LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

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THE *REAL* "RIGHT TO WORK"

John R. Runyan
Sachs Waldman

The year was 1930. A man named Camille Deweerdt was employed as a milk wagon driver by C.F. Burger Creamery, delivering milk, cream and other dairy products to customers within the City of Detroit. Upon commencing employment, Mr. Deweerdt entered into an employment contract which provided in relevant part as follows:

> 'XI It is further agreed between the said employer and employee, that said employee shall not at any time while he is in the employ of the said employer, or within ninety days after leaving its service, for himself, or any other person, persons or company, call for and deliver milk or cream to any person or persons who have been customers ofsaid employer, and supplied by said employee during any time he may have been employed under this contract, nor will said employee in any way directly or indirectly solicit, divert or take away, or attempt to solicit, divert or take away any of the customers or patronage of said patrons within said ninety days.
>
> 'XII It is further agreed between the said employer and employee, that as hereinbefore set forth, the said employer herewith furnishes to said employee a list of the customers or patrons, commonly called a route list, within certain territory in which said employee is to work, and that in consideration of the furnishing of said route list or names of customers the said employee agrees not to perform similar services in such territory for himself or any other person, or company, engaged in a like or competing line of business, for a period of ninety days after the termination of this agreement of service.'

On or about October 1, 1931, Mr. Deweerdt voluntarily resigned his employment with the creamery, went into business for himself and using C.F. Burger's route lists, began delivering milk to its former customers. Burger sued to enforce the non-compete clause contained in Deweerdt's employment contract. Deweerdt argued that the non-compete was unenforceable, relying upon Act No. 329 of the Public Acts of 1905, which then provided as follows:

> 'All agreements and contracts by which any person, copartnership or corporation promises or agrees not to engage in any avocation, employment, pursuit, trade, profession or business, whether reasonable or unreasonable, partial or general, limited or unlimited, are hereby declared to be against public policy and illegal and void.'
>
> MCL 445.761 *et seq*, MSA 28.61 *et seq*. (repealed)

A majority of the Michigan Supreme Court agreed with Deweerdt that under the 1905 statute, even as amended in 1917, the legislature had declared "illegal and void" any agreement by which an employee was denied the right to make a living for himself by engaging in any lawful business. *CF Burger Creamery v. Deweerdt,* 263 Mich 366,248 NW 839 (1933).

This was the law in Michigan for eighty years, from 1905 until 1985. The 1917 amendment, referenced in *Deweerdt,* had created a small exception for agreements which protected an employer for ninety days from competition by a former employee who had been given "a list of customers or patrons, commonly called a route list, within a certain territory." MCL 445.766; MSA 28.66 (repealed). The only other statutory exception to the prohibition on covenants not to compete was for contracts involving the sale of a business or profession. MCL 445.766, MS 28.66 (repealed).

Everything changed in 1985. Although still unlawful in California and several other states, covenants not to compete entered into after March 29, 1985 became enforceable in Michigan, so long as they are reasonable as to "duration, geographical area and the type of employment or line of business." MCLA 445.774a. Moreover, in an unusual statutory twist, the legislature provided that to the extent a particular covenant is found overly broad or "unreasonable," "a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited." MCLA 445.774a.

A recent study conducted by professors at MIT's Sloan School of Management and the University of California-Berkeley concluded that "(p)olicy makers who sanction the use of noncompetes could be inadvertently creating regional disadvantage as far as retention of knowledge workers is concerned." *Crain 's Detroit Business* (March 18, 2015) (http://www.crainsdetroit.com/article/20150318/NEWS01/150319843/laws-on-noncompete-agreements-hurt michigan-new-study-says). The study focused on the behavior of Michigan inventors who had registered at least two patents during the thirty year period between 1975 and 2005. It found that after Michigan changed its law in 1985, the rate of emigration among inventors was twice as high as it was in states where non-competes remained illegal. Not surprisingly, inventors were particularly likely to relocate to states that did not enforce non-competes. *Id*. Even worse, the study found that the state's most talented inventors—those whose patents had been cited more often than the median (a common indicator of an invention's impact)—were most likely to flee to a state in which non-competes were illegal. *Id*.

Under recent case law, moreover, it matters not where the work is to be performed. *In Stone Surgical, LLC v. Stryker Corp.,* 858 F.3d 383 (6th Cir. 2017), the Sixth Circuit recently enforced a covenant not to compete against a sales representative of a Michigan company who received medical device products at his home in Louisiana, delivered them to Louisiana physicians and hospitals and conducted sales meetings with other employees in his Louisiana territories. *Id*. at 386. Because the non-compete agreement included a Michigan choice-of-law provision as well as a Michigan forum-selection clause, the Court of Appeals concluded that Judge Robeti Holmes Bell had properly applied covenant-friendly Michigan law over covenant-hostile Louisiana law, even though it found that" (t)aken on the whole, the state with

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STATEMENT OF EDITORIAL POLICY

Labor and Employment Lawnotes is a quarterly journal published under the auspices of the Council of the Labor and Employment Law Section of the State Bar of Michigan. Views expressed in articles and case commentaries are those of the authors, and not necessarily those of the Council, the Section, or the State Bar. We encourage Section members and others interested in labor and employment law to submit articles, letters, and other material for possible publication.

Stuart M. Israel, ***Editor***
John G. Adam, ***Associate Editor***

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the "most significant relationship to the transaction and the parties" within the meaning of the Restatement (Second) of Conflict of Laws was Louisiana, not Michigan. *Id*. at 390. *See also, Certified Restoration Dry Cleaning Network LLC v. Tenke Corp*., 511 F.3d 535, 539-540, 551-552 (6th Cir. 2007); *Delphi Automotive PLC v. Absmeier,* 167 F. Supp. 3d 868, 874-879 (E.D. Mich. 2016), *appeal dismissed* (6th Cir. 16-1292) (June 16, 20l6).

In addition, many employers ask their employees to sign non-competes which are either partially or entirely unenforceable in their own jurisdictions, suggesting that such firms may be trying to take unfair advantage of their workers. In California, for example, workers are bound by non-competes at a rate slightly higher than the national average (19 percent), despite the fact that with limited exceptions, non competes can not be enforced in that state. "Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses" (The White House, May 2016). In several states, non-competes are enforceable even against workers fired without cause.

The Growth of Non-Competes

Research suggests that approximately 30 million American workers or roughly 18% of the workforce are currently covered by non-compete agreements. "Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses" (The White House, May 2016). A 2013 study commissioned by the *Wall Street Journal* found a 61% growth between 2002 and 2013 in the number of employees being sued by their former employers for breach of non-compete agreements.[1] Russell Beck, a partner at Boston's Beck Reed Riden who does an annual survey of non-compete litigation, said in 2017 that the most recent data showed that non-compete and trade secret litigation had roughly tripled since 2000. Conor Dougherty "How Non-Compete Clauses Keep Workers Locked in," NY York Times, May 13, 2017 (https://www.nytimes.com/2017/05/13/business/noncompete-clauses.html).

Non-competes not only make it difficult for employees to change jobs but there is convincing evidence that they reduce workers' ability to use job switching or the threat of job switching to negotiate for higher wages and improved working conditions, better reflecting their true value to their employers. (http://paper.ssm.com/so13/papers.cfm?abstrac t_id=2905 782). A recent Depatiment of Treasury report found that stricter enforcement of non-compete agreements is associated with lower initial wages and lower wage growth-an increase of one standard deviation in non-compete enforcement reduces wages by 1.4%. Office of Economic Policy, U.S Department of the Treasury, Non-Compete Contracts: Economic Effects and Policy Implications (March 2016) Table 1. There is also evidence that "non-competes reduce employee motivation, entrepreneurship and sharing of knowledge, the fundamental building blocks of innovation and economic growth." Orly Lobel, "Companies Compete But Won't Let Their Workers Do The Same," NY Times Opinion Pages, May 4, 2017 (https://www.nytimes.com/2017/05/04/opinion/noncompete-agreement.html). In addition to reducing job mobility and worker bargaining power, non-compete agreements negatively impact other employers by constricting the labor pool from which to hire. Some critics argue that non-competes also stifle innovation by reducing the diffusion of skills and ideas between companies within a region, negatively impacting economic growth.

Alan B. Krueger, a Princeton economics professor who was

chairman of President Obama' s Council of Economic Advisers, recently described non-competes and other restrictive employment contracts—along with outright collusion—as a part of a "rigged" labor market in which employers "act to prevent the forces of competition." Conor Dougherty "How Non-Compete Clauses Keep Workers Locked in," NY York Times, May 13, 2017 (https://www.nytimes.com/2017/05/13/business/noncompete-clauses.html). By giving employers the power to dictate where and for whom their former employees can work, non-competes take away a worker's greatest professional assets-years of hard work and earned skills-and turn them into a liability.

Of particular concern is the fact that non-competes are increasingly found not only in the employment agreements of senior executives and other highly compensated employees but also in the contracts of comparatively low-skilled and low-wage workers. According to a recent study, approximately 15% of workers without a college degree are currently subject to non-compete agreements and 14% of those individuals earning less than $40,000 annually are subject to them. "Non- Compete Agreements: Analysis of the Usage, Potential Issues and State Responses," The White House (May 2016).

Illustrative is a recent case in which Goldfish Swim School of Farmington Hills attempted to enjoin an $11.00/hour swim instructor whose employment it had terminated from going to work for "Aqua Tots," a nearby competitor. *BHB Investment Holdings, LLC, d/bla Goldfish Swim School of rarmington Hills v. Ogg,* 2017 WL 723789 (February 21, 2017) (unpublished). Judge Gleicher's concurring opinion is instructive:

> Preventing Ogg from being a swim instructor for a one-year period to protect Goldfish secrets is akin to making a teenaged minimum-wage McDonald's employee promise not to work for Burger King in the future. Certainly, a person learns some generalized skills at a fast food restaurant that would reduce training time if the person accepted employment at another fast food establishment. But the employee's understanding of how to cook a hamburger and operate a cash register would not give Burger King an "unfair advantage." The McDonald's transferee could not use the secret of the Big Mac to alter the Whopper.
>
> Similarly, Ogg learned from Goldfish how to interact with and teach young children. This skill likely made training at Aqua Tots easier. As with any other large chain, however, the Goldfish-institutional knowledge of a single low-level employee could not reform Aqua Tots.
>
> I do not doubt that under the right circumstances an employee and his or her subsequent employer may be unjustly enriched by a prior employer's training investment. If an employer expends large sums of money or time in training an employee who quits immediately thereafter and takes a position with a competitor, an unjust enrichment claim may have merit. Here, however, BHB expended only 40 hours, or one week of fulltime employment, training Ogg. Goldfish requires its swim instructors to be lifeguard certified, but it expects new hires to achieve this goal on their own. *(Id*. at *10)

Changes on the Horizon

On October 25, 2016, the Obama Administration issued a "State Call to Action on Non-Compete Agreements." This call to action was part of President Obama's Executive Order directing states to increase competition for workers and consumers. In order to reduce the misuse of non-competes in states which still chose to enforce them, the President called on State law makers to join in pursuing the following best practices:

1. Ban non-compete clauses for categories of workers, such as workers under a certain wage threshold; workers in certain occupations that promote public health and safety; workers who are unlikely to possess trade secrets; or those who may suffer undue adverse impacts from non-competes, such as workers laid off or terminated without cause.
2. Improve transparency and fairness of non-compete agreements by, for example, disallowing non-competes unless they are proposed before a job offer or significant promotion has been accepted (because an applicant who has accepted an offer and declined other positions may have less bargaining power); providing consideration over and above continued employment for workers who sign non-compete agreements; or encouraging employers to better inform workers about the law in their state and the existence of non-competes in contracts and how they work.
3. Incentivize employers to write enforceable contracts, and encourage the elimination of unenforceable provisions by, for example, promoting the use of the "red pencil doctrine," which renders contracts with unenforceable provisions void in their entirety.

https://obamawhitehouse.archives.gov/sites/default/files/ competition/noncompetes-calltoaction-final.pdf

Congress introduced two bills in 2016-the Limiting the Ability to Demand Detrimental Employment Restrictions Act (Ladder Act) and the Mobility and Opportunity for Vulnerable Employees Act (Move Act).

Despite the change in administrations, a number of states, including Michigan, have joined the growing ranks of those seeking to reform the law relative to non competes. Colorado, Massachusetts, Oregon, and New York have recently introduced reforms. Illinois (the home of the infamous "Jimmy John's" lawsuit[2]) just passed the "Illinois Freedom to Work Act," prohibiting covenants not to compete with any low wage employee (defined as one who earns the greater of the minimum wage or $13.00/hour). *Illinois Compiled Statutes Annotated* Chapter 820, §9011. New Mexico recently enacted legislation limiting the enforceability of non-compete agreements for health care practitioners. *New Mexico Statutes Annotated* Chapter 24, Article 1i-2. Hawaii passed a law in 2015 prohibiting non-competes in the tech industry. *Hawaii Revised Statutes Annotated §* 480-4.

Oregon recently banned non-compete agreements lasting longer than 18 months, while Utah limited the agreements to one year. *Oregon Revised Statutes Annotated§* 653.295; *Utah Code Annotated* 1953 § 34-51-201(1). In Oregon and New Hampshire, non-competes may be rendered void for lack of consideration when employers failure to disclose them in the original terms of employment. *Oregon Revised Statutes Annotated §* 653.295; *Revised Statutes Annotated of the State of New Hampshire,* Title XXIII, Chapter 275:70. Oregon has also passed legislation restricting the enforceability of non-competes as against employees under a certain income threshold. *Id*.

