LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

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FIRST TRIAL UNDER THE ELLIOTT-LARSEN CIVIL RIGHTS ACT

Sheldon J. Stark
Arbitrator and Mediator (Retired)

In January 1977, I was retained by the Dean of a small urban college involuntarily forced to retire at the end of the current semester by virtue of reaching the age of 65. The decision was not pursuant to any "retirement plan or system", neither *bona fide n*or "a subterfuge to evade the purposes" of the anti-discrimination laws. MCLA 37.2202(2). I immediately brought suit alleging age discrimination under both Michigan's Fair Employment Practices Act, MCLA 423.301 *et seq*. and the recently passed but not yet effective Elliott-Larsen Civil Rights Act of Michigan, MCLA 37.2101 *et seq*. The case was assigned to the Honorable James Montante, a smart, colorful, hard-working and highly respected trial court judge on the Wayne County Circuit Court bench.

Taking a clue from an American Medical Association *amicus* brief noting that mandatory retirement results in an immediate negative impact on health and life expectancy, I had my client evaluated by a well-known forensic psychiatrist, Dr. Emmanuel Tanay. Tanay concurred: mandatory retirement would have an immediate and negative impact on the dean's health and life expectancy, permitting me to advocate for a preliminary injunction because damages would be an inadequate remedy should plaintiff prevail. The court granted the injunction but set an "immediate" trial date for the first week in April 1977, only a few short months away. At the time, the Wayne County docket was so dysfunctional, we would otherwise have waited three years – for our *first* trial date yet alone a *real* one!

The injunction kept the dean on the job as we shifted into turbo mode for the discovery phase. One of the first defenses articulated was lack of competence. Discovery quickly revealed the record was quite the opposite. Another defense was that retirement at 65 was mandated by the rules of TIAA/CREF, which held the dean's retirement funds. Off to New York City we flew to TIAA/CREF headquarters. No, the witnesses testified, TIAA/CREF had no such rule.

If I'm not mistaken, Michigan's Fair Employment Practices Act protections were limited to individuals aged 18 to 60, while Elliott-Larsen had no such restrictions. The effective date of Elliott-Larsen was March 31, 1977, a day or so before our trial date, and months before the effective date of the dean's retirement. Elliott-Larsen expressly *repealed* FEPA. MCLA 37.2804. I filed a motion seeking to apply Elliott-Larsen "retrospectively," which was granted by the court. We proceeded to trial under Elliott-Larsen. I no longer remember whether we started the trial Friday, April 1 or Monday, April 4. Either way, we were all conscious we were swearing in the first jury ever to hear a dispute under the Elliott-Larsen Civil Rights Act of Michigan.

After several days of testimony and argument, the defense approached Judge Montante to initiate settlement negotiations. For anyone old enough to remember, Judge Montante was an outstanding settlement judge with many quirky settlement "techniques." He kept a little music box which tinkled out the theme from the Godfather movie, as in "I'm going to make you an offer you can't refuse." He was an excellent golfer and kept a putter, a golf ball and a little practice cup in chambers. "If I make this putt," he would say, "your case is going to settle today." He rarely missed the cup. He would listen patiently to each side in joint session, ask a few questions – always pertinent and savvy - and then write down the number he thought each side had in mind on a little piece of paper cupped in his hand. "Is this your number?" he would ask carefully revealing his prediction only to you. It was magical, uncanny. He hit it right almost every time. For both sides. Sometimes he would say, "That's NOT your number? It should be!" Several times I saw counsel and client confer, then admit Judge Montante was correct. Once "bookends" were established, he went back and forth exchanging numbers until resolution was achieved.

His skill and success rate were remarkable. The age case settled by the end of the day. How did it resolve? I *believe* the dean kept his job. I *know* the college saved a bundle so there must have been equitable relief. Almost 50 years have flown by. I clearly remember my fee was paid. That's because my favorite suit for years after – a navy blue chalk stripe - was purchased with a portion of that fee. The Dean loved his work and dreaded retirement. Head of the business school, he was a conservative individual who thought long and hard before challenging the college. Keeping his job was his overriding goal. I well remember the arguments, which included learning the difference between "retroactive" and "retrospective". I certainly remember the parties, especially the Chairman of the College Board of Trustees, who gave a most helpful deposition and was one of the first witnesses I called to the stand as a "hostile" or opposite party. I fondly remember the judge. I even remember mixing it up with opposing counsel. Regrettably, I can no longer remember the exact result. I'm sticking with the Dean kept his job.

I distinctly remember that our trial, started within hours of the effective date of Elliott-Larsen, and was the first case in Michigan tried under the then brand, spanking new civil rights act. ■

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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.

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

DFR RULINGS BY MERC

Lauren Nicholson
White Schneider PC

Detroit Fire Fighters Association, Local 344 -and- Victor Bryant, Jr., Case No. 25-E-0855-CU (November 17, 2025)

The Charging Party was a probationary firefighter and member of the Detroit Fire Fighters Association ("DFFA"), Local 344, who was discharged from employment after failing to obtain an EMT license. Although Bryant later obtained a license, the Employer refused to reinstate him and the DFFA declined to file a grievance over the discharge.

The Commission found, in agreement with Administrative Law Judge David M. Peltz, that the DFFA did not violate PERA by negotiating a collective bargaining agreement which prohibited it from filing certain grievances on behalf of probationary employees, and that the DFFA did not violate its duty of fair representation by refusing to grieve Bryant's termination or the actions leading up to it.

The Commission affirmed ALJ Peltz's findings, and adopted his recommended dismissal of the charge but the Commission found that the facts in this case were sufficient to establish that the charge was untimely, and that it should therefore be dismissed on that basis as well.

AFSCME Local 2389.26 -and- David Bendele**,** Case No. 25-B-0293-CU (October 3, 2025)

The Commission adopted the ALJ Travis Calderwood ruling that AFSCME did not violate PERA and dismissed the complaint.

Bendele appeared to allege that AFSCME had essentially abandoned the bargaining unit upon its election loss in January of 2025 in which the Technical, Professional, Officeworkers Association of Michigan replaced AFSCME as the bargaining representative. Bendele relied on a January 22, 2025 letter in which the union disclaimed its interest "from any continuing, current, or future responsibility" towards the unit. According to Bendele, the Union either failed or refused to process pending grievances and a ULP despite the Union's continuing obligation to do so until the collective bargaining agreement expired on April 1, 2025.

ALJ Calderwood held that although the language in the January 22, 2025 letter could have been misinterpreted, this was "insufficient to establish a violation of the Union's duty under *Quinn v. Police Officers Labor Council*, 572 NW2d 641 (1998)." Additionally, while Bendele and other unit members were potentially dissatisfied with the Union's resolution of the issues, such dissatisfaction does not establish a violation of the Union's duty. The issues complained of by Charging Party were also resolved in a global settlement with the Union after the charge was filed. Therefore, the Charge was dismissed for its failure to set forth any factually supported allegations which would state a claim upon which relief could be granted under PERA. ■

SUBPOENAS AGAINST NON-PARTIES: QUASHED IF DOCUMENTS AVAILABLE FROM PARTY

John G. Adam

Before you subject a non-party to a subpoena to get documents, make sure to try and get those documents from a party that has the documents.

Under Rule 26(b)(2)(C)(i) court must limit discovery if the "discovery sought is unreasonably cumulative or duplicative or that it can be obtained from some other source that is more convenient, less burdensome, or less expensive."

Rule 45(d)(1) requires a party serving a subpoena on a nonparty to "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena."

Courts are required to enforce that duty and must quash or modify a subpoena that would require disclosure of privileged matter or subject the nonparty to undue burden. Rule 45(d)(1) & (d)(3)(iii)-(iv).

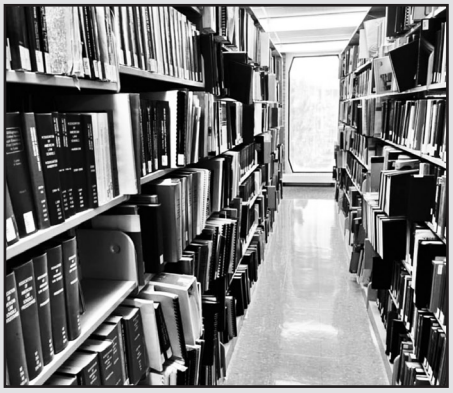
A subpoena to a non-party should generally be quashed when the documents are obtainable from a party.This principle is explained in *Baumer v. Schmidt*, 423 F. Supp. 3d 393, 408-409 (E.D. Mich. 2019): "courts in this circuit have repeatedly denied motions to compel discovery and quashed subpoenas directed to non-parties where the discovery sought was obtainable from a party to the litigation," citing for example:

> *Vamplew v. WSU,* 2013 WL 3188879, at *4 (E.D. Mich.) ((subpoena quashed because request could be direct to a party to litigation);
>
> *Versata Software v. Internet Brands*, 2011 WL 4905665, at *2 (E.D. Mich.) ((subpoena quashed where information sought by plaintiff could be obtained from defendant);
>
> *Seven Bros. Painting, Inc. v. Painters & Allied Trades Council,* 2010 WL 11545174, at *3 (E.D. Mich.) (quashing subpoenas where plaintiff made no showing that it could not obtain relevant information from the defendant);
>
> *In re CareSource Mgmt*, 289 F.R.D. 251, 253-54 (S.D. Ohio 2013) ((subpoena quashed where documents were available to plaintiff from its party-opponent)
>
> *Recycled Paper. v. Davis*, 2008 WL 440458, at *4-5 (N.D. Ohio) (subpoena quashed because documents sought could have or had been produced by a party to the litigation);
>
> *Cleveland Clinic v. Innovative Placements, Inc.*, 2012 WL 187979, at *2 (N.D. Ohio) (subpoena quashed where defendants had another viable means – the plaintiff – to obtain the many of documents that they requested from non-party) (citing *Haworth, Inc. v. Herman Miller,* 998 F.2d 975, 978 (Fed. Cir. 1993) (required defendant "to seek discovery from its party opponent before burdening the nonparty").

Judge Robert J. White cited *Baumer* in *Brink's Capital v. Randazzo*, 2025 WL 1975658, at *2 (E.D.Mich., 2025)

> Courts must also limit discovery if it is unreasonably cumulative or duplicative; can be obtained from another source that is more convenient, less burdensome, or less expensive; or is outside the scope permitted by Rule 26(b)(1). Rule 26(b)(2)(C). "Under this principle, courts in this circuit have repeatedly denied motions to compel discovery and quashed subpoenas directed to non-parties where the discovery sought was obtainable from a party to the litigation." *Baumer v. Schmidt*, 423 F. Supp. 3d 393, 408-09 (E.D. Mich. 2019) (collecting cases).

In sum, non-parties should not be forced to produce documents that the requesting party could reasonably obtain from a party. This is supported by Rule 26(b) which requires "proportional to the needs of the case" and by Rule 26(b)(2)(C) limits discovery if "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome." ■



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For information and publication guidelines, contact *Lawnotes* editor John Adam at jgabrieladam@gmail.com.

NO JURY FOR DODD-FRANK WHISTLEBLOWER CLAIMS

Marianne Grano
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Under the Seventh Amendment, not every civil claim is entitled to a jury trial. Only cases that would have been heard by a jury historically are subject to a jury trial right today. Claims that would have been heard in a court of equity are for a judge to decide.

In employment cases, most plaintiffs prefer a jury and most employers do not. Jury trials are often perceived as more favorable to employees, and more expensive and time-consuming for companies.

Edwards v First Tr. Portfolios LP, 774 F Supp 3d 833, 834–35 (ND Tex, 2025) held that a Dodd-Frank whistleblower claim falls on the "equitable" side of the line, meaning no jury.

The Seventh Amendment is short and succinct: "In Suits at common law… the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." Historically, suits "at common law" were heard by a jury, whereas a court of equity would decide other claims. Whether the Seventh Amendment applies, then, hinges on whether the claim is "legal" or "equitable" in nature.

"Legal" cases seek to punish or deter misconduct, typically through monetary damages. "Equitable" cases seek to restore the status quo, through remedies like reinstatement, injunctions, or back pay. The remedy is thus critical. Under Title VII, for instance, courts consistently hold that claims for job reinstatement and back pay simply restore the status quo and do not entitle plaintiffs to a jury trial. But Title VII claims for compensatory and punitive damages seek to deter and punish employers' behavior, entitling a plaintiff to a trial by jury.

Edwards involved a relatively new cause of action: whistleblower claims under the Dodd-Frank Act. Aaron Edwards, a former employee of First Trust, alleged that he was fired for complaining that an employee gift program violated securities laws. He brought a Dodd-Frank claim, which authorizes remedies like reinstatement, double back pay with interest, and attorneys' fees.

