

# Labor *AND* Employment Law

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## *Kudos to Young Lawyers*

Most articles in this issue cover programs presented at the Section's 11th Annual Labor and Employment Law Conference in Washington, DC in November 2017. Many were written by newer lawyers from the ABA's Young Lawyers Division. The Section encourages new lawyers to author articles in future *LEL* issues. If you are interested, please contact Sarah Fask, [sfask@littler.com](mailto:sfask@littler.com).



We encourage everyone to mark their calendars now for the 12th Annual Conference, to be conducted November 7-10 in San Francisco.

## Love is a Battlefield (Also, an Employment Law Minefield)

By Marisa Sternstein

**N**avigating any romantic relationship can be difficult. What if this relationship was in the workplace? Panelists addressed this challenging topic at the 11th Annual Labor and Employment Law Conference. The panel, "Forbidden Love: Managing Employee Relationships to Prevent Litigation," featured management lawyer Kim Geisler of Scott Dukes & Geisler, in-house lawyer Katie Bunch of JP Morgan Chase, union lawyer Hope Singer of Busch Gottlieb and employee rights attorney Scott Pollins of Pollins Law. The panel used various vignettes from popular culture to introduce hypotheticals that challenged the audience and offered practical tips that attendees could take back to their practices.

What happens when two co-workers work late and engage in an extra-marital affair, *on company premises*? To add complication, a secret video surveillance captured the incident. Although a consensual romantic relationship between two co-workers does not likely implicate concerns regarding unlawful sexual harassment,

there are still a host of other issues that can be created by this problem. What happens if only one of the employees is disciplined for the conduct, and not the other? The employee who was subject to disciplinary action could have a claim for discrimination on the basis of sex, argued Mr. Pollins. And, to boot, if an employee is unlawfully terminated, then any restrictive covenants that he or she may have signed may not be enforceable in many states. What about states like California, Colorado and New York that have so-called "off duty conduct" laws that protect employees from suffering adverse employment actions due to engaging in lawful off-duty conduct? Whether this type of conduct would be protected depends on the scope of the off-duty conduct law, and whether the underlying conduct itself is lawful, said Mr. Pollins. Although there may be several legal claims that an employee in this situation can bring, Mr. Pollins cautions attorneys to keep their client's

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## *Inside*

Hollywood Blockbuster:  
Inclusion Riders Go Viral  
*see page 9*



2018 is now in full-swing, both for you and your Section. Hopefully, this edition of our Newsletter finds you enjoying good health, lots of happiness and new-found wealth.

There is still a warm glow surrounding the Section as a remnant of the successful Annual Conference held this past November in our nation's capital. Over 1200 of our members and guests enjoyed three days of top-notch CLE presentations, interactions with government officials, visitations to various federal agencies, hourly networking opportunities and delightful social affairs. The planning has already begun in earnest for the 2018 Conference to be held in San Francisco.

Throughout the fall the Section conducted the Trial Advocacy Competition in six regional locations from New York to Los Angeles. Nearly 300 law students took part at these sites with the winners emerging to contend for the National Championship in New Orleans this past January. We congratulate the team from St. Thomas University, the overall champions!

We are now in our annual cycle Standing Committee Midwinter Meetings. With gatherings in various places stretching across the North American Continent from Puerto Rico to Puerto Vallarta. These committee forums are great opportunities for gaining up-to-date information about your practice field and expanding your knowledge about the latest developments in the many disciplines within the practice of labor and employment law. There are also wonderful opportunities of networking with other practitioners from all sides of the labor/management equation (union, employer, employee, government and neutral). Members of the Executive Committee and the Council are present at each committee meeting to share updated news about the Section's activities, discuss plans for future projects and take input from members as to their concerns and needs. We are encouraging all committees to consider adopting a pro bono or community outreach project to address some societal concern in the area where their meeting is taking place.

Special note should be made of two projects which were Midwinter Meeting success stories. The Employee Benefits Committee raised almost \$3,000 in support of those impacted by last year's hurricanes, while the Development of the Law Under the National Labor Relations Act Committee distributed care packages to low income neighborhoods of San Juan.

A quick note of sincere "thanks" and appreciation: None of the activities mentioned in the preceding paragraphs would have happened without

the dedicated effort of our Section Staff and the volunteer Chairs and Vice Chairs of the Conference Planning Committee, the Trial Advocacy Competition Committee, the various standing committees and the Pro Bono and Community Outreach Committee.

Personally, I ventured to Vancouver for the ABA Midyear Meeting where I was joined by the Section's representatives to the House of Delegates (Mike Posner, Cyndi Nance and Keith Frazier) and our Member of the Board of Governors (Bernie King). The big items on the agenda included the new proposed "OneABA" concept which could bolster ABA membership and income but might have serious negative impact on the Sections' and Divisions' financial capacities.

Until the next issue, I wish you "happy trails" (or "trials") and "successful outcomes". ■

**Don Slesnick** is a Partner in the Coral Gables, Florida office of Slesnick and Casey LLP. He became Chair of the Section on August 5, 2017.



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## MEMBER BENEFIT!

