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Tyson Foods and Other Threats to Employment Class Actions

By David Borgen

The roster of cases pending on the Supreme Court's docket for the term starting in October 2015 poses substantial threats to the viability of employment class actions.

The Supreme Court will hear oral arguments on *Tyson Foods, Inc., v. Bouaphakeo*, No. 14-1146, on November 10, 2015. Back on August 25, 2014, the Eighth Circuit had affirmed the jury's $5,785,757.40 verdict on compensable time claims brought under both the Fair Labor Standards Act (FLSA) and the Iowa Wage Payment Collection Law. The class plaintiffs sued Tyson for not paying overtime for time spent donning and doffing personal protective equipment (PPE) and clothing as well as for walking time between lockers and the production floor in a meat processing plant in Storm Lake, Iowa. Tyson paid the employees on "gang time" and "K-code" time but did not record all the allegedly compensable work time, resulting in the alleged underpayments. The court conducted a nine-day jury trial in which plaintiffs proved liability and damages using individual time sheets, and average donning, doffing, and walking times calculated from 744 videotaped

employee observations. The class had 3,344 members, of whom 212 workers had no damages for overtime pay even when the average uncompensated times were added to their time sheets. On appeal, the Eighth Circuit affirmed under *Anderson v. Mt. Clemens Pottery* (1946), which allows, when an employer fails to keep records, for damages to be estimated by just and reasonable inferences from representative evidence.

This might appear, to many of the Section's wage/hour class action litigators, to be an unremarkable scenario. However, the Supreme Court granted certiorari on two questions that go to the heart of whether private counsel or even the Secretary of Labor can enforce overtime or minimum wage laws on a class, collective, or group basis. The two questions presented are (1) whether a wage/hour class action under FRCP 23(b)(3) can be tried using representative evidence resulting in an average recovery, and (2) whether in a Rule 23(b)(3) or collective action plaintiffs must demonstrate that all class members have been injured (i.e., have damages)? A ruling in *Tyson* could conceivably limit or overrule the longstanding *Mt. Clemens* rule, decades of enforcement practices by the Department of Labor, and the more recent trend, starting in the 1990s, of wage/hour enforcement by the private bar. Already, at least one federal court in California has stayed a putative wage/hour class action seeking payments for bag check time to await a ruling in *Tyson* (*see Pelz v. Abercrombie & Fitch*, No. CV14-06327-DSF, C.D. Cal., Dkt. No. 63). In late September, the Solicitor General and the Solicitor of Labor submitted a brief in support of the employees' position. Numerous employer and employee advocates have also submitted amicus briefs on these critical issues.

On April 27, 2015, the Supreme Court also granted certiorari in *Robins v. Spokeo*, No. 13-1339, a Fair Credit Reporting Act (FCRA) case out of the Ninth Circuit.

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Estreicher's Judicial Performance Index

By Samuel Estreicher

Political criteria for judging the Supreme Court's work are hopelessly unsatisfying as long as we reserve the right to have different political views and legal philosophies and the Court continues to have a completely discretionary docket. I propose, instead, a more limited criterion that may generate broader consensus: Is the Court deciding what it has to and no more than it has to? In the table that follows, I apply this criterion to labor and employment cases argued and decided during the Court's 2012–2013 Term. A grade of 1 is awarded whenever the Court decides the case on the issue presented by the petition and the facts and rules no more than is necessary to address that question; if the Court purports to decide (rather than merely offer dicta on) a broader issue, it receives a score of 0. On the other hand, when the Court hears a case and fails to address a fairly presented issue, it also receives a score of 0.

Eight years of results are in:

- In the 2005–2006 Term, the Court heard nine cases involving labor and employment issues. The maximum score it could have received was 9; instead, it received a grade of 4, for an overall performance score of .44.
- In the 2006–2007 Term, the Court heard four cases raising labor and employment issues and received the maximum score of 4, for an overall performance score of 1.0.
- In the 2007–2008 Term, the Court decided 11 cases raising labor and employment issues and received a grade of 10, for

