Labor and Employment LAW

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Discrimination in the Age of Artificial Intelligence

BY AMBER M. ROGERS AND MICHAEL REED

In his 1968 classic film, *2001: A Space Odyssey*, Stanley Kubrick introduced us to—and terrified us with—HAL, the sentient computer that sabotaged its human operators after learning of their plans to disconnect it. HAL, it seemed, had outsmarted its human creators to protect itself and bring about their demise.

Artificial intelligence ("AI") has been a fixture in the collective American mind for decades. Although it has not progressed to the terrifying extremes depicted in *2001* (at least not yet), AI now plays a role in almost every industry in the world. Automobiles now come standard with a bevy of automated features and the prospect of self-driving cars seems imminent. AI has infiltrated the legal industry too. Lawyers pride themselves on their intellect and ability to apply critical analysis to constantly changing circumstances. Perhaps that will remain a uniquely human ability for now, but AI is now being used to analyze case law and even assemble legal briefs.

Another new frontier for AI is the corporate hiring process. Companies are now using AI not only to scan resumes for relevant experience or accomplishments, but even social media pages for potential applicants who the company can target directly with an automated solicitation or application. Proponents of this use of AI say that it allows employers to process a far greater number of resumes or applications than they otherwise could with only humans at the helm. It also would seem to eliminate the risk of human biases based on names, age, race, or gender, by removing that information from any algorithm on which the AI is based. Moreover, an AI-powered screening process does not get tired at 3:00 p.m. after reviewing reams of resumes or applications, like humans do, which has been shown to correlate with rejected applications. The ability of AI to process a seemingly endless amount of data would lead one to think that it increases the opportunity for applicants and employers to find each other. The AI skeptics say that it is only as good as the humans who create the underlying algorithms and that it detracts the essential "human" element from an especially interpersonal process. There are also technical problems with AI, as there is with any new technology, that skeptics say make it unsuitable for certain uses. Facial and voice recognition AI, for example, while rapidly improving, is still far from perfect and makes errors on a regular basis.

There are also particular risks for employers under federal and state employment statutes. Title VII of the Civil Rights Act of 1964 ("Title VII") provides federal protections for employees and applicants against discrimination on the basis of certain characteristics, including race, religion and gender, and the Age Discrimination in Employment Act ("ADEA") prohibits age discrimination. An employer relying on AI to sort through applications could inadvertently disqualify an applicant or group of applicants based on a protected trait. For example, an AI screening application that disqualifies applicants outside of a certain geographic radius might inadvertently discriminate against a particular racial or ethnic group.

Likewise, a screening application that discards applicants who lack certain educational credentials might inadvertently discriminate against older applicants. If AI is throwing out an entire class of applicants, even if based on seemingly innocuous factors such as geography, the employer could be held liable for disparate impact discrimination, especially if the plaintiffs are able to show that a less discriminatory practice would have accomplished the employer's hiring initiatives.

In addition, states are increasingly passing their own anti-discrimination laws that include other types of employees. Virginia, for example, recently passed a law that protects employees who use cannabis oil for medical purposes. This law distinguishes "cannabis oil" from other types of medicinal marijuana and has specific definitions of what is and is not protected. An algorithm that fails to

CONTINUED ON PAGE 12

THE SECTION

BY SAMANTHA C. GRANT, CHAIR

It was a privilege and honor to serve as the Chair of the ABA Section of Labor and Employment Law over the past year. When I was elected Chair-Elect in 2019, I pledged then, as I had throughout my ABA and professional career, to continue to focus on promoting diversity, equity and inclusion (DEI) within the profession and in the Section. As Section Chair, I am proud of the steps we took this year to institutionalize diversity, equity and inclusion into the Section. In addition to my DEI goals, I was focused on expanding our outreach to international lawyers and supporting new and young lawyers. We have made many strides in all of these areas over the past year, which are highlighted in my past couple of columns. I devote my last column to recent Section accomplishments as well as gratitude for our leadership's collective efforts over the past year.

We continued to expand our outreach to attorneys internationally and to enhance our profile and collaboration with bar associations from around the world in the last couple of months. The Section's Outreach to New and Young Lawyers Committee and the International Association of Young Lawyers (AIJA) hosted a webinar on best practices for returning to the office after the pandemic followed by a networking event for our members to meet AIJA members. The webinar was excellent, and attendees from both associations enjoyed meeting each other.

Further to our efforts of promoting and recognizing the efforts of new and young attorneys, the Section created a new and young lawyer award. Up to two of these awards will be given each year. Nominations will soon be open for this award, which will be presented at the Annual Section Conference in November.

The Outreach to International Lawyers Committee hosted a webinar on the benefits and pitfalls of the use of artificial intelligence in the workplace followed by a networking event with the Employment Law Association of Ireland, Employment Lawyers Association (UK), Employment Lawyers' Group (Northern Ireland), German Federal Bar, International Association of Young Lawyers (AIJA), Inter-Pacific Bar Association, Italian Employment Lawyers Association, and Mexican Bar Association. The substance of the webinar was very helpful to attorneys from all jurisdictions, and the attendees continued to discuss the topic during the networking event while also enjoying getting to know attorneys from other bar associations. Thanks to Mercedes Balado Bevilacqua and Cristiano Cominotto for their energy and excellent work on planning and speaking on the webinar.

Two of the co-chairs of the Section's International Labor and Employment Law Committee, Melanie Crowley and Ify Okoli-Watson, held the Section's first ever Instagram live event. It was very informative and promoted other Section events at the same time. Thanks to Melanie and Ify for their creativity and execution!

