Labor AND Employment Law

WINTER 2016
VOLUME 44, NUMBER 2
Section of Labor and Employment Law
American Bar Association

Expansion in LGBTQ Employees' Rights and Benefits

By Shirley Lin

Major shifts in gender equality jurisprudence in recent years have led to expanded rights and benefits for LGBTQ employees. Two panels at the 9th Annual Labor and Employment Law Conference focused on the rapidly developing areas of discrimination law, employee benefits, and sexual orientation and gender identity in the workplace.

The scope of civil rights protections for LGBTQ employees under Title VII generated the most discussion in the wake of the Supreme Court's decision in *Obergefell v. Hodges* (2015), and the EEOC's decision in *Baldwin v. Foxx* (EEOC 2015). In *Obergefell*, the Court held that the 14th Amendment guarantees all couples, straight or gay, the fundamental right to marry under a due process analysis, although Justice Kennedy noted that the ruling derived in part from the Equal Protection clause.

According to panelist Lisa J. Banks of Katz, Marshall & Banks, LLP, *Obergefell*'s discussion of the long history of discrimination against gay and lesbian individuals omitted any rational basis or heightened scrutiny analysis, but could set up a later case to determine the applicable level of equal protection analysis. "If that came to pass, certainly any ruling that an LGBT person should be treated as a suspect class would greatly increase the strength of public employees' claims," said Banks.

But the Supreme Court has yet to decide whether discrimination based upon sexual orientation or gender identity is prohibited discrimination "because of sex" under Title VII. According to panelist J. Randall Coffey of Fisher & Phillips LLP, the majority of circuits have taken the position that sexual orientation does not fall within the statute's language as the statute does not expressly prohibit discrimination against LGBTQ individuals. Although the case law remains mixed, a majority of circuit courts also now recognize that it is possible for LGBTQ employees to raise a viable claim of sex stereotyping under the Supreme Court's decision in *Price Waterhouse v. Hopkins* (1989) if they do not conform to preconceived notions of gender.

The EEOC adopted this broader reading of sex-based discrimination, building upon its landmark decision in *Macy v. Holder* (EEOC 2012), in which it upheld the Title VII sex discrimination claims of a transgender employee, with its recent decision in *Baldwin*, which adopted a similarly expansive reading of Title VII as to sexual orientation discrimination. In *Baldwin*, the Commission held that besides a sex-stereotyping theory, a gay employee could also be discriminated against "because of" his sex when his employer takes adverse action because he is not in a relationship with someone of the opposite sex. Alternatively, the EEOC found that a theory of associational discrimination because the employee is "associated with" someone of the same sex fell within the purview of Title VII's prohibition against sex discrimination. Since *Baldwin*, lower

continued on page 11

Jim Obergefell, the named plaintiff in the *Obergefell v. Hodges* Supreme Court case that legalized same-sex marriage nationwide, is backed by supporters of the court's ruling on same-sex marriage on the steps of the Texas Capitol during a rally Monday, June 29, 2015, in Austin, Texas. AP PHOTO

Steven Greenhouse Plenary

By Keith D. Greenberg

AP PHOTO

In a discussion with Judge Bernice B. Donald of the U.S. Court of Appeals for the Sixth Circuit that focused on issues of income inequality and other issues of fairness in the workplace, retired *New York Times* labor reporter Steven Greenhouse addressed a plenary session of the Section of Labor and Employment Law's 9th Annual Conference. Greenhouse expressed a number of controversial positions, on issues of significance to labor, management, employees, and neutrals. His comments generated pointed questions and lively debate from the audience.

A longtime reporter for the *Times* and a New York University Law School graduate with decades of experience reporting on labor and workplace issues, Greenhouse began by contrasting today's organized labor with its 1930s iteration. He noted that, 80 years ago, "the labor movement had much more energy" and represented "a way up" from poverty as unions formed around a mix of workplace and ethnic solidarity and attracted "the best and brightest." Greenhouse contrasted that past with today's labor movement, which he characterized as facing, among other challenges: the public's more limited familiarity with and understanding of unions and their purpose; better treatment of employees by employers in general; and more sophisticated corporate efforts to defeat unionization drives.

He attributed part of organized labor's current challenges to lackluster organizing efforts under AFL-CIO leaders George Meany and Lane Kirkland, opposition by segments of organized labor to affirmative action efforts—which he believes fractured linkages between the labor movement and the civil rights movement—as well as to the PATCO air traffic controllers' strike and the federal government's response, among other seminal events in labor-management relations, and to global trends like globalization. Greenhouse also described a fundamental shift in the public's approach to benefits obtained through collective bargaining—he noted that where non-represented employees used to say, "I wish I had what those union members have. . . [now], people resent union [members] for having it better."

Greenhouse spoke at length about the "Fight for $15" campaign to raise the minimum wage for fast-food workers. He opined that the campaign represented "the most interesting labor effort that's gone on in this country in the past 10 or 20 years," in part because it addressed growing inequality and the increase in low-wage jobs in a way that laid the groundwork for organizing campaigns and generated interest from young activists. He noted, however, that such a significant increase in the minimum wage might result in a loss of jobs, potentially through automation, and might reduce opportunities for new labor market entrants—recent high school graduates, for example—to begin to earn money and build experience in the workplace.

In describing his view that the business community has "torn the social contract," Greenhouse pointed to the general understanding developed between the 1940s and 1960s that prosperous American companies would take steps to ensure that their workers would share in their successes through adequate wages, benefits, and paid leave. He described a number of changes in the 1980s—including increased globalization and competition as well as increased pressure from shareholders to maximize profits and reduce costs—as forcing American businesses to reassess their social contract with American workers as companies struggled to survive. He drew a sharp contrast between these businesses and firms like Uber, which he characterized as an example of the sharing economy and described as "want[ing] nothing to do with the social contract. [Uber] says, don't even discuss that with us. The 400,000 people who are driving for us aren't employees, they are independent contractors, end of story." He indicated that the degree of control exercised by Uber over its drivers, however, suggested an employer-employee relationship and speculated that, if Uber is found to be an employer of its drivers, its $5 billion valuation might decline sharply.

