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The Editor’s Page

“I don’t think they even offered employment law when I was in law school.” This is a common response I receive from labor and employment attorneys when I talk about my law school experience. Practicing attorneys are particularly impressed with the opportunity I and my fellow Journal members have had to gain knowledge about labor and employment law while still in law school through our participation in this Journal.

Our staff members, all second-year law students, work tirelessly to ensure the accuracy of the work that we print. This year, Arielle Dagensundsahl, Camille Doom, Luke Gagnon, Samuel Jackson, Katlyn Lynch, Christopher Ortega, Mark Rosenfeld, Marc J. Shinn-Krantz, and Molly Vo have done an excellent job of reading every source cited in every article. For you, our readers, this produces trustworthy factual statements that you can rely on in your practice. For our staff members, it gives them the opportunity to read foundational National Labor Relations Board decisions or cutting-edge studies on non-compete clauses.

Our editors also gain valuable expertise in labor and employment law, while simultaneously playing an important role in producing a professional publication. The note and article editors, Ethan Landy and Alex Schoephoerster, review all of the papers presented at the annual ABA Section of Labor and Employment Law Conference and many of the Section committees’ midwinter conferences. Our managing editors, Erik Bal, Kent Dolphay, and Armeen F. Mistry, ensure the substantive and technical accuracy of our articles and occasionally have to “reverse research” a statement to add missing footnotes. Finally, the lead managing editor, Andrew C. Kuettel, and I read and edit every article published at least four or five times. Each of us will complete our time working for this Journal not just with the expected deep knowledge of the Bluebook, but with a firm grasp of and appreciation for the field of labor and employment law. Law school classes in general, and academic publications specifically, often focus on the abstract. Being Journal staff members affords us a unique opportunity to participate in an enterprise providing useful articles for practicing attorneys, giving us valuable practical knowledge as we begin our legal careers.

The broad range of articles in this issue address topics straight from the headlines, but with content that will explain and explore those headlines.

The annual Supreme Court review by the ABA Section of Labor and Employment Law Secretary opens this issue. In Unusual Unanimity and the Ongoing Debate on the Meaning of Words: The Labor and Employment Decisions from the Supreme Court’s 2013–14 Term, Professor Michael Z. Green of Texas A&M University School of Law
analyzes the labor and employment implications of select decisions from the Supreme Court’s 2013–14 term. Professor Green examines the Court’s perceived unanimity, as well as the trend of key cases turning on the meaning of individual words.

In *Immigration Action: The Civil Litigation Side of Employing Foreign Nationals*, Brian S. Green, Jonathan A. Grode, and Alex Varghese draw on their experience as immigration attorneys to identify potential dangers for employers arising from the increasing use of civil litigation to redress employers’ immigration violations. The authors provide examples of recent cases, advice for employers seeking to prevent violations, and suggestions for plaintiffs’ attorneys initiating litigation.

David B. Schwartz, senior counsel at the National Labor Relations Board, discusses the relevance of the Supreme Court’s *Hobby Lobby* decision in relation to the National Labor Relations Act (NLRA) in *The NLRA’s Religious Exemption in a Post-Hobby Lobby World: Current Status, Future Difficulties, and a Proposed Solution*. Writing as an individual and not on behalf of the Board, Mr. Schwartz reviews the broad issue of employment law in religious settings and the development of the NLRA’s religious exemption. He suggests a standard for application of the Board’s religious exemption designed to achieve an appropriate balance of the competing interests.

In *Developing Trends in Non-Compete Agreements and Other Restrictive Covenants*, two management attorneys and an attorney who represents employees discuss current litigation on diverse aspects of restrictive covenants. Angie Davis, Eric D. Reicin, and Marisa Warren identify emerging issues, including the employee choice doctrine and forfeiture, choice-of-law, non-poaching agreements, and enforcement of restrictive covenants outside the United States.

Labor attorney Evan J. Spelfogel, in *Permissible Coordinated Action by Employers in Labor Negotiations*, explains the actions, consistent with the NLRA and federal antitrust laws, that companies may take when engaged in coordinated bargaining with a union and the ways those companies may protect their interests during a strike.

Each year, the ABA Section of Labor and Employment Law and the College of Labor and Employment Lawyers conduct a national law student writing competition. The winning article this year is *Evolving Causation Standards and Their Post-Nassar Application to Retaliation Claims Under the False Claims Act*, by Andrew M. Witko, a 2014 graduate of the University of Maryland’s Francis King Carey School of Law. He discusses the appropriate causation standard to prove an impermissible relationship between protected actions and adverse employment action in False Claims Act retaliation claims. The second place winner was Jody Lopez-Jacobs, a 2015 graduate of Beasley School of Law at Temple University, for his article *Who Owns the Tips? Chevron and Tip Ownership Under*
the FLSA. His article can be found at http://laborandemploymentcollege.org/pdf/Jody%20Lopez-Jacobs%20paper.pdf. Third place was awarded to Timothy Farmer from the University of Denver Sturm College of Law for his article *A Ground Shift for Union Organizing in Charter Schools: The NLRB Decision in In re Chicago Mathematics & Science Academy Charter School, Inc.* His article is posted at http://laborandemploymentcollege.org/pdf/Timothy%20Farmer%20paper.pdf.

*Brittany S. Mitchell*
*Editor-in-Chief*
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Unusual Unanimity and the Ongoing Debate on the Meaning of Words: The Labor and Employment Decisions from the Supreme Court’s 2013–14 Term

Michael Z. Green*

I. Introduction

In its 2013–14 term, the Supreme Court focused on labor relations, wage and hour law, whistleblowing, and employee benefits in several cases. The Court also addressed constitutional issues concerning the First Amendment, the Recess Appointments Clause, and affirmative action. The Court did not decide any employment discrimination cases during the term. Decisions in the prior term clarified the definition of a supervisor for purposes of workplace harassment and addressed the burden of proof in establishing causation in retaliation claims. The Court’s respite from considering employment discrimination cases in 2013–14 was, however, very brief as three discrimination cases are scheduled for consideration during the 2014–15 term.

* Professor, Texas A&M University School of Law. I would like to thank my student assistants Ali Crocker, Emily Goodman, Casandra Johnson, Mackenzie Lewis, Hisham Masri, and Chelsea Mikulencak for their diligent research efforts in reviewing the Supreme Court decisions and oral arguments. I am also grateful for the financial support from the Texas A&M University School of Law summer research grant in producing this Article. I am proud to follow in the footsteps of so many wonderful past secretaries for the ABA Labor and Employment Section who have assessed the labor and employment decisions of prior Supreme Court terms.

1. Vance v. Ball State Univ., 133 S. Ct. 2434, 2443 (2013) (“We hold that an employer may be vicariously liable for an employee’s unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim.”).

2. Univ. of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2533 (2013) (“Title VII retaliation claims must be proved according to traditional principles of but-for causation” and “[t]his requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.”).

3. See E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106 (10th Cir. 2013), cert. granted, 135 S. Ct. 44 (Mem.) (Oct. 2, 2014) (No. 14-86) (whether the refusal to hire a woman because she wore a hijab [religious headscarf] to her interview is religious discrimination); Young v. United Parcel Serv., 707 F.3d 437 (4th Cir. 2013), cert. granted, 134 S. Ct. 2898 (Mem.) (July 1, 2014) (No. 12-1226) (whether an employer must reasonably accommodate pregnant employees to avoid employment discrimination under the Americans with Disabilities Act); Mach Mining, LLC v. E.E.O.C., 738 F.3d 171 (7th
Court also expects to address labor and employee benefits, whistleblowing, and wage and hour law during the 2014–15 term. 4

Even without employment discrimination cases, the 2013–14 term provided ten key cases of importance to labor and employment lawyers. Three of these involved distinctly different matters of concern for organized labor: Sandifer v. U.S. Steel Corp., 5 NLRB v. Noel Canning, 6 and Harris v. Quinn. 7 Two addressed employee whistleblowing matters: Lawson v. FMR LLC 8 and Lane v. Franks. 9 Three focused on employee benefits: Heimeshoff v. Hartford Life & Accident Insurance Co., 10 Fifth Third Bancorp v. Dudenhoeffer, 11 and Burwell v. Hobby Lobby Stores, Inc. 12 Two cases addressed issues tangentially related to employment law: one involving affirmative action, Schuette v. Coalition to Defend Affirmative Action, 13 and another involving taxation of severance payments, United States v. Quality Stores, Inc. 14

The Court initially agreed to hear two other labor and employment cases this term but subsequently found its decisions to review improvidently granted. 15 In one of those cases, three justices vigorously dissented from the decision that the Court had improvidently

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4. See Perez v. Mortg. Bankers’ Ass’n, 720 F.3d 966 (D.C. Cir. 2013), cert. granted, 134 S. Ct. 2820 (Mem.) (June 16, 2014) (No. 13-1041) (agency authority to change mortgage loan officer exemption criteria under the FLSA); MacLean v. Dep’t of Homeland Sec., 714 F.3d 1301 (Fed. Cir. 2013), cert. granted, 134 S. Ct. 2290 (Mem.) (May 19, 2014) (No. 13-894) (considering if communication is specifically prohibited under the Whistleblower Protection Act); Tibble v. Edison Int'l, 729 F.3d 1110 (9th Cir. 2013), cert. granted, 135 S. Ct. 43 (Mem.) (Oct. 2, 2014) (No. 13-550) (whether initial purchase of high-cost investment mutual funds instead of lower-cost funds commenced the ERISA six-year statute of limitations period or if continuing to offer these high-cost funds when lower funds were available represented a continuing breach of fiduciary duty); M&G Polymers USA, LLC v. Tackett, 733 F.3d 589 (6th Cir. 2013), cert. granted, 134 S. Ct. 2136 (Mem.) (May 5, 2014) (No. 13-1010) (labor and employee retirement benefits); Integrity Staffing Solutions, Inc. v. Busk, 713 F.3d 525 (9th Cir. 2013), cert. granted, 134 S. Ct. 1490 (Mem.) (Mar. 3, 2014) (No. 13-433) (FLSA compensatory time for collective action).

granted certiorari. As a result, the issue in that case—whether the government may impose criminal penalties against employers and unions that enter into neutrality agreements with respect to future labor organizing—will likely return to the Court in the near future.

The authors of an empirical examination of Court decisions from 1946 to 2011 found that five of the current members of the Court are in the top ten of all justices who were “friendliest to business,” with Justice Samuel Alito and Chief Justice John Roberts being the two “most favorable to business.” As a result, the study’s authors concluded “that the Roberts Court is indeed highly pro-business—the conservatives extremely so and the liberals only moderately liberal.” In assessing this past term, one commentator mentioned that the Supreme Court generated “a remarkable record of unanimous rulings: nearly two-thirds of the [C]ourt’s 70 signed opinions.” Nevertheless, the same commentator noted that some believe this unanimity was deceptive and have mockingly called it “fauxnanimity.” Justice Antonin Scalia led this attack, asserting that several “specious” unanimous decisions arose from unanimous agreement on a limited result with blistering concurring opinions questioning the majority’s rationale. A great number of the debates centered on different approaches to interpreting the meaning of words. While this jurisprudential debate is not new, several labor and employment cases offered an opportunity

17. See id. at 595 (“Unless resolved, the differences among the Courts of Appeals could negatively affect the collective-bargaining process.”).
19. Id. at 1449.
21. Marcia Coyle, Ginsburg on Rulings, Race: Justice Says Public Dismay About Congress Spills Over to High Court, NAT’L L.J., Aug. 22, 2014, at 3 (the “fauxnanimity” criticism of some of the Court’s unanimous decisions during the 2013–14 term while also asking Justice Ginsburg about Justice Scalia’s claim of “specious’ unanimity” in a decision regarding buffering zones for abortion clinics and Noel Canning); Dahlia Lithwick, Supreme Court Breakfast Table: The Justices Don’t Like Massachusetts’ Buffer Zones. But They’re Fine with the One Around the Supreme Court, SLATE SUPREME COURT TABLE, June 26, 2014, at 1, 2 (“This morning, the Supreme Court handed down two unanimous decisions (I am inventing the word faux-namious effective immediately to account for [Justice] Scalia’s very dissent-y concurrences) in two of the most hotly contested cases of the term [and the first is Canning, the recess appointments case].”).
22. Linda Greenhouse, Tragedy or Triumph, N.Y. TIMES (Sept. 3, 2014), at 5, http://www.nytimes.com/2014/09/04/opinion/tragedy-or-triumph.html (A key example of this type of unanimous decision is NLRB v. Noel Canning, 134 S. Ct. 2550 (2014), in which Justice Scalia, in reading his concurring opinion from the bench, “denounced the Court’s ‘judicial adventurism’ and made abundantly clear that this was a dissent in all but the most formal sense.”).
23. See discussion infra Part VI.
for members of the Court to flex their intellectual muscles while interpreting the intent and meaning of words.

