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Impact of SCOTUS Affirmative Action Ruling on Employers

BY ESTHER G. LANDER & AMANDA S. MCGINN

In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (the "Harvard Opinion"), the United States Supreme Court overturned its past precedent and held that the goal of achieving a diverse student body cannot justify using race as a "plus factor" in college admissions, and doing so violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act. The below discusses the impact of this decision on employers.

The Impact of the Court's Opinion on Employers

The Court's Harvard Opinion does not directly apply to private employers. This is because the Equal Protection Clause applies only to federal and state actors, and the protections from discrimination under Title VI apply only to recipients of federal funding.

Moreover, unlike in higher education, in the employment context affirmative action that involves racial or gender preferences to achieve diversity has never been permissible. Rather, under Title VII, race- or gender-conscious affirmative action by private employers is generally unlawful in the absence of a remedial purpose.

Thus, although the Harvard Opinion does not change the landscape for private employers, where the use of affirmative action is already extremely limited, employers should anticipate increased scrutiny and challenges to their workplace affirmative action plans and diversity initiatives. Employers should therefore review their practices to ensure they are being carried out in a manner that is not vulnerable to attack under Title VII and the Supreme Court's teachings.

Impact on Workplace Affirmative Action

The Supreme Court has previously held that Title VII does not prohibit race- or sex-based affirmative action plans in the workplace, so long as the plans meet specific criteria. In particular, an affirmative action plan must be justified by a "manifest imbalance" reflecting an underrepresentation of minorities or women in "traditionally segregated job categories," and any race- or gender-based preference in the plan must be properly tailored to cure the disparity without unnecessarily trammeling the interests of non-minorities or males.[1]

Consistent with these opinions, the EEOC implemented regulations under Title VII that place similar restrictions on affirmative action. In order for employers to engage in race- or gender-conscious employment decisions, they must (i) have a written plan; (ii) engage in reasonable self-analysis of the relevant employment practice (e.g., hiring or promotion); (iii) have reasonable basis to conclude from the self-analysis that the relevant employment practice has had an adverse effect on "previously excluded groups" or groups whose opportunities have been "artificially limited"; (iv) include reasonable action in the plan that is narrowly tailored to solve the problem identified without placing unnecessary restrictions

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THE SECTION

BY DENISE M. CLARK, CHAIR

As summer days start to shorten, so has our time with our 2022–2023 Section Chair, Doug Dexter. I am fortunate to follow Doug, as his leadership has continued our efforts at diversity, equity and inclusion within the Section. This past year, those efforts have resulted in an increase in diverse members attending our Annual Section Conference and Midwinter Meetings, an increase in the number of diverse speakers at all of our meetings and webinars, and an increase in our diversity at the leadership level.

For many years, the Section of Labor and Employment Law (LEL) has endeavored to increase our diversity and provide opportunities for diverse lawyers to engage and thrive within the Section. The LEL has embraced DEI teachings and constructs to include all members of the labor and employment bar through the 21-Day Racial Equity Habit-Building Challenge©, our Leadership Development Program, and DEI events at our Annual Section Conference and Midwinter Meetings. Doug's time as chair reflects a high point in those efforts. The efforts of our member firms and organizations to do the same only make the LEL more successful.

As we start a new bar year, challenges to DEI efforts of our member firms are under attack by the American Alliance for Equal Rights. The LEL encourages those firms to continue with their DEI efforts to promote meaningful diversity, equity and inclusion in the practice. We should not turn away from where we have come, as that only defines us. So, as we start a new bar year, let's embrace who we have defined ourselves to be: the bar of employment and labor lawyers who collectively represent the best in the field and who also know the importance of including all attorneys who want to join us no matter their race, gender, age, sexual orientation, or disability. We hold most important the diversity and inclusion of all because we know that ensures a successful LEL.

Let us have a great bar year! •

Denise M. Clark is the founder of the Clark Law Group, PLLC, in Washington, D.C. She is Chair of the ABA Section of Labor and Employment Law for the 2023-2024 bar year. Denise's practice is focused on litigation in the areas of disability discrimination, retaliation under several employment statutes, and ERISA pension and disability claims.