Greenhouse also discussed a recent *New York Times* series regarding the increasing use of binding arbitration in consumer and employment matters, remarking that "most objective observers will say, by and large, [that] arbitration is not as fair to the plaintiff as going to court," as well as that he sees "the push towards arbitration is the pendulum swinging too far" in favor of companies and employers because of the ability to preclude class and collective claims in mandatory arbitration agreements. He acknowledged that labor-management arbitration, in contrast to compulsory consumer and employment arbitration, presents fewer concerns about fairness because of the relatively equal bargaining power of the unions and employers involved in that process and in the selection of the arbitrator, but expressed his belief that even in labor-management disputes, some arbitrators might "try to pitch the ball down the middle" to remain acceptable to parties—an assertion that drew vocal consternation from a number of conference attendees. These comments followed Greenhouse's description of the challenge of guarding against his own bias in his writing. He noted that, for particularly contentious stories, he "would literally count paragraphs" regarding each point of view as he did during coverage of a 1997 strike of United Parcel Service by the International Brotherhood of Teamsters.

Over the course of the session, Greenhouse addressed a number of other subjects, including the costs of pensions for public employees, the upcoming arguments and decision in *Friedrichs v. California Teachers Association* concerning the lawfulness of mandatory dues for public-sector employees in California, the influence of the wealthy on politics, and the increased prevalence of wage theft by employers. He noted that while most of his articles, as well as the majority of those published by the *Times* generally, related to people and organizations acting badly, he would occasionally have an opportunity to write stories about positive developments in the workplace, such as Costco's employment practices and Ernst & Young's work-life balance policies, which proved among his most popular stories. ■

Keith D. Greenberg (*kdgreenberg@laborarbitration.com*) is a labor and employment arbitrator and mediator in North Bethesda, MD. He serves as the neutral Co-Chair of the Section's Webinar Committee and is a member of the ABA Young Lawyers Division.

Supreme Court: 2014–2015 Annual Update

By Courtney Mickman

University of Colorado Law School Professor Scott A. Moss provided attendees at the 9th Annual Labor and Employment Law Conference with a comprehensive analysis of the nine labor and employment law decisions issued by the U.S. Supreme Court in the 2014–2015 Term. Making-up approximately 10 percent of the Court's docket, the labor and employment law questions presented to the Court varied considerably from issues of discrimination to retirement benefits.

In a case that made national headlines, the Court decided *EEOC v. Abercrombie & Fitch Stores, Inc.*, which lowered the standard for the level of knowledge employers must have regarding an employee's need for a religious accommodation. Employers may now be held liable for actions taken without "actual knowledge" and with an unsubstantiated suspicion of an employee's need for a religious accommodation.

The Court in *Young v. United Parcel Service* used the *McDonnell Douglas* framework to hold the denial of a pregnancy accommodation may constitute disparate treatment if non-pregnant employees are provided accommodations that pregnant employees are not. Moss highlighted the ambiguity in the Court's decision regarding how much accommodation of the non-pregnant employee proves discrimination against the pregnant employee.

With respect to the Court's decision in *Mach Mining, LLC v. EEOC*, Moss reported the case "may be the Court's least important employment decision ever." In a factual and procedural situation unlikely to occur ever again, the Court held that once the EEOC has made a finding of reasonable cause that discrimination occurred, the EEOC's statutory obligation to engage in conciliation is negligible.

Moss chastised the Court for potentially creating confusion in *Integrity Staffing Solutions, Inc. v. Busk*, a decision in which the Court held the FLSA does not obligate employers to pay employees for time they undergo, and await to undergo, mandatory security checks because such time is unrelated to "principal activities" of their job. Moss suggested that "by us[ing] language implying that no waiting time is compensable, yet approvingly citing precedent holding some waiting time is compensable," the Court limited the *Busk* decision to its narrow, fact-specific circumstances.

In *Perez v. Mortgage Bankers Association*, a case involving a hybrid issue of wage-hour exemptions and administrative law, the Court held that issuing or repealing non-binding guidance (*i.e.*, opinion letters, administrator interpretations, *etc.*) does not require a notice-and-comment process. Moss said that "by protecting easy agency reversals of major statutory interpretations and protecting those reversals from litigation, *Perez* arguably kept it worthwhile to lobby agencies for favored interpretations, because regulations are hard to change, but easy to alter with interpretations that, under *Perez*, are unchallengeable in court."

The Court reversed the Merit Systems Protection Board in *Dep't of Homeland Security v. MacLean* and held a regulation barring disclosure did not make the disclosure unprotected as a "'disclosure . . . specifically prohibited by law' because the reference to 'law' meant only statutory law.'" In this case, the Department of Homeland Security terminated an employee for whistleblowing regarding the TSA's decision to curtail the use of air marshals. The employee argued his disclosure was protected under the Whistleblower Protection Act, but the Merit Systems Protection Board disagreed, holding that the employee's disclosure was prohibited under a TSA regulation and not protected under the WPA.

Moss characterized the "remarkable sequence of dismissals and filings" in *Kellogg Brown & Root v. U.S. ex rel Carter* as unlikely to recur. He explained, however, that the Court's holding in this case does have import for future False Claim Act lawsuits. Moss reasoned the "'first-to-file' bar, which historically precludes a *qui tam* suit based on the facts underlying a pending action, is not implicated when the prior action is dismissed for failure to prosecute." According to Moss, "at the very least, [the case] assures that a meritorious claim will not be precluded by an ill-conceived complaint that is voluntarily dismissed, or by a complaint a plaintiff simply declines to pursue after filing."

Making-up approximately ten percent of the Court's docket, the labor and employment law questions presented to the Court varied considerably from the issues of discrimination to retirement benefits.

In *Tibble v. Edison Int'l*, the Court decided, for the purposes of a statute of limitations analysis, whether an ERISA fiduciary's bad investment was complete upon purchase, or, given an ERISA fiduciary's ongoing duty of care, a recurring violation. The plaintiff-employees alleged the employer-fiduciary chose the poor investment funds for the 401(k) plan, thereby wasting their retirement assets. The Court reasoned that ERISA fiduciaries have an ongoing duty to monitor investments and to remove imprudent ones and held that, therefore, plaintiffs may challenge ongoing retention of imprudent investments even if they cannot recover for the purchase of the imprudent investments.

Finally, Moss recounted that in *M&G Polymers USA, Inc. v. Tackett* the Court decided whether a collective bargaining agreement's promise of retiree health benefits is presumed permanent or revocable after the expiration of the collective bargaining agreement. In *Tackett*, the collective bargaining agreement promised "lifetime contribution-free health care benefits for retirees." The retirees argued this promise is permanent and did not terminate when the bargaining agreement expired. The Court unanimously held there is no presumption that a collective bargaining agreement's terms extend past the life of the agreement. Moss emphasized, however, that "following *M&G Polymers USA*, a court applying ordinary contract principles could find, in a fact-based, individualized examination of the parties' intent that those parties intended a promise of life-guaranteed retiree benefits."

