ABA Employment Rights & Responsibilities Committee
Midwinter Meeting
March 19-23, 2019
Las Vegas, Nevada

Tuesday, March 19

6:00 – 8:00 p.m. Welcome Reception at Four Seasons Hotel Las Vegas

Wednesday, March 20

8:00 – 9:00 a.m. Continental Breakfast

8:00 – 9:00 a.m. ERR Subcommittee Co-Chair Meeting

9:00 – 10:00 am You Can’t Change What You Can’t See: Key Lessons from the 2018 Report on Racial and Gender Bias in the Legal Profession

A comprehensive report by the ABA Commission on Women in the Profession, the Minority Corporate Counsel Association and Hastings College of Law’s Center for WorkLife Law concludes that “traditional diversity tools” have been “ineffective” at addressing bias in the legal profession. The report encourages firms and in-house departments to adopt “evidence-based, metrics-driven” changes to personnel processes as a way to disrupt the transmission of bias in decisions. Our panel of diversity and inclusion experts will review the report’s key findings and will discuss the “toolkits” it recommends for targeting and eliminating bias in personnel decisions.

Moderator: Samantha C. Grant, Sheppard, Mullin, Richter & Hampton LLP, Los Angeles, CA

Speakers: Wendi S. Lazar, Outten & Golden LLP, New York, NY
Jean Lee, Minority Corporate Counsel Association, Washington, DC
Louis Lopez, Office of Special Counsel, Washington, DC

10:00 – 11:30 a.m. Corporate Counsel Caucus

Bobbie J. Fox and Donald S. Barth will host a caucus meeting for in-house attorneys focusing on emergent issues important to the in-house labor and employment practitioner. The topics will be discussed from the unique perspective of in-house counsel responsible for providing legal advice to corporate clients on these issues. The meeting format allows participants to discuss and compare approaches for addressing risk management and other legal issues. Attendance is limited to in-house corporate counsel to promote a free flow of information. Discussion topics will be solicited from in-house registrants in advance of the meeting.

10:00 – 10:15 am Refreshment Break

10:15 – 11:15 am Uncovering and Challenging Bias in Jury Selection and Deliberations

Presented by the Trial and Appellate Advocacy Subcommittee

Since deciding Batson v. Kentucky in 1986, the United States Supreme Court has handed down decisions involving bias in jury selection (Foster v. Chatman) and juror deliberations (Pena-Rodriguez v. Colorado). Recently, questions about the role of “implicit” bias nearly reached the Supreme Court in Rhines v. South Dakota, a case dealing with sexual orientation. Our distinguished panel will explore solutions for dealing with bias in trial proceedings and will conduct a short “implicit bias test” to show how covert bias infects and affects the legal profession and society in general.

Moderator: Maureen S. Binetti, Wilentz, Goldman & Spitzer, P.A., Woodbridge, NJ
11:30 – 12:45 p.m.  First-Time Attendee Luncheon  
**Sponsored by Morrison & Foerster LLP**
First-time attendees are invited to an informal luncheon with Section and Committee leaders who will discuss what ERR does and how to get involved.

1:00 – 1:30 p.m.  Welcome, Introductions and Section Leadership Report

**Committee Co-Chairs**
- Melinda C. Burrows, Netscout Systems, Inc., Westford, MA
- Lori L. Deem, Outten & Golden LLP, Chicago, IL
- Hon. Stephanie M. Jones, Federal Agency, Knoxville, TN
- Paul E. Starkman, Clark Hill PLC, Chicago, IL
- Douglas L. Steele, Woodley & McGillivary LLP, Washington, DC

**Program Co-Chairs**
- Wynter P. Allen, Alden Law Group, PLLC, Washington, DC
- Gary B. Eidelman, Saul Ewing Arnstein & Lehr LLP, Baltimore, MD
- Heather F. Lindsay, Lindsay & Lindsay, P.A., Milton, FL
- George L. Washington, Jr., Orange Business Services, Oak Hill, VA

**Administrative Co-Chairs**
- Glen D. Savits, Green Savits LLC, Florham Park, NJ

1:30 – 2:30 pm  Arbitration in an Epic World
**Presented by the Alternatives to Litigation Subcommittee**
Now that the Supreme Court has green-lit class waivers in arbitration agreements, employers have a choice: stick with the old-fashioned route of litigation in court or require employees to enter into arbitration agreements as the exclusive means of dispute resolution. This experienced panel will explore factors employers weigh in deciding whether to enter into arbitration agreements with employees, and how the plaintiff’s bar has responded to Epic Systems. We will also discuss how the Supreme Court's decision squares with the increasing number of state laws banning mandatory arbitration of sexual harassment claims in response to the #MeToo movement.