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The FMLA Turns 30

BY JOHN W. STEWART

August 5, 2023, marked 30 years from the date the Family and Medical Leave Act ("FMLA") of 1993 went fully into effect. Signed into law on February 5, 1993, by newly-inaugurated President Clinton, the FMLA gave American workers the right to take time off work to care for themselves and their family members without giving up their livelihood in the process. The tremendous success of the FMLA deserves celebrating, but the fight to improve family and medical leave rights in this country is not over.

Prior to the FMLA's enactment, employees suffering from serious health conditions (and employees with family members suffering from serious health conditions) regularly had to choose between taking the time off work they needed to seek treatment, recover, or attend to the needs of a family member, and keeping their jobs. For those whose employers provided the health insurance they needed to get medical care, this was no choice at all.

The FMLA, for the first time, gave covered employees a federally-protected right to take unpaid leave—for up to 12 weeks—to care for a family member, bond with a new child, or recover from their own serious health condition, and still have their job waiting for them when they returned. In the words of the former President of the National Partnership for Women & Families, Debra L. Ness, the impact of the FMLA has been "enormous," letting "tens of millions of workers take leave when they needed it the most, and changing the culture in this country. Those are women who needed medical care during difficult pregnancies, fathers who took time to care for children fighting cancer, adult sons and daughters caring for frail parents, and workers taking time to recover from their own serious illnesses. Because of the FMLA, their health insurance continued, and their jobs were waiting when they returned to work."

Department of Labor statistics tell a similar story. In the DOL's 2018 surveys of employees and worksites, for example, 15 percent of U.S employees reported that they had taken leave for FMLA-qualifying reasons in just the past 12 months. Scott Brown et al., *Employee and Worksite Perspectives of the Family and Medical Leave Act: Results from the 2018 Surveys*, ABT Assocs., July 2020, at 23. That rate was an uptick from 13 percent in a similar 2012 study and 12 percent in similar 1995 and 2000 studies—an ongoing upward trend in employee leave use for purposes protected by the FMLA. *Id*. at 26. In fact, the National Partnership for Women & Families estimates that, since the FMLA's enactment in 1993, American workers have relied on protected leave to care for themselves and their loved ones nearly *463 million* times.[1]

Now 30 years in the proving, the FMLA represents a great success story for progressive labor standards, which has all but silenced its once-outspoken detractors, who successfully blocked the statute for nearly a decade. First introduced in Congress in 1984, the FMLA would be introduced again in each year that followed, before finally making it to the desk of President George H.W. Bush in 1991. President H.W. Bush vetoed the bill, in 1991 and again in 1992, citing concerns over the costs that the FMLA would supposedly place on businesses and the economy.[2]

But, since the FMLA's enactment in 1993, the burdens of compliance imagined by the FMLA's critics have not been nearly as onerous as originally supposed. In fact, in a 2012 Department of Labor survey, *91 percent* of employers reported that complying with the FMLA had either no noticeable effect or even had a *positive* effect on business operations, such as its influence on employee absenteeism, turnover and morale. Alyssa Pozniak et al., *The Family and Medical Leave Act (FMLA) Final Report: Detailed Results Appendix*, ABT Assocs., Sept. 6, 2012, at 157. In a follow-up to that survey conducted in 2018, the Department of Labor found that *95 percent* of worksites surveyed reported positive or neutral perceptions of the overall effect of the FMLA on productivity, profitability and employees. Scott Brown et al., *Employee and Worksite Perspectives of the Family and Medical*

NEVERTHELESS, THERE REMAINS SIGNIFICANT ROOM FOR IMPROVEMENT IN THE AREA OF WORKPLACE PROTECTIONS AROUND FAMILY AND MEDICAL LEAVE.

Leave Act: Results from the 2018 Surveys, ABT Assocs., July 2020, at 53-54.

Nevertheless, there remains significant room for improvement in the area of workplace protections around family and medical leave. For instance, despite its many benefits, the FMLA does not require that employers *pay* their employees while out on FMLA-qualifying leave. Efforts to remedy this shortcoming federally have so far been unsuccessful but are ongoing. For example, the Family and Medical Insurance Leave ("FAMILY") Act of 2023, first introduced in 2013, would secure the right to receive partial income (up to 85% of normal wages, for the lowest-earning employees) for the 12 weeks of leave provided by the FMLA, among several other important expansions of FMLA-related rights.