As Moss's case review and comments show, the Supreme Court had a busy year deciding important labor and employment issues. It will be interesting to see how these decisions impact employers and employees in the lower courts in the years to come. ■

Courtney Mickman (*cmickman@fedattorney.com*) is an associate at Tully Rinckey, PLLC, in Washington, DC. She is a Panel Coordinator for the Section's Law Student Outreach Committee and a member of the ABA Young Lawyers Division.

By Wayne N. Outten

Midwinter Meetings

It is Midwinter Meeting season for our Section. I encourage you to attend and to invite others to attend. See the calendar of meetings at **ambar.org/midwinter**.

Our fifteen Standing Committees are the lifeblood of our Section, and the core activity of most of those Committees is a Midwinter Meeting. For many of our members, attendance at a Midwinter Meeting was their first encounter with the ABA and/or with our Section; that was true for me more than thirty years ago when I attended a meeting of what is now called the Employment Rights and Responsibilities Committee. And for many of our members (including me), the opportunity to attend such meetings is a primary reason for becoming and remaining part of the ABA and the Section.

The raison d'etre of the Midwinter Meetings is the CLE. Committee planners spend many hours selecting interesting topics and qualified presenters; and the speakers and panelists, knowing that expectations are high, work very hard on preparing their presentations. As a result, the CLE is consistently relevant and very well done. Moreover, the panels are balanced to assure that applicable perspectives and interests are represented. The accompanying papers are valuable resources on topics relevant to our practices.

Nonetheless, many of us are drawn to the Midwinter Meetings for reasons beyond the CLE. We get to meet and know lawyers in our field who we otherwise might never encounter—from other parts of the country and with different experiences and perspectives. For those in private practice, the networking can be good for business. But it also can be personally rewarding. For many of us, our best professional friends are colleagues from our "home" committee who we see year after year at the Midwinter Meetings.

So, come and bring others. Encouraging a colleague to attend a Midwinter Meeting may be a good deed for that person—and maybe even a career-changing event. It was for me.

Annual Section Conferences

The 9th Annual Conference in Philadelphia is now history. More than 1,250 lawyers attended, experiencing three plenary sessions and more than 75 breakout sessions. The Thursday night diversity reception at the Barnes Foundation attracted a record turnout of more than 800 guests, who were able to tour one of the most spectacular art collections in the world. The Friday night reception and dinner at the Reading Terminal provided diverse food offerings, great music, and an iconic environment for networking and dancing. You will find articles on some of the CLE programs throughout this edition of the *Newsletter*.

The next Annual Conference will be at the Sheraton Chicago Hotel & Towers from November 9–12, 2016. Given that this will be the Section's 10th Annual Conference and that it will be in the hometown of the ABA (and of then-Chair Gail Golman Holtzman), you won't want to miss out. Hold the dates! The Conference Planning Committee is almost finished selecting the topics and now is working on selecting presenters. Section Secretary-Elect Tom Goldstein, a noted Supreme Court advocate, will present the annual review of Supreme Court cases. Ideas for great social activities are being developed as well.

ABA Annual Meeting

Our Section will present three CLE sessions during the ABA Annual Meeting in San Francisco on August 4, 2016.

Presidential Appointments

ABA President-Elect Linda Klein is seeking nominations for hundreds of committees, commissions, and other entities. For additional information (including suggestions on positions that may be of special interest to our members), check my Chair's Comments in the January 2016 FLASH at **americanbar.org/laborlaw**. Also, you can learn all about the positions and the nomination process at **ambar.org/appointments**. Self-nomination is appropriate and encouraged; please let Section leadership know of your nomination.

On behalf of our Section, I wish you all a healthy and successful 2016. ■

Wayne N. Outten is the founder and managing partner of Outten & Golden LLP, which focuses exclusively on representing employees with workplace issues. The firm has offices in New York, San Francisco, and Chicago. He became Chair of the Section on August 1, 2015.

AMERICAN BAR ASSOCIATION
Section of Labor and Employment Law

Labor and Employment Law (ISSN: 0193-5739) is published four times a year by season, by the Section of Labor and Employment Law of the American Bar Association, 321 North Clark Street, Chicago, Illinois 60654, 312/988-5813. *www.americanbar.org/laborlaw*

Fighting Human Trafficking: A Moral and Financial Imperative

By Darrious Baker

During the presentation entitled "Civil Labor Enforcement, Private Claims and Supply Chain Accountability: What You Can Do to Help Fight Trafficking in Persons," panelists discussed the moral and legal problems associated with human trafficking, as well as ways the United States legal system can help combat it. Panelist Martina Vandenberg of the Human Trafficking Pro Bono Legal Center began the presentation by discussing a *Wall Street Journal* article characterizing human trafficking as an issue of both moral and financial bankruptcy for businesses, using the *Signal International* cases as an example.

Panelist Chandra Bhatnagar of the Equal Employment Opportunity Commission (EEOC) focused on Signal International's trafficking practices. Signal hired an immigration attorney, an American labor broker, and an Indian recruiter to bring 590 men from India to repair oil rigs damaged by Hurricane Katrina. The men were promised well-paying jobs and an opportunity to permanently live in America with their families. Some of the workers had paid as much as $25,000 to come to America. However, when they arrived they learned they were on temporary, non-immigrant visas, which expired after ten months and were renewable only twice for a maximum of 30 months.

Signal used spies to discover the workers had been meeting with community leaders and lawyers. Signal threatened to send the workers back to India if any of the workers filed a lawsuit. Despite these threats the workers eventually filed lawsuits. The first lawsuit, *David v. Signal International LLC* (E.D. La.), involved five of the workers and resulted in a $14.1 million jury verdict in early 2015. The verdict caused Signal to agree to a $20 million global settlement on behalf of all of the workers who filed claims. Signal subsequently filed for Chapter 11 bankruptcy.

In response to Bhatnagar's summary, Vandenberg said, "We have a tendency to think of supply chains as over there. However, many of the labor supply issues are right here and involve temporary visas. . . . Hopefully, the *Signal* case not only sent a message to the business community but also [to] the plaintiff's bar that these cases are winnable."

Vandenberg explained that Section 18 U.S.C. 159 gives human-trafficking victims a right to civil causes of action, which may be more effective than criminal cases in helping trafficked workers given the lower burden of proof. She stated that, as of the time of the presentation, 153 federal civil lawsuits have been filed in human trafficking cases, with 89 of those cases naming corporate defendants. Most cases were brought by *pro bono* defense attorneys. Awards typically are in seven figures. For example, in *Doe v. Howard,* a worker received $3.3 million in damages after she was held four months and repeatedly sexually abused.