The Section held its eighth Leadership Development Program (LDP) in July. Continuing our focus on DEI, this year's LDP was designed to focus on enhancing inclusive leadership skills and Section governance knowledge. Lauren Stiller Rikleen, a leading researcher, speaker and author in the fields of leadership and inclusion, was the LDP facilitator. She was very well received by the 28 LDP participants representing the employer, employee, in-house corporate counsel, government and union constituencies. We are grateful to the LDP Committee co-chairs for their excellent work and collegiality particularly when dealing with curve balls in the planning process!

The results of the tireless work of our Diversity, Equity and Inclusion in the Legal Profession Committee (DEILP) came to fruition this summer. In support of our Section-wide mission to develop and retain a diverse membership and to enhance a sense of belongingness for our members, the Section launched five affinity groups: women attorneys, attorneys of color, attorneys with disabilities, LGBTQ+ attorneys, and new and young lawyers. We hope that these groups will cultivate spaces and activities for members who share common interests, experiences and identities. We encourage Section members to

CONTINUED ON PAGE 11

Labor and Employment LAW

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The Supreme Court Term from the Labor and Employment Perspective

BY SHEENA R. HAMILTON AND BRANDI D. PIKES

In the first half of this year, several cases were decided at the Supreme Court of the United States that did not explicitly arise under labor and employment law. Nevertheless, the Supreme Court's holdings in those cases may have a significant impact on this practice area. The Supreme Court also denied cert. in several employment cases that raised questions under its prior holdings. The cert. denials in these cases means that its prior holdings remain good law for now. Some of the most notable cases are summarized below.

In *Van Buren v. United States*, No. 19-783 (Jun. 3, 2021), in a 6-3 decision, Justice Barrett authored the majority opinion, which held that "[a]n individual exceeds authorized access [under the Computer Fraud and Abuse Act of 1986 ("CFAA")], when he accesses a computer with authorization but then obtains information located in particular areas of the computer—such as files, folders or databases—that are off-limits to him." The case involved a former police officer who, in violation of police department policies limiting use of certain databases to law enforcement purposes, allegedly committed a felony violation of the CFAA when he ran a search in a law enforcement license plate database in exchange for payment. The Court found that the CFAA did not "cover" people like the officer who "have improper motives for obtaining information that is otherwise available to them." Interestingly, the Court noted that a broad interpretation of the statute would criminalize a "breathtaking amount of commonplace computer activit[ies]," such as "send[ing] a personal e-mail or read[ing] the news." Although employers have other tools in their toolbox with regard to improper use of information, the Court's decision resolved a Circuit split and significantly narrowed the applicability of the CFAA to employment cases. The decision suggests that employers should review employee computer policies to further define the computer activities that are and are not authorized to ensure protection of sensitive data.

In *Tanzin, et al., v. Tanvir, et al.*, No. 19-071 (Dec. 10, 2020), Justice Thomas, in a unanimous opinion, held that the Religious Freedom Restoration Act ("RFRA") of 1993's express remedies provision "permits litigants, when appropriate, to obtain money damages against federal officials in their individual capacities" for violating litigants' rights to free exercise of religion under the First Amendment. This case involved three Muslim men who argued that their religious freedom was violated by an FBI agent who allegedly placed them on the no-fly list after they refused to become FBI informants. The men stated that their religious beliefs prohibited them from assisting the FBI in this way. Although this case is not a pure employment case, this decision may open the door to employment suits against government employers in their individual capacities for money damages when their conduct violates RFRA.

In *California, et al., v. Texas, et al.*, No. 19-840 (Jun. 17, 2021), one of the most high profile cases of the term, the Court was confronted with the question of whether reducing the required coverage under the Affordable Care Act ("ACA") to zero rendered the minimum coverage provision unconstitutional. The Fifth Circuit previously held that the elimination of the individual mandate, when Congress reduced the required amount of health coverage to zero in the Tax Cuts and Jobs Act of 2017, resulted in parts of the ACA being unconstitutional. The Court, in a 7-2 decision, reversed and remanded the Fifth Circuit's ruling. Ultimately, the Court did not reach the question of the minimum coverage provision's constitutionality because it held that the plaintiffs lacked standing to bring the claims. Employers covered by the ACA, then, must continue to comply with all ACA provisions.

Notably, SCOTUS denied cert. in three employment related cases, which had the effect of affirming its prior holdings. When denying cert in *Collier v. Dallas County Hospital District, dba Parkland Health & Hospital System*, No. 20-1004 (May 17, 2021), a case from the Fifth Circuit regarding whether the display of the N-word might create a hostile work environment under Title VII of the 1964 Civil Rights Act, the Court reaffirmed its holding in *Harris v. Forklift Systems, Inc.* 510 U.S. 17 (1993) that a single use of an epithet may not be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment. The Court affirmed its holdings in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019) and *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995) that, where there is "clear and unmistakable" evidence of an agreement to arbitrate "arbitrability" a court will not disregard that evidence, when it denied cert. in *Piersing v. Domino's Pizza Franchising LLC*, No. 20-695 (Jan. 25, 2021). The question presented in *Piersing*, a case from the Sixth Circuit, was whether a non-signatory of an arbitration agreement may enforce the agreement's terms against a signatory. The denial of cert. in *Piersing* also appears to reiterate SCOTUS's decision in *GE Energy Conversion France SAS v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (2020), where it held a non-signatory may enforce an agreement to arbitrate against a signatory based on the equitable estoppel doctrine. With its decision not to take up *Employer Solutions Staffing Group, LLC, et al., v. Scalia*, No. 20-660 (Feb. 22, 2021), a case from the Ninth Circuit addressing whether joint employers have a right to indemnification or contribution from each another where there is a collective, willful failure to pay overtime under the Fair Labor Standards Act, the Court reaffirmed its decision in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), where it rejected the argument that where joint and several liability is found, contribution must also exist. •

Sheena R. Hamilton is a partner at Dowd Bennett LLP in St. Louis, representing employers in workplace investigations and litigation. She also serves as a member of the ABA Board of Governors. **Brandi D. Pikes** is a law clerk at the United States District Court for the Southern District of Texas.

