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A B A J O U R N A L O F

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The Editors' Page

The November 8, 2016, presidential election shook the world. When Americans awoke the following day, feelings of jubilation and dread redounded with virtually equal prevalence. And, while the Trump administration has launched its tenure with a flurry of activity, the impact of the new leadership on U.S. law and policy remains uncertain.

The realm of labor and employment law is not immune to this uncertainty. Speculation abounds as to future law and policy changes. Some executive actions—such as the rescission of President Obama's Executive Order on transgender bathroom access—have already been implemented. Some regulatory changes—such as withdrawal of proposed Department of Labor regulations concerning overtime pay and fiduciary obligations—are likely. But the contours of specific legislative changes remain murky. President Trump has expressed support for nationwide right-to-work legislation, but Senate approval of such a measure is far from certain. At the other end of the spectrum, President Trump has spoken publicly about the importance of paid leave for caregivers, but congressional support for such a measure does not appear strong. Finally, what precedents will be reversed as Trump appointees join the Supreme Court, National Labor Relations Board, and Equal Employment Opportunity Commission?

The labor and employment bar clearly is abuzz about what the future may hold. This focused consternation is illustrated by the fact that several of the articles in this issue include speculation about how the new administration will impact the future direction of labor and employment law.

In this time of uncertainty, one thing is certain. The *ABA Journal of Labor & Employment Law* is at the ready to chronicle any significant new developments. We will be looking for conference papers and scholarly submissions of practical utility to Section members. As you prepare papers for the November CLE conference and the various midwinter meetings, please give serious thought to contributing to this discussion.

This issue opens with the annual Supreme Court Review by Thomas C. Goldstein, an experienced Supreme Court litigator at Goldstein & Russell, P.C., co-founder of SCOTUSblog, and Secretary of the ABA Section of Labor and Employment Law. In **Labor and Employment Decisions from the Supreme Court's 2015–2016 Term**, Goldstein summarizes labor and employment decisions from the Court's most recent term, two of which were left unresolved after Justice Antonin Scalia's death, and analyzes how they will impact practitioners. He also predicts how the newly fully staffed Court will analyze cases upcoming in the 2016–2017 term.

Both labor and management are increasingly utilizing a hybrid dispute resolution system, mediation-arbitration (med-arb), for both collective bargaining and contract grievance disputes as a quicker, less costly

resolution strategy than traditional stand-alone dispute resolution mechanisms. In **Better Process, Better Results: Integrating Mediation and Arbitration to Resolve Collective Bargaining Disputes,** Joshua M. Javits relies on his experience as a mediator-arbitrator for major airline disputes to describe med-arb's process in practice. He highlights which industries would benefit most from its use and offers practical pointers to parties seeking to reinvigorate their own collective bargaining processes.

The Department of Labor's Office of Federal Contract Compliance (OFCCP) measures federal contractors' compliance with affirmative action hiring requirements by determining whether qualified candidates were hired at rates consistent with what would be expected in a neutral selection process. In **An Equal Opportunity Paradox for Federal Contractors**, management attorneys Jon A. Geier, Kenneth W. Gage, Tammy Daub, and Regan Herald argue this method forces contractors to meet specific hiring quotas and fails to identify and eliminate workplace discrimination. To help contractors meet the OFCCP's statistical compliance test, the authors detail OFCCP's electronic hiring requirements and provide strategic and practical guidance on how to implement and maintain hiring procedures to avoid liability under federal antidiscrimination laws.

Employers are increasingly relying on algorithms in the hiring process to narrow the applicant pool efficiently. Some have recently utilized video games to evaluate skills that cannot be identified from typical job applications. In **Video Games in Job Interviews: Using Algorithms to Minimize Discrimination and Unconscious Bias**, Richard Bales, a law professor at Ohio Northern University, and David Savage, a third-year law student, discuss whether employer algorithm use results in disparate impact and disparate treatment discrimination. The authors argue that although algorithms are susceptible to such discrimination, it can be avoided by careful design and monitoring, and, if used properly, they can even avoid unconscious bias more effectively than human assessment.

In **The Rights of School Employee-Coaches Under Title VII and Title IX in Educational Athletic Programs**, Kim Turner draws on her experience as a plaintiffs' attorney enforcing Title IX to discuss under what circumstances a coach-employee facing workplace discrimination should proceed under Title VII, Title IX, or both. She highlights the advantages and disadvantages of proceeding under each statute, and explains how the plaintiff's goals, exhaustion requirements, statute of limitations, and preemption issues will impact a coach's decision to proceed under one or both statutes.

In **On Ice: The Slippery Slope of Employer-Paid Egg Freezing**, Nicole M. Mattson, a third-year law student at Denver Sturm College of Law and this year's winner of the ABA Section of Labor and Employment Law and The College of Labor and Employment Lawyers national law student writing competition, discusses how egg-freezing furthers workplace gender equity by giving women more control over career and family de-

cisions. Mattson explains, however, that employers offering egg-freezing benefits could unintentionally face liability under antidiscrimination and job-protected leave laws and warns that egg-freezing, even when offered with the best intentions, could detrimentally impact workplace culture.

Paige Haughton, a third-year law student at the University of Minnesota Law School and the *Journal*'s Editor-in-Chief, discusses the three most commonly used doctrines courts rely on to determine whether an injury "arises out of" employment in **Workers' Compensation: The Hazard of Adopting the Increased-Risk Doctrine When Interpreting "Arising out of."** She contends the actual-risk doctrine and increased-risk doctrine are inconsistent with the purpose of workers' compensation and argues that states should instead adopt the positional-risk doctrine because it provides fair outcomes for employees and is consistent with the system's goal of providing an easily administered remedy. The article includes a comparative chart of states' current approaches to the issue.

Professor Stephen F. Befort
Professor Laura J. Cooper
Editors

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