One of the main social concerns revolving around the surge of Artificial Intelligence is the ethical challenges surrounding this technology’s development, implementation, and use. In recent years, we have encountered numerous examples of how AI, despite being originally aimed at improving human well-being and increasing the level of objectivity in human decision-making, has performed wrongly, providing an unlawful outcome that causes harm to the weakest sectors of society.

This unintended consequence was clearly evident in Amazon’s AI recruiting engine, which was precisely intended to ensure full impartiality within recruitment procedures. This system was trained to screen job applications by observing patterns in old resumes (most of which had been submitted by men). The system taught itself to value and appreciate those traits more commonly found in male applicants, and thus refused most of the female candidates. Luckily, this deviation was spotted at a testing stage and the product never actually made it to the open market. The potential damage to female applicants’ careers and reputations, however, was palpable.

The opposite happened with “Compas”, the predictive justice software that was broadly used by American Courts to forecast future criminal behavior of convicts. This system assesses the probabilities of recurrence by convicts based on the answers given to a set of 137 questions. When analyzed at scale, however, the results showed that the system was plausibly biased against African-Americans. Almost 50% of African-Americans considered by the software to be at “high risk” of recurrence never recurred; while 47.7% of whites considered to be “low risk” ended up committing other offenses. This system was not intentionally biased to harm a particular group of people, but many of the questions that the system posed (such as, “How many of your friends are taking drugs illegally?” or “Was one of your parents ever sent to jail or prison?”), created a false positive for recurrence among African-Americans.

AI systems like Amazon’s flawed recruitment software are increasingly being used by companies for hiring, performance tracking, and promotion. Those systems are basically fed huge amounts of data, which nourish the algorithms to make them capable of making decisions. Such data, however, are not necessarily complete or fully representative of all social groups. Much too often we have relied on the misleading proposition that merely shifting the decision-making process from a human to an AI-run machine will inevitably produce a more objective result. Experience shows, however, that data can be intentionally manipulated to cause prejudice to a certain group, and authorities can and should take steps to prevent that from happening. Still, it is the unintended harm caused by AI that should preoccupy us the most.

This is because data is inherently biased to some extent and, thus, a decision that may seem as objectively made could embed some bias factor which, only when continuously repeated, is actually visible to the human eye.

In this context, it will be of utmost importance for both employers and employees to not blindly embrace these kinds of tools, but to constantly question, audit and revise their outcomes to ensure that they have a beneficial, not a detrimental, impact on the organization and continued on page 5
Upon assuming my position as Section Chair at the recent ABA Annual Meeting, I made some comments about my background and provided a brief overview of my involvement with the Section. I’m going to do the same in this, my debut Newsletter column.

As I did at the Annual Meeting, I start by thanking our Immediate Past Section Chair, Joe Tilson. Joe was both an effective and accessible Chair and good friend. He steered us ably as the ABA unveiled its New Membership Model (ambar.org/jenewmembership), and he has been an invaluable resource to our membership outreach groups. He has dealt diplomatically with the federal agencies with which the Section interacts, and he presided over the first application of the Section’s Consensus Principal. Joe has also been a tremendously active supporter of programs which the Section’s governance Council created to enhance the skills of labor/employment practitioners, such as our acclaimed Law Student Trial Advocacy Competition and our Trial Institute as well as initiatives designed to foster future Section leaders such as our Leadership Development Program. The Section continued to strengthen under Joe’s leadership, and we all owe him a tremendous debt of gratitude.

I first became active in the Section when I attended the Development of the Law Under the National Labor Relations Act Committee (DLL) Midwinter Meeting in 1988. My involvement with DLL introduced me to colleagues who have represented some of the best qualities that I’ve come to expect from the Section. For example, two lawyers from a union and employee firm in Los Angeles, Mike Posner and Howard Rosen, sat down at the table next to mine at breakfast on the first day of the Meeting, introduced themselves and made it a point to get to know me while telling me something about themselves. In short, they made me feel welcome. Although it hadn’t yet been formalized by the Section, Howard and Mike were my first Section mentors. They remain my good friends to this day.

In 1997, I became the Union & Employee Co-Chair of the DLL Committee and I served alongside John Neighbours who was the Employer Co-Chair. John and I come from different backgrounds and perspectives in many ways—John a political conservative, a participant in local Republican Party politics, and an ardent golfer; me a social/civil rights activist, liberal left leaning Democrat and pathetic golfer on the very few occasions I tried. Yet we made a terrific team! We always demonstrated great respect for each other, and that allowed us to serve our members very effectively.

When my term as DLL Co-Chair ended, Steve Gordon, then a member of the Section Council, encouraged me to become active in the work of the Section’s Administrative Committees. Steve eventually served as Section Chair and he has been a great role model for me. Steve is the son of a tough, competitive labor leader. And Steve took that same competitive approach when facing legal issues, but he did so with an unflinching sense of humor that often left those who strongly differed with him on substantive issues laughing with him. Most importantly, Steve has always stayed true to his commitment to working people including the staff of the ABA at a critical moment.

Over the past several years, I have been honored to serve on the Section’s Executive Committee. I’ll use the rest of this space to introduce you to my fellow members.

Doug Dexter is the most recent addition to the Committee and serves as the Employer Vice Chair. While some Section leaders, including me, are troglobytes when it comes to understanding newer mediums available for telling the Section’s story, Doug is an enthusiastic supporter of social media and will guide us in those efforts.