Even though efforts to expand the FMLA directly to provide paid leave have not yet borne fruit, a growing number of states and local governments have filled in the gaps with their own paid leave laws. For example, paid family/medical leave is required or will soon be required for covered employees under the laws of California, Colorado, Connecticut, Delaware, the District of Columbia, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Rhode Island and Washington.[3] Hopefully, as this trend continues, the lessons learned from new state paid leave programs will lead to an expansion of medical and family leave rights at the federal level. •

Endnotes

1. Nat'l P'ship for Women & Fams., *Key Facts: The Family and Medical Leave Act*, Feb. 2023, at 1 & n.1, https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/key-facts-the-family-and-medical-leave-act.pdf.

2. *See, e.g.*, Message to Senate Returning without Approval the Family and Medical Leave Act of 1992, 28 Weekly Comp. Pres. Doc. 1722-23 (Sept. 22, 1992).

3. *See* Nat'l P'ship for Women & Fams., *State Paid Family & Medical Leave Insurance Laws*, Oct. 2022, at 2, https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/state-paid-family-leave-laws.pdf (collecting statutes).

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Pregnant Workers Fairness Act

What You Need to Know

BY LIZ MORRIS AND CYNTHIA THOMAS CALVERT

In the final days of 2022, President Biden signed into law the Pregnant Workers Fairness Act (PWFA), which went into effect on June 27, 2023. The law was backed by a surprising bipartisan coalition that included workers' rights groups, the Society for Human Resources Management, U.S. Chamber of Commerce, ACLU and U.S. Conference of Catholic Bishops. Talk about strange bedfellows. But here we are, and here's what you need to know to help your clients—employers or employees—understand the law:

What is PWFA? A new law requiring covered employers to make "reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical condition of a qualified employee" unless the employer can demonstrate undue hardship. The statute is modeled largely on the Americans with Disabilities Act, including the ADA's interactive process. It applies to private and public sector (Congress, federal agencies, state, local and municipal agencies) employers with at least 15 employees, employment agencies, and labor organizations. It is enforced in the same manner as other federal employment discrimination laws, so claims against private employers are initiated by filing a charge with the Equal Employment Opportunity Commission and can lead to court action and damages.

Why do employees need pregnancy accommodation? Most pregnant people will need at least some changes at work, whether due to normal pregnancy symptoms (morning sickness, bladder control issues, increased thirst, growing belly) or more serious complications (gestational diabetes, preeclampsia). Employees in certain jobs may require accommodation to avoid hazards, like exposure to toxics or the risk of falls. Employees may likewise need accommodation to meet their health needs associated with childbirth, infertility, pregnancy termination and loss, and lactation—all of which are covered by PWFA. A key purpose of the law is to keep pregnant employees working for as long as they want to and are able to, which benefits them and their employers.

What types of accommodations must be made? It ranges widely, depending on the employee's needs and job duties. Examples include flexible hours to attend prenatal care appointments, a chair to sit on while checking out customers at the cash register, a temporary transfer to a position that is safer during pregnancy, work from home to avoid exposure to COVID-19, and assistance with lifting. For more, see the Center for WorkLife Law's guide.

Can employees take leave under PWFA? Leave can be a reasonable accommodation, such as when an employee needs to recover from pregnancy loss or childbirth. However, an employer cannot require an employee to take leave if they want to continue working and another reasonable accommodation is available.

Must employers accommodate abortion? Yes. An employee who requests accommodation for abortion healthcare is seeking accommodation for a limitation "related to, affected by, or arising out of pregnancy," as required by PWFA. For more information about abortion and work, visit WorkLife Law's FAQs .

My client is pregnant. How does she request an accommodation? The pregnant employee does not have to use any magic words. They can trigger the employer's legal obligation through a communication that demonstrates that they need an accommodation for a pregnancy-related limitation. For example, "I'm pregnant and having bad morning sickness, so I'm having trouble getting to the office on time" is sufficient to put the employer on notice. The employee can request a specific accommodation, such as a later arrival time, but they do not have to.

How must the employer respond? If the requested accommodation is clear and easy to provide, the employer should just provide it. If the request is unclear or the accommodation seems unreasonable or impossible, the employer and employee should engage in an interactive process to identify an accommodation that will meet the employee's needs. It can be an informal conversation with both sides discussing various options, or it can be a more formal process. The one thing it shouldn't be is lengthy, unless the employer is providing an interim accommodation. An employer that does not provide an accommodation in a reasonable period of time leaves themself open to claims that it has denied an accommodation and/or has interfered with the employee's exercise of its PWFA rights.