THE SUPREME COURT'S 2013–2015 LABOR AND EMPLOYMENT DECISIONS

Case	Issue	Judicial Restraint?	Non-Decision?	Net Score
EEOC v. Abercrombie & Fitch Stores, Inc., 135 S.Ct. 2028 (2015)	Whether an employer can be liable under Title VII for refusing to hire an applicant or discharging an employee based on a "religious observance and practice" only if the employer has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee.	Decided question presented.	No	1
Tibble v. Edison International, 135 S.Ct. 1823 (2015)	Whether a claim that ERISA plan fiduciaries breached their duty of prudence by offering higher-cost retail-class mutual funds to plan participants, even though identical lower-cost institution-class mutual funds were available, is barred by 29 U. S. C. §1113(1) when fiduciaries initially chose the higher-cost mutual funds as plan investments more than six years before the claim was filed.	Decided question presented.	No	1
Mach Mining, LLC v. EEOC, 135 S.Ct. 1645 (2015)	Whether and to what extent a court may enforce the EEOC's mandatory duty to conciliate discrimination claims before filing suit.	Decided question presented.	No	1
Young v. United Parcel Service, Inc., 135 S.Ct. 1338 (2015)	Whether, and in what circumstances, an employer that provides work accommodations to nonpregnant employees with work limitations must [under 42 U.S.C. § 2000e(k)] provide work accommodations to pregnant employees who are "similar in their ability or inability to work."	Decided question presented.	No	1
Perez v. Mortgage Bankers Assn., 135 S.Ct. 1199 (2015)	Whether a federal agency must engage in notice-and-comment rulemaking before it can significantly alter an interpretative rule that articulates an interpretation of an agency regulation.	Decided question presented.	No	1
M&G Polymers USA v. Tackett, 135 S.Ct. 926 (2015)	Whether, when construing collective bargaining agreements in LMRA courts should presume that silence concerning the duration of retiree health-care benefits means the parties intended those benefits to vest (and therefore continue indefinitely…); or should require a clear statement that health-care benefits are intended to survive the termination of the collective bargaining agreement…; or should require at least some language in the agreement that can reasonably support an interpretation that health-care benefits should continue indefinitely…	Decided question presented.	No	1
Dept. of Homeland Security v. MacLean, 135 S.Ct. 913 (2015)	Whether certain statutory protections codified at 5 U.S.C. §2302(b)(8)(A), which are inapplicable when an employee makes a disclosure "specifically prohibited by law," can bar an agency from taking an enforcement action against an employee who intentionally discloses sensitive security information.	Decided question presented.	No	1
Integrity Staffing Solutions, Inc. v. Busk, 135 S.Ct. 513 (2014)	Whether time spent in security screenings is compensable under the FLSA, as amended by the Portal-to-Portal Act.	Decided question presented.	No	1
Harris v. Quinn, 134 S.Ct. 2618 (2014)	1. May a state, consistent with the First and Fourteenth Amendments to the United States Constitution, compel personal care providers to accept and financially support a private organization as their exclusive representative to petition the state for greater reimbursements from its Medicaid programs? 2. Did the lower court err in holding that the claims of providers in the Home Based Support Services Program are not ripe for judicial review?	Decision sprinkled with dicta re overruling *Abood.*		0

an overall performance score of .9.

- In the 2008–2009 Term, the Court decided nine cases raising labor and employment issues and received a grade of 6, for an overall performance score of .67.
- In the 2009–2010 Term, the Court decided ten cases raising labor and employment issues and received a grade of 8, for an overall performance score of .8.
- In the 2010–2011 Term, the Court decided 11 cases raising labor and employment issues and received a grade of 9, for an overall performance score of .81.
- In the 2011–2012 Term, the Court decided six cases raising labor and employment issues and received a grade of 5, for an overall performance score of .85.
- In the 2012–2013 Term, the Court decided seven cases raising labor and employment issues (although two did not arise in an employment context) and received a grade of 3, for an overall performance score of .43.
- In the 2013-2014 Term, the Court decided ten cases raising labor and employment issues (although one case involved a dismissal after briefing and oral argument) and received a score of 5 for an overall performance score of .45. (The overall performance score would have been .0.5 if the cert. dismissal were not counted.)
- In the 2014-2015 Term, the Court decided eight cases raising labor and employment issues and received a grade of 8, for an overall performance score of 1.0.

After a hesitant start in the 2005–2006 Term, with the dip repeated in the 2008–2009, 2012–2013, and 2013-2014 Terms, the Court appears to be doing a fairly decent job of deciding the question presented and not deciding more than it has to (in deciding that question) in cases involving the law of the workplace.

We will apply the same criteria to evaluate the Court's work product during the 2015-2016 Term. Stay tuned. ■

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NLRB v. Noel Canning, 134 S.Ct. 2550 (2014)	1. Whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate 2. Whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess.	Decided more than it had once it ruled against the President on short-term recesses between two pro forma sessions.		0
Fifth Third Bancorp v. Dudenhoeffer, 134 S.Ct. 2459 (2014)	1. Whether the Sixth Circuit erred by holding that respondents were not required to plausibly allege in their complaint that the fiduciaries of an employee stock ownership plan (ESOP abused their discretion by remaining invested in employer stock, in order to overcome the presumption that their decision to invest in employer stock was reasonable, as required by ERISA and every other circuit to address the issue. 2. Whether the Sixth Circuit erred by refusing to follow precedent of this Court (and the holdings of every other circuit to address the issue) by holding that filings with the Securities and Exchange Commission (SEC) become actionable ERISA fiduciary communications merely by virtue of their incorporation by reference into plan documents.	Extended essay on how future litigation should be handled.		0
Lane v. Franks, 134 S.Ct. 2369 (2014)	1. Is the government categorically free under the First Amendment to retaliate against a public employee for truthful sworn testimony that was compelled by subpoena and was not part of the employee's ordinary job responsibilities? 2. Does qualified immunity preclude a claim for damages arising from such retaliation?	Decided question presented.	No	1
Schuette v. Coalition to Defend Affirmative Action, 134 S.Ct. 1623 (2014)	Whether a state violates the Equal Protection Clause by amending its constitution to prohibit race- and sex-based discrimination or preferential treatment in public-university admissions decisions.		No majority for a position.	0
United States v. Quality Stores, Inc., 134 S.Ct. 1395 (2014)	Whether severance payments made to employees terminated against their will are taxable wages under the Federal Insurance Contributions Act, 26 U.S.C. § 3101 et seq.	Decided question presented.	No	1
Lawson v. FMR LLC, 134 S.Ct. 1158 (2014)	Is an employee of a privately held contractor or subcontractor of a public company protected from retaliation by Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A?	Decided question presented.	No	1
Sandifer v. United States Steel Corp., 134 S.Ct. 870 (2014)	1. What constitutes "changing clothes" within the meaning of Section 203(o) of the FLSA, 29 U.S.C. § 203(o)? 2. If a worker's actions are a principal activity but fall within the scope of the Section 203(o) exemption, do those actions nonetheless commence the period of time during which (aside from the clothes-changing time) the worker must be compensated? 3. If a worker engages in a principal activity which is not exempted by Section 203(o), but which involves only a *de minimis* amount of time, does the activity nonetheless commence the period of time during which the worker must be compensated?	Decided question presented.	No	1
Heimeshoff v. Hartford Life & Accident Insurance Co., 134 S.Ct. 604 (2013)	When should a statute of limitations accrue for judicial review of an ERISA disability adverse benefit determination?	Decided question presented.	No	1
Unite Here Local 355 v. Mulhall, 134 S.Ct. 594 (2013)	Whether an employer and union may violate Section 302 of the LMRA by entering into an agreement under which the employer exercises its freedom of speech by promising to remain neutral to union organizing, its property rights by granting union representatives limited access to the employer's property and employees, and its freedom of contract by obtaining the union's promise to forego its rights to picket, boycott, or otherwise put pressure on the employer's business.		No decision – cert, dismissed.	0

