Fall Meeting 2018

Montreal

October 12 – 14, 2018

Hyatt Regency Montreal
1255 rue Jeanne-Mance
Montreal, Canada

THE NEW YORK BAR FOUNDATION

This program is co-sponsored by The New York Bar Foundation

Fall Meeting 2018

Labor & Employment Law Section

October 12-14, 2018

Hyatt Regency Montreal

1255 rue Jeanne-Mance, Montreal, Canada

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New York State Bar Association

Accessing the Online Electronic Course Materials

Program materials will be distributed exclusively online in PDF format. It is strongly recommended that you save the course materials in advance, in the event that you will be bringing a computer or tablet with you to the program.

Printing the complete materials is not required for attending the program.

> The course materials may be accessed online at:
> **http://www.nysba.org/LABRFA18Materials/**

A hard copy NotePad will be provided to attendees at the live program site, which contains lined pages for taking notes on each topic, speaker biographies, and presentation slides or outlines if available.

Please note:

- You must have Adobe Acrobat on your computer in order to view, save, and/or print the files. If you do not already have this software, you can download a free copy of Adobe Acrobat Reader at https://get.adobe.com/reader/
- If you are bringing a laptop, tablet or other mobile device with you to the program, please be sure that your batteries are fully charged in advance, as electrical outlets may not be available.
- NYSBA cannot guarantee that free or paid Wi-Fi access will be available for your use at the program location.

MCLE INFORMATION

Program Title: **LABOR & EMPLOYMENT LAW SECTION FALL MEETING**
Date/s: OCTOBER 12-14, 2018 Location: Montreal, Canada

Evaluation:

This evaluation survey link will be emailed to registrants following the program.

Total Credits: **7.0 New York CLE credit hours**

Credit Category:

4.5 Areas of Professional Practice
1.5 Diversity, Inclusion & Elimination of Bias
1.0 Ethics and Professionalism

This course is approved for credit for experienced attorneys only.
For information about the CLE Rules, visit www.nycourts.gov/attorneys/cle

Attendance Verification for New York MCLE Credit

In order to receive MCLE credit, attendees must:

1) **Sign in** with registration staff

2) Complete and return a **Verification of Presence form** (included with course materials) at the end of the program or session. For multi-day programs, you will receive a separate form for each day of the program and/or Workshops, to be returned each day.

Partial credit for program segments is not allowed. Under New York State Continuing Legal Education Regulations and Guidelines, credit shall be awarded only for attendance at an entire course or program, or for attendance at an entire session of a course or program. Persons who arrive late, depart early, or are absent for any portion of a segment will not receive credit for that segment. The Verification of Presence form certifies presence for the entire presentation. Any exceptions where full educational benefit of the presentation is not received should be indicated on the form and noted with registration personnel.

Program Evaluation

The New York State Bar Association is committed to providing high quality continuing legal education courses, and your feedback regarding speakers and program accommodations is important to us. Following the program, an email will be sent to registrants with a link to complete an online evaluation survey. The link is also listed above.

Additional Information and Policies

Recording of NYSBA seminars, meetings and events is not permitted.

Accredited Provider

The New York State Bar Association's **Section and Meeting Services Department** has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education courses and programs.

Credit Application Outside of New York State

Attorneys who wish to apply for credit outside of New York State should contact the governing body for MCLE in the respective jurisdiction.

MCLE Certificates

MCLE Certificates will be emailed to attendees a few weeks after the program, or mailed to those without an email address on file. **To update your contact information with NYSBA**, visit www.nysba.org/MyProfile, or contact the Member Resource Center at (800) 582-2452 or MRC@nysba.org.

Newly Admitted Attorneys—Permitted Formats

In accordance with New York CLE Board Regulations and Guidelines (section 2, part C), newly admitted attorneys (admitted to the New York Bar for less than two years) must complete **Skills** credit in the traditional live classroom setting or by fully interactive videoconference. **Ethics and Professionalism** credit may be completed in the traditional live classroom setting; by fully interactive videoconference; or by simultaneous transmission with synchronous interactivity, such as a live-streamed webcast that allows questions during the program. **Law Practice Management** and **Areas of Professional Practice** credit may be completed in any approved format.

Tuition Assistance

New York State Bar Association members and non-members may apply for a discount or scholarship to attend MCLE programs, based on financial hardship. This discount applies to the educational portion of the program only. Application details can be found at www.nysba.org/SectionCLEAssistance.

Questions

For questions, contact the NYSBA Section and Meeting Services Department at SectionCLE@nysba.org, or (800) 582-2452 (or (518) 463-3724 in the Albany area).

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SCHEDULE OF EVENTS

Friday, October 12

11:00 a.m.	**Registration** – Inspiration Foyer
11:00 a.m. – 12:00 p.m.	**Lunch** – Inspiration Foyer Boxed lunches are provided for registered attorneys only as part of their meeting fees***. Additional box lunches may be purchased ala carte for guests/spouses/children on the registration form.***
12:15 – 3:00 p.m.	**GENERAL SESSION** – Inspiration Room
12:15 – 12:30 p.m.	**NYSBA Welcome** Henry M. Greenberg, Esq. President-Elect **Labor & Employment Law Section Welcome** Cara E. Greene, Esq. Section Chair
12:30 – 1:45 p.m.	**Plenary One: Constitutional and Labor Rights: Across the Border Hedge** This plenary session will compare and contrast the scope of labor rights protected under the United States Constitution and the Canadian Charter of Rights and Freedoms. The panel will discuss and analyze the Supreme Court decision in *Janus v. AFSCME*, recent decisions under the Canadian Charter, and related statutory issues.
Moderator:	**William A. Herbert, Esq.**, Distinguished Lecturer and Executive Director, National Center for the Study of Collective Bargaining in Higher Education and the Professions, Hunter College, City University of New York, New York City
Panelists:	**John D.R. Craig, Esq.**, Fasken Martineau DuMoulin, Toronto, Canada **Charlotte Garden**, Professor, Seattle University School of Law, Seattle, Washington **Matthew Ginsburg, Esq.**, Associate General Counsel, AFL-CIO, Washington, DC **Sara Slinn, Esq.**, Associate Professor, Osgoode Hall Law School, York University, Toronto, Canada
1:45 – 2:00 p.m.	Coffee/Networking Break
2:00 – 3:15 p.m.	**Plenary Two: Will Women Survive at Law Firms? Taking up the challenges of a diminishing population amidst the #MeToo movement, diversity challenges, and work-life balance.** Women law students hit the 50% mark about 30 years ago, but less than 18% are equity partners in law firms, and fewer are in leadership positions. Many senior and child-bearing aged women are leaving the profession after dedicating their most productive years to law firm life. Finally, women and particularly women of color are concerned about sexual inappropriateness, sexual harassment and bullying. This program will examine the social and legal challenges faced in the legal profession by women in Canada and the U.S., who are struggling for civility, pay and leadership equity, for progressive and meaningful practices, and often work-life balance.
Moderator:	**Wendi S. Lazar, Esq.**, Outten & Golden LLP, New York City
Panelists:	**Michele Coleman Mayes, Esq.**, Vice President, General Counsel & Secretary, The New York Public Library, New York City **Laleh Moshiri**, National Director, Diversity and Inclusion, Borden Ladner Gervais LLP, Toronto, Canada **Jill Rosenberg, Esq.**, Orrick, New York City
3:15 – 3:30 p.m.	Coffee/Networking Break

SCHEDULE OF EVENTS

CONCURRENT WORKSHOPS (PLEASE SELECT ONE)

3:30 – 4:20 p.m.	**Workshop A: Switching to Offense in Employment Cases** Proactive steps an employer can take to avoid liability under the Equal Pay Act, the pros and cons of class action waivers in employment agreements, the anatomy of a successful mediation strategy, and the effective use or threatened use of counterclaims and employer-side fee shifting.
Panelists:	**Howard M. Miller, Esq.**, Bond Schoeneck and King PLLC, Garden City **Karen Fernbach, Esq.**, Hofstra Law School, Hempstead **Melissa L. Stewart, Esq.**, Outten & Golden LLP, New York City
3:30 – 4:20 p.m.	**Workshop B: Best Practices in Settling Wage-Hour Disputes** Experienced wage-hour practitioners discuss the challenges of settling disputes, both before and during litigation. The panel will address the impact of decisions from the Second Circuit and NY Court of Appeals that impose procedural hurdles to settlements, the special considerations that apply in settlement of "hybrid" actions, and tips for resolving cases outside of litigation.
Moderator:	**Robert Whitman, Esq.**, Seyfarth Shaw LLP, New York City
Panelists:	**Patrick J. Solomon, Esq.**, Thomas & Solomon LLP, Rochester **Deirdre A. Aaron, Esq.**, Outten & Golden, New York City **Stephen J. Jones, Esq.**, Nixon Peabody LLP, Rochester
3:30 – 4:20 p.m.	**Workshop C: Managing Risk and Creating Safe Workplaces** The last year has brought workplace safety to the forefront of public discussions. From #MeToo to the shooting at Marjory Stoneman Douglas High School, workplaces are faced with new challenges and new opportunities to address workplace violence. Attorneys who represent plaintiffs, unions, and management will discuss how to ensure a safe and secure working environment.
Moderator:	**Nina Martinez, Esq.**, Outten & Golden LLP, New York City
Panelists:	**Stephen Sonnenberg, Esq.**, Mediator, JAMS, New York City **John Ho, Esq.**, Cozen O'Connor, New York City **Suzanne Demitrio Campbell, Esq.**, Senior Trial Attorney, U.S. Department of Labor, Solicitor's Office, New York City **Wendy Hord,** Assistant for Health & Safety and Healthcare, New York State United Teachers, Latham **Heidi R. Burakiewicz, Esq.**, Kalijarvi, Chuzi, Newman & Fitch, P.C., Washington, DC
6:30 – 10:00 p.m.	**COCKTAIL RECEPTION & DINNER** – Terrace and Ovation Room ***Ala carte tickets may be purchased for guests/spouses/children on the registration form.*** Dinner Speaker: The **Honorable Mr. Clément Gascon**, Supreme Court of Canada

Saturday, October 13

7:30 – 9:00 a.m.	**Continental Breakfast** – SIX Resto Lounge
8:00 a.m. – 9:00 a.m.	**Committees' Breakfast Meetings** – Creation Room
9:00 a.m. – 12:00 p.m.	Guest/Family Jaunt to the **MONTREAL SCIENCE CENTER, King Edward Quay, 2 rue de la Commune Ouest in Old Port** Interactive, kid-friendly museum. In the Fabrik – Creativity Factory, kids aged 6+ use their hands and minds to craft Derby cars, parachutes, catapults, floating vessels and whatever their imaginations can dream up. For smaller children, there's Clic! – The Zone for Curious Young Minds where children can build a house, design a roller coaster, create forms and patterns, and mix colors. Discover the mysteries nesting in submarine forests and coral reefs; meet friendly 40 ton mammals and clever sea creatures in the IMAX film: Oceans 3D along with other permanent and traveling exhibits. **Tickets include 2 hour Museum visit and 1 hour IMAX movie. Purchase on registration form.**
9:00 a.m. – 12:00 p.m.	**GENERAL SESSION** – Inspiration Room

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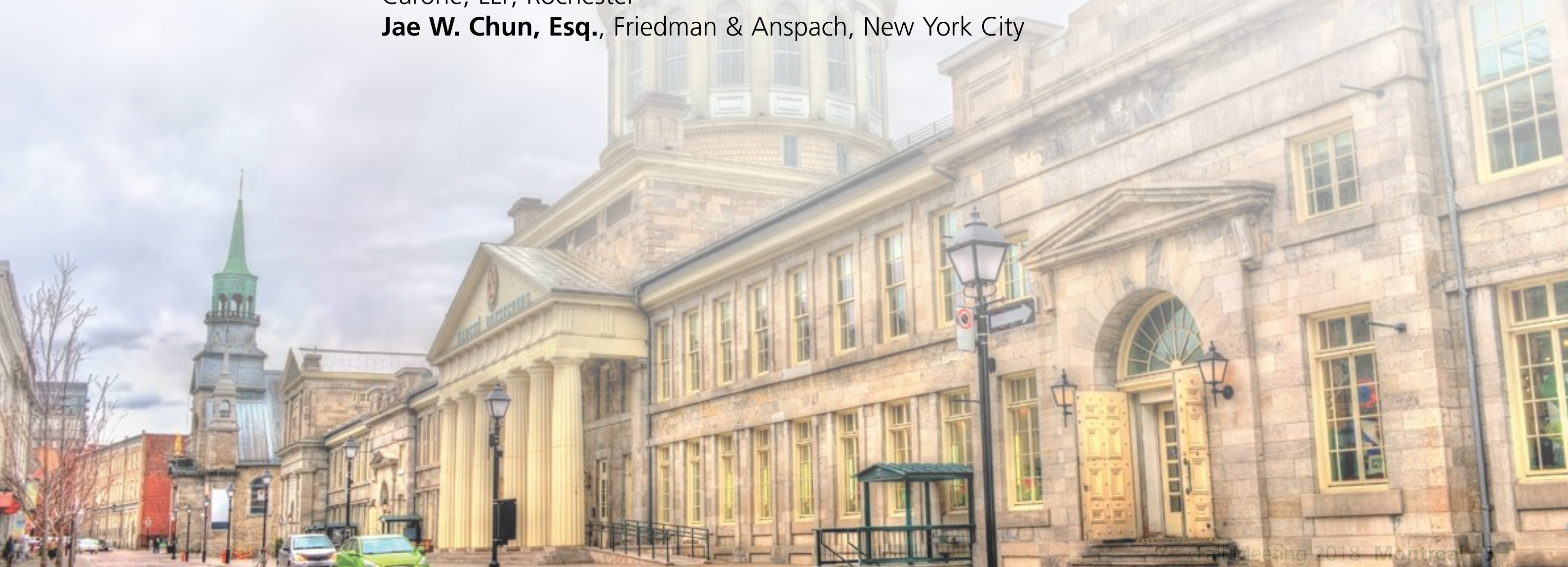
9:00 – 9:10 a.m.	**Program Introduction** Christopher A. D'Angelo, Esq., CLE Committee Program Co-Chair
9:10 – 10:00 a.m.	**Plenary Three: *Epic* Changes? Arbitration and Class/Collective Action Waivers…What's Next?** The United States Supreme Court held in *Epic Systems Corp. v. Lewis* that employers may require employees to enter into arbitration agreements that waive the ability to participate in a class or collective action. Join us for a discussion of the *Epic* decision, including: • Whether to Consider Arbitration with Class/Collective Wavier & Program Design Considerations; • Implementation and Grounds that Exist for Challenging the Enforcement of Class/Collective Waivers; and • Class Arbitration Practices and Procedures
Moderator:	**Howard M. Wexler, Esq,**, Seyfarth Shaw LLP, New York City
Panelists:	**Michael Billok, Esq.**, Bond, Schoeneck & King, PLLC, Saratoga Springs **Alfred G. Feliu, Esq.**, Feliu Neutral Services LLC, New Rochelle **Marijana Matura, Esq.**, Shulman Kessler LLP, Melville
10:00 – 10:15 a.m.	Coffee/Networking Break
10:15 – 11:05 a.m.	**Plenary Four: Transforming Workplace Culture** Transforming Workplace Culture In the Era of #MeToo, #BlackLivesMatter, and More." Virtually all segments of our labor and employment community are being decried as ineffective in dealing with sexual and other workplace discrimination, harassment, and retaliation. What new approaches might be warranted? We will suggest and begin exploring possibilities through a presentation that includes real-time polling and other forms of creative and interactive engagement, with the intention of inspiring subsequent explorations of solutions. Bring your ideas, voices, and smartphones (to text for polling) on potential culturally transformative approaches to hiring, policies, training, investigations, discipline, and more.
Panelists:	**Loren Gesinsky, Esq.**, Seyfarth Shaw LLP, New York City **James L. Hallman, Esq.**, New York City Department of Transportation, New York City **Jay A. Hewlin, Esq.**, The Hewlin Group, Montreal and New York City **Sarah E. Ruhlen, Esq.**, Satter Law Firm, PLLC, Syracuse **Andrea H. Stempel, Esq.**, Ernst & Young LLP, New York City
11:05 – 11:55 a.m.	**Plenary Five: From Michael Clayton to Michael Cohen: Ethical Considerations for "Fixers"** Some people hire lawyers to "make it go away" or "find a way around it." When does a lawyer go too far? In this program, we discuss some of the allegations against Donald Trump's personal attorney, Michael Cohen, and ask whether certain ethical rules are implicated by his actions.
Panelists:	**Sharon P. Stiller, Esq.**, Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP, Rochester **Jae W. Chun, Esq.**, Friedman & Anspach, New York City



SCHEDULE OF EVENTS

OPTIONAL TOURS:

1:30 – 4:30 p.m.	**OLD MONTREAL WALKING TOUR** The perfect experience to begin your Montreal visit. Explore cobblestoned streets, pass centuries-old British & French architectural gems, and catch views of docked ships. Learn how Old Montreal and its St. Lawrence River Port were the most important and wealthy part of Canada for over 300 years. See how the area has evolved into the dynamic and thriving (but less industrial) riverfront neighborhood it is today. Includes a visit to Notre-Dame Basilica (entrance included). ***Meet in front of Toque Restaurant, 900 Jean-Paul-Riopelle Place at 1:30 p.m. sharp.*** **Preregistration required. $45 per person.**
1:45 – 4:15 p.m.	**STREET ART WALK** Montreal is known for street art. It unexpectedly pops up in some surprising locations. This walk traverses the artsy Plateau and hip Mile-End neighborhoods to take in some of Montreal's "graffiti" street art. These culture-rich areas will give you an off-the-beaten-path experience of the city. Zigzagging through the colorful streets and alleyways to admire some impressive murals, public artworks and progressive community projects, you will see why Montreal is considered to be one of Canada's most artistic and cultural cities. Our guide will describe the artworks, the artists and put them in context. Novice art admirer or a well versed art connoisseur, there is something for everyone! Departure point to be announced. **Preregistration required. $35 per person.**
6:30 – 7:30 p.m.	**Cocktail Reception** – Perche Terrace, 4th floor of Hotel William Gray, 153 rue Saint-Amable, Old Montreal. Perche is a 15 minute walk from the Hyatt Regency. ***Ala carte tickets may be purchased for guests/spouses/children on the registration form.***
7:30 – 10:00 p.m.	**Dinner** – **On Your Own or Optional "Dine-Around"** with fellow attendees: we will make group reservations at several local restaurants, people may sign up onsite at registration to join a group. **Please indicate when registering if you are interested in the "Dine Around!"**

Sunday, October 14

9:00 – 11:00 a.m.	**Executive Committee Breakfast Meeting** – Inspiration Room
	Checkout

Lawyer Assistance Program 800.255.0569

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

1.800.255.0569

NEW YORK STATE BAR ASSOCIATION

JOIN OUR SECTION

☐ As a NYSBA member, **PLEASE BILL ME $35 for Labor and Employment Law Section dues.** (law student rate is $5)

☐ I wish to become a member of the NYSBA (please see Association membership dues categories) and the Labor and Employment Law Section. **PLEASE BILL ME for both.**

☐ I am a Section member — please consider me for appointment to committees marked.

Name ____

Address____

____

City ________________ State ____ Zip________________

The above address is my ☐ Home ☐ Office ☐ Both

Please supply us with an additional address.

Name ____

Address____

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Office phone (_______) ____________________________

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Fax number (_______) ____________________________

E-mail address ______________________________________

Date of birth _______ /_______ /_______

Law school ____

Graduation date____________

States and dates of admission to Bar: ____________________

Please return this application to:

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JOIN A LABOR AND EMPLOYMENT LAW SECTION COMMITTEE(S)

On the list below, please designate, in order of preference (1, 2, 3), up to three committees to which you would like to be appointed as a member. Every effort will be made to accommodate your preferences, but each committee's composition is based on space availability and balance.

___ Alternative Dispute Resolution (LABR2600)
___ Communications (LABR3400)
___ Continuing Legal Education (LABR1020)
___ Diversity and Leadership Development (LABR3200)
___ Employee Benefits and Compensation (LABR1500)
___ Equal Employment Opportunity Law (LABR1600)
___ Ethics and Professional Responsibility (LABR2700)
___ Finance (LABR3300)
___ International Employment and Immigration Law (LABR3100)
___ Labor Arbitration (LABR2100)
___ Labor Relations Law and Procedure (LABR2200)
___ Legislation and Regulatory Developments (LABR1030)
___ Membership (LABR1040)
___ Mentoring Program (LABR4700)
___ New Lawyers (LABR4400)
___ Public Sector Labor Relations (LABR1700)
___ Technology in Workplace and Practice (LABR4500)
___ Wage and Hour (LABR4600)
___ Workplace Rights and Responsibilities (LABR1900)

2019 ANNUAL MEMBERSHIP DUES

Class based on first year of admission to bar of any state. Membership year runs January through December.

ACTIVE/ASSOCIATE IN-STATE ATTORNEY MEMBERSHIP	
Attorneys admitted 2011 and prior	$275
Attorneys admitted 2012-2013	185
Attorneys admitted 2014-2015	125
Attorneys admitted 2016 - 3.31.2018	60

ACTIVE/ASSOCIATE OUT-OF-STATE ATTORNEY MEMBERSHIP	
Attorneys admitted 2011 and prior	$180
Attorneys admitted 2012-2013	150
Attorneys admitted 2014-2015	120
Attorneys admitted 2016 - 3.31.2018	60

OTHER	
Sustaining Member	$400
Affiliate Member	185
Newly Admitted Member*	FREE

DEFINITIONS

Active In-State = Attorneys admitted in NYS, who work and/or reside in NYS
Associate In-State = Attorneys not admitted in NYS, who work and/or reside in NYS
Active Out-of-State = Attorneys admitted in NYS, who neither work nor reside in NYS
Associate Out-of-State = Attorneys not admitted in NYS, who neither work nor reside in NYS
Sustaining = Attorney members who voluntarily provide additional funds to further support the work of the Association
Affiliate = Person(s) holding a JD, not admitted to practice, who work for a law school or bar association
*Newly admitted = Attorneys admitted on or after April 1, 2018

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Constitutional and Labor Rights: Across the Border Hedge

William A. Herbert, Esq., Moderator
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Professor Charlotte Garden
Seattle University School of Law, Seattle, WA

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The Deregulatory First Amendment at Work

Reprinted with Permission

*Charlotte Garden**

Introduction

It has been more than seventy years since Justice Hugo Black wrote that First Amendment rights were "essential to the poorly financed causes of little people."[1] Since then, the well-financed causes of the powerful have discovered the First Amendment as well, deploying it to crowd out the little people in electoral politics and undo their legislative successes in the courts. The seeds for this project were planted in the 1970s—the decade in which Justice Lewis Powell joined the Court, and in which the Court decided both *Buckley v. Valeo*[2] and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc*[3]—and they are now in full bloom.

In this Article, I discuss a new generation of deregulatory First Amendment theories, and their potentially calamitous effects on workers if courts accept them. This is not to suggest deregulatory First Amendment cases are missing from other areas of life; to the contrary, consumer protection, public health, securities regulation, and election law are also targets.[4] But it is illuminating to examine challenges arising in the workplace context for two reasons: first, the great (or terrible) variety of forms that the challenges take; and second, the close analogy to the *Lochner*-era substantive due process cases that struck down workplace regulations in the name of freedom of contract. However, there is also at least one key difference between these emerging First Amendment theories and *Lochner*—only the former are

* Associate Professor, Seattle University School of Law. I am grateful for comments on this Article from Brooke Coleman, Nancy Leong, and Andrew Siegel, as well as participants in the 2015 Colloquium on Scholarship in Employment and Labor Law at Indiana University Maurer School of Law; the 2015 meeting of the Law & Society Association in Seattle; and the 2015 Seattle University Summer Workshop Series. I am also grateful to the editors of the *Harvard Civil Rights-Civil Liberties Law Review* for their conscientious work on this article.

[1] Martin v. Struthers, 319 U.S. 141, 146 (1943).

[2] 424 U.S. 1 (1976).

[3] 425 U.S. 748 (1976).

[4] *See, e.g.*, McCutcheon v. FEC, 134 S. Ct. 1434, 1443 (2014) (striking down Federal Election Campaign Act's aggregate limit on individual contributions to federal candidates and party committees); Edwards v. Dist. of Columbia, 755 F.3d 996 (D.C. Cir. 2014) (holding that proffered interest in ensuring that consumers receive a quality experience was insufficient D.C. licensing requirement for tour guides); Wagner v. FEC, 793 F.3d 1, 26 (D.C. Cir. 2015) (rejecting First Amendment challenge to Federal Election Campaign Act ban on campaign contributions from government contractors); Am. Meat Inst. v. USDA, 760 F.3d 18, 23–24 (D.C. Cir. 2014) (en banc) (upholding "country of origin" labeling requirement applicable to meat producers, and reversing prior D.C. Circuit opinions that struck down the SEC's conflict minerals disclosure rule, and the NLRB's notice-posting rule); *see also* Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 Harv. L. Rev. F. 165, 167 & n.13 (2015) (accumulating cases).

linked to an enumerated part of the Constitution, which may be important in marshaling the support of some conservative judges and justices for the greater deregulatory project.

That project is broad in scope, and it is increasingly well received by conservative judges.[5] For instance, Judge Janice Rogers Brown of the District of Columbia Circuit recently authored a concurring opinion that argued in favor of resurrecting heightened scrutiny for economic rights in a case involving the USDA's regulation of milk prices.[6] In Judge Brown's view (as well as that of Judge David Sentelle, who joined the opinion, and possibly even Judge Thomas Griffith, who did not join but nonetheless wrote that he was "by no means unsympathetic"[7]), Article III courts should be able to step in when "the government has thwarted the free market" to protect a faction.[8] Putting a finer point on it, Judge Brown added that these market interventions "just *seem[ ]* like a crime."[9] Judge Brown's opinion did not come in a labor case, but her disdain for "collectivization" schemes would translate easily into the labor context—as evidenced by her earlier remarks arguing that New Deal precedent such as *NLRB v. Jones & Laughlin Steel Corporation*[10] represented "the triumph of our socialist revolution," and analogizing the liberal welfare state to "slavery."[11]

Yet, as Judge Brown acknowledged, these arguments are squarely closed off; with the exception of Justice Thomas, no modern Supreme Court justice has been willing to revisit them.[12] But, to proponents of the theories described in this Article, the First Amendment provides a possible workaround, if only courts can be convinced to apply it frequently and robustly to protect businesses' day-to-day activities involving speech. If these advocates

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[5] *See* Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 574–77 (2015).

[6] Hettinga v. United States, 677 F.3d 471, 475 (DC Cir. 2012) (Brown, J., concurring). The USDA's rule eliminated an exemption for certain vertically integrated milk producers, meaning that they would have to comply with the "pricing and pooling requirements of federal milk marketing orders." Judge Brown's opinion was remarkable, beginning with the observation that the Hettingas no doubt would have wished to make the long-foreclosed argument that "the operation and production of their enterprises had been impermissibly collectivized."

[7] *Id.* at 483.

[8] *Id.*

[9] *Id.* (emphasis in original).

[10] 301 U.S. 1 (1937); *see also id.* at 30 (upholding National Labor Relations Act as valid exercise of Congress's Commerce Clause authority).

[11] David D. Kirkpatrick, *New Judge Sees Slavery in Liberalism*, N.Y. TIMES (June 9, 2005), http://www.nytimes.com/2005/06/09/politics/09brown.html, archived at https://perma.cc/KRE7-GDP2.

[12] Justice Clarence Thomas's view of the Commerce Clause already has much in common with pre-New Deal Constitutional principles. *See* United States v. Lopez, 514 U.S. 549, 597-99 (Thomas, J., concurring) (characterizing the "substantial effects" test as "but an innovation of the 20th century"). And, while Justice Thomas rejects modern substantive due process, *e.g.*, Lawrence v. Texas, 539 U.S. 558, 605 (2003) (Thomas, J., concurring), he has also called for reinvigoration of the Fourteenth Amendment's Privileges and Immunities Clause; in that regard, he has argued that the *Slaughterhouse Cases*, in which the Court rejected the argument that that clause secured economic rights, were wrongly decided. Saenz v. Roe, 526 U.S. 489, 522–23 (Thomas, J., dissenting).

succeed, important workplace protections will be lost for many; as one scholar put it, "[b]ecause nearly all human action operates through communication or expression, the First Amendment poses near total deregulatory potential."[13]

The purpose of this Article is primarily to identify emerging First Amendment theories aimed at deregulating the work place, many of which have escaped notice thus far.[14] In addition, it urges that, although many of these theories are a stretch for now, individual deregulatory First Amendment cases should not be viewed as outliers: the outward push is occurring simultaneously on multiple fronts, and its standard-bearers include some exceedingly well-respected and influential lawyers. In that regard, the Article also urges greater attention to the potential consequences of the deregulatory First Amendment in the information economy.

Part I of this Article discusses the recent history of the deregulatory First Amendment, beginning with the Supreme Court's adoption of First Amendment protections for commercial speech in 1976 before discussing key recent deregulatory cases. This Part is intended to provide a working overview of the deregulatory First Amendment, and to identify certain themes that are relevant to Part II of this Article. Then, Part II turns to the future: what might the deregulatory First Amendment look like if its proponents are victorious in the courts? Here, I identify three themes, which are mutually reinforcing and overlapping: First, that compelled speech and subsidization of speech, including commercial speech, should be more robustly protected than it currently is; second, that more business activities that implicate speech—even very indirectly—should be covered by the First Amendment; and third, that changing statutory baselines that alter incentives to speak can implicate the First Amendment.

I. Laying the Groundwork

A. *The Emerging Deregulatory First Amendment at the Supreme Court*

The deregulatory First Amendment began to emerge in the 1970s, with the Court holding that commercial speech was entitled to First Amendment protection,[15] that attempts to equalize election spending were constitutionally suspect,[16] and that a for-profit, non-expressive corporation had its own First Amendment rights.[17] Thus, in 1987, Cass Sunstein wrote that cases like

[13] Amanda Shanor, *The New* Lochner, 2016 Wis. L. Rev. 133, 133 (2016).

[14] Thus, the Article does not undertake a detailed analysis or rebuttal of each argument; rather, it provides a foundation for others to engage in such work in the future.

[15] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976).

[16] Buckley v. Valeo, 424 U.S. 1, 19 (1976).

[17] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978). By "expressive corporation," I refer to a corporation formed for the purpose of conveying a substantive message. *See* FEC v. Mass. Citizens for Life, 479 U.S. 238, 264 (1986) (holding that restriction on

Buckley—and not substantive due process-based privacy or reproductive autonomy cases—were the true descendants of *Lochner*.[18] In support of his thesis, Sunstein identified key similarities between *Lochner*, and *Buckley*, as well as cases arising in other areas of law: "The key concepts here are . . . government inaction, the existing distribution of wealth and entitlements, and the baseline set by the common law."[19] More recently, other scholars have also noted a deregulatory or Lochnerian turn in constitutional law, and especially in First Amendment law.[20]

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independent political spending could not be applied to corporation that "was formed for the express purpose of promoting political ideas").

[18] 198 U.S. 45, 57 (1905) (striking down state law maximum hours law on grounds that it impermissibly interfered with the individual "right of free contract"). Sunstein was not the first to identify the Lochnerian strains in the Court's commercial speech decisions. *See* Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1, 30-31 (1979) (discussing *Virginia Board of Pharmacy*, and stating that "the Supreme Court has reconstituted the values of *Lochner v. New York* as components of freedom of speech"); *see also* Archibald Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 Harv. L. Rev. 1, 28 (1980) (noting that comparisons of the Court's commercial speech cases to *Lochner* are "hardly surprising").

[19] Cass R. Sunstein, Lochner*'s Legacy*, 87 Colum. L. Rev. 873, 874 (1987). Sunstein explained further that, for the *Lochner* Court, as well as for the Court in more recent decisions:

> Governmental intervention was constitutionally troublesome, whereas inaction was not; and both neutrality and inaction were defined as respect for the behavior of private actors pursuant to the common law, in light of the existing distribution of wealth and entitlements. Market ordering under the common law was understood to be a part of nature rather than a legal constrict, and it formed the baseline from which to measure the constitutionally critical lines that distinguished action from inaction and neutrality from impermissible partisanship.

Id. at 874.

[20] *See, e.g.*, Shanor, *supra* note 13; Rebecca Tushnet, *Cool Story: Country of Origin Labeling and the First Amendment*, 70 Food & Drug L.J. 25, 26 (2015) (describing First Amendment objections to country-of-origin labeling requirements as "perhaps the clearest example of the way in which the First Amendment has become the new *Lochner*"); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 Colum. L. Rev. 1453, 1453 (2015); Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. Rev. 1149, 1212 (2015) (discussing "striking parallels between the traditional understanding of Lochnerism and the First Amendment critique" of privacy regulations); Leo E. Strine, Jr., *Corporate Power Ratchet: The Courts' Role in Eroding 'We the People's' Ability to Constrain Our Corporate Creations*, 51 Harv. C.R.-C.L. L. Rev. (2016); Morton J. Horwitz, *The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 Harv. L. Rev. 30, 109–110 (1993) ("The generalization and universalization of freedom of speech, and the Court's concomitant devotion to its abstract doctrine of 'content neutrality,' however, have combined to produce a Lochnerization of the First Amendment."); Neil M. Richards, *Why Data Privacy Law is (Mostly) Constitutional)*, 56 Wm. & Mary L. Rev. 1501, 1530 (2015) ("[I]f the lessons of the twentieth century are that government regulation is sometimes necessary in an industrial economy, we should not forget those lessons in our information economy."); Leslie Kendrick, *First Amendment Expansionism*, 56 Wm. & Mary L. Rev. 1199, 1207 (2015); Daniel J.H. Greenwood, *First Amendment Imperialism*, 1999 Utah L. Rev. 659, 661 (1999) ("The courts have increasingly begun to use the First Amendment to restrict economic regulation and enforce a vision of the market freed not from politics 'gone bad,' but rather from all politics altogether."); Post & Shanor, *supra* note 4, at 179 ("If the regulation of every speech act is a constitutional question, we . . . must abandon the possibility of meaningful self-determination and turn back our democracy to the juristocracy that controlled society in the days of *Lochner*.").

The origin of this deregulatory turn in First Amendment law is sometimes attributed to Justice Powell,[21] both because he authored key opinions extending First Amendment rights for corporations, and because of his now-infamous "Powell memo." That memo, drafted in 1971 while Powell was in private practice, urged "a broad, multi-channel effort at mobilizing corporations and their resources to defend capitalism and the 'free enterprise system'" on college campuses, in the media, among politicians, and in the courts.[22] As to the last, Powell urged the Chamber of Commerce to model itself after the ACLU, labor unions, and civil rights groups by strategically initiating lawsuits and filing amicus briefs—a role that the Chamber took on with gusto and continues to pursue today.[23] But the Powell memo was light on specifics. The memo contained no blueprint for what a pro-business First Amendment might look like; that plan came from elsewhere, developed by lawyers and academics.[24]

During that same period, some conservative Supreme Court litigators displayed a certain ambivalence—or even skepticism—about expanding the First Amendment to advance commercial speech interests. For example, consider the case that first clearly announced First Amendment coverage for commercial speech: *Virginia State Board of Pharmacy*, in which the Court invalidated on First Amendment grounds a Virginia statute forbidding the advertisement of prescription drug prices.[25] The plaintiffs in *Virginia State Board of Pharmacy* were represented not by a conservative or pro-business group, but instead by Alan Morrison of the liberal Public Citizen Litigation Group, which he co-founded with Ralph Nader in 1972.[26] Moreover, this

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[21] *See, e.g.*, Robert L. Kerr, *Naturalizing the Artificial Citizen: Repeating* Lochner*'s Error in* Citizens United v. Fed. Election Comm'n, 15 Comm. L. & Pol'y 311, 314 (2010); John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, & Implications*, 30 Const. Comment. 223, 242 (2015); Shanor, *supra* note 13 at 155.

[22] Coates, *supra* note 21, at 242; John A. Powell & Stephen Menendian, *Beyond Public/Private: Understanding Excessive Corporate Prerogative*, 100 Ky. L.J. 43, 74–75 (2011–12) (emphasizing Justice Powell's role in deregulatory First Amendment cases); *see also* Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, New Republic (June 2, 2013), https://newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation, *archived at* https://perma.cc/75J6-LLCA.

[23] *See* Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 760–61 (2000).

[24] *See* Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 Geo. Wash. L. Rev. 429 (1971) *see also* Teles, The Rise of the Conservative Legal Movement 84 (reporting Center for Applied Jurisprudence panel on the First Amendment as "mostly on commercial speech; dominated, intellectually, by Mike McConnell and Lillian BeVier").

[25] *See* 425 U.S. at 761–62 (stating that "the speech whose content deprives it of protection cannot simply be speech on a commercial subject"). The Court had disposed of a handful of other cases involving commercial advertisements before *Virginia Bd. of Pharmacy*, but it was the first to plainly overrule *Valentine v. Chrestensen*, 316 U.S. 52 (1942), in which the Court held that "the Constitution imposes no such restraint on government as respects purely commercial advertising," *id.* at 54. *See* Genevieve Lakier, *The Invention of Low Value Speech*, 128 Harv. L. Rev. 2166, 2182 (2015).

[26] Tony Mauro, *Moving On: A Nader Protégé With Friends in High Places*, 27 Legal-Times 21 (May 24, 2004).

was not a case of strange bedfellows; amazingly, by today's standards, the case drew almost no amicus brief submissions at all, and none from either conservative or liberal movement groups.[27] (This lack of amicus interest partially reflects the fact that fewer amicus briefs were filed in prior decades than today; still, amicus briefs were becoming increasingly common by the time Public Citizen litigated *Virginia State Board of Pharmacy.*[28])

This relative disinterest might be shocking to a modern-day observer, but it was at the time consistent with much academic and judicial thought about commercial speech among both liberals and conservatives.[29] For example, in 1971, Robert Bork, who would become a District of Columbia Circuit Judge and Supreme Court nominee, wrote that "[c]onstitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic."[30] It is telling that Judge Bork felt no need even to list "advertising" as a form of speech outside First Amendment protection, as though that point was self-evident. Similarly, throughout his career, Chief Justice William Rehnquist authored dissents in key cases that advanced commercial speech rights, including in *Virginia State Board of Pharmacy* and *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[31] where he charged that by elevating the First Amendment status of commercial speech, the Court "returns to the bygone era of *Lochner v. New York*."[32] This is not to say this view was unanimous; liberal-leaning Martin Redish famously argued in 1971—the same year that Justice Powell wrote his memo—that commercial speech could be as equally valuable to listeners as other types of speech and therefore deserved similar First Amendment protection, and some movement conservatives made similar arguments.[33]

This skepticism was in part linked to doctrinal concerns. Much of the conservative legal movement of the 1970s and 1980s responded to perceived

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[27] *See* Docket, *Virginia State Bd. of Pharmacy*, No. 74-895 (U.S.) (reflecting amicus briefs filed by the American Association of Retired Persons & National Retired Teachers Association; Osco Drug, Inc. and the Association of National Advertisers, Inc.).

[28] Kearney & Merrill, *supra* note 23 at 751.

[29] *See* C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981, 982 (2009) (discussing history of scholarship and judicial opinions regarding commercial speech); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 355 (1978) (criticizing *Virginia Pharmacy* as "not justified either by principle or by pragmatic or institutional concerns related to principle"); Jackson & Jeffries, *supra* note 18 at 5–6 (arguing that *Virginia Pharmacy* was "decided wrongly" because commercial speech does not advance First Amendment values).

[30] Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971).

[31] 447 U.S. 557 (1980).

[32] *E.g.*, *id.* at 591; *see also* Earl M. Maltz, *The Strange Career of Commercial Speech*, 6 CHAP. L. REV. 161, 167 (2003) (discussing Chief Justice Rehnquist's views on commercial speech and noting that "[i]n 1976, then-Justice Rehnquist's views were seen as epitomizing conservative jurisprudence").

[33] *See generally* Redish, *supra* note 24; Shanor, *supra* note 13, at 140–42.

excesses of the Warren and Burger Courts by calling for more restraint in constitutional interpretation; arguments for First Amendment coverage for commercial speech would have sat in tension with this approach.[34] Additionally, Stephen Teles has posited that conservatives' initial lack of attention, and even hostility, to the deregulatory First Amendment was because "[t]he most mobilized interest of conservatives in the early 1970s was business, a problematic ally for the cause because of its unreliable opposition—and frequent support—for state activism."[35] In other words, business supporters of newly forming conservative legal activist groups had learned to work within existing regulatory frameworks (perhaps even concluding that they benefitted from those frameworks), and therefore felt little need to prioritize toppling those frameworks through litigation. Relatedly, many conservative attorneys and scholars simply had other First Amendment priorities. Thus, when President Ronald Reagan's Office of Legal Policy generated a pair of lengthy documents about the Department of Justice's positions on a variety of constitutional issues, they contained nothing about advancing business interests under the First Amendment. Instead, they focused more closely on "culture war" issues, such as religious freedom and the right of groups to exclude unwanted members.[36]

Moreover, some key early cases involving commercial First Amendment rights arose in the context of "culture war" issues, in which the socially conservative position was not aligned with the pro-speech position. *Virginia State Board of Pharmacy* is not such a case—but it followed on the heels of *Bigelow v. Virginia*,[37] in which the Court struck down on First Amendment grounds the conviction of a newspaper editor under a criminal ban on the advertisement of abortion services.[38] The two amicus briefs filed in *Bigelow* are telling. In one brief, Public Citizen previewed the argument that it would successfully make in *Virginia State Board of Pharmacy*: that the advertising restrictions at issue in the case harmed listeners' interests in obtaining information.[39] In the other brief, the group Virginia Right to Life argued that "commercial advertisement . . . has no protection under the First

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[34] *See, e.g.*, BeVier, *supra* note 29 at 304 (arguing that "the only legitimate sources of constitutional principle are the words of the Constitution itself, and the inferences that reasonably can be drawn from its text, from its history, and from the structure of government it prescribes").

[35] Teles, *supra* note 24, at 58.

[36] *See* U.S. Dep't of Justice, Office of Legal Policy, Guidelines on Constitutional Litigation (1988), http://www.ialsnet.org/documents/Patersonmaterials2.pdf [hereinafter Guidelines], *archived at* https://perma.cc/Y98J-GQ4D; U.S. Dep't of Justice, Office of Legal Policy, The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation (1988), http://www.scribd.com/doc/7888685/The-Constitution-in-the-year-2000-choices-ahead-in-constitutional-interpretation, *archived at* https://perma.cc/P35D-HZ97.

[37] 421 U.S. 809 (1975).

[38] *See id.* at 825.

[39] Brief for Public Citizen and Center for Women Policy Studies as Amici Curiae Supporting Petitioner, *Bigelow*, 421 U.S. 809 (No. 73-1309), 1974 WL 186260.

Amendment."[40] Then, the following year, the Court rejected a First Amendment challenge brought by "operators of two adult motion picture theaters" to an "anti-skid row ordinance."[41] Again, amicus participation was scant, with just the American Civil Liberties Union and the Motion Picture Association of America weighing in on the theaters' side.[42] Arising in these contexts, First Amendment protections for commercial speech must have seemed like a mixed bag, at best, to many conservatives.

Still, *Virginia State Board of Pharmacy* represented a turning point, providing a toe-hold for deregulatory and pro-business First Amendment cases, which soon (and inevitably, given our common law system[43]) began to emerge.[44] By 1980, when Justice Powell announced the primary test applicable to the regulation of commercial speech in *Central Hudson*,[45] the players in the deregulatory First Amendment landscape had begun to line up in a way that would be more recognizable today. In that case, three conservative movement groups and the Chamber of Commerce filed amicus briefs in opposition to New York's ban on advertising by electric utilities;[46] environmental and consumer groups filed amici in support of the state.[47] Academics, too, developed creative new ways to push at the boundaries of the First

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[40] Brief for Va. Right to Life, Inc. as Amicus Curiae Supporting Respondent, *Bigelow*, 421 U.S. 809 (No. 73-1309), 1974 WL 186261 at *4.

[41] Young v. American Mini Theatres, Inc., 427 U.S. 50, 55 (1976).

[42] Docket, Young v. American Mini Theatres, Inc., 127 U.S. 50 (2007) (No. 75-312).

[43] Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM & MARY L. REV. 1613, 1625–26 (2015) (discussing why lawyering is "opportunistic," in the sense that when courts embrace novel First Amendment theories, litigants will tend to recast their claims in First Amendment terms).

[44] For example, several conservative groups and the Chamber of Commerce filed amicus briefs in support of the petitioners in *Bellotti*, in which the Court struck down a Massachusetts law prohibiting banks and corporations from making contributions or expenditures to influence certain voter referenda, *see* 435 U.S. at 768. *See, e.g.*, Motion of the Chamber of Commerce of the United States of America for Leave to File a Brief Amicus Curiae and Brief Amicus Curiae in Support of Appellants, *Bellotti*, Case No. 76-1172, June 2, 1977; Motion for Leave to File Brief as Amici Curiae and Brief Amici Curiae Northeastern Legal Fdn. And Mid-America Legal Fdn. In Support of Appellants, *Bellotti*, Case No. 76-1172, June 10, 1977.

[45] Justice Powell wrote:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

[46] Brief for Mid-Atlantic Legal Foundation and Donald Powers as Amici Curiae Supporting Petitioner, *Cent. Hudson Gas*, 447 U.S. 557 (No. 79-565), 1980 WL 339968; Brief for Washington Legal Foundation as Amicus Curiae Supporting Petitioner, *Cent. Hudson Gas*, 447 U.S. 557 (No. 79-565), 1979 WL 200000; Brief for New England Legal Foundation as Amicus Curiae Supporting Petitioner, *Cent. Hudson Gas*, 447 U.S. 557 (No. 79-565), 1979 WL 2000011979.

[47] Brief for the Natural Resources Defense Council, Friends of the Earth et al., as Amici Curiae Supporting Respondent *Cent. Hudson Gas*, 447 U.S. 557 (No. 79-565), 1979 WL 200002.

Amendment, while establishing closer ties to conservative legal groups—especially the Federalist Society—and allowing new theories to more easily be put into practice.[48] Ultimately, even Judge Bork took a more favorable view of First Amendment protection of commercial speech, concluding that "evidence makes clear that the 'the freedom of the press' protected by the Constitution extends to that which we now characterize as 'commercial speech.' "[49]

Whatever the reasons, advances under the First Amendment by business interests have been inexorable over the past two decades. As an empirical study by John Coates IV recently concluded, "[n]early half of First Amendment legal challenges now benefit business corporations and trade groups, rather than other kinds of organizations or individuals."[50] Further, these pro-business cases do not involve core expression, but rather entail "attacks on laws and regulations that inhibit 'speech' . . . in areas of activity incidental or instrumental to their core profit-making activity."[51]

While Justice Powell's early call to action and later First Amendment jurisprudence helped begin the process of deregulation by First Amendment, the Roberts Court has significantly furthered the project, as discussed below. This trend is consistent with the generally pro-business orientation of the Roberts Court, which was found to be "much friendlier to business than either the Burger or Rehnquist Courts" in a study by Lee Epstein, William M. Landes, and Judge Richard Posner.[52] Moreover, the study found that "five of the ten Justices who . . . have been the most favorable to business are currently serving, with two of them ranking at the very top among the thirty-six Justices in our study."[53] Unsurprisingly, they are, in order, Justice Samuel Alito, Chief Justice John Roberts, Justice Clarence Thomas, Justice Anthony Kennedy, and the late Justice Antonin Scalia, with Justice Alito and Chief Justice Roberts in positions one and two, respectively of the thirty-six justices studied.[54] Justice Powell ranked number nine—ranking below four of the current Justices, and only one spot above Justice Scalia.[55]

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[48] *See* Teles, *supra* note 24, at 82–84 (noting that "by the mid-1980s the conservative movement had developed a cadres of activists and thinkers whose primary commitment was to a set of ideas rather than the defense of particular interests or constituencies," and describing a conference featuring panels "mostly on commercial speech[ ] dominated, intellectually, by [Michael] McConnell and Lillian BeVier").

[49] Robert Bork, *Activist FDA Threatens Constitutional Speech Rights*, Am. Enterprise Inst. (Jan. 19, 1996), http://www.aei.org/publication/activist-fda-threatens-constitutional-speech-rights/, *archived at* https://perma.cc/4VHT-SA6H (arguing that proposed FDA restrictions on cigarette advertising were unconstitutional); *see also* Jonathan H. Adler, *Robert Bork & Commercial Speech*, 10 J.L. Econ. & Pol'y 615, 616 (2014).

[50] Coates, *supra* note 21, at 223.

[51] *Id.* at 249.

[52] Lee Epstein, William M. Landes, & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 Minn. L. Rev. 1431, 1471 (2013).

[53] *Id.*

[54] *Id.* at 1450 (table 7).

[55] *Id.*

B. Recent Cases: A Preview of Things to Come?

All this is to say that much has already changed in the last three decades of First Amendment jurisprudence. But, as the next section discusses, the new generation of legal challenges would expand First Amendment protections significantly beyond today's (already expanded) limits. These new challenges rely on several different strands of First Amendment law, but three cases, each authored by Justice Kennedy, deserve special mention: *United States v. United Foods, Inc.*,[56] *Citizens United v. FEC*,[57] and *Sorrell v. IMS Health Inc*.[58] Together, these cases: (1) expand the scope of activity to which the First Amendment applies, covering more economic activity that incidentally involves or affects speech; (2) embrace a more absolutist approach to the First Amendment than the balancing favored by many earlier Courts and Justices, including Justice Powell, by ratcheting up the level of First Amendment scrutiny for restrictions on commercial or economically motivated speech or compelled subsidization of speech; and (3) signal the Court's willingness to entertain new or aggressive forms of deregulatory First Amendment challenges, in turn prompting more litigants to advance novel free speech arguments. Given these cases' pivotal position in advancing the deregulatory First Amendment, it is worth briefly discussing their significance.[59]

First, in *United Foods*, the Court held that the Department of Agriculture could not require mushroom producers to contribute to a generic advertising fund when the contributions were not part of a comprehensive scheme of economic regulation. The Court decided the issue narrowly and avoided explicitly overruling any prior cases, including *Glickman v. Wileman Brothers & Elliott, Inc.*,[60] in which the Court upheld mandatory contributions to a slightly different generic advertising scheme.[61] Yet, the decision matters for two reasons relevant to this Article. First, the Court muddied the difference between compelled speech and compelled subsidization of speech, suggesting that the two were equivalent in at least some contexts.[62] (The Court later further elided that difference in *Knox v. Service Employees International Union, Local 1000*,[63] describing mandatory union fees as "a form of

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[56] 533 U.S. 405 (2001).

[57] 558 U.S. 310 (2010).

[58] 564 U.S. 552 (2011).

[59] I have previously discussed these cases in more detail. *See* Charlotte Garden, Citizens United *and the First Amendment of Labor Law*, 43 STETSON L. REV. 571, 585–86 (2014); Charlotte Garden, *Meta Rights*, 83 FORDHAM L. REV. 855, 880–81 (2014).

[60] 521 U.S. 457 (2001).

[61] *See id.* at 474.

[62] *See* 533 U.S. at 410–11 (citing cases concerning compelled speech and compelled subsidization of speech); *cf. Glickman*, 521 U.S. at 470-71 ("The use of assessments to pay for advertising does not require respondents to repeat an objectionable message out of their own mouths.").

[63] 132 S. Ct. (2012) 2277.

compelled speech and association" and citing *United Foods*.[64]) Then, once the Court had identified the challenged constitutional harm as tantamount to compelled speech, it decided heightened scrutiny should apply; in contrast, earlier decisions had suggested that, to the extent compelled subsidization of speech implicated the First Amendment at all, a more generous balancing test was appropriate.[65] Thus, *United Foods* is significant in large part because of its discussion of the level of scrutiny to be applied to claims involving mandatory subsidization of economic speech or association.

The second aspect of *United Foods* relevant to this Article is the Court's conclusion that, as a matter of "First Amendment values," the "general rule is that the speaker and the audience, not the government, assess the value of the information presented."[66] That is, courts cannot be entrusted to decide whether an objection to generic mushroom advertising contributes significantly to democratic deliberation and self-governance, the marketplace of ideas, or any other abstract First Amendment value;[67] instead, courts must leave it to speakers to decide what matters. Put another way, if a speaker concludes that a generic advertising assessment is worth making a federal case over, who is the court to say otherwise?[68]

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[64] *Id.* at 2289.

[65] *Compare* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 224 (1977) (holding that "important government interests . . . presumptively support the impingement upon association freedom created by the agency shop"), *with Knox*, 132 S. Ct. at 2289 (stating that strict scrutiny applies to "mandatory associations" and citing *United Foods*); see also, *Glickman*, 521 U.S. at 469–70 (distinguishing agricultural advertising subsidies from previous compelled subsidization of speech cases including *Abood* because: "First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views").

[66] 533 U.S. at 411 (quotation mark omitted) (quoting Edenfield v. Fane, 507 U.S. 761, 767 (1993)). *Edenfield* itself is a significant case for the development of the deregulatory First Amendment; in that case, the Court, in an opinion authored by Justice Kennedy, struck down a Florida law banning certified public accountants from making direct personal solicitations to potential clients. *See* 507 U.S. at 763–64. Justice Kennedy wrote that the law "threatens societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard," *id.* at 767, though he also squarely applied traditional intermediate scrutiny in striking down the law, *see id.* at 767.

[67] *See* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 9–10 (2000) (arguing that First Amendment scrutiny "is brought to bear only when the regulation of communication affects a constitutional value specifically protected by the First Amendment"); Horwitz, *supra* note 20, at 113 ("Such a 'content neutral' approach [to the First Amendment] necessarily ignores what had originally been the central practical goal of modern First Amendment history: the use of free speech doctrine to 'level the playing field' in order to provide economically or socially weak political dissidents with a chance to engage in political debate.").

[68] *See* Robert Post, *Compelled Subsidization of Speech:* Johanns v. Livestock Marketing Association, 2005 SUP. CT. REV. 195, 216 (2005) (reasoning that the *United Foods* principle that "'First Amendment concerns apply' whenever the state requires persons to 'subsidize speech with which they disagree'" is "false" because "First Amendment concerns are not automatically aroused when persons are forced to speak in ways that they find objectionable"); Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119, 1122 (2015) (First Amendment decisions including *Sorrell* are "are infused with the neoliberal tropes of economic liberty and consumerist participation, and the label 'speech' has become a fig leaf

This approach is a significant turn from Justice Stevens' analysis in *Glickman*. For Justice Stevens, it was easy to conclude that a stone fruit subsidy did not "compel the producers to endorse or to finance any political or ideological views," or to refrain from expressing any views—even contrary ones—on their own dime.[69] With that conclusion, Justice Stevens took the compelled advertising scheme out of the realm of the First Amendment altogether, grouping it instead with other forms of ordinary market regulation that have been subject only to rational basis review since the Court's rejection of *Lochner* in 1937.[70] Thus, the mere fact that advertising involves speech was not enough to bring the First Amendment into play for the *Glickman* majority; instead, the Court looked to the general character of the regulation to assess whether it implicated genuine First Amendment concerns, or whether the case was instead an attempt at an end-run around the Court's rejection of heightened scrutiny for economic due process-type claims.

In declining to overrule *Glickman*, Justice Kennedy was left to backfill a basis to distinguish that decision. The one he chose was that the advertising order in *Glickman* was part of a more extensive scheme of economic regulation that prohibited certain market competition between producers.[71] Thus, after *United Foods*, governments may compel producers to subsidize private advertising only when it also restricts their market freedom in ways that do not involve speech.[72] Yet all market participants are restricted in innumerable ways that do and do not involve speech—for example, most market participants must comply with prohibitions on anticompetitive activity, with labor and employment law, and with deceptive advertising rules. Thus, Kennedy's *United Foods* rule must be more limited; presumably confined to those situations in which the same regulatory scheme both restricts market behavior and compels producers to subsidize advertising, with the restriction and the subsidy aimed at the same goal.[73] The upshot is that, under *United Foods*, more market regulation comes in for more rigorous

strategically deployed to denote and legitimize proprietary claims over the patterns of information flow.").

[69] Glickman v. Wileman Brothers & Elliott, Inc., 521 U.S. 457, 469–70 (2001).

[70] *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 393 (1937) ("In dealing with the relation of employer and employed, the [state] has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted . . . .").

[71] *See* 533 U.S. at 412 ("The California tree fruits were marketed 'pursuant to detailed marketing orders that ha[d] displaced many aspects of independent business activity.'").

[72] Alternatively, the government may assess fees if it then uses them to fund its own speech. *See* Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 562 (2005) ("When . . . the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages.").

[73] 533 U.S. at 412 ("[A]lmost all of the funds collected under the mandatory assessments are for one purpose: generic advertising. Beyond the collection and disbursement of advertising funds, there are no marketing orders that regulate how mushrooms may be produced and sold, no exemption from the antitrust laws, and nothing preventing individual producers from making their own marketing decisions.").

First Amendment scrutiny; in contrast, the *Glickman* rule left government a freer hand with respect to compelled subsidization of speech, provided that there was no recognizably ideological or political component involved. Or, as the *United Foods* dissenters put it, the majority's rule risks "creat[ing] through its First Amendment analysis a serious obstacle to the operation of well-established, legislatively created, regulatory programs, thereby seriously hindering the operation of that democratic self-government that the Constitution seeks to create and to protect."[74]

Several years later, the Court in *Sorrell* compounded the effects of *United Foods* by holding that regulations targeting commercial dealings in information can be content- and speaker-based discrimination deserving of "heightened" First Amendment scrutiny.[75] Specifically, the Court struck down a Vermont law prohibiting pharmaceutical marketers from buying or using pharmacy records that revealed individual physicians' prescribing practices.[76] The statute did not prohibit pharmaceutical marketing—it simply made the marketing harder by depriving marketers of information that might allow them to better target their efforts at individual physicians. Thus, Vermont and some of its amici argued that the law did not regulate speech at all, but rather banned a species of commerce. That argument had been accepted by the First Circuit, which put it like this:

> [T]his is a situation in which information itself has become a commodity. The plaintiffs, who are in the business of harvesting, refining, and selling this commodity, ask us in essence to rule that because their product is information instead of, say, beef jerky, any regulation constitutes a restriction of speech. We think that such an interpretation stretches the fabric of the First Amendment beyond any rational measure.[77]

The *Sorrell* majority, however, rejected that argument because "the creation and dissemination of information are speech within the meaning of the First Amendment."[78] Then, the Court focused on the fact that the law targeted a single type of market actor—pharmaceutical marketers—who wanted to use physician information to facilitate their speech.[79] Thus, the Court concluded not only that the law implicated the First Amendment, but also that it dis-

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[74] 533 U.S. at 425 (Breyer, J., dissenting).

[75] *See* 131 S. Ct. at 2659 (holding that a statute restricting on "sale, disclosure, and use of pharmacy records . . . must be subjected to heightened judicial scrutiny" because the statute targets "[s]peech in aid of pharmaceutical marketing").

[76] *Id.*

[77] IMS Health Inc. v. Ayotte, 550 F.3d 42, 53 (1st Cir. 2008), *abrogated sub nom Sorrell*, 131 S. Ct. at 2659.

[78] *Sorrell*, 131 S. Ct. at 2667.

[79] *See id.* at 2663 ("On its face, Vermont's law enacts content-and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information.").

criminated based on viewpoint.[80] The result is at least a strong implication that laws targeting data-mining operations or otherwise protecting the privacy of certain information will now be subject to heightened First Amendment scrutiny.[81] As to what level of heightened scrutiny, the Court held that *at least* intermediate scrutiny would apply, but it intimated that something "stricter" might be called for when laws target commercial information purchasers or users only, leaving others (such as academics or non-profits) unregulated.[82]

Despite the Court's occasional protestations to the contrary, regulations that come in for heightened scrutiny are usually not long for this world,[83] and *Sorrell* was not an exceptional case. Much as he did in *Edenfield*, Justice Kennedy began by describing pharmaceutical marketing—the end result of the data trade in which the *Sorrell* respondents engaged—as "effective and informative."[84] Later in the decision, he wrote that "[i]f pharmaceutical marketing affects treatment decisions, it does so because doctors find it persuasive."[85] For Justice Kennedy, then, physicians are presumptively *homo economicus*, immune to irrational responses to marketing efforts that could lead to worse outcomes for patients.[86] Thus, it would not be enough for Vermont to point to changes in physician behavior resulting from personalized marketing approaches; instead, the state would also have to demonstrate worse (or more expensive) patient outcomes as a result of pharmaceutical marketing. But the process of generating this data would be difficult and expensive. If generated, perhaps it would show that Vermont's premise was flawed all along. Perhaps not. The point, though, is that whereas Vermont's efforts to regulate the pharmaceutical industry would generally be subject to rational basis review, *Sorrell* stands for the proposition that some form of heightened scrutiny applies where the exchange of data is restricted; those restrictions will often wither under such scrutiny. The result will be not just

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[80] *See id.* ("'In its practical operation,' Vermont's law 'goes even beyond mere content discrimination, to actual viewpoint discrimination.'" (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992))).

[81] *See* Ashutosh Bhagwat, Sorrell v. IMS Health*: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855, 867–68 (2012).

[82] *Sorrell*, 131 S. Ct. at 2667.

[83] *Cf.* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 844 (2006) (concluding, based on empirical analysis of how often government prevails in cases in which strict scrutiny applies, that "strict scrutiny is actually most fatal in the area of free speech, where the survival rate is 22 percent, lower than in any other right"); Jennifer L. Pomeranz, *No Need to Break New Ground: A Response to the Supreme Court's Threat to Overhaul the Commercial Speech Doctrine*, 45 LOY. L.A. L. REV. 389, 391 (2012) ("The U.S. Supreme Court has not upheld a commercial speech restriction since 1995.").

[84] 131 S. Ct. at 1663 (citing *Edenfield*'s description of in-person solicitation as having "considerable value").

[85] 131 S. Ct. at 2670.

[86] See also Reza R. Dibadj, *The Political Economy of Commercial Speech*, 58 S.C. L. REV. 913, 927 (2007) (discussing the role of listeners in commercial speech law, and observing that "the Court is shifting attention away from the rights of an artificial, putatively profit-seeking entity, toward those of a much more sympathetic class—the audience").

less regulation of speech, but also less regulation of markets. To be sure, this result is, in a sense, a consequence of First Amendment protection for commercial speech generally,[87] but *Sorrell*'s broad language enables new arguments that (1) heightened scrutiny should apply to regulation targeting a particular set of commercial actors who are doing business via speech; and (2) regulation of the sale of raw data or data-mining services that might lead to commercial expression should be treated as equivalent to more direct regulation of speech.[88] Or, as Justice Breyer put it in his *Sorrell* dissent, "[b]y inviting courts to scrutinize whether a State's legitimate regulatory interests can be achieved in less restrictive ways whenever they touch (even indirectly) upon commercial speech, today's majority risks repeating the mistakes of the past in a manner not anticipated by our precedents."[89]

I have left for last *Citizens United*, which has the greatest symbolic importance of the cases discussed in this Part. *Citizens United* is sometimes wrongly characterized as having announced for the first time that "corporations are people" (which is in turn shorthand for the principle that corporations have First Amendment rights), or that "money is speech." Neither of those principles was original to *Citizens United*, though that case did apply them aggressively.[90] Obviously *Citizens United* matters a great deal to campaign finance law; among other things, the importance of its holding that only *quid pro quo* corruption can justify limits on political spending should not be understated.[91]

But beyond election law, *Citizens United* embraced the principle that speaker-based discrimination is offensive to the First Amendment: "Prohibited, too, are restrictions distinguishing among different speakers . . . Speech restrictions based on the identity of the speaker are all too often simply a means to control content."[92] That principle laid the groundwork for *Sorrell*,

[87] *See* Nat Stern & Mark Joseph Stern, *Advancing an Adaptive Standard of Strict Scrutiny for Content-Based Commercial Speech*, 47 U. RICH. L. REV. 1171, 1173–74 (2013) (discussing Supreme Court decisions that rejected "paternalistic" justifications for limiting advertising).

[88] *See* Pomeranz, *supra* note 83 at 422–23 & 424–25 (noting *Sorrell*'s concern with content-based regulation of speech, whereas "[c]ommercial speech is by its very definition content-based: speech that 'propose[s] a commercial transaction;'" and contrasting *Sorrell*'s treatment of speaker-based distinctions to that of other commercial speech cases); Tamara Piety, *The First Amendment and the Corporate Civil Rights Movement*, 11 J. BUS. & TECH. L. 1, 20 (2016) (arguing that "that a statute which treats marketing differently than other speech, is constitutionally infirm *on that ground*, makes a hash of the commercial speech doctrine because, by definition, the commercial speech doctrine is applicable only to a specific type of content—commercial content). *Cf.* Richards, *supra* note 20 at 1501 ("Laws regulating the collection, use, and disclosure of personal data are (mostly) constitutional, and critics who suggest otherwise are wrong").

[89] 131 S. Ct. at 592 (Breyer, J., dissenting)

[90] *See* Deborah Hellman, *Money Talks But It Isn't Speech*, 95 MINN. L. REV. 953, 955 (2011) (criticizing *Citizens United* because "the Court considered it so obvious that restrictions on spending money amount to restrictions on speech that it needed no discussion at all" in support of that proposition).

[91] *See* Citizens United v. FEC, 558 U.S. 310, 359 (2010).

[92] *Id.* at 898–99; *see also* Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 FL. ST. L. REV. 765, 766 (2015) (arguing that *Citizens United* "gave full-

where the Court was similarly distrustful of a speaker-based distinction. In addition, *Citizens United* served an important signaling function—namely, that five members of the Court were willing to reach major First Amendment holdings to strike down federal law, even when more narrow or incremental holdings were available.[93] Specifically, the Court rejected several narrow arguments that the Bipartisan Campaign Reform Act's ban on spending from corporate general treasuries on certain independent political advocacy did not apply (or could be construed not to apply) to Citizens United's proposed speech.[94] Instead, the Court concluded that an incremental approach would be time-consuming, leading to "an inevitable, pervasive, and serious risk of chilling protected speech" while the law was developing.[95] In contrast, the Court had previously proceeded in the more cautious manner that it eschewed in *Citizens United*.[96] In that sense, *Citizens United* made the First Amendment a more salient vehicle for challenging regulatory frameworks by suggesting that the Court viewed incremental or narrow holdings—usually a sign of desirable judicial restraint—as problematic when First Amendment rights are at stake. Thus, among *Citizens United*'s most important contributions to the greater deregulatory project may have been its signal that the Roberts Court is open for business, when business wants to advance new and aggressive First Amendment theories.[97]

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throated articulation to the principle that discrimination on the basis of the identity of the speaker is offensive to the First Amendment, even when there is no content discrimination" and that "[t]his newly articulated doctrine has the potential to reshape free speech law far beyond the corporate and election contexts"); Charlotte Garden, *Citizens United and* Citizens United*: The Future of Labor Speech Rights?*, 53 Wm. & Mary L. Rev. 1, 10 (2012) (arguing that "*Citizens United* . . . rejected [the Court's] previous conclusion that a speaker's purpose or motivation, including profit motive, could be determinative of his or her First Amendment rights"); Piety, *supra* note 88, at 20 ("What . . . flowered in *Citizens United*, was this notion that regulation of a corporation is somehow discriminatory and that similarly, regulation of commercial speech on different terms than that of other protected speech is likewise discriminatory.").

[93] *See* Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 Sup. Ct. Rev. 181, 183 (2009) ("In *Citizens United*, the Court failed to dispose of the case initially through a plausible reading of a statute, setting itself up to address a constitutional question head-on that was not properly presented to the Court.").

[94] 558 U.S. at 326–27.

[95] *Id.*

[96] *See, e.g.*, FEC v. Mass. Citizens for Life, 479 U.S. 238, 263–64 (1986) (holding that independent spending restriction could not be applied to non-profit entity because it was "formed for the express purpose of promoting political ideas," its fundraising "cannot be considered business activities," and it "was not established by a business corporation or labor union").

[97] Relatedly, Julie Cohen has observed that the *Citizens United* Court privileged the ownership of "the means of communication." As she put it, "[t]he invocation of media companies [by the *Citizens United* Court] as the paradigmatic example of corporate freedom of speech signals that the ultimate touchstone of expressive freedom is ownership of the means of communication. One who owns resources has the means to speak; one who owns the means of communication may speak most fully and completely." Cohen, *supra* note 68, at 1124.

The legal evolution described in Part I threatens something of a perfect storm for the deregulatory First Amendment in the workplace, given the combined effects of the Court's willingness to expand First Amendment coverage and the increase in "information work" in America. It is unsurprising, then, that employers and business advocacy groups like the International Franchise Association, the Chamber of Commerce, and the National Federation of Independent Business are aggressively pursuing novel First Amendment theories in the federal courts. Part II describes these theories.

II. Next Generation Themes of the Deregulatory First Amendment

As Professor Coates's research shows, there is a frequently invoked pro-business First Amendment "core," which encompasses application of ordinary commercial speech principles. This Part is not about those cases. Instead, it identifies a new wave of deregulatory and pro-business First Amendment arguments that push at the First Amendment's boundaries. This is not to predict that litigants will convince courts to adopt all of these theories—perhaps none of them will become law; perhaps some of them will, though their chances significantly decreased with Justice Scalia's death in February 2016. But it is nonetheless significant that these arguments are being made, particularly because they are often advanced by high-profile litigators who may hope to begin the process of moving arguments from "off the wall" to "on the wall." Further, it is an actuarial certainty that the composition of the Supreme Court will change significantly over the next ten years; future nominees, as well as the eventual confirmation of a Justice to fill Justice Scalia's seat, will determine whether or not these First Amendment theories gain traction.

The remainder of this Article discusses themes of the emerging deregulatory First Amendment. While the arguments overlap and reinforce each other, I have attempted to tease apart significant strands.

A. Compelled speech or subsidization of speech should routinely be subject to strict scrutiny, requiring detailed justifications for economic regulations that involve speech or spending.

First, a new generation of arguments seeks to expand the Court's precedents on compelled speech and subsidization of speech. Many of these cases involve the constitutionality of mandatory union fees or even union representation itself in the public sector, although novel uses of First Amendment compelled speech principles have also occurred outside of the union fees context. These arguments have had some success already, and until Justice Scalia's death, more successes were likely to come; now, the permissible scope of public sector labor relations likely rests with Justice Scalia's successor.

1. Public Sector Union Cases

In the previous Part, I argued that the Roberts Court's First Amendment decisions have put wind in the sails of advocates who would make novel and aggressive use of the First Amendment as a deregulatory tool. But there is a much more specific sense in which the Court has invited recent challenges to mandatory union fees in the public sector. It is not a stretch to say that Justice Alito is the primary architect of the legal theories advanced in these cases,[98] and that he has all but called for advocates to run with his ideas.

Justice Alito's invitation came wrapped in the Court's 2012 decision in *Knox v. SEIU Local 1000*. The pre-*Knox* baseline rules governing unions in the public sector—which, as discussed below, still apply—are roughly as follows. First, the National Labor Relations Act ("NLRA") does not apply to public sector employers,[99] leaving governments at the federal, state, and sometimes local levels to define the scope of their employees' collective bargaining rights.[100] The resulting legal regimes differ significantly; a small list of states have made public sector collective bargaining illegal, while others provide their public sector workers more robust bargaining rights than private sector employees enjoy under the NLRA.[101] However, most states allow at least some public sector workers to bargain collectively, as does the federal government.[102] Virtually all states that allow collective bargaining require elected unions to become the exclusive representative for an entire group of employees, with the union in turn required to fairly represent each worker in the bargaining unit.[103]

While governments have a range of options regarding the scope of public sector union representation, there are also some constitutional limits.[104] The First Amendment protects workers' rights to refrain from union membership, and to decline to contribute money to an elected union's activities

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[98] Justice Alito's role in inviting challenges to aspects of public sector collective bargaining was most evident in *Knox v. SEIU Local 1000*, 132 S. Ct. 2277 (2012), and is discussed below.

[99] 29 U.S.C. § 2(2) (definition of "employer" "shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof").

[100] Joseph Slater, *The Strangely Unsettled State of Public-Sector Labor in the Past Thirty Years*, 30 HOFSTRA LAB. & EMP. L.J. 511, 512–13 (2013).

[101] *Id.*; Ann C. Hodges, *Lessons From the Laboratory: The Polar Opposites on the Public Labor Law Spectrum*, 18 CORNELL J.L. & PUB. POL'Y 735, 735-36 (2009) (discussing "two of the jurisdictions at opposite ends of the legal spectrum, Illinois and Virginia").

[102] Slater, *supra* 100, 512–13 & 518–19.

[103] Only three states have ever experimented with a "members only" or "proportional representation" model, in which a union represents only the employees in the bargaining unit that choose to be so represented, allowing subsets of workers within a single bargaining unit to choose representation by different unions. MARTIN H. MALIN, ANN C. HODGES, & JOSEPH E. SLATER, PUBLIC SECTOR EMPLOYMENT: CASES & MATERIALS, 340 (2d ed. 2011). The only state that currently allows proportional representation in Tennessee. TENN. CODE ANN. § 49-5-605 (2011) (permitting any representative chosen by fifteen percent of teachers to participate in "collaborative conferencing").

[104] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233–34 (1977).

that are unrelated to its duties as the collective bargaining agent for a group of employees.[105] Thus, the law currently reflects a compromise—or, as Professor Cynthia Estlund puts it, a quid pro quo[106]—involving two parts. First, where required by a statute or a collective bargaining agreement, public sector workers can be required to pay an agency fee representing their pro-rata share of a union's costs associated with collective bargaining and contract administration. Second, they cannot be required to fund the union's other activities, including its political advocacy. Finally, where employees are required to pay an agency fee, the divide between chargeable and non-chargeable expenses is protected by a minimum set of procedures, known as *Hudson* procedures, which were first developed by the Supreme Court in *Chicago Teachers Union, Local No. 1 v. Hudson*.[107]

For decades, the "right to work" movement has fought agency fees in legislatures and the courts.[108] It received oblique encouragement in 2007, when Justice Scalia, upholding a state law requiring employees to affirmatively consent to contributing to union political activity, wrote that "it is undeniably unusual for a government agency to give a private entity the power, in essence, to tax government employees."[109] But it was 2012's *Knox* that all but issued a request for claimants to bring cases seeking to undo *Abood*'s fundamental compromise. That invitation came in two forms. First, although the issue in *Knox* was whether a public sector union violated the First Amendment rights of represented workers when it levied a mid-year dues increase without providing a fresh *Hudson* notice, the majority characterized the *Abood* rule as "something of an anomaly."[110] Second, the Court granted more relief than the challengers sought: whereas the petitioners argued that they were entitled to a fresh *Hudson* notice and opportunity to opt out of non-mandatory fees when the union levied the dues increase,[111] the Court held that the First Amendment instead required that the union obtain affirmative consent before charging represented non-members for its expenses unrelated to collective bargaining.[112] Although the *Knox* Court for-

[105] *Id.*; *see also* Cynthia Estlund, *Are Unions A Constitutional Anomaly?*, 114 MICH. L. REV. 169, 184–85 (2015).

[106] *Id.* at 169.

[107] 475 U.S. 292 (1986). These procedures require unions to issue an annual notice of the employees' right to opt out, a calculation of the agency fee based on the union's spending during the previous year, and the right to challenge that calculation before an impartial arbitrator. *Id.* at 305–06.

[108] Estlund, *supra* note 105, at 179–85; *see generally* SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION: FROM THE NEW DEAL TO THE NEW RIGHT (2014).

[109] Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 184 (2007).

[110] Knox v. SEIU Local 1000, 132 S. Ct. 2277, 2290 (2012).

[111] Br. for Petitioners, Knox v. Serv. Emps. Int'l Union, Local 1000, No. 10-1121, 2011 WL 4100440, at *i (stating that question presented is whether "a State, consistent with the First and Fourteenth Amendments, may condition employment on the payment of a special union assessment intended solely for political purposes—a statewide ballot initiative campaign—without first providing a *Hudson* notice that includes information about that assessment and provides an opportunity to opt out of supporting those political exactions?").

[112] *Knox*, 132 S. Ct. at 2293.

mally limited its holding to mid-year dues increases, the implication was clear: this was an area of law in which challengers should think big.

I have argued elsewhere that the *Knox*'s conclusions were unsupported by existing caselaw or logic,[113] and I do not repeat those arguments here. Suffice it to say, the Court's invitation did not fall on deaf ears; many of the cases discussed in the remainder of this subsection were filed after, and apparently in response to, *Knox*. However, that was not strictly true of 2014's *Harris v. Quinn* decision, in which the Court held that Medicaid-funded home healthcare workers could not be required to pay an agency fee.[114] *Harris* was filed before *Knox*, although the Court took it up two Terms later.[115] Nonetheless, the *Harris* challengers significantly expanded the scope of their arguments between their *certiorari* petition and merits briefing, presumably in response to *Knox*'s encouragement.[116] Ultimately, the *Harris* Court ruled for the challengers on relatively narrow grounds, holding that the *Abood* compromise was not justified in the context of "partial" or "quasi" public employees, such as the state-funded, but privately supervised, home healthcare aides.[117] However, Justice Alito, again writing for the majority, devoted several pages to criticizing *Abood* even as applied to traditional public employees.[118] Given that this discussion was officially dicta, Supreme Court kremlinologists were left to speculate about its purpose: did it reflect that Justice Alito had tried and failed to win four additional votes to overrule *Abood* in *Harris*? Or was it that he was signaling that a future head-on challenge to *Abood* would meet a warm reception at the Court?[119]

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[113] *See generally* Garden, *Meta Rights*, *supra* note 59, at 895–98 & 899–906.

[114] 134 S. Ct. 2618, 2639–40.

[115] The timing of the grant of *certiorari* in *Harris v. Quinn* was, to use Justice Alito's word, anomalous. The Seventh Circuit ruled for the state and the union, and against the challengers, on Sept. 1, 2011, and the challengers filed their cert. petition on Nov. 29, 2011, several months after the Court granted cert. in *Knox*. *Compare* Docket, Knox v. SEIU Local 1000, No. 10-1121, *with* Docket, Harris v. Quinn, No. 11-681. That timing would have made it difficult (though not impossible) for the Court to have granted and heard *Harris* the same Term as *Knox*. However, not only did the Court not did not grant *Harris* for the same Term, it did not grant it for the following Term either; instead, it relisted the petition six times, ultimately granting it on Oct. 1, 2013 and hearing argument on Jan. 21, 2014.

[116] *Compare* Pet. for Writ of Cert., Harris v. Quinn, No. 11-681, at *11 (Nov. 29, 2011) (arguing that home health aides could not be compelled to financially support a labor union because they were not "actual government employees"), *with* Br. for Petitioners, Harris v. Quinn, No. 11-681 at *16 (arguing that "*Abood* should be overruled").

[117] Harris, 134 S. Ct. at 2638.

[118] *Id.* at 2630–34.

[119] See Laurence H. Tribe, *Supreme Court Breakfast Table*, SLATE (June 30, 2014) http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2014/scotus_roundup/supreme_court_2014_harris_v_quinn_forgets_the_lesson_of_the_new_deal.html ("*Harris* could well portend a far broader decision in a future case"); Charlotte Garden, Harris v. Quinn *Symposium: Decision Will Affect Workers & Limit States' Ability to Effectively Manage Their Workforces*, SCOTUSBLOG (July 2, 2014), http://www.scotusblog.com/2014/07/harris-v-quinn-symposium-decision-will-affect-workers-limit-states-ability-to-effectively-manage-their-workforces/, *archived at* https://perma.cc/Z7JY-KX8P ("I do not anticipate that it will be the precursor to overturning *Abood* in the next couple of years"); Terry Pell, *Harris v. Quinn*

In addition, Justice Alito offered a curious basis on which to distinguish *Harris* from other public employee speech cases, in which the Court had permitted government employers to limit the speech of their employees, even outside of work.[120] Specifically, he reasoned that whereas some other employee speech cases concerned an individual employee's grievance, *Harris* involved spending in support of union bargaining for raises for all home healthcare aids, which "would almost certainly mean increased expenditures in the Medicaid program."[121] Thus, he continued, only the latter was a matter of public concern.[122] This reasoning was remarkable for at least three reasons. First, it implies that collective speech is entitled to more First Amendment protection than individual speech, a principle that stands at odds with the Court's cases addressing labor union speech in other contexts.[123] Second, it seems to suggest that a single worker who asks for a raise for all workers would be entitled to more First Amendment protection than a single worker who asks for a raise only for herself—unless there is some additional limiting principle, such as that this rule applies only when the collective speech has some likelihood of success. Third, even assuming that speech that could result in greater public expenditures is more likely to be of public concern, *Harris* ultimately concerned individual workers' agency fees—any one of which, taken alone, is unlikely to have any effect on public expenditures.

Building on *Harris*'s dicta, a group of public employees—California teachers—soon called for the Court to overturn *Abood* and establish a constitutional "right to work" in the public sector by filing their complaint in *Friedrichs v. California Teachers Association*.[124] In addition, the *Friedrichs* plaintiffs built on *Knox* to argue that there should be a First Amendment right to an "opt in" default rather than an "opt out" default as to any non-mandatory portion of union dues.[125] If the Court had adopted the petitioners' arguments in their entirety, then it would have created a new First Amendment right not to contribute money to an elected public sector union repre-

Symposium: A Preview of Things to Come (July 1, 2014), http://www.scotusblog.com/2014/07/214665/, *archived at* https://perma.cc/X2DZ-NNZU.

[120] *Harris*, 134 S. Ct. at 2642 (listing public employee speech cases in which the Court ruled for the government employer).

[121] *Id.*

[122] *Id.* at 2643.

[123] Many scholars have identified significant differences in the Court's treatment of speech by labor unions, as compared to other speakers, including other social movement groups. *See, e.g.*, James G. Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 Hastings Const. L.Q. 189, 191 (1984) ("On the ladder of First Amendment values, political speech occupies the top rung, commercial speech rests on the rung below, and labor speech is relegated to a 'black hole' beneath the ladder.").

[124] 2014 WL 10076847 (9th Cir. Nov. 18, 2014), *cert. granted*, No. 14-915, 135 S. Ct. 2933 (U.S. 2015) (mem); Br. for the Petitioners, Friedrichs v. Cal. Teachers Ass'n, No. 14-915, at i, http://www.scotusblog.com/wp-content/uploads/2015/09/friedrichs-opening-brief.pdf, *archived at* https://perma.cc/RZB3-UAZ3.

[125] *Id.*

sentative, and required unions to obtain affirmative consent from represented non-members before charging them any money.

The Supreme Court heard argument in *Friedrichs* on January 11, 2016, and the five more conservative Justices' questions suggested a likely win for the challengers.[126] In particular, Justice Scalia—the most likely conservative swing vote based on his prior opinions as well as his skeptical questioning of the challengers in *Harris*,[127] seemed inclined to vote to overrule *Abood*.[128] However, a decision overturning *Abood* was not to be. After Justice Scalia's death in February 2016, the Court issued a single-sentence opinion stating that the Ninth Circuit's opinion (which had simply applied *Abood*) was "affirmed by an equally divided Court."[129] The unanimous consensus was that public sector unions had dodged a bullet, escaped a sword of Damocles, and escaped by the skin of their teeth.[130] Colorful metaphors aside, at the time this Article went to print, there was no end in sight to the Court's division over *Abood*, as Senate Republicans took the position that they would not act to confirm a new justice until after the 2016 presidential election.[131] For their part, the *Friedrichs* plaintiffs have sought to keep their case alive by filing a Petition for Rehearing,[132] presumably hoping the Court will hold the case until it is back to full strength.

In the meantime, other recent and pending cases ask the courts to go beyond overruling *Abood* and limit public sector union representation in even more fundamental ways. First, at least three cases litigated by the National Right to Work Legal Defense Foundation argue that exclusive representation—decoupled from the issue of who pays for that representation—is

[126] Post-argument commentary generally shared this assessment. *E.g.*, Brian Mahoney & Josh Gerstein, *SCOTUS Signals Support for Anti-Union Plaintiffs*, Politico (Jan. 11, 2016), http://www.politico.com/story/2016/01/supreme-court-public-sector-unions-fees-217572, *archived at* https://perma.cc/A8PY-J26R; Adam Liptak, *Supreme Court Seems Poised to Deal Unions a Major Setback*, N.Y. Times (Jan. 11, 2016), http://www.nytimes.com/2016/01/12/us/politics/at-supreme-court-public-unions-face-possible-major-setback.html.

[127] *See* Catherine Fisk, *Guest Post: Scalia May Be Critical Vote in Friedrichs v. California Teachers' Ass'n*, OnLabor (June 30, 2015), https://onlabor.org/2015/06/30/guest-post-scalia-may-be-critical-vote-in-friedrichs-v-california-teachers-assn/, *archived at* https://perma.cc/9PYE-B7MA; Garden, Harris v. Quinn *Symposium*, *supra* note 119.

[128] For example, in the course of questioning the Solicitor General of California, Justice Scalia stated that "[t]he problem is that is everything is collectively bargained with the government is within the political sphere, almost by definition." Transcript of Oral Argument at 45, Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2016).

[129] 136 S. Ct. 1083 (2016).

[130] *See, e.g.*, Kevin Mahnken, *Public Sector Unions Dodge a Bullet in Friedrichs Case*, Thomas B. Fordham Inst. (Apr. 1, 2016), http://edexcellence.net/articles/public-sector-unions-dodge-a-bullet-in-friedrichs-case, *archived at* https://perma.cc/WUN8-259L; Richard Wolf, *Public Employee Unions Dodge a Supreme Court Bullet*, USA Today (Mar. 30, 2016), http://www.usatoday.com/story/news/politics/2016/03/29/supreme-court-public-employee-unions-mandatory-fees-scalia/81123772/, *archived at* https://perma.cc/R9UB-MK28.

[131] Ted Barrett & Manu Raju, *Senate Republicans Rule Out Garland Confirmation in Lame Duck Session*, CNN (May 10, 2016), http://www.cnn.com/2016/05/10/politics/merrick-garland-supreme-court-senate-republicans/, *archived at* https://perma.cc/W7JQ-V6ZM.

[132] Petition for Rehearing, Friedrichs v. California Teachers Association, No. 14-915 (Apr. 8, 2016).

illegal as to partial public employees.[133] That is to say, the Plaintiffs argue that, as to publicly funded but privately supervised workers, it is unconstitutional for a public employer to choose to bargain with an elected union official over state-determined pay and other working conditions. For example, in *Bierman v. Dayton*,[134] the plaintiffs' only claim is that certification of an exclusive representative for home healthcare workers is a First Amendment violation.[135] The plaintiffs' argument, in summary, is that exclusive representation is equivalent to forced association and petitioning and is therefore unconstitutional, at least with respect to partial public employees. As they put it in an appellate brief, "Minnesota is forcing individual providers to lobby the State over its Medicaid policies through an entity the State itself designated."[136]

To be clear, this argument has not prevailed to date,[137] nor is it likely to do so in the future. For one thing, several members of the Court seemed distinctly skeptical of this argument during oral argument in *Harris*.[138] In addition, the plaintiffs will have to distinguish or seek to have overruled the Court's decision in *Minnesota State Board for Community Colleges v. Knight*,[139] which upheld Minnesota's exclusive representation rule against argument by a group of employees that they should have the same rights as an elected union to meet and confer with their employer.[140] In their Eighth Circuit brief in *Bierman*, the plaintiffs argued that *Knight* was inapposite because, unlike in that case, the plaintiffs were not seeking bargaining rights of their own; they simply aimed to displace the union as their representative.[141] In other words, the plaintiffs' argument was that partial public employees have a constitutional right to have public employers set terms and conditions of employment unilaterally—an argument with undeniably Lochnerian overtones. Still, the gravamen of *Knight* was that government employers are free to consult whomever they choose (and to exclude others) in setting employ-

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[133] D'Agostino v. Baker, 812 F.3d 240 (1st Cir. 2016) (holding exclusive representation of childcare providers does not violate the First Amendment); Bierman v. Dayton, 817 F.3d 1070 (8th Cir. 2016) (affirming denial of preliminary injunction); Complaint, Mentele v. Inslee, No. 15-cv-05134 (W.D. Wash. Mar. 4, 2015).

[134] No. 14-3021 (MJD/LIB), 2014 WL 4145410 (D. Minn. Aug. 20, 2014).

[135] *See* Amended Complaint, ECF No. 57, *Bierman*, 2014 WL 4145410.

[136] Appellants' Brief at 12, *Bierman*, No. 14-3468 (8th Cir. 2014). This brief was filed in connection with an interlocutory appeal of the District Court's decision to deny a preliminary injunction. *See Bierman*, 2014 WL 4145410.

[137] *D'Agostino*, 812 F.3d at 242–43 (distinguishing *Harris v. Quinn* to reject plaintiffs' arguments) Bierman v. Dayton, No. 14-3021 (MJD/LIB), 2014 WL 5438505 *1 (D. Minn., Oct. 22, 2014) (denying motion for preliminary injunction because "Plaintiffs are unlikely to succeed on the merits of their claim").

[138] Transcript of Oral Argument at 7–10, 19, Harris v. Quinn, 134 S. Ct. 2618 (2014) (No. 11-681).

[139] 465 U.S. 271 (1984).

[140] *See id.* at 280–87.

[141] *See* Appellants' Brief, *supra* note 136, at 30 ("*Knight* is not controlling here because the Providers do not allege that they are wrongfully excluded from union negotiation sessions.").

ment policies; it is not clear why it should matter that an employer decided with whom to consult based on a union election.

In other cases, advocacy groups seek to limit unions' member recruitment opportunities or strategies. For example, in *Bain v. California Teachers Association*,[142] the plaintiffs are targeting unions' abilities to offer membership incentives and limit the right to vote in union elections to members. The *Bain* challengers, represented by the high-profile appellate lawyer Ted Boutrous, argue that represented public sector employees "should not be forced to make the untenable choice of either (a) abandoning their First Amendment rights or (b) abandoning the employment-related benefits and voting rights that the State and the unions make available *only* to union members."[143] Instead, they argue that represented workers should be free to opt out of contributing to union political activity while still enjoying the benefits of union membership.[144] The district court rejected this argument—in my view, correctly—holding that the relationship between the union and its members did not implicate state action.[145] However, the District Court left open the possibility that the Plaintiffs could establish state action if they "establish[ed] a connection between the unions' relationship with a government actor and the specific decision to bundle membership requirements."[146] Accordingly, litigation may continue in this and other cases.

Alvarez v. Inslee involves a different issue, but also concerns opportunities for unions to convince represented workers to become union members. The plaintiff in *Alvarez* challenges provisions of the collective bargaining agreement between Washington state and the union that represents "quasi-public" home healthcare workers in bargaining with the state over terms and conditions of employment that the state sets.[147] Those provisions permit the union opportunities to make its case for membership during meetings and trainings that workers are required to attend, to post literature on bulletin boards likely to be seen by workers, and to display messages on the state payroll system.[148] The plaintiff's theory is that these opportunities for the union to convey its message constitute unconstitutional "compelled receipt of speech."[149] The plaintiff's further argue that strict scrutiny is appropriate because the provisions at issue are content based.[150]

Similar to the exclusive representation cases, the plaintiff acknowledges that the government may unilaterally subject workers to its own speech;[151] in

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[142] No. 15-cv-02465 (C.D. Cal. 2015).
[143] *Id.*, Second Amended Complaint *6, Dkt. 88 (Oct. 28, 2015).
[144] *Id.* at *38.
[145] Bain v. Cal. Teachers Ass'n, 156 F. Supp. 3d 1142, 1149–54 (C.D. Cal. 2015)
[146] *Id.* at *7.
[147] Complaint, Alvarez v. Inslee, Dkt. No. 3:16-cv-0511, at *5 (W.D. Wash., Feb. 11, 2016).
[148] *Id.* at *6-9.
[149] *Id.* at 1.
[150] *Id.* at 15.
[151] *Id.* at 16.

his view, the problem arises only when the entity engaged in speech is a private entity chosen by workers themselves. The novelty of the argument is illustrated by the Supreme Court case *Perry Education Association v. Perry Local Educators' Association*, in which an insurgent union challenged a collective bargaining agreement provision that allowed only the exclusive bargaining representative access to teacher mailboxes.[152] The claim was somewhat different in that case—the insurgent union wanted equal access to the mailboxes, rather than to preclude the exclusive representative's access.[153] Still, the Court did not seem to question that schools could allow "outside organizations" access to communicate with public employees in a manner similar to that challenged in *Alvarez*.[154]

Taken together, these cases illustrate the substantial resources devoted to challenging aspects of public sector union representation on First Amendment grounds. This focus should not be taken as a sign that public sector union representation is the primary context in which compelled speech or subsidization occurs—as Robert Post has shown, many instances of compelled speech and subsidization have escaped First Amendment challenge altogether.[155] So why the focus on public sector unions? To answer this question, one might look to unions' activity away from the bargaining table: as Daryl Levinson and Benjamin Sachs have written, "because unions are critical institutional supporters of the contemporary Democratic Party, undermining the efficacy of labor unions is a well-understood means by which incumbent Republican leaders can increase their reelection prospects."[156] Along those lines, Michael Carvin, who argued on behalf of the *Friedrichs* challengers before the Supreme Court, pointedly commented that the case "may impede [unions] ability to become the largest political contributors to the Democratic Party."[157] Similarly, the CEO of the Freedom Foundation, the group funding *Mentele v. Inslee*, reportedly "told supporters he wants to force unions to spend money playing defense," "because they bankroll liberal causes and Democratic candidates."[158] And, to the extent that decreased union participation in electoral politics means Democrats are less likely to be elected, *Friedrichs* and cases like it could have knock on effects beyond just

[152] 460 U.S. 37 (1983).

[153] *Id.* at 44-45.

[154] *Id.* at 47.

[155] Robert Post, *Compelled Subsidization of Speech: Johanns v. Livestock Marketing Ass'n*, 2005 Sup. Ct. Rev. 195, 211-12 (2005)

[156] Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 Yale L.J. 400, 436 (2015); *see also* Linda Greenhouse, *Scalia's Putsch at the Supreme Court*, NY Times (Jan. 21, 2016), http://www.nytimes.com/2016/01/21/opinion/scalias-putsch-at-the-supreme-court.html ("It's no secret that in recent years, major segments of the Republican Party have declared open season on public employee unions.").

[157] Nina Totenberg, *Is it Fair to Have to Pay Fees to a Union You Don't Agree With*, NPR (Jan. 11, 2016), http://www.npr.org/2016/01/11/462607980/scotuspublicunions.

[158] Jordan Schrader, *Freedom Foundation has Unions in its Sights*, News Tribune (Oct. 4, 2015), http://www.thenewstribune.com/news/local/politics-government/article37688484.html, *archived at* https://perma.cc/9GUQ-EK87.

their precedential holdings: they could also make it more likely that judges who are more inclined towards the deregulatory First Amendment will be appointed to the federal bench.

2. *Workplace Compelled Speech Theories Outside the Agency Fee Context*

Novel compelled speech arguments are not limited to the agency fee context. For example, in *National Association of Manufacturers v. NLRB* ("*NAM*"),[159] the D.C. Circuit struck down on compelled speech grounds a National Labor Relations Board rule requiring employers to post a notice informing employees of their rights under the NLRA, and imposing penalties for failing to post the notice.[160] Even though that case was later overturned in part by the D.C. Circuit sitting *en banc*, the panel's decision has had continuing effects in terms of the notice posting requirement itself, as well as uncertainty regarding the NLRB's ability to compel employers to notify employees of their rights.

The panel decision in *NAM* rested on NLRA § 8(c), which protects employers' rights to express "any views, argument, or opinion,"[161] but the Court also drew heavily on First Amendment caselaw.[162] That discussion began with a citation to *Sorrell* for the proposition that "the 'dissemination' of messages others have created is entitled to the same level of protection as the 'creation' of messages."[163] Then, the Court discussed cases concerning the right against compelled speech and subsidization of speech, before rejecting the Board's arguments that the notice posting requirement was valid because the message was non-ideological, because the poster was drafted by the Board and identifiable as the Board's (and not the employer's) speech, and because the Court had upheld a similar notice-posting requirement in 2003.[164]

This decision was surprising on several grounds, chief among them that mandatory "know your rights" posters are ubiquitous in American workplaces, with little suggestion that they violate the First Amendment. Moreover, the D.C. Circuit's opinion seemed to push at the boundaries of even *United Foods*, as the notice-posting requirement was a part of the broader regulatory scheme imposed by the NLRA. Alternatively, as Charles Morris

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[159] 717 F.3d 947 (D.C. Cir. 2013).

[160] *Id.* at 960.

[161] 29 U.S.C. § 158(c).

[162] 717 F.3d at 956 ("We approach the question by considering some firmly established principles of First Amendment free-speech law.").

[163] *Id.*

[164] *Id.* at 957–58; *see also* UAW-Labor & Emp. Training Corp. v. Chao, 325 F.3d 360 (D.C. Cir. 2003). The plaintiffs in this case did not argue that the notice posting requirement violated the First Amendment. *Id.* at 364 (noting "plaintiff raises no free-standing First Amendment claim"); *see also* Kendrick, *supra* note 20, at 1203 (discussing tension between this case and *NAM*).

has argued,[165] one could also view the decision as standing in tension with cases involving content-neutral government regulations, including *Turner Broadcasting System, Inc. v. FCC*,[166] in which the Court rejected a First Amendment challenge to the federal requirement that cable television systems carry local programming. Significantly, *Turner* did not analyze the "must-carry" provision as a case of compelled speech at all—instead, it applied the *O'Brien* test associated with content neutral laws that have the effect of hampering expressive conduct.

Importantly, *NAM* also read narrowly *Zauderer v. Office of Disciplinary Counsel*,[167] in which the Court held that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers," at least where the disclosure involves truthful and non-controversial information.[168] The *NAM* Court concluded that *Zauderer* applied only to mandatory disclosures necessary to fight deception.[169] However, the *en banc* D.C. Circuit, rejected this reading in partially overruling *NAM* in *American Meat Institute v. US Department of Agriculture* (*AMI*).[170]

Still, the *NAM* decision has had lasting effects. First, *AMI* came too late for the NLRB notice posting requirement, which the Board withdrew in light of *NAM* and a Fourth Circuit case rejecting the rule on different grounds; perhaps the Board will attempt to revive the notice posting rule in the future, but there is currently no sign of such an effort.[171] Second, *AMI* held that *NAM* construed *Zauderer* too narrowly, but did not actually address its application to the NLRB notice. As a result, employers can (and do) rely on *NAM* in other cases. For example, when the NLRB exercised its separate authority to conduct elections to require employers to post notices of employee rights—without the possibility of unfair labor practice liability—employer groups relied on *NAM* to argue that the requirement violated NLRA § 8(c).[172] (The ensuing litigation, and the rulemaking it sought to invalidate,

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[165] Charles J. Morris, *Notice-Posting of Employee Rights: NLRB Rulemaking and the Upcoming Backfire*, Rutgers L. Rev. 1397–99 (2015) (arguing that *Turner* "is directly on point").

[166] 520 U.S. 180 (1997).

[167] 471 U.S. 626 (1985); *see also* Shanor, *supra* note 13, at 147 (discussing tension between *Zauderer* and D.C. Circuit cases striking down compelled disclosures).

[168] 471 U.S. at 651.

[169] 717 F.3d at 959 n.18.

[170] Am. Meat Inst. v. USDA, 760 F.3d 18, 23–24 (D.C. Cir. 2014) (en banc) (stating that "[t]o the extent that other cases in this circuit may be read as . . . . limiting *Zauderer* to cases in which the government points to an interest in correcting deception, we now overrule them," and citing *NAM*).

[171] *See* Chamber of Commerce v. NLRB, 721 F.3d 152 (4th Cir. 2013).

[172] Chamber of Commerce v. NLRB, 118 F. Supp. 3d 171, 190 (D.D.C. 2015) (rejecting argument that *NAM* controlled Board's authority to require employers to post notice of employee rights once a petition for a union election has been filed "because the D.C. Circuit specifically distinguished the general employee rights notice involved in that case, which carried with it the unfair labor practice penalty, from the then-existing NLRB election notice posting requirement").

are discussed in greater detail in Part II.C, below.) In other words, *AMI* did not foreclose arguments that *NAM*'s conclusion should be affirmed on other grounds. These could include arguments that NLRA § 8(c) is broader than *Zauderer*, or that *Zauderer* was inapplicable because an employer found the Board's notice to be controversial.[173] Third, the Court's compelled speech analysis is a blueprint for making compelled speech arguments in other cases involving regulation of businesses, such as the one discussed in the next paragraph.

Shortly after *NAM*, compelled speech and subsidization arguments made another appearance in former-NLRB Member Johnson's dissent in *Purple Communications, Inc. and Communications Workers of America, AFL-CIO*,[174] in which the NLRB held that NLRA § 7[175] protects employees' rights to use their work e-mail addresses for union activity.[176] His argument was twofold. First, he argued that employers would effectively be required to pay for employees "hostile speech," either because it would be contained in e-mails composed on work time, or because of costs associated with network maintenance and storage.[177] Second, he argued that the use of a work e-mail address lent "indicia of authority and thus the real potential of confusion."[178]

Former Member Johnson's second argument reflects an empirical judgment about how recipients are likely to interpret e-mail that comes from an address linked to an employer; the NLRB majority had a different assessment, and therefore rejected the argument.[179] But Member Johnson's first argument relies heavily on a string of First Amendment caselaw beginning with *Harris* and *Knox*, as well *NAM*.[180] Thus, following the *Knox* Court in equating compelled speech with compelled subsidization of speech, he concluded that "we are really telling employers they must subsidize the speech of their employees, and, thus 'have employers say whatever the employees want them to.'"[181] While this argument came in a dissent, it is a near certainty that employers appealing unfair labor practice charges based on the *Purple Communications* rule will continue to advance it.

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[173] In this regard, *United Foods*' broad and speaker-defined approach to identifying controversial speech lends support to the argument that, for example, a speaker could find it controversial to inform employees of statutory rights to participate in collective action.

[174] 361 NLRB 126 (2014).

[175] 29 U.S.C. § 157 (2012).

[176] *See Purple Communication*, 361 NLRB No. 126 at *1, slip op. at 1.

[177] *Id.* slip op. at 56 (Member Johnson, dissenting).

[178] *Id.* slip op. at 58 (Member Johnson, dissenting).

[179] *Id.* slip op. at 16 ("We are simply unpersuaded that an email message, sent using the employer's email system but not from the employer, could reasonably be perceived as speech by, or speech endorsed by, the employer.").

[180] *Id.* slip op. at 57.

[181] *Id.*

In short, the boundaries of compelled commercial speech, spending, and association are acutely contested.[182] Like many of the arguments discussed in this Part, the outcome of these cases will matter significantly for workers' free speech and association; in a real sense, expanding employers' or union objectors' rights to avoid compelled First Amendment activity would come at the expense of the rights of groups of workers to engage in their own collective speech and association.

B. The First Amendment Should Cover, and Should Protect Robustly, More Business Activities That Involve Speech.

Another group of recent deregulatory First Amendment theories seek to expand the field that the First Amendment covers—that is, to bring activity formerly thought to be beyond the reach of First Amendment scrutiny within its ambit.[183] Others have made this observation as well, noting that the Court's recent decisions in cases including *United States v. Stevens*[184] and *Brown v. Entertainment Merchants Association*[185] "might be understood to create a strong presumption" that activities involving speech or expression are covered by the First Amendment.[186] These cases sometimes arise in the workplace setting when enterprises that do their work through the "sweat of their jaws" seek to overturn limits on what they may say. But, as discussed below, some cases go further, challenging on First Amendment grounds even restrictions on their spending on activities other than speech.

One set of cases argues for heightened scrutiny of occupational speech, an issue on which the circuit courts have splintered. Until recently, courts have generally held that "when [occupational] speech consists of advice or recommendations made in the course of business and is in any way tailored to the circumstances or needs of the listener, licensing that speech raises no cognizable First Amendment claim."[187] But several more recent cases have sought to undo that principle. Many of these new cases arise in politically

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[182] For an argument that *Zauderer* should be read narrowly, see Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right to Know"*, 58 ARIZ. L. REV. 421, 434–37 (2016).

[183] *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminiary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768–69 (2004) (describing concept of First Amendment coverage, and stating that "even the briefest glimpse at the vast universe of widely accepted content-based restrictions on communication reveals that the speech with which the First Amendment deals is the exception and the speech that may routinely be regulated is the rule").

[184] 599 U.S. 460 (2010).

[185] 564 U.S. 786 (2011).

[186] Schauer, *Politics and Incentives*, *supra* note 43, at 1624; Ronald K.L. Collins, *Exceptional Freedom—The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 433–34 (2012–13) (discussing "absolutist" thread in *Stevens* and *Brown*); *see also* Lakier, *supra* note 25, at 2170 (critiquing *Stevens* as an "unjustified and undesirable" departure from "longstanding historical practice").

[187] Paul Sherman, *Occupational Speech and the First Amendment*, 128 HARV. L. REV. F. 183, 187–88 (2015).

charged contexts; these include challenges to a ban on physicians asking their patients about guns in the home,[188] therapists engaging in so-called "gay conversion" therapy,[189] and a proscription against recommending medical marijuana.[190] As was true of *Bigelow*, one can see these cases through the lens of viewpoint discrimination relatively easily. But just as *Bigelow*'s argument against a politically charged ban on advertising abortion services soon translated to the more general *Virginia State Board of Pharmacy*, the argument that the First Amendment should robustly protect occupational speech will extend to decidedly more pedestrian contexts—for example, *Hines v. Alldredge*, in which a retired veterinarian challenged a statute forbidding the dispensation of veterinary advice without an in-person physical exam.[191]

The argument that the First Amendment prohibits occupational speech restrictions may be appealing in some of these contexts and repulsive in others, depending on one's take on the culture war issues implicated by various challenged statutes. For example, many readers will have a strong reaction to *Wollschlaeger*, in which court began by describing Florida's restrictions on physicians asking patients about guns in the home as codifying "the commonsense conclusion that good medical care does not require inquiry or record-keeping regarding firearms when unnecessary to a patient's care."[192] But stripping away the subject matter of the cases reveals uncertainty and disagreement among and within the courts of appeals regarding what level of First Amendment scrutiny applies to occupational speech restrictions. For example, the Ninth Circuit has stated both that "professional speech may be entitled to 'the strongest protection our Constitution has to offer'"[193] in the context of doctor recommendations, but also that once those recommendations become "the actual provision of treatment," they lose First Amendment protection altogether.[194] The Third Circuit took a middle ground, analogizing to commercial speech, and applying intermediate scru-

[188] *See* Wollschlaeger v. Florida, 814 F.3d 1159 (11th Cir. 2015) *reh'g en banc granted, vacated*, 2016 WL 2959373 (11th Cir. Feb. 3, 2016) (rejecting facial First Amendment challenge to statute that restricted physicians from asking patients about firearm ownership, or recording such information, in most circumstances, because statute could survive any level of scrutiny).

[189] *See* King v. New Jersey, 767 F.3d 216, 220, 233 (3d Cir. 2014) (upholding statutory prohibition against practicing "gay conversion" therapy, and holding that "prohibitions of professional speech are constitutional only if they directly advance the State's interest in protecting its citizens from harmful or ineffective professional practices and are no more extensive than necessary to serve that interest"); Pickup v. Brown, 740 F.3d 1208, 1231–32 (9th Cir. 2014) (upholding state ban on "gay conversion" therapy and concluding that treatment was conduct rather than speech, and therefore subject to rational basis review).

[190] *See* Conant v. Walters, 309 F.3d 629, 632 (9th Cir. 2002) (striking down federal prohibition against doctors recommending medical marijuana after concluding that the ban was viewpoint discriminatory).

[191] *See* Hines v. Alldredge, 783 F.3d 197, 198–99 (5th Cir. 2015).

[192] *Wollschlaeger*, 814 F. 3d at 1168.

[193] *Conant*, 309 F.3d at 637.

[194] *Pickup*, 740 F.3d at 1229.

tiny.[195] And the Eleventh Circuit concluded that credible arguments supported the application of either intermediate or strict scrutiny, depending on whether the operative inquiry was whether the statute regulated professional speech, or whether it was a content-based speech restriction.[196]

The outcome of this debate could have significant ramifications for the mine run of ordinary occupational regulations. To see why, consider *Hines*. The challenged statute was probably adopted with the goal of promoting best veterinary practices, which a legislature could reasonably decide should involve seeing the patient. But Ronald Hines, the retired veterinarian who challenged the statute, acted responsibly by all accounts—mostly, he provided advice, often free of charge, to those who could not afford other veterinary care or who received conflicting advice from other vets. The Fifth Circuit concluded the First Amendment did not apply to regulation of the "practice of veterinary medicine" even when the regulation had an incidental burden on speech.[197] But, had the Fifth Circuit gone the other way on that initial question (as some other circuits have in more charged cases), the application of First Amendment heightened scrutiny in the context of an as-applied challenge would at minimum present a significant question. And, although the answer to that question may not matter greatly in the context of a single well-intentioned veterinarian, the cumulative effect of legal challenges to the application of occupational regulation affecting speech could quickly become crippling, leading states to abandon their attempts to meaningfully enforce these regulations. Dissenting from denial of rehearing en banc in *Pickup*, Judge O'Scannlain acknowledged as much, while arguing against the panel's conclusion that the First Amendment did not apply to treatment:

> Perhaps what really shapes the panel's reasoning in these cases is not the principles supposedly distilled from the case law, but rather problematic and potentially unavoidable implications of an alternative conclusion. By subjecting SB 1172 to any First Amendment scrutiny at all, the panel may fear it will open Pandora's box: heretofore uncontroversial professional regulations proscribing negligent, incompetent, or harmful advice will now attract meritless challenges merely on the basis that such provisions prohibit speech.[198]

It is probably unsurprising that advocates of the deregulatory First Amendment have begun to challenge restrictions on professional communications—after all, those restrictions do directly limit activity that recognizably qualifies as speech, even if there might be good reasons to treat it as

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[195] King v. New Jersey, 767 F.3d 216, 233 (3d Cir. 2014).
[196] *Wollschlaeger*, 814 F.3d at 1185–86.
[197] *Hines*, 783 F.3d at 201.
[198] 740 F.3d at 1220.

something else. But in another case, high-profile litigator Paul Clement has recently argued that depleting the money available for speech can implicate the First Amendment.[199] This First Amendment theory is probably the greatest "reach" of those discussed in this Article; conversely, it has the greatest potential for damage to the regulatory state. If accepted, it would have the potential to do what many conservatives and libertarians had previously (but futilely) hoped the doctrine of regulatory takings would accomplish,[200] and what Lochnerism did before that.

Though unsuccessful before a district court and the Ninth Circuit at the preliminary injunction phase,[201] this argument was advanced in a lawsuit by the International Franchise Association ("IFA") challenging the treatment of franchises under Seattle's $15 hourly minimum wage law.[202] The law groups franchises as large businesses, which are required to phase in the minimum wage more quickly than small businesses, provided the entire franchise network, taken together, meets the threshold number of employees.[203] As the IFA asserted in its complaint:

> Commercial speech "is a form of expression protected by the Free Speech Clause of the First Amendment," and the Ordinance will curtail franchisee commercial speech in at least three important respects. First, by increasing the labor costs of franchisees, the Ordinance will reduce the ability of franchisees to dedicate funding to the promotion of their businesses and brands. Second, the increased labor costs the Ordinance mandates may cause some franchisees to shut their doors, reducing the amount of relevant commercial speech they engage in to zero. Third, and relatedly, the Ordinance will likely cause potential franchisees to forgo purchasing a franchise because of the associated higher operation costs, again eliminating all associated speech.[204]

This argument, if taken seriously, could be cause for alarm, depending on one's risk tolerance or willingness to embrace *Lochner*-style arguments. Because *any* money could eventually be spent on speech, nearly any regulation that requires an individual or entity to spend risks interfering with speech, and, under this reasoning, must be justified under heightened scrutiny. Read more charitably, the IFA's argument seems to be that Seattle's decision to classify franchises as large businesses will *differentially* decrease franchises' ability to engage in speech. But business regulations almost always draw

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[199] *Infra* Part II.C.
[200] Colby & Smith, *supra* note 5, at 570–01.
[201] Int'l Franchise Ass'n v. Seattle, 803 F.3d 389, 408-09 (9th Cir. 2015).
[202] *Id.* at 397.
[203] Seattle Ordinance No. 124490 §§ 2(T) & 4 (2014); Seattle Mun. Code §§ 14.19.010(T) & 14.19.030
[204] Complaint at 32, Int'l Franchise Ass'n v. City of Seattle, No. 2:14-cv-00848 (W.D. Wash. June 11, 2014) (internal citation omitted).

coverage distinctions. By focusing on speech, the IFA is attempting to get what it elsewhere acknowledged was unobtainable under the Equal Protection Clause—heightened scrutiny.[205]

Additionally, in its briefing in support of a preliminary injunction, the IFA made an alternative First Amendment argument based on free association rather than on free speech. The argument asserts that the Seattle ordinance violates the rights of free speech and association by defining franchise employers as "a business that operates 'under a marketing plan prescribed or suggested in substantial part by a grantor or affiliate' and is 'substantially associated with a trademark, service mark, trade name, advertising, or other commercial symbol.'"[206] As the IFA's argument goes, "[m]arketing, trademarks, and advertising all involve protected speech, and a franchisee's decision to associate itself with a franchisor's trademark or engage in coordinated marketing and advertising is protected by the First Amendment."[207] Similar to the IFA's primary argument, this argument was fundamentally similar to an Equal Protection claim, and if brought under the Equal Protection Clause would have been subject to rational basis review. Yet the IFA called for heightened scrutiny because a franchise has a contractual relationship with a franchisor.

The argument stretches the right of association a long way from its origins in *NAACP v. Alabama ex rel. Patterson*,[208] or even its more recent incarnation in *Roberts v. U.S. Jaycees*[209] and related cases. Moreover, Justice Sandra Day O'Connor disavowed all but minimal protections for the commercial right of association in her concurrence in *Roberts*.[210] There is neither a privacy component to the IFA's argument, nor a claim that Seattle is attempting to dictate who should be employed by franchises (though Seattle could certainly do that under the framework established by *Roberts* and *Boy*

[205] Though not arising in the work law context, Verizon made a similar argument against the FCC's net neutrality rule, though the D.C. Circuit ultimately did not reach the argument. *See* Verizon v. FCC, 740 F.3d 623, 634 (2014); *see also* Janai S. Nelson, *The First Amendment, Equal Protection and Felon Disenfranchisement: A New Viewpoint*, 65 FL. L. REV. 111, 143–44 (2013) (discussing a First Amendment theory of equal protection, but limiting her theory to instances where the differential treatment is imposed to engage in viewpoint discrimination).

[206] Seattle Mun. Code § 14.19.010(T).

[207] Plaintiffs' Motion for a Limited Preliminary Injunction at 21, Int'l Franchise Ass'n v. City of Seattle, No. 2:14-cv-848 (W.D. Wash. Aug. 5, 2014).

[208] 357 U.S. 449 (1958).

[209] 468 U.S. 609 (1984).

[210] *See id.* at 634 ("[T]here is only minimal constitutional protection of the freedom of commercial association. . . . The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State."); *see also* James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461, 464 (2015) ("Although the Supreme Court has never explicitly endorsed the distinction between expressive associations and commercial associations, that basic dichotomy is commonly accepted in the law.").

Scouts of America v. Dale[211]). Rather, the argument is an attempt to adapt the approach of cases such as *Citizens United* and *United Foods* in two ways: first, the argument assumes that if there is a First Amendment right enjoyed by individuals and certain associations, surely it must be enjoyed equally by corporations; second, it posits that courts should generally not be in the business of distinguishing between First Amendment activity for economic purposes, versus for other purposes. So given that First Amendment protection for individuals to associate for expressive purposes is established, it is unsurprising that the argument that corporations should be able to associate freely for economic purposes was not far behind.

C. Changing statutory baselines can disrupt First Amendment entitlements.

A key element of Sunstein's theory of post-1970's First Amendment Lochnerism was the treatment of "the existing distribution of wealth and entitlements, and the baseline set by the common law," as a constitutional imperative.[212] But some new First Amendment arguments go a step further, arguing that statutory baselines can also create First Amendment entitlements. The argument is that moving a statutory baseline in a way that makes private speech more difficult or less desirable should be scrutinized under the First Amendment, particularly if the baseline was moved with an intent to make speaking less appealing. Or, as the Chamber of Commerce put it in a challenge to the Department of Labor's rule expanding the universe of professionals obligated to disclose their union avoidance "persuader" activity, "a new intervention by the federal government into the marketplace of ideas" raises "serious First Amendment doubts."[213]

An early, and high profile, example of this argument came in response to the Employee Free Choice Act ("EFCA"),[214] which was introduced in 2007 and again in 2009,[215] but never became law. One important aspect of EFCA would have changed the way workers elect a union representative. Specifically, instead of permitting an employer to insist on a union election conducted by the NLRB, it would have required the Board to certify a labor union as the exclusive representative of a group of employees once a majority of those employees signed cards authorizing the union to represent them.

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[211] 530 U.S. 640, 648 ("The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints.").

[212] Sunstein, *supra* note 19, at 874.

[213] Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of Plaintiffs' Motion for Preliminary Injunction, Associated Builders & Contractors of Arkansas v. Perez, Dkt. No. 4:16-cv-169 (KGB) at *18 (E.D. Ark., Apr. 14, 2016).

[214] S. 1041, 110th Cong. (2007); H.R. 800, 110th Cong. (2007). In 2007, EFCA passed the House, but failed cloture in the Senate.

[215] S. 560, 111th Cong. (2009); H.R. 1409, 111th Cong. (2009).

This election process—which is currently permissible but not required under the NLRA—is known as "card check."

In 2008, Richard Epstein argued that the card-check provisions of the proposed EFCA violated the First Amendment. His argument was that if EFCA made it possible for an organizing campaign to take place in secret, employers would lose their most meaningful opportunity to oppose a union drive. But, EFCA did not ban employer speech; rather, Epstein's argument was that depriving employers of knowledge of a union drive would violate the First Amendment because (1) the knowledge would give employers an incentive to speak; and (2) employers would have received the information under the pre-EFCA NLRA.[216] Epstein further elaborated on his First Amendment argument in his monograph, *The Case Against the Employee Free Choice Act*. There, he argued that card check would "infringe the ordinary rights of political association that are guaranteed to workers, and perhaps their employers, under the First Amendment."[217] The details of the argument are somewhat opaque, but in general, Epstein argues that card check is more likely to violate the Constitution in the private sector than in the public sector because government is binding private firms rather than itself; that a desire to increase union density cannot overcome intermediate scrutiny because the motivation behind EFCA was "partisan, not social"; and that in sum, card check "has no clear legitimate end, and . . . [would] terminate any and all rights of workers to participation in union affairs, while forcing employers to deal with unions when they are denied all opportunity to make their case against the union."[218]

Given that EFCA never became law, there was no opportunity to test Epstein's theories in courts. However, lawyers have recently relied on a similar theory in challenging the NLRB's new election procedures rule.[219] This new rule implements a suite of procedural changes that, taken together, shorten the time between the filing of an election petition and the date an NLRB election is held.[220]

The argument against this aspect of the rule is nearly identical to Epstein's argument against EFCA—by shortening the time between when a union files for an election and when the election is held, employers are de-

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[216] *See* Richard A. Epstein, *The Employee Free Choice Act is Unconstitutional*, WALL STREET J. (Dec. 19, 2008), http://www.wsj.com/articles/SB122964977342320545; Richard A. Epstein, *The Employee Free Choice Act: Free Choice or No Choice for Workers*, MANHATTAN INST. FOR POLICY RES. (Mar. 29, 2009), *archived at* https://perma.cc/DJF5-YHEU ("The entire process can take place without a single word of public debate. It is not only the employer who does not speak. It is also workers who are denied a chance to participate in collective deliberation of the sort that is consistent with . . . union democracy . . . .").

[217] RICHARD A. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT 95–96 (2009).

[218] *Id.* at 97–98.

[219] Representation - Case Procedures, 79 Fed. Reg. 74,308, 74,311-15 (Dec. 15, 2014).

[220] *Id.*; *see also* Jeffrey M. Hirsch, *NLRB Elections: Ambush of Anticlimax?*, 64 EMORY L.J. 1647, 1557–63 (explaining aspects of the election procedures rule that decrease time between filing and the election, such as streamlining pre-election challenges).

prived of the opportunity to oppose the union. The three Board Members who voted for the final rule rejected these arguments, offering a two-pronged response. First, they argued that "neither the proposed rule nor the final rule imposes any restrictions on the speech of any party."[221] That is, it leaves employers free to engage in the same anti-union speech as before the rule—for example, the rule would do nothing to prevent an employer from beginning every workday with an anti-union message to its employees. Second, the majority "emphatically disclaim[ed] any . . . motivation"[222] to limit employer influence in elections by shortening the time to campaign against a union. "As previously discussed, the problems caused by delay have nothing to do with employer speech."[223]

On the other hand, Board Member Philip Miscimarra and then-Board Member Harry Johnson were persuaded by the argument against this rule, writing that:

> In short, in respect to free speech concerns, the Final Rule has two infirmities. First, the Rule single-mindedly accelerates the time from the filing of the petition to the date when employees must vote in representation elections (indeed, the Rule overtly requires election voting as soon as "practicable" after a petition is filed). Second, the Rule irrationally ignores the self-evident proposition that, when one eliminates a reasonable opportunity for speech to occur, parties cannot engage in protected speech. In combination, these problems inescapably reflect the same uniform purpose and effect: To limit pre-election campaigning and curtail protected speech, contrary to the First Amendment, the Act and decades of case law establishing that all parties—and the Board—regard pre-election campaigns as vitally important.

The Chamber of Commerce echoed this argument in suing to invalidate the NLRB rule. The Chamber of Commerce argued in part that the rule violated the First Amendment, reasoning that "the Board's rationale for limiting the opportunity for free speech is 'the hallmark characteristic associated with *every* infringement on free speech: the government simply determines the speech is not necessary.'"[224]

A district court rejected the Chamber's First Amendment argument.[225] As the court put it, "the Final Rule does not specifically burden *employer* speech, because all parties to the election proceeding are constrained by the

[221] Representation - Case Procedures, 79 Fed. Reg. at 74318.

[222] *Id.* at 74323 n.68.

[223] *Id.*

[224] Plaintiff's Motion for Summary Judgment and Memorandum in Support at 43–44, 2015 WL 5656568, Chamber of Commerce v. NLRB, No. 1:15-cv-9-ABJ, 2015 WL 4572948 (D.D.C. Jul. 9, 2015).

[225] *See Chamber of Commerce,* 2015 WL 4572948, at *13–15.

same timeframe in disseminating their views to employees."[226] Moreover, the court noted that the NLRB Regional Director, a government official charged with setting union elections, "retains discretion" to set the election date so as to ensure an adequate opportunity for employer speech.[227]

In addition, the court might have pointed to existing First Amendment case law regarding the rights of unions and union-represented employees, including *Davenport v. Washington Education Association*[228] and *Ysursa v. Pocatello Education Association*.[229] Both of those cases involved changes to state law that made it more difficult for unions to collect fees from represented non-members. In *Davenport*, Washington changed its law to prohibit unions from using non-members' fees for political expenditures without written authorization, and in *Ysursa*, Idaho changed its law to prohibit automatic payroll deduction of union PAC contributions. In both cases, the Court had little difficulty determining that the First Amendment was not implicated by a state changing its statutory baseline in a way that declined to facilitate union speech.[230]

Moreover, a statutory baseline, to which both Epstein and the NLRB rule challengers claim a First Amendment entitlement, is at most a legislative choice that facilitates speech—but it does not actually regulate either speech or communicative conduct—it merely sets out timeline for the NLRB to complete its own election process.[231] *Davenport* suggests that the First Amendment does not even apply to such legislative choices; to the extent there is a contrary argument, it would support at most very deferential review. And, that principle suggests it should not be fatal for the rule even if the NLRB *had* an intention to limit employer speech in order to improve the employee voice and association at work, though conceivably a problem could have arisen if, say, the rule had (counterfactually) represented a naked attempt to promote union membership in order to enhance electioneering in support of Democratic candidates for office.[232]

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[226] *Id.* at *25.

[227] *Id.*

[228] 551 U.S. 177 (2007).

[229] 555 U.S. 353 (2009).

[230] *Davenport*, 551 U.S. at 185 ("The mere fact that Washington required more than the *Hudson* minimum does not trigger First Amendment scrutiny."); *Ysursa*, 555 U.S. at 355 ("The First Amendment prohibits government from 'abridging the freedom of speech'; it does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression."). *Hudson* procedures are explained above, *supra* Part II.A.I.

[231] *See Davenport*, 551 U.S. at 191 ("Quite obviously, no suppression of ideas is afoot, since the union remains as free as any other entity to participate in the electoral process with all available funds other than the state-coerced agency fees lacking affirmative permission."); *see also id.* (noting that "First Amendment does not require the government to enhance a person's ability to speak").

[232] *Id.* (statute intended to "protect the integrity of the election process, . . . which the voters evidently thought was being impaired by the infusion of money extracted from nonmembers of unions without their consent" was constitutional even if content-based, because it was not viewpoint discriminatory). Significantly, Justice Scalia did not state that viewpoint neutrality was required in order for the statute to be considered constitutional; he instead said

Conclusion

It is not just the Supreme Court, but also the economy, that has changed. "Today's workers manipulate information, not wood or metal. Yet the modern, information-based workplace, no less than its more materially based predecessors, requires the application of community standards."[233] But the First Amendment theories discussed above—which would cover more routine business activity, while also preventing government from either implementing collective regulatory schemes that require participant contributions, or making adjustments to existing law that affects incentives to speak—could threaten this regulatory project. This is especially true as the shift to an information economy means that more employers are dealing in data — even when workers are not.[234] As Ernest Young put it, "[i]t is . . . no longer possible to classify 'free speech' as a personal right separate from the concerns of 'economic regulation.'"[235] Young continued, "[i]f much economic regulation is also speech regulation, then the Court must either fundamentally narrow First Amendment doctrine to allow application of traditional rational basis review to economic regulation of speech or reintroduce meaningful judicial scrutiny into a large swath of regulatory activity."[236]

Consider the following: First, Verizon and other internet service providers ("ISPs") have advanced the argument that the federal government could not mandate "net neutrality" because that step would "violate[ ] the First Amendment by stripping [ISPs] of control over the transmission of speech on their networks."[237] That argument implies that the decision to slow download speeds for certain websites should be treated the same as an editorial decision to include or exclude an article in a newspaper.[238] And, while the D.C. Circuit has not yet reached the issue,[239] it is likely to recur.[240] Sec-

that "Even if it be thought necessary that the content limitation be reasonable and viewpoint neutral," the statute satisfied those requirements. *Id. Cf.* Minneapolis Star & Tribune Co. v. MN Comm'r of Rev., 460 U.S. 575, 591 (1983) (tax on paper and ink was unconstitutional where it was targeted only a small group of newspapers).

[233] Stephen Breyer, *Our Democratic Constitution*, 77 NYU L. Rev. 245, 255 (2002).

[234] Kendrick, *supra* note 20 at 1209 (discussing incentive to file deregulatory First Amendment cases in "an information economy, where many activities and products involve communication").

[235] Ernest A. Young, Sorrell v. IMS Health *and the End of the Constitutional Double Standard*, 36 Vt. L. Rev. 903, 904 (2012).

[236] *Id.* at 925.

[237] Joint Brief for Verizon and MetroPCS at 3, 2012 WL 9937411, at *3, Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014); *see also* AT&T Inc. v. FCC, Statement of Issues to be Raised, D.C. Cir. No. 15-1092 (May 15, 2015).

[238] *See* Joint Brief for Verizon and MetroPCS, *supra* note 237, at 43 (arguing that "broadband providers possess 'editorial discretion'").

[239] *See Verizon*, 740 F.3d 623, 634 (D.C. Cir. 2014) (rejecting net neutrality order on other grounds).

[240] In addition, the argument has spawned a large amount of scholarship, both pro and con. *See, e.g.*, James Grimmelmann, *Speech Engines*, 98 Minn. L. Rev. 868, 893 (2014) (arguing that search engines are more like "advisors" than "editors"); Jane Bambauer, *Is Data Speech?*,

ond, Uber, the ridesharing app, and other companies in the "1099 economy"[241] have sought to avoid "employer" status by emphasizing that they are technology platforms that simply enable workers to "be their own bosses"—albeit "bosses" subject to significant constraints imposed by Uber itself.[242] While Uber has not, to my knowledge, argued that the First Amendment protects its business model from interference by regulators, it is easy to see how the argument might go based on the arguments discussed above. For example, Uber might argue that its business model is about communicating information about the location of people who need rides to drivers who are willing to provide them for a certain price. If courts accept that premise, then it is a short jump to the argument that, by regulating (or even refusing to license) Uber, a city is suppressing a disfavored speaker.

That may sound farfetched (just as many of the arguments described in Part II may sound farfetched), but it is not purely theoretical. When the Federal Aviation Administration restricted the operation of the website Flytenow.com—essentially, a cross between Uber and Airbnb, the short-term accommodation sharing platform, for private planes—the Goldwater Institute argued that the regulation was invalid because "[p]rivate pilots have a First Amendment right to communicate their travel plans with others."[243] The D.C. Circuit rejected this argument, focusing first on the FAA's ban on operating as a "common carrier" without a commercial pilot's license, and then reasoning that "the advertising of illegal activity has never

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66 STAN. L. REV. 57, 57 (2014) (arguing "data must receive First Amendment protection"); Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1151 (2008) (arguing that the First Amendment "does not prohibit" "some regulation of the ability of search engines to manipulate and structure their results").

[241] The phrase "1099 economy" is used interchangeably with "gig economy," "on-demand economy," and "sharing economy." These phrases refer to "new labor relationships being enabled by digital technology," in which workers accept assignments on a piecework basis. Justin Fox, *The Rise of the 1099 Economy*, BLOOMBERG VIEW (Dec. 11, 2015), http://www.bloombergview.com/articles/2015-12-11/the-gig-economy-is-showing-up-in-irs-s-1099-forms, *archived at* https://perma.cc/6JSN-BML6.

[242] *See* Tom Simonite, *When Your Boss Is an Uber Algorithm*, MIT TECH. REV. (Dec. 1, 2015), http://www.technologyreview.com/news/543946/when-your-boss-is-an-uber-algorithm/, *archived at* https://perma.cc/9L92-7XN6; Alex Rosenblat & Luke Stark, *Uber's Drivers: Information Asymmetries & Control in Dynamic Work*, DATA & SOCIETY 2 (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2686227 (noting that "Uber makes claims that its platform fosters entrepreneurship in drivers, while simultaneously exerting significant control over how drivers do their jobs through constant monitoring, predictive and real-time scheduling management, routine performance evaluations, and implicit and explicit rules about driver performance").

[243] GOLDWATER INST., *FAA Meets Internet: Ruling On General Aviation Limits The Sharing Economy* (Jan. 23, 2015), http://goldwaterinstitute.org/en/work/topics/constitutional-rights/free-speech/faa-meets-internet-ruling-on-general-aviation-limi/, *archived at* https://perma.cc/33UJ-TWPQ; *see also* Petitioner's Opening Brief, Flytenow, Inc. v. FAA, D.C. Cir. No. 14-1168, Jan. 5, 2015 at *39 ("By concluding that all expense-sharing flight operations resulting from Internet-based communications are *per se* "common carriage," . . . the FAA not only chills, but freezes out Internet-based speech").

been protected speech."[244] However, that means that the D.C. Circuit's rejection of the First Amendment challenge hinged on the fact that the government already regulated underlying non-speech conduct—it is less clear what that Court might have done in a scenario in which the non-speech conduct was not so easily identified.

Similarly, consider the app MonkeyParking, which "lets users auction off their public parking spaces" by posting to the app when they are about to vacate a public parking space and allowing other users to bid for information about the space's location.[245] When San Francisco took the position that the app was facilitating the sale or rental of public parking spaces in violation of city law, MonkeyParking claimed in the media (though not in litigation to date) that "it auctions off information *about* the parking spaces," invoking the "First Amendment right to express and sell such information."[246]

Finally, even First Amendment arguments that are unlikely to be accepted can matter; for example, Chicago reportedly considered a minimum wage ordinance modeled on Seattle's, but abandoning it in light of the IFA's challenge. As Jedediah Purdy recently put it: "The availability of these arguments imposes (1) costs in litigation, (2) caution in drafting, and (3) general uncertainty on those who support, design, and implement the policies that the novel arguments call into question."[247] Thus, one problem with the emerging deregulatory First Amendment is that it can accomplish some of its aims without the courts ever adopting it; the increasingly real threat of expensive litigation by high-profile litigators can stay regulators' hands. Thus, in one sense, those advancing the deregulatory First Amendment are right—the translation of First Amendment doctrines developed in a pre-digital age are in need of an update. But key questions remain about how big the First Amendment will grow under any new approach, and the extent to which it will eclipse government regulation of the workplace.

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[244] Flytenow, Inc. v. FAA, 808 F.3d 882, 894 (D.C. Cir. 2015).

[245] Gene Maddaus, *Kicked Out of San Francisco, MonkeyParking App Plans a Fresh Start in Santa Monica*, LA WEEKLY (Sept. 18, 2014), http://www.laweekly.com/news/kicked-out-of-san-francisco-monkeyparking-app-plans-a-fresh-start-in-santa-monica-5080436.

[246] Cyrus Farivar, *Parking Spot Auction Startup Defies San Francisco's Orders to Shut Down*, ARSTECHNICA (Jan. 26, 2014), http://arstechnica.com/tech-policy/2014/06/parking-spot-auction-startup-defies-san-franciscos-orders-to-shut-down/.

[247] Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195, 209 (2014).

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

JANUS *v.* AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 16–1466. Argued February 26, 2018—Decided June 27, 2018

Illinois law permits public employees to unionize. If a majority of the employees in a bargaining unit vote to be represented by a union, that union is designated as the exclusive representative of all the employees, even those who do not join. Only the union may engage in collective bargaining; individual employees may not be represented by another agent or negotiate directly with their employer. Nonmembers are required to pay what is generally called an "agency fee," *i.e.*, a percentage of the full union dues. Under *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209, 235–236, this fee may cover union expenditures attributable to those activities "germane" to the union's collective-bargaining activities (chargeable expenditures), but may not cover the union's political and ideological projects (nonchargeable expenditures). The union sets the agency fee annually and then sends nonmembers a notice explaining the basis for the fee and the breakdown of expenditures. Here it was 78.06% of full union dues.

Petitioner Mark Janus is a state employee whose unit is represented by a public-sector union (Union), one of the respondents. He refused to join the Union because he opposes many of its positions, including those taken in collective bargaining. Illinois' Governor, similarly opposed to many of these positions, filed suit challenging the constitutionality of the state law authorizing agency fees. The state attorney general, another respondent, intervened to defend the law, while Janus moved to intervene on the Governor's side. The District Court dismissed the Governor's challenge for lack of standing, but it simultaneously allowed Janus to file his own complaint challenging the constitutionality of agency fees. The District Court

granted respondents' motion to dismiss on the ground that the claim was foreclosed by *Abood*. The Seventh Circuit affirmed.

Held:

1. The District Court had jurisdiction over petitioner's suit. Petitioner was undisputedly injured in fact by Illinois' agency-fee scheme and his injuries can be redressed by a favorable court decision. For jurisdictional purposes, the court permissibly treated his amended complaint in intervention as the operative complaint in a new lawsuit. *United States ex rel. Texas Portland Cement Co.* v. *McCord*, 233 U. S. 157, distinguished. Pp. 6–7.

2. The State's extraction of agency fees from nonconsenting public-sector employees violates the First Amendment. *Abood* erred in concluding otherwise, and *stare decisis* cannot support it. *Abood* is therefore overruled. Pp. 7–47.

(a) *Abood*'s holding is inconsistent with standard First Amendment principles. Pp. 7–18.

(1) Forcing free and independent individuals to endorse ideas they find objectionable raises serious First Amendment concerns. *E.g.*, *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 633. That includes compelling a person to subsidize the speech of other private speakers. *E.g.*, *Knox* v. *Service Employees*, 567 U. S. 298, 309. In *Knox* and *Harris* v. *Quinn*, 573 U. S. ___, the Court applied an "exacting" scrutiny standard in judging the constitutionality of agency fees rather than the more traditional strict scrutiny. Even under the more permissive standard, Illinois' scheme cannot survive. Pp. 7–11.

(2) Neither of *Abood*'s two justifications for agency fees passes muster under this standard. First, agency fees cannot be upheld on the ground that they promote an interest in "labor peace." The *Abood* Court's fears of conflict and disruption if employees were represented by more than one union have proved to be unfounded: Exclusive representation of all the employees in a unit and the exaction of agency fees are not inextricably linked. To the contrary, in the Federal Government and the 28 States with laws prohibiting agency fees, millions of public employees are represented by unions that effectively serve as the exclusive representatives of all the employees. Whatever may have been the case 41 years ago when *Abood* was decided, it is thus now undeniable that "labor peace" can readily be achieved through less restrictive means than the assessment of agency fees.

Second, avoiding "the risk of 'free riders,' " *Abood*, *supra*, at 224, is not a compelling state interest. Free-rider "arguments . . . are generally insufficient to overcome First Amendment objections," *Knox*, *supra*, at 311, and the statutory requirement that unions represent members and nonmembers alike does not justify different treatment. As is evident in non-agency-fee jurisdictions, unions are quite willing

to represent nonmembers in the absence of agency fees. And their duty of fair representation is a necessary concomitant of the authority that a union seeks when it chooses to be the exclusive representative. In any event, States can avoid free riders through less restrictive means than the imposition of agency fees. Pp. 11–18.

(b) Respondents' alternative justifications for *Abood* are similarly unavailing. Pp. 18–26.

(1) The Union claims that *Abood* is supported by the First Amendment's original meaning. But neither founding-era evidence nor dictum in *Connick* v. *Myers*, 461 U. S. 138, 143, supports the view that the First Amendment was originally understood to allow States to force public employees to subsidize a private third party. If anything, the opposite is true. Pp. 18–22.

(2) Nor does *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, provide a basis for *Abood*. *Abood* was not based on *Pickering*, and for good reasons. First, *Pickering*'s framework was developed for use in cases involving "one employee's speech and its impact on that employee's public responsibilities," *United States* v. *Treasury Employees*, 513 U. S. 454, 467, while *Abood* and other agency-fee cases involve a blanket requirement that all employees subsidize private speech with which they may not agree. Second, *Pickering*'s framework was designed to determine whether a public employee's speech interferes with the effective operation of a government office, not what happens when the government compels speech or speech subsidies in support of third parties. Third, the categorization schemes of *Pickering* and *Abood* do not line up. For example, under *Abood*, nonmembers cannot be charged for speech that concerns political or ideological issues; but under *Pickering*, an employee's free speech interests on such issues could be overcome if outweighed by the employer's interests. Pp. 22–26.

(c) Even under some form of *Pickering*, Illinois' agency-fee arrangement would not survive. Pp. 26–33.

(1) Respondents compare union speech in collective bargaining and grievance proceedings to speech "pursuant to [an employee's] official duties," *Garcetti* v. *Ceballos*, 547 U. S. 410, 421, which the State may require of its employees. But in those situations, the employee's words are really the words of the employer, whereas here the union is speaking on behalf of the employees. *Garcetti* therefore does not apply. Pp. 26–27.

(2) Nor does the union speech at issue cover only matters of private concern, which the State may also generally regulate under *Pickering*. To the contrary, union speech covers critically important and public matters such as the State's budget crisis, taxes, and collective bargaining issues related to education, child welfare, healthcare, and

minority rights. Pp. 27–31.

(3) The government's proffered interests must therefore justify the heavy burden of agency fees on nonmembers' First Amendment interests. They do not. The state interests asserted in *Abood*—promoting "labor peace" and avoiding free riders—clearly do not, as explained earlier. And the new interests asserted in *Harris* and here—bargaining with an adequately funded agent and improving the efficiency of the work force—do not suffice either. Experience shows that unions can be effective even without agency fees. Pp. 31–33.

(d) *Stare decisis* does not require retention of *Abood*. An analysis of several important factors that should be taken into account in deciding whether to overrule a past decision supports this conclusion. Pp. 33–47.

(1) *Abood* was poorly reasoned, and those arguing for retaining it have recast its reasoning, which further undermines its *stare decisis* effect, *e.g.*, *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 363. *Abood* relied on *Railway Employes* v. *Hanson*, 351 U. S. 225, and *Machinists* v. *Street*, 367 U. S. 740, both of which involved private-sector collective-bargaining agreements where the government merely authorized agency fees. *Abood* did not appreciate the very different First Amendment question that arises when a State *requires* its employees to pay agency fees. *Abood* also judged the constitutionality of public-sector agency fees using *Hanson*'s deferential standard, which is inappropriate in deciding free speech issues. Nor did *Abood* take into account the difference between the effects of agency fees in public- and private-sector collective bargaining, anticipate administrative problems with classifying union expenses as chargeable or nonchargeable, foresee practical problems faced by nonmembers wishing to challenge those decisions, or understand the inherently political nature of public-sector bargaining. Pp. 35–38.

(2) *Abood*'s lack of workability also weighs against it. Its line between chargeable and nonchargeable expenditures has proved to be impossible to draw with precision, as even respondents recognize. See, *e.g.*, *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, 519. What is more, a nonmember objecting to union chargeability determinations will have much trouble determining the accuracy of the union's reported expenditures, which are often expressed in extremely broad and vague terms. Pp. 38–41.

(3) Developments since *Abood*, both factual and legal, have "eroded" the decision's "underpinnings" and left it an outlier among the Court's First Amendment cases. *United States* v. *Gaudin*, 515 U. S. 506, 521. *Abood* relied on an assumption that "the principle of exclusive representation in the public sector is dependent on a union or

agency shop," *Harris*, 573 U. S., at ___–___, but experience has shown otherwise. It was also decided when public-sector unionism was a relatively new phenomenon. Today, however, public-sector union membership has surpassed that in the private sector, and that ascendency corresponds with a parallel increase in public spending. *Abood* is also an anomaly in the Court's First Amendment jurisprudence, where exacting scrutiny, if not a more demanding standard, generally applies. Overruling *Abood* will also end the oddity of allowing public employers to compel union support (which is not supported by any tradition) but not to compel party support (which is supported by tradition), see, *e.g.*, *Elrod* v. *Burns*, 427 U. S. 347. Pp. 42–44.

(4) Reliance on *Abood* does not carry decisive weight. The uncertain status of *Abood*, known to unions for years; the lack of clarity it provides; the short-term nature of collective-bargaining agreements; and the ability of unions to protect themselves if an agency-fee provision was crucial to its bargain undermine the force of reliance. Pp. 44–47.

3. For these reasons, States and public-sector unions may no longer extract agency fees from nonconsenting employees. The First Amendment is violated when money is taken from nonconsenting employees for a public-sector union; employees must choose to support the union before anything is taken from them. Accordingly, neither an agency fee nor any other form of payment to a public-sector union may be deducted from an employee, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. Pp. 48–49.

851 F. 3d 746, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and, GORSUCH, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 16–1466

MARK JANUS, PETITIONER *v.* AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[June 27, 2018]

JUSTICE ALITO delivered the opinion of the Court.

Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities. We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.

We upheld a similar law in *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977), and we recognize the importance of following precedent unless there are strong reasons for not doing so. But there are very strong reasons in this case. Fundamental free speech rights are at stake. *Abood* was poorly reasoned. It has led to practical problems and abuse. It is inconsistent with other First Amendment cases and has been undermined by more recent decisions. Developments since *Abood* was handed down have shed new light on the issue of agency fees, and no reliance interests on the part of public-sector unions are sufficient to justify the perpetuation of the free speech violations

that *Abood* has countenanced for the past 41 years. *Abood* is therefore overruled.

I

A

Under the Illinois Public Labor Relations Act (IPLRA), employees of the State and its political subdivisions are permitted to unionize. See Ill. Comp. Stat., ch. 5, §315/6(a) (West 2016). If a majority of the employees in a bargaining unit vote to be represented by a union, that union is designated as the exclusive representative of all the employees. §§315/3(s)(1), 315/6(c), 315/9. Employees in the unit are not obligated to join the union selected by their co-workers, but whether they join or not, that union is deemed to be their sole permitted representative. See §§315/6(a), (c).

Once a union is so designated, it is vested with broad authority. Only the union may negotiate with the employer on matters relating to "pay, wages, hours[,] and other conditions of employment." §315/6(c). And this authority extends to the negotiation of what the IPLRA calls "policy matters," such as merit pay, the size of the work force, layoffs, privatization, promotion methods, and non-discrimination policies. §315/4; see §315/6(c); see generally, *e.g.*, *Illinois Dept. of Central Management Servs.* v. *AFSCME, Council 31*, No. S–CB–16–17 etc., 33 PERI ¶67 (ILRB Dec. 13, 2016) (Board Decision).

Designating a union as the employees' exclusive representative substantially restricts the rights of individual employees. Among other things, this designation means that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer. §§315/6(c)–(d), 315/10(a)(4); see *Matthews* v. *Chicago Transit Authority*, 2016 IL 117638, 51 N. E. 3d 753, 782; accord, *Medo Photo Supply Corp.* v. *NLRB*, 321 U. S. 678,

683–684 (1944). Protection of the employees' interests is placed in the hands of the union, and therefore the union is required by law to provide fair representation for all employees in the unit, members and nonmembers alike. §315/6(d).

Employees who decline to join the union are not assessed full union dues but must instead pay what is generally called an "agency fee," which amounts to a percentage of the union dues. Under *Abood*, nonmembers may be charged for the portion of union dues attributable to activities that are "germane to [the union's] duties as collective-bargaining representative," but nonmembers may not be required to fund the union's political and ideological projects. 431 U. S., at 235; see *id.*, at 235–236. In labor-law parlance, the outlays in the first category are known as "chargeable" expenditures, while those in the latter are labeled "nonchargeable."

Illinois law does not specify in detail which expenditures are chargeable and which are not. The IPLRA provides that an agency fee may compensate a union for the costs incurred in "the collective bargaining process, contract administration[,] and pursuing matters affecting wages, hours[,] and conditions of employment." §315/6(e); see also §315/3(g). Excluded from the agency-fee calculation are union expenditures "related to the election or support of any candidate for political office." §315/3(g); see §315/6(e).

Applying this standard, a union categorizes its expenditures as chargeable or nonchargeable and thus determines a nonmember's "proportionate share," §315/6(e); this determination is then audited; the amount of the "proportionate share" is certified to the employer; and the employer automatically deducts that amount from the nonmembers' wages. See *ibid.*; App. to Pet. for Cert. 37a; see also *Harris* v. *Quinn*, 573 U. S. ___, ___–___ (2014) (slip op., at 19–20) (describing this process). Nonmembers need not be asked, and they are not required to consent before

the fees are deducted.

After the amount of the agency fee is fixed each year, the union must send nonmembers what is known as a *Hudson* notice. See *Teachers* v. *Hudson*, 475 U. S. 292 (1986). This notice is supposed to provide nonmembers with "an adequate explanation of the basis for the [agency] fee." *Id.*, at 310. If nonmembers "suspect that a union has improperly put certain expenses in the [chargeable] category," they may challenge that determination. *Harris*, *supra*, at ___ (slip op., at 19).

As illustrated by the record in this case, unions charge nonmembers, not just for the cost of collective bargaining *per se*, but also for many other supposedly connected activities. See App. to Pet. for Cert. 28a–39a. Here, the nonmembers were told that they had to pay for "[l]obbying," "[s]ocial and recreational activities," "advertising," "[m]embership meetings and conventions," and "litigation," as well as other unspecified "[s]ervices" that "may ultimately inure to the benefit of the members of the local bargaining unit." *Id.*, at 28a–32a. The total chargeable amount for nonmembers was 78.06% of full union dues. *Id.*, at 34a.

B

Petitioner Mark Janus is employed by the Illinois Department of Healthcare and Family Services as a child support specialist. *Id.*, at 10a. The employees in his unit are among the 35,000 public employees in Illinois who are represented by respondent American Federation of State, County, and Municipal Employees, Council 31 (Union). *Ibid.* Janus refused to join the Union because he opposes "many of the public policy positions that [it] advocates," including the positions it takes in collective bargaining. *Id.*, at 10a, 18a. Janus believes that the Union's "behavior in bargaining does not appreciate the current fiscal crises in Illinois and does not reflect his best interests or the

interests of Illinois citizens." *Id.*, at 18a. Therefore, if he had the choice, he "would not pay any fees or otherwise subsidize [the Union]." *Ibid.* Under his unit's collective-bargaining agreement, however, he was required to pay an agency fee of $44.58 per month, *id.*, at 14a—which would amount to about $535 per year.

Janus's concern about Illinois' current financial situation is shared by the Governor of the State, and it was the Governor who initially challenged the statute authorizing the imposition of agency fees. The Governor commenced an action in federal court, asking that the law be declared unconstitutional, and the Illinois attorney general (a respondent here) intervened to defend the law. App. 41. Janus and two other state employees also moved to intervene—but on the Governor's side. *Id.*, at 60.

Respondents moved to dismiss the Governor's challenge for lack of standing, contending that the agency fees did not cause him any personal injury. *E.g.*, *id.*, at 48–49. The District Court agreed that the Governor could not maintain the lawsuit, but it held that petitioner and the other individuals who had moved to intervene had standing because the agency fees unquestionably injured them. Accordingly, "in the interest of judicial economy," the court dismissed the Governor as a plaintiff, while simultaneously allowing petitioner and the other employees to file their own complaint. *Id.*, at 112. They did so, and the case proceeded on the basis of this new complaint.

The amended complaint claims that all "nonmember fee deductions are coerced political speech" and that "the First Amendment forbids coercing any money from the nonmembers." App. to Pet. for Cert. 23a. Respondents moved to dismiss the amended complaint, correctly recognizing that the claim it asserted was foreclosed by *Abood*. The District Court granted the motion, *id.*, at 7a, and the Court of Appeals for the Seventh Circuit affirmed, 851 F. 3d 746 (2017).

Janus then sought review in this Court, asking us to overrule *Abood* and hold that public-sector agency-fee arrangements are unconstitutional. We granted certiorari to consider this important question. 582 U. S. ___ (2017).

II

Before reaching this question, however, we must consider a threshold issue. Respondents contend that the District Court lacked jurisdiction under Article III of the Constitution because petitioner "moved to intervene in [the Governor's] jurisdictionally defective lawsuit." Union Brief in Opposition 11; see also *id.*, at 13–17; State Brief in Opposition 6; Brief for Union Respondent i, 16–17; Brief for State Respondents 14, n. 1. This argument is clearly wrong.

It rests on the faulty premise that petitioner intervened in the action brought by the Governor, but that is not what happened. The District Court did not grant petitioner's motion to intervene in that lawsuit. Instead, the court essentially treated petitioner's amended complaint as the operative complaint in a new lawsuit. App. 110–112. And when the case is viewed in that way, any Article III issue vanishes. As the District Court recognized—and as respondents concede—petitioner was injured in fact by Illinois' agency-fee scheme, and his injuries can be redressed by a favorable court decision. *Ibid.*; see Record 2312–2313, 2322–2323. Therefore, he clearly has Article III standing. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992). It is true that the District Court docketed petitioner's complaint under the number originally assigned to the Governor's complaint, instead of giving it a new number of its own. But Article III jurisdiction does not turn on such trivialities.

The sole decision on which respondents rely, *United States ex rel. Texas Portland Cement Co.* v. *McCord*, 233 U. S. 157 (1914), actually works against them. That case

concerned a statute permitting creditors of a government contractor to bring suit on a bond between 6 and 12 months after the completion of the work. *Id.*, at 162. One creditor filed suit before the 6-month starting date, but another intervened within the 6-to-12-month window. The Court held that the "[t]he intervention [did] not cure th[e] vice in the original [prematurely filed] suit," but the Court also contemplated treating "intervention . . . as an original suit" in a case in which the intervenor met the requirements that a plaintiff must satisfy—*e.g.*, filing a separate complaint and properly serving the defendants. *Id.*, at 163–164. Because that is what petitioner did here, we may reach the merits of the question presented.

III

In *Abood*, the Court upheld the constitutionality of an agency-shop arrangement like the one now before us, 431 U. S., at 232, but in more recent cases we have recognized that this holding is "something of an anomaly," *Knox* v. *Service Employees*, 567 U. S. 298, 311 (2012), and that *Abood*'s "analysis is questionable on several grounds," *Harris*, 573 U. S., at ___ (slip op., at 17); see *id.*, at ___–___ (slip op., at 17–20) (discussing flaws in *Abood*'s reasoning). We have therefore refused to extend *Abood* to situations where it does not squarely control, see *Harris*, *supra*, at ___–___ (slip op., at 27–29), while leaving for another day the question whether *Abood* should be overruled, *Harris*, *supra*, at ___, n. 19 (slip op., at 27, n. 19); see *Knox*, *supra*, at 310–311.

We now address that question. We first consider whether *Abood*'s holding is consistent with standard First Amendment principles.

A

The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the

freedom of speech. We have held time and again that freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley* v. *Maynard*, 430 U. S. 705, 714 (1977); see *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 796–797 (1988); *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U. S. 539, 559 (1985); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 256–257 (1974); accord, *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U. S. 1, 9 (1986) (plurality opinion). The right to eschew association for expressive purposes is likewise protected. *Roberts* v. *United States Jaycees*, 468 U. S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate"); see *Pacific Gas & Elec.*, *supra*, at 12 ("[F]orced associations that burden protected speech are impermissible"). As Justice Jackson memorably put it: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein*." *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943) (emphasis added).

Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned. Suppose, for example, that the State of Illinois required all residents to sign a document expressing support for a particular set of positions on controversial public issues—say, the platform of one of the major political parties. No one, we trust, would seriously argue that the First Amendment permits this.

Perhaps because such compulsion so plainly violates the Constitution, most of our free speech cases have involved restrictions on what can be said, rather than laws compelling speech. But measures compelling speech are at least as threatening.

Free speech serves many ends. It is essential to our democratic form of government, see, *e.g.*, *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964), and it furthers the search for truth, see, *e.g.*, *Thornhill* v. *Alabama*, 310 U. S. 88, 95 (1940). Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends.

When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding "involuntary affirmation" of objected-to beliefs would require "even more immediate and urgent grounds" than a law demanding silence. *Barnette*, *supra*, at 633; see also *Riley*, *supra*, at 796–797 (rejecting "deferential test" for compelled speech claims).

Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns. *Knox*, *supra*, at 309; *United States* v. *United Foods, Inc.*, 533 U. S. 405, 410 (2001); *Abood*, *supra*, at 222, 234–235. As Jefferson famously put it, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical." A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950) (emphasis deleted and footnote omitted); see also *Hudson*, 475 U. S., at 305, n. 15. We have therefore recognized that a "'significant impingement on First Amendment rights'" occurs when public employees are required to provide financial support for a union that "takes many positions during collective bargaining that have powerful political and civic consequences." *Knox*, *supra*, at 310–311 (quoting *Ellis* v. *Railway Clerks*, 466 U. S. 435, 455 (1984)).

Because the compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed. Our free speech cases have identified "levels of scrutiny" to be applied in different contexts, and in three recent cases, we have considered the standard that should be used in judging the constitutionality of agency fees. See *Knox*, *supra*; *Harris*, *supra*; *Friedrichs* v. *California Teachers Assn.*, 578 U. S. ___ (2016) (*per curiam*) (affirming decision below by equally divided Court).

In *Knox*, the first of these cases, we found it sufficient to hold that the conduct in question was unconstitutional under even the test used for the compulsory subsidization of commercial speech. 567 U. S., at 309–310, 321–322. Even though commercial speech has been thought to enjoy a lesser degree of protection, see, *e.g.*, *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 562–563 (1980), prior precedent in that area, specifically *United Foods*, *supra*, had applied what we characterized as "exacting" scrutiny, *Knox*, 567 U. S., at 310, a less demanding test than the "strict" scrutiny that might be thought to apply outside the commercial sphere. Under "exacting" scrutiny, we noted, a compelled subsidy must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Ibid.* (internal quotation marks and alterations omitted).

In *Harris*, the second of these cases, we again found that an agency-fee requirement failed "exacting scrutiny." 573 U. S., at ___ (slip op., at 33). But we questioned whether that test provides sufficient protection for free speech rights, since "it is apparent that the speech compelled" in agency-fee cases "is not commercial speech." *Id.*, at ___ (slip op., at 30).

Picking up that cue, petitioner in the present case contends that the Illinois law at issue should be subjected to "strict scrutiny." Brief for Petitioner 36. The dissent, on

the other hand, proposes that we apply what amounts to rational-basis review, that is, that we ask only whether a government employer could reasonably believe that the exaction of agency fees serves its interests. See *post*, at 4 (KAGAN, J., dissenting) ("A government entity could reasonably conclude that such a clause was needed"). This form of minimal scrutiny is foreign to our free-speech jurisprudence, and we reject it here. At the same time, we again find it unnecessary to decide the issue of strict scrutiny because the Illinois scheme cannot survive under even the more permissive standard applied in *Knox* and *Harris*.

In the remainder of this part of our opinion (Parts III–B and III–C), we will apply this standard to the justifications for agency fees adopted by the Court in *Abood*. Then, in Parts IV and V, we will turn to alternative rationales proffered by respondents and their *amici*.

B

In *Abood*, the main defense of the agency-fee arrangement was that it served the State's interest in "labor peace," 431 U. S., at 224. By "labor peace," the *Abood* Court meant avoidance of the conflict and disruption that it envisioned would occur if the employees in a unit were represented by more than one union. In such a situation, the Court predicted, "inter-union rivalries" would foster "dissension within the work force," and the employer could face "conflicting demands from different unions." *Id.*, at 220–221. Confusion would ensue if the employer entered into and attempted to "enforce two or more agreements specifying different terms and conditions of employment." *Id.*, at 220. And a settlement with one union would be "subject to attack from [a] rival labor organizatio[n]." *Id.*, at 221.

We assume that "labor peace," in this sense of the term, is a compelling state interest, but *Abood* cited no evidence

that the pandemonium it imagined would result if agency fees were not allowed, and it is now clear that *Abood*'s fears were unfounded. The *Abood* Court assumed that designation of a union as the exclusive representative of all the employees in a unit and the exaction of agency fees are inextricably linked, but that is simply not true. *Harris*, *supra*, at ___ (slip op., at 31).

The federal employment experience is illustrative. Under federal law, a union chosen by majority vote is designated as the exclusive representative of all the employees, but federal law does not permit agency fees. See 5 U. S. C. §§7102, 7111(a), 7114(a). Nevertheless, nearly a million federal employees—about 27% of the federal work force—are union members.[1] The situation in the Postal Service is similar. Although permitted to choose an exclusive representative, Postal Service employees are not required to pay an agency fee, 39 U. S. C. §§1203(a), 1209(c), and about 400,000 are union members.[2] Likewise, millions of public employees in the 28 States that have laws generally prohibiting agency fees are represented by unions that serve as the exclusive representatives of all the employees.[3] Whatever may have been the case 41 years ago when *Abood* was handed down, it is now undeniable that "labor peace" can readily be achieved "through means significantly less restrictive of associational freedoms" than the assessment of agency fees. *Harris*, *supra*, at ___ (slip op., at 30) (internal quotation marks omitted).

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[1] See Bureau of Labor Statistics (BLS), Labor Force Statistics From the Current Population Survey (Table 42) (2017), https://www.bls.gov/cps/tables.htm (all Internet materials as visited June 26, 2018).

[2] See Union Membership and Coverage Database From the Current Population Survey (Jan. 21, 2018), unionstats.com.

[3] See National Conference of State Legislatures, Right-to-Work States (2018), http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx#chart; see also, *e.g.*, Brief for Mackinac Center for Public Policy as *Amicus Curiae* 27–28, 34–36.

C

In addition to the promotion of "labor peace," *Abood* cited "the risk of 'free riders'" as justification for agency fees, 431 U. S., at 224. Respondents and some of their *amici* endorse this reasoning, contending that agency fees are needed to prevent nonmembers from enjoying the benefits of union representation without shouldering the costs. Brief for Union Respondent 34–36; Brief for State Respondents 41–45; see, *e.g.*, Brief for International Brotherhood of Teamsters as *Amicus Curiae* 3–5.

Petitioner strenuously objects to this free-rider label. He argues that he is not a free rider on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage.

Whichever description fits the majority of public employees who would not subsidize a union if given the option, avoiding free riders is not a compelling interest. As we have noted, "free-rider arguments . . . are generally insufficient to overcome First Amendment objections." *Knox*, 567 U. S., at 311. To hold otherwise across the board would have startling consequences. Many private groups speak out with the objective of obtaining government action that will have the effect of benefiting nonmembers. May all those who are thought to benefit from such efforts be compelled to subsidize this speech?