Steve Moldof continues as the Union & Employee Vice Chair. Like Doug, Steve formerly served as a Co-Chair of the Section’s Budget and Finance Committee and is committed to accounting for every dime that we spend. He is a creative and tough but humorous negotiator who has spent years making the Section stronger.

Samantha Grant is our new Chair-Elect. I have known Samantha for fifteen years and have observed her at the first Leadership Development Program in 2009, as a leader of the Employment Rights and Responsibilities Committee, as an amazing resource for programming and speaker suggestions and as a persistent voice encouraging the Section to fulfill its commitment to racial, ethnic, gender and disability diversity. I am very proud of the strides that the Section has made over the years in regard to inclusion, and many of the successes that we all enjoy can be traced directly to Samantha’s tireless advocacy.

As Immediate Past Chair, Joe Tilson completes the Executive Committee. I’m also deeply indebted to Don Slesnick. Don served as Section Chair from 2017-18 and was an important guide to me in managing the Section’s many challenges. He encouraged open dialogue on sensitive issues and he skillfully guided the Union & Employee Caucus to new pathways to leadership within the Section. Don had confidence that open dialogue, creativity and humor could get those of opposing views to continue to respect each other, and that allowed us to serve our members very effectively.

Christopher T. Hexter (cth@schuchatcwc.com) is a Partner with Schuchat, Cook & Werner in St. Louis, Mo. He became Chair of the Section on August 10, 2019.
Ethical and Cultural Considerations in Litigating Cases with Limited English Proficient (LEP) Workers

By Shelly C. Anand

Approximately 1 in every 10 working-age adults (ages 16 to 64) is considered Limited English Proficient (LEP). Individuals are considered LEP if they do not speak English as their primary language and have a limited ability to read, speak, write, or understand English. LEP workers earn anywhere between 25% to 40% less than their English-speaking counterparts. LEP workers often tend to be concentrated in low—paying industries and they are also some of the most vulnerable workers when it comes to wage violations and workplace health and safety issues. In fact, the work-related fatality rate for LEP workers, particularly Spanish speaking Latino workers, has been higher than the national fatality rate since 1995 because these workers tend to work in some of the most dangerous jobs. As labor and employment attorneys, we interface frequently with LEP workers and employers—whether representing LEP workers directly as plaintiff side attorneys, having LEP workers serve as witnesses in government cases, defending an employer who employs LEP workers, or defending an LEP employer. Therefore it is critical that labor and employment attorneys become comfortable and competent in ensuring language access to LEP workers and employers.

The foundation for what is known as “language access” or ensuring that LEP individuals are provided with meaningful access is the Supreme Court case Lau v. Nichols, 414 U.S. 563 (1974), a 1974 decision finding that a San Francisco public school’s failure to provide LEP students of Chinese origin with supplemental English courses was a form of national origin discrimination in violation of the Civil Rights Act of 1964 and the Fourteenth Amendment.

Under Executive Order 13166, federal agencies are required to ensure that LEP individuals have meaningful access to their programs and activities. Recipients of federal funding, such as public schools, police departments, and Legal Services Corporation (LSC) funded legal aid organizations, are required to do the same under Title VI of the Civil Rights Act of 1964. Meaningful access means ensuring that LEP individuals are able to participate in processes, the use of services, and the benefits comparable to those enjoyed by fluent English speakers. In the legal setting this means ensuring that vital documents are translated and significant verbal communications are interpreted. Vital documents and significant verbal communications are those that could implicate the LEP individual’s due process rights. For federal attorneys and legal aid attorneys, this means ensuring that vital documents such as notices of intent to institute legal proceedings and/or complaints are translated for LEP employers and using qualified interpreters for important meetings with LEP individuals, such as discussion of settlement terms or deposition/trial preparation. Though attorneys outside the government and federally funded organizations are not held to the same standard under EO 13166 and Title VI, there are ethical requirements under the ABA Model Rules that come into play when representing and/or litigating a case involving LEP individuals.

Specifically, ABA Model Rule 1.4 requires effective attorney-client communication. The rule further requires that a lawyer inform, consult with, explain and seek consent from the client about the case. When representing an LEP client and communicating with that client, the attorney must consider when the use of an interpreter is required outside of formal legal settings such as the courtroom or a deposition. An individuals lack of proficiency in English can be a point of shame or embarrassment for them. It is common for LEP persons to not request an interpreter or the translation of a document, even when they cannot understand everything that is being said to them verbally or in written communication. The fact that an LEP person is involved in a legal proceeding heightens her need for interpretation and translation services, regardless of whether the person has some English proficiency. Therefore, attorneys must be respectful and culturally competent when working with LEP individuals and should lean on the side of caution by providing interpretation and translation services. This holds true for defense attorneys representing employers who employ LEP workers. Resisting the use of interpreters in the deposition and courtroom setting could lead to unnecessary delays and costs and will also paint the attorneys and their clients as not being culturally competent with respect to LEP workers.

Once the attorney has confirmed that language services are required, the topic of who provides the interpretation (verbal) and/or translation (written) services is important so as to ensure the quality of the communications and maintain attorney-client privilege. For the reasons set forth below, obtaining a qualified interpreter for critical attorney-client communications is a best practice. A qualified interpreter is a person who is able to orally render a communication from one language into another language effectively, accurately, and impartially.