This Article first addresses the Court’s decisions of significance to organized labor. The Article next discusses the Court’s review of whistleblowing matters. It then describes the implications for employees and employers of employee benefits cases. The Article then reviews two cases regarding important, but tangential, concerns in labor and employment law even though those cases did not arise in the workplace context. To explore the common theme of false unanimity, this Article reviews both the unanimous components of the decisions as well as the justices’ existing divisions, especially over different approaches to interpreting the meaning of words. Finally, the Article identifies the significance of the Supreme Court’s 2013–14 labor and employment decisions and forecasts similar issues likely in store for the Court in the near future.

II. Organized Labor: Clothing Changes as Wages, Agency Recess Appointments, and Public Sector Union Fair Share Dues

Three cases addressed concerns of organized labor and employers who deal with organized labor. In *Sandifer*, the Court explored a collective bargaining agreement that made time spent “changing clothes” noncompensable under federal wage and hour law. In *Noel Canning*, the president’s ability to make a valid Senate-recess appointment of a National Labor Relations Board (NLRB) member represented an important issue, with respect to not only the Constitution, but also the viability of a major federal agency charged with protecting the rights of employees to engage in concerted and union activity. Finally, in *Harris*, the Court examined the viability and enforcement of public sector labor laws that require unions to receive a “fair share” or agency fee from employees who choose not to join the union. Another case, in which the Court decided it had improvidently granted review, had raised a labor issue likely to return to the Court. A case scheduled for the 2014–15 term involves a labor and employee retirement benefits issue. As a result, it appears

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25. *Id.* at 880–81.
28. *Id.* at 2658.
29. See supra note 16–17 and accompanying text (describing *UNITE HERE Local 355 v. Mulhall*, 667 F.3d 1211 (11th Cir. 2012), cert. improvidently granted per curiam, 134 S. Ct. 594 (Dec. 10, 2013) (No. 12-99), and how the issue is likely to come back to the Court).
that organized labor’s legal concerns will be among the matters on the Court’s extremely busy docket.

A. Sandifer v. U.S. Steel Corp.

In a decision involving the Fair Labor Standards Act of 1938 (FLSA), written by Justice Scalia and joined by Chief Justice Roberts and Justices Anthony Kennedy, Clarence Thomas, Ruth Bader Ginsburg, Stephen Breyer, Samuel Alito, and Elena Kagan, the Court addressed the meaning of the phrase “changing clothes” in section 203(o) of the FLSA. The petitioners, current and former employees of U.S. Steel Corporation, filed a collective action seeking back pay for time spent donning and doffing protective gear while beginning or ending work. Section 203(o) “allows parties to decide, as part of a collective-bargaining agreement, that ‘time spent in changing clothes . . . at the beginning or end of each workday’ is noncompensable.” A 1949 amendment established “that the compensability of time spent changing clothes or washing is a subject appropriately committed to collective bargaining” between an employer and a union representing its employees.

U.S. Steel conceded that it would have compensated employees for time spent donning and doffing protective gear if section 203(o) had not rendered that time noncompensable as part of a collective bargaining agreement covering the employees. In contrast, the employees argued that the donning and doffing of the protective gear did not qualify as “changing clothes” pursuant to section 203(o). As a result, the Court had to determine the meaning of “clothes” under section 203(o). The Court reviewed the dictionary definition of “clothes” at the time Congress enacted the provision and decided that “clothes” had the ordinary meaning of “items that are both designed and used to cover the body and are commonly regarded as articles of dress.”

The Court rejected the employees’ claim that the definition of “clothes” excluded “items designed and used to protect against workplace hazards” because Webster’s dictionary during that period provided that clothes are for comfort. The Court explained that

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32. Sandifer v. U.S. Steel Corp., 134 S. Ct. 870, 873–74, n.7 (2014) (Justice Sotomayor joined the opinion except with respect to footnote 7, in which the Court stated that although “exemptions . . . are to be narrowly construed against the employers seeking to assert them,” this “narrow-construction principle” does not apply to the definition provision of FLSA § 203).
33. Id. at 874 n.1.
34. Id. at 874 (quoting 29 U.S.C. § 203(o)).
35. Id. at 876.
36. Id.
37. Id.
38. Id.
39. Id. at 877.
“‘protection’ and ‘comfort’ are not incompatible, and are often synonymous.”40

Further, the Court determined that an attempt to distinguish “items designed and used to protect against workplace hazards” from the definition of clothes would turn the purpose of section 203(o) to “nothingness” because the clothes at issue must be integral to job performance.41 Also, the application of this purported distinction for safety items “abandons the assertion that clothes are for decency or comfort.”42 The Court acknowledged that the meaning of “clothes” under section 203(o) of the FLSA does “not embrace . . . essentially anything worn on the body” as there are some “wearable items that are not clothes, such as some equipment and devices.”43

The Court also analyzed “changing” to assess whether adding layers or putting on additional clothes constituted changing if the original clothes remained. The Court found that “despite the usual meaning of ‘changing clothes,’ the broader statutory context makes it plain that ‘time spent in changing clothes’ includes time spent in altering dress.”44 Further, if the purpose of section 203(o) was “to permit collective bargaining over the compensability of clothes-changing time and to promote the predictability achieved through mutually beneficial negotiation,” then “changing” could not be limited to just “substituting.”45

The Court applied its definition of clothes to the following twelve items raised by the employees: “a flame-retardant jacket, pair of pants and hood; a hardhat; a snood; wristlets; work gloves; leggings; metatarsal boots; safety glasses; earplugs; and a respirator.”46 The Court found that the first nine items were “clearly . . . designed and used to cover the body and are commonly regarded as articles of dress.”47 The glasses and earplugs were not usually considered articles of dress even if they have a covering function.48 Also, a respirator does not have a covering function; nor can it be considered an article of dress.49 As a result, these three items—glasses, earplugs, and respirators—were not clothes under section 203(o).50

However, the Sandifer Court concluded that time spent donning and doffing safety glasses and earplugs was “minimal.”51 If the

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40. Id. (the Court identified gloves as an example of an item that protects a person from scrapes and cuts while also enhancing a person’s comfort).
41. Id.
42. Id.
43. Id. at 878; see also id. at n.6 (description of a “wristwatch”).
44. Id. at 879.
45. Id.
46. Id.
47. Id.
48. Id. at 880.
49. Id.
50. Id.
51. Id. at 881.
majority of time was spent “changing clothes” as defined under section 203(o), the entire time, even time spent donning and doffing non-clothes items such as safety glasses and ear plugs, was still time spent “changing clothes.” The Court, on the other hand, specifically mentioned that if the majority of time is spent putting on and taking off nonclothes items, the time would not qualify as “time spent in changing clothes” and would not be negotiable as noncompensable under section 203(o).

With respect to respirators, employees used them only as needed throughout the normal workday. Consequently, section 203(o) did not cover respirator usage here as a preliminary or postliminary subject covered by section 203(o). Thus, the Court affirmed the Seventh Circuit decision approving summary judgment for the employer because (1) under section 203(o) the employer and union had negotiated the time spent putting on and taking off the nine clothes items as non-compensable pursuant to a collective bargaining agreement, (2) the time spent putting on and taking off nonclothes items at the beginning and end of workdays was minimal and subsumed by the time spent changing the nine clothes items, and (3) section 203(o) did not cover the time spent putting on respirators as it did not occur during the beginning or end of the workday.

B. NLRB v. Noel Canning

In Noel Canning, the Court determined whether President Barack Obama validly appointed three NLRB members during a three-day adjournment of the Senate pursuant to the Recess Appointments Clause of the Constitution. That clause states the president has the power “to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” The Court first addressed whether the words “Recess of the Senate” referred only to an intersession recess or also to an intrasession recess. There was no dispute whether the clause applied during intersession recesses. However, the Court held that the clause applied to both an intersession recess and an “intra-session recess of substantial length.”

52. Id.
53. Id.
54. Id. at 873.
55. Id. at 881.
56. Id. at 880–81.
57. Id. at 874.
58. Id. at 881.
60. U.S. CONST., art. II, § 2, cl. 3.
61. Noel Canning, 134 S. Ct. at 2556 (discussing U.S. CONST., art. II, § 2, cl. 3).
62. Id. at 2561.
63. Id.
The Court discussed the meaning of the word “recess” at the time of the Constitution’s drafting and decided that “[t]he Founders themselves used the word to refer to intra-session, as well as to inter-session, breaks.” The Court also noted that even “though the 40th Congress impeached President [Andrew] Johnson on charges relating to his appointment power, he was not accused of violating the Constitution by making intra-session recess appointments.” The Court then acknowledged the pragmatic implications of its holding: “if we include military appointments, Presidents have made thousands of intra-session recess appointments” throughout the Recess Appointments Clause’s existence.

The Court addressed three arguments the parties raised. The first argument was that the founders did not intend to apply the Recess Appointments Clause to anything but intersession recesses as they “hardly knew any other” type of recess. The Court concluded that “[t]he Founders knew they were writing a document designed to apply to ever-changing circumstances over centuries” because “a Constitution is ‘intended to endure for ages to come,’ and must adapt itself to a future that can only be ‘seen dimly,’ if at all.”

The second argument challenging the NLRB appointments was that allowing intra-session appointments would make the length of those appointments illogical. The Court rejected this argument as well and noted how long it normally takes to appoint someone even when the Senate is actively in session.

The third argument challenging the appointments was that including intra-session recesses would make the Recess Appointments Clause vague. The Court responded, “One can find problems of uncertainty, however, either way” and described examples of how uncertainty could also occur during intersession breaks.

As a result, the Court decided that both intra-session and intersession recesses are included within the Clause’s coverage. The Court limited its holding, finding that the language regarding “[v]acancies that may happen during the recess of the Senate” means only vacancies that occur during the recess or before the recess. The words “may happen” helped convince the Court to also include vacancies.
that occurred before the recess instead of a narrower reading limited to just vacancies during the recess.\textsuperscript{75} While ordinarily meaning “to originate,” the Court found that the words “may happen” also meant the “chance to be.”\textsuperscript{76}

The Court then addressed the concern that under its broad reading of the clause, as opposed to the narrower interpretation that Justice Scalia posed,\textsuperscript{77} the president could completely circumvent the Senate’s role in the appointment process.\textsuperscript{78} The Court determined that because “both interpretations carry with them some risk of undesirable consequences, . . . the narrower interpretation risks undermining constitutionally conferred powers more seriously and more often.”\textsuperscript{79} According to the Court, the narrower interpretation would also prevent the president from making “any recess appointment that arose before a recess, no matter who the official, no matter how dire the need, no matter how uncontroversial the appointment, and no matter how late in the session the office fell vacant.”\textsuperscript{80}

In finding the Recess Appointments Clause ambiguous, the Court decided it would not “upset the compromises and working arrangements” of prior presidents and Senates who established a common historical practice of making appointments for recesses lasting at least ten or more days.\textsuperscript{81} The Court held that, “for purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business” and “[t]he Senate met that standard here.”\textsuperscript{82}

The Court also considered if a specific break was still part of a session or a recess and, if it was a recess, whether it was sufficiently long for the NLRB appointments in \textit{Noel Canning} to be valid.\textsuperscript{83} The Court concluded that the Senate’s pro forma gatherings at issue in the case were part of a session, not a recess.\textsuperscript{84} Nevertheless, the Court found that a recess of four to nine days is “presumptively too short” to create an opening for the president to make an appointment and a recess of three days or fewer is absolutely too short for a constitutionally valid appointment.\textsuperscript{85} As a result, the Court deemed the three-day break between pro forma sessions in \textit{Noel Canning} too short to give the

\begin{itemize}
\item \textsuperscript{75} Id.
\item \textsuperscript{76} Id. at 2568.
\item \textsuperscript{77} See id at 2606.
\item \textsuperscript{78} Id. at 2569.
\item \textsuperscript{79} Id.
\item \textsuperscript{80} Id. at 2569–70.
\item \textsuperscript{81} Id. at 2553, 2560.
\item \textsuperscript{82} Id. at 2574.
\item \textsuperscript{83} Id. at 2573.
\item \textsuperscript{84} Id. at 2575.
\item \textsuperscript{85} Id. at 2566–67, 2599.
\end{itemize}
In concurring, Justice Scalia agreed that the president did not have the authority to appoint the NLRB members, but nonetheless vehemently criticized the majority’s textual interpretation of the Recess Appointments Clause. According to Justice Scalia, the only appointments available to the president under the clause must have arisen during an intersession and the appointment had to be made during that intersession. Specifically, Justice Scalia stated that “[w]hat the majority needs to sustain its judgment is an ambiguous text and a clear historical practice” when “[w]hat it has is a clear text and an at-best-ambiguous historical practice.” Because Justice Scalia found the words “[r]ecess” and “happens” to be clear, he vigorously asserted that the Court’s interpretation allowing intrasession appointments was incorrect even if the Court agreed unanimously about the judgment.