Trendspotting

Four Web Accessibility Developments that Shaped the First Half of 2021

BY JEREMY HORELICK

Since 2017, plaintiffs have brought roughly 10,000 digital accessibility lawsuits against businesses and governments under Titles II and III of the Americans with Disabilities Act (ADA) and other statutes. The causes of action vary, but most claims target defendants whose websites or other digital assets are allegedly built in a way that fails to integrate with the assistive technologies that people with disabilities use to understand web content such as pictures, text, and video. Few cases ever proceed to litigation; the majority settle privately and require the defendant to address the allegedly problematic conditions within 12-36 months.

The pace and volume of digital accessibility litigation remained robust in the first half of 2021, as the world began to emerge from COVID-19 and many businesses resumed their pre-pandemic operations. This article outlines four digital accessibility developments from the first six months of this year that will continue to shape the business landscape for private and public companies, non-profits, and government entities that have public websites.

1. *Gil v. Winn-Dixie*, 993 F.3d 1266 (11th Cir. 2021)

In April, a three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit reversed a landmark 2017 district court ruling in favor of the plaintiff that found that websites may be places of public accommodation under the ADA. In the aftermath, that reversal has curbed the number of filings by plaintiffs in the Eleventh Circuit, which includes Alabama, Georgia, and Florida. Shortly after the panel issued its opinion, however, the plaintiff petitioned for *en banc* review, potentially throwing the case back into limbo. Should the appellate court grant *en banc* review and vacate the panel's decision, businesses in the Eleventh Circuit may expect the rate of digital inaccessibility complaints to increase.

2. New Guidance from the W3C

In January, the World Wide Web Consortium (W3C), the private body that issues international web standards, released a working draft of the Web Content Accessibility Guidelines (WCAG) version 3.0. The WCAG is intended to provide a wide range of recommendations for making web content more accessible to users with disabilities. While the new standards likely will not take effect until 2023, business owners and website developers should begin planning now by visiting https://www.w3.org/TR/wcag-3.0/ to familiarize themselves with the proposed changes. Chief among these recommendations is a new scoring system that will make the evaluation of a given site's accessibility easier and more nuanced. WCAG 3.0 will focus not on "success criteria," as WCAG 2.0 does, but on outcomes that are measured holistically and based on functional needs. The working draft will surely evolve further before its release, since the W3C solicits ongoing feedback from members. Nevertheless, we should anticipate that the WCAG 3.0 will help clarify the confusion that practitioners may feel about the current evaluation system.

3. Expected Increase in Follow-on Suits

An estimated 25 percent of digital inaccessibility complaints filed in federal court this year have been against defendants who were previously sued under Title III of the ADA. These claims are often brought by a new plaintiff and target the same websites that were at issue in prior lawsuits. But increasingly, it is other types of digital assets—mobile applications, mobile-responsive websites, streaming platforms, embedded videos—that are the focus of this new litigation. Businesses with an online presence are wise to consider the appeals court's 2018 holding in *Haynes v. Hooters of America*, 893 F.3d 781 (11th Cir. 2018), that the settlement of one plaintiff's claims for relief does not moot those of a second plaintiff.

4. Software-Based "Solutions" in the Crosshairs

Hundreds of companies may have learned in 2021 that the low-cost widget and overlay products now widely available online neither prevent litigation nor meaningfully improve digital accessibility. Roughly 10 percent of lawsuits filed this year have been against companies whose overlays were already active when the plaintiff visited the site. As a group of over 500 leading accessibility voices worldwide attest on www.overlayfactsheet.com: "No overlay product on the market can cause a website to become fully compliant with any existing accessibility standard and therefore cannot eliminate legal risk." Additionally, as the National Federation for the Blind reports, there is particular concern that some overlay providers are actually "harmful to the advancement of blind people in society." The NFB has since distanced itself from these companies (https://nfb.org/about-us/press-room/national-convention-sponsorship-statement-regarding-accessibe). Given the dissent by leading advocacy groups,

businesses should instead promote a compliance strategy that fixes the underlying source code of digital assets and builds accessibility into the design and development of websites and apps, rather than rely on these "quick fixes" that may make things worse.

In addition to fixing the underlying source code, rather than relying on widgets and overlay products, business owners, web developers, compliance managers, legal counsel and other stakeholders can provide an equitable and inclusive user experience, while minimizing legal exposure by:

a. Shifting from a discrete, reactive view of digital accessibility to one that is continuous, proactive, and dynamic. Businesses should maintain accessibility policies and procedures that include regular testing of existing assets, as well as IT and marketing practices that build ADA compliance into the development lifecycle.
b. Incorporating people with wide-ranging disabilities—visual, auditory, mobility, cognitive—into the auditing process. Their feedback, based on a wide set of testing tools, software, and methods, is central to an egalitarian and satisfying user experience.
c. Seeing digital accessibility in light of the good will it creates among users. Investing in true usability, not just in band-aid measures, may generate positivity in the disability community, widely estimated to exceed 1.5 billion people worldwide. While this translates into higher profitability for businesses, the return on that investment may surpass the mere increased purchasing power of an often-disenfranchised part of the population. It also carries with it the promise of a more equitable global future, in which more people have greater access to the goods and services they need. •

Jeremy Horelick is the Vice President of Business Development of ADA Site Compliance.