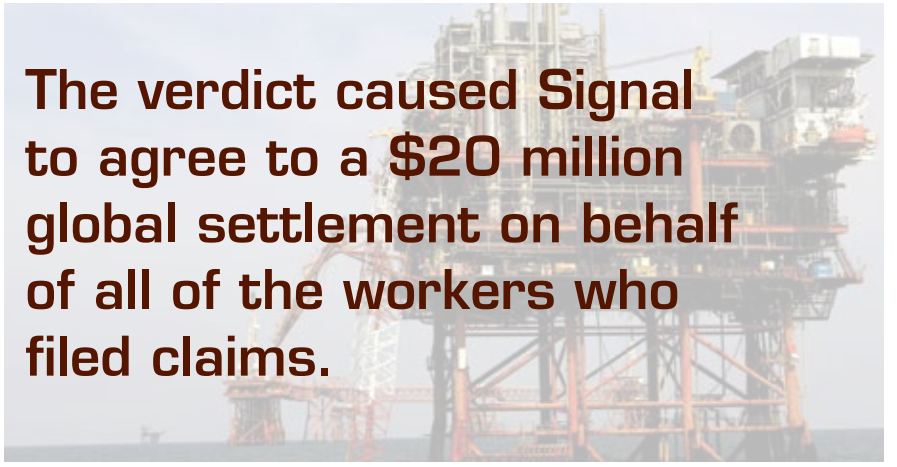
Vandenberg further explained that applicable criminal laws were amended in 2008 to include extraterritorial jurisdiction, allowing crimes that happen abroad to be prosecuted in the United States. She said that labor recruiters are most often the defendants in such criminal actions.

The panelists discussed how the U.S. government can help fight human trafficking. Panelist Laura Moskowitz of the U.S. Department of Labor said that the agency does not have jurisdiction over human trafficking, but it has used the Fair Labor Standards Act as a way to fight it, focusing primarily on employers who have vulnerable agriculture and janitorial workers. According to Bhatnagar, the EEOC included human trafficking issues in its 2013–2016 Strategic Plan.

Vandenberg described other resources available to help victims, including the Human Trafficking Pro Bono Center's resources. The Center has a password-protected database that includes every human trafficking-related civil action, which is available to *pro bono* and plaintiff attorneys representing victims. The Center is about to partner with Thompson Reuters to launch a public database that will include every human trafficking indictment since 2009. The Center also offers consultations for *pro bono* attorneys.

Panelist E. Christopher Johnson, who is the Chair of the ABA Business Law Section's Task Force on Implementation of the ABA Model Principles on Labor Trafficking and Child Labor and the CEO and Co-Founder of the Center for Justice, Rights and Dignity, and a retired Vice President and General Counsel for General Motors North America, explained how the ABA is helping. For example, the Business Law Section developed model policies and principles against human trafficking consistent with existing human trafficking disclosure laws. The Section's UCC Articles 1 and 2 Committees created working groups to develop provisions allowing companies to incorporate the model policies and principles. He explained that companies are beginning to see how human trafficking can impact their businesses and are adopting the model policies and principles to ensure compliance with trafficking disclosure laws.

Panelist Jonathan Grode of Green and Spiegel LLC, in Philadelphia concluded the panel by emphasizing that there is a united movement across all sectors to fight the common harm of human trafficking. Grode remarked how difficult it is to reach a consensus across all constituencies in the ABA Section of Labor and Employment Law on most labor and employment law issues, but that on this issue there is consensus against the atrocities of human trafficking as well as support for the various laws and enforcement mechanisms against it. ■



The verdict caused Signal to agree to a $20 million global settlement on behalf of all of the workers who filed claims.

AP PHOTO

Darrious Baker (*bakerd@dhec.sc.gov*) is the Director of Talent Management for South Carolina Department of Health and Environmental Control in Columbia, South Carolina. Darrious serves as the Employer Co-Chair for the Section's Outreach to the Young Lawyers Division. He is a member of the ABA Young Lawyers Division.

Pro Bono Award to Attorneys Working to Free Labor Activists

By Elana R. Hollo

In recognition of their *pro bono* work on behalf of three Vietnamese labor activists, Gregory K. McGillivary and T. Reid Coploff were awarded the Section's 2015 Frances Perkins Award for *pro bono* work. The legal issue on which McGillivary and Coploff worked began in January 2010, when three Vietnamese labor activists wrote and circulated a list of demands on behalf of workers who were striking at the My Phong shoe factory because of managers' arbitrary pay policies and abusive behavior. Although management's initial response was to seal the workers inside the factory, local and regional officials became involved and negotiated a successful compromise. Following the peaceful conclusion of the strike, authorities arrested the three activists, Mr. Doan, Ms. Do, and Mr. Nguyen. Mr. Doan is a founding member of the United Farmers and Workers Organization, an independent Vietnamese labor union.

Reid Coploff and Gregory McGillivary accept the 2015 Frances Perkins Public Service Award from Bill Bush, Co-Chair of the Section's Pro Bono Committee.

Just ten days after they were indicted on charges of disrupting national security, they were tried jointly and convicted. The trio's trial was plagued with violations of fair trial standards, according to Freedom Now, a Washington, D.C.-based non-profit, non-governmental, and non-partisan organization that works to free individual prisoners of conscience through focused legal, political, and public relations advocacy efforts. Prisoners of conscience are, by Freedom Now standards, persons detained for their political, religious, or other beliefs, or because of their ethnic origin, sex, sexual orientation, color, language, national or social origin, economic status, birth, or other status—who have not used or advocated violence. Freedom Now, which has been working on behalf of Doan, Do, and Nguyen for a number of years, maintains that the three did not have access to legal counsel during their closed-door trial. In addition, the government prevented them from speaking in their own defense during the proceedings. Although their families managed to retain a lawyer for their appeal, their convictions were upheld during another closed-door proceeding. Doan and Do were sentenced to seven years in prison, while Nguyen was sentenced to nine. While in prison, the three have been subjected to serious mistreatment, including long periods of solitary confinement and multiple, severe beatings, according to documents filed in 2013 by Freedom Now with the Office of the High Commissioner for Human Rights.

In the summer of 2012, McGillivary and Coploff began serving as *pro bono* co-counsel with Freedom Now on behalf of Doan, Nguyen, and Do. The two established international precedent when the United Nations Working Group on Arbitrary Detention (UNWGAD) issued a 2013 decision finding for the first time that freedom of association in organizing workers into an independent union is considered an international human right. Vietnam is a totalitarian state, as only one union is recognized by the State, said McGillivary.

