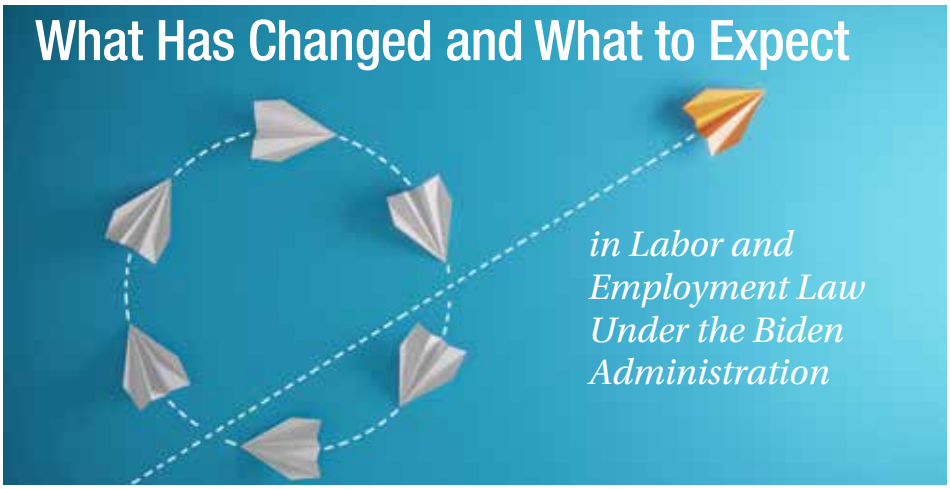
Labor and Employment LAW

AMERICAN BAR ASSOCIATION
Labor and Employment Law Section

SECTION OF LABOR AND EMPLOYMENT LAW | AMERICAN BAR ASSOCIATION

WINTER/SPRING 2021 | VOL. 49, NO. 1

What Has Changed and What to Expect *in Labor and Employment Law Under the Biden Administration*



BY DEMETRIUS PYBURN

With the Biden administration having now completed its first 100 days, we can begin to see a shift in the direction for labor and employment law, and we should be prepared. While COVID-19 has continued to dominate the legislative agendas, there has been noteworthy attention to many labor and employment matters. Below are some of the laws and initiatives that have been made a priority.

The Equality Act. H.R. 5, which has already passed the House of Representatives previously and passed again on February 25, 2021, is consistent with the June 2020 Supreme Court decision confirming that protections under Title VII of the Civil Rights Act of 1964 extend to individuals on the basis of sexual orientation and gender identity. Specifically, the bill defines and includes sex, sexual orientation, and gender identity among the prohibited categories of discrimination or segregation. The bill expands the definition of public accommodations to include places or establishments that provide (1) exhibitions, recreation, exercise, amusement, gatherings, or displays; (2) goods, services, or programs; and (3) transportation services. Finally, the bill prohibits an individual from being denied access to a shared facility, including a restroom, a locker room, and a dressing room, that is in accordance with the individual's gender identity.

Strengthening Union and Labor Laws. President Biden made clear in his campaign that he planned to strengthen unions and encourage unionizations. Part of that effort involved the appointment of former Boston Mayor Marty Walsh to serve as the Secretary of Labor. Secretary Walsh is the first union member to fill the role in nearly a half a century. Another part of that effort was the House of Representatives passing the Protecting the Right to Organize Act of 2021, commonly referred to as the PRO Act, on March 9, 2021. This bill expands various labor protections related to employees' rights to organize and collectively bargain in the workplace. Among other things, it (1) revises the definitions of employee, supervisor, and employer to broaden the scope of individuals covered by the fair labor standards; (2) permits labor organizations to encourage participation of union members in strikes initiated by employees represented by a different labor organization (i.e., secondary strikes); (3) prohibits employers from bringing claims against

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CALL FOR NOMINATIONS: THE FRANCES PERKINS PUBLIC SERVICE AWARD

The Frances Perkins Public Service Award recognizes the individuals or organizations that demonstrate a significant commitment to providing pro bono legal services, primarily in the areas of labor and employment law, to people of limited means or to the nonprofit, governmental, civic, community or religious organizations that are engaged in addressing the needs of individuals with limited means.

The need for pro bono services in the labor and employment area is acute. Questions relating to labor and employment law account for more than a quarter of the issues raised in many pro bono programs. The American Bar Association Section of Labor and Employment Law wishes to acknowledge the individuals, firms, corporate and union legal departments, government agencies, and other organizations that help meet this crucial need. As a result, the Section is seeking nominations for its annual Frances Perkins Public Service Award.

View the Award Criteria and Past Award Recipients.
Nominations are due September 1, 2021.

THE SECTION

SAMANTHA C. GRANT, Chair

I have been incredibly proud and impressed by the accomplishments of the Section of Labor and Employment Law leaders over the past several months since my last column.

The 14th Annual Section Conference was, by all accounts, a tremendous success and the most inclusive Conference we have ever had. The panelists presented excellent substantive content and practical guidance, and the panels were permeated with women attorneys and attorneys of color who are thought leaders in our field. Our new Diversity, Equity and Inclusion (DEI) Track was a very timely and popular track. I'm very pleased that the Section Conference Planning Committee enthusiastically supported this idea and that the DEI Track will be a staple feature at our Section Conferences going forward. The new Foundations and Essentials Day, which was focused on new and young lawyers, was also very popular, and the Section plans to continue that track, as well. I'm grateful to the Section Conference Planning, New and Young Lawyers, Revenue and Partnership Development and Social Media Committees, the speakers, the sponsors and the more than 800 attendees who joined us for our first conference in a virtual format.

Also, at the Section Conference, we presented the **Arvid Anderson Public Sector Labor and Employment Attorney of the Year Award** to Robert M. Dohrmann, Schwartz, Steinsapir, Dohrmann & Sommers LLP, the **Federal Labor and Employment Attorney of the Year Award** to Orlando J. Pannocchia, U.S. Department of Labor, Office of the Solicitor, the **Frances Perkins Public Service Award** to Buck Lewis, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, and the **Honorable Bernice B. Donald Diversity, Equity and Inclusion in the Legal Profession Award** to the Honorable Bernice B. Donald, U.S. Court of Appeals for the Sixth Circuit, and Jane Howard-Martin, Toyota Motor North America, Inc. I again congratulate these individuals on their well-deserved honors.

I was pleased to convene a group of chairs from numerous leading international employment law associations from around the world. With the great work of the Section's Outreach to International Lawyers Committee, on February 23, 2021, this chairs' group hosted a webinar featuring speakers from each of these associations discussing Employment Litigation in the Age of COVID-19. This webinar attracted 550 attorneys from more than 40 countries. I was honored to moderate the webinar and introduce all of the bar leaders to the attendees. Our outreach to these international bars continues to be well received, and we are in the process of further collaboration with them. The Section is enriched by the participation of international attorneys, and the Outreach to International Lawyers Committee continues to attract international lawyers to the Section, forge relationships and plan events with other bar associations, and promote the Section via social media.