Other states require that employers provide some consideration above and beyond continued employment such as a pay raise, training or promotion when a worker is asked to sign a non-compete after

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being employed for some period of time. Delaware, Illinois, Tennessee, Texas, Massachusetts have exempted the physician patient relationship from the restrictions of a non-competition agreement, recognizing the "public interest" involved in the consumption of critical goods and services. Unlike Michigan, some states provide disincentives for employees to draft overly broad non-competes by refusing to "blue pencil" or strike unenforceable provisions, instead refusing to enforce the entire non-compete agreement.

Although no legislation has as yet been enacted in Michigan, Representative Peter Lucido (R-Shelby Township) has introduced a bill which would amend the Michigan Antitrust Reform Act to allow only "fair and reasonable non-compete agreements" in Michigan. House Bill No. 4755, which was referred to the Committee on Commerce and Trade, contains the following provisions:

1. An employer may not obtain a non-compete from an employee or applicant unless the employer has disclosed and posted written notice of the terms of the non-compete before hiring the employee.

2. An employer may not request or obtain a non-compete from an applicant or employee who is a "low wage employee," meaning an employee who receives less than the greater of $15.00/hour or 150% of the minimum hourly wage or $31,200 per year.

3. Moreover, the employer bears the burden of proving that the employee is not a low wage employee and that the duration, geographical area and employment or line of business are reasonable.

4. Finally, non-competes obtained in violation of these requirements, or which purport to waive these requirements or a choice of law provision which would negate these requirements are void and unenforceable.

Here is hoping that the Michigan legislature's recent affinity for "Right to Work" legislation translates this time into meaningful reform: a bill like that introduced by Representative Lucido which guarantees Michigan workers the right to change jobs and yet remain employed in occupations for which they have studied or trained and then successfully labored, particularly if they are employed in low wage jobs like a Jimmy Johns cashier or a Goldfish Swim School instructor.

—END NOTES—

1 Wall Street Journal. "Litigation Over Noncompete Clauses ls Rising." http://www.wsj.com/articles/SB10001424127887323446404579011501388418552.

2 Jimmy John's is a popular sandwich chain, headquartered in Illinois, which made headlines when it prohibited employees during their employment and for two years afterward from working at any other business that sells "submarine, hero-type, deli-style, pita, and/or wrapped or rolled sandwiches" within 2 miles of any Jimmy John's shop in the United States. An agreement in effect from 2007 to 2012 extended its geographic scope to 3 miles. Jimmy John's abandoned its non-compete requirement when it was sued twice, first by New York Attorney General Eric Schneiderman and later by Illinois Attorney General Lisa Madigan

Author's note: My former associate, Rich Olszewski, contributed significantly to the research on which this article is based. He and I collaborated on the title, although I can't recall which of us (which means it was probably him) first suggested the Real Right to Work. ■

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

An Arbitrator Walks Into A Restaurant

Ms. Screech: Good evening, Mr. Goldman. I'm Amanda Screech from the law firm of Bother, Pleader & Hoot representing the chicken entrée.

Mr. Z'Beard: Hello Mr. Goldman. I'm Ozgood Z'Beard with Z'Beard and Oolong on behalf of the salmon.

The parties have stipulated that only two entrees will be presented today for your consideration. We agree there is no reason to burden the record with additional dishes. We have also agreed that the chicken will proceed first, without waiving any argument with regard to burden of proof.

Ms. Screech: This is a simple and straightforward matter. The facts are not in dispute. The chicken with wine sauce appears on the menu with the following description:

> The chef's chicken with capers and white wine sauce is a delicious chicken breast delicately seasoned and simply grilled, finished with a white wine reduction, and served over Algerian couscous.

The language is clear and unambiguous. The chicken is "delicious." No such language appears anywhere on the menu with relation to the salmon. As you are aware, clear and unambiguous language should be construed to give meaning to its clear and unambiguous terms. The diner has no authority to amend or alter the terms of the menu. His decision must draw its essence from the menu, and he may not impose his own brand of culinary justice.

Based on the clear documentary evidence, the chicken is delicious. Obviously, the drafters of the menu knew how to say an entrée was delicious if they wanted to. They chose not to say that with regard to the salmon. The conclusion is inescapable. The representatives of the salmon entrée are trying to achieve at the table what they could not achieve in the menu drafting process. An order in favor of the chicken is compelled by the weight of the evidence. Thank you.

Mr. Z'Beard: I agree with my colleague that this is a simple case, but that is the extent of our agreement.

As the diner is aware, long ago in a restaurant far away someone said there are seven tests of a just course. It has long been settled that if the answer to any of these questions is no then the course is improper and may not be ordered:

> Is there a dish?
>
> Does it appear on the menu?
>
> Does the kitchen know how to prepare it?
>
> Is it available?
>
> Are other people eating it?
>
> Do they appear to be enjoying it?
>
> Has the diner enjoyed the same or similar dishes under similar circumstances in the past?

The evidence will show that the answer to each of these questions is yes. Therefore, it is entirely proper and within the diner's authority to order the salmon if, in his sole and exclusive judgment, he feels like it. There is no legal requirement that he order the chicken based on the mere appearance of the word "delicious" elsewhere in the menu.

To rule otherwise would be to ignore the clear intent of the parties and to render meaningless the inclusion of the salmon on the menu. If, acting properly within the bounds of his authority, the diner could order only the chicken, then the appearance of the salmon on the menu is nugatory and without meaning or effect. It would be mere surplusage. As has long been recognized in arbitral law, such a finding would be contrary to the rules of construction.

Ordering the salmon is therefore entirely within the diner's authority. And it looks nice tonight. Thank you.

Ms. Screech: May I suggest we take a comfort break before we call our first witness. ■

TAX CONSIDERATIONS WHEN SETTLING AN EMPLOYMENT CLAIM

Alan Shamoun
Plunkett Cooney, P.C.

The time has finally come where you and opposing counsel seem to come to an agreement on a dollar amount to settle the employment dispute at hand; but how should the actual payment be made? How should it be reported—on a W2 or 1099-MISC? Should taxes be applied to the settlement proceeds? How many checks should be written? Should you separate attorney's fees for the plaintiff? There are a number of issues to consider before writing up a settlement agreement and making sure all parties involved know what their obligations are for reporting *and* paying the proper amount of taxes.

In most instances, the plaintiff/employee is seeking the biggest payout and wants to avoid or delay paying taxes from the settlement. Plaintiff's counsel often finds itself in the difficult position of trying to lay out a settlement that reduces the amount of taxes owed to appease their client, while the defendant's counsel wants to make sure the case is resolved accurately with as little ongoing risk as possible. No matter how one particular party would like to label the settlement, the Internal Revenue Service (IRS) has been very clear in their interpretation of the taxability of these settlement proceeds.

DETERMINING IF THE PAYMENT IS TAXABLE

The first step to determine the taxability of the settlement proceeds is to determine what exactly is being paid out. As a general rule, nearly all settlement payments in an employment lawsuit are included in the plaintiff's taxable income. This includes payments for back pay, front pay, emotional distress damages, punitive and liquidated damages, and interest awarded. The only exception to this rule is for payments intended to compensate the plaintiff for damages "on account of personal physical injuries or physical sickness" that would not be covered by a worker's compensation claim. I.R.C. § 104(a)(2).

To qualify for the physical injury/sickness exception, the plaintiff must show that the settlement payment was received as a result of their observable or documented bodily harm, such as bruising, cuts, swelling, or bleeding. If these observable injuries did not occur as a result of the conduct in question, then they are not eligible to exclude any portion of the settlement proceeds under IRC Section 104(a)(2). It is important to note that physical symptoms that result from emotional distress unrelated to any physical injuries are also not excludable under this same section.

SETTLEMENT AGREEMENTS

Since the settlement the plaintiff is about to receive is likely going to be taxable, the next step is to lay out how they should be paid through the settlement agreement. As a general rule, the settlement agreement should require that there be at least two checks written—one to the attorney for their fees and another to the plaintiff. If the settlement results in a series of payments to the plaintiff over a period of time, these checks should be made payable directly to the plaintiff as well.

If the plaintiff is going to attempt to claim that the settlement proceeds are excludable from their taxable income, the burden falls on them to prove this position to the IRS. *Getty v. Commissioner*, 913 F.2d 1486 (9th Cir. 1990). If the settlement is to compensate a plaintiff for physical injury/sickness, then it is important that the settlement agreement expressly allocate what portion of the proceeds are intended as a result of the physical damages. The IRS will accept the settlement agreement as binding for tax purposes if the agreement is entered into in an adversarial context, at arm's length, and in good faith. *Bagley v. Commissioner*, 105 T.C. 396, 406 (1995), *aff'd* 121 F.3d 393 (8th Cir. 1997). The key inquiry from the IRS regarding the taxability of the settlement is determining the intent of the employer when a settlement is made.

REPORTING REQUIREMENTS

The payment of the settlement requires consideration for the reporting obligations and taxes to be withheld from the payments accordingly. The settlement agreement should also explicitly provide for how the settlement will be reported as well. The two primary methods to report the settlement to the IRS are either on a Form W-2 or a Form 1099-MISC. IRC § 3402(a)(1) provides, generally, that every employer making payment of wages shall deduct and withhold federal income taxes. Even if an employee is no longer employed at the time of the settlement payment, the payment is still deemed to be wages subject to tax withholdings. These payments would need to be reported on a W-2 and the check should be processed as if it was a payroll check allowing for deductions of income tax, FICA and state withholdings. The employer will also be subject to their share of the FICA taxes. If the employer fails to withhold and remit the proper amount of taxes, they may be subject to additional liabilities, penalties, and interest. *See* 26 U.S.C. § 3509.

Any portion of the proceeds that are not subject to payroll taxes would be reported on a Form 1099-MISC. The types of payments that would be included on this form include attorney's fees, punitive damages, emotional distress and other nonphysical injuries, and prejudgment interest. The amounts listed on Form 1099-MISC are paid to the plaintiff (or plaintiff's counsel) and does not have taxes taken out of the initial payment.

ATTORNEY'S FEES

Attorney's fees received in a settlement in an employment dispute are taxable to the plaintiff, even if the fees are paid directly to the attorney. There are a number of exceptions to this rule to consider. First, attorney's fees are not included in a plaintiff's gross income if the recovery is associated with physical injury/ sickness payments. Second, attorneys' fees paid directly to class counsel out of a settlement fund are not included in a class member's gross income if (1) the class member did not have a separate contingency fee arrangement or retainer agreement and (2) the class action was an opt-out class action.

The third exception for when attorneys' fees are not included in a plaintiff's income is when the fees are the expenses of another person or entity such as when a union files a claim against a company. And one last item to consider, and advise a plaintiff on, is that while payments for attorney's fees are typically included in plaintiff's gross income, they can often be deducted 'above the line' when calculating the plaintiff's adjusted gross income. To qualify for an above the line deduction, the settlement of the claim should be made under one of the statutes listed under IRC § 62(e).

INDEMNIFICATION CLAUSE

One additional consideration for an employer to protect themselves regarding the taxability of a settlement is an indemnification clause. If the settlement is ever challenged by the IRS, the employer can request an indemnification clause be part of the settlement agreement. However, this can only protect them so far. If the plaintiff does not properly report the income on their tax returns, the IRS will first attempt to collect from the plaintiff. If they are deemed to not be collectible, then the employer will be on the hook for the portion of taxes the IRS believes they should have withdrawn from a settlement payment. This is why it is so important that the parties allocate the payments correctly and take the tax considerations into account to avoid further risk.

Lastly, if you are not sure what taxes should be paid or how a transaction should be reported, consult a tax attorney familiar with the rules for guidance. ■

THINGS ARE NOT ALWAYS AS THEY SEEM

Thomas G. Kienbaum
Kienbaum Opperwall Hardy & Pelton, P.L.C.

We frequently take comfort in making decisions based on what makes sense. In most instances, the result comports with the law, but not always.

Two recent decisions by U.S. Courts of Appeals—the Seventh Circuit in *Kleber v. CareFusion Corp*. and the Ninth Circuit in *Rizo v. Yovino*—provide a caution against personnel decisions that may in the past have been made reflexively.

In *Kleber*, the Seventh Circuit addressed problems associated with hiring an overqualified candidate. In the past, employers may have rejected such job applicants based on the common sense notion that hiring an overqualified candidate can lead to job dissatisfaction, which serves neither the interest of the employer nor the employee.

Kleber, a 58-year-old highly experienced lawyer, lost the last of several leadership positions he had held over the years. He applied for positions in law departments, but was routinely rejected. In the last instance he sought a position as staff counsel with CareFusion, which had posted for applicants with "3 to 7 years (no more than 7 years) of relevant experience." Kleber was rejected though he was admittedly qualified. CareFusion defended against Kleber's resulting age discrimination claim on the basis that Kleber's overqualification had led to the "reasonable concern that an individual with many more years of experience would not be satisfied with less complex duties . . . which could lead to issues with retention."

The main issue before the court was whether the federal Age Discrimination in Employment Act's (ADEA's) adverse impact doctrine applies to applicants, as opposed to just employees. In the past, the Seventh Circuit had suggested that it does not extend to applicants, and no other decision, to our knowledge, has held that the adverse impact analysis of the ADEA does extend to job applicants. In a 2-1 panel decision, the Seventh Circuit held that the adverse impact claim asserted by Kleber was legally sustainable and that it should survive summary judgment.

While that panel decision was vacated in April 2018 as a result of the grant of rehearing *en banc* (i.e., before the entire bench of the Seventh Circuit), the decision provides a caution regardless of the eventual outcome. Employers may want to refrain from articulating a firm position against hiring an overqualified candidate—until the issue is finally resolved by the U.S. Supreme Court, which may find occasion to revisit its prior holding that the adverse impact theory applies *generally* to the ADEA.

