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Avoiding Ethical Pitfalls in Using Social Media

By Robert C. Nagle and Andrew M. MacDonald

In the world of labor and employment law, social media (Facebook, Twitter, Snapchat, etc.) allows lawyers unique access for—and to—various legal parties, including employers, employees, unions, counsel, witnesses, jurors and even judges. For lawyers, social media provides potential access to useful information, including direct evidence and party admissions, but it also presents potential pitfalls in the realm of legal ethics.

Social media's power to impact a case's outcome is clear in *Gulliver Sch., Inc. v. Snay*, No. 3D13-1952, 2014 Fla. App. LEXIS 2595 (Fla 3d DCA 2014). Patrick Snay, a former headmaster of a school operated by Gulliver, had asserted discrimination and retaliation claims based upon Gulliver's decision not to renew his employment contract. The parties reached a settlement providing for a substantial monetary payment to Snay in exchange for a full release of claims and other terms, including a confidentiality provision barring Snay from disclosing the existence or terms of the settlement agreement to anyone other than his attorneys,

other professional advisors, or *spouse*. Just days after the parties executed the settlement agreement, Snay's daughter posted the following on her Facebook page:

> "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT."

Alas, daughter Snay's post went out to over 1,200 Facebook friends, many of whom were present or former Gulliver students. Thus, with a single click, daughter Snay revealed the existence of the settlement to the world and proved conclusively that the plaintiff had informed his daughter of the settlement agreement. The result: Papa Snay had to forego $80,000 of settlement funds.

Just imagine: In a world without Facebook, the defendant in *Snay* never might have known of the breach of the settlement agreement. With evidence like this floating out in the social media sphere, practitioners must be at least somewhat familiar with common social media platforms and their functions. Indeed, Comment 8 to ABA Model Rule of Professional Conduct 1.1 (Competence) provides: To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, ***including the benefits and risks associated with relevant technology*** . . . . (emphasis added).

In addition to using social media to obtain information about adversaries and parties, lawyers also use social media to gather information about witnesses, judges, and jurors. However, with opportunity comes (professional) responsibility. When searching for information on social media, lawyers must be mindful of their ethical obligations. A lawyer's use of social media implicates several Rules of Professional Conduct, including those pertaining to fairness to opposing parties (Model Rule

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By Gail Golman Holtzman

Midwinter Meeting Season: Incredible Programs, Dinners on the Beach and a Visit to the LBJ Library

Midwinter Meeting season is winding down, and I hope that you all attended one or more of the amazing meetings of our Section's 15 Standing Committees. These meetings offer cutting-edge, timely and balanced programming, along with fun social events, valuable networking events and opportunities to explore interesting meeting venues.

These meetings provide an opportunity for our leadership to meet and visit with the myriads of volunteers who contribute so meaningfully to our Section, to share our exciting Section initiatives and developments, and to see first-hand the work of the various Committees. I want to recognize the contributions of our Committee leadership from the various constituent groups who work diligently throughout the year to plan a Midwinter Meeting that runs seamlessly as well as our Government Fellows who contribute significantly to the value of the Committees.

As of the time of submitting this article, Chair-Elect Don Slesnick and I had attended the first two meetings in January, the ADR in Labor and Employment Law and State and Local Government Bargaining and Employment Law Committee Midwinter Meetings that overlapped in beautiful Puerto Vallarta, Mexico. Congratulations to ADR Committee Co-Chairs Tom Allison, Raquel Fas Bravo, Fred Dichter and Kevin McCarthy, as well as to Council Liaisons Ginger Hardwick, Susan Grody Ruben, Julie Totten, and Gwynne Wilcox, for providing informative and thoughtful programs on timely topics. In addition to the outstanding programming at the meeting, the ADR Committee produces the following exemplary treatises: *ADR in Labor and Employment Law; Discipline and Discharge in Arbitration; Elkouri and Elkouri: How Arbitration Works; How ADR Works; Labor Arbitration: A Practice Guide for Advocates; Labor Arbitration Cases and Materials for Advocates; and Labor Arbitrator Development: A Handbook*.

Appreciation also is extended to Government Fellows Brandon Iriye, Victor Voloshin and Michael Franczak for their presentations and reports on the Federal Labor Relations Authority, Equal Employment Opportunity Commission, and Federal Mediation and Conciliation Service, respectively. Thanks also to Scholar-in-Residence and past Section Secretary Professor Michael Green for his presentation, "ADR and Racial Prejudice in the Workplace," and to Professor Ted St. Antoine for his presentation, "Arbitrators' Ethical Obligations," as well as to all presenters. After the programs, attendees were able to socialize and dine within feet of the Pacific Ocean with picturesque mountains in the background.

Concurrent with the ADR Midwinter Meeting was the State and Local Government Bargaining and Employment Law Committee, where attendees discussed and learned about developments in public sector negotiations and bargaining and due process, and other related Constitutional issues. Together, the Committees offered attendees a joint program about "Interest Arbitration." Congratulations to State and Local Government Bargaining and Employment Law Committee Co-Chairs Gary Messing, Lynn Morrison and Bob Smith, and Council Liaisons Gary Bailey and Julie Totten. Appreciation also is extended to Government Fellows Sarah Cudahy and Page Garcia and to Professor Marty Malin, the 2016 Arvid Anderson Award Recipient, for his keynote address, as well as to all presenters. The meeting attendees and their guests also enjoyed a sunset cruise, as well as a beautiful dining experience on the beach.

In February, I attended the Employee Benefits Committee Midwinter Meeting in Austin, Texas. More than 250 attendees focused on the many developing issues in the employee benefits area, including potential changes to the Affordable Care Act, the status of the fiduciary rule, and the "Church exception" that will be the subject of Supreme Court review this term. Congratulations to Co-Chairs Marjorie Butler, Judy Broach, Denise Clark and Al Holifield for coordinating a tremendous program addressing so many evolving issues. Thanks also to Council Liaisons Ruben Chapa, Joe Torres and Eunice Washington and to Government Fellows Nathan Goldstein, Nicole Hagan and Joanne Roskey. I also want to recognize the outstanding treatise, *Employee Benefits Law*, produced by this Committee, and thank the editors and authors for their work on the Fourth Edition and 2017 Supplement to be published this year.

