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Labor and Employment Law Journal

A publication of the Labor and Employment Law Section of the New York State Bar Association

Winners of the Stein Memorial Law Student Writing Competition

Brian Flores Takes Aim at the Rooney Rule, Part II: What an Effective Corporate DEI Initiative Looks Like

Anti-Discrimination Laws and Remote Workers in New York and New Jersey

Congratulations to the Co-Winners of the Samuel M. Kaynard Memorial Student Service Awards

Seth Goldstein

Seth Goldstein is a third-year law student at St. John's University School of Law. During his time in law school, Seth has served as a staff member of the *St. John's Law Review*, where his note, "Rigid Rideshares and the Driver Flexibility Myth," will be published in a forthcoming edition. Additionally, he is the President of the Labor Relations and Employment Law Society, is a Research Assistant to Professor Miriam Cherry, and is a Teaching Assistant and tutor for many courses, including Legal Writing and Analysis, Intro to U.S. Law and Legal Systems, and Applied Legal Analysis. Seth is additionally a pro bono scholar with the St. John's Child Advocacy Center. Prior to law school, Seth attended the Cornell University School of Industrial Relations and then worked for six years in health care software, including both a domestic placement and a three-year placement in Singapore. After graduating from law school this summer, he will join the New York office of Skadden, Arps, Slate, Meager, & Flom LLP.

Astrid M. Aune

Astrid M. Aune is a third-year law student in the evening program at the CUNY School of Law. Prior to law school, she earned a bachelor's in global studies at New York University and a master's in social policy from the London School of Economics and Political Science. Astrid serves as the Deputy Chief of Staff for State Senator Jessica Ramos, who represents neighborhoods in central and western Queens, and chairs the Senate Committee on Labor. In her nearly three years working for Senator Ramos, Astrid has worked on legislation to raise and index the minimum wage, codify salary transparency in job descriptions, protect workers and whistleblowers from retaliation, and protect warehouse workers from dangerous and predatory surveillance. She is a founding member of the organizing committee of the New York State Legislative Workers United, who are organizing state legislative staff toward their first collective bargaining agreement.

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Message From the Outgoing Chair

As my nieces and nephews graduate from college and join the workforce, they have questions for me: Are my bosses allowed to read my social media posts? Will I get paid time off for religious holidays? What happens if I get sick? They know that I am always available to answer because, in addition to being an employment lawyer, I am an awesome aunt.

My nieces' and nephews' questions inspired me to focus on educational programming during my term as Chair of the NYSBA Labor and Employment Law Section.

Like most of you, I had long enjoyed the Section's Fall Meeting and Annual Meeting programs both for networking and as a resource to learn about new workplace laws and prepare for what's next. Over the past year, labor and employment laws at the federal, state and local levels have changed at a fast and furious pace, giving us many topics to explore.

At our 2023 Fall Meeting and 2024 Annual Meeting, the Section was honored to present influential speakers who provided a look "behind the scenes" at emerging laws and enforcement priorities. National Labor Relations Board (NLRB) General Counsel Jennifer Abruzzo, NLRB Regional Director Teresa Poor, New York State Senator Jessica Ramos, and New York State Department of Labor Deputy General Counsel and Associate Commissioner Bridget Holohan Scally were among the featured speakers at our Annual Meeting program in 2024. Associate Justice Tanya R. Kennedy, EEOC Commissioner Keith E. Sonderling, NLRB Regional Director Linda M. Leslie, and NLRB Regional Attorney Jessica L. Cacaccio shared their insights at our Fall Meeting program in 2023.

We had more to share than we could fit into those two meetings. So, we expanded our Section programming to add webinars on hot topics and emerging issues. I am proud to report that the Section organized and presented webinars on bias audits and AI in employment law, free speech in the workplace, late wage payment claims in New York, and understanding body size discrimination in New York City. More webinars are in the works. If you missed any of our webinars, they are available on demand through the NYSBA website.

Meanwhile, we renewed our focus on developing future leaders of the Section. At the Annual Meeting, we recognized two law students with the Samuel M. Kaynard Memorial Student Service Awards for their extraordinary accomplishments in the labor and employment law field. We recognized three law students as winners of the Dr. Emanuel Stein and Kenneth Stein Memorial Law Student Writing Competition for excellent writing in the area of labor and employment law. We welcomed our Section fellow at the Section's Fall and Annual Meetings. Our members served as judges at moot court events such as the New York Law School's Robert F. Wagner National Labor and Employment Law Moot Court Competition. And, on June 13, a panel of labor and employment law attorneys will share what they love, or don't, about their field in an informational webinar and virtual networking event called "So You Want To Be a Labor and Employment Lawyer: What This Attorney Does."

If you have heard me speak at any of our events or webinars, you will have heard me say that our Section members represent unions, management, employers, and employees. We are partners, associates, in-house counsel, solo practitioners, mediators and arbitrators. We are in all stages of our careers. This mix provides our members with opportunities to grow their professional network and connections.

You will also have heard me say that while our members may be adversaries in the courtroom or at the negotiating table, those of us who have worked together on Section programs and committees have become colleagues, mentors, supporters, and friends. I am proud of that fact and, on a personal note, grateful. When I was figuring out next steps in my career path, friends in the Section graciously shared their own experiences and connections. When I have questions about laws outside my practice areas, colleagues in the Section graciously share their expertise.

Finally, you will have heard me say that, through our committees, programs, journal, and events, the Labor and Employment Law Section offers many opportunities to speak, write, plan programs and network. We invite you to get involved and look forward to welcoming you.

It has been my honor to serve as Section Chair this past year. Thank you to the section's Nominating Committee, Executive Committee and Section members for giving me this opportunity. Thank you to the Section's Executive Committee, Continuing Legal Education Committee, standing committees, and speakers, for your work on the Section's programs, webinars,

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Message From the Incoming Chair

Dear Members,

Engagement. If the foremost focus of our NYSBA Labor and Employment Section needs to be identified at this critical juncture in the history of our Section and beyond, engagement is it. In broadest terms, we in Section and Association leadership need to engage you individually and collectively, as you do with us, to ensure you find your membership meaningful. There are many paths already defined, and openness to forging new paths, for doing so.

At a time of increased polarization, retreat to echo chambers, and even isolation, our Section remains a haven for sometimes challenging, but always collegial and often fun, exchanges of viewpoints across the full breadth of our New York's L&E community. Our members are not only outside counsel to employers or workers individually or collectively. They include those working in government, unions, and corporations, as well as judges, neutrals, academics, and non-practicing attorneys. We differ in our roles, geographic locations, backgrounds, and perspectives. Where we align is our commitment to engage with each other for mutual benefit.

If any segment of our profession should be adept at such engagement, it is our L&E community. What becomes a flashpoint or otherwise important in society often surfaces earliest in the workplace. As a result, we're among the attorneys with the most current and deep experience navigating these issues, including with a keen understanding of the practical impacts within the work sphere where so much time, identity, and reliance for economic sustenance are invested.

The paths to engagement our Section have already defined include our many live and remote substantive and networking programs, this journal, and listserves and social media devoted to the sharing of substantive and career-development information. Simply observing these can be a meaningful form of engagement. But often the most meaningful and enjoyable form of engagement is more active. Show up and interact. For example, our Fall and Annual Meetings are reliably informative and fun opportunities for live interaction. Volunteer to speak or write for the Section. Share substantive topics, networking opportunities, and other ideas that may best be pursued through one of the already defined paths or paths we've not yet pursued or even identified. Suggest those new paths. All of this will certainly be a Section focus during my tenure as Chair from this June through next May, as it has been and will continue to be for all Section leaders and other members who have already been actively engaging with each other, including our excellent ougoing Section Chair Sheryl Galler and next Chair-Elect Abigail Levy.

Please join us in working together actively to improve our L&E community, workplaces, and society while supporting each other and having fun in the process!

Loren Gesinsky

Message From the Outgoing Chair (cont'd)

awards, events and journal. Last, but certainly not least, thank you to our NYSBA liaison, Emily Kurtzner, for taking care of the million and one details that make our Section a success.

The Labor and Employment Law Section was my first home at NYSBA, and I hope to continue as an active member for many years. I am confident that if any of my nieces or nephews were to follow me into the field of labor and employment law, the Section would welcome them as it welcomed me!

Warm regards,

Sheryl

Sheryl B. Galler is Outgoing Chair of NYSBA's Labor and Employment Law Section and Immediate Past Chair of NYSBA's Women in Law Section. She has been a member of NYSBA since 1994 and is a partner at Book Law LLP in New York City.

Loren Gesinsky is Incoming Chair of NYSBA's Labor and Employment Law Section and co-chair of the Section's Equal Employment Opportunity Law Committee. He is a partner at Seyfarth Shaw LLP in New York City.

Beyond the Ban: One Major Challenge Facing the FTC Non-Compete Rule

By Brendan Mohan

FIRST PLACE WINNER

Dr. Emanuel Stein and Kenneth Stein Memorial Law Student Writing Competition

On July 9, 2021, President Biden issued Executive Order 14036 on Promoting Competition in the American Economy, a directive aimed at fostering fair competition and dismantling barriers that hinder market competition.[1] Within the Order, the president urged the Federal Trade Commission (FTC) to curtail the use of non-compete clauses that may unfairly limit worker mobility.[2] While the Executive Order's issuance was unsurprising, it sparked numerous questions about the future landscape of non-compete agreements.[3] The FTC had a range of regulation options to fulfill the objectives laid out in the Executive Order.[4] Yet, on January 5, 2023, nearly a year and a half later, the FTC took a significant step by submitting a notice of proposed rulemaking to prohibit and outright ban the use of non-compete agreements.[5] The Non-Compete Clause Rule (NPRM) would introduce a new subchapter in the Code of Federal Regulation (CFR) that would prevent employers from entering into non-compete clauses with workers and require the rescission of existing non-compete agreements.[6] The proposed rule sparked immediate backlash.[7] Should it go into effect in its current form, the rule would significantly alter the landscape of employment and non-compete agreements.

The FTC argues that there are significant benefits to enacting the NPRM. The agency estimates that the ban would increase workers' earnings between $250 billion and $296 billion annually and impact millions of employers and employees,[8] as it would apply to independent contractors and anyone who works for an employer, paid or unpaid.[9] The FTC chair and two commissioners further argue that the rule would help to double the number of companies founded by former workers in the same industry and close the racial and gender wage gaps by 3.6-9.1%.[10] Finally, amidst rising inflation costs with a significant impact on consumers, the FTC chair and two commissioners contend that the proposed rule would potentially decrease consumer health care prices by roughly $150 billion a year.[11] The response to the NPRM has been divisive and extensive, with the FTC having to extend the public comment period and push back its vote on the rule until 2024 after receiving over 27,000 public comments.[12] If enacted in its proposed form, the rule would impact almost every industry in the United States.[13]

The FTC relies on § § 5 and 6(g) of the FTC Act, along with limited case law, to establish its legal authority for implementing the NPRM.[14] Section 5 of the FTC Act directs the Commission "to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce."[15] Section 6(g) authorizes the Commission to "make rules and regulations for the purpose of carrying out the provisions of" the FTC Act, including the Act's prohibition on unfair methods of competition.[16] Taking § § 5 and 6 together, the FTC argues that the two sections provide it with the authority to issue regulations declaring practices to be unfair methods of competition.[17] The agency cites previous U.S. Supreme Court decisions that allow § 5 to reach conduct that, while not prohibited by the Sherman or Clayton Acts, violates the spirit or policies underlying those statutes.[18] This precedent, the FTC argues, coupled with its determination that non-compete agreements are an unfair method of competition, allows the agency to regulate and outright ban non-compete agreements.[19]

There are several legal challenges along the agency's path to banning non-compete agreements.[20] At a time when the FTC is seeking to expand its administrative agency power under Article 5, the Supreme Court has taken a contrasting approach by actively eroding administrative agency power and delegated authority.[21] In the 2022 landmark Supreme Court case *West Virginia v. EPA*, the majority opined for the first time the major questions doctrine, holding that Congress must provide clear direction to the EPA agency rather than a broad delegation of power for the agency to regulate greenhouse gas emissions.[22] The major questions doctrine asserts that courts should not defer to agencies on matters of "vast economic or political significance" unless the U.S. Congress has explicitly given the agencies the authority to act in those situations.[23] The recent opinion in *Biden v. Nebraska* further expanded the major questions doctrine. In *Nebraska*, the Court ruled against President Biden's student loan forgiveness program, concluding that "the basic and consequential tradeoffs inherent in a mass debt cancellation program are ones that Congress would likely have intended for itself."[24] Most significant in the *Nebraska* case was Justice Barrett's concurrence, which defended the application of the major questions doctrine and further fleshed out guidelines for its use.[25]

Another challenge to the NPRM is the potential overturning of *Chevron* deference. *Chevron* holds that when a court reviews an agency's construction of the statute that it administers, it must first ask whether Congress has directly spoken to the precise question at issue.[26] If it has not, then courts proceed to step two and ask whether the agency's interpretation of the statute is reasonable.[27] The FTC is interpreting the power to ban non-competes from § § 5 and 6 of the FTC Act, meaning that the FTC's interpretation would fall directly under a *Chevron* deference analysis. The Supreme Court is set to rule in the coming term on whether it should overrule *Chevron* deference in *Loper Bright Enterprises v. Raimondo*.[28] No doubt the outcome in *Loper Bright* will have a significant impact on how a court analyzes the non-compete ban.

If passed in its current form, the NPRM is likely to be challenged and reach the Supreme Court.[29] Various challenges can be raised against the proposed rule,[30] but based on recent precedent and the Court's emphasis on placing restrictions on administrative agency power, the most likely challenge to the rule will arise through the major questions doctrine. This article is thus divided into three parts. Part I provides an overview of the proposed rule, § 5 and § 6(g) of the FTC Act, and the FTC's defense of the rule. Part II examines the evolution and growing prominence of the major questions doctrine and the history of non-compete agreements. In Part III, this article applies the major questions doctrine to the proposed rule in a manner consistent with recent Supreme Court decisions and ends by discussing the implications that the NPRM has on labor and employment law. If the proposed rule were to pass as currently written and subsequently face a challenge in the Supreme Court, the FTC's non-compete rule would likely not only be struck down and rejected but could also have far-reaching implications for future regulations of the FTC, the Department of Labor, and other administrative agencies. If the rule goes unchallenged, it will eliminate non-compete clauses from employment agreements. Either path would fundamentally alter not only the current landscape of labor and employment law but also how administrative agencies function and regulate our society.

I. The Proposed Non-Compete Clause Rule

The FTC's non-compete rule proposes to add a new subchapter consisting of five sections under Title 16 of the Code of Federal Regulations.[31] The five sections set out the definitions for the subchapter, the non-compete ban, exceptions to the ban, the ban's relation to state laws, and the compliance date.[32]

The non-compete ban is found under the proposed § 910.2, and states that:

> It is an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe that the worker is subject to an enforceable non-compete clause.

The same section also requires an employer that entered a non-compete clause with a worker to rescind the non-compete clause no later than the specified compliance date, effectively establishing a retroactive non-compete ban.[33] The employer must then provide notice to the employee that the non-compete clause is no longer in effect and that it may not be enforced against the worker.[34]

There is, however, a limited sale-of-business exception that exists within the NPRM. Section 910.3 provides that the ban does not apply to non-competes entered between the seller and buyer of a business and is only available where the party restricted by the non-compete clause is a substantial owner of, or substantial member or substantial partner in, the business entity at the time the person enters into the non-compete clause.[35] The proposed rule is seeking public comment as to whether franchisees should be covered by the rule and whether senior executives should be exempted from the rule, or subject to a rebuttable presumption rather than a ban.[36] Despite the potential exemptions for senior executives and franchisees, the proposed rule's exemption remains narrow.

The fourth section, § 910.4, includes an express preemption provision of conflicting state law. Specifically, it holds that § 910 shall supersede any state statute, regulation, order, or interpretation to the extent that it is inconsistent with § 910.[37] But the preemption clause only preempts state laws that afford weaker protections against non-competes, not greater protections. Hence, a state law permitting non-compete agreements when the terms are tailored to a legitimate business interest and are reasonably limited would conflict and be subject to preemption. A state law that categorically prohibits all non-competes without exemptions would not conflict and would not be subject to the express preemption provision.[38]

The final section of the proposed rule establishes both an effective date and a compliance date.[39] According to § 910.5, the effective date of the rule would be 60 days after the final rule is published in the *Federal Register*, while the compliance date would be set 180 days after the final rule is published in the *Register*.[40] To adhere to the proposed rule an employer would need to revoke any non-compete clauses that it entered into before the compliance date.[41] Accordingly, during the compliance period and before the compliance date, an employer would need to assess whether to implement replacements for their existing non-compete clauses, draft the replacements, and then negotiate and enter into those replacements with the relevant employees.[42] Employers are also required during the compliance period to remove any non-compete clauses from employment contracts that they provide new workers to avoid entering into future non-compete agreements with employees.[43]

As noted, the FTC is basing its power to propose the non-compete rule on § § 5 and 6(g) of the FTC Act.[44] The FTC Act is the primary statute of the Commission and is where Congress sets out the FTC's powers, responsibilities, and limitations.[45] The FTC Act has its origins around the Sherman Antitrust Act, the Clayton Antitrust Act, and the strong anti-trust movement in the early 1900s.[46] When Congress passed the FTC Act, the focus of the FTC was to enforce both consumer protection and antitrust laws.[47] Section 5 of the Act declares "unfair methods of competition" illegal, and empowers the FTC to prevent persons, partnerships, or corporations from using unfair methods of competition in a manner that affects commerce.[48] Section 6(g) of the Act authorizes the FTC to "make rules and regulations for the purpose of carrying out the provisions of" the FTC Act, including the Act's prohibition of unfair methods of competition.[49]

Section 5 of the FTC Act was heavily debated, edited, and analyzed throughout its creation and subsequent passage.[50] The FTC Act was proposed at a time when the Sherman Act was failing to limit monopolies and protect consumers and was thus enacted to fix these worsening issues.[51] Section 5 became the focus of the debate on the bill and drew varying responses from senators.[52] Opponents of § 5 criticized the broad discretion they understood the statute to convey and distrusted the proposed agency that the Act would create.[53] Supporters of § 5 liked that it established a new agency with prosecutorial capabilities that could fill the void of addressing anticompetitive acts when the Department of Justice fell short.[54] Issues also surrounded what "unfair competition" was meant to entail, as opponents charged that § 5 was so vague it unconstitutionally delegated legislative authority.[55] Although not ultimately defined in the bill, the sponsors argued that "unfair competition" was a competition by which firms grew for reasons other than efficiency, and referenced a recent article at the time that stated, "fair competition in an economic sense signifies a competition of economic or productive efficiency."[56] On August 5, 1914, the Senate passed the Commission bill.[57] In regards to § 5, the House and Senate versions of the Commission bill differed little.[58] Ultimately, the FTC Act passed the Senate 43-5 and passed the House without a recorded vote, becoming law on September 26, 1914.[59]

The FTC is relying on § § 5 and 6(g) to pass the proposed rule, arguing that it is a violation of § 5 for an employer to engage in certain actions related to non-compete clauses.[60] Extensive debate surrounds two aspects of the rule: (1) whether non-competes are unfair methods of competition, and (2) whether Congress intended for the FTC to use § § 5 and 6(g) in such a broad and decisive manner.[61] Opponents of the proposed rule contend that it should also be set aside by a court, as the rule is arbitrary and capricious under the Administrative Procedures Act (APA).[62] For this article, the focus will primarily be on the Congressional intent of § § 5 and 6(g) under the proposed rule, as this will be the focus under a major questions doctrine analysis.