Suppose that a particular group lobbies or speaks out on behalf of what it thinks are the needs of senior citizens or veterans or physicians, to take just a few examples. Could the government require that all seniors, veterans, or doctors pay for that service even if they object? It has never been thought that this is permissible. "[P]rivate speech often furthers the interests of nonspeakers," but "that does not alone empower the state to compel the speech to be paid for." *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, 556 (1991) (Scalia, J., concurring in judgment in part and dissenting in part). In simple terms, the First

Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay.[4]

Those supporting agency fees contend that the situation here is different because unions are statutorily required to "represen[t] the interests of all public employees in the unit," whether or not they are union members. §315/6(d); see, *e.g.*, Brief for State Respondents 40–41, 45; *post*, at 7 (KAGAN, J., dissenting). Why might this matter?

We can think of two possible arguments. It might be argued that a State has a compelling interest in requiring the payment of agency fees because (1) unions would otherwise be unwilling to represent nonmembers or (2) it would be fundamentally unfair to require unions to provide fair representation for nonmembers if nonmembers were not required to pay. Neither of these arguments is sound.

First, it is simply not true that unions will refuse to serve as the exclusive representative of all employees in the unit if they are not given agency fees. As noted, unions represent millions of public employees in jurisdictions that do not permit agency fees. No union is ever compelled to seek that designation. On the contrary, designation as exclusive representative is avidly sought.[5] Why is

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[4] The collective-action problem cited by the dissent, *post*, at 6, is not specific to the agency-fee context. And contrary to the dissent's suggestion, it is often not practical for an entity that lobbies or advocates on behalf of the members of a group to tailor its message so that only its members benefit from its efforts. Consider how effective it would be for a group that advocates on behalf of, say, seniors, to argue that a new measure should apply only to its dues-paying members.

[5] In order to obtain that status, a union must petition to be recognized and campaign to win majority approval. Ill. Comp. Stat., ch. 5, §315/9(a) (2016); see, *e.g.*, *County of Du Page* v. *Illinois Labor Relations Bd.*, 231 Ill. 2d 593, 597–600, 900 N. E. 2d 1095, 1098–1099 (2008). And unions eagerly seek this support. See, *e.g.*, Brief for Employees of

this so?

Even without agency fees, designation as the exclusive representative confers many benefits. As noted, that status gives the union a privileged place in negotiations over wages, benefits, and working conditions. See §315/6(c). Not only is the union given the exclusive right to speak for all the employees in collective bargaining, but the employer is required by state law to listen to and to bargain in good faith with only that union. §315/7. Designation as exclusive representative thus "results in a tremendous increase in the power" of the union. *American Communications Assn.* v. *Douds*, 339 U. S. 382, 401 (1950).

In addition, a union designated as exclusive representative is often granted special privileges, such as obtaining information about employees, see §315/6(c), and having dues and fees deducted directly from employee wages, §§315/6(e)–(f). The collective-bargaining agreement in this case guarantees a long list of additional privileges. See App. 138–143.

These benefits greatly outweigh any extra burden imposed by the duty of providing fair representation for nonmembers. What this duty entails, in simple terms, is an obligation not to "act solely in the interests of [the union's] own members." Brief for State Respondents 41; see *Cintron* v. *AFSCME, Council 31*, No. S–CB–16–032, p. 1, 34 PERI ¶105 (ILRB Dec. 13, 2017) (union may not intentionally direct "animosity" toward nonmembers based on their "dissident union practices"); accord, *14 Penn Plaza LLC* v. *Pyett*, 556 U. S. 247, 271 (2009); *Vaca* v. *Sipes*, 386 U. S. 171, 177 (1967).

What does this mean when it comes to the negotiation of a contract? The union may not negotiate a collective-bargaining agreement that discriminates against non-

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the State of Minnesota Court System as *Amici Curiae* 9–17.

members, see *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 202–203 (1944), but the union's bargaining latitude would be little different if state law simply prohibited public employers from entering into agreements that discriminate in that way. And for that matter, it is questionable whether the Constitution would permit a public-sector employer to adopt a collective-bargaining agreement that discriminates against nonmembers. See *id.*, at 198–199, 202 (analogizing a private-sector union's fair-representation duty to the duty "the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates"); cf. *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 69 (2006) (recognizing that government may not "impose penalties or withhold benefits based on membership in a disfavored group" where doing so "ma[kes] group membership less attractive"). To the extent that an employer would be barred from acceding to a discriminatory agreement anyway, the union's duty not to ask for one is superfluous. It is noteworthy that neither respondents nor any of the 39 *amicus* briefs supporting them—nor the dissent—has explained why the duty of fair representation causes public-sector unions to incur significantly greater expenses than they would otherwise bear in negotiating collective-bargaining agreements.

What about the representation of nonmembers in grievance proceedings? Unions do not undertake this activity solely for the benefit of nonmembers—which is why Illinois law gives a public-sector union the right to send a representative to such proceedings even if the employee declines union representation. §315/6(b). Representation of nonmembers furthers the union's interest in keeping control of the administration of the collective-bargaining agreement, since the resolution of one employee's grievance can affect others. And when a union controls the grievance process, it may, as a practical matter, effectively

subordinate "the interests of [an] individual employee . . . to the collective interests of all employees in the bargaining unit." *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 58, n. 19 (1974); see *Stahulak* v. *Chicago*, 184 Ill. 2d 176, 180–181, 703 N. E. 2d 44, 46–47 (1998); *Mahoney* v. *Chicago*, 293 Ill. App. 3d 69, 73–74, 687 N. E. 2d 132, 135–137 (1997) (union has "'discretion to refuse to process'" a grievance, provided it does not act "arbitrar[ily]" or "in bad faith" (emphasis deleted)).

In any event, whatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters can be eliminated "through means significantly less restrictive of associational freedoms" than the imposition of agency fees. *Harris*, 573 U. S., at ___ (slip op., at 30) (internal quotation marks omitted). Individual nonmembers could be required to pay for that service or could be denied union representation altogether.[6] Thus, agency fees cannot be sustained on the ground that unions would otherwise be unwilling to represent nonmembers.

Nor can such fees be justified on the ground that it would otherwise be unfair to require a union to bear the duty of fair representation. That duty is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all the employees in a unit. As explained, designating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights. *Supra*, at 2–3. Protec-

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[6] There is precedent for such arrangements. Some States have laws providing that, if an employee with a religious objection to paying an agency fee "requests the [union] to use the grievance procedure or arbitration procedure on the employee's behalf, the [union] is authorized to charge the employee for the reasonable cost of using such procedure." *E.g.*, Cal. Govt. Code Ann. §3546.3 (West 2010); cf. Ill. Comp. Stat., ch. 5, §315/6(g) (2016). This more tailored alternative, if applied to other objectors, would prevent free ridership while imposing a lesser burden on First Amendment rights.

tion of their interests is placed in the hands of the union, and if the union were free to disregard or even work against those interests, these employees would be wholly unprotected. That is why we said many years ago that serious "constitutional questions [would] arise" if the union were *not* subject to the duty to represent all employees fairly. *Steele*, *supra*, at 198.

In sum, we do not see any reason to treat the free-rider interest any differently in the agency-fee context than in any other First Amendment context. See *Knox*, 567 U. S., at 311, 321. We therefore hold that agency fees cannot be upheld on free-rider grounds.

IV

Implicitly acknowledging the weakness of *Abood*'s own reasoning, proponents of agency fees have come forward with alternative justifications for the decision, and we now address these arguments.

A

The most surprising of these new arguments is the Union respondent's originalist defense of *Abood*. According to this argument, *Abood* was correctly decided because the First Amendment was not originally understood to provide *any* protection for the free speech rights of public employees. Brief for Union Respondent 2–3, 17–20.

As an initial matter, we doubt that the Union—or its members—actually want us to hold that public employees have "*no* [free speech] rights." *Id.*, at 1. Cf., *e.g.*, Brief for National Treasury Employees Union as *Amicus Curiae* in *Garcetti* v. *Ceballos*, O. T. 2005, No. 04–473, p. 7 (arguing for "broa[d]" public-employee First Amendment rights); Brief for AFL–CIO as *Amicus Curiae* in No. 04–473 (similar).

It is particularly discordant to find this argument in a brief that trumpets the importance of *stare decisis*. See

Brief for Union Respondent 47–57. Taking away free speech protection for public employees would mean overturning decades of landmark precedent. Under the Union's theory, *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968), and its progeny would fall. Yet *Pickering*, as we will discuss, is now the foundation for respondents' chief defense of *Abood*. And indeed, *Abood* itself would have to go if public employees have no free speech rights, since *Abood* holds that the First Amendment prohibits the exaction of agency fees for political or ideological purposes. 431 U. S., at 234–235 (finding it "clear" that "a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment"). Our political patronage cases would be doomed. See, *e.g.*, *Rutan* v. *Republican Party of Ill.*, 497 U. S. 62 (1990); *Branti* v. *Finkel*, 445 U. S. 507 (1980); *Elrod* v. *Burns*, 427 U. S. 347 (1976). Also imperiled would be older precedents like *Wieman* v. *Updegraff*, 344 U. S. 183 (1952) (loyalty oaths), *Shelton* v. *Tucker*, 364 U. S. 479 (1960) (disclosure of memberships and contributions), and *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589 (1967) (subversive speech). Respondents presumably want none of this, desiring instead that we apply the Constitution's supposed original meaning only when it suits them—to retain the part of *Abood* that they like. See Tr. of Oral Arg. 56–57. We will not engage in this halfway originalism.

Nor, in any event, does the First Amendment's original meaning support the Union's claim. The Union offers no persuasive founding-era evidence that public employees were understood to lack free speech protections. While it observes that restrictions on federal employees' activities have existed since the First Congress, most of its historical examples involved limitations on public officials' outside business dealings, not on their speech. See *Ex parte*

Curtis, 106 U. S. 371, 372–373 (1882). The only early *speech* restrictions the Union identifies are an 1806 statute prohibiting military personnel from using "'contemptuous or disrespectful words against the President'" and other officials, and an 1801 directive limiting electioneering by top government employees. Brief for Union Respondent 3. But those examples at most show that the government was understood to have power to limit employee speech that threatened important governmental interests (such as maintaining military discipline and preventing corruption)—not that public employees' speech was entirely unprotected. Indeed, more recently this Court has upheld similar restrictions even while recognizing that government employees possess First Amendment rights. See, *e.g.*, *Brown* v. *Glines*, 444 U. S. 348, 353 (1980) (upholding military restriction on speech that threatened troop readiness); *Civil Service Comm'n* v. *Letter Carriers*, 413 U. S. 548, 556–557 (1973) (upholding limits on public employees' political activities).

Ultimately, the Union relies, not on founding-era evidence, but on dictum from a 1983 opinion of this Court stating that, "[f]or most of th[e 20th] century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Connick* v. *Myers*, 461 U. S. 138, 143; see Brief for Union Respondent 2, 17. Even on its own terms, this dictum about 20th-century views does not purport to describe how the First Amendment was understood in 1791. And a careful examination of the decisions by this Court that *Connick* cited to support its dictum, see 461 U. S., at 144, reveals that none of them rested on the facile premise that public employees are unprotected by the First Amendment. Instead, they considered (much as we do today) whether particular speech restrictions were "necessary to protect"

fundamental government interests. *Curtis*, *supra*, at 374.

The Union has also failed to show that, even if public employees enjoyed free speech rights, the First Amendment was nonetheless originally understood to allow forced subsidies like those at issue here. We can safely say that, at the time of the adoption of the First Amendment, no one gave any thought to whether public-sector unions could charge nonmembers agency fees. Entities resembling labor unions did not exist at the founding, and public-sector unions did not emerge until the mid-20th century. The idea of public-sector unionization and agency fees would astound those who framed and ratified the Bill of Rights.[7] Thus, the Union cannot point to any accepted founding-era practice that even remotely resembles the compulsory assessment of agency fees from public-sector employees. We do know, however, that prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed. As noted, Jefferson denounced compelled support for such beliefs as "'sinful and tyrannical,'" *supra*, at 9, and others expressed similar views.[8]

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[7] Indeed, under common law, "collective bargaining was unlawful," *Teamsters* v. *Terry*, 494 U. S. 558, 565–566 (1990) (plurality opinion); see N. Citrine, Trade Union Law 4–7, 9–10 (2d ed. 1960); Notes, Legality of Trade Unions at Common Law, 25 Harv. L. Rev. 465, 466 (1912), and into the 20th century, every individual employee had the "liberty of contract" to "sell his labor upon such terms as he deem[ed] proper," *Adair* v. *United States*, 208 U. S. 161, 174–175 (1908); see R. Morris, Government and Labor in Early America 208, 529 (1946). So even the concept of a private third-party entity with the power to bind employees on the terms of their employment likely would have been foreign to the Founders. We note this only to show the problems inherent in the Union respondent's argument; we are not in any way questioning the foundations of modern labor law.

[8] See, *e.g.*, Ellsworth, The Landholder, VII (1787), in Essays on the Constitution of the United States 167–171 (P. Ford ed. 1892); Webster, On Test Laws, Oaths of Allegiance and Abjuration, and Partial Exclu-

In short, the Union has offered no basis for concluding that *Abood* is supported by the original understanding of the First Amendment.

B

The principal defense of *Abood* advanced by respondents and the dissent is based on our decision in *Pickering*, 391 U. S. 563, which held that a school district violated the First Amendment by firing a teacher for writing a letter critical of the school administration. Under *Pickering* and later cases in the same line, employee speech is largely unprotected if it is part of what the employee is paid to do, see *Garcetti* v. *Ceballos*, 547 U. S. 410, 421–422 (2006), or if it involved a matter of only private concern, see *Connick*, *supra*, at 146–149. On the other hand, when a public employee speaks as a citizen on a matter of public concern, the employee's speech is protected unless "'the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees' outweighs 'the interests of the [employee], as a citizen, in commenting upon matters of public concern.'" *Harris*, 573 U. S., at ___ (slip op., at 35) (quoting *Pickering*, *supra*, at 568). *Pickering* was the centerpiece of the defense of *Abood* in *Harris*, see 573 U. S., at ___–___ (slip op., at 17–21) (KAGAN, J., dissenting), and we found the argument unpersuasive, see *id.*, at ___–___ (slip op., at 34–37). The intervening years have not improved its appeal.

1

As we pointed out in *Harris*, *Abood* was not based on *Pickering*. 573 U. S., at ___, and n. 26 (slip op., at 34, and n. 26). The *Abood* majority cited the case exactly once—in a footnote—and then merely to acknowledge that "there may be limits on the extent to which an employee in a

sions from Office, in A Collection of Essays and Fugitiv[e] Writings 151–153 (1790).

sensitive or policymaking position may freely criticize his superiors and the policies they espouse." 431 U. S., at 230, n. 27. That aside has no bearing on the agency-fee issue here.[9]

Respondents' reliance on *Pickering* is thus "an effort to find a new justification for the decision in *Abood*." *Harris*, *supra*, at ___ (slip op., at 34). And we have previously taken a dim view of similar attempts to recast problematic First Amendment decisions. See, *e.g.*, *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 348–349, 363 (2010) (rejecting efforts to recast *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652 (1990)); see also *Citizens United*, *supra*, at 382–385 (ROBERTS, C. J., concurring). We see no good reason, at this late date, to try to shoehorn *Abood* into the *Pickering* framework.

2

Even if that were attempted, the shoe would be a painful fit for at least three reasons.

First, the *Pickering* framework was developed for use in a very different context—in cases that involve "one employee's speech and its impact on that employee's public responsibilities." *United States* v. *Treasury Employees*, 513 U. S. 454, 467 (1995). This case, by contrast, involves a blanket requirement that all employees subsidize speech with which they may not agree. While we have sometimes looked to *Pickering* in considering general rules that affect broad categories of employees, we have acknowledged that

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[9] Justice Powell's separate opinion did invoke *Pickering* in a relevant sense, but he did so only to acknowledge the State's relatively greater interest in regulating speech when it acts as employer than when it acts as sovereign. *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209, 259 (1977) (concurring in judgment). In the very next sentence, he explained that "even in public employment, a significant impairment of First Amendment rights must survive exacting scrutiny." *Ibid.* (internal quotation marks omitted). That is the test we apply today.

the standard *Pickering* analysis requires modification in that situation. See 513 U. S., at 466–468, and n. 11. A speech-restrictive law with "widespread impact," we have said, "gives rise to far more serious concerns than could any single supervisory decision." *Id.*, at 468. Therefore, when such a law is at issue, the government must shoulder a correspondingly "heav[ier]" burden, *id.*, at 466, and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights, see *id.*, at 475–476, n. 21; accord, *id.*, at 482–483 (O'Connor, J., concurring in judgment in part and dissenting in part). The end product of those adjustments is a test that more closely resembles exacting scrutiny than the traditional *Pickering* analysis.

The core collective-bargaining issue of wages and benefits illustrates this point. Suppose that a single employee complains that he or she should have received a 5% raise. This individual complaint would likely constitute a matter of only private concern and would therefore be unprotected under *Pickering*. But a public-sector union's demand for a 5% raise for the many thousands of employees it represents would be another matter entirely. Granting such a raise could have a serious impact on the budget of the government unit in question, and by the same token, denying a raise might have a significant effect on the performance of government services. When a large number of employees speak through their union, the category of speech that is of public concern is greatly enlarged, and the category of speech that is of only private concern is substantially shrunk. By disputing this, *post*, at 13–14, the dissent denies the obvious.

Second, the *Pickering* framework fits much less well where the government compels speech or speech subsidies in support of third parties. *Pickering* is based on the insight that the speech of a public-sector employee may interfere with the effective operation of a government

office. When a public employer does not simply restrict potentially disruptive speech but commands that its employees mouth a message on its own behalf, the calculus is very different. Of course, if the speech in question is part of an employee's official duties, the employer may insist that the employee deliver any lawful message. See *Garcetti*, 547 U. S., at 421–422, 425–426. Otherwise, however, it is not easy to imagine a situation in which a public employer has a legitimate need to demand that its employees recite words with which they disagree. And we have never applied *Pickering* in such a case.

Consider our decision in *Connick*. In that case, we held that an assistant district attorney's complaints about the supervisors in her office were, for the most part, matters of only private concern. 461 U. S., at 148. As a result, we held, the district attorney could fire her for making those comments. *Id.*, at 154. Now, suppose that the assistant had not made any critical comments about the supervisors but that the district attorney, out of the blue, demanded that she circulate a memo praising the supervisors. Would her refusal to go along still be a matter of purely private concern? And if not, would the order be justified on the ground that the effective operation of the office demanded that the assistant voice complimentary sentiments with which she disagreed? If *Pickering* applies at all to compelled speech—a question that we do not decide—it would certainly require adjustment in that context.

Third, although both *Pickering* and *Abood* divided speech into two categories, the cases' categorization schemes do not line up. Superimposing the *Pickering* scheme on *Abood* would significantly change the *Abood* regime.

Let us first look at speech that is not germane to collective bargaining but instead concerns political or ideological issues. Under *Abood*, a public employer is flatly pro-

hibited from permitting nonmembers to be charged for this speech, but under *Pickering*, the employees' free speech interests could be overcome if a court found that the employer's interests outweighed the employees'.

A similar problem arises with respect to speech that *is* germane to collective bargaining. The parties dispute how much of this speech is of public concern, but respondents concede that much of it falls squarely into that category. See Tr. of Oral Arg. 47, 65. Under *Abood*, nonmembers may be required to pay for all this speech, but *Pickering* would permit that practice only if the employer's interests outweighed those of the employees. Thus, recasting *Abood* as an application of *Pickering* would substantially alter the *Abood* scheme.

For all these reasons, *Pickering* is a poor fit indeed.

V

Even if we were to apply some form of *Pickering*, Illinois' agency-fee arrangement would not survive.

A

Respondents begin by suggesting that union speech in collective-bargaining and grievance proceedings should be treated like the employee speech in *Garcetti*, *i.e.*, as speech "pursuant to [an employee's] official duties," 547 U. S., at 421. Many employees, in both the public and private sectors, are paid to write or speak for the purpose of furthering the interests of their employers. There are laws that protect public employees from being compelled to say things that they reasonably believe to be untrue or improper, see *id.*, at 425–426, but in general when public employees are performing their job duties, their speech may be controlled by their employer. Trying to fit union speech into this framework, respondents now suggest that the union speech funded by agency fees forms part of the official duties of the union officers who engage in the

speech. Brief for Union Respondent 22–23; see Brief for State Respondents 23–24.

This argument distorts collective bargaining and grievance adjustment beyond recognition. When an employee engages in speech that is part of the employee's job duties, the employee's words are really the words of the employer. The employee is effectively the employer's spokesperson. But when a union negotiates with the employer or represents employees in disciplinary proceedings, the union speaks for the *employees*, not the employer. Otherwise, the employer would be negotiating with itself and disputing its own actions. That is not what anybody understands to be happening.

What is more, if the union's speech is really the employer's speech, then the employer could dictate what the union says. Unions, we trust, would be appalled by such a suggestion. For these reasons, *Garcetti* is totally inapposite here.

B

Since the union speech paid for by agency fees is not controlled by *Garcetti*, we move on to the next step of the *Pickering* framework and ask whether the speech is on a matter of public or only private concern. In *Harris*, the dissent's central argument in defense of *Abood* was that union speech in collective bargaining, including speech about wages and benefits, is basically a matter of only private interest. See 573 U. S., at ___–___ (slip op., at 19–20) (KAGAN, J., dissenting). We squarely rejected that argument, see *id.*, at ___–___ (slip op., at 35–36), and the facts of the present case substantiate what we said at that time: "[I]t is impossible to argue that the level of . . . state spending for employee benefits . . . is not a matter of great public concern," *id.*, at ___ (slip op., at 36).

Illinois, like some other States and a number of counties and cities around the country, suffers from severe budget

problems.[10] As of 2013, Illinois had nearly $160 billion in unfunded pension and retiree healthcare liabilities.[11] By 2017, that number had only grown, and the State was grappling with $15 billion in unpaid bills.[12] We are told that a "quarter of the budget is now devoted to paying down" those liabilities.[13] These problems and others led Moody's and S&P to downgrade Illinois' credit rating to "one step above junk"—the "lowest ranking on record for a U. S. state."[14]

The Governor, on one side, and public-sector unions, on the other, disagree sharply about what to do about these problems. The State claims that its employment-related debt is "'squeezing core programs in education, public safety, and human services, in addition to limiting [the State's] ability to pay [its] bills.'" Securities Act of 1933 Release No. 9389, 105 S. E. C. Docket 3381 (2013). It therefore "told the Union that it would attempt to address th[e financial] crisis, at least in part, through collective bargaining." Board Decision 12–13. And "the State's

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[10] See Brief for State of Michigan et al. as *Amici Curiae* 9–24. Nationwide, the cost of state and local employees' wages and benefits, for example, is nearly $1.5 trillion—more than half of those jurisdictions' total expenditures. See Dept. of Commerce, Bureau of Economic Analysis, National Data, GDP & Personal Income, Table 6.2D, line 92 (Aug. 3, 2017), and Table 3.3, line 37 (May 30, 2018), https://www.bea.gov/iTable/iTable.cfm?reqid=19&step=2#reqid=19&step=2&isuri=1&1921=survey. And many States and cities struggle with unfunded pension and retiree healthcare liabilities and other budget issues.

[11] PEW Charitable Trusts, Fiscal 50: State Trends and Analysis (updated May 17, 2016), http://www.pewtrusts.org/en/research-and-analysis/data-visualizations/2014/fiscal-50#ind4.

[12] See Brief for Jason R. Barclay et al. as *Amici Curiae* 9; M. Egan, How Illinois Became America's Most Messed-Up State, CNN Money (July 1, 2017), https://cnnmon.ie/2tp9NX5.

[13] Brief for Jason R. Barclay et al. as *Amici Curiae* 9.

[14] E. Campbell, S&P, Moody's Downgrade Illinois to Near Junk, Lowest Ever for a U. S. State, Bloomberg (June 1, 2017), https://bloom.bg/2roEJUc.

desire for savings" in fact "dr[o]ve [its] bargaining" positions on matters such as health-insurance benefits and holiday, overtime, and promotion policies. *Id.*, at 13; *Illinois Dept. of Central Management Servs.* v. *AFSCME, Council 31*, No. S–CB–16–17 etc., 33 PERI ¶67 (ILRB Dec. 13, 2016) (ALJ Decision), pp. 26–28, 63–66, 224. But when the State offered cost-saving proposals on these issues, the Union countered with very different suggestions. Among other things, it advocated wage and tax increases, cutting spending "to Wall Street financial institutions," and reforms to Illinois' pension and tax systems (such as closing "corporate tax loopholes," "[e]xpanding the base of the state sales tax," and "allowing an income tax that is adjusted in accordance with ability to pay"). *Id.*, at 27–28. To suggest that speech on such matters is not of great public concern—or that it is not directed at the "public square," *post*, at 16 (KAGAN, J., dissenting)—is to deny reality.

In addition to affecting how public money is spent, union speech in collective bargaining addresses many other important matters. As the examples offered by respondents' own *amici* show, unions express views on a wide range of subjects—education, child welfare, healthcare, and minority rights, to name a few. See, *e.g.*, Brief for American Federation of Teachers as *Amicus Curiae* 15–27; Brief for Child Protective Service Workers et al. as *Amici Curiae* 5–13; Brief for Human Rights Campaign et al. as *Amici Curiae* 10–17; Brief for National Women's Law Center et al. as *Amici Curiae* 14–30. What unions have to say on these matters in the context of collective bargaining is of great public importance.

Take the example of education, which was the focus of briefing and argument in *Friedrichs*. The public importance of subsidized union speech is especially apparent in this field, since educators make up by far the largest category of state and local government employees, and

education is typically the largest component of state and local government expenditures.[15]

Speech in this area also touches on fundamental questions of education policy. Should teacher pay be based on seniority, the better to retain experienced teachers? Or should schools adopt merit-pay systems to encourage teachers to get the best results out of their students?[16] Should districts transfer more experienced teachers to the lower performing schools that may have the greatest need for their skills, or should those teachers be allowed to stay where they have put down roots?[17] Should teachers be given tenure protection and, if so, under what conditions? On what grounds and pursuant to what procedures should teachers be subject to discipline or dismissal? How should teacher performance and student progress be measured—by standardized tests or other means?

Unions can also speak out in collective bargaining on controversial subjects such as climate change,[18] the Confederacy,[19] sexual orientation and gender identity,[20] evolution,[21] and minority religions.[22] These are sensitive politi-

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[15] See National Association of State Budget Officers, Summary: Spring 2018 Fiscal Survey of States 2 (June 14, 2018), http://www.nasbo.org; ProQuest Statistical Abstract of the United States: 2018, pp. 306, Table 476, 321, Table 489.

[16] See Rogers, School Districts 'Race to the Top' Despite Teacher Dispute, Marin Independent J., June 19, 2010.

[17] See Sawchuk, Transferring Top Teachers Has Benefits: Study Probes Moving Talent to Low-Performing Schools, Education Week, Nov. 13, 2013, pp. 1, 13.

[18] See Tucker, Textbooks Equivocate on Global Warming: Stanford Study Finds Portrayal 'Dishonest,' San Francisco Chronicle, Nov. 24, 2015, p. C1.

[19] See Reagan, Anti-Confederacy Movement Rekindles Texas Textbook Controversy, San Antonio Current, Aug. 4, 2015.

[20] See Watanabe, How To Teach Gay Issues in 1st Grade? A New Law Requiring California Schools To Have Lessons About LGBT Americans Raises Tough Questions, L. A. Times, Oct. 16, 2011, p. A1.

[21] See Goodstein, A Web of Faith, Law and Science in Evolution Suit,

cal topics, and they are undoubtedly matters of profound "'value and concern to the public.'" *Snyder* v. *Phelps*, 562 U. S. 443, 453 (2011). We have often recognized that such speech "'occupies the highest rung of the hierarchy of First Amendment values'" and merits "'special protection.'" *Id.*, at 452.

What does the dissent say about the prevalence of such issues? The most that it is willing to admit is that "some" issues that arise in collective bargaining "raise important non-budgetary disputes." *Post*, at 17. Here again, the dissent refuses to recognize what actually occurs in public-sector collective bargaining.

Even union speech in the handling of grievances may be of substantial public importance and may be directed at the "public square." *Post*, at 16. For instance, the Union respondent in this case recently filed a grievance seeking to compel Illinois to appropriate $75 million to fund a 2% wage increase. *State* v. *AFSCME Council 31*, 2016 IL 118422, 51 N. E. 3d 738, 740–742, and n. 4. In short, the union speech at issue in this case is overwhelmingly of substantial public concern.

C

The only remaining question under *Pickering* is whether the State's proffered interests justify the heavy burden that agency fees inflict on nonmembers' First Amendment interests. We have already addressed the state interests asserted in *Abood*—promoting "labor peace" and avoiding free riders, see *supra*, at 11–18—and we will not repeat that analysis.

In *Harris* and this case, defenders of *Abood* have asserted a different state interest—in the words of the *Harris* dissent, the State's "interest in bargaining with an ade-

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N. Y. Times, Sept. 26, 2005, p. A1.

[22] See Golden, Defending the Faith: New Battleground in Textbook Wars: Religion in History, Wall St. J., Jan. 25, 2006, p. A1.

quately funded exclusive bargaining agent." 573 U. S., at ___ (KAGAN, J., dissenting) (slip op., at 7); see also *post*, at 6–7 (KAGAN, J., dissenting). This was not "the interest *Abood* recognized and protected," *Harris*, *supra*, at ___ (slip op., at 7) (KAGAN, J., dissenting), and, in any event, it is insufficient.

Although the dissent would accept without any serious independent evaluation the State's assertion that the absence of agency fees would cripple public-sector unions and thus impair the efficiency of government operations, see *post*, at 8–9, 11, ample experience, as we have noted, *supra*, at 12, shows that this is questionable.

Especially in light of the more rigorous form of *Pickering* analysis that would apply in this context, see *supra*, at 23–25, the balance tips decisively in favor of the employees' free speech rights.[23]

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[23] Claiming that our decision will hobble government operations, the dissent asserts that it would prevent a government employer from taking action against disruptive non-unionized employees in two carefully constructed hypothetical situations. See *post*, at 17–18. Both hypotheticals are short on potentially important details, but in any event, neither would be affected by our decision in this case. Rather, both would simply call for the application of the standard *Pickering* test.

In one of the hypotheticals, teachers "protest merit pay in the school cafeteria." *Post*, at 17. If such a case actually arose, it would be important to know, among other things, whether the teachers involved were supposed to be teaching in their classrooms at the time in question and whether the protest occurred in the presence of students during the student lunch period. If both those conditions were met, the teachers would presumably be violating content-neutral rules regarding their duty to teach at specified times and places, and their conduct might well have a disruptive effect on the educational process. Thus, in the dissent's hypothetical, the school's interests might well outweigh those of the teachers, but in this hypothetical case, as in all *Pickering* cases, the particular facts would be very important.

In the other hypothetical, employees agitate for a better health plan "at various inopportune times and places." *Post*, at 17. Here, the lack of factual detail makes it impossible to evaluate how the *Pickering*

We readily acknowledge, as *Pickering* did, that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." 391 U. S., at 568. Our analysis is consistent with that principle. The exacting scrutiny standard we apply in this case was developed in the context of commercial speech, another area where the government has traditionally enjoyed greater-than-usual power to regulate speech. See *supra*, at 10. It is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees—itself a significant impingement on associational freedoms that would not be tolerated in other contexts. We simply draw the line at allowing the government to go further still and require all employees to support the union irrespective of whether they share its views. Nothing in the *Pickering* line of cases requires us to uphold every speech restriction the government imposes as an employer. See *Pickering*, *supra*, at 564–566 (holding teacher's dismissal for criticizing school board unconstitutional); *Rankin* v. *McPherson*, 483 U. S. 378, 392 (1987) (holding clerical employee's dismissal for supporting assassination attempt on President unconstitutional); *Treasury Employees*, 513 U. S., at 477 (holding federal-employee honoraria ban unconstitutional).

VI

For the reasons given above, we conclude that public-sector agency-shop arrangements violate the First Amendment, and *Abood* erred in concluding otherwise. There remains the question whether *stare decisis* nonetheless counsels against overruling *Abood*. It does not.

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balance would come out. The term "agitat[ion]" can encompass a wide range of conduct, as well as speech. *Post*, at 17. And the time and place of the agitation would also be important.

"*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). We will not overturn a past decision unless there are strong grounds for doing so. *United States* v. *International Business Machines Corp.*, 517 U. S. 843, 855–856 (1996); *Citizens United*, 558 U. S., at 377 (ROBERTS, C. J., concurring). But as we have often recognized, *stare decisis* is "'not an inexorable command.'" *Pearson* v. *Callahan*, 555 U. S. 223, 233 (2009); see also *Lawrence* v. *Texas*, 539 U. S. 558, 577 (2003); *State Oil Co.* v. *Khan*, 522 U. S. 3, 20 (1997); *Agostini* v. *Felton*, 521 U. S. 203, 235 (1997); *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 63 (1996); *Payne*, *supra*, at 828.

The doctrine "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini*, *supra*, at 235. And *stare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights: "This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)." *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U. S. 449, 500 (2007) (Scalia, J., concurring in part and concurring in judgment) (internal quotation marks omitted); see also *Citizens United*, *supra*, at 362–365 (overruling *Austin*, 494 U. S. 652); *Barnette*, 319 U. S., at 642 (overruling *Minersville School Dist.* v. *Gobitis*, 310 U. S. 586 (1940)).

Our cases identify factors that should be taken into account in deciding whether to overrule a past decision. Five of these are most important here: the quality of *Abood*'s reasoning, the workability of the rule it established, its consistency with other related decisions, devel-

opments since the decision was handed down, and reliance on the decision. After analyzing these factors, we conclude that *stare decisis* does not require us to retain *Abood*.

A

An important factor in determining whether a precedent should be overruled is the quality of its reasoning, see *Citizens United*, 558 U. S., at 363–364; *id.*, at 382–385 (ROBERTS, C. J., concurring); *Lawrence*, 539 U. S., at 577–578, and as we explained in *Harris*, *Abood* was poorly reasoned, see 573 U. S., at ___–___ (slip op., at 17–20). We will summarize, but not repeat, *Harris*'s lengthy discussion of the issue.

Abood went wrong at the start when it concluded that two prior decisions, *Railway Employes* v. *Hanson*, 351 U. S. 225 (1956), and *Machinists* v. *Street*, 367 U. S. 740 (1961), "appear[ed] to require validation of the agency-shop agreement before [the Court]." 431 U. S., at 226. Properly understood, those decisions did no such thing. Both cases involved Congress's "*bare authorization*" of *private-sector* union shops under the Railway Labor Act. *Street*, *supra*, at 749 (emphasis added).[24] *Abood* failed to appreciate that a very different First Amendment question

[24] No First Amendment issue could have properly arisen in those cases unless Congress's enactment of a provision allowing, but not requiring, private parties to enter into union-shop arrangements was sufficient to establish governmental action. That proposition was debatable when *Abood* was decided, and is even more questionable today. See *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U. S. 40, 53 (1999); *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 357 (1974). Compare, *e.g.*, *White* v. *Communications Workers of Am., AFL–CIO, Local 13000*, 370 F. 3d 346, 350 (CA3 2004) (no state action), and *Kolinske* v. *Lubbers*, 712 F. 2d 471, 477–478 (CADC 1983) (same), with *Beck* v. *Communications Workers of Am.*, 776 F. 2d 1187, 1207 (CA4 1985) (state action), and *Linscott* v. *Millers Falls Co.*, 440 F. 2d 14, 16, and n. 2 (CA1 1971) (same). We reserved decision on this question in *Communications Workers* v. *Beck*, 487 U. S. 735, 761 (1988), and do not resolve it here.

arises when a State *requires* its employees to pay agency fees. See *Harris*, *supra*, at ___ (slip op., at 17).

Moreover, neither *Hanson* nor *Street* gave careful consideration to the First Amendment. In *Hanson*, the primary questions were whether Congress exceeded its power under the Commerce Clause or violated substantive due process by authorizing private union-shop arrangements under the Commerce and Due Process Clauses. 351 U. S., at 233–235. After deciding those questions, the Court summarily dismissed what was essentially a facial First Amendment challenge, noting that the record did not substantiate the challengers' claim. *Id.*, at 238; see *Harris*, *supra*, at ___ (slip op., at 17). For its part, *Street* was decided as a matter of statutory construction, and so did not reach any constitutional issue. 367 U. S., at 749–750, 768–769. *Abood* nevertheless took the view that *Hanson* and *Street* "all but decided" the important free speech issue that was before the Court. *Harris*, 573 U. S., at ___ (slip op., at 17). As we said in *Harris*, "[s]urely a First Amendment issue of this importance deserved better treatment." *Ibid.*

Abood's unwarranted reliance on *Hanson* and *Street* appears to have contributed to another mistake: *Abood* judged the constitutionality of public-sector agency fees under a deferential standard that finds no support in our free speech cases. (As noted, *supra*, at 10–11, today's dissent makes the same fundamental mistake.) *Abood* did not independently evaluate the strength of the government interests that were said to support the challenged agency-fee provision; nor did it ask how well that provision actually promoted those interests or whether they could have been adequately served without impinging so heavily on the free speech rights of nonmembers. Rather, *Abood* followed *Hanson* and *Street*, which it interpreted as having deferred to "*the legislative assessment* of the important contribution of the union shop to the system of labor rela-

tions established by Congress." 431 U. S., at 222 (emphasis added). But *Hanson* deferred to that judgment in deciding the Commerce Clause and substantive due process questions that were the focus of the case. Such deference to legislative judgments is inappropriate in deciding free speech issues.

If *Abood* had considered whether agency fees were actually needed to serve the asserted state interests, it might not have made the serious mistake of assuming that one of those interests—"labor peace"—demanded, not only that a single union be designated as the exclusive representative of all the employees in the relevant unit, but also that nonmembers be required to pay agency fees. Deferring to a perceived legislative judgment, *Abood* failed to see that the designation of a union as exclusive representative and the imposition of agency fees are not inextricably linked. See *supra*, at 11–12; *Harris*, *supra*, at ___ (slip op., at 31).

Abood also did not sufficiently take into account the difference between the effects of agency fees in public- and private-sector collective bargaining. The challengers in *Abood* argued that collective bargaining with a government employer, unlike collective bargaining in the private sector, involves "inherently 'political'" speech. 431 U. S., at 226. The Court did not dispute that characterization, and in fact conceded that "decisionmaking by a public employer is above all a political process" driven more by policy concerns than economic ones. *Id.*, at 228; see *id.*, at 228–231. But (again invoking *Hanson*), the *Abood* Court asserted that public employees do not have "weightier First Amendment interest[s]" against compelled speech than do private employees. *Id.*, at 229. That missed the point. Assuming for the sake of argument that the First Amendment applies at all to private-sector agency-shop arrangements, the individual interests at stake still differ. "In the public sector, core issues such as wages, pensions,

and benefits are important political issues, but that is generally not so in the private sector." *Harris*, 573 U. S., at ___ (slip op., at 17).

Overlooking the importance of this distinction, "*Abood* failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends." *Id.*, at ___ (slip op., at 18). Likewise, "*Abood* does not seem to have anticipated the magnitude of the practical administrative problems that would result in attempting to classify public-sector union expenditures as either 'chargeable' . . . or nonchargeable." *Ibid.* Nor did *Abood* "foresee the practical problems that would face objecting nonmembers." *Id.*, at ___ (slip op., at 19).

In sum, as detailed in *Harris*, *Abood* was not well reasoned.[25]

B

Another relevant consideration in the *stare decisis* calculus is the workability of the precedent in question, *Montejo* v. *Louisiana*, 556 U. S. 778, 792 (2009), and that factor also weighs against *Abood*.

1

Abood's line between chargeable and nonchargeable union expenditures has proved to be impossible to draw with precision. We tried to give the line some definition in *Lehnert*. There, a majority of the Court adopted a three-part test requiring that chargeable expenses (1) be "'ger-

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[25] Contrary to the dissent's claim, see *post*, at 19, and n. 4, the fact that "[t]he rationale of [*Abood*] does not withstand careful analysis" *is* a reason to overrule it, *e.g.*, *Lawrence* v. *Texas*, 539 U. S. 558, 577 (2003). And that is even truer when, as here, the defenders of the precedent do not attempt to "defend [its actual] reasoning." *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 363 (2010); *id.*, at 382–385 (ROBERTS, C. J., concurring).

mane'" to collective bargaining, (2) be "justified" by the government's labor-peace and free-rider interests, and (3) not add "significantly" to the burden on free speech, 500 U. S., at 519, but the Court splintered over the application of this test, see *id.*, at 519–522 (plurality opinion); *id.*, at 533–534 (Marshall, J., concurring in part and dissenting in part). That division was not surprising. As the *Lehnert* dissenters aptly observed, each part of the majority's test "involves a substantial judgment call," *id.*, at 551 (opinion of Scalia, J.), rendering the test "altogether malleable" and "no[t] principled," *id.*, at 563 (KENNEDY, J., concurring in judgment in part and dissenting in part).

Justice Scalia presciently warned that *Lehnert*'s amorphous standard would invite "perpetua[l] give-it-a-try litigation," *id.*, at 551, and the Court's experience with union lobbying expenses illustrates the point. The *Lehnert* plurality held that money spent on lobbying for increased education funding was not chargeable. *Id.*, at 519–522. But Justice Marshall—applying the same three-prong test—reached precisely the opposite conclusion. *Id.*, at 533–542. And *Lehnert* failed to settle the matter; States and unions have continued to "give it a try" ever since.

In *Knox*, for example, we confronted a union's claim that the costs of lobbying the legislature and the electorate about a ballot measure were chargeable expenses under *Lehnert*. See Brief for Respondent in *Knox* v. *Service Employees*, O. T. 2011, No. 10–1121, pp. 48–53. The Court rejected this claim out of hand, 567 U. S., at 320–321, but the dissent refused to do so, *id.*, at 336 (opinion of BREYER, J.). And in the present case, nonmembers are required to pay for unspecified "[l]obbying" expenses and for "[s]ervices" that "may ultimately inure to the benefit of the members of the local bargaining unit." App. to Pet. for Cert. 31a–32a. That formulation is broad enough to encompass just about anything that the union might choose to do.

Respondents agree that *Abood*'s chargeable-nonchargeable line suffers from "a vagueness problem," that it sometimes "allows what it shouldn't allow," and that "a firm[er] line c[ould] be drawn." Tr. of Oral Arg. 47–48. They therefore argue that we should "consider revisiting" this part of *Abood*. Tr. of Oral Arg. 66; see Brief for Union Respondent 46–47; Brief for State Respondents 30. This concession only underscores the reality that *Abood* has proved unworkable: Not even the parties defending agency fees support the line that it has taken this Court over 40 years to draw.

2

Objecting employees also face a daunting and expensive task if they wish to challenge union chargeability determinations. While *Hudson* requires a union to provide nonmembers with "sufficient information to gauge the propriety of the union's fee," 475 U. S., at 306, the *Hudson* notice in the present case and in others that have come before us do not begin to permit a nonmember to make such a determination.

In this case, the notice lists categories of expenses and sets out the amount in each category that is said to be attributable to chargeable and nonchargeable expenses. Here are some examples regarding the Union respondent's expenditures:

Category	Total Expense	Chargeable Expense
Salary and Benefits	$14,718,708	$11,830,230
Office Printing, Supplies, and Advertising	$148,272	$127,959
Postage and Freight	$373,509	$268,107
Telephone	$214,820	$192,721
Convention Expense	$268,855	$268,855

See App. to Pet. for Cert. 35a–36a.

How could any nonmember determine whether these numbers are even close to the mark without launching a legal challenge and retaining the services of attorneys and accountants? Indeed, even with such services, it would be a laborious and difficult task to check these figures.[26]

The Union respondent argues that challenging its chargeability determinations is not burdensome because the Union pays for the costs of arbitration, see Brief for Union Respondent 10–11, but objectors must still pay for the attorneys and experts needed to mount a serious challenge. And the attorney's fees incurred in such a proceeding can be substantial. See, *e.g.*, *Knox* v. *Chiang*, 2013 WL 2434606, *15 (ED Cal., June 5, 2013) (attorney's fees in *Knox* exceeded $1 million). The Union respondent's suggestion that an objector could obtain adequate review without even showing up at an arbitration, see App. to Pet. for Cert. 40a–41a, is therefore farfetched.

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[26] For this reason, it is hardly surprising that chargeability issues have not arisen in many Court of Appeals cases. See *post*, at 22 (KAGAN, J., dissenting).

C

Developments since *Abood*, both factual and legal, have also "eroded" the decision's "underpinnings" and left it an outlier among our First Amendment cases. *United States* v. *Gaudin*, 515 U. S. 506, 521 (1995).

1

Abood pinned its result on the "unsupported empirical assumption" that "the principle of exclusive representation in the public sector is dependent on a union or agency shop." *Harris*, 573 U. S., at ___ (slip op., at 20); *Abood*, 431 U. S., at 220–222. But, as already noted, experience has shown otherwise. See *supra*, at 11–12.

It is also significant that the Court decided *Abood* against a very different legal and economic backdrop. Public-sector unionism was a relatively new phenomenon in 1977. The first State to permit collective bargaining by government employees was Wisconsin in 1959, R. Kearney & P. Mareschal, Labor Relations in the Public Sector 64 (5th ed. 2014), and public-sector union membership remained relatively low until a "spurt" in the late 1960's and early 1970's, shortly before *Abood* was decided, Freeman, Unionism Comes to the Public Sector, 24 J. Econ. Lit. 41, 45 (1986). Since then, public-sector union membership has come to surpass private-sector union membership, even though there are nearly four times as many total private-sector employees as public-sector employees. B. Hirsch & D. Macpherson, Union Membership and Earnings Data Book 9–10, 12, 16 (2013 ed.).

This ascendance of public-sector unions has been marked by a parallel increase in public spending. In 1970, total state and local government expenditures amounted to $646 per capita in nominal terms, or about $4,000 per capita in 2014 dollars. See Dept. of Commerce, Statistical Abstract of the United States: 1972, p. 419; CPI Inflation Calculator, BLS, http://data.bls.gov/cgi-bin/cpicalc.pl. By

2014, that figure had ballooned to approximately $10,238 per capita. ProQuest, Statistical Abstract of the United States: 2018, pp. 17, Table 14, 300, Table 469. Not all that increase can be attributed to public-sector unions, of course, but the mounting costs of public-employee wages, benefits, and pensions undoubtedly played a substantial role. We are told, for example, that Illinois' pension funds are underfunded by $129 billion as a result of generous public-employee retirement packages. Brief for Jason R. Barclay et al. as *Amici Curiae* 9, 14. Unsustainable collective-bargaining agreements have also been blamed for multiple municipal bankruptcies. See Brief for State of Michigan et al. as *Amici Curiae* 10–19. These developments, and the political debate over public spending and debt they have spurred, have given collective-bargaining issues a political valence that *Abood* did not fully appreciate.

2

Abood is also an "anomaly" in our First Amendment jurisprudence, as we recognized in *Harris* and *Knox*. *Harris*, *supra*, at ___ (slip op., at 8); *Knox*, 567 U. S., at 311. This is not an altogether new observation. In *Abood* itself, Justice Powell faulted the Court for failing to perform the "'exacting scrutiny'" applied in other cases involving significant impingements on First Amendment rights. 431 U. S., at 259; see *id.*, at 259–260, and n. 14. Our later cases involving compelled speech and association have also employed exacting scrutiny, if not a more demanding standard. See, *e.g.*, *Roberts*, 468 U. S., at 623; *United Foods*, 533 U. S., at 414. And we have more recently refused, even in agency-fee cases, to extend *Abood* beyond circumstances where it directly controls. See *Knox*, *supra*, at 314; *Harris*, *supra*, at ___–___ (slip op., at 28–29).

Abood particularly sticks out when viewed against our

cases holding that public employees generally may not be required to support a political party. See *Elrod*, 427 U. S. 347; *Branti*, 445 U. S. 507; *Rutan*, 497 U. S. 62; *O'Hare Truck Service, Inc.* v. *City of Northlake*, 518 U. S. 712 (1996). The Court reached that conclusion despite a "long tradition" of political patronage in government. *Rutan*, *supra*, at 95 (Scalia, J., dissenting); see also *Elrod*, 427 U. S., at 353 (plurality opinion); *id.*, at 377–378 (Powell, J., dissenting). It is an odd feature of our First Amendment cases that political patronage has been deemed largely unconstitutional, while forced subsidization of union speech (which has no such pedigree) has been largely permitted. As Justice Powell observed: "I am at a loss to understand why the State's decision to adopt the agency shop in the public sector should be worthy of *greater* deference, when challenged on First Amendment grounds, than its decision to adhere to the *tradition* of political patronage." *Abood*, *supra*, at 260, n. 14 (opinion concurring in judgment) (citing *Elrod*, *supra*, at 376–380, 382–387 (Powell, J., dissenting); emphasis added). We have no occasion here to reconsider our political patronage decisions, but Justice Powell's observation is sound as far as it goes. By overruling *Abood*, we end the oddity of privileging compelled union support over compelled party support and bring a measure of greater coherence to our First Amendment law.

D

In some cases, reliance provides a strong reason for adhering to established law, see, *e.g.*, *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197, 202–203 (1991), and this is the factor that is stressed most strongly by respondents, their *amici*, and the dissent. They contend that collective-bargaining agreements now in effect were negotiated with agency fees in mind and that unions may have given up other benefits in exchange for provi-

sions granting them such fees. Tr. of Oral Arg. 67–68; see Brief for State Respondents 54; Brief for Union Respondent 50; *post*, at 22–26 (KAGAN, J., dissenting). In this case, however, reliance does not carry decisive weight.

For one thing, it would be unconscionable to permit free speech rights to be abridged in perpetuity in order to preserve contract provisions that will expire on their own in a few years' time. "The fact that [public-sector unions] may view [agency fees] as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that [nonmembers] share in having their constitutional rights fully protected." *Arizona* v. *Gant*, 556 U. S. 332, 349 (2009).

For another, *Abood* does not provide "a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced." *South Dakota* v. *Wayfair, Inc.*, *ante*, at 20; see *supra*, at 38–41.

This is especially so because public-sector unions have been on notice for years regarding this Court's misgivings about *Abood*. In *Knox*, decided in 2012, we described *Abood* as a First Amendment "anomaly." 567 U. S., at 311. Two years later in *Harris*, we were asked to overrule *Abood*, and while we found it unnecessary to take that step, we cataloged *Abood*'s many weaknesses. In 2015, we granted a petition for certiorari asking us to review a decision that sustained an agency-fee arrangement under *Abood*. *Friedrichs* v. *California Teachers Assn.*, 576 U. S. ___. After exhaustive briefing and argument on the question whether *Abood* should be overruled, we affirmed the decision below by an equally divided vote. 578 U. S. ___ (2016) (*per curiam*). During this period of time, any public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain.

That is certainly true with respect to the collective-bargaining agreement in the present case. That agree-

ment initially ran from July 1, 2012, until June 30, 2015. App. 331. Since then, the agreement has been extended pursuant to a provision providing for automatic renewal for an additional year unless either party gives timely notice that it desires to amend or terminate the contract. *Ibid.* Thus, for the past three years, the Union could not have been confident about the continuation of the agency-fee arrangement for more than a year at a time.

Because public-sector collective-bargaining agreements are generally of rather short duration, a great many of those now in effect probably began or were renewed since *Knox* (2012) or *Harris* (2014). But even if an agreement antedates those decisions, the union was able to protect itself if an agency-fee provision was essential to the overall bargain. A union's attorneys undoubtedly understand that if one provision of a collective-bargaining agreement is found to be unlawful, the remaining provisions are likely to remain in effect. See *NLRB* v. *Rockaway News Supply Co.*, 345 U. S. 71, 76–79 (1953); see also 8 R. Lord, Williston on Contracts §19:70 (4th ed. 2010). Any union believing that an agency-fee provision was essential to its bargain could have insisted on a provision giving it greater protection. The agreement in the present case, by contrast, provides expressly that the invalidation of any part of the agreement "shall not invalidate the remaining portions," which "shall remain in full force and effect." App. 328. Such severability clauses ensure that "entire contracts" are not "br[ought] down" by today's ruling. *Post*, at 23, n. 5 (KAGAN, J., dissenting).

In short, the uncertain status of *Abood*, the lack of clarity it provides, the short-term nature of collective-bargaining agreements, and the ability of unions to protect themselves if an agency-fee provision was crucial to its bargain all work to undermine the force of reliance as a

factor supporting *Abood*.[27]

* * *

We recognize that the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and retain members. But we must weigh these disadvantages against the considerable windfall that unions have received under *Abood* for the past 41 years. It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment. Those unconstitutional exactions cannot be allowed to continue indefinitely.

All these reasons—that *Abood*'s proponents have abandoned its reasoning, that the precedent has proved unworkable, that it conflicts with other First Amendment decisions, and that subsequent developments have eroded its underpinnings—provide the "'special justification[s]'" for overruling *Abood*. *Post*, at 19 (KAGAN, J., dissenting) (quoting *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. ___, ___ (2015) (slip op., at 8)).[28]

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[27] The dissent emphasizes another type of reliance, namely, that "[o]ver 20 States have by now enacted statutes authorizing [agency-fee] provisions." *Post*, at 23. But as we explained in *Citizens United*, "[t]his is not a compelling interest for *stare decisis*. If it were, legislative acts could prevent us from overruling our own precedents, thereby interfering with our duty 'to say what the law is.'" 558 U. S., at 365 (quoting *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803)). Nor does our decision "'require an extensive legislative response.'" *Post*, at 23. States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions. In this way, these States can follow the model of the federal government and 28 other States.

[28] Unfortunately, the dissent sees the need to resort to accusations that we are acting like "black-robed rulers" who have shut down an "energetic policy debate." *Post*, at 27–28. We certainly agree that judges should not "overrid[e] citizens' choices" or "pick the winning

VII

For these reasons, States and public-sector unions may no longer extract agency fees from nonconsenting employees. Under Illinois law, if a public-sector collective-bargaining agreement includes an agency-fee provision and the union certifies to the employer the amount of the fee, that amount is automatically deducted from the nonmember's wages. §315/6(e). No form of employee consent is required.

This procedure violates the First Amendment and cannot continue. Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938); see also *Knox*, 567 U. S., at 312–313. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 145 (1967) (plurality opinion); see also *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. 666, 680–682 (1999). Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

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side," *ibid.*—unless the Constitution commands that they do so. But when a federal or state law violates the Constitution, the American doctrine of judicial review requires us to enforce the Constitution. Here, States with agency-fee laws have abridged fundamental free speech rights. In holding that these laws violate the Constitution, we are simply enforcing the First Amendment as properly understood, "[t]he very purpose of [which] was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 638 (1943).

* * *

Abood was wrongly decided and is now overruled. The judgment of the United States Court of Appeals for the Seventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 16–1466

MARK JANUS, PETITIONER *v.* AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[June 27, 2018]

JUSTICE SOTOMAYOR, dissenting.

I join JUSTICE KAGAN's dissent in full. Although I joined the majority in *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552 (2011), I disagree with the way that this Court has since interpreted and applied that opinion. See, *e.g., National Institute of Family and Life Advocates* v. *Becerra*, *ante,* p. ___. Having seen the troubling development in First Amendment jurisprudence over the years, both in this Court and in lower courts, I agree fully with JUSTICE KAGAN that *Sorrell*—in the way it has been read by this Court—has allowed courts to "wiel[d] the First Amendment in . . . an aggressive way" just as the majority does today. *Post,* at 27.

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[June 27, 2018]

JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, dissenting.

For over 40 years, *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977), struck a stable balance between public employees' First Amendment rights and government entities' interests in running their workforces as they thought proper. Under that decision, a government entity could require public employees to pay a fair share of the cost that a union incurs when negotiating on their behalf over terms of employment. But no part of that fair-share payment could go to any of the union's political or ideological activities.

That holding fit comfortably with this Court's general framework for evaluating claims that a condition of public employment violates the First Amendment. The Court's decisions have long made plain that government entities have substantial latitude to regulate their employees' speech—especially about terms of employment—in the interest of operating their workplaces effectively. *Abood* allowed governments to do just that. While protecting public employees' expression about non-workplace matters, the decision enabled a government to advance important managerial interests—by ensuring the presence of

an exclusive employee representative to bargain with. Far from an "anomaly," *ante,* at 7, the *Abood* regime was a paradigmatic example of how the government can regulate speech in its capacity as an employer.

Not any longer. Today, the Court succeeds in its 6-year campaign to reverse *Abood*. See *Friedrichs* v. *California Teachers Assn.*, 578 U. S. ___ (2016) (*per curiam*); *Harris* v. *Quinn*, 573 U. S. ___ (2014); *Knox* v. *Service Employees*, 567 U. S. 298 (2012). Its decision will have large-scale consequences. Public employee unions will lose a secure source of financial support. State and local governments that thought fair-share provisions furthered their interests will need to find new ways of managing their workforces. Across the country, the relationships of public employees and employers will alter in both predictable and wholly unexpected ways.

Rarely if ever has the Court overruled a decision—let alone one of this import—with so little regard for the usual principles of *stare decisis*. There are no special justifications for reversing *Abood.* It has proved workable. No recent developments have eroded its underpinnings. And it is deeply entrenched, in both the law and the real world. More than 20 States have statutory schemes built on the decision. Those laws underpin thousands of ongoing contracts involving millions of employees. Reliance interests do not come any stronger than those surrounding *Abood*. And likewise, judicial disruption does not get any greater than what the Court does today. I respectfully dissent.

I

I begin with *Abood*, the 41-year-old precedent the majority overrules. That case involved a union that had been certified as the exclusive representative of Detroit's public school teachers. The union's collective-bargaining agreement with the city included an "agency shop" clause,

which required teachers who had not joined the union to pay it "a service charge equal to the regular dues required of [u]nion members." *Abood*, 431 U. S., at 212. A group of non-union members sued over that clause, arguing that it violated the First Amendment.

In considering their challenge, the Court canvassed the purposes of the "agency shop" clause. It was rooted, the Court understood, in the "principle of exclusive union representation"—a "central element" in "industrial relations" since the New Deal. *Id.,* at 220. Significant benefits, the Court explained, could derive from the "designation of a single [union] representative" for all similarly situated employees in a workplace. *Ibid.* In particular, such arrangements: "avoid[ ] the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment"; "prevent[ ] inter-union rivalries from creating dissension within the work force"; "free[ ] the employer from the possibility of facing conflicting demands from different unions"; and "permit[ ] the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations." *Id.,* at 220–221. As proof, the Court pointed to the example of exclusive-representation arrangements in the private-employment sphere: There, Congress had long thought that such schemes would promote "peaceful labor relations" and "labor stability." *Id.,* at 219, 229. A public employer like Detroit, the Court believed, could reasonably make the same calculation.

But for an exclusive-bargaining arrangement to work, such an employer often thought, the union needed adequate funding. Because the "designation of a union as exclusive representative carries with it great responsibilities," the Court reasoned, it inevitably also entails substantial costs. *Id.,* at 221. "The tasks of negotiating and administering a collective-bargaining agreement and

representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones." *Ibid.* Those activities, the Court noted, require the "expenditure of much time and money"—for example, payment for the "services of lawyers, expert negotiators, economists, and a research staff." *Ibid.* And there is no way to confine the union's services to union members alone (and thus to trim costs) because unions must by law fairly represent all employees in a given bargaining unit—union members and non-members alike. See *ibid.*

With all that in mind, the Court recognized why both a government entity and its union bargaining partner would gravitate toward an agency-fee clause. Those fees, the Court reasoned, "distribute fairly the cost" of collective bargaining "among those who benefit"—that is, *all* employees in the work unit. *Id.,* at 222. And they "counteract[ ] the incentive that employees might otherwise have to become 'free riders.'" *Ibid.* In other words, an agency-fee provision prevents employees from reaping all the "benefits of union representation"—higher pay, a better retirement plan, and so forth—while leaving it to others to bear the costs. *Ibid.* To the Court, the upshot was clear: A government entity could reasonably conclude that such a clause was needed to maintain the kind of exclusive bargaining arrangement that would facilitate peaceful and stable labor relations.

But the Court acknowledged as well the "First Amendment interests" of dissenting employees. *Ibid.* It recognized that some workers might oppose positions the union takes in collective bargaining, or even "unionism itself." *Ibid.* And still more, it understood that unions often advance "political and ideological" views outside the collective-bargaining context—as when they "contribute to political candidates." *Id.,* at 232, 234. Employees might well object to the use of their money to support such "ideological causes." *Id.,* at 235.

So the Court struck a balance, which has governed this area ever since. On the one hand, employees could be required to pay fees to support the union in "collective bargaining, contract administration, and grievance adjustment." *Id.,* at 225–226. There, the Court held, the "important government interests" in having a stably funded bargaining partner justify "the impingement upon" public employees' expression. *Id.,* at 225. But on the other hand, employees could not be compelled to fund the union's political and ideological activities. Outside the collective-bargaining sphere, the Court determined, an employee's First Amendment rights defeated any conflicting government interest. See *id.,* at 234–235.

II

Unlike the majority, I see nothing "questionable" about *Abood*'s analysis. *Ante,* at 7 (quoting *Harris*, 573 U. S., at ___ (slip op., at 17)). The decision's account of why some government entities have a strong interest in agency fees (now often called fair-share fees) is fundamentally sound. And the balance *Abood* struck between public employers' interests and public employees' expression is right at home in First Amendment doctrine.

A

Abood's reasoning about governmental interests has three connected parts. First, exclusive representation arrangements benefit some government entities because they can facilitate stable labor relations. In particular, such arrangements eliminate the potential for inter-union conflict and streamline the process of negotiating terms of employment. See 431 U. S., at 220–221. Second, the government may be unable to avail itself of those benefits unless the single union has a secure source of funding. The various tasks involved in representing employees cost money; if the union doesn't have enough, it can't be an

effective employee representative and bargaining partner. See *id.*, at 221. And third, agency fees are often needed to ensure such stable funding. That is because without those fees, employees have every incentive to free ride on the union dues paid by others. See *id.*, at 222.

The majority does not take issue with the first point. See *ante,* at 33 (It is "not disputed that the State may require that a union serve as exclusive bargaining agent for its employees" in order to advance the State's "interests as an employer"). The majority claims that the second point never appears in *Abood*, but is willing to assume it for the sake of argument. See *ante,* at 31–32; but see *Abood*, 431 U. S., at 221 (The tasks of an exclusive representative "often entail expenditure of much time and money"). So the majority stakes everything on the third point—the conclusion that maintaining an effective system of exclusive representation often entails agency fees. *Ante*, at 12 (It "is simply not true" that exclusive representation and agency fees are "inextricably linked"); see *ante,* at 14.

But basic economic theory shows why a government would think that agency fees are necessary for exclusive representation to work. What ties the two together, as *Abood* recognized, is the likelihood of free-riding when fees are absent. Remember that once a union achieves exclusive-representation status, the law compels it to fairly represent all workers in the bargaining unit, whether or not they join or contribute to the union. See *supra,* at 4. Because of that legal duty, the union cannot give special advantages to its own members. And that in turn creates a collective action problem of nightmarish proportions. Everyone—not just those who oppose the union, but also those who back it—has an economic incentive to withhold dues; only altruism or loyalty—as *against* financial self-interest—can explain why an employee would pay the union for its services. And so emerged *Abood*'s rule allow-

ing fair-share agreements: That rule ensured that a union would receive sufficient funds, despite its legally imposed disability, to effectively carry out its duties as exclusive representative of the government's employees.

The majority's initial response to this reasoning is simply to dismiss it. "[F]ree rider arguments," the majority pronounces, "are generally insufficient to overcome First Amendment objections." *Ante,* at 13 (quoting *Knox*, 567 U. S., at 311). "To hold otherwise," it continues, "would have startling consequences" because "[m]any private groups speak out" in ways that will "benefit[ ] nonmembers." *Ante,* at 13. But that disregards the defining characteristic of *this* free-rider argument—that unions, unlike those many other private groups, must serve members and non-members alike. Groups advocating for "senior citizens or veterans" (to use the majority's examples) have no legal duty to provide benefits to all those individuals: They can spur people to pay dues by conferring all kinds of special advantages on their dues-paying members. Unions are—by law—in a different position, as this Court has long recognized. See, *e.g., Machinists* v. *Street*, 367 U. S. 740, 762 (1961). Justice Scalia, responding to the same argument as the majority's, may have put the point best. In a way that is true of no other private group, the "law *requires* the union to carry" non-members—"indeed, requires the union to *go out of its way* to benefit [them], even at the expense of its other interests." *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, 556 (1991) (opinion concurring in part and dissenting in part). That special feature was what justified *Abood*: "Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them." 500 U. S., at 556.

The majority's fallback argument purports to respond to the distinctive position of unions, but still misses *Abood*'s economic insight. Here, the majority delivers a four-page exegesis on why unions will seek to serve as an exclusive

bargaining representative even "if they are not given agency fees." *Ante,* at 14; see *ante,* at 14–17. The gist of the account is that "designation as the exclusive representative confers many benefits," which outweigh the costs of providing services to non-members. *Ante,* at 15. But that response avoids the key question, which is whether unions without agency fees will be *able to* (not whether they will *want to*) carry on as an effective exclusive representative. And as to that question, the majority again fails to reckon with how economically rational actors behave—in public as well as private workplaces. Without a fair-share agreement, the class of union non-members spirals upward. Employees (including those who love the union) realize that they can get the same benefits even if they let their memberships expire. And as more and more stop paying dues, those left must take up the financial slack (and anyway, begin to feel like suckers)—so they too quit the union. See Ichniowski & Zax, Right-to-Work Laws, Free Riders, and Unionization in the Local Public Sector, 9 J. Labor Economics 255, 257 (1991).[1] And when the vicious cycle finally ends, chances are that the union will lack the resources to effectively perform the responsi-

[1] The majority relies on statistics from the federal workforce (where agency fees are unlawful) to suggest that public employees do not act in accord with economic logic. See *ante,* at 12. But first, many fewer federal employees pay dues than have voted for a union to represent them, indicating that free-riding in fact pervades the federal sector. See, *e.g.,* R. Kearney & P. Mareschal, Labor Relations in the Public Sector 26 (5th ed. 2014). And second, that sector is not typical of other public workforces. Bargaining in the federal sphere is limited; most notably, it does not extend to wages and benefits. See *Fort Stewart Schools* v. *FLRA*, 495 U. S. 641, 649 (1990). That means union operating expenses are lower than they are elsewhere. And the gap further widens because the federal sector uses large, often national, bargaining units that provide unions with economies of scale. See Brief for International Brotherhood of Teamsters as *Amicus Curiae* 7. For those reasons, the federal workforce is the wrong place to look for meaningful empirical evidence on the issues here.

bilities of an exclusive representative—or, in the worst case, to perform them at all. The result is to frustrate the interests of every government entity that thinks a strong exclusive-representation scheme will promote stable labor relations.

Of course, not all public employers will share that view. Some would rather not bargain with an exclusive representative. Others would prefer that representative to be poorly funded—to serve more as a front than an effectual bargaining partner. But as reflected in the number of fair-share statutes and contracts across the Nation, see *supra,* at 2, many government entities think that effective exclusive representation makes for good labor relations—and recognize, just as *Abood* did, that representation of that kind often depends on agency fees. See, *e.g., Harris*, 573 U. S., at ___ (slip op., at 24) (KAGAN, J., dissenting) (describing why Illinois thought that bargaining with an adequately funded exclusive representative of in-home caregivers would enable the State to better serve its disabled citizens). *Abood* respected that state interest; today's majority fails even to understand it. Little wonder that the majority's First Amendment analysis, which involves assessing the government's reasons for imposing agency fees, also comes up short.

B

1

In many cases over many decades, this Court has addressed how the First Amendment applies when the government, acting not as sovereign but as employer, limits its workers' speech. Those decisions have granted substantial latitude to the government, in recognition of its significant interests in managing its workforce so as to best serve the public. *Abood* fit neatly with that caselaw, in both reasoning and result. Indeed, its reversal today creates a significant anomaly—an exception, applying to

union fees alone, from the usual rules governing public employees' speech.

"Time and again our cases have recognized that the Government has a much freer hand" in dealing with its employees than with "citizens at large." *NASA* v. *Nelson*, 562 U. S. 134, 148 (2011) (internal quotation marks omitted). The government, we have stated, needs to run "as effectively and efficiently as possible." *Engquist* v. *Oregon Dept. of Agriculture*, 553 U. S. 591, 598 (2008) (internal quotation marks omitted). That means it must be able, much as a private employer is, to manage its workforce as it thinks fit. A public employee thus must submit to "certain limitations on his or her freedom." *Garcetti* v. *Ceballos*, 547 U. S. 410, 418 (2006). Government workers, of course, do not wholly "lose their constitutional rights when they accept their positions." *Engquist*, 553 U. S., at 600. But under our precedent, their rights often yield when weighed "against the realities of the employment context." *Ibid.* If it were otherwise—if every employment decision were to "bec[o]me a constitutional matter"—"the Government could not function." *NASA*, 562 U. S., at 149 (internal quotation marks omitted).

Those principles apply with full force when public employees' expressive rights are at issue. As we have explained: "Government employers, like private employers, need a significant degree of control over their employees' words" in order to "efficient[ly] provi[de] public services." *Garcetti*, 547 U. S., at 418. Again, significant control does not mean absolute authority. In particular, the Court has guarded against government efforts to "leverage the employment relationship" to shut down its employees' speech as private citizens. *Id.,* at 419. But when the government imposes speech restrictions relating to workplace operations, of the kind a private employer also would, the Court reliably upholds them. See, *e.g., id.*, at 426; *Connick* v. *Myers*, 461 U. S. 138, 154 (1983).

In striking the proper balance between employee speech rights and managerial interests, the Court has long applied a test originating in *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968). That case arose out of an individual employment action: the firing of a public school teacher. As we later described the *Pickering* inquiry, the Court first asks whether the employee "spoke as a citizen on a matter of public concern." *Garcetti*, 547 U. S., at 418. If she did not—but rather spoke as an employee on a workplace matter—she has no "possibility of a First Amendment claim": A public employer can curtail her speech just as a private one could. *Ibid.* But if she did speak as a citizen on a public matter, the public employer must demonstrate "an adequate justification for treating the employee differently from any other member of the general public." *Ibid.* The government, that is, needs to show that legitimate workplace interests lay behind the speech regulation.

Abood coheres with that framework. The point here is not, as the majority suggests, that *Abood* is an overt, one-to-one "application of *Pickering*." *Ante,* at 26. It is not. *Abood* related to a municipality's labor policy, and so the Court looked to prior cases about unions, not to *Pickering*'s analysis of an employee's dismissal. (And truth be told, *Pickering* was not at that time much to look at: What the Court now thinks of as the two-step *Pickering* test, as the majority's own citations show, really emerged from *Garcetti* and *Connick*—two cases post-dating *Abood*. See *ante,* at 22.)[2] But *Abood* and *Pickering* raised variants of the same basic issue: the extent of the government's authority to

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[2] For those reasons, it is not surprising that the "categorization schemes" in *Abood* and *Pickering* are not precisely coterminous. *Ante,* at 25. The two cases are fraternal rather than identical twins—both standing for the proposition that the government receives great deference when it regulates speech as an employer rather than as a sovereign. See *infra* this page and 12–13.

make employment decisions affecting expression. And in both, the Court struck the same basic balance, enabling the government to curb speech when—but only when—the regulation was designed to protect its managerial interests. Consider the parallels:

Like *Pickering*, *Abood* drew the constitutional line by analyzing the connection between the government's managerial interests and different kinds of expression. The Court first discussed the use of agency fees to subsidize the speech involved in "collective bargaining, contract administration, and grievance adjustment." 431 U. S., at 225–226. It understood that expression (really, who would not?) as intimately tied to the workplace and employment relationship. The speech was about "working conditions, pay, discipline, promotions, leave, vacations, and terminations," *Borough of Duryea* v. *Guarnieri*, 564 U. S. 379, 391 (2011); the speech occurred (almost always) in the workplace; and the speech was directed (at least mainly) to the employer. As noted earlier, *Abood* described the managerial interests of employers in channeling all that speech through a single union. See 431 U. S., at 220–222, 224–226; *supra,* at 3. And so *Abood* allowed the government to mandate fees for collective bargaining—just as *Pickering* permits the government to regulate employees' speech on similar workplace matters. But still, *Abood* realized that compulsion could go too far. The Court barred the use of fees for union speech supporting political candidates or "ideological causes." 431 U. S., at 235. That speech, it understood, was "unrelated to [the union's] duties as exclusive bargaining representative," but instead was directed at the broader public sphere. *Id.,* at 234. And for that reason, the Court saw no legitimate managerial interests in compelling its subsidization. The employees' First Amendment claims would thus prevail—as, again, they would have under *Pickering*.

Abood thus dovetailed with the Court's usual attitude in

First Amendment cases toward the regulation of public employees' speech. That attitude is one of respect—even solicitude—for the government's prerogatives as an employer. So long as the government is acting as an employer—rather than exploiting the employment relationship for other ends—it has a wide berth, comparable to that of a private employer. And when the regulated expression concerns the terms and conditions of employment—the very stuff of the employment relationship—the government really cannot lose. There, managerial interests are obvious and strong. And so government employees are . . . just employees, even though they work for the government. Except that today the government does lose, in a first for the law. Now, the government can constitutionally adopt all policies regulating core workplace speech in pursuit of managerial goals—save this single one.

2

The majority claims it is not making a special and unjustified exception. It offers two main reasons for declining to apply here our usual deferential approach, as exemplified in *Pickering*, to the regulation of public employee speech. First, the majority says, this case involves a "blanket" policy rather than an individualized employment decision, so *Pickering* is a "painful fit." *Ante,* at 23. Second, the majority asserts, the regulation here involves compelling rather than restricting speech, so the pain gets sharper still. See *ante*, at 24–25. And finally, the majority claims that even under the solicitous *Pickering* standard, the government should lose, because the speech here involves a matter of public concern and the government's managerial interests do not justify its regulation. See *ante,* at 27–31. The majority goes wrong at every turn.

First, this Court has applied the same basic approach whether a public employee challenges a general policy or an individualized decision. Even the majority must con-

cede that "we have sometimes looked to *Pickering* in considering general rules that affect broad categories of employees." *Ante,* at 23. In fact, the majority cannot come up with any case in which we have *not* done so. All it can muster is one case in which *while* applying the *Pickering* test to a broad rule—barring any federal employee from accepting any payment for any speech or article on any topic—the Court noted that the policy's breadth would count against the government at the test's second step. See *United States* v. *Treasury Employees*, 513 U. S. 454 (1995). Which is completely predictable. The inquiry at that stage, after all, is whether the government has an employment-related interest in going however far it has gone—and in *Treasury Employees*, the government had indeed gone far. (The Court ultimately struck down the rule because it applied to speech in which the government had no identifiable managerial interest. See *id.,* at 470, 477.) Nothing in *Treasury Employees* suggests that the Court defers only to ad hoc actions, and not to general rules, about public employee speech. That would be a perverse regime, given the greater regularity of rulemaking and the lesser danger of its abuse. So I would wager a small fortune that the next time a general rule governing public employee speech comes before us, we will dust off *Pickering*.

Second, the majority's distinction between compelling and restricting speech also lacks force. The majority posits that compelling speech always works a greater injury, and so always requires a greater justification. See *ante,* at 8. But the only case the majority cites for that reading of our precedent is possibly (thankfully) the most exceptional in our First Amendment annals: It involved the state forcing children to swear an oath contrary to their religious beliefs. See *ibid.* (quoting *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943)). Regulations challenged as compelling expression do not usually look

anything like that—and for that reason, the standard First Amendment rule is that the "difference between compelled speech and compelled silence" is "without constitutional significance." *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 796 (1988); see *Wooley* v. *Maynard*, 430 U. S. 705, 714 (1977) (referring to "[t]he right to speak and the right to refrain from speaking" as "complementary components" of the First Amendment). And if anything, the First Amendment scales tip the opposite way when (as here) the government is not compelling actual speech, but instead compelling a subsidy that others will use for expression. See Brief for Eugene Volokh et al. as *Amici Curiae* 4–5 (offering many examples to show that the First Amendment "simply do[es] not guarantee that one's hard-earned dollars will never be spent on speech one disapproves of").[3] So when a government mandates a speech subsidy from a public employee—here, we might think of it as levying a tax to support collective bargaining—it should get at least as much deference as when it restricts the employee's speech. As this case shows, the former may advance a managerial interest as well as the latter—in which case the government's "freer hand" in dealing with its employees should apply with equal (if not greater) force. *NASA*, 562 U. S., at 148.

Third and finally, the majority errs in thinking that under the usual deferential approach, the government should lose this case. The majority mainly argues here

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[3] That's why this Court has blessed the constitutionality of compelled speech subsidies in a variety of cases beyond *Abood*, involving a variety of contexts beyond labor relations. The list includes mandatory fees imposed on state bar members (for professional expression); university students (for campus events); and fruit processors (for generic advertising). See *Keller* v. *State Bar of Cal.*, 496 U. S. 1, 14 (1990); *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217, 233 (2000); *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U. S. 457, 474 (1997); see also *infra*, at 20.

that, at *Pickering*'s first step, "union speech in collective bargaining" is a "matter of great public concern" because it "affect[s] how public money is spent" and addresses "other important matters" like teacher merit pay or tenure. *Ante,* at 27, 29 (internal quotation marks omitted). But to start, the majority misunderstands the threshold inquiry set out in *Pickering* and later cases. The question is not, as the majority seems to think, whether the public is, or should be, interested in a government employee's speech. Instead, the question is whether that speech is about and directed to the workplace—as contrasted with the broader public square. *Treasury Employees* offers the Court's fullest explanation. The Court held there that the government's policy prevented employees from speaking as "citizen[s]" on "matters of public concern." 513 U. S., at 466 (quoting *Pickering*, 391 U. S., at 568). Why? Because the speeches and articles "were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their Government employment." 513 U. S., at 466; see *id.,* at 465, 470 (repeating that analysis twice more). The Court could not have cared less whether the speech at issue was "important." *Ante,* at 29. It instead asked whether the speech was truly *of* the workplace—addressed *to* it, made *in* it, and (most of all) *about* it.

Consistent with that focus, speech about the terms and conditions of employment—the essential stuff of collective bargaining—has never survived *Pickering*'s first step. This Court has rejected all attempts by employees to make a "federal constitutional issue" out of basic "employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations." *Guarnieri*, 564 U. S., at 391; see *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr*, 518 U. S. 668, 675 (1996) (stating that public employees' "speech on merely private employment matters is unprotected"). For that reason, even the Jus-

tices who originally objected to *Abood* conceded that the use of agency fees for bargaining on "economic issues" like "salaries and pension benefits" would not raise significant First Amendment questions. 431 U. S., at 263, n. 16 (Powell, J., concurring in judgment). Of course, most of those issues have budgetary consequences: They "affect[ ] how public money is spent." *Ante,* at 29. And some raise important non-budgetary disputes; teacher merit pay is a good example, see *ante,* at 30. But arguing about the terms of employment is still arguing about the terms of employment: The workplace remains both the context and the subject matter of the expression. If all that speech really counted as "of public concern," as the majority suggests, the mass of public employees' complaints (about pay and benefits and workplace policy and such) *would* become "federal constitutional issue[s]." *Guarnieri*, 564 U. S., at 391. And contrary to decades' worth of precedent, government employers would then have far less control over their workforces than private employers do. See *supra,* at 9–11.

Consider an analogy, not involving union fees: Suppose a government entity disciplines a group of (non-unionized) employees for agitating for a better health plan at various inopportune times and places. The better health plan will of course drive up public spending; so according to the majority's analysis, the employees' speech satisfies *Pickering*'s "public concern" test. Or similarly, suppose a public employer penalizes a group of (non-unionized) teachers who protest merit pay in the school cafeteria. Once again, the majority's logic runs, the speech is of "public concern," so the employees have a plausible First Amendment claim. (And indeed, the majority appears to concede as much, by asserting that the results in these hypotheticals should turn on various "factual detail[s]" relevant to the interest balancing that occurs at the *Pickering* test's *second* step. *Ante,* at 32, n. 23.) But in fact, this Court has always

understood such cases to end at *Pickering*'s *first* step: If an employee's speech is about, in, and directed to the workplace, she has no "possibility of a First Amendment claim." *Garcetti*, 547 U. S., at 418; see *supra,* at 11. So take your pick. Either the majority is exposing government entities across the country to increased First Amendment litigation and liability—and thus preventing them from regulating their workforces as private employers could. Or else, when actual cases of this kind come around, we will discover that today's majority has crafted a "unions only" carve-out to our employee-speech law.

What's more, the government should prevail even if the speech involved in collective bargaining satisfies *Pickering*'s first part. Recall that the next question is whether the government has shown "an adequate justification for treating the employee differently from any other member of the general public." *Garcetti*, 547 U. S., at 418; *supra,* at 11. That inquiry is itself famously respectful of government interests. This Court has reversed the government only when it has tried to "leverage the employment relationship" to achieve an outcome unrelated to the workplace's "effective functioning." *Garcetti*, 547 U. S., at 419; *Rankin* v. *McPherson*, 483 U. S. 378, 388 (1987). Nothing like that is true here. As *Abood* described, many government entities have found agency fees the best way to ensure a stable and productive relationship with an exclusive bargaining agent. See 431 U. S., at 220–221, 224–226; *supra,* at 3–4. And here, Illinois and many governmental *amici* have explained again how agency fees advance their workplace goals. See Brief for State Respondents 12, 36; Brief for Governor Tom Wolf et al. as *Amici Curiae* 21–33. In no other employee-speech case has this Court dismissed such work-related interests, as the majority does here. See *supra,* at 6–9 (discussing the majority's refusal to engage with the logic of the State's position). Time and again, the Court has instead respected

and acceded to those interests—just as *Abood* did.

The key point about *Abood* is that it fit naturally with this Court's consistent teaching about the permissibility of regulating public employees' speech. The Court allows a government entity to regulate that expression in aid of managing its workforce to effectively provide public services. That is just what a government aims to do when it enforces a fair-share agreement. And so, the key point about today's decision is that it creates an unjustified hole in the law, applicable to union fees alone. This case is *sui generis* among those addressing public employee speech—and will almost surely remain so.

III

But the worse part of today's opinion is where the majority subverts all known principles of *stare decisis*. The majority makes plain, in the first 33 pages of its decision, that it believes *Abood* was wrong.[4] But even if that were true (which it is not), it is not enough. "Respecting *stare decisis* means sticking to some wrong decisions." *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. ___, ___ (2015) (slip op., at 7). Any departure from settled precedent (so the Court has often stated) demands a "special justification—over and above the belief that the precedent was wrongly decided." *Id.,* at ___ (slip op., at 8) (internal quotation marks omitted); see, *e.g., Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984). And the majority does not have anything close. To the contrary: all that is "special" in this case—especially the massive reliance interests at stake—demands retaining *Abood*, beyond even the normal precedent.

Consider first why these principles about precedent are so important. *Stare decisis*—"the idea that today's Court

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[4] And then, after ostensibly turning to *stare decisis*, the majority spends another four pages insisting that *Abood* was "not well reasoned," which is just more of the same. *Ante,* at 38; see *ante,* at 35–38.

should stand by yesterday's decisions"—is "a foundation stone of the rule of law." *Kimble,* 576 U. S., at ___ (slip op., at 7) (quoting *Michigan* v. *Bay Mills Indian Community*, 572 U. S. ___, ___ (2014) (slip op., at 15)). It "promotes the evenhanded, predictable, and consistent development" of legal doctrine. *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). It fosters respect for and reliance on judicial decisions. See *ibid.* And it "contributes to the actual and perceived integrity of the judicial process," *ibid.*, by ensuring that decisions are "founded in the law rather than in the proclivities of individuals," *Vasquez* v. *Hillery*, 474 U. S. 254, 265 (1986).

And *Abood* is not just any precedent: It is embedded in the law (not to mention, as I'll later address, in the world) in a way not many decisions are. Over four decades, this Court has cited *Abood* favorably many times, and has affirmed and applied its central distinction between the costs of collective bargaining (which the government can charge to all employees) and those of political activities (which it cannot). See, *e.g., Locke* v. *Karass*, 555 U. S. 207, 213–214 (2009); *Lehnert*, 500 U. S., at 519; *Teachers* v. *Hudson*, 475 U. S. 292, 301–302 (1986); *Ellis* v. *Railway Clerks*, 466 U. S. 435, 455–457 (1984). Reviewing those decisions not a decade ago, this Court—unanimously—called the *Abood* rule "a general First Amendment principle." *Locke*, 555 U. S., at 213. And indeed, the Court has relied on that rule when deciding cases involving compelled speech subsidies outside the labor sphere—cases today's decision does not question. See, *e.g., Keller* v. *State Bar of Cal.*, 496 U. S. 1, 9–17 (1990) (state bar fees); *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217, 230–232 (2000) (public university student fees); *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U. S. 457, 471–473 (1997) (commercial advertising assessments); see also n. 3, *supra*.

Ignoring our repeated validation of *Abood*, the majority

claims it has become "an outlier among our First Amendment cases." *Ante,* at 42. That claim fails most spectacularly for reasons already discussed: *Abood* coheres with the *Pickering* approach to reviewing regulation of public employees' speech. See *supra,* at 11–13. Needing to stretch further, the majority suggests that *Abood* conflicts with "our political patronage decisions." *Ante,* at 44. But in fact those decisions strike a balance much like *Abood*'s. On the one hand, the Court has enabled governments to compel policymakers to support a political party, because that requirement (like fees for collective bargaining) can reasonably be thought to advance the interest in workplace effectiveness. See *Elrod* v. *Burns*, 427 U. S. 347, 366–367 (1976); *Branti* v. *Finkel*, 445 U. S. 507, 517 (1980). On the other hand, the Court has barred governments from extending that rule to non-policymaking employees because that application (like fees for political campaigns) can't be thought to promote that interest, see *Elrod,* 427 U. S., at 366; the government is instead trying to "leverage the employment relationship" to achieve other goals, *Garcetti*, 547 U. S., at 419. So all that the majority has left is *Knox* and *Harris*. See *ante,* at 43. Dicta in those recent decisions indeed began the assault on *Abood* that has culminated today. But neither actually addressed the extent to which a public employer may regulate its own employees' speech. Relying on them is bootstrapping—and mocking *stare decisis*. Don't like a decision? Just throw some gratuitous criticisms into a couple of opinions and a few years later point to them as "special justifications."

The majority is likewise wrong to invoke "workability" as a reason for overruling *Abood*. *Ante,* at 38. Does *Abood* require drawing a line? Yes, between a union's collective-bargaining activities and its political activities. Is that line perfectly and pristinely "precis[e]," as the majority demands? *Ante,* at 38. Well, not quite that—but as exer-

cises of constitutional linedrawing go, *Abood* stands well above average. In the 40 years since *Abood*, this Court has had to resolve only a handful of cases raising questions about the distinction. To my knowledge, the circuit courts are not divided on any classification issue; neither are they issuing distress signals of the kind that sometimes prompt the Court to reverse a decision. See, *e.g., Johnson* v. *United States,* 576 U. S. ___ (2015) (overruling precedent because of frequent splits and mass confusion). And that tranquility is unsurprising: There may be some gray areas (there always are), but in the mine run of cases, everyone knows the difference between politicking and collective bargaining. The majority cites some disagreement in two of the classification cases this Court decided—as if non-unanimity among Justices were something startling. And it notes that a dissenter in one of those cases called the Court's approach "malleable" and "not principled," *ante,* at 39—as though those weren't stock terms in dissenting vocabulary. See, *e.g., Murr* v. *Wisconsin*, 582 U. S. ___, ___ (2017) (ROBERTS, C. J., dissenting) (slip op., at 2); *Dietz* v. *Bouldin*, 579 U. S. ___, ___ (2016) (THOMAS, J., dissenting) (slip op., at 1); *Alabama Legislative Black Caucus* v. *Alabama*, 575 U. S. ___, ___ (2015) (slip op., at 13) (SCALIA, J., dissenting). As I wrote in *Harris* a few Terms ago: "If the kind of hand-wringing about blurry lines that the majority offers were enough to justify breaking with precedent, we might have to discard whole volumes of the U. S. Reports." 573 U. S., at ___ (slip op., at 15).

And in any event, one *stare decisis* factor—reliance—dominates all others here and demands keeping *Abood*. *Stare decisis*, this Court has held, "has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision." *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197, 202 (1991). That is because overruling a

decision would then "require an extensive legislative response" or "dislodge settled rights and expectations." *Ibid.* Both will happen here: The Court today wreaks havoc on entrenched legislative and contractual arrangements.

Over 20 States have by now enacted statutes authorizing fair-share provisions. To be precise, 22 States, the District of Columbia, and Puerto Rico—plus another two States for police and firefighter unions. Many of those States have multiple statutory provisions, with variations for different categories of public employees. See, *e.g.,* Brief for State of California as *Amicus Curiae* 24–25. Every one of them will now need to come up with new ways—elaborated in new statutes—to structure relations between government employers and their workers. The majority responds, in a footnote no less, that this is of no proper concern to the Court. See *ante,* at 47, n. 27. But in fact, we have weighed heavily against "abandon[ing] our settled jurisprudence" that "[s]tate legislatures have relied upon" it and would have to "reexamine [and amend] their statutes" if it were overruled. *Allied-Signal, Inc.* v. *Director, Div. of Taxation*, 504 U. S. 768, 785 (1992); *Hilton*, 502 U. S., at 203.

Still more, thousands of current contracts covering millions of workers provide for agency fees. Usually, this Court recognizes that "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights." *Payne*, 501 U. S., at 828. Not today. The majority undoes bargains reached all over the country.[5] It prevents the parties from fulfilling other commitments they have made based on those agreements. It forces the

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[5] Indeed, some agency-fee provisions, if canceled, could bring down entire contracts because they lack severability clauses. See *ante,* at 46 (noting that unions could have negotiated for that result); Brief for Governor Tom Wolf et al. as *Amici Curiae* 11.

parties—immediately—to renegotiate once-settled terms and create new tradeoffs. It does so knowing that many of the parties will have to revise (or redo) multiple contracts simultaneously. (New York City, for example, has agreed to agency fees in 144 contracts with 97 public-sector unions. See Brief for New York City Municipal Labor Committee as *Amicus Curiae* 4.) It does so knowing that those renegotiations will occur in an environment of legal uncertainty, as state governments scramble to enact new labor legislation. See *supra,* at 23. It does so with no real clue of what will happen next—of how its action will alter public-sector labor relations. It does so even though the government services affected—policing, firefighting, teaching, transportation, sanitation (and more)—affect the quality of life of tens of millions of Americans.

The majority asserts that no one should care much because the canceled agreements are "of rather short duration" and would "expire on their own in a few years' time." *Ante,* at 45, 46. But to begin with, that response ignores the substantial time and effort that state legislatures will have to devote to revamping their statutory schemes. See *supra,* at 23. And anyway, it misunderstands the nature of contract negotiations when the parties have a continuing relationship. The parties, in renewing an old collective-bargaining agreement, don't start on an empty page. Instead, various "long-settled" terms—like fair-share provisions—are taken as a given. Brief for Governor Tom Wolf et al. 11; see Brief for New York City Sergeants Benevolent Assn. as *Amicus Curiae* 18. So the majority's ruling does more than advance by a few years a future renegotiation (though even that would be significant). In most cases, it commands new bargaining over how to replace a term that the parties never expected to change. And not just new bargaining; given the interests at stake, complicated and possibly contentious bargaining

as well. See Brief for Governor Tom Wolf et al. 11.[6]

The majority, though, offers another reason for not worrying about reliance: The parties, it says, "have been on notice for years regarding this Court's misgivings about *Abood*." *Ante,* at 45. Here, the majority proudly lays claim to its 6-year crusade to ban agency fees. In *Knox*, the majority relates, it described *Abood* as an "anomaly." *Ante,* at 45 (quoting 567 U. S., at 311). Then, in *Harris*, it "cataloged *Abood*'s many weaknesses." *Ante,* at 45. Finally, in *Friedrichs*, "we granted a petition for certiorari asking us to" reverse *Abood*, but found ourselves equally divided. *Ante,* at 45. "During this period of time," the majority concludes, public-sector unions "must have understood that the constitutionality of [an agency-fee] provision was uncertain." *Ibid*. And so, says the majority, they should have structured their affairs accordingly.

But that argument reflects a radically wrong understanding of how *stare decisis* operates. Justice Scalia once confronted a similar argument for "disregard[ing] reliance interests" and showed how antithetical it was to rule-of-law principles. *Quill Corp.* v. *North Dakota*, 504 U. S. 298, 320 (1992) (concurring opinion). He noted first what we always tell lower courts: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [they] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.,*

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[6] In a single, cryptic sentence, the majority also claims that arguments about reliance "based on [*Abood*'s] clarity are misplaced" because *Abood* did not provide a "clear or easily applicable standard" to separate fees for collective bargaining from those for political activities. *Ante,* at 45. But to begin, the standard for separating those activities was clear and workable, as I have already shown. See *supra,* at 21–22. And in any event, the reliance *Abood* engendered was based not on the clarity of that line, but on the clarity of its holding that governments and unions could generally agree to fair-share arrangements.

at 321 (quoting *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989); some alterations omitted). That instruction, Justice Scalia explained, was "incompatible" with an expectation that "private parties anticipate our overrulings." 406 U. S., at 320. He concluded: "[R]eliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance." *Ibid.* *Abood*'s holding was square. It was unabandoned before today. It was, in other words, the law—however much some were working overtime to make it not. Parties, both unions and governments, were thus justified in relying on it. And they did rely, to an extent rare among our decisions. To dismiss the overthrowing of their settled expectations as entailing no more than some "adjustments" and "unpleasant transition costs," *ante,* at 47, is to trivialize *stare decisis.*

IV

There is no sugarcoating today's opinion. The majority overthrows a decision entrenched in this Nation's law—and in its economic life—for over 40 years. As a result, it prevents the American people, acting through their state and local officials, from making important choices about workplace governance. And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.

Departures from *stare decisis* are supposed to be "exceptional action[s]" demanding "special justification," *Rumsey*, 467 U. S., at 212—but the majority offers nothing like that here. In contrast to the vigor of its attack on *Abood*, the majority's discussion of *stare decisis* barely limps to the finish line. And no wonder: The standard factors this Court considers when deciding to overrule a decision all cut one way. *Abood*'s legal underpinnings have not eroded over time: *Abood* is now, as it was when issued, consistent

with this Court's First Amendment law. *Abood* provided a workable standard for courts to apply. And *Abood* has generated enormous reliance interests. The majority has overruled *Abood* for no exceptional or special reason, but because it never liked the decision. It has overruled *Abood* because it wanted to.

Because, that is, it wanted to pick the winning side in what should be—and until now, has been—an energetic policy debate. Some state and local governments (and the constituents they serve) think that stable unions promote healthy labor relations and thereby improve the provision of services to the public. Other state and local governments (and their constituents) think, to the contrary, that strong unions impose excessive costs and impair those services. Americans have debated the pros and cons for many decades—in large part, by deciding whether to use fair-share arrangements. Yesterday, 22 States were on one side, 28 on the other (ignoring a couple of in-betweeners). Today, that healthy—that democratic—debate ends. The majority has adjudged who should prevail. Indeed, the majority is bursting with pride over what it has accomplished: Now those 22 States, it crows, "can follow the model of the federal government and 28 other States." *Ante,* at 47, n. 27.

And maybe most alarming, the majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy. Today is not the first time the Court has wielded the First Amendment in such an aggressive way. See, *e.g., National Institute of Family and Life Advocates* v. *Becerra, ante,* p. ___ (invalidating a law requiring medical and counseling facilities to provide relevant information to users); *Sorrell* v. *IMS Health Inc.,* 564 U. S. 552 (2011) (striking down a law that restricted pharmacies from selling various data). And it threatens not to be the last. Speech is everywhere—a part of every human activity

(employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech. So the majority's road runs long. And at every stop are black-robed rulers overriding citizens' choices. The First Amendment was meant for better things. It was meant not to undermine but to protect democratic governance—including over the role of public-sector unions.

No. 16-1466

IN THE

Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, *et al.*,

Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The City of New York submits this brief *amicus curiae* to describe how, decades ago, it came to embrace agency fees. This historical perspective will illuminate a key backdrop to *Abood v. Detroit Board of Education*, as well as the City's powerful interest, on behalf of all its residents, in the Court's preserving that decision now.

The story centers on a series of paralyzing public-sector strikes in the 1960s and 1970s that wreaked havoc on millions of City residents, including union members and their families but hardly limited to them. Garbage piled in streets, children missed weeks of school, and subways ground to a halt.

When a ban on strikes paired with collective bargaining and automatic dues collection proved an ineffectual response to the crisis, the City and State turned to agency shop agreements as part of a broader labor management strategy designed to promote labor stability. The City's collective bargaining system flourished thereafter, and its success has helped protect public health and safety ever since.

Over the decades, the reliable funding provided by agency fees has enabled the City's public-sector unions to pursue informed bargaining strategies that benefit the workforce broadly, rather than short-term or confrontational approaches designed to serve only the interests of those most willing to pay union dues. Effective collective bargaining

regimes are time- and resource-intensive, and must protect all represented employees, whether active or inactive, member or nonmember. Financial stability helps empower unions to build long-lasting and constructive bargaining relationships with the City, improving the provision of public services to the benefit of all residents. Indeed, disagreements between the City and its unions now rarely result in the sort of public disruption that plagued New Yorkers before agency fees were used.

Agency fees remain critically important. The City retains over 380,000 workers—more than all but five private employers in the country—and nearly all of those workers are currently represented by a union. It ranks first nationwide in the number of unionized workers it manages. And unionized public-sector workers are responsible for a wide range of services essential to the operation of the nation's densest and most populous city.

Overruling *Abood* would strip jurisdictions like New York City of a vital tool that has for years promoted productive relationships with public workforces. History shows that millions of everyday New Yorkers, including the City's public employees, would ultimately shoulder the cost of any resulting discord. That is a risk that should not be revived.

SUMMARY OF THE ARGUMENT

Under traditional collective bargaining schemes, employees have the right to select a union by majority vote to serve as their exclusive representative in negotiations. Agency shop provisions permit the selected union to charge employees who decline to join it a fee to defray the cost of its non-political activities that benefit the entirety of the workforce it represents. Forty years ago, this Court upheld the constitutionality of the public-sector agency shop in *Abood v. Detroit Board of Education*.[1] Relying on *Abood*, jurisdictions across the nation have legalized and negotiated the collection of agency fees to support public-sector collective bargaining.

New York City agrees with respondents that agency fees do not run afoul of the First Amendment, and that *Abood's* decades-old precedent should be preserved. In support of these contentions, the City submits this brief to highlight two points which illustrate why agency fees are central to many public labor management schemes, and the strength of the government interest—as employer and protector of public welfare—in permitting their collection.

First, as the City's history demonstrates, agency fees are a key means of protecting the public from the disruption of government services caused by

[1] 431 U.S. 209 (1977).

labor disputes. The City embraced the agency shop as part of a comprehensive labor management system at a time when existing collective bargaining policy proved insufficient to yield a reliable alternative to strikes. The change helped to stabilize labor relations for the benefit of all City residents, not just the City's workers.

Second, and relatedly, the City's experience rebuts petitioner's crabbed portrayal of the government interest in agency fees. The collaborative benefits of strong bargaining relationships aside, Petitioner ignores the massive public harm that can arise from the disruption of public services, especially in large, densely populated cities like New York City. Given this threat, tools that reduce the risk of public-sector strikes—like agency fees—serve a compelling government interest that far exceeds mere administrative convenience. While different jurisdictions may reasonably find different labor management strategies better suited for their particular circumstances, *Abood* wisely left those choices to the political process.

ARGUMENT

I. The City authorized agency fees in response to a series of devastating strikes that caused massive public harm.

The City has found it essential public policy both to pursue collective bargaining with public-sector unions and to promote its effectiveness. Successful negotiations not only advance the welfare of wage-earners and their families, but more broadly serve the public's strong interest in prompt and successful resolution of labor disputes. In plain terms, the City's residents suffer when vital public services are interrupted by strikes.

The City had this consideration specifically in mind when it pushed for agency fees as part of a comprehensive program—based on successful private-sector models—that would protect the public from the catastrophic harm of public-sector strikes. The fees served to buttress the existing labor relations framework at a time when collective bargaining and union exclusivity alone proved inadequate to yield a sufficiently stable and robust alternative to strikes.

Certainly, no labor relations system is perfect. Nor can the impact of any of its components be measured in isolation. But it is undeniable that collective bargaining paired with agency fees has proven to be a successful formula for promoting labor peace in New York City (and across New York State).

A. The City's early adoption of public-sector collective bargaining proved insufficient to prevent labor disruption.

Congress protected private-sector workers' right to organize and bargain in the 1935 National Labor Relations Act.[2] For decades thereafter, however, no similar system existed for public-sector workers. Instead, many states, including New York, attempted to minimize the damage of public-sector labor disputes by simply banning government workers from striking and imposing harsh fines on violators.[3]

But banning strikes proved ineffective absent a mechanism to address and remedy the root causes of labor unrest.[4] In response, the City pioneered collective bargaining as a means of promoting the fair resolution of public-sector labor disputes such that employees would not feel compelled to walk out on the job.

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[2] *See* National Labor Relations Act, ch. 372, § 7, 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C § 157 (2012)).

[3] *See* Condon-Wadlin Act, ch. 391, 1947 N.Y. Laws 256 (repealed 1967); *see also* Terry O'Neil & E.J. McMahon, Empire Ctr., SR4-07, *Taylor Made: The Cost and Consequences of New York's Public-Sector Labor Laws* 3 (2007), available at http://www.empirecenter.org/wp-content/uploads/2013/06/Taylor-Made.pdf.

[4] O'Neil & McMahon, *supra* note 3, at 3 (noting Condon-Wadlin's "mixed effectiveness" and that it ultimately was deemed "flawed and unenforceable").

In 1958, Mayor Robert F. Wagner issued an executive order authorizing collective bargaining through public-sector labor unions for certain groups of City workers.[5] The order recognized that "labor disputes between the City and its employees [would] be minimized, and that effective operation of the City's affairs in the public interest [would] be safeguarded, by permitting employees to participate … through their freely chosen representatives in the determination of the terms and conditions of their employment."[6] It positioned the City as "one of the first jurisdictions in the nation to adopt an essentially private sector model for municipal labor relations."[7] Similar rights would not be granted to any State workers until 1959,[8] to federal public employees until 1962,[9] or to New York State public employees until 1967.[10]

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[5] *See* Ronald Donovan, *Administering the Taylor Law: Public Employee Relations in New York* 14 (1990) (describing the Executive Order); O'Neil & McMahon, *supra* note 3, at 4.

[6] Exec. Order (Mayor Wagner) No. 49 § 2 (1958).

[7] Michael Marmo, *More Profile than Courage: The New York City Transit Strike of 1966*, at 72 (1990).

[8] Donovan, *supra* note 5, at v; Steven Greenhouse, *The Wisconsin Legacy*, N.Y. Times, Feb. 23, 2014, at BU1.

[9] Exec. Order No. 10,988, 3 C.F.R. 321 (1959–1963).

[10] *See* Public Employees' Fair Employment Act (Taylor Law), ch. 392, §§ 202–03, 1967 N.Y. Sess. Laws 393, 396 (McKinney)

Without agency fees, the right to collectively bargain, even when paired with an outright ban on public-sector strikes, failed to prevent destructive labor disputes. New York City was the epicenter of a series of strikes from the mid-1960s through the early 1970s. State officials considered the City to be the poster child for the failure of then-existing law to "protect vital public interests."[11] The effect on ordinary New Yorkers, including union members, was profound.

The wave of public-sector strikes began in 1965, when eight thousand welfare workers held a twenty-eight-day work stoppage, closing two-thirds of the City's welfare centers.[12] It disrupted vital services for half a million welfare recipients, many of them children or seniors.[13]

(codified as amended at N.Y. Civ. Serv. Law §§ 202–03 (2015)); *see also* O'Neil & McMahon, *supra* note 3, at 6.

[11] Letter from Governor's Comm. on Pub. Emp. Relations to Governor Nelson A. Rockefeller 10 (Jan. 23, 1969) (on file with the New York City Law Department).

[12] *See* Joshua B. Freeman, *Working-Class New York: Life and Labor Since World War II* 205 (2000); O'Neil & McMahon, *supra* note 3, at 3.

[13] Emanuel Perlmutter, *Welfare Help in a City Curbed by a Walkout*, N.Y. Times, Jan. 5, 1965, at 1, 21; Emanuel Perlmutter*, Welfare Strike Due in City Today in Spite of Writ*, N.Y. Times, Jan. 4, 1965, at 1, 25.

Then, on the following New Year's Day, transit workers began a twelve-day strike—which persisted despite a court injunction—that cost the City's economy nearly $9 billion in today's dollars.[14] The strike effectively shut down the subway and bus system, overwhelming railroads, producing historic traffic jams, and closing public schools. This led the mayor to devise "the most urgent civil defense plan New York City has ever had to improvise for its own health and safety."[15] The New York Times captured the scene: "Seldom in its history has New York City been through more difficult days, … and not since the draft riots of the Civil War has the normal course of life in [the] city been more profoundly altered for so many days."[16]

In the aftermath of this vast turmoil, the City and State governments each made it a priority to promote the resolution of labor disputes through an

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[14] Donovan, *supra* note 5, at 19; Freeman, *supra* note 12, at 211; Marmo, *supra* note 7, at 151; O'Neil & McMahon, *supra* note 10, at 4; *see also News Summary and Index: The Major Events of the Day: Transit Strike*, N.Y. Times, Jan. 5, 1966, at 33; *$100-Million Loss Each Day Is Seen*, N.Y. Times, Jan. 5, 1966, at 1, 16

[15] Editorial, *The Big Crush*, N.Y. Times, Jan. 3, 1966, at 26; Homer Bigart, *New Talks Today: Quill Scores Mayor—Says Walkout Could Last for a Month*, N.Y. Times, Jan. 2, 1966, at 1, 58; *Strict Rules Set on Travel into the City During Strike*, N.Y. Times, Jan. 1, 1966, at 1, 6.

[16] Editorial, *This Beleaguered City*, N.Y. Times, Jan. 12, 1966, at 20.

effective bargaining system. In 1967, based largely on the City's recent experience, New York State enacted the Taylor Law to "protect[] the public against the disruption of vital public services …, while at the same time protecting the rights of public employees."[17] The law created a new comprehensive scheme for public-sector labor relations to address the root causes of labor unrest. It paired the State's prohibition on public employee strikes with an overarching process for collective bargaining, including an automatic deduction of union dues from paychecks (or "dues check-off"). The law also established a "new administrative agency charged exclusively with the regulation of public sector labor relations."[18]

Relying on a Taylor Law provision permitting local flexibility and experimentation, the City enacted its own Collective Bargaining Law, creating an Office of Collective Bargaining to

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[17] Governor's Comm. on Pub. Emp. Relations, *Final Report* 9 (1966) (internal quotation marks omitted) (on file with the New York City Law Department); *see also* Public Employees' Fair Employment Act (Taylor Law), ch. 392, § 200, 1967 N.Y. Sess. Laws 393, 394 (McKinney) (codified as amended at N.Y. Civ. Serv. Law § 200 (2015)) (describing its purpose as "to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government").

[18] Donovan, *supra* note 5, at v; O'Neil & McMahon, *supra* note 3, at 6.

"effectuat[e] sound labor relations and collective bargaining between public employers and institutions in the city and their employees."[19] The legislation took effect on the same day as the Taylor Law.[20]

While a positive step, the new collective-bargaining laws, without agency shop provisions, failed to solve the problem of labor unrest. Instead, disagreements between the City and public-sector workers continued to impose enormous financial costs and public harm:

- In February 1968, a sanitation strike left the streets piled with nearly 100,000 tons of refuse—enough to fill the Titanic twice.[21] This led to a proliferation of trash fires and the City's first general health emergency since a 1931 polio epidemic.[22] The New York Times likened the City to "a vast slum" as "mounds of refuse grew

[19] Local Law No. 53 (1967) of City of New York.

[20] John V. Lindsay, City of N.Y., *Report Submitted Pursuant to Chapter 24, Laws of 1969, Designed to Bring New York City's Labor Relations Practices into Substantial Equivalence with the Public Employees' Fair Employment Act* 7 (1969) (on file with the New York City Law Department).

[21] *See Fragrant Days in Fun City*, Time, Feb. 16, 1968, at 23; Tad Fitch, J. Kent Layton & Bill Wormstedt, *On a Sea of Glass: The Life and Loss of the RMS Titanic*, at App. A (2013).

[22] *See Fragrant Days in Fun City*, *supra* note 21, at 23.

higher and strong winds whirled the filth through the streets."[23]

- Later in 1968, three teacher walkouts caused more than a million children to miss thirty-six days of school.[24] The City's poorest children were hardest hit: 240,000 kids went without their free daily lunches.[25] Some parents fashioned improvised classrooms in churches and storefronts, while others resorted to smashing doors and windows to open their children's schools.[26]

- In January 1971, the City's police force held an unscheduled walkout (or "wildcat strike"). For six days, less than a sixth of the City's patrolmen reported for work.[27]

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[23] Emanuel Perlmutter, *Shots Are Fired in Refuse Strike; Filth Litters City*, N.Y. Times, Feb. 5, 1968, at 1, 37.

[24] *See* Leonard Buder, *Strike Cripples Schools, No Settlement in Sight*, N.Y. Times, Oct. 15, 1968, at 1, 38; *Strike's Bitter End*, Time, Nov. 29, 1968, at 89.

[25] *See Strike's Bitter End*, *supra* note 24, at 89.

[26] Leonard Buder, *Parents Smash Windows, Doors to Open Schools*, N.Y. Times, Oct. 19, 1968, at 1, 26; *Strike's Bitter End*, *supra* note 24, at 89.

[27] Jeffrey A. Kroessler, *New York Year By Year: A Chronology of the Great Metropolis* 309 (2002); *The Police Strike in New York*, Chi. Trib., Jan. 21, 1971, at 20; Richard Reeves, *Police:*

> The Chicago Tribune described a city "nakedly exposed to the threat of criminality on a massive scale."[28]

The continued turmoil made abundantly clear that more had to be done to forge an effective system of collective bargaining that would serve, consistently and in the long term, as a bulwark against public-sector strikes.

B. The City's use of agency shop provisions ultimately fortified a successful collective bargaining system.

It was at this pivotal time that New York City looked to agency shop provisions to help create effective and stable collective bargaining and stem labor unrest. In 1969, the City's Mayor urged the State Legislature to adopt "the agency shop, a recognized form of union security," as a means of promoting both "labor harmony and responsibility."[29]

'Attention Must Be Paid!' Say the Men on Strike, N.Y. Times, Jan. 17, 1971, at E1.

[28] *The Police Strike in New York*, *supra* note 27, at 20.

[29] John V. Lindsay, City of N.Y., *Report and Plan Submitted Pursuant to Chapter 24, Laws of 1969, Designed to Bring New York City's Labor Relations Practices into Substantial Equivalence with the Public Employees' Fair Employment Act* 9-10 (1969) (on file with the New York City Law Department). The City pursued agency shop arrangements that same year.

Three years later, in 1972, the City explicitly amended its own Collective Bargaining Law to permit the negotiation of agency shop arrangements to the full extent permitted by state law.[30] Only a few years after that, and against the backdrop of repeated disruption of public services in New York and other cities, this Court decided *Abood*. The stakes would have been clear to any newspaper reader of the time—and could not have been lost on the Court.

After *Abood* resolved the constitutionality of agency fees in the public sector, New York State moved quickly to amend the Taylor Law to require state employees to pay agency fees and to designate them a mandatory subject of negotiation at the local level.[31] The Legislature explicitly relied on

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[30] *See* Local Law No. 1 (1972) of City of New York § 10; *see also* Presentation by the Majority Leader, Thomas J. Cuite 4, *reprinted in* New York Legislative Service, NYLS' New York City Legislative History: 1972 Local Law #1 (2010) at unnumbered 221. In *Bauch v. New York*, the Court of Appeals acknowledged that "[t]he maintenance of stability in the relations between the city and employee organizations, as well as the avoidance of devastating work stoppages, are major responsibilities of the city administration." 21 N.Y.2d 599, 607 (1968). The City interpreted agency shop arrangements as "further[ing] these objectives." *Id.*

[31] *See* Act of Aug. 3, 1977, ch. 677, § 3, 1977 N.Y. Sess. Law 1081, 1082 (McKinney); *see also* O'Neil & McMahon, *supra* note 3, at 24 n.17. In 1992, the State amended the Taylor Law to require agency shop arrangements for all public employees.

Abood; a full copy of the decision was included in the bill's official legislative history.[32]

The City strongly supported the amendment, urging the State Legislature that agency fees "generate a more stable and responsible labor relation atmosphere at the bargaining table" by providing unions with the organizational security necessary to resist "divisive elements"—those within and without their ranks who undermine meaningful negotiation—and thereby deterring strikes.[33] When the amendment passed, the Mayor directed city agencies to implement agreements with agency fees "expeditiously."[34]

Within only a few years of state-wide implementation of agency shop provisions, the rate of strikes plummeted by well over 90% across all of

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See Act of July 24, 1992, ch. 606, § 2, 1992 N.Y. Sess. Laws 1650, 1650 (McKinney); *see also* O'Neil & McMahon, *supra* note 3, at 24 n.17.

[32] *See* Bill Jacket for Act of Aug. 3, 1977, ch. 677.

[33] Richard L. Rubin, Memorandum in Support (July 29, 1977), *reprinted in* Bill Jacket for Act of Aug. 3, 1977, ch. 677; *see also* Memorandum from Donald H. Wollett, N.Y. State Office of Emp. Relations, to Judah Gribetz, Counsel to the Governor (July 29, 1977), *reprinted in* Bill Jacket for Act of Aug. 3, 1977, ch. 677 (noting that agency shop arrangements "provide[] to employee organizations the organizational security necessary for responsible collective bargaining").

[34] Admin. Order (Mayor Beame) No. 38 (1977) (on file with the New York City Law Department).

New York State—a dramatic improvement in cooperation between labor and government.[35] As a result, "the last quarter-century has been an era of labor tranquility in … state and local government throughout New York."[36] Both workers and the general public have benefitted.

While the precise explanation for the reduction in strikes may be complex, government employers like New York City have good reason to conclude that agency shop provisions remain a cornerstone of successful strategies for promoting labor peace. Armed with a stable source of funding, public-sector unions have used collaborative approaches and adopted long-term perspectives in resolving labor disputes, rather than seeing strikes or other confrontational tactics as their only or best option. Agency fees also temper the influence of extreme elements and curb incentives for labor leaders to play up disputes or management intransigence as a means of attracting members.[37] A return to the

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[35] In the 15 years after the first Taylor Law came into effect (1967–1982), there were, on average, about 20 public-sector strikes per year in New York State. *See* O'Neil & McMahon, *supra* note 3, at 10. By contrast, between 1983 and 2006, there were, on average, less than two per year. *Id.*

[36] *Id.*

[37] This mechanism is further explained in the brief of Amici Curiae Los Angeles County's Department of Health Services, NYC Health + Hospitals, and Service Employees International Union.

failed labor regime of the past risks a serious regression which, as the City's history illustrates, would come at great cost to the public at large.

II. Petitioner and amici ignore the compelling public interest of New York City and other jurisdictions in avoiding disruption of essential public services.

The history of New York City's collective bargaining system demonstrates that petitioner and his amici frame the government interest in agency fees far too narrowly. In posing the relevant First Amendment question, petitioner mischaracterizes the pursuit of "labor peace" under *Abood* as an interest in the mere administrative convenience of "bargaining with exclusive representatives."[38] Indeed, petitioner's brief does not even mention strikes or other work stoppages, when agency fees, as a matter of historical fact, were meant to help prevent them.[39]

This amnesia about the origin and purpose of agency fees leads petitioner and his amici to overlook the substantial risk of injury to the public

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[38] *See* Brief for the Petitioner at 61, *see also id.* at 53–60.

[39] *See generally Brief Amici Curiae of Los Angeles County's Department of Health Services, NYC Health + Hospitals, And Service Employees International Union Supporting Respondents.*

as a whole that can be posed by unsuccessful public-sector labor negotiations.[40] But these devastating strikes prompted the City and State to first embrace agency fees. When petitioner and his amici reduce this interest to mere "rational basis justification[s]" like limiting bargaining partners and avoiding confusion,[41] they erase decades of history and ignore hardships endured by millions of City residents.

New York City's experience also refutes petitioner's assumption that the governmental interest in labor peace is uniform nationwide. We are a nation of many different governments—federal, state, and local—all with widely varying circumstances, histories, and needs that in turn may warrant different labor relations strategies.[42]

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[40] Similarly, when petitioner limits the advantages of "collectivization" to securing greater benefits for public-sector employees, he turns a blind eye to the broader public benefit that is confirmed by history, at least for some jurisdictions. *Id.* at 58–59.

[41] *Id.* at 56; *see also id.* at 57–59.

[42] This point shows the fallacy of the blunt comparison offered by Amicus Curiae Freedom Foundation and Economists between states with so-called "right-to-work" laws and those without them. That analysis fails to control for numerous relevant variables, and it cannot measure the impact of agency fees in any particular jurisdiction or predict the consequences of stripping them now. *See* Brief of the Freedom Foundation and Economists as Amicus Curiae in Support of the Petitioners at 6. As New York City's experience

A constitutional rule that mandates a single answer to the agency shop question—the practical result of overruling *Abood*—is simply not workable.

A. The City's circumstances render labor peace a particularly compelling interest here.

In New York City, the disruption of public services presents an untenable risk due to the City's size, density, and diversity. It packs more than eight-and-a-half million residents into its tiny geography[43]—outranking forty states[44] and standing as the nation's most densely populated major city.[45] It also hosts 600,000 commuters each

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illustrates, the unique challenges faced by some government employers, and the nature of the workforces they manage, render agency fees an essential tool, even if they are not uniformly necessary, or even sensible, nationwide.

[43] *See Annual Estimates of the Resident Population for Incorporated Places of 50,000 or More, Ranked by July 1, 2016 Population*: *April 1, 2010 to July 1, 2016*, U.S. Census Bureau (2017), https://factfinder.census.gov/bkmk/table/1.0/en/PEP/2016/PEPANNRSIP.US12A.

[44] *Population Facts*, N.Y.C. Dep't of Planning, http://www.nyc.gov/html/dcp/html/census/pop_facts.shtml (last visited Dec. 6, 2017).

[45] Mike Maciag, *Mapping the Nation's Most Densely Populated Cities*, Governing (Oct. 2, 2013), http://www.governing.com/blogs/by-the-numbers/most-densely-populated-cities-data-map.html.

weekday,[46] joined by over 60 million tourists each year.[47]

Core governmental services loom large for the City's residents and visitors alike, leaving them especially vulnerable to labor disruption. For example:

- Public transportation is essential (less than 45 percent of City households own a car).[48] Mass transit provides nearly nine million rides every weekday, bringing employees and customers to thousands of businesses.[49]

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[46] Sam Roberts, *Commuters Nearly Double Manhattan's Daytime Population, Census Says*, N.Y. Times: City Room (June 3, 2013, 11:56 AM), http://cityroom.blogs.nytimes.com/2013/06/03/commuters-nearly-double-manhattans-daytime-population-census-says/.

[47] Press Release, City of N.Y., *Mayor de Blasio Announces Total NYC Visitors Surpasses 60 Million for First Time* (Dec. 19, 2016), http://www1.nyc.gov/office-of-the-mayor/news/963-16/mayor-de-blasio-total-nyc-visitors-surpasses-60-million-first-time.

[48] *See Physical Housing Characteristics for Occupied Housing Units: 2011-2015 American Community Survey 5-Year Estimates*, U.S. Census Bureau (2017), https://factfinder.census.gov/bkmk/table/1.0/en/ACS/15_5YR/S2504/1600000US3651000.

[49] *The MTA Network*, Metro. Transp. Auth., http://web.mta.info/mta/network.htm (last visited Dec. 6, 2017).

- Garbage collection is critical for public health in the City's incredibly dense environment. The volume of residents, visitors, and businesses in the City produces over 21,000 tons of waste every day—which the City employs a small army of sanitation workers to collect.[50] Without them, trash would quickly pile in the streets—as it did in 1968.

- The City runs the largest fire and police departments in the country.[51] It also operates the biggest single-district public school system,[52] employing over 90,000 educators who teach a million public school students each day.[53] The

[50] *About DSNY*, N.Y.C. Dep't of Sanitation, http://www1.nyc.gov/assets/dsny/about/inside-dsny.shtml (last visited Dec. 6, 2017).

[51] Brian A. Reaves, U.S. Dep't of Justice, Bureau of Justice Statistics, *Local Police Departments, 2013: Personnel, Policies, and Practices* 3 (2015), *available at* http://www.bjs.gov/content/pub/pdf/lpd13ppp.pdf; *Overview*, N.Y.C. Fire Dep't, https://www1.nyc.gov/site/fdny/about/overview/overview.page (last visited Dec. 11, 2017).

[52] *Enrollment, Poverty, and Federal Funds for the 100 Largest School Districts, by Enrollment Size in 2012*, U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics (2015), https://nces.ed.gov/programs/digest/d14/tables/dt14_215.30.asp.

[53] Dep't of Citywide Admin. Servs., *New York City Gov't Workforce Profile Report, Fiscal Year 2016* at 67 (2016),

> disruption of any of these services would have devastating consequences for City residents.

Because of the scale and critical importance of basic public services in the City, even relatively small disruptions can wreak havoc.[54] Less than a week without mass transit, for example, would cost the City economy over a billion dollars.[55] A week without garbage collection would flood the streets with refuse, threatening a public health crisis.[56] One day without teachers would squander a million days' worth of learning.[57] Simply put, the damage inflicted by public-sector strikes in New York City is too great to risk. The City therefore has an overriding—and compelling—interest in ensuring its collective bargaining system works.

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http://www.nyc.gov/html/dcas/downloads/pdf/misc/workforce_profile_report_fy_2016.pdf; *Statistical Summaries*, N.Y.C. Dep't of Educ., http://schools.nyc.gov/AboutUs/schools/data/stats/"default.htm (last visited Dec. 6, 2017).

[54] *See supra* Part I.

[55] *See* Mike Pesca, *The True Cost of the NYC Transit Strike*, NPR (Dec. 21, 2005, 12:00 AM), http://www.npr.org/templates/story/story.php?storyId=5064612.

[56] *See supra* Part I.B.

[57] *Cf. Statistical Summaries*, *supra* note 61.

The City's experience also makes plain that the incremental benefit of agency fees does not have to be overwhelming for them to be constitutionally permissible. The harms of public-sector work stoppages are often so large that even a marginal reduction in the risk of strikes is compelling grounds for authorizing agency fees. This is not a theoretical justification. The City *tried* collective bargaining without agency fees, and despite employing techniques like the "government assistance with … dues collection" suggested by petitioner,[58] the public continued to suffer.

B. Governments' practical need to adapt to local circumstances points against constitutionalizing a single approach to public-sector labor relations.

To be sure, not all jurisdictions permit agency fees. Petitioner and his amici paint the variety in labor laws across the nation as evidence that such fees are unnecessary.[59] Yet they draw precisely the wrong conclusion. The diversity of labor laws nationwide is reason for this Court to adhere to *Abood*'s flexible framework, not to abandon it. Divergence in public-sector labor laws is the natural result of the dramatically different circumstances confronted by state and local governments across the nation.

[58] Brief for the Petitioner at 42.

[59] *See, e.g., id.* at 37; Brief of Amicus Curiae Mackinac Center for Public Policy in Support of Petitioner at 27-36.

For example, while several states have laws that prohibit agency fees (known as "right-to-work" laws),[60] the people in those States did not experience the same series of strikes that New Yorkers endured in the 1960s and 1970s. Nor do those jurisdictions have the same "long, deep tradition" of labor activism as New York City does, where unions are embedded in its institutions and its culture. Even its housing stock bears the imprint of its vibrant labor movement, with more than a dozen union-sponsored housing cooperatives anchoring neighborhoods across the City.[61]

Governments in "right-to-work" states, by contrast, manage different workforces, have endured different histories, and must satisfy different demands. Their legislative choices thus should not control outside their borders any more than New York City's approach should dictate labor policy in Madison, Wisconsin or Fort Worth, Texas. In short, mandating one nationwide rule on agency fees would be deeply inconsistent with this Court's

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[60] *Right-To-Work Resources*, Nat'l Conf. of State Legislators, (2017), http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx.

[61] Freeman, *supra* note 12, at 100; David W. Chen, *Electchester Getting Less Electrical; Queens Co-op for Trade Workers Slowly Departs From Its Roots*, N.Y. Times, Mar. 15, 2004, at B1 (describing union-sponsored housing cooperatives providing nearly 50,000 apartments).

recognition that needs vary across the nation,[62] and that local communities should have leeway to promote their own health, safety, and welfare through core labor policies.[63]

Varied circumstances have even led to policy divergence among right-to-work states themselves. Some ban public-sector unions altogether,[64] rejecting collective bargaining as a labor management strategy entirely. Others, however, stop short of abandoning agency fees in all contexts. For example, while Michigan and Wisconsin currently prohibit agency fees for some public-sector unions, both States exempt local police and firefighter unions.[65] The exemptions are necessary because, as Wisconsin's governor put it,

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[62] *See Kelo v. City of New London*, 545 U.S. 469, 482 (2005) ("Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances.").

[63] *See Bond v. United States*, 564 U.S. 211, 220–22 (2011) (discussing the role, and virtues, of federalism).

[64] For example, Texas does not permit the recognition of public-sector labor unions as bargaining agents, nor does it allow state officials to enter into collective bargaining contracts with public employees. Texas Gov't Code § 617.002 (2017).

[65] *See* Mich. Comp. Laws § 423.210(4) (2017); Wis. Stat. §§ 111.81(9), 111.845, 111.85 (2017).

"there's no way we're going to put the public safety at risk."[66]

Petitioner and his amici thus mistake public controversy for constitutional error. As this Court has made clear, "[t]he genius of our government provides that, within the sphere of constitutional action, the people—acting not through the courts but through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires."[67] Consistent with this principle, *Abood* left the "wisdom" of adopting agency fees to voters in each State, ensuring that no labor relations policy is frozen in place.[68]

Judgments about risk tolerance and the necessity of public services necessarily differ, and they can even change over time within individual

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[66] Mark Niquette, *Walker's Bill Gives Wisconsin Police a Pass on Pension Payments*, Bloomberg (Feb. 25, 2011, 12:00 AM), http://www.bloomberg.com/news/articles/2011-02-25/walker-says-public-safety-means-wisconsin-cops-keep-collective-bargaining.

[67] *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985) (quoting *Helvering v. Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring)).

[68] *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 224–25 (1977).

jurisdictions.[69] While *Abood* itself concerned a Michigan law authorizing agency fees,[70] the state has since chosen to limit the use of such fees.[71] That change was accomplished through state legislation, not a constitutional rule that imposed Michigan's choice on other communities.

New York City has a powerful interest in labor peace because of its importance to avoiding disruption of essential public services, precisely the rationale that petitioner ignores. Given its unique circumstances and history, the City reasonably views its public services as integral to public safety and welfare, and it accordingly extends to all public unions the same agency shop protection that other jurisdictions offer only to a subset of their public workforces.

More broadly, New York City has for decades chosen to rely on strong, stable unions as a key part

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[69] The range of permissible policy judgments about labor practices is remarkably broad. While most jurisdictions prohibit public workers from striking, some States authorize strikes by some or all government workers. *See, e.g.,* Ohio Rev. Code Ann. § 4117.14(D)(2) (2017). But the existence of those laws does not refute the need to limit or prohibit public-sector strikes in New York and elsewhere.

[70] *Abood*, 431 U.S. at 211.

[71] *See, e.g.,* Jack Spencer, *Right-to-Work Bills Pass Michigan House, Senate*, Mich. Capitol Confidential (Dec. 7, 2012), http://www.michigancapitolconfidential.com/18028; *see also* Mich. Comp. Laws § 423.210(3)(c) (2017).

of its governance strategy, one that embraces the provision of services to strengthen the fabric of the City and better the lives of its residents, while also ensuring fair treatment and protection for workers who serve the public. While other jurisdictions may choose a different course, this Court should not embed that choice in a constitutional rule that overrides New York City's successful long-term labor management scheme or the similar strategies of other cities and states.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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No. 16-1466

IN THE

Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE STATES OF NEW YORK, ALASKA, CONNECTICUT, DELAWARE, HAWAII, IOWA, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA AND WASHINGTON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court confirmed that the Constitution permits States to adopt the model of collective bargaining that is widely used in the private sector pursuant to federal labor law. Under this model, a union that employees select to serve as their exclusive representative in collective-bargaining negotiations may charge all represented employees—including those who decline to join the union—an "agency fee" to defray the costs of the workplace services provided by the union. In reliance on *Abood*, twenty-three States and the District of Columbia have long authorized public-sector collective-bargaining arrangements that include agency-fee provisions.

Amici States address the following question raised by petitioners:

> Whether *Abood* should be overruled, thereby forcing many States to abandon the labor-management arrangements that they have long used to ensure the efficient and uninterrupted provision of government services to the public?

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INTEREST OF THE AMICI STATES

Every day, millions of state and local government employees across the country perform varied functions in the service of varied communities. There is no one-size-fits-all approach for the government employers tasked with managing them. What works to attract and retain police officers in a small rural community is vastly different from what is required to attract and retain sanitation workers in a large urban area, or public school teachers in the suburbs.

Accordingly, this Court has long recognized that States' judgments about how best to manage their workforces warrant deference. *See Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *Abood* held in relevant part that States may permit collective-bargaining arrangements under which state and local government employees who are represented by a union—including those employees who decline to become union members—may be charged an "agency fee" to cover the costs of the workplace services provided by the union. *Id.* at 221-22. In that context, the government is acting as an employer, and the Court has long recognized that the First Amendment permits government employers to adopt reasonable workforce-management policies to promote efficient and effective operation of the public sector workplace, *see, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 417-20 (2006).

This amicus brief is filed on behalf of the States of New York, Alaska, Connecticut, Delaware, Hawaii, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, New Mexico, New Jersey, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington, and the District of

Columbia.[1] Amici States employ a wide range of different approaches for managing their workforces, but all have a significant interest in preserving the flexibility to structure public-sector labor relations that *Abood* allows.

As *Abood* recognized, the task of balancing the potentially divergent interests of public employers, public employees, and the public is delicate and difficult. And the stakes are high. In the decades before *Abood*, many States faced paralyzing public-sector strikes and labor unrest that jeopardized public order and safety. The relative success of state labor-relations systems in preserving public-sector labor peace should not be mistaken for evidence that the leeway afforded by *Abood* is no longer needed. To the contrary, that success is evidence that *Abood* works because it confirms that states and local governments have used the flexibility allowed by *Abood* to adopt policies best tailored to meet their needs in achieving labor peace. That flexibility is no less critical today than when *Abood* was decided. Now, as before, labor peace secures the uninterrupted function of *government itself* and is a necessary precondition for the secure and effective provision of government services.

Amici States also have a substantial interest in avoiding the vast disruption in state and local labor relations that would occur if the Court were now to overrule *Abood*'s approval of public-sector collective-bargaining arrangements utilizing agency-fee rules. That ruling is the foundation for thousands of contracts

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[1] The District of Columbia is not a State, but possesses a strong interest in this matter similar to those of the States. It is included in this brief's references to "Amici States."

involving millions of public employees in twenty-three States and the District of Columbia.

Abood is permissive, not mandatory. Voters and elected officials in each State—including the States that support petitioner here—remain free to decide what policies should apply in public-sector labor relations for their communities. Petitioner and his amici should not be permitted to constrain those options by constitutionalizing a single approach to public-sector labor relations for all state and local governments nationwide. As this Court has recognized, the Constitution permits States "broad autonomy in structuring their governments" out of respect for the "'integrity, dignity, and residual sovereignty of the States'" and to "'secure[] to citizens the liberties that derive from diffusion of sovereign power.'" *Shelby County v. Holder*, 133 S. Ct. 2612, 2623 (2013) (quoting *Bond v. United States*, 564 U.S. 211, 221 (2011)).

STATEMENT OF THE CASE

A. This Court's Longstanding Recognition That Private Employers May Require Employees to Fund the Workplace-Related Activities of a Union Designated to Act as Their Exclusive Representative

Labor-relations law in the United States has long been based on a model of exclusive representation accompanied by agency-fee authorization. The first federal law guaranteeing workers the right to organize was the Railway Labor Act (RLA), 45 U.S.C. § 151 et seq. Enacted in 1926 after decades of labor unrest in the railroad industry, the RLA enabled railroad workers to select a union that would serve as

their exclusive representative in dealing with management, and imposed a corresponding duty of fair-representation on the union to represent all employees in good faith and without discrimination. *See Burlington N. R.R. Co. v. Maintenance of Way Employees*, 481 U.S. 429, 444 (1987); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 750-60 (1961). The RLA was later expanded to specifically authorize "union-shop" arrangements that required employees to join the union designated as their exclusive-bargaining representative and to pay an "agency fee," as a condition of continued employment. *See* Ch. 1220, 64 Stat. 1238 (1951) (amending 45 U.S.C. § 152).

Congress adopted a similar model in enacting the much broader National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169, the federal statute that comprehensively regulates labor relations for most employees in the private sector. As with the RLA, Congress sought to end labor strife and to reduce the need for labor strikes by encouraging collective bargaining. And Congress once again identified exclusive-representation collective bargaining as the best model for achieving labor peace. *See First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 674-75 (1981). The NLRA also authorized "agency shop" agreements that permitted employees to choose not to join the union that represented them, but required all represented employees to pay fees to the union for the collective-bargaining assistance and other workplace-related services that those employees received. *See Communications Workers of Am. v. Beck*, 487 U.S. 735, 738 & 744-45 (1988).

In a series of decisions beginning with *Railway Employees' Department v. Hanson*, this Court construed

the "union shop" and "agency shop" provisions of the RLA and NLRA as requiring only financial support for an employee-selected union, not compelled union membership by objecting employees. 351 U.S. 225, 238 (1956). This Court also determined that compulsory fees must be limited to compensating the union for actual collective bargaining and related activities, and could not be used to fund unrelated political lobbying. With those limits in place, the Court rejected claims that the First Amendment prohibited government legislation authorizing unions to impose a mandatory financial obligation on represented employees who chose not to join the union, to defray the union's costs for collective bargaining and other workplace-related activities germane to labor-management relations. *See Railway Clerks v. Allen*, 373 U.S. 113 (1963); *Street*, 367 U.S. at 749.

B. This Court's Determination in *Abood* That States May Adopt Labor-Management Policies Similar to Those That Have Proved Effective in the Private Sector

In *Abood*, this Court recognized the important state interest in avoiding labor strife that could disrupt government operations and programs. The Court confirmed that States, acting as employers, should not be deprived of the ability to pursue labor peace and stability in the public workforce by adopting labor-management policies—such as exclusive-representation collective-bargaining funded through agency-fees—that federal law has long allowed private employers to utilize. *See* 431 U.S. at 229-33.

Abood involved a First Amendment challenge to a Michigan statute that authorized collective bargaining for local public school teachers under the same

exclusive-representation, agency-fee model authorized by federal law for the private sector. *Id.* at 212-14, 223-24. This Court, in rejecting that challenge, noted that government entities have a strong interest in providing for exclusive representation in light of "[t]he confusion and conflict that could arise" if government employers had to reach multiple, potentially varying agreements with different unions. *Id*. at 224; *see id.* at 220. And the Court further observed that the union's "tasks of negotiating and administering a collective-bargaining agreement . . . often entail expenditure of much time and money." *Id.* at 221. The Court recognized that agency fees address the inherent "free rider" problem created by exclusive representation: that is, employees who are guaranteed union representation may decline to share in the costs incurred by the union, creating the risk that unions will be underfunded and unable to fulfill their intended duties. *Id.* at 221-22.

Abood acknowledged that public-sector unionization was controversial as a policy matter and that there was widespread debate and disagreement about the utility of adopting private-sector models to manage public-sector workplaces. *Id.* at 224-25, 229. Partly for that reason, *Abood* deferred to state judgments about appropriate workforce policies to achieve stable public-sector labor relations. The Court noted that the "'ingredients'" of labor peace and stability were too numerous, complex, and context-dependent for judges to second-guess the wisdom of particular state choices. *Id*. at 225 n.20 (quoting *Hanson*, 351 U.S. at 233-34).

Abood and multiple later cases establish that the First Amendment permits agency fees to be imposed on public employees who do not wish to join the union

designated as their exclusive representative, so long as objecting employees are not charged for political or ideological activities unrelated to the union's workplace services. *See, e.g., Locke v. Karass*, 555 U.S. 207, 213 (2009); *see also Knox v. Service Emps. Int'l Union*, 567 U.S. 298, 302 (2012). To be sure, the Court has concluded that a State's desire to secure labor peace and prevent free-riding may not justify the imposition of an agency-fee requirement on persons who are not "full-fledged public employees." *Harris v. Quinn*, 134 S. Ct. 2618, 2638 (2014). But the Court has recognized that different considerations are implicated when a State—acting in its capacity as an employer—devises rules for managing its own workers. *Id.* at 2634.

C. Abood's Centrality to Public-Sector Workforce Management

Abood's framework is now central to state labor law. See Appendix, Survey of State Statutory Authority for Public-Sector Collective Bargaining by Exclusive Representative. Forty-one States, the District of Columbia, and Puerto Rico authorize collective bargaining for at least some public employees, and all adopt the federal model of exclusive representation.[2] Twenty-three States and the District of Columbia also authorize agency fees (also known as

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[2] These States are Alaska, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, South Dakota, Utah, Vermont, Washington, Wisconsin, and Wyoming. See Appendix.

"fair share" fees) to provide a mechanism for ensuring that represented employees contribute to the costs of workplace-related services that their exclusive representative provides. The majority of these statutes make agency-fee requirements a permissible subject of bargaining and authorize (but do not require) agency-fee provisions as part of public-sector collective-bargaining agreements.[3] Many state agency-fee statutes were enacted in specific reliance on *Abood*.[4]

D. Petitioner's Challenge

Illinois law permits public employees to select a union to act as their exclusive representative and authorizes the union to negotiate the inclusion of an agency-fee provision—called a "fair share" clause—in its collective-bargaining agreement to cover "the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment." 5 Ill. Comp. Stat. 315/6(e); *see also id.* § 315/6(c). Petitioner Mark Janus is employed by the State of Illinois in a bargaining unit that is exclusively represented by Respondent AFSCME

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[3] These States are Alaska, California (for local and state employees), Connecticut, Delaware, Hawaii, Illinois, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington, and the District of Columbia. See Appendix.

[4] *See, e.g.*, N.Y. Div. of Budget, Budget Report for S. 6835, at 3, *reprinted in* Bill Jacket for ch. 677 (1977) (discussing *Abood*); *see also* Sally Whiteside, Robert Vogt, & Sherryl Scott, *Illinois Public Labor Relations Laws: A Commentary and Analysis,* 60 Chi.-Kent L. Rev. 883, 924 & n.264 (1984) (Illinois Public Labor Relations Act was drafted by the Illinois Legislature to comport with *Abood*).

Council 31; the collective bargaining agreement covering his employment contains a fair-share clause to help the union defray its costs of collective bargaining and other workplace services. (Joint App'x ("J.A.") 68, 124.) Petitioner is not a member of the union and objects to paying his fair-share fee because he disagrees with the union's "one-sided politicking for only its point of view" and believes the union fails to "appreciate the current fiscal crises in Illinois and does not reflect his best interests or the interests of Illinois citizens." (J.A. 87.)

SUMMARY OF ARGUMENT

In the 1960s and 1970s, many States experienced devastating public-sector work stoppages that disrupted the delivery of critical government services. In the wake of those disruptions, States reconsidered how best to manage their public workforces to avoid labor unrest. Many States adopted laws permitting public employees to elect an exclusive representative; some States also adopted laws permitting agency-fee arrangements to ensure adequate funding for the exclusive representative.

Abood permitted States flexibility to make these judgments, and that flexibility should be preserved. As Amici States' experiences have shown, there is no one-size-fits-all approach to managing the millions of state and local public employees across the country. For some public employers, the services of an exclusive representative funded by agency fees may be unnecessary. For others, those services and the agency fees that support them may be critically important to ensure the delivery of core government services. Jurisdictions can disagree about how best to achieve

labor peace, and this Court should continue to respect those judgments as it did in *Abood*.

ARGUMENT

THE STATES HAVE A SIGNIFICANT AND VALID INTEREST IN PRESERVING *ABOOD*

Abood recognized that States have a significant and valid interest in being able to employ the models of collective bargaining that have proved successful for avoiding strikes in the private sector. And *Abood* deferred to the judgments of States that have chosen to permit use of the core elements of private-sector collective bargaining—exclusive representation and agency fees—to manage labor relations with state and local government employees.

In the decades since *Abood*, States have relied substantially on that decision when crafting their public-sector labor-management systems. Petitioner's attack on *Abood* and its approval of public-sector agency-fee rules threatens the labor-relations systems of twenty-three States and the District of Columbia.[5]

Principles of *stare decisis* have special force where States have relied on this Court's precedent in structuring their laws, because the resulting statutes would be invalidated if the Court's precedent is overruled or altered. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 985-86 (1996) (plurality op.); *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 785-86 (1992); *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202-03 (1991). Here, the *Abood* rule is deeply

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[5] See *supra* n.2, and accompanying Appendix.

entrenched, and is the foundation for thousands of contracts involving millions of public employees across the Nation. Even in constitutional cases, the doctrine of *stare decisis* carries such persuasive weight that this Court has "always required . . . special justification" for overruling settled precedent. *See, e.g., United States v. International Bus. Machs. Corp.,* 517 U.S. 843, 856 (1996) (quotation marks omitted).

Petitioner identifies no special justification for overruling *Abood.* Rather, he bases his call to revisit *Abood* on decisions declining to extend *Abood*'s reasoning to new and different contexts. For example, petitioner relies substantially on *Knox v. Service Employees International Union*, which holds that the First Amendment prohibits a union from charging the non-members it represents in collective bargaining a "special assessment or dues increase that is levied to meet expenses that were not disclosed when the amount of the regular assessment was set." 567 U.S. at 303; *see also id.* at 318, 322. Petitioner also relies heavily on *Harris v. Quinn*, which holds that *Abood*'s rationale does not apply where the government seeks to impose an agency-fee requirement on persons who are not "full-fledged public employees," 134 S. Ct. at 2638. Neither of those decisions addresses the different considerations that are implicated when a State—in its capacity as an employer—devises collective-bargaining rules for its own employees. *See Id.* at 2634; *Knox*, 567 U.S. at 311-12.

I. Agency Fees Are Important to Maintaining the Labor-Management Model That Many States Rely on to Ensure the Effective and Efficient Provision of Services to the Public.

After confronting devastating public-sector work stoppages that caused disruptions in critical government services, many States decided to authorize public-sector employees to select an exclusive union representative, recognizing—as private-sector employers had long understood—that such a representative could provide services in the workplace that would minimize labor unrest. Many States also decided to permit agency-fee arrangements to fund those services, having determined that a secure funding source was important to ensure the union's ability to provide the full range of contemplated workplace services. Even some States that do not generally permit agency-fee arrangements for public-sector unions—including Michigan, which supports petitioner here—have made exceptions for police and firefighter unions in recognition of the especially destructive nature of labor unrest in those fields. These state experiences confirm that exclusive representation supported by agency fees can be an indispensable tool to protect the public from harmful disruptions to government services and programs, and foster efficiency in government workplaces.

A. State Laws Authorizing Public-Sector Collective Bargaining Were Adopted in Response to Devastating Strikes and Labor Unrest by State and Local Government Employees.

Public-sector collective-bargaining laws were enacted to protect the public from the harmful effects

of public-sector work stoppages and other disruptions in government operations. *See* David Lewin et al., Getting it Right: Empirical Evidence and Policy Implications from Research on Public-Sector Unionism and Collective Bargaining 13 (Mar. 16, 2011). Although strikes and other work disruptions by public workers are now rare, they were common at the time that the majority of States first adopted public-sector collective-bargaining laws. *See, e.g.*, David Ziskind, *One Thousand Strikes of Government Employees* 187 (1940) (documenting 1,116 strikes by employees in all sectors of government service through 1940). Much of the labor unrest occurred because state and local workers wanted "a greater voice" in determining the terms of their employment, and lacked other means to air grievances and settle disputes with management. See N.Y. Governor's Comm. on Pub. Emp. Relations, *Final Report* 42, 55 (1966). States thus realized "that protection of the public from strikes in the public services requires the designation of other ways and means for dealing with claims of public employees for equitable treatment." *Id.* at 9.[6]

Between 1965 and 1970, for example, there were over 1,400 separate work-stoppages by state and local public workers, involving well over a quarter million employees. *See* Richard Kearney, *Labor Relations in the Public Sector* 226-27 (3d ed. 2001); *see also* Morris

[6] *See also* Pa. Governor's Comm'n to Revise the Pub. Emp. Law, *Report and Recommendations* 6 (1968) (concluding that the "inability" of public employees to "bargain collectively has . . . led to more friction and strikes than any other single cause"); 5 Ill. Comp. Stat. 315/2 (declaring aim to establish "an alternate, expeditious, equitable and effective procedure for the resolution of labor disputes subject to approval procedures mandated by this Act").

Horowitz, *Collective Bargaining in the Public Sector* 115 (1994). In the 1960s, "strikes by public employees" in New York alone were "too numerous to recall or record"; they included "strikes by transit workers, firemen, sanitation employees, teachers, ferry workers, [and] on other occasions, social workers, practical nurses, city-employed lifeguards, doctors and public health nurses, etc." *DiMaggio v. Brown*, 19 N.Y.2d 283, 289 (1967).

Walkouts and other work stoppages occurred despite state laws that directly prohibited public employees from striking or punished them for doing so. *See, e.g., Association of Surrogates & Sup. Ct. Reporters v. State*, 78 N.Y.2d 143, 152-53 (1991) (recounting New York's historical experience). The States found that direct prohibitions on strikes were ineffective and difficult to enforce, and failed to address the root causes of labor unrest. And it quickly became clear that labor unrest in the public sector had the potential to inflict vast public harm and disruption.

- In Baltimore, a 1974 strike by police officers, jail guards, and other municipal workers resulted in widespread "looting, shooting, and rock-throwing," and "fires ran 150 percent above normal." *See* Md. Dep't of Labor, Licensing & Regulation, *Collective Bargaining for Maryland Public Employees: A Review of Policy Issues and Options* 5 (1996) (recounting 1974 strike). State troopers had to patrol the streets to keep the peace. *See* Ben Franklin, *Troopers Patrol Baltimore to Bar Renewed Unrest*, N.Y. Times, July 13, 1974, at 1.
- In 1968, a series of public-school teacher walkouts in New York City resulted in more

than one million children being deprived of education for thirty-six school days. Parents had to physically occupy public schools to keep the schools open. Many children were denied key services provided through public schools. For example, while the city typically provided 400,000 free daily lunches to schoolchildren, only 160,000 were provided during the teacher strikes. *See Strike's Bitter End*, Time, Nov. 29, 1968, at 97.

- Between 1940 and 1980, strikes by public transport workers in Cleveland, Philadelphia, Atlanta, Chicago, Los Angeles, and New York City caused vast disruptions. *See Atlanta Buses Running Again*, N.Y. Times, June 25, 1950, at 50 (Atlanta's transit strike); *Bus Strike Imperils Chicago's Transit*, N.Y. Times, Aug. 26, 1968, at 25 (Chicago strike); *Strike Halts Most Public Transit Runs in Philadelphia*, N.Y. Times, Mar. 26, 1977, at 8 (Philadelphia strike); *Transit Workers Strike Los Angeles Area Bus System*, N.Y. Times, Aug. 27, 1979, at A15 (Los Angeles and Cleveland strikes). In 1966, private businesses suffered over $100 million in losses daily during a twelve-day transit strike in New York City. *See Transit Strike*, N.Y. Times, Jan. 5, 1966, at 33. Moreover, because people could not travel to hospitals to donate blood, the city's blood supply fell to a twenty-year low, causing the postponement of nonemergency surgeries. *Id.*

- During this same period, multiple strikes by sanitation workers caused uncollected trash to pile up on city streets, threatening a serious public-health emergency in many cities. *See,*

e.g., *Fragrant Days in Fun City*, Time, Feb. 16, 1968, at 33; *see also* Joseph Sullivan, *Mediators Seek to Settle Newark Sanitation Strike*, N.Y. Times, Dec. 29, 1976, at 55 (discussing strike in Newark, N.J.); Ziskind, *supra*, at 91-94 (recounting strikes by sanitation workers across the country).

- In 1965, a strike by 8000 welfare workers in New York City forced two-thirds of the city's welfare centers to close for twenty-eight days and led to the interruption of services to more than 500,000 welfare recipients, many of whom were children or elderly. *See* Joshua Freeman, *Working-Class New York: Life and Labor Since World War II* 205-06 (2001); *see also* Emanuel Perlmutter, *Welfare Strike Due in City Today Inspite of Writ*, N.Y. Times, Jan. 4, 1965, at 1.
- Strikes by workers at state mental hospitals also interrupted critical care for patients with mental illness. In 1968, a strike by mental-health workers at four state-run hospitals in New York forced patients to be sent home and led to a reduction in psychiatric treatment and rehabilitation services. *See* Ronald Donovan, *Administering the Taylor Law* 89-90 (1990); Damon Stetson, *Fourth Hospital Moves Patients*, N.Y. Times, Nov. 23, 1968, at 1. Care was likewise interrupted in Ohio in 1974 when half of the workers at the State's mental hospitals went on strike. *See* Louise Cooke, *Workers' Unrest Interrupts Municipal Service*, St. Petersburg Times, July 15, 1974, at 4-A.

As these examples illustrate, the harm of unresolved public-sector labor disputes can be

catastrophic. Public services such as police and fire protection, sanitation, and public-health tend to be provided uniquely by state and local governments, and the absence of those services threatens serious irreparable harm to the public. *See National League of Cities v. Usery*, 426 U.S. 833, 851 (1976), *overruled on other grounds*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Even where private substitutes exist, state and local programs are often made available at no cost (such as public education) or are heavily subsidized (such as public transportation). As a result, disruption of these services especially threatens the most vulnerable citizens—low-income persons or those who have a special need for government support. The harms of public-sector labor breakdowns are thus difficult to predict or to control, and even short-term disruptions in particular services can have vast social and economic spillover effects.

B. In Responding to These Crises, States Looked to the Labor-Management Model That Had Already Proven Effective in the Private Sector under Federal Labor Law.

In the wake of these work stoppages, States sought to implement workforce-management strategies that would minimize the potential for interruption of government services.[7] *See, e.g.*, N.Y. Governor's

[7] *See, e.g.,* Del. Code tit. 19, § 1301 (collective-bargaining system for public employees is designed "to protect the public by assuring the orderly and uninterrupted operations and functions" of government); Fla. Stat. § 447.201 (same); Iowa Code § 20.1 (same); Kansas Stat. § 75-4321(3) (same); Neb. Revised Stat. §§ 48-802, 81-1370 (same); N.Y. Civ. Serv. Law § 200 (same); Or. Rev. Stat. § 243.656(3) (permitting collective

Comm., *supra*, at 9, 42. In undertaking this task, States understandably sought guidance in solutions that had already proven effective in minimizing labor unrest in the private sector—that is, by permitting employees to select an exclusive representative to deal with management.[8] In fact, nearly every State has adopted the exclusive-representation model that Congress permitted for private employees. See Appendix. Many States did so only after careful study by expert commissions charged with examining the underlying reasons for public-sector labor unrest and devising appropriate solutions.[9]

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bargaining safeguards "the public from injury, impairment and interruptions of necessary services, and removes certain recognized sources of strife and unrest"); Vt. Stat. Ann., tit. 3, § 901 (state employees' labor relations act aims "to protect the rights of the public in connection with labor disputes").

[8] *See, e.g.*, Harry Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 Mich. L. Rev. 885, 932 (1973) (noting "accelerating" trend among States towards using "private sector principles to guide the development of labor relations in the public sector"); Russell Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 Mich. L. Rev. 891, 897, 899, 901, 904 (1969) (noting that various state commissions relied on NLRA and other private-sector models in offering recommendations for public-sector labor relations policy in the State).

[9] *See, e.g.*, Milton Derber, *Labor-Management Policy for Public Employees in Illinois: The Experience of the Governor's Commission, 1966-1967*, 21 Indus. & Lab. Rel. Rev. 541, 549 (1968); *see also* Conn. Interim Comm'n to Study Collective Bargaining by Municipalities, *Final Report* 7-8 (1965); Md. Dep't of Labor, *supra*, at 3-6; Mass. Legis. Research Council, Report Relative to Collective Bargaining and Local Government Employees 8-11 (1969); Mich. Advisory Comm. Pub. Emp. Relations, *Report to Governor* (1967), *reprinted in* Gov't Emp. Relations Report, No. 181 (Feb. 28, 1967); N.J. Pub. & Sch.

1. An exclusive representative can provide services in the workplace that reduce labor unrest and yield other benefits for employers.

As in the private sector, exclusive representation can advance a public employer's interest in maintaining workforce stability by providing services to workers that minimize labor unrest. One such service, of course, is collective bargaining. Giving workers a voice in the agreement that will govern the terms and conditions of their employment reduces the likelihood that they will resort to strikes and work stoppages to achieve their demands.[10] Another such service is "grievance adjustment." *See Abood*, 431 U.S. at 225-26. Grievance systems vary among workplaces, but the exclusive representative's central role in administering those systems does not. The union's involvement begins before any grievance is filed, by communicating directly with workers about their concerns in the workplace. The union-trained shop steward, who typically fills this role, thus "plays a vital role in effecting peaceful union-management relations" by serving as "a front-line troubleshooter."

Emps.' Grievance Procedure Study Comm'n, *Final Report* 6, 15-17 (1968); N.Y. Governor's Comm., *supra*, at 34-35, 41-42; Pa. Governor's Comm., *supra*, at ii, 1.

[10] *See, e.g.*, Janet Currie & Sheena McConnell, *The Impact of Collective-Bargaining Legislation on Disputes in the U.S. Public Sector: No Legislation May Be the Worst Legislation*, 37 J.L. & Econ. 519, 530 (1994) (finding strike incidence highest where parties have "neither a duty to bargain nor dispute-resolution procedures"); Richard Freeman & James Medoff, *What Do Unions Do?*, at 7-10 (1984) (articulating "voice" function of union representation).

Carlton Snow & Elliot Abramson, *The Dual Role of the Union Steward: A Problem in Labor-Management Relations*, 33 Syracuse L. Rev. 795, 795 (1982). The steward investigates worker complaints, organizes and documents them, and then initially presents worker grievances to management. *See* AFSCME, *Steward Handbook* 21-39 (2013).[11] The union also typically provides representation throughout the grievance process. Professional union staff appear with the worker for meetings with management and prepare written submissions and oral presentation on the worker's behalf. If the dispute proceeds to formal arbitration or judicial proceedings, the union representative provides services similar to those that an attorney would provide in traditional civil litigation.

Union participation in the grievance process is an obvious benefit to workers. It increases the likelihood of a positive outcome, relieves the worker of a significant financial burden, and provides support through what can be a stressful experience.

But States' experiences show that a union's participation in grievance adjustment is also a significant benefit for employers. The existence of an advocate for workers who is independent of management means that workers are likely to communicate their concerns more freely, which advances organizational efficiency by reducing employee turnover and

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[11] *See also* Paul Clark, *The Role of the Steward in Shaping Union Member Attitudes toward the Grievance Procedure*, 13 Lab. Stud. J. 3, 3-6 (Fall 1988); Glenn Miller & Ned Rosen, *Members' Attitudes Toward the Shop Steward*, 10 Indus. & Lab. Rel. Rev. 516, 517 (1957) (noting steward's responsibility to "convey information to the members" and to convey "to the officers the attitudes and point of view of members").

promoting workplace productivity. *See* Freeman & Medoff, *supra*, at 103-07, 169; *see also* E. Edward Herman, *Collective Bargaining and Labor Relations* 283-86 (3d ed. 1992). Employers benefit from facing a single advocate, whose experience with the workplace and institutional knowledge of the collective-bargaining agreement help facilitate timely and satisfactory dispute resolution. And by serving as the gatekeeper for worker disputes, a union alleviates the administrative burden of organizing, prioritizing, and raising issues in the workplace that would otherwise fall to the employer.

In addition to its role in the grievance process, an exclusive representative provides important services to workers and employers alike through its day-to-day administration of the collective-bargaining agreement. This may sometimes occur through formal means, such as by participating in joint labor-management committees formed under the auspices of a collective-bargaining agreement. (*E.g.*, J.A. 143-144.) In the experience of many States, such committees are an important and effective tool for improving public services. *See, e.g.*, U.S. Dep't of Labor Task Force on Excellence in State and Local Government through Labor-Management Cooperation, *Working Together for Public Service: Final Report*, i, 2 (1996) ("*Task Force Report*").[12] For instance, in Connecticut, a labor-management committee created a workplace safety

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[12] *See also* E. Edward Herman, *Collective Bargaining and Labor Relations* 311-12 (2d ed. 1987); Freeman & Medoff, *supra*, at 169; *Minnesota State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 291-92 (1983) (recognizing state's "legitimate interest" in system of exclusive representation because it ensures that decisions by public employers will be based on "majority view" of its employees).

program that reduced workers' compensation expenses by five-million dollars through a forty-percent reduction in workplace injuries. *Id.* at 15. In Seattle, municipal government officials and a union of public-employee sewer workers worked collaboratively to identify a number of significant cost savings in the maintenance and repair of the City's underground transit tunnel, allowing the city to achieve concrete cost savings while also improving the quality of its transportation infrastructure. *Id.* at 19-20. And in New York City, local government and the sanitation workers' union negotiated to reduce the number of sanitation workers operating a sanitation truck, permitting the city to lower its labor costs by adopting cost-saving technologies. Lewin, *supra*, at 17. Indeed, particularly when faced with a looming economic crisis, government and unions have worked together to develop solutions that are mutually beneficial and ensure the continued provision of indispensable government services.

Administering the collective-bargaining agreement also involves a full range of informal services that the union provides in the workplace every day. These services include core human-resource functions like: (i) advising employees about their pay, benefits, or other contract rights, through published union bulletins and in in-person meetings; (ii) communicating with management to resolve errors in the processing of employee benefits, such as incorrect payroll deductions, leave accruals, or medical benefits reimbursements; (iii) reviewing management's day-to-day personnel decisions, such as setting shift schedules and granting leave requests, for compliance with the collective-bargaining agreement; and (iv) coordinating workplace inspections and worker health and safety

trainings mandated by law or the collective-bargaining agreement. The union's informal support of workers in the workplace plays an important role in improving their day-to-day experience and reducing the possibility that daily resentments will metastasize into full-scale labor unrest.

2. Many States have determined that agency fees help them secure the full benefits of exclusive representation.

In sum, an exclusive representative provides a wealth of services beyond contract bargaining, and a public employer could rationally conclude that those services can be an important ingredient in minimizing labor unrest and assuring a stable and effective public workforce. To ensure that an exclusive representative is able to provide its services in the workplace, many States' laws permit public employers—state or local—to include agency-fee arrangements in their collective-bargaining agreements. See Appendix. These laws typically do not *require* any public employee to pay an agency fee, or *require* any public employer to include an agency-fee arrangement in its contracts. Rather, States that have enacted such measures have decided to give government employers the flexibility to make that choice based on their own circumstances.

As those States have recognized, agency fees can be important to developing a collaborative labor-management relationship that promotes labor peace and ensures the delivery of high-quality services. First, agency fees are an effective way to address the free-rider problem long recognized to exist in this context. *See, e.g.*, *Street*, 367 U.S. at 765-66.

A union needs significant resources to provide the full range of workplace services that States deem helpful for minimizing labor unrest. *See Abood*, 431 U.S. at 221 (recognizing that unions require "[t]he services of lawyers, expert negotiators, economists, and a research staff" to negotiate and administer a collective-bargaining agreement). But experience shows that many employees—even employees who would otherwise join the union—will choose not to pay for such services if they have the option to receive them without charge.[13] This free-rider problem is particularly acute for governments with a history of labor unrest, as it erodes the union's ability to provide the very services that government deems important to securing labor peace. State experiences show that a well-funded union is a more stable advocate for workers and that dealing with such a partner "lead[s] to greater labor peace and stability." Md. Dep't of Labor, *supra*, at 19.