The Section also held thirteen Midwinter Meetings between January and May. The meetings were well attended, with a third of the Committees recording a 10-year high number of registrations. The Midwinter Meetings continue to attract national and international thought leaders as well as high-level government officials. We appreciate the active participation of government attorneys in our Section and Midwinter Meetings, and were honored to have government officials from the EEOC, NLRB, DOL, DOJ, OSHRC, FMSHRC, NMB, FLRA, MSPB, PBGC, and others, speak at our Midwinter Meetings. I enjoyed attending all of the Midwinter Meetings, enhancing my substantive knowledge in the vast subject areas covered by our Standing Committees and experiencing the unique culture of our different committees. Thanks again to all of the Standing Committee Co-Chairs and Program

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Labor and Employment LAW

Labor and Employment Law (ISSN: 0193-5739) is published four times a year by season, by the Section of Labor and Employment Law of the American Bar Association, 321 North Clark Street, Chicago, Illinois 60654, 312/988-5813. *www.americanbar.org/laborlaw*

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Congress Considers Ban on Mandatory Predispute Arbitration and Class Action Waivers

BY BENJAMIN GOLDSTEIN

In its current session, Congress once again will consider legislation to prohibit mandatory predispute arbitration agreements and class action waivers in employment, consumer, antitrust, and civil rights disputes.

Congressman Hank Johnson (D-GA) recently reintroduced the Forced Arbitration Injustice Repeal Act, or FAIR Act, in the House of Representatives.

The FAIR Act passed the House in September 2019 with a vote of 225 to 186, with one Republican—Congressman Matt Gaetz (R-FL)—voting in favor. The Republican-controlled Senate did not bring the bill out of the Senate Judiciary Committee for a vote. With the Senate now under Democratic control, the FAIR Act will likely see a vote in both houses of Congress in the near future. President Biden has indicated his intent to sign the bill into law if it makes it to his desk.

Under the FAIR Act, "no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute." FAIR Act, H.R. 963, 117th Cong. § 1 (2021). "Joint-actions" include joint, class, and collective actions. The ban would not cover collective bargaining agreements between labor organizations and employers. As currently drafted, the FAIR Act would apply to any claim that arises or accrues after the date of enactment, affecting millions of arbitration agreements and class action waivers entered into before that date.

Predispute arbitration agreements are currently enforceable under the Federal Arbitration Act (FAA). The FAA was enacted in 1925, but its scope has greatly expanded as a result of a series of federal court decisions since the 1980s. The proposed ban would undo the Supreme Court's 2018 decision in *Epic Systems v. Lewis*, 138 S. Ct. 1612 (2018), which upheld the enforceability of class action waivers in the employment context.

The National Employment Law Project (NELP), which supports the FAIR Act, estimates that 55% of all private-sector non-union employees are subject to mandatory arbitration agreements, including 64% of workers earning less than $13 per hour. Hugh Baran, Nat'l Emp't Law Project, *Forced Arbitration Enabled Employers to Steal $12.6 Billion From Workers in Low Paid Jobs in 2019*, https://s27147.pcdn.co/wp-content/uploads/Data-Brief-Forced-Arbitration-Enabled-Wage-Theft-Losses.pdf.

Opponents, including many in the business community, argue that the FAIR Act will increase the costs of doing business and settling disputes, lead to unnecessary litigation, and burden an already backlogged and under-funded court system. In protesting the bill, the U.S. Chamber of Commerce stated that "most consumer and employee disputes are not eligible to be resolved through a class action," and that arbitration gives them "the only realistic avenue for obtaining relief." Letter from Neil L. Bradley, U.S. Chamber of Com., Exec. Vice President & Chief Policy Officer, to Members of the U.S. Cong. (Mar. 8, 2021), https://www.uschamber.com/sites/default/files/210308_s._505_h.r._963_fairact_congress.pdf.

Public interest and consumer advocacy groups, along with most Congressional Democrats, have lined up in support of the bill. They argue that arbitrations combined with class action waivers reduce employee and consumer access to justice and, because of the confidentiality of arbitration proceedings, allow companies to shield misconduct from public view. One legal scholar recently estimated that annually more than 98% of several hundred thousand potential employment claims subject to mandatory arbitration have gone unfiled. Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679, 696 (2018). The study attributes the low case filings to a combination of the deterrent language of arbitration clauses, the small value of individual cases, as opposed to class actions, and, for those cases that actually make it in front of an attorney, the low economic incentive to take on such cases. *Id.* at 700-02. With claims assertable in court, the study argues, these incentives are altered, resulting in greater deterrence of illegal conduct by employers. *Id.* at 681.

But other studies point to the superiority of arbitration for employees. For example, a study by ndp|analytics, which was commissioned by the U.S. Chamber of Commerce Institute for Legal Reform, examined approximately 90,000 federal lawsuits and 10,000 arbitrations between 2014 and 2018. Nam D. Pham et al., *Fairer, Better, Faster: An Empirical Assessment of Employment Arbitration*, ndp|analytics, 5-6, https://instituteforlegalreform.com/wp-content/uploads/2020/10/Empirical-Assessment-Employment-Arbitration.pdf. This analysis found that employee-plaintiffs in arbitrations won three times more often than in litigation, recovered almost twice as much in damages, and achieved these results on average in 100 fewer days. *Id.* at 5. The ndp|analytics study did not address arbitrations that went unfiled because of mandatory arbitration provisions and class waivers.

Questions also arise about the FAIR Act's possible effect on current agreements and employment law precedents. Opponents voice concern that the bill could upend years of FAA-related jurisprudence and create upheaval for the millions of employment agreements containing arbitration and class action waiver provisions. The bill's proponents fault mandated arbitrations for stunting legal development. Because arbitrator decisions have no precedential value, are often unavailable to the public, and do not always provide the arbitrator's full reasoning, employment law is not developing to mirror changes in society and the modern workplace.

Once it passes the House as expected, the FAIR Act will require bipartisan support to overcome a Republican filibuster in the Senate. •

Benjamin Goldstein is an Associate at Kessler Matura P.C. in Melville, NY

Americans Want Workplace Representation, But Employers Still Win Union Elections

How the PRO Act Levels the Playing Field, Protects Workers and Gives Them a Fighting Chance at Unionization

BY JOSÉ A. MASINI

Nearly half of workers *want* union representation but only about a tenth of them have it. Existing safeguards on the right to organize often prove insufficient when faced with employers determined to prevent unionization at all cost. The Protect the Right to Organize (PRO) Act, however, if passed, will help workers effectively exercise the right to union representation, discourage employer interference with and retaliation for the exercise of that right, as well as provide workers with additional protections in the workplace.