Program details and registration information will be available on the **Conference webpage** later this month.

Reserve your room at the **Beverly Hilton online** or by calling the hotel at (310) 274-7777.

Calendar of Events

NOVEMBER 10–13 | 2021
15th Annual Section of Labor & Employment Law Conference
Beverly Hilton
Los Angeles, California

JANUARY 27–29 | 2022
State & Local Government Bargaining & Employment Law Committee
MIDWINTER MEETING
Westin Resort
Puerto Vallarta, Mexico

FEBRUARY 2–5 | 2022
Employee Benefits Committee
MIDWINTER MEETING
Hilton New Orleans Riverside
New Orleans, Louisiana

FEBRUARY 16–18 | 2022
Federal Labor Standards Legislation Committee
Grand Hyatt Kauai
Koloa, Hawaii

FEBRUARY 27–MARCH 2 | 2022
Committee on Development of the Law Under the NLRA
Grand Hyatt Kauai
Koloa, Hawaii

MARCH 1–4 | 2022
Committee on Practice & Procedure Under the NLRA
Grand Hyatt Kauai
Koloa, Hawaii

MARCH 8–11 | 2022
Occupational Safety & Health Law Committee
MIDWINTER MEETING
Westin Sarasota
Sarasota, Florida

MARCH 15–19 | 2022
Employment Rights & Responsibilities Committee
MIDWINTER MEETING
Westin Resort
Puerto Vallarta, Mexico

MARCH 30–APRIL 2 | 2022
National Conference on Equal Employment Opportunity Law
The Peabody Memphis
Memphis, Tennessee

MAY 1–5 | 2022
International Labor & Employment Law Committee
MIDWINTER MEETING
Ritz-Carlton
Berlin, Germany

NOVEMBER 9–12 | 2022
16th Annual Section of Labor & Employment Law Conference
Marriott Marquis
Washington, D.C.

FOR MORE EVENT INFORMATION, CONTACT THE SECTION OFFICE AT 312/988-5813 OR VISIT **www.americanbar.org/laborlaw**.

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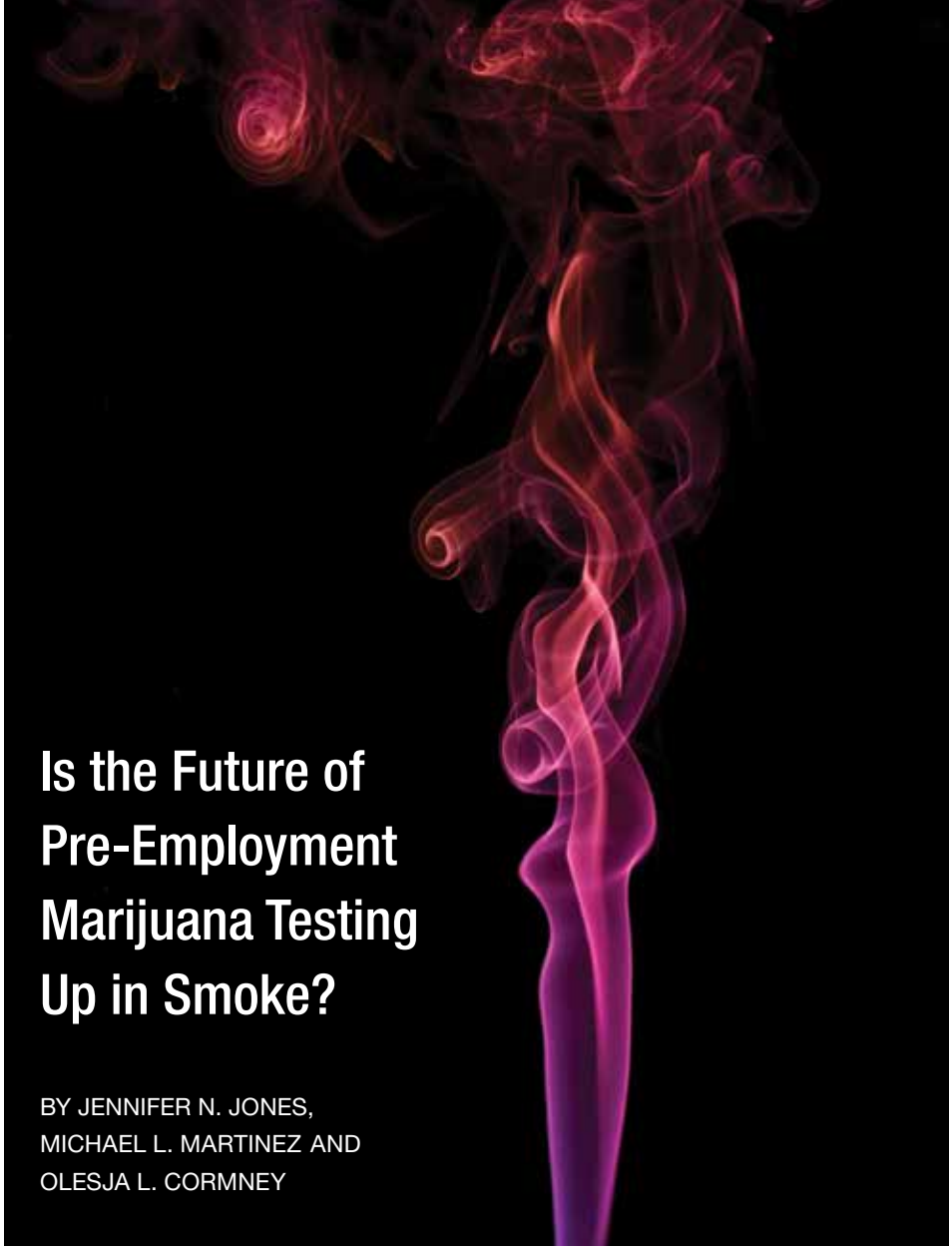

Is the Future of Pre-Employment Marijuana Testing Up in Smoke?

