Pay Equity: Somebody Has to Regulate

By Sabine Jean

Should employers be incentivized to report pay data? Well, as with everything else in the law, it depends. The panel, “The EEOC Pay Reporting Requirement: Will It Persist and Impact the Pay Gap?,” featured Olamide Adetunji, the Fight for $15 Law Fellow Service Employees International Union; Joshua Mitchell, Ph.D., Senior Economist at Welch Consulting; Maranda Rosenthal, Director and Senior Attorney at American Airline, Inc.; and Anne Shaver, a Partner at Lieff, Cabraser, Heimann & Bernstein, LLP. The program was moderated by T. Scott Kelly of Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

Pay reporting requirements in foreign countries have been a hot topic of discussion in recent years. As Kelly stated while framing the discussion, “the more well-known requirement is from the United Kingdom. Employers there that have 250 or more employees have to report on their pay gap at the end of each financial year.” The panelists gave overviews of different points in the history of the EEOC’s pay requirement data, including discussing a pending lawsuit that the National Women’s Law Center and Labor Council for Latin American Advancement filed against the Office of Management and Budget and various individuals regarding the enforcement of the EEOC’s pay reporting requirement.

The discussion turned to the audience with an attorney asking, “Wouldn’t it be easier for employers to simply collect this data internally and report out if there is a pay gap?” Shaver was quick to comment with some skepticism of what employers will report. As the conversation continued, Adetunji and Rosenthal spoke of the public shaming that could serve as a potential incentive to get companies to comply with the requirement. Is public shaming a good incentive? Shaver took another view. She looked at reporting as a utility. Shaver commented that “equal pay for equal work” is not the only question. She suggested employers look at the “unadjusted median pay gap” that would span beyond job title and geographical location and look at where women, employees of color, and other protected groups may fall—“is there a significant difference in where women and employees of color and other protected groups are in a company? . . . [A]re they not in

continued on page 11
Our Section and the Wealth of Opportunities We Have to Gain with the Latest Cutting-Edge Information in Our Field

In the past two weeks, I have been lucky enough to have been a guest at the Midwinter Meetings of three of our substantive committees: State and Local Government Bargaining and Employment Law, ADR in Labor and Employment Law, and Employee Benefits. At these meetings, I witnessed participants discuss the latest “hot topic” issues affecting millions of employees, employers and retirees. For example, how likely will it be that federal arbitration law, as it is being interpreted almost every year by the Supreme Court, will either require independent contractor contract claims to be arbitrated or permit class litigation of those claims against the backdrop of the federal preference for arbitration? How will the rights of individual public employees fare against the claims of public sector unions’ contractual rights to collect bargained for dues essential to service collective bargaining agreements? How will our country and its public deal with the impact on pension plans, Social Security and health insurance when more than one half of the working public have no funds to cover their retirement after they no longer can work? In addition, it was gratifying at the Employee Benefits Committee Midwinter Meeting to participate in its proceedings with over 50 union attorneys (out of 230 total attendees)—the largest number I have ever been with at a Midwinter Meeting.

Well, that’s a small picture of the discussions held in the first three programs of the 2020 Midwinter Meeting season. The Section will present ten more Midwinter/Midyear Meetings over the next three months. In short, we in the Section of Labor and Employment Law have an abundance of riches including the opportunity to learn from experts about the rights of driver-contractors to impact how they are paid for their work and potentially organize as employees in their workplaces, to learn about the latest issues affecting the practice of religion as it might conflict with dress in in the workplace, to learn about the right of employees in engaging in political protest at their non-unionized place of employment including organized work stoppages, and how all of these national workplace issues also play out internationally. In the present political environment, all of us in the Section should have a compelling interest in protecting the freedom of association that is essential to preserving the wages, health and welfare of employees both in the United States and across the world. During the next few months, I look forward to attending more Midwinter Meetings, and along with Section Chair-Elect Samantha Grant, getting to meet with many of you both who may be attending the Section’s Midwinter Meetings or those who may not, but who may always contact Saman-tha and me about the Section.

Last, I want to recognize and celebrate the life and work of my law partner Charles A. Werner. Charles died on December 7, 2019 one week after he celebrated his 90th birthday, surrounded by his family, friends and law partners. I practiced law with Charles for over 35 years. He was an inspired lawyer always looking for creative ways to expand the rights and security of the workers he chose to defend including modestly paid custodians at the largest reform temple in St. Louis where Charles had been president for several years. Throughout his legal career, Charles was active in the Section of Labor and Employment Law, culminating in 2005–06 as its Chair. Over the past two months, I have heard from many of Charles’ friends in the Section, all of whom commented on his generosity of spirit, openness to new ideas and ways of contributing to the community we serve. He will be sorely missed.

Christopher T. Hexter (cth@schuchatcw.com) is a Partner with Schuchat, Cook & Werner in St. Louis, Mo. He became Chair of the Section on August 10, 2019.
Tips for Identifying the Best Jury for Your Case in the Social Media Age

By Alyssa Sediqzad

What trial attorney wouldn’t want to get to know his or her potential jurors better during the jury selection process? What if you could research potential jurors and find out all the things a judge will not explicitly let you ask during voir dire—for example, the political figures a person follows or “likes” on social media or how that person feels about relevant topics, like the “#MeToo” movement. In some instances, you can find that information easily. But, when that information is not readily available, or you are otherwise too pressed for time, you would be well-served to find information about potential jurors in other ways.