It has also been common for employers, when making starting salary offers, to take into consideration an applicant's current or prior salary. After all, the applicant is likely to accept a reasonable bump in pay, and why pay more than necessary?

In the *Rizo v. Yovino* case, a California school system had adopted a procedure that a new hire's salary would be determined by adding five percent to an applicant's prior pay. When Rizo learned that male employees were paid more than she was upon hire, she brought a lawsuit under the federal Equal Pay Act (EPA).

The school system responded that the pay differential was based on "a factor other than sex" (namely prior salary), which is *generally* a defense to an EPA claim. The trial court denied the school system's motion for summary judgment because it found reliance on prior pay to constitute a *per se* violation of the EPA. Because this holding conflicted with a prior Ninth Circuit decision that use of prior pay could, under proper circumstances, be considered as a defense, the decision was reversed on appeal by a three-judge panel of the Ninth Circuit. However, that holding was subsequently set aside by the Ninth Circuit *en banc*.

The *en banc* court then endorsed the trial court's holding that prior pay could not, under any circumstance, form the basis of a new employee's salary. This holding puts the Ninth Circuit at odds with all other Circuits that have considered the issue. Most Circuits permit some consideration of prior pay. Even the EEOC's compliance manual provides that if "the employee's prior salary accurately reflects ability, based on job-related qualifications," prior pay can be considered. The Seventh Circuit had even gone so far as to hold in one of its opinions that prior salary *always* involved "a factor other than sex."

It remains to be seen whether the *Rizo* decision holds up if a petition for *certiorari* is filed with the U.S. Supreme Court. Ninth Circuit Judge Reinhardt, who wrote the *en banc* majority opinion in *Rizo*, is perhaps the most reversed federal Court of Appeals judge in the United States. Given that a conflict exists between Circuits, a petition for *certiorari* stands a good chance of being granted, and with the Supreme Court's more conservative majority now, it would probably adopt the view of the other Circuits, perhaps even the Seventh Circuit's. For the time being, however, employers in the Ninth Circuit should be careful in using prior salary as a measure for what an applicant's salary offer should be. ■

BRIEFS AND WITNESS PREP IN WORKERS' COMPENSATION AND SOCIAL SECURITY DISABILITY CASES

Kevin P. Kales
Legghio & Israel, P.C.

A Little Background. As federal and state governments grew in their promulgation of laws, it became clear that agencies were needed to regulate and standardize the application of those laws. Fairness and due process are essential values of our legal system and do not occur by whim. The Administrative Procedures Act of 1946 (5 U.S.C. §§ 551-9) was passed to promote those values. Michigan's similar APA is MCL § 24.306.

One of the largest federal administrative agencies is the Department of Health and Human Services. HHS has over 1400 ALJs who decide Social Security cases—including disability claims. Currently, 126 Social Security ALJs are based in Michigan. Workers' compensation claims in Michigan are also administrative, decided by 17 state magistrates.

These judges govern narrow subject-matter areas but deal with high-volume caseloads, are time-pressured, and have heard similar testimony hundreds or even thousands of times. How can you hold their attention? How can you prepare for a hearing and persuade the judge that your client is more deserving than any other person on the planet—or at least is deserving of benefits?

Reduce Your Case. That's right—in your brief and when presenting testimony and other evidence—shrink your case. These judges are busy and they've heard it all before, so make your brief tight and punchy. I like to **bold the most important points in my brief, so they jump off the page.** My theory is that bold type helps—even forces—the reader to focus on the **strengths of my case**. Bolding some lines in your brief shrinks your case so the busy judge can't help but see your strengths. And you want them to **remember** the strengths of your case. In fact, I suggest you put this page down and see how **your attention automatically goes to the bold lines**. Highbrow editors, please forgive me, but a brief ought to direct the judge's brain to the strength of the case.

Prepare Thy Witness. Again and again. And again and again. Prepare. Giving testimony is difficult and unusual. All witnesses are scared. Scared people don't think carefully. Some clients have great cases but cannot tell their story without help. So help them. Prep them. Over, and over, and over again. Help them get their answers down to clear short phrases. Great facts must be effectively communicated. Prepping a client can be difficult for the client, so it helps at the beginning to acknowledge how difficult and unusual it is to be in the witness chair. I show the client that we will do what it takes to prepare to effectively tell the client's human story. During prep, I'm might be nice to the client. Or I might be mean. Whatever it takes.

At the end of prep, I again acknowledge how difficult this process is for everyone. Invariably, clients are grateful. Clients thank me for helping them to effectively express what they are thinking and feeling. They say things like: *I never had to think about these details before*. Trust me, you don't want a witness who never thought about these details before. Neither does the judge.

Judges want your client to have the answers to the relevant questions, and they want the answers to be succinct, organized, clear, simple, and effectively and efficiently presented. I tell clients to use simple words, phrases, and sentences—like talking to a 10-year-old, I say. This usually helps. With all due respect, simplicity is exactly what the judge wants. The firm, clear, and simple answer is usually the persuasive answer. The slow, nervous, and complicated answer—not so much. So prep the client and prep the client again. Your clients—and the judges—will be grateful.

Help The Judge. Most judges want to do the right thing. Most want to be fair. In fact, most people feel they are at their best when they promote fairness. Judges are people, too. They want to champion fairness. How can you help?

Give careful attention to your brief. Highlight your strengths. Make them jump off the page. Address weaknesses as necessary.

You can do still more with testimony. Hearings are emotional events. There is tension and suspense. Fear, joy, and the risk of defeat. You know how this feels and your clients will know soon. You hang on every word your client says and on how your client says it. You watch the judge. You try to discern what the judge is thinking and feeling. Is the judge persuaded? Is the judge receptive or closing down? Is your witness effective?

One key is whether your witness is emotionally compelling. The right answers—given mechanically or with a sense of entitlement—are not good enough. You want answers to influence the judge, to go through the judge's gut and up to the judge's heart so the judge will *want* to help your client. Prepare your witness to paint a persuasive and emotionally-compelling picture. Sometimes, the sincerity of the answers is more important than the actual words.

If you have caused the judge to emotionally connect to your client's story, then doing the right thing—helping your client—is the judge's natural next step.

Prepare an Opening and Closing. After your pre-hearing brief, and after the prep, reduce your arguments again—this time to only three or four points. You cannot expect a busy judge to listen to more. Some judges cannot—and some will not—afford you the luxuries of complexity, verbosity, and protracted time on the clock. These luxuries make judges irritable—and you do not want judges irritated at you or your clients.

And there is something magic about brevity. Be brief. Be punchy. Do not bore. Look the judge in the eye. Make your essential points succinctly and clearly, with force and conviction. Judges respond positively to clarity, confidence, and conviction—efficiently communicated. We all do.

My observation of judges over the years suggests a formula. Start with a strong, simple opening statement. Prove your case with the client's strong, simple human story. Close with your three or four essential points delivered with strength and conviction. Efficient, effective, and compelling. ■

DOGS, HORSES, SNAKES AND PEACOCKS (?) ON THE JOB: WHEN ANIMALS MUST BE ALLOWED ON PREMISES

Thomas J. Davis
Kienbaum Opperwall Hardy & Pelton, P.L.C.

> ". . . it's like there's a horse loose in a hospital. I think eventually everything's going to be OK, but I have no idea what's going to happen next. And neither do any of you, and neither do your parents, because there's a horse loose in the hospital. That's never happened before!" – John Mulaney, *Kid Gorgeous at Radio City* (Netflix 2018).

It turns out that Netflix comedians—even really popular ones—get it wrong. Not only have (miniature) horses been in hospitals before—a "Wonder Horse" named Amos reportedly brought smiles to children and elderly in 200 yearly visits to Florida hospitals and nursing homes—the law may *require* the admission of such animals, including to places of employment, even if it does not qualify as a "service animal." So long as the animal provides emotional support for a medical condition, a request to bring such an animal to work may trigger the Americans with Disabilities Act (ADA), and its requirement of reasonable accommodation.

An ADA regulation dealing with public facilities and accommodations requires "reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability." (29 C.F.R. §§ 36.136(i), 36.302).

The EEOC, in fact, has recently sued CRST International on behalf of a putative employee because it would not allow a psychiatrist-prescribed "emotional support dog" to accompany him on a training exercise. The EEOC's position, as stated in its opposition to CRST's pending motion for summary judgment: "[W]hether an animal (a service dog, an emotional support dog, *or any other animal*) is required in any specific employment situation turns on a standard reasonable accommodation analysis" under the ADA.

If so, the italicized phrase "any other animal" could have a host of interesting employment applications. The use of trained horses for therapeutic work, and consequent requirement that they be allowed into public facilities and accommodations, has now been codified into the ADA regulations, as described above—and the ADA does not necessarily rule out such animals being permitted or required in a workplace.

The United Kingdom's National Health Service has recruited "therapy snakes" to assist with depression, finding they are "a great motivator . . . for male patients who often don't want to look after furry animals." And recently, United Airlines was in the news for refusing to allow a woman to board a plane with her "emotional support peacock" named Dexter. But might Dexter be permitted to come to work in the office or manufacturing facility with his owner? Perhaps.

Notably, although the EEOC's position *vis-à-vis* emotional support animals in the workplace may be of recent vintage, there is authority holding that "reasonable accommodation" of disability in other contexts can extend to emotional support animals. In *Overlook Mut. Homes, Inc. v. Spencer*, a U.S. District Court in Ohio held that "emotional support animals do not need training to ameliorate the effects of a person's mental and emotional disabilities" and that these untrained emotional support animals "can qualify as reasonable accommodations" under the federal Fair Housing Act. And nothing about the ADA precludes animals from being a reasonable accommodation that allows the employee to perform his or her work duties.

That is not to say that every employee is entitled to have an emotional support animal in every workplace. An employee is entitled to a *reasonable* accommodation, not his or her preferred accommodation; likewise, an emotional support animal may constitute an undue hardship to the employer. Earlier this year, a U.S. District Court in Virginia granted summary judgment to the employer in *Maubach v. City of Fairfax* where the plaintiff's emotional support dog caused several employees to suffer allergies, and where the plaintiff refused to consider alternative accommodations.

Even a trained service animal may not be a reasonable accommodation in some circumstances, such as an automobile assembly plant. The U.S. Court of Appeals for the Sixth Circuit recently affirmed a Michigan U.S. District Court's finding in *Arndt v. Ford Motor Co.* that there was insufficient evidence that the plaintiff's service dog would assist him with performing assembly line functions.

The bottom line for employers: you must, at a minimum, engage in a good faith interactive process, no differently than any other ADA request, if an employee requests an accommodation related to an emotional support animal. ■

DEMONSTRATORS IN THE MIDST? HANDLING POLITICAL ACTIVITY IN THE WORKPLACE

John F. Birmingham, Jr. and Jeffrey Kopp
with Daimeon Cotton

INTRODUCTION

While political expression has always been part of the workplace, a number of evolving factors have amplified the challenges for both employers and employees. First, social media, the remote workplace, and changing societal norms have blurred the lines between the workplace and "private lives." Second, there is little doubt that we have become a more polarized society, with each political party calling for more activism, with fervor. Debate, discussion, and political expression occur in the workplace—and in social media and demonstrations outside of work. While most employees can maintain and express their beliefs without necessarily impacting the workplace, other employees' conduct may interfere with work, productivity, the civil rights of fellow employees, morale, brand, and even safety.

For example, employees may attend rallies, political protests, campaign for certain politicians or political causes, or blog about their political and social beliefs. In doing so, they may link such activism with publicly criticizing their employer or its leaders. How employers deal with these situations is complicated, as it involves reviewing and assessing pertinent federal and state laws and company policies, applying good policies consistently, and exercising good judgment.

I. Ability to Regulate Depends on Type of Employer

The starting point for addressing employee political behavior depends on whether the employer is public or private. In most states, employees of private companies are not protected from discrimination based purely on political affiliation or activity. In contrast, public employees generally are protected by state and federal constitutional provisions, including the First Amendment, which protects political speech, and the Fourth Amendment, which prohibits unreasonable searches and seizures. However, even for public employees, if the speech is not of a public concern, it is not protected. Even if it is of public concern, courts will balance factors including whether the speech interferes with the employee's workplace duties, creates a conflict, or undermines public trust and confidence.

For private employers, which are the focus of this article, generally, we start with the assumption that employees are presumptively "at-will," meaning their employment is terminable at the will of the employer or the employee, for any reason or no reason at all. *Lytle v. Malady (on rehearing)*, 458 Mich. 153, 164, 579 NW2d 906 (1998). In at-will situations, restrictions on the ability to discipline employees for political activities rest upon statutory and common law rights. In contrast, when an employee is employed pursuant to a contract, or is represented by a union and governed by a collective bargaining agreement, adverse action based upon political expression is also a matter of contract.

II. Applicable Laws and Statutes

There are many sources of law that may be implicated in regulating employee political speech and activity. A variety of federal and state statutes address discrimination in the workplace, including Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), the Michigan Elliott-Larsen Civil Rights Act (ELCRA), and the Michigan Persons With Disabilities Civil Rights Act, which respectively prohibit discrimination and retaliation based on an individual's race, color, sex, age, religion, national origin, disability, height, weight, or marital status. Other statutes like the National Labor Relations Act (NLRA), 29 U.S.C. §151 *et seq*., protect certain concerted activity by employees related to the terms and conditions of employment. The NLRA protects both union and nonunion employees who engage in concerted activity. Section 7 of the NLRA provides that employees have the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." The NLRA also might protect employee speech where it concerns the terms and conditions of employment under the 'mutual aid or protection' clause. *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 566-69 (1978).

