

# Labor *AND* Employment Law

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## A Review of the Supreme Court's 2017–2018 Labor and Employment Decisions

By **Courtlyn Roser-Jones**

On the last day of the 2017–2018 term, the Supreme Court decided its most anticipated labor case in decades, and the opinion wasn't even the day's leading story. Hours after *Janus v. AFSCME* reversed forty-one years of precedent and invalidated statutory provisions in twenty-two states, the most important labor decision in years was overshadowed by Justice Kennedy's retirement announcement—the most important change to the Court's makeup in recent history. A pivotal justice's retirement triggering an embattled nomination process that would dominate the better part of summer recess was a fitting conclusion to the Court's year. But in a period that marked not only the last full term for Justice Kennedy and the first for Justice Gorsuch—but also upheld the President's Travel Ban, heard cases on voting rights and partisan gerrymandering, and established new legal principles in technology—the significance of the Court's 2017–2018 labor and employment rulings cannot be overstated.

This Article reviews several of these decisions. Parts I and II discuss two landmark labor cases:



**Plaintiff Mark Janus meets the press.**

PHOTO BY COURTLYN ROSER-JONES

*Janus v. AFSCME*, which invalidated a major source of financial security for labor unions in the public sector; and *Epic Systems Corp. v. Lewis*, which enforced arbitration clauses waiving employees' rights to arbitrate workplace grievances collectively. Part III describes three lesser-known rulings addressing collectively bargained-for retiree benefits, exemptions to overtime-pay, and whistleblower protections: *CNH Industrial N.V. v. Reese*, *Digital Realty Trust, Inc. v. Somers*, and *Encino Motorcars, LLC v. Navarro*. Not surprisingly, with the addition of conservative Justice Gorsuch to the Court, all five of these decisions were employer friendly. Together they have enhanced the authority of corporations, limited the liability of employers, and restrained employee collective activities and bargained-for privileges, even when doing so has meant sidestepping core principles of *stare decisis* and judicial restraint.

### ***Janus v. AFSCME***

In an anticipated blow to organized labor, *Janus v. AFSCME*

*continued on page 9*

I am honored and excited to assume the role of Chair of the Section of Labor and Employment Law. I am also grateful to Don Slesnick for his outstanding leadership over the years and for leaving our Section in a very good place financially and otherwise. Don also played a crucial role through his service on the OneABA Working Group in shaping the ABA's new membership model and dues structure, which will present a great opportunity for our Section to grow our membership. I am also thankful to thank Gail Holtzman for mentoring me over the years and preparing me to face the inevitable challenges that come with my new role.

Over the next year, I plan to focus on three initiatives begun by my predecessors: (1) promoting diversity and inclusion within our Section; (2) increasing our in-house counsel membership; and (3) attracting and retaining young lawyers to be members of the Section.

Promoting opportunities for diverse attorneys has become part of our Section's DNA, and we have made great strides in achieving diversity in recent years. We have now completed our leadership appointments for the Section's 29 administrative committees and 14 standing committees, and I am proud to announce that no less than 31% of our leadership positions are held by diverse attorneys, and 53% of those positions are held by women. Some of our success can be traced to the partnerships we have established with minority bar associations such as the National Employment Lawyers Council (NELC), and I plan to continue to find opportunities to collaborate with these organization on important projects, such as our Trial Institute and our Negotiation Institute, to build bridges between their membership and our Section.

We have also made significant progress in growing our Section's in-house corporate counsel membership and enhancing their role in the Section. Currently, 23% of the Section's leadership positions on the employer side are held by in-house corporate counsel, and we have recently added new leadership positions on our standing committees specifically for in-house counsel, such as the In-House Corporate Counsel Co-Chair positions for our Employment Rights and Responsibilities and Equal Employment Opportunity Committees.

I plan to double down on our ongoing efforts to attract and retain law student members and young lawyers. Our new membership model will undoubtedly enhance our ability to recruit young lawyers to the Section and convert law students to full members once they graduate as ABA membership dues will become far more affordable for recent law school graduates. Indeed, under our new membership model, ABA dues will be slashed to \$75 for lawyers who have been admitted to the bar for fewer than five years, effective August 2019. Between now and then, I plan to work with our various membership committees to ensure that our Section becomes even more relevant to younger lawyers. For example, we are dramatically stepping up our presence on various social media platforms, particularly Twitter—so please start following the Section's Twitter handle #abalel to track Section news and late breaking developments in labor and employment law!

These are indeed exciting times for our Section as we approach our signature event, our Annual Section Conference at the Hilton Union Square in San Francisco on November 7–10, 2018. This year's Conference will feature more than 60 panels spread over 15 separate tracks, many of which are geared toward various sub-specialties. The Annual Conference also provides unique opportunities to network and build relationships with high level government officials and lawyers who are normally adversaries in a friendly setting at the Conference's many receptions and social events.

This month we also will be kicking off our 15th Annual Law Student Trial Advocacy Competition with Regional Competitions taking place throughout October and November in New York, Chicago, Miami, Dallas,

Washington, DC and Los Angeles. If you reside in or our around one of these cities, I strongly urge you to participate as an evaluator or don a robe and serve as a federal judge for a day. It truly is a fun and rewarding experience to interact with these impressive student advocates and watch them refine their skills as they receive constructive feedback from prominent labor and employment lawyers over the course of the competition.

We are also currently planning our second Bi-Annual Trial Institute, which is a four-day trial advocacy "boot camp" geared toward teaching newer lawyers (approximately 7–15 years in practice) how to try jury cases. The Trial Institute culminates with mock trials in the federal courthouse in Chicago with actual federal judges presiding. The upcoming Trial Institute will once again be co-sponsored by the NELC and Kent Law School, which is a great example of how the Section can successfully collaborate with diverse bar associations and other entities to put on highly successful CLE programs.