In February 2014, eleven Congressmen sent a letter to His Excellency Truong Tan Sang, President of the Socialist Republic of Vietnam, expressing "serious concern about the imprisonment and mistreatment of independent labor activists in Vietnam," including Doan, Nguyen, and Do. The Congressmen noted that although UNWGAD found their imprisonment a violation of international law, the three remained in government custody.

On June 26, 2014, Ms. Do was released early from prison following an unconditional pardon, and in December of that year McGillivary and Coploff met her at the State Department. As part of their ongoing representation of Doan and Nguyen, who remain imprisoned, McGillivary and Coploff met with representatives of the Vietnam government at the Vietnamese embassy in Washington, D.C., on November 4, 2015, and met with the staff of the House Ways and Means Committee on November 9, 2015.

In accepting the award on behalf of Freedom Now, McGillivary said this case is the first labor case Freedom Now has pursued, and the only human rights case his firm has ever taken. McGillivary is a partner and Coploff is an associate at Woodley & McGillivary LLP, a union-side labor and employment firm based in Washington, DC. McGillivary also serves as a Board member of Freedom Now helping decide which cases the organization will accept and assisting in the overall management of the organization. For further information, vist www.freedom-now.org. ■

Elana R. Hollo (*elana.hollo@nlrb.gov*) is a Senior Field Attorney at the NLRB in Philadelphia. She serves as a Co-Chair of the Section's Federal Law Clerk Training Program. The views expressed in this article are those of the author and do not reflect the views of the NLRB.

New NLRB Election Rules: Data on the First Six Months

By Marie Duarte

The National Labor Relations Board's (NLRB) new election rules have been labeled by many employer practitioners as an "ambush" and hailed by union practitioners as long overdue. Speaking at the 9th Annual Labor and Employment Law Conference, Deputy General Counsel of the NLRB Jennifer Abruzzo addressed the impact of the new representation case ("R-Case") rules in the first six months since their implementation.

Based on issues that the NLRB Regional Offices are seeing under the new rules, Abruzzo recommended that practitioners:

- Ensure that election petitions contain all relevant information prior to filing. Abruzzo explained, "We are getting petitions that are not completely filled out. In particular, petitioners are not putting down the date, time, place, and method. Please make sure that you are doing that."
- File and serve all necessary petition-related documents, including the petition, the description of the Board's representation case procedures form, the statement of position form, a cert[ificate] of service. Abruzzo noted that many petition-related filings have been incomplete.
- Comply with notice-posting requirements. Abruzzo explained that employers must post a notice of petition for election within two business days after service of the notice of hearing. She further stated that if employers customarily communicate with their employees electronically, they also must disseminate the notice posting electronically. Abruzzo cautioned that the consequences for failing to post and/or appropriately disseminate a notice of election petition are severe, including possibly the setting aside of an election.
- Complete the statement of position appropriately. Abruzzo reminded practitioners that the statement of position must provide the basis for any contention that the proposed unit is not an appropriate unit, explaining in detail what other job classifications or employee groupings should be included or excluded. She said the statement of position also must include any voter-eligibility issues that practitioners wish to raise. She cautioned that if practitioners fail to timely provide the statement of position or fail to furnish an alphabetized electronic list of employees, "you are precluded from contesting the appropriateness of the unit, at any time."

She then covered statistics associated with R-Cases under the new rules, stating:

- There are more "RC petitions," which are petitions seeking certification of a union, and fewer "RD petitions," which are petitions seeking decertification of a union, for the same time period in 2015, as compared to 2014.
- There are similar breakdowns in percentages won-and-lost for both RC and RD petitions in 2015, as compared to 2014.
- Under the new rules, pre-election hearings are typically taking place within ten days of the filing of a petition.
- Election agreements have increased since the new rules—approximately 94 percent of petitions have stipulated election agreements.
- Elections are taking place an average of 24 days after filing of the petition under the new rules, as opposed to 38 days after filing under the old rules.
- As of the date of the presentation, the Regions had not received any petitions with electronic signature showings of interest.

Craig Becker, Co-General Counsel to the AFL-CIO and a former NLRB member, supports the new election rules. To study the impact of the rules on election petitions, Becker read all of the Regions' Decisions and Directions of Elections that have issued since the inception of the new rules. Becker said that, based on this review, he believes the shorter time to an election is partially the result of good management by regions, and not entirely because of the new rules. He explained that "decisions are being issued more quickly after the close of the hearing." Becker acknowledged elections also are occurring more quickly because of what he characterized as the appropriate limiting of issues heard at pre-election hearings. He argued that "the only statutory purpose of the hearing is to determine whether there is a question concerning representation that should be resolved by an election, not to resolve all the disputes which might arise, such as eligibility of voters during the election."

Becker expressed optimism that, although the new rules have not changed the outcomes of elections, the shortened time to an election and the increased predictability of election procedures may make filing a petition a more viable way of exercising workers' rights because election procedures have become less costly and more predictable. He said this could lead to an increased number of petitions.

Elections are taking place an average of 24 days after filing of the petition under the new rules, as opposes to 38 days after filing under the old rules.

Joseph Torres of Winston & Strawn LLP, in Chicago did not share Becker's enthusiasm for the new rules. He argued that "the alarming consequences of these rules cannot be overstated" and cautioned practitioners that they should not be persuaded that the new rules have not brought about material changes in the outcomes of elections. He believes that "the current statistics do not explain the full impact of the rules, [and] six months of data is not enough to show the impact of the rules on particular industries or in particular regions of the country."

Torres advised employers to begin to think about their positions and communications to employees before being served with an election petition, saying, "you have an unlimited amount of time to communicate about your views prior to an election petition being filed" but a very short period of time after one is filed. Torres emphasized that the new rules create the reality for employers that they must begin to address their stance on unionization before a petition is filed. ■

Marie Duarte (*duarte@workerlaw.com*) is an associate at Schwerin Campbell Barnard Iglitzin & Lavitt LLP, in Seattle, WA. She is a member of the ABA Young Lawyers Division. She is the Young Lawyers Division Fellow to the Section's Development of the Law under the NRLA Committee.

High Stakes in Worker Misclassification

By Saranicole A. Duaban

Misclassification of workers remains a "hot button" issue in employment law this year. At the 9th Annual Labor and Employment Law Conference, panelists discussed the state of the case law on misclassification, specifically the economic-realities test used to determine whether a worker is misclassified under the Fair Labor Standards Act.