Retaliation for engaging in activity which is purely political, without a nexus to employment-related issues, is not likely covered by Title VII, the ELCRA, or the NLRA. However, certain types of political speech—such as comparing "me too" harassment described in the media with the employees' work environment, or advocacy for better wages in connection with political activity—may constitute protected activity and trigger statutory protection. Also, employers may be required to stop certain types of "political" speech if it creates a hostile environment for, or indicates animus towards, other employees in a protected class.

Additionally, some states have passed legislation to address adverse action based on political activity. For instance, Colorado, North Dakota, and Utah prohibit discrimination based on "lawful conduct outside of work." Connecticut goes even further and prohibits discrimination based on the rights guaranteed by the First Amendment, even for private employers so long as the activity does not substantially interfere with the employee's job performance. Other states, such as California and New York, prohibit discrimination for off-duty "recreational activities," which could include attending political events.

A handful of states and jurisdictions, including California, Colorado, Guam, Louisiana, Minnesota, Missouri, Nebraska, Nevada, South Carolina, Utah, West Virginia, Seattle (Washington), and Madison (Wisconsin), prohibit employers from retaliating against employees for engaging in "political activities." New Mexico protects employees' "political opinions." Colorado and North Dakota ban employers from firing employees for any off-duty lawful activity, including speech. Finally, other states and jurisdictions, including New York, Illinois, Washington D.C., Utah, Iowa, Louisiana, Puerto Rico, Virgin Islands, Broward County (Florida) and Urbana (Illinois) specifically prohibit employers from discriminating against employees based on party membership or for engaging in election-related speech and political activities. Thus, it is very important to consider all state authority that might impact employee conduct related to demonstrations.

Federal and state whistleblower laws may also be implicated by employee speech or conduct. Additionally, while they are difficult to establish, if all else fails, employees may bring a claim asserting that discharge based on certain employee conduct or speech violates "public policy."

III. Employer Rules and Handbooks

Most employers have workplace rules that define permissible employee conduct, including workplace conduct, attendance, dress and grooming standards, codes of conduct, and other rules, such as social media policies, and confidentiality obligations

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DEMONSTRATORS IN THE MIST? HANDLING POLITICAL ACTIVITY IN THE WORKPLACE

(Continued from page 9)

Under the Obama administration, the NLRB closely examined company rules and handbooks and concluded that they violated the NLRA if they had a chilling effect on protected-concerted activity. However, under the Trump administration, the NLRB has shifted course and changed the test for evaluating workplace handbooks and policies. *See The Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017). To provide greater clarity to all parties, the Board's majority announced that, in the future, it will analyze the legality of workplace policies based on three categories:

- **Category 1** includes rules that the Board considers lawful, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights, and thus no balancing of employee rights versus employer justification is warranted; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. An example would be a rule that requires employees to be civil with each other, and overruled previous cases that held to the contrary.

- **Category 2** includes rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.

- **Category 3** includes rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 policy is one that prohibits employees from discussing wages or benefits with each other.

Thus, in light of this new guidance, employers have greater flexibility to implement rules that prevent employees from making disrespectful comments about managers or Company leaders and other reasonable workplace directives.

IV. Type of Activity

In analyzing whether to discipline employees related to speech, protests and demonstrations, it is necessary to consider the individual conduct at issue and its impact. Practically, the employer must determine whether the conduct violates a company workplace rule, whether the conduct is consistent with the employer's reasonable and legitimate expectations for the workplace, and whether it implicates protected activity.

a. Attendance

Companies have a right to enforce their reasonable attendance policies. While the NLRA prohibits retaliation against an employee who engages in "protected concerted activity," e.g., complaining about wages, benefits, or other terms and conditions of employment, employees generally must comply with the employer's attendance policy.

Under the NLRA, employees have the right to solicit union interest (hand out union cards, talk about organizing efforts) during non-work time (breaks, lunch, etc.). Employees also may engage in organizing efforts on company property while off-duty, but only if outside working areas. Employees also may discuss issues relating to working conditions and pay, even if the solicitation or discussions occur during regular work/shift hours, but the employees generally must be at their assigned work areas and performing work, absent some emergency scenario.

Thus, in the context of participating in political rallies and demonstrations, the analysis is relatively simple if an employee misses work to attend the rally. The employer can enforce the attendance policy and discipline the employee accordingly.

In contrast, the analysis is more complicated if the rally or protest is not during scheduled work time because it would not necessarily impact the employer's attendance policy. As stated above, different jurisdictions have statutes regarding regulating off-duty conduct and political expression. Employers should determine whether there is really an impact to the business as a result of the conduct, and determine whether any state or local statutes might apply. Companies normally should not discipline or fire an employee for engaging in lawful off-duty conduct such as supporting a political cause (i.e., gun control, abortion rights, etc.) or supporting a particular candidate when not at work or volunteering in political campaigns.

Finally, some labor unions are politically involved and applicable collective bargaining agreements may contain language that prohibits discrimination against union workers because of their political activity.

b. Employee Speech in the Workplace

1. Religious and Political Speech

Like attendance policies, companies generally have an obligation under Title VII and various state statutes to prevent discrimination and harassment in the workplace by taking prompt remedial action when they become aware of employee complaints or situations that violate the policy. Situations where employees express themselves about politics, religion, and other controversial subjects implicate these policies.

As stated above, in private workplaces, the First Amendment generally does not apply and employers have wide latitude to limit speech that might be offensive to other employees. Even in states that protect political speech, however, the employer can discipline or discharge an employee for legitimate, business-related reasons. The key is to evaluate whether the political expression interferes with the business, disrupts others, or affects the company's productivity. Employers should ensure that they are handling these matters consistently to avoid claims of disparate treatment. For example, an employer could face a lawsuit if it disciplines an employee for displaying the Koran at work, while allowing other employees to exhibit the Bible.

When it comes to political speech in the workplace, employers also have discretion to ensure that its policies are enforced, including its non-solicitation policies. Employers may discipline employees who are not performing their jobs, and instead focusing on political activities. Case in point is the recent firing of two employees of the Cheesecake Factory who allegedly taunted a Trump supporter who was eating at Cheesecake Factory's Miami restaurant in May 2018. The patron, who was wearing a red "Make America Great Again" hat, received unwanted gestures and threats from two employees who apparently did not agree with the customer's political leanings. The employer clearly had the right to enforce its policies and ensure that employee conduct towards customers satisfied its legitimate expectations.

Employees' participation in politics could be protected if it relates

to labor or working conditions, or is otherwise protected by the NLRA. For example, an employee may be protected from retaliation for testifying before Congress or protesting wages, even if outside the workplace. On the other hand, speech without a nexus to the workplace, such as the NFL protests, is not likely to be protected under the NLRA. Additionally, just recently, on August 15, 2018, the NLRB's Associate General Counsel issued a memo stating that a group of Latino employees who skipped work to attend a rally called "A Day Without Immigrants" were protected under the NLRA because the employees had previously complained to their employer about mistreatment and their work complaints were linked with the protest. Despite the fact that in 2006 the NLRB had concluded that a similar protest was not protected, the advice memo that the workers were protected because their strike was aimed at bringing attention to grievances specific to their workplace.

Religious speech can also be a divisive topic in the workplace. Discrimination on the basis of religion is prohibited under Title VII and the ELCRA. In addition, an employer must reasonably accommodate an employee's religious practice absent an undue hardship. According to the EEOC, an employee displaying a religious object in his/her private office does not pose an undue hardship. In contrast, an employee proselytizing or handing out leaflets at work would potentially disrupt the workplace and create a hardship upon the employer. An employer can also restrict employees from harassing their co-workers regarding their religious beliefs, if those views are pervasive and unwelcome.

Employers should remind all employees of their discrimination and harassment policies. Employers should also treat all complaints seriously and investigate all employee complaints.

2. Speech Critical of the Employer

Employees also sometimes face situations where employees criticize their own employers. For example, last year, a Google employee published a controversial memorandum critical of Google's diversity policies, basically claiming that Google discriminates against white males by promoting diversity. Google terminated the employee, and the employee filed an NLRB charge claiming that he had engaged in protected concerted activity under the NLRA. The employee also could have claimed that Google's conduct violated Title VII because he was discriminated for challenging sex discrimination (even if his view was unpopular). If an employer disciplines an employee for speech that is critical of the employer's hiring and promotion practices, the employee may claim he was disciplined for opposing an "unlawful employment practice." 42 USC § 2000e-3(a).

Employers can also prohibit protected political speech that is profane, defamatory, or malicious against the company or its managers. *See e.g., N.L.R.B. v. Honda of America Manufacturing, Inc.*, 73 Fed. Appx. 810, 814-815 (6th Cir. 2003). However, especially in the protected concerted activity zone of the NLRA, employees typically are afforded some latitude in how they express their views and the line can be cloudy.

c. Social Media Political and Disparaging Comments

Blogging is a personal on-line diary, and permits comments to be added. It may combine text, photographs, videos and links to other blogs or websites. Blogs are generally accessible by anyone and few laws regulate their content.

Companies should be concerned about blogs and other forms of social media for various reasons. First, employees have the ability to disclose trade secrets and other confidential information. In addition, as employees use their phones to go on-line, employees could be spending work-time focusing on these extra-curricular activities rather than work. Employees also do not have the right to engage in defamatory or libelous speech in making comments about their employer. *Klehr Harrison Harvey et al v JPA Development, Inc.*, 2006 WL 37020 (Pa. 2006). However, again, employers have to be careful in assessing the speech. For example, complaints that the employer is cheap because it pays substandard wages, or allows a hostile environment to exist in the workplace, may be disparaging but still protected.

In addition, companies have to be concerned that employee comments on social media could expose the company to liability. *Blakey v. Continental Airlines, Inc.*, 164 N.J. 38 (2000) (Company liable for comments posted on computer bulletin board suggesting a pattern of harassment).

Practically, employers should determine whether blogs or social media posts violate company policies. Does the expression violate the no-harassment policy? Does it disclose confidential information? Also, does the speech implicate the NLRA? On a case-by-case basis, the employer should analyze whether the speech is protected (e.g., is the employee complaining about violations of the law and therefore entitled to Whistleblower protection?) and whether it raises these other implications.

All employers should implement an electronic communications policy that expressly mentions that the employer's computer system, including its internet and social media policies, is company property. Policies provide a basis to discipline employees for violating company policy. Employers must also consistently enforce their harassment and discrimination policies.

c. Dress and Grooming

Companies also have a legitimate interest in promoting certain dress and grooming standards, especially in hospital and retail establishments where there is contact with customers and patients. Employees may be vocal and passionate about topics such as the #MeToo Movement, gun control, abortion, and other topics and may attempt to wear shirts and buttons that reflect their position on these topics.

Some federal and state laws could apply. For example, the NLRA protects an employee's right to wear union or organizing buttons or insignia, unless there are special circumstances related to production, discipline or customer relations. Under the NLRA, employees lawfully can display labor union insignia, even if it has a political message. Certain statutes such as ELCRA, prohibit discrimination based on weight, and other cities have ordinances that prohibit discrimination based on physical appearance. *E.g.*, Milwaukee Ordinance MEOO 3.23.

Nonetheless, an employer can implement dress code policies prohibiting employees from displaying political buttons and logos, provided it is consistent with other types of non-political speech. Employers might have a policy, for instance, that restricts campaign signs and solicitations in the workplace.

CONCLUSION

The challenges presented by the hyper-partisan nature of American society, the passions of today's employees, the different tools available to express opinions, and the myriad of workplace laws that may protect certain speech, are real. Employers can certainly restrict political speech and should employ a policy that does so while providing appropriate carve-outs for protected speech. However, attempting to shut down all such speech and activity is unwise and unlikely to be effective. In fact, open dialogue and civil discourse is welcome at most workplaces unless it creates disruption, discredits the product or service, or impacts safety. Therefore, in confronting these challenges, employers should cultivate a culture of mutual respect, employ a reasonable policy, apply the policy consistently, and exercise good judgment.

This article is based on the author's materials and presentation at ICLE's 2018 Labor & Employment Law Institute. ■

MICHIGAN CIVIL RIGHTS COMMISSION EXTENDS ACT TO SEXUAL ORIENTATION AND GENDER IDENTITY

Sarah L. Nirenberg
Kienbaum Opperwall Hardy & Pelton, P.L.C.

Discrimination or harassment based on a person's sexual orientation or gender identity is not explicitly proscribed by Michigan's Elliott-Larsen Civil Rights Act (ELCRA). In fact, Michigan's legislature has expressly rejected efforts to add classifications to ELCRA eleven times since 1999. In the face of that, the Michigan Civil Rights Commission announced that, starting May 22, 2018, it will interpret ELCRA's ban on "discrimination because of . . . sex" to include discrimination against sexual orientation or gender identity.

After the Commission's announcement, the Michigan Department of Civil Rights has taken complaints of sexual orientation/gender identity discrimination, but has yet to hold hearings.

This announcement by the Commission came shortly after the U.S. Court of Appeals for the Sixth Circuit's ruling in *EEOC v. RG & GR Harris Funeral Homes,* which held that discrimination on the basis of transgender and transitioning status violates Title VII, and that an employer's religious belief does not give it the right to discriminate on that basis.

The Commission had considered this interpretation before the Sixth Circuit's ruling, but held off on two earlier occasions after the Michigan Attorney General opined that the Commission did not have the legal authority to insert sexual orientation and gender identity into ELCRA. On July 20, 2018, the Michigan Attorney General opined once again that *only* the Michigan legislature, not the Commission, has authority to expand ELCRA's coverage.

