

Labor *AND* Employment Law

SPRING 2020 ■ VOLUME 48, NUMBER 3

SECTION OF LABOR AND EMPLOYMENT LAW ■ AMERICAN BAR ASSOCIATION



Lawyering in Color: The Ethics of Diversity and Inclusion

By Shelly C. Anand and R. Nelson Williams

In the middle of depositions for an OSHA case involving a farmworker sickened by heat stress, the deponent—the worker’s supervisor—testified on the record: “These Mexican workers are made for this kind of labor.” The deposing attorney, a Latinx woman, reeled in shock from this racialized statement. Yet the deponent’s attorney said nothing, and the deposition continued.

For attorneys of color, this story, while shocking, is not surprising or uncommon. And until very recently, there was no explicit recourse for this kind of misconduct. That changed in August 2016, when the American Bar Association formally adopted Model Rule 8.4(g). Under Rule 8.4(g), it is professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of



a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Before this addition, the Rules did not directly or expressly address discriminatory conduct in the legal field. Rule 8.4(d) came close, as it prohibited lawyers

from engaging in “conduct that is prejudicial to the administration of justice.” The comments to Rule 8.4(d) clarified that “[a] lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status violates paragraph (d) when such actions are prejudicial to the administration of justice.” However, these admonitions

were limited to the “administration of justice.”

Rule 8.4(g) made critical changes to the Model Rules. First, it added a knowledge/intent requirement. Second, it expanded the list of protected classes to include ethnicity, gender identity, and marital status. Third, whereas 8.4(d) applied only to conduct occurring in the administration of justice, 8.4(g) broadened the scope of its reach

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This is my last column to the Section as its 2019-2020 Chair. It has been quite a year that I hope you will catch by the tone and hope expressed in this column. However, before going further, I wish to thank the many people in and out of the Section that helped me as Chair. First I owe my colleagues on the Section's Executive Committee a debt of gratitude – Chair-Elect Samantha Grant, Vice Chairs Steve Moldof and Doug Dexter and Immediate Past Chair Joe Tilson – all of whom guided me through the different land mines any Chair of the Section will likely face in his/her term in office. Then I owe a big debt to the Section's former Associate Director, Chris Meacham, who facilitated many of the Administrative Committees, worked with the newsletters and *Journal*, and assisted with many of the Midwinter Meetings. Chris will be missed by me as well as many others in the Section, and I wish him well in his new ABA position. I also have had the luck and pleasure of working with Judy Stofko, who is certainly the friendliest and most accessible Administrative Assistant that I know.

Almost last but certainly not least, I can't overstate my debt to Brad Hoffman, who is the most efficient and organized director of a complex organism that I know – always on top of where everything is, unflappable in the face of periodic crises that erupt during the Section year, a very good listener and sounding board and an encyclopedic source of who everyone is in the Section. Now last, I thank my wife Shellie, who didn't quite know what would follow for me in this Section leadership gig: how often I would disappear to take the fourth or fifth conference call on any given day, how much time I would spend engaged in promoting the Section and the ABA to whomever would listen and the amount of time I spent on making our Section Committees the vital glue that hold our Section together.

During my year as your Section Chair, I have observed how much this Section intersects with the economy and social lives of people throughout the U.S. and the world. I succeeded to this position on August 10, 2019 on the same day that Jeffrey Epstein, who for many years had trafficked in and abused young women, committed suicide in New York. At the same time the U.S. Immigration and Customs Enforcement Agency arrested and initiated deportation proceedings against 680 undocumented non-nationals in Mississippi with no notice to their children or families. Both events directly related to the interests and work of our Section's Immigration and Human Trafficking Committee and later to the work of our Pro Bono and Community Outreach Committee.

From August 10, 2019 through much of the year including the exciting 13th Annual Section Conference in New Orleans, Law Student Trial Advocacy Competition, and Midwinter Meeting season beginning in late January, things moved smoothly and efficiently for the Section. But in early March, we met our match in the Coronavirus pandemic that brought to a grinding halt our four last Midwinter Meetings, the 2020 ABA Annual Meeting and our 14th Annual Section Conference. Despite these setbacks, the Section has continued its programming and service to our members and others. This has been accomplished when the majority of our Section members are learning to work at home and a significant number are doing this with childcare duties added to their daily tasks. And of course, this has been in a country that, as of May, faced nearly 21 million unemployed workers up 15.2 million since February 1, suffered 119,055 deaths due to COVID-19, discovered major disruptions to our health care system and presently lives with anxiety among many that we have not yet overcome the ravaging consequences of the pandemic in the absence of a successful vaccine.

In the face of these major disruptions for so many, the Section has

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addressed its consequences to the workplace with leading public and private sector experts. To help our members adjust to this new world, we have held webinars focused on using videoconferencing to conduct mediations and arbitrations, how new and young lawyers can make the most of the new COVID-19 terrain to advance their practice in the legal world, and protecting LGBT rights under Title VII. Before September 1, the Section has scheduled many more webinars on both substantive law issues and the practice of labor and employment law relevant to our Section's members. See the webinar schedule at www.ambar.org/labor.

Most recently, we have been rocked by the deaths of Breonna Taylor, George Floyd, Ahmad Arbery, and Rayshard Brooks. Clearly, these incidents are a microcosm of a systemic abuse of power to African Americans that has gone on for 401 years since the first slaves were delivered to English settlers. That abuse needs to end – no matter how hard it is or will be for many to come to grips with that reality. In our Section, we represent employers, unions and individual employees in the private and public sectors. It is our responsibility to put our full weight against the tide of history and take advantage of our access to so many people at all levels of power to steer each and every one of them to build a more humane society appreciating the multihued colors of our people. That is the goal we must set for ourselves in our homes, in our communities, in our workplaces, in the country and most immediately in our Section for next year and in the future.