In addition to the many excellent presentations was a "Retrospective: The Last Eight Years at EBSA" presented by Phyllis Borzi, who is the longest serving Assistant Secretary at the DOL Employee Benefit Security Administration. After the programs, attendees enjoyed receptions and an

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Heightened Scrutiny for Medical Marijuana at Work

By T. Benjamin (Ben) Huggett and Greg H. Greubel

Medicinal marijuana laws are no longer a fringe issue. Currently, twenty-eight states and Washington D.C. have laws addressing the use of marijuana for a medicinal purpose. Of those twenty-eight states, less than half address the rights and obligations of employers.

Generally, the states that have addressed the rights and obligations of employers have barred discrimination based on medical marijuana use and status as a medicinal marijuana user. These laws all universally protect employers by allowing them to prohibit marijuana use and impairment in the workplace. The prohibition of impairment suggests that employers cannot take any adverse employment action due to a positive marijuana test unless the employer can show that the employee was impaired at work.

So, how exactly would an employer show that an employee was impaired at work? Along those same lines, how could an employee rebut an allegation of impairment at work? Unlike alcohol, there is currently no reliable test to determine if an individual is currently impaired by THC, the psychoactive chemical in marijuana. Indeed, there is no consensus on the level of THC at which an individual is "impaired."

This situation is troubling for both employees who lawfully use medicinal marijuana and for employers. Employees who legally use marijuana may fear that they will be terminated for failing a drug test. Employers are concerned not only about employee productivity but also about the potential liability if an employee causes an accident.

One way employees who legally use medicinal marijuana have attempted to minimize their fear of being "outed" is to approach the issue head on and request an accommodation to use medicinal marijuana under the Americans with Disabilities Act.

Currently, no state requires an employer to accommodate a medicinal marijuana user by allowing the employee to use marijuana at work or be impaired while working. Further, no court has held that the ADA requires an employer to accommodate an employee who uses a drug that is illegal under federal law. However, some states, such as Nevada, require employers to accommodate medicinal marijuana users.

Even if an employer operates in a state that does require it to accommodate medicinal marijuana users, the employer may not be obligated to follow the state's law if a major portion of its business comes from federal contracts.

Federal contractors are obligated to comply with the Drug-Free Workplace Act of 1988, which requires employers to prohibit employees from engaging in the unlawful possession or use of any controlled substance. Because marijuana is a "controlled substance" under federal law, federal contractors cannot comply with state law requiring employers to accommodate medicinal marijuana users.

Again, both the federal contractor and the employee are left in a precarious situation. Federal contractors in states like Nevada who discover that an otherwise productive employee is using marijuana are forced to either terminate the employee and face a potential lawsuit under state law or accommodate the employee and risk losing its federal contracts. As for the federal contractor's employees who use medicinal marijuana, they are unable to disclose their use to their employer and must simply hope that they are not chosen for a drug test.

In addition to managing current employees who use medicinal marijuana, employers also face difficult choices concerning pre-employment drug testing. For employers, requiring pre-employment testing is not only expensive and heavily regulated, but it may also make it more difficult to find employees. Furthermore, employers may face lawsuits for declining to hire a medicinal marijuana user.

As with current employees, applicants who use medicinal marijuana are left in an untenable situation. For these individuals, a doctor has determined that marijuana is an effective remedy for their condition. Nevertheless, the medicinal marijuana user is unable to apply for positions requiring a pre-employment drug test.

The current state of the law on medical marijuana is clearly troubling for both employers and employees. In the past five years, however, lawyers and legislators have paid more attention to the issues surrounding medical marijuana in the workplace. Hopefully, this increased attention will spur more standardized and easier to follow practices for both workers and employers. ■

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event at "Speakeasy" that included live music, dancing, games and cocktails on a rooftop terrace.

Following conclusion of the Employee Benefits Committee Midwinter Meeting, my husband Steve and I walked to the incredible LBJ Library that sits on a hill on the University of Texas campus. The Library is filled with photos, recordings, artifacts and memoirs documenting the many initiatives of "The Great Society." Significant to our Section, the Library's "Social Justice Gallery" is filled with fascinating historical information and photographs relating to passage of the Civil Rights Act of 1964. President Johnson wrote "This bill is going to be enacted because justice and morality demand it."

In addition to a replica of the Oval Office at the Johnson White House is the desk on which President Johnson signed the Voting Rights Act of 1965 and a telegram from Dr. Martin Luther King to President Johnson sharing a sense of encouragement and appreciation for the President's remarks to the joint session of Congress in support of the Voting Rights Act. Also at the Library is a bronze sculpture of LBJ with his words inscribed: "There are no problems which we cannot solve together, and there are very few which any of us can settle by himself."

As a Section, through the work of our many talented volunteers, we are able to understand and address issues in our labor and employment field and to advance our profession in the most positive and productive ways. I encourage you next year to attend the Midwinter Meetings and to find time now to explore ways to become involved in our amazing Section. Please visit our website at *www.americanbar.org/groups/labor_law.html* to find the committees, projects and initiatives that most interest you. Together we can make a difference! ■

SCOTUS to Decide Future of Class Waiver Arbitration Clauses

By J. Kevin Hennessy

From Fortune 500s to regional warehouses, employers have long relied on arbitration clauses that prohibit class or collective action employment claims in order to minimize legal costs and financial exposure. However, the National Labor Relations Board (NLRB) and a patchwork of court decisions have put those clauses under increasing scrutiny, and in its next term, SCOTUS will finally decide if such waivers are enforceable.

Setting the Scene: How We Got Here

For over 20 years, the use of arbitration agreements prohibiting class claims by employees has been on the rise. Employers maintain that such agreements are useful in facing potentially costly internal investigations, the prospect of adverse publicity and expensive class action litigation and settlements. Arbitration clauses that prohibit class claims may offer a safeguard from steady streams of settlement demands, often devoid of any substantive merit but which are nevertheless very costly to defend. Wage hour class actions are the law suits *du jour*, with employers in California, especially, often facing cumulative and crippling penalties.