When the FTC issued a notice of proposed rulemaking and opened it for public comment, it included materials to defend and inform the public about the proposed rule.[63] This included a "Legal Authority" section under the NPRM, where the FTC laid out its claims and arguments in favor of the broad scope and usage of § § 5 and 6.[64] The FTC argues that taken together, § § 5 and 6(g) provide the Commission with the authority to issue regulations declaring practices to be unfair methods of competition.[65] It goes on the argue that courts have consistently clarified that § 5 of the FTC Act prohibits unfair methods of competition, which includes practices violating both the Sherman and Clayton Acts, and that the scope of § 5 extends beyond the specific conduct prohibited by these acts or common law.[66] The rule encompasses incipient violations, referring to conduct that, if left unchecked, would likely develop into antitrust violations in the future.[67] Finally, the FTC argues that conduct violating the spirit or policies underlying the Sherman or Clayton Acts, although these statutes do not prohibit it, falls within the reach of § 5.[68]

Following the FTC's proposed rule, the general counsel of the National Labor Relations Board (NLRB) issued a memo discussing her view that most non-competes and non-solicitation agreements unlawfully interfere with employees' protected rights under the National Labor Relations Act (NLRA).[69] The memo also contained guidance that directs field investigators to look for and refer non-competes that may violate the NLRA to NLRB headquarters for review and possible prosecution.[70] However, the NLRB's position differs from the FTC's proposed rule in two major ways. First, the memo states that the NLRB will only focus on "overbroad non-compete provisions [that] are imposed on low-wage or middle-wage workers who lack access to trade secrets or other protectible interests."[71] This is significantly different than a complete ban on non-competes. Second, the memo only contains guidance, and the NLRB has yet to issue a rule or decision banning non-competes.[72] Even if the NLRB issued a rule against non-competes, it is unlikely that it would go as far as the FTC and enact a rule completely banning non-compete agreements. The legality of a hypothetical NLRB rule against non-competes is well beyond the scope of this article.[73]

II. History of the Major Questions Doctrine and Non-Compete Agreements

The major questions doctrine is a novel, expanding theory that courts are using to limit federal agency power, and is similar in nature to the nondelegation doctrine.[74] Under the major questions doctrine, the Supreme Court has rejected agency claims of regulatory authority when 1) the underlying claim of authority concerns an issue of "vast 'economic and political significance,'" and 2) Congress has not empowered the agency with authority over the issue. Before the emergence of the doctrine, courts gave significant deference and trust to administrative agencies under *Chevron* and similar precedents.[75] However, in recent years, both the courts' and Americans' trust in administrative agencies has rapidly diminished.[76] The eroding of society's trust is the main motivator that is prompting courts to curtail agencies' authority under the major questions doctrine.

A. The History of the Major Questions Doctrine

The origins of the major questions doctrine can be traced back to the 1994 decision in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co*,[77] and a decision six years later in *FDA v. Brown & Williamson*.[78] In the MCI decision, the Court emphasized that Congress was unlikely to intend agency discretion in determining industry regulation, stressing that such significant determinations should be made by Congress rather than delegated to agencies.[79] In *FDA v. Brown & Williamson*, the Court upheld its previous decision in *MCI* when it found that it was highly unlikely that Congress intended to delegate a decision of such economic and political importance to an administrative agency[80] and that Congress had already previously addressed the matter.[81]

After the decision in *Brown & Williamson*, the issues of delegation fell dormant until the Supreme Court decision 14 years later in *Utility Air Regulatory Group v. Environmental Protection Agency*.[82] In the *Utility Air* decision, the Supreme Court ruled that agency claims of regulatory authority should be rejected when the underlying claim of authority concerns an issue of "vast 'economic and political significance,'" and where Congress has not clearly empowered the agency with authority over the issue.[83] The decisions in *Utility Air* helped set the groundwork for the creation of the major questions doctrine and its rise to the majority rule in agency law. A few years later, in the landmark case of *West Virginia v. EPA*, the Supreme Court for the first time opined a majority opinion that embraced and referenced the major questions doctrine.[84] The Court directly referenced its decision in *Utility Air*, finding that "courts expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."[85] The agency instead must point to "clear congressional authorization" for the power it claims."[86] The *West Virginia* decision established the major questions doctrine as the primary tool for the Supreme Court to restrict agency power on significant political and economic issues wherever it deems necessary.

A case that is similar to the FTC non-compete rule is the *National Federation of Independent Business v. Occupational Safety and Health Administration (NFIB)*.[87] *NFIB* dealt with the issue of whether Congress delegated statutory authority through the OSHA Act to the secretary of labor to enact a national COVID-19 vaccine mandate.[88] Although not mentioned directly in the majority opinion, the major questions doctrine was heavily discussed in the concurring opinion.[89] Justice Gorsuch concluded that the vaccine mandate represented a claim of power to address a matter of vast national significance, as it affected the vaccination status of 84 million Americans.[90] In his concurring opinion, Gorsuch underscored the historical practice of regulating such matters at the state level, where governmental authorities possess broader and more general powers, rather than relying on federal agencies to do so.[91] Gorsuch finished his opinion noting that the purpose of the major questions doctrine was to guard against the possibility of an agency seeking to assume responsibilities far beyond its initial assignment and that the doctrine is "a vital check on expansive and aggressive assertions of executive authority."[92]

After the decision in *West Virginia*, lower courts were left struggling with how to properly apply the doctrine. The case *Biden v. Nebraska*, and Justice Barrett's concurrence, helped to better flesh out standards for the new rule.[93] The concurring opinion discussed the ongoing debate about the doctrine's source and status.[94] First, Justice Barrett worked to differentiate the major questions doctrine from substantive canons.[95] The major questions doctrine, according to Justice Barrett, is not "a strong-form substantive canon" but rather serves as "an interpretive tool reflecting common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."[96] Justice Barrett also stressed the significance of common sense and context throughout her opinion, specifically when applying the major questions doctrine and interpreting the scope of delegation.[97] Finally, the concurrence highlights two important considerations relevant to the NPRM when analyzing delegation under the doctrine. The first is the mismatch between broad invocations of power by agencies and relatively narrow statutes that purport to delegate that power.[98] The second relative consideration under the doctrine is when an agency claims to discover in a statute an unheralded and innovative power to regulate "a significant portion" of the American economy.[99] In reaching her conclusion against the student loan forgiveness in *Biden*, Justice Barrett found that "[c]ommon sense tells us that as more indicators from our previous major questions cases are present, the less likely it is that Congress would have delegated the power to the agency without saying so more clearly."[100]

B. History of Non-Compete Agreements

The history of non-compete agreements can be traced back to the early 15th century, yet the modern framework for non-competes in both the United States and England is centered on the 1711 decision in *Mitchel v Reynolds*.[101] In *Mitchel*, Chief Justice Parker of the Queen's Bench noted that there was a presumption that all restraints of trade are invalid, but that this presumption may be overcome by demonstrating that the restraint is valuable consideration on a reasonable and useful contract.[102] This decision fundamentally changed how the courts analyzed non-competes, and for the first time, distinguished between "contracts in restraint of trade generally," which at the time were considered void, and those "limited as to time or place or persons," which "have been regarded as valid and duly enforced."[103] The *Mitchel* decision played a pivotal role in shaping and defining the 19th-century English and United States courts' perspective on non-compete issues.[104]

Since the early 19th century, non-compete agreements have fallen under the purview of state regulation, allowing each state to craft policy decisions that align with the needs of their citizens and economies.[105] One of the first modern Supreme Court decisions on the issue, *Oregon Steam Navigation Company v. Winsor*, upheld a covenant, given in connection with the sale of a steamship, not to compete in the state of California.[106] The Court noted that "[i]t is a well-settled rule of law that an agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable and there be a consideration to support it."[107] The *Winsor* decision solidified the reasonableness standard followed by a number of states today.

State non-compete laws have continued to evolve, but recently there has been a significant push by states to re-evaluate their non-compete agreement laws.[108] In recent years, 37 states have reassessed their non-compete laws, with 24 of them implementing changes in their laws.[109] In 2021 alone, 66 non-compete bills were pending in 25 states.[110] Four states have now banned non-compete agreements entirely, and many other states have enacted restrictions, such as setting a compensation threshold or requiring advance notice.[111] The New York Legislature recently passed a bill that would ban non-compete agreements, but the governor has yet to sign the bill into law.[112] The varying state laws on non-compete agreements have left employers dealing with a patchwork of state-level requirements, creating challenges for companies operating across states with different laws.

The recent storm of states reconsidering their non-compete agreement laws has led to increased federal attention on the subject. In 2015, a surge of federal legislative activity emerged around the topic of non-compete agreements.[113] The first bill to be brought forward, the MOVE Act, sought to prohibit the use of non-competes for low-wage employees.[114] That same year, two more federal bills were introduced with objectives similar to the MOVE Act, yet none of the trio managed to reach the floor.[115] A year later the Obama administration issued two reports investigating the use and impacts of non-compete agreements.[116] This again set off a push for federal regulation, with both sides of the political aisle looking to pass legislation to ban or severely limit non-compete agreements.[117] The FTC became involved after certain members of Congress publicly urged the agency to examine the appropriateness of regulating non-competes.[118] After the 2020 election, President Biden announced his plan to eliminate non-compete clauses and no-poaching agreements that hinder the ability of employees to seek higher wages, better benefits, and working conditions by changing employers.[119] This plan led to Executive Order 14036, the basis for which the FTC issued its non-compete ban. Although historically regulated by individual states, non-compete agreements have recently become the focus of concerted efforts by the federal government to regulate them to the greatest extent possible.

III. The Major Questions Doctrine and Non-Compete Ban

In her dissenting statement on the NPRM, Commissioner Wilson highlighted three legal challenges that the proposed rule would likely face and fail under.[120] Two of the three challenges deal with the major questions doctrine and delegated authority.[121] Commissioner Wilson's dissent, coupled with the recent trend that the Supreme Court has taken in administrative authority cases, underscores the likelihood that the Court would analyze a challenge to the ban under the major questions doctrine. It is crucial to acknowledge that the FTC retains the ability to review and amend the rule based on feedback and additional analysis before ultimately issuing a final rule. Thus, this article will focus on a major questions analysis of the current proposed rule, but its applicability could be limited depending on the final rule.

A. Issue of Vast Economic and Political Significance

Under the current proposed FTC non-compete rule, it is extremely likely that the Court would find that the underlying claim of authority concerns an issue of vast economic significance. The FTC has continued to market the rule as beneficial for the economy and tens of millions of Americans. Yet, the FTC's promotion and marketing of the ban as economically beneficial undermines the agency's position in a major questions doctrine analysis. Similar to the student loan forgiveness program, the proposed non-compete rule, according to the FTC, is projected to impact millions of Americans;[122] create an estimated economic impact of hundreds of billions of dollars;[123] and interfere with the laws surrounding non-compete agreements, which have historically been a particular domain of state law.[124] The government's continual promotion of these facts will no doubt be used against the FTC for the first prong of the major questions doctrine should the ban be challenged.[125]

The rule likely would be found to be politically significant as well, because it would have deep impacts on an area of law that is typically an issue left to be decided by the states.[126] Justice Gorsuch's concurring opinion in *NFIB* highlights the majority's view that such particular domains of state law should be regulated at the state level, where governmental authorities possess broader and more general powers, rather than at the federal level. [127] Further, Justice Gorsuch found that "[t]he agency claims the power to force 84 million Americans to receive a vaccine or undergo regular testing. By any measure, that is a claim of power to resolve a question of vast national significance."[128] No doubt would the justices also find the same here; that the proposed non-compete ban is a question of vast national significance and thus is a claim of authority that concerns an issue of vast economic and political significance.

As the proposed rule sits, it is likely to be found as a claim of authority that concerns an issue of vast economic and political significance. Further twisting the FTC's arm is the fact that it proclaimed and marketed the proposed rule as such.[129] In order to avoid this classification, the only path forward for the agency would be to scale back the ban in the final rule to lessen its impact on the economy. This could be achieved by broadening the exceptions, limiting applicability to certain professions, and excluding the retroactive clause against non-competes. If the agency continued with the proposed rule in its current form, it would be interesting to see how the Court would analyze the ban's impact on the economy. The Supreme Court found that the EPA rule[130] and the national moratorium on evictions[131] were both considered negatives to the economy. Although disputed,[132] the argued positive economic impact of the FTC's proposed rule could potentially be used by the FTC to separate the proposed ban from the Court's decisions in *West Virginia* and *Alabama Association*.

B. Clear Congressional Authorization

If the Court determines that the underlying issue meets the criteria of the first prong of the major questions doctrine, it then proceeds to the second and final prong. This second prong assesses whether Congress has clearly empowered the agency with authority over the issue.[133] Because it is likely that the Court would find the proposed rule in its current form as a vast issue of economic and political significance, the FTC "must point to "clear congressional authorization" for the power it claims."[134]

To enact the proposed rule, the FTC relies on its power under § § 5 and 6(g) of the FTC Act.[135] Section 5 of the Act declares "unfair methods of competition" to be considered unlawful, and allows the Commission to prevent persons, partnerships, or corporations from using unfair methods of competition with or affecting commerce.[136] Section 6(g) of the Act authorizes the Commission to "make rules and regulations for the purpose of carrying out the provisions of" the FTC Act, including the Act's prohibition on unfair methods of competition.[137] The question for the Court, then, is whether Congress empowered the FTC with the authority over the issue of non-compete clauses, and whether non-compete clauses are considered "unfair methods of competition." Like in *West Virginia*[138] and *NFIB*,[139] the Court would start the second prong of its analysis of the proposed rule by examining the Act under which the agency is claiming powers for its actions. The FTC is claiming its power to ban non-competes under § 5, arguing that non-competes are "unfair methods of competition."[140] Unfortunately, however, there are several factors weighing against the Court finding in favor of the FTC and its proposed rule.

The first is the legislative history and intent surrounding § 5 of the FTC Act. The support for the bill predominantly focused on the fact that it bolstered antitrust laws. Supporters of § 5 of the Act liked that it created a new agency that would prosecute if the Department of Justice failed to, and liked that it enforced a flexible new standard that could reach where the Sherman Act did not.[141] However, the FTC Act did not include a definition for what classifies as 'unfair competition' which led bill opponents to challenge the section as "so vague [that] it unconstitutionally delegated legislative authority."[142] This issue became the focus of the subsequent debates on the commission bill.[143] The sponsors of the FTC Act relied on a memo written by George Rublee to President Wilson, now a significant part of the FTC Act's legislative history, to articulate the meaning of unfair competition.[144] Rublee wrote that "[c]ompetition is unfair when it resorts to methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper."[145]

Considering this provided definition of unfair competition and the lack of clear authorization given to the agency, it is unlikely that the Court would find that Congress has clearly empowered the FTC with authority over non-compete agreements. The FTC failed in its proposed rule to provide a viable argument for how non-competes shut out competitors or how non-competes inhibit prospering businesses.[146] Moreover, there is no explicit mention in the bill, legislative history, or discussions surrounding the bill that demonstrates Congress's endorsement or explicit authorization for the FTC to restrict non-competes or similar contractual agreements.[147]

"Surrounding circumstances," Justice Barrett notes in her concurring opinion in *Biden v. Nebraska*, "can narrow or broaden the scope of the delegation to an agency."[148] The circumstances that both Barrett and the majority focused on most in their opinions in *Biden v. Nebraska* was how sweeping the proposed rule was and the fact that the agency had never "previously claimed powers of this magnitude."[149] In *NFIB*, the Court noted that "it [was] telling that OSHA, in its half-century of existence, has never before adopted a broad public health regulation of this kind."[150] In *West Virginia*, the Court found that the "EPA had never regulated in that manner, despite having issued many prior rules governing power plants under Section 111."[151] As the FTC has never before defined the term "unfair competition" in such a broad and sweeping manner and does so now with little legislative history to support its move, it is likely that the Court would find that Congress did not clearly empower the FTC with the authority to ban non-compete agreements.

The final, and most telling, factor is that Congress has already considered and rejected bills proposing to ban non-compete clauses.[152] The Court has taken a strong position against agency action where Congress has already previously addressed the matter.[153] According to Gorsuch's concurring opinion in *West Virginia*, "[the] Court has found it telling when Congress has 'considered and rejected' bills authorizing something akin to the agency's proposed course of action."[154] While individual members of Congress have indeed voiced their support for legislation prohibiting non-competes, Congress as a whole has consistently declined to pass such measures on multiple occasions. Because Congress has already rejected bills proposing to ban non-compete laws, the proposed rule could be viewed as the FTC trying to "workaround" the legislative process to resolve a question of political significance.[155] It is likely that the Court would not only find that Congress has not delegated the power to the FTC to pass the proposed rule, but that the rule is the agency's attempt at a "workaround" past the legislative process.

C. Fallout and Potential Implications

Non-compete agreements have played a substantial role in U.S. employment law for decades. When appropriately regulated, non-compete agreements provide various pro-competitive advantages, such as improved training and compensation for employees, decreased inflation and turnover rates, and safeguarding employers' trade secrets. However, employers can exploit non-compete agreements to suppress competition and hinder innovation at the expense of their employees. It is important, therefore, to find a healthy balance between the two. As proposed, the NPRM would not only ban future non-compete agreements but would also retroactively ban non-competes as well. A complete ban would place a substantial cost burden on employers and courts. The ban would also pose various challenges for courts, including logistical concerns, protection of trade secrets, state police powers, potential conflicts with federal laws, and the right of employers to freely contract.

The FTC has three potential paths it could take to strike a balance between the pro-competitive and anti-competitive aspects of non-competes. The first, although improbable, would involve the FTC terminating the NPRM process, maintaining the current status quo in federal law on non-competes. The second more feasible approach entails the FTC modifying the proposed rule to incorporate additional exemptions. This would allow for broader exemptions concerning trade secrets, prevent conflicts with federal laws, and mitigate the risk of the rule facing legal challenges. The third and most promising option would involve the agency publishing a supplemental proposed rule similar to the NLRB's issued guidance on non-competes. This rule would specifically target a stronger regulation of future non-competes for low- and middle-wage workers while adopting a case-by-case assessment approach instead of implementing a blanket nationwide ban. This option has the best chance of not only achieving pro-competitive federal regulation of non-competes but also surviving a major questions doctrine challenge.

The proposed non-compete rule comes at a time when agency law is drastically changing. Should the FTC decide to finalize the proposed ban as it is now, it would likely face immediate legal challenges once it goes into effect. Under the major questions doctrine, a court would find that the FTC's claim of authority over non-competes concerns an issue of "vast 'economic and political significance,'" and that Congress has not clearly empowered the agency with authority over the issue. However, the FTC could implement the discussed changes in this article, decreasing its chances of being challenged and rejected by a court under the major questions doctrine. Should the Supreme Court pick up the issue, it would further limit future agency rulemaking and enforcement powers. This could substantially impact not only the FTC, but administrative agencies like the EEOC, DOL, EBSA, and others. Further limitations on federal administrative agency powers and regulations will fundamentally alter labor and employment law. The proposed rule, as it currently stands, is more likely to result in a ban on the FTC's rulemaking powers and regulating abilities rather than a ban on non-compete agreements.