THE SECTION

By Wayne N. Outten

As the new Chair of the Section, my first order of business is to recognize the exceptional service of my predecessor as Chair, Joyce Margulies. It is difficult to imagine how anyone could give more time, energy, and dedication than she gave during her year as Chair. On behalf of our Section, I would like to thank Joyce for all she has done—and continues to do—for the Section. I look forward to working during the next year with Gail Holtzman, Chair-Elect, and the other members of the Strategic Planning Committee: Don Slesnick, Vice Chair (union and employee), Joe Tilson, Vice Chair (employer), and Joyce Margulies, Immediate Past Chair.

My second order of business is to urge all Section members (and others) to attend our Section's excellent CLE offerings over the next year. Of course, our 9th Annual Labor and Employment Law Conference will be held in Philadelphia, November 4–7, 2015, at the Loews Philadelphia Hotel. The complete program may be viewed on our website at ambar.org/laborconference. Our 10th Annual Labor and Employment Law Conference will be held in Chicago, November 9–12, 2016. In between, each of our 15 Standing Committees will conduct a midwinter meeting. See the Calendar of Events at the end of this newsletter setting forth the dates and locations of those meetings. Also, our Webinar Committee will be producing many programs between now and next September; keep an eye on your email inbox for the invitations to those webinars, or check our website at americanbar.org/laborlaw.

My third order of business is to state that my initial goal as a Section leader is to use my business background and experience to help solidify the financial and administrative aspects of the Section's operations. The remainder of this column addresses some of those activities during recent months.

In her last column, Joyce mentioned that the Section's leadership (the Strategic Planning Committee and the Council) spent considerable time on an "in-depth review of the Section's budget to ensure its alignment with Section priorities and its fiscal integrity." That is definitely the case.

Over the past decade, the Section has invested heavily in the funding of new and expanded programs to increase CLE offerings (e.g., the Annual Section Conference and webinars), to improve other programs, to increase membership, and to enhance member benefits. The Strategic Planning Committee, working closely with Section Director Brad Hoffman, prepared a budget for the fiscal year starting September 1, 2015, that reflects some reductions in spending and increases in revenues. The Council approved that budget in June. During this fiscal year, we will be focused on continuing our many significant initiatives and programs and on enhancing non-dues revenues (e.g., registrations for CLE programs and sponsorships from law firms and vendors).

After the budget was approved, the Section leadership turned its attention to the Section's various committees and task forces. Over the years, the Section's programs, activities, and initiatives have led to the piecemeal creation and evolution of various committees, subcommittees, and task forces, resulting in a sometimes confusing organizational structure. Accordingly, during recent weeks, I have worked with Gail, Joyce, and Brad (and other members of the SPC) to re-examine the roles, descriptions, and relationships of the Section's committees, subcommittees, and task forces. The result is a major reorganization. See the Section's website for the new lineup of committees and task forces.

In short, the Section's Standing Committees will remain substantially the same, though three Standing Committees will be transformed due to newly articulated criteria for Standing Committee status: specifically, a Standing Committee must have a membership base and an annual CLE meeting of its membership. Under these standards, the Federal Legislative Developments (Standing) Committee will become an Administrative Committee; the Immigration Committee will merge into the Human Trafficking Task Force, which will become the Immigration and Human Trafficking (Administrative) Committee; and the Union Administration and Procedure (Standing) Committee will become an Administrative Committee.

The Administrative Committees have been changed in numerous ways, such as the following:

- On the CLE front, the National Programs Subcommittee (NPS) of the CLE/Institutes and Meetings Committee has been renamed to reflect its actual role—and has been elevated to full committee status—as the Webinar Committee; the Annual Section Conference Subcommittee and the ABA Annual Meeting Subcommittee have been elevated to full committee status; and a new CLE Coordinating and Resources

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Technology Tools for Labor and Employment Lawyers

By Melissa Stewart

Technology is not just a challenge for lawyers— it is also an opportunity. New technology tools are revolutionizing the way lawyers do business, giving labor and employment litigators smart, cost-effective solutions for common litigation tasks.

Get It Signed

Labor and employment lawyers routinely gather signatures for a range of documents such as declarations, discovery responses, and consent forms, as well as retainers and employment agreements. Several companies, including "DocuSign," which holds the largest market share, give lawyers a quick, cost-effective way to gather digital signatures through email, without the need for printers and scanners.

Gathering signatures electronically allows for instantaneous transmission and cuts transaction costs, including mailing and printing. Clients, witnesses, and employees can sign documents from the comfort of their computer or mobile device.

Attorneys can upload documents to be signed, create templates for commonly used documents, and send documents to multiple signers, with automated workflows embedded in the program. For example, after the client verifies and signs a discovery response, the program can send an email requesting the attorney's final review and signature.