**Moderator:**
- T. Warren Jackson, Signature Resolution, Los Angeles, CA

**Speakers:**
- Jeffrey A. James, Sebris Busto James, Bellevue, WA
- Lucas J. Kaster, Nichols Kaster, PLLP, Minneapolis, MN
- Anna M. Pohl, Thompson Reuters, New York, NY
- Jean Sternlight, Director and Michael and Sonja Saltman Professor of Law, Saltman Center for Conflict Resolution, University of Nevada Las Vegas Boyd School of Law, Las Vegas, NV

2:35 – 3:50 pm  Safely and Successfully Accommodating Mental Health Conditions in the Workplace
**Jointly Presented by the Disability and Leaves of Absence Subcommittee and Diversity Outreach and Inclusion Task Force**
Mental health conditions present employers and employees (and unions) with difficult questions in determining effective accommodations. Issues surrounding privacy, safety, and productivity are especially challenging when accommodating mental health impairments. Join our panel to explore many of the legal and practical concerns surrounding these important matters, including dealing with opioid use, responding to suicidal ideation, and preserving the dignity of workers.
Moderator: Sonya Richburg, Coca-Cola Bottling Co. Consolidated, Charlotte, NC

Naomi N. Oglesby, Ogletree, Deakins, Nash, Smoak & Stewar, P.C., Detroit, MI
Douglas L. Steele, Woodley & McGillivary, LLP, Washington, DC

6:00 – 7:00 p.m. Subcommittee Reception
For those having a hard time deciding which ERR subcommittee to join, the Membership Committee will present the Subcommittee Reception. First-time attendees are encouraged to meet with subcommittee co-chairs and other ERR and Section leaders in a festive and relaxed setting to learn more about ERR’s subcommittees and how to become involved in ERR activities.

We thank the following firms for their generous contributions in support of this reception:

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7:00 – 8:30 p.m. Networking Reception

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Thursday, March 21

8:00 – 9:00 a.m. Continental Breakfast

8:00 – 9:00 am Breakfast Roundtable: From #MeToo to #WeToo: International Perspectives on the Movement Against Sexual Harassment and Sexual Assault in the Workplace
Presented by the International Law Subcommittee
In little more than a year, the #MeToo movement has changed cultural norms in workplaces around the world and has led to legal reforms and proposed legislation in many countries. Join an international panel of experts for an interactive discussion of the latest developments in this global phenomenon, including a comparison of legislative and regulatory efforts in the U.S. and abroad, and a discussion of workplace initiatives undertaken by employers and employees in response to #MeToo.

Moderator: Alyson Palmer, Google, San Francisco, CA

Speakers: Janis Block, CMS Hasche Sigle, Cologne, Germany
Javiera Medina Reza, Baker McKenzie, Mexico City, Mexico
Roselyn S. Sands, EY Société d’Avocats, Paris, France
Andrea L. Zwack, Gall Legge Grant Zwack LLP, Vancouver, BC
CONCURRENT PROGRAMS: TRACK 1

9:00 – 10:00 am  Rolling Snake Eyes:
Counseling Executives and Companies when the House Goes Bust
Presented by the Contracts and Executive Compensation Subcommittee
When a company is in extreme crisis and considering the best way to move forward, executives face unique labor and employment issues. Executives debating whether to stay the course or leave need to understand how they will be compensated and how retention bonuses are scrutinized and approved. Indemnification agreements play a critical role in that debate, because they impact a number of issues if a company goes into bankruptcy proceedings. This panel will focus on these and other issues facing companies and their executives when in moments of financial peril.

Moderator:  Donna M. Hughes, Bedminster, NJ
Speakers:  Jonathan Ben-Asher, Ritz Clark & Ben-Asher LLP, New York, NY
Robert S. Gilmore, Kohrman Jackson & Krantz LLP, Cleveland, OH
Joseph A. Kohanski, Jr., Bush Gottlieb, Glendale, CA

10:00 – 10:15 am  Refreshment Break

10:15 – 11:15 am  Here, There and Everywhere:
A Globetrotting Update of Developments in Employment and Labor Law
Presented by the International Law Subcommittee
From impactful court decisions to far-reaching legislation, countries around the world have seen significant developments in their labor and employment laws. This program will provide a guided tour of countries with notable developments, with stops in France, the United Kingdom, Asia, Latin America and the United States. Our tour guides will analyze trends that appear to emerge from the developments and will make predictions about future destinations for labor and employment laws in these and other countries.