On June 4, 2018, shortly after the Commission's order expanding ELCRA, the U.S. Supreme Court issued its decision in the "gay wedding cake" case—*Masterpiece Cakeshop v. Colorado Civil Rights Commission*—arguably drawing into question the Sixth Circuit's conclusion in the *Harris Funeral Homes* case. In the *Masterpiece Cakeshop* case, the owner and baker had refused to create a wedding cake for a same-sex couple because of his religious opposition to same-sex marriage. The couple filed a charge with the Colorado Civil Rights Commission pursuant to the Colorado Anti-Discrimination Act (CADA), which expressly prohibits a person from denying an individual, because of sexual orientation, the full and equal enjoyment of goods or a place of public accommodation.

The Colorado Civil Rights Commission had rejected the baker's claim that requiring him to create a cake for a same-sex wedding would violate his First Amendment right to free speech and free exercise of religion, and ordered the baker to "cease and desist from discriminating against . . . same-sex couples by refusing to sell them wedding cakes or any product [he] would sell to heterosexual couples." The Colorado Court of Appeals affirmed, and the case worked its way to the U.S. Supreme Court.

The Supreme Court reversed, finding that the Colorado Commission's decision violated the First Amendment because it was inconsistent with the state's obligation of religious neutrality. Justice Kennedy, writing the majority opinion, explained that the Commission had exhibited hostility toward religion based on statements Commissioners had made during a public meeting that implied that religious persons and their beliefs are less than fully welcome in Colorado's business community. The Court also found a lack of neutrality evidenced by the Colorado Commission's earlier inconsistent treatment of three bakers who had refused to make a cake for a customer who requested images that conveyed disapproval of same-sex marriage. In that case, the Commission had found that the bakers' refusal did not violate the Colorado Act on a religious basis because the requested images were "derogatory" and "hateful," and they would be attributed to the bakers.

In contrast to the Colorado statute, the Michigan statute prohibits the denial to an individual the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or services because of certain characteristics, including religion, but not including sexual orientation or gender identity.

Putting aside the legal sustainability of the Michigan Commission's May 22 attempt to expand ELCRA's coverage, when faced with a religious defense to a discrimination claim, heed should be paid to Justice Kennedy's admonition in the *Masterpiece Cakeshop* case that ". . . these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market." ■

WRITER'S BLOCK?

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FEDERAL AND STATE GOVERNMENTS SEEK LIMITS ON ENFORCEMENT EFFORTS BY OFCCP AND OTHER AGENCIES

Julia Turner Baumhart
Kienbaum Opperwall Hardy & Pelton, P.L.C.

In what could be another setback for the Office of Federal Contract Compliance Programs (OFCCP) and other U.S. Department of Labor (DOL) enforcement tools, the Trump administration recently issued a 132-page report entitled "Delivering Government Solutions in the 21st Century—Reform Plan and Reorganization Recommendations." This report sets forth a comprehensive plan to reorganize and streamline the federal government's executive branch by reducing redundancies and increasing efficiencies. The report lumps proposed executive agency realignments into four categories, including "mission alignment imperatives." OFCCP's proposed future lies here, as does most of the DOL's, under the subcategory "organizational realignments to enhance mission and service delivery" through enforcement.

The primary vehicle for this realignment is the proposed merger of the U.S. Departments of Education and Labor into a single agency, to be called the Department of Education and the Workforce. The combined agency would focus on (1) K-12 education; (2) higher education and workforce development, e.g., apprenticeship programs; and (3) research, evaluation, and administration. The enforcement arm would have responsibility for worker pay and benefits, civil rights and equal access, and worker and school safety. All subsectors would report to a single senior official.

If the proposed merger actually occurs, it would likely succeed only incrementally and pursuant to a long-term hard-fought initiative. Merging the Departments of Education and Labor has been attempted before—unsuccessfully—first under the Reagan administration in the 1980s and later in the mid-1990s when the Republicans took control of Congress. Still, given some recent successes by the current administration where others have failed, critics should be careful about giving short shrift to initiatives designed to reduce spending and increase efficiency in government.

In another potential setback for a longstanding DOL enforcement vehicle—the prevailing wage requirements of the Davis-Bacon Act—on June 6, 2018, Michigan joined company with 22 other states by repealing Michigan's Prevailing Wage Act. This repeal removed the requirement that construction contractors pay workers on state-funded contracts wages and benefits equivalent to union scale. The Michigan legislature took action after a successful petition drive to set up the repeal as a ballot initiative for the November 2018 election. The repeal does not alter existing state-funded construction contracts, but applies to new contracts or renewals effective June 6, 2018 or thereafter.

Supporters of the repeal and petition drive contend that the move will promote fair competition and increase the number of projects the state can fund by reducing substantial overcharges borne by Michigan taxpayers. Opponents argue that qualified construction workers will leave Michigan to earn higher compensation for their skills elsewhere. While the repeal does not directly impact the federal Davis-Bacon Act, which requires that construction workers on federally funded projects receive a prevailing wage, it does add volume to the voice against taxpayer-funded prevailing wages in government construction contracts. ■

UNITED STATES SUPREME COURT UPDATE

Regan K. Dahle
Butzel Long

Agency Fees Violate the First Amendment

In *Janus v. Am Fed'n of State, Co., & Mun. Employees, Council 31*, 138 S. Ct. 2448 (2018), the plaintiff challenged the constitutionality of an Illinois statute requiring public employees to pay an agency fee to the union even if they opted not to join the union. In 1977, the U.S. Supreme Court held in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209; 97 S. Ct. 1782, 1786; 52 L. Ed. 2d 261 (1977), that represented public employees who opted not to join the union could be compelled to pay a percentage of full union dues for costs incurred by the union for activities directly related to collective bargaining. *Id.* at 235. Nonmembers could not be required, however, to pay any fee associated with "ideological activities unrelated to collective bargaining." *Id.* at 236. The plaintiff in *Janus* sought reversal of this 41 year old decision in *Abood* and relief from an Illinois statute requiring him to pay an agency fee to the union to subsidize the costs associated with collective bargaining.

The Court sided with Janus and reversed its decision in *Abood*, finding it "poorly reasoned" and leading to "practical problems and abuse." *Janus*, 138 S. Ct. at 2460. Citing the Jeffersonian ideal that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical," the Court recognized that "the compelled subsidization of private speech seriously impinges on First Amendment Rights . . ." *Id.* at 2464. The Court rejected the notion that promotion of labor peace and eliminating the risk of "free riders" justifies the infringement on First Amendment Rights imposed by agency fees. *Id.* at 2468-69. In overturning *Abood*, the Court concluded that "[n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." *Id.* at 2486. ■

80TH ANNIVERSARY OF THE ANACHRONIST FLSA

Eric J. Pelton
Kienbaum Opperwall Hardy & Pelton, P.L.C.

What do you get when you cross a 1930's industrial era workplace model with the modern American workplace? A compliance nightmare.

The Fair Labor Standards Act (FLSA) recently marked its 80th anniversary. Enacted on June 25, 1938, the FLSA has undergone a number of changes since its enactment, but it has hardly kept pace with the modern workplace. And as the pace of change in workplace conditions grows at a dizzying pace—think working from home, alternative work schedules, 24-7 connectivity, the "gig economy"—the law and the U.S. Department of Labor's (DOL's) interpretive regulations simply do not fit.

Although FLSA litigation was dormant for many decades, the past 20 years have witnessed an explosion of costly litigation against employers. Individual claims may not amount to much, but relatively easy-to-certify collective actions and DOL investigations have resulted in billions of dollars in judgments, settlements, and defense costs. According to the blog TSheets, just the top ten 2017 FLSA settlements exceeded $180 million. Diverse industries such as insurance, restaurants, banking, retail, government, and health care all felt the pain. The law firm Seyfarth Shaw has reported that wage and hour settlements over the past two years have totaled $1.2 billion. Even "exotic dancers" at Déjà Vu were awarded $6.5 million.

Plaintiffs' attorneys take a large share of that amount. And employees are often unhappy with the changes necessary to achieve compliance, sometimes preferring a more flexible and family-friendly compensation system.

Efforts at common-sense change, however, have fallen short. In 2004, during the George W. Bush presidency, comprehensive changes were demagogued by politicians, unions, plaintiffs' lawyers, and employers resulting in minimal meaningful change that might have modernized the law. The Obama administration instituted significant changes through regulatory fiat, which a U.S. District Court in Texas enjoined, and the Trump administration quickly reversed.

As a result, the compliance nightmare continues. Employers are wise to audit their compensation systems to ensure compliance. Among the issues to review are:

Exemptions. Just because an employee is paid a salary, as opposed to an hourly wage, does not mean the employee is exempt from mandatory overtime under the FLSA. The employee must also meet a duties test.

Off-the-Clock Work. Are employees being paid for all time worked? This analysis may require employers to review how it handles travel pay, training pay, work-from-home pay, breaks and mealtime, time spent donning and doffing, among other issues.

Tipped Employees. An always complicated area to manage, protections for tipped employees were recently extended under the Tipped Income Protection Act, signed into law by President Trump in March 2018.

Independent Contractors. As we have written in recent issues of *Insight*, the U.S. Department of Labor (DOL) has been aggressively cracking down on the use of independent contractors to avoid FLSA regulations. The definition of "employee" under the FLSA has been noted by the courts to be among the broadest definitions anywhere in the law.

Recordkeeping and Overtime Pay Requirements. Maintaining accurate records of hours worked is essential. But correctly calculating the regular rate of pay on which overtime is based is also essential, and can be complex where pay rates vary and bonuses are paid.

State Law Issues. Most states have their own wage and hour laws that may differ from, and often exceed, the requirements under the federal FLSA. The FLSA governs minimum wage and overtime, but many states have specific requirements on when and how wages and fringe benefits are paid, special rules for breaks and meals, and a higher minimum wage. Some states also require overtime pay on a basis more favorable to employees than under the FLSA.

Some efforts are underway to modernize the FLSA. But the chances of real reform in Congress that would balance the needs of today's employers and the desire for flexibility for employees seem doomed to political dysfunction. While we wait for future reform, employers would do well to closely review their pay practices, especially when providing more liberal alternatives to traditional work schedules. ■

NUTS AND BOLTS OF AN NLRB INVESTIGATION

Colleen Carol, ***Attorney***
National Labor Relations Board Region 7

I. GENERAL INFORMATION

A. **www.nlrb.gov**

B. Information Officer

II. UNFAIR LABOR PRACTICE CHARGE IS FILED

A. Initial Review of the Charge by Regional Office

Regional Office personnel review every charge that is filed with the office, whether it be by mail, e-file or in person. If necessary, the Region's Information Officer may contact the Charging Party if there is a question regarding the timeliness of the charge under Section 10(b) of the Act, jurisdiction, or whether the charge has identified the appropriate section of the Act. (CHM 10012.7)

B. Agent Assigned, Notice Issued (CHM 10040)

- The charge is assigned to an investigating agent. The Region then sends notice to the parties notifying them that the charge has been filed, who the investigator is, the case number and general information about the parties' rights and obligations regarding investigation process.
- **Impact Analysis** is a system the agency uses to prioritize the investigation of cases and will often determine how quickly the parties will have to present evidence either in support of or in defense of a charge. Category III charges (exceptional cases) are considered the types of charges that have the most impact on employee rights (discharges, organizing campaigns, first-contract bargaining allegations, picketing cases), and thus must be investigated in 7 weeks. Category II cases (significant cases), which contain allegations that have a slightly less impact on employee rights (often cases involving discipline less than discharge, deferrable cases, information requests, etc.) must be investigated in 11 weeks and Category I (Important cases) cases must be investigated in 14 weeks.
- **NLRB Form 4541** is a Notice of Appearance for the designation of counsel that is provided with the initial letter. Please return as soon as possible to ensure proper service and to give the investigator the identity of the person s/he will need to contact. (CHM 10058.1)
- **Commerce Questionnaire (NLRB Form 5081)** is also an important form for the Region to ascertain whether the Board has jurisdiction over the charged party.
- **Contacting the Investigating Agent** is a good idea if you want to let the Board agent know you are representing the Charged Party and a synopsis of the underlying events/arguments.

III. INVESTIGATION PART I: CHARGING PARTY EVIDENCE (CHM 10050-10070)

A. Affidavit Testimony

The Charging Party is required to present its evidence in a timely manner and is required to provide affidavit testimony under most circumstances. Affidavits are confidential and are not disclosed to any outside party at any time during the investigation. If additional witnesses are identified and contacted their identities *will not* be identified, nor will any statements they provide be disclosed during the investigation. (CHM 10060)

A failure to provide an affidavit or evidence in support of the charge in a timely manner can result in a charge being dismissed for a lack of cooperation. (CHM 10054.1(c))

B. Documentary Evidence

Charging Parties are also required to present any documentary evidence that relates to their charge.