ABA Model Rule 1.6 states that “A lawyer shall not reveal information relating to the representation of a client.” The 1961 2nd Circuit decision U.S. v. Kovel, 296 F.2d 918 (2d Cir. 1961), held that the attorney-client privilege is not waived by a lawyer’s use of an agent to facilitate communication with the client. Similarly, the mere presence of an interpreter does not automatically waive the attorney client privilege. However, the continued on page 10
ICE Raids Fake University in Michigan

By Jonathan A. Grode and Joshua H. Rolf

A few months ago, Immigration and Customs Enforcement ("ICE") arrested more than 100 students and 8 recruiters connected with the University of Farmington, located in the suburbs of Detroit, Michigan. If you have never heard of the University of Farmington before reading this post, or any of the recent news surrounding it, that should come as no surprise; it will not appear in this year’s college rankings, or threaten to upset a top seed in March Madness.

That is because the University of Farmington is a fake university the Department of Homeland Security ("DHS") established to ensnare not only foreign nationals seeking employment authorization while studying in the United States, but also the recruiters who sold them this program. While the University was wholly fabricated by DHS, that more than 100 foreign nationals are in government custody pending immigration court proceedings and 8 recruiters have been charged criminally, sparking outcries from lawmakers in the United States and India, is decidedly real, as are the mounting issues with our immigration system that this case exposes.

Work Authorization for F-1 Students
Curricular Practical Training and Optional Practical Training

The students arrested were all enrolled at University of Farmington and participating in Curricular Practical Training ("CPT")—a form of work authorization granted to foreign national students whose employment outside the classroom is “an integral part of an established curriculum.” A university’s International Student Office ("ISO") enters into cooperative agreements to ensure this work is directly connected to and in furtherance of the program’s academic objectives, with the ISOs granting authorization to work under CPT. Therefore, and unlike Optional Practical Training ("OPT") that requires application to and approval from U.S. Citizenship and Immigration Services ("USCIS"), the CPT regime is largely university-driven and capable of granting working authorization on a much faster timeline for foreign national students. With the struggle for students to transition from F-1 to H-1B (as well as other visa classifications), CPT is a popular, though heavily scrutinized, route for international students who want to maintain lawful status while also gaining professional experience—especially after they have struck out in the H-1B Cap Lottery.

Maintainance of F-1 Status During CPT

Importantly, in addition to CPT employment being directly related to the degree program, foreign nationals employed while studying must otherwise comply with all other F-1 requirements to maintain student status. For example, they must have a full schedule of classes that they attend in-person, and which earn credits towards completing a degree. As such, foreign nationals may not enroll in a degree program simply to gain CPT authorization; they must be students, first and foremost, who also work as part of earning their degree.

Maintenance of status—both in the CPT employment being “integral” to the degree and continuing to attend class, etc.—comes up in the context of H-1B Petitions seeking a change of status from F-1 CPT to H-1B. In such cases, USCIS seeks extensive documentation to ensure the student employee is not solely using F-1 CPT to stay and work in the United States. Such proof includes everything from attendance records, transcripts, and syllabi, to book receipts, evidence of transportation/lodgings when attending school, and the cooperative agreements governing the university-employer partnership. And with the DHS’ new Policy Memorandum heightening the consequences of students’ failure to comply with their F-1 status, abiding by all applicable regulations has become more important than ever.

University of Farmington Students
Pay to Stay, or DHS Victims?

As reported by the Detroit Free Press, DHS went to great lengths to make the University of Farmington appear to be a real institution of higher education. Federal agents posed as university administrators—including “Ali Milani,” who had a LinkedIn page as the University’s President—advertising its national accreditation, STEM program, and ability to accept foreign national students. Federal officials used fake names to register the University with the State of Michigan, and even created a backstory to connect the school with Detroit’s history post-World-War-II as an epicenter for technical innovation.

All of these efforts were to present a facade for a University that was only that in name; the University of Farmington had no real faculty, no curriculum, and never intended to grant a degree to its enrollees. Instead, it was created for the sole purpose of allowing foreign national students to secure F-1 CPT employment authorization, a “pay to stay” scheme sold by recruiters to
more than 600 foreign national students. And according to the unsealed indictments, the students were in on the sham, knowing full-well that the university was a fictitious means by which to secure employment authorization. Now, more than 100 students have been detained by ICE, many of whom remain in custody pending immigration court hearings that could render them permanently barred from the United States for having committed immigration fraud.

According to attorneys engaged in the case, however, many of the students lacked the fraudulent intent described in the indictment, and instead believed they were enrolling in a bona fide university. Indeed, many real universities attract foreign national students due to the ease with which they can secure lawful employment authorization pursuant to CPT, while also genuinely pursuing a bachelor’s level or advanced degree. Considering the myriad ways the University of Farmington presented itself as a legitimate institution, it would not be surprising if these appearances fooled many students into believing the university offered a smooth and legal route to academic-related work authorization.

According to one attorney, when faced with questions regarding the unavailability of class offering, University of Farmington (i.e. U.S. government) officials assured students that classes ensuring their compliance with immigration laws and regulations would come soon. Select students transferred upon learning the school would not offer classes as advertised, whereas others – some of whom took out loans to pay for admission to the university— could not afford to transfer and pay additional tuition fees to a new school.

Additional issues have also come to the fore – namely, the treatment of the detained students from India while they await their hearings. In fact, local members of Congress have written ICE to convey their concerns about these students’ treatment. The Indian government’s Ministry of External Affairs also lodged its concerns with the U.S. Embassy in New Delhi over its citizens’ treatment. Amongst these allegations are that students do not receive vegetarian meals that comply with their religious beliefs, a common complaint amongst immigrant detainees.