Second, free-riding may itself create labor unrest, in light of the "resentment spawned by 'free riders.'" *Beck*, 487 U.S. at 750. Without agency fees, union members would be required to pay more in union dues—and take home less pay than their colleagues—to subsidize the cost of providing workplace services to non-members. Such inequities create divisions in the workplace that corrode cohesion and morale. *See Ellis v. Railway Clerks*, 466 U.S. 435, 452 (1984). Agency fees eliminate this problem by ensuring that no

[13] *See* Richard Kearney & Patrice Mareschal, *Labor Relations in the Public Sector* 79 (5th ed. 2014); *see also* Jeffrey Keefe, *On* Friedrichs v. California Teachers Association*: The Inextricable Links Between Exclusive Representation, Agency Fees, and the Duty of Fair Representation* 4 (Econ. Pol'y Inst. Briefing Paper No. 411, 2015).

employees receive "the benefits of union representation without paying for them." *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 416 (1976).

Furthermore, agency fees address the problems of free-riding with only minimal impact on workers' rights of expression and association. Agency-fee arrangements do not require any worker to join a union or donate to a union's political or ideological activities. Nor do they restrict an employee's speech in any way. An employee remains free to speak against a union's political agenda or negotiating positions, and to oppose the government officials responsible for negotiating the union's contract. Agency fees merely require an employee to pay for services rendered. Thus, in practice, Amici States' experience is that the "grievous First Amendment injury," Pet. Br. 12, of which petitioner warns is not a valid practical concern.

Petitioner argues that an exclusive representative does not need mandatory agency fees to function because it can generate sufficient operating funds through other means. *See* Pet. Br. 37-43. The evidence is to the contrary. See *supra* n.13. In any event, this argument fails to recognize that—based on their different experiences—jurisdictions can reasonably disagree about an exclusive representative's proper role in the workplace and the appropriate method to fund those activities.

For example, federal law permits federal public-sector workers to elect a union to serve as their exclusive representative without any attendant requirement that workers join or financially support the union, but that law also severely restricts the scope of issues that can be collectively bargained, and exempts key topics that would be covered by broader

state collective-bargaining regimes, such as wages and number of employees. *See* 5 U.S.C. § 7106(a)(1); *see also Navy Charleston Naval Shipyard v. Federal Labor Relations Auth.*, 885 F.2d 185, 187 (4th Cir. 1989). Having prescribed a restricted role, a jurisdiction could rationally conclude—as does the federal government—that agency fees are not necessary to guarantee the exclusive representative's proper functioning. This is especially true because the federal government funds union activities through alternate means, for instance by compensating federal employees for time spent performing union-related functions. *See* 5 U.S.C. § 7131; *see also* U.S. Office of Pers. Mgmt., *Official Time Usage in the Federal Government, Fiscal Year 2014*, at 3 (2017).

Likewise, many jurisdictions with so-called "right-to-work" laws—that is, laws permitting exclusive representation but prohibiting mandatory agency fees—lack the history of labor unrest and disruption to government services that many States experienced before *Abood*. *See* Kearney, *supra*, at 65. A jurisdiction that has not experienced a history of public-sector labor unrest could rationally decide not to fund an exclusive representative's services through mandatory agency fees. But that policy choice does not refute the benefits of different policy choices that other jurisdictions have made based on their own different experiences. Even jurisdictions that do not authorize agency fees for most public-sector workers recognize that a different policy might be appropriate in certain circumstances. For instance, Michigan and Wisconsin prohibit agency fees for some public unions but exempt local police and firefighter unions from that prohibition as a matter of public safety. *See* Mich. Comp. Laws § 423.210(3)-(4); Wis. Stat. §§ 111.81(9),

111.845, 111.85; *see also* Mark Niquette, *Walker's Bill Gives Wisconsin Police a Pass on Pension Payments*, Bloomberg (Feb. 25, 2011) (noting Wisconsin governor's comment, in enacting the exemption for public safety employees, that "there's no way we're going to put the public safety at risk"). Thus even the practices of petitioner's own amici call into question petitioner's proposed one-size-fits-all approach.

Abood confirmed that States should have the leeway to adopt the labor-relations systems best suited to their individual circumstances and policy judgments. And States have relied on that flexibility. States have enacted more than one hundred statutes governing state and local labor relations, augmented by local ordinances, court decisions, attorney general opinions, and executive orders. *See* Kearney & Mareschal, *supra*, at 64-66.

Petitioner attempts to deprive States, and ultimately voters, of the ability to judge for themselves what labor-management policies are best suited for their public workforces. States like Illinois authorize agency-fee arrangements because a majority of duly elected representatives determined that affording government employers that flexibility was sound policy. Indeed, legislatures in Michigan and Wisconsin—two of petitioner's amici—also decided that, in some situations, public employers must have the ability to include agency-fee arrangements in their collective-bargaining agreements. This Court should view skeptically the efforts of these States and of petitioner himself to subvert the democratic decisions of voters by seeking to constitutionalize a contrary policy of their own preference.

C. Petitioners' *Amici* Misrepresent the Role of Public-Sector Collective Bargaining in Municipal Bankruptcies.

The States supporting petitioner attempt to justify a constitutional ban on agency fees by claiming that public-sector collective bargaining creates heightened risks of municipal bankruptcy. Br. of Amici Curiae States of Michigan, et al. in Support of Pet. ("Pet. States Amici") 11-19. There is, however, no clear correlation between collective bargaining and a municipality's fiscal health.

First, the vast majority of municipalities across the country have permitted collective bargaining for public-sector employees since the mid-1970s, *see* Kearney & Mareschal, *supra*, at 64-66, but only a very small percentage of municipalities—two-hundred-and-sixty-four in total—have filed for bankruptcy after that time, *see* Chapman & Cutler, LLP, *Primer on Municipal Debt Adjustment—Chapter 9: The Last Resort for Financially Distressed Municipalities*, app. C-1 (2012) (municipal bankruptcies between 1980 and 2012). And a number of those bankruptcies occurred in States that do not permit collective bargaining by state and local government employees or severely restrict it. Texas, for example, ranks third among all States in municipal bankruptcies but does not permit public-sector collective bargaining except by police or firefighters. *See id.* at app. C-2; *see also* Kearney & Mareschal, *supra*, at 66. There is thus nothing to support amici's speculation that it is *collectively bargained* public-sector employee benefits that drive municipal bankruptcies.

Second, municipal bankruptcies occur as a result of a complex mix of factors, often unique to each

locality's particular history and circumstances, and cannot be explained simply as the product of high public-sector labor costs. Indeed, it is traditionally a decrease in revenues that causes a municipality to seek bankruptcy protection. The bankruptcy of Detroit, for instance, is typically attributed to a myriad of factors that depressed municipal tax receipts, such as declining population, poor economic performance, and reductions in state financial support. *See, e.g.*, Wallace Turbeville, *The Detroit Bankruptcy* 13-21, 33-34 (Dēmos Rep. 2013). And a similar story is true in Stockton and San Bernadino, California, whose financial distress and ultimate bankruptcies were driven largely by a unique vulnerability to the "double whammy of unbridled speculation, followed by steep losses of property value" as a result of the 2008 recession. Tracy Gordon et al., *Exuberance & Municipal Bankruptcy: A Case Study of San Bernardino, Stockton & Vallejo, CA* 15-16 (Goldman Sch. Pub. Pol'y Working Paper Series May 2017 draft).[14] Amici's simplistic narrative gloss that high public-sector labor costs cause municipal bankruptcies thus fails to grapple with—and indeed purposely obscures—the diverse causative factors that produced these complicated fiscal incidents.

Amici's reliance on the purported "public impact" of the cost of public-employee pension plans is also misplaced. *See, e.g.*, Pet. States Amici 13. All States—regardless of whether they authorize collective

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[14] *See also* Sydney Evans et al., *How Stockton Went Bust: A California City's Decade of Policies and the Financial Crisis That Followed* 2 (Cal. Common Sense. Rep. June 2012); The Pew Charitable Trusts, *The State Role in Local Government Financial Distress* 9-11 (July 2013).

bargaining in the public sector—establish the terms and conditions of their public-employee benefit plans by statute. It is the legislature, and not unions, that sets the scope of public-employee pension benefits.

II. Petitioner's Constitutional Challenge Should Be Rejected.

Petitioner's attempt to avoid paying his fair share for the services of his exclusive representative is grounded in two mischaracterizations of the nature and effect of agency fees. First, petitioner obscures the fact that agency-fee requirements are conditions of public employment that advance the government's interest in managing its workforce. Second, petitioner confuses his objection to funding his exclusive representative's collective-bargaining activities with a broader challenge to all of the services that an exclusive representative provides.

A. The First Amendment Affords Public Employers Flexibility to Manage Their Workforces.

Petitioner's First Amendment challenge rests centrally on the premise that government may not require a person to support speech absent a compelling interest that is furthered by the narrowest means possible. *See* Pet. Br. 36. But this characterization obscures the fact that agency-fee arrangements are negotiated by the government *acting as an employer to manage its public workforce*. Contrary to petitioner's contention, such a condition of employment is not subject to "strict" or "exacting" scrutiny under the First Amendment.

This Court has long recognized that the First Amendment permits States to adopt reasonable

workforce-management policies to promote effective government operations, even if those policies impact a public employee's First Amendment rights. *See, e.g., Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 598-600 (2008); *Garcetti*, 547 U.S. at 417-20; *Waters v. Churchill*, 511 U.S. 661, 671-75 (1994) (plurality op.). As this Court has explained, the Constitution allows the government flexibility to fulfill its "'mission as employer,'" *Engquist*, 553 U.S. at 598 (quoting *Waters*, 511 U.S. at 674-75), and does not require that a government's employment-related measures be "narrowly tailored to a compelling government interest," *Waters,* 511 U.S. at 674-75; *see also National Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 153-55 (2011).

"[T]here is a crucial difference, with respect to constitutional analysis, between the government exercising the power to regulate" and the government acting "to manage its internal operation[s]." *Engquist,* 553 U.S. at 598 (alteration and quotation marks omitted); *see also Connick v. Myers*, 461 U.S. 138, 143 (1983) (recognizing "the common sense realization that government offices could not function if every employment decision became a constitutional matter"). First, "[t]he government's interest in achieving its goals as effectively and efficiently as possible" commands greater weight, being "elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Waters*, 511 U.S. at 675 (plurality op.). Second, the government's "reasonable predictions of disruption" are entitled to "substantial weight . . . even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign [the Court's] review of legislative

predictions of harm is considerably less deferential." *Id.* at 673.

This Court has on many occasions confirmed that the First Amendment is not a mandate for lesser public efficiency. The Court has explained that when an individual "enters government service," he or she "must accept certain limitations on his or her freedom," including limitations that would be imposed in a private employment setting. *Garcetti*, 547 U.S. at 418. These limitations may and often do restrict speech or associational activities that the government could not limit outside of the employment relationship. *See, e.g.*, *Connick*, 461 U.S. at 141 (rejecting employee claim that termination for views expressed in questionnaire distributed to coworkers violated First Amendment); *Public Workers v. Mitchell*, 330 U.S. 75, 99, 101 (1947) (upholding provision of federal statute prohibiting federal employees from active participation in political management or political campaigns).

Abood's holding—that public employers may adopt a model of collective bargaining that utilizes agency fees in support of exclusive representation—is fully consistent with these principles and with the decisions in which the Court has applied them. *Abood* recognizes that the task of crafting a workable labor-relations system is complex and difficult, and requires balancing numerous potentially conflicting interests in areas where there is widespread debate and no clear answer. *Abood* accordingly does not mandate that any State enact any particular labor-relations law. It leaves States free to devise systems based on their own history and particular policy choices, and it gives voters in each State the ultimate say over changes or amendments to labor policy. *See* 431 U.S. at 224-25 & n.20.

The federal government's recent change of heart is strong proof that this Court should not constitutionalize one approach to public workforce management. For decades, the federal government defended *Abood* and the principle that the First Amendment affords States flexibility to adopt reasonable workplace management policies, even if federal policy was to the contrary. Now, the federal government has apparently changed its mind. But the strength of *Abood*—and of our federal system—is that it creates space for this kind of disagreement. *See, e.g.*, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). States whose experiences show the value of exclusive bargaining funded by mandatory agency fees should not be constitutionally bound to the federal policy currently in vogue.

B. Petitioner's Challenge Is Overbroad Because It Encompasses Agency Fees for Union Services to Which He Does Not Object.

Petitioner's First Amendment challenge conflates an exclusive representative's collective-bargaining activities—which petitioner challenges as unduly political—with the range of other workplace-related functions that an exclusive representative performs. Petitioner's request for a judgment categorically prohibiting the collection of agency fees for any purpose is therefore overbroad.

This Court recognized in *Abood* that requiring public employees to pay agency fees to cover the costs of an exclusive representative's services could impact employees' First Amendment rights. *See* 431 U.S. at 222. And the Court made clear that government's

interest as an employer justified this First Amendment injury only so long as those fees were not used for "ideological causes not germane to [the exclusive representative's] duties as collective-bargaining representative." *Id.* at 235; *see also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991). Petitioner seeks in effect to revisit that balancing. Thus, he alleges that he objects to the "positions that AFSCME advocates for in collective bargaining" (J.A. 87) and argues that "bargaining with the government is political speech," Pet. Br. 10-11. Petitioner's amici adopt this line of attack, arguing that an exclusive representative's collective-bargaining activity "necessarily implicates matters of public policy." Br. for the United States as Amicus Curiae Supporting Pet. 15.

But even if this characterization of public-sector collective bargaining were accurate—and it is not, *see, e.g.*, AFSCME Resp. Br. 42-45—petitioner's objection to funding his exclusive representative's collective-bargaining activities would not justify his request for a ruling that, as a matter of law, "public employees cannot be forced to pay any union fees whatsoever," Pet. Br. 61. As discussed above (*supra* Point I.B) an exclusive representative does more than collectively bargain on behalf of workers; the union can provide a range of services in the workplace that help to minimize labor unrest and promote stability in the workforce. Thus, even if petitioner can prove on remand the allegation that his exclusive representative's collective-bargaining activities are unduly political, that would say nothing about the permissibility of collecting agency fees to cover other expenses of his exclusive representative, which petitioner does not label "political speech." *See Abood*, 431 U.S. at 236

(political nature of non-chargeable expenses is a fact issue); *see also Lehnert*, 500 U.S. at 513.

Petitioner contends that adjusting grievances "is just as political an act as bargaining for that deal." Pet. Br. 14. But petitioner's complaint does not frame an objection to—or even mention—his exclusive representative's grievance-resolution activities. (*E.g.*, J.A. 87.) And petitioner's brief does not make a serious effort to substantiate his conclusion that the range of activities encompassed by "grievance-adjustment" constitute speech on matters of public concern. *See Abood*, 431 U.S. at 232. Nor is that conclusion self-evident. There is simply no conceivable speech objection, for instance, to a union's receipt and investigation of a workplace-related complaint—steps taken long before the union even adopts a substantive position on the merits of a grievance. And this is true both for the vast majority of grievances, which implicate only the rights of the grievant, as well as for grievances with a potentially broader impact. What is more, grievance adjustment is only aspect of the non-collective-bargaining services that an exclusive representative provides. Petitioner does not articulate, either in his complaint or his brief in this Court, any First Amendment objection to paying for an exclusive representative's informal daily services—for instance, advising workers about dental benefits or inquiring with management about incorrect leave accruals for another coworker.

A public employer could conclude that these services, and the agency fees that support them, are necessary to meet the needs of its workforce and to ensure uninterrupted provision of public services. This Court should respect those judgments and preserve governments' flexibility to adopt labor-

management policies tailored to the unique circumstances confronting their workforces, as this Court did before in *Abood*.

CONCLUSION

This Court should decline to overrule *Abood*.

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Appendix

Survey of State Statutory Authority for Public-Sector Collective Bargaining by Exclusive Representative*

State	Authority
Alabama	No statutory authority
Alaska *Alaska Stat.*	*Public Employees* – §§ 23.40.100, **23.40.110**
Arizona	No statutory authority
Arkansas *Ark. Code Ann.*	*Teachers* – § 6-17-202
California *Cal. Gov't Code*	*Local Government Employees* – § **3502.5** *State Employees* – §§ 3515.5, **3515.7** *Public School Employees* – §§ 3543-3543.2, **3546** *Higher Education Employees* – §§ **3583.5**, **3584**
Colorado *Colo. Rev. Stat.*	*Public Mass Transportation System Employees* – §§ 8-3-104(12), 8-3-107

**Citations in bold indicate authorization for agency or fair-share fees. Some States combine authority for collective-bargaining and for fees in a single statutory provision.*

App. 1

Connecticut *Conn. Gen. Stat.*	*Municipal Employees* – §§ 7-468 to 7-469 *State Employees* – §§ 5-271, **5-280** *Teachers* – § **10-153a** *Family Child Care Providers* – § **17b-705a** *Personal-Care Attendants* – § **17b-706b**
Delaware *Del. Code Ann. [tit.], [§]*	*Public Employees* – 19, §§ 1303-1304, **1319** *Police Officers & Firefighters* – 19, §§ 1603-1604 *Public School Employees* – 14, §§ 4003-4004, **4019**
District of Columbia *D.C. Code*	*Public Employees* – §§ **1-617.07**, 1-617.10, 1-617.11
Florida *Fla. Stat.*	*Public Employees* – § 447.307
Georgia *Ga. Code Ann.*	*Firefighters* – § 25-5-5 Collective-Bargaining Restriction on Teachers – § 20-2-989.10
Hawai'i *Haw. Rev. Stat.*	*Public Employees* – §§ **89-3**, **89-4**, 89-8

Idaho *Idaho Code*	*Teachers* – § 33-1273 *Firefighters* – § 44-1803
Illinois *[ch.] Ill. Comp. Stat. [§]*	*Public Employees* – 5, § **315/6** *Educational Employees* – 115, §§ 5/3, 5/10, **5/11** *Home Care & Home Health Workers* – 20, § **2405/3**
Indiana *Ind. Code*	*Employees of Correctional Institutions* – § 11-10-5-5 *Employees of State Institutions* – § 12-24-3-5 *Employees of Soldiers' & Sailors' Children's Home* – § 16-33-4-23 *Employees of the Schools for the Blind and for the Deaf* – §§ 20-21-4-4, 20-22-4-4 *Employees of a School Corp. or Charter School* – § 20-26-5-32.2 *Teachers* – §§ 20-29-2-9, 20-29-5-2 *Some Local Public Safety Employees* – § 36-8-22-7
Iowa *Iowa Code*	*Public Employees* – § 20.16
Kansas *Kan. Stat. Ann.*	*Teachers* – § 72-5415

App. 3

Kentucky *Ky. Rev. Stat. Ann.*	*City & Local Government Firefighters* – §§ 345.030, 345.040 *Local Government Police Officers* – §§ 67C.402, 67C.404 *Urban-County Police Officers, Firefighter Personnel, Firefighters & Corrections Personnel* – §§ 67A.6902, 67A.6903 ***Housing Auth. of Louisville v. Service Emps. Int'l Union, Local 557***, 885 S.W.2d 692, 696-97 (Ky. 1994) (upholding fair-share fees)
Louisiana	No statutory authority
Maine *Me. Stat. [tit.] [§]*	*Municipal Employees* – 26, §§ **629**, **963**, 965, 967 *State Employees* – 26, §§ **979-B**, 979-D, 979-F *University of Maine Employees* – 26, §§ 1023, 1025, 1026 *Judicial Employees* – 26, §§ **1283**, 1285, 1287
Maryland *Md. Code Ann., [subject]*	*State Employees* – State Pers. & Pens., §§ 3-301, 3-407, **3-502** *Teachers* – Educ. §§ 6-404, **6-407** *School Employees* – Educ. §§ **6-504**, 6-505, 6-509 *Family Child Care Providers* – Fam. Law § **5-595.3** *Independent Child Care Providers* – Health-Gen. § **15-904**

Massachusetts *Mass. Gen. Laws [ch.], [§]*	*Public Employees* – 150E, §§ **2**, 4, 5, **12** *Child Care Providers* – 15D, § 17 *Personal Care Attendants* – 118E, § 73
Michigan *Mich. Comp. Laws*	*Public Police & Fire Dep't Employees* – §§ 423.234, **423.210** *State Police Troopers & Sergeants* – § 423.274
Minnesota *Minn. Stat.*	*Public Employees* – § **179A.06**
Mississippi	No statutory authority
Missouri *Mo. Rev. Stat.*	*Public Employees* – §§ 105.510, **105.520; *Schaffer v. Board of Educ. of City of St. Louis***, 869 S.W.2d 163, 166 (Mo. Ct. App. 1993) (finding implicit authority for fair-share provisions in § 105.520) *Personal Care Attendants* – § 208.862
Montana *Mont. Code Ann.*	*Public Employees* – §§ **39-31-204**, 39-31-205, 39-31-305, **39-31-401**

Nebraska *Neb. Rev. Stat.*	*Public Employees* – §§ 48-816, 48-838 *State Employees* – § 81-1372
Nevada *Nev. Rev. Stat.*	*Local Government Employees* – § 288.160
New Hampshire *N.H. Rev. Stat. Ann.*	*Public Employees* – §§ **273-A:3**, 273-A:11; ***Nashua Teachers Union v. Nashua Sch. Dist.*,** 707 A.2d 448, 451-52 (N.H. 1998**)** (§ 273-A:3(I) permits negotiation of agency fees)
New Jersey *N.J. Stat. Ann.*	*Public Employees* – §§ 34:13A-5.3, **34A:13A-5.5**, **34:13A-5.6**
New Mexico *N.M. Stat. Ann.*	*Public Employees* – §§ **10-7E-9**, 10-7E-15 *Family Child Care Providers* – § 50-4-33
New York *N.Y. [subject] Law*	*Public Employees* – Civ. Serv. §§ 204, **208** *Child Care Providers* – Lab. § 695-d
North Carolina *N.C. Gen. Stat.*	Public-sector collective-bargaining restriction – § 95-98

App. 6

North Dakota *N.D. Cent. Code*	*Meet-and-Confer Authorization for Teachers* – § 15.1-16-13
Ohio *Ohio Rev. Code Ann.*	*Public Employees* – §§ 4117.04, 4117.05, **4117.09**
Oklahoma *Okla. Stat. [tit.] [§]*	*Municipal Firefighters & Police Officers* – 11, § 51-103 *Rural Fire Protection District Firefighters* – 19, § 901.30-2 *School Employees* – 70, § 509.2
Oregon *Or. Rev. Stat.*	*Public Employees* – §§ 243.666, 243.672 *Home Care Workers* – §§ 410.612, 410.614 *Family Child Care Workers* – § 657A.430
Pennsylvania *Pa. Stat. [tit.], [§]*	*Public Employees* – 43, §§ **1102.3**, 1101.606 *Police Officers & Firefighters* – 43, § 217.1
Puerto Rico *P.R. Laws [tit.], [§]*	*Public Employees* – 3, §§ 1451b, 1451f, **1454a**

Rhode Island *R.I. Gen. Laws*	*State Employees* – §§ **36-11-2**, 36-11-7 *Employees, including Public Employees* – § 28-7-14 *Municipal Firefighters* – § 28-9.1-5 *Municipal Police Officers* – § 28-9.2-5 *Teachers* – § 28-9.3-3; ***Town of North Kingstown v. North Kingstown Teachers Ass'n***, 110 R.I. 698, 706 (1972) (fair-share fees permissible) *Municipal Employees* – § 28-9.4-4 *State Police* – § 28-9.5-5 *Statewide 911 Employees* – § 28-9.6-5 *State Correctional Officers* – § 28-9.7-5 *Family Child Care Providers* – §§ 40-6.6-2, 40-6.6-4
South Carolina	Public sector collective bargaining restriction
South Dakota *S.D. Codified Laws*	*Public Employees* – § 3-18-3
Tennessee *Tenn. Code*	*Meet and Confer Authorization for Local Public-School Teachers* – § 49-5-608

Texas *Tex Gov't Code Ann.*	Public-sector collective-bargaining restriction – § 617.002
Utah *Utah Code Ann.*	*Firefighters* – § 34-20A-4
Vermont *Vt. Stat. Ann.* *[tit.], [§]*	*State Employees* – 3, §§ **903**, 941 *Judiciary Employees* – 3, §§ 1011, **1012** *Teachers & Administrators* – 16, §§ **1982**, 1991 *Independent Direct Support Providers* – 21, § **1634** *Municipal Employees* – 21, §§ **1722**, 1723, **1726**, 1734
Virginia *Va. Code Ann.*	Public sector collective bargaining restriction – § 40.1-57.2

Washington *Wash. Rev. Code*	*State Employees* – §§ **41.80.50**. 41.80.080, **41.80.100** *Local Government Employees* – §§ 41.56.100, **41.56.113**, **41.56.122** *School Employees* – §§ 41.59.090, **41.59.100** *Community College Employees* – §§ **28B.52.025**, 28B.52.030, **28B.52.045** *Marine Employees* – §§ 47.64.011, 47.64.135, **47.64.160** *Port Employees* – §§ 53.18.015, 53.18.050 *Long-Term Care Workers* – § 74.39A.270
West Virginia	No statutory authority
Wisconsin *Wis. Stat.*	*Public Safety Officers* – §§ **111.81**, 111.82, **111.85**, 111.825, 111.83
Wyoming *Wyo. Stat. Ann.*	*Firefighters* – § 27-10-103

No. 16-1466

IN THE

Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 55 national and international labor organizations with a total membership of 12.5 million working men and women.[1] This case addresses the constitutionality of contract clauses that require public employees who benefit from union representation to share the costs of negotiating and enforcing their collective bargaining agreements. A number of AFL-CIO affiliates represent public employees and negotiate collective bargaining agreements containing clauses that require the covered employees to financially support collective bargaining.

SUMMARY OF ARGUMENT

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Court held that public employees may be compelled to subsidize their union representative's participation in the collective bargaining system by which their terms of employment are set. The Court also held that employees may not be compelled to subsidize their union's political or ideological ac-

[1] Counsel for the petitioner and counsel for the respondents have consented to the filing of *amicus* briefs. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

tivities unrelated to collective bargaining. The plaintiff challenges the distinction drawn in *Abood* and maintains that compelled subsidization of collective bargaining activities is indistinguishable for purposes of First Amendment analysis from compelled subsidization of political or ideological speech unrelated to collective bargaining.

Abood is one in a long line of compelled-subsidy cases decided by this Court. The compelled-subsidy cases involve a variety of situations in which the government mandates that individuals participate in an association for the purpose of advising the government on a program affecting those individuals. The compelled-subsidy analysis employed in those cases allows the government to require that members of the advisory association financially subsidize the association's participation in the government program. The fact that the association's representation of the members' interests often involves speech directed to the government does not make the compelled subsidization a violation of the First Amendment, because the subsidized speech is germane to the legitimate government program that justified mandating the formation of the association in the first place.

In challenging the distinction drawn in *Abood*, the plaintiff ignores altogether the applicable compelled-subsidy analysis and instead relies solely on cases involving either compelled speech or compelled expressive association. The compelled-speech and compelled-association cases, however, are concerned with direct government interference with individuals' self-expression, either by compelling them to convey a particular message or by compelling

them to associate with others with whom they disagree in a way that affects their ability to convey their own message. Neither of those concerns arise in the compelled-subsidy cases, because individuals are not forced to convey any message nor are they personally associated with any message in a way that affects their ability to express themselves.

First Amendment concerns do arise in the compelled-subsidy context where the mandated association uses compelled subsidies to support speech that is unrelated to the government's regulatory program. To address this concern, the Court has held that compelled subsidization of association speech that occurs outside of the government program is permissible only to the extent that the governmental interests in compelling subsidization outweigh the First Amendment interests of association members who object to the speech. This Court's decisions regarding the use of agency fees to support union lobbying activities are an example of this. The Court has held that public employees may not be compelled to subsidize union lobbying activity except to the extent necessary to secure legislative ratification of a collective bargaining agreement. The plaintiff denies that there is any First Amendment difference between collective bargaining and union lobbying, but this Court's decisions explain the relevant differences and their significance for purposes of the First Amendment.

The plaintiff's objection to *Abood* is nothing less than a full-scale challenge to this Court's entire line of compelled-subsidy cases. By denying the distinction drawn in *Abood* between compelled subsidization of collective bargaining and compelled subsidi-

zation of political or ideological speech unrelated to collective bargaining, the plaintiff denies a distinction that underlies the decisions in all of the compelled-subsidy cases. In conducting an assault on this established aspect of the Court's First Amendment jurisprudence, the plaintiff makes no attempt to come to grips with the Court's compelled-subsidy analysis and instead relies upon a line of compelled-speech/compelled-association cases that address significantly different free speech concerns.

ARGUMENT

In *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 211 (1977), the Court held that requiring public employees to pay a service charge—or agency fee—to their union representative does not violate the First Amendment "insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment." *Id*. at 225. At the same time, the Court also held "that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative" to the extent those "expenditures [are] financed from charges, dues, or assessments paid by employees who . . . object to advancing those ideas." *Id*. at 235-36.

The plaintiff in this case challenges "the basic distinction drawn in *Abood*," between " 'preventing compulsory subsidization of ideological activity by employees who object thereto' " and " 'requir[ing] every

employee to contribute to the cost of collective-bargaining activities.'" *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 302 (1986), quoting *Abood*, 431 U.S. at 237. It is the plaintiff's position that there is no such distinction and that requiring financial support for collective bargaining activities is no different in First Amendment terms than requiring financial support for ideological expression unrelated to collective bargaining.

In challenging the distinction drawn in *Abood*, the plaintiff calls into question not just the holding of that case but the holdings in all of this Court's "compelled-subsidy cases" in which "*Abood* and *Keller* [*v. State Bar of California*, 496 U.S. 1 (1990),] 'provide the beginning point for [the Court's] analysis.'" *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 559 (2005), quoting *Board of Regents of the Univ. of Wisconsin v. Southworth*, 529 U.S. 217, 230 (2000). "[T]he compelled-subsidy analysis" drawn from *Abood* and *Keller* "differs substantively" from the "compelled-speech" analysis on which the plaintiff relies in challenging *Abood*. *Id*. at 565 n. 8. Under the "compelled-subsidy" analysis, "an individual [may be] required by the government to subsidize a message he disagrees with, expressed by a private entity," to the extent that the message is "germane to the regulatory interests" of the government. *Id*. at 557-58.

There is no question that union communications "for the purposes of collective bargaining, contract administration, and grievance adjustment," *Abood*, 431 U.S. at 225, are "germane to the regulatory interests" of the government, *Johanns*, 544 U.S. at 558, in negotiating the terms of public employment. Thus,

under the applicable "compelled-subsidy analysis," the plaintiff's challenge to "the basic distinction drawn in *Abood*," *Hudson*, 475 U.S. at 302, fails.

I. COMPELLED SUBSIDIZATION OF A PRIVATE ASSOCIATION THAT HAS BEEN MANDATED IN ORDER TO FURTHER A LEGITIMATE GOVERNMENT INTEREST IS NOT A FORM OF COMPELLED SPEECH SUBJECT TO HEIGHTENED FIRST AMENDMENT SCRUTINY.

A. Compelled Subsidization of Private Speech that is Germane to Legitimate Government Regulatory Interests.

The compelled-subsidy cases involve various situations in which "compelled association . . . [is] justified by the [government's] interest in regulating" aspects of a particular population's activities or relationships. *Keller v. State Bar of California*, 496 U.S. 1, 13 (1990). The issue of "compelled association" arises where the government decides to allow "a large measure of self-regulation" by mandating association among members of the regulated community for the purpose of allowing them to advise on "regulation conducted by a government body." *Id*. at 12. For example, public employers frequently provide for employee input on their terms of employment through a system of exclusive representation. Or, to take another "substantial[ly] analog[ous]" example, state courts often require practicing lawyers to join an integrated bar association that "provide[s] specialized professional advice to those with the ultimate responsibility of governing the legal profession." *Id*. at 12 & 13.

In all of the compelled-subsidy cases, "there is some state imposed obligation which makes group membership less than voluntary" that is justified by "the legitimate purposes of the group [that are] furthered by the mandated association." *United States v. United Foods, Inc.*, 533 U.S. 405, 413-14 (2001). The advisory process inevitably involves speech by the association that is directed toward the government regulator, but compulsory subsidization of that advisory speech does not violate the First Amendment, so long as "objecting members [a]re not required to give speech subsidies for matters not germane to the larger regulatory purpose which justified the required association." *Id.* at 414.

The earliest compelled-subsidy cases involved collective-bargaining agreements that require covered employees to pay fees equal to union dues and integrated bar associations that require membership as a condition of practicing law. In *Railway Employes' Dept. v. Hanson*, 351 U.S. 225, 235 (1956), the Court sustained the Railway Labor Act's authorization of union shop agreements against a First Amendment challenge on the ground that, although "[t]o require, rather than to induce, the beneficiaries of trade unionism to contribute to its costs may not be the wisest course[,] Congress might well believe that it would help insure the right to work in and along the arteries of interstate commerce." Treating *Hanson* as controlling First Amendment authority, the Court later held that a state "may constitutionally require that the costs of improving the [legal] profession [with the advice of the integrated bar] be shared by the subjects and beneficiaries of the regulatory program" so long as the State "might reasonably believe"

that the requirement "further[s] the State's legitimate interests." *Lathrop v. Donahue*, 367 U.S. 820, 843 (1961). *See also id.* at 849 (concurring opinion).[2]

When the Court returned to these two forms of compelled subsidization in *Abood* and *Keller*, it began to define the limits of what is constitutionally permissible. *Abood* held that a public employer may require its employees to subsidize the costs of collective bargaining on their behalf but not of "ideological activities unrelated to collective bargaining." 431 U.S. at 225-26 & 236. Applying *Abood* to the integrated bar, *Keller* held that a state may require practicing attorneys to subsidize only those "expenditures [that] are necessarily or reasonably incurred for the purpose of regulating the legal profession." 496 U.S. at 14. In *Keller*, the bar association argued that *Abood* should not apply, because it was possible to "distinguish the two situations on the grounds that the compelled association in the context of labor unions serves only a private economic interest in collective bargaining, while the State Bar serves more substan-

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[2] Seven Justices in *Lathrop* voted to affirm the decision of the Wisconsin Supreme Court upholding the constitutionality of the integrated bar—six on the basis of *Hanson*, 367 U.S. at 842 & 849. Justice Whittaker concurred on separate grounds. *Id.* at 865. Justice Black agreed that "the question posed" by the "integrated bar" is "identical to that posed" by the union shop, but he dissented on the ground that both are unconstitutional. *Id.* at 871. Only Justice Douglas disputed that the integrated bar and union shop presented analogous constitutional questions, and he maintained that the union shop, unlike the integrated bar, was constitutional based on "[t]he power of a State to manage its internal affairs by requiring a union-shop agreement." *Id.* at 879.

tial public interests." *Id.* at 13. The Court rejected that argument, explaining, "We are not possessed of any scales which would enable us to determine that the one outweighs the other sufficiently to produce a different result." *Ibid.* Taken together, "*Abood* and *Keller* provide the beginning point for [the] analysis" in the "compelled-subsidy cases." *Johanns*, 544 U.S. at 559 (quotation marks and citation omitted).

"[T]he rule announced in *Abood* and further refined in *Keller*" was applied in reviewing the system by which producers advise the Secretary of Agriculture regarding marketing orders issued pursuant to Agricultural Marketing Agreement Act of 1937. *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 473 (1997). *See also id.* at 478 (dissenting opinion) ("[A] proper understanding of *Abood* is necessary for the disposition of this case."). "The orders are implemented by committees composed of producers and handlers of the regulated commodity, . . . who recommend rules to the Secretary governing marketing matters such as fruit size and maturity," *id.* at 462, and "impose assessments on [producers] that cover the expenses of administering the orders," *id.* at 460. "Given that producers were bound together in the common venture" by the marketing orders, the Court held that "the imposition upon their First Amendment rights caused by using compelled contributions . . . was, as in *Abood* and *Keller*, in furtherance of an otherwise legitimate program." *United Foods*, 533 U.S. at 414-15. Accordingly, "*Abood* and *Keller* would permit the mandatory fee if it were 'germane' to a 'broader regulatory scheme,'" *Johanns*, 544 U.S. at 558, quoting *United Foods*, 533 U.S. at 415, that was "judged by

Congress to be necessary to maintain a stable market," *United Foods*, 533 U.S. at 414.

In each of these situations, the government could have dispensed altogether with any "measure of self-regulation" and provided for unilateral "regulation conducted by a government body." *Keller*, 496 U.S. at 13. Public employers often unilaterally set the terms of public employment. And, even if some employee input were desired, the government could provide for "bargaining carried on by the Secretary of Labor," or some other publicly appointed figure, rather than representation by an independent labor union. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 552 (1991) (Scalia, J., concurring in part and dissenting in part), quoting *Machinists v. Street*, 367 U.S. 740, 787 (1967) (Black, J., dissenting). By the same token, "a state legislature could set up a staff or commission to recommend" rules governing the practice of law. *Lathrop*, 367 U.S. at 864. And, the Secretary of Agriculture could conduct his own "research and development projects" to determine the "rules . . . governing marketing matters," without the advice of "committees composed of producers and handlers." *Glickman*, 521 U.S. at 461-62.

In each instance, were the government to choose to seek advice from a source other than the affected individuals, it could obviously impose "a reasonable license tax," *Lathrop*, 367 U.S. at 865, to "require that the costs of [procuring the advice] be shared by the subjects and beneficiaries of the regulatory program," *Keller*, 496 U.S. at 8, without raising any serious First Amendment question. In the variety of different contexts addressed in the compelled-subsidy

cases, the Court has held that the government may likewise seek advice on its program from the affected group of individuals and may require the group to share the cost of giving that advice.

Finally, in considering a closely related "First Amendment challenge to a mandatory student activity fee imposed by . . . the University of Wisconsin System and used in part by the University to support student organizations engaging in political or ideological speech," the Court treated "[t]he *Abood* and *Keller* cases [as] provid[ing] the beginning point for our analysis." *Southworth*, 529 U.S. at 221, 230. The University could have financed the "program designed to facilitate extracurricular student speech" itself but instead chose to "charge its students an activity fee used to fund [the] program." *Id.* at 220-21. Nevertheless, applying "the constitutional rule" from "*Abood* and *Keller*," the Court held that "a public university may require its students to pay a fee which creates the mechanism for the extracurricular speech of other students," based on the University's "determin[ation] that its mission is well served if students have means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall." *Id.* at 231, 233.

The compelled-subsidy line of cases stands for the proposition that, so long as the state "might reasonably believe" that mandated association will further "a legitimate end of state policy," it "may constitutionally require that the costs of [association] should be shared by the subjects and beneficiaries of the regulatory program." *Lathrop*, 367 U.S. at

843. *Accord Southworth*, 529 U.S. at 233 ("If the University reaches this conclusion [that its mission is well served if students have the means to engage in dynamic extracurricular discussions], it is entitled to impose a mandatory fee to sustain an open dialogue to these ends."). Thus, "using compelled contributions . . . in furtherance of an otherwise legitimate program" does not violate "the First Amendment rights" of those who are "required to pay moneys in support of activities that [a]re germane to the reason justifying the compelled association in the first place." *United Foods*, 533 U.S. at 414-15. *Accord Johanns*, 544 U.S. at 565 n. 8 (the First Amendment is violated only by compelled-subsidy of speech "unconnected to any legitimate government purpose").

B. The Reasoning of the Compelled-Speech Precedents Applies Only to Compelled Subsidization of Private Speech that is Not Germane to Legitimate Government Regulatory Interests.

The plaintiff maintains that compelled subsidization of a public sector union's core collective bargaining activities should be subjected to the same level of scrutiny as that employed in cases of "compelled speech" or "compelled association." Pet. Br. 19-20. However, the heightened level of First Amendment review in the cases on which plaintiff relies "relates to compelled *speech* rather than compelled *subsidy*." *Johanns*, 544 U.S. at 564-65 (emphasis in original). And, as the Court has explained, the First Amendment concerns regarding "compelled speech" or "compelled association" are not implicated in

"compelled subsidy" of private speech within a legitimate government program.

"[T]rue 'compelled-speech' cases" involve situations "in which an individual is obliged personally to express a message he disagrees with, imposed by the government." *Johanns*, 544 U.S. at 557. This "line[] of precedent . . . exemplified by *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), and *Wooley v. Maynard*, 430 U.S. 705 (1977), stands for the principle that government may not force individuals to utter or convey messages they disagree with or, indeed, say anything at all." *Id.* at 573 (dissenting opinion).

The "compelled-speech cases are not limited to the situation in which an individual must personally speak the government's message," they "have also in a number of instances limited the government's ability to force one speaker to host or accommodate another speaker's message." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006), citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 566 (1995) (state law cannot require a parade to include a group whose message the parade's organizer does not wish to send); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U. S. 1, 20-21 (1986) (plurality opinion); accord, *id.* at 25 (Marshall, J., concurring in judgment) (state agency cannot require a utility company to include a third-party newsletter in its billing envelope); *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241, 258 (1974) (right-of-reply statute violates editors' right to determine the content of their newspapers). "The compelled-speech violation in [the forced hosting or accommodation] cases, however,

resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Rumsfeld*, 547 U.S. at 63.

The First Amendment problems identified by the compelled-speech cases do not arise in the compelled-subsidy cases, because the mandated self-regulatory associations "impose no restraint on the freedom of any [individual] to communicate any message to any audience" and "do not compel any person to engage in any actual or symbolic speech." *Glickman*, 521 U.S. at 469. Nor do the mandated associations require any covered individual to take any action "that makes them appear to endorse the [subsidized] message." *Johanns*, 544 U.S. at 565 n. 8. In these very important regards, the types of mandatory association at issue in the compelled-subsidy cases are completely unlike partisan political patronage, which causes individuals to "feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 73 (1990).

"The reasoning of these compelled-speech cases has been carried over to certain instances in which individuals are compelled not to speak, but to subsidize a private message with which they disagree." *Johanns*, 544 U.S. at 557. With regard to "speech with . . . content [that is] not germane to the regulatory interests that justified compelled membership," the Court has held that "making those who disagree[] with [the content] pay for it violate[s] the First Amendment." *Id*. at 558. This is so, because "being forced to fund someone else's private speech *unconnected to*

any legitimate government purpose violates personal autonomy." *Id*. at 565 n. 8 (emphasis added), citing *id*. at 557-58 ("discussing *Keller* and *Abood*"). This First Amendment concern is fully addressed by the rule "that the objecting members [a]re not required to give speech subsidies for matters not germane to the larger regulatory purpose which justified the required association." *United Foods*, 533 U.S. at 414. *See Southworth*, 529 U.S. at 231 ("In *Abood* and *Keller*, the constitutional rule took the form of limiting the required subsidy to speech germane to the purposes of the union or bar association.").[3]

The core holding of *Abood* is that public employees can be compelled to subsidize the cost of collective bargaining with their employer. The speech entailed in such collective bargaining is most certainly "'germane' to a 'broader regulatory scheme'" for establishing terms of public employment. *Johanns*, 544 U.S. at 558, quoting *United Foods*, 533 U.S. 415-16. Thus, compelled subsidization of collective bargaining is *not* an instance of employees "being forced to fund someone else's private speech unconnected to any legitimate government purpose." *Id*. at 565 n. 8. Accordingly, the core holding of *Abood* is fully consistent with this Court "compelled-subsidy analysis." *Ibid*.

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[3] This rule was applied in *Knox v. Service Employees*, 567 U.S. ___ (2012), in deciding "whether the First Amendment allows a public-sector union to require objecting nonmembers to pay a special fee for the purpose of financing the union's political and ideological activities." Slip op. 1. *See id*. at 9-10 (discussing *United Food*'s treatment of "compulsory subsidies for private speech" that is unrelated to "a comprehensive regulatory scheme").

II. *ABOOD* REPRESENTS A SOUND APPLICATION OF COMPELLED-SUBSIDY ANALYSIS TO PUBLIC SECTOR COLLECTIVE BARGAINING.

The plaintiff advances two reasons that "*Abood* should be overruled":

> "[i] *Abood* was wrongly decided because bargaining with the government is political speech indistinguishable from lobbying the government; [ii] *Abood* is inconsistent with this Court's precedents that subject instances of compelled speech and association to heightened constitutional scrutiny." Pet. Br. 9.

The decisions in this Court's "compelled-subsidy cases," *Johanns*, 544 U.S. at 559, refute both of these assertions.

A. For Purposes of First Amendment Analysis, Collective Bargaining Over Terms of Public Employment is Not Equivalent to Lobbying.

"[T]he principal reason *Abood* was wrongly decided," according to the plaintiff, is that it failed to recognize that "bargaining with the government is political speech indistinguishable from lobbying the government." Pet. Br. 10-11. From the premise that public sector collective bargaining is indistinguishable from lobbying, the plaintiff draws the conclusion that "[a]gency fees thus inflict the same grievous First Amendment injury as would the government forcing individuals to support a mandatory lobbyist or political advocacy group." *Id*. at 12. The plaintiff's

argument rests on the understanding that "lobbying" encompasses any "meeting and speaking with public officials, as an agent of parties, to influence public policies that affect those parties." *Id.* at 11.

By the plaintiff's lights, *all* of this Court's compelled-subsidy cases, not just *Abood*, involved "the government forcing individuals to support a mandatory lobbyist or political advocacy group." Pet. Br. 12. In *Keller*, "[t]he plan established by California for the regulation of the [legal] profession [wa]s for recommendations as to admission to practice, the disciplining of lawyers, codes of conduct, and the like to be made to the courts or the legislature by the organized bar." 496 U.S. at 12. *Glickman* involved "committees composed of producers and handlers of the regulated commodity, appointed by the Secretary [of Agriculture], who recommend rules to the Secretary governing marketing matters such as fruit size and maturity levels." 521 U.S. at 462. And, in *Southworth*, the mandatory fee was imposed precisely in order to "support student organization engaging in political or ideological speech." 529 U.S. at 221.

In each of these situations, "the compelled contributions . . . did not raise First Amendment concerns" so long as the "compelled contributions" were "in furtherance of a legitimate program." *United Foods*, 533 U.S. at 415. At the point where "the legitimate purposes of the group were [not] furthered by the mandated association," however, "[a] proper application of the rule in *Abood* require[d] . . . invalidat[ion of] the . . . statutory scheme." *Id.* at 413-14. This Court's decisions in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), and *Harris v. Quinn*, 573 U.S.

___ (2014), represent an application of this rule that squarely rejects the identity between public sector collective bargaining and lobbying drawn by the plaintiff.

In *Lehnert*, this Court distinguished "discussion by negotiators regarding the terms and conditions of employment" from "lobbying and electoral speech . . . concern[ing] topics about which individuals hold strong personal views." 500 U.S. at 521. The Court determined that "allowing the use of dissenters' assessments for political activities outside the scope of the collective-bargaining context would present additional interference with the First Amendment interests of objecting employees," and on this ground held "that the State constitutionally may not compel its employees to subsidize legislative lobbying or other political union activities outside the limited context of contract ratification or implementation." 500 U.S. at 521-22 (internal quotation marks omitted). The Court explained that, "unlike collective-bargaining negotiations between union and management, our national and state legislatures, the media, and the platform of public discourse are public fora open to all." *Id*. at 521. The Court also noted that "[t]here is no question as to the expressive and ideological content" of lobbying in these fora, because the "policy choices performed by legislatures is not limited to the workplace but typically has ramifications that extend into diverse aspects of an employee's life." *Ibid*.

By contrast, the negotiation of a collective bargaining does not involve "public discourse [in] public fora open to all" and the subjects of bargaining are "limited to the workplace." *Lehnert*, 500 U.S. at 521.

Collective bargaining involves establishing the terms of employment controlled by the government through negotiations with designated executive branch representatives. *See* 5 ILCS 315/7. Thus, the collective bargaining activities that the employees are compelled to financially support typically "will not seek to communicate to the public or to advance a political or social point of view beyond the employment context." *Borough of Duryea, Pennsylvania v. Guarnieri*, 564 U.S. 379, 398 (2011).

The Illinois Public Labor Relations Act, for example, is typical of public sector bargaining laws in providing that in such "closed bargaining sessions" the government will "admit, hear the views of, and respond to only the designated representatives of a union selected by the majority of its employees." *City of Madison Jt. School Dist, No. 8. v. Wisconsin Emp. Rel. Commn.*, 429 U.S. 167, 178 (1976) (Brennan, J., concurring). *See* 5 ILCS 315. Such sessions are exempt from the Illinois Open Meetings Law. 5 ILCS 120/2(c)(2). And, what occurs at such sessions is exempt from public disclosure under § 7 of the Illinois Freedom of Information Act. 5 ILCS 140/7(1)(p). Illinois law thus shields collective bargaining from public disclosure in the same manner that it shields other types of commercial contract negotiations. *See, e.g.*, 5 ILCS 120/2(c)(5)("purchase or lease of real property") & (c)(7) ("sale or purchase of securities, investments, or investment contracts"); 5 ILCS 140/7(1)(h)("Proposals and bids for any contract, grant, or agreement") & (r)("records, documents, and information relating to real estate purchase negotiations"). *See City of Madison Jt. School Dist.*, 429 U.S. at 175 n. 6 (drawing a distinction of constitu-

tional significance between the school board's "open session where the public was invited" and "true bargaining sessions between the union and the board [] conducted in private").

Indeed, the holding of *Harris v. Quinn*, *supra*, rests entirely on the distinction between lobbying and collective bargaining drawn in *Lehnert*. In *Harris*, the Court determined that allowing compelled-subsidization of a "union [that] is largely limited to petitioning the State for greater pay and benefits," slip op. 32, rather than collective bargaining, would "amount[] to a very significant expansion of *Abood*," *id*. at 8-9. Based on the distinction between lobbying and bargaining, *Harris* "refuse[d] to extend *Abood*" to allow compelled subsidization of union representation that was effectively limited to lobbying. *Id*. at 39. Thus, while the majority opinion in *Harris* criticizes *Abood* in dicta, the holding of that case reinforces "the basic distinction drawn in *Abood*," between " 'compulsory subsidization of ideological activity' " and " 'requir[ing] every employee to contribute to the cost of collective-bargaining activities.' " *Hudson*, 475 U.S. at 302, quoting *Abood*, 431 U.S. at 237.

B. The Level of First Amendment Scrutiny Generally Applied in Cases of Compelled Speech and Compelled Association Does Not Apply to Compelled Subsidization of Core Collective Bargaining Activities.

The plaintiff more generally criticizes "*Abood*'s failure to apply [the] heightened scrutiny to agency fees" that often applies in cases of "compelled expressive and political association" or "compelled speech." Pet.

Br. 18-19. However, as we have explained in point I, "th[e] compelled-speech [analysis]" on which the plaintiff relies "differs substantively from the compelled-subsidy analysis" that applies to mandatory association in furtherance of a legitimate government program. *Johanns*, 544 U.S. at 565 n. 8.[4]

The compelled-subsidy analysis establishes that the government "may constitutionally require that the costs of [mandated association] should be shared by the subjects and beneficiaries of the regulatory program," so long as the government "might reasonably believe" a mandated system of self-regulation will further "a legitimate end of state policy." *Lathrop*, 367 U.S. at 843. The decision to set the terms of public employment through collective bargaining is certainly "a reasonable position, falling within the wide latitude granted the Government in its dealings with employees." *National Aeronautics and Space Administration v. Nelson*, 562 U.S. 134, 154 (2011) (quotation marks and citation omitted).

To begin with, there is not the slightest doubt that, "[t]o attain the desired benefit of collective bargaining, union members and nonmembers [may be] required to associate with one another" by choosing an exclusive bargaining representative as "the legitimate purposes of the group [a]re furthered by th[at] mandated association." *United Foods*, 533 U.S. at

[4] In determining whether "unions constitutionally may subsidize lobbying and other political activities with dissenters' fees," the Court has *not* applied exacting scrutiny but rather has balanced "the governmental interests underlying . . . union-security arrangements" against the "burden upon freedom of expression." *Lehnert*, 500 U.S. at 520 & 522.

414. There are strong practical reasons for allowing units of similarly situated employees to choose an exclusive representative in order to avoid "[t]he confusion and conflict that could arise if rival . . . unions, holding quite different views as to the proper [terms] each sought to obtain the employer's agreement." *Abood*, 431 U.S. at 224.

In *Knight v. Minnesota Community College Faculty Assn.*, 460 U.S. 1048 (1983), the Court summarily affirmed a three-judge district court decision that had "rejected [an] attack on the constitutionality of exclusive representation in bargaining over terms and conditions of employment, relying chiefly on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)." *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 278 (1984). As the Court explained, "it is rational for the State to give the exclusive representative a unique role in the 'meet and negotiate' process" leading to a collective bargaining agreement, because "[t]he goal of reaching agreement makes it imperative for an employer to have before it only one collective view of its employees when 'negotiating.' See *Abood v. Detroit Board of Education*, 431 U.S. at 224." *Id*. at 291. *See also id*. at 315-16 (Stevens, J., dissenting in part) ("It is now settled law that a public employer may negotiate only with the elected representative of its employees, because it would be impracticable to negotiate simultaneously with rival labor unions.").

"The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones"

that "often entail expenditure of much time and money." *Abood*, 431 U.S. at 221. Precisely because "the union is obliged fairly and equitably to represent all employees . . ., union and nonunion, within the relevant unit," the state could reasonably conclude that requiring all represented employees to contribute "distribute[s] fairly the cost of the[representational] activities among those who benefit, and . . . counteracts the incentive that employees might otherwise have to become 'free riders'—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." *Id*. at 222. On this ground, *Abood* determined that "the permissive use of an agency shop" was a reasonable method of financing exclusive representation. *Id*. at 229. *See also Lathrop*, 367 U.S. at 843 (the state "may constitutionally require that the costs . . . should be shared by the subjects and beneficiaries of the regulatory program").

To the extent that "[t]he reasoning of the[] compelled-speech cases has been carried over to certain instances in which individuals are compelled . . . to subsidize a private message," it has been applied to "invalidate[] the use of . . . compulsory fees to fund speech on political matters" that "was not germane to the regulatory interests that justified compelled membership." *Johanns*, 544 U.S. at 557-58. This application of that reasoning is reflected in "the basic distinction drawn in *Abood*," between " 'preventing compulsory subsidization of ideological activity by employees who object thereto' " and " 'requir[ing] every employee to contribute to the cost of collective-bargaining activities.' " *Hudson*, 475 U.S. at 302, quoting *Abood*, 431 U.S. at 237.

Abood expressly recognized that "compelled . . . contributions for political purposes" would be "an infringement of [employees'] constitutional rights." *Abood*, 431 U.S. at 234. Accordingly, the Court held that, while "a union [may] constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative . . ., such expenditures [must] be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas." *Id.* at 235-36. While "*Abood* did not attempt to draw a precise line between permissible assessments for public-sector collective bargaining activities and prohibited assessments for ideological activities," *Lehnert*, 500 U.S. at 517, the Court has undertaken to do so with great care in subsequent decisions. *See, e.g.*, *Ellis v. Railway Clerks*, 466 U.S. 435, 448-57 (1984); *Lehnert*, 500 U.S. at 518-32; *Locke v. Karass*, 555 U.S. 207, 217-21 (2009).

The plaintiff cannot deny that the use of compulsory fees to support collective bargaining over economic terms of employment is "the logical concomitant of a valid scheme of economic regulation." *United Foods*, 533 U.S. at 412. Nor can he deny that, for the most part, the "basic distinction drawn in *Abood*," *Hudson*, 475 U.S. at 302, protects him from "being forced to fund someone else's private speech unconnected to any legitimate government purpose." *Johanns*, 544 U.S. at 565 n. 8. Rather, the plaintiff challenges *Abood* primarily on the grounds that, at the margins, "it is difficult to distinguish chargeable from nonchargeable expenses under *Abood*," singling

out for criticism what he refers to as "[t]he amorphous *Lehnert* and *Locke* tests." Pet. Br. 26 & 27.

Whatever one may think about the Court's subsequent attempts to "draw a precise line between permissible assessments for public-sector collective bargaining activities and prohibited assessments for ideological activities," *Lehnert*, 500 U.S. at 517, so long as "the extreme ends of the spectrum are clear," the fact that "where the line falls . . . will not always be easy to discern," *Keller*, 496 U.S. at 15, provides no basis for overruling *Abood*'s core holding that public sector agency shop agreements are constitutional "insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment," 431 U.S. at 225. *See Southworth*, 529 U.S. at 232 (upholding compelled subsidization of student speech even though "the vast extent of permitted expression makes the test of germane speech inappropriate").

There is no serious question that, with respect to negotiating economic terms of employment, "the case for requiring [employees] to speak through a single representative would be quite strong," as would be "the case for requiring all [employees] to contribute to the clearly identified costs of collective bargaining," and that "the concomitant limitation of First Amendment rights would be relatively insignificant." *Abood*, 431 U.S. at 263 n. 16 (concurring opinion). While the plaintiff may object to financially supporting bargaining over economic issues, such as, "wage increases" or "health insurance," Pet. Br. 12, he makes no effort to show that the use of agency

fees to support such bargaining is "not germane to the regulatory interests that justif[y] compelled [participation in public sector collective bargaining]." *Johanns*, 544 U.S. at 558. *See* Pet. Br. 12-14 (describing the various subjects of bargaining). *Abood*'s core ruling regarding compelled-subsidy of the cost of collective bargaining thus fits comfortably within this Court's First Amendment jurisprudence.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Appendix No. 1 of Materials Submitted by John Craig and Sara Slinn, Canadian Charter of Rights of Freedoms Excerpt

***The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11**

Guarantee of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

Appendix No.2 of Materials Submitted by John Craig and Sara Slinn:
Barrett & Craig, "Collective Bargaining, Labour Law, and the Charter in the Supreme Court of Canada, 1987 to 2017"

Collective Bargaining, Labour Law, and the *Charter* in the Supreme Court of Canada, 1987 to 2017

Steven Barrett & John Craig[*]

This chapter provides an overview and analysis of the Supreme Court of Canada's shifting approach to the guarantee of freedom of association under section 2(d) of the *Canadian Charter of Rights and Freedoms*, as it applies to labour relations and collective bargaining. We focus on the Court's treatment of the question of whether section 2(d) includes constitutional protection for the right to organize, the right to collectively bargain, and the right to strike. While the Court's approach in applying the justificatory criteria under section 1 of the *Charter* to legislation it finds unconstitutional and the resulting remedial questions are also significant issues in considering the ambit of associational rights, this chapter is directed at the Court's delineation of the scope and content of section 2(d) itself.

In Part A, we trace the evolution of the Court's thinking as it relates to constitutional protection for organizing, bargaining, and strike activity. In our view, an understanding of the doctrinal development of the Court's understanding of section 2(d) is critical to any appreciation of the Court's present view, and how that view may evolve in future cases.

Part A begins with the initial judicial creation of a virtual "no-go zone" established by the 1987 freedom of association trilogy. This restrictive approach to the recognition of collective bargaining rights under section 2(d)

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was to last for almost fifteen years, but began to erode with a more expansive conception of the protection for union organizing activity in *Dunmore* (2001), and for collective bargaining itself in *Health Services* (2007). This growing recognition of a broader scope for section 2(d) in labour relations and collective bargaining was temporarily interrupted by a more cautious and reactionary pause in *Fraser* (2011), which sanctioned a separate and somewhat anemic collective bargaining regime for agricultural workers. However, four years later, in the 2015 trilogy, the Court returned to a broad and purposive conception of the scope of section 2(d) protection (particularly in *MPAO*, and in *SFL,* which extended section 2(d) protection to the right to strike). Most recently, however, some uncertainty has been created as to the precise contours of the right to bargain collectively by the Court's brief and cryptic reasons in *BCTF* (2017).

Part B then turns to an assessment of what we regard as three of the most important unresolved issues arising from the Supreme Court of Canada's revised approach to freedom of association in the labour relations and collective bargaining field: 1) the role of pre-legislative consultation in satisfying the section 2(d) requirement for a meaningful process of collective bargaining; 2) the current status of the substantial interference test for a violation of section 2(d); and 3) the impact of the Court's revised approach to section 2(d) on the law of forced association.

A. OVERVIEW OF THE SCC'S EVOLVING APPROACH TO SECTION 2(D)

1. 1987 Freedom of Association Trilogy

While section 2(d) applies to all associational activity, it has been most litigated, and its meaning most hotly contested, in its application to labour relations. In the first years after the enactment of the *Charter*, in what came to be known as the 1987 freedom of association trilogy, the Court was faced with three separate challenges to legislation interfering with fundamental components of the collective bargaining system. In the *Reference Re Public Service Employee Relations Act (Alta)* case,[1] the challenged legislation limited the right to strike for public sector workers. In *Retail, Wholesale and Department Store Union v Saskatchewan* (the *Saskatchewan Dairy Workers* case),[2] legislation ordering striking workers

1 [1987] 1 SCR 313 [*Alberta Reference*].

2 [1987] 1 SCR 460.

back to work was at issue. In the *Public Service Alliance of Canada v Canada* case,[3] the legislation under challenge overrode freely negotiated collective agreements and imposed wage controls. The three cases raised the question of whether section 2(d) provided constitutional protection for collective bargaining or the right to strike.

In the 1987 trilogy, the Supreme Court of Canada adopted a restrictive and narrow approach to the scope and content of the freedom of association guarantee, one departing from the broad and purposive approach the Court had articulated in relation to other *Charter* rights and freedoms.[4] In the trilogy, the Court ruled that freedom of association did not include a right to collective bargaining or strike. Rather, the freedom extended protection only to the right to form and join an association (what can be described as "formative activity"). In addition, some members of the Court, while rejecting protection for collective bargaining activity, recognized doctrinally that section 2(d) should extend to the right to engage collectively in those associational activities that were otherwise lawful when carried out by an individual.

While the four members of the Court's 4:2 majority had different reasons for rejecting an expansive reach for collective bargaining in the sphere of labour relations, they put forward four basic rationales in support of the conclusion that the *Charter* did not protect collective bargaining or the right to strike, namely:

a) the rights to bargain collectively and to strike were "modern rights" created by legislation, and were not the kind of "fundamental freedoms" that the *Charter* protected;
b) recognizing a right to collective bargaining would interfere with government regulation of labour relations, and the courts should defer to governments in the sensitive area of calibrating the balance of power between unions and employers;
c) section 2(d) was not intended to protect the "objects", goals or activities of association; and

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3 [1987] 1 SCR 424 [*PSAC*].

4 See, for example, in the section 2(b) context, the Supreme Court of Canada's 1989 decision in *Irwin Toy Ltd v Québec (Attorney General)*, [1989] 1 SCR 927, dealing with the expression guarantee in section 2(b) of the *Charter*. There, the Court took a very broad approach to the content of section 2(d), rejecting a distinction between belief and action, and ruling that section 2(b) protects any activity intending to convey meaning, i.e., all expressive activity, with violent activity constituting the only exception. By contrast, the majority in the *Alberta Reference* held that there is no section 2(d) protection for purely or inherently associational activity, regardless of its nature or purpose.

d) those members of the Court who recognized that freedom of association protects activities that can be lawfully performed by an individual nonetheless held that there was no individual counterpart to the right to bargain or strike collectively.

The lead case with the most extensive reasoning in the 1987 trilogy was the *Alberta Reference* decision, although, given the importance of the issues, the plurality reasons of LeDain J (joined by Beetz and La Forest JJ) were somewhat concise. For these three judges, freedom of association essentially meant no more than the right to join together, and to form and constitute an association or union; the guarantee was not meant to extend in any way to the protection of any of its collective activities, including the right to strike or collectively bargain. According to LeDain J, section 2(d) protected only "the freedom to work for the establishment of an association, to belong to an association, to maintain it, and to participate in its lawful activity without penalty or reprisal . . . ."[5]

From a policy perspective, these judges were concerned that, if section 2(d) protected some or all group activities, or those activities essential to an association's purposes, then this would potentially constitutionalize too great a range of activity simply because they were engaged in by two or more individuals. Under this approach, there was no basis for understanding freedom of association as safeguarding some independent or inherent value in group or collective activity. In short, since the right extended only to participating in the lawful activities of a trade union, the legislature was free to make any or all union activities illegal.

Justice LeDain also offered an additional policy basis for narrowly reading the section 2(d) guarantee, one specific to the labour relations context — namely, an appeal to the principle of judicial deference, which had been developed by the courts in administrative law review of labour decisions, and that LeDain J suggested was relevant as an aid to interpreting the scope of section 2(d). As LeDain J wrote:

> The rights for which constitutional protection are sought — the modern rights to bargain collectively and to strike, involving correlative duties or obligations resting on an employer — are not fundamental rights or freedoms. They are the creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as requiring a specialized expertise. It is surprising that in an area in which this Court has affirmed a principle of judicial restraint in the review of administrative action we should be considering the

5 *Alberta Reference*, above note 1 at 390–91.

> substitution of our judgment for that of the Legislature by constitutionalizing in general and abstract terms rights which the *Legislature* has found it necessary to define and qualify in various ways according to the particular field of labour relations involved. The resulting necessity of applying s. 1 of the *Charter* to a review of particular legislation in this field demonstrates in my respectful opinion the extent to which the Court becomes involved in a review of legislative policy for which it is really not fitted.[6]

A fourth judge, McIntyre J, joined with LeDain J in holding that section 2(d) did not extend to the right to strike, although he articulated, at least in theory, a somewhat more liberal approach to the meaning of freedom of association. In this respect, McIntyre J would have expanded the scope of the freedom of association guarantee to certain associational activities, holding that if an individual has the right to pursue an activity then section 2(d) protected the individual's right to engage in the same activity with others. Applying this approach to the right to strike, however, McIntrryre J concluded that there was no lawful or analogous individual counterpart to the right to strike. Therefore, it could not be said that by prohibiting the right to strike, the group or collective had been denied a right that an individual acting alone could lawfully exercise.[7]

At the same time, McIntyre J joined with LeDain J in rejecting altogether the notion that section 2(d) could extend protection to associational activity because it furthered or was essential to the goals or objects of an association. In McIntyre J's view, there was no basis for according:

> . . . an independent constitutional status to the aims, purposes, and activities of the association, and thereby confer greater constitutional rights upon members of the association than upon nonmembers. It would extend *Charter* protection to all the activities of an association which are essential to its lawful objects or goals, but, it would not extend an equivalent right to individuals. *The Charter* does not give, nor was it ever intended to give, constitutional protection to all the acts of an individual which are essential to his or her personal goals or objectives.[8]

Like LeDain J, McIntryre J also relied upon the need for judicial deference to the legislature in matters of labour relations, referring to the sensitivity, instability, and inherently dynamic nature of labour law; the

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6 *Ibid* at 391–92.

7 *Ibid* at 410–11.

8 *Ibid* at 404.

delicate balance between organized labour and employers; the corresponding need to constantly reassess traditional approaches to labour law and policy; the importance of provinces playing a "step by step" role as "laboratories for legal experimentation with our industrial relations ailments; the lack of judicial expertise to adjudicate labour law matters; and a corresponding concern with the incapacity and imprudence of judicial application of section 1 of the *Charter* to reconsider and intrude upon the balance struck by the legislature if section 2(d) were to be interpreted generously in the labour context.

By contrast, the two dissenting judges in the *Alberta Reference* (Dickson CJ joined by Wilson J) held that freedom of association extended to protection for the right to collectively bargain and to strike. Their conclusion was based on an alternative doctrinal approach to the section 2(d) guarantee — one that ultimately came to form the foundation for the renewed life breathed into freedom of association in *Dunmore*, as subsequently further expanded in *Health Services* and in the 2015 trilogy.

In his dissenting reasons, Dickson CJ began by rejecting as "legalistic" and "vapid" the constitutive definition of freedom of association adopted by LeDain J:

> At one extreme is a purely constitutive definition whereby freedom of association entails only a freedom to belong to or form an association. On this view, the constitutional guarantee does not extend beyond protecting the individual's status as a member of an association. It would not protect his or her associational actions . . . .
>
> If freedom of association only protects the joining together of persons for common purposes, but not the pursuit of the very activities for which the association was formed, then the freedom is indeed legalistic, ungenerous, indeed vapid.[9]

Instead, he believed that the scope of freedom of association must be determined in the context of a recognition that association is the critical mechanism through which individuals are able to contest the actions of more powerful institutions:

> Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who

9 *Ibid* at 362–63.

> would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict.[10]

At the same time, Dickson CJ recognized that not all associational activity should be protected merely because it is engaged in by more than one individual:

> This is not an unlimited constitutional license for all group activity. The mere fact that an activity is capable of being carried out by several people together, as well as individually, does not mean that the activity acquires constitutional protection from legislative prohibition or regulation.[11]

In this respect, and agreeing on this point with McIntyre J, Dickson CJ held that freedom of association must at least "embrace . . . the liberty to do collectively that which one is permitted to do as an individual."[12] Thus, in addition to the narrow protection offered by LeDain J, Dickson CJ's approach to section 2(d) would protect individuals engaging in associational activity where an individual could lawfully engage in that same activity. The basis for this protection is that an attack on activity performed in association when the same activity is permitted if performed by an individual is aimed at the "collective or associational aspect" of the activity, and not the activity itself. As Dickson CJ observed:

> Certainly, if a legislature permits an individual to enjoy an activity which it forecloses to a collectivity, it may properly be inferred that the legislature intended to prohibit the collective activity because of its collective or associational aspect. Conversely, one may infer from a legislative proscription which applies equally to individuals and groups that the purpose of the legislation was a *bona fide* prohibition of a particular activity because of detrimental qualities inhering in the activity (e.g., criminal conduct), and not merely because of the fact that the activity might sometimes be done in association.[13]

However, according to the Chief Justice, this principle of equal treatment of the individual and the collectivity cannot be the "exclusive touchstone for determining the presence or absence of a violation of s. 2(d),"[14] since

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10 *Ibid* at 365–66.

11 *Ibid* at 366.

12 *Ibid*.

13 *Ibid* at 367.

14 *Ibid*.

it fails to recognize that some associational activity has no analogous individual counterpart:

> There will, however, be occasions when no analogy involving individuals can be found for associational activity, or when a comparison between groups and individuals fails to capture the essence of a possible violation of associational rights. This is precisely the situation in this case. There is no individual equivalent to a strike. The refusal to work by one individual does not parallel a collective refusal to work. The latter is qualitatively rather than quantitatively different. The overarching consideration remains whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits. The legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature.[15]

For this reason, under Dickson CJ's approach, section 2(d) protection would also extend to certain inherently or uniquely associational activities, i.e., those activities (that in his view included the right to strike) without any individual counterpart. Where it could be established that the restriction is "aimed at foreclosing a particular collective activity because of its associational nature," there would be an interference with constitutionally protected associational activity.[16]

Thus, unlike McIntyre J, for Dickson CJ the fact that the right to strike had no individual analogue was not a reason to deny it protection but rather signalled that it was a form of activity that had a unique and important associational aspect warranting protection. Indeed, precisely because there was no individual equivalent to a strike, which he believed to be qualitatively different than a refusal to work by one individual, Dickson CJ held that the denial of the right to strike was aimed at preventing a particular collective activity precisely because of its associational nature, and so constituted an infringement of section 2(d) of the *Charter*.

Applying this doctrinal approach to the question of whether the right to collectively bargain and to strike were the kind of uniquely collective associational activities falling within the scope of section 2(d), Dickson CJ pointed to the understanding under various international law treaties and instruments that freedom of association encompassed collective bargaining and the right to strike, to the extent that collect-

15 *Ibid*.
16 *Ibid* at 371.

ive bargaining and strike activity involved not only the pursuit of economic interests but also advanced the interests of dignity, self-worth, and emotional well-being, and to the extent that the activities of collective bargaining and withdrawing services had over time been essential to the capacity of workers to collectively counter the strength of their employers.

2. *Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner)*

Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner)[17] was decided by a seven-member Court in 1990, three years after the 1987 trilogy. The case involved a claim that section 2(d) was breached when a group of unionized workers represented by one union under federal legislation were transferred to territorial jurisdiction. The applicable territorial legislation included the workers in a larger bargaining unit represented by another trade union, thereby denying them representation by the union of their choice. Writing for a narrow 4:3 majority, Sopinka J rejected the challenge, which he characterized as being rooted in a claim that collective bargaining — in that case, choosing one's bargaining agent — was constitutionally protected.

While Sopinka J rejected the more expansive view of the right articulated by Dickson CJ, he accepted the conception of the right articulated by McIntyre J, summarizing the scope of section 2(d) with the following four propositions:

> The first proposition, that s. 2(d) protects the freedom to establish, belong to and maintain an association; second, that s. 2(d) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association; third, that s. 2(d) protects the exercise in association of the constitutional rights and freedoms of individuals; and fourth, that s. 2(d) protects the exercise in association of the lawful rights of individuals.[18]

Applying this conception of freedom of association to the case before him, Sopinka J concluded:

> Collective bargaining is not an activity that is, without more, protected by the guarantee of freedom of association. Restrictions on the activity of collective bargaining do not normally affect the ability of individuals to form or join unions. Although collective bargaining may be the

17 [1990] 2 SCR 367 [*PIPSC*].
18 *Ibid* at 402.

> essential purpose of the formation of trade unions, the argument is no longer open that this alone is a sufficient condition to engage s. 2(d). Finally, bargaining for working conditions is not, of itself, a constitutional freedom of individuals, and it is not an individual legal right in circumstances in which a collective bargaining regime has been implemented: see McIntyre J. in the *Alberta Reference* . . . . It is difficult, therefore, to conceive of a principle that could bring other aspects of the collective bargaining relationship within the purview of s. 2(d), and yet not overrule the trilogy . . . .
>
> It is simply no longer open to an association (union or otherwise) to argue that the legislative frustration of its objects is a violation of s. 2(d) if the restriction is not aimed at and does not affect the establishment or existence of the association — unless the association's activity is another *Charter*-protected right, or an activity that may lawfully be performed by an individual . . . it is equally plain that, as a result of the *Alberta Reference*, the activity for which constitutional protection is sought (collective bargaining for working conditions) satisfies neither of the tests for protected activity.[19]

Ironically, Dickson CJ was the fourth "swing vote" in forming the majority in *PIPSC*. His own judgment makes clear that had he maintained his *Alberta Reference* approach, he would have joined with the dissenting judges and so formed part of a 4:3 majority. However, in the face of the freedom of association labour law trilogy, which he viewed as binding, he ruled that he was constrained to hold that collective bargaining is not protected by section 2(d), and that section 2(d) was only an individual and not a group right.

Justice Cory's dissent in *PIPSC* is notable because, twenty-five years later, his view of the role of free choice under section 2(d), leading in his view to a violation of section 2(d), was expressly relied upon by the Supreme Court in the *MPAO* decision (as discussed in further detail in Part B below).

3. *Delisle v Canada (Deputy Attorney General)*

After the resounding rejection of section 2(d) constitutional protection for collective bargaining and the right to strike, it took another nine years, until 1999, for the court to consider its next section 2(d) labour freedom of association case.

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19 *Ibid* at 404.

In *Delisle v Canada (Deputy Attorney General)*,[20] the Court rejected, by a 5:2 majority, a section 2(d) challenge to an outright exclusion of RCMP officers from access to any legislative collective bargaining scheme.

Writing for the majority of the seven-member court, Bastarache J drew on the previous freedom of association cases to outline his view of the limited scope of section 2(d) protection:

> The outcome of the case at bar has largely been determined by the previous decisions of this Court which have defined the concept of freedom of association, guaranteed in s. 2(*d*) of the *Charter*. The three cases of the 1987 trilogy . . . are especially determinative of this issue as they explore the concept in the labour relations context.[21]

Then, applying the 1987 trilogy and the *PIPSC* decision to the exclusion of RCMP officers from collective bargaining legislation, Bastarache J concluded:

> In accordance with the decision of the majority of this Court in [*PIPSC*] there is no violation of s. 2(*d*) of the *Charter* when certain groups of workers are excluded from a specific trade union regime . . . . Freedom of association does not include the right to establish a particular type of association defined in a particular statute; this kind of recognition would unduly limit the ability of Parliament or a provincial legislature to regulate labour relations in the public service and would subject employers, without their consent, to greater obligations toward the association than toward their employees individually. I share the opinion expressed by McIntyre J. in *Reference re Public Service Employee Relations Act (Alta.)*, *supra*, at p. 415, when he states that labour relations is an area in which a deferential approach is required in order to leave Parliament enough flexibility to act.[22]

Thus, the *Delisle* majority continued to apply the same restrictive approach to freedom of association originally articulated in the labour relations trilogy, including the same appeal to deference in defining the scope of section 2(d) rights, at least in the context of labour relations.

In his reasons, Bastarache J also characterized the section 2(d) exclusion claim as effectively amounting to a claim that government could be under a positive obligation to enact legislation protecting or advancing constitutional rights. He rejected that argument outright, accepting it only as a possibility in exceptional circumstances, and emphasizing the differences between the fundamental freedoms protected by section 2

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20 [1999] 2 SCR 989.

21 *Ibid* at para 11.

22 *Ibid* at para 33.

of the *Charter*, and the equality guarantee contained in section 15, in the following terms:

> The structure of s. 2 of the *Charter* is very different from that of s. 15 and it is important not to confuse them. While s. 2 defines the specific fundamental freedoms Canadians enjoy, s. 15 provides they are equal before and under the law and have the right to equal protection and equal benefit of the law. The only reason why s. 15 may from time to time be invoked when a statute is underinclusive, that is, when it does not offer the same protection or the same benefits to a person on the basis of an enumerated or analogous ground . . . is because this is contemplated in the wording itself of s. 15. The distinguishing feature of s. 15 is that the *Charter* may require the government to extend the special status, benefit or protection it afforded to the members of one group to another group if the exclusion is discriminatory and is based on an enumerated or analogous ground of discrimination . . . .
>
> However, while the letter and spirit of the right to equality sometimes dictate a requirement of inclusion in a statutory regime, the same cannot be said of the individual freedoms set out in s. 2, which generally requires only that the state not interfere and does not call upon any comparative standard.
>
> . . .
>
> On the whole, the fundamental freedoms protected by s. 2 of the *Charter* do not impose a positive obligation of protection or inclusion on Parliament or the government, except perhaps in exceptional circumstances which are not at issue in the instant case.[23]

By contrast, in her concurring reasons, L'Heureux-Dubé J was more hopeful about the possibility that section 2(d) might well impose positive obligations on government in a future case:

> . . . where the employer does not form part of government, there exists no *Charter* protection against employer interference. In such a case, it might be demonstrated that the selective exclusion of a group of workers from statutory unfair labour practice protections has the purpose or effect of encouraging private employers to interfere with employee associations. It may also be that there is a positive obligation on the part of governments to provide legislative protection against unfair labour practices or some form of official recognition under labour legislation, because of the inherent vulnerability of employees to pressure from management, and

23 *Ibid* at paras 25 and 33.

the private power of employers, when left unchecked, to interfere with the formation and administration of unions.[24]

4. The Dunmore Breakthrough

Two years later, in *Dunmore*,[25] the Court was again required to consider to what extent exclusion from a labour relations regime might constitute a violation of freedom of association, this time involving the exclusion of agricultural workers from access to collective bargaining legislation. Despite having just found in *Delisle* that the exclusion of RCMP officers from collective bargaining legislation did not impinge on associational activity, the *Dunmore* Court found that the exclusion of agricultural workers from the protection of unfair labour practice provisions under collective bargaining legislation violated their associational freedoms, putting particular emphasis on their vulnerability to employer intimidation. From a doctrinal perspective, for the first time, a majority of the Court recognized that section 2(d) extended constitutional protection to certain collective or associational activities — in that case union organizing activity and the ability of workers to make collective representations on working terms and conditions.

Thus, *Dunmore* signalled a fundamental shift in defining the scope of *Charter* protected associational activity under section 2(d) of the *Charter* — both in general doctrinal terms and in the specific context of labour relations and collective bargaining. Indeed, as Bastarache J acknowledged, the conclusion that section 2(d) is violated where the state "has precluded activity *because* of its associational nature, thereby discouraging the collective pursuit of common goals" was an adoption of Dickson CJ's dissenting approach in the 1987 trilogy — where the Chief Justice had said that: "the legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature."[26]

Equally important, until *Dunmore*, the scope of freedom of association, as reflected in the four aspects of section 2(d) protection set out by Sopinka J in *PIPSC*,[27] was firmly anchored in the individual and conceived of only as an individual right. *Dunmore* rejected this narrow view of freedom of association, expanding its scope to include constitutional protection for certain associational or group activity.

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24 *Ibid* at para 7.

25 *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 [*Dunmore*].

26 *Ibid* at para 16, quoting *Alberta Reference*, above note 1 at 367.

27 See discussion in text above note 18.

This shift resulted in large measure from a new and revised appreciation of the importance of the purpose of constitutional protection for determining the scope of the freedom of association guarantee. Indeed, in his reasons, Bastarache J identified the purpose of section 2(d) as an additional and "enduring source of insight into the content of s. 2(d)." He accepted the purpose of section 2(d) as "the collective action of individuals in pursuit of their common goals" and, from this, then inferred that "the purpose of s. 2(d) commands a single inquiry: has the state precluded activity *because* of its associational nature, thereby discouraging the collective pursuit of common goals?"[28]

Based on this expanded understanding of the purpose of section 2(d), Bastarache J proceeded to reject the Court's previous approach to freedom of association on the basis that:

> [I]t does not capture the full range of activities protected by s. 2(*d*). In particular, there will be occasions where a given activity does not fall within the third and fourth rules set forth by Sopinka J. in *PIPSC, supra*, but where the state has nevertheless prohibited that activity solely because of its associational nature. These occasions will involve activities which 1) are not protected under any other constitutional freedom, and 2) cannot, for one reason or another, be understood as the lawful activities of individuals. As discussed by Dickson C.J. in the *Alberta Reference*, *supra,* such activities may be *collective* in nature, in that they cannot be performed by individuals acting alone. The prohibition of such activities must surely, in some cases, be a violation of s. 2(*d*).
>
> There will, however, be occasions when no analogy involving individuals can be found for associational activity, or when a comparison between groups and individuals fails to capture the essence of a possible violation of associational rights . . . . *The overarching consideration remains whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits*. The legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature. [Emphasis added.][29]

Having resuscitated the purposive approach to section 2(d) articulated in the *Alberta Reference* dissent, Bastarache J emphasized the importance of recognizing "that the collective is 'qualitatively' distinct from the individual: individuals associate not simply because there is strength

28 *Dunmore*, above note 25 at paras 15–16.

29 *Ibid* at para 16 [emphasis in original].

in numbers, but because communities can embody objectives that individuals cannot." Indeed, echoing Dickson CJ, Bastarache J raised the concern that "to limit s. 2(*d*) to activities that are performable by individuals would, in my view, render futile these fundamental initiatives."[30] According to Bastarache J, "certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning."[31] Thus, in addition to the four-part test for freedom of association articulated in *PIPSC*, he held that freedom of association must also protect against legislation that "has targeted associational conduct because of its concerted or associational nature."[32]

In support of this broader approach to freedom of association, Bastarache J also drew on international human rights law (as had Dickson CJ in the *Alberta Reference* dissent), observing that "[t]he collective dimension of s. 2(d) is also consistent with developments in international human rights law, as indicated by the jurisprudence of the Committee of Experts on the Application of Conventions and Recommendations and the ILO Committee on Freedom of Association," and that ILO jurisprudence not only "illustrate[s] the range of activities that may be exercised by a collectivity of employees, but the International Labour organization has repeatedly interpreted the right to organize as a collective right."[33]

Having recognized that certain collective activities must be protected by section 2(d), Bastarache J moved on to consider which collective union activities were deserving of protection, concluding that "certain union activities . . . may be central to freedom of association even though they are inconceivable on the individual level."[34] According to Bastarache J, this included "making collective representations to an employer, adopting a majority political platform, [and] federating with other unions."[35] Later in his reasons, he added "the freedom to organize, that is, the freedom to collectively embody the interests of individual workers."[36]

Nonetheless, while the Court in *Dunmore* extended the understanding of freedom of association to protect certain uniquely collective associational activities (even where they may not have an individual counterpart), the *Dunmore* Court continued to cling to the view that neither collective bargaining nor strike activities were protected by section 2(d).

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30 *Ibid*.
31 *Ibid* at para 17.
32 *Ibid* at para 18.
33 *Ibid* at para 16.
34 *Ibid* at para 17.
35 *Ibid*.
36 *Ibid* at para 30.

This led to the incongruous result that the two most important collective activities for workers were excluded from the fundamental protection offered by section 2(d), while collective activities of lesser importance found protection.

However, most significantly, the *Dunmore* Court's reformulated approach removed, in a fundamental way, the doctrinal underpinning of the restrictive approach to freedom of association that had been adopted in the 1987 trilogy, *PIPSC*, and *Delisle*. Once it was recognized that certain activities were central to the purposes of freedom of association, whether they could be exercised on an individual level or not, and precisely because of their inherently collective nature, the underlying doctrinal basis for rejecting collective bargaining and the right to strike as deserving of protection had been undermined. As set out above, those cases had based their restrictive approach to section 2(d) on a narrow conception of the purposes of section 2(d), which led to the proposition that collective activities which were not constitutive in nature or which could not be performed by individuals acting alone could not be section 2(d) protected; the *Dunmore* Court was now saying the precise opposite. As a result, the only remaining basis for continuing to exclude collective bargaining and strikes from section 2(d) was the concept of judicial restraint in the realm of labour relations advanced by LeDain and McIntyre JJ in the *Alberta Reference*.

5. Health Services and Support — *Facilities Subsector Bargaining Assn v British Columbia*

It took another six years however, until 2007, for the Court to consider the full doctrinal implications of *Dunmore* for the constitutional protection of collective bargaining. The *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*[37] case involved a constitutional challenge to virtually unprecedented legislation, the British Columbia *Health and Social Services Delivery Improvement Act*, which invalidated certain key negotiated job security collective agreement protections contained in collective agreements (including protections against contracting out, layoff, and bumping rights), and precluded future bargaining over those matters.

After the legislation was passed, thousands of non-clinical support staff were laid off from BC hospitals. Those hired by the subcontractor service providers to replace them were subsequently paid substantially

37 2007 SCC 27 [*Health Services*].

less to perform the same services at and for the hospitals from which they had been laid off.

The unions challenged the *Act*, arguing that its interference with their freely negotiated collective agreements, and the prohibition on future bargaining, violated the *Charter*'s guarantee of freedom of association. After their case had been rejected by the British Columbia Supreme Court and by the British Columbia Court of Appeal (on the grounds that there was no section 2(d) protection for collective bargaining based on the current caselaw), the unions successfully appealed to the Supreme Court of Canada.

In accepting that freedom of association should be interpreted to extend constitutional protection to collective bargaining (thereby overruling the 1987 trilogy), the Court concluded that the reasons it had relied on in the past to conclude that section 2(d) did not protect collective bargaining could no longer "withstand principled scrutiny." In particular, the Court held that:[38]

a) the 1987 trilogy notion that the right to bargain collectively was a modern right created by legislation ignored the history of labour relations in Canada. The right to bargain collectively was not created by statute; it pre-existed statutory collective bargaining. Indeed, it was because of the fundamental importance of collective bargaining to labour relations that collective bargaining was incorporated into legislation. This recognition of the non-statutory basis for constitutional protection for collective bargaining echoed the holding in *Dunmore* that the "freedom to organize" existed "independently of any statutory enactment", and that "the effective exercise of this freedom requires legislative protection in some cases . . . ought not change the fundamentally non-statutory character of the freedom itself."[39] In *Health Services*, the Court recognized that this observation applied equally to the right to collectively bargain;
b) the reluctance to interfere with government regulation of labour relations placed too much emphasis on judicial deference. While judicial deference might be appropriate in particular cases, it was not reasonable to declare that no constitutional interests were implicated simply because the courts might get involved in policy

38 See *ibid* at paras 25–31.

39 Although, in a bid to contain section 2(d), Bastarache J had contrasted this with the characterization of the right to bargain collectively and strike in the *Alberta Reference* as "so-called 'modern rights.'"

matters. As the Court observed, "to declare a judicial 'no go' zone for an entire right on the ground that it may involve the courts in policy matters is to push deference too far;"[40]

c) while the *Alberta Reference* had rejected constitutional protection for collective bargaining because of the view that section 2(d) protection was limited to activities that can be performed by individuals and not to collective activities, this limitation had been squarely rejected in *Dunmore,* where the Court had recognized that some collective activities are, by their very nature, impossible for one person to perform, yet nonetheless not disqualified from constitutional protection. Indeed, according to the Court in *Health Serv*ices, some collective activities may be central to freedom of association even though they cannot be performed by an individual, so that if the freedom to form and maintain an association is to have any meaning, certain collective activities must be recognized as falling within the scope of section 2(d); and

d) the *Alberta Reference* majority had also dismissed constitutional protection for collective bargaining by characterizing collective bargaining as a union's "object," but this was not a principled reason to deny protection, since any activity pursued by an association could be characterized as its object or goal. While the *Charter* could not be used to protect the substantive outcome of bargaining, the "process" of collective bargaining should be protected, without granting constitutional protection to any particular outcome.

As a result, the Court concluded that it was now necessary to reassess the question of whether collective bargaining was protected by section 2(d) of the *Charter*. In considering this question, the Court examined Canadian labour and legislative history, collective bargaining in relation to freedom of association in an international context, and whether finding collective bargaining to be a constitutionally protected associational activity would be consistent with *Charter* values.

After concluding that workers' participation in collective bargaining long predated its statutory recognition and protection, the Court turned to international law, emphasizing that "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified."[41] The Court relied on the protection of collective bargaining in the *International Coven-*

40 *Health Services*, above note 37 at para 26.

41 *Ibid* at para 70.

ant on Economic, Social and Cultural Rights, the *International Covenant on Civil and Political Rights*, and *ILO Convention No 87* of the International Labour Organization (ILO), noting that all three instruments "extend protection to the functioning of trade unions in a manner suggesting that a right to collective bargaining is part of freedom of association."[42] In particular, with respect to *Convention No 87*, the Court noted that it has been interpreted by the ILO to mean that (i) the right to collective bargaining is a fundamental right, which includes a good faith obligation to recognize unions, engage in genuine and constructive negotiations, and respect commitments entered into; and (ii) collective bargaining is a voluntary process, that should be free of interventions by government, save in exceptional situations, following consultations with the unions involved.

The Court also concluded that protecting the process of collective bargaining under section 2(d) would be consistent with the *Charter*'s underlying values, including "[h]uman dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy . . . ."[43] The right to bargain collectively enhances the human dignity, liberty, and autonomy of workers by giving them "the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work."[44] A constitutional right to collective bargaining would also enhance the *Charter* value of equality since it relieves against the historical inequality between employers and employees. It would also enhance the *Charter* value of democracy, the Court held, since "[c]ollective bargaining permits workers to achieve a form of workplace democracy and to ensure the rule of law in the workplace."[45]

For all these reasons, the Court concluded that section 2(d) "should be understood as protecting the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining"[46] or, put another way, "the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issue and terms of employment."[47] Therefore, according to the Court, it guarantees *the process* through which these goals are pursued.

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42 *Ibid* at para 72.
43 *Ibid* at para 81.
44 *Ibid* at para 82.
45 *Ibid* at para 85.
46 *Ibid* at para 87.
47 *Ibid* at para 89.

However, the Court was clear that section 2(d) of the *Charter* does not protect all aspects of the process of collective bargaining. It protects only against "substantial interference" with that process. The Court explained:

> To constitute substantial interference with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer that we call collective bargaining. Laws or actions that can be characterized as "union breaking" clearly meet this requirement. But less dramatic interference with the collective process may also suffice. In *Dunmore*, denying the union access to the labour laws of Ontario designed to support and give a voice to unions was enough. Acts of bad faith, or unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation may also significantly undermine the process of collective bargaining. The inquiry in every case is contextual and fact-specific. The question in every case is whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted.[48]

Thus, according to the Court, if government action or legislation does not substantially interfere with the process of collective bargaining, it will not violate section 2(d). The decision to incorporate a "substantial interference" test in section 2(d) has had significant implications for the caselaw that followed, a matter discussed further in Part B, below.

According to the Court in *Health Services,* there are two factors to consider in determining whether there has been substantial interference in collective bargaining, namely, how important the subject matter is to the process of collective bargaining, and the manner in which the government measure impacts on the collective right to good faith negotiation and consultation. The duty to negotiate in good faith lies at the heart of collective bargaining, the Court held.

As the Court concluded in summarizing the prerequisites to finding a breach of the section 2(d) collective bargaining guarantee:

> In summary, s. 2(d) may be breached by government legislation or conduct that substantially interferes with the collective bargaining process. Substantial interference must be determined contextually, on the facts of the case, having regard to the importance of the matter affected to the collective activity, and to the manner in which the government

48 *Ibid* at para 92.

> measure is accomplished. Important changes effected through a process of good faith negotiation may not violate s. 2(d). Conversely, less central matters may be changed more summarily, without violating s. 2(d). Only where the matter is both important to the process of collective bargaining, and has been imposed in violation of the duty of good faith negotiation will s. 2(d) be breached.[49]

After reviewing the various provisions of the *Health and Social Services Delivery Improvement Act*, and considering their impact, the Court held that those provisions of the *Act* that eliminated the job security protections, and precluded future bargaining, constituted a substantial interference with the section 2(d) freedom. In so finding, the Court rejected the BC government's argument that the *Act* did not interfere with collective bargaining because it did not explicitly prohibit health care employees from making collective representations, emphasizing that the right to collective bargaining cannot be reduced to a mere right to make representations:

> . . . the right to bargain collectively protects not just the act of making representations, but also the right of employees to have their views heard in the context of a meaningful process of consultation and discussion . . . . While the language of the Act does not technically prohibit collective representations to an employer, the right to collective bargaining cannot be reduced to a mere right to make representations. The necessary implication of the Act is that prohibited matters cannot be adopted into a valid collective agreement, with the result that the process of collective bargaining becomes meaningless with respect to them. This constitutes interference with collective bargaining.[50]

At the same time, while the Court ruled that section 2(d) should be extended to protect meaningful collective bargaining, it also emphasized that section 2(d) protected the right to a general process of collective bargaining, but not to a particular model of labour relations, or a specific bargaining method. In this respect, while the Court held that section 2(d) incorporated principles of good faith bargaining, it did not fully sketch out the content of the associational freedom to engage in meaningful negotiations with their employer.

Significantly, as it turned out, there were important aspects of the Courts' reasons that gave rise to uncertainty over the precise scope and nature of constitutional protection for collective bargaining. On the

49 *Ibid* at para 109.
50 *Ibid* at para 114.

most restrictive view of the Court's conception of section 2(d) protection for collective bargaining, all that section 2(d) protected was a process of good faith bargaining or discussion so that, as long as government engaged in good faith bargaining or consultation prior to legislatively overriding important collective agreement terms, and/or so long as the restriction on future bargaining was not permanent, there was no breach of section 2(d). More generally, on this view, all that section 2(d) protected was the right of employees to engage in a process of good faith negotiation with their employer. On a more generous view of the Court's approach, legislatively overriding negotiated collective agreement provisions and/or prohibiting future bargaining necessarily undermined the principles of good faith bargaining protected by section 2(d), such that pre-legislative consultation was relevant, if at all, only to the section 1 justification inquiry. Moreover, on this view, section 2(d) protected a meaningful right to collective bargaining, so that legislation that undermined or did not sufficiently facilitate or promote the bargaining process infringed section 2(d).

It did not take long for some of these questions to come before the Court again, in the appeal from the Ontario Court of Appeal's decision in *Ontario (Attorney General) v Fraser.*

6. *Ontario (Attorney General) v Fraser*

Before summarizing the 2011 *Ontario (Attorney General) v Fraser* decision,[51] it is useful to briefly outline the main features of the legislation challenged in that case, namely, the *Agricultural Employees Protection Act* (*AEPA*), which had been enacted by the Ontario government in response to the *Dunmore* decision. The *AEPA* provided some measure of unfair labour practice protection for farm workers, and also granted an employee association representing farm workers the right to make representations to employers respecting the terms and conditions of their employment. However, the *AEPA* did not expressly provide for a duty to bargain in good faith, did not provide for bargaining agency based on majoritarian exclusivity, and did not provide the parties with the right to engage in economic sanctions to resolve collective bargaining impasses, or some other fair, independent, and binding dispute resolution mechanism, i.e., interest arbitration.

In *Fraser*, the Ontario Court of Appeal, applying the principles as it understood them from *Health Services*, found that the failure to legislatively provide for a duty to bargain in good faith, for a system of ex-

51 2011 SCC 20 [*Fraser*].

clusivity based on majority support, and for a statutory mechanism for resolving both collective bargaining impasses and contractual disputes arising during the life of a collective agreement, rendered meaningless the ability of agricultural workers to engage in meaningful collective bargaining (as protected by *Health Services)*, and therefore violated the freedom of association guarantee.

On appeal, the Supreme Court of Canada (with Abella J dissenting)[52] took a very different view. While upholding the ruling in *Health Services* that freedom of association extends to the process of collective bargaining, McLachlin CJ and LeBel J, writing for a five-judge majority, firmly rejected what they considered to be the Court of Appeal's overly expansive view of the scope of constitutionally protected collective bargaining articulated in *Health Services*. As the majority judgment concluded in relation to the Court of Appeal's reasons:

> *Health Services* does not support the view of the Ontario Court of Appeal in this case that legislatures are constitutionally required, in all cases and for all industries, to enact laws that set up a uniform model of labour relations imposing a statutory duty to bargain in good faith, statutory recognition of the principles of exclusive majority representation and a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements (C.A. reasons, at para. 80). What is protected is associational activity, not a particular process or result. If it is shown that it is impossible to meaningfully exercise the right to associate due to substantial interference by a law (or absence of laws: see *Dunmore*) or by government action, a limit on the exercise of the s. 2(d) right is established, and the onus shifts to the state to justify the limit under s. 1 of the *Charter*.[53]

The majority's reasons focused on the extent to which the Court's decision in *Health Services* had emphasized that section 2(d) "does not impose a particular process," "does not require the parties to conclude an agreement or

52 There were also reasons "concurring" in the result, from Rothstein J, joined by Charron J, but this concurrence was actually a dissent from the very notion of constitutional protection for collective bargaining as found by the Court in *Health Services*. The majority reasons also respond to Rothstein J's views. One of us has more extensively explored the tension between the majority and Rothstein J, and critiqued Rothstein J's analysis: see Steven Barrett & Ethan Poskanzer, "What *Fraser* Means for Labour Rights in Canada" in Fay Faraday, Judy Fudge, & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012) 190.

53 *Fraser*, above note 51 at para 47.

accept any particular terms and does not guarantee a legislated dispute resolution mechanism in the case of an impasse," "protects only 'the right . . . to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method,'" and "does not require a particular model of bargaining."[54]

While the majority rejected the more generous approach taken by the Ontario Court of Appeal, it also reaffirmed the *Health Services* holding that meaningful collective bargaining is included within the scope of freedom of association. In the *Fraser* majority's view, this "requires the parties to meet and bargain in good faith on issues of fundamental importance in the workplace."[55] According to the Court:

> This is not limited to a mere right to make representations to one's employer, but requires the employer to engage in a process of consideration and discussion to have them considered by the employer. In this sense, collective bargaining is protected by s. 2(d).[56]
>
> . . .
>
> What s. 2(d) guarantees in the labour relations context is a meaningful process. A process which permits an employer not even to consider employee representations is not a meaningful process . . . . Without such a process, the purpose of associating in pursuit of workplace goals would be defeated, resulting in a significant impairment of the exercise of the right to freedom of association. One way to interfere with free association in pursuit of workplace goals is to ban employee associations. Another way, just as effective, is to set up a system that makes it impossible to have meaningful negotiations on workplace matters. Both approaches in fact limit the exercise of the s. 2(d) associational right, and both must be justified under s. 1 of the *Charter* to avoid unconstitutionality.[57]
>
> In summary, *Health Services* . . . . requires a good faith process of consideration by the employer of employee representations and of discussion with their representatives is hardly radical. It is difficult to imagine a meaningful collective process in pursuit of workplace aims that does not involve the employer at least considering, in good faith, employee representations. The protection for collective bargaining in

54 *Ibid* at paras 41 & 42.

55 *Ibid* at para 37.

56 *Ibid* at para 40.

57 *Ibid* at para 42.

> the sense affirmed in Health Services is quite simply a necessary condition of meaningful association in the workplace context.[58]
>
> . . .
>
> In our view, the majority decision in *Health Services* should be interpreted as holding what it repeatedly states: that workers have a constitutional right to make collective representations and to have their collective representations considered in good faith.[59]
>
> . . .
>
> *Health Services* affirms a derivative right to collective bargaining, understood in the sense of a process that allows employees to make representations and have them considered in good faith by employers, who in turn must engage in a process of meaningful discussion. The logic that compels this conclusion, following settled *Charter* jurisprudence, is that the effect of denying these rights is to render the associational process effectively useless and hence to substantially impair the exercise of the associational rights guaranteed by s. 2(d). No particular bargaining model is required.[60]

When it came to applying its understanding of section 2(d) to assessing the constitutionality of the *AEPA*, the majority concluded that the legislation at issue should be interpreted to require a process of good faith collective bargaining (which it at times seemed to equate with good faith consultation or discussion). In this respect, while the legislation itself contained no express duty to bargain in good faith, the legislation did not preclude this. In the majority's view, the statutory provisions requiring the employer to listen to and acknowledge representations made by an employee association could and should be interpreted by implying a duty on agricultural employers to consider employer representations in good faith. As the majority concluded, "[T]he *AEPA*, correctly interpreted, protects not only the right of employees to make submissions to employers on workplace matters, but also the right to have those submissions considered in good faith by the employer."[61]

In response to the concern that the right to an adjudicative process for resolving bad faith bargaining complaints would be ineffective, the majority responded that insofar as the union had not made a significant attempt to make the process work, and insofar as the process has not yet been fully explored and tested, it was premature to conclude that the

58 *Ibid* at para 43.

59 *Ibid* at para 51.

60 *Ibid* at para 54.

61 *Ibid* at para 107.

AEPA would not result in good faith bargaining. On this basis, the majority held that the *AEPA* did not violate section 2(d) and allowed the appeal.

At the same time, despite finding that the AEPA did not infringe section 2(d), the majority explicitly reconfirmed the specific holding in *Health Services* that imposing restrictions on the ability of employees to bargain over important workplace matters, by nullifying negotiated collective agreement provisions, and/or by preventing future bargaining, violates the freedom of association guarantee:

> Section 2(d), interpreted purposively and in light of Canada's values and commitments, protects associational collective activity in furtherance of workplace goals. The right is not merely a paper right, but a right to a process that permits meaningful pursuit of those goals. The claimants had a right to pursue workplace goals and collective bargaining activities related to those goals. The government employer passed legislation and took actions that rendered the meaningful pursuit of these goals impossible and effectively nullified the right to associate of its employees. This constituted a limit on the exercise of s. 2(d), and was thus unconstitutional unless justified under s. 1 of the *Charter*.[62]
>
> . . .
>
> If s. 2(d) merely protected the right to act collectively and to make collective representations, the legislation at issue in that case [*Health Services*] would have been constitutional. The legislation in that case violated s. 2(d) since it undermined the ability of workers to engage in meaningful collective bargaining, which the majority defined as good faith negotiations (para. 90). The majority underlined that:
>
>> the right to bargain collectively protects not just the act of making representations, but also the right of employees to have their views heard in the context of a meaningful process of consultation and discussion. *This rebuts arguments made by the respondent that the Act does not interfere with collective bargaining because it does not explicitly prohibit health care employees from making collective representations.* While the language of the Act does not technically prohibit collective representations to an employer, the right to collective bargaining cannot be reduced to a mere right to make representations. [Emphasis added; para. 114.][63]

62 *Ibid* at para 38.

63 *Ibid* at para 50, quoting *Health Services*, above note 37 at para 114.

In this respect, the *Fraser* majority also affirmed that overriding important collective agreement terms and preventing future bargaining over those terms constitutes an infringement of section 2(d):

> *Dunmore* established that claimants must demonstrate the substantial impossibility of exercising their freedom of association in order to compel the government to enact statutory protections. It did not, however, define the ambit of the right of association protected by s. 2(d) in the context of collective bargaining. Relying on *Dunmore*, the majority of the Court in Health Services, per McLachlin C.J. and LeBel J., held that legislation and government actions that repealed existing collective agreements and substantially interfered with the possibility of meaningful collective bargaining in the future constituted a limit on the s. 2(d) right of freedom of association.[64]
>
> . . .
>
> The unions responded by bringing an action claiming that the government had breached s. 2(d) by legislatively interfering with freedom of association. They further claimed that the government had done so in circumstances that could not be justified under s. 1 of the *Charter*. *Health Services* thus put directly in issue the right to collective bargaining. The claimants did not seek the enactment of associational protections. Rather, they asserted that s. 2(d) protected a right to collective bargaining and that the government had violated the constitutional guarantee of freedom of association by legislating to both overturn existing contracts and preclude effective collective bargaining in the future. The unions lost at trial and on appeal but succeeded in this Court.[65]
>
> While *Health Services* concerned the actions of a government employer nullifying collective bargaining arrangements with unions representing its own employees, the Court rested its decision on a more general discussion of s. 2 of the *Charter*. Applying the principles of interpretation established in *Dunmore*, a majority of the Court held that s. 2(d) includes "a process of collective action to achieve workplace goals" (para. 19). This process requires the parties to meet and bargain in good faith on issues of fundamental importance in the workplace (para. 90). By legislating to undo the existing collective bargaining arrangements and by hampering future collective bargaining on important workplace issues, the British Columbia government had "substantially interfered" with the s. 2(d) right of free association, and had

64 *Fraser*, above note 51 at para 34.

65 *Ibid* at para 36.

> failed to justify the resultant limitation on the exercise of the right under s. 1 of the *Charter* (paras. 129–161).[66]
>
> . . .
>
> The majority in *Health Services* held that the unilateral nullification of significant contractual terms, by the government that had entered into them or that had overseen their conclusion, coupled with effective denial of future collective bargaining, undermines the s. 2(d) right to associate, not that labour contracts could never be interfered with by legislation.[67]

Despite the majority's repeated emphasis on the continued validity of its finding in *Health Services* that a process of meaningful collective bargaining was constitutionally protected by section 2(d), it is fair to say that the *Fraser* decision was regarded by various provincial superior and appellate courts as a retrenchment of section 2(d) protection. These Courts focused on the fact that the actual reasons in *Fraser* had at times suggested a higher "impossibility" (rather than "substantial interference") threshold for finding an infringement of section 2(d) had diminished section 2(d) protection for collective bargaining by describing it as being merely a "derivative" right, and had equated good faith collective bargaining with mere discussions or consultation or the right to make representations.[68]

As a result, when a new trilogy of section 2(d) cases came before the Court in 2015, it was clear that the Court was faced with the task of determining whether the doctrinal evolution and expansion of section 2(d) which had started in *Dunmore* and continued in *Health Services* should be reinforced, or whether the potential retreat that was at least partially signalled in *Fraser* should continue.

7. The New Trilogy: MPAO, SFL, and Meredith

Over the course of two weeks in January 2015, the Supreme Court of Canada released its reasons in three collective bargaining cases dealing with freedom of association, which have become known as the 2015 freedom of association trilogy. These decisions make clear that, at least for a strong majority of the Court, the doctrinal journey that began with the dissenting reasons of Dickson CJ in the original 1987 trilogy, and

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66 *Ibid* at para 37.

67 *Ibid* at para 76.

68 See, for example, in Ontario, the Court of Appeal's decisions in *Mounted Police Association of Ontario v Canada (Attorney General)*, 2012 ONCA 363; and in *Assn of Justice Counsel v Canada (Attorney General)*, 2012 ONCA 530.

that continued with majority recognition of constitutional protection for the right to organize in *Dunmore* and for collective bargaining in *Health Services*, would not be retreated from, but would instead form a fundamental part of our constitutional and labour law.

a) *Mounted Police Association of Ontario v Attorney General of Canada (MPAO)*

The *Mounted Police Association of Ontario v Attorney General of Canada* case[69] involved a challenge to two separate but related aspects of the legal regime governing RCMP members: a) the imposition of a non-union representational structure on RCMP members (the Staff Relations Representative Program or SRRP), which prevented them from democratically choosing and bargaining through their own independent bargaining agent, and b) the long-standing exclusion of RCMP members from the *Public Service Labour Relations Act*, which had been upheld in *Delisle*.

By a 6:1 majority, the Supreme Court of Canada held that members of the RCMP had the right to be represented by a democratically selected independent association of their own choosing. The Court held that section 2(d) of the *Charter* requires that employees be provided with a degree of choice and independence sufficient to enable them to determine and pursue their collective workplace goals, and, in particular, to engage in meaningful collective bargaining. As the Court concluded in striking down the SRRP and the legislative exclusion: "The current RCMP labour relations regime denies RCMP members that choice, and imposes on them a scheme that does not permit them to identify and advance their workplace concerns free from management's influence."[70]

While the earlier *Health Services* decision recognized section 2(d) protections for a process of collective bargaining, the Court had not previously explicitly recognized employee selection of trade union representation, and trade union independence, as core aspects of the section 2(d) guarantee.

The majority decision, written together by LeBel J and McLachlin CJ, brings the approach taken to section 2(d) in line with the approach taken to other fundamental freedoms. The Court emphasized the need for a purposive, generous, and contextual approach to the scope of freedom of association, squarely adopting Dickson CJ's focus in his dissenting reasons in the *Alberta Reference* on the purpose of freedom of association. In particular, in *MPAO*, the Court emphasized that the core purpose of

69 2015 SCC 1 [*MPAO*].

70 *Ibid* at para 5.

section 2(d) is protection of "collective activity that enables 'those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict,'"[71] also stressing that "freedom of association is empowering, and that we value the guarantee enshrined in s. 2(d) because it empowers groups whose members' individual voices may be all too easily drowned out."[72]The Court concluded as follows:

> This then is a fundamental purpose of s. 2(d) — to protect the individual from "state-enforced isolation in the pursuit of his or her ends": *Alberta Reference*, at p. 365. The guarantee functions to protect individuals against more powerful entities. By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society.[73]

Where associational activity relates to "reducing social imbalances" or joining "with others to meet on more equal terms the power and strength of other groups or entities,"[74] that activity will be constitutionally protected.[75]

Indeed, in language reminiscent of the Court's approach to freedom of expression, while the Court recognized that some collective activity lies outside the *Charter's* protection, the only example it gave was "associational activity that constitutes violence,"[76] going so far as to leave open the question as to "[w]hether there are other categories of activity in addition to violence that are by their very nature entirely excluded from s. 2(d) protection need not be canvassed here."[77]

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71 *Ibid* at para 54.

72 *Ibid* at para 55.

73 *Ibid* at para 58.

74 *Ibid* at para 66.

75 While beyond the scope of this chapter, it is fair to say that the Court's description of the purpose of section 2(d) as redressing inequality and imbalances in power, and its broad definition of associational activities as embracing non-violent associational activities necessary to "reduc[e] social imbalances," and the right to join "with others to meet on more equal terms the power and strength of other groups or entities," may well have broader implications for workers beyond collective bargaining and for other civil society associations outside of the workplace context.

76 *MPAO*, above note 69 at para 59.

77 *Ibid* at para 60.

It is difficult to envision a more expansive approach to the scope of section 2(d). What's more, the Court's reasons made explicit what was implicit in prior decisions, namely, that section 2(d) protects not only individual rights, but also "collective rights that inhere in associations,"[78] recognizing that both individual rights and collective rights are essential for full *Charter* protection.[79] Although the *Charter* generally speaks of individuals as rights holders, the majority held that there is a collective aspect to section 2(d) rights, and that "[r]ecognizing group or collective rights complements rather than undercuts individual rights."[80] As the Court reasoned:

> Section 2(d), we have seen, protects associational activity for the purpose of securing the individual against state-enforced isolation and empowering individuals to achieve collectively what they could not achieve individually. It follows that the associational rights protected by s. 2(d) are not merely a bundle of individual rights, but collective rights that inhere in associations.[81]

Applying its recognition of both the "redressing power imbalance" purpose of section 2(d) together with the collective rights nature of section 2(d) protection to the workplace context, the Court had no difficulty determining that section 2(d) protects a meaningful process of collective bargaining. As the Court concluded:

> As we have seen, s. 2(d) functions to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power. Nowhere are these dual functions of s. 2(d) more pertinent than in labour relations. Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals.
>
> The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in a meaningful way (*Health Services*; *Fraser*). Yet a process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals. As this Court stated in *Health Services*:

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78 *Ibid* at para 62.

79 *Ibid* at paras 62–65.

80 *Ibid* at para 65.

81 *Ibid* at para 62.

> "One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees . . ." (para. 84). A process that substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power is therefore inconsistent with the guarantee of freedom of association enshrined in s. 2(d).
>
> The balance necessary to ensure the meaningful pursuit of workplace goals can be disrupted in many ways. Laws and regulations may restrict the subjects that can be discussed, or impose arbitrary outcomes. They may ban recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power. They may make the employees' workplace goals impossible to achieve. Or they may set up a process that the employees cannot effectively control or influence. Whatever the nature of the restriction, the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining: *Health Services*, at para. 90.[82]

Significantly, the Court recognized that legislative measures which substantially reduce the ability of employees to negotiate will undermine the freedom of association guarantee. Moreover, the Court included in its list of measures substantially interfering with meaningful bargaining laws and regulations which "restrict the subjects that can be discussed, or impose arbitrary outcomes."[83] This lends strong support to the view that measures which restrict the scope of the subject matter of collective bargaining, or that impose collective bargaining outcomes, will be found to be inconsistent with the section 2(d) guarantee.

Having found that freedom of association mandates a "meaningful process," the majority went on to identify "the features essential to a meaningful process of collective bargaining under s. 2(d),"[84] concluding that "a meaningful process of collective bargaining is a process that provides employees with a degree of choice and independence sufficient to enable them to determine their collective interests and meaningfully pursue them."[85] Notably, as further addressed in Part B below, the Court relied on Cory J's dissent in *PIPSC* in identifying freedom of choice as a essential feature of meaningful collective bargaining. To quote the Court in *MPAO*:

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82 *Ibid* at paras 70–72.

83 *Ibid* at para 72.

84 *Ibid* at para 81.

85 *Ibid*.

> Collective bargaining constitutes a fundamental aspect of Canadian society which "enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work" (*Health Services*, at para. 82). Put simply, its purpose is to preserve collective employee autonomy against the superior power of management and to maintain equilibrium between the parties. This equilibrium is embodied in the degree of choice and independence afforded to the employees in the labour relations process.[86]
>
> But choice and independence are not absolute: they are limited by the context of collective bargaining. In our view, the degree of choice required by the *Charter* for collective bargaining purposes is one that enables employees to have effective input into the selection of the collective goals to be advanced by their association. In the same vein, the degree of independence required by the *Charter* for collective bargaining purposes is one that ensures that the activities of the association are aligned with the interests of its members.[87]
>
> . . .
>
> Independence and choice are complementary principles in assessing the constitutional compliance of a labour relations scheme. *Charter* compliance is evaluated based on the *degrees* of independence and choice guaranteed by the labour relations scheme, considered with careful attention to the entire context of the scheme. The degrees of choice and independence afforded should not be considered in isolation, but must be assessed globally always with the goal of determining whether the employees are able to associate for the purposes of meaningfully pursuing collective workplace goals.[88]

The Court identified, as the hallmark of employee choice in the collective bargaining context, "the ability to form and join new associations, to change representatives, to set and change collective workplace goals, and to dissolve existing associations."[89]

So far as the requirement for independence from management is concerned, the Court held it was necessary "that the activities of the association reflect the interests of the employees, thus respecting the nature and purpose of the collective bargaining process."[90] As the Court went on to state:

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86 *Ibid* at para 82.
87 *Ibid* at para 83.
88 *Ibid* at para 90 [emphasis in original].
89 *Ibid* at para 86.
90 *Ibid* at para 89.

> Just as with choice, independence from management ensures that the activities of the association reflect the interests of the employees, thus respecting the nature and purpose of the collective bargaining process and allowing it to function properly. Conversely, a lack of independence means that employees may not be able to advance their own interests, but are limited to picking and choosing from among the interests management permits them to advance. Relevant considerations in assessing independence include the freedom to amend the association's constitution and rules, the freedom to elect the association's representatives, control over financial administration and control over the activities the association chooses to pursue.[91]

At the same time, the Court emphasized that no one representational model is required to give effect to employee choice and independence:

> Employee choice may lead to a diversity of associational structures and to competition between associations, but it is a form of exercise of freedom of association that is essential to the existence of employee organizations and to the maintenance of the confidence of members in them.[92]
>
> . . .
>
> A variety of labour relations models may provide sufficient employee choice and independence from management to permit meaningful collective bargaining. As discussed, choice and independence are not absolute in the context of collective bargaining.[93]
>
> This Court has consistently held that freedom of association does not guarantee a particular model of labour relations (*Delisle*, at para. 33; *Health Services*, at para. 91; *Fraser*, at para. 42). What is required is not a particular model, but a regime that does not substantially interfere with meaningful collective bargaining and thus complies with s. 2(d) (*Health Services*, at para. 94; *Fraser*, at para. 40). What is required in turn to permit meaningful collective bargaining varies with the industry culture and workplace in question. As with all s. 2(d) inquiries, the required analysis is contextual.[94]

The Court was also clear that the Wagner model of democratically chosen exclusive bargaining agency within an appropriate bargaining unit, upon

91 *Ibid.*
92 *Ibid* at para 86.
93 *Ibid* at para 92.
94 *Ibid* at para 93.

which virtually all Canadian collective bargaining legislation is based, meets the twin section 2(d) requirements of choice and independence:

> The *Wagner Act* model of labour relations in force in most private sector and many public sector workplaces offers one example of how the requirements of choice and independence ensure meaningful collective bargaining. That model permits a sufficiently large sector of employees to *choose* to associate themselves with a particular trade union and, if necessary, to decertify a union that fails to serve their needs. The principles of majoritarianism and exclusivity, the mechanism of "bargaining units" and the processes of certification and decertification — all under the supervision of an independent labour relations board — ensure that an employer deals with the association most representative of its employees . . . .[95]
>
> . . . s. 2(d) does not require a process whereby *every* association will ultimately *gain* the recognition it seeks . . . . As we said, s. 2(d) can also accommodate a model based on majoritarianism and exclusivity (such as the *Wagner Act* model) that imposes restrictions on individual rights to pursue collective goals.[96]

Indeed, the Court explicitly recognized that there are other collective bargaining representation models that also are consistent with section 2(d), in that they accommodate "choice and independence in a way that ensures meaningful collective bargaining."[97] In this respect, the Court specifically referred to the bargaining agent designation model under teachers' collective bargaining legislation in Ontario, observing that "although the employees' bargaining agent under such a model is designated rather than chosen by the employees, the employees appear to retain sufficient choice over workplace goals and sufficient independence from management to ensure meaningful collective bargaining."[98] As the Court concluded:

> The search is not for an "ideal" model of collective bargaining, but rather for a model which provides sufficient employee choice and independence to permit the formulation and pursuit of employee interests in the particular workplace context at issue. Choice and independence do not *require* adversarial labour relations; nothing in the *Charter*_prevents an employee association from engaging willingly

95 *Ibid* at para 94.
96 *Ibid* at para 98.
97 *Ibid* at para 95.
98 *Ibid*.

> with an employer in different, less adversarial and more cooperative ways. This said, genuine collective bargaining cannot be based on the suppression of employees' interests, where these diverge from those of their employer, in the name of a "non-adversarial" process. Whatever the model, the *Charter* does not permit choice and independence to be eroded such that there is substantial interference with a meaningful process of collective bargaining. Designation of collective bargaining agents and determination of collective bargaining frameworks would therefore not breach s. 2(d) where the structures that are put in place are free from employer interference, remain under the control of employees and provide employees with sufficient choice over the workplace goals they wish to advance.[99]

Turning to the constitutionality of the SRRP, the Court held that both its purpose and effect violated section 2(d). As the Court concluded:

> We conclude that the flaws in the SRRP process do not permit meaningful collective bargaining, and are inconsistent with s. 2(d). The SRRP process fails to respect RCMP members' freedom of association in both its purpose and its effects.[100]
>
> Section 96 of the *RCMP Regulations* imposed the SRRP on RCMP members as the sole means of presenting their concerns to management. Section 56 of the current-day *RCMP Regulations, 2014* continues to impose the SRRP under nearly identical terms. RCMP members are represented by an organization they did not choose and do not control. They must work within a structure that lacks independence from management. Indeed, this structure and process are part of the management organization of the RCMP. The process fails to achieve the balance between employees and employer that is essential to meaningful collective bargaining, and leaves members in a disadvantaged, vulnerable position.[101]
>
> . . .
>
> [T]he Attorney General appears to concede that the SRRP continues to be imposed on members of the RCMP for the purpose of preventing collective bargaining through an independent association. Its position is rather that s. 2(d) does not guarantee RCMP members a right to form and bargain through an association of their own choosing. We have rejected this view. Accordingly, it follows that the purpose of the imposition of the SRRP, to prevent the formation of independent RCMP

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99 *Ibid* at para 97 [emphasis in original].
100 *Ibid* at para 105.
101 *Ibid* at para 106.

> members' associations for the purposes of collective bargaining, is unconstitutional.[102]
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> . . .
>
> Simply put, in our view, the SRRP is not an association in any meaningful sense, nor a form of exercise of the right to freedom of association. It is simply an internal human relations scheme imposed on RCMP members by management. Accordingly, the element of employee choice is almost entirely missing under the present scheme.[103]
>
> . . .
>
> These constitutional defects in the SRRP are not cured by the election of SRRs. On this point we agree with the conclusion of the application judge, that "agreeing to populate a structure created by management for the purpose of labour relations cannot reasonably be construed as a choice not to conduct labour relations through an association of the members' own making" (para. 63).[104]

Furthermore, with respect to section 2(1)(d) of the *Public Service Labour Relations Act*, which excluded RCMP members from the protections of that Act, the Court reversed its 1999 decision in *Delisle* (where, as set out above, the Court had found that the exclusion did not breach section 2(d)). The Court reasoned that at the time *Delisle* was decided, the right to collective bargaining had not been recognized under the *Charter*. Further, the majority found that this appeal gave it the opportunity to view the exclusion of RCMP members in its full context, including the impact of the SRRP scheme, which had not been directly challenged in *Delisle*.

The majority found that the government's purpose in excluding RCMP members from the *PSLRA* was itself unconstitutional, as it was "designed to prevent the exercise of the section 2(d) rights of RCMP members." As the Court reasoned:

> The exclusion of RCMP members from the *PSSRA* in 1967 — the only vehicle available for meaningful collective bargaining in the federal public service — was intended to prevent them from engaging in collective bargaining. The then Commissioner of the RCMP acknowledged this in correspondence to the Solicitor General of Canada in 1980, stating: "There is no enabling legislation which allows members to collectively bargain and we must infer that Parliament has not intended that members of the Force have that right" (see A.F., at para. 106).

102 *Ibid* at para 110.
103 *Ibid* at para 118.
104 *Ibid* at para 120.

> The *PSSRA*'s successor, the *PSLRA*, reduced the categories of excluded public servants. RCMP members, however, continued to be excluded in identical terms as under the *PSSRA*, and no other statute permitted RCMP members to engage in a process of collective bargaining . . . .[105]

However, the majority also noted that its conclusion that the exclusion breached the freedom of association guarantee did not mean that Parliament was necessarily required to include RCMP members within the *PSLRA* in the future, and that "it remains open to the federal government to explore other collective bargaining processes that could better address the specific context in which members of the RCMP discharge their duties."[106] As is typical in successful *Charter* challenges, the Court suspended the effect of its decision for a period of twelve months to provide the government an opportunity to respond with new legislation.

This aspect of the *MPAO* decision may carry positive implications for other groups of workers still excluded from collective bargaining legislation, both in the private and public sectors. While the 1999 *Delisle* decision had seemingly closed the door to these challenges, and while *Dunmore* had opened the door for more vulnerable employees such as agricultural workers, *MPAO* suggests that where it can be established that the purpose (or effect) of legislation is to deprive employees of the only mechanism available for meaningful collective bargaining, this may be a violation of section 2(d).

Finally, from a doctrinal perspective, the decision is also noteworthy due to the majority's clarification of two key aspects of the *Fraser* decision, which some lower courts, and the government, had relied on in an attempt to narrow the scope of section 2(d) protections.

First, the majority confirmed that the proper test for a violation of section 2(d) is the lower threshold of "substantial interference" and not "impossibility" (this is discussed in detail below in Part B).

Second, the majority reasons also clarify that collective bargaining is not to be treated as a "derivative right". After *Fraser*, the Ontario Court of Appeal and some other courts had grappled with the Supreme Court's suggestion in *Fraser* that collective bargaining was merely "derivative" of freedom of association. The lower courts took from this that collective bargaining was only protected "where employees establish that it is effectively impossible for them to [otherwise] act collectively to achieve

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105 *Ibid* at paras 134–35.

106 *Ibid* at para 137.

workplace goals." However, the Supreme Court firmly rejected this view in *MPAO*:

> To the extent the term "derivative right" suggests that the right to a meaningful process of collective bargaining only applies where the guarantee under s. 2(d) is otherwise frustrated, use of that term should be avoided. Furthermore, any suggestion that an aspect of a *Charter* right may somehow be secondary or subservient to other aspects of that right is out of keeping with the purposive approach to s. 2(d).[107]

b) ***Saskatchewan Federation of Labour v Saskatchewan (SFL)***

Released two weeks after *MPAO*, *SFL*[108] completed the reversal of the earlier 1987 trilogy, first begun in *Dunmore*, substantially advanced in *Health Services*, and affirmed by *MPAO*.

If the 1987 majority reasons in the trilogy were, from a trade union perspective, the black hole of constitutional protection for labour rights, Abella J's reasons for the majority in *SFL* are a super nova, fully resuscitating Dickson CJ's *Alberta Reference* dissenting view that the right to strike is protected by the freedom of association guarantee.

The case involved the issue as to whether Saskatchewan legislation restricting employer-designated essential service employees from engaging in strike action infringed section 2(d) of the *Charter*. The majority unequivocally concluded that section 2(d) protects the right of employees to participate in strike action, at least for the purposes of negotiating the terms and conditions of their employment. Pointing to labour history, caselaw, and Canada's international obligations, the Court found that "the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations."[109]

Moreover, the Court emphasized that "the right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right"[110] that is "vital to protecting the meaningful process of collective bargaining within s. 2(d)."[111] The Court also stated that "the ability to engage in the collective withdrawal of services in the process of the negotiation of a collective agreement is . . . and has historically been, the 'irreducible minimum' of the freedom to associate in Canadian labour relations,"[112] and that (approvingly endorsing Dickson CJ's view

107 *Ibid* at para 79.

108 *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 [*SFL*].

109 *Ibid* at para 3.

110 *Ibid*.

111 *Ibid* at para 24.

112 *Ibid* at para 61.

in the *Alberta Reference*) "effective constitutional protection of the associational interests of employees in the collective bargaining process requires concomitant protection of their freedom to withdraw collectively their services."[113]

Based on its review of the historical origins and purpose of the right to strike, the Court readily concluded that "the ability of employees to withdraw their labour in concert has long been essential to meaningful collective bargaining."[114] The Court also emphasized that the right to strike is essential to realizing both *Charter* values in general and section 2(d) values and purposes in particular:

> The right to strike is essential to realizing these values and objectives through a collective bargaining process because it permits workers to withdraw their labour in concert when collective bargaining reaches an impasse. Through a strike, workers come together to participate directly in the process of determining their wages, working conditions and the rules that will govern their working lives (Fudge and Tucker, at p. 334). The ability to strike thereby allows workers, through collective action, to refuse to work under imposed terms and conditions. This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives.[115]

Indeed, picking up on the rationale for section 2(d) identified in *MPAO*, the Court emphasized the extent to which the right to strike, which it describes as the "powerhouse" of collective bargaining, is essential to promoting equality (and overcoming individual employee vulnerability) in the workplace:

> This Court has long recognized the deep inequalities that structure the relationship between employers and employees, and the vulnerability of employees in this context. In the Alberta Reference, Dickson C.J. observed that:
>
> > [t]he role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers. [p. 368]
>
> And this Court affirmed in Mounted Police that:

113 *Ibid* at para 49.
114 *Ibid* at para 51.
115 *Ibid* at para 54.

> . . . s. 2(d) functions to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power. Nowhere are these dual functions of s. 2(d) more pertinent than in labour relations. Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals.
>
> The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in a meaningful way . . . . [The] process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals. [paras 70–71]
>
> . . . [I]t is "the possibility of the strike which enables workers to negotiate with their employers on terms of approximate equality" (p. 333). Without it, "bargaining risks being inconsequential — a dead letter" . . . .[116]

And, directly responding to the dissent of Rothstein and Wagner JJ (who accused the majority, "under the rubric of 'workplace justice,'" of relying on a nineteenth century conception of the relationship between employers and workers, and of reaching back to nineteenth century French novelists and *fin de siècle* France),[117] the majority stated:

> In essentially attributing equivalence between the power of employees and employers, this reasoning, with respect, turns labour relations on its head, and ignores the fundamental power imbalance which the entire history of modern labour legislation has been scrupulously devoted to rectifying. It drives us inevitably to Anatole France's aphoristic fallacy: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.[118]

Moreover, in response to the dissent's charge that in protecting the right to strike the Court was constitutionally protecting and guaranteeing the objects of trade unions, the majority noted as follows:

> Strike activity itself does not guarantee that a labour dispute will be resolved in any particular manner, or that it will be resolved at all. And, as the trial judge recognized, strike action has the potential to

116 *Ibid* at para 55.

117 *Ibid* at paras 117 and 125.

118 *Ibid* at para 56.

> place pressure on both sides of a dispute to engage in good faith negotiations. But what it does permit is the employees' ability to engage in negotiations with an employer on a more equal footing.[119]

The Court also rejected the view that so long as an effective alternative dispute resolution mechanism is provided, there is no interference with the process of meaningful bargaining. To the contrary, the Court held that such a mechanism is not "associational in nature" and does not "realize what is protected by the values and objectives underlying freedom of association."[120] As a result, it amounts to an infringement of section 2(d), which must be justified under section 1 of the *Charter*.

In addition, rejecting the argument that the *Fraser* decision limits section 2(d) protection to good faith consultation (an argument pressed by both employer and government counsel, and accepted in Rothstein and Wagner JJ's dissenting reasons), the Court recognized that a good faith bargaining obligation alone is not at all sufficient to ensure a meaningful process of collective bargaining. Rather, as the Court concluded, "[w]here good faith negotiations break down, the ability to engage in the collective withdrawal of services is a necessary component of the process through which workers can continue to participate meaningfully in the pursuit of their collective workplace goals."[121]

With respect to international law and Canada's international law obligations, the Court forcefully turned back the attempt to undermine its earlier reliance on international law in *Health Services* and *Fraser*, concluding that Canada's own binding international law commitments and other persuasive sources of international law all point to "protecting the right to strike as part of a meaningful process of collective bargaining."[122]

Having found that strike action is protected associational activity under section 2(d), the Court readily found that restricting designated essential service employees from engaging in strike action is a violation of freedom of association.[123]

Finally, while the Court recognized that in the case of workers essential to life, health, and safety, restriction on the right to strike can be justified, it also ruled that, in order to be minimally impairing under section 1, the right to strike "must be replaced by one of the meaningful

119 *Ibid* at para 57.

120 *Ibid* at para 60.

121 *Ibid* at para 75.

122 *Ibid* at para 62. See also *ibid* at paras 62–75.

123 *Ibid* at para 78.

dispute resolution mechanisms commonly used in labour relations."[124] As the Court observed, returning to Dickson CJ's 1987 dissent:

> Not surprisingly, Dickson C.J. was alive to the profound bargaining imbalance the union inherits when the removal of the right to strike is not accompanied by a meaningful mechanism for resolving collective bargaining disputes:
>
> > Clearly, if the freedom to strike were denied and no effective and fair means for resolving bargaining disputes were put in its place, employees would be denied any input at all in ensuring fair and decent working conditions, and labour relations law would be skewed entirely to the advantage of the employer. It is for this reason that legislative prohibition of freedom to strike must be accompanied by a mechanism for dispute resolution by a third party. I agree with the Alberta International Fire Fighters Association at p. 22 of its factum that "It is generally accepted that employers and employees should be on an equal footing in terms of their positions in strike situations or at compulsory arbitration where the right to strike is withdrawn". *The purpose of such a mechanism is to ensure that the loss in bargaining power through legislative prohibition of strikes is balanced by access to a system which is capable of resolving in a fair, effective and expeditious manner disputes which arise between employees and employers*. [Emphasis added.][125]

c) *Meredith v Canada (Attorney General)*

The Court's decision in *Meredith v Canada (Attorney General)*,[126] released at the same time as *MPAO*, involved consideration of the same RCMP representational scheme that the Court found to be unconstitutional in *MPAO*. However, in *Meredith*, the challenge arose in the context of the part of the scheme that, far from providing a meaningful process of collective bargaining, set out only a limited right of consultation over pay increases through the advisory RCMP Pay Council (with equal representatives of RCMP management and RCMP members and a neutral chair), that in turn made pay recommendations to the RCMP Commissioner, who in turn made recommendations to Treasury Board.

In *Meredith*, the Government had agreed to pay increases for RCMP members through this process, but then reversed and replaced them with lower increases, initially through executive action and then

124 *Ibid* at para 25.

125 *Ibid* at para 94.

126 2015 SCC 2 [*Meredith*].

through legislation (the federal *Expenditure Restraint Act* (*ERA*)). Meredith and other RCMP members challenged this on the basis that overriding the increases interfered with what they asserted to be a section 2(d) protected associational consultative process.

The first issue the Court faced was how to deal with its finding in the companion *MPAO* case that the Pay Council process itself was part of a representation scheme found to be unconstitutional (in that it did not provide for meaningful collective bargaining through democratically chosen and independent bargaining agents). However, the Court found that in the absence of a *Charter*-compliant meaningful or "true collective bargaining process," RCMP members nonetheless used the Pay Council to develop recommendations for members' pay and to advance their compensationrelated goals.[127] As a result, in the Court's view, despite being constitutionally deficient, the Pay Council consultative process amounted to *Charter*-protected associational activity "even though the process does not provide all that the *Charter* requires."[128] As the Court stated: "the legal alternatives available are not full collective bargaining or a total absence of constitutional protection. Interference with a constitutionally inadequate process may attract scrutiny under s. 2(d)."[129]

As it turned out, given the limited consultative nature of the constitutional activity at issue, the majority had little trouble concluding that the legislation did not substantially interfere with RCMP members' constitutionally deficient and limited associational consultative activity.[130] As the Court concluded, "the Pay Council continued to afford RCMP members a process for consultation on compensation-related issues within the constitutionally inadequate labour relations framework that was then in place."[131]

On one view, *Meredith* can be regarded as the least significant of the 2015 trilogy decisions. This is because RCMP members could only claim interference with what was, by definition, a constitutionally inadequate, minimal, and thin right to be consulted, falling well short of the meaningful (or "true") collective bargaining process protected and required by section 2(d). For this reason, the majority's analysis, which focused of necessity only on whether the legislation interfered with the *Charter*-deficient "constitutionally inadequate" Pay Council process, arguably sheds little if any light on the approach to be taken in assessing whether legislative

127 *Ibid* at para 25.

128 *Ibid*.

129 *Ibid*.

130 *Ibid* at paras 28–30.

131 *Ibid* at para 30.

wage control or similar restrictions overriding or precluding negotiated provisions interfere with the thicker section 2(d) right to a meaningful collective bargaining process that unionized employees possess.

On this view, the constitutional right being claimed by RCMP members in *Meredith* — the right to be consulted through the RCMP representational scheme — fell well short of what the Court has found to be protected in *MPAO* and *Health Services*, namely meaningful collective bargaining (and not mere consultation) through a democratically chosen independent association or union, backed up by the right to strike (or in essential services, independent and binding interest arbitration).

On the other hand, if one ignores the limited nature of the constitutional right at issue in *Meredith*, the decision can be viewed as supporting a more impoverished view of the scope of section 2(d) protection, left somewhat ambiguous since *Health Services* — namely, that so long as a government engages in a process of good faith consultation prior to overriding negotiating collective agreement terms, and/or precluding future bargaining, the requirements of section 2(d) have been met.

8. *British Columbia Teachers' Federation v British Columbia*

The Court's most recent foray into the section 2(d) thicket, its November 2016 decision in *British Columbia Teachers' Federation v British Columbia* (*BCTF*),[132] could potentially have firmly resolved lingering ambiguities in the scope of section 2(d) protection for collective bargaining. However, if there is one lesson to learn when it comes to the Supreme Court of Canada's approach to freedom of association in the collective bargaining context, it is that while (as Abella J pronounced in *SFL*) "the [section 2(d)] arc bends increasingly towards workplace justice,"[133] the arc is not necessarily a smooth one, with uncertain twists and bends along the way. The *BCTF* decision is perhaps the latest example.

The *BCTF* case initially arose back in 2002, involving an issue similar to that in *Health Services*, except it arose in the education sector, and the legislation at issue (Bill 28) overrode and removed negotiating collective agreement provisions aimed primarily at placing limits on class size, while at the same time prohibited future bargaining over class size and certain other related working conditions.

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132 2016 SCC 49 [*BCTF, SCC*].

133 *SFL*, above note 108 at para 1.

Following the Supreme Court of Canada's decision in *Health Services*, in 2011 Griffin J of the BC Superior Court found that Bill 28 unjustifiably infringed section 2(d), and declared it to be unconstitutional, with the usual one-year suspension of the declaration of invalidity. The government did not appeal, but instead entered into discussions/consultations with the teachers' unions. Following a period of bargaining/consultation with the unions, the government then enacted Bill 22 one year later, which, in essence, continued in effect the terms of Bill 28 overriding the class size provisions, with the only difference being that Bill 22 permitted bargaining in future rounds over class size.

According to the BC government, relying especially on the *Fraser* decision, all that section 2(d) required it to do was to consult in good faith prior to enacting Bill 22, which it argued it had done. For their part, the teachers' unions had a different view, arguing that section 2(d) precluded the unilateral imposition of legislative terms, and that in any event the government had failed to consult or negotiate in good faith.

At trial again, Griffin J found that Bill 22 was contrary to section 2(d) of the *Charter* and not saved by section 1.[134] According to Griffin J, even if pre-legislative consultation was relevant to determining whether there had been a breach of section 2(d), the government had not consulted in good faith, having come into the process with a closed mind, and having tried to provoke the teachers to go on strike so that they could potentially justify back to work legislation. But Griffin J also held, on the basis of her reading of the prior Supreme Court of Canada caselaw reviewed above, that pre-legislative good faith consultation was not relevant to the section 2(d) inquiry in the first place, i.e., that legislation overriding important negotiating collective agreement terms and/or precluding future bargaining over such terms infringed section 2(d), since it undermined the process of good faith bargaining required by section 2(d).

The BC Court of Appeal, by a 4:1 majority with Donald J dissenting, issued its decision reversing the trial judge and upholding the legislation, in a decision released in April 2015, three months after the Supreme Court of Canada released the 2015 *MPAO*/*Meredith*/*SFL* trilogy. According to the majority of the BC Court of Appeal,[135] the *MPAO* and *SFL* decisions were not relevant to the issues arising in *BCTF*, since "pre-legislative consultations were not a factor in *MPAO* or *SFL*, both of which dealt with the structure of collective bargaining regimes."[136] By contrast, according to the majority, both *Health Services* and *Meredith* sup-

134 *British Columbia Teachers' Federation v British Columbia*, 2014 BCSC 121.

135 *British Columbia Teachers' Federation v British Columbia*, 2015 BCCA 184 [*BCTF, BCCA*].

136 *Ibid* at para 63.

ported the view that, where a government consulted in advance prior to enacting legislation that interfered with the negotiation of important collective agreement terms, that was an important contextual factor against finding an infringement of section 2(d). Moreover, according to the Court of Appeal majority, the fact that the legislation in question overrode terms and conditions of employment involving important matters of public policy was another factor that weighed against a finding of section 2(d) infringement.

The Court of Appeal went on to find that the trial judge had erred in finding that the government had consulted in good faith by *inter alia* having inquired into the substantive reasonableness and motivations of the government's position and, upholding the appeal and reversing the trial judge, determined that the government had followed a good faith process of consultation.

When the appeal was argued in the Supreme Court of Canada on 10 November 2016, the Court ruled from the bench, upholding the appeal and finding the legislation to be unconstitutional, with a seven-judge majority allowing the appeal "substantially for the reasons of Justice Donald,"[137] and two judges (Côté and Brown JJ), dissenting "substantially for the reasons of the majority of the Court of Appeal."[138] Given that the majority allowed the appeal "substantially for the reasons of Justice Donald," and gave no other reasons, it is necessary to consider the reasons of Donald J if we are to understand the rationale for the Supreme Court of Canada's decision. At the same time, the fact that the Court stated that it was in substantial agreement with Donald J's reasons leaves us to speculate as to which aspects of the reasons the majority agreed with, and which it did not.

Significantly, unlike his majority colleagues in the BC Court of Appeal, Donald J did not view the Supreme Court of Canada's decisions in *MPAO* and *SFL* as irrelevant. Rather, in the first section of his reasons dealing with "The Health Services Test and Pre-Legislative Consultation," Donald J specifically emphasizes the importance of the statement in *MPAO* that "a process that substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power is therefore inconsistent with the guarantee of freedom of association enshrined in s. 2(d),"[139] and that separate and apart from "bad faith negotiations or the refusal to consider submissions,"[140] collective

137 *BCTF, SCC*, above note 132 at para 1.

138 *Ibid*.

139 *BCTF, BCCA*, above note 135 at para 344.

140 *Ibid* at para 286.

bargaining is also "protected in the sense that substantial interference with past, present, or future attempts at collective bargaining can render employees' collective representatives effectively feckless, and thus negate the employees' right to *meaningful* freedom of association."[141]

Justice Donald also explains, without any reference to pre-legislative consultation, that unilaterally nullifying collective agreement terms can infringe section 2(d):

> The act of associating for the purpose of collective bargaining can also be rendered futile by unilateral nullification of previous agreements, because it discourages collective bargaining in the future by rendering all previous efforts nugatory: see *Health Services* at para. 96. This is not an exercise in "constitutionalizing" the terms of a collective agreement or the result of collective bargaining, but is instead the result of constitutionalizing the right to a meaningful process that is not continually under threat of being rendered pointless.[142]

Moreover, when it comes to considering whether pre-legislative consultation meets the requirements of section 2(d), Donald J emphasized that the union must be given "the opportunity to *meaningfully* influence the changes made, on bargaining terms of approximate equality,"[143] specifically referencing paragraph 55 of the *SFL* decision that it is "the possibility of the strike which enables workers to negotiate with their employers on terms of approximate equality," and that without it, "bargaining risks being inconsequential — a dead letter."[144] As Donald J concluded:

> Pre-legislative consultation, then, can be seen as a replacement for the traditional collective bargaining process, but only if it truly is a *meaningful* substitution. To be meaningful, the bargaining parties must consult from an assumed position of "approximate equality". I note here that in *SFL*, Abella J., writing for the majority of the Court, found that a right to strike was essential in order to maintain "approximate equality" between employees and employers in the collective bargaining process: at para. 55, quoting Judy Fudge and Eric Tucker, "The Freedom to Strike in Canada: A Brief Legal History" (2009–2010), 15 C.L.E.L.J. 333 at 333.[145]

141 *Ibid* at para 284 [emphasis in original].
142 *Ibid* at para 285.
143 *Ibid* at para 287 [emphasis in original].
144 *SFL*, above note 108 at para 55.
145 *BCTF, BCCA*, above note 135 at para 291.

Finally, Donald J expressly states that he does "not believe that any amount of pre-legislative consultation could . . . prevent a finding of unconstitutionality" where a government passes "legislation that permanently prohibits collective bargaining or associational activities" (such as the previous Bill 28).[146]

At the same time, there are passages in Donald J's reasons that appear to suggest that pre-legislative consultation may in some cases meet the requirements of section 2(d). For example, Donald J expresses his agreement with the majority, and his disagreement with the trial judge, that good faith pre-legislative consultation can never be relevant to determining whether a section 2(d) breach has occurred, since "a *Charter* breach cannot always be seen within the four corners of legislation, but must sometimes be found to occur *prior* to the passage of the legislation" i.e., where "the government failed to consult a union in good faith or give it an opportunity to bargain collectively."[147]

Moreover, after expressing his view as to the relevance of both *MPAO* and *SFL* to the constitutional analysis, Donald J nonetheless states that "if the government negotiates or consults with an association in good faith and nevertheless comes to an impasse, it will likely have satisfied its constitutional duty and may unilaterally pass necessary legislation consistent with that consultation process."[148] Justice Donald also describes the central issue in the case as being "whether . . . unilateral nullification came after a point of impasse following good faith consultation, and thus gave effect to the BCTF's right to a form of collective bargaining, or whether the Province's 'consultation' was treated merely as a formality."[149]

Certainly, it seems difficult to reconcile these passages with Donald J's earlier emphasis (and the Supreme Court of Canada's emphasis in *SFL*) on the fundamental importance of the right to strike precisely at the point of resolving collective bargaining impasses.

Ultimately, Donald J focuses his finding that the legislation infringes section 2(d) on the basis of his disagreement with the majority over whether the trial judge correctly inquired into the substantive reasonableness and motivations of the government in the pre-legislative consultation process leading to the enactment of Bill 22, and over the failure of the majority to accord the trial judge's factual findings concerning

146 *Ibid* at para 296.

147 *Ibid* at para 288 [emphasis in original].

148 *Ibid* at para 293.

149 *Ibid* at para 311.

bad faith a sufficient degree of deference on the overriding and palpable error standard.

As a result, there would seem to be considerable uncertainty flowing from the Supreme Court of Canada majority's substantial agreement with Donald J's dissenting reasons in *BCTF*. On the one hand, there are aspects of Donald J's reasons that seemingly accept the distinction between consultation — good faith or otherwise — and the meaningful right to collective bargaining backed up by the right to strike confirmed in *MPAO* and *SFL*, and the inadequacy of the latter for section 2(d) constitutional purposes. On the other hand, there are aspects of Donald J's reasons that put the focus of section 2(d) inquiry on the good faith adequacy of a pre-legislative consultation process.

We can safely predict that debate will continue as to which of the conflicting strands in Donald J's reasoning attracted the agreement of the Supreme Court. Union-side labour lawyers will no doubt argue that Donald J (and the Supreme Court of Canada in substantially agreeing with this reason) was merely recognizing that good faith pre-legislative consultation is a necessary but not sufficient prerequisite for section 2(d) compliance. They can also be expected to emphasize the argument that in substantially agreeing with Donald J's reasons, the majority was simply agreeing with the ratio or core of Donald J's decision, namely, his disagreement within the majority of the BC Court of Appeal over the extent to which a court can probe the substantive reasons and motivations of government in determining whether it acted in good faith, and over the extent to which an appellate court should defer to the factual finding of a trial judge. For their part, government and employer lawyers can be expected to argue that, after *BCTF*, all that is required in the context of legislation interfering with and/or prohibiting the negotiation of important collective agreement protection is a process of advance good faith legislative consultation.

B. DOCTRINAL TENSIONS AND UNRESOLVED ISSUES

After a review of the Supreme Court's evolving approach to section 2(d), it seems fair to say that the original 1987 trilogy has now effectively been buried, with the constitutional labour relations world turned on its head. Chief Justice Dickson's 1987 dissent a quarter of a century later has become 2015's majority outcome. Despite Rothstein J's consistent and repeated dissents attempting to limit this retreat from the previous section

2(d) "no-go zone", we now know that section 2(d) protects not only the right to join and maintain an association, but also protects a meaningful collective bargaining process, including the right to a process of meaningful collective bargain through a democratically chosen and independent union, as well as the right to strike (now recognized since *SFL* as an indispensable element of a meaningful collective bargaining process).

However, despite this apparent paradigm shift, and while the arc of freedom of association has evolved to recognize a significantly larger zone of constitutional protection for organizing, collective bargaining, and the right strike, some caution is warranted. The Supreme Court has been neither consistent nor reliable in its approach to labour rights under section 2(d). Outcomes in this area may well depend on the views of individual judges about the role of the courts in advancing collective rights and workplace justice. Of course, this could change as judges leave the Court and are replaced over time. Of the judges who had substantial labour expertise and spearheaded the expansion of section 2(d) over the past decade, Cromwell and LeBel JJ have retired and the Chief Justice will retire in December 2017. The majority that gave us *MPAO* and *SFL* is now gone. Justice Abella, perhaps the Court's strongest advocate for expanding section 2(d), remains, but she will retire in less than four years. As new judges reach the Supreme Court, little should be taken for granted when it comes to the future direction of section 2(d).

Whatever the composition of the future Supreme Court, it will have to address a number of unresolved questions about section 2(d) amid doctrinal tension and uncertainty. It is beyond this chapter's scope and ambition to identify and analyze all of the areas of contested terrain, and to work through the various and competing ways in which those questions and tensions may be resolved. However, what follows is an analysis of three aspects of the current section 2(d) jurisprudence that are the subject of uncertainty and controversy: 1) the role of pre-legislative consultation in satisfying the section 2(d) requirement for a meaningful process of collective bargaining; 2) the current status of the substantial interference test for a violation of section 2(d); and 3) the impact of the Court's revised approach to section 2(d) on the law of forced association.

1. Pre-legislative Consultation

As noted above in Part A, there are conflicting aspects of the Supreme Court's section 2(d) caselaw regarding the question as to whether government can comply with section 2(d) merely by engaging in good faith consultation prior to enacting legislation overriding important collective

agreement protections. This ambiguity arises from the Court's reasons in *Health Services*, its partial retreat in *Fraser*, the subsequent reinforcement of section 2(d) protection in the 2015 trilogy, and the Court's recent brief and uncertain endorsement in *BCTF*.

No doubt, after the *Fraser* decision, some employer and government counsel posited that section 2(d) protects only a process of good faith bargaining, and that good faith bargaining is all that is needed to ensure a meaningful process of collective bargaining (rather than some form of dispute resolution). From this perspective, in a world where section 2(d) protection for collective bargaining was comprehended as being no more than the right to make collective representations and have those representations considered in good faith, it may well be that advance good faith pre-legislative consultation could be understood as satisfying the section 2(d) obligation.

However, now that the right to strike has been constitutionally recognized as an integral and indispensable component of collective bargaining, it seems difficult to appreciate (despite the uncertainty of the Supreme Court's cryptic reasons in *BCTF* substantially agreeing with Donald J's reasons — which, as set out in Part A above, are themselves ambiguous) how prior legislative consultation can be seen as responsive to or respectful of the fundamental right of workers, as part of the collective bargaining process with their employer, to withdraw their services through strike action where collective bargaining (or for that matter pre-legislative consultation) reaches an impasse.

On this view, after *SFL*, section 2(d) protects more than the right to be consulted, and extends to the right to engage in strike action, and to do so precisely when prior good faith consultation or bargaining has reached an impasse. In this respect, there would seem to be a fundamental distinction between consultation, on the one hand, and section 2(d) protected meaningful or authentic collective bargaining, on the other hand. Consultation requires that the consulting party (whether government or the employer) retains the final authority over the decision. By contrast, meaningful collective bargaining requires that neither party has a unilateral power of decision, and that, in the event of a disagreement, workers have a right to withdraw their services (or resort to interest arbitration in the cases where the right to strike has been justifiably removed) rather than having terms imposed upon them.

From this perspective, the right to a meaningful collective bargaining process backed up by the right to strike would seem by definition to be abrogated where a legislature unilaterally imposes terms following good faith consultation, but without affording workers their

right to engage in strike action (or in the case of essential service workers, the right to an independent and binding interest arbitration process) to contest and shape those terms.

Indeed, in considering this issue, it is constructive and informative to consider the following rationales articulated by the Court in *SFL* in support of constitutional protection of the right to strike:

a) section 2(d) "prevents the state from substantially interfering with the ability of workers, acting collectively through their union, to exert meaningful influence over their working conditions through a process of collective bargaining";
b) "the ability to collectively withdraw services for the purposes of negotiating terms and conditions of employment . . . is an essential component of the collective bargaining process," so that "acceptance of collective bargaining carries with it a recognition of the right to invoke the economic sanction of the strike";
c) "effective constitutional protection of the associational interests of employees in the collective bargaining process requires concomitant protection of their freedom to withdraw collectively their services, subject to s. 1 of the *Charter*" [quoting Dickson CJ in the *Alberta Reference*];
d) "the right to strike is constitutionally protected because of its crucial role in a meaningful process of collective bargaining";
e) "the right to strike is essential to realizing these values and objectives through a collective bargaining process because it permits workers to withdraw their labour in concert when collective bargaining reaches an impasse";
f) "the ability to strike . . . allows workers, through collective action, to refuse to work under imposed terms and conditions";
g) it is "the possibility of the strike which enables workers to negotiate with their employers on terms of approximate equality";
h) without the right to strike, "bargaining risks being inconsequential — a dead letter";
i) "the ability to engage in the collective withdrawal of services in the process of the negotiation of a collective agreement is therefore, and has historically been, the 'irreducible minimum' of the freedom to associate in Canadian labour relations"; and
j) "a meaningful process of collective bargaining requires the ability of employees to participate in the collective withdrawal of services for the purpose of pursuing the terms and conditions of their employment through a collective agreement. Where good faith negotiations break down, the ability to engage in the collective

> withdrawal of services is a necessary component of the process through which workers can continue to participate meaningfully in the pursuit of their collective workplace goals."[150]

Given all of these various rationales for constitutional protection of the right to strike — and given the explicit recognition that the right to strike is protected so as to enable employees to attempt collectively to resist the imposition of important employment terms by withdrawing their services precisely at the point of impasse, and when good faith bargaining has broken down — it would seem difficult to support the notion that the right to collective bargaining guarantees no more than a right of consultation, i.e., to make representations to one's employer or government and have those representations considered in good faith. After *SFL*, section 2(d) protects more than the right to be consulted. It extends protection to the right to engage in strike action (or independent dispute resolution in the case of essential service workers), and to do so precisely when prior good faith consultation or bargaining has reached an impasse. Indeed, if legislatures could unilaterally impose important collective agreement terms in the face of an impasse following consultation, the protection afforded by section 2(d) would, perversely, end at the very point at which the constitutionally protected right to strike as an indispensable element of meaningful collective bargaining is most critical.

As noted above, some observers and courts have also suggested that *Health Services* itself only protected a process of good faith bargaining, and permitted legislation to override collective agreement terms or to prohibit future bargaining, so long as the legislation was preceded by a process of pre-legislative good faith consultation. However, whatever the validity of this view as to the intended scope of section 2(d) protection based on the *Health Services* decision alone, any reference to the sufficiency of good faith bargaining alone in *Health Services* could not and would not have contemplated the right to strike as forming an indispensable component of a meaningful collective bargaining process, since the 1987 trilogy finding that the right to strike was not constitutionally protected was neither addressed nor disturbed in *Health Services*. However, now that *SFL* has recognized a constitutional right to strike as an indispensable component of the constitutionally protected collective bargaining process, the focus of the second aspect of the *Health Services* inquiry (into whether the legislation has preserved a process of good faith collective bargaining) must now include inquiring into whether the legislation has respected and preserved the right of employees to with-

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150 *SFL*, above note 108 at paras 77, 46, 49, 51, 54, 55, 61, and 75.

draw their services in the event of a collective bargaining impasse over important terms and conditions of employment, since this has now been recognized as an indispensable component of any good faith or meaningful collective process.

2. The Substantial Interference Test for a Section 2(d) Infringement

As discussed in Part A, the Supreme Court has insisted since 2007 that parties claiming a violation of the right of collective bargaining under section 2(d) must establish more than a mere interference in order to demonstrate a violation of freedom of association; generally, the Court's test has required a "substantial interference". This is not the only internal limitation under the existing section 2(d) law. As discussed below, the forced association caselaw has its own internal limitation, requiring "ideological conformity" to be established for a section 2(d) violation.

Over the past decade, successive decisions of the Supreme Court have provided insights into the factors that may be relevant in establishing interference sufficient for a section 2(d) violation. Nevertheless, as will be demonstrated below, the meaning of "substantial interference" remains elusive and potentially quite subjective and impressionistic. What follows is an overview of the leading cases that have developed the substantial interference test and a discussion of some of the emerging issues concerning how substantial interference should be understood and applied in a given context.

a) *Dunmore v Ontario (Attorney General)*

Although *Health Services* introduced the "substantial interference" test as a general requirement for section 2(d), it is important to look back at *Dunmore* where the test first appeared in a majority judgment. In fact, the Court in *Health Services* expressly referred to the "test crafted in Dunmore by Bastarache J, which asked whether 'excluding agricultural workers from a statutory labour relations regime, without expressly or intentionally prohibiting association, [can] constitute a substantial interference with freedom of association' (para. 23)."[151]

Indeed, the substantial interference test was a prominent feature of the *Dunmore* decision. What is notable about the above-quoted statement from *Dunmore* is that it was made in a particular context — namely, in circumstances where a group of workers had been excluded from labour

151 *Health Services*, above note 37 at para 41.

legislation and the issue arose as to whether section 2(d) required their inclusion. While the Supreme Court recognized that any distinction between positive and negative state obligations should be "nuanced in the context of labour relations," the distinction was nevertheless an important one in *Dunmore*.[152] Since the claim being advanced to the Supreme Court was based on legislative under-inclusion rather than legislative interference, the Court adopted the proposition that a "substantial interference" in freedom of association would have to be demonstrated before section 2(d) would have the unusual effect of requiring the state to take legislative action.[153] Justice Bastarache linked the requirement of a "substantial interference" directly to under-inclusion cases and even cited Dickson CJ's dissent in the *Alberta Reference* for support:

> . . . the underinclusion cases demonstrate that a proper evidentiary foundation must be provided before creating a positive obligation under the *Charter*. This requirement proved fatal in *Haig*, *NWAC and Delisle* because the claimants in all three cases were unable to prove that the fundamental freedom at issue, as opposed to merely their requested statutory entitlement, was impossible to exercise. On the contrary, it was concluded in *Haig* that "the referendum itself, far from stifling expression, provided a particular forum for such expression" (p. 1040) . . . . Finally, it was concluded in *Delisle* that "it is difficult to argue that the exclusion of RCMP members from the statutory regime of the *PSSRA* prevents the establishment of an independent employee association because RCMP members have in fact formed such an association in several provinces, including Quebec, where 'C' Division was created by Mr. Delisle himself" (para. 31). In my view, the evidentiary burden in these cases is to demonstrate that exclusion from a statutory regime permits a *substantial* interference with the exercise of protected s. 2(d) activity. Such a burden was implied by Dickson C.J. in the *Alberta Reference*, *supra*, where he stated that positive obligations may be required "where the absence of government intervention may in effect *substantially impede* the enjoyment of fundamental freedoms" (p. 361 (emphasis added)).[154]

It is clear from *Dunmore* that judicial restraint was the underlying purpose of the substantial interference test as initially conceived. In other words, courts should respect the legislative function by limiting the circumstances in which they order legislators to take positive action

152 *Dunmore*, above note 25 at para 20.

153 *Ibid* at paras 21–23.

154 *Ibid* at para 25.

pursuant to section 2(d). Only in exceptional circumstances would it be appropriate for the courts to intrude by requiring legislative action.

b) *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*

In *Health Services*, however, the Supreme Court took the substantial interference requirement from *Dunmore* and effectively inserted it into the general test for a violation of section 2(d) in all collective bargaining cases. In the portion of the *Health Services* decision purporting to define the scope of the right to bargain collectively, the Court goes to great pains to make the point that the new right is "limited." To demonstrate its limited nature, the Court cites *Dunmore* for the proposition that the right "protects only against 'substantial interference' with associational activity."[155] The Court even characterizes substantial interference as the most important limit on the right of collective bargaining, where it states, "Finally, and most importantly, the interference, as *Dunmore* instructs, must be substantial . . . ."[156]

Health Services includes no discussion or explanation as to how or why a requirement developed in *Dunmore* to address under-inclusion cases could or should morph into a test for all collective bargaining cases. The Supreme Court simply ignores the issue. However, the Court's efforts to provide reassurances about the "limited" nature of the right of collective bargaining suggest that the Court was concerned about the potential impact of unleashing a broad and new collective bargaining right on a heavily regulated labour relations system. The substantial interference requirement was an existing limit within section 2(d); its adoption provided further reassurance to those on the losing side of *Health Services* (i.e., governments and employers) that much of the legislative status quo would still remain beyond the reach of section 2(d).