These programs are encrypted for secure access and save an audit trail for each document, including each person's signature date, time, and IP address. Cases like *Lorraine v. Markel Am. Ins. Co.*, have held that like documents signed in hard copy, documents signed electronically are subject to the normal authenticity and admissibility requirements. Additionally, the Electronic Signatures in Global and National Commerce Act (ESIGN), provides that "a signature … may not be denied legal effect … solely because it is in electronic form." For litigation documents, practitioners should refer to local court rules for specific information regarding the submission of electronically signed documents.

Separate the Wheat from the Chaff

Labor and employment cases regularly require attorneys to sift through large volumes of electronic documents. Most e-discovery tools have technology-assisted review (TAR) tools that can save countless hours in attorney time, for both producing and receiving parties.

As they become more advanced, TAR tools are earning the blessing of courts and commentators alike, who hail TAR as a smart way to control costs. For example, amendments to the Federal Rules of Civil Procedure, adopted by the Supreme Court, and set to become effective December 1, 2015, absent congressional action, encourage parties to consider options for reducing the burden or expense of discovery through the use of computer-based document search methods (in other words, TAR).

TAR tools can save time and costs for producing parties (in the search phase) or for receiving parties (in the review phase). Common time-saving TAR tools include clustering, threading, and predictive coding.

Clustering. Clustering tools analyze language to find concepts and themes in documents, and map relationships between themes in a document collection. Because clustering tools do not require significant user input, they can be a helpful way to explore a set of documents at the early stages of review when the team is unfamiliar with the data set. Clustering can be used across an entire database, or, for a more targeted search, within a particular set of custodians or date ranges.

Threading. An email "thread" is a single email conversation, including the original message and all responses. "Threading" tools group related emails so that they can be reviewed alongside other emails in the same conversation. Because reviewers are able to understand the full context of an email conversation, they can make a quick decision about responsiveness or relevance for an entire group of emails at the same time. Threading can also identify inclusive versions (that contain the most complete conversation chain), which cuts review time for duplicative emails.

Predictive Coding. Predictive coding—a machine-learning technology that can be trained, based on examples, to identify relevant documents—can be used to cull, identify, and prioritize the review of key documents in large data sets after production. The training is accomplished by feeding the system exemplar documents (seed sets) and/or input from knowledgeable human reviewers as to the responsiveness of documents sampled from the relevant universe.

Cooperation in Using TAR. Where TAR tools are applied to identify responsive documents at the search phase, the producing party should engage the other side to ensure a defensible and cost-effective process. *See, e.g., Rio Tinto PLC v. Vale S.A.*, No. 14 Civ. 3042, 2015 WL 872294, at *2 (S.D.N.Y. Mar. 2, 2015) (Peck, M.J.) (discussing the evolving standards for transparency and cooperation in technology-assisted review); *In re Actos (Pioglitazone) Products Liab. Litig.*, No. 11 MDL 2299, 2012 WL 7861249, at *4 (W.D. La. July 27, 2012) (describing collaborative process whereby both parties simultaneously reviewed and coded the seed set); *Moore v. Publicis Groupe*, 287 F.R.D. 182, 192 (S.D.N.Y. 2012), *adopted by* No. 11 Civ. 1279, 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012) (discussing best practices for transparency and cooperation in e-discovery).

The 2015 amendments to the Federal Rules of Civil Procedure underline the importance of transparency in applying TAR at the initial search phase. For example, the rules as amended require that document request objections explicitly "state whether any responsive materials are being withheld[.]" Fed. R. Civ. P. 34(b)(2)(C) (as amended, effective December 1, 2015). As examples of ways to comply with that requirement, the advisory committee's notes discuss objections that explain time limits or search terms applied to an electronic search for responsive documents. Fed. R. Civ. P. 34(b)(2)(B) & (C), advisory committee's notes.

Show Off Your Presentation Skills

Lawyers have been moving beyond easels, overhead projectors, and PowerPoint, into a new world of courtroom presentation software. The main competitors are TrialDirector, Sanction, and TrialPad. With these programs, presenters can switch seamlessly between exhibits without fumbling through binders when examining witnesses or giving a closing statement.

These programs present video deposition testimony, often with syncing to transcript text page and line number; and allow attorneys to pull up exhibits, and with click-and-present ease, highlight, call out, and enlarge text. Many federal courtrooms are now equipped for electronic evidence presentations. ■

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New NLRB Rules Spark Faster Elections

By Eileen B. Goldsmith

The National Labor Relations Board's new rules for union representation elections took effect in April, leading to faster union elections and so far unsuccessful employer challenges.

Under its rarely used power to write regulations, the NLRB issued a comprehensive new rule in December 2014 that applies to election petitions filed on or after April 14, 2015. Of the many changes this rule makes to the union election process, the ones that provoked the greatest controversy include:

A new notice: The employer must post a Notice of Petition for Election within two business days after the petition is served. This Notice remains posted until it is replaced with a Notice of Election (or taken down because no election has been ordered).

Streamlined pre-election hearing procedures: Pre-election hearings will be scheduled for the eighth day after the union's petition is filed, and continuances will be rare. Before the hearing, the employer must file a Statement of Position with its view on the union's requested bargaining unit, other issues relevant to representation, and any voter eligibility issues it believes should be addressed. At the start of the hearing, the hearing officer will take offers of proof regarding the issues raised by the parties, and will decide the issues on which to receive evidence. Eligibility issues will ordinarily be deferred until after the election. Issues that are not raised in the Statement of Position will not be litigated, although parties may still challenge individual voters' eligibility on election day. Finally, appeals to the NLRB from Regional Directors' pre-election rulings are deferred until after the election, to be heard with any appeals from post-election objections or challenges.