A critical component of the PRO Act is that it facilitates access to union elections and limits employer interference with the process. Presently, for example, employers can require workers to attend near-unlimited "captive audience" meetings, and force them to listen to anti-union propaganda, which has proven an effective tool in defeating organizing drives. The PRO Act makes participation in such meetings voluntary. Additionally, the bill requires employers to post notices informing workers of their rights and for employers to disclose contracts with anti-union consultants hired to dissuade employees from unionization, thus bringing honesty and transparency to the union election process. The PRO Act also allows union elections to happen in a neutral environment away from an employer's premises, thereby reducing the potentially coercive effect of holding an election in an anti-union workplace.

To more effectively discourage unlawful employer conduct, the PRO Act empowers the National Labor Relations Board (NLRB) to go beyond its equitable remedies for unlawful retaliatory terminations—reinstatement, backpay and notice posting—and impose monetary penalties for violations. Such penalties may extend beyond the company and onto corporate directors and officers who participate in those violations or who, having knowledge of them, fail to take preventive action. Furthermore, the bill requires the NLRB to seek injunctions to reinstate workers while their case is pending—a crucial step in preventing an unlawful termination from inflicting irreparable economic harm on a worker, or having a permanent chilling effect on an organizing campaign by firing the strongest leaders. It also streamlines the NLRB's enforcement process by permitting it to enforce its rulings, rather than wait on Circuit Court enforcement. Nonetheless, as these and already existing protections may be insufficient to deter hostile employers from unlawful, coercive, and retaliatory acts against workers, the bill further protects workers' rights to freely choose a bargaining representative by allowing the NLRB to issue bargaining orders against employers who unlawfully interfere in an election instead of currently having to get Court approval of very rare *Gissel* bargaining orders under 10(j) or rerun the election.

The bill also addresses what happens after an election. It requires mediation and arbitration to settle disputes in first contract negotiations, thus preventing uncooperative employers from dragging out the bargaining process when union support may be most fragile. The bill overrides so-called "right-to-work" laws and allows unions and employers to enter into collective bargaining agreements that include collecting fair-share fees to cover the costs of collective bargaining and contract administration for workers who otherwise reap the benefits of unionization but do not contribute to them. The bill further allows workers to strike in support of and in solidarity with workers at other companies—also known as secondary activity—and to participate in economic strikes without the risk of being permanently replaced.

The PRO Act would protect workers in a broader context as well. The bill makes it unlawful under the National Labor Relations Act to misclassify workers as independent contractors when they are employees; misclassification subjects workers to less favorable terms and conditions of employment, and misleads workers into thinking their rights to organize and seek better terms and conditions are not protected. The bill codifies a joint-employer standard with less leeway for employers, who under a recent NLRB rule can deploy these joint management schemes to retain influence over terms and conditions of employment while evading bargaining obligations and liability for violations.

Undoubtedly the PRO Act will face stiff opposition from employers who fear unionization or the consequences of unlawful anti-worker behavior. However, to unions and their workers, it signifies perhaps the boldest effort to protect the right to organize and advocate for better working conditions since the origin of the National Labor Relations Act. •

José A. Masini Torres is Assistant General Counsel at the International Union of Operating Engineers and a former NLRB field attorney who primarily practices traditional labor law. José is a member of ABA Committee on Practice and Procedure Under the NLRA and presented at the Committee's 2020 Midwinter Meeting. He has served as a Chapter Editor for the *7th Edition of Employment Discrimination Law* and the *2020 Edition of How to Take a Case Before the NLRB*, and is a contributing editor for *The Developing Labor Law*. Views presented herein are strictly his own.

The PRO Act

Permanently Remove Obstacles for Organizing

BY MICHAEL J. HANLON AND BENJAMIN L. SHECHTMAN

The Protecting the Right to Organize Act ("PRO Act") is a dramatic overhaul to federal labor law, reflecting organized labor's wish list to regain its steadily declining membership. The PRO Act is intended to remove any obstacles to union organizing efforts by granting the National Labor Relations Board ("NLRB") new powers, quashing employer opposition to organizing, and extending new union rights. The filibuster and opposition by a few Senators leaves its passage uncertain.

The PRO Act would totally alter the landscape for organizing, overturning decades of existing law. Among the most significant changes, the Act would make it an unfair labor practice for an employer to require employees, while on the clock, to attend meetings where the employer provides attendees with information regarding unionization. Employers would effectively be gagged while union supporters would be permitted to use company systems to engage in persuasion. The PRO Act also would:

- Eliminate standing for employers to participate in pre-election process, which would speed up the election process, open up the process to micro-units, prohibit "captive audience" meetings and prohibit permanent strike replacements;
- Redefine who is considered a supervisor under the NLRA, which will result in more supervisors being included in bargaining units with employees they supervise;
- Increase who would be considered employers by adopting the NLRB's former joint employer test (set forth in *Browning Ferris Industries*) as well as California's AB5 test for independent contractor status;
- Certify a union despite a union election loss if the union has a majority of cards and the employer engages in any objectionable conduct, which the NLRB will presume would make a re-run election impossible (back-door card check);
- Legalize and protect intermittent and partial strikes, which would create chaos;
- Legalize secondary picketing and boycotts, allowing unions to attack an employer's customers and suppliers that have nothing to do with the labor dispute;
- Impose first contract interest arbitration, with terms lasting up to two years;
- Invalidate right to work laws and arbitration agreements with class action waivers;
- Impair the attorney-client privilege and make it more difficult for employers to comply with constantly changing labor laws by eliminating the advice exception to the Labor-Management Reporting Disclosure Act's reporting requirements
- Overhaul the NLRB's remedies, including liquidated damages, civil penalties and individual liability for managers, officers and directors; and
- Allow a private right of action, which would provide charging parties with an alternative path to litigate claims under the NLRA by going directly to court.

Amazon's recent union election in Bessemer, Alabama received unusual press coverage and substantial public and political support for the union. The Retail, Wholesale and Department Store Union conducted a months-long campaign among the nearly 6,000 employees at Amazon's fulfillment center in Bessemer, contending that Amazon's monitoring of workers infringes on workers' dignity and that wages failed to compensate workers for the pressure that they felt as a result of such monitoring. Both the RWDSU and Amazon ran hard-fought campaigns. In Bessemer, Amazon defeated the union, which won only 738 votes to 1,798 cast against it. Despite 5,805 eligible voters, the NLRB received only 3,215 ballots. This 55% turnout represents a low turnout for a union election of this profile, and one in which employees cast mail-in ballots. If the PRO Act were in place:

- The election would have been held more quickly with fewer potential voting employees (the union wanted a fragmented unit; Amazon argued for a wall-to-wall unit);
- Amazon would have been prohibited from conducting campaign/informational meetings with its employees;
- Amazon would have faced far greater consequences for any objectionable or unlawful conduct, which might have impacted its campaign strategy;
- The union could have engaged in economic warfare not just against Amazon but also against anyone that does business with Amazon, including major customers;
- If the NLRB had determined Amazon engaged in unlawful or objectionable conduct, it could have certified the win for the union if it had a majority of authorization cards; and
- Finally, the overall power dynamic might have been different had Alabama's right to work law not been in place, as unions generally would have more power and dedicated funding.

