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Labor and Employment Law Journal

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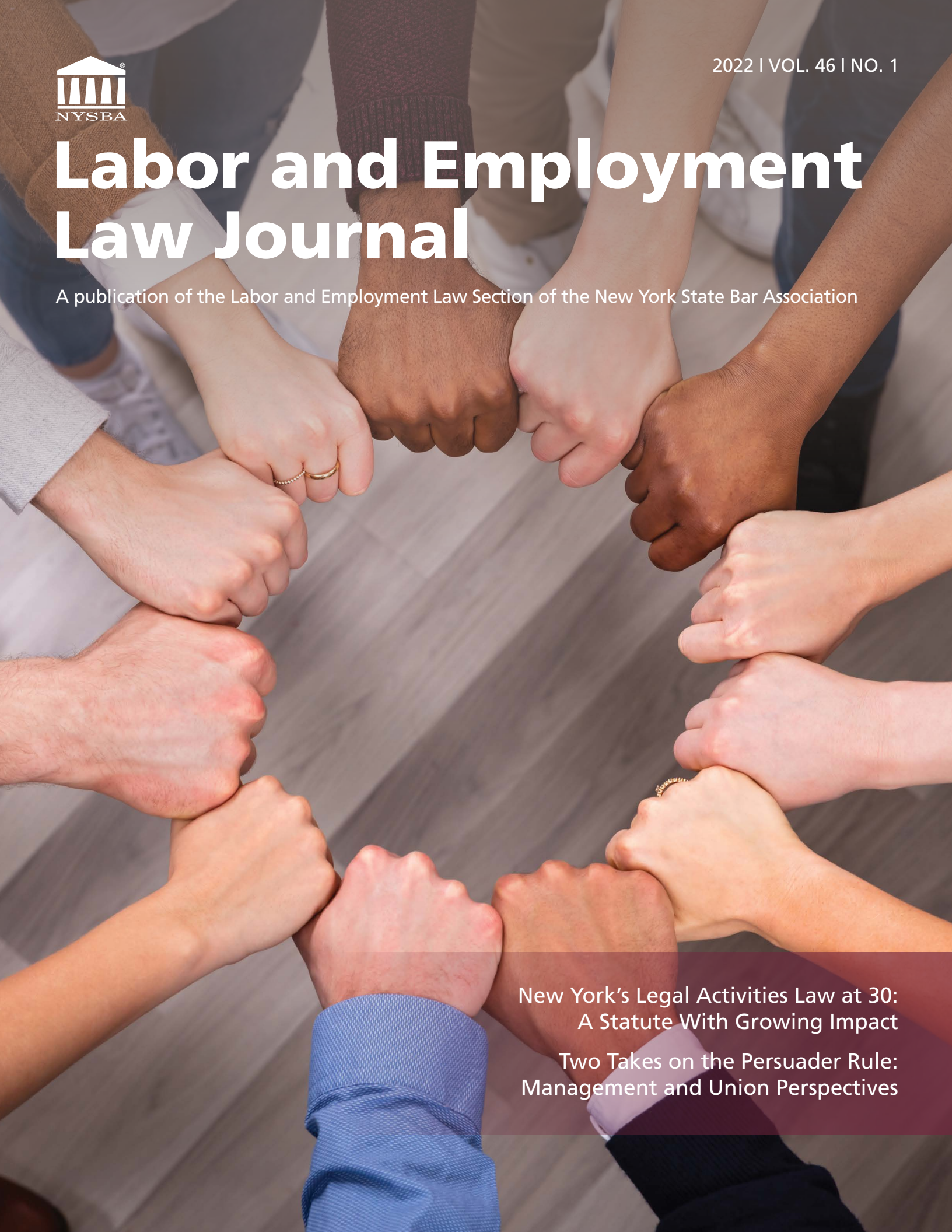

New York's Legal Activities Law at 30: A Statute With Growing Impact

Two Takes on the Persuader Rule: Management and Union Perspectives

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Fourth Edition

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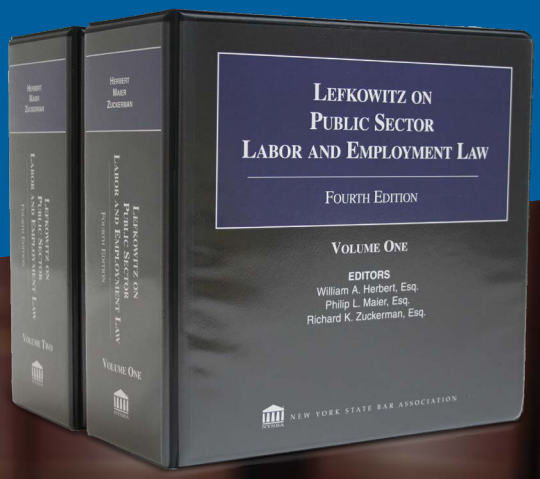

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Message From the Chair

Dear Members,

With the dark cloud of COVID appearing to lift and spring underway, we return to a new normal. Many of us are back to in-person proceedings but with some remote hearings. Our Section has remained engaged, robust, and vibrant throughout the pandemic. A large number of our members attended the fall Section meeting in Saratoga. Our CLE programs were dynamic. At our Annual Meeting in January, we elected Sheryl Galler as our next Chair-elect. Ms. Galler is an excellent choice. Her track record of service and chair of our Finance Committee make her selection much deserved. At the Annual Meeting, the panels presented updates regarding the NLRB, collective bargaining, arbitration, ethics, the great resignation, and workplace investigations. We had many student submissions for Dr. Emanuel to review for the Kenneth D. Stein Memorial Writing Competition and the Samuel M. Kaynard Memorial Student Award, and this edition includes the winning submissions.

In February 2022, we continued our new tradition of celebrating Black History Month with esteemed moderator Melissa Woods and a panel of outstanding advocates, including Monte Chandler, Derek Sells, Taren Greenidge, Adrian Neil, and Pamela Fynes. It's been a pleasure working with Patrick Meany, our Section's new NYSBA liaison.

Our Public Sector Committee is busy planning an in-person program on June 10, 2022, in Albany, and editors Subhash Viswanathan, Tyler Hendry, and Julie Torrey have been busy preparing this spring edition of the *Labor and Employment Law Journal*.

As we move forward, I'm looking forward to our fall 2022 meeting in picturesque Cooperstown on September 15-18, 2022. As the world turns, our focus remains the same: the enduring quest for justice, due process, fundamental fairness, freedom, and democracy. I'm proud to serve as Section Chair and look forward to transitioning leadership to Bob Boreanaz on June 1, 2022. Please enjoy this edition of the *Journal*.

Warm Regards,

Timothy S. Taylor

NEW YORK STATE BAR ASSOCIATION

Request for Articles

If you have written an article you would like considered for publication, or have an idea for one, please contact any one of the editors:

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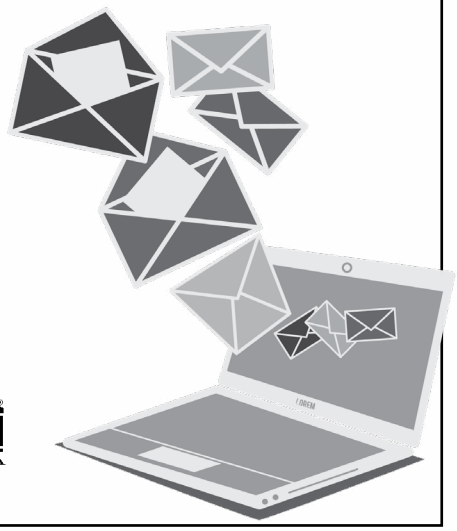
Subhash Viswanathan:	**sviswanathan@bsk.com**

Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information.



Q&A: Ethical Issues Regarding Demand Letters

By Colin Leonard

Question

I represent an employer who received a letter from a lawyer. The letter states the lawyer represents a former employee of my client who claims she was subject to unlawful discrimination. Among other statements in the letter, it provides that "unless this matter is brought to an acceptable resolution by January 31, the attached complaint *will be filed* with the appropriate state or federal agency." Accompanying the letter is a 45-page complaint.

It is now nearly a year later; consistent with my client's instruction, I did not respond to the demand letter and the complaint never was filed.

Has the lawyer who threatened to file the complaint, but never did, engaged in unethical conduct in violation of the Rules of Professional Conduct ("Rules")?

Answer

We all have prepared them. Or received them. Or both. The ominous demand letter, made all the more convincing when accompanied by a fully framed complaint, ready for filing.

Here, the lawyer for the former employee stated in no uncertain terms, that the complaint "will be" filed. No equivocation. It was even put in underline/bold format so no one would miss it. But alas, it never was filed. (And for purposes of this exercise, let's put aside the irrationality of a lawyer spending the time and effort to develop and draft a 45-page complaint, but never file it or resolve the matter).

As lawyers, we know that in our conduct we are held to a higher standard in many respects. In particular, the Rules prohibit a lawyer, in the course of representing a client, from "knowingly making a false statement of fact or law to a third person." Rule 4.1. Even outside the context of representing a client, a lawyer commits misconduct where she engages in conduct involving "dishonesty, fraud, deceit or misrepresentation." Rule 8.4(c).

In a recent opinion of the New York State Bar Association's Committee on Professional Ethics, the committee concluded that in most cases the lawyer's threat of an intention to file the complaint will not rise to the level of a false statement of fact. Opinion 1228 (August 30, 2021). In reaching this conclusion, the committee recognized the various uncertainties that clients face prior to commencing a lawsuit: What will the fees be? Is additional legal research or factual investigation needed? Moreover, some clients will make a final determination on proceeding only after seeing how (or if) the other party responds.

Of course, if the client expresses the view that under no circumstances will she commence a lawsuit against her former employer, then the threat to file the complaint is false and is prohibited conduct under the Rules. But this circumstance, according to the committee, would be infrequent and considered unusual.

Finally, in an expression of caution, the opinion recognizes the applicability of the prohibition on a lawyer engaging in "frivolous conduct." Rule 3.1(b). A lawyer engages in frivolous conduct where, among other things, the lawyer knowingly advances a claim or defense that is unwarranted under existing law (except where the lawyer has a good faith argument for extension, modification or reversal of existing law) or where the lawyer knowingly asserts "material factual statements that are false." Rule 3.1(b)(1) and (3). If the draft complaint or the demand letter is frivolous (within the meaning of Rule 3.1), then the sending of these items would constitute an attempt to violate the Rules, which is itself an ethical violation under Rule 8.4(a).

The moral of the story? Include the draft complaint with your demand letter if you want and even threaten to file it. But be guided by the need to avoid always frivolous conduct.

Colin Leonard, former editor-in-chief of the *Labor and Employment Law Journal*, is a management-side labor and employment lawyer at Bond, Schoeneck & King in Syracuse. He can be reached at cleonard@bsk.com.

Legislative Update: A Brief Overview of New Laws and Proposed Legislation

By Kenneth R. Shaw

Since the end of the 2021 legislative session last June, New York State and New York City have seen several changes. Changes in leadership, from Governor Cuomo to Governor Hochul and Mayor Bill De Blasio to Mayor Eric Adams. A change in the workplace, from fully remote employees during much of the pandemic to many returning to the office. And a change in the job market, where several employers are vying to retain and attract top talent through increased pay and perquisites during a period identified as the Great Resignation.

Concurrently, New York's legal landscape has changed as well. With several amended and newly enacted federal, state and city labor and employment laws, this article provides brief a summary of each.

I. Federal Law Update

A. EEOC

When COVID-19 is a disability under Title I of ADA and Section 501 of the Rehabilitation Act

- On December 14, 2021, the Equal Employment Opportunity Commission (EEOC) clarified that an applicant's or employee's COVID-19 may be considered a disability when COVID-19 causes impairments that are themselves disabilities under the ADA. Mild symptoms that resolve are not considered a disability; however, more severe symptoms that do not resolve are entitled to a reasonable accommodation if the condition requires it and the accommodation is not an undue hardship for the employer.[1]
- The EEOC also warned that an employer risks violating the ADA if it relies on myths, fears or stereotypes about a condition and prevents an employee's return to work once the employee is no longer infectious.[2]
- Details of the EEOC guidance may be found on the Labor and Employment Section webpage.*

II. New York State Law Updates

A. Prevailing wage for delivery and hauling of supply construction materials (S.255-B/A.1106-B)

- On December 31, 2021, Governor Hochul signed a bill into law that amends the public work provisions of § 220 of the New York Labor Law. The bill requires payment of the prevailing wage for work involving delivery and hauling of construction materials on public work projects.[3]
- Details and the full text of the bill may be found on the Labor and Employment Section webpage.*

B. New York Paid Family Leave amendments

1. Increase to cap for intermittent leave (amendment to 12 N.Y.C.R.R. 380-2.5(c))

- On December 30, 2021, the New York State Workers' Compensation Board amended the New York Paid Family Leave Benefits Law (PFL) by removing the 60-day intermittent leave cap for employees who average five or more days per week. Now, employees may be entitled to up to 72 days of intermittent PFL.[4]
- Details of the amendment may be found on the Labor and Employment Section webpage.*

2. Addition of sibling to the definition of family member for PFL (S.2928-A/A.06098-A).

- On November 1, 2021, Governor Hochul signed a bill to expand the definition of family member under the PFL to allow caring for siblings; the expanded definition goes into effect on January 1, 2023.[5]

- The full text of the legislation may be found on the Labor and Employment Section webpage.*

C. Continuance of unemployment benefits for compelling family reasons (S.2623 /A.6080)

- Effective December 22, 2021, individuals will not be disqualified from receiving unemployment insurance benefits if they voluntarily separate from employment due to child care obligations, and they have made reasonable efforts to secure alternative child care.[6]

- The full text of the legislation may be found on the Labor and Employment Section webpage.*

D. Electronic monitoring law (S.2628/A.430)

- Effective May 7, 2022, all private employers in New York must notify employees if they intend to monitor work phones, email, or the internet use of its employees.[7]

Under the law employers must advise employees that:

- Any and all telephone conversations or transmissions, or internet access or usage by an employee by any electronic device or system, including but not limited to the use of a computer, telephone, wire, radio, or electromagnetic, photo-electronic, or photo-optical systems may be subject to monitoring at any and all times and by any and all lawful means.

- The full text of the legislation may be found on the Labor and Employment Section webpage.*

E. Expanded whistleblower protections (S.4394-A/A.5144-A)

- Effective January 26, 2022, § 740 of the Labor Law was amended to (1) expand whistleblower protections to former employees and independent contractors, and (2) significantly expands the definition of protected activities to include employees who have a reasonable belief of (and not just known) violations of *any* law, rule or regulation, or conduct that the employee reasonably believes poses a substantial and specific danger to the public health or safety.[8]

- The amendments also increase the statute of limitations from one to two years and require employers to post a § 740 notice in the workplace.[9]

- The full text of the legislation may be found on the Labor and Employment Section webpage.*

F. Changes to shared work program petition process (S.17-A/A.7373-A)

- Effective October 23, 2021, any group of employees who reasonably expect to experience an employment loss as a result or a reduction in workforce or who have suffered such a reduction now have the right to petition their employer in writing to encourage the employer to apply to participate in a shared work program.[10]

- An employer has seven days to respond to the petition in writing, but it is not required to implement the program.

- The full text of the legislation may be found on the Labor and Employment Section webpage.*

G. Workplace safety and pay legislation

On Labor Day, September 6, 2021, Governor Hochul signed four pieces of legislation designed to boost workplace safety and pay workers more. More details regarding these bills may be found on the Labor and Employment Section webpage.*

1. Establishes speed violation monitoring systems in work zones (S.4682-B/A.485-B)

   - Protects highway workers by establishing speed violation monitoring systems in work zones by means of photo devices and related notices of liability and adjudication of certain traffic infractions.[11]

2. Makes contractors liable for wages paid to subcontractors (S.2766-C/A.3350-A).

   - Makes general contractors on construction projects jointly liable for wages owed to employees of their subcontractors.[12]

3. Requires employers to pay prevailing wage rates to building service employees at co-ops and condos that receive certain tax abatements (S.6350-A/A.7434-A).

   - Employers must pay prevailing wages to building services employees at co-ops and condominiums that receive tax abatements under § 467a of the tax law.[13]

   - The law applies to buildings with an average unit assessed value of more than $60,000, with certain exceptions.[14]

4. Extends shared work benefits (S.4049/A.5678).

   - Amends the cap on shared work benefits from 26 consecutive weeks to an amount of time equal to 26 weeks' worth of benefits. The program also allows employers to keep employees and avoid layoffs by allowing staff to receive partial unemployment benefits while working reduced hours.[15]

H. The New York Health and Essential Rights Act and subsequent COVID-19 designation as an airborne infectious disease

- The New York Health and Essential Rights Act (the "NY HERO Act") was passed into law in May 2021.

Under the NY HERO Act, employers must establish an airborne infectious disease exposure plan that must meet minimum standards and be activated whenever the New York State Commissioner of Health designates the existence of a highly contagious communicable disease that presents a serious risk of harm to the public health.[16]

- On Sept. 2, 2021, COVID-19 was designated as a highly contagious communicable disease that seriously risks the public health, thus requiring employers to activate their exposure plans. This designation has been extended at least five times, through at least March 17, 2022.[17]

I. No Wage Theft Loophole Act (S.858-B/A.1893)

- Effective August 19, 2021, the New York State No Wage Theft Loophole Act, Article 6 of the New York Labor Law was amended to clarify that there are no exceptions to employer liability for failing to pay wages or benefits; this amendment was implemented in response to narrow court interpretations of Article 6 of the New York Labor Law that critics alleged created wage-theft loopholes.[18]
- The full text of the legislation may be found on the Labor and Employment Section webpage.*

J. Minimum wage and exempt salary threshold increases

- Effective December 31, 2021, the statewide minimum wage increased to $13.20 per hour, and the minimum wage in Westchester, Suffolk, and Nassau counties increased to $15.00 per hour. The $15.00 per hour rate has been in effect in New York City since 2019.[19]
- The minimum wage increase comes with a corresponding salary threshold increase for employees to be classified as exempt under the executive and administrative employee exemptions. Statewide, employees must earn at least $990 per week to be classified as exempt, and employees in Nassau, Suffolk, and Westchester counties must earn at least $1,125 per week.[20]

III. New York City Law Updates

A. Required salary listings for job postings (Int. 1208-B)

- Effective May 15, 2022, New York City employers with four or more employees will be required to include a "good faith" minimum and maximum salary range for all job postings for positions performed within New York City.[21]
- The full text of the legislation may be found on the Labor and Employment Section webpage.*
- New York State is also considered a similar salary listing requirement to amend the New York Labor Law; the legislation was referred to the Labor Committee on January 5, 2022, and no further action has been taken.[22]

B. Amendments to the New York City Fair Chance Act (Int. 1314-A)

- On July 29, 2021, New York City's "ban-the-box" law—the New York City Fair Chance Act—was amended to significantly expand protections for employees and applicants with criminal histories, and the New York Commission on Human Rights issued revised enforcement guidance relating to the amendment.[23]
- The law now: (1) applies to current employees and independent contractors, instead of just applicants, (2) requires employers to apply the Fair Chance act process to pending arrests, (3) expands the definition of non-convictions, and (4) requires employers to only request and consider criminal background check information after the employer has assessed all other job qualifications and made a conditional offer of employment.[24]
- The full text of the legislation and the enforcement guidance may be found on the Labor and Employment Section webpage.*

*For links please go to https://nysba.org/laborpublinks.

Kenneth R. Shaw is an attorney in the Department of Employee and Labor Relations at the Consolidated Edison Company of New York. A graduate of Fordham Law School, Class of 2009, he is a co-chair of the Legislative Committee of the Labor and Employment Section.

Endnotes

1. Equal Emp. Opportunity Comm'n, *What You Should Know About Covid-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* Paragraph N, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#N.
2. *Id*. at paragraph N.8.
3. N.Y. Lab. L. § 220(f) (Westlaw Edge 2022).
4. 12 NYCRR § 380-2.5(c) (Westlaw Edge 2022).
5. N.Y. Workers' Comp. L. § 201(20) (Westlaw Edge 2022).
6. N.Y. Unemployment Ins. L. § 593(1)(b)(iv) (Westlaw Edge 2022).
7. N.Y. Civ. Rts. L. § 52-c (Westlaw Edge 2022).
8. N.Y. Lab. L. § 740 (Westlaw Edge 2022).
9. *Id.*
10. N.Y. Lab. L. § 605-a (Westlaw Edge 2022).
11. N.Y. Vehicle and Traffic L. § 371-a and N.Y. Gen. Muni. L. § 87 (Westlaw Edge 2022).
12. N.Y. Lab. L. § 198-e and N.Y. Gen. Bus. L. § 756-f (Westlaw Edge 2022).
13. N.Y. Real Prop. Tax L. § 467-a (Westlaw Edge 2022).
14. *Id.*
15. N.Y. Lab. L. § 607 (Westlaw Edge 2022).
16. N.Y. Lab. L. §§ 27-d and 218-b (Westlaw Edge 2022).
17. New York State Commissioner of Health, *Commissioner's Designation Pursuant to Labor Law § 218-b for COVID-19* (February 15, 2022) *available at* https://www.health.ny.gov/press/releases/2022/docs/hero_act_designation_extension_5.pdf.
18. N.Y. Lab. L. § 193(5) (Westlaw Edge 2022).
19. N.Y. Lab. L. § 652 (Westlaw Edge 2022).
20. N.Y. Lab. L. § 651(5) (Westlaw Edge 2022).
21. N.Y.C. Admin. Code §§ 8-102 and 8-107(32).
22. 2021-2022 NY Senate-Assembly Bill S.5598B, A.6529A, available at https://www.nysenate.gov/legislation/bills/2021/s5598.
23. N.Y.C. Admin Code §§ 8-102, 8-107(9)(4)(a), 8-107(9)(5)(a), 8-107(10), 8-107(11), and 8-107 (11-a) (Westlaw Edge 2022); New York City Commission on Human Rights, *NYC Commission on Human Rights Legal Enforcement Guidance on the Fair Chance Act and Employment Discrimination on the Basis of Criminal History* (January 3, 2022) *available at* https://www1.nyc.gov/assets/cchr/downloads/pdf/fca-guidance-july-15-2021.pdf.
24. *Id.*

New York's Legal Activities Law at 30: A Statute With Growing Impact

By Geoffrey Mort

Thirty years ago the New York State Legislature passed what became known as the Legal Activities Law to protect employees from discrimination based on their after-hours activities outside of the workplace. The statute, § 201-d of the New York Labor Law, not only has long prohibited employers from taking adverse action against workers for their off-duty conduct but has become even more important in recent years for reasons that will be discussed below.

The Legal Activities Law bars discrimination against employees for four types of off-duty behavior: (1) political activities, (2) recreational activities, (3) use of consumable products, and (4) labor union activity. The statute's scope, however, is not as broad as it may appear to be due to a number of exceptions to the prohibitions noted above. The anti-discrimination provision does not protect conduct that creates a material conflict of interest related to the employer's confidential information; activity that violates the Public Officers Law or any executive order; actions that violate a collective bargaining agreement or state or federal statute or regulation; and, with one major exception, behavior that is impermissible due to a workplace substance abuse policy or alcohol program. Nonetheless, the Legal Activities Law has proved effective in curbing employer discrimination against workers based on their off-duty conduct that was lawful prior to 1992.

Background of the Legal Activities Law

The statute has an unlikely beginning. In the 1980s, the tobacco industry was concerned about the number of employers who maintained a policy of not hiring smokers. As a result, the industry used its influence in Albany to persuade legislators to draft a bill making it unlawful for employers to discriminate—including failure to hire—against employees who smoked. In the process of doing so, state senators and others decided that any prohibition of adverse action against employees who smoked outside the workplace should be enlarged to include other kinds of off-duty behavior. The result was an amendment to the state Labor Law adding § 201-d, "Discrimination against the engagement in certain activities."[1] In subsequent years, New York courts grappled with the question of precisely what conduct falls within the meaning of "political activities" and "recreational activities."

Developing Caselaw Establishes the Boundaries of Conduct Protected by the Statute

Approximately five years after the enactment of the Legal Activities Law, the Third Department took an early step in defining how the statute should be applied. The plaintiff in *Cavanaugh v. Doherty*,[2] an assistant public relations officer in the state Department of Correctional Services, had engaged in an argument in a restaurant with a high-ranking state government official. (The official made disparaging remarks about the plaintiff's political leanings and supervisor and called her an "asshole"). The plaintiff's superior was thereafter directed to fire her, and her employment was terminated. Although the argument between the plaintiff and the official at least in part concerned political matters, the court found that she stated a cause of action for a violation of § 201-d's prohibition of discrimination based on an employee's recreational activities. The court so concluded because "she was terminated as a result of a discussion during recreational activities outside of the workplace in which her political affiliations became an issue."[3]

Over the years, however, a majority of claims under the Legal Activities Law have concerned alleged discrimination for participating in some kind of political activity. Typical of such cases is *Notaro v. Giambra*,[4] where the plaintiff was an employee of a quasi-governmental organization known as the Buffalo and Erie County Workforce Development Consortium who, during his employment with the consortium, had been active in the New York State Liberal Party and served as its executive director. The plaintiff was an ardent supporter of and adviser to the Democratic Erie County Executive, who was defeated in 1999 by his Republican opponent. Soon thereafter, the plaintiff was advised that his employment with the consortium would be terminated. Although the court found the plaintiff's case to be untimely under another statute, it recognized that he had engaged in protected "political activities" and that his dismissal would otherwise have been a violation of the Legal Activities Law. Similarly, the Legal Activities Law was found to have been violated in *Baker v. City of Elmira*,[5] where the plaintiff was terminated because of his political activity of having previously served as a Republican city chairperson.

Fishman v. County of Nassau[6] demonstrates that the courts interpret "political activity" fairly broadly. The plaintiff in *Fishman* was found to have been unlawfully terminated because he engaged in such off-duty activi-

ties as making campaign phone bank calls and distributing campaign literature. (The *Fishman* court also stated that "employer" under the Legal Activities Law should be interpreted broadly, to include "officers, agents and employees of [an employer] who act for the [employer] in employing labor."[7)] And, in *Zappa v. Town of Hempstead Sanitary Dist. No. 7*[8], an employee's termination for merely supporting a particular candidate was held to violate the statute. The statute's limitations, however, were pointed out by the court in *McCue v. County of Westchester*,[9] a case where an employee was discharged for attending a political candidate's press conference. The termination, notwithstanding its questionable motive, was found not to violate the statute because the press conference was held during "working hours."[10]

Recreational Activity and the Controversy Over Protection for Employee Relationships

What is meant by the somewhat imprecise term "recreational activity" has been addressed by a number of courts since the Legal Activities Law was enacted. The statute defines recreational activities as "any lawful, leisure-time activity . . . which is generally engaged in for recreational purposes." Examples provided by the statute are "sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material."[11] This definition leaves a good deal of room for interpretation, and the courts over the years have attempted to fill in the gaps. In *Kolb v. Camilleri*,[12] for example, the court reviewed prior caselaw on the meaning of recreational activity and concluded that picketing is not a recreational activity and thus not protected by the statute.

Much of the caselaw on the question of recreational activity concerns employers' ability to terminate employees who engage in relationships, particularly those of a romantic nature. Two years after the Legal Activities Law became effective, the court in *Pasch v. Katz Media Corp*.[13] found that co-habitation involving employees is a recreational activity protected by the statute. That same year, however, the Third Department in *State v. Wal-Mart Stores, Inc*.[14]—in what some commentators saw as a peculiar and poorly reasoned decision—held that dating is different from and actually "bears little resemblance to recreational activity."[15]

The *Wal-Mart Stores* conclusion that "personal relationships fall outside the scope of legislative intent"[16] seems inconsistent with the court's conclusion on the same subject in *Aquilone v. Republic National Bank*.[17] The court in *Aquilone*, citing *Pasch*, found that an employee's personal, apparently non-romantic, friendship with a vendor for the bank where he worked was a protected recreational activity.

The Second Circuit considered the question of dating as a recreational activity in *McCavitt v. Swiss Reinsurance Am. Corp.*,[18] where an employee had been fired for dating a colleague outside the workplace. Deciding that it was bound by the decision in *Wal-Mart Stores*, because the New York Court of Appeals had never ruled on the issue, the court held that it had no choice but to find that dating is not conduct protected by the Legal Activities Law. In a concurrence, Judge Joseph McLaughlin described the Legal Activities Law's definition of recreational activity as "[n]ot especially enlightening" and declared that "[i]t is repugnant to our most basic ideals in a free society that an employer can destroy an individual's livelihood on the basis of who he is courting."[19] Judge McLaughlin called on the New York State Legislature to amend the Legal Activities Law to explicitly cover dating, but to date it has not done so.

Why the Legal Activities Law Is More Relevant Today Than Before

In 2021, the New York Legislature passed, and the governor signed, the Marijuana Regulation and Taxation Act (MRTA), a sweeping law that, among other things, legalized marijuana for all adult purposes. Specifically, the MRTA amended the Legal Activities Law to specify cannabis use outside work hours as a legal recreational activity, providing for the first time protection for employees who engage in recreational marijuana use. As a practical matter, the amendment may result in a significant change in employer drug testing. With employers now prohibited from discriminating against employees who use marijuana outside the workplace, there is no longer a reason to test new and existing employees for cannabis. The Legal Activities Law, previously invoked largely by employees active in political campaigns or who befriended or sought to date co-workers, is now a bulwark to protect the many employees who engage in recreational or medical marijuana use.

The statute is also increasingly important because of the proliferation of social media. As employees continually post on Facebook and other social media detailed information about their personal conduct, employers have gained an insight into the off-duty lives of their employees that they never before had. No doubt, some employers are now learning about aspects of their employees' lives outside the workplace that they disapprove of. However, so long as the behavior of employees after working hours which is revealed on social media falls within the realm of recreational, political or union activities or entails the consumption of legal products covered by the Legal Activities Law, employers may not lawfully retaliate against them for engaging in it.

Conclusion

When it was passed in 1992, the Legal Activities Law was considered a relatively minor piece of legislation that many associated primarily with smokers' rights. Events including the explosive growth of social media and the passage of the MRTA have made the statute a far more important one that now plays a key role in the evolution of employee rights in New York. Litigation under this statute

seems likely to increase, and observers of the legislature in Albany can be expected to keep a closer eye on developing caselaw related to the Legal Activities Law and whether there is any impetus toward amending it to address the gaps in its coverage and extending its reach to such conduct as relationships between employees.

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Endnotes

1. N.Y. Consol. Laws Service, Labor § 201-d (LEXIS through 1992 legislation).
2. 243 A.D.2d 92 (3d Dep't, 1998).
3. *Id.* at 100.
4. 2004 U.S. Dist. LEXIS 17180 (W.D.N.Y. Aug. 19, 2004).
5. 271 A.D.2d 906 (3d Dept. 2000).
6. 2013 U.S. Dist. LEXIS 47071 (E.D.N.Y. April 1, 2013).
7. *Id.* at *30.
8. 2018 U.S. Dist. LEXIS 7628 (E.D.N.Y. Jan. 16, 2018).
9. 57 A.D.3d 746 (2d Dept. 2008).
10. *Id.* at 746.
11. N.Y. Labor Law § 201-d (1).
12. 2008 U.S. Dist. LEXIS 59549 (W.D.N.Y. Aug. 1, 2008).
13. 1995 U.S. Dist. LEXIS 11153 (S.D.N.Y. Aug. 8, 1995).
14. 207 A.D.2d 150 (3d Dep't, 1995).
15. *Kolb, supra,* at *34.
16. *Wal-Mart Stores, supra,* at 152.
17. 1998 U.S. Dist. LEXIS 19531 (S.D.N.Y. Dec. 15, 1998).
18. 237 F.3d 166 (2d Cir. 2001).
19. *Id.* at 169.