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Endnotes

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2. *Id.*
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8. *Non-Compete Clause Rulemaking*, *supra* note 5.
9. *Id.*
10. Federal Trade Commission, P201200, *Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya Regarding the Notice of Proposed Rulemaking to Restrict Employers' Use of Noncompete Clauses* (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/statement-of-chair-lina-m-khan-joined-by-commrs-slaughter-and-bedoya-on-noncompete-nprm.pdf.
11. *Id.*
12. Molzberger & Prewitt, *supra* note 7.
13. Edward Dartley & Jacqueline Duval, *Emerging and Mid-Sized Managers: Preparing for the FTC's Proposal to Eliminate Non-Competes*, The National Law Review (May 16, 2023), https://www.natlawreview.com/article/emerging-and-mid-sized-managers-preparing-ftc-s-proposal-to-eliminate-non-competes.
14. *Non-Compete Clause Rulemaking*, *supra* note 5.
15. 15 U.S.C. 45(a)(2).
16. 15 U.S.C. 46(g).
17. Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910), https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule.
18. *Id.* at 3499.
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20. Joseph Lavigne et al., *Legal Challenges the FTC Faces in Light of Proposed Ban*, The National Law Review (Jan. 27, 2023), https://www.natlawreview.com/article/legal-challenges-ftc-faces-light-proposed-ban-non-compete-agreements.
21. Andrew Blum et al., *Supreme Court Signals Move Away from Judicial Deference to Administrative Agencies*, The National Law Review (Jul. 20, 2022), https://www.natlawreview.com/article/supreme-court-signals-move-away-judicial-deference-to-administrative-agencies.
22. *West Virginia v. EPA*, 142 S. Ct. 2587, 2596-2609 (2022).
23. *Id.*
24. *Biden v. Nebraska,* 143 S. Ct. 2355, 2361 (2023).
25. *Id.* at 2367-2385.
26. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984).
27. *Id.*
28. *22-451 Loper Bright Enters. v. Raimondo Questions Presented,* Supreme Court of the United States (May 1, 2023), https://www.supremecourt.gov/docket/docketfiles/html/qp/22-00451qp.pdf.
29. William Kishman, *The Non-Compete Landscape in 2023: What Employers Should Know About Changes in Non-Compete Law from the FTC, NLRB, Antitrust Claims and New State Laws (US)*, National Law Review (Sep. 28, 2023), https://www.natlawreview.com/article/non-compete-landscape-2023-what-employers-should-know-about-changes-non-compete-law (noting that "[t]here is a good chance that the U.S. Supreme Court ultimately will decide those challenges, as it has with several other recent challenges to federal agency rules.").
30. These challenges include the right to contract, economic rights, and trade secret issues. These issues will likely be raised alongside a major question doctrine challenge but contain significant Constitutional claims that the Court could potentially address. Given the scope of the paper, these issues are relevant to the legality of the ban but are omitted as they do not fit in with a major questions doctrine analysis.
31. *Non-Compete Clause Rulemaking*, *supra* note 5.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Non-Compete Clause Rule*, *supra* note 17.
39. *Non-Compete Clause Rulemaking*, *supra* note 5.
40. *Non-Compete Clause Rule*, *supra* note 17.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Federal Trade Commission Act*, Federal Trade Commission, https://www.ftc.gov/legal-library/browse/statutes/federal-trade-commission-act.
46. Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 Antitrust L. J. 1, 2 (2003).
47. *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, Federal Trade Commission, https://www.ftc.gov/about-ftc/mission/enforcement-authority.
48. 15 U.S.C. 45(a)(1)-(2).
49. 15 U.S.C. 46(g).
50. Marc Winerman, *supra* note 46 at 93.
51. *Id.* at 2.
52. *Id.* at 69.
53. *Id.*
54. *Id.* at 3.
55. *Id.* at 74.
56. *Id.* at 75.
57. *Id.* at 88.

58. *Id*. at 90.

59. *Id*. at 92.

60. *Non-Compete Clause Rule*, *supra* note 17.

61. *The FTC's Noncompete Rulemaking is Blatantly Unlawful*, U.S. Chamber of Commerce, https://www.uschamber.com/finance/antitrust/the-ftcs-noncompete-rulemaking-is-blatantly-unlawful.

62. Peter Steinmeyer & Erik Weibust, *Expert Q&A on the FTC's Proposed Rule Banning Employee Non-Competes*, Reuters (Feb. 7, 2023), https://www.reuters.com/practical-law-the-journal/transactional/ftcs-proposed-rule-banning-employee-non-competes-2023-02-07/.

63. *Non-Compete Clause Rulemaking*, *supra* note 5.

64. *Non-Compete Clause Rule*, *supra* note 17.

65. *Id*.

66. *Id*.

67. *Id*.

68. *Id*.

69. *NLRB General Counsel Issues Memo on Non-competes Violating the National Labor Relations Act*, National Labor Relations Board (May 30, 2023), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-issues-memo-on-non-competes-violating-the-national.

70. Kishman, *supra* note 29.

71. National Labor Relations Board, Office of General Counsel, Memorandum GC 23-08, *Non-Compete Agreements that Violate the National Labor Relations Act* (May 30, 2023).

72. Kishman, *supra* note 29.

73. No doubt would an analysis of the NLRB rule be completely different as well. It would likely be challenged under the major questions doctrine but would depend on what power the NLRB bases its claim on, the scope of the rule, and any potential exemptions that would be included within it.

74. Randolph May, *NFIB v. OSHA: Nondelegation, Major Questions, and Chevron's No Show,* Yale J. Reg. (Jan. 25, 2022), https://www.yalejreg.com/nc/nfib-v-osha-of-labor-nondelegation-major-questions-and-chevrons-no-show-by-randolph-may/.

75. *ArtI.S1.5.5 Agency Discretion and Chevron Deference*, Legal Information Institute, https://www.law.cornell.edu/constitution-conan/article-1/section-1/agency-discretion-and-chevron-deference (noting that "Congress has given considerable leeway to administrative agencies to interpret statutory ambiguities, which has been sustained by the Supreme Court under the Chevron doctrine.").

76. Jeffery Jones, *Trust in Federal Government Branches Continues to Falter*, Gallup (Oct. 11, 2022), https://news.gallup.com/poll/402737/trust-federal-government-branches-continues-falter.aspx.

77. 512 U.S. 218, 220 (1994).

78. 529 U.S. 120, 121 (2000).

79. 512 U.S. at 231-34.

80. Brown & Williamson Tobacco Corp., 529 U.S. at 160.

81. The Court noted that Congress had directly addressed the problem of tobacco and health through legislation on six occasions since 1965. *Id.* at 137.

82. 573 U.S. 302, 307 (2014).

83. *Id*. at 324.

84. "The dissent criticizes us for announc[ing] the arrival of this major questions doctrine and argues that each of the decisions just cited simply followed our "ordinary method" of "normal statutory interpretation" but the bottom line—a requirement of "clear congressional authorization,"—confirms that the approach under the major questions doctrine is distinct." *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

85. *Id*. at 2605.

86. *Id*.

87. 142 S. Ct. 661, 662 (2022).

88. *Id*. at 662-663.

89. *Id*. at 667.

90. *Id*.

91. *Id*. at 668.

92. *Id.* at 669.

93. 143 S. Ct. 2355, 2361 (2023).

94. *Id*. at 2376.

95. *Id* at 2377 (noting "[y]et for the reasons that follow, I do not see the major questions doctrine that way.").

96. *Id.* at 2378.

97. *Id.* (noting that "clarity may come from specific words in the statute, but context can also do the trick. Surrounding circumstances, whether contained within the statutory scheme or external to it, can narrow or broaden the scope of a delegation to an agency.").

98. *Id.* at 2382.

99. *Id.* at 2383.

100. *Id.* at 2384.

101. Harlan Blake, *Employee Agreements Not to Compete*, 73 Harv. L. R. 625, 631 (1960).

102. *Id.* at 629.

103. *Alger v. Thacher*, 36 Mass. 51, 53 (1837).

104. Harlan Blake, *supra* note 101 at 638-39.

105. *A Brief History of Noncompete Regulation*, Fair Competition Law (Oct. 11, 2021), https://faircompetitionlaw.com/2021/10/11/a-brief-history-of-noncompete-regulation/.

106. 87 U.S. 64, 71 (1873).

107. *Id.* at 67.

108. *A Brief History of Noncompete Regulation*, *supra* note 105.

109. *Id.*

110. *Id.*

111. Leah Shepard, *States Outlaw Noncompete Agreements*, SHRM (Jul. 10, 2023), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/states-restrict-noncompetes.aspx.

112. *Id.*

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114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Federal Trade Commission, P201200-1, *Dissenting Statement of Commissioner Christine S. Wilson Regarding the Notice of*

Proposed Rulemaking for the Non-Compete Clause Rule (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf.

121. *Id.*

122. The FTC estimates that the rule would impact approximately 30 million people. *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, Federal Trade Commission (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

123. *Non-compete Clause Rulemaking*, *supra* note 5.

124. Atlas et al., *supra* note 3.

125. Similar to how the EPA's statements in the Federal Registrar were used against it in the *West Virginia* decision. (noting that "[i]ts generation-shifting scheme was projected to have billions of dollars of impact." *West Virginia v. EPA*, 142 S. Ct. 2587, 2605 (2022).

126. Atlas et al., *supra* note 3.

127. *Nat'l Fed'n of Indep. Bus. v. DOL*, OSHA, 142 S. Ct. 661, 668 (2022).

128. *Id.*

129. *Non-Compete Clause Rulemaking*, *supra* note 5.

130. *West Virginia*, 142 S. Ct. at 2605.

131. *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021).

132. Sarah Lam et al., *Economist Comments in the Matter of the FTC's Proposed Non-Compete Clause Rule* (Apr. 19, 2023), http://dx.doi.org/10.2139/ssrn.4425577.

133. Util. Air Reg. Group (UARG) v. EPA, 573 U.S. 302, 324 (2014).

134. West Virginia, 142 S. Ct. at 2605.

135. *Non-Compete Clause Rule*, *supra* note 17.

136. 15 U.S.C. 45(a)(1)-(2).

137. 15 U.S.C. 46(g).

138. *West Virginia*, 142 S. Ct. at 2605.

139. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 663.

140. *Non-Compete Clause Rule*, *supra* note 17.

141. Marc Winerman, *supra* note 46 at 3.

142. *Id.* at 74.

143. *Id.* at 68.

144. *Id.* at 67.

145. *Id.* at 67.

146. *Non-Compete Clause Rule*, *supra* note 17.

147. *Federal Trade Commission Act*, *supra* note 45.

148. 143 S. Ct. 2355, 2381 (2023).

149. *Id.* at 2373.

150. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 666.

151. *West Virginia*, 142 S. Ct. at 2613.

152. *Dissenting Statement of Commissioner Christine S. Wilson*, *supra* note 120.

153. "Congress has directly addressed the problem of tobacco and health through legislation on six occasions since 1965. . . A ban of tobacco products by the FDA would therefore plainly contradict congressional policy." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 138-39 (2000). "Nor can the Court ignore that the regulatory writ EPA newly uncovered in Section 111(d) conveniently enabled it to enact a program, namely, cap-and-trade for carbon, that Congress had already considered and rejected numerous times." *West Virginia* 142 S. Ct. at 2596. "[A]though Congress has enacted significant legislation addressing the COVID-19 pandemic, it has declined to enact any measure similar to what OSHA has promulgated here." *Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661, 662 (2022).

154. *West Virginia* 142 S. Ct. at 2621.

155. *Dissenting Statement of Commissioner Christine S. Wilson*, *supra* note 120.

Brian Flores Takes Aim at the Rooney Rule, Part II: What an Effective Corporate DEI Initiative Looks Like

By Chris D'Angelo

Our previous article on this lawsuit[1] focused on a challenge to the National Football League's (NFL) "Rooney Rule" by Brian Flores, the former head coach of the Miami Dolphins who had been fired despite some success in the role. Immediately after he was fired, Flores secured several interview opportunities for vacant head coaching jobs, but he was passed over for each in favor of white candidates.

As a reminder, when it was first put in place in 2003, the Rooney Rule required NFL teams to interview at least one candidate of color for vacant head coaching positions. Over the next two decades the NFL modified the Rooney Rule 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. Nevertheless, comments from Jonathan Beane, the NFL's chief diversity and inclusion officer, indicate a clear recognition that the rule has shortcomings. Indeed, NFL Commissioner Roger Goodell has characterized the League's results under the Rooney Rule as "unacceptable."[2]

At the conclusion of the first article, we asked the following question: What diversity, equity, and inclusion (DEI) programs in "corporate America" have fared better, and why, and what are the potential risks and barriers to success? This article was promised at that time as a follow-up to address this inquiry. In the interim, the United States Supreme Court issued its decision in two cases involving affirmative action programs in higher education. The Supreme Court's decision in *Students for Fair Admissions v. Harvard University* and *Students for Fair Admissions v. University of North Carolina*[3] (SFFA) effectively ended race-conscious affirmative action admissions programs in colleges and universities. Although this decision has no direct impact on employment with private employers, it has put a spotlight on corporate DEI programs and prompted additional legal challenges to those programs.

The New York State Bar Association responded to the *SFFA* decision by naming a task force and commissioning a report focused on the issue of advancing diversity in light of this legal development. The report is extensive at nearly 100 pages and addresses a number of issues raised by the Court's decision. Of note, the report includes a lengthy discussion of recommendations for private employers who wish to maintain a lawful DEI program in light of the decision. The recommendations offered by the task force are very much aligned with the components of a successful DEI program.

As the Flores litigation slowly grinds its way through the federal court system, it seemed appropriate to call an audible here in light of the shifting landscape created by the *SFFA* decision and the task force report. This follow-up article will, therefore, provide a discussion of what helps make or create a successful DEI program, as well as focus on and summarize the recommendations of NYSBA's task force.

What Are the Components of a Successful DEI Program?

There is no shortage of literature on what is required to have a successful DEI program.[4] Within this literature several common themes emerge. Here are five that stand out.

Commitment From the Top

First, there is a strong consensus that a company's commitment to DEI must come from the top down. This is more than the chief executive officer announcing a firm stand that the organization is committed to DEI. The CEO must also be actively engaged with the program, acting as a role model, having direct involvement with the organization's chief diversity officer, and reinforcing the organizational commitment with repeated and frequent supportive statements to company personnel, as well as examples of how the company's DEI initiatives are adding value.

Accountability at the Senior Leadership Level

Second, intricately connected to the "top down" approach is the importance of accountability for the company's DEI initiative. While some suggest that the concept of accountability should cover the entire organization, the consensus favors a narrower approach, where top corporate leadership is held responsible for the program's success or failure. Accountability generally comes in the form of an impact on compensation, positive or negative, depending on whether the lawful components of the DEI program have met certain metrics.

Clear and Transparent Communication

Third, be clear and transparent with what the organization is looking to achieve. This involves establishing goals and objectives and establishing metrics to measure the program's progress. As indicated by the *SFFA* decision, these goals must be consistent with applicable law. Ideally, there should be a set time for achievement of these objectives, and a schedule of touchpoints during this time to determine progress toward the objectives. More on this in the next section.

Employee Engagement

Fourth, engage employees at every level of the organization. This can be achieved through establishing a narrative for the DEI program that is communicated regularly; forming an Executive DEI Council comprised of members from throughout the company, and mini-councils within each company department; establishing Employee Resource Groups (ERGs), which are internal, voluntary communities of workers with shared interests and, in many cases, identity (though this element should not be mandatory); requiring each ERG to have an Executive Sponsor, usually a senior leader in the organization, is generally imperative to the success of an ERG; and conduct anonymous employee surveys on a periodic basis to obtain input and insight into what is working and not working with the DEI initiative.

Training

Fifth, training is also critical to a successful DEI initiative. It is important to take all steps necessary to establish training that is not performative or just a "check the box" offering. Instead, the training should be meaningful, offering a host of programs to address and combat the different forms of bias and exclusion that work against the success of a DEI initiative.

NYSBA Task Force on Expanding Diversity

The New York State Bar Association's House of Delegates recently approved a Report and Recommendation of the Task Force on Advancing Diversity ("Report").[5] The Report was commissioned in response to the *SFFA* decision. The decision ruled that race-based college admissions programs used by colleges and universities violated the Equal Protection Clause set forth in the 14th Amendment to the United States Constitution, and Title VI of the Civil Rights Act of 1964, which prohibits race discrimination by colleges and universities receiving federal funds.

While the *SFFA* decision does not have a direct impact on DEI programs and initiatives implemented by private employers, it has put these DEI programs in the spotlight. Groups advocating against discrimination of any kind have initiated lawsuits against private employers and law firms, while politicians have written letters urging law firms to cease advising their clients on the implementation of DEI programs.

The Task Force was co-chaired by Jeh Johnson, former secretary of homeland security and now a partner at Paul Weiss, and Loretta Lynch, former United States attorney general and also a Paul Weiss partner. It was comprised of 54 attorneys from both the public and private sector, including judges, law school deans, in-house general counsel, and law firm partners. This group split into four working groups, covering academia, corporations, law firms, and the judiciary, and in September 2023 produced a 23-page report which included a comprehensive review of the importance of diversity, summary of the decision and applicable law, and implications of the decision for the four working groups identified above.

The Report makes it clear that the *SFFA* decision is a setback to achieve diversity through all aspects of American life. It notes that "[r]egrettably, in the year 2023, we are still in many respects a segregated society-where we live, where we worship, and with whom we socialize."[6] According to this portion of the Report, diversity on college and university campuses has strengthened our professions by alleviating racial disparities and is often the first opportunity for many "to broaden their horizons by living, socializing and learning with those different from themselves."[7]

Task Force Recommendations for Private Employers

The goal of the Task Force, and the Report that was written, is to assist employers who remain committed to DEI initiatives chart a lawful path to doing so. For private corporations, the Report includes a list of ten recommendations to consider with respect to their DEI initiatives. The list includes the importance of communicating a continued commitment to DEI (both internally as well as externally to stakeholders), implementing education and training for all key stakeholders, fostering good practices through commitment by and accountability of senior leadership, engaging the entire workforce, and being clear, specific and transparent about what the organization is trying to achieve.

The Report also identifies several other important considerations for companies that remain committed to their DEI initiatives.[8] Set forth below is a high-level summary of many of the recommendations made in light of the SFFA decision.

Assess Existing DEI Programs

While the *SFFA* decision does not directly address corporate DEI initiatives, it does bring college admissions programs in line with the law that has long-applied to corporate employers in general; that is, that race-based decisions are unlawful.[9] Corporate DEI programs, of course, must comply with this law. In light of the heightened scrutiny that the *SFFA* decision has brought to bear, the Report includes a recommendation to employers to conduct an assessment of their programs, one that is conducted by outside counsel and, therefore, privileged. The goals of such an assessment are:

> to confirm that: (1) these programs do not make or encourage decisions to be made on the basis of race or another protected characteristic; (2) diversity is appropriately and accurately defined across the enterprise; (3) internal and external written materials regarding DEI objectives and programs are accurate, consistent and, where appropriate, in-

clude the business-related criteria being used for evaluation; (4) ERGs are clearly described as voluntary, employee-led and open to all employees; and (5) appropriate oversight is in place for all DEI-related public statements (e.g., vetting by DEI leads, legal teams and other relevant stakeholders).[10]

In addition, companies should avoid programs that establish rigid numerical goals, or which exert pressure on managers, supervisors, recruiters, or others in the organization "to achieve particular results."[11]

What this means is that DEI initiatives should not make decisions "because of" an individual's status in a protected classification, such as race, gender, or disability. In New York City, where the New York City Human Rights Law is in place, the calculus is even more restrictive; an individual's status in a protected classifications may not be used as a factor in the decision-making process.