Proponents of the PRO Act almost certainly will contend that the outcome in Bessemer increases the urgency for its passage. What is clear is that as the number of workers represented by unions in the private sector continues to decline, unions will seek to eliminate any involvement of the employer in the process and impose a collective bargaining agreement if one is not agreed upon. •

Michael J. Hanlon and **Benjamin L. Shechtman** are members with the Philadelphia, PA office of Cozen O'Connor.

Zoom vs. In-Person Arbitration Hearings

BY RICHARD BALES

In March 2020, in-person arbitration hearings came to a screeching halt in response to lockdowns related to COVID-19. Initially, most parties postponed scheduled hearings hoping the pandemic would be short-lived. But when weeks turned to months, hearings went online.

Now that much of the country is returning to a semblance of normal, parties often have a choice of whether to proceed in-person or online. Our new proficiency with online hearings gained during the pandemic makes it likely online hearings will become a permanent part of labor and employment law practice. Here are my observations on the relative advantages of each format:

Online

- There is no safety risk to anyone from either the hearing itself or from associated travel. One or more participants may be particularly susceptible to COVID, but may not want to disclose it and hesitate to object to an in-person hearing for fear of implying such susceptibility. The arbitrator may be in a different risk category than employees or advocates.
- No one travels, which may save considerable time and expense.
- Eliminating travel makes scheduling hearings much easier. Consequently, an online hearing often can be scheduled much sooner than an in-person hearing.
- Parties do not pay for the arbitrator's travel time or expenses, which may result in a considerably reduced fee.
- Some advocates prefer an in-person hearing because witness credibility will be at issue. But if witness credibility is at issue, I would rather see witnesses online than in-person at a distance with a mask.
- Hearings often run more smoothly, especially if the advocates exchange and agree on exhibits beforehand.
- There are no negotiations or disputes over social distancing, how many people to allow in the hearing room, mask-wearing protocols, and the like.
- It is easy to turn up (or down) the volume. If there are a lot of participants in a large hearing room, and everyone is masked and socially distanced, it can be difficult to hear whoever is talking.
- Hearings need not be cancelled or postponed if a peripheral participant has a minor illness because that person may still be able to participate online.
- An arbitrator capable of running an online hearing is likely to be technologically adept in other ways as well, and therefore more efficient.

In-person

- No one gets dropped from a lost internet connection. In-person conversations are not "choppy" or delayed.
- Some witnesses may not have great internet connections, a computer or private room at home.
- There is no disagreement over which online platform to use or over who will control the online meeting.
- Some witnesses may not be comfortable using the designated online platform.
- There often is cathartic value to the Grievant of "telling her story" with a Company representative physically present—this might be diminished somewhat online.
- It may be easier for advocates to "read the room"—to pick up on nonverbal cues, both of witnesses and of the other folks in the room (including the arbitrator). An arbitrator can send a powerful message by putting down her pen—a message that may be lost online. On the other hand, "reading a room" is considerably more difficult if everyone is masked and socially distanced.
- Some clients may not like the optics of the workplace being open and employees expected to work, but hearings being held online. That sends a message to employees that "our safety is more important than yours."
- Most arbitrators, before an online hearing, will hold a pre-hearing conference to discuss logistics such as how exhibits will be exchanged and introduced, whether the hearing will be digitally recorded, and how technical challenges will be addressed. A pre-hearing conference to discuss these issues is not necessary for in-person hearings. However, these conferences can improve the flow of hearings and may result in the advocates agreeing on other issues, such as factual stipulations.
- Arbitrators in online hearings usually encourage or require the parties to exchange electronic copies of exhibits before the hearing. This may make it more difficult for the advocates to adjust their strategy on the fly (or, more cynically, to ambush the other side). However, it is still possible to introduce exhibits at the last minute in an online hearing, such as by sharing the exhibit on-screen, or sending the document by email.
- It may be more difficult to introduce physical evidence. If it is important for the arbitrator to see the physical place an incident occurred, video may not adequately convey the sense of space. The presentation of video evidence may be harder (or easier) online than in person.
- In an in-person hearing, it is usually obvious if an advocate is inappropriately conferring with a witness during a recess in the middle of the witness's testimony. In an online hearing, it is possible for the advocate and witness to turn off their cameras and mute their microphones, then use a mobile phone to call or text each other. Similarly, it is probably easier for a witness to be coached during his testimony, or to have inappropriate documents in front of him, in an online hearing. Online hearings presuppose the advocates' and witness' ethical good faith and mutual trust.

After a year of physical isolation and social distancing, many of us are looking forward to in-person hearings being "normal" again. I suspect, however, that online hearings are here to stay, especially when hearing participants are scattered geographically or the parties are cost-conscious. That is not altogether a bad thing, because online hearings can help us return labor arbitration to its promise of a quick, efficient and relatively inexpensive way to resolve labor disputes. •

Richard Bales is a labor arbitrator (NAA, FMCS, AAA) and Professor of Law at Ohio Northern University. Thanks to the following National Academy of Arbitrators members for their comments: Luella Nelson, Dan Nielsen, Marty Malin, Barry Goldman, Lise Gelernter, Michael Cavanaugh and Chris Albertyn. He also thanks Samuel Morris, Steven Wheeless, David Lichtman and David Campbell, whose correspondence inspired this article.

CALL FOR NOMINATIONS: *Federal Labor and Employment Attorney of the Year Award Nominations*

The American Bar Association Section of Labor and Employment Law is pleased to announce that nominations are now being accepted for the Federal Labor and Employment Attorney of the Year Award ("FLEAYA") for outstanding achievement in government service by a federal practitioner.

The Section is concerned with fairness and equal opportunity in our nation's workplaces. Section members represent employees, employers, unions, third party neutrals and workplace advocates. We partner with dedicated civil servants who implement and enforce our nation's labor and employment laws, rules, regulations, policies and procedures. However, the Section recognizes that our federal partners are often underappreciated and not adequately recognized for their accomplishments.

This prestigious award is a salute to federal labor and employment lawyers and their many accomplishments. Any career attorney in the field who has made a significant contribution to the field is eligible for nomination. All nominations will be considered. The honoree will be chosen based on his or her commitment to government service, demonstrated contribution to the legal profession and sustained excellence in the quality of their work product. The FLEAYA trophy is accompanied by an expense paid trip to the Section Annual Conference, which will be held in Los Angeles this year.