The panelists focused on the significant factors that have comprised the economic-realities test for the last thirty years: the degree of control over the manner in which work is performed; the opportunity for profit or loss; the investment in tools or equipment; the special skill required; the degree of permanency and duration of the working relationship; and the extent to which the services rendered are an integral part of the employer's business. Harold Lichten of Lichten & Liss-Riordan, P.C., in Boston described the test as being "so garbled that the same case could be put before two different judges and come up a different way." He argued the test is in need of "significant refinement because it was made in an age where people worked with their hands and tools."

Chief Counsel Employment and Labor Law for International Paper Company Kevin Mencke expressed similar sentiments, saying "employers . . . are more concerned than ever before" about misclassification issues. He commented that employers are not only worried about more traditional wage-hour and anti-discrimination liability issues associated with misclassification, but also about the upcoming "sledgehammer penalty" under the Affordable Care Act. The Act requires, that by January 1, 2016, 95 percent of employees must be covered by health insurance. Mencke gave an example that if a company has 30,000 workers and 1,500 are misclassified and not receiving health insurance, then the company could be hit with a $60 million penalty.

Rick Warren of Ford Harrison LLP, in Atlanta echoed Mencke's concern, noting that many of his clients are franchisors worried about whether they are joint employers with their franchisees. He said, "An entire business model is concerned about misclassification and joint employer issues."

The U.S. Department of Labor (DOL) is not doing anything to alleviate employers' concerns, as it recently has focused on misclassification issues. Kathy Bissell, the DOL's Deputy Solicitor for Regional Enforcement, stated that "there has been an emphasis [in the Department] that workers who are employees should be classified as employees."

She pointed to the July 15, 2015, DOL administrative interpretation as a "comprehensive guide on what the DOL is thinking" in this enforcement area, highlighting the interpretation's basic framework:

- Putting the discussion of who is an independent contractor and who is an employee in the context of the history of the FLSA, namely that the definition of employee under the FLSA means "to suffer or permit to work" and that this definition should overlay the economic-realities test;
- Recognizing that the economic-realities test is the broadest test for determining whether someone is an independent contractor or employee;
- Concluding ultimately whether *in reality* someone is an independent contractor or employee.

In response, Warren noted the DOL interpretation is not binding on the courts.

The panelists next discussed common issues in misclassification cases and their strategies and arguments for dealing with them. Moderator Anna Prakash of Nichols Kaster PLLP, in Minneapolis addressed the issue of whether a contract or agreement is dispositive in misclassification cases, saying she is surprised when management attorneys produce an executed contract and believe there is no dispute. Admitting that a contract is not dispositive, Warren pointed out that contracts are useful in discerning the structure of the working relationship. He said the nature of the relationship can be vital in determining whether someone is an employee or independent contractor. Lichten agreed with Prakash that contracts are not dispositive, but noted judges and juries often find contracts persuasive.

Turning to the common issue of tax filings, the panelists pointed to a trend of employers asking contractors to incorporate and form their own limited liability companies. Lichten reiterated that incorporation is only one factor in the independent contractor determination. He has been unpersuaded in cases where the purported employer makes incorporation a requirement for the performance of work. To drive this point home, Bissell summarized a DOL investigation in Utah where construction workers were required to form LLCs. The dispositive fact in the investigation was the company outbidding other companies because it was not properly paying the construction workers. From this, the DOL concluded the workers should have been classified as employees. Bissell said the DOL "wants to make sure that businesses are playing by the rules and other businesses are not disadvantaged" and that it is indicative of misclassification when an employer is using corporate structure to gain an unfair business advantage.

The panelists next addressed non-compete agreements. Lichten stated, "plaintiff attorneys love non-competes" because such provisions are highly indicative of an employment relationship. Warren cautioned, however, that non-compete provisions in contracts are not necessarily dispositive, arguing that non-compete provisions are highly fact-specific. He said that whether such provisions truly show an employment relationship depends on the type of business and the breadth of the non-competition provision. He believes employers can legitimately include non-solicitation or confidentiality clauses in independent contractors' contracts.

The panelists concluded by reminding the audience to be aware of state laws on worker classification. Some states have different tests to determine whether a worker is an independent contractor, such as Massachusetts, which has a more expansive test than the economic-realities test. The panelists further cautioned that attorneys need to be aware of additional, but related, state law causes of action such as claims under payroll deduction statutes. ■

Saranicole A. Duaban (*sduaban@gmail.com*) is an associate at Stoll, Glickman & Bellina LLP, in Brooklyn, NY. She is a member of the ABA Young Lawyers Division.

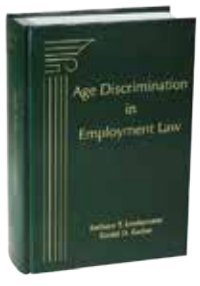
LEL: Kudos to Young Lawyers

Most Articles in this issue cover programs presented at the Section's 9th Annual Labor and Employment Law Conference in Philadelphia in November 2015. Many were written by new lawyers from the ABA's Young Lawyers Division. The Section encourages new lawyers to author articles in future *LEL* issues. If you are interested, please contact Sarah Fask, sfask@littler.com or Molly Gabel, molly.gabel@alaskaair.com.

Bloomberg BNA

AMERICAN BAR ASSOCIATION
Section of
Labor and Employment Law

GET THESE MAIN VOLUMES AND NEW SUPPLEMENTS AT EXCLUSIVE SECTION MEMBER DISCOUNT PRICES!



NEW EDITION!

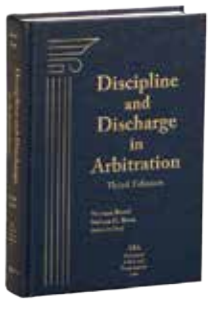
AGE DISCRIMINATION IN EMPLOYMENT LAW, SECOND EDITION

By **Barbara T. Lindemann** and **David D. Kadue; Eric W. Iskra** and **Eric E. Kinder,** Editors-in-Chief; **Federal Labor Standards Legislation Committee**

This treatise is the practitioner's complete resource for bringing and defending age discrimination claims. It covers essential information such as who is protected under the Age Discrimination in Employment Act, hiring, promotion, reductions in force, retaliation, litigation strategies, the evolving role of the EEOC and EEOC litigation, the increasing role of arbitrations in resolving age discrimination disputes, analysis of the latest decisions and regulations on the "reasonable factor other than age" defense, and more.

Visit www.bna.com/bnabooks/abale for more detailed information.

2015/1,628 pp./Hardcover/ISBN 978-1-61746-675-5
Order #2675/$425.00/**SECTION MEMBER PRICE: $318.75**



NEW EDITION!