At issue was whether Edwards was entitled to a jury trial. Edwards claimed that since the statute provided for *double* back pay, it sought to do more than restore the status quo but instead was designed to punish and deter misconduct—and was thus a "legal" case entitling him to a jury trial. First Trust argued that a mere automatic doubling of back pay is a mathematical calculation and does not reflect the discretion generally associated with a jury's award of monetary damages, and thus remained equitable. The district court agreed with First Trust, and ordered that the case would be heard without a jury.

Of course, *Edwards* is only a single district-court case and is not binding anywhere else, let alone in Michigan. Still, it is instructive. Employers should carefully assess the nature of the claims being brought in an employment suit and—if appropriate—argue that the claims are "equitable" and not legal, thus requiring a bench trial. ■

UNEMPLOYMENT INSURANCE APPEALS COMMISSION: BASICS & BOUNDARIES

Commissioners Alejandra Del Pino and Andrea Rossi
Unemployment Insurance Appeals Commission

The Unemployment Insurance Appeals Commission (UIAC) is a seven-member body appointed by the Governor for four-year terms. The UIAC was formerly known as the Michigan Compensation Appellate Commission (MCAC). As the MCAC, the Commission decided unemployment insurance and worker's compensation cases. In 2019, the UIAC was formalized and worker's compensation cases were diverted to a separate entity.

Unemployment insurance cases begin as claims for benefits at the Unemployment Insurance Agency (Agency). Most claims involve three categories of parties: The Agency, a claimant, and employers. The number of employers involved in a case depends on the base period employment history, benefit year employment, and the substantive issue adjudicated in the case. Each case is usually limited to a single substantive issue.

Parties normally have two opportunities to object at the Agency level. The first is by protesting the initial notice (determination), the second is by appealing subsequent notices (redetermination(s)). It is the second that generally elevates a case for hearing before an Administrative Law Judge (ALJ) with the Michigan Office of Administrative Hearings and Rules (MOAHR). In most cases it is an appeal of an ALJ order that puts a case before the UIAC.

The UIAC is the final administrative authority over unemployment insurance cases and it operates independently of the Agency. An appeal from an UIAC decision proceeds in the arena of state or federal courts of general jurisdiction.

A panel of 3 Commissioners adjudicates most cases. The exception being matters of first impression, or impact cases, where the entire 7-member Commission adjudicates the matter.

As in any legal practice, preparation is paramount. We offer the following tips and tricks to guide attorneys and non-attorney advocates in thoughtful and purposeful preparation.

UIA ≠ MOAHR ≠ UIAC. The Agency, MOAHR, and UIAC are separate entities. Parties must keep current contact information with each separate entity. Most problems in this arena occur when cases elevate from the Agency to MOAHR. Parties often fail to recognize that MOAHR and UIAC documents will not come electronically and are not accessible from the Agency's online claim platforms (such as MiWAM).

TIMELINESS IS IMPERATIVE. We hear you, this should be obvious; but timeliness problems repeatedly permeate cases before the Commission. Untimely handling can obliterate rights.

If there is a timeliness component, prepare to address that factor. This means securing testimony and other evidence to explain why a protest or appeal was late, or why a party missed a hearing.

Generally, the UIAC has no jurisdiction to hear appeals from an ALJ order that are past the 30-day appeal deadline. Consider whether a well-written and specific request to reopen with the ALJ is a better return on investment than a late appeal to UIAC. Recognize the distinctions and scope of authority between requests for rehearing versus requests for reopening, and submissions to ALJs versus UIAC.

READ DOCUMENTS CAREFULLY AND THOROUGHLY. Thoughtful preparation for the ALJ hearing will include a careful read of the Notice of Hearing. In addition to absorbing the hearing protocols for matters like records (proposed exhibits), witnesses, and adjournments, it is prudent to carefully note the date, time, and time zone of the hearing. It is also important to note the issue(s) listed on the Notice of Hearing.

Purposeful preparation will include a careful read of the (re) determinations that gave rise to the case. The ALJ and UIAC only have jurisdiction to hear the issue(s) and time period(s) identified by the (re)determinations and the Notice of Hearing specific to that case.

Usually the notices giving rise to a case are determinations and redeterminations, or monetary determinations and monetary redeterminations. Those notices set forth the scope of the case as to the issue for adjudication and the relevant time period. Ancillary jurisdictional documents (e.g., Weeks of Overpayment notices) might accompany the substantive notices (e.g., determination, redetermination). It is also important to be on alert for potential jurisdictional landmines.

Jurisdictional landmines come in many forms. For example:

- Does the Section of the Michigan Employment Security Act match the statement of the issue adjudicated?
- Are there any good cause components?

TELEPHONE HEARINGS ARE FORMAL HEARINGS. Most unemployment insurance hearings before an ALJ are held via conference call format. This approach may imbue a sense of informality, and evidentiary rules are relaxed to some degree for administrative hearings. But the rules of evidence still apply.

Do not rely on the Agency to provide the ALJ with information or records from the case. It is incredibly common for parties to point to documentation that was previously submitted to the Agency; and then be disappointed when that documentation is not before the ALJ. Parties expect the ALJ to have what the Agency has. This is an unwarranted expectation, and the Notice of Hearing explains as much.

MOAHR is an independent entity. MOAHR and UIAC do not have access to a party's claim file. The Agency only provides limited documents for jurisdictional purposes. This means it can be pivotal to gather all pertinent records and proposed evidence, and to submit same to all parties according to the instructions in the Notice of Hearing. The UIAC adjudication process includes a thorough review of the entire record. Mich Admin Code R 792.11419 and Rule 792.11424 define the parameters of the record and the UIAC's guiderails.

The UIAC reviews all cases de novo. This means the UIAC is not bound by the legal conclusion or assumptions made by the ALJ. The UIAC reviews the ALJ's factual finding(s) and application of the law to those facts. Therefore, when making a case before the ALJ be sure to seek proper admission of proposed exhibits with the ALJ. It is not enough to verbally reference materials.

Consider moving to enter all desired records, even if simply to preserve an appeal if admission is refused. Prepare and present your case in anticipation of further appeal.

INTEGRITY AND EFFICIENCY. You risk your reputation if you elect to fabricate information or hide unfavorable facts. For example, if you submit an application for transfer to the UIAC in order to secure an adjournment from an ALJ hearing, assume your reasons for the application will be vetted. You can avoid this scrutiny by seeking an adjournment from the ALJ well before the hearing date.

If an ALJ denies an adjournment request, or it is not feasible to seek an adjournment from the ALJ, then there is an option to file an application for transfer of proceedings to UIAC. Most cases are not transferred to UIAC, but the application for transfer has the effect of imposing a stay (adjournment) on the ALJ proceedings. A 'regular' application is one made more than 3-business days before the hearing date under Rule 792.11425(1)-(2). A 'regular' application is subject to less scrutiny than a 'delayed' or 'extenuating circumstances' application.

A 'delayed' application is one filed less than 3-business days before the hearing date under Rule 11425(3). After two applications an application is evaluated under the 'extenuating circumstances' Rule 11425(4).

UIAC commonly receives requests for specific rescheduling of the ALJ hearing. MOAHR and UIAC are separate entities. UIAC does not have the authority or capacity to schedule ALJ hearings. Parties are encouraged to work together and with MOAHR to address anticipated scheduling barriers.

Embrace precision and efficiency. It is only necessary to submit an appeal to UIAC one time. It is acceptable to reach out to UIAC to confirm receipt of an appeal. It is not necessary to send multiple copies of the same content. Duplicates slow down the UIAC's capacity to process a case.

ADDITIONAL EVIDENCE, WRITTEN ARGUMENT, AND ORAL ARGUMENT. Submissions to UIAC often include proposed additional evidence and written arguments. Some submissions request oral argument before the UIAC. Decisions on additional evidence, written argument, and oral argument are made on a case-by-case basis. Parties and representatives can empower themselves by becoming familiar with Rules 792.11420 through 792.11423. Failure to serve all the parties is the most frequent reason that requests are denied.

CLOSING SENTIMENTS. Representatives and parties are encouraged to visit the UIAC web-site for Impact Cases, Decision Search, Commission Digest access, language access options, and other valuable information. ■

CURRENT EVENTS

James M. Moore

Current events have caused me to recall an article I wrote in *Lawnotes* 20 years ago when I was LEL Section Chair. See Vol. 15, No. 2 *Labor and Employment Lawnotes* 23 (Summer 2005). In 2005, I reflected on the parallels between the anti-Muslim hysteria of the times and the experience of my wife's family during World War II. Her parents, native born, raised on farms in California, met in an internment camp where most of their families were sent. My wife's father was never interned because in November 1941 he had enlisted in the army, frustrated that despite his degree from UC Berkley, he could not find work. He never went overseas but another family member, Iwao (Bill) Yamaji was in the service as well and was killed in action in Italy a month before Germany surrendered.

In the 20 years since I wrote my article the treatment of immigrants and as well as citizens who were deemed to be somehow aligned with them has ebbed and flowed. Now the sweeping demonization of immigrants has accelerated, punctuated by family separations, inhumane treatment and a fundamental disregard for due process, a sad and frightening demonstration of willful ignorance of the lessons of the past. The jury is out on whether and how the judiciary will ultimately adjudicate the many executive actions and, indeed, on the willingness of the administration to honor and enforce unfavorable court rulings, rather than defy them with hyperbolic rhetoric about "rogue" judges. Respect for the rule of law has not been a cornerstone of the administration.

The experience of the Japanese-American community brings an instructive perspective to present day circumstances and it is certainly not alone in condemning the government's ham-fisted rush to judgment against immigrants. A *New York Times* article (December 2, 2025) reported on the activities of the Japanese American community in opposition to the roundup of Latino immigrants in Los Angeles.

The administration's relentless positive spin on its activities is, of course, consistent with its approach to an unblemished American past, unencumbered by inconvenient facts. In that regard, my wife and I have been wondering how the National Park Service, which now operates facilities at the locations of the ten internment camps, will, in accordance with the administration's executive order, draft a positive "triumphant narrative" for the sites. ■

FEDERAL NON-COMPETE CRACKDOWN STALLS AT FTC AND NLRB

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As 2025 came to an end, federal efforts to rein in non-competes have largely fizzled. Despite headline-grabbing moves last year by the Federal Trade Commission ("FTC") and National Labor Relations Board ("NLRB") to limit non-competes and related restrictive covenants, those endeavors have been quickly disrupted by the courts and the change in presidential administration. And while the Supreme Court has recently restricted the ability of courts to impose broadly sweeping injunctions, it left an important carve-out that leaves in place earlier court orders blocking these regulations. So, as of now, federal limits on non-competes remain in limbo, if not entirely dead in the water.

The FTC Rule Against Non-Competes and Subsequent Judicial Vacatur

On May 7, 2024, the FTC issued its "Non-Compete Clause Rule," declaring that "it is an unfair method of competition for persons to, among other things, enter into non-compete clauses," and stating that most existing non-competes would become void by its effective date of September 4, 2024.[1] But before that final administrative rule could become effective, the United States Chamber of Commerce and certain regulated businesses brought a successful challenge in the Northern District of Texas that barred the FTC from enforcing the non-compete ban. That case, *Ryan, LLC v. Federal Trade Commission*,[2] challenged the FTC's rulemaking under the Administrative Procedures Act, arguing that the FTC lacked statutory authority to create substantive rules to preclude unfair methods of competition and that the regulations were arbitrary and capricious. The court agreed, and applied its ruling beyond the named parties, reasoning that "the APA does not contemplate party-specific relief" but instead requires "'nationwide effect' [that] is 'not party-restricted,' and [that] affects persons in all judicial districts equally.'"[3] The FTC initially appealed this decision to the U.S. Court of Appeals for the Fifth Circuit, but the appeal has since been voluntarily stayed for the foreseeable future. Thus, at present, the FTC's final rule and regulations remain set aside and without any effect.

Importantly, the U.S. Supreme Court's recent decision in *Trump v. CASA, Inc.*[4]—which ruled against a nationwide injunction related to birthright citizenship—has no bearing on the court's decision in *Ryan, LLC*. In that decision, the Supreme Court specifically stated that it was not resolving "the distinct question whether the Administrative Procedure Act authorizes federal courts to vacate federal agency action."[5] In other words, at least for now, judicial vacatur of agency decisionmaking like in *Ryan, LLC* remains valid, and the FTC's "Non-Compete Clause Rule" is, for all intents and purposes, ineffectual.