View the complete Award guidelines.

The Federal Labor and Employment Attorney of the Year Award is a symbol of public/private partnership in the furtherance of fairness and equal opportunity. We encourage you to share this information with your friends and colleagues. By nominating a government attorney for the FLEAYA, you are showing your appreciation for our nation's talented career service lawyers.

Nominations must be received by August 30, 2021.
Download the Nomination Form.

Leadership Development Program Announces Rolling Admission through June 14

The Leadership Development Program is initiating rolling admission and is accepting applications through June 14, 2021. You are encouraged to apply sooner to maximize your chances to participate in this fantastic program. We are excited to announce that Dr. Arin N. Reeves, President of Nextions LLC,will be this year's program facilitator. Dr. Reeves is a leading researcher, best-selling author and advisor in the fields of leadership and inclusion.

Successful applicants will attend the LDP virtually on July 21–23, 2021, where they will enhance their leadership skills and learn more about the structure and leadership of the Section and pathways to leadership within the Section. At the conclusion of the LDP, each participant will be assigned a role in a Section project.

Apply today!

Fifth Circuit Challenges the FLSA Two-Step Conditional Certification Framework

BY OLENA SAVYTSKA

Earlier this year, the Fifth Circuit issued a decision that purported to change the way conditional certification is managed by courts in Fair Labor Standards Act ("FLSA") cases. In *Swales v. KLLM Transport Servs, LLC*, 985 F. 3d 430 (5th Cir. 2021), the court held that courts should, prior to issuing notice to members of a collective, determine "whether merits questions can be answered collectively" and "identify, at the outset of the case, what facts and legal considerations will be material to determining whether a group of 'employees' is 'similarly situated.'" *Id.* at 441-42. The *Swales* decision marks a significant departure from the traditional two-step conditional certification framework adopted by other appellate and district courts, *see, e.g., Myers v. Hertz Corp.*, 624 F.3d 537, 554–55 (2d Cir. 2010); *Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527, 536 (3d Cir. 2012); *White v. Baptist Meml. Health Care Corp.*, 699 F.3d 869, 877 (6th Cir. 2012), and has prompted briefing around the country regarding the timing and standard for conditional certification.

The touchstones of the first-step, conditional certification inquiry are that (1) it takes place early on in the case, prior to discovery; (2) it is conducted based on minimal evidence—usually pleadings and affidavits; and (3) it is based on a very lenient standard, and often results in notice being issued. The rationale for early conditional certification and prompt notice is to preserve the statute of limitations on collective action members' claims, which continues to run until they opt in. *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75 (2013); *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989). This is because the opt-in procedures of the FLSA are fundamentally different from the opt out procedures of a class action brought under Fed R. Civ. P. 23. In an FLSA collective action, discovery is typically conducted *after* the collective is conditionally certified and the workers have been provided with an opportunity to join the case. At the close of discovery, defendants can move for decertification, and the court takes a closer look at the collective action members, using a more stringent standard, to determine whether they are, in fact, similarly situated.

However, according to the Fifth Circuit, "[w]hen a district court ignores that it can decide merits issues when considering the scope of a collective, it ignores the 'similarly situated' analysis and is likely to send notice to employees who are not potential plaintiffs. In that circumstance, the district court risks crossing the line from using notice as a case-management tool to using notice as a claims-solicitation tool." *Swales*, 985 F.3d at 442. The approach proposed by *Swales* to avoid this issue is to "authorize preliminary discovery" to "determine if and when to send notice to potential opt-in plaintiffs." *Id.* at 441.

The Fifth Circuit largely left the decision about which cases call for additional discovery and in what amount to the discretion of the district courts. The Fifth Circuit also did not address the attendant prejudice to potential opt-in plaintiffs in not being provided with timely notice and opportunity to join the case and toll the statute of limitations on their claims.

Defense counsel's reaction to *Swales* has been swift. In the past few months, plaintiffs' conditional certification motions have repeatedly been met with the "*Swales* argument"—namely, that the court needs more information to determine whether collective action members are, in fact, similarly situated, and that discovery is necessary prior to conditional certification. Defense counsel also

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Breaking the Chains of Bondage Among Foreign Suppliers of Imported Goods

BY MARLEY S. WEISS

Xinjiang China, Malaysia, Turkmenistan, and Zimbabwe share an attribute that is significant for labor and employment lawyers: goods from each country are subject to a Customs and Border Protection (CBP) "withhold release order" (WRO). Such merchandise is detained at the U.S. border, unless the importer can prove that forced labor has not been used in any aspect of making the goods. The goods may become subject to seizure and forfeiture. Major supply chain reconfiguration may become necessary.

In the front page case involving the Chinese ethnic minority Uyghurs, cotton and tomatoes from the Xinjiang Uyghur Autonomous Region (XUAR) are covered by a January 13, 2021 WRO. This WRO was preceded by narrower WROs, as well as a July 2, 2020, "business advisory" from the Departments of State, Treasury, Commerce and Homeland Security, warning that "businesses. . . that choose to operate in Xinjiang or engage with entities that use labor from Xinjiang elsewhere in China should be aware of reputational, economic, and, in certain instances, legal, risks associated with certain types of involvement with entities that engage in human rights abuses, which could include WROs, civil or criminal investigations, and export controls." The 2021 WRO extends to all "downstream products," wherever made whenever the product incorporates cotton or tomatoes from Xinjiang. CBP's investigation yielded evidence of "debt bondage, restriction of movement, isolation and threats, withholding of wages, and abusive living and working conditions," sufficient to "reasonably indicate" the use of prohibited detainee, prison or other forms of forced labor.

Until recently, business leaders, labor and employment lawyers, and human rights advocates have focused on minimally enforceable international conventions prohibiting "modern day slavery," and on "soft law instruments" such as the U.N. Guiding Principles on Business and Human Rights. Morality, reputation, and avoidance of consumer backlash have further motivated businesses to reduce risks of extreme exploitation in global supply chains.

Section 307 of the Tariff Act of 1930, 19 U.S.C. § 1307, by contrast, is "hard law," with big "teeth." It forbids importation of goods "mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions." "Forced labor" includes "all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily," plus "forced or indentured child labor." Goods detained at port of entry may be exported elsewhere, or the importer, within three months, may prove to CBP that no elements of the goods were produced with forced labor. If the evidence is insufficient, however, CBP may seize and forfeit the merchandise. 19 C.F.R. §§ 12.43, 12.44. In certain cases, CBP also may assess penalties upon importers. 19 U.S.C. § 1595a.