In the coming months, I look forward to working with our Executive Committee, including Chair-Elect, Chris Hexter; Immediate Past Chair, Don Slesnick; and Vice Chairs, Samantha Grant and Steve Moldof, on these and many other projects, and I am excited to carry on the traditions and serve the members of our great Section! ■

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# Political Action in the Non-Union Workforce

By John F. Beasley

Thomas Jefferson once said that “a little rebellion now and then is a good thing and as necessary in the political world as storms in the physical.” Tell that to employers when faced with political protests at work and you might get a different response. In the past year, people have found a lot to rebel against—from immigration to tariffs—and their protests have seeped into the workplace. The 2017 Day Without Immigrants, the Women’s March on Washington, and the NFL players “taking the knee,” are but a few examples. In such situations, employers and employees alike must understand that the right to protest can be protected even in the non-union shop.

Recent Supreme Court decisions notwithstanding, the National Labor Relations Act (NLRA) is still a formidable shield in the hands of the non-managerial employee. The NLRA was enacted to equalize bargaining power between the employer and employee by allowing employees to band together to confront an employer regarding the terms and conditions of their employment. *N.L.R.B. v. City Disposal Sys.*, 465 U.S. 822, 835 (1984). And the definition of “terms and conditions” can be quite broad. Indeed, it can cover even political protests. The National Labor Relations Board (NLRB), charged with enforcing the NLRA, will not dismiss a political protest if there is a clear nexus between the subject of the protest and an identifiable employment concern. Take, for example, the President’s executive orders on immigration that sparked the Day Without Immigrants protest in 2017. It is not far-fetched to suggest that one aspect of such political action was to stem the tide of employment for undocumented workers. As a

result, employers could be reluctant to hire even documented immigrants to avoid inadvertent violations. Thus, a workplace protest of the executive orders could be deemed protected activity under the NLRA. This was exactly the conclusion of the former General Counsel of the NLRB, Ronald Meisburg, in guidelines he issued in 2008 referring to similar protests in 2006. See *Subject: Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy*, MEMORANDUM GC 08-10, 2008 WL 6708138 (July 22, 2008). Consider now whether a protest against the policy on separating families at the border coupled with the current stance against over promoting breast feeding versus the use of formula could have some nexus with family leave and childcare policies in the workplace. At a minimum, any such protest would demand scrutiny under the NLRA.

To be sure, allowing political speech in the workplace is a delicate matter. Exactly what type of activity is protected and when employment at will might trump an employee’s rights under the NLRA is a formidable question. The former General Counsel’s guidelines offer some insight. Generally speaking, as long as there is a relationship to a specific, identifiable employment concern, non-disruptive political advocacy that takes place during the employees’ own time and in non-work areas, is protected. Furthermore, subject to some restrictions on the method and manner of protest, including neutrally applied work rules, even on-duty political activity or leaving or stopping work to engage in political advocacy could be protected.

So, say you are an employee-side attorney and a group of

employees approach you for advice on a political protest related to a particular work rule. What suggestions do you have to keep them employed despite their planned protest? If you are a management attorney and receive a call from a client faced with a sudden politically motivated walk-out by a group of employees, what do you advise? The Supreme Court has held that the right to strike by two or more employees is generally protected and the discharge of employees for engaging in a protected concerted work stoppage in a non-union setting can violate Section 8(a)(1) of the NLRA. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). It is the method and manner of the protest that often makes the difference.

Generally speaking, partial or intermittent strikes, sit-down strikes, and work slow-downs are not protected under the NLRA. That said the NLRB may employ a balancing test to determine whether such action favors protection or is so disruptive as to allow for adverse employment actions against the participants. Considerations include: whether the work stoppage was peaceful; whether it interfered with production or deprived the employer of access to property or equipment; whether any warnings were given; the duration of the work stoppage; and whether the employees remained on the property beyond their shift. To make matters a bit more confusing, there is on-going debate over what exactly is an intermittent strike and even whether such a strike could nevertheless be protected.

Given these uncertainties, when it comes to political protests in a non-union setting there are a few practical considerations:

- First and foremost, employers and employees must consider whether the action can be deemed concerted activity for purposes of bargaining or mutual aid and protection associated with the terms or conditions of employment. In other words, is there a workplace connection—is the protest related to workplace standards or conditions (wages, safety, employee treatment, diversity policies, equal pay, etc.)?
- Employees may want to consider written notice to the employer of the activity in order to document a proper purpose and plan.
- Are the employees using or attempting to use illegal methods (violence, aggression, or unlawful acts such as theft, destruction of property, etc.)?
- Has the employer dealt with a similar issue in the past—and is the response consistent with past practices?
- What type of press or publicity could the employer face after the response?
- Are the employees prepared to suffer possible disciplinary action including termination and can they afford the cost in time and money of a responsive legal proceeding?

In this volatile political climate, employee protests may become more common and it is incumbent upon counsel for employees and employers alike to realize that protections for such conduct can exist and that the NLRA still matters. ■

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# The *Dynamex* Decision and the Use of Independent Contractors in California

By Timothy T. Kim

Well before the rise of the so-called “Gig Economy,” independent contractors have been a portion of the country’s workforce. Unbeknownst to the average consumer, independent contractors have long played a role in nearly every industry, particularly in California where there are nearly 2 million individuals working as independent contractors.

On April 30, 2018, the California Supreme Court issued a landmark decision on the subject in the



matter of *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 4 Cal. 5th 903, 416 P.3d 1 (2018), reh’g denied (June 20, 2018). In a voluminous, 82-page decision, the California Supreme Court embraced a standard presuming that all workers are employees instead of contractors, and placed the burden on any entity classifying an individual as an independent contractor of establishing that such classification is proper under the newly adopted “ABC test.”