Moderator:  Amy F. Shulman, Outten & Golden LLP, New York, NY
Speakers:  Paul Callaghan, Taylor Wessing, London, United Kingdom
Myriam Delawari-de Gaudusson, De Gaulle Fleurance & Associés, Paris, France
Analia V. Duran, MBB Abogados, Buenos Aires, Argentina
Jingbo (Jason) Lu, River Delta Law Firm, Shanghai, China

11:20 – 12:20 pm  Lessons Learned from Title IX
Presented by the Workplace Investigations Subcommittee
This session will compare and contrast Title IX campus sexual misconduct investigations with Title VII workplace investigations. We will cover unique Title IX issues, such as trauma informed interviewing approaches; the importance of the institution’s policies, including the concept of “affirmative consent”; and the impact of intoxication and incapacitation. We will explore growing trends in Title VII investigations in the wake of the #MeToo movement, including anonymous complaints, stale claims and off-duty conduct. Finally, we will cover how these Title IX and Title VII concepts can overlap for an investigator or legal advisor.

Moderator:  Hon. Stephanie M. Jones, Federal Agency, Knoxville, TN
Jeff Brodin, Brodin HR Law, Phoenix, AZ
Nina T. Pirrotti, Garrison, Levin-Epstein, Fitzgerald & Pirrotti, P.C., New Haven, CT
Sheree C. Wright, Vanderbilt University, Nashville, TN
CONCURRENT PROGRAMS: TRACK 2

9:00 – 10:00 am  Demystifying ERISA for Employment Lawyers  
*Presented by the Employee Benefits Subcommittee*

If you have ever broken out in a cold sweat because the word “ERISA” appeared in a complaint or demand, then this is the program for you. This panel of expert practitioners will explain key ERISA concepts that every labor and employment lawyer should know, including the role of fiduciaries, required notifications of employee rights, and vesting of employee interests. Our panelists will also discuss the intersections between employment law and ERISA and arm you with the tools to evaluate the interrelationships.

Moderator:  Audrey Browne, DC 37 Health & Security Plan, New York, NY

Speakers:  
Joel R. Hurt, Feinstein Doyle Payne & Kravec, LLC, Pittsburgh, PA  
J. Timothy McDonald, Thompson Hine LLP, Atlanta, GA  
Erin M. Sweeney, Miller & Chevalier Chartered, Washington, DC

10:00 – 10:15 am  Refreshment Break

10:15 – 11:15 am  Identifying and Addressing Whistleblower Claims: Can You Hear the Whistle Blowing?  
*Presented by the Whistleblower Subcommittee*

What constitutes whistleblowing and retaliation? This panel will discuss employee protections under the Sarbanes-Oxley Act of 2002 (SOX) and the Dodd-Frank Wall Reform and Consumer Protection Act (Dodd-Frank) and will provide guidance on how to address claims regarding adverse employment actions.

Moderator:  Melinda C. Burrows, Netscout Systems, Inc., Westford, MA

Speakers:  
Lloyd B. Chinn, Proskauer Rose LLP, New York, NY  
Uche Egemonye, U.S. Department of Labor, Atlanta, GA  
Jason Zuckerman, Zuckerman Law, Washington, DC

11:20 – 12:20 pm  Balanced Approaches to Regulating Romance in the Workplace: Tainted Love?  
*Presented by the Employment at Will Subcommittee*

Mention workplace romance to employers and you may hear fears about legal claims, lost productivity and the agita of managing office gossip, claims of favoritism, and hurt feelings. These concerns have led more companies to develop stricter policies to address relationships between employees and coworkers, supervisors, competitors and clients. But, as with some romances, there are limits to how far these policies can go, especially in states that protect employees’ off-duty conduct. This panel will discuss the implications of workplace romance policies and solutions for regulating romance while still respecting employees’ rights.

Moderator:  Kimberly W. Geisler, Scott Dukes & Geisler, P.C., Birmingham, AL

Speakers:  
Sandra Pullman, Office of the New York State Attorney General, Civil Rights Bureau, New York, NY  
Kathleen O. Sedey, The Case Law Firm, Chicago, IL  
Bobby C. Simpson, General Electric, Louisville, KY

12:30 – 1:30 p.m.  Subcommittee Luncheon

ERR’s subcommittees will meet over lunch to plan activities for the next year and their panels for the 2020 Midwinter Meeting in Puerto Rico. Newcomers are encouraged to attend!