To assist in understanding how substantial interference would apply in a case of legislative intervention in collective bargaining, the Supreme Court offered additional guidance. As set out above, two lines of inquiry were identified: (1) an inquiry into the importance of the matter affected to the process of collective bargaining (and in particular the capacity of union members to come together and pursue collective goals in concert); and (2) an inquiry into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.[157] The Court then elaborated on these inquiries. In respect of the

155 *Health Services*, above note 37 at para 90.

156 *Ibid* at para 91.

157 *Ibid* at para 93.

first inquiry, the Court noted that an interference in matters of less importance (like the design of a uniform, the organization of a cafeteria, or the availability of parking) is more likely to fall short of discouraging the capacity of union members to come together and pursue common goals. On the other hand, an interference in significant negotiated collective agreement terms may have that discouraging impact.[158] In respect of the second inquiry, the Court emphasized that legislative interference on a significant matter may still not violate section 2(d) if the state has respected the duty to consult and negotiate in good faith.[159] So long as good faith bargaining and meaningful dialogue occur, the substantial interference test may not be satisfied.

c) Ontario (Attorney General) v Fraser

In *Fraser,* the majority of the Court retreated without explanation from the substantial interference test, instead appearing to apply a more stringent test requiring a claimant to demonstrate the "effective impossibility" of exercising associational rights. In the portion of the decision entitled "The Issue in This Appeal", the majority made the following statements:

> *In every case*, the question is whether the impugned law or state action has the effect of *making it impossible* to act collectively to achieve workplace goals. [160]
>
> If it is shown that it is *impossible* to meaningfully exercise the right to associate due to substantial interference by a law (or absence of laws: see *Dunmore*) or by government action, a limit on the s. 2(d) right is established . . . .[161]
>
> The question here, as it was in those cases, is whether the legislative scheme (the *AEPA*) renders association in pursuit of workplace goals *impossible*, thereby substantially impairing the exercise of the s. 2(d) associational right.[162]

In answering the question of whether the *AEPA* violates section 2(d), the majority again articulated (not once but *twice*) the applicable test using the language of effective impossibility:

158 *Ibid* at para 96.

159 *Ibid* at para 97.

160 *Fraser,* above note 51 at para 46 [emphasis added].

161 *Ibid* at para 47 [emphasis added].

162 *Ibid* at para 48 [emphasis added].

> The essential question is whether the *AEPA* makes meaningful association to achieve workplace goals *effectively impossible*, as was the case in *Dunmore*. If the *AEPA* process, viewed in terms of its effect, makes good faith resolution of workplace issues between employees and their employer *effectively impossible*, then the exercise of the right to meaningful association guaranteed by s. 2(d) of the *Charter will* have been limited, and the law found to be unconstitutional . . . .[163]

The Court then proceeded to interpret the *AEPA* as not only protecting the right of agricultural workers to make representations to their employer, but also requiring the employer to consider those representations in "good faith."[164] This led the Court to reject the section 2(d) claim.

The *Fraser* decision veered away from *Health Services* by applying a test based on impossibility rather than substantial interference. *Fraser* also made no mention of the two lines of inquiry described in *Health Services*. As noted by the BC Court of Appeal in a later case, "The majority [in *Fraser*] appears to short-circuit the first half of the analysis and move directly to the second half, where it asks whether the effect of the purported infringement is to make good faith resolution of workplace issues 'effectively impossible.'"[165]

What explanation is there for *Fraser's* retreat from the substantial interference test articulated in *Health Services*? As discussed below, the Supreme Court itself later provided a fairly unconvincing explanation in *MPAO*. One can only speculate about the Court's true motivation. However, it is important to recall that *Health Services* had been a controversial decision that attracted criticism and concern. The Ontario Court of Appeal in *Fraser* (and other lower courts and tribunals) read *Health Services* broadly and applied it enthusiastically to constitutionalize aspects of the Wagner Model. Justices Rothstein and Charron were so troubled about the impact of *Health Services* that they characterized it as "unworkable" and argued in their concurring opinion for the decision to be overturned.[166] The majority's departures from *Health Services* may be a reflection of the fact that they were on the defensive and thought that a more restrictive approach would be an effective response to the claim that *Health Services* overshot the mark and was unworkable.

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163 *Ibid* at para 98 [emphasis added].

164 *Ibid* at para 102.

165 *Federal Government Dockyard Trades and Labour Council v Canada (Attorney General)*, 2016 BCCA 156 at para 48 [*Dockyard*].

166 *Fraser*, above note 51 at para 145.

d) Mounted Police Association of Ontario v Canada (Attorney General)

In *MPAO*, the Court purported to resolve the inconsistency between the effective impossibility test in *Fraser* and the substantial interference test in *Health Services*. The majority confirmed that the test for finding a violation of section 2(d) is whether there is "substantial interference with the right to a meaningful process of collective bargaining."[167]

In attempting to explain the decision in *Fraser*, the Court stated that the decisions in *Health Services* and *Fraser* had used terms like "impossible" and "effectively nullified" merely to describe the effect of legislative schemes rather than the legal test for infringement of section 2(d).[168] The Court also pointed out that *Fraser* reaffirmed the holding from *Health Services* that a substantial impairment is required for a violation of section 2(d).[169] The Court proceeded to state confidently that "the majority in *Fraser* adopts substantial interference as the *legal test* for infringement of freedom of association."[170]

The Court's explanation cannot easily be reconciled with the actual text of the *Fraser* decision. Certainly, the Ontario Court of Appeal did not read *Fraser* this way when it upheld the RCMP's labour relations system because it did not make it effectively impossible for RCMP members to meaningfully exercise their section 2(d) rights.[171] Justice Rothstein (dissenting) was convinced, like the Ontario Court of Appeal, that *Fraser* mandated a test of effective impossibility. This is clear where he states: "There is no escaping the majority's decision in [Fraser]; it referred to the test of impossibility — either effective or substantial impossibility — *no less than 12 times* . . . . With respect, by resiling from a test so recently established and refusing to acknowledge this departure, the majority undermines the legitimacy of its approach in this appeal."[172] Justice Rothstein added, "Inconveniently for my colleagues, at para. 46, the majority in *Fraser* unambiguously states: '*In every case*, the question is whether the impugned law or state action *has the effect of making it impossible* to act collectively to achieve workplace goals.'"[173]

In a response that tends to validate how the Ontario Court of Appeal and Rothstein J understood *Fraser*, the Court conceded that certain pas-

167 *MPAO*, above note 69 at para 80.

168 See *ibid* at para 75.

169 See *ibid* at para 76.

170 *Ibid* at para 75 [emphasis in original].

171 *Ibid* at para 28.

172 *Ibid* at para 213 [emphasis in original].

173 *Ibid* at para 214 [emphasis in original].

sages of *Fraser* "seem to unnecessarily complicate the analysis" by referring to both effective impossibility (as the effect of certain state action) and substantial interference or impairment (as the test for infringement of section 2(d)).[174] However, the Court argued that the *Fraser* decision must be understood in context with the earlier decisions in *Dunmore* and *Health Services*, as well as the purposive and generous approach to section 2(d).[175]

In any event, the Court's return to the "substantial interference" test in *MPAO* was unequivocal. It was also one of the reasons (if not *the* reason) that the *MPAO* appeal was allowed. Both the Ontario Court of Appeal and Rothstein J applied the stricter "effective impossibility" test to the facts of *MPAO* and found no section 2(d) violation.

MPAO provided some additional guidance on what a substantial interference with section 2(d) might actually look like. The majority focused on collective bargaining as a means to address the historical power imbalance between employers and employees. Thus, the Court described substantial interference in terms of a disruption in this balance of power. In particular, the Court clarified that a process that "substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power"[176] would violate section 2(d). The majority further elaborated on this notion in the following passage:

> The balance necessary to ensure the meaningful pursuit of workplace goals can be disrupted in many ways. Laws and regulations may restrict the subjects that can be discussed, or impose arbitrary outcomes. They may ban recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power. They may make the employees' workplace goals impossible to achieve. Or they may set up a process that the employees cannot effectively control or influence. Whatever the nature of the restriction, the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining: *Health Services*, at para. 90.[177]

Although the Court in *MPAO* cited paragraph 90 of *Health Services* in support of the statement that the "ultimate question" is whether the balance between employees and employers has been disrupted, the cited

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174 *Ibid* at para 77.
175 *Ibid*.
176 *Ibid* at para 71.
177 *Ibid* at para 72.

paragraph does not directly address the need for preservation of a bargaining balance. Rather, the paragraph in question is solely concerned with the second inquiry from *Health Services* (discussed above) and the need for good faith to be respected. Preservation of a balance of power between workers and their employer therefore appears to emerge from *MPAO* as a new focus of the substantial interference test.

MPAO is also notable because the Court defined a meaningful process of collective bargaining as one "that provides employees with a degree of choice and independence sufficient to enable them to determine their collective interests and meaningfully pursue them."[178] The Court addressed "choice" and "independence" as two distinct aspects of a meaningful process. According to the Court, the hallmarks of employee choice "include the ability to form and join new associations, to change representatives, to set and change collective workplace goals, and to dissolve existing associations."[179] Independence refers specifically to independence from management, which is important to ensure that an association acts in the best interests of employees and is not influenced or dominated by the employer. Independence can be assessed based on factors such as the freedom to amend the association's constitution and rules, the freedom to elect the association's representatives, control over financial administration, and control over the activities the association chooses to pursue.[180]

Although the Court treated choice and independence as two separate aspects of a meaningful collective bargaining process, the Court also stated that they are "complementary principles" and that *Charter* compliance is evaluated based on the degrees of independence and choice in a labour relations scheme.[181] What then becomes apparent is that the Court's analysis of the substantial interference test, and whether a balance is preserved between RCMP members and their employer, was based on its assessment of whether the RCMP labour relations system provided sufficient independence and choice. The Court described the SRRP as a process that was imposed on RCMP members and lacked independence from management.[182] For these reasons, the Court concluded that "the process fails to achieve the balance between employees and employer that is essential to meaningful collective bargaining . . . ."[183] It is,

178 *Ibid* at para 81.
179 *Ibid* at para 86.
180 *Ibid* at paras 88–89.
181 *Ibid* at para 90.
182 See *ibid* at para 106.
183 *Ibid*.

therefore, an absence of sufficient choice and independence that led to a finding of a substantial interference in section 2(d).[184]

While *MPAO* marked a return to the substantial interference test from *Health Services*, the Court's analysis bore little resemblance to the "two inquiry" approach. This is likely because the Court was not addressing legislative interferences in collective agreements under section 2(d) (as in *Health Services*). Rather, the Court was addressing a different type of case concerning whether an entire labour relations system could be sustained under section 2(d) as a meaningful process of collective bargaining. Not surprisingly, the Court's analysis in *MPAO* reflected systemic considerations and, specifically, the minimum requirements for a constitutionally compliant labour relations scheme.

e) *Meredith v Canada (Attorney General)* and *Saskatchewan Federation of Labour v Saskatchewan*

Both *Meredith* and *SFL* confirmed that the correct legal test for a section 2(d) violation is "substantial interference" with employees' collective pursuit of workplace goals.

In *Meredith*, in assessing whether the wage rollback in the *ERA* constituted a substantial interference, the Court compared the situation to what had occurred in *Health Services*.[185] The Court noted that *Health Services* should not be viewed as "a minimum threshold for finding a breach of s. 2(d)."[186] Nevertheless, the Court thought that there was a much more significant interference in *Health Services* than in *Meredith*. Whereas the BC government had imposed radical changes to significant collective agreement terms and had precluded future negotiations on some issues, the *ERA* imposed wage rates that had been negotiated with other bargaining agents and did not preclude consultation from taking place. In fact, according to the Court, there was evidence that RCMP members were still able to achieve significant benefits through the Pay Council process. The Court reasoned that the *ERA* had a relatively minor impact on the appellants' associational activity, and that the requirement of a substantial interference had not been satisfied.[187]

Whereas *Meredith* raised collective bargaining issues that were similar to *Health Services*, *SFL* expanded section 2(d)'s protection of the collective bargaining process into a new area by recognizing the right to strike. However, the Court was clear that the test for an infringement

184 See *ibid* at para 121.

185 See *Meredith*, above note 126 at para 29.

186 *Ibid* at para 28.

187 *Ibid* at paras 29–30.

of section 2(d) in a right to strike case would still focus on "whether the legislative interference . . . in a particular case amounts to a substantial interference with collective bargaining."[188] The Court then applied this test to the facts of *SFL* in a single sentence: "The *PSESA* demonstrably meets this threshold because it prevents designated employees from engaging in *any* work stoppage as part of the bargaining process."[189]

Although the Court refers to the "ultimate question" from *MPAO* as to whether the balance between employees and the employer has been disrupted, the Court does not actually answer this question in its decision. Presumably, the Court must have considered it self-evident that the legislation at issue was so unfair and one-sided that a disruption of the labour relations balance was the purpose and the inevitable effect. Still, it would have been helpful for future cases if the Court had provided a substantive response to the "ultimate question".

In any event, the Court's single sentence analysis of the "substantial interference" test in *SFL* suggests that the bar may not be set high to establish a violation of section 2(d) in the case of the right to strike. A legislative restriction preventing a group of employees from engaging in any strike as part of the bargaining process is, apparently, a substantial interference by definition. This is the case even if the employees are truly "essential" (in the legal sense) and even if strikes and lockouts are replaced by a neutral, fair binding arbitration process. Such matters are relevant only to section 1, not to section 2(d).

Still, the right to strike itself cannot be absolute under section 2(d). The Court's single sentence emphasizes that the substantial interference in *SFL* arises from prohibiting *any* strike as part of the bargaining process. Prohibitions on strikes at particular times (i.e., no strikes for recognition or during the term of a collective agreement) and procedural preconditions to strikes (i.e., conciliation, mediation, provision of notice to the employer and the minister of labour, etc.) would not necessarily rise to the level of a substantial interference because the right to strike is preserved to some extent. In addition, there may be circumstances where workers (through representatives) voluntarily give up their right to strike in a consultation process leading to labour legislation. An example would be the process leading to Ontario's *Agricultural Labour Relations Act* (1993), where a tripartite consensus was reached that farm workers should not have the right to strike and this was reflected in the

188 *SFL*, above note 108 at para 78.

189 *Ibid* [emphasis in original].

legislation.[190] In a circumstance like this, it would be hard to view the limitation on the right to strike as a substantial interference with freedom of association and harder still to see the point of applying section 1 in such a case.

f) *British Columbia Teachers' Federation v British Columbia*

BCTF provided the Supreme Court with an ideal opportunity to review and clarify the "substantial interference" test. After all, the BC Court of Appeal had defined the central question in the case as "whether Bill 22 substantially interfered with teachers' s. 2(d) right to a meaningful process by which they could make collective representations about workplace goals and have those representations considered in good faith."[191] In answering this question, the Court of Appeal was divided; the majority found no substantial interference, while Donald J delivered a strong dissent arguing that a substantial interference had been demonstrated.

As discussed above, the Supreme Court squandered the opportunity, issuing a one-sentence decision in which the majority of the Court substantially adopted Donald J's dissent. Nevertheless, some insight may be gained by reviewing what Donald J had to say on the issue of "substantial interference."

In his reasons, Donald J reviewed the past Supreme Court caselaw and summarized state actions that could rise to the level of a "substantial interference." These actions include:

- Legislative interference with past, present, or future attempts at collective bargaining that render employees' collective representatives effectively feckless;
- Actions by government that reduce employees' negotiating power with respect to the employer;
- Unilateral nullification of previous agreements that discourages collective bargaining in the future by rendering all previous efforts nugatory;
- Bad faith negotiation by the government or the refusal by the government to consider submissions; and
- Imposing absolute barriers to collective bargaining, or prohibiting collective bargaining entirely.[192]

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190 Task Force on Agricultural Labour Relations, *Report of the Task Force on Agricultural Labour Relations: Report to the Minister of Labour* (Toronto: The Task Force, 1992), discussed in *Dunmore*, above note 25 at para 3.

191 *BCTF, BCCA*, above note 135 at para 31.

192 *Ibid* at paras 284–86.

Justice Donald also delivered this caution:

> The mere act of passing the terms of employment through legislation rather than a traditional collective agreement makes no difference to whether the employees were given the opportunity to associate and *effectively* pursue workplace goals. If the government, prior to unilaterally changing terms of employment, gives a union the opportunity to *meaningfully* influence the changes made, on bargaining terms of approximate equality, it will likely lead to a finding that the union was not rendered feckless and the employees' attempts at associating to pursue workplace goals were not pointless or futile: Thus, the employees' freedom of association would likely not therefore be breached.[193]

In this sense, Donald J's reasons emphasize that pre-legislative consultation can be seen as a replacement for traditional collective bargaining, but only so long as the consultation occurs within a meaningful and effective, good faith process that reflects an approximate equality of bargaining power.[194] Conversely, Donald J observed that a court must consider the degree and nature of pre-legislative consultation when determining whether a breach occurred, as a *Charter* breach cannot always be seen within the four corners of the legislation.[195]

Justice Donald's finding of a substantial interference ultimately hinged on two points. First, the trial judge found a substantial interference in the right to collective bargaining, and Donald J called for deference to this finding. Justice Donald was particularly persuaded by the fact that the legislative interferences before him were of a much greater scale than those at issue in *Meredith* (where no substantial interference was established), and were in fact analogous to the interferences in *Health Services* (where a substantial interference was found).[196] Second, Donald J was persuaded that the government of BC had engaged in bad faith conduct when it purported to consult about the legislative changes it was contemplating. The government was closed-minded in its dealings with the relevant unions and advanced objectively unreasonable positions.[197]

In summary, Donald J held that the province's consultation efforts were not in good faith and, thus, the trial judge did not err in concluding that Bill 22 substantially interfered in teachers' section 2(d) rights. While the Supreme Court did not expressly adopt the entirety of Donald

193 *Ibid* at para 287 [emphasis in original].

194 *Ibid* at para 291.

195 *Ibid* at para 288.

196 *Ibid* at paras 309–12.

197 *Ibid* at paras 357–62.

J's dissent in *BCTF,* his reasons provide some insight into the meaning of substantial interference by offering concrete examples of state actions that might rise to this level. Further, his reasons suggest that, regardless of whether the content of legislation itself substantially interferes with section 2(d), substantial interference may in fact also occur at the stage of pre-legislative consultation (or lack thereof).

g) Future Substantial Interference Issues

The Supreme Court's cases suggest that the analysis of "substantial interference" will depend on the specific facts of each case, how judges understand and assess those facts and the surrounding context, and how judges ultimately measure the extent of the impact on workers' participation in a meaningful process of collective bargaining. Given the dramatically different facts and context of each case, no single coherent approach has emerged. In terms of future issues arising from the substantial interference test, one can look to how the test is being viewed and applied in the lower courts. Two issues are addressed below: (i) the role of balance of power in the substantial interference test, and (ii) the status of the two lines of inquiry set out in *Health Services*.

i) Balance of Power in the Substantial Interference Test

As noted above, *MPAO* established that "the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining."[198] In several cases, lower courts have adopted and applied the notion that a substantial interference arises from disrupting the labour relations balance. For instance, in *Canada (Attorney General) v Canadian Union of Public Employees, Local 675*, substantial interference was described as follows:

> Interference is substantial when, despite not being the worst conceivable violation, it nevertheless disturbs the power balance that s. 2(d) seeks to protect by discouraging the collective pursuit of common goals or by seriously compromising collective action.[199]

Presumably, everyone should be able to agree that an interference in freedom of association does not have to be the "worst conceivable violation" to run afoul of section 2(d). Beyond this (hopefully) narrow category of extreme violations, there are bound to be a wide range of

198 *MPAO*, above note 69 at para 72.
199 2016 QCCA 163 at para 47.

legislative intrusions in meaningful collective bargaining that may be constitutionally suspect. The question is whether a focus on the power balance between employers and employees should drive the substantial interference analysis.

On one side, *Canadian Union of Postal Workers v Canada (Attorney General)*[200] suggests that power imbalance is a crucial consideration under the substantial interference test. *CUPW* was a challenge to back to work legislation introduced to bring an end to a work stoppage at Canada Post. Drawing on the discussion of substantial interference in *MPAO* and *SFL*, the Ontario Superior Court of Justice concluded that the determination of substantial interference depends on whether there has been a disruption in the balance between employer and employees.[201] In analyzing whether the impugned Act had this disruptive impact, the court noted that after the impugned legislation was introduced in Parliament, the union modified its bargaining proposals to be "less ambitious" than their previous positions, while the employer hardened its positions. According to the court, "[t]hese facts emphatically demonstrate[d] the disruption in the balance between the parties wrought by the Act."[202]

A recent BC Court of Appeal decision paints a different picture of the role of the balance of power within the substantial interference test. In *Federal Government Dockyard Trades and Labour Council v Canada (Attorney General)*,[203] the appellants argued that the *ERA* (the same legislation at issue in *Meredith*) infringed their section 2(d) rights by disrupting the balance between employers and employees. The Court of Appeal took issue with the fact that the appellants attached particular significance to the "balance" aspect of the test as described in *MPAO*. In particular, the Court of Appeal stated:

> I disagree with the appellants' articulation of the test as whether an enactment "disrupts the balance" the *Charter* achieves between employers and employees. While *MPAO* discusses the importance of s. 2(d) in negotiating a balance of power in the workplace, I agree with the respondent British Columbia that the Supreme Court was not attempting to articulate a new version of the substantial interference test. In my view, the remarks in question are best understood in the context of the historical discussion of the purpose of according workplace association s. 2(d) protection. *MPAO*, *Meredith* and *Saskatchewan Federa-*

200 2016 ONSC 418.

201 *Ibid* at para 183.

202 *Ibid* at para 193.

203 *Dockyard*, above note 165.

> *tion of Labour* firmly establish "substantial interference" as the relevant threshold.[204]

As such, the Court of Appeal emphasized that the substantial interference test remains a holistic and contextual inquiry. In applying the test, the Court of Appeal upheld the trial judge's conclusion that the level of interference was not constitutionally impermissible, stating "I am not persuaded the rollback of this single wage increase undermines the capacity of the union to collectively and effectively pursue its goals."[205]

These cases reveal a tension in the law with respect to how the substantial interference test should be applied. While *CUPW* suggests that a primary consideration in the section 2(d) analysis is whether the impugned legislation disrupts the balance of power between employees and the employer, *Dockyard* suggests that the Supreme Court's reference to the balance of power in *MPAO* was largely a rhetorical device and not intended to change the substantial interference test.

Whatever the Supreme Court's intent and meaning in linking the issue of substantial interference to a disruption in the balance of power between bargaining parties, there are reasons to question whether collective bargaining power can, on its own, be a reliable or workable basis for courts to assess a section 2(d) violation. Consider the analysis in *CUPW*. There, the Court assumed that the parties' pre-legislation bargaining positions were a true reflection of the balance of power between them. The Court then assumed that the balance of power was disrupted when the parties changed their positions upon the introduction of the legislation. However, many events during collective bargaining will cause parties to review and change their positions — consider how positions can change in response to a successful strike vote or the issuance of a strike or lockout notice. Such events can serve as a "reality check," forcing a party to review and change its positions to reflect its actual power position and what it can reasonably expect to achieve. It is entirely possible that the introduction of back to work or other state interventions in collective bargaining can play the same "reality check" role. Those experienced in labour relations know that parties commonly "overplay their hand" in collective bargaining, often with full awareness that their bargaining power is insufficient to achieve their demands. The fact that parties changes their demands in response to an event, including a legislative intervention of some sort, may be a tenuous basis on its own for concluding that the event disrupted the balance of bargaining power

204 *Ibid* at para 90.

205 *Ibid* at para 91.

between those parties. Of course, this is not to say that there would not be other grounds for finding that legislation prohibiting strike activity by employees and ordering them back to work substantially interferes with section 2(d); rather, the point is that merely focusing on whether the pre-existing balance was disrupted may not be appropriate.

Focusing on the impact of legislation on the relative power of an employer and a union can also be problematic, because most judges will lack the labour relations experience and expertise to assess and appreciate the true impact of the legislation. Given how often collective bargaining parties themselves fail to appreciate their respective power positions, judges can hardly be expected to figure them out. A substantial interference test concerned principally with the impact of legislative interventions on the balance of collective bargaining power may only be workable with the assistance of evidence from industrial relations experts. Even with expert assistance (and, as always, there will be competing experts with different opinions!), an assessment of relative bargaining power may be elusive.

Finally, if the balance of power is now an important aspect of the substantial interference test, then it is unclear whether the test is satisfied by any disruption in the balance of power between the parties, or only by a disruption that is itself "substantial." It is also possible that a disruption can be one factor that, in combination with others, could amount to a substantial interference. On this issue, the "ultimate question" specified in *MPAO* is not particularly helpful: "whether the measures disrupt the balance between employees and employer that s. 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining."[206]

Given that the origin of the substantial interference test is judicial restraint and that the test probably still performs this role to some extent, one would assume that the test would have to screen out disruptions in the balance of power of a lesser magnitude. If so, then the judicial task will be even more challenging: judges will not only have to identify whether an alleged disruption in the balance of power has actually occurred, but also *measure* it.

ii) Are There Still Two Lines of Inquiry?

Another question arising from the recent jurisprudence is whether the courts must apply the two separate inquiries as originally articulated in *Health Services*: namely (1) the inquiry into the importance of the matter affected to the process of collective bargaining, and more specifically,

206 *MPAO*, above note 69 at para 72.

to the capacity of the union members to come together and pursue collective goals in concert; and (2) the inquiry into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.

In *Dockyard,* the BC Court of Appeal did not apply these two lines of inquiry, commenting that "the [Supreme] Court has not always applied the formalistic two-part test set out in *Health Services*."[207] Rather, the Court of Appeal stated that that the appropriate test involves a blended, holistic inquiry, taking into account the nature of the matter subject to the interference, the effect of the interference, and the circumstance of the interference.[208]

In contrast to *Dockyard*, the two-part inquiry articulated in *Health Services* was applied by the Ontario Court of Appeal in *Gordon v Canada (Attorney General)*.[209] The Court of Appeal noted that the Supreme Court did not expressly distinguish between the two inquiries in the 2015 labour trilogy.[210] Nonetheless, the Court of Appeal applied the two inquiries because the parties had accepted that these two inquiries were relevant on the facts. In analyzing the prior jurisprudence regarding the two lines of inquiry, the Court of Appeal stated as follows:

> As I read *MPAO* and *Meredith*, the Supreme Court did take the two inquiries into account. In *MPAO*, the court addressed squarely the absence of a meaningful collective bargaining process, which is the focus of the second *BC Health Services* inquiry. In *Meredith*, the real focus of the decision was on the wage rollback issue — an outcome or matter — which is the focus of the first *BC Health Services* inquiry. In each instance, the Supreme Court simply applied that branch of the *BC Health Services* test most relevant to the particular case.[211]

Thus, while most of the cases since *MPAO* seem to have blended the two-part inquiry into a single analysis, *Gordon* illustrates that some courts continue to pursue the substantial interference test as two separate lines of inquiry as originally framed in *Health Services*.

Indeed, the Supreme Court's treatment of "substantial interference" in cases since *Health Services* has hardly been a model of rigour, consistency, and clarity. Judges seem to reach conclusions about whether or not an interference is "substantial" based on subjective and even impressionistic

207 *Dockyard,* above note 165 at para 82.

208 *Ibid* at para 83.

209 2016 ONCA 625.

210 *Ibid* at para 46.

211 *Ibid* at para 48.

assessments. Over the past decade, the most appropriate metaphor to describe the test has been "shifting sand."

At this stage of the jurisprudence, it is possible to identify at least four distinct categories of section 2(d) cases where the substantial interference test appears to apply: (1) legislative interferences in collective bargaining and collective agreements (*Health Services*, *Meredith, BCTF*), (2) legislative interferences in strike activity (*SFL*, *CUPW*), (3) alternative labour relations systems that deviate from the Wagner model (*MPAO*), and (4) legislative failures to protect workers (*Dunmore*). In a future case, it would be helpful for the Supreme Court to synthesize the various factors and considerations that the Court has referenced in applying the substantial interference test, explain how these factors and considerations relate to the two lines of inquiry from *Health Services*, and perhaps identify those categories of cases where different lines of inquiry may be necessary. If, for example, a disruption in the balance of power is now a separate line of inquiry, the Court may wish to provide additional guidance. To his credit, Donald J attempted to do much of this work for the Court in *BCTF*, but, as noted above, it is unclear to what extent his dissenting reasons were adopted by the Supreme Court.

To summarize, while the substantial interference test now seems clearly entrenched in the section 2(d) jurisprudence, it is now so far removed from its first iteration in *Dunmore* that it is almost unrecognizable. How the test is to be applied to particular facts and categories of cases remains unclear. Lower courts are primarily left to their own devices in interpreting what substantial interference means in any given context. The lack of clear guidance and the high level of discord in the jurisprudence is troubling, especially given that judges often lack the labour relations expertise required to determine whether a given legislative scheme substantially interferes with meaningful collective bargaining. In future cases, the Supreme Court will have to determine the role of relative bargaining power in assessing whether an alleged interference rises to the level of "substantial." The Court will also have to grapple with the factors and considerations that are relevant to the substantial interference test in particular categories of section 2(d) cases.

The Supreme Court may also wish to review the section 2(d) substantial interference test in the context of its jurisprudence concerning other fundamental freedoms. In the case of freedom of conscience and religion under section 2(a), for example, the Court has held that a trivial

or insubstantial interference does not amount to a *Charter* violation.[212] The cases suggest that the test for section 2(d) imposes a stronger internal limitation than the test for section 2(a) (and certainly stronger than section 2(b), which has always been treated as a broad, almost-unlimited freedom[213]). In the future, the Court may wish to explore why different elements of section 2 attract different internal limitations, and perhaps consider whether a more uniform approach would be preferable.

3. Forced Association under Section 2(d)

As set out above, during the period prior to 2007 and the *Health Services* decision, section 2(d) played a very limited role in the labour law field in relation to protecting the right of individuals to advance their collective interests as workers. There was one notable area prior to 2007, however, where the Supreme Court recognized another potential role for section 2(d) — protecting workers from "forced association." The key cases are *Lavigne v Ontario Public Service Employees Union*[214] and *R v Advance Cutting and Coring Ltd*.[215]

Given that the Supreme Court has overruled so many of the pre-2007 section 2(d) decisions (e.g., *Alberta Reference*, *PIPSC*, *Delisle*) and consigned them to the trash heap of *Charter* history, it is necessary to consider the current status of the forced association cases.

a) *Lavigne v Ontario Public Service Employees Union*

The Supreme Court first acknowledged the existence of a freedom not to associate within section 2(d) in the 1991 case of *Lavigne*. Lavigne was a unionized teacher at a community college. The applicable collective agreement provided for the "Rand formula" whereby members of the bargaining unit had to pay union dues but did not have to join the union in order to remain an employee of the college. Since the employer was a state actor, any collective agreement to which it was a party could be

212 See *Syndicat Northwest v Anselem*, 2004 SCC 47 at para 59: "It consequently suffices that a claimant show that the impugned contractual or legislative provision (or conduct) interferes with his or her ability to act in accordance with his or her religious beliefs *in a manner that is more than trivial or insubstantial*" [emphasis in original]. See also *R v Jones*, [1986] 2 SCR 284 at paras 67–69, Wilson J; *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 at para 97, Dickson CJ; and *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 91.

213 See above note 4 and accompanying text.

214 [1991] 2 SCR 211 [*Lavigne*].

215 2001 SCC 70 [*Advance Cutting*].

challenged directly under the *Charter*.[216] Lavigne therefore challenged the Rand formula provision, arguing that the union used dues to fund political causes and other matters unrelated to the representation of college employees in collective bargaining. He claimed that a requirement to pay union dues resulted in him being forced to associate with the union on matters with which he fundamentally disagreed.

Although the Supreme Court unanimously denied the appeal, it was split into three distinct camps on the question of whether the Rand formula provision violated section 2(d):

1. Three members of the Court (Wilson J, joined by Cory and L'Heureux-Dubé JJ) found that section 2(d) did not include a right against forced association at all.
2. Three members of the Court (La Forest J, joined by Sopinka and Gonthier JJ) held that freedom of association includes the negative freedom not to associate. Justice La Forest reasoned that the portion of union dues applied to causes other than collective bargaining activity violated section 2(d) of the *Charter* because it would bring an employee into "*association with the Union in its capacity as an organization which speaks on matters of local, national and world politics*."[217] Justice La Forest was careful, however, to distinguish the forced association at issue from association within the labour relations system that arises through democratic principles. He observed that, "some of the concerns which might normally be raised by a compelled association are tempered when that association is, as in this case, established in accordance with democratic principles". If "democracy in the workplace has been kept within its proper or constitutionally permissible sphere", then there is no section 2(d) violation when individuals are forced to associate in the labour relations system.[218] Hence, La Forest J provided a reassurance that the majority exclusivity principle, and collective bargaining activities undertaken by a union based on the majority view, cannot be challenged as forced association under section 2(d) since they are consistent with democratic principles.
3. Justice McLachlin (as she then was), agreed that freedom of association included a right not to associate, but she added an important caveat — section 2(d) is only violated by forced association when it results in "ideological conformity." She did not see a collective

216 A Rand formula provision negotiated into a private sector collective agreement could not be challenged under the *Charter*.

217 *Lavigne*, above note 214 at 330.

218 *Ibid*.

agreement requirement to pay union dues as an issue of forced association, since membership in the union was not compelled, and employees were able to disassociate from the union's non-collective bargaining activities and thereby avoid ideological conformity.[219]

Although the majority view in *Lavigne* was that section 2(d) included the freedom from association, there was no majority view as to the appropriate test for a violation of section 2(d) in a case of alleged forced association. This left forced association in a state of jurisprudential limbo; in theory, it existed as an aspect of section 2(d), but, in practice, there was no clear direction on how to analyze and identify a violation.

b) *R v Advance Cutting and Coring Ltd*

Ten years later, the Supreme Court had a second opportunity to examine freedom from association in the 2001 case of *Advance Cutting*. The case concerned a Quebec law that required construction workers to join one of five trade unions in order to obtain a certificate of competency. The law made it an offence for an employer to hire a construction worker who had not obtained a certificate from one of the five unions, as well as for an individual to work without a certificate. The result of the legislative scheme was that a Quebec construction worker was forced to join a union in order to obtain work. Advance Cutting was charged with the above-noted offence, as were a group of workers hired without certificates. They defended the charges by arguing that the law in question violated section 2(d) of the *Charter* and was invalid.

Once again, the Supreme Court was divided, with a slim 5:4 majority finding that the legislation violated section 2(d) and a differently constituted 5:4 majority finding that the violation was justified under section 1. Eight of the nine judges acknowledged the existence of a right to be free from compelled association under section 2(d).[220] Some of the uncertainty arising from *Lavigne* was resolved when a clear majority (seven of the nine judges) agreed that the appropriate test for a violation of forced association was McLachlin CJ's "ideological conformity test" from *Lavigne*.[221] However, considerable uncertainty remained as a result of the judges splitting into two camps on the question of whether this test was met on the facts of the case:

219 *Ibid* at 343–51.

220 The lone holdout was L'Heureux-Dubé J, who repeated her position from *Lavigne* that section 2(d) does not include any right against forced association at all.

221 Justice Iacobucci adopted a test focusing on whether "liberty interests" were impacted by forced association (which he characterized as a broader test than the "ideological conformity" test).

1. Justice Bastarache (joined by McLachlin CJ and Major and Binnie JJ) adopted a broad view of the "ideological conformity" test,[222] finding that mandatory union membership leads necessarily to ideological conformity in violation of section 2(d). He reasoned that unions are inherently political and social actors. Membership in such associations should be free.[223] Being forced to join a union associates a worker not only with the union but with the political and social causes that the union supports. Notably, his analysis of section 2(d) attracted McLachlin CJ's concurrence, thereby giving it added credibility since, after all, she had developed the test in *Lavigne*. Moreover, Like La Forest J in *Lavigne*, Bastarache J observed that forced association in the labour relations system does not violate section 2(d) where it is based on democratic principles like majoritarianism.[224] However, the forced association at issue in *Advance Cutting* was an example of "a situation whereby the democratic rights of workers are taken away."[225]
2. Justice LeBel, joined by Gonthier and Arbour JJ, did not find a violation of section 2(d). He cited decisions like the *Alberta Reference* and *PIPSC* to advance the proposition that the courts have adopted a "non-intervention policy" in the field of labour relations.[226] While acknowledging that labour laws are not immune to *Charter* review, he nevertheless referenced the need for the Court to "maintain . . . an attitude of reserve towards constitutional interventions in labour relations."[227] Unlike Bastarache J, who was prepared to find that forced union membership satisfies the ideological conformity test due to the social and political nature of trade unions, LeBel J refused to do so. He took a narrower view, stating that ideological conformity arising from forced union membership cannot be presumed and is not "self-evident." There would have to be evidence in a particular case to support a finding of ideological conformity and, in his view, the record was insufficient in *Advance Cutting*.[228]

Since a clear majority of the Supreme Court agreed that section 2(d) protected against forced association *and* that the test required an analysis of ideological conformity, *Advance Cutting* moved beyond *Lavigne* in two

222 *Advance Cutting*, above note 215 at para 9.

223 *Ibid* at para 17.

224 *Ibid* at para 36.

225 *Ibid* at para 34.

226 *Ibid* at para 160.

227 *Ibid* at para 162.

228 *Ibid* at paras 227–32.

important ways. First, *Advance Cutting* appeared to close the door to any argument that freedom from association fell beyond the reach of the *Charter*. Second, *Advance Cutting* resolved that the test for forced association would focus on ideological conformity. However, as in *Lavigne*, there was no clear majority view. On the question of whether forced union membership actually violates section 2(d), the Court was divided. A majority coalesced around a finding that section 2(d) had been breached, but this majority relied on the vote of Iacobucci J, who disagreed with the ideological conformity test and applied a different (and arguably even broader) test focused on the violation of liberty interests.

Although *Lavigne* and *Advance Cutting* provided little clarity as to what would constitute forced association contrary to section 2(d), there was at least some clarity about what would *not* violate section 2(d). The Supreme Court appeared satisfied that aspects of the labour relations system giving rise to forced association could not be challenged so long as they respected democratic principles. An individual could therefore be brought into association with others within a bargaining unit, and be required to pay union dues to the bargaining agent, without offending section 2(d), so long as this occurred through a process directed by the will of the majority (i.e., majority exclusivity). However, absent a process premised on democratic principles, it appeared that freedom from association could be engaged to challenge aspects of the labour relations system.

c) Forced Association Post-2007

Since *Health Services*, the Supreme Court of Canada has only dealt with freedom from association in one case, *Bernard v Canada (Attorney General)*.[229] There, the Court upheld a decision of the Public Service Labour Relations Board, finding that it was reasonable to require an employer to provide home contact information about bargaining unit members to their representative union, since the union was under a statutory duty to represent all bargaining unit members fairly. The appellant, Bernard, argued that providing her home contact information to the union amounted to compelled association, contrary to section 2(d) of the *Charter*. The Court unanimously rejected this argument, finding it reasonable for the board to uphold the requirement that the employer provide contact information to the union. The Court agreed that home contact information was required for the union to represent all bargaining unit members effectively.

229 2014 SCC 13.

Justices Abella and Cromwell, writing jointly for the majority of the Court, found that Bernard's section 2(d) claim had no legal foundation. They first reviewed *Lavigne*, and distilled the various judgments down to a single majority proposition: ". . . s. 2(d) does not provide protection from all forms of involuntary association, and was not intended to protect against association with others that is a necessary and inevitable part of membership in a modern democratic community."[230] They cited La Forest J's judgment in *Lavigne* as support for the proposition that section 2(d) is not violated where employees are required to associate with a union on matters where there is a "natural association," such as working terms and conditions. They then observed (without further elaboration) that while there were three distinct approaches to forced association in *Advance Cutting*, none of them would provide Bernard with a plausible claim.[231]

Justice Rothstein (dissenting in part, but concurring on the section 2(d) issue) spent considerably more time than Abella and Cromwell JJ analyzing Bernard's forced association claim. He observed that two distinct tests emerged from *Lavigne* and *Advance Cutting*: the "ideological conformity" test (applied by the majority in *Advance Cutting*) and the "liberty" test (applied by Iacobucci J in *Advance Cutting*). He then proceeded to discuss and apply *both* tests.

On the question of whether Bernard was exposed to ideological conformity contrary to section 2(d), Rothstein J identified two essential requirements of the ideological conformity test that were not met. First, Bernard would have to show that she was forced to associate in the sense of being required to establish, belong to, maintain, or participate in an association. Providing the union with Bernard's home contact information results in no such forced association. She remains free to "hang up the phone, discard any mail received, or close the front door" whenever the union tries to contact her.[232] Second, Bernard would have to show that any forced association resulted in compelled ideological conformity. According to Rothstein J, "*mere contact [by a union] does not amount to such compulsion*."[233]

In very brief reasons, Rothstein J also addressed Iacobucci J's liberty test. Justice Rothstein found that being required to establish, belong to, maintain, or participate in an association is also an essential require-

230 *Ibid* at para 38.
231 *Ibid* at para 39.
232 *Ibid* at para 107.
233 *Ibid* at para 109.

ment of this alternative test, and that this requirement was not satisfied by Bernard.[234]

Although "forced association" has not received a great deal of judicial attention since 2007, the *Bernard* decision suggests that *Lavigne* and *Advance Cutting* remain good law to the extent that freedom from association is still a part of section 2(d). Nevertheless, *Bernard* cannot be relied upon as a definitive statement from the Supreme Court on freedom from association, since none of the judges who wrote decisions offered any resolution of the doctrinal issues that remained outstanding after *Advance Cutting*.

d) Future Forced Association Issues

So what are the issues that may emerge? Two in particular come to mind: first, since the section 2(d) jurisprudence has shifted so dramatically since 2007, what is the impact on freedom from association?; and second, what is the relationship between freedom from association and the new concept of freedom of choice that emerged in *MPAO*?

*i) What is the Impact of the Caselaw after **Health Services**?*

Lavigne and *Advance Cutting* were decided years before the section 2(d) caselaw was turned on its head in 2007 in *Health Services*. As the caselaw has evolved (and the arc of section 2(d) has bent in the direction of workplace justice), an obvious question arises about the potential impact of the post-2007 jurisprudence on freedom from association. *Bernard* arguably confirmed the continued existence of freedom from association under section 2(d), but it is probably more accurate to say that it simply allowed the doctrinal controversies from *Lavigne* and *Advance Cutting* to linger.

Given the Supreme Court's tendency to either overturn its previous section 2(d) caselaw or engage in revisionism about what it previously decided, it is worth considering whether the freedom from association cases are next on the Court's chopping block. One can imagine a future case in which a party argues that protecting against forced association prior to 2007 was a "sign of the times" that is now out-dated and should be reversed based on the modern judicial view of section 2(d). Indeed, prior to cases like *Dunmore* and *Health Services*, the Supreme Court's guiding approach to section 2(d) was to protect the individual and ensure the exclusion of collective activities from the *Charter*. While, on one view, recognizing a right against forced involvement in unions and collective action can readily be reconciled with this approach, on another

234 *Ibid* at para 110.

view, the Supreme Court's post-2007 adoption of workplace justice as the guiding principle for section 2(d) is harder to square with constitutional protection against forced union membership, particularly given the Court's emphasis in *MPAO* on "the associational rights protected by section 2(d) . . . [being] not merely a bundle of individual rights, but collective rights that inhere in associations."[235] If union membership and collective action are desirable, and even necessary, for workplace justice, then why would section 2(d) protect against forced union membership? Can it be argued that the arc of section 2(d) has swung so far in the direction of workplace justice that the principles of freedom from association can no longer be sustained?

The challenge with such an argument is that it requires courts to view section 2(d) exclusively as a right that promotes collective activities and interests rather than a freedom that first and foremost protects individual choice and autonomy. It is worth recalling La Forest J's observation in *Lavigne* that freedom of association and freedom from association "are not distinct rights, but two sides of a bilateral freedom which has as its unifying purpose the advancement of individual aspirations."[236] On this view, section 2(d) remains today, at its core, an individual right that, through evolution, has expanded from its individual roots to also include protection for collective activities. Section 2(d) has not somehow abandoned individual protection or been transformed to become hostile to individual choice about whether to associate or not. Pre-2007 decisions like the *Alberta Reference* and *PIPSC* were overruled because they had failed to protect collective activities like collective bargaining and strikes under section 2(d). They were not overruled because they offered too much protection to individuals.

In fact, on this view, protecting against forced association is a fairly straightforward application of the basic section 2(d) principle (accepted in the *Alberta Reference* and still accepted today) that an individual should be free (subject to section 1) to decide whom he or she wishes to associate with. This is the *individual* conception of freedom of association. Preventing a person from associating with others, and forcing a person to associate with others, are, on this view, equally violative of an individual's liberty and autonomy.

In any event, the fact that the Supreme Court in *MPAO* favourably cited the decisions in *Lavigne* and *Advance Cutting* as examples of the purposive approach to section 2(d)[237] would tend to suggest that the cur-

235 *MPAO*, above note 69 at para 62.

236 *Lavigne*, above note 214 at 213.

237 *MPAO*, above note 69 at para 42.

rent Court sees no inconsistency between freedom from association and the jurisprudential developments since 2007.

Interestingly, the post-2007 caselaw could potentially resolve the debate between Bastarache J and LeBel J in *Advance Cutting* as to whether the "ideological conformity" test should be applied broadly or narrowly. As noted above, LeBel J's preference for a narrow approach was influenced by the decisions in the *Alberta Reference* and *PIPSC*, and the Court's adoption prior to 2007 of a "non-intervention policy" when it came to applying the *Charter* to labour matters. Ironically, LeBel J was one of the biggest proponents after 2007 of overturning the very cases he expressly relied upon in *Advance Cutting*. On this view, given that the jurisprudential underpinnings of LeBel J's narrow approach to freedom from association have been eliminated, and given that more judges in *Advance Cutting* favoured a broad approach to freedom from association, it may be that a future Supreme Court would rely on these doctrinal developments to support Bastarache J's reasons and approach.

In more general terms, the test for freedom from association could benefit from developments in the post-2007 section 2(d) caselaw. As discussed above, the decisions concerning freedom of association and collective bargaining have focused since *Dunmore* on the existence of a "substantial interference." Section 2(d) therefore already has an internal limitation — an interference with collective bargaining will only rise to the level of a violation of section 2(d) if it is "substantial."

In *Lavigne* and *Advance Cutting,* the Supreme Court also saw the need to impose an internal limitation on freedom from association in order to distinguish between forced associations that are a normal part of life in modern society and forced associations that are coercive in nature. The Court eventually settled on "ideological conformity" — a forced association would only violate section 2(d) if it imposes ideological conformity. However, the Court struggled and failed in *Advance Cutting* (and did not really try in *Bernard*) to articulate a coherent approach for applying the ideological conformity test.

There may be significant advantages to "mainstreaming" (or perhaps "rebooting") freedom from association in section 2(d) and applying a substantial interference test rather than a test based on a difficult and abstract notion of ideological conformity that requires courts to draw inferences and make presumptions about what it entails to be a member of an association. A focus on substantial interference would filter out forced associations that are necessary for social and economic life in modern society (since they would hardly be considered substantial) but would permit the Court to identify factors and circumstances that in

certain cases of forced association could lead to violations of section 2(d). Freedom from association could then become the fifth category of section 2(d) cases where substantial interference applies, perhaps benefiting from jurisprudential developments involving the other four categories.

ii) What Is the Impact of the Concept of Freedom of Choice from ***MPAO****?*

In *MPAO*, the Supreme Court stated that a process of meaningful collective bargaining had to include at least two features: the freedom of employees to choose a bargaining representative and the right of employees to a bargaining representative independent of the employer.[238] In its analysis, the Supreme Court found that the employer-imposed SRRP deprived RCMP members of their ability to choose and control their representation and, as such, impeded their right to a meaningful process of collective bargaining.

MPAO was not argued as a forced association case. However, it is hard to ignore the fact that the flip side of the argument of the appellant police associations was that RCMP members were compelled to engage in associational activities through an association they did not choose.[239] As noted above, *Lavigne* and *Advance Cutting* were favourably cited by the Court in *MPAO*. In fact, they were lauded as cases establishing the purposive approach that led to the present-day jurisprudence:

> Parallel to these cases, the Court considered the "negative" aspect of freedom of association — the freedom not to associate: *Lavigne v. Ontario Public Service Employees Unio*n, [1991] 2 S.C.R. 211; *R. v. Advance Cutting & Coring Ltd*., 2001 SCC 70, [2001] 3 S.C.R. 209; affirmed in *Bernard v. Canada (Attorney General)*, 2014 SCC 13, [2014] 1 S.C.R. 227. But, *Lavigne* and *Advance Cutt*ing are significant because they applied a purposive approach to s. 2(d). In *Lavigne*, at p. 318, La Forest J. suggested that, in keeping with democratic ideals, the guarantee of freedom of association should be interpreted as protecting "the individual's potential for self-fulfillment and realization as surely as voluntary association will develop it". (See also *Lavigne*, at p. 344, per McLachlin J.; and *Advance Cutting*, at paras. 15–17, per Bastarache J., and at paras. 170–71, per LeBel J.)

238 *Ibid* at para 5.

239 The appellants may have realized early on that they could not succeed in challenging the SRRP as forced association, since no RCMP member was required to become a member of the SRRP and the SRRP itself had a very limited mandate that did not allow for political and social activities. In other words, it would have been very difficult for the appellants to establish "ideological conformity." The appellants framed their challenge as a denial of choice and independence rather than forced association, and succeeded.

> Both judgments emphasized the importance of a purposive interpretation of s. 2(d).
>
> These cases marked the beginning of a more generous, purposive approach to s. 2(d) — an approach that was resoundingly affirmed in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016.[240]

Justice Rothstein, who was the lone dissenter and would have upheld the constitutionality of the RCMP labour scheme, saw a more direct connection between forced association and free choice. In criticizing the majority's adoption of freedom of choice as a basis for the constitutional protection of collective bargaining, Rothstein J observed that free choice is circumscribed in numerous ways by the labour relations system (e.g., imposing a bargaining representative on all employees based on majoritarian exclusivity, limiting the ability of employees to choose a different bargaining representative, requiring the payment of union dues under the Rand formula, etc.), and that *Lavigne* and *Advance Cutting* had closed the door to the existence of unbridled employee choice in labour relations.[241]

MPAO ultimately decided that "choice" was a necessary aspect of freedom of association — i.e., workers should be able to choose their bargaining representative and not have the representative imposed upon them. This sounds quite analogous to a claim to freedom from association. Admittedly, the majority decision in *MPAO* does not expressly connect the principle of choice to the forced association cases. However, it may well be significant that the majority relies on Cory J's dissent in *PIPSC*, a 1990 case pre-dating both *Lavigne* and *Advance Cutting*.

In *PIPSC*, the majority decision of Sopinka J relied on the *Alberta Reference* to find that the *Act* did not violate the freedom of association. In dissent, Cory J (joined by Wilson and Gonthier JJ) found that the provisions of the Act were such that the government was able to control all aspects of the collective bargaining process, including determining which association would become the collective bargaining agent. Justice Cory saw the legislation as being strongly in favour of the government, referring to it as "an untrammelled governmental discretion" that would *prima facie* violate the freedom of association. The basis of the violation, in his view, was the denial of an individual employee's right to choose the association that represents them in collective bargaining.[242]

Justice Cory's dissenting reasons in PIPSC have now been endorsed by the Supreme Court and presumably reflect the proper approach to

240 *MPAO*, above note 69 at paras 42–43.

241 *Ibid* at para 183.

242 *PIPSC*, above note 17 at 381.

collective bargaining under section 2(d). While Cory J did not expressly rely on forced association as a basis for developing the freedom of choice (in fact, the forced association cases did not yet exist when he wrote his judgment), there are clear linkages. In particular, both the freedom from association and the freedom to choose an association are strongly linked to the majoritarian principle.[243]

On this view, freedom of choice as first described in *PIPSC*, and now elevated to the law of the land in *MPAO*, seems complimentary to freedom from association and is potentially even broader. For example, a denial of freedom of choice does not depend on a claimant establishing ideological conformity resulting from having a bargaining representative imposed. Instead, the imposition of a bargaining representative — particularly where it occurs contrary to the majoritarian principle — could be enough to establish the substantial interference required for a violation of the right to a process of meaningful collective bargaining.

On the other hand, while there are reasons to think that freedom of choice in *MPAO* overlaps with, and potentially even subsumes, freedom from association, one should be cautious for at least two reasons.

First, the Supreme Court suggested in *MPAO* that section 2(d) may not require freedom of choice in some circumstances. As set out in Part A above, in a passage concerning the potential constitutionality of designated models such as the one applicable to Ontario teachers, the Court observed that the legislature may be able to impose a bargaining representative and deny employee choice if the representative is independent from the employer.[244] This is a puzzling statement that was presumably included to reassure governments that designated bargaining representatives are not presumptively in violation of section 2(d). Perhaps the statement signals that a denial of freedom of choice is simply one factor among many that courts should take into account in applying the substantial interference test. However, the Court also went out of its way in *MPAO* to stress the crucial importance of freedom of choice within section 2(d): "If employees cannot choose the voice that speaks on their behalf, that voice is unlikely to speak up for their interests. It is precisely employee choice of representative that guarantees a representative voice." The Court then characterized freedom of choice as one of the two principles that "are the most appropriate in assessing s. 2(d) compliance

243 *Ibid* at 388. Justice Cory observed that one of the most important aspects of choice, as reflected in statutory certification processes, is that "*a majority, or at least a substantial number, of the employees are members of the union applying for certification, or wish that union to be their bargaining agent*."

244 *MPAO*, above note 69 at para 95.

in the context of labour relations"[245] (the other being independence). This suggests that freedom of choice is not just a factor in assessing section 2(d) but, in many cases, is a *requirement* for compliance with section 2(d).

Second, it could be argued that freedom of choice under section 2(d) is merely the freedom to choose amongst potential bargaining representatives and does not include the freedom to choose *not to have* a bargaining representative at all. Does the imposition of a bargaining representative potentially violate section 2(d) *only* because it denies individual workers the right to choose a different union than the one designated? Or does it also potentially violate section 2(d) because it deprives those workers of the choice of not having a union at all? Given the general trend of the section 2(d) caselaw over the past decade, it may be hard to believe that the Supreme Court in *MPAO* would be affirming, let alone expanding, the right of individual workers to resist unionization. On the other hand, the initial decision to unionize or not is usually more fundamental and impactful for a person's working life than the decision about which union to choose. This could influence the Supreme Court's view of the scope of freedom of choice.

The potential overlap between freedom from association and freedom of choice could be resolved, at least in part, by emphasizing majoritarianism, which is embedded in both aspects of section 2(d) and serves as a unifying principle. It is apparent that there can be no violation of either freedom of choice or freedom from association under section 2(d) where an individual participates in a process that respects democratic principles. If affected workers get the opportunity to express their choice in a democratic system, then the losers have no basis to complain under the *Charter* that their choice did not win the day or that they are being forced into some form of association. However, the freedom of choice (and therefore section 2(d)) would be violated where the individual is deprived of a choice at all, or the choice is illusory because it does not respect majoritarianism and therefore offends the basic democratic principle.

In any event, in a future case the Supreme Court may well be required to explore the relationship between freedom from association and the freedom of choice principle that was first identified by Cory J in *PIPSC* and is now considered by the Court to be a key principle in assessing section 2(d) compliance in the labour relations context. Are they overlapping elements of section 2(d), or are they distinct aspects that perform unique roles in protecting associational rights?

245 *Ibid* at paras 101 and 103.

4. Conclusion

In this Part, we have touched on only three of the doctrinal issues the Court may have to confront in further delineating the scope and content of the freedom of association guarantee in the labour law context. There are, of course, various other doctrinal and substantive issues that may well arise in future cases. These include challenges to statutory exclusions from collective bargaining; the extent to which section 2(d) protects the right to organize, bargain, and/or strike of non-unionized or managerial/excluded employees; legislative restrictions on the scope of collective bargaining and on what may be negotiated or arbitrated in collective agreements; whether protection for the right to strike implies or includes positive protections for striking employees as well as the implications of *SFL* for the common law to strike; the implications of constitutional protection for the right to strike on long-standing *Wagner Act* restrictions, such as the ban on mid-contract strikes, including political strikes; the potential relationship between section 2(d) and section 2(b) freedom of expression in protecting the right to strike and other collective activities with an expressive quality; and the constitutional threshold for essential service employees accessing interest arbitration together with the extent to which section 2(d) ensures the independence of the interest arbitration process.

If there is one lesson to be learned from this chapter's overview and analysis of the doctrinal evolution of section 2(d) protection in the sphere of labour relations and collective bargaining, it is that while many issues have been resolved in a manner that broadly advances workplace justice, there remains a high level of uncertainty about the nature and scope of section 2(d) protection in many contexts and on many issues. The Supreme Court's ambiguous one-sentence decision in *BCTF* suggests that the Court itself may not be eager at this time to provide direction to the lower courts and counsel. Given the claims currently proceeding through the courts testing the limits and uncertainties of the current section 2(d) jurisprudence, and given the likelihood that more claims will be coming, we predict that it will not be long before the Supreme Court is once again dealing substantively with freedom of association in the labour context. We may even see yet another section 2(d) labour trilogy before the next decade is out.

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DEVELOPMENTS IN PAY EQUITY / EQUAL PAY LAW

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DEVELOPMENTS IN PAY EQUITY/EQUAL PAY LAW*

Equal pay has moved to the forefront of regulatory, political, shareholder, employee and public concern.[1] With the recent unprecedented wave of legislation and initiatives enacted in the U.S. and abroad to address the gender pay gap, it is easier than ever before for employees and government agencies to bring pay claims against employers - exposing employers across all industries to public scrutiny and increased litigation costs and risks.

This paper will address several emerging issues in the equal pay landscape. Sections I and II discuss federal equal pay laws as well as new equal pay laws in several states that impose greater burdens on employers to justify pay differences and new laws that limit employers' ability to use prior salary in determining starting salaries for new employees. Section III provides an overview of current pay audit practices and regulatory initiatives by the Office of Federal Contract Compliance Programs ("OFCCP") that will impact federal contractors as well as initiatives of the Equal Employment Opportunity Commission ("EEOC"). Section IV addresses the continuing wave of shareholder proposals, which if passed, would require companies to disclose publicly the percentage "pay gap" between male and female employees. Finally, Section V discusses the nuances of pay audits, including issues surrounding preservation of privilege and considerations that inform remedial steps such as pay adjustments.

I. FEDERAL EQUAL PAY LAWS

A. Equal Pay Act

The Equal Pay Act ("Equal Pay Act" or "EPA") requires an employer to provide equal pay to men and women who perform equal work. Congress passed the Equal Pay Act in 1963, which amended the Fair Labor Standards Act, 29 U.S.C. § 206(d). Congress's intent in passing the Act was to "insure, where men and women are doing the same job under the same working conditions that they will receive the same pay."[2] "Specifically, the EPA provides that employers may not pay unequal wages to men and women who perform jobs that require substantially equal skill, effort and responsibility, and that are

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[1] It is important to distinguish between "pay equity" – equal pay for equal (or, depending upon the jurisdiction, "substantially similar") work – and the oft-cited "pay gap." For purposes of this paper, the "pay gap" between men and women (frequently cited nationally as women in the United States making eighty cents for every dollar men make) is understood as a simple ratio of median earnings among male full-time workers compared to female full-time workers. *See* U.S. CENSUS BUREAU, HISTORICAL INCOME TABLE P-40: WOMEN'S EARNINGS AS A PERCENTAGE OF MEN'S EARNINGS BY RACE AND HISPANIC ORIGIN (2017), https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-people.html. Employers sometimes refer to their own company's "pay gap," typically meaning a comparison of the median earnings of men and women company-wide. These "pay gap" statistics do not compare similarly situated employees or control for other meaningful factors, such as company position or unpaid leaves. While this paper discusses both concepts, the primary focus is on "pay equity," meaning a determination of whether comparable employees are paid equitably based on their work, irrespective of gender.

[2] 109 Cong. Rec. 9196 (1963).

*The author would like to thank Michael Disotell, an associate at Orrick, Herrington & Sutcliffe LLP, for assistance in preparing this paper.

performed under similar working conditions within the same establishment."[3] Although federal legislation seeking to overhaul the existing national equal pay regime was regularly introduced throughout the Obama Administration and most recently under the Trump Administration, no bill garnered sufficient support to pass both chambers.[4]

A plaintiff seeking to prove an EPA violation must show that: (1) employees of the opposite sex are paid different wages; (2) the employees perform equal work in jobs that require equal skill, effort and responsibility; and (3) the jobs are carried out under similar working conditions.[5] When looking at comparators, the EPA keeps the analysis limited to the "same establishment."[6] If a *prima facie* EPA claim is established, the employer then has an opportunity to assert one of four statutorily-recognized affirmative defenses, by showing that the wage discrepancy is justified because it is based on: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential "based on any other factor other than sex."[7] If an employer sets forth evidence proving an affirmative defense, the burden then shifts back to the plaintiff to show that the employer's proffered reasons are actually a pretext for sex discrimination.[8]

An individual may file a charge under the EPA with the EEOC, but there is no requirement to exhaust administrative remedies before the EEOC and filing a claim with the EEOC does not toll the statute of limitations for bringing the action in court.[9] A plaintiff must file her claim under the EPA

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3 *See*, *e.g.*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, "Facts About Equal Pay and Compensation Discrimination," (last visited July 9, 2018), *available at* https://www.eeoc.gov/eeoc/publications/fs-epa.cfm.

4 For example, in September 2015, U.S. Sen. Kelly Ayotte (R-N.H.) introduced a bill titled the "Gender Advancement in Pay Act," which would: (1) require equal pay among men and women without reducing the opportunity for merit rewards; (2) require employers to prove there is "a business-related factor other than sex" for differences in pay (as opposed to "any factor other than sex" as under current law); (3) prohibit retaliation against employees for discussing (or not discussing) their pay information; and (4) create civil penalties for employers that willfully engage in sex-based pay discrimination. *See*, *e.g.*, U.S. SENATE BILL NO. 2070, "GAP Act," (Sept. 22, 2015), *available at* https://www.congress.gov/bill/114th-congress/senate-bill/2070/text. U.S. Rep. Eleanor Homes Norton (D-DC) introduced a bill in April 2017 that would amend the Fair Labor Standards Act of 1938 to prohibit discrimination in the payment of wages on account of sex, race, or national origin. U.S. HOUSE OF REPRESENTATIVES BILL NO. 2095, "Fair Pay Act of 2017," (Apr. 14, 2017), *available at* https://www.congress.gov/bill/115th-congress/house-bill/2095/text. The bill was referred to the House Committee on Education and the Workforce, but no further action has been taken.

5 *See* 29 U.S.C. § 206(d)(1); *see also Ryduchowski v. Port Authority of New York and New Jersey*, 203 F.3d 135 (2d Cir. 2000).

6 Generally, the EPA regulations define an establishment as a distinct physical place of business, rather than an entire enterprise that might have several separate places of business. 29 C.F.R. § 1620.9.

7 *See* 29 U.S.C. § 206(d)(1).

8 *Id.*

9 29 U.S.C. § 216(b).

within two years (or three years where there is a willful violation) of the alleged violation.[10] A plaintiff may file her claim individually or as a collective action.

B. Title VII

Title VII of the Civil Rights Act of 1964 (Title VII)[11] serves as the cornerstone for anti-discrimination protection within the workplace. When it was passed, the statute specifically prohibited employment discrimination on the basis of race, color, national origin, religion, and sex. It also proscribed retaliation against individuals who challenged discriminatory workplace practices prohibited by Title VII. These protections have been extended over the years to bar discrimination on the basis of age, pregnancy, disability, and genetic information as well.

Title VII contains broader protections against gender discrimination in the workplace than does the EPA. It not only prohibits pay discrimination, like the EPA, but also prohibits discrimination on any other terms or conditions of employment. In addition, Title VII offers multiple theories of liability. To encourage consistent interpretation of Title VII and the EPA's prohibition of sex-based compensation discrimination, however, employers defending compensation claims in sex discrimination cases under Title VII may take advantage of the affirmative defenses available under the EPA, in addition to any other defenses available under Title VII.[12]

Generally, Title VII disparate treatment claims are analyzed under the burden-shifting rules of *McDonnell Douglas*.[13] "Under *McDonnell Douglas*, a plaintiff must first make out a *prima facie* case, *i.e.*, she must demonstrate the following: (1) she was within the protected class; (2) she was qualified for the position; (3) she was subject to an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination."[14] "Once the prima facie case has been shown, the burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason" for the adverse employment action."[15] "The burden then shifts back to the plaintiff to show that [the defendant's] stated reason for [the adverse employment action] was in fact pretext."[16]

In addition to or in the place of a disparate treatment claim, a plaintiff may use a disparate impact theory of liability to bring a claim under Title VII. Here, the plaintiff must identify a neutral policy or practice that has a disproportionately harmful effect on a protected class, *i.e.*, women.[17] The burden of persuasion then shifts to the employer to show that the policy or practice causing the pay discrepancy is

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[10] 29 U.S.C. § 255(a).

[11] 42 U.S.C. § 2000e *et seq*.

[12] 42 U.S.C. § 2000e-2(h).

[13] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973).

[14] *United States v. Brennan*, 650 F.3d 65, 93 (2d Cir. 2011) (internal quotations omitted).

[15] *Id*.

[16] *Id*.

[17] 42 U.S.C. § 2000e-2(k); *see also Ricci v. DeStefano*, 557 U.S. 557, 577 (2009).

"job related for the position in question and consistent with business necessity."[18] If the employer meets this burden, the plaintiff may still prevail if she shows that an alternative employment practice has less disparate impact and would also serve the employer's legitimate business interest.[19]

An individual must file a charge with the EEOC within 300/180 days (depending on whether or not the practice occurred in a deferral state) after the alleged unlawful practice occurred.[20] The plaintiff must commence a civil action within 90 days after the EEOC notifies the individuals of their right to sue.[21] A plaintiff may file her claim individually or as a class action.[22]

C. Litigation Trends Over Equal Pay

Private litigants have heightened the focus on equal pay through a proliferation of compensation discrimination lawsuits under both Title VII and the EPA as well as state law analogs, discussed in more detail below in Section II. Putative class action suits were filed in New York in 2016 against the New York Times and Bank of America, alleging compensation discrimination against women in reporting and managing director positions, respectively.[23] Over the past two years, suits have also been filed in California against Qualcomm[24] as well as against the law firms Sedgwick (now defunct),[25] Steptoe &

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[18] *Id.*

[19] *Id.*

[20] 42 U.S.C. § 2000e-5(e). As a result of the Lilly Ledbetter Fair Pay Act of 2009, each time an employee receives a paycheck that stems from a discriminatory pay practice or policy, a new limitations period begins to run. 42 U.S.C. § 2000e-5(e)(3).

[21] 42 U.S.C. § 2000e-5(f)(1).

[22] *See, e.g.*, Fed. R. Civ. P. 23 (governing opt-out class action mechanism).

[23] *See Grant v. New York Times Co.*, No. 1:16-cv-03175, 2016 WL 1723132 (S.D.N.Y. Apr. 28, 2016); *Messina v. Bank of America Corp.*, No. 1:16-cv-03653, 2016 WL 2864870 (S.D.N.Y. May 16, 2016). In *Grant*, the court granted the employer's motion to dismiss the individual plaintiff's federal EPA and Title VII gender discrimination claims, finding insufficient allegations of appropriate, better-compensated comparators, but denied the motion to strike class allegations. *Messina*, by contrast, was dismissed with prejudice just four months after filing.

[24] *See Pan v. Qualcomm, Inc.*, No. 3:16-CV-01885, 2016 WL 8540185 (S.D. Cal. July 25, 2016). Qualcomm ultimately settled the case for $19.5 million in monetary relief and $4 million in other forms of programmatic relief, discussed *infra*. *See Pan v. Qualcomm Inc.*, No. 16-CV-01885-JLS-DHB, 2017 WL 3252212, at *3 (S.D. Cal. July 31, 2017) (final order approving settlement).

[25] *See Ribeiro v. Sedgwick LLP*, No. CGC-16-553231, 2016 WL 4010993 (Cal. Super. Ct. San Francisco County July 26, 2016), *motion to compel arbitration after removal granted*, No. C 16-04507, 2016 WL 6473238 (N.D. Cal. Nov. 2, 2016). The parties eventually settled the claims for an undisclosed amount. *See* Melissa Daniels, "Sedgwick Partner Settles In Gender Discrimination Suit," LAW360 (June 23, 2017), https://www.law360.com/articles/938092/sedgwick-partner-settles-in-gender-discrimination-suit.

Johnson LLP,[26] Ogletree Deakins,[27] Morrison & Foerster,[28] and Jones Day.[29] Most recently, a California court overruled a second demurrer allowing a putative class of at least 5,000 women to move forward with their claims against Google, after plaintiffs had adequately revised their complaint to allege a common practice of pay discrimination at the company.[30] The amended complaint alleges that Google pays women less than men for the same work, essentially by channeling women into lower paying jobs, salary levels and job ladders, in violation of the EPA and state laws.[31]

Companies can expect not only more equal pay litigation, but also more detailed demands for programmatic injunctive relief in systemic cases. In *Pan v. Qualcomm, Inc.*,[32] for example, the parties agreed to programmatic relief worth an estimated four million dollars that included, among other things, appointing a compliance officer responsible for monitoring the settlement agreement. The settlement further required the employer to retain two industrial/organizational psychology consultants to assess policies and practices and implement changes, and to conduct annual statistical analyses of compensation.[33] Similarly, the settlement in *Coates v. Farmers Insurance Group*[34] required the employer

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[26] *See Houck v. Steptoe & Johnson LLP*, No. 2:17-cv-04595, 2017 WL 2791115 (C.D. Cal. June 22, 2017). On May 31, 2018, the court dismissed the case without prejudice and referred the dispute to individual arbitration. *See* Order Dismissing Action and referring Dispute to Individual Arbitration, No. 2:17-cv-04595 (May 31, 2018) ECF No. 59.

[27] *See Knepper v. Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*, No. 3:18-cv-00303, 2018 WL 416522 (N.D. Cal. Jan. 12, 2018). Ogletree has moved to transfer venue in both suits from the Northern District of California to the Central District, claiming that Knepper engaged in forum-shopping. Knepper claims she is concerned that because she regularly defends employers in the Central District, her clients might see her plaintiff-side case as adverse to their interests. Ryan Boysen, *Ogletree Says Atty In Gender Bias Suit Is Forum Shopping*, LAW360 (June 8, 2018 10:52 PM), https://www.law360.com/articles/1051772/ogletree-says-atty-in-gender-bias-suit-is-forum-shopping.

[28] Complaint, *Doe v. Morrison & Foerster, LLP*, No. 3:18-cv-02542, 2018 WL 2002994 (N.D. Cal. Apr. 30, 2018).

[29] Complaint, *Moore v. Jones Day*, No. CGC-18-567391 (Cal. Super. Ct. June 19, 2018), https://www.documentcloud.org/documents/4524034-Moore-v-Jones-Day-Complaint.html.

[30] *See* Cara Bayles, "Google Can't Nix Class Claims From Gender Pay Gap Suit," LAW360 (March 26, 2018), https://www.law360.com/employment/articles/1026240/google-can-t-nix-class-claims-from-gender-pay-gap-suit.

[31] *See* RJ Vogt, "Google Workers Take 2nd Shot At Gender Pay Class Action," LAW360 (Jan. 3, 2018), https://www.law360.com/articles/998623?scroll=1.

[32] No. 16-CV-01885-JLS-DHB, 2016 WL 9024896 (S.D. Cal. Dec. 5, 2016).

[33] Plaintiffs' Memorandum of Law in Support of Unopposed Motion for Preliminary Approval of Class Settlement, *Pan v. Qualcomm, Inc.*, No. 3:16-CV-01885-JLS-DHB, 2016 WL 6662241, at *12 (S.D. Cal. July 26, 2016).

[34] No. 15-CV-01913-LHK, 2016 WL 5791413 (N.D. Cal. 2016)

to conduct annual statistical analyses of compensation and eliminate any unjustified adverse impacts revealed.[35]

In addition, employers must reconcile state and local litigation trends with existing and emerging federal law. The Ninth Circuit in *Rizo v. Yovino*[36] examined affirmative defenses under the federal EPA, in particular whether reliance on prior salary was a legitimate justification. A panel decision concluded that an employer may rely on prior salary information as an affirmative defense to claims under the EPA if "it show[s] that the factor 'effectuate[s] some business policy' and that the employer 'use[s] the factor reasonably in light of the employer's stated purpose as well as other practices.'" An *en banc* Ninth Circuit has now reversed the panel's prior opinion.[37]

In *Rizo,* the Fresno County school district ("County") employed plaintiff Aileen Rizo as a math consultant. In 2012, she learned that the County paid a recently hired male math consultant a higher salary than her, and she soon discovered that the County paid other male math consultants more than her, too. When she complained, the County explained that it determined all starting salaries for teachers based on the person's most recent prior salary plus an automatic five percent increase.

Rizo alleged the policy resulted in impermissible sex discrimination under the EPA. The County conceded that Rizo was in fact paid less than men doing the same job, and thus did not challenge whether she had satisfied the exacting "equal work" standard of the EPA. Nonetheless, it moved for summary judgment on the grounds that the pay differential was based a "factor other than sex," *i.e.*, Rizo and her male comparator's prior salaries, and thus was permissible under the EPA. The County asserted four business reasons for following the standard operating procedure that relied on prior pay: (1) it was objective; (2) it encouraged candidates to leave their current jobs for employment with the County; (3) it prevented favoritism and encouraged consistency in its application; and (4) it was a "judicious use of taxpayer dollars." The district court denied the County's motion, holding that prior pay does not qualify as a factor other than sex under the EPA because it can perpetuate a discriminatory wage disparity between men and women. It certified an interlocutory appeal on the question of whether "as a matter of law under the EPA, 29 U.S.C. § 206(d), an employer subject to the EPA may rely on prior salary alone when setting an employee's starting salary."

On appeal, a panel of Ninth Circuit reaffirmed its previous 1982 decision, *Kouba v. Allstate*, and held that an employer may rely on prior salary if it "show[s] that the factor 'effectuate[s] some business policy'" and that the employer "use[s] the factor reasonably in light of the employer's stated purpose as well as other practices.'" The full Ninth Circuit in turn granted *en banc* review. In its *en banc* decision – written by the late Judge Reinhardt – the Ninth Circuit overruled *Kouba v. Allstate* and rejected the County's defense. In his opinion, Judge Reinhardt wrote: "The question before us is … simple: can an

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[35] *See* Notice of Motion and Unopposed Motion for Preliminary Approval of Class/Collective Action Settlement; Memorandum of Points and Authorities at 13, *Coates v. Farmers Insurance Group*, No. 15-CV-01913-LHK (N.D. Cal. Apr. 13, 2016) (No. 126).

[36] 854 F.3d 1161, 1165 (9th Cir. 2017) (citing *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876–77 (9th Cir. 1982)).

[37] *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018), *petition for cert. filed*, *Yovino v. Rizo* (U.S. August 30, 2018) (No. 18-272).

employer justify a wage differential between male and female employees by relying on prior salary? ... Based on the text, history and purpose of the Equal Pay Act, the answer is clear: No." Judge Reinhardt reasoned that "[t]o hold otherwise—to allow employers to capitalize on the persistence of the wage gap and perpetuate that gap *ad infinitum*—would be contrary to the text and history of the Equal Pay Act, and would vitiate the very purpose for which the Act stands." Instead, the Ninth Circuit concluded that the "factor other than sex" defense is limited to "legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance."

Of note, however, the majority appeared to cabin its holding to the facts of the case before it, in which the County had an express policy of relying on prior salary across the board. For example, the court expressly declined to offer any opinion on "whether or under what circumstances, past salary may play a role in the course of an ***individualized*** salary negotiation." The Ninth Circuit's decision is thus silent on the viability of the "factor other than sex" defense where, for example, an applicant volunteers his or her prior salary in negotiating for starting pay, or an individual applicant's prior pay is discussed in the context of how it reflects the skills and abilities that he or she brings to the position.

Other Circuits have also tightened the reigns on EPA affirmative defenses, undercutting the use of prior salary and, to some extent, prior experience as a basis for justifying wage disparities. The Eleventh Circuit, in *Bowen v. Manheim Remarketing, Inc.*,[38] reversed summary judgment and allowed plaintiff's claim to proceed to trial finding that a reasonable jury could find that the employer had not established its affirmative defense to plaintiff's EPA claim. Where the plaintiff alleged that her employer paid her less because of her gender, the court found that a jury could find that "prior salary and prior experience *alone* do not explain [the employer's] disparate approach to [plaintiff's] salary over time."[39] To assert the affirmative defense, an employer must show that the factor of sex provided "no basis for the wage differential."[40] In this case, a jury could find that sex played a role where the employer paid the male predecessor a much greater starting salary near the midpoint of the compensation range, while it set plaintiff's salary at the bottom of the range. Further, once plaintiff established herself as an effective arbitration manager, "prior salary and prior experience would not seem to justify treating her different than the predecessor."[41] Finally, plaintiff produced evidence that managers at the employer were influenced by sex bias, taking sex into account when considering other personnel matters.

In addition, in *U.S. Equal Employment Opportunity Comm'n v. Maryland Ins. Admin.*,[42] the Fourth Circuit found that the appropriate standard for asserting the fourth affirmative defense under the EPA is not whether factors other than sex *might* explain the wage disparity, but whether factors other than sex were *in fact* the reason for the disparity. Here, the Maryland Insurance Agency ("MIA") attempted to establish that the wage disparity between male and female fraud investigators resulted from the state salary schedule as well as from the comparators' experience and qualifications. The court held that a "jury would not be compelled to find that the reasons proffered by MIA were, *in fact*, the reasons for the

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[38] 882 F.3d 1358, 1364 (11th Cir. 2018).

[39] *Id*. (emphasis added).

[40] *Id*. at 1362.

[41] *Id*. at 1363.

[42] 879 F.3d 114, 124 (4th Cir. 2018).

disparity in pay awarded to the claimants and the comparators."[43] For example, while applying a neutral salary schedule, the employer exercises discretion to assign a new hire to a specific step and salary range. Further, this discretion takes into account prior state employment, prior experience and qualifications. Hence, where gender-neutral factors could explain a wage disparity, the affirmative defense requires that the evidences establishes that such factors *in fact* explained such disparity.

II. STATE EQUAL PAY LAWS

Beyond the protections provided and enforced under the EPA, numerous states have adopted laws that supplement and augment those protections. However, as discussed in more detail below, seven states – California, New York, Maryland, Massachusetts, Oregon, New Jersey, and Washington – have passed particularly stringent equal pay laws that significantly increase the burdens on employers to justify pay disparities. Following suit, additional states have proposed and/or adopted more piecemeal policies – such as Nevada – addressing equal pay concerns, but on a significantly lesser scale than the seven states mentioned above.

Several other state governments have begun to advance similar equal pay legislation, often citing the positive impact of wage equality on workplace dynamics. To date, over two dozen other states have introduced legislation seeking to address the concerns regarding the use of salary history.

A. California

Effective January 1, 2016, California amended its equal pay legislation through the California Fair Pay Act ("FPA") to include more employee-friendly provisions.[44] It was modeled after the federal Paycheck Fairness Act,[45] which has been repeatedly introduced but never passed in Congress for over twenty years. In September 2016, California again amended its equal pay regime to incorporate identical protections against discrimination on the basis of race and ethnicity.[46]

The most important aspect of the FPA is that it changes the standard from "equal pay for equal work" (which remains the standard under the EPA) to "equal pay for substantially similar work" based on a composite of the employee's skill, effort, and responsibility, performed under similar working conditions. The California Department of Industrial Relations has defined the terms of the new standard:

> "Substantially similar work" refers to work that is mostly similar in skill, effort, responsibility, and performed under similar working conditions. Skill refers to the experience, ability, education, and training required to perform the job. Effort refers to the amount of physical or

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[43] *Id*. (emphasis added).

[44] *See, e.g.,* CALIFORNIA SENATE BILL NO. 358, "Conditions of employment; gender wage differential," (Oct. 6, 2015), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB358; *see also* CALIFORNIA LAB. CODE § 1197.5.

[45] *See, e.g.*, U.S. SENATE BILL NO. 84, "Paycheck Fairness Act," (Jan. 23, 2013), *available at* https://www.congress.gov/bill/113th-congress/senate-bill/84.

[46] CALIFORNIA LAB. CODE § 1197.5(b).

mental exertion needed to perform the job. Responsibility refers to the degree of accountability or duties required in performing the job. Working conditions has been interpreted to mean the physical surroundings (temperature, fumes, ventilation) and hazards.[47]

No court or administrative agency, however, has yet applied this guidance.

The original version of the FPA would have changed the "equal work" standard to "comparable work," further enlarging the pool of possible comparators. However, the bill was revised based on input from various opponents to the standard, particularly the California Chamber of Commerce, which argued that "trying to determine 'comparable' work for different job duties can be extremely subjective, leading to different interpretations and thus the potential for litigation." The Chamber proposed the "substantially similar" standard because it is the standard used under the regulations interpreting federal law, and California courts generally rely on the federal regulations to interpret the California Act since no equivalent state regulations exist. The California Assembly's Judiciary Committee bill analysis also explains that the "substantially similar" standard is designed to prevent employers from arguing "that the jobs performed by persons of opposite sex were not 'equal' in every way."

Like the EPA, the FPA affords employers four affirmative defenses to justify pay disparities: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a bona fide factor other than sex.[48] The new law offers a non-exhaustive list of factors that could fall under the "bona fide factor other than sex" defense (such as "education, training, or experience"). Employers must demonstrate that unequal pay is based on one of these factors, that is reasonably applied and accounts for the entire pay difference.[49] The FPA fails to define "reasonable" and places the burden on the employer to demonstrate that a factor is: (1) not based on a sex-based differential in compensation; (2) job-related to the position in question; and (3) consistent with a business necessity.[50] The burden then shifts back to the employee to revive the claim if he or she demonstrates that an alternative business practice exists that would serve the same purpose without producing wage disparity. Finally, the FPA no longer requires comparator wages to be from "the same establishment."

The change from "comparable" to "substantially similar" undoubtedly improved the bill, which is one of the key reasons that the Chamber eventually supported it. Nevertheless, the FPA is vague and ambiguous, raising many issues and the increased potential for litigation. In particular, the updated burden of proof is perhaps the ripest area for interpretive disputes. While the new burden-shifting framework for the "bona fide factor other than sex" defense arguably tracks Title VII, it leaves open many questions about when and whether any given compensation decision will be "job-related" or "consistent with business necessity." Specifically, it is unclear to what extent employers will be able to structure wages according "to the market" and consider factors such as the overall supply of talented workers, the potential existence of other competitive offers of employment, and prior employee salary. As discussed

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[47] California Equal Pay Act: Frequently Asked Questions, STATE OF CAL. DEP'T OF INDUS. RELATIONS (Oct. 2017), https://www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm.

[48] *Id.*

[49] CALIFORNIA LAB. CODE § 1197.5(a)(2)-(3).

[50] CALIFORNIA LAB. CODE § 1197.5(a)(1)(D).

further below, the amended FPA also contains a provision limiting the ability of employers to rely exclusively on prior salary to justify a disparity in compensation.

The California Senate Judiciary Committee's bill analysis suggests that the law is intended to target, among other things, "the practice of basing a starting salary on the employee's prior salary" and the "inherently gender-biased" nature of the job market. Proponents of the law argue that "employers should have control over the way they determine wages, and the employers should be choosing methods that do not have intentional or inherent wage discrimination." The FPA increases the burden on employers when defending wage decisions based on factors such as market conditions, the employer's financial circumstance, or the need to offer a raise to retain a given worker at a given moment. Practically speaking, the FPA may also complicate moving for summary judgment, as most circumstances will involve intricate factual disputes as to whether the employer's decisions were "job related" and "consistent with business necessity." Such a determination is increasingly important in the wake of a FPA amendment regarding employer salary history inquiries, as described in greater detail in Section II.G.1.

These changes may ultimately leave more discretion in the hands of judges and juries to determine what attributes employers should value in their employees as they make pay and promotion decisions. But there is much more to pay and promotion decisions than meets the eye, and values differ from industry to industry, employer to employer, job to job and employee to employee. Each case will present new challenges for fact finders as they try to determine whether pay disparities arise from discrimination.

The FPA also includes enhanced anti-retaliation provisions intended to improve transparency about employees' salaries and provides that employers may not retaliate against employees who discuss their own wages, others' wages, or seek information about another employee's salary.[51] The FPA not only states that employers may not prohibit employees from discussing their own or others' wages, it also creates a private right of action for employees who claim retaliation.[52]

B. New York

Effective January 19, 2016, New York enacted a group of eight bills, referred to as the Women's Equality Agenda, which expand protections for women in the workplace and elsewhere in the state. A significant part of this legislative "agenda," the Achieve Pay Equity (APE)[53] law makes several important amendments to the state's equal pay law, which, until now, closely tracked the EPA.[54] Under prior law,

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51 CALIFORNIA LAB. CODE § 1197.5(a)(3).

52 *Id.* § 1197.5(k).

53 NEW YORK SENATE BILL NO. 1, "Prohibits differential pay because of sex," (Oct. 21, 2015), *available at* https://www.nysenate.gov/legislation/bills/2015/s1; *see also*, NEW YORK LAB. LAW § 194(1).

54 *See*, *e.g*., Jill Rosenberg, "New York State Expands Equal Pay Law and Other Workplace Protections for Women," ORRICK EMP'T LAW AND LITIG. BLOG, (Oct. 26, 2015), *available at* http://blogs.orrick.com/employment/2015/10/26/new-york-state-expands-equal-pay-law-and-other-

employers were required to provide equal pay to men and women in the "same establishment" for "equal work," defined as work requiring "equal skill, effort and responsibility" and "performed under similar working conditions."

The law broadens the meaning of "same establishment" by defining it to include workplaces located in the "same geographic region" (but no larger than a county), taking into account population distribution, economic activity and/or the presence of municipalities.[55] Thus, the comparison of employee wages may go beyond a single location, for example, two retail stores of a company in the same city or in different cities but in the same county.

APE also replaces the catch-all "any other factor other than sex" defense to a wage differential with the defense of "a bona fide factor other than sex, such as education, training, or experience." Similar to California, the new law then shifts the burden on the employer to demonstrate that the factor: (1) is not based on or derived from a sex-based differential in compensation; (2) is job-related with respect to the position in question; and (3) is consistent with a business necessity.[56] The new law also allows employees to rebut an employer's defense with evidence that an employment practice has a sex-based disparate *impact*, that an alternative practice that serves the same purpose without disparate impact is available, and that the employer has refused to adopt such a practice.

In addition, the law provides that employers may not prohibit employees from inquiring about, discussing or disclosing their own or other employees' wages.[57] Unlike California, however, New York states that employers "may, in a written policy provided to all employees, establish reasonable workplace and workday limitations on the time, place and manner for inquiries about, discussion of, or the disclosure of wages," although such limitations must be consistent with state and federal law, and "may include prohibiting an employee from discussing or disclosing the wages of another employee without such employee's prior permission."[58] Employers must also comply with New York Department of Labor regulations that state that time, place, and manner limitations may not be so restrictive as to "unreasonably or effectively preclude[] or prevent[] inquiry, discussion, or disclosure of wages," and must be content-neutral, narrowly tailored, and "leave open ample alternative channels for the communication of information."[59] Unlike California, the New York law contains a provision denying protection in some circumstances to employees with job duties affording access to other employees' compensation.[60]

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workplace-protections-for-women/ (further information and analysis regarding the scope and import of the New York law).

[55] N.Y. LAB. LAW § 194(1), (3).

[56] *Id.* § 194(1)(d).

[57] *Id.* § 194(4)(a).

[58] *Id.* § 194(4)(b).

[59] 12 NYCRR § 194-1.3 (N.Y. Dep't of Lab. Feb. 1, 2017); N.Y. COMP. CODES R. & REGS. tit. 12 § 194-1.3 (2017).

[60] N.Y. LAB. LAW § 194(4)(d). The law states that it "shall not apply to instances in which an employee who has access to the wage information of other employees as a part of such employee's essential job

C. Maryland

In May 2016, Maryland enacted the "Equal Pay for Equal Work Act of 2016," which took effect in October 2016. The law substantially amends Maryland's existing equal pay regime and expands the law's potential impact, most notably by including the term "gender identity" as a protected class within the state's definition of sex-based discrimination.[61]

The explicit adoption of "gender identity" represents a new development in the context of state equal pay laws, although other portions of Maryland's law mirror similar regimes at the state and federal level. For example, Maryland's law contains so-called "pay secrecy" provisions that prohibit employers from retaliating against employees for inquiries related to wages.[62] Like New York, Maryland allows employers to maintain written policies with reasonable workday limitations on the time, place, and manner for wage discussions consistent with the Commissioner of Labor and Industry's standards and other state and federal laws.[63] These provisions substantially resemble similar restrictions adopted for federal contractors by the Office of Federal Contract Compliance Programs in January 2016.[64]

Additionally, Maryland has adopted restrictions on the availability of affirmative defenses to pay disparity that are similar to provisions in New York and California. Specifically, like California (and, to a lesser extent, New York), employers in Maryland seeking to establish that an alleged pay disparity is based upon "bona fide factors" other than impermissible sexual discrimination are limited to factors that: (1) are not derived from a sex-based differential in compensation; (2) are "job-related" and "consistent with business necessity;" and (3) account for the entire pay differential at issue.[65]

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functions discloses the wages of such other employees to individuals who do not otherwise have access to such information, unless such disclosure is in response to a complaint or charge, or in furtherance of an investigation, proceeding, hearing, or action under this chapter, including an investigation conducted by the employer." *Id.*

61 MD. CODE ANN., LAB. & EMPL. § 3-304(b).

62 *Id.* § 3-304.1. Maryland prohibits employers from taking adverse employment actions against employees who: (1) inquire about another employee's wages; (2) disclose their own wages; (3) discuss another employee's wages, if those wages have been disclosed voluntarily; (4) ask the employer to provide a reason for the employee's wages; or (5) aid or encourage another employee's exercise of rights under the Maryland law. *Id.*

63 *Id*. Additionally, Maryland does not: (1) require employees to discuss or disclose their wages; (2) diminish employees' rights to negotiate terms and conditions of employment; (3) limit an employee's rights under a collective bargaining agreement; (4) obligate employers or employees to disclose wages; (5) permit disclosure of proprietary information, trade secrets, or information that is otherwise protected by law without written consent of the employer; or (6) permit employees to disclose wage information to an employer's competitor. *Id.*

64 U.S. DEP'T OF LABOR OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, "OFCCP Final Rule Promotes Pay Transparency," (Jan. 2016), *available at* https://www.dol.gov/ofccp/PayTransparency.html.

65 MD. CODE ANN., LAB. & EMPL. § 3-304(b).

One of the more striking differences in the Maryland law is its prohibition on gender-based pay disparity for "work of comparable character or work on the same operation, in the same business or of the same type," as opposed to the "substantially similar" definition under California law (which is similar to the EPA).[66] Maryland's regime also prohibits providing "less favorable employment opportunities based on sex or gender identity," with specific references to diminished "career paths" (an ambiguous term whose application to equal pay is untested).[67]

In addition to the Equal Pay Act, Maryland also passed the Equal Pay Commission Establishment Act into law, thereby creating the Equal Pay Commission of the Maryland Division of Labor and Industry.[68] The Commission membership will be appointed by the governor of Maryland, and drawn from the Maryland business community, labor organization representatives (as nominated by labor federations), and other relevant organizations. The Commission is empowered to implement a number of different initiatives under the new law, including: (1) evaluate the extent of wage disparities in the public and private sectors; (2) establish wage data collection mechanisms with employers; (3) develop strategy to determine equal pay best practices; (4) recommend options for streamlining available administrative and legal remedies; (5) foster partnerships with private industry; and (6) share data (most specifically in an annual report to be delivered to the state government on December 15 of each year, beginning with 2017).

D. Massachusetts

In August 2016, Massachusetts enacted comprehensive equal pay legislation which took effect on July 1, 2018.[69] The Massachusetts bill follows many of the equal pay innovations in California, New York and Maryland, with several important distinctions. For example, the law adopts the "comparable work" language rejected by the California legislature, but defines that phrase to mean "work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions."[70]

The bill leaves intact those compensation schemes that base employee wages on seniority, merit, quality or quantity of production, geography, education, training or experience, and travel.[71] As in other states, however, "seniority" may not be reduced for time spent on leave due to a "pregnancy-related condition" or other types of parental, family and medical leave.[72]

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[66] In particular, this language mirrors proposed language that was eventually stripped from the finalized version of California's equal pay amendments.

[67] *Id.* § 3-304(a).

[68] *See, e.g.*, MARYLAND HOUSE BILL 1004, "Equal Pay Commission – Establishment," (May 19, 2016), *available at* http://mgaleg.maryland.gov/2016rs/chapters_noln/ch_639_hb1004t.pdf.

[69] MASS. GEN. LAWS ch. 149, §§ 1 *et seq.*

[70] *Id*. § 105A(a).

[71] *Id*. § 105A(b).

[72] *Id*.

The law does not contain the "catch-all" defense of a "bona fide factor other than sex," however, distinguishing it from California and Maryland.[73] The law expressly removes an employee's previous wage or salary history as a defense to an action regarding an identified wage differential. On the other hand, the new Massachusetts law contains a "safe harbor" that affords employers a defense against an allegation of wage discrimination if "within the previous 3 years and prior to the commencement of the action, [the employer] has both completed a self-evaluation of its pay practices in good faith and can demonstrate that reasonable progress has been made towards eliminating wage differentials based on gender for comparable work … in accordance with that evaluation ...."[74]

Moreover, the Massachusetts law states that employers may not require, "as a condition of employment, that an employee refrain from inquiring about, discussing, or disclosing" wage information.[75] It also prohibits employers from contracting with employees to avoid pay transparency obligations, or otherwise trying to exempt themselves from the law's requirements.[76] The law does, however, permit employers to prohibit employees who have access to the pay data of others due to their job responsibilities from disclosing other employees' compensation information without first obtaining the other employee's permission.[77] Employers are not required to disclose employee wages to any third party.[78]

As in Maryland, the Massachusetts law creates a special commission to aid in its enforcement. By January 1, 2019, the commission is tasked with submitting a report to the legislature that will evaluate "the factors, causes and impact of pay disparity" based on, among other protected statuses, gender identity, sexual orientation, and disability status.[79] While the bill does not describe a role for the commission beyond this initial reporting duty, the focus on pay disparity with respect to other diverse groups signals a possible new frontier in equal pay initiatives; several states and municipalities, including Iowa, already prohibit wage discrimination on these bases.[80] Massachusetts has also led the charge in creating the first truly comprehensive state law on salary history discrimination, discussed further in Section II.G.1.

E. Oregon

The Oregon Equal Pay Act of 2017 was signed by Governor Kate Brown on June 1, 2017.[81] Under the new law, the majority of which will take effect on January 1, 2019, it is unlawful for an

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73 *See generally id.*

74 *Id.* § 105A(d).

75 *Id.* § 105A(c)(1).

76 *Id.* § 105A(c).

77 *Id.*

78 *Id.* § 105A(c)(1).

79 *Id.* at ch. 151B, § 1.

80 IOWA CODE § 216.6A(b).

81 OREGON HOUSE BILL 2005, "Relating to pay equity; and prescribing an effective date," (June 1, 2017), *available at* https://olis.leg.state.or.us/liz/2017R1/Measures/Overview/HB2005.

employer to pay wages to an employee at a rate greater than that which the employer pays employees of a protected class, for work of comparable character, the performance of which requires comparable skills.[82] This is a change from Oregon's previous law, which prohibited the payment of wages to any employee at a rate less than that at which the employer paid wages to employees of the opposite sex. Thus, the new law uses the term "protected class" whereas the old law only covered differences based on gender. With that, the law expands its reach to prohibit wage disparities on the basis of race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability, or age.[83]

While the bill does take steps to eliminate pay disparities based on discrimination, it does not prohibit all disparities in salary. Rather, the bill provides for exceptions if the difference is based on a bona fide factor such as a seniority system, a merit system, workplace locations, travel, education, training, experience, or a combination of factors.[84] Therefore, while the law aims to combat discriminatory differences in salary, it recognizes several valid, non-discriminatory reasons for some pay disparities.

In addition, the Oregon law, like the law in Massachusetts, includes a "safe harbor" that allows employers to limit potential backpay awards if they can demonstrate that they: (1) completed a good-faith equal pay analysis reasonable in detail and scope within three years before the date the employee filed the action; (2) eliminated the plaintiff's wage differential; and (3) took reasonable and substantial steps to end pay differentials for the plaintiff's protected class.[85] If the employer proves this defense, the court may only award a prevailing plaintiff back pay for the two years immediately preceding filing the lawsuit and costs and reasonable attorneys' fees.[86] In such cases, neither compensatory nor punitive damages can be awarded.[87]

F. New Jersey

The national proliferation of equal pay laws continued into 2018 with the addition of New Jersey. Prior to 2018, state legislators made several unsuccessful attempts to amend New Jersey's equal pay law (the NJLAD). For example, in February 2016, the New Jersey Senate passed a bill to address the gender pay gap that would require equal pay for "substantially similar" work in terms of effort, skill, and responsibility.[88] The New Jersey Assembly passed the same bill on March 14, 2016.[89] However, in early

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82 OR. REV. STAT. § 652.220(1)(b).

83 OR. REV. STAT. § 652.210(5).

84 OR. REV. STAT. § 652.220(2).

85 OREGON HOUSE BILL 2005, *supra* note 81, at § 12(1).

86 *Id*. § 12(2).

87 *Id*.

88 NEW JERSEY SENATE BILL NO. 992, "An act concerning equal pay for women and employment discrimination, requiring public contractors to report certain employment information, amending P.L.1945, c.169, and supplementing P.L.1952, c.9," (Feb. 4, 2016), *available at* http://assets.law360news.com/0791000/791513/s992%20cv.pdf.

May 2016, New Jersey Governor Chris Christie vetoed the legislation, specifically objecting to various provisions as "anti-business."[90] The inauguration of new Governor Phil Murphy, however, renewed opportunities to present new equal pay legislation, and state legislators capitalized with an extensive reform bill on March 26, 2018.[91] Governor Murphy signed the bill on April 24, 2018,[92] and it took effect as of July 1, 2018. This law, unlike many other equal pay laws that only address unequal pay based on sex, prohibits employers from providing unequal pay to employees based on any of the characteristics protected by the NJLAD.

Like many comparable state equal pay laws, the New Jersey law modifies the federal standard by prohibiting discrimination between employees performing "substantially similar" work. Similar to the California FPA and other equal pay laws, "substantially similar" work is assessed as a composite of the skill, effort, and responsibility necessary to perform that work.[93] Comparators include employees performing substantially similar work at all of the employer's operations or facilities.[94]

An employer may justify the existence of an observed wage differential by establishing the existence of: (1) a seniority-based compensation system; (2) a merit-based compensation system; or (3) each of the following criteria: (i) that the differential is based on bona fide factors other than a protected characteristic, including training, education, experience, or production factors; (ii) that the factors do not perpetuate a compensation differential based on a protected characteristics; (iii) any bona fide factor is applied reasonably; (iv) any bona fide factor accounts for the entire wage differential; and (v) any bona fide job factor is job-related and based on a legitimate business necessity.[95] Moreover, a compensation factor based on business necessity is not defensible if there is an alternative practice available that would not produce the same disparity.[96]

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89 *See, e.g.*, NEW JERSEY ASSEMBLY BILL NO. 2750, "An Act concerning equal pay for women and employment discrimination, requiring public contractors to report certain employment information," (March 14, 2016), *available at* https://legiscan.com/NJ/bill/A2750/2016.

90 *See, e.g.*, Gov. Chris Christie, "Memorandum – Senate Bill No. 992," (May 2, 2016), *available at* http://assets.law360news.com/0791000/791513/s992%20cv.pdf.

91 NEW JERSEY SENATE BILL NO. 104, "Diane B. Allen Equal Pay Act, amending P.L.1945, c.169, and supplementing P.L.1952, c.9," (March 26, 2018), *available at* https://www.csemploymentblog.com/wp-content/uploads/sites/45/2018/04/here.pdf.

92 Murphy's first official act in office was to sign an executive order targeting gender pay inequality. The Order protects public employees from wage discrimination by prohibiting state entities from inquiring about prior salary. Executive Order No. 1, http://nj.gov/infobank/eo/056murphy/pdf/EO-1.pdf.

93 NEW JERSEY SENATE BILL NO. 104, *supra* note 91, at § 11(t).

94 *Id*. at § 11(t)(5).

95 *Id*. at § 11(t)(1)-(5).

96 *Id*. at § 11(t)(5).

As amended, the NJLAD permits recovery of up to six years of back pay, and restarts the statute of limitations period with each successive non-compliant paycheck.[97] The NJLAD also curtails the use of waivers in the equal pay context by making it an unlawful act to require an employee's consent to a truncated limitations period.[98] In addition, the statute provides for treble damages for violations of the pay equity provisions.[99]

Other equal pay enhancements include prohibitions on retaliation for wage disclosures and discussions.[100] Violations of the retaliation provisions may, as for other types of pay equity violations, result in awards for treble damages.[101] The law also expands anti-retaliation protections to cover activities that include seeking legal advice and consulting with a government agency.[102]

In addition, the amended NJLAD creates unique reporting obligations for certain government contractors. Covered contractors must provide information on compensation and hours worked, further broken down by gender, race, ethnicity, and job category.[103] The general reporting requirements exclude government contractors performing "public work" (such as construction) and contractors for the sale of goods.[104] With respect to contractors performing "public work," a pending bill – the Wage Transparency Act – would require contractors' certified payroll records to include the following data points for each employee associated with a given contract: gender, race, job title, occupational category and rate of compensation.[105] In order to promote further transparency, the Wage Transparency Act would entitle employees of covered contractors to access to the reported compensation data.[106]

G. Washington

On March 21, 2018, Washington Governor Jay Inslee signed into law amendments to Washington State's Equal Pay Act, the first amendments to the statute in 75 years. Per its express text, the new law seeks "to address income disparities, employer discrimination, and retaliation practices, and to reflect the

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[97] *Id*. at § 11(a).

[98] *Id*. at § 11(r).

[99] *Id*. at § 12.

[100] *Id*. at § 11(r).

[101] *Id*. at § 12.

[102] *Id*. at § 11(r).

[103] *Id*. at § 5.

[104] *Id*.

[105] NEW JERSEY ASSEMBLY BILL NO. 1825, "Wage Transparency Act, an act requiring public contractors to report certain employment information and supplementing P.L.1952, c.9 (C.34:11-56.1 et seq.)" (pre-filed for introduction in 2018), *available at* http://www.njleg.state.nj.us/2018/Bills/A2000/1825_I1.HTM.

[106] *Id*. at § 2(c).

equal status of all workers in Washington state."[107] The amendments constitute a significant overhaul to Washington's equal pay law, and reflect continued momentum in state legislation that exceeds minimum federal standards. Washington's new law took effect on June 7, 2018.[108]

Prior to the enactment of H.B. 1506, which was introduced in January 2017, Washington prohibited compensation discrimination based on "sex," including with regards to promotion, where employees are "similarly employed." The new law modifies prior law and/or increases the scope of prohibited conduct in the following ways. First, the revised statute specifies that individuals are "similarly employed" if the "performance of the job requires comparable skill, effort, and responsibility, and the jobs are performed under similar working conditions."[109] Washington's new law further clarifies that job titles alone are not determinative.[110] Notably absent from the law are provisions addressing location of the work performed, in contrast with amended laws in New Jersey and elsewhere.

Second, the revised statute alters the available defenses for pay equity claims. Similar to federal law, Washington's new law provides there is no discrimination if a differential is based on a seniority system, a merit system, or a system that measures earning by quantity or quality of production.[111] Washington also recognizes a "bona fide regional difference in compensation levels."[112] Moving beyond the federal requirements, however, Washington increases the burden on the employer to prove that these defenses, or any other "bona fide job-related factor" on which the employer relies, are (1) based in good faith, (2) consistent with business necessity, (3) not based on or derived from a gender-based differential, and (4) account for the entire differential.[113] The enhanced burden is consistent with New Jersey and other recent state pay equity laws. The law also expressly clarifies that reliance an individual's prior salary is not a defense.[114]

Third, although Washington previously prohibited compensation discrimination, the new law expands protections against discrimination in terms of conduct that deprives an employee of "career advancement opportunities."[115] In this regard, Washington's equal pay law is among the nation's farthest reaching, and among the most significant departures from federal law.

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[107] WASHINGTON HOUSE BILL NO. 1506, "Addressing Workplace Practices to Achieve Gender Pay Equity," (March 21, 2018), *available at* http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bills/House%20Passed%20Legislature/1506-S2.PL.pdf.

[108] Washington State Legislature, Bill Information > HB 1506, "HB 1506 – 2017-18," *available at* http://apps2.leg.wa.gov/billsummary?BillNumber=1506&Year=2017&BillNumber=1506&Year=2017.

[109] R.C.W. 49.12.175 § 3(2).

[110] *Id*.

[111] *Id*. at § 3(3)(b)(i)-(iv).

[112] *Id*. at § 3(3)(b)(v).

[113] *Id*. at § 3(3)(a)(i)-(iii).

[114] *Id*. at § 3(3)(d).

[115] *Id*. at § 4(2).

Fourth, Washington's amended statute includes wage transparency provisions that mirror those incorporated into other state pay equity laws. Washington law now prohibits retaliation against employees for discussing wages[116] and for requesting the employer to provide a justification for perceived wage disparities,[117] among other conduct.

Finally, in addition to traditional civil suits, the new law also includes numerous provisions related to administrative enforcement and penalties, as governed by the Department of Labor and Industries.[118] In particular, the law authorizes employees to file complaints directly with the state Department of Labor and Industries, which is newly authorized to investigate claims and impose penalties of actual and statutory damages, as well as to award the employee's costs and fees, with a four-year reach back window.[119]

H. Nevada

Nevada's novel approach to pay equity relies on the "carrot" of potential state government contracts rather than the "stick" of potential fines or litigation. Effective January 1, 2018, Nevada will certify vendors who "pay their employees equal pay for equal work without regard to gender."[120] Nevada gives certified vendors preference in competition for state contracts and permits them to note their certification in advertising, marketing, or other promotional materials.[121] Nevada also permits companies to "self-certify" in accordance with state regulation, but contractors face debarment penalties if they make fraudulent misrepresentations.[122]

I. Salary History Laws

In addition to laws directly targeting pay inequality, several cities and states have rapidly begun to introduce legislation that forbids employers from seeking or otherwise considering a prospective employee's salary history during the recruitment and hiring process. The sudden proliferation of such legislation is guided by the belief that wage history inquiries perpetuate pay inequality throughout an individual's career, allowing past discrimination to set compensation benchmarks that follow an individual between workplaces. Though no law prohibiting salary history inquiries presently exists at the federal level, Congresswoman Eleanor Holmes Norton recently introduced H.R. 2418, the Pay Equity for

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[116] *Id*. at § 5(2)(a).

[117] *Id*. at § 5(2)(b).

[118] *Id*. at § 7.

[119] *Id*.

[120] Assembly Bill No. 106, 79th Sess. (Nev. 2017). The law includes a sunset provision phasing the system out in 2021. *Id*.

[121] *See id*. §§ 25, 28(6).

[122] *Id*. § 24(2).

All Act of 2017,[123] which would prohibit employers from seeking "the previous wages or salary history, including benefits or other compensation, of any prospective employee from any current or former employer of such employee."

1. State Laws

Massachusetts was the first state to pass a law specifically limiting an employer's ability to inquire into an employee's salary history.[124] As of July 1, 2018, employers may only request confirmation of a prospective employee's past wages after the employee has voluntary disclosed such information, or an offer of employment with compensation has been extended. In addition to prohibiting salary inquiries generally, the act makes it an unlawful practice to "require that a prospective employee's prior wage or salary history meet certain criteria" as a condition of employment.[125]

Delaware followed suit on June 14, 2017, becoming the second state to pass salary history legislation, and, with an effective date of December 14, 2017, the first to enact such provisions into law.[126] The law prohibits employers from screening applicants based on prior salary, and from requiring that a candidate's prior salary meet a minimum or maximum amount.[127] Similarly, employers may not ask applicants about compensation history or elicit information from current or former employers.[128] However, the law explicitly does not prohibit employers and applicants from "negotiating compensation expectations" if employers do not request or require applicants' compensation histories.[129] Furthermore, employers are free to ask about compensation history after extending, and after applicants accept, offers including proposed terms of compensation.[130] Employers are not liable for conduct of any non-employee agents (e.g., recruiting firms) that employers instruct to comply with the law, even if such agents later violate it.[131] Initial violations of the statute carry civil penalties of $1,000 to $5,000, while employers are subject to penalties ranging from $5,000 to $10,000 for each subsequent violation.[132]

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[123] H.R. 2418, "Pay Equity for All Act of 2017," (May 11, 2017), *available at* https://www.congress.gov/bill/115th-congress/house-bill/2418/text?q=%7B%22search%22%3A%5B%22eleanor+holmes%22%5D%7D&r=5.

[124] MASS. GEN. LAWS CH. 149 § 105A(c)(2).

[125] *Id.*

[126] DELAWARE HOUSE BILL NO. 1, "An Act to Amend Title 19 of the Delaware Code Relating to Unlawful Employment Practices," (June 6, 2017), *available at* http://legis.delaware.gov/json/BillDetail/GenerateHtmlDocument?legislationId=25599&legislationTypeId=1&docTypeId=2&legislationName=HB1.

[127] DEL. CODE ANN. tit. 19 § 709B(b)(1).

[128] *Id.* § 709B(b)(2).

[129] *Id.* § 709B(d).

[130] *Id.* § 709B(e).

[131] *Id.* § 709B(c).

[132] *Id.* § 709B(h).

Following a winding legislative effort, California passed a comprehensive law prohibiting salary history inquiries in September 2017. Previously, the California legislature passed A.B. 1017, a bill that would have prohibited asking job applicants about their salary histories.[133] Governor Jerry Brown vetoed the bill, explaining that it "broadly prohibits employers from obtaining relevant information with little evidence that this would assure more equitable wages." Notwithstanding Governor Brown's strong message about the relevance of prior salaries in setting pay, California Assembly Member Nora Campos introduced a slightly modified bill on January 19, 2016, that would have prohibited an employer from seeking a job applicant's prior salary history and required employers to provide a pay scale for various positions on request.[134] Although the California Legislative Women's Caucus identified the bill as one of its top priorities for the 2015-2016 legislative session,[135] the controversial language was ultimately removed.[136] However, in September 2016, California enacted a new amendment to the FPA which provides that "prior salary shall not, by itself, justify any disparity in compensation."[137] While it does not prohibit employers from requesting employees' prior salary information, the amendment does significantly undermine the utility of past compensation in current hiring decisions.

The California legislature again introduced a bill prohibiting salary history inquiries on January 17, 2017.[138] The bill passed state Senate and Assembly votes on September 12 and 14, 2017 respectively, and this time, on October 12, 2017, received the Governor's approval. The law took effect on January 1, 2018.[139] Like other comparable state laws, the California law prohibits employers from "seek[ing] salary history information" from any applicant, either directly or indirectly. Moreover, it prohibits employers from relying on salary history information in determining what salary to offer unless the applicant "voluntarily and without prompting" discloses that information – and even in that instance, consistent with the FPA, the prior salary information cannot in and of itself justify any resulting pay disparities.[140]

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[133] CALIFORNIA ASSEMBLY BILL NO. 1017, "An act to add Section 432.3 to the Labor Code, relating to employers," (February 26, 2015), *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1017.

[134] *See, e.g.*, CALIFORNIA ASSEMBLY BILL NO. 1676, "An act to amend Section 1197.5 of the Labor Code, relating to employers," (June 15, 2016), *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB1676.

[135] Press Release, "California Legislative Women's Caucus, Women's Caucus Announces Priority Legislation and Budget Action to Fix Outdated Infrastructure Supporting California's Women, Workforce and Economy," CALIFORNIA LEGISLATIVE WOMEN'S CAUCUS (Feb. 11, 2016), *available at* http://womenscaucus.legislature.ca.gov/news/2016-02-11-lwc-releases-2016-budget-and-policy-priorities.

[136] *See* CALIFORNIA ASSEMBLY BILL NO. 1676, *supra* note 134 (text of the bill as amended by the California Senate would now only amend the relevant California Labor Code section to state that "[p]rior salary shall not, by itself, justify any disparity in compensation").

[137] CALIFORNIA LAB. CODE § 1197.5(a)(3).

[138] CALIFORNIA ASSEMBLY BILL NO. 168, "Employers: salary information," (Jan. 17, 2017), *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB168.

[139] *Id*. § 432.3.

[140] *Id*.

Finally, the new law mandates that employers furnish "the pay scale for a position" to any applicant "upon reasonable request,"[141] a feature that so far is unique to California among salary history laws.

California passed further salary history legislation on July 18, 2018, clarifying several ambiguities in the existing law.[142] The legislation also defines key terms such as "applicant" and "pay scale."[143] In addition, prior salary cannot be used to justify a pay differential between employees of different sexes, races or ethnicities, except when such compensation differentials result from a seniority system, merit system, or other bona fide factor other than sex, race or ethnicity.[144] The clarifying provisions take effect January 1, 2019.

On January 10, 2018, the California Pay Equity Task Force released draft guidance documents for employers regarding starting salary setting practices in light of these new laws, but these have not yet been formally adopted or relied upon by any court.[145]

Oregon law prohibits employers from "[s]creen[ing]" applicants based on prior compensation or "seek[ing]" salary history of an applicant or employee.[146] Neither term is defined, though the new law does expressly authorize employers to request written authorization from applicants to confirm prior compensation after an offer defining compensation has been extended.[147] This provision took effect on October 6, 2017.[148] The Oregon Bureau of Labor and Industries will begin enforcing this provision and may issue civil fines beginning January 1, 2019.[149] Beginning January 1, 2024, employees will have a private right of action against potential employers under this provision.[150]

Connecticut became the fifth state to enact a law banning an employer from asking prospective employees about their prior salary history. Connecticut Governor Dannel Malloy signed the Act

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[141] *Id.*

[142] CALIFORNIA ASSEMBLY BILL NO. 2282, "Salary history information," (Jul. 18, 2018), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB2282.

[143] *Id.*

[144] *Id.*

[145] *See* CALIFORNIA PAY EQUITY TASK FORCE, JANUARY 10, 2018 AGENDA AND MEETING BINDER, https://women.ca.gov/wp-content/uploads/sites/58/2018/02/Pay-Equity-Task-Force-Meeting-Packet-.pdf (last visited July 11, 2018).

[146] OREGON HOUSE BILL 2005, supra note 81, at § 2(1)(c)-(d).

[147] *Id.* § 2(1)(d).

[148] *Oregon Equal Pay Law*, OREGON.GOV (Sept. 2017), http://www.oregon.gov/boli/TA/Pages/Equal%20Pay%20Law.aspx.

[149] *Id.*

[150] *Id.*

Concerning Pay Equity bill into law on May 24, 2018.[151] The Connecticut prohibits an employer, or a third party acting on the employer's behalf (like a recruiting firm), from inquiring about a prospective employee's wage and salary history unless voluntarily disclosed by the applicant. The law does permit an employer to inquire about other components that contributed to the applicant's previous total compensation package, but not about the value of those items. Although no examples are provided in the legislation, it would seemingly be permissible to ask whether a prospective employee received stock options at their previous employment, but not the value of those options. The salary history ban becomes effective January 1, 2019. The law amends Title 31 of the Connecticut General Statutes, Labor Section 31-40z, which also provides that employers cannot prohibit, among other things, employees from disclosing or discussing their wages with other employees. The statute allows up to two years for an action to be brought in court and an employer found liable under the law could face compensatory and punitive damages, as well as attorney's fees and costs.

Vermont law also restricts employers from making compensation history inquiries. Vermont Governor Phil Scott signed the legislation on May 11, 2018, and the law became effective on July 1, 2018.[152] Compensation includes base salary, bonuses, benefits, fringe benefits, and equity-based compensation. Employers may not require a prospective candidate's current or past compensation satisfy minimum or maximum criteria for employment either. If the candidate voluntarily discloses his or her compensation history, the employer may request that the applicant confirm the disclosed compensation after making an offer of employment. Furthermore, an employer may also ask a job candidate about general salary expectations. However, the employer may not determine whether to interview the prospective employee based on this information.

More recently, Hawaii banned employers from asking applicants about their prior compensation history on July 5, 2018. Employers are covered if they have at least 1 employee in the state, and the law becomes effective on January 1, 2019.[153] Employers are also prohibited from searching publicly available records or reports to learn about a candidate's salary history, but they may discuss compensation expectations with the candidate. Further, the law does not apply to applicants for internal transfer or promotion with their current employer.

Massachusetts, Delaware, California, Oregon, Connecticut, Vermont, and Hawaii are joined by Puerto Rico, where Act 16 took effect in March 2017. Act 16 prohibits salary history inquiries unless the

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[151] SUBSTITUTED HOUSE BILL NO. 5386 "An Act Concerning Pay Equity," *available at* https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&which_year=2018&bill_num=5386.

[152] H. 294, 2018 Gen. Assemb., Leg. Sess. (Vt. 2018), *available at* https://legislature.vermont.gov/assets/Documents/2018/Docs/BILLS/H-0294/H-0294%20As%20Passed%20by%20Both%20House%20and%20Senate%20Official.pdf.

[153] HAWAII S.B. 2351 (July 5, 2018), *available at* https://www.capitol.hawaii.gov/session2018/bills/SB2351_CD1_.PDF.

applicant volunteers such information or until an employer has extended an offer of employment, including the prospective rate of compensation.[154]

While no salary history law has been enacted at the state level in New York, one such law is percolating in the state legislature. Assembly Bill 6707, which would "prohibit[] employers from seeking salary history from prospective employees," was proposed in March 2017.[155] The bill, however, is presently stalled in committee. In the public sector, Governor Andrew Cuomo issued an executive order on January 10, 2017[156] that prohibits state entities from evaluating prospective candidates based on wage history.[157] In April 2018, Governor Cuomo unveiled Program Bill No. 20, proposed legislation that would expand the prohibition on wage history questions to private employers.[158]

2. Local and Municipal Laws

Wage equality proponents have found additional success at the municipal level. New York's Albany[159] and Westchester[160] counties have passed legislation generally prohibiting prior salary inquiries within those jurisdictions. In addition, on November 4, 2016, New York City Mayor Bill de Blasio issued an executive order banning city agencies from requesting job applicants' past salary.[161] A proposal before the New York City Council to expand the same protection to all public and private sector employees

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[154] Maralyssa Álvarez-Sánchez & Juan Felipe Santos, "Puerto Rico Enacts Equal Pay Law, Prohibits Employers from Inquiring about Past Salary History," THE NATIONAL LAW REVIEW (Mar. 13, 2017), https://www.natlawreview.com/article/puerto-rico-enacts-equal-pay-law-prohibits-employers-inquiring-about-past-salary.

[155] NEW YORK ASSEMBLY BILL 6707, "Prohibits employers from seeking salary history from prospective employees," (March 16, 2017), *available at* https://legiscan.com/NY/bill/A06707/2017.

[156] NEW YORK EXECUTIVE ORDER NO. 161, "Ensuring Pay Equity by State Employers," (Jan. 10, 2017), *available at* https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_161.pdf.

[157] A companion executive order issued January 11, 2017, requires prime and subcontractors in the state to report on a quarterly basis the job title and salary of each employee "performing work on a State contract." NEW YORK EXECUTIVE ORDER NO. 162, "Ensuring Pay Equity by State Employers," (Jan. 11, 2017), *available at* https://www.governor.ny.gov/news/no-162-ensuring-pay-equity-state-contractors. The executive order applies to contracts valued in excess of $25,000, and increases the frequency of reporting to monthly for construction contracts in excess of $100,000.

[158] *See* Program Bill #20 (Apr. 9, 2018), *available at* https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/GPB_%2320_SALARY_HISTORY_BILL.pdf

[159] LOCAL LAW NO. P FOR 2016 (October 10, 2017), http://albanycounty.com/Libraries/County_Executive/20171030-PH-16-LL_P.sflb.ashx.

[160] LAWS OF WESTCHESTER COUNTY § 700.03(a)(9).

[161] NEW YORK CITY EXECUTIVE ORDER NO. 21, "Restriction on Inquiries regarding Pay History" (November 4, 2016), http://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2016/eo_21.pdf.

passed on April 5, 2017.[162] The ordinance, which took effect October 31, 2017, is typical of salary history legislation, prohibiting employers from soliciting applicants' past wage information and from using this information in determining compensation but still allowing employers to discuss salary expectations with job applicants. Along with a majority of other salary history laws, the ordinance provides an important exception permitting employers to consider and verify previous wages when disclosed voluntarily and "without prompting."[163] A New York City employer may further "engage in a discussion" regarding "unvested equity or deferred compensation" that an applicant would forfeit by leaving his or her present employment.[164] The law expressly states that it does not apply to applicants for internal transfer or promotion with current employers.[165]

Recent guidance from the NYCCHR offers additional clarification regarding how the ordinance will be enforced.[166] First, the ordinance applies both to interviews for out-of-state jobs conducted in New York City as well as interviews for New York City jobs conducted outside of the state. Second, employers are prohibited from obtaining information about an applicant's prior wages from a secondary source or, if such information is discovered accidentally, from relying on this information in determining compensation. The guidance also provides that a disclosure is made "without prompting" when "the average job applicant would not think that the employer encouraged the disclosure based on the overall context and the employer's words or actions." The ordinance further will not impact an employer's ability to inquire about the value of an applicant's competing offers, or from asking about an applicant's salary history after compensation is set.

Philadelphia has also enacted legislation prohibiting employers from asking prospective employees about wage history.[167] The January 2017 ordinance declares that "[s]alary offers should be based upon the job responsibilities of the position sought and not based upon the prior wages earned by the applicant."[168] As a result, the bill not only prohibits employers from asking about prior salary, but also bans using prior salary information to set a newly-hired employee's salary if discovered later in the hiring process.[169] The Philadelphia Chamber of Commerce challenged the law, arguing that it violates employers' free speech rights and obstructs interstate commerce with little or no evidence that it will improve pay equity.[170] On April 30, 2018, a federal district court in the Eastern District of Pennsylvania

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162 N.Y.C. ADMIN. CODE § 8-107(25).

163 *Id*. at § 8-107(25)(d).

164 *Id*. at § 8-107(25)(c).

165 *Id*. at § 8-107(25)(e)(2).

166 "Salary History Law: Frequently Asked Questions," NYCCHR (Oct. 10, 2017), http://www1.nyc.gov/site/cchr/media/salary-history-frequently-asked-questions.page#expectations.

167 PHILA. CODE § 9-1131(2)(a)(i)-(ii).

168 *Id*. § 9-1131(1)(e).

169 *Id*. § 9-1131(2)(a)(i)-(ii).

170 *See* First Amended Complaint, *Chamber of Commerce for Greater Phila. v. City of Philadelphia*, No. 2:17-cv-01548 (E.D. Pa. June 13, 2017); *see also* Tricia L. Nadolny, "Chamber Files New Suit, Leaving City's Wage Equity Law on Hold," PHILA. INQUIRER (June 14, 2017),

granted a preliminary injunction enjoining enforcement of the ordinance that prohibits employers from inquiring about prior salary, finding that such inquiry violates the First Amendment's free speech clause.[171] The court, however, left intact the portion of the provision that prohibits employers from relying on wage history to determine a salary for the employee.[172] Thus, any information an employer obtains through a lawful inquiry cannot then be used lawfully to establish salary, making the decision of limited import. The Chamber's lawsuit may become moot, as legislation has been introduced in the Pennsylvania state legislature that would preempt local equal-pay laws; as of May 2018, that legislation has not yet been taken up for a vote, however.[173]

In addition to New York City and Philadelphia, Chicago,[174] Kansas City (Missouri),[175] Louisville,[176] New Orleans[177] and Pittsburgh[178] have passed bans on salary history inquiries in the public sector. These prohibitions typically track similar state-level legislation as described *supra*. Chicago's executive order, for example, prohibits city departments from requesting or requiring candidates to disclose prior salary as a condition of an offer or employment, and prohibits such departments from engaging in candidate screening based on maximum or minimum prior salary criteria. Pittsburgh's ordinance forbids any city agency from relying on salary history in the hiring process, unless such information is volunteered by the candidate.[179]

The San Francisco Board of Supervisors voted unanimously in June 2017 to ban employers from asking applicants about prior salary history, and Mayor Ed Less subsequently signed the "Parity in Pay

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http://www.philly.com/philly/news/politics/city/chamber-files-new-suit-leaving-citys-wage-equity-law-on-hold-20170614.html.

[171] *Chamber of Commerce for Greater Phila. v. City of Philadelphia*, 2018 WL 2010596 (E.D. Pa. Apr. 30, 2018).

[172] *Id*. An appeal was filed in the case on May 30, 2018. *See Chamber of Commerce for Greater Phila. v. City of Philadelphia*, No. 18-2176 (3d Cir. May 30, 2018).

[173] S. 241, Gen. Assemb., Reg. Sess. (Pa. 2017–18), http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2017&sInd=0&body=S&type=B&bn=241.

[174] CHICAGO EXECUTIVE ORDER NO. 2018-1, "Reaffirmation of Commitment to Gender Pay Equality," (April 10, 2018), *available at* https://d12v9rtnomnebu.cloudfront.net/diveimages/EXEC_ORD_NO._2018-1_gen_20180410095817.pdf.

[175] KANSAS CITY RESOLUTION NO. 180519.

[176] LOUISVILLE ORD. NO. 2018-066.

[177] NEW ORLEANS EXECUTIVE ORDER NO. MJL17-01.

[178] CITY OF PITTSBURGH ORD. NO. 2017-1121.

[179] *Id*.

Ordinance" into law.[180] It applies to all employers in the city, as well as city contractors and subcontractors. The law provides that employers may not "consider or rely on" applicants' salary histories in determining salaries to offer applicants, unless they volunteer the information or salary information is available online, as for city employees, for example. However, employers can still ask applicants about their "expectations with respect to salary."

Most recently, presumably in response to the wave of local salary ban laws, a few states have passed preemption bills prohibiting local legislation on salary history inquiries. On March 26, 2018, Michigan's governor signed an amendment to a 2015 law prohibiting local legislation on salary history inquiries.[181] The law is similar to preemption laws in other contexts, and further prevents local and municipal governments from legislating with respect to the minimum wage and sick leave. As amended, the law reaches more broadly than wage history questions alone, instead curtailing any regulation of "information an employer or potential employer must request, require or exclude … during the interview process."[182] A similar bill prohibiting local regulation of salary history inquiries passed in the Wisconsin legislature on March 22, 2018, and the Governor approved it on April 16, 2018.[183]

The rapid pace at which salary history bills are being introduced nationwide, as well as the countertrend in preemption bills, suggests an important direction in equal pay legislation, as well as a new and burgeoning compliance area for employers to monitor. For this reason, some employers are proactively adopting pay inquiry restrictions for their talent acquisition protocols as a reflection of their commitment to pay equity and, practically speaking, also based on the challenge of complying with varying laws nationally. For example, an employer with operations in New York and Massachusetts, and also localities where no pay nondisclosure law has been enacted, would face the quandary of managing different interview standards and applicant tracking systems for new hire candidates in certain jurisdictions versus others.

J. Other State and Local Laws of Interest

The National Women's Law Center issued a report in June 2018 highlighting the unprecedented level of activity in new state equal pay laws and legislation.[184]

Similar to the wage transparency and anti-retaliation provisions in the laws in California, Maryland, New York, and Washington, Connecticut and New Hampshire have enacted equal pay laws

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[180] S.F., CAL. ENACTMENT NO. 142-17, § 1 (2017), https://sfgov.legistar.com/View.ashx?M=F&ID=5328258&GUID=A694B95B-B9A4-4B58-8572-E015F3120929.

[181] M.C.L.A. § 123.1384.

[182] *Id.*

[183] WISCONSIN ASSEMBLY BILL NO. 748, "2017 Wisconsin Act," (Dec. 19, 2017), *available at* https://docs.legis.wisconsin.gov/2017/proposals/reg/asm/bill/ab748.

[184] Nat'l Women's Law Ctr., "Progress in the States for Equal Pay" (June 2018), *available at* https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/06/Progress-in-the-States-for-Equal-Pay-FINAL.pdf.

that prohibit employers from retaliating against employees for discussing their wages with each other or in general. North Dakota recently passed a law requiring employers to maintain records of employee compensation for the length of an employee's tenure, and to report on these records upon inquiry from the state. Illinois amended its equal pay laws to expand coverage to employers with four or more employees and increase the amount of civil penalties available for equal-pay violations. Delaware, Minnesota, and Oregon now hold state contractors accountable for certifying their compliance with state and federal equal pay laws. Finally, Rhode Island has created a tip line for employees to report violations of the state's gender-based wage discrimination laws.

In addition to the legislation described above, nearly a dozen states either proposed or passed bills to address the pay gap in 2017 and 2018, including Florida,[185] Indiana,[186] Louisiana,[187] Michigan,[188] Ohio,[189] Pennsylvania,[190] and South Carolina.[191] And while there is a clear trend among states to push for greater equal pay protections on a local level, there remains significant opposition to such enactments, particularly from those who argue that the legislation poses a threat to commercial prosperity and business survival.

In addition to the unprecedented volume of new equal pay legislation, state equal pay laws have begun to expand to the issue of public pay gap reporting. A California bill – enrolled in the state legislature on September 13, 2017 but vetoed by the Governor on October 15, 2017 – would have required employers with 500 or more employees to collect and report mean and median wage gap values by job classification or title beginning in 2019.[192] The proposed bill did not provide an enforcement

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[185] FLORIDA SENATE BILL NO. 594, "Discrimination in Labor and Employment," (Oct. 23, 2017), *available at* https://www.flsenate.gov/Session/Bill/2018/594/BillText/Filed/PDF (proposed bill prohibiting opportunity and pay discrimination on the basis of sex, as well as prior salary inquiries).

[186] INDIANA HOUSE BILL NO. 1390 and INDIANA SENATE BILL NO. 93.

[187] LOUISIANA SENATE BILL NO. 117, "Requires that any contractor who enters into a contract with a state entity comply with the Louisiana Equal Pay for Women Act," (Apr. 2, 2018), *available at* http://www.legis.la.gov/legis/ViewDocument.aspx?d=1075632 (proposed bill to expand equal pay protections to employees of government contractors).

[188] MICHIGAN HOUSE BILL NO. 4510, "Elliott-Larsen civil rights act," (Apr. 25, 2017), *available at* http://www.legislature.mi.gov/documents/2017-2018/billintroduced/House/pdf/2017-HIB-4510.pdf.

[189] OHIO HOUSE BILL NO. 180, "Eliminate sex-based disparities in pay," (Apr. 10, 2017), *available at* https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-HB-180.

[190] PENNSYLVANIA SENATE BILL NO. 241, "Amending the act of December 17, 1959 (P.L.1913, No.694)," (January 31, 2017), *available at* http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2017&sessInd=0&billBody=S&billTyp=B&billNbr=0241&pn=0297.

[191] SOUTH CAROLINA HOUSE BILL NO. 3342, "South Carolina State Employee Equal Pay for Equal Work," (Jan. 10, 2017), *available at* https://www.scstatehouse.gov/sess122_2017-2018/prever/3342_20161215.htm.

[192] CALIFORNIA ASSEMBLY BILL NO. 1209, "Employers: gender pay differentials," (Feb. 17, 2017), *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB1209.

mechanism for any reported disparities. Instead, the information reported would have been published on a public-facing website maintained by the California Secretary of State.[193] Critics objected to the law on the basis that wage gap statistics which fail to control for other employee variables, such as skill or experience, are inherently misleading. Aggregate statistics may similarly lack substantial descriptive value, and are vulnerable to influence by extreme outlier values. Proponents, by contrast, noted that the bill was merely one tool to promote greater transparency among large employers and to encourage equal pay accountability. Notably, the bill followed the withdrawal of a proposed federal Department of Labor rule that would have required employers to collect and report employee wage information on the EEO-1 form.[194] The California bill, while less demanding in some respects, implicitly called for employers to follow many of the same collection procedures.

However, a new version of the bill resurfaced in February 2018 that would require California employers with at least 100 employees to annually report certain demographic pay data to the California Department of Fair Employment and Housing (DFEH).[195] Key provisions of the bill include annual reporting of the number of employees by sex, race, and ethnicity within each of ten broad job categories; the number of employees by sex, race, and ethnicity within each of the pay bands "used by the U.S. Bureau of Labor Statistics in the Occupation Employment Statistics survey"; and the number of hours worked by each employee within each pay band.[196] The legislation omits additional statistical reporting requirements that featured in the predecessor bill, such as mean and median pay gap figures. Further, the bill expressly designates information disclosed to the DFEH as confidential exempts such information from public disclosure under the California Public Records Act. As critics have noted, however, the broad job categories on which the reporting requirements are based do not track the California EPA requirement of equal pay for employees who perform "substantially similar" work, and therefore may be misleading in terms of identifying pay equity concerns.[197]What wage reporting laws will ultimately mean for employers beyond the immediate additional compliance costs remains to be seen. A likely outcome, however, is a rise in voluntary wage gap reporting among large employers to counter any unfavorable bottom-line statistics as published by the state, including more granular data analyses. Employers should expect to see similar bills on the horizon in other jurisdictions.

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[193] *Id*.

[194] Neomi Rao, "EEO-1 Form; Review and Stay," Office of Management and Budget (Aug. 29, 2017), *available at* https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf.

[195] CALIFORNIA SENATE BILL NO. 1284, "Employers: annual report: pay data" (2018), https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201720180SB1284.

[196] *Id*.

[197] Erin Connell, Kathryn Mantoan, and Necia Hobbes, *The Coast is Not (Necessarily) Clear: California Seeks to Mandate Pay Data Reporting Modeled on Revised EEO-1 Form Stayed by OMB*, ORRICK'S EQUAL PAY PULSE (May 24, 2018), https://blogs.orrick.com/equalpaypulse/2018/05/24/the-coast-is-not-necessarily-clear-california-seeks-to-mandate-pay-data-reporting-modeled-on-revised-eeo-1-form-stayed-by-omb/.

III. PAY AUDIT AND REGULATORY INITIATIVES

A. Current OFCCP Audit and Enforcement Practices

The Obama Administration made pay discrimination a top priority, and the OFCCP has continued to pursue this policy vigorously in enforcement actions against contractors. Indeed, the agency continues to aggressively prosecute the enforcement actions filed at the end of the Obama Administration. Nonetheless, under the new administration, it is unclear whether the Agency will press forward on a very aggressive compensation and pay equity agenda. Some signs exist that President Trump would be interested in addressing equal pay albeit in a less onerous fashion compared to the past administration. In addition, Ivanka Trump has made several statements decrying the pay gap and OFCCP's efforts until the new Director gets up to speed.

Equal pay has also gained bi-partisan traction at the state level as Republican governors in Massachusetts and Maryland have signed far-reaching equal pay laws.[198] The Obama OFCCP's tactics, which relied heavily upon statistical analysis and expanded its approach to compensation reviews under Directive 307, may change under Republican leadership to mirror those guidelines previously employed by the George W. Bush administration and return to more traditional Title VII analyses.

The Obama administration's OFCCP's focus on equal pay has led to intensive investigation of compensation practices including massive human resources document requests and data demands. Compensation reviews generally consist of interviews with the compensation manager, but may potentially expand to other managers, and at times dozens or even hundreds of employees. The OFCCP will conduct manager interviews in the presence of an organization's in-house and external counsel if requested, but typically insists on completing a random selection of employee interviews during audits without any employer representatives present. Employers can request to know the names of non-manager employees to be interviewed, however, in order to ensure proper notification and debriefing.

Enforcement actions by OFCCP involving systemic pay discrimination have also carried significant payments. In January 2017, LexisNexis settled with OFCCP for more than $1.2 million for systemic pay discrimination claims.[199] OFCCP looked back as far as December of 2012 finding significant differences in pay between men and women doing the same jobs even after factoring in legitimate, sex-neutral factors. The agreement includes back pay and interest for 111 female employees at two locations and more than $45,000 in adjustments to female salaries. LexisNexis further agreed to conduct an annual compensation analysis at two locations.

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[198] *See* Mass.gov, "Governor Baker Signs Bipartisan Pay Equity Legislation" (Aug. 1, 2016), https://www.mass.gov/news/governor-baker-signs-bipartisan-pay-equity-legislation; Maryland.gov, "Equal Pay for Equal Work – Employment Standards Service," https://www.dllr.state.md.us/labor/wages/equalpay.shtml (last visited March 15, 2018).

[199] U.S. Dep't of Labor, "LexisNexis Risk Solutions to Pay Over $1.2M in Back Pay and Interest to 211 Employees After Investigation Finds Pay Discrimination" (Jan. 12, 2017), https://www.dol.gov/newsroom/releases/ofccp/ofccp20170112.

The previous administration closed with a flurry of new enforcement actions and settlements, including aggressively pursuing two large tech companies and a large financial institution within two weeks of each other for actions involving compensation.

- Google Inc. (San Francisco). In a suit against Google, OFCCP is seeking to require the company to provide compensation data and documents for Google's Headquarters as part of a compliance evaluation. If Google fails to comply, OFCCP has asked the court to cancel all of Google's current government contracts and to debar the company from entering into future contacts. In March, an administrative law judge denied the DOL's request for summary judgment saying that the department's request, which included job and salary histories among 38 categories of data, was not reasonable.[200] A hearing before an administrative law judge on the issue of OFCCP's data and document requests was held in May. On July 14, 2017, the Administrative Law Judge issued a ruling denying the bulk of OFCCP's data requests on the grounds that they were not reasonable, but did uphold a more limited request for employee compensation and contact information.[201] The OFCCP has filed an appeal of the ALJ's decision with the Administrative Review Board (ARB).[202]

- Oracle America, Inc. (San Francisco). OFCCP's action against Oracle America, Inc. seeks to remedy discriminatory pay practices via a permanent injunction and lost wages, stock, interest, front wages, salary adjustments, promotions and all other lost benefits of employment and a reform of discriminatory policies. The government alleges that the company systemically paid white male workers more than female, African American and Asian counterparts.[203] In addition, OFCCP has alleged that Oracle discriminated against Whites and African Americans by preferring Asians in the hiring process.

- JPMorgan Chase & Co. (New York). The OFCCP accuses JP Morgan Chase of systematically discriminating against female employees in certain professional positions by compensating them less than their male counterparts. This suit affects at least 93 female employees within their Investment Bank, Technology & Market Strategies unit.[204]

Under the Trump Administration, there have been a few settlements, but no filed lawsuits. Recent cases reflect OFCCP's push into systemic compensation cases in more complex workplaces,

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[200] *See* Order Den. Pl.'s Mot. For Summ. J. at 6, *OFCCP v. Google Inc*., 2017-OFC-00004 (Mar. 15, 2017).

[201] *OFCCP v. Google, Inc*., 2017-OFC-00004 (July 14 2017).

[202] Plaintiff OFCCP's Exceptions to the Administrative Law Judge's July 14, 2017 Recommended Decision and Order, *OFFCP v. Google Inc*., ARB Case No. 17-059 (Aug. 23, 2017).

[203] *See* U.S. Dept. of Labor, "US Department of Labor Sues Oracle America, Inc. for Discriminatory Pay Practices" (Jan. 18, 2017), https://www.dol.gov/newsroom/releases/ofccp/ofccp20170118-0.

[204] *See* U.S. Dept. of Labor, "US Department of Labor Sues JP Morgan Chase & Co. for Discriminatory Pay Practices Against Female Employees" (Jan. 18, 2017), https://www.dol.gov/newsroom/releases/ofccp/ofccp20170118.

including the technology and financial services sectors. These sectors were particular targets during the previous administration. By carrying over the plan for the two research centers, we expect that the new administration will continue the push in auditing and enforcing matters against contractors in these sectors.

B. Regulatory and Guidance Updates

1. Sex Discrimination Regulations

On June 14, 2016, OFCCP unveiled its final sex discrimination guidelines governing covered federal contractors.[205] The OFCCP proposed changes to the rule on January 30, 2015, and the official comment period closed on April 14, 2015, following a two-week extension so that it could take comment on the Supreme Court's pregnancy discrimination decision in *Young v. United Parcel Serv., Inc*.[206] The final rules came six months after the expected date and almost seven years after the agency signaled that it was seeking to update the rules.

The final rules mark a significant rewriting of the guidelines, which were originally published in 1970, and address various legal developments regarding sexual harassment, pregnancy leave, gender identity, and sex stereotyping. The OFCCP attempted to minimize the impact of the final rules by stating that the rules merely enshrine policies already established by the courts and other federal agencies.[207] However, by codifying those principles through notice and comment rulemaking and announcing them with fanfare at the White House,[208] the Obama Administration sent a clear signal that the rule change was an important part of its domestic equality agenda.

The final rule forbids any "employment practice that discriminates in wages, benefits, or other forms of compensation."[209] While this prohibition is somewhat generic, the textual changes from the proposal and agency's discussion of compensation discrimination is enlightening based on the OFCCP's recent aggressive stances on pay disparity. The final rule changes the prohibition on denying "equal wages" to "discrimination in wages," clarifying confusion implicating the Equal Pay Act. In explaining its view of the term "similarly situated," the agency noted it intended to have flexibility in how the term should be used and that it would be case specific. Specifically, the agency stated that, "depending on the unique pay systems and policies of a given contractor, [the analysis] may involve comparing employees

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[205] 81 Fed. Reg. 39108 (final rule).

[206] 135 S. Ct. 1338 (2015).

[207] The regulations are an outgrowth of one of President Obama's early government-related initiatives. Executive Order 13563 required agencies to review their regulations and identify those that could be "more efficient and less burdensome." The Department of Labor identified OFCCP's guidelines through this process. Nonetheless, it took the agency about six years to draft the regulations and then another 18 months to finalize them.

[208] The U.S. Dept. of Labor, "US Labor Department Announces Updated Sex Discrimination Regulations for Federal Contractors" (June 14, 2016), https://www.dol.gov/newsroom/releases/ofccp/ofccp20160614.

[209] 41 C.F.R. § 60-20.4.

in similar, but not necessarily identical, jobs or employees who are similar in terms of level, function or other classification relevant to the contract's workforce."[210] The agency also addressed specific factors that may affect pay. Some commentators requested that the agency add "market forces" and "prior salary" to the regulatory language as factors that may be discriminatory.[211] The agency declined stating that the case law was unsettled and did not support adding a "per se" rule permitting or prohibiting the use of such factors.[212] Rather, the agency settled on evaluating the factors on a case-by-case basis. The analysis also addresses the relevant legitimate factors that contractors may rely upon to explain differences in pay. The agency listed the relevant factors as:

- A particular skill or attribute;
- Education;
- Work experience;
- The position, level or function;
- Tenure in a position; and
- Performance ratings.[213]

The agency states that it would determine whether such factors would be tainted by discrimination or should be included as legitimate factors based on the facts of the particular cases.

On August 24, 2018, the OFCCP unveiled a new directive, Directive 2018-05, which rescinds former Directive 2013-03.[214] Directive 2018-05 leaves unaltered the agency's substantive guidelines concerning prohibited discrimination, but updates its protocol for assessing compensation practices. For example, the Directive specifies that except in cases where the statistical evidence is "exceptionally strong," the agency is less likely to pursue matters involving exclusively statistical disparities, versus those corroborated by anecdotal evidence.[215] The Directive also provides some limited detail on the agency's analytical methodology.[216] However, the Directive also omits references, as under the former Directive, to three key inquiries guiding a compliance officer's investigation with respect to compensation differentials.[217] How precisely these changes will impact agency audits and enforcement actions remains to be seen.

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[210] 81 Fed. Reg. 39127 (final rule).

[211] *Id.*

[212] *Id.*

[213] 81 Fed. Reg. 39128 (final rule).

[214] U.S. DEP'T OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, DIR 2018-05, ANALYSIS OF CONTRACTOR COMPENSATION PRACTICES DURING A COMPLIANCE EVALUATION (2018), available at https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_05.html.

[215] *Id*.

[216] *Id*.

[217] *Compare* DIR 2018-05, *supra* note 207, and U.S. DEPT'S OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAM, DIR 2013-03, PROCEDURES FOR REVIEWING CONTRACTOR COMPENSATION

2. Equal Pay Report and EEO-1 Pay Reporting

The Obama Administration had turned to the OFCCP and the EEOC as its prominent weapons on pay equity. In 2014, the OFCCP issued a Notice of Proposed Rulemaking ("NPRM") for contractors that are required to file EEO-1 reports to file an annual Equal Pay Report. Today, while the Equal Pay Report technically remains on the agenda,[218] the final rule has been essentially mooted by the EEOC's finalizing the EEO-1 form to include compensation information.

Like the OFCCP, equal pay been a priority for the EEOC in its enforcement of Title VII. In 2012, and again in 2016, the EEOC released its Strategic Enforcement Plan (SEP), identifying national priorities of the agency.[219] Enforcing equal pay laws and targeting "compensation systems and practices that discriminate based on gender" were priorities for fiscal years 2013 through 2016.[220] For fiscal years 2017 through 2021, the EEOC extended this priority to cover other types of pay discrimination, including discrimination based on race, ethnicity, age, disability, and "the intersection of protected bases."[221]

In September 2016, the EEOC announced approval of a revised EEO-1 form that would have required certain employers to report aggregate W-2 pay data, as well as hours worked, by gender, race, and ethnicity across twelve pay bands for the ten EEO-1 job categories[222] beginning in March 2018.[223] The job categories, which remain unchanged from the prior EEO-1 form, include broad groupings such as "Professionals" and "Service Workers."[224] On August 29, 2017, however, the Office of Management and Budget (OMB) informed the EEOC that it was initiating a review and immediate stay of the pay data

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SYSTEMS AND PRACTICES (2013) at 7, available at https://www.dol.gov/ofccp/regs/compliance/directives/Dir307_508c.pdf.

[218] 79 Fed. Reg. 46562 (proposed rule).

[219] *See* Press Release, "U.S. Equal Emp't Opportunity Comm'n, EEOC Approves Strategic Enforcement Plan" (Dec. 18, 2012), https://www.eeoc.gov/eeoc/newsroom/release/12-18-12a.cfm; Press Release, U.S. Equal Emp't Opportunity Comm'n, "EEOC Updates Strategic Enforcement Plan" (Oct. 17, 2016), https://www.eeoc.gov/eeoc/newsroom/release/10-17-16.cfm.

[220] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, STRATEGIC ENFORCEMENT PLAN FY 2013–2016, at 8–10 (2012), http://www.eeoc.gov/eeoc/plan/sep.cfm.

[221] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, STRATEGIC ENFORCEMENT PLAN FY 2017–2021, at 8 (2016), https://www.eeoc.gov/eeoc/plan/sep-2017.cfm.

[222] Agency Information Collection Activities: Revision of the Employer Information Report (EEO–1) and Comment Request, 81 Fed. Reg. 5113 (Feb. 1, 2016), https://www.gpo.gov/fdsys/pkg/FR-2016-02-01/pdf/2016-01544.pdf.

[223] Press Release, U.S. Equal Emp't Opportunity Comm'n, "EEOC to Collect Summary Pay Data" (Sept. 29, 2016), https://www.eeoc.gov/eeoc/newsroom/release/9-29-16.cfm.

[224] *See Agency Information Collection Activities: Revision of the Employer Information Report (EEO–1) and Comment Request, supra* note 205.

collection aspects of the revised EEO-1 form.[225] Given this open review and stay of the pay data collection aspect of EEO-1 reporting, employers must comply with the earlier approved EEO-1 by the previous filing date of March 31, 2018.[226] It remains to be seen what will happen to the EEO-1 pay reporting rule.

IV. RESPONDING TO AND DEFENDING AGAINST SHAREHOLDER PROPOSALS

In response to the recent trend of state-enacted equal pay laws and regulations, many companies are now facing shareholder proposals from activist groups and individual shareholders aimed at requiring the company to publicly disclose the percentage "pay gap" between male and female employees, as well as the steps the company is planning to take to rectify the disparity. Technology companies, specifically, have been the target of many recent proposals. In fact, in 2015 and 2016, Arjuna filed shareholder proposals against tech giants including Microsoft, Intel, Amazon, Google, and Facebook, that, if passed, would have required disclosing publicly percentage pay gaps between male and female employees and remediation plans. In response, several companies, including Apple, Intel, and Amazon, released gender pay information, including statistics and remediation plans.[227] These releases largely satisfied the activist funds. Shareholders of other companies, such as Google and Adobe, defeated the proposals and declined to disclose pay data.[228]

In late 2016 the same three activist funds issued a second wave of shareholder proposals, this time targeting prominent U.S. financial institutions for the 2017 proxy season.[229] Consistent with earlier efforts in the technology industry, these demanded disclosure of sex-based compensation data, as well as additional diversity statistics on employee race and gender. Targets included Goldman Sachs, Citigroup, Bank of America, Bank of New York Mellon, Wells Fargo, American Express, MasterCard, and JPMorgan Chase. Pax withdrew several proposals directed at companies that agreed to terms of disclosure, but MasterCard allowed the proposal to go to a vote. Only 7.8% of shareholder votes favored

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[225] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, WHAT YOU SHOULD KNOW: STATEMENT OF ACTING CHAIR VICTORIA A. LIPNIC ABOUT OMB DECISION ON EEO-1 PAY DATA COLLECTION (2017), https://www.eeoc.gov/eeoc/newsroom/wysk/eeo1-pay-data.cfm.

[226] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, QUESTIONS AND ANSWERS: THE 2017 EEO-1 REPORT, https://www.eeoc.gov/employers/eeo1survey/2017-qanda.cfm (last visited July 12, 2018).

[227] Press Release, Arjuna Capital, "Arjuna: Microsoft Is Fifth Tech Giant This Year To Respond To Shareholder Push For Gender Pay Equity" (Apr. 11, 2016) https://arjuna-capital.com/news/arjuna-microsoft-is-fifth-tech-giant-this-year-to-respond-to-shareholder-push-for-gender-pay-equity/.

[228] Press Release, Arjuna Capital, "Alphabet Still Learning the A-B-Cs of Gender Pay Equity" (June 10, 2016) http://arjuna-capital.com/news/alphabet-still-learning-b-cs-gender-pay-equity-sexist-reference-lady-cfo-followed-shareholder-vote/; Letter from Matt S. McNair, Senior Special Counsel, Sec. & Exchange Comm'n, to Michael Dillon, Adobe Systems Incorporated (Jan. 4, 2016), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2016/adamseitchik010416-14a8.pdf.

[229] Laura Colby, "Goldman, Citigroup Targeted by Diversity Activists in 2017," BLOOMBERG (Dec. 6, 2016), https://www.bloomberg.com/news/articles/2016-12-06/goldman-citigroup-in-crosshairs-of-diversity-activists-for-2017.

the proposal, but Pax has said "it's enough to permit the resolution to be refiled next year."[230] In recent months, however, financial services companies have shown increased willingness to publicly disclose information regarding their gender and pay gaps, with Citigroup leading the way in January 2018[231] and several other financial institutions, including Bank of America, BNY Mellon, Wells Fargo, MasterCard, JPMorgan Chase, and most recently, American Express, following suit.[232]

Additional industries, including retail and telecommunications, are now in the sights of activist investors. Arjuna Capital has filed proposals against Starbucks, Nike, The Gap, Costco, and Walmart similar to those it filed against technology companies.[233] Zevin Asset Management, LLC filed a similar proposal against TJX Cos., the owner of T.J. Maxx, Marshalls, and HomeGoods.[234] Telecommunications firms including Qualcomm, Verizon, and AT&T have also been targeted.[235] In addition to seeking gender pay gap information, however, this latest round of proposals also sought pay gap information on race and ethnicity.[236] Arjuna Capital also released its first Gender Pay Scorecard ("GPS") in April 2018.[237] The GPS analyzes quantitative metrics for 33 of the world's largest companies in finance, technology, and retail based on "current gender pay disclosures, performance, and commitments" and assigns each company a grade between A and F.[238] Perhaps unsurprisingly, no company listed in the 2018 GPS received an "A" grade.[239]

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[230] Julie Gorte, "New Opportunities, New Challenges," PAX (Sept. 11, 2017), http://paxworld.com/new-opportunities-new-challenges/.

[231] Laura Colby & Dakin Campbell, "Citigroup Discloses Gender and Racial Pay Gaps, Plans Raises," BLOOMBERG (Jan. 15, 2018), https://www.bloomberg.com/news/articles/2018-01-15/citigroup-discloses-gender-and-racial-pay-gaps-plans-raises.

[232] Leslie P. Norton, "AmEx Agrees to Report Gender Pay Gap," BARRON'S (Mar. 7, 2018), https://www.barrons.com/articles/amex-agrees-to-report-gender-pay-gap-1520455335.

[233] Andrea Vittorio, "Shareholders Ask Retailers to Mind the Pay Gap," BLOOMBERG BNA (Jan. 10, 2017), https://www.bna.com/shareholders-ask-retailers-n73014449531/; "Gender Pay Equity: Costco Latest Retail Giant To Take Action, Following Leads of Starbucks, Nike, and Gap – reports Arjuna Capital," CISION PR NEWSWIRE (Nov. 16, 2017), https://www.prnewswire.com/news-releases/gender-pay-equity-costco-latest-retail-giant-to-take-action-following-leads-of-starbucks-nike-and-gap---reports-arjuna-capital-300557830.html.

[234] *Id*.

[235] Laura Colby, "Goldman, BNY Mellon Bow to Investor Pressure on Gender Pay," BLOOMBERG (Mar. 23, 2017, 4:03 PM), https://www.bloomberg.com/news/articles/2017-03-23/goldman-bny-mellon-bow-to-investor-pressure-on-gender-pay-gap.

[236] Vittorio, *supra* note 216.

[237] Arjuna Capital, Gender Pay Scorecard, April 2018, http://arjuna-capital.com/wp-content/uploads/2018/04/GenderPayScorecard.pdf

[238] *Id.* at 1.

[239] *Id.*

Responding to such proposals raises various concerns for management, including (1) minimizing litigation risk; and (2) presenting an image of social corporate responsibility. Various options exist for responding to and dealing with such proposals, as discussed below.

A. Responding to Shareholder Proposals

Companies that receive shareholder proposals have three main options to respond: (1) omit the proposal from the proxy statement by requesting and receiving a no-action letter from the SEC; (2) informally resolve the matter with the shareholder/activist group that made the proposal; and (3) include the proposal in the proxy statement, along with a recommendation for a "no" vote. These three options are discussed below.

1. No-Action Letters

Many companies that have received shareholder proposals regarding equal pay are seeking to omit the proposals from their proxy statements by requesting no-action letters from the SEC, pursuant to 17 CFR 240.14a-8. Various arguments have been raised by companies seeking no-action letters in this regard, including the following:

- Management Functions. A company may seek to exclude the proposal by arguing that the topic of equal pay is a matter relating to the company's ordinary business operations. (14a-8(i)(7))

- Violation of Proxy Rules. A company may seek to exclude the proposal on the grounds that the proposal violates any of the proxy rules set forth in section 240.14a-9, including that the proposal is vague and indefinite. (14a-8(i)(3))

- Absence of Power/Authority to Implement. A company may seek to exclude a proposal from the proxy report by arguing that the company lacks the power or authority to implement the proposal. (14a-8(i)(6))

- Substantial Implementation. A company may seek to exclude a proposal from the proxy report if it has already substantially implemented the proposal, i.e., by claiming to have 100% pay equality, or by already publicly committing to eliminate any existing pay gap. (14a-8(i)(10))

- Failure to Meet Procedural Requirements. A company may seek to omit a proposal from the proxy statement on the basis that the shareholder presenting the proposal did not meet the eligibility and/or procedural requirements to do so; however, a company may do so only after providing the shareholder with an opportunity to correct the deficiency. (14a-8(f))

The SEC has generally denied company requests for no-action letters to omit shareholder proposals related to equal pay, making these efforts largely unsuccessful.

2. Voluntary Settlement/Disclosure

Given the lack of traction from the SEC in being permitted to omit such proposals from their proxy reports, many companies are instead choosing to resolve such matters informally with the activist

shareholders by voluntarily releasing gender pay information claiming 100% equity/near-equity in terms of pay structure, and/or making a public commitment to eliminate any pay disparity within a certain timeframe with clearly delineated steps to achieving that goal, in exchange for the shareholder and/or activist group withdrawing its proposal on the topic.

3. Inclusion in Proxy Statement with Recommendation for "No" Vote

Alternatively, companies may choose to present the proposal, along with a recommendation for a "no" vote, on their proxy statements. To date, all proxy statements to include such a proposal have recommended "no" votes to release the data, citing other and better sources of information demonstrating a commitment to gender diversity. Such data might include workplace demographic data, as well as data regarding diversity and inclusion efforts.

B. Potential Exposure

1. Liability Under 17 CFR 240.14a-9 – False or Misleading Statements

When responding to a shareholder proposal, companies must take care to avoid potential liability that can arise from the content of the response. For example, if a company chooses to include in its proxy statement any explanation as to why it recommends a "no" vote on the shareholder proposal, the company could face liability under section 14a-9 based on the contents of the disclosures. Section 14a-9 provides that the content and reasons contained in a proxy statement cannot include any material misrepresentation or omission. In determining "materiality," the question posed is whether a reasonable shareholder could consider the matter important in deciding how to vote. Additionally, the standard for liability under section 14a-9 is probably negligence, not scienter. Accordingly, a plaintiff need not show that the misstatements were made with an intent to deceive, manipulate, or defraud the shareholders in order to prove liability. Instead, lesser misrepresentations can be sufficient to establish liability, such as misleading statements or statistics that misrepresent the existence and/or scope of any pay disparity.

2. Liability Under 17 CFR 240.10b-5 – Employment of Manipulative and Deceptive Devices

Companies may also face liability under 10b-5 based on what they choose to disclose in a pay equity report. Section 10b-5 broadly prohibits the making of any untrue or misleading statements or omissions as to material facts in connection with the purchase or sale of any security. A company could face liability if it chooses to disclose information on its pay equity statistics, policies, and/or future goals or plans to address and eliminate any existing disparity. Accordingly, the contents of any such disclosure must comply with the requirements of 10b-5 to be accurate, complete, and not misleading. Liability under 10b-5 is harder to establish than under 14a-9, given that it requires a finding of intentional fraud or deceit. However, a company must still exercise care to ensure that no inaccurate or misleading statements or omissions are made and may have a duty to disclose and/or correct any prior statements that were misleading.

C. Practical Recommendations

A company can take various steps to protect itself from such activist proposals or, at the very least, to be prepared to respond to such a proposal. First, a company should conduct an audit of its

employees' pay data to determine if any disparities exist and, if so, whether the disparities can be justified by factors other than gender. If a disparity is identified, the company should take steps to correct it.

After conducting such an audit, a company must consider whether to release the results of the audit, either in full or in part. When doing so, special consideration must be given to preserving privilege, to the extent it exists, as discussed more fully in Section V.C. below. Determinations will depend on each company's particular balance of minimizing litigation risk against demonstrating social corporate responsibility.

V. PAY AUDITS

In response to the increased regulatory, legislative, and litigation focus on equal pay, including the trends of pay transparency and the public disclosure of pay data, many employers have adopted, or are considering adopting, more robust processes to monitor compensation. Chief among these efforts are pay audits. These audits seek to determine whether the company or some subdivision has either a pay gap or, according to one or more potentially applicable legal standards, a pay equity problem. Pay gap audits – attempting to determine the ratio between the compensation paid to male and female employees – are done for a variety of reasons, including by companies considering a public disclosure.[240] A recent U.K. law makes such disclosures mandatory, requiring employers with 250 or more employees to publish certain statutory pay gap statistics on an annual basis.[241] Those statistics include mean and median pay gap values for compensation and bonuses, as well as the respective proportions of men and women in an employer's workforce that received bonus payments.[242] Employers also conduct pay equity audits for various reasons, but most often to assess risk from litigation or enable legal counsel to provide informed advice about forward-looking compensation practices. This section gives an overview of some of the more common types of pay audits, and seeks to provide general guidance and practice tips for developing and conducting such audits. The best approach for a particular company will depend on a host of factors, including the impetus for the pay audit, the presence of threatened or ongoing litigation, and the particular business needs that guide the company's compensation practices.