Meanwhile, the NLRB, state courts and federal courts have conflicting opinions as to whether such agreements are legally enforceable. This scene is set by the conflict between the National Labor Relations Act (NLRA), which the Board says protects the filing of class or collective actions in court by employees as a form of "concerted activity," and the Federal Arbitration Act (FAA), which encourages and safeguards arbitrations as a mechanism to resolve disputes quickly and less expensively (as SCOTUS affirmed in *AT&T Mobility LLC v. Concepcion*[1] and *American Express Co. v. Italian Colors Restaurant*).[2]

Backed by *AT&T* and subsequent decisions, many employers across the country have created employment arbitration policies modeled on the arbitration/class waiver clauses upheld by the Supreme Court in those cases. Sony, Netflix, eBay, PayPal, and StubHub are among the companies that reportedly utilized employment-related arbitration provisions with class waivers after the *AT&T* decision. In response, the NLRB has taken the hard stance that class action waivers violate sections 7 and 8 of the NLRA, beginning with its much-publicized 2012 decision in *D.R. Horton, Inc.*[3] and later in 2014 in *Murphy Oil USA, Inc.*,[4] finding that the right to file or participate in collective proceedings cannot be waived.

The ultimate winner… may well be the one who convinces SCOTUS where to start the analysis—the FAA or NLRB.

But the NLRB has had mixed results in gaining appellate court approval of the *D.R. Horton* and *Murphy Oil* decisions. The Second, Fifth, and Eighth Circuits in *Sutherland v. Ernst & Young*,[5] the appeals of *D.R. Horton, Inc.*[6] and *Murphy Oil USA, Inc.*,[7] and *Owen v. Bristol Care, Inc.*[8] and *Cellular Sales of Missouri LLC v. NLRB*,[9] respectively, have rejected the Board's reasoning and currently allow class action waivers in mandatory employment arbitration agreements. They have refused to give the Board's interpretation of the FAA the customary "deference" rendered to Board decisions interpreting its own NLRA.

On the other hand, the Ninth Circuit and, recently, the Seventh Circuit in *Morris v. Ernst & Young*[10] and *Lewis v. Epic Systems Corporation*,[11] respectively, have agreed with the Board's position. Of note, the Ninth Circuit has also held in *Johnmohammadi v. Bloomingdale's*[12] that a class action waiver is enforceable if the employee can "opt-out" of the arbitration agreement. (The NLRB has nevertheless concluded that "opt-out" features in such agreements still violate the NLRA[13]).

The Majority of Circuits Has the Best of the Argument

The crux of the dispute is that the Circuits which approve class action waivers start from the logical proposition that class or collective actions (such as Rule 23) are a *procedural* mechanism and not a *substantive right*. After all, Rule 23 is a Federal Rule of *Procedure*. The Supreme Court in *AT&T* aptly held that requiring the availability of class action waivers, as the NLRB appears to be doing, "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[14] That patent inconsistency places the burden on the party resisting arbitration (typically a former employee as class representative) to prove there is a "contrary congressional command" which would otherwise cause a court to deny enforcement of arbitration under the FAA. Under long-standing precedent, any doubts are to be resolved in favor of arbitration.[15] These Circuit Courts follow prior SCOTUS precedent holding that there is no such contrary "command" in Title VII or the FLSA (which actually espouse the substantive rights at issue), much less in the NLRA.

The two Circuit decisions in *Morris* and *Epic Systems* which approved the NLRB's reasoning basically place the FAA and NLRB on their respective heads by suggesting that the NLRA is the substantive right at issue (as opposed to the FLSA which is the actual underlying substantive cause of action in these cases), and that the party opposing the NLRB's position therefore has to somehow overcome a "heavy presumption" to prove that the FAA and NLRA are in actual conflict. So is the end result in the Circuit split to depend on whether a case is filed first under the NLRA or filed first under the FLSA/Title VII? Or perhaps is it decided by whichever statute is mentioned first in the motion to arbitrate? This "race to the courthouse" construct does not appear to be the most reasoned approach to a serious issue.

Even more confusing perhaps is the fact that the Seventh Circuit's opinion in *Epic Systems,* one of the anti-waiver cases before SCOTUS next term, cites as supportive authority the holding in *14 Penn Plaza LLC v. Pyett*,[16] upholding class action waivers in a labor agreement. Relying on *Pyett*, the Court in *Epic Systems* said: "…it is entirely possible that the NLRA would not bar Epic's [waiver] provisions if it were included in a collective bargaining agreement."[17] Can one logically conclude that there is any real difference between class action waivers in labor agreements with arbitration provisions and such waivers in private employment arbitration agreements? There are certainly some superficial differences in the sense that a labor union typically decides which matters to arbitrate under a labor agreement, while a non-represented employee makes that decision on his or her own under a private employment arbitration agreement. But that is a difference not a distinction; and it is a difference which nonetheless actually favors enforcement of class action waivers in the non-represented employee context. More to the point: the waiver language is virtually the same in both agreements and the effect of the waiver is the same. Logically, *Pyett* cuts only one way—in favor of the enforcement of class action waivers in both labor agreements and private employment arbitration agreements.

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What Does Brexit Really Mean for UK Employment Law?

By Paul Callaghan and Roxane Bradley

On June 23 2016, by a small margin, voters in the United Kingdom voted to leave the European Union. Just under 52% of votes cast were to leave with the other 48% voting to remain.

Since the UK joined what was then called the EEC in 1973, many areas of UK employment law have been affected by EU law. This period coincided with the move away from collective labor law based on what was known as the voluntarist system and the largely unregulated workplace, which was based around trade unions and their members, towards more individual employment law. The UK had introduced unfair dismissal rights a few years earlier and, in 1971, had passed its Equal Pay Act requiring men and women to be paid the same for the same or substantially similar work.

From the late 1970s onwards, the EU issued Directives and Regulations that affected employment law. Directives need to be incorporated into domestic law by each EU member, although the way they're implemented can vary from country to country, whereas regulations have direct immediate effect in the same way in each country.