Until 2016, a "consumptive demand exception" made Section 307 inapplicable to goods not "mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States." Repeal of that exclusion set the stage for the provision's invigorated use. Any person can bring the use of foreign forced labor in imported goods to the attention of CBP. NGOs, particularly Solidarity Center, have become active in filing petitions utilizing Section 307.

Importers must ensure that no forced labor is used anywhere within the supply chain, "including the production and harvesting of the raw material." They must "trace the supply chain from point of origin . . . , to the production and processing of downstream products, to the merchandise imported into the" U.S. through purchase orders, invoices, and proof of payment for the raw materials and each stage of the processed materials, transportation documents showing how the product moved at various stages in its production, and "supporting documents related to employees" who performed the work. The Department of Labor even provides a "Comply Chain App," https://www.dol.gov/general/apps/ilab-comply-chain.

Uyghur forced labor must be suspected in virtually any product using raw agricultural materials from Xinjiang, risking exclusion from the U.S., but businesses have had trouble tracking remote layers of subcontractors. Efforts are underway to develop electronic supply chain recording. A growing number of companies, in the meantime, are reconstructing their supply chains. In a business nightmare, as major brands such as H&M have proclaimed to western audiences that they will eliminate cotton from Xinjiang from their products, the Chinese government has encouraged Chinese consumers to retaliate through massive consumer boycotts and to switch their allegiance to Chinese brands.

Although extreme, the Uyghur situation is far from isolated. During FY 2020, CBP issued twelve WROs, the most ever in a single year. Thus far in FY 2021, CBP has issued four. Cotton and cotton products from Turkmenistan are under a 2018 WRO. Supply chains with links to anything produced by labor from North Korea, whether working in North Korea, China, or elsewhere, are subject to a WRO and to other foreign policy-based sanctions. WROs apply to fishing vessels accused of using forced labor to harvest seafood. Tobacco products from Malawi are under a WRO. Disposable gloves produced by Malaysia's Top Glove Corporation achieved notoriety recently. Malaysian palm oil products have been detained at the U.S. border.

Labor and employment lawyers should address the urgency of eliminating forced labor in American supply chains. It would be ironic in the extreme, and devastatingly sad morally, if labor and employment lawyers lagged behind trade and customs attorneys in highlighting this imperative when counseling their clients. Moreover, forced labor and heightened national security considerations are viewed by many commentators as moving companies towards re-shoring many types of production. It is American labor and employment lawyers whose expertise will be necessary, working together with foreign counterparts, if substantial reinvestment in U.S. production is to be done properly, as a matter of law, economics, and business ethics. •

Marley S. Weiss is professor of law at the University of Maryland Carey School of Law. She is academic co-chair of the ABA Section of Labor and Employment Law's Immigration and Human Trafficking Committee. She is a former co-chair of the International Labor and Employment Law Committee. She also is a former Secretary of the Section.

IN MEMORIAM

Last November, our Section lost one of its finest members with the passing of **Steve Moldof**. Steve truly was a lawyer's lawyer—a formidable litigator, negotiator, strategist and advisor. He devoted his professional life to advancing collective bargaining and the interests of working people.

As befitting someone who loved to travel, he devoted the majority of his career to representing the Air Line Pilots Association. He litigated many of the seminal cases affirming that labor unions should be given broad deference in carrying out their representational duties. Some of his earliest cases, on behalf of flight attendants who were pregnant or living with chronic medical conditions, made real the guarantees of the federal non-discrimination laws and fundamentally changed the workplace. Steve served as Co-Chair of the ABA Railway and Airline Labor Law Committee and later as Council Liaison.

An expert on international labor law, Steve was an active and beloved member of the ABA International Labor and Employment Law Committee, serving as the Committee Co-Chair from 2000 to 2007.

In 2018, he was elected Vice Chair of the ABA Section of Labor and Employment Law, and he was slated to become the Section Chair-Elect in August 2020 until his illness deferred that plan. By unanimous consent, the Section Council voted to make Steve Honorary Section Chair-Elect for the remainder of the current ABA year and Honorary Section Chair for 2021-2022.

Steve was also a charter member of the College of Labor and Employment Lawyers.

As his many friends and colleagues can attest, Steve's passion for travel, walking and listening to jazz, as well as his good taste in food and wine, led to many enjoyable times with him at ABA and other professional conferences. He will be greatly missed. •

The U.S. Supreme Court's 2020 EEO Jurisprudence

Two Decisions that Matter and One that Probably Doesn't

BY MICHAEL C. SUBIT AND J. RANDALL COFFEY

In 2020 the United States Supreme Court issued three decisions relating to EEO Law. One was extremely important (*Bostock v. Clayton County, GA*, 140 S. Ct. 1731), one was pretty important (*Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049); and one was pretty unimportant (*Babb v. Wilkie*, 140 S. Ct. 1168).

Justice Gorsuch's majority opinion for six Justices in *Bostock* held that "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids." The Court made explicitly clear that it is irrelevant that a prohibition on the basis of sexual orientation or transgender status was never anticipated by the Congress that passed Title VII. "[M]any, maybe most, applications of Title VII's sex provision were 'unanticipated' at the time of the law's adoption."

The Court reaffirmed that "because of" ordinarily means "but for" causation; "a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." The Court acknowledged that "but-for" can be a "sweeping standard" that includes multiple causes. "[T]he adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision."

Significantly, the Court observed that Title VII prohibits discrimination against individuals as opposed to groups or categories of individuals. As a consequence, "[i]t's no defense for the employer to note that, while he treated that individual woman worse than he would have treated a man, he gives preferential treatment to female employees overall. The employer is liable for treating *this* woman worse in part because of her sex." (Emphasis original). An employee doesn't have to prove that the employer discriminates against *all* women or men, only the employee bringing the claim. An employer who treats men and women equally but discriminates among both women and men because of sex-related characteristics doubles its liability.

Discrimination because of sexual orientation or transgender status unavoidably discriminates on the basis of sex, the Court said, because the employer would have treated an employee of the opposite sex differently under the circumstances. It does not matter that another causal factor may also be at play. Intentional discrimination based on sex violates Title VII even if it is intended to achieve the employer's ultimate goal of discriminating based on sexual orientation or transgender status. If "changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred." Again, it simply does not matter that the employer doesn't perceive itself as motivated by a desire to discriminate on the basis of sex.

Bostock expressly left open how the Court would analyze a discrimination claim against a religious employer. *Our Lady of Guadalupe School* gave an answer to that question at least as far as religious-school teachers are concerned. The Court ruled 7-2 that such teachers cannot bring claims for EEO discrimination. Justice Alito explained that the purpose of the First Amendment's so-called "ministerial exception" is to protect the autonomy of religious institutions with respect to internal management decisions that are essential to the institutions' central mission, in particular the selection of the individuals who play certain key roles.