**Takeaways**
**With Fewer Opportunities and Greater Scrutiny, Students Must be Vigilant in Maintaining Status**

Whether students innocently fell prey to the government’s ploy or knowingly went along with a pay-to-stay scheme, the University of Farmington story illustrates the challenges facing foreign nationals seeking to study and/or work in the United States. With H-1B Cap visas subject to the yearly lottery due to heavy oversubscription and more frequent requests for evidence and denials for H-1B and other Petitions, foreign nationals have fewer and fewer opportunities to transition from F-1 student to nonimmigrant worker. In this environment, students have sought advanced degrees that grant them employment authorization. Though many students abide by the numerous requirements for maintaining F-1 status while obtaining professional experience under CPT, others have used the program as an end-around to work in the United States while waiting for another avenue to come available.

Enforcement has been ramped-up across the board, with USCIS demanding to review evidence of maintenance of status, with the consequences of failing to do so quite severe.

Jonathan A. Grode (jgrode@gande-us.com) is the U.S. Practice Director and Joshua H. Rolf (jrolf@gands-us.com) is an Associate at Green & Spiegel LLC in Philadelphia, Pennsylvania.

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**Workplace AI**
**continued from page 1**

its workforce. To accomplish that goal, designers, developers, distributors and employers should undertake focused, high-level training to ensure that users are capable of analyzing an AI system’s performance from an ethical and legal perspective.

Such preventive measures, however, will often be limited by practical limitations, such as the actual impossibility of determining how decisions are taken by a software of this kind and which factors the system takes into consideration in making its decisions (the so-called “black box”). That is the reason why legislation and standardization of practices among the different countries will play a very relevant role in ensuring the development of beneficial AI, which removes the technical obstacles to transparent and understandable AI systems.

To that end, in April 2019, the European Commission issued the “Ethics Guidelines for Trustworthy AI”. This document expresses the Commission’s view that AI should not be viewed as a means in itself but rather as having the goal to increase human well-being. This inevitably implies the need to adopt a human-centric vision of AI, and to guarantee preservation of fundamental rights and values of the individuals who directly or collaterally interact with AI systems. This document emphasizes the importance and relevance of implementing permanent controls over how AI systems are initially designed, and later on used.

Although the April 2019 document is not an enforceable legal mandate, it could be setting the foundations for upcoming European regulations on the matter. Some of the tools that the Commission envisions as suitable to build and ensure ethically reliable AI are as follows:

- **Transparency**: AI system designers and programmers could be required to prove and evidence how such systems make decisions and, in particular, what specific factors are used within this process.
- **Extensive testing**: AI development could require a certain level of testing prior to its implementation, so as to spot, and subsequently avoid, potential unlawful, prejudicial outcomes.
- **Auditing**: AI systems could be subject to periodic audits of their use and consequences, so that they can be revised and corrected when a prejudicial outcome is spotted.
- **Implementation of Codes of Conduct**: AI designer companies could be obliged to adopt Codes of Conducts which include the objectives and goals of the systems they develop.
- **Diverse and inclusive design teams**: AI designer companies could be obliged to achieve a certain degree of diversity within their teams to ensure diversity of social experience and goals in system development.

In short, it seems that legislation will play a relevant role in ensuring that the ethical purpose of AI is maintained at the design and development stage (which will act as a firewall for major disruptions). However, it will also be necessary for employees and, especially employers, to monitor these tools to avoid a prejudicial impact on workforce and employee rights, and illegitimate judicial actions resulting from inherently biased AI employment systems.

Rubén Agote (ruben.agote@cuatrecasas.com) is a Partner and Blanca Vives (blanca.vives@cuatrecasas.com) is an Associate at Cuatrecasas in Barcelona, Spain.
Orchestra Musicians Strike a Chord In Defined Benefit Pension Battle

By Jenny Goltz and Susanna Bramlett

On March 10, 2019, after eleven, arduous months of unsuccessful negotiations with management (the Chicago Symphony Orchestra Association (CSOA)), the musicians of the Chicago Symphony Orchestra (CSO) (represented by the Chicago Federation of Musicians (CFM)), went on strike. The musicians remained on strike for seven-weeks until the CFM and the CSOA finally reached agreement on April 27, 2019. The striking musicians achieved a couple of important wins with respect to salary and heath care benefits. But the primary impetus for the strike was the musicians’ retirement benefits, which are an important recruitment tool for the orchestra, and still remains somewhat of an open issue even after ratification of the new contract. The CSOA wanted to shift entirely from a traditional defined-benefit plan to a defined-contribution plan. The musicians, however, were concerned about the detrimental impact of degrading the benefits package on attracting new talent to the organization and maintaining the quality of the orchestra. The CFM and the CSOA reached a quasicompromise, in which current musicians’ accrued funds in the existing defined-benefit plan will be frozen, and will continue to provide the benefits that people had earned. Eventually, however, the musicians will have to transfer to the new plan by July 2023. Most critically, new hires going forward will only be able to participate in the defined-contribution plan. Thus, the CFM and the CSOA agreed to assemble a joint committee over the next year, to brainstorm a plan to provide retirement security for new hires even in the wake of the transition to this new plan.