Several panelists explored various ways of identifying the best jury in today’s age, at the 13th Annual Labor and Employment Law Conference in New Orleans, Louisiana. The panelists were The Hon. Nanette Jolivette Brown, Chief United States District Judge of the United States District Court for the Eastern District of Louisiana, Michael Subit of Frank, Freed, Subit, & Thomas in Seattle, Michael Royal of Littler Mendelson in Dallas, Dr. Jill Huntley Taylor, Director with Dispute Dynamics, Inc. in Philadelphia, and Justin Mulaire, attorney at the Chicago office of the U.S. Equal Employment Opportunity Commission.

Initially, the panelists noted the differences between selecting a jury in state court versus selecting a jury in federal court. While state court is more relaxed, federal court can be pretty rigid.

Judge Brown noted she often asks the questions during jury selection. However, she would encourage the attorneys on each side to propose questions they want her to ask. If not, she will stick to more general questions. Regardless, attorneys should always ask a judge at the pretrial conference how jury selection is done, as there is a lot of variation from federal court to federal court.

Royal suggested that you should always do your due diligence beforehand. A good, time-efficient way to get more information about potential jurors is to provide them with a questionnaire so you can get to know potential jurors quickly. Jury selection happens very quickly, so you need to use your time as efficiently as possible.

Royal also proffered that jury "selection" is really more like jury "de-selection," as you are deciding who you don’t want on your jury. And, the people you want to kick off your jury should largely be driven by the facts of that case.

Mulaire agreed with that sentiment, expressing that “the profile of the juror favorable to you should be driven by the facts of your case.” Taylor added that it is important for attorneys to formulate questions so as to get at those "case-specific attitudes." However, in practice, it is not always easy to get that information. A judge is not likely to allow you to ask questions like “What is your political affiliation?” Rather, you want to drill down on things that may help you get to the answer. For example, people more likely to side with the defense see life more in “black and white” than in “gray.”

Beyond that, attorneys really should focus on potential jurors’ life experiences. Attorneys want to “put the human back in the process” and appreciate the importance of being “fair and impartial.” Most of the time, potential jurors understand the importance of the duty and genuinely want to be fair.

Obviously, whenever possible, attorneys want to make use of our newfound resources in voir dire, including a potential juror’s social media. If attorneys can get the answers they are looking for with just a few clicks, it will save them a ton of work and time. Even if attorneys can get just a few tidbits of information on each particular juror to help them ask targeted questions, they still should be in a more advantageous position.

However, the panelists also warned against going too far in the social media search, as you could make a potential juror feel violated. Many of us feel a sense of privacy on our Facebook, LinkedIn, etc. So, if you are going to use information from a potential juror’s social media to ask them a question, you should be careful how you use that information. If it is obvious to them you researched them beforehand, you could risk alienating them.

When all else fails, Subit and Mulaire suggest you pay attention to non-verbal clues. If it helps, you may want to recruit a colleague to pay attention to such physical cues from counsel’s table. For example, which jurors are hanging out with each other on breaks? Or, are certain potential jurors reacting to certain statements or questions? For example, Mulaire once saw a potential juror rolled his eyes whenever the word “transgender” was used. As an attorney for the EEOC, Mulaire quickly realized he probably would not want that person to be on his jury.

Overall, attorneys should approach the jury selection process as prepared as possible. If social media is an option, use it! If not, attorneys should utilize the plethora of other resources available and tailor questions so as to elicit useful information, pay attention to potential jurors’ non-verbal cues, and, above all, remember that jurors are human, too.

Alyssa Sediqzad is an associate at Littler Mendelson P.C. in Kansas City, Missouri, where she advises and represents employers in a wide range of labor and employment matters.
A Pox on Both Your Houses
Executive Order 13839 Leaves Practitioners on All Sides Struggling to Find a Way Forward

By Martha G. Vázquez

Historically, the “clean record settlement” has been a powerful bargaining chip that agencies have utilized to resolve an employee controversy. Such settlements cost little for the agency and allow the employee to move on from a workplace that did not work out, without documentation that may hold the employee back from finding a new place of employment. In many ways, a clean record settlement is a win-win for both the agency and the employee: the costly and time-consuming appeal and grievance process is avoided, the agency is free of an unwanted employee, and the employee is able to move on without a mark on his or her record, whether deserved or not.

However, the White House apparently decided this process was bad for government. In Executive Order 13839 of May 25, 2018, called “Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles” (the “Executive Order”), the President did away with the clean record settlement—maybe.

As discussed by Cathy Harris, co-manager of the firm Kator, Parks, Weiser & Harris, PLLC, Tristan Leavitt of the U.S. Merit Systems Protection Board, Cathie McQuiston, Deputy General Counsel at the American Federation of Government Employees, and Jeff Rosenblum, Assistant General Counsel for Labor, Employment, and Administration at the Federal Deposit Insurance Corporation during the panel “The Current Administration’s Impact on the Federal Workplace,” the wording of the Executive Order creates more questions than answers when it comes to the obligations of the agency in resolving an employee controversy.