In the UK, EU law has expanded discrimination rights which previously only covered sex, race and disability discrimination before an EU directive also added age, religion or belief and sexual orientation as protected characteristics. The EU also has implemented rules that govern working time, including the only UK laws that require any minimum vacation for UK employees. Many of the family leave laws have also been enhanced by the EU, as well as rules protecting agency workers.

Some supporters of the "leave campaign" suggested that one of the very reasons to vote for Brexit was that, without being bound by European employment laws, the UK would be free to determine its own employment laws and could deregulate and allegedly become more competitive. On the other hand, "remain" campaigners warned that a leave vote would put workers' rights on the line and suggested that this was a good reason to stay in the EU.

Despite this disagreement, since the referendum result, the government has suggested that they are unlikely to substantially repeal or amend European derived employment laws. Reasons for this position vary, but an important factor is that a key demographic supporting Brexit was poorly educated white working class voters. Following the referendum, many of the "leave" campaign supporters believe it is important to repay this constituency which, on the whole, values employment rights. Also, many of the laws, such as the anti-discrimination laws, are now viewed as more fundamental rights rather than a burden. Moreover, the UK is likely to more easily secure a reasonably favourable trade deal with the EU if it retains most, if not all, of the EU's laws in this area.

In fact, when the UK Prime Minister Theresa May announced her 12-point Brexit plan, point 7 of that plan was to protect workers' rights. Rather than diminish or repeal employment laws, the Prime Minister stated that as the UK translates the body of European law into its domestic regulations, the Government would "ensure that workers' rights are fully protected and maintained". Indeed, the plan suggested that workers' rights would actually be built on following Brexit, rather than reduced. However, there will be pressure particularly from conservative MPs who support deregulation to amend or repeal some laws. So where do we think these changes are likely to be?

One area is the Agency Worker Regulations. These bulky and sometimes cumbersome regulations regulate the relationship between employment agencies, temporary workers, and the end user client, who is "hiring" the temporary workers. They have proved unpopular with business, and given the relatively limited scope in which they apply, they seem an obvious choice for repeal. Also, at the moment, compensation for unlawful discrimination is uncapped. This is very different from unfair dismissal compensation which is capped at the lower of around £80,000 or one year's pay. The Government has previously said that it would like a cap on discrimination compensation and may therefore introduce such a proposal following Brexit.

The complex rules regarding working time may also be changed. European Court Judgments which suggest that employees on sick leave have to accrue vacation and that overtime and commission payments need to be included in vacation pay have proved unpopular with employers. There will be pressure to remove those.

Likewise, the Transfer of Undertakings Regulations, known as "TUPE", are sometimes unpopular to US buyers of UK companies. There may well be some pressure to at least modify the successor employer rules in this area.

However, all of these ideas are within the context of the Government saying that it is potentially going to build on workers' rights to reflect the new economy. Any repeal of rules may therefore also be accompanied by giving more rules to workers in the new style gig economy. As in the US, the UK has had a number of cases where workers within the gig economy have tried to rebut their apparent self-employed status. The UK Government is currently looking at ways of dealing with the gig economy and, post-Brexit may introduce new rights for this category of worker so that litigation is no longer needed.

Brexit will not actually take effect until two years following the UK giving notice of its intention to withdraw from the EU. It is also likely that no change will take place for a period after the withdrawal. The UK's next general election will probably be held in 2020, approximately one year after the UK is expected to leave the EU. It seems unlikely that any major changes will occur until after that general election, and any changes will be dependent upon the result of the election itself. ■

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"Top Five" Immigration Issues under the Trump Administration: What You Need to Know

By Karlie Dunsky and Tejas Shah

President Donald Trump has made waves with the speed and ferocity of his actions targeting immigration to the United States in the first 100 days of his administration. Although many of his actions are consistent with his campaign promises, they have left many suffering from a sense of whiplash.

With that in mind, we identify the "top five" immigration issues that could impact individuals and organizations under the Trump administration. We've tried to keep prognostication to a minimum—after all, we already have the first 100 days of the Trump administration to rely upon! However, we couldn't resist gazing into our collective crystal balls.

1 Travel bans

President Trump issued three executive orders during his first week in office. The biggest splash came from his order temporarily blocking the U.S. refugee resettlement program and the admission of all nationals of seven predominantly Muslim nations. The order, as initially implemented, created chaos as individuals holding green cards or U.S. visas were instantly blocked from entering the country or even boarding U.S.-bound planes. This executive order was quickly blocked through a nationwide temporary restraining order issued by a federal district court in the state of Washington, and the U.S. Court of Appeals for the Ninth Circuit dismissed the administration's appeal from this injunction.

On February 3, the President issued a "repackaged" travel ban. The second travel ban was more narrowly drawn, excluded Iraq, and exempted legal permanent residents and individuals already holding U.S. visas. But the second travel ban was also blocked in multiple federal district courts, just before the ban's effective date.

The Administration is now seeking judicial review of these decisions in multiple U.S. Courts of Appeal.

The practical impact of even a nuanced travel ban is very significant. The blocked orders have already caused individuals who are not citizens of the 6 affected countries to reconsider their travel plans. If implemented, such an order, coupled with a generalized climate of hostility to immigrants, could block and discourage many prospective employees from taking jobs with U.S. employers, and could result in many improper denials of admission by Customs and Border Protection (CBP) due to the difficulty of operationalizing the new executive order with its nuanced waivers and exemptions. Already, there is concern that these executive orders may impact international student enrollment at U.S. higher education institutions.

2 You want to unlock my phone?

Individuals with valid visas and entry documents are also feeling the impact of more aggressive admissions and vetting policies. CBP has expanded the scope of its inspections of those seeking entry to the United States, regardless of immigration status or nationality. CBP has reportedly requested access to personal devices, including cell phones and laptops, as well as personal social media accounts. There are also reports that professional employees have been "tested" on their knowledge of their profession in a haphazard manner by CBP employees. Travelers to the United States are not guaranteed admission even when they have a valid visa/entry document, and they also have no right to legal representation when seeking admission. The discretion afforded to CBP to make admissibility determinations makes it critical that individuals engaging in international travel effectively prepare for what to expect.