## The *Dynamex* Decision

The *Dynamex* decision involved the classification of delivery drivers under California’s Industrial Wage Commission (“IWC”) wage

orders, which impose obligations relating to minimum wages, maximum hours, and other working conditions for California employees. *Dynamex* is a nationwide same-day courier and delivery service that offers on-demand, same-day pickup and delivery services to businesses and the public. Prior to 2004, *Dynamex* classified its California drivers as employees. Starting in 2004, however, *Dynamex* converted all of its drivers to independent contractors as a cost savings measure.

In January 2005, Charles Lee entered into a written independent contractor agreement with *Dynamex* to provide delivery services for the company. Just three months after leaving his work at *Dynamex*, Lee filed this lawsuit on his own behalf and on behalf of similarly situated *Dynamex* drivers, alleging that *Dynamex* misclassified its drivers as independent contractors, thereby violating the provisions of IWC wage order No. 9, the applicable state wage order governing the transportation industry, as well as various sections of the Labor Code, and, as a result, engaging in unfair and unlawful business practices under Business and Professions Code section 17200.

After several rounds of heavily-litigated decisions in both the trial and intermediate appellate courts, the California Supreme Court eventually granted review to clarify the appropriate standard for determining employee or contractor status in the wage order context.

In its decision, the Court broadly characterized the misclassification of independent contractors as harmful and unfair to workers, honest competitors, and the public as a whole. The Court then provided a long, detailed, and nuanced analysis of the relevant case lineage, reading the cases

and their respective holdings in a decidedly worker-friendly fashion. The Court concluded by adopting a standard presuming all workers to be employees unless that presumption is rebutted by meeting the so-called ABC test.

Under the ABC test, a worker will be deemed to have been “suffered or permitted to work,” and thus, an employee for wage order purposes, unless the putative employer proves:

- A** that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- B** that the worker performs work that is outside the usual course of the hiring entity’s business; and
- C** that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

Note that *each* of these requirements need to be met in order for the presumption that a worker is an employee to be rebutted, and for a court to recognize that a worker has been properly classified as an independent contractor. Prong B of the ABC test is particularly notable because it seemingly precludes businesses from using independent contractors to deliver or provide their core product or service.

In applying the ABC test to *Dynamex*, the Court noted that a class of delivery drivers could be certified under prong B because the question of whether the delivery drivers were performing outside the usual course of *Dynamex*’s business could clearly be resolved on a classwide basis. Indeed, delivery services—which are

provided by the delivery drivers—are the very core of *Dynamex*’s business.

## *Dynamex*’s Impact

The question of whether an individual worker should be classified as an employee or independent contractor has considerable significance for workers, businesses, and the public generally. If a worker is classified as an employee, the employer bears the responsibility of paying Social Security and payroll taxes, unemployment insurance taxes and state employment taxes, providing worker’s compensation insurance, and of course, complying with state and federal statutes governing the wages, hours, and working conditions of employees.

Indeed, many businesses, particularly those operating in the Gig Economy, have significant risk exposure as a result of this decision. For example, the San Francisco City Attorney has recently issued subpoenas to Uber and Lyft in order to ascertain whether the ride-sharing companies classify their drivers as employees or independent contractors in the wake of the landmark decision. The wider business community, for its part, have made urgent calls for legislative relief to both state and federal legislators. All in all, although *Dynamex*’s holding was technically limited to coverage under the IWC wage orders, there is no doubt that the opinion’s expansive reasoning will have a significant impact not only on California—the country’s wealthiest and most populous market—but the independent contractor market as a whole. ■

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# What I Did During My Summer of *Janus*

By Michael C. Subit

Like most other public sector labor lawyers, I have spent much of my time lately dealing with the fallout from *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (June 27, 2018). By a vote of 5-4 the Court overruled 40 years of precedent and held that the First Amendment prohibits unions representing full-fledged public employees from collecting mandatory agency fees, also known as “fair share fees.”

Previously the Court had allowed such unions to require bargaining unit members who chose not to join the union to pay their fair share of the costs of collective bargaining and other union activities that directly benefited them while exempting non-members from paying for the unions’ overtly political activities. *Janus* also held for the first time that public sector unions must obtain “affirmative consent” before collecting dues or fees from bargaining unit members. For decades the Supreme Court had allowed public sector unions to use opt-out systems, consistent with First Amendment law generally.

Donald Trump’s election and the Senate’s refusal to give Judge Merrick Garland a confirmation hearing all-but guaranteed the eventual abolition of public sector agency fees nationwide. Even before *Janus*, about half the States had adopted legislation outlawing them. Such legislation is commonly called “right to work,” but from the union perspective “right to free-ride” is more accurate. That’s because unions must provide bargaining unit members with the same representation regardless of whether they are union members. Furthermore, the Supreme Court had abolished, also by a vote of 5-4, agency fees for so-called “partial public employees” in *Harris v. Quinn*, 134 S. Ct. 2618 (2014). *Harris* involved homecare workers who were state employees for

collective bargaining purposes but were also the employees of the clients they served.

No one in the public sector labor movement welcomed the Supreme Court’s rollback of established precedent in *Harris* and *Janus*. As the *New York Times* put it the day of the *Janus* decision, public sector unions will likely be smaller and poorer after these cases, but not necessarily weaker. The experiences of unions that represent partial public employees over the past four years and of unions who represent employees where agency shops have long been forbidden suggest there are ways to make lemonade from the lemons the Supreme Court has given the union movement.

People tend to be more enthusiastic in their support of organizations to which they give their money by choice. Public sector unions must now convince bargaining unit members to voluntarily contribute. That requires unions to do what unions should do best: organize. Unions will have to show their bargaining unit members what the union has done, is doing, and can do for them. Most Americans don’t believe it’s right that they should get something for nothing.

Public sector unions are generally stronger in states where *Janus* changed existing law regarding agency fees. Many states have statutes requiring public sector unions to fairly represent both members and non-members. *Janus* reiterates that a “union may not negotiate a collective-bargaining agreement that discriminates against nonmembers.” 138 S. Ct. at 2468. But the majority made clear that unions have no constitutional obligation to represent non-members in disciplinary matters and could require nonmembers to pay for that service. *Id.* at 2468-69.