Hosanna-Tabor Evangelical Luther Church and School v. EEOC, 565 U.S. 171 (2012), had made four circumstances relevant—the employee's title, religious training, whether the employee held herself out as minister, and whether the employee's job duties reflected a role in conveying the institution's message and mission. The *Our Lady of Guadalupe School* Court cited the *Hosanna-Tabor* concurrence's emphasis on the function rather than labels or designations and held the *Hosanna-Tabor* factors are not inflexible requirements or a "rigid formula," and "[w]hat matters, at bottom, is what an employee does."

After reviewing the importance of religious education in several faiths, the majority reasoned that "educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." The Court found that the teachers here were responsible for providing instruction in all subjects, including religion, and were the members of the school staff who were entrusted most directly with the responsibility of educating their students in the faith. Even though their titles did not include the term "minister" and they had little formal religious training, they both had their core responsibilities as teachers of religion."

The Court rejected the plaintiffs' assertion that that ministerial exception should be limited to members, practicing or otherwise, of the religion with which the school is associated.

Finally, *Babb* involved the federal sector provision of the ADEA, which provides that personnel actions "shall be made free from any discrimination based on age." Writing for all but Justice Thomas, Justice Alito held the plain text of the statute established "that age need not be a but-for cause of an employment decision in order for there to be a violation . . . ." "If age discrimination plays any part in a way a decision is made, then the decision is not made in a way that is untainted by such discrimination."

The Court went on to hold that proof of but-for causation would determine the appropriate remedy. "[P]laintiffs who demonstrate that they were only subject to unequal consideration cannot obtain reinstatement, backpay, compensatory damages, or any other forms of relief related to the end result of an employment decision." The Court found such a plaintiff who could not show but-for causation could receive only "injunctive or other forward-looking relief." •

Mike Subit is a partner at Frank Freed Subit & Thomas in Seattle. He represents plaintiffs in employment matters and unions in labor matters, in both individual cases and class actions.

Randy Coffey is a partner in the Kansas City office of Fisher Phillips LLP. He regularly provides advice and counsel to employers in all aspects of employment law, and litigates class and individual discrimination cases under federal and state law, as well as FMLA and wage and hour matters. Randy has tried more than 30 lawsuits during his career.

DISCRIMINATION BECAUSE OF SEXUAL ORIENTATION OR TRANSGENDER STATUS UNAVOIDABLY DISCRIMINATES ON THE BASIS OF SEX, THE COURT SAID, BECAUSE THE EMPLOYER WOULD HAVE TREATED AN EMPLOYEE OF THE OPPOSITE SEX DIFFERENTLY UNDER THE CIRCUMSTANCES.

Calendar of Events

NOVEMBER 10–13 | 2021
15th Annual Section of Labor & Employment Law Conference
Beverly Hilton
Los Angeles, California

JANUARY 27–29 | 2022
State & Local Government Bargaining & Employment Law Committee
MIDWINTER MEETING
Westin Resort
Puerto Vallarta, Mexico

FEBRUARY 2–5 | 2022
Employee Benefits Committee
MIDWINTER MEETING
Hilton New Orleans Riverside
New Orleans, Louisiana

MARCH 8–11 | 2022
Occupational Safety & Health Law Committee
MIDWINTER MEETING
Westin Sarasota
Sarasota, Florida

MARCH 15–19 | 2022
Employment Rights & Responsibilities Committee
MIDWINTER MEETING
Westin Resort
Puerto Vallarta, Mexico

MARCH 30–APRIL 2 | 2022
National Conference on Equal Employment Opportunity Law
The Peabody Hotel
Memphis, Tennessee

NOVEMBER 9–12 | 2022
16th Annual Section of Labor & Employment Law Conference
Marriott Marquis
Washington, DC

FOR MORE EVENT INFORMATION, CONTACT THE SECTION OFFICE AT 312/988-5813 OR VISIT **www.americanbar.org/laborlaw**.

AMERICAN BAR ASSOCIATION
Labor and Employment Law Section

WHAT TO EXPECT

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unions that conduct such secondary strikes; and (4) imposes penalties on companies that interfere with workers' organization efforts.

Repealing Prior Executive Orders. Presidential executive orders have become a preferred means of making policies when initiatives do not move in Congress. President Biden has already used executive orders to revisit and/or repeal the prior administration's orders and issue new ones. One of the first executive orders repealed was Executive Order 13950 "Combatting Race and Sex Stereotyping," which sought to regulate the contents of diversity and inclusion training. Other executive orders that President Biden has already or may revisit concern immigration, including a proposed rule to "preserve and fortify" the Deferred Action for Childhood Arrivals (DACA) policy.

Revisiting some Federal Wage and Hour Laws. The Department of Labor has moved quickly to rescind its regulation interpreting the joint employer status under the Fair Labor Standards Act, and remove the regulation at 29 CFR Part 791 established by the Rule. Additionally, consistent with the memorandum of January 20, 2021, from the Assistant to the President and Chief of Staff, titled "Regulatory Freeze Pending Review," the Department subsequently issued a notice on March 4, 2021 delaying the DOL's Independent Contractor Status Under the Fair Labor Standards Act Rule's effective date until May 7, 2021. On March 11, 2021, the Department announced a notice of proposed rulemaking proposing to rescind the Independent Contractor Rule.

Paycheck Fairness Act. President Biden was a former co-sponsor of this act as a Senator. The bill addresses wage discrimination on the basis of sex, which is defined to include sex stereotypes, pregnancy, sexual orientation, gender identity, and sex characteristics. Some of the highlights of the bill include: (1) banning salary history questions during interviews; (2) limiting an employer's defense that a pay differential is based on a factor other than sex to only bona fide job-related factors in wage discrimination claims; (3) making it unlawful to require an employee to sign a contract or waiver prohibiting the employee from disclosing information about the employee's wages; and (4) increasing civil penalties for violations of equal pay provisions.

Minimum Wage Increases. Many expect the Biden Administration to push for raising the federal minimum wage, following states and local governments nationwide, who have passed laws steadily increasing their minimum wage rates. The last time the federal minimum wage was raised was over ten years ago, and currently remains at $7.25 per hour.

Many of the new labor and employment laws and initiatives include a continuation of policies from the last year. The above does not fully incorporate all of the legal changes expected in the weeks and months to come. •

Demetrius Pyburn is an associate with Haynsworth Sinkler Boyd, P.A in Greenville, South Carolina. He offers advice and counsel to clients on aviation and drone law, in addition to employment law issues involving the ADA, FMLA, Title VII and other employment-related regulations.

FIFTH CIRCUIT

CONTINUED FROM PAGE 8

argue that nothing in the text of the FLSA requires a two-step conditional certification analysis.