The Executive Order states that:

*Agencies shall not agree to erase, remove, alter, or withhold from another agency any information about a civilian employee’s performance or conduct in that employee’s official personnel records, including an employee’s Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse personnel action.*

Seems pretty straightforward—or is it?

To a practitioner in the federal sector, however, this obligation has created a big—and unwanted—splash that reflects a lack of practical understanding of the world of federal employment law. For example, there is no such thing as an “Employee Performance File”; the only record that meets that definition is the employee’s Official Personnel File, aka the e-OPF. This may seem minor, but because agencies maintain a number of different personnel files, including ones that do not make it into the e-OPF, it is almost impossible to know what the agency can or cannot remove, or even from where those files can or cannot be removed. For example, agencies sometimes maintain separate discipline files, which stay with the agency. Are these covered under the Executive Order? That depends whom you ask.

Ms. Harris, referencing the “Employee Performance File” language, noted that she was “very skeptical” of the terminology but also “quite certain [the writers of the Executive Order] have nothing to do with litigating federal sector claims.” Mr. Rosenblum had to agree and admitted that even agency counsel was “perplexed” by the terminology used in the Executive Order, which was “not the most precisely drafted.”

The Office of Personnel Management (“OPM”) issued guidance to clarify the no-clean record provision of the Executive Order on October 10, 2018, but that guidance only served to muddy the waters around the requirements of the Executive Order. OPM clarified that changes to a personnel file could be altered to reflect a mistake or an inaccuracy and where there is corrective action based on the discovery of material information prior to a final agency action. Notably, two key terms were not defined in the guidance: what is a mistake or inaccuracy? And what is final agency action in this context? These are open questions that neither the agencies nor the employee attorneys are able to answer.

For both agencies and employees, the “biggest splash” of this Administration has been this Executive Order and the resulting restrictions on agencies. Both Ms. Harris and Mr. Rosenblum noted that the Executive Order has greatly curtailed agencies’ ability to negotiate a clean record settlement, leading to increased litigation costs and a feeling of a lot of hassle for very little pay off.

While the White House seems to be overwhelmingly concerned that keeping this information out of an employee’s record is a major disadvantage to future employers, the panelists seemed to feel quite the opposite. In practice, the ability to enter into a clean-record settlement was almost universally recognized as a method of resolving disputes fairly at an early stage, thereby saving money, time and resources for both employees and the agencies. Further, the panelists strongly felt that the problem of employees moving on to other agencies with impunity is not at all the major concern the White House seems to have taken to other agencies with impunity is not at all the major concern the White House appears to believe it is and should not have been dealt with in the blunt manner taken in the Executive Order. “There are much better ways to achieve the same goals,” opined Mr. Rosenblum. Ms. Harris agreed: “Limiting the agency options at an early stage through alternative dispute resolution is counter-productive.”

All around, this Executive Order has been a hindrance on agencies and employees alike. In the words of a panelist, the White House seems to have taken a “pox on both your houses” view in dealing with what it sees as a major problem in federal employment procedures. For both agency management and federal employees, the effect of this sea change is yet to be fully realized. In the meantime, the panel agreed that practitioners should continue to look for creative ways to deal with the ever-changing landscape.

Martha G. Vázquez is an associate at Wiley Rein, LLP in Washington, D.C. where she counsels and represents corporate clients and government contractors in all aspects of employment law.
The “Fissured Workplace”

By Blaine Taylor

The emergence of digitally-mediated platforms that let people earn money by driving passengers for Uber or Lyft, delivering groceries for Instacart, or becoming a “Dasher” for DoorDash, have sparked debate about the “rise of the gig economy,” in which workers are no longer employed in traditional workplaces. However, research conducted by the U.S. Bureau of Labor Statistics shows that the number of gig workers is idling and not expanding. According to Lynn Rhinehart from the Economic Policy Institute, “Despite what you might think. And, despite what you’re seeing in the papers. And, despite the title of our plenary, we’re not becoming a nation of gig workers. We just aren’t.”

At the 13th Annual Labor and Employment Law Conference in New Orleans, panelists discussed changes in the traditional employer-employee relationships during the “Changing Workplace” program. Ms. Rhinehart was joined on the panel by Dennis McClelland from Phelps Dunbar LLP, P. Casey Pitts from Altshuler Berzon LLP, and George Washington Jr. from Orange Business Services.

Ms. Rhinehart urged labor and employment attorneys to pay special attention to the rise of another major trend in the labor market: the “fissured workplace” because “that’s really where the action is.” The workplace is “fissuring” because businesses, now more than ever, are concentrating on their core competencies while finding subcontractors to perform jobs that would normally be done in-house. Today, our food and/or product deliveries are often made by contractors and our hotel rooms are often cleaned by temporary employees from staffing agencies. In today’s fissured workplace, businesses are utilizing a variety of different models such as subcontracting, using staffing agencies, franchising or classifying workers as “independent contractors.”