Labor and Employment Law (ISSN: 0193-5739) is published four times a year by season, by the Section of Labor and Employment Law of the American Bar Association, 321 North Clark Street, Chicago, Illinois 60654, 312/988-5813. www.americanbar.org/laborlaw

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The Department of Labor's and National Labor Relations Board's New Joint Employer Rules

By Brian Nugent and Tiffany D. Hendricks

Both the Department of Labor (DOL) and the National Labor Relations Board (NLRB) recently issued important final rules as guidance to employers to determine joint employer status under the Fair Labor Standards Act and the National Labor Relations Act (NLRA).

The DOL's Joint Employer Final Rule

Effective March 16, 2020, employers will be able to use a four-factor balancing test in determining joint employment status under the FLSA.

The four-factor balancing test focuses on whether the other individual or entity:

- hires or fires the employee;
- supervises and controls the employee's work schedules or conditions of employment to a substantial degree;
- determines the employee's rate and method of payment; and
- maintains the employee's employment records.

The DOL stated that in evaluating the four factors above, all facts will be considered, and no one factor is more relevant than another. The DOL made it a point to provide clarification regarding the maintenance of employee's employment records: maintaining employment records will not, without more, create a basis for a finding of joint employer.

The rule expressly states that to be a joint employer under the Act,

the other person must *actually* exercise-directly or indirectly-one or more of the four control factors. The other person's ability, power, or reserved right to act in relation to the employee may be relevant for determining joint employer status, but such ability, power, or right alone does not demonstrate joint employer status

without some actual exercise of control.

The final rule establishes that certain business models (i.e., franchises), certain business practices (i.e., allowing the operation of a store on one's premises), and certain contractual agreements (i.e., requiring a party in a contract to institute sexual harassment policies) do not make joint employer status *more or less likely* under the FLSA. Thus, the existence of a franchise relationship or other business arrangement, without more, will not likely lead to a finding of joint employment.

Notably, the final rule states that an employee's economic dependence on a potential joint employer is not relevant in determining whether that individual or entity is an FLSA joint employer. Further, the mere reservation of a contractual right of direction and/or control over an employee, without more, is not enough to create joint employer status. The rule also comments on the effect of other contractual rights between possible joint employers, and states that not wanting to discourage parties from requiring compliance with health, safety, and legal obligations is not an indication of joint employer status.

The DOL's final rule provides much needed guidance for FLSA compliance, and clarifies whether certain facts or arrangements, without more, indicate joint employment. Employers now have guidance for erecting guard rails when forming business relationships with other parties, some "bright lines" to provide a clearer path under certain circumstances (e.g., franchising, maintaining employee records) with this new final rule from the DOL. However, employers will also need to pay attention to courts' acceptance (or not) of the final rule.

The NLRB's Joint Employer Final Rule

Right on the heels of the DOL issuing its joint employer test, the NLRB issued its own final rule for determining joint employer liability under the NLRA. The NLRB's final rule is scheduled to become effective April 27, 2020.

The NLRB's joint employer standard returns the NLRB to past interpretation. Under that old precedent, the NLRB found a joint-employer relationship existed only where two separate employers codetermined matters governing the essential terms and conditions of employment. In meeting that joint employer standard, the NLRB looked for evidence that the putative joint employer had "direct and immediate" control over key matters of the employment relationship.

In 2015, the NLRB departed from this precedent in its *Browning-Ferris* decision and established a new standard: it would no longer require evidence of direct and immediate control. A joint employer finding could be based on evidence that an employer exercised indirect control or reserved authority to exercise control over employees of another employer.

In its December 2017 *Hy-Brand* decision, the NLRB overruled *Browning-Ferris*, and returned to the prior requirement of "direct and immediate" control. The *Hy-Brand* decision was vacated, however, because of a conflict of interest of one of the NLRB members who participated in the decision. Thereafter, the NLRB took a new tack. Instead of creating law by ruling on cases—as the NLRB has long done—in September 2018, the NLRB formally proposed a new rule codifying the standard pre-*Browning-Ferris*.

The new codified rule focuses on an employer's "direct and immediate control" (not sporadic,

isolated, or *de minimis*) over the "essential terms and conditions of employment" (wages, benefits, hours of work, hiring, discipline, discharge, supervision, and direction).

The NLRB issued a fact sheet to provide additional guidance to employers regarding the circumstances when one company may be considered a joint employer of another company's employees. An employer will be considered a joint employer when:

- The employer shares or codetermines the essential terms and conditions of employment of a different employer's employees;
- The employer possesses and exercises substantial direct and immediate control over one or more essential terms and conditions of employment of another employer's employees; and
- The employer possesses more than indirect influence or a contractual reservation of a right to control over a different employer's employee. However, evidence of that is probative of joint employer status to the extent that it supplements and reinforces evidence of direct and immediate control.

Many employers, especially those who rely on staffing companies to provide temporary employees and those in the franchise industry, will likely have to reassess whether they may be considered a joint employer under the final rule, and how that may affect their business relationships before the rule goes into effect on April 27, 2020. ■

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You Negotiate Like A Girl—Thank You!

By Amanda Clark

While off-season sports labor and employment related news is usually dominated by pending strikes in baseball or football, and player trades during the free-agency periods, the past year has really been the year of women. Not all of the news has been great. The U.S. Women's National Team is locked in a vicious gender discrimination case against the U.S. Soccer Federation, alleging pay disparity with the men's team. Despite the women's team having won four World Cups to the men's team zero, U.S. Soccer fanned the flames when it filed documents alleging that the men's team¹ had more responsibilities and biological differences and "indisputable science", as a justification for the men's team being paid more. The president of the U.S. Soccer Federation resigned during the outcry after the filing became public, and the new president has indicated a different approach to resolving the lawsuit. Nike also came under fire in 2019 when female athletes it sponsored went public with lack of maternity protections in its contracts. However, again after public uproar, Nike rewrote its contracts and made clear that it could not apply any performance related reductions for 18 months, starting eight months before the athlete's due date.