Curing Gig Economy Worker Misclassification During COVID-19 and Beyond: Portable Benefits as an Updated Solution for an Updated Workforce

By Trish Dessai

Introduction

This article will focus on solving the misclassification of gig economy workers as independent contractors. Rather than trying to fit gig workers into either an employee or independent contractor classification, this article suggests using a portable benefits system to retain worker protection as well as employer flexibility. Part I will discuss the relevance of independent contractor misclassification during the pandemic. Additionally, Part I will address the immediate need to create a universal portable benefits system for gig workers during the pandemic. Part II will detail the role of government, unions, gig companies, and fintech in creating a universal portable benefits system for workers. Part III will focus on how these four factors can work together to create a pilot universal portable benefits system for workers. Ultimately, this article focuses on the creation of a universal portable benefits system applicable to every worker, irrespective of classification, resulting in universal worker protection.

Background: Misclassification of Gig Economy Workers as Independent Contractors

The arrival of gig-centric companies such as Uber or Lyft, and the recent prominence of companies such as DoorDash, Instacart, TaskRabbit, Postmates, and Amazon, has caused a soaring demand for gig economy workers. As recently as 2018, approximately 36% of Americans relied on gig economy work as their primary or secondary source of income.[1] Thus, the question arises: who qualifies as a gig worker?

Gig workers are defined as workers with flexible work schedules who are actively responding to the consumer's ebb and flow of demand for a given service. Due to the flexibility of the arrangement, gig workers appear to be independent contractors. An independent contractor is defined as a person who contracts with a company but is not controlled by the company nor subject to the company's control with respect to physical conduct or performance.[2] Additionally, independent contractors are not entitled

to employee benefits such as unemployment insurance, health care and minimum wage standards.

Gig companies argue gig workers are independent contractors because the gig company does not control the time worked or the schedule chosen by the workers. The major issue with this argument is the conflation of "worker flexibility" with the absence of control by the business. The gig companies control terms of service, fares charged, incentive-based pay, deactivation fees and rating structures of the workers. Thus, workers' advocates argue gig workers are employees because the gig companies exercise sufficient control over the terms and conditions of work assigned to gig workers.

The merits of each argument can be seen in two recent cases. For example, in *In re Vega*[3] the court held Postmate delivery drivers were employees because Postmate exhibited unilateral control over compensation, fixed delivery destinations, and the hiring of replacement drivers. Conversely, in *Lawson v. GrubHub*,[4] the court held GrubHub delivery drivers are independent contractors because GrubHub did not control the number of deliveries, the work schedule timing, or require any training or orientation. Both cases deal with identical services provided by gig economy delivery drivers using identical gig platforms, yet the courts reached different conclusions based on the definition of employer control.

The issue of misclassification has been further exacerbated due to the effects of the COVID-19 pandemic. State lockdown orders have classified gig workers as "essential." The majority of gig workers are working overtime in response to the demand for essential workers during the pandemic. Due to independent contractor classification, gig workers are denied basic benefits such as minimum wages, paid sick leave, and unemployment insurance. The absence of basic work benefits has proven to be detrimental to gig workers. For example, the inability to take paid sick leave forces workers to choose between their health, their paycheck, and endangering the lives of customers due to the direct contact nature of the job.

To combat this injustice, Instacart workers staged a nationwide strike demanding hazard pay and sick leave for working during the pandemic.[5] In response to the outcries of gig economy workers, Congress extended the Coronavirus Aid, Relief, and Economic Security Act (CARES) to include the allocation of unemployment insurance to independent contractors. This was a historic move as it was the first time a "portable benefit" was extended by the government to independent contractors rather than only to employees. However, the imperative question remains: why not classify all gig workers as employees rather than independent contractors?

Recently, *People v. Uber*[6] held Uber and Lyft drivers who were classified as independent contractors were in violation of the California Labor Code § 2775 ("ABC Test").[7] Although this decision was a momentous win for employee-based coverage, it only applies to ride-sharing-based companies such as Uber and Lyft. The issue of employer control varies dramatically in other businesses such as: delivery application-based companies (DoorDash, GrubHub, Instacart), hotel and lodging-based companies (AirBnb), online market-based companies (Amazon Flex Drivers, Task Rabbit), and domestic worker, service-based companies (SweepSouth).

The gig economy is continuously evolving and the services provided by gig workers are expanding. It is likely that gig companies will continue to find different ways to support the classification of gig workers as independent contractors. Gig companies want to keep costs low and increase profits; gig workers, on the other hand, want to maintain flexibility but still retain basic worker protections. So, this begs the question: can we achieve a system in which gig companies and gig workers both win?

A New Solution: Portable Benefits

Definitions and Relevance to Gig Economy Workers

Portable benefits are defined as benefits which are connected to a worker rather than a particular employer such that the benefits can be taken from job to job without interruption in coverage or loss of funding.[8] As a result, workers can accumulate benefits such as unemployment insurance or paid time off while working for different employers. This solution will allow workers, whether independent contractor or employee, to retain a basic level of worker protection across the board.

As stated above, the gig economy is growing rapidly. The MBO Partners State of Independence report[9] projects 52% of the workforce will be participating in the gig economy by 2023. Trends are showing that even unionized work such as construction and mining will move towards an app-based, service-oriented model. The protection of this new wave of workers must be the focus of the portable benefits system.

A functional portable benefits system will require an equitable infrastructure set forth by the government, unions and gig companies, and executed through the assistance of fintech. The next section of this article will address the current roles of the government, unions, gig companies, and fintech in creating a portable benefits system. The final section will propose the infrastructure for a pilot portable benefits system in response to pandemic and the growing gig economy.

Current Role of the Government in the Creation of Portable Benefits

Congress does not extend unemployment insurance to independent contractors as they are not classified as employees. However, in light of the current pandemic, Congress extended unemployment insurance to independent contractors. This is the first time a benefit was extended by the government to independent contractors *and* employ-

ees. The benefit was universally attainable to workers irrespective of classification status—the first *truly universal* portable benefit. Further, it has proved to be effective in assisting gig workers during the pandemic.

Similarly, some municipalities have taken action to pilot portable benefit systems which apply to workers within the state. Philadelphia recently passed the Philadelphia Domestic Workers Bill of Rights,[10] which ensures domestic workers the right to paid time off through a portable benefits model. All clients of domestic workers are required to pay a 2.5% fee towards the workers' portable benefits fund. The domestic workers will receive one hour of paid time off (PTO) for every 40 hours of paid work. The PTO accrues from client to client and the workers take the benefit (PTO) from job to job. The ratio is applied irrespective of where or when the hours are completed, effectively retaining the flexibility of the worker. Philadelphia is actively considering extending these provisions to gig economy workers as well.

The Seattle Universal Worker Protection Bill[11] proposes a similarly structured portable benefits system targeted towards gig economy workers. Companies pay a 5% fee, capped at $1 per hour, which is deposited in a portable benefits fund. The benefits in the fund include health insurance, retirement savings, and paid vacation time. The worker can take these benefits from one employer to the next, once accumulated. In addition, several states, including New York and New Jersey, have considered legislation which supports creating similar portable benefit systems for independent contractors.

The active criticism with respect to extending portable benefits to independent contractors is: why would gig companies be willing to pay a 2.5% fee for the sake of worker protection?

The Current Role of Gig Companies in the Creation of Portable Benefits

Gig companies favor an independent contractor classification for gig workers because the flexibility in worker protection allows gig companies to maintain profit margins. In a portable benefits system, gig companies would have to pay a 2.5% fee toward a workers' benefit fund. Thus, the question still stands: why would gig companies be willing to pay a 2.5% fee for the sake of worker protection?

Gig companies will be willing bear this cost in two scenarios: a) the company is able to pass the cost on to the consumer, or b) the company is able to pay a smaller portion of the net cost. The first scenario is best exemplified by New York's Black Car Fund Model.[12] New York's Black Car Fund Model was established by the New York Legislature to exact a 2.5% surcharge on all companies which hire drivers. If the company owns less than 50% of the cars and 90% of the customer transactions are cashless, a 2.5% surcharge applies. The money obtained from the surcharge is deposited into a workers' benefit fund that includes telemedicine coverage, vision benefits, and accidental death benefits. The benefits transfer with the driver from job to job, covered under the Black Car Fund. Uber and Lyft are subject to this 2.5% surcharge in New York, and simply pass the cost to the consumer. Both companies have still maintained profitability while also promoting workers' benefits.

Alternatively, gig companies can use the customers' tips to contribute to the workers' portable benefits fund, allowing the companies to bear a smaller net cost. There is research showing that customers would be willing to pay extra in order to ensure workers receive benefits. For example, Alia[13] is an application which allows consumers to pay tips for their domestic workers into a portable benefit fund. Alia pools together voluntary funding from the customers of domestic workers to create a portable workers' benefit plan which gives workers access to protections such as accident insurance, paid time off and life insurance. Alia has been a success for domestic workers and customers. Customers report the driving factor behind the willingness to tip was the incentive of battling against the systemic inequality which domestic workers face, in addition to the negligible monetary amount required in order to make a difference.[14] The spotlight has been placed on gig economy workers as essential workers, raising social awareness about gig worker exploitation and the lack of workers' benefits provided. This consumer awareness-based template can be applied to the gig economy workers incentivizing consumers to tip 2.5% per ride—approximately $.50 on a $20 ride.

Additionally, consumers have trended towards supporting workers against abuses as seen with the Collation of Immokalee Workers (CIW) campaign for farmworkers. The CIW raised awareness about the abusive practices of companies using suppliers who exploited farm workers. Consumers responded by boycotting such companies, causing companies such as Taco Bell to comply with fair practices in order to save their reputation. Consumers of the gig economy play a big role in influencing the practices of the gig companies and when mobilized correctly can effectuate an efficient portable benefits system as well.

Thus, the overarching question remains: how will the surcharge be decided in diverse industries, such as gig economy drivers versus domestic workers?

The Current Role of Unions in the Creation of Portable Benefits

The concept of portable benefits transferring with workers from job to job may seem like a new idea, but unions have been implementing a very similar framework via the Taft-Hartley Act[15] for decades. The distinction, however, is that benefits move with the worker based on the industry. Employees and employers pay into a multi-employer fund subject to the terms of a collective bargaining agreement. The accrued funds are then reinvested and

pay for the members' benefits. The most common examples of these agreements include ERISA benefits across the construction industry. Another relevant example is the Screen Actors Guild Pension and Health Plan. Although actors are contingent workers, the Guild submitted to collective bargaining agreements with each of the studios in order to pay for benefits for actors. The benefits are portable across any studio party to the collective bargaining agreement across the entertainment industry.

The inevitable criticism to this process is: why would gig companies agree to the collective bargaining process of unions when the goal of classifying workers as independent contractors is to circumvent the control imposed by collective bargaining agreements?

Oddly enough, gig companies have been open to the notion of a certain level of collective bargaining when creating portable benefits.[16] Under a recent joint letter between the Service Employees International Union (SEIU) and Uber, both parties made a commitment to create a collaborative universally portable benefits system for drivers espousing principles of universality, flexibility, proportionality, and innovation. The letter acknowledges the longstanding legal barriers and legal history of conflict between companies and employers and pledges to break down such barriers by creating a portable benefits system from scratch with the input of both parties. Given this recent collaboration, it is highly likely that unions will turn to the Taft Hartley Act model to structure the disbursement and negotiation of worker benefits.

Thus, the last question that must be addressed is: what is the most effective way to execute the disbursement and management of portable benefits?

The Current Role of Financial Technology in the Creation of Portable Benefits

Financial technology (fintech) is defined as an innovative economic industry composed of companies whose purpose is to use technology to make financial services more efficient.[17] In response to COVID-19, Mastercard has partnered with Stride,[18] a portable benefits fintech platform, to provide cost-effective worker benefit options for gig economy workers. Workers can choose from a suite of benefits via the Stride application and the benefits directly transfer to the worker via the worker's Mastercard account. The benefits and disbursement platform would remain the same irrespective of whether the worker changes jobs or moves from job to job.

Similarly, the application Alia, as described above, uses a fintech platform to transfer the voluntary funds from the client to the domestic worker. The domestic worker can access the funds in the form of benefits directly from the Alia application. Furthermore, the United Kingdom launched Pirkx,[19] a fintech platform, which allows users of its platform to access workers' benefits irrespective of their classification as self-employed, part-time, independent or full-time workers. Fintech is actively innovating and working around the current lack of protection for workers during the pandemic by providing efficient disbursement platforms. However, the costs of benefit plans offered by fintech is extremely high and may come at a hefty cost to the employee, thus strengthening the call for a universally low-cost portable benefit system.

The Pilot Portable Benefits Model for COVID-19 and Beyond

This section sets forth the groundwork for a pilot portable benefits system. The system will involve a collaboration of the government, employers, unions, and fintech.

First, the government must pass overarching legislation approving a portable benefits plan that is applicable to all workers irrespective of independent contractor or employee status. The plan can mirror that of the Philadelphia Portable Benefits Plan and charge a fixed surcharge to the employer in order to contribute to the universal benefits fund. The government may offer tax subsidies to companies in order to incentivize participation in the pilot program for a minimum two-year period.

Second, the surcharge will be determined by the industry and negotiated by unions. Using a model akin to the Taft-Hartley Act, unions and companies will collaboratively set the surcharge across the industry.

Third, the gig companies can respond to the surcharge by either (a) passing it on to customers analogous to the Black Car Fund model or (b) pooling customer tips to offset the net cost of the surcharge. Additionally, employers can offer the option for consumers to pay directly towards the workers' fund rather than merely tipping in order to build social awareness about worker protection.

Fourth, the money collected by the surcharge will be invested into the industry-wide workers' fund, collaboratively negotiated by both the unions and the companies, and converted into a benefit which will be accessible to all workers in a given industry.

Fifth, a fintech platform will present the suite of benefits available to each worker, and the worker can choose the benefits they deem necessary based on their independent contracting needs. The disbursement method will be analogous to the method used by the Alia application.

This collaboration between the government, employers, unions, and fintech lays a rudimentary groundwork for a strong universal portable benefits system which is restricted by industry for the ease of distributing the benefits. This by no means is a fully exhaustive plan and modifications can be made accordingly in response to any conflicts or issues that may arise.

The major criticism that may be set forth in response to this plan is the presumption that the gig companies would

be open to negotiating with unions. The recent collaborative efforts of the SEIU and Uber in negotiating a universal portable benefits plans strongly suggests this issue is not insurmountable. The recent collaborative efforts by both parties to create a portable benefits system from scratch in order to dismantle the underlying tension between companies and unions is a positive step forward in this direction.

Conclusion

The classification of gig economy workers as independent contractors has focused on the presence or absence of control by the company over the worker, across many different industries, including car services (Uber, Lyft), delivery application-based companies (DoorDash, GrubHub, Instacart), hotel and lodging-based companies (AirBnb), online market-based companies (Amazon Flex Drivers, Task Rabbit), and domestic workers (SweepSouth). Independent workers and self-employed workers are still workers even if they are not classified as employees. Therefore, these categories of workers should be afforded some form of basic worker protection as well. A workable solution is a universal portable benefits fund where the benefits attach to the worker, rather than to the classification of employee and employer. The fund will be created by a collaboration between the government, employers, unions and fintech. A rough framework for such a model is detailed as well. During the COVID-19 pandemic, workers, irrespective of classification status, have been left vulnerable without paid sick leave, or minimum wages—all of which could be cured by a portable benefits system. Fintech is already finding ways to innovate portable benefits through a privatized means. Rather than letting portable benefits act as another privately created fissure to workplace protections, let us work together to make it an efficient pro-worker system which provides benefits to any classification of worker. As long as you are worker, you should be protected—a case for universal portable benefits system.

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Endnotes

1. Gallup's Perspective on the Gig Economy and Alternative Work Arrangements (2018), https://www.gallup.com/workplace/240878/gig-economy-paper-2018.aspx.
2. Restatement (Second) of Agency § 2 (1958).
3. *Matter of Vega*, 35 N.Y.3d 131, 136 (2020).
4. *Lawson v. Grubhub, Inc.*, 302 F. Supp.3d 1071, 1072 (N.D. Cal. 2018).
5. Arielle Pardes, *This Pandemic Is a 'Fork in the Road' for Gig Worker Benefits* (April 9, 2020), https://www.wired.com/story/gig-worker-benefits-covid-19-pandemic/.
6. *People v. Uber Techs., Inc.*, No. A160701, 2020 WL 6193994, at *3 (Cal. Ct. App. Oct. 22, 2020).
7. *See* Labor Code § 2775, subd. (b); *Dynamex Operations West. Inc. v. Superior Court of Los Angeles*, 4 Cal.5th 903 (2018).
8. Natalie Foster, et al., Aspen Inst., Portable Benefits Resource Guide 7 (2016), https://assets.aspeninstitute.org/content/uploads/files/content/upload/Portable_Benefits_final.pdf.
9. The State of Independence in America (2018), https://www.mbopartners.com/wp-content/uploads/2019/02/State_of_Independence_2018.pdf/1.
10. Philadelphia Domestic Workers Bill of Rights (April 27, 2020), https://www.phila.gov/media/20200427102747/Domestic-Worker-Bill-of-Rights.pdf/.
11. The Seattle Universal Worker Protection Bill, H.R 1601, 116 Cong. § 5 (2019).
12. Testimony of Ira Goldstein, Executive Director of the Black Car Fund Before the New York State Senate Standing Committee on Internet and Technology Public Hearing: Examination of the Gig Economy (October 16, 2020), https://www.nysenate.gov/sites/default/files/ira_goldstein-_black_car_fund_testimony_10.16.19.pdf.
13. NWDA Labs: Alia (2015), https://www.ndwalabs.org/alia.
14. *This New Service Gives Domestic Workers a Way To Get Benefits and Paid Time Off* (2018), https://www.fastcompany.com/90278942/this-new-service-gives-domestic-workers-a-way-to-get-benefits-and-paid-time-off.
15. David Rolf, et al., Aspen Inst., Portable Benefits in the 21st Century 3–4 (2016), https://assets.aspeninstitute.org/content/uploads/2016/07/portable-ben-21stcent.pdf?_ga=2.71541907.1605673233.1586528020-1677866451.1586528020.
16. David Rolf, *Building a Portable Benefits System for Today's World* (January 23, 2017), https://ubernewsroomapi.10upcdn.com/wp-content/uploads/2018/01/Portable-Benefits-Principles-FINAL.pdf.
17. *What Is FinTech and Where Does It Live?* (July 26, 2016), https://www.finextra.com/blogposting/12890/what-is-fintech-and-where-does-it-live.
18. *Mastercard and Stride Team Up to Bring Portable Benefits to Gig and Independent Workers* (October 15, 2020), https://investor.mastercard.com/investor-news/investor-news-details/2020/Mastercard-and-Stride-Team-Up-to-Bring-Portable-Benefits-to-Gig-and-Independent-Workers/default.aspx.
19. Jessica Ellerm, *Gig Workers Are on the Rise Post COVID, Fintech Pirkx Stands To Benefit* (October 6, 2020), https://dailyfintech.com/2020/06/10/gig-workers-are-on-the-rise-post-covid-fintech-pirkx-stands-to-benefit/.

Madam Director, What's My Motivating Factor?

By Nick Martiniano

I. Introduction

Once upon a time, there were two distinct causation standards under Title VII of the Civil Rights Act of 1964 ("Title VII"): "but-for" and "motivating factor."[1] Then, in 2020, the Supreme Court issued its decision in *Bostock v. Clayton County, Georgia*.[2] Although the decision was welcomed by many for its explicit prohibition of discrimination on the basis of sexual orientation or transgender status,[3] the decision was also lamented by those tasked with explaining the difference between the two causation standards in light of *Bostock*'s holding.[4] The Court, in *Bostock*, acknowledged the two different standards;[5] however, the test for the but-for causation announced in that case severely blurred the line between how to show that a protected characteristic was a motivating factor versus a but-for cause.[6] Before *Bostock*, confusion already existed among the lower courts regarding what was required to prove that a protected characteristic was a motivating factor under both Title VII[7] and the United States Employment and Reemployment Rights Act (USERRA).[8] Afterwards, the answer was even less clear. Accordingly, this article seeks to tackle the question: what is required to prove that a protected characteristic was a motivating factor in an employment decision?

Part II examines Title VII's text, the U.S. Supreme Court's evolving interpretation of that text, and how the lower courts have interpreted the text and Supreme Court precedent.[9] Part III provides a similar background for USERRA.[10] Part IV, taking *Bostock* into account, suggests what should be required to prove that a protected characteristic was a motivating factor in an employment decision.[11] Part V offers concluding remarks.[12]

II. Title VII

Title VII was passed as part of the Civil Rights Act of 1964. The purposes of Title VII were twofold: (1) to "eliminat[e] the effects of discrimination in the workplace"[13] and (2) if such discrimination does occur, "to make persons whole for injuries suffered on account of unlawful employment discrimination."[14] To meet those goals, the statute provided:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.[15]

For nearly a quarter of a century, Title VII's text was understood to proscribe only actions taken "because of" an individual's protected characteristic, requiring the employee to prove that, but for the employee's protected characteristic, the employer would not have made the discriminatory employment decision.[16] Employees could meet their burden of proof through either direct or circumstantial evidence.[17]

In 1980, the Supreme Court, in the plurality opinion of *Price Waterhouse v. Hopkins*,[18] recognized an additional avenue of protection from discriminatory employment decisions: protection from "mixed-motive" decisions—actions taken because of a mix of legal and illegal considerations.[19] The plurality held that employees could meet their burden under a mixed-motive theory by proving that a protected characteristic was "a motivating factor" in the employment action. Justice White, in a concurrence, stated that he would have required the protected characteristic to be a "*substantial* factor."[20] Justice O'Connor, also concurring, would have required direct evidence that the protected characteristic was a substantial factor.[21] The plurality and concurrences in *Price Waterhouse* all believed that Title VII includes a mixed-motive framework.[22] They differed, however, in the nature and degree of evidence a plaintiff must provide before the burden of proof switches to the employer to prove that the protected characteristic was not a "but-for" cause of the employment action in question.[23]

In the 1991 Civil Rights Amendments, Congress amended Title VII to codify mixed-motive liability; "an unlawful employment practice," it provided, "is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[24] Once a plaintiff successfully provides that proof, the employer has an opportunity to show that it "would have taken the same action in the absence of the impermissible motivating factor."[25]

Under the 1991 Civil Rights Amendments, the framework for remedies under motivating-factor causation is distinct from that of but-for causation. If plaintiffs proceed under but-for causation, then it is all-or-nothing: the plaintiffs either succeed in proving that a protected characteristic was a but-for cause of the employment decision, and thus have access to the full cornucopia of remedies, or the

plaintiffs fail to meet their burden and receive nothing. Available remedies include an order to reinstate or hire the employee, back pay (for up to two years), front pay, compensatory damages, punitive damages for malicious discrimination, and any other appropriate equitable relief.[26] Under motivating-factor causation, if plaintiffs meet their burden by proving that a protected characteristic was a motivating factor in the employment decision, even if the employer can establish a same-decision defense, they immediately would be entitled to "declaratory relief, certain types of injunctive relief, and attorney's fees and costs."[27] Only if the employer is unable to establish the affirmative defense—that it would have taken the same action without considering the protected characteristic—does the motivating-factor plaintiff have access to the full scope of available remedies.[28]

In the period following *Price Waterhouse*, lower courts across the country struggled to pin down exactly what a plaintiff must prove to shift the burden to the employer in a mixed-motive case.[29] The Supreme Court, in *Desert Palace, Inc. v. Costa,*[30] then clarified that no direct evidence is needed—all plaintiffs must do to meet their burden in a mixed-motive claim is exhibit that a protected characteristic was a motivating factor in the employment decision at issue.[31]

The Supreme Court has not decided what is required for plaintiffs to prove that their protected characteristic was a motivating factor in an employment action. However, in *Bostock*, the Court clarified what is required under the but-for causation standard.[32] The Court began its analysis by reiterating that "Title VII's 'because of' test incorporates the 'simple' and 'traditional' standard of but-for causation."[33] The Court then described what constitutes "but-for" causation, explaining that "events [often] have multiple but-for causes."[34] In order to determine whether an impermissible consideration was a but-for cause, courts must "change one thing at a time and see if the outcome changes. If it does, . . . but-for caus[ation has been established]."[35]

Distinguishing the two causation standards became more complex after *Bostock*.[36] If but-for causation is satisfied by any consideration that, if removed, would yield a different decision, what is motivating factor? The Court has made clear that a plaintiff's burden to establish motivating factor causation is lesser than that required to establish but-for causation.[37] However, it is difficult to imagine a definition of "motivating factor" that is not duplicative of the Court's definition of but-for causation in *Bostock*. Under the canon against surplusage, courts will avoid a statutory interpretation that would render other statutory provisions meaningless.[38] Therefore, the statutorily provided standards cannot be exactly the same.[39] Beyond knowing that there *is* a difference, clarity on what that difference entails is lacking. Reviewing how lower courts have applied the statutory text and Supreme Court precedents may illuminate the distinction that *Bostock* blurred.

Lower courts have expanded the explanation of motivating-factor causation beyond the Supreme Court's guidance that it imposes a lesser burden than required by but-for causation, while echoing that the motivating-factor test is not intended to be an "onerous" burden.[40] The standard "should preclude sending the case to the jury only where the record is *devoid* of evidence that could reasonably be construed to support the plaintiff's claim."[41] In contrast with what some courts have stated concerning but-for causation,[42] no proof is required that the protected characteristic was the sole factor for the decision.[43] The motivating-factor test merely requires the plaintiff to prove that "one of the [protected] characteristics was a 'motivating factor' behind a particular employment decision, even if there were other, even legitimate, factors motivating that decision as well."[44] The determination "is not whether discrimination played the dispositive role but merely whether it played 'a motivating part' in an employment decision."[45]

In application, several types of evidence can help satisfy a plaintiff's burden to prove that a protected characteristic was a motivating factor. The Seventh Circuit has enumerated the following types of evidence that can provide sufficient proof:

> The first [and most common] [type of evidence] consists of suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn. . . . Second is evidence, whether or not rigorously statistical, that employees similarly situated to the plaintiff other than in the characteristic (pregnancy, sex, race, or whatever) on which an employer is forbidden to base a difference in treatment received systemically better treatment. And third is evidence that the plaintiff was qualified for the job in question but passed over in favor of (or replaced by) a person not having the forbidden characteristic and that the employer's stated reason for the difference in treatment is unworthy of belief, a mere pretext for discrimination.[46]

Other courts have recognized the relevance of similar evidence. In line with the Seventh Circuit's first type of evidence, the Sixth Circuit found that a decisionmaker's prior statement that "nobody wanted to be around a black man" revealed a "racial bias" indicating race as a motivating factor;[47] the Eleventh Circuit found that comments "[suggesting] bias can serve as evidence of discrimination."[48] Consistent with the Seventh Circuit's second type of evidence, the Third Circuit made clear plaintiffs must be able to establish they "possess[ed] the minimal qualifications

for the position [they] sought to obtain or retain,"[49] i.e., not necessarily subjective proof that the plaintiff performed the job well, but, simply, whether in possession of licensure or qualifications necessary to perform the job's objective requirements.[50] As to the Seventh Circuit's third type of evidence, the Ninth Circuit has stated, "'Proof that the defendant's explanation is unworthy of credence is [a] form of circumstantial evidence that is probative of intentional discrimination.'"[51] Further, as expressed by the Second Circuit, while helpful to prove that a protected characteristic was a motivating factor, "[a] plaintiff who . . . claims that the employer acted with mixed motives is not *required* to prove that the employer's reason was a pretext."[52] At the same time, the Sixth Circuit has emphasized courts should also consider an employer's evidence indicating "that the protected characteristic was *not* a motivating factor for its employment decision."[53] Until the Supreme Court clarifies the requisites of Title VII to establish a protected characteristic as a motivating factor, it is difficult at this point to articulate a truly uniform standard.

III. USERRA

Similar to Title VII cases, courts have struggled to apply the proper causation standard in USERRA cases. USERRA was passed in 1994, shortly after the 1991 Civil Rights Amendments,[54] to encourage participation in the uniformed services and ensure individuals that their civilian careers would not be harmed by providing service to their country.[55] The statute provides that:

> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.[56]

The statute further specifies that if any of the enumerated obligations to uniformed service are "a motivating factor in the employer's action," the employer has "engaged in actions prohibited."[57] However, the employer may establish an affirmative defense if it can prove that "the action would have been taken in the absence of such [protected status or activity]."[58] If able to prove that their protected status or activity was a motivating factor in an employment decision, plaintiffs are entitled to an injunction preventing the employer from further USERRA violations and back pay.[59] If, moreover, plaintiffs can prove that their employer's violation of USERRA was "willful," the court may order "the employer to pay [them] an amount equal to the [amount of back pay available] as liquidated damages."[60]

The only Supreme Court decision considering USERRA is *Staub v. Proctor Hospital*.[61] The issue there was whether "an employer may be held liable for employment discrimination based on the discriminatory animus of an employee," e.g., a supervisor "who influenced, but did not make, the ultimate employment decision."[62] Applying the "cat's paw" theory of liability, the Court held that "if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act"—although the act of one who is not the decisionmaker— "is the proximate cause of the ultimate employment action, the employer is liable under USERRA."[63] Indeed, the cat's paw theory of liability has also been applied to Title VII cases.[64] As the Court explained, the cat's paw theory's heightened requirement—showing antimilitary animus—is appropriate because of the attenuated connection between the person with such animus and the actual decision.[65]

Despite USERRA's clear burden-shifting framework and the unique (and distinguishable) circumstances in *Staub*, courts have struggled to apply a uniform—or even consistent—standard for when the protected characteristic was a motivating factor in an employment decision.[66] The Second, Third, and Sixth Circuits provide the *most* faithful interpretation of USERRA's text, requiring plaintiffs to show that their protected status or activity was "a substantial or motivating factor" in the employer's action.[67] The Sixth Circuit adopted a list of non-exhaustive factors, known as the *Sheehan* factors,[68] that can prove the protected status or activity was a motivating factor, including:

> proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses.[69]

While these factors are not necessary to meet a plaintiff's burden, their presence may be sufficient to shift the burden to the employer.[70]

Other circuits have imposed requirements beyond what is found in USERRA's text. The First, Fourth, Fifth, Seventh, Eleventh, and Federal Circuits have interpreted USERRA's text to require a showing that the employer had a "discriminatory animus" or "discriminatory motive."[71] Additionally, the Fifth and Federal circuits require proof that the employer acted "because" of the employee's protected status or activity,[72] seemingly elevating the plaintiff's burden to but-for causation.

Courts, moreover, do not even consistently apply their heightened requirements. At times, the same courts that

favor a heightened showing resolve cases with no discussion of the purportedly requisite "discriminatory animus" or "discriminatory motive."[73] During other times, courts state that an employee may prove that protected status or activity was a motivating factor by simply showing that "the defendant relied on, took into account, considered, or conditioned its decision on that consideration."[74]

A hypothetical framed in the Petition for a Writ of Certiorari for *Kitlinski v. Dep't of Justice* exemplifies the confusion:

> Assume "Supervisor" served in the military and comes from a multi-generation military family. "Employee," who is in the United States Army Reserve, requests a military transfer to a different location that would reduce commuting costs and give Employee an increase in salary. Supervisor explains that the position Employee seeks is very competitive. Supervisor also explains that while he always tries to help those that serve our country, Supervisor is concerned that Employee will be deployed soon and further explains that rather than transferring Employee now, Supervisor will wait until after the deployment and then explore comparable transfers. In this hypothetical, there is no evidence that Supervisor harbors anti-military bias, but Employee's military service clearly factored into Supervisor's decision not to transfer Employee. Under the causation standard as applied in the Second, Third, and Sixth Circuits—which apply USERRA's plain language—Employee would be able to show that military service was a motivating factor in the decision not to transfer Employee, and the burden would correctly shift to the employer to show they would have made the same decision. Alternatively, in the Fourth Circuit, there would be no shift of burden because the Fourth Circuit required some showing of anti-military bias. In yet another standard, the First, Seventh, and Eleventh Circuits, in addition to showing that the service was a motivating factor, Employee would have to show some form of undefined animus in order to shift the burden of proof to the employer. In the Fifth and Federal Circuits, Employee would be required to prove that the undefined animus was a but-for cause to shift the burden. As demonstrated above, Employee rights under USERRA are wholly dependent on where they file their claim.[75]

Although the *Kitlinski* petition is currently pending, many other courts are attempting to apply mixed-motive standards without any clear guidance from the Supreme Court.[76] Until the High Court steps in and defines exactly how a plaintiff may show that a protected characteristic was a motivating factor in an employment decision, especially considering the Court's decision in *Bostock*, lower courts will likely continue to struggle.