What if the employee asks for changes to their essential job duties? The employer should consider making them. PWFA protects "qualified employees," which means an employee or job applicant who can perform the essential functions of the job with or without accommodation. This language is drawn from the ADA, but unlike the ADA, a worker who cannot perform the essential job functions may still be entitled to accommodation under PWFA, so long as the inability is temporary and can be reasonably accommodated, and the worker will be able to perform the essential functions in the near future.

What if the employer can't grant the employee's accommodation request? Although an employer should consider an employee's requested accommodation, the employee is not entitled to their preferred accommodation. The employer can offer alternatives that are as effective at protecting the employee's health and safety and that the employer can provide without undue hardship.

We are in a state that has its own PWFA. Do we have to comply with both? PWFA does not limit state or local laws that provide greater protection. Some state pregnancy accommodation laws apply to smaller employers, have longer statutes of limitation, require certain accommodation requests to be granted automatically, and don't have damages caps.

What about the Pregnancy Discrimination Act? Most employers and employees will now rely on PWFA to understand accommodation obligations, but the PDA and Americans with Disabilities Act continue to play important roles in preventing and remedying discrimination.

To learn more, check out the PWFA Explainer from the Center for WorkLife Law and the ACLU. •

Liz Morris (she/her) is the deputy director of the Center for WorkLife Law at UC College of the Law San Francisco, an advocacy and research center that builds legal rights in employment and education for family caregivers struggling to take care of their loved ones while making ends meet. Liz leads WorkLife Law's legal team, which has counseled thousands of workers in need of pregnancy and lactation accommodations and developed novel legal theories adopted by courts around the country to expand workplace protections.

Cynthia Thomas Calvert is the Senior Advisor to the Center for WorkLife Law. Cynthia's work includes counseling employees who are facing discrimination because of pregnancy or their caregiving roles, advising plaintiffs' lawyers who are litigating pregnancy and caregiver claims, and public education about the laws that protect pregnant employees and caregivers. She is also the principal of Workforce 21C, which helps employers to advance women and better manage employees who are pregnant, breastfeeding, or caring for family members.

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The PUMP Act

Legislation for Working Mothers

BY CARLY STEIN

The Center for Disease Control's 2022 Breastfeeding Report Card indicates that breastfeeding rates for babies drop sharply from birth, and at six months only 24.9% of babies are receiving exclusively breastmilk. Furthermore, over half of mothers who breastfeed report stopping prior to their intended end date. While a variety of reasons contribute to this shortened breastfeeding duration, top among these included difficulties associated with pumping breastmilk.

Seen as a step in the right direction for solving this problem, the Providing Urgent Maternal Protections for Nursing Mothers Act or "PUMP" for Nursing Mothers Act, passed by Congress in December of 2022, expands protections granted to nursing mothers in the workplace. The PUMP Act amends the Fair Labor Standards Act to provide nursing employees with reasonable break times and private spaces in which to express breast milk.

The Act expands on the nursing protections originally afforded only to overtime eligible, hourly employees under the Patient Protection and Affordable Care Act. Under the PUMP Act, these protections have been extended to another nine million employees, regardless of overtime status. This expansion includes many female-dominated occupations previously not covered, such as nurses and teachers, as well as agricultural workers. The law also applies to teleworking employees who are being afforded the same protections as to privacy and time allotted for breaks to pump. It also does not preempt any state or local laws protecting breastfeeding mothers, although currently only thirty states have laws protecting breastfeeding mothers in the workplace.

Rather than take a "one-size-fits-all" approach, this brief amendment requires employers to provide eligible employees with a "reasonable break time" to express breast milk for up to a year after the child's birth. Expounding on this language, the U.S. Department of Labor (DOL) Wage and Hour Division released a Field Assistance Bulletin on May 17, 2023, which explained how the law should be applied in the workplace. The DOL considers the frequency, timing, and duration of the pump breaks as a function of the needs of the nursing employee and her child, without regard to the employer's preferences. Accordingly, the employer cannot dictate a schedule to which the employee must adhere, and if the two agree on a schedule the employee may adjust it as her breastfeeding needs change.