As you read through this issue, remember that Section members have online access to all program materials submitted in conjunction with the Section Conference. Files are posted on the Section website at [www.ambar.org/1elconferencepapers](http://www.ambar.org/1elconferencepapers). Midwinter Meeting materials are also available to Section members on our website.

Audio recordings of sessions from the 11th Annual Labor and Employment Law Conference may be ordered by visiting [ambar.org/1eltapes](http://ambar.org/1eltapes).

# The 411 on the 420: Clearing Smoke Around Marijuana Laws

By Lindsey Wagner

It's highly likely that if you're an employer in one of the 11 states that have anti-discrimination provisions within their medical marijuana statutes, you need to worry about potential employment discrimination claims from employees using medical marijuana with a valid prescription.

At the 11th Annual Labor and Employment Law Conference, panelists demystified the current law on marijuana in the workplace during the panel "411 on the 420: Clearing Smoke Around Marijuana Laws." Panelists included Eric Su from Ford & Harrison, Rebecca Meissner from Alaska Airlines, Ellen M. Kelman from The Kelman Buescher Firm, Michael C. Subit from Frank Freed Subit & Thomas LLP, and Joyce Walker-Jones from the U.S. Equal Employment Opportunity Commission.

To understand the complications of marijuana in the workplace, as Subit explained, "you have to start off with the fact that under federal law, marijuana is listed as a Schedule I controlled substance." Thus, the federal government has maintained the position that marijuana has no medical benefits. The conflict between some states' medical marijuana laws and federal law came to a head in 2005 in the case of *Gonzales v. Raich*, 545 U.S. 1 (2005), with the question of whether federal marijuana law (the Controlled Substances Act) preempted states' marijuana laws (California's Compassionate Use Act) and whether the Controlled Substances Act exceeded Congress' power under the Commerce Clause.

In a 6-3 decision, the Supreme Court found that the commerce clause gave Congress the authority to prohibit the local use of marijuana permitted by state law. But as emphasized by Subit, no state has a statute providing employment protections regarding recreational marijuana. However, the analysis is different

when marijuana is prescribed for a medical purpose. Currently, 11 states have anti-discrimination provisions within their medical marijuana statutes that offer employment protections for employees using medical marijuana. These anti-discrimination provisions offer a source of protection for employees using medical marijuana in those states.

Courts have heard challenges by employers to these explicit anti-discrimination provisions, but these challenges have been unsuccessful so far. The first of these cases was heard in Rhode Island, where the state court rejected the employer's federal preemption argument and held state law provided a private right of action. *Callaghan v. Darlington Fabrics Corp.*, 2017 WL 2321181 (R.I. Super. May 23, 2017). The Rhode Island medical marijuana statute contains an explicit anti-discrimination provision. The issue in *Callaghan* involved an alleged violation of Rhode Island's medical marijuana statute by a plaintiff who disclosed she had a medical marijuana card for pain during an interview and was denied employment. In an opinion that begins with the quote, "I get high with a little help from my friends," the trial court granted the plaintiff's motion for summary judgment and held that refusing to hire someone because she could not pass a drug test due to medical marijuana use outside the workplace violated the Rhode Island medical marijuana law. The court further held that the law permitted employers to discipline employees for coming to work under the influence of marijuana in a manner that affects job performance, but rejected the employer's argument that the statute's protection for being a medical marijuana card-holder did not cover the actual use of medical marijuana.

In a subsequent case in



Connecticut, a federal court was presented with a case about Marinol—a legal, synthetic form of marijuana. *Noffsinger v. SSC Niantic Operating Co., LLC*,—F. Supp. 3d—2017 WL 3401260 (D. Conn. Aug. 8, 2017). In *Noffsinger*, the plaintiff had registered as a medical marijuana patient and used Marinol for PTSD. She received a job offer as a recreational therapist at a nursing facility and provided the company with her registration certificate. The plaintiff explained to the company she used Marinol only at night, but failed a pre-employment drug test based on cannabis. She was terminated and brought claims for violations of the state medical marijuana statute, which contains an explicit anti-discrimination provision.

The employer moved to dismiss based on federal preemption grounds, including the Controlled Substances Act, the ADA, and the Food Drug and Cosmetic Act. The court upheld Connecticut's statutory employment protections for medical marijuana. The court found that the Controlled

Substances Act did not regulate employment and while Congress made it a federal crime to use marijuana, it did not make it illegal to employ a marijuana user. As to the ADA, the employer argued that the ADA's savings clause preempted the state statute. In rejecting this argument, the court held that although the ADA allows employers to prohibit illegal use of drugs in the workplace it does not give employers the power to regulate non-workplace activity, noting "the ADA is not an employer's Magna Carta to engage in drug testing for all employees." During the panel, Walker-Jones reminded the audience that the ADA would not cover someone who is currently engaging in the use of illegal drugs, but that the ADA does protect someone who has a history of drug addiction. Those employees may be entitled to a reasonable accommodation, for example an employee with a former addiction who is more tempted to use drugs when they may be under

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# Uncharted Territory: Independent Workers in the Expanding “Gig Economy”

By **Kyllan B. Kerhsaw**

## 2017

2017 was marked by independent workers increasingly participating in short-term gigs, contract jobs, and work-for-hire, also known as the gig economy. All this rapid change raises the question, does the gig economy mean the end of traditional employment as we know it? That was the view of the panelists for the “Traditional Versus Alternative Organizing Approaches” panel at the 11th Annual Labor and Employment Law Conference. The panelists included former National Labor Relations Board member, Harry I. Johnson, III, now a partner at Morgan, Lewis, & Bockius; Zubin Soleimany, a staff attorney at the New York Taxi Workers Alliance and National Taxi Workers Alliance, AFL-CIO; and Kimberly A. Walters, a Field Attorney for the National Labor Relations Board.