New, expanded employee lists: With its Statement of Position, the employer must identify the employees in the requested bargaining unit and the employer's preferred unit, together with their job classifications. If an election goes forward, the employer must provide a voter list including employee names, addresses, phone numbers, and email addresses—expanding the Board's long-standing requirement of an "*Excelsior* list" containing names and addresses. The Board explained that "employers increasingly communicate with their employees via email about representation elections," and the old *Excelsior* lists are out of step with modern communications.

No guidelines for election dates: There is no longer a 24-day waiting period after a Regional Director directs an election to proceed before the election may be held, because parties can no longer appeal pre-election rulings to the NLRB.

The earliest data released by the NLRB shows that the new rules are indeed leading to faster elections. The first month under the new rules reflected a 17 percent increase in the number of petitions filed, as compared to the same period in 2014. The median number of days from petition to election was 23, irrespective of whether a pre-election hearing was held or whether the parties stipulated to an election without a hearing, as compared to 38 days in FY 2014. (The new rule does not change long-standing practice by which the Regional offices seek election stipulations in lieu of formal pre-election hearings.)

Employers have filed three lawsuits challenging the new rules, focusing largely on the new pre-election hearing procedures and the expanded employee list requirements. Two district courts have now discussed these challenges on summary judgment.

First to rule was Judge Robert Pitman of the U.S. District Court for the Western District of Texas, who rejected a facial challenge to the rules on June 1 in *Associated Builders & Contractors v. NLRB*. Judge Pitman held that the new rules are consistent with the National Labor Relations Act, do not improperly interfere with employer speech or employee privacy rights, and are not arbitrary and capricious. The Board intended to make the election process more efficient, and "increasing efficiency and effectiveness are hardly bases for concluding" that a rule is arbitrary and capricious, Judge Pitman wrote. An appeal is pending in the Fifth Circuit. In their August 10 brief, the employer urged the Fifth Circuit to reverse Judge Pitman and declare the new election rule invalid on its face under the Administrative Procedure Act and the National Labor Relations Act.

On July 29, Judge Amy Berman Jackson of the U.S. District Court for the District of Columbia likewise disposed of a facial challenge to the rules in *Chamber of Commerce v. NLRB*. Judge Jackson rejected the chamber's "dramatic pronouncements" and "mischaracterizations of what the Final Rule actually provides," holding that its "statutory and constitutional challenges do not withstand close inspection." "What is left," she wrote, is merely a "significant policy disagreement … with choices made by the agency entrusted by Congress with broad discretion to implement the provisions of the NLRA."

Like Judge Pitman, Judge Jackson held that the new rules are consistent with the NLRA and employers' First Amendment and due process rights, and are not arbitrary and capricious. Judge Jackson found that the NLRB thoroughly analyzed the privacy concerns raised during the rule-making process, and balanced them against the need, in a world of 21st century communications, to ensure that employees have adequate information on which to vote. Rejecting the chamber's challenge to the elimination of the old pre-election waiting period, Judge Jackson found that the new rules give the Regional offices discretion to set appropriate election dates, and "plaintiffs do not—and cannot—point to language in the NLRA which provides a right to a waiting period of some specified length." As for the chamber's due process arguments, Judge Jackson observed that plaintiffs could not even identify any "liberty or property right [that] could be infringed" by the new hearing procedures.

In another case, *Baker DC v. NLRB*, Judge Jackson in April denied a TRO sought by a construction company faced with one of the first election petitions filed by a union under the new rules. Foreshadowing her later ruling in the *Chamber* case, she rejected the company's arguments that it would suffer irreparable harm by posting the new notice of election petition, disclosing employee contact information on a voter list, or participating in a pre-election hearing conducted under the new rules. Since then, a mail ballot election was held, and Judge Jackson dismissed Baker's lawsuit together with the chamber's challenge.

When the new rules issued, the employer community cried "Election by ambush!" while labor advocates hoped that more streamlined procedures would lead to greater union organizing success. Congressional Republicans approved a joint resolution to block the new rules from taking effect, but President Obama vetoed it. It remains to be seen whether or not the new election rules result in significantly greater efficiencies in the conduct of elections, who benefits from the new system, and whether any of the employers' legal challenges will be successful. ■

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Data Security in the Workplace and in the Cloud

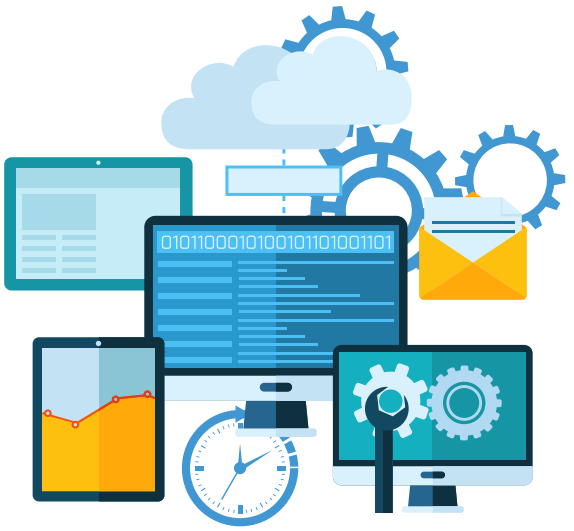
By Leigh Anne Yeargan, Marisa Warren, and Sheena R. Hamilton

In today's digital age, attorneys must be prepared to explore and discuss privacy policies, auditing procedures, and action plans for addressing data breaches both inside the law firm and for clients.

Employers spend significant time strategizing about ways to keep outsiders away from their data systems, but the same employers may also be vulnerable from the inside. The Federal Bureau of Investigation and Department of Homeland Security issued a public service announcement on September 23, 2014, regarding the increase in insider threat cases for business networks. FBI cyber investigations data revealed businesses incurring costs ranging from $5,000 to $3 million resulting from cyber incidents involving disgruntled or former employees, some through the use of cloud storage websites. Forrester Research has also reported that 36 percent of internal data breaches stem from employees' inadvertent data misuse.