We thank the following for their generous contributions in support of the Subcommittee Luncheon:
Friday, March 22

8:00 – 9:00 a.m. Continental Breakfast

8:00 – 9:00 am Breakfast Roundtable: Gab with the Government
Join a panel of government agency attorneys from the DOL, EEOC and NLRB who will discuss the newest developments and provide the latest updates from their respective agencies. Come prepared to ask questions and learn about matters currently of interest to the federal government in the labor and employment law context.


Speakers: Uche Egemonye, U.S. Department of Labor, Atlanta, GA
Amber Trzinski Fox, U.S. Equal Employment Opportunity Commission, Baltimore, MD
Linda M. Mohns, National Labor Relations Board, Memphis, TN
Jeremy Montiero, U.S. Department of Justice, Washington DC

CONCURRENT PROGRAMS: TRACK 1

9:00 – 10:00 am Unauthorized Practice of Law in a Multijurisdictional World: Road Warriors Beware
Labor and employment attorneys face a conundrum when it comes to their practices: the work is not limited by state lines, but law licenses may be. And the rules may vary depending on whether you are practicing in federal court, state court, or private arbitration; whether the work involves pre-litigation activities; or whether your role is one of in-house counsel. This interactive panel will consider the nature of multi-jurisdictional practice from the management, in-house, union, plaintiff, and government perspective, and will discuss what attorneys ethically can (and can’t do) across state and jurisdictional lines.

Moderator: Jeffrey Heller, JHeller Consulting, LLC, Houston, TX

Speakers: Daniel Bonnett, Martin & Bonnett, Phoenix, AZ
Ruben J. Garcia, Associate Dean for Faculty Development and Research and Co-Director, UNLV Workplace Law Program, Las Vegas, NV
Sonya Richburg, Coca-Cola Bottling Co. Consolidated, Charlotte, NC

10:00 – 10:15 am Refreshment Break

10:15 – 11:30 am Strategies and Tips for Helping Lawyers with Substance Abuse Problems
Lawyers are at an elevated risk of experiencing substance abuse disorders; more than 1 in 5 lawyers report that they experienced problematic use of alcohol or other drugs at some point in their adult lives, which is more than twice the rate of the general population, and the rate of
substance abuse increases the longer attorneys have been practicing. This panel will provide practical tips for identifying and responding to attorneys with substance abuse problems from the perspective of the law firm or employer, the impaired attorney, and the concerned colleague, and will feature experts who focus on substance abuse in the legal profession.

Moderator: Cara E. Greene, Outten & Golden LLP, New York, NY

Speakers: John Husband, Holland & Hart LLP, Denver, CO
          Benjamin Kremenak, Hazelden Betty Ford Foundation, Minneapolis, MN

11:35 – 12:50 pm Interrupting Bias in the Legal Profession: What Would You Do?
Presented by the Ethics and Professional Responsibility Subcommittee
While many lawyers are aware of the existence of implicit and explicit biases, they often struggle with how to respond when they observe the operation of bias in colleagues, clients, opposing counsel, or the courts. This panel of subject-matter experts will focus on our professional obligations as lawyers to address bias, as well as practical strategies for interrupting bias in the legal profession.

Moderator: Michelle Craig, Transcendent Legal, New Orleans, LA

Speakers: Navin Jani, U.S. Department of Labor, Dallas, TX
          Lucas Kaster, Nichols Kaster, PLLP, Minneapolis, MN
          Ann C. McGinley, Co-Director, UNLV Workplace Law Program, Las Vegas, NV

CONCURRENT PROGRAMS: TRACK 2

9:00 – 10:00 am Non-Compete Enforcement Issues in Business Acquisitions 2019: What are Your Odds?
Presented by the Covenants Not to Compete Subcommittee
Lawyers in business transactions often find themselves drafting or assessing restrictive covenants, intellectual property and trade secret protection issues in the sale/purchase of a business. Clever drafters will often stack the deck with favorable terms and conditions, so it is important to be able to read all of the cards when reviewing such provisions. Practitioners must understand the ins and outs of these transactions to determine if such restrictions are enforceable and also consider how new federal and state statutes may come into play. This panel will provide analysis, strategies and tips to avoid making a losing bet when representing clients.