IV. Analysis

Multiple federal statutes state that protected characteristics may not be a "motivating factor" in an employment decision.[77] Despite courts providing examples of different ways that a plaintiff may prove that a protected characteristic was a motivating factor,[78] there is no consensus as to what constitutes a motivating factor and, therefore, when the burden of proof may be shifted to the employer to prove that the protected characteristic was not a but-for cause of the employment action. In contrast, *Bostock* clarified that but-for causation is *any* consideration that, if removed, would yield a different outcome.[79] Perhaps Justice Gorsuch is correct that there is only one causation standard—the only difference being that in mixed-motive cases, "the burden of proving but-for causation [is taken] from the plaintiff and handed to the defendant as an affirmative defense."[80]

Accordingly, this article proposes that the Supreme Court should adopt a two-step framework that mirrors the statutory framework. This would clarify what is required in but-for causation versus motivating-factor causation. For the first step, all a plaintiff must do is prove by a preponderance of the evidence that an employer merely *considered* the protected characteristic. This burden would be the plaintiff's under both but-for causation and motivating-factor causation. For the second step, proof must be provided that the protected characteristic was (or was not) a but-for cause of the employment decision. Under but-for causation, the burden of proof would stay with the plaintiff, utilizing the decades-old burden-shifting framework of *McDonnell Douglas* and *Burdine*.[81] However, under the motivating-factor test, the plaintiff's burden would be satisfied by showing that the employer considered the protected characteristic, switching the burden of proof to the employer to establish a same-decision defense.[82] Given Title VII's and USERRA's purposes and the announced definition of but-for causation in *Bostock*, coupled with the canons of statutory construction, the proposed framework appears to be the best interpretation of Title VII and USERRA's motivating-factor language.

The proposed framework serves the statutes' purposes. Title VII and USERRA are intended to reduce workplace discrimination based both on race, color, religion, sex, or national origin[83] and obligations required of uniformed service, respectively.[84] Allowing for a motivating factor as a deterrent, a plaintiff's burden is deemed satisfied once proof is provided that the employer considered the pro-

tected characteristic at issue.[85] Employers would likely take greater steps to prevent workplace discrimination if even *considering* the protected characteristic would lead to court costs of establishing a same-decision defense as well as possible attorney's fees for the plaintiff.

The proposed interpretation is also consistent with Supreme Court precedent. First, the interpretation is directly drawn from Justice Gorsuch's comments in *Comcast Corp. v. National Association of African American-Owned Media*.[86] There he noted that the two standards differ only as to which party has the burden to prove but-for cause.[87] Additionally, it is consistent with *Bostock*'s statements that motivating factor is "a more forgiving standard" that can impose liability "even if [the protected characteristic] *wasn't* a but-for cause of the employer's challenged decision."[88] Allowing a Title VII-plaintiff to receive at least declaratory relief and attorney's fees, without regard to whether the employer can prove that the protected characteristic was a but-for cause of the employment decision, is consistent with the Court's limited guidance on motivating-factor causation.

The proposed interpretation alleviates any conflicts with other statutory provisions. Overlap between separately enumerated standards would violate the canon against surplusage.[89] Allowing a motivating factor to meet a plaintiff's burden by showing that the employer considered a protected characteristic accommodates a standard meaningfully different from but-for causation. It also justifies Title VII's distinction as to available remedies consistent with the nature of the plaintiff's proof.[90] A lesser burden imposed on the plaintiff prior to the employer establishing a same-decision defense would allow for USERRA's inclusion of additional liquidated damages for "willful" violations of the Act.[91] Without the proposed framework, the heightened requirement on USERRA plaintiffs likely would lead to the inclusion of liquidated damages in practically all successful claims.

The one identifiable difficulty with this framework is that it would require the plaintiff to prove what an employer considered, i.e., arguably, what the employer "thought."[92] However, similar circumstantial evidence that is utilized across employment discrimination law may be utilized to suggest it is likely an employer considered a protected characteristic prior to taking the employment action in question.[93] Although stray remarks about a protected characteristic, without more, may be insufficient to establish liability for a hostile work environment claim,[94] they could plausibly serve as paradigmatic circumstantial evidence that an employer considered that characteristic when taking an employment action. While direct evidence of an employer's consideration might be difficult to come by, the availability of circumstantial evidence—as often utilized in employment discrimination cases—justifies the proposed framework.

V. Conclusion

The Supreme Court's decision in *Bostock* provided as many questions as it provided answers. The Court clarified that but-for causation includes any consideration that, if removed, would change the outcome, even if other factors also contributed to the decision.[95] The Court also acknowledged that motivating-factor causation was a "more forgiving standard,"[96] but the Court has never explicitly addressed what level of consideration constitutes a motivating factor. This article proposes that, under the mixed-motive framework, mere consideration of a protected characteristic is sufficient to switch the burden of proof to the employer.[97] The employer would then have a chance to prove that it would have made the same decision regardless of the protected characteristic, thus limiting certain forms of relief.[98] This framework is the correct interpretation for three reasons. First, the framework helps serve the purposes of Title VII and USERRA, two statutes that incorporate the motivating-factor standard.[99] Second, the framework is consistent with the Supreme Court's precedent, including its but-for causation standard in *Bostock*.[100] Third, in light of *Bostock*, it is the only interpretation that would meaningfully distinguish the two standards, complying with the canon against surplusage.[101] Accordingly, the Supreme Court should take the first available opportunity to adopt this standard for motivating factor so as to provide clarification (inclusive of relief, where appropriate) to our courts across the country.

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Endnotes

1. *See E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 772–73 (2015) (discussing the two standards).
2. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).
3. *Id.* at 1754.
4. Sandra Sperino, *Comcast and Bostock Offer Clarity on Causation Standard*, Am. Bar Assn. Hum. Rts. Mag. (Jan. 11, 2021), https://bit.ly/3DDDRzk (explaining that, prior to *Bostock*, there was an understanding that but-for causation required proof that the protected characteristic was the sole cause, distinguishing but-for causation from motivating factor causation, and then explaining that *Bostock* erased that difference). *But see Burrage v. United States*, 571 U.S. 204, 212–15 (2014) (indicating that the Court's past Title VII decisions indicate that there can be multiple but-for causes to an employment action).
5. *Bostock*, 140 S. Ct. at 1739–40.
6. *See* Sperino, *supra* note 4.
7. *See Harris v. Shelby Cnty. Bd. of Educ.*, 99 F.3d 1078, 1085 (11th Cir. 1996); *Holcomb v. Iona Coll.*, 521 F.3d 130, 141–42 (2d Cir. 2008); *Makky v. Chertoff*, 541 F.3d 205, 214 (3d Cir. 2008); *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008); *Quigg v. Thomas Cnty. Sch. Dist.*, 814 F.3d 1227, 1241 (11th Cir. 2016); *Hossack v. Floor Covering Assocs. of Joliet, Inc.*, 492 F.3d 853, 860–62 (7th Cir. 2007); *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 318 (4th Cir. 2005); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004).

8. *Compare Caroll v. Del. River Port Auth.*, 843 F.3d 129, 132 (3d Cir. 2016); *Gummo v. Village of Depew*, 75 F.3d 98, 106 (2d Cir. 1996); *Hickle v. Am. Multi-Cinema, Inc.*, 927 F.3d 945, 952 (6th Cir. 2019), *with Hill v. Michelin N. Am., Inc.*, 252 F.3d 307, 314 (4th Cir. 2001); *Arroyo v. Volvo Grp. N. Am., LLC*, 805 F.3d 278, 284 (7th Cir. 2015); *Coffman v. Chugach Support Servs., Inc.*, 411 F.3d 1231, 1238 (11th Cir. 2005), *and Bradberry v. Jefferson County*, 732 F.3d 540, 547 (5th Cir. 2013); *Brasch v. Merit Sys. Prot. Bd.*, 664 F. App'x 915, 918 (Fed. Cir. 2016).
9. *See infra* Part II.
10. *See infra* Part III.
11. *See infra* Part IV.
12. *See infra* Part V.
13. *See Johnson v. Transp.*, 480 U.S. 616, 631 (1987).
14. *Abermarle Paper Co. v. Moody,* 422 U.S. 405, 418 (1975).
15. *See* 42 U.S.C. § 2000e-2(a)(1).
16. *See City of Los Angeles v. Manhart*, 435 U.S. 702, 711 (1978) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1205 (7th Cir. 1971) (Stevens, J., dissenting)) (stating that Title VII's test is whether "the evidence shows 'treatment of a person in a manner which but for that person's [protected characteristic] would be different'").
17. *See U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716–17 (1983) (holding that a plaintiff's burden could be met through direct or circumstantial evidence); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973) (providing the now-commonly used burden-shifting framework to infer discrimination).
18. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion).
19. *See id.* at 258.
20. *Id.* at 259 (White, J., concurring).
21. *See id.* at 278–79 (O'Connor, J., concurring).
22. *See id.* at 241; *id.* at 260 (White, J., concurring); *id.* at 263 (O'Connor, J., concurring).
23. *Compare id.* at 258, *with id.* at 259 (White, J., concurring), *and id.* at 278–79 (O'Connor, J., concurring).
24. 42 U.S.C. § 2000e-2(m).
25. 42 U.S.C. § 2000e-5(g)(2)(B); *see also Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003).
26. *See* 42 U.S.C. § 2000e-5(g)(1).
27. *Desert Palace*, 539 U.S. at 94 (citing 42 U.S.C. § 2000e-5(g)(2)(B)); *see also* 42 U.S.C. § 2000e-5(g)(2)(B).
28. *See Desert Palace*, 539 U.S. at 94–95; 42 U.S.C. § 2000e-5(g)(2)(B).
29. *See, e.g.*, *Trotter v. Bd. of Trs. of Univ. of Ala.*, 91 F.3d 1449, 1453 (11th Cir. 1996) (stating that, after *Price Waterhouse*, there is a difference in the analytical framework when direct evidence is provided as opposed to circumstantial evidence); *Taylor v. Va. Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999) (finding that a plaintiff must provide direct evidence in mixed-motive cases).
30. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003).
31. *Id.* at 101–02.
32. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020).
33. *See id.*
34. *Id.*
35. *Id.*
36. *See* Sperino, *supra* note 4.
37. *See id.* at 1740 ("[Motivating factor is a] more forgiving standard."); *Univ. of Tex. S.W. Med. Ctr. v. Nassar,* 570 U.S. 338, 348–49 (2013) (providing that motivating factor is "of course, [] a lessened causation standard").
38. *See City of Chicago v. Fulton*, 141 S. Ct. 585, 591 (2021) (quoting *Yates v. United States*, 574 U.S. 528, 543 (2015)) ("'The cannon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.'").
39. *Compare* 42 U.S.C. § 2000e-2(a)(1), *with* 42 U.S.C. § 2000e-2(m).
40. *See White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008).
41. *Id.* (emphasis added) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)).
42. *See, e.g.*, *Ginger v. District of Columbia*, 527 F.3d 1340, 1345 (D.C. Cir. 2008).
43. *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 318 (4th Cir. 2005).
44. *Harris v. Shelby Cnty. Bd. of Educ.*, 99 F.3d 1078, 1084 (11th Cir. 1996) (citing *Preston v. Va. ex rel. New River Coll.*, 31 F.3d 203, 207 (4th Cir. 1994); *Pilditch v. Bd. of Educ.*, 3 F.3d 1113, 1118 n.2 (7th Cir. 1993), *cert. denied* 510 U.S. 1116 (1994); *Hannon v. Chater,* 887 F. Supp. 1303, 1314 (N.D. Cal. 1995)); *see also Hossack v. Floor Covering Assocs. of Joliet, Inc.*, 492 F.3d 853, 860 (7th Cir. 2007) ("To prove that sex was a motivating factor, a plaintiff must demonstrate that her sex was one of the reasons that the employer took adverse action against her.").
45. *Makky v. Chertoff*, 541 F.3d 205, 214 (3d Cir. 2008).
46. *Hossack*, 492 F.3d at 862 (quoting *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994)). The confusion surrounding the causation standards is further muddled when comparing this list of evidence to the ways to prove that an employer's "legitimate, nondiscriminatory reason" under the *McDonnell Douglas* burden-shifting framework, *see McDonnell Douglas v. Green*, 411 U.S. 792, 802–03 (1973), is pretext for discrimination. *Id.* at 804–05.
47. *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 404 (6th Cir. 2008).
48. *Quigg v. Thomas Cnty. Sch. Dist.,* 814 F.3d 1227, 1241 (11th Cir. 2016).
49. *Makky v. Chertoff*, 541 F.3d 205, 215 (3d Cir. 2008).
50. *See id.* at 216.
51. *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1123 (9th Cir. 2004) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000)).
52. *Holcomb v. Iona Coll.*, 521 F.3d 130, 141–42 (2d Cir. 2008).
53. *See White v. Baxter Healthcare Corp.*, 533 F.3d 381, 401 (6th Cir. 2008) (quoting *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 720 (6th Cir. 2006) (Moore, J., concurring)).
54. United States Employment and Reemployment Rights Act, Pub. L. 103-353, § 2(a), Oct. 13, 1994, 108 Stat. 3153 (codified as amended at 38 U.S.C. §§ 4301–4333).
55. *See* 38 U.S.C. § 4301(a).
56. 38 U.S.C. § 4311(a).
57. 38 U.S.C. § 4311(c).
58. *Id.*
59. 38 U.S.C. § 4323(d)(1)(A)–(B).
60. 38 U.S.C. § 4323(d)(1)(C).
61. *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011). A Petition for a Writ of Certiorari is pending before the Court asking it to clarify what is required to prove motivating factor under USSERA. *See Kitlinski v. U.S. Dep't of Just.*, 994 F.3d 224 (4th Cir. 2021), *petition for cert. filed*, https://bit.ly/3DCkfLH (U.S. Nov. 1, 2021) (No. 19-1621).
62. *Staub*, 562 U.S. at 413.
63. *Id.* at 422.
64. *Id.* at 416. The cat's paw theory of liability has also been applied to Title VII cases. *See, e.g.*, *Fisher v. Lufkin Indus., Inc.*, 847 F.3d 752, 758 (5th Cir. 2017).
65. *Staub*, 562 U.S. at 419–20.

66. *Compare Caroll v. Del. River Port Auth.*, 843 F.3d 129, 132 (3d Cir. 2016); *Gummo v. Village of Depew*, 75 F.3d 98, 106 (2d Cir. 1996); *Hickle v. Am. Multi-Cinema, Inc.*, 927 F.3d 945, 952 (6th Cir. 2019), *with Kitlinski*, 994 F.3d at 230; *Arroyo v. Volvo Grp. N. Am., LLC*, 805 F.3d 278, 284 (7th Cir. 2015); *Coffman v. Chugach Support Servs., Inc.*, 411 F.3d 1231, 1238 (11th Cir. 2005), *and Bradberry v. Jefferson County*, 732 F.3d 540, 547 (5th Cir. 2013); *Brasch v. Merit Sys. Prot. Bd.*, 664 F. App'x 915, 918 (Fed. Cir. 2016).

67. *See Caroll*, 843 F.3d at 132; *Gummo*, 75 F.3d at 106; *Hickle*, 927 F.3d at 952. However, even this interpretation is not strictly in line with the statutory text because it provides that plaintiffs may also meet their burden by showing that the protected status or activity was a "substantial" factor. This misguided approach likely developed as some kind of middle ground for courts that could not decide which of the *Price Waterhouse* opinions—the plurality or Justices O'Connor and White's concurrences—were controlling. However, Justice O'Connor herself recognized that the codified "motivating factor" language abrogated her *Price Waterhouse* concurrence. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 102 (2003) (O'Connor, J., concurring). On the other hand, this surplusage is likely a de minimis departure from the statutory text because the requirement is framed as a disjunctive, so plaintiffs can still meet their burden merely by meeting the statutory text's requirements.

68. These factors are named after a federal circuit case that originally announced these factors. *See Sheehan v. Dep't of Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001).

69. *Savage v. Fed. Express Corp.*, 856 F.3d 440, 447 (6th Cir. 2017). The *Sheehan* factors have been adopted, at least in part, by nearly every circuit. *See Velázquez-García v. Horizon Lines of P.R., Inc.*, 473 F.3d 11, 19 (1st Cir. 2007*); Murphy v. Radnor Township*, 542 F. App'x 173, 178 (3d Cir. 2013); *Hill v. Michelin N. Am., Inc.*, 252 F.3d 307, 314 (4th Cir. 2001); *Rademacher v. HBE Corp.*, 645 F.3d 1005, 1010–11 (8th Cir. 2011); *Leisek v. Brightwood Corp.*, 278 F.3d 895, 900 (9th Cir. 2002); *Greer v. City of Wichita*, 943 F.3d 1320, 1324 (10th Cir. 2019); *Coffman*, 411 F.3d at 1238.

70. *See Sheehan*, 240 F.3d at 1014.

71. *See, e.g.*, *Kitlinski*, 994 F.3d at 230 ("[Section] 4311 . . . requires *some evidence of discriminatory animus* by a civilian employer.") (emphasis added); *Arroyo*, 805 F.3d at 284 (discussing the ways that plaintiffs can use circumstantial evidence to meet their burden of proving "the employer's ill motive"); *Coffman*, 411 F.3d at 1238 ("Section 4311 clearly mandates proof of discriminatory motive.").

72. *Bradberry v. Jefferson County*, 732 F.3d 540, 547 (5th Cir. 2013); *Brasch v. Merit Sys. Prot. Bd.*, 664 F. App'x 915, 918 (Fed. Cir. 2016).

73. *See, e.g.*, *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 309 (4th Cir. 2006); *Hill*, 252 F.3d at 312; *Gambrill v. Cullman Cnty. Bd. of Educ.*, 395 F. App'x 543, 544 (11th Cir. 2010); *Erickson v. U.S. Postal Serv.*, 571 F.3d 1364, 1368–69 (Fed. Cir. 2009).

74. *Coffman*, 411 F.3d at 1238 (quoting *Brandsasse v. City of Suffolk*, 72 F. Supp. 2d 608, 617 (E.D. Va. 1999)); *Petty v. Metro. Gov't of Nashville-Davidson Cnty.*, 538 F.3d 431, 446 (6th Cir. 2008) (citing *Coffman*, 411 F.3d at 1238); *Murphy*, 542 F. App'x at 177 (citing *Coffman*, 411 F.3d at 1238); *see also Erickson*, 571 F.3d at 1368.

75. Petition for Writ of Certiorari, *Kitlinski v. U.S. Dep't of Just.*, (No. 19-1621) (on file with author).

76. *See, e.g.*, *Smith v. City of Toledo*, 13 F.4th 508, 514 n. 1 (6th Cir. 2021); *Lindsey v. Bio-Medical Applications of La., L.L.C.*, 9 F.4th 317, 325 (5th Cir. 2021); *Campos v. Steves & Sons, Inc.*, 10 F.4th 515, 529 n. 4 (5th Cir. 2021); *Vaughn v. Ret. Sys. of Ala.*, 856 F. App'x 787 (11th Cir. 2021); *Fonte v. Lee Mem'l Health Sys.*, No. 20-13240, 2021 WL 5368096 (11th Cir. Nov. 18, 2021); *Stevenson v. City of Sunrise*, No. 20-12530, 2021 WL 4806722 (11th Cir. Oct. 15, 2021).

77. *See, e.g.*, 42 U.S.C. § 2000e-2(m); 38 U.S.C. § 4311(c).

78. *See, e.g.*, *Hossack v. Floor Covering Assocs. of Joliet, Inc.*, 492 F.3d 853, 862 (7th Cir. 2007) (quoting *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994)) (providing a list of types of evidence that a Title VII-plaintiff can use to prove that a protected characteristic was a motivating factor in an employment decision); *Savage v. Fed. Express Corp.*, 856 F.3d 440, 447 (6th Cir. 2017) (listing the *Sheehan* factors to prove whether a USERRA-plaintiff's protected status or activity was a motivating factor in an employment decision).

79. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020).

80. *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1017 (2020).

81. *See Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 257–58 (1981) (stating that, under but-for causation, the employer never bears the burden of proof, only a burden of production).

82. *See* 42 U.S.C. § 2000e-5(g)(2)(B); 38 U.S.C. § 4311(c); *see also Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003).

83. *See Johnson v. Transp. Agency*, 480 U.S. 616, 631 (1987).

84. *See* 38 U.S.C. 4301(a).

85. *See, e.g.*, *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 546 (1999) (plurality opinion) (providing that additional costs or damages deter Title VII violations); *Florida v. Long*, 487 U.S. 223, 230 (1988) (same); *West v. Gibson*, 527 U.S. 212, 217–18 (1999) (same).

86. *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009 (2020).

87. *Id.* at 1017.

88. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739–40 (2020).

89. *See City of Chicago v. Fulton*, 141 S. Ct. 585, 591 (2021) (quoting *Yates v. United States*, 574 U.S. 528, 543 (2015)) ("'The cannon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.'").

90. *Compare* 42 U.S.C. § 2000e-5(g)(1), *with* 42 U.S.C. § 2000e-5(g)(2)(B).

91. 38 U.S.C. § 4323(d)(1)(C).

92. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 262 (1989) (plurality opinion) (O'Connor, J., concurring) ("Congress was attempting to eradicate discriminatory actions in the employment setting, not mere discriminatory thoughts.").

93. *See Hossack v. Floor Covering Assocs. of Joliet, Inc.*, 492 F.3d 853, 862 (7th Cir. 2007) (quoting *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994)); *supra* note 46 and accompanying text.

94. *See, e.g.*, *Tomassi v. Insignia Fin. Grp., Inc.*, 478 F.3d 111, 115 (2d Cir. 2007), *abrogated in part on other grounds by Gross v. FBL Fin. Servs. Inc.*, 557 U.S. 167 (2009) (stating that although stray remarks may be insufficient to establish liability, "[t]he more a remark evinces a discriminatory state of mind, and the closer the remark's relation to the alleged discriminatory behavior, the more probative that remark will be").

95. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020).

96. *Id.* at 1739–40.

97. *See Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1017 (2020) (stating that the mixed-motive framework is primarily just taking the but-for causation framework but moving the burden of proof to the employer to prove that the protected characteristic was not a but-for cause).

98. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94–95 (2003); 42 U.S.C. § 2000e-5(g)(2)(B).

99. *See Johnson v. Transp. Agency*, 480 U.S. 616, 631 (1987); 38 U.S.C. § 4301(a).

100. *See Bostock*, 140 S. Ct. at 1739.

101. *See City of Chicago v. Fulton*, 141 S. Ct. 585, 591 (2021) (quoting *Yates v. United States*, 574 U.S. 528, 543 (2015)) (providing that statutes should be interpreted in a way that does not invalidate other statutory provisions in the same act).

Psychotherapist Privilege in Employment Discrimination Cases: To Waive or Not To Waive?

By Barbara K. Hathaway

Introduction

Most plaintiffs in employment discrimination cases claim emotional harm and seek damages for emotional distress. In certain circumstances, when a plaintiff places his or her mental health at issue, this will result in a waiver of the psychotherapist-patient privilege that would otherwise apply to records of treatment for mental health issues. Attorneys representing both plaintiffs and defendants should be aware of what constitutes an express or implied waiver of the privilege, as it will likely result in the disclosure of mental health treatment records and the depositions of treatment providers. And plaintiffs' attorneys should carefully discuss with their clients the advantages and disadvantages of such a waiver before deciding what causes of action to assert, what damages to claim in the complaint, and how to respond to discovery requests.

This article will discuss the rules governing the psychotherapist-patient privilege, as well as when the privilege is deemed waived. Waiver can occur in a variety of circumstances, including when a plaintiff asserts a cause of action for which serious emotional distress is an element (such as intentional or negligent infliction of severe emotional distress), seeks damages for serious emotional damages beyond "garden variety" emotional damages, or proffers evidence to support such a claim for emotional damages. The article will also discuss when the privilege is *not* waived, such as when a defendant seeks to challenge plaintiff's credibility. The article will also address the consequences of waiver or non-waiver. If the privilege is waived, defendants may obtain access to mental health records and depositions of mental health treatment providers, and the amount of emotional distress damages that may be recovered may be limited if the privilege is not waived. Plaintiffs may also want to consider ways to limit the privacy consequences of a waiver, including confidentiality stipulations. Finally, the ground rules for depositions of mental health experts, such as the presence of counsel, will be addressed. This information should assist both plaintiffs' and defense counsel to make informed decisions about whether the privilege should be or has been waived, and what discovery will be available or what discovery requests should be resisted.

The Scope of Discovery Under Federal Rules of Civil Procedure

Before considering when the psychotherapist-privilege may apply and when it may be waived, it is useful to review the general scope of discovery. Federal Rule of Civil Procedure 26 authorizes discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case."[1] In applying this standard, courts are to consider "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."[2] Relevance under Rule 26 has been construed broadly to include "any matter that bears on, or that reasonably could lead to other matter that could bear on" any party's claim or defense.[3] The current version of Rule 26 expressly incorporates considerations of proportionality and burden; thus, arguments that the burden of discovery is not warranted by the nature of the claims in the case may be available.[4]

Any party may also move for a protective order, upon a showing of good cause, to limit or prevent discovery which may cause "annoyance, embarrassment, oppression or undue burden or expense . . . "[5]

Rule 35 also provides that when the mental or physical condition of a party is in controversy, the court may order the party to "submit to a physical or mental examination." The order must be made on motion for "good cause shown."[6] As will be further discussed, courts generally will not find that a plaintiff's mental condition is placed in controversy by the mere assertion of claims for garden variety emotional distress. Rather, a plaintiff must do more, such as claiming significant emotional distress, asserting a claim for intentional or negligent infliction of emotional distress, or proffering expert testimony to support a claim of emotional distress.[7]

The Availability of Emotional Distress Damages in Employment Cases

Before considering the applicability of the psychotherapist-patient privilege and the implications of a waiver, it is useful to keep in mind what damages are available for mental or emotional injuries in such cases. Under Title VII, the primary federal employment discrimination statute, emotional damages are capped on a sliding scale, depending upon the size of the employer. For employers with more than 500 employees, damages, including punitive damages, are capped at $300,000, not including certain types of monetary relief, such as back pay and attorney's fees.[8] Emotional distress damages are not available under the Age Discrimination in Employment Act or the Family

and Medical Leave Act, although liquidated damages are available for willful violations.[9] There is no cap for claims brought under the federal Civil War-era statute known as § 1981 or the New York anti-discrimination statute, the Human Rights Law.[10]

The Categories of Emotional Distress Claims

Claims for emotional distress have traditionally been grouped into three categories—garden variety, significant and egregious. These categories are relevant not only to determining whether a plaintiff has placed her mental state in issue for purposes of a waiver of the privilege, but also for assessing the monetary amounts awarded, often on a motion for remittitur after a jury verdict. Garden variety claims have been defined as "the distress that any healthy, well-adjusted person would likely feel as a result of being . . . victimized."[11] Garden variety claims are typically supported by plaintiff's testimony without the support of an expert witness. Significant claims are based on more substantial harm or more offensive conduct, and are often supported by medical testimony and evidence of treatment and/or medication. Egregious emotional distress claims generally involve outrageous or shocking discriminatory conduct or a significant impact on the plaintiff, with evidence of severe impairment requiring treatment.[12] Garden variety emotional distress claims typically merit an award of damages in the range of $30,000 to $125,000, significant claims in the range from $100,000 to $200,000 or even $500,000, and egregious awards can be in excess of $500,000[13]

The Psychotherapist-Patient Privilege

Congress has not promulgated federal statutory privilege rules, but Rule 501 of the Federal Rules of Evidence authorizes federal courts to define privileges by interpreting "common law principles . . . in the light of reason and experience."[14] The common-law principles of testimonial privileges reflect the general rule that the public has a "right to every man's evidence" and that there is a general duty to "give what testimony one is capable of giving."[15] "Exceptions from the general rule disfavoring testimonial privileges may be justified, however, by a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'"[16]

In *Jaffee v. Redmond*, the Supreme Court recognized a testimonial privilege protecting confidential communications between a psychotherapist and patient. The Court noted that because effective psychotherapy "depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears," protecting communications between therapists and patients served an important private interest in allowing individuals to pursue mental health treatment. Moreover, the privilege furthered an important public interest because "the mental health of our citizenry, no less than its physical health, is a public good of transcendent importance."[17] In contrast, the Court found that the benefit to the judicial system from having access to such evidence would likely be modest, reasoning that if patients were aware that their communications were not protected, conversations would probably be chilled, and thus the evidence would likely never be created.[18] The Court's conclusion was further supported by the fact that all 50 states and the District of Columbia had recognized the privilege, and that the Advisory Committee had recommended that Congress include a psychotherapist privilege as part of the proposed Federal Rules of Evidence (although this was never enacted).

With respect to what types of mental health providers the privilege covers, the Court noted that there was agreement that it extended to licensed psychiatrists and psychologists. The Court went on to find that for the same reasons the privilege should also extend to licensed social workers, the providers at issue in the case before it.[19]

Finally, the Court rejected the balancing approach that the lower court had applied to the privilege due to the need for individuals to have some certainty about whether communications would be protected, because an "'uncertain privilege or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'" The Court explained that "[making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."[20] While the Court held that the privilege must not be subject to a balancing test, it did note that the privilege could be waived, without specifying the ways in which such a waiver could occur.[21] The Court also declined to define the precise scope of the privilege, leaving that to a case-by-case determination.[22]

The Second Circuit outlined the scope of the privilege and clarified the principles surrounding the waiver of the privilege in the seminal case of *In re Sims*.[23] In *Sims,* an inmate commenced a pro se civil rights action against prison officials based on the alleged use of excessive force. While representing himself at a deposition, after his request for appointment of counsel had been denied, he answered questions concerning conversations with a prison mental health provider about the alleged assault and his injuries. He gave somewhat conflicting testimony concerning any emotional injuries. Defendants then sought access to his mental health records. Counsel, who had since entered the case, objected to the request and expressly withdrew any claim for non-garden variety emotional distress injuries.

The Second Circuit held that the plaintiff had not waived the privilege, establishing that the privilege is not waived by assertion of a claim only for garden variety emotional distress damages, that a plaintiff may withdraw or abandon claims for emotional distress to avoid waiver of the privilege, and that the privilege is not overcome

when the plaintiff's mental state is put in issue only by the defendant, such as in an effort to challenge plaintiff's credibility or his version of the events. The Court explained that a waiver may be either express or implied, and that a waiver may be implied "in circumstances where it is called for in the interests of fairness," such as when a party attempts to use the privilege as both a shield and a sword. While this is to be determined on a case-by-case basis, the Court made clear that a party cannot "'partially disclose privileged communications or affirmatively rely on privileged communications *to support its claim or defense* and then shield the underlying communications from scrutiny by the opposing party.'"[24]

Thus, the Court found that the pro se plaintiff had not placed his mental state in issue simply by responding to questions during his deposition (at which he was not represented by counsel), and that he had not claimed serious emotional distress. Although he testified that he dreamed about the assault and became anxious when he saw a correction officer holding a knife, he also testified that he was not receiving treatment and never stated that he sought damages for mental injuries. In any event, his counsel's subsequent withdrawal of any claims for non-garden variety emotional distress prevented a waiver.[25] The Court further rejected the defendant's argument that the records were relevant to probe plaintiff's state of mind at the time of the incident, and specifically whether he started the altercation. The Court explained that if the privilege may be breached whenever records may be useful in testing the plaintiff's credibility or may have some other probative value, this would in effect inject the balancing approach that the Supreme Court had rejected in *Jaffee*.[26]

The parameters of the privilege have been further defined in a number of cases. The privilege will extend to confidential communications between a patient and a mental health provider, including psychiatrists, psychologists and licensed social workers. The communications must be made for the purpose of diagnosis and treatment. The privilege does not extend to medical providers who are not licensed *mental* health professionals, even if such individuals may treat or prescribe medication for mental health issues.[27] However, courts have found that patients have privacy interests in such medical records, and have directed release of such records when they are relevant, considering the privacy interests at issue, the expense and burden of the discovery, the relevance and importance of the discovery to the issues in the litigation, and whether a state evidentiary privilege exists.[28]

New York State protects communications with mental health providers as a matter of statute, not common law.[29]

Where there is federal question jurisdiction and evidence is relevant to both federal and state claims, issues of privilege are governed by federal law.[30]

When Is the Psychotherapist Privilege Waived—And When Is It Not Waived?