3 Comprehensive immigration reform and immigration enforcement

President Trump has signaled a desire for comprehensive immigration reform, but it is unclear what principles he supports. On at least one occasion, he indicated a willingness to provide legal status to undocumented immigrants without criminal backgrounds, but he has also frequently derided "amnesty" programs and previously called the "DACA" program for "DREAMer" immigrants an unconstitutional amnesty. In his February 28 address to Congress, he also called for reforming immigration guidelines to emphasize skills-based immigration. Congress itself may struggle to pass an immigration reform bill due to strong partisanship, and piecemeal reform rather than a comprehensive bill remains a distinct possibility. In addition, with healthcare reform and the budget appearing to consume Congress's legislative attention, it seems unlikely that immigration will be an immediate focus for Congress.

In the meantime, the Trump administration also appears to be very aggressively enforcing immigration laws. The new administration has widely expanded the grounds for being considered a removal "priority," is hiring more agents for CBP and Immigration and Customs Enforcement (ICE), and called for more partnerships with state and local law enforcement to participate in immigration enforcement. Such aggressive enforcement actions are likely to continue for the foreseeable future.

4 Getting tough on legal immigration

If this isn't making you dizzy yet, here's more: a leaked draft of an unissued executive order suggests that President Trump intends to reform most of the widely-used visa programs to increase scrutiny and accountability in light of his concerns that employers are using visa programs to replace U.S. workers with cheap labor. On April 18, President Trump signed the "Buy American and Hire American" executive order, which calls for a review of the H-1B program and requires the Secretaries of State, Labor and Homeland Security to propose new regulations to "protect … U.S. workers," although the order does not specify concrete actions. President Trump has publicly discussed his interest in returning legal immigration to a merit-based focus to allow high-skilled workers entry while protecting U.S. workers in blue collar industries. He also faces significant pressure from Silicon Valley to ensure that businesses

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Contract Theory: Lessons for Employment Lawyers

By Vikram Shroff

The 2016 Nobel Prize for Economic Sciences was awarded to Dr. Oliver Hart and Dr. Begnt Holmström for their remarkable work in the field of Contract Theory. In this article, we provide an overview of Contract Theory principles and how employment lawyers can best utilize these principles to structure employment contracts in areas of employee remuneration and incentivisation.

Introduction

Contract Theory is the study of contract design and contract optimization—using economic, mathematical, and sociological tools to design and interpret contracts. The cornerstone of Contract Theory is the principle of party autonomy, implying that parties are free to design their contracts in a manner that best reflects their commercial intent. This principle becomes pertinent in the event of a dispute, where courts employ the rules of interpretation to discover the intent of the parties. Therefore, parties must allocate sufficient resources towards designing a contract that accurately communicates the performance standards and obligations of the parties. For instance, parties could opt to internalise costs of determining performance standards by including specific and defined terms in their contracts. These defined terms instruct courts to enforce the obligations that parties have specifically agreed to at the time of formation of the contract, and thereby reduce the courts' need to determine the performance standard.

Contract Theory is particularly useful in its analysis of the 'agency problem', which arises when an agent (the employee), who is supposed to independently act on behalf of the principal (for the principal's benefit), fails to do so because the parties' objectives are not aligned. For instance, a manager might take actions that further his/her career-building goals but not the organisation's. These instances of misaligned objectives are broadly categorised as the 'moral hazards' of agency.

Common Practice

The regulation of employee conduct through comprehensive and universal HR policies, in addition to individual employment contracts, is common practice. Often, the employment contract itself is cursory, with the HR policy containing the vast majority of the terms and conditions of employment. It is therefore imperative to eliminate from the employment arrangement subjective elements which might give rise to conflicting views between the employer and the employee with respect to the rights, duties and obligations of either party. Additionally, the employer must hedge against the ability of an employee to plead ignorance of certain HR policies.

Using the principles of Contract Theory, employment contracts and incentive schemes should ideally contain provisions that: (i) accurately communicate to the employee the performance standards and obligations relating to the incentive; (ii) provide a specific list of 'do's' and 'don'ts' that the employee must adhere to, failing which the employer is insulated from harm/loss arising out of the conduct of the employee; and (iii) provide a specific set of remedies addressing employee grievances. However, in some cases the employment contract and HR policies do not completely cover these aspects and, therefore, the employer's intent is not fully communicated to its employees, resulting in friction at the workplace. Conversely, employees cannot appreciate/evaluate the incentive policies being offered by the employer and could be unaware of their criteria for performance evaluation, which could lead to under performance.

The principles of Contract Theory might be useful in drafting more robust employment contracts, and aid employment lawyers in advising their clients (employers) in a manner that adds value to the workplace by boosting employee performance, compensation, growth and retention, with minimal conflict of interests.

Principles of Contract Theory

Dr. Holmström has developed the following principles that could be applied to employment contracts, and employee remuneration and incentivisation, to ensure an optimal balance of employer and employee interests:

The Informativeness Principle: This principle requires that the employer internalise costs of determining the exact performance outcome expected of the employee. In other words, the Informativeness Principle seeks to set out specific and verifiable performance parameters to which an employee should adhere in order to maximise performance and incentives. This formulation requires that the evaluation of the employees' performance be insulated from any non-verifiable or uncertain factor. Accordingly, the practice of linking key management bonuses to the company's stock price would fail because it is based on the assumption that a company's performance is directly proportional to the performance of its employees. However, stock price does not necessarily reflect the performance of its employees because stock price may be affected by extraneous factors. An incentive model based on 'chance' is counter-productive. Contract Theory proposes that incentives be linked to quantifiable factors, determined by the employer.

Using a robust incentive scheme enables the employer to direct its employees' actions by picking the most efficient incentive scheme that is aligned with the desired object of ensuring employee performance. On the other hand, having a specific

incentive template allows employees to adjust their performance according to the incentive desired and to calibrate their exertions to suit their desire for compensation/incentive. Both the employers and employees are informed of the criteria for evaluation and output, thereby eliminating lack of information as a basis for negative employee morale.