The NLRB's Current Treatment of Non-Competes

During President Biden's administration, the NLRB took a pro-labor shift on the issue of non-competes. In a July 9, 2021 Executive Order, President Biden "encourage[d]" the FTC "to exercise the FTC's statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."[6] Consistent with that directive, former NLRB General Counsel Jennifer Abruzzo issued multiple memoranda addressing non-competes. The first memorandum, titled "Non-Compete Agreements that Violate the National Labor Relations Act," stated that the "proffer, maintenance, and enforcement" of noncompete provisions in employment or severance agreements generally violate the NLRA, "[e]xcept in limited circumstances."[7] As a result, General Counsel Abruzzo advised that, among other things, "Regions should seek make-whole relief for employees who, because of their employer's unlawful maintenance of an overbroad non-compete provision, can demonstrate that they lost opportunities for other employment, even absent additional conduct by the employer to enforce the provision."[8]

In a second memorandum, Abruzzo reaffirmed the NLRB's hostility toward noncompete clauses and even expanded the focus to include so-called "stay-or-pay" agreements, i.e., those requiring an employee to remain with the company for a set time or else reimburse the employer for training costs, bonuses, and the like.[9] Both memoranda advocated for robust remedies for workers harmed by these restrictive covenants.

Following these guidance documents, administrative law judges within the NLRB issued decisions interpreting noncompete clauses' legality under the NLRA, with mixed results. For instance, in *J.O. Mory*, an ALJ determined that an employment agreement which "contains a non-compete clause . . . chills employees from engaging in union and other protected activities."[10]

On the other hand, in *NTT Data Americas*, the ALJ rejected General Counsel Abruzzo's position—which it characterized as "a novel legal theory"—and found that the employer's noncompete and non-solicitation agreements did not violate the NLRA.[11] Thus, ALJ decisions have come down on both sides of the issue, and there is no real clarity on the NLRB's stance on non-competes.

Further muddying the waters a bit, shortly after President Trump took office, his Administration walked back General Counsel Abruzzo's prior memoranda against non-competes. On February 14, 2025, NLRB Acting General Counsel William B. Cowen issued a memorandum titled, "Rescission of Certain General Counsel Memoranda,"[12] which specifically listed both GC 23-08 and GC 25-01—former General Counsel Abruzzo's memoranda on non-competes—as among those guidance documents that should be rescinded.

Taken all together, then, the NLRB does not currently impose an explicit, general ban on noncompete agreements. And while it has flirted with the idea, such an interpretation has not been cemented in any binding rule or Board decision, with the NLRB's current leadership pulling back the prior guidance. For now, the most current position is that there is no explicit NLRB ban on non-compete agreements, although past NLRB interpretations and decisions have cast serious doubt on overly broad non-competes as incompatible with workers' Section 7 rights, at least in certain contexts. ■

—END NOTES—

[1] *89 Fed. Reg. 38,342-01, 38,342 (May 7, 2024).*
[2] 746 F. Supp. 3d 369 (N.D. Tex. 2024).
[3] Id. at 389–90.
[4] 606 U.S. 831 (2025).
[5] Id. at 847 n.10.
[6] President Biden, Executive Order on Promoting Competition in the American Economy (July 9, 2021), available at https://bidenwhitehouse.archives.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.
[7] NLRB Gen. Counsel, Memorandum GC 23-08, at 1 (May 30, 2023), available at https://apps.nlrb.gov/link/document.aspx/09031d4583a87168.
[8] Id. at 6.
[9] NLRB Gen. Counsel, Memorandum GC 25-01, at 1 (Oct. 7, 2024), available at https://apps.nlrb.gov/link/document.aspx/09031d4583e5510c.
[10] J.O. Mory Inc. & Ind. State Pipe Trades Ass'n, 2024 WL 3010808 (June 13, 2024).
[11] NTT Data Americas, Inc. & Steven D. Melcher, 2024 WL 4474952 (Oct. 10, 2024).
[12] NLRB Gen. Counsel, Memorandum GC 25-05, at 1–2 (Feb. 14, 2025), available at https://apps.nlrb.gov/link/document.aspx/09031d4583f3f58c.

JUDICIAL PRESUMPTION IN FAVOR OF ARBITRATION, *STEELWORKERS TRILOGY* AND RETIREE BENEFITS

John G. Adam

Labor arbitration is generally the proper forum to address an employer's collectively-bargained promises. CBA interpretation is the province—and the special expertise—of labor arbitrators, not courts, under the *Steelworkers Trilogy* and its progeny.

1.

Judicial assessment of CBA disputes applies "the presumption that national labor policy favors arbitration." *USW v. Cooper Tire & Rubber Co.*, 474 F.3d 271, 277 (6th Cir. 2007).

The presumption is grounded in the *Steelworkers Trilogy:* **(1)** *USWA v. American Mfg. Co.*, 363 U.S. 564 (1960); **(2)** *USWA v. Warrior & Gulf Navigation Co*., 363 U.S. 574 (1960); and **(3)** *USWA v. Enterprise Wheel & Car Corp*., 363 U.S. 593 (1960).

"The presumption favoring arbitration is based on a policy recognizing arbitration as a 'substitute for industrial strife.'" *Cooper Tire*, 474 F.3d at 278 (citations omitted). A "major factor in achieving industrial peace is the inclusion [in a CBA] of a provision for arbitration of grievances." *Warrior & Gulf*, 363 U.S. at 578. *Titan Tire v. USW*, 656 F.3d 368, 371–72 (6th Cir. 2011)

(The seminal Supreme Court instruction on this national policy is found in the Steelworkers Trilogy, three cases simultaneously decided in 1960. Their key lesson is that the judiciary shall defer to the method selected by the parties to settle their differences, usually a grievance procedure culminating in final and binding arbitration.").

Labor arbitrators, "more so than the courts, possess the proper experience and expertise to resolve labor disputes." *Cooper Tire*, 474 F.3d at 278 (citations omitted).

See *Warrior & Gulf*, 363 U.S. at 582 (recognizing that the "ablest judge cannot be expected to bring the same experience and competence" in CBA application and interpretation as labor arbitrators) and *United Paperworkers v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987) ("Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning" of the CBA that the parties' "agreed to accept.").

2.

In deciding whether a dispute is subject to labor arbitration, a court is "not to consider the merits of the underlying claim" and "should not deny an order to arbitrate unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Cooper Tire*, 474 F.3d at 277-278.

In deciding whether a dispute falls within the substantive scope of an arbitration clause, courts view broad arbitration language as making the presumption of arbitrability especially relevant. The Supreme Court reached this conclusion when faced with a clause that encompassed "any differences arising with respect to the interpretation of this contract and the performances of any obligation hereunder." *AT&T v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986).

See IAM v. ISP Chems., Inc., 261 F. App'x 841, 843, 845 (6th Cir. 2008) (applying presumption to clause covering "any difference of opinion or dispute between representatives of the Company and Union representatives regarding interpretation or application of any provision") and *Cleveland Elec.* 440 F.3d at 814 (applying presumption to clause covering "any disagreement concerning the interpretation or application of this" CBA).

3.

The "presumption of arbitrability applies to disputes over retirees' benefits if the parties have contracted for such benefits" unless—unlike here—the CBA "specifically excludes the dispute from arbitration." *Cleveland Electric v. UWU*, 440 F.3d 809, 816 (6th Cir. 2006).

A union has the right to arbitrate "any dispute concerning" collectively-bargained "retiree benefits" because the union "has a direct interest in maintaining the integrity of the retiree benefits created by the CBA." *Cooper Tire*, 474 F.3d at 282.

An employer is also bound to arbitrate retiree healthcare disputes *absent* specific exclusion. See *USW v. Kelsey-Hayes Co*., 862 F.Supp.2d 690, 692-693 (E.D. Mich. 2012) (the "presumption of arbitrability applies to disputes over retirees' benefits"; employer motion to compel arbitration denied because the CBAs *expressly excluded* healthcare disputes from arbitration).

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In sum, retiree benefits can be subject to arbitration. Don't mix up the rights of retirees and the rights of the union. While their legal claims overlap, they have separate rights. The fact that a union can arbitrate to enforce retiree healthcare benefits does not mean that retirees are obligated to do so. Retirees have separate and independent ERISA and LMRA rights. ■

DISSECTING THE MICHIGAN SUPREME COURT'S *JANETSKY* OPINION

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It would be convenient, as a plaintiff's attorney, to routinely be able to forecast whether a prospective case will lead to an impactful development in jurisprudence. However, I do not possess that power, nor, do I assume, many of my colleagues. Instead, we file cases based on their merit and our client's desire for justice and proceed down the well-trodden path of litigation. Then, sometimes, we find ourselves, ten years down the road, still litigating that case, our client's desire for justice unwavering, and *ideally* some positive impact on the jurisprudence to show for our trouble.

And that, in a nutshell, is how we find ourselves with the *Janetsky v. Saginaw County* opinion. *Janetsky v. Cnty. of Saginaw*, __Mich. App. __, 2025 WL 2095369. After ten years, two trips to Michigan's Court of Appeals, and two resultant appearances before Michigan's Supreme Court, Jennifer Janetsky's quest for justice – while not over – has at least resulted in wider access to justice for plaintiffs.

I. Whistleblower Protection Act

One of the principal issues before the Michigan Supreme Court in *Janetsky* III was whether defendant Saginaw County, was Janetsky's "employer," for purposes of Michigan's Whistleblowers Protection Act, MCL 15.361 et seq., when she had been employed as a Saginaw County Assistant Prosecuting Attorney leading up to her termination. The Court of Appeals took the position that Saginaw County was not Janetsky's employer, and, therefore, could not be held liable under the WPA. The Supreme Court rejected this holding:

> "[T]he WPA prohibits a 'person who has 1 or more employees' from retaliating against 'a person who performs a service for wages or other remuneration under a contract of hire,' MCL 15.361, 'regarding [that person's] compensation, terms, conditions, location, or privileges of employment' on account of protected activity, MCL 15.362. **Nothing in the WPA requires a specific form of relationship to exist for a defendant to be an 'employer' that is susceptible to suit under the WPA.**"

Janetsky, 2025 WL 2095369 at *4 (emphasis added). Thus, any "employee" may bring a whistleblower claim against any "employer," as defined by MCL 15.361, if they can demonstrate a prima facie case. While this holding may not have far-reaching implications – giving rise to legal claims that previously did not exist – it prevents defendant-employers from asserting a frivolous legal defense, particularly when involving municipal employees. Indeed, the most practical implication of this holding may be that it cements the straight-forward statutory language within judicial interpretation and eliminates one more legal obstacle for plaintiffs.

II. Public Policy

Just a few years ago, I wrote an article--"The Disappearing Public Policy Claim"---asserting that as the title suggests, public policy cases were on the verge of disappearing from our jurisprudence. Vol. 33, No. 3 *Labor and Employment Lawnotes* 11 (Fall 2023). With the state's employment landscape shifting from employment relationships to contractual relationships, the Michigan Supreme Court's denial of appeal in *Smith v. Town & Country Properties II, Inc*. meant that an increasing number of the state's workforce would be barred from bringing public policy claims. *Smith v. Town & Country Properties II, Inc.,* 338 Mich. App. 462, 980 N.W.2d 131 (2021), *appeal denied*, 975 N.W.2d 928 (Mich. 2022).

Yet, *Janetsky* provides new hope for public policy claims, albeit for different reasons.

Michigan's Supreme Court has previously recognized three explicit bases for a public policy claim: (1) explicit legislative statements prohibiting the discharge or other adverse treatment of employees who act in accordance with a statutory right or duty; (2) "where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment," and (3) "when the reason for a discharge was the employee's exercise of a right conferred by a well-established legislative enactment." *Suchodolski v. Mich. Consol. Gas Co*., 412 Mich. 692, 695-96 (1982). Furthermore, "sufficient legislative expression[s] of policy" may "imply a cause of action for wrongful termination even in the absence of an explicit prohibition on retaliatory discharges." *Id*., at 695.

Relying on this history, the Michigan Supreme Court in *Janetsky* further explained: "A cause of action may be brought for wrongful termination in violation of public policy if, broadly stated, it would protect employees for 'performing an action that public policy would encourage' or 'refusing to perform an action that public policy would condemn[.]'" *Janetsky*, 2025 WL 2095369 at *6 (citing Tobias, 1 Litigating Wrongful Discharge Claims (June 2024 update), § 5.1). Drawing upon this, the Court held that an employer cannot retaliate against an employee "for attempting to prevent or remedy a violation of law," without violating this state's common law. *Id*., at *7.

In order to pursue a public policy claim under this theory, a plaintiff must show: "(1) that the law was or would have been violated, (2) that they reasonably and in good faith believed they were remedying or preventing a violation of law, and (3) that their actions regarding the alleged violation were the basis for an adverse employment action." *Id*., at 8. The Court reasoned, "[r]equiring a plaintiff to show both that the law was or would have been violated and that they acted reasonably and in good faith protects against overreliance on one 'employee's subjective understanding of the law' and the resulting negative consequences." *Id*.

Accordingly, public policy jurisprudence has expanded to recognize an additional protected activity, but with limitations; "the law was or would have been violated." *Id*. Even with the limitation, the *Janetsky* holding recognizes that public policy jurisprudence may not account for every actionable scenario and provides an example of how the Court may expand its recognition of protected activity under the law. There's hope. ■

SIXTH CIRCUIT ADDRESSES FREE SPEECH

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1. Free Speech or Misgendering? Sixth Circuit Strikes Down School Pronoun Policy

Can a public school discipline students for using pronouns that reflect a classmate's biological sex, rather than their gender identity? According to the Sixth Circuit's *en banc* decision issued November 6, 2025, the answer is no—not without violating the First Amendment. *Defending Education v. Olentangy Local School District Board of Education*, 158 F.4th 732 (6th Cir. 2025).