The general principle guiding a determination of when the psychotherapist privilege is waived in federal cases is one of fairness—when one places her mental condition in issue, the opposing party must have an opportunity to contest the claims. It has often been said that one cannot use the privilege as both a sword and a shield, by relying upon evidence of one's mental status while at the same time asserting the privilege to prevent disclosure of relevant information. The privilege may be waived in a number of ways, including seeking damages for emotional distress beyond garden variety, raising a claim that includes an element of emotional distress such as intentional or negligent infliction of severe emotional distress, alleging significant emotional distress or a specific serious mental health diagnosis or treatment, or putting forward evidence of serious emotional distress in discovery responses or through an expert witness. Nonetheless, even if a waiver has occurred, a litigant may still retain the benefit of the privilege by expressly abandoning or withdrawing such claims.

First, the type of emotional damages sought will dictate whether there is a waiver of the privilege. The privilege is not waived by claiming only garden variety emotional distress, which, as noted, is defined as the distress that any healthy, well-adjusted person would experience as a result of the conduct alleged. However, if the plaintiff claims more serious emotional distress, a waiver will be found. While this is undoubtedly a heavily fact-laden inquiry, where a plaintiff claims long-lasting mental health issues requiring treatment or medication, a court is likely to find a waiver. For example, where the plaintiff "seeks over $6,000,000 in compensatory damages for her hospitalization, future mental health treatment, and lost opportunities . . . as a result of Defendants' conduct," it was "clear that serious and possibly permanent 'emotional harm is at the heart of the litigation'" and the privilege was deemed waived.[31] By contrast, where a plaintiff claimed that he was scared, shocked, embarrassed and humiliated, but did not allege any specific mental disorder or unusually severe emotional distress, and had not disclosed an expert, the court found that he had claimed no more than garden variety emotional distress.[32]

A plaintiff will also be deemed to have waived the privilege by relying on her emotional distress as an element of a cause of action. Thus, numerous courts have found that asserting a claim for intentional or negligent infliction of emotional distress will constitute a waiver.[33]

Allegations of a serious, diagnosable mental health condition or significant trauma will likely also constitute a waiver of the privilege.[34]

A waiver may also be found where plaintiff proffers evidence of serious emotional distress through testimony, interrogatory responses, or documents produced in dis-

covery, including medical records, or retains an expert witness on emotional injuries.[35]

By contrast, the defendant may not overcome the privilege by claiming that plaintiff's mental health is relevant to the defense. Thus, a defendant's argument that an employee's erratic behavior provided a legitimate, non-discriminatory reason for its employment action did not result in a waiver.[36] Nor can a defendant gain access to privileged psychotherapy records by arguing that the evidence may be relevant to plaintiff's credibility or contradict plaintiff's version of events.[37]

Even where a waiver has occurred by plaintiff placing her mental status in issue, the plaintiff may prevent access to the otherwise privileged information by formally withdrawing any claim for other than garden variety emotional distress and committing to not using any evidence beyond her own testimony to support her claims. If there is any ambiguity about whether the plaintiff has abandoned claims for more than garden variety emotional distress, courts have often issued an order deeming such claims abandoned or required the plaintiff to clarify her position or file an affidavit withdrawing the claims.[38]

Under New York state law, a party waives the privilege when he or she affirmatively places his or her mental condition in issue. However, a defendant does not waive the privilege simply by denying the allegations, even if his or her physical or mental state is relevant. Thus, in *Dillenbeck v. Hess*, where plaintiff in an action involving an automobile accident sought access to defendant's medical records to determine whether he was intoxicated, the Court held that the defendant had not waived his privilege.[39] Also, as in federal law, even if a plaintiff has placed her mental condition in issue, for example by asserting a claim for intentional infliction of emotional distress, plaintiff can prevent a waiver of the privilege by withdrawing the claim.[40]

Consequences of Waiver or Non-Waiver

The waiver of the psychotherapist privilege, or non-waiver, whether inadvertent or not, can have significant consequences for a litigation. Waiver of the privilege by placing one's mental condition at issue will likely result in the opposing party gaining access to the records of mental health treatment and to depositions of any mental health providers and of any expert on emotional damages who has been retained.

Importantly, whether one has sought only garden variety emotional distress damages (thereby not waiving the privilege), or damages beyond garden variety (thereby waiving the privilege), will impact the amount of damages a plaintiff may receive. If a plaintiff seeks only garden variety emotional distress damages, she will likely be limited to damages of between $30,000 and $125,000, and if greater damages are awarded by a jury a defendant is likely to obtain a reduction on a motion for remittitur.

Thus, a decision of what emotional damages to claim and what causes of action to assert in a pleading and during the litigation, and what evidence to proffer, should be made with these potential consequences in mind. For example, if a plaintiff claims only garden variety emotional damages during the pre-trial stages of the litigation, but then seeks to introduce evidence of greater damages at trial, such as through medical records or testimony of a mental health provider, a court may preclude such evidence on the grounds that defendant was not on notice of the claim and had no opportunity to explore the mental health issues during discovery. Consequently, plaintiff's damages will be limited. On the other hand, if a plaintiff unwittingly claims more than garden variety emotional distress or voluntarily discloses mental health records, he or she will be deemed to have waived the privilege and defendant will have the right to access the mental health records.

Defendants should also keep in mind the consequences of a waiver. If a plaintiff claims more than garden variety damages, a defendant should fully explore the mental health issues in discovery by seeking releases for and obtaining the mental health records and deposing any treatment providers or experts who are expected to testify. If a plaintiff appears to seek only garden variety damages, on the other hand, a defendant should hold him or her to that

and possibly seek a written commitment or court order to that effect. And if a jury awards excessive damages, a defendant should move for remittitur to reduce the damages.

Even where plaintiffs elect to place their mental health at issue, they may also want to consider ways in which to minimize the intrusion into their privacy. Plaintiffs should consider attempting to limit the time frame for which their mental health records and history will be discoverable or objecting to unduly broad discovery requests. Most courts will permit the defendant to seek information for a reasonable time period prior to the events at issue, in order to investigate whether the mental health issues were preexisting, but may be willing to limit the time period.[41]

Another common mechanism used to handle confidential medical or psychiatric information is to enter into a confidentiality agreement or seek a protective order providing that the information may be disclosed only to limited individuals and will be used only for purposes of the litigation.[42] Some federal judges have model confidentiality agreements in their individual rules of practice, and such rules should be consulted.

A Note About IMEs

As noted, if a plaintiff places his mental status at issue, he may be required to undergo a Rule 35 medical examination by an expert retained by the defendant. Courts have looked at factors similar to those used to determine whether a plaintiff has waived the psychotherapist privilege to determine whether there is good cause for a mental examination. These factors include whether he or she has asserted a cause of action for intentional or negligent infliction of emotional distress, alleged a specific mental injury or disorder, claimed unusually severe emotional distress, or offered expert testimony to support a claim.[43] In *Jarrar*, the court denied the motion to compel plaintiff to submit to an examination, finding none of those factors present.

Where an examination is appropriate, several issues may arise in connection with such IMEs. One area of dispute that has often arisen is whether the plaintiff's attorney may be present. The general rule in federal litigation is that the attorney (for either party) may not be present, absent special circumstances.[44] The rationale behind this rule is that the presence of an attorney at the examination "'would tend to impair its effectiveness and render it adversarial,'" and may thus interfere with the examiner being able to conduct a thorough and objective examination. Moreover, an attorney who is present may potentially become a witness, raising conflict of interest issues.[45] That the presence of his or her attorney may make the plaintiff more comfortable and provide moral support is an insufficient justification for allowing the attorney to be present.[46] However, that the party is also facing criminal charges has been held to warrant an attorney's presence in order to protect his Fifth Amendment rights.[47] Federal courts have also precluded the taping of examinations, unless special circumstances are shown.[48]

The rule is different in New York state courts. Attorneys are generally permitted to be present at physical and mental examinations of their clients, "provided that the attorney does not unduly interfere with the examination."[49] However, the court has discretion to alter this rule. For example, in an action involving rape of a child on the defendant's premises, the court properly ordered that the examination be performed without the presence of counsel, given the sensitive nature of the inquiry, but that the examination could be audiotaped. [50]

Handling Mental Health Evidence at Trial

Finally, it should be noted that the scope of discovery is broader than the scope of evidence that may be admissible at trial; simply because information about a party's mental health has been produced in discovery does not necessarily mean that it will be admissible at trial.[51] A plaintiff should be alert to the possibility of limiting the evidence that is admitted, if that is her desire. A plaintiff may move in limine to preclude the defendant from using certain evidence on the ground that it is irrelevant or that the prejudice outweighs the probative value of the evidence. Of course, if a plaintiff intends to make a case for more than garden variety emotional distress damages, this may be a difficult argument.[52] Nonetheless, there may be reasons to limit the scope of the evidence that will be admitted by time period or otherwise.[53] A plaintiff may also want to consider seeking to have certain exhibits, such as particularly sensitive mental health treatment records, placed under seal.[54] The local court rules on sealing must be consulted.

In conclusion, decisions about the allegations to include concerning emotional distress or the causes of action to assert in a pleading, and whether to voluntarily proffer evidence of serious emotional distress or retain an expert on emotional distress damages, should be made with the probable consequences in mind. The plaintiff should weigh the intrusion on her privacy against the ability to seek greater damages in making these decisions, after being advised by counsel of the consequences. And defendants should be mindful of whether a plaintiff seeks emotional damages that go beyond garden variety, and if so should be vigilant about conducting appropriate discovery concerning the plaintiff's mental condition in order to be able to appropriately counter plaintiff's case on emotional injury.

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Endnotes

1. Federal Rule of Civil Procedure 26(b)(1).
2. *Id.*
3. *Doe v. Sarah Lawrence Coll.*, No. 19 Civ. 10028, 2021 WL 197132, at *3 (S.D.N.Y. Jan. 20, 2021) (citations omitted).
4. 8B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2008.1 (3d ed. 2021).
5. Fed. R. Civ. P. 26(c) (1). *See also Doe v. Sarah Lawrence*, 2021 WL 197132, at *2.
6. Fed. R. Civ. P. 35(a).
7. *Jarrar v. Harris*, No. CV 07-3299, 2008 WL 2946000, at *3 (E.D.N.Y. July 25, 2008).
8. 42 U.S.C. § 1981a(b)(3).
9. *Walsh v. Scarsdale Union Free Sch. Dist.*, 375 F. Supp. 3d 467, 482 (S.D.N.Y. 2019); *Penberg v. Healthbridge Mgmt.*, No. 08 CV 1534, 2012 WL 13103710, at *4 (E.D.N.Y. Jan. 20, 2012). *See also* 29 U.S.C. 2617(a); 29 U.S.C. 626(b).
10. 42 U.S.C. § 1981; N.Y. Executive Law § 296.
11. *Doe v. Sarah Lawrence Coll.*, No. 19 Civ. 10028, 2021 WL 197132, at *4 (S.D.N.Y. Jan. 20, 2021) (citations omitted). *See also Misas v. North-Shore Long Island Jewish Health Sys.*, No. 14-cv-8787, 2016 WL 4082718, at *4 (S.D.N.Y. July 25, 2016).
12. *Duarte v. St. Barnabas Hosp.*, 341 F. Supp. 3d 306, 319-20 (S.D.N.Y. 2018).
13. *Id.* at 320. *See also EEOC v. United Health Programs of Am., Inc.*, No. 14-CV-3673, 2020 WL 1083771, at *12-13 (E.D.N.Y. Mar. 6, 2020); *Emamian v. Rockefeller Univ.*, No. 07 Civ. 3919, 2018 WL 2849700, at *16-17 (S.D.N.Y. June 8, 2018), *aff'd,* 823 F. App'x 40 (2d Cir. 2020).
14. Federal Rule of Evidence 501.
15. *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996), quoting *United States v Bryan*, 339 U.S. 323, 331 (1950).
16. *Jaffee*, 518 U.S. at 9, quoting *Trammel v United States*, 445 U.S. 40, 50 (1980).
17. *Jaffee*, 518 U.S. at 10-11.
18. *Id.* at 12.
19. *Id.* at 15-16.
20. *Id.* at 17-18.
21. *Id.* at 15 n.14.
22. *Id.* at 18.
23. 534 F.3d 117 (2d Cir. 2008).
24. *Id.* at 132 (citation omitted).
25. *Id.* at 137.
26. *Id.*
27. *Doe v. Sarah Lawrence Coll.*, No. 19 Civ. 10028, 2021 WL 197132, at *3 (S.D.N.Y. Jan. 20, 2021) (citations omitted); *EEOC v. Nichols Gas & Oil, Inc.*, 256 F.R.D. 114, 119-20 (W.D.N.Y. 2009).
28. *EEOC v. Nichols Gas & Oil,* 256 F.R.D. at 122-23.
29. N.Y. Civil Practice Law & Rules 4504 (physicians), 4507 (psychologists), 4508 (social workers). *See generally Dillenbeck v. Hess*, 73 N.Y.2d 278, 539 N.Y.S.2d 707 (1989).
30. *Tavares v. Lawrence & Mem'l Hosp.*, No. 3:11-CV-770, 2012 WL 4321961, at *6 (D. Conn. Sept. 20, 2012).
31. *Doe v. Sarah Lawrence*, 2021 WL 197132, at *4. *See also Michelman v. Ricoh Americas Corp.*, No. CV 11-3633, 2012 WL 13046733, at *3 (E.D.N.Y. May 21, 2012) (where plaintiff had taken varying positions on her emotional damages, sought damages for "shame, humiliation, embarrassment and mental distress," was represented by counsel, unlike the plaintiff in *Sims*, and had not formally abandoned her claims, the privilege was waived).
32. *Jarrar v. Harris*, No. CV 07-3299, 2008 WL 2946000, at *5 (E.D.N.Y. July 25, 2008).
33. *Doe v. Sarah Lawrence*, 2021 WL 197132, at *4; *Green v. St. Vincent's Med. Ctr.*, 252 F.R.D. 125, 129 (D. Conn. 2008).
34. *Henderson v. Rite Aid of New York, Inc.*, No. 16-CV-785, 2018 WL 3023378, at *4 (W.D.N.Y. June 18, 2018) ("to the extent that plaintiff intends to use mental health records as evidence of significant trauma or a diagnosable mental health condition caused by the allegations in her complaint, she cannot shield her mental health records").
35. *Tavares v. Lawrence & Mem'l Hosp.*, No. 3:11-CV-770, 2012 WL 4321961, at *7-8 (D. Conn. Sept. 20, 2012) (finding an implied waiver by submission of a letter from a therapist and listing of a health care professional in response to an interrogatory); *Jacobs v. Conn. Cmty. Tech. Colls.*, 258 F.R.D. 192, 197 (D. Conn. 2009).
36. *Michelman*, 2012 WL 13046733, at *2.
37. *In re Sims*, 534 F.3d 117, 141 (2d Cir. 2008).
38. *Babbitt v. Koeppel Nissan, Inc.*, No. 18 CV 5242, 2019 WL 3296984 (E.D.N.Y. July 23, 2019); *Henderson v. Rite Aid of New York, Inc.*, No. 16-CV-785, 2018 WL 3023378, at *4 (W.D.N.Y. June 18, 2018); *Michelman*, 2012 WL 13046733, at *4.
39. 73 N.Y.2d 278, 539 N.Y.S.2d 707 (1989).
40. *Brown v. Telerep, Inc.*, 263 A.D.2d 378, 693 N.Y.S.2d 34 (1st Dep't 1999).
41. *Hirschheimer v. Assoc. Metals & Minerals Corp.*, No. 94-CV-6155, 1995 WL 736901, at *5 (S.D.N.Y. Dec. 12, 1995).
42. *Jin v. Choi*, No. 1:20-cv-09129, 2021 WL 738843 (S.D.N.Y. Feb. 24, 2021) (court directs the parties to file a proposed protective order either signed by the parties or proposed by defendant).
43. *Jarrar v. Harris*, No. CV 07-3299, 2008 WL 2946000, at *3-4 (E.D.N.Y. July 25, 2008).
44. 8B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2236 (3d ed. 2021).
45. *Hodge v. City of Long Beach*, No. CV 02-5851, 2007 WL 2891266, at *6 (E.D.N.Y. Sept. 28, 2007), citing *Hirschheimer v. Assoc. Metals & Mineral Corp.*, No. 94-CV-6155, 1995 WL 736901(S.D.N.Y. Dec. 12,1995), *vacated in part*, 2008 WL 11343456 (E.D.N.Y. Jan. 14, 2008). *See also Salemi v. Boccador, Inc.*, No. 02 Civ. 6648, 2005 WL 926965 (S.D.N.Y. Apr. 19, 2005).
46. *Hirschheimer*, 1995 WL 736901, at *3.
47. *Marsch v. Rensselaer Cnty.*, 218 F.R.D. 367, 371 (N.D.N.Y. 2003).
48. *Hirschheimer*, 1995 WL 736901, at *4.
49. *Ramsey v. New York Univ. Hosp. Ctr.*, 14 A.D.3d 349, 789 N.Y.S.2d 104 (1st Dep't 2005) (citation omitted).
50. *Barraza v. 55 W. 47th St. Co.*, 156 A.D.2d 271, 548 N.Y.S.2d 660 (1st Dep't 1989).
51. *Jin v. Choi*, No. 1:20-cv-09129, 2021 WL 738843, at *2 (S.D.N.Y. Feb. 24, 2021) (although a party is entitled to discovery, the "admissibility at trial of Plaintiff's mental health records is 'a matter for another day.'" (citation omitted).
52. *See Potenza v. City of New York*, No. 04-CV-2434, 2009 WL 2156917, at *4-5 (E.D.N.Y. July 15, 2009) (finding evidence of plaintiff's use of prescription use of pain medication "relevant to issues of causation and damages to the extent that plaintiff's use of pain medication may have … potentially contributed to plaintiff's psychological injuries.")
53. *Hirschheimer v. Assoc. Metals & Minerals Corp.*, No. 94-CV-6155, 1995 WL 736901, at *5 (S.D.N.Y. Dec. 12, 1995).
54. *Tavares v. Lawrence & Mem'l Hosp.*, No. 3:11-CV-770, 2012 WL 4321961, at *11 (D. Conn. Sept. 20, 2012).

The Family and Medical Leave Act and the Evolving Workplace

By Rebecca Rychik

In 2021, many working parents struggled with challenges resulting from the new reality of remote work. Due to the pandemic outbreak in March 2020 (and continuing into 2022), offices shut down and as a result, employees began working from home. More than a year later, offices remained closed and many parents were still working remotely from their homes.[1] At the same time in March 2020, schools closed and sent children home to participate in online learning. Children across the United States have been learning remotely since the pandemic outbreak and some are still not fully back in the classroom.[2]

While parents and children remain at home, balancing work and family responsibilities has become a juggling act for families across the United States. Now nearly two years later, parents are still trying to manage assisting and caring for their children at home, while simultaneously keeping up with their own jobs. Parents throughout the country have described feeling pushed out of the workforce in order to manage and keep up with their increasing responsibilities at home.[3] Too often, parents working at home with children by their sides have been forced to choose between these competing needs.

In 1993, Congress enacted the Family and Medical Leave Act (FMLA) to assist families in balancing the demands of the workplace with the need to care for themselves and their families.[4] Written 28 years ago, the legislation provided protections based on the typical family needs and workplace arrangements at that time in history. Today, the trend to remote work has changed the landscape of work and challenges remain for parents struggling to balance family and work responsibilities.

More specifically, for many Americans with typical office jobs, the COVID-19 outbreak has led to a change in work setting. Compared with 1993, the traditional physical workplace often looks different today, with many different work arrangements for employers and employees. This has been especially true throughout the pandemic, as employees and employers are not working in one office together, but rather miles away in their respective homes. Many workplaces have permanently closed facilities or have plans to reduce the number of employees working from one central office.[5] Notably, the sudden closure of many workplaces in March 2020 brought in a new era of remote work that is likely to remain. Employees have expressed interest in continued remote work,[6] and employers have also recognized the benefits of remote work.[7]

Although the workplace has changed and continues to evolve, the term "worksite" used in the FMLA to determine eligibility remains ambiguous and outdated. Neither Congress nor the Department of Labor has addressed the issue of FMLA eligibility for remote employees who may not meet the physical distance criteria. Specifically, the current language used in FMLA eligibility provisions does not address the definition of the term "worksite" for an employer that has closed or substantially reduced its main physical offices. FMLA eligibility requirements are based upon the traditional physical workplace, typically a central office or building location, where many employees work alongside one another.

Congress has not addressed whether employees who are working remotely and are not physically present in an office with at least 50 others within a 75-mile radius are still eligible for FMLA protections. Additionally, the Department of Labor has not revised or made any pronouncements on this direct issue. Further, the courts have not reached the issue of eligibility for employees working from home or other remote worksites that are not located within 75 miles of 50 other employees who, similarly, are working remotely from their homes, as per FMLA eligibility requirements. Though the worksites for many employees have changed, the need for protected leave to care for oneself or family members remains. New work arrangements mandated by COVID or its aftershocks should not disqualify working parents from receiving FMLA job-protected leave.

By examining the legislative history of the FMLA and existing case law within the current FMLA framework, this article evaluates whether the Family and Medical Leave Act of 1993 needs to be changed to accommodate employees in a modern workplace environment. It further assesses different routes to bring about change and account for the gap in the legislation. The author proposes that the Department of Labor, the agency with oversight and expertise, issue a rule to construe the Family and Medical Leave Act of 1993 so that it properly accommodates employees working remotely. The reforms might also include adding language that recognizes a home office as a proper workplace. Alternatively, the Department of Labor could issue a rule affording FMLA eligibility to remote employees, with cur-

rent family needs, who may not be within close proximity to other company employees. Indeed, where appropriate, the Department of Labor might even define the workplace of individuals who are working from home as their employer's main workplace facility.

Part I examines the legislative history and purpose of the Family and Medical Leave Act of 1993. It also lays out the current protections provided by the FMLA, along with the eligibility requirements. Part II assesses whether, given the evolving workplace, the FMLA of 1993 provides the intended protections for employees. Specifically, it evaluates whether the current FMLA needs to be changed or clarified to accommodate current family needs in the modern workplace environment. Finally, Part III proposes solutions to the legal issue of ambiguity in the current legislation, suggesting that the Department of Labor issue a rule clarifying FMLA coverage for employees working from home.

I. The Current FMLA

A. FMLA Background

1. Findings and Purposes

Prior to the passage of the Family and Medical Leave Act in 1993, due to a lack of employment policies to accommodate working parents, employees commonly had to choose between caring for themselves or their families and keeping their jobs. At that time, employees were not provided any protections when they or a family member had a serious illness requiring them to take off from work.[8] Further, many workplaces did not allow for parents to take time off after having a baby.[9] Across the board, workplaces were not accommodating, and employees were not guaranteed job-protected time off from work to deal with family responsibilities.

In 1993, Congress enacted the Family and Medical Leave Act in response to the new reality of working families, specifically mothers in the workforce.[10] Recognizing the growing number of single-parent households, Congress sought to assist families in balancing competing responsibilities in the workplace and at home. According to the U.S. Department of Labor, the FMLA helps employees to balance these competing needs, without sacrificing one for the other.[11] By allowing individuals to take reasonable unpaid leave for certain family and medical reasons, Congress sought to promote economic security for families, while also preserving family stability and integrity.[12] 29 CFR Part 825 discusses the purpose of the FMLA. Section 825.101 states:

> America's children and elderly are in need of care from family members who have demanding responsibilities at work. When a family emergency arises, requiring workers to attend to seriously-ill children or parents, or to newly-born or adopted infants, or even to their own serious illness, workers need reassurance that they will not be asked to choose between their employment and meeting their personal and family obligations or tending to vital needs at home.[13]

The FMLA acknowledged the struggles that families face balancing their responsibilities and the need for unpaid job protection. At the same time, Congress there sought to accomplish the goal of helping families in a way that also accommodates the legitimate interests of employers.[14]

2. Legislative History

Since its passage in 1993, Congress amended the FMLA and expanded coverage to include employees not explicitly listed in the original signed law. First, in 1995, Congress amended the FMLA to cover certain legislative branch employees.[15] Next, in 2008 and 2009, Congress amended the FMLA to create a new entitlement for military leave.[16] Again, in December of 2009, Congress amended the FMLA to modify the hours-of-service eligibility requirement for airline flight crews.[17] Clearly, Congress has the authority to amend the FMLA to reflect modern work situations that were not originally included in the law drafted in 1993 and, in fact, Congress has successfully amended the law to account for the expansion of different types of work throughout its history.

B. Main FMLA Provisions

1. General Protections

The FMLA allows eligible employees of a covered employer to take 12 weeks of job-protected, unpaid leave per year.[18] It provides entitled employees two types of unpaid leave: leave to care for family or personal medical reasons, and military leave.[19] This article will focus exclusively on leave to care for oneself or a family member. Job-protected leave may be taken for specified family and medical reasons, including time off after the birth or foster placement of a child, to care for a family member with a serious health condition, or for one's own serious health condition.[20]

2. Covered Employers

The FMLA applies exclusively to employers that meet the criteria set forth in the legislation. To be covered under the FMLA (and, thus, to be required to provide FMLA leaves), an employer must be a private sector employer with 50 or more employees for 20 or more work weeks in the current or preceding calendar year, including a joint employer or successor in interest to a covered employer.[21] The FMLA also covers public agencies, including local, state, or federal government agencies, regardless of the number of their employees.[22] Additionally, it covers public or private elementary or secondary schools, also regardless of the number of their employees.[23]

3. Eligible Employees

To be eligible for FMLA leave with a covered employer, the employee must have (1) worked for the employer for at least 12 months and (2) worked 1,250 hours in the previous 12 months prior to the leave.[24] The FMLA also lists specific exclusions: "The term 'eligible employee' does not include any employee of an employer who is employed at a worksite at which such employer employs fewer than 50 employees, provided the total number of eligible employees may take up to 12 work weeks of unpaid leave in a 12-month period.[25] Unpaid, job-protected time off can be taken after the birth of a child or after placement of a child for adoption or foster care in order to care for the child.[26] An eligible employee can also take leave to care for a child, spouse, or parent who has a serious health condition.[27] Further, an eligible employee with a serious health condition and unable to perform the essential functions of the job may take FMLA leave.[28] Finally, eligible employees may take unpaid leave for any "qualifying exigency" arising out of the foreign military deployment of an employee's spouse, son, daughter, or parent.[29]

5. 50 Employees Must Be Employed Within 75 Miles (The 50/75 Provision)

In drafting the law, Congress sought to assist families, but in a way that took into account the legitimate interests of employers.[30] It did not include protections for employees working for employers without a large number of employees. To be eligible, an employee must work at a site with at least 50 other employees within a 75-mile radius of the worksite[31]—commonly referred to as the 50/75 provision.[32] The statute, however, does not define "worksite."

Under FMLA regulations of the Department of Labor, an employee's worksite will usually be the location to which the employee reports;[33] where no fixed[34] or single site to which the employee reports, the worksite will be the location from which that employee's work is assigned.[35] Generally, however, a worksite may refer to either a single location or a group of contiguous locations (e.g., structures that form a campus or industrial park, or separate facilities in proximity with one another).[36]

While the Department of Labor has further clarified the meaning of a worksite for various types of employees, it has not done so for addressed employees working from home. In fact, though remote work has become an up-and-coming trend, neither the legislation enacted by Congress nor the regulations issued by the Department of Labor specifically address whether remote employees should be subject to the 50/75 provision. Accordingly, it remains unclear whether an employee working from home, reporting to an employer at a business site or to one who is also working from a home without 50 employees within a 75-mile radius, is eligible for FMLA leave. Neither has the Department of Labor opined on whether 50 or more employees working from their separate homes but all within a 75-mile radius become eligible for FMLA leave.

Even though new work arrangements exist, for many employers, the total number of employees remains the same. Employees may be scattered physically, yet remote employees oftentimes work for employers who still have more than 50 employees reporting to one supervisor. Consistent with the purpose Congress had in enacting this provision,[37] the remote physical location of such an employee does not necessarily affect whether an employer

"Though one could argue that job-protected unpaid time off is not necessary for parents working from home, juggling competing responsibilities, even while at home, is not an easy task. The same pre-pandemic family matters requiring job-protected unpaid leave still exist and, if anything, pose new problems as well."

will suffer a great burden from allowing the employee to take leave.

While the current law and regulations do not address the new type of work arrangement, the trend of working from home is continuously evolving. As a result of the COVID-19 pandemic, many employers no longer have a physical single place to which employees report, or even one physical place from where all employees get their work. Since this may be dependent on where each employee's supervisor is located, often, 50 employees are not employed within 75 miles as per the written eligibility requirement. Moreover, if employers choose to close their main physical offices, many employees might be left ineligible to take protected leave. In short, as written, the legislation does not account for the new reality of remote work. Additionally, the Department of Labor has yet to speak about potential FMLA eligibility implications of this new reality.

II. The Current FMLA Law Leaves Remote Employees Behind

A. Despite the Shift to Remote Work, Difficulties Balancing Family and Work Responsibilities Persist

Balancing work and family responsibilities has always been difficult for parents with young children.[38] Pandemic-related school and day care closures have only amplified these challenges.[39] Two years since the pandemic outbreak, many employees are still working remotely[40] and some school-aged children have yet to fully return to the classroom.[41] As many parents remain working from home with their children participating in remote school by their sides, working parents continue to struggle with balancing family and work responsibilities simultaneously.[42] Some employers have adjusted their expectations of working parents and implemented policies to support working parents who face COVID-19 challenges.[43] Further, with the passage of the Family First Coronavirus Response Act (FFCRA), Congress sought to provide some relief for struggling families during the pandemic. The FFCRA required certain employers to provide paid sick leave or expanded Family and Medical Leave for employees with specified needs related to COVID-19.[44] Though these measures were helpful, many parents continue to struggle in their balancing of work and family responsibilities in the current environment.

Though one could argue that job-protected unpaid time off is not necessary for parents working from home, juggling competing responsibilities, even while at home, is not an easy task. The same pre-pandemic family matters requiring job-protected unpaid leave still exist and, if anything, pose new problems as well.

B. The New Type of Workplace

With the advancement of technology, telework is a rising trend across many fields.[45] While this was already an upward trend before COVID-19, as a result of the pandemic outbreak, employers have accelerated the shift to remote work. Starting with the implementation of stay-at-home orders and continuing throughout the pandemic, the landscape of work has vastly changed.[46] The abrupt closure of many workplaces in March 2020 brought a new wave of remote work that is likely to remain in the future.[47]

Notably, attitudes toward remote work have also greatly changed in the past year. Before the pandemic, one common notion was that productivity levels plummet when employees work from home.[48] After working remotely for more than a year, both employers and employees have reported feeling extremely satisfied with remote work arrangements. Employees have said they are able to perform adequately, and some have said that working remotely allows them to be even more efficient.[49] Many employees have further expressed their enjoyment of working from home and preference to do so going forward.[50]

Employers have also been flexible in accommodating remote work and may be likely to do so going forward.[51] Satisfied with the progress over the past year, employers have said that much of the workforce that allows for remote working will continue to transition going forward.[52] According to Gallagher's annual survey, which gathered data from 3,921 employers from December 2019 to May

2020, as well as a series of employer surveys between April and July 2020, nearly all employers say work from home will continue after the pandemic. As much as 59% say flex scheduling will also remain an option.[53]

Since many employees will continue to work remotely, this new type of work should be addressed in legislation like the FMLA. Though the physical circumstances have changed, working parents should continue to benefit from unpaid job-protected leave when certain family responsibilities arise.