BY JENNIFER N. JONES, MICHAEL L. MARTINEZ AND OLESJA L. CORMNEY

With pre-employment drug testing being commonplace, we rarely—if ever—stop to consider how and why it started and whether it still serves its intended purpose. With the recent surge in state laws legalizing marijuana use (either medically or recreationally), perhaps it is time to pause and reconsider what the future should look like for pre-employment marijuana testing.

Pre-employment drug testing largely began during the "War on Drugs," when President Ronald Reagan mandated federal employees undergo drug testing. Private sector employers followed suit, and within a decade pre-employment drug testing became ubiquitous. The contention, backed by studies often conducted by drug testing companies or the federal government from the 1980s, is that pre-employment drug testing increases workplace safety and productivity, decreases absenteeism/turnover, and generally deters drug users from seeking employment at a company that drug tests. In a vacuum, these perceived benefits are difficult to verify, and the reality is most employers conduct drug tests (pre-employment or otherwise) because that is what they have always done since the 1980s.

Current Landscape and Employment Implications

It's no secret the legal landscape surrounding marijuana and the workplace is changing quickly. Employers must navigate a maze of federal and state statutes and court decisions when developing and revising substance abuse policies and drug-testing practices around marijuana.

Currently, 34 states and the District of Columbia have legalized medical marijuana use. Nineteen states and the District of Columbia have legalized recreational marijuana use. Three locations—New York City, Philadelphia and Nevada—have outright prohibited pre-employment marijuana testing in most industries.

Despite the state and local laws referenced above, employers can generally still test for marijuana and are not restricted from complying with federal (i.e., DOT) testing requirements. Also, some state laws legalizing marijuana have carve-outs for safety sensitive positions, and all the current state laws continue to prohibit marijuana use on company property and employees working under the influence.

However, some state laws provide medical or recreational marijuana users with some level of employment protection against adverse actions, like a failure to hire or termination for a positive test result. This creates challenges for multistate employers who are left struggling to decide how to address these issues through drug and alcohol policies, how to treat applicants and employees uniformly, and whether to have state-specific policies or universal policies on these issues.

Another challenge is determining whether keeping marijuana on drug-testing panels, pre-hire or post-hire, continues to make sense if employers cannot act merely on a positive test result. And if employers stop drug testing for marijuana, how do they ensure employees are not coming to work under the influence of cannabis?

Therefore, proving that an employee is "under the influence" has become a critical component, now that a positive test result is no longer sufficient under many state laws. Proving "under the influence" is not as easy as it seems. Marijuana remains detectable for long periods of time and that detectability varies with the type of testing performed. Current testing methods, although accurate, will not establish whether an employee was under the influence of marijuana during work hours. Until employers can spot-test for intoxication, these challenges

will continue to mount as more states decriminalize/legalize cannabis.

Where to Go from Here: Practical Tips for Employers

Is pre-employment marijuana testing deterring job applicants from applying with your company or eliminating otherwise-qualified applicants? How do you still help ensure safety of your employees if you decide to steer away from this testing altogether?

As employers grapple with attracting new employees and navigating the challenges of complying with federal, state, and local marijuana laws, they can consider several options regarding pre-employment marijuana testing:

- adopt numerous state/locality-specific policies and practices;
- implement a universal policy and practice that complies with the most restrictive laws for locations where they operate;
- eliminate pre-employment marijuana testing altogether; or
- adopt a "business need" approach, requiring pre-employment marijuana testing based on business need.

The key is determining what serves your business—or specific business units within your company—best. There is no one-size-fits-all approach here. What would work for a tech company's office environment may not work for a manufacturing facility. Even within the same facility, you may require pre-employment marijuana testing for some applicants but not others, depending on how safety-sensitive those positions are.

If you decide to do away with pre-employment marijuana testing completely—in locations where there is no legal requirement to do so, you should carefully review whether this approach may expose your company to negligent hiring vulnerabilities. For example, if your employees operate motor vehicles, work within customer homes, or work unsupervised with vulnerable populations, you should consider the duty of care your company owes the public or the customers it serves.

The bottom line with any approach, however, should be the safety of your employees. Ensuring employees are not working under the influence of drugs is an important component of keeping the workplace safe. One of the best ways to do that is by creating a robust reasonable suspicion testing program—putting policies and processes in place that focus on monitoring for employees who are "under the influence." This requires training human resources professionals and management, who will be required to administer the program, on signs of impairment, proper documentation of those signs, testing procedures, and then robust communication of the program to employees to promote awareness and transparency. While a reasonable suspicion testing program should be an integral component of a substance abuse policy for any employer, it is especially critical where pre-employment marijuana testing has been eliminated or where there are limitations on the use of a positive result.

As employers ponder the future of pre-employment marijuana testing, one thing is clear: we can no longer take the "it's how we've always done this" approach. In the hunt for new employees and in light of the ever-expanding web of marijuana laws across the nation, employers should consider making some tough decisions around what approach on pre-employment marijuana testing would work best for their workforces. •

Jennifer N. Jones, **Michael L. Martinez** and **Olesja L. Cormney** are Managing Counsel at Toyota Motor North America, Inc.