The Act does not require employees to be paid during pump breaks, but if the employee is not completely relieved from their work duties, the time must be considered hours worked. Furthermore, if the employee is normally granted paid breaks at work, these breaks can be used for pumping.

In addition, the space provided for employees to pump breast milk must be shielded from view, free from intrusion from both coworkers and the public, available each time it is needed by the employee, and cannot be a bathroom. To ensure privacy, the employer may post a notice when the space is in use or provide a lock on the door to prevent others from entering. While the space must be functional for pumping, which according to the DOL requires a place for the pumping employee to sit, not on the floor, and a place to store breast milk, further functionality is not required by the Act. This oversight may result in employees being required to pump in a location that lacks the outlets necessary for many traditional electrical pumps or without sinks for the employee to wash pump equipment afterwards.

WHILE THIS EXPANSION OF PROTECTIONS FOR WORKING MOTHERS IS A POSITIVE ONE, THERE ARE STILL A NUMBER OF EXCEPTIONS UNDER THE LAW THAT WILL LEAVE MANY MOTHERS UNPROTECTED.

While this expansion of protections for working mothers is a positive one, there are still a number of exceptions under the law which will leave many mothers unprotected. The PUMP Act does not apply to airline crew members, including flight attendants, even though according to the Women in Aviation Advisory Board March 2022 Report, almost 80% of flight attendants are women. Women in other

transportation industries, including members of train crews, rail carrier employees, and motorcoach employees, will also not receive the protections of this law until December of 2025. In addition, in those railway industries, employers will not be required to make accommodations if they require a significant expense. The law explicitly includes removing seats from the carriers as a significant expense.

Furthermore, while the law applies to all covered employees and employers, employers with less than fifty employees are not subject to the Act if doing so would "impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business." The WHD will consider an employer's alleged undue hardship on a case-by-case basis, but this presents a real possibility that smaller employers will be able to deny these protections to their nursing employees.

Unlike the prior protections in 2010, the PUMP Act has more areas for legal recourse when an employee's rights are violated. Employees may either file a complaint with the Wage and Hour Division of the DOL about any violation of the law or bring a private lawsuit to enforce the reasonable break time mandate of the law. If the employee wishes to file a private suit over the lack of space to pump, they must first provide the employer with at least ten days to become compliant after the initial request for space.

While the protections of the PUMP Act are welcomed and long overdue, there remain many areas of improvement for women in the workplace. Employers wishing to retain working mothers should consider the requirements of this Act a floor, and not a ceiling, for assisting these employees in returning to work. •

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NEW/YOUNG LAWYER AWARD

This Award recognizes up to two new and/or young members of the ABA Section of Labor and Employment Law (LEL) who have demonstrated a commitment to the Section and to the advancement of the Section's initiatives, specifically including promoting involvement and membership in the LEL Section.

This is an excellent way to honor and encourage those New and Young lawyers who have already exhibited an eagerness and enthusiasm for the Section and all that it offers.

AWARD CRITERIA

The nominees will be evaluated based upon the following criteria:

- The nominee must be a current member of the Section of Labor and Employment Law.
- The nominee must have practiced for five years or less OR be age 40 or younger (does not need to be both).
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- The nominee has demonstrated a commitment to the Section through active involvement, volunteering to participate in Section events and initiatives, or expressed a strong desire to become actively involved.
- The nominee has promoted the Section, including efforts to encourage other new/young lawyers to become involved in the Section or to seek leadership opportunities within the Section.

View the Nomination and Submission Process.

Nominations are due September 29, 2023.

Child Labor Laws

Balancing Education, Work and Rights

BY DAIQUIRI J. STEELE

It has been nearly a century since the topic of domestic child labor has garnered as much attention as it has recently. The term "child labor"[1] alone can conjure up images of early twentieth century adolescents with soot-smeared faces from working in mines or factories. However, the child labor debate seems to have been reignited in the past couple of years, and change is on the horizon for several states.