C. Remote Work and FMLA Eligibility

As noted above, to be eligible for FMLA leave, an employee must work at a location that has at least 50 other employees within 75 miles of the worksite.[54] Complying with stay-at-home orders, many employers closed their central offices in March of 2020, forcing employers and employees to work from home.[55] Though employers have retained their total number of employees, many have yet to re-open their central offices[56] and employees remain scattered geographically as they work from their respective homes. Many employers have not expressed a desire to return employees to the main worksites in the near future,[57] and remote work may be the new reality for many employees going forward. Since the homes of remote employees working for the same employer may be geographically spread, the trend to remote work can leave many employees short of FMLA eligibility.

Thus, compared to 1993 when Congress enacted the FMLA, the physical workplace looks very different today. Though the workplace has changed, balancing work and family remains difficult for working parents.[58] The Family and Medical Leave Act did not account for these modern difficulties, and Congress has not amended the FMLA in any way to reflect the shift away from traditional work arrangements. Neither has the Department of Labor issued a rule or any guidance to assure working parents of such protection, even though their work conditions have changed.[59] For eligibility purposes, the term "workplace" used in the FMLA simply does not reflect modern realities. While accommodations for alternate work arrangements are becoming widely accepted,[60] the law remains steps behind.

D. Determining Whether 50 Employees Are Employed Within 75 Miles

Congress did not define the term "worksite" in the 50/75 provision of the FMLA and has not since passed any amendments addressing remote work under the provision. However, the Department of Labor, acting pursuant to its rule-making authority, has promulgated a federal rule providing direction for determining whether employees meet the 50/75 requirement. A subpart of the rule specifically addresses employees with no fixed worksite:

> For employees with no fixed worksite . . . the "worksite" is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. . . . An employee's personal residence is not a worksite in the case of employees, such as salespersons, who travel a sales territory and who generally leave to work and return from work to their personal residence, or employees who work at home, as under the concept of flexiplace or telecommuting. Rather, their worksite is the office to which they report and from which assignments are made.[61]

Still, under this rule, it remains unclear whether certain remote employees continue to be eligible for leave. While this regulation provides assistance for some specific employees without a fixed worksite, it is silent on eligibility issues posed by supervisory employers assigning work from their personal residences to many remote employees working from their respective homes, which are all spread out geographically.

It is clear from this rule that for FMLA eligibility purposes, the term "worksite" may be viewed as the office to which an employee reports and from which assignments are made. However, what remains ambiguous is whether this rule should similarly apply to remote employees who are receiving work from a supervisor in his or her residence miles away from other of the employer's employees. Further, the application to an employee working for an employer that no longer has one central physical office remains vague.

E. Existing Case Law Within the Current FMLA Framework

Cases within the current FMLA framework have addressed eligibility issues posed by employees working at non-traditional worksites. Specifically, courts have grappled with the issue of whether for FMLA eligibility purposes, an employee's worksite may be considered the home office of his/her supervisor. Yet, certain eligibility issues posed by modern remote work circumstances remain unresolved.

In *Killion v. Hospira Worldwide, Inc.*, the court dealt with the issue of whether FMLA protections extend to employees who are not located within 75 miles of 50 of the employer's employees. There, a plaintiff working from home as a traveling salesperson was denied FMLA protection and subsequently filed a complaint.[62] The defendant sought summary judgment, arguing that the plaintiff was rightfully excluded from FMLA coverage because 50 employees were not employed within 75 miles of the plaintiff's worksite.[63] The main issue was which office was considered to be the plaintiff's worksite for purposes of FMLA eligibility. The court examined this issue by relying

on two previous cases that similarly discussed non-traditional worksites for FMLA eligibility purposes.

In *Conners v. SpectraSite Commc'ns, Inc.*, the court addressed whether under the FMLA, a salesperson's home can be considered a worksite.[64] To determine FMLA eligibility, the court relied on the criteria set by the Department of Labor to assess eligibility for employees without a fixed worksite. The rule states that a "worksite" is the site to which they are assigned as their home base, from which their work is assigned, or to which they report.[65] Evidence was presented that the plaintiff reported to and received assignments from the smaller office, which did not have 50 employees within a 75-mile radius. Therefore, the court held that the plaintiff was not an eligible employee for the purposes of FMLA coverage.[66]

In *Killion v. Hospira Worldwide, Inc.*, the main issue was whether the worksite to which the plaintiff reported was the home office of her supervisor or the employer's headquarters.[67] Due to disputed facts regarding the plaintiff's worksite, the court denied summary judgment.[68] However, the determination remains unresolved. Similarly, In *O'Dea-Evans v. A Place for Mom. Inc.*, where the parties argued about whether the plaintiff satisfied the 50/75 requirement for FMLA eligibility purposes, the court denied summary judgment.[69] Thus, the court did not decide which location was considered the worksite within the FMLA framework.

Relying on the Department of Labor rule, courts have made it clear that an employee's personal residence should not be considered the worksite for FMLA eligibility.[70] Instead, the worksite is the office to which employees report or from which assignments are made.[71] While it would seem that a supervisor's home from which assignments are sent and tasks are delegated to employees would fit the definition of worksite, the court has yet to speak on that exact issue. If the supervisor's home is considered the worksite, and it is located more than 75 miles from other employees, many workers could be denied FMLA eligibility for a failure to satisfy the 50/75 provision. This denial would be based arbitrarily on the geographical location of a supervisor's home.

Though courts have applied the Department of Labor regulations when addressing questions of FMLA leave, they have yet to address the new type of work situation that many employees face when working at home for remote employers, i.e., the issue of eligibility for a remote employee, reporting to an employer working from home, who is not within 75 miles of 50 other employees. This issue is further complicated when the employer does not have a main central office with many employees. It remains unclear whether employees, now commonly in this type of situation, would qualify for FMLA leave.

III. Congressional Amendment and/or Department of Labor Promulgation of a Rule Addressing FMLA Eligibility for Remote Employees

The effect of the COVID-19 pandemic on work arrangements, specifically the limited use or even complete closure of central office locations, will likely impact the nature of the workplace in the future. Even after the pandemic wanes, many employers may allow their employees to continue working from home, changing the landscape of the traditional workplace. In 2021, the definition of the term "worksite" simply is no longer limited to the typical central facility building, where many employees work side by side. For reasons stated above, the 50/75 eligibility requirement should be changed or adapted to accommodate employees who work from home, whether by Congress and/or the Department of Labor acting within their respective authorities to allow for remote employees to take permitted leave. Both of these options could clarify the application of the law to current work trends and minimize, if not eliminate, confusion by employers and employees.[72]

A. Interpreting the Current Statute

Before turning to any possible reforms, an attempt should be made to interpret the current FMLA and gain an understanding as to Congressional intent. Typically, when the legislative meaning is not clear, courts have used a "hierarchy" to determine the meaning and application.[73] In accordance with the rules of statutory interpretation, courts first look at the plain meaning of the statute to discover the original intent.[74] However, since Congress did not define the term "worksite" in the FMLA, based on the plain meaning, the original intent remains ambiguous. The meaning of the term "worksite" is no longer as limited and precise as it once was.

If the language of the statute does not provide any clarification, courts attempt to ascertain the intent of Congress by looking at the legislative meaning, including the ordinary or prototypical meaning of the word at the time of enactment. As a basic rule, courts often assume that the legislature uses words in their "ordinary sense."[75] At the time of enactment in 1993, the term "worksite" had a narrow meaning, typically referring to a central building, office or facility location. Years ago, people would never have imagined that employees could work from anywhere, so long as they have internet connection and a device at hand. Due to the changing times, resulting from the rise of technology, remote work has become a widespread trend. However, an originalist approach to interpretation would suggest that individual homes do not fall within the definition of the term "worksite."

Nevertheless, to gain a clearer understanding and to ascertain the intent of Congress, courts may also look at the findings or purposes of the FMLA.[76] As written, the purpose of the statute was to assist families in balancing

competing responsibilities at work and at home.[77] Though the workplace may look different for many employees today, balancing work and family responsibilities remains challenging. Just like employees who show up to a physical plant, showroom or office each day, remote employees also need help balancing work and family responsibilities.[78] Based on the intended purpose of the FMLA, interpreting the legislation to include remote employees seems plausible.

However, application of the rules of statutory interpretation has been inconsistent and uncertain by courts.[79] Thus, without further amendments by Congress or rules by the Department of Labor addressing the present issue ambiguity, there is currently no clear standard for courts to follow.

B. A Legislation-Oriented Approach

Congress has the authority to write bills to address subjects on which law already exists.[80] Congress can consider an amendment proposing to strike language from a bill, insert new language, or replace language.[81] To date, Congress has considered various proposals to amend the FMLA, and Congress has amended the Act four times.[82]

The 114th Congress considered two proposals to amend the general eligibility requirements for employees seeking FMLA leave. Though neither passed, one proposed bill would have reduced the minimum number of employees within 75 miles of an employee's worksite from 50 employees to 15 employees.[83] To address the current ambiguity in the statute as applied to remote employees working for remote employers, Congress could consider a similar bill, reducing the minimum number of employees required for eligibility purposes. This, however, likely would not adequately solve the issue and would exclude many employees. Even with such an amendment, the eligibility criteria would still be arbitrarily based upon the geographic location of the homes of employers and employees and devoid of any connection between the physical location of employees and the need to protect leave. Further, geographic location of a "worksite" does not have an impact on the burden imposed on an employer when leave is taken.

Alternatively, Congress could strike the 50/75 provision altogether and replace it with a provision that adequately addresses the impact of FMLA leave on smaller employers. A better option may be for Congress to insert new language that clearly addresses eligibility for remote employees who are not reporting to a central office location. Though Congress has the tools to address the issue in many different ways, gridlock in the legislative branch may stand as a barrier to any desirable outcome.[84] Additionally, the process may be lengthy, posing issues for employers and employees until a final bill is agreed upon. Remote employees cannot afford to wait for this issue to be sorted out by a divided Congress.[85]

C. Regulation by the Department of Labor

In an organic statute or a subsequent law, Congress authorizes agencies to issue rules and regulations.[86] In the FMLA, Congress included a broad delegation of rulemaking authority to the Department of Labor.[87] It directs the Secretary of Labor to "prescribe such regulations as are necessary to carry out" parts of the FMLA.[88]

According to *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.* (the "*Chevron* rule"), when a court reviews an agency's construction of a statute which it administers, it is confronted with two questions. The first is whether Congress addressed the precise question at issue.[89] If the intent of Congress is clear, the matter ends there and effect must be given to the unambiguously expressed intent of Congress.[90] Where a statute's language is "either silent or unclear on the point at issue" a court will generally defer to an agency's exercise of delegated authority.[91] Thus, if the expressed intent of Congress is not clear, a court would then look at whether the agency's answer is based on a permissible construction of the statute.[92] If so, a court would defer to the agency interpretation and uphold the agency action.[93]

Given Congress' authorization,[94] a court could find that the Department of Labor has the authority to prescribe rules and regulations necessary to carry out parts of the FMLA. In the 50/75 provision of Family and Medical Leave Act, Congress did not define the term "worksite." Thus, looking at the word on its face, there is no clear, "unambiguously expressed, intent of Congress."[95] Since the term "worksite" is ambiguous, the *Chevron* rule applies. As long as the agency's answer is based on a permissible construction, a court would give deference to the Department of Labor.

As the agency responsible for the FMLA,[96] the Department of Labor can prescribe rules and regulations necessary to carry out the FMLA. The Department of Labor has done so in the past,[97] and courts have consistently applied Department of Labor regulations when addressing questions about FMLA leave.[98] For example, in *O'Dea-Evans v. A Place For Mom, Inc.*, the court concluded that the definition of "worksite " promulgated by the Department of Labor is entitled to deference under *Chevron*.[99] As such, the Department of Labor should promulgate a rule specifically addressing FMLA eligibility for remote employees working from or reporting to a location that does not have 50 other employees within a 75-mile radius.[100]

To date, the Department of Labor has issued rules based on a permissible construction of the statute, adequately responding to new types of work and the evolving needs of families. In 2009, the Department of Labor issued a rule on the definition of "worksite" for salespersons with no fixed worksite.[101] In 2015, the Department of Labor issued another rule, amending the definition of "spouse" for employees in a same-sex marriage or a common law marriage in a state where such marriages are legally recognized.[102]

The Department of Labor should act in accordance with its regulatory authority to issue a new rule in a timely manner, properly addressing the evolving nature of the workplace. Specifically, the Department of Labor should address the many different possible forms of a "worksite" in modern times for the purposes of eligibility under the 50/75 provision. The rule should allow for remote employees to be eligible for FMLA, even if they are not working from or reporting to a central location that employs 50 people within a 75-mile radius.

Since there are many ways that the Department of Labor can address the ambiguity, public input should guide the agency in the rule-making process. When promulgating rules, an agency must follow an open public process according to the Administrative Procedure Act (APA).[103] The Department of Labor should issue a general notice of proposed rule-making in the Federal Register, which would be followed by a period of public comment.[104] The notice and comment would allow for a dialogue between the public and the agency. Anyone interested may submit comments to be considered by the agency and the agency would respond to all relevant comments. This process would be extremely beneficial for interested employers and employees, who may be adjusting to a new era of remote work and would like to give their input and be involved in the rule-making process.

It is time for FMLA protections to extend to home offices/worksites. The current legislation is outdated and accords protections to employees who work in a typical physical office which now may not be, and likely will no longer be, for many the primary "worksite" and is unlikely to remain so in the future. With changing times, parents working from home in a non-traditional work arrangement should be entitled to the same relief given to employees working alongside others in a central facility location.

Conclusion

The pandemic has brought a whole new meaning to the term "workplace" for many entities. The worksite of employers, supervisors and employees of many employers has shifted to a home office. and for many, it will remain so in the future. The change of physical workplaces should not preclude otherwise entitled employees from FMLA eligibility, merely because they are physically distant from other employees. The Department of Labor should take action to ensure that the FMLA does not lag behind the current times and adequately provides the intended protections for American families.

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Endnotes

1. *See* Kim Parker et al., *How the Coronavirus Outbreak Has—and Hasn't—Changed the Way Americans Work*, Pew Research Center, (Dec. 9, 2020), https://www.pewresearch.org/social-trends/2020/12/09/how-the-coronavirus-outbreak-has-and-hasnt-changed-the-way-americans-work/.
2. *Where Schools Are Reopening in the U.S.*, CNN (Mar. 1, 2021), https://www.cnn.com/interactive/2020/health/coronavirus-schools-reopening/.
3. Deb Perelman, *In the COVID-19 Economy, You Can Have a Kid or a Job. You Can't Have Both*, N.Y. Times, (July 2, 2020), https://www.nytimes.com/2020/07/02/business/covid-economy-parents-kids-career-homeschooling.html.
4. Family and Medical Leave Act, Pub. L. No. 103-3, 107 STAT. 6-7 (1993).
5. *See* Susan Lund et al., *The Future of Work After COVID-19*, McKinsey (Feb. 18, 2021), https://www.mckinsey.com/featured-insights/future-of-work/the-future-of-work-after-covid-19.
6. A survey conducted by Pew Research Center indicates that if given the choice, many employees want to keep working from home even after local governments lift public health restrictions. Kim Parker et al., *supra* note 1.
7. Among other benefits, remote work can lead to greater productivity. Further, it can help companies save money on rent for office space. *See* Baruch Silvermann, *Does Working From Home Save Companies Money?*, Business.com, (Jun. 16,2020), https://www.business.com/articles/working-from-home-save-money/.
8. Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601 (2018).
9. *History of FMLA*, Labor Law Center, https://www.laborlawcenter.com/education-center/history-of-fmla/#:~:text=Before%20FMLA%2C%20women%20routinely%20lost,effort%20to%20protect%20their%20jobs.
10. Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601 (2018).
11. *Id.*
12. *Id.*
13. 29 C.F.R. § 825.101(2009).
14. Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601 (2018).
15. Congressional Accountability Act, Pub. L. No. 104-1, 109 STAT. 3 (1995).
16. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 STAT. 3 (2008); P.L. 111-84, National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 STAT. 2190 (2009).
17. Airline Flight Crew Technical Correction Act, Pub. L. No. 111-119, 123 STAT. 3476 (2009).
18. Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2612 (2018).
19. *Id.* During the period in which the Emergency Family and Medical Leave Expansion Act was in effect, the act also permitted leave due to a qualifying need relating to a public health emergency. Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2620 (2018).

20. Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2612 (2018).
21. Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2611 (2018).
22. *Id.*
23. 29 U.S.C.A. § 2611 (West).
24. Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2611 (2018).
25. Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2612 (2018).
26. *Id.*
27. *Id.*
28. *Id.*
29. This includes a military member on covered active duty or called to covered active duty status. *Id.*
30. Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601 (2018).
31. Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2611 (2018).
32. By limiting FMLA coverage, this provision sought to balance allowing employees to take reasonable leave while also protecting employers with few employees who would suffer from allowing employees to take time off. Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601 (2018).
33. Though not directly applicable to the analysis for remote employees, the regulation also explains how to determine employee eligibility when an employee is jointly employed by two or more employers. 29 C.F.R § 825.111(a)(3). The regulation also specifies how the 75-mile distance is measured. 29 C.F.R § 825.111(b)(2009). Further, it states that leave is determined based on the number of employees maintained on the payroll. 29 C.F.R § 825.111(c). (2009).
34. The regulation specifically mentions that for construction workers, transportation workers, salespersons or the like, the worksite is considered to be the site to which they are assigned as their home base, from which their work is assigned, or to which they report. 29 C.F.R. § 825.111(a)(2) (2009).
35. 29 C.F.R § 825.111(a)(2009).
36. *Id.*
37. Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601 (2018).
38. *Supra* Section I.A.
39. *See* Jennifer Fabiano, *Working From Home Is Hardest for This Specific Group of People*, Ladders (July 14, 2020), https://www.theladders.com/career-advice/working-from-home-parents-coronavirus.
40. *See* Henry, *Every Company Going Remote Permanently: Apr 7, 2021 Update*, Build Remote (Apr. 7, 2021), https://buildremote.co/companies/companies-going-remote-permanently/.
41. *Cf.* COVID-19 Information and Updates, New York City Dep't of Ed., https://www.schools.nyc.gov/school-life/health-and-wellness/coronavirus-update. (In the second half of the 2020-21 School Year, some families were given the choice to transition their children to a blended learning model. This allows children to be in the school building for part of the week. While some parents chose this model for their children, other students remain completely remote).
42. According to a new analysis of a Pew Research Center survey conducted in October 2020, many working parents experience professional challenges while trying to balance their work and family responsibilities. *See* Ruth Igielnik, *A Rising Share of Working Parents in the U.S. Say It's Been Difficult To Handle Child Care During the Pandemic*, Pew Research Center (Jan. 26, 2021), https://www.pewresearch.org/fact-tank/2021/01/26/a-rising-share-of-working-parents-in-the-u-s-say-its-been-difficult-to-handle-child-care-during-the-pandemic/.
43. *E.g.*, Claire Hastwell, *Real Stories of How Best Workplaces TM Are Supporting Parents During COVID-19*, Great Place To Work (Aug. 11, 2020), https://www.greatplacetowork.com/resources/blog/these-companies-are-making-life-a-little-easier-for-working-parents-right-now.
44. Family First Coronavirus Response Act, Pub. L. No. 116-127, 134 STAT. 178 (2020). (This was extended through September 2021).
45. *See* Sean Peek, *Communication Technology and Inclusion Will Shape the Future of Remote Work*, Business News Daily (Mar. 18, 2020), https://www.businessnewsdaily.com/8156-future-of-remote-work.html.
46. *See* Kim Parker et al., *supra* note 1.
47. *E.g.* Kate Conger, *Facebook Starts Planning for Permanent Remote Workers*, N.Y Times (May 21, 2020), https://www.nytimes.com/2020/05/21/technology/facebook-remote-work-coronavirus.html.
48. Sean Peek, *Communication Technology and Inclusion Will Shape the Future of Remote Work*, Business News Daily (Mar. 18, 2020), https://www.businessnewsdaily.com/8156-future-of-remote-work.html.
49. *See* Roy Maurer, *Study Finds Productivity Not Deterred by Shift to Remote Work*, SHRM, (Sept. 16, 2020), https://www.shrm.org/hr-today/news/hr-news/Pages/Study-Productivity-Shift-Remote-Work-COVID-Coronavirus.aspx.
50. *Id.*
51. *See* Dora Mekouar, *Is Working From Home Here to Stay?*, Voice of America (Apr. 9, 2021, 6:54 AM), https://www.voanews.com/usa/all-about-america/working-home-here-stay.
52. Accord Ted Knutson, *Telecommuting Surge Likely To Last Past COVID-19 Crisis, Predicts Brookings Report*, Forbes (Apr. 8, 2020, 10:23am EDT), https://www.forbes.com/sites/tedknutson/2020/04/08/telecommuting-surge-likely-to-last-past-covid-19-crisis-says-brookings-report/?sh=8b7e17c74ca2.
53. Accord Kathryn Mayer, *Number of the Day: Remote Work After COVID*, Human Resource Executive (Sept. 14, 2020), https://hrexecutive.com/hres-number-of-the-day-remote-work-after-covid/.
54. Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2611 (2018).
55. Rita Zeidner, *Coronavirus Makes Work From Home the New Normal*, SHRM (Mar. 30, 2020), https://www.shrm.org/hr-today/news/all-things-work/pages/remote-work-has-become-the-new-normal.aspx.

56. *See* Henry, *Every Company Going Remote Permanently: Apr 7, 2021 Update*, Build Remote (Apr. 7, 2021), https://buildremote.co/companies/companies-going-remote-permanently/.
57. Lance Lambert, *Nearly a Third of Workers Don't Want To Ever Return to the Office*, Fortune (Dec. 6, 2020, 5:57 PM), https://fortune.com/2020/12/06/offices-covid-workers-returning-never-want-to-stats-data-2/.
58. Some would argue that this is even more difficult in 2021. *See supra* Section II.A.
59. Although the Department of Labor has issued a rule on remote employees with no fixed worksite years ago (29 C.F.R § 825.111(a)(2009)), the issue posed by the closing of central worksites is a novel one.
60. Kathryn Mayer, *Number of the Day: Remote Work After COVID*, Human Resource Executive (Sept. 14, 2020), https://hrexecutive.com/hres-number-of-the-day-remote-work-after-covid/.
61. 29 C.F.R. § 825.111(a)(2)(2009).
62. *Killion v. Hospira Worldwide, Inc.*, No. CIV. 08-516-GPM, 2009 WL 249357, *at 1 (S.D. Ill. Feb. 3, 2009).
63. *Id*. at *2.
64. *Conners v. SpectraSite Commc'ns, Inc.*, 465 F. Supp. 2d 834 (S.D. Ohio 2006).
65. 29 C.F.R. § 825.111(a)(2)(2009).
66. Similarly, in *Cialini v. Nilfisk-Advance Am., Inc.*, the court focused on "the source of day-to-day instructions" to determine the worksite. *Cialini v. Nilfisk-Advance Am., Inc.*, No. CIV. A. 99-3954, 2000 WL 230215, at *4 (E.D. Pa. Feb. 28, 2000).
67. *Killion*, 2009 WL 249357, at *1.
68. *Id.*
69. *Id*. at *8.
70. Conners, 465 F. Supp. 2d at 834.
71. *Id.*
72. If Congress amends the legislation, or alternatively if the Department of Labor promulgates a rule, the burdens placed on courts to spend time and money analyzing specific facts under an ambiguous statue will be significantly reduced.
73. *See* Max Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863 (1930).
74. Where the language is plain and there is only one meaning, there is no issue of interpretation. *See Hamilton v. Rathbone*, 175 U.S. 414, 421 (1899).
75. *See, e.g., Nix v. Hedden*, 149 U.S. 304, 307 (1893).
76. "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534,542 (1940).
77. Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601 (2018).
78. *Supra* Section II.A.
79. *See* Quintin Johnstone, *An Evaluation of the Rules of Statutory Interpretation*, 3 U. Kan. L. Rev. 1,5 (1954).
80. U.S. Const. art. I, § 1.
81. Christoper M. Davis, Cong Research Serv.., RL98-853, The Amending Process in the Senate (2015).
82. *Supra* Section I.A.2.
83. Family and Medical Leave Enhancement Act of 2016, H.R.5518, 114th Cong. (2015-2016).
84. See David Bullock, *Why Legislation in Washington Is Sadly at a Standstill*, The Morning Call (Feb. 21, 2020, 9:00am), https://www.mcall.com/opinion/mc-opi-washington-gridlock-bullock-20200221-ofa5mjc5o5dr3bcpnf5hrboe4i-story.html.
85. *Congress Is Currently Divided*. 117th United States Congress, Ballotpedia, https://ballotpedia.org/117th_United_States_Congress.
86. The first question to ask is whether Congress delegated authority to the agency to issue rules or orders carrying the force of law. *United States v. Mead Corp.*, 533 U.S. 218, 121 (2001).
87. 29 U.S.C. § 2654 (2018).
88. *Id.*
89. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S.837, 842 (1984).
90. *Id* at 842-43.
91. *Id* at 842.
92. *Id* at 843.
93. *Id.*
94. 29 U.S.C. § 2654 (2018).
95. Specifically, Congress was not clear on whether a worksite should be narrowly construed to mean a central office location.
96. Congress gave the Department of Labor authority to "prescribe such regulations as are necessary to carry out" parts of the FMLA. 29 U.S.C. § 2654 (2018).
97. 29 C.F.R. § 825.111(a)(2)(2009).
98. *See* O'Dea-Evans, 2009 WL 2143739, at *3; *see also* Killion, 2009 WL 249357, at *2.
99. O'Dea-Evans, 2009 WL 2143739, at *5.
100. A rule as such would certainly be based on a permissible construction of the statute.
101. 29 C.F.R. § 825.111(a)(2)(2009).
102. 80 FR 9989.
103. 5 U.S.C.§ 553(2018).
104. This will notify the public and include the goals of the agency in promulgating the rule.

First and Ten or Fourth and Long? Brian Flores Takes Aim at the Rooney Rule: What Does This Mean for the National Football League and Corporate DEI Initiatives?

By Chris D'Angelo

Introduction

The sports world was rocked in February 2022 when Brian Flores sued the National Football League and three of its teams for racial discrimination. Flores compiled 25 wins and 24 losses in three seasons as the head coach of the Miami Dolphins, concluding with records of 10-6 and 9-8 in the last two seasons, the first time the Dolphins had achieved back-to-back winning seasons since 2003. Yet, Flores was fired at the end of his third season.

The lawsuit did not immediately follow his termination. Flores appeared to be under serious consideration for at least two vacant head coaching positions, one with the Denver Broncos, and one with the New York Giants. He was interviewed for both jobs but was not offered either position. Instead, each position went to other coaches, each white, with no previous head coaching experience in the NFL.

There are many allegations in the 58-page lawsuit Flores filed in federal district court in New York on February 1, 2022. Some are sensational, such as the allegation that the owner of the Dolphins ordered him to lose games intentionally to improve the club's position in the annual college draft, and another where the owner allegedly arranged a "chance" meeting with a high-profile quarterback who was under contract with another team, raising concerns about tampering.

The allegations that have garnered the most attention are the allegations relating to race discrimination in the NFL. The allegations in the lawsuit stand out because they strike at the heart of the NFL's diversity, equity and inclusion (DEI) signature program, the Rooney Rule.

This article is the first in a two-part series. Here, a broad overview of the claims raised by Flores and how those claims address the Rooney Rule will be discussed. The next article will focus on DEI in a more general sense, from a legal perspective, the initiatives taken by corporate America, and how these may differ from the NFL's Rooney Rule.

Background on the Rooney Rule

What Is the Rooney Rule?

According to the NFL's website, the Rooney Rule "encourages hiring best practices to foster and provide opportunity to diverse leadership throughout the NFL."[1] The rule was adopted in 2003, named after Dan Rooney, who was then an owner of the Pittsburgh Steelers and used inclusive hiring practices throughout his career.[2] The rule was a reaction to criticism following the termination of two Black NFL coaches, Tony Dungy and Dennis Green, at a time when Dungy had a winning record with the Tampa Bay Buccaneers and Green had his first losing record in 10 seasons with the Minnesota Vikings. Originally focused

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on head coaching positions, the Rooney Rule initially required that teams interview at least one person of color for a head coaching vacancy. It has been since been modified several times to expand its reach within NFL organizations, and to expand the number of people of color who must be considered for certain vacancies.[3]

In his lawsuit, Flores alleges that his interviews with both the Broncos and the Giants were a sham, designed only to "check the box" and satisfy the requirement to consider underrepresented individuals for a vacancy. In a twist worthy of an Agatha Christie novel, Flores cites as evidence a text he received from Bill Belichick, head coach of the New England Patriots, and no stranger to controversy himself. In the text, which arrived before Flores had his second interview with the Giants, Belichick writes that he heard from "Buffalo and NYG" that Flores is the guy, and congratulates Flores on getting the Giants' job. Belichick apparently meant to send the text to Brian Daboll, a white assistant and coordinator with the Buffalo Bills who was named the head coach within hours of Flores' final interview.

Impact of the Rooney Rule

Whether the Rooney Rule has been a success or a failure is open to debate. Proponents of the rule point to a number of favorable events and statistics. The rule has been strengthened over the years in many ways, now requiring multiple candidates of all racial and ethnic groups to be considered, and it extends to coordinator and front-office positions. When the 2006 NFL season began, the percentage of Black coaches initially increased from 6% in 2002 to 22%.[4] In 2007 two Black head coaches (Dungy and Lovie Smith) led their teams to the Super Bowl and in all, 10 Black head coaches have appeared in the Super Bowl.[5]

Critics, however, point to other evidence as indicative of failure. The Flores situation is one example, but there are many others. Even though the rule has been in place for 20 years, at present there are only three Black head coaches (Mike Tomlin of the Steelers, Lovie Smith of the Texans, and Mike McDaniel of the Dolphins, who is multi-racial). This represents 9.4% of the head coaches in a league with Blacks comprising about 70% of the players.[6] The number of Black head coaches hit a high of 25% in 2017 and 2018, but fell to 15.6% in 2021, and now even lower in 2022.[7,8]

There also appears to be some evidence suggesting a history of perfunctory interviews or interview attempts for Black candidates, beginning in 2003, the first year of the Rooney Rule, when the Detroit Lions president Matt Millen was fined $200,000 for identifying a white coach as his top choice prior to conducting interviews. After this announcement, a number of Black candidates refused invitations to speak with Millen, who then hired Steve Mariucci, the white coach he had identified.[9] That same year, three other teams hired white coaches, but none were fined.[10] In 2017, the Oakland Raiders came under heavy criticism when Jon Gruden was hired to be their head coach.[11] This year, after Flores filed his lawsuit, Marvin Lewis asserted publicly on numerous occasions that his interview with the Carolina Panthers for their head coaching slot was a sham, because John Fox had already been selected.[12] Finally, the Flores complaint is a putative class action, asserting claims on behalf of Flores and others similarly situated. The complaint includes allegations suggesting that other Black coaches have endured sham interviews, and by its nature as a class action, suggests that Flores and his attorneys are aware of many other examples.