Moral Hazard in Teams: Where employee incentives are based primarily on team performance, the 'free-rider' problem exists: certain employees may shirk work because they believe that other team members would pick up their slack. This situation might also create conflict within the team. To reduce this moral hazard, Contract Theory seeks to allocate incentives to both individual and team performance—team performance would not be considered when an individual's performance is poor. In effect, this is an extension of the Informativeness Principle, wherein the costs of information dissemination with respect to performance parameters and incentives is shared by the employer and the individual team leaders. There is greater focus on joint and several efforts of individual team members.

Multitasking: In several instances, employee incentives might be linked to a predominant performance parameter. This, in turn, allows employees to manipulate their performance to focus solely on this parameter without balancing his work-time towards other requirements that might be part of his responsibilities. To avoid this shirking of responsibilities, it is recommended that employers distribute appropriate weightages to the different performance parameters/ responsibilities of the employee in a manner that allows the firm/ employer to utilize the employee's abilities in a holistic fashion.

Career Concerns: Employers might also wish to calibrate the incentives in light of the employees' concern for career development, progress and growth by balancing monetary incentives against non-monetary facilities/incentives such as status, recognition, and leadership roles. The employment contract should address employee concerns in relation to promotion, additional responsibilities, facilities, and status as they relate to performance.

Principles of Contract Theory can help employment lawyers become true business enablers for their clients.

Drafting Employment Contracts and Incentive Schemes by Applying the Principles of Contract Theory

To draft employment contracts and incentive schemes that optimally balance employer-employee interests, lawyers must be mindful of certain principles of Contract Theory. We have attempted to categorise and apply the above-mentioned principles of Contract Theory to contracts of the following nature:

Key Management Contracts: In most instances, these employees would not be incentivised by the possibility of career progress as they are already at senior positions within the organisation. Hence, employment lawyers might advise employers to provide these employees with sufficient monetary incentives. Further, while structuring an incentive and remuneration scheme in the contract, employment lawyers could help their client apply the Informativeness Principle and the principle of Multitasking, whereby the employee's incentive is based on identified performance parameters that are attributable solely to the employee's performance. For instance, the incentive and remuneration scheme in the key management contracts may be structured as follows:

- Bonuses must be split into a yearly bonus indexed to the individual employee's performance and a long term bonus that is indexed to the company's performance. However, external factors must be taken into consideration when indexing the company's performance; and
- Performance parameters be distributed based on the company's long term objectives.

Managerial/Mid-Level Employee Contracts: Unlike key managerial personnel, mid-level managers would still be motivated by the aspect of career progress. Additionally, it is important to factor in the 'moral hazard in teams' theory as these employees would be in charge of teams and, in most cases, the performance of their teams would determine their incentives. Therefore, while drafting managerial contracts, employment lawyers could help their clients ensure that that apart from monetary incentives, good performance is also rewarded with career progress. Further, the performance parameters should be fluid to the extent that the performance of managerial/mid-level employees can be distinguished from the overall performance of their teams. For example:

- Provide stock options with a moderate timeframe for vesting and with a predetermined exercise price to assure the employee of adequate remuneration in the future; and
- Link a portion of the employee bonus or increment to the performance of the individuals in the employee's team, rather than the overall performance of the team to ensure that managerial employees try to enhance each team member's performance, resulting in good performance for the team.

Junior Level Employee Contracts: While structuring contracts for junior level employees, employment lawyers can ensure that employers rely primarily on the career progression theory for employee incentivisation. Such contracts could be have monetary incentives are deferred to a later stage of employment, but current performance attributed to this incentivisation. Further, the contract could contain performance criteria that are linked to the individual employee's performance, thereby reducing the moral hazard inherent in teams. Therefore, the contract and remuneration could be structured as follows:

- They should contain a schedule informing employees of the performance parameters required for promotions. The employer, however, must ensure that these parameters are achievable and benefit the company.
- The company should provide these employees with significant yearly increments, rather than bonuses, as this would increase the employee's need for career progression—an increase in remuneration each year would support the employees' belief that monetary drawbacks during the start of the employee's career would be set-off against their future earnings.

Conclusion

Contract Theory could help employment lawyers 'design' employment contracts, not just draft them, thereby acting as true business enablers for their clients. ■

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Social Media

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3.3), truthfulness in statements to others (Rule 4.1), communications with persons represented by counsel (Rule 4.2), and communications with unrepresented persons (Rule 4.3). Separately, attorney communications on LinkedIn or commentary on AVVO may implicate the ethics rules pertaining to solicitation and advertising.

When searching for evidence regarding parties on social media, lawyers must pay special attention to Rules of Professional Ethics 4.2 and 4.3, which restrict attorney communications with represented and unrepresented parties, respectively. These rules are relevant because the viewing of social media accounts may constitute a "communication" or "dealing" with a represented or unrepresented party.

Generally, viewing the *public* profile of any person will not normally result in an ethical issue. However, some social media platforms, like LinkedIn, send users a message informing them that someone has viewed their profile. At least three bar associations have opined that the "who's viewed my profile" message on LinkedIn is a "communication" to that person within the ambit of the rules of professional conduct, which, depending on the circumstances, could constitute an ethical violation.

Some social media accounts are "private." Viewers, including lawyers, cannot access these accounts without first requesting consent to view the user's profile, which is commonly referred to as "friending." The request, obviously, constitutes a communication or dealing that can conflict with ethics rules. Where the user is represented by counsel, it will generally be considered a violation of Rule 4.2 to request access to the profile, unless the user's counsel has consented to the communication.

Where the social media user is not represented by counsel, the ethical obligations become murkier. Depending on the jurisdiction, a lawyer may not be able to "friend" the unrepresented-user without disclosing the purpose for requesting access to the profile. In other jurisdictions, a lawyer may be able to "friend" that person as long as the lawyer does not use deception to obtain the user's consent. Thus, lawyers must check with the guidance in their respective jurisdictions before sending a "friend" request.