Moderator: David J. Carr, Ice Miller LLP, Indianapolis, IN

Speakers: Barbara A. Robb, Hartley Michon Robb LLP, Boston, MA
          Justin Suhr, Uber, San Francisco, CA

10:00 – 10:15 am Refreshment Break

10:15 – 11:30 am Equal Pay Act and the #TimesUp Movement
Jointly Presented by the Complex Litigation and Statutory Rights Subcommittees
This panel will review the Equal Pay Act in light of the #TimesUp Movement, noting the important intersection of pay and other forms of discrimination (e.g. race, pregnancy, harassment, job steering) and explore the complexities of litigating these cases, particularly from a class perspective.

Moderator: Tamika D. Lynch, Siemens Corporation, Buffalo Grove, IL

Speakers: Kelly M. Dermody, Lieff Cabraser Heimann & Bernstein, LLP, San Francisco, CA
          Diane I. Smason, U.S. Equal Employment Opportunity Commission, Chicago, IL
          Eric A. Tate, Morrison & Foerster LLP, San Francisco, CA
11:35 – 12:50 pm  Employer Use of Technology and Tracking Employees in the Workplace

Jointly Presented by the Employee Privacy and Technology Subcommittees

The use of AI in employment decisions, its impact on privacy concerns, and unintended consequences leading to litigation will be discussed in this presentation. The inevitable conflict between technology and privacy has raised concerns about wage and hour claims as well as discriminatory targeting of recruitment efforts based on user demographics. Additionally, the intersection of the technology of biometrics with the use of AI in recruiting, as well as the use of surveillance and GPS to track, identify, and supervise employees in the workplace will also be discussed.

Moderator:  Kelly Trindel, pymetrics, Washington, DC

Speakers:  Adam S. Forman, Epstein Becker & Green, P.C., Detroit, MI
Jason C. Marsili, Rosen Marsili Rapp LLP, Los Angeles, CA
Garry G. Mathiason, Littler Mendelson P.C., San Francisco, CA

12:50 – 1:00 p.m.  Committee Business and Feedback Meeting

7:00 – 10:00 p.m.  Reception, Dinner and Dance

Saturday, March 23

8:00 – 9:00 a.m.  Continental Breakfast

9:00 – 10:15 am  State Law Requirements for Ethical and Technical Standards Regarding ESI and Electronic Communications

Jointly Presented by the Ethics and Professional Responsibility and State Law Developments Subcommittees

Following on the heels of the ABA Commission on Ethics 20/20, states have begun requiring attorneys to have a level of technical proficiency on ESI and e-discovery as well as general technological competence as part of their ethical obligations to clients. Panelists will explore this hot topic as it is developing on the state court level and in state bars.

Moderator:  Donald S. Barth, Munich Reinsurance America, Inc., Princeton, NJ

Speakers:  Hon. Yvette Roland, State Bar of California, Los Angeles, CA
Eric W. Iskra, Spilman Thomas & Battle, PLLC, Charleston, WV
John P. Madden, O’Malley & Madden, P.C., Chicago, IL
Megan K. Mechak, Woodley & McGillivary LLP, Washington, DC

10:15 – 10:30 am  Refreshment Break

10:30 – 11:30 am  Strategies for Counseling Clients in ICE Enforcement Actions

Workplace enforcement actions by ICE have increased five-fold since the start of President Trump’s administration and the scope of workplace raids has expanded beyond compliance with I-9 regulations. These factors, combined with a constricting visa processing system and enhanced removal practices, create challenges for foreign workers and their employers. Panelists will provide practical guidance on how labor and employment lawyers can better advocate for clients (whether employers, unions, or workers) when faced with an ICE action.

Moderator:  Jonathan G. Grode, Green and Spiegel LLC, Philadelphia, PA

Speakers:  Chelsea Edwards, Justice at Work, Philadelphia, PA
Cathi J. Hunt, Fortive Corporation, Everett, WA
11:35 – 12:35 pm Contingent Workers: The Next Unionized Workforce?

Presented by the Contingent Workers Subcommittee

Ordinances in Seattle and New York City that gave ride-sharing app drivers the right to organize created test cases for the intersection of the gig economy and collective bargaining rights. The litigation that ensued may be instructive to other jurisdictions about the NLRA and potential federal preemption of city ordinances. This panel will discuss how labor unions are attempting to organize gig economy workers, whether the NLRA and other labor laws adequately provide for such unionization, and what further organizing would mean for workers, employers, and consumers.

Moderator: Eric L. Barnum, Baker and Hostetler LLP, Atlanta, GA

Speakers: Caryl L. Flannery, Centene Corporation, St. Louis, MO
Linda M. Mohns, National Labor Relations Board, Memphis, TN
P. Casey Pitts, Alshuler Berzon LLP, San Francisco, CA