So it seems safe to say that the results for the Rooney Rule have been mixed at best. There is no doubt that more Black head coaches, as well as coordinators, have been hired over the past 20 years. But the numbers before 2003 were not impressive. As Collins argues in his *NYU Law Review* article, however, the real focus of the Rooney Rule was to break up the "old boy" network within the NFL, which featured unconscious bias that favored white coaches over people of color. In this context, the Rooney Rule has had some success. For example, Collins cites the case of Herm Edwards, who spent five years coaching the New York Jets, and three years coaching the Kansas City Chiefs. Edwards was recruited away from the Jets by the Chiefs as a result of Edwards' close personal relationship with the Chiefs' president.[13]

But the Collins article was written in 2007, and the number of Black coaches who have secured head coaching positions in the NFL seems to have hit a plateau or taken a step backwards. Jonathan Beane, the NFL's chief diversity and inclusion officer, concedes there are shortcomings.[14] There is some dispute, however, as to whether the fault lies with the rule, or with the individuals charged with implementing and executing it, or both. Beane argues, for exam-

ple, that the rule provides more opportunity and should result in better outcomes for people of color: "When you have more candidates from different backgrounds that are part of the process and actually are in the room to compete for roles, the opportunity for a diverse candidate getting hired goes up."[15] Some criticize this thinking as an endorsement of the "check the box" mentality. John Feinstein, a prominent sportswriter and author who has written on the issue of race in sports,[16] relays a story in an NPR article where he was told by a Black coordinator "some of those guys were legitimately looking at me as a potential head coach. Other guys were just, you know, carrying out their Rooney Rule . . . obligations, and you can tell, when you walk into the room, which is which."[17]

What Next?

Beane is correct when he endorses the notion that opportunity should lead to better outcomes. Even Roger Goodell, the NFL commissioner, acknowledges that hiring results under the Rooney Rule have been "unacceptable."[18] But, well-intentioned as it is, the Rooney Rule clearly needs a close examination and study to determine how the rule itself can be improved, and how other programs can be implemented to support the rule. Establishing metrics and measuring an organization's success against those metrics is an important piece of a comprehensive DEI initiative, but it should not stand alone. Other important pieces include state-of-the-art training around bystander intervention, diversity leadership training and coaching, and mentorship and sponsorship programs, in addition to metrics which offer opportunity not just for higher-level positions but also inclusion in training, development and networking.

While the Rooney Rule itself is limited to metrics,[19] the NFL has surrounded the rule with what should be considered a strong supporting cast. These efforts include the Nunn-Wooten Scouting Felllowship, the Bill Walsh Diversity Coaching Fellowship, programs focused on historically Black colleges and universities, the NFL-NCAA Coaches Academy, and career development symposiums.[20] The NFL is also closely affiliated with the Fritz Pollard Alliance, a 501(c)(3) membership organization whose mission is to "champion diversity in the NFL through education and providing its members with resources that will help them succeed at every level of the game."[21]

These programs should provide a strong foundation for success, but as we have seen earlier in this article, senior leaders in the NFL, including the commissioner, acknowledge shortcomings and unacceptable results. Clearly, the Rooney Rule needs improvement, but what can be done? What DEI programs in "corporate America" have fared better, and why, and what are the potential risks and barriers to success?

These and other issues will be addressed in Part Two of this series.

Endnotes

1. NFL Football Operations, https://operations.nfl.com/inside-football-ops/diversity-inclusion/the-rooney-rule/ ("NFL Operations").
2. Cyrus Mehri, *How the NFL Fumbled the Battle for Equal Opportunity in Coaching*, The Washington Post, (Feb. 4, 2022) (https://www.washingtonpost.com/opinions/2022/02/04/how-nfl-fumbled-battle-equal-opportunity-coaching/)("Mehri").
3. *Id.; see also* NFL Operations.
4. Brian W. Collins, *Tackling Unconscious Bias in Hiring Practices: The Plight of the Rooney Rule*, New York University Law Review, (June 2007) (https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-82-3-Collins.pdf)("Collins").
5. Mehri, *supra* note 2.
6. Erik Ortiz, *The Rooney Rule Was Supposed to Solve the NFL's Hiring Issue. The Numbers Show the Problem Runs Deep*, NBC, (Feb. 4, 2022) (https://www.nbcnews.com/news/sports/rooney-rule-was-going-solve-nfls-hiring-issue-numbers-show-problem-run-rcna14569)(Ortiz).
7. Scott Neuman, *Why A 20-year Effort by the NFL Hasn't Led to More Minorities in Top Coaching Jobs*, NPR, (Feb. 3, 2022) (https://www.npr.org/2022/02/03/1075520411/rooney-rule-nfl)("Neumann").
8. It should be noted that there are other non-white head coaches, namely, Ron Rivera (Hispanic) of the Washington Commandeers and Robert Saleh (Lebanese) of the New York Jets.
9. Collins, *supra* note 4.
10. *Id.*
11. Mehri, *supra* note 2.
12. Madeline Coleman, *Marvin Lewis Details Similar Interview Experience As Flores with Panthers*, Sports Illustrated, (Feb. 2, 2022) (https://www.si.com/nfl/2022/02/02/brian-flores-marvin-lewis-details-similar-interview-experience-with-panthers)("Coleman").
13. Collins also notes that the year Edwards went from the Jets to the Chiefs, there were a total of 10 coaching vacancies. Two were filled by Black coaches, including the Edwards hiring in Kansas City, leaving a net gain of 1 Black head coach.
14. Neuman, *supra* note 7("Beane…acknowledges that the Rooney Rule has fallen short of its ultimate goal").
15. *Id.*
16. John Feinstein, *Raise a Fist, Take a Knee: Race and the Illusion of Progress in Modern Sports*, Little Brown and Company, (2021).
17. Neuman, *supra* note 7.
18. Judy Battista, *2022 NFL Head Coach Hires: Exploring the Results of Another Cycle Marred by Diversity Issues*, NFL.com (Feb. 6, 2022)(https://www.nfl.com/_amp/nfl-coach-hires-exploring-results-of-another-cycle-marred-by-diversity-issues).
19. NFL Operations, *supra* note 1.
20. *Id.*
21. The Fritz Pollard Alliance Foundation, www.fritzpollard.org (Fritz Pollard was the first Black head coach in the NFL).

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The Persuader Rule: A Management Perspective

By Randall Odza and Peter H. Wiltenburg

Introduction

During over 60 years since the enactment of the Labor-Management Reporting and Disclosure Act (LMRDA)[1] there has been a periodic effort to amend the definition of the word "advice" as contained in its applicable regulations of the United States Department of Labor (DOL). In 2016, DOL attempted to do so through emergency rulemaking, but a U.S. district court blocked its implementation and the DOL later rescinded the emergency rule. Once again efforts to amend the LMRDA's definition of "advice" are gaining momentum in Washington, this time through proposed legislation and renewed focus regulations and DOL's interpretation of them. If any of these efforts are successful, the change in the definition of this one word would result in a significant change in employers' ability to seek legal counsel in connection with union drives and collective bargaining activity. Perhaps more importantly, the suggested change would have profound effects on the relationship between attorneys and their clients, specifically confidentiality and the attorney-client privilege.

Background of LMRDA

The LMRDA became law in 1959. Four provisions of LMRDA are relevant to this discussion: Sections 203(a)-(c), and Section 204.

Section 203(a) requires employers to report to DOL "any agreement or arrangement with a labor relations consultant or other independent contractor or organization" under which such person "undertakes activities where an object thereof, directly or indirectly, is to persuade employees to exercise or not to exercise," or how to exercise, their rights to union representation and collective bargaining.[2] The report must show the date and amount of such payment, agreement or arrangement, as well as "a full explanation of the circumstances of all such payments, including the terms of any agreement or understanding pursuant to which they were made." The DOL has created "Form LM-10" for this reporting obligation. The term "consultant or other independent contractor or organization" includes attorneys.

Section 203(b) imposes two reporting obligations. The first, as the counterpart to 203(a), is on anybody "who pursuant to any agreement or arrangement with an employer undertakes activities where an object thereof is, directly or indirectly . . . to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively."[3] This report must be filed within 30 days of entering into such agreement and contain "a detailed statement of [its] terms and conditions." The DOL has created "Form LM-20" for this reporting obligation.

Even more significantly, the second 203(b) obligation requires that anybody who must file Form LM-20 must also file a report containing a statement of their receipts and disbursements "of any kind from *employers* on account of *labor relations advice or services*," at the end of each fiscal year in which payments for such an agreement were made.[4] The DOL has created "Form LM-21" for this reporting obligation.

Section 203(c) has come to be known as the "advice exemption." It provides that "nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person *by reason of his giving or agreeing to give advice to such employer*."[5]

Section 204 further exempts from reporting "information which was lawfully communicated to [an] . . . attorney by any of his clients in the course of a legitimate attorney-client relationship."[6]

The subject of this article is the advice exemption, in general, and the definition of the word "advice," in particular.

History of DOL's Interpretation of the 'Advice Exemption'

Early Interpretation and Longstanding Policy

DOL's first interpretation of the advice exemption, in 1960, provided that arrangements with labor relations consultants "to draft speeches or written material to be delivered or disseminated to employees for the purpose of persuading such employees as to their right to organize and bargain collectively" were reportable.[7] The DOL confirmed in opinion letters to members of the public that this included attorney revisions to employer documents.[8]

Just two years later, DOL amended its interpretation of the advice exemption and created the bright-line rule that has now been in effect for nearly 60 years. This new interpretation declared consultant communications to be "advice" within the statutory exemption if: (1) the consultant did not communicate directly with non-management/supervisory employees; and (2) the employer was free to accept or reject the consultant's advice.[9] This 1962 LMRDA Interpretative Manual expressly stated that so

long as there was "no indication that the middleman is operating under a deceptive arrangement with the employer, the fact that the middleman drafts the material in its entirety will not in itself generally be sufficient to require a report."[10]

During the ensuing decades, while litigation over this rule was rare, several U.S. circuit courts recognized this understanding of the advice exemption.[11]

The Obama Administration's 'Persuader Rule'

In June 2011, DOL took the first step toward undoing its 50-year-old interpretation of the advice exemption by issuing a notice of proposed rulemaking to revise its interpretation of 203(c) (the "Persuader Rule").[12] Had it ever taken effect, the Persuader Rule would have upended decades of settled understanding of the advice exemption. It redefined exempt "advice" very narrowly as "an oral or written recommendation regarding a decision or a course of conduct."[13] This definition of "advice" made it mutually exclusive of "activities with an object to persuade."[14] If a consultant engaged both in activities designed to persuade and in giving advice, the entire arrangement would need to be reported.[15]

The Persuader Rule identified four new scenarios, in which there would be *no contact* between the consultant and employees, that the DOL would nevertheless deem persuasive activity triggering reporting obligations: (1) planning, directing, or coordinating activities undertaken by employer representatives; (2) drafting or revising material to be disseminated to employees; (3) conducting seminars for supervisors or other employer representatives; and (4) developing or implementing personnel policies, practices, or actions for the employer.[16] To amplify one of the examples, if a client engaged its lawyer to provide training to managers on what may be lawfully said to employees about union representation, this would now be reportable "advice," even it took place outside the context of an actual union organizing effort.

The DOL revised Forms LM-10 and LM-20 to incorporate these new scenarios, along with a catch-all category of "other."[17] However, the DOL deferred any revision of Form LM-21 until sometime later.

The ABA Publicly Opposes the Persuader Rule

On September 21, 2011, the American Bar Association (ABA) publicly opposed the Persuader Rule's new definition of "advice."[18] The ABA made clear that it was not "taking sides on a union-versus-management dispute," but rather was "defending the confidential client-lawyer relationship and urging the Department not to impose an unjustified and intrusive burden on lawyers and law firms and their clients."[19]

The ABA presented four specific objections. First, the DOL's longstanding interpretation of "advice" was a clear, bright-line rule consistent with the statute's language and intent, while the then-proposed new definition would in effect nullify the advice exemption, thwarting the will of Congress. Second, the amended definition was inconsistent with ABA Model Rule of Professional Conduct 1.6, addressing "Confidentiality of Information," and the many binding state rules based on it. Third, the amendment would seriously undermine the confidential attorney-client relationship and employers' fundamental right to counsel. Fourth, the expansive disclosure requirements then contemplated for the new Form LM-21 would require lawyers engaged in direct or indirect persuader activities to disclose confidential client information having no reasonable nexus to the "persuader activities" that the LMRDA sought to monitor.[20]

DOL Implements the Persuader Rule by Emergency Rulemaking, but It Is Enjoined Before Taking Effect

On March 24, 2016, the department issued its final rule through the emergency rulemaking procedure. The rule was promptly challenged in three federal district courts.[21] On June 27, 2016, the U.S. District Court for the Northern District of Texas issued a nationwide preliminary injunction blocking implementation of the rule.[22]

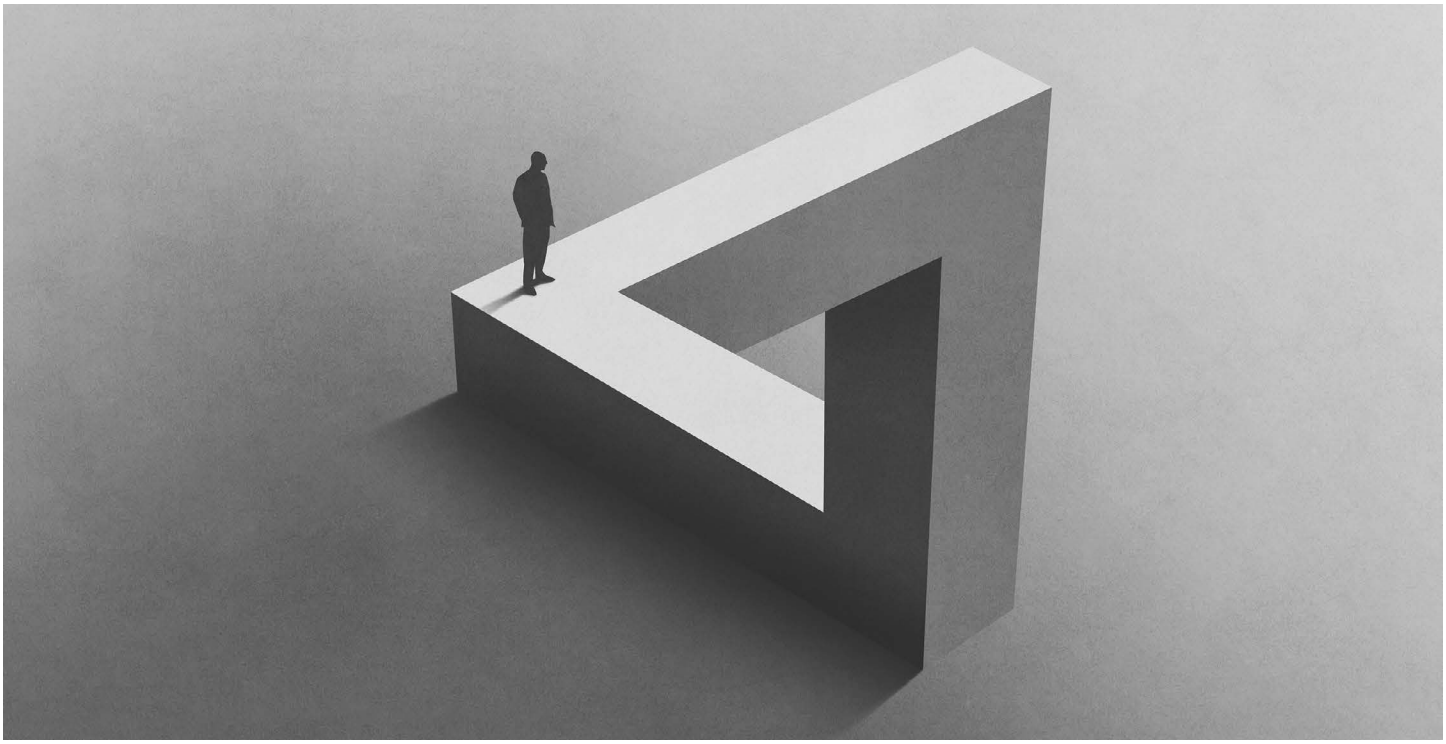
The Court found that plaintiffs were likely to succeed on their arguments that (1) the new interpretation effectively eliminated the statute's Advice Exemption, "contrary to the plain text of Section 203(c)";[23] (2) DOL's action was arbitrary and capricious because it changed a decades-old rule that "'engendered serious reliance interests'" without adequate justification;[24] (3) the rule unreasonably conflicted with state rules governing law practice, since it undermined attorney-client confidentiality;[25] (4) the DOL could only articulate vague and speculative purported benefits, not a compelling interest, thereby failing to meet strict scrutiny of its content-based restriction on free speech;[26] and (5) the rule was unconstitutionally vague, since it replaced an "easily understandable bright-line rule with one that is vague and impossible to apply."[27] The Court converted the preliminary injunction to a permanent injunction on November 16, 2016.[28]

2018 Rescission

On July 18, 2018, the DOL rescinded the enjoined Persuader Rule and formally reinstated its longstanding definition of "advice." It cited four primary reasons: (1) the plain text of 203(c) forbids the narrower definition; (2) the Persuader Rule would have improperly required disclosure of client confidences; (3) DOL failed to properly consider the burden of filing Form LM-21; and (4) the DOL's scarce resources were better allocated to other priorities.[29]

Recent Developments

President Biden pledged during his candidacy to be "the strongest labor president you have ever had," and the recent tone in Washington has reflected this. In March



2021, the House of Representatives passed the Protect the Right to Organize Act of 2021 ("PRO Act"), which, among other things, would codify the Persuader Rule's definition of advice. The ABA has publicly opposed these provisions on similar grounds as it did the Persuader Rule.[30] President Biden urged passage of the PRO Act during his 2022 State of the Union Address. While, according to the pundits, the PRO Act stands little chance of passing the Senate, it suggests renewed momentum behind efforts to resurrect the Persuader Rule's definition of "advice."

In April 2021, the White House established a Task Force on Worker Organizing and Empowerment,[31] which issued a set of recommendations in February 2022.[32] While the task force did not directly mention the Persuader Rule, it recommended that the DOL "review its rules and policies on persuader reporting" and take action to strengthen enforcement and to "ensure maximum compliance and reporting of persuader activity."[33] It also recommended changes that would require filers to identify whether they are federal contractors, and a mechanism for ensuring compliance with a 2009 Executive Order that prohibits use of federal contract dollars on persuader activity.[34]

The DOL has also apparently turned its attention back to LMRDA. On January 5, 2022, Jeffrey Freund, Director of the DOL Office of Labor-Management Standards (OLMS), published a blog post asserting that employers and their consultants have been significantly under-reporting their agreements and "expenditures made with an object of violating the NLRA." He stated that OLMS is "taking steps to end this chronic non-compliance," by, among other things, reestablishing a "compliance assistance program" designed to educate and remind employers and consultants about their reporting obligations (this was apparently reintroduced in April 2021), and instituting a tip line and encouraging unions and employees to report persuader activity. While this publication emphasized addressing purported under-compliance and an effort to step up enforcement under the existing rules, rather than an overt change to the DOL's interpretation of the advice exemption, it remains to be seen whether the DOL will take enforcement action against consultants/attorneys relying on the advice exemption under the commonly-understood rule or a narrower view of the "advice" exemption.[35]

The Persuader Rule Should Not Be Introduced Again

If this recent momentum leads to more calls to resurrect the Persuader Rule, such calls should be rejected. The rule's narrow definition of "advice" is contrary to the LMRDA's plain language; it would force attorneys to violate their ethical obligations while undermining the attorney-client relationship and restricting employer access to counsel, and would in any event not be effective at achieving its stated purposes.

The Narrow Definition Is Incompatible With the Plain Language of LMRDA

If the DOL attempts to narrow the definition of "advice" by rule making, thereby treating it as mutually exclusive from "persuasive activity," it ignores the plain language of Section 203(c) and effectively writes it out of the statute. Put another way, it would be improperly attempting to amend the statute through rulemaking.

A straightforward reading of Sections 203(b)-(c) presents a clear two-question process to determine whether

attorney activity must be reported. First, is the attorney work in furtherance of employer activity designed to persuade employees about their collective bargaining rights or decisions? If yes, then proceed to the second question: is it advice? If yes, then it falls within the statutory exemption and does not trigger a reporting obligation.

This straightforward path through the plain meaning of the statutory text is therefore based on the seemingly obvious premise that some attorney work for employers in this context will be *both* (1) directly or indirectly designed to persuade, *and* (2) advice.

The 2016 definition of "advice," by contrast, forces employers and attorneys to make a very different inquiry: is the attorney activity "directly or indirectly designed to persuade," *or* is it "advice"? Under the tortured logic of the Persuader Rule, it can't be both, because "persuasive activity" and "advice" must be mutually exclusive.

This false dichotomy can be seen in the 2016 definition. It defined advice narrowly as "an oral or written recommendation regarding a decision or a course of conduct."[36] It also identified certain specific attorney activities, such as revising employer drafts of documents to disseminate to employees, and conducting tailored seminars for supervisors, as triggering the reporting obligation, even when the attorney has no contact with employees and the employer was free to accept or reject the attorney's proposed document revisions or ignore the advice delivered in the seminar.

First, this interpretation renders Section 203(c) superfluous. If an activity can never be both "designed to persuade" and "advice," then no exemption is needed for "advice," because it falls outside the reporting scope of Sections 203(a) and (b). Under the Persuader Rule, Section 203(c) is at best surplusage that does not have any independent meaning, and only clarifies the scope of Sections 203(a) and (b). This interpretation violates the longstanding principle "that Congress, when drafting a statute, gives each provision independent meaning."[37] The far more plausible reading of the statute is that Congress included Section 203(c) because it recognized that persuasive activity can also sometimes be "advice."

Second, this false dichotomy cannot stand up to logical scrutiny and would be impossible to apply in practice. The same attorney work product can be both indirectly designed to persuade *and* a recommendation about a course of conduct. An attorney's revisions to an employer's draft to be disseminated to employees is itself the attorney's recommendation about how best to engage in a course of conduct—namely, how best to communicate with employees about their collective bargaining rights in a lawful manner. An attorney's revisions to a supervisor presentation to be delivered to employees is a recommendation about how to do that lawfully and effectively. Because the way something is phrased may make the difference as to whether what is said is lawful or a violation of the National Labor Relations Act (NLRA), it is critical that the client has the advice of an attorney who understands nuance in the use of words.

Moreover, under the broad reporting obligations imposed by the Persuader Rule, the reporting obligation is not limited to situations where a union is or might be attempting to organize employees. For example, labor lawyers are often asked to advise clients on how to communicate with employees about the negotiation of a collective bargaining agreement. A critical part of collective bargaining is achieving a settlement that will be ratified by the bargaining unit employees. The attorney advising the employer on collective bargaining must not ignore this reality and should advise on how and when to communicate to employees about the process of collective bargaining and the agreements reached. That activity would be considered reportable under the narrow 2016 definition of "advice." This has never before been the case and would have the most impact on small employers who cannot afford sophisticated human resources/labor relations professionals on staff.

The Persuader Rule's narrow definition of "advice" ignores the well-known realities of attorneys' work, which is both to advise clients on technical aspects of the law and to prepare them to present themselves most effectively, whether to a jury, regulator, or contracting party. The rule's proponents would apparently limit attorneys only to making margin notes on an employer's draft that say, "this statement may violate the law," and leave it to the client to figure out how to revise the statement to be compliant. Identifying which side of this imaginary barrier between "persuasive activity" and "advice" any attorney work product would fall would be nearly impossible and would likely result in both employers and attorneys reporting essentially every attorney retention during a union organizing drive or even labor negotiations, even that attorney activity that falls within any reasonable understanding of the meaning of the word "advice."

In summary, the DOL's longstanding interpretation uses an ordinary and common-sense definition of "advice," avoids the false dichotomy of the Persuader Rule, and provides an easily-applied bright-line rule that puts employers and attorneys on fair notice of what conduct is reportable.

The Narrow Definition of 'Advice' Would Cause Lawyers To Violate Fundamental Duties To Protect Confidential Client Information and Undermine the Attorney-Client Relationship

A narrow definition of "advice" will require attorneys to violate their duties to protect confidential information because of the requirements of both Forms LM-20 and LM-21.

ABA Model Rule of Professional Conduct (RPC) 1.6 states that "a lawyer shall not reveal information relat-

ing to the representation of a client unless the client gives informed consent . . . " or unless one of the few narrow exceptions is present.[38] The rule's comments state that without client consent, "the lawyer must not reveal information relating to the representation," and that the rule "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."[39] The range of client information covered by the rule is broader than material covered by the attorney-client privilege or the work product doctrine.[40]

The Persuader Rule would require attorneys to violate RPC 1.6 by disclosing confidential client information such as the client's identity, the amount of fees paid, the nature of the retention, and a brief description of the work performed. At least 10 state bar associations have issued formal ethics opinions that confidential information about a client that includes the identity of the client, the fact of representation, and the fees paid as part of that representation are "confidential" information as defined by their states' rules of ethics.[41] This would give lawyers the impossible dilemma of complying with the law or violating one of the most foundational ethical obligations to their clients. The other equally unacceptable alternative would be for the lawyer to tell the client that he/she cannot provide the needed advice under the attorney/client privilege or subject to confidentiality. This would leave the client without the ability to secure the needed legal advice. For example, if the client asks the attorney how the client may say X without violating the NLRA, that conversation would not be considered advice under the narrow definition of "advice," and for the attorney to answer the question the attorney would be subject to the reporting obligations of the Persuader Rule.

The Persuader Rule with the narrow definition of "advice" is also incompatible with LMRDA Section 204. That section exempts from disclosure all *information* communicated by the client to the lawyer, not just privileged communications. Among information communicated to the lawyer will have been the nature of the representation, the associated fees, and any information that a lawyer would have to disclose to provide a brief description of the work performed. There is precedent in the federal circuits holding that the agreement between a client and its attorney is protected by the attorney-client privilege if it might "reveal the motive of the client in seeking representation."[42]

In this reporting context, the attorney would have to disclose the attorney-client relationship even if the attorney had not taken any public action associated with the representation, and the fact of the relationship was not publicly known. In that situation, the mere disclosure of the existence of the relationship would likely reveal the nature of the advice sought. All of this would threaten the sanctity of the confidential relationship between the attorney and client and the attorney-client privilege.

As noted above, the Persuader Rule with the narrow definition of "advice" would require attorneys to violate their ethical obligations even further, and not just with respect to the clients that retained them for services related to persuader activity. Section 203(b) requires that any law firm that submits Form LM-20 must also submit Form LM-21. Form LM-21 requires disclosure of all receipts of any kind received from clients for which a law firm performed "labor relations" services, even if those representations had nothing to do with persuader activities.

This rule will expose many clients' confidential retention agreements with law firms in a way that has no relationship to the purposes of LMRDA. The term "labor relations advice and services" is not defined in the statute.[43] Under the DOL's current Interpretative Manual, advice "on the various federal and state laws bearing on the employer-employee relationship" meets the definition and would be reportable.[44] This means that if a law firm is retained to just give advice on a question of communication to employees about union representation, even if there is not current union organizing activity, the law firm would have file a report at the end of the year disclosing every single client for which it provided any kind of labor and employment advice. This kind of representation is often not made public, such as, for example, when a law firm is retained to perform a sensitive internal investigation of an allegation of harassment or when it gives clients advice under the various wage and hour laws. While it is unclear whether any future revision to the DOL's interpretation of the advice exemption would also relieve parties of the obligation to file Form LM-21, this is not certain and would be difficult without amending the statute.[45]

All of this will undermine, chill, and in some cases eliminate the attorney-client relationship. Mandatory disclosure of confidential information will compromise employers' ability to share information candidly with their attorneys. Some attorneys will decide to forgo advising clients on any issue subject to the reporting obligations. As a result, more employers will try to figure out how to comply with the myriad laws and regulations applicable to employee communications without legal counsel. This will almost certainly result in employers commiting more technical violations of the law, prompting more of the conduct that such laws were designed to prevent, and subjecting the employers to additional liability and a weakened bargaining position because of an unfair deprivation of legal counsel. Small employers with no in-house attorneys will be impacted the most.

Even those employers that want to retain counsel despite the disclosure requirements will have a harder time doing so. The *NFIB* court—the court that enjoined the 2016 Persuader Rule—found that law firms around the country had announced their intention to cease providing advice and representations that would trigger reporting under DOL's new rule, which "decrease[s] employers' access to advice from an independent attorney of one's choice."[46]

Access to counsel has long been considered a fundamental right in our society. Those trying to strengthen the bargaining position of organized labor should not be permitted to do so by disingenuously depriving employers of their right to confidential counsel.

Narrowing the Definition of 'Advice' Would Not Achieve Its Stated Purpose

Proponents of the narrowing of the definition of "advice" assert that employees will benefit from the disclosure of additional information about the consultants and attorneys their employers engage.[47] Even when facing a serious legal challenge to the Rule, the DOL resorted to nothing more than similar generalities about the benefits of additional disclosure, such as that the rule would provide employees with "essential information about the underlying source of the views and materials being directed at them. . . . " and that "[t]ransparency [p]romotes [w]orker [r]ights by [c]reating a [m]ore [i]nformed [e]lectorate."[48] The *NFIB* court found that this was not a compelling justification.[49]

Contrary to these general assertions, the narrowing of the definition of "advice" would not actually provide employees with any useful information about the source of the views directed to them. It would not in any meaningful way make them a more informed electorate than they would be under the current reporting requirements.

First, most LM-20 disclosures would reach the employees mere days before the representation election, and some would not reach them until after the election. As of 2018, the median timeframe between the filing of an NLRB petition and the ensuing election was 38 days, and 90% of elections are held within 56 days.[50] The 2016 Persuader Rule required law firms to file Form LM-20 within 30 days of the agreement giving rise to the reporting obligation.[51] Therefore, if the employer takes eight days or more to retain counsel following the filing of a petition, the employee representatives would not even see the LM-20 disclosure before an election that proceeds on the median 38-day timeline. Even disclosure several days before the election would leave employee representatives little time to do much with it. The disclosure would be pointless for its stated purpose but would still inflict all the harms to employers and their lawyers described above.

Second, when employees receive written materials from their employer or listen to a presentation from a supervisor, they know the source and its potential biases. The fact that the employer's attorneys revised written materials or presentations is not relevant to assessing whether its source is trustworthy, because, as has long been recognized in other contexts, "the maker of a statement is the person or entity with ultimate authority over the statement and whether and how to communicate it."[52] The same principle applies here. The employer, having been free to accept or reject the attorneys' advice, is the source of the statement and is responsible for it. The LM-20 under the narrower definition of the "advice" would merely disclose that the employer retained an attorney. The employees would still not know which written materials, presentations, or other communications from the employer were affected by the advice of counsel. Yet, it seems to be assumed that somehow employees would be less inclined to accept the representations in an employer document or speech if they knew that the employer had consulted with its lawyers about how to respond to the union organization drive. This scenario is entirely implausible. Rather, the real justification of the narrower definition of "advice," is apparently to make it less likely that employers retain counsel, thereby weakening their position by increasing the likelihood that they commit unwitting violations of the NLRA.

The LMRDA was never intended to restrict the advice that an attorney may give to its clients consistent with the attorney code of ethics. Rather, the legislative history reveals that Congress was trying to address the problem of "middlemen," who were "involved in bribery and corruption as well as unfair labor practices."[53] Employers had engaged "so-called middlemen to organize 'no-union committees' and engage in other activities to prevent union organization among their employees."[54] These middlemen would make contact with employees and actively deceive them about their identity, perhaps even by pretending to be another employee. In these circumstances, the employees had no idea that the source of information directed to them was biased and actually coming from the employer. Disclosure of this sort of arrangement is warranted. By contrast, none of these conditions is present in the type of advice that narrowing the definition of advice would then require reporting. When a communication comes directly from an employer representative, and the attorney has no contact with employees, the employees would learn nothing of any value from a disclosure that the employer retained an attorney in connection with its persuader efforts.

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Endnotes

1. 29 U.S.C. § § 431, *et seq.*
2. 29 U.S.C. § 433(a).
3. 29 U.S.C. § 433(b).
4. *Id.* (emphasis added).
5. 29 U.S.C. § 433(c) (emphasis added).
6. 29 U.S.C. § 434.