Not all the news in the professional women's sports arena has started with a large public uproar. The Women's National Basketball Association ("WNBA") and the Women's National Basketball Players Association ("WNBPA") reached agreement on a groundbreaking collective bargaining agreement in January of 2020, to run for eight years. The agreement was a huge step forward for the players and a dedication to the future of the sport and its athletes for the league. The agreement is worth examination, as it may provide a path forward for other women's professional



sports organizations in their collective bargaining negotiations.

The WNBA was founded in 1996, with its inaugural season in 1997 with eight teams, all owned by the NBA until 2002. It is currently comprised of twelve teams. The WNBPA was formed in 1998. It is the first labor union of professional women athletes. It negotiated the first collective bargaining agreement on behalf of its players in 1999, gaining impressive benefits: an 75% increase in top players' salaries; an 100% increase in the minimum salary; paid maternity leave; year-round health and dental insurance; a retirement plan; and a limit on the number of players from the American Basketball League, a "professional league for women, which only lasted two seasons. That first contract lasted until 2003.

The 2003 contract was a three-year deal, and the WNBA exercised an option under the contract to extend it an additional year, through 2007. That was the last year that the League's side of the negotiations were handled as a single entity before shifting to

individual team ownership model. During these negotiations, David Stern, president of the NBA, which was still providing \$12 million in assistance to the WNBA, threatened to cancel the season if an agreement was not reached by early April, 2003. The 2003 contract ushered several changes: it introduced free agency for any player with six years of experience and an expired contract; increased by 17 percent what teams could spend on salaries over the life of the contract—including the extension year; and dropped from 18 to 6 the prohibited categories of player endorsements (no list of the prohibited categories has ever surfaced publicly). The 2008 CBA resulted in: a guarantee that player salaries would at least increase each year of the contract; an increase in player minimum and maximum salaries; a limitation on the number of players who could be designated as "core", which would prevent free agency and player movement; and individual hotel rooms for players with five or more years in the league. This

agreement expired before the 2013 post-season ended, and the players agreed to finish that season without a contract. The 2014 contract increased player rosters back to 12 members after it was decreased from 13 to 11 the prior season. This was the lynch pin issue for the WNBPA in these negotiations. The agreement also provided for more limited annual increases to the salary cap, allowed owners' ability to increase fines and penalties when players played overseas and did not fulfill WNBA obligations, and improved the players' revenue sharing program.

The 2020 contract not only built on the work that had been done in the prior contracts, but it also filled longstanding holes in the benefits provided to the professional athletes. The WNBPA sought to address four major areas of concern: compensation, revenue split, travel arrangement and benefits. The 2020 contract is a three-year agreement that provides a 53% increase in cash compensation. It raises top player salary caps to \$215,000 with up to \$300,000 in "league market agreements" and cash bonuses for mid-season tournaments, All-Star game selections, and similar honors. It is also the first time that players other than the elite players will earn six figures, with average compensation at \$130,000. Players will also start earning a 50/50 split of League revenue, up from 20/80. The increased compensation portions are intended to keep players from having to supplement their income by playing in overseas leagues during the off season.

For travel arrangements, all players will now get their own hotel rooms, instead of having to wait until they had five years in the league. In addition, players will fly in at least economy plus

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Representing Employees at the United Nations and Affiliated Organizations Through a Unique “Internal Justice System” for Grieving and Resolving Workplace Disputes

By Robert B. Stulberg and Zachary R. Bergman

Founded in 1945—fresh off the heels of World War II—the United Nations (the “UN”) was initially staffed by a mere 300 workers, tasked with preserving international peace and security, improving relations among nations, promoting international cooperation, and encouraging collective action. Today, the “UN System,” also known as the “UN Family,” employs tens-of-thousands of workers around the globe in a vast array of professions and occupations. Those workers, like workers everywhere, can benefit from legal representation in negotiating and enforcing their workplace rights. This article provides an overview of the UN Family’s global workplace and the legal rules and procedures that protect its workers’ rights.

The UN Family is comprised of: the UN’s six principal organs (General Assembly; Security Council; Economic and Social Council; Trusteeship Council; International Court of Justice; and UN Secretariat); the UN’s affiliated Funds and Programmes (such as the United Nations Children’s Fund (“UNICEF”) and United Nations Development Programme (“UNDP”)); and the UN’s specialized agencies (such as the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) and the World Health Organization (“WHO”)). The UN’s affiliated Funds and Programmes, and specialized agencies, each have their own leadership, budget and funding sources (as recently highlighted by President Trump’s decision to halt United States funding for WHO in the midst of the COVID-19 pandemic).

UN Family staff and employers are governed by a sophisticated civil service-type system infused with generally pro-worker protections. Because of

the multinational, multi-faceted nature of the UN Family’s mission and workforce, the intricacies of employment issues confronting UN Family staff is unparalleled. For example, the UN Secretariat, which is responsible for carrying out the UN’s day-to-day functions and is representative of the UN as a whole, is headquartered in New York; maintains offices in Geneva, Vienna and Nairobi; has economic commissions in Bangkok, Beirut, Addis Ababa, Geneva and Santiago; and runs other offices and programs around the world. It employs nearly 44,000 staff members, approximately 60% of whom work in field locations. Those workers are arranged into the following five categories—each dramatically different from the next—based on, among other things, job function, tenure,

recruitment, and required linguistic and cultural proficiencies: (1) “Professional and higher,” recruited internationally, with the expectation that they will be assigned to duty stations around the world; (2) “General Service,” typically recruited locally and performing administrative, secretarial and clerical tasks, and also engaging in specialized technical functions like printing, security and building maintenance; (3) “National Professional Officers,” typically locally recruited because of the need for particular language and custom fluencies and placed in non-headquarter stations in positions like interpreters, civil engineers and medical, human rights, political affairs, legal, child protection and humanitarian affairs officers; (4) “Field Service,” internationally recruited

to serve in field missions and provide administrative, technical, logistical and other support services; and (5) “Senior Appointments,” appointed by one of the UN’s legislative organs or by its Chief Administrative Officer.