Child labor violations are on the rise. There are some extraordinary stories that have made national news, such as 10-year-olds working at a McDonalds in Kentucky and the work-related deaths of three teenagers, all age 16, in Mississippi, Missouri, and Wisconsin over a 5-week period in Summer 2023. The number of child labor violations has increased over 280 percent since fiscal year 2015. From fiscal years 2021 to 2022, the U.S. Department of Labor (DOL) saw an increase in youth employment violations of approximately 37 percent. Migrant youth are particularly vulnerable to child labor exploitation. In the wake of this uptick in non-compliance, the Biden Administration has pledged to make child labor violations an enforcement priority. The Administration has formed interagency partnerships between the departments of Agriculture, Commerce, Education, Health and Human Services, Homeland Security, Justice, Labor, and State to strengthen enforcement and additional legislative interventions related to penalties for violations.

While the federal government is working to bolster child labor laws, many states are working to loosen them. Many states have either passed bills that would loosen youth employment laws or have legislation pending to do so. The Fair Labor Standards Act of 1938 (FLSA) is the federal law that primarily governs youth employment. However, many states have laws that contain stricter rules regarding employing youth. For example, federal child labor laws do not require minors to obtain work permits, but a majority of states do. However, some states are abandoning this requirement. For instance, Arkansas eliminated the requirement that youth provide a work permit from the state labor agency verifying their age and parental consent. Additionally, the FLSA's coverage is not universal in scope, and even among those entities that are covered, the rules are bifurcated based on whether the job is in the agricultural sector. Hence, states may legislate looser restrictions in certain areas without running afoul of federal law. Below are a few important considerations on the issue of child labor.

Working Hours. One important restriction on youth employment is a limitation on the hours teenagers can work. Working hours for teenagers are different during the academic year than during the summer break. Federal law does not restrict the working hours of minors aged 16 or older, though it does impose restrictions on the hours 14- and 15-year-olds can work.

Job Duties. There are 17 categories of job duties that have been deemed so hazardous that minors are prohibited from performing them. Examples include duties like using power-driven hoisting equipment and meatpacking. There is also a prohibition on driving for 16-year-olds and numerous driving restrictions for 17-year-olds. One job responsibility that has been the subject of several state bills is the minimum age to work in an establishment where alcohol is sold.

Wages. Upon obtaining a certificate from DOL, federal law allows an employer to pay certain teenage employees a "youth opportunity wage" of $4.25 per hour for a 90-day period. However, there are some restrictions. For instance, it must be the first time that the employer hired the teenager. Additionally, employers are prohibited from terminating existing employees or reducing their working hours to create positions that can be filled by a worker being paid a youth opportunity wage. This effectively allows some employers to pay youth a subminimum wage. If the subminimum wage is higher in the applicable state, employees must be paid at least the amount of the higher wage.

One of the primary threads running through all child labor issues is vulnerability. Youth in general and migrant youth in particular are exceptionally vulnerable to exploitation. This vulnerability not only makes them targets for violations of child labor laws, but also for retaliatory conduct by employers for objecting to violations or reporting non-compliance of child labor or other workplace laws (e.g., sexual harassment, occupational safety, accommodations requirements, etc.). This tension between federal government attempts to strengthen youth employment laws and the efforts of some state governments to loosen restrictions will continue to play out in the near future. However, both proponents and opponents of more robust child labor laws seem to agree on one thing: It is time to revisit the child labor laws. •

Endnote

1. In 2008 the U.S. Department of Labor began to use the term "youth employment" in place of "child labor" when discussing permitted and restricted employment for persons younger than the age of 18 years. Those terms will be used interchangeably here.

Daiquiri J. Steele is an Assistant Professor of Law at the University of Alabama School of Law where she teaches and writes in the areas of labor and employment law, civil rights, education law, administrative law and torts.

The Attorney-Paralegal Relationship

Notes for the New Attorney

BY CONNOR POLYDOROFF

Law school undoubtedly teaches you a lot and provides a strong educational foundation on which new attorneys practice. Having not attended law school myself, it is difficult to know the specifics of what is taught and how it is taught, but I think it is safe to assume that law school does not touch on—at least not in great detail—the relationship between the attorney and their paralegal. This is a foundational relationship in the practice of law, and the strength of the relationship can have a direct correlation to case success and job satisfaction. This article is a personal testimonial of my own working relationships with attorneys, and it will discuss how new attorneys might consider practicing in order to establish a strong relationship with their paralegals leading to case success and job satisfaction.