Assess Perceptions of DEI Efforts

The recommendation to assess current DEI initiatives extends to the perception of DEI efforts both internally, among the employee base, as well as among external stakeholders. According to the Report, the data obtained will help identify what is working, where potential gaps may exist, and what areas of opportunity may exist. Engagement interviews with underrepresented employees, led by senior managers, should also be utilized as a means to determine whether certain groups believe they have "the same [equal] opportunities to advance" and whether obstacles to advancement exist.[12]

Identify Interests and Develop Measurable Objectives

The *SFFA* decision was based, in part, on a constitutional challenge to the programs in place at Harvard and UNC. As a result, the Court applied a "strict scrutiny" standard to analyze those programs. The schools asserted that the goals of their programs survived "strict scrutiny." The Court determined that while those goals ("training future leaders in the public and private sectors," "preparing graduates to 'adapt to an increasingly pluralistic society,'" "producing new knowledge stemming from diverse outlooks," "promoting the robust exchange of ideas") were "commendable" and "plainly worthy" goals, they were not "sufficiently measurable to pass strict scrutiny."[13]

Of course, this constitutional standard does not apply to the private sector. Nevertheless, the Report contends that "it may be helpful for employers to identify the specific benefits of diversity in their workplaces and to develop programs and initiatives specifically tailored to further those benefits."[14] Doing so has a legal benefit. It "can help employers demonstrate the legitimate business purpose [supporting its DEI initiative] and show how these programs contribute to the profitability of the business if their DEI efforts are challenged."[15] The Report also suggests that being specific about the correlation between the benefits of diversity in a company's workplace may also allow "employers to identify how DEI programs help address barriers to employment opportunities that would otherwise exist."[16]

The Report identifies at least three benefits of a diverse workforce for private employers.[17] The first is enhancing cognitive and financial performance. To support this thesis, the Report cites two studies (a 2018 study from the Boston Consulting Group, and a 2020 study from McKinsey) for the proposition that above average diversity tends to lead to more innovation, better innovation, and more revenue generation.[18]

The second and third items identified as benefits in the Report relate to handling an increasingly diverse consumer and/or client base and attracting new employees. According to the Report, workplace diversity allows for more effective communications with a diverse base, while also being an element that younger job seekers prioritize.[19]

Increase Internal Controls

As previously stated, both internal and external communication regarding an organization's commitment to DEI is critically important to its success. The Task Force Report adds value by focusing as well on the importance of consistency in these communications. The Report urges companies to pay "careful attention" to communications, both for the sake of accuracy, as well as to ensure that the organization is comfortable with the possible ramifications of disclosure, be it internal or external. In this regard, the Report recommends "multiple, focused layers of review for all material communications" by a multidisciplinary team including marketing/communications, investor relations, HR, and law "to ensure alignment with commitments and previous messaging, as well as compliance with state and local laws, including discriminatory advertising."[20]

Implement Education and Training

Earlier in this article we referenced the importance of training all employees regarding the importance of diversity and EEO initiatives. While the Report also recommends training, it suggests that certain training for managers and others responsible for making employment decisions should go beyond the basic EEO training, which is mandatory in New York and other states, and also go beyond more in-depth training regarding issues like implicit bias and psychological safety, that organizations offer on a voluntary basis. Instead, the Report indicates that managers and other involved in making employment decisions should be required to participate in mandatory training involving 1) the purpose of DEI programs, 2) key legal programs involving DEI programs, and 3) how to perform employment-related functions within the construct of legal principles relating to DEI.[21]

Appropriately Collect, Track, Manage and Utilize DEI Data

Metrics are critical to assessing the effectiveness of a DEI program. According to the Report, collecting, tracking, and analyzing the data enables an organization "to identify and better understand patterns, gaps and opportunities for improvement regarding" their DEI programs.[22] However, it is important to restrict access to any such data and be attentive to the purpose for which it is reviewed.

Conclusion

In sum, there seem to be three critical components to implementing an effective DEI program. The first is consistent communication and continued commitment within the organization, from the top down. Along these lines, it is important to create a team of individuals within the organization to review these communications in advance, for clarity and consistency of purpose. The second is to be intentional and thoughtful about setting up goals and metrics, as well as collecting, managing, and analyzing those metrics on a regular basis to identify gaps and trends. Third, work internally and with outside counsel to develop strategies that follow legal requirements relating to EEO and DEI initiatives. Given how recent the *SFFA* decision is, it is also important to regularly monitor developments in this area.

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9. Race may be used to address a manifest imbalance in the racial demographic of a workforce. *United Steelworkers of America v. Weber, 443 U.S. 193 (1979).*
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Anti-Discrimination Laws and Remote Workers in New York and New Jersey

By Robert Whitman, Daniel Small, Bernie Olshansky and Paxton Moore

Introduction

With the rise of remote work since the COVID-19 outbreak, courts will be asked to grapple anew with a perennial question: whether state and local anti-discrimination laws apply to workers who are not physically present in the jurisdiction. In New York and New Jersey, the courts have taken different approaches to this important threshold question.

Applicability of New York Statutes to Non-New York Workers

In New York, the Court of Appeals definitively concluded more than a decade ago, in *Hoffman v. Parade Publications*, "a nonresident must plead that the alleged discriminatory conduct had an impact in New York" to be covered under the New York State and New York City human rights laws (HRLs).[1]

The plaintiff in *Hoffman* was a Georgia resident who worked in Atlanta, attended occasional meetings in New York City, and did not service any accounts in New York.[2] Even though the decision to terminate the plaintiff's employment was made in New York City, the court held that the plaintiff did not demonstrate a sufficient impact to invoke the protections of the NYCHRL.[3]

State and federal courts after *Hoffman* have consistently applied the court's holding. The First Department recently affirmed the dismissal of a claim brought by a plaintiff living and working in Montreal, Canada, holding in *Pakniat v. Moor*, "[t]he fact that the alleged discriminatory acts and unlawful decision to terminate plaintiff's employment occurred in New York is insufficient to plead impact in New York."[4]

In opposition to the defendant's motion to dismiss, the plaintiff in *Pakniat* specifically argued that the increase of remote working arrangements resulting from the COVID-19 pandemic necessitates expanding the jurisdictional breadth of the city and state HRLs.[5] Despite expressing sympathy for the argument, the First Department ultimately declined the invitation, highlighting *Hoffman's* "clear directive," and holding that, "[t]o avail herself of [the NYCHRL and NYSHRL], plaintiff must still satisfy the jurisdictional requirement that the impact of the discrimination was felt in New York City and State."[6] Similarly, in a 2022 federal court decision, the court held that the pandemic had no effect on the *Hoffman* impact test.[7]

The "impact" test is narrowly construed and strictly applied. To maintain a claim under the NYCHRL and NYSHRL, the impact of the alleged conduct must be felt within the boundaries of the city and state. In *Shiber v. Centerview Partners LLC*, for example, the plaintiff worked remotely from her home in New Jersey for a New York City-based company. She understood her remote work arrangement to be temporary and expected to work in person in the city when her employer's offices reopened. However, her employer terminated her employment before reopening its offices.[8] The court dismissed the plaintiff's NYCHRL and NYSHRL claims, finding her expectation to work in the city insufficient to satisfy the jurisdictional requirement.[9] "Pleading impact in New York City by 'unspecified future career prospects,'" the court said, would be an "impermissible broadening" of the statutes. The court further noted that "if 'impact can be shown by a mere hope to work in New York down the line, the flood gates would be open.'"[10] Moreover, the court held, "a non-resident plaintiff's occasional meetings in or travel to the city are tangential and do not satisfy the impact requirement."[11]

In a 2014 decision, the First Department came to a similar conclusion on a vastly different set of facts.[12] There, the plaintiff worked for a New York City-based employer and resided in New York State, but not the city. She brought claims under the state and city laws against three out-of-state defendants for discrimination and retaliation after she rejected a superior's sexual advances during a 2009 overseas assignment. The crux of her allegations was that, in retaliation for that rejection, the defendants diminished her responsibilities at the 2012 London Olympics.[13] The plaintiff argued the place of impact of the discriminatory acts—namely, the decision to reassign her and later reduce her responsibilities—should be controlled by her place of employment in New York City.[14] Drawing on *Hoffman* and its progeny, the First Department rejected her claims, concluding "it is the place where the *impact* of the alleged discriminatory conduct *is felt* that controls whether the Human Rights Laws apply, not *where the decision is made*."[15] The "plaintiff's mere employment in New York [did] not satisfy the 'impact' requirement" because the alleged discriminatory acts occurred in London and she made no claim that they had any impact on the "terms, conditions or extent of her employment . . . within the boundaries of New York."[16]

Until recently, an open question remained under *Hoffman*: whether a nonresident plaintiff who is not yet employed in New York City or State satisfies the impact requirement if the plaintiff pleads and later proves that an employer deprived the plaintiff of a New York City- or State-based job opportunity on discriminatory grounds. The Second Circuit certified the question to the New York Court of Appeals on February 9, 2023.[17] In a March 14, 2024 opinion, the Court of Appeals answered this question affirmatively.[18]

In that case, the plaintiff was a Washington-D.C.-based woman of South Asian descent working for the defendant-employer. She alleged that she was subjected to discrimination when her employer failed to transfer her to one of several open, in-person positions based in New York City to which she had applied. She then resigned and alleged in her lawsuit that she was subjected to a constructive discharge based on the employer's discriminatory failure to transfer her to those New York-based positions.[19]

The Court of Appeals held that the NYSHRL and NYCHRL apply in such a situation because "a nonresident who has been discriminatorily denied a job in New York City or State loses the chance to work, and perhaps live, within those geographic areas."[20] Buttressing its conclusion with policy considerations, the court noted that discriminatory conduct harms not only the nonresident applicants but also the state and the city, which "are deprived of [the] economic and civic contributions from [these] individuals."[21] Notably, in a footnote, the court made clear that it was limiting its holding to positions that require the employee "to be physically present in New York, so that the decision would not apply where a non-resident was seeking a remote position based in New York City or State.[22]

This decision may be read by some to be a departure from prior precedent, and it remains to be seen what impact the court's analysis will have on individuals who are similarly situated to the plaintiff in *Shiber*—will an individual be entitled to the protections of the NYCHRL and NYSHRL based upon a mere expectation of in-person work?

New Jersey LAD Applicability to Out-of-State Employees

In New Jersey, a recent decision from the U.S. District Court for the District of New Jersey held that the state's Law Against Discrimination (NJLAD) applies to employees of New Jersey-based companies who live and work outside the state.[23]

The plaintiff in that case, *Schulman v. Zoetis, Inc.*, lived and worked in New Hampshire. The defendant moved to dismiss on grounds that the NJLAD did not apply because the plaintiff's "only meaningful allegation related to New Jersey [was] that the Defendants' headquarters are there."[24]

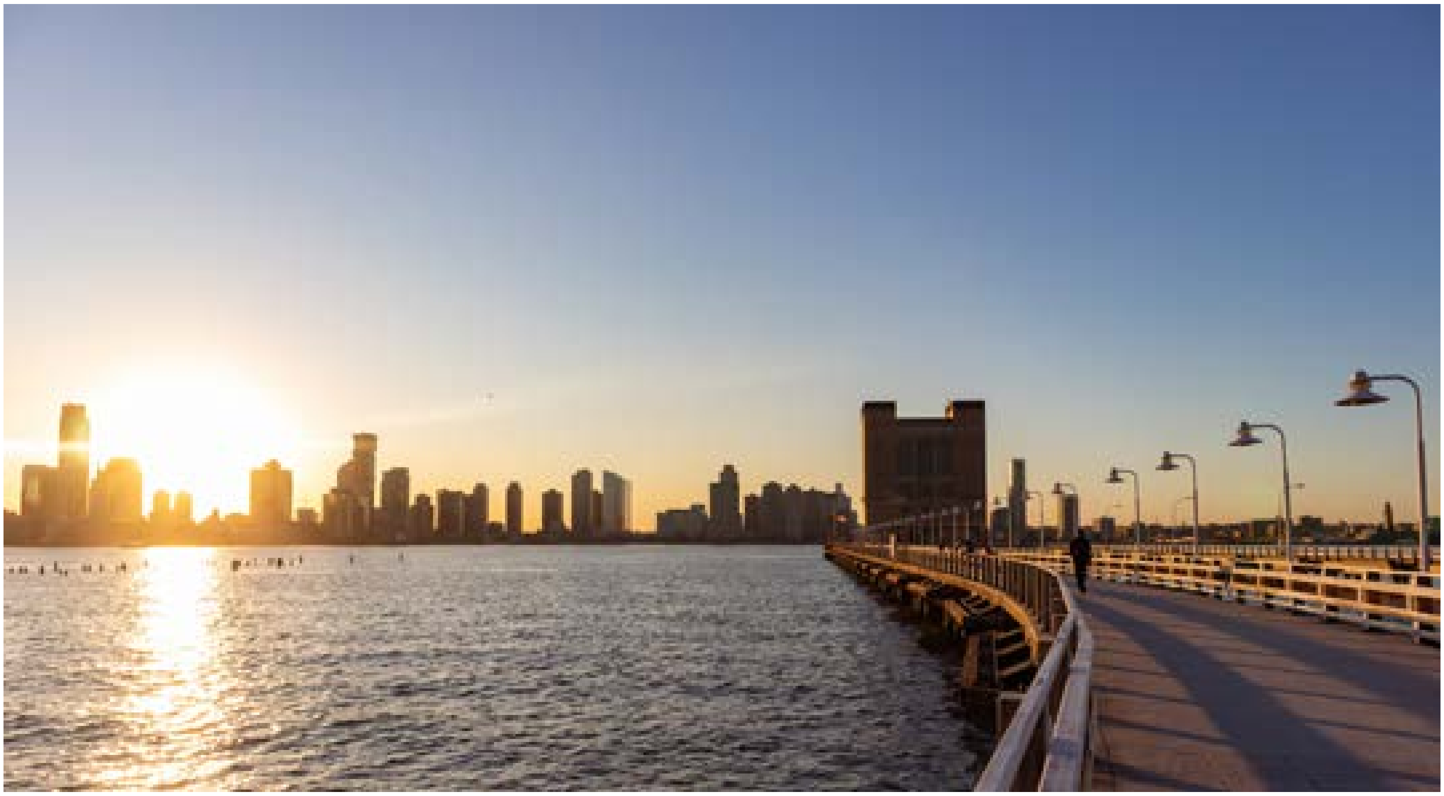
Applying a 2019 New Jersey state court holding,[25] the court denied the motion, holding that the NJLAD can "extend" to employment actions taken against non-New Jersey residents by New Jersey employers.[26] Based on this decision, the federal court predicted that the New Jersey Supreme Court, which has not yet addressed this issue, would apply the NJLAD to out-of-state employees.

In so ruling, the *Schulman* court highlighted three factors for the applicability of the NJLAD to out-of-state employees: 1) the location(s) of the person(s) within the company who took part in the decision to take the employment action; 2) the sole or dominant place, if any, that the decision was made; and 3) the location(s) of the plaintiff's conduct that precipitated the employment decision.[27]

Ultimately, the *Schulman* court applied principles of statutory interpretation and followed analogous New Jersey state and federal court decisions in holding the plaintiff at-issue to be "like the plaintiff in *Calabotta*: a non-New Jersey resident working outside of New Jersey for a New Jersey-connected employer."[28] In *Calabotta*, a non-New Jersey resident sued his "New Jersey-based former employer" for a violation of the NJLAD.[29] The *Calabotta* court held that the NJLAD can "extend" to the non-promotion of a non-New Jersey resident into a New Jersey job and that the NJLAD can "extend" to wrongfully discharging a non-New Jersey resident from a non-New Jersey-based job with a New Jersey entity's subsidiary.[30]

Looking Ahead

Since the COVID-19 pandemic, employers have varied their approaches regarding employees returning to the office, ranging from five-day-per-week mandates to complete employee flexibility. Employers in both New Jersey and New York should consider the applicability of each state's anti-discrimination laws in evaluating their remote work policies. The highest courts of both states may soon provide helpful clarification on the open questions discussed above. Their decisions will be critical to an analysis of statutory coverage in the new world of remote work.



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5. *Pakniat*, 145 N.Y.S.3d at 31.
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Let's Stay Engaged: Party Participation During Remote Mediations

By Darren Rumack

> Until we meet again
>
> Let's stay engaged
>
> Until then
>
> Let's stay engaged
>
> —The Tragically Hip, "Let's Stay Engaged"

Mediations for employment law disputes have continued to grow in popularity in the past decade. With the advent of the automatic referral program in the SDNY and increasing use of mediation in EDNY cases, a large swath of employment matters are subject to mediation in federal court, along with mediation options at the EEOC and in state court. For example, the SDNY reports that in 2021, 1,483 cases were referred to the SDNY's mediation program, 44% of which were FLSA, employment and § 1983 claims. In 2022, 1,550 cases were referred to the SDNY's mediation program, 36% of which were FLSA, employment, and § 1983 claims.[1]

Similarly, in the EDNY in 2021, FLSA cases constituted 46% of the mediation referrals (424 cases overall), with employment discrimination cases being the second most common type of mediation referral (83 cases overall).[2]

Since the proliferation and expansion of remote mediation during the COVID pandemic, the flexibility and ease of scheduling has led to even greater popularity for mediation referrals. But even in a remote setting, mediation can be a slog for the parties. As the mediation drags on, it is natural for parties to start to tune out.

Remote mediation offers unique obstacles to keeping the parties engaged, since the nature of the remote process limits party participation. Left unaddressed, this can lead to a non-productive mediation session. However, counsel and mediators can take a series of practical steps to overcome these barriers and ensure party engagement in their mediations.

1. Keep the Parties On-Screen During the Mediation

Remote mediations began in earnest during the COVID-19 pandemic when law offices were closed, so most parties would appear from their homes. However, this frequently remains the case post-pandemic, and, while convenient for the parties, there are negatives to consider.

When appearing from home, a party may dial in to the mediation and not appear on camera. If the party cannot be seen, both the mediator and the attorney will be unable to detect any visual cues or respond to body language. The party may also be distracted and not focus on the mediation.

Separately, even when the party appears from their attorney's office, some lawyers keep their client "off-camera." Whether on purpose or not, keeping the party out of the mediator's view can similarly limit party interaction and engagement in the mediation.

Not seeing the party can impede the mediator from developing a relationship with the party during the mediation. The absence of mediator-party rapport can complicate the mediator's ability to have a difficult conversation with the party during the mediation, either regarding the viability of the case, or whether they should strongly consider a settlement offer. Visual cues are important during a mediation, and establishing credibility with the party is more difficult for the mediator if he or she is not able to see the party's face. Further, if a party is not appearing on video, there is an increased risk that the party is not sufficiently engaged in the process.

As a result, mediators and attorneys should insist the party appear on camera during the mediation, and preferably from their attorneys' office for the duration of the mediation.

2. Ensure Non-English Speaking Parties Are Kept Engaged During the Mediation

Employment cases often feature non-English speaking plaintiffs, which can add another barrier to party engagement that can be exacerbated during a remote mediation. Often in a Zoom mediation, the attorney may appear in one room, with the plaintiff and translator in another room. This separates the plaintiff from the proceedings because it leads to their attorney doing all the talking with minimal client engagement. As the mediation progresses, the party is more likely to tune out. When possible, having the party appear from the same room as their attorney and translator can help ensure the client is a more active participant throughout the mediation and not just a passive bystander.

3. Adequately Prepare Clients for Remote Mediation

There is a tendency by some parties to take remote mediation less seriously than in-person sessions. To some extent, parties have less skin in the game when they do not have to dress formally and travel to a courthouse or attorney's office for a mediation session. Parties may also view it as easier to leave a mediation session at any time when they can simply press a button to close their remote connection from the comfort of their homes.

As a result, it is important for attorneys to prepare their clients for remote mediation and to highlight the differences from an in-person session, including how to use the technology ahead of time. Additionally, attorneys should stress that a remote mediation is no less formal than an in-person session, even if their party is appearing from home.

Remote mediation has quickly became the preferred option for parties since 2020 and is not going away. As a result, it is imperative that mediators and counsel work together to ensure that remote mediations are as productive as possible by keeping the parties engaged throughout the process.

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Endnotes

1. October 2023 Southern District of New York's Final Report of the Mediation Program (October 2023).
2. EDNY ADR Final Report January 1, 2021 – December 31, 2021, https://img.nyed.uscourts.gov/files/local_rules/2021%20annual%20report.pdf.