IV. CHARGED PARTY EVIDENCE/CHARGED PARTY DEFENSE (CHM 10054.4)

A. Request for Information Letter

- The Board agent will review the evidence presented by the Charging Party and submit a letter asking for the Employer's legal position and evidence to complete the investigation. The deadline varies depending on the impact analysis category, the Board agent's work load and whether neutral witnesses need to be located and interviewed (deadlines are rarely more than 2 weeks).
- **Affidavits** from agents/supervisors who have knowledge or information about the allegations will be requested and the presentation of such evidence is considered "full and complete cooperation." (CHM 10054.5) Charged Party counsel (and Charging Party counsel if applicable) may only be present if interviewing an agent or supervisor, unless specifically authorized as counsel for the witness and with a Notice of Appearance on file for that particular individual.[1]
- **Documentary Evidence** will be requested, usually involving documents related to the work history of a charging party, comparable disciplinary actions, policies/memoranda related to the dispute, correspondence of managers as it relates to dispute.
- **Investigative Subpoenas:** If an Employer determines not to provide such evidence or testimony, the Regional Director *can* issue an investigative subpoena for such evidence. Investigative subpoenas are subject to review by NLRB Headquarters. (CHM 10058.5) The majority of investigative subpoenas are for documentary evidence that the Regional Director feels is necessary to be able to make a decision.
- **Legal Position**: The Charged Party will also be asked to provide a legal position ("position statement") on whether the allegations, if proven, would constitute a violation of the Act. Please note that limitations on the future use of position statements are prohibited in the initial letter and will often result in the issuance of an additional letter from the Region reminding counsel specifically indicating that the Board's use of such statements cannot be limited by a party. (CHM 10054.6) Those statements can, under most circumstances, be used by the Board in litigation as an admission of a party opponent. (Fed. Rules of Evidence 801(d)(2)(C))
- **10(j) Injunctive Relief**: When requested by the Charging Party or if the Region believes that injunctive relief could be warranted, the Charged Party's position on such relief will be sought. Additional evidence related to that request may also be solicited by the investigator.

(Continued on page 16

NUTS AND BOLTS OF AN NLRB INVESTIGATION

(Continued from page 15)

B. Deadlines and Follow Up Investigation (CHM 10068.2)

As mentioned above, the timeline for investigations vary based on the allegations and the deadlines for the submission of evidence by parties are usually governed by those timelines. The Board Agent needs to have the Charged Party's information while leaving sufficient time to do any additional investigation that may be required based on that evidence. The closer the timelines set by the Board Agent can be followed, the more likely a correct decision will be made (or at least one that is based on the parties'complete arguments/facts).

If the evidence is not timely submitted, most Board Agents contact counsel to see if they are planning to present anything and if so, when they expect to do so. If there is no response from the Charged Party or it does not give a certain and immediate date for the submission of such evidence, the Regional Director is authorized to make a decision solely on the Charging Party's evidence. (CHM 10054.5)

V. THE DECISION

A. **No-Merit (CHM 10120 – CHM 10122)**

- If the Regional Director has all she needs to make a decision and decides the charge has no merit, the Charging Party will be given an opportunity to withdraw the charge. If the Charging Party wishes to appeal the decision or does not want to withdraw, the charge will be dismissed. All parties will be notified of the dismissal and a general basis for the Regional Director's decision.
- Charging Parties may appeal the dismissal. The case decision could be overturned or remanded for further investigation, but are more often upheld. If further investigation is needed, you will be notified by the Board Agent.
- A "merit dismissal" involves a case where there may be a meritorious allegation, but in some cases the litigation of such an allegation would not constitute a judicious use of the agency resources. This is within the Regional Director's discretion and is not very common. (CHM 10122.2(c))

B. **Deferral (CHM 10118)**

Where an employer and a union have a collective bargaining agreement with a grievance procedure and binding arbitration, the Board can and often does defer to that procedure, provided the dispute is covered by the contract and there is "arguable merit."

Deferral is NOT Appropriate if:

- Question of whether employees are an accretion to an existing unit;
- 8(a)(5) refusal to provide information allegations;
- Conduct that constitutes a rejection of the principles of collective bargaining such as a withdrawal of recognition, frustration of the grievance procedure or an elimination of the entire unit of employees;
- Anything involving unlawful contract provisions, interest arbitration or negotiability of issues during the term of a contract;
- Direct dealing allegations;
- Where the interests of the employees is divergent from the union representing them;
- 8(a)(4) retaliation cases

Deferral Under *Collyer Insulated Wire*, 192 NLRB 837 (1971)

- 8(a)(5) unilateral change allegations or 8(a)(1) allegations that do not involve adverse employment action can be deferred under *Collyer*, supra. *Collyer* provides that where a grievance has been filed or could have been filed and the dispute is susceptible to the resolution under the grievance procedure, the Regional Director can administratively hold the charge until the grievance has been resolved. The Employer must waive any timeliness defenses to the filing or processing of any such grievance in order for the Regional Director to find such deferral appropriate.
- If the underlying grievance is not filed or processed by the Union, the charge can be dismissed. If the Employer frustrates the procedure or doesn't abide by its agreement to waive timeliness defenses, deferral can be revoked and the investigation resumed/complaint issue.
- After the grievance is arbitrated, the award will be reviewed by the Region using the standard set forth in *Spielberg Manufacturing Co*., 112 NLRB 1080 (1955) and *Olin Corp*., 286 NLRB 573 (1984).
- The award will be deferred to, regardless of the outcome, so long as: 1) the proceedings were fair and regular; 2) all parties agreed to be bound; 3) the award is not "clearly repugnant" to the policies of the Act; 4) the contractual issue was factually parallel with the ULP issues and 5) that the arbitrator was presented generally with the facts relevant to the unfair labor practice issue.
- If the arbitrator's award meets those standards, the charge will be dismissed unless withdrawn. If the award does not meet those standards, the investigation will resume and a decision made on the merits.

Deferral Under *Babcock & Wilcox Construction Co*., 361 NLRB No. 132 (2014)(anything arising after December 15, 2014)

- Cases alleging discriminatory action under 8(a)(1) or (3) OR 8(a)(5) violations that involve individual Section 7 right or have serious economic impact can still be deferred under the standard in *Collyer* so long as there is explicit authorization for the arbitrator to decide the statutory issue—either by contractual language or separate agreement. The same waivers are required procedural/timeliness defenses.
- An arbitrator's award in discrimination cases is assessed differently under *Babcock & Wilcox*. The Board will defer to such an award if: 1) the arbitrator is explicitly authorized to decide the statutory issue either by explicit agreement or contractual language; 2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and 3) Board law "reasonably permits" the award. The burden is on the party urging deferral.

Deferral to Grievance Settlements: Grievance settlements are

either assessed under the standard set forth in *Alpha-Beta Co*., 273 NLRB 1546 (1985), which mirror those in *Collyer*, or, in *Babcock &* Wilcox/discrimination cases, where:

- The parties intended to settle the unfair labor practice issue;
- The parties addressed the issue in the settlement and;
- Board law permits the settlement, i.e., whether it meets the standards set out in *Independent Stave Co.,* 287 NRLB 740 (1987), as discussed more fully below.

C. **Merit Determination :**

- If the Regional Director believes there is merit to the charge, **Complaint** will issue unless the Charged Party wishes to settle the matter. The Charged Party will almost always be given the opportunity to settle before a complaint issues, but a settlement can be reached at any time.
  - **Informal Settlement Agreements** are prepared by the Region and submitted to the Charged Party for review. Settlements should contain: a) a provision requiring the Charged Party to post a notice to employees for 60 days (or mailing/emailing or posting on an intranet) indicating that the Employer will not engage in unlawful conduct and listing employee rights protected by the Act; b) backpay, with interest and an offer of reinstatement to employees who have been discriminated against; c) an assurance that the discipline/discharge will be removed from the employees' file and d) an assurance that if there is no compliance with the agreement, a complaint will either issue or re-issue. (CHM 10146 -10154) In certain situations, the Board will seek certain special or enhanced remedies, which can include, *inter alia,* a notice reading to employees by an Employer agent, an extension of the certification year, a bargaining order or an extended posting period.
  - **Non-Board Settlement Agreements (CHM 10140 - 10142)** are private agreements between the parties instead of an agreement between the Charged Party and the Board. Because the Board wants to encourage dispute resolution between the parties, such agreements can be accepted (usually resulting in a request to withdraw the charge), so long as the agreement meets the standards set forth in *Independent Stave Co*., 287 NLRB 740 (1987). Parties should be prepared to present the Board agent with a copy of the agreement as well as the contact information of any individually impacted employees, as they will have to be independently contacted to ascertain their position. The following guidelines will be followed in the assessment of any Non-Board Settlement:
    - Regions generally will *not* approve such settlements if they include a provision requiring an employee to release future rights to file charges or other causes of action, with the exception that an employee may knowingly waive the right to seek employment with the named employer in the future;
    - Regions will generally *not* approve agreements that prohibit an employee from providing assistance to other employees;
    - Regions generally will *not* approve agreements that prohibit an employee from engaging in discussions about the Charged Party. The Region normally will accept prohibitions on defamatory statements and specific discussions of the financial aspect of the settlement, but such prohibitions will be carefully reviewed.
    - Such agreements should *not* include "unduly harsh" penalties for breach of the agreements such as repayment of backpay or a requirement that the employee pay attorney fees/costs. Damages that are "directly related to the breach" are acceptable, but not clearly defined. Such damages are often given close scrutiny and are at the Regional Director's discretion.
    - Monetary awards should comport with tax regulations.
  - **Formal Settlement Agreements (CHM 10164 -10170)** are relatively unusual and must be approved by the Board. These agreements often provide for a consent judgment to enforce the settlement if necessary and contain essential pleadings within the agreement itself. These only occur after a complaint has issued and are generally sought when:
    - There is a history of prior unfair labor practices;
    - There is a likelihood of recurrence;
    - There is a continuing violation with a high impact or;
    - Where there is a back pay installment schedule covering an extended period of time.

VI. LITIGATION

A. A Hearing date is set when the Complaint issues and, shortly before the hearing, an administrative law judge will be assigned to handle the matter.

B. A Conference Call is normally held with that judge at least two weeks before the hearing to discuss settlement possibilities, and if applicable, subpoena issues.

C. No Discovery – Documents and witnesses subject to subpoenas by the parties are not producible until the date of the hearing.

D. ALJ Decision: After the submission of briefs (usually 28 days from the hearing), the ALJ issues a decision.

E. Board Approval: Either side can take exceptions to the ALJ's decision and with the Board. The Board will either rule on those exceptions or remand to the ALJ for further fact-finding. If no exceptions are filed, the Board automatically adopts the ALJ's decision.

F. Enforcement: Board Orders are not self-enforcing. The Board must seek such enforcement from the federal courts of appeals either in the circuit of the Region/dispute or the D.C. Circuit.

—END NOTE—

1 If there is a question regarding supervisory status, a person may be contacted and interviewed to determine whether the person is a supervisor under Section 2(11) or an agent under 2(13) of the Act *only*. Whether any testimony beyond facts needed to ascertain status is solicited without involvement depends on that person's status, as decided by the Regional Director. Whether former supervisors who come forward to provide testimony can do so without notice or participation of legal counsel is jurisdiction-specific. In the state of Michigan, those individuals can provide testimony without any notice to or participation from counsel.

This article is based on the author's materials and presentation at ICLE's 2018 Labor & Employment Law Institute. ■

DUST OFF THOSE ARBITRATION RULES: A NEW REALITY FOR CLASS AND COLLECTIVE ACTIONS IN EMPLOYMENT LITIGATION

Jesse L. Young
Kreis, Enderle, Hudgins & Borsos, P.C.

Most federal circuit courts have long held that an employee's right to participate in a class or collective action may be waived through an arbitration agreement. Employees relentlessly challenged those decisions over the years and, in 2016, the Seventh and Ninth Circuits bucked the trend, creating a circuit split and breathing new life into the issue. On May 21, 2018, the U.S. Supreme Court finally weighed in and held that class and collective action waivers in mandatory employment arbitration agreements are indeed enforceable under the Federal Arbitration Act ("FAA"). *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

Newly minted Justice Gorsuch wrote the opinion for the slim majority (5-4) and Justice Ginsburg authored a strongly worded dissent. While the Justices jousted and wrestled with numerous legal issues in *Epic Systems*, the primary issue was whether class and collective action waivers in arbitration agreements violate the National Labor Relations Act ("NLRA") and are thus unenforceable under the FAA's savings clause.

In *Epic Systems*, the employee entered into an arbitration agreement with a class action waiver, but nevertheless forged ahead in court with a collective action under the Fair Labor Standards Act ("FLSA"). He argued that wage-hour class action litigation was "protected concerted activity" under the NLRA and that the class waiver in his arbitration agreement was illegal, and thus unenforceable, because it violated the NLRA's prohibition on employer interference with concerted activity. Justice Gorsuch and the majority disagreed, concluding it was inappropriate to read the FAA and NLRA as conflicting statutes. The Court reasoned that the FAA's mandate to enforce arbitration agreements cannot be construed to conflict with the NLRA's protection of concerted activity (the NLRA does not expressly state a right to bring class or collective action).

It would have been interesting to see the Supreme Court's analysis as between the FAA and the FLSA, given the employee's recognized statutory right to participate in a collective action. *Killion v. KeHE Distrib., LLC*, 761 F.3d 574, 590-91 (6th Cir. 2014). Although the Supreme Court touched upon that issue in *Epic Systems*, it was only mentioned in passing and was not fully analyzed. After *Epic Systems* was decided, however, the Sixth Circuit gave us a preview of what that analysis might look like. *Gaffers v. Kelly Services, Inc.*, No. 16-2210 (6th Cir. 2018) (relying on *Epic Systems* and concluding that arbitration agreements with class and collective waivers do not violate the FLSA or the FAA's savings clause).

The impact of the Supreme Court's decision is that employers may lawfully force employees, as a condition of employment, into mandatory arbitration agreements which preclude them from participating in class actions, whether in court or in arbitration. Employees who are subject to such valid arbitration agreements may now only litigate claims against their employers in individual arbitrations, one by one, in piecemeal fashion.