No one is insulated from this threat. Our nation's most noteworthy intelligence and security team was the subject of one of the most, if not the most, significant internal data breach in United States history. Edward Snowden's breach of the National Security Agency should have taught employers that a company's intellectual property team poses the biggest threat to its data security. Reuters reported that "Edward Snowden may have persuaded between 20 and 25 fellow workers at the NSA regional operations center in Hawaii to give him their logins and passwords by telling them they were needed for him to do his job as a computer systems administrator."

The significant number of cyber incidents involving cloud storage websites demonstrates the new challenges facing attorneys and their clients who utilize the cloud. The "cloud" is "a fancy way of saying stuff's not on your computer." "Byte Rights," by Quinn Norton, Maximum PC (Sept. 2010). Essentially, the cloud consists of remote servers where data is housed as opposed to a personal computer or a law firm's or employer's server. Generally, third parties are responsible for maintaining cloud-based storage. Individuals are able to access the data remotely through their computers. There are typically three types of cloud service models: Platform as a Service (PAAS), Infrastructure as a Service (IAAS), and Software as a Service (SAAS). The type of cloud service model is relevant in evaluating potential security risks and an attorney's responsibilities to protect law firm and client data.



Security breaches could certainly be a public relations nightmare for any business. But what if this business is a client or even a law firm? When considering acts of cyber espionage, one cannot forget attorneys' ethical obligations. The recent amendments to the Model Rules of Professional Conduct make clear that "competent" counsel in the digital age must be aware of the risks and benefits associated with technology. This would necessarily include an understanding of the potential threats and exposure that may put a law firm (and clients' confidential information) at risk. The Model Rules further require attorneys to appropriately safeguard client property and dictate that attorneys shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or allowing access to, information relating to representation of a client. Attorneys must therefore consider whether use of a particular cloud system is indeed "reasonable" and comports with their obligations under local professional rules of conduct. Each of the twenty states that have issued opinions on the ethics of cloud computing has found that the use of cloud computing is ethical so long as the attorney exercises "reasonable care" when doing so. Each of these opinions provides slightly different guidelines for lawyers using cloud computing and what is meant by "reasonable care." Therefore, it is important to consult the local rules and ethics opinions relevant to each jurisdiction when trying to ascertain the scope of such professional obligations. ■

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The Supreme Court Rules on Retiree Health Vesting

By Brendan M. Coyle

With the *M&G Polymers USA* case, the Supreme Court has spoken on thorny issues related to retiree health benefits. Retiree health benefits can be a difficult area for legal practitioners negotiating both public and private sector collective bargaining agreements. Retiree health benefits can include, but are not limited to, permitting retirees to stay on the employer's group insurance plan, paying all or a portion of retirees' health insurance (either the same or less as when they were employees), or providing a direct monetary supplement to retirees to offset the cost of obtaining health insurance.

Negotiating retiree health benefits is unique in that the parties discuss benefits for a class of employees who will not be part of the collective bargaining unit at the time they receive the benefit. By definition, such benefits are unlike traditional benefits like wage increases that inure to bargaining unit members during the term of an existing collective bargaining agreement. In these instances, if the benefit is eliminated through subsequent negotiations, then it is axiomatic that bargaining unit employees will no longer receive the benefit either upon the ratification or effective date of a successor agreement. If parties agree to eliminate retiree health benefits in a successor collective bargaining agreement, the question that arises is whether employees who retired while the prior agreement and benefit were in effect should continue to be entitled to the benefit. More simply put, the issue is whether the retiree health benefit vests when an employee retires during the term of an agreement providing for the benefit. This issue has been the subject of extensive litigation across the country.

The courts have grappled with a few variations of commonly used language providing retiree health benefits. Some of the collective bargaining agreements at issue have provided that employees will receive a retiree health benefit for the term of the agreement. Others have provided that employees will receive the benefit until they become eligible for coverage under Medicare or until a certain age, while others have even gone further, providing that retirees will receive the coverage for life. Perhaps most common are agreements with language that is ambiguous or silent as to duration (such as "retired employees will receive health benefits" or "health benefits will continue for retired employees").

The Supreme Court recently considered this issue in *M&G Polymers USA, LLC. v. Tackett*. The Court found that the Sixth Circuit Court of Appeals improperly created a presumption of vesting by tying eligibility for retiree health benefits to eligibility for a pension, and inferring without foundation that the parties intended those benefits to continue as long as the beneficiary was a retiree. The Court found that ordinary contract principles should apply. When the words of a contract are clear and unambiguous, its meaning should be ascertained from the plainly expressed intent, but when the contract is ambiguous a court may consider extrinsic evidence to determine the parties' intentions. The Court reversed the decision and remanded the case to the Court of Appeals to apply ordinary principles of contract law to determine whether the benefits vested. Justice Ginsburg, in a concurring opinion, emphasized that this analysis should encompass the entire collective bargaining agreement in light of industry-specific customs, practices, usages, terminology, and, if necessary, extrinsic evidence like the parties' bargaining history.

While this is the essence of contract interpretation, practitioners negotiating retiree health benefits were hoping for some more guidance in determining certain language that can be used to infer the parties' intent one way or the other, to include the specific language in the *M&G Polymers* case tying retiree health benefits to the pension. The Court's opinion results in a case-by-case approach that will often turn on review of the parties' customs or practices relating to health insurance and/or application of certain durational language discussed above to other provisions in the agreement where the same language may be used for other benefits. If a reviewing court determines the agreement is still ambiguous, it could look to the parties' bargaining history to determine the origin of the retiree health benefits provision, or negotiations involving health insurance generally.