The Court struck down an Ohio school district's policy prohibiting students from using "biological pronouns" when referring to transgender or nonbinary peers. The majority held that such restrictions constitute viewpoint discrimination and compelled speech, running afoul of the First Amendment protection for expression on matters of public concern.

The Sixth Circuit emphasized that while schools may act to prevent harassment or bullying, "they may not this debate by forcing one side to change the way it conveys its message or by compelling it to express a different view." The district had introduced no evidence that the use of what the court referred to as "biological pronouns" would materially disrupt school functions or meet the legal definition of harassment.

The case arose after a parent asked administrators whether students could be disciplined for refusing to use a transgender classmate's preferred pronouns. The district claimed "purposefully referring to another student by gendered language contrary to their identity" would be considered discrimination under applicable Board policy. That response prompted *Defending Education*—a national organization representing parents of school-aged children—to sue on behalf of four member families. Their children held religious and scientific beliefs that sex is immutable and wished to use pronouns consistent with their biological sex, and that policies on harassment, bullying, and "discriminatory language" chilled their speech and compelled them to affirm views they rejected.

The district court denied a preliminary injunction, and a Sixth Circuit panel affirmed. But the appellate court granted rehearing by the full court, vacated the panel opinion, and ultimately sided with *Defending Education*, holding that the school's policies likely violated the First Amendment. Mandating preferred pronouns discriminates between competing viewpoints by elevating one belief system (that gender identity determines pronouns) and penalizing the contrary belief (that pronouns should comport with biological sex).

2. When Politics Sounds Like Profanity: Sixth Circuit Backs School Ban

Can a political slogan be too vulgar for school, even if it never actually uses a bad word? That was the question before the U.S. Court of Appeals for the Sixth Circuit in *B.A. v. Tri County Area Schools,* 156 F.4th 782 (6th Cir. 2025), a case testing how far the First Amendment protects student political expression.

Two middle school students attempted to wear "Let's Go Brandon" sweatshirts at school in 2022. That slogan is a euphemistic substitute for an explicitly profane anti-Biden"—"F**k Joe Biden." The assistant principal instructed one student to remove the sweatshirt because the phrase "means the F-word," and required the student to change into school-provided clothing when the student also had a "Let's Go Brandon" shirt underneath. A teacher later warned the student to remove the sweatshirt or speak with the assistant principal, and the student complied.

The second student was later instructed to remove his sweatshirt because the slogan had a "profane double meaning." At the time, the Tri County Middle School dress code prohibited attire with messages or illustrations that are "lewd, indecent, vulgar, or profane," among other restrictions, and staff could enforce the dress code. The record also reflected that students wore other political apparel, including MAGA and pro-Trump clothing, without issue when it did not violate the dress code. The principal testified he was not aware of any disruption caused by "Let's Go Brandon" apparel, but administrators viewed it as bannable because it was vulgar.

After a May 2022 cease-and-desist demand was rejected, the students and their mother sued in April 2023, asserting Section 1983 claims against the individual defendants, a Monell claim against the district, and related declaratory and injunctive claims (including vagueness and overbreadth challenges to the dress code). The district court granted summary judgment to defendants, reasoning that if schools may prohibit profanity, they may also prohibit apparel that can reasonably be interpreted as profane, without needing to show disruption.

The Sixth Circuit affirmed. The majority framed the case as one about the "vulgarity exception" and specifically addressed how schools may regulate political speech that lacks explicit profane words but is reasonably understood to communicate a vulgar message. The court identified two preliminary questions: a linguistic question (whether speech without explicit profanity can still have a vulgar meaning) and a doctrinal question (whether schools may prohibit student political speech that carries a vulgar message). The court answered both in the affirmative and concluded the district court correctly found no constitutional deprivation.

On the linguistic question, the 2-1 majority emphasized that the communicative content of a message can remain the same even when a speaker uses a euphemism to obscure an offensive word, and observed that plaintiffs conceded a school could prohibit students from saying the explicit profanity.

The court relied on prior precedent for the proposition that schools may regulate speech conveying a vulgar message even when the words used are not themselves explicitly vulgar. The opinion also explained that administrators are given significant latitude in determining what is vulgar or profane so long as the decision is not unreasonable.

On the doctrinal question, the majority acknowledged the high constitutional value of political speech and the role of schools in "educating the young for citizenship," but held that, under Fraser, vulgarity can "trump[] the political aspect of speech at school."

In the court's view, the law permits schools to prohibit vulgar

and offensive terms even when those terms are deployed to make a political point or comment on public issues, because student speech rights in school are calibrated to the school environment and the school's responsibility to teach civility. Applying that approach, the majority concluded it was reasonable for school officials to understand "Let's Go Brandon" as communicating a vulgar message and therefore constitutional to require removal of the apparel.

This decision strengthens the position of school districts that vulgarity exception can apply even when student expression lacks explicit profanity, so long as administrators can articulate a reasonable basis for concluding the expression conveys a vulgar message as commonly understood. Practically, this shifts the litigation center of gravity away from disruption evidence and toward the reasonableness of the district's interpretation of meaning, the consistency of enforcement, and the clarity of the dress code or student conduct provisions that the district invokes. The opinion also underscores the value of a content-neutral, viewpoint-consistent enforcement record. The record here included testimony that political statements were generally permitted under the dress code and that students wore apparel supporting candidates from both parties, which supported the district's argument that enforcement turned on vulgarity rather than viewpoint discrimination.

3. Speech, Not Conduct: Sixth Circuit Enjoins Michigan's Minor Conversion Therapy Ban at Preliminary Injunction Stage

Can Michigan fine or discipline a licensed psychologist or counselor for providing talk therapy to a minor, with a parent's consent, when the counseling goal is to help the minor align feelings or behavior with biological sex or religious beliefs, rather than to affirm a gender transition? Michigan's HB 4616 took effect in February 2024, prohibits licensed mental health professionals from engaging in "conversion therapy" with minors as defined in the statute, and is enforced through licensure discipline and significant fines. Mich. Compl. Laws 330.1901a.

Michigan's Legislature enacted two laws, collectively referenced in the opinion as HB 4616, that prohibit licensed "mental health professional[s]" from "engag[ing] in conversion therapy with a minor." The statute defines "conversion therapy" as any "practice or treatment" by a mental health professional that "seeks to change an individual's sexual orientation or gender identity," including efforts to change behavior or gender expression or reduce same sex attractions or feelings, while excluding certain forms of counseling such as assistance to an individual undergoing a gender transition and supportive or exploratory counseling that does not seek to change orientation or gender identity. Mich. Compl. Laws 330.1100a(20). The law took effect in February 2024, is administered by Michigan's Department of Licensing and Regulatory Affairs and authorizes licensure discipline and substantial fines for violations.

Catholic Charities of Jackson, Lenawee, and Hillsdale Counties and licensed psychologist Emily McJones sued in July 2024, contending the law blocks counseling they provide through talk therapy, and on December 17, 2025, the Sixth Circuit ruled that Michigan's minor conversion therapy ban functions as a speech restriction. *Catholic Charities of Jackson, Lenawee, and Hillsdale Counties & Emily McJones v. Gretchen Whitmer, et. al*., case no. No. 25-1105, 6th Cir. Dec. 17, 2025. The plaintiffs gave their services with informed consent and viewed the client as setting the counseling goals, including goals connected to sexual orientation or gender identity that align with the client's religious beliefs. The plaintiffs wanted patients to become more comfortable with their biological sex or reduce dissonance between gender identity and biological sex, or to reduce same sex sexual activity and align sexual-orientation identity with religious beliefs.

The district court denied preliminary relief, reasoning that the law regulates licensed professionals' conduct in delivering treatment and only incidentally burdens expression, applied rational basis review, and concluded the plaintiffs had not shown a likelihood of success on their First Amendment challenge, prompting the interlocutory appeal.

The State of Michigan argued, in effect, that it was regulating professional conduct. But the Sixth Circuit found that the conduct here is speech, because the asserted therapy is conversation. The panel held the statute is content based because liability turns on the purpose of what the counselor is trying to do through speech, namely whether the counseling "seeks to change" a minor's sexual orientation or gender identity. The appellate court also found viewpoint discrimination because the statute permits counseling that affirms or supports one direction of identity development while forbidding counseling that aims in the opposite direction, even when a minor and parent are requesting that counseling. That pairing, content plus viewpoint, is the First Amendment equivalent of turning on stadium lights. The 2-1 majority treated strict scrutiny as the required standard, and it concluded the State had not met it at this preliminary stage. That finding drove the outcome on likelihood of success, and it carried the day on injunctive relief. The Sixth Circuit's approach is pointed: the State may regulate a profession, but it does not get to re-label a speech restriction as "treatment" simply because a licensed person is speaking. In the majority's telling, a law that makes the therapist's license hinge on the direction, aim, or message of a counseling conversation is not merely regulating the practice of a profession. It is choosing winners and losers in a debate and enforcing that choice through licensure penalties.

That reasoning tees up the same issue now sitting at the Supreme Court in the Colorado case, *Chiles v. Salazar*, argued October 7, 2025. In *Chiles*, the Court is being asked to decide whether a state may treat certain talk therapy conversations with minors as regulable professional conduct, or whether that kind of restriction is really a speech rule that triggers heightened First Amendment scrutiny. The Sixth Circuit chose not to pause and wait for the Supreme Court's answer, which means this Michigan decision matters immediately for providers and regulators in the Sixth Circuit, but it may not be the last word for long. If the Supreme Court sides with Colorado's approach, the Sixth Circuit's speech first analysis may be undercut; if the Court agrees with the Sixth Circuit, similar bans nationwide will face much tougher constitutional headwinds. ■

POST-HEARING: ADMINISTRATIVE DECISIONS AND JUDICIAL REVIEW

Bryan Davis, Jr.

My prior *Lawnotes* articles have explored the importance of pre-hearing and hearing considerations within the context of administrative proceedings. As I explained, these considerations include imotion practice, discovery, witness examination, and exhibit admittance, have a direct bearing on post-hearing matters, including appeals of administrative decisions. Here, I explore some post-hearing considerations.

Michigan's Constitution

As previously noted, the Michigan Constitution provides for the creation of administrative agencies as a part of the executive branch. Mich Const 1963, art 5, §2. Beyond this, however, the Constitution addresses judicial review of certain administrative decisions or orders, providing, in part, that "[a]ll final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law," and that such "review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record." Mich Const 1963, art 6, §28. However, as made clear by such constitutional provision, not all administrative decisions are absolutely guaranteed judicial review. *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83, 91 (2011). For the provision to apply, such decision must be a final decision rendered by an agency, with the agency acting in a capacity that is judicial or quasi-judicial, and the decision must be one which affects private rights or licenses. *Id*.

Michigan's Administrative Procedures Act

Michigan's Administrative Procedures Act (MAPA), MCL 24.201 et seq., addresses not only requirements pertaining to administrative decision or orders in contested cases, but also judicial review of such decisions or order. Notably, MAPA defines "contested cases" as proceedings "in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing." MCL 24.203(3). And, Chapter 6 of MAPA pertains to judicial review of administrative decisions or orders in contested cases. MCL 24.301-.306; MCL 24.301-24.306. It is noted, however, that MAPA details certain exemptions to the applicability of Chapter 6. Specifically, MAPA details that Chapter 6 is not applicable "to proceedings conducted under the worker's disability compensation act of 1969" nor "final decisions or orders rendered under article 15 of the public health code." MCL 24.315(1); (4).

And, MAPA details that, when an individual "has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, … the decision or order is subject to direct review by the courts as provided by law." MCL 24.301. Practitioners should note that exhaustion of administrative remedies available within an agency "does not require the filing of a motion or application for rehearing or reconsideration unless the agency rules require the filing before judicial review is sought." *Id*. Importantly, "preliminary, procedural or intermediate agency action" will not be available for immediate review, however, courts "may grant leave for review of such action if review of the agency's final decision or order would not provide an adequate remedy." *Id*. Here, judicial review of final agency decisions or orders are conducted pursuant to "any applicable special statutory review proceeding in any court specified by statute and in accordance with the general court rules," however, if such specifications are absent or inadequate, judicial review is to be brought about via a petition for review in accordance with applicable sections of MAPA. MCL 24.302.