Over the past decade, orchestras across the country have stepped up their efforts to cut costs, citing the overall economic decline since 2008 as a threat to financial stability. Defined benefit pension plans, which have been the norm historically and promise musicians a certain amount of pension per month upon retirement, are increasingly being cut as part of efforts to scale down orchestra budgets.

Maintaining a pension plan has become financially challenging for a couple of reasons. First, the IRS requires that employers who sponsor defined-benefit plans pay a certain amount in order to balance out low interest rates. Because the interest rates have been low for the past ten years, the IRS has mandated increasingly higher pay-ins. Second, as the average life expectancy lengthens, the plan must account for more pensions at any given time. For non-profit institutions, maintaining defined-benefit plans has been particularly challenging.

In response to these factors, many orchestras have turned to defined-contribution plans. Defined-contribution plans oblige management to pay a certain percentage of the employee’s salary into a retirement account each year. Instead of promising a certain amount of benefits upon retirement, management promises to pay a certain amount on the前端. The musicians, too, can invest up to a federally-prescribed amount into the account each year. In the CFM’s view, however, this shifts a great financial burden and investment risk onto the musicians, requiring them to ensure that they have saved enough to support themselves post-retirement, instead of putting that burden on the employer. The uncertainty resulting from the defined-contribution plan, from the CFM’s perspective, would seriously degrade the quality of benefits offered to potential recruits.

The CSOA cited grave concerns about the long-term financial sustainability of the defined benefit plan. While the CSOA paid $803,000 into the plan in 2017, it was required to pay $3.8 million this year. Per the CSOA’s FAQ regarding the negotiations:

Projections indicate the CSOA will have to make payments totaling more than $36 million into the plan over the next eight years. However, the IRS-required funding is highly volatile and could be as much as $64 million over the next 10 years. As a not-for-profit charitable organization, the size of these payments and the unpredictability of the amounts exposes the CSOA to great financial jeopardy. The annual costs of a Defined Contribution plan are lower, and completely predictable, while providing a sizable retirement benefit to CSO musicians.

See https://cso.org/about/press-room/negotiations/faq/.

Instead of being at the mercy of interest rates, the CSOA pays a pre-determined percentage into the retirement plan for each year of the collective-bargaining agreement. While this may mean that more money would need to be allocated into the plan in a given year, the CSOA favors the ability to better predict the amount to budget towards retirement benefits under the defined-contribution model. The CSOA also assured that this change would not in any way impact the quality of the orchestra, as auditions for vacant positions continue to attract hundreds of applications from throughout the world, and that the proposed defined-contribution plan was an enticing benefit to potential recruits.

With respect to salary, the CFM pointed out that CSO musicians were paid less than musicians at comparators such as the San Francisco Symphony Orchestra and the Los Angeles Philharmonic, even though the CSO is higher-ranked, had record-breaking ticket sales, and generally better financial health than nearly all of its competitors in 2018. The CFM argued that the CSO, consistently rated the best orchestra in North America, should offer salary and benefits that are commensurate with or better than those provided by comparable, top-ranked organizations.

In response to the CFM’s contentions regarding salary, the CSOA argued that the CSO’s salary range was proportional due to the difference in the cost of living between those two cities and...
Chicago. Citing data from the Council for Community and Economic Outreach, the CSOA pointed out that the cost of housing in San Francisco is 132% higher than in Chicago, and it is 55% higher in Los Angeles. Both of these orchestras incorporate a housing allowance into their base salaries. For that reason, the base salaries at these two orchestras surpass the salary of other major U.S. orchestras. The CSO musicians’ $159,016 base salary for the 2017-18 season stretches far enough to be practically equivalent to the base salaries of the CSO’s counterparts in San Francisco ($166,400) and Los Angeles ($164,476), according to the CSOA.

Impasse on these two critical issues—retirement benefits and salary—prompted the strike. The CFM were on the picket line for 47 days. During that time, Speaker of the House Nancy Pelosi, candidates for the Chicago Mayoral race (which was held on April 2nd, during the strike), and fellow musicians from around the world expressed their support for the musicians’ cause. In a rare move for a conductor, the CSO’s Conductor Riccardo Muti also joined the picket line, choosing the musicians over management.

On April 27, 2019 (with the help of two FMCS mediators and Chicago’s then-Mayor Rahm Emanuel), the parties reached a deal for a new, five-year contract, which was retro-dated to September 2018 and is to expire September 2023. The CSOA conceded a 14% pay increase over the course of the five-year contract, bringing the base salary to $181,272 in the final year. No changes will be made to the musicians’ health care benefits.

As of July 2020, however, the defined-benefit plan will be closed to all new hires. Instead, the CSOA will contribute 7.5% of the minimum salary to each employee’s retirement account without matching requirements. For the musicians currently on the defined-benefit plan, their accruals will freeze on July 1, 2023 and they will be enrolled in the defined-contribution plan, if they have not elected to do so already. Current musicians will receive an additional assurance under the new plan: if a current musician’s defined-contribution plan fails to accrue the same amount of savings as it would have under the defined-benefit plan, the CSOA will provide the musician with the difference at the point of retirement. Thus, while the current musicians will have a combination of frozen defined-benefit plans and new, defined-contribution plans, future hires will have defined contribution plans only. A joint committee, comprised of representatives from both the musician and management side, will meet for a year-long study to examine and discuss potential inequity between the hybrid retirement plans offered to current musicians and the defined-contribution-only plans. Specifically, the committee is charged with making recommendations for how to make the defined-contribution-only participants’ retirement benefits comparable in value to those who have defined-benefit pension plans.