A. Pay Gap Audits

Employers contemplating a public statement or disclosure about their pay data first need to determine what their data shows. Most often, employers do this through a privileged analysis to determine whether or not they have a "pay gap." Generally, these audits are nationwide, although pay gap audits can be conducted on one or more subsets of a company's employee population.

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[240] Although pay audits most often address gender-based compensation differences, they can be performed to examine pay disparities between any two groups of employees (e.g., different races, ethnicities, *etc.*).

[241] Advisory, Conciliation and Arbitration Service and Government Equalities Office, "Gender Pay Gap Reporting: Overview" (Feb. 22, 2017), https://www.gov.uk/guidance/gender-pay-gap-reporting-overview.

[242] *Id.*

Because the goal of such an audit is to compare the average earnings of women with the average earnings of men, these types of audits typically do not attempt to control for all variables that may legitimately impact pay (*e.g.*, choice of specialty or role within the company). Of note, several financial services companies in early 2018 publicly reported their pay gap results as follows:

Financial Services Firm	Female average salary compared to males	Ethnic minority average salary compared to Whites
Citi Group	99%	99%
Bank of America	99%	99%
MasterCard	99%	Not reported
Wells Fargo	99%	99%
BNY Mellon	99%	99%
JP Morgan	99%	99%

Particularly if an employer is considering a public disclosure of pay gap statistics, it is important that the analysis and results be accurate and reliable, and that they are clearly distinguished from pay equity analysis based on regression modeling more likely subject to an attorney/client privilege protections (as discussed in the section below). Accordingly, a best approach is to work with an experienced statistician or labor economist to conduct the statistical analysis. It also is important to ensure the underlying data on which the analysis is based is complete and accurate. Particularly in cases where the underlying data comes from more than one source, an experienced statistician or labor economist can help reconcile such information into a usable database, including reconciliation of current and historical data pulls.

B. Pay Equity Audits

Pay equity audits – which seek to assess a company's pay practices against one or more potentially applicable legal standards or government agency approaches – are significantly more complicated than pay gap analyses. The most common type of pay equity analysis is a statistical model using regression factors to compare the pay of groups of employees. In some cases, individual, or "cohort," comparisons also are used. Pay equity audits compare earnings of men and women or of other protected groups after controlling for a robust set of variables that impact pay. They aim to determine whether comparable employees (who, depending on the applicable law or jurisdiction, could be "similarly situated" employees, or employees who perform "equal" or "substantially similar" work) are nevertheless paid unequally. Accordingly, a critical first step in any pay equity analysis is determining which employees to compare to one another.

In most cases, and particularly for jobs involving specialized, unique and advanced skill sets, aggregating dissimilar employees into a single statistical model will yield invalid results. Thus, in determining the appropriate employee groupings, it is imperative to identify upfront who appropriate comparators are, taking into account the myriad state and federal laws that may define related but non-identical standards. Overreliance on factors such as job title or level to identify comparators could lead to invalid results and generate false positives, if not every employee in the company with the same job title and level is truly doing the same type of work on projects of comparable difficulty and importance to the company. For this reason, courts have regularly rejected analyses that rely uncritically on job title alone

to identify comparators. A more nuanced analysis is generally needed. In some cases, employers may find their jobs are so specialized and unique that comparable groups large enough for statistical analysis do not exist, and a meaningful statistical analysis is not possible.

In addition to identifying appropriate comparator groupings, a pay equity analysis also must identify and incorporate legitimate factors that could explain pay disparities. Potential examples may include time in company, time in level, organization, performance rating, or prior experience. An experienced statistician or labor economist can assist in determining which variables correlate with pay, and should be included in the model. A pay equity analysis may be subject to criticism if it omits relevant variables, or if variables that are included are later alleged to be biased or discriminatory themselves (*i.e.*, "tainted" variables). Accordingly, carefully analyzing and determining which factors to include in an analysis is critical. It is also important to determine whether there are legitimate determinants of pay in the company's compensation system that cannot be reduced to numeric values (*i.e.*, are nonquantifiable), and thus cannot be accurately captured by or controlled for in a statistical model.

As with pay gap analyses, the data on which any analysis will be based must be complete and accurate. Errors or gaps in the underlying data set, which typically includes information pulled and aggregated from various sources, can lead to inaccurate or unreliable results. Accordingly, any questions or uncertainties about the underlying data should be addressed and reconciled prior to conducting an analysis.

C. Establishing and Preserving Attorney-Client and Attorney Work-Product Privileges

In order to preserve attorney-client privilege and attorney work-product protections, employers typically conduct pay analyses pursuant to the direction of legal counsel. As the Supreme Court has recognized, protecting these privileges is important to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[243] Retaining outside counsel to direct the analysis – including the work of retained labor economists or statisticians – encourages candid discussions about their compensation practices, and allows exploration of a wider range of possible models without concern that those explorations may later be subject to discovery in any future litigation, and/or taken out of context.

Retaining outside counsel to direct pay audits, rather than relying solely on their in-house teams, also sidesteps arguments about whether in-house counsel are functioning in a business role, or providing advice for a "business" and not a "legal" purpose, and thus are operating outside the scope of the privilege. The engagement letters for these retentions may make clear that legal advice is being sought from outside counsel, and confirm that counsel are being retained so that they can use their legal skills and expertise to provide legal advice to the company. Any third-party experts retained by outside counsel may in turn work under a retention agreement that specifies that counsel will direct the analysis to be done, in service of counsel's formulation of legal advice.

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[243] *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981) ("The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.").

Pay equity audits may also fall under the ambit of protected work product, if they are done "in anticipation of litigation."[244] Attorney work product is a qualified privilege only, however, and the law in many jurisdictions is unsettled regarding whether litigation is "anticipated." Nevertheless, reliance on both attorney-client privilege and attorney work product is advisable for purposes of encouraging candid discussions about compensation practices, identifying potential pay disparities, and determining appropriate remedial steps when needed.

In addition, steps should be taken by employers conducting audits to ensure that appropriate internal Human Resources, managers and other professional adopt the practice of labeling emails, documents, instant messages and other correspondence related to an audit as "Attorney/Client Privileged & Confidential; Attorney Work Product" or similar wording. Appropriate care should also be taken to ensure that in-house lawyers distribute advice-based audit communications instead of permitting employees to do so, or to forward same indiscriminately to others in the firm. While this approach should not be overused, or used incorrectly, the absence of this discipline can call into question whether key audit-related communications and underlying analyses are discoverable.

D. Interpreting the Results and Determining Next Steps

When statistically significant disparities are discovered in either a pay gap audit or pay equity audit, careful consideration of next steps is warranted. Doing nothing in the face of observed and unexplained disparities could potentially increase legal risk, given an employer's knowledge of the disparities. Accordingly, many employers seek to investigate and better understand the causes of any observed disparities, and may ultimately decide that pay adjustments are appropriate. At the same time, reflexively adjusting compensation before considering whether legitimate factors –including factors that may have been overlooked in the initial model, or may not be susceptible to statistical modeling – explain the observed differences is rarely the best course of action.

Employers can take one of several approaches in response to a pay gap audit. If the analysis does not show any significant disparity, employers may choose to publicize the results. It is important to first confirm the accuracy and robustness of the analysis, however, as highlighted above – particularly if the employer is a publicly-traded company subject to SEC oversight. If the analysis does indicate disparities, the employer may want to consider drilling down via a more robust pay equity analysis that – unlike a nationwide pay gap audit – endeavors to control for the variables that legitimately impact pay.

The results of an in-depth pay equity audit also present employers with several options. Most employers focus on those divisions or segments of the company, if any, in which statistically significant pay disparities are identified. At this point, employers may begin by taking another look at the variables included in the initial model. The presence of a statistically significant disparity simply means that the difference is unlikely to have occurred by chance, and only suggests a pay equity problem if the model appropriately controls for every variable that plays in to determination of pay. Previously omitted, legitimate variables – for example, length of service in a particular department or on a particular product team – may have further explanatory power. Cohort analyses that compare two or more employees who the initial model treated as comparators may bring to light other nondiscriminatory factors that legitimately impact pay and explain seeming disparities.

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[244] FED. R. CIV. P. 26(b)(3).

Next steps may also involve determining whether there are any outliers be they female or male, highly compensated or not – that could have skewed the analysis. For example, a single employee who was "red circled" – *i.e.*, who chose to move to a lower-level role within the company, but who was not required to take a corresponding pay cut – can create the appearance of a problematic disparity when, in fact, there is a legitimate explanation for the disparity. This is particularly true where the groups of employees being compared to one another are relatively small. Understanding the sources of any outlier compensation can therefore be important in determining how to proceed.

A prudent employer may also want to look more broadly at the policies or practices that may have caused any observed disparity, in order to mitigate risk going forward. This may include evaluating the performance management or evaluation systems that impact pay, and standards for promotion, to determine whether these are being consistently applied across the company. Another heavily debated topic – and one which many employers opt to review – are practices for determining starting pay, whether of entry-level hires or lateral recruits. Additionally, employers may want to consider making targeted and appropriate pay adjustments, which must take the form of increasing the pay of one or more individuals (rather than "levelling down"). Making pay adjustments may raise several legal implications, as discussed in more detail below in Section V.E. Sustained inaction as to persistent unexplained disparities, however, can lead to avoidable risk for the organization, warranting consideration of awarding pay increases to affected employees at some standardized frequency. Conducting this process apart from an organization's typical year-end performance review and related bonus determination cycle may be helpful to ensure that competitive merit-based pay decisions are separated from equity-based pay increases.

Finally, employers can use the lessons learned from a pay equity audit to inform best practices going forward. In addition to evaluating policies and practices for determining compensation, employers are well-advised to renew their focus on documentation and record-keeping regarding pay decisions. The legitimate factors that inform an individual's starting salary or adjustments thereafter can and should be recorded, so that the determinants that impacted pay can be reviewed if and as needed.

E. Legal Implications of Resulting Pay Adjustments

Making pay adjustments following a pay equity study to only females and people of color ("POC") identified as negative outliers, excluding white male negative outliers, raises several legal implications. A likely plaintiff(s) would be a white male employee or a group of white male employees who were determined to be negative outliers with no legitimate explanation for their lower pay but did not receive a pay adjustment. The allegation under such a scenario would be that making adjustments to only females and POC, while excluding white males, would constitute actionable discrimination under either or both of the Equal Pay Act of 1963 ("EPA") or Title VII.[245]

[245] These claims are not theoretical. *See e.g.*, *Rudebusch v. Hughes*, 313 F.3d 506, 513 (9th Cir. 2002) (class of white male professors sued university-employer under Title VII but not the EPA, challenging one-time base pay adjustments given to certain women and minority faculty by Northern Arizona University in an effort to achieve pay equity after a jury finding that a manifest imbalance existed with respect to pay of women and minority faculty); *Maitland v. Univ. of Minnesota*, 155 F.3d 1013 (8th Cir. 1998) (male university faculty member sued university under Title VII challenging implementation of consent decree that settled a gender discrimination class action that provided for

As further detailed below, there is a risk of liability for a company if it chooses to provide pay adjustments to female and POC negative outliers but exclude white male negative outliers. Moreover, attempting to defend that scenario if challenged would also require the company to admit that manifest imbalance in the pay of females and POC and white males. That admission could have collateral consequences for litigation by those adjusted arising from past pay differences.

1. Legal Risks Under the EPA

A male plaintiff who did not receive a salary adjustment could seek to establish a *prima facie* case of EPA discrimination by comparing his unadjusted wage to the adjusted wage of a woman who works in a job requiring equal skill, effort and responsibility under similar working conditions. The company would then need to establish one of the four articulated affirmative defenses under the EPA. The first three defenses (seniority system, merit system, system which measures earnings by quantity or quality of production) would be inapplicable. And several courts have held the fourth affirmative defense (a differential based on any other factor other than sex) to be inapplicable under similar circumstances.[246]

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the distribution of three million dollars in salary increases to women); *Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 674 (4th Cir. 1996) (five male professors challenged pay raises under Title VII that university gave to its female faculty based on a voluntary salary equity study conducted at the university).

[246] *See Bd. of Regents v. Dawes*, 522 F.2d 380, 384 (8th Cir. 1975) (holding that university violated the EPA when it increased female teachers' salaries via formula in an effort to guard against EPA violation, but failed to apply the formula to male teachers: "[W]hen a University establishes and effectuates a formula for determining a minimum salary schedule for one sex ..., it is a violation of the Equal Pay Act to refuse to pay employees of the opposite sex the minimum required under the formula."); *Volpe v. Nassau Cty.*, 915 F. Supp. 2d 284, 295 (E.D.N.Y. 2013) (analyzing payments made via settlement agreement made to females only in a particular job role: "Although under no obligation to make backpay or other types of payments to any PCOs or PCOSs when they chose to remit such payments to female PCOs or PCOSs to settle the Ebbert case, once they elected to pay the females, those payments had to be applied to both sexes equally."); *Klask v. Nw. Airlines, Inc.*, 1989 WL 308010, at *5 (D. Minn. Aug. 28, 1989) (rejecting defendant's "factor other than sex" defense as a matter of law where defendant made payments to female cabin attendants to equalize their pay with another category of employees pursuant to a court judgment, but failed to do so for male cabin attendants). *But see Ende v. Bd. of Regents of Regency Universities*, 757 F.2d 176, 177 (7th Cir. 1985) (holding that the fourth affirmative defense could apply in circumstances where an employer increases the salaries of women to "bring the women to a salary level they would have reached in ordinary course if they had been men and not subjected to sex discrimination" and where "[a]pplying it to men would only serve to continue the discriminatory differential, albeit at a higher level of compensation."). *Ende* would be distinguishable provided that there has been no finding that women would have reached the "proper" salary level had they been men. Moreover, unlike in *Ende*, increasing the salary of male negative outliers would not "continue the discriminatory differential," it would simply bring them into alignment. Finally, relying on this case would be tantamount to admitting that women are underpaid because of discrimination based on their gender, which of course has a whole host of other consequences.

Unlike Title VII, there is no "affirmative action plan" defense to liability available under the EPA. Any defense under the EPA must be based on a factor other than sex, and, as discussed below, asserting the "affirmative action plan" defense by its nature admits that a manifest imbalance in pay exists with respect to females as compared to males. Thus, there would be a risk of liability pursuant to the EPA.[247]

2. Legal Risks Under Title VII

A white male plaintiff who did not receive a salary adjustment would seek to establish a *prima facie* case of discrimination by pointing to the decision to give women and POC the pay adjustment while excluding similarly situated white men. The burden would then shift to the company to articulate a nondiscriminatory rationale for its decision. "The existence of an affirmative action plan provides such a rationale."

Affirmative action plan defenses are analyzed under the analytical framework of *Johnson/Weber*, pursuant to which an employer defending an affirmative-action plan against a Title VII reverse-discrimination challenge needs to show that (1) there is a "manifest imbalance" in a traditionally segregated job category and (2) the plan does not "unnecessarily trammel" interests of adversely affected third parties.[248]

In order to determine whether the company can, as a legal matter, assert the existence of an affirmative action plan defense, one must first determine whether, in fact, the contemplated pay adjustments constitute an affirmative action plan.[249] If the pay adjustments are considered an affirmative action plan, then the affirmative action defense would likely be analyzed under *Johnson/Weber*; if not, a more stringent "strong-basis-in-evidence" standard applies.[250]

Affirmative action plans are "intended to provide ex ante benefits to all members of a racial or gender class."[251] Plans intended to provide "make-whole relief" and which are intended to provide "ex

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[247] With respect to damages, U.S.C. § 216(b) provides that recovery for an EPA violation consists of the amount of underpayment and "an additional equal amount as liquidated damages." However, "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [EPA], the court may, in its sound discretion" reduce the award of liquidated damages (but not the underlying damages award). 29 U.S.C. § 260. There is no statutory authority for an award of damages for emotional distress, pain and suffering, or lost opportunity. There is also no provision permitting punitive damages for willful violations.

[248] *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616 (1987); *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

[249] *United States v. Brennan*, 650 F.3d 65, 97 (2d Cir. 2011) ("[T]o determine whether a voluntary, private, race- and sex-conscious employer action is eligible for the *Johnson/Weber* defense, courts should ask whether the race- and sex-conscious action constitutes an affirmative action plan at all.").

[250] *Ricci v. DeStefano*, 557 U.S. 557 (2009)

[251] *Brennan*, 650 F.3d at 104.

post benefits to specified individuals who have suffered discrimination" are not qualifying "affirmative action" plans for purposes of the *Johnson/Weber* defense. Here, the company would not be providing retroactive or make whole relief, instead it would be providing ex ante benefits to all women and POC who are negative outliers. Thus, the contemplated pay adjustments would likely be considered "affirmative action" plans subject to the *Johnson/Weber* analysis.

Depending on the extent of the statistical variation between the pay of females and POC versus white males found in the study performed by the company, there could be an argument that the manifest imbalance factor of the *Johnson/Weber* analysis would be satisfied. However, this is a question of fact and would depend on a number of factors, including whether all variables were accounted for by the regression analysis. In litigation over whether an employer can rely on the affirmative action plan defense, white males would argue that important variables were omitted from the multiple regression analysis and as such the study is not sufficient to establish manifest imbalance as a matter of law. At the very least, the company would have a hard time succeeding on a motion for summary judgment with respect to this issue.[252] Moreover, in order to defend on the basis of an affirmative action plan defense, the company would have to admit and assert that a manifest imbalance in pay exists between white men and women and POC, with multiple collateral consequences associated with that kind of admission. Thus, there would be a risk of liability pursuant to Title VII and the assertion of the affirmative action plan defense could have adverse consequences.[253]

[252] *See Smith*, 84 F.3d at 677 ("Given the number of important variables omitted from the multiple regression analysis, and the evidence presented by the appellants that these variables are crucial, a dispute of material fact remains as to the validity of the study to establish manifest imbalance.").

[253] Although the one-time pay adjustments could pass muster pursuant to an affirmative action defense (depending on the facts), choosing not to adjust salaries of white male outliers could lead to liability in the future. White males who are paid less than similarly situated POC and females may have a cause of action for pay bias under Title VII. Thus, failing to adjust the salaries of underpaid white males could lead to a situation in the future where white men in the company are underpaid as compared to women and POC, which could lead to a finding of reverse-discrimination. *King v. Acosta Sales & Mktg., Inc.*, 678 F.3d 470, 475 (7th Cir. 2012).

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Best Practices for Combating Sex-Based Harassment in the Legal Profession

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THE PROBLEM OF SEX-BASED HARASSMENT AND THE NEED FOR ZERO TOLERANCE

In 1992, the American Bar Association, in response to an effort spearheaded by the ABA Commission on Women in the Profession, passed a resolution to work to eradicate sex-based harassment in the legal profession. The ABA recognized at the time that sexual harassment was a "serious problem" in the legal profession, and elsewhere.[1] Twenty-four years later, on August 8, 2016, the ABA House of Delegates voted to amend the definition of professional misconduct under Model Rule 8.4 to include harassment and discrimination on the basis of protected

characteristics, such as sex.[2] The Model Rules are, of course, nonbinding and are "promulgated by the ABA as a model for states to use as they establish or amend their own ethics rules,"[3] and are but one effort to address the continued prevalence of sex-based harassment in the legal profession. Still, adoption of Rule 8.4(g) recognizes the realities of discrimination and in particular, sex-based harassment, in the legal profession and provides a framework for victims that may be more accessible than many of the state rules (and antidiscrimination laws) that came before it.

Despite the ongoing efforts of the ABA and the legal community to address this issue, sex-based harassment in the field of law continues to persist.[4] Statistical data in employment, educational, and professional settings, as well as substantial anecdotal evidence, reveal that a significant number of lawyers and legal professionals have experienced some form of sex-based harassment in their careers. While sex-based harassment continues to take the traditionally recognized forms of overt inappropriate comments and actions, it also exists as often-unrecognized micro-inequities resulting from conscious and unconscious biases. These behaviors, even if they do not create legal liability or subject the offending attorney to disciplinary action, still perpetuate inequality and negative stereotypes that discourage women from remaining in the profession and taking on leadership roles, and ultimately, diminish the prestige of the legal profession.

Women represent approximately 45 percent of associates in private practice, but make up only 21.5 percent of non-equity partners and only 18 percent of equity partners—only 2 percent higher than percentages held more than a decade ago—and only 24.8 percent of general counsel at Fortune 500 companies.[5] Now that close to 50 percent of law school graduates are women,[6] how is it possible that the number of women holding top legal jobs remains so low? A variety of factors account for the lack of progress, but a major reason is that women *still* do not feel

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welcomed or valued in many legal work environments, and continue to be deterred and undermined by inappropriate advances and sex-based harassment.

Although studies have shown that sex-based harassment, through training and policy enforcement, is less reported today than in 1992,[7] data and anecdotal accounts demonstrate that harassment still is a major problem for the legal profession.[8] A significant percentage of female lawyers and female court personnel continue to experience or observe sexual harassment,[9] including sexual propositions, lewd comments, and physical groping.[10] Depending on the study or survey cited, as many as 50 percent of female lawyers report experiencing sexual harassment in their present or previous jobs,[11] and nearly three-quarters of women lawyers believe harassment is a problem in their workplace.[12] Taking into account underreporting and fear of retaliation, the numbers likely are much higher.[13] The psychological costs experienced by victims of sex-based harassment, such as anxiety, depression, lowered job satisfaction, and other stress-related conditions, are real and severe.[14]

The legal profession presents unique challenges to the problem of sex-based harassment.[15] Law firms (small, mid-size, and large), corporate counsel, legal services organizations, and even military practice[16] rely on those in leadership at the organization to set the tone on sexual harassment policies and to monitor relationships that, if unchecked, could permit sex-based harassment to go unreported and unaddressed. Those structures, as well as other impediments, can make it difficult for victims of sex-based harassment to seek redress.

The power structures in firm partnerships often perpetuate sex-based harassment by shielding harassers and silencing victims. There are far more male partners receiving higher pay and more lucrative assignments than women partners, and women remain tokens on management and compensation committees.[17] Being in a weaker position to start with, victims often do not

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report harassment because the harasser may be the victim's direct manager, mentor, or a key figure in the firm, and because human resource departments, if they exist at firms, often have little or no autonomy. Given the advantages of maintaining a predominantly male "boys club" of partners, it is not surprising that male partners have a vested interest in protecting each other and turning a blind eye to instances of harassment.[18] In a recent study by Major, Lindsey and Africa on partner compensation in the Am Law 200, it was revealed that approximately 24 percent of partners surveyed felt that male "cronyism" contributed to the assignment of work and origination credit.[19] Indeed, firms frequently fall short when investigating or punishing harassers, particularly if the offender is a "rainmaker" or is in a firm leadership position.[20]

Compounding the problem, it is quite common for the victim to be asked to leave the firm after a complaint or an action has been brought. Not unlike rape cases, the victims of sexual harassment become the pariahs—and their own behavior suspect.[21] Often, harassment victims are abandoned by fellow associates or partners, their billable time drops off, and they begin to fail at the firms at which they previously had succeeded. It is common for victims to settle claims under strict confidentiality, and to depart without references or another position secured. Due to preferences and practices of many firms, equivalent lateral positions may be difficult to find and frequently come with restrictions or setbacks to advancement or partnership tracks.[22] Weighed against the stigma, including damage to career and partnership prospects, many opt not to give their employer a public opportunity to blame the victim by bringing a claim.[23]

In addition, binding arbitration clauses in legal employment and partnership agreements are on the rise, making a public lawsuit less of a threat. Without public accountability for the firm and named partners, law firms have little incentive to have reasonable polices (some firms have none), or to enforce them

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to protect victims and punish perpetrators. Law firm partners have an additional hurdle when bringing a claim against a law firm, as Title VII generally protects employees, not partners, from workplace discrimination.[24]

Even when employees do pursue their claims, the courts rarely are a refuge. Unfortunately, there are instances where judges have expressed reluctance to police their own profession in matters they think should be handled internally.[25] Furthermore, their own personal biases, along with gender, age, and political affiliation, can greatly affect the outcomes of sexual harassment cases, usually with negative outcomes for plaintiff victims.[26] This is to say nothing of the public shaming that so frequently accompanies public discussion of sex-based harassment lawsuits.

The persistence of sex-based harassment in the legal profession is not without its costs to employers as well. These costs include decreased employee morale and productivity, increased employee turnover, impaired recruitment, loss of reputation, and legal liability.[27] Indeed, the cost of sex-based harassment to employers remains high. In January 2016, a Los Angeles jury awarded Minakshi Jafa-Bodden, a female lawyer harassed by yoga guru Bikram Choudhury, $924,500 in compensatory damages and $6.4 million in punitive damages.[28]

Whereas employers in general are guilty of minimizing women's complaints of harassment, law firms in particular, and the profession as a whole, have been slow to set up proper systems for reporting, training, and dispute resolution in order to combat the problem.[29] What we do know is that sex-based harassment perpetuates the submissive status of women, decreases productivity, and is costly for both employers and employees.[30] It therefore is in the best interest of legal employers to reduce, correct, and prevent problems of sexual harassment before the harassment reaches the standard of "severe or pervasive"[31] actionable under the law,[32] and to instead address all forms of improper sex-based conduct.

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As lawyers, our continued ambivalence, and at times, delinquency, in this area is unacceptable. It is our collective duty as a profession to make sure that we are setting the standard for safe and welcoming workplaces, and to do everything we can to combat sexual harassment. Reducing instances of harassment and making the legal workplace a more hospitable one for women is a win-win for retaining talented and successful women lawyers. It is time for the legal profession to take a hard look at itself, and to adopt a zero tolerance approach to sex-based harassment.

Endnotes

1. ABA House of Delegates, Recommendation 117 (Feb. 1992).
2. Model Rules of Prof'l Conduct R. 8.4(g) (2016); *see also* http://www.americanbar.org/news/abanews/aba-news-archives/2016/08/annual_meeting_20161.html (video of Aug. 8, 2016, meeting of House of Delegates) (last visited Feb. 28, 2017).
3. Hon. Louraine C. Arkfeld, *Amending Rule 8.4 of the Model Rules of Professional Conduct*, 1 ABA Voice of Experience, no. 7, *available at* https://www.americanbar.org/publications/voice_of_experience/20160/july-2016/amending-rule-8-4-of-the-model-rules-of-professional-conduct.html (last visited Feb. 28, 2017).
4. Janet E. Gans Epner, *Visible Invisibility: Women of Color in Law Firms*, ABA Comm'n on Women in the Profession 10 (2006), https://www.americanbar.org/content/dam/aba/marketing/women/visibleinvisibility.authcheckdam.pdf (finding that between 47 and 49 percent of women reported being subjected to harassment while working in a law firm setting).
5. ABA Comm'n on Women in the Profession, *A Current Glance at Women in the Law* 2 (January 2017), https://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_january2017.authcheckdam.pdf; Lauren Stiller Rikleen, *Women Lawyers Continue to Lag Behind Male Colleagues: Report of the*

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Ninth Annual NAWL National Survey on Retention and Promotion of Women in Law Firms, Nat'l Assoc. of Women Lawyers (October 2015), http://www.nawl.org/p/cm/ld/fid=506 [hereinafter 2015 NAWL Survey].

6. ABA Comm'n on Women, *supra* note 5.
7. Amanda Shelley, *Sexual Harassment Trends in the Legal Industry: Policy Enforcement & Targeted Sexual Harassment Training Are Key*, The Network Blog (Nov. 6, 2014), https://www.tnwinc.com/10538/sexual-harassment-training-and-trends-legal-industry/.
8. *See e.g.*, Chechelnitsky v. McElroy, Deutsch, Mulvaney & Carpenter, LLP, No. 01777 (S.D.N.Y. Mar. 5, 2015); Jane Roe v. The Law Offices of Adelson, Testan, Brundo, Novell & Jimenez, Corp., No. BC560465 (L.A. Sup. Ct. C.D. Oct. 14, 2014); Marchuk v. Faruqi & Faruqi, LLP, et al., No. 01669 (S.D.N.Y. Mar. 13, 2013); Lauren Stiller Rikleen, *Solving the Law Firm Gender Gap Problem*, Harv. Bus. Rev., Aug. 20, 2013; Illinois Attorney Registration and Disciplinary Commission, *In re* Paul M. Weiss, Commission No. 08 CH 116 (attorney disbarred after being found to have engaged in criminal conduct of a sexual nature against women, including employees), https://www.iardc.org/rd_database/rulesdecisions.html; *In re* Depew, 237 P.3d 24, 26 (Kan. 2010), *reinstatement granted*, 284 P.3d 279 (Kan. 2012) (lawyer temporarily suspended for sexual harassment of at least five female district court employees); *see also* sources cited *infra* notes 12–15.

9. *See* Women Lawyers of Utah, *The Utah Report: The Initiative on the Advancement and Retention of Women in Law Firms* (Oct. 2010), http://ms-jd.org/files/wlu_report_final.pdf ("37% of women in firms responded that they experienced verbal or physical behavior that created an unpleasant or offensive work environment[, and] 27% of the 37% indicated that the situation became serious enough that they felt they were being harassed (approximately 10% of women in firms). The vast majority (86%) of those reporting harassment identified sex as the basis for the harassment."); ABA Comm'n on Women in the Profession, *The Unfinished Agenda: Women and the Legal Profession* 18–19 (2001) (citing survey results indicating that one-half to two-thirds of women

lawyers experienced or observed sexual harassment); Audrey Wolfson Latourette, *Sex Discrimination in the Legal Profession: Historical and Contemporary Perspectives*, 39 Val. U. L. Rev. 859, 894 (2005); Martha Neil, *Hidden Harassment: Law Firms and Disciplinary Authorities Look for Ways to Fight Sexual Misconduct*, 92-Mar. A.B.A. J. 43 (2006); Patricia W. Hatamyar & Kevin M. Simmons, *Are Women More Ethical Lawyers? An Empirical Study*, 31 Fla. St. U. L. Rev. 785, 837 (2004) ("Female lawyers around the country report a significant incidence of gender-based discrimination and incivility against them by judges, court personnel, other lawyers, and clients."); Lorraine Dusky, *Still Unequal: The Shameful Truth About Women and Justice in America* 223–24 (1996) (half of female litigators, 43 percent of law firm lawyers); Lynn S. Glasser, *Survey of Female Litigators: Discrimination by Clients Limits Opportunities*, *in* The Woman Advocate: Excelling in the 90s 55 (Jean MacLean Snyder & Andra Barmash Greene, eds., 1995) (55 percent of woman litigators reported harassment); Lisa Pfenninger, *Sexual Harassment in the Legal Profession: Workplace Education and Reform, Civil Remedies, and Professional Discipline*, 22 Fla. St. U. L. Rev. 171, 176–77 (1994) (citing surveys); Thom Weidlich & Charise K. Lawrence, *Sex and the Firms: A Progress Report*, Nat'l L.J., Dec. 20, 1993, at 1 (51 percent of female lawyer respondents reported having experienced sexual harassment on the job); David N. Laband & Bernard F. Lentz, *Effects of Sexual Harassment on Job Satisfaction, Earnings, and Turnover Among Female Lawyers*, 51 Indus. & Lab. Rel. Rev. 594 (1998) (66 percent of women in law firms and 46 percent of women in corporate and public sector organizations); Catherine E. Shanelaris & Henrietta Walsh Luneau, *Ten Year Gender Survey*, N.H. Bus. J. 56–78 (Mar. 1998) (one-half to two-thirds of female lawyers in New Hampshire reported sexual harassment); Richard C. Kearney & Holley Taylor Sellers, *Gender Bias in Court Personnel Administration*, 81 Judicature 8 (1997) (49 percent of female court employees in Missouri reported instances of sexual advances to obtain job benefits; 35–40 percent of Rhode Island women experienced sexual comments, touching, or disrespectful interest; 27 percent of Mississippi women experienced

unwanted verbal or physical harassment); Myra C. Selby, *Examining Race and Gender Bias in the Courts: A Legacy of Indifference or Opportunity*, 32 Ind. L. Rev. 1167, 1172–73 (1999) (describing reported conduct reflecting gender bias and sex-based harassment by male attorneys and judges against female lawyers in the courtroom and the workplace); *see also* Joan Brockman, Gender in the Legal Profession 115–19 (2001) (34 percent of surveyed Canadian women lawyers reported sexual harassment by lawyers, 12 percent by judges, and 10 percent by clients). Of course, such surveys, based on self-reporting, do not necessarily indicate how much of the conduct labeled harassment would be sufficiently severe or pervasive to be legally actionable. *See generally* Margaret A. Crouch, Thinking about Sexual Harassment: A Guide for the Perplexed 102–07 (2001) (discussing problems with survey methodology).

10. *See, e.g.*, Jane Roe v. The Law Offices of Adelson, Testan, Brundo, Novell & Jimenez, Corp., No. BC560465 (L.A. Sup. Ct. C.D. Oct. 14, 2014); Marchuk v. Faruqi & Faruqi, LLP, No. 01669 (S.D.N.Y. Mar. 13, 2013); Illinois Attorney Registration and Disciplinary Commission, *supra* note 8; *In re* Depew, 237 P.3d 24, 26 (Kan. 2010), *reinstatement granted*, 284 P.3d 279 (Kan. 2012) (lawyer temporarily suspended for sexual harassment of at least five women employed in the district court where counsel practiced); EEOC v. Rappaport, Hertz, Cherson & Rosenthal, P.C., 2006 WL 2660981 (E.D.N.Y. 2006) (allegations that law firm failed to stop sexual harassment so severe that employee was forced to quit); Woods v. Chubb & Son, 2005 WL 3271486 (9th Cir. 2005); Mellino v. Kampinski Co., L.P.A., 837 N.E.2d 385, 389 (Ohio App. 2005) (sexual harassment allegations by law firm's receptionist); Cincinnati Bar Assn. v. Young, 731 N.E.2d 631 (Ohio 2000); Wynn v. Mass. Comm'n Against Discrimination, 729 N.E.2d 1068 (Mass. 2000); Weeks v. Baker & McKenzie, 74 Cal. Rptr. 2d 510 (1st App. Dist. 1998); Rochester v. Fishman, 1997 WL 24720 (N.D. IL. 1997); People v. Lowery, 894 P.2d 758 (Colo. 1995); Reed Abelson, *By the Water Cooler in Cyberspace, the Talk Turns Ugly*, N.Y. Times, Apr. 29, 2001, at A4, 24; Bill Kisliuk, *A Tale of Destruction*, S.F. Recorder, Mar. 5, 1997, at 1; Pfenninger, *supra* note 9, at 176–77, 179–80, 212;

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Joanna Grossman, *Sexual Harassment in Law Firms: Why It Still Exists, and Why Firms Haven't Taken Steps to Prevent It and to Decrease Their Own Liability*, FindLaw Nov. 10, 2000), http://writ.news.findlaw.com/grossman/20001110.html; Paul Braverman, *Manhandled*, Am. Law., Aug. 2002, at 73; *Hot Catalog, Hot Judge*, Nat'l L. J., Apr. 22, 2002, at A13; Janet E. Gans Epner, *Visible Invisibility: Women of Color in Law Firms*, ABA Comm'n on Women in the Profession 10–11 (2006), https://www.americanbar.org/content/dam/aba/marketing/women/visibleinvisibility.authcheckdam.pdf. Additionally, the website Above the Law compiles anecdotal evidence of workplace sex-based harassment from female lawyers and legal workers. *See* The Pink Ghetto Archives, abovethelaw.com/tag/the-pink-ghetto/.

11. Rachel Oliver, *Are Gender Schemas Still Shaping Lives of Women Lawyers*, Ms. JD (June 6, 2013), http://ms-jd.org/blog/article/are-gender-schemas-still-shaping-lives-of-women-lawyers; *Sexual Harassment: What If It Happened at Your Firm?*, FindLaw, http://careers.findlaw.com/legal-career-assessment/sexual-harassment-what-if-it-happened-at-your-firm.html (last visited Feb. 25, 2016).

12. Martha Neil, *Hidden Harassment*, *supra* note 9; Eyana J. Smith, *Employment Discrimination in the Firm: Does the Legal System Provide Remedies for Women and Minority Members of the Bar?*, 6 U. Pa. J. Lab. & Emp. L. 789, 800 (2004) (sexual discrimination also has had the devastating result among lawyers of forcing women to leave the law completely); Grossman, *supra* note 10.

    A recent survey of male and female attorneys by The Center for WorkLife Law found that, over the course of a year, 82 percent of women (and 74 percent of men) reported experiencing sexist comments, stories, or jokes at least once; 13 percent of women believed they had lost opportunities because they had rebuffed sexual advances from co-workers or superiors; 27 percent of women reported receiving unwanted romantic or sexual attention, or unwanted attempts to touch them; and 6 percent of women reported feeling bribed or threatened for not engaging in sexual behavior with a work colleague. Joan C. Williams, unpublished study conducted by The Center for WorkLife Law

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at UC Hastings College of the Law (2016). Note, of course, that women—like men—may not only be victims of harassment, but may engage in it themselves, although it is far less likely.

13. *See* Jillian Berman & Emily Swanson, *Workplace Sexual Harassment Poll Finds Large Share of Workers Suffer, Don't Report*, HUFF-POST (Aug. 27, 2013), http://www.huffingtonpost.com/2013/08/27/workplace-sexual-harassment-poll_n_3823671.html (although 32 percent of respondents from a variety of professions reported being sexually harassed, 70 percent of those respondents never reported it); James E. Gruber & Michael D. Smith, *Women's Responses to Sexual Harassment: A Multivariate Analysis* 17 BASIC & APPLIED SOCIAL PSYCHOLOGY (1995) (surveys across a number of industries indicate that fewer than 10 percent of women who experience sex-based harassment make any formal complaint).
14. Emily A. Leskinen, Lilia M. Cortina, & Dana B. Kabat, *Gender Harassment: Broadening Our Understanding of Sex-Based Harassment at Work*, 35 LAW & HUM. BEHAV. 25, 36 (2011) ("Among attorneys, gender-harassed women (compared to nonharassed women) reported lower satisfaction with professional relationships and higher job stress, above and beyond the effects of race and job tenure."); KERRY SEGRAVE, THE SEXUAL HARASSMENT OF WOMEN IN THE WORKPLACE: 1600 TO 1993 203 (1994); Laband & Lentz, *supra* note 9, at 600–04; L. Camille Hebert, *The Disparate Impact of Sexual Harassment: Does Motive Matter?*, 53 U. KAN. L. REV. 341, 387–88 (2005) (empirical evidence suggests that women are more likely than men to suffer significant negative personal and work consequences as the result of sexual harassment); Latourette, *supra* note 9 ("[I]nequities do exist despite the popular belief that women are no longer discriminated against in the legal profession. . . . The facts show that the odds of a woman being made partner is less than one third of the odds for a man being named partner.").
15. *See generally* Wendi S. Lazar, *Sexual Harassment in the Legal Profession: It's Time to Make It Stop*, 255 N.Y.L.J. (Mar. 4, 2016), *available at* http://www.outtengolden.com/sites/default/files/nylj-030416-wsl.pdf.

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16. Similarly, the use of the term "firm" throughout this manual should be read as a shorthand for law firms of all sizes, as well as for other types of legal employers more generally, such as corporate counsel, legal services organizations, and the military.
17. Jeffrey Lowe, *2016 Partner Compensation Survey*, Major, Lindsey & Africa 15 (2016), https://www.mlaglobal.com/publications/research/compensation-survey-2016 [hereinafter 2016 MLA Survey]; 2015 NAWL Survey, *supra* note 5, at 10.
18. Jane Gross, *When the Biggest Firm Faces Sexual Harassment Suit*, N.Y. Times, July 29, 1994, http://www.nytimes.com/1994/07/29/us/when-the-biggest-firm-faces-sexual-harassment-suit.html?pagewanted=all.
19. 2016 MLA Survey, *supra* note 17, at 35.
20. Julie A. Pace, *Harassment, Discrimination & Retaliation Time to Audit Your Firm*, Ariz. Att'y, 10, 12 (Sept. 2007).
21. Deborah Edros Knapp, Robert H. Faley, Steven E. Ekebert, & Cathy L.Z. Dubois, *Determinants of Target Responses to Sexual Harassment: A Conceptual Framework*, 22 Acad. Mgmt Rev. 687, 702 (1997).

22. *See generally* Lazar, *supra* note 15.
23. *Id.*
24. Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 450–51 (2003); E.E.O.C. v. Sidley Austin Brown & Wood, 315 F.3d 696, 702 (7th Cir. 2002) (demoted partners were "employees" because they lacked any meaningful control over the firm's affairs).
25. *See, e.g.*, Fitzgerald v. Ford Marrin Esposito Witmeyer & Gleser, LLP, 153 F. Supp. 2d 219 (S.D.N.Y. 2001); Sier v. Jacobs Persinger & Parker, 714 N.Y.S.2d 283, 285 (App. Div. 2000) (reducing emotional distress award against law firm); K.S. v. ABC Prof'l Corp., 749 A.D.2d 425 (N.J. Super. Ct. App. Div. 2000) (imposing a protective order preventing plaintiff from deposing partners about their sexual relationships with other firm employees); *but see* Fitzgerald v. Ford Marrin Espositio Whitmeyer & Gleser, LLP, 29 F. App'x 740 (2d Cir. 2002).
26. Carol T. Kulik, Elissa L. Perry, & Molly B. Pepper, *Here Comes the Judge: The Influence of Judge Personal Characteristics on Federal*

Sexual Harassment Case Outcomes, 27 LAW & HUM. BEHAV. 69 (2003); Daniel L. Chen & Jasmin Sethi, *Insiders and Outsiders: Does Forbidding Sexual Harassment Exacerbate Gender Inequality?* (Duke Law Sch., Working Paper No. 226892, Oct. 2011) .

27. ABA Presidential Task Force on Gender Equity and the Comm'n on Women in the Profession, *Power of the Purse: How General Counsel Can Impact Pay Equity for Women Lawyers* (2013), https://www.americanbar.org/content/dam/aba/administrative/women/power_of_purse.authcheckdam.pdf (discussing costs to businesses of unwanted gender-based attrition); DEBORAH L. RHODE, ACCESS TO JUSTICE 28 (2004) ("Sexual harassment lawsuits . . . were once regarded as unnecessary and frivolous . . . until studies revealed that the average Fortune 500 company lost approximately six million dollars in turnover, worker absences, and lost productivity as a result of these apparently insignificant injuries" (citations omitted)).
28. *See* Jafa-Bodden v. Choudhury, Case No. BC512041 (Los Angeles Sup. Ct. Feb. 22, 2016), *as modified*, (Los Angeles Sup. Ct. Apr. 13, 2016) (reducing punitive damages award to $4.6 million).
29. Deborah L. Rhode, *The Unfinished Agenda: Women and the Legal Profession*, ABA COMM'N ON WOMEN IN THE PROFESSION 7–8 (2001).
30. *Id.*
31. *See generally* Jana L Raver & Michele J. Felgand, *Beyond the Individual Victim: Linking Sexual Harassment, Team Processes, and Team Performance*, 48 ACAD. OF MGMT. J. 387 (2005).
32. Megan E. Wooster, *Sexual Harassment Law—The Jury Is Wrong as a Matter of Law*, 32 U. ARK. LITTLE ROCK L. REV. 215, 240–41 (2010).

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2

THE LEGAL FRAMEWORK FOR SEX-BASED HARASSMENT AND BULLYING

What Is Sex-Based Harassment?

Title VII of the Civil Rights Act of 1964, as well as many state and municipal laws, prohibits sex-based harassment in the workplace.[1] The Equal Employment Opportunity Commission (EEOC) has issued authoritative guidelines on sexual harassment under Title VII, imposing on employers "an affirmative duty" to prevent and eliminate sexual harassment.[2] The guidelines define sexual harassment as follows:

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> Unwanted sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when any one of three criteria is met: (1) Submission to such conduct is made either explicitly or implicitly a term or condition of the individual's employment; (2) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; (3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.[3]

The EEOC has since made clear that "harassment not involving sexual activity or language may also give rise to Title VII liability . . . if it is 'sufficiently patterned or pervasive' and directed at employees because of their sex,"[4] and that the employer may be vicariously liable for such harassment.[5] Prohibitions on such conduct apply to supervisors, co-workers, peers, clients, judges, professors, students, and vendors.[6]

A variety of abusive behaviors that are directed at individuals on the basis of sex may constitute sex-based harassment.[7] Examples include unwanted touching, groping, or sexual advances; quid pro quo requests for sexual favors; or demeaning, condescending, or sexualized comments or jokes. With increasing frequency, sex-based harassment has taken on more subtle forms, such as interruptions or dismissive comments, comments on appearance or decorum, or subtle threats or intimidations. Inappropriate behavior can come from colleagues, adversaries, or even judges; many women anecdotally report that opposing counsel and court personnel, including judges, still refer to them using pet names or mistake them to be secretaries or paralegals.

In Chapter 5 of the manual, we provide guidance on developing and implementing workplace policies against sex-based

harassment. One key consideration in developing that policy is how to define "sex-based harassment." What will constitute legally actionable harassment often is situational and fact specific. However, if the goal is to prevent and eliminate sex-based harassment from the legal profession, practitioners should look beyond what is required by law, to policies that develop a culture of zero tolerance of sex-based harassment. The following formulation for defining sex-based harassment has been suggested by Fran Sepler, a human resources consultant and expert on workplace harassment investigations:

> Sex-based harassment means inadvertent or intentional behavior, language, humor, displays or other acts that are a) directed at a person because of their sex, sexual identity or sexual orientation or b) offensive based on content that is sexual in nature or demeaning towards individuals based on sex, sexual orientation and sexual identity—to the degree it affects someone's ability to perform their job or to be reasonably comfortable in the workplace. This includes conduct that may not yet rise to a level where it is actionable.[8]

This definition is consistent with the ABA's recent amendment to Model Rule 8.4(g), which now defines "professional misconduct" to include any "[c]onduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of . . . sex, . . . sexual orientation, gender identity, [or] marital status . . . in conduct related to the practice of law."[9]

Legal employers also should be mindful of the various and subtle ways sex-based harassment may manifest. For example, although not per se illegal in most jurisdictions, gender bullying is prevalent in the legal workplace and is often a precursor to more severe forms of sex-based harassment. There are also a host of unconscious behaviors that perpetuate stereotypes and

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sex-based treatment that many fail to recognize in themselves. Legal employers therefore are advised to adopt bias training and institute harassment policies that prohibit a wide scope of inappropriate workplace conduct, as such conduct is itself harmful to employees, and often is a precursor to more severe behavior.

Important Case Law

It was not until 1986, when the Supreme Court decided *Meritor Savings Bank v. Vinson*, that sex-based harassment was recognized as a form of illegal sex discrimination actionable under Title VII of the Civil Rights Act of 1964.[10] The Court interpreted Title VII's language prohibiting discrimination in the "terms, conditions, or privileges of employment" as covering the psychological, as well as financial, aspects of employment. The Court held that Title VII gives "employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult," even where tangible employment benefits such as pay and promotion are not affected.[11]

Seven years later, in *Harris v. Forklift Systems, Inc.*, the Supreme Court again focused on harassment that creates a hostile work environment.[12] In *Harris*, the Court held that conduct need not seriously affect a complainant's psychological well-being to be actionable. Rather, hostile work environment harassment violates Title VII so long as it is both subjectively offensive to the complainant and objectively offensive to "a reasonable person."[13] Factors relevant in determining whether an environment is hostile or abusive include "the frequency of the conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[14]

In 1998, in *Oncale v. Sundowner Offshore Services, Inc.*, the Court held that same-sex harassment—that is, harassment of a man by a man, or harassment of a woman by a woman—can be actionable under Title VII.[15]

That same year, in *Faragher v. City of Boca Raton*[16] and *Burlington Industries v. Ellerth*,[17] the Court clarified the circumstances under which employers will be held liable for harassment committed by their agents and employees. Specifically, the Supreme Court articulated an affirmative defense for employers in sexual harassment cases if the employer can demonstrate by a preponderance of the evidence that:

> (a) [the employer] exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[18]

The Court, however, also held that, "[no] affirmative defense is available . . . when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable assignment[.]"[19]

Recently, in *Vance v. Ball State University*, the Supreme Court clarified that an employee is a "supervisor" for purposes of vicarious liability under Title VII only if he or she is empowered by the employer to take tangible employment actions against the victim.[20] This standard requires that a person have the power to hire, fire, demote, promote, transfer, or discipline the victim. It is not sufficient that an employee merely have the ability to exercise significant direction over the victim's daily work.

Title VII also prohibits employers from retaliating against employees for reporting harassment (or other types of illegal

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discrimination) or for filing a charge, testifying, assisting, or participating in Title VII investigations, proceedings, or hearings.[21] Workers who make good-faith reports of sexual harassment are protected from retaliation even if the behavior at issue is determined to not constitute illegal harassment.[22] Interestingly, the number of retaliation complaints filed with the EEOC has more than doubled over the past two decades, with retaliation cases (under Title VII and other statutes) making up 44.5 percent of the EEOC's charge inventory for 2015.[23]

In *Burlington Northern & Santa Fe Railway Co. v. White*, the Supreme Court held that an employer violates Title VII's anti-retaliation protections when it takes action against an employee that would be considered materially adverse by a reasonable employee—that is, when an employer takes retaliatory actions that "could well dissuade a reasonable worker from making or supporting a charge of discrimination."[24] For example, in *Burlington Northern*, the Court held that an employer commits illegal retaliation by assigning an employee who had complained of sex discrimination to a job with less desirable duties, or indefinitely suspending that employee without pay.[25] The Court made clear that Title VII's anti-retaliation protection "extends beyond workplace-related or employment-related retaliatory acts and harm."[26]

Finally, an employee who alleges sex-based discrimination under Title VII need only show that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision. Until recently, that same standard applied to Title VII retaliation claims. However, in 2013 the Supreme Court in *University of Texas Southwestern Medical Center v. Nassar* held that, to prove retaliation under Title VII, employees must meet the higher burden of establishing that retaliatory motive was the "but-for" cause of the employer's action.[27]

State Statutes and Rules of Professional Conduct

For women lawyers and other legal professionals in law firms, the available remedies under federal law for sex-based harassment may be limited and there are many impediments to bringing claims. For instance, Title VII applies only to firms of 15 or more employees, and the plaintiff must be considered an "employee" in order to be protected.[28] In addition, courts generally have been reluctant to apply antidiscrimination laws to management decisions of law firms. Legal remedies for harassment also may not be available against opposing counsel, co-counsel, or other attorneys outside of a female attorney's own workplace.[29] Mandatory arbitration clauses incorporated into many law firm agreements and policies also pose an impediment to victims of harassment, as they dispense with many elements of a full and fair hearing, such as more than minimal discovery, a public trial, and appeal rights.

Lawyers and legal professionals may find redress, however, under state or local law, or through local rules of professional conduct. State and local laws that prohibit gender discrimination and harassment may be more protective than their federal counterparts, and often have more lenient jurisdictional requirements. Additionally, before the ABA amended Rule 8.4 this past year,[30] about half of the states already had adopted similar disciplinary rules against sex-based harassment, discrimination, or both.[31] When enforceable, state bar penalties for lawyers who have engaged in sex-based harassment can include suspension or disbarment.[32] Many of those states' ethics rules, however, are drafted so as to offer less protection than ABA Model Rule 8.4(g).

For example, many state rules limit the harassing behavior to the workplace rather than focusing on "conduct related to the profession,"[33] which could exclude harassment that takes place

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in a limousine or at a hotel conference, firm retreat, or meeting in a restaurant—all places where harassment typically occurs during the working life of lawyers. Many state ethics rules also demand exhaustion of other state remedies before a complaint can be filed by a lawyer. Given the reluctance of victims of harassment to publicly resolve their claims, such restrictions deter rather than encourage victims of harassment to bring ethics complaints based on sexual harassment. Few states allow victims to bring ethics violations against a firm but rather permit claims only against an individual lawyer, again limiting relief for the victim. Though the breadth of ABA Model Rule 8.4(g) has been criticized by some, it provides the victims of sexual harassment with significantly more redress if adopted by the states in its amended form than most states' current ethic rules. In addition, it may compel greater personal accountability by lawyers and greater incentives for firms to address sex-based harassment and work to prevent it.

Endnotes

1. An employer must have 15 or more employees to be subject to Title VII's prohibitions; many state and municipal laws require fewer employees. 42 U.S.C. § 2000e-2a; 29 C.F.R. § 1604.11.
2. 42 U.S.C. § 2000e-2a; 29 C.F.R. § 1604.11.
3. 29 C.F.R. § 1604.11(a).
4. Equal Employment Opportunity Commission, 1990 Policy Guidance on Current Issues of Sexual Harassment, subsection C(4), https://www.eeoc.gov/policy/docs/currentissues.html.
5. U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, https://www.eeoc.gov/policy/docs/harassment.htm.
6. *See* Freeman v. Dal-Tile Corp., 750 F.3d 413, 423 (4th Cir. 2014) ("[A]n employer is liable under Title VII for third parties creating

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a hostile work environment if the employer knew or should have known of the harassment and failed to take prompt remedial action reasonably calculated to end the harassment.") (internal quotations omitted); Lea B. Vaughn, *The Customer Is Always Right . . . Not! Employer Liability for Third Party Sexual Harassment*, 9 Mich. J. Gender & L. 1, 7 (2002) (61.5 percent of the 553 women litigators surveyed reported being sexually harassed by clients in the previous five years).

7. *See, e.g.*, Smith v. First Union Nat'l Bank, 202 F.3d 234, 242 (4th Cir. 2000) (reversing order granting summary judgment for employer in Title VII suit; "district court failed to recognize that a woman's work environment can be hostile even if she is not subjected to sexual advances or propositions"); Easko v. Howard Cnty., 2005 U.S. Dist. LEXIS 37602, at *8, *12 (D. Md. 2005) (dismissing complaint against individual defendants but allowing Title VII hostile environment claim against county to continue; quoting Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998)).

8. Fran Sepler, *Sexual Harassment: From Protective Response to Proactive Prevention*, 11 Hamline J. Pub. L. & Pol'y 61 (1990).
9. Model Rules of Prof'l Conduct R. 8.4(g) (2017).
10. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).
11. *Id*. at 65.
12. Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).
13. *Id*. at 21.
14. *Id*. at 23.
15. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998).
16. Faragher v. City of Boca Raton, 524 U.S. 775 (1998).
17. Burlington Industries v. Ellerth, 524 U.S. 742 (1998).
18. *Faragher*, 524 U.S. at 807–08.
19. *Id*.
20. Vance v. Ball State University, 133 S. Ct. 2434 (2013).
21. 42 U.S.C. § 2000e-3.
22. *See, e.g.*, Pryor v. Seyfarth, Shaw, Fairweather & Geraldson, 212 F.3d 976 (7th Cir. 2000) (granting summary judgment to defendant law firm on plaintiff secretary's sexual harassment claim, but allowing her retaliation claim to continue).

23. National Partnership for Women & Families, *Women at Work: Looking Behind the Numbers, 40 Years after the Civil Rights Act of 1964* 12 (2004); *see also Sex Discrimination Cases Predominate in Recent Class Actions Filed by EEOC*, 71 U.S.L.W. 2158 (Sept. 10, 2002) (reporting that, of the 52 class action cases filed by the EEOC between October 1, 2001 and June 30, 2002, 25 of the cases included claims of retaliation). Retaliation carries especially great potential for harm because it deters victims from reporting harassment.
24. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).
25. *Id*. at 70–73.
26. *Id.* at 67.
27. Univ. of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2522–23 (2013).
28. *See* Hishon v. King & Spalding, 467 U.S. 69, 80 (1984) (Powell, J., concurring) ("The relationship among law partners differs markedly from that between employer and employee—including that between the partnership and its associates."); EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 698 (7th Cir. 2002) (counsel demoted from equity partnership may be "employee"); *see generally* Douglas R. Richmond, *Changing Times and the Changing Landscape of Law Firm Disputes*, J. Prof. Law. 73, 96 (2009).

29. *See generally* Meg Carpentier, *"Not Becoming of a Woman": Lawyers May Finally Get Recourse for Harassment*, The Guardian, Aug. 18, 2016, https://www.theguardian.com/law/2016/aug/18/american-bar-association-harassment-discrimination-lawyers (describing continued discrimination and harassment among lawyers).
30. Model Rules of Prof'l Conduct R. 8.4(g) (extending definition of "professional misconduct" to include any "[c]onduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.").
31. At the time Model Rule 8.4 was amended through passage of Resolution 109 by the American Bar Association, several states

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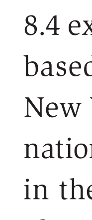

(including Florida, Iowa, Nebraska, New Jersey, Rhode Island, Washington, and other states) had already adopted a form of Rule 8.4 expressly prohibiting discrimination or discriminatory conduct based on sex, while other states (including Illinois, Minnesota, New York, and Ohio) had rules prohibiting unlawful sex discrimination. Vermont already had a rule prohibiting sex discrimination in the employment context. Additionally, Oregon and Wisconsin already had a rule expressly prohibiting sex harassment, and Iowa already had a rule that defined sexual harassment as a form of unlawful, prohibited discrimination. *See* ABA, CPR Policy Implementation Committee, Variations of the ABA Model Rules of Professional Conduct, updated Sept. 29, 2017, at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4.authcheckdam.pdf.

32. *See* Iowa Supreme Ct. Att'y Disciplinary Bd. v. Moothart, 860 N.W.2d 598 (2015) (suspending Iowa attorney indefinitely with no possibility of reinstatement for 30 months based on his pattern of sexual harassment of clients and employee); *In re* Tenenbaum, 880 A.2d 1025 (Del. 2005) (three-year suspension of Delaware lawyer for engaging in repeated verbal and physical harassment of clients and employees); *In re* White, 611 S.E.2d 917 (S.C. 2005) (18-month suspension of South Carolina lawyer for multiple instances of sexual harassment of a client); Cincinnati Bar Ass'n v. Young, 731 N.E.2d 631 (Ohio 2000) (affirming two-year suspension of Ohio lawyer for making sexually explicit comments and propositions to a law student under his supervision, and for engaging in verbal and physical abuse toward legal assistants and secretaries).
33. *See* CPR Policy Implementation Committee, *supra* note 31.

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Survey of Workplace Conduct and Behaviors in Law Firms

Authored by Lauren Stiller Rikleen, Esq.

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ABOUT THE WOMEN'S BAR ASSOCIATION OF MASSACHUSETTS

Founded in 1978 by a group of activist women lawyers, the Women's Bar Association boasts a vast membership of accomplished women lawyers, judges, and law students across Massachusetts. The WBA is committed to the full and equal participation of women in the legal profession and in a just society. The WBA works to achieve this mission through committees and task forces and by developing and promoting a legislative agenda to address society's most critical social and legal issues. Other WBA activities include drafting amicus briefs, studying employment issues affecting women, encouraging women to enter the judiciary, recognizing the achievement of women in the law, and providing pro bono services to women in need through supporting its charitable sister organization, the Women's Bar Foundation.

For more information, visit **www.womensbar.org.**

ABOUT THE RIKLEEN INSTITUTE FOR STRATEGIC LEADERSHIP

Lauren Stiller Rikleen, founder and president of the Rikleen Institute for Strategic Leadership, is a nationally recognized expert on developing a thriving, diverse and multi-generational workforce. Through her speaking, training, consulting, and writing, she addresses women's leadership and advancement, implementing strategies to minimize the impact of unconscious bias, and strengthening multi-generational teams.

Reports authored by Lauren include the *Report of the Ninth Annual NAWL National Survey On Retention And Promotion Of Women In Law Firms* (2015), and *Closing the Gap: A Roadmap for Achieving Gender Pay Equity in Law Firm Partner Compensation* (American Bar Association's Gender Equity Task Force, 2013). Lauren is the recipient of numerous awards, including the American Bar Association Commission on Women's Margaret Brent Women of Achievement Award and the Lelia J. Robinson Award from the Women's Bar Association of Massachusetts.

Lauren's books include: *Ending the Gauntlet: Removing Barriers to Women's Success in the Law; Ladder Down: Success Strategies For Lawyers From The Women Who Will Be Hiring, Reviewing and Promoting You;* and *You Raised Us, Now Work With Us: Millennials, Career Success, and Building Strong Workplace Teams.* She has also authored more than 170 articles, including topical commentary and op ed pieces in major media outlets.

For more information, visit **www.RikleenInstitute.com.**

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Overview

In the wake of the #MeToo movement and the enormous focus on workplace behaviors that profoundly impact careers, the **Women's Bar Association of Massachusetts** ("WBA"), in partnership with the **Rikleen Institute for Strategic Leadership** ("Rikleen Institute"), developed and distributed a detailed survey to: provide a more nuanced understanding of behaviors that take place in the law firm environment; identify steps that have been taken to address behaviors of concern; and offer recommendations to help law firms provide a safe, respectful and inclusive workplace for all employees.

This survey comes at an important moment, following a deluge of media coverage reporting allegations of workplace sexual harassment. This media coverage, however, should drive every organization to look both at and beyond sexual harassment, and to analyze its own workplace culture with the goal of providing a safe and respectful environment for employees every day.

Understanding whether incidents of sexual harassment occur is one component of that goal. It is also critical to know whether other behaviors that negatively impact workplace culture are prevalent. Every organization should provide a workplace free of fear, intimidation, and any behaviors that diminish or disparage individuals or groups, even where such instances may not meet a legal definition of harassment.

The WBA is proud to be addressing these issues in the legal profession – a high stress environment for everyone. People go to work each day, committed to doing their best work on behalf of their firm's clients, often against a backdrop of long hours, crushing deadlines, complex legal issues, and a host of other considerations, including an ego and emotional investment in the outcome.

This engagement can come at a price. People manifest their stress responses in a variety of ways that can deeply impact those around them. Left unchecked, these behaviors can further facilitate a cycle of negativity that imbues the entire workplace, resulting in a culture that inhibits high performance and employee engagement.

The goal of this survey is to develop a better understanding of whether behaviors exist in the law firm environment that negatively impact lawyers, paralegals, firm administrators, support staff, interns, and law students. In addition, the survey provides specific recommendations for positive change that can be of benefit in any workplace environment.

Methodology and Limitations

Survey questions were developed to provide insight into the possible existence of a range of behaviors that are unwelcome, inappropriate, offensive, or otherwise contribute to an environment that negatively impacts one's workplace experiences. It is important to emphasize that the questions purposefully did not focus solely on behaviors that would meet a legal definition of harassment or that were otherwise legally actionable.

Rather, the WBA was seeking to understand the day-to-day experiences that people may have in the law firm environment and determine whether there are patterns of behaviors that negatively impact an individual's performance and sense of well-being.

The survey was open between February 5, 2018 and April 2, 2018. Responses were sought from individuals who work or had worked in a law office in Massachusetts, whether or not the firm had offices in other locations outside of the Commonwealth.

The survey was distributed in a variety of ways to ensure widespread distribution within the Massachusetts legal community:

1. The WBA posted a description of and link to the study on its website.
2. The WBA distributed 6 email blasts to its 1,500 members, as well as included the survey link in its weekly e-newsletter throughout the time the survey was live. In each communication, the WBA highlighted the importance of and provided a link to the survey.
3. The WBA sent 5 separate emails to the managing Partners of the top 100 law firms in Massachusetts, reaching firms ranging in size from approximately 20 lawyers to more than 500 lawyers, requesting their support distributing the survey link within their firm.
4. Massachusetts Lawyers Weekly, as a sponsoring partner of this research project, ran a story in advance of the survey and then promoted it extensively over several weeks via print, web and email.
5. The Massachusetts Bar Association posted a link to the survey on its website.
6. The WBA and Women's Bar Foundation Board members distributed links to the survey to their own networks, as did many others who knew of the survey and offered to help reach a wide audience.
7. The WBA reached out to many affinity bar associations in the state to enlist their assistance in distributing the survey link to their respective membership.
8. Several allied organizations also distributed the survey link to their members.

Each time the survey was distributed, the link was preceded by language stating that all responses would be confidential and no individuals or firms would be identified. The survey was open to both men and women.

In total, 1,243 individuals responded to the survey. As is normal with surveys of this nature, not all respondents answered every question.

At the outset, the WBA anticipated that law firms – either through firm management or via women's affinity groups – would be willing to distribute the survey internally, particularly in light of the fact that no firms or individuals would be identified. Based on anecdotal responses, firm-wide distribution appears to have occurred only on a limited basis. Although a number of firms made survey links internally available, there were also firms that responded to the WBA's request by stating they were not willing to distribute the survey, notwithstanding the commitment of confidentiality. As a result, that avenue of outreach was less available than had been expected. This proved to be a similar con-

straint with respect to the WBA's hope that there would be wider distribution through other bar association networks or website access.

The WBA is pleased that, notwithstanding these constraints, the results showed widespread interest and a desire by many to share their stories. The constraints, however, also indicate the sensitivity of the topic and the reluctance that some feel about directly addressing these issues in a survey of this nature.

Numerous respondents gave examples of behaviors responsive to each question. The anecdotes that are included give voice to the experiences described. Only quotes that ensure the protection of the respondent's confidentiality were selected (and in a few instances, potentially identifying details that the respondent may have included has been omitted for that same reason). Moreover, quotes that are included are representative of other quotes detailing similar experiences. Quotes that describe unique experiences are also not included for reasons of confidentiality.

Of the respondents who answered the demographic question regarding gender, approximately 80% were women and approximately 17% were male; most of the remaining 3% chose not to specify.

Respondents were also asked to identify their age range to provide insights into which generations were responding to the survey. The distribution was relatively even among the three major generations in the workplace. Of those who answered this question: 36% were Millennials; 30% were in Gen X; and 33% were Boomers. Only 2% were born in the generation prior to the Boomers (Traditionalists).

For each question, respondents were asked if there had been a woman on the firm's highest governing committee at the time of the incident(s); however, because only a very small number responded to this subpart in each of the questions, there is insufficient information to report this data.

Respondents were asked to identify approximately when the behaviors identified in this survey occurred. The purpose was to determine whether the preponderance of the behaviors happened in past decades, as compared to more recent years, to see whether such behaviors were diminishing over time. The time periods that respondents could select were by decade, beginning with 1980-1989.

For each question, a significant percentage of the respondents stated that the incidents occurred between 2010 and 2018. This makes clear that these behaviors are not relics of a past era, but are contemporary concerns.

The highest percentage of affirmative responses in that 2010-2018 time-frame was for question 11, regarding whether others in the firm had spoken with the respondent about workplace behaviors that made them uncomfortable. This response is interesting on two levels. First, it is another indication that negative workplace behaviors remain a challenge. Second, it may also demonstrate that people are more willing to identify and discuss – at least among themselves – concerns about behaviors that, decades ago, were buried in silence.

There are inherent limitations in any method of inquiry. Accordingly, these survey results should not be viewed as offering definitive conclusions about the legal profession overall. Rather, the results offer a snapshot in time that provides a more nuanced understanding of the experiences of individuals in law firms.

As noted above, this survey was not designed to define sexual harassment or otherwise focus only on behaviors that might be considered to fall within a legally actionable definition. It is intended to seek information about the possible presence of a broad range of behaviors that can inhibit employee engagement and diminish an individual's self-worth or ability to perform at work without fear or discomfort, notwithstanding whether such behaviors are technically legal.

The responses to this survey suggest that much work needs to be done to ensure that law firms are providing a workplace culture where negative behaviors are not tolerated and where people can work without fear. The analysis and recommendations that follow are in the spirit of facilitating conversations that can help the legal profession serve as a model for self-reflection and, ultimately, the implementation of practices that allow all personnel to thrive in a safe, respectful, and inclusive environment.

The WBA and the Rikleen Institute for Strategic Leadership are deeply grateful to the women and men who took the time to respond to this important survey. We are confident that their efforts have made a positive contribution to improving the workplace.

Executive Summary

It is critical to highlight at the outset that, although many of the details provided by the respondents are disturbing, they are examples of behaviors that occur in other workplace settings across the country. One need only follow the numerous and comprehensive media accounts covering multiple industries to recognize that too many people face seriously flawed workplace cultures that impact workers on a frequent basis. The legal profession is not alone in facing these challenges.

Lawyers have an opportunity to serve as leaders by addressing these issues in their individual workplace and putting in place mechanisms across the profession that ensure the highest standards are met. Lawyers are the gatekeepers to our justice system; accordingly, they have a unique opportunity to serve as role models to other professions and businesses, to our clients, and to our employees.

Unchecked power imbalance serves as the foundation for and perpetuation of negative and inappropriate behaviors in the workplace. This is a clear theme that emerged from the responses to each question. In the vast majority of responses, the incidents described happened to individuals in the age range of associates, or to others in the firm who were young or were otherwise in a subordinate role.

Power imbalances also emerged in the ways in which negative behaviors were or were not addressed. For example, many of the experiences described by the respondents were perpetrated by partners and, frequently, important rainmakers or senior leaders in the firm. Because of their status, respondents did not report the behaviors, often because they feared retribution or because the people they would report to were involved in the incidents described. Respondents pointed to examples where firms ignored negative behaviors of key partners, or where retribution was taken against those who did report. This was particularly the case where firms did not seem to have a process in place to protect those who reported or felt victimized by alleged negative behaviors.

A number of respondents stated that they discussed the offending incidents with a female partner. In most such cases, the respondent also noted that there was no follow up and that no action was taken. There was generally no indication that the women who were told had a position of authority within the firm or otherwise had any power to follow up without repercussions. Yet we know from the extensive body of research regarding women in the profession that women are under-represented in law firm leadership roles, particularly at the management or executive committee level. It is possible that some of the senior women may themselves have felt vulnerable and without power to act on inappropriate situations brought to their attention. In firms with relatively few, if any, women equity partners and where women may not be serving in key firm management roles, it is difficult to place the expectations for addressing these behaviors on a woman partner, if that partner does not have the authority to take the necessary steps to follow up.

Reporting is also inhibited by the pressure to "go along with" or otherwise accept inappropriate comments as "just a joke". Respondents reported numerous incidents of office conversations that were racist, sexist, homophobic, xenophobic, and offensive to individuals and groups. Too often, however, there was clear pressure in the workplace to avoid being viewed as humorless or as not a team player.

Analysis

1) Have you ever been the recipient of or copied on unwelcome emails, texts, or instant messages of a personal or sexual nature at work?

Nearly 38% of the respondents to this question stated that they had been the recipient of or copied on an unwelcome email, text, or instant message of a personal or sexual nature at work. Nearly half stated that the incident occurred between 2010 and 2018.

QUESTION 1	Percentage
Yes	37.50%
No	62.50%

More than two-thirds of those responding to this question were Associates at the time of the incident, 10% were Partners, and approximately 18% were in Administrative, Paralegal, and Support Personnel roles.

Approximately three-quarters of the respondents who provided information about the size of their firm at the time of the incident were in offices with fewer than 50 lawyers.

More than 66% of those responding to this question stated that they did not report the incident.

Reported	Percentage
No	66.67%
Yes	33.33%

Examples of Behaviors Included in Survey Responses to Question 1

Examples of behaviors described in the responses included:

- Numerous examples of sharing images of sexually explicit photos (some photo-shopped to look as though it were a colleague). Many described the distribution of graphic images such as adult porn or links to videos that respondents described as "vulgar" and "inappropriate". In some examples, images seemed meant to ridicule same-sex relationships.
- Numerous examples of emails that included offensive jokes of a sexual nature, or included inappropriate and demeaning remarks about race and gender. Some described emails that ridiculed others or that made the recipients uncomfortable, such as negatively commenting on maternity leaves and commentary defending individuals in the news accused of sexual harassment.
- Partners and senior colleagues (some married or engaged) sending cards or emails expressing romantic interest in younger colleagues. Some respondents described persistent communications that felt as though the senior colleague was exerting pressure.
- Partners, senior colleagues, and clients sending comments of a sexual nature either via email or text.
- Inappropriate text messages from lawyers in supervisory roles, commenting on the physical appearance of young female lawyers.
- Sexually-charged telephone calls, or instant messages, including from inebriated colleagues.
- Senior colleagues sharing details of marital problems.
- Senior colleagues expressing anger in emails through graphic descriptions.

Respondents' Perspectives on Reporting Behaviors

The respondents provided detailed insights into their reasons for not reporting behaviors to others in the firm. In many instances, the offending behavior came from someone in a position of direct authority or power over the victim. As a respondent in a small firm who felt there was nowhere to turn described:

… As far as I know nothing was said or done because it was the owning attorney who made the comment who was known to be offensive to women and all kinds of different subcultures. It was an employee-at-will office and he was known to dismiss/fire/lay people off on a whim. It was a terrible office to work for.

Many stated that they based their decision not to report on the experiences of others who reported in the past. One respondent best summarized this line of comments:

People who had been subjected to their advances and reported the issues were no longer employed there and these men were. Is there anything more to be said?

Some respondents tolerated frequent advances received via both email and directly because they feared even more negative repercussions from reporting. For example, a lawyer described why she did not report recurrent romantic overtures from a married partner:

I was young and naïve, hoping that it had been a one-time indiscretion on his part and that this was not a pattern of activity. I didn't want to ruin his career and family … but he certainly derailed mine for a period of time.

Another stated:

Would have impacted my review and ability to remain on partner track. Would not have been viewed as a team player.

Similarly, a respondent who was the recipient of vulgar and inappropriate emails noted:

It's my boss, an equity partner, and our HR dept. is useless. It would only jeopardize my job.

Still another did not report suggestive texts and inappropriate touching because of:

Concern for repercussions in ability to get billable work.

Some who did share their concerns with others in a more senior role stated that the behaviors were dismissed as in keeping with the offender's personality. For example, a respondent described the inappropriate texts and uninvited touching she'd experienced from others, including a partner, and noted:

Told multiple supervisors … and was told the comments I was receiving were typical from the individual so don't worry about it. I told one female supervisor when it got to be unbearable and she did report it. I told a male supervisor (of another instance) and it was immediately reported. However, once it was reported, I was told this individual is notoriously inappropriate so … just move on.

A respondent describing sexual comments received from partners similarly stated:

It was firm culture. When discussed, it was dismissed.

Numerous respondents described negative consequences that followed from discussing their concerns internally. For example, a respondent described the retaliation she experienced after reporting emails that denigrated women:

[One of the partners who wrote the emails] retaliated with a false, critical performance review.

A respondent who was the recipient of many unsolicited romantic emails from a senior lawyer stated:

Spoke to female coworker and friend. No follow up actions took place. Eventually I was asked to leave the firm.

In some instances, respondents noted that, although no steps were taken within the firm to officially address the behaviors, they did receive an apology. Another stated that after an attorney inadvertently sent an inappropriate email to the entire firm:

HR followed up within the firm with some mandatory training.

2) Have you ever been the recipient of or witnessed unwelcome physical contact at work?

More than 21% of the respondents to this question stated that they had been the recipient of or witnessed unwelcome physical contact at work. Of these, 36% stated that the incident occurred between 2010 and 2018.

QUESTION 2	Percentage
Yes	21.56%
No	78.44%

Nearly 51% of the respondents to this question were Associates at the time of the incident, 9% were Partners, and the Administrative, Paralegal, and Support Personnel categories exceeded 33%.

Approximately 47% of the respondents who provided information about the size of their firm at the time of the incident were in offices with fewer than 50 lawyers; 40% were in offices of 100 lawyers or greater.

More than two-thirds of those responding to this question stated that they did not report the incident.

Reported	Percentage
No	68.02%
Yes	31.97%

Examples of Behaviors Included in Survey Responses to Question 2

Examples of behaviors described in the responses included:

- Nearly all of the respondents who provided anecdotes reported examples of unwanted and unsolicited hugging, back-rubbing, groping, shoulder rubs, kissing, and lewd comments.
- Numerous respondents described inappropriate groping and other forms of unwanted physical contact during holiday parties and at other social gatherings where there was alcohol.
- Many respondents reported witnessing inappropriate behavior by male colleagues towards younger female associates or staff members.
- Several respondents identified examples of men leering, staring at various parts of a female's anatomy, and standing or walking or "brushing by" inappropriately close.
- Several respondents described incidents early in their career where their boss would proposition them or offer suggestions for ways to dress that would appeal to clients, or otherwise flirt with them.

One respondent, describing numerous examples of "virtually on a daily basis" being propositioned, then bullied when those advances were resisted, stated:

> *It created emotional, financial and professional turmoil in my life which continues … I hope that this survey demonstrates how much even lawyers feel hopeless and incapable of standing up to sexual harassment in a law firm.*

Respondents' Perspectives on Reporting Behaviors

In so many responses to this question, respondents were more likely to stay silent than report offensive or unwanted contact. Most of the respondents who provided anecdotes of unwelcome physical contact focused on the power imbalance as the reason for not reporting concerns about more senior and often powerful colleagues. In particular, they frequently expressed concern about damaging their career opportunities, for example:

> *I was an intern, I wanted a job or good recommendations for future jobs.*

A respondent described a married partner's persistent physical contact when they would be working together. She explained her reason for remaining silent:

> *I was an associate close to partnership. He would vote on my partnership.*

A respondent described inappropriate touching by a colleague and stated her concern about the possible repercussion to her young career:

> *I believed that reporting my male colleague would result in my termination.*

Another respondent who described an incident of inappropriate touching stated:

> *Partner who did this was very popular/made lots of money for the firm and if one of us had to go it would have been me.*

One respondent in a small firm noted:

> *Firm had culture of demanding compliance with inappropriate behavior to "belong," the firm's small size meant that the management committee was overly concerned with protecting partners at all costs ….*

Others observed that no actions had been taken with respect to past allegations, so there was no reason to expect a different result in the future. For example, a respondent stated:

> *Prior complaints about male partner behavior were not heeded. Firm prioritized workplace experience of partners over associates. Size of firm and power dynamic … rendered associates without power and required compliant behavior to keep employment.*

Another respondent who also described multiple incidents of inappropriate contact and comments by both a male partner and a senior associate stated:

> *I spoke to friends and peers. [G]iven the treatment of senior people who committed far more egregious acts, what would be the point in raising the issue?*

Another described incidents of partners trying to date associates and noted:

> *The firm was aware of the behavior already and did nothing. Firms care about rainmaking more than associates.*

A number of respondents informally shared information with lawyers in their firms who were more senior, but were told to treat the remarks or behaviors as a joke. This type of response was recurrent. A respondent who reported unsolicited touching stated:

> *It was treated as a joke and we just had to put up with it.*

A respondent described being inappropriately touched with regularity and stated:

> *Told senior partners and it became a joke. Not taken seriously.*

Similarly, a respondent described a senior partner who frequently engaged in unwelcome physical contact, noting:

> *The senior partner was enormously powerful and popular, and furthermore his conduct was well-known and done in front of other partners and the senior managing partner – and the employment partner – on a regular basis. People who complained about this and other forms of harassment were told they had no sense of humor…. What's the point?*

In other instances, people shared a warning system to alert others:

> *This man's behavior was so well-known that a male partner once asked me to warn a new female … associate about him.*

Another described her efforts to warn:

> *That individual had a reputation for hitting on young women, whether paralegals, summer clerks or associates and I did my best to warn those coming in to the firm to stay clear of him.*

Others shared examples of where efforts to inform others more senior in the firm were unheeded. One respondent noted:

> *I told multiple people including partners. I did not want to make a formal report. No follow up actions took place.*

Another respondent described multiple incidents of unwanted physical contact, stating:

Told head of HR … but asked that it be off the record. Also told male colleagues, venting. Nothing ever happened to my knowledge.

In many of the responses provided, fears of retaliation appeared warranted. Respondents who did report told of circumstances in which they were the target of retaliation. For example, one respondent described her response to a partner's groping and other unwanted physical contact:

I was nervous about mentioning it to HR, so I first told co-workers and some of the younger attorneys. They were … unsure of the repercussions of reporting an equity partner of the firm. [Described process by which another equity partner assisted with follow up.] The situation was handled but some of the long-term attorneys blamed me ….

Respondents described a variety of retaliatory actions, but all had career impacts. Stated one:

Ultimately I was given less and less work after that until I left the firm.

Some respondents told of providing information confidentially to a more senior lawyer, to help others identify patterns in the future, for example:

[I] told a female senior partner, said I didn't want to make a formal complaint but wanted someone to know in case things escalated.

Several respondents noted specific examples where bystander intervention – usually by male colleagues – immediately halted the improper behavior. For example, an attorney who witnessed offensive comments being made by a partner to an associate at a social event where people were drinking stated:

Spoke directly [with the] female associate informing her that I saw the offense as very serious and would address it [with] my partners. Notified [person who handles employment issues within the firm]. Notified all partners. The offending partner was spoken to.

No direct punishment but I think damage to his reputation.

In another instance where a male was inappropriately touching and making suggestive comments to female law clerks, bystander intervention helped when male coworkers collectively told the offending lawyer his behavior was unacceptable.

Several noted that they cut off contact with the individual involved by moving to a different location in the firm or changing practice groups.

3) Have you ever felt that someone was trying to engage you in unwelcome discussions (including through comments or actions) of a sexual nature?

More than 25% of the respondents to this question stated they felt someone had tried to engage them in unwelcome discussions of a sexual nature. Of these, approximately 35% stated that the incident occurred between 2010 and 2018.

QUESTION 3	Percentage
Yes	25.38%
No	74.62%

Of those who responded to this question, nearly 70% were Associates at the time of the incident, slightly more than 6% were Partners, and the Administrative, Paralegal, and Support Personnel categories comprised 21%.

Nearly 56% of the respondents who provided information about the size of their firm at the time of the incident were in offices with fewer than 50 lawyers, 21% were in offices with between 50 and 99 lawyers, and 23% were in offices of 100 lawyers or more.

Nearly 75% of those who responded to this question did not report the behavior.

Reported	Percentage
No	73.91%
Yes	26.08%

Examples of Behaviors Included in Survey Responses to Question 3

Examples of behaviors described in the responses included:

- Male lawyers demeaning young women in front of male colleagues or clients through sexual references.
- Discussions of extra-marital affairs, sexual escapades, or sexual fantasies.
- Senior male colleagues moving conversations from the professional to personal issues.
- Frequent vulgar or sexualized jokes and remarks that objectify women.
- Prying into the personal and sex lives of women in the firm.
- Direct sexualized and objectifying comments to women about their physical appearance or the physical appearance of others.
- Sexualized comments, innuendos, or propositions made at or after firm social events at which alcohol was served.
- Leering and comments directed at summer associates by partners and senior associates.
- Inappropriate comments, unsolicited touching, and prying questions to LGBT lawyers, prying into their sexual life.

Respondents' Perspectives on Reporting Behaviors

Many respondents expressed an unwillingness to report these behaviors. Reasons centered on the lack of a clear avenue for reporting, the involvement of senior leaders in the behaviors, and concerns about negative repercussions. For example, one respondent observed:

> *I didn't have a supervisor. There was no person or process for reporting. [I]f I had tried to make an issue of it I would have lost my job.*

A respondent who did not report a partner's highly sexualized comments noted:

> *It's my boss, an equity partner, and our HR is useless. It would only negatively impact my job.*

Another respondent discussing a culture of vulgar or sexualized jokes stated:

> *I was a young associate in a virtually all-male department and afraid I would be perceived as not "fitting in."*

Similarly, a respondent observed:

> *It was expected and accepted behavior by other partners and staff.*

Long-term career impacts loomed large in the calculation many respondents made in deciding whether they had any place to turn within the firm. A respondent who was the recipient of frequent lewd comments and behaviors stated:

> *Fear of retribution, fear of rocking the boat as a brand new attorney with no status in the firm yet, desire to be seen as a "chill", non-dramatic team member…. My career was directly in these partners hands, since even first year associates were beholden to partners for feeding them work in a vassal/feudal sort of structure the firm insisted on maintaining.*

Another respondent who endured frequent comments about her body and sexual innuendos noted she did nothing because the behaviors were:

> *Part of the … culture; the comments came from senior partners; and there was no one to report to whom I considered to be sympathetic to the issues. Also, fear of retaliation.*

A respondent described explicit overtures that were made and stated:

> *The transgressor was the managing partner and there was no one else to go to.*

Many respondents described sharing their stories with others, but not reporting to anyone with authority within the firm. A respondent who was the frequent recipient

of improper comments explained why she spoke only to friends and peers:

> *No sense in reporting. These individuals had had indiscretions and improper conduct with subordinates that had been reported and known and they were still with the employer and the women were not.*

Some respondents noted that they shared information with a woman partner, for example:

> *I reported [the behaviors] to a female partner. No follow up.*

A respondent who did not report an uncomfortable proposition from a married partner while she was an intern also revealed how continued silence fuels ongoing inappropriate behaviors:

> *Later on, I did [speak] with a female partner and I did tell her, and she said she was not surprised to hear the story.*

A respondent who did not report a partner's frequent sexualized comments and demeaning remarks noted a satisfactory result when the behavior was finally reported:

> *At the time, I just ignored it. Eventually someone else reported it and this person was asked to leave the firm due to other inappropriate behavior.*

Several respondents reported that they handled the situations by confronting the offending lawyer directly, sometimes with positive results:

> *I dealt with it myself. I also think the person who engaged in the conduct would not do it again to me or anyone else at work.*

Similarly, another respondent reported a successful result when direct action was finally taken:

> *It finally stopped when I confronted the people involved about it and explained why I thought their actions were a problem. It took me a couple of years to do that.*

4) Have you ever witnessed materials or items of a sexual or disparaging nature, including sexual images, displayed in your workplace?

Slightly more than 10% of those who responded to this question stated that they had witnessed materials or items of a sexual or disparaging nature displayed in the workplace. Of these, 36% stated that the incident occurred between 2010 and 2018.

QUESTION 4	Percentage
Yes	10.22%
No	89.78%

Nearly 54% of those responding were Associates at the time of the incident, almost 17% were Partners, and the combined categories of Administrative, Paralegal, and Support Personnel comprised approximately 22%.

Approximately 75% of the respondents who provided information about the size of their firm at the time of the incident were in offices of fewer than 50 lawyers.

More than 72% of those responding did not report the incident.

Reported	Percentage
No	72.83%
Yes	27.16%

Examples of Behaviors Included in Survey Responses to Question 4

Examples of behaviors described in the responses included:

- Content displayed on a computer, including inappropriate screen-saver images as well as watching porn.
- Sexual posters or other images in rest rooms and office areas.
- Attorneys sending or sharing pornographic emails or images.

Respondents' Perspectives on Reporting Behaviors

Respondents generally did not report these behaviors, stating that, in most instances, it was already known

and, in other instances, they did not want to risk retaliation. For example, one respondent said:

[P]erhaps cowardice; but more likely a strong desire to remain employed and meaningfully engaged within my practice, without imaginable retaliation.

Another described her reluctance to report attorneys who shared sexual images:

I feared that I would be ostracized/retaliated against.

Several respondents stated that their supervisors were involved in the offending conduct, rendering reporting futile. Others stated that they just ignored the images or put it out of their mind.

Some respondents reported instances of pornography with mixed results. One respondent noted that inappropriate graphic imagery was reported to two partners, including the Managing Partner:

I expected that the individual who was engaged in the action I reported would be spoken to but I learned that did not take place.

One respondent took an effective route by reporting pornography on another lawyer's computer to the IT department:

Notified our IT department and personnel to make sure the computer was purged and blocked.

A respondent who did not report a co-worker's excessive watching of porn stated that, after the behavior was reported by someone else, the individual was terminated.

5) Have you ever witnessed any incidents of disparagement of other people or groups in the workplace that made you feel uncomfortable?

More than a third of those responding to this question stated that they had witnessed incidents of disparagement of others at work in a way that made them feel uncomfortable. Of these, more than 50% stated that the incident occurred between 2010 and 2018.

QUESTION 5	Percentage
Yes	35.31%
No	64.69%

Approximately 69% of those responding to this question were Associates, 10% were Partners, and the combined categories of Administrative, Paralegals, and Support Personnel comprised more than 17%.

More than 60% of the respondents were in offices of fewer than 50 lawyers and nearly 25% were in offices of 100 lawyers or more.

Nearly 75% did not report the incident to a co-worker or supervisor.

Reported	Percentage
No	74.24%
Yes	25.75%

Examples of Behaviors Included in Survey Responses to Question 5

Examples of behaviors described in the responses included:

- Slurs and demeaning comments about race, gender, religion, and sexual orientation.
- Disparaging or inappropriate comments about pregnancy, maternity leaves, or status as a mother.
- Negative behaviors towards minorities, women, and older workers.
- Women partners dismissive of experiences of younger female lawyers with respect to work-life choices.
- Anti-immigrant comments.
- Ageist comments.

One respondent commented on her three decades in the profession, including multiple workplaces:

Many, many, many, many, many (seems like countless) derogatory remarks about people of color, people of different ethnicity, gay bashing, transgender bashing from all levels (clients, coworkers, management) in every single position, every single firm I have held/ worked for throughout my 30 year career. I wish I could say I was exaggerating but, alas, I am not…. Believe me when I say all kinds of 'isms in Massachusetts are alive, well and thriving throughout all different kinds of law firms, throughout all different levels.

Respondents' Perspectives on Reporting Behaviors

Respondents who did not report disparaging comments that they witnessed or that were made directly to them offered reasons similar to the responses in prior questions for remaining silent: no expectation that anything would be done; the engagement of senior leadership in the behaviors; and the belief that, by reporting, the respondent would be labeled as humorless.

One respondent described the frustration of seeing behaviors continue unchecked across the span of the respondent's career, which included multiple law firms:

Many comments were made by management which does not encourage one to report anything. The comments that were made by co-workers I tried to address myself to no avail. The few times I have mentioned things to management they were swept under the rug as a non-issue. When this happens more times than not, you just stop reporting the micro-aggressions and learn how to live/deal with it to the best of your ability.

Many respondents noted the power imbalance that enabled lawyers to act with impunity. One such respondent noted:

He was one of the controlling rainmakers in the firm. No one said no to him or could control him.

Another respondent commented on the power imbalance that prevented a response to a culture of "demeaning racial/ethnic jokes":

I was a young associate in a predominately male department afraid of being perceived as not fitting in.

A respondent who did not report what she saw as anti-immigrant and misogynistic comments observed:

They mostly knew and did nothing about it, so the expectation was that even if they were told of something new they would still not do anything about it.

Another respondent described a culture of "innumerable sexist, homophobic, racist, anti-Semitic comments," noting:

[I] did not feel empowered to do so as associate who needed job to pay student loans and support young family etc.

One respondent did not report frequent observations of disparaging treatment of support staff by partners:

Because I had no power. Instead, I looked for a new job.

An LGBT attorney described a culture of frequent disparaging jokes against multiple targets and that such comments were " … never aggressively offensive, but deniable in the just-joking-around context." The respondent stated why reporting did not feel like an option:

Culturally accepted in the firm. Had no faith in ability to change the culture.

A young lawyer who did not report shared the pain experienced from hearing disparaging comments about immigrants:

I was a diverse scholarship winner at the time and I didn't know how to even begin to explain how hurtful it was to hear people in the firm make jokes about immigrants and other minorities. I had higher expectations for the firm ….

Respondents frequently described a culture where the comments were expected to be viewed as humorous. As one respondent stated:

There was no point – such remarks and commentary were routinely tolerated and brushed aside as "jokes". Reporting would only jeopardize my position. I would be viewed as someone who "can't take a joke". Reporting would not have brought about a positive change.

Another, describing ongoing crude commentary, noted that a:

… toxic culture of inappropriate behavior was tolerated and laughed off. There was a feeling that there was no point in reporting.

Numerous respondents stated that there was no one to report to, as those in charge were part of the problem, for example:

The comments were made by or to the person to whom I would have reported.

Similarly, another noted:

Everyone I would report the conduct to is always in the room when it happens.

A few respondents gave examples of an HR structure that declined to get involved. For example, one respondent who reached out to HR with concerns about discriminatory behaviors against women stated:

I informed the HR manager, who said the Partners were "out of touch" and told me to ignore them.

Another stated:

HR was present when senior partner made disparaging comments and did nothing.

In some cases, reports of disparaging comments were made, but no follow up feedback was provided. For example, a respondent described a senior attorney's disparaging treatment of support staff and noted:

I informed the managing partner. To my knowledge, no steps were taken to resolve the issue.

In other instances, respondents who tried to report were told to figure out how to avoid the individual or improve the relationship. For example, one respondent described her effort to report a female partner's disparagement of her pregnancy and status as a mother (a situation described by several respondents):

I told an equity partner.… He told me that if I wanted to become a partner, I had to get this female partner to like me more.

Some stated they tried to shut down the conversation when offensive stereotyped comments were made, as this respondent indicated:

Most of the time, I just told them to stop.

A partner in a leadership role described responding to a lawyer who openly expressed bigoted views:

I … immediately addressed this issue with the person and it never happened again and nobody ever told me that they had heard any derogatory remarks or discriminatory remarks from him after this.

A few respondents described a reporting process that worked. One respondent noted:

In fact, we have reporting systems in place at my current office. I know of incidents witnessed by co-workers that have been reported and are being addressed by HR/management.

One respondent described the eventual termination of an equity partner who continued to make disparaging comments, notwithstanding after efforts to coach and monitor his behavior:

I told our local managing partner and the firm's managing partner.… After attempting coaching, sensitivity training, and months of supervising his behavior,

the firm eventually fired him.

A respondent described responses to several incidents of disparaging comments and behavior, including at a social event and another in the office:

As to the misbehavior [at the social event], it was widely reported, and the firm disciplined the partners involved and held trainings throughout the firm. As to the other one, the … department investigated and reprimanded the person.

6) Have you been present when comments or jokes were made that were sexual in nature or disparaging of other people or groups?

This question garnered the highest percentage of affirmative responses, with 40% of those responding to this question stating that they had been present when comments or jokes were made that were sexual in nature or disparaging of other people or groups. Of these, approximately 40% stated that the incident occurred between 2010 and 2018.

QUESTION 6	Percentage
Yes	40.23%
No	59.77%

More than 65% of those who responded to this question were Associates at the time of the incident, 11% were Partners, and the combined categories of Administrative, Paralegal, and Support Personnel comprised 21%.

Approximately 58% of those responding to this question were working in offices of fewer than 50 lawyers and approximately 28% were in offices with 100 lawyers or more.

Nearly 87% stated that they did not report the information to a co-worker or someone in a supervisory role, the question with the highest percentage of non-reporting respondents in the survey.

Reported	Percentage
No	86.66%
Yes	13.33%

Examples of Behaviors Included in Survey Responses to Question 6

Examples of behaviors described in the responses included:

- Frequent gender-based jokes and efforts at humorous commentary focusing on women's bodies, specifically relating to breasts, sexuality, weight, and maternal status.
- Frequent jokes and commentary by men referencing their sexual fantasies or joking about sexual exploits.
- Frequent jokes that involve race, religion, sexual orientation, and gender.
- Inappropriate jokes told at events where alcohol was served; sometimes the jokes were told publicly, as part of a lawyer's official remarks, and sometimes privately within social groups.

Respondents' Perspectives on Reporting Behaviors

Many respondents to this question described off-color or disparaging humor as "pervasive" or "too many incidents to describe." Most did not report the incidents. Consistent with the reasons provided in other questions, many felt fearful of retaliation or that there was no one to report to, particularly because of the status of the offending individual. In many instances, these types of remarks felt like part of the firm culture.

Several respondents described the conflict between the danger of appearing humorless compared to the sense of being worn down by the continued stream of insulting remarks. A respondent commented on her reaction to frequent disparaging jokes about women:

This kind of commentary was tolerated and accepted as part of the culture. Reporting would not bring about a change and would only negatively impact my career. Additionally, a single comment can easily be brushed aside as a joke – one almost feels silly/ doesn't want to be viewed as being too serious about any one offhand comment.

Similarly, a respondent observed:

It seemed like it was expected and "normal," and I

was too junior to complain.

Another noted that jokes about females were "pervasive":

People in highest positions do it. It's a "joke."

Again, the status of the individuals making the comments seemed to serve as an inoculation against a negative response, for example:

Such behavior and statements are typical of this senior partner, and after repeated instances of such, there is an understanding that there are no repercussions for this person, so there is no reason or person to report this to.

Another respondent stated why she did not report graphic joking from a partner:

The firm had a history of ousting women who reported issues. He was a practice group co-leader at the point. We were junior associates. We preferred to stay employed.

A respondent further highlighted this point:

I reported this to a female partner. She agreed this was despicable but nothing was ever done because the partner who made the comments was a big rainmaker.

One respondent observed how the power imbalance can shift over time, depending on one's status within the firm:

On most occasions, I was in a position to tell them to stop. When I wasn't a partner, I felt my job would be in jeopardy.

Several respondents described sexually charged jokes at firm social events. One noted:

Those were the guys in power. No good would have come from reporting these incidents. I would have been ostracized.

In a few instances, respondents spoke of off-color jokes as "locker room talk" or "banter" that was not harmful, so they did not feel a need to report the remarks.

One respondent highlighted senior partner support that stands as an example of a useful intervention. Describing graphic stories being told to a group during a break in a meeting, the senior partner left the room with the associate and further made it clear that the associate should never feel pressured to remain in such a situation.

In another positive example, a respondent described disparaging jokes made by a more senior lawyer and then noted the follow up:

I spoke with a[n] … attorney, who brought me to a very senior female attorney.… She talked with me about options for what could be done, and let me choose. She did what I asked (which was for her to speak with this guy). She spoke with him, and he apologized (it seemed sincere).

A respondent who very directly "let offenders know this was verboten" noted her valid reason for doing so without worry about retribution:

I am the boss.

7) *Have you ever been asked personal questions or questions of a sexual nature that made you feel uncomfortable?*

Nearly 16% of those responding to this question noted that they had been asked personal questions or questions of a sexual nature that made them uncomfortable. Of these, approximately 41% stated that the incident occurred between 2010 and 2018.

QUESTION 7	Percentage
Yes	15.80%
No	84.20%

Sixty-seven percent of those who responded affirmatively were Associates at the time of the incident and less than 5% were Partners. The combined categories of Administrative, Paralegal, and Support Personnel exceeded 22%.

Nearly two-thirds of the respondents were in offices of fewer than 50 lawyers; more than 28% reported being in offices of 100 lawyers or more.

More than 78% said they did not report the incidents to a co-worker or supervisor.

Reported	Percentage
No	78.57%
Yes	21.42%

Examples of Behaviors Included in Survey Responses to Question 7

Examples of behaviors described in the responses included:

- Male lawyers asking pregnant women detailed questions about their physical condition, including questions about their breasts.
- New mothers being asked detailed questions about breastfeeding.
- Women asked questions about their age and their personal life such as whether they were married or engaged, and when they planned to have children.
- Men commenting on specific physical aspects of a woman (as distinct from a generic compliment).
- People being asked about their sexual orientation.
- People being asked questions about their sexual relationships.
- Clients asking questions of a sexual nature.

Respondents' Perspectives on Reporting Behaviors

Fear of retribution and concern about one's internal reputation again emerged as primary reasons for not reporting. Both of these concerns were highlighted in a respondent's explanation of why she did not report a male lawyer's prying comments:

> *This person was notorious for his treatment of females – it was already known from the top down. Reporting would not have made a difference. Also you worry what reporting would do to your own career. It wasn't worth the risk.*

A number of respondents stated that they did not report because they feared a diminished reputation in the firm. For example, a respondent who was asked highly inappropriate questions on multiple occasions noted:

> *[The concerns were] uncomfortable to talk about, not the only one who has experienced this and nothing is done about it. If something was done it would likely hurt my professional relationship with the attorney(s) involved as well as others at the firm.*

Similarly, another respondent who described her personal discomfort with sexualized questions stated:

> *Who wants to be known as the person who complained about something, rather than known for my skills?*

In many of the examples provided, and similar to the responses in other questions, respondents stated that they did not report the behaviors because the person to whom they would report was the person making the comments, for example:

> *The supervisor was the perpetrator. [I]t was either my career or report the comment(s). I was not going to let his actions hinder my career.*

Another respondent who described uncomfortable comments made to her about her sexual orientation succinctly stated why she did not report:

> *He was one of the managing attorneys.*

A respondent who described being asked inappropriate personal questions noted:

> *Perpetrator protected by management.*

Other respondents offered similar reasons:

> *The comments/questions came from the managing*

partner.

Some respondents indicated they found solace by commiserating with others in the firm. For example, a respondent stated that female associates who found themselves the object of inappropriate questions and prying by another lawyer formed their own support network:

> *We both decided to be a support system for each other, and we discussed ways to avoid being alone with that attorney.*

Respondents also described informally sharing information with those more senior. One respondent gave examples of behaviors from someone she described as known to be a "serial harasser" and noted:

> *I reported him several times to a female partner.*

In a number of instances, respondents were the recipient of inappropriate questions and comments from clients. In those examples, the respondents generally spoke with a more senior person in the firm but often specifically asked that nothing further be done.

8) Have you ever been made to feel that you needed to engage in sexual behavior or develop a personal relationship with someone at work to advance?

This question had the smallest number of respondents. Of those who did respond, more than 28% answered affirmatively. Of these, nearly 35% stated that the incident occurred between 2010 and 2018.

QUESTION 8	Percentage
Yes	28.57%
No	71.43%

Approximately 60% of those who responded to this question were Associates at the time of the incident, 8% were Partners, and the combined categories of Administrative, Paralegal, and Support Personnel comprised 16%.

More than 56% were in offices of fewer than 50 lawyers; approximately 30% worked in offices of 100 lawyers or more.

For this question, the percentage of those who reported the behavior was higher than the other questions (although the number of respondents overall was much smaller): more than 57% reported the behavior to someone else.

Reported	Percentage
No	42.86%
Yes	57.14%

Examples of Behaviors Included in Survey Responses to Question 8

Examples of behaviors described in the responses included:

- Lawyers describing sexualized behaviors and implying that such behaviors can help career advancement.
- Proposing to have "mentoring conversations" in a non-professional atmosphere such as a bar or hotel.
- Inappropriate advances towards summer associates.

Respondents' Perspectives on Reporting Behaviors

Respondents who provided information for this question generally did not feel they had any place to turn. Most simply expressed their frustration, for example:

> *It was clear that the only way to assure a good salary and a promotion was to sleep with the boss. He had the power and he made the decisions. The … only action we could take was to leave.*

Another, observing that firm partners revealed clear preferences for how they expected females to behave, noted:

> *I was unwilling to flirt or act like this, and felt I was ignored and even berated by certain male partners. The offending male partners were too powerful…. Plus, I don't even think they were consciously aware of their bias.*

Some respondents said they felt unable to advance because they refused to be part of a culture where success seemed linked to social expectations. One respondent described how social interactions served as a gatekeeper to success:

Advancement within the firm/access to more sophisticated work was largely driven by personal relationships.… Despite … disparaging comments about the quality of a colleague's work, such colleague was given more opportunities because he played the game of drinking/going out/wing-manning with/for the young-ish partners.

Another respondent described how reporting uncomfortable and inappropriate experiences as a summer associate backfired:

Reported it to [the] male … in charge of summer associate program and some hiring. It ended up becoming a mess because I was pressured to let him tell partners and ultimately the person who I reported found out I had done so and basically it made the work environment hostile.

9) Have you ever felt you were the recipient of or have witnessed bullying behavior in the workplace?

Nearly 40% of those responding to this question stated that they had been the recipient of or had witnessed bullying behavior in the workplace. Of these, approximately 44% stated that the incident occurred between 2010 and 2018.

QUESTION 9	Percentage
Yes	39.45%
No	60.55%

More than 69% of those who responded affirmatively to this question were Associates at the time of the incident, nearly 10% were Partners, and the categories of Administrative, Paralegal, and Support Personnel comprised nearly 16%.

Approximately 56% were in offices of fewer than 50 lawyers; nearly 27% were in offices with 100 lawyers or greater.

As with all questions, the majority of the respondents did not report the behaviors, although the percentage of those who did not report the behaviors was less than in most other questions.

Reported	Percentage
No	54.05%
Yes	45.94%

Examples of Behaviors Included in Survey Responses to Question 9

Examples of behaviors described in the responses included:

- Partners screaming at or otherwise humiliating others (at all levels) in the firm.
- Bullying that escalated to physical abuse or throwing of objects.
- Feigning deadlines or other hazing behaviors.
- Feeling punished by more senior women.

Respondents' Perspectives on Reporting Behaviors

Respondents described a range of behaviors, including those that induced physical stress reactions in both the victims of bullying and the witnesses – who reasonably may have been fearful as to whether they were next. One respondent described negative physical consequences experienced by others in the firm, then explained why no action was taken:

[S]enior partner and head of the … department would routinely humiliate anyone who crossed him.… This would include his fellow partners as well as outside counsel. For example … he would make … snide personal comments … about [people's] height, weight, or looks. In general, he did this when he was about to be challenged on an issue.… This was a senior partner and decision maker. Raising the issue would just result in more humiliation.

Another described bullying tactics she endured and offered similar reasons for not reporting:

My boss was a jerk, unnecessarily. His teaching style was to make me feel like I had done something egregiously wrong when it was a minor issue. He seemed

purposefully to start a discussion by suggesting I had really screwed up when I hadn't. Every time I saw a note from him to see him, or I got a call from him, I would get very nervous. It was very stressful.… I did not report it for several reasons. First, he was the managing partner. Second, everyone knew that was just the way this partner operated. Indeed, it tends to be a revolving door of associates who work with this partner …

Many respondents who specifically described bullying of associates that took place also reinforced, similar to responses in other questions, that the apparent common knowledge of the perpetrators' behaviors rendered reporting not an option, for example:

Some senior partners and associates would use demeaning language and actions directed at younger associates as part of their management style. It was common knowledge at the firm.

Similarly, some respondents described extreme behaviors that went beyond verbal abuse and explained that the behaviors were not reported because the perpetrators were powerful partners:

Certain partners, mostly male, were extremely bullying and nasty to the staff and associates. [More than one] of them threw objects around the office. [Anecdote described an incident where someone was physically targeted.] No need to report it. Other partners were aware but powerless to reign in the powerful male partners, who also happened to be rainmakers.

A number of respondents gave examples of escalating behaviors, with a similar reason for not reporting:

Partners regularly bullied associates by calling them out publicly on assignments, yelling and screaming at them, throwing files, dumping files, and if the partners knew associates had vacation coming, assigning new and/or additional cases so that the associate could not go on his or her trip. This was to ensure that associates knew who was in charge. This was the firm culture. It was well known that it would get worse if you started to complain to HR about it.

Another respondent noted an atmosphere of intimidation with no recourse because of the status of the perpetrator:

Files … being thrown across room, staff being yelled at, staff members being pitted against one another, staff being belittled …

Similarly, a respondent described intimidating behaviors that also included the throwing of objects:

Objects thrown around office. Screaming. Yelling. Slamming doors. Verbal threats.

In many cases, the respondents highlighted behaviors that they said felt more like hazing than being part of a legal team. In such circumstances, the general view was that there was no point in reporting. One respondent typified many of the comments:

Insecure men bully to make themselves feel better. For example making associates pull all nighters in the office to haze them, knowing it was not necessary to meet client needs. Yelling. Screaming. Culture was to toughen up and take whatever a partner dishes out. Partner is always right.

Another respondent observed the hazing aspect with no opportunity for redress:

Senior partners frequently bullied associates as an intimidation and motivation technique – this was part of one's initiation in the world of large law firms. The persons conducting the bullying were senior members of the firm. They were the supervisors and everyone was aware this type of conduct was expected.

Similarly, a respondent noted:

Requests aren't made in civil tones, but in harsh tones, coupled with negative comments re: quality of associate's work or associate's commitment –

especially if associate has family obligations. Felt like putting up with this conduct was a job requirement.

A few respondents described bullying behaviors from women, for example:

Women constantly knocked women.… The women in power did not have children, and seemed to not be able to relate to me or like me. I was a threat and was punished. What was the point – I needed to advance.

Another respondent similarly described bullying by female partners and the failure of the firm to follow up after reporting the behaviors:

My two supervisors, both of whom were women, were horrible bullies. One in particular never took personal responsibility for anything and always laid blame at the feet of others. It was truly a toxic environment. I told HR … , the CFO … , and the managing partner.… The entire firm was aware of the behavior, which was a pattern, and … no one has done anything about it because [they] bring in money.… The firm simply does not care.

On the other hand, many respondents described women as receiving the brunt of verbally abusive tactics, yet few saw any hope for change. Noted one respondent:

Bullying and intimidation of women when older men felt threatened by their greater competence and social abilities. Fear of reprisal and negative impact on career [are reasons for not reporting].

One respondent described the negative results following efforts to intervene:

I worked with a senior partner who bullied everyone around him.… He would make derogatory remarks as a matter of course to everyone. Because he was the principal rainmaker at the firm. When I did finally cross this individual in an attempt to protect a more junior attorney, I ultimately lost his good opinion, and left the firm.

Several respondents who described an abusive culture noted that efforts to report proved futile, for example:

Been through countless meetings and encounters – senior partner(s) scream and yell and throw things because they are unable to properly express their frustrations. This is the hardest part of my work environment. I have developed a fear response, which is ridiculous. [Reporting has usually been done to] HR or close male colleagues. Nothing is ever done.

In another example, a respondent described the lack of follow through after behavior was reported:

At my firm, I am aware of two partners who have bullied subordinate attorneys and staff. In relation to the local partner … who engaged in bullying, I talked with the Partner in charge of our office … and the Practice group leader.… Further management training for the offending partner was discussed, but has not yet been implemented.

One respondent noted that an internal process may have been triggered, yet no specific information about follow up was available:

I witnessed numerous incidents of male partners screaming at and bullying younger associates – mostly female but some male. It was already under investigation.

Based on some of the comments, it appeared that there was greater follow up when an associate engaged in wrongful behavior, rather than a partner. One respondent described being frequently bullied by an associate and how it was ultimately handled:

I spoke with [particular person within the firm who raised the issue] and it was nipped in the bud. They spoke with him and it was done in an appropriate way and the behavior changed.

A respondent provided an example of a firm taking action against a partner when it learned of the extent of that partner's behaviors, including physical intimida-

tion and sexual harassment of female associates. The respondent spoke with the managing partner and other partners, and subsequently the offending partner was forced out of the firm.

Other respondents also provided positive examples of reporting that led to a satisfactory result. For example, one respondent told another lawyer of a partner's verbally abusive behavior and later received a phone call in which the partner apologized.

In another instance, a respondent described an atmosphere of rudeness and disrespect by the managing partners. When a female partner addressed this directly, one of the managing partners called the respondent to apologize, and his behavior improved.

Another respondent reported on a successful self-help measure:

> *I was berated and yelled at by senior attorneys for reasons that had nothing to do with my work.... The whole experience was absolutely horrible. I have since changed jobs and currently work for an absolutely incredible, very supportive firm where I truly feel that I have the tools that I need to succeed.*

10) Have you ever felt threatened, embarrassed or humiliated, or witnessed someone being threatened, embarrassed or humiliated, by someone in the workplace?

Nearly a third of those who responded to this question reported feeling, or witnessed someone being, threatened, embarrassed, or humiliated by someone in the workplace. Of these, 44% stated that the incident occurred between 2010 and 2018.

QUESTION 10	Percentage
Yes	31.69%
No	68.31%

Nearly three-quarters of those responding were Associates at the time of the incident, approximately 12% were Partners, and the combined categories of Administrative, Paralegal, and Support Staff comprised nearly 15%.

Approximately half of the respondents worked in offices of fewer than 50 lawyers and nearly 40% were in offices of 100 lawyers or more.

Sixty percent of those responding affirmatively to this question did not report the behaviors.

Reported	Percentage
No	60.18%
Yes	39.81%

Examples of Behaviors Included in Survey Responses to Question 10

Examples of behaviors described in the responses included:

- Partners expressing anger by openly berating lawyers, yelling in public, or otherwise demeaning a younger colleague.
- Being directly asked to engage in sexual activity.
- Criticisms and insults designed to diminish the confidence of associates.
- Criticizing people in public for personal behaviors relating to what they eat, whether they exercise, their weight, etc.
- Sexualized behaviors and comments.
- Demeaning the skills of female lawyers by saying they were only being included (e.g. in a meeting, or assigned to a particular matter) because of their looks or because they needed to add a woman to the team.

Respondents' Perspectives on Reporting Behaviors

Many of the anecdotes described in response to question 10 were similar to the types of behaviors reported in question 9. Respondents described situations in which they felt intimidated and humiliated, with no recourse available.

A few respondents who were more senior in their career described earlier experiences where they endured humiliating behaviors from other lawyers. For example, one stated:

I have found in my career many lawyers with large egos who have taken upon themselves to humiliate me and others in order to make them feel large. There has been so many incidents that it would take a volume of pages to write them all. If you had reported any humiliating incidents, especially when it was in response to lawyers, you were seen as a trouble maker and run the risk of a bad annual review and possible termination.

Some respondents described behaviors that combined humiliation and actual physical assault:

One … partner would swear, berate and humiliate associates in public areas.… He also threw … desk items at associates. The incidents didn't happen to me, and it was already common knowledge to management.

A respondent who witnessed partners screaming at and insulting more junior lawyers did not see reporting as a productive option:

Did not want to hurt partner's reputation or damage my professional relationship with the partner or other professionals at the firm.

Another respondent noted a lawyer's humiliating tactics that were not reported:

A senior associate consistently humiliated me in front of co-workers and opposing counsel. I did not report it because I did not believe it would change the senior associate's behavior. I also thought that it would have negative consequences on my career.

As noted in responses to other questions, being a rainmaker served to inoculate many partners from being held accountable. One respondent, describing a senior partner who frequently yelled at and belittled others in the firm, stated why the behaviors were not reported:

Because everyone tolerated him because his book of business was really big and he was a good … lawyer.

Another respondent stated:

As a rule, many of the attorneys I worked for or with did not have good leadership or training skills and would make associates or others miserable while trying to train them. Just accepted that was the way it was.

Some respondents described senior partners who seemed to use the humiliation of others as a tactic, observing that even where managing partners spoke to the offending lawyers, nothing changed.

Several female respondents noted incidents of sexualized behaviors. One respondent described having to continually ignore a partner's "intense" behaviors:

Partner was basically a good person who looked at my chest, not my eyes, a little too often.

In another example of a male partner treating women in a demeaning way, the respondent described reaching out to a member of the large firm's leadership and its HR Department. The firm leader dismissed the concerns and the HR Department did not follow up.

Humiliating behaviors sometimes took the form of publicly undermining the skills or capabilities of another attorney. For a number of female survey respondents, this happened when they were told that they were only being included in a meeting or assigned to a case because of their looks or because they needed a woman on the team. In one example, such a statement was overheard by a male partner who then reported the incident to the managing partner. The firm followed up with a clear reprimand that included the actions that would be taken if such an incident happened again.

Not all of the offending behaviors came from men. Some respondents described incidents where women partners humiliated others in the firm. In one such incident, the recipient of the berating behaviors was assigned to other partners; in another instance, efforts to speak to the partner failed to result in changed behaviors. Another respondent reported a successful resolution to a female partner's efforts to humiliate others:

> *I had a supervising attorney who would humiliate the other female attorneys; in retrospect she saw other females as threats. I confronted her about it, and she stopped.*

It is interesting to note that a few respondents challenged the notion that there might be something wrong with using humiliation as a tactic to address someone's mistakes. For example, one respondent stated:

> *It is not uncommon to be humiliated in the practice of law when things go wrong, and you have made a mistake on the part of a client. We should be humiliated when we screw up.*

Another observed:

> *Isn't the culture of a law firm to be highly critical and demanding? It's the culture – sink or swim.*

A few others seemed resigned to the idea that being a lawyer meant being part of a harsh culture. One respondent stated:

> *One of the senior partners would yell at me and at others as part of his "management style." It was not necessary to report it because it was widely witnessed and experienced by many people in the firm.*

11) Has anyone ever spoken with you about their concerns regarding workplace behavior that made them feel uncomfortable?

Of those who responded to this question, nearly a third said others had spoken to them about workplace behaviors that made them feel uncomfortable. Of these, approximately 62% stated that these conversations occurred between 2010 and 2018.

QUESTION 11	Percentage
Yes	31.37%
No	68.63%

As with most other questions, the highest percentage of the respondents were Associates (approximately 44%). It is interesting to note that 20% of the Partners responded affirmatively – more than in any other question. This suggests that people in the workplace who share their stories may be seeking support from more senior level individuals.

Nearly 38% of the respondents who provided information about the size of their firm at the time of the incident were in firms of fewer than 50 lawyers. Approximately half were in firms of 100 lawyers or more, somewhat higher than the percentage reported in response to other questions.

Among those responding to this question, the percentage of respondents who reported was similar to the percentage of respondents who did not.

Reported	Percentage
No	50.44%
Yes	49.56%

Examples of Behaviors Included in Survey Responses to Question 11

Examples of behaviors described in the responses included:

- Colleagues sharing examples of being sexually harassed, sexually assaulted, or propositioned by partners in the firm (including incidents involving partners and summer associates).
- Colleagues sharing examples of experiencing homophobia.
- Colleagues sharing negative comments made about women becoming pregnant and having children.
- Colleagues sharing stories among each other about which partners to avoid.
- Summer associates sharing examples of inappropriate behaviors they experienced.

Respondents' Perspectives on Reporting Behaviors
Generally, respondents stated that they did not further report information shared by colleagues. For example, a respondent noted that a colleague had been the frequent target of sexual harassment by a partner, but the respondent did not report the behavior:

> *I feared being retaliated against, and I thought the colleague would also be retaliated against.*

A respondent stated that female colleagues shared their discomfort with having to thwart explicit advances from senior colleagues, then noted why the respondent did not further report these incidents:

> *It was not my story to tell.*

Several stated that anecdotes were shared in confidence. For example, a respondent honored the request of a colleague to not report that person's uncomfortable experiences with homophobic comments in the workplace:

> *My colleague asked me not to report it for personal reasons.*

The sharing of information among colleagues, in many instances, seemed to be part of the workaround, as this response exemplified:

> *Associates talked among ourselves; "whisper network" regarding specific partners to avoid or be careful around. Was culture of large law firm life.*

Another reported:

> *Associates would talk amongst themselves about which partners were the ones that were desirable to work for and which ones you wanted to avoid working for because of the poor treatment you would receive. It was known behavior in the firm from everyone else that had advanced through the partnership.*

A respondent commented on the many stories shared by colleagues about their uncomfortable situations:

> *I mainly played a listening role as my colleagues just wanted someone to talk to because they feared retaliation if they reported anything.*

When attorneys exhibited patterns of negative behavior, it frequently became common knowledge within the firm. Yet respondents often noted that no steps were taken to address the concerns, for example:

> *Other associates were afraid of working with the same person who had bullied me. Everyone already knew this person was a problem and firm had chosen not to do anything about it.*

Another respondent described the importance of shared behaviors in an atmosphere where reporting was not an option:

> *All of the women in the office knew that certain departments were a minefield and we all tried to work around it.… When does the firm become responsible for its persistent problems in not properly addressing the behavior?*

In some instances, respondent stated that friends at work discussed being bullied or propositioned, but did not report the behaviors:

> *The incidents weren't disturbing enough to report.*

A respondent commented on involvement in an investigation of a senior partner who made sexual overtures to young women:

> *There was a formal investigation. Senior partner – man – had clearly engaged in alleged behavior. The firm did more to keep young women away from him but there was no loss of stature for this person.*

One respondent offered a glimpse into the behaviors that colleagues endure and the varied responses:

> *Stressed, overworked, and/or unhappy partners demeaning others, not privately. I console and counsel them, sometimes report to HR, sometimes confront perpetrator.*

Another respondent followed up after young women expressed annoyance with the leering behaviors of male partners:

I spoke with a female partner on the firm's management committee. Not sure if anything happened but tend to doubt it.

Some respondents intervened and described positive results. One explained the follow up after a female associate shared comments made to her by a partner about her appearance:

I went to the senior partner, who was the offender, and told him that his behavior and comments were inappropriate and offensive, that he was not to make any further comments of that nature, and that he was to apologize to the associate.

A respondent was told by an intern of a partner's sexual comments. The respondent spoke with the managing partner who took immediate action against the partner. Another sought and received permission to report a colleague's experiences of being bullied.

One respondent offered an example of a reporting process that worked in response to a partner's inappropriate joking:

As a member of the firm's Management Committee I responded to the associate's complaint, reached out to the Partner in charge … and confirmed that the firm's sexual harassment committee would address the complaint. I received confirmation that the associate was satisfied with the committee's response and did not want to further pursue the complaint.

In another example, a respondent stated that a colleague expressed concern about someone in the office making a racially discriminatory comment. The respondent noted:

I reported this to HR … and to a member of the firm's Diversity Committee. HR and the member of the Diversity Committee had follow-up conversations with the [person who raised the concerns].

One respondent described supporting a colleague who reported inappropriate comments made by men in the firm:

She reported it, I supported her, and we addressed this generally in anti-harassment training at the firm.

A respondent highlighted a number of ways of responding to concerns:

Our firm has a code of conduct – mostly unwritten originally, but more formal now. We have also mentors for attorneys and supervisors for staff, as well as currently formal HR procedures. On an irregular basis, associates, partners, paralegals, and support staff speak to me about concerns. I counsel them on how to deal with the concerns. Sometimes I intercede. Sometimes I initiate involvement by our HR folks. In egregious situations, or repeated situations, I go to HR.… In some situations, I raise the issue during evaluations. In some situations, I discuss the situation with another colleague. In some situations, I have a one-on-one meeting with the individual who caused the situation.

12) At the time of any incident(s) described above, did the firm have a process for reporting behaviors of concern?

The respondents provided a range of responses that lend greater insight to the challenges that firms face in addressing the issues identified in this survey. Only slightly more than one-third of the respondents to this question said that, at the time of incidents described in other responses to this survey, their firm had a process for reporting behaviors; approximately 20% said their firms did not. Of particular interest, close to half did not know whether the firm did or did not have a reporting process at the time.

QUESTION 12	Percentage
Yes	35.14%
No	19.2%
Don't Know	45.65%

Many respondents reported that they had a sexual harassment policy made available to all, but did not further describe a process for resolving complaints. Others, as noted below, highlighted a variety of initial reporting mechanisms, but did not provide a description of the subsequent steps that would be taken after the report is made. It is, however, understandable that respondents to a survey would only provide minimal detail in response to an open-ended question.

For example, many said the firm had a committee to which complaints about inappropriate workplace conduct can be reported. Others stated that the firm had in place a rapid response team for such matters, and a few said the firm had an ombudsman to whom any type of matter could be reported.

Several said that complaints were to be directed to specific named supervisors or to the Human Resources Department. Some respondents noted that they had designated partners to address complaints. Others required reports to be made to practice group leaders or to the managing partner. A few respondents said that reports could be made to anyone in the firm with whom the complainant felt comfortable.

Some respondents indicated that the firm offered a number of different avenues for bringing concerns forward, for example:

> *We have always had a process for reporting violations of firm policy, including anti-discrimination and anti-harassment policies, which provided multiple routes for reporting. Also there has always been a strict anti-retaliation policy.*

Another respondent created an alternative where the firm's process did not provide a point of contact that felt comfortable:

> *The process was to speak to the Managing Partner or another designated partner at the time. I was new to the firm and did not feel comfortable with either partner, so I went to a partner who I felt more comfortable with.*

One respondent observed a discrepancy between firm policy and practice that should be cautionary to others:

> *It's on paper, but in reality … we know what the reality was. Partners would go for "sensitivity training." After they came back, they were deemed "cleaned up" until they did it again. It created a laissez faire top down culture.*

13) If you are currently working in a law firm, does the firm have an internal process for reporting behaviors of concern?

As with responses to question 12, a significant number of respondents did not know if their firm has an internal process for reporting.

QUESTION 13	Percentage
Yes	47.62%
No	13.16%
Don't Know	39.20%

The responses to question 13 were similar to the responses to question 12. Respondents described a variety of reporting avenues within the firm that included one or a combination of: managing partners, management committees, standing committees or other designated groups for addressing complaints, HR departments, practice group leaders, firm administrators, specific partners, and office managers. In a few instances, respondents stated that a reporting mechanism was through partner mentors or other trusted partners.

Few respondents provided information about what happens after a complaint is made. In one instance, the respondent expressed concern about the designated individual:

> *The process involves speaking to the head of the non-attorney staff. However, I am not aware that she ever did anything to address any of the … behaviors, and her judgment is suspect.*

In a couple of other examples, however, the respondent expressed a more positive view of the process, for example:

> *The behavior would be reported to HR who would then handle the situation. We have a zero tolerance policy so presumably, that person would be fired if found true.*

Another stated:

> *There is a standing committee with a variety of individuals (different genders, sexual orientations, positions in firm, etc.) who you can report any incident to. A discussion is held as to consequences. Any concerns are raised to the executive committee. Then actions are considered based on the victims' wishes and the firm's policies.*

Recommendations

Consistent with what is reported in the media about other workplace settings, inappropriate behaviors remain an ongoing challenge in law firms as well. The survey results further demonstrate that these behaviors are a particular challenge for young women entering the work force. Moreover, unchecked power imbalances can leave those who serve in subordinate roles vulnerable to a range of negative behaviors.

We cannot know how many careers have been thwarted by workplaces that allow – through tacit acceptance, willful ignorance, or simply neglect – negative behaviors to continue unrestrained. We do know, however, that the results can be devastating to careers and economically harmful to those organizations that leave themselves vulnerable to disengaged and distracted employees, rampant turnover, and possible lawsuits.

Every law firm has an obligation to provide a culture in which people can do their jobs in a safe and respectful environment. The following recommendations offer a road map towards achieving that result.

1. **Engage leadership in creating a positive firm culture that treats all with civility and respect.**
   Cultural change in an organization is impossible without direct leadership engagement. Even when leaders are, or profess to be, unaware of negative behaviors, employees generally assume they have full knowledge. Survey respondents frequently described circumstances in which employees warned each other of those who should be avoided, or grumbled quietly about the latest transgressions. Their frustration was compounded by a belief that the behaviors were known to those in leadership, just as they were known to others in the organization; otherwise, they assumed, victimizers would have been stopped.

   Leaders have an obligation to understand all aspects of their workplace culture. In particular, they need to learn whether there are negative behaviors to address. Failure to do so can be costly to the organization – resulting in low morale, perpetuating a climate of fear, accelerating turnover, negatively impacting the firm's reputation, and potentially risking litigation.

2. **Implement measures to hold all firm leaders accountable for the behaviors of those they supervise or manage.**
   Meaningful change requires accountability. Organizations use metrics to track that which is important. Just as firms track billable hours, originations, and collections, they should also track reports of negative behaviors, attrition rates by department and office location, and other indicia of ways in which workplace culture impacts morale, engagement, and productivity.

3. **Undertake an internal self-assessment to determine areas of particular challenge.**
   The survey demonstrated that many workplaces have areas of vulnerability, for example, employees (including Partners) who may pose particular challenges in how they treat others, practice groups where incivility – or worse – is tolerated, star performers who engage in bullying tactics, or Partners who may be exerting control in ways that demean others. Some workplaces fail to address a culture where fear and stress are taking an emotional and financial toll. The challenges differ from firm to firm; an internal assessment designed to produce honest feedback can help identify measures that can be implemented to improve culture.

   Toward that goal, firms should engage in a process to solicit confidential feedback from employees and

Partners. An assessment can be conducted in a variety of ways, including as a survey or a series of confidential conversations. To ensure interviewees and/or survey respondents can provide information openly and confidentially, the firm could engage a neutral, independent party to conduct the assessment. Based on the findings, the firm can develop both short-term and long-term goals for improving culture and strengthening relationships among colleagues.

4. **Develop a comprehensive policy that does not hide behind strict definitions.**
   The questions asked in this survey purposefully reached beyond a legal definition of sexual harassment. The intent was to more fully identify a variety of behaviors that could have an impact on firm culture and employee engagement.

   There is a high cost paid by those who are subjected to the behaviors of fellow workers who demean, disparage, or insult others, whether that treatment is against individuals or particular groups. In several of the anecdotal responses provided, the respondents who did report such behaviors were told that the words or actions did not violate policy or meet a specific legal definition of, for example, sexual harassment.

   Firms should not erect barriers that require a legal definition to be met before they can respond to behaviors that undermine a culture of civility and respect. Law firms should set boundaries around behaviors that are deemed unacceptable, regardless of whether they are legally actionable.

5. **Consider an independent process for reporting.**
   It is clear from this survey, as well as countless media stories, that a safe reporting process, free of retribution or other negative consequences, is absolutely essential. Many firms offer avenues of reporting to senior leaders, an HR department, or other designated individuals or groups. As many respondents demonstrated, however, these mechanisms do not always work. Moreover, based on the responses to this survey, a reporting process that is directed solely to a firm's Human Resources Department is insufficient. HR Departments, no matter how well-meaning, may have conflicting loyalties when individuals come forward with information that may have negative consequences for the organization itself.

   Firms should consider adding to their internal reporting processes an opportunity to report to an independent person who is separate from the firm's existing hierarchy.

6. **Be clear about lines of authority and extent of responsibilities.**
   Many of the survey respondents wrote that they had spoken with their Human Resources Department about incidents of concern, but nothing happened. In some cases, they may not have been informed of any follow up. In many instances, however, they were told to either ignore the person, or the behaviors, or that nothing could be done. Sometimes, the HR response was to be protective of the organization.

   It is reasonable for younger employees in particular to expect that HR departments will address workplace behaviors. Leaders should be clear as to the limitations on the HR Department to become involved in or otherwise follow up on reports about, in particular, the behaviors of partners or other senior leaders.

7. **Make sure everyone is informed about the existence of a firm's policy and reporting process.**
   The fact that nearly half of the respondents did not even know whether their firm had a policy for reporting suggests ample room for improving a law firm's communications about its policies and procedures for addressing complaints about workplace behaviors. Law firms should distribute regular reminders about their policies and the related process for reporting and follow up.

8. **Develop a process to encourage reporting and then provide ongoing support and information to those who do so.**
   Respondents frequently wrote that they spoke with their HR Department about negative behaviors, but then asked that their conversation remain off-the-record and confidential. This reflects the fear and discomfort felt by the individual, yet can leave the firm powerless to respond appropriately without the complainant's willingness to participate further in an investigatory process.

   Supporting those who have been the victims of inappropriate behaviors is a critical part of the process. It is not enough to have a process in place to conduct an investigation or otherwise respond to reports without a parallel process for supporting those who come forward.

9. **Look for patterns of behavior.**
   Too often, both victims of negative behaviors and others in the firm try to find consolation in the notion that the witnessed behavior is not part of a pattern. But it is incumbent on the firm to investigate each incident and to look for patterns as part of that investigation.

   A striking aspect of the survey responses is how infrequently formal reports were made within the reporting hierarchy of the firm (to the extent one existed), even as information was shared with colleagues, including partners. It is important to ask, however, whether that informal sharing of information served as an unsatisfactory alternative to the preferred result of an institutional response. Such a result can be greatly facilitated by the collection of information that helps identify individuals who engage in patterns of improper behaviors. At least in that way, shared information can assist in identifying offenders who have impacted multiple people.

   Accordingly, workplaces need to develop a system for collecting information about behaviors that are detrimental to the firm and that are not in keeping with the values and ethical constructs of the legal profession.

10. **Do not force face-to-face interactions between a person who reports and the person being reported.**
    To properly provide support throughout an internal process, it is important to avoid steps that emphasize the imbalance of power generally existing between those who report behaviors of concern and those who are the subject of such a report. Several respondents noted that, subsequent to reporting, they were required to meet directly with the alleged perpetrator to discuss the accusations. None of these meetings had support mechanisms in place for the reporting individual including, for example, a neutral party who could facilitate a positive conversation. In fact, some described the atmosphere of these meetings as punitive and a reinforcement of the power imbalance.

    It is hard enough for someone to take the step of reporting. What follows within the organization should be a process in which the individual feels safe in the workplace and supported through each phase of the investigation. A forced meeting in which the only other attendees are part of the firm's power structure is a setting designed to intimidate someone already feeling victimized. The result is to further discourage reporting.

11. **Commiseration is not a strategy.**
    As noted, a large number of respondents to this survey felt they could not formally report the offending behaviors but, instead, spoke with supportive colleagues. While it is important to be able to have trusted colleagues at work to whom one can speak confidentially about sensitive topics, this approach generally will not help the individual's circumstances, and will certainly not bring about any positive change.

    People share negative stories in the workplace for several reasons, including affirmation that they did not deserve what they experienced, comfort for what they are feeling and, importantly, finding hope that somehow the behavior will change. Those who hear stories of improper behaviors in the workplace should have an opportunity to respond in a way

that is not simply comforting to the victim's feelings, but can result in corrective measures being taken.

Many respondents who were reluctant to report provided ample reasons for being fearful. Certainly there are some situations where the behaviors are so untenable, and the likelihood of a positive resolution so remote, that leaving is an appropriate response. But in every circumstance, it is important to ask whether there can be a process beyond sharing stories with trusted colleagues, if only to help pave the way for future employees to avoid the same pain.

12. **Avoidance is also not a strategy.**
    When partners are engaging in inappropriate behaviors, the response should not be to propose that the perpetrator and the person aggrieved by the behaviors simply be separated physically. Several respondents reported being moved away from a harasser or bullying partner, without the firm addressing the root cause of the problem. Not only do such measures fail to change firm dynamics overall, they also may impact the types of future work assignments given to the victim and can impede other career opportunities through loss of proximity to a practice group and to supportive peers, as well as possible decreased visibility to key partners.

    In many cases, avoidance as a strategy is not even possible because of the underlying working relationship. For example, are young lawyers supposed to steer clear of partners who may have been abusive or have otherwise engaged in inappropriate behavior, but who are an important source of work? What would prevent further negative career impacts? And why should the responsibility fall on the victim to make the required adjustments?

    Firms need a variety of appropriate responses to address the range of behaviors that were identified in this survey. Those responses, however, cannot include actions that only impact the person feeling victimized.

13. **Vigilantly prevent retaliatory behaviors.**
    Retaliation can be blatant or more subtle. The blatant forms are easily observable, for example, whether a complainant is fired or partners stop assigning work to someone who raises concerns. But there are many more subtle ways in which a person's career can be damaged through less obvious retaliatory behaviors. For example, a person can be socially ostracized, excluded from client opportunities, or not given high value work, just to name a few ways. Firms should include in their process a way to monitor subsequent behaviors towards those who file reports to prevent any form of retaliation.

14. **Beware of "Death By A Thousand Cuts."**
    Many of the anecdotes reported demonstrated the pernicious way in which humor is used as a sword and a shield. Such remarks inflict damage over time through frequent cuts to those who are victimized by the comments, while offering the protective shield of "It's just a joke" to the perpetrators – who then accuse complainants of lacking a sense of humor.

    Humor that denigrates others is not funny. Individuals should be free to go to work without facing offensive comments justified as jokes, and then made to feel badly for not laughing.

15. **Develop training techniques for and encourage implementation of bystander intervention.**
    Bystanders who observe inappropriate behaviors have an important opportunity to give voice to someone who may feel voiceless, or to amplify a rebuke to what is transpiring. One respondent who has been in the workplace for several decades noted that she now plays an active role in helping to stop conversations that are veering into a negative direction by simply stating "That's inappropriate" or "None of your business."

    There are many forms of bystander intervention that can help make a difference, and firms can offer training to teach employees constructive strategies for such intervention.

16. Resist backlash attempts against the #MeToo Movement.

A number of respondents told of remarks made by partners that denigrated or complained about the #MeToo Movement, even including comments that they can no longer "get away with" what they could previously. These remarks mirror the undercurrent of resistance that has been identified in other workplace settings, manifesting in objections to the symbolic importance of #MeToo as providing a voice to those who have previously felt voiceless.

One concern that appears with increasing frequency is whether the #MeToo movement will inhibit regular interactions between men and women, including mentoring. As the anecdotes offered by the survey respondents make clear, however, such comments are a decoy, directing attention away from the real and compelling need to bring workplace behaviors to light.

None of the survey respondents complained that someone may have complimented their outfit. They did raise many concerns about leering remarks and comments specifically directed to their chest or other personal parts of their body.

Nor did female respondents complain about positive relationships they have developed with their male colleagues. Rather, they focused on men who sought mentoring meetings in bars or in hotel rooms while on work trips.

People being kind to and complimenting one another is not unacceptable behavior. Remarks, however, that are clearly sexual in nature or that, at their core, reinforce the power imbalance in the workplace should not be tolerated.

17. Consider Curbs on Social Drinking at Firm-Sanctioned Social Gatherings.

So many respondents provided anecdotes in which inappropriate behaviors occurred at a holiday or other social gathering in which the perpetrators were clearly inebriated. Law firms should consider ways to curb excessive drinking at firm-sponsored social events.

Conclusion

The survey yielded several striking findings. First – and no surprise when the survey is viewed in comparison to other organizations, corporations, and industries – is that the majority of the negative behaviors described arose from those in authority who misused their power. Nearly all of the anecdotes reported described events that happened to younger people, where the perpetrator was more senior and, frequently, among the more powerful persons in the firm.

In such circumstances where the source of the negative conduct was a senior partner or firm leader, there was no place for the victim to turn for support or remedial measures. Fear of retaliation and concern about loss of status and opportunity to advance within the firm loomed large.

As noted previously, a few respondents seemed resigned to a profession where humiliation was acceptable and a sink or swim culture an appropriate way to train lawyers. Those comments demonstrate how behaviors in the workplace are learned, and how culture is perpetuated. It would be difficult to find a book for organization leaders that extols humiliation and bullying as a technique for success in the workplace.

Law firm partners are often placed in leadership roles as a result of their client development and lawyering skills. Talent development and management of people are not necessarily part of that same skill set. Accordingly, firms may choose to consider management courses for all of its leaders, to facilitate skill sets that bring out the best from those who come to work each day, wanting only to serve the firm's clients and live the best values of the legal profession.

We hope that lawyers see in this survey a way to help facilitate a culture of civility, respect, and inclusion.

Workshop A: Switching to Offense in Employment Cases

Howard M. Miller, Esq.
Bond Schoeneck & King PLLC, Garden City

Karen Fernbach, Esq.
Hofstra Law School, Hempstead

Melissa L. Stewart, Esq.
Outten & Golden LLP, NYC

NYS Bar Association –
Labor & Employment Law Section

Switching to Offense in Employment Cases

October 12, 2018

Howard M. Miller, Esq.
of Bond, Schoeneck & King

Karen Fernbach, Esq.
of Hofstra Law School

Melissa L. Stewart, Esq.
of Outten & Golden LLP

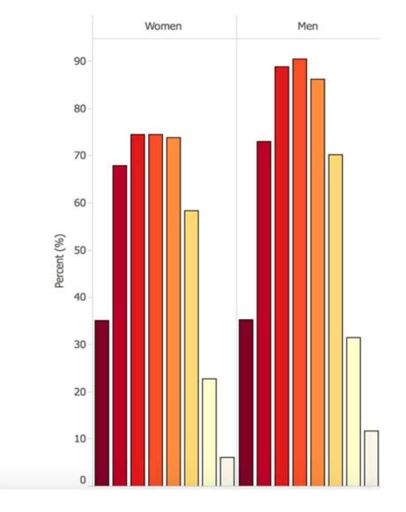
Agenda

- Equal Pay Act
- Class Action Waivers
- Responding to Attorney Letters & Mediation
- Counterclaims, and the Threat Thereof
- Fee Shifting

Unequal Pay Disputes under Equal Pay Act in #Me Too Era – How to Avoid Litigation

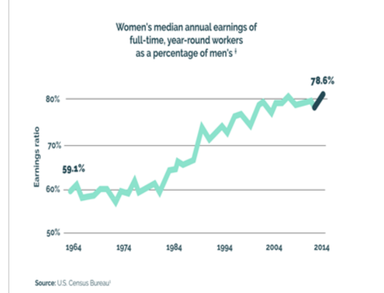
Statistics about Women in the Workforce

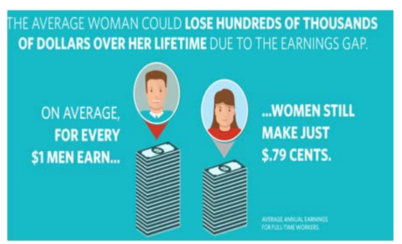
- 56.8% of eligible women are currently in the U.S. workforce (as compared to 69.2 % of men)
- Most women range from 25-34; 35-44; and 45-54 years old
- Most common industries women work in include education, nursing, secretary/administrative assistants, and customer service



The Pay Gap

- In 1963, women earned 59 cents to every $1 a man made
- Although the wage gap is getting smaller, today women still only earn 80 cents to every $1 a man earns
- The average woman must work far into the next year to earn what the average man earns the previous year.
- The difference in pay amounts to $10,086 per year and $403,440 over a 40-year career.





Equal Pay Day 2018

- Tuesday, April 10, 2018
- The average woman must work far into the next year to earn what the average man earns the previous year.
- Equal Pay Day is the approximate day the typical woman must work into the new year to make what the typical man made at the end of the previous year. Based on ACS Census data, the 2018 wage gap between women and men is $.80 (cents).

Old Time "Justifications" for Pay Gap

Education Disparities- more men than women had college degrees

Workforce Numbers- more men worked than women

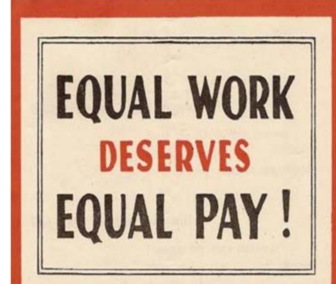
Industry Differences- more men work in certain industries that pay more

Child Care Obligations- more women tend to family matters than men

History of the Fight for Equal Pay

- In 1869, a resolution to **ensure equal pay to government employees** passed the House but was ultimately watered down by the time it passed the Senate in 1870.
- In 1911, **New York teachers** were granted pay equal to that of their male counterparts, after a long and contentious battle with the Board of Education.
- Women made up **a quarter of the American workforce** by the early 20th century, but they were traditionally paid far less than men, even in cases where they performed the same job.
- Efforts to correct the wage gap escalated during **World War II when thousands of American women entered factory jobs in place of men** who had enlisted in the military. In 1942, for example, the **National War Labor Board endorsed policies to provide equal pay** in instances where women were directly replacing male workers.

- In 1945, the U.S. Congress introduced the **Women's Equal Pay Act**, which would have made it illegal to pay women less than men for work of "comparable quality and quantity." The measure **failed to pass**, however.
- After the war ended, the demand for equal pay seemed to lose some steam. In 1947, **Secretary of Labor Lewis Schwellenbach tried to get an equal pay amendment** passed that would apply to the private sector. But as **veterans needed work after the war** and women were increasingly expected to stay in the home, Schwellenbach's bid was unsuccessful.
- By 1960, women still earned **less than two-thirds** of what their male counterparts were paid.
- In 1963, the **Equal Pay Act** was passed.
- In 1964, **The Civil Rights Act of 1964**, which prohibited discrimination on the basis of race, origin, color, religion or sex was passed.



The Equal Pay Act

- Signed into law on June 10, 1963 by **President John F. Kennedy**
- Part of the **Fair Labor Standards Act** of 1938 (FLSA)
- Administered and enforced by the **Equal Employment Opportunity Commission** (EEOC)
- Prohibits **sex-based wage discrimination** between men and women in the same **establishment** who perform jobs that require equal **skill**, **effort** and **responsibility** under similar **working conditions**.

- **Establishment**: a **distinct physical place of business** rather than an entire business or enterprise consisting of several places of business. In some circumstances, physically separate places of business may be treated as one establishment.
- **Skill:** Measured by factors such as the experience, ability, education, and training required to perform the job. The issue is **what skills are required for the job, not what skills the individual employees may have**.
- **Effort**: The amount of **physical or mental exertion** needed to perform the job.
- **Responsibility**: The degree of **accountability** required in performing the job. Minor differences in responsibility would not justify a pay differential.
- **Working Conditions** This encompasses two factors: (1**) physical surroundings** like temperature, fumes, and ventilation; and (2) **hazards**.

Title VII of the Civil Rights Act

- Signed into law by **President Lyndon B. Johnson** on July 2, 1964
- Title VII prohibits **discrimination in pay and all other aspects of employment** based on **sex** (as well as, race, color, national origin, religion, or retaliation).
- Under Title VII, the question is **whether you were paid less because of your sex.** If an employer pays women less than men in the same situation, and its explanation (if any) does not adequately explain the difference, then there is indirect proof of pay discrimination under Title VII.
- Title VII only applies to employers with **15 or more employees** whereas EPA applies to all employers regardless of number of employees.

Violations of EPA and Title VII

- In 2017, the EEOC received **996 equal wage discrimination charges**. Yet just a fraction of these charges go beyond the initial filing. Last year, 65.1% were found to have "no reasonable cause" for action. But 18.7% were meritorious and resulted in collecting $9.3 million in monetary benefits.
- Under the EPA, you don't need to file a charge of discrimination with EEOC. Instead, you are allowed to go directly to court and file a lawsuit.
- The EPA is **intent-neutral**. In other words, it doesn't matter whether you meant to pay an employee less because of gender—the fact that you did it is enough.
- In 2017, **25,605 Title VII charges** were filed with the EEOC alleging sex-based discrimination. 16.2%% were merit resolutions collecting monetary benefits of $135.1 million in monetary benefits.

Statue of Limitations

- Under the **EPA**, you generally have **two years from the date of payment** to go to the EEOC or directly to court. The only exception is if you can show that the employer intentionally disregarded the legal requirements of the EPA; then, you have three years from the discriminatory payment.
- You must file a **Title VII** charge within **180 days** of when you received the discriminatory pay. (This 180-day deadline may be extended to 300 days if your charge also is covered by a state or local anti-discrimination law and you filed with the local agency. Once you receive a right to sue letter, you can then file with the U.S. District Court but it must be filed within 90 days from the date you received the right to sue letter.
- To challenge pay discrimination by the federal government, you only have 45 days to contact your agency's EEO counselor.

Employer's Affirmative Defenses

1. Seniority System
2. Merit System
3. Pay System based on quantity or quality of output
4. Any other factor other than sex

While the first three factors are pretty straightforward, that last **"catch-all" category** is where employers get creative. They may say the higher paid employee has more experience or training, or that he was simply a better negotiator

Prior Salary History

Aileen Rizo v. Jim Yovino, No. 16-15372 (9th Circuit, April 9, 2018) (en banc decision)

- Court held: employers fighting claims under the federal Equal Pay Act can't rely on workers' **past salaries** to justify paying women less than men.
- **"Prior salary alone or in combination with other factors cannot justify a wage differential**," Judge Reinhardt said. "To hold otherwise — to allow employers to capitalize on the persistence of the wage gap and perpetuate that gap ad infinitum — would be contrary to the text and history of the Equal Pay Act."
- Prior salary therefore is not "a factor other than sex" affirmative defense
- This is first Circuit Court to impose strict prohibition against use of prior salary as a factor.
- The Second Circuit requires the fourth factor to be job-related but hasn't to date banned reliance on prior salary as one factor to consider. *See Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 526 (2d Cir. 1992).

Prior Salary History – Philadelphia Statute

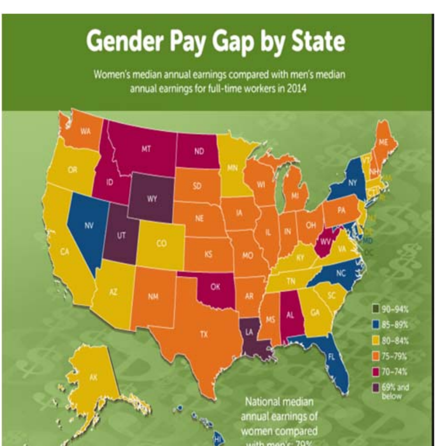
- Philadelphia passed the first law prohibiting inquiry about salary history.
- Chamber of commerce sought to invalidate and enjoin the law on basis that prohibiting inquiry into prior salary history violates an employer's free speech rights under the First Amendment. **The Chamber of Commerce for Greater Philadelphia v. City of Philadelphia, No. 2:17-cv-01548 (U.S. District Court, Eastern Dist. Pennsylvania)**
- District Court Judge Mitchell Goldberg on April 30, 2018 granted preliminary injunction on the portion of the law banning the inquiry about prior salary on basis that there is a likelihood that the Chamber would prevail on a First Amendment ground that ran afoul of an employer's free speech rights.

Prior Salary History – Philadelphia Statute (continued)

- The district court upheld the portion of the law that prohibited an employer from relying on the wage history of an applicant unless the applicant knowingly and willingly disclosed it.
- An appeal is pending before the Third Circuit.
- The validity of the Philadelphia law and other similar laws such as NYC law, and recent Mass. Law banning inquiry of prior salary will await further litigation. Philadelphia lawsuit is likely to be the test case.

State Laws that Prohibit Unequal Pay

- **All states** except for seven of them have specific legislation that prohibits employers from paying a female employee less than a male employee.
- The exceptions are North Carolina, South Carolina, Utah, Wisconsin, and D.C. which do have **general employment discrimination laws**, but no specific pay gap laws.
- Alabama and Mississippi have no legislation regarding this matter, but follow the federal legislation



NYS - Achieve Pay Equity Law

- Signed in Oct. 2015 by Governor Cuomo, it provides greater workplace protections than the federal Equal Pay Act.
- Applies to all public and private employees in New York State.
- First – it broadens the term "same establishment" by defining it to include "workplaces in the "same geographic region"
- Second – It replaces the "any other factor other than sex" defense with the more limited defense of "bona fide factor other than sex, such as education, training, or experience"
- The Employer must demonstrate that this factor is
  - Not based on or derived from a sex-based differential in compensation
  - Is job related with respect to the position in question

NYS – Achieve Equal Pay Law (continued)

- Is consistent with a business necessity (defined as "a factor that bears a manifest relationship to the employment in question")
- Further, even if the employer can satisfy its burden with respect to these three elements, the defense will not be allowed if the employee can then demonstrate that:
  - The Employer uses an employment practice that causes a disparate impact on the basis of sex
  - An alternative employment practice exists that would serve the same purpose without causing a disparate impact; and
  - The employer has refused to adopt the alternative practice.

NYS - Achieve Equal Pay Act (continued)

- Two additional revisions to the Equal Pay Act provide:
  - Pay Transparency – Employers may not prohibit employees from inquiring about, discussing or disclosing wage information, except under limited circumstances.
    - Many employees already have this protection – those covered by NLRA and/or employed by federal contractors.
  - Increased Damages: The amount of liquidated damages for failure to pay equal wage is increased from 100% to 300% of wages due, but only in the case of a willful violation.

Mass. Equal Pay Act

- Effective July 1, 2018
- Goes further than NYS Law by prohibiting discrimination based on gender, if employee is performing **comparable work** rather than pay disparity between genders if performing **equal work** as set forth by the Equal Protection Act**.**
- Compare with New York Equal Pay Provision Section 194 that retains the same standard as the EPA in prohibiting a lesser wage "**for employees of the opposite sex employed in the same establishment if performing equal work on a job the performance of which requires equal skill, effort and responsibility, and which is performed under similar working conditions"**

Governor Cuomo's Equal Pay Executive Orders (effective June 1, 2017)

- Exec. Order #161: all state agencies are prohibited from asking an applicant for current or prior salary before a conditional offer of employment with compensation is made to applicant.
- Exec. Order #162: new reporting requirements for state contractors and subcontractors – submission of job title and salary for each employee working on a contract (including sex, race, and ethnicity, already required).
- State agencies are prohibited from relying on prior salary history to determine salary, unless required by law or a collective-bargaining agreement.

Cuomo’s Proposal to Restrict Job Applicant Inquiry in New York State

- Proposed on April 10, 2018 (Equal Pay Day)
- Statute would ban employers from asking job applicants about past salaries under an amendment to the NYS Human rights Law.
- Governor Cuomo: “The gender pay gap exists across the economic spectrum, across all industries, and can follow women throughout their careers. By banning salary history, we can break the weight of this unfair, unequal cycle and work to achieve fair pay for all women in this state”
- Not passed as of now but let’s watch further.

Mayor De Blasio’s Equal Pay Executive Order

- Order 1253 took effect on Oct. 31, 2017.
- **Prohibits all employers in New York City (public and private) from inquiring about an applicant employee’s salary history.**
- Public Advocate Letitia James: “This law is a major step toward achieving pay equity … By prohibiting employers from asking about salary history during the hiring process, we will ensure that being underpaid once does not condemn anyone to a lifetime of inequity.”
- This law protects not only women but also immigrants, minorities, older women, among others.

Proactive Steps to Avoid Gender-Based Unequal Pay Litigation

Get ahead of the curve . . .

- Voluntarily follow the NYC law (even if not covered) and refrain from asking applicants about prior salary.
- Voluntarily adopt proactive approach called for by the Mass Equal Pay Act (MEPA), which provides an affirmative defense for employers who conduct a good faith pre-litigation self-audit of pay practices and take steps to remedy unjustified gender pay disparities.
  - Hire outside experts to conduct the pay study.
  - Self-correction - pay increases to correct gender-based differentials.
  - Study could also be used to address wages disparities for other protected groups.

Proactive Steps to Avoid Gender-Based Unequal Pay Litigation

- Evaluate processes:
  - Engage an HR consultant or I/O psychologist to study validity of evaluations and other systems for determining initial pay, merit increases, bonuses, and promotions.
  - Design systems based on objective, job-related criteria and not based on subjective determinations made by supervisors or HR personnel.
- Train supervisors and managers:
  - Frame of reference training.
  - Implicit bias training.
  - Engage business managers and leadership in equal pay efforts.
- Increase transparency:
  - Pay structure, salary ranges within job classifications, information on methodology supervisors use to grant pay increases, merit increases, bonuses, and promotions
  - European models: British, Australian, German laws requiring public disclosure of gender-based salary disparities
- Re-build the workplace culture:
  - Engage business-side leaders (not just HR) to promote gender equity
  - Incentivize managers to promote positive outcomes

Proactive Steps to Avoid Gender Based Unequal Pay Litigation in NYS

- Increase communications:
  - Review employee performance at least twice a year so employees are made aware of areas that need improvement, areas where they are performing in a satisfactory manner, and areas where their performance is commendable or even outstanding.
  - Regular reviews will motivate employees and ensure them that the system of remuneration is fair and objective.
- Create an effective complaint mechanism:
  - Appoint a committee or task force (not a direct supervisor of the complainant) to review pay discrimination complaints.
  - Maintain complaints electronically and report issues to leadership.
  - Institute periodic follow-up procedure after complaint to ensure no adverse action.
  - Establish a mediation program to address pay issues.

Class Action Waivers

- *Epiq Systems v. Lewis* (2018) – the U.S. Supreme Court upheld an employer's use of class action waivers in arbitration agreements

Class Action Waivers

Pros

- May discourage expensive, prolonged class action litigation
- Less publicity and exposure of litigation documents in arbitration
- Some plaintiff's attorneys are more willing to take class action lawsuits over arbitration proceedings
- To bring multiple arbitrations, plaintiffs must have employees "signed up"

Cons

- Time-consuming battles about threshold issues
- Potential for hundreds of individual arbitration proceedings, resulting in costly arbitrator and administration fees
- Lack of coordination to handle similar issues/discovery
- Possibility of claim/argument preclusion against the employer
- Different arbitration results on similar issues which could lead to uncertainty for business practices
- Media attention and public backlash against arbitration, confidentiality, class waivers, and general fairness.

Class Action Waivers

- Enforceability of Class Action Waivers
  - It is insufficient to state that the parties agree to arbitration—there must be an explicit provision stating that arbitration proceedings will be on an individual basis
  - Employers may also have a provision explicitly prohibiting class/collective claims
  - NY State Law prohibits arbitration of sexual harassment claims

Responding to Attorney Letters & Mediation

- What are the pros/cons of pre-suit or early mediation?
- How much factual information or documentation should each party share?
- Should the parties agree to tolling pending mediation?
- Share mediation statement with the other side? Include case citations?
- How do we ensure the mediation will be the most effective?

Counterclaims: Employer Playing Offense

"Hence to fight and conquer in all your battles is not supreme excellence; supreme excellence consists in breaking the enemy's resistance without fighting." – Sun Tzu, The Art of War

- Counterclaims are sometimes available in employment cases, however, employers should be cautious and not pursue frivolous counterclaims because they have been found by some courts to be retaliatory.

Compulsory Counterclaims

- As explained in *Adam v. Jacobs*, 950 F.2d 89, 92 (2d Cir. 1991):
  - Under Fed. R. Civ. P. 13(a), a pleading must state as a counterclaim any claim that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.
  - The test for determining whether a counterclaim is compulsory is whether a logical relationship exists between the claim and counterclaim and whether the essential facts of the claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit.
- *E.g.*, counterclaims based on a contract are compulsory in actions relating to the same contract.

Counterclaims

- Meritorious counterclaims cannot be deemed retaliatory
- *Marchuk v. Faruqi & Faruqi, LLP*, 100 F. Supp. 2d 302, 311-312 (S.D.N.Y. 2015) - holding that counterclaims cannot "form the basis for a Title VII retaliation claim" unless they are "completely baseless".

Faithless Servant Doctrine

- Common-law theory that when an employee is disloyal to an employer (*e.g.*, unfair competition, insider trading, theft), the employer is entitled to all compensation paid to the employee during the time of disloyalty.
- Applies to many different types of employee misconduct:
  - *Morgan Stanley v. Skowron*, (S.D.N.Y. 2013) (insider trading);
  - *Colliton v. Cravath, Swaine & Moore, LLC* (S.D.N.Y. 2008) (off-duty sexual misconduct);
  - *Maritime Fish Products, Inc. v. World-Wide Fish Products, Inc.*, (1st Dep't 1984) (unfair competition);
  - *Astra USA v. Bildman*, (Mass. 2009) (sexual harassment).

New Life to an Old Doctrine

In *William Floyd Union Free Sch. Dist. v. Wright* (2d Dep't 2009), the court ordered two District employees who had stolen money from the District to forfeit the compensation paid to them since their **first disloyal act**, and all of their life and health insurance premiums that the District would otherwise be obligated to pay them into retirement. This resulted in a judgment of almost $1.6 million in the District's favor.

Faithless Servant Doctrine

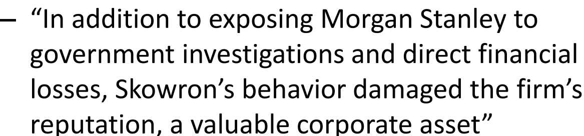
- *Salus Capital Partners, LLC v. Moser* (S.D.N.Y. 2018) – after terminating CEO without cause, the company reviewed former CEO's emails and uncovered evidence of that he attempted to conceal unauthorized personal charges on the corporate credit card. Court upheld arbitrator's award which found that the CEO had:
  - Spent $90,000 in questionable CC charges, including:
    - Patio furniture
    - Watches
    - Family travel expenses
    - Boston Bruins gear

Salus & the Faithless Servant Doctrine

- Arbitrator also found CEO:
  - Falsified an AV vendor's invoices totaling $100,000 with the intent to deceive Salus as to the true nature of the expenses incurred – since the AV work was actually done for his personal home, *not Salus*
  - Spent $35,000 in personal use of the company's NetJets account
- Arbitrator awarded $879,514 to the employer under the FSD and $748,155 in attorneys' fees for the investigation conducted after the CEO's employ ended

Faithless Servant Doctrine & Insider Trading

- *Morgan Stanley v. Skowron*, 989 F. Supp. 2d 356 (S.D.N.Y. 2013) – ordering disgorgement of compensation following a single instance of insider trading, lying to regulators, and failing to disclose the misconduct to the employer
  - "In addition to exposing Morgan Stanley to government investigations and direct financial losses, Skowron's behavior damaged the firm's reputation, a valuable corporate asset"
  - 100% of the compensation he received during the period of disloyalty because he was not paid on a "task-by-task" basis



Faithless Servant Doctrine

Task-by-task forfeiture for salaried employees, like defendant, would not only run afoul of New York's strict application of the forfeiture doctrine…, but would also have the ill effect of embroiling the courts in deciding how much general compensation should be forfeited, where the general compensation was awarded while the agent was acting disloyally in some, but not all, of his [or her] work…For these reasons, we decline to relax the faithless servant doctrine so as to limit plaintiff's forfeiture of all compensation earned by defendant during the period in which he was disloyal.

- *City of Binghamton v. Whalen,* (3d Dep't 2016) (internal citations and quotations omitted).

Faithless Servant Doctrine

- <u>Compare</u>: *Astra USA, Inc. v. Bildman*, 455 Mass. 116 (Mass. 2009) and *Colliton v. Cravath, Swaine & Moore, LLP*, 2008 U.S. Dist. LEXIS 74388 (S.D.N.Y. 2008), *aff'd*, 356 F. App'x 535 (2d Cir. 2009) with *Pozner v. Fox Broadcasting Co.*, 2018 N.Y. Misc. LEXIS 1149 (Sup. Ct. N.Y. Cnty. April 2, 2018).