DISCIPLINE AND DISCHARGE IN ARBITRATION, THIRD EDITION

Norman Brand and **Melissa H. Biren**, Editors-in-Chief; **Committee on ADR in Labor and Employment Law**

Now in its **Third Edition**, this treatise analyzes the standards and rationales used by arbitrators in rendering their awards in a wide variety of discipline cases, including those involving absenteeism, insubordination, theft, falsification, off-duty behavior, negligence on the job, substance abuse, fighting, and off-duty conduct. Reflecting the changing world in which we live and work, the **Third Edition** also devotes an entire chapter to the developing area of employee use of social media, an area in which the expectations of privacy are changing and where speech traditionally regarded as "off duty" may raise workplace concerns.

Visit www.bna.com/bnabooks/abale for more detailed information.

2015/905 pp./Hardcover/ISBN 978-1-61746-463-8
Order #2463/$250.00/**SECTION MEMBER PRICE: $187.50**

NEW SUPPLEMENT!

EMPLOYEE BENEFITS LAW, THIRD EDITION, AND 2015 CUMULATIVE SUPPLEMENT

Jeffrey Lewis, Myron D. Rumeld, and **Ivelisse Berio LeBeau,** Co-Chairs, Board of Senior Editors; **Ivelisse Berio LeBeau,** Editor-in-Chief (2015 Cumulative Supplement)**; Employee Benefits Committee**

Employee Benefits Law, Third Edition offers detailed, annotated coverage of ERISA Titles I and IV; rules of tax qualification, deductibility, and other key tax issues; preemption; evidentiary issues surrounding benefit claims; and effects of sexual orientation and veteran status on benefits. It also features a thorough discussion of the law governing breach of fiduciary duty and prohibited transaction claims, including commonly litigated areas such as employer securities, service provider fees, and fiduciary misrepresentations.

The **2015 Cumulative Supplement** updates the main volume with discussion of the Multiemployer Pension Reform Act of 2014, including its effect on multiemployer defined benefit plan funding requirements, new standards allowing for benefit cutbacks for deeply troubled plans, and disclosure and notice obligations.

Visit www.bna.com/bnabooks/abale for more detailed information.

2012/1,942 pp./Hardcover /ISBN 978-1-57018-936-4
Order #1936/$695.00/SECTION MEMBER PRICE: $521.25

2015 Cumulative Supplement alone/406 pp. Softcover
ISBN 978-1-61746-683-0
Order #2683/$335.00/SECTION MEMBER PRICE: $134.00

NEW EDITION!

THE FAIR LABOR STANDARDS ACT, THIRD EDITION

Ellen C. Kearns, Aaron D. Kaufmann, and **Dennis M. McClelland,** Editors-in-Chief; **Federal Labor Standards Legislation Committee**

Now in its **Third Edition**, and with a reorganized chapter structure, **The Fair Labor Standards Act** is an essential tool for helping practitioners understand FLSA coverage and exemptions. With this resource, counsel can make informed decisions about why and how to proceed on a particular course for clients. Highlights of the new edition include an updated analysis of the evolving jurisprudence on arbitration of FLSA claims, including arbitration of collective actions, expanded analysis of the Section 7(i) retail sales or service establishment exemption, new discussion on FLSA coverage of interns, and a completely rewritten chapter analyzing independent contractor and joint employer issues.

Visit www.bna.com/bnabooks/abale for more detailed information.

2015/2 Volumes/2,848 pp./Hardcover/ISBN 978-1-61746-687-8
Order #2687/$755.00/SECTION MEMBER PRICE: $566.25

For more information call 800.960.1220 • To order on the Web: www.bna.com/bnabooks/abale

In the Eye of the Visa Holder

Obtaining Work Permission in the United States for Artists

By Jonathan A. Grode

David Eustace, a Canadian national, always dreamed of traveling south of the border in the hopes of finding a large audience where his modern art would resonate and allow his passion to become a career. But, unlike artists born in the United States, the development of artistic talent and recognition is not allowed to happen organically. It must be pragmatic and planned, which is sometimes difficult for the creative mind. Understanding how immigration law can be used to achieve a goal like David's is an important component of representing the international artist.

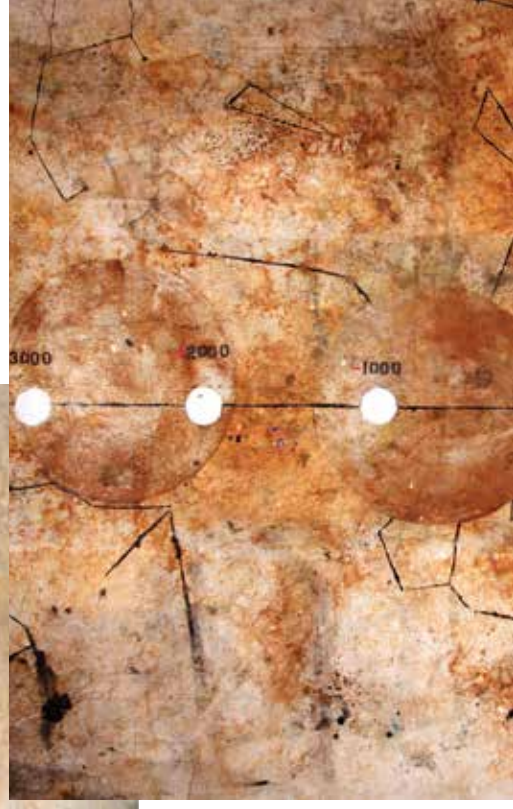
For David, who started his professional career as a copywriter, the decision to become a visual artist was a conscious one.

Ultimately, he was able to amass enough savings to fulfill this objective. His first stop for inspiration was New York City. But, how to do it legally became another stumbling block.

Most visa classifications under United States Immigration require sponsorship. Whether it is a family member or an employer, the foreign national needs someone to act as a petitioner on his or her behalf in order to obtain an immigration benefit. For artists, especially visual artists like David, the industry in and of itself does not lend to standard employment arrangements. It is not as simple as obtaining an H-1B visa for a professional position requiring a degree in a specific field of endeavor nor as pervasive as an international intracompany transferee moving from one entity to another (L visa classification). The solo and sometimes solitary life of an artist centers on self-production and at least until fame befalls the creator, self-promotion.

Fortunately, United States immigration law provides an avenue for an artist to not only live in the United States after developing an international reputation, but also a means of developing that reputation. One of the most common misconceptions of the visitor visa classification (B-1/B-2) is that it is only possible to use it for pleasure (*e.g.* vacations) and for business meetings (*e.g.* attending a conference). However, as cited in the Foreign Affairs Manual (*see* 9 FAM 402.2-5), there are additional uses for the visitor visa classification.