Highlights from the NYSBA Annual Meeting

New Laws in New York

The Labor and Employment Section Annual Meeting on January 19, 2024 began with a panel discussion on new laws in New York. The panel was moderated by Sara Kula, Kula Law P.C., and the speakers included Miriam F. Clark, Ritz Clark & Ben-Asher LLP, Tracey Salmon-Smith, Faegre Drinker Biddle & Reath LLP and Steven A. Zuckerman, Cooley LLP. We were also thrilled to have Bridget Holohan Scally, Deputy General Counsel and Associate Commissioner of the New York State Department of Labor, join the panel and share insights into what has been happening inside the Department of Labor, including their work on the state's new Salary Transparency Law.

The panel also discussed amendments to New York's law governing non-disclosure agreements in certain settlement agreements, the Freelance Isn't Free Act, amendments to the city law, including height and weight as protected categories, and other laws that were enacted in 2023. When asked what they were looking out for in 2024, the panel discussed strengthened enforcement of child-labor laws, legislation limiting the use of non-competition agreements, and laws relating to artificial intelligence.

Student Players as Employees Under the NLRA

Another workshop at Annual Meeting was on whether student players should be considered employees under the NLRA, and, if so, who would be their employers.

The panel was moderated by Bernard E. Mason of the New York State Nurses Association and featured the legal perspectives of César F. Rosado Marzán of the University of Iowa School of Law, Alice B. Stock of Bond Schoeneck & King, and Megan S. Shaw of Cohen, Weiss and Simon. The topics discussed by the panel centered on the legal issues in the current NLRB case involving scholarship basketball and football players, the University of Southern California, the Pac-12 Conference, and the National Collegiate Athletic Association as well as the NLRB case involving non-scholarship student players at Dartmouth College.

During the course of the workshop, the panelists opined on what should be the appropriate legal standards for determining whether student players are indeed employees under the Act as well as the legal standards for determining whether college universities, athletic conferences, and the NCAA could be considered joint employers. The discussion generated significant audience participation, and some of the panelists were proven right by the groundbreaking decision issued in that Dartmouth College case just weeks later.

Taking a Pregnant Pause: The Pregnant Workers Fairness Act (PWFA) and the Providing Urgent Maternal Protections to Nursing Mothers Act (PUMP) Are Supporting Pregnant Workers in New York State and Beyond

On Thursday, January 18, the NYSBA Labor and Employment Law Thursday evening program featured a panel on the Pregnant Workers Fairness Act (PWFA) and the Providing Urgent Maternal Protections to Nursing Mothers Act (PUMP). The panel, which was moderated by attorney Joan C. Lenihan, was part of the Labor and Employment Law Section's Annual Meeting. The speakers, Katherine Greenberg, Director of Strategic Litigation at A Better Balance, and Michael Del Piano, Partner at Lewis Johs Avallone Avilles discussed why they felt this new federal legislation was necessary and how it increased the rights of pregnant workers and nursing mothers. Although New York State and City have passed legislation that has strengthened protections for this population, many states are lagging behind when it comes to accommodating pregnant workers.

Mr. Del Piano explained how covered employers (those with 15 or more employees) will now have to accommodate workers who are limited due to pregnancy, childbirth, and related medical conditions. "Employers should be aware that customary policies for handling requests for accommodations under the Americans with Disabilities Act may not be sufficient under the PWFA." The interactive process is an integral part of the PWFA, so " . . . employers are also prohibited from requiring PWFA covered employees to take an accommodation other than one arrived at through the interactive process," stated Mr. Del Piano.

The discussion then turned to the PUMP Act, which amends the Fair Labor Standards Act (FLSA). "The PUMP Act requires employers to provide reasonable break time for an employee to express breast milk each time an employee has a need to express milk for one year after the child's birth," Mr. Del Piano explained. Both Ms. Greenberg and Mr. Del Piano noted that there already has been a proposed collective action lawsuit under FLSA and PUMP filed by USPS employees based on the U.S. Postal Service's alleged forcing of the employees to express milk in the following locations: the back of a hot, windowless mail truck, in a break room with co-workers present, and the locker room where the employee was not allowed to hang a sheet for privacy. *Masseur et al v. United States Postal System*

Above: So What's New in New York? (L-R): Sara Kula, Miriam Clark, Tracy Salmon Smith, Bridget Hollohan Scally, Steven Zuckerman

The New Federal Pregnant Workers Fairness Act and Pump Act. (L-R): Michael Del Piano, Joan C. Lenihan, Katherine Greenberg

What's It Worth to You? (L-R): Victoria Spagnolo, Ana C. Shields, Timothy S. Taylor, Jeanne M. Christensen

The Changing Face of Religious Discrimination Law (L-R): William Devitt, Dawn Solowey, Geoffrey Mort, Abner S. Greene

et al was filed on July 21, 2023 in the U.S. District Court of the District of Columbia. According to plaintiffs, the USPS had several options that would have assisted them, including a change in route or reassigning them to a stationary role. Both options would have given the USPS employees appropriate options to lactate. If plaintiffs prove their case, the U.S. Postal Service could face heavy penalties since employers who violate PUMP are subject to liquidated, compensatory, and punitive damages.

What's It Worth to You? Valuing Discrimination and Harassment Claims

On the final day of the NYSBA Annual Meeting, the Labor and Employment Section met to discuss updates on laws and decisions in the employment law sphere. Among the many thought-provoking discussions was the "What's It Worth to You?" panel on best practices for valuing discrimination and harassment claims. The panelists—Ana C. Shields, the Office Managing Principal at the Long Island office of Jackson Lewis P.C.; Jeanne M. Christensen, Partner at Wigdor LLP; and Timonthy S. Taylor, Arbitrator and Mediator—offered insight into the unique perspectives of defense counsel, plaintiff counsel, and neutrals, respectively, on how to best assess the monetary value of discrimination claims.

The discussion, led by Victoria Spagnolo, an Associate Attorney at Book Law LLP, centered around two hypothetical cases. The first case presented a somewhat novel issue, a disability discrimination claim based on mental health. Because the case was (hypothetically) proceeding to a jury trial, the panelist discussed the importance of considering the cost of litigation, including the cost of dispositive motion practice and expert witness testimony, as well as the likelihood of success at trial. The second hypothetical case involved a sexual harassment claim of a female employee whose employment agreement contained an arbitration clause, which, as some of the panelists pointed out, would only add to defendant's costs.

The panel discussion, including the many questions from the audience, revealed the great uncertainty with discrimination claims. As the value of a discrimination claim depends on the very particular circumstances of the parties, placing a monetary value on these cases can, at times, be difficult.

Fall Meeting 2023 - Toronto

President-Elect Domenick Napoletano

Breakfast Committee Meetings (L-R) Peter Jones, R. Scott DeLuca (Secretary), Kimberly Anne Lehmann, Karen P. Fernbach

AI Panel (L-R): Alyssa Zuckerman, Shokouh Abadi, Hon. Tanya Kennedy, Mark Berman

Workplace DEI Initiatives Under "Anti-Woke" Attack (L-R): Kori Carew, Teri Dennis-Davies, Iyana Titus

The Ethics of Chat GPT and Related AI in Law Practice Management

Annual Meeting 2023

(L-R): Abigail Levy (Program Chair), Melinda Gordon, Hilary Mofsowitz, Cheryl Massena

(L-R:) Jeffrey Hartnett, James D. Bilik, William Herbert

Past Section Chair Evan Spelfogel

Meet the NLRB General Counsel (L-R): Jennifer Abruzzo, Teresa Poor

Annual Meeting Luncheon (L-R): Chair Sheryl Galler, Isaac Thuesen (3rd place recipient, Stein Award), Brendan Mohan (1st place recipient, Stein Award), Seth Goldstein (2nd place recipient, Stein Award and co-winner of Kaynard Studen Service Award), Astrid Aune (co-winner, Kaynard Student Services Award), Former Section Chair Evan Spelfogel

Rigid Rideshares and Driver Monitoring

By Seth D. Goldstein

SECOND PLACE WINNER

Dr. Emanuel Stein and Kenneth Stein Memorial Law Student Writing Competition

Since 2018, Uber has submitted applications for numerous patents that use algorithms to "define" safety. These patents "calculate" safety through multiple factors, including crime reports and statistics, news databases, academic databases of reports of violent conflicts in a location, the car's condition, how often the driver swerves, and "social media."[1] These machine-learning models attempt to predict "the likelihood that a driver will be involved in dangerous driving or interpersonal conflict."[2] Drivers are generally outraged by these patents and have commented that these recorded metrics will be "used to manipulate and influence" driver behavior.[3] There is merit to this fear. For example, in one patent application, Uber has associated a lower safety score with drivers who work at night and complete fewer trips.[4] In other words, Uber is evaluating safety for riders through a lens of what it deems safe, which happens to correlate with what may improve its bottom line.

While there are inherent advantages to increased safety measures, the downside of these measures is often overlooked. Transportation Network Companies (TNC) successfully distract drivers and riders from the pervasive monitoring and mandatory job training through the lens of rider safety features. This article will review the way rider safety, driver "flexibility," and driver monitoring interact, and will ultimately argue that there is probative value in these factors to determine that TNC drivers are employees.

Part I will review the importance of the classification question and the varying analyses under United States common law. This will include a review of the development and transformation of various tests employed by courts to determine worker classification in the United States. Part I also briefly summarizes my previous work in "Rigid Rideshares and the Driver Flexibility Myth" to highlight how TNCs perpetuate a false narrative that drivers have flexible schedules and therefore should be considered independent contractors.

Part II will focus on the motivation behind why TNCs monitor drivers, as well as the methods TNCs use to carry out this monitoring. This includes data on driver speed, acceleration, braking, route information, phone placement in the car, and much more. This section will highlight how TNCs use the guise of safety to increase monitoring measures of drivers. Part II will additionally discuss how TNCs use this information to make supervisory decisions akin to those of an employer and further restrict driver flexibility.

Part III will review the impact of this pervasive monitoring. First, this section will review how these monitoring techniques and required training impact the TNC driver experience. Part III will then analyze how courts and administrative agencies have ruled on the classification question concerning TNCs and highlight that monitoring is missing from the analysis. Finally, Part IV will suggest factors that courts and administrative agencies should consider in the classification analysis moving forward.

I. United States Labor Law, Misclassification, and the Driver "Flexibility" Narrative

States define a "TNC" similarly: as an organization that provides "prearranged transportation services for compensation using an online-enabled application or platform to connect passengers with drivers."[5] In other words, TNCs, like Uber, Lyft, and Via, are platforms that use technology to connect individuals seeking a ride ("riders") with those who are driving their car seeking a job ("drivers") and set a fare for the ride. This seemingly simple idea has had an enormous global impact: the ride-sharing market globally was valued at $84.30 billion and is expected to grow to $242.73 billion by 2028.[6] Additionally, TNCs provide a substantial number of rides to the public. For example, in 2021, there were 39.7 million rides in Massachusetts[7] and more than 50 million rides in Chicago.[8] In December 2022, there was an average of nearly 635,000 trips per day in New York City alone.[9]

The increasing presence of rideshare platforms has led to regulatory questions and subsequent legislation to address some of those questions.[10] However, TNC's extensive lobbying efforts have influenced state laws.[11] Therefore, the resulting laws tend to closely align with the goals and desires of TNCs, as opposed to what might be best for drivers and riders.[12] For example, TNCs have had a lot of leverage concerning driver classification as independent contractors under the law. California—through an initiative process—and Washington—through legislation—have both identified drivers as independent contractors under the law, rather than as employees.[13] At the same time, these two states added some portion of rights to create a new "independent contractor plus" category.[14]

A. The Employee/Independent Contractor Dichotomy

In 1935, Congress passed the National Labor Relations Act to protect workers in their "full freedom of association, self-organization, and designation of representatives" to achieve "mutual aid or protection."[15] The NLRA makes clear that inequality of bargaining power "substantially burdens and affects the flow of commerce . . . by depressing wage rates and the purchasing power of wage earners . . . ."[16] However, "employee" under the NLRA does not include "any individual having the status of an independent contractor."[17]

In 1938, Congress passed the Fair Labor Standards Act.[18] The Roosevelt administration argued that, without this legislation, "desperate workers would accept working conditions that fell below what a 'self-supporting and self-respecting democracy' could tolerate."[19] The FLSA set minimum wage requirements, overtime pay eligibility, recordkeeping standards, and child labor standards.[20] Despite the distinctively broad definitions of "employee" and "employ" in the FLSA—"employee" is defined as "any individual employed by an employer" and "employ" is defined as "to suffer or permit to work"—there is similarly a carve-out for independent contractors.[21] Therefore, workers classified as independent contractors do not receive the substantive benefits guaranteed under the NLRA or the FLSA.

B. Common Law Tests To Determine Classification

There is no singular test used across courts and federal agencies to determine whether an employment relationship exists. The National Labor Relations Board (NLRB), the federal agency that oversees the administration of the NLRA, applies a common law agency test.[22] This test includes factors like the extent of control exercised over the worker.[23] Under the FLSA, courts look to the "circumstances of the whole activity," or the "economic reality" of the working relationship.[24] However, the specific factors utilized, and how they are utilized, vary by jurisdiction.[25] Federal circuit courts have also adopted various tests to make this factual determination. Though never adopted by the Supreme Court, one of the most significant tests, used by at least 20 states, is the ABC test, which shifts the burden onto the employer to prove that a worker is an independent contractor.[26]

C. TNC's Misleading Driver "Flexibility" Narrative

In my previous work, "Rigid Rideshares and the Flexibility Myth," I argued that TNC drivers do not have the flexibility that TNCs claim because of the TNC incentivization schemes, the way TNCs have gamified work, and the need for drivers to align their work schedules with TNC-proscribed hours to earn a livable wage.[27] For example, drivers tend to work shift-like schedules because of surge pricing and other incentives that TNCs offer during those hours, as well as in-app notifications that suggest a driver continues driving "for another hour."[28] Further, I argued that even if factually TNC drivers had a wealth of flexibility, that does not preclude them from being classified as employees under the law.[29] Ultimately, I concluded that TNCs employ a false narrative of flexibility to urge and improperly convince the general public, legislators, and judges that TNC drivers must be categorized as independent contractors to retain that flexibility.[30]

Rider monitoring, surveillance, and required training are all ways in which TNCs continue to demonstrate control over riders, thus seriously diminishing their flexibility. TNCs monitor drivers through GPS tracking, rider rating systems, phone tracking, and other app-level data. These monitoring devices provide TNCs granular information about how fast a driver was going, whether they took the most efficient route, whether riders felt the driver's car was comfortable, and much more. While TNCs implement these measures in the name of safety for riders, they also heavily rely on this data for account suspension and other human resource management (HRM) functions. Further, since the algorithms TNCs employ are a "black box," it is very possible that TNCs use this to determine their ride assignment system.[31] Thus, TNCs act much more like an employer than they would confess because of their extensive use of driver monitoring and required driver training.

II. Driver Monitoring and Training as a Proxy for Rider Safety

TNCs use technology, through real-time platform data, to increase and improve safety measures. To receive this data, TNCs monitor driver activity through their use of the platform, but also through GPS location tracking. The increased monitoring changes the relationship between drivers and TNCs that deploy the platform. As TNCs increase their monitoring, they are more likely to form employment relationships with drivers.

Rider safety initiatives, like Uber's RideCheck, which detects in real time if a trip "goes unusually off course or if a possible crash occurred,"[32] and Lyft's Smart Trip Check-In, which "monitors rides for unusual activity, like long stops or route deviations,"[33] rely on real-time data and monitoring of rides, and therefore, drivers. TNCs implement these measures to increase safety measures for riders; however, in doing so, they use their platforms to monitor and make supervisory decisions, including hiring, firing, suspension, and "suggesting" certain client-facing behaviors that heavily impact a driver's supposedly flexible and independent work.

A. The Stress for Rider Safety Initiatives Among Riders, Legislators, and TNCs

Uber's "About Us" page lists its core values: sustainability, diversity, integrity, and safety.[34] The page, aimed primarily at rideshare customers, states that "when you're in the back seat . . . your safety is essential," and that Uber "develop[s] new technologies and systems to help improve safety."[35] This is echoed in Uber's full mission statement, which states that "[f]rom drivers with background checks to real-time verification, safety is a top priority every single day."[36] Lyft claims that "[s]afety for all means looking out for riders."[37] To further this goal, Lyft states that their safety measures "are always on . . . anytime night or day . . . ."[38] To promote rider safety, Lyft proudly boasts that they "monitor rides, share locations, and monitor with whom [the customer is] riding."[39]

Safety is important to riders. One study found that trust in the TNC platform is a key factor in how users determine which rideshare platform to use.[40] Further, the study found that trust acts as a lens for the perceived value of the platform.[41] Additional research identifies that TNCs have "strong market incentives" to ensure rides are safe.[42] Studies by Uber and Lyft highlight that there is a direct relationship between the safety and comfort of a car and the tips received.[43] Uber has additionally taken note, publishing a U.S. Safety Report in June 2022 that was specifically published to "bring hard data to bear to drive accountability and improve safety for Uber and the entire industry."[44]

Legislators have also taken note of safety concerns. In South Carolina, the Samantha L. Josephson Ridesharing Safety Act requires TNC vehicles to display license plate information.[45] In New Jersey, Sami's Law requires rideshare drivers to display illuminated signs and digital barcodes on their windshields.[46] Both the South Carolina and New Jersey laws are named after a victim of a crime resulting from a rider mistakenly getting into a car she believed was her requested rideshare.[47] As of May 2016, legislation regulating TNCs has been enacted in 34 states and Washington, D.C.[48] In 2023, President Biden signed Sami's Law, or H.R. 1082, to create a nationwide push for riders' safety.[49] The federal bill requires studies of the incidence of fatal and non-fatal assaults in TNC and for-hire vehicles to enhance safety.[50]

B. TNC Methods of Monitoring and Training

As a result of safety concerns, TNCs implement new technology measures to monitor rides in minute detail. This monitoring diminishes the flexibility of TNC drivers. Additionally, the extensive control that platforms enforce indicates that drivers of TNCs are likely closer to employees than to independent contractors. As Alex Rosenblat and Luke Stark state, "[r]egardless of the language used by Uber to describe its legal and rhetorical relationship to its drivers, an analysis of driver experiences with the company's system reveals numerous manifestations of algorithmic management."[51]

Further, TNCs play an active part in every transaction on the platform and thereby shape the behavior of providers and consumers.[52] TNCs use a variety of tactics to accomplish this, including making decisions based on passenger ratings, using GPS real-time location services, and other information from the platform. TNCs use the data received from these monitoring tactics to further restrict driver flexibility and make employment-related decisions that would not be relevant if drivers were truly independent contractors.