Faithless Servant Doctrine as a Counterclaim

- In *Markbreiter v. Feinberg*, (S.D.N.Y. 2010), a former physician's office manager/secretary filed a claim for recovery under the FLSA and NYLL for unpaid overtime.
- The Court ruled the employer's counterclaim under the faithless servant doctrine was compulsory – finding it arose out of the "same transaction or occurrence."
  - "Here, the counterclaim seeks to recover compensation defendants paid to plaintiff for hours during which she allegedly was acting on behalf of competing physicians to attract defendants' patients where plaintiff seeks, at a minimum, to count those same hours in determining her entitled to overtime compensation."
- *Cf. Sanders v. Madison Square Garden, L.P.*, 2007 U.S. Dist. LEXIS 48126 (S.D.N.Y. 2007) ("[T]he alleged misconduct [tax fraud] here is so far removed from [plaintiff's] job responsibilities that it cannot be said that the misconduct "substantial[ly]" interfered with her job performance.")

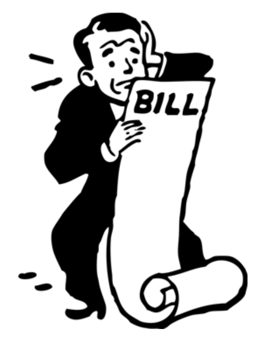
Fee Shifting

Sun Tzu: "If we do not wish to fight, we can prevent the enemy from engaging us even though the lines of our encampment be merely traced out on the ground. All we need to do is to throw something odd and unaccountable in his way."

- A defense attorney may move for fee-shifting against a plaintiff's lawyer who has been put on notice that the plaintiff's claim is frivolous.

Fee Shifting

- *Capone v. Pachogue-Medford Union Free Sch. Dist.*, (E.D.N.Y. 2006) (imposing full fee-shifting against plaintiff's counsel in an employment case).
- The EEOC was found to be liable for attorney's fees where the agency should have known by pretrial conference that it did not have enough evidence to establish a prima facie case of discrimination. *EEOC v. West Customer Mgmt. Group, LLC*, (N.D. Fl. 2015).



Sanctions

"By presenting to the court a pleading, written motion, or other paper – whether by signing, filing, submitting, or later advocating it – an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Fed. R. Civ. P. 11(b).

- *LaVigna v. WABC Television*, (S.D.N.Y. 1995) (requiring the employee's attorney to pay $250 and attend CLE courses after finding the plaintiff's Title VII and FLSA claims were "wholly frivolous and objectively unreasonable").

Treble Damages

An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,
2. Willfully delays his client's suit with a view to his own gain; or, willfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

(N.Y. Judiciary Law § 487).

Offer of Judgment

- Rule 68 of the Federal Rules of Civil Procedure permits defendants, 14 days prior to the date set for trial, to make an offer of judgment to the plaintiff to dispose of the case for a certain amount.
- If the plaintiff rejects or does not respond to the offer within 14 days, and the plaintiff receives a judgment at trial which is less than defendant's pre-trial offer, plaintiff must pay the defendant's post-offer costs.
- Depending on the claim and what constitutes "costs" under the applicable statute (FLSA, Title VII, etc.), there may be a limit on plaintiff's post-offer attorney's fees.

Offer of Judgment

- An offer of judgment in a Title VII discrimination case will cut off the accrual of attorney's fees post-offer because the statute defines "costs" to include reasonable attorney's fees. *See, e.g., Tai Van Le v. University of Pennsylvania*, 321 F.3d 403, 411 (3d Cir. 2003).
- An offer of judgment in an FLSA, ADA or ADEA case will not cut off the accrual of attorney's fees post-offer because the statutes do not define costs as including attorney's fees. *See, e.g., Grochowski v. Ajet Construction Corp.*, 2002 U.S. Dist. LEXIS 5031, at *6 (S.D.N.Y. Mar. 27, 2002).

Workshop B: Best Practices in Settling Wage-Hour Disputes

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New York State Bar Association
Labor & Employment Law Section Fall Meeting 2018
Montreal, Canada
Best Practices in Settling Wage-Hour Disputes

I. **Summary of *Cheeks***

Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, 206 (2d Cir. 2015):

1. Take-away FLSA claims cannot be dismissed with prejudice pursuant to a R. 41(a)(1)(A)(ii) stipulation absent court approval.
2. Underlying claims were for overtime, liquidated damages, and attorneys' fees under FLSA and NYLL
3. The parties reached a private settlement filed for R. 41(a)(1)(A)(ii) dismissal with prejudice, but the district court refused to enter stipulation on the basis that settlement of FLSA claims required court or DOL approval.
   a. Court ordered the parties to file a copy of the settlement agreement on the public docket and provide additional information demonstrating why the settlement was fair and reasonable.
4. On both parties' request, the the court stayed proceedings and certified for interlocutory appeal the question of whether FLSA settlements are an exception to the general rule that parties may stipulate to a dismissal without court approval
5. Holding: "Rule 41(a)(1)(A)(ii) stipulated dismissals settling FLSA claims with prejudice require the approval of the district court or the DOL to take effect" because of the "unique policy considerations underlying the FLSA." *Id.* at 206.
6. The court also highlighted several areas of potential abuse in FLSA settlements that demonstrate need for judicial review:
   a. highly restrictive confidentiality provisions
   b. overbroad releases, including general releases and releases that otherwise release claims wholly unrelated to wage-and-hour law
   c. attorneys' fees provisions including high percentages (e.g. over 40%) and "without adequate documentation to support such a fee award."
   d. agreement by plaintiffs' attorneys not to represent anyone in the future bringing similar claims against defendants.

II. **Sample Cases Post-*Cheeks* (non-exhaustive list):**

A. Confidentiality Provisions:

1. Generally have been rejected
2. *Jones v. Smith*, No. 16 Civ. 2194, 2018 WL 2227990 (E.D.N.Y. May 14, 2018): Parties tried to defend confidentiality provision and avoid filing settlement on the public docket by stipulating for settlement purposes only that the plaintiff was an independent contractor and therefore the FLSA did not apply to him, and by arguing for a "celebrity" exception to filing the settlement on the public docket.

Court rejected settlement and instructed the parties to revise the agreement so that it did not include "any impermissible confidentiality provisions." *Id.* at *5.

3. *Souza v. 65 St. Marks Bistro*, *Souza v. 65 St. Marks Bistro*, No. 15 Civ. 327, 2015 WL 7271747, at *4-5 (S.D.N.Y. Nov. 6, 2015): rejecting confidentiality provision as conflicting with Congressional intent to advance employees' awareness of their FLSA rights and ensure implementation of the FLSA. *Lopez v. Ploy Dee, Inc.*, No. 15 Civ. 647, 2016 WL 1626631, at *3 (S.D.N.Y. Apr. 21, 2016): rejecting confidentiality provision that required the plaintiff "to keep the existence, terms, and events leading up to and incorporated within this Agreement strictly and forever confidential[,]" not to "directly or indirectly encourage, induce, solicit, or assist anyone to file a wage and hour action or collective or class action against" Defendants, and imposed a $10,000 penalty for each breach.

B. Releases:

1. Courts have generally been more approving of general releases when they are mutual, but not when the defendant releasees are too broadly defined.
2. *Burgos v. Ne. Logistics, Inc.*, No. 15 Civ. 6840, 2018 WL 2376481, at *6 (E.D.N.Y. Apr. 26, 2018), *report and recommendation adopted*, 2018 WL 2376300 (E.D.N.Y. May 24, 2018): rejecting mutual release that was "asymmetrical with respect to the parties" and collecting cases rejecting similar releases. Defendant releasees included defendant, "its parent, subsidiaries, division, affiliates, commonly owned entities and other related entities, [defendant's" customers ... and each of their incumbent and former officers, directors, owners, shareholders, investors, agents, attorneys, employees, fiduciaries, successors, assigns, and representatives."
3. *Bukhari v. Senior*, No. 16 Civ. 9249, 2018 WL 559153, at *2 (S.D.N.Y. Jan. 23, 2018): Rejecting broad release that required employee to "release and forever discharge Defendants ... from any and all claims, known or unknown, asserted or unasserted, which [Bukhari] ha[s] or may have against [defendants] ... arising from or concerning in any way [Bukhari's] employment by or association with Defendants." *Id.* at *2. Fact that release was "facially mutual, although favoring the settlement, does not salvage it, absent a sound explanation for how this broad release benefits the plaintiff employee." *Id.*
4. *Ceesae v. TT's Car Wash Corp.*, No. 17 Civ. 291, 2018 WL 1767866, at *5 (E.D.N.Y. Jan. 3, 2018), *report and recommendation adopted*, 2018 WL 741396 (E.D.N.Y. Feb. 7, 2018): ordering that "the release should be limited to any claims plaintiff did or could have brought under the FLSA, NYLL and New York Code of Rule and Regulations, or it runs the risk of being overbroad and releasing defendant of liability unconnected to plaintiff's wage and hour claims."
5. *Souza v. 65 St. Marks Bistro*, *Souza v. 65 St. Marks Bistro*, No. 15 Civ. 327, 2015 WL 7271747, at *5 (S.D.N.Y. Nov. 6, 2015): approving general release where plaintiffs were former employees on the condition that the parties modify the release to be mutual.

6. *Lopez v. Ploy Dee, Inc.*, No. 15 Civ. 647, 2016 WL 1626631, at *3 (S.D.N.Y. Apr. 21, 2016): rejecting release of claims that plaintiff "did not know or suspect to exist," and "covenant not to sue Defendants "'in any forum for any reason'" in perpetuity[.]"

C. Attorneys' fees:

1. Requests for more than a third will be highly scrutinized, as will requested rates, and attorneys should submit contemporaneous billing records
2. *Lopez v. Ploy Dee, Inc.*, No. 15 Civ. 647, 2016 WL 1626631, at *4 (S.D.N.Y. Apr. 21, 2016) fees and costs that totaled 40% of settlement ($10,000 out of $25,000) were excessive, even though counsel's actual lodestar was higher (based upon rates that the court noted were on the "high end of what is typical in FLSA cases"). Also noting that courts rarely approve fees representing more than a third of the total settlement amount.
3. *Banegas v. Mirador Corp.*, No. 14 Civ. 8491, 2016 WL 1451550, at *3 (S.D.N.Y. Apr. 12, 2016): Requested attorneys' fee award was "not adequately supported" because "no billing records documenting the expenditure of time on this case [we]re included." Ordering plaintiff's counsel to submit "proper documentation of the billing records from this case in order for the Court to determine what constitutes a reasonable attorneys' fee."
4. *Lazaro-Garcia v. Sengupta Food Servs.*, No. 15 Civ. 4259, 2015 WL 9162701, at *3-4 (S.D.N.Y. Dec. 15, 2015): Rejecting settlement on other grounds but noting that attorneys' fee request for 39% of the total settlement would have been "excessive" because case was "fairly straightforward", the reduction in fees directly impacted Plaintiff's recovery, and plaintiffs' counsel's proposed rates were "too high in light of the work performed."

D. Other

1. Non-disparagement provisions
    a. *Lazaro-Garcia v. Sengupta Food Servs.*, No. 15 Civ. 4259, 2015 WL 9162701 (S.D.N.Y. Dec. 15, 2015): non-disparagement provision was overly restrictive because it contained no carve-out for "'truthful statements about plaintiffs' experience litigating their case.'" *Id.* at *3 (quoting carve-out *Lopez v. Nights of Cabiria, LLC*, 96 F. Supp. 3d 170, 180 (S.D.N.Y. 2015). Explaining that without the carve-out, plaintiff would be prohibited from informing other employees who might not be award of their rights of the company's failure to pay wages.
2. Restrictions on re-employment
    a. *Flores v. Hill Country Chicken NY, LLC*, No. 16 Civ. 2916, 2017 WL 3448018, at *2 (S.D.N.Y. Aug. 11, 2017): finding provision that "bars plaintiffs from ever working, or applying to work, for defendants and the releasees" not permissible.
3. Assisting in other litigations

a. *Guzman v. Kahala Holdings, LLC*, No. 15 Civ. 9625, 2017 WL 4748389, at *2 (S.D.N.Y. Oct. 18, 2017): rejecting provision that "prohibits plaintiffs from assisting in any other wage and hour litigation against defendants." Also rejecting no reemployment provision.

III. Open Issues Following *Cheeks*

A. Rule 68 Offers of Judgment

1. Do they also require Court approval in light of Cheeks?
2. Split of authority among district courts, issue is now pending at the 2nd Circuit in *Yu v. Hasaki*, No. 17-3388-cv
    a. District Court found that concerns about potential for abuse in FLSA settlements "apply no less to settlements under Rule 68 than they do to settlements under Rule 41." *Yu v. Hasaki Rest.*, 319 F.R.D. 111, 115 (S.D.N.Y. 2017).
    b. District court in *Yu* explained that: "[a]lthough *Cheeks* may not apply *a fortiori* to a Rule 68 FLSA settlement given its reliance on the language of Rule 41, its reasoning—combined with the fact that Rule 68 is not always, as the majority of courts in the Circuit have assumed, mandatory—compels the conclusion that parties may not evade the requirement for judicial (or DOL) approval by way of Rule 68." *Id.* at 116 (collecting cases holding same).
    c. Certified for interlocutory appeal and now fully briefed at the Second Circuit. Oral argument on **October 10**

B. Dismissals without Prejudice

1. Most courts have concluded dismissal without prejudice is not permissible if its purpose is an "end-run" around *Cheeks*, since the potential preclusive effect of a dismissal without prejudice coupled with the statute of limitations could create a de facto dismissal with prejudice.
2. *Carson v. Team Brown Consulting, Inc.*, No. 16 Civ. 4206, 2017 WL 4357393 (E.D.N.Y. Sept. 29, 2017): after reaching a settlement and being instructed by the magistrate judge to file the settlement documents, plaintiff's counsel filed a notice of voluntary dismissal under R. 41(a)(1)(A)(i) to avoid a *Cheeks* review of the settlement. Before filing the dismissal, the parties had already suggested to the court that there may be issues with the breadth of the release and that a *Cheeks* review would "directly impact" the terms of the settlement. The district court ordered the parties to submit papers sufficient to allow a *Cheeks* review, explaining that "[n]otices of dismissal without prejudice should not be used in FLSA cases as a mechanism to effect an end-run around the policy concerns articulated in *Cheeks*." *Id.* at *4.
3. *But see Martinez v. SJG Foods LLC*, No. 16 Civ. 7890, 2017 WL 2169234, at *3 n. 3 (S.D.N.Y. May 16, 2017): "The parties may stipulate to a dismissal of this

action without prejudice, as the Second Circuit has not expressly held that such settlement agreements require court approval."

C. Bifurcation of Approval of FLSA and non-FLSA Claims

1. *Yunda v. SAFI-G, Inc.*, No. 15 CIV. 8861, 2017 WL 1608898, at *2 (S.D.N.Y. Apr. 28, 2017): parties entered into two separate settlement agreements: (1) one for FLSA claims, and (2) 1 for NYLL claims. The NYLL agreement "contains several provisions that would be impermissible in an FLSA settlement" and parties included those provisions in the NYLL agreement "to immunize them from judicial review." *Id.* at *2. Court found that the bifurcated settlement agreement was permissible.
2. *Gallardo v. PS Chicken Inc.*, 285 F. Supp. 3d 549, 553 (E.D.N.Y. 2018): generally agreeing that separate settlement agreements for FLSA and non-FLSA claims is permissible and the non-FLSA agreement generally would not be subject to judicial review, but nonetheless requiring judicial review. Without review, court would not be able to determine whether the dismissal was a "true dismissal without prejudice" or "whether the agreement contains other conditions relating to or otherwise affecting the FLSA claims that would be impermissible if executed in an FLSA settlement agreement."

***Desrosiers v Perry Ellis Menswear, LLC*, 30 NY3d 488 (2017)**

The New York Court of Appeals held that pursuant to CPLR 908 putative class members must be notified of a settlement even if the case settles prior to class certification.

Procedural Background

This case involved appeals from two separate wage and hour class actions: *Desrosiers v. Perry Ellis Menswear* and *Vasquez v. National Securities Corporation.*

In *Desrosiers,* the defendant made an offer of compromise to the plaintiff which was accepted. The defendant subsequently moved to dismiss the action. At the time of the dismissal, the time by which the plaintiff was required to move for class certification had expired. In response to the defendant's motion to dismiss, the plaintiff filed a cross motion seeking leave to provide notice of the proposed dismissal to the putative class members pursuant to CPLR 908 despite there being no class certification. The Supreme Court dismissed the complaint and denied plaintiff's cross motion. On appeal, however, the First Department reversed the order, concluding that CPLR 908 "is not rendered inoperable simply because the time for the individual plaintiff to move for class certification has expired." The First Department also noted that notice to putative class members, at this stage, is "particularly important under the present circumstances, where the limitations period could run on the putative class members' cases following discontinuance of the individual plaintiff's action."

In *Vasquez*, the parties agreed to postpone a motion for class certification in order to complete precertification discovery. Before the plaintiff moved for class certification, he accepted a settlement offer and the defendant thereafter moved to dismiss the complaint. The plaintiff filed a cross motion to provide notice of the proposed dismissal to putative class members pursuant to CPLR 908. The Supreme Court granted the cross motion to provide notice to putative class members and directed that the action would not be dismissed until after notice had been issued.

The New York Court of Appeals Holds that Notice to Potential Class Members is Required Prior to Class Certification

On appeal, the New York Court of Appeals first commented that "[t]he text of CPLR 908 is ambiguous with respect to this [precertification notice] issue." The Court then noted that the only case to address the issue was *Avena v Ford Motor Co.* (85 AD2d 149, 447 NYS2d 278 (1st Dept 1982). In that case, the named plaintiffs settled with the defendant before class certification. The Supreme Court would not approve the settlement until notice was provided to the putative class members. The First Department affirmed, holding that CPLR 908 applied to settlements reached before class certification because the "potential for abuse by private settlement at this stage is . . . obvious and recognized." The First Department also found that the named plaintiffs had a fiduciary obligation to disclose relevant facts to putative class members.

The Court of Appeals reasoned that, "the fact that the legislature has not amended CPLR 908 in the decades since *Avena* has been decided is particularly persuasive evidence that the Court correctly interpreted the legislature's intent as it existed when CPLR 908 was enacted in light of

developments occurring in the years after *Avena* was decided." Specifically, the Court of Appeals noted that in 2003, Federal Rule of Civil Procedure Rule 23(e) was amended to clarify that settlement notice only had to be sent to putative class members of certified classes. That same year, multiple New York City Bar Committees recommended changes to CPLR 908 to clarify similarly the class member notice requirements at the precertification stage. However, no legislative action was taken to amend CPLR 908.

The Court of Appeals observed that "[n]otwithstanding these repeated proposals, and the legislature's awareness of this issue . . . the legislature has left CPLR 908 untouched from its original version as enacted in 1975." Therefore, because the legislature has declined to amend CPLR 908 since the *Avena* decision, the Court of Appeals determined that the *Avena* court had correctly interpreted the legislature's intent concerning CPLR 908 and that any "practical difficulties and policy concerns" that arise from this interpretation of CPLR 908 should be addressed by the legislature. Consequently, the Court affirmed both cases.

14-299-cv
Cheeks v. Freeport Pancake House, Inc.

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
3 ______________
4
5 August Term, 2014
6
7 (Argued: November 14, 2014 Decided: August 7, 2015)
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9 Docket No. 14-299-cv
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11 ______________
12
13 DORIAN CHEEKS,
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15 *Plaintiff-Appellant*,
16
17 v.
18
19 FREEPORT PANCAKE HOUSE, INC., W.P.S. INDUSTRIES, INC.,
20
21 *Defendants-Appellees*.
22
23 ______________
24
25 Before: POOLER, PARKER and WESLEY, *Circuit Judges*.
26
27 Dorian Cheeks appeals, pursuant to 28 U.S.C. § 1292(b), from the refusal of
28 the United States District Court for the Eastern District of New York (Joanna
29 Seybert, *J.*) to enter the parties' stipulation of settlement dismissing, with
30 prejudice, Cheeks' claims under the Fair Labor Standards Act ("FLSA") and New

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1 York Labor Law. We agree that absent such approval, plaintiffs cannot settle their
2 FLSA claims through a private stipulated dismissal with prejudice pursuant to
3 Federal Rule of Civil Procedure 41(a)(1)(A)(ii). We thus affirm, and remand for
4 further proceedings consistent with this opinion.
5 Affirmed.
6

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7 ABDUL HASSAN, Queens Village, NY, *for Plaintiff-*
8 *Appellant Dorian Cheeks*.
9
10 JEFFREY MEYER, Kaufman, Dolowich & Voluck, LLP
11 (Keith Gutstein, *on the brief*),Woodbury, NY, *for*
12 *Defendants-Appellees Freeport Pancake House, Inc. and*
13 *W.P.S. Industries, Inc.*
14
15 Laura Moskowitz, Senior Attorney, U.S. Department of
16 Labor, Office of the Solicitor, (M. Patricia Smith,
17 Solicitor of Labor, Jennifer S. Brand, Associate Solicitor,
18 Paul L. Frieden, Counsel for Appellate Litigation, *on the*
19 *brief*), Washington, D.C., *for Amicus Curiae U.S.*
20 *Department of Labor*.
21
22 POOLER, *Circuit Judge*:
23 Dorian Cheeks appeals, pursuant to 28 U.S.C. § 1292(b), from the refusal of
24 the United States District Court for the Eastern District of New York (Joanna
25 Seybert, *J.*) to enter the parties' stipulation of settlement dismissing, with

1 prejudice, Cheeks' claims under the Fair Labor Standards Act ("FLSA") and New
2 York Labor Law. The district court held that parties cannot enter into private
3 settlements of FLSA claims without either the approval of the district court or the
4 Department of Labor ("DOL"). We agree that absent such approval, parties
5 cannot settle their FLSA claims through a private stipulated dismissal with
6 prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii). We thus
7 affirm, and remand for further proceedings consistent with this opinion.

8 **BACKGROUND**

9 Cheeks worked at both Freeport Pancake House, Inc. and W.P.S.
10 Industries, Inc. (together, "Freeport Pancake House") as a restaurant server and
11 manager over the course of several years. In August 2012, Cheeks sued Freeport
12 Pancake House seeking to recover overtime wages, liquidated damages and
13 attorneys' fees under both the FLSA and New York Labor Law. Cheeks also
14 alleged he was demoted, and ultimately fired, for complaining about Freeport
15 Pancake House's failure to pay him and other employees the required overtime
16 wage. Cheeks sought back pay, front pay in lieu of reinstatement, and damages
17 for the unlawful retaliation. Freeport Pancake House denied Cheeks' allegations.
18 After appearing at an initial conference with the district court, and

1 engaging in a period of discovery, the parties agreed on a private settlement of
2 Cheeks' action. The parties then filed a joint stipulation and order of dismissal
3 with prejudice pursuant to Rule 41(a)(1)(A)(ii). Cheeks v. Freeport Pancake
4 House, Inc., No. 2:12-cv-04199 (E.D.N.Y. Dec. 27, 2013) ECF No. 15. The district
5 court declined to accept the stipulation as submitted, concluding that Cheeks
6 could not agree to a private settlement of his FLSA claims without either the
7 approval of the district court or the supervision of the DOL. The district court
8 directed the parties to "file a copy of the settlement agreement on the public
9 docket," and to "show cause why the proposed settlement reflects a reasonable
10 compromise of disputed issues rather than a mere waiver of statutory rights
11 brought about by an employer's overreaching." App'x at 35 (internal quotation
12 marks omitted). The district court further ordered the parties to "show cause by
13 providing the Court with additional information in the form of affidavits or other
14 documentary evidence explaining why the proposed settlement is fair and
15 reasonable." App'x at 35.

16 Rather than disclose the terms of their settlement, the parties instead asked
17 the district court to stay further proceedings and to certify, pursuant to 28 U.S.C.
18 § 1292(b), the question of whether FLSA actions are an exception to Rule

1 41(a)(1)(A)(ii)'s general rule that parties may stipulate to the dismissal of an
2 action without the involvement of the court. On February 20, 2014, the district
3 court entered an order staying the case and certifying the question for
4 interlocutory appeal. Our Court granted the motion. Cheeks v. Freeport Pancake
5 House, Inc., 14-299-cv (2d Cir. May 7, 2014), ECF No. 44 . Our Court heard oral
6 argument on November 14, 2014. As both parties advocated in favor of reversal,
7 following oral argument we solicited the views of the DOL on the issues raised in
8 this matter. The DOL submitted a letter brief on March 27, 2015, taking the
9 position that the FLSA falls within the "applicable federal statute" exception to
10 Rule 41(a)(1)(A), such that the parties may not stipulate to the dismissal of FLSA
11 claims with prejudice without the involvement of a court or the DOL." Cheeks
12 submitted supplemental briefing in response to the DOL's submission on April
13 20, 2015, and we find no need for additional oral argument.

14 **DISCUSSION**

15 The current appeal raises the issue of determining whether parties may
16 settle FLSA claims with prejudice, without court approval or DOL supervision[1],

[1] Pursuant to Section 216(c) of the FLSA, the Secretary of Labor has the authority to "supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under" the

1 under Federal Rule of Civil Procedure 41(a)(1)(A)(ii). The question of whether
2 judicial approval of, and public access to, FLSA settlements is required is an open
3 one in our Circuit.[2] We review this question of law de novo. *See Cmty. Health Care*
4 *Ass'n of N.Y. v. Shah*, 770 F.3d 129, 150 (2d Cir. 2014).

5 Rule 41(a)(1)(A) provides in relevant part that:

6 Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any
7 applicable federal statute, the plaintiff may dismiss an
8 action without a court order by filing:
9
10 (i) a notice of dismissal before the opposing party
11 serves either an answer or a motion for
12 summary judgment; or
13
14 (ii) a stipulation of dismissal signed by all parties
15 who have appeared.
16
17 Fed. R. Civ. P. 41(a)(1)(A).

18 The FLSA is silent as to Rule 41. We must determine, then, if the FLSA is an

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FLSA. 29 U.S.C. § 216(c). "[T]he agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have . . . to such unpaid minimum wages or unpaid overtime compensation and" liquidated damages due under the FLSA. *Id.*

[2]As it is not before us, we leave for another day the question of whether parties may settle such cases without court approval or DOL supervision by entering into a Rule 41(a)(1)(A) stipulation without prejudice.

1 "applicable federal statute" within the meaning of the rule. If it is not, then
2 Cheeks' case was dismissed by operation of Rule 41(a)(1)(A)(ii), and the parties
3 did not need approval from the district court for the dismissal to be effective.
4 *Hester Indus., Inc. v. Tyson Foods, Inc.*, 160 F.3d 911, 916 (2d Cir. 1998) ("The
5 judge's signature on the stipulation did not change the nature of the dismissal.
6 Because the dismissal was effectuated by stipulation of the parties, the court
7 lacked the authority to condition [the] dismissal . . . .") (collecting cases).

8 We start with a relatively blank slate, as neither the Supreme Court nor our
9 sister Circuits have addressed the precise issue before us. District courts in our
10 Circuit, however, have grappled with the issue to differing results. Those
11 requiring court approval of private FLSA settlements regularly base their
12 analysis on a pair of Supreme Court cases: *Brooklyn Savings Bank v. O'Neil*, 324
13 U.S. 697 (1945) and *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946).

14 *Brooklyn Savings* involved a night watchman who worked at Brooklyn
15 Savings Bank for two years. 324 U.S. at 699. The watchman was entitled to
16 overtime pay for his work, but was not compensated for his overtime while he
17 worked for the bank. *Id.* at 700. The watchman left the bank's employ, and two
18 years later the bank computed the statutory overtime it owed him and offered the

1 watchman a check for $423.16 in exchange for a release of all his FLSA rights. *Id.*
2 The watchman signed the release, took the check, and then sued the bank for
3 liquidated damages pursuant to the FLSA, which were admittedly not included
4 in the settlement. *Id.*

5 The Supreme Court held that in the absence of a genuine dispute as to
6 whether employees are entitled to damages, employees could not waive their
7 rights to such damages in a private FLSA settlement. *Id.* at 704. Because the only
8 issue before the court was the issue of liquidated damages, which were a matter
9 of statutory calculation, the Court concluded that there was no bona fide dispute
10 between the parties as to the amount in dispute. *Id.* at 703. The Court noted that
11 the FLSA's legislative history "shows an intent on the part of Congress to protect
12 certain groups of the population from substandard wages and excessive hours
13 which endangered the national health and well-being and the free flow of goods
14 in interstate commerce." *Id*. at 706. In addition, the FLSA "was a recognition of
15 the fact that due to the unequal bargaining power as between employer and
16 employee, certain segments of the population required federal compulsory
17 legislation to prevent private contracts on their part which endangered national
18 health and efficiency and as a result the free movement of goods in interstate

1 commerce." *Id.* at 706–07. Concluding that the FLSA's statutory language
2 indicated that "Congress did not intend that an employee should be allowed to
3 waive his right to liquidated damages," the Court refused to enforce the release
4 and allowed the watchman to proceed on his claim for liquidated damages. *Id*. at
5 706. However, the Court left unaddressed the issue of whether parties could
6 privately settle FLSA claims if such settlements resolved "a bona fide dispute
7 between the parties." *Id.* at 703.

8 A year later, in *D.A. Schulte*, the Supreme Court answered that question in
9 part, barring enforcement of private settlements of bona fide disputes where the
10 dispute centered on whether or not the employer is covered by the FLSA. 328
11 U.S. at 114. Again, the Supreme Court looked to the purpose of the FLSA, which
12 "was to secure for the lowest paid segment of the nation's workers a subsistence
13 wage," and determined "that neither wages nor the damages for withholding
14 them are capable of reduction by compromise of controversies over coverage." *Id.*
15 at 116. However, the Supreme Court again specifically declined to opine as to
16 "the possibility of compromises in other situations which may arise, such as a
17 dispute over the number of hours worked or the regular rate of employment." *Id.*
18 at 114–15.

1 *Brooklyn Savings* and *Gangi* establish that (1) employees may not waive the
2 right to recover liquidated damages due under the FLSA; and (2) that employees
3 may not privately settle the issue of whether an employer is covered under the
4 FLSA. These cases leave open the question of whether employees can enforce
5 private settlements of FLSA claims where there is a bona fide dispute as to
6 liability, i.e., the number of hours worked or the amount of compensation due. In
7 considering that question, the Eleventh Circuit answered "yes," but only if the
8 DOL or a district court first determines that the proposed settlement "is a fair and
9 reasonable resolution of a bona fide dispute over FLSA provisions." *Lynn's Food*
10 *Stores, Inc. v. United States Dep't of Labor*, 679 F.2d 1350, 1355 (11th Cir. 1982).[3]
11 In *Lynn's Foods*, an employer sought a declaratory judgment that the
12 private settlements it had entered into with its employees absolved it of any
13 future liability under the FLSA. *Id.* at 1351–52. The private settlements were
14 entered into after the DOL found the employer "was liable to its employees for
15 back wages and liquidated damages," *id*. at 1352, but were not made with DOL

[3] Because this appeal was certified before the parties presented the district court with evidence to support their proposed settlement, we express no opinion as to whether a bona fide dispute exists here, or what the district court must consider in deciding whether to approve the putative settlement of Cheeks' claims.

1 approval. The putative settlements paid the employees far less than the DOL had
2 calculated the employees were owed.
3 In rejecting the settlements, the Eleventh Circuit noted that "FLSA rights
4 cannot be abridged by contract or otherwise waived because this would nullify
5 the purposes of the statute and thwart the legislative policies it was designed to
6 effectuate." *Id.* (internal quotation marks omitted). The court reasoned that
7 requiring DOL or district court involvement maintains fairness in the settlement
8 process given the great disparity in bargaining power between employers and
9 employees. *Id.* The Eleventh Circuit noted that the employer's actions were "a
10 virtual catalog of the sort of practices which the FLSA was intended to prohibit."
11 *Id*. at 1354. For example, the employees had not brought suit under the FLSA and
12 were seemingly "unaware that the Department of Labor had determined that
13 Lynn's owed them back wages under the FLSA, or that they had any rights at all
14 under the statute." *Id*. Despite that, the employer "insinuated that the employees
15 were not really entitled to any back wages," and suggested "that only
16 malcontents would accept back wages owed them under the FLSA." *Id*. The
17 employees were not represented by counsel, and in some cases did not speak
18 English. *Id*. The Eleventh Circuit noted that these practices were "illustrative of

1 the many harms which may occur when employers are allowed to 'bargain' with
2 their employees over minimum wages and overtime compensation, and
3 convinces us of the necessity of a rule to prohibit such invidious practices." *Id.* at
4 1354-55.[4]

5 The Fifth Circuit, however, concluded that a private settlement agreement
6 containing a release of FLSA claims entered into between a union and an
7 employer waived employees' FLSA claims, even without district court approval
8 or DOL supervision. *Martin v. Spring Break '83 Prods., L.L.C.*, 688 F.3d 247, 253–57
9 (5th Cir. 2012). In *Martin*, the plaintiffs were members of a union, and the union
10 had entered into a collective bargaining agreement with the employer. *Id.* at 249.
11 The plaintiffs filed a grievance with the union regarding the employer's alleged
12 failure to pay wages for work performed by the plaintiffs. *Id*. Following an
13 investigation, the union entered into an agreement with the employer settling the
14 disputed compensation for hours worked. *Id*. However, before the settlement

[4] Other Circuits agree with the Eleventh Circuit's conclusion that waiver of a FLSA claim in a private settlement is not valid. *Copeland v. ABB, Inc.*, 521 F.3d 1010, 1014 (8th Cir. 2008) ("FLSA rights are statutory and cannot be waived"); *see also Taylor v. Progress Energy, Inc.*, 680 F. Supp. 2d 750, 753 (D. Md. 201) *aff'd* 493 F.3d 454, 460 (4th Cir. 2007) *superseded by regulation on other grounds as stated in Whiting v. The Johns Hopkins Hosp*., 416 F. App'x 312 (4th Cir. 2011) (same); *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 306 (7th Cir. 1986) (same).

1 agreement was executed, the plaintiffs sued, seeking to recover unpaid wages
2 pursuant to the FLSA. *Id*. at 249–50.

3 The Fifth Circuit concluded that the agreement between the union and
4 employer was binding on the plaintiffs and barred the plaintiffs from filing a
5 FLSA claim against the employer. *Id.* at 253–54. The Fifth Circuit carved out an
6 exception from the general rule barring employees' waiver of FLSA claims and
7 adopted the rationale set forth in *Martinez v. Bohls Bearing Equipment Co.*, 361 F.
8 Supp. 2d 608, 633 (W.D. Tex. 2005) ("[A] private compromise of claims under the
9 FLSA is permissible where there exists a bona fide dispute as to liability."). The
10 Fifth Circuit reasoned that "[t]he Settlement Agreement was a way to resolve a
11 bona fide dispute as to the number of hours worked–not the rate at which
12 Appellants would be paid for those hours–and though Appellants contend they
13 are yet not satisfied, they received agreed-upon compensation for the disputed
14 number of hours worked." *Martin*, 688 F.3d at 256. The Fifth Circuit noted that
15 the concerns identified in *Lynn's Foods*–unrepresented workers unaware of their
16 FLSA rights–"[were] not implicated." *Id.* at 256 n.10. *Martin*, however, cannot be
17 read as a wholesale rejection of *Lynn's Foods:* it relies heavily on evidence that a
18 bona fide dispute between the parties existed, and that the employees who

1 accepted the earlier settlement were represented by counsel. *Id.* at 255, 256 n.10;
2 *Bodle v. TXL Mortg. Corp.*, 788 F.3d 159, 165 (5th Cir. 2015) (emphasizing that the
3 private settlements approved in *Martin* did not "undermine the purpose of the
4 FLSA because the plaintiffs did not waive their claims through some sort of
5 bargain but instead received compensation for the disputed hours").

6 While offering useful guidance, the cases discussed above all arise in the
7 context of whether a private FLSA settlement is enforceable. The question before
8 us, however, asks whether the parties can enter into a private stipulated
9 dismissal of FLSA claims with prejudice, without the involvement of the district
10 court or DOL, that may later be enforceable. The parties do not cite, and our
11 research did not reveal, any cases that speak directly to the issue before us:
12 whether the FLSA is an"applicable federal statute" within the meaning of Rule
13 41(a)(1)(A). Nor are we aided by the Advisory Committee's notes, which simply
14 state that the language "any applicable federal statute" serves to "preserve"
15 provisions in "such statutes as" 8 U.S.C. § 1329 (immigration violations) and 31
16 U.S.C. § 3730 (qui tam actions), both of which explicitly require court approval
17 before dismissal. Fed. R. Civ. P. 41 advisory committee's note to 1937 Adoption.
18 As noted above, the FLSA itself is silent on the issue. One district court in our

1 Circuit found that this silence supports the conclusion that the FLSA is not an
2 "applicable federal statute" within the meaning of Rule 41. *Picerni v. Bilingual Seit*
3 *& Preschool Inc.*, 925 F. Supp. 2d 368, 375 (E.D.N.Y. 2013) ("[W]hile the FLSA
4 expressly authorizes an individual or collective action for wage violations, it does
5 not condition their dismissal upon court approval. The absence of such a
6 requirement is a strong indication that Congress did not intend it, as it has
7 expressly conditioned dismissals under other statutes upon court approval.").
8 The *Picerni* court concluded that:

> 9 Nothing in *Brooklyn Savings*, *Gangi*, or any of their
> 10 reasoned progeny expressly holds that the FLSA is one
> 11 of those Rule 41–exempted statutes. For it is one thing to
> 12 say that a release given to an employer in a private
> 13 settlement will not, under certain circumstances, be
> 14 enforced in subsequent litigation—that is the holding of
> 15 *Brooklyn Savings* and *Gangi*—it is quite another to say
> 16 that even if the parties want to take their chances that
> 17 their settlement will not be effective, the Court will not
> 18 permit them to do so.

19

20 *Id.* at 373.

21 The *Picerni* court also noted that "the vast majority of FLSA cases . . . are
22 simply too small, and the employer's finances too marginal, to have the parties
23 take further action if the Court is not satisfied with the settlement." *Id.* at 377.

1 Thus, the *Picerni* court concluded, "the FLSA is not one of the qualifying statutes
2 that fall within the exemption from Rule 41." *Id.* at 375; *see also Lima v. Hatsuhana*
3 *of USA, Inc.*, No. 13 Civ. 3389(JMF), 2014 WL 177412, at *1–2 (S.D.N.Y. Jan. 16,
4 2014) (indicating a willingness to follow *Picerni* but declining to do so given the
5 inadequacy of the parties' briefing on the issue).
6 Seemingly unpersuaded by *Picerni*, the majority of district courts in our
7 Circuit continue to require judicial approval of private FLSA settlements. *See, e.g.*,
8 *Lopez v. Nights of Cabiria, LLC*, --- F. Supp. 3d ----, No. 14-cv-1274 (LAK), 2015 WL
9 1455689, at *3 (S.D.N.Y. March 30, 2015) ("Some disagreement has arisen among
10 district courts in this circuit as to whether such settlements do in fact require
11 court approval, or may be consummated as a matter of right under Rule 41. The
12 trend among district courts is nonetheless to continue subjecting FLSA
13 settlements to judicial scrutiny.") (citation omitted); *Armenta v. Dirty Bird Grp.,*
14 *LLC*, No. 13cv4603, 2014 WL 3344287, at *4 (S.D.N.Y. June 27, 2014) (same)
15 (collecting cases), *Archer v. TNT USA Inc.,* 12 F. Supp. 3d 373, 384 n.2 (E.D.N.Y.
16 2014) (same); *Files*, 2013 WL 1874602, at *1–3 (same).
17 In *Socias v. Vornado Realty L.P.*, the district court explained its disagreement
18 with *Picerni*:

> Low wage employees, even when represented in the context of a pending lawsuit, often face extenuating economic and social circumstances and lack equal bargaining power; therefore, they are more susceptible to coercion or more likely to accept unreasonable, discounted settlement offers quickly. In recognition of this problem, the FLSA is distinct from all other employment statutes.

297 F.R.D. 38, 40 (E.D.N.Y. 2014). The *Socias* court further noted that "although employees, through counsel, often voluntarily consent to dismissal of FLSA claims and, in some instances, are resistant to judicial review of settlement, the purposes of FLSA require that it be applied even to those who would decline its protections." *Id.* at 41 (internal quotation marks, alteration, and emphasis omitted). Finally, the *Socias* court observed that judicial approval furthers the purposes of the FLSA, because "[w]ithout judicial oversight, . . . employers may be more inclined to offer, and employees, even when represented by counsel, may be more inclined to accept, private settlements that ultimately are cheaper to the employer than compliance with the Act." *Id.; see also Armenta*, 2014 WL 3344287, at *4 ("Taken to its logical conclusion, *Picerni* would permit defendants to circumvent the FLSA's 'deterrent effect' and eviscerate FLSA protections.").

We conclude that the cases discussed above, read in light of the unique

1 policy considerations underlying the FLSA, place the FLSA within Rule 41's
2 "applicable federal statute" exception. Thus, Rule 41(a)(1)(A)(ii) stipulated
3 dismissals settling FLSA claims with prejudice require the approval of the district
4 court or the DOL to take effect. Requiring judicial or DOL approval of such
5 settlements is consistent with what both the Supreme Court and our Court have
6 long recognized as the FLSA's underlying purpose: "to extend the frontiers of
7 social progress by insuring to all our able-bodied working men and women a fair
8 day's pay for a fair day's work." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493
9 (1945) (internal quotation marks omitted). "[T]hese provisions were designed to
10 remedy the evil of overwork by ensuring workers were adequately compensated
11 for long hours, as well as by applying financial pressure on employers to reduce
12 overtime." *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 285 (2d Cir. 2008) (internal
13 quotation marks omitted). Thus, "[i]n service of the statute's remedial and
14 humanitarian goals, the Supreme Court consistently has interpreted the Act
15 liberally and afforded its protections exceptionally broad coverage." *Id.* at 285.
16 Examining the basis on which district courts recently rejected several
17 proposed FLSA settlements highlights the potential for abuse in such settlements,
18 and underscores why judicial approval in the FLSA setting is necessary. In *Nights*

1 *of Cabiria*, the proposed settlement agreement included (1) "a battery of highly
2 restrictive confidentiality provisions . . . in strong tension with the remedial
3 purposes of the FLSA;" (2) an overbroad release that would "waive practically
4 any possible claim against the defendants, including unknown claims and claims
5 that have no relationship whatsoever to wage-and-hour issues;" and (3) a
6 provision that would set the fee for plaintiff's attorney at "between 40 and 43.6
7 percent of the total settlement payment" without adequate documentation to
8 support such a fee award. 2015 WL 1455689, at *1–7. In *Guareno v. Vincent Perito,*
9 *Inc.*, the district court rejected a proposed FLSA settlement in part because it
10 contained a pledge by plaintiff's attorney not to "represent any person bringing
11 similar claims against Defendants." No. 14cv1635, 2014 WL 4953746, at *2
12 (S.D.N.Y. Sept. 26, 2014). "Such a provision raises the specter of defendants
13 settling FLSA claims with plaintiffs, perhaps at a premium, in order to avoid a
14 collective action or individual lawsuits from other employees whose rights have
15 been similarly violated." *Id.; see also, e.g., Nall v. Mai-Motels, Inc.*, 723 F.3d 1304,
16 1306 (11th Cir. 2013) (employee testified she felt pressured to accept employer's
17 out-of-court settlement offer because "she trusted [the employer] and she was
18 homeless at the time and needed money") (internal quotation marks omitted);

1 *Walker v. Vital Recovery Servs., Inc.*, 300 F.R.D. 599, 600 n.4 (N.D. Ga. 2014)
2 ("According to Plaintiff's counsel, twenty-two plaintiffs accepted the offers of
3 judgment—many for $100—because "they are unemployed and desperate for
4 any money they can find.").

5 We are mindful of the concerns articulated in *Picerni*, particularly the
6 court's observation that the "vast majority of FLSA cases" before it "are simply
7 too small, and the employer's finances too marginal," for proceeding with
8 litigation to make financial sense if the district court rejects the proposed
9 settlement. 925 F. Supp. 2d at 377 (noting that FLSA cases tend to "settle for less
10 than $20,000 in combined recovery and attorneys' fees, and usually for far less
11 than that; often the employee will settle for between $500 and $2000 dollars in
12 unpaid wages."). However, the FLSA is a uniquely protective statute. The
13 burdens described in *Picerni* must be balanced against the FLSA's primary
14 remedial purpose: to prevent abuses by unscrupulous employers, and remedy
15 the disparate bargaining power between employers and employees. *See Brooklyn*
16 *Sav. Bank*, 324 U.S. at 706-07. As the cases described above illustrate, the need for
17 such employee protections, even where the employees are represented by
18 counsel, remains.

1 **CONCLUSION**

2 For the reasons given above, we affirm and remand for further proceedings

3 consistent with this opinion.

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit
UNITED STATES SECOND CIRCUIT COURT OF APPEALS

This opinion is uncorrected and subject to revision before publication in the New York Reports.

No. 121
Geoffrey Desrosiers, &c.,
Respondents,
v.
Perry Ellis Menswear, LLC,
et al.,
Appellants.

No. 122
Christopher Vasquez, &c.,
Respondent,
v.
National Securities Corporation,
Appellant,
Mark Goldwasser,
Defendant.

Case No. 121:
Frank H. Henry, for appellants.
LaDonna M. Lusher, for respondents.

Case No. 122:
Daniel J. Buzzetta, for appellant.
LaDonna M. Lusher, for respondent.

FAHEY, J.:

CPLR 908 provides that "[a] class action shall not be dismissed, discontinued, or compromised without the approval of the court," and that "[n]otice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs." On this appeal,

we must determine whether CPLR 908 applies only to certified class actions, or also to class actions that are settled or dismissed before the class has been certified. We conclude that CPLR 908 applies in the pre-certification context. As a result, notice to putative class members of a proposed dismissal, discontinuance, or compromise must be given.

I.

Plaintiff Geoffrey Desrosiers worked as an unpaid intern for Perry Ellis Menswear, LLC in 2012. In February 2015, he commenced a class action against defendants Perry Ellis Menswear and an affiliated entity (collectively, Perry Ellis), alleging that Perry Ellis improperly classified employees as interns. He sought wages on behalf of himself and similarly-situated individuals.

In March 2015, Perry Ellis sent an offer of compromise to Desrosiers, which he accepted. On May 18, 2015, Perry Ellis moved to dismiss the complaint. By that date, the time within which Desrosiers was required to move for class certification pursuant to CPLR 902 had expired. Desrosiers did not oppose dismissal of the complaint, but he filed a cross motion seeking leave to provide notice of the proposed dismissal to putative class members pursuant to CPLR 908. Perry Ellis opposed the cross motion, arguing that notice to putative class members was inappropriate because Desrosiers had not moved for class certification within the required time. Supreme Court dismissed

the complaint but denied the cross motion to provide notice to putative class members.

On appeal, the Appellate Division reversed the order insofar as appealed from by Desrosiers (Desrosiers v Perry Ellis Menswear, LLC, 139 AD3d 473 [1st Dept 2016]). The court concluded that CPLR 908 "is not rendered inoperable simply because the time for the individual plaintiff to move for class certification has expired," and that notice to putative class members is "particularly important under the present circumstances, where the limitations period could run on the putative class members' cases following discontinuance of the individual plaintiff's action" (id. at 474).

Plaintiff Christopher Vasquez was employed by defendant National Securities Corporation (NSC) as a financial products salesperson in 2007 and 2008. In June 2014, he filed a class action against NSC on behalf of himself and all similarly-situated individuals who worked for NSC after June 2008. Vasquez alleged that the compensation paid by NSC fell below the required minimum wage, and he sought wage and overtime compensation for himself and similarly-situated individuals.

The parties agreed to postpone a motion for class certification in order to complete pre-certification discovery. In February 2015, before Vasquez had moved for class certification, NSC made a settlement offer, which Vasquez accepted the following month. NSC thereafter moved to dismiss

the complaint. Vasquez cross-moved to provide notice of the proposed dismissal to putative class members pursuant to CPLR 908. NSC opposed the cross motion, asserting that CPLR 908 applies only to certified class actions.

Supreme Court granted the cross motion to provide notice to putative class members and granted NSC's motion to dismiss the complaint, but directed that the action would not be marked disposed until after notice had been issued (Vasquez v National Sec. Corp., 48 Misc 3d 597, 601 [Sup Ct, NY County 2015]). On appeal, the Appellate Division affirmed (Vasquez v National Sec. Corp., 139 AD3d 503 [1st Dept 2016]). Adhering to its 1982 decision in Avena v Ford Motor Co. (85 AD2d 149 [1st Dept 1982]), the First Department reasoned that "[t]he legislature, presumably aware of the law as stated in Avena, has not amended CPLR 908" (Vasquez, 139 AD3d at 503).

In each case, the Appellate Division granted the defendant leave to appeal to this Court, certifying the question whether its order was properly made. We now affirm in both cases.

II.

"In matters of statutory interpretation, our primary consideration is to discern and give effect to the Legislature's intention" (Matter of Albany Law School v New York State Off. of Mental Retardation & Dev. Disabilities, 19 NY3d 106, 120 [2012]). "The statutory text is the clearest indicator of legislative

intent and courts should construe unambiguous language to give effect to its plain meaning" (Matter of DaimlerChrysler Corp. v Spitzer, 7 NY3d 653, 660 [2006]; see Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d 577, 583 [1998]).

The text of CPLR 908 is ambiguous with respect to this issue. Defendants argue that the statute's reference to a "class action" means a "certified class action," but the legislature did not use those words, or a phrase such as "maintained as a class action," which appears in CPLR 905 and 909. Plaintiffs assert that an action is a "class action" within the meaning of the statute from the moment the complaint containing class allegations is filed, but the statutory text does not make that clear.

Similarly, the statute's instruction that notice of a proposed dismissal, discontinuance, or compromise must be provided to "all members of the class" is inconclusive. Defendants contend that there are no "members of the class" until class certification is granted pursuant to CPLR 902 and the class is defined pursuant to CPLR 903. Yet the legislature did not state that notice should be provided to "all members of the certified class," or "all members of the class who would be bound" by the proposed termination, or some other phrase that would have made the legislature's intent clear. In the context of these ambiguities, we turn to other principles of statutory interpretation and sources beyond the statutory text itself to

discern the intent of the legislature (see Albany Law School, 19 NY3d at 120; Matter of Shannon, 25 NY3d 345, 351 [2015]).

CPLR article 9 was enacted in 1975, replacing former CPLR 1005. The Governor's Approval Memorandum stated that the legislation would "enable individuals injured by the same pattern of conduct by another to pool their resources and collectively seek relief" where their individual damages "may not be sufficient to justify the costs of litigation" (Governor's Approval Mem, Bill Jacket, L 1975, ch 207, 1975 NY Legis Ann at 426, 1975 McKinney's Session Laws of NY at 1748). With respect to CPLR 908, which the legislature has not amended since it was originally enacted in 1975, the State Consumer Protection Board observed that the purpose of that statute "is to safeguard the class against a 'quickie' settlement that primarily benefits the named plaintiff or his or her attorney, without substantially aiding the class" (Mem from State Consumer Protection Board, May 29, 1975 at 7, Bill Jacket, L 1975, ch 207).

The New York State Bar Association's Banking Law, Business Law, and CPLR Committees, which opposed the bill, recommended that CPLR 908 be amended such that its notice provisions would apply only to certified class actions (see Letter from NY State Bar Association Banking Law, Business Law, and CPLR Committees, at 5, Bill Jacket, L 1975, ch 207). Those committees "agree[d] that any settlement or withdrawal of an action commenced as a class action should be subject to court

approval," but expressed the view that "if the dismissal, discontinuance or compromise is effected prior to the determination that a class action is proper, the court should be permitted to dispense with notice to class members" (id.).

In addition, CPLR article 9 was "modeled on similar federal law," specifically, Federal Rules of Civil Procedure rule 23 (Governor's Approval Mem, L 1975, ch 207; see Siegel, NY Prac § 139 at 247 [5th ed 2011]). At the time, rule 23 (e) was virtually indistinguishable from the current text of CPLR 908; it provided that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs" (former Fed Rules Civ Pro rule 23 [e]).

The majority of federal circuit courts of appeal to address the issue concluded that the prior version of rule 23 (e) also applied in the pre-certification context, but that notice to putative class members before certification was discretionary, after consideration of factors such as potential collusion and the publicity the class action had received (see e.g. Doe v Lexington-Fayette Urban County Govt., 407 F3d 755, 761-763 [6th Cir 2005], cert denied 546 US 1094 [2006]; Crawford v F. Hoffman-La Roche Ltd., 267 F3d 760, 764-765 [8th Cir 2001]; Diaz v Trust Territory of Pac. Is., 876 F2d 1401, 1408-1409 [9th Cir 1989]; Glidden v Chromalloy Am. Corp., 808 F2d 621, 626-628 [7th Cir

1986]).[1] Conversely, the United States Court of Appeals for the Fourth Circuit concluded that the prior version of the rule mandated notice to class members only in certified class actions (see Shelton v Pargo, Inc., 582 F2d 1298, 1314-1316 [4th Cir 1978]).[2] Thus, faced with virtually identical language in the former version of Federal Rule of Civil Procedure rule 23 (e), most federal circuit courts of appeal to consider the issue concluded that rule 23 (e) applied even before a class had been certified.[3]

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[1] Although these federal courts held that notice to putative class members before certification was discretionary under the former version of rule 23 (e), the parties do not ask us to read discretion into CPLR 908, nor could we based on the text of that statute. CPLR 908 states that notice "shall" be provided, but that the *manner* of notice will be "as the court directs." The only question on this appeal is whether mandatory notice is required only after certification or also before certification. For similar reasons, we reject plaintiffs' contention that the Appellate Division ordered notice in an exercise of its discretion, and therefore that its orders are reviewable by this Court only for an abuse of discretion as a matter of law. These appeals present an issue of law.

[2] The Fourth Circuit shared the concern that pre-certification settlements between the named plaintiff and the defendant might involve collusion. The circuit court instructed district courts to examine proposed settlements for collusion or prejudice to absent putative class members and, if such collusion or prejudice existed, to hold a certification hearing and give notice to members of the class in the event that certification was granted (see Shelton, 582 F2d at 1315-1316).

[3] Other circuit courts of appeal did not directly address this issue before the 2003 amendment to rule 23 (e) (see e.g. Rice v Ford Motor Co., 88 F3d 914, 919 n 8 [11th Cir 1996] ["In this Circuit, the applicability of Rule 23(e) to proposed classes prior to their certification is an open question"]). Many federal district courts also considered this issue (see generally

In New York, the only appellate-level decision to address this issue as it pertains to CPLR 908 (other than the two decisions on appeal here) is Avena v Ford Motor Co. (85 AD2d 149 [1st Dept 1982]). In that case, the named plaintiffs settled with the defendant before class certification, and the settlement was without prejudice to putative class members (see id. at 151). The trial court refused to approve the settlement without first providing notice to the putative class members (see id.). The Appellate Division affirmed that determination, concluding that CPLR 908 applied to settlements reached before certification. The First Department reasoned that the "potential for abuse by private settlement at this stage is . . . obvious and recognized" (id. at 152), and that the named plaintiffs had a fiduciary obligation to disclose relevant facts to putative class members (see id. at 153, 156).

This Court has never overruled Avena or addressed this particular issue, and no other department of the Appellate Division has expressed a contrary view. Consequently, for 35 years Avena has been New York's sole appellate judicial interpretation of whether notice to putative class members before certification is required by CPLR 908.

Generally, "we have often been reluctant to ascribe

Annotation, Notice of Proposed Dismissal or Compromise of Class Action to Absent Putative Class Members in Uncertified Class Action Under Rule 23 (e) of Federal Rules of Civil Procedure, 68 ALR Fed 290).

persuasive significance to legislative inaction" (Boreali v Axelrod, 71 NY2d 1, 13 [1987]; see Clark v Cuomo, 66 NY2d 185, 190-191 [1985]). We have distinguished, however, "instances in which the legislative inactivity has continued in the face of a prevailing statutory construction" (Brooklyn Union Gas Co. v New York State Human Rights Appeal Bd., 41 NY2d 84, 90 [1976]). Thus, "[w]hen the Legislature, with presumed knowledge of the judicial construction of a statute, forgoes specific invitations and requests to amend its provisions to effect a different result, we have construed that to be some manifestation of legislative approbation of the judicial interpretation, albeit of the lower courts" (Matter of Alonzo M. v New York City Dept. of Probation, 72 NY2d 662, 667 [1988]). Stated another way, "it is a recognized principle that where a statute has been interpreted by the courts, the continued use of the same language by the Legislature subsequent to the judicial interpretation is indicative that the legislative intent has been correctly ascertained" (Matter of Knight-Ridder Broadcasting v Greenberg, 70 NY2d 151, 157 [1987]). "The underlying concern, of course, is that public policy determined by the Legislature is not to be altered by a court by reason of its notion of what the public policy ought to be" (id. at 158).

Granted, the persuasive significance of legislative inaction in this context carries more weight where the legislature has amended the statute after the judicial

interpretation but its amendments "do not alter the judicial interpretation" (id. at 157), or when the judicial interpretation stems from a decision of this Court or "unanimous judgment of the intermediate appellate courts" (Anheuser-Busch, Inc. v Abrams, 71 NY2d 327, 334 [1988]). Nevertheless, the fact that the legislature has not amended CPLR 908 in the decades since Avena has been decided is particularly persuasive evidence that the court correctly interpreted the legislature's intent as it existed when CPLR 908 was enacted in light of developments occurring in the years after Avena was decided.

Specifically, in 2003, Federal Rules of Civil Procedure rule 23 (e) was amended to clarify that the district court must approve any settlement, voluntary dismissal, or compromise involving a "certified class," and that the court must provide notice of such to "all class members who would be bound" by the proposal (Fed Rules Civ Pro rule 23 [e]). Thus, under the current federal rule, mandatory approval and notice of a proposed settlement is now required only for certified classes.

That same year, the New York City Bar Association's Council on Judicial Administration recommended several changes to CPLR article 9, including amendments to CPLR 908. The Council opined that, unlike the updated federal rule, CPLR 908 should continue to require judicial approval of settlement at the pre-certification stage, but that notice to putative class members before certification should be discretionary, not mandatory, and

should be provided when necessary to protect members of the putative class (see New York City Bar Association, Council on Judicial Administration, State Class Actions: Three Proposed Amendments to Article 9 of the Civil Practice Law and Rules, 58 Rec of Assn of Bar of City of NY at 316 [2003], available at http://www.nycbar.org/pdf/report/Art9.draft.082703.MWord.pdf [last accessed Dec. 7, 2017]). Various committees of the City Bar made the same recommendation in 2015 (see New York City Bar Association, State Courts of Superior Jurisdiction Committee, Council on Judicial Administration, and Litigation Committee, Proposed Amendments to Article 9 of the Civil Practice Law and Rules to Reform and Modernize the Administration of Class Actions in NYS Courts, Nov. 5, 2015, available at http://www2.nycbar.org/pdf/report/uploads/20072985-ClassActionsProposedAmendsArt9CPLRJudicialAdminLitigationStateCourtsReportFINAL11515.pdf [last accessed Dec. 7, 2017]). Notwithstanding these repeated proposals, and the legislature's awareness of this issue (see 2016 NY Assembly Bill A9573; cf. Roberts v Tishman Speyer Props., L.P., 13 NY3d 270, 287 [2009]), the legislature has left CPLR 908 untouched from its original version as enacted in 1975.

Thus, despite criticisms of the Avena decision (see e.g. Joseph M. McLaughlin, 1982 Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 908 [1976 ed], 2005 Cumulative Pocket Part at 248-249), the 2003 amendment of the federal rule upon which CPLR 908 was modeled to address this

situation, and specific and repeated calls to the legislature to amend the statute, the legislature has not amended CPLR 908, either to state that Avena was not a correct interpretation of its original intent or to express its revised, present intent. Under these circumstances, and in light of the legislative history discussed above, we conclude that the legislature's refusal to amend CPLR 908 in the decades since Avena was decided indicates that the Avena decision correctly ascertained the legislature's intent (see Alonzo M., 72 NY2d at 667; Knight-Ridder, 70 NY2d at 157).

Any practical difficulties and policy concerns that may arise from Avena's interpretation of CPLR 908 are best addressed by the legislature (see Knight-Ridder, 70 NY2d at 158), especially considering that there are also policy reasons in favor of applying CPLR 908 in the pre-certification context, such as ensuring that the settlement between the named plaintiff and the defendant is free from collusion and that absent putative class members will not be prejudiced (see Avena, 85 AD2d at 152-155; see also Diaz, 876 F2d at 1409; Glidden, 808 F2d at 627; Vincent C. Alexander, Practice Commentaries, McKinneys Cons Laws of NY, Book 7B, CPLR 908, at 224-225). The balancing of these concerns is for the legislature, not this Court, to resolve.

Accordingly, in both Desrosiers and Vasquez, the orders of the Appellate Division should be affirmed, with costs, and the certified questions answered in the affirmative.

Desrosiers, &c. v Perry Ellis Menswear, LLC, et al.;
Vasquez, &c. National Securities Corporation, et al.

Nos. 121 & 122

STEIN, J.(dissenting):

The majority finds ambiguity in CPLR 908 where none exists and, in my view, places undue weight on the First Department's holding in Avena v Ford Motor Co. (85 AD2d 149 [1st Dept 1982]). Even a cursory reading of the analysis in Avena reveals that it is not grounded in the unambiguous statutory text. We are not bound by the result in that case or by subsequent legislative inaction, and the passage of time does not alter that conclusion. Instead, it is within the province of this Court of last resort to interpret the statute as a matter of law, guided by our principles of statutory interpretation.

In that regard, the requirement in CPLR 908 that notice be provided "to all members of the class" is expressly limited to a "class action." In each of the actions here, plaintiffs did not comply with the requirements under article 9 of the CPLR that are necessary to transform the purported class action into an actual class action, with members of a class bound by the disposition of the litigation. Thus, there is no class action here, and no basis under the statutory scheme to mandate CPLR 908 notice to putative members of an undefined class that an individual claim -- of which they had received no prior notice

and in which they had taken no part -- is being settled, but the settlement is not binding on them. For these reasons, I respectfully dissent.

-I-

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature, and where the statutory language is clear and unambiguous, the court should . . . give effect to the plain meaning of the words used" (Patrolmen's Benevolent Assn. of City of N.Y. v City of New York, 41 NY2d 205, 208 [1976]). Therefore, "the starting point in any case of interpretation must always be the language itself" (Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d 577, 583 [1998]), considering the various statutory sections together with reference to each other (see Matter of New York County Lawyers' Assn. v Bloomberg, 19 NY3d 712, 721 [2012]). We are also guided by the principle that "resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning" (Majewski, 91 NY2d at 583 [internal quotation marks and citation omitted]).

Article 9 of the CPLR begins with CPLR 901, which specifies the prerequisites that must be satisfied for one or more members of a designated class to sue or be sued as

representative parties on behalf of the other members of that class. CPLR 902 requires the plaintiff "in an action brought as a class action" to "move for an order to determine whether it is to be so maintained" within 60 days after expiration of the time in which a defendant must serve responsive pleadings. Thereafter, "[t]he action may be maintained as a class action only if the court finds that the prerequisites under section 901 have been satisfied" (CPLR 902). In determining whether the action "may proceed as a class action," the court must consider certain factors, including the interests of the members of the purported class, the impracticability or inefficiency of proceeding separately, any pending litigation, the desirability of concentrating the litigation, and class action management difficulties that may arise (see CPLR 902 [1]-[5]). If the court allows the action to proceed as a class action, the order "permitting [the] class action" must describe the class (CPLR 903; see also CPLR 907).

Once the prerequisites of sections 901 and 902 have been met, reasonable notice of the commencement of the class action must be given to the certified class "in such manner as the court directs," except in the case of class actions brought primarily for equitable relief, in which case, the court has discretion to determine whether notice is necessary and appropriate (CPL 904 [a], [b]; see also Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR

904). Any judgment in a class action must describe the class, and such a judgment is binding only upon "those whom the court finds to be members of the class" (CPLR 905; see also CPLR 909).

CPLR 908 -- the provision at issue here -- prescribes that a "class action shall not be dismissed, discontinued, or compromised without the approval of the court. Notice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs." The question before us is whether this provision requires notice to putative class members if the action is settled or dismissed prior to class certification. In my view, it does not.

CPLR 908 must be considered in the context of the statutory scheme set forth in the entirety of article 9. Inasmuch as "[an] action may be maintained as a class action only if the court finds that the prerequisites under section 901 have been satisfied" upon a motion brought within the specified time period pursuant to CPLR 902 (emphasis added), it follows that a purported class action is not actually "a class action" until so adjudicated by the court; concomitantly, prior to class certification, there are no "members of the class" to whom notice could be provided. Thus, there is no statutory basis for applying the CPLR 908 notice requirement when, as here, the litigation is resolved during the pre-certification phase without prejudice to the rights of putative class members.

There is nothing talismanic about styling a complaint

as a class action. Indeed, any plaintiff may merely allege that a claim is being brought "on behalf of all others similarly situated." However, under article 9 of the CPLR, the court, not a would-be class representative, has the power to determine whether an action "brought as a class action" may be maintained as such, and may do so only upon a showing that the prerequisites set forth in CPLR 901 have been satisfied (CPLR 902).[1] Logically, the converse of that proposition must also be true -- i.e., if the court has not made an affirmative finding that the CPLR 901 prerequisites have been met, the action may not be maintained as a class action. Here, the fact that plaintiffs did not comply with CPLR 902 and did not obtain orders adjudicating

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[1] Contrary to the majority's reasoning, CPLR 908 is not ambiguous because it uses the phrase "class action" instead of "maintained as a class action." These phrases are used interchangeably throughout CPLR article 9 to refer to an action that has been adjudicated a class action by the court pursuant to the mechanism set forth in CPLR 902. The phrase "class action" is repeatedly used throughout article 9 in instances, like CPLR 908, where it is readily apparent that the intent of the legislature is to refer to an actual "class action," not merely a purported class action (see CPLR 903 ["(t)he order permitting a class action shall describe the class"], 904 [certification notice requirement referring to "class actions"], 907 [permitting certain court orders in the "conduct of class actions"]). The majority also posits that CPLR 908 is ambiguous because the phrases "class action" and "all members of the class" do not also include the word "certified." This reasoning is unsound. Insofar as "[t]he language is certain and definite, intelligible and has an unequivocal meaning" (People ex rel. New York Cent. & Hudson Riv. R.R. Co. v Woodbury, 208 NY 421, 424 [1913]), within the context of the statutory scheme (see Bloomberg, 19 NY3d at 721), there is no occasion to engage in "conjecture about or to add to or to subtract from [the] words" used by the legislature (McKinney's Statutes, § 76, cmt).

their actions as class actions is fatal to their argument that notice of their settlements to purported class members is required.

This Court's holding in O'Hara v Del Bello (47 NY2d 363 [1979]) is instructive. In that case, the petitioner commenced a proceeding on behalf of himself and others similarly situated who were denied payment of authorized and approved travel vouchers by their employer. Supreme Court granted the petitioner summary judgment, directing the respondents to pay all properly submitted travel vouchers, including those to be submitted in the future. This Court ultimately affirmed the award of summary judgment to the petitioner, but modified the judgment to limit relief to only the named petitioner. We held that, "[i]nasmuch as there was a failure to comply with the procedural and substantive provisions of CPLR article 9 with respect to class action[s] . . . there [was] no basis for granting relief other than to the individual party who brought the proceeding" (O'Hara, 47 NY2d at 368). The Court reasoned that "[t]he explicit design of article 9 . . . is that a determination [pursuant to CPLR 902] as to the appropriateness of class action relief shall be promptly made at the outset of the litigation" (id.). The Court emphasized that:

> "To countenance making the determination as to the identity of the beneficiaries on whose behalf the litigation had been prosecuted or defended after its outcome is known would be to open the possibility both of conferring a gratuitous benefit on persons who have not been parties and were not at any time exposed to the risk of an adverse adjudication and further of substantially enlarging the liability of the loser

> beyond anything contemplated during the contest and resolution of the issues on their merits"

(id. at 369).

The majority now construes CPLR 908, contrary to its plain language, to permit the results this Court cautioned against in O'Hara. Plaintiffs in both actions failed to make timely CPLR 902 motions for an order to certify the class. Instead, they accepted settlement offers, allowed the deadline for certification to pass, and declined to oppose defendants' motions to dismiss, but nonetheless subsequently asked the court to direct notice to putative class members under CPLR 908. As in O'Hara, by virtue of plaintiffs' failure to comply with CPLR article 9 -- and particularly CPLR 902 -- there is no basis to impose the notice requirements of CPLR 908, which only apply to class actions, not purported class actions.

Directing such notice under these circumstances would lack practical significance. Indeed, the notice would essentially inform putative class members that an individual claim -- of which they received no prior notice -- was being resolved by an agreement that was not binding on them. Moreover, as defendants point out, because no class had been certified under CPLR 902, it is unclear to whom notice was purportedly required. Not only would this uncertainty create administrative difficulties that would entail the expenditure of time and

resources by both the court and the parties,[2] the ultimate purpose of the notice appears, at most, to be to allow plaintiffs' counsel to identify more clients at the expense of the court and defendants.[3]

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[2] Although plaintiffs minimize the significance of this burden, mandating notice of pre-certification dismissals requires that the court and the parties attempt to define both the group of individuals to whom notice should be provided in the absence of a defined class, as well as the content of that notice, all concerning the resolution of individual claims that do not bind the notice recipients in any way. While, in some cases, it may be easy to identify the putative class members, in others, it may be difficult and time-consuming, as well as expensive, to identify and provide notice to them.

[3] Any claimed virtue of plaintiffs' position that notice is required to protect putative class members is a distraction. If plaintiffs desired to obtain relief on behalf of the putative class members, they could have followed the proper procedure to certify the class. Instead, they settled their individual claims. Moreover, while it could reasonably be argued that mandating notice here amounts to no more than solicitation on behalf of plaintiffs' counsel, it is worth noting that directing notice prior to certification could, under some circumstances, actually inure to the detriment of a plaintiff's attorney. For example, a plaintiff's attorney could quickly conclude that a putative class action has little merit, and would not wish to bear the cost of notifying putative class members in a class that could not, for instance, be certified due to lack of typicality or predominance. Therefore, knowing that the majority's rule may impose the costs of notice even if no class is ever certified (see CPLR 904 [d] [presumptively placing the costs of notice on the plaintiff]), members of the plaintiffs' bar may be less likely to commence some class actions in the first place. Relatedly, the majority's rule may also discourage settlement. If a plaintiff's attorney determines that there are deficiencies with either the named plaintiff's claim or the class claim, or both, the attorney would have an incentive to litigate and lose the class certification motion rather than to stipulate to a dismissal, because the stipulation of dismissal would require notice, whereas (presumably, although the majority is unclear about this), no notice would be required in the event that the

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In concluding that CPLR 908 should be applied to actions that were never adjudicated to be class actions, the majority places great weight on the fact that lower courts have been bound to follow Avena (85 AD2d 149 [1st Dept 1982]) because this Court has not yet overruled that case, and no other Appellate Division Department has had the occasion to express a contrary view. However, the interpretation of the plain language of CPLR 908 is now squarely before us, and inaction on the part of other appellate courts -- or the legislature -- in the wake of Avena is no hindrance to our adherence to the statutory text.

In my view, the First Department's decision in Avena was flawed and continued reliance on it is misguided. It is evident, simply from the manner in which the First Department framed its inquiry, that the court departed from the statutory text, contrary to longstanding fundamental rules of construction (see Majewski, 91 NY2d at 583). Instead of starting with the text of CPLR 908 itself -- which by its plain terms applies only to "class actions" -- the Avena court began its analysis by inquiring whether an action that merely "purports to be a class action" should nevertheless "be deemed 'a class action'" to which CPLR 908 would apply (Avena, 85 AD2d at 152 [emphasis added]). Further, noting that the defendant in Avena did not dispute the applicability of CPLR 908, the First Department broadly stated,

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court denied class certification.

without citation, that "[t]he fiduciary obligations of the named plaintiffs in instituting . . . [a class] action are generally recognized and not disputed" (85 AD2d at 152 [emphasis added]). It was solely on this basis that the First Department concluded "that CPLR 908 should apply to even a without prejudice (to the class) settlement and discontinuance of a purported class action before certification or denial of certification" (id.).

However, it is questionable whether a would-be class representative has fiduciary responsibilities in the pre-certification stage in light of the absence of the would-be representative's authority to bind putative class members (see CPLR 905; cf. Standard Fire Ins. Co. v Knowles, 568 US 588, 593 [2013]). Because there is no res judicata impact upon putative class members (see Rodden v Axelrod, 79 AD2d 29, 32 [3d Dept 1981]), their ability to bring their own claims is unimpaired and they are, therefore, not impacted by the resolution of the named plaintiff's individual claim.[4] Under these circumstances, it is difficult to understand why the Avena court would invoke fiduciary considerations in the pre-certification context and hold that CPLR 908 should apply to even a settlement that is without prejudice to the putative class. While the majority

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[4] To the extent the Avena court expressed concern about the prospect of disingenuous plaintiffs using a frivolous class action claim as leverage in settlement negotiations, it bears noting that there are other mechanisms in place to prevent such abuse, including, of course, early certification (as required under article 9 of the CPLR) and sanctions.

glosses over whether it actually agrees with Avena, it adopts the rule of that case, following the novel theory espoused by the First Department, without question. I would not acquiesce to the reasoning in Avena; instead, I would interpret the statute before us, which inexorably leads me to conclude that CPLR 908 notice is not required prior to certification.

Further, contrary to the majority's reasoning here, the legislature's failure to amend CPLR 908 after Avena was decided does not compel the conclusion that Avena correctly ascertained the legislature's intent (see Matter of New York State Assn. of Life Underwriters v New York State Banking Dept., 83 NY2d 353, 363 [1994]; see also People v Ocasio, 28 NY3d 178, 183 [2016] [legislative "inaction is susceptible to varying interpretations"]).[5] Despite acknowledging that this case does not present one of the scenarios in which legislative inaction may nonetheless carry some significance (cf. Matter of Knight-

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[5] Similarly, the memorandum of the consumer protection board and the bar association letter cited by the majority lack persuasive force (see majority op at 6-7). To the extent the memorandum indicates that the purpose of CPLR 908 is to safeguard against a settlement benefitting only the named plaintiff or plaintiff's counsel to the detriment of the class (see Mem from State Consumer Protection Board, May 29, 1975 at 7, Bill Jacket, L 1975, ch 207), this concern is implicated only when the disposition would bind the class, i.e., after certification. For its part, the bar association advanced its interpretation of CPLR 908 within the context of its advocacy for a discretionary notice regime (see Letter from NY State Bar Association Banking Law, Business Law, and CPLR Committees, at 5, Bill Jacket, L 1975, ch 207) ["the court should be permitted to dispense with notice to class members"]). The legislature clearly rejected that approach.

Ridder Broadcasting v Greenberg, 70 NY2d 151, 157 [1987]; Anheuser-Busch, Inc. v Abrams, 71 NY2d 327, 334 [1988]), the majority relies on the length of time that has passed since Avena was decided. Although Avena may enjoy a distinguished patina owing to the passage of time, the decision has not withstood any meaningful consideration by other appellate courts. To the contrary, the case has been followed by only a handful of lower courts (see e.g. Astill v Kumquat Properties, LLC, 2013 NY Slip Op 32964[U] [Sup Ct, NY County 2013]; Diakonikolas v New Horizons Worldwide, Inc., 2011 NY Slip Op 33098[U] [Sup Ct, NY County 2011]), which were bound to do so. Moreover, as Supreme Court observed here, the "wisdom" of the rule announced in Avena "has been questioned by many, including the CPLR commentary." Thus, the existence of Avena is no bar to this Court adopting a more reasoned approach based on the express language of CPLR 908.

Finally, to the extent the majority relies on certain federal cases construing the pre-2003 version of Rule 23 (e) of the Federal Rules of Civil Procedure, each of those cases held that notice to putative class members prior to certification was discretionary, based on various considerations not included in the rule itself (see Diaz v Trust Territory of Pacific Islands, 876 F2d 1401, 1408, 1411 [9th Cir 1989] [adopting the "majority approach" and holding that "(n)otice to the class of pre-certification dismissal is not . . . required in all circumstances"]). Those cases do not address the dispositive

issue in this case, which is -- as the majority acknowledges -- whether notice is mandatory under CPLR 908. Although there may be policy considerations that support the discretionary rule crafted by various federal courts -- which was ultimately rejected by Congress (Fed Rules Civ Pro rule 23 [e]) -- our role here is to interpret the plain language of CPLR 908.

For the reasons stated herein, I would hold that the plain language of CPLR 908, taken in context, does not require notice to putative class members if the action is resolved prior to class certification.

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For Each Case: Order affirmed, with costs, and certified question answered in the affirmative. Opinion by Judge Fahey. Chief Judge DiFiore and Judges Rivera and Feinman concur. Judge Stein dissents in an opinion, in which Judges Garcia and Wilson concur.

Decided December 12, 2017

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SOUTHERN DISTRICT OF NEW YORK ADR PROGRAM ANOUNCES PILOT PROGRAMS FOR FLSA AND § 1983 EFFECTIVE OCTOBER 3, 2016

The United States District Court for the Southern District of New York announces two pilot programs effective October 3, 2016. Both programs are designed to promote the just, speedy, and inexpensive resolution of civil cases by providing litigants with automatic and expeditious disclosure of critical documents and requiring them to participate in mediation unless ordered otherwise.

1. Cases filed under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., assigned to District Judges Abrams, Briccetti, Carter, Daniels, Ramos, Seibel, and Woods will, once the defendant appears, be ordered directly to mediation with limited pre-mediation disclosures.
2. Cases against police officers filed in White Plains under 42 U.S.C. § 1983 will automatically participate in a protocol requiring limited pre-mediation disclosures and referral to mediation once the Answer is filed. This pilot replicates the automatic referral program for section 1983 cases in Manhattan under Local Civil Rule 83.10.

More information about both pilot programs, and the Mediation Program Procedures, will be available at http://www.nysd.uscourts.gov/mediation. Questions or comments about either protocol can be directed to the Court's ADR Program at 212-805-0643 or MediationOffice@nysd.uscourts.gov.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: FLSA PILOT PROGRAM	:	MEDIATION REFERRAL ORDER FOR CASES THAT INCLUDE CLAIMS UNDER THE FAIR LABOR STANDARDS ACT 29 U.S.C. § 201 *et seq.*

Briccetti, J.:

As part of a pilot program for cases involving claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, the Clerk of Court is directed to enter this order in all newly filed FLSA cases on my docket. Since cases involving FLSA claims often benefit from early mediation, it is hereby

ORDERED that prior to the case management conference pursuant to a Fed. R. Civ. P. 16(b) the Court is referring this case to mediation under Local Civil Rule 83.9 and that mediation shall be scheduled within sixty days.

IT IS FURTHER ORDERED that to facilitate mediation the parties shall, within four weeks of this Order, confer and provide the following:

1. Both parties shall produce any existing documents that describe Plaintiff's duties and responsibilities.
2. Both parties shall produce any existing records of wages paid to and hours worked by the Plaintiff (e.g., payroll records, time sheets, work schedules, wage statements and wage notices).
3. Plaintiff shall produce a spreadsheet of alleged underpayments and other damages.
4. Defendants shall produce any existing documents describing compensation policies or practices.
5. If Defendants intend to assert an inability to pay then they shall produce proof of financial condition including tax records, business records, or other documents demonstrating their financial status.

IT IS FURTHER ORDERED that in the event the parties reach settlement, pursuant to *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015), they shall prepare a joint statement explaining the basis for the proposed settlement, including any provision for attorney fees, and why it should be approved as fair and reasonable. The settlement agreement and joint statement shall be presented to the assigned District Judge, or to the assigned Magistrate Judge should the parties consent to proceed for all purposes before the assigned Magistrate Judge (the appropriate form for which is available at http://nysd.uscourts.gov/file/forms/consent-to-proceed-before-us-magistrate-judge).

IT IS FURTHER ORDERED that, in the event the parties do not reach a settlement, they shall promptly meet and confer pursuant to Fed. R. Civ. P. 26(f) in preparation for their initial

pretrial conference with the Court.

Counsel who have noticed an appearance as of the issuance of this order are directed to notify all other parties' attorneys in this action by serving upon each of them a copy of this order. If unaware of the identity of counsel for any of the parties, counsel receiving this order must send a copy of this order to that party directly.

Dated: August 31, 2016
White Plains, NY

SO ORDERED:

____
Vincent L. Briccetti
United States District Judge

Wage & Hour Litigation Blog

Money for Nothing! Court Allows Employees to Pursue Lawsuit Despite DOL Settlement

By **Seyfarth Shaw LLP** on July 18, 2017

POSTED IN SETTLEMENT

Co-authored by **Robert S. Whitman** and **Howard M. Wexler**

Seyfarth Synopsis: The majority of courts have held that releases of FLSA rights require approval by a court or the US Department of Labor. A recent case in the Southern District of New York highlights a dilemma employers face when seeking "finality" through DOL-approved settlements.

In ***Wai Hung Chan v. A Taste of Mao, Inc.***, five employees asserted FLSA claims for unpaid minimum wage and overtime. Before the lawsuit was filed, the employer agreed with the DOL to pay back wages of $38,883.80 to 19 of its employees, including four of the five plaintiffs in the lawsuit. During negotiations on that agreement, the DOL confirmed that it had the authority to represent and resolve all of the employees' claims, and it subsequently mailed WH-60 forms notifying them of the settlement and their right to a share of it. Meanwhile, the employer transmitted the settlement funds to the DOL for distribution to the employees.

The five *Chan* Plaintiffs did not sign the WH-60 forms and instead commenced the lawsuit, seeking back pay for a period exceeding that covered by the DOL settlement. The employer sought summary judgment on grounds that the DOL still possessed the settlement funds that it remitted on behalf of the plaintiffs, even though they did not sign the WH-60 forms.

District Judge William H. Pauley, III rejected the employer's argument that the plaintiffs "constructively accepted the funds when the DOL, as their authorized representative, took possession of such funds." He held that the plaintiffs' refusal to sign the WH-60 forms was "tantamount to a rejection" of the settlement offer, invoking a presumption that "employees do not have to take the settlement unless they specifically opt into it." The court held that the employer expressly acknowledged this possibility as part of its settlement with the DOL by agreeing that any unclaimed funds would be disbursed to the U.S. Treasury.

Judge Pauley also rejected the employer's argument that the plaintiffs should be bound to the agreement on grounds that "employers who in good faith strive to settle claims should be afforded the benefit of knowing that they will not face liability in the future." Although he was sympathetic to the employer's predicament, he stated that "it is Congress – not this Court – which must force a solution to that quandary…even if it means compelling an outcome that forces [the employer] to address the same allegations it believed were resolved through the DOL Settlement."

The *Chan* decision highlights yet another potential hurdle to complete and binding settlements of employee wage claims. In the **Second Circuit** and elsewhere, releases of FLSA rights require approval, and agreements submitted for judicial approval are subjected to **close scrutiny** that is difficult to **bypass.** In light of *Chan*, DOL approval doesn't make the process any easier. The circumstances described in *Chan* demonstrate that employers may not be able to obtain true finality in such settlements and may still face the risk of subsequent litigation.

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New York's Highest Court: Pre-Certification Settlements Require Classwide Notice

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Reports of the Death of the Mootness Maneuver Are Greatly Exaggerated

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Wage & Hour Litigation Blog

New York's Highest Court: Pre-Certification Settlements Require Classwide Notice

By **Robert Whitman** on December 13, 2017

POSTED IN SETTLEMENT

Seyfarth Synopsis: *The New York Court of Appeals holds that the state's class action rules require notice of settlements to be sent to putative class members – even though no class has been certified.*

In a **decision** sure to send shivers up the spines of wage and hour practitioners in New York, the State's highest court has held that notice of a class action settlement must be distributed to all members of the putative class, even when the settlement comes before a class has

been certified. Together with ***Cheeks v. Freeport Pancake House***, a Second Circuit ruling that pertains to FLSA settlements, the decision erects some very high hurdles for parties seeking early settlements in wage and hour cases in New York.

The case involved appeals in two separate wage and hour cases: *Desrosiers v. Perry Ellis Menswear*, brought by an unpaid intern seeking wages, and *Vasquez v. National Securities Corporation*, in which a financial products salesperson alleged that his pay fell below minimum wage. Both cases were brought in state court as putative class actions under the New York Labor Law. Both were settled early – before class certification – but the plaintiffs filed motions seeking leave to send notice of the settlement to members of the putative classes.

In a 4-3 decision, the Court of Appeals (New York's highest court) held that notice is required, even though the classes had not been certified in either case.

At issue was the language of CPLR 908, which states that a class action "shall not be dismissed, discontinued, or compromised without the approval of the court," and that "[n]otice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs." The defendants argued that the statute's reference to a "class action" means a *certified* class action, while the plaintiffs contended "that an action is a 'class action' within the meaning of the statute from the moment the complaint containing class allegations is filed."

Finding ambiguity in the statutory text, the majority looked to the legislative history and other interpretive guidance. It placed particular weight on the State legislature's failure to amend CPLR 908 in the decades since a 1982 decision from an intermediate appellate court holding that it does apply to pre-certification settlements. The court held that this failure, in the face of the "sole appellate judicial interpretation of whether notice to putative class members before certification is required," amounts to legislative acceptance of that decision's construction of the rule.

The majority also drew a distinction between CPLR 908 and Federal Rule of Civil Procedure 23(e), on which it was modeled. Rule 23 was amended in 2003 to provide that a district court is required to approve settlements only in cases where there is a "certified class" and that notice must be given only to class members "who would be bound" by the settlement. In

contrast, CPLR 908 has not be so amended, despite proposals by the New York City Bar Association and scholarly criticisms of the rule.

Thus persuaded that the text of the rule requires notice before certification, the court declined to consider the practical implications of its decision on the desirability of early settlements in class actions:

> Any practical difficulties and policy concerns that may arise from [the court's] interpretation of CPLR 908 are best addressed by the legislature, especially considering that there are also policy reasons in favor of applying CPLR 908 in the pre-certification context, such as ensuring that the settlement between the named plaintiff and the defendant is free from collusion and that absent putative class members will not be prejudiced. The balancing of these concerns is for the legislature, not this Court, to resolve.

In dissent, three judges took the majority to task for what they described as an unwarranted reading of the rule in light of the overall context of the class action provisions in CPLR Article 9. In their view, the fact that the plaintiffs had never moved for, let alone received, a ruling granting class certification meant that the case was not a class action at all. "In each of the actions here," they said, "plaintiffs did not comply with the requirements under article 9 of the CPLR that are necessary to transform the *purported* class action into an *actual* class action, with members of a class bound by the disposition of the litigation."

Responding in particular to the plaintiffs contention that a case becomes a "class action" from the moment it is filed putatively as such, the dissent said:

> There is nothing talismanic about styling a complaint as a class action. Indeed, any plaintiff may merely allege that a claim is being brought "on behalf of all others similarly situated." However, under article 9 of the CPLR, the court, not a would-be class representative, has the power to determine whether an action "brought as a class action" may be maintained as such, and may do so only upon a showing that the prerequisites set forth in CPLR 901 have been satisfied.

As we have observed repeatedly in this **blog**, the Second Circuit's holding in *Cheeks*, which requires court approval of FLSA settlements and tends to preclude various customary settlement provisions like confidentiality clauses, poses obstacles that may lessen the

desirability of settlements in wage and hour cases. And in ***Yu v. Hasaki Restaurant***, the Second Circuit is now being asked to decide whether court approval is required even for a settlement achieved through an Offer of Judgment under FRCP 68. Now, with *Desrosiers* on the books, the challenges for early settlements have been extended to wage hour settlements brought in state court under New York law. (The case will presumably not apply to New York Labor Law claims brought in *federal* court, where Rule 23 rather than CPLR Article 9 would apply.)

The lesson for New York practitioners is as simple as it is daunting: if you want to settle a wage and hour case early, be prepared to jump through some significant procedural hoops.

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Wage & Hour Litigation Blog

SDNY Pancakes Parties' Attempt to Bypass Cheeks: Requires Approval of Rule 68 Settlement

By **Seyfarth Shaw LLP** on May 1, 2017

POSTED IN SETTLEMENT

Co-authored by **Brett C. Bartlett** and **Samuel Sverdlov**

Seyfarth Synopsis: The Southern District of New York recently held that parties may not settle FLSA claims without court approval through an offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure.

Background: Rule 68

Under Rule 68, a party defending a claim can make an "offer of judgment" to the other party. If the other party accepts the offer, the clerk must enter judgment pursuant to the offer's terms. However, if the offered party rejects the offer and obtains a less favorable judgment at trial, that party must then pay the costs incurred by the offering party after the offer was made.

Courts have explained that the purpose of Rule 68 is to prompt parties to evaluate the risks and costs of litigation and to balance those risks against the likelihood of success.

Cheeks Decision

As we have previously **discussed**, in *Cheeks v. Freeport Pancake House, Inc.*, a landmark decision of the Second Circuit, the court held that absent approval by either the district court or the DOL, parties "cannot" settle FLSA claims with prejudice. The *Cheeks* decision has made it increasingly **difficult** for parties to reach a settlement of FLSA claims in the Second Circuit, and accordingly, litigants have increasingly tried to avoid the requirement for judicial or DOL approval by entering into settlements pursuant to Rule 68.

Recent SDNY Decision

In the recent case of *Mei Xing Yu v. Hasaki Restaurant, Inc., et al.*, the parties attempted to do just this — bypass judicial scrutiny of an FLSA settlement by settling their claims pursuant to a Rule 68 offer of judgment. The parties in *Hasaki* argued that the language of Rule 68 provides that the clerk "must" enter judgment of an accepted offer of judgment. The SDNY, however, **held** "that parties may not circumvent judicial scrutiny of an FLSA settlement via Rule 68." Judge Furman reasoned that FLSA settlements are ripe for abuse by defendant employers, and that there are a number of scenarios where a settlement must pass judicial scrutiny, even where there is a Rule 68 offer of judgment. For instance, among other examples, judicial scrutiny is required in *qui tam* actions under the False Claims Act, settlements on behalf of a minor, and in cases where injunctive relief is sought.

The majority of district courts in the Second Circuit disagree with Judge Furman, and have held that Rule 68 offers of judgment in FLSA cases do not need to undergo judicial scrutiny. Given the split in authority on this issue within the Second Circuit, Judge Furman certified the decision for interlocutory appeal, noting an immediate appeal would "materially advance the ultimate termination of the litigation." Further, the court held that "resolution [of this issue] by the Second Circuit is plainly desirable, if not necessary."

Outlook for Employers

Until there is resolution of this issue, employers in the Second Circuit should carefully consider whether a Rule 68 offer of judgment in an FLSA case is worth the risk that the district court would nonetheless require scrutiny of the settlement. Given that *Hasaki* has been

certified for appeal to the Second Circuit, we hope to have clarity on whether settlement of an FLSA case pursuant to Rule 68 requires judicial approval.

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17-1067-cv
Yu v. Hasaki Restaurant, Inc.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2017

Submitted: September 19, 2017 Decided: October 23, 2017

Docket No. 17-1067

- -

MEI XING YU, individually, on behalf of all other employees similarly situated,

Plaintiff,

v.

HASAKI RESTAURANT, INC., SHUJI YAGI, KUNITSUGU NAKATA, HASHIMOTO GEN,

Defendants-Petitioners,

JOHN DOE AND JANE DOE #1-10,

Defendants.[1]

- -

Before: NEWMAN, WALKER, and POOLER, Circuit Judges.

Petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) and for leave to file a late petition.

Petition and late filing granted.

[1] The Clerk is requested to change the official caption as above.

Louis Pechman, Laura Rodríguez, Lillian M. Marquez, Pechman Law Group PLLC, New York, NY, for Defendants-Petitioners.

JON O. NEWMAN, Circuit Judge:

The pending petition for permission to take an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) presents a narrow issue concerning the procedure for perfecting such an appeal. The issue is whether, under the circumstances of this case, the petitioners' notice of appeal, which was filed within ten days of the District Court's order sought to be reviewed, is the functional equivalent of a section 1292(b) petition to invoke our jurisdiction over a later filed petition.

Background

The section 1292(b) petition arises out of a suit filed in the District Court for the Southern District of New York by Mei Zing Yu, a sushi chef, against Yu's employer, Hasaki Restaurants, Inc., and three restaurant owners or managers (collectively "Hasaki") for alleged violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* and

New York Labor Law.[2] The complaint was filed "on behalf [of] all other employees similarly situated."

Yu and Hasaki negotiated a settlement. Counsel for Yu then informed the District Court by letter that Yu had accepted the defendants' offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure.

The District Court (Jesse M. Furman, District Judge) ordered the parties to submit the settlement agreement to the Court for the Court's approval and also to submit letters detailing why the settlement was fair and reasonable. In response, counsel for Hasaki sent the Court a letter for all parties, arguing that the District Court lacked authority to review the offer of judgment because entry of a Rule 68 judgment is mandatory. The Judge Furman considered an amicus curiae brief filed by the U.S. Department of Labor in a similar case pending before another District Judge. That brief argued that District Court approval of the settlement was required.

[2] The complaint also sought relief against "Defendant [*sic*] John Doe and Jane Doe #1-10" alleged to own the stock of Hasaki Restaurant, Inc. and to make decisions about employees' salaries and hours.

On April 10, 2017, the District Court entered an Opinion and Order setting forth its view that judicial review of an FLSA settlement was required before entry of a Rule 68 judgment. *Yu v. Hasaki Restaurant, Inc.*, 319 F.R.D. 111 (S.D.N.Y. 2017). Judge Furman explained that the considerations animating this Court's decision in *Cheeks v. Freeport Pancake House, Inc.*, 769 F.3d 199 (2d Cir. 2015), requiring court approval of FLSA claims sought to be settled by stipulated dismissal, *see* Fed. R. Civ. P. 41(a)(1)(A)(ii), applied to Rule 68 settlements. *See Yu*, 319 F.R.D. at 117. The District Court's Order directed the parties, in the absence of a notice of appeal filed within ten days, to submit a joint letter explaining the basis for their settlement and why it should be approved. Acknowledging the split of authorities on the Rule 68 issue among district courts within the Second Circuit, Judge Furman certified his order for interlocutory review under 28 U.S.C. § 1292(b). He also stayed the FLSA case in the event a timely notice of appeal was filed.

On April 14, 2017, Hasaki filed in the District Court a notice of appeal from the District Court's April 10 Order.[3] The notice of appeal identified the Order appealed from and its date. On the same date, the notice of appeal, the District Court's Order and Opinion sought to be reviewed, and the docket sheet were electronically transferred to this Court by the CM/ECF system. On April 27, 2017, Hasaki filed in this Court Forms C and D, describing the nature of the action and the issues to be raised. On June 21, 2017, Hasaki filed a petition for leave to appeal pursuant to section 1292(b) with a request that it be accepted as timely filed. Yu has filed no response to the petition.

Discussion

Timeliness. Section 1292(b) of Title 28 authorizes a district judge, when entering an order not otherwise appealable in a civil action, to state "that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. §

[3] The notice of appeal uses the District Court's caption, identifying the plaintiff as "Mei Xing Yu, on behalf of himself and all others similarly situated."

1292(b). The relevant court of appeals may, in its discretion, permit an appeal from the order if application is made within ten days after entry of the order. *See id.* Rule 5 of the Federal Rules of Appellate Procedure requires a request for permission to file a discretionary appeal to be filed within the time specified by the statute authorizing the appeal. *See* FRAP 5(a)(2).

We acknowledge at the outset that time requirements for invoking appellate jurisdiction are strictly enforced. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (appellate time limits are jurisdictional). In *Bowles v. Russell*, 551 U.S. 205 (2007), for example, the Supreme Court ruled that a court of appeals lacked jurisdiction where a district court had mistakenly told an appellant that his notice of appeal could be filed within seventeen days, instead of the fourteen days specified in the relevant rule, FRAP 4(a)(6). *See id.* at 209-15.

In the pending matter, Hasaki's petition to appeal the District Court's April 10 Order was filed beyond the ten days specified in section 1292(b). However, a notice of appeal was filed within that ten day period. The issue presented is whether the notice of appeal may be deemed the

functional equivalent of a section 1292(b) petition for purposes of invoking this Court's jurisdiction over Hasaki's petition.

In *Casey v. Long Island R.R. Co.*, 406 F.3d 142, 146 (2d Cir. 2005), we ruled that a brief, filed within ten days of a District Court's order, was the functional equivalent of a section 1292(b) petition. A brief is, of course, a far more informative document that a bare notice of appeal. But *Casey* permits us to determine whether, under the circumstances of this case, we should deem Hasaki's notice of appeal, filed in the District Court, sufficient to invoke our appellate jurisdiction over the petition for an interlocutory appeal. That notice identified the Order for which review was sought. It also triggered the automatic electronic transmission to this Court of the notice of appeal and the District Court's Order and Opinion. That Opinion fully informed us of the considerations relevant to whether the District Court's Order was appropriate for a section 1292(b) appeal.

We thus knew, within ten days of the District Court's Order, everything we needed to know in order to exercise our discretion whether to permit the interlocutory appeal.

We note that the District Court's Order required the parties to explain the justification for their settlement "[a]bsent a notice of appeal being filed within ten days, *see* 28 U.S.C. § 1292(b)." *Yu*, 319 F.R.D. at 117. The citation was helpful, but the reference to a notice of appeal was not.

There is a reason why this Court should be somewhat indulgent in determining whether the notice of appeal should be considered the functional equivalent of a section 1292(b) petition. We are not asked to uphold appellate jurisdiction solely for the benefit of a litigant who has not prevailed after plenary proceedings in a district court. *Compare Hartford Fire Insurance Co. v. Orient Overseas Containers Lines (UK) Ltd.*, 230 F.3d 549, 554 (2d Cir. 2000) (rejecting appellate jurisdiction because of an arguably deficient notice of appeal) *with Billino v. Citibank, N.A.*, 123 F.3d 723, 725-26 (2d Cir. 1997) (upholding appellate jurisdiction despite an arguably deficient notice of appeal). Here, the acceptance of appellate jurisdiction would achieve the objective of a conscientious district court judge who has determined, after a comprehensive analysis, that an interlocutory

appeal will serve the interests of efficient judicial administration.

Under all the circumstances, we deem the timely filed notice of appeal sufficient to invoke our appellate jurisdiction over the section 1292(b) petition.[4] Having accepted jurisdiction over the petition by virtue of the timely notice of appeal and timely receipt of related information, we grant Hasaki's request to file his later filed formal section 1292(b) petition.

Appellate discretion. The District Court's Order clearly merits interlocutory review under section 1292(b), as Judge Furman sensibly recognized. The issue of whether Rule 68 settlements in FLSA cases require District Court review and approval is "a controlling question of law," 28 U.S.C. § 1292(b), and "there is substantial ground for difference of opinion," *id.*, as the differing rulings

[4] Our reliance on a timely filed notice of appeal distinguishes this case from *Bowles*, 551 U.S. at 213, where the Supreme Court rejected appellate jurisdiction in the absence of a notice of appeal filed within the prescribed time period. We acknowledge that the Eighth Circuit declined to deem a notice of appeal the functional equivalent of a section 1292(b) petition under circumstances similar to those in this case. *See Estate of Storm v. Northwest Iowa Hospital Corp.*, 548 F.3d 686 (8th Cir. 2008). We note that the issue tendered for interlocutory review concerned whether to certify a state law question to a state court. *See id.* at 687. By contrast, the pending case concerns the interplay of a federal statute and a federal rule.

within this Circuit demonstrate. *Compare, e.g., Sanchez v. Burgers & Cupcakes LLC,* No. 16-CV-3862 (VEC), 2017 WL 2171870, at *3 (S.D.N.Y. Mar. 16, 2017) (Rule 68 settlement of FLSA case not valid absent court or Department of Labor approval), *with, e.g., Anwar v. Stephens*, No. 15-CV-4493 (JS) (GRB), 2017 WL 455416, at *1 (E.D.N.Y. Feb. 2, 2017) (Rule 68 settlement of FLSA case not subject to court approval). Furthermore, "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

Conclusion

Leave to file the petition for section 1292(b) review is granted, and the petition is granted.

Workshop C: Managing Risk and Creating Safe Workplaces

Nina Martinez, Esq., Moderator
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OSHA AND WORKPLACE VIOLENCE[1]

John S. Ho

The shooting earlier in the year in Florida, where a lone gunman killed five people and then himself at an Orlando awning factory, and the recent tragedy in Maryland, where an employee of a granite company shot five people, three of them fatally, are sad reminders that workplace violence remains a serious issue for businesses.

OSHA estimates that approximately 2 million American workers are victims of workplace violence each year and that it can strike anywhere, at any time. Although there are no specific OSHA standards for workplace violence, ignoring signs and failing to abate recognized hazards including workplace violence could lead to a violation of Section 5(a)(1), the general duty clause, of the Occupational Safety and Health Act. Specifically, an employer that has experienced acts of workplace violence or becomes aware of threats or other indicators showing the potential for workplace violence would be on notice for risk of workplace violence and should implement a workplace violence prevention program including engineering controls, administrative controls, and training, as it generally should for any other kind of recognized hazard in the workplace. Indeed, some states such as New York already require certain employers to have a written workplace violence program including conducting a hazard assessment.

In many of these tragedies, there may have been visible workplace violence signs or other indicators. Indeed, police have said that the gunman in Maryland had a prior history of workplace violence.

OSHA has issued a Fact Sheet on Workplace Violence that serves as a helpful guide in preparing and implementing a workplace violence policy which is available at: https://www.osha.gov/OshDoc/data_General_Facts/factsheet-workplace-violence.pdf.

Not surprisingly, OSHA recommends that employers adopt a zero-tolerance workplace violence program that should be incorporated into an employee handbook or manual of standard operating procedures or similar document. Proactive suggestions include:

- Providing safety education for employees
- Securing the workplace, when appropriate, with video surveillance, extra lighting, and alarm systems, etc.
- Providing drop safes to limit cash on hand

[1] Modified from “OSHA and Workplace Safety,” published by John S. Ho in Occupational Health & Safety Online, Oct. 23, 2017, available at https://ohsonline.com/blogs/the-ohs-wire/2017/10/osha-and-workplace-violence.aspx.

- Equipping field staff with cell phones and other communication devices
- Instructing employees not to enter any locations where they feel unsafe or to use a "buddy" system

In addition, OSHA has developed other more specific workplace violence guidelines for high-risk industries such as health care, taxi drivers, and late-night retail establishments. Of course, OSHA is not the only legal issue employers need to be aware of when dealing with workplace violence. For example, the Americans with Disabilities Act may need to be considered; it generally protects individuals with disabilities or perceived disabilities (both physical and mental), and some states, like New York, protect domestic violence victims against employment discrimination.

An effective workplace violence program should address how employees can protect themselves and what employers should do following an incident of workplace violence. Like any other safety and health policy, the specific operational facts will dictate what is necessary. By conducting an appropriate workplace violence assessment, an employer will be in a much better position to determine what protocols it should have in place and to provide training for such as an active shooter scenario. In addressing workplace violence, the cliché "hope for the best and prepare for the worst" is ultimately the best strategy.

MENTAL STABILITY AT WORK: AN ASSESSMENT[1]

Stephen Sonnenberg and Shaira Sithian

Mental stability is a term that defies simple definition. That should come as no surprise, given that the latest edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders identifies approximately 300 different psychiatric diagnoses. Nor is the presence of mental stability, or mental illness, susceptible to a single objective test. Rather, mental health professionals apply their clinical expertise and a wide variety of objective measures to assess and diagnose individuals.

Against this backdrop, employers and employees alike must address day-to-day questions about the mental stability of their workplace colleagues. They must consider the range of inquiries and interventions that employers lawfully may make when an employee's mental state is in question. For guidance, they should turn to the statutory and regulatory framework under the Americans with Disabilities Act ("ADA") and analogous state laws, guidance published by the Equal Employment Opportunity Commission ("EEOC"), and case law interpreting the statutory framework. They may also turn to mental health professionals as consultants, forensic examiners or, if they have rendered treatment, fact witnesses.

There is reason to feel some reassurance. Under certain conditions, employers are allowed to make inquiries, to require mental examinations (and pay all costs), and even to exclude workers from the workplace as a direct threat to themselves, their colleagues or the public. At the same time, employees are protected from inquiries or exams that are neither job-related nor consistent with business necessity. Information about an employee's mental health is especially sensitive, and courts and the EEOC are typically attentive to employee privacy interests. The challenge for all involved is to find the proper balance between employer and employee interests, and protection and privacy, in the context of the statutory and regulatory scheme.

Ensuring that myths, fears and stereotypes about mental illness do not influence employment decisions involving individuals who are or appear to be mentally disabled is at the heart of the ADA. An employer's decision to ask an employee questions about his or her mental condition, to require a mental examination, or to exclude the individual from the workplace should be based on objective evidence. Fear that an employee with mental illness is likely to engage in violent behavior, in the absence of any indication the employee is having difficulty performing his or her job duties or poses a risk in the workplace, is unlikely to stand up to scrutiny by the EEOC or a court. Indeed, studies by mental health professionals show that the correlation between a diagnosis of a mental impairment and an increased risk of violent behavior, absent certain additional factors, is uncertain. When additional factors are present, e.g., substance abuse, a history of violence, paranoid delusions and hallucinations, personality disorders or personal crisis such as divorce or becoming a victim of crime, the risks increase.[2] Some of these factors

[1] Modified from *"Mental Stability at Work – An Assessment,"* published by Stephen Sonnenberg and Shaira Sithian in The New York Law Journal, Vol. 253, No. 112, June 12, 2015.
[2] Eric B. Elbogen, PhD, Sally C. Johnson, MD, The Intricate Link Between Violence & Mental Disorder, JAMA Psychiatry, Feb. 1, 2009, Vol. 66, No. 2, http://archpsyc.jamanetwork.com/article.aspx?articleid=210191.

may be known to employers and employees concerned about a particular individual and those factors, rather than myths and stereotypes, should be considered as part of the risk assessment.

The key legal standard for employer inquiries or exams regarding mental disabilities, and their nature and severity, is embodied in 42 U.S.C. §12112(d)(4)(A). According to the EEOC, the "job-related" and "consistent with business necessity" standard is met when an employer has a reasonable belief, based on objective evidence, that an employee's ability to perform essential job functions is impaired by a medical condition, or an employee will impose a direct threat due to a medical condition. The EEOC identifies at least three potential sources of such information. An employer may observe performance problems and reasonably attribute them to a medical condition, receive reliable information from a credible third party that an employee has a medical condition, or observe symptoms indicating that an employee may have a medical condition that will impair his or her ability to perform essential job functions or will pose a direct threat. [3]

In the Second Circuit, the leading decision regarding the "business necessity" standard is *Conroy v. New York Dep't of Corr. Servs.*, 333 F.3d 88 (2d Cir. 2003). In *Conroy,* the Court of Appeals held that an employer cannot justify an inquiry about a disability by simply showing it is convenient or beneficial to its business. "Business necessity" means something vital to the business. That said, the Court recognized that an employer's quest to ensure a "safe and secure" workplace is a business necessity. So, too, are examinations or inquiries necessary to determine whether an employee can perform job-related duties ("fitness-for-duty" exams), so long as the employer can identify legitimate, non-discriminatory reasons to doubt the employee's capacity to do so.

Although *Conroy* affords employers substantial latitude to seek information about an employee's mental health issues and treatment as a business necessity, it does not throw caution to the wind. *Conroy* requires an employer to show that its request for information, or the mental exam itself, is "no broader or more intrusive than necessary." This limitation is not as stringent, however, as the EEOC's position that the scope of an employer's inquiry or mental exam should not exceed the specific mental condition at issue (e.g., depression) and its effect on the employee's ability to perform essential job functions or to work without posing a direct threat.[4]

The EEOC's position readily conflicts with the scope of inquiry that many mental health professionals find necessary to clinically evaluate an individual's mental status and to formulate sound diagnoses. A mental health professional, well aware that mind and body are not separate, may wish to ask questions about an individual's general level of symptoms and functioning, both mental and physical, past and current. In similar fashion, most doctors considering a patient's report of localized pain would inquire in due course about the patient's overall medical history and general health. Restricting the focus of the doctor's physical exam and inquiries may compromise the validity or accuracy of her or his medical assessment. Mental health professionals subject to restrictions may be similarly impacted. Given *Conroy*'s business

[3] *See* EEOC, Enforcement Guidance: Disability-Related Inquiries And Medical Examination Of Employees Under The Americans With Disabilities Act (ADA), pp. 6-7 (2005), http://www.eeoc.gov/policy/docs/guidance-inquiries.html.

[4] *See* EEOC, Enforcement Guidance: The Americans With Disabilities Act And Psychiatric Disabilities, Question No. 14, Examples C and D (1997), http://www.eeoc.gov/policy/docs/psych.html.

necessity standard and the EEOC's more restrictive position on inquiries and exams, however, employers may want to confer with knowledgeable counsel about the scope of a mental examination or inquiry before proceeding.

It is important to distinguish between exams and inquiries, on the one hand, and mandated psychiatric treatment, on the other. Mandated treatment or medication is likely to trigger heightened scrutiny by a court or the EEOC. In *Borgus v. SmithKline Beecham Corp.*, No. 02-CV-6472, 2004 WL 2095534, at *5 (W.D.N.Y. Sept. 20, 2004), the district court applied *Conroy's* business necessity standard to an ADA disability discrimination claim arising from the employer's mandate that an employee attend regular psychotherapy sessions with medication management, following her fitness-for-duty exam, until her providers deemed treatment unnecessary. The employee had, at various times, been diagnosed with paranoia, bi-polar disorder, and possibly psychotic depression. The employer argued that, considering the employee's diagnoses, a treatment agreement was necessary for her to adequately do her job, just as similar agreements are allowed to deal with substance abusers. Although the court did not fault the employer for mandating a fitness-for-duty exam, it denied summary judgment, explaining that while "[e]nsuring the safety of employees is a reasonable basis for a company to make a legitimate medical inquiry of an employee," it was "unable to find as a matter of law that the treatment agreement in the instant case was no more intrusive than necessary under the circumstances."

Borgus and other decisions addressing mental inquiries and exams under the ADA illustrate that the business necessity standard does not lend itself to rote determinations. Inquiries deemed necessary in one circumstance may be unnecessary in another. The nature of the workplace and position at issue often play key roles in the analysis. Certain workplaces, such as the state correctional facility at issue in *Conroy*, present "special circumstances."

Numerous courts, within and outside the Second Circuit, have allowed inquiries and exams of employees who hold safety-sensitive positions and whose mental stability is in question. In *Brownfield v. City of Yakima*, 612 F.3d 1140 (9th Cir. 2010), the Court of Appeals affirmed summary judgment for the employer, holding that the City did not violate the ADA by requiring a police officer to take a fitness for duty exam after he exhibited "emotionally volatile behavior," including swearing at a supervisor, engaging in a loud argument with a coworker, and becoming extremely angry when the incident was investigated, all within one month. The court explained that its consideration of the exam's legitimacy was "heavily colored" by the nature of the officer's employment. *Brownfield* is significant because the court rejected the plaintiff's argument that the business necessity standard requires a showing that an employee's job performance has suffered because of health problems. Noting similar holdings in the Seventh, Eighth and Eleventh Circuits, the Court of Appeals held that "prophylactic psychological examinations can sometimes satisfy the business necessity standard, particularly when the employer is engaged in dangerous work."

Even when non-safety-sensitive positions are involved, courts often allow mental exams and inquiries intended to ensure that workplaces are safe and secure. In *Shannon v. Verizon New York Inc.*, No. 1:05-CV-0555 (LEK/DRH), 2009 WL 1514478, at *1 (N.D.N.Y. May 29, 2009), the employer required an employee to take a leave until he submitted to a mental fitness-for-duty examination because he told his coworker and supervisor that, if someone was bothering him, he

would "go postal and that would solve the problem and [he] would laugh from [his] jail cell." The court granted summary judgment for the employer on the employee's ADA and New York Human Rights Law claims. In *Rivera v. Smith,* No. 07 Civ. 3246(BSJ)(AJP), 2009 WL 124968, at *4 (S.D.N.Y. Jan. 20, 2009) *aff'd*, 375 F. App'x 117 (2d Cir. 2010), the court held that the employer's requirement that an employee submit to a psychiatric examination before being allowed to return to work after a co-worker complained that she felt threatened and unsafe by his behavior was "for an appropriate business necessity — ensuring a safe work environment for all of its employees."

Situations involving an employee's suicidal thoughts or attempted suicide are particularly delicate. Each must be considered on an individual basis. An employee's contemporaneous suicidal thoughts or action will typically support an employer's request for a mental examination and, in some circumstances, exclusion from the workplace pending the results of the exam. A more difficult situation arises when employees are concerned about a colleague who is known to have experienced suicidal ideation in the past, or to have attempted suicide. While every situation is different, concerns may focus on a colleague who wants to return from a medical leave of absence, or may be actively employed but exhibiting troubling behavior.

The EEOC observes that in most circumstances, an individual who has attempted suicide will not pose a direct threat when she or he seeks to return to work.[5] While the EEOC's guidance makes clear that employers and employees should not presume an individual poses a risk, it does not bar an employer's inquiry as to whether, in fact, risk is present. Indeed, the EEOC stresses that in these situations an employer must base its determination on an individualized assessment of the employee's current ability to perform his or her job functions safely.

In *Walton v. Spherion Staffing LLC*, No. 13-6896, 2015 WL 171805, at *1 (E.D. Pa. Jan. 13, 2015), the district court addressed a situation in which an employer did not engage in an individualized assessment of a formerly suicidal employee, and described the lawsuit as one that "tests the outer bounds of the Americans with Disabilities Act in the context of workplace violence." The employee had suicidal and homicidal thoughts and wrote a plea of help to his supervisor, which led the police to take him willingly to the police station. He later called his employer to report his diagnosis (depression), and ask about insurance coverage. The employer promptly terminated his employment. In response to his ADA discrimination lawsuit, the employer argued that the employee's threats disqualified him from protection under the ADA. Denying the employer's motion to dismiss, the court explained that "[p]redictable, and in some instances understandable, fear of the mentally-ill can skew an objective evaluation of risk." Noting that there was no indication that the employee had a history of any violent conduct, and that his individual instinct in the moment of crisis was to seek help, and to be protective of others, the court denied the employer's motion to dismiss.

Objective information is the touchstone of an employer's assessment when dealing with an employee who has been or is suicidal. Employers may request and consider reasonable information about performance problems or symptoms indicating that an employee may have a medical condition that will impair his or her ability to perform essential job functions or will

[5] *See* EEOC, Enforcement Guidance: The Americans With Disabilities Act And Psychiatric Disabilities, Question No. 35 (1997), http://www.eeoc.gov/policy/docs/psych.html.

pose a direct threat. Reliable information from credible third parties, including coworkers, should be considered. Often, the opinion of a mental health professional retained to clinically assess the employee will provide valuable objective information. Employers and employees can rest assured that the statutory and regulatory scheme under the ADA affords opportunities for inquiries and exams that respect the dignity of employees while promoting safety in the workplace.

Guidelines for Preventing workplace violence for Healthcare and Social Service Workers

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OSHA 3148-06R 2016

Occupational Safety and Health Act of 1970
"To assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act; by assisting and encouraging the States in their efforts to assure safe and healthful working conditions; by providing for research, information, education, and training in the field of occupational safety and health..."

This publication provides a general overview of worker rights under the *Occupational Safety and Health Act* (OSH Act). This publication does not alter or determine compliance responsibilities which are set forth in OSHA standards and the OSH Act. Moreover, because interpretations and enforcement policy may change over time, for additional guidance on OSHA compliance requirements the reader should consult current administrative interpretations and decisions by the Occupational Safety and Health Review Commission and the courts.

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Guidelines for Preventing Workplace Violence for Healthcare and Social Service Workers

U.S. Department of Labor
Occupational Safety and Health Administration

OSHA 3148-06R 2016

U.S. Department of Labor

This guidance document is advisory in nature and informational in content. It is not a standard or regulation, and it neither creates new legal obligations nor alters existing obligations created by the Occupational Safety and Health Administration (OSHA) standards or the *Occupational Safety and Health Act of 1970* (OSH Act or Act). Pursuant to the OSH Act, employers must comply with safety and health standards and regulations issued and enforced either by OSHA or by an OSHA-approved state plan. In addition, the Act's General Duty Clause, Section 5(a)(1), requires employers to provide their workers with a workplace free from recognized hazards that are causing or likely to cause death or serious physical harm. In addition, Section 11(c)(1) of the Act provides that "No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Reprisal or discrimination against an employee for reporting an incident or injury related to workplace violence, related to this guidance, to an employer or OSHA would constitute a violation of Section 11(c) of the Act. In addition, 29 CFR 1904.36 provides that Section 11(c) of the Act prohibits discrimination against an employee for reporting a work-related fatality, injury or illness.

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Overview of the Guidelines

Healthcare and social service workers face significant risks of job-related violence and it is OSHA's mission to help employers address these serious hazards. This publication updates OSHA's 1996 and 2004 voluntary guidelines for preventing workplace violence for healthcare and social service workers. OSHA's violence prevention guidelines are based on industry best practices and feedback from stakeholders, and provide recommendations for developing policies and procedures to eliminate or reduce workplace violence in a range of healthcare and social service settings.

These guidelines reflect the variations that exist in different settings and incorporate the latest and most effective ways to reduce the risk of violence in the workplace. Workplace setting determines not only the types of hazards that exist, but also the measures that will be available and appropriate to reduce or eliminate workplace violence hazards.

For the purpose of these guidelines, we have identified five different settings:

- **Hospital** settings represent large institutional medical facilities;
- **Residential Treatment** settings include institutional facilities such as nursing homes, and other long-term care facilities;
- **Non-residential Treatment/Service** settings include small neighborhood clinics and mental health centers;
- **Community Care** settings include community-based residential facilities and group homes; and
- **Field work** settings include home healthcare workers or social workers who make home visits.

Indeed, these guidelines are intended to cover a broad spectrum of workers, including those in: psychiatric facilities, hospital emergency departments, community mental health clinics, drug abuse treatment centers, pharmacies, community-care centers, and long-term care facilities. Healthcare and social service workers covered by these guidelines include: registered nurses, nurses' aides, therapists, technicians, home healthcare workers,

social workers, emergency medical care personnel, physicians, pharmacists, physicians' assistants, nurse practitioners, and other support staff who come in contact with clients with known histories of violence. Employers should use these guidelines to develop appropriate workplace violence prevention programs, engaging workers to ensure their perspective is recognized and their needs are incorporated into the program.

Violence in the Workplace: The Impact of Workplace Violence on Healthcare and Social Service Workers

Healthcare and social service workers face a significant risk of job-related violence. The National Institute for Occupational Safety and Health (NIOSH) defines workplace violence as "violent acts (including physical assaults and threats of assaults) directed toward persons at work or on duty."[1] According to the Bureau of Labor Statistics (BLS), 27 out of the 100 fatalities in healthcare and social service settings that occurred in 2013 were due to assaults and violent acts.

While media attention tends to focus on reports of workplace homicides, the vast majority of workplace violence incidents result in non-fatal, yet serious injuries. Statistics based on the Bureau of Labor Statistics (BLS) and National Crime Victimization Survey (NCVS)[2] data both reveal that workplace violence is a threat to those in the healthcare and social service settings. BLS data show that the majority of injuries from assaults at work that required days away from work occurred in the healthcare and social services settings. Between 2011 and 2013, workplace assaults ranged from 23,540 and 25,630 annually, with 70 to 74% occurring in healthcare and social service settings. For healthcare workers, assaults comprise 10-11% of workplace injuries involving days away from work, as compared to 3% of injuries of all private sector employees.

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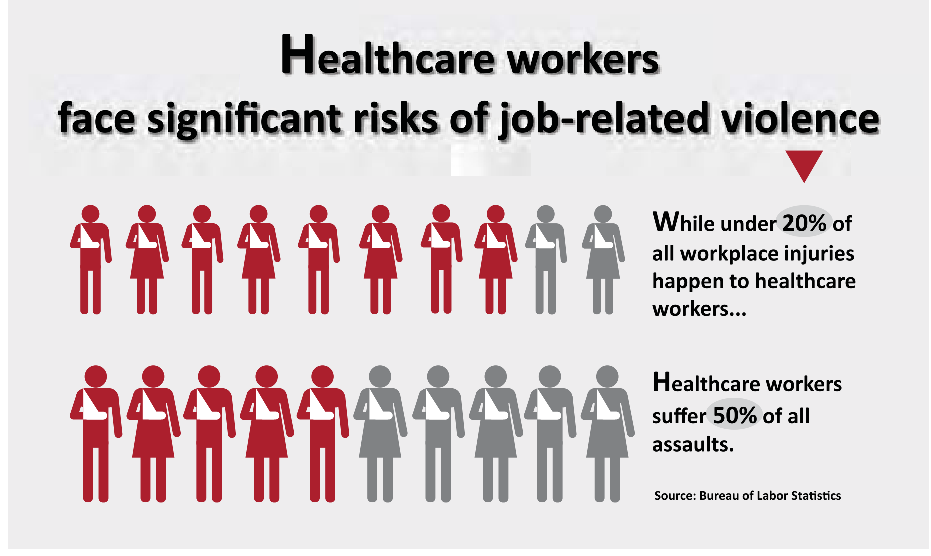
[1] CDC/NIOSH. Violence. Occupational Hazards in Hospitals. 2002.

[2] Cited in the U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics report, Workplace Violence, 1993-2009 National Crime Victimization Survey and the Census of Fatal Occupational Injuries. March 2011. (www.bjs.gov/content/pub/pdf/wv09.pdf)

In 2013, a large number of the assaults involving days away from work occurred at healthcare and social assistance facilities (ranging from 13 to 36 per 10,000 workers). By comparison, the days away from work due to violence for the private sector as a whole in 2013 were only approximately 3 per 10,000 full-time workers. The workplace violence rates highlighted in BLS data are corroborated by the NCVS, which estimates that between 1993 and 2009 healthcare workers had a 20% (6.5 per 1,000) overall higher rate of workplace violence than all other workers (5.1 per 1,000).[3] In addition, workplace violence in the medical occupations represented 10.2% of all workplace violence incidents. It should also be noted that research has found that workplace violence is underreported—suggesting that the actual rates may be much higher.

Risk Factors: Identifying and Assessing Workplace Violence Hazards

Healthcare and social service workers face an increased risk of work-related assaults resulting primarily from violent behavior of their patients, clients and/or residents. While no specific diagnosis or type of patient predicts future violence, epidemiological studies consistently demonstrate that inpatient and acute psychiatric services, geriatric long term care settings,



[3] The report defined medical occupations as: physicians, nurses, technicians, and other medical professionals.

high volume urban emergency departments and residential and day social services present the highest risks. Pain, devastating prognoses, unfamiliar surroundings, mind and mood altering medications and drugs, and disease progression can also cause agitation and violent behaviors.

While the individual risk factors will vary, depending on the type and location of a healthcare or social service setting, as well as the type of organization, some of the risk factors include:

Patient, Client and Setting-Related Risk Factors

- Working directly with people who have a history of violence, abuse drugs or alcohol, gang members, and relatives of patients or clients;
- Transporting patients and clients;
- Working alone in a facility or in patients' homes;
- Poor environmental design of the workplace that may block employees' vision or interfere with their escape from a violent incident;
- Poorly lit corridors, rooms, parking lots and other areas;[4]
- Lack of means of emergency communication;
- Prevalence of firearms, knives and other weapons among patients and their families and friends; and
- Working in neighborhoods with high crime rates.

Organizational Risk Factors

- Lack of facility policies and staff training for recognizing and managing escalating hostile and assaultive behaviors from patients, clients, visitors, or staff;
- Working when understaffed—especially during mealtimes and visiting hours;
- High worker turnover;
- Inadequate security and mental health personnel on site;

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[4] CDC/NIOSH. Violence. Occupational Hazards in Hospitals. 2002.

- Long waits for patients or clients and overcrowded, uncomfortable waiting rooms;
- Unrestricted movement of the public in clinics and hospitals; and
- Perception that violence is tolerated and victims will not be able to report the incident to police and/or press charges.

Violence Prevention Programs

A written program for workplace violence prevention, incorporated into an organization's overall safety and health program, offers an effective approach to reduce or eliminate the risk of violence in the workplace. The building blocks for developing an effective workplace violence prevention program include:

(1) Management commitment and employee participation,

(2) Worksite analysis,

(3) Hazard prevention and control,

(4) Safety and health training, and

(5) Recordkeeping and program evaluation.

A violence prevention program focuses on developing processes and procedures appropriate for the workplace in question.

Specifically, a workplace's violence prevention program should have clear goals and objectives for preventing workplace violence, be suitable for the size and complexity of operations and be adaptable to specific situations and specific facilities or units. The components are interdependent and require regular reassessment and adjustment to respond to changes occurring within an organization, such as expanding a facility or changes in managers, clients, or procedures. And, as with any occupational safety and health program, it should be evaluated and reassessed on a regular basis. Those developing a workplace violence prevention program should also check for applicable state requirements. Several states have passed legislation and developed requirements that address workplace violence.

1. Management Commitment and Worker Participation

Management commitment and worker participation are essential elements of an effective violence prevention program. The leadership of management in providing full support for the development of the workplace's program, combined with worker involvement is critical for the success of the program. Developing procedures to ensure that management and employees are involved in the creation and operation of a workplace violence prevention program can be achieved through regular meetings—possibly as a team or committee.[5]

Effective management leadership begins by recognizing that workplace violence is a safety and health hazard.

Effective management leadership begins by recognizing that workplace violence is a safety and health hazard. Management commitment, including the endorsement and visible involvement of top management, provides the motivation and resources for workers and employers to deal effectively with workplace violence. This commitment should include:

- Acknowledging the value of a safe and healthful, violence-free workplace and ensuring and exhibiting equal commitment to the safety and health of workers and patients/clients;
- Allocating appropriate authority and resources to all responsible parties. Resource needs often go beyond financial needs to include access to information, personnel, time, training, tools, or equipment;
- Assigning responsibility and authority for the various aspects of the workplace violence prevention program to ensure that all managers and supervisors understand their obligations;
- Maintaining a system of accountability for involved managers, supervisors and workers;
- Supporting and implementing appropriate recommendations from safety and health committees;

[5] If employers take this approach, they should consult and follow the applicable provisions of the *National Labor Relations Act*—29 U.S.C. 151-169.

- Establishing a comprehensive program of medical and psychological counseling and debriefing for workers who have experienced or witnessed assaults and other violent incidents and ensuring that trauma-informed care is available; and
- Establishing policies that ensure the reporting, recording, and monitoring of incidents and near misses and that no reprisals are made against anyone who does so in good faith.

Additionally, management should: (1) articulate a policy and establish goals; (2) allocate sufficient resources; and (3) uphold program performance expectations.

Through involvement and feedback, workers can provide useful information to employers to design, implement and evaluate the program. In addition, workers with different functions and at various organizational levels bring a broad range of experience and skills to program design, implementation, and assessment. Mental health specialists have the ability to appropriately characterize disease characteristics but may need training and input from threat assessment professionals. Direct care workers, in emergency departments or mental health, may bring very different perspectives to committee work. The range of viewpoints and needs should be reflected in committee composition. This involvement should include:

- Participation in the development, implementation, evaluation, and modification of the workplace violence prevention program;
- Participation in safety and health committees that receive reports of violent incidents or security problems, making facility inspections and responding to recommendations for corrective strategies;
- Providing input on additions to or redesigns of facilities;
- Identifying the daily activities that employees believe put them most at risk for workplace violence;
- Discussions and assessments to improve policies and procedures—including complaint and suggestion programs designed to improve safety and security;

- Ensuring that there is a way to report and record incidents and near misses, and that issues are addressed appropriately;
- Ensuring that there are procedures to ensure that employees are not retaliated against for voicing concerns or reporting injuries; and
- Employee training and continuing education programs.

2. Worksite Analysis and Hazard Identification

A worksite analysis involves a mutual step-by-step assessment of the workplace to find existing or potential hazards that may lead to incidents of workplace violence. Cooperation between workers and employers in identifying and assessing hazards is the foundation of a successful violence prevention program. The assessment should be made by a team that includes senior management, supervisors and workers. Although management is responsible for controlling hazards, workers have a critical role to play in helping to identify and assess workplace hazards, because of their knowledge and familiarity with facility operations, process activities and potential threats. Depending on the size and structure of the organization, the team may also include representatives from operations; employee assistance; security; occupational safety and health; legal; and human resources staff. The assessment should include a records review, a review of the procedures and operations for different jobs, employee surveys and workplace security analysis.

Cooperation between workers and employers in identifying and assessing hazards is the foundation of a successful violence prevention program.

Once the worksite analysis is complete, it should be used to identify the types of hazard prevention and control measures needed to reduce or eliminate the possibility of a workplace violence incident occurring. In addition, it should assist in the identification or development of appropriate training. The assessment team should also determine how often and under

what circumstances worksite analyses should be conducted. For example, the team may determine that a comprehensive annual worksite analysis should be conducted, but require that an investigative analysis occur after every incident or near miss.

Additionally, those conducting the worksite analysis should periodically inspect the workplace and evaluate worker tasks in order to identify hazards, conditions, operations and situations that could lead to potential violence. The advice of independent reviewers, such as safety and health professionals, law enforcement or security specialists, and insurance safety auditors may be solicited to strengthen programs. These experts often provide a different perspective that serves to improve a program.

Information is generally collected through: (1) records analysis; (2) job hazard analysis; (3) employee surveys; and (4) patient/client surveys.

Records analysis and tracking

Records review is important to identify patterns of assaults or near misses that could be prevented or reduced through the implementation of appropriate controls. Records review should include medical, safety, specific threat assessments, workers' compensation and insurance records. The review should also include the OSHA Log of Work-Related Injuries and Illnesses (OSHA Form 300) if the employer is required to maintain one. In addition, incident/near-miss logs, a facility's general event or daily log and police reports should be reviewed to identify assaults relative to particular:

- Departments/Units;
- Work areas;
- Job titles;
- Activities—such as transporting patients between units or facilities, patient intake; and
- Time of day.

Possible Findings from Records Review:

	Hospital	Residential Treatment	Non-residential Treatment/ Service	Community Care	Field Workers (Home Healthcare and Social Service)
Departments/ Units	· Emergency Department · Psychiatric Unit · Geriatric Unit	· Dementia Unit · Adolescent Unit			
Work areas	· Waiting room · Nurses' station · Hallway · Treatment rooms	· Therapy room · Patient's room · Dining area · Van/Car transport	· Waiting area · Therapy room	· Kitchen · Car	· Kitchen · Car · Bedroom
Job titles	· Security guard · Nurse · Therapist · Doctor · Receptionist · Health aide · Technician	· Social worker · Therapist · Nurse · Health aide · Security guard · Driver · Technician	· Social worker · Behavioral health specialist · Nurse · Technician	· Social worker · Therapist · Health aide	· Social worker · Health aide · Child Support services · Emergency medical personnel
Activities	· Patient intake · Transferring patients from one floor to another · Meal time · Bathing · Changing of staff · Scanning for weapons	· Conducting therapy · Transitioning patients from one area to another · Driving patients · Feeding patient	· Therapy room · Client intake	· Conducting therapy · Bathing/ changing/ feeding client · Administering meds · Driving patient	· Bathing/ changing/ feeding client · Administering meds · Driving patient · Interacting with clients' families
Time of day	· After 10 PM · Meal times	· Late afternoon and evening	· No pattern	· Entry or exit	· Entry or exit · Meal times

Job Hazard Analysis

A job hazard analysis is an assessment that focuses on job tasks to identify hazards. Through review of procedures and operations connected to specific tasks or positions to identify if they contribute to hazards related to workplace violence and/or can be modified to reduce the likelihood of violence occurring, it examines the relationship between the employee, the task, tools, and the work environment. Worker participation is an essential component of the analysis. As noted in OSHA's publication on job hazard analyses,[6] priority should be given to specific types of job. For example, priority should be given to:

- Jobs with high assault rates due to workplace violence;
- Jobs that are new to an operation or have undergone procedural changes that may increase the potential for workplace violence; and
- Jobs that require written instructions, such as procedures for administering medicine, and steps required for transferring patients.

After an incident or near miss, the analysis should focus on:

- Analyzing those positions that were affected;
- Identifying if existing procedures and operations were followed and if not, why not (in some instances, not following procedures could result in more effective protections);
- Identifying if staff were adequately qualified and/or trained for the tasks required; and
- Developing, if necessary, new procedures and operations to improve staff safety and security.

Employee surveys

Employee questionnaires or surveys are effective ways for employers to identify potential hazards that may lead to violent incidents, identify the types of problems workers face in their daily activities, and assess the effects of changes in

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[6] OSHA 3071-2002 (Revised). *Job Hazard Analysis.*

work processes. Detailed baseline screening surveys can help pinpoint tasks that put workers at risk. Periodic surveys—conducted at least annually or whenever operations change or incidents of workplace violence occur—help identify new or previously unnoticed risk factors and deficiencies or failures in work practices. The periodic review process should also include feedback and follow-up. The following are sample questions:

- What daily activities, if any, expose you to the greatest risk of violence?
- What, if any, work activities make you feel unprepared to respond to a violent action?
- Can you recommend any changes or additions to the workplace violence prevention training you received?
- Can you describe how a change in a patient's daily routine affected the precautions you take to address the potential for workplace violence?

Client/Patient Surveys

Clients and patients may also have valuable feedback that may enable those being served by the facility to provide useful information to design, implement, and evaluate the program. Clients and patients may be able to participate in identifying triggers to violence, daily activities that may lead to violence, and effective responses.

3. Hazard Prevention and Control

After the systematic worksite analysis is complete, the employer should take the appropriate steps to prevent or control the hazards that were identified. To do this, the employer should: (1) identify and evaluate control options for workplace hazards; (2) select effective and feasible controls to eliminate or reduce hazards; (3) implement these controls in the workplace; (4) follow up to confirm that these controls are being used and maintained properly; and (5) evaluate the effectiveness of controls and improve, expand, or update them as needed.

In the field of industrial hygiene, these steps are generally categorized, in order of effectiveness, as (1) substitution; (2) engineering controls; and (3) administrative and work practice controls. These principles, which are described in more detail below, can also be applied to the field of workplace violence. In addition, employers should ensure that, if an incident of workplace violence occurs, post-incident procedures and services are in place and/or immediately made available.

Substitution

The best way to eliminate a hazard is to eliminate it or substitute a safer work practice. While these substitutions may be difficult in the therapeutic healthcare environment, an example may be transferring a client or patient to a more appropriate facility if the client has a history of violent behavior that may not be appropriate in a less secure therapeutic environment.

Engineering controls and workplace adaptations to minimize risk

Engineering controls are physical changes that either remove the hazard from the workplace or create a barrier between the worker and the hazard. In facilities where it is appropriate, there are several engineering control measures that can effectively prevent or control workplace hazards. Engineering control strategies include: (a) using physical barriers (such as enclosures or guards) or door locks to reduce employee exposure to the hazard; (b) metal detectors; (c) panic buttons, (d) better or additional lighting; and (e) more accessible exits (where appropriate). The measures taken should be site-specific and based on the hazards identified in the worksite analysis appropriate to the specific therapeutic setting. For example, closed circuit videos and bulletproof glass may be appropriate in a hospital or other institutional setting, but not in a community care facility. Similarly, it should be noted that services performed in the field (e.g., home health or social services) often occur in private residences where some engineering controls may not be possible or appropriate.

If new construction or modifications are planned for a facility, assess any plans to eliminate or reduce security hazards.

The following are possible engineering controls that could apply in different settings. Note that this is a list of suggested measures whose appropriateness will depend on a number of factors.

Possible engineering controls for different healthcare and social service settings

<table>
<tr><th></th><th>Hospital</th><th>Residential Treatment</th><th>Non-residential Treatment/ Service</th><th>Community Care</th><th>Field Workers (Home Healthcare, Social Service)</th></tr>
<tr><td rowspan="2">Security/ silenced alarm systems</td><td colspan="3">· Panic buttons or paging system at workstations or personal alarm devices worn by employees</td><td colspan="2">· Paging system
· GPS tracking[7]
· Cell phones</td></tr>
<tr><td colspan="5">· Security/silenced alarm systems should be regularly maintained and managers and staff should fully understand the range and limitations of the system.</td></tr>
<tr><td rowspan="2">Exit routes</td><td colspan="2">· Where possible, rooms should have two exits
· Provide employee 'safe room' for emergencies
· Arrange furniture so workers have a clear exit route</td><td>· Where possible, counseling rooms should have two exits
· Arrange furniture so workers have a clear exit route</td><td colspan="2">· Managers and workers should assess homes for exit routes</td></tr>
<tr><td colspan="5">· Workers should be familiar with a site and identify the different exit routes available.</td></tr>
<tr><td>Metal detectors – hand-held or installed</td><td colspan="5">· Employers and workers will have to determine the appropriate balance of creating the suitable atmosphere for services being provided and the types of barriers put in place.
· Metal detectors should be regularly maintained and assessed for effectiveness in reducing the weapons brought into a facility.
· Staff should be appropriately assigned, and trained to use the equipment and remove weapons.</td></tr>
<tr><td rowspan="2">Monitoring systems & natural surveillance</td><td colspan="2">· Closed-circuit video – inside and outside
· Curved mirrors
· Proper placement of nurses' stations to allow visual scanning of areas
· Glass panels in doors/walls for better monitoring</td><td>· Closed-circuit video – inside and outside
· Curved mirrors
· Glass panels in doors for better monitoring</td><td></td><td></td></tr>
<tr><td colspan="5">· Employers and workers will have to determine the appropriate balance of creating the suitable atmosphere for services being provided and the types of barriers put in place.
· Staff should know if video monitoring is in use or not and whether someone is always monitoring the video or not.</td></tr>
</table>

[7] Employers and workers should determine the most effective method for ensuring the safety of workers without negatively impacting working conditions.

	Hospital	Residential Treatment	Non-residential Treatment/ Service	Community Care	Field Workers (Home Healthcare, Social Service)
Barrier protection	• Enclosed receptionist desk with bulletproof glass • Deep counters at nurses' stations • Lock doors to staff counseling and treatment rooms • Provide lockable (or keyless door systems) and secure bathrooms for staff members (with locks on the inside)—separated from patient/ client and visitor facilities • Lock all unused doors to limit access, in accord with local fire codes	• Deep counters in offices • Provide lockable (or keyless door systems) and secure bathrooms for staff members (with locks on the inside)—separated from patient/ client and visitor facilities • Lock all unused doors to limit access, in accord with local fire codes	• Deep counters • Provide lockable (or keyless door systems) and secure bathrooms for staff members (with locks on the inside)—separated from patient/client and visitor facilities		
	• Employers and workers will have to determine the appropriate balance of creating the suitable atmosphere for the services being provided and the types of barriers put in place.				

<table>
<tr><th></th><th>Hospital</th><th>Residential Treatment</th><th>Non-residential Treatment/ Service</th><th>Community Care</th><th>Field Workers (Home Healthcare, Social Service)</th></tr>
<tr><td rowspan="2">Patient/client areas</td><td>• Establish areas for patients/ clients to de-escalate
• Provide comfortable waiting areas to reduce stress
• Divide waiting areas to limit the spreading of agitation among clients/ visitors</td><td>• Establish areas for patients/ clients to de-escalate
• Provide comfortable waiting areas to reduce stress
• Assess staff rotations in facilities where clients become agitated by unfamiliar staff</td><td>• Provide comfortable waiting areas to reduce stress</td><td>• Establish areas for patients/ clients to de-escalate</td><td>• Establish areas for patients/ clients to de-escalate</td></tr>
<tr><td colspan="5">• Employers and workers will have to determine the appropriate balance of creating the suitable atmosphere for the services being provided and the types of barriers put in place.</td></tr>
<tr><td rowspan="2">Furniture, materials & maintenance</td><td colspan="3">• Secure furniture and other items that could be used as weapons
• Replace open hinges on doors with continuous hinges to reduce pinching hazards
• Ensure cabinets and syringe drawers have working locks
• Pad or replace sharp edged objects (such as metal table frames)
• Consider changing or adding materials to reduce noise in certain areas
• Recess any hand rails, drinking fountains and any other protrusions
• Smooth down or cover any sharp surfaces</td><td>• When feasible, secure furniture or other items that could be used as weapons
• Ensure cabinets and syringe drawers have working locks
• Pad or replace sharp edged objects (such as metal table frames)
• Ensure carrying equipment for medical equipment, medicines and valuables have working locks</td><td>• Ensure carrying equipment for medical equipment, medicines and valuables have working locks</td></tr>
<tr><td colspan="5">• Employers and workers will have to establish a balance between creating the appropriate atmosphere for the services being provided and securing furniture.</td></tr>
</table>

	Hospital	Residential Treatment	Non-residential Treatment/ Service	Community Care	Field Workers (Home Healthcare, Social Service)
Lighting	· Install bright, effective lighting—both indoors and outdoors on the grounds, in parking areas and walkways			· Ensure lighting is adequate in both the indoor and outdoor areas	· Work with client to ensure lighting is adequate in both the indoor and outdoor areas
	· Ensure burned out lights are replaced immediately. · While lighting should be effective it should not be harsh or cause undue glare.				
Travel vehicles	· Ensure vehicles are properly maintained · Where appropriate, consider physical barrier between driver and patients			· Ensure vehicles are properly maintained	

Administrative and work practice controls

Administrative and work practice controls are appropriate when engineering controls are not feasible or not completely protective. These controls affect the way staff perform jobs or tasks. Changes in work practices and administrative procedures can help prevent violent incidents. As with engineering controls, the practices chosen to abate workplace violence should be appropriate to the type of site and in response to hazards identified.

In addition to the specific measures listed below, training for administrative and treatment staff should include therapeutic procedures that are sensitive to the cause and stimulus of violence. For example, research has shown that Trauma Informed Care is a treatment technique that has been successfully instituted in inpatient psychiatric units as a way to reduce patient violence, and the need for seclusion and restraint. As explained by the Substance Abuse and Mental Health Services Administration, trauma-informed services are based on an understanding of the vulnerabilities or triggers of trauma for survivors and can be more supportive than traditional service delivery approaches, thus avoiding re-traumatization.[8]

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[8] Referenced on the Substance Abuse and Mental Health Services Administration's website on February 25, 2013 (www.samhsa.gov/nctic).

The following are possible administrative controls that could apply in different settings.

Possible administrative and work practice controls for different healthcare and social service settings

<table>
<tr><th></th><th>Hospital</th><th>Residential Treatment</th><th>Non-residential Treatment/Service</th><th>Community Care</th><th>Field Workers (Home Healthcare, Social Service)</th></tr>
<tr><td>Workplace violence response policy</td><td colspan="5">• Clearly state to patients, clients, visitors and workers that violence is not permitted and will not be tolerated.
• Such a policy makes it clear to workers that assaults are not considered part of the job or acceptable behavior.</td></tr>
<tr><td rowspan="2">Tracking workers[9]</td><td></td><td>Traveling workers should:
• have specific log-in and log-out procedures
• be required to contact the office after each visit and managers should have procedures to follow-up if workers fail to do so</td><td></td><td colspan="2">Workers should:
• have specific log-in and log-out procedures
• be required to contact the office after each visit and managers should have procedures to follow-up if workers fail to do so
• be given discretion as to whether or not they begin or continue a visit if they feel threatened or unsafe</td></tr>
<tr><td colspan="5">• Log-in/log-out procedures should include:
• the name and address of client visited;
• the scheduled time and duration of visit;
• a contact number;
• a code word used to inform someone of an incident/threat;
• worker's vehicle description and license plate number;
• details of any travel plans with client;
• contacting office/supervisor with any changes.</td></tr>
<tr><td>Tracking clients with a known history of violence</td><td colspan="2">• Supervise the movement of patients throughout the facility
• Update staff in shift report about violent history or incident</td><td>• Update staff in shift report about violent history or incident</td><td colspan="2">• Report all violent incidents to employer</td></tr>
</table>

[9] Massachusetts Department of Mental Health Task Force on Staff and Client Safety. (2011). Report of the Massachusetts Department of Mental Health Task Force on Staff and Client Safety.

<table>
<tr><th></th><th>Hospital</th><th>Residential Treatment</th><th>Non-residential Treatment/Service</th><th>Community Care</th><th>Field Workers (Home Healthcare, Social Service)</th></tr>
<tr><td></td><td colspan="5">• Determine the behavioral history of new and transferred patients and clients to learn about any past violent or assaultive behaviors.
  • Identify any event triggers for clients, such as certain dates or visitors.
  • Identify the type of violence including severity, pattern and intended purpose.
  • Information gained should be used to formulate individualized plans for early identification and prevention of future violence.
• Establish a system—such as chart tags, log books or verbal census reports—to identify patients and clients with a history of violence and identify triggers and the best responses and means of de-escalation.
• Ensure workers know and follow procedures for updates to patients' and clients' behavior.
• Ensure patient and client confidentiality is maintained.
• Update as needed.
• If stalking is suspected, consider varying check-in and check-out times for affected workers and plan different travel routes for those workers.</td></tr>
<tr><td rowspan="2">Working alone or in secure areas</td><td colspan="2">• Treat and interview aggressive or agitated clients in relatively open areas that still maintain privacy and confidentiality
• Ensure workers are not alone when performing intimate physical examinations of patients
• Advise staff to exercise extra care in elevators and stairwells
• Provide staff members with security escorts to parking areas during evening/ late hours— Ensure these areas are well lit and highly visible</td><td>• Advise staff to exercise extra care in elevators, stairwells
• Provide staff members with security escorts to parking areas during evening/ late hours. Ensure these areas are well lit and highly visible</td><td>• Ensure workers have means of communica-tion—either cell phones of panic buttons
• Develop policy to determine when a buddy system should be implemented</td><td>• Advise staff to exercise extra care in unfamiliar residences
• Workers should be given discretion to receive backup assistance by another worker or law enforcement officer
• Workers should be given discre-tion as to whether or not they begin or continue a visit if they feel threatened or unsafe
• Ensure workers have means of communica-tion—either cell phones or panic buttons</td></tr>
<tr><td colspan="5">• Limit workers from working alone in emergency areas or walk-in clinics, particularly at night or when assistance is unavailable.
• Establish policies and procedures for secured areas and emergency evacuations.
• Use the "buddy system," especially when personal safety may be threatened.</td></tr>
<tr><td>Reporting</td><td colspan="5">• Require workers to report all assaults or threats to a supervisor or manager (for example, through a confidential interview). Keep logbooks and reports of such incidents to help determine any necessary actions to prevent recurrences.
• Establish a liaison with local police, service providers who can assist (e.g., counselors) and state prosecutors. When needed, give police physical layouts of facilities to expedite investigations.</td></tr>
</table>

<table>
<tr><th></th><th>Hospital</th><th>Residential Treatment</th><th>Non-residential Treatment/Service</th><th>Community Care</th><th>Field Workers (Home Healthcare, Social Service)</th></tr>
<tr><td>Entry procedures</td><td>· Provide responsive, timely information to those waiting; adopt measures to reduce waiting times
· Institute sign-in procedures and visitor passes
· Enforce visitor hours and procedures for being in the hospital
· Have a “restricted visitors” list for patients with a history of violence/ gang activity; make copies available to security, nurses, and sign-in clerk</td><td>· Institute sign-in procedures with passes for visitors
· Enforce visitor hours and procedures
· Establish a list of “restricted visitors” for patients with a history of violence or gang activity; make copies available at security checkpoints, nurses’ stations and visitor sign-in areas</td><td>· Provide responsive, timely information to those waiting; adopt measures to reduce waiting times</td><td>· Ensure workers determine how best to enter facilities</td><td>· Ensure workers determine how best to enter clients’ homes</td></tr>
<tr><td>Incident response/ high risk activities</td><td colspan="2">· Use properly trained security officers and counselors to respond to aggressive behavior; follow written security procedures
· Ensure that adequate and qualified staff members are available at all times, especially during high-risk times such as patient transfers, emergency responses, mealtimes and at night
· Ensure that adequate and qualified staff members are available to disarm and de-escalate patients if necessary
· Assess changing client routines and activities to reduce or eliminate the possibility of violent outbursts</td><td>· Use properly trained security officers and counselors to respond to aggressive behavior; follow written security procedures</td><td></td><td>· Ensure assistance if children will be removed from the home</td></tr>
</table>

	Hospital	Residential Treatment	Non-residential Treatment/Service	Community Care	Field Workers (Home Healthcare, Social Service)
	· Advise workers of company procedures for requesting police assistance or filing charges when assaulted—and assist them in doing so if necessary. · Provide management support during emergencies. Respond promptly to all complaints. · Ensure that adequately trained staff members and counselors are available to de-escalate a situation and counsel patients. · Prepare contingency plans to treat clients who are "acting out" or making verbal or physical attacks or threats. · Emergency action plans should be developed to ensure that workers know how to call for help or medical assistance.				
Employee uniforms/ dress	· Provide staff with identification badges, preferably without last names, to readily verify employment. · Discourage workers from wearing necklaces or chains to help prevent possible strangulation in confrontational situations. · Discourage workers from wearing expensive jewelry or carrying large sums of money. · Discourage workers from carrying keys or other items that could be used as weapons. · Encourage the use of head netting/cap so hair cannot be grabbed and used to pull or shove workers.				
Facility & work procedures	· Survey facility periodically to remove tools or possessions left by visitors or staff that could be used inappropriately by patients · Survey facilities regularly to ensure doors that should be locked are locked—smoking policies should not allow these doors to be propped open · Keep desks and work areas free of items, including extra pens and pencils, glass photo frames, etc.		· Survey facility periodically to remove tools or possessions left by visitors or staff that could be used inappropriately by patients · Keep desks and work areas free of items, including extra pens and pencils, glass photo frames, etc.	· Survey facility periodically to remove tools or possessions left by visitors or staff that could be used inappro-priately by patients · Establish daily work plans to keep a designated contact person informed about employees' whereabouts throughout the workday; have a contact person follow up if an employee does not report in as expected	· Have clear contracts on how home visits will be conducted, the presence of others in the home during visits and the refusal to provide services in clearly hazardous situations · Establish daily work plans to keep a designated contact person informed about employees' whereabouts throughout the workday; have a contact person follow up if an employee does not report in as expected

	Hospital	Residential Treatment	Non-residential Treatment/Service	Community Care	Field Workers (Home Healthcare, Social Service)
Transportation procedures	· Develop safety procedures that specifically address the transport of patients. · Ensure that workers transporting patients have an effective and reliable means of communicating with their home office			· Develop safety procedures that specifically address the transport of patients. · Ensure that workers transporting patients have an effective and reliable means of communicating with their home office	

Post-incident procedures and services

Post-incident response and evaluation are important components to an effective violence prevention program. Investigating incidents of workplace violence thoroughly will provide a roadmap to avoiding fatalities and injuries associated with future incidents. The purpose of the investigation should be to identify the "root cause" of the incident. Root causes, if not corrected, will inevitably recreate the conditions for another incident to occur.

When an incident occurs, the immediate first steps are to provide first aid and emergency care for the injured worker(s) and to take any measures necessary to prevent others from being injured. All workplace violence programs should provide comprehensive treatment for workers who are victimized personally or may be traumatized by witnessing a workplace violence incident. Injured staff should receive prompt treatment and psychological evaluation whenever an assault takes place, regardless of its severity—free of charge. Also, injured workers should be provided transportation to medical care if not available on site.

Victims of workplace violence could suffer a variety of consequences in addition to their actual physical injuries. These may include:

- Short- and long-term psychological trauma;
- Fear of returning to work;
- Changes in relationships with coworkers and family;
- Feelings of incompetence, guilt, powerlessness; and
- Fear of criticism by supervisors or managers.

Consequently, a strong follow-up program for these workers will not only help them address these problems but also help prepare them to confront or prevent future incidents of violence.

Several types of assistance can be incorporated into the post-incident response. For example, trauma-crisis counseling, critical-incident stress debriefing or employee assistance programs may be provided to assist victims. As explained by the Substance Abuse and Mental Health Services Administration, trauma-informed services are based on an understanding of the vulnerabilities or triggers of trauma for survivors and can be more supportive than traditional service delivery approaches, thus avoiding re-traumatization.[10] Whether the support is trauma-informed or not, certified employee assistance professionals, psychologists, psychiatrists, clinical nurse specialists or social workers should provide this counseling. Alternatively, the employer may refer staff victims to an outside specialist. In addition, the employer may establish an employee counseling service, peer counseling, or support groups.

Counselors should be well trained and have a good understanding of the issues and consequences of assaults and other aggressive, violent behavior. Appropriate and promptly rendered post-incident debriefings and counseling reduce acute psychological trauma and general stress levels among victims and witnesses. In addition, this type of counseling educates staff about workplace violence and positively influences workplace and organizational cultural norms to reduce trauma associated with future incidents.

Investigation of Incidents

Once these immediate needs are taken care of, the investigation should begin promptly. The basic steps in conducting incident investigations are:

1. *Report as required*. Determine who needs to be notified, both within the organization and outside (e.g., authorities), when there is an incident. Understand what types of

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[10] Referenced on the Substance Abuse and Mental Health Services Administration's website on February 25, 2013 (www.samhsa.gov/nctic).

incidents must be reported, and what information needs to be included. If the incident involves hazardous materials additional reporting requirements may apply.

2. *Involve workers in the incident investigation.* The employees who work most closely in the area where the event occurred may have special insight into the causes and solutions.

3. *Identify Root Causes:* Identify the root causes of the incident. Don't stop an investigation at "worker error" or "unpredictable event." Ask "why" the patient or client acted, "why" the worker responded in a certain way, etc.

4. *Collect and review other information*. Depending on the nature of the incident, records related to training, maintenance, inspections, audits, and past incident reports may be relevant to review.

5. *Investigate Near Misses.* In addition to investigating all incidents resulting in a fatality, injury or illness, any near miss (a situation that could potentially have resulted in death, injury, or illness) should be promptly investigated as well. Near misses are caused by the same conditions that produce more serious outcomes, and signal that some hazards are not being adequately controlled, or that previously unidentified hazards exist.

Identify the root causes of the incident. Don't stop an investigation at "worker error" or "unpredictable event." Ask "why" the patient or client acted, "why" the worker responded in a certain way, etc.

4. Safety and Health Training

Education and training are key elements of a workplace violence protection program, and help ensure that all staff members are aware of potential hazards and how to protect themselves and their coworkers through established policies and procedures. Such training can be part of a broader type of instruction that includes protecting patients and clients (such as training on de-escalation techniques). However, employers should ensure that worker safety is a separate component that is thoroughly addressed.

Training for all workers

Training can: (1) help raise the overall safety and health knowledge across the workforce, (2) provide employees with the tools needed to identify workplace safety and security hazards, and (3) address potential problems before they arise and ultimately reduce the likelihood of workers being assaulted. The training program should involve all workers, including contract workers, supervisors, and managers. Workers who may face safety and security hazards should receive formal instruction on any specific or potential hazards associated with the unit or job and the facility. Such training may include information on the types of injuries or problems identified in the facility and the methods to control the specific hazards. It may also include instructions to limit physical interventions in workplace altercations whenever possible.

Every worker should understand the concept of "universal precautions for violence"— that is, that violence should be expected but can be avoided or mitigated through preparation. In addition, workers should understand the importance of a culture of respect, dignity, and active mutual engagement in preventing workplace violence.

New and reassigned workers should receive an initial orientation before being assigned their job duties. All workers should receive required training annually. In high-risk settings and institutions, refresher training may be needed more frequently, perhaps monthly or quarterly, to effectively reach and inform all workers. Visiting staff, such as physicians, should receive the same training as permanent staff and contract workers. Qualified trainers should instruct at the comprehension level appropriate for the staff. Effective training programs should involve role-playing, simulations and drills.

Training topics

Training topics may include management of assaultive behavior, professional/police assault-response training, or personal safety training on how to prevent and avoid assaults.

A combination of training programs may be used, depending on the severity of the risk.

In general, training should cover the policies and procedures for a facility as well as de-escalation and self-defense techniques. Both de-escalation and self-defense training should include a hands-on component. The following provides a list of possible topics:

- The workplace violence prevention policy;
- Risk factors that cause or contribute to assaults;
- Policies and procedures for documenting patients' or clients' change in behavior;
- The location, operation, and coverage of safety devices such as alarm systems, along with the required maintenance schedules and procedures;
- Early recognition of escalating behavior or recognition of warning signs or situations that may lead to assaults;
- Ways to recognize, prevent or diffuse volatile situations or aggressive behavior, manage anger and appropriately use medications;
- Ways to deal with hostile people other than patients and clients, such as relatives and visitors;
- Proper use of safe rooms—areas where staff can find shelter from a violent incident;
- A standard response action plan for violent situations, including the availability of assistance, response to alarm systems and communication procedures;
- Self-defense procedures where appropriate;
- Progressive behavior control methods and when and how to apply restraints properly and safety when necessary;
- Ways to protect oneself and coworkers, including use of the "buddy system";
- Policies and procedures for reporting and recordkeeping;
- Policies and procedures for obtaining medical care, trauma-informed care, counseling, workers' compensation or legal assistance after a violent episode or injury.

Training for supervisors and managers

Supervisors and managers must be trained to recognize high-risk situations, so they can ensure that workers are not placed in assignments that compromise their safety. Such training should include encouraging workers to report incidents and to seek the appropriate care after experiencing a violent incident.

Supervisors and managers must be trained to recognize high-risk situations, so they can ensure that workers are not placed in assignments that compromise their safety.

Supervisors and managers should learn how to reduce safety hazards and ensure that workers receive appropriate training. Following training, supervisors and managers should be able to recognize a potentially hazardous situation and make any necessary changes in the physical plant, patient care treatment program and staffing policy, and procedures to reduce or eliminate the hazards.

Training for security personnel

Security personnel need specific training from the hospital or clinic, including the psychological components of handling aggressive and abusive clients, and ways to handle aggression and defuse hostile situations.

Evaluation of training

The training program should also include an evaluation. At least annually, the team or coordinator responsible for the program should review its content, methods and the frequency of training. Program evaluation may involve supervisor and employee interviews, testing, observing and reviewing reports of behavior of individuals in threatening situations.

5. Recordkeeping and Program Evaluation

Recordkeeping and evaluation of the violence prevention program are necessary to determine its overall effectiveness and identify any deficiencies or changes that should be made.

Accurate records of injuries, illnesses, incidents, assaults, hazards, corrective actions, patient histories and training can help employers determine the severity of the problem; identify any developing trends or patterns in particular locations, jobs or departments; evaluate methods of hazard control; identify training needs and develop solutions for an effective program. Records can be especially useful to large organizations and for members of a trade association that “pool” data. Key records include:

- *OSHA Log of Work-Related Injuries and Illnesses (OSHA Form 300).* Covered employers are required to prepare and maintain records of serious occupational injuries and illnesses, using the OSHA 300 Log. As of January 2015, all employers must report: (1) all work-related fatalities within 8 hours and (2) all work-related inpatient hospitalizations, all amputations and all losses of an eye within 24 hours. Injuries caused by assaults must be entered on the log if they meet the recording criteria.[11]
- *Medical reports of work injury, workers’ compensation reports and supervisors’ reports for each recorded assault.* These records should describe the type of assault, such as an unprovoked sudden attack or patient-to-patient altercation, who was assaulted, and all other circumstances of the incident. The records should include a description of the environment or location, lost work time that resulted and the nature of injuries sustained. These medical records are confidential documents and should be kept in a locked location under the direct responsibility of a healthcare professional.
- *Records of incidents of abuse, reports conducted by security personnel, verbal attacks or aggressive behavior that may be threatening*, such as pushing or shouting and acts of aggression toward other clients. This may be kept as part of an assaultive incident report. Ensure that the affected department evaluates these records routinely.
- *Information on patients with a history of past violence, drug abuse or criminal activity recorded on the patient’s chart.* Anyone who cares for a potentially aggressive, abusive or

[11] 29 CFR Part 1904, revised 2014.

violent client should be aware of the person's background and history, including triggers and de-escalation responses. Log the admission of violent patients to help determine potential risks. Log violent events on patients' charts and flagged charts.[12]

- *Documentation of minutes of safety meetings, records of hazard analyses and corrective actions recommended and taken.*
- *Records of all training programs, attendees, and qualifications of trainers.*

Elements of a program evaluation

As part of their overall program, employers should evaluate their safety and security measures. Top management should review the program regularly and, with each incident, to evaluate its success. Responsible parties (including managers, supervisors and employees) should reevaluate policies and procedures on a regular basis to identify deficiencies and take corrective action.

Management should share workplace violence prevention evaluation reports with all workers. Any changes in the program should be discussed at regular meetings of the safety committee, union representatives or other employee groups.

All reports should protect worker and patient confidentiality either by presenting only aggregate data or by removing personal identifiers if individual data are used.

