Federal Labor Standards Legislation Committee Newsletter

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A Word from the new Editor...

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The Committee recently concluded its highly successful 2019 Midwinter Meeting, held February 20-22 in Playa del Carmen, Mexico. We enjoyed excellent weather during the event that allowed the participants to appreciate the beauty of the Yucatan Peninsula and take advantage of the numerous significant archeologic sites in Tulum, Coba and Chichén Itzá. Several members took side trips to visit these Mayan ruins and swim in numerous cenotes prevalent in this part of Mexico. The hospitality and wonderful cuisine of our host country were on full display. Selected photographs of the event are posted at the end of this report.

Professor William Corbett from Louisiana State University kicked off the meeting Wednesday afternoon with an entertaining, in depth, scholarly analysis of recent key decisions from the U.S. Supreme Court with particular emphasis on topics covered by the Committee. The Honorable Charlotte Burrows, a Commissioner at the U.S. Equal Employment Opportunity Commission, discussed, among other things, the EEOC's current position on enforcement. The status of arbitration agreements was the subject of a lively discussion framed from the perspectives of the employee/employer representatives. More on these presentations later.

Committee News

The location and dates for the 2020 Midwinter Meeting have not yet been determined, but Committee leadership is looking at various warm weather sites.

The Committee co-chairs are always looking for contributors to the five treatises that are written by the Committee. The Committee writes treatises on the FLSA, State-by-State Wage and Hour Laws, the ADEA, FMLA and USERRA, each with ongoing work for the annual supplements or the publication of a new edition. We are delighted to announce that the Committee’s list of publications will likely now include a treatise on Sarbanes-Oxley/The Dodd-Frank Act. Please contact one of the Committee chairs if you are interested in working on one of these treatises.

Joe Tilson, Chair of the Section of Labor and Employment Law, joined the Section’s leadership, Michele Fisher, Jason Marsili, Lawrence Peikes and Dane Steffenson, to encourage members to write for the various Section publications including the Section Newsletter (4 times per year), the FLASH eNewsletter (monthly) and Hot Topics (occasionally). These publications are distributed to over 13,000 attorneys in the Section.

Members were encouraged to attend the 13th Annual Section Conference, which will be held this year in New Orleans, Louisiana, November 6-9 and include more than 60 programs and attendance by over 1,200 attorneys.

Our Section’s leadership reiterated our commitment to diversity and inclusion among speakers and leadership positions. To further this goal, the Section has a Section Leadership Development Fund that provides funds to subsidize new-to-
the-profession lawyers’ attendance at the Section’s meetings for 3 years. Several lawyers, who have been beneficiaries of the Fund, attended our meeting and contributed. The Committee also established a Diversity Scholarship Fund last year aimed at including diverse members in our Midwinter Meeting and bringing those in positions such as in-house or public interest positions who might not otherwise be able to attend. The Committee funded two such scholarships at the meeting this year and are seeking contributors to those scholarships, which are tax deductible, so additional individuals can attend our meeting next year.

Playa del Carmen Meeting Details

1. Reports

The Midwinter Meeting reports and papers can be found on the [Committee’s website](#). The Subcommittee Reports this year include the following:

1. Age Discrimination in Employment Act
2. Equal Pay Act
3. Fair Labor Standards Act
4. Family and Medical Leave Act
5. USERRA
7. WARN & EPPA
8. SOX/Dodd-Frank

The papers presented at the meeting include the following:

Oyez! Oyez! Oyez! Supreme Court Review Professor William Corbett

Classifying Workers as Independent Contractors: The Risk Versus Reward
*Elizabeth Arnold, Michael Josephson, Joseph Mulherin and Dane Steffenson*

What’s New at the EEOC: New Initiatives and Notable Cases
*Honorable Charlotte Burrows and Kathy Butler*

FLSA Hot Topics
*Robert Boonin, Ryan Hagerty, Jonathan Keselenko and Juno Turner*

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
*Theodore Cheng, Karla Gilbride, Matthew Helland and Lisa "Lee" Schreter*

Attorneys’ Fees and Costs in Employment Litigation
*Allison Balus, C. Ryan Morgan, Nate Oleson and Christine Webber*

State Wage and Hour Law: Where the Action Is
*Loren Donnell, Robyn Klinger and Stephanie Lee*

I’ll Take the FMLA for $1,000
*Sara Faulman, C. Andrew Head and Jennifer Williams*

ADEA
*Martine Wells and Roxana Bell*

Hot Topics in Whistleblower Law
*Michael A. Filoromo, III and Harry (Hal) Wellford, Jr.*

Anatomy of an Equal Pay Act Class and Collective Action
*Rebekah Bailey, Susan Ellingstad and Gina Janeiro*
Professor Corbett was the first speaker out of the box and began his review with a thorough analysis of the U.S. Supreme Court’s decision in *Epic Systems v. Lewis*. Professor Corbett suggested that the Supreme Court gave short shrift in Epic to the “mutual aid and protection” provision of the National Labor Relations Act, which the National Labor Relations Board had argued created a conflict with the Federal Arbitration Act and validated the NLRB’s position under the FAA’s savings clause. Professor Corbett reviewed several recent lower court decisions that have fallen in line with Epic such as *Gaffers v. Kelley Services*.