1. Passenger Ratings as the New Middle Manager

After every trip, TNCs prompt riders to rate the driver on a scale from one to five stars.[53] If the rider gives fewer than five stars, the platform will prompt riders to provide additional information about why that rating was chosen, including vehicle cleanliness, driver speed, and comfort of the car.[54] In 2014, Uber shared that a driver rating of 4.6 or lower is when the TNC begins considering deactivating an account.[55] In blogs and Reddit threads, drivers state that "the way that the ratings work, anything less than a five-star rating is a fireable [sic] offense."[56] Lyft notifies drivers that "if your rating drops below 4.8, you might want to start thinking about what you can do to improve it since consistently low ratings can put you at risk of deactivation."[57]

User ratings in the gig economy have, from inception, been a proxy for HRM.[58] User-generated ratings serve the key functions of ensuring safety and reliability.[59] David Carranza aptly describes rating systems as the "invisible manager" by promoting drivers with good ratings and pushing out those with bad ratings.[60] While user ratings, at first glance, seem to have been designed for riders to provide accurate feedback to TNCs, they function to "exercise control over platforms' workforces."[61] User rating systems have been used as "a substitute for a company management structure."[62] This separation from a classic management structure enables TNCs to exercise more granular control over driver actions through employee monitoring.[63] Deepa Das Acevedo refers to these rating systems as "reputational feedback systems" and argues that user-based rating systems often have discriminatory impacts because of the bias of riders, including "spite grading" and inaccurately low ratings.[64]

Uber suggests certain functions to raise a driver's rating. For example, the website suggests that drivers "offer passengers bottled water, chewing gum, snacks, mints, and phone chargers," as well as "keep your vehicle clean and well-maintained[,] . . . dress appropriately[,] . . . [and] take the best route."[65] Additionally, weekly emails from Uber provide drivers with their ratings, comments from riders, and whether or not they are above or below average.[66] Essentially, to achieve a five-star rating—anything below which is considered failing—drivers must behave in certain ways, which results in a necessarily "homogenous Uber experience for riders," which conflicts with any conception of driver flexibility.[67]

2. GPS Information Serves an Algorithmic Supervisor

GPS navigation and location are undoubtedly an important part of TNC business models: they determine driver-rider matches, allow for seamless pickup, and create efficient routes for drivers. TNCs encourage the use of built-in GPS navigation within the app.[68] Even when TNCs allow for the use of a third-party app, they continue to monitor drivers' location and trip details.[69] TNCs claim that they do this to monitor rides for unusual activity, "like long stops or route deviations," because "safety for all means looking out for our riders."[70] The ways TNCs use GPS data to make work assignment decisions highlight how algorithmic management is not neutral and takes advantage of workers.[71]

TNCs are not the first industry to incorporate geolocation information to make HRM decisions. Platforms may be the modern-day sociometric badges, collecting data about the worker's location and interactions with other platform users.[72] Tracking the physical location of a worker is a means of ensuring productivity or monitoring against misconduct, and "traverses several occupational fields."[73] Additionally, services like AllGeo claim to "take the complexity out of managing your payroll" by using always-on automatic GPS trracking to "start and stop as your employee's arrival and departures from a job site," and to trigger alerts for exceptions to expected workflows.[74]

TNCs additionally collect significantly more data than just driver location. First, they use data to track driving speed, including information about how suddenly a driver stops or accelerates.[75] Second, Uber and Lyft's GPS tracking devices include "advanced telematic features such as vehicle, diagnosis, and fuel level indicator and engine levels of temperatures."[76] Finally, TNCs use location data and GPS information to dictate specific routes for drivers.[77]

TNCs can use the data collected from location tracking to make supervisory decisions. Data is collected and stored long-term and is used to analyze driving expertise and "inform the authorities" whenever there is rapid acceleration, harsh braking, speeding, or dangerous cornering.[78] Uber then uses this data to "cut off drivers that they feel are constantly dangerous or poorly performing."[79]

3. Mandatory Driver Training Programs

TNCs emphasize that they implement mandatory training programs to ensure safety is a priority. For example, before a driver can work for Uber, they have to complete a variety of trainings, including how to use the app and navigation system, as well as recognizing and standing up to sexual harassment.[80] Until this training is complete, the platform is unavailable to drivers.[81] Additionally, all training occurs within the platform.[82] In certain jurisdictions, drivers are required to participate in defensive driving programs approved by TNCs.[83]

These monitoring measures are directly tied to the amount of control that TNCs assert over drivers, and therefore the presumed flexibility that drivers can enjoy. Therefore, these monitoring measures directly impact the driver's experience and should be considered part of the legal analysis of whether drivers are employees or independent contractors of their respective TNCs.

III. The Impact of Monitoring and Training

The cumulative effect of TNC monitoring and required driver training results in a significant increase in control exerted over drivers and a decrease in the flexibility that TNCs claim. The driver experience is much different than what Uber touts, and specifically "the autonomy celebrated by Uber's model stands in stark contrast to the everyday experience of its drivers, who are carefully monitored by an algorithmic boss."[84] Further, the level of granular data Uber can get on drivers through its monitoring schemes is "a type of workplace surveillance that contradicts its claims that it has a 'hands-off' management style."[85] The control that TNCs have over the driver experience should be reflected in the classification analysis and should weigh heavily in finding TNC drivers as employees.

A. Impact of Monitoring on the Driver Experience

TNC drivers worry about the level of monitoring TNCs employ. A quick search through driver forums finds hundreds of forums with titles like "PRIVACY —Uber (big brother) is watching you (listening & tracking too)."[86] In that post, 81% of respondents responded with either they "don't want Uber knowing everything that goes on in [their] life," or "WTF??"[87] Drivers post about new monitoring techniques, including "telling [drivers] where and when [they] speed,"[88] and a "new alcohol monitoring system."[89] Finally, drivers often post about the accuracy of these monitoring methods. For example, one Redditor commented that "[the] breaking/acceleration tracking is broken . . . it keeps losing my rating when even my passengers acknowledge it was a smooth ride."[90] Other drivers affirm this finding, stating that they "never had any [braking notices] for the longest time . . . [b]ut when [they] changed phones, it got much worse."[91]

TNCs are not transparent about what they monitor and what data they collect, causing drivers to engage in behavioral modifications that benefit the TNC.[92] Because of this lack of transparency, drivers suspect that TNCs collect much more information than they communicate and act as if they are always being watched.[93] Tim Christiaens argues that this leads to an "infinite feedback loop of self-improvement" where drivers "engage in trial-and-error experiments to optimize their reputation vis a vis the algorithm."[94] In other words, drivers internalize the potential impact of automation and algorithms and try to engage in specific behaviors that benefit the TNC to avoid punitive measures.

The reason that drivers worry about this monitoring is that it likely has a significant impact on their ability to find rides. Uber's app, for example, displays a safe-driving report that outlines "smooth breaks" and "smooth accelerations."[95] One driver had smooth breaks 219/264 times, and the app displayed the message "Several harsh breaks detected."[96] Uber will also send notifications to drivers in real time, ranging from "[h]ave you been speeding?"[97] to "[s]peeding is dangerous for you and riders."[98] Lyft "nudges" drivers with notifications like "[i]t looks like you've been stopped for a while."[99]

Problematically, Uber and Lyft are not transparent about what they include in their algorithmic decision-making. Uber explains that drivers lose access to their account due to safety issues, which includes "reports that the driver . . . had . . . repeated reports of poor, unsafe, or distracted driving while using the Driver app."[100] But beyond deactivation, TNCs make every decision regarding matching drivers and riders and the appropriate fare. In other words, without further information from Uber or Lyft, drivers worry that these notifications impact the number of ride requests they get, the pick-up and drop-off destinations, the length of the trip, the fare, and ultimately their ability to make a livable wage.[101] This unpredictability and lack of transparency, driven by fast-evolving parameters—like incomplete data from a driver's phone—cause management decisions by the algorithm to become difficult to record and explain.[102]

B. Impact of Monitoring on the Legal Analysis

Courts thus far have not put the appropriate emphasis on driver monitoring in analyzing whether drivers are employees or independent contractors of their respective TNCs. Outside of the TNC context, however, some courts and agencies appropriately weigh monitoring.[103] For example, in *Ruiz*, the Ninth Circuit Court of Appeals found that techniques employed to monitor furniture delivery drivers, including notifications every two to three stops, monitoring drivers on the "route monitoring screen" and contacting drivers if they were running late or off course, indicated a type of supervision which more likely than not indicated that the drivers were employees.[104] Additionally, in *Alexander v. FedEx Ground Package System, Inc.*, the Ninth Circuit Court of Appeals found that FedEx drivers were employees because "FedEx's lack of control over some parts of its drivers' jobs does not counteract the extensive control it does exercise" specifically concerning the way FedEx makes "suggestions" that dictate the "manner and means" of the way drivers work.[105] Still, courts and administrative agencies have been hesitant to include monitoring in their analysis for TNC drivers. The term "monitoring" often does not appear in opinions explaining supervision and control, yet the examples used show pervasive monitoring.

In an advisory memo from the general counsel of the NLRB, Jayme Sophir stated that the level of control should be assessed "in the context of its effect on the entrepreneurial opportunity."[106] Sophir additionally stated that drivers operate without supervision from Uber.[107] Sophir came to this conclusion because drivers don't "report to supervisors" and that Uber's "minimum service standards . . . do not amount to the kind of supervision normally indicative of employee status."[108] However, Sophir admits that the "minimum service standards" include approving a vehicle before a driver could use it, adhering to dispatch procedures, and competent driving and navigation based on GPS data.[109]

In *Tyler v. Uber Technologies, Inc.*, the D.C. circuit court held that Uber drivers had not alleged sufficient facts to support a claim that Uber was their employer.[110] The court held that "collecting a review after a ride is over is more similar to evaluating an end product than monitoring work performance on an ongoing basis."[111] Not once in the opinion does the court discuss surveillance as a factor, despite it being relevant to the applicable test under a Title VII claim.[112] The court held that "the extent of the employer's right to control the 'means and manner' of the worker's performance is the 'most important factor.'"[113] However, the court did not consider how Uber does control the "means and manner" of performance through active and constant monitoring.

Similarly, in *Cotter v. Lyft, Inc.*, the court did not determine whether Lyft drivers were employees, and instead left it as a question for the jury, explaining that jurors in this call will be "handed a square peg and asked to choose between two round holes."[114] Again, in *Cotter*, the court does not mention monitoring in its analysis. The court focuses on control of the manner and means of the work, without paying regard to supervision or monitoring, which both directly impact how drivers carry out the manner and means of work.

IV. What the Legal Analysis *Should* Look Like

The Department of Labor (DOL), in the 2022 Proposed Rule "Employee or Independent Contractor Classification Under the Fair Labor Standards Act," stated that issues related to supervision over the performance of work should be considered under the control factor of the classification question under the FLSA.[115] Further, the DOL stated that "supervision can also come in many different forms, which may not be immediately apparent,"[116] and that supervision "can be maintained remotely through technology" through systems that "can track a worker's location and productivity, and even generate automated reminders . . . ."[117] These important factors should be included in court and agency interpretation and analysis of the classification question.

A. Relevant Factors of Control and Supervision

Though courts and agencies are hesitant to equate monitoring with control, the analytical leap from one to the other is surprisingly short. The act of monitoring, in a vacuum, may seem distinguishable from outright control of how drivers operate. However, the methods of monitoring TNCs employ highlight a high degree of control, in which TNCs de facto require certain behaviors that strongly benefit the company at the expense of the driver. In *O'Connor v. Uber Technologies*, the California district court held that Uber is "deeply involved in . . . monitoring [drivers'] performance" and "disciplining (or terminating) those who fail to meet standards."[118]

1. Platform "Suggestions" (and Failure To Comply)

As previously discussed, TNC drivers receive numerous "nudges" and notifications from the respective TNC platforms about the state of their driving and service, and how the TNC "suggests" the driver modify their behaviors.[119] Suggestion, however, is a misnomer. As the court in *O'Connor* correctly pointed out, Uber monitors its drivers to ensure compliance through quality control "suggestions," that "actively monitor" driver performance."[120] Similarly, in *Ruiz*, the court found that guidelines, regardless of being referred to as "suggestions," were requirements, and should be considered under the right to control drivers.[121]

The crux of the inquiry should be what effect on the driver a failure to comply with a "suggestion" has. In focusing on that, the key question becomes: is this a suggestion, or is this an employer-imposed requirement on an employee? When a putative employer monitors drivers with the effect of imposing required changes in the driver's behavior that benefit the putative employer over the employee, the reality of the relationship between the driver and the platform becomes clear. Courts should appropriately weigh the de facto effect of these "suggestions" and whether that effect indicates a level of control that TNCs have over drivers.

2. Active and Constant Monitoring

Jeremy Bentham's panopticon provides the background theory behind how TNC drivers alter their behavior to benefit the TNC due to constant TNC monitoring. Bentham's panopticon is a theoretical prison from which there is a tower in the center, which can see into each of the inmate's cells. However, inmates cannot see inside the tower and therefore are never sure when they are being monitored. Bentham hypothesized that seemingly constant surveillance would alter inmate behavior to ensure prisoners follow the prescribed rules.[122] Specifically, the major effect of the panopticon is "to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power."[123]

Modern academics have connected the dots between the panopticon and technology in the workplace. For example, Yuhuai Liu argued that "even though a compliant employee does not necessarily consider himself or herself as a prisoner trapped in the workplace, his or her behavior is still influenced by employee monitoring."[124] Additionally, researchers have suggested that employers are now monitoring employees beyond the scope of their work functions, including personal activities on cell phones.[125]

Courts should analyze the impact that constant and active monitoring has on TNC drivers. For example, in *O'Connor*, the court held that Uber was constantly monitoring driver behavior, which gives Uber a "tremendous amount of control over the 'manner and means' of its drivers' performance."[126] In *O'Connor*, Uber argued that there was a distinction between in-person monitoring and the alleged monitoring it imposes on drivers. The court found the existence of a distinction to be true but held that Uber's alleged monitoring is far more pervasive.[127] Additionally, courts should reject any potential argument that the monitoring is done at the rider's behest to promote rider safety. While this may partially be true, it does not limit the control TNCs have over drivers. In *Molina v. South Florida Express BankServ, Inc.,* the court rejected this very argument, holding that the putative employer's "reasoning is circular."[128]

3. Impact of "Algorithmic" and "User" Decision Making

TNCs may claim that they should not be held liable for the decisions of users—through rider ratings—or an algorithm. However, as I argued in "Rigid Rideshares and the Driver Flexibility Myth," TNCs unlawfully use their platform "as a shield between it and employer liability."[129] TNCs rely on the data they get from constant monitoring to provide information to the algorithm, and they still determine whether or not to take punitive actions against a driver.

In *O'Connor*, the court held that though "drivers' adherence to every detail of Uber's directions (or 'suggestions') may not be specifically through rider ratings[,] . . . monitoring through rider ratings may be a generally effective enforcement mechanism."[130] Additionally, basing employment decisions on user ratings "puts into dispute the extent to which drivers are free to control how they drive rides to users" and "indicates that drivers instead might be de facto bound by the Uber Driver Handbook . . . ."[131]

Courts and administrative agencies should focus not on who is providing the input for these decisions, but on the effect these decisions have on the driver's behavior. In doing so, the influence TNCs exert over drivers, through their extensive monitoring of driver behavior and reliance on biased rider ratings, results in drivers modifying their behavior to act less like independent contractors and more like employees.

V. Conclusion

Undoubtedly, rider safety is an important concern and priority for TNCs, drivers, and the general public. This article emphasizes, however, that the monitoring tactics that TNCs employ to effectuate increased rider safety result in a substantial increase in the control platforms have over drivers. Since control and supervision are significant factors in determining whether a worker is an employee or an independent contractor, courts, and agencies need to incorporate monitoring in this analysis. In doing so, it is much more likely that TNC drivers are employees, rather than independent contractors, of the respective TNC platform.

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The Evolution and Role of the NLRB General Counsel

By Isaac Thuesen

THIRD PLACE WINNER

Dr. Emanuel Stein and Kenneth Stein Memorial Law Student Writing Competition

Introduction

While much has been said about partisanship among board members at the National Labor Relations Board, not much has been written about the agency's General Counsel in this regard. This article examines the thinking behind the modern General Counsel position as codified in the Taft-Hartley Act. It argues that the aim of the system for dividing power between the Board and the General Counsel, first introduced by Taft-Hartley, represented an attempt to rein in the excesses of a liberal board, but that this empowering of the General Counsel has also at times had the unintended effect of hamstringing anti-union interests. To illustrate the ways in which the General Counsel has clashed with the Board, two General Counsels—one a Republican appointee and the other Democratic—are analyzed as case studies.

The NLRB General Counsel: Description and Historical Background

Appointment and Duties

Section 3(d) of the National Labor Relations Act describes the role of the General Counsel.[1] General Counsels are appointed by the president and serve a term of four years.[2] They have supervisory authority over "all attorneys employed by the Board," with the exception of the Board's administrative law judges, and are empowered with "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law."[3]

Legislative Impetus and Reaction

While the position of General Counsel has existed since the Board's inception, it did not take its modern shape until the Taft-Hartley Act in 1947.[4] The Taft-Hartley Act designated the General Counsel "as an independent prosecutor to bring cases before the policymaking Board."[5] There is disagreement among scholars regarding the extent to which the Taft-Hartley Act represented a reversal of the Wagner Act's pro-union policy aims.[6] Some scholars have deemphasized the Taft-Hartley's Act anti-union bent, by, among other things, emphasizing how the drafters declined to extend the same prohibition on "interfer[ing] with" to unions in 8(b)(1) that binds employers in 8(a)(1), or pointing to the fact that Congress deliberately declined to add the same language affirming employees' right to "refrain from" union activity that it had added to Section 7 to the general summary of the Act's aims in Section 1. However, there is no doubt that the Taft-Hartley Act as a whole represented a negative reaction to the explosive growth of unions, whose total membership swelled from 3 million at the time of the passage of the Wagner Act in 1935 to 15 million in 1947, and the associated "wave of strikes that shut down many steel mills, auto plants, seaports, and large sections of other industries."[7]

With this drive to curtail the surging power of unions as the backdrop, the Taft-Hartley Act redefined the "General Counsel as an independent prosecutor to bring cases before the policymaking Board."[8] At the same time, the Act expanded the number of Board members from three to five and vested in the Board judicial authority, to contrast with the General Counsel's prosecutorial and administrative duties.[9] While Senator Robert Taft justified this shift "by emphasizing the virtue of distinct judicial and prosecutorial functions," it appeared clear that he and other management-friendly legislators envisioned the newly defined General Counsel as a potential "conservative counterweight to the liberal leanings of the sitting Board members."[10] This was evidenced by how, under the new division of power, the General Counsel determined which cases the Board ruled on.[11]

An even clearer indication of the conservative aims of this new power-sharing arrangement between the Board and the General Counsel came in the form of the Board members and others' reactions to the change. Member William Leiserson bemoaned the "conflicts of authority" that this shift would inevitably create.[12] President Truman, whose veto of the Taft-Hartley Act was overridden by Congress, "opposed the 'unique' administrative restrictions Taft-Hartley placed on the Board compared to other New Deal administrative agencies."[13]

Historical Overview of Post-Taft-Hartley General Counsels

The fears of union-friendly figures vis-à-vis the revamped General Counsel position were further confirmed when President Eisenhower's Republican administration succeeded Truman's Democratic. President Eisenhower, for the first time in the Board's history, appointed to the General Counsel position an attorney, Theophil Kammholz, who had worked for years in management-side labor law.[14] Arnold Ordman, the General Counsel under Kennedy and Johnson's successive Democratic administrations, by contrast, was a career Board attorney.[15] The same was true of President Carter's appointment to the General Counsel position, William Lubbers, though Lubbers nevertheless faced significant resistance from the Senate during his confirmation process, due to his closeness with Board chairman John Fanning (he had served as Fanning's assistant for several years) and the fact that he had met with top AFL-CIO officials around the time that they were pushing for an ultimately doomed 1977 overhaul of the NLRA.[16]

In much the same way as Eisenhower, President Reagan nominated an attorney with management-side experience to the General Counsel position.[17] A few years later, President Clinton departed from his Democratic predecessors by appointing to the position for the first time an attorney who had worked for labor unions.[18] This helped cement a trend towards partisanship that continued into the 21st century, with the General Counsel under President George W. Bush declining to exercise his power to seek 10(j) injunctions at anywhere near the rate of his Clinton-appointed predecessor, and the General Counsels under Obama/Biden and Trump all but explicitly declaring their opposition and support, respectively, for organized labor.[19]

General Counsel Case Studies

Rosemary Collyer

The Reagan-era NLRB was characterized on the whole by an unprecedented willingness to work against the interests of organized labor, with Reagan appointing avowedly pro-business figures, including an unprecedented non-lawyer, to the Board.[20] However, his General Counsel appointment, Rosemary Collyer, acted as a stumbling block to the worst excesses of anti-unionism.