Call for Nominations: 2021 JUDGE BERNICE B. DONALD DIVERSITY, EQUITY AND INCLUSION IN THE LEGAL PROFESSION AWARD

The Judge Bernice B. Donald Diversity, Equity and Inclusion in the Legal Profession Award recognizes an ABA Section of Labor and Employment Law (LEL) member, law firm, corporation, organization or academic institution that has demonstrated leadership in and commitment to advancing diversity, equity and inclusion in the legal profession. Nominees will be evaluated based on their actions and impact influencing diversity, equity and inclusion in the legal profession. Nominations must be submitted by an LEL member. An LEL member must work or volunteer for the nominees that are law firms, corporations, organizations or academic institutions. Nominations must include the following information:

Nominee and Nominator Information: Names, addresses, firm, corporation, organization or academic institution, telephone numbers, and e-mail addresses for the nominee and nominator.

Nomination Narrative: The nomination narrative should include a link to the nominee's bio and describe the significant diversity, equity and inclusion in the legal profession contributions, specify the nature of those contributions, and identify those who have benefited. Provide specific materials that demonstrate the nominee's contributions, including articles, presentations and other documentation. Also, nominators may provide the names and contact information of no more than three other individuals who, if asked, could provide additional information.

Letters of support from other individuals and organizations aware of the nominee's contributions may be included, but are not required.

The award will be presented during the 15th Annual Section of Labor and Employment Law Conference.

Submit all materials no later than October 11, 2021 to:
Brad Hoffman, Director
ABA Section of Labor and Employment Law
brad.hoffman@americanbar.org

Arbitration vs. Litigation

Take-Aways from a Recent Study of Commercial Judges and Arbitrators

BY RICHARD BALES

Is arbitration a form of second-class justice as compared to litigation? The issue is an important one to labor/employment attorneys, since nearly all labor disputes and an increasing number of employment disputes are resolved through arbitration.

Stacie Strong (University of Sydney Law School; previously at University of Missouri Law School) emphatically answers "no". She surveyed judges and arbitrators regarding three building blocks of legal reasoning: legal authority, factual authority, and the reasoning process. The take-away: judges and arbitrators approach dispute resolution identically.

The book is *Legal Reasoning Across Commercial Disputes* (Oxford University Press, 2020). As the title indicates, the study focuses on commercial disputes, both domestic and international. Nonetheless, most of the findings likely apply to labor and employment arbitration as well—and they help explain what arbitrators do and why we do it.

One topic that may not translate directly from commercial to labor disputes is the use of legal versus contractual authority. Arbitrators in both labor and commercial arbitration are bound by the contracts that confer decisional authority. However, while in labor arbitration there usually is only one CBA at issue (and, perhaps, earlier versions of the same CBA, side letter agreements, interpretive arbitration awards, and consistent past practices), commercial disputes are moving away from a single-contract, bilateral model toward disputes that are multi-party and multi-contract—thus often making the contract(s) less useful in crafting a decision. Also, while in commercial arbitration there is usually a set of laws that govern the contract to be interpreted, in labor arbitration external law may or may not be incorporated into the CBA, and precedent is advisory rather than binding. Both factors, I think, tend to increase a labor arbitrator's reliance on the CBA (and decrease reliance on other sources of law) as the basis for decisional law, as compared to either arbitrators or judges in commercial disputes, who are less likely to rely on the contract and more likely to rely on the commercial law of the relevant jurisdiction. When comparing labor disputes to commercial disputes, it may therefore be appropriate (and in many instances mandatory) to treat CBAs as "legal" authority—i.e., the "law of the shop."

With this in mind, a common myth is that judges focus on the law whereas arbitrators focus on the facts. Strong's study debunks this. She finds arbitrators and judges both believe factual issues are central to the resolution of legal disputes, and both approach resolution of factual disputes similarly.

Attention to Detail

Arbitrators and judges showed a remarkable degree of consistency in ranking the factors determining how detailed a given decision should be. Arbitrators and judges agreed the most important factor was the complexity of disputes of fact, followed closely by the complexity of disputes of law. (As discussed above, I would include disputes over CBA interpretations in labor cases as analogous to disputes of law in commercial cases.)

The third-ranked factor by both judges and arbitrators—and one that particularly resonated with me—was whether the act of writing would help the decisionmaker "think through the analytical process and increase[] the likelihood of reaching the right outcome." One survey participant, who had served as both judge and arbitrator, wrote: "It's like writing an essay—sometimes (rarely) it just doesn't write. As you write, you find it hard to support your argument. If it's too hard, you can't go there, so you go the other way."

Judges were more likely than arbitrators to write a more-detailed decision to increase the prestige of the decision itself. Both arbitrators and judges valued highly that the losing party feels heard, but arbitrators valued much more highly than judges that the *winning* party feels

CONTINUED ON PAGE 12

CALL FOR NOMINATIONS: THE FRANCES PERKINS PUBLIC SERVICE AWARD

The Frances Perkins Public Service Award recognizes the individuals or organizations that demonstrate a significant commitment to providing pro bono legal services, primarily in the areas of labor and employment law, to people of limited means or to the nonprofit, governmental, civic, community or religious organizations that are engaged in addressing the needs of individuals with limited means.

The need for pro bono services in the labor and employment area is acute. Questions relating to labor and employment law account for more than a quarter of the issues raised in many pro bono programs. The American Bar Association Section of Labor and Employment Law wishes to acknowledge the individuals, firms, corporate and union legal departments, government agencies, and other organizations that help meet this crucial need. As a result, the Section is seeking nominations for its annual Frances Perkins Public Service Award.

View the Award Criteria and Past Award Recipients.
Nominations are due September 1, 2021.

SMARTER FASTER

Labor and Employment

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Transgender Students and Sports

Title IX Compliance in an Uncertain World

BY CHRISTOPHER M. PARDO AND KATHERINE P. SANDBERG

A national debate currently rages over whether transgender athletes should be permitted to compete on sports teams that correspond to their gender identities. Title IX applies to any higher education institution that receives federal financial assistance and prohibits discrimination on the basis of gender, but the law does not address transgender students.