I have been a paralegal for about four years, working under attorneys with varying levels of experience. I began my paralegal career under a senior associate who had a strong grasp on every one of their 100+ active cases. This attorney gave me clear and concise direction on nearly all of my tasks. This attorney also frequently provided me with the "why" we are doing something so that I would better understand the area of practice. As a new paralegal, I appreciated the specific instructions and educational tidbits. In fact, the deep knowledge of the law that I gathered from my past attorney is something that I use at work every day; I am grateful for their teachings.

After this attorney left my firm, I began working under another associate in the same area of practice. My new associate is a seasoned attorney, but does not have quite as much experience as the senior associate I describe above, at least in our area of practice. This is where all the knowledge I gained under my past attorney became critical. I receive much less direction under my new attorney, but since I already established a strong working understanding of the law, it is easy for me to anticipate the next steps in a case, identify strengths and weaknesses of a case, make suggestions for work that we need to accomplish, and more.

I have also performed work under a couple firm partners. This work is a whole different ballgame. Working for a partner can be intimidating because, well, they are the leaders of the firm and have a lot of pull when it comes to hiring and firing. Firm partners are also very busy people, which means they may not always be aware of minute details of a case. Working under partners has been frustrating at times because they frequently ask me to bring them up to speed on things that I may have already written them an e-mail about. Detailed case notes come in handy in these types of situations (detailed case notes are something that both attorneys and paralegals should maintain).

The working relationship that I have with my current supervising attorney is one that I cherish. I would like to touch on a few ways in which the new attorney might practice in order to establish a strong working relationship with their paralegals.

First and foremost, it is important to build trust. The attorney must be confident in their paralegal's work, and the paralegal must be confident in the attorney's ability to practice law. Trust is not something that is built overnight, but rather something that requires ongoing communication, regular check-in meetings, and even passing draft work back and forth. With trust, the team can appropriately delegate tasks in order to efficiently and consistently produce exemplary work product.

Second, the attorney-paralegal relationship should be viewed as a collaborative relationship, rather than a hierarchy. Sure, attorneys are the ones with law degrees and the ones that should guide cases, but working under a strict hierarchy has the possibility to create disdain and job dissatisfaction. Collaborative work requires keen attention to a strong team effort, but when curated properly allows for work to be completed in a more efficient manner. Collaborative work has the added benefits of taking

work off the attorney's plate while allowing the paralegal to try their hand at higher level work.

Lastly, the paralegal and attorney can benefit from learning from each other. The attorney is likely to know more about the law itself, but the paralegal may have the upper hand when it comes to most efficient processes and procedures, or the logistics associated with practicing law. It is also worth recognizing that experienced paralegals may actually have an advanced understanding of the law. Regardless, paralegals and attorneys can undoubtedly learn from each other, and both parties must be open minded when it comes to learning new things.

Through the conscious building of trust, collaborative work, and being open to continued learning, I believe that attorneys and paralegals can develop a strong foundational relationship with one another such that they will not only be happy with their jobs, but they also will work well together and consistently achieve positive outcomes for clients. This relationship is not one that should be taken for granted but rather one that should be carefully and intelligently developed. •

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Calendar of Events

NOVEMBER 8–11 | 2023
17th Annual Labor and Employment Law Conference
Westin Seattle
Seattle, Washington

JANUARY 25–27 | 2024
State and Local Government Bargaining and Employment Law
MIDWINTER MEETING
Westin Resort
Puerto Vallarta, Mexico

JANUARY 31–FEBRUARY 3 | 2024
Employee Benefits Committee
MIDWINTER MEETING
Westin Gaslamp Quarter
San Diego, California

FEBRUARY 14–16 | 2024
Federal Labor Standards Legislation Committee
MIDWINTER MEETING
La Concha Renaissance Resort
San Juan, Puerto Rico

FEBRUARY 25–28 | 2024
Committee on Development of the Law under the NLRA
MIDWINTER MEETING
Fairmont Miramar
Santa Monica, California

FEBRUARY 27–MARCH 1 | 2024
Committee on Practice and Procedure under the NLRA
MIDWINTER MEETING
Fairmont Miramar
Santa Monica, California

MARCH 5–8 | 2024
Workplace and Occupational Safety and Health Law Committee
MIDWINTER MEETING
La Concha Renaissance Resort
San Juan, Puerto Rico