Plaintiffs' counsel have pushed back against the *Swales* approach, arguing that that the pre-certification discovery and more stringent inquiry proposed by *Swales* conflates conditional certification with decertification, and that the delay caused by this approach frustrates the remedial purposes of the FLSA and the benefits of early notice as set out by the Supreme Court in *Hoffman-LaRoche*. Plaintiffs' counsel have also argued that further delay prejudices the claims of potential opt-in plaintiffs, which diminish with each week that passes without notice.

The majority of district courts presented with *Swales* arguments so far have rejected *Swales* and have stood by the traditional two-step conditional certification approach. *See, e.g., Wright v. Waste Pro USA, Inc.*, 2021 WL 1290299, at *3 (S.D. Fla. Apr. 6, 2021) ("no court outside of the Fifth Circuit has followed the *Swales* opinion in the three months since it was issued."); *Brewer v. Alliance Coal*, LLC, 2021 WL 1307721, at *1 (E.D. Ky. Apr. 6, 2021) ("While the Court agrees that nothing in the Sixth Circuit's case law precludes the use of an approach similar to that of the Fifth Circuit in *Swales*, the Court will nevertheless follow the historical, two-stage approach most often utilized in this circuit."); *McCoy v. Elkhart Prods. Corp.*, 2021 WL 510626, at *2 (W.D. Ark. Feb. 11, 2021) ("Defendant requests the Court to follow the recent Fifth Circuit opinion in *Swales* . . . The Court will follow the historical, two-stage approach, which has proven to be an efficient means of resolution of this issue . . . Defendant's complaint that the two-stage approach leads courts to grant conditional certification without reviewing if potential opt-in plaintiffs are similarly situated is unfounded."); *Piazza v. New Albertsons*, 2021 WL 365771, at *5, n. 6 (N.D. Ill. Feb. 3, 2021) ("The Court declines New Albertsons' invitation to deviate from the well-established process or standard to allow the parties to engage in extensive discovery based on *Swales*.").

For now, *Swales* and its reasoning appear confined to the Fifth Circuit, and the two-step approach to conditional certification of FLSA cases continues to have widespread support in district courts across the country. •

Olena Savytska is an associate attorney at Lichten & Liss-Riordan, P.C., in Boston, Massachusetts.

CHAIR'S COLUMN

CONTINUED FROM PAGE 2

Co-Chairs for their hard work, dedication and creativity in presenting this year's Midwinter Meetings in a virtual format, and to the sponsors and attendees for their support.

It is well documented that women have been particularly hard hit by the pandemic. I was proud that our union, employee, in-house corporate counsel, employer and government representatives on the Section Council all came together to support the ABA House of Delegates resolution that encourages bar associations, specialty bar associations, legal employers and law schools to develop policies and best practices regarding fair and affordable access to and support for high-quality family care for all individuals working in the legal profession. The House of Delegates passed the Resolution on February 22, 2021. The Section is uniquely positioned to continue supporting the efforts of encouraging legal employers and organizations to adopt practices to create equity for women. In that regard, Past Section Chair Gail Golman Holtzman graciously volunteered to draft template family care policies that the ABA Practice Forward Coordinating Group can share with organizations needing assistance with creating appropriate policies modelled on best practices.

As a former Commissioner of the ABA Commission on Women in the Profession, I was pleased to pledge the Section's support for the ABA Commission on Women in the Profession Day of Conversation. The Commission invited interested organizations and individuals to commit to hosting conversations to address equity within the profession by using the Commission's *This Talk Isn't Cheap: Women of Color and White Women Attorneys Find Common Ground* report and Guided Conversations toolkit. The purpose of the Day of Conversation, which took place on April 27, 2021, was to build allyship and to help reduce bias in the legal profession with a particular emphasis on the intersectionality of race and gender in the legal profession and how women of color and white women can bridge gaps in understanding and build allyship to promote racial equity. Given our Section's focus on DEI, in addition to encouraging our Section members to host their own Day of Conversation, I brought the Section's leaders together to participate in the Day of Conversation as a group. Gail Golman Holtzman and Dean Emeritus Cynthia Nance adeptly facilitated the discussion in which our Section leaders' actively participated.

> THE SECTION IS UNIQUELY POSITIONED TO CONTINUE SUPPORTING THE EFFORTS OF ENCOURAGING LEGAL EMPLOYERS AND ASSOCIATIONS TO ADOPT PRACTICES TO CREATE EQUITY FOR WOMEN . . .

On July 21–23, 2021, the Section will hold its eighth Leadership Development Program (LDP). Continuing our focus on DEI, this year's LDP is designed to enhance inclusive leadership skills and Section governance knowledge in members from all constituencies of the Section. I'm thrilled that Dr. Arin N. Reeves, President of Nextions LLC, will be the facilitator for this year's LDP. Dr. Reeves is a leading researcher, speaker and author in the fields of leadership and inclusion. She has advised countless organizations, firms and bar associations on inclusive leadership and allyship and will bring her insight, research and practical advice to our 2021 LDP class. I had the privilege of participating in the inaugural LDP class in 2009, and many of the Section's most active leaders have graduated from the program. I encourage active Section members to apply for the class, which will undoubtedly help you in your volunteer work within the Section—and your day jobs, too!

On a sad note, Section Vice Chair Steve Moldof passed away on November 9, 2020. Even before Steve and I served together on the Section's Executive Committee, I got to know Steve and his wife Mike at Section events, and in particular, at the Section's International Labor and Employment Law Committee Midyear Meetings. I enjoyed spending time with them and was very pleased to get to spend more time with them and work more closely with Steve when he was first elected as Vice Chair in August 2018. Steve was a phenomenal lawyer and gracious human being. I sorely miss his presence on the Executive Committee. Had he not fallen ill, Steve would have been serving side-by-side with me as Chair-Elect this year, so I was very pleased when the Council enthusiastically embraced my idea to appoint him as Honorary Chair-Elect for the remainder of this term and Honorary Chair for the next bar year.

I would like to end by expressing my eternal gratitude to Doug Dexter, Section Vice Chair, who consistently demonstrates his commitment to DEI and models allyship through his words and actions. I would also like to thank the entire Executive Committee, Council and Committee leadership for their commitment and service to the Section and our members. I would also like to express my gratitude to the Section's phenomenal Section Director Brad Hoffman, Associate Director Rose Ashford, Section Assistant Judy Stofko, and Program Specialist Fifi Adekola. I'm beyond grateful for their efforts. We will all continue to work together to provide Section members with a meaningful and impactful year.

The Section of Labor and Employment Law is *your* section, and I want to make sure that we focus on initiatives that are important to you. I thank the Newsletter Committee leadership for their dedication and efforts in publishing this newsletter and I appreciate this opportunity to share information on Section developments and initiatives. •

Samantha Grant is a partner with Sheppard Mullin in Century City. She became Chair of the Section on August 1, 2020.


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