Recently, in mostly Republican-led states (Montana, North Dakota, South Dakota, Minnesota, Iowa, Wisconsin, Michigan, Ohio, Missouri, Kentucky, West Virginia, Utah, Arizona, Arkansas, Tennessee, Mississippi, New Mexico, Hawaii, Kansas, Oklahoma, Texas, Louisiana, Alabama, Georgia, Florida, South Carolina, Connecticut, New Jersey, Pennsylvania, Maine and New Hampshire) lawmakers have introduced a flurry of legislation that generally regulates the ability of transgender athletes to play on their schools' sports teams. Meanwhile, the legal landscape is far from certain, as the Supreme Court has not yet taken up the issue of whether Title IX applies to transgender students. Given the conflicting lower court rulings, Department of Education Office for Civil Rights guidance, and state legislation, the obligations that schools and universities have toward their transgender students under Title IX is unclear. Nonetheless, there are certain steps that schools and universities can take to feel more certain about their federal funding.

The Biden Administration's Take: Upending the Trump Administration, Affirming Obama-era Guidance

On June 16, 2021, the Department of Education issued a Dear Colleague letter that sets forth the Biden administration's interpretation of Title IX. Notably, this guidance has changed depending on the party in office: in 2016, the Obama administration issued similar guidance stating that Title IX protected transgender students. In 2017, the Trump administration reversed course and rescinded the guidance, and additionally threatened to withhold federal funding from schools that allowed transgender students to participate in sports consistent with their gender identities. Although the Biden administration's notice does not create new law, it provides notice to institutions that the Office of Civil Rights will review any complaints that transgender students may bring with the same level of scrutiny as claims for gender discrimination that are clearly covered under Title IX.

The Rush to Legislate Transgender Students' Participation in Sports

To date, over 30 states have introduced bills that prohibit transgender students from playing sports that correspond to their gender identities. Some states (in particular, Arkansas, Mississippi, Tennessee, Idaho and Florida) have implemented bans that prohibit transgender athletes from participating in sports that correspond to their gender identities. Proponents of these bills argue that they are necessary to protect opportunities to obtain athletic scholarships. Specifically, they claim that transgender women have higher levels of testosterone, which creates a competitive advantage. Opponents of transgender bans in female sports point to inconclusive scientific studies on the topic; difficulty quantifying the effect that elevated testosterone levels may have on performance; and the fact that competitors with other physical advantages (for example, extremely long legs or large feet) are not precluded from participating. Moreover, some females have naturally high testosterone levels. For example, Namibian athletes Christine Mboma and Beatrice Masilingi were recently precluded from competing in the 400 meters (but not the 200 meters) at the Olympics after testing revealed high testosterone.

The Complicated Legal Landscape

The Supreme Court has not addressed whether Title IX provides protections to transgender students, and lower courts have reached differing opinions. On June 28, 2020, the U.S. Supreme Court elected to keep in place a Fourth Circuit Court of Appeals decision that a Virginia school board violated Title IX when it prohibited a transgender former public high school student from using the bathroom that corresponded to his gender identity. The Court's order indicates that Justices Thomas and Alito would have agreed to hear the case.

The Fourth Circuit's ruling took into account the Supreme Court's June 15, 2020, ruling in Bostock v. Clayton County, which held that Title VII's protections extend to transgender employees. In the 6-3 ruling, Justice Gorsuch's majority opinion clearly

stated that employment discrimination on the basis of sexual orientation is prohibited under Title VII, but the Court left quite a few questions open, such as whether employers must permit employees to use the bathroom or locker room that corresponds with their gender identities. Given the questions left open in the Bostock decision, is it difficult to predict how the Supreme Court will rule if it addresses the issue of whether Title IX's protections apply to transgender students.

Indeed, courts have come to different conclusions regarding whether sex discrimination laws (either Title IX or Title VII) extend protections to transgender people. *See Etsitty v. Utah Transit Auth.*, 502 F. 3d 1215 (determining that Title VII does not provide protections to transgender workers in all cases); *Wittmer v. Phillips 66 Co.*, 915 F.3d 328 (5th Cir. 2019) (stating in dicta that Title VII does not prohibit discrimination against transgender people); *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. Aug. 21, 2016) (holding that Title IX does not apply to transgender people).

Steps that Educational Institutions Can Take to Ensure Compliance

Due to the constantly changing landscape in federal, state, and local law, the first step that educational institutions should take is to ensure that they are apprised of the latest guidance from the Department of Education's Office of Civil Rights ("OCR"). The OCR's guidance should be considered alongside any changes in federal or state law. Where the laws conflict, educational institutions should work with their counsel to determine an appropriate course of action.

Next, educational institutions should address any policies that they have on a wholesale level if those policies could implicate transgender rights. Some of these are obvious—for example, whether gender identify and expression are addressed (and how) in Title IX and antidiscrimination policies. Others are less obvious and involve evaluating how the information that is provided in a student's record (such as name and gender) might limit the student's ability to participate on certain sports teams and in other activities.

Educational institutions should also evaluate the facilities such as locker rooms, and allow transgender students to use the locker rooms that correspond to their gender identity. Additionally, schools should also implement and enforce policies regarding locker room etiquette that protect students' privacy and prohibit behavior that contradicts student and athletic codes of conduct. Educational institutions may also wish to explore establishing private areas (such as single occupancy restrooms) that students may use if they wish. •

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CHAIR'S COLUMN

CONTINUED FROM PAGE 2

join any of the affinity groups by logging into their MyABA account, clicking "manage membership" and then "join committees" to select the desired affinity group(s) from the list.