Reflecting this extraordinary mix of positions, UN staff compensation, which is tax exempt, varies widely. Some staff are paid in accordance with prevailing local wages, and other staff receive annual base salaries ranging between \$31,000 to \$123,000, subject to potentially significant post adjustment increases. Similarly, benefit packages vary widely, and may include, among other things: rental subsidies; dependency allowances; hardship allowances; hazard pay; health insurance; and a retirement

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Natural Hair Movement Spurs Nationwide Legislative Response to Prevent Hairstyle Discrimination

By Katherine P. Sandberg, J. Drei Munar and Amber M. Rogers

Hairstyle discrimination has been a trending topic in the national news media over the past year as a flurry of states passed legislation to extend protected status to employees' hairstyles. Most of the media attention has focused on cases in which schools told African American students that their natural hairstyles violated the school dress code.

For example, Deandre Arnold, a senior at a high school in Texas, was suspended for his dreadlocks. The school gave Arnold an ultimatum: cut the dreadlocks, or be prohibited from walking at graduation. The school's policy drew national attention, and Arnold was invited to and attended the Oscars with his family. At the Oscars, Matthew Cherry won the Oscar for best animated short film for "Hair Love," which tells the story of an African American father trying to do his young daughter's natural hair for the first time. During his speech, Cherry advocated the passage of the CROWN (Create a Respectful and Open Workplace for Natural Hair) Act, which refers to a California law that prohibits discrimination by schools and employers on the basis of traits, such as hairstyle, commonly associated with race.

At the same time, a movement for natural hair is growing. This movement is made up of participants (usually African American) who wish to forego chemicals, heat damage, time, and expensive upkeep for styles that aim to smooth or straighten the hair. The natural hair movement has gained traction through YouTube and social media outlets, where users can document and share their journeys on reclaiming their natural hair via tutorials and posts. Yet in a study sponsored in part by Dove, an African American woman's hair is 3.4 times as

likely to be perceived as "unprofessional" in comparison to Caucasian women, and African American women were 50% more likely than white women to be sent home from their workplace because of their hair.

What Does Case Law Say Regarding Hairstyle Discrimination?

The case law on whether protections against race discrimination extend to a person's hairstyle is sparse, but it generally concludes that anti-discrimination protections do not extend to hairstyle on its own. The most notable case was brought by the EEOC on behalf of Chastity Jones against Catastrophe Management Systems (CMS). The EEOC alleged that Jones was discriminated against when CMS rescinded her job offer because Jones refused to cut her dreadlocks. The company's hairstyle policy stated that a "hairstyle should reflect a business/professional image" and "[n]o excessive hairstyles or unusual colors are permitted." The EEOC argued that dreadlocks are a "racial characteristic, just as skin color is a racial characteristic."

The district court judge dismissed the lawsuit, and the EEOC appealed to the 11th Circuit. A unanimous panel upheld the lower court's ruling, stating that the EEOC "did not state a plausible claim that CMS intentionally discriminated against Ms. Jones because of her race." The EEOC requested a rehearing *en banc*, but was denied. A majority of judges in active service in the 11th Circuit sided with the three-judge panel, and stated that "[u]nder our precedent, banning dreadlocks in the workplace under a race-neutral grooming policy—without more—does not constitute intentional race-based discrimination." The EEOC



elects not to appeal to the U.S. Supreme Court.

In 2018, the NAACP filed a motion to intervene to allow Jones to bring the appeal, but that motion was denied. Similar decisions in various district courts considering dress code policies like the one at issue in Jones' case have likewise found in favor of the employer.

State Laws and Municipal Ordinances Banning Hairstyle Discrimination

Taking note of the national attention on hairstyle discrimination, multiple states have passed legislation prohibiting discrimination on the basis of a person's hairstyle. The national trend was spurred by a new California law known as the CROWN Act, which went into effect on January 1, 2020. The CROWN Act extends the definition of race in the Fair Employment and Housing Act (FEHA) and the Education Code to include "traits historically associated with race, including, but not limited to, hair texture and

protective hairstyles," which include "braids, locks, and twists."

New York and New Jersey have passed legislation that similarly expands the definition of race to include traits associated with race (such as hairstyle) in New York's Human Rights Law and Dignity for All Students Act and in the New Jersey Law Against Discrimination. At a local level, Cincinnati, Ohio and Montgomery County, Maryland have also enacted ordinances that prohibit hairstyle discrimination.

Virginia recently became the fourth state, and the first Southern state, to ban hairstyle discrimination. The bill amends Virginia's Human Rights Act to include a section that extends the definitions of "because of race" or "on the basis of race" to include traits that are historically associated with race, such as a hair texture, type, or style. The law will take effect on July 1, 2020.

As recently as March 6, Colorado also enacted CROWN Act legislation. The law specifies that

the state's anti-discrimination laws will cover discrimination based on hair texture, hair type, or protective hairstyle, such as braids, locks, twists, tight coils or curls, cornrows, Bantu knots, Afros, and headwraps.

Pending Legislation States and Municipalities

CROWN Act legislation is pending in other states including Arizona, Connecticut, Florida, Georgia, Illinois, Michigan, South Carolina, Kansas, Kentucky, Louisiana, Washington, Tennessee, Wisconsin, Massachusetts, Minnesota, Nebraska, Ohio, Oregon, Pennsylvania, and Rhode Island. Members of the Texas Legislative Black Caucus

have also announced that they will be drafting a bill for the 2021 legislative session in response to Deandre Arnold's story. At the local level, ordinances in Baltimore, Maryland and Toledo, Ohio are pending.