C. Harris v. Quinn

In a five-four decision by Justice Alito, Harris addressed “whether the First Amendment permits a State to compel [in-home,] personal care providers to subsidize speech on matters of public concern by a union that they do not wish to join or support.” The Court held that the First Amendment did not permit this state action. The Court first explained the employment structure for in-home personal care providers who visit disabled individuals through Medicaid-waiver programs of the Illinois Department of Human Services. The disabled person, the “customer,” employs those personal care providers. The Court held that the customer, as the employer, maintains control over the relationship and decides what services the provider delivers.
as the government only pays the provider and establishes minimum employment requirements.95

Illinois classified personal care providers as "'public employees' of the State of Illinois—but '[s]olely for the purposes of coverage under the Illinois Public Labor Relations Act.'"96 This allowed the union representing these employees to charge a "fair share" or agency fee under Illinois law to help pay for the cost of certain union representational activities.97 A union must fairly represent all members of a bargaining unit including those who choose not to join and never pay full membership dues.98 In requiring a fair share payment, the state law prevents "free riders" from reaping the benefit of unionization without contributing to the costs.99 According to the Court, the "personal assistants" in 

Beyond finding that these employees were not public sector workers, the Court went further to question on First Amendment grounds its prior endorsement of fair share payments for public sector workers. The Court had previously acknowledged the "free-rider" problem in its 1977 decision in 

The Court also addressed the issue from the perspective of its most recent public sector labor decision, 

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95. Id. at 2624–25.
96. Id. at 2626.
97. Id.
98. Id. at 2656.
99. Id. at 2627.
100. Id. at 2626.
101. Id. at 2627 (citing Abood v. Detroit Bd. of Educ., 97 S. Ct. 1782 (1977)).
102. Id.
103. Id.
104. Id. at 2638.
105. Id.
International Union, Local 1000,106 in which it had applied the compelling state interest test to assess whether a government entity could restrict an individual’s First Amendment rights by requiring payment of an agency fee for union representation.107 The Court did not find any compelling state interest to justify the fair share provision in Harris.108 Nothing in the record showed that the personal assistants could not obtain similar benefits to those who voluntarily chose to pay dues.109

The Court considered applying a balancing test from Pickering v. Board of Education.110 While the Court asserted that the Pickering balancing test did not apply to the circumstances,111 the Court held that Illinois’s actions would not pass that test in any event because the balance favored First Amendment protection for the personal assistants.112

Justice Kagan, in dissent, thought this case fell squarely within the perimeter of Abood.113 She asserted that “[t]he idea that Abood applies only if a union can bargain with the State over every issue [as opposed to the control that the patient has in deciding terms] comes from nowhere and relates to nothing in that decision—and would revolutionize public labor law.”114 Justice Kagan also observed that while the petitioners sought to overturn more than thirty years of sound precedent in Abood, “[t]he good news out of this case is clear: The majority declined that radical request.”115

According to Justice Kagan, “[t]he true issue is whether Illinois has a sufficient stake in, and control over, the petitioners’ terms and conditions of employment to implicate Abood’s rationales and trigger its application.”116 However, “[t]he bad news is just as simple: The majority robbed Illinois of that choice in administering its in-home care program.”117 In closing, Justice Kagan stated: “The majority today misapplies Abood, which properly should control this case” as “[n]othing separates, for purposes of that decision, Illinois’s personal assistants from any other public employee.”118

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107. Harris, 134 S. Ct. at 2639 (citing Knox, 132 S. Ct. at 2289).
108. Id. at 2639–40.
109. Id. at 2640–41.
111. Harris, 134 S. Ct. at 2641–42.
112. Id.
113. Id. at 2645 (Kagan, J., dissenting).
114. Id. at 2650.
115. Id. at 2658.
116. Id. at 2649.
117. Id. at 2658.
118. Id.
III. Whistleblowing: Sarbanes-Oxley Private Subcontractors and Public Sector Testimony

Whistleblower cases have become a recurring part of the Court’s docket. Two were considered during the 2013–14 term. One case, *Lawson*,\(^{119}\) addressed the scope of coverage for employees of private subcontractors of publicly traded companies covered by the Sarbanes-Oxley Act.\(^{120}\) Another case, *Lane*,\(^{121}\) examined whether the First Amendment protects public sector employees terminated for providing whistleblowing testimony in court.\(^{122}\) Another whistleblower case, *MacLean*,\(^{123}\) is part of the Court’s docket for the 2014–15 term.

A. *Lawson v. FMR LLC*

In *Lawson*, Justice Ginsburg’s six-three decision reviewed the scope of coverage under the Sarbanes-Oxley Act (SOX)\(^{124}\) section 1514A, which provides employee whistleblower protection to deter fraudulent financial disclosures regarding publicly traded companies.\(^{125}\) In deciding whether statutory whistleblower protection under SOX only extended to employees of publicly traded companies, and not subcontractor employees, the Court found that section 1514A “shelters employees of private contractors and subcontractors, just as it shelters employees of the public company served by the contractors and subcontractors.”\(^{126}\)

The Court examined the statute’s purpose and motivation. The Court stated that “Congress identified the lack of whistleblower protection as ‘a significant deficiency’ in the law.”\(^{127}\) The two *Lawson* plaintiffs worked for separate private companies that provided advisory and management services to Fidelity, a publicly traded company.\(^{128}\) Fidelity had no employees and instead contracted with outside companies to handle day-to-day operations.\(^{129}\)

The main issue was whether section 1514A—which provides whistleblower protection to employees of publicly traded companies “or any officer, employee, contractor, subcontractor, or agent of such

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\(^{120}\) *Id.* at 1159.

\(^{121}\) *Lane v. Franks*, 134 S. Ct. 2369 (2014).

\(^{122}\) *Id.* at 2377.

\(^{123}\) *MacLean v. Dep’t of Homeland Sec.*, 714 F.3d 1301, 1304 (Fed. Cir. 2013), cert. granted, 82 U.S.L.W. 3470 (U.S. May 19, 2014) (No. 13-894) (whether federal air marshal’s claim of making a protected communication to a reporter under the federal Whistleblower Protection Act exists if the communication involved disclosure of sensitive security information specifically prohibited by law).


\(^{126}\) *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1161 (2014).

\(^{127}\) *Id.* at 1162–63.

\(^{128}\) *Id.* at 1164.

\(^{129}\) *Id.*
company”—protected whistleblower employees of the outside companies.\textsuperscript{130} The Court advanced several reasons for its decision. First, the Department of Labor’s Arbitration Review Board (ARB), in an unrelated opinion issued after \textit{Lawson} was heard at the appellate level, held that section “1514A affords whistleblower protection to employees of privately-held contractors that render services to public companies.”\textsuperscript{131}

Second, the Court analyzed the statute’s language and found that “FMR’s interpretation of the text requires insertion of ‘of a public company’ after an employee” when the statute’s relevant portion reads “no . . . contractor . . . may discharge . . . an employee.”\textsuperscript{132} The Court pointed out that FMR’s argument did not make sense because contractors would not have authority over the public company’s employees.\textsuperscript{133} The Court decided that the plain language means “[a] contractor may not retaliate against its own employee for engaging in protected whistleblowing.”\textsuperscript{134} The employer argued that the statute referred only to contractors in an “ax-wielder” position with the only responsibility being to discharge employees.\textsuperscript{135} The Court rejected this argument, stating that even if an ax-wielder did the actual firing, the public company would still be the entity retaliating.\textsuperscript{136}

The employer also raised two textual arguments. First, “[i]f . . . ‘an employee’ includes employees of contractors, then grammatically, the term also includes employees of public company officers and employees.”\textsuperscript{137} The Court found this was an unlikely hypothetical problem as housekeepers and gardeners and other personal employees of public company officers and employees were unlikely to become aware of evidence of their employer’s fraud involving a SOX whistleblower claim.\textsuperscript{138} Second, the employer argued that the statutory language’s heading only referred to publicly traded companies.\textsuperscript{139} However, the Court noted that “the headings here are ‘but a short-hand reference to the general subject matter’ of the provision” and were “‘not meant to take the place of the detailed provisions of the text.’”\textsuperscript{140}

Although it determined that the plain language was not ambiguous, the Court still discussed the statutory intent revealed in the

\begin{itemize}
\item \textsuperscript{130} \textit{Id.} at 1163.
\item \textsuperscript{131} \textit{Id.} at 1165.
\item \textsuperscript{132} \textit{Id.}
\item \textsuperscript{133} \textit{Id.} at 1166.
\item \textsuperscript{134} \textit{Id.}
\item \textsuperscript{135} \textit{Id.} (using a character from the movie \textit{Up In The Air}, played by actor George Clooney as an example of such an “ax-wielder”).
\item \textsuperscript{136} \textit{Id.}
\item \textsuperscript{137} \textit{Id.} at 1168.
\item \textsuperscript{138} \textit{Id.}
\item \textsuperscript{139} \textit{Id.} at 1169.
\item \textsuperscript{140} \textit{Id.}
\end{itemize}
legislative history.\textsuperscript{141} The Court reasoned that if the statute was read as FMR and the dissent suggested, there would be a hole in the protection offered. All public companies would have to do to avoid SOX liability is hire private contracted companies to perform their work and those employees would not have the whistleblower protection provided by section 1514A.\textsuperscript{142} The Court also discussed the legislative reasoning for SOX and concluded that Congress enacted section 1514A to “ward off another Enron debacle.”\textsuperscript{143} According to the Court, in enacting SOX Congress was just as “focused on the role of Enron’s outside contractors in facilitating the fraud as it was on the actions of Enron’s own officers.”\textsuperscript{144}

The Court also compared section 1514A to another whistleblower statute, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21),\textsuperscript{145} that has similar language stating that “[n]o air carrier or contractor or subcontractor of an air carrier may discharge an employee.”\textsuperscript{146} The Court also found that “[t]he ARB has consistently construed AIR 21 to cover contractor employees.”\textsuperscript{147} Due to the “parallel text,” the Court interpreted the two provisions consistently because section 1514A was modeled on AIR 21.\textsuperscript{148} The Court held that whistleblower protection under SOX extends to employees of contractors and subcontractors.\textsuperscript{149}

B. Lane v. Franks

In \textit{Lane}, Justice Sonia Sotomayor’s unanimous opinion considered whether the First Amendment protected a public employee who provided truthful sworn testimony in court when a subpoena compelled the testimony and giving the testimony was outside the employee’s regular job duties.\textsuperscript{150} The Court decided that the employee’s testimony was protected speech.\textsuperscript{151} In \textit{Lane}, a community college president, Franks, fired Lane, a director for the college, in retaliation for testimony Lane gave against a former employee and political appointee, Schmitz, during Schmitz’s trial for mail fraud and theft. Lane had fired Schmitz before the trial when he discovered that Schmitz had been receiving compensation for a job she never performed, and Lane was asked to testify at Schmitz’s trial about his reasoning for terminating Schmitz.\textsuperscript{152}

\textsuperscript{141} Id. at 1169–71.
\textsuperscript{142} Id. at 1182.
\textsuperscript{143} Id. at 1169.
\textsuperscript{144} Id.
\textsuperscript{145} 49 U.S.C. § 42121(a) (2012).
\textsuperscript{146} \textit{Lawson}, 134 S. Ct. at 1175.
\textsuperscript{147} Id.
\textsuperscript{148} Id. at 1176.
\textsuperscript{149} Id.
\textsuperscript{150} Lane v. Franks, 134 S. Ct. 2369, 2374–75 (2014).
\textsuperscript{151} Id. at 2375.
\textsuperscript{152} Id.
The Court used a two-step inquiry from *Garcetti v. Ceballos*153 and *Pickering v. Board of Education*154 to determine if the government’s interest outweighed the employee’s interest as a citizen and if the employee was entitled to First Amendment protection.155 The two-step inquiry from *Garcetti* is (1) “whether the employee spoke as a citizen on a matter of public concern”156 and (2) “whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.”157

The Court concluded that Lane met the first step by speaking as a citizen.158 The Court explained: “[s]worn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth.”159 In response to the argument that the employee’s speech was different because it concerned information learned from his job duties, the Court pointed out that “[t]he critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.”160

Speech based on information learned on the job can make a difference in *Pickering* balancing, but the Court decided that “[t]he importance of public employee speech is especially evident in the context of this case: a public corruption scandal.”161 Further, “[i]t would be antithetical to our jurisprudence to conclude that the very kind of speech necessary to prosecute corruption by public officials—speech by public employees regarding information learned through their employment—may never form the basis for a First Amendment retaliation claim.”162 For these reasons, the Court determined that the employee’s testimony was speech as a citizen on a matter of public concern.163