Processes involved in an evaluation include:

- Establishing a uniform violence reporting system and regular review of reports;
- Reviewing reports and minutes from staff meetings on safety and security issues;
- Analyzing trends and rates in illnesses, injuries or fatalities caused by violence relative to initial or "baseline" rates;
- Measuring improvement based on lowering the frequency and severity of workplace violence;

[12] Proper patient confidentiality must be maintained.

- Keeping up-to-date records of administrative and work practice changes to prevent workplace violence to evaluate how well they work;
- Surveying workers before and after making job or worksite changes or installing security measures or new systems to determine their effectiveness;
- Tracking recommendations through to completion;
- Keeping abreast of new strategies available to prevent and respond to violence in the healthcare and social service fields as they develop;
- Surveying workers periodically to learn if they experience hostile situations in performing their jobs;
- Complying with OSHA and state requirements for recording and reporting injuries, illnesses, and fatalities; and
- Requesting periodic law enforcement or outside consultant review of the worksite for recommendations on improving worker safety.

Workplace Violence Program Checklists

These checklists can help you or your workplace violence/crime prevention committee evaluate the workplace and job tasks to identify situations that may place workers at risk of assault. It is not designed for a specific industry or occupation, and may be used for any workplace. Adapt the checklist to fit your own needs. It is very comprehensive and not every question will apply to your workplace—if the question does not apply, either delete or write "N/A" in the NOTES column. Add any other questions that may be relevant to your worksite.

1. RISK FACTORS FOR WORKPLACE VIOLENCE

Cal/OSHA and NIOSH have identified the following risk factors that may contribute to violence in the workplace. If you have one or more of these risk factors in your workplace, there may be a potential for violence.

	YES	NO	Notes/Follow-up Action
Do employees have contact with the public?			
Do they exchange money with the public?			
Do they work alone?			
Do they work late at night or during early morning hours?			
Is the workplace often understaffed?			
Is the workplace located in an area with a high crime rate?			
Do employees enter areas with a high crime rate?			
Do they have a mobile workplace (patrol vehicle, work van, etc.)?			
Do they deliver passengers or goods?			
Do employees perform jobs that might put them in conflict with others?			
Do they ever perform duties that could upset people (deny benefits, confiscate property, terminate child custody, etc.)?			
Do they deal with people known or suspected of having a history of violence?			
Do any employees or supervisors have a history of assault, verbal abuse, harassment, or other threatening behavior?			
Other risk factors – please describe:			

2. INSPECTING WORK AREAS

- Who is responsible for building security?__________________

  ____

- Are workers told or can they identify who is responsible for security? Yes No

You or your workplace violence/crime prevention committee should now begin a "walkaround" inspection to identify potential security hazards. This inspection can tell you which hazards are already well controlled, and what control measures need to be added. Not all of the following questions may be answered through simple observation. You may also need to talk to workers or investigate in other ways.

	All Areas	Some Areas	Few Areas	No Areas	NOTES/FOLLOW-UP ACTION
Are nametags or ID cards required for employees (omitting personal information such as last name and home address)?					
Are workers notified of past violent acts in the workplace?					
Are trained security and counseling personnel accessible to workers in a timely manner?					
Do security and counseling personnel have sufficient authority to take all necessary action to ensure worker safety?					
Is there an established liaison with state police and/or local police and counseling agencies?					
Are bullet-resistant windows or similar barriers used when money is exchanged with the public?					
Are areas where money is exchanged visible to others who could help in an emergency? (For example, can you see cash register areas from outside?)					
Is a limited amount of cash kept on hand, with appropriate signs posted?					
Could someone hear a worker who calls for help?					
Can employees observe patients or clients in waiting areas?					
Do areas used for patient or client interviews allow co-workers to observe any problems?					
Are waiting areas and work areas free of objects that could be used as weapons?					
Are chairs and furniture secured to prevent their use as weapons?					
Is furniture in waiting areas and work areas arranged to prevent entrapment of workers?					
Are patient or client waiting areas designed to maximize comfort and minimize stress?					

	All Areas	Some Areas	Few Areas	No Areas	NOTES/FOLLOW-UP ACTION
Are patients or clients in waiting areas clearly informed how to use the department's services so they will not become frustrated?					
Are waiting times for patient or client services kept short to prevent frustration?					
Are private, locked restrooms available for employees?					
Is there a secure place for workers to store personal belongings?					

3. INSPECTING EXTERIOR BUILDING AREAS

	Yes	No	NOTES/FOLLOW-UP ACTION
Do workers feel safe walking to and from the workplace?			
Are the entrances to the building clearly visible from the street?			
Is the area surrounding the building free of bushes or other hiding places?			
Is lighting bright and effective in outside areas?			
Are security personnel provided outside the building?			
Is video surveillance provided outside the building?			
Are remote areas secured during off shifts?			
Is a buddy escort system required to remote areas during off shifts?			
Are all exterior walkways visible to security personnel?			

4. INSPECTING PARKING AREAS

	Yes	No	NOTES/FOLLOW-UP ACTION
Is there a nearby parking lot reserved for employees only?			
Is the parking lot attended or otherwise secured?			
Is the parking lot free of blind spots and is landscaping trimmed back to prevent hiding places?			
Is there enough lighting to see clearly in the parking lot and when walking to the building?			
Are security escorts available to employees walking to and from the parking lot?			

5. SECURITY MEASURES

Does the workplace have:	In Place	Should Add	Doesn't Apply	NOTES/FOLLOW-UP ACTION
Physical barriers (plexiglass partitions, bullet-resistant customer window, etc.)?				
Security cameras or closed-circuit TV in high-risk areas?				
Panic buttons?				
Alarm systems?				
Metal detectors?				
Security screening device?				
Door locks?				
Internal telephone system to contact emergency assistance?				
Telephones with an outside line programmed for 911?				
Two-way radios, pagers, or cellular telephones?				
Security mirrors (e.g., convex mirrors)?				
Secured entry (e.g., "buzzers")?				
Personal alarm devices?				
"Drop safes" to limit the amount of cash on hand?				
Broken windows repaired promptly?				
Security systems, locks, etc. tested on a regular basis and repaired promptly when necessary?				

6. COMMENTS

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Checklist completed by: __________________ Date: ____________

Department/Location: ______________________________________

Phone Number: ____

Workplace Violence Prevention Program Assessment Checklist

Use this checklist as part of a regular safety and health inspection or audit to be conducted by the Health and Safety, Crime/Workplace Violence Prevention Coordinator, or joint labor/management committee. If a question does not apply to the workplace, then write "N/A" (not applicable) in the notes column. Add any other questions that may be appropriate.

	Yes	No	NOTES
STAFFING			
Is there someone responsible for building security?			
Who is it?			
Are workers told who is responsible for security?			
Is adequate and trained staffing available to protect workers who are in potentially dangerous situations?			
Are there trained security personnel accessible to workers in a timely manner?			
Do security personnel have sufficient authority to take all necessary action to ensure worker safety?			
Are security personnel provided outside the building?			
Is the parking lot attended or otherwise secure?			
Are security escorts available to walk employees to and from the parking lot?			

	Yes	No	NOTES
TRAINING			
Are workers trained in the emergency response plan (for example, escape routes, notifying the proper authorities)?			
Are workers trained to report violent incidents or threats?			
Are workers trained in how to handle difficult clients or patients?			
Are workers trained in ways to prevent or defuse potentially violent situations?			
Are workers trained in personal safety and self-defense?			
FACILITY DESIGN			
Are there enough exits and adequate routes of escape?			
Can exit doors be opened only from the inside to prevent unauthorized entry?			
Is the lighting adequate to see clearly in indoor areas?			
Are there employee-only work areas that are separate from public areas?			
Is access to work areas only through a reception area?			
Are reception and work areas designed to prevent unauthorized entry?			
Could someone hear a worker call for help?			
Can workers observe patients or clients in waiting areas?			
Do areas used for patient or client interviews allow co-workers to observe any problems?			
Are waiting and work areas free of objects that could be used as weapons?			
Are chairs and furniture secured to prevent their use as weapons?			
Is furniture in waiting and work areas arranged to prevent workers from becoming trapped?			
Are patient or client areas designed to maximize comfort and minimize stress?			
Is a secure place available for workers to store their personal belongings?			
Are private, locked restrooms available for staff?			

	Yes	No	NOTES
SECURITY MEASURES – Does the workplace have?			
Physical barriers (Plexiglas partitions, elevated counters to prevent people from jumping over them, bullet-resistant customer windows, etc.)?			
Security cameras or closed-circuit TV in high-risk areas?			
Panic buttons – (portable or fixed)			
Alarm systems?			
Metal detectors?			
X-ray machines?			
Door locks?			
Internal phone system to activate emergency assistance?			
Phones with an outside line programmed to call 911?			
Security mirrors (convex mirrors)?			
Secured entry (buzzers)?			
Personal alarm devices?			
OUTSIDE THE FACILITY			
Do workers feel safe walking to and from the workplace?			
Are the entrances to the building clearly visible from the street?			
Is the area surrounding the building free of bushes or other hiding places?			
Is video surveillance provided outside the building?			
Is there enough lighting to see clearly outside the building?			
Are all exterior walkways visible to security personnel?			
Is there a nearby parking lot reserved for employees only?			
Is the parking lot free of bushes or other hiding places?			
Is there enough lighting to see clearly in the parking lot and when walking to the building?			
Have neighboring facilities and businesses experienced violence or crime?			

	Yes	No	NOTES
WORKPLACE PROCEDURES			
Are employees given maps and clear directions in order to navigate the areas where they will be working?			
Is public access to the building controlled?			
Are floor plans posted showing building entrances, exits, and location of security personnel?			
Are these floor plans visible only to staff and not to outsiders?			
Is other emergency information posted, such as the telephone numbers?			
Are special security measures taken to protect people who work late at night (escorts, locked entrances, etc.)?			
Are visitors or clients escorted to offices for appointments?			
Are authorized visitors to the building required to wear ID badges?			
Are identification tags required for staff (omitting personal information such as the person's last name and social security number)?			
Are workers notified of past violent acts by particular clients, patients, etc.?			
Is there an established liaison with local police and counseling agencies?			
Are patients or clients in waiting areas clearly informed how to use the department's services so they will not become frustrated?			
Are waiting times for patient or client services kept short to prevent frustration?			
Are broken windows and locks repaired promptly?			
Are security devices (locks, cameras, alarms, etc.) tested on a regular basis and repaired promptly when necessary?			
FIELD WORK – Staffing:			
Are escorts or "buddies" provided for people who work in potentially dangerous situations?			
Is assistance provided to workers in the field in a timely manner when requested?			
FIELD WORK – Training:			
Are workers briefed about the area in which they will be working (gang colors, neighborhood culture, language, drug activity, etc.)?			

	Yes	No	NOTES
Can workers effectively communicate with people they meet in the field (same language, etc.)?			
Are people who work in the field late at night or early mornings advised about special precautions to take?			
FIELD WORK – Work Environment:			
Is there enough lighting to see clearly in all areas where workers must go?			
Are there safe places for workers to eat, use the restroom, store valuables, etc.?			
Are there places where workers can go for protection in an emergency?			
Is safe parking readily available for employees in the field?			
FIELD WORK – Security Measures:			
Are workers provided two-way radios, pagers, or cellular phones?			
Are workers provided with personal alarm devices or portable panic buttons?			
Are vehicle door and window locks controlled by the driver?			
Are vehicles equipped with physical barriers (Plexiglas partitions, etc.)?			
FIELD WORK – Work Procedures:			
Are employees given maps and clear directions for covering the areas where they will be working?			
Are employees given alternative routes to use in neighborhoods with a high crime rate?			
Does a policy exist to allow employees to refuse service to clients or customers (in the home, etc.) in a hazardous situation?			
Has a liaison with the police been established?			
Do workers avoid carrying unnecessary items that someone could use as weapon against them?			
Does the employer provide a safe vehicle or other transportation for use in the field?			
Are vehicles used in the field routinely inspected and kept in good working order?			
Is there always someone who knows where each employee is?			
Are nametags required for workers in the field (omitting personal information such as last name and social security number)?			
Are workers notified of past violent acts by particular clients, patients, etc.?			

	Yes	No	NOTES
FIELD WORK – Are special precautions taken when workers:			
Have to take something away from people (remove children from the home)?			
Have contact with people who behave violently?			
Use vehicles or wear clothing marked with the name of an organization that the public may strongly dislike?			
Perform duties inside people's homes?			
Have contact with dangerous animals (dogs, etc.)?			

Adapted from the workplace violence prevention program checklist, California Department of Human Resources, see www.calhr.ca.gov/Documents/model-workplace-violence-and-bullying-prevention-program.pdf (last accessed November 25, 2014).

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Workers' Rights

Workers have the right to:

- Working conditions that do not pose a risk of serious harm.
- Receive information and training (in a language and vocabulary the worker understands) about workplace hazards, methods to prevent them, and the OSHA standards that apply to their workplace.
- Review records of work-related injuries and illnesses.
- File a complaint asking OSHA to inspect their workplace if they believe there is a serious hazard or that their employer is not following OSHA's rules. OSHA will keep all identities confidential.
- Exercise their rights under the law without retaliation, including reporting an injury or raising health and safety concerns with their employer or OSHA. If a worker has been retaliated against for using their rights, they must file a complaint with OSHA as soon as possible, but no later than 30 days.

For more information, see OSHA's Workers page.

OSHA Assistance, Services and Programs

OSHA has a great deal of information to assist employers in complying with their responsibilities under OSHA law. Several OSHA programs and services can help employers identify and correct job hazards, as well as improve their injury and illness prevention program.

Establishing an Injury and Illness Prevention Program

The key to a safe and healthful work environment is a comprehensive injury and illness prevention program.

Injury and illness prevention programs are systems that can substantially reduce the number and severity of workplace injuries and illnesses, while reducing costs to employers. Thousands of employers across the United States already manage safety using injury and illness prevention programs, and OSHA believes that all employers can and should do the same. Thirty-four states have requirements or voluntary guidelines for workplace injury and illness prevention programs. Most successful injury and illness prevention programs are based on a common set of key elements. These include management leadership, worker participation, hazard identification, hazard prevention and control, education and training, and program evaluation and improvement. Visit OSHA's Injury and Illness Prevention Programs web page at www.osha.gov/dsg/topics/safetyhealth for more information.

Compliance Assistance Specialists

OSHA has compliance assistance specialists throughout the nation located in most OSHA offices. Compliance assistance specialists can provide information to employers and workers about OSHA standards, short educational programs on specific hazards or OSHA rights and responsibilities, and information on additional compliance assistance resources. For more details, visit www.osha.gov/dcsp/compliance_assistance/cas.html or call 1-800-321-OSHA (6742) to contact your local OSHA office.

Free On-site Safety and Health Consultation Services for Small Business

OSHA's On-site Consultation Program offers free and confidential advice to small and medium-sized businesses in all states across the country, with priority given to high-hazard worksites. Each year, responding to requests from small employers looking to create or improve their safety and health management programs, OSHA's On-site Consultation Program conducts over 29,000 visits to small business worksites covering over 1.5 million workers across the nation.

On-site consultation services are separate from enforcement and do not result in penalties or citations. Consultants from state agencies or universities work with employers to identify workplace hazards, provide advice on compliance with OSHA standards, and assist in establishing safety and health management programs.

For more information, to find the local On-site Consultation office in your state, or to request a brochure on Consultation Services, visit www.osha.gov/consultation, or call 1-800-321-OSHA (6742).

Under the consultation program, certain exemplary employers may request participation in OSHA's **Safety and Health Achievement Recognition Program (SHARP).** Eligibility for participation includes, but is not limited to, receiving a full-service, comprehensive consultation visit, correcting all identified hazards and developing an effective safety and health management program. Worksites that receive SHARP recognition are exempt from programmed inspections during the period that the SHARP certification is valid.

Cooperative Programs

OSHA offers cooperative programs under which businesses, labor groups and other organizations can work cooperatively with OSHA. To find out more about any of the following programs, visit www.osha.gov/cooperativeprograms.

Strategic Partnerships and Alliances

The OSHA Strategic Partnerships (OSP) provide the opportunity for OSHA to partner with employers, workers, professional or trade associations, labor organizations, and/or other interested stakeholders. OSHA Partnerships are formalized through unique agreements designed to encourage, assist, and recognize partner efforts to eliminate serious hazards and achieve model workplace safety and health practices. Through the Alliance Program, OSHA works with groups committed to worker safety and health to prevent workplace fatalities, injuries and illnesses by developing compliance assistance tools and resources to share with workers and employers, and educate workers and employers about their rights and responsibilities.

Voluntary Protection Programs (VPP)

The VPP recognize employers and workers in private industry and federal agencies who have implemented effective safety and health management programs and maintain injury and illness rates below the national average for their respective industries. In VPP, management, labor, and OSHA work cooperatively and proactively to prevent fatalities, injuries, and illnesses through a system focused on: hazard prevention and control, worksite analysis, training, and management commitment and worker involvement.

Occupational Safety and Health Training

The OSHA Training Institute partners with 27 OSHA Training Institute Education Centers at 42 locations throughout the United States to deliver courses on OSHA standards and occupational safety and health topics to thousands of students a year. For more information on training courses, visit www.osha.gov/otiec.

OSHA Educational Materials

OSHA has many types of educational materials in English, Spanish, Vietnamese and other languages available in print or online. These include:

- Brochures/booklets;
- Fact Sheets;
- Guidance documents that provide detailed examinations of specific safety and health issues;
- Online Safety and Health Topics pages;
- Posters;
- Small, laminated QuickCards™ that provide brief safety and health information; and
- *QuickTakes*, OSHA's free, twice-monthly online newsletter with the latest news about OSHA initiatives and products to assist employers and workers in finding and preventing workplace hazards. To sign up for *QuickTakes* visit www.osha.gov/quicktakes.

To view materials available online or for a listing of free publications, visit www.osha.gov/publications. You can also call 1-800-321-OSHA (6742) to order publications.

Select OSHA publications are available in e-Book format. OSHA e-Books are designed to increase readability on smartphones, tablets and other mobile devices. For access, go to www.osha.gov/ebooks.

OSHA's web site also has information on job hazards and injury and illness prevention for employers and workers. To learn more about OSHA's safety and health resources online, visit www.osha.gov or www.osha.gov/html/a-z-index.html.

NIOSH Health Hazard Evaluation Program

Getting Help with Health Hazards

The National Institute for Occupational Safety and Health (NIOSH) is a federal agency that conducts scientific and medical research on workers' safety and health. At no cost to employers or workers, NIOSH can help identify health hazards and recommend ways to reduce or eliminate those hazards in the workplace through its Health Hazard Evaluation (HHE) Program.

Workers, union representatives and employers can request a NIOSH HHE. An HHE is often requested when there is a higher than expected rate of a disease or injury in a group of workers. These situations may be the result of an unknown cause, a new hazard, or a mixture of sources. To request a NIOSH Health Hazard Evaluation go to www.cdc.gov/niosh/hhe/request.html. To find out more, in English or Spanish, about the Health Hazard Evaluation Program:

E-mail HHERequestHelp@cdc.gov or call 800-CDC-INFO (800-232-4636).

OSHA Regional Offices

Region I
Boston Regional Office
(CT*, ME*, MA, NH, RI, VT*)
JFK Federal Building, Room E340
Boston, MA 02203
(617) 565-9860 (617) 565-9827 Fax

Region II
New York Regional Office
(NJ*, NY*, PR*, VI*)
201 Varick Street, Room 670
New York, NY 10014
(212) 337-2378 (212) 337-2371 Fax

Region III
Philadelphia Regional Office
(DE, DC, MD*, PA, VA*, WV)
The Curtis Center
170 S. Independence Mall West
Suite 740 West
Philadelphia, PA 19106-3309
(215) 861-4900 (215) 861-4904 Fax

Region IV
Atlanta Regional Office
(AL, FL, GA, KY*, MS, NC*, SC*, TN*)
61 Forsyth Street, SW, Room 6T50
Atlanta, GA 30303
(678) 237-0400 (678) 237-0447 Fax

Region V
Chicago Regional Office
(IL*, IN*, MI*, MN*, OH, WI)
230 South Dearborn Street
Room 3244
Chicago, IL 60604
(312) 353-2220 (312) 353-7774 Fax

Region VI
Dallas Regional Office
(AR, LA, NM*, OK, TX)
525 Griffin Street, Room 602
Dallas, TX 75202
(972) 850-4145 (972) 850-4149 Fax
(972) 850-4150 FSO Fax

Region VII
Kansas City Regional Office
(IA*, KS, MO, NE)
Two Pershing Square Building
2300 Main Street, Suite 1010
Kansas City, MO 64108-2416
(816) 283-8745 (816) 283-0547 Fax

Region VIII
Denver Regional Office
(CO, MT, ND, SD, UT*, WY*)
Cesar Chavez Memorial Building
1244 Speer Boulevard, Suite 551
Denver, CO 80204
(720) 264-6550 (720) 264-6585 Fax

Region IX
San Francisco Regional Office
(AZ*, CA*, HI*, NV*, and American Samoa,
Guam and the Northern Mariana Islands)
90 7th Street, Suite 18100
San Francisco, CA 94103
(415) 625-2547 (415) 625-2534 Fax

Region X
Seattle Regional Office
(AK*, ID, OR*, WA*)
300 Fifth Avenue, Suite 1280
Seattle, WA 98104
(206) 757-6700 (206) 757-6705 Fax

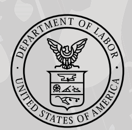
* These states and territories operate their own OSHA-approved job safety and health plans and cover state and local government employees as well as private sector employees. The Connecticut, Illinois, Maine, New Jersey, New York and Virgin Islands programs cover public employees only. (Private sector workers in these states are covered by Federal OSHA). States with approved programs must have standards that are identical to, or at least as effective as, the Federal OSHA standards.

Note: To get contact information for OSHA area offices, OSHA-approved state plans and OSHA consultation projects, please visit us online at www.osha.gov or call us at 1-800-321-OSHA (6742).

How to Contact OSHA

For questions or to get information or advice, to report an emergency, fatality, inpatient hospitalization, amputation, or loss of an eye, or to file a confidential complaint, contact your nearest OSHA office, visit www.osha.gov or call OSHA at 1-800-321-OSHA (6742), TTY 1-877-889-5627.

For assistance, contact us.
We are OSHA. We can help.



U.S. Department of Labor

For more information:

www.osha.gov (800) 321-OSHA (6742)

Web Sites for Violence in Schools/Youth Violence Prevention

- FBI Resources on School Violence: https://www.fbi.gov/stats-services/school-violence
- National After School Association: http://naaweb.org/
- National Association of School Safety and Law Enforcement Officers: http://www.nassleo.org/
- National Center on Safe Supportive Learning Environments: https://safesupportivelearning.ed.gov/
- National Institute for Justice/School Crime and Security:
  - https://www.nij.gov/topics/crime/school-crime/pages/welcome.aspx
- The National School Climate Center: https://www.schoolclimate.org/
- National School Safety and Security Services: http://www.schoolsecurity.org/
- New York State Center for School Safety: http://www.nyscfss.org/
- Safe and Drug Free Schools and Communities (NY State Ed Dept):
  - http://www.p12.nysed.gov/sss/ssae/schoolsafety/sdfsca/
- School Violence: Prevention Tools and Resources: http://www.cdc.gov/violenceprevention/youthviolence/schoolviolence/tools.html
- U.S. Secret Service Threat Assessment Model
  - https://www.secretservice.gov/data/protection/ntac/USSS_NTAC_Enhancing_School_Safety_Guide_7.11.18.pdf

Epic Changes? Arbitration and Class/Collective Action Waivers… What's Next?

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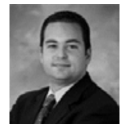

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The Class/Collective Action Explosion

- More and more of employers' employment law spend is on class and wage and hour collective actions
  - Fueled mainly by:
    - Rise of the collective action under the FLSA
      - 4.5x increase since 2000
      - In 2017, FLSA collective actions were filed more frequently than all other types of workplace class actions
    - State-law Rule-23 class actions asserting wage-hour claims – many times with longer statutes of limitations.
  - Lenient Certification standards
    - FLSA: Conditional Certification: "modest showing," "low burden"
    - Rule 23: more rigorous, but test can be difficult to apply and time consuming and expensive to determine.
  - Even non-meritorious class and collective actions exert pressure for settlement.

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The NLRB's Challenge to Class Waivers, *cont.*

In 2016, the NLRB's theory began to gain Circuit court support:

- *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016)
- *Morris v. E&Y*, 834 F.3d 975 (9th Cir. 2016) – a change in course from prior decisions in the Circuit, citing the *Epic* decision
- *NLRB v. Alternative Entertainment, Inc.*, 858 F.3d 393 (6th Cir. 2017)

In January 2017, SCOTUS granted *cert* to resolve the split

- SCOTUS consolidated three cases: *Epic*, *Morris*, and *Murphy Oil*
- Oral argument held on the first day of the term, October 2, 2017
- Solicitor General switched sides:
  - At *cert*, Obama administration backed the NLRB
  - By oral argument, Trump administration backed the employers
- The NLRB Office of General Counsel backed the agency throughout, placing government on both sides of issue at oral argument

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Supreme Court Firmly Embraces Arbitration. Again

Epic Systems Corp. v. Lewis, 584 U.S. ____ (May 21, 2018)

- Majority opinion authored by Gorsuch, joined by Roberts, Kennedy, Thomas, and Alito
- FAA mandates that courts enforce arbitration agreements
  - The FAA's Savings Clause applies only to "generally" applicable contract defenses – fraud, duress, unconscionability
- NLRA does not create a right to bring class or collective action
  - Section 7 is focused on the right to organize unions and bargain collectively
  - Section 7's catch-all provision only protects activities similar to those explicitly listed, and thus reaches only to "things employees do for themselves in the course of exercising their right to free association *in the workplace*" (emphasis added)
  - Section 7 thus does not create a right to pursue a class or collective action in court or arbitral forum

Supreme Court Firmly Embraces Arbitration. Again

Epic Systems Corp. v. Lewis, 584 U.S. ____ (May 21, 2018)

- Some other observations by the majority:
  - Class and collective action procedures were "hardly known" in 1935 when the NLRA was passed
  - The NLRA imposes a strict regulatory regime in certain areas, but provides no rules on class or collective action
  - Collective action procedures under the FLSA are just like the collective action procedures under the ADEA, which the Supreme Court previously held does not prohibit mandatory individual arbitration
  - The Court has rejected every prior effort to find a conflict between the FAA and other federal statutes
  - No *Chevron* deference can be afforded, since the NLRB is interpreting a statute (the FAA) outside its charge and only recently came to its *D.R. Horton* position; also, the Executive branch contradicts itself
- Key takeaways:
  - Broader than expected victory for employers
  - Another full-throated statement favoring the FAA's commands that arbitration agreements be enforced according to their terms
  - There may be no Section 7 right to pursue a class or collective action in the first place

Arbitration/Class Waiver Pros and Cons

Pros	Cons
Leverage to slow or derail class actions	No waiver of EEOC/DOL lawsuits
No jury trials	No waiver of administrative charges
Confidentiality of proceedings	Likely not effective or desired for ERISA class actions
Possible limitations on scope of discovery	Harder to FOIA EEOC charge files
Lower average settlements and/or awards	Arbitrators often less predictable than judges
Shorter cycle time (Sometimes)	Easier to initiate arbitration than lawsuit
Lower total fees through hearing v. (Questionable)	Much Higher arbitration and administrate fees
	Additional fees incurred to compel arbitration
	Possible mass-individual-arbitration filings and re-litigation of the same issue over and over
	Possible confidentiality and res judicata issues
	Narrow right of appeal
	Program implementation costs
	Summary judgment less likely
	Higher fees per-matter average?
	Arbitrator has a financial incentive to keep cases alive

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The Pros and Cons: A Case Illustration Federal Court v. Class Action Waiver Arbitration

Assumptions:

- State/Federal Wage and Hour Claims
- Class: 100 current and former employees

	Federal Court (One Case)	Arbitration (100 Individual Cases)
Filing Administrative Fee	$400	$3,000 x 100 cases = $300,000
Judge/Arbitration Fees	$0	$30,000 - $50,000 x 100 cases = $3 – $5 Million
Well-Defined Discovery Rules	YES	Maybe
Well-Defined E-Discovery Rules	Maybe	Maybe
Contractual Limitations on Discovery	NO	YES
Well-Defined Standard to Certify and Decertify Class/Collective Actions	YES	Maybe
Summary Judgment Available	YES	NO (usually)
Incentive to Grant Summary Judgment	YES	NO
Right to Appeal After Trial	YES	Narrow Right
Confidentiality of Litigation and Result	NO	Yes, but with caveats and limitations
Res Judicata Issues	NO	Maybe
Range of Remedies/Damages	Same	Same
Legal Fees	Expensive	Expensive

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Chapter 6

Class and Collective Actions

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III. Management of Class Actions in Arbitration

A. What Rules Govern?

Because Section 4 of the FAA requires that agreements to arbitrate disputes be enforced according to their terms, most well-drafted arbitration agreements will expressly set forth some procedural rules that will apply to the arbitration. However, as a practical matter, instead of expressly addressing all of the procedural rules that will apply, most arbitration agreements incorporate by reference the procedural rules established by a third-party alternative dispute resolution (ADR) organization such as the American Arbitration Association (AAA) or JAMS (originally Judicial Arbitration and Mediation Services, Inc.).

Indeed, both AAA and JAMS have their own class action procedural rules that were enacted following *Green Tree Financial Corp. v. Bazzle*,[157] where a plurality of the U.S. Supreme Court concluded that if an arbitration agreement is silent on the permissibility of class arbitration, the arbitrator (not the court) must decide if the agreement forbids class arbitration. These rules are intended to supplement the arbitration rules that would otherwise be applicable to the underlying dispute.

The class action procedural rules adopted by both AAA and JAMS divide the resolution of class arbitration issues into three phases: (1) construction of the arbitration clause determining whether the matter should proceed in arbitration; (2) class certification; and (3) final award or settlement.

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[156]Guida v. Home Sav. of Am., Inc., 793 F. Supp. 2d 611, 619 (E.D.N.Y. 2011).

[157]539 U.S. 444, 91 FEP Cases 1832 (2003). For a discussion of the *Bazzle* decision, *see* section II.B.3.

B. Phase One: Should the Matter Proceed in Arbitration?

In the first phase, the arbitrator must determine "as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class."[158] This "clause construction award" is published on the AAA's website and the parties have 30 days after the determination of whether the arbitration provision allows for class arbitration to move a court of competent jurisdiction to confirm or vacate the clause construction award.

The AAA Rules also provide that "[i]n construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis."[159] This provision serves to ensure employers that they will not be deemed to have consented to class arbitration merely because they refer to or incorporate other AAA rules. In other words, a party cannot insist on class arbitration by arguing that it must have been intended because the AAA has rules that apply to class arbitrations.

Only after the parties inform the arbitrator that they do not intend to seek judicial review of the clause construction award, or after the time to seek judicial review expires, does the arbitration then turn to the actual process of certification.

C. Phase Two: Class Certification

1. Differences Between Class Actions and Collective Actions

Rule 23 of the Federal Rules of Civil Procedure governs class actions in federal court. Specifically, a class action may proceed only where the plaintiffs have satisfied all of the requirements of Rule 23(a), including: numerosity, commonality, typicality, and adequate representation, and the requirements of one of the three subparts of Rule 23(b).[160] In a class action

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[158] AAA, Supplementary Rules for Class Arbitrations, Rule 3 (effective Oct. 8, 2003).

[159] *Id.*

[160] Fed. R. Civ. P. 23(a).

brought under Rule 23, putative class members are generally bound by any judgment or settlement unless they expressly opt out of the class.[161] Cases brought under the FLSA, the ADEA, or the Equal Pay Act (EPA) may not be brought as class actions; rather, they must be brought as collective actions.

There are some key distinctions between collective actions and class actions. First, and most importantly, an employee who seeks to become a member of a collective action must expressly *opt in* to the class by filing a written consent.[162] This requirement is in contrast to Rule 23 class actions, where the putative class members are generally bound by any judgment or settlement in the class action, unless they expressly *opt out* of the class. Even where a defendant has offered a plaintiff the full amount of potential recovery, some courts have been unwilling to dismiss collective actions where at least one other person has agreed to opt in.[163] Next, discovery may be broader in collective actions because they require class members to expressly opt in and, depending on the court in which the case is pending, this can have the potential to lead to more depositions and written discovery directed at each individual plaintiff. Finally, most courts have held that the Rule 23 certification requirements do not apply to collective actions.[164] This is so because the requirements of Rule 23 are designed to protect the due process rights

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[161] Fed. R. Civ. P. 23.

[162] 29 U.S.C. §216(b).

[163] Yeboah v. Central Parking Sys., No. 06 CV 0128, 2007 U.S. Dist. LEXIS 81256, at *8–9 (E.D.N.Y. Oct. 31, 2007) (Rule 68 offer does not moot underlying FLSA collective action where employees other than named plaintiff have opted in). *But see* Genesis Healthcare v. Symczyk, 20 WH Cases 2d 801 (2013) (holding that "the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied"; because respondent's claim was mooted before any other employees had opted into action, she had no "personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness").

[164] *See, e.g.*, Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 862 (9th Cir. 1977); La Chapelle v. Owens-Illinois, Inc., 513 F.2d 286, 288, 10 FEP Cases 1010 (5th Cir. 1975) ("[t]here is a fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by FLSA § 16(b)"); Schmidt v. Fuller Brush Co., 527 F.2d 532, 536 (8th Cir. 1975) (same); Morisky v. Public Serv. Elec. & Gas Co., 111 F. Supp. 2d 493, 496–99, 8 WH Cases 2d 568 (D.N.J. 2000) (applying Rule 23 to state law claims, but §216(b) to FLSA claim); *see also* Kelley v. SBC, Inc., No. 97-CV-2729, 1998 U.S. Dist. LEXIS 18643, at *38, 5 WH Cases 2d 16 (N.D. Cal. Nov. 13, 1998) (holding that although Rule 23 class actions may be improper under FLSA, "opt-in

of the absent class members, whereas in a collective action, there are no absent class members to protect.[165] Although most courts have held that the Rule 23 requirements do not govern FLSA collective actions, some courts have looked to Rule 23 for guidance in deciding whether to certify an FLSA class.[166]

Courts have generally held that there is no bar to maintaining both a class and collective action in the same case.[167] Even so, there are many practical issues that may dissuade plaintiffs from attempting to combine these claims. For example, in some states, the law provides more attractive penalties, making FLSA actions less appealing—although plaintiffs may still, at least initially, bring both class and collective action claims. If class certification cannot be obtained after trying, a plaintiff may still be able to pursue collective action claims under the FLSA, assuming that the statute of limitations has not run.

2. Communications With Potential Class Members (Pre- and Post-Certification)

Class action suits often present concerns regarding whether it is proper for attorneys (whether they represent the plaintiff or the defendant) to communicate directly with unrepresented potential class members and when such ex parte communications are permissible. Lawyers seeking to communicate with

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provisions of the FLSA do not act as a complete bar to class certification under Rule 23 where pendent State law claims are involved").

[165]*See* Hoffmann v. Sbarro, Inc., 982 F. Supp. 249, 263, 4 WH Cases 2d 335 (S.D.N.Y. 1997).

[166]*See*, *e.g.*, Espenscheid v. DirectSat USA, LLC, 705 F.3d 770, 772 (7th Cir. 2013) ("[D]espite the difference between a collective action and a class action and the absence from the collective-action section of the Fair Labor Standards Act of the kind of detailed procedural provisions found in Rule 23 . . . there isn't a good reason to have different standards for the certification of the two different types of action, and the case law has largely merged the standards, though with some terminological differences."); Chase v. Aimco Props., LP, 374 F. Supp. 2d 196, 200, 10 WH Cases 2d 1399 (D.D.C. 2005) ("it may simply be that what is 'similarly situated' enough for collective action treatment under the FLSA is a matter for the sound discretion of trial courts, guided mostly by Rule 23(b)(3)—like considerations of manageability and efficiency").

[167]*See, e.g.*, Busk v. Integrity Staffing Solutions, Inc., 713 F.3d 525, 20 WH Cases 2d 937 (9th Cir. 2013); Knepper v. Rite-Aid Corp., 675 F.3d 249, 18 WH Cases 2d 1648 (3d Cir. 2012); Ervin v. OS Rest. Servs., Inc., 632 F.3d 971, 17 WH Cases 2d 97 (7th Cir. 2011).

putative class members must be aware of the Rules of Professional Conduct and Code of Professional Responsibility (and state bar variants) that affect communications in class actions.[168]

Courts have shown a willingness to allow attorneys to communicate directly with potential clients in class actions, although they often place limits and controls on such communication.[169] A majority of courts have expressly held that communications between defense counsel and putative class members are improper only after a class has been certified.[170] Courts, however, are especially critical of communications by defense counsel (or those acting at their behest) that seek to encourage putative class members not to participate in the action.[171]

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[168]*See e.g.*, American Bar Association, Model Rules of Professional Conduct, Rule 7.3 (1983) (regarding solicitations).

[169]Gulf Oil Co. v. Bernard, 452 U.S. 89, 25 FEP Cases 1377 (1981) (involving Title VII class action, Court showed great deference to right of class counsel in Rule 23 class actions to communicate with potential class members for purpose of notification and information, even prior to class certification); EEOC v. Morgan Stanley & Co., 206 F. Supp. 2d 559, 89 FEP Cases 245 (S.D.N.Y. 2002) (holding that employer was permitted to contact potential class members, but had to provide written notice to employees, on court-approved form, which contained specific information concerning lawsuit and employees' rights).

[170]*See, e.g.*, Resnick v. American Dental Ass'n, 95 F.R.D. 372, 376, 31 FEP Cases 1359 (N.D. Ill. 1982) ("once the class has been certified, [unnamed class members] are 'represented by' the class counsel"); Van Gemert v. Boeing Co., 590 F.2d 433, 440 n.15 (2d Cir. 1978), *aff'd*, 444 U.S. 472, 100 S. Ct. 745, 62 L. Ed. 2d 676 (1980) (until certification, class members are not technically represented). *But see* Kleiner v. First Nat'l Bank of Atlanta, 751 F.2d 1193, 1206–07 (11th Cir. 1985) ("defense counsel had an ethical duty to refrain from discussing the litigation with members of the class as of the date of class certification, if not sooner"); Dondore v. NGK Metals Corp., 152 F. Supp. 2d 662 (E.D. Pa. 2001), *on reconsideration*, CIV. A. 00-1966, 2001 WL 516635 (E.D. Pa. May 16, 2001) (defense counsel not permitted to contact or interview putative class members pre-certification); Haffer v. Temple Univ., 115 F.R.D. 506, 512 (E.D. Pa. 1987) (pre-certification communications to potential class members by defense counsel and university official acting at request of defense counsel, where potential class members were encouraged not to meet with class counsel, were improper).

[171]*See, e.g.*, *Kleiner*, 751 F.2d at 1210–11 (disqualifying and fining defense counsel who advised defendant to conduct covert telephone campaign aimed at soliciting opt outs from potential class members); *Haffer*, 115 F.R.D. at 512 (awarding class costs and attorneys' fees to plaintiff for defendants' "improper communication and thwarting of discovery" through "false and misleading" memorandum and statement to potential class members); Tedesco v. Mishkin, 629 F. Supp. 1474, 1483 (S.D.N.Y. 1986) (imposing sanctions on an attorney who sent "unauthorized, misleading, and inherently coercive" letter to class members, attacking class counsel and discouraging participation in suit);

Once the matter has been certified, defense counsel is prohibited from contacting putative class members as they are all then deemed represented by plaintiffs' counsel (unless they have expressly opted out and are not represented by other counsel). There is nothing in either the AAA or JAMS class procedural rules relating to contact with potential class members. As such, this is a matter that will be left to the discretion of the arbitrator, who should be guided by the law of the jurisdiction that is to be applied in the underlying action.

3. Discovery

a. Scope: What Discovery Will Be Permitted?

Neither the AAA nor JAMS class action procedural rules contain any provisions relating to discovery. As such, the general discovery rules applicable to arbitrations of employment matters will likewise apply in class arbitration. These rules permit written discovery, including interrogatories and document requests, and depositions.

b. Written Discovery and Depositions

The AAA Employment Rules provide that "[t]he arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration."[172] The parties are required to have an arbitration management conference "[a]s promptly as practicable after the selection of the arbitrator(s), but not later than 60 days thereafter" where, inter alia, "the resolution of outstanding discovery issues and establishment of discovery parameters"

Impervious Paint Indus., Inc. v. Ashland Oil, 508 F. Supp. 720, 723 (W.D. Ky. 1981) (requiring corrective notice and injunction after representatives of corporate defendant, acting with "full knowledge of counsel," telephoned potential class members to influence them to opt out of action); Bullock v. Automobile Club of S. Cal., No. SA CV 01-731-GLT (ANX), 2002 U.S. Dist. LEXIS 7692, at *11–14 (C.D. Cal. Jan. 28, 2002) (ordering corrective notice because of defendant's communication that tended to discourage putative class members from opting in to FLSA action).

[172]AAA, Employment Arbitration Rules and Mediation Procedures, Rule 9 (Rules amended and effective Nov. 1, 2009).

will be addressed.[173] Accordingly, under the AAA Employment Rules, the arbitrator will determine the bounds of discovery, including the number of depositions that may be taken and the parameters surrounding written discovery (e.g., the scope of discovery requests and number of interrogatories that may be propounded).

The JAMS Employment Rules are more extensive, and provide:

> (a) The Parties shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information (including electronically stored information ("ESI")) relevant to the dispute or claim immediately after commencement of the Arbitration. They shall complete an initial exchange of all relevant, non-privileged documents, including, without limitation, copies of all documents in their possession or control on which they rely in support of their positions, names of individuals whom they may call as witnesses at the Arbitration Hearing, and names of all experts who may be called to testify at the Arbitration Hearing, together with each expert's report that may be introduced at the Arbitration Hearing, within twenty-one (21) calendar days after all pleadings or notice of claims have been received. The Arbitrator may modify these obligations at the Preliminary Conference.
>
> (b) Each Party may take at least one deposition of an opposing Party or an individual under the control of the opposing Party. The Parties shall attempt to agree on the number, time, location, and duration of the deposition(s). Absent agreement, the Arbitrator shall determine these issues including whether to grant a request for additional depositions, based upon the reasonable need for the requested information, the availability of other discovery, and the burdensomeness of the request on the opposing Parties and witness.
>
> (c) As they become aware of new documents or information, including experts who may be called upon to testify, all Parties continue to be obligated to provide relevant, non-privileged documents, to supplement their identification of witnesses and experts and to honor any informal agreements or understandings between the Parties regarding documents or information to be exchanged. Documents that were not previously exchanged, or witnesses and experts that were not previously identified, may not be considered by the Arbitrator at the

[173] *Id.* at Rule 8.

Hearing, unless agreed by the Parties or upon a showing of good cause.[174]

The key differences between the AAA Employment Rules on discovery and the JAMS Employment Rules on discovery is that the JAMS Rules specifically provide that the parties shall informally exchange all relevant information, including ESI, the names of witnesses and experts, and copies of expert reports.[175] Otherwise, discovery will generally proceed in a similar fashion.

c. *Certification Versus Merits Discovery and Bifurcation*

At the certification stage, the main issue to be determined is whether the plaintiff will be able to prove the underlying claims by common evidence. Pre-certification discovery is complicated because the issue to be determined by the arbitrator is whether certification is appropriate, not whether the underlying claims have merit. For this reason, defense counsel will often argue that discovery should be bifurcated (split) between class certification and merits issues. Plaintiffs' counsel, on the other hand, typically argues that full discovery regarding all issues should begin pre-certification and that discovery should not be bifurcated. The common practice is for discovery to be bifurcated and pre-certification discovery to be limited to class certification issues. The arbitrator has the discretion to determine whether to bifurcate.

Even when discovery is bifurcated, the line between certification and merits discovery is not always clear and some merits discovery is usually necessary for the plaintiff to develop the issues. One common issue that arises during pre-certification discovery is the extent to which plaintiffs' counsel can obtain the names and contact information of unnamed class members. For example, in California, individuals have a constitutionally protected right of privacy, which includes personal contact information.[176] Employers, in turn, have a well-established legal

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[174]JAMS, Employment Arbitration Rules & Procedures, Rule 17 (effective July 1, 2014).

[175]*Id.* at Rule 17(a).

[176]CAL. CONST. art. 1, §1. *See also* Belaire W. Landscape, Inc. v. Superior Court, 149 Cal. App. 4th 554, 561, 57 Cal. Rptr. 3d 197 (2007) ("The contact information for [employer's] current and former employees deserves privacy protection.").

obligation to protect this information.[177] Accordingly, when the plaintiffs seek the disclosure of putative class members' contact information, courts must carefully balance the privacy interests against the need for the information.[178] The extent to which the names and contact information of putative class members will be available to plaintiffs' counsel pre-certification is a matter that will be left to the discretion of the arbitrator.

d. Discovery Disputes

In the event that a discovery dispute arises, both AAA and JAMS provide a mechanism for resolution of the issue. "The AAA does not require notice of discovery-related matters and communications unless a dispute arises. At that time, the parties should notify the AAA of the dispute so that it may be presented to the arbitrator for determination."[179] The JAMS Employment Rules in turn provide:

> The Parties shall promptly notify JAMS when a dispute exists regarding discovery issues. A conference shall be arranged with the Arbitrator, either by telephone or in person, and the Arbitrator shall decide the dispute. With the written consent of all Parties, and in accordance with an agreed written procedure, the Arbitrator may appoint a special master to assist in resolving a discovery dispute.[180]

Accordingly, discovery disputes in arbitrations will be resolved much as they are in litigated matters—by submitting the dispute to the arbitrator for resolution.

4. Class Certification

a. Certifying the Class

At the class certification stage, the arbitrator must determine whether the matter should proceed as a class arbitration. In so ruling, the arbitrator is largely guided by the criteria set

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[177] *See* Pioneer Electronics (USA), Inc. v. Superior Court, 40 Cal. 4th 360, 368, 150 P.3d 198 (2007) (custodian of identifying information has standing to assert privacy interests of persons providing information).

[178] *See, e.g.*, *id*. at 370; Valley Bank of Nev. v. Superior Court, 15 Cal. 3d 652, 657 (1975).

[179] AAA, Employment Arbitration Rules and Mediation Procedures, Rule 9.

[180] JAMS, Employment Arbitration Rules & Procedures, Rule 17(d).

forth in the Federal Rules of Civil Procedure, Rule 23(a) (i.e., numerosity, commonality, typicality, and adequacy) and Rule 23(b)—although the requirements are not identical.[181] An arbitrator will certify a class only if the following conditions are met:

1. the class is so numerous that joinder of separate arbitrations on behalf of all members is impracticable;
2. there are questions of law or fact common to the class; . . . and
6. each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members.[182]

Moreover, the class may be certified only if the arbitrator finds that the named plaintiffs and their counsel are suitable to represent the class. In that regard, the claims of the named plaintiffs must be typical of the class and the arbitrator must find that the named plaintiffs and their counsel "will fairly and adequately protect the interests of the class."[183]

Finally, the AAA requires that:

> the arbitrator finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class arbitration is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:
>
> (1) the interest of members of the class in individually controlling the prosecution or defense of separate arbitrations;
> (2) the extent and nature of any other proceedings concerning the controversy already commenced by or against members of the class;

[181]JAMS, Class Action Procedures, Rule 3(b) (effective May 1, 2009); *see also* AAA, Supplementary Rules for Class Arbitration, Rule 4(a)–(b) (which tracks Federal Rule of Civil Procedure 23(a) and 23(b)(3)).

[182]AAA, Supplementary Rules for Class Arbitration, Rule 4(a).

[183]*Id.*; *see also* JAMS, Class Action Procedures, Rule 3(a) ("The Arbitrator also shall determine whether one or more members of a class may act in the arbitration as representative parties on behalf of all members of the class described. The Arbitrator shall permit a class member to serve as a representative only if the conditions set forth in Federal Rules of Civil Procedure, Rule 23(a) are met.").

(3) the desirability or undesirability of concentrating the determination of the claims in a single arbitral forum; and

(4) the difficulties likely to be encountered in the management of a class arbitration.[184]

At all times, the burden of demonstrating that all the prerequisites to class certification have been met remains with the plaintiff.[185]

The AAA and JAMS class procedural rules do not address certification in a collective action. Because the procedure for certification in a collective action is different from that of a Rule 23 class action, it is likely that an arbitrator will follow the law relating to certification of collective actions.

b. Class Determination Award

Once the arbitrator has determined that the matter should proceed as a class arbitration, that determination "shall be set forth in a reasoned, partial final award (the "Class Determination Award"), which shall address each of the matters set forth in [AAA Supplementary Rules for Class Arbitration] Rule 4."[186] The Class Determination Award shall "define the class, identify the class representative(s) and counsel, and shall set forth the class claims, issues, or defenses"[187] and "state when and how members of the class may be excluded from the class arbitration."[188] A copy of the proposed Notice of Class Determination, which specifies the intended mode of delivery of the Notice to all class members, must be attached to the Award.[189] This decision is subject to immediate judicial review by a court of competent jurisdiction.[190] Finally, "[a] Class Determination Award may be altered or amended by the arbitrator before a final award is rendered."[191] Accordingly, a defendant could file a motion to decertify the class following certification.

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[184] AAA, Supplementary Rules for Class Arbitrations, Rule 4.

[185] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011).

[186] AAA, Supplementary Rules for Class Arbitrations, Rule 5(a); *see also* JAMS, Class Action Procedures, Rule 3(c).

[187] AAA, Supplementary Rules for Class Arbitrations, Rule 5(b).

[188] *Id.* at Rule 5(c).

[189] *Id.* at Rule 5(b).

[190] *Id.* at Rule 5(d); JAMS, Class Action Procedures, Rule 3(c).

[191] AAA, Supplementary Rules for Class Arbitrations, Rule 5.

c. Notice

Once a class has been certified, notice must be provided to all class members who "can be identified through reasonable effort."[192]

The Notice of Class Determination must concisely and clearly state in plain, easily understood language:

1. the nature of the action;
2. the definition of the class certified;
3. the class claims, issues, or defenses;
4. that a class member may enter an appearance through counsel if the member so desires, and that any class member may attend the hearings;
5. that the arbitrator will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded;
6. the binding effect of a class judgment on class members;
7. the identity and biographical information about the arbitrator, the class representative(s) and class counsel that have been approved by the arbitrator to represent the class; and
8. how and to whom a class member may communicate about the class arbitration, including information about the AAA Class Arbitration Docket (see Rule 9).[193]

D. Phase Three: Final Award or Class Settlement

1. Final Award

Final awards must be reasoned (regardless of whether favorable or unfavorable to the class). Final awards must also define the class with specificity. Additionally, final awards must "specify or describe those to whom the notice provided in Rule 6 was directed, those the arbitrator finds to be members of the class, and those who have elected to opt out of the class."[194]

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[192] *Id.* at Rule 6; JAMS, Class Action Procedures, Rule 4.

[193] *Id.*

[194] AAA, Supplementary Rules for Class Arbitrations, Rule 7; JAMS, Class Action Procedures, Rule 5.

2. *Settlement, Voluntary Dismissal, or Compromise*

Similar to the court approval that is required of litigated class actions, under the AAA Rules, "[a]ny settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of an arbitration filed as a class arbitration shall not be effective unless approved by the arbitrator."[195] The arbitrator must also direct that notice of the settlement be provided to all class members.[196] Additionally, like the procedure of preliminary approval required under the federal Rules, "[t]he arbitrator may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate."[197]

An arbitrator "may" refuse to approve a settlement that does not afford absent class members another opportunity to opt out of the class and reject participation in the settlement.[198] Absent class members may also object to the proposed settlement, and the arbitrator must withdraw those objections.[199]

E. Key Distinctions Between the AAA and JAMS Class Arbitration Rules

As outlined earlier, the JAMS Class Action Procedures are very similar to the AAA Supplementary Rules for Class Arbitrations and also divide class arbitration into the same three phases and allow for intermediate review by a court after each stage. A previous version of the JAMS Procedures did not require the arbitrator to give an opportunity for court review of the clause construction award, but, since 2009, the JAMS Procedures are identical to the AAA Rules on that point as well.

One significant difference between the JAMS Procedures and the AAA Rules is that under the AAA Rules "at least one

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[195] AAA, Supplementary Rules for Class Arbitrations, Rule 8(a)(1); JAMS, Class Action Procedures, Rule 6(a)(3).

[196] AAA, Supplementary Rules for Class Arbitrations, Rule 8(a)(2); JAMS, Class Action Procedures, Rule 6(a)(1).

[197] AAA, Supplementary Rules for Class Arbitrations, Rule 8(a)(3); JAMS, Class Action Procedures, Rule 6(a)(2).

[198] AAA, Supplementary Rules for Class Arbitrations, Rule 8(c); JAMS, Class Action Procedures, Rule 6(c).

[199] AAA, Supplementary Rules for Class Arbitrations, Rule 8(d); JAMS, Class Action Procedures, Rule 6(d).

of the arbitrators shall be appointed from the AAA's national roster of class arbitration arbitrators,"[200] while the JAMS Procedures have no equivalent rule. Parties may prefer the assurance provided by the AAA Rules that in the event of a class arbitration, the arbitrator selected will have had some class action experience.

Another difference pertains to confidentiality. JAMS general rules provide that arbitration proceedings shall be confidential except as necessary in connection with a judicial challenge to the enforcement of an award, or unless otherwise required by law or judicial decision.[201] The arbitrator also has the discretion to exclude nonparties from the arbitration hearing.[202] The AAA Rules, by contrast, provide that "[t]he presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitrations. All class arbitration hearings and filings may be made public, subject to the authority of the arbitrator to provide otherwise in special circumstances."[203] Also, the AAA maintains a website with a class arbitration docket that provides certain information about class arbitrations to the public.[204] This difference may lead counsel to choose the JAMS Procedures over the AAA Rules for those with reason to be concerned about the confidentiality or privacy of any class arbitration proceedings.

F. FINRA Arbitration

The Financial Industry Regulatory Authority (FINRA) is a self-regulatory organization that performs financial regulation of member brokerage firms and exchange markets. FINRA enforces its own rules, including rules regarding mandatory arbitration provisions that apply to disputes between customers and FINRA member firms, between competing firms, or between firms and certain covered persons, including employees. Thus, for employers and employees covered by FINRA, the FINRA arbitration rules may provide another important means of dispute resolution.

The FINRA Rules expressly preclude class actions from being brought in FINRA arbitration; therefore, there is no risk

[200] AAA, Supplementary Rules for Class Arbitrations, Rule 2(a).
[201] JAMS, Employment Arbitration Rules & Procedures, Rule 26.
[202] *Id.*
[203] AAA, Supplementary Rules for Class Arbitrations, Rule 9(a).
[204] *Id.* at Rule 9(b).

to employers that they will ever be faced with a class arbitration in a FINRA proceeding.[205] However, the FINRA Rules also at least implicitly contemplate that claims can be brought as class claims in court.[206] Additionally, the FINRA Rules do allow for the joinder of claims in arbitration.[207] Unlike class claims, however, to be joined in arbitration, claims must "arise out of the same transaction or occurrence, or series of transactions or occurrences."[208]

A FINRA hearing panel recently addressed whether parties can avoid class litigation and compel individual arbitration under the FINRA Rules. In *Department of Enforcement v. Charles Schwab & Co. (CRD No. 5393)*,[209] the FINRA Office of Hearing Officers held that the FAA applied to allow Charles Schwab to include a mandatory class action waiver, which FINRA had no authority to contradict. However, the FINRA Board of Governors recently reviewed the hearing panel's decision and determined that the FAA does not preempt application of FINRA rules. Specifically, the Board of Governors found that the Securities and Exchange Commission (SEC) has received authority from Congress to approve FINRA rules that govern arbitration in FINRA's forum and, thus, Congress has provided a "congressional command" that overcomes the FAA's general preemptive effect. Thus, the SEC (through FINRA's Rules) has the authority to exempt certain claims from arbitration—including class claims. As a result of the decision, Charles Schwab agreed to pay the $500,000 fine imposed by the hearing panel; there will be no further appeal. Because the dispute and the FINRA Board of Governors' decision expressly addressed only customer agreements, the import of this decision in the employment arena remains to be seen, but it is an important development that employers covered by FINRA will be watching closely.[210]

Another possible wrinkle for employers covered by FINRA is that the FINRA Rules provide that statutory discrimination claims are not required to be arbitrated, and that such claims

[205]FINRA Code of Arbitration Procedure for Industry Disputes (FINRA), Rule 12204(a).

[206]*Id.* at Rule 12204(c), (d).

[207]*Id.* at Rule 12312.

[208]*Id.*

[209]No. 2011029760201, 2013 WL 1463100 (NASDR Feb. 21, 2013).

[210]No. 2011029760201, 2014 WL 1665738 (NASDR Apr. 24, 2014).

will be not be arbitrated unless the parties agreed to it either before or after the dispute arose.[211] Therefore, in a lawsuit covered by FINRA, where only the arbitration rules of FINRA are relied on, an employee might be compelled to arbitrate only some of his or her claims. An employer desiring to have all potential claims submitted to FINRA arbitration should have a separate arbitration agreement that expressly covers even statutory discrimination claims.

IV. COMPARISON TO LITIGATED CLASS ACTIONS[212]

Arbitration is designed to be more efficient and cost effective than litigation. However, it is unavoidable that the complexities of most class actions will diminish this efficiency. As the U.S. Supreme Court has observed, "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."[213] Ideally, the "procedural morass" remains less in arbitration than it would be in court, but procedures remain and often arbitration proceedings end up no less complex than court proceedings. Parties faced with the prospect of class arbitration ought to become familiar with the general procedural rules and devices of arbitration, especially given the higher stakes of a class action.

A. Pre-Hearing Procedure

Although it is possible for many arbitrations to be decided without a hearing—on the basis of stipulated facts, written briefs, and declarations—this is much more unlikely in a class arbitration. Nonetheless, as in court where much of a case can be resolved prior to trial, the pre-hearing procedures in arbitration can be critical to achieving a favorable result.

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[211]FINRA Rule 13201(a).

[212]This section highlights some of the procedures applicable to arbitrated class actions. For a more complete discussion of arbitration procedures, see Chapter 9.

[213]AT&T Mobility LLC v. Concepcion, 563 U.S. 321, 131 S. Ct. 1740, 1751 (2011).

As a general matter, the arbitration and pre-hearing procedures are subject to the control of the arbitrator and the rules of procedure adopted or agreed to by the parties. As a result, if there are certain procedures that either side desires, those should be incorporated into the agreement itself to ensure their enforcement.

1. Ability to Select Arbitrator and Define Scope of Authority

One significant advantage that the parties possess in arbitration that they do not in court is the ability to select the arbitrator. In some state courts, litigants may have the (limited) ability to avoid a judge they dislike, but in federal court, litigants have no ability to "select" the judge assigned to their case.

One method of initiating arbitration is a submission, stipulation, or agreement to arbitrate, whereby the parties jointly ask for arbitration to be commenced. This submission, signed by both parties, can ask for the appointment of a specific arbitrator—which will be followed, provided that the selected arbitrator meets standards of impartiality and independence.[214]

The arbitration submission is also an effective tool for the parties to select other procedures that will apply to the arbitration, to the extent that they can agree. For example, the parties can specify any limitations on the arbitrator's authority and define the scope of the issues to be arbitrated.[215] Thus, the arbitration submission presents the parties with an opportunity to control the conduct and scope of arbitration in a manner not possible in court—again, subject to the important caveat that the parties must agree on those controls.

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[214]*See, e.g.*, AAA, Employment Arbitration Rules and Mediation Procedures, Rule 13.

[215]Ottley v. Schwartzberg, 819 F.2d 373, 376 (2d Cir. 1987) ("[T]he scope of authority of arbitrators generally depends on the intention of the parties to an arbitration, and is determined by the agreement or submission. Such an agreement or submission serves not only to define, but to circumscribe, the authority of arbitrators.... Because there is no indication that the parties agreed to submit the issue of compliance to the arbitrator, we think it clear that the arbitrator was without authority to rule on that issue.") (quotation omitted).

2. Pre-Hearing Conference and Submissions

Usually, the parties and the arbitrator hold a pre-hearing conference to settle any issues regarding hearing procedures or to refine the scope of the issues if necessary. To a certain degree this is similar to a litigated case where parties participate in scheduling and pre-trial conferences. However, in arbitration, as explained earlier, the parties have a much greater ability to determine for themselves the procedural rules that will govern because of arbitration's informality.

During the pre-hearing phase, much like in a litigated matter, the arbitrator will be responsible for ruling on issues related to class notice, including sampling of the potential class, the mailing of notices to potential class members, opt-in procedures (if it is an FLSA collective action), and opt-out procedures (if it is a class action). However, unlike in a litigated matter where the parties are bound by the court's rules, the parties have greater flexibility.

The AAA Employment Arbitration Rules and Mediation Procedures require an "Arbitration Management Conference" within 60 days of selection of the arbitrator.[216] The enumerated topics to be covered at the conference show that most matters are up for discussion, whereas in court the parties would be bound by the applicable rules. For example, topics include, among other things, "the law, standards, rules of evidence and burdens of proof that are to apply to the proceeding."[217]

3. Dispositive Motions

Although the arbitration rules do not provide for "summary judgment" motions as a matter of course, arbitrators do have authority to decide dispositive motions in certain circumstances. For example, the AAA Rules provide that the arbitrator may allow a dispositive motion if the moving party shows "substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case."[218] Similarly the JAMS Employment Arbitration Rules & Procedures provide that the arbitrator "may

[216] *See* AAA, Employment Arbitration Rules and Mediation Procedures, Rule 8.

[217] *Id.*

[218] *See, e.g.*, AAA, Employment Arbitration Rules and Mediation Procedures, Rule 27.

permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the motion."[219]

B. Hearing Procedures

1. Structure of the Hearing

In the class context, an arbitration hearing will proceed in a manner similar to a litigated class action, with both sides having an opportunity to present their cases. The arbitrator, however, does have discretion in how the hearing will be conducted and "shall conduct the proceedings with a view toward expediting the resolution of the dispute."[220] In that regard, the arbitrator "may direct the order of proof, bifurcate proceedings, and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case."[221] In addition to bifurcating proceedings (whereby the arbitration is split into two phases: liability and damages), an arbitration may also be trifurcated (whereby the arbitration is split into three phases: liability, damages, and allocations of arbitration costs).

"The arbitrator shall have the authority to exclude witnesses, other than a party, from the hearing during the testimony of any other witness. The arbitrator shall also have the authority to decide whether any person who is not a witness may attend the hearing."[222] Although a court may exclude witnesses from attending the hearing during other witnesses' testimony in a litigated matter, the employer typically has no control over the attendance of nonwitnesses at the trial. At the close of the hearing, the arbitrator will inquire as to whether the parties have any additional witnesses to be heard or proofs to offer. Once the arbitrator is satisfied that the record is complete, the hearing will be closed, unless the parties will be submitting post-hearing briefs.[223]

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[219] JAMS, Employment Arbitration Rules & Procedures, Rule 18.

[220] AAA, Employment Arbitration Rules and Mediation Procedures, Rule 28.

[221] *Id.*

[222] *Id.* at Rule 22.

[223] *Id.* at Rule 33.

2. Procedural and Evidentiary Rules

As discussed earlier, hearing rules will vary depending on the terms of the arbitration agreement, the arbitration rules, the arbitrator's preferences, and the needs of the parties as discussed at the pre-hearing conference. Although arbitration is more informal than a court proceeding, the parties generally have the same burdens of proof and production as would apply had their claims been brought in court.[224] Otherwise, "the arbitrator has the authority to set the rules for the conduct of the proceedings and shall exercise that authority to afford a full and equal opportunity to all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute."[225]

Although an arbitrator "may be guided" by the Federal Rules of Evidence or any other applicable evidentiary rules, rarely will those rules of evidence apply.[226] As with a litigated action, the arbitrator decides the relevance and materiality of the evidence; however, unlike a litigated action, in arbitration "conformity to legal rules of evidence shall not be necessary."[227] Because the evidence rules are more relaxed, it is more difficult to get evidence excluded. For example, hearsay evidence is normally admissible, unless the parties have agreed otherwise.

Arbitrators must consider relevant deposition testimony, by transcript or video, provided that all other parties had the opportunity to attend and cross-examine the deponent.[228] Arbitrators may also accept "witness affidavits or other recorded testimony" in lieu of live testimony.[229] This can be particularly useful in class arbitration, where the parties may wish to submit affidavits from class members, co-workers, or supervisors regarding their experiences while working for the employer. Because the affiants are not subject to cross-examination, and the affidavits are likely drafted by counsel, the arbitrator may not give the affidavits as much weight as witnesses who testify

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[224] *Id.* at Rule 28.

[225] *Id.*

[226] JAMS, Employment Arbitration Rules & Procedures, Rule 22(d) ("[s]trict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product").

[227] AAA, Employment Arbitration Rules and Mediation Procedures, Rule 30.

[228] JAMS, Employment Arbitration Rules & Procedures, Rule 22(e).

[229] *Id.*

live. Even so, the submission of affidavits can be very helpful for both sides.

Finally, unlike in a litigated matter where all evidence must be admitted prior to the close of the case, in an arbitration, the arbitrator may accept documents or other evidence after the hearing.[230]

3. Decision

A major difference between litigated actions and arbitrations is that an arbitrator is required to issue a decision in writing, which includes the reasons for the award, unless the parties have otherwise agreed.[231] The arbitrator may grant any remedy or relief that would have been available to the parties had the matter been heard in court, including awards of attorneys' fees and costs.[232] The arbitrator's award is final and binding.[233] Unlike a litigated action where a party may move for reconsideration of the trial court's decision, the arbitrator has no power to review a prior decision.[234] Even so, upon timely application, the arbitrator may correct "any clerical, typographical, technical, or computational errors in the award."[235] Finally, JAMS general rules provide that arbitration proceedings shall be confidential except as necessary in connection with a judicial challenge to the enforcement of an award, or unless otherwise required by law or judicial decision.[236] In litigated matters and matters proceeding according to the AAA Rules, by contrast, there is no presumption of confidentiality (although an arbitrator may determine that certain information is confidential).[237]

C. Scope of Judicial Review[238]

Arbitration is intended to be final and binding. For that reason, the scope of judicial review of an arbitrator's decision

[230]AAA, Employment Arbitration Rules and Mediation Procedures, Rule 30.

[231]*Id.* at Rule 39(c).

[232]*Id.* at Rule 39(d).

[233]*Id.* at Rule 39(g).

[234]*Id.* at Rule 40.

[235]*Id.*

[236]JAMS, Employment Arbitration Rules & Procedures, Rule 26.

[237]AAA, Supplementary Rules for Class Arbitrations, Rule 9(a).

[238]For a more detailed discussion of the availability of review of arbitration awards, see Chapter 13, section II.

is limited. The FAA or the applicable state arbitration law will provide the standard by which a court may review an arbitrator's decision. Whether the FAA or state arbitration law applies is determined by the nature of the underlying action and the terms of the arbitration agreement.[239] Judicial review under the FAA is extremely limited.[240] The FAA does not permit a merits review of an arbitral decision. Awards may be set aside under only limited circumstances: where the award was obtained by fraud, corruption, or undue means; or where the arbitrator engaged in misconduct, was not impartial, or exceeded his or her authority.[241] Similarly, courts may correct arbitration awards only where there is a showing of an evident material miscalculation, or material mistake, or where the arbitrator's award is imperfect in form.[242] Parties that seek to expand the scope of judicial review should consider whether the applicable state arbitration law would permit expanded judicial review. For example, although the FAA does not permit the parties to agree to expand the scope of judicial review, the California Arbitration Act does permit parties to contractually agree to expanded judicial review.[243]

The arbitration rules themselves also provide for limited review of an arbitrator's decision.

D. Appellate Arbitration

Both the AAA and JAMS have adopted rules that provide a procedure for parties to pursue appeals within the arbitration process. The rules provide for the same general appeal rights when they are specifically incorporated into the parties' agreement. In other words, an award can be appealed only where the parties have agreed to permit appeals.[244] During the pendency of the appeal, the underlying award is not considered final and the time period for commencement of judicial proceedings

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[239]*See* 9 U.S.C. §2 (FAA applies to all written arbitration agreements involving interstate commerce).

[240]9 U.S.C. §§10–11.

[241]*Id.* at §10(a)(1)–(4).

[242]*Id.* at §11.

[243]Biller v. Toyota Motor Corp., 668 F.3d 655 (9th Cir. 2012); *see also* Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 128 S. Ct. 1396 (2008) (holding that parties cannot contractually expand grounds for vacating arbitrator's award under FAA).

[244]AAA, Optional Appellate Arbitration Rules, Rule A-1 (effective Nov. 1, 2013); JAMS, Employment Arbitration Rules & Procedures, Rule 34.

is tolled.[245] The AAA provides that a party may appeal on the grounds that the award is based upon: "(1) an error of law that is material and prejudicial; or (2) determinations of fact that are clearly erroneous."[246] The AAA further provides that a party may appeal only issues or evidence that were raised during the arbitration hearing.[247] The parties submit briefs outlining the issues for appeal; the appeal panel reviews the record of the hearing, including all exhibits, affidavits, etc., that were accepted into the record at the hearing; and conducts an oral argument, if necessary.[248] Under the AAA, the appeal tribunal may adopt the original award, substitute its own award, or request additional information.[249] Likewise, the JAMS Rules provide that an appeal tribunal "will apply the same standard of review that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision," and although it may not remand to the original arbitrator, the appeal panel may reopen the record to review evidence that was improperly excluded by the original arbitrator or that the panel otherwise deems necessary.[250] Under both AAA and JAMS appellate rules, the appeal tribunal's decision shall become the final award.[251]

[245]AAA, Optional Appellate Arbitration Rules, Rule A-2(a); JAMS, Optional Arbitration Appeal Procedure, Rule (C) (effective June 2003).

[246]AAA, Optional Appellate Arbitration Rules, Rule A-10.

[247]*Id.* at Rule A-16.

[248]AAA, Optional Appellate Arbitration Rules, Rule A-15; JAMS, Optional Arbitration Appeal Procedure, Rule (B).

[249]AAA, Optional Appellate Arbitration Rules, Rule A-19(a).

[250]JAMS, Optional Arbitration Appeal Procedure, Rule (D).

[251]AAA, Optional Appellate Arbitration Rules, Rule A-20; JAMS Optional Arbitration Appeal Procedure, Rule (F).

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Chapter 6

Class and Collective Actions

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III. MANAGEMENT OF CLASS ACTIONS IN ARBITRATION

B. Phase One: Should the Matter Proceed in Arbitration?

[158]**[On page 263 of the Main Volume, at the end of the footnote, add the following.]**

; *see also* JAMS Class Action Procedures, Rule 2 (effective May 1, 2009).

[On page 263 of the Main Volume, at the end of the second full paragraph, add the following new footnote.]

[42]Using identical language, Rule 2 of the JAMS Class Action Procedures provides the same assurance to employers.

C. Phase Two: Class Certification

3. Discovery

b. Written Discovery and Depositions

[On page 269 of the Main Volume, in the first full sentence, after "informally", add "and voluntarily".]

d. Discovery Disputes

[On page 270 of the Main Volume, replace the first two sentences with the following.]

Except where a dispute arises, "[t]he AAA does not require notice of discovery related matters and communications . . .

[On page 270 of the Main Volume, after the sentence ending with footnote 179, add the following.]

In the event of such a dispute, both AAA and JAMS provide a mechanism for resolution of the issue.

4. Class Certification

a. Certifying the Class

[On page 270 of the Main Volume, replace the second sentence with the following.]

In so ruling, the arbitrator is largely guided by the same criteria as are set forth in the Federal Rules of Civil Procedure, Rule 23(a) (i.e., numerosity, commonality, typicality, and adequacy) and Rule 23(b)—although the requirements under arbitration rules are not identical.[43a]

[On page 271 of the Main Volume, in "2" in the enumerated list, delete "... and" and add to the list the following.]

3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
4. the representative parties will fairly and adequately protect the interests of the class;
5. counsel selected to represent the class will fairly and adequately protect the interests of the class; and

[On page 271 of the Main Volume, in the second full paragraph, replace the first sentence before the colon with the following.]

Finally, in addition to the prerequisites above, the AAA rules permit maintenance of an action as a class arbitration only where:

[184]**[On page 272 of the Main Volume, replace "Rule 4" with "Rule 4(b)".]**

[43a]JAMS, Class Action Procedures, Rule 3(b) (effective May 1, 2009) (incorporating Fed. R. Civ. P. 23(a)–(b) by reference); *see also* AAA, Supplementary Rules for Class Arbitration, Rule 4(a)–(b) (which tracks Fed. R. Civ. P. 23(a) and 23(b)(3)).

[185]**[On page 272 of the Main Volume, replace the S. Ct. and L. Ed. citations with "564 U.S. 338, 349".]**

b. Class Determination Award

[On page 272 of the Main Volume, replace the third sentence with the following.]

A "copy of the proposed Notice of Class Determination . . . specifying the intended mode of delivery of the Notice to the class members, shall be attached to the award."[44]

[191]**[On page 272 of the Main Volume, replace "Rule 5" with "Rule 5(e)".]**

c. Notice

[On page 273 of the Main Volume, in the second paragraph, insert open quotation marks before "concisely" and closed quotation marks after "(see Rule 9).".]

[On page 273 of the Main Volume, replace footnotes 192 and 193 with the following.]

[192]*Id.* at Rule 6(a); JAMS, Class Action Procedures, Rule 4.
[193]AAA, Supplementary Rules for Class Arbitrations, Rule 6(a); JAMS, Class Action Procedures Rule 4 (note that the JAMS counterpart to the rule omits item number 8 from the above-cited list).

[194]**[On page 273 of the Main Volume, replace with the following.]**

Id. at Rule 6(a); JAMS, Class Action Procedures Rule 4 (note that the JAMS counterpart to the rule omits item number 8 from the above-cited list).

D. Phase Three: Final Award or Class Settlement

1. Final Award

[On page 273 of the Main Volume, in the third sentence, after "Rule 6", add "(AAA) and Rule 4 (JAMS)".]

[44]*Id.* at Rule 5(b).

2. *Settlement, Voluntary Dismissal, or Compromise*

[197]**[On page 274 of the Main Volume, add to the end of the footnote the following.]**

(identical to the AAA rule, except for a single word variation—"a finding" versus the AAA rule's "on finding").

E. Key Distinctions Between the AAA and JAMS Class Arbitration Rules

[On page 274 of the Main Volume, delete the second sentence.]

[201]**[On page 275 of the Main Volume, replace "Rule 26" with "Rule 26(a)".]**

[202]**[On page 275 of the Main Volume, at the end of the footnote, add "at Rule 26(c)."]**

Class Action Prevention: Arbitration Agreements With Class Action Waivers

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CLASS ACTION PREVENTION: ARBITRATION AGREEMENTS WITH CLASS ACTION WAIVERS

I. The Federal Arbitration Act

A. History of the Act

1. Codified at 9 U.S.C. § 1, *et seq.*

2. First enacted in 1925 as the United States Arbitration Act, and reenacted in 1947 as the Federal Arbitration Act ("FAA").

B. The FAA reflects a strong federal policy in favor of arbitration.

1. The FAA states:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added).

2. An arbitration agreement may only be held invalid, revocable, or unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

3. In other words, the Act permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

4. "Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Id.* (emphasis in original).

C. Requirements of the FAA

1. There must be a contract. 9 U.S.C. § 2.

2. The contract must be in writing. 9 U.S.C. § 2.

3. The contract must involve "commerce," *i.e.*, interstate commerce. 9 U.S.C. §§ 1, 2.

    a. That is generally not a difficult hurdle. The Supreme Court has interpreted the FAA as "implementing Congress' intent 'to exercise [its] commerce power to the full.'" *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001) (alteration in original) (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995)).

    b. Even if interstate commerce is not involved, state law may provide for similar enforcement of arbitration agreements. *See* N.Y. C.P.L.R. § 7501, et seq.

D. If the FAA's requirements are satisfied, a lawsuit can be stayed until arbitration has been had.

1. The FAA states:

    > "<u>If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration</u> under an agreement in writing for such arbitration, <u>the court in which such suit is pending</u>, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, <u>shall on application of one of the parties stay the trial of the action until such arbitration has been had</u> in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3 (emphasis added).

2. The FAA's mandate to enforce arbitration agreements applies in both federal and state courts. *See*, *e.g.*, *Vaden v. Discovery Bank*, 556 U.S. 49, 71 (2009) ("Under the FAA, state courts as well as federal courts are obliged to honor and enforce agreements to arbitrate."); *GAF Corp. v. Werner*, 66 N.Y.2d 97, 102 (1985) ("The right which the Act grants to enforce an arbitration provision is not dependent upon the forum – Federal or State – in which it is asserted. . . .").

3. A court's role when faced with a motion to compel arbitration under the FAA is limited to deciding certain gateway "'question[s] of arbitrability,'" such as "'whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of

controversy.'" *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 n.2 (2013) (citation omitted).

4. If those limited gateway questions are answered in the affirmative, all other matters are generally for the arbitrator to decide.

E. The arbitration agreement can specify a particular arbitrator, but it does not have to do so.

1. The FAA states:

> "If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator." 9 U.S.C. § 5 (emphasis added).

2. *See Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 792-93 (7th Cir. 2013) (explaining that when an arbitration clause is "detail-free," Section 5 of the FAA "allows judges to supply details in order to make arbitration work").

F. Following the arbitration, the court can enter judgment upon the arbitrator's award, if the arbitration agreement calls for it.

1. The FAA states:

> "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected . . . . If no court is specified in the agreement of the parties, then such application may be made

to the United States court in and for the district within which such award was made. . . ." 9 U.S.C. § 9.

G. A court's power to vacate an arbitrator's award under the FAA is limited.

1. Following the arbitration, the arbitrator's decision can only be overturned under extraordinary circumstances, *e.g.*, if the arbitrator's award was procured by corruption or fraud, or if the arbitrator exceeded his powers, *i.e.*, if the arbitrator took some action that the parties' arbitration agreement did not empower him to take. *See* 9 U.S.C. § 10.

H. The FAA does not apply to transportation workers' employment contracts, but other employment contracts are covered.

1. The Act excludes from its scope "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.

2. "[W]orkers engaged in . . . interstate commerce" could cover almost anyone, but the Supreme Court has held that this exemption is limited to transportation workers, under the principle of *ejusdem generis*. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001).

II. The Supreme Court's Recent Support for Arbitration Agreements with Class Action Waivers

A. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011)

1. The U.S. Supreme Court enforced an arbitration agreement with a class action waiver in a putative class action involving state law claims.

2. Question Presented: "[W]hether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." *Id.* at 1744.

3. Facts:

a. The Concepcions were consumers who purchased AT&T wireless service, which was advertised as including the provision of free phones; they were not charged for the

phones, but they were charged $30.22 in sales tax based on the phones' retail value.

b. The Concepcions filed a complaint against AT&T in the United States District Court for the Southern District of California. The complaint was later consolidated with a putative class action alleging, among other things, that AT&T had engaged in false advertising and fraud by charging sales tax on phones it advertised as free.

c. AT&T's wireless service agreement contained an arbitration clause in its standard terms and conditions.

d. AT&T's arbitration clause provided for arbitration of all disputes between the parties, but required that claims be brought in the parties' "'individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.'" *Id.* at 1744.

e. The contract's arbitration provision further stated that "'the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding.'" *Id.* at 1744 n.2.

f. AT&T's arbitration clause contained several pro-consumer provisions. *Id.* at 1744.

   i. The agreement specified that, in the event the parties proceeded to arbitration, AT&T must pay all costs for nonfrivolous claims.

   ii. The agreement specified that arbitration must take place in the county in which the customer is billed.

   iii. The agreement specified that, for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions.

   iv. The agreement specified that either party may bring a claim in small claims court in lieu of arbitration.

v. The agreement specified that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages.

vi. The agreement denied AT&T any ability to seek reimbursement of its attorney's fees.

vii. In the event a customer received an arbitration award greater than AT&T's last written settlement offer, the agreement required AT&T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees.

viii. By the time the case was heard by the Supreme Court, AT&T had increased that guaranteed minimum recovery to $10,000.

4. Procedural History:

a. AT&T moved to compel arbitration under the terms of its contract with the Concepcions.

b. The Concepcions opposed the motion, contending that the arbitration agreement was unconscionable and unlawfully exculpatory under California law because it disallowed classwide procedures.

c. The District Court denied AT&T's motion to compel arbitration.

d. Relying on California law, the District Court found that the arbitration provision was unconscionable because AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions.

e. The Ninth Circuit affirmed, agreeing with the District Court that AT&T's arbitration clause was unconscionable under California law.

f. The Ninth Circuit based its decision on the California Supreme Court's prior decision in *Discover Bank v. Superior Court*, 113 P.3d 1100 (2005).

i. In *Discover Bank*, the California Supreme Court had struck down a provision in Discover's credit

cardholder agreement that required arbitration but prohibited classwide arbitration. 113 P.3d at 1103.

ii. The California Supreme Court had held in *Discover Bank* that "at least under some circumstances, the law in California is that class action waivers in consumer contracts of adhesion are unenforceable, whether the consumer is being asked to waive the right to class action litigation or the right to classwide arbitration." *Id.*

5. Decision of the Court:

a. The Supreme Court's analysis started with an affirmation that the Federal Arbitration Act reflects both "'a liberal federal policy favoring arbitration,'" and the "'fundamental principle that arbitration is a matter of contract.'" 131 S. Ct. at 1745 (citations omitted).

b. It follows, explained the Court, that "courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *Id.* at 1745 (citations omitted).

c. Thus, as the Court explained, the Federal Arbitration Act "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 1746 (citations omitted).

d. The Court rejected the plaintiffs' argument that the California Supreme Court's decision in *Discover* was merely applying a generally applicable contract defense – unconscionability – and not a defense that applies only to arbitration agreements.

e. The Court explained: "The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S. Ct. at 1748.

f. Thus, the Court concluded, California's *Discover Bank* rule, whereby courts would refuse to enforce class-arbitration waivers as unconscionable, impermissibly "interferes with arbitration" in violation of the Federal Arbitration Act. *Id.* at 1750.

g. The Court rejected the argument that California's *Discover Bank* rule was limited to adhesion contracts, finding that "the times in which consumer contracts were anything other than adhesive are long past." *Id.* at 1750.

h. In a footnote, however, the Court allowed that "[o]f course States remain free to take steps addressing the concerns that attend contracts of adhesion – for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms." *Id.* at 1750 n.6.

i. The Court did not base its decision on the pro-consumer provisions afforded to claimants under AT&T's contract, but those pro-consumer provisions did not go unnoticed. As the Court stated near the conclusion of its opinion:

> "As noted earlier, the arbitration agreement provides that AT&T will pay claimants a minimum of $7,500 and twice their attorney's fees if they obtain an arbitration award greater than AT&T's last settlement offer. The District Court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and the Ninth Circuit admitted that aggrieved customers who filed claims would be 'essentially guarantee[d]' to be made whole. Indeed, the District Court concluded that the Concepcions were *better off* under their arbitration agreement with AT&T than they would have been as participants in a class action, which 'could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars.'"

Id. at 1753 (citations omitted).

B. *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013)

1. The U.S. Supreme Court enforced an arbitration clause with a class action waiver in a putative class action involving federal statutory claims.

2. Question Presented: "[W]hether a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery." 133 S. Ct. at 2307.

3. Facts:

   a. The plaintiffs were merchants who accept American Express cards.

   b. They brought a class action in the Southern District of New York against American Express for violations of the federal antitrust laws, alleging that "American Express used its monopoly power in the market for charge cards to force merchants to accept credit cards at rates approximately 30% higher than the fees for competing credit cards." *Id.* at 2308.

   c. The parties' contract contained an arbitration clause that required all disputes to be resolved by arbitration, and further provided that "'[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis.'" *Id.* at 2308 (alteration in original).

4. Procedural History (abridged):

   a. American Express moved to compel individual arbitration under the FAA.

   b. The District Court granted American Express' motion to compel individual arbitration.

   c. The Second Circuit reversed and remanded for further proceedings.

   d. The Second Circuit's decision was based on plaintiffs' expert evidence that the cost necessary to prove their antitrust claims would be "'at least several hundred thousand dollars, and might exceed $1 million,'" while the

maximum recovery for an individual plaintiff would be less than $40,000. *Id.* at 2308.

e. The Second Circuit held that because respondents had established that "'they would incur prohibitive costs if compelled to arbitrate under the class action waiver,'" the waiver was unenforceable and the arbitration could not proceed. *Id.* at 2308 (citation omitted).

f. The Supreme Court granted certiorari to consider the question "'[w]hether the Federal Arbitration Act permits courts . . . to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim.'" *Id.* at 2308 (alteration in original).

5. Decision of the Court:

a. The Supreme Court rejected the plaintiffs' arguments that requiring them to arbitrate their claims individually, as they contracted to do, would contravene the policies of the antitrust laws or the congressional approval of class actions reflected in the Federal Rules of Civil Procedure. *Id.* at 2309-10.

b. The Court held that the FAA's mandate to enforce arbitration agreements according to their terms can only be "'overridden by a contrary congressional command,'" and it found no such "command" in the Sherman Act or the Federal Rules of Civil Procedure. *Id.* at 2309-10 (citation omitted).

c. The Court also rejected the plaintiffs' invocation of the so-called "effective vindication" doctrine, which, they argued, allowed courts to invalidate arbitration agreements that prevent the "effective vindication" of a federal statutory right. *Id.* at 2310.

d. The Court stated that an "effective vindication" exception to the FAA, assuming one existed, "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights." *Id.* at 2310.

e. The Court also allowed that an "effective vindication" exception "would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." *Id.* at 2310-11.

f. But neither of those circumstances were before the Court in *Italian Colors*, and the Court refused to apply an "effective vindication" exception on the basis that plaintiffs' costs to prove their claims would outweigh any individual award. *Id.* at 2310-11.

g. As the Court explained, "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." *Id.* at 2311 (emphasis in original).

h. In a concluding footnote, the Court put it very simply: "the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims." *Id.* at 2312 n.5.

C. *Epic Sys. Court v. Lewis*, 138 S. Ct. 1612 (2018)

1. The U.S. Supreme Court enforced arbitration clauses requiring individual arbitrations.

2. Question Presented: "Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?" 138 S. Ct. at 1619.

3. Facts:

   a. The Court provided the factual details of one of the three cases on appeal, *Ernst & Young v. Morris*, on appeal from Ninth Circuit. Junior account signed agreement requiring individualized arbitration, then brought a putative class and collection action claim in federal court in California. *Id.* at 1619-20.

4. Procedural History (abridged):

   a. Ernst & Young moved to compel individual arbitration under the FAA.

   b. The District Court granted the motion to compel individual arbitration.

c. The Ninth Circuit reversed, holding that the "savings clause" of the FAA violated the National Labor Relations Act, as class actions are protected "concerted activity." *Id.*

5. Decision of the Court:

a. The Supreme Court rejected the plaintiffs' arguments that the "savings clause" of the FAA or the NLRA trumped the terms of the arbitration agreements.

b. The Court found that the "savings clause" "recognizes only defenses that apply to 'any' contract. In this way the clause establishes a sort of 'equal-treatment' rule for arbitration contracts." *Id.* at 1622.

c. The Court went on to cite *Concepcion* and its logic: the savings clause "'permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability.' *Concepcion*, 563 U. S., at 339, 131 S. Ct. 1740, 179 L. Ed. 2d 742. At the same time, the clause offers no refuge for 'defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.' *Ibid.* Under our precedent, this means the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration."' *Id.* Thus, the Court found that the FAA requires arbitration agreements to be enforced as written, like any contract, and subject to the defenses afforded any contract.

d. The Court went on to analyze whether the NLRA provided a right to collective actions, and found it did not for a number of reasons: Section 7 does not mention arbitrations or prohibit them; class actions were a rarity when the NLRA was adopted; the NLRA should be read to be in concert and not in conflict with other laws when possible; and the NLRB was not entitled to *Chevron* deference as it has no power to administer or interpret the FAA. *Id.* at 1624-30.

III. Does Your Arbitration Agreement Really Prohibit Classwide Arbitration?

A. It does if it says it does.

1. Under *Concepcion*, an express prohibition on classwide arbitration should generally be enforced according to its terms.

B. What if your arbitration agreement is silent?

1. In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), the Supreme Court held that an arbitration panel had exceeded its powers, in violation of the Federal Arbitration Act, by imposing class arbitration on a defendant whose arbitration clauses were "silent" on that issue. *Id.* at 672.

    a. The parties in *Stolt-Nielsen* "agreed their agreement was 'silent' in the sense that they had not reached any agreement on the issue of class arbitration." *Id.* at 673.

    b. In light of that stipulation, the Court held "there can be only one possible outcome." *Id.* at 677.

    c. "[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 684 (emphasis in original).

    d. Thus, the arbitration panel's decision to allow classwide arbitration, despite the parties' agreement that they had not reached any agreement on the issue of class arbitration, was "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent." *Id.* at 684.

    e. As the Court went on to explain, "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id.* at 685.

    f. Thus, the Court stated, "[w]e think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Id.* at 687.

    g. As the Court concluded, "we see the question as being whether the parties *agreed to authorize* class arbitration.

Here, where the parties stipulated that there was 'no agreement' on this question, it follows that the parties cannot be compelled to submit their dispute to class arbitration." *Id.* at 687 (emphasis in original).

C. Is your arbitration agreement really silent?

1. The Court in *Stolt-Nielsen* did *not* hold that an arbitration agreement can only be construed as allowing classwide arbitration when class arbitration is *expressly* permitted by its terms.

2. The Court left the door open for lower courts and arbitrators to *imply* that parties have acquiesced to classwide arbitration, if the circumstances of their agreement warrant such an inference.

3. As the Court stated in *Stolt-Nielsen*: "We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration. Here, as noted, the parties stipulated that there was 'no agreement' on the issue of class-action arbitration." *Id.* at 687 n.10.

4. Since *Stolt-Nielsen* was decided, some lower courts, including the Second Circuit, have held that an agreement to arbitrate on a classwide basis can be implied.

    a. In *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113 (2d Cir. 2011), *cert denied*, 132 S. Ct. 1742 (2012), the Second Circuit found that "*Stolt-Nielsen* does not foreclose the possibility that parties may reach an implicit – rather than express – agreement to authorize class-action arbitration." *Id.* at 123 (citation and internal quotation marks omitted).

    b. Based on that reading of *Stolt-Nielsen*, the Second Circuit refused to vacate an arbitrator's award that permitted employees to proceed with classwide arbitration against their employer, even though the parties' arbitration agreement made "no mention of class claims." *Id.* at 117.

5. The Supreme Court took up the issue again in *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013).

    a. In *Oxford*, the Court began by reconfirming the fundamental principle of *Stolt-Nielsen*:

"Class arbitration is a matter of consent: An arbitrator may employ class procedures only if the parties have authorized them." 133 S. Ct. at 2066.

b. But the Court in *Oxford* went on to uphold an arbitrator's decision to conduct classwide arbitration under an arbitration provision that made no mention whatsoever of class arbitration.

c. Facts:

    i. The plaintiff in *Oxford*, Dr. John Sutter, was a New Jersey pediatrician who entered into a provider agreement with Oxford Health Plans, a health insurance company.

    ii. Sutter commenced a putative class action lawsuit against Oxford in New Jersey Superior Court, on behalf of himself and a proposed class of other New Jersey physicians under contract with Oxford, alleging that Oxford had failed to make full and prompt payment to the doctors, in violation of their agreements and various state laws.

    iii. Sutter's provider agreement with Oxford contained an arbitration clause.

    iv. The arbitration agreement stated:

    "No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator." *Id.* at 2067.

d. Procedural History (abridged):

    i. Oxford moved to compel arbitration, and the state court granted Oxford's motion, thus referring the suit to arbitration.

    ii. The parties agreed that the arbitrator should decide whether their contract authorized class arbitration, and he determined that it did.

iii. Oxford filed a motion in federal court to vacate the arbitrator's decision on the ground that he had "exceeded his powers" under § 10(a)(4) of the FAA.

iv. The District Court denied the motion.

v. The Third Circuit affirmed.

e. Decision of the Court:

i. Noting that "[u]nder the FAA, courts may vacate an arbitrator's decision 'only in very unusual circumstances,'" the Supreme Court ruled that the arbitrator's decision to permit classwide arbitration under the parties' agreement had to be upheld. *Id.* at 2068 (citations omitted).

ii. The Court plainly thought the arbitrator got it wrong, but that was not the question before it.

iii. As the Court explained: "Because the parties 'bargained for the arbitrator's construction of their agreement,' an arbitral decision 'even arguably construing or applying the contract' must stand, regardless of a court's view of its (de)merits." *Id.* at 2068 (citations omitted).

iv. The arbitrator had reasoned that the clause sent to arbitration "'the same universal class of disputes'" that it barred the parties from bringing "'as civil actions'" in court. *Id.* at 2067.

v. According to the arbitrator's reading of the parties' agreement, the "'intent of the clause'" was "'to vest in the arbitration process everything that is prohibited from the court process.'" *Id.*

vi. And a class action, the arbitrator continued, "'is plainly one of the possible forms of civil action that could be brought in a court'" absent the agreement. *Id.*

vii. Accordingly, the arbitrator concluded that "'on its face, the arbitration clause . . . expresses the parties' intent that class arbitration can be maintained.'" *Id.* at 2067.

viii. Right or wrong, that was enough for the Supreme Court, because "the arbitrator did what the parties had asked: He considered their contract and decided whether it reflected an agreement to permit class proceedings. That suffices to show that the arbitrator did not exceed[ ] [his] powers." *Id.* at 2069 (alterations in original) (internal quotation marks omitted) (citing 9 U.S.C. § 10(a)(4)).

ix. Oxford protested that its contract contained merely "a garden-variety arbitration clause, lacking any of the terms or features that would indicate an agreement to use class procedures," and the Court did not disagree. *Id.* at 2070.

x. In fact, the Court went out of its way to emphasize that "[n]othing we say in this opinion should be taken to reflect an agreement with the arbitrator's contract interpretation, or any quarrel with Oxford's contrary reading." *Id.* at 2070.

xi. As the Court explained, however, the FAA "permits courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed the task poorly." *Id.* at 2070.

xii. The Court distinguished its previous decision in *Stolt-Nielsen* this way: "The parties in *Stolt-Nielsen* had entered into an unusual stipulation that they had never reached an agreement on class arbitration." *Id.* "In that circumstance, we noted, the panel's decision was not – indeed, could not have been – 'based on a determination regarding the parties' intent.'" *Id.* at 2069 (citation omitted).

f. <u>Question Left Open</u>:

i. Despite its deference to the arbitrator's decision, the Supreme Court expressly declined to decide in *Oxford* whether the availability of classwide arbitration had been a question properly decided by the arbitrator (rather than the trial court) in the first place. *Id.* at 2068 n. 2.

ii. The Court observed that "this Court has not yet decided whether the availability of class arbitration is a question of arbitrability," *i.e.*, one of the "gateway matters, such as whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy" that "are presumptively for courts to decide." *Id.* at 2068-69 n. 2 (citations and internal quotation marks omitted).

iii. The question was not before the Court in *Oxford*, "because Oxford agreed that the arbitrator should determine whether its contract with Sutter authorized class procedures." *Id.*

iv. The question remains unsettled, but at least two U.S. Courts of Appeals have now held that the availability of class arbitration is a gateway question of arbitrability, to be decided by a court before it refers a matter to arbitration, unless the parties' arbitration agreement clearly reserves the question for the arbitrator. *Opalinski v. Robert Half Int'l*, 761 F.3d 326, 335 (3d Cir. 2014) ("the District Court had to decide whether the arbitration agreements permitted classwide arbitration"); *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013) ("whether an arbitration agreement permits classwide arbitration is a gateway matter" that is presumptively "for judicial determination[.]").

IV. Federal Law Restricts Mandatory Arbitration Agreements in Certain Contexts

A. Federal statutes limit the use of mandatory pre-dispute arbitration clauses in certain types of contracts.

1. Residential mortgage loans (15 U.S.C. § 1639c(e))

2. Open end consumer credit plans secured by the principal dwelling of the consumer (15 U.S.C. § 1639c(e))

3. Motor vehicle franchise contracts (15 U.S.C. § 1226(a)(2))

4. Livestock and poultry contracts (7 U.S.C. § 197c)

5. Consumer credit agreements with military members or their dependents (10 U.S.C. § 987(e)(3), (f)(4))

B. Federal statutes also limit the enforcement of mandatory pre-dispute arbitration agreements with respect to certain types of claims.

1. Whistleblower retaliation claims under the Sarbanes-Oxley Act of 2002, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act") (18 U.S.C. § 1514A(e)).

    a. 18 U.S.C. § 1514A(e)(2) suggests that an arbitration agreement may be wholly unenforceable for <u>any</u> purpose unless it expressly carves out whistleblower retaliation claims: "No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section." *Id.*

    b. However, at least two U.S. Courts of Appeals have held that the Dodd-Frank Act's anti-arbitration provisions do not prohibit arbitration of non-whistleblower claims simply because an arbitration agreement fails to carve out Dodd-Frank whistleblower claims. *See Santoro v. Accenture Federal Services, LLC*, 748 F.3d 217 (4th Cir. 2014) (age discrimination plaintiff could not invalidate the arbitration clause in his employment agreement with Accenture on the basis that it failed to carve out whistleblower claims under the Dodd-Frank Act; Dodd-Frank does not prohibit arbitration of non-whistleblower claims simply because an arbitration agreement does not carve out Dodd-Frank whistleblower claims); *Holmes v. Air Liquide Indus. US LP*, 498 Fed. Appx. 405 (5th Cir. 2012) (former employee suing under the ADA, Title VII and the FMLA could not invalidate her arbitration agreement based on its failure to carve out Dodd-Frank whistleblower claims).

2. Whistleblower retaliation claims under the Commodity Exchange Act, as amended by the Dodd-Frank Act (7 U.S.C. § 26(n))

    a. Here, too, the statute suggests that an arbitration agreement may be wholly unenforceable for <u>any</u> purpose unless it expressly carves out whistleblower retaliation claims: "No predispute arbitration agreement shall be

valid or enforceable, if the agreement requires arbitration of a dispute arising under this section." 7 U.S.C. § 26(n)(2).

b. *But see Santoro* and *Holmes, supra.*

3. Whistleblower retaliation claims under the Consumer Financial Protection Act of 2010, also enacted as part of the Dodd-Frank Act (12 U.S.C. § 5567(d))

a. 12 U.S.C. § 5567(d)(2) states, in pertinent part, "no predispute arbitration agreement shall be valid or enforceable to the extent that it requires arbitration of a dispute arising under this section."

b. Contains a limited exception for collective bargaining agreements. (12 U.S.C. § 5567(d)(3)).

C. Arbitration Agreements and the EEOC

1. In *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), the Supreme Court held that an arbitration agreement between an employee and his employer did not prevent the Equal Employment Opportunity Commission ("EEOC") from pursuing a federal lawsuit against the employer to recover reinstatement, back pay and damages for discrimination on behalf of the employee.

2. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Supreme Court stated that "[a]n individual . . . claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action." *Id.* at 28.

V. Some of The Things to Consider When Drafting An Arbitration Agreement with Class Action Waiver

A. The drafting of an effective arbitration agreement will depend on a number of factors specific to your situation.

1. The drafting of an effective arbitration agreement depends on a host of issues specific to the nature of the relationship(s) and dispute(s) to be covered by the agreement, and the jurisdiction(s) in which the agreement will be used. This section provides a non-exhaustive list of things to consider.

B. Be clear about what claims and rights are covered by the arbitration agreement.

   1. Consider whether to expressly carve-out any types of claims or charges.

C. Be clear about your intent with respect to class, collective, or other representative proceedings.

   1. There should be a clear and express waiver of the right to commence or participate in class, collective, or other representative proceedings in court or arbitration, if that is what you intend.

      a. The Second Circuit recently held that a waiver of the right to bring class or collective claims in court is conceptually distinct from a waiver of class and collective arbitration. *Cohen v. UBS Fin. Servs.*, 2015 U.S. App. LEXIS 11184, at *7 n.4 (2d Cir. June 30, 2015); *see also Lloyd v. J.P. Morgan Chase & Co.*, 791 F.3d 265, 272 n.7 (2d Cir. 2015).

   2. If you intend to restrict the parties to individual arbitration, make it explicit that the arbitrator shall not be allowed to conduct arbitration on a class, collective, or other representative basis, and that the arbitrator shall not be allowed to consolidate arbitration demands filed by others.

   3. The lesson of *Oxford Health* is that your arbitration agreement should leave no room for an arbitrator or a court to infer that classwide arbitration is permitted, if that is not your intent.

   4. Consider whether to include language to the effect that if the waiver of class proceedings is deemed unenforceable, then any class claims must be brought in court, not in arbitration.

D. Know your arbitrators, know their rules.

   1. Incorporating a particular arbitrator's rules into your arbitration agreement can have unintended consequences.

      a. Example: In *Mork v. Loram Maintenance of Way, Inc.*, 844 F. Supp. 2d 950, 955-56 (D. Minn. 2012), the court found that the parties' arbitration agreement allowed for classwide arbitration because it stated that any arbitration would be conducted in accordance with the

rules of the American Arbitration Association ("AAA"), and the AAA rules in effect at the time allowed for class arbitration under the circumstances.

b. Example: In *Lloyd v. J.P. Morgan Chase & Co.*, 791 F.3d 265, 272-73 (2d Cir. 2015), the Second Circuit held that Chase had no right to compel arbitration in a putative class and collective action brought by a group of its financial advisors for alleged violations of state and federal wage and hour laws; Chase's arbitration agreement expressly called for "individual arbitration," but it also expressly incorporated FINRA's arbitration rules, and those rules prohibited individual arbitration of claims that were the subject of a pending putative class or collective action.

2. Stay informed of any amendments to your arbitrator's rules.

a. In *Lloyd v. J.P. Morgan Chase, supra*, Chase's motion to compel arbitration was sunk, in part, by amendments to the FINRA arbitration rules that were enacted *after* Chase incorporated FINRA's arbitration rules into its arbitration agreement. *Id.* at 273.

b. The Second Circuit's position was buyer beware: "A party that agrees to arbitrate before a particular forum according to the rules of that forum assumes the risk that the forum's rules might change." *Id.*

E. Consider whether and how to use a severability clause.

1. In particular, consider whether any provisions of your arbitration agreement should be deemed non-severable, in the event they are found to be illegal or unenforceable.

F. Know the laws of the jurisdiction(s) in which your arbitration agreement will be used and enforced.

1. The FAA notwithstanding, state law still has a significant role to play in this arena.

2. The scope of FAA preemption is evolving; not all state regulation of arbitration agreements may be preempted.

3. In addition, general state contract law principles concerning the validity, revocability, and enforceability of contracts are not

preempted by the FAA. *See Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996).

a. Thus, fundamentally, "[t]he question whether the parties agreed to arbitrate is governed by state law principles regarding contract formation." *Patterson v. Raymours Furniture Co.*, 2015 U.S. Dist. LEXIS 40162, at *7 (S.D.N.Y. Mar. 27, 2015) (citing *First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920, 1924 (1995)).

b. For example, what constitutes a sufficient offer and acceptance, or adequate consideration, to make a binding contract may vary from state to state, and affect the validity of your arbitration agreement.

The Post-*Epic* Fight for Employees' Rights in Individual Arbitration

By: Marijana Matura, Esq.

The Supreme Court's 5 to 4 decision in *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018), ruled that class and collective action waivers in employment agreements are enforceable. The ruling has left plaintiff attorneys with the feeling that the glass is half empty. So what, if anything, can plaintiff's attorneys do now? It is up to plaintiffs' bar to change course from only pursuing class or collective action claims to taking on the challenge of multiple individual arbitrations. Through mass individual arbitrations, class-action waivers and mandatory arbitration may prove to be a path less taken by employers. As this shift in course has already begun, so have the debates between employer and employee attorneys in arbitration – with costs being the driving element.

I. The *Epic* Decision.

In *Epic Sys. Corp. v. Lewis*, the Supreme Court ruled that arbitration clauses that require individual proceedings for employees are enforceable under the Federal Arbitration Act ("FAA"). *Epic* arose from three consolidated FLSA cases involving employer-employee agreements that required arbitration. *Epic Systems* came from the U.S. Court of Appeals for the Seventh Circuit; *Ernst & Young v. Morris*, from the Ninth Circuit; and *National Labor Relations Board v. Murphy Oil USA*, from the Fifth Circuit. In all three of these cases, the employee entered into an agreement with their employer that required individual arbitration, and in *Murphy Oil* the agreement specifically waived the right to pursue class and collective actions.

1. **The Employee's Argument**.

The employees in *Epic* argued that the class and collective waiver was unenforceable because the savings clause of the FAA, a statute which otherwise requires the strict enforcement of arbitration agreements, permits courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract, § 2-recognizes only generally applicable contract defenses, such as fraud, duress, or unconscionability." *Epic Sys.*, 138 S. Ct. at 1616 (quotation and citation omitted). The employees also argued that if the Court were to find a conflict between the FAA and the National Labor Relations Act ("NLRA"), the NLRA would control, and thus hold any agreements that contain class action waivers to be unlawful through § 7 of the NLRA which guarantees employees "the right to . . . engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157.

This trio of cases raised a conflict between the NLRA, enacted in 1935, and the FAA, enacted in 1925. Under conflict of law principles, in the event of a conflict between co-equal statutes, the later-enacted statute controls. In this case, the NLRA should have controlled and provided a win for the employees. Specifically, the employees argued that class and collective actions were protected "concerted activities" under § 7 of the NLRA. *See* 29 U.S.C. § 157. However, the Supreme Court failed to see a conflict between the FAA and the NLRA.

2. **The Employer's Argument**.

The employer's argued that the FAA requires enforcement of the arbitration agreements, and that there was no conflict between the FAA and the NLRA as the NLRA's protection for

"concerted activities" only concerned providing employee's access to a forum in which to raise their grievances with their employers – and not a right to a class or collective litigation.

3. The Court's Decision.

The Court sided with employers, ruling that the class waivers were lawful and did not fall within the scope of the FAA's savings clause. Second, the majority opinion found no conflict between the FAA and the NLRA, reasoning that the NLRA does not explicitly mention or mandate the availability of class or collective actions, as:

> [ ] it does not express approval or disapproval of arbitration. It does not mention class or collective action procedure. It does not even hint at a wish to displace the Arbitration Act – let alone accomplish that much clearly and manifestly, as our precedents demand.

138 S. Ct. at 1624.

The Court's dissent disagrees with this interpretation of the NLRA and argues that:

> In face of the NLRA's text, history, purposes, and longstanding construction, the Court nevertheless concludes that collective proceedings do not fall within the scope of § 7. None of the Court's reasons for diminishing § 7 should carry the day.

Id. at 1638.

II. Considerations for Plaintiff's Attorneys Post-*Epic*.

1. The Cost of *Epic* on Employers and Employees.

The trickle-down effect of the Supreme Court's May 2018 decision in *Epic* is still manifesting itself, but an increase in employers' use of class-action waivers and arbitration provisions is anticipated and a decrease in class action lawsuit. This is not a new concept, and is in fact a trend has been on the rise for the last few decades, but in the post-*Epic* era the inclusion

of arbitration clauses is expected to grow exponentially. *See, e.g.* Economic Policy Institute (EPI), A. Colvin, The Growing Use of Mandatory Arbitration 1-2, 4 (Sept. 27, 2017), available at http://www.epi.org/publication/the-growing-use-of-mandatory -arbitration/ (data indicates that only 2.1% of nonunionized companies imposed mandatory arbitration agreements on their employees in 1992, but 53.9% do today) (last visited September 10, 2018). It is estimated that over 60 million American workers are subject to mandatory employment arbitration procedures. *Id.* Prior to *Epic*, it was the general consensus that attorneys were less likely to take a claim where a mandatory arbitration provision was present due to the smaller damages awards available in individual arbitration as opposed to class litigation. However, as more individual arbitration provisions become more prevalent, plaintiff attorneys must adjust their perspective.

The decision in *Epic* to require individual arbitration does not alter the ubiquitous manner in which employers violate the law in the workplace. Where a single employee brings a claim for a wage and hour violation or discrimination, the violation is historically the result of a systematically unlawful policy or culture in the workplace. Thus, if there is one employee whose rights are being violated, there are likely a larger group of other individuals whose rights are also being violated. It is now time for plaintiff attorneys to roll up their sleeves and use traditional methods to collect other employees with similar violations and file multiple arbitrations against a single employer. Solicitations, word of mouth, and co-counseling mass arbitrations on a nation-wide basis are becoming the new tools plaintiff attorneys must utilize in order to fight for employee’s rights. As multiple individual arbitrations vamp up in the wake of *Epic*, so will employers’ costs of administering individual employment arbitrations.

So what does arbitration cost for the employee? The initial filing fee for the employee is between approximately $75 to $400. *See* NAM, Employment Dispute Fees Individual

(www.namadr.com/wp-content/uploads/2016/07/Employment-Fees-7.1.18.pdf); JAMS, Arbitration Schedule of Fees and Costs (www.jamsadr.com/arbitration-fees). Administrative agencies like the AAA or NAM will typically require the employee to only pay the initial filing fee and that the employer is responsible for paying ***both*** the costs of arbitration ***and*** the arbitrator's compensation. *See* American Arbitration Association ("AAA") Employment Rules, p. 33; *see al*so National Arbitration and Mediation Employment Rules, Rule No. 5. Employers are costs in an individual arbitration that can range from approximately $35,000 to over $100,000 per arbitration, depending on the hourly rates of the arbitrator selected which may be between $300 to above $1,500 per hour. *See* Dispute Resolution Magazine, Deborah Rothman, *Trends in Arbitrator Compensation*, Spring 2017 (www.americanbar.org/content/dam/aba/publications/dispute_resultion_magazine/spring2017/3_rothman_trends_in_arbitrator.authcheckdam.pdf). These costs are frequently more than the value of the employee's underlying claim, particularly with FLSA claims where low wage workers are traditionally seeking unpaid wages. *See Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547, 552 (S.D.N.Y. 2011) (finding that the employee using the prescribed arbitration program would likely have to spend $200,000 to recover only $1,867.02 in overtime pay and an equivalent amount in liquidated damages).

Large employers may not be dismayed by these costs for one arbitration, but these costs become significant after 100+ individual arbitrations are filed. Each arbitration provides plaintiff attorneys with additional leverage for settlement – ironically, a class settlement may not be off the table in these situations depending on the size of the putative class and the projected costs of future arbitrations. Class litigation may prove to be a cheaper alternative for employers as

plaintiff attorneys begin to mobilize and vendors begin to develop products geared toward mass individual arbitration.

i. **How to Avoid Costs at the AAA**.

The AAA administers approximately 50% of mandatory employment arbitration cases. *See* EPI, A. Colvin, The Growing Use of Mandatory Arbitration, 5. The rules permit the AAA to make an initial determination that governs who is responsible for the costs of the arbitration. Specifically:

> When the arbitration is filed, the AAA makes an initial administrative determination as to whether the dispute arises from an employer plan or an individually-negotiated employment agreement or contract. This determination is made by reviewing the documentation provided to the AAA by the parties, including, but not limited to, the demand for arbitration, the parties' arbitration program or agreement, and any employment agreements or contracts between the parties. . . the AAA's review is focused on two primary issues. The first . . . whether the arbitration program and/or agreement. . . is one in which it appears that the employer has drafted a standardized arbitration clause with its employees. The second aspect of the review focuses on the ability of the parties to negotiate the terms and conditions of the parties' agreement.

If the dispute arises from an employer plan, then the AAA will hold the employer responsible for the costs of the arbitration. However, if the AAA determines that the dispute is based on an individually-negotiated agreement, than the AAA may assess costs against the employee.

Thus, employees must be specific in their demands for arbitration, particularly with the AAA, and specifically set forth if: (1) if it was the employer promulgated arbitration clause; and; (2) whether the employee had the ability to negotiate the arbitration clause. These allegations will permit the AAA to easily make the initial determination.

Plaintiff attorneys must beware that in instances where the employee is claiming he was misclassified as an independent contractor, the AAA will be administered the arbitration pursuant to the AAA's Employment Arbitration Rules and Mediation Procedures. *See* AAA Commercial Rules, R-1 (Providing that "a dispute arising out of an employer-promulgated plan will be administered under the AAA's Employment Arbitration Rules and Mediation Procedures."). This permits employees to avoid the Commercial Arbitration Rules which tend to have higher administrative costs.

2. Consolidation of Arbitrations

In the absence of a confidentiality provision and where the availability of a large amount of individual arbitrations is not likely, plaintiff attorneys may attempt to consolidate individual arbitrations in an effort to decrease the cost of litigation and save time. Arbitration clauses often fail to set forth procedures to be applied in arbitration, or they are silent with regard to consolidation. Nonetheless, consolidation of discovery, depositions, and motion practice will save money and time for attorneys on both sides of the bar. The issue of when to request consolidation is a case by case determination, and may not be useful in all cases.

3. NY Bans Mandatory Arbitration for Sexual Harassment Claims

The recent #MeToo movement has motivated New York to enact laws which prohibit mandatory arbitration of sexual harassment cases in the workplace, thereby providing victims of workplace sexual harassment a voice and the ability for their claims to be known and heard. The law applies to all contracts entered into on or after July 11, 2018, and declares "null and void" "any cause or provision in any contract which requires . . . the parties submit to mandatory arbitration to resolve any allegation or claim of. . . sexual harassment." N.Y.C.P.L.R §

7515(a)(2), 7515(a)(4)(b)(i)-(iii). This law does not affect the arbitrability of claims unrelated to sexual harassment nor does it apply to collective bargaining agreements. Washington, Maryland, South Carolina, and California are all either following suit with New York or considering similar legislation. However, the issue to look for post-*Epic*, are cases that claim the FAA preempts these state laws. The FAA could likely invalidate this state legislation which already acknowledges that the NY Statute applies "except where inconsistent with federal law." N.Y.C.P.L.R. 7515(a)(4)(b)(i).

4. Call on Congress

The only path left for employee's to reverse what the dissent refers to as the Court's "egregiously wrong" decision in *Epic*, is to listen to Justice Ginsberg's call for: "Congressional correction of the Court's elevation of the FAA over workers' rights to act in concert is urgently in order." 138 S. Ct. at 1633. From a policy perspective, mandatory arbitration is bad for workers and forced individual arbitration are the new yellow dog contracts of our time. Employees typically have no other option but to sign an arbitration agreement that will now typically contain class and collective waivers – these are conditions of employment that employees have no ability to bargain around. Thus, it is up to Congress to confirm workers' rights – specifically, the right to participate in class and collective actions.

Since the Supreme Court has treated the FAA to mean that courts must "rigorously [] enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted," it will also be up to Congress to resolve any issues between the FAA preempting state laws that prohibit mandatory arbitration of sexual harassment claims. *Epic*, 138 S. Ct. at 1621.

III. What Grounds Remain to Challenge Arbitration Provisions Post-*Epic*.

1. Vague Language is Sufficient to Compel Arbitration.

An arbitration clause in a contract between the employee and the employer does not need to be specific to require arbitration. *See Ryan, Beck & Co., LLC v. Fakih*, 268 F. Supp. 2d 210, 221 (E.D.N.Y. 2003) (language requiring arbitration of "all disputes" is sufficient to compel arbitration). This also true if details about the arbitration procedure are omitted. *See, e.g.*, *Hudson Specialty Ins. Co. v. New Jersey Transit Corp.*, No. 15 Civ. 89, 2015 WL 3542548, at *7 (S.D.N.Y. June 5, 2015); *Hojnowski v. Buffalo Bills, Inc.,* 995 F. Supp. 2d 232, 237 (W.D.N.Y. 2014) (failure to provide worker with rules of arbitration did not preclude forming of agreement to arbitrate where the worker was (1) fully aware of the duty to arbitrate "any dispute," and (2) the rules for resolving the dispute were accessible to the employee).[1] But, there must be a meeting of the minds regarding whether arbitration is mandatory. *See ISC Holding AG v. Nobel Biocare Invs. N.V.*, 351 F. App'x 480, 481-82 (2d Cir. 2009) (summary order) (arbitration not mandatory where the agreement allowed disputes to be arbitrated *or* brought in court).

2. Standard Contract Defenses.

The FAA provides for the enforcement of arbitration agreements, "save upon ground as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. As discussed *supra*, this exception is known as the "saving clause" and permits courts to invalidate arbitration agreements based on contract defenses, such as "fraud, duress, or unconscionability[.]" *AT&T Mobility LLC*

[1] Note that an agreement in employee handbook may be unlawful and unenforceable if the provision is so broad that a reasonable worker would believe it prohibits them from filing with the NLRB. *See Countrywide Fin. Corp.*, 362 NLRB No. 165, slip op. at 2 (Aug. 14, 2015); *but see Bloomingdale's, Inc.*, Case No. 31-CA-071281, slip op. at 4-5, 9 (NLRB Div. of Judges, June 25, 2013) (NLRA not violated where the employees were granted the option to, and repeatedly advised of their ability to, opt-out of the arbitration policy and still work for Bloomingdale's); *accord Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072 (9th Cir. 2014).

v. Concepcion, 563 U.S. 33, 229 (2011) (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)); *see, e.g.*, *O'Connor v. Uber Techs., Inc.*, No. 13 Civ. 3826, 2015 WL 8587879 (N.D. Cal. Dec. 10, 2015) (Uber's carve out for intellectual property claims, confidentiality clause, and unilateral modification were substantially unconscionable, rendering the arbitration agreement unenforceable).

3. Was there ever an agreement to arbitrate?

Likewise, a court may not compel arbitration unless it has established that the arbitration agreement exists. *See Specht v. Netscape Comm. Corp.*, 306 F.3d 17, 26 (2d Cir. 2002); *see also JLM Industries, Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 171 (2d Cir. 2004) ("[A]rbitration is a matter of contract, and therefore a party cannot be required to submit to arbitration any dispute which [it] has not agreed so to submit.") (internal citations omitted). This benefits the employee seeking to avoid arbitration, because a court must evaluate a motion to compel under the same standard as a summary judgment motion. *See Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003). Thus, when "a motion to compel arbitration is opposed on the ground that no agreement to arbitrate has been made between the parties, a district court should give the opposing party the benefit of all reasonable doubts and inferences that may arise." *Dreyfuss v. eTelecare Global Solutions-US, Inc.*, No. 08 Civ. 1115, 2008 WL 4974864, at *3 (S.D.N.Y. Nov. 19, 2008), *aff'd*, 349 F. App'x 551 (2d Cir. 2009) (citation and internal quotes omitted). A trial on the issue may even be required. 9 U.S.C. § 4 ("If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof."); *Benckiser Consumer Prods., Inc. v. Kasday*, No. 97 Civ. 5389, 1998 WL 677631, at *3 (S.D.N.Y. Sept. 30, 1998) (ordering a trial and denying motion to compel where there were disputed issues of fact as to whether an agreement to arbitrate existed).

4. Did the agreement to arbitrate expire?

Courts presume that the obligation to arbitrate survives the termination of a larger contract. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 204 (1991). But the survival presumption can be "negated expressly or by clear implication." *Id.*

5. Did the employee receive the Arbitration Notice?

In *Schmell v. Morgan Stanely*, a motion to compel arbitration was denied where a question of fact existed regarding whether the employee received an email that contained the employer's revised arbitration policy. *See Schmell v. Morgan Stanely*, No. 17 Civ. 13080, 2018 WL 1128502, at *4 (D.N.J. Mar. 1, 2018). The employee provided certified statements to the court that he had "no recollection of receiving, viewing, or opening the . . . email." *Id.* 2018 WL 1128502, at *3. The employer provided documentary evidence that the email containing the arbitration agreement was delivered to the employee and argued that continued employment constitutes notice and assent to the arbitration agreement. *Id.* Thus in situations where the employee does not recall receiving an arbitration agreement and/or the employer cannot provide proof of receipt of the arbitration agreement, *Schmell* provides a basis for denying a motion to compel arbitration.

6. Claims Exempt from Arbitration under the FAA.

The FAA exempts "contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. This exemption tends to become an issue in cases involving delivery drivers. In this regard, the Supreme Court has interpreted "any other class or workers" to mean "transportation workers." *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001); *see also Adams v. Suozzi*, 433 F.3d 220, 226 (2d

Cir. 2005) (FAA's Section 1 exemption applies to "workers involved in the transportation industries." (internal quotations omitted)).

When a court is faced with a motion to compel arbitration of transportation workers' claims, the court is to apply the standard as if the FAA "had never been enacted." *Palcko v. Ariborne Express Inc.*, 372 F.3d 588, 596 (3d Cir. 2004). If the agreement is also governed by state law, the court may compel arbitration under the law of that state. *See, e.g.*, *Davis v. EGL Eagle Global Logistics LP*, 243 F. App'x 39, 43-44 (5th Cir. 2007) (compelling arbitration under state law because the agreement provided for the application of state law, even though arbitration could not be compelled under the FAA); *Cilluffo v. C. Refrigerated Servs., Inc.*, No. 12 Civ. 886, 2012 WL 8523507 (C.D. Cal. Sept. 24, 2012) (same), order clarified, 2012 WL 8523474 (C.D. Cal. Nov. 8, 2012).

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I. Background

A. Blacks Lives Matter

1. Following the acquittal of George Zimmerman for the murder of Trayvon Martin in 2013, activists began using the hashtag #BlackLivesMatter on social media, and particularly on Twitter.com. The movement quickly moved from the online world to the public sphere with protests in 2014 following the deaths of Michael Brown in Ferguson, Missouri and Eric Garner in New York City. Iconic images of police in riot gear and protestors closing interstate highways followed. But BLM, for short, was not just a call to action against institutionalized racism among police forces; it also represented a new era of self-reflection for employers of all sizes and across all industries.

B. Me-Too Movement

1. In early October 2017, the New York Times published the stories of a number of women who raised serious sexual harassment allegations against movie-mogul Harvey Weinstein. Less than a week later, the New Yorker featured an exposé by Ronan Farrow in which a number of women accused Weinstein of rape. On October 15, 2017, actress Alyssa Milano invited women to tweet using the hashtag #metoo "to give people a sense of the magnitude of the problem." Within 24 hours, more than 12 million #metoo posts had been posted on Facebook. Over the next several months, dozens of additional high-profile men were felled by allegations of harassment. According to a June 25, 2018 report by Time Magazine: "At least 414 high-profile executives and employees across fields and industries have been outed by the #MeToo Movement in 18 months."[1] News of super-sized corporate settlements to resolve prior claims of inappropriate behavior by employees shocked the public. Legislative bodies

[1] *See* Jeff Green, *#MeToo Has Implicated 414 High-Profile Executives and Employees in 18 Months*, http://time.com/5321130/414-executives-metoo/

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reacted aggressively, enacting new training requirements and limitations on non-disclosure agreements and arbitration clauses for sexual harassment cases. From the start, the #MeToo Movement has been linked closely to the workplace and employers have needed to react quickly, or potentially bear the brunt of public backlash and shareholder disapproval.

C. The Employment Community in the Media - Me-Too and Black Lives Matter

Countless think pieces have been written on the MeToo Movement and Black Lives Matter. Many publications, including the New York Times and the Washington Post, have cast the employment law community at large as at least partially to blame for the failure of workplace realities to keep pace with societal expectations. Below are a few examples:

1. In #MeToo Has Done What the Law Could Not, New York Times op-ed contributor Catharine MacKinnon noted that, while some may perceive an enacted law as eradicating the unlawful behavior it is designed to prevent, the reality is that "pervasive practices like sexual harassment…are built into structural social hierarchies." MacKinnon credited the #MeToo Movement with overcoming what she called this "logjam" between the letter of the law and its true operation.

2. In Why Didn't Unions Stop Sexual Harassment?, Politco reporter Ian Kullgren noted that two of the industries that faced the biggest fallout from the MeToo Movement, Hollywood and the news media, were heavily unionized industries. According to Kullgren, the inability of labor unions to prevent workplace harassment is due to a number of factors, including in part "the labor movement's own male-dominated culture, itself no stranger to sexual harassment." Labor organizations themselves have not been immune from the MeToo Movement, with top leaders at the AFL-CIO and the SEIU facing harassment allegations.

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3. In How the Legal World Built A Wall of Silence Around Workplace Sexual Harassment, Washington Post reporter Minna Kotkin argued that "our regulatory and judicial systems are complicit in protecting harassers from public exposure and opprobrium." Specifically, Kotkin blamed the prevalence of confidentiality clauses in settlement agreements and the administrative exhaustion requirements of the EEOC charge process. Kotkin also faulted the typical contingency-fee arrangement as creating improper incentives for plaintiff's lawyers to resolve cases even when the settlement agreements contain such confidentiality language.

II. Equal Employment Opportunity Commission's ("EEOC") Task Force Report

A. Background.

1. Before the #MeToo Movement even began, the EEOC had already sounded the alarm, and began examining why workplace harassment remains so prevalent, despite the fact that laws have been in place prohibiting such conduct for decades. Thus, the EEOC convened the "Select Task Force on the Study of Harassment in the Workplace" ("Task Force").

2. The Task Force consisted of an interdisciplinary select group of outside experts impaneled to examine harassment in our workplaces—its causes, its effects, and what can be better done to prevent it. The experts included management and plaintiffs' attorneys, representatives of employee and employer advocacy groups, labor representatives, and academics (sociologists, psychologists, and experts in organizational behavior). The Task Force, co-chaired by former Seyfarth Shaw LLP partner Victoria Lipnic, was charged to "identify strategies to prevent and remedy harassment in the workplace." Rather than focus only on unlawful harassment, the Task Force utilized an expanded definition of harassment. The Task Force instead looked at all "unwelcome or offensive conduct in the workplace" based on a

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protected characteristic that "is detrimental to an employee's work performance, professional advancement, and/or mental health."

3. In 2016, the two co-chairs of the Task Force, Chai Feldblum and Victoria A. Lipnic published a Report ("EEOC Report").[2] Below are some of the key findings and conclusions.

B. Workplace Harassment is Prevalent

1. 1/3 of 90,000 EEOC charges in FY 2015 included an allegation of harassment; and approximately half of those (or about 15,000) were allegations of harassment based on sex.

2. These numbers likely do not convey the widespread nature of harassment in the workplace as research indicates that "90% of individuals who say they have experienced harassment never take formal action against the harassment, such as filing a charge or complaint."[3]

3. It can be difficult to obtain accurate statistics on the incidence rate of sexual harassment in the workplace. Some surveys, such as the Sexual Experiences Questionnaire (SEQ), include both sexual harassment and what is known as "gender harassment," or hostile behaviors that are devoid of sexual interest." According to the Task Force Report, "when researchers disaggregate harassment into the various subtypes (unwanted sexual attention, sexual coercion, and gender harassment), they find that gender harassment is the most common form of harassment."

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[2] See Chai Feldblum and Victoria A. Lipnic, Select Task Force on the Study of Harassment in the Workplace, https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

[3] EEOC, p. 8. (citing Lilia M. Cortina and Jennifer L. Berdahl, *Sexual Harassment in Organizations: A Decade of Research in Review*, 1 THE SAGE HANDBOOK OF ORGANIZATIONAL BEHAVIOR 469, 469-96 (J. Barling & C.L. Cooper eds., 2008).

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4. There is a substantial dearth of research with respect to sexual-orientation harassment, race and ethnicity-based harassment, disability, age, and religion-based harassment.

C. Workplace Harassment Too Often Goes Unreported

1. "The least common response of either men or women to harassment is to take some formal action." In fact, according to two studies, approximately 70% of victims of harassment "never even talked with a supervisor, manager, or union representative about the harassing conduct."

2. Reporting levels also differed based on the type of harassment that occurred. For example, "gender-harassing conduct was almost never reported; unwanted physical touching was formally reported only 8% of the time; and sexually coercive behavior was reported by only 30% of the women who experienced it."

D. There is a Compelling Case for Stopping and Preventing Harassment

1. Reducing harassment, according to the Task Force Report, would reduce the number of costly harassment charges that employers must defend. For example, the Report indicates that "Since 2010, employers have paid out $698.7 million to employees alleging harassment through the [EEOC's] administrative enforcement pre-litigation process alone."

2. In addition to these direct costs, the Report also argues that businesses face substantial *indirect* costs related to harassment through decreased productivity, increased employee turnover, and reputational damage to the employer.

3. Although more prevalent prior to the #MeToo Movement, companies may still be hesitant to discharge a top-performer who has engaged in inappropriate behavior. However, a Harvard Business School study has indicated that "the profit consequences of so-called 'toxic workers'—*specifically including* those who are 'top performers'—is net negative."

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E. Factors that May Increase Risk of Harassment According to Select Task Force

1. Homogenous Workforces

2. Workplaces Where Some Workers Do Not Conform to Workplace Norms

3. Cultural and Language Differences in the Workplace

4. Coarsened Social Discourse Outside the Workplace

5. Workforces with Many Young Workers

6. Workplaces with "High Value" Employees

7. Workplaces with Significant Power Disparities

8. Workplaces that Reply on Customer Services or Client Satisfaction

9. Workplaces Where Work is Monotonous / Consists of Low-Intensity Tasks

10. Isolated Workplaces

11. Workplace Cultures that Tolerate or Encourage Alcohol Consumption

12. Decentralized Workplaces

F. Preventing Harassment in the Workplace

1. A Company's number one defense against harassment is a workplace culture that not only includes a commitment to diversity, inclusion, and respect from its leadership, but that "holds employees accountable for this expectation" throughout the organization.

a. Leadership's Focus on Harassment Prevention -- The Company's commitment to preventing workplace harassment must be evident through its internal leaders. Leaders must create a "sense of urgency" around preventing harassment. The level of value that the Company places on prevention of workplace harassment will be immediately evident by the

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amount of resources that are dedicated to its prevention. The most important of these resources are time and money.

b. Accountability Throughout the Organization -- Accountability requires that individuals who engage in unwanted behaviors are held responsible with appropriate sanctions. This requires prompt, fair, and reasonable investigations by those charged with investigating harassment. In addition, managers and supervisors must serve as the first line of defense for the Company by effectively "monitoring and stopping harassment by those they supervise and manage."

c. Training must change so that it may be an effective tool for preventing workplace harassment. We discuss training, including the EEOC's findings and conclusions regarding training, in greater detail below.

G. A Reconvening of the Select Task Force on the Study of Harassment in the Workplace - June 11, 2018

1. Following the publication of the EEOC Report in 2016 and the renewed focus on preventing workplace harassment in light of the #MeToo Movement, the Task Force reconvened in June of 2018 to hear from additional experts.

2. Much of the testimony in June focused on the potential legislative changes to non-disclosure agreements, arbitration clauses, and harassment training.

3. Representatives from academia, the plaintiff's bar, labor unions, management attorneys, and more testified.

III. Leadership, Visibility, and Owning Workplace Culture

A. Who owns workplace culture:

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1. In its Report, the EEOC observed that "workplace culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment." The EEOC further provided two key take-aways in determining workplace culture. First, "leadership and commitment to a diverse, inclusive and respectful workplace . . . is paramount," and "leadership must come from the very top of the organization." Second, the commitment has to be "at all levels, across all positions" and a company "must have systems in place that hold employees accountable for this expectation." In order to shift a company's culture and create a discrimination- and harassment-free workplace, the goal must be more than simply compliance, and must instead be furtherance "of an overall diversity and inclusion strategy."[4]

B. Senior Leadership:

1. Senior leadership's commitment to a culture of respect and inclusion is critical.

2. Commitment from senior leadership must come in two forms: (i) messaging and visibility: leaders must clearly communicate and demonstrate that the company does not tolerate workplace harassment and is committed to the creation of a diverse workforce; and (ii) allocating sufficient time and resources to an anti-harassment program and initiatives that focus on the recruitment, promotion and retention of a diverse workforce.

3. Examples of ways senior leadership can demonstrate their commitment to anti-harassment initiatives and the promotion of diversity through messaging and visibility include:

a. Model good behavior and be an example in the company;

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[4] *See* Chai Feldblum and Victoria A. Lipnic, Select Task Force on the Study of Harassment in the Workplace, https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

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b. Publish a diversity statement on the company website and/or in corporate materials;

c. Update and distribute the company's anti-harassment policy regularly - and if it is circulated via company email have the email come from top executives;

d. Attend or make an opening statement at anti-harassment trainings;

e. Regularly meet with human resources or institute reporting procedures to ensure senior leadership is up-to-date on complaints about harassment and how the complaints are being handled;

f. Hold other senior executives and high-value employees accountable. High-level offenders must also be subject to appropriate discipline. If violators are not punished, employees learn that the behavior is tolerated, no matter how much lip service is paid to messaging, training, and policies.

g. Set company-wide Diversity and Inclusion ("D&I") goals and include an update on diversity during annual updates with employees;

h. Regularly meet with executives to review D&I goals and assess how the company is performing;

i. Require regular reports and updates on D&I metrics;

j. Provide an annual update on diversity to the board of directors; and

k. Hold managers and teams accountable for advancing D&I goals.

4. Examples of ways senior leadership can demonstrate their commitment to anti-harassment initiatives and the promotion of diversity through resource allocation include:

a. *Assess the company's risk factors*. Undertake an internal assessment of whether key risk factors exist that could heighten the risk of harassment. Some of

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these factors include homogenous workforces, workplaces where some workers do not conform to workplace norms, cultural and language differences in the workplace (including workplaces that are extremely diverse), workplaces with "high value" employees or power disparities, decentralized and isolated workplaces, and workplace cultures that tolerate or encourage alcohol consumption.

b. *Assess the climate of the company*. Utilize survey tools, sometimes referred to as "climate surveys," which are geared towards getting feedback from employees regarding harassment and diversity initiatives. For example, surveys can be used to gauge not only whether employees feel harassment is occurring in the workplace and whether employees believe harassment is being dealt with effectively, but also whether or not the strategies employed by the company are working to prevent and/or address harassment. Use this information to better tailor existing programs and think creatively about alternative strategies.

c. *Invest money and Resources*. Add to the budget a line item for anti-harassment and diversity efforts, including customized anti-harassment, workplace civility, and/or unconscious bias training. Consider creating a senior leadership role solely dedicated to diversity and inclusion, such as a Chief Diversity Officer, a VP or SVP of Diversity and Inclusion, or a diversity director.

d. *Institute hiring, recruiting and retention initiatives aimed at diversity*. Post job opportunities on career websites geared towards specific groups like women, minorities, and LGBTQIA applicants and institute specific recruitment initiatives to target these potential employees. Offer internships, apprenticeships, and/or scholarships for individuals who belong to these underrepresented groups. Consider implementing policies that include diversity

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targets or quotas for hiring and promotion decisions (such as ensuring that one woman and one underrepresented candidate is in the final candidate pool for every position).

e. *Incorporate consideration of pay equity*. Proactively evaluate and, if necessary, modify pay practices, policies, procedures, and implement training to ensure compliance with pay equity laws. Consider conducting pay equity audits to asses if there are any disparities and if they are appropriately justified. In instances where there are unexplained differences in pay based on gender or race/ethnicity, implement strategies to make necessary adjustments.

f. *Demand diversity from your partners and suppliers through business initiatives.* Track whether your suppliers or partners are in line with your diversity efforts and/or institute a formal supplier diversity quota. For example, is your company partnering with women or minority owned businesses? Do your consultants, external PR teams, law firms, or banks meet certain diversity requirements? Consider demanding these things.

C. Engage Employees at all levels:

1. It is imperative that all employees are active participants in creating a respectful, diverse workforce. Only through a company-wide-buy-in on anti-harassment and D&I efforts will real change occur.

2. It is also important that these efforts not only ensure that employees from underrepresented groups feel valued and safe, but that other employees do not feel alienated or that the system is unfair.

3. Practical ways companies have tried to encourage employee commitment to anti-harassment and D&I efforts include the following:

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a. *Training*. It is a necessity that employees at every level are trained properly in anti-harassment efforts. However, some companies are going above and beyond required anti-discrimination and harassment training by offering additional types of training, such as: unconscious bias training, training on gender differences in communication and leadership styles, ally or up-stander training (e.g., programs designed to teach men how to be allies in the workplace); and cultural sensitivity training. Regardless of the substantive focus, the best training involves not only robust interactivity between trainers and participants, but also considerable experiential learning between group participants through modeling behaviors and group activities. Even the most doubting of employees typically find it hard to continue as outliers when it becomes apparent that the vast majority of colleagues are invested heavily in an enlightened approach.

b. *Toolkits or handbooks*. Create toolkits or playbooks to help provide supervisors with strategies designed to make meetings and assignments more inclusive.

c. *Create visibility and support networks*. Encourage employees to participate and belong to a diversity task force or committee geared towards under-represented groups. Offer to host events or support professional associations that are geared towards these groups. Implement mentoring programs specifically targeted towards employees who belong to underrepresented groups.

d. *Elicit feedback from employees at all levels*. Solicit feedback from underrepresented groups like women, employees of color, LGBTQIA employees, or employees with disabilities. Engagement surveys can include feedback on climate, culture and advancement opportunities. Make changes based on the feedback so that employees realize they have a voice and their feedback is valued. If complaints or incidents have been widespread,

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consider cultural audit including focus groups, trend analysis, communication data monitoring, & identification of reporting barriers

e. *Incentives to reinforce goals.* Consider instituting incentives for managers and supervisors who meet diversity goals or significantly contribute to D&I initiatives.

IV. Employee Training

A. The EEOC's Findings & Guidance: Training Must Change

1. In its June 2016 Report, the EEOC observed that historically anti-harassment training has generally not been a successful prevention tool. Rather, training has been too focused simply on avoiding legal liability. Thus, in order to be more effective, training must change.

2. The most effective trainings are those that are:

a. Part of a larger, holistic effort to prevent workplace harassment;

b. Supported by senior leadership;

c. Live and/or interactive;

d. Given to *all* employees;

e. Tailored to the specific workplace and workforce;

f. Offered regularly and constantly evaluated and audited;

3. Substantively, to increase effectiveness, trainings should:

a. Provide examples about what forms of conduct are not acceptable in the workplace (and those examples should not be limited to *unlawful* conduct, but should include examples of conduct that is simply unacceptable in the workplace).

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b. Clarify the ways in which employees who witness or experience harassment can report the incident, and how the formal complaint and investigation process will proceed;

c. Explain that confidentiality will be maintained to the fullest extent possible and that the company does not retaliate against individuals who report harassment or cooperate with an investigation or legal proceeding;

d. State the consequences of engaging in workplace harassment.

4. Training must also be particularly robust for middle and first-line managers. When managers are educated on methods for dealing with harassment and understand that they will be held accountable, companies may be able to prevent harassment before it starts.[5]

B. Recent Legislative Developments

1. This year, New York State, New York City, and Delaware passed legislation that requires, among other things, employers to conduct anti-harassment training.

2. *New York State*: As part of the 2018-19 budget law, New York State included provisions making sweeping changes to the law governing workplace sexual harassment. The new legislation, among other things, requires all employers (regardless of the number of its employees) to conduct anti-sexual harassment training for all employees.[6]

a. The training must be offered *annually* and must be *interactive*.

b. The training must also provide:

(i) an explanation of sexual harassment;

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[5] *See* Chai Feldblum and Victoria A. Lipnic, Select Task Force on the Study of Harassment in the Workplace, https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

[6] *See* Robert S. Whitman, Nila Merola, and Anne R. Dana, In a Nod to the #MeToo Movement, New York Legislature Passes Comprehensive Anti-Sexual Harassment Legislation, (Apr. 5, 2018), https://www.seyfarth.com/publications/MA040518-LE.

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(ii) examples of conduct constituting unlawful sexual harassment;

(iii) information concerning the federal and state laws and remedies available to victims of sexual harassment;

(iv) information concerning employees' rights of redress and all available forums for adjudicating complaints; and

(v) a discussion of conduct and responsibilities for supervisors.

c. New York's training law went into effect on October 9, 2018. The New York State Division of Human Rights, in consultation with the Department of Labor, has issued a model training that employers may use in order to comply.

3. *New York City*: New York City passed a package of eleven bills—together referred to as the Stop Sexual Harassment in NYC Act—that, among other things, require private employers with 15 or more employees to conduct annual sexual harassment training for all employees located in New York City.[7]

a. The NYC training must also be conducted *annually* and be *interactive.*

b. Training must, at a minimum, include the following:

(i) an explanation of sexual harassment as a form of unlawful discrimination under city, state, and federal law;

(ii) a description of sexual harassment, including examples;

[7] *See* Robert S. Whitman, Anne R. Dana, and Nila Merola, Following State's Lead, New York City Council Passes "Stop Sexual Harassment in NYC Act (Apr. 17, 2018), https://www.seyfarth.com/publications/MA041718-LE2.

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(iii) a summary of the employer's internal complaint process as well as the complaint process available through the City Commission on Human Rights, the State Division of Human Rights, and the EEOC;

(iv) a prohibition of retaliation and examples of what constitutes retaliation;

(v) information concerning bystander intervention; and

(vi) a discussion of the responsibilities of and actions that must be taken by supervisory and managerial employees in the prevention of sexual harassment and retaliation.

c. The City law will go into effect on April 1, 2019. The New York City Commission on Human Rights is required to develop an online, interactive training module that may be used by employers to satisfy the training component.

4. *Delaware*: On August 29, 2018, Delaware Governor John Carney signed into law a bill (SB 360) that requires employers with 50 or more employees to provide interactive sexual harassment training for all employees and supervisors. The Delaware law will become effective on January 1, 2019.

5. Notably, New York State, New York City, and Delaware's training requirements are limited to anti-*sexual* harassment training.

C. Other Training Requirements Around the Country

1. While New York is not alone in requiring employers to provide anti-sexual harassment training, the requirements of the State law are now perhaps the most robust in the country, given that *all* employers must provide *annual* training to *all employees*.

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2. For example, California requires employers with *50 or more employees* to provide at least two hours of training *every two years*, but *only to supervisory employees*. However, as of January 2018, in addition to sexual harassment, content on harassment based on gender identity, gender expression and sexual orientation must be included in the training. *See* CA Govt. Code § 12950.1.

3. Similarly, Connecticut law requires employers with *50 or more employees* to conduct two hours of sexual harassment awareness training for *all supervisory employees* within 6 months of commencement of employment. *See* Conn. Gen. Stat. §§ 46a-54 (15) (B) and 46a-54-204.

4. Additionally, Maine (the first state in the country to enact a training requirement for private employers) requires employers with *15 or more employees* to conduct an education and training program for all new employees and all supervisory and managerial employees within one year of commencement of employment. *See* Title 26 M.R.S.A. § 806.

D. Going Above and Beyond: Employers searching for ways to go above and beyond basic compliance might also consider the following:

1. Require *all employees*, including those outside New York State and City, to participate in training;

2. Require training not just on sexual harassment, but all forms of harassment, discrimination, and retaliation (especially for those employers in New York State and City, where only sexual harassment training is required);

3. Offer live training, rather than web-based or pre-recorded training;

4. Conduct training in multiple languages, depending on the workforce;

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5. Incorporate principles of bystander intervention training. Bystander training aims to give employees the tools to recognize potentially problematic behavior, motivate them to step in and take action when they observe problematic behavior, and empower them to intervene when appropriate;

6. Offer workplace civility training. Civility training does not focus on eliminating unwelcome behavior based on characteristics protected under employment non-discrimination laws, but rather on generally promoting respect in the workplace;

7. Conduct unconscious bias training. Unconscious (or implicit) biases are learned stereotypes that are automatic, unintentional, deeply engrained, universal, and able to influence behavior. Unconscious bias training programs are designed to expose people to their unconscious biases, provide tools to adjust automatic patterns of thinking, and ultimately eliminate discriminatory behaviors. A critical component of unconscious bias training is creating awareness for implicit bias.[8] If unconscious bias training is conducted, it is critical to make it clear that the focus is solely on increasing awareness of the benefits of reflecting on potential unconscious biases before taking action, while emphasizing that any testing will be anonymous and does not in any way predetermine that actions will reflect any testing results (particularly with the benefits of reflection before action).

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[8] *See* Nila Merola, Anne Dana, Cameron Smith, and Loren Gesinsky, The Future of Anti-Harassment Training and Shifting Workplace Culture in the Era of #MeToo, #BlackLivesMatter, and Others (Aug. 6, 2018), https://www.futureenterprise.com/blog/2018/8/2/the-future-of-anti-harassment-training-and-shifting-workplace-culture-in-the-era-of-metoo-blacklivesmatter-and-others.

See also Camille A. Olson et al., Implicit Bias Theory in Employment Litigation, http://files.ali-cle.org/files/periodical/articles/TPL1710_Olson.pdf.

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E. Survey Results: What are other organizations doing?

1. As of January 2018, 32% of organizations had changed their sexual harassment training in the past 12 months, and 22% planned to change their sexual harassment training over the next 12 months.[9]

2. The most common changes organizations have recently made to their training programs include:

a. Adding workplace civility components to their trainings (49%);

b. Tailoring training to the specific organization's workforce (47%);

c. Requiring training for all staff (46%).[10]

3. Some companies are instituting more robust manager training, which includes additional or more nuanced training. One survey polled 33 companies, many of which are Fortune 500 companies, regarding the types of management training offered. The participating companies were polled in 2012 and 2016. As the results show below, the percentage of companies offering more nuanced and targeted manager training rose significantly from 2012 to 2016:

a. Micro-inequities (such as unconscious bias) -- 85% of participants included this as a component to training in 2016, compared with 52% in 2012;

b. Generational diversity -- 79% of participants included this as a component to training in 2016, compared with 50% in 2012;

c. Bias in talent process -- 67% of participants included this as a component to training in 2016 (N/A for 2012);

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[9] *See* SHRM Harassment-Free Workplace Series: A Focus on Sexual Harassment, https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Pages/Workplace-Sexual-Harassment.aspx, (last visited Aug. 21, 2018).

[10] *See id*.

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d. Sexual orientation diversity -- 64% of participants included this as a component to training, compared with 30% in 2012;

e. Cross-cultural issues -- 61% of participants included this as a component to training in 2016, compared with 55% in 2012;

f. Gender differences in communication/leadership styles -- 55% of participants included this as a component to training in 2016, compared with 36% in 2012;

g. Racial/ethnic communication/leadership styles -- 46% of participants included this as a component to training in 2016, compared with 3% in 2012.[11]

V. Policies

A. Background: The EEOC Task Force report explained that "reporting procedures, investigations, and corrective actions are essential components of the holistic effort that employers must engage in to prevent harassment." It is the EEOC's position that "employers should adopt a robust anti-harassment policy, regularly train each employee on its contents, and vigorously follow and enforce the policy." The same statements and related concepts apply equally well to the prevention of discrimination and retaliation; and they can even apply to the promotion of a respectful workplace at a level well beyond legal compliance.

B. The EEOC recommends that policies should include the following:

1. A clear explanation of prohibited conduct, including examples;

2. Clear assurance that employees who make complaints or provide information related to complaints, witnesses, and others who participate in the investigation will be protected against retaliation;

[11] *See* 2012 & 2016 Diversity Best Practices Benchmarking Tool, https://www.diversitybestpractices.com/sites/diversitybestpractices.com/files/attachments/2017/01/2016_dbp_executive_summary_.pdf (last accessed Aug. 21, 2018).

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3. A clearly described complaint process that provides multiple, accessible avenues of complaint;

4. Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;

5. A complaint process that provides a prompt, thorough, and impartial investigation;

6. Assurance that the employer will take immediate and proportionate corrective action when it determines that harassment has occurred, and respond appropriately to behavior which may not be legally-actionable "harassment" but which, left unchecked, may lead to same;

7. Written in clear, simple words, in all the languages used in the workplace and the policy itself should be simple and easy to understand;

8. Make clear that harassment on the basis of any protected characteristic will not be tolerated; and

9. The policy must be communicated on a regular basis to employees, particularly information about how to file a complaint or how to report harassment that one observes, and how an employee who files a complaint or an employee who reports harassment or participates in an investigation of alleged harassment will be protected from retaliation.

10. Notably, the Task Report cautioned against use of the phrase "a 'zero tolerance' anti-harassment policy." This is because they believe use of the term "zero tolerance" is misleading and potentially counterproductive. Their research found that "[a]ccountability requires that discipline for harassment be proportionate to the offensiveness of the conduct." Thus, referencing "zero tolerance" could incorrectly "convey a one-size-fits-all approach, in

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which every instance of harassment brings the same level of discipline," which could then "contribute to employee under-reporting of harassment, particularly where they do not want a colleague or co-worker to lose their job over relatively minor harassing behavior - they simply want the harassment to stop."

C. New York State's New Sexual Harassment Law

1. Earlier this year, the New York legislature passed legislation that creates uniform requirements for employers' sexual harassment policies.

2. The law, which among other things amends the New York State Labor Law by adding Section 201(g), requires that effective October 9, 2018, employers either (1) adopt the model sexual harassment prevention policy to be provided by the Department of Labor, in consultation with the division of Human Rights; or (2) adopt a sexual harassment prevention policy that meets or exceeds the minimum standards required under the law.

3. At the time of publication of this outline, the final model policy and guidance concerning the state law were not yet available. However, on August 23, 2018, the Office of Governor Andrew M. Cuomo released drafts for comment of the Model Sexual Harassment Policy[12] and Minimum Standards for Sexual Harassment Prevention Policies,[13] among other documents.

4. At minimum, a compliant policy must prohibit sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights and must:

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[12] Draft Model Sexual Harassment Policy, https://www.ny.gov/sites/ny.gov/files/atoms/files/StatewideSexualHarassment_PreventionPolicy.pdf

[13] Draft Minimum Standards, https://www.ny.gov/sites/ny.gov/files/atoms/files/StandardsSexualHarassmentPreventionPolicies.pdf

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a. Provide examples of prohibited conduct that would constitute unlawful sexual harassment;

b. Include federal and state statutory provisions regarding sexual harassment, the remedies available to victims, and a statement that there may be additional applicable local laws;

c. Include a complaint form;[14]

d. Include a procedure for the timely and confidential investigation of complaints that ensures due process for all parties;

e. Inform employees of their rights and all available forums where they may obtain redress;

f. State clearly that sexual harassment is a form of employee misconduct and that sanctions will be enforced against individuals who engage in such conduct and supervisory and managerial employees who knowingly allow such behavior to continue; and

g. State clearly that it is unlawful to retaliate against any individual who complains of sexual harassment or who testifies or assists in investigations involving sexual harassment.

5. Employers must provide each employee with a copy of the written policy in the language that is spoken by their employees. According to preliminary guidance, employers may distribute the policy electronically if workers are able to access the employer's policy on a computer provided by the employer during work time and are able to print a copy for

[14] Complaint form for reporting sexual harassment, https://www.ny.gov/sites/ny.gov/files/atoms/files/ComplaintformSexualHarassment.pdf

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their records. Although no acknowledgment is required, employers are encouraged to obtain a signed acknowledgment from employees.

D. New York City Sexual Harassment Law

1. The New York City law, which among other things amends Section 8-07 of the New York City Code, requires that effective September 6, 2018, employers conspicuously display an anti-sexual harassment rights and responsibilities poster in employee break rooms or other common areas and that employers. The notice must be posted in both English and Spanish. Employers must also distribute an information sheet to new employees at the time of hire.

2. The New York City poster provides a definition of sexual harassment under the law, provides examples of sexual harassment, and states that retaliation is prohibited under the law. Further, the poster provides contact information for employees who have witnessed or experienced sexual harassment, directing them to contact (1) a manager; (2) the equal employment opportunity officer at the employee's workplace, (3) human resources; or the NYC Commission on Human Rights. The poster also directs employees to federal (www.eeoc.gov) and state (www.dhr.ny.gov) resources.

E. What Are Other Companies Doing?

1. A survey conducted by Society for Human Resource Management ("SHRM") found that despite approximately 94% of Human Resources professionals reporting that their organization has a sexual harassment policy, one-out-of-five non-manager employees reported that they were not sure whether their organization had a policy.[15]

[15] SHRM, Harassment-Free Workplace Series: A Focus on Sexual Harassment, Research and Surveys (Jan. 31, 2018) available at https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/workplace-sexual-harassment.aspx.

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2. Sexual harassment is underreported and 76% of non-manager employees who have experienced sexual harassment within the last year have not reported the incidents.[16] Some of the reasons for the underreporting include:

a. Fear of retaliation;

b. Belief that little or no action would have been taken had it been reported;

c. Downplaying of behavior; and

d. Addressing the harasser personally.[17]

3. Typically, sexual harassment policies are presented in an employee handbook or manual (86% of surveyed employers) and/or are provided to employees during new-hire orientation (74% of surveyed employers).[18] Other employers distribute their sexual harassment policy when conducting training (56% of surveyed employers) and by providing the policy on the Company website or intranet (41% of surveyed employers).[19]

4. To support their sexual harassment policies, employers implement:

a. Complaint procedures (95% of surveyed employers);

b. Complaint investigation procedures (82% of surveyed employers);

c. Documentation of policy acknowledgement from employees (73% of surveyed employers);

d. Online/video training (37% of surveyed employers);

e. Face-to-face training (27% of surveyed employers);

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[16] Id.
[17] Id.
[18] Id.
[19] Id.

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f. Both face-to-face and online/video training (36% of surveyed employers).[20]

5. The EEOC recommends that employers should offer reporting procedures that offer a range of methods and multiple points of contact for an employee to report harassment. Employers should also test their reporting systems in order to determine whether the system is properly working. The EEOC further recommends that employers ensure that discipline is prompt, consistent, and proportionate.

F. How To Go Above and Beyond

1. The anti-harassment policy should be written in straight-forward language, use easy-to-understand examples, and be reiterated to employees consistently (*e.g.*, through the Company's intranet).

2. Employers should include provisions in their policy regarding the Company's prohibition of sexual harassment and other forms of harassment at events that take place outside of work (*e.g.*, work trips, happy-hour events, holiday events, and other social events).

3. Employers should go beyond limiting unlawful conduct and should implement a code of civility, requiring that employees be respectful. Employers must ensure that such code of civility complies with the National Labor Relation Act, as well as any other applicable law.

4. Employers should indicate that the employer does not tolerate harassment from employees and non-employees.

5. Policies should provide specific examples of unacceptable behavior and they should be tailored to the workplace.

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[20] Id.

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6. Policies should also convey that the policy does not provide that individuals should avoid those who are different from them, but supervisors can and should engage in mentoring and promoting social inclusion within a diverse workplace. The Company should also encourage inclusion among co-workers.

7. Ensure that management and first-line supervisors are trained properly to follow the procedures/protocols in the policy, including protocols relating to reporting harassment claims to the appropriate person/department.

VI. Reporting Channels and Investigation Procedures:

A. The EEOC Task Force Report found that harassment is under-reported.

a. The most common explanations from non-reporters include:

(i) Avoid alleged bad actor (33% to 75%).

(ii) Deny or downplay harassing behavior (54% to 73%).

(iii) Ignore harassing behavior 44% to 70%).

(iv) Confer with family (27% to 37%) or friend/confidant (50% to 70%).

2. Employees who fail to report harassment often fear:

a. Disbelief or trivialization of allegations;

b. Blame for alleged acts;

c. Inaction or ineffective investigation;

d. Toothless remedial action; or

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e. Retaliation:

(i) As much as 70% of employees report experiencing some form of retaliation following reports.[21]

(ii) Employment actions that courts routinely have held are not materially adverse would dissuade employees from complaining.[22]

(iii) Cost/benefit analysis is made by potential complainants based on fear of retaliation.[23]

B. Effective Reporting Systems and Channels

1. Effective reporting systems should provide those who experience and/or observe harassment with confidence to report incidents.

2. Channels should incorporate a range methods and contact points.

a. Clear and prominent Open-door policy.[24]

b. Anonymous and Multi-lingual Hotline.[25]

c. Ombudsmen.

d. Apps or Artificial Intelligence - (*AllVoices, STOPit, tEQitable, Callisto, Talk to Spot*): Web platforms and artificial intelligence applications that allows employees to anonymously report instances of sexual harassment.[26]

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[21] See EEOC Report a 15 - 16.

[22] See Nicole Buonocore Porter, Ending Harassment by Starting with Retaliation, 71 Stan. L. Rev. Online 49, 51 (2018).

[23] See id.

[24] See EEOC Report at 43-44.

[25] See EEOC Report at 40-41.

[26] See Rashal G. Baz, Katherine Mendez, and Chelsea D. Mesa, Click To Complain: Using Technology to Outsource Workplace Harassment Grievances, (Mar. 23, 2018),

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e. Information Escrow: Information escrows allow people to transmit sensitive information to a trusted intermediary, an escrow agent, who only forwards the information under pre-specified conditions.[27]

3. Effectiveness: Are employees comfortable using reporting channels?

a. Diverse members of reporting structure - reporting structures that are dominated by one race, gender, or any other protected class may reduce the effectiveness of reporting structure.

b. User-friendly and accessible to complainants.

c. Intake process collects information necessary for investigation (*i.e.*, dates of incidents, witnesses, documents, narrative prompts).

d. Separate reporting structure when allegations are made against high-level management or member reporting structure.

e. Clear presentation of anti-retaliation policies throughout intake and reporting process.

C. Responding to Complaint of Harassment

1. Goal is to *promptly* investigate complaints and issue a *proportionate* remedial response that *prevents* future harassment.

2. Prompt investigation:

a. Well-trained, objective, and neutral investigators are a key component of an investigation.

(i) Guidelines for credibility determination.

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https://www.laborandemploymentlawcounsel.com/2018/03/click-to-complain-using-technology-to-outsource-workplace-harassment-grievances.

[27] See Ian Ayres & Cait Unkovic, Information Escrows, 111 Mich. L. Rev. 145 (2012).

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(ii) Detailed documentation of investigation.

(iii) Proper resource allocation.

(iv) Soft-skill training.

b. Consistent with applicable law, protect the privacy of alleged victims, witnesses, and alleged harassers.

(i) Acknowledge that assigned investigator will do her or his best to keep witness statements confidential, but she or he may need to disclose to others to do a thorough investigation, including post-investigation report.

(ii) National Labor Relations Board has held that a blanket instruction not to discuss the investigation may violate an employee's Section 7 rights under the National Labor Relations Act unless the employer has a legitimate and substantial business justification for requesting strict confidentiality.[28]

c. Create supportive environment where alleged victims, individuals who report harassment, and witnesses are not subjected to retaliation.

3. Proportionate Response:

a. Ensure that alleged harassers are not prematurely presumed guilty or prematurely disciplined. Avoid unintended consequences of zero tolerance.

(i) Avoid reduced workplace/professional engagement with members of a protected classification.

(ii) Avoid reduced involvement in diversity initiatives.

b. Consider use of voluntary alternative dispute resolution processes to facilitate open communication as well as prevent and address prohibited conduct.

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[28] See Banner Health System, 362 NLRB No. 137 (June 26, 2015).

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c. Convey the resolution of the complaint to the complainant and the alleged harasser. Consider in-person check-ins with complainants and in-person reminders to offenders.

4. Prevention of Future Harm:

a. Accountability

(i) Prompt and decisive action on "gateway" conduct by managers (*i.e.*, abuse of authority, bullying, inappropriate personal relationships, etc…).

(ii) Supervisors and managers are held responsible for monitoring and stopping harassment.

(iii) Disciplinary actions for those who fail to undertake prompt or thorough investigations.

(iv) Disciplinary actions for those that fail to report instances of harassment or discrimination.

b. Data collection: Track & Respond to Trends

(i) Use data to monitor the number of complaints, potential recidivism, and prevalent types of harassment/discrimination.

(ii) Recalibrate reporting structures and investigation processes based on results.

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AUGUST 6, 2018 · FUTURE EMPLOYER

The Future of Anti-Harassment Training and Shifting Workplace Culture in the Era of #MeToo, #BlackLivesMatter, and Others

BY: NILA MEROLA, ANNE DANA, CAMERON SMITH, AND LOREN GESINSKY

In the wake of the #MeToo movement, there has been considerable buzz surrounding workplace culture. For many employers, simply satisfying basic legal requirements is a thing of the past. The future, instead, is focused on creating and fostering a workplace culture of respect and inclusion. Over the next several weeks, we will review what it means to transform a workplace culture, what initiatives work and don't work, and what employers who want to "go the extra mile" can and should be thinking about.

In this post, particularly in light of recent legislative developments, we will focus on anti-harassment training. Some states like Connecticut, California, and Maine have, for some time now, required that certain employers provide anti-harassment training for supervisors. New York State recently upped the ante and passed legislation mandating *all* employers to provide *annual* anti-sexual harassment training to *all* employees. Shortly thereafter, New York City also passed legislation mandating annual anti-sexual harassment training for employers with 15 or more employees. Beyond basic legal compliance, however, how can employers design trainings that are effective tools for preventing harassment?