Given this holding, public

sector unions should lobby their state legislatures to limit the duty of fair representation to collective bargaining and allow unions to charge non-members for all other services. Unions provide shop stewards, in-house counsel, or outside lawyers to represent bargaining unit members in grievances and arbitrations. Those services can cost tens of thousands of dollars. Unions should not have to provide those services for free-riders.

Public sector unions can also offer their members additional benefits and services beyond

**By a vote of 5-4 the Court overruled 40 years of precedent and held that the First Amendment prohibits unions representing full-fledged public employees from collecting mandatory agency fees, also known as “fair share fees.”**

those provided by the collective bargaining agreement with the employer. Unions have a long history of providing social services to members. Unions can offer their members everything from life insurance and legal services plans to member discounts at retailers. While this may not be practical for every public sector union, it will be for some.

Public sector unions should also lobby their state legislatures to provide the incumbent union with access to bargaining unit members during orientation and training. Public sector unions should also try to get such provisions included in collective bargaining agreements. Now that public sector unions can’t require non-members to contribute, more than ever they need multiple avenues to reach and teach

prospective members about the benefits of unionism.

The Supreme Court held decades ago that union members have an absolute right to resign from membership at any time. *Pattern Makers League of N. Am., AFL-CIO v. N.L.R.B.*, 473 U.S. 95 (1985). The right to resign however, does *not* include the right to renege on existing financial obligations to the union. *N.L.R.B. v. Granite State Joint Bd. Textile Workers Union*, 409 U.S. 213, 216 (1972). For seventy years it has been the law that unions may enforce an agreement to pay dues for up to a year regardless of the employee’s membership status. Indeed, Congress has authorized such agreements for both federal and postal employees, 5 U.S.C. § 7115(a)-(b), 39 U.S.C. § 1205, even though it did not authorize agency fees for such employees.

The First Amendment does not prohibit the enforceability of dues deduction authorizations with limited windows on revocability. *Fisk v. Inslee*, 2017 WL 4619223 (W.D. Wash. Oct. 16, 2017), *appeal filed*. The authorizations must make clear that the dues deduction will continue for a specified period regardless of union membership status. “For the period of irrevocability, the union can be certain that dues will not be temporarily withheld to protest some union decision.” *N.L.R.B. v. U.S. Postal Serv.*, 827 F.2d 548, 553 (9th Cir. 1987).

While only time will tell, if anti-union forces thought that *Janus* would be the death-knell for public sector unionism, they are likely to be disappointed. Public sector unions will have to change the way they do business but they aren’t going out of business. ■

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# New York Class Certification Decision Advances Human Trafficking Claims

By Mary K. O'Melveny

Slowly, but surely, local, state and federal governments are creating protections for victims of forced labor. Corporations are beginning to create internal policies to curtail forced labor within supply chains. However, a recent New York federal court decision might have an even greater impact for victims of human trafficking in the United States.

In mid-September, 2018, class certification was granted to Rose Ann Paguirigan, a Filipino nurse, on claims under the Trafficking Victims Protection Act (TVPA), 18 U.S.C. §§1589, *et seq.*, against two nursing home employment and recruitment agencies, their agents and officers, and two nursing homes that had recruited her overseas and later employed her in New York. *Paguirigan v. Prompt Nursing Employment Agency LLC*, Case No. 1:17-cv-01302-NG-JO (E.D.N.Y. September 12, 2018). The court granted Fed.R.Civ.P. Rule 23(b)(3) certification for TVPA and other claims, following an earlier ruling denying defendants' motion to dismiss all claims. *Paguirigan v. Prompt Nursing Employment Agency LLC*, 286 F. Supp.3d 430 (E.D.N.Y. 2017). The decision underscores an important remedy for victims of illegal recruitment practices who end up working in the United States.

The plaintiff, along with other Filipino nurses, was recruited using signed employment contracts containing identical provisions: (1) a statement that the employee would be paid the "prevailing wage" for the geographic area of their employment when it commenced; (2) a cover letter stating that each nurse had been offered an hourly wage; (3) a "liquidated damages" provision requiring payment of a \$25,000 "contract termination fee" if the nurse left defendants' employment before the end of a

three-year term and (4) a \$25,000 confession of judgment to be filed in court if they left their position.

After a lengthy visa approval process, the plaintiff signed these documents in April 2015 and began working at a Brooklyn nursing home owned by defendants in June 2015. She was not paid the promised "prevailing wage." After quitting her job in March 2016, she and two other Filipino nurses were sued by defendants to enforce the \$25,000 fee and for \$250,000 in damages for tortious interference with contract. Defendants never disclosed to the plaintiff that, in 2012, a New York state court had voided the "contract termination fee" as unenforceable based on the parties' unequal bargaining power. *SentosaCare LLC v. Anilao*, No. 6079/06 (N.Y. Sup. Ct. Nassau Cty. May 20, 2010).

Defendants actively pursued legal proceedings against at least thirty Filipino nurses who quit their jobs, including proceedings to take away their nursing licenses and even a criminal complaint. The nurses were vindicated in these proceedings, including by a court ruling that such a prosecution would violate the nurses' Thirteenth Amendment rights. *Matter of Vinluan v. Doyle*, 60 A.D.3d 237, 240 (2d Dept. 2009).