For the inquiry’s second step, the Court used the *Pickering* balancing test.164 That test “requires ‘balanc[ing] . . . the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.’”165

The Court determined that,

155. Lane, 134 S. Ct. at 2377–78.
156. Id. at 2378.
157. Id.
158. Id.
159. Id. at 2379.
160. Id.
161. Id. at 2380.
162. Id.
163. Id.
164. Id. at 2381.
165. Id. at 2377.
here, the employer’s side of the Pickering scale is entirely empty: Respondents do not assert, and cannot demonstrate, any government interest that tips the balance in their favor. There is no evidence, for example, that Lane’s testimony at Schmitz’ trial was false or erroneous or that Lane unnecessarily disclosed any sensitive, confidential, or privileged information while testifying.\textsuperscript{166}

As a result, the Court held the speech protected.\textsuperscript{167}

The Court agreed that Franks was protected by qualified immunity for the claims against him in his individual capacity because of ambiguity regarding the application of Garcetti to assess Franks’s actions.\textsuperscript{168} With qualified immunity, “courts may not award damages against a government official in his personal capacity unless ‘the official violated a statutory or constitutional right,’ and ‘the right was ‘clearly established’ at time of the challenged conduct.’”\textsuperscript{169}

Justice Thomas’s succinct concurring opinion, in which Justices Scalia and Alito joined, identified situations in which an employee could testify as a part of job duties under the Garcetti inquiry’s first step, including testimony by police officers and laboratory analysts.\textsuperscript{170} Nevertheless, the concurring opinion concluded that there was no reason to address these constitutional questions and stated that the Court’s opinion “leaves the constitutional questions raised by these scenarios for another day.”\textsuperscript{171}

IV. Benefits: Plan Statute of Limitations, Presumptions of Ordinary Prudence in Company Investments, and Religious Objections to Contraceptive Coverage

For good or ill, issues involving employee benefits under the Employee Retirement Income Security Act of 1974 (ERISA)\textsuperscript{172} continue to receive substantial attention from the Supreme Court.\textsuperscript{173} The Court’s influence on employee benefits is likely to persist as new issues arise under the Patient Protection and Affordable Care Act (ACA)\textsuperscript{174} and debates occur about that statute’s meaning and impact.\textsuperscript{175} Cases decided

\begin{itemize}
  \item \textsuperscript{166} Id. at 2381.
  \item \textsuperscript{167} Id.
  \item \textsuperscript{168} Id.
  \item \textsuperscript{169} Id.
  \item \textsuperscript{170} Id. at 2384 (Thomas, J., concurring).
  \item \textsuperscript{171} Id.
  \item \textsuperscript{173} See Paul M. Secunda, \textit{Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA}, 61 HASTINGS L.J. 131, 159–65 (2009) (an ongoing debate about employee benefit law interpretations by the Supreme Court regarding the choice between a more focused remedial approach and a majority-based approach).
  \item \textsuperscript{175} See Brendan S. Maher, \textit{The Affordable Care Act, Remedy and Litigation Reform}, 63 AM. U. L. REV. 649, 651–52 (2014) (the ACA “rewrote the law of private health
\end{itemize}
during the 2013–14 term further demonstrated the importance of employee benefits under ERISA and the ACA’s burgeoning impact.

A. Heimeshoff v. Hartford Life

In Heimeshoff, Justice Thomas’s unanimous opinion addressed the plaintiff’s ERISA claim arising from denial of long-term disability benefits under a plan administered by Hartford. Heimeshoff, a Walmart manager, developed lupus and fibromyalgia. Hartford denied her claim for disability and, after exhaustion of agency procedures, Heimeshoff sued in federal court.

There is no statute of limitations defined under ERISA for Heimeshoff’s claim, but the employee’s benefit plan provided a three-year limitation from the time written proof of loss was required to be furnished. Because the plan’s limitation period was over by the time the ERISA court claim was filed, Heimeshoff argued that a limitation period should not be applied unless the “statutes of limitations commence upon accrual of the cause of action.” The Court rejected that argument. The Court held that parties may contract to a limitation and a court “must give effect to the Plan’s limitations provisions unless we determine either that the period is unreasonably short, or that a ‘controlling statute’ prevents the limitations provision from taking effect.”

Neither party had argued that the limitations period was unreasonably short. Further, the statute of limitations in the plan did not undermine the two-tiered remedial scheme requiring exhaustion of plan remedies before pursuing court remedies under ERISA. If the deadline had been set in bad faith, courts could have heard the case because bad faith is an allowable basis to challenge a plan’s limitations period. Also, in appropriate cases, a party may assert equitable defenses, such as waiver, estoppel, and tolling, to address any concerns about enforcing the plan’s statute of limitations.

B. Fifth Third Bancorp v. Dudenhoeffer

In Dudenhoeffer, Justice Breyer’s unanimous opinion considered former employees’ claims that the employee stock option plan

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177. Id. at 608.
178. Id. at 609.
179. Id. at 609–10.
180. Id. at 610.
181. Id.
182. Id. at 612.
183. Id. at 613.
184. Id. at 614.
185. Id. at 615–16.
ESOP) fiduciary had violated ERISA’s duty of prudence by continuing to invest in company stock purportedly known to be devaluing. Specifically, the Court addressed “when an ESOP fiduciary’s decision to buy or hold the employer’s stock is challenged in court, [whether] the fiduciary is entitled to a defense-friendly standard that the lower courts have called a ‘presumption of prudence.’”

The Court considered four of the employer’s arguments. “First, petitioners argue that the special purpose of an ESOP—investing participants’ savings in stock of their employer—calls for a presumption that such investments are prudent.” The Court responded by pointing out that “[section 1104(a)(1)(D) of ERISA] makes clear that the duty of prudence trumps the instructions of a plan document, such as an instruction to invest exclusively in employer stock even if financial goals demand the contrary.” Second, the employer argued that the duty of prudence should be read in light of trust law under which “the settlor can reduce or waive the prudent man standard of care by specific language in the trust instrument.” The Court disagreed, concluding that “trust documents cannot excuse trustees from their duties under ERISA.”

The employer’s third argument asserted that, without the prudence standard, fiduciaries could be seen as engaging in unlawful insider trading. The Court held that that there was no distinction between fiduciaries in this situation and any other, and that ERISA surely cannot require the breaking of insider trading laws. The Court further explained:

To state a claim for breach of the duty of prudence on the basis of inside information, a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it.

The employer also argued that “without some sort of special presumption, the threat of costly duty-of-prudence lawsuits will deter companies from offering ESOP’s to their employees, contrary to the stated intent of Congress.” The Court rejected this argument,
stating, “we do not believe that the presumption at issue here is an appropriate way to weed out meritless lawsuits or to provide the requisite ‘balancing.’”

According to the Court, “[t]he proposed presumption makes it impossible for a plaintiff to state a duty-of-prudence claim, no matter how meritorious, unless the employer is in very bad economic circumstances.” The Court further explained that a motion to dismiss for failure to state a claim would be the more appropriate approach to address the plan’s concerns. The Court vacated the court of appeals decision and remanded the case because the plaintiff’s alternate options for the fiduciaries’ investments may not have been plausible. Finally, the Court held that, on remand, the motion to dismiss standard should apply.

C. Burwell v. Hobby Lobby Stores, Inc.

In Hobby Lobby—a five-four opinion by Justice Alito—three closely held corporations brought claims under both the Religious Freedom Restoration Act of 1993 (RFRA) and the First Amendment. The companies’ owners believed that the ACA regulations, as the Department of Health and Human Services (HHS) interpreted them, violated their sincerely held religious beliefs by mandating that they provide employees with coverage for four types of contraceptives that operate after conception. The Court held these ACA mandates violated the RFRA because they substantially burdened the claimants’ exercise of religion and did not provide the least restrictive means to accomplish the ACA’s goals.

The Court first considered whether the companies could bring a claim under RFRA. The government argued that companies could not bring their claims for several reasons: corporations are not “persons” under the RFRA, corporations cannot “exercise religion,” and it is hard to ascertain the sincerely held “beliefs” of a corporation. Nevertheless, the Court concluded that corporations are “persons” under the RFRA by looking at the Dictionary Act definition of a person. The Court then noted that the government conceded that

| 197. | Id. at 2470. |
| 198. | Id. |
| 199. | Id. at 2471. |
| 200. | Id. |
| 201. | Id. |
| 204. | Id. at 2759, 2766. |
| 205. | Id. at 2759–60. |
| 206. | Id. at 2767. |
| 207. | Id. at 2769–74. |
| 209. | Burwell, 134 S. Ct. at 2768. |
nonprofit corporations can exercise religion and there was no reason to draw a line between nonprofits and for-profits because “[n]ot all corporations that decline to organize as nonprofits do so in order to maximize profits.”

Also, the Court identified various reasons why a company may not organize as a nonprofit organization, including the need to lobby for legislation. The Court noted: “It is quite a stretch to argue that RFRA, a law enacted to provide very broad protection for religious liberty, left for-profit corporations unprotected.”

According to Justice Alito, “[i]f Title VII and similar laws show anything, it is that Congress speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations.”

Finally, when addressing the difficulty of assessing the sincerity of beliefs of corporations, the Court explained: “If Congress thought that the federal courts were up to the job of dealing with insincere prisoner claims, there is no reason to believe that Congress limited RFRA’s reach out of concern for the seemingly less difficult task of doing the same in corporate cases.”

Also, the Court suggested that if multiple owners have disputes about their religious beliefs on a particular matter, “[s]tate corporate law provides a ready means for resolving” how management conflicts should be addressed.

The Court next analyzed whether the HHS regulations substantially burdened the companies’ religious beliefs. The Court held the HHS regulations did substantially burden the companies because they either have to “engage in conduct that seriously violates their religious beliefs,” “be taxed $100 per day for each affected individual,” or pay a penalty of “$2000 per employee [who qualifies for a subsidy on a government-run exchange] each year” if they decide not to provide any coverage at all.

Although the government argued for the first time that the $2000 penalty would be less-costly than offering insurance, the Court was not persuaded and stated that “it is far from clear that it would be financially advantageous for an employer to drop coverage and pay the penalty.”

The Court also explained: “We doubt that the Congress that enacted RFRA—or, for that matter, ACA—would have believed it a tolerable result to put family-run businesses to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans.”

210. Id. at 2771.
211. Id.
212. Id. at 2773.
213. Id. at 2773–74.
214. Id. at 2774.
215. Id. at 2775.
216. Id. at 2775–76.
217. Id. at 2777.
218. Id.
Next, the Court analyzed whether the government had shown that the contraceptive “mandate both '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'”\(^{219}\) The Court specified that the RFRA required that the government have a compelling interest for “application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.”\(^{220}\) The Court found it unnecessary to decide whether the government’s interests in promoting “public health” and “gender equality” were compelling.\(^{221}\) The Court assumed that there was a compelling interest in “guaranteeing cost-free access to the four challenged contraceptive methods.”\(^{222}\)

As a result, the Court turned to the least restrictive means analysis and held that the government did not satisfy the standard.\(^{223}\) The Court suggested a less restrictive alternative in which the government is responsible for the cost of providing contraceptives so that there is still no cost sharing for the employees.\(^{224}\) The Court rejected the government’s “view that RFRA can never require the Government to spend even a small amount” because that approach “reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted that law.”\(^{225}\)

The Court also pointed out that the government “has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs” because the government “has already established an accommodation for nonprofit organizations with religious objections.”\(^{226}\) This accommodation allows the “organization’s insurance issuer or third-party administrator” to remove contraceptive coverage from the group health insurance plan and provide separate payments for contraceptive services without employer involvement in any cost-sharing.\(^{227}\) According to Justice Alito, the dissenters identified no reason “why this accommodation would fail to protect the asserted needs of women as effectively as the contraceptive mandate” because “there is none.”\(^{228}\)

Finally, the Court addressed Justice Ginsberg’s dissent that asserted the majority’s decision will open up the floodgates to “religious

\(^{219}\) Id. at 2779 (quoting RFRA, 42 U.S.C. § 2000bb-1(b) (2012)).

\(^{220}\) Id. (internal citation omitted).

\(^{221}\) Id.

\(^{222}\) Id. at 2780.

\(^{223}\) Id.

\(^{224}\) Id.

\(^{225}\) Id. at 2781.

\(^{226}\) Id. at 2782 & n.41.

\(^{227}\) Id.

\(^{228}\) Id.
objections regarding a wide variety of medical procedures and drugs." In response, the Court described its decision as narrow and stated that it "should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer’s religious beliefs . . . [given that] other coverage requirements, such as immunizations, may be supported by different interests . . . and may involve different arguments about the least restrictive means of providing them." The Court also concluded that there was no evidence of current insurance policies that exclude the other types of medical procedures the dissenting opinion suggested companies will attempt to exempt such as blood transfusions and vaccines. Because the Court held that the contraceptive mandate violated the RFRA, it did not reach the First Amendment claim.