Petitions for Review of Administrative Decisions or Orders

Generally, a petition for review of an administrative decision or order must be filed in one of three applicable locations: 1) the circuit court in the county where a petitioner either resides; 2) has their principal place of business in Michigan, or; 3) in the circuit court for Ingham county. MCL 24.303(1). A concise statement must be contained within such petition and must address "[t]he nature of the proceedings as to which review is sought;" "[t]he facts on which venue is based;" "[t]he grounds on which relief is sought," and; "[t]he relief sought." MCL 24.303(3)(a)-(d). Beyond this, a petitioner must "attach to the petition, as an exhibit, a copy of the agency decision or order of which review is sought." MCL 24.303(4). Petitioners should also be mindful that appellants are generally required to file a copy of a claim or application of appeal with the Michigan Office of Administrative Hearings and Rules. Mich Admin Code, R 792.10137.

Petitions for review must be filed within the applicable court within 60 days following "the date of mailing notice of the final decision or order of the agency, or if a rehearing before the agency is timely requested, within 60 days after delivery or mailing notice of the decision or order thereon." MCL 24.304(1). It should be noted that enforcement of an agency's action will not be stayed by the filing of a petition, however, an agency may elect to grant, or a court may order a stay under certain terms. MCL 24.304(1). Following service of a petition, an agency must, within 60 days, or within such additional time allowed for by a court, provide the court with "the original or certified copy of the entire record of the proceedings, unless parties to the proceedings for judicial review stipulate that the record be shortened." MCL 24.304(2). Such record must include:

(a) Notices, pleadings, motions and intermediate rulings.

(b) Questions and offers of proof, objections and rulings thereon.

(c) Evidence presented.

(d) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose.

(e) Proposed findings and exceptions.

(f) Any decision, opinion, order or report by the officer presiding at the hearing and by the agency. [MCL 24.286(1).]

And, oral proceedings in which evidence is presented must be recorded. MCL 24.286(2). Notably, such oral proceedings are not required to be transcribed "unless requested by a party who shall pay for the transcript of the portion requested except as otherwise provided by law." *Id*.

Standards of Review

While beyond the scope of this article, it is critical for practitioners pursuing judicial review of an administrative decision or order to carefully consider the basis for seeking such review. MAPA provides for grounds upon which a court may set aside an agency decision or order. MCL 24.306. Unless a statute or the State Constitution details a different standard of review, a court is required to hold as unlawful and set aside an agency's decision or order if "substantial rights" of the party appealing the decision or order "have been prejudiced because the decision or order is any of the following:"

(a) In violation of the constitution or a statute.

(b) In excess of the statutory authority or jurisdiction of the agency.

(c) Made upon unlawful procedure resulting in material prejudice to a party.

(d) Not supported by competent, material and substantial evidence on the whole record.

(e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.

(f) Affected by other substantial and material error of law. [MCL 24.306(a)-(f).]

And, as discussed above, the State Constitution provides for review of certain administrative decisions or orders for purposes of determining whether the decision at issue is authorized by law and, in the event a hearing is required, whether such "decision is supported by record evidence." *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 100 (2008). In general, both the Michigan Constitution, art 6, §28, and MCL 24.306 require that judicial review determine whether competent, material, and substantial evidence on the record support an administrative decision.

The above highlights the importance of final agency decisions meeting various requirements, including requirements pertaining to findings of fact and conclusions of law and their inclusion within the final decision or order of an agency in a contested case. See MCL 24.285. With respect to findings of fact, such findings must "be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them." *Id*. And, "[e]ach conclusion of law shall be supported by authority or reasoned opinion." *Id*. Decisions or orders of administrative agencies cannot be made without "consideration of the record as a whole or a portion of the record as may be cited by any party to the proceeding and as supported by and in accordance with the competent, material, and substantial evidence." *Id*.

It should be noted that judicial review of agency decisions or orders occurs without a jury and is confined to the record before the court. MCL 24.304(3). Notably, however, in those cases where there is an "alleged irregularity in procedure before the agency, not shown in the record, proof thereof may be taken by the court." MCL 24.304(3). It is further noted that courts, "on request, shall hear oral arguments and receive written briefs." MCL 24.304(3).

It is further noted, if an application for leave to present additional evidence is made to a court within a timely manner, and a party can show to the courts satisfaction that an "inadequate record was made at the hearing before the agency" or that the additional evidence which the party seeks to present is material, and that good reasons existed for the failure to record or present such evidence in the agency proceeding, " the court shall order the taking of additional evidence before the agency on such conditions as the court deems proper." MCL 24.305. In light of such additional evidence, "[t]he agency may modify its findings, decision or order" and "shall file with the court the additional evidence and any new findings, decision or order, which shall become part of the record." MCL 24.305.

Conclusion

In short, practitioners within the administrative realm must carefully consider the potential for and implications of appeals from administrative decisions and orders. Counsel handling such appellate matters must consider not only the manner in which an administrative decision reaches a judicial body, but also the applicable standard of review. As has consistently been echoed throughout the course of these writings, it is only through extensive consideration and preparation that a practitioner can effectively navigate the complexities of the administrative landscape. ■

IT'S NOT JUST ABOUT SAVING YOUR TEETH ANYMORE: YOUR DENTIST COULD SAVE YOUR LIFE!

Doug Thompson, DDS and Chelsea Watkins, DDS

Periodontal disease is one of the most prevalent diseases affecting humans. This chronic inflammatory condition affects the gum tissue and the bone supporting the teeth and, if left untreated, can lead to eventual tooth loss. Periodontitis is initiated by an unhealthy biofilm made up of pathogenic bacteria, yeasts, viruses, and their byproducts.

Every person has a unique host response to disease-producing biofilm. Some people react very aggressively to disease-associated biofilm, which creates or exacerbates chronic inflammation, whereas others do not appear to have such a significant response. This host response is generated by a combination of innate and acquired risk factors that are unique to each individual. Innate, or genetic, risk factors are characteristics we are born with that cannot be altered, such as ethnicity, sex, and age.

Innate, or genetic, risk factors are characteristics we are born with that cannot be altered, such as ethnicity, sex, and age. Acquired, or environmental, risk factors are modifiable components like smoking, nutrition, stress management, and sleep quantity and quality. Managing disease-associated biofilm along with each patient's individual risk factors is imperative for long-term periodontal stability. If left untreated, periodontal disease can lead to tooth loss due to the destruction of supporting structures such as the gums, connective tissue, and bone that keep the teeth stable.

How many people have periodontal disease? Recent studies suggest that approximately half of adults aged 30 and over have periodontal disease. Disease prevalence is reported to be higher in men (56.4%) than in women (38.4%) and is positively associated with increasing age. Emerging research now shows that periodontal disease not only affects the oral cavity but also has real systemic implications. Harmful microbes harbored in oral biofilm can enter the bloodstream during an inflammatory response and travel to other areas of the body, raising further concern.

Due to this traveling oral microbiome, periodontal disease has now been associated with more than 57 systemic health conditions, including cardiovascular disease, stroke, cognitive decline, cancer, diabetes, osteoporosis, and pulmonary disorders, just to name a few. Historically, treatment for active periodontitis consisted of a 'deep cleaning', often without consideration of the root cause of the disease. This paradigm is now shifting thanks to more advanced and affordable technologies available to dentists.

One of the most significant developments in this shift is that dentists can now perform a simple swish-and-spit saliva test that helps identify the makeup of a patient's personalized oral biofilm. If testing reveals a disease-causing biofilm, targeted personalized intervention can be planned to better manage not only oral conditions but systemic health as well. We never imagined there would be a day when a dentist could help prevent a heart attack or a stroke, the leading causes of death in both men and women.

Several reliable, affordable, and easy-to-collect salivary tests are now available to dental practitioners. These diagnostic tests can evaluate for a variety of microbes that can drive disease, including bacteria, yeast, and viruses, and can also identify certain genetic variations that influence the expression of inflammatory mediators. By using these tests, individually or in certain combinations, clinicians can significantly enhance their understanding of the initiators and aggravators of the periodontal disease process providing a level of insight into the oral cavity that was previously unattainable to the general dental population.

These tests are intended to serve as supportive adjuncts to conventional diagnostic methodologies such as comprehensive periodontal charting, regular radiographic examination, and assessment of personal and family history of periodontal disease. These conventional diagnostic tools inform clinicians that periodontal disease is present, while the results of the salivary diagnostic tests help clinicians understand the 'why' behind the disease process along with revealing any potential systemic risk the oral microbiome may pose. Based on salivary test results, clinicians can make more informed decisions regarding appropriate treatment adjuncts necessary for effective disease management. A hallmark of periodontal disease management is biofilm control involving mechanical debridement, commonly erroneously referred to a 'deep cleaning', and antiseptics, often including systemic antibiotics, based on disease severity, host risk factors, and microbial profile.

Considering the more than 50 associated systemic conditions linked to periodontal biofilm, dentists are best positioned to help patients through personalized treatment strategies. Salivary diagnostics provide valuable insight when developing individualized plans to eliminate, suppress, or alter unhealthy biofilms to a more health-associated profile. As research continues to evolve, it has become increasingly clear that periodontal disease is a medical condition harbored in the mouth and has historically been left solely to dentists to diagnose and treat.

Evidence now shows that periodontal disease is polymicrobial, multifactorial, and episodic with a bidirectional relationship to other systemic conditions we now know that dentists cannot best treat the disease alone. Collaboration between dentists and physicians is imperative to help patients achieve the best possible health outcomes. The result? The potential improvement of total healthcare for our mutual patients. The future of dentistry is bright. It is becoming more personalized, more collaborative with medicine, and more impactful on long-term patient health thanks to the doors opened by salivary diagnostics. ■

Editor's Note: The authors are dentists at Integrative Oral Medicine in Bloomfield Hills, MI. **www.ioralmed.com**

MERC OPERATIONS

Sidney McBride, Bureau Director
Bureau of Employment Relations

I highlight some key key areas of the agency's operations that you may find useful.

New MERC Labor Mediator. Our newest MERC Labor Mediator is Jeff McCarthy, who began with the agency in late August 2025. Jeff is no stranger to labor mediation having served as an FMCS Commissioner/Mediator for 3 years prior to coming to MERC. Additionally, his prior collective bargaining experience with the Operating Engineers, Local 324 will ensure his success as a MERC Labor Mediator.

Electronic Filing on MERC Cases . The Commission recently amended the agency's case filing policy by expanding the use of technology to minimize many negative issues associated with mail in filings. These changes streamline and simplify the case filing process for all users. The revised Policy on Electronic Filing on MERC Cases is posted on the agency's website at www.michigan.gov/merc and has key changes that include those listed below. There will be continued updates on these case filing enhancements in upcoming Lawnotes editions, and on the agency's website.

Four (4) Approved Electronic Filing method	• MERC eFile • Designated email addresses (6) • MERC Fax Filing email • Web-filing Forms	Use any option
List Party Representatives	• List a Rep for each Party • List Rep's email & phone • Listed Rep to receive e-communications on case.	
Electronic Service of Filings/ Documents to all party representatives	Approved e-Service options: • Email (with proof) • Fax (with proof) • MERC e-Serve	Web forms satisfy both e-filing and e-service requirements
Extra copies NOT required when e-Filing		
Mandatory e-Filing on all Mediation and Grievance Cases -- 4 case types CB, GM, GA, WS plus Act 312 and Fact-Finding filing	Must: • E-File all submissions • Include Reps for all Parties • E-serve all Party Reps	Web forms and MERC e-File meet both requirements

Mandatory Electronic filing on all Mediation and Grievance Cases. As a reminder and noted above, as of the start of FY 2026, all filings on Mediation and Grievance cases must be electronically submitted pursuant to the revised Electronic Filing Policy by using any of the e-filing and e-service options noted above and in the policy.

When initiating a new case, any listed party must also have a party representative listed with a valid email and phone number. If unsure about the representative information, please contact the party to obtain that information. Also, all filings must be served on all other parties using an acceptable form of electronic service noted in the policy. This e-filing requirement for mediation division cases is already taking place in most instances, except with the filing of the initial bargaining notice. The previous filings forms have all been revised into new web forms that should be used if not filing directly into MERC e-File.

Expanded MERC Services

Majority Status Verifications. Under our Mediation Division, the agency will confirm the existence of a majority members of the impacted/proposed bargaining unit has issued valid show of interest authorizations. The service is conducted remotely by staff and offered in public and private sector workplaces. For now, simply email— berinfo@michigan.gov to arrange a majority status verification case with the agency.

Electronic Balloting. The agency offers electronic balloting in Election and Mediation related areas. For Elections, the e-ballot request is made as part the election details to replace mail and in-person balloting. In Mediation, we offer Labor Organizations the ability to have CBA ratification conducted by MERC staff using a link to an e-ballot to vote on the pending labor contract or last offer proposal. Email merc-elections@michigan.gov or merc-mediation@michigan.gov if interested in the e-ballot process for your next election or CBA ratification event.