There was a sharp divide amongst the panelists about the policy implications of the fissured workplace. Mr. Pitts emphasized that the “independent contractor” classification “has really had substantial consequences on labor employment rights and the social safety net.” Typically, businesses do not have to withhold or pay Social Security, Medicare and unemployment taxes for “independent contractors.” Obviously, if there are fewer “employees” paying taxes into the social safety net, then there will be fewer tax dollars to provide critical social services.

On the other hand, Mr. McClelland criticized the Obama Administration for taking a “very aggressive stance” on “so called” misclassification, and he praised the Trump Administration for taking steps to “preserve and protect” a company’s right to use independent contractors. For example, the NLRB’s General Counsel recently issued an Advisory Memo finding that Uber and Lyft drivers are independent contractors because of their entrepreneurial opportunities, control over their own schedule, and freedom to work for competitors.

Mr. Pitts took issue with Mr. McClelland’s “preserve and protect” rhetoric and referred to the moves made by the Trump Administration as a “roll back to the 1930s.” Mr. Pitts applauded the efforts at the local and state level “to try and protect workers who may be misclassified as independent contractors.” The most prominent example of state action was California AB-5, which significantly narrowed the definition of independent contractors. Under the “ABC” test, a worker is presumed to be an employee and the burden to demonstrate their independent contractor status is on the company. The legislation requires many contract workers to be treated as regular employees, which means that they are covered by minimum wage, overtime, unemployment insurance and other traditional labor protections.

The “increased flexibility” for both businesses and workers was a factor that Mr. Washington really supported. Mr. Washington emphasized that there were “other ways to provide benefits and protections than simply relying on payroll and social security taxes.” However, Mr. Washington also brought up recent studies that pointed out that the current “independent contractor or employee” paradigm is “not well suited for today,” and perhaps we should take a look at modifying the traditional model that adds a “third category” of workers that would grant some—but not all—labor law protections to workers engaged in nontraditional work relationships.

The panel concluded with a short discussion about the “voice gap” and “automation and artificial intelligence.” The “voice gap” at work refers to the lack of bargaining power that workers have with respect to terms and conditions of employment. For instance, “stagnant wages,” according to Ms. Rhinehart, “have driven a resurgence of collective action in the workplace.” Ms. Rhinehart provided examples such as digital journalists who recently organized digital news outfits, students who are attempting to organize schools, and employee walkouts over sexual harassment and forced arbitration clauses at Google. According to Mr. Washington, “the explosion of social media has fueled organizing efforts, not necessarily associated with unions, where workers can discuss their grievances and feel emboldened to speak out online.”

Ms. Rhinehart and Mr. Washington both agreed that headlines about losing jobs to automation and artificial intelligence were overhyped. Mr. Washington explained that the notion that automation and artificial intelligence are taking over the workplace or killing jobs is “overstated.” Ms. Rhinehart, who remarked: “I agree with George! Is that allowed here?,” cited an MIT study concluding that the “evidence does not show there is, or will be, massive worker displacement due to artificial intelligence.” According to Ms. Rhinehart, “there will be some displacement, but other jobs will pop up elsewhere.” In fact, Ms. Rhinehart encouraged the audience to “embrace” artificial intelligence and to use it to “create better jobs.”

Right now, the trend at the local and state level has been to enact laws similar to California’s AB-5 that make it much more difficult to classify workers as independent contractors. On the other hand, the trend at the federal level is to make it much easier to classify workers as independent contractors. Because workplaces often change faster than the laws that govern them, attorneys should regularly think about how business models will look in the present and in the future.

Blaine Taylor is a labor and employment attorney at Buttsavage & Durkalski, P.C. in Washington, DC.
Updates from the NLRB and the Office of the General Counsel

By Alan H. Bowie, Jr.

The updates from the National Labor Relations Board (“Meet the National Labor Relations Board”) and the Office of the General Counsel (“Meet the National Labor Relations Board General Counsel”) at the 13th Annual Labor and Employment Law Conference summarized the second full year of the NLRB under the Trump Administration.

Updates from the National Labor Relations Board
Chairman Jonathan Ring and Board Members Lauren McFerran, William Emanuel and Marvin Kaplan gave updates on behalf of the Board. Chairman Ring gave a status update on the Board and its administrative initiatives. Members McFerran, Emanuel and Kaplan discussed the key decisions the Board issued.

Board Composition
Chairman Ring noted that the Board currently has one vacancy resulting from the expiration of former Member and Chairman Mark Gaston Pearce’s term. With the expiration of McFerran term on December 16, 2019, there will be another vacancy. Chairman Ring opined that a Board with a maximum number of participants is preferable but noted that the Board has no control over appointments.

Administrative Update and Rulemaking
In 2019, the Board piloted a program for expedited case processing to decide more efficiently and expeditiously. The program first targeted the oldest cases. In its first year, the Board issued 300 decisions and reduced the median age of cases 33% (from 233 days to 157). Lastly, Chairman Ring discussed the Board’s proposed rules on joint-employer status, election rules and protection, and graduate student organizing.

Significant Board Decisions
Members Kaplan and McFerran discussed (and disagreed) on the Board’s recent decisions involving employee access to employer premises. Kaplan and the Board majority viewed these decisions as consistent with Supreme Court and other precedent. By contrast, McFerran viewed these decisions as inconsistent with settled precedent and/or the spirit and purpose of the National Labor Relations Act (the “Act”) or a misapplication of the law.