Justice Ginsburg’s dissent stated: “In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.” Justice Ginsburg noted that, when addressing less restrictive alternatives, the Court suggested that instead of “tolling an enterprise claiming a religion-based exemption, the government, i.e., the general public, can pick up the tab.” The dissent maintained that “Congress left health care decisions—including the choice among contraceptive methods—in the hands of women, with the aid of their health care providers.” According to Justice Ginsburg, the religious-based exemption for companies impinges on the interests of third parties who do not share their religious view, “the thousands of women employed by” them, and the “dependents of persons those corporations employ.”

Justice Ginsburg asserted that the Court also failed to inquire adequately into the “substantial” aspects of the burden placed on the companies’ exercise of religious beliefs. Instead, Justice Ginsburg would have found that the effect on the employer is “too attenuated to rank as substantial” because the companies need not purchase contraceptives and only have to place funds in the plans that would cover this benefit along with other benefits. In closing, the dissent stated: “The Court, I fear, has ventured into a minefield” by not confining its

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229. Id. at 2783.
230. Id.
231. Id.
232. Id. at 2785.
233. Id. at 2787 (Ginsburg, J., dissenting).
234. Id.
235. Id. at 2789–90.
236. Id. at 2778.
237. Id. at 2798.
238. Id. at 2799.
V. Tangential Employment Matters: Affirmative Action and Taxation of Severance Payments

Two cases decided in the 2013–14 term are of interest to employers and employees even though the disputes did not involve claims in which employees squared off against employers. The issues of affirmative action in a state ballot initiative regarding college admissions in Schuette is merely a step away from the issue of affirmative action in the workplace, a major concern for our increasingly diverse society. Also, Quality Stores provides a unique understanding of a tax issue affecting handling of severance arrangements. Thus, Schuette and Quality Stores offer some legal guidance for labor and employment practitioners.

A. Schuette v. Coalition to Defend Affirmative Action

In Schuette, the Court decided the constitutionality of a Michigan constitutional amendment—that arose from a voter referendum—prohibiting affirmative action and the consideration of race during the admissions process of state universities. Justice Kennedy, in a plurality opinion joined by Chief Justice Roberts and Justice Alito, found that the law was constitutional because “there is no authority in the Constitution of the United States or in this Court’s precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters.” Justice Kennedy emphasized that this case “is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education . . . but whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions.”

Justice Scalia’s concurring opinion, joined by Justice Thomas, maintained the state law did not offend the Fourteenth Amendment’s

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239. Id. at 2805 (citation omitted).
240. See Marcia Coyle, Race Question on Hold; Ruling Doesn’t Spell End of Affirmative Action—Yet, NAT’L J. (Apr. 28, 2014) (Professor Melissa Hart believes “the issue of affirmative action is just on hold” after Schuette and will return possibly when the Court’s 2013 decision in Fisher v. University of Texas works its way back to the Court). The Fifth Circuit Court of Appeals, on remand from the Court to conduct a closer review of the diversity admissions plan to ensure that it was not discriminatory, affirmed the district court’s grant of summary judgment on behalf of the University of Texas in Fisher on July 15, 2014. See Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 637 (5th Cir. 2014).
242. Id. at 1638.
243. Id. at 1630.
Equal Protection Clause because “[t]he Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.” Justice Scalia continued: “It is precisely this understanding—the correct understanding—of the federal Equal Protection Clause that the people of the State of Michigan have adopted for their own fundamental law . . . [to insure that] they did not simultaneously offend it.” Justice Scalia also found that the law was “facially neutral” because it directs “state actors to provide equal protection.”

At the end of his opinion, Justice Scalia quoted from the famous dissenting opinion in *Plessy v. Ferguson* as part of his final analysis: “As Justice Harlan observed over a century ago, ‘[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.’ The people of Michigan wish the same for their governing charter. It would be shameful for us to stand in the way.” Justice Scalia also asserted that it was “doubly shameful” for Justice Sotomayor to equate the majority in support of the Michigan prohibition with “the majority’ responsible for Jim Crow.”

Justice Breyer, in a separate concurring opinion, noted that “[w]e need now decide no more than whether the Federal Constitution permits Michigan to apply its constitutional amendment in those circumstances” in which the decision making on whether to use raced-based admissions was transferred to the voters away from unelected administrators and “I would hold that it does.”

In a vigorous dissent, Justice Sotomayor, joined by Justice Ginsburg, asserted that Michigan law violated the Equal Protection Clause because it was oppressive to minority groups. The dissent maintained that state voters cannot democratically ratify an amendment that violates the Equal Protection Clause, and yet the Michigan amendment both has a racial focus and places a greater burden on racial minorities. Specifically, Justice Sotomayor asserted that “[o]ur precedents do not permit political restructurings that create one process for racial minorities and a separate, less burdensome process for everyone else.”

244. Id. at 1639 (quoting Grutter v. Bollinger, 539 U.S. 306, 349 (2003)) (Scalia, J., concurring in part and dissenting in part).
245. Id.
246. Id. at 1640.
247. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
248. Schuette, 134 S. Ct. at 1648 (Scalia, J., concurring in part and dissenting in part).
249. Id. at 1648 n.11.
250. Id. at 1651 (Breyer, J., concurring).
251. Id. at 1651 (Sotomayor, J., dissenting).
252. Id. at 1653.
253. Id.
Further, the dissent viewed section 26 of the Michigan law as having a clear “racial focus” because the text “prohibits Michigan’s public colleges and universities from ‘granting preferential treatment to any individual or group on the basis of race.’” The Court therefore should subject the state’s action to strict scrutiny, and the failure of Michigan to assert some compelling interest should have resolved this case. Justice Sotomayor also vehemently criticized the Court for failing even to attempt to recognize that “race matters” while purposefully appearing to want “to leave race out of the picture entirely.”

B. United States v. Quality Stores, Inc.

In a tax case affecting the workplace, Quality Stores, the Court considered whether, under the Federal Insurance Contributions Act (FICA), employee severance payments are taxable wages. The Court held that severance payments fall under the broad definition of wages under FICA. The Court first examined whether the definition of “wages” in FICA specifically included severance payments. FICA’s definition is “‘all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash.’” The Court concluded that “as a matter of plain meaning, severance payments made to terminated employees are ‘remuneration for employment’” and “it would be contrary to common usage to describe as a severance payment remuneration provided to someone who has not worked for the employer.”

The Court explained that severance packages are like any other benefit that companies use to attract talented employees. Additionally, FICA specifically exempts severance payments made for retirement or disability. The Court noted “that exemption would be unnecessary were severance payments in general not within FICA’s definition of ‘wages.’”

The Court also addressed section 3402(o) of the Internal Revenue Code and its definition of wages. Section 3402(o) reads: “(A) any

254. Id. at 1659.
255. Id. at 1663.
256. Id. at 1676.
257. Id. at 1675.
260. Id.
261. Id. at 1399.
262. Id. (quoting FICA, 26 U.S.C. § 3121(a)).
263. Id. at 1399–400.
264. Id. at 1400.
265. Id.
266. Id.
267. Id. at 1401.
supplemental unemployment compensation benefit paid to an individual . . . shall be treated as if it were a payment of wages by an employer to an employee for a payroll period."268 The employer argued that the “as if” language is “an indirect means of stating that the definition of wages for income-tax withholding does not cover severance payments.”269

Rejecting that argument, the Court said that, similar to the FICA definition section, the definitional section for income tax withholding has specific exemptions that do not include severance payments.270 The Court further agreed with the Federal Circuit that “the statement that ‘all men shall be treated as if they were six feet tall does not imply that no men are six feet tall.’”271 The Court found “that simplicity of administration and consistency of statutory interpretation” should also “instruct that the meaning of ‘wages’ should be, in general, the same for income-tax withholding and FICA calculations.”272

VI. Unanimity While Fighting Especially over Words

A strange form of unanimity was a common theme among the labor and employment cases of the 2013–14 term.273 The Court’s ongoing battle over how to interpret the meaning of words was central to several cases.274 One commentator noted in 2010 that the Justices’ “work more often is deciphering the muddy language of legislative compromise or even the ambiguous words of their predecessors on the bench.”275 In Sandifer,276 essentially a unanimous decision of the Court, Justice Scalia highlighted the key to the decision was understanding the meaning of the words “changing clothes” while also recognizing that the terms “donning” and “doffing” were important additional considerations: “We still

268. Id. (quoting 26 U.S.C. § 3402(o)).
269. Id.
270. Id. at 1401–02.
271. Id. at 1402 (quoting CSX Corp. v. United States, 518 F.3d 1328, 1342 (Fed. Cir. 2008)).
272. Id. at 1405.
273. See supra notes 20–22 and accompanying text.
274. See Sandra J. Mullings, The Supreme Court Takes on the EEOC: What’s at Stake in Mach Mining?, 65 Lab. L.J. 144, 146 (Sept. 1, 2014) (in employment discrimination cases “the Supreme Court has often harkened to the language, or ‘plain language’ . . . in question” and it is “incorrect to infer that Congress meant anything other than what the text does say”); see also Debra Cassens Weiss, Supreme Court Debates Word Choice in Three Recent Arguments, A.B.A. J. (Oct. 18, 2010), http://www.abajournal.com/news/article/supreme_court_debates_word_choice_in_three_recent_arguments/ (last accessed Dec. 31, 2014) (the Court debated word choice in three cases in 2010, including an employment law case).
“Don we now our gay apparel” at Christmas, . . . and I suppose a well-bred gentleman still doffs his hat to a lady.”

One commentator believes that Sandifer suggested that “‘preliminary’ and ‘postliminary’ activities are compensable under the FLSA only if they are an ‘integral and indispensable part of the principal activities for which covered workmen are employed.’”

Future wage and hour cases may support employer arguments that “activities that are tangentially related, but not integral to the performance of one’s job, are not compensable principal activities.”

Already in 2014, in Integrity Staffing, the Court held that “an activity is integral and indispensable to the principal activities that an employee is employed to perform . . . if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities.”

The Court concluded that going through Integrity Staffing’s security screening before leaving the workplace did not meet this criterion and was thus noncompensable under the FLSA.

Lawson was another case in which words played a key role: the Court battled over the meaning of the words “an employee” in deciding the scope of whistleblower coverage under SOX.

Did “an employee” only mean an employee of a publicly traded company or did an employee mean an “officer, employee, contractor, subcontractor, or agent of such company”?

In one of its classic debates over words, the Court decided that the statute’s logical reading suggested that “an employee” meant all employees of these entities. But the Court used different approaches in determining the meaning.

Justice Scalia considered it not problematic that “an employee” could have such a broad meaning, even if it might lead to absurd results, because clear terms must be adhered to even if those terms allow babysitters or gardeners to be covered by SOX.

On the other hand, Justice Ginsberg’s majority opinion recognized the expansive nature of a broad interpretation and sought a more pragmatic reading that would not lead to an absurd result.

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279. Id. (emphasis omitted).


281. Id.


283. Id. at 1161–63.

284. Id. at 1176.

285. Id. (Scalia, J., concurring in part).

286. Id. at 1168 (majority op.).
Scalia acknowledged these policy reasons, he criticized the Court for pursuing this analysis instead of relying solely on the text. Justice Scalia framed his textual concern as follows: “I do not endorse, however, the Court’s occasional excursions beyond the interpretive terra firma of text and context, into the swamps of legislative history. Reliance on legislative history rests upon several frail premises.”

He explained further that “[b]ecause we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended, the sole object of the interpretative enterprise is to determine what a law says.” Justice Scalia added: “on most issues of detail that come before this Court, I am confident that the majority of Senators and Representatives had no views whatever on how the issues should be resolved—indeed, were unaware of the issues entirely.”

Justice Sotomayor’s Lawson dissent rejected Justice Scalia’s criticism, using a concern about absurd results to conclude that Congress could not have intended to protect babysitters and gardeners as SOX whistleblowers. Lawson, probably more than any other case last term, thus highlights the ongoing divisions in the Court about interpretation of words and how those divisions continue to affect labor and employment law.

Both the unusual unanimity and the debate over how to interpret the meaning of words were directly at issue in Noel Canning. Despite the unanimity of the judgment, the justices disagreed about how to interpret the meaning of “recess.” Justice Scalia’s textualist views came to center stage as he asserted in a concurring opinion that the language in the Recess Appointments Clause clearly applied only to intersession recesses regardless of whether presidents have made countless appointments without complaint, inconsistent with his analysis. Justice Breyer instead, in Noel Canning, examined definitions at the time the constitutional drafters used the language and also considered the pattern of recess appointments over time.