The Supreme Court's decision in *Epic Systems* appears to resolve facial challenges to class action waivers in arbitration agreements. However, at least one district court already found that the holding in *Epic Systems* is limited to "genuinely bilateral" arbitration agreements. *Bayer v. Neiman Marcus Grp., Inc.*, 2018 U.S. Dist. LEXIS 90228, *26 (N.D. Cal. May 30, 2018) (citing Justice Ginsburg's dissent). Another district court affirmed the general holding of *Epic Systems*, but also denied an employer's motion to compel individual arbitration of class members because the employer materially breached the agreements by failing to timely pay the required arbitration fees in connection with two employees' arbitration cases. *Gomez v. MLB Enters., Corp.*, 2018 U.S. Dist. LEXIS 96145, *33-34 (S.D.N.Y. June 5, 2018). And of course, employees may still challenge arbitration agreements under generally available contract defenses such as fraud, duress or unconscionability. To be sure, the plaintiffs' bar and employee advocacy groups will seize upon these and other arguments to evade arbitration agreements containing class action waivers.

While class action waivers can be a powerful tool for limiting significant potential employer liability, mandatory individual arbitration is not necessarily a silver bullet for avoiding complex and expensive litigation. Employers should make informed and thoughtful judgments about implementing, maintaining, or enforcing arbitration agreements with class action waivers. Arbitration can be expensive, and one strategy plaintiffs' lawyers have already started implementing to deal with class action waivers is the filing of dozens, hundreds, and even thousands of individual arbitrations at a time, sometimes all over the country, for which employers are often required to foot the bill for arbitrator fees, filing fees, attorneys' fees, and other litigation costs.

Unless Congress amends the FAA, or exempts specific claims from the FAA's coverage (*e.g.*, FLSA collective actions), this is the new reality for class and collective actions in employment litigation. ■

EPIC SYSTEMS CLEARS A WIDER PATH FOR ARBITRATION IN MICHIGAN

Robert A. Lusk
Adam Walker
Lusk Albertson PLC

Introduction

The authors enjoy litigating and arbitrating cases. Well, "enjoy" is a strong word. Litigation and arbitration are hard work. Litigation, in particular, is also painful and expensive for clients, win or lose. While concepts like pain and expense are relative, our experience has been that trials are usually worse than arbitrations from an objective standpoint. So, when we have the opportunity, we recommend arbitration over trial almost every time.

Our preference is based on several factors, the first of which is that arbitrations are governed by voluntary contracts. In an ideal case, the parties and their attorneys are able to craft a bespoke arbitration agreement that meets their specific needs. The potential to tailor an agreement is in stark contract to the one-size-fits-all rules of procedure and evidence that apply in civil litigation. Even when the arbitration agreement is imposed by one of the parties, as may be the case in the employment and consumer context, the arbitration's rules are almost always more flexible and accommodating than the court's procedural and evidentiary rules.

Arbitrations are also generally less expensive than litigation. Clients often incur tens of thousands of dollars in attorneys' fees and costs before the trial even begins. Formal papers, discovery practice, motion practice, status conferences and court ordered attempts at alternative dispute resolution rack up considerable pre-trial legal fees and costs. If the case actually goes to trial, the parties incur significant additional fees and costs for thorough trial preparation including, in many cases, demonstrative evidence and private investigations. If the trial is by jury rather than by a judge, there may be jury consultant fees as well. And, the trial does not necessarily end the case. There are post-trial motions and, frequently, one or more levels of appeal that further inflate the cost of litigation.

Data support these assertions. For example, a study was conducted in 2017 that analyzed the economic impact associated with the length of trial and appeal as compared with the length of arbitration. The study found that the direct losses resulting from the delay of trial in U.S. federal district courts (i.e., not the relative cost of litigation v. arbitration, but the opportunity cost of the resources tied up in litigation) was approximately $10.9-13.6 billion between 2011 and 2015 (more than $180 million per month). The direct losses were even worse at the appellate level—to the tune of $20.0-22.9 billion over the same time period (more than $330 million per month). Worse, the study concluded that these losses caused a snowball effect, and the actual losses were more than double the above figures.[1] This does not mean all arbitrations are models of efficiency. But, in contrast to trials, they are considerably less expensive on average.

Arbitration is also more private than civil litigation. Whether by the parties' agreement or arbitrator's ruling, there are often rules set in place to protect sensitive business information or scandalous personal information. In contrast, almost everything about a civil trial is public. Court rules provide some latitude for protecting private or sensitive information during the discovery process; but, even so, a party carries a heavy, near impossible, burden of protecting information it wishes the court to consider in reaching its decision.[2]

Predictability is another consideration. We're often asked whether a new case is "good" or "bad." If we've been working with the client as the dispute developed, sometimes we have an idea. Most of the time, though, we're forced to admit the outcome of the trial would be much easier to predict if only we knew: what our opposing counsel knows; how the assigned judge has ruled in similar cases; and, the predilections of the six citizens who will be selected to sit on the jury. In other words, the outcome of civil litigation can be difficult to accurately predict, even when you're waiting for the jury's verdict. It's generally easier to predict how arbitrations will turn out. For one thing, sophisticated parties may choose their own arbitrator(s) when they negotiate their contract. Even outside such ideal situations, experienced counsel will know potential arbitrators, by reputation or experience, or at least be in a position to make an educated guess based on the arbitrator's resume. Personal knowledge aside, we usually feel comfortable making assumptions about how fellow attorneys will react to facts and arguments. We're typically less confident about the reactions of lay jurors. Most attorneys agree.

So far, the factors discussed militate in favor of arbitration. There is, however, one potential drawback: if the arbitrator makes the wrong decision, it is quite difficult to secure a reversal. Frankly, it's not much easier if a judge or a jury makes the mistake. But, courts are notoriously reluctant to reverse arbitrators' decisions and will not do so simply based on a judicial conclusion the arbitrator got it wrong. The only bases for reversing an arbitrator's award are: that it was procured by corruption, fraud or other undue means; evident partiality by an arbitrator appointed as a neutral; misconduct by an arbitrator prejudicing the rights of a party; an arbitrator exceeding his or her authority; or, the absence of an agreement to arbitrate.[3] Outside of these considerations, a party that loses in arbitration will be stuck with the arbitrator's decision and award even if it is wrong.[4]

Michigan's Uniform Arbitration Act (MUAA)

The MUAA took effect in 2013. The general idea was to encourage arbitration in Michigan. Several MUAA provisions advance this goal including: Section 4,[5] which provides the parties flexibility to waive or amend certain MUAA requirements; Section 5,[6] which permits the parties interim access to judicial intervention, when necessary; Section 6,[7] which makes arbitration agreements "valid, enforceable, and irrevocable except on a ground that exists at law or in equity for the revocation of a contract," a subject to which we will return when we consider the Epic Systems decision; Section 8,[8] which permits the arbitrator or the court to grant provisional remedies necessary to protect the effectiveness of the arbitration award, e.g., preliminary injunctions; Section 10,[9] which permits courts to consolidate separate arbitration proceedings for efficiency; Section 14,[10] which provides arbitrators with immunity from civil liability to the same extent as judges; Section 17,[11] which grants arbitrators broad authority to address discovery issues and issue subpoenas; and, Section 21,[12] which permits arbitrators to award attorneys' fees, costs and punitive damages in appropriate cases. Section 29[13] contains a rule of construction, encouraging the MUAA's interpretation in a manner that promotes uniformity among the

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EPIC SYSTEMS CLEARS A WIDER PATH FOR ARBITRATION IN MICHIGAN

(Continued from page 19)

states that have adopted uniform arbitration acts. Finally, Section 30[14] brings the MUAA into the 21st century by facilitating the use of electronic records and signatures.

Epic Systems

The Federal Arbitration Act (FAA), 9 USC 1, et seq., enacted in 1925, was intended to promote arbitration as a means of resolving legal disputes by statutorily reversing the common law's prejudice against arbitration. The problem being—the merits of efficient and predictable dispute resolution through arbitration are not shared by every litigant. This phenomenon was humorously illustrated by Robert Downey, Jr.'s (the attorney) advice about jury selection to Robert Duvall (the client) in "The Judge," when the former points out, "Did you know 90% of the country believes in ghosts? Less than a third in evolution? 35% can correctly identify Homer Simpson's fictional town in which he resides. Less than 1% knows the name Thurgood Marshall."

Yet, over time, as dockets have burgeoned and the burden and expense of civil litigation have mounted, the Supreme Court increasingly has been willing to give the FAA broad effect. Recently, significant uncertainty about the enforcement of arbitration agreements was removed by the United States Supreme Court's decision in *Epic Systems Corp v. Lewis*, 138 S. Ct. 1612; 200 L. Ed. 2d 889 (2018). *Epic Systems* concerned the interpretation of the FAA, which differs in some respects from the MUAA. However, the question presented in *Epic Systems*, identical to the question presented by Section 2 of the FAA[15] and Section 6 of MUAA,[16] was whether or not a particular arbitration agreement was enforceable "… on such grounds as exist at law or in equity for the revocation of any [a] contract." The arbitration agreement at issue in *Epic Systems* purported to bar a group of employees from banding together to litigate their overtime claims in a class action lawsuit filed in federal court. The employees argued that, if the arbitration agreements were enforceable and they were required to arbitrate their claims in separate arbitration hearings, their right to engage in "concerted activity," granted by the National Labor Relations Act (NLRA), 29 USC 151, et seq., would be comprised. This, their argument went, was a ground that "exist[ed] at law … for the revocation of [the arbitration] contract."

The Supreme Court disagreed. The Court noted that Section 2 of the FAA, like Section 6 of the MUAA, only applies to defenses that apply to "any" contract.[17] Conversely, these provisions do not apply to defenses that apply only to arbitration or that derive their meaning from the fact than an agreement to arbitrate is at issue. Specifically, the Court held:

> … [Section 2 of the FAA] recognizes only defenses that apply to 'any' contract. In this way the clause establishes a sort of equal-treatment rule for arbitration contracts. The clause permits applicable contract defenses, such as fraud, duress, or unconscionability. At the same time, the clause offers no refuge for defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. Under our precedent, this means [Section 2] does not save defenses that target arbitration either by name or more subtle methods, such as by interfering with fundamental attributes of arbitration.
>
> This is where the employees' argument stumbles. They don't suggest that their arbitration agreements were extracted, say, by an act of fraud or duress or in some other unconscionable way that would render any contract unenforceable. Instead, they object to their agreements precisely because they require individualized arbitration proceedings instead of class or collective ones. And by attacking (only) the individualized nature of the arbitration proceedings, the employees' argument seek to interfere with one of arbitration's fundamental attributes.
>
> 138 SCt at 1622. (emphasis in original, quotation marks and citations omitted).

Conclusion

Many experienced lawyers, including the authors of this article, prefer arbitration over litigation as a means for resolving legal disputes. Considerations favoring arbitration include flexibility, efficiency, privacy and predictability. On the other hand, it is very difficult to secure the reversal of an arbitration decision exclusively on the grounds the arbitrator decided the dispute incorrectly. Congress and the Michigan legislature, through the FAA and MUAA, have taken significant steps to encourage parties to resolve legal disputes through arbitration. In *Epic Systems* the Supreme Court rejected indirect challenges to arbitration based on rights created by other statutes. However, *Epic Systems* does not necessarily prevent Congress or state legislatures from directly limiting the scope of arbitration agreements.

—END NOTES—

1 Roy Weinstein, Cullen Edes, Joe Hale, and Nels Pearsall, Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings, Micronomics Economic Research and Consulting (March 2017), http://www.micronomics.com/articles/Efficiency_Economic_Benefits_Dispute_Resolution_through_Arbitration_Compared_with_US_District_Court_Proceedings.pdf.

2 See, e.g., Shane Group v. Blue Cross Blue Shield of Mich, 825 F.3d 299, 305 (6th Cir. 2016).

3 MCL 691.1703(1). Those familiar with the statute will note we have pruned its language for the sake of readability.

4 See, e.g., Folkways Music Publishing, Inc. v. Weiss, 989 F.2d 108, 111 (2d Cir. 1993).

5 MCL 691.1784.

6 MCL 691.1785.

7 MCL 691.1786.

8 MCL 691.1788.

9 MCL 691.1690.

10 MCL 691.1694.

11 MCL 691.1697.

12 MCL 691.1701.

13 MCL 691.1709.

14 MCL 691.1710.

15 9 USC 2.

16 MCL 691.1686.

17 The MUAA uses "a" in place of the FAA's "any." ■

CULTURAL REFERENCES

Stuart M. Israel
Legghio & Israel, P.C.

Judges often welcome advocates to the oral argument podium with an admonition. "Rest assured, counsel," a judge might say, "this Court has read the papers and you should not repeat the law and facts covered in the briefs."

Respecting judicial impatience with repetition, I always leave out of the briefs a few controlling appellate decisions and a smoking-gun fact or two, so I will have something fresh to reveal at oral argument.

Only kidding! The important stuff *must* be in the briefs—the law, the facts, and explanation of how they connect to compel the result sought by your side.

I make this important-stuff point to newer lawyers. I invoke Dashiell Hammett.

Hammett was, off and on beginning in 1915, a Pinkerton detective. He wrote of lessons learned—in a 1923 article called "From the Memoirs of a Private Detective." He wrote:

> The chief of police of a Southern city once gave me a description of a man, complete to the mole on his neck, but neglected to mention that he only had one arm.[1]

My reference to Hammett makes my important-stuff point memorably and a good time is had by all.

But of late, I get questions, like "Dashiell who"!?

"You know," I say, "*The Maltese Falcon*." Blank stares. I continue, "Humphrey Bogart as Sam Spade." "Sidney Greenstreet." "Peter Lorre." Nothing. "The stuff that dreams are made of." Silence. "It's a movie, and before that a book by Hammett." Nope.