Fast-Track Grievance Mediation. A fully virtual process that provides expedited mediation on a contract grievance dispute is offered by the agency. The goal is to conduct the virtual mediation session within 72 hours of the agency initiating the fast-track grievance mediation case. Requires valid emails for all party representatives, and the availability of all participants for remote participation using MS Teams or Zoom. If interested, submit a new case filing using the Grievance Mediation (GM) webform or MERC efile with all representatives information. Again, the process is fully virtual as to MERC staff's participation and connection with the party representatives. ■

LABOR, THE CONTROLLED SUBSTANCE ACT, AND RESCHEDULING OF CANNABIS

Benjamin L. King
McKnight, Canzano, Smith, Radtke & Brault, P.C.

With many states, including Michigan, decriminalizing the recreational use of marijuana some federal courts and regulators have grappled with their role in enforcement of federal labor laws as they relate to the cannabis industry. On December 18, 2025, President Trump issued an executive order directing the Department of Justice to "take all necessary steps to complete the rulemaking process related to rescheduling marijuana to Schedule III." While it is unlikely that President Trump's executive order will impact labor regulations on employers in the cannabis industry the eventual rulemaking could provide regulators and federal courts with direction relative to the enforcement of federal labor law in the cannabis industry.

1.

The Controlled Substances Act ("CSA"). 21 U.S.C. §801 *et seq*. was signed into law in 1977. The CSA makes it illegal to "manufacture, distribute, or dispense, or possess with the intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1). Drugs, substances, and certain chemicals used to make drugs are classified into five distinct categories or schedules depending upon the drug's acceptable medical use and the drug's abuse or dependency potential. The abuse rate is a determinate factor in the scheduling of the drug; for example, Schedule I drugs have a high potential for abuse and the potential to create severe psychological and/or physical dependence. As the drug schedule changes-- Schedule II, Schedule III, etc., so does the abuse potential-- Schedule V drugs represents the least potential for abuse. Schedule I substances such drugs as heroin, PCP, and marijuana. Schedule III substances include such drugs as steroids, codeine, and certain varieties of testosterone.

2.

Some employers in the cannabis industry have argued that their businesses are not subject to federal labor laws because their business is prohibited by the CSA.

These arguments have generally been rejected. In *Kenney v. Helix TCS, Inc.*, 939 F.3d 1106, 1112 (10th Cir. 2019), the court recognized that cannabis workers are protected by the Fair Labor Standards Act (FLSA). *Id.* The Tenth Circuit observed, "employers are not excused from complying with federal laws just because their business practices are federally prohibited." *Id.* Federal courts have almost uniformly enforced other workplace-protection statutes in the cannabis industry. For example, in *Greenwood v. Green Leaf Lab LLC*, 2017 WL 3391671 (D. Or. July 13, 2017), the court allowed a cannabis worker's FLSA claim, rejecting the employer's argument that federal illegality exempts them from compliance.

Outside of the FLSA, federal courts have permitted plaintiffs to maintain state law, ADA, and numerous other civil actions against businesses in the cannabis industry despite their business being illegal. A cannabis business "must do more than simply point to the marijuana aspects of the enterprise to have the claims dismissed." *Sensoria, LLC v. Kaweske*, 548 F. Supp. 3d 1011 (D. Col. 2021) (investor lawsuit against cannabis entities allowed to move forward). *See also, Tarr v. USF Reddaway, Inc.*, 2018 WL 659859, at *3 (D. Or. Feb. 1, 2018) (wrongful death lawsuit could proceed in federal court where remedy would require a cannabis employer to pay economic damages in the form of lost future earnings); *EEOC v. Nature's Herb and Wellness Center, dba High Plainz Strain*, U.S, District Court for the District of Colorado, 1:24-cv-02706 (federal court entered consent decree where cannabis employer discriminated against the employee based on ADA disability unrelated to marijuana use and agreed to pay settlement).

Historically, federal courts have found that federal labor laws apply to entities whose business violates federal law. *See e.g., Donovan v. Burgett Greenhouses, Inc.,* 759 F.2d 1483, 1485 (10th Cir. 1985) (employers must comply with the FLSA regardless of a worker's immigration status); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891-92 (1984) (undocumented workers are covered "employees" under the NLRA because such workers "are not among the few groups of workers expressly exempted by Congress, [so] they plainly come within the broad statutory definition of [covered] "employee."); *Lucas v. Jerusalem Cafe, LLC*, 721 F.3d 927 (8th Cir. 2013) (undocumented workers are "employees" within the meaning of the FLSA); *Bustamente v. Uno Café & Billiards Inc.,* 2018 WL 2349507, at *7 (EDNY, May 23, 2028) (finding FLSA covered an employee working as a security guard for an illegal gambling operations).

3.

The National Labor Relations Act's ("NLRA") applicability to employers and workers in the cannabis industry is less salient than those of other federal labor laws.

In 2013, the NLRB Office of General Counsel issued an Advice Memorandum in *Ne. Patients Grp. d/b/a Wellness Connection of Me., Cases* 01–CA–104979; 01–CA–106405, (Oct. 25, 2013), (the "Wellness Memo"). The Wellness Memo concluded the NLRB had jurisdiction over a labor dispute against an employer in the cannabis industry. The Wellness Memo stated that "it is appropriate for the Board to assert jurisdiction here even though the Employer's enterprise violates federal laws… [The] federal policy towards state-level marijuana legalization efforts creates a situation in which the medical marijuana industry is in existence, integrating into local, state, and national economies, and employing thousands of people, some of whom are represented by labor unions or involved in labor organizing efforts despite the industry's illegality…That the Employer is violating one federal law, does not give it license to violate another." *Id.* at pp. 10-11.

Thus far, federal courts have accepted the NLRB's jurisdiction over employers in the cannabis industry. In *Absolute Healthcare v. Nat'l Lab Rels. Bd.*, a cannabis retailer employee was terminated after the employee attempted to unionize. 103 F.4th 61 (D.C. Cir. 2024). On petition for review the circuit court noted the NLRB had jurisdiction under 29 U.S.C. §160(a) to prevent unlawful labor practices and that it had jurisdiction to review the decision pursuant to 20 U.S.C. §160(e). *Absolute Healthcare*, 103 F.4th at 67 (D.C. Cir. 2024). Notwithstanding, the ruling in *Absolute Healthcare*, Judge Walker issued a concurring opinion that questioned the NLRB's jurisdiction over

employer's in the cannabis industry. Judge Walker noted that "the NLRB usually retains jurisdiction even after an employer breaks a law. Indeed, Congress tasked the NLRB with holding employers accountable when they violate federal labor law. But that's when the enterprise is otherwise legitimate — not necessarily when its sole aim is to sell an illegal product or provide an illegal service. That distinction may be more significant than the NLRB appreciates. After all, rings of bookies and counterfeiters affect interstate commerce, but the NLRB does not seem eager to adjudicate their labor disputes. Ditto for street gangs. Why does that change when a corner boy calls himself a "budtender" and his crew incorporates under state law? To me, at least, the answer is hazy." *Id.* at 73.

In *Casala, LLC v. Kotek*, a federal district court judge held that "the NLRA likely applies to [an employer in the cannabis industry's] business. The NLRA does not limit its jurisdiction to "lawful commerce" or "legal substance," as some other federal laws do. 789 F. Supp. 3d 1025, 1037 (D. Or. 2025).

With the rescheduling of cannabis to Schedule III it appears that Courts, the NLRB, and other federal regulators will be more likely to apply federal labor laws to employers and workers in the cannabis industry. ■

FINAL JUDGMENT AND DAMAGES

What if the complaint does not make a specific demand for relief? Does the complaint have to list all forms of relief?

A "final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Fed. R. Civ. P. 54(c).

See *Soltys v. Costello*, 520 F.3d 737, 742 (7th Cir. 2008) ("Rule 54(c) contemplates an award of punitive damages if the party deserves such relief—whether or not a claim for punitive damages appears in the complaint" and thus describing as a "fundamental legal error" "the assumption that a prayer for punitive damages had to appear in the complaint in order to sustain an award of such damages.").

This rule makes sure that the winning party receives the remedy justified by the facts and law, even if the complaint does not ask for such damages.

John G. Adam

INCREASES TO MICHIGAN'S MINIMUM WAGE

Andrew Niedzinski
Wage Hour Division Administrator

Starting January 1, 2026, Michigan's minimum wage will increase to $13.73 per hour, up from the current rate of $12.48 per hour. This change reflects the restoration and modification of voter-initiated wage provisions previously amended by the Legislature. Minimum wage will increase again in 2027 to $15.00 per hour. Beginning in 2028 there will be yearly automatic inflation-based adjustments, subject to statutory economic conditions.

Minimum wage is governed by the Improved Workforce Opportunity Wage Act, which establishes a minimum wage for most employers and employees. The statute reflects the Legislature's intent to ensure that workers receive a base level of compensation while providing predictability for employers operating across the state.

Michigan law also provides for several special wage categories that must be applied carefully. Tipped employees are subject to a separate tipped wage, which is set as a percentage of the full minimum wage, 2026 rate is set at 40%. The tipped rate is being phased up to 50% by 2031. Employers utilizing a tipped wage must ensure that an employee's combined wages and tips equal at least the full minimum wage for all hours worked and must make up any shortfall if they do not. Tipped employees may voluntarily share tips with other workers; bussers, hosts, or food runners who are part of the service chain but aren't managers or supervisors. Less common special wage rates for minors; 16 and 17 may be paid a reduced rate equal to 85% of the standard minimum wage. Also, a training wage of $4.25 per hour may be paid to newly hired employees aged 16-19 during their first 90 days of employment.

Minimum wage increases can have other impacts for compliance other than base hourly pay. Overtime compensation is generally calculated using an employee's regular rate of pay, increases to the minimum wage may affect overtime rates for non-exempt employees. Employers must also review salary thresholds, piece-rate arrangements, and commission structures to ensure that an employee's effective hourly rate does not fall below the statutory minimum. Minimum wage protections require employers to ensure compliance across all compensation methods. Accurate payroll records and timely system updates are essential to maintaining compliance.

For employees, increases to the minimum wage can result in higher earnings and improved financial stability, particularly for workers in lower-wage or entry-level positions. These increases may also lead to wage compression, prompting employers to reassess pay scales for employees earning just above the minimum.

Enforcement of Michigan's minimum wage law is carried out through investigations, audits, and complaint-based enforcement actions. Employers found to be out of compliance may be liable for unpaid wages, civil penalties, and additional remedies provided by statute. As Michigan's minimum wage continues to increase on a scheduled basis, employers are encouraged to monitor statutory changes closely, update workplace postings and policies, and regularly review pay practices to ensure compliance with state law. For more information or to find required postings, see Michigan.gov/wagehour ■

ALGORITHMIC MANAGEMENT AND JUST CAUSE IN MICHIGAN ARBITRATION

Lisa W. Timmons
Arbitrator and Mediator

A warehouse worker is discharged after a dashboard flags repeated "time off task." A call center employee is written up because software detected "insufficient enthusiasm" in their voice. In each case, the decision is framed as objective, the system says so, even though the worker insists the data is wrong, incomplete, or missing key information about the workday. These disputes are increasingly appearing in grievance arbitration, and they arrive with a new kind of proof: system-generated metrics that look precise, but can be hard to test.

This is algorithmic management: the use of software, including AI-enabled tools, to measure and direct work, often through scores, quotas, triggers, or recommendations that influence scheduling, incentives, discipline, or discharge. It can be as simple as a points-based attendance policy that automatically calculates penalties. It can also be far more complex, integrating production rates, location tracking, customer ratings, and sensor data into performance scores.

The arbitrator's central question remains the same. Did the employer prove just cause for its action under the collective bargaining agreement, using evidence that can be tested, explained, and weighed?

Why Michigan's Standard of Review Makes the Record Matter

Michigan courts describe labor arbitration as a "product of contract," where an arbitrator's authority is derived exclusively from the collective bargaining agreement. *Port Huron Area Sch Dist v Port Huron Ed Ass'n*, 426 Mich 143; 393 NW2d 811 (1986). Judicial review is correspondingly narrow. Courts do not reweigh evidence or revisit the merits. The question is whether the award "draws its essence" from the contract and stays within the authority the parties granted.

Michigan Supreme Court decisions also emphasize that arbitrators exceed their powers when they act beyond the material terms of the contract from which they draw authority, or in contravention of controlling law, *DAIIE v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982). In practical terms, that doctrine is a reminder that arbitrators should make the contract path visible, particularly when the proof is technical or opaque.

At the same time, Michigan procedure expects a fundamentally fair hearing. Under the Michigan Court Rules, MCR 3.602(J)(2)(d), a court must vacate an award if the arbitrator refused to hear evidence material to the controversy or otherwise conducted the hearing to substantially prejudice a party's rights. In a metric-driven discipline case, fairness often depends on whether the parties can test reliability. What did the metric measure? What inputs were used? What exceptions were recorded? What human review occurred before discipline was imposed?

The standard of review is narrow. The obligation to build a record that supports reasoned findings is not.