VII. Conclusion: Labor and Employment Court Concerns for the Immediate Future

Although the debate about the meaning of words will continue to play a key role in deciding cases, some specific areas of labor and

287. Id. at 1176 (Scalia, J., concurring in part).
288. Id. at 1176–77.
289. Id. at 1177.
290. Id. at 1183–84 (Sotomayor, J., dissenting).
292. Id. at 2556.
293. Id. at 2617 (Scalia, J., concurring).
294. Id. at 2559–61 (majority op.).
employment law seem ripe for further Court review. Whistleblowing, wage and hour, labor, and employee benefits law are areas in which the Court will be facing new issues beyond those resolved during the 2013–14 term. Also, while there were no statutory employment discrimination claims during this term, the upcoming docket suggests these claims have returned to the Court’s attention.

Despite concern that the Court’s unanimity in some cases this past term was specious—in light of some of the concurring opinions—the Court is still resolving more decisions on a purportedly unanimous basis. Whether unanimity is a smokescreen will require more analysis of the concurring opinions. When the only exception to unanimity is a single justice objecting to an expansive footnote, as in Sandifer, that sounds like wide approval. However, if all the justices agree on the result, but the concurring opinions are so different and critical that there does not appear to be any real agreement about how to deal with the underlying issue, such as the definition of a recess appointment in Noel Canning, that decision suggests unanimity was only on the surface.

Labor and employment cases will continue to be an important area of law for the Court to consider. The 2013–14 term demonstrated the breadth of potential labor and employment law matters. The return of employment discrimination issues during the 2014–15 term, along with labor, wage and hour, whistleblowing, and benefits cases, demonstrates the significance of labor and employment matters for the Court, both now and in the future.

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295. See Coyle, supra note 21.
Immigration Action: The Civil Litigation Side of Employing Foreign Nationals

By Brian S. Green,* Jonathan A. Grode,** & Alex Varghese***

I. Introduction

For almost two decades after the passage of the last great comprehensive immigration reform bill, the Immigration Reform and Control Act of 1986 (IRCA),1 there was relatively minimal enforcement of its expansive provisions that mandated that employers ensure the legality of their workforce and comply with applicable labor laws.2 Actions of the Office of Special Counsel (a body within the Department of

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Justice created by the IRCA) to ensure that foreign and domestic workers were not discriminated against resulted in penalties that were minor when compared to similar actions brought by the Equal Employment Opportunity Commission.

Dissolution of the Immigration and Naturalization Service in 2003 and creation of an enforcement-centered agency, Immigration and Customs Enforcement (ICE) under the Department of Homeland Security (DHS), led to a dramatic shift in the enforcement efforts of the government and significant increases in the number of investigations, penalties, and sanctions levied against employers.\(^3\) Since 2003, the Department of Labor’s (DOL) Wage and Hour Division (WHD) has, in parallel with DHS, also increased its investigations of employers who utilize the H-1B, H-2A, and H-2B visa programs.\(^4\)

Until very recently, most enforcement actions against employers rested squarely with the government.\(^5\) The plaintiffs’ bar, however, has been learning incrementally that private immigration-related actions against employers for a variety of civil offenses are not only possible, but can often be quite successful. Plaintiffs in recent cases have included not just foreign workers who were discriminated against by their employers, but also U.S. workers who were passed over for employment in favor of foreign workers.\(^6\) Actions have been filed in a range of venues including the DOL Office of Administrative Law Judges (OALJ), state courts, and federal district courts. Complaints filed with and investigated by WHD, and litigated in OALJ courts, include the improper assessment of recruitment fees from H-1B workers, underpayment or non-payment of H-1B workers, improper termination of H-1B workers, and improper replacement of laid-off U.S. workers with H-1B workers within ninety days of termination. In federal district court, plaintiffs have sued for reverse discrimination on the basis of race, ethnicity, or national origin under Title VII of the Civil Rights Act as well as actions for the systematic recruitment and unfair exploitation of foreign H-1B workers under the Racketeering Influenced and Corrupt Organizations Act (RICO)\(^7\) and Trafficking Victims

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5. Id. See also United States Government Accountability Office, supra note 2.


Protection Act (TVPA). State civil actions run the gamut from claims for breach of H-1B employment contracts to suits for the recovery of back wages where employers withheld payment of wages or made improper deductions for H-1B program expenses from their employees in direct contravention of U.S. immigration law.

This Article addresses in detail a representative sample of recent claims, including a discussion of how plaintiffs’ counsel can seek redress on behalf of foreign workers and, importantly, what employers can do in turn to create policies and procedures that prevent violations from occurring or mitigate damages for violations that may have already occurred. Section II reviews the H-1B program and the statutory and regulatory framework in which violations may occur. Section III explores several claims available to plaintiffs through the WHD and OALJ. Section IV examines a sample of innovative federal and state claims seeking to redress H-1B violations. While this article is particularly focuses on the H-1B program, the principles and concepts explored here can be applied across the spectrum of nonimmigrant and immigrant visa processes as well as by those who represent foreign nationals that do not have legal authorization to remain in the United States.

II. Overview of the H-1B Program

The H-1 program was created in 1952 by the Immigration and Nationality Act (INA), which divided immigration into three categories: family reunification, employment, and humanitarian reasons. The Immigration Act of 1990 further revised the employment category, creating for the first time the H-1B visa for specialty occupations, defined as those requiring highly specialized knowledge as well as a bachelor’s degree or its equivalent. The H-1B program, as currently administered, is complex and imposes serious obligations on participating employers. Although H-1B status is an immigration benefit and ultimately granted by the United States Citizenship and Immigration Services (USCIS), a DHS agency, key roles in administering and overseeing the H-1B program are carried out by the DOL and WHD. The DOL is initially involved in the process by reviewing and certifying Labor Condition Applications (LCAs), which is a required component of any H-1B petition filed with USCIS. As described in greater detail below, the LCA is an attestation by the employer that it will provide

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the same working conditions (both in terms of salary and benefits) to the H-1B visa worker as those provided to U.S. workers. The WHD is responsible for ensuring that employers adhere to the LCA's conditions as well as all other DOL H-1B regulations. Failure to comply with H-1B program regulations can lead to investigations and penalties from the WHD and frequent claims for back wages, some of which may arise even after the H-1B worker is separated from employment. From the outset, it is clear that employers and their counsel are well-advised to thoroughly understand the H-1B program before making LCA attestations to the DOL that may create long-lasting problems.

A. The H-1B Process

A U.S. employer wishing to sponsor a specific foreign national under the H-1B program begins by filing a LCA online on the DOL's Employment and Training Administration (ETA) website. LCAs are the source of most employer obligations and responsibilities in the H-1B program and must include information about the specific occupation in which the worker will engage, as well as details intended to demonstrate that the domestic U.S. workforce will not be harmed by hiring a foreign worker. The LCA includes attestations that bind the employer to paying the higher of either the prevailing wage listed for the occupation in the geographical area of intended employment or the actual wage paid to similarly employed co-workers within the company. The LCA also lists the number of hours that the H-1B worker will be employed per week and, by signing the LCA, the employer agrees to compensate the H-1B worker for the agreed upon hours per week or pay period, regardless of the actual minimum hours worked, subject to very limited exceptions. Other labor protections included in the LCA are attestations that no labor strike is ongoing at the time of the LCA and that no U.S. workers will be displaced by the employment of the H-1B worker.

Some of the most common ways an employer violates the LCA include assigning the foreign national work in an occupation not approved

13. Id.
14. See, e.g., Limanseto v. Ganze & Co., 2013 WL 3490723 (Dep't of Labor Admin. Rev. Bd. June 6, 2013) (awarding a terminated H1-B worker $44,528.00 in back wages plus up to $2,500 in reimbursements, plus pre-judgment and post-judgment interest, because his employer failed to follow proper termination procedures as dictated by the INA. See infra Part III).
17. 20 C.F.R. § 655.730(d) (2013).
18. See id. § 655.731(c).
19. See id. § 655.730(d). Once the DOL has certified the LCA, it may be used as the foundation of an H-1B petition, which is filed with the USCIS on Form I-129. See 8 C.F.R. §§ 214.2(h)(4)(iii)(B), 214.2(h)(2)(i)(A) (2013).
by USCIS, locating the foreign national for more than thirty or sixty
days in an unapproved location, and not paying the wage listed either
through benching or based upon the incorrect assumption that non-
guaranteed bonuses can be considered salary. Some of these provi-
sions protect the U.S. workforce against wage deflation and others pro-
tect H-1B workers from abuse or exploitation.

The WHD enforces the employment standards and worker protec-
tion provisions of the INA for several nonimmigrant visa programs, in-
cluding the H-1B. Created in 1938 to administer the landmark Fair
Labor Standards Act (FLSA), the WHD employs investigators who
act on complaints from aggrieved parties and information provided
by the DOL or other federal agencies about possible violations of the
H-1B program. WHD investigators compile evidence of violations,
meet with workers and employers, and may issue findings in the
form of determination letters. If the employer or an affected worker
disagrees with the WHD findings, either party may appeal by request-
ing a hearing from the DOL’s Chief Administrative Law Judge.

Many WHD H-1B investigations begin with a complaint filed by a
current or former employee, often for compensation issues. These
can include claims of unpaid wages, unauthorized deductions from
pay, withheld final paychecks, failure to place a worker on payroll
for a period of time after they enter the United States or after the ap-
proval of the H-1B petition if they are already in the United States and
changing employers or “changing status,” and requiring employees to
pay for fees or costs associated with the H-1B petition, LCA, or H-1B
process.

B. Where Employers Go Wrong

North Shore School for the Arts demonstrates how even the
most well-meaning employers can run afoul of immigrations laws.
The North Shore School was operated by a non-practicing attorney,
who served as an H-1B sponsor as a favor for a Japanese musician

1182(t)(3)(A) (2012)). An H-1B employee is generally not permitted to work at an unap-
proved location for more than ninety workdays during any three-year period. See
20 C.F.R. § 655.735(c) (2013).
24. Id.
27. In accordance with federal regulations, the WHD considers all costs associated
with the H-1B program to be employer expenses and any shifting of these expenses to
H-1B workers as a deflation of the wages paid to them, often resulting in a “required
28. See N. Shore Sch. for the Arts, 2012-LCA-00039 (Dep’t of Labor Jan. 18, 2013).
who wanted to work in the United States, even though the employer did not have a full-time need for the musician. North Shore School submitted the required LCA to the DOL and attested to a number of obligations, including a commitment to pay the musician the proffered wage for a specified period of twenty hours per week. The foreign worker, after obtaining H-1B classification, taught a small number of students and was paid accordingly on an hourly basis. The employer mistakenly believed that the musician could be paid only for hours worked and did not compensate the foreign worker for the full twenty hours per week stated on the LCA. In his opinion, the DOL Administrative Law Judge (ALJ) admonished the employer for acting with virtually no knowledge of the requirements of the H-1B program. This incongruence between “required wages” and wages actually paid is not permitted under the regulations and only an exception to the general rule allowed the employer’s back wage obligation to be mitigated. While the WHD originally awarded the teacher $16,800 in back wages, the ALJ reduced that amount to $2,980, but only because he found that the worker had not shown that she had been “ready, willing and able” to perform her job duties as required by the regulations. While the financial penalty associated with this case is small, larger employers are subjected to an exponential effect for similar violations when more H-1B workers are involved and more hours promised. As clearly expressed by North Shore School for the Arts, ignorance and good intentions will not spare an employer from the DOL’s exacting scrutiny, no matter how small the violation appears to be.

29. Id. at 5–6, 8–9, 13.
30. Id. at 4, 8–11.
31. Id. at 4.
32. Id. at 14–15.
33. Id. (The employer was ordered to pay for time actually worked).
34. Id. at 13.
35. Employers who participate in the H-1B program must be familiar with the distinct concepts of prevailing, actual, and required wages under DOL regulations. The “prevailing wage” is the average wage paid to similarly employed workers in a specific occupation in the geographical area of intended employment, the determination of this rate is based on information and surveys of wages conducted around the filing time of an H-1B petition. 20 C.F.R. § 655.731(a)(2) (2013). The “actual wage” is the wage paid by the H-1B sponsoring employer to all other individuals with similar experience and qualifications for the position to be sponsored. Id. § 655.731(a)(1). The “required wage,” which must be paid to all H-1B workers, is the greater of the two wages described above. Id. The simple take-away for employers is that, while a prevailing wage survey may list an acceptable wage rate, actions by the employer to pay above that amount will result in the re-setting of the required wage and an increased back wage risk should the H-1B employer not properly pay each H-1B worker. See generally Mao v. Nasser, ARB Case No. 06-121, 10–11, n.25 (Dep’t of Labor Admin. Rev. Bd. Nov. 26, 2008).
36. N. Shore Sch. for the Arts at 11–14.
37. Id. at 12–14.
III. Claims Available Through the DOL WHD and OALJ

A. Improper Termination

The past decade has seen WHD investigators and the regional offices that coordinate them become increasingly sophisticated in enforcing H-1B program violations. One of the most frequently investigated violations is benching. Benching refers to a period of time where an H-1B worker is not actively engaged in H-1B employment and is not compensated while waiting to work. More recently, a version of benching known as “terminal benching,” which the WHD defines as failure to pay required wages at the end of an H-1B worker’s period of employment, has received more attention. A recent series of ALJ and Administrative Review Board (ARB) decisions focused on, and arguably expanded, the penalty that H-1B employers incur when they fail to effect a bona fide termination for each H-1B worker whom they have sponsored. Generally, an employer must pay the required wages promised to each H-1B worker for the entire period certified by the DOL in the relevant LCA. The required period even includes nonproductive time caused by conditions related to employment, including the lack of work (i.e. benching). The only way to end this wage obligation is to complete a bona fide termination of the worker or for the LCA to expire.