EEOC Report

Indeed, in June 2016, the Equal Employment Opportunity Commission ("EEOC") issued a report regarding harassment in the workplace. In that report, the EEOC observed that, over the last several years, anti-harassment training has generally not been a successful prevention tool. Rather, training has been too focused simply on avoiding legal liability. Nevertheless, and despite its shortcomings, the EEOC concluded that training is still an essential element of an overall anti-harassment effort and *can be* an effective prevention tool. Among the EEOC's key conclusions,

therefore, is that anti-harassment training must change.

The EEOC observed that the most effective anti-harassment trainings are those that are part of a holistic effort to prevent and combat workplace harassment. In other words, in order to be effective, training cannot stand on its own. Senior leadership must be truly committed and the organization must allocate sufficient resources to its anti-harassment initiatives. Further, the most effective anti-harassment trainings are those that are live, interactive, offered to *all* employees, and tailored to the specific workforce and workplace. Trainings should also be offered regularly—rather than once in an employee's career—and routinely evaluated. It is also critical that middle-managers and first-line supervisors are properly trained to prevent, identify, and stop workplace harassment. Importantly, while the report focused primarily on sexual harassment, the EEOC was clear that employees should be trained on all forms of harassment, not just sexual harassment.

EEOC Training Tips

The EEOC found that, in order to increase effectiveness, anti-harassment trainings should contain certain components. For example, training should:

- Provide examples about what forms of conduct are not acceptable in the workplace. Importantly, the conduct discussed should not be limited only to conduct that is unlawful. Rather, the training should describe conduct that is simply unacceptable in the workplace and, if left unchecked, might rise to the level of illegal harassment. To have a real impact on employees, these examples should be tailored to the specific workplace and workplace.
- Clarify employees' rights and responsibilities if they witness or experience unacceptable conduct. Specifically, the training should clarify the ways in which employees who witness or experience harassment can report the incident, and explain how the formal complaint and investigation process will proceed.
- Explain that the employer will keep the investigation and complaint as confidential as possible and ensure that those who report having experienced or witnessed harassment will not be retaliated against.
- State the consequences of engaging in unacceptable workplace conduct, including that corrective action will be proportionate to the severity of the conduct.

Further, middle and first-line managers should receive even more robust training. In order for an organization to prevent harassment before it starts, managers must understand that they are accountable. They must also be educated on methods for dealing with harassment that they observe, that is reported to them, or of which they have knowledge or information (even if there is no formal complaint). Managers should also be instructed on how to report harassing behavior further up in the organization.

Employers who are considering additional ways to go above and beyond might also consider conducting training in multiple languages, depending on their workforce, and/or offering new models of training, such as bystander intervention training or workplace civility training. Bystander training aims to give employees the tools to recognize potentially problematic behavior, motivate them to step in and take action when they observe problematic behavior, and empower them to intervene when appropriate. Civility training does not focus on eliminating unwelcome behavior based on characteristics protected under employment non-discrimination laws, but rather on generally promoting respect in the workplace.

New York's Revised Training

The drafters of the New York State and New York City legislation appear to have been cognizant of the criticism of existing training programs and considered the EEOC's recommendations when drafting the new laws. As a result, the New York State and New York City laws setting forth the requirements for anti-sexual harassment training are now among the most comprehensive in the country.

Notably, however, both the New York State and New York City trainings requirements are limited to anti-*sexual* harassment training.

Specifically, the New York State law, which goes into effect on October 9, 2018, requires the Department of Labor, in consultation with the Division of Human Rights, to produce a model sexual harassment prevention training program. Every employer must either adopt the model training program or establish a training program that equals or exceeds the minimum standards provided by the model.

The law includes the following requirements that the training: (i) be interactive; (ii) provide an explanation of sexual harassment; (iii) provide examples of conduct constituting unlawful sexual harassment; (iv) provide information concerning the federal and state laws and remedies available to victims of sexual harassment; (v) provide information concerning employees' rights of redress and all available forums for adjudicating complaints; and (vi) address conduct and responsibilities for supervisors.

NYC-Specific Requirements

The New York City law, which goes into effect on April 1, 2019, requires covered employers to conduct annual, interactive anti-sexual harassment training for all employees employed in New York City, including supervisory and managerial employees. In order to help employers meet this mandate, the New York City Commission on Human Rights is tasked with creating and posting on its website an online, interactive training module.

Similar to the State law, the City law requires that the training be "interactive." While the law does not require that the training be live, it must qualify as participatory teaching "whereby the trainee is engaged in a trainer-trainee interaction, use of audio-visuals, computer or online training program, or other participatory forms of training as determined by the commission."

The City law also requires that the training must include the following: (1) an explanation of sexual harassment as a form of unlawful discrimination under city, state, and federal law; (2) a description of sexual harassment, including examples; (3) the employer's internal complaint process as well as the complaint process available through the City Commission on Human Rights, the State Division of Human Rights, and the Equal Employment Opportunity Commission; (4) a prohibition of retaliation and examples of what constitutes retaliation; (5) information concerning bystander intervention; and (6) the responsibilities of and actions that must be taken by supervisory and managerial employees in the prevention of sexual harassment and retaliation.

While it is not yet known what the impact of the new training requirements will be, the passage of the New York State and City laws suggest that more comprehensive training programs, which take into consideration the EEOC's recommendations, are the way of the future. Thus, while employers with employees in New York State or New York City will have to comply with the mandatory training requirements, these new laws provide an opportunity for employers nationally to take stock of their existing training programs and consider whether they want to go above and beyond what the law may require.

For example, although the New York State and City laws require only anti-sexual harassment trainings, employers should consider conducting annual training that does not focus exclusively on sexual harassment, but rather covers all forms of harassment, discrimination, and retaliation. Additionally, employers in other states may want to utilize New York's model training programs. For employers with employees in New York as well as other states without mandatory training laws, they may want to consider expanding the training to all employees and tailoring it to each state or municipality in which they operate. Finally, for employers that do institute a training program (whether required or voluntarily), they will need to consider whether to expand the training to include more novel training models, such

as bystander intervention training and work place civility training.

As we move toward a future more focused on creating a positive and inclusive workplace, rather than just complying with the law, employers should review their existing trainings and consider whether and how they could be more effective for their specific workforce and workplace. And, of course, employers without existing training programs should consider making training a requirement. But, as noted above, training cannot stand on its own. It must be part of a holistic anti-harassment effort, with robust policies and procedures and committed senior leadership.

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Reporting and Investigating Harassment in the Age of Social Movements

BY: EPHRAIM J. PIERRE, NILA MEROLA, ANNE DANA, AND LOREN GESINSKY

Social movements such as #MeToo, #TimesUp, and #BlackLivesMatter have created an ongoing conversation about workplace culture. For many employers, simply satisfying basic legal requirements is a thing of the past. The future, instead, is focused on creating and fostering a workplace culture of respect and inclusion by re-evaluating workplace policies, practices, and procedures. As part of an ongoing series, we continue to examine what it means to change a workplace culture, what initiatives work and do not work, and what employers who want to "go the extra mile" can and should be thinking about.

In our last post, we examined effective anti-harassment training. In this post, we will focus on effective reporting systems and internal investigations. In June 2016, the Equal Employment Opportunity Commission (EEOC) issued a report regarding harassment in the workplace. In the report, the EEOC observed that approximately 70% of individuals who experienced harassment *did not* report such conduct to a manager, supervisor, or union representative. Even more troubling, approximately 90% of individuals who experienced workplace harassment *never formally* filed a complaint with their employer. Instead, the report found that employees often avoid the alleged harasser, ignore or minimize alleged harassing conduct, or confide in friends or trusted advisors.

Given the resoundingly high percentage of employees who do not report harassing conduct, it begs the question as to why employees are so reluctant to report harassment. The answer, according to most studies and anecdotal evidence, is that non-reporting employees often fear an ineffective response and retaliation. Sometimes employees simply do not know or recall how and where to report harassment.

Effective Reporting Systems and Investigations

According to the EEOC's June 2016 report, current reporting systems and investigation procedures are simply not instilling confidence in those who experience or observe harassment, and thus inappropriate conduct often goes unreported. The EEOC's report observed that effective reporting systems and investigations are among the most critical elements of a holistic anti-harassment effort. As a result, employers should carefully re-examine their reporting systems so that harassing conduct is reported, promptly investigated, and appropriately addressed.

To that end, the EEOC found that, to increase effectiveness, reporting systems and investigations should contain certain components. Specifically, employers should:

- Adopt and maintain a comprehensive anti-harassment policy as well as a clear and prominent open-door policy, which encourages employees to report harassing behavior not only to direct supervisors,

but also to management personnel;

- Ensure that the anti-harassment policy describes in detail how to complain about harassment, and that such policy is communicated frequently to employees in several forms and methods;
- Offer multi-faceted reporting procedures, including multiple points-of-contact with geographic and organizational diversity, where possible;
- Make clear that retaliation will not be tolerated and outline the steps employees should take to report retaliation if it occurs;
- Ensure that management personnel are held accountable for monitoring and stopping harassment;
- Periodically "test" reporting systems to assess their effectiveness;
- Devote sufficient resources so that harassment allegations are objective as well as promptly and thoroughly investigated;
- Conduct regular training for investigators, human resources personnel, and management tasked with conducting investigations;
- Ensure investigations are kept as confidential as possible under applicable federal, state, and local laws; and
- Ensure that investigations result in a proportionate and consistent response.

Non-Traditional Ideas for Improvement

In addition to the measures outlined above, employers may also consider exploring non-traditional means for improving reporting systems. In particular, recent technology and outside consultants may provide useful tools for mitigating perceived biases and fear of ineffectual response and retaliation. Below are novel measures that some employers utilize:

- *Mobile Applications/Online Platforms*: Several recent mobile applications and online platforms (*i.e.,* AllVoices, STOPit, tEQuitable, Callisto, Talk to Spot) allow employees to report harassing conduct anonymously through pre-populated forms or interactions with artificial intelligence systems. These mobile applications and online platforms solicit key details regarding harassment allegations such as potential witnesses, incident dates, narrative responses, and documents. These mobile applications and online platforms claim to provide a safe space for raising concerns, free from external interference and potential retaliation. However, these technologies do pose certain challenges. One challenge is that these technologies may embolden employees with non-meritorious claims to submit petty workplace grievances, which nonetheless may require prompt investigation to ensure nothing more material has been missed. Another challenge is that the anonymity of an accuser/observer makes it more difficult to investigate promptly and thoroughly because of the lack of an identifiable person with whom to meet and follow up.
- *External Consulting Groups*: Third-party consulting groups have also responded to the #MeToo movement by creating company-specific tools through which employees can file complaints. In turn, consultants assess the complaint, write an action plan regarding an investigation, and provide a third party at least arguably more independent than someone in-house to conduct the workplace investigation. These services promote their experienced personnel as well as their ability to mitigate perceived bias towards human resources and management personnel among employees. Employers should note that using an external service does not change an employer's obligation to investigate claims. Thus, employers should carefully consider whether consultants are indeed qualified to handle complaints. Further, an employer's uniform response is helpful in investigating and later defending against retaliation suits. External consultants could introduce variance into the investigation process, which may weaken potential defenses in litigation.
- *Hotline Services*: While ordinary hotlines simply provide employees a voicemail or email inbox to report harassing conduct, third-party services now offer more interactive complaint intake procedures. Several third parties are now offering human resources professionals who intake complaints and produce a report that allows the employer to investigate potential claims internally or externally with a consultant. As noted above, employers should carefully consider whether consultants are indeed qualified to receive complaints and formulate responses. Further, employers should also consider how consultants augment rather than replace in-house human resource professionals. Employers should also consider internal training for human resources professionals and supervisors on how to

respond to a complaint from outside consultants.

- *Big Data*: Employers now routinely collect data and metrics regarding efficiency and productivity. To encourage accountability, some employers collect and monitor data relating to harassment complaints and their resolutions. Employers may elect to collect and analyze this data with an eye towards recalibrating processes if the data suggests significant room for improvement. Employers should note that trends revealed by complaint data and analytics may trigger investigation obligations. Further, employers should note that plaintiffs' counsel may seek complaint data and analytics in future litigation in an effort to exploit such trends.

Importantly, while additional and novel reporting processes may be beneficial to obtaining data and addressing complaints, using external technology and professional services does not change an employer's ongoing obligations to investigate harassment allegations promptly and effectively. Indeed, new methods for reporting harassment may mean a resulting uptick in potential harassment complaints, including dated claims and claims against high-value employees. Employers should be prepared to fully investigate and address such claims. Nonetheless, the potential for improved reporting systems via technology and external servicers is promising for employers and employees alike.

As we move toward a future more focused on creating a positive and inclusive workplace, rather than just complying with the law, employers should review their existing reporting systems and investigation procedures and consider whether and how they could be more effective for their specific workforce and culture. And robust reporting and investigation systems only achieve maximum effectiveness if they mesh seamlessly with other aspects of a holistic anti-harassment effort.

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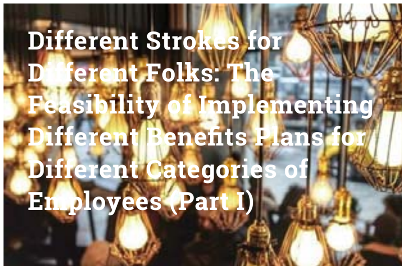

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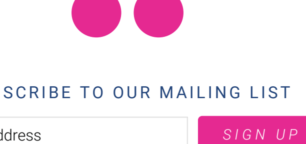

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Transforming Workplace Cultures and The Future of Diversity and Inclusion Initiatives

BY: ANNE DANA, LOREN GESINSKY, AND NILA MEROLA

This is the third article in a series in which we address what it means to transform workplace culture in light of the #MeToo, #BlackLivesMatter, and other movements, what initiatives work and don't work, and what employers who want to go above and beyond can and are thinking about. Our first post discussed how to create an effective training program, and our second post discussed reporting and investigating harassment. In this post, we focus on how leadership can transform workplace cultures and what practices companies at the forefront of change are implementing.

In June 2016, the Equal Employment Opportunity Commission (EEOC) issued a report regarding harassment in the workplace. In that report, the EEOC observed that "workplace culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment." The EEOC further provided two key take-away points in determining workplace culture. First, "leadership and commitment to a diverse, inclusive and respectful workplace . . . is paramount," and "leadership must come from the very top of the organization." Second,

the commitment has to be “at all levels, across all positions” and a company “must have systems in place that hold employees accountable for this expectation.” At bottom, in order to shift a company’s culture and truly create a workplace free of discrimination, harassment, and retaliation, the goal must be more than simply compliance, and must instead be “part of an overall diversity and inclusion strategy.

Notably, the report also acknowledged the business case for preventing harassment, citing not just the direct financial costs associated with harassment complaints and litigation, but the indirect costs of decreased productivity, increased turnover, and reputational damage. Companies are also increasingly acknowledging the long-term economic benefits to having a diverse workforce, which can result in a wider variety of perspectives, approaches, and experiences resulting in increased creativity, more efficient strategies, and improved client services.

In light of this, we address some of the key steps companies can take to promote diversity and inclusion and shift workplace cultures.

Leadership and Commitment from the Top

Senior leadership’s commitment to a culture of respect and inclusion is critical. Part of that commitment is about messaging and visibility. Leaders must clearly communicate and demonstrate that the company does not tolerate workplace discrimination, harassment, and retaliation and is committed to the creation of a diverse workforce. Another part of that commitment is about allocating sufficient time and resources to prevention programs and initiatives that focus on the recruitment, promotion and retention of a diverse workforce.

Here are some ways in which senior leaders may demonstrate their commitment to preventing discrimination, harassment, and retaliation

and anti-harassment initiatives and the promotion of diversity through messaging and visibility:

- Model positive behavior and be an example to employees in the company;
- Insist upon policies and practices that require a respectful workplace with standards above just basic compliance in preventing illegal discrimination, harassment, and retaliation;
- Update and distribute the company's anti-discrimination, harassment and retaliation policies regularly;
- Make an opening statement at, and participate in, respectful workplace trainings;
- Regularly meet with human resources or institute reporting procedures to ensure senior leadership is up-to-date on complaints about discrimination, harassment, and retaliation and how the complaints are being handled;
- Hold other senior executives and high-value employees accountable. High-level offenders must also be subject to appropriate discipline. If violators are not punished, employees learn that the behavior is tolerated, no matter how much lip service is paid to messaging, training, and policies.
- Set company-wide Diversity and Inclusion (D&I) goals, and include an update on diversity during annual updates with employees;
- Publish a D&I statement on the company website and/or in corporate materials;
- Meet regularly with executives to review D&I goals and assess how the company is performing;
- Require regular reports and updates on D&I metrics;
- Provide an update on D&I to the board of directors quarterly or at least annually; and
- Hold managers and teams accountable for advancing D&I goals.

Some of the ways in which senior leaders may demonstrate their commitment to respectful workplace and D&I through resource allocation include:

- **Assess your company's risk factors**. Undertake an internal assessment of whether key risk factors exist that could heighten the risk of discrimination, harassment, and retaliation. Some of these factors include homogenous workforces, workplaces where some workers do not conform to workplace norms, cultural and language differences in the workplace (including workplaces that are extremely diverse), workplaces with "high value" employees or power disparities, decentralized and isolated workplaces, and workplace cultures that tolerate or encourage alcohol consumption.
- **Assess the climate of the company**. Utilize survey tools, sometimes referred to as "climate surveys," which are geared towards getting feedback from employees regarding respectful workplace and D&I initiatives. For example, surveys can be used to gauge not only whether employees believe discrimination, harassment, and/or retaliation is occurring in the workplace, but also whether the strategies employed by the company are working to prevent and/or address it. Use this information to better tailor existing programs and think creatively about alternative strategies.
- **Invest money and other resources**. Add to the budget a line item for respectful workplace and D&I efforts, including customized anti-harassment, workplace civility, and/or unconscious bias training. Consider creating a senior leadership role solely dedicated to D&I, such as a Chief Diversity and Inclusion Officer.
- **Institute hiring, recruiting and retention initiatives aimed at D&I.** Post job opportunities on career websites geared towards specific groups like women, minorities, LGBTQ and disabled

applicants and institute specific recruitment initiatives to target these potential employees. Offer internships, apprenticeships, and/or scholarships for individuals who belong to these underrepresented groups. Consider implementing policies that include diversity targets or quotas for hiring and promotion decisions (such as ensuring that one woman and one underrepresented candidate is in the final candidate pool for every position).

- **Demand diversity from your partners and suppliers through business initiatives**. Track whether your suppliers and other business partners are in line with your diversity efforts. For example, is your company partnering with women or minority owned businesses? Do your consultants, external PR teams, law firms, or banks meet certain diversity requirements?

Employee Commitment at All Levels

No matter which of the above efforts are undertaken, leadership cannot do it alone. It is imperative that all employees are active participants in creating a respectful, diverse, and inclusive workforce. This requires that employees at every level are trained properly in respectful workplace efforts and empowered to have a voice in D&I initiatives. It is also important that these efforts not only ensure that employees from underrepresented groups feel valued and safe, but that other employees do not feel alienated or that the system is unfair. Significant change is only likely to occur through a universal company-wide buy-in on respectful workplace initiatives and D&I efforts. Below are some practical ways companies have tried to encourage employee commitment to respectful workplace and D&I efforts.

- **Training and toolkits.** Go above and beyond required training on preventing discrimination, harassment, and retaliation by offering additional types of training, such as: unconscious bias training, training on gender differences in communication and leadership styles, ally or up-stander training (*e.g.*, programs designed to coach men on how to be valued allies in the workplace); and cultural sensitivity training. Create toolkits or playbooks to help provide supervisors with concrete steps designed to make meetings and assignments more inclusive.
- **Create visibility and support networks.** Encourage employees to participate and belong to a D&I task force or committee geared towards under-represented groups. Offer to host events or support professional associations that are geared towards these groups. Implement mentoring programs specifically targeted towards employees who belong to underrepresented groups.
- **Elicit feedback from employees at all levels**. Solicit feedback from underrepresented groups like women, employees of color, LGBTQ employees, and employees with disabilities. Make changes based on the feedback so that employees realize they have a voice and their feedback is valued.

At the end of the day, there is no "silver bullet" to ending discrimination, harassment, and retaliation in the workplace or to creating a diverse and inclusive workforce. However, as companies increasingly realize the direct and indirect financial costs of litigation arising out of discrimination, harassment, and retaliation, coupled with the realization that there are significant economic benefits to having a diverse and inclusive workforce, they are increasingly looking to new and dynamic approaches to solve these issues.

Management Alert

Recent New York State and New York City Anti-Sexual Harassment Legislation: Now What?

By Robert S. Whitman, Nila M. Merola, and Anne R. Dana

Seyfarth Synopsis: *New York Governor Andrew M. Cuomo and New York City Mayor Bill de Blasio have each signed new laws designed to combat workplace sexual harassment. Together, these new laws have resulted in sweeping changes to City and State law governing employers in the State and City.*

Both New York State and New York City have enacted comprehensive legislation targeting workplace sexual harassment. On April 12, 2018, Governor Andrew M. Cuomo signed a bill enacting anti-sexual harassment legislation. On May 9, 2018, Mayor Bill de Blasio signed the Stop Sexual Harassment in NYC Act, which is a collection of eleven pieces of legislation. With that law officially on the books, employers in the State and City now know the effective dates of the various provisions the laws enact, with some provisions effective immediately and others taking effect on future dates. Our previous Alerts on these laws, linked here and here, outlined the key provisions of both the State and City laws. Below is a brief re-cap of the State and City provisions, highlighting their effective dates.

Key Provisions of New York State Law

Extension of Protections to Non-Employees -- Effective Immediately

The law adds Section 296-D to the New York State Executive Law. Section 296-D imposes upon all employers liability for sex-based harassment experienced by non-employees, such as contractors, vendors, or consultants.

Prohibition of Mandatory Arbitration Clauses -- Effective July 11, 2018

The law adds Section 7515 to the Civil Practice Law and Rules ("CPLR"). It provides that, "except where inconsistent with federal law," employers are prohibited from including, in any contracts with employees, provisions that mandate arbitration for allegations or claims of sexual harassment. The law also declares null and void clauses in existing contracts that mandate arbitration of sexual harassment claims.

Prohibition of Non-Disclosure Agreements -- Effective July 11, 2018

The law adds Section 5-336 to the General Obligations Law and Section 5003-b to the CPLR. These provisions prohibit employers from including an NDA in any settlement of a sexual harassment claim unless the complainant requests confidentiality. If the complainant requests confidentiality, the complainant must have 21 days to consider the terms, and 7 days to revoke the agreement.

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Mandatory Sexual Harassment Prevention Policy and Training Program -- Effective October 9, 2018

The law amends the Labor Law by adding Section 201-g, which requires the Department of Labor, in consultation with the Division of Human Rights, to produce a model sexual harassment prevention policy and a model sexual harassment prevention training program.

Every employer must either adopt the model policy and training program, or establish a policy and training program that equals or exceeds the minimum standards provided by the models. Employers are also required to provide all employees with a written copy of the policy and training on an annual basis.

Prevention of Sexual Harassment By Bidders for State Contracts -- Effective January 1, 2019

The law amends the State Finance Law to require that, for every bid made to the State, *where competitive bidding is required*, the bidder must certify that it has a written sexual harassment policy and provides annual sexual harassment prevention training to all employees. Where competitive bidding is not required, the certification requirement is at the discretion of the department, agency or official.

Key Provisions of Stop Sexual Harassment in NYC Act

Expansion of the Statute of Limitations -- Effective Immediately

The Act amends section 8-109(e) of the City Code to expand the statute of limitations for claims of gender-based harassment from one year to three years after the alleged harassing conduct occurred.

Increased Coverage -- Effective Immediately

The Act amends 8-102(5) of the City Code to expand coverage of sexual harassment cases to employers with fewer than four employees. Previously, only employers with four or more employees were covered by the law.

Sexual Harassment Poster and Information Sheet -- Effective September 6, 2018

The Act amends section 8-107 of the City Code to require employers to display conspicuously an anti-sexual harassment rights and responsibilities poster in employee break rooms or other common areas. Employers will also be required to distribute a sexual harassment information sheet to new employees at the time of hire. The Commission will design and post on its website the poster and information sheet, both of which must be in English and Spanish.

Mandatory Anti-Sexual Harassment Training -- Effective April 1, 2019

The Act amends section 8-107 of the Administrative Code of the City of New York to require employers with 15 or more employees to conduct annual, interactive anti-sexual harassment training for all employees employed in New York City, including supervisory and managerial employees. In order to help employers meet this mandate, the New York City Commission on Human Rights is tasked with creating and posting on its website an online, interactive training module.

What Happens Next?

The provisions of most direct impact for employers are those that concern mandatory arbitration clauses, NDAs, policies, and training.

As we explained in our previous Alert, the Statewide prohibition on mandatory arbitration clauses for sexual harassment claims may be vulnerable to a legal challenge based on preemption by the Federal Arbitration Act. But sorting out that thorny legal issue could take years. In the meantime, and in anticipation of the July effective date of the prohibition, employers that currently have arbitration agreements, or are considering adopting them, should consult with legal counsel to assess whether to revise their agreements and/or policies and to be cognizant of the impact the law may have on pre-existing agreements.

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New York employers should also review and revise their standard settlement agreements to ensure that they comply with the State law's new prohibition of certain NDAs.

The State law will also likely require employers to make substantial revisions to their existing anti-harassment policies and employers without written policies will need to institute them. In addition, all New York State employers will need to comply with the State law's training requirements. All New York City employers with 15 or more employees will similarly need to comply with *both* the State *and* the City training requirements. While there is some overlap between those requirements, the State law has an earlier effective date and certain substantive requirements not mandated by the City law, whereas the City law has certain requirements not necessary under the State law. Compliance with both the training and policy requirements will be easier to assess once the model policy and training modules are published by the applicable agencies.

The attorneys at Seyfarth Shaw LLP are available to provide assistance with guidance on both the State and City requirements, including ensuring that employers have robust policies in place regarding anti-harassment in the workplace and procedures to effectively respond to complaints. We can also provide interactive anti-harassment training tailored to your company's specific business and needs.

If you would like further information, please contact Robert S. Whitman at rwhitman@seyfarth.com, Nila M. Merola at nmerola@seyfarth.com, or Anne R. Dana at adana@seyfarth.com.

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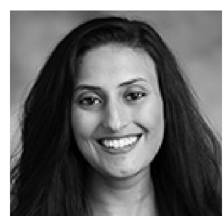
IMPLICIT BIAS THEORY IN EMPLOYMENT LITIGATION



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The term "implicit bias" is commonly used to refer to ingrained beliefs, whether positive or negative, about other individuals or groups that are triggered automatically. These beliefs are not conscious thoughts but rather represent reflexive reactions at the unconscious level.

The developers of the theory, social psychologists Anthony Greenwald and Mahzarin Banaji, first used the term to describe the theory in 1995.[1] Greenwald and Banaji also created a test to attempt to measure an individual's implicit bias. Known as the Implicit Association Test ("IAT"), the test is designed to provide data on the unconscious associations people maintain between social groups and positive or negative characteristics.[2]

Some social psychologists, including Greenwald and Banaji, believe that these unconscious attitudes actually predict behavior. These social psychologists posit that people's unconscious beliefs in certain stereotypes result in biased decisionmaking and discriminatory behaviors based on unintentional preferences.[3]

Since 1995, the theory of implicit bias has moved from the halls of academic debate to the parlance of everyday Americans with remarkable speed. Many people may recall that in the first presidential debate between Hillary Clinton and Donald Trump, Clinton responded to a question from Lester Holt regarding whether police were implicitly biased by stating, "Implicit bias is a problem for everyone, not just police."[4] Part of this visibility is owed to the fact that the IAT is easily accessible via the website Project Implicit, hosted by Harvard University.[5] In fact, according to Greenwald, the test has been taken over 17 million times on the Project Implicit website.[6]

All of this might lead one to believe that the concept of implicit bias and its relationship with discriminatory behaviors is well-settled. That is certainly not the case. Although many social psychologists agree that people often possess non-conscious preferences, the degree to which such biases play a role in deliberative behavior is hotly contested.[7] Further, many academics have specifically criticized the IAT itself as an ineffective metric of implicit bias.[8]

WORKPLACE TRAINING

Despite academic divergence over the impact of implicit bias in the workplace, corporations have shown a marked willingness to adopt training measures intended to combat the issue. The exercises are designed to facilitate uncovering employees' unconscious biases, in the hopes that by revealing certain stereotypes, people may begin to eliminate them.

A June 12, 2017 New York Times article entitled, "150 Executives Commit to Fostering Diversity and Inclusion" describes a new initiative called "C.E.O. Action for Diversity" in which the CEOs of many of the nation's largest and most recognizable companies have pledged to "support more inclusive workplaces" in part via a commitment to "implement and expand unconscious bias education."[9] The website for the initiative notes, "Unconscious bias education enables individuals to begin recognizing, acknowledging, and therefore minimizing any potential blind spots he or she might have, but wasn't aware of previously. We will commit to rolling out and/or expanding unconscious bias education within our companies in the form that best fits our specific culture and business. By helping our employees recognize and minimize their blind spots, we aim to facilitate more open and honest conversations. Additionally, we will make non-proprietary unconscious bias education modules available to others free of charge."[10]

According to the Wall Street Journal, one estimate by the FutureWork Institute predicts that unconscious bias training will be provided by more than 50 percent of large U.S. employers with diversity programs by 2019.[11]

Often, however, these corporate exercises designed to reveal and eliminate implicit biases have unintended consequences. In one noteworthy case, statements made by participants during a diversity training were used as direct evidence to support a class action suit alleging discrimination on the basis of sex.[12]

Beyond legal ramifications, the well-meaning exercises may also unintentionally reinforce certain negative attitudes simply by providing a mechanism to voice their existence. This is not to say that companies must shy away from providing diversity trainings to their employees; just that such trainings should be carefully evaluated to ensure that they are more helpful than harmful.[13]

In addition to large corporations, the ABA has also launched endeavors aimed at combatting implicit bias, including the aptly named, "Implicit Bias Initiative" created "To help combat implicit bias in the justice system."[14]

IMPLICIT BIAS THEORY IN EMPLOYMENT LAW

For many employment practitioners, the theory of implicit bias raises complex questions when applied to the traditional legal standards and theories of proof in discrimination cases. Implicit bias has encountered a mixed reception in the judiciary, primarily due to the difficulty of establishing a causal link between employer conduct and discriminatory action. Importantly, this link is closely tied to the requirement in Title VII disparate impact cases that plaintiffs identify a specific employment practice causing the disparate impact based on a protected category.[15] Where this causal link is more obvious, courts are more willing to accept that bias may have permeated individual decisions.

Courts Rejecting Implicit Bias

The lack of conclusive links between implicit bias and actual decision-making have left some courts wary of accepting evidence or expert testimony concerning implicit bias, even where disparities in employment outcomes exist. The Supreme Court most notably rejected the application of general evidence of implicit bias in Wal-Mart v. Dukes,[16] as did the Iowa courts in Pippen v. Iowa.[17]

In Wal-Mart v. Dukes, the Court rejected a proposed class of 1.5 million women nationwide who had been employed by Wal-Mart because it found social science evidence of implicit bias in the exercise of managerial discretion insufficient to support their allegations of discrimination.[18] The plaintiffs alleged, among other things, that Wal-Mart's policy of granting local managers discretion over pay and promotion decisions had caused a disparate impact on the basis of gender. To

establish commonality under Rule 23(a)(2) by showing significant proof that the company "operated under a general policy of discrimination," the plaintiffs relied on statistical evidence of pay and promotion disparities based on sex, anecdotal evidence of sex discrimination, and the testimony of sociologist Dr. William Bielby.[19] Dr. Bielby conducted a social-framework analysis of Wal-Mart's culture and personnel practices and concluded that Wal-Mart was "vulnerable to gender discrimination."[20] The Court found this testimony unpersuasive, noting that Dr. Bielby could not "determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal–Mart … [and at] his deposition … conceded that he could not calculate whether 0.5 or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking."[21] Based on this criticism, the Court found Dr. Bielby's analysis insufficient to establish commonality under Rule 23 and also expressed doubt that this evidence would survive a Daubert analysis.[22] The Court, in a footnote, recognized peer criticism of Dr. Bielby's report for "testif[ying] about social facts specific to Wal-Mart" with "no verifiable method for measuring and testing any of the variables that were crucial to his conclusions."[23] The Court stated that "[o]ther than the bare existence of delegated discretion, [the plaintiffs] have identified no 'specific employment practice'—much less one that ties all their 1.5 million claims together. Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice."[24] In this opinion, the Supreme Court raised substantial doubt as to whether social science analysis that the exercise of managerial discretion is vulnerable to bias, even when coupled with sex-based disparities in pay and promotions, can establish a policy of discrimination sufficient to establish commonality for a class of employees.[25]

Soon after, in Pippen v. Iowa, a class of African-American employees asserted Title VII and state law claims of disparate impact based on race in Iowa state court.[26] The plaintiffs alleged that the state of Iowa's discretionary, merit-based hiring and promotion practices systemically discriminated against African-American employees.[27] The plaintiffs submitted the testimony of two experts who opined that it was possible that implicit bias affected decision-makers and that implicit bias is so pervasive that it would affect any merit-based employment system, merely serving to legitimize inequality.[28] Neither of the experts opined on any specific employment decisions by the relevant Iowa officials.[29] For reasons similar to those in Dukes, the court rejected the use of such generalized social science evidence. The court criticized the plaintiffs' failure to identify a specific employment practice creating the racial disparity and echoed the idea that "[d]elegated discretion without a specific employment practice, even supported by adverse outcomes in ultimate hiring statistics" will not suffice.[30] Where the experts showed no evidence of how many discretionary employment decisions made in Iowa's hiring process resulted from unconscious bias, the court concluded the experts had not demonstrated that the "bottom-line figures were caused by implicit racial bias."[31]

Other courts have recently rejected the use of social science evidence in employment discrimination cases on evidentiary grounds under the standards of Daubert. In Jones v. Nat'l Council of Young Men's Christian Associations of the United States of America, the Northern District of Illinois refused to admit the plaintiffs' expert testimony on implicit bias theory during the class certification stage of a race discrimination case.[32] The court determined that general evidence on the existence of implicit bias could not be used to "educate the factfinder" because it was not "adequately tied to the facts of the case to be useful to a jury. Even opinions about general principles have to be logically related to the factual context of a case to be admissible—those general principles must still 'fit' the case."[33] Under similar circumstances, the Third Circuit concluded in Karlo v. Pittsburgh Glass Works, LLC that the trial court had not abused its discretion by excluding expert testimony on implicit bias theory in an age discrimination case on the grounds that it did not "fit" the facts of the case as required by Daubert.[34]

Courts Accepting Implicit Bias

Other jurisdictions have proven more receptive; notably these cases involve a single plaintiff and workplace.

In Thomas v. Eastman Kodak Co., the First Circuit reviewed the lower court's grant of summary judgment against a plaintiff claiming that she was discriminatorily laid off because of her race. In assessing whether the employer's articulated reason for the plaintiff's layoff was pretextual and whether the true reason was discrimination, the court noted that where "the employee has been treated disparately 'because of race,'" a disparate treatment claim survives "regardless of whether

the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias."[35] The court relied on disparate treatment case law and several law review pieces (accepting the existence of implicit bias) to support its statement that several types of biased thinking are "widely recognized."[36]

In Ahmed v. Johnson, the First Circuit reversed the trial court's grant of summary judgment to an employer in a single plaintiff case alleging the discriminatory denial of a promotion based on race, national origin, and religion.[37] Although not explicitly relying on implicit bias theory, the court noted that "[o]utright admissions of impermissible [discriminatory] motivation are infrequent" and "unlawful discrimination can stem from stereotypes and other types of cognitive biases, as well as from conscious animus."[38]

THE EEOC PERSPECTIVE

The EEOC has made its position regarding the role of unconscious bias in employment discrimination clear. According to its own guidance on race and color discrimination, the EEOC notes that intentional discrimination occurs "when an employment decision is affected by the person's race . . . includ[ing] not only racial animosity, but also conscious or unconscious stereotypes about the abilities, traits, or performance of individuals of certain racial groups."[39]

From 2008 to 2013, the EEOC implemented an initiative known as "Eradicating Racism and Colorism from Employment" or E-RACE. The purpose of the E-RACE initiative, according to the EEOC website, was to "retool [the EEOC's] enforcement efforts to address contemporary forms of overt, subtle and implicit bias."[40] As part of its E-RACE efforts, the EEOC committed to holding a series of public hearings to address implicit bias in employment.[41] Other examples of the EEOC's position on implicit bias, specifically with respect to race and color discrimination, include:

- In its recommended best practices for employers on how to prevent race and color discrimination, the EEOC recommends that employers "Establish neutral and objective criteria to avoid subjective employment decisions based on personal stereotypes or hidden biases."[42]
- According to the Compliance Manual, Section 15: Race & Color Discrimination, "Racially biased decisionmaking and treatment, however are not always conscious. The statute thus covers not only decisions driven by racial animosity, but also decisions infected by stereotyped thinking or other forms of less conscious bias."[43]

To a much more limited degree, the EEOC has also addressed implicit bias with respect to sex discrimination. Thus, in the EEOC's enforcement guidance for unlawful disparate treatment of workers with caregiving responsibilities, the agency notes, "Investigators should be aware that it may be more difficult to recognize sex stereotyping when it affects an employer's evaluation of a worker's general competence than when it leads to assumptions about how a worker will balance work and caregiving responsibilities. Such stereotyping can be based on unconscious bias, particularly where officials engage in subjective decision-making."[44]

Finally, a number of panelists speaking before the EEOC have recently integrated the concept of implicit bias into their testimony. Although those testifying do not speak on behalf of the agency, the comments made during public hearings may reflect the EEOC's own perspective and may even provide insight into future EEOC initiatives.

Thus, for example:

- On October 13, 2016, Marko J. Mrkonich, Shareholder with Littler Mendelson P.C., testified that "Big Data, used correctly, can be a powerful tool to eliminate overt and implicit bias from an employee selection process, and a misplaced, rigid adherence to outdated legal tests and standards cannot prevent this progress from taking place."[45]
- On May 18, 2016, Kweilin Ellingrud, Partner with McKinsey & Company testified regarding promoting diverse and inclusive workplaces in the tech sector. In his testimony, Ellingrud noted, "There are . . . companies that are using advanced analytics to understand and assess unconscious bias much more strongly throughout their people processes. They are searching for keywords in review memos and other sources for gender-skewed feedback on things like 'abrasive style' and 'lack of executive presence,' for women vs. men."[46]
- On March 16, 2016, Betsey Stevenson, Associate Professor of Economics and Public Policy at the

University of Michigan, argued that the proposed revisions to the EEO-1 Report would assist in "making employers aware of implicit bias."[47] However, for a contrary view, see Camille A. Olson's testimony on the proposed revisions to EEO-1.[48]

- On July 1, 2015, Rachel D. Godsil, Professor at Seton Hall University School of Law described implicit bias at length, noting, "Using experimental methods in laboratory and field studies, researchers have provided convincing evidence that implicit biases exist, are pervasive, are large in magnitude, and have real-world effects."[49]

- On April 15, 2015, Barbara Arnwine, President for the Lawyers' Committee for Civil Rights Under Law testified that "The sad fact is that the explicit discrimination that existed for decades, when state statutes and union rules expressly excluded African Americans from many job opportunities, has been succeeded by a new and enhanced set of barriers to employment for African Americans and other disadvantaged groups. These added barriers range from a simple double standard in the minds of hiring managers—implicit bias that unconsciously results in African Americans being required to demonstrate superior qualifications to be considered—to new examples of explicit criteria, like criminal background checks, credit background checks, unemployment bias, and entry-level tests of various abilities, many of which have a devastating impact to deprive African Americans of equal opportunity to obtain jobs and advance in their careers."[50]

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13 For example, trainings should focus on action and positive solutions rather than negative stereotypes.

14 Implicit Bias Initiative, American Bar Association, https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias.html (last visited June 20, 2017).

15 Title VII of The Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., Sec. 703(k)(1)(A) and (B), 42 U.S.C. 200e-2(k)(1)(A) and (B)..

16 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

17 Pippen v. Iowa, 854 N.W.2d 1 (Iowa 2014).

18 Note that the Supreme Court and First Circuit, decades ago, had rejected the attempt to use implicit biases as evidence of discrimination. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988) ("subconscious stereotypes and prejudices… may not prove discriminatory intent"); Jackson v. Harvard Univ., 721 F. Supp. 1397, 1432-33 (D. Mass. 1989), aff'd, 900 F.2d 464 (1st Cir. 1990), cert. denied, 498 U.S. 848 (1990) ("[d]isparate treatment analysis is concerned with intentional discrimination…. [S]ubconscious attitudes… are precisely the sort that disparate treatment analysis cannot and was never designed to police.")

19 Dukes, supra, 564 U.S. at 346, 353.

20 Id. at 346 (internal quotation marks and citation omitted).

21 Id. at 354 (internal quotation marks and citation omitted).

22 The standards for the admission of expert testimony are found in Federal Rule of Evidence 702 and the Supreme Court case, Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

23 Dukes, supra, 564 U.S. at 354 n.8.

24 Id. at 357.

25 In an opinion issued soon thereafter with very similar allegations and reasoning as Dukes, the Sixth Circuit echoed the logic of the Supreme Court. Davis v. Cintas Corp., 717 F.3d 476, 489 (6th Cir. 2013) (finding unpersuasive the plaintiffs' implicit bias theory evidence and finding the proposed class lacked commonality).

26 Ruling at 55-56, Pippen v. Iowa, 2012 WL 1388902 (Iowa Dist. Ct. Apr. 17, 2012) ("Pippen"), aff›d, 854 N.W.2d 1 (Iowa 2014).

27 Pippen at 1.

28 Pippen at 31.

29 Pippen at 52-54.

30 Pippen at 52.

31 Pippen at 53.

32 Jones v. Nat›l Council of Young Men›s Christian Associations of the United States of Am., 34 F. Supp. 3d 896, 900 (N.D. Ill. 2014).

33 Id. at 900.

34 Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61, 85 (3d Cir. 2017).

35 Thomas v. Eastman Kodak Co., 183 F.3d 38, 58 (1st Cir. 1999), cert. denied, 528 U.S. 1611 (2000).

36 Id. at 59-61.

37 Ahmed v. Johnson, 752 F.3d 490, 503 (1st Cir. 2014).

38 Id. at 503.

39 Questions and Answers About Race and Color Discrimination in Employment, The U.S. Equal Employment Opportunity Commission (May 16, 2006), https://www.eeoc.gov/policy/docs/qanda_race_color.html.

40 Significant EEOC Race/Color Cases, The U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/eeoc/initiatives/e-race/caselist.cfm (last visited August 2017).

41 E-RACE Goals and Objectives, The U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/eeoc/initiatives/e-race/goals.cfm (last visited August 2017).

42 Best Practices for Employers and Human Resources/EEO Professionals, The U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/eeoc/initiatives/e-race/upload/bestpractices-employers.pdf (last visited August 2017).

43 Compliance Manual, The U.S. Equal Employment Opportunity Commission (Feb. 8, 2011), https://www.eeoc.gov/policy/docs/race-color.html.

44 Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, The U.S. Equal Employment Opportunity Commission (Feb. 8, 2011) https://www.eeoc.gov/policy/docs/caregiving.html.

45 Written Testimony of Marko J. Mrkonich, Shareholder, Littler Mendelson P.C., The U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/eeoc/meetings/10-13-16/mrkonich.cfm (last visited August 2017).

46 Written Testimony of Kweilin Ellingrud, Partner, McKinsey & Company and Co-Author of Power of Parity Work on the Gender Pay Gap, The U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/eeoc/meetings/5-18-16/ellingrud.cfm (last visited August 2017).

47 Written Testimony of Betsey Stevenson, Associate Professor of Economics and Public Policy, Ford School of Public Policy, University of Michigan, The U.S. Equal Employment Opportunity Commission, https://www1.eeoc.gov/eeoc/meetings/3-16-16/stevenson.cfm?renderforprint=1 (last visited August 2017).

48 Written Testimony of Camille A. Olson, Partner, Seyfarth Shaw LLP, The U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/eeoc/meetings/3-16-16/olson.cfm (last visited August 2017).

49 Written Testimony of Rachel D. Godsil, Professor, Seton Hall University School of Law, The U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/eeoc/meetings/7-1-15/godsil.cfm (last visited August 2017).

50 Written Testimony of Barbara Arnwine, President, Lawyers' Committee for Civil Rights Under Law, The U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/eeoc/meetings/4-15-15/arnwine.cfm (last visited June 20, 2017).

From Michael Clayton to Michael Cohen: Ethical Considerations for “Fixers”

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NYSBA Labor & Employment Law
Fall Section Meeting, Montreal

YOU CAN'T MAKE THESE THINGS UP: ETHICAL DILEMMAS EXPOSED BY ALLEGED CONDUCT OF MICHAEL COHEN AND MICHAEL AVENATTI*

October 13, 2018 (Saturday)
11:05 a.m. – 11:55 a.m.

PRESENTERS

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INTRODUCTION:

Most of us have been bemused by the headlines for the past year, including the following:

- **Michael Cohen: When does Advocacy become unethical?**

  Gary Alt: Michael Cohen: When does advocacy become unethical?, https://stories.avvo.com/news/michael-cohen-advocacy-unethical.html (last visited Sept. 11, 2018).

- **Public Citizen files ethics complaints against Trump Lawyer Michael Cohen**

  Fredreka Schouten: Public Citizen files ethics complaints against Trump lawyer Michael Cohen,https://www.usatoday.com/story/news/politics/2018/05/10/public-citizen-against-donald-trump-lawyer-michael-cohen/599750002/ (last visited July 25, 2018).

- **Cohen Threatened the Onion in 2013 over Satirical Trump Article**

  Morgan Gstalter: Cohen threatened The Onion in 2013 over satirical Trump article, http://thehill.com/homenews/media/388740-cohen-threatened-the-onion-in-2013-over-satirical-trump-article (last visited Sept. 11, 2018).

- **Trump Lawyer Arranged $130,000 Payment for Adult-Film Star's Silence**

  Michael Rothfeld and Joe Palazzolo: Trump Lawyer Arranged $130,000 Payment for Adult-Film Star's Silence, https://www.wsj.com/articles/trump-lawyer-arranged-130-000-payment-for-adult-film-stars-silence-1515787678 (last visited July 27, 2018).

- **Taking to Twitter, Trump says the FBI Raid Targeting his Lawyer violated Attorney-Client Privilege**

John Wagner and Devlin Barrett: Taking to Twitter, Trump says the FBI raid targeting his lawyer violated attorney-client privilege, https://www.washingtonpost.com/news/post-politics/wp/2018/04/10/taking-to-twitter-trump-says-the-fbi-raid-targeting-his-lawyer-violated-attorney-client-privilege/ (last visited Sept. 11, 2018).

- **In Tense Exchange, Legal Scholar Alan Dershowitz accuses Michael Avenatti of Ethics Lapse**

  Josiah Ryan: In tense exchange, legal scholar Alan Dershowitz accuses Michael Avenatti of ethics lapse, https://www.cnn.com/2018/07/28/politics/dershowitz-accuses-avenatti-of-ethics-lapse-cnntv/index.html (last visited July 30, 2018).

While engrossed in these fascinating articles, the bottom line is that we, as attorneys, are bound by the same rules that cover the actions of Michael Cohen and Michael Avenatti. Michael Cohen is licensed to practice law in New York. Michael Avenatti is licensed to practice law in California, but for purposes of this article, we will particularly focus on the New York State Rules of Professional Conduct, 22 NYCRR 1200.0 *et seq*.

THE CAST OF CHARACTERS:

Michael Avenatti

Michael Avenatti has a law office in California. He is best known of late for representing Stormy Daniels, whose real name is Stephanie Clifford (hereafter referred to as "Daniels"). In 2007, Mr. Avenatti formed the law firm Eagan Avenatti, LLP (formerly known as Eagan O'Malley & Avenatti, LLP) with offices in Newport Beach, Los Angeles and San Francisco, California.

In 2017, a Florida man named Gerald Tobin alleged Avenatti failed to pay him $28,700 for private investigatory work. As a result, Mr. Avenatti's firm was abruptly forced into bankruptcy. In 2018, Mr. Avenatti's law firm was subjected to a $10 million judgment in U.S. bankruptcy court. Mr. Avenatti has also defaulted on a $440,000 judgment in back taxes, penalties, and interest that he was personally obligated to pay under another bankruptcy settlement. In June 2018, the former partner filed a motion in U.S. bankruptcy court asking for a lien on any and all legal fees Mr. Avenatti's firm might collect, up to $10 million, from clients in 54 cases including his representation of Stormy Daniels.

Michael Cohen

Michael Cohen began practicing personal injury law in New York in 1992, working for Melvyn Estrin in Manhattan. As of 2003, Cohen was an attorney in private practice and CEO of MLA Cruises, Inc., and of the Atlantic Casino.

In 2003, when Cohen was a candidate for New York City Council, he provided a biography to the New York City Campaign Finance Board for inclusion in its voters' guide, listing him as co-owner of Taxi Funding Corp. and a fleet of New York City taxicabs numbering over 200. As of 2017, Cohen was estimated to own at least 34 taxi medallions through 17 limited liability companies (LLCs).

Until April 2017, "taxi king" Evgeny Freidman managed the medallions still held by Mr. Cohen; this arrangement ended after the city's Taxi and Limousine Commission decided not to renew Freidman's licenses. Between April and June 2017, the New York State Department of Taxation and Finance filed seven tax warrants against Cohen and his wife for $37,434 in unpaid taxi taxes due to the MTA.

In 2006, Mr. Cohen was a lawyer at the law firm Phillips Nizer LLP. He worked at the firm for about a year before taking a job at The Trump Organization.

While at the company, Mr. Cohen became a close confidant to Donald Trump, maintaining an office near Mr. Trump at Trump Tower. Mr. Cohen aided Mr. Trump in his struggle with the condominium board at the Trump World Tower, which led to Mr. Trump successfully obtaining control of the board.

In 2008, Mr. Cohen was named COO of the MMA promotion Affliction Entertainment.

Approximately three weeks before the 2016 election, Mr. Cohen set up a limited liability corporation, called Essential Consultants, LLC.

THE ARTICLES:

In February 2018, the Wall Street Journal reported that:

- The month before, Michael Cohen had sent a written statement in Daniels's name to the Wall Street Journal, denying that she had a "sexual and/or romantic affair" with President Trump or "received hush money" from Trump; and
- Issued his own statement, in his capacity as Trump's lawyer, that President Trump "vehemently denies" any affair with her.

On February 13, 2018, Michael Cohen told the press that he paid the Stormy Daniels settlement out of his own pocket. He stated that he had not been reimbursed by the Trump campaign either directly or indirectly. Maggie Haberman: Michael D. Cohen, Trump's Longtime Lawyer, Says He Paid Stormy Daniels Out of His Own Pocket, https://www.nytimes.com/2018/02/13/us/politics/stormy-daniels-michael-cohen-trump.html (last visited July 27, 2018).

In March, 2018, New York magazine reported that Daniels alleged that the October 2016 nondisclosure agreement, signed in exchange for $130,000.00 was void, because Michael Cohen had discussed the payment publicly and because he had used "intimidation and coercive tactics" to force her to sign a false statement denying the relationship with now President Trump. Margaret Hartmann: As Trump's Attorney, Michael Cohen's Loyalty Matters More Than His Lawyering, http://nymag.com/daily/intelligencer/2018/03/trump-values-michael-cohens-loyalty-more-than-his-lawyering.html (last visited July 27, 2018).

On April 16, 2018, Michael Cohen disclosed that he had been consulted by Sean Hannity. This disclosure was made after Judge Kimba Wood ruled that the attorney-client privilege did not prohibit Cohen from revealing the identity of his third client. Up until that point Cohen had maintained that his third client wished to remain anonymous. Paul Farhi: Sean Hannity had a lot to say about Michael Cohen lately. But he left a few things out., https://www.washingtonpost.com/lifestyle/style/sean-hannity-had-a-lot-to-say-about-michael-cohen-lately-but-he-left-a-few-things-out/ (last visited July 25, 2018).

In March 2018 and late May 2018, numerous articles appeared on the Internet concerning Mr. Cohen's alleged threats to various parties, ostensibly made in his capacity as Trump's "fixer", including the following:

a. In 2013, after the Onion's satirical post regarding Trump, Cohen sought to "fix" the matter by informing the Onion's staff that their "commentary goes way beyond defamation and, if not immediately removed, I will take all actions necessary to ensure your actions do not go without consequence. Guide yourself accordingly." Morgan Gstalter: Cohen threatened The Onion in 2013 over satirical Trump article, http://thehill.com/homenews/media/388740-cohen-

threatened-the-onion-in-2013-over-satirical-trump-article (last visited Sept. 11, 2018).

b. In 2015, Cohen threatened the Daily Beast and its reporter over the phone. With respect to the reporter individually, Cohen said "I'm warning you, tread very [expletive] lightly because what I'm going to do to you is going to be [expletive] disgusting. Do you understand me? Don't think you can hide behind your pen because it's not going to happen." Later in the conversation, Cohen went on to attack the Daily Beast as well, saying "it's going to be my absolute pleasure to serve you with a $500 million lawsuit, like I told - I did to Univision." (referencing Trump's 2015 lawsuit against Univision for dropping the Miss Universe pageant). Christianna Silva: Michael Cohen threatened a journalist and said spousal rape isn't real in 2015, https://news.vice.com/en_us/article/xwmab7/michael-cohen-threatened-a-journalist-and-said-spousal-rape-isnt-real-in-2015/ (last visited Sept. 11, 2018).

c. In 2016, after a Harvard student pranked Trump during the campaign, Cohen called the student threatening expulsion from Harvard, as well as a lawsuit. Tim Mak: Listen: How Michael Cohen Protects Trump By Making Legal Threats, https://www.npr.org/2018/05/31/615843930/listen-how-michael-cohen-protects-trump-by-making-legal-threats (last visited Sept. 11, 2018).

d. Daniels's attorney, Avenatti, stated in an MSNBC interview that his client had been threatened with physical harm, though he did not name Cohen. Stormy Daniels' attorney says his client was threatened physically,

https://www.msnbc.com/morning-joe/watch/stormy-daniels-attorney-says-his-client-was-threatened-physically-1187514947648/ (last visited Sept. 11, 2018).

This article will explore the ethical issues raised by some of these headlines, and provide you with

ETHICAL DILEMMA ONE: WHAT CAN AND SHOULD AN ATTORNEY SAY AND WHAT SHOULD AN ATTORNEY AVOID SAYING IN THE CONTEXT OF REPRESENTING A CLIENT?

guidance.

A. The first ethical issue arises in the context of Michael Cohen's representation that Daniels had denied having an affair with President Trump and denied receiving "hush money," as well as his own representation that President Trump "vehemently" denied any affair. What ethics rules govern these types of disclosures?

First, if any part of either statement is untrue or the attorney believes the client's representation to be untrue, it implicates N.Y. Rules of Professional Conduct, Rules 8.4, 4.1, 3.1, and 4.4.

Rule 8.4 (c) provides that a lawyer or law firm shall not: (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 4.1, Truthfulness in Statements to Others, states: **"[i]n the course of representing a client, a lawyer shall not knowingly make**

a false statement of fact or law to a third person. The comment to Rule 4.1 elaborates on what may constitute a misrepresentation:

> "A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. As to dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, *see* Rule 8.4." NY ST RPC Rule 4.1 cmt. 1, misrepresentation (McKinney)

Rule 4.1 applies in the limited context of representing a client. Rule 8.4 (and each of its subsections) addresses a lawyer's conduct at any time, whether or not the lawyer is concurrently representing a client. See *In Re Eagan*, 142 A.D.3d 182 (2d Dept. 2016) (attorney suspended for two years after not filing personal tax returns for ten years); *In re Jones* 118 A.D.3d 41 (2d Dept. 2014) (attorney failed to pay back loan made to attorney by a client, and the attorney's testimony conflicted with his prior written representations to the grievance committee regarding moving funds in his escrow account).

In addition, knowingly asserting a material false statement may constitute frivolous conduct in the context of litigation. **Rule 3.1. Non-Meritorious Claims and Contentions, prohibits frivolous conduct and provides that (b) A lawyer's conduct is "frivolous" for purposes of this Rule if: […] (3) the lawyer knowingly asserts material factual statements that are false (in the context of bringing or defending a proceeding). Similar to Rule 4.1 and** in contrast with Rule 8.4, Rule 3.1 is limited to addressing a lawyer's conduct in the context of bringing or defending a proceeding.

In our scenario, it is unclear whether Mr. Cohen's representations were made in the context of bringing or defending a proceeding. It was not until March 6, 2018, that Ms. Daniels

brought a lawsuit alleging that the "hush agreement" was of no force and effect. She noted in ¶ 27 of her Complaint, that "at no time did Mr. Cohen claim Ms. Clifford did not have an intimate relationship with Mr. Trump. Indeed, were he to make such a statement, it would be patently false". *Clifford v. Trump, et al.*, Case No. BC696568 (Sup. Ct. Cal.), Complaint at ¶ 27, http://documents.latimes.com/stormy-daniels-donald-trump-complaint/ (last visited Sept. 12, 2018).

Rule 3.4(a)(4) Fairness to Opposing Party and Counsel, provides that: A lawyer shall not […] knowingly use perjured testimony or false evidence." Rule 3.4(a)(5) precludes an attorney from participating in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false." While the wording of Rule 3.4 is consistent with the inference that the Rule is applicable while a proceeding is pending, the context of Rule 3.4 overall indicates that it applies where opposing parties exist. It is further applicable to "any conduct that falls within [the Rule's] general terms that is a crime, an intentional tort or prohibited by rule or a ruling of a tribunal." NY ST RPC Rule 3.4 cmt. 1 (McKinney). In some cases, such conduct could occur where legal proceedings were foreseeable. NY ST RPC Rule 3.4 cmt. 2 (McKinney). Related Rule 3.3 deals specifically with candor/truthfulness "before a tribunal", which may include virtually any adjudicatory body, such as an arbitrator or an administrative agency operating in an adjudicatory capacity. The comments indicate that "[i]t also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client has offered false evidence in a deposition." NY ST RPC Rule 3.3 cmt. 1 (McKinney).

Lawyers have obligations to prevent the use of false information or frivolous lawsuits when considering whether to withdraw from representation of a client as well. Rule 1.16 (a) provides that a lawyer shall not accept employment on behalf of a person if the lawyer knows or reasonably should know that such person wishes to:

1) **Bring a legal action, conduct a defense, or assert a position in a matter, or otherwise have steps taken for such person, merely for the purpose of harassing or maliciously injuring another person.** NY ST RPC Rule 1.16(a) (McKinney).

If the lawyer is already representing the client, then the lawyer "shall withdraw from" representing the client when:

4) **the lawyer knows or reasonably should know that the client is bringing the legal action, conducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.** NY ST RPC Rule 1.16(a) (McKinney).

This does not mean that it is unethical for attorneys to engage in conduct meant to flush out whether testimony is truthful. For example, it has been held that it is acceptable for an attorney to employ an investigator for the purpose of befriending a key prosecution witness in order to ascertain truthfulness of testimony. N.Y.St.Bar.Assn.Comm.Prof.Eth. Op. 75-402. In the age of "friending" in the social media context, the issue addressed by Op. 75-402 becomes complicated by the ability to hide behind the wall of social media. While an attorney may join a social media network for the purpose of obtaining publicly available information regarding a witness, the attorney (or attorney's agent) may not "friend" or communicate with an

unrepresented opposing party without being truthful about his or her identity. N.Y.St.Bar.Assn.Comm.Prof.Eth. Op. 2010-02.

B. The second ethical issue presented by Michael Cohen's alleged statements is whether it was unethical for him to disclose Sean Hannity's identity.

Most attorneys believe that the identities of their clients are confidential, and there are many occasions where a client may not want his or her identity or the fact of representation known. And, as we all know, attorneys are obligated to maintain the confidences of their clients under most situations.

There are a number of ethics rules dealing with the obligation to maintain the confidences of clients. Rule 1.6: **Confidentiality of Information,** governs the disclosure of information protected by the professional duty of confidentiality. "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." NY ST RPC Rule 1.6 (McKinney). Other rules also deal with confidential information: See "Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients; Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client; Rule 1.14(c) for information relating to representation of a client with diminished capacity; Rule 1.18(b) for the lawyer's duties with respect to information provided to the lawyer by a prospective client; Rule 3.3 for the lawyer's duty of candor to a tribunal; and Rule 8.3(c) for information gained by a lawyer or judge while participating in an approved lawyer assistance program." NY ST RPC

Rule 1.6 cmt. 1 (McKinney). As of August 24, 2018, New York Judiciary Law Section 498(2) has been amended to protect communications between lawyer referral services and prospective clients "on the same basis as the privilege provided by law for communications between attorney and client." N.Y. Judiciary Law § 498 (McKinney).

However, given Judge Wood's finding and the weight of authority in general, Cohen's obligation to maintain his client's identity in confidence at his client's request was overridden by a court order to the contrary.

As Judge Kimba Wood found, the Second Circuit has ruled that generally, disclosure of a client's identity is not covered by an attorney-client privilege. *Vingelli, v. United States*, 992 F.2d 449 (2d Cir. 1993) ("We have determined that in the absence of special circumstances client identity and fee arrangements do not fall within the attorney-client privilege because they are not the kinds of disclosures that would not have been made absent the privilege and their disclosure does not incapacitate the attorney from rendering legal advice. *See In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 247 (2d Cir. 1944) (en banc), *cert. denied*, 475 U.S. 1108, 106 S. Ct. 1515, 89 L. Ed. 2d 914 (1986); *accord In re Shargel*, 742 F.2d 61, 62 (2d Cir. 1984); *Colton v. United States*, 306 F.2d 633, 637-38 (2d Cir. 1962), *cert. denied*, 371 U.S. 951, 83 S. Ct. 505, 9 L. Ed. 2d 499 (1963); *United States v. Pape*, 144 F.2d 778, 782-83 (2d Cir. 1944), *cert. denied*, 323 U.S. 752, 65 S. Ct. 86, 89 L. Ed. 602 (1944). Appellant believes "special circumstances exist in the case at hand because revealing the sought-after client information necessarily would reveal the purpose for which the client consulted him."). *Vingelli, v. United States*, 992 F.2d 449 (2d Cir. 1993).

This conclusion flows from almost half a century old case law in the Second Circuit, interpreting the scope of privileged information. *See Colton v. United States*, *supra*, 306 F.2d

633, 637 (2d Cir. 1962). The *Colton* court held that, "although the word 'communications' must be broadly interpreted in this context, *see* 8 Wigmore, Evidence § 2306 (McNaughton rev. 1961), the authorities are clear that the privilege extends essentially only to the substance of matters communicated to an attorney in professional confidence. Thus, the identity of a client, or the fact that a given individual has become a client are matters which an attorney normally may not refuse to disclose, even though the fact of having retained counsel may be used as evidence against the client. *United States v. Pape*, 144 F.2d 778 (2d Cir. YEAR), *cert. denied*, 323 U.S. 752, 65 S.Ct. 86, 89 L.Ed. 602 (1944); *Behrens v. Hironimus*, 170 F.2d 627 (4th Cir. 1958); *Goddard v. United States*, 131 F.2d 220 (5th Cir. 1942); *People ex rel. Vogelstein v. Warden*, 150 Misc. 714, 270 N.Y.S. 362 (Sup.Ct.1934), *aff'd mem*. 242 App. Div. 611, 271 N.Y.S. 1059 (1st Dept. 1934); 8 Wigmore, Evidence § 2313 (McNaughton rev. 1961); McCormick, Evidence § 94 (1954)".

The *Vingelli* court noted an "exception to the notion that client identity and fee arrangements must be revealed, called the substantial disclosure exception. *See Colton*, 306 F.2d at 637. That exception states that where the substance of a confidential communication has already been revealed, but not its source, identifying the client constitutes a prejudicial disclosure of a confidential communication. *Id*." Where special circumstances did not implicate either of the recognized exceptions, no reason to depart from the general rule requiring disclosure existed. The court also noted that other circuits have ruled that client identity or fee information is protected by the privilege under certain circumstances. *Vingelli, v. United States*, 992 F.2d 449 (2d Cir. 1993). See also *Matter of Jacqueline F.*, 47 N.Y.2d 215 (1979) (attorney could be compelled to disclose client's address because of deliberate attempt by client to avoid court's mandate).

One of the earliest cases defining a special circumstances exception was *United States v. Hodge & Zweig*, 548 F.2d 1347, 1353 (9th Cir. 1977), in which the Ninth Circuit stated an exception to the general rule of client identity disclosure when there is a strong probability that such disclosure would implicate the client in the very activity for which legal advice was sought. Currently most circuits considering the issue have found special circumstances warranting a privilege when the disclosure of the information would be tantamount to revealing a confidential communication. *See, e.g., Tornay v. United States*, 840 F.2d 1424, 1428 (9th Cir. 1988); *In re Grand Jury Subpoena (DeGuerin),* 926 F.2d 1423, 1431 (5th Cir. 1991); *In re Grand Jury Subpoenas (Anderson),* 906 F.2d 1485, 1491 (10th Cir. 1990); *see also* Seymour Glanzer and Paul R. Taskier, Attorneys Before the Grand Jury: Assertion of the Attorney-Client Privilege To Protect a Client's Identity, 75 J.Crim.L. & Criminology 1070 (1984) (discussing exceptions to the general rule permitting disclosure of client identity).

The Ninth Circuit's formulation in *Hodge & Zweig* that a strong probability that disclosure would implicate the client in the very criminal activity for which legal advice was sought was later limited by the Ninth Circuit. *See In re Osterhoudt*, 722 F.2d 591, 593-94 (9th Cir. 1983). *Osterhoudt* 's gloss on *Hodge & Zweig* limited the protection of a client's identity to those circumstances where its disclosure would in substance be a disclosure of the confidential communication between the attorney and client. This view has become known as the confidential communication exception, recognized in *In re Shargel*, 742 F.2d at 62-63, and with which the other circuits cited above agree.

The rule governing the unprivileged nature of client identification implicitly accepts the fact that a client might retain or consult an attorney for numerous reasons. Thus, the fact that disclosure of an attorney’s client's identity might suggest the possibility of wrongdoing on his or

her part does not affect analysis of whether disclosure would reveal a confidential communication.

Therefore, in the Michael Cohen scenario, the exception does not apply and Judge Wood correctly required the disclosure of Hannity's identity.

The next ethics issue concerns statements Michael Cohen allegedly made to intimidate others.

C. The next ethics issue concerns threatening statements Michael Cohen allegedly made to intimidate others.

Threats may implicate Rule 4 et seq. While it has been widely reported that he made "threats", it is necessary to probe what is meant by the term "threats". For example, in a lawsuit against her former attorney K Davidson, for breach of his ethical obligations under California law, the only incident of intimidation by Cohen that Daniels referenced is that he initiated an arbitration proceeding against her to enforce the nondisclosure agreement.

Rule 4.4 Provides that: (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person or use methods of obtaining evidence that violate the legal rights of such person. N.Y.County 607 (1972).

Threatening criminal prosecution is one side of the spectrum; other less severe conduct may be permissible.

New York Rule 3.4(e), provides that a "lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter**.**" The rationale for the prior Disciplinary Rule (the identically worded DR 7-105) appeared in Ethical Consideration 7-21:

> "The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system." NYC Eth. Op. 1995-13 (N.Y.C.Assn.B.Comm.Prof.Jud.Eth.), 1995 WL 877125.

The current Comments to New York Rule 3.4 do not contain this rationale.

While this Rule does not prohibit a lawyer from reporting a crime committed by an adverse party for the purposes of having it prosecuted, it does prohibit threatening to commence or commencing prosecution solely as a means to secure a settlement. *See In re Glavin*, 107 A.D.2d 1006 (3d Dept. 1985); NYC Eth. Op. 1995-13 (N.Y.C.Assn.B.Comm.Prof.Jud.Eth.), 1995 WL 877125. An opinion by the New York State Bar Association's Committee on Professional Ethics, NYSBA Formal Opinion 772 (2003), under the prior Disciplinary Rules, gives a very literal reading to this provision. There, the Committee affirmed that, as the language suggests, the prohibition only applies if the "sole purpose" behind the threat or commencement of prosecution is to secure a civil settlement. If some other purpose is evident, a violation will not be found. NY Eth. Op. 772 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2003 WL 23099784.

Oddly enough, it is permissible for the lawyer representing the party subject to criminal charges to raise the issue and seek as part of any civil settlement that criminal charges not be filed. It is similarly permissible for the other party's attorney to negotiate over such a restriction once this door has been opened by the potential criminal defendant or his counsel. NYC Eth. Op. 1995-13 (N.Y.C.Assn.B.Comm.Prof.Jud.Eth.), 1995 WL 877125.

Although a potential criminal defendant in New York may ethically request the other party to agree to forebear criminal prosecution as a condition of settlement, New York City Formal Opinion 1995-13 makes clear that such agreements may not in fact be enforceable by either party. As the Committee in that decision noted:

> "Should the aggrieved party choose to report the defendant's conduct after the defendant has performed pursuant to the settlement, the defendant will not be able either to prevent a prosecution or to obtain damages. In the event of non-performance of settlement conditions by the potential defendant, on the other hand, the potential plaintiff may not be permitted by the courts to recover on the settlement because it contains a non-reporting agreement."

Id. Therefore, a lawyer negotiating a settlement containing a non-reporting agreement should disclose to the client that the settlement may ultimately be unenforceable by either party due to the presence of such a provision. At least two other jurisdictions which have provisions similar to that found in New York have reached a similar conclusion. D.C. Bar Formal Opinion 339; Wisconsin Opinion E-87-5 (1987).

A similar prohibition against threats of criminal prosecution to gain advantage in a civil matter does not exist under the Model Rules of Professional Conduct, as applicable in most other states. ABA Formal Op. 92-363 (1992); ABA Formal Op. 94-383 (1994); MD Jud. Eth. Comm. Op. 03-16 (2003). Thus, in states adhering to the Model Rules, a lawyer is not prohibited from threatening criminal action to gain advantage in a civil suit provided the criminal matter is related to the civil claim, the lawyer has a well-founded belief that the civil and criminal claims are warranted by the facts, and the lawyer does not attempt to suggest any improper influence over the criminal process. ABA Formal Op. 92-363; see also DE Jud. Eth. Adv. Comm. Op. JEAC 1995-2 (1995) (imposing additional requirement that the threatening attorney actually intends to go forward with the criminal charges in the event the civil dispute is not

resolved).With respect to avoiding criminal implications, care must be taken that the party agreeing to forebear reporting not agree to, nor the defendant soliciting that forbearance seek, an agreement that obligates the victim to destroy evidence, fail to cooperate with law enforcement authorities if such cooperation is requested, or suppress or alter evidence that the lawyer or client is under a legal obligation to produce. Entering into such agreements may themselves be criminal acts under New York law. *See, e.g.,* N.Y. Penal Law §§ 215.40 (Tampering with Physical Evidence); 177.05/175.10 (Falsifying Business Records); 205.50 (Hindering Prosecution) 215.50 (Criminal Contempt) and 215.00 (Bribing a Witness). In addition, lawyers for both parties entering into a settlement agreement which contains an agreement not to report a crime must be sure that the agreement does not run afoul of N.Y. Penal Code § 215.45 (Compounding a Crime). As the New York City Committee on Professional and Judicial Ethics observed:

> "[T]he legality of every agreement not to report a crime is controlled by N.Y. Penal Law § 215.45, Compounding a Crime, which forbids offering or accepting "any benefit" upon an understanding that, in return, criminal conduct will not be reported. The statute provides an affirmative defense that excludes from criminal liability a person who offers or accepts a benefit upon a reasonable belief that the benefit was no more than the amount due as restitution or indemnification for the harm caused by the crime. This law places strict limits upon anyone who wishes to negotiate a civil settlement that includes an agreement not to report criminal conduct. First, one must have a reasonable belief that facts in the case support a criminal charge. Second, any civil claim that is settled must arise from the same facts that give rise to the criminal charge. Third, any benefit conferred may be no more than the amount reasonably believed to constitute restitution or indemnification for the crime."

NYC Eth. Op. 1995-13 (N.Y.C.Assn.B.Comm.Prof.Jud.Eth.), 1995 WL 877125 (citations omitted). Likewise, proof of a threat to present criminal charges unless specified action is performed constitutes a prima facie case of criminal coercion, N.Y. Penal Law §135.60, and if

property is actually obtained, it constitutes a prima facie case of extortion, N.Y. Penal Law § 155.05. In both cases, an affirmative defense similar to that available to a charge of Compounding a Crime exists. *See* N.Y. Penal Law §§ 135.75 and 155.12(a). Thus, it is important that a party agreeing to forego filing charges not attempt to secure more than proper restitution in exchange for doing so.

With respect to threatening disciplinary charges, ABA Formal Op. 94-383 (1994) concluded that a lawyer may not threaten to file a disciplinary complaint or report against opposing counsel solely to obtain an advantage in a civil case. Although this type of action is not per se prohibited by the Model Rules of Professional Conduct, when the opposing counsel's misconduct raises a serious question about his honesty, trustworthiness or fitness as a lawyer, the lawyer has an absolute obligation to report the opposing counsel under Model Rule 8.3(a). ABA Formal Op. 94-383 (1994). New York's Rules of Professional Conduct contain a similar provision in New York Rule 8.3(a). Under both the Model Rules and New York Rules, the reporting obligation only extends to information which is not confidential information. The ABA Committee has concluded that threatening to report such a violation if settlement is not reached is impermissible because it suggests that if a settlement is reached, reporting (even if otherwise required) will not occur. The ABA Committee also found that a threat of disciplinary action against opposing counsel is unethical, even in cases where reporting is not required, if "the misconduct is unrelated to the civil claim, the disciplinary charges would not be well-founded in fact and law, or if the threat has no substantial purpose or effect other than to embarrass, delay, or burden opposing counsel or his client, or to prejudice the administration of justice." ABA Formal Op. 94-383 (1994), s*ee also* Nassau County Opinion 98-12 (1998) (reaching a similar conclusion).

NYSBA Formal Opinion 772 casts some doubt on a similar conclusion in New York. There, the Committee on Professional Ethics narrowly construed the identical predecessor of Rule 3.4 (DR 7-105) as applying only to the filing of "criminal charges." While it noted that other bodies (including the ABA and Nassau County) had reached a conclusion that the prohibition extended to other types of non-criminal disciplinary charges, it concluded that "the threatened or actual filing of complaints with, or the participation in proceedings of, administrative agencies or disciplinary authorities lies outside the scope of DR 7-105(a)." NY Eth. Op. 772 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2003 WL 23099784. The facts before the Committee did not involve attorney disciplinary charges, but rather dealt with the filing of professional disciplinary charges against an adversary-broker under the rules of the New York Stock Exchange. Whether a different result would have been reached if attorney disciplinary charges had been at issue is unclear. Given the fact that Opinion 772 explicitly disagreed with Nassau County Opinion 98-12, and the Nassau County matter did involve an attorney disciplinary complaint, it would appear that, at least in the eyes of the NYSBA Committee, DR 7-105 did not, and New York Rule 3.4 presumably does not, extend that far.

While New York City Formal Opinion 2015-5 also applied a literal reading to Rule 3.4, resulting in a narrow application, like ABA Formal Opinion 94-383, it concluded that other rules could be violated by the threat to file non-criminal charges in appropriate circumstances. NY Eth. Op. 2015-5 (N.Y.C.Assn.B.Comm.Prof.Jud.Eth.) 2015 WL 4197679.

Applying this analysis to the allegations made against Michael Cohen demonstrates that a great deal more information is necessary before it can be determined whether any unethical coercive techniques were used in any of the scenarios identified by media headlines. It is likely that an allegation that he threatened arbitration, such as the allegation made by Daniels in an

action against her former attorney, Keith Davidson, are not sufficient to demonstrate any unethical conduct.

ETHICAL DILEMMA TWO: WHEN DOES A LAWYER'S CONDUCT IN MAKING PAYMENTS ON BEHALF OF A CLIENT BECOME UNETHICAL

- In February, 2018, the media reported that Michael Cohen paid Daniels, $130,000 out of his own pocket to prevent her from talking to the press about an alleged encounter with President Trump.
- The Wall Street Journal reported that Cohen wired Daniels the funds on October 27, 2016. Cohen had not been able to reach Trump before making the transfer. When reporters asked President Trump about the payment in April 2018, he denied knowing about the payment.
- In response to a complaint filed with the Federal Election Commission by Common Cause, Cohen alleged that he made the $130,000 settlement payment to Stormy Daniels out of his own pocket to prevent her from talking to the press about her alleged relationship with now President Trump. Common Cause claimed that this amounted to a campaign contribution beyond the $2700 maximum contribution permitted for individuals. The Federal Election Campaign Act, 52 U.S.C. §30101 et seq. regulates contributions to federal political campaigns but whether this constituted an illegal campaign contribution will not be addressed in this article. [1] If, on the other hand, the payment was a loan, it would not violate the campaign contribution laws but might violate the ethics rules.

[1] On August 21, 2018, Mr. Cohen waived indictment and pleaded guilty to eight (8) counts of a federal information. He will be sentenced in December, 2018. Among other matters, he admitted to unlawful and excessive campaign contributions in advancing payments to two unnamed women to assure that they did not publicize damaging allegations before the 2016 presidential election and therefore influence that election.

Rule 1.8 (e) limits an attorney's ability to advance funds on behalf of a client. **While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client** (with several exceptions). One of the exceptions is that a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter. NY ST RPC Rule 1.8(e).

The first question in working through our scenario, then, is whether the payment constituted financial assistance to now President Trump. Some have suggested that it does not, that President Trump did not need the money, and could have paid it himself.

A corollary question is whether paying a settlement constitutes a permissible advancing of costs or expenses of litigation. This depends on whether there was any litigation such that the settlement payment could arguably constitute an expense of litigation. This, in turn, requires an analysis of the facts, which are complicated by the related campaign.

According to the August 18, 2018 federal information filed against Mr. Cohen, in October 2016 an agent for an adult film actress informed an Editor that she was willing to make public statements and confirm on the record her alleged past affair with an individual unidentified in the Information. The Editor put him in touch with Michael Cohen, and put Cohen in touch with an attorney representing the Woman, and Cohen "negotiated a $130,000 agreement with Attorney -1 to himself purchase Woman-2's silence, and received a signed confidential settlement agreement and a separate side letter agreement from the Woman. *U.S. v. Michael Cohen*, Case No.: 1:18-cr-00602-WHP (Doc. 2).

It is important to understand the reason why Rule 1.8(e) (which is based on the American Bar Association Model Rules of Professional Conduct) exists. The ABA/BNA Lawyers Manual on Professional Conduct, sums up the underlying reason for Rule 1.8's prohibition on attorney

advances to clients: "the rules can also be said to protect lawyers from client requests for help, and also from the competition from other lawyers who might be willing to provide monetary assistance." Philip G. Schrag, The Unethical Ethics Rule: Nine Ways to Fix Model Rule of Professional Conduct 1.8(e), 28 Geo. J. Legal Ethics 39, 60 (2015).

The cases and opinions suggest varying approaches to loaning clients money. NYS Bar Association opinion 1044 (10/8/15) take a restrictive approach. It addresses the question whether an attorney can advance a client's taxi or other expenses to attend an independent medical examination and the expenses for other doctor's appointments. The opinion notes that Comment 9B to Rule 1.8 limits permitted financial assistance to court costs and expense directly related to the litigation and does not include living expenses. NY Eth. Op. 1044 (N.Y.St.Bar.Assn.Comm.Prof.Eth.) 2015. The reason behind this is that fronting living expenses would "encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigations." Expenses of litigation include items like fees of a private investigator, the lawyer's travel expenses to visit witnesses or attend depositions, long distance phone bills, costs of clandestine videos and other expenses that a lawyer or lawyer's agents incur while investigating the facts of the case. R. Simon, Simon's N.Y. Rules of Professional Conduct Annotated 484 (2014 ed). In answer to the questions addressed in the opinion, the lawyer may advance the client's taxi and other transportation costs to the independent medical examination and may even pay those expenses if the client is indigent, but whether the lawyer can pay expenses depends on whether they are expenses of the litigation. The opinion concludes that some medical expenses may be expenses of the litigation, but that the cost of routine medical care may not qualify. See also *Matter of Moran*, 42 A.D.3d

272 (4th Dept. 2007) (attorney was suspended for 18 months for conduct which included loaning money to clients through intermediaries.)

How other jurisdictions treat the issue depends on their variation of the rule. Missouri Formal Ethics Opinion 125 https://www.courts.mo.gov/file.jsp?id=32148 (2008) dealt with this issue in the context of whether a lawyer may indemnify his client for debts owed to the opposing party. The opinion stated:

> "…Any type of guarantee to cover a client's debts constitutes financial assistance If a client owes a debt to a third party who expects payment from the client's recovery by settlement or judgment, an attorney may not agree to pay the third party from the attorney's own funds, if the client does not pay the third party. See *In re Morse* (lawyer who loaned friend and client $1400 to pay rent, transportation given a reprimand); *State ex rel. Counsel for Discipline v. Kratina,* 746 N.W.2d 378 (2008) (lawyer suspended for 60 days for paying vehicle and transportation expenses, insurance premiums, and rent for an unemployed client and friend)." Missouri Formal Ethics Opinion 125 https://www.courts.mo.gov/file.jsp?id=32148 (2008).

Conversely, in *Attorney Grievance Com'n of Maryland v. Stolarz*, 379 Md. 387 (2004) a Maryland attorney signed an acknowledgement agreement faxed to him by a Virginia-based bank, in which the attorney agreed that the bank's $300.00 loan to his client would be paid out of settlement proceeds. The attorney was not a guarantor of the funds. Due to error by both attorney and client in disbursing settlement funds, the loan went unpaid. When the client refused to pay back the loan, the bank filed a grievance against the attorney, who paid back the loan plus interest from his own personal funds. In this instance the Maryland Court of Appeals considered the attorney's conduct a mitigating factor, dismissing the case with a non-disciplinary warning. *Attorney Grievance Com'n of Maryland v. Stolarz*, 379 Md. 387 (2004).

Even good intentions do not ameliorate the harshness of the rule. For example, a lawyer's wife's charitable loan resulted in a suspension of six months for her lawyer husband. *Toledo Bar Ass'n v. Pheils,* Ohio, 951 N.E.2d 758 (2011). The Florida Supreme Court meted out

a one-year suspension for the lawyer who had covered the appellate fees for a client whose case outcome might yield substantial legal fees for the lawyer. (*Florida Bar v. Patrick,* Fla., 67 So.3d 1009 (2011); *compare Mercantile Adjustment Bureau LLC v. Flood, 278 P.3d 348 (2012)* (trial lawyer's payment of appellate counsel fees for client's case did not violate Rule 1.8(e), citing access to justice policy).

California allows attorneys to outright make loans to their clients, provided the attorney has been retained, and the client's obligation to repay the loan is in writing. Philip G. Schrag, <u>The Unethical Ethics Rule: Nine Ways to Fix Model Rule of Professional Conduct 1.8(e)</u>, 28 Geo. J. Legal Ethics 39, 56 (2015)

Mississippi and Lousiana allow attorneys to make loans to clients 60 days after being retained, for necessities related to the litigation such as payments to prevent foreclosure or repossession, as well as medical expenses. Loans under $1,500.00 must be reported to the bar association, and loans over $1,500.00 require bar association approval. *Id.;* Miss. Rules of Prof'l Conduct R. 1.8(e); LA. Rules of Prof'l Conduct R. 1.8(e).

In a jurisdiction like New York, which is not so lenient, there is a strong argument that advancing settlement funds on behalf of a client violates Rule 1.8. Further, the settlement payment may have violated Rules 1.2 and 1.4(a), requiring a lawyer to abide by a client's decisions in settling a matter, and to promptly communicate settlement offers to the client, respectively. After the payment was made, public statements from both Cohen and Trump regarding whether Trump knew about the payment and whether Cohen was reimbursed by Trump indicate that Rules 1.2 and 1.4(a) were not complied with.

ETHICAL DILEMMA THREE: IS IT ETHICAL FOR A LAWYER TO RECORD A CLIENT WITHOUT THE CLIENT'S KNOWLEDGE

In the April 2018 raid of Cohen's offices, the FBI seized a recorded a conversation between Cohen and Trump that revolved around payments to Karen McDougal, the Playboy model who said she had an affair with then-candidate Trump. Mr. Cohen recorded the conversation without Mr. Trump's knowledge. Mr. Cohen's legal team then released the tape in order to correct statements made by President Trump's legal team.

There are both legal prohibitions and ethical considerations involved in tape recording. Under federal law, surreptitious tape recording is permitted so long as one party being taped consents. *See* 18 U.S.C. § 2511(2)(d) (2001). A similar rule is followed in most states, including New York. *See* N.Y. Penal L. §§ 250.00 & 250.05.

Nonetheless, until the early 2000's, it had been considered unethical for an attorney to record any person, including adverse parties, without their consent, even if otherwise lawful. *See* ABA Formal Op. 337; *see also* NYC Eth. Op. 1995-10 (N.Y.C.Assn.B.Comm.Prof.Jud.Eth.), 1995 WL 607779, *modified* by NYC Eth. Op. 2003-02 (N.Y.C.Assn.B.Comm.Prof.Jud.Eth.), 2004 WL 837933 (holding taping is permissible where attorney has good faith basis for believing disclosure of taping would significantly impair pursuit of a generally accepted societal good); NYSBA Formal Opinions 328 (1974) and 696 (1993); *Bacote v. Riverbay_Corp.*, 2017 U.S. Dist. LEXIS 35098 (S.D.N.Y. 2017); *Anderson v. Hale*, 202 F.R.D. 548 (N.D. Ill. 2001) (reported at 17 ABA/BNA Lawyers' Manual on Professional Conduct 283 (May 9, 2001)); *but see Meachum v. Outdoor World Corp.*, 654 N.Y.S.2d 240 (Sup. Ct., Queens Co. 1996) (attorney's involvement in improper tape recording relevant to attorney's fitness to serve as class counsel).

The primary concern addressed by the rule prohibiting clandestine taping by attorneys is that an attorney's status as a member of the bar translates to an expectation of candor and honesty in dealing with others. Also implicated is Rule 8.4, prohibiting dishonesty, fraud, deceit or misrepresentation by an attorney including recording of a conversation without the other party's knowledge or consent. This is regardless of whether the person who is the target of taping is a party represented in the matter in issue. *Miano v. AC & R Advert., Inc.*, 148 F.R.D. 68, 73 (S.D.N.Y.), *amended* (Mar. 4, 1993), *adopted*, 834 F. Supp. 632 (S.D.N.Y. 1993).

However, in ABA Formal Op. 01-422 (2001), the Committee on Professional Responsibility reversed ABA Formal Op. 337, and held that surreptitious recording of another does not necessarily violate ethics rules so long as doing so is legal in the jurisdiction involved and there is no false representation that the conversation is not being taped. ABA Formal Op. 01-422 (2001). New York County Opinion 696 (1993) similarly recognizes that secret recordings are permissible provided at least one party to the conversation consents. See also Order Amending Tennessee Rules of Professional Conduct (Tenn. 2003); Maine Board of Bar Overseers Professional Ethics Commission, Opinion 168 (1999) (no prohibition against lawyer tape recordings). The Association of the Bar of the City of New York, however, continues to take a harder line regarding surreptitious taping, holding that a lawyer may not, as a matter of routine practice, tape record conversations without disclosure. However, it does recognize that undisclosed taping may be permissible if the lawyer has a reasonable basis for believing that disclosure of the taping would impair pursuit of a generally accepted societal good. New York City Opinion 2003-02 (2003).

A number of authorities recognizing a general ban on surreptitious recordings similarly recognize some limited exceptions to this rule. *See, e.g.,* New York City Opinions 1980-95

(1982) and 2003-02 (2003) (criminal defense counsel documentation of threats/criminal activity; or investigation of discrimination or questionable business practices); Virginia Bar Association Opinion 1738 (2000) (permissible for counsel to tape or direct taping in criminal or housing discrimination investigations, where one party consents, or where the lawyer is a victim of a criminal threat); Alaska Bar Association Opinion 95-5 (1995) (recordings made by criminal defense attorneys may be permissible); North Carolina Ethics Opinion 171 (1994) (permissible for counsel to tape opposing counsel).

In *Bermejo v. NYC Health and Hospitals Corp.*, 135 A.D.3d 116 (2nd Dept. 2015), an attorney for the injured plaintiff surreptitiously videotaped an independent medical examination. The attorney failed to disclose the taping until he sought to use it to impeach the doctor conducting the IME at trial. The attorney claimed he taped the exam, to prevent against the doctor claiming, as he had before, that the lawyer engaged in obstructionist tactics during the exam. He claimed that the "societal good" justified the taping, to expose what he believed would be incorrect allegations of misconduct. However, the Second Department found that the secret video "cannot be regarded as an 'appropriate tool' or an activity that attorneys should feel free to engage in "all the time," focusing in particular on the lawyer's failure to provide notice to defense counsel of the taping or to obtain approval from the court.

In *Alexander Interactive, Inc. v. Adorama, Inc.*, 2014 WL 2968528 (S.D. N.Y. 2014), the plaintiff's lawyer claimed that she had taped everything with an expert during an onsite visit by defense counsel to plaintiff's office. After Defendant's counsel raised the issue with the magistrate, plaintiff's counsel said she was "bluffing", but the magistrate found that if counsel had actually surreptitiously taped the expert, this would violate Rule 8.4(c) by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See also City Bar Op. 2003-2.

The Court distinguished her conduct from much narrower examples of where undisclosed taping might be acceptable, including the investigation of ongoing criminal activity or significant misconduct or conversations with persons who had previously made threats against the attorney or a client. City Bar Op. 2003–02.

To the extent a lawyer may now directly engage in lawful surreptitious taping, it is not inappropriate for a lawyer to advise a client with respect to their engaging in such activities.

In *Mena v. Key Food Stores Cooperative, Inc.*, 195 Misc. 2d 402 (Sup. Ct., Kings Co. 2003), the court refused to disqualify an attorney for assisting his client in the surreptitious recording of her employer in the context of an employment discrimination case. The court also refused to suppress the resulting evidence, noting that evidence is not rendered inadmissible simply because it is secured by unlawful or unethical means. *See also* NYSBA Formal Opinion 515 (1979) (recognizing that attorney may counsel a client on the surreptitious recording of another where the client requested that advice).

While it is generally improper for an attorney to use another, including a client, as an agent to secretly record a conversation, there is a carve-out for "accepted investigative techniques." *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, 82 F.Supp.2d 119 (S.D.N.Y. Sept. 20, 1999). In *Gidatex*, a furniture manufacturer's counsel did not violate New York's rule against attorney misrepresentations by having private investigators secretly tape conversations with defendant distributor's salespeople, in an effort to gain evidence in a trademark infringement suit. The hiring of investigators to pose as consumers was found to be an acceptable investigative technique, because "Gidatex's investigators did not intrude upon Campaniello's attorney-client privilege or attempt to use superior legal knowledge to take advantage of Campaniello's

salespeople. Neither investigator was an attorney and neither attempted to interview party witnesses." *Id*. at 122.

A number of courts have recognized that when surreptitious recordings violate ethical standards they may be subject to disclosure even if the information contained therein otherwise would have been protected as privileged work product. *Parrott v. Wilson*, 707 F.2d 1262 (11th Cir. 1983), *cert. denied*, (1983) (secret tape recording of defendant not attorney work product and discoverable); *Byrd v. Reno*, 1998 WL 429767 (D.D.C. 1998), *appeal dismissed*, 180 F.3d 298 (D.C. Cir. 1999) (same); *Roberts v. Amercable Intl. Inc.*, 883 F. Supp. 499 (E.D. Ca. 1995) (same). *Ward v. Maritz, Inc.*, 156 F.R.D. 592 (D. N.J. 1994) (work product privilege violated where attorney suggests surreptitious recording); *Bogan v. Northwestern Mutual Life Ins. Co.*, 144 F.R.D. 51 (S.D.N.Y. 1992) (plaintiff's tape recorded conversations with certain witnesses without consent discoverable). Even if the lawyer did not personally conduct the recordings, or even suggest to his client that she do so, a client's recordings may be subject to disclosure if they were in any way relied upon by the lawyer. *Haigh v. Matshushita Elec. Corp. of America*, 676 F. Supp. 1332 (E.D. Va. 1987) (attorney's review and use of conversations secretly recorded by plaintiff, who acted on her own, subject to discovery since such review and use amounted to encouragement and support of plaintiff's actions); *see also Otto v. Box U.S.A. Group, Inc.*, 177 F.R.D. 698 (N.D. Ga. 1997) (plaintiff's taping of a conversation prior to hiring attorney not protected by work product privilege). As jurisdictions adopt the more recent ABA approach of Formal Opinion 01-422, this view that any work product privilege is waived is likely to change.

The question then becomes whether an attorney's surreptitious recording of his client would become discoverable, despite an argument that the communications are confidential. Since the privilege belongs to the client, not counsel, it is unlikely that counsel's behavior can

waive the privilege. In the scenario we are addressing, any privilege was allegedly waived when President Trump's legal team referenced the tape. Kevin Breuninger and Dan Mangan: Michael Cohen's secret tape was originally deemed 'privileged' – but Trump's team blabbed about it anyway, https://www.cnbc.com/2018/07/21/trump-team-waived-privilege-to-release-michael-cohens-tape-source.html (last visited Sept. 12, 2018).

Where tape recordings were turned over to an attorney by the client, they would not necessarily be deemed privileged where the law firm failed to establish that the tape recordings were disclosed to it is as confidential communications. *Matter of Application to Quash a Grand Jury Subpoena Duces Tecum*, 157 Misc. 2d 432 (N.Y. Cty. Crim. Term 1993). In *Lanza v. NYS Joint Legislative Committee on Government Operations*, 3 N.Y.2d 92 (1957), the Court permitted disclosure of a tape recording of a private consultation between attorney and client, holding that it was not compelled testimony and therefore not susceptible to an injunction and that the privilege did not inhibit disclosures by others who have overheard the communication). See also *Niceforo v. UBS Global Asset Management Americas, Inc.*, 20 F. Supp. 3d 428, 436 (S.D. N.Y. 2014) ("Niceforo was on notice of UBS's privacy policy. Her decision to record her communications with counsel in a notebook kept in her desk drawer, combined with her failure to seek the notebook's return for more than a year, destroys any claim that she intended to keep the communications confidential.") It therefore appears that the answer to the question of whether privilege would apply to a tape recording of communications between counsel and the client would depend upon 1) whether the communication was intended to be confidential; 2) whether it was the attorney or the client who tape-recorded the conversation and is seeking to disclose it; and 3) whether the person making the recording took reasonable precautions to keep the information confidential.

CONCLUSION:

These are but some of the ethical issues attorneys can learn from, based on the Michael Cohen and Michael Avenatti experiences. It is truly unfortunate that these type of issues continue to exist, such that real life situations provide such extensive fodder for this ethics discussion.

Formal Opinion 2018-4: Duties When an Attorney Is Asked to Assist in a Suspicious Transaction

TOPICS: Client Due Diligence, Confidentiality, Duty of Candor, Duty to Refrain from Counseling Fraudulent or Illegal Conduct**.**

DIGEST: The New York Rules of Professional Conduct (the "Rules") prohibit a lawyer from knowingly assisting a client's crime or fraud but do not explicitly address a lawyer's duty when the lawyer merely has doubts about the lawfulness of the client's conduct; nor do the Rules explicitly require a lawyer to investigate in such circumstances in order to ascertain whether the legal services would in fact assist a crime or fraud before assisting the client. Nevertheless, when a lawyer is asked to assist in a transaction that the lawyer suspects may involve a crime or fraud, a duty of inquiry in some circumstances is implicit in the Rules. First, in order to render competent representation as required by Rule 1.1, a lawyer has a duty to the client in some circumstances to undertake an inquiry into suspicious transactions to render reasonable and candid advice to the client about whether to undertake the proposed conduct and the consequences of doing so. Second, notwithstanding the absence of an explicit requirement, a duty to inquire into suspicious transactions under some circumstances is implicit in the duty to avoid knowingly assisting wrongful conduct. The lawyer's inquiry must be consistent with the confidentiality duty of Rule 1.6, which governs disclosures the lawyer may make to third parties during the inquiry, as well as with the duty to keep the client informed during the representation. If the lawyer concludes that the client will engage or is engaging in a crime or fraud, the lawyer must not assist, or further assist, the wrongdoing. The lawyer may undertake remedial measures to the extent permitted by the exceptions to the confidentiality rule.

RULES: 1.1, 1.2, 1.6, 1.16, 2.1, 8.4

QUESTION: When an individual client asks a lawyer to provide legal assistance in a transaction, and the lawyer suspects that the legal services may assist the client's crime or fraud, to what extent must the lawyer investigate to allay or confirm the suspicions, and what other conduct must the lawyer undertake under the Rules?[1]

[1] This opinion addresses the straightforward situation in which a lawyer for an individual in a transactional representation suspects that the client's conduct may be criminal or fraudulent. It does not address a lawyer's duties with regard to a client's potentially illegal conduct in the context of litigation. Rule 3.3 (Conduct Before a Tribunal) may establish additional, or different, obligations in that context. This opinion is relevant to the representation of an entity as well as an individual but it does not address additional or different obligations that in-house counsel or outside counsel may have when representing an entity, including under Rule 1.13 (Organization as Client). Finally, this opinion does not address obligations that may be established by law other than the Rules, such as obligations that may have to be undertaken to satisfy a legal standard of care under professional negligence law.

OPINION:

I. Introduction

In the context of the following scenario, this opinion addresses lawyers' obligations under the Rules when the lawyer is retained to assist an individual client in a transaction that appears to the lawyer to be suspicious.

> A lawyer represents a client in the sale of a business in New York. The client advises the lawyer that the proceeds of the transaction will be used to purchase a different business. The client directs that after the first transaction closes, all payments be sent to a bank in a well-known secrecy jurisdiction. The client then asks the lawyer to proceed with the purchase. In preparing the documents and doing general due diligence, the lawyer realizes that the proposed purchase price is much more than the business is worth. The lawyer also learns inadvertently that the client has two passports, each from a secrecy jurisdiction different than the one in which the bank is located. The lawyer suspects, but does not know, that the transaction will involve a fraud or crime, such as money laundering or tax evasion, on the part of the client.[2]

As set forth below, a number of Rules and considerations bear on whether a transactional lawyer has a duty to investigate the client's conduct in this scenario and whether there are other steps that must be taken. These include the lawyer's duties of competence [Rule 1.1], of confidentiality [Rule 1.6], and to refrain from assisting a client in conduct that the lawyer knows is illegal or fraudulent [Rule 1.2(d)].

[2] Many U.S. lawyers and law firms conduct due diligence before accepting a new client, and they are well-advised to do so. *See* ABA Formal Op. 463 (2013) ("It would be prudent for lawyers to undertake Client Due Diligence ('CDD') in appropriate circumstances to avoid facilitating illegal activity or being drawn unwittingly into a criminal activity."). However, there is no uniform legal requirement that US lawyers undertake due diligence. This contrasts with the law in a number of non-US jurisdictions that have well-developed anti-money laundering and other due diligence requirements. *See generally* John A. Terrill, II & Michael A. Breslow, *The Role of Lawyers in Combating Money Laundering and Terrorist Financing: Lessons from the English Approach*, 59 N.Y.L. Sch. L. Rev. 433, 440 (2014-2015) (discussing UK anti-money-laundering law requiring lawyers, among others, to undertake client due diligence, including identifying a beneficial owner who is not the customer and obtaining information on the purpose of the representation).

II. A Transactional Lawyer May Have a Duty to Inquire When Serious Questions are Raised Regarding Whether the Lawyer is Assisting the Client in a Crime or Fraud

a. The duty of competence may require the lawyer to conduct due diligence into the client's potentially fraudulent conduct

Rule 1.1(a) requires a lawyer to provide "competent representation to a client." In many contexts, the very purpose of the representation is to provide advice about the lawfulness of a client's proposed course of conduct or to assist the client in structuring a proposed transaction in a manner that conforms to the law. Rule 1.2(d) authorizes a lawyer to "discuss the legal consequences of any proposed course of conduct with a client," and in such cases, Rule 1.1 presupposes that the lawyer will provide competent advice about whether the proposed conduct would be unlawful or about how to achieve the client's objectives within the law.

Regardless of the client's objectives, competent representation presupposes that the lawyer is rendering assistance in carrying out a client's *lawful* objectives. Committing a crime or engaging in other illegal or fraudulent conduct is not a lawful objective. Rule 1.2(d) forbids a lawyer from assisting the client in conduct that the lawyer *knows* to be illegal or fraudulent. But even if the lawyer does not have the requisite knowledge under Rule 1.2(d), furthering a client's illegal or fraudulent transaction – thereby subjecting a client to criminal or civil liability – may run afoul of the Rules if the lawyer did not act competently under Rule 1.1(a). In general, assisting in a suspicious transaction is not competent where a reasonable lawyer prompted by serious doubts would have refrained from providing assistance or would have investigated to allay suspicions before rendering or continuing to render legal assistance.

Further, Rules 1.4 and 2.1 require lawyers to render reasonable, candid advice. Unless the lawyer inquires in response to serious suspicions, the lawyer will not be in a position to advise the client about the attendant risks of civil or criminal liability. Thus, the duty of competence not only protects the client, but also in some situations requires the lawyer to take the steps necessary, including additional inquiry, to ensure that she is providing competent advice.

What constitutes a suspicion sufficient to trigger inquiry will depend on the circumstances. In many representations, there is no reason for the lawyer to doubt the lawfulness of the client's proposed actions. On the other hand, there may be representations where the circumstances raise suspicions or questions. For example, in the hypothetical above, the lawyer may have a duty to inquire of the client as to the reasons for a purchase of a business at a higher-than-market price and for running the funds through a bank in a secrecy jurisdiction to determine whether the transaction is being used to launder money, to avoid legitimate taxes, or for some other criminal or fraudulent purpose. Depending upon the answer, the lawyer may conclude that the transaction is legitimate, that she needs to make further inquiry, or that she must not provide further assistance in the transaction.

These conclusions are consistent with Comment [5] to Rule 1.1 which notes that "[c]ompetent handling of a particular matter includes inquiry into an analysis of the factual and legal elements of the problem," and with other authorities. *See, e.g.,* N.Y. City 2015-3 (2015) (a lawyer who believes he is the victim of a scam by a purported prospective client has a duty of competence to

investigate further before proceeding with the matter); ABA Informal Op. 1470 (1981) ("Opinion 1470") ("[A] lawyer should not undertake representation in disregard of facts suggesting that the representation might aid the client in perpetrating a fraud or otherwise committing a crime."); *cf.* N.Y. City 2018-2 (2018) ("The duty of competence under Rule 1.1 establishes additional duties in the post-conviction context, including, in some cases, a duty to investigate new potentially exculpatory evidence regardless of whether Rule 3.8(c) is triggered.").

b. A lawyer who fails to investigate potentially fraudulent conduct may also violate Rule 1.2(d), depending on the circumstances

Rule 1.2(d) prohibits a lawyer from assisting a client in conduct that the lawyer *knows* to be criminal or fraudulent. "Knowledge" under the Rules is defined as "actual knowledge of the fact in question . . . [which] may be inferred from the circumstances." Rule 1.0(k). However, consistent with the criminal law standard of "conscious avoidance," a lawyer may be deemed to have knowledge that the client is engaged in a criminal or fraudulent transaction if the lawyer is aware of serious questions about the legality of the transaction and renders assistance without considering readily available facts that would have confirmed the wrongfulness of the transaction. *See* N.Y. City 2018-2 (2018) ("Conscious avoidance of the fact in question may also constitute knowledge under the Rules, as under criminal law") (citing N.Y. City 99-02 (1999) ("Lawyers have an obligation not to shut their eyes to what was plainly to be seen … A lawyer cannot escape responsibility by avoiding inquiry.")).[3]

Opinion 1470 similarly recognized that when lawyers are aware that the client's proposed course of conduct is likely to be illegal, they "cannot escape responsibility by avoiding inquiry" but "must be satisfied, on the facts before [them] and readily available to [them], that [they] can perform the requested services without abetting fraudulent or criminal conduct and without relying on past client crime or fraud to achieve results the client now wants"; if lawyers are not satisfied that the client's conduct is lawful, they have "a duty of further inquiry" before rendering assistance. Thus, while Rule 1.2(d) does not require lawyers to inquire when there is no ground for suspicion, they cannot ignore "red flags." *Cf.* Rebecca Roiphe, *The Ethics of Willful Ignorance*, 24 Geo. J. Legal Ethics 187 (2011), citing *In re Blatt*, 63 324 A.2d 15, 17-19 (N.J. 1974) (holding that "a lawyer committed misconduct by helping a client effect a purchase after failing to investigate its suspicious nature"); *In re Dobson*, 427 S.E.2d 166, 166-68 (S.C. 1993) (sanctioning "an attorney for helping his client while remaining deliberately ignorant of his client's criminal conduct" and holding that the court would " not countenance the conscious

[3] The knowledge standard differs from the "should know" or "should have known" standard of several other Rules. *See* Rules 4.4(b), 5.1(d)(2)(ii), 5.3(b)(2)(ii). Under the knowledge standard of Rule 1.2(d), a lawyer is not deemed to "know" facts, or the significance of facts, that become evident only with the benefit of hindsight. As Justice Stevens observed in a different context, after a representation ends, "a particular fact may be as clear and certain as a piece of crystal or a small diamond," but lawyers "often deal with mixtures of sand and clay. Even a pebble that seems clear enough at first glance may take on a different hue in a handful of gravel." *Nix v. Whiteside*, 475 U.S. 157, 189, 106 S. Ct. 988, 1005 (1986) (Stevens J, concurring).

avoidance of one's ethical duties as an attorney").[4]

III. Limits on the Lawyer's Duty to Inquire

Ordinarily, a lawyer will begin an inquiry by seeking information from the client before turning to other sources. After concluding a reasonable inquiry, the lawyer may ordinarily credit the client when there are doubts. Whether a particular inquiry is adequate will vary with the circumstances.

To the extent that the lawyer must seek information from others, the Rules may impose conditions or limits. In general, the duty under Rule 1.4 to keep the client reasonably informed will require the lawyer to explain why there are doubts about the legality of the transaction and what steps the lawyer proposes to take to allay or confirm suspicions. If suspicions are sufficiently serious to give rise to a duty of inquiry under Rule 1.2(d), then the lawyer would render further assistance at her peril. A lawyer's fear that a client may seek to cover up his actions does not eliminate the duty of communication. Rule 1.4(a)(5). If the lawyer does suspect a cover-up and cannot persuade the client to be forthcoming, she may choose to terminate the representation. Rule 1.16(c)(2). Similarly, if the client will not authorize such an inquiry, the lawyer may have no realistic choice other than to cease assisting in the particular transaction, because to continue the representation may put her in jeopardy of violating Rule 1.2(d). And, needless to say, a client's refusal to authorize and assist in an inquiry into the lawfulness of the client's proposed conduct will ordinarily constitute an additional, and very significant, "red flag."

If the client green-lights an inquiry but refuses to pay for the time required to conduct it, the lawyer must decide whether to conduct the inquiry at her own expense or terminate the representation. The lawyer may discontinue the representation based on concerns as to the legality of the transaction. *See* Rule 1.2(f) (permitting a lawyer to refuse to participate in conduct that the lawyer believes to be unlawful, even if there is support for an argument that the conduct is legal); Rule 1.2, Cmt. [15].[5]

[4] This opinion focuses on situations where a lawyer recognizes that a transaction is suspicious at the outset or at some later time before the transaction is completed. It does not address a lawyer's duty of inquiry, if any, after assisting in a potentially fraudulent or criminal transaction that is completed. We note, however, that Rule 8.4(h), which prohibits a lawyer from "engag[ing] in any other conduct that adversely reflects on the lawyer's fitness as a lawyer," has been found to require inquiry after assisting a completed transaction if the lawyer then suspects that the transaction was fraudulent or criminal. *See Matter of Reno*, 147 A.D.3d 8, 12 (1st Dep't 2016) (sanctioning lawyer under Rule 8.4(h) for assisting and not then remedying a fraudulent transaction, because the lawyer had strong reasons to suspect that his client was defrauding a vulnerable seller and "at a minimum, had a duty to confirm that his client tendered the agreed consideration . . . to ensure that the transaction was 'legitimate.'"). The implication of the *Reno* opinion is that, if the lawyer concluded upon inquiry that the transaction he assisted was fraudulent, the lawyer would have had some remedial obligation.

[5] Whether a lawyer should continue to work on the potentially illegal or fraudulent matter while conducting the inquiry depends on the circumstances. Even if the transaction is never

Further, any inquiry must be undertaken consistently with the confidentiality duty under Rule 1.6. Ordinarily, without client consent, the lawyer cannot conduct the inquiry in a manner that discloses client confidences to third parties. *See* NYCBA Formal Op. 2015-3.

IV. Remedial Obligations

If a lawyer gains knowledge during the course of representation that a client is engaged in unlawful conduct (or plans to be), the lawyer has a range of options. The lawyer's remedial steps should be dictated by such factors as the lawyer's knowledge of the facts at hand, the seriousness of the client's misconduct, and the extent of the lawyer's involvement in the client's misconduct. When the lawyer has actual knowledge of prospective wrongdoing, the lawyer may not assist in the wrongdoing and, further, must counsel the client against the illegal course of conduct under Rule 1.4(a)(5). This counseling obligation derives from the duty of competence under Rule 1.1. Despite the challenges involved in "persuading a client to take necessary preventive or corrective action" under Rule 1.4, such communications are appropriate not only to assist the client but to mitigate any risks the attorney is assuming by continuing to represent the client. Rule 1.2(d), Cmt. [10].

In our hypothetical situation, if the lawyer determines that the client may be engaged in tax fraud or tax evasion, the lawyer may choose to counsel the client to pay the appropriate taxes or take other corrective action. There may also be circumstances in which corrective action is not possible and the lawyer may have no alternative but to resign.[6] Rule 1.16(b)(1).

If it becomes clear during a lawyer's representation that the client has failed to take necessary corrective action, and the lawyer's continued representation would assist client conduct that is illegal or fraudulent, Rule 1.16(b)(1) mandates that the lawyer withdraw from representation. Comment [10] to Rule 1.2(d) states that the lawyer's obligations are "to avoid assisting the client" and to "remonstrate with the client" when the representation will result in violation of the Rules or other law. Withdrawal alone may be insufficient in some circumstances, for example, where the lawyer believes there is continued third-party reliance on an inaccurate opinion or representation. In that case, the lawyer may engage in "noisy withdrawal," which permits the attorney to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. Rule 1.2(d), Cmt [10]; *see* Rule 1.6(b)(3); Rule 4.1, Cmt. [3]. The lawyer must also decide whether and how to prevent any serious harm that will result from the client's conduct, including whether to reveal the client's confidential information to accomplish that end. In general, the potentially applicable exceptions to the ordinary confidentiality duty

completed, a lawyer is subject to discipline for knowingly *attempting* to assist a client's illegal or fraudulent conduct. *See* Rule 8.4(a) (providing that a lawyer or law firm may not attempt to violate the Rules). But certain tasks may be peripheral to the transaction and unrelated to any potential wrongdoing. And preliminary work on the transaction may not constitute a knowing "attempt" to assist a client's illegal or fraudulent conduct if the lawyer is concurrently investigating with an eye toward ending assistance if suspicions are confirmed.

[6] If, for example, the lawyer learns that the transaction is being used to launder the proceeds of a crime, it is unlikely that counseling the client not to act unlawfully will be successful.

provide that the lawyer may disclose confidences to prevent criminal conduct or for other specified purposes, but not that the lawyer must do so. *See* Rule 1.6(b)(1), (2) & (3).[7]

Throughout the process described above, the prudent lawyer would be well advised to keep a record of the decision making process and the basis for the steps she has (or has not) taken.

V. Conclusion

When asked to represent a client in a transaction that a lawyer believes to be suspicious, the lawyer has an implicit duty under some circumstances to inquire into the client's conduct. If the lawyer believes that her client is entering into a transaction that is illegal or fraudulent, the lawyer ordinarily must attempt to inquire in order to provide competent representation to the client under Rule 1.1. Further, under Rule 1.2(d), which forbids knowingly assisting a client's illegal or fraudulent conduct, a lawyer has the requisite knowledge if the lawyer is aware of serious questions about the legality of the transaction and renders assistance without considering readily available facts that would have confirmed the wrongfulness of the transaction. Implicit in the rule, therefore, is the obligation to take reasonably available measures to ascertain whether the client's transaction is illegal or fraudulent. The lawyer's inquiry must be consistent with the confidentiality duty of Rule 1.6, which governs disclosures the lawyer may make to third parties during the inquiry, as well as with the duty to keep the client informed during the representation. If the lawyer concludes that the client's conduct is illegal or fraudulent, the lawyer must not further assist the wrongdoing and may undertake remedial measures to the extent permitted by the exceptions to the confidentiality rule.

[7] This opinion does not address whether there are circumstances where a lawyer *must* undertake remedial measures to prevent or rectify wrongdoing in a transactional context and, if so, what measures must be undertaken. We assume that, in the transactional context, whether, and in what circumstances, such an obligation exists will largely be determined by substantive law rather than the Rules. *See* ABA Model Rules of Professional Conduct, Rule 4.1, Cmt. [3] (observing that: "In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid assisting a client's crime or fraud.").

Speaker Biographies

DEIRDRE A. AARON, ESQ.
BIOGRAPHY

Deirdre Aaron is an associate at Outten & Golden LLP in New York, and a member of the firm's Class Action Practice Group and the Family Responsibilities & Disability Discrimination Practice Group. She also serves on the firm's Public Interest Committee. She primarily litigates wage theft and discrimination class actions.

Ms. Aaron has litigated and settled nationwide class and collective action cases on behalf of workers in many industries, including bank workers, retail workers, and restaurant workers. She has represented workers who were denied overtime, misclassified as independent contractors rather than employees, and denied minimum wage. Ms. Aaron was also a member of the litigation team in *Gonzalez v. Pritzker*, a landmark class action against the Census Bureau that challenged the use of arrest and criminal history records as a screen for employment for 850,000 applicants. The litigation team's work was recognized with the Public Justice 2017 Trial Lawyer of the Year Award.

Prior to joining the firm in 2012, Ms. Aaron worked as a Staff Attorney for the United States Court of Appeals for the Eighth Circuit. Ms. Aaron received her B.A. from Northwestern University in 2004, and her J.D., *magna cum laude*, from Washington University in St. Louis in 2010.

Ms. Aaron is admitted to practice in the states of New York and Pennsylvania, the U.S. District Courts for the Southern, Eastern, and Western Districts of New York and the Eastern District of Pennsylvania, and the U.S. Second Circuit Court of Appeals.

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Honors & Affiliations

- Lisa Niles Distinguished Alumni Award, Leadership Saratoga, 2018
- Listed in:
  - BTI Client Service All-Stars 2017
  - *New York Super Lawyers 2017®*, Employment and Labor
  - Order of the Coif
- Associate Editor, *Georgetown Law Journal*

Representative Presentations

- Times Up: Navigating Sexual Harassment in an Evolving Legal and Cultural Landscape, ESSAE Annual Conference & Trade Show, June 21, 2018
- What's New and What's Next, Alloya Corporate Federal Credit Union CFO Roundtable, September 29, 2017
- Workplace Violence, New York State Payroll Conference Association 2017 Statewide Conference, September 28, 2017
- Cybersecurity and Data Privacy, New York State Payroll Conference Association 2017 Statewide Conference, September 28, 2017
- New York Paid Family Leave, Minich MacGregor Wealth Management Employer Insights Breakfast Series, June 15, 2017
- Panel Member, Cybersecurity for Human Resource Professionals, CNY SHRM, April 6, 2017
- Panel Member, Tracking the Latest Initiatives of the New Secretary of Labor, and What is On the Horizon for Labor Agendas in the Year Ahead?, American Conference Institute's 30th National Forum on Wage & Hour Claims and Class Actions, June 12, 2016
- Will Overtime Rules Changes Impact Your Organization? Upcoming Exemption Changes to the Fair Labor Standards Act, Saratoga County Chamber of Commerce, October 18, 2016
- Legal Ethical Implications of Social Networking by Attorneys and Clients, Panel Member, New York State Bar Association Seminar, November 24, 2014
- Saratoga County Chamber of Commerce, Human Resources Seminar, February 19, 2014

Representative Publications

- "Business Report: What About Last-Minute Schedule Pay?," *Saratoga Business Journal*, April 5, 2018; *Glens Falls Business Journal*, April 12, 2018
- Quoted in "Many firms unaware of new OSHA slip and fall requirements," *Newsday*, May 28, 2017
- "Business Report: What To Do When Demand Exceeds Output," *Saratoga Business Journal*, April 7, 2017; *Glens Falls Business Journal*, April 14, 2017
- Quoted in "OSHA limit on silica exposure: excessive?," *Buffalo Law Journal*, July 18, 2016
- Quoted in "Businesses must contend with higher workplace safety fines," *Albany Business Review*, July 6, 2016

Education

- Georgetown University Law Center (J.D., *magna cum laude*, 2006)
- United States Naval Academy (B.S. in Physics, *with distinction*, 1996)

Bar/Court Admissions

- New York
- U.S. Supreme Court
- U.S. Court of Appeals for the District of Columbia Circuit
- U.S. Court of Appeals for the Second Circuit
- U.S. District Court for the District of Columbia
- U.S. District Court for the District of Maryland
- U.S. District Court for the Eastern District of New York
- U.S. District Court for the Northern District of New York
- U.S. District Court for the Southern District of New York
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HEIDI BURAKIEWICZ, ESQ.
BIOGRAPHY

Heidi Burakiewicz is a partner at Kalijarvi, Chuzi, Newman & Fitch, P.C. She has been in private practice in Washington, D.C. for seventeen years representing employees and unions nationwide. Ms. Burakiewicz handles the full spectrum of labor and employment law issues on behalf of employees and unions, including claims concerning: violations of wage and hour laws; laws prohibiting discrimination, harassment, and retaliation; collective bargaining agreement violations; employee discipline; and whistleblower retaliation.

Ms. Burakiewicz has spent a large portion of her career representing federal employees and has recovered approximately $100 million dollars in damages from the United States on behalf of federal employees.

She is lead counsel in *Martin et al. v. U.S.*, a collective action on behalf of over 25,000 federal employees. In a July 2014 ruling, the federal judge presiding over the case determined that the government violated the Fair Labor Standards Act (“FLSA”) by failing to pay the essential employees whom it required to work during the October 2013 shutdown on their regularly scheduled pay dates. In a February 2017 ruling, the court ruled that the government is liable for liquidated damages to the essential employees because it did not act in good faith.

Ms. Burakiewicz is also lead counsel in *White et al. v. Sessions*, a class action on behalf of nearly 550 female employees of the Federal Bureau of Prisons in Coleman, Florida, alleging that the government failed to take reasonable steps to prevent inmates from egregiously sexually harassing them. The case settled in December 2016 for $20 million dollars and a long list of negotiated changes designed to eradicate the sexual harassment, which the judge described as “impressive by any standard” in the January 17, 2017 decision preliminarily approving the settlement.

Ms. Burakiewicz serves on the Advisory Council to the U.S. Court of Federal Claims for military and civilian pay claims. She served as a co-chair for the Federal Service Labor and Employment Law Committee, part of the American Bar Association’s, Labor and Employment Law Section for five years.

Ms. Burakiewicz is a graduate of Goucher College and American University’s Washington College of Law and lives in Maryland with her three exuberant, funny, and kind daughters.

SUZANNE DEMITRIO CAMPBELL, ESQ.
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Suzanne Demitrio Campbell is a senior trial attorney for the United States Department of Labor, New York Regional Solicitors Office, where she has practiced since 1998. She received her J.D. from Georgetown University Law Center in 1997, and her undergraduate degree from Harvard University in 1991. She is a member of the New York and New Jersey bars. Ms. Campbell has spent her career litigating cases brought by the Secretary of Labor under the Occupational Safety and Health Act, the Employee Retirement Income Security Act, the Mine Safety and Health Act, and other labor statutes. She also assists OSHA and EBSA with provides pre-issuance advice and case development, and teaches trial skills to OSHA investigators at the OSHA Training Institute.

JAE CHUN, ESQ.
BIOGRAPHY

Jae represents labor unions and multiemployer pension and welfare plans at the table and in court. He is an Executive Committee member of the NYSBA's Labor Section, where he co-chairs the Ethics Committee. He is also a long-standing member of the New York City Bar's Judiciary Committee and the AFL-CIO Lawyers Coordinating Committee. Jae enjoys speaking about labor issues, and has done so for the American Bar Association, NYU Law School, Cornell Law School, Teamsters Lawyers, AFL-CIO Lawyers, the City Bar, and the NYSBA. He is a 2001 graduate of the Cornell Law School, and a 1996 *summa cum laude* graduate of Binghamton University, where he majored in philosophy.

JOHN D.R. CRAIG, ESQ.
BIOGRAPHY

John D.R. Craig practices exclusively in the areas of labour, employment and human rights law at Fasken Martineau DuMoulin. John works with clients throughout the collective bargaining process and before arbitrators, labour relations boards, human rights tribunals and the courts.

John has represented Canadian, foreign and multinational employers on a range of cross-border and international labour matters. Assisting with labour aspects of corporate social responsibility, John has drafted and implemented workplace codes of conduct applicable to overseas and supply chain operations, and has managed projects for multinational clients involving multi-jurisdictional reviews of human resource policies.

As a delegate of the Canadian Employers Counsel ("CEC"), John regularly represents Canadian employers at meetings of the International Labour Organization (ILO), the World Bank, the Organization of American States (OAS) and the Inter-American Conference of Ministers of Labour (IACML). John serves as a member of the Executive Committee of CEATAL, the hemispheric organization that represents employers within the OAS. He is an official spokesperson of CEATAL.

The author of Privacy and Employment Law, a book that examines the transposition of human rights law into the workplace, John is also the co-editor of both *Globalization and the Future of Labour Law* and *Federal Labour Law and Practice*. Frequently writing for journals including the Canadian Labour & Employment Law Journal, the Comparative Labour Law & Policy Journal, the Industrial Law Journal, and the European Human Rights Law Review, John has spoken at academic and practice-focused conferences on international labour law, anti-discrimination, privacy, constitutional law, and administrative law.

John began his career as a law clerk to Chief Justice Antonio Lamer and Justice Charles Gonthier of the Supreme Court of Canada in 1994. He holds masters and doctoral degrees in comparative and international labour law from the University of Oxford, has been an Assistant Professor with the University of Western Ontario Faculty of Law since 1999, and is the Co-Director of Osgoode Hall Law School's Professional LLM in Labour and Employment Law.

A recognized expert in the labour, employment and human rights law, John has been ranked in leading legal directories including the Canadian Legal Lexpert Directory, Best Lawyers in Canada, and Who's Who Legal.

ALFRED G. FELIU, ESQ.

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Mr. Feliu has over 35 years of experience in employment and labor law and commercial matters. Early in his career he represented principally management clients while at large, international law firms, most notably as a partner at Paul Hastings. With the founding of Vandenberg & Feliu in 1998, Mr. Feliu expanded his practice to include the counseling and representation of executives and employees. Mr. Feliu is a recent past Chair of the New York State Bar Association's Labor and Employment Law Section and a College of Commercial Arbitrators Fellow and a Fellow of the College of Labor & Employment Lawyers.

Mr. Feliu is a well-respected and nationally-recognized arbitrator and mediator. He is a member of the AAA's Complex Commercial Case, Class Action, and Employment Disputes Panels. Mr. Feliu is also a member of the National Academy of Distinguished Neutrals and of various CPR dispute resolution panels. He is also in demand as an independent investigator and has served as the EEO Officer for the Port of New York and New Jersey since 2006. Mr. Feliu's fourth book, *ADR in Employment Law,* was published by Bloomberg/BNA in 2015 with a supplement published in 2017.

Mr. Feliu is a graduate of Columbia College and Columbia Law School.

KAREN P. FERNBACH, ESQ.
BIOGRAPHY

Ms. Fernbach commenced her career with the National Labor Relations Board upon graduation from St. John's Law School in 1977. In 2012, she was appointed Regional Director for the Manhattan Region of the National Labor Relations Board. In 2017, she retired after almost 40 years of federal public service. Currently Ms. Fernbach is a Visiting Assistant Professor at Hofstra Law School. She teaches labor law, employment law, collective bargaining and advanced topics of labor and employment law. She also teaches labor law as an Adjunct Professor at St. John's law school.

Ms. Fernbach is trained as a labor arbitrator and mediator. She has mediated federal employee work place disputes. She was trained by the American Arbitration Association which selected her as a fellow for their Higginbotham Program. Their mission is to promote diversity both in the training and selection of arbitrators. Ms. Fernbach is an active member of the Labor and Employment Law Section and a member of the Alternative Dispute Section of the NYS Bar Association. She has been invited to speak at numerous conferences addressing current legal issues in both the labor and employment field. Some of the organizations she has presented at include the NYS Bar Association, American Bar Association, NYC Bar Association, LERA-both NYC and Long Island Sections, American Conference Institute, and Cornell Institute.

PROFESSOR CHARLOTTE GARDEN
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Charlotte Garden is an expert in labor law and the regulation of work & workers. She is an Associate Professor at the Seattle University School of Law, where she teaches Labor Law, Constitutional Law, Appellate Litigation and Legislation & Regulation. She also teaches in the Civil Rights Amicus Clinic, serves as the Faculty Advisor for the School's chapter of the American Constitution Society, and is the Litigation Director at the School's Korematsu Center for Law & Equality.

Professor Garden's scholarship focuses on the intersection of work/labor law and the Constitution. Her articles have appeared in the Emory Law Journal, Boston University Law Review, George Washington Law Review, Fordham Law Review, William & Mary Law Review, and the Harvard Civil Rights-Civil Liberties Law Review. She regularly writes opinion and analysis pieces for non-academic audiences at popular outlets such as The Atlantic, SCOTUSblog, Salon and the blog of the American Constitution Society. Her legal analysis has been featured in the mainstream media, on platforms such as the New York Times, APR's Marketplace, Bloomberg News, the Washington Post, The Nation, and Politico. Professor Garden is a co-author of a Labor Law casebook, with collaborators Seth Harris, Anne Marie Lofaso, and Joe Slater.

In addition to her teaching and scholarship, Professor Garden serves on the Executive Committee of the AALS Section on Labor Relations and Employment Law, is a co-chair of the Labor Rights Collaborative Research Network of the Law & Society Association, and is a co-editor of the Work Law section for the online legal journal JOTWELL. She also regularly authors amicus briefs in cases affecting unions and workers, most recently in Vergara v. California, Friedrichs v. California Teachers Association, M&G Polymers USA, LLC v. Tackett, and Harris v. Quinn.

Before joining Seattle University, Professor Garden was a teaching fellow in the Appellate Litigation Clinic at Georgetown University Law Center, where she also received her LL.M. While there, she argued cases before the Fourth and D.C. Circuits. Professor Garden then clerked for Judge Thomas L. Ambro of the U.S. Court of Appeals for the Third Circuit. A graduate of NYU School of Law and McGill University, Professor Garden also spent several years in practice as a public interest litigator. From 2005-2008, she was an associate at the union-side labor law firm Bredhoff & Kaiser, PLLC in Washington, D.C. Before that, she was a guardian ad litem at the Children's Law Center in Washington D.C., and held the Abraham Fuchsberg Fellowship at Public Citizen Litigation Group, where she focused on consumer safety issues, class action fairness, and Internet privacy.

Education

B.A., with great distinction, McGill University, 2000
J.D., cum laude, New York University School of Law, 2003
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Specializations

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LOREN GESINSKY, ESQ.
BIOGRAPHY

Loren Gesinsky is a partner in the Labor & Employment Department in the New York office of Seyfarth Shaw LLP. He represents employers before state and federal courts, administrative agencies, arbitrators, mediators, and other tribunals regarding all legal issues relating to the workplace, including wage and hour collective and class actions, discrimination, harassment, wrongful discharge, breach of contract, non-compete, other restrictive covenants and trade secrets. He also counsels employers and negotiates agreements regarding these issues, with particular attention on strategies to avoid litigation. Additionally, he participated actively in the United States Chamber of Commerce task force that developed comments on the United States Department of Labor's proposed regulatory changes to the FLSA's white-collar exemptions.

Mr. Gesinsky has around twenty-five years of experience working as a labor and employment attorney. He developed an especially broad foundation for his representation of employers by previously practicing plaintiff's employment law and commercial litigation. Mr. Gesinsky has successfully tried, arbitrated, mediated, and otherwise advocated in numerous matters involving multiple and single plaintiffs. His advocacy abilities in the courtroom, as well as his negotiating and public speaking abilities, have been enriched by his considerable training and experience as an actor.

Recognition of Mr. Gesinsky's professional accomplishments includes his election as a Fellow of the College of Labor and Employment Attorneys, listing in *Best Lawyers* and *Super Lawyers*, appointments to Chair the Committee on Legal Issues Affecting People With Disabilities and the State Affairs Committee of the New York City Bar Association, and selection for mayoral appointment to the New York City Commission on Human Rights. He is a frequent author and presenter on employment-law issues.

Education

- J.D., New York University School of Law (1991)
- B.A., Northwestern University (1988)
  Phi Beta Kappa; National Merit Scholar

Admissions

- New York

Courts

- United States District Court for the Southern, Eastern, and Northern Districts of New York
- United States District Court for the Northern District of Ohio
- United States Court of Appeals for the Sixth Circuit

MATTHEW GINSBURG, ESQ.
BIOGRAPHY

Matthew Ginsburg is Associate General Counsel at the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 55 national and international unions in the United States and Canada representing over 12 million working men and women.

Matt's work focuses on traditional labor law issues, new forms of worker representation, the rights of immigrant workers, and the governance of the Federation. He regularly briefs and argues cases on behalf of unions and workers in the federal courts of appeals and presents the AFL-CIO's view on important workplace legal issues to the Supreme Court in *amicus curiae* briefs.

Prior to joining the AFL-CIO, Matt was an attorney at Cornfield & Feldman, a union-side labor law firm in Chicago, Illinois, and, prior to that, he was a Skadden Fellow and staff attorney at the Chicago Lawyers' Committee for Civil Rights Under Law.

Matt clerked for Judge Diane P. Wood of the United States Court of Appeals for the Seventh Circuit. He is a *magna cum laude* graduate of the New York University School of Law, where he was a Root-Tilden-Kern Scholar and a member of the Order of the Coif. Matt was a union organizer for several years prior to becoming a lawyer.

JAMES L. HALLMAN, ESQ.
BIOGRAPHY

James L. Hallman began his college career at Hofstra University in the summer of 1999. Mr. Hallman triple majored in Political Science, Sociology and Africana Studies and earned his B.A. in May of 2004.

In 2006, Mr. Hallman began pursuit of his law degree at Rutgers School of Law – Newark. He graduated from Rutgers in May of 2009, and after law school, joined the New York City Law Department's Labor and Employment Law Division as Assistant Corporation Counsel (ACC), where his work focused on civil rights and labor and employment cases. As an ACC, he routinely defended the City of New York, its entities and employees, in claims arising under the various federal, state and local laws. Mr. Hallman was responsible for handling all aspects of the litigation process for each of his cases, from commencement through trial. Notably, in 2012 and 2013, he brought two highly publicized federal cases to trial, where he obtained defense verdicts in both cases.

In 2014, Mr. Hallman joined New York City's Department of Health and Mental Hygiene as the Agency's Equal Employment Opportunity Director / Chief Diversity Officer. As EEO Director, it was Mr. Hallman's responsibility to ensure that all prospective and current employees were provided working environments that were free of discrimination, retaliation and harassment. In his role as Chief Diversity Officer, Mr. Hallman was responsible for the implementation and enforcement of the Agency's diversity and inclusion policies. He and his staff regularly partnered with various internal units and external entities to create and implement different diversity initiatives, which included strategies for recruitment, retention, training, and professional development at all levels.

In 2016, Mr. Hallman transitioned to the New York City Department of Transportation (DOT) as Executive Agency Counsel, but again serving in the dual role of Chief Diversity Officer / Equal Employment Opportunity (EEO) Director. Mr. Hallman was promoted to Assistant Commissioner of EEO, Diversity & Inclusion in May, 2018. In his role, Mr. Hallman provides counsel to DOT's Commissioner, General Counsel, Human Resources Division, and other Executive Staff on labor and employment-related legal issues, including but not limited to EEO, FMLA and other protected leaves, ADEA, ADA reasonable accommodations, diversity management, recruitment, hiring, retention, training, succession planning, performance reviews, and discipline. He is also charged with developing, implementing, and monitoring the Agency's strategic diversity and inclusion plan.

WILLIAM A. HERBERT, ESQ.
BIOGRAPHY

William A. Herbert is a Distinguished Lecturer at Hunter College, City University of New York and the Executive Director of the National Center for the Study of Collective Bargaining in Higher Education and the Professions. He is also a Faculty Associate at the Roosevelt House Institute for Public Policy at Hunter College, an adjunct professor at Albany Law School, and a Fellow of the College of Labor and Employment Lawyers,

Prior to joining Hunter College's faculty, Mr. Herbert was Deputy Chair and Counsel to the New York State Public Employment Relations Board (PERB). Before his tenure at PERB, Mr. Herbert was Senior Counsel at CSEA Local 1000, AFSCME, AFL-CIO, where he litigated labor and employment cases in federal and state courts, administrative agencies and in arbitration. He is also a former supervising attorney with the New York City Commission on Human Rights.

Mr. Herbert is a former Chair of the New York State Bar Association Labor and Employment Law Section and a former Co-Chair of the American Bar Association Labor and Employment Section's Technology in the Practice and Workplace Committee. He is a co-editor of the New York State Bar Association's treatise Lefkowitz on Public Sector Labor and Employment Law. In addition, he has authored several law review articles and lectured on labor and employment topics including collective bargaining in higher education, public sector labor law and history, workplace privacy, the application of the First and Fourth Amendments to public employment, employment discrimination, and whistleblower and retaliation issues.

JAY A. HEWLIN, ESQ.
BIOGRAPHY

Jay A. Hewlin is an attorney and consultant, specializing in employment law, managerial effectiveness, leadership, contract negotiations, and conflict resolution. Jay's diverse clients include corporations, law firms, government agencies, and not-for-profits. Jay's counseling, training, and instruction facilitate organizational change, strategic human resource management, handling complaints of discrimination, mediation, and more generally, optimization of organizational development through effective human resource strategy. Jay has extensive experience counseling U.S. corporations on employment law matters arising under federal, state, and local laws.

Jay is a Lecturer in Law at Columbia Law School, NY, where he teaches "Negotiation Workshop." He is also a Course Lecturer at the Desautels Faculty of Management at McGill University, Montréal, Canada, where he teaches Negotiations and Conflict Resolution for the MBA and Bcom programs. His work in the Faculty of Management has won him the Distinguished Teaching Award in recognition of outstanding teaching. Jay also teaches in modules of both the International Masters in Practicing Management, and the International Management in Health Leadership programs, co-founded by Henry Mintzberg. On occasion, Jay teaches Business Fundamentals for Musicians for the Schulich School of Music at McGill, and also on occasion, conducts seminars and workshops on Contract Negotiations and Conflict Resolution for McGill's School of Continuing Studies. Most recently, he was invited to lecture at the National University of Singapore, Singapore, and Southwestern University of Finance and Economics in Chengdu, China.

Jay's consulting and teaching are largely informed by his extensive management experience as well as his collaborative efforts with management scholars throughout the US and Canada on research examining employee satisfaction, retention, organizational culture, managing inclusive work forces, and employee selection. He is often called upon to assist managers with developing core competencies of leveraging talent within diverse environments.

In addition to his work for corporations, Jay has counseled and represented the United States Senate offices in employment law matters, and researched the impact of particular provisions of the U.S. Constitution on workplace policy. Before working for the Senate, Jay worked in New York City for Proskauer Rose LLP, one of the largest U.S. law firms, with a national reputation for its Labor and Employment practice. While at Proskauer, Jay investigated charges of discrimination for private and public sector clients. He counseled human resource managers and senior executives on a broad range of labor and employment issues arising under federal and state labor and employment laws.

Jay holds a Juris Doctorate from Columbia University and a Bachelor of Arts degree in Brass Performance from Boston University.

JOHN S. HO, ESQ.
BIOGRAPHY

John S. Ho exclusively represents employers on all labor and employment matters and regularly handles wage and hour matters involving federal and state laws, such as the Fair Labor Standards Act, the New York Labor Law, New York's Miscellaneous Industries Wage Order, and New York's Hospitality Wage Order which includes numerous cases involving New York's Wage Theft Prevention Act, tip credits and tip pooling issues. John also routinely works with the Occupational Safety and Health Act and New York's Public Employee Safety and Health Act in addition to handling discrimination claims, drafting employee handbook policies and procedures and employment contracts, conducting workplace investigations, and arbitrations. John has defended a wide range of employers against hybrid class and collective actions under the FLSA and the New York Labor Law. He also frequently assists companies with internal wage and hour audits, as well as Department of Labor audits, including those generated by misclassification of independent contractors in New York State unemployment filings. John also has extensive experience with assisting businesses with internal safety and health audits and resolving and contesting OSHA citations before the Occupational Safety and Health Review Commission including but not limited to fatality investigations as well as defending against claims of retaliation under OSHA and New York's Workers' Compensation Law.

As a former trial attorney with the U.S. Department of Labor, Office of the Solicitor, John was part of a litigation team that recovered approximately $4 million under the FLSA on behalf of New York State Environmental Conservation Officers. While at the DOL, he also received a commendation from OSHA's Regional Administrator for his prosecution of a discrimination complaint under the Surface Transportation Assistance Act.

John serves as the chair of Cozen O'Connor's OSHA Practice and is also the author of its safety and health blog, the OSHA Chronicle.

John is a founding member of the Wage and Hour Defense Institute, and he frequently lectures on FLSA, OSHA, and Labor Department audits. He has also taught business and employment law at the Pratt Institute and the New School.

John also writes extensively on labor and employment law. He is currently the co-editor of the American Bar Association Labor and Employment Law Section electronic newsletter. He was a contributing editor to The Fair Labor Standards Act, 2002-2005, Cumulative Supplement, published by BNA Books, and has served on its editorial board since 2006. John is also serving

as a chapter editor for the Occupational Safety and Health Law, Fourth Edition published by the ABA and Bloomberg Law.

John has been named a New York Metro Super Lawyer since 2013 and has been selected for inclusion in Best Lawyers of America, 2018.

WENDY HORD
BIOGRAPHY

Wendy Hord is the Assistant in Health and Safety and Healthcare for NYSUT. She has worked for labor unions for over 31 years and in occupational safety and health 27 years. She is responsible for the development and coordination of NYSUT's health and safety and healthcare professional programs which includes providing technical assistance and training on a variety of health and safety issues such as indoor environment hazards, ergonomics and workplace violence. She has assisted workers on the issue of workplace violence for over 25 years, including having inspected numerous workplaces to give suggestions for security improvements, and conducted training for various unions and organizations both in and out of New York State.

She completed her undergraduate bachelor's degree in socioeconomics and her master's degree in labor and industrial relations, both from Michigan State University. Wendy is an Associate Safety Professional (ASP), an authorized OSHA General Industry Outreach Trainer, member of the American Public Health Association and American Society of Safety Professionals, Chair of the New York Committee for Occupational Safety and Health and Vice-Chair of the Occupational and Environmental Health Center of Eastern New York.

STEPHEN J. JONES, ESQ.
BIOGRAPHY

Steve Jones is a trusted advisor and experienced trial attorney representing employers of every size. Steve leads Nixon Peabody's Labor & Employment Class Action Team and is regularly called upon to defend "bet the company," high-stakes litigation. His experience includes defense of approximately 100 class actions and collective actions under the FLSA, ERISA, FCRA, and Title VII of the Civil Rights Act. His practice also includes extensive non-competition and trade secret litigation and defense of whistleblower, discrimination, and sexual harassment claims in state and federal courts and before the EEOC, DOL, and state human rights agencies. Steve has developed innovative auditing methodologies in wage-hour and EEO areas (including statistical pay equity analysis), thereby reducing or eliminating his clients' exposure to class action litigation and EEOC systemic discrimination enforcement actions.

Steve has been named to the 2017-2018 editions of *Best Lawyers in America* (Litigation-Labor and Employment) and to the 2014-2018 editions of *Super Lawyers* (Employment Litigation Defense) based on peer review and professional achievement. In 2014, the *New York Law Journal* chose Steve for its Rising Stars Award—the only Rochester attorney to receive the award that year, based on his contributions to the practice of law. His practice has been profiled by the *Rochester Democrat & Chronicle*. To read more, click here. Steve is recognized as an industry thought leader, regularly providing commentary to the news media on legal developments, presenting CLEs, and publishing articles advocating for specific legislati e or legal reforms

Steve served for over a year on special assignment as in-house counsel to Eastman Kodak Company, where he was responsible for managing external counsel and counseling business units. This experience has proven invaluable in understanding the pressures and budgetary constraints placed on his in-house clients.

Community Activity

Steve is highly active in community leadership. He has served for six years on the Board of Directors of Volunteers of America, Upstate New York ("VOA"), holding at arious times the positions of Vice Chair, Corporate Secretary, and Chair of the Governance Committee. Steve recently completed the Board Leadership Program, Center for Community Engagement, St. John Fisher College. Prior to VOA, Steve served for three years as the President of the Board of Directors of Step by Step, a Rochester-based organization dedicated to assisting and rehabilitating incarcerated women. Steve led this organization through the Great Recession, at a time when government funding and private donations dropped precipitously. He also helped spearhead a merger between Step by Step and VOA in 2012. He has served on the Judiciary Committee of the Monroe County Bar Association. In 2009, Steve was selected to the *Rochester Business Journal's* 40 Under 40 Award in recognition of his civic and professional achievement. Steve also served as a coach and mentor to high school students in the Monroe County Law Explorers Program for over five years. He actively represents several community-based, nonprofit organizations on a pro bono basis.

WENDI S. LAZAR, ESQ.
BIOGRAPHY

WENDI S. LAZAR is a partner at Outten & Golden LLP in New York where she co-heads the firm's Individual Practice and the Executives and Professionals Practice Group. Ms. Lazar practices in many areas of employment law with a focus on executive agreements, including retention, expatriate, non-competition, talent, severance, and compensation arrangements. She also represents teams of executives, founders and partners transitioning during a sale, merger and acquisitions and other corporate transactions. Ms. Lazar's practice is international in scope, and she advises clients and attorneys in the U.S. and abroad on employment, contract, and often related immigration issues. Ms. Lazar represents individuals, partners, and management teams at portfolio and public companies, financial institutions (including banks, hedge funds, private equity companies), and entertainment, advertising and media companies. She also represents law partners and associates, accounting professionals, doctors and medical practitioners in all transactional matters. Ms. Lazar was appointed as a commissioner by the American Bar Association's Commission on Women, where she heads the Sexual Harassment and Gender Based Bullying Committee, and just completed her 3 year term.

Ms. Lazar is the former Diversity Co-Chair and a member of the Executive Committee of the New York State Bar Association Labor & Employment Section, and is an active member of NELA, ABA and NYSBA committees. She is former Employee Co-Chair of the American Bar Association Labor and Employment Law Section's International Labor and Employment Law Committee.

Ms. Lazar writes a quarterly column for the New York Law Journal entitled "Employees in the Workplace." She regularly lectures on employment issues to bar associations and industry groups and has had numerous legal articles and book chapters published. She was co-author and Editor- in-Chief of "Zero Tolerance: Best Practices for Combating Sex-Based Harassment in the Legal Profession," published in 2018 by the ABA. Ms. Lazar also co-authored as Co-Editor In-Chief, "Restrictive Covenants and Trade Secrets in Employment Law: An International Survey," published in 2010 by the BNA and its supplements through 2013, which includes the chapter "Confidentiality, Trade Secrets, and Other Duties and Restrictive Covenants in a Global Economy." In addition, she is also the author of the chapter "Negotiating and Drafting Expatriate Employment Agreements," in the 3rd Edition of Vol. 1B of International Labor & Employment Law, published in 2009 by the BNA.

Martindale-Hubbell recognizes Ms. Lazar as an AV "Preeminent" rated attorney. She was named to Best Lawyers in America 2012, 2013, 2014, 2015, 2016, 2017, 2018 and 2019 in the field of Employment Law – Individuals. Ms. Lazar was also recognized by Super Lawyers in 2012, 2013, 2014, 2015, 2016, 2017 and 2018. Ms. Lazar has been selected as a 2013, 2014, 2015, 2016, 2017 and 2018 Lawdragon 500 Leading Lawyer. In 2014, Ms. Lazar was elected as a Fellow to the College of Labor & Employment Lawyers. Ms. Lazar was named a New York Law Journal: Top Women in the Law 2016. She is also a Board Member of Work Life Law, UC Hastings College of the Law. Before she began practicing law in 1993, Ms. Lazar was a film and television producer. Her ten years of experience in that field include many television and feature film credits as well as an Emmy Award. Ms. Lazar graduated magna cum laude from Hunter College and received her J.D. cum laude from Benjamin N. Cardozo School of Law, where she received a Ford Foundation Fellowship in International Law and was an Alexander Fellow, participating as a federal judicial law clerk.

MARIJANA MATURA, ESQ.
BIOGRAPHY

Marijana Matura is a partner at Shulman Kessler LLP, where she represents individuals in litigation and negotiation in all areas of employment law. Ms. Matura holds a J.D. from St. John's University School of Law and a B.S. in Industrial and Labor Relations from Cornell University.

She has represented employees across many industries, including restaurant workers, healthcare marketing representatives, delivery drivers, administrative assistants, domestic workers, manual laborers, and medical technicians, achieving unpaid wages, liquidated damages, and other relief. She is a member of the National Employment Lawyers Association of New York (NELA/NY), New York State Bar Association, American Bar Association, and Huntington Lawyers' Club.

Recent reported cases include: *Nunes v. Rob-Glen Enterprises, Inc.*, No. Civ. 6207, 2018 WL 3351798 (E.D.N.Y. July 5, 2018); *Savino v. Visiting Nurse Service of New York*, No. 15 Civ. 9451, 2017 WL 2473214 (S.D.N.Y. June 7, 2017); *Puglisi v. TD Bank, N.A.,* No. 13 Civ. 637, 2015 WL 4608655 (E.D.N.Y. July 30, 2015); *Bijoux v. Amerigroup New York, LLC*, No. 14 Civ. 3891, 2015 WL 5444944 (E.D.N.Y. Sept. 15, 2015); *Sukhnandan v. Royal Health Care of Long Island LLC*, 2014 WL 3778173 (S.D.N.Y. July 31, 2014); *Morris v. Affinity Health Plan*, 859 F. Supp. 2d 611 (S.D.N.Y. 2012); *Salomon v. Adderley Industries,* 847 F. Supp. 2d 561 (S.D.N.Y. 2012); *Garcia v. Pancho Villa's of Huntington Village,* 281 F.R.D. 100 (E.D.N.Y. 2011); *Avila v. Northport Car Wash,* 774 F. Supp. 2d 450 (E.D.N.Y. 2011); *Moore v. Eagle Sanitation, Inc.,* 276 F.R.D. 54 (E.D.N.Y. 2011); *Garcia v. Pancho Villa's of Huntington Village,* 678 F. Supp. 2d 89 (E.D.N.Y. 2010); *Romero v. Jocorena Bakery, Inc.*, No. 09 Civ. 5402, 2010 WL 4781110 (E.D.N.Y. Nov. 23, 2010); and *Cruz v. Lyn-Rog Inc.,* 754 F. Supp. 2d 521 (E.D.N.Y. 2010).

Super Lawyers Magazine has repeatedly named Ms. Matura to its list of top attorneys in New York in Employment Litigation from 2013 through 2018. Ms. Matura is proficient in both Spanish and Croatian.

MICHELE COLEMAN MAYES, ESQ.
BIOGRAPHY

Michele Coleman Mayes is Vice President, General Counsel and Secretary for the New York Public Library (NYPL). Ms. Mayes joined NYPL in August 2012 after serving as Executive Vice President and General Counsel for Allstate Insurance Company since 2007. She served as a Senior Vice President and the General Counsel of Pitney Bowes Inc. from 2003 to 2007 and in several legal capacities at Colgate-Palmolive from 1992 to 2003. In 1982, Ms. Mayes entered the corporate sector as managing attorney of Burroughs Corporation. After Burroughs and Sperry Corporation merged, creating Unisys Corporation, she was appointed Staff Vice President and Associate General Counsel for Worldwide Litigation. From 1976 through 1982, she served in the U.S. Department of Justice as an Assistant United States Attorney in Detroit and Brooklyn, eventually assuming the role of Chief of the Civil Division in Detroit. Ms. Mayes received a B.A. from the University of Michigan and a J.D. from the University of Michigan Law School.

Ms. Mayes served on the Presidential Commission on Election Administration under President Obama from 2013-2014. She served as Chair of the Commission on Women in the Profession of the American Bar Association from 2014-2017. Effective in 2015, she was appointed as an Advisor to the ABA Business Law Section, and in that same year, became a Fellow of the American College of Governance Counsel. In August 2016, she was elected to the Board of Directors of Gogo Inc. (NASDAQ: GOGO).

HOWARD M. MILLER, ESQ.

Howard Miller of Bond Schoeneck & King combines innovative thinking and pragmatic problem solving with committed advocacy on a day to day basis to help his clients achieve their goals and objectives.

A Path Forward in Education

In the area of education law, Howard represents public school districts and private universities throughout New York. He provides collaborative real time day to day advice on the most complex and controversial matters facing his clients. When problems cannot be solved amicably, Howard provides zealous, yet cost effective, advocacy, collaborating with his clients at each and every phase of the matter.

A Path Forward in Business

In private sector employment litigation, Howard litigates all types of employment discrimination and retaliation claims. He also represents clients in noncompete and trade secret cases and has won two significant appellate court decisions strengthening and cementing New York's "Faithless Servant Doctrine." Due to Howard's extensive litigation experience, his clients can expect to be fully informed up front of both the strengths and weaknesses of their case, as well as potential fees. There is simply no substitute for informed strategic decisions at the outset.

Beyond the Courtroom

Many of Howard's cases have received media attention and have been reported in national employment law periodicals. In addition, Howard frequently lectures and writes articles on topics such as Constitutional Law, non-compete and trade secret litigation, employment and Constitutional issues relating to social networking sites and various aspects of employment discrimination and education law.

Honors & Affiliations

- Listed in:
  - *The Best Lawyers in America®* 2019, Education Law (listed for 5 years)
  - *New York Super Lawyers 2017®*, Employment & Labor
- New York State Bar Association
- Nassau County Bar Association
- National Association of College and University Attorneys
- Member, Law Review
- St. Thomas More Scholar

Representative Matters

- *Gingrich v. William Floyd School District*, 2018 U.S. Dist. LEXIS 103371 (E.D.N.Y. 2018) (dismissing constitutional claims arising out of student-on-student assault)
- *Nadolecki v. William Floyd School District*, 2016 U.S. Dist. LEXIS 88399 (E.D.N.Y. 2016) (recommending dismissal of First Amendment retaliation claims), *adopted in its entirety* 15-cv-2915 (September 13, 2016)

Education

- St. John's University School of Law (J.D., 1990)
- State University of New York at Albany (B.S., *cum laude*, 1986)

Bar/Court Admissions

- New York
- Connecticut
- U.S. Court of Appeals for the Second Circuit
- U.S. District Court for the Eastern District of New York
- U.S. District Court for the Northern District of New York
- U.S. District Court for the Southern District of New York

Practices

- School Districts
- Municipalities
- Higher Education
- Labor and Employment
- Health Care

LALEH MOSHIRI, ESQ.
BIOGRAPHY

Laleh is the National Director of Diversity and Inclusion at Borden Ladner Gervais LLP in Toronto, Canada. In this capacity, she is responsible for developing and implementing the firm's diversity and inclusion strategy. Laleh brings over 15 years of progressive responsibility and experience in managing professional talent for BLG to this role.

Laleh received her BA in History from Williams College and her JD from the University of Toronto. She was called to the Ontario Bar in 1994 and began her legal career at BLG as a litigator specializing in health law. She transitioned to law firm administration in 1998.

Laleh is the recipient of the Canadian Centre for Diversity and Inclusion's Practitioner of the Year Award for 2017.

JILL L. ROSENBERG, ESQ.
BIOGRAPHY

Jill L. Rosenberg, an employment partner at Orrick, Herrington & Sutcliffe LLP in New York, is a nationally recognized employment litigator and counselor. Ms. Rosenberg has significant experience defending and advising employers in discrimination, sexual harassment, whistleblowing, wrongful discharge, affirmative action, wage-and-hour and traditional labor matters. She handles complex individual cases, as well as class actions and systemic government investigations. She represents a broad range of companies, with a focus on employers in the securities industry, banks and financial institutions, accounting firms and law firms.

Ms. Rosenberg also has particular expertise in the representation of nonprofit entities, including colleges, universities, hospitals, foundations and cultural institutions. She frequently speaks on employment law issues for employer and bar association groups. Ms. Rosenberg has been recognized by *Chambers USA* as a leading employment lawyer. Ms. Rosenberg is the firm-wide Partner in Charge of Pro Bono Programs and serves on the firm's Personnel Development, Risk Management and Diversity Committees. She currently serves as the Co-Chair of the Diversity and Leadership Committee of the New York State Bar Association Labor and Employment Law Section. She is the Chairperson of the Board of Directors of New York Legal Assistance Group, a legal services organization serving New Yorkers in need.

Ms. Rosenberg graduated from Princeton University, and earned her J.D. from The University of Chicago Law School.

SARAH E. RUHLEN, ESQ.
BIOGRAPHY

Sarah E. Ruhlen (Satter Law Firm, PLLC, Syracuse, NY) currently serves as co-chair of the EEO Committee of the NYSBA Labor and Employment Law Section; additionally she is a member of the AFL-CIO Lawyers Coordinating Committee, the National Organization of Social Security Claimants' Representatives, the National Employment Lawyers' Association, and the New York State Women's Bar Association, Central New York chapter. She serves on the Board of the Greater Syracuse YMCA Arts Branch. Ms. Ruhlen represents Employees in race, sex, religion, national origin, color, age, disability, sexual orientation, TGNC, and other discrimination claims, as well as wage and hour, family leave, severance, non-competes, and other employment matters. She works with private and public sector unions in the healthcare, public safety, education, transportation, and other industries. She is an alumna of both the Peggy Browning Fellowship Program and the AFL-CIO Law Student Union Summer.

DR. SARA SLINN

Associate Dean (Research and Institutional Relations) & Associate Professor

Sara Slinn is an Associate Professor at Osgoode Hall Law School, specializing in labour, employment, human rights and the Charter. She studied at the University of Toronto, CIRHR (Ph.D 2003), the University of British Columbia (LL.B.), and Queen's University (BA Honours and MIR). Her background includes practicing labour and employment law at the Labour Relations Board of British Columbia and private law firms in Vancouver.

Professor Slinn has been a visitor at Melbourne Law School's Centre for Employment and Labour Relations Law, Cornell University's Industrial and Labour Relations School and the RMIT Graduate School of Business and Law. She has received numerous research grants including as principal investigator in a SSHRC standard research grant investigating the workplace and expression; Borden Ladner Gervais Research Fellowships exploring labour board decision-making and researching back-to-work legislation; and, a Foundation for Legal Research grant to study employer workplace communications.

She has recently completed a co-edited volume addressing teacher collective bargaining structures: Dynamic Negotiations: Teacher Labour Relations in Canadian Elementary and Secondary Education. Recent research includes a study funded by the National Academy of Arbitrators Research and Education Fund, with co-researchers Martin Malin (Chicago-Kent) and Jon Werner (Wisconsin): "An Empirical Evaluation of the Adjudication of Statutory Human Rights Claims before Labour Arbitrators and Human Rights Tribunals in Ontario." Professor Slinn also serves on the editorial board of the journal Relations Industrielles, and is a member of both the Labour Law Casebook Group in Canada and the Labor Law Group in the United States.

PATRICK SOLOMON, ESQ.
BIOGRAPHY

Patrick Solomon is a founding partner of Thomas & Solomon LLP. He has practiced solely in employment law, first at a large firm advising employers, and then, since 2001, as partner at Thomas & Solomon LLP representing employees. Currently, he concentrates his practice on national wage and hour, class and collective action litigation. He has represented hundreds of thousands of employees, and recovered back wages resulting in tens of millions of dollars for those clients. Mr. Solomon was selected to be a mediator for the United States District Court for the Western District of New York and regularly mediates federal actions for the court.

Mr. Solomon is an executive committee member of the New York State Bar Association's Labor and Employment Law section, and co-chairs the section's Wage and Hour Committee.

Mr. Solomon played goalie on the Iroquois National Lacrosse Team in the 1990 and 1998 World Lacrosse Championships in Perth, Australia and Baltimore, Maryland. He also played on the twelve-time National Championship Hobart College Lacrosse team earning three National Championships.

BAR ADMISSIONS

- New York, 1996
- U.S. Supreme Court, 2012
- U.S. Court of Appeals 1st Circuit, 2010
- U.S. Court of Appeals 2nd Circuit, 2005
- U.S. District Court Northern District of New York, 1997
- U.S. District Court Western District of New York, 1996
- U.S. District Court Southern District of New York, 2012
- U.S. District of Colorado, 2010

EDUCATION

- **Cornell Law School, Ithaca, New York**
  - J.D. – 1995
  - President of the American Indian Law Students Association, 1994-1995
- **Hobart College, Geneva, New York**
  - B.A. - 1992
  - Honors: With Honors

HONORS AND AWARDS

- Rochester Business Journal's Forty Under 40 Award, 2005
- New York Super Lawyers, 2007 - Present
- The Monroe County Bar Association's President Award, 2010

ANDREA H. STEMPEL, ESQ.
BIOGRAPHY

Andrea H. Stempel is Associate General Counsel and the Head of Employment Law at Ernst & Young LLP. Prior to that, she was a Managing Director at Societe Generale in New York, where she ran the employment law function in the Americas for 14 years. She joined the French bank after 10 years as a labor and employment litigator in private practice, including with the law firms of Chadbourne & Parke and Orrick, Herrington & Sutcliffe. A Brooklyn native, Andrea graduated from Williams College and the Boston University School of Law.

MELISSA LARDO STEWART, ESQ.
BIOGRAPHY

MELISSA LARDO STEWART is a partner at Outten & Golden LLP in New York, where she represents employees in class action wage and discrimination cases. She has represented workers across many industries and job functions, including retail, sales, food service, hospitality, financial services, accounting, and telecommunications. She has prosecuted wage theft claims on behalf of workers who were required to work off-the-clock, subjected to time-shaving, wrongly classified as exempt from overtime protections, and improperly treated as independent contractors. Ms. Stewart also currently represents employees and applicants in class and collective action gender and age discrimination cases.

Before Ms. Stewart joined Outten & Golden LLP in November 2013, she clerked for the Honorable James Orenstein in the Eastern District of New York and the Honorable Dickinson R. Debevoise in the District of New Jersey, and represented workers and labor unions as an associate at Woodley & McGillivary in Washington, D.C. She graduated *magna cum laude* from Fordham University School of Law in 2009.

SHARON STILLER, ESQ.
BIOGRAPHY

Sharon Stiller is a Partner and Director of the Employment Law Practice at Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP. Ms. Stiller is a fellow of the prestigious College of Labor and Employment Lawyers, and is the author of two treatises on employment law, Employment Law in New York (2nd Series) (West Group 2012) (Volume 13A of the New York State Practice Series) and the national treatise, Expert Witnesses: Employment Cases (Thomson West 2008-2009). She is an author for Practitioner Insights, a Thomson Reuters offering on the WestlawNext legal research platform. Ms. Stiller has been appointed to the American Arbitration Association Panel of Neutrals for Employment Law. Ms. Stiller has been recognized for her legal work and community service, and received the Volunteer Legal Services Project William C. McKnight Volunteer Service Award from the Monroe County Bar Association, the Kate Stoneman award from Albany Law School, the Raymond J. Pauley Award, from the Monroe County Bar Association, and the Rochester Women's Network's "W" Award. She has been named one of the top 25 Women Lawyers in Western New York. Ms. Stiller has been designated a "Super Lawyer" from 2007-Present, a distinction earned by only five percent of the lawyers in the Upstate New York area. She was selected by her peers for inclusion in The Best Lawyers in America® 2013 - 2018 in employment law. She has also served as an expert witness in the area of employment law.