American Bar Association
Section of Labor and Employment Law
Federal Labor Standards Legislation Committee Midwinter Meeting
Playa del Carmen, Mexico
February 20-22, 2019

PROGRAM AGENDA

Wednesday, February 20

4:00 – 5:45  Registration

4:30 – 4:45 Welcome, Introductions, and Report from Section Leadership
Michele Fisher, Nichols Kaster, PLLP, Employee Co-chair
Jason Marsili, Rosen Marsili Rapp LLP, Union & Employee Co-chair
Lawrence Peikes, Wiggin and Dana LLP, Employer Co-chair
Dane Steffenson, U.S. Department of Labor, Public Co-chair

4:45 – 5:45 Oyez! Oyez! Oyez!
Hear from an entertaining legal scholar about recent key decisions from the United States Supreme Court and what to watch for in the coming year.

Speaker: Prof. William R. Corbett, Louisiana State University, Baton Rouge, LA

6:00 – 6:30 Reception for First Time Attendees and Mentors

6:30 – 8:00 Welcome Reception

Thursday, February 21

7:00 – 8:00 Breakfast Buffet

8:00 – 9:30 Classifying Workers as Independent Contractors: The Risk Versus Reward
Litigation and arbitration remain steady in the fight over whether workers are independent contractors or employees entitled to the protection of the minimum wage and overtime law. The discussion will include industries in the crosshairs, the gig economy, joint employment and the benefits versus the risks of classifying workers as independent contractors. Also, learn how employers are using scientific measures to prove factors within the economic realities test.

Speakers: Elizabeth Arnold, Berkeley Research Group LLC, San Francisco, CA
Michael Josephson, Josephson Dunlap, Houston, TX
Joseph Mulherin, Vedder Price, Chicago, IL
Dane Steffenson, U.S. Department of Labor, Atlanta, GA

9:00 – 10:30 Spouse/Guest Breakfast

9:30-9:45 Break
9:45 – 10:45  **What’s New at the EEOC/EEOC Case Law Update**
Learn about EEOC initiatives and notable cases from the past year.

Kathy Butler, *Butler & Harris, Houston, TX*

10:45 – 11:45  **FLSA Hot Topics**
Our ever popular FLSA roundup. No time to read the hundreds of pages summarizing FLSA cases in 2018? No problem! This panel will highlight what you need to know about the past year’s most significant FLSA decisions and regulations, and their likely impact on future wage and hour litigation. This interactive panel will invite the audience to test their knowledge of hot topics, and specific cases and/or trending issues in the FLSA world through real-time electronic polling.

**Moderator:** Robert A. Boonin, *Dykema, Detroit, MI*

**Speakers:** Ryan Hagerty, *Asher, Gittler & D’Alba, Ltd., Chicago, IL*
Jonathan Keselenko, *Foley Hoag LLP, Boston, MA*
Juno Turner, *Outten & Golden, LLP, New York, NY*

11:45 – 12:00  **Break**

12:00 – 1:00  **What the Epic Decision Means for FLSA Litigation: The Status of the Law on Arbitration and Arbitration Agreements, and the Tactical Response by Employees and Employers**
Panelists will first discuss the state of the law on arbitration and challenges still being raised to arbitration agreements since the Supreme Court’s ruling in *Epic Systems*. Next, panelists will discuss the tactical strategies by employees and employers regarding arbitration, including the ins and outs and pros and cons of arbitration.

**Speakers:** Theodore Cheng, *ADR Office of Theo Cheng, Princeton Junction, NJ*
Karla Gilbride, *Public Justice, Washington, DC*
Matthew Helland, *Nichols Kaster, PLLP, San Francisco, CA*
Lisa “Lee” Schreter, *Littler Mendelson, Atlanta, GA*

1:00 – 1:30  **Committee Business Meeting**
a. Section Updates
b. Publications
c. Liaisons to Section Administrative Committees
d. Future Meetings

7:00 – 9:00  **Reception and Dinner at Grand Hyatt Playa del Carmen**

**Friday, February 22**

7:15 – 8:15  **Breakfast Buffet**

8:15 – 9:15  **Attorneys’ Fees and Costs in Employment Litigation**
This panel will share advice on litigating attorneys’ fee issues in employment cases. This will include basic concepts, as well as trends in litigation surrounding fees both in the trial and settlement context. Which costs courts are determining are recoverable and which are not also will be addressed.
Speakers: Allison D. Balus, Baird Holm LLP, Omaha, NE  
C. Ryan Morgan, Morgan & Morgan, Orlando, FL  
Nate Oleson, Akin Gump, Washington, DC  
Christine Webber, Cohen Milstein, Washington, DC

9:15 – 10:15 BREAKOUT SESSION 1

A: State Wage & Hour Law: Where the Action Is
Wage-and-hour law is an ever-evolving mystery of theories, ideas and what-ifs. While the battle between federal and states’ rights may never be resolved, what is clear is that the “action” in wage-and-hour developments is happening at the state level. This presentation will interactively explore the more interesting state laws and state law trends that practitioners should be aware of, wherever you practice. The presentation also will feature prizes. What’s not to love?