Federal Legislation

On December 5, 2019, U.S. Senator Cory Booker introduced a CROWN Act bill that would prohibit discrimination based on hair textures and styles. Any such discrimination would be classified as race or national origin discrimination. The Senate bill, co-sponsored by U.S. Senator Sherrod Brown, is backed by multiple civil rights groups, including Color of Change, National Urban League,

and Western Center on Law & Poverty. Beauty brand Dove is also a supporter. In the House of Representatives, U.S. Representative Cedric Richmond has introduced companion legislation.

Takeaway for Practitioners

Given the widespread trend of states enacting CROWN Act legislation, practitioners should carefully monitor the laws in the jurisdictions where they practice and where their clients are located. If the federal legislation passes, and if it conflicts with a state law or local ordinance, the controlling law will be the one which affords the most protection to the employee. ■

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EU's "CCOO" Ruling: Back to Punching a Clock?

By Thomas De Jongh

On the 14th of May 2019, the Court of Justice of the European Union issued a new ruling. At issue is how to ensure effective compliance with maximum weekly working time and minimum daily and weekly rest periods mandated by EU-regulations. Under the new ruling, EU Member States must require employers to establish an objective, reliable and accessible system for measuring the duration of time worked each day by each worker. (*Case C-55/18, CCOO v. Deutsche Bank*).

This landmark ruling has upended the current flow in the EU Member States of working time flexibility. Consequently, it should not come as a surprise that employers across Europe have raised concerns that the EU, through its Court of Justice, is now reintroducing the punch clock in the 21st century.

Indeed, several EU countries have no current record-keeping requirements either for daily or weekly rest periods, or for all hours of work. Thus, currently, their national legislation does not comply with EU law.

This is the case, for example, in Belgium, the United Kingdom and Germany. Besides a few

exceptions for certain types of workers or types of employment, there is no general obligation for employers to track working time. Employers doing business in these countries are now facing a potentially significant administrative burden in their day-to-day organization, that did not exist before. Furthermore, the CCOO ruling could reinforce overtime claims by unions or workers.

Having said that, the general reaction in these three countries is less drastic than the CCOO ruling itself. Some expect the Court of Justice to soften the ground in future rulings or expect the EU Commission to come up with new regulations. In the meantime, employers are often advised not to jump the gun, and at least to wait for national legislation to catch up with this CCOO ruling, if at all. This attitude is especially apparent in the United Kingdom, where new legislation after Brexit could supersede previous EU employment regulations.

However, some EU countries already have a general obligation to track working time and, therefore, are not directly impacted by the CCOO ruling. One example is France, where national legislation

requires employers to measure working time on a daily basis. A similar obligation has existed in The Netherlands since 1996. However, in the latter, adult workers who earn at least three times the statutory minimum wage are exempted. Where there is an obligation to measure working time, employers often use an attendance register or a time clock. Nevertheless, not all companies comply with this national legal framework, especially in the Netherlands, although non-compliance is punishable by significant fines.

Although the CCOO ruling has led to all EU countries taking a closer look at their working time regulations and to pay additional attention to how to deal with possible overtime claims, non-compliant EU countries advise employers to wait for national legislation to catch up. In Belgium, monitoring employers on the working time issue does not seem to be on the social inspectorates' priority list. Consequently, it seems a calculated risk not to move on the CCOO ruling, at least for now.

Furthermore, although some unions support this ruling as a tool to fight the number of overtime hours, the question remains



whether workers would benefit from greater employer control over their working time, as the court mandates. As the demand for more flexibility in the workplace to reconcile work and life responsibilities seems to have reached an all-time high, this question will probably be hotly debated, and we will have to await a resolution. ■

Thomas De Jongh is attorney at Van Olmen Wynant and specializes in employment law.

Lawyering in Color

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to include “conduct related to the practice of law.” Notably, “conduct related to the practice of law” includes “representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.”

The ABA’s adoption of Rule 8.4(g) has met significant resistance on the state level. Only two states—Vermont and Maine—

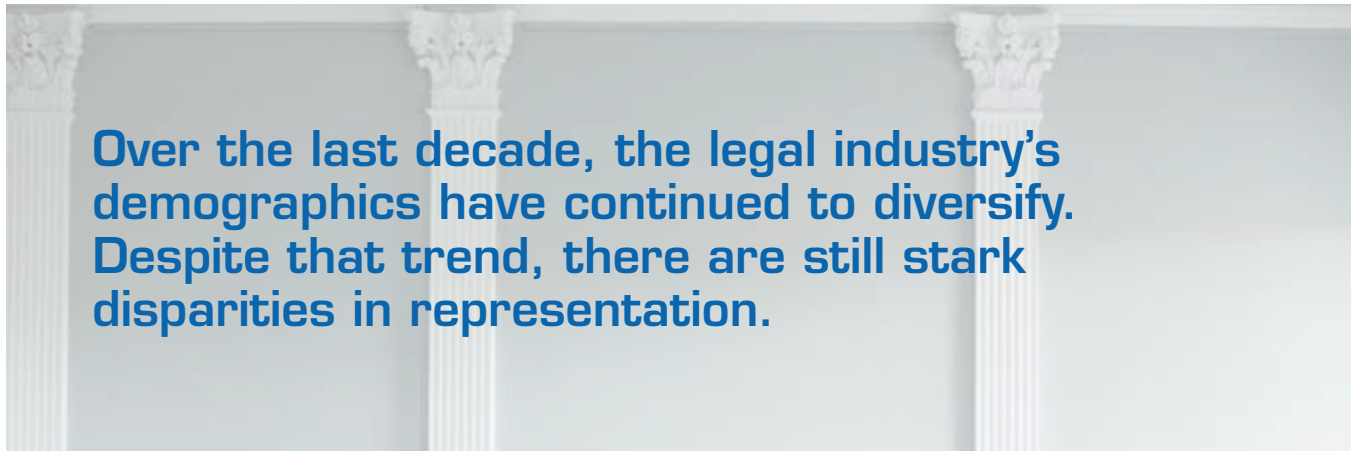
legislature passed a resolution stating the Rule “seeks to destroy the bedrock foundations and traditions of American independent thought, speech, and action.” The Texas Attorney General wrote that “candid dialogues about illegal immigration, same-sex marriage, or restrictions on bathroom usage will likely involve discussions about national origin, sexual orientation, and gender identity. Model Rule 8.4(g) would subject many participants in such dialogue to discipline...” The Texas Attorney General also claimed the Rule would restrict attorneys from representing faith-based organizations that oppose same-sex marriage.

the ethos of this industry and the spirit of the ABA Preamble’s call to action.