For the artist, the type of the B-1 visa that should be considered is under the independent research provision. While the foreign national using this provision must have sufficient funds to support his or her trip to the United States and must possess the intent to depart the United States, it is possible to gain permission to spend up to six months in the United States pursuing artistic ideas and inspiration.



It was this provision of the visitor classification that allowed David to enter the United States and start his artistic career in earnest. Upon discovering the Gowanus Canal—a post-industrial runoff that flows through Brooklyn, David was struck with inspiration. This find led to a series of works that gained critical acclaim and served as the touchstone for his strong reputation among the modern-art community.

After his six month stay was over, David returned to Canada and secured an agent in the United States. This agent served as his sponsor and David was able to pursue an O-1 visa as an artist of extraordinary ability. Again, the title of the visa classification is misleading. It is common to assume that the O-1 classification is reserved for those that have risen to the very top of their field of endeavor. While this is true for those engaged in business, science, and athletics, the regulations found at 8 CFR § 214.2(o) allow for a lower standard for those in the arts.

An artist seeking O-1 classification still needs to meet a number of criteria in order to obtain the classification, such as being able to show recognition through print media. However, as the value of art is a matter of interpretation more so than any other area of professional endeavor, obtaining O-1 classification is certainly an achievable goal for those who are prominent in smaller artistic circles. Once secured, O-1 classification allows for admission for up to three years and is renewable indefinitely in one-year increments. Understanding and using immigration law to his advantage has changed David's life. He states:

Being in the States has not just afforded me great opportunities to work in diverse and interesting places with terrifically talented people but also been a significant influence on my artistic practice aka the way I think about and make art. It sounds incredibly clichéd but it really feels like the land of the free—for me, I've always felt a kind of tacit social support for whatever crazy, bad ideas I'd like to try out, this unspoken permission to fail miserably, on your own terms, in pursuit of personal excellence is just in the air here . . .

Ultimately, it is refreshing to see that our immigration laws continue to promote the arts and allow for those with the creative spirit to rise and thrive in the United States. While so much attention is paid to the problems facing undocumented workers and the shortage of H-1B visas, it is nice to know that art still lies in the eye of the visa holder. ■

Jonathan A. Grode is a partner at Green and Spiegel LLC, in Philadelphia, PA.

LGBTQ

continued from page 1

courts have continued to reach inconsistent conclusions as to whether discrimination based upon sexual orientation is cognizable as sex discrimination. Panelist Jeanne Goldberg, EEOC Senior Attorney Advisor, noted that the Seventh Circuit *en banc* revised a panel opinion in *Muhammad v. Caterpillar* (2014) to remove a statement that Title VII categorically does not protect against sexual-orientation discrimination or related retaliation and predicted other circuits may likely revisit their holdings in the near future.

Labor unions' collective bargaining agreements often provide another source of protection, as panelist Manuel Quintos-Pozos of Deats Durst Owen & Levy, PLLC, pointed out, because health and leave benefits may be made available to same-sex partners or adopted children pursuant to bargained provisions on behalf of LGBTQ members. In addition, approximately 200,000 federal contractors and their employees—comprising about 25 percent of the U.S. workforce—are now subject to Obama Executive Order 13672, which amended two earlier executive orders to expressly prohibit sexual orientation and gender identity discrimination by those employers.

Momentum from the Supreme Court's decision in *United States v. Windsor* (2013), which struck down as unconstitutional Section 3 of the Defense of Marriage Act, continued through this Term's *Obergefell* decision, which established a nationwide right to marriage equality and eliminated discrepancies between federal and state tax requirements for married same-sex couples. Both decisions yielded major changes in employee benefits law at the federal level, including ERISA and taxation.

Beginning September 16, 2013, the IRS determined that it would recognize marriages under the "ceremony rule," in which marriages that were lawful when performed would be recognized. The DOL followed suit on March 27, 2015, by adapting that rule to Family and Medical Leave Act eligibility for spouses in same-sex marriages.

In the employee benefits context, a court recently held in *Cozen O'Connor P.C. v. Tobits* (E.D. Pa. 2013), that a widow of a same-sex spouse who passed away before *Windsor* could still retroactively benefit from its holding even though the pension plan in question referenced the law of a state that did not recognize same-sex marriages. Panelist Teresa Renaker of Renaker Hasselman LLP, who litigated *Tobits*, observed that retroactivity issues are rarely litigated and are often directly resolved.

The Affordable Care Act of 2010 broke new ground for transgender employees by prohibiting, for the first time in federal law, sex discrimination in health care, including the health insurance marketplace. Under a proposed rule implementing Section 1557, health programs or activities that receive federal funding cannot discriminate on the basis of sex, *inter alia*. Thus, coverage for medically appropriate services must be provided on the same terms regardless of the individual's "sex assigned at birth, gender identity, or recorded gender." Panelist AJ Pearlman of the Department of Health and Human Services Office for Civil Rights emphasized that categorical exclusions of services related to gender transition would be "considered facially discriminatory." ■

Shirley Lin (*SL@outtengolden.com*) is an associate at Outten & Golden LLP, in New York City. She is a member of the Section's Employment Rights and Responsibilities Committee and a member of the ABA Young Lawyers Division.

Labor AND Employment Law

Section of Labor and Employment Law
American Bar Association
321 North Clark Street
Chicago, Illinois 60654

WINTER 2016, VOL.44, NO. 2

AMERICAN BAR ASSOCIATION
Section of
Labor and Employment Law

Special Post-Section Conference Edition

Calendar of Events

March 9–11
Railway and Airline Labor Law Committee Midwinter Meeting
St. Pete Beach, FL

March 10–12
Workers' Compensation Committee Midwinter Seminar and Conference
Cosponsored by the Tort, Trial and Insurance Practice Section
New Orleans, LA

March 15–19
Employment Rights and Responsibilities Committee Midwinter Meeting
New Orleans, LA

March 17–19
Ethics and Professional Responsibility Committee Midwinter Meeting
New Orleans, LA

March 30 – April 2
National Conference on Equal Employment Opportunity Law
Presented by the Equal Employment Opportunity Committee
Austin, TX

April 6–8
National Symposium on Technology in Labor and Employment Law
Presented by the Technology in the Practice and Workplace Committee
Washington, DC

May 1–5
International Labor and Employment Law Committee Midyear Meeting
Hong Kong

August 5–6
ABA Annual Meeting
San Francisco, CA

November 9–12, 2016
CHICAGO
10th Annual Labor and Employment Law Conference

November 9–12
10th Annual Labor and Employment Law Conference
Chicago, IL

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