MARCH 6–8 | 2024
Railway and Airline Labor Law Committee
MIDWINTER MEETING
Renaissance Phoenix Downtown
Phoenix, Arizona

MARCH 12–14 | 2024
National Symposium on Technology in Labor and Employment Law
La Concha Renaissance Resort
San Juan, Puerto Rico

MARCH 12–15 | 2024
Employment Rights and Responsibilities Committee
MIDWINTER MEETING
La Concha Renaissance Resort
San Juan, Puerto Rico

MARCH 19–22 | 2024
National Conference on Equal Employment Opportunity Law
Presented by the Equal Employment Opportunity Committee
Westin Copley Place
Boston, Massachusetts

MAY 5–9 | 2024
International Labor and Employment Law Committee
MIDYEAR MEETING
JW Marriott
Mexico City, Mexico

NOVEMBER 13–16 | 2024
18th Annual Section of Labor and Employment Law Conference
Marriott Marquis
New York, New York

NOVEMBER 12–15 | 2025
19th Annual Section of Labor and Employment Law Conference
Hyatt Regency Denver at Colorado Convention Center
Denver, Colorado

NOVEMBER 4–7 | 2026
20th Annual Section of Labor and Employment Law Conference
Marriott Marquis
Washington, D.C.

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IMPACT OF SCOTUS AFFIRMATIVE ACTION

CONTINUED FROM PAGE 1

on the workforce as a whole; and (v) maintain the plan no longer than necessary to achieve the plan's objective.

Employers who wish to develop written affirmative action plans should therefore ensure that their plans are remedial, narrowly tailored to cure documented and identified statistical imbalances in specific jobs, temporary, and do not unduly harm non-beneficiaries of the preference.

Impact on Workplace Diversity Initiatives

Many workplace diversity initiatives include transparent goals and employment programs that take race, gender and ethnicity into account. When implementing and updating diversity initiatives and programs, there are several important takeaways from the Harvard Opinion that employers should consider:

- ***Race or gender should not be used as a plus factor* to *improve workplace diversity.*** As noted above, under Title VII, race or gender can only be used as a plus facwtor when an employer has a written affirmative action plan that meets the above criteria.
- ***Race or sex should not be a factor when deciding who advances at any stage of the selection process.*** Beyond sourcing and recruiting to ensure a diverse pool, diversity initiatives should not consider race or ethnicity at any point in the selection process. For example, diverse slate requirements should be implemented in a manner where a candidate's gender, race or ethnicity is not being used to decide whose resume moves forward, or who advances to the interview stage, if doing so is at the expense of advancing a majority group candidate who would have made the cut absent the diversity requirement.
- ***Representation goals based on EEO-1 categories should be reconsidered.*** The Supreme Court correctly pointed out that the six EEO-1 race and ethnicity categories are both over-inclusive (e.g., by grouping all Asians as one category) and under-inclusive (e.g., no category for individuals of Middle Eastern descent) if they are being used to measure true diversity of thoughts, ideas and perspectives. These concerns may draw into question the weight companies are placing on EEO-1 diversity metrics gains or losses.
- ***Diversity initiatives should not be a zero sum game.*** Lawful diversity initiatives should be designed to expand opportunity for underrepresented groups without also negatively impacting opportunities for those in the majority. Diversity initiatives that are a pathway to permanent employment, or advancement initiatives that provide a leg up on promotion, should not be open only to minorities or women because they could be recast as, ultimately, negatively impacting opportunities for the majority group. Thus, employers should establish carefully the criteria for diversity-based hiring and advancement

programs, and focus on a potential participant's life experiences, which can include how diverse characteristics of any kind have affected their lives, "be it through discrimination, inspiration, or otherwise." Employers might also consider documenting the reasons for their final selections so that it is clear the decisions were made for reasons other than the "inherent benefit in race *qua* race — in race for race's sake," which the Harvard Opinion describes as impermissible stereotyping. •

Endnote

1. See *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616 (1987); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

Esther Lander is a partner with Akin in Washington DC. Her practice focuses on complex employment litigation, internal and government investigations, and client counseling regarding allegations of discrimination, harassment and other employee misconduct; pattern or practice, class, and collective actions; disparate impact discrimination involving selection procedures and testing validation; and diversity and inclusion initiatives and pay equity.

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Mindy Gulati from Fundamental Advisory leads the July 2023 Leadership Development Program.