To understand how Rosemary Collyer's time as General Counsel represented a partial subversion of prevailing conservative, anti-union currents, it is necessary to analyze Donald L. Dotson's tenure as Board Chairman. Dotson worked as an attorney for the Board, then served for a time in private industry.[21] In March 1983, President Reagan appointed Dotson to the Board.[22]

Dotson's tenure at the Board was immediately marked by controversy. After just one month as chairman, Dotson signaled an unwillingness to work with the incumbent Democratic-appointed General Counsel William Lubbers by rescinding the "Delegation Agreement," in place since 1955, which delineated power-sharing between the Board and the General Counsel and that reserved the power to enforce the Board's decisions for the General Counsel.[23] With the General Counsel Lubbers now stripped of this power, Chairman Dotson delegated the power, for the first time in Board history, to the Solicitor, an office controlled by the Board members rather than the General Counsel.[24]

While the controversy surrounding the powers formerly delineated in the 1955 power-sharing agreement eventually subsided with "Lubbers and Dotson "reach[ing] an informal compromise permitting Board members to review the general counsel's court filings,"[25] Dotson continued to represent for many in organized labor the worst excesses of the anti-union Reagan administration. Under Chairman Dotson's leadership, the Board "issued a series of precedent-shifting, pro-management decisions at a remarkable rate."[26]

Into this increasingly anti-union environment stepped Rosemary Collyer, President Reagan's 1984 appointment to replace William Lubbers in the General Counsel position.[27] Collyer was a young attorney with "unprecedentedly thin qualifications" for the General Counsel position.[28] Just 38 years old, Collyer had, as had become the norm for Republican appointments to the General Counsel position, practiced management-side labor law after graduating law school.[29] Immediately prior to assuming the General Counsel position, she had served as the Reagan-nominated Chairman of the Federal Mine Safety and Health Review Commission.[30] No doubt wary of Collyer's connections to management, the AFL and its Senate allies "mounted a vigorous anti-Collyer campaign and were able to block her confirmation for almost a year."[31]

Given the staunch opposition from organized labor to her nomination, one might have expected Collyer to leap into curtailment of organized labor with the same abandon as Chairman Dotson. However, Collyer's tenure was marked almost immediately by clashes with Dotson. Just one year after Collyer's confirmation, Dotson issued a letter that criticized the pace of the Board's case-handling, complaining that the Board had not been given the chance to issue a consequential decision "'in over a year.'"[32] Given how Dotson's stated time frame pointedly overlapped with Collyer's tenure, and how it is the General Counsel's job to select cases for the Board to decide, Dotson's letter seemed to be an obvious "jab at Collyer."[33] However, Collyer did not wither in the face of this attack but rather declared that Dotson's criticism "was wrong."[34]

Beyond Dotson's disagreements about case-handling, anti-union forces also clashed with Collyer over one of the most consequential labor disputes in Reagan's presidency. Amid the wave of plant closings and outsourcing that characterized the state of American manufacturing in the 1980s, General Motor's Saturn plant represented a rare bright spot.[35] The plant, which was part of GM's efforts to match the efficiency of its Japanese competitors by innovating new production techniques and cutting labor costs, was touted by politicians and business interests the country over and even received a visit from Vice President George H.W. Bush.[36] Recognizing the need for flexibility in the battle to stem the tide of outsourcing and overseas competition, the United Auto Workers announced its plan to depart from its standard collective bargaining arrangement with General Motors, abandoning its typical strong limitations on managerial authority in favor of provisions that gave GM managers the "flexibility to structure operations."[37] The UAW also accepted pay for its workers that was 20% lower than usual, in exchange for the promise of performance bonuses.[38]

Notwithstanding the outpouring of popular support for the new Saturn plant, the pro-management organization National Right to Work filed an unfair labor practice against GM and UAW, alleging, among other things, that GM and the UAW, in violation of Sections 8(a)(3) and 8(b)(2) of the NLRA respectively, had unlawfully granted preferential hiring rights to GM workers from UAW-represented units.[39] However, Collyer decided to overrule the regional director in charge of the case and issue a dismissal, and Right to Work later lost its appeal.[40] Collyer's decision to dismiss Right to Work's charge was a significant repudiation of the more extreme pro-management currents in the 1980s and one that prompted multiple personal attacks on her from the president of Right to Work, Reed Larson.[41]

Some, including even the president of UAW, argued that Collyer may have stretched the law to reach this decision.[42] Collyer's decision had turned on the reasoning that the Saturn situation was distinguishable from *International Garment Workers' Union v. NLRB (Bernhard-Altmann)*, in which the Supreme Court affirmed the Board's holding that an employer had violated Sections 8(a)(1)–(2) by, in the mistaken belief that the union had secured majority support, issuing a "memorandum of understanding" recognizing the union.[43] In distinguishing the Saturn scenario from the one in *Bernhard-Altmann*, Collyer leaned heavily on the argument that GM's agreement with the union contained an "implied condition of majority support" and also analogized the situation to a case—*Houston Div. of the Kroger Co.*—in which the Board upheld the legality of a clause providing for the recognition of unions at future Kroger stores which did not explicitly condition that acceptance on majority support.[44] Some scholars have criticized these arguments as questionable, with Professor Michael Powers arguing that Collyer's office mischaracterized the issue and holding in *Kroger* to make the case seem as though it were about premature recognition, when in fact the issue in the case had been "whether the 'additional store clause' required the employer to recognize the union on the basis of a card majority."[45]

Collyer's career as General Counsel offers a cautionary tale to anyone hoping to influence the workings of an agency. Whereas the pro-business interests behind the Taft-Hartley Act envisioned the strengthening of the General Counsel relative to the Board as a move designed to rein in a liberal board, Collyer's tenure illustrates how such a move can have a similar dampening effect on the very interests that pushed for the reform in the first place.

Frederick Feinstein

In 1994, Frederick Feinstein was the first attorney with a background representing unions to be appointed to the General Counsel position.[46] Just like Collyer before him, Feinstein's tenure was characterized by clashes with the Board Chairman.[47] There is scholarly disagreement on how exactly to characterize the dynamic between General Counsel Feinstein and Board Chairman William Gould IV. Professor Joan Flynn has criticized Gould as suffering from "a lack of both internal and external political skills," as evidenced by the frequent congressional scrutiny of the Board that he invited with his oftentimes blunt and provocative comments.[48] Professor Flynn seems to regard Feinstein as something of a foil to Gould in this regard, praising Feinstein's "low-key approach." Professor Michael Goldberg, by contrast, has argued that Flynn's criticisms of Gould are unduly harsh and points to the fact that, "low-key approach" notwithstanding, Feinstein invited just as much congressional scrutiny as Gould.[49]

One thing for is for sure, however, and that is that Feinstein and Gould clashed over how to handle the issue of seeking a 10(j) injunction against Major League Baseball amid the 1994 strike.[50] Feinstein is notable as a General Counsel for the sheer number of 10(j) injunctions that he sought, an achievement that he himself trumpeted in a retrospective on his tenure.[51] Whereas his predecessors in the Reagan and Bush I administrations greatly limited the number of 10(j) injunction requests that they granted, Feinstein greatly expanded the practice, with "the number . . . of authorizations [expanding], from 26 in 1992 (the last year of the Bush I Board) to 104 in 1995."[52] The number of 10(j) injunctions again fell during the Bush II presidency, with the General Counsel making only "between fifteen and twenty-eight requests yearly."[53]

Despite this general willingness to enjoin companies' activity, Feinstein balked at Gould's suggestion that he enjoin Major League Baseball in response for their having "unilaterally impos[ed] a salary cap and eliminate[d] salary arbitration before an impasse in bargaining had been reached."[54] Feinstein's hesitation to do so was all the more frustrating to Gould given that the players had promised to return to work if such an injunction were issued.[55] Though no one is sure why exactly Feinstein was so reluctant to take action, Gould has speculated that Feinstein was afraid that any fallout from the decision to enjoin Major League Baseball would be directed at him rather than the agency as a whole.[56]

Thus, while Feinstein's union background and his willingness to enjoin companies may seem like the antithesis of the Reagan- and Bush I-era Boards' priorities, Feinstein nevertheless bears a striking resemblance to Rosemary Collyer in the way that he clashed with his Board Chairman.

Conclusion

In sum, the clashes between the Republican appointees Rosemary Collyer and Donald Dotson and the Democratic appointees William Gould IV and Frederick Feinstein show how the vesting in the General Counsel of powers that do not belong to the Board has resulted in reduction of the Board's power, just as the drafters of the Taft-Hartley Act most likely envisioned. However, the case of Rosemary Collyer in particular illustrates how these clashes do not always serve anti-union interests. With such unpredictable political effects, the only consistent result from this sharing of power is inter-agency division, with the Board and the General Counsel pitted against each other.

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New York City's New Weight and Height Anti-Bias Law: Weighing the Costs and Benefits of an Obesity Protection Law

By Michael Diederich, Jr.

In May 2023, New York City amended its Human Rights Law (NYCHRL) to prohibit weight and height discrimination. The law, which became effective on November 22, 2023, is intended to protect employees working in the city against discrimination based upon height or weight. It is among the first of its kind in the nation, and, indeed, in the world.[1] The European Union has addressed the subject and offers some level of protection for obesity as a disability.[2] Yet European policy is intended to help people reduce obesity,[3] as obesity is seen by health experts as something to be avoided. The New York City law is designed to protect tall or short and obese or underweight people from being discriminated against based on their size.

This law is very different from most other federal and state anti-discrimination laws[4] because weight is not, at least technically speaking, an "immutable characteristic"[5] of any human being. Diet and lifestyle—personal choices—can significantly affect a person's weight, unlike a person's race, national origin, sex, gender preference, or disability.[6] This type of anti-discrimination law is somewhat sui generis.

Objectively, expressing a negative view toward someone because of their race or national origin is mean and bigoted. Yet telling a loved one that he or she should lose some weight might be well-intentioned (though likely inefficacious). Holding a negative view toward obesity is arguably helpful, rather than injurious, to both individuals and society at large. Health care professionals warn of the "epidemic of obesity"[7] in the United States, and the health risks associated with obesity are well documented. Health advocates urge measures such as healthier diets, food and exercise[8] to reduce weight in an American population in which 42% of adults are obese. Ten years ago, New York City Mayor Michael Bloomberg proposed a city-wide ban of super-sized sodas and sugary drinks as a public health measure.[9] Similarly, former First Lady Michelle Obama led an initiative for healthier school lunches and more physical activity to combat childhood obesity.[10]

Yet prejudice toward people who are overweight or obese can be devastating for the people the prejudice is directed at. The New York City law is designed to deter this prejudice, but will this then discourage dieting or other weight loss measures?

European policymakers recognize the dichotomy of unfair bias versus unhealthy living. The European Union grants obesity protection as a disability, yet at the same time seeks to help the obese control their weight as a matter of personal and public health.[11] Public health experts should similarly study the effects of this new law with this aim in mind.

It is a scientific truism that genetics influence weight. A person's genetic makeup is an immutable factor beyond an individual's control. Yet many other factors affect one's weight. One factor is the mass-marketing that attempts to addict people to junk food and sweets.[12] Another is public schools serving high-calorie and unhealthy foods.[13] Another slightly more controversial view may be a health care industrial complex that profits from an obese American population, where so many different ailments requiring medical care result from being overweight—heart disease, high blood pressure, and diabetes, to name a few. The CDC reports that obesity costs the U.S. health care system nearly $173 billion a year.[14]

Is legislation that some may see as promoting (or at least not discouraging) obesity wise? Maybe not. Yet victims of weight discrimination feel the pain of prejudice. Because of the large number of overweight and obese voters in New York City (and in America), one may opine that elected representatives surely see some political self-interest in "helping." And the reality is that the employment law bar—both employee-side and management-side—will profit from new anti-discrimination legislation such as this.

Yet the overarching concern should obviously not be who profits from adding "obesity bias" to the protections afforded by the NYCHRL. Rather, the concern should be for the interests of those who are ostensibly protected by the law. To what extent is enacting city (or state, or federal) legislation making discrimination against the obese unlawful beneficial to individuals and society, and to what extent might it be harmful? What are the individual and societal cost—and potential benefits—in prohibiting obesity discrimination?

There are competing interests, and there are legitimate viewpoints from all angles of these interests.

A. The Employer's Dilemma: Fire, or Don't Hire, an Overweight Worker?

Currently, there is no legal protection for an employee against termination of his or her employment specifically for being overweight, absent an accompanying legally cognizable disability. An overweight (or underweight) individual might find legal protection under the New York State Labor Law, because consuming more (or less) than is necessary for nourishment is arguably a "recreational activity" covered by Labor Law § 201-d (1)(b). Discrimination "because of . . . legal use of consumable products" is prohibited under § 201-d (2)(b). Yet "use" (of high caloric food) is not the same as results (obesity) and bias against such results, which the city law now addresses.

A possible unintended consequence of the proposed law might be that some employers in New York City that employ overweight individuals might determine that it will be in the employers' self-interest to terminate overweight employees before the city law takes effect. This might especially be the case if the employer had, for example, commented adversely about an employee's weight in the past, even if only in jest. Such comments, particularly if made frequently and not merely "stray comments,"[15] could be used against the employer in a future wrongful termination case.

Thus, from an employer's point of view, both as to existing and future employees, the city law regarding weight is problematic. Consider various hypotheticals:

- The overly concerned employer that repeatedly urges an employee to lose weight because the employee was morbidly obese, and another to gain weight because of anorexia, and the employer sincerely believes that the employees would suffer serious health consequences and an early death if the weight problems are not addressed.
- An employer that expects employees to do vigorous physical labor on the job might believe the labor to be unduly arduous for a seriously overweight or underweight employee, perhaps even precipitating a serious health issue (e.g., heart attack or stroke) on the job.
- The small employer that would consider hiring an overweight or anorexic individual under present law, yet may be reluctant under the new law because of the possibility of a weight-discrimination lawsuit in the future if the employee is hired but then fired for poor job performance (notwithstanding a "same actor" defense).
- The employer needs to downsize the company and accurately evaluates an obese or anorexic employee as less productive than other employees. As with other protected categories, this adds an extra layer of risk to this consideration.

The reality is that employers will sometimes act in their perceived (and sometimes biased) self-interest, and a law's good intentions may have undesirable results when put into practice.

B. Protected and Unprotected Employees' Points of View

As to weight, there are basically two classes of employees, namely, those of "ordinary" weight and those who are not (because they are either overweight, e.g., obese, or underweight, e.g., anorexic). Employees in these two classes may have distinctly different points of view.

For example, the point of view of the overweight employee may be reflected in the view of Tigress Osborn, the chairwoman of the National Association to Advance Fat Acceptance, that "[a]nti-fatness doesn't just break our heart—sit drains our wallets, steals our opportunities, and limits our lives."[16]

On the other hand, a more competent, better-performing non-obese employee will certainly beg to differ if she is laid off instead of a less competent, lesser-performing obese employee because of the employer's fear of an obesity bias discrimination lawsuit. By protecting one class of workers, the "average size" employee may be disadvantaged by the law when it comes to a reduction in force. The employer might be worried about a lawsuit from an obese or anorexic employee, and depending on their risk tolerance, may terminate the employee who is not in the "protected class."

Conversely, when it comes to hiring, the obese candidate for employment may be penalized by the city law because an employer who today would not think twice about hiring an overweight or underweight employee might have second thoughts if the new law is enacted because liability may result if the employee in the newly protected class is subsequently terminated.

One might ask: "Doesn't the argument above apply to *every* anti-discrimination law?" No. Anti-discrimination laws such as those prohibiting race, national origin, age, sexual preference and disability discrimination protect people who are in a disadvantaged minority group and treated unfairly due to an immutable characteristic.[17] Anti-discrimination laws provide statutory protection when there is sometimes even a constitutional need, for example, to protect a "discrete and insular minority." In Justice Harlan F. Stone's words:[18]

> [P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

If overweight and underweight employees make up the majority of the population (which may be the case today, or soon), they cannot be regarded as "discrete and insular." It also does not appear that American society has historically discriminated against people who are overweight in a systemic way, many of whom have had considerable political or social power. Thus, weight is quite unlike race, national origin, sex and disability discrimination.

C. Society's Interests

Anti-discrimination laws have historically been designed to reduce and eliminate discrimination and bias that may have been motivated by evil intention or unfounded fear. However, when it comes to obesity, New York City's new law may be a remedy for employment decisions that do not involve such intentions or fears. In fact, the remedy may punish good intentions and what some may feel are reasonable fears, some of which identified in the above hypotheticals.

Will the new law result in scenarios that produce both fair and unfair outcomes for the employer, society as a whole, and even the obese individual? Perhaps, yes. What if an employer observes that an employee is gaining weight and suggests, or even encourages, the employee to change diet or exercise, for health reasons? Such action can be viewed as unlawful, even though done with good intentions and the employee's welfare in mind. Will the law be abused by some? It is possible. Although it may seem extreme, an employee may gain weight intentionally in order to gain entry into this new protected class.

On the other hand, the City Council was persuaded by many individual stories of weight bias that seriously harmed individuals—economically, emotionally, and more. For many Americans, controlling weight is an exasperating problem, and if one adds workplace discrimination to this struggle, the workplace can become insufferable.

D. Conclusion

This article does not pretend to have answers to all of these questions. As with all proper legislation, there must be a wise balancing of individual and societal interests. The new city law seeks to protect overweight individuals against animus. Yet, it is possible it may create more harm than good. Time will tell, and public health experts should study the effects of this law and assess whether the overall benefits exceed the overall burdens. And it is up to the City Council—and other legislative bodies—to meaningfully evaluate this research.

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16. Jiminez*, supra* note 1.
17. Clarke *supra* note 5.
18. *See, e.g., United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 *(1938).* ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

Recent Leading Cases Relating to the ADR Field

By Alfred G. Feliu

Litigation Stayed Pending Appeal of Denial of Motion To Compel

The Supreme Court, resolving a question that had divided the courts of appeal, ruled that litigation must be stayed pending an interlocutory appeal of the denial of a motion to compel. Prior to this decision, six circuit courts imposed an automatic stay while three left the question to the discretion of the district judge. In an exception to the general rule that appeals may only be taken from a final judgment, the FAA permits immediate interlocutory appeals where a motion to compel is denied. The majority in this 5-4 decision concluded that while a matter is appealed, as was the case here, the district court is divested of its control over the case. "If the district court could move forward with pre-trial and trial proceedings while the appeal on arbitrability was ongoing, then many of the asserted benefits of arbitration (efficiency, less expense, less intrusive discovery, and the like) would be irretrievably lost—even if the court of appeals later concluded that the case actually had belonged in arbitration all along." The majority saw potential coercion if a party that had bargained for arbitration was required to proceed through discovery and trial while awaiting determination of its motion to compel. Further, the majority opined, from "the Judiciary's institutional perspective, moreover, allowing a case to proceed simultaneously in a district court and the court of appeals creates the possibility that the district court will waste scarce judicial resources—which could be devoted to other pressing criminal or civil matters—on a dispute that will ultimately head to arbitration in any event." The majority viewed this as the "worst possible outcome" and concluded that an automatic stay was required while the question of arbitrability was being decided on appeal. *Coin Base, Inc v. Bielski*, 599 U.S. 736 (2023).