A bona fide termination under immigration regulations consists of three steps: (1) notification of the employee; (2) notification of USCIS; and (3) an offer to pay the employee the reasonable costs of return transportation abroad. If any of these steps are lacking, the employer is potentially liable for back wages for the remaining period of the LCA. As many LCAs are certified for the maximum validity of three years, back wages in these situations can be significant.

This occurred in Limanseto v. Ganze, where the ALJ found that the employer had failed to complete a bona fide termination and was

40. The ARB is the DOL appellate body that reviews ALJ decisions. See 20 C.F.R. § 655.845(a) (2013).
43. Id.
44. Id.
45. It should be noted that the requirement to pay return transportation costs only applies to involuntarily terminated workers. If an H-1B worker voluntarily quits a position, to join another U.S. employer, for example, this requirement is effectively waived. See 20 C.F.R. § 655.731(c)(7)(ii) (2013) and 8 C.F.R. § 214.2(h)(4)(iii)(E) (2014).
thus obligated to pay almost three years of back wages, an amount totaling more than $156,000.47 This decision gained attention not only because of the size of the back wage award, but because the H-1B worker spent most of the covered three years in Indonesia, nowhere close to the employer’s work location in California.48 The ALJ found that being physically absent from the United States, and arguably unavailable to work, did not relieve the employer from paying the worker’s full salary for the period of time cited on the LCA.49 Likewise, Limanseto’s employment elsewhere during those three years was not deemed to mitigate damages.50 The employer appealed to the ARB, which reduced the back wage award not because back wages cannot accrue if a worker is unavailable and outside of the United States, but rather because plaintiff’s counsel made concessions during the ALJ hearing that his client only sought back wages for specific time periods.51 While the ARB reduced the back wage obligation from the original $156,425.00 to $44,585.00, it did not decide the question about the outer limits of back wage liability when an employer fails to complete all the steps required for a bona fide termination.52

The ARB revisited the issue of back wages for H-1B workers in a July 2014 decision that created an exception to the bona fide termination requirement for a sub-group of H-1B workers.53 In Batyrbekov v. Barclays Capital, the ARB reviewed an H-1B worker’s claim for back wages, bonuses, and benefits following his termination, which forced him to leave the United States, although he returned to work for another H-1B employer in the same field.54 Batyrbekov argued that Barclays failed to complete a bona fide termination, thus creating ongoing employer liability.55 The Board looked at the employment departures of many H-1B workers and the practice of workers “porting” to a new H-1B employer using a provision of the American Competitiveness in the Twenty-First Century Act (AC21).56 Under AC21, H-1B workers may leave their employment and join new H-1B employers without having to leave the United States and obtain a new

47. Limanseto v. Ganze & Co., 2013 WL 3490723, at *1–2 (DOL Admin. Rev. Bd. June 6, 2013). Although the employer notified the employee, it did not notify USCIS or offer to pay return transportation as required by the regulations. Id.
48. Id. at *2.
49. Id.
50. Id.
51. Id. at *1, *4–5.
54. Id. at *2.
55. Id. at *3.
H-1B visa, increasing this often highly educated foreign workforce’s mobility.57

In Batyrbekov, the ARB held that back wage liability ends when an H-1B worker ports to a new employer, even if the original employer failed to complete a bona fide termination, because the USCIS is put on notice that the original employment ended when the new employer files a Form I-129 petition requesting permission to employ the worker after a change in employment.58 A bona fide termination, therefore, is not required as its purpose of informing the worker and USCIS that the employment ended is accomplished.59

Batyrbekov is extremely important to H-1B employers, especially those who are “H-1B dependent” by virtue of, for smaller employers, having more than a certain number of H-1B workers or more than fifteen percent of their workforce in H-1B status for larger companies.60 Under Limanseto, a failure to complete timely bona fide terminations could cause an H-1B dependent employer to accumulate back wages in the hundreds of thousands or even millions of dollars. With the new precedent set in Batyrbekov, the same facts might lead to minimal findings of back wages since most H-1B workers seek permanent residence and obtaining a “green card” involves years of H-1B status, possibly with multiple H-1B-sponsoring employers. The DOL policy introduced in Batyrbekov now more accurately reflects this reality of employment for H-1B workers.

Despite this positive change, counsel for employers would be well advised to adhere strictly to regulations in the termination of every H-1B worker. Limanseto can still serve as a useful cautionary tale in advising clients about the type of reasoning that the WHD and ALJs will follow in cases in which a bona fide termination was not completed and the H-1B worker did not port to a new employer.

B. Improper Collection of H-1B Fees

The WHD has also scrutinized claims that employers are passing the cost of the H-1B program along to sponsored foreign workers.61 Imposing such business expenses on the H-1B employee is a violation of the prevailing wage requirement.62 The rationale here is that paying such fees effectively depresses the wages of foreign workers, placing U.S. workers at a competitive disadvantage.63 While some expenses may arguably be assumed by workers, the WHD sees most, if not

58. Id. at *7–8.
59. Id. at *6–7.
62. Id. § 655.731(c)(11).
63. See id. § 655.731(c)(12).
all, expenses related to H-1B matters as employer expenses.64 If one former employee complains of this practice, the WHD investigator may deem that to be evidence of a more widespread policy and broaden the investigation, resulting in the potential reimbursement of a larger number of employees.

One such prominent case that utilized this provision was brought against the Prince George’s County Public Schools system in Maryland, where the WHD reached a settlement, securing over $4.2 million in back wages to 1,044 workers (primarily teachers from the Philippines), $1.7 million in penalties, and a two-year debarment period, during which the district was disqualified from filing new petitions, requests for visa extensions, or permanent residency requests for foreign workers.65 The investigation, which lasted several years, was initiated by a complaint from employees who were disgruntled about having to pay fees associated with their H-1B petitions.66 Despite months of negotiations between the district and the WHD, during which the school system professed ignorance of the regulations and claimed good faith in their actions, the ALJ, on appeal, found the school district to be a “willful violator,” triggering the two-year debarment in addition to the fines and back wages.67 The unexpected consequence was that the Filipino teachers, some of whom had complained to the WHD initially, were now faced with employment at a school district that could not renew their H-1B visa nor continue with any sponsorship for their lawful permanent residency in the United States.68 Many, if not most, of these Filipino teachers injured by their employer were left scrambling to find new employers to sponsor them for new H-1B petitions or leave the United States.69 Thus a lawsuit that sought to protect foreign workers left the workers arguably worse off. Additionally, Prince George’s County Public Schools most likely did not want to lose a seasoned and experienced group of dedicated teachers. Despite negotiations and an appeal to an ALJ, the draconian penalty of debarment could not be avoided.70

64. See id. § 655.731(c)(9)(iii). Expenses that may be paid by workers include attorney’s fees for any portion of an H-1B case that relates to their personal situation, such as filing for a change of status based on changed family circumstances, seeking an H-1B visa abroad, or even the substantial premium processing fee when the need for a fast adjudication is personal rather than employer-driven. Id.


66. Id.

67. Id.


69. See id.

70. See Samuels, supra note 65.
WHD took the position, as it does with terminal benching claims, that ignorance is no bar to enforcement actions under the exacting standards of the H-1B regulations.\(^7\) Once again, when the WHD takes such a stance, the consequences for both employer and H-1B employees can be severe.

**C. The WHD Complaint Process**

As the foregoing examples show, H-1B workers, particularly given the qualifying requirement of a college degree or its equivalent, are by definition an educated and well-informed group. They consequently often have better access to legal resources than workers in other categories. A large number of websites run by plaintiffs’ attorneys and even other H-1B foreign nationals inform these workers through blogs, forums, and online articles.\(^7\) Thus, workers are often well aware of their legal options, and may seek other recourse when the WHD process does not result in swift action and compensation. Kevin Limanseto, for example, was dissatisfied when the WHD investigation found no violations.\(^7\) He appealed the finding to an ALJ and, rather than recovering nothing, was awarded close to three full years of back wages.\(^7\) As the plaintiff’s bar becomes more aggressive in pursuing H-1B related claims with the WHD and in the courts, the options available to their wronged H-1B clients increase.

1. Lodging a WHD Complaint

H-1B workers, or their counsel, may report claims of violations to the WHD using a DOL Form WH-4.\(^7\) However, no official form is required and oral complaints may be memorialized by WHD personnel.\(^7\) When a complaint is received, the WHD has ten days to determine if reasonable cause exists that a covered violation occurred.\(^7\) If a covered violation is found and it occurred within the twelve months preceding the complaint filing, the WHD may investigate.\(^7\)

Complaints may be filed either by aggrieved parties or non-aggrieved ones.\(^7\) Aggrieved parties include H-1B workers who have been injured through a violation committed by an employer.\(^7\)

\(^7\) See id.


\(^7\) Id.


\(^7\) See 20 C.F.R. § 655.806(a) (2013).

\(^7\) Id.

\(^7\) Id.

\(^7\) Id. §§ 655.806–07.

\(^7\) Id. § 655.806.
Non-aggrieved parties may include whistleblowers and the general public.\textsuperscript{81} Disgruntled former or current employees, competitors, applicants who were not selected for employment, and third-party activists may all report alleged violations to the WHD.\textsuperscript{82} If a U.S. worker is laid-off and replaced within ninety days by an H-1B worker, a report of the displacement may be made to the WHD.\textsuperscript{83}

As noted above, H-1B workers have standing to request a hearing and for \textit{de novo} review of their claims by an ALJ.\textsuperscript{84} For example, when Limanseto appealed, the WHD stepped back and the ALJ heard the case as presented by the worker and by the employer-respondent.\textsuperscript{85} Similarly, employers unhappy with the findings of the WHD may request an ALJ hearing.\textsuperscript{86} Requests for a hearing must be made in writing and actually received by the DOL’s Chief ALJ within fifteen calendar days of the WHD determination (not the date it was received by a party).\textsuperscript{87} As most WHD determination letters are sent by certified mail, parties may have significantly less than fifteen days to request a hearing.

2. Conduct of ALJ Hearings

Once a timely request for hearing is received, the Chief ALJ will appoint an ALJ to oversee the hearing.\textsuperscript{88} DOL ALJ hearings are conducted with strong time constraints when compared with state and federal court proceedings. Within seven days of assignment, ALJs must inform all interested parties of the date, time, and place of the hearing.\textsuperscript{89} This schedule may be completed through a pre-hearing order that may also set forth important deadlines for the hearing process.\textsuperscript{90} Under DOL regulations, the hearing must take place within sixty days of the issuance of the WHD determination letter.\textsuperscript{91} Since this sixty days includes the fifteen days allotted for appeal and seven days for setting the hearing, it is possible that the parties could have as little as thirty-eight days to prepare for a hearing. Preparation may include drafting and serving discovery requests and

\textsuperscript{81} See generally id. § 655.807.

\textsuperscript{82} Id.; See also Complaint, Koehler v. Infosys, No. 2:13-cv-00885-CNC (E.D. Wis. Aug. 1, 2013) (complaint brought by U.S. citizen job applicant who was rejected in favor of an H-1B foreign national); Santiglia v. Sun Microsystems, Inc., 2005 WL 1827744 (Dep’t of Labor Admin. Rev. Bd. July 29, 2005) (whistleblower suit by disgruntled former U.S. citizen employee who claimed fraudulent conduct by employer in processing LCAs for H-1B employees).

\textsuperscript{83} See 20 C.F.R. § 655.738(c) (2013).

\textsuperscript{84} Id. § 655.806.


\textsuperscript{86} 20 C.F.R. § 655.820 (2013).

\textsuperscript{87} Id. §§ 655.815(a)–(c).

\textsuperscript{88} Id. § 655.835(a).

\textsuperscript{89} Id. § 655.835(b).