While the change to the retirement benefit plan is somewhat of a loss to the musicians, it is reflective of the general trend amongst similar organizations to transition from defined-benefit pension plans to defined-contribution retirement plans. Observers will have to wait to see what recommendations the joint committee generates, whether they will have any impact to make the two-tiered pension system more equitable, and whether this issue will lead to an impasse again in the future. If the musicians are unsatisfied with the committee’s progress, they will have to wait until the next round of negotiations to raise it, but at this point that is a mere four years away. This episode highlights unique issues in the world of collective bargaining, that we suspect are far from definitively resolved.

Jenny Goltz is a Partner and Susanna Bramlett is an Associate in the Chicago offices of Cozen O’Connor LLP.
Biometrics: the name is new, but the concept is not. The earliest known use of fingerprints for identification purposes was in China around 220 B.C. In 1903, officials at the Ft. Leavenworth, Kansas penitentiary compared the fingerprints of two suspects to arrive at the conclusion that they were one and the same person. The identification division of the FBI was established in 1924; by 1971, that agency had collected more than 200 million fingerprints. See [http://onin.com/fp/fphistory.html](http://onin.com/fp/fphistory.html). This first form of biometric information was a law enforcement tool used for protection; the notion of misappropriating fingerprints for nefarious purposes as yet unheard-of.

"Biometrics" today generally refers to measurable human biological and behavioral characteristics that can be used for identification, including iris and retina templates, voice prints, two or three-dimensional facial structure maps (facial recognition), hand or finger geometry maps, and vein recognition templates. It also refers to automated methods of recognizing or analyzing an individual based on human biological and behavioral characteristics, such as through gait recognition algorithms or voice recognition.

Biometrics serve both public and private purposes. The U.S. Department of Homeland Security uses biometrics to detect and prevent illegal entry into the U.S., administer immigration benefits and vet and credential immi-

The benefits of this technology bring with them the risk of exploitation. Theft of biometric data holds serious and irreversible consequences: credit cards and social security numbers can be re-issued, but unique biometric markers, once compromised, cannot be restored only to their original owner. Significant ingenuity, time and technical expertise tends to be needed to acquire “raw” biometric material. In 2014, a prominent German hacker demonstrated that he had replicated the thumbprint of a German politician using a close-up of her thumb and other photographs taken with a standard camera from different angles while she spoke at a public event. See [https://www.bbc.com/news/technology-30623611](https://www.bbc.com/news/technology-30623611). The more pressing concern for employers is theft of stored biometric data. In the 2015 breach of the Office of Personnel Management’s systems, fingerprints of 5.6 million federal employees were stolen. [HuffPost](https://www.huffpost.com/entry/pentagon-hack-fingerprints-department-of-defense_n_7268285) India reported last year that a malicious patch disabled critical security features in India’s biometric database, allowing hackers to create unauthorized ID numbers and to fool biometric recognition systems from anywhere in the world.

U.S. employers have sparse legal guidance when it comes to their obligations around biometric data. No federal statute directly governs the collection, use or retention of such information (in contrast to the European Union’s General Data Protection Regulation 2016/679, which establishes a comprehensive security framework for processing biometric data). The most comprehensive biometric privacy law in this country is the Illinois Biometric Information Privacy Act (BIPA), 740 ILCS 14/1 to 14/99. Any employer with a multi-state presence that includes Illinois should be aware of this law.

Enacted in 2008, BIPA applies to all private entities, but not state or local government agencies. It prohibits employers from collecting and using a person’s biometric information without first making certain disclosures and obtaining a written release. 740 ILCS 14/15(b). Employers must develop a written policy governing the retention and permanent destruction of such data, may not sell or otherwise profit from the biometric data of employees or customers, may disclose such data only in limited circumstances, and must store such data using the “reasonable standard of care” applicable to the employer’s industry, and in the same manner the employer stores, transmits and protects other confidential and sensitive information. 740 ILCS 14/15(a) – (e). And, BIPA has sharp teeth: it creates a private right of action, allowing any person “aggrieved” by a violation of the act to sue an employer. Successful BIPA plaintiffs are entitled to liquidated damages of $1000 or actual damages, whichever is

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Covenants Not to Compete: A State-by-State Survey, Twelfth 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 respected and authoritative three-volume treatise delivers the information practitioners need to analyze, draft, and confidently litigate covenants not to compete and other restrictive covenants in the employment, partnership, franchise, license, and sale-of-business contexts. Representative cutting-edge issues considered in the Twelfth Edition include: the viability of covenants that don't specify a list of particular competitors as prohibited employers; the validity of covenants of worldwide scope; whether questions of enforceability are for the judge and not the jury; the effect of an employer's criminal conviction; how an overly broad confidentiality agreement has been treated as a noncompetition covenant; the anticipatory repudiation of covenants; the impact of a state statute prohibiting noncompetes for technology employees; the adequacy of continued employment as consideration for execution of an afterthought covenant; the impact of a statute requiring courts to reform overbroad noncompetition covenants; whether more than “sporadic” communication between employees and customers is required for there to be a protectable interest in goodwill; the enforceability of noncompete agreements executed by physicians who treat rare disorders; and more.

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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

Reflecting the rapid expansion of litigation concerning the application of the employee duty of loyalty, Employee Duty of Loyalty: A State-by-State Survey reviews the duty on a state-by-state basis, analyzing prohibited and permitted conduct, litigation issues, defenses, damages, and the availability of injunctive relief.