RICO May Be Invoked To Enforce Foreign Arbitration Award

Smagin, who resides in Russia, obtained an arbitration award of over $84 million against a joint venturer who resides in California. A California district court affirmed the award and post-judgment orders to enforce the award. Smagin brought a civil RICO suit, alleging, with good cause, that the joint venturer was hiding assets to avoid creditors, including Smagin. In particular, the suit alleged that the joint venturer in conjunction with others engaged in a pattern of wire fraud and other predicate racketeering acts, including witness tampering and obstruction of justice. The question for the United States Supreme Court was whether Smagin suffered a "domestic injury" in United States sufficient to invoke RICO. The majority, applying a contextual approach, emphasized that Smagin obtained "a judgment in California because that is where [the joint venturer] lives, and thus where Smagin hoped to collect. The rights that the California judgement provides to Smagin exists only as in California, including the right to obtain post-judgment discovery, the right to seize assets in California, and the right to seek other appropriate relief from the California District Court." The alleged RICO scheme, the majority explained, thwarted and undercut the orders of the California District Court and Smagin's efforts to enforce rights. "On the Court's contextual approach, those allegations suffice to state a domestic injury in this suit." *Yegiazaryan v. Smagin*, 599 U.S. 533 (2023).

EFAA Applies Even if Claim Not Styled as Sexual Harassment

Plaintiff alleged that she faced sex-based animus from defendant dance company's executive director. This included criticism for bringing her child to work while not criticizing men, including plaintiff's husband, for doing the same and for reaching across her body for a phone while she was pumping milk while at her desk, even though open phones were available elsewhere. Plaintiff's complaint alleged gender, caregiver, and familial status discrimination but did not identify the offensive acts as specifically sexual harassment. The dance company moved to compel arbitration. The question for the court was whether the End Forced Arbitration Act, which bars the arbitration of sexual harassment disputes, applies. The court, applying the lenient standard for stating sexual harassment claims under the New York City Human Rights Law, concluded that it did and denied the motion to compel. The court emphasized that EFAA defines sexual harassment broadly as relating to conduct that, as alleged, constitutes sexual harassment. The court acknowledged that some of the allegations were conclusory and could not be given weight but concluded that other factual allegations plausibly stated unwanted gender-based conduct. *Delo v. Paul Taylor Dance Foundation*, 2023 WL 4883337 (S.D.N.Y.).

Wage Claims Not Barred by EFAA

The End Forced Arbitration Act prohibits the arbitration of claims related to sex harassment and assault. The question raised here was whether claims of wage and hour violations that apply to all employees working at defendant restaurant are similarly barred if those claims are coupled with a sexual harassment claim. The court ruled that sexual orientation harassment claims brought under the New York State and New York City Human Rights Laws were covered by EFAA and could not be arbitrated. However, the court concluded that plaintiff's wage and hour claims were not covered by EFAA and granted defendant's motion to compel specifically with respect to those claims. The court emphasized that EFAA applies only to claims that "relate to" sexual harassment and sexual assault. The court pointed out that while the sexual orientation discrimination and harassment claims applied specifically to plaintiff, the wage and hour claims apply to all employees working at the restaurant. "Since Plaintiff's wage and hour claims under the FLSA and the [New York Labor Law] do not relate in any way to the sexual harassment dispute, they must be arbitrated." *Mera v. SA Hospitality Group*, 2023 WL 3791712 (S.D.N.Y.).

"Reasonably Prudent Internet User" Standard Clarified

The consumer here brought a class action against defendant Klarna whose "buy now, pay later" policy resulted in unreimbursed overdraft fees being charged. Klarna moved to compel based on the arbitration provision embedded in its website interface. In particular, Klarna contended that plaintiff agreed to its terms of service at various points during the online transaction, including when she used Klarna's checkout "widget" to finalize her purchase. The district court denied the motion to compel but the Second Circuit reversed. First, the court found that the content was "visible at once" without the need to review beyond what was immediately visible. In its view, a "reasonable internet user, therefore, could not avoid noticing the hyperlink to Klarna's terms." The appellate court also concluded that under the totality of the circumstances test a reasonable internet user would understand that by clicking the "confirm and continue" button he or she was agreeing to the payment terms. While acknowledging that Klarna had provided only some but not all of the relevant payment terms, plaintiff was on inquiry notice as to those terms placing the "burden . . . . on her to find out to what terms she was accepting." The court concluded that plaintiff "unambiguously manifested her assent to Klarna's terms," and the court held that "as a matter of law [plaintiff] agreed to arbitrate her claims against Klarna." *Edmundson v. Klarna, Inc.*, 85 F.4th 695 (2d Cir. 2023).

Meeting of Minds Lacking for Settlement Purposes in E-Mail Exchange

The party in the Surrogate's Court proceeding reached a tentative settlement in a court-ordered mediation. Petitioner sent an e-mail "to follow up [on] the settlement reached at mediation," noting the settlement amount of $515,000, and outlining the settlement terms as well as promising to prepare a draft settlement agreement. Respondent answered by asking that the "timing of payment" be left open. A week later petitioner's counsel forwarded the draft settlement agreement to which respondent's counsel replied that the client could not settle on the proposed terms because it would have enormous tax consequences for her. Petitioner moved to enforce the settlement terms, but the court rejected the application. The court emphasized that to be enforceable, a stipulation of settlement of a pending litigation must include a written agreement subscribed to by the parties. The court explained that to the extent that petitioner "asserts that the initial e-mail set out an overview of the material terms to which the parties agreed during the ADR session, we note that such verbal out-of-court agreements are insufficient to form the basis for a stipulation of settlement." The court made clear that silence did not necessarily constitute assent. "Indeed, the record is devoid of any indication that the wife's counsel assented to the terms outlined in the initial e-mail or in the subsequent draft settlement agreement." As there was no meeting of the minds the court concluded no settlement had been reached by the parties. *In re Estate of James Eckert*, 217 A.D.3d 1151 (N.Y. App. Div. 2023), *lv denied*, 40 N.Y.3d 1024 (2023).

Panel's Application of AAA Rule Not Unfair

Minority shareholders sought to enforce their contractual right to force the sale of the company over the objection of the majority shareholders and a highly contentious arbitration followed. The arbitration was conducted in accordance with the Commercial Rules of the American Arbitration Association. The panel granted the minority shareholders' request for specific performance and ordered the sale of the company in a partial final award issued under Rule 47 of the Commercial Rules. The majority shareholders challenged the partial final award, arguing that New York law and not Rule 47 should apply. The district court rejected the argument, and the Second Circuit affirmed. The court emphasized that the parties were on notice that the AAA rules applied to this proceeding. The court acknowledged that the parties and the panel did at times focus on New York law but concluded that it was "not unfair to expect the parties to be prepared to address" Rule 47 which had been suggested by the panel as governing. The court noted that even after the panel averted to Rule 47 during oral argument, the majority shareholders still sought application of New York law relating to specific performance and continued to do so on appeal. The court observed that respondents "were not prejudiced by the alleged 'last-minute switch' because their litigation posture remained unchanged." The court added that in any event "the panel analyzed the specific performance issues under New York law in the alternative and arrived at the same conclusion." For these reasons, the Second Circuit affirmed the district court's refusal to vacate the panel's rulings. *Telecom Business Solution, LLC v. Terra Towers Corp.*, 2024 WL 446016 (2d Cir.).

Discovery Related to FAA Transportation Exemption Ordered

Uber drivers brought a class action and Uber moved to compel arbitration. Uber asserted that the FAA Transportation Exemption applied to them and sought discovery in support of their position. The district court ruled that based solely on the face of the complaint the Transportation Exemption did not apply. The Second Circuit reversed, holding that the pleading did not "provide a sufficient factual record on which to evaluate the applicability" of the Transportation Exemption. The court ordered that limited discovery be permitted and offered the following nonexclusive list of topics for which discovery may be warranted: "Uber's policies regarding interstate trips; the potential penalties and costs of declining interstate trips; Uber's revenue from interstate trips; the average number of interstate trips Uber drivers take over various time periods (such as a week, a month, or a year); the median number of interstate trips for Uber drivers over various time periods; what percentage of Uber drivers take interstate trips over various time periods; how often Uber drivers decline interstate trips; and any other relevant information." For these reasons, the court remanded the case back to the district court to allow for a prescribed discovery period. *Aleksanian v. Uber Technologies, Inc.*, 2023 WL 7537627 (2d Cir.).

MLB Decision-Making Committee Ruled Impartial

The Baltimore Orioles and the Washington Nationals had a dispute over broadcasting rights. Major League Baseball (MLB) has a Revenue Sharing Definitions Committee (RSDC) established for these kinds of disputes. The RSDC consists of representatives from three major baseball league teams with rotating membership. The RSDC's determination is final and binding. The parties attempted to negotiate a settlement of the dispute in 2013 and the MLB advanced $25 million in an effort to facilitate resolution. Negotiations failed and the dispute was heard and decided by the RSDC. That ruling, however, was vacated on evident partiality grounds because the Proskauer law firm represented both the MLB and the Nationals. The dispute was returned to the RSDC in accordance with a settlement agreement but with different team representatives and with new counsel. The RSDC issued a second ruling, which was again challenged. The award was confirmed, and the New York Court of Appeals affirmed. The Court rejected the claim that the $25 million advance by the MLB demonstrated that the RSDC was biased, finding "no evidence that MLB or [the Commissioner of Baseball] had any undisclosed influence on the panel members beyond that which the parties had bargained for in the settlement agreement." The Court reasoned that the Federal Arbitration Act's purpose was furthered by having the RSDC rule on the issue "ensuring that arbitration contracts are enforced according to their terms." The Court made clear that the "parties also specifically agreed to arbitrate before the RSDC because it possessed specialized knowledge concerning the complex telecast rights valuations at issue here and an understanding of the ramifications of its decision. The parties agreed to an industry insider-controlled process with a full understanding of the commissioner's involvement." *TCR Sports Broadcasting v. WN Partner, LLC*, 40 N.Y.3d 71 (N.Y. 2023).

Request To Unseal Confidential Arbitration Documents Denied

Counsel to a group of IBM employees filed an action challenging the dismissal of their claims and arbitration on timeliness grounds. Counsel then filed an early summary judgment motion, which contained confidential documents, submitted under seal, obtained in arbitration proceedings for other IBM employee clients of this counsel. Plaintiffs moved to unseal those documents, and IBM objected and moved to keep those documents under seal. The district court granted IBM's application, and the Second Circuit affirmed. The court acknowledged that the presumption of public access attaches to court filings. Here, however, the court determined that that presumption was weak, in part, because the plaintiffs' underlying claim relating to timeliness was rejected. "Protecting this confidentiality interest is particularly important when the stated objective of Plaintiffs' motion to unseal is to circumvent the Confidentiality Provision to assist plaintiffs in other proceedings—including Plaintiffs' counsel's other clients." The court weighed the competing interest between public access to court filed documents and the FAA's "strong policy protecting the confidentiality of arbitral proceedings." The court pointed out "allowing unsealing under such circumstances would create a legal loophole allowing parties to evade confidentiality agreements simply by attaching documents to court filings." The court concluded that the district court correctly ruled that the confidential documents must remain sealed. *In re: IBM Arbitration Agreement Litigation*, 76 F.4th 74 (2d Cir. 2023), *cert. denied sub nom.*, *Abelar v. Int'l Bus. Machines Corp.*, 2024 WL 674879 (U.S.).

Piggyback Rule Allowing Untimely Discrimination Claims Does Not Apply in Arbitration

A group of former IBM employees failed to file their age discrimination claims in arbitration in a timely fashion, and all those claims were dismissed. These plaintiffs sued, alleging that the arbitration timeliness requirement was unenforceable because it did not incorporate the court-created "piggyback" rule, also known as the single-filing rule, which allows subsequent charging parties before the EEOC to submit otherwise untimely claims by joining a pending related matter that was timely filed. The district court rejected application of the piggyback rule in arbitration, and the Second Circuit affirmed. The court emphasized that the piggyback rule was court-created and is not jurisdictional. Rather, it is an exception to the filing requirements of an administrative agency, here the EEOC. The court added that "in any event, the piggybacking rule is not a substantive right under the ADEA." For these reasons, the court concluded that IBM's timeliness requirements in its dispute resolution process were enforceable, and the district court's dismissal of the action was affirmed. *In re: IBM Arbitration Agreement Litigation*, 76 F.4th 74 (2d Cir. 2023), *cert. denied sub nom., Abelar v. Int'l Bus. Machines Corp.*, 2024 WL 674879 (U.S.).

"Infinite" Arbitration Clause Rejected

Broad arbitration provisions that require any claims between the parties to be arbitrated, even those without any nexus to the agreement containing the arbitration clause, have been recently styled as "infinite arbitration clauses." The court here refused to enforce such an arbitration clause with respect to claims with no nexus to the web platform whose terms of service contained the arbitration provision. In particular, the defendants here are the online ordering platforms Grubhub, Uber Eats, and Postmates who are accused of antitrust violations by prohibiting restaurants from charging prices lower than those charged to the defendants. The court emphasized that the defendants were invoking their arbitration provision for claims not related to use of their platforms, that is, interactions between restaurants and non-parties. The court reasoned that New York contract law would not allow interpretations that are "absurd, commercially unreasonable or contrary to the reasonable expectation of the parties." Alternatively, the court found that "it would be unconscionable to enforce defendants' arbitration clauses with respect to claims untethered to defendants' respective terms of use." The court concluded that "as a matter of either contract formation or unconscionability, the Court holds that defendants' arbitration clauses do not apply to plaintiffs' claims to the extent that they lack any nexus to the underlying contracts—i.e., to the extent they are not brought by plaintiffs in their capacities as a current or former user of defendants' platforms." *Davitashvili v. Grubhub*, 2023 WL 2537777 (S.D.N.Y.).

Arbitration Based on Website Terms of Use Rejected

Plaintiffs brought a class action under the Sherman Act alleging that Grubhub, Uber Eats, and Postmates unlawfully fixed prices for restaurant meals by precluding those restaurants from charging lower prices to others. Defendants' motion to compel arbitration based on provisions in their respective terms of use on their apps was denied by the district court. The court found that in each case the defendants failed to provide inquiry notice to the user or failed to provide sufficient evidence of assent to the terms of use. For example, the court found that Uber "failed to provide sufficient information about what its app or web page looked like when the Platform Plaintiffs initially signed up or at any other relevant time." Similarly, the court rejected Grubhub's claim that its webpage constituted a clickwrap agreement. In doing so, the court noted that Grubhub's checkout page "does not require users to check a box or take any affirmative action indicating that they have assented to, let alone read, the Grubhub terms of use." Rather, the user was notified that by placing an order it was agreeing to the terms of use, which the court concluded did not constitute a clickwrap agreement which is generally favored in these circumstances. Finally, the court rejected Grubhub's claim that the plaintiffs agreed to the terms of service because it failed to produce any evidence that the e-mail notice was sent to or opened by plaintiffs, or that plaintiffs assented to any prior agreement with an arbitration provision. For all these reasons, the court concluded that defendants failed to demonstrate that an agreement to arbitrate was entered into by plaintiffs. *Davitashvili v. Grubhub*, 2023 WL 2537777 (S.D.N.Y.).

Arbitrator To Decide Admissibility of Evidence Precluded in Court

A court ruled that defendant's dashcam video of a car accident could not be entered into evidence in court. The parties agreed to arbitrate the dispute, and the arbitrator let the parties know that he was prepared to view the dashcam video but, as that issue was in dispute, would give parties the opportunity to seek judicial relief if so inclined. Plaintiff moved in court for appointment of a new arbitrator and for preclusion in arbitration of the video evidence. The court agreed to order that a new arbitrator be appointed but declined to preclude the video evidence. The court criticized the arbitrator as having "relinquished his responsibility to rule on the admissibility of the evidence." The court noted that while the arbitrator was sensitive to the fact that introduction of the video was in contention, "oftentimes such evidentiary disputes do arise in arbitration. The arbitrator should not have avoided making a determination" and "punting" on the evidentiary issue. In the court's view, this "contravened how arbitration is intended to work—to serve as a forum for expeditiously resolving disputes in a more informal process." The court noted that "if either party wished to pursue the matter in court, review of the arbitrator's decision could have taken place in a post-arbitration" court proceeding to vacate the award. The court concluded that the application seeking preclusion of the video evidence constituted an improper attempt to file an "in limine motion to determine what evidence an arbitrator may consider." As defendant consented to proceed with a new arbitrator, the court ordered the case back to arbitration with a new arbitrator who "shall determine whether or not to admit and consider the subject dashcam video and audio recordings and, if they are admitted, said arbitrator shall determine their probative value." *Graci v. Chen,* 77 Misc.3d 1236(A) (N.Y. Sup. Ct. 2023).

Presumption of Arbitrability Limited

The Second Circuit took the opportunity in this case to "clarify the law of this Circuit regarding disputes about the interpretation of arbitration clauses in collective bargaining agreements." The underlying question in this case was whether a dispute related to retired union members was arbitrable. The court pointed out that the Supreme Court cautioned that to "presume that a dispute is arbitrable because an arbitration clause is framed broadly runs the risk of requiring parties to arbitrate disputes they did not consent to arbitrate." Here, even though the retired employees were not members of the bargaining unit, the court made clear that an employer, as here, can contractually agree to include retirees within the collective bargaining agreement. The court concluded that the collective bargaining agreement's grievance and arbitration provision unambiguously covered the retirees' grievance in this case. The court took the opportunity, however, to point out that while the district court reached the correct result, its approach was faulty. "Rather than finding the Agreement's arbitration clause is ambiguous in scope before applying the presumption of arbitrability, the district court started by characterizing the arbitration clause itself and held that the presumption of arbitrability applied, without determining whether the Agreement covered the parties' dispute." Instead, the Second Circuit emphasized that general contract principles must be applied, and courts should determine first "whether, under ordinary principles of contract interpretation, a particular dispute is covered by the language to which the parties agreed." Once that is established, the presumption of arbitrability may be applied as a "court's last, rather than first, resort." *Local Union 97 v. Niagara Mohawk Power Corp.*, 67 F.4th 107 (2d Cir. 2023).

Court Can Appoint Arbitrator Where Lapse in Appointment Process Occurs

The parties here each appointed an arbitrator for a three-person panel, but the two selected arbitrators could not agree on an umpire for the panel. One party moved under Section 5 of the FAA to have the court appoint the umpire. In agreeing to do so, the court noted that "the party arbitrators have failed to agree on an umpire despite exchanging a half dozen names." The court pointed out that under Section 5 a court could appoint an arbitrator where there is a "lapse in the naming of an arbitrator." The court noted that a lapse can occur even where, as here, the arbitrators are still exchanging names of possible umpires. Each party presented to the court three names of possible arbitrators for the court to consider. "While the FAA limits courts' authority to examine the qualifications of an umpire once he or she is selected, the Second Circuit has expressly held that Section 5 of the FAA grants courts the authority to examine candidates' qualifications in exercising their authority to appoint an umpire." The court selected a former federal judge with significant experience with the issues raised by the parties and who was based in the jurisdiction which, the court noted, reduced the costs to the parties. *Certain Underwriters at Lloyd's London v. The Falls of Inverrary Condominiums*, 2023 WL 2784513 (S.D.N.Y.).

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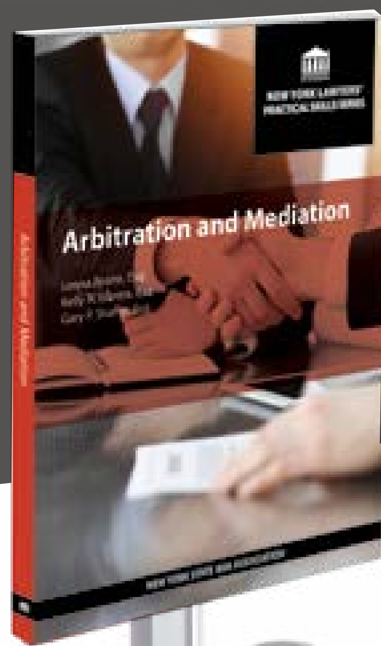

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