The question of whether a person is "represented" can be tricky in traditional labor law, where, for example, a management attorney might wish to obtain evidence about a grievant in the course of a grievance proceeding or arbitration. While courts have generally found that union attorneys do not directly represent individual employees in this context, *see Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985) (malpractice claim), an arbitrator may frown upon direct communications from management counsel to the grievant. A similar issue could arise where a union attorney seeks access to a supervisor's social media profile. Thus, it is advisable that both management and union attorneys tread carefully when attempting to gain access to the social media profiles of employees and supervisors.

Finally, ethical "friending" violations can have serious practical implications. Aside from bar proceedings against an attorney, an ethical violation could result in exclusion of evidence or sanctions. *Cf. Meyer v. Kalanick*, 15 cv 9796 (S.D.N.Y July 25, 2016) (excluding evidence where deception was involved in investigation of plaintiff and plaintiff's counsel); *Lester v. Allied Concrete Co.,* 83 Va. Cir. 308 (Sept. 2011) (sanctioning attorney $540,000 and client $180,000 where attorney instructed client to "clean up" the client's Facebook page, resulting in spoliation of harmful evidence).

In conclusion, the explosive growth in the usage of social media presents lawyers with an array of opportunities to enhance (and promote) their practice, but lawyers must take care to adhere to the applicable rules of professional responsibility in their actions on social media. ■

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Immigration

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have access to the best and brightest from abroad. Potential reforms to the H-1B program include increasing required wages (also known as prevailing wages), limits on applications per sponsor, preferential issuance of visas to higher-paying or higher skilled roles, and/or institution of requirements to conduct recruitment and demonstrate a need for foreign labor.

5 Here come the Feds! Workplace enforcement

Given the ramping up of internal enforcement, it stands to reason that the administration will also be boosting its enforcement efforts against employers. We anticipate increased audits of I-9 records, investigation of discriminatory hiring practices, and worksite compliance visits for visa programs. Employers "replacing" U.S. workers with foreign workers may also face increased scrutiny from EEOC and the Department of Justice. Given ICE activity in the past few months, it is likely that the agency will return to its pre-2010 practice of workplace raids in industries where undocumented labor is suspected. The impact of a return to workplace raids — on businesses and communities — would be dramatic and could result in more fear and uncertainty. Individuals fearing immigration enforcement actions could stop showing up to work and employers may face more pressure to "shield" employees from enforcement actions in collective bargaining agreements.

Takeaways: Here are our recommendations to help you deal with this whiplash!

- Find reliable sources of information so that you can stay abreast of fluid situations. Act quickly to assess individuals who may be impacted by executive orders, reinforce workplace policies, partner with legal counsel, and provide resources to affected individuals. Carefully consider nonessential travel and use caution to protect sensitive business information that may be stored on devices you carry with you.
- If you are an employer, proactively protect your organization before ICE investigations are initiated by conducting an internal audit of your I-9 records and wage and hour policies — immigration compliance investigations often stem directly from discoveries made during wage and hour investigations. Ensure your staff knows how to respond to different types of ICE inquiries, including compliance visits and arrest warrant situations. Ensure that you understand the E-Verify program.
- Recognize the anxiety in immigrant communities right now. You can provide legal resources and counsel to affected individuals, but if you are an employer, you must be very conscious about the potential liability for violating prohibitions against knowingly employing unauthorized workers. ■

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NBA, Players' Union Set Example for Collective Bargaining

By Stuart R. Buttrick and Ryan J. Funk

When the public encourages professional athletes to be role models, they typically have kids in mind—not lawyers. But unions and management in all industries can now look to the National Basketball Association (NBA) and the National Basketball Players Association (NBPA) for examples of best practices in collective bargaining.

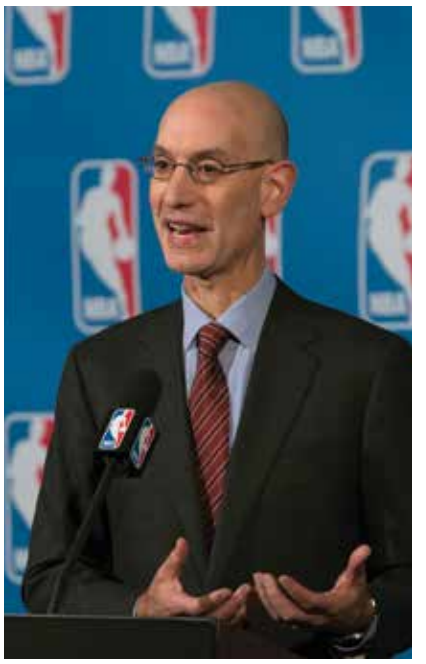
In December 2016, the parties reached a tentative deal for a seven-year CBA and a temporary extension of a deadline under the previous agreement to give each side time to formally ratify the new agreement. In January 2017, the parties finalized the deal. The feat is particularly impressive given the recent history of lockouts that truncated seasons in 1998, 1999, and 2011.

What was the winning formula in 2016 negotiations? From the outside, it appears that the parties found mutual interests that drove them to agreement. One of these interests is unique to professional sports. Leagues like the NBA and the individual franchises within them need collective bargaining, because it provides a platform to work together without violating antitrust laws. Salary caps? A "draft" system for recruitment? These are anti-competitive mechanisms that are not unlawful only because they are the creation of agreement with the players themselves (via their union).

Another area of mutual interest is broadcasting an image of peaceful negotiations. The NBA sells entertainment to the public. While acrimonious negotiations make a few headlines and captivate the attention of sports writers and some hardcore fans, they do nothing to sell tickets and drive viewership. When recent lockouts shortened seasons, the seats were empty. Game broadcasts were replaced with reruns and hockey. The NBA and its players make money when they play basketball.

A lot of money, in the case of the NBA, which recently entered into a deal with ESPN and Turner Sports that pays the league $2.6 billion per year, starting with the season currently in progress. Previously, the NBA's media rights deal paid $930 million a year. Because of the rising tide of income, the NBPA was willing to accept a CBA that kept the players' share of "basketball related income" at the same percentage as in the previous CBA, even though the deal before that one paid the players a higher percentage of income. The excitement of increasing revenue streams seemed to be enough to incentivize the parties to work together as "partners." During negotiations NBA Commissioner Adam Silver credited the recent success of the league to a "true sense of partnership between the players and the owners."