Employee Duty of Loyalty includes Finding Lists and detailed chapter contents, appendices containing relevant Restatement excerpts, extensive quotations from the case law, and cross-references to other titles in the Bloomberg Law State-by-State Survey Series.

Sample questions examined in the Seventh Edition include:
• Does the duty of loyalty persist after resignation?
• Will an employer’s failure to identify specifically solicited customers be fatal to a breach of duty claim?
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• Does assisting a person to encourage employees to leave their employer amount to aiding and abetting a breach of the duty of loyalty?

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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

This treatise provides authoritative, in-depth analysis of each state’s statutory and common law protection of trade secrets and other confidential business information, both within and outside the employment context.

Cutting-edge questions examined in the Sixth Edition include:
• Can terms of employment qualify as trade secrets?
• Is pseudocode statutorily protected?
• Does emailing screenshots of a user interface constitute misappropriation?
• Is storing information in a cloud-based internet account a reasonable effort to maintain secrecy?
• Can an employee be held liable for accessing work documents and sending them to his personal email?
• And more.

Using a uniform topic structure that provides a comparative view across states, this treatise is invaluable for lawyers with a multi-jurisdictional practice, as well as for those seeking persuasive authority from other states.

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to reach agreement on long standing divisive issues—and he was right!

Finally, I offer my sincere thanks to our tremendous Section Staff. I trust that there is not a Section leader who does not realize how indebted all of us are to Brad Hoffman, Stephen Falvo Judy Stofko and Chris Meacham for all of their work.

I am pleased to begin my tenure as Chair by being able to show you that the Section is in excellent hands, led by people who give their time generously on behalf of the Section, its programs, its Standing and Administrative Committees, its publishing endeavors, and its governance.

After reading this column, I hope that you have an idea of what I value in the Section—lawyers strongly committed to their positions on the legal and moral issues facing the labor-management community and the legal profession in general; at the same time, lawyers who are committed to participating in the Section civilly with those with whom they may disagree on substantive legal issues, and lawyers who bring a sense of humor to our Section community. I also hope that you learned something about the work of the Section. Over the next year, I will write in greater detail about that work and identify opportunities for anyone reading to get involved.

Thank you for the opportunity to serve as your Chair.

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use of a family member or friend of the client as an interpreter could waive the attorney client privilege as a court is less likely to see them as an agent of the attorney. Further, use of an unqualified interpreter could lead to important information being lost in communication between the attorney and the LEP client. Therefore, it is a best practice to use a qualified, impartial interpreter. Even with a qualified, impartial interpreter the attorney is obligated to make reasonable efforts to ensure the interpreter does not violate the attorney-client privilege by sharing the communications with a third party under ABA Model Rule 5.3. Therefore it is essential that the attorney communicate early on to the interpreter that they are prohibited from sharing the communications to any third parties. Further the attorney must make sure that the interpreter is not providing legal counsel beyond what the attorney is saying as that could result in the unauthorized practice of law.

As the U.S.’s worker population becomes more and more linguistically diverse, attorneys must be equipped with the requisite tools to effectively litigate employment cases involving LEP workers. Becoming fluent and comfortable in the realm of language access is a requisite for any attorney in this line of work. This article provides some basic concepts but, of course, there is much more on this topic. Below are some resources that may be of use as you begin to think about how to improve the language access services you provide to the worker populations you interface with:

- www.lep.gov
- Paul Uyehara, Legal Help for Speakers of Other Languages: Ethical Traps, Cornerstone Vol. 29, No. 1 (2007)
- Kia H. Vernon, No Se Habla Espanol: Ethical and Practical Considerations for Non Spanish-Speaking Attorneys

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greater, for an intentional or reckless violation, plus attorney’s fees and costs, and injunctive and other relief. 740 ILCS 14/20.

BIPA has generated significant litigation: Southwest Airlines, Wendy’s, Speedway, and Six Flags, among other large employers, all recently have been sued by employees under BIPA. In January of this year, the Illinois Supreme Court affirmed the broad reach of the statute by holding that even a technical violation of the statute’s disclosure and written consent requirements is enough to support a cause of action. Rosenbach v. Six Flags Entertainment Corp., 2019 I 123186 (Jan. 25, 2019). It ruled that Six Flags violated the rights of a 14-year old season pass holder by using a fingerprinting process for its park reentry passes without disclosing the practice and obtaining the customer’s written consent.

The legal landscape is evolving. Texas and Washington have enacted similar biometric privacy laws, but without the private right of action that makes BIPA such a potent weapon. In 2020, California will put into effect enhanced protections of personal information defined to include biometric data, but whether the law will apply to employers’ use of employee data is an unanswered question. Meanwhile, biometric data legislation similar to BIPA has been introduced in New York’s 2019 legislative session, and several other states have either proposed or passed legislation to include biometric data in security breach notification statutes.

Any employer who touches biometric data in some form should consider adopting BIPA’s notice and consent procedures as a matter of best practices, and be attuned to further developments on the state and federal level. Beyond this, thorny questions remain to be answered, many relating to data security and liability for breach. What is the “reasonable standard of care” in a given industry for protection of private employee data? How are obligations and liability allocated between employers and third party vendors who collect and maintain biometric data, such as payroll companies? How significant a security investment should companies be required to make in systems that hold biometric data? Employment counsel increasingly will be required to support Human Resources decision-making on these and related issues.