Parties may be able to avoid litigation surrounding the issue by including an expressed statement of intent. Parties may either include a provision stating that it is their intent that the retiree benefits vest upon retirement, or the converse, that it is their intent that the benefits do not vest and the employer can eliminate them at any time. Unfortunately, as negotiators know, there are many variables and issues surrounding collective bargaining, and this is much easier said than done. ■

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Employment Class Actions

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While not an employment case, the underlying class action issue also threatens employment class actions. In *Spokeo*, the federal district court had dismissed the consumer's FCRA action which had sought statutory penalties for the publication, on Spokeo's website, of inaccurate personal information. The district court agreed with the defendant that the consumer lacked Article III standing because the complaint failed to allege any actual or imminent harm. The Ninth Circuit reversed and remanded, finding that the FCRA statute created a private right of action for statutory damages and that was sufficient to confer standing. The issue at the SCOTUS is whether standing can be conferred in this manner. The application to the employment context is apparent and also echoes the issue in *Tyson* to the extent that the Supreme Court will weigh whether each class member has to have an actual harm or wage loss for a class to be certified or maintained.

Similarly, on May 18, 2015, the Supreme Court granted certiorari in *Campbell-Evald Co. v. Gomez*, No. 14-857. This is the successor case to *Genesis Healthcare Corp. v. Symczyk* (2013). In *Campbell-Evald*, the Ninth Circuit declined to extend *Genesis* from the FLSA collective action context to the Rule 23 class action context, holding that an unaccepted Rule 68 offer did not moot the individual or the class claims. Again, while *Campbell-Evald* arises in the context of the Telephone Consumer Protection Act (TCPA), which protects against unsolicited text messaging, the potential impact on employment class actions is fairly apparent. Should the SCOTUS reject the Ninth Circuit's analysis, employers would be at liberty to pick off class action plaintiffs' individual claims with Rule 68 offers, thereby evading class action enforcement of labor and employment laws designed to protect all employees.

In addition, proposed new legislation also imperils employment class action litigation. The House Judiciary Committee has approved the Fairness in Class Action Litigation Act of 2015, which would bar federal trial courts from certifying class actions unless the party seeking to maintain the class action "affirmatively demonstrates that each proposed class member suffered the same type and scope of injury as the named class representative or representatives." This legislation is supported by the U.S. Chamber of Commerce and is designed to head off the so-called "no injury" class action typified by the Whirlpool mold litigation. Again, while not an employment case, this legislation, if passed in its current form, could readily be used to challenge proposed employment class actions along the lines discussed above.

In sum, the path to class certification for employment cases continues to face serious challenges that go beyond those created by *Wal-Mart Stores, Inc. v. Dukes* (2011). Recently, the Fourth Circuit turned back a challenge to job promotion and racially hostile work environment class claims in the context of a single plant in South Carolina. The workers successfully distinguished their single facility case, *Brown v. Nucor* (2015), from the massive multi-facility multi-state context in *Wal-Mart*. On June 24, 2015, the Fourth Circuit refused to rehear the matter *en banc*. However, despite this glimmer of success, this matter could be back in appellate court, depending on the resolution of the new challenges posed by *Tyson* and the other cases on the upcoming SCOTUS docket. Stay tuned. ■

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The Section

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Committee will coordinate and support all non-Midwinter Meeting CLE activities of the Section.

- On the publishing front, a new eNewsletter Committee has been created to produce the monthly FLASH (formerly produced by the Marketing Committee) and the periodic Hot Topics e-alerts (formerly produced by the NPS); in addition, a new Bloomberg BNA Treatise Committee has been established to oversee production of existing and new books as part of our Section's relationship with Bloomberg BNA.
- On the membership front, the Outreach to the Young Lawyers Subcommittee of the Membership Development Committee has become a free-standing committee; the Membership Development Committee will coordinate with the Committees for Outreach to Young Lawyers, Law Students, and Government Lawyers; and the Government Fellowship Program Task Force will become part of the Outreach to Government Lawyers Committee.
- On the finance front, the existing Sponsorships, Donors and Grants Task Force has evolved into the new Revenue Development (Administrative) Committee.

In addition, the Section has created four new Task Forces (designed to be temporary) to make recommendations to the Section's leadership: Content Convergence, Midwinter Meeting Funding, Specialization, and Trial Institutes. The existing BBNA Task Force, focused on enhancing the BBNA relationship, will continue, and the In-House Corporate Counsel Task Force has become an Administrative Committee. ■

Doping Allegations Trail Nike Oregon Project

By William J. McMahon IV

The Nike Oregon Project (NOP) has assembled one of the most talented and successful group of long-distance runners in the United States. Led by head coach, and three-time New York City Marathon winner, Alberto Salazar, the group lives and trains in Beaverton, Oregon, next to Nike's headquarters and is outfitted with every training advantage imaginable, from anti-gravity treadmills to living in a house with air thinning technology to remove oxygen from the air and simulate living at altitude, thereby increasing red blood cells. NOP's Mo Farah and Galen Rupp won the 10,000 meters in the 2012 London Olympics, taking gold and silver medals, respectively. Farah also won gold in the 5,000 meters in London.

Now a serious question has been raised as to whether the NOP has achieved all of its success legally. On June 3, 2015, *ProPublica* released an in-depth report citing interviews with one of Salazar's former employees, Steve Magness, as well as several former athletes raising a number of claims.