Continuing his analysis on Supreme Court arbitration opinions, Professor Corbett was particularly intrigued by Justice Gorsuch’s opinion in *New Prime, Inc. v. Oliveira*, concerning who should initially determine – the courts or an arbitrator – whether Section 1 of the FAA’s exclusion for disputes involving “contract[s] of employment” applied when ordering arbitration. Professor Corbett questioned Justice Gorsuch’s use of an originalist analysis which focused on “[how] a reasonable reader at the time” in 1925 (when the statute was enacted) would interpret the statute’s definition of employment to today’s workforce. Professor Corbett highlighted Justice Ginsberg’s, brief concurring opinion summarizing circumstances in which “Congress . . . may design legislation to govern changing times and circumstances,” suggesting that a rigorous adherence to the meaning of the text at the time of its enactment often might thwart rather than execute congressional intent.

Professor Corbett was somewhat skeptical of the underpinnings for the Supreme Court’s opinion in *Janus v. AFSCME*, in which the mandatory payment of union dues by public sector employees was deemed a violation of freedom of the First Amendment. Professor Corbett opined that the Supreme Court’s change in position was potentially harmful to the stare decisis doctrine. As to Supreme Court trends, Professor Corbett predicted that whether sexual orientation is covered under Title VII, will be a topic taken up by the Supreme Court in one of the next two terms. Finally, in his list of predictions, Professor Corbett stated that the Ninth Circuit’s position in *Lamps Plus v. Varela* will be reversed by the United States Supreme Court. Let’s see how the Professor’s prognostications hold up at next year’s Midwinter Meeting.

The *Epic* decision’s impact on FLSA litigation was also addressed in a lively session involving, among others, Matthew Helland and Lee Schreter. Interestingly, Ms. Schreter, when discussing the impact of arbitration agreements on class notice, accurately predicted that the Fifth Circuit Court of Appeals, in *In re: JPMorgan Chase & Company*, would hold there was no right to notice. Mr. Helland and others highlighted how plaintiffs are doing mass arbitrations and some of the issues that arise during that process.

The Honorable Charlotte Burrows and Kathy Butler presented on developments at the EEOC. Commissioner Burrows noted that she continued to support the EEOC’s agenda previously in place, which focused on low paying industries and systemic discrimination. She noted that the EEOC’s ability to be proactive was limited by the failure to have a full complement of commissioners. Commissioner Burrows encouraged employers at the conference to utilize the EEOC as a partner in correcting discrimination and as a vehicle to training, especially in the sexual harassment arena. Finally, Commissioner Burrows discussed the latest on employer’s deadlines and duties to report EEO-1 data.

Ms. Butler conducted an excellent analysis of the Ninth Circuit’s holding at the time in *Yovino v. Rizzo*, which she indicated set up the potential for a circuit split requiring Supreme Court clarification of whether prior salary history can be the legitimate nondiscriminatory reason to justify pay inequities under the Equal Pay Act. As fate would have it, the Ninth Circuit’s groundbreaking en banc opinion in Rizzo was vacated, for unrelated reasons, three weeks after the Conference. It will be reheard en banc, and certainly will be a topic at next year’s meeting. Ms. Butler also wondered, out loud, when discussing sexual harassment cases, why plaintiffs fail to utilize a negligence theory in Title VII sexual harassment cases. Ms. Butler believes plaintiffs would have great success challenging whether the employer “knew or should have known about” the sexual harassment, as opposed to battling over affirmative defenses set forth in *Ellerth*.

Perhaps the most argumentative presentation centered on the classification of independent contractors. In his presentation on this topic, Michael Josephson took employers to task on utilizing independent contractor
agreements. Josephson cited a litany of studies in demonstrating that independent contractor agreements erode employee wages, benefits, safety, workers’ compensation, and unemployment benefits, all while shifting the cost of doing business on the worker. Josephson identified several industries which are in the cross-hairs: delivery services/gig economy, construction/energy, cable, long-haul and commercial drivers, and not for profits. The presenters had a lively exchange concerning whether employers actually engaged in the privileged analysis of reclassification costs in which employers reviewed the cost of increased taxes, benefits, overtime, and onboarding when deciding to classify employees as independent contractors even when the strength of the classification is in question. The clash of conflicting positions, and the passion of the presenters, made this discussion stand out.

There were also excellent presentations on The Equal Pay Act and state law wage and hour litigation, among other topics.

The Committee meeting was capped off by a spectacular dinner at Cinco restaurant at the Thompson Hotel. Several long-time attendees such as Joe Tilson, Dan Vliet, Greg McGillivary, David Borgen and Robyn Klinger, reminisced as they swapped photographs of prior Committee dinners in which past members were fondly toasted.

Finally, the Committee wishes to thank Chip Aubry for his service as the longtime editor of this newsletter. Chip, and his predecessor, David Safon, have set a high bar for this missive.