Shelly C. Anand [anand.shelly.c@dal.gov] is a Trial Attorney in the Office of the Solicitor, U.S. Department of Labor in Washington, DC.

Andrea Calem [acalem@huntonak.com] and Natalie Tynan [ntynan@huntonak.com] are Senior Attorneys and Cullan Jones [cjones@huntonak.com] is an Associate at Hunton Andrews Kurth LLP in Washington, DC.
U.S. Women's Soccer Team Sues For Equal Pay and Work Conditions

By Angela Hart-Edwards and Cecilia Ehresman

Women soccer players challenge pay inequities that are the result of different pay structures bargained by two different collective bargaining units and the subject of two different collective bargaining agreements in a lawsuit filed in the U.S. District Court for the Central District of California Western Division against the U.S. Soccer Federation Inc. ("US Soccer"). We can learn from this lawsuit whether different negotiated pay structures for men and women soccer teams can serve as a factor other than sex to justify the pay inequities. The lawsuit, filed by the U.S. Women's Soccer Team ("USWST"), seeks equal pay and employment conditions as compared to their male colleagues on the United States Men's Soccer Team ("USMST").

The U.S. Women's Soccer Team ("USWST") is paid a maximum of $99,000 or $4,950 per game, while their male counterparts on the U.S. Men's Soccer Team ("USMST") earn an average of $263,320 or $13,166 per game, despite (i) holding more championship titles; (ii) receiving greater notoriety; (iii) playing more matches; and (iv) winning more matches over the same period.

To prove their case, the USWST must show that they perform jobs requiring substantially equal skill, effort and responsibility, under similar working conditions within the same establishment. The USWST alleges that its players, like their male colleagues, are required to, among other things, "maintain competitive soccer skills, physical conditioning, and overall health by undergoing rigorous training routines," adhere "to certain nutrition, physical therapy and other regiments," and "attend training camps and practices, participate in skills drills and play scrimmages and other practice events." But the USWST has a substantial hurdle to overcome: the terms and conditions of its 2017 negotiated collective bargaining agreement.

In their Answer to the Complaint, US Soccer asserts that the USWST does not have a single member who is similarly situated to any member of the USMST because the members of the two teams are compensated based upon wholly independent and distinct collective bargaining agreements. Members of the USWST are compensated through guaranteed salaries and benefits. Members of the USMST, on the other hand, are paid strictly on a match appearance fee basis. In other words, members of the USMST are only paid for individual match appearances when they are included on a tournament or tournament-qualifying roster; men who are not on the roster receive no compensation for that match.

US Soccer utilizes these compensation structure differentials, along with viewing and tournament financials, to assert that the USWST and USMST "are physically and functionally separate organizations that perform services for U.S. Soccer in physically separate spaces and compete in different competitions, venues, and countries at different times; have different coaches, staff, and leadership … and have separate budgets that take into account the different revenue that the teams generate." Since the two teams receive fundamentally different pay structures for performing different work under their separate collective bargaining agreements that require different obligations and responsibilities, members of the USMST cannot properly serve as comparators under the Equal Pay Act or Title VII.

US Soccer also heavily relies on the fact that the USWST in their recent negotiations for their 2017 collective bargaining agreement rejected all proposals to switch their compensation structure from guaranteed salary to the "pay-for-play" structure utilized by the USMST. These differences in compensation structure and generated revenue, along with the USWST rejection of a similar compensation formula, may prove to be substantial hurdles for the USWST in the lawsuit. Should the USWST be unable to demonstrate that the members of the USMST are similarly situated, they will be unable to prove their case under the Equal Pay Act. On the other hand, it almost goes against logic to state that women and men who play the exact same sport for the exact same organization are in no way comparable to one another solely because of a decision to be compensated differently. Furthermore, it has yet to be revealed why the USWST was opposed to the compensation structure utilized by the USMST. Regardless, one thing is for sure, the USWST's collective bargaining agreement has already deprived the team of one bit of leverage: the players cannot strike to press their case until the agreement expires in 2021.

While the eyes of the world were on the USWST defending their World Cup title in June, professional women athletes across the United States were watching this lawsuit. Should the USWST be successful in their legal endeavors, it is likely that more professional women's athletic organizations facing pay differentials (e.g., the Women's National Basketball Association whose players' median salaries are $71,635, compared to the Men's National Basketball Association's minimum salary of $582,180) will come forward with similar lawsuits. While the USWST is indisputably a force to be reckoned with on the field, their shot on goal in the court system could potentially have a similar roar.

Ranked number one in the world by the Federation Internationale de Football Association ("FIFA") for the past ten of eleven years, the USWST is considered a powerhouse in women's sports. The holder of four World Cup titles, four Olympic Gold Metals, and numerous other accolades, it comes as no shock that their 2015 FIFA World Cup final match holds the record as the most watched soccer match televised in the English-language in the United States. While this influential team successfully defended its World Cup title in France this June, it has taken another shot on goal: equal pay and playing conditions as compared to its male counterparts.

Angela Hart-Edwards (angela.hart-edwards@akerman.com) is a Partner and Cecilia Ehresman (cecilia.ehresman@akerman.com) is an Associate with Akerman LLP. Ms. Hart-Edwards is located in Washington, DC and Ms. Ehresman is in New York.
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For more event information, contact the Section office at 312/988-5813 or visit www.americanbar.org/laborlaw.