Magness claims that in 2011, Salazar wanted Rupp to take a steroid, prednisone, before Rupp left for an indoor track meet in Germany. Because prednisone is a corticosteroid and would normally be considered a prohibited substance on the World Anti-Doping Agency's (WADA) list, Rupp needed a therapeutic use exemption (TUE) before he could take the medication. Rupp was unable to secure a TUE in time for the meet, but took the medication anyway.

In connection with the same track meet, Magness flew to Germany and met with Rupp prior to the race. When Rupp said that he was not feeling well, Magness contacted Salazar, who told him to expect a package. Magness says that a couple of days later a box arrived containing a paperback book with some pages hollowed out to create a compartment, in which two pills were taped. Magness handed the pills to Rupp, who took them and laughed about the way Salazar sent them to him.

Magness was reviewing blood testing records for NOP athletes (which were analyzed to determine how runners responded to altitude training in terms of hemoglobin production) and allegedly came across a notation from a 2002 record for Rupp that read: "presently on prednisone and testosterone medication."

According to Magness, Salazar would often test certain supplements on his own son. For example, Magness claims that one time Salazar's son was incrementally rubbing testosterone gel on himself and getting tested and retested in the lab. According to Magness, Salazar's justification for such testing was to determine how much of the gel it would take for a positive test. Magness believed Salazar was testing the limits for the benefit of his own runners and determining how much testosterone could be administered without a positive test.

In response the allegations raised in *ProPublica's* report, Salazar issued an extremely detailed two-part response, including links to some 30 exhibits, that he released on June 24, 2015, and that has been posted on NOP's website. Salazar states that he and the NOP "will never permit doping." He addresses

Allegations have been raised about Coach Alberto Salazar (center), shown here with athletes Mo Farah (right) and Galen Rupp (left), after they took gold and silver medals at the London 2012 Olympics. AP PHOTOS

Rupp's medical history and explains that Rupp has been medically diagnosed with asthma, as well as Hashimoto's disease, an autoimmune disorder, and states that Rupp has never taken a banned substance in violation of the WADA code, nor manipulated the TUE system.

Salazar notes that Magness did not leave the NOP voluntarily; rather, Salazar claims that he terminated Magness' contract in 2012 because he was a poor coach who had difficulty building rapport with world-class athletes. Salazar also notes that some NOP runners approached him to complain that they believed Magness may have been having a physical relationship with one of NOP's female runners.

With respect to the hollowed-out book, a method that Salazar utilized so the package would not get delayed in customs, he explains that the book contained a Nasonex prescription and that Magness was well aware of this fact. Salazar even links to a February 2011 email from Rupp that reads, "You went all Shawshank Redemption on that book and nasal spray. I loved it!!" Salazar also addresses the testosterone testing and concedes that he did, in fact, test his sons with topical testosterone and then conducted urine tests to see how much would trigger a positive result. Salazar details, however, that this testing protocol was developed in an effort to ensure that NOP's post-race protocol eliminated the risk of sabotage by other athletes.

The Associated Press has reported that the USADA has begun an investigation into the allegations raised against the NOP and Salazar. The current status of the confidential investigation remains unknown. Regardless of the outcome, the allegations, and Salazar's detailed response, have shed some light on how WADA's anti-doping rules are navigated by world-class track athletes.

For readers interested in these issues, *ProPublica's* report can be accessed at: https://www.propublica.org/article/former-team-members-accuse-coach-alberto-salazar-of-breaking-drug-rules. Salazar's two-part response to the allegations can be accessed at: http://nikeoregonproject.com/blogs/news. ■

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Labor AND Employment Law

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AMERICAN BAR ASSOCIATION
Section of
Labor and Employment Law

Visit the Section website at
www.ambar.org/midwinter
for information on 2016 Midwinter Meetings!

Calendar of Events

November 4–7
9th Annual Labor and Employment Law Conference
Philadelphia, PA

TRIAL ADVOCACY COMPETITION

October 31 – November 1
New York, NY
San Francisco, CA

November 7–8
Philadelphia, PA

November 14–15
Chicago, IL
Washington, DC

November 21–22
Dallas, TX
Miami, FL
Los Angeles, CA

National Finals
January 23–24, 2016
New Orleans, LA

2016 MIDWINTER MEETINGS

January 21–23
State and Local Government Bargaining and Employment Law Committee
New Orleans, LA

February 10–13
Employee Benefits Committee
Las Vegas, NV

February 11–14
ADR in Labor and Employment Law Committee
St. Pete Beach, FL

February 16–17
Federal Sector Labor and Employment Law Committee
Washington, DC

February 17–19
Federal Labor Standards Legislation Committee
San Juan, PR

February 21–24
Committee on Development of the Law Under the NLRA
Naples, FL

February 24–27
Committee on Practice and Procedure Under the NLRA
Naples, FL

March 8–11
Occupational Safety and Health Law Committee
Santa Barbara, CA

March 9–11
Railway and Airline Labor Law Committee
St. Pete Beach, FL

March 10–12
Workers' Compensation Committee Midwinter Seminar and Conference
Cosponsored by the Tort, Trial and Insurance Practice Section
New Orleans, LA

March 15–19
Employment Rights and Responsibilities Committee
New Orleans, LA

March 17–19
Ethics and Professional Responsibility Committee
New Orleans, LA

March 30 – April 2
National Conference on Equal Employment Opportunity Law
Presented by the Equal Employment Opportunity Committee
Austin, TX

April 6–8
National Symposium on Technology in Labor and Employment Law
Presented by the Technology in the Practice and Workplace Committee
Washington, DC

May 1–5
International Labor and Employment Law Committee
Hong Kong

For more event information, contact the Section office at 312/988-5813 or visit *www.americanbar.org/laborlaw*.