Just Cause, Updated for Metrics

Algorithmic management does not replace traditional just-cause analysis. It stress-tests it. When discipline turns on dashboards and scores, the familiar elements of just cause still apply, but they require sharper questions.

Notice. If the real expectation is a calculated level of efficiency, employees need the standard itself, how it is calculated, and what is excluded (equipment failures, safety meetings, required downtime, paid breaks, training time). Telling an employee to "work faster" without measurable criteria is not notice.

Reasonable investigation. When a system flags an employee, did management do more than just accept the flag? A reasonable investigation should include at least three steps:

1. confirming the data belongs to the correct employee, job, and time period;

2. checking for logged errors, exceptions, or system health issues; and

3. interviewing supervisors, dispatchers, or coworkers about workplace context the system cannot see.

The more automated the discipline trigger, the more the employer should be prepared to show that a human reviewed the trigger and relevant context, and that the employer did not treat the metric as a verdict.

Consistency. A system can increase consistency, but it can also create a false appearance of consistency if it weights tasks, routes, or assignments differently. A consistency analysis often requires looking past the final score to confirm that comparable workers were measured under the same rules and that exceptions were handled the same way. Automated systems also tend to miss the human factors that experienced supervisors routinely consider, such as what happened that day, whether this is a one-off, and whether there is information management should know before treating a reliable employee as a repeat offender.

Proportionality. Automated tools are not good at nuance. They do not reliably account for length of service, an isolated emergency, safety interventions, or a supervisor's direction to deviate from normal practice. Progressive discipline remains a human judgment, and the computer recommended termination is not a substitute for contractual proportionality.

Evidence and Disclosure: What to Ask For

Algorithmic cases predictably produce an early standoff. Employers argue the system is proprietary. Unions and employees argue they cannot challenge the evidence without understanding it. Many cases can still be litigated fairly, and intellectual property can still be protected, if the parties focus on operational transparency and meaning. The focus should be on what the system did in this case, rather than on a full technical blueprint.

Proportional requests often include:

- the policy defining the metric and the discipline threshold;

- the employee's raw data for the relevant period (scan logs, route logs, events, attendance entries);

• exception logs, error reports, and system health notices for the relevant period;

• records of human review, including who reviewed the data, what was checked, and what conclusions were reached;

• comparator information showing how similarly situated employees were measured and disciplined; and

• training materials for supervisors and employees on interpreting system outputs.

Michigan's personnel-records statute can help frame access. The Bullard-Plawecki Employee Right to Know Act defines "personnel record" broadly as a record used or that may affect an employee's qualifications, compensation, or discipline, and it expressly includes records held by a third party with a contractual agreement to keep or supply the record, MCL 423.501(2)(c). Performance data stored in a vendor platform can qualify as a personnel record when it is used to evaluate or discipline an employee.

Confidentiality concerns can usually be managed with protective orders, limited disclosure to counsel or experts, and targeted redactions. The guiding principle is proportionality. If a party relies on a metric to justify discipline, it should disclose enough about inputs, thresholds, and exceptions for the opposing party to test accuracy and for the arbitrator to make a reasoned finding.

Civil Rights, Accommodations, and Bias: The Michigan Lens

Algorithmic management can implicate Michigan civil-rights obligations even when the caption reads "just cause."

Michigan's Elliott-Larsen Civil Rights Act (ELCRA) recognizes the opportunity to obtain employment without discrimination as a civil right. MCL 37.2102(1). Michigan's Persons with Disabilities Civil Rights Act (PWDCRA) similarly guarantees employment opportunity without disability discrimination and requires accommodation absent undue hardship. MCL 37.1102(1)–(2).

In practice, advocates may argue that a metric penalizes disability-related limitations, discourages safe-work practices, or produces materially different outcomes across protected groups. Even when statutory discrimination claims are not formally arbitrated, workplace due process still requires the arbitrator to ask whether the metric was applied neutrally under the contract and whether management considered individualized circumstances the system may not capture.

Michigan's Civil Rights Commission has also addressed AI-related concerns directly. In October 2024, it adopted a resolution establishing "Guiding Principles for the Elimination and Prevention of Artificial Intelligence Bias and Discrimination,"[1] emphasizing risks of biased data and disparate impacts, and calling for transparency and appropriate human alternatives. That guidance does not decide a grievance, but it is a useful Michigan-based lens when the evidence suggests the metric may be systematically skewed or when human review appears to have been reduced to a perfunctory review.

Writing the Award: Make the Data Path Clear

When the discipline evidence is metric-driven, a strong award does two things well.

First, it identifies the contractual standard and explains how the proof satisfies, or fails to satisfy, that standard, including what investigation occurred, such as:

• what was measured;

• what time period was covered;

• what exceptions were available and which were considered; and

• what human review occurred before the discipline decision.

Second, it addresses the employee's specific challenges to the data, including identity, time period, data integrity, exceptions, workplace context, consistency, and proportionality. An arbitrator does not need to become a computer scientist, but the award should show the arbitrator evaluated reliability rather than deferring to a system output as a verdict.

A Hearing Checklist

1. Define the metric. What is measured, what is excluded, and what threshold triggers discipline?

2. Verify identity and scope. Is the data tied to the correct employee, job, and timeframe?

3. Confirm exceptions and errors. Are system failures, equipment outages, and authorized deviations documented?

4. Require proof of human review. Who reviewed the data, and what did they check beyond the dashboard?

5. Test consistency. How were comparable employees measured and treated?

6. Evaluate proportionality. What mitigating factors exist, and how does progressive discipline apply under the contract?

7. Consider accommodations and protected categories where relevant. Evaluate the claim under contract language, employer policy, and Michigan civil-rights principles.

Conclusion

Algorithmic management changes the form of workplace proof, but it does not change the foundation of just cause. Michigan arbitration law requires a fair hearing that considers material evidence. The data may be new. The due process is not. The human decision-maker still carries the responsibility to test reliability, require transparency sufficient to evaluate proof, and ensure that a system output is evidence, rather than a verdict. ■

—END NOTES—

[1] *https://www.michigan.gov/mdcr/-/media/Project/Websites/mdcr/mcrc/resolutions/2024/MCRC-AI-Guiding-Principles.pdf.*

THE GLORIOUS LOYALTY OATH CRUSADE

Stuart M. Israel

The "duly elected directors and trustees of the 2025 Detroit Bar Association and Foundation's respective boards" issued a "Special Statement Regarding the Rule of Law." It is posted at detroitlawyer.org.

It begins with the excerpts from *The Lawyer's Oath* where the solemnly swearing (or affirming) lawyer promises to "support" the federal and state constitutions and to "maintain the respect due to courts of justice and judicial officers." *The Lawyer's Oath* is available at michbar.org. It may be printed in a "suitable for framing" format.

Such bar-leadership statements remind me of the Glorious Loyalty Oath Crusade described in Joseph Heller's 1961 novel, *Catch-22*.

1. Cheers for the rule of law.

We "are a government of laws and not of individuals," the DBA board-members' special statement says, and reiterates: "The Rule of Law is meant to ensure that the government actions are based on laws and not the whims of individuals."

"Our oath as lawyers," the DBA statement says, "requires us to defend our institutions and our constitution, first, foremost and always"—and to do so "independent of political outcomes" and without regard to "political expediency."

What's new here?

In the 1770s, John Adams and other Founders called for a government of laws and not of men. Under U.S. Const. art. VI, §3 (1787), federal and state legislators and executive and judicial officers "shall be bound by oath or affirmation, to support this Constitution." Alexander Hamilton, in Federalist No. 78 (1788), describes the independent federal judiciary charged to uphold the constitution and the rule of law.

A legal maxim makes the point in authoritative Latin: *nemo est supra leges*—no one is above the law. The recent separation-of-powers official-acts-immunity case, *Trump v. U.S.,* 603 U.S. 593 (2024), reminds that under the rule of law there is no all-encompassing unfettered government-official immunity, that even a U.S. president—"regardless of politics, policy, or party"—"is not above the law."

Why the DBA special statement? The authors tell us: "Recent events have demonstrated threats to the independent judiciary of this country and to lawyers and judges who have carried out their duties consistently with their oaths of office."

The 2025 statement doesn't specify those "recent events."

2. "Recent events"?

Maybe the "recent events" are the harassment and threats directed to certain justices and their families after *Dobbs v. Jackson Women's Health Organization*—despite Attorney General Merrick Garland's warning that "violence and threats of violence" would not be tolerated. Garland's warning, however, was accompanied by his suggestion that there was not much "respect due" the *Dobbs*-majority justices. Garland wrote that the majority "eliminated an essential component of women's liberty" by "renouncing" the "established" and "fundamental" constitutional "right to abortion" and, doing so, "upended the doctrine of *stare decisis*, a key pillar of the rule of law."

No, the *Dobbs* events probably did not prompt the 2025 DBA statement. The timing is wrong. *Dobbs* was decided on June 24, 2022, after the publication of a leaked draft opinion, and immediately produced protests and counterprotests.

Rather, the DBA statement likely was prompted by events after the 2025 inauguration. Maybe by partisan disrespect of, and calls for impeaching, federal judges who ruled on contentious disagreements about executive authority. Or by friction between the new administration and BigLaw practitioners of what has come to be called political lawfare. Or by friction between the administration and the American Bar Association about the ABA's role in evaluating judicial nominees and the ABA's monopoly on accrediting law schools.

You will have to surmise what "recent events" and "threats" prompted the 2025 DBA board-members' special rule-of-law statement.

3. Politics or principles?

A reader of the DBA special statement might conclude that the authors' politics inform the authors' views on "recent events." That conclusion is supported by the statement's disclaimers. It "is made by the duly elected directors and trustees" of the "respective boards, not on behalf of all individual DBA members." And it "does not necessarily reflect the views of directors' and trustees' employers."

Why do bar leaders use their associations' official platforms to declare their own views that members may not share, and that are "not necessarily" shared by the leaders' employers—*i.e.,* views on which reasonable people may disagree, on subjects, borrowing a phrase from *The Lawyer's Oath*, which are "honestly debatable under the law of the land"?

It seems unlikely that any DBA members, or any of the DBA directors' and trustees' employers, would object to a statement endorsing *The Lawyer's Oath*. Most "duly-admitted" Michigan lawyers, I expect, subscribe to the *Oath*'s principles and do "support" the federal and state constitutions, the rule of law, and due process of law, and do not have qualms about extending the "respect due to courts of justice and judicial officers."

But, of course, the devil is in the details.

4. The rule of law is complicated.

Lawyers disagree about what process is due litigants, what respect is due judicial officers, what boundaries divide law and politics, and what the rule of law requires exactly. These questions are situation-specific, and resolving them typically requires more than platitudinous pronouncements, however inspirational.

Unlike the Ten Commandments, the law is not carved in stone. Law evolves and changes. The rule of law has included judicial decisions that failed the test of time, some made by judicial officers who, even in their own times, were not due much respect.

You remember *Plessy v. Ferguson* (1896) (separate but equal); *Lochner v. New York* (1905) (statutory six-day, 10-hour-daily work limits violate employer's implicit constitutional right to freedom of contract); *Buck v. Bell* (1927) (permitting forced sterilization of state-declared "unfit" and "mentally defective" people; "Three generations of imbeciles are enough."); *Korematsu v. U.S.* (1944) (upholding internment of Japanese-Americans); and *Bowers v. Hardwick* (1986) (no constitutional right to private "homosexual sodomy").

Consider the more recent *Trump v. CASA* (2025), which reflects the Supreme Court's divided assessment of "universal injunctions" and the equitable authority of federal courts. Justices disagree about the "respect due" other justices' views. Justice Amy Coney Barrett's view is that Justice Ketanji Brown Jackson's view is "at odds with more than two centuries' worth of precedent, not to mention the Constitution itself." Jackson views the majority decision as an "existential threat to the rule of law." There are, some observers say, politically-informed differences within the Court about the rule of law.

Most lawyers agree on the broad principles in *The Lawyer's Oath*, but often lawyers disagree on how to apply those principles, and whether particular applications pose existential threats to the rule of law. The inevitability of lawyer-disagreements likely accounts for why special statements made by bar leaders often include disclaimers that the views expressed are "not necessarily" universal.

5. More cheers for the rule of law.

Bar-leader special rule-of-law statements seem to be trending.

See, *e.g.,* the "Statement from SBM [State Bar of Michigan] Leadership on Unprecedented Threats to Rule of Law" and the "Special Statement from SBM Leadership." Both are posted on michbar.org, dated March 21, 2025.

SBM leadership says that the "need for an independent judiciary" is one of the "self-evident truths woven into the very fabric of American democracy" and that "the rule of law" is part of "the cornerstone of democracy" that "is baked into the foundation of our government, our state and federal constitutions, and our way of life."