In some ways, collective bargaining in professional sports is different than in other industries. The antitrust concerns are unique. The business of entertainment and the mind-boggling revenues make the NBA negotiations look like something other than the routine bargaining that employers and unions do every day in other industries. But in most ways, the interests and collaboration of the NBA and NBPA match those of other employers and unions. All businesses have customers to assuage.



NBA Commissioner Adam Silver

AP PHOTOS

Strikes and lockouts are painful anywhere, and best avoided. Employees and unions do well when their employers do well. Collective bargaining is an opportunity for employees and employers to partner together to try to ensure success for all involved. The recent NBA negotiations illustrate these concepts in sharp relief, but the example they set is relevant to all industries.

But as long as the NBA is in the entertainment business, labor and employment lawyers should focus not just on the mundane, but also try to find some fun in exploring some of the unusual aspects of its CBA:

- No hurry. The CBA is finalized now, but it won't take effect until July—well into the offseason.
- A broad recognition clause. The NBA recognizes the NBPA as the exclusive representative of not just its current players, but also "all persons . . . who may become employed" as professional basketball players by NBA teams during the life of the CBA. The National Labor Relations Act requires employers to bargain collectively with unions that represent *their employees*, but the NBA would have no statutory obligation to recognize the NBPA as the representative of *prospective* employees. The CBA goes on to claim that "[t]he Players Association warrants that it is duly empowered to enter into this Agreement for and on behalf of such persons."
- The Union helps keep players in line. The NBPA agrees to "use its best efforts" to do various things, including preventing players from sitting out that dreaded All-Star Game.
- Serious arbitration. Discovery, witness lists, you name it—formalities abound in the arbitration provisions.
- Shhhhh. The word *confidential* appears 72 times in the CBA and attachments thereto.
- Staying power. The deal is in place until at least 2023.
- For the love of the game . . . and the starting salary, which is a cool $815,615 per year. ■

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SCOTUS

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Where to From Here?

SCOTUS has received four petitions for *certiorari* to address these issues. The petitions have been brought from both sides of the Circuit split, including one petition from employees, two from employers, and one from the NLRB itself. On January 13, 2017, the Court consolidated several of these cases and collectively granted *certiorari* to *Murphy Oil*, *Morris,* and *Epic Systems*.

With this issue now on the Supreme Court docket for next term, it appears that the question may be resolved once and for all. However, the Court recently stood at eight justices since the passing of Justice Scalia. Those eight are on record as an even 4-4 split in *AT&T.* With Judge Gorsuch's ascension to the Supreme Court there is reasoned speculation that Gorsuch will break the 4-4 tie in favor of class action waivers. This speculation was further fueled by the Court's pre-confirmation decision to delay consideration of these appeals until its next term.

Although one cannot predict with any degree of accuracy how Justice Gorsuch will vote on any given case, there are some educated guesses that can be proffered based on his prior opinions. For example, Judge Gorsuch's dissent in *N.L.R.B. v. Community Health Services* took issue with the scope of the NLRB's authority in issuing new rules and opined on judicial deference to the NLRB's decisions: "In the end, it's difficult to come away from this case without wondering if the board's actions stem from a frustration with the current statutory limits on its remedial powers—a frustration that it cannot pursue more tantalizing goals like punishing employers for unlawful actions or maximizing employment."[18] Judge Gorsuch continued: "But…frustration should not beget license. In our legal order the proper avenue for addressing any dissatisfaction with congressional limits on agency authority lies in new legislation, not administrative ipse dixit."[19] Perhaps even more instructive is Judge Gorsuch's own disclosure to the Senate Judiciary Committee on what he considers his ten "most significant" decisions, one of which was his occurrence in *Gutierrez-Brizuela v. Lynch*,[20] which he used as a platform to attack *Chevron* and *Brand X,* two Supreme Court decisions often cited as authority for requiring judicial deference to agency decisions. One will recall that judicial deference was accorded the NLRB's stance in the Circuit Court opinion in *Epic Systems* but was rejected by the Fifth Circuit in *Murphy Oil* and *D.R. Horton* (principally because the courts there refused to defer to the NLRB's opining on the FAA).

Don't Forget: What About the NLRB?

Not to be lost in the debate before SCOTUS is the fact that the new administration will have the opportunity to appoint members to *three* NLRB vacancies over the coming year which, if tradition is followed, would allow for a Republican majority on a five-member Board and the prospect of a 180-degree reversal of the Board's current position as reflected in its *D.R. Horton* and *Murphy Oil* decisions. There are numerous class action waiver cases pending before the NLRB which can provide the platform to accomplish this result. One can reasonably anticipate that President Trump will nominate candidates for the NLRB soon and a Republican majority in the Senate will be in a position to confirm. Stay tuned. ■

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Endnotes

1. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).
2. *American Express Co. v. Italian Colors Restaurant*, ___ U.S. ___, 133 S. Ct. 2304 (2013).
3. 357 NLRB No. 184 (2012).
4. 361 NLRB No. 72 (2014).
5. 726 F.3d 290 (2d Cir. 2013).
6. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013).
7. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).
8. 702 F.3d 1050 (8th Cir. 2013).
9. 824 F.3d 772 (8th Cir. 2016).
10. 834 F.3d 975 (9th Cir. 2016).
11. 823 F.3d 1147 (7th Cir. 2016).
12. 755 F.3d 1072 (9th Cir. 2014).
13. *E.g., On Assignment Staffing Services*, 362 NLRB 189 (2015).
14. *AT&T*, 563 U.S. at 334.
15. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 482 U.S. 220, 226 (1987).
16. 556 U.S. 247 (2009).
17. *Epic Systems*, 823 F.3d at 1158.
18. 812 F.3d 768, 786 (10th Cir. 2016).
19. *Id.*
20. 834 F.3d 1142 (2016).

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