In addition to working to launch the affinity groups, the DEILP Committee also wrote a new Diversity, Equity and Inclusion Plan to align with the Section's current goals and provide resources. Also, as we know, measuring progress is integral to DEI efforts. As such, the DEI Plan contains important benchmarks. The Section also created, subject to Board of Governors approval, two new DEI officer positions to further our efforts to focus on and promote DEI in the Section. Thanks to the DEILP Committee for such meaningful and long-lasting work.

Thanks to the Executive Committee, Council Members and Officers, Standing Committee Co-Chairs and Program Co-Chairs, Administrative Committee Co-Chairs and Vice Chairs, and the other Section and Committee leaders for your hard work, dedication and creativity this year. Thank you also to the Section's members for their engagement this year under unprecedented circumstances.

The Section could not have achieved all of these success without the Section's phenomenal staff: Brad Hoffman, Rose Ashford, Judy Stofko and Fifi Adekola. I am beyond grateful for all of their efforts. Judy is retiring this month after three decades with the ABA. She has showered all of us with her kindness and has been a thoughtful, diligent, dedicated and all around great colleague. We wish her well in her retirement.

I wish Christopher Hexter well as he rolls off of the Executive Committee and thank him for his decades of service to the Section. I look forward to continuing to work with Kelly Dermody, Doug Dexter and Denise Clark on the Executive Committee over the next year and welcome Joseph Torres to the Executive Committee.

Thank you to Sheppard Mullin and my colleagues for supporting the Section and me. I have formed countless friendships with Section members over the past couple of decades, and I am grateful for the support of my friends and colleagues in the Section. I particularly appreciate Dean Emeritus Cynthia Nance for encouraging me to consider Section leadership and supporting me throughout that journey. I could not have ascended to the role of Chair or volunteered the significant time it takes to be Chair without the support of my family and, in particular, my sister Sarah Grant and my husband Steven Marsh. Words cannot express my gratitude to them.

As we move through the coming months with a resurgence of the pandemic, please remember how isolating and challenging it can be for many of our friends and colleagues who may be staying at home and having less human contact. I encourage you to be intentional about connecting and staying in touch with them and offering support or just lending an ear. I will be doing the same.

I look forward to staying in touch with all of you. Thank you for sharing in the professional honor of my career. •

Samantha Grant is a partner with Sheppard Mullin in Century City. She served as Chair of the Section from August 1, 2020 to August 10, 2021.

ARTIFICIAL INTELLIGENCE

CONTINUED FROM PAGE 1

take these nuances into consideration might inadvertently discriminate against protected cannabis users. These challenges are all the more difficult for large employers who receive a broad array of applicants and must comply with not only the federal anti-discrimination laws, but also those of each state in which the company hires people.

There are currently no federal regulations governing the use of AI in employment. Municipalities and state legislatures, however, recently began taking steps directed toward preventing AI-induced bias. New York City, for example, is currently debating a measure that would regulate the use of "automated employment decision tools," which include "certain systems that use algorithmic methodologies to filter candidates for hire or to make decisions regarding any other term, condition or privilege of employment."

Illinois recently enacted the Artificial Intelligence Video Interview Act. Under the Act, effective January 2020, employers are required to notify applicants in writing and obtain their consent if AI may be used to analyze facial expressions during a job interview. Employers must also provide applicants with detailed information about the AI application and how it will be used to evaluate them. A 2021 proposed amendment to the law would, if passed, require employers that rely solely upon artificial intelligence in deciding whether to interview an applicant to report certain demographic information to the state. Several other states, including Massachusetts, New Jersey and Vermont, to name a few, have pending laws that address AI discrimination in some capacity.

As AI becomes more common in the workplace and especially in the hiring process, more cities and states (and possibly the federal government) will enact regulations governing its use. Employers who use AI in the hiring process should be mindful of this and should also be mindful of the algorithms underlying their AI applications. At a minimum, employers should see that these algorithms and applications are audited or monitored to prevent the inadvertent disqualification of a particular protected group of applicants. AI offers many benefits for employers, but the technology is new and constantly changing, as are the laws that govern it. •

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ARBITRATION VS. LITIGATION

CONTINUED FROM PAGE 8

heard. At the bottom of the list for both arbitrators and judges was avoiding a legal challenge to the decision.

Legal Reasoning Process

Judges and arbitrators showed remarkable similarity in their approach to legal reasoning. Nearly all either start with the facts and then apply the law relevant to those facts, or use a blended approach that simultaneously considers both facts and law. Almost none start with the law and then look for relevant facts, or start with the outcome and then look for the facts and law to support that outcome.

Another survey section sought to test the common assumption that judges and arbitrators change their approach to legal reasoning over time. The vast majority of respondents—both arbitrators and judges—said their approach had not changed. Of the handful who did change, the vast majority increased their reliance on facts.

Several questions asked respondents who had served as both judges and arbitrators to discuss whether and to what extent their reasoning process differed depending on their status. Nearly 80% said their reasoning process did not change, suggesting to Strong "that the allegation that arbitral justice is somehow different or less than judicial justice is incorrect."

The discussion above barely scratches the surface of the ways Strong compared the approaches taken by arbitrators and judges. Across the board, both domestically and internationally, she found the approaches were nearly identical. My take-away: by opting for arbitration rather than litigation, parties can save considerable time and expense without compromising the substance of their claims. •

Richard Bales is a faculty member at Ohio Northern University College of Law. He is editor of the ABA International Labor and Employment Law Committee Newsletter and a member of the ABA Law Student Division Competitions Committee.