As mentioned above, Rule 8.4(g) proscribes intentional conduct. The Rule specifically encompasses conduct that a lawyer “knows or reasonably should know” constitutes discrimination. But, what about unintentional conduct? The employment field is encountering an increasing number of lawsuits premised upon an implicit bias theory. For example, in 2018, a St. Louis jury awarded \$8.5 million to an African American female employee who claimed, among other things, that she was passed over for a promo-

are societal factors that adversely impact access to legal resources. Those same factors also infiltrate and influence the demography of the legal field and the dearth of diversity among firm leadership.

Over the last decade, the legal industry’s demographics have continued to diversify. Despite that trend, there are still stark disparities in representation. According to the 2019 National Association for Law Placement Report on Diversity in U.S. Law Firms, approximately 61% of male partners are equity partners while only 47% of women partners are equity partners. In 2018, nearly 71% of all partners were White men. In 2019, 25.44% of associates were people of color while only 9.55% of partners are people of color. Of that number, 3.89% of partners identify as Asian, and 2.52% identify as Latinx. Approximately 1.22% of partners are Black men. With respect to diversity among women, the numbers are even more troubling. National Association for Law Placement (NALP) reports that 20.3% of equity partners are women. Intersectionality, however, is critically important when analyzing the segments of our field that are most disproportionately impacted. In 2009, only 1.88% of partners were women of color. In 2019, that number rose to just 3.45%. Of that number, 1.46% identify as Asian, 0.80% identify as Latinx, and 0.75% identify as Black. The abysmal underrepresentation of Black women is particularly troubling when viewed over time. In 2009, 2.93% of associates were Black women. In 2019, that number decreased to 2.80%. In contrast, the number of Asian women associates increased from 5.12% in 2009 to 7.17% in 2019. Notably, Black women currently represent approximately 59% of Black associates, but only 38% of Black partners. LGBT representation has steadily increased over the years. In 2004, 1.33% of associates and 0.79% of partners identified as LGBT. In 2009, those numbers increased, with 2.29% of associates and 1.36% of partners identifying as LGBT. A decade later in 2019, 4.14% of associates and



Over the last decade, the legal industry’s demographics have continued to diversify. Despite that trend, there are still stark disparities in representation.

have adopted Rule 8.4(g), though Maine’s version varies from the ABA Rule. It does not prohibit discrimination based on marital or socioeconomic status, and does not proscribe conduct in bar association, business, and social activities. American Samoa, the Northern Mariana Islands, and the U.S. Virgin Islands have also adopted Rule 8.4(g). While California did not outright adopt Rule 8.4(g), its Rule 8.4.1 has very similar language prohibiting discrimination, harassment, or retaliation based on protected categories such as race, gender, race, religion, sexual orientation, gender identity, and physical disability, among others.

At least six states rejected the Rule. The Montana state

The significance of Rule 8.4(g) cannot be understated. Codifying the prohibition of discriminatory behavior in not only the practice of law, but also in the management of legal practices and interactions with legal professionals, sends a clarion call to the legal industry that discrimination—an expansive term that includes an array of misconduct—is inconsistent with the code of ethics to which attorneys are bound. The addition of gender identity and marital status grants additional protections to entire populations that have been historically excluded from the reach of the law. Moreover, the ABA’s backing of Rule 8.4(g) adds the necessary heft to trigger realignment and, where applicable, eradication of behaviors that are antithetical to

tion in favor of a younger, white female coworker with less experience and education. Notably, the plaintiff did not receive any direct racist comments while at work. Instead, her case was premised on implicit bias—the idea that her supervisors treated her differently through subtle microaggressions.

Implicit bias has a long-documented history in our society. On its face, Rule 8.4(g) does not expressly cover implicit bias. Yet the workplace microaggressions through which implicit bias operates are ever-present and continue to destabilize the most vulnerable members of the legal industry: those who are the most underrepresented and least powerful. As the Preamble to the Model Rules makes clear, there

2.07% of partners identified as LGBT.

Thus, while the movement of ensuring diversity and inclusion in the legal profession has achieved tangible results, the numbers show that more needs to be done. On November 1, 2019, attorney David Douglass introduced a revised Model Rule 8.5, which provides:

As a learned member of society with an ethical obligation to promote the ideal of equality for all members of society, every lawyer has a professional duty to undertake affirmative steps to remedy de facto and de jure discrimination, eliminate bias, and promote equality, diversity and inclusion in the legal profession. Every lawyer should aspire to devote at least 20 hours per year to efforts to eliminate bias and promote equality, diversity and inclusion in the legal profession.

This proposed rule highlights critical steps needed to eliminate bias. Examples of such efforts include, but are not limited to: adopting measures to promote the identification, hiring and

advancement of diverse lawyers and legal professionals; attending CLE and non-CLE programs concerning issues of discrimination, explicit and implicit bias, and diversity; and active participation in and financial support of organizations and associations dedicated to remedying bias and promoting equality, diversity, and inclusion in the profession. Though the rule has not been adopted, its underlying intent is embodied in several initiatives in the industry. Notably, in 2016, the ABA House of Delegates passed Resolution 113, which urged “providers of legal services” to “expand and create opportunities at all levels of responsibility for diverse attorneys.” The Resolution also implored clients to “assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys.” These are the types of intentional, purpose-driven initiatives that will be required in order to reverse decades of routine underrepresentation.