7. Rescission of Rule Interpreting "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 83 Fed. Reg. 33826, 33827-28 July 18, 2018) (to be codified at 29 C.F.R. pt. 405 and 406) (citing Bureau of Labor-Management ReportsTechnical Assistance Aid No. 4: Guide for Employer Reporting (1960)).
8. *Id*. (citing 76 Fed. Reg. 36178, 36180) (June 21, 2011) (NPRM) (citing Benjamin Naumoff, Reporting Requirements under the Labor-Management Reporting and Disclosure Act, in fourteenth Annual Proceedings of the New York University Conference on Labor 129, 140-141 (1961)).
9. *See, e.g., Nat'l Fed'n of Indep. Bus. v. Perez*, No. 5:16-CV-00066-C, 2016 WL 3766121, at *18 (N.D. Tex. June 27, 2016) (citing LMRDA Interpretative Manual Entry § 265.005); see also 76 Fed. Reg. 36178, 36180 (June 21, 2011); 81 Fed. Reg. 15924, 15,931 (Mar. 24, 2016).
10. *Supra* note 7 at 33838 (citing 81 Fed. Reg at 15936).
11. *See, e.g., Int'l Union, United Auto., etc. ("UAW") v. Dole*, 869 F.2d 616, 618 (D.C. Cir. 1989) (Ginsburg, J.); Wirtz v. Fowler, 372 F.2d 315, 330 & n.32 (5th Cir. 1966) (noting authorities reasoning that the Advice Exemption should be applicable to "all activities of the lawyer in which it is contemplated that the client will be the ultimate implementing actor and in which the client retains the power to accept or reject the activities of the lawyer" and "not include activities in which the lawyer or his agent implement the activity by interposition between the client and his employees.").
12. *Supra* note 7 (While DOL temporarily altered its interpretation in 2001, the interpretation was rescinded later that year and DOL returned to its prior view).
13. *Id.*
14. Interpretation of the "Advice" Exemption in Section (c) of the Labor-Management Reporting and Disclosure Act, 81 Fed. Reg. 15924, 15937 (Mar. 24, 2016) (to be codified at 29 C.F.R. pt. 405 and 406).
15. *Id.*
16. *Id.* at 15938).(Please note that the examples cited by the DOL are only some examples of things that would no longer fit within the "advice" exemption.)
17. *Id*. at 16038, 16051
18. Letter from William T. Robinson, President, A.B.A., to Andrew R. Davis, Chief of the Division of Interpretations & Standards, Office of Labor-Management Standards, U.S. Dept. of Labor (Sept. 21, 2011) (the "2011 ABA Letter").
19. *Id.* at 1.
20. *Id*. at 1-2.
21. *See, Nat'l Fed'n of Indep. Bus. v. Perez*, No. 5:16-CV-00066-C, 2016 WL 3766121 (N.D. Tex. June 27, 2016) ("NFIB"); L*abnet, Inc. v. U.S. Dep't of Labor*, 197 F. Supp. 3d 1159 (D. Minn. 2016); *Associated Builders & Contractors of Arkansas v. Perez*, No. 4:16-CV-00169, 2016 WL 3574514 (E.D. Ark. Apr. 28, 2016)).
22. NFIB, 2016 WL 3766121 at *46.
23. *Id.* at *25.
24. *Id.* at *29 (*citing Encino Motorcars, LLC v. Navarro*, 579 U.S. 211 (2016)).
25. *Id*. at *29-30.
26. *Id*. at *31-32.
27. *Id.* at *36.
28. *Nat'l Fed'n of Indep. Bus. v. Perez*, No. 5:16-CV-066-C, 2016 WL 8193279 (N.D. Tex. Nov. 16, 2016).
29. *Supra* note 7 at 33828-33834.
30. Letter from Patricia Lee Rufo, President, A.B.A., to the Hon. Charles Schumer, Majority Leader, United States Senate, the Hon. Mitch McConnell, Minority Leader, United States Senate, the Hon. Patty Murray, Chairwoman, Committee on Health, Education, Labor and Pensions, United States Senate, and the Hon. Richard Burr, Ranking Member, Committee on Health, Education, Labor and Pensions, United States Senate (April 20, 2021). The 2021 ABA Letter did not include the argument that the Persuader Rule is inconsistent with the LMRDA's language or Congressional intent, which would of course be revised in the event Congress passes the Pro Act.
31. https://www.whitehouse.gov/briefing-room/presidential-actions/2021/04/26/executive-order-on-worker-organizing-and-empowerment/..
32. *See* https://www.whitehouse.gov/wp-content/uploads/2022/02/White-House-Task-Force-on-Worker-Organizing-and-Empowerment-Report.pdf.
33. *Id.* at 23.
34. *Id.*
35. The blog may be found on the DOL website: https://blog.dol.gov/2022/01/05/putting-management-back-into-the-LMRDA.
36. *Supra* note 7.
37. *Supra* note 7 at 33830 (*citing Torres v. Lynch*, 136 S. Ct. 1619, 1628 (2016)).
38. 2011 ABA Letter at 6 (noting that many states have adopted binding rules that track the model rule).
39. Joint letter from representatives of the Association of Corporate Counsel to Andrew R. Davis, Chief of the Division of Interpretations and Standards, Office of Labor-Management Standards, United States Department of Labor (Sept. 21, 2011) ("ACC Letter") at 4-5.
40. ACC Letter at 6.
41. ACC Letter at 6, fn. 10.
42. *See, e.g., Avgoustis v. Shineski*, 639 F.3d 1340, 1345 (Fed. Cir. 2011) (*citing Clarke v. Am. Commerce Nat'l Bank*, 974 F.2d 129-30 (9th Cir. 1992)).
43. ACC Letter at 10.
44. *Id.*
45. On April 13, 2016, following commencement of litigation seeking to enjoin the Persuader Rule, the DOL announced a "Special Enforcement Policy" by which filers of form LM-20 would not have to complete the sections of Form LM-21 pertaining to receipts and disbursements for "labor relations advice or services." The Special Enforcement Policy was to be in effect for 90 days, could be rescinded at any time, and DOL did not announce what it intended to do after 90 days. *See,* NFIB, 2016 WL 3766121, at *22.
46. NFIB, 2016 WL 3766121, at *10.
47. *Supra* note 7 at 33832 (citing public comment that "leveling the playing field for workers by making sure they receive the information they deserve before making a decision on forming a union.").
48. *Id.*
49. NFIB, 2016 WL 3766121, at *32.
50. *Supra* note 7 at 33832.
51. *Id.*
52. *Supra* note 7 at 33829 (c*iting Janus Capital Grp. v. First Derivative Traders*, 564 U.S. 135, 142 (2011)).
53. ACC Letter at 24.
54. ACC Letter at 25.

The Persuader Rule: A Union-Side Perspective—Promoting Transparency During Union Organizing

By Jeffrey P. Nieznanski

Introduction

In his remarks from the East Room of the White House on Sept. 8, 2021, President Joe Biden emphasized that the legal guarantees workers have to a free and fair choice to join a union belong to workers, not to their employers or to special interests.[1] Nevertheless, illegal tactics coupled with legal coercion result in union elections that make a mockery of the democratic process guaranteed by the National Labor Relations Act (NLRA). This article supports reinstatement of the Persuader Rule as a means towards restoring workers' rights to a free and fair choice in union elections.

The legal advice provided during union organizing drives at Amazon in Virginia in 2015 and Alabama this past April are good examples of why our legal profession should heed the advice of former U.S. Supreme Court Justice William J. Brennan, who asserted that "[l]awyers must bring real morality into the legal consciousness."[2] In August 2021, a hearing officer for the National Labor Relations Board found that Amazon illegally discouraged their workers from organizing a union at an Alabama warehouse.[3]

That was not the first time Amazon was charged with labor law violations. It was reported that in a secret 2016 settlement in Virginia, Amazon swore off threatening and intimidating workers.[4] In the wake of allegations of illegal acts by Amazon in both organizing drives, the time has come to pull back the curtain to better understand the process employers use in obtaining legal advice to oppose their employees' desire to organize unions, and how the legal profession assists them.

Why It Matters

Unions are good for workers and the economy. Workers who win union representation and collectively bargain earn 13.2% more than peers with similar education, occupation, and experience in non-unionized workplaces in the same sector.[5] Better pay and benefits lessen the need for public assistance and strengthen the middle class. Many more U.S. workers want unions than have the benefit of representation. "A 2017 survey found that nearly half (48%) of all nonunion workers say they would vote for a union if given the opportunity—a full 15 percentage points higher than when a similar survey was taken four decades earlier."[6]

National Policy

Under the NLRA, "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[7] Further,

> Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.[8]

Laboratory Conditions

The National Labor Relations Board (the "Board") is charged with ensuring that union representation elections are free from misconduct, coercion or improper influence. To ensure that employees are able to exercise their rights, the Board has the power to see if the election proceedings are conducted in a manner designed to replicate "laboratory conditions," free from coercion.[9] Although this standard is not literally construed, the Board and the courts have drawn a firm line that an election cannot stand where the results do not reflect the employees' free choice.[10]

Departure From National Policy

The right to self-organization has become increasingly illusory, as U.S. employers have been charged with violating federal law in 41.5% of all union election campaigns, according to a 2019 report by the Economic Policy Institute.[11] This EPI report is based on analysis of 3,620 NLRB election filings and 49,396 unfair labor practice charges filed against employers between fiscal years 2015 and 2018.[12] It found that "one out of five union election campaigns involves a charge that a worker was illegally

fired for union activity," and that "employers are charged with making threats, engaging in surveillance activities, or harassing workers in nearly a third of all union election campaigns."[13]

The Persuader Rule

The short-lived Persuader Rule sought to provide employees with information about consultants hired by their employers to influence their views on union representation.[14] Generally, the Persuader Rule required the disclosure of certain consultant activity. Specifically, reporting was required when consultants would: 1) plan, direct, or coordinate management efforts to persuade workers; 2) provide persuader materials to employers to disseminate to workers; 3) conduct union avoidance seminars; or 4) develop or implement personnel policies or actions to persuade workers.[15] A U.S. Department of Labor summary of the Persuader Rule noted that "[t]his Rule does not prohibit employers from hiring consultants or constrain them in what information they can provide."[16]

Employees typically hear from their employers in response to union organizing drives at their workplaces. In the absence of persuader reporting requirements, however, they often do not know the source of the message. The knowledge that a third-party consultant hired by their employer is the source of the information will enable employees to better assess the merits of the arguments directed at them. This information would help employees consider the extent to which an employer's message reflects the genuine view of their employer, or if it instead reflects strategy designed by the consultant to counter union representation.

Union avoidance law firms offer legal services, advice, consultation, training seminars, workshops and materials for management and supervisors, and also prepare targeted anti-union materials for distribution to employees, including videos, posters, leaflets, flyers and giveaways.[17] These sophisticated and costly tactics help anti-union employers create dissension and division among employees during an organizing campaign and spread misinformation about the union before workers vote in a union representation election.[18] Additionally, these consultants advise management on how to stall or prolong the bargaining process, almost indefinitely.[19]

Amazon's union avoidance efforts and those coordinating them were invisible to the public and to employees voting in the Alabama election, largely because the Trump administration scrapped the Obama-era Persuader Rule that would have required disclosure of certain union avoidance expenditures by corporations.[20]

Background on the Persuader Rule

The Persuader Rule took effect on April 25, 2016, amending the Labor-Management Reporting and Disclosure Act (LMRDA).[21] As stated at the time in the Federal Register about how the LMRDA reporting requirement was being interpreted prior to the Persuader Rule:

> This [reporting requirement] left a broad category of persuader activities unreported, thereby denying employees important information that would enable them to consider the source of the information about union representation directed at them when assessing the merits of the arguments and deciding how to exercise their rights. The Department proposed to eliminate this reporting gap without imposing any restraints on the content, timing, or method by which an employer chooses to make known to its employees its position on matters relating to union representation or collective bargaining. The final rule also maintains the LMRDA's 203(c) advice exemption and the traditional privileges and disclosure requirements associated with the attorney-client relationship.[22]

The Advice Exemption

The 2016 Persuader Rule modified the "advice exemption" loophole in federal disclosure regulations that exempt businesses from filing publicly accessible reports about their hiring of third-party labor relations advisers. "Companies now don't need to disclose that information as long as the outside advisers don't directly engage with workers—a broad exemption that shields a workforce's awareness of avoidance messaging when it's relayed to them solely by their bosses."[23]

Legal Challenges

The Persuader Rule was challenged upon its enactment by business interests and management-side law firms in three different federal courts. Two federal courts declined to enjoin the rule from taking effect.[24] However, a U.S. District Court Judge in Lubbock, Texas appointed by President Reagan halted implementation of the rule by ordering a nationwide preliminary injunction.[25] The Trump administration then rescinded the Persuader Rule before an appeal could be decided, saying that it "was incompatible with the law and client confidentiality."[26]

In allowing the preliminary injunction, the Texas court adopted the American Bar Association's claim that the Persuader Rule placed "unfair reporting burdens on both the lawyers and the employer clients they represent," and that "the Proposed Rule could very well discourage many employers from seeking the expert legal representation that they need, thereby effectively denying them their fundamental right to counsel."[27]

ABA Opposition Refuted

Given its stated mission of "delivering justice as the national representative of the legal profession,"[28] ABA opposition to the Persuader Rule is both troubling and a departure from its usual neutral posture on union-management disputes.[29] The ABA's arguments against the rule were effectively refuted by 34 law professors specializing in legal ethics and labor law, who sent a letter to lawmakers supporting the rule and addressing ethical concerns.[30] In their letter to lawmakers these professors pointed out that "[t]he LMRDA's reporting regime has always accommodated attorney professional responsibility concerns when attorney-client communications were potentially subject to disclosure."[31] Additionally, "several circuit courts of appeal have seen no conflict between LMRDA's reporting requirements and the attorney-client privilege."[32]

Confidentiality and Attorney-Client Privilege

Importantly, ABA Model Rule 1.6(b)(6) allows attorneys to disclose certain client information to comply "with other law or court order."[33] Therefore, the Model Rule clearly contemplates the disclosure of client information to comply with a law such as the LMRDA.

The Persuader Rule does not violate attorney-client privilege, as it requires the disclosure of facts, not the advice given by the attorney. These facts include the identity of the client, the fee arrangement, and the scope and nature of the persuader agreement in cases where the consultant has agreed to provide services other than legal services with the intent to persuade employees regarding union representation or collective bargaining.[34] This basic information is not privileged. The attorney-client privilege protects confidential communications between a lawyer and client relating to legal advice sought by the client.[35] To be subject to attorney-client privilege, communication must be primarily of legal, not factual, character.[36] Because the Persuader Rule only would require disclosure of factual information and not legal advice, the Persuader Rule does not violate attorney-client privilege.

Significantly, there are other laws that require disclosures by attorneys when they engage in certain activities on behalf of a client, including bankruptcy law[37] and the Lobbying Disclosure Act (LDA) of 1995.[38] Lobbying disclosure reports require much of the same information as requested on the forms that are at issue here, including the names of clients and payments.[39] Both lawyers and nonlawyers alike are subject to the reporting requirements of the LDA,[40] which has never been successfully challenged in the over 25 years it has been in effect.[41]

In regards to the LDA, the U.S. Court of Appeals for the District of Columbia found that the government had a compelling interest in increasing public awareness of efforts of paid lobbyists to influence public decision-making.[42] Just as responsible representative government requires public awareness of the efforts of paid lobbyists to influence the public decision-making process, so too do workers need to know who is trying to influence them when they vote in union elections. The time has come, in the words of U.S. Supreme Court Justice William J. Brennan, to "bring real morality into the legal consciousness" by supporting reenactment of the Persuader Rule.

Conclusion

Supporting the Persuader Rule is consistent with our mission as members of the New York State Bar Association to shape the development of the law, educate and inform the public, and to promote equal access to justice for all.

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The views expressed in this article are the personal opinion of the author, and they do not represent nor reflect the position of the New York State Bar Association.

Endnotes

1. Joseph R. Biden, Remarks by President Biden in Honor of Labor Unions, Sept. 8, 2021 (transcript available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/08/remarks-by-president-biden-in-honor-of-labor-unions/).
2. Travis A. Knobbe, Brennan v. Scalia, *Justice or Jurisprudence? A Moderate Proposal*, 110 W. Va. L. Rev. 1265, 1271 (2008).
3. Noam Scheiber, *Labor Board Official Backs Union Challenge on Amazon Vote*, N.Y. Times, Aug. 2, 2021, https://www.nytimes.com/2021/08/02/business/amazon-union-alabama-nlrb.html.
4. David Streitfeld, *How Amazon Crushes Unions*, N.Y. Times, Mar. 16, 2021, https://www.nytimes.com/2021/03/16/technology/amazon-unions-virginia.html.
5. Celine McNicholas et al., *Unlawful: U.S. Employers Are Charged With Violating Federal Law in 41.5% of All Union Election Campaigns*, 1 (Economic Policy Institute, Report 2019), https://files.epi.org/pdf/179315.pdf.
6. Thomas A. Kochan et al., *Worker Voice in America: Is There a Gap Between What Workers Expect and What They Experience*?, 72 ILR Rev. 3-38 (2019).
7. 29 U.S.C. § 157.
8. 29 U.S.C. § 401, *see generally* Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA), Pub. L. No. 86-257, 73 Stat. 519 (1959), codified at 29 U.S.C. §§ 401-531 (establishing labor-management transparency through reporting and disclosure requirements for labor organizations and their officials, employers, labor relations consultants, and surety companies).
9. *SSC Mystic Operating Co., LLC v. N.L.R.B.*, 801 F.3d 302, 309 (D.C. Cir. 2015) (explaining that "[t]o ensure that employees are fully able to exercise their section 7 rights, the Board requires that elections take place under 'laboratory conditions' free from coercion by the union or the employer").
10. *See N.L.R.B. v. City Wide Insulation of Madison, Inc.*, 370 F.3d 654, 658 (7th Cir. 2004) (stating, "the laboratory conditions doctrine is satisfied where the employees exercised a 'free choice.'"); *Overnite Transp. Co. v. N.L.R.B.*, 104 F.3d 109 (7th Cir. 1997) (holding that record did not show that union conduct interfered with employees' exercise of free choice to such an extent that it materially affected results of election so as to warrant a new representation election).
11. McNicholas, *supra* note 5, at 2.
12. *Id.*
13. *Id.*
14. Interpretation of the "Advice" Exemption in § 203(c) of the Labor-Management Reporting and Disclosure Act, 81 FR 15923 (Mar. 24, 2016) (to be codified at 29 CFR pt. 405, 406).
15. *Id*. at 15927.
16. U.S. Dep't of Lab., *Overview/Summary Persuader Agreements: Ensuring Transparency in Reporting For Employer and Labor Relations*, http://static.politico.com/24/b9/727920a748889063f7ce7213ab5d/persuader-rule-fact-sheet.pdf (last visited Mar. 21, 2022).
17. Erin Johansson, *Unionbusters 101* (Jobs with Justice Ed. Fund, Mar. 13, 2017 at 1), https://www.jwj.org/unionbusters-101.
18. *Id.*
19. *Id*.
20. News Release, Ofc. of Labor-Management Standards, No. 18-1198-NAT, *U.S. Dep't of Labor Rescinds 2016 Persuader Rule*, July 17, 2018, https://www.dol.gov/newsroom/releases/olms/olms20180717.
21. Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, *supra* note 14.
22. *Id.* at 15924.
23. Ben Penn, *Biden DOL Explores Redo of Obama Union-Avoidance Reporting Rule*, Bloomberg Law, Apr. 28, 2021, https://news.bloomberglaw.com/daily-labor-report/biden-dol-explores-redo-of-obama-union-avoidance-reporting-rule-1.
24. *Labnet Inc. v. U.S. Dep't of Lab.*, 197 F. Supp.3d 1159 (D. Minn. 2016); *Nat'l Ass'n of Mfrs. v. Perez*, No. 4:16CV00169-KGB (E.D. Ark. Mar. 30, 2016).
25. *Nat'l Fed'n of Indep. Bus. v. Perez*, No. 5:16-CV-00066-C, 2016 WL 3766121, at *1-47 (N.D. Tex. June 27, 2016).
26. Ofc. of Labor-Management Standards, *supra* note 20.
27. Nat'l Fed'n of Indep. Bus., 2016 WL 3766121, *supra* note 25, at *9.
28. The American Bar Ass'n, https://www.americanbar.org/about_the_aba/ (last visited Aug. 19, 2021).
29. Penn, *supra* note 23.
30. Letter from Richard L. Abel et al., to Hon. John Kline, Chairman, Comm. on Educ. and the Workforce and Hon. Robert C. "Bobby" Scott, Ranking Member, Comm. on Educ. and the Workforce (May 16, 2016)
31. *Id.*
32. *Id*., *see, e.g., Humphreys et al v. Donovan*, 755 F.2d 1211, 1219 (6th Cir. 1985) (upholding LMRDA's reporting requirements for attorneys engaged in persuader activity and noting that, "[i]n general, the fact of legal consultation or employment, clients' identities, attorneys' fees, and the scope and nature of employment are not deemed privileged"); *Wirtz v. Fowler*, 332-33 (5th Cir. 1966), rev'd in part on other grounds, *Price v. Wirtz*, 412 F.2d 647 (1969); *Douglas v. Wirtz*, 353 F.2d 30, 33 (4th Cir. 1965).
33. The Lawyer's Code of Professional Responsibility, § 1.6(b)(6).
34. Interpretation of the "Advice" Exemption in § 203(c) of the Labor-Management Reporting and Disclosure Act, *supra* note 14 at 15943.
35. *In re Nassau Cty*. Grand Jury Subpoena Duces Tecum Dated June 24, 2003, 4 N.Y.3d 665, 797 N.Y.S.2d 790, 830 N.E.2d 1118 (2005).
36. *Muriel Siebert & Co. v. Intuit Inc.*, 32 A.D.3d 284, 820 N.Y.S.2d 54 (1st Dep't 2006), *aff'd*, 8 N.Y.3d 506, 868 N.E.2d 208 (2007) (citing *Spectrum Sys. Int'l Corp. v. Chemical Bank*, 78 N.Y.2d 371, 575 N.Y.S.2d 809, 581 N.E.2d 1055 (1991); *Eisic Trading Corp. v. Somerset Marine*, 212 A.D.2d 451, 622 N.Y.S.2d 728 (1995)).
37. *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 559 U.S. 229 (2010) (holding that a restriction on attorneys acting as debt relief agencies advising people to incur more debt in contemplation of filing for bankruptcy is a constitutionally permissible disclosure requirement because it is reasonably related to the government's interest in preventing deception of consumers).
38. 2 U.S.C. § § 1601 *et seq.*
39. 2 U.S.C. § 1604.
40. 2 U.S.C. § 1602(10).
41. *See* Lobbying Disclosure Act of 1995, Pub.L. 104-65, 109 Stat. 691 (1995) (codified as amended at 2 U.S.C. § § 1601 *et seq*.).
42. *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 13 (D.C. Cir. 2009).

The Need for Unions in Esports and the Challenges Associated With Unionization

By Mollie Carney

I. Introduction

Not too long ago, the idea of a person in his or her 20s spending "10 to 12 hours per day, six days a week"[1] playing video games would likely be met with pity and a comment about the young adult's lack of work ethic. Just five years ago, in 2016, the *Chicago Tribune* published an article entitled, "Study Finds Young Men Are Playing Video Games Instead of Getting Jobs." There, the author examined a study from Princeton, the University of Rochester and the University of Chicago and blamed young men "living at home and enjoying video games" for nationwide economic issues.[2] While this may have been a common trope in the past, the reality is that many young people are playing video games "10 to 12 hours per day, six days a week" professionally in careers as esports players.[3]

Esports is "competitive video game play" that "involves head-to-head, real-time competition, in which players dedicate themselves to one particular game . . . [and] develop proficiency in utilizing the skill set . . . and . . . fan bases through online broadcasts of the gaming action."[4] "Esports" is a term that covers many different games, such as League of Legends, Overwatch, and Fortnite, just as the term "sports" encompasses football, baseball, and basketball.[5] While video game tournaments have been held since as early as 1972 —at a time when "not many people even knew that video games existed"[6] — the first video game tournament to be covered by ESPN was held in 2014.[7] Though esports "may have once stood for a subset of sports culture, it not only has grown into a full industry in its own right," but investments in esports reached $4.5 billion in 2018, up 837% from the $480 million recorded in 2017.[8] Further, Andy Miller, cofounder and co-CEO of the NRG esports team and stakeholder of the NBA team the Sacramento Kings, told the *New York Times* that the popular game Overwatch "was reaching as many people in one day during the 2019 season as attend roughly five to seven home games of an average NBA team."[9]

The esports industry is made up of six main entities: the sponsors, the game providers, the game leagues, the team organizations, the professional players, and the streaming sites.[10] Organized leagues are usually subsidiaries of the game providers, meaning the companies that produce individual games control the league.[11] Esports leagues have several sources of revenue that are similar to the revenue streams of traditional sports leagues, including advertising, ticket sales, media rights, and corporate sponsorships.[12] The players sign individual contracts with their teams, not with the league or the game provider.[13]

Esports players are usually young; the average retirement age of players is 25.[14] While esports players do not typically participate in the same training regiments as traditional athletes,[15] the working conditions of esports players are similar to those of traditional professional athletes.[16] In order to achieve the "peak level of performance and competitiveness that a league demands," players will practice for "over 60 or 70 hours per week."[17] One player reported practicing "a minimum of 12 hours a day . . . 15 hours a day when it's close to a match."[18] As a result of an unrelenting practice schedule and huge social media presences, players have been known to face mental health issues, such as panic attacks and acute anxiety, as well as career-ending physical problems, such as carpal tunnel syndrome and wrist injuries.[19] In return, players could potentially make millions of dollars.[20] However, the average salary for non-superstars is around $60,000.[21] Furthermore, players often live in training facilities with their team, with the expectation to practice "more or less around the clock" and with the "genuine fear for their livelihood because they didn't have a good game."[22]

While athletes in traditional sports are "virtually the same age when they turn pro" the key distinction is that traditional sports leagues have "an entire ecosystem of agents, managers, lawyers, players unions and other representation [that] has evolved to service" the leagues' athletes.[23] While players are subjected to harsh conditions, early retirement, and often less than expected salaries, closely resembling the conditions of professional athletes before the advent of player's associations, esports players are not represented by a union as athletes in traditional sports are and do not reap the benefits of collective bargaining as athletes in traditional sports do.[24] However, while there are many similarities between modern esports players and traditional professional athletes before they were represented, there are nuances to the esports industry that result in unique obstacles that may hinder the unionization of players.[25]

II. Background

A. The Law

The National Labor Relations Act (NLRA), enacted by Congress in 1935, is the federal statute that governs unions in the United States.[26] The NLRA was passed during the Great Depression "to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices which can harm the general welfare of workers, businesses and the U.S. economy."[27] More specifically, the act estab-

lishes "employee rights to organize, join unions, and engage in collective bargaining."[28] It protects these rights by protecting the employees' "freedoms of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[29] It also established the National Labor Relations Board (NLRB) to "assure fair labor practices and workplace democracy nationwide."[30]

The NLRA regulates employers and organized labor groups alike in "an attempt to streamline conflicts by protecting employee and employer rights, minimizing harms, and maximizing commerce."[31] It defines "employer" as:

> [i]nclud[ing] any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act . . . or any labor organization (other than when acting as an employer), or agent of such labor organization.[32]

It defines "labor organization" as:

> any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.[33]

Labor organizations represent employees, and therefore if a labor organization may represent an individual, it first must be determined if the individual is an employee.[34] The NLRA defines "employee" as:

> Includ[ing] any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act . . .[35]

Because this definition does not explicitly define the term "employee," the Supreme Court has held that the term should be interpreted by courts to "incorporate the established meaning" of the term.[36] In *National Labor Relations Board v. Town & Country Electric, Inc.*, the Court stated that an interpretation of the term "employee" should be consistent with the common law definition of "employee," though the National Labor Relations Board's interpretation of the term is entitled to considerable deference.[37] When applying the common law of agency to determine whether a party is an employee, courts "consider the hiring party's right to control the manner and means by which the product is accomplished."[38] Additionally, courts must consider the skill required, the source of the instrumentalities and tools, the location of the work, the duration of the relationship between the parties, whether the hiring party has the right to assign additional projects to the hired party, the extent of the hired party's discretion over when and how long to work, the method of payment, the hired party's role in hiring and paying assistants, whether the work is part of the regular business of the hiring party, whether the hiring party is in business, the provision of employee benefits, and the tax treatment of the hired party.[39]

If determined to be an employee, the individual enjoys several rights under the NLRA.[40] These rights include the right to "self-organization, to form, join or assist labor organizations, to bargain collectively thorough representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[41] Employees also have the "right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment."[42]

One way unions protect employees is through collective bargaining.[43] The NLRA defines "collective bargaining" as:

> [T]he performance of the mutual obligation of the employer and the representative of the employees to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party.[44]

The definition further specifies that neither party is compelled "to agree to a proposal or require the making of a concession."[45] The party that acts as the "representative" during collective bargaining is selected "by majority of the employees in a unit appropriate for such purposes," also known as the "bargaining unit."[46] There must be an

appropriate "community of interest" among the employees in order for the NLRB to define a group as a bargaining unit.[47] To determine if there is a sufficient community among employees, several factors are weighed, including "1. similarity in skills, interests, duties, and working conditions; 2. the employees' desires; 3. integration of personnel and functions; 4. bargaining history; 5. the employer's organizational structure; and 6. the extent of union organization."[48]

There are two ways to form a union.[49] "If at least 30% of workers sign cards or a petition saying they want a union, the NLRB will conduct an election."[50] If a majority of voters then choose a union, the NLRB will certify the union to represent the workers.[51] Alternatively, an employer "may voluntarily recognize a union based on evidence—typically signed union-authorization cards—that a majority of employees want it to represent them."[52] An employer is required to bargain with a union representative once the union has been certified or recognized.[53]

B. Traditional Sports

Unions and collective bargaining have been a part of traditional professional sports leagues since 1885, when the Brotherhood of Professional Baseball Players was formed,[54] and the history of organizing within professional sports can be used as a tool to examine both what may be adopted by the world of esports on the road to unionizing and what nuances exist in esports that would cause unique obstacles for the formation of unions.