The TVPA makes it unlawful to "knowingly provide or obtain the labor or services of a person" using force or by other means, including "serious harm or threats of serious harm," "the abuse or threatened abuse of law or legal process" or "any scheme, plan or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person would suffer serious harm or physical restraint." 18 U.S.C. § 1589(a). Earlier, the court rejected arguments that the TVPA did not apply to defendants' use of legal



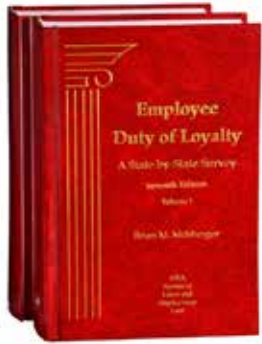
processes because no physical coercion was involved, holding that the Act covered any actions that would "compel a reasonable person of the same background and in the same circumstances to perform or continue performing labor or services in order to avoid incurring that harm." §1589(c)(2). The court found that defendants' continued efforts to enforce the \$25,000 fee, coupled with its lawsuits against plaintiff and other nurses who quit their positions resulted in the type of non-violent "serious harm" proscribed by the TVPA. It also rejected defendants' argument that no "forced labor" existed because the plaintiff could "freely leave" her employment. *Paguirigan*, 286 F.Supp.3d at 438.

In certifying a class of "all nurses recruited by the defendants in the Philippines and employed by the defendants in the United States at any time since December 23, 2008," the court found that plaintiff's TVPA claims for forced labor, trafficking and conspiracy raised issues common to the claims of approximately 200 similarly situated recruited Filipino nurses, all of whom were recruited using the same contracts and paid a wage lower than the one promised. The court applied the TVPA's "reasonable person" standard to hold that resolution of whether "serious harm or threat of harm" exists that would compel a

worker to continue performing labor or services was common to all putative class members "who shared background characteristics including national origin, profession and approximate level of education." Slip. Op. 16. Class treatment was appropriate because "potential class members are foreign nationals who are likely unfamiliar with the U.S. legal system. Many may be unaware – as plaintiff was – that their wages were calculated based on the prevailing wage from years before they started working." Plaintiff's breach of contract claim was also certified since any wage losses were easily calculated. *Id.* at 19-20.

Nurses, as well as teachers, are among many foreign nationals regularly recruited for jobs in the United States. *See, e.g., Tanedo v. East Baton Rouge Parish School Board*, 2011 WL 7095434, at \*6-8 (C.D. Cal. Dec. 12, 2011). Such class action rulings make TPVA remedies for hidden recruitment fees and other coercive contract terms easier for trafficking victims to enforce. ■

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**New Edition!**

## Employee Duty of Loyalty: A State-by-State Survey, Seventh Edition

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**

This treatise reviews the duty of loyalty and analyzes prohibited and permitted conduct, litigation issues, defenses, damages, and the availability of injunctive relief. Extensive discussions of state law show how the duty is applied depending on an employee's level of responsibility.

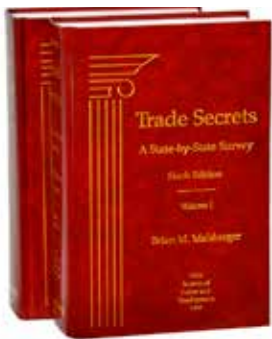
Sample questions examined in the **Seventh Edition** include:

- Does the duty of loyalty persist after resignation?
- Is forfeiture of a disloyal employee's salary available without proof of damages?
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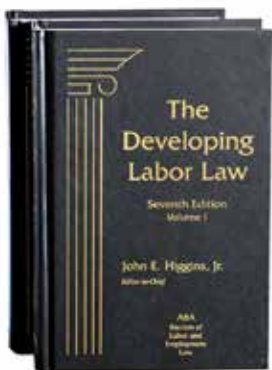
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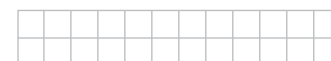
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# Technology's Impact on Equality in the Workplace

By Zoë R. DeGeer

April 10, 2018, was a Tuesday and the beginning of the workweek for the millions of women who make up almost half of the U.S. labor force. It was also Equal Pay Day, which symbolizes how many days into 2018 women had to work to catch up with what men earned in 2017 alone. In the dawn of #timesup, and an ever-increasing awareness of the inequalities women face at work, why do we still pay women 80 cents on a man's dollar? Panelists addressed this timely topic at the ABA Technology in the Practice and Workplace Committee's Annual Symposium. Panelists included the Honorable John Henderson, Administrative Judge for the Equal Employment Opportunity Commission, Nicole Decter from Segal Roitman LLP, Heather Morgan from Grube, Brown & Geidt LLP, and myself. There was one thing we could all agree on: Time is certainly up.

However slowly, our federal and state laws are evolving to address these issues more quickly than employers are responding. The Federal Equal Pay Act (EPA) of 1963 prohibits paying women less than men for equal work on jobs that require "equal skill, effort, and responsibility, and which are performed under similar working conditions[,]" except under certain circumstances, the most litigated exception being "a differential based on any other factor other than sex." In 1964, Congress enacted Title VII of the Civil Rights Act, which includes sex as a class protected from discrimination. In 1972, the EPA was expanded to cover all employees, including executives, administrative or professional workers, and outside salespersons. In 2009, President Barack Obama signed into law the Lilly Ledbetter Fair Pay Act which provided that each gender-unequal paycheck is a new violation of the law, expanding the statute of limitations for equal

pay claims. And, in *Rizo v. Yovino*, 887 F.3d 453(9th Cir. 2018), the Ninth Circuit held that salary history is not a justification, alone or with other factors, for pay gaps between men and women under the Equal Pay Act.

State laws have also been enacted to protect women or men who are paid unequal wages. All states, other than Mississippi and Alabama, have equal pay laws that range from language modeled after the Federal Act, to broader language, as in California, that requires equal pay for "substantially similar work when viewed as a composite of skill, effort and responsibility, and performed under similar working conditions." Cal. Labor Code § 1197.5(a). Like federal courts, states have also limited employers' defenses to these claims. In California, AB 2282 was enacted to clarify that prior salary can never be a factor to justify a gender or race differential and California Labor Code Section 432.3 prohibits employers from asking job applicants about their salary histories because doing so perpetuates pay inequities.