The significant access decisions are the following:
- UPMC Hospital where the Board held that a Hospital did not violate the Act by ejecting non-employee union organizers from its cafeteria for meeting with employees and discussing union activities.
- Kroger where the Board held that a grocery store operator did not violate the Act by ejecting the union organizers from the parking lot where they were soliciting support of the store’s customers.
- Bexar County where the Board held that the property owner did not violate the Act by removing bargaining offsite contractors, who were distributing leaflets, from their property.

In addition to these decisions, the Board is seeking to propose a rule to clearly define the right of an employer to prohibit activities on its private property by: (1) off duty contractors and (2) employees of various different types.

Chairman Ring and Members Emanuel and McFerran also discussed the following significant decisions:
- Cordua Restaurants where the Board held that employers do not violate the Act by informing employees that failing to sign an arbitration agreement will result in discipline or discharge or creating a mandatory arbitration agreement in response to a class action.
- Phelox Express where the Board held that employers do not violate the Act solely by misclassifying employees as independent contractors.
- Walmart Stores where the Board held that the employees’ intermittent strike strategy rendered the employees’ walkouts unprotected.

McFerran strongly disagreed with these decisions and described the Cordua Restaurants case as “a joke.”

As of August 2019, there was a surplus at the agency, and most of the money has been spent on technology.

Budget
Generally, the NLRB has been flat funded for the past 5 years. As of August 2019, there was a surplus at the agency, and most of the money has been spent on technology.

Vacancies and Staffing
Stock discussed the NLRB’s issues with staffing and vacancies. She noted, in general, that NLRB cases have decreased by an average of 2 percent per year. Staff numbers have similarly decreased over the years through attrition. As a result, the NLRB has seen an imbalance in staffing and has encouraged sharing resources between regions (such as compliance officers) and the consolidation of regional offices. Robb stated that he is opposed to closing regional offices and has not seen whether consolidation will save money. Further, the Board has consolidated administrative professional positions into one position that has several different requirements and skills.

Statistics
Robb stated that he was “struck” that the current case processing time was significantly higher than his initial stint at the NLRB. As a result, he has sought to decrease case processing time and the Agency’s backlog. For FY2019, the processing time has decreased 11.5% (from 173 days to 153), the office of appeals backlog has decreased from 298 cases to 98, advice cases have been reduced to 38.6 with an average processing time of 54 days, and FOIA cases are now closed in an average of 9.1 days (a 34% reduction.) He stated that the quality of decided cases did not diminish and that the decreased processing time has not affected the merit or settlement rates.

Alan H. Bowie, Jr. is an associate at Carmody Torrance Sandak & Hennessey LLP where he practices primarily in the area of Labor and Employment.
New Cumulative Supplement!

John E. Higgins, Jr., Editor-in-Chief (Seventh Edition); Nicole Cuda Pérez, Jayme Sophir, and Amy J. Zdravecky, Co-Editors (2019 Cumulative Supplement)

This treatise gives labor and employment law practitioners essential insight into all the latest updates in U.S. labor law. It covers the legal rights and duties of employees, employers, and unions, as well as procedures and remedies under the National Labor Relations Act. Updated regularly, it discusses major cases and what might be expected from the Board in the future.

The 2019 Cumulative Supplement updates the treatise through December 31, 2018, and reviews the impact of two significant Supreme Court decisions: Epic Systems Corp. v. Lewis and Abood v. Detroit Board of Education.

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By Barbara T. Lindemann, Paul Grossman, and C. Geoffrey Weirich; Laurie E. Leader, Nicole Buonocore Porter, Marianna Moss, and C. Geoffrey Weirich, Executive Editors; Equal Employment Opportunity Law Committee, ABA Section of Labor and Employment Law

Employment Discrimination Law is the definitive treatise in this complex and highly detailed field. The balanced and unbiased approach of this two-volume work reflects the combined efforts of attorneys representing the plaintiff/public, management, and union employment bars. Offering the most comprehensive coverage of employment discrimination law available, Employment Discrimination Law is described as an “indispensable resource” in the Legal Information Buyer’s Guide and Reference Manual.

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Circuits Differ in Applying Rule 23 Amendments

By Tana Forrester

In December 2018, Federal Rule of Civil Procedure 23, which governs class actions, was amended for the first time in 15 years. The amendments included several key changes which impact federal class action litigation in significant ways. Panelists at the 13th Annual Labor and Employment Law Conference addressed the effect of the amendments during the panel “All You Need to Know about Rule 23 Amendments,” featuring Tracey Holmes Donesky of Stinson Leonard Street LLP, Loren B. Donnell, Burr & Smith, LLP, and Jennifer L. Kroll of Martin & Bonnett P.L.L.C.

Uniform Criteria for Granting Preliminary Approval

Under the amended Rule, parties are required to provide the court with information needed to evaluate the proposed notice and settlement. A court must “frontload” the analysis at the preliminary approval stage, examining many of the same factors it will consider when determining a grant of final approval. The Advisory Committee Notes provide the rationale for this frontloading stating that “[t]he decision to give notice of a proposed settlement to the class is an important event. It should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and opportunity to object.”