Professional sports leagues consist of two subgroups: the "Big Four": Major League Baseball (MLB), the National Basketball Association (NBA), the National Football League (NFL), and the National Hockey League (NHL), and the single-entity leagues, such as Major League Soccer (MLS).[55] Professional leagues follow a franchising model, and teams generally enjoy regional market monopolies, though some leagues allow for more than one franchise within a region, such as the New York Giants and the New York Jets within the NFL.[56] Professional sports leagues have a set number of teams, which are defined in the rules of the league, and therefore restrict a new team from entering the league unless it does so under specific conditions.[57] Generally, teams are owned by private entities, "including sole proprietorships, partnerships, and corporations."[58] The leagues have rules in place to ensure fair competition, but teams are permitted to compete "as rival companies, just as they would in any other business."[59] Single entity leagues allow for investor-operators, as opposed to team owners, allowing single entities to control more than one team.[60] Investor-operators manage the operations of their teams, while the league is a single organization that owns the teams that compete within it.[61] Leagues and teams earn revenue from broadcasting contracts, sponsorship deals, fan attendance at games, and merchandise sales.[62]

Players associations are the "unions in the realm of sports" and each professional league has players associations that represent the interest of its members.[63] Players associations negotiate and administer collective bargaining agreements on behalf of their players, work with players who have filed for grievance arbitration, and organize strikes when collective bargaining agreements fails.[64]

Before the dawn of players associations in professional sports, "the tightly knit organization established by the owners in professional sports . . . made possible the enforcement" of oppressive regulations to which players had to adhere in order to play at the professional level.[65] For instance, players had to sign uniform contracts in order to compete on professional teams, and in baseball, basketball, and hockey, these contracts included reserve clauses.[66] Reserve clauses were renewal clauses "which empower[ed] the club unilaterally to renew the contract for the following year if the club and the player fail[ed] to come to terms."[67] The effect of these clauses was that once a player signed a contract with a team, the club had a "perpetual option on his services," as the renewed contract mirrored the original and also contained the reserve clause.[68] NFL contracts also had these clauses until 1948, when the league adopted one-year contracts with a one-year option for renewal, allowing a player to sign with a different team at the end of two years. However, the average career of players at the time was limited to four to five years and players often did not take advantage of this opportunity.[69] Additionally, the NFL constitution and bylaws passed in 1963 included a clause that stated:

> Whenever a player, becoming a free agent . . . signs a contract with a different club in the League, then, unless mutually satisfactory arrangements have been concluded between the two League clubs [the former club and the acquiring club], the Commissioner may name and then award to the former club one or more players . . . of the acquiring club as the Commissioner, in his sole discretion, deems fair and equitable; any such decision by the Commissioner shall be final and conclusive.[70]

This clause substantially discouraged club owners from acquiring free agents, as the acquiring team risked losing its existing players *and* players from the team's selection list.[71] Additionally, the NHL had restrictive covenants in the form of non-compete agreements that restricted any player "retiring from professional hockey [from] manag[ing] or coach[ing] for any other team, *amateur or* professional, without the consent of his former employer."[72] Though the legality of these clauses was "highly questionable, the fact that clubs [would] not deal with a player who violate[d] them effectuate[d] their purpose."[73]

In an effort to protect their interests, players from multiple leagues made attempts at organizing. In 1885, the Brotherhood of Professional Baseball Players was formed, though the union lasted only until 1891, 10 years before the American League was founded.[74] "Other attempts to orga-

nize players included the creation of the Players' Protective Association in 1900, the Fraternity of Professional Baseball Players of America in 1912, and the American Baseball Guild in 1946," though none of these attempts managed to bring "an end to the reserve clause."[75]

The Major League Baseball Players Association (MLBPA) was formed in 1953, but was represented by Robert Cannon, who was "more concerned with pleasing owners than with representing players," and, accordingly, unsuccessful in making any meaningful strides for players.[76] At this time the MLBPA was funded by the MLB, preventing it from being recognized as a union under the NLRA.[77] In 1965 players sought the expertise of Marvin Miller, "a highly respected economist for the United Steelworkers of America who immediately began to mold the players into a bona fide labor union."[78] As a result, the owners ceased funding the MLBPA, in an attempt to "undercut players' efforts."[79] Three years later, in 1968, Miller helped players negotiate a collective bargaining agreement, the first of its kind in professional sports.[80] Following its initial collective bargaining agreement, the MLBPA brought "base salaries, pension fund, licensing rights and revenue . . . to new levels, laying the groundwork that helped create what is widely considered one of the strongest unions in the country."[81] "The most recent collective bargaining agreement sets a minimum salary of $535,000 for 2017, with increases set for each subsequent year . . .[,] a salary arbitration process, expense allowance provisions, termination pay provisions, disciplinary protections, safety and health provisions, a revenue sharing plan, and many other agreed upon provisions."[82]

Players in other sports also sought to unionize to protect their interests. In 1955, Bob Cousy of the Boston Celtics went to then NBA President Maurice Podoloff with a list of reasonable player demands on behalf of the National Basketball Players Association (NBPA).[83] The NBA refused to recognize the union, and did not begin discussions with the union until 1957 when players threatened to strike and Cousy met with the AFL-CIO regarding possible union affiliation.[84] The union made slow progress in the years to come, until 1964 when players threatened to strike the All-Star Game (the first to be nationally televised), unless the league agreed to establish a pension plan, to formally recognize the NBPA as the exclusive bargaining agent for players, and to increase the player per diem to $8 per day.[85]

The National Football League Players Association (NFLPA) was formed in 1956, when a "group of unhappy Cleveland Browns approach[ed] Creighton Miller," an attorney and "former Notre Dame standout [who] reluctantly accept[ed] the roles of legal counsel and chief spokesman" for the NFLPA.[86] The NFLPA was able to use the emergence of the American Football League as leverage to gain "additional pension coverage and improved benefits" until the leagues merged in 1966.[87] On July 3, 1968, the NFLPA voted "to have its first player strike in hopes of better compensation," and as a result the first collective bargaining agreement was signed July 14, 1968, though players were largely unsatisfied with the results.[88] The players went on strike again in July 1970 for two days, and that led to a four-year collective bargaining agreement that "solidified the NFLPA as an established entity and formidable bargaining force."[89]

C. Esports

Many aspects of competitive esports leagues are similar to those of professional sports leagues. The League of Legends Championship Series (LCS) and the Overwatch League (OWL), two of the most developed competitive esports leagues, have "defined seasons, franchised teams, set league rules, and playoffs" much as do professional sports leagues.[90] Also like professional sports teams is the multimillion dollar cost of owning an esports team. In 2016, Blizzard Entertainment "announced a $20 million price tag" for each of 12 OWL franchises when it established its professional league.[91] Robert Kraft and The Kraft Group, collective owners of the New England Patriots, secured the Boston franchise, while the parent companies of the Los Angeles Rams, Denver Nuggets, and Philadelphia Flyers bought OWL teams as well.[92] Partial owners and investors included Shaquille O'Neal, Joe Montana, and the Wilpon family, former owners of the New York Mets.[93] The league now has 20 franchises, including the Beasley Broadcast Group, which "paid $35 million to acquire the Houston Outlaws" in 2019.[94] When Riot Games launched its franchising model for the LCS in 2017, teams applied for one of 10 spots, and selected teams paid "a flat fee of $10 million to participate in the LCS as well as a $3 million fee to compensate those teams whose applications were not accepted."[95]

According to Marc Merrill, a Riot Games cofounder, co-chairman, and former CEO, the tournaments function primarily to provide "marketing to bring in new players and to inspire loyalty in regulars."[96] Though LCS has sponsors and charges admissions to spectators who attend live events, "[t]he goal is to inspire enthusiasts, doing for [League of Legends] what Lebron James and other stars do for basketball."[97] While the goal of LCS tournaments is to drive fans to play League of Legends, rather than turn a profit, league commissioner Chris Greeley predicts that the league may generate a profit for the first time in 2021, in spite of pandemic-related challenges.[98] Turning a profit in an esports league would be a significant milestone, "especially given how often new leagues for traditional sports either fail (the XFL, twice) or operate at a loss (WNBA)."[99] If the LCS is successful in generating a profit in the 2021 season, esports players will serve both as major sources of marketing for League of Legends and, additionally, as key revenue sources for Riot Games as the main drivers of the LCS.

Though esports players are tremendously important to the successes of the leagues and promote the games themselves, they often find themselves in vulnerable situ-

ations and at the mercy of their teams and leagues. This was highlighted on July 24, 2018, when former LCS team Echo Fox suddenly released player Kim "Fenix" Jae-hun just five hours before teams had to "lock in" their final roster for the next season.[100] This meant that Fenix had five hours to "reach out to other teams, negotiate with those teams, agree on contract terms, and sign a contract with a team" in order to play in the upcoming season.[101] Because he was unable to do so, Fenix did not play in the 2018 summer season.[102] Though Echo Fox did not explicitly restrict Fenix's ability to join a new team after releasing him, they orchestrated the player release in a way that made it nearly impossible for him to play in the upcoming season, not unlike the way the NFL made it unreasonably difficult for free agents to join new teams under the 1963 NFL constitution and bylaws.[103]

The issue of player vulnerability was further highlighted when Turner "Tfue" Tenney brought suit against FaZe Clan—self-described as "the world's most prominent and influential gaming organization known for its disruptive original content and hyper-engaged global fanbase of 345 million" with seven different competitive teams—in May 2019.[104] Tenney alleged that the gamer agreement he signed with FaZe Clan was "grossly oppressive, onerous, and one-sided."[105] Specifically, Tenney alleged that the agreement entitled FaZe Clan "to a finder's fee of up to eighty percent of the revenue paid by third-parties for Tenney's services . . . and use[d] illegal and anti-competitive provisions . . . to severely limit Tenney's ability to compete in the martketplace."[106] "In May 2019 . . . Tenney filed two lawsuits against FaZe Clan in California state tribunals, seeking to have the Gamer Agreement declared void ab initio."[107] Three months later, in August 2019, FaZe Clan brought suit against Tenney in the Southern District of New York, "asserting four causes of action for breach of the Gamer Agreement . . . and five related tort and quasi-contract claims," relying on a forum selection clause in the gamer agreement.[108] The parties settled before trial commenced, but the dispute highlighted oppressive terms in player contracts and the power disparity between players and teams in contract negotiations.[109]

Players are not just at the mercy of their teams, but also of the leagues for which they play. For instance, game producers can change the rules as they see fit. "One esports company, Epic Games, publisher of the popular *Fortnite* title, released a new patch (which alters the software at the code level, meaning players are completely unable to ignore the changes) on the same day as a $500,000 tournament."[110] While players criticized the Epic Games for this, they still had to adjust their playing style in order to perform well at the tournament, as Epic Games had complete authority to make changes to the game at it saw fit.[111]

III. Obstacles

Though esports players would benefit from the protections that come with unionizing, there are challenges that may prevent players from organizing into players associations. Namely, players need to overcome issues regarding employment status and bargaining units.

A. Employment Status

The NLRA's definition of employee explicitly excludes independent contractors.[112] Therefore, in order to qualify for the protections guaranteed to employees under the NLRA, esports players would have to satisfy the common law definition of "employee."[113] Specifically, esports players would have to qualify as employees rather than independent contractors under the right to control test.[114]

Players in the LCS and OWL are required by the leagues to sign contracts with their teams.[115] The OWL Official Rules and Code of Conduct for the 2020 season state that "[i]n order to be eligible to participate in the League, each Player must be retained as an employee of his or her respective Team by entering into a Player Agreement."[116] The OWL rules further state that "[n]o Player or Team Manager may be a director, officer or employee of the Blizzard Group or the League Office, unless the League Office has been notified of and expressly authorized such relationship in writing."[117] Likewise, the LCS Official Rules for the 2020 season state that "[a]ll Players on the Full Team Roster must have a written contract with the Team they are playing for (a "Player Services Agreement")."[118] The LCS rules also state that "[m]embers of the Full Team Roster may not be employees of Riot Games Inc. . . . , North America League of Legends Championship Series LLC . . . , the League of Legends Esports Federation LLC or any of their respective affiliates at the start of or at any point during the LCS Competitive Season."[119] These terms seem to imply that the leagues do not consider players to be their employees. However, the test to determine whether a person is an employee under the NLRA depends on whether the person falls under the common law definition of "employee," not whether or not the employer labels the person as an employee within a contract.[120]

Both the teams and the leagues in the LCS and OWL seem to wield sufficient control over players to allow the players to satisfy the common law definition of "employee," and may be considered joint employers of players.[121] In both the LCS and the OWL, the league provides equipment to players for matches, and players may use "player-provided equipment" only in certain instances.[122] Additionally, competitive video gaming is "part of the regular business" of both leagues and teams; leagues use competitive video gaming as marketing tools and may soon begin to generate profits as a result of competitive video gaming, and teams exist for the sole purpose of participating in competitive video gaming.[123] While video games may be played from anywhere, leagues and teams control where players are located when they compete and practice.[124] Teams have the discretion to hire and fire players as they see fit.[125] The LCS rules also contain a provision which states, "All decisions regarding the interpretation of these Rules, Player eligibility, scheduling and staging of the League, and penalties for misconduct, lie solely with the League, the decisions of

which are final . . . [and] cannot be appealed."[126] This provision demonstrates that the LCS has clear control over its players.

B. Bargaining Units

"A critical step in the creation of a union is the formation—and the NLRB's recognition—of an appropriate bargaining unit."[127] Therefore, an important step in unionizing esports players will be to define what constitutes a bargaining unit. "A unit of employees is a group of two or more employees who share a community of interest and may reasonably be grouped together for purposes of collective bargaining. The determination of what is an appropriate unit [is] left to the discretion of the NLRB."[128] To determine whether a unit constitutes an appropriate bargaining unit, the NLRB looks to whether there is a sufficient community of interests among the members of the unit.[129] "Those who have the same or substantially similar interests concerning wages, hours, and working conditions are grouped together in a bargaining unit."[130] If "employers are grouped together in voluntary associations, a unit can include employees of two or more employers in any number of locations."[131]

The structure of the esports industry may make it difficult to define an appropriate bargaining unit. It may be difficult to prove a community of interests in an industry-wide bargaining unit because the industry includes players from several different games. This would be the equivalent of trying to establish a "Sports Players Association" and argue that a community of interests exists between players from the New England Patriots, the New York Mets, the Los Angeles Lakers, and the Washington Capitals. Likewise, in some cases it would likely be difficult for members of individual teams to establish that they share a sufficient community of interests faced with the reality that players compete in different games and have different concerns.[132] For instance, the FaZe Clan has players who compete in seven different games.[133] This would be analogous to having Tom Brady, Jacob deGrom, Lebron James, and Alexander Ovechkin all within the same organization while each played their respective sports. Each player might have the same overall interests, such as fair contract terms and pension plans, but, by way of example, it would be difficult to establish specific common needs between a quarterback and a pitcher. Moreover, if several bargaining units existed within each organization (one for *Fortnite* players, one for Overwatch players, one for League of Legends players, etc.), each organization would need to enter into multiple collective bargaining agreements and each unit might be too small to have any real bargaining power.[134]

Additionally, it would be difficult for players from individual teams to unionize, even if the team members shared a community of interests. In the past, the NLRB has taken note of the "symbiotic relationship among the various teams, conferences, and the [league]" in situations resembling professional sports and concluded that "labor issues directly involving an individual team and its players would also affect the [league], the [conference], and other member institutions."[135] The NLRA is clear: "'it would be difficult to imagine any degree of stability in labor relations' if [it] were to assert jurisdiction in [a] single-team case."[136]

In determining that asserting jurisdiction over an individual team would not promote stability in labor relations, the NLRB noted that "all previous Board cases concerning professional sports involve leaguewide bargaining units."[137] In the context of esports, leaguewide bargaining units would most closely resemble players associations in traditional professional sports.[138] In this case, it is likely that players will be able to establish a community of interests in that they share a skillset (playing Overwatch, for instance), are subject to the same league rules, and would likely have similar desires regarding working conditions and contract terms. In this case, team organizations would likely be subject to multiple collective bargaining agreements, but this in not unprecedented. For instance, the Kraft Group currently owns the New England Patriots (an NFL team), the New England Revolution (an MLS team), and the Boston Uprising (an OWL team).[139] While there is no collective bargaining agreement for the OWL, there are collective bargaining agreements for both the NFL and the MLS.[140] Accordingly, in the world of professional sports, it is not uncommon for team owners to be subject to multiple collective bargaining agreements.[141]

Bargaining units at the league level would most likely be the most successful way esports players would be able to unionize. However, because team organizations are structured in an unprecedented way, the NLRB might determine, for unprecedented reasons, that the units are not appropriate bargaining units.

IV. Conclusion

Esports players need to unionize in order to protect their interests against team owners, league offices, and game developers. While the structures of professional esports leagues create unique challenges that the players will need to overcome in order to unionize, players can likely be considered employees and would likely be able to establish bargaining units if they organize at the league level. Unionization, in such cases, is a very real possibility that will give players in this rapidly growing industry the power to protect themselves and their interests.

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Endnotes

1. *Why Do Some Esports Stars Burn Out so Young?*, Esports.net (Dec. 24, 2018), https://www.esports.net/news/industry/esports-stars-burn-out-young/.
2. Ana Swanson, *Study Finds Young Men Are Playing Video Games Instead of Getting Jobs*, Chicago Tribune (Sept. 23, 2016), https://www.chicagotribune.com/business/ct-video-games-jobs-emploment-20160923-story.html.
3. *Supra* note 1.
4. Aaron D. Lovaas, *Esports: A Whole Different Ball Game*, 26 Nev. Law. 26, 26 (2018).
5. Jas Purewal and Isabel Davies, *The eSports Explosion: Legal Challenges and Opportunities*, ABA Landslide (Nov. 2016), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2016-17/november-december/esports-explosion-legal-challenges-opportunities/.
6. Chris Baker, *Stewart Brand Recalls First 'Spacewar' Video Game Tournament*, Rolling Stone (May 25, 2016), https://www.rollingstone.com/culture/culture-news/stewart-brand-recalls-first-spacewar-video-game-tournament-187669/.
7. Nick Schwartz, *ESPN Embraces Esports, Broadcasts Dota 2 Championship 'The International,'* USA Today (July 21, 2014), https://ftw.usatoday.com/2014/07/espn-dota-2-international-esports.
8. Mariel Soto Reyes, *Esports Ecosystem Report 2021: The Key Industry Companies and Trends Growing the Esports Market Which Is on Track To Surpass $1.5B by 2023*, Business Insider (Jan. 5, 2021), https://www.businessinsider.com/esports-ecosystem-market-report.
9. Robert Capps, *How to Make Billions in E-Sports*, The New York Times Magazine (Feb. 18, 2020), https://www.nytimes.com/interactive/2020/02/18/magazine/esports-business.html. The article further quotes Miller as stating: "This weekend there were four Overwatch games. The average had something like 130,000 to 140,000 concurrent viewers on the English stream . . . there is the China stream, which is even bigger, and the French stream and the German stream," and comparing the Overwatch viewership to the NBA viewership which averages "20,000 to 40,000 household viewers in their local markets" by saying "That's one of my guys, you know, just [expletive] around on his streams at night." *Id.*
10. Hunter Amadeus Bayliss, *Not Just a Game: The Employment Status and Collective Bargaining Rights of Professional Esports Players*, 22 Wash. & Lee J Civ. Rts. & Soc. Just. 359, 363–64 (2016).
11. *Id*. at 364.
12. Maxwell Adams, Note, *Collective Bargaining Challenges in the Rise of Esports and Professional Video Gaming*, 53 Ind. Law Rev. 371, 381 (2020) (citing *eSports Joins the Big Leagues*, Goldman Sachs, https://www.goldmansachs.com/insights/pages/infographics/e-sports/).
13. *2020 Official Rules – NA LCS and NA LACS*, North American League of Legends Championship Series (Version 20.1, Jan. 17, 2020), https://nexus.leagueoflegends.com/wp-content/uploads/2020/01/2020-LCS-Rule-Set-v20.1_6bkbwz26cgp7fngeat6a.pdf [hereinafter LCS 2020 Official Rules].
14. Kelsey F. Ridenhour, *Traditional Sports and Esports: The Path to Collective Bargaining*, 105 Iowa Law Rev. 1857, 1881 (2020).
15. *But see* Andrew Keh, *E-Sports Embraces Traditional Training Methods: Less Pizza, More Yoga*, The New York Times (Apr. 2, 2019), https://www.nytimes.com/2019/04/02/sports/esports-league-of-legends.html?searchResultPosition=40 (describing the physical training methods and healthy eating choices that more closely reflect the training of traditional athletes that were adopted by Origen, a European League of Legends team, and the successful results).
16. Ridenhour, *supra* note 14, at 1880.
17. *Id.*; *supra* note 1.
18. Simon Hattenstone, *The Rise of eSports: Are Addiction and Corruption the Price of Its Success?*, Guardian (June 16, 2017), https://www.theguardian.com/sport/2017/jun/16/top-addiction-young-people-gaming-esports.
19. *Supra* note 1.
20. Hattenstone, *supra* note 18.
21. Arijeta Lajka, *Esports Players Burn Out Young as the Grind Takes Mental, Physical Toll*, CBS News (Dec. 21, 2018), https://www.cbsnews.com/news/esports-burnout-in-video-gaming-cbsn-originals/.
22. *Id.*
23. Capps, *supra* note 9.
24. Ridenhour, *supra* note 14, at 1869–74.
25. *See infra* Part III.
26. Douglas E. Rey, Calvin William Sharpe & Robert N. Strassfeld, Understanding Labor Law 10 (2d ed. 2005).
27. Nat'l Lab. Rel. Board, *National Labor Relations Act*, https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act.
28. Bruce S. Feldacker & Michael J. Hayes, Labor Guide to Labor Law 3 (5th ed. 2014).
29. George Blum, et al., *National Labor Relations Act (NLRA)–Purposes*, 48 AM. Jur. 2d Labor and Labor Relations § 2 (2019).
30. National Labor Relations Act, 29 U.S.C. § 153 (2019); Nat'l Lab. Rel. Board, *About NLRB*, https://www.nlrb.gov/about-nlrb.
31. Riddenhour, *supra* note 14, at 1862.
32. 29 U.S.C. § 152(2) (2019).
33. 29 U.S.C. § 152(5) (2019).
34. *Id.*; 29 U.S.C. § 158 (2019).
35. 29 U.S.C. § 152(3) (2019).
36. *N.L.R.B. v. Town & Country Elec., Inc.*, 516 U.S. 85, 94. (1995) (holding that eleven applicants that were not interviewed or retained because of their union membership were protected employees within the meaning of the NLRA, even though the applicants intended to help organize the company and be paid by the union for doing so).
37. *Id*.
38. *Cmty. for Creative Non-Violence v. Reid*, 490 U.S.730, 751 (1989) (holding that when an act does not fully define the term "employee," the Court must defer to the common law meaning of the word, and that the common law meaning of the word "employee" relies on the master's right to control, as opposed to the economic realities test).
39. *Id*. at 751–52.
40. 29 U.S.C. § 157 (2019).
41. *Id.*
42. *Id.* The NLRA authorizes an employer to make an agreement with a labor organization to require "as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement" subject to several conditions. 29 U.S.C. § 158(3) (2019).
43. 29 U.S.C. § 157 (2019).
44. 29 U.S.C. § 158(d) (2019).
45. *Id.*
46. 29 U.S.C. § 159(a) (2019).
47. *N.L.R.B. v. Sec.-Columbian Banknote Co., Div. of U.S. Banknote Corp.*, 541 F.2d 135, 140 (3d Cir. 1976) (examining whether employees that were moved to a new plant still shared a community of interest with employees at the old plant such that the new employees

could be represented by their previous shared collective bargaining agreement).

48. *N.L.R.B. v. Retail Clerks Loc. 588*, 587 F.2d 984, 987 (9th Cir. 1978) (finding that drug clerks that worked in the same building as a foodstore but had separate entrances, checkout counters, costs, payroll, management and merchandising, had a sufficient community of interest to be considered a separate bargaining unit and therefore represented by a separate union than the foodstore employees).
49. Nat'l Lab. Rel. Board, *Your Right To Form a Union*, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/your-right-to-form-a-union.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *History*, MLBPlayers.com, https://www.mlbplayers.com/history.
55. Glenn M. Wong, Essentials of Sports Law 2 (4th ed. 2010).
56. *Id.* at 456.
57. *Id.* at 466.
58. *Id.* at 4.
59. *Id.*
60. *Id.* at 15.
61. *Id.*
62. *Id.* at 4.
63. Ridenhour, *supra* note 14, at 1869.
64. Wong, *supra* note 54, at 585; Ryan T. Dryer, Comment, *Beyond the Box Score: A Look at the Collective Bargaining Agreements in Professional Sports and Their Effect on Competition*, 2008 J. Disp. Resol. 267, 271 (2008).
65. Erwin G. Krasnow & Herman M. Levy, *Unionization and Professional Sports*, 51 Geo. L. J. 749, 752 (1963).
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 752–53.
70. *Id.* at 753.
71. *Id.*
72. *Id.* (emphasis added).
73. *Id.* at 754.
74. MLBPlayers.com, *supra* note 54; Wong, *supra* note 55, at 534; Andrew Golden, *120 Years Ago, the American League Formed in Chicago With the White Sox as a Charter Member–Putting the Wheels in Motion for What Would Become MLB*, Chicago Tribune (Jan. 28, 2021), https://www.chicagotribune.com/sports/white-sox/ct-chicago-white-sox-american-league-otd-20210128-6ckmcfhx5beknf6b6fiv2jysce-story.html.
75. MLBPlayers.com, *supra* note 54.
76. Ridenhour, *supra* note 14, at 1870–71.
77. Zachary Moser, *The History of the MLBPA, Part One: The Rise of Sports' Strongest Union*, SB Nation: Beyond the Box Score (Feb. 16, 2017), https://www.beyondtheboxscore.com/2017/2/16/14151448/mlbpa-history-rise-curt-flood-bowie-kuhn-marvin-miller.
78. MLBPlayers.COM, *supra* note 53.
79. Ridenhour, *supra* note 14, at 1871.
80. MLBPlayers.com, *supra* note 53.
81. *Id.*
82. Ridenhour, *supra* note 14, at 1872.
83. NBPA.com, *About & History*, https://nbpa.com/about.
84. *Id.*
85. *Id.*; NBA President Walter Kennedy personally agreed "[m]inutes before gametime" and the game started "ten minutes late." *Id*.
86. NBPA.com, About & History: 1956, https://nflpa.com/about/history/1956-the-beginning.
87. NBPA.com, About & History: 1960s, https://nflpa.com/about/history/1960s-afl-vs-nfl.
88. *Id.*
89. Dryer, *supra* note 64, at 281.
90. Adams, *supra* note 12, at 382.
91. Lovaas, *supra* note 4, at 26.
92. *Id.*
93. *Id.*
94. Kevin Webb, *The Overwatch League Is Getting Its First Big Test as an International Esports Organization This Season and Investors Have Millions on the Line*, Business Insider (Mar. 4, 2020), https://www.businessinsider.com/overwatch-league-international-esports-investor-owner-team-value-breakdown-2020-3.
95. Ridenhour, *supra* note 14, at 382–83.
96. *Who We Are: Marc Merrill*, Riot Games, https://www.riotgames.com/en/who-we-are/riot-games-leadership/marc-merrill; David Segal, *Behind League of Legends, E-Sports's Main Attraction*, The New York Times (Oct. 10, 2014), https://www.nytimes.com/2014/10/12/technology/riot-games-league-of-legends-main-attraction-esports.html.
97. Segal, *supra* note 96.
98. Noah Smith, *LCS Projects a Profitable 2021 Season, Despite Navigating Covid-19 Crisis*, The Washington Post (June 19, 2020), https://www.washingtonpost.com/video-games/esports/2020/06/19/lcs-projects-profitable-2021-season-despite-navigating-covid-19-crisis/.
99. *Id.*
100. Adams, *supra* note 12, at 371 (citing to Youngbo "Roxyy" Sim & David "Viion" Jang, *Fenix Speaks of the Behind Stories on the Release from Echo Fox: "They Just Suddenly Released Me.,"* Invenglobal (Aug. 10, 2018), https://www.invenglobal.com/articles/5916/fenix-speaks-of-the-behind-stories-on-the-release-from-echo-fox-they-just-suddenly-released-me).
101. *Id.*
102. *Id.*
103. *See supra* p. 10–11.
104. FaZe Clan, LinkedIn, https://www.linkedin.com/company/faze-clan/about/; Complaint, *Tenney v. FaZe Clan Inc.*, (Super. Ct. of Cal., Cty. Of L.A., 2019) (19STCV17341), https://www.foley.com/en/insights/publications/2019/06/-/media/ae331ba2932049e896a06c2e8bbc187a.ashx [hereinafter Complaint].
105. Complaint, at 3.
106. *Id.*
107. *FaZe Clan Inc. v. Tenney*, 467 F.Supp.3d 180, 184 (S.D.N.Y. 2020).
108. *Id.*
109. Julie Alexander, *Tfue Settles Lawsuit Against Faze Clan Over 'Oppresive' Gaming Contract*, The Verge (Aug. 26, 2020), https://www.theverge.com/2020/8/26/21403052/tfue-faze-clan-lawsuit-settled-streaming-events-competition-esports.
110. Ridenhour, *supra* note 14, at 1883 (citing to Jordan Ashley, *TSM Myth Calls for Unionization After Fortnite Backlash*, Esports.net (Jan. 29, 2019), https://www.esports.net/news/fortnite/tsm-myth-unionization-fortnite-backlash/).

111. Ashley, *supra* note 110.

112. 29 USC § 152(3) (2019) ("The term 'employee' shall . . . not include . . . any individual having the status of an independent contractor").

113. *N.L.R.B. v. Town & Country Elec., Inc.*, 516 U.S. 85, 94. (1995).

114. *Cmty. for Creative Non-Violence v. Reid*, 490 U.S.730, 751–52 (1989).

115. LCS 2020 Official Rules, *supra* note 13; *Summary of Official Rules and Code of Conduct: 2020 Season*, Overwatch League, https://bnetcmsus-a.akamaihd.net/cms/page_media/wg/WG2YO9KJ0I5I1587056527743.pdf [hereinafter Overwatch 2020 Official Rules].

116. Overwatch 2020 Official Rules, *supra* note 114, at 5.16(b).

117. Id., at 3.5.

118. LCS 2020 Official Rules, *supra* note 13, at 3.10.

119. Id., at 2.6

120. *N.L.R.B. v. Town & Country Elec., Inc.*, 516 U.S. 85, 94. (1995).

121. Adams, *supra* note 12, at 391.

122. LCS 2020 Official Rules, *supra* note 13, at 6.2; Overwatch 2020 Official Rules, *supra* note 114, at 5.10(a), (b).

123. Segal, *supra* note 96; Smith, *supra* note 98.

124. Overwatch 2020 Official Rules, *supra* note 115, at 2.2(d).

125. Adams, *supra* note 12, at 392.

126. LCS 2020 Official Rules, *supra* note 13, at 15.1.

127. Timothy Heggem, *It's Complicated: Analyzing the Potential for Esports Players' Unions*, 6 Ariz. St. U. Sports & Ent. L.J. 447, 454 (2017).

128. Nat'l Lab. Rel. Board, *Basic Guide to the National Labor Relations Act: General Principles of the Law Under the Statute and Procedures of the National Labor Relations Board*, at 12 (1997), https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf.

129. *Id.*, at 13.

130. *Id.*

131. *Id.*

132. FaZe Clan, LinkedIn, *supra* note 104.

133. *Id.*

134. Heggem, *supra* note 127, at 454–55.

135. Nw. Univ., 362 NLRB 1350, 1353–54 (2015) (examining whether scholarship athletes at Northwestern would be able to form a bargaining unit).

136. *Id.* at 1354.

137. *Id.*

138. Ridenhour, *supra* note 14, at 1888.

139. The Kraft Group, *Sports + Entertainment*, https://www.thekraftgroup.com/sports-entertainment/.

140. NFLPA, Collective Bargaining Agreement (Mar. 15, 2020),https://nflpaweb.blob.core.windows.net/website/PDFs/CBA/March-15-2020-NFL-NFLPA-Collective-Bargaining-Agreement-Final-Executed-Copy.pdf; MLSPA, 2020-2024 Collective Bargaining Agreement https://mlsplayers.org/2020-cba.

141. *See also Jerry Reinsdorf*, Forbes, https://www.forbes.com/profile/jerry-reinsdorf/?sh=1fb3bfc16d28 (Jerry Reinsdorf owns both the Chicago White Sox and the Chicago Bulls); *Here's How the Knicks And Rangers Could Be Worth Over $7 Billion After MSG Spinoff*, Forbes, https://www.forbes.com/sites/mikeozanian/2019/11/08/heres-the-bet-on-how-knicks-and-rangers-could-be-worth-7-billion/?sh=7065310056a1 (Madison Square Garden Network owns both the New York Knicks and the New York Rangers, as well as Counter Logic Gaming, which has players on from several leagues); *Stanley Kroenke*, Forbes, https://www.forbes.com/profile/stanley-kroenke/?sh=19b6dc8c742c (Stanley Kroenke owns the Los Angeles Rams, the Denver Nuggets, the Colorado Avalanche, and the Colorado Rapids, as well as the OWL's Los Angeles Gladiators).

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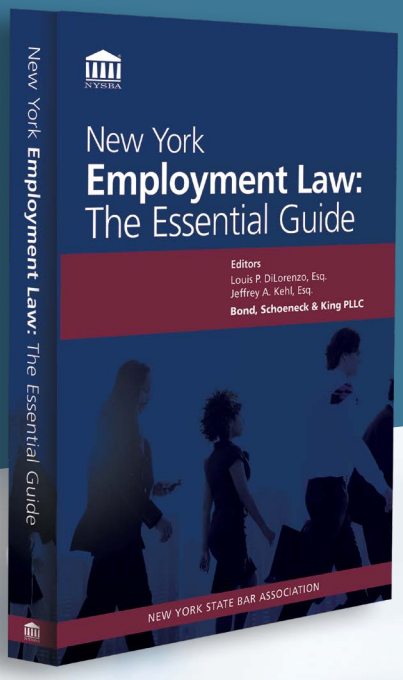

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