But still, according to the U.S. Census Bureau, in 2016, Hispanic or Latina women were paid 54% of white men's median earnings; black or African American women were paid 63%; white women were paid 79%; and Asian women were paid 87%. In 2016, among full-time workers, non-Asian minority women had lower median annual earnings compared with non-Hispanic white and Asian women, but they had a smaller gender pay gap when compared with men of the same racial or ethnic group. Put simply, if you are a woman working in America today, pay inequity likely affects you. And it affects your family – between 1967 and 2012 the percentage of mothers making at a least a quarter of the family's earnings rose from 28 percent to 63 percent. In



2016, 42 percent of mothers with children under 18 years old were their families' primary or sole wage earners.

When it comes to the idea of equal pay for equal work, our country has moved at a glacial pace. Our panelists took a hopeful outlook, though, discussing how companies are proactively responding to these disheartening numbers. Whether by way of lawsuit, litigation prevention, pressure from shareholders, or simple morality, companies are increasingly using technology and pay equity software to audit their pay practices. Employers like Google and Wells Fargo conducted third party pay equity analyses and reported their results publicly to promote transparency and good will among employees and customers. But, what are the pitfalls of proactively conducting such a review? For one, awareness requires change. Although the federal and state equal pay acts do not require intent, companies that know they have unjustified pay inequities and do nothing to rectify the situation are risking increased litigation, punitive damages under anti-discrimination laws, and tarnishing their reputation in a world where one click of a tweet reaches millions. Although employers may be able to shield some of the review as

attorney-client privileged, they will have to meet the same threshold that applies generally: Does it reflect legal advice and, if so, has the privilege been waived by, i.e., putting out internal company communications? One thing the panel made clear: consult with an attorney before conducting or discussing a pay equity review. If the decision is made to conduct a review, pay equity software can provide answers to two primary questions: Is the gap between men and women statistically significant? If yes, is the gap fully explainable by controls such as educational attainment, tenure, or non-gender based measures of performance? If not, an employer needs to consult with an attorney to develop a comprehensive plan to address the pay gap.

We live in a technology-centric society, so it does not come as a surprise that technology is assisting us in achieving pay equity. As they say, knowledge is power. Let's hope we use that power to level the playing field for the millions of women who are (still) screaming #timesup. ■

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## SCOTUS Cases

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struck down state laws allowing public sector unions to collect “fair share” or “agency” fees from represented nonmembers. The third time in recent years that the Court has been asked to weigh in on the issue, *Janus* held 5–4 that these fee arrangements violate the First Amendment. Joined by his conservative colleagues, Justice Alito’s majority opinion adopted the theory that forcing public employees to pay fees for the collective bargaining services of a union required by law to represent them is akin to forcing them to subsidize political speech. The Court had unanimously rejected this argument in a 1977 case, *Abood v. Detroit Board of Education*. But *Janus* declared *Abood* “wrongly decided,” and determined that even *stare decisis* principles must yield when “fundamental free speech rights are at stake.”

In her dissent Justice Kagan defended the balance *Abood* struck between government employers and their employees in agency fee regimes. But she saved the strongest language of the term for the majority’s disregard for *Abood*’s strong reliance interests, and “all known principles of *stare decisis*.” Referring to her majority colleagues as “black-robed rulers overriding citizens’ choices,” she accused them of “weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic” regulatory policies. “The First Amendment was meant for better things,” Justice Kagan mourned. It “was meant not to undermine but to protect democratic governance.”

### ***Epic Systems Corp. v. Lewis***

In addition to *Janus*, *Epic Systems Corp. v. Lewis* decided another contentious labor issue along ideological lines. *Epic Systems* consolidated three separate cases to address the validity of individual arbitration clauses in employment agreements. In an opinion by Justice Gorsuch, *Epic Systems*

rejected arguments that these contractual agreements to settle workplace disputes *individually*—preventing employees from arbitrating as a “class” or in groups—conflicted with the NLRA’s “concerted activity” protections. Harmonizing the Federal Arbitration Act’s (FAA) directives to enforce arbitration agreements and the NLRA, the Court adopted a narrow reading of the labor statute. The NLRA “focuses on the right to organize unions and bargain collectively ... not the treatment of class or collective actions” in arbitration proceedings. According to the *Epic Systems* Court, the absence of any specific arbitration or class-action discussion in the NLRA was an important indicator that Congress had not meant to for it to displace the FAA.

## Still lingering is the circuit split as to whether Title VII prohibits sexual orientation and gender identity discrimination in the workplace.

*Epic Systems* continues the Court’s recent trend of enforcing arbitration clauses in employment agreements. In a dissent joined by the Court’s liberal block, Justice Ginsburg described this trend as a series of “wrong turns” that have harmed the most vulnerable workers. If Justice Kagan’s *Janus* dissent laments workplaces in the future without economic regulations, Justice Ginsburg’s *Epic Systems* dissent references workplaces from the past, before such employee-protective economic regulations were enacted. Comparing individual arbitration agreements to “yellow-dog contracts” made unlawful by the NLRA, she notes that class arbitration waivers, like the yellow-dog contract before them, are both intended to hinder workers’ abilities to act in concert for their mutual benefit. As such, Justice Ginsburg’s dissent

understood employees’ rights to engage in collective employment arbitration as firmly rooted in the NLRA’s “strength in numbers” purpose and design, and viewed employer interferences in that right as unlawful and unenforceable.

### ***CNH Industrial N.V. v. Reese, Encino Motorcars, LLC v. Navarro, and Digital Realty Trust, Inc. v. Somers***

Not all the labor and employment cases from last year’s term were as stirring as *Janus* and *Epic Systems*. For instance, *CNH Industrial N.V. v. Reese*, reaffirmed a long-standing principle of labor and contract law: that clauses within collective bargaining agreements not subject to more than one reasonable interpretation are not ambiguous. *CNH Industrial N.V.* involved a dispute over whether

applied to the retirees’ healthcare benefits that “ran concurrently” with, and were “made part of” the expired collective bargaining agreement.