In addition, Diversity Lab has implemented the Mansfield Rule 3.0: a certification that “measures whether law firms have

considered at least 30% women, attorneys of color, LGBTQ+, and lawyers with disabilities for leadership and governance roles, equity partner promotions, formal client pitch opportunities, and senior lateral positions.” The Mansfield Rule seeks to increase the representation of diverse lawyers in law firm leadership, requiring participating law firms to broaden their candidate pool. Centering the active promotion of diverse attorneys as an organizational goal will help halt, if not reverse, rates of attrition among minorities who often become displaced in large law firm settings due to lack of access. Finally, legal businesses that offer mentorship programs often experience increased retention among their diverse attorneys. However, to have meaningful impact, mentorship must involve sponsorship: attorneys in positions of influence taking active roles in the careers of minority attorneys by providing them with significant, career-advancing work, client-facing opportunities, and critical feedback. Minority attorneys often find themselves out-of-synch with their peers because they have been excluded from the social spheres where informal relationships develop and, consequently,

work is assigned. Dismantling exclusionary work silos, along with the implementation of deliberate and earnest investment in career success, are prerequisites to undoing the microaggressions that are so often visited upon minority attorneys.

All employers and practitioners in the legal field should work towards creating inclusive environments whether in the office, in the courtroom, or at a happy hour. Not doing so not only leads to lack of retention and leadership from diverse attorneys, but could also lead to professional repercussions for attorneys as the ABA and State Bar Associations create and adopt model rules that provide recourse for those subject to such discrimination. ■

Shelly C. Anand is a supervising staff attorney at the Tahirih Justice Center where she represents immigrant victims of gender-based violence and provides support to other members of the legal team as well as pro bono attorneys.

R. Nelson Williams is a partner at Thompson Coburn LLP and represents employers in various aspects of employment law and litigation.

Negotiate Like A Girl

continued from page 4

or comfort class for all game travel. Prior travel saw players, including 6 foot 4 centers, stuck in the middle seat in economy class and on routes that had multiple layovers, leaving little time to warm up before games.

Addressing benefits, the contract requires full pay for the period of players maternity leave. It also includes a \$5,000 child care stipend as well as a guarantee of a two-bedroom apartment for players with children. New mothers will be provided with proper nursing accommodations. Players will also be reimbursed up to \$60,000 for adoption fees, fertility

treatments and freezing their eggs. The League will also provide nutrition counselors and access to experts in women’s health, as well as enhanced mental health benefits and resources. The League will also develop a domestic/intimate partner violence education and counseling program.

Career development also became an issue with this contract, as the WNBA will work with affiliated leagues, namely the NBA, teams and sponsors to give players off-season jobs in order to plan for post-retirement careers. The League will also work to institute diversity in a coaching initiative for players looking to coach after retirement. Under the

contract, players also won representation on League policy committees.

The strides achieved for the professional athletes of the WNBA in this contract cannot be overstated and were hailed large steps in the right direction for women’s professional sports. Many are crediting the new League commissioner, Cathy Engelbert, with a key role in the negotiations. Engelbert is a former Deloitte CEO, but almost as importantly, a former college player during her days at St. Johns. One has to wonder if having a former player at the helm for the League changed its approach in negotiations. And one has to wonder if the same change will be observed in the U.S. Women’s National Team

lawsuit, now that the U.S. Soccer Federation has Cindy Parlow Cone, a former National Team member herself, at the helm. One can only hope that the WNBA/WNBPA contract is a harbinger of things to come in professional women’s sports. ■

1. *Morgan, et. al v. United States Soccer Federation, Inc.* Case No. 19-cv-01717 (W. Dist. Cal., 2019).

Amanda Clark is an associate at Asher, Gittler & D’Alba, Ltd. and practices both labor and employment law. The bulk of her work is advocating for both public and private sector unions, and individual employment plaintiffs.

Employees at the UN

continued from page 5

pension. The Secretariat also relies on interns, temporary workers, consultants, and up to 8,000 volunteers each year, who are responsible for their own costs and living expenses.

As an international, intergovernmental organization, the UN enjoys privileges and immunities from the laws, courts and tribunals of its 193 Member States, and operates outside of any governmental system. To address that vacuum, the General Assembly, on November 24, 1949, adopted Resolution 351A(IV), which established the UN Administrative Tribunal, an independent body employing an administrative model, tasked with passing judgment over employment contract disputes brought by Secretariat, UN Programmes and Funds, and specialized agencies staff. The Administrative Tribunal, however, decided only 1500 cases in its first 60 years of existence, and was criticized for failing to adequately resolve disputes, promote workplace efficiencies and accountability, provide basic due process as afforded under other international human rights instruments, and guarantee individual rights.

After much deliberation, in an

effort to provide UN Family staff with a meaningful way to grieve workplace disputes, the UN, on July 1, 2009, established the “UN Internal Justice System” (the “System”)—a sophisticated, civil service-type schema, containing generally pro-worker protections with protocols designed to be “consistent with international law, and the principles of the rule of law, and due process.” The multi-faceted System attempts to achieve those ends by interpreting and applying internal UN legal frameworks, comprised of Staff Regulations and Rules, and administrative issuances, which define management and staff workplace obligations and set forth robust worker rights, duties and protections. For example, Rule 9.6 of the Staff Regulations and Rules of the United Nations curtails an employer’s ability to terminate staff, and Rules 10.1 through 10.4 set forth disciplinary protocols which provide staff with due process procedures and the right to legal counsel in disciplinary matters. Notably, the UN’s affiliated Funds and Programmes, and the specialized agencies, each have their own legal frameworks, which differ from each other in various respects.

The System has three components: (1) the Office of Staff Legal

Assistance (“OSLA”), which advises grievants from certain UN Family entities as to the merits of potential claims and, in some cases, provides representation during the grievance process; (2) the UN Dispute Tribunal (“UNDT”), which, as the UN court of first instance, conducts hearings, issues orders and renders judgments; and (3) the UN Appeals Tribunal (“UNAT”), which hears appeals from judgments rendered by UNDT and other UN organizations, agencies and related entities. Because each agency within the UN Family has its own legal framework, however, not all UN Family staff have access to each of the System’s key components.