Rule 23 as amended provides a uniform set of criteria that must be examined at the preliminary approval stage. Rule 23(e)(2) requires courts to analyze four factors:

1. the adequacy of representation by class representatives and class counsel;
2. whether settlement negotiations were done fairly at arm’s length;
3. the adequacy of relief provided under the settlement, this includes: an analysis of the cost, risks and delay of trial and appeal; an analysis of how relief will be distributed to the class; an analysis of any agreement required to be identified under Rule 23(e)(3); and an analysis of the terms of any proposed award of attorney fees, including timing of payment; and
4. the equitable treatment of class members.

Panelists noted that despite the fact that the amendments set out to create uniformity, in practice the application of the Rule 23 factors varied greatly across circuits, with some courts wholly adopting the amended Rule 23 factors, other courts using their own precedent in conjunction with Rule 23 standards and a number of courts ignoring the amended Rule 23 factors, and instead relying on their own precedent to determine what constitutes a fair, reasonable and adequate settlement.

The Advisory Committee Notes underscore that the amendment was not intended to eliminate factors or supplant individual circuit test but rather provide guidance about priorities:

[t]he goal of the amendment is not to displace any factor, but rather focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.

Panelist Jennifer L. Kroll noted that at this early stage it is still uncertain as to whether the courts in her circuit will adopt the amended Rule 23 factors or continue to rely on the circuit test that had been developed through precedent. Because of this uncertainty, Kroll fully briefs both circuit factors and the amended Rule 23 factors in her settlement approval motions. Panelists advised that practitioners fully examine the district court decisions in one’s own circuit before replacing one’s circuit court factors with the amended Rule 23 factors.

Providing the Best Notice that is Practicable Under the Circumstances

The amended Rule requires courts and counsel to focus on the method or combination of methods that are most likely to deliver effective notice in a particular case. Under the amended rule, notice by electronic means is now specifically mentioned in Rule 23(c)(2) as an appropriate means of providing notice to the class. The panel, echoing the Advisory Committee, cautioned that electronic means may not be the best means of furnishing notice in every case and that the parties must examine which means or combination of means will best serve the goal of providing notice to a particular class. Parties must consider class members’ access and familiarity with email. In addition to carefully considering the means by which notice is delivered, parties and the court must also consider the content of the notice and the way that it will be received and understood by class members. Panelist Loren B. Donnell emphasized the importance of conducting thorough research when selecting a claims administrator. Donnell underscored that the purpose of notice is to protect class members’ due process rights and noted that high quality claims administrators who are willing to address the specific circumstances of the class and foresee obstacles to class members receiving notice significantly impact both receipt of notice and the response rate.

Addressing Serial Objectors

The 2018 amendment to Rule 23(e)(5) explicitly addresses the issue of bad faith “serial” objectors to proposed class action settlements by mandating that objectors state the specific grounds for their objection. Prior to the 2018 amendment, Rule 23 allowed any class member to object to a class action settlement and only allowed withdrawal of the objection with court approval. This allowed “serial” or “professional” objectors to seek compensation in exchange for withdrawal of their objections. The amendment requires objectors to state specifically why they are objecting and indicate if the objection applies to the objector only, some subset of the class, or the entire class. The Advisory Committee Notes caution that the amendment should not be used to burden unsophisticated class members who are not represented by counsel and wish to object. “[A] class member who is not represented by counsel may present objections that do not adhere to technical legal standards.”

Rule 23 as amended provides a uniform set of criteria that must be examined at the preliminary approval stage.

Tana Forrester is an associate at Kessler Matura P.C. in Melville, New York and represents employees in negotiation and litigation in discrimination and wage and hour cases.
Do You Smell What the Department of Labor Is Cooking?
Insight into the DOL’s Strategic Direction

By Kyle E. Simmons

Understanding why the Department of Labor issues certain regulations and what changes are in store for 2019 and beyond are just some of the topics discussed at this year's 13th Annual Labor and Employment Law Conference. The panel, “Meet the Department of Labor: A Discussion of Strategic Initiatives in 2019 and Beyond,” featured Hon. Kate O'Scannlain, Solicitor of Labor at the U.S. Department of Labor; Cheryl M. Stanton, Administrator of the Wage and Hour Division at the U.S. Department of Labor; Michelle R. Fisher, employee attorney at Nichols Kaster, PLLP; and David S. Fortney, employee attorney at Fortney & Scott, LLC.

Ms. O'Scannlain and Ms. Stanton provided some background and context to the work that is performed, critical regulations that have been adopted and/or proposed, and how the DOL will operate moving forward. Ms. O'Scannlain first highlighted the Wage and Hour Enforcement Division and added that “changes in 2019 come from enforcement: compliance and regulations.” She added that filings regarding the Fair Labor Standards Act (FLSA) are down, but that is likely due to more cases being handled on the state level and in arbitration. Ms. Stanton stated that an increase in companies disclosing FLSA violations through the Payroll Audit Independent Determination (PAID) pilot is also responsible for the decrease in the number of FLSA filings.