\textsuperscript{90} Id. § 655.835(d).

\textsuperscript{91} Id. § 655.835(c) (2013).
discovery responses, taking depositions, exchanging evidence and exhibits, and filing pre-hearing motions. Hearings are conducted de novo, under the provisions of 29 C.F.R. § 18.92.

3. Appeals of ALJ Decisions

Following an ALJ written decision, all parties have thirty days to appeal to the ARB. The ARB conducts its review of the case on the record and may take a year or two to issue a decision. The ARB’s decision may be appealed to the U.S. District Court with jurisdiction over the place of the original WHD investigation. Plaintiffs may appeal an ALJ or ARB decision even if the WHD does not believe that further judicial review is warranted.

4. Other Considerations During the WHD and ALJ Process

Counsel on both sides of H-1B labor disputes should recognize that by filing a complaint with the WHD, the parties are surrendering control over the process to a third-party that has its own enforcement priorities. If an aggrieved H-1B worker wants to recover back wages and reimbursements quickly, perhaps as part of a move to a new employer or a move overseas, the drawn-out WHD investigation process may be a less attractive option than direct negotiations with the employer. WHD investigations may take several years, depending on factors such as the complexity of the issues involved, the availability of corporate records and witnesses, and the experience level and workload of the assigned investigator. In addition, the ALJ process can be time-consuming and ARB decisions can take one to two years to be released. Even after the ARB has ruled, either party may then litigate the case for an extended period of time in federal court.

If one H-1B worker complains against a large or very noncompliant employer, the WHD may expand the investigation to include many additional aggrieved workers. In the case of Administrator v. Sirsai, Inc., the WHD’s findings ultimately covered more than 100 employees and awarded back wages, ordered reimbursements, and assessed civil

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93. 20 C.F.R. § 655.845(a) (2013).
96. See 5 U.S.C. § 704 (2012). Throughout this years-long process, the employer’s obligation to pay any back wages or to make reimbursements is stayed, subject to the accrual of interest. 20 C.F.R. §§ 655.820(a), 655.845(c) (2013).
monetary penalties in excess of $1.3 million.\textsuperscript{99} Sirsai first requested a hearing with the ALJ, and then appealed that adverse decision to the ARB, which accepted the case and sought briefing.\textsuperscript{100} As of the date of this article, more than four years after the initial complaint, no workers in the Sirsai case have received any back wages.\textsuperscript{101}

Both parties should carefully consider the cost of multi-year litigation and appeals. Plaintiffs’ counsel may need to charge by the hour or, if state ethics rules permit, work under a contingent fee agreement. Employers’ counsel, whether in-house or from an outside source, will expend time and resources in conducting an investigation, preparing a defense, and presenting a case first to the WHD and possibly in successive appeals. Witnesses, typically current or former employees, may be located anywhere in the United States or even overseas. Subpoenas issued by ALJs cannot compel distant witnesses to travel at their own expense to save the litigants money.\textsuperscript{102} Deposing just one witness may involve considerable expense, and defending a large WHD investigation can require fees and expenses that reach into the six-figure range. If claims are made by just one individual or even a small number of H-1B workers, it may be more cost-effective to settle either directly with the workers’ counsel or through the WHD. Plaintiffs’ counsel should likewise keep in mind that a settlement, even for less than the full amount of possible back wages, paid quickly, may be more attractive to an individual H-1B worker, rather than waiting years to recover an unknown amount with only a paltry return in pre-judgment and post-judgment interest.

Both sides should also understand the difference between these settlements prior to WHD involvement and settlements after WHD has been contacted. The decision-makers in disputes where the WHD is not yet involved are the employer and the aggrieved workers. Once the WHD has opened an investigation, however, the WHD District Director or Assistant District Director with jurisdiction is ultimately the person who will accept or reject a settlement, not the worker or workers in question.\textsuperscript{103} It should be apparent that

\textsuperscript{99} Id. at 2.
\textsuperscript{100} Brian Green, the first author of this article, is counsel for Sirsai, Inc. in the ongoing litigation.
\textsuperscript{101} Id.
\textsuperscript{102} See 29 C.F.R. § 22.25 (2013).
\textsuperscript{103} See 20 C.F.R. §§ 655.800, 655.806, 655.810 (2013); WHD FIELD OPERATIONS HANDBOOK 71a00(c) (2006) ("WH enforces all elements of the LCA, which include the material facts and labor condition statements"); id. at 71b00 ("The regulations authorize the Administrator to impose CMPs, [back wages], and other appropriate remedies."); id. at 71h00(a) ("Upon JRC review and approval of any finding and remedy (if any), the [employer] must be provided with a determination letter. This letter can be personally served at the final conference or the [District Director / Assistant District Director] may mail the determination to the [employer].")
settlement may be easier to reach without WHD involvement. In cases where this is not possible, the ALJ overseeing the hearing may appoint a mediation judge to mediate with the parties, as long as both the employer and affected H-1B workers agree to that process.104

5. Preventative Measures to Mitigate Harm.

Employers can also seek to mitigate the risk, fines, damages, and adverse publicity that may come from an investigation by the WHD. One strategy is to conduct an internal audit of the company’s H-1B compliance with particular attention to required wage issues, any reduction in compensation to H-1B workers, all deductions taken from H-1B workers’ pay, and any payments or reimbursement made by H-1B employees to the company. If violations are found, counsel for employers should seek either to remedy them and ensure on-going compliance or, if outside assistance is needed, obtain a dedicated immigration co-counsel. If back wage obligations are found to exist, affected H-1B employees may be approached and offered reimbursement. It is important to consider the tax implications of such reimbursements, as the WHD may not agree, for example, that a reimbursement in 2013, for wages owed in 2011, is adequate. The restating of taxes and reissuance of W-2 forms may be required.

IV. Federal and State Civil Actions

The discussion above outlines how the WHD investigation and ALJ hearing process may take control over the prosecution of H-1B claims away from workers and their counsel. Some H-1B workers and their attorneys may elect to forgo the WHD process altogether in order to gain an advantage in negotiations or to bring claims in jurisdictions where laws provide for the recovery of treble damages or attorney’s fees. One challenge to going outside the traditional WHD framework is that the INA does not provide an independent cause of action for H-1B employees who suffer violations of the H-1B program regulations.105 However, state law and some federal labor laws may provide viable causes of action, as may some non-labor statutes such as RICO and Title VII.106

Protections available under state laws vary greatly, but the existence of a contract between an H-1B worker and the employer may allow breach of contract claims to be brought in state courts. Some state statutes create private causes of action for the recovery of unpaid

104. See 20 C.F.R. § 655.840.
105. See INA § 212(n)(1) (codified at 8 U.S.C. § 1182(n) (2012)) (the statute solely refers to actions “the Secretary” may take on behalf of workers).
wages (or where wages were reduced based on improper deductions, possibly of H-1B program expenses),\(^{107}\) and some even provide for treble damages in cases where back wages are recovered, with some limitations.\(^{108}\)

### A. Statutes of Limitations

One important consideration in determining the course of legal action is whether a statute of limitations exists under federal or state law that is longer than one year. The statute and regulations governing the H-1B program do not contain an express statute of limitations but, in practice, the WHD will not investigate a claim based on a violation that occurred more than one year before it was reported to the DOL.\(^{109}\) If more than a year has passed since the last possible violation by the H-1B employer, the WHD may close the case before the investigation begins in earnest.\(^{110}\) With claims involving a failure to pay wages, it may be difficult to set a final date for when the violation last occurred. If there is no bona fide termination, the WHD has taken the position that a required wage violation ends no sooner than at the end of the employment validity period of the LCA (which can be up to three years), giving the aggrieved H-1B worker a full year from that end date to report the problem.\(^{111}\)

Using *Limanseto* as an example, that would have given the employee a full four years to make his claim known to the WHD. This time period could be longer than the statute of limitations provided under state or federal law. It is incumbent upon counsel for employers and aggrieved employees to check carefully when the alleged violations occurred and when they could have last occurred (which may be a legal issue, rather than a factual one) and challenge the WHD before it issues its initial findings. If the WHD District Director or Assistant District Director disagrees and issues findings that violate

\(^{107}\) See, e.g., MASS. GEN. LAWS ch. 149, § 148 (2014); WIS. STAT. § 109.3(5) (2014).


\(^{109}\) See 20 C.F.R. § 655.806(a)(5) (2013) (The regulation describes this limit as a “jurisdictional bar.”).

\(^{110}\) See WHD FIELD OPERATIONS HANDBOOK 71b06(a) (2006) (“Complaints must allege violation(s) which occurred within the 12-month ‘window’ prior to the date of the receipt of the complaints. Complaints received after this deadline cannot be investigated. . . . In the event that an alleged violation has not ended and is ongoing at the time that the complaint is filed/received, the ‘last day that the alleged violation occurred’ (for purposes of screening the complaint) is considered to be the date that the complaint is filed/received.”).

\(^{111}\) See Limanseto v. Ganze & Co., 2013 WL 3490723, at *3 (Dep’t of Lab. Admin. Rev. Bd. June 6, 2013). (“The ALJ concluded that Ganze was thus liable for wages for the entire period of the LCA at the actual hourly rate. . . .”).
20 C.F.R. § 655.806(a)(5), this issue should be litigated before an ALJ, the ARB or in the federal courts.

B. **FLSA, TVPA, and RICO**

Individual H-1B workers may bring suit under the FLSA for unpaid minimum and overtime wages, plus liquidated damages in an equal amount.\(^{112}\) Successful plaintiffs under the FLSA may also recover their attorney’s fees, costs, and post-judgment interest.\(^{113}\)

Class actions by H-1B workers are becoming more frequent, as is demonstrated by the case of *Nunag-Tanedo v. East Baton Rouge Parish School Board*.\(^{114}\) The plaintiffs were Filipino nationals who came to the United States to work as teachers in the Louisiana public school system.\(^{115}\) The class alleged they were recruited in the Philippines and subjected to acts that violated the TVPA and RICO.\(^{116}\) A recruiting company based in the Philippines required each class member to pay a $5,000 recruitment fee, which is alleged to have covered the U.S. employer’s H-1B program expenses, in violation of U.S. statutes and regulations.\(^{117}\) After being approved for their H-1B visas, the recruiters took possession of the teachers’ passports and demanded a second fee equal to 25% of the expected first-year salary in Louisiana.\(^{118}\) The total fees paid by these teachers may have reached as high as $15,000.\(^{119}\) Once inside the United States, the class members allege they were threatened with deportation if they protested this fee arrangement.\(^{120}\)

The allegations raised by the class members in *Tanedo* are a good example of the remedies potentially available to plaintiffs beyond those provided by the INA and litigated by the WHD. The *Tanedo* plaintiffs allege under TVPA and RICO a conspiracy to extort money from H-1B workers before they enter the United States and to control their behavior in the United States through threats of harm and the possession and control of their personal identity and travel documents.\(^{121}\) The TVPA was enacted in 2000, in part, to prevent individuals or organizations from trafficking persons into the United States.\(^{122}\) In 2008, Congress amended the TVPA to enlarge the required definition of “harm” required for a finding of “trafficking” to

\(^{112}\) See FLSA § 16(b), 29 U.S.C. § 216(b) (2012).


\(^{114}\) 790 F. Supp. 2d 1134 (C.D. Cal. 2011).

\(^{115}\) *Id.* at 1138.

\(^{116}\) *Id.* at 1138–39.

\(^{117}\) *Id.* at 1138–41.

\(^{118}\) *Id.* at 1141.

\(^{119}\) *Id.* at 1142.

\(^{120}\) *Id.* at 1143.

\(^{121}\) *Id.* at 1151.

include nonphysical harm and non-violent coercion, such as financial and psychological harm.\textsuperscript{123}

The \textit{Tanedo} plaintiffs also used their TVPA claims as predicate acts required for relief under RICO. Defendant East Baton Rouge Parish School Board sought to dismiss the RICO claims, but the U.S. District Court judge denied the motion, stating that the TVPA and extortion claims were sufficient to raise a colorable RICO claim.\textsuperscript{124} The court also rejected the argument that the TVPA and RICO could not be applied extraterritorially to acts that occurred in the recruitment of the teachers in the Philippines.\textsuperscript{125} The court held that sufficient TVPA acts had occurred within the United States to serve as the predicate acts for a RICO claim.\textsuperscript{126}

With the expansion to cover financial harm, the amended TVPA may now provide a federal cause of action to H-1B workers who can show that they were recruited from outside of the United States as part of a business plan that contained elements violating the H-1B program, including required payments to recruiters or enforced loans for H-1B program expenses, travel expenses, or other costs meant to control the H-1B employees. While educated, professional employees may not be the first to come to mind when litigators think of TVPA claimants,\textsuperscript{127} the \textit{Tanedo} class action lawsuit will not go unnoticed by