Speakers: Loren Donnell, Burr and Smith, St. Petersburg, FL  
Robyn Klinger, Robyn B. Klinger, Esq. Workplace Counsel and Investigations, Boston, MA  
Stephanie Lee, Orrick, Herrington & Sutcliffe LLP, Los Angeles, CA

B: I'll Take the FMLA for $1,000
This interactive FMLA Jeopardy session was such fun last year, that we are doing it again. Participants will be divided into teams and compete for prizes by playing through this unique answer-and-question format based on 2018 FMLA decisions summarized in the Midwinter Report. This hands-on exercise will demonstrate the complexities that employees and employers face when requesting or approving FMLA leave. Whether you consider yourself well-versed in the FMLA, or are just learning the ropes, you will leave this session with a new appreciation for the FMLA.

Speakers: Sara Faulman, Woodley & McGillivary LLP, Washington, DC  
C. Andrew Head, Head Law Firm, LLC, Chicago, IL  
Jennifer Williams, Cozen O'Connor, Miami, FL

10:15 – 10:30 Break

10:30 – 11:30 BREAKOUT SESSION 2

A: ADEA and Hot Topics in Whistleblower Law
ADEA Hot Topics.
Learn about and debate the ADEA’s hottest topic—the circuit split regarding whether the ADEA covers job applicants in addition to current and former workers. The Seventh Circuit’s CareFusion case created this split and the issue is likely headed to the Supreme Court. The top-five key developments in ADEA collective and individual actions, including the controversial recruitment technique of targeting younger workers with technology, will also be covered.

In the SOX World: Be careful what you wish for.
While many in the defense bar hail the Digital Realty decision as a victory for employers, one obvious consequence is that many employees may choose – or be advised by counsel – to report to the SEC before a company has a chance to internally address potential securities violations. Similarly, many plaintiffs’ attorneys consider the Bio-Rad decision a win for whistleblowers, yet it may only have muddied the already-cloudy waters on what information an employee can use in supporting a SOX retaliation claim. Learn how the real-world implications of these cases including the advice counsel for employees and employers give their clients.
Speakers: Roxana Bell, University of Detroit Mercy, Detroit, MI
Bernard Mazaheri, Morgan & Morgan, Lexington, KY
Harry (Hal) Welford, Littler Mendelson PC, Saint Louis, MO
Martine T. Wells, Brownstein Hyatt Farber Schreck, Denver, CO

**B: Anatomy of an Equal Pay Act Class and Collective Action**

In light of recent decisions denying class certification, this panel will discuss how to litigate pay discrimination cases under state and federal law—start to finish—from the plaintiff and defense perspective. This session will analyze strategies to get Rule 23 and Rule 216(b) classes certified, how to defeat certification, and the pitfalls that lead to the denial of class certification. Learn how to establish and defend against liability and damages under the EPA and state fair pay laws.

Speakers: Rebekah Bailey, Nichols Kaster, PLLP, Minneapolis, MN
Susan E. Ellingstad, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN
Gina K. Janeiro, Jackson Lewis P.C., Minneapolis, MN

11:30 – 12:30 **Hear Ye Hear Ye, Get Your Ethics Credit!**

Litigating FLSA cases can be fraught with ethical issues. The panel will highlight the past year’s bell-weather cases and explore ethical issues receiving increased attention: company attorneys’ interaction with employees, litigation involving limited English proficient individuals, and problems related to confidentiality in settlement agreements and protective orders—all with a look at best practices.

Speakers: Shelly Anand, U.S. Department of Labor, Atlanta, GA
Jennifer Keating, Leonard Carder, San Francisco, CA
Jack A. Raisner, Outten & Golden LLP, New York, NY
Stephanie Sweitzer, Morgan Lewis, Chicago, IL

7:00 – 9:00 **Dinner (optional ticketed event)**
We thank our sponsors for their generous contributions:

**Diamond Level**

**Platinum Level**

**Gold Level**

**Silver Level**
Brownstein Hyatt Farber Schreck
Polsinelli PC
Veronica S. Jung, PLLC

**Bronze Level**
Berkeley Research Group LLC
Constangy, Brooks, Smith & Prophete, LLP
Goldstein, Borgen, Dardarian & Ho
Werman Salas PC
Yezbak Law Offices PLLC