Though not the first, *CNH Industrial N.V.* is the last nail in the coffin for the Sixth Circuit’s “*Yard-Man* Inferences.” In a 2015 opinion (*M&G Polymers USA, LLC v. Tackett*), the Court rejected the “*Yard-Man* Inference”—that presumed ambiguous collective bargaining agreements vested certain benefits for life—as inconsistent with ordinary contract principles. After *CNH Industrial N.V.*, it is now also clear that “*Yard-Man* Inferences” cannot be repurposed to create ambiguity within collective bargaining agreements.

In another familiar case for the Court, *Encino Motorcars, LLC v. Navarro* determined that a specific category of employees—service advisors at an automobile dealership—are exempt from the FLSA’s overtime pay requirements. The Court first heard the current and former service advisors allegations that they were misclassified as exempt under the FLSA’s “salesmen, partsmen, or mechanics primarily engaged in selling or servicing automobiles” exemption three years ago. After being remanded back to the lower court for procedural reasons, the Ninth Circuit Court of Appeals interpreted the FLSA exemption narrowly, so as not to include the service advisors. According to the Ninth Circuit, the service advisors—whose job was to greet customers and sell automobile accessories and replacement parts—were not covered by the exemption because they were not *salesmen selling automobiles*. This time around the high Court rejected the Ninth Circuit’s narrow interpretation in a 5–4 opinion authored by Justice Thomas. Relying on ordinary dictionary definitions, *Encino Motorcars* opined that the service advisors were “salesmen servicing automobiles” and, therefore, properly within the FLSA’s exemption. *Encino Motorcars*’ “fair reading” of the statute signals that the Court

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## SCOTUS Cases

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may be steering away from its practice of construing FLSA exemptions narrowly.

Scoring the only unanimous labor and employment decision of the Term, *Digital Realty Trust, Inc. v. Somers* determined that whistleblower protections under the Dodd-Frank Act cover employees who report suspected securities violations directly to the SEC, and not employees who only report violations internally. Although other workplace statutes that protect whistleblowers from retaliation have been interpreted more expansively—protecting both employees who file claims or provide information to government agencies and employees making internal complaints—the Court noted that Dodd-Frank explicitly provided a more limiting statutory definition. Reasoning that

Congress, knowing how other statutes define “whistleblowers,” intended a different meaning by including dissimilar language, the Court applied the whistleblower definition as written without any retaliatory protections for internal reporters.

### Looking Ahead

Much about the upcoming 2018–2019 term remains unclear. Keeping with *Epic Systems’* trend, several more cases relating to employment arbitration clauses have already been added to the docket—with *New Prime Inc. v. Oliveria* (arbitration clauses in transportation-worker agreements) getting significant attention. With Judge Kavanaugh confirmed, expect the employer-slanted majority to continue enforcing arbitration clauses in a broad variety of workplace contexts. After last Term’s hiatus, at least one employment discrimination

case is scheduled (*Mount Lemmon Fire District v. Guido*, applying the ADEA). And while not an “employment discrimination” case in the truest sense, observers are watching to see if any of the sequels to *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Commission* will make the Court’s docket. Last Term’s anticipated blockbuster involving a Colorado baker’s refusal to create a same-sex wedding cake left constitutional questions unanswered. And a ruling as to whether the First Amendment allows businesses to discriminate against individuals based on sincerely-held religious beliefs has implications for all discrimination laws applying to the workplace. A decisive opinion to a *Masterpiece Cakeshop* sequel may also suggest how this Court will address sexual orientation and gender identity matters in the future now that the champion for marriage equality is off the bench.

Still lingering is the circuit split as to whether Title VII prohibits sexual orientation and gender identity discrimination in the workplace. But so far, the Court has declined to address the issue in 2018–19 (see *Evans v. Georgia Regional Hospital* – Petition for certiorari denied). By comparison to 2017–18, the upcoming term actually looks quite subdued on all legal fronts. And the Court’s avoidance of highly controversial cases will probably continue until a ninth justice is confirmed, so as not to risk a 4–4 split that accomplishes nothing. It could be years before the Court decides another labor and employment case as impactful as *Janus* and *Epic Systems* were, much less two in one term. ■

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## 2nd LABOR AND EMPLOYMENT LAW TRIAL INSTITUTE



The Section is pleased to announce that we will be conducting our second Labor and Employment Law Trial Institute in Chicago, September 19–22, 2019. We will partner with the National Employment Lawyers Council and IIT Chicago-Kent College of Law to present this exciting program.

Participants will receive three days of intensive instruction on the nuances of trying a labor and employment case from expert practitioners. The fourth day will feature mock trials conducted at the U.S. Courthouse in Chicago with feedback from practitioners.

Enrollment for the Institute is limited; we encourage you to apply early!

Visit [ambar.org/lelinstitute](http://ambar.org/lelinstitute) to view the agenda and for information on applying.

## UPON FURTHER REVIEW: NFL Enacts—then Suspends— National Anthem Policy

By William J. McMahon, IV

Since August 2016, when Colin Kaepernick sat during the national anthem at a San Francisco 49ers' preseason game to protest racial injustice and police brutality, perhaps no issue has garnered more consistent weekly attention in the National Football League (NFL) than who is protesting during the national anthem, and in what way. Whether it is sitting, kneeling, standing with a raised fist, standing with locked arms, or skipping the anthem altogether by staying in the locker room, the media covering the NFL has become focused on reporting the most minute details when it comes to national anthem protests. Moreover, the players' protests have become an extremely divisive issue for the NFL's fan base, with many people supporting the players' right to protest, but others accusing the players of being unpatriotic or disrespectful to military veterans. President Trump's commentary and criticism of the protests—including his tweet stating that players should be fired for not standing for the anthem—has only intensified the spotlight on the situation and moved it further to the forefront of the political landscape.