The second highlight from the panel was hearing about a number of regulations that have been proposed. The regulations highlighted were: 1) the allowance of online retirement disclosures that will allow for a cost savings of $2.5 billion over the next ten years; 2) the expansion of the association retirement plan that will allow small businesses to group together to purchase retirement plans based on industry and location; 3) a proposed revision to fluctuating the workweek for the purpose of computing overtime; 4) a proposed rule relating to sharing tips with back of the house staff and not management; 5) an update to regular rate regulations (i.e. time and a half in overtime calculations); and 6) a proposed regulation regarding joint employers being jointly responsible for employee wages.

Mr. Fortney reminded the audience and panel that “due to the Administrative Procedure Act (APA), the panelists from the Department of Labor are not able to discuss proposed regulations that are in the comment period.” This included the six proposed regulations listed above.

However, the one regulation that was discussed was the update of the overtime rule. This was the first time the rule was updated since being implemented almost fifteen years ago. Mr. Fortney stated, “The updated rule is the equivalent of increasing the salary by the cost of living allowance increase since 2004.” Ms. Stanton went on to add that “The salary level means that those persons making that salary level or less are automatically non-exempt and eligible for overtime.”

A question was asked of the panel if whether they anticipated litigation based on the update of this new rule. Ms. Fisher stated, “Litigation is likely based on the new overtime rule that will be effective January 1, 2020.” Ms. O'Scannlain replied, “If the other Trump era regulations are any barometer, we (the DOL) expect that there will be litigation.”

The last segment of the program addressed how the Department of Labor determines what regulations will be addressed each year. Ms. O'Scannlain said “The DOL will look at a number of factors to include: 1) what is the priority of the current administration; 2) are there any regulations that are outdated and need to be updated; 3) are there industries looking for help; and 4) have there been decisions made by the court that need to be addressed.” Ms. Stanton also added that the “DOL tracks complaints and allows the data that they collect from different regions to help direct what specific areas or industries that need to be helped.”

Despite hearing the multiple variables that go into determining which regulations will be revised or proposed, Ms. Fisher asked, “If the DOL is open to hearing from plaintiff attorneys about what issues need to be addressed and/or revised.” Ms. Scanlon responded that they currently hear from both management attorneys and plaintiff attorneys. She added that the DOL wants to hear from all stakeholders and that even if you are not in the Washington, D.C. area, you can contact the DOL.

At the conclusion of the panel, both Ms. O'Scannlain and Ms. Stanton added that the public has the ability to have their voice heard during the comment period. All comments are reviewed and if for some reason the government decides not to address the comment in the final version of the regulation, then the government must provide reasoning as to why it will not incorporate that suggestion. Nonetheless, attorneys from both employee and employer law firms would be best served by participating in drafting comments for different rules whereby their constituencies are most impacted. The upcoming proposed regulations that the panel was unable to discuss will be worthwhile to follow, especially for how the fluctuating workweek is implemented and whether that will override existing collective bargaining agreements, whether the update to regular rate regulations, i.e. time-and-a-half in overtime calculations will increase the cost to overtime, and how the proposed regulation for joint employers will impact businesses both large and small.

Kyle E. Simmons, Esq., M.P.A. provides strategic advice and expertise to management on labor and employee relations issues including collective bargaining interpretation and conducts Title VII investigations at Kaiser Permanente—Mid-Atlantic States. He is the In-House Council Vice-Chair to the Outreach to Law Students Committee to the Section of Labor and Employment Law.

www.americanbar.org/laborlaw
ABA Resolution Encouraging Use of Technology-based Platforms Adopted with Section of Labor and Employment Law Support

By Wendy L. Kahn

At its 2020 Midyear Meeting, with support of the Section on Labor and Employment Law, the ABA adopted Resolution 113, encouraging legal professionals “to use and promote technology-based platforms that facilitate the efficient, timely, and targeted matching of survivors of human trafficking who have legal needs with lawyers who have the requisite specialization and availability to meet those needs pro bono.” The resolution was sponsored by ABA Center for Human Rights ("CHR"). In addition to LEL, the resolution was supported by the ABA Standing Committee on Pro Bono and Public Service, the Commission on Youth at Risk and the Section of Science and Technology Law.

Human Trafficking is a modern form of slavery; from forced labor to forced prostitution, human trafficking is an egregious human rights abuse that permeates into the world of work. As set forth in the Report to Resolution 113, “The scale of human trafficking is enormous. Even with the understanding that statistics cannot capture the full extent of a crime that benefits from keeping its victims in the shadows, the latest data from the International Labour Organization show that, in 2016, globally 40.3 million people were estimated to be in ‘modern slavery,’ a term that reflects 24.9 million in forced labor, bonded labor, forced child labor, and sexual servitude and 15.4 million in forced labor and marriage.” Women and girls are disproportionately affected by forced labor, accounting for 99% of the victims in the commercial sex industry, and 58% in other sectors. Overall, 71% of modern slavery victims are women and girls.”