The SBM leaders stand against "[e]fforts to undermine judicial independence—whether through threats to judicial security, calls for removal based on case outcomes, or actions that erode the public's trust in the courts." Does this list allude to FDR's 1937 "court-packing" plan? Or to the well-armed, self-declared aspiring assassin arrested in 2022 near Justice Brett Kavanaugh's home, reportedly motivated by Kavanaugh's views favoring limits on abortion and gun control? Or to more recent events? The leaders do not specify.

They do say that the statements are "made by the duly elected officers" of "the SBM's 2024-2025 Board of Commissioners, not on behalf of all individual SBM members" and do "not necessarily reflect the views of officers' employers."

On March 26, 2025, the American Bar Association and other bar groups published their disclaimer-free "Statement In Support of the Rule of Law." The institutional signatories "speak out against intimidation" and they "stand together"—to "reject efforts to undermine the courts and the legal profession," and to "support" the "rule of law." That statement, with a list of signatories, is posted at americanbar.org.

6. Statements, commitments, and pledges.

Bar leaders increasingly, it seems, are using their association platforms to make statements, commitments, and pledges expressing their personal views on things like the rule of law, the state of democracy and "our way of life," diversity and inclusion, eroding professionalism and civility, and crisis-level drug and alcohol abuse, gambling addiction, stress and depression, and other mental health concerns negatively affecting the professional performance and overall "wellness" of lawyers, law students, and judges.

Posted on michbar.org, for example, is a "Pledge to Achieve Diversity & Inclusion in the Legal Profession in Michigan." It invites lawyers and others to affirm legal-profession diversity and inclusion as "core values" related to "trust in the administration of justice and the rule of law." The pledge, of course, is voluntary. Mandatory associations, like the SBM, have to be careful about ideological and political neutrality and stewardship of compelled dues money. Voluntary associations, like the ABA, however, have more leeway, though they are constrained by the financial imperative of dues-payer-satisfaction.

Reportedly, ABA membership in total and as a percentage of the legal profession has significantly declined in recent years, in part, AI-generated information suggests, because of the ABA's ideological and political orientations. The ABA's historical influence and authority are in flux and the ABA is at odds with the current administration, in litigation and in the court of public opinion (among the public concerned about lawyer-things).

Lawyers may pay careful attention to ideology and politics when considering joining, and remaining members of, voluntary associations, as AI suggests. But do lawyers pay attention to, much less find value and inspiration in, special "core values" statements, commitments, and pledges offered by leaders of mandatory associations? Not "necessarily." That brings us to *Catch-22*.

7. The "Glorious Loyalty Oath Crusade."

Catch-22 is set mostly at a military air base on a Mediterranean island off the coast of Italy during World War II, the staging area for American bomber units. Called a "great anti-war book," the novel also portrays follies that grow within hierarchical and bureaucratic organizations, often arising out of differences between, on the one hand, armchair bosses and desk-dwelling administrators and, on the other hand, on-the-ground, in-the-field, administered-upon doers.

In the novel's Chapter 11 we are acquainted with Captain Black, the disappointed rear-echelon intelligence officer. Passed over for squadron commander, he nonetheless has authority over the pilots, navigators, gunners, and bombardiers who fly perilous missions.

Catch-22, by the way, is serious *and* funny. One reviewer called it "*The Naked and the Dead* scripted for the Marx Brothers, a kind of *From Here to Insanity*."

Captain Black, we learn, "really hit on something" when he implemented the "Glorious Loyalty Oath Crusade." Under his direction:

THE GLORIOUS LOYALTY OATH CRUSADE

(Continued from page 1)

> "All the enlisted men and officers on combat duty had to sign a loyalty oath to get their map cases from the intelligence tent, a second loyalty oath to receive their flak suits and parachutes from the parachute tent, a third loyalty oath for…the motor vehicle officer, to be allowed to ride from the squadron to the airfield in one of the trucks. Every time they turned around there was another loyalty oath to be signed. They signed a loyalty oath to get their pay from the finance officer, to obtain their PX supplies, to have their hair cut by the Italian barbers.
>
> ***
>
> [Captain Black] would stand second to none in his devotion to country….[He made every SOB] who came to his intelligence tent sign two loyalty oaths, then three, then four; then he introduced the pledge of allegiance, and after that 'The Star-Spangled Banner,' one chorus, two choruses, three choruses, four choruses.***
>
> Without realizing how it had come about, the combat men in the squadron discovered themselves dominated by the administrators appointed to serve them….When they voiced objection, Captain Black replied that people who were loyal would not mind signing all the loyalty oaths they had to. To anyone who questioned the effectiveness of the loyalty oaths, he replied that people who really did owe allegiance to their country would be proud to pledge it as often as he forced them to….The more loyalty oaths a person signed, the more loyal he was; to Captain Black it was as simple as that…
>
> ***
>
> 'The important thing is to keep them pledging,' he explained to his cohorts, 'it doesn't matter if they mean it or not.'
>
> ***
>
> [When two officers complained that] the Glorious Loyalty Oath Crusade was a glorious pain in the ass, since it complicated their task of organizing the crews for each combat mission, [Black responded:] 'Of course it's up to you…Nobody's trying to pressure you. But everyone else is making them sign loyalty oaths, and it's going to look mighty funny to the F.B.I. if you two are the only ones who don't care enough about your country to make them sign loyalty oaths, too. If you want to get a bad reputation, that's nobody's business but your own. All we're trying to do is help.' "

You will read, at the chapter's close, how "the Glorious Loyalty Oath Crusade came to an end."

Conclusion.

Do "recent events"—or anything else—warrant public statements from bar-leaders, distributed on bar-association platforms, presenting views which seem official but don't "necessarily" reflect the views of all (or any) association members, or of the leaders' employers, or of anybody besides the leaders? Borrowing from the picket-line song: "Which side are you on, necessarily?" You can take a stand on this question.

Or you can stay silent. You are not required to respond to—much less draw inspiration from—your dues-funded leaders' pronouncements. You can ignore them, and just stick with *The Lawyer's Oath.* And maybe reread the *Rules of Professional Conduct.*

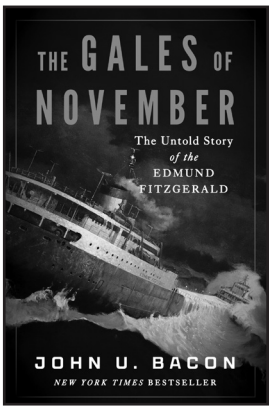
Also, you need not unveil your own rule-of-law views in statements, commitments, pledges, and media releases—unless you *want to* declare your views to the world.

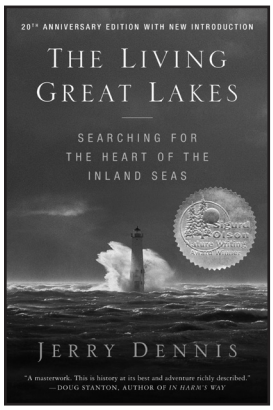
It's up to you. Nobody's trying to pressure you, but many lawyers regularly take virtuous stands, and it might look mighty funny if you are the only one who doesn't. But this is nobody's business but your own. All this article is trying to do is help. ■

Afterword.

For a (perhaps) heterodox view of what "respect" is "due" to "judicial officers," see Fifth Circuit Judge James C. Ho, "Not Enough Respect For The Judiciary—Or Too Much? Arrogance And The Myth Of Judicial Supremacy," 24 Harvard Journal of Law & Public Policy (Winter 2026). A glimpse: "I'm tired of hearing judges today complain about threats to judicial independence. These judges need to get over themselves." Judge Ho remarks on the "self-importance and subornation to elite approval that have pervaded the judicial branch."

GREAT "GREAT LAKES" BOOKS





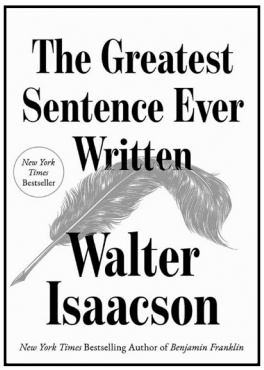
John U. Bacon, *The Gales of November: The Untold Story of the Edmund Fitzgerald* (2025).

Jerry Dennis, *The Living Great Lakes: Searching for the Heart of the Inland Seas* (2003, new introduction 2024) (Chapter 7 is on sinking of the Edmund Fitzgerald).

THE GREATEST SENTENCE: "WE HOLD THESE TRUTHS TO BE SELF-EVIDENT"

John G. Adam

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."



1.

Almost 250 years ago, these 35 revolutionary-words became the second sentence to our Declaration of Independence, July 4, 1776. "It became the greatest sentence ever crafted by human hand," according to Walter Isaacson whose recent book of the same title discusses these words, *The Greatest Sentence Ever Written* at 2 (2025). While written primarily by Jefferson, the Declaration was the product of a committee consisting of John Adams, Benjamin Franklin, Thomas Jefferson, Robert Livingston, and Roger Sherman.

The concepts of God-given rights, equality, unalienable rights, and life, liberty, and happiness were revolutionary concepts in 1776. And what country is founded in part on the "pursuit of Happiness." As Dennis Prager's book title says, *Happiness Is a Serious Problem: A Human Nature Repair Manual* 3 (1998) ("happiness is a moral obligation" as people in general "act more decently when they are happy.").

2.

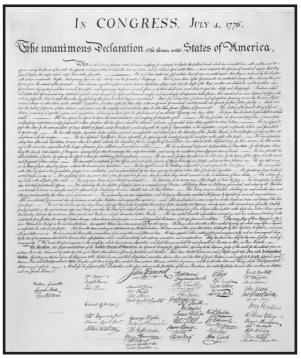
But like any great writing it went through several drafts. Jefferson's first draft contained a long sentence that started like this: "We hold these truths to be *sacred & undeniable;* that all men are created *equal & independant,* that from that *equal creation they derive rights i*nherent & inalienable, among which are the preservation of life, *& liberty, &* the pursuit of happiness…" *Greatest Sentence* at 53 (italics added showing words were changed).

Jefferson's "We hold these truths to be sacred…" was edited by Franklin to "We hold these truths to be self-evident…"

In Jefferson's first draft, "that from that equal creation they derive rights" was tweaked by the committee: "They are endowed by their Creator" with rights, the final version declares.

The Greatest Sentence regarding unalienable to inalienable at 23:

> The final version of the Declaration of Independence declares that people are endowed "with certain unalienable Rights." That's not exactly how Jefferson wrote it. He used the word inalienable, which is how the phrase is inscribed on the Jefferson Memorial. But Adams, when he made a copy of Jefferson's rough draft, changed it to unalienable. That is the way it appeared in the parchment approved on July 4.
>
> So if Jefferson needs editing, we all need editing and re-editing.



3.

Lincoln revered the Declaration, invoking it in his Gettysburg address: **"**Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal."

Martin Luther King Jr. also often invoked the Declaration: "Before the pen of Jefferson scratched across the pages of history the majestic word of the Declaration of Independence, we [African-Americans] were here." 1963 "Letter from Birmingham Jail." In "I Have Dream" speech, King said:

> When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men, yes, Black men as well as White men, would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness.

It is hard to argue with Jefferson, Lincoln, King and Isaacson (and me!), but if you do, submit your greatest sentence to *Lawnotes* and explain its significance. ■

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INSIDE *LAWNOTES*

Ski Michigan

- Shel Stark reviews the first trial under the Michigan Elliott Larsen Act and tells us about Wayne Circuit Court Judge James Montante's unique settlement "techniques."
- Get an excellent overview of the basics and boundaries of the Unemployment Insurance Appeals Commission from Commissioners Alejandra Del Pino and Andrea Rossi.
- Stuart Israel invokes Catch-22 to remind us that—among other things—The Lawyer's Oath tells us to "maintain the respect due to courts of justice and judicial officers."
- Sean T.H. Dutton explains that as 2025 came to an end, federal efforts to rein in non-competes have largely fizzled and federal limits on non-competes remain in limbo, if not entirely dead in the water.
- John Adam in separate articles addresses (1) subpoenas directed at non-parties, (2) the presumption of arbitrability involving retiree benefits, and (3) the Declaration of Independence.
- Bryan Davis continues to enlighten us on Michigan administrative law as to post-hearing and judicial review.
- Ben King discuss Michigan's legalization of marijuana under state law in connection with federal law.
- Cover page photo of UM Law School is from *Guardians of Michigan—Architectural Sculpture of the Pleasant Peninsulas* (Univ. of Mich. Press 2022), was previously used in in the Summer 2023 Lawnotes review of the great book which included the photo with the permission of author, photographer, and historian Jeff Morrison.

Authors: John G. Adam, Ahmad Chehab, Bryan Davis, Jr., Alejandra Del Pino, Sean T.H. Dutton, Marianne Grano, Stuart M. Israel, Benjamin L. King, Sidney McBride, Lauren Nicholson, Andrew Niedzinski, Channing Robinson-Holmes, Andrea Rossi, Sheldon J. Stark, Dr. Doug Thompson, Lisa W. Timmons, and Dr. Chelsea Watkins.