Until recently, the NFL had taken no real position on the issue. After Kaepernick's initial protest, the league simply stated, "Players are encouraged but not required to stand during the playing of the national anthem." This largely noncommittal stance continued throughout the 2016 and 2017 seasons, but the momentum of the movement grew, as various players from different teams built on Kaepernick's initiative and began to protest as well. So, as

the 2018 NFL season was approaching, a looming question was what, if anything, the NFL was going to do about the players' national anthem protests.

On May 23, 2018, we got our answer. That day, all 32 team owners voted (but without any input from the players or National Football League Players Association (NFLPA)) to approve a national anthem "Policy Statement," which was an apparent attempt at a compromise. The Policy Statement consisted of six points:

1. All team and league personnel on the field shall stand and show respect for the flag and the anthem.
2. The Game Operations Manual will be revised to remove the requirement that all players be on the field for the anthem.
3. Personnel who choose not to stand for the anthem may stay in the locker room or in a similar location off the field until after the anthem has been performed.
4. A club will be fined by the League if its personnel are on the field and do not stand and show respect for the flag and the anthem.
5. Each club may develop its own work rules, consistent with the above principles, regarding its personnel who do not stand and show respect for the flag and the anthem.
6. The commissioner will impose appropriate discipline on league personnel who do not stand and show respect for the flag and the anthem.

In short, the Policy Statement allowed for protests, but now those



Roger S. Goodell, Commissioner of the National Football League, addressing the media. AP PHOTO

protests had to be off the field and not visible to the fans or media. As the league is a private entity, there is no First Amendment protection for the players, and so from a Constitutional standpoint the Policy Statement is permissible. But the league also cannot implement new terms and conditions of employment unilaterally and without first bargaining over those terms with the NFLPA. However, from the league's standpoint, the player contract template (attached as an appendix to the collective bargaining agreement) contains at least a couple of provisions that it likely relied upon in issuing the Policy Statement and concluding that it was a topic already addressed in the CBA. First, paragraph 2 of the player contract (Employment and Services) states that each player agrees "to conduct himself on and off the field with appropriate recognition of the fact that the success of professional football depends largely on public respect for and approval of those associated with the game." Similarly, paragraph 11 (Skill, Performance and Conduct) allows a team to terminate a player if he "has engaged in personal conduct reasonably judged by Club to adversely affect or reflect on Club..."

Not surprisingly, NFLPA had major concerns with both the policy's impact on chilling the ability of players to express themselves and its unilateral implementation. Accordingly, on July 10, 2018, it filed a non-injury grievance under Article 43 of the CBA challenging

the Policy Statement. Among other issues, the NFLPA would likely argue that the policy infringes upon the players' rights to engage in protected concerted activity under Section 7 of the National Labor Relations Act.

While the grievance set the stage for what could have been an extended legal battle, the league quickly backtracked after *The Associated Press* ran a story, in July 2018, covering the team conduct rules that the Miami Dolphins submitted to the league. Among other things, the Dolphins' proposed rules provided that players could be suspended for up to four games for protesting during the national anthem. That story propelled the league and the NFLPA to come together on July 19, 2018 and issue a statement explaining that a "standstill agreement" had been reached on both national anthem policy and the NFLPA's grievance as both parties continued to discuss the issue.

As the 2018 NFL season is now underway, the national anthem policy remains a key issue to be considered by both the NFL and NFLPA, especially within the context of the current collective bargaining agreement which is set to expire at the end of the 2020 season. ■

**William J. McMahon IV**

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# Calendar of Events

## 2019

January 23 – 29  
**ABA Midyear Meeting**  
Caesars Palace  
Las Vegas, Nevada

January 26 – 27  
**Law Student Trial Advocacy  
Competition National Final**  
New Orleans, Louisiana

January 24 – 26  
**State & Local Government  
Bargaining & Employment Law  
Committee Midwinter Meeting**  
Grand Hyatt Playa del Carmen  
Playa del Carmen, Mexico

February 5 – 6  
**Federal Sector Labor & Employment  
Law Committee Midwinter Meeting**  
The Madison  
Washington, DC

February 6 – 9  
**Employee Benefits Committee  
Midwinter Meeting**  
Loews Vanderbilt Hotel  
Nashville, Tennessee

February 15  
**Negotiation Institute**  
*Co-Sponsored with Section of  
Dispute Resolution*  
Hotel Del Coronado  
Coronado, California

February 16–17  
**ADR in Labor & Employment  
Law Committee Midwinter Meeting**  
Hotel Del Coronado  
Coronado, California

February 20 – 22  
**Federal Labor Standards Legislation  
Committee**  
Grand Hyatt Playa del Carmen  
Playa del Carmen, Mexico

February 24 – 27  
**Committee on Development of the Law  
Under the NLRA**  
Fairmont Miramar  
Santa Monica, California

February 26 – March 1  
**Committee on Practice & Procedure  
Under the NLRA Midwinter Meeting**  
Fairmont Miramar  
Santa Monica, California

March 5 – 8  
**Occupational Safety & Health Law  
Committee Midwinter Meeting**  
El San Juan Hotel  
San Juan, Puerto Rico

March 6 – 8  
**Railway & Airline Labor Law  
Committee Midwinter Meeting**  
Hotel Monteleone  
New Orleans, Louisiana

March 14 – 16  
**Workers' Compensation Committee  
Seminar & Conference**  
The Biltmore Hotel  
Coral Gables, Florida

March 19 – 23  
**Employment Rights &  
Responsibilities Midwinter Meeting**  
Four Seasons Hotel  
Las Vegas, Nevada

April 3 – 6  
**National Conference on Equal  
Employment Opportunity Law**  
*Presented by the EEO Committee*  
The Biltmore Hotel  
Coral Gables, Florida

April 10–12  
**National Symposium on Technology  
in Labor & Employment Law**  
*Presented by the Technology in the  
Practice & Workplace Committee*  
Hotel Monaco  
Chicago, Illinois

May 5 – 9  
**International Labor and Employment  
Law Committee Midyear Meeting**  
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July 17–19  
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