Recognizing (1) there is a great need on the part of survivors for pro bono legal services to resolve legal issues that impede their reintegration to security and independence, and to avoid revictimization, and (2) that many lawyers want to provide those services pro bono, Resolution 113 describes a replicable, technology-based model using an app platform that has emerged recently. This model involves the matching of a lawyer who has the required expertise, proximity and prompt availability to a survivor’s specific needs and complex legal needs and also incorporates supportive social services to provide a comprehensive approach to a survivor’s situation. The model, developed by the Alliance to Lead Impact in Global Human Trafficking (ALIGHT), is based in Denver, Colorado and is being tried in some other states.

As the Report to Resolution 113 points out, “the ABA has recognized that the re-victimization of survivors in the legal system compounds the injustice, as survivors are often criminalized in that system. And many current avenues of relief are inadequate…” As cited in the Report at 2-3, “[m]any survivors … have been arrested for offenses stemming from the victimization. Resulting criminal records—both arrest and court documents—then follow survivors and create barriers that impact their independence, stability, and safety.” As cited in the Report at 2-3, “[m]any survivors … have been arrested for offenses stemming from the victimization. Resulting criminal records—both arrest and court documents—then follow survivors and create barriers that impact their independence, stability, and safety.”

The Section of Labor and Employment Law’s Immigration and Human Trafficking Committee is a “home” and a resource for attorneys interested in human trafficking and pro bono service. In addition to providing information, education and a forum for discussion regarding key immigration issues relating to labor and employment law, the Committee also aims to assist lawyers in obtaining information about legal and regulatory developments and to identify resources on combating human trafficking in the workplace. The Section encourages its members to provide pro bono assistance to trafficking victims. On the resource page on the Committee’s webpage, there are links to some of the important pro bono organizations that can help coordinate such pro bono work.

For example, The Human Trafficking Pro Bono Legal Center provides training and assistance to attorneys who want to offer such pro bono assistance. Information about a technology-based platform, such as ALIGHT’s model, that blends law, technology and human trafficking-specific considerations to create a marketplace where survivors with limited opportunities can seek help and connect with specialized attorneys on a pro bono basis will be a valuable addition to the Committee’s materials.

Wendy L. Kahn retired from the labor union and employment practice at Zwerdling, Paul, Kahn & Wolly, P.C. in Washington, D.C. She is a former member of the Council of the Section of Labor and Employment Law.

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1. https://www.americanbar.org/groups/human_rights/. The purpose of the Center for Human Rights is to develop educational programs in the field of human rights; promote a greater understanding of and belief in the importance of human rights; collaborate with other ABA entities in the development and encouragement of human rights efforts, activities and programs; and assist in the development of appropriate ABA policies on human rights issues. The Section on Labor and Employment Law has two liaisons to CHR: Barbara J. D’Aquila, Employer, and Wendy L. Kahn, Union and Employee.


3. Id at 9.

4. Walk Free, 2018 Global Slavery Index: United States, available at https://www.globalslaveryindex.org/2018. This estimate has been criticized as being too high.

Pay Equity
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the highest paying jobs? Are they in the lower levels? . . . That can be another red flag.”

Mitchell was concerned with seeing what the EEOC does with the data, noting that companies “try to do the right thing.” But of course, we are three to four years out from getting any data analysis. Collecting this data is a lot of work, notes Kelly, speaking from the management side.

Don’t employers have to do this anyway? Mostly, yes. Companies often do pay audits, but they are mostly confidential. The EEOC pay reporting data is also confidential but can be published in aggregate as to not reveal any employer’s or employee’s information. The EEOC’s main goal is likely the accountability aspect. When employers know there is a problem, such as a wage gap, they are likely to fix it. That seems to be the case with Danish employers, who in 2006 faced a similar pay reporting requirement according to a January 2019 article from the Harvard Business Review. So, what was the result? The Danish companies saw their pay gap shrink by seven percent and saw an increase in the number of females hired and promoted.

Employers may not want to come out and say, “We have a wage gap issue.” We often do not hear about wage gap issues until news about a gender and/or race class action gets filed against a major company. As Adetunji points out, there is a lot of secrecy around pay. She stated, “If reporting is the problem, employers have to take the initiative and do this on their own . . . actually, make attempts to make sure that they are doing something to shrink the wage gap.” As an attorney at a union, Adetunji is familiar with the amount of paperwork involved with a survey of this kind, so she was not sympathetic to the argument that this was too much work for employers. She further notes that while employers, and perhaps the EEOC, may not get it right or have the perfect data this first time around, there are now systems in place to collect this data.

On the one hand, reporting pay data through Component 2 of the EEO-1 survey may not be the best use of an employer’s time. They have this data collected internally, so why not report it using whatever systems they already have in place. On the other hand, governmental agencies have a special interest in seeing that Title VII is upheld. If they see a pattern that results in a wage gap for protected groups, the EEOC is best positioned to help the company do something about it. It will be interesting to follow what the EEOC decides to do with this data and what, if anything, becomes public.

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Calendar of Events

2020

July 31–August 1
ABA Annual Meeting
Chicago, IL

November 11–14
14th Annual Section of Labor & Employment Law Conference
Beverly Hilton
Los Angeles, CA

2021

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

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

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

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

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

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

November 3–6
15th Annual Section of Labor & Employment Law Conference
Marriott Marquis
Washington, D.C.

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