In addition, the System contains both “formal” and “informal” dispute resolution tracks, which can be pursued simultaneously. A typical formal track case begins by timely filing a request for a “Management Evaluation,” in which a grievant identifies acts or decisions complained of so that the UN can evaluate and rectify improper decisions or justify its actions to the grievant. With certain exceptions, filing a Management Evaluation is a condition precedent to pursuing relief before the UNDT. In contrast, the informal track encourages aggrieved staff to use an ombudsman and/or mediation,

as needed, to attempt to resolve disputes.

UN Family staff seeking recourse before the UNDT can arrange for representation by: a private attorney authorized to practice in a “national jurisdiction”; a staff member or former staff member of the UN or a specialized UN agency; or, for certain eligible employees, OSLA counsel, if counsel agrees to take on the matter. Individuals appearing before the UNDT and UNAT must adhere to the UN “code of conduct for legal representatives and litigants in person,” and advocates employed by a UN Family entity also must abide by their organization’s staff conduct rules and regulations.

In short, the UN and its various agencies and affiliates employ skilled staff throughout the world, in a wide range of vital roles. Because their employers are immune from suit, these workers must rely upon the UN’s recently developed, civil service-type dispute resolution mechanisms to seek and obtain recourse for labor and employment breaches. To successfully navigate those unique and complex dispute resolution mechanisms, UN Family grievants are well advised to avail themselves of experienced, knowledgeable counsel to ensure that their rights are protected to the fullest. ■



IN MEMORIAM

Last fall, our Section lost one of its treasures with the passing of Susan Grody Ruben, a friend and colleague who enriched our Section with her intelligence, skills and judgment and delighted us with her clever wit.

Susan enjoyed an active mediation and arbitration practice in Cleveland, Ohio and was a member of the National Academy of Arbitrators where she served in various leadership roles. In addition, Susan was an instructor in Employment Law Mediator Training as part of Cornell University’s Dispute Resolution Training program.

Within our Section, Susan held several leadership roles, serving on the Council as an At-Large Member, as ADR in Labor and Employment Law Committee Co-Chair, and Section Liaison to the Section of Dispute Resolution. As Liaison, Susan always ensured that our Section’s interests were protected, and she helped our Section work cooperatively and productively with the Section of Dispute Resolution.

Susan was inducted as a Fellow of the College of Labor and Employment Lawyers, listed in The Best Lawyers in America, in Cleveland’s Best Lawyers in Alternative Dispute Resolution and named an Ohio Super Lawyer.

Susan was most proud and fulfilled by her family, including her twins, Daniel and his wife Deborah, and her daughter Sarah and her husband Dave, and their precious daughter Selah. Susan always had photos and an adorable story to share about her beloved granddaughter. She will be missed by her family and so many friends.

Our Section recognizes, appreciates and honors Susan’s prolific and significant contributions. She will be dearly missed by her ABA family.

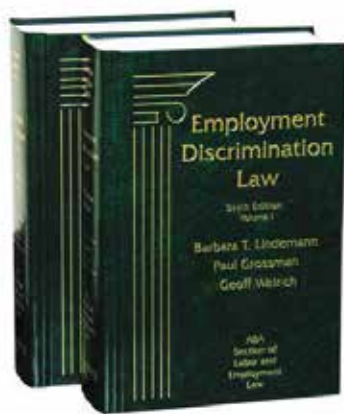
Robert B. Stulberg is a founding partner of Broach & Stulberg, LLP (now Stulberg & Walsh, LLP) in New York City, where he represents individual employees, classes of employees, labor unions, employee benefit funds, and disability rights organizations in the private and public sectors.

Zachary Russell Bergman is an associate at Stulberg & Walsh, LLP where he primarily practices labor, employment and civil rights law, representing individual and institutional clients in federal and state court, before the Merit Systems Protection Board, pursuant to the United Nations’ internal justice system, and in front of federal and state agencies.

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Calendar of Events

2020

November 11–13
14th Annual Section of Labor & Employment Law Virtual Conference

2021

January 28–30
State & Local Government Bargaining & Employment Law Committee Midwinter Meeting
 Westin Resort
 Puerto Vallarta, Mexico

February 3–6
Employee Benefits Committee Midwinter Meeting
 Fairmont El San Juan Hotel
 San Juan, Puerto Rico

February 10–12
ADR in Labor & Employment Law Committee Midwinter Meeting
 Marriott Marquis
 Washington, D.C.

February 17–19
Federal Labor Standards Legislation Committee Midwinter Meeting
 Grand Hyatt
 Playa del Carmen, Mexico

February 23–26
Occupational Safety & Health Law Committee
 Westin Sarasota
 Sarasota, Florida

February 28–March 3
Committee on Development of the Law under the NLRA
 Loews Coronado Beach Resort
 Coronado, CA

March 2–5
Committee on Practice and Procedure under the NLRA
 Loews Coronado Beach Resort
 Coronado, CA

March 8–9
Federal Sector Labor & Employment Law Committee Midwinter Meeting
 Washington, D.C.

March 10–12
Railway & Airline Labor Law Committee
 JW Marriott Savannah Plant
 Riverside District
 Savannah, Georgia

March 17–20
Employment Rights & Responsibilities Committee Midwinter Meeting
 Fairmont El San Juan Hotel
 San Juan, Puerto Rico

April 7–10
National Conference on Equal Employment Opportunity Law
 The Peabody Hotel
 Memphis, Tennessee

April 14–16
National Symposium on Technology in Labor & Employment Law
 Marriott Marquis
 Washington, D.C.

May 2–6
International Labor & Employment Law Committee
 Ritz-Carlton Berlin
 Berlin, Germany

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

For more event information, contact the Section office at 312/988-5813 or visit www.americanbar.org/laborlaw.