It seems few millennials have seen a black-and-white movie. Maybe they are dissuaded by warnings about upsetting images of excessive smoking.

Anyway, I recommend *The Maltese Falcon*, movie and book.[2] Both are entertaining, contain lean prose, promote professionalism (in Spade's case, post-mortem loyalty to his murdered business partner), and teach other valuable lessons. Here, for example, is Hammett on the realities of negotiation.

> The contents of the envelope were thousand-dollar bills, smooth and stiff and new. Spade took them out and counted them. There were ten of them. Spade looked up smiling. He said mildly: "We were talking about more money than this."
>
> "Yes, sir, we were," Gutman agreed, "but we were talking then. This is actual money, genuine coin of the realm, sir. With a dollar of this you can buy more than with ten dollars of talk."[3]

You don't get that kind of wisdom from *Wonder Woman*.

Comparing Hammett to the English country house detective writers who dominated the "Golden Age"—from the end of World War I to about 1930—Raymond Chandler wrote: "Hammett gave murder back to the kind of people that commit it for reasons, not just to provide a corpse; and with the means at hand, not with hand wrought dueling pistols, curare, and tropical fish."[4]

In sum, **(1)** always include the important stuff in your briefs and **(2)** see some black-and-white movies, so you will understand my cultural references. If you don't follow my recommendations I will be "shocked, shocked."[5]

—END NOTES—

1 Dashiell Hammett, "From the Memoirs of a Private Detective," published in *The Smart Set* (March 1923).

2 Dashiell Hammett, *The Maltese Falcon* (1930). The Bogart movie, one of three based on Hammett's book, came out in 1941, directed by John Huston.

3 *The Maltese Falcon*, Chapter XVIII.

4 Raymond Chandler, *The Simple Art of Murder* (1950).

5 Google it. ■

LOOKING FOR *Lawnotes* Contributors!

Lawnotes is looking for contributions of interest to Labor and Employment Law Section members.

Contributions may address legal developments, trends in the law, practice skills or techniques, professional issues, new books and resources, etc. They can be objective or opinionated, serious or light, humble or (mildly) self-aggrandizing, long or short, original or recycled. They can be articles, outlines, opinions, letters to the editor, cartoons, copyright-free art, or in any other form suitable for publication.

For information and publication guidelines, contact *Lawnotes* editor Stuart M. Israel at Legghio & Israel, P.C., Suite 600, 306 South Washington, Royal Oak, Michigan 48067 or (248) 398-5900 or israel@legghioisrael.com.

MERC NEWS

Ashley Rahrig, ***Department Analyst***
James Spalding, ***Mediation Supervisor***
D. Lynn Morison, ***Staff Attorney***
Bureau of Employment Relations

Retirement Announcement — MERC presented a resolution to Bureau of Employment Relations Mediation Supervisor James Spalding in recognition of his more than 25 years of service to the State of Michigan and anticipated retirement on October 26, 2018. Jim began his career in the Bureau's mediation division in 1992. His retirement plans include pursuing his hobby of restoring and driving classic cars and hot rods and spending time with his grandchildren.

Commissioners Reappointment — On August 3, 2018, Governor Snyder re-appointed Commissioner Robert S. LaBrant to another three-year term on the Commission, expiring on June 30, 2021. Commissioner LaBrant was initially appointed to MERC in 2012 and was re-appointed in 2015. He previously served as Senior Vice President and General Counsel at the Michigan Chamber of Commerce and holds a J.D., *cum laude*, from Thomas M. Cooley Law School.

Changes to MERC's Website Resulting from the *Janus* Decision — The U.S. Supreme Court issued *Janus v AFSCME, Council 31, et al*, 585 U. S. ___; 138 S Ct 2448; 86 USLW 4663 (2018) on June 27, 2018. The Court found that it is unconstitutional for public employees to be required to pay agency fees to the labor organization representing their bargaining unit. Although Michigan became a Right-to-Work state in 2013, we have reviewed MERC decisions and publications for compliance with *Janus*. Bureau staff has determined that language in some of the Commission's Right-to-Work decisions and summaries of those decisions may not be consistent with *Janus*. To the extent that language in those decision is inconsistent with *Janus*, that language should not be relied upon. We have also revised the *Guide to Public Sector Labor Relations Law in Michigan*, the Freedom to Work FAQs, and the Michigan Freedom to Work in the Public Sector Informational Poster on our website. If you or your clients have the "Freedom to Work in the Public Sector" poster that was distributed a few years ago, you may wish to note these revisions.

Use of the Correct Case Number in Appealing MERC Decisions — Several recent Court of Appeals opinions reviewing MERC decisions have incorrectly listed the docket number used by the Michigan Administrative Hearing System (MAHS) as the lower court case number. This is especially problematic for the Bureau as we rely on the MERC case number for case tracking purposes, to maintain the file, and when preparing the record for the Court. Since the appeal is from a MERC (not MAHS) decision, the MERC case number should be used as the lower court case number. When appealing a MERC decision, therefore, please use the MERC case number listed on the Commission's decision on all correspondence. This will ensure proper and prompt processing of your appeal.

Strategic Planning — As MERC is presently engaged in its strategic planning process, please be advised that a survey is being sent out to our constituents in late October/early November soliciting your input. We look forward to your participation.

Wage and Hour Division Holds Free Seminars — In recognition of the 40th anniversary of Michigan's Wage and Fringe Benefit Act law (P.A 390 of 1978), this year, the Wage and Hour Division of the Bureau of Employment Relations conducted free-of-charge seminars at a variety of locations. Attendees had the opportunity to meet Wage and Hour staff and to pose questions and receive answers concerning: Michigan Minimum Wage, the Payment of Wages and Fringe Benefit Act, and the Human Trafficking Notification Act. Outreach events were held to provide information about the recent repeal of Michigan's Prevailing Wage law, as well. Wage and Hour staff would be pleased to speak to your group about the laws enforced by the agency. To arrange for a presenter(s), contact Division Manager Jennifer Fields at 517-284-7800 or 855-464-9243. Visit www.michigan.gov/wagehour to learn more information about the Wage and Hour division. ■

CAN NON-COMPETE AGREEMENTS WITH LOW-WAGE EMPLOYEES PASS JUDICIAL SCRUTINY?

William B. Forrest, III
Kienbaum Opperwall Hardy & Pelton, P.L.C.

National fast-food sandwich shop Jimmy John's recently came under fire for requiring its employees—including sandwich makers and freaky-fast delivery drivers—to sign non-compete agreements. The contracts at issue prohibited the employees from working, both during and for two years after their Jimmy John's employment, at any other business that earned more than 10% of its revenue from selling "submarine, hero-type, deli-style, pita, and/or wrapped or rolled sandwiches" within two miles of any Jimmy John's location in the United States.

Critics, including the attorneys general of Illinois and New York, claimed that these non-competes improperly chained Jimmy John's workers to their low-paying jobs. Jimmy Johns ultimately settled those claims and scrapped the agreements. The State of Illinois then passed the "Freedom to Work Act," prohibiting employers from entering into non-compete agreements with employees earning $13 or less per hour.

While Michigan does not have a comparable law banning non-compete agreements with low-wage workers, a recent opinion from the Michigan Court of Appeals illustrates how those agreements are analyzed under Michigan law. In *BHB Investment Holdings d/b/a Goldfish Swim School v. Steven Ogg and Aqua Tots*, the plaintiff operated a Goldfish Swim School in Farmington Hills. The defendant Ogg, when hired as a swim instructor at Goldfish for $10 per hour, signed a contract that prohibited him from: (1) working for a competitor within a 20-mile radius of any Goldfish location for one year after his employment ended; and (2) soliciting any Goldfish employees or customers for 18 months after his employment ended. Goldfish terminated Ogg's employment. He was thereafter hired as a swim instructor by Aqua Tots, a direct competitor within a 20-mile radius of more than one Goldfish location.

After its cease-and-desist letters were ignored, Goldfish sued Ogg and Aqua Tots. Goldfish requested a preliminary injunction that would prohibit Ogg from working as a swim instructor for Aqua Tots, given that Goldfish had trained Ogg extensively (and at significant expense) in the allegedly unique Goldfish techniques for teaching children how to swim. Goldfish also argued that Ogg could unfairly lure customers away from Goldfish, and to his new employer, because children and their families become attached to swim instructors and often follow them between jobs. Aqua Tots responded that it had taught Ogg its own distinct teaching method and that Ogg had not taken any Goldfish documents, customers, or employees with him to Aqua Tots.

The trial court granted Goldfish the preliminary injunction.

But the case was then reassigned to a new trial judge, who vacated the injunction and dismissed Goldfish's claims on the grounds that Goldfish had failed to demonstrate that its teaching curriculum was either proprietary or a trade secret, and further failed to show that it had been harmed by Ogg through lost customers or the disclosure of confidential information. Goldfish appealed.

The Michigan Court of Appeals began its analysis with a reminder that, while most contracts are presumed to be legal, valid, and enforceable, all non-compete agreements are disfavored as restraints on commerce and are only enforceable in Michigan to the extent that they are *reasonable*. A Michigan statute provides that non-competes must: (1) protect the employer's legitimate competitive business interest; and (2) be reasonable as to the duration, geographical area, and the type of employment or line of business that is prohibited. The court found that Goldfish's non-compete with Ogg, an entry-level swim instructor, did not serve a protectable interest because Goldfish's instructional methods were not truly proprietary or trade secrets. Those methods were observed daily by family members (and the general public) during children's swimming lessons at Goldfish. Because Goldfish's stated competitive business interest was not reasonable, the non-compete that Ogg signed was unenforceable under Michigan law.

The Court of Appeals noted, however, that the contract's provision that prohibited Ogg from soliciting Goldfish clients was reasonable and enforceable. But because there was no evidence that Ogg had in fact solicited any customers to leave Goldfish and join him at Aqua Tots, that claim was dismissed.

In a concurring opinion, one Court of Appeals judge offered the following fast-food analogy:

> Preventing Ogg from being a swim instructor for a one-year period to protect Goldfish secrets is akin to making a teenaged minimum-wage McDonald's employee promise not to work for Burger King in the future. Certainly, a person learns some generalized skills at a fast food restaurant that would reduce training time if the person accepted employment at another fast food establishment. But the employee's understanding of how to cook a hamburger and operate a cash register would not give Burger King an "unfair advantage." The McDonald's transferee could not use the secret of the Big Mac to alter the Whopper.

This analogy encapsulates the skepticism with which courts view non-compete agreements with low-wage employees. Employers should carefully consider the nature and extent of all restrictive covenants (such as non-competition and non-solicitation provisions) with the various types and pay levels of their employees. There is no one-size-fits-all approach. Any non-compete agreements with entry-level or low-wage employees will be subject to substantial judicial scrutiny, and, if found to be over-reaching and unreasonable, could even taint and jeopardize the enforceability for higher-level employees with whom a non-compete may be reasonable and defensible. ■

MICHIGAN SUPREME COURT UPDATE

Richard Hooker
Varnum

***McQueer v Perfect Fence Co,* ___ Mich ___ (2018), *rev'g*, 2016 WL 1579019 (Mich App 2016)(unpub).**

This case was originally filed by Plaintiff McQueer following a workplace injury on theories Defendant had been negligent in failing to obtain (i.e., pay premiums for) workers compensation coverage for him, and that Defendant had used coercion, intimidation and deceit to encourage Plaintiff that he pose as an independent contractor under the statutory employer provision of Michigan's Workers' Disability Compensation Act (WDCA), MCL 418.171(4). The trial court granted Defendant summary judgment, ruling it had workers compensation coverage in place and its failure to pay premiums properly did nothing to change that fact. Plaintiff's exclusive remedy, therefore, lay in the workers compensation forum. The trial court also denied Plaintiff's motion to amend his complaint and add an intentional tort claim against Defendant.

The Court of Appeals reversed. While it agreed Defendant's failure to pay proper premiums alone did not violate the requirement it have workers compensation coverage for its employees, it found there to have been a fact question whether Defendant had used coercion, intimidation and deceit in violation of MCL 418.171(4). It also found there was evidence to support Plaintiff's intentional tort claim, so Plaintiff should have been allowed to amend his Complaint. Defendant then sought Leave to Appeal.

The Supreme Court Majority (Justices Viviano, Zahra, Markman and Wilder) reversed the Court of Appeals with regard to the statutory employer provisions of MCL 418.171, ruling that Section applicable only to tripartite relationships under which a "principal" can be liable for injuries to its "contractor's" employees, for whom the "contractor" fails to provide the required workers compensation coverage. Since Plaintiff here was by admission of all concerned directly employed by Defendant, the relationship was bipartite and Plaintiff McQueer's exclusive remedy lay with the employer provisions of the WDCA, notwithstanding Defendant's failure to pay premiums on coverage for him.

The Court effectively denied leave to appeal as to all remaining issues, finding them not worthy of review. In a curious hodgepodge, the Decision was accompanied by two separate Concurring/Dissenting Opinions: Justice Zahra, joined by Justices Markman and Wilder, would have granted leave on the intentional tort issue, but only for the purpose of reversing the Court of Appeals finding the trial court had abused its discretion in refusing Plaintiff the opportunity to amend his Complaint; and Justice Clement, joined by Justices McCormack and Bernstein, disagreed with the Majority's interpretation of the statutory employer provision, but agreed with the decision to deny leave on the intentional tort/abuse of discretion issue. ■

Labor and Employment Law Section
State Bar of Michigan
The Michael Franck Building
306 Townsend Street
Lansing, Michigan 48933

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- Sarah Nirenberg reports on ELCRA and sexual orientation and gender identity. Eric Pelton looks at the octogenarian FLSA.
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