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Saint Louis University School of Law
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The Editors' Page

This issue begins a new volume of the *ABA Journal of Labor & Employment Law* with a new group of student editors. The faculty co-editors also saw some transitions. We said goodbye to Professor Miriam Cherry, thanking her for her terrific contributions to the *Journal* during her tenure at SLU, and welcomed Professor Michael Duff, one of the country's leading experts on workers' compensation and an expert in labor law, as well.

To kick off the new volume, the issue begins with **The Supreme Court's 2021–22 Term in Review**, by the 2022–23 Labor and Employment Law Section Secretary Louis Lopez, Chief of the Policy and Strategy Section in the Civil Rights Division at the U.S. Department of Justice. In the review, Mr. Lopez focuses on cases in five major areas: COVID-19 vaccine mandates, mandatory arbitration, state sovereign immunity, public employee First Amendment rights, and employee benefits. The three vaccine mandate cases involved the Court's emergency docket: *Biden v. Missouri*,[1] concerning the Health & Human Services mandate for healthcare workers, *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*,[2] about OSHA's vaccine-or-test mandate, and *Austin v. United States Navy Seals*,[3] over the Navy's vaccine mandate for service members. The mandatory arbitration cases considered several exceptions to enforcement of arbitration agreements. They included *Morgan v. Sundance, Inc.*,[4] *Southwest Airlines Co. v. Saxon*,[5] and *Viking River Cruises, Inc. v. Moriana*.[6] *Torres v. Texas Department of Public Safety*[7] concerned Eleventh Amendment immunity under the Uniformed Services Employment and Reemployment Rights Act. And the First Amendment case was *Kennedy v. Bremerton School District*,[8] where a public school football coach had been asked not to pray on the field after games. Lastly, the article summarized the five cases about work-related benefits decided by the Court: *Marietta Memorial Hospital Employee Health Benefits Plan v. DaVita,*

1. Biden v. Missouri, 142 S. Ct. 647 (2022) (per curiam).
2. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661 (2022) (per curiam).
3. Austin v. U.S. Navy Seals, 142 S. Ct. 1301 (2022).
4. Morgan v. Sundance, 142 S. Ct. 1708 (2022).
5. Sw. Airlines Co. v. Saxon, 142 S. Ct. 1783 (2022).
6. Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906 (2022).
7. Torres v. Tex. Dep't of Pub. Safety, 142 S. Ct. 2455 (2022).
8. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

Inc.,[9] *United States v. Washington*,[10] *LeDure v. Union Pacific Railroad Co.*,[11] *Babcock v. Kijakazi*,[12] and *Hughes v. Northwestern University*.[13] Mr. Lopez concluded by highlighting several cases set to be decided in the current term.

The second article is written by Assaf Harel, Ph.D. in Law, Peres Academic Center in Rehovot, Israel. In **First Amendment Protection of Hybrid Personas Speaking in the Course of Their Employment: An Israeli Perspective**, Dr. Harel critiques "the rigid binary approach of the Supreme Court that differentiates sharply between speech in the course of employment and private speech," exemplified by the Court's *Garcetti v. Ceballos* decision. He argues that every person operating in the public sphere has a public/private hybrid persona, a reality recognized by Israel's approach to public employee speech. The article describes how the law in Israel balances the private and public aspects of hybrid personas and protects all types of statements on private and public issues as long as the statement does not harm public trust, moral rectitude, and the proper functioning of public administration.

Following that article is **The Misuse of the Business Judgment Rule in Employment Discrimination Cases**, authored by Robert S. Mantell, partner at Powers, Jodoin, Margolis & Mantell LLP in Boston, Massachusetts. Mr. Mantell's article argues that the business judgment rule in employment discrimination cases has evolved to improperly limit scrutiny of an employer's asserted nondiscriminatory reason to the point that it effectively grants employers immunity simply because they characterize their decision as a business judgment. He argues that courts ought to examine that judgment as part of a pretext analysis where the reason given by an employer for an adverse action is irrational. Finally, Mr. Mantell concludes that the extreme form of business judgment rule should be rejected because no policy arguments justify the rule.

Next is one of the winners of the annual writing competition sponsored by the ABA Section of Labor and Employment Law and the College of Labor and Employment Lawyers, **The Health and Safety of Incarcerated Workers: OSHA's Applicability in the Prison Context** by Megan Hauptman. Adding to the scholarship on prison inmate workers and employment law, Ms. Hauptman focuses on the safety of their workplaces and argues that they ought to be protected by the Occupational Health and Safety Act (OSHA). Unpacking the term "employee" as it has been applied to incarcerated workers and looking

9. Marietta Mem'l Hosp. Emp. Health Benefits Plan v. DaVita Inc., 142 S. Ct. 1968 (2022).
10. United States v. Washington, 142 S. Ct. 1976 (2022).
11. LeDure v. Union Pac. R.R. Co., 142 S. Ct. 1582 (2022) (per curiam).
12. Babcock v. Kijakazi, 142 S. Ct. 641 (2022).
13. Hughes v. Nw. Univ., 142 S. Ct. 737 (2022).

at how courts have carved out a "prisoner exception" from federal protective legislation. Ms. Hauptman suggests how OSHA coverage could be achieved and engages with how courts might distinguish OSHA's definition of "employee" from more restrictive definitions in other federal legislation.

Lastly, the issue contains a note authored by former Note Editor for the *Journal*, Hannah E. Wissler. In **Overlooked and Undervalued: Ex-Offenders in the Employment Market**, Ms. Wissler focuses on employment problems faced by those with criminal records and catalogues state laws on the issue, some of which exacerbate these problems. The article rates those laws by how likely they are to help ex-offenders gain employment. It concludes with recommendations for best practices, including Clean Slate Laws, collateral consequence training, and Fair Chance Laws.

We hope you enjoy this issue and join us in thanking the *Journal*'s student board, staff editors, and authors in bringing this issue to our readers.

Professor Marcia L. McCormick
Professor Matthew T. Bodie
Professor Michael Duff
Faculty Co-Editors