Despite representing contingencies that frequently oppose one another, the panelists agreed on a variety of issues. All asserted that the “gig economy” is here to stay despite the headaches it may cause employment lawyers—the advances in technology driving the gig economy have become a way of life for consumers, such that a roll-back of these changes will not happen. As Mr. Johnson stated, “we cannot go backwards.”

The consensus among the panelists was that the gig economy will only grow—with LinkedIn predicting that nearly 43% of the workforce will be active participants in the gig economy by 2020. No one disputed that the expansion of the gig economy poses significant challenges for employers trying to comply with existing employment laws and for unions trying to organize workers. Likewise, the NLRB is trying to navigate these issues under the existing legislative framework. For example, a petition filed seeking to represent participants in the

gig economy raises questions about the nature of the employer, defining the unit and deciding whether the petitioned-for workers are statutory employees or independent contractors, and where to post notices and conduct elections, among others. The panelists further agreed that the existing statutory framework is ill-equipped to address labor issues involving gig-economy workers and that such laws will likely require change to address the rapid changes to the traditional-employment model.

Because the National Labor Relations Act (NLRA) expressly excludes independent contractors, the frequent classification of gig-economy workers in that role poses significant challenges for organized labor. Unions have attempted to work around the NLRA and organize independent contractors, most notably through the Seattle Ordinance driven by the International Brotherhood of Teamsters in response to Uber and Lyft. The Seattle Ordinance grants collective-bargaining rights to for-hire drivers who are independent contractors and creates seven mandatory subjects of bargaining, including rates of pay, safety standards, working hours, and termination policies. The U.S. Chamber of Commerce has challenged the Ordinance, alleging that the Sherman Antitrust Act prohibits Seattle sanctioning anti-competitive among the independent workers and that the Ordinance is preempted by the NLRA. The U.S. District Court for the Western District of Washington denied the Chamber’s challenge to the Ordinance, finding that neither the Sherman Antitrust Act nor the NLRA preempted the Ordinance. The Chamber has appealed to the U.S. Court of Appeals for the Ninth Circuit, which has enjoined implementation of the Ordinance pending appeal.



After discussing the legal challenges to the Ordinance, Mr. Johnson and Mr. Soleimany opined on the likelihood that such a law would be effective. Mr. Johnson noted that many of these workers have already banded together to share information through tools such as “Ride Share Guy,” which provides for-hire drivers with guidance to help them maximize their income, including the best times of day, pickup locations, and days to drive. For-hire drivers also enjoy significant flexibility, including the ability to swap routes. Mr. Johnson and Mr. Soleimany agreed that these drivers would likely be forced to sacrifice some of these freedoms in order to solicit meaningful concessions from employers during collective bargaining. Mr. Soleimany also pointed out that employees are frequently misclassified as “independent contractors” and that by signing on to such a law, workers are potentially conceding labor and employment rights that would apply if they are in fact statutory employees. He also advised that the Ordinance may have a chilling effect on a worker’s ability to assert employee rights.

The panelists seemed to agree that approaches other than local ordinances are likely to be more

effective for independent workers. Mr. Soleimany proposed that workers focus on lobbying for regulations that would set benchmarks for gig-economy workers on issues such as worker earnings. Mr. Johnson noted that one of the challenges that unions face in organizing gig-economy workers is that they are “disaggregated” and without a fixed work location, significantly limiting the potential for interaction with co-independent workers. He pointed to existing collaborations among independent workers such as “Ride Share Guy” and “Coworker.org,” which allow workers to aggregate information about current events and workplace rules. If unions begin to take advantage of or create similar websites and applications, Johnson believes we will likely see a slow-but-steady increase in the bargaining power of gig-economy workers. That said, changes to the law to account for independent workers in the gig economy are likely necessary for employers, unions, and workers to be able to navigate this “new normal.” ■

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# Cross-Border Populism: Implications on Labor and Employment Law

By Roxana M. Underwood

The United Kingdom's referendum vote to leave the European Union ("Brexit") and the election of Donald Trump as the 45th President of the United States are two notable and recent examples of populism in the 21st century. At the 11th Annual Labor and Employment Law Conference, a panel of legal professionals analyzed social science research on the Brexit vote. Panelist Marley Weiss, of the University of Maryland School of Law, concluded much of the motivation behind populism is driven by credibility gaps between major political parties and their voters on key issues. These issues include questions of capital mobility, trade, job loss, and immigration, along with issues of national identity. Across the pond, Professor Weiss identified parallels with respect to immigration, jobs, and unrest. In the United States, dissatisfaction over these issues has been widely speculated to have contributed to the election of President Trump. With all of this rapid change, the long and short-term implications a trend toward populism will have on labor and employment and the international labor market remains in flux.

In the United Kingdom post-Brexit, panelist Nicola Whiteley of Orrick, Herrington & Sutcliffe LLP, London, United Kingdom, opined the future of labor and employment law depends upon who is in power. Now, with Theresa May as Prime Minister, a bill to withdraw from the European Union is making its way through Parliament, which, if passed, would effectively transfer European Union law into United Kingdom law. Once transferred, a transitional time period would ensue, allowing the United Kingdom to amend, appeal, or improve such laws. Whiteley speculated Brexit will have little impact on domestically driven employment laws that are

"entirely home grown." Whiteley suggested that during the transitional time period, a more conservative prime minister may "water down rights to make it harder for employees to bring claims," and a more liberal one may increase worker protections. The United Kingdom's legal system is enshrined with over 40 years of laws driven and influenced by the European Union. Rather than make a complete reform, Whiteley believes some equivalency must remain in place to allow the United Kingdom to continue trade with the European Union.

The long-term implications of Brexit also hinge on whether the United Kingdom will make a "hard" or "soft" exit from the European Union. Whiteley, while skeptical of it actually occurring, surmised a "hard Brexit" would increase political pressure to deliver more favorable tax and regulation benefits to businesses. A hard Brexit would also mean the United Kingdom would likely increase its reliance on trade with countries outside of the European Union. Conversely, panelist Colleen Cleary of CC Solicitors, Dublin, Ireland, opined the United Kingdom is indeed leaning toward a hard Brexit, particularly given the composition of the Brexit negotiating committees. Cleary explained a hard Brexit would mean the United Kingdom would give up full access to the European Union's single market and customs union to maintain full control of its borders.

Cleary expressed Brexit may stifle the longstanding tradition of free movement between the United Kingdom and Ireland. From Ireland's perspective, one of the most significant concerns is the future of Northern Ireland. Cleary stated the "suggestion that there isn't going to be a border doesn't seem credible." Cleary posited that installing a border and restricting free movement

would "decimate the economy." From Whiteley's perspective, while the populists who voted for Brexit are anti-free movement, trade and business are not practically workable without it. She explained that one of the largest bargaining chips in the Brexit negotiations is free movement, which the Government "may have to cave on and [then] sell that message to voters."

With a looming Brexit, businesses are establishing contingency plans and bracing for the worst while hoping for the best as they estimate over 70,000 job losses and relocations may occur post-Brexit. There is an overall "collective holding of breath," but Whiteley does not believe any

economy, for example. Similar to Ireland, Di Vincenzo says Canada welcomes immigration and realizes the need for skilled workers to immigrate within its borders.

Professor Weiss opined there are also labor migration uncertainties in the United States, which have caused skilled labor shortages in the agriculture industry. If the Trump administration curtails temporary agricultural visas, many corporations will be unable to fulfill labor needs. Professor Weiss explained that a host of problems for management and labor alike are magnified by changing terms of trade and access to mobile labor across borders. Relatedly, panelist Owen Herrstadt of IAMAW, Upper

**"The long term implications of Brexit also hinge on whether the United Kingdom will make a "hard" or "soft" exit from the European Union."**

city has the infrastructure or ability to take on large scale relocations of its businesses outside of the United Kingdom. Of course, Cleary explained Ireland welcomes businesses with open arms in hopes that relocations to Ireland invigorate its economy.

Panelist Danilo Di Vincenzo of Le Corre Lawyers, LLP, Montreal, Quebec stated that the seeds of populism are present in Canada, but not spreading or flourishing as they have elsewhere. While internal debates regarding immigration continue, as well as the debates between the French and English populations regarding the succession of Quebec from Canada, the focus is elsewhere—like the

Marlboro, Maryland, discussed the need to renegotiate major trade agreements to provide for strong labor chapters. This would protect workers to ensure that the United States improves international labor standards in the wake of future trade deals with the European Union and other countries alike. ■

**Roxana M. (Crasovan) Underwood**, ([runderwood@cbslawyers.com](mailto:runderwood@cbslawyers.com)) is an Associate at Clark Baird Smith LLP in Rosemont, Illinois. She is a member of the ABA Young Lawyers Division and State and Local Government Bargaining and Employment Law Committee.

# Federal Whistleblower Protections Remain Strong for Employees

By Joanna Bowers

Protections for employees who “blow the whistle” on their employers remain strong under federal law, both in the private sector and for federal employees. Two panels at this year’s 11th Annual Labor and Employment Law Conference discussed the legal protections for whistleblowers, as well as potential pitfalls and standards of proof.

The panels considered the current bi-partisan effort to strengthen whistleblower protections for federal employees. On June 14, 2017, President Trump signed into law the Follow the

As legal protections for federal whistleblowers expand, there is also a greater scrutiny of employees who publicly disclose information they believe to be illegal or unethical conduct by the federal government. The Trump administration has been vocal about cracking-down on “leakers,” which raises the question, when are employees protected whistleblowers and when are they unprotected “leakers?” Although “leaker” is not statutorily defined, the panel members generally agreed that it encompasses employees who either unlawfully

program has been successful for three primary reasons: (1) if the SEC collects more than \$1 million based on information from a whistleblower, that person can receive an award of between 10% and 30% of the total amount collected, (2) the SEC is careful to protect the confidentiality of whistleblowers, and (3) the SEC strongly enforces the anti-retaliation provisions of the whistleblower statutes. Despite the success of the SEC program and the consensus among the panelists that the laws enforced by OSHA and the SEC are unlikely to see significant changes in the near future, panelist Jason Zuckerman, of Zuckerman Law in Washington, DC, expressed concern about low staffing levels at the SEC and OSHA, which is resulting in slower processing and investigation of whistleblower claims.

In addition to Congressional and federal agency activity, the courts also play an active role in developing whistleblower jurisprudence. Some courts, however, have issued conflicting opinions on the standards of evidentiary proof for a *prima facie* claim of whistleblower retaliation or for a defense to a retaliation claim.

First, courts have diverged on the extent to which an employee may take confidential employer documents in support of a whistleblower claim without repercussions. Although there is generally no “whistleblower exception” to liability for stealing employer documents, some courts have recognized that taking employer documents in support of a whistleblower claim may be protected in certain circumstances. For example, in *Erhart v. Bofi Holding, Inc.* (2017), a California district court held an employee’s act of downloading and emailing confidential employer documents was “protected” and he was not liable for breaching his confidentiality agreement because he took the

documents in furtherance of his whistleblower claim and was selective about which documents he took. Other courts, however, have come to different conclusions about whether and when such conduct is protected. Panelists Lloyd Chinn, of Proskauer Rose, and Debra Katz, of Katz Marshall & Banks, LLP, likewise disagreed about the extent to which taking employer documents may be protected, but both recognized that courts generally view an employee’s judicious taking of documents more favorably than when an employee appears to take documents in a wholesale manner.

Next, the courts disagree on the standard for “reasonableness” in the requirement that an employee “reasonably believe” he or she has reported a violation of the law. Recognizing that employees frequently do not know whether conduct by the employer is unlawful or which laws the conduct violates, plaintiff-side practitioners like panelist Jason Zuckerman advocate that courts should look to the state of mind of the employee to determine whether the employee had a “reasonable belief” he or she made a complaint of unlawful conduct. On the other hand, management-side practitioners, including panelist Stacey Campbell of Campbell Litigation in Denver, Colorado, take the position that the employees should be required to articulate what they believe is a violation of the law in order to prevent employees from claiming they are whistleblowers in response to performance issues.

Whistleblower protections continue to evolve, and we can expect that courts and federal agencies will continue to be active in this area next year. ■

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“...when are employees protected whistleblowers and when are they unprotected “leakers?””



Rules Act, which extends whistleblower protections to employees who refuse to violate a statute, rule, or regulation. This law was enacted in response to a 2016 Federal Circuit decision, *Rainey v. Merit Systems Protection Board*, which held that an employee does not engage in statutorily protected conduct if he or she refuses to take an action which would violate a regulation (as opposed to a statute, which would be protected). Similarly, on October 26, 2017, President Trump signed the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017 into law. This law provides additional protections for federal sector whistleblowers and requires, among other things, training supervisors on responding to whistleblower retaliation complaints.

disclose information (such as confidential information) or who disclose information outside of lawful channels.

In the private sector, federal agencies such as the SEC and OSHA continue to be active in enforcing whistleblower protection laws, both in terms of investigating reports made by employees and protecting employees from unlawful retaliation for making protected reports and disclosures. Both panels discussed the perceived successes of the SEC’s whistleblower program. Through the program, the SEC has received approximately 18,000 reports of potential securities law violations, which has allowed the SEC to collect over \$1 billion in penalties from companies.

The panelists opined that the



**New Edition!**

## The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act, Seventh Edition

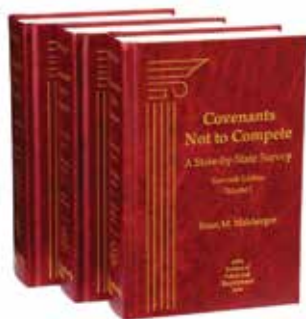
John E. Higgins, Jr., Editor-in-Chief; Committee on Development of the Law Under the NLRA

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By **Brian M. Malsberger**; Board of Review Associate Editors: **David J. Carr**, **Arnold H. Pedowitz**, and **Eric Akira Tate**; Committee on Employment Rights and Responsibilities

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# 14th Law Student Trial Competition

The National Final of the ABA Labor and Employment Law Student Trial Advocacy Competition was conducted in New Orleans, Louisiana on January 27 and 28. Winning teams from the six regional competitions, which were held in October and November 2017, came together to try a case focusing on religious discrimination in the workplace.

77 teams participated in regional competitions conducted in Dallas, Miami, Chicago, Los Angeles, New York and Washington, DC. Winning teams in those regions came from the following schools:

- CHICAGO Northwestern University Pritzker School of Law
- DALLAS Southern Methodist University Dedman School of Law
- LOS ANGELES University of California, Hastings College of the Law
- MIAMI Saint Thomas University School of Law
- NEW YORK Harvard Law School



Hon. Bernice B. Donald poses with the winning team members from St. Thomas University and their coaches.

- WASHINGTON, DC William & Mary Law School

After a three preliminary rounds, teams from St. Thomas and University of California advanced to the final round, which St. Thomas won. The Competition was designed to provide an introduction to the practice of labor and

employment law to law students.

The Competition is made possible by the efforts of our dedicated Section members, including the Competition's Co-Chairs, Maureen Binetti, Alisa Arnoff and Jim Casey along with Howard Shapiro and Matt McCluer who chaired the rounds in New Orleans. We were also very

honored to have Judge Bernice Donald preside over the final round and Judge Nanette Brown judge a semi-final round.

Plans are already underway for the 15th Annual Competition. To learn how you can become involved, contact the Section office at [laboremplaw@americanbar.org](mailto:laboremplaw@americanbar.org). ■

## ABA Journal of Labor & Employment Law

The *ABA Journal of Labor & Employment Law* is distributed three times each year to all members of the Section. The *Journal* (formerly *The Labor Lawyer*) has been published since 1985.

The *Journal* is committed to providing balanced discussions of current developments in labor and employment law to meet the practical needs of attorneys, judges, administrators, and the public. Articles published in the *Journal* reflect the diversity of practice areas and perspectives in the Section.

Editorial work on the *Journal* is a faculty-student collaboration. Faculty co-editors Matthew T. Bodie, Miriam A. Cherry, and Marcia L. McCormick work with third-year law students to select and edit articles. Other students work as co-editors to cite-check articles.

### Submissions

The editors welcome contributions from all interested persons. Submissions are considered throughout the year. The preferred method of submission is as a Microsoft Word document submitted via email to [emplaw@law.slu.edu](mailto:emplaw@law.slu.edu). Alternatively, articles may be submitted for consideration by mail to the ABA Journal of Labor & Employment Law, Wefel Center for Employment Law, Saint Louis University School of Law, 100 North Tucker Boulevard, Saint Louis, MO 63101. Manuscripts should generally be shorter than 40 double spaced pages, including text and footnotes.

Questions may be directed to the faculty co-editors: Matthew Bodie, [matthew.bodie@slu.edu](mailto:matthew.bodie@slu.edu); Miriam Cherry, [miriam.cherry@slu.edu](mailto:miriam.cherry@slu.edu); or Marcia L. McCormick, [marcia.mccormick@slu.edu](mailto:marcia.mccormick@slu.edu).



# The Newest Hollywood Blockbuster: Inclusion Riders

By David Borgen

*“I have only two words to leave with you tonight, ladies and gentlemen: Inclusion Rider.”*

On Sunday night, March 4, 2018, Frances McDormand concluded her acceptance speech, walked triumphantly off the stage after winning her Academy Award for Best Actress, and left many of us, even veteran employment lawyers, scratching our heads, wondering what an “Inclusion Rider” was and where somebody could get one.

Ms. McDormand was suggesting the latest tactic in attacking decades of under-representation of women, people of color, LGBTQ artists, and workers with disabilities in the film industry. The concept of some kind of “equity clause” to address systemic under-representation in film and TV jobs ranging from directors and lead roles, to minor roles and behind the camera jobs, was first proposed by Dr. Stacy L. Smith last year as part of the USC Annenberg Center’s Inclusion Initiative. Dr. Smith was introduced to Cohen Millstein (Washington, DC) partner Kalpana Kotagal by the firm’s Of Counsel Anita Hill.

Kotagal drafted a flexible contract clause that specifies a more equitable process for auditioning and casting on screen talent, as well as for recruiting and hiring behind the camera jobs such as Cinematographer, Production Designer, Sound Editor, Visual Effects, and Composers. The concept is that “A-List” talent (like Ms. McDormand) would insist on incorporating such terms into their contracts, thus leveraging their bargaining power to compel Hollywood employers to adopt a system of checks, balances, and metrics to increase employment

diversity on film projects.

The Inclusion Rider does not mandate quotas, but is designed to combat implicit bias in hiring and to open up the hiring system to the under-represented. It is similar in many ways to the “Rooney Rule” in effect in the National Football League (NFL) which requires teams to interview minority candidates before hiring for coaching positions.

The Inclusion Rider is designed to counteract long term gender disparities in the movies. For example, a July 2017 study published by the Annenberg Center analyzed hundreds of films and concluded:

A total of 4,583 speaking characters were assessed for gender across the 100 top fictional films of 2016. A full 68.6% were male and 31.4% were female, which means viewers will see 2.18 males for every 1 female character on screen. The prevalence of female speaking characters has not changed meaningfully across the 9 years evaluated.

Kotagal says that the Inclusion Rider focuses on improving diversity in smaller minor roles that do not impact “story sovereignty” or interfere with financing or insurance. As such, the program will increase the pipeline for greater diversity in featured roles as well. The Inclusion Rider will set clear goals for inclusion and specific well tailored processes governing recruitment, auditioning,



Frances McDormand accepts the award for best performance by an actress in a leading role for “Three Billboards Outside Ebbing, Missouri” at the Oscars on Sunday, March 4, 2018, at the Dolby Theatre in Los Angeles. (PHOTO BY CHRIS PIZZELLO/INVISION/AP)

interviewing, casting, and hiring. This will permit tracking and evaluation of an employer’s progress. The riders may specify penalties for non-performance or work with local governments to provide tax incentives for fulfilling contractual terms.

Kotagal is working with the Annenberg Inclusion Initiative and other Hollywood stars toward the adoption of Inclusion Riders. Her work got a huge spotlight at the nationally televised Oscars show. More information about the demographics of Hollywood jobs and the mechanics of the Inclusion Rider is available at [www.annenberg.usc.edu/research/annenberg-inclusion-initiative](http://www.annenberg.usc.edu/research/annenberg-inclusion-initiative).

Kotagal is a member of the Advisory Board for the Annenberg Inclusion Initiative. She is a 2005 graduate of University of Pennsylvania Law School and clerked for the Hon. Betty Fletcher of the Ninth Circuit (U.S. Court of Appeals) before joining Cohen Milstein’s Civil Rights Litigation team where her practice focuses on Title VII and Equal Pay Act claims. ■

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**Yes, love is certainly a battlefield—but when the workplace becomes the battlefield, it is important that both the employer and employee navigate this battlefield with close attention paid to avoiding serious missteps that may have business and personal consequences.**

## Love is a Battlefield

*continued from page 1*

ultimate needs at the center of any analysis. Potentially putting a private romantic matter, like that involving something as sensitive as an extra-marital affair, into the public eye can be harmful to the client's well-being and home life. Although a legal claim may allow them to recover financial gain, Mr. Pollins cautions that it is incumbent upon attorneys to counsel their clients of the personal cost and put the client's needs first.

Ms. Bunch and Ms. Geisler discussed some of the challenges surrounding workplace relationships from the employer's perspective—including managing the so-called “rumor mill.” Both panelists agreed that controlling any discussion by other employees

was nearly impossible—and although workplace gossip can be distracting, often ignoring it ultimately leads to the best and quickest resolution. Ms. Bunch and Ms. Geisler discussed the merits of having a clear and enforceable policy regarding workplace relationships. Ms. Bunch recommended drafting a policy that highlights any concerns the employer may have regarding relationships in the workplace, not only to avoid liability, but also to account for business considerations, such as employee morale, actual or perceived conflicts of interest, and breach of confidentiality obligations. By using the employer's end goals as the guide, the employer is more likely to create a policy that addresses its concerns and is clear for employees to follow. Ms.

Bunch reminded that to ensure successful implementation of any workplace policy, training of the employees who are subject to the policy and responsible for enforcing the policy is key.

Ms. Singer offered additional considerations when employee relationships occur in a unionized workplace. Many collective bargaining agreements contain a “just cause” provision, dictating that employers cannot terminate employees without “just cause.” The agreements also typically set forth a progressive discipline scheme in lieu of immediate termination. It is crucial when dealing with surrounding issues from workplace romantic relationships that unionized employers adhere to these provisions. Otherwise, the union will likely arbitrate on the employee's behalf, cautioned Ms. Singer. If misconduct arises out of a workplace relationship, and the potentially disciplined employee is a longtime employee with a clean record, the union may argue that these are mitigating circumstances and the adverse action taken by the employer was not justified. Other terms in the collective bargaining agreement, such as a “non-fraternization” policy which limits employees' ability to engage in romantic relationships, may also come into play and should be closely examined.

The panel adjourned to the rhythmic tunes of the aptly selected “Love is a Battlefield” by Pat Benetar. Yes, love is certainly a battlefield—but when the workplace becomes the battlefield, it is important that both the employer and the employee navigate this battlefield with close attention to avoid serious missteps that may have business and personal consequences. Workplace romances present a host of issues that require careful attention from the employee, employer, and union perspective. ■

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## Marijuana Laws

*continued from page 3*

stress in the office being permitted to work from home. As far as what is “current use,” Walker-Jones cautioned that there is no bright line—“current use” is not necessarily limited to a given number of days or weeks. In some cases, it may be a year, but the question is up for debate.

Despite these cases, as well as the trend in the majority of states towards some sort of marijuana legalization (recreational, medical, or otherwise), the panelists reminded the audience that all medical marijuana statutes, including statutes such as Rhode Island's, permit an employer to discipline an employee for coming to work under the influence if it impacts their job performance.

In Kelman's practice, which involves handling issues with union-represented workers in labor arbitrations, she finds that illegality of the drug is rarely the issue. Rather, the questions typically surround whether off-duty conduct can be subject to discipline. In those situations, the outcome largely depends on how much proof the arbitrator requires as to impact on the workplace. Surprisingly, the analytics involved in the determinations are not terribly new—it is the same analysis that arbitrators have been applying for years to questions involving off-duty social media use or even off-duty pornography use. Kelman finds that there is a split among arbitrators as to whether off-duty use of marijuana (whether it is illegal or legal under state law) is, in itself, grounds for discipline or whether the employer must show the individual was impaired at work.

What does all of this mean for employers? Should employers follow federal or state law? In answering the difficult question for employers of whether they should follow federal or state law, all of the panelists agreed: it depends. And more specifically, it depends on the employer's industry. For instance, if some of the employer's employees are

performing work involving the Department of Transportation, or the Department of Defense, they may be subject to random testing and prohibited from using illegal drugs under federal law. But what about for employers who are not heavily regulated? Su and Meissner recommended a default analysis with several steps should first view each situation from the most employee-protective perspective. Next it should strip away the protections after considering the underlying conditions for which the marijuana use is prescribed and the essential job functions and the hardship considerations for the employer.

The panelists also provided some best practices and tips for employers. First, they suggested



that employers consider adopting policies, like a policy which grants anti-discrimination protections to medical marijuana card holders, which allows the applicant/employee to request a reasonable accommodation which would then be discussed. When an employer is terminating

**“...hard and fast rules regarding the adoption of zero-tolerance for medical marijuana should be avoided”**

someone for medical marijuana use, the employer should confirm the use is illegal (marijuana) rather than legal (Marinol). Further, hard and fast rules regarding the adoption of zero-tolerance policies for medical marijuana should be avoided. In closing, all the panelists agreed that there

are lots of unknowns when it comes to medical marijuana in the workplace. ■

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## IN MEMORIAM: John Ferguson

By Barry J. Kearney

John Ferguson, Section Council member, and Associate General Counsel of the Division of Enforcement Litigation at the National Labor Relations Board passed away on December 26, 2017.

John was a wonderful friend and colleague who was a dedicated public servant who cared deeply about the National Labor Relations Act and the promise it held out to working men and women. During his nearly five decade career at the board he worked diligently to keep that promise and enforce those rights given to employees. John played a critical role over the past 17 years directing and shaping federal court litigation addressing many of the most important legal issues arising under the National Labor Relations Act, and some having constitutional significance beyond the NLRB. Most recently, John directed the agency’s appellate litigation—including its current

litigation in the Supreme Court—defending the Boards rule that employers’ mandatory arbitration agreements precluding any concerted litigation of employment issues in any forum violate the Act, litigation that involves one of the most significant issues affecting contemporary labor relations and employee rights under the National Labor Relations Act.

John was recognized often for his many achievements including receiving the Mary C. Lawton Outstanding Government Service Award of the American Bar Association Section of Administrative and Regulatory practice which “honors sustained and outstanding contributions to the development, implementation, and improvement of administrative law and regulatory practice.” John was also a member of the Section’s Development of the Law Under the National Labor Relations Act Committee and an

Associate Editor of its labor law treatise. For over a decade John presented the Enforcement Litigation Review at the Committee’s Midwinter Meeting. His paper was always an invaluable resource to practitioners as a desktop reference to all significant NLRB appellate decisions.

John was also a member of the College of Labor and Employment Lawyers. One of the missions of the College is to establish high standards of professionalism and civility for the practice of labor and employment. John lived those words. No one who has ever worked with John ever heard an angry word from him. No matter what the situation, John was always on an even keel and was renowned for being patient in all his dealings. He was the model of civility. John was a scholar who deeply cared about the law but he also cared about people and wanted to connect with everyone he met on a personal level.

The internal NLRB newsletter, *All Aboard*, featured a section where friends and colleagues shared memories of John. As an introduction to those remembrances the editor of the newsletter wrote “As I compiled them I was struck by a common thread. So many people wrote about John learning something from them, an interest in philosophy, a hometown, a fascination with coffee, and would invariably really remember it and bring it up in discussion, sometimes years later. It was part of his incomparable way of connecting with every person he met.”

John touched many people during his long career both on a professional and personal level. He will be missed. ■

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# Calendar of Events

## 2018

\*MIDWINTER MEETINGS

April 11–13

**National Symposium on  
Technology in Labor and  
Employment Law\***

Hilton San Francisco  
Union Square  
San Francisco, California

May 6–10

**International Labor &  
Employment Law  
Committee Midyear Meeting\***  
Four Seasons Hotel Milano  
Milan, Italy

August 3–4

**ABA Annual Meeting**  
Chicago, Illinois

April 28–29

**Spring Council Meeting**  
The Biltmore Hotel  
Coral Gables, Florida

November 7–10

**12th Annual Labor and  
Employment Law Conference**  
Hilton San Francisco  
San Francisco, California

November 10–11

**Fall Council Meeting**  
Hilton San Francisco  
San Francisco, California



For more event information, contact the Section office at 312/988-5813  
or visit [www.americanbar.org/laborlaw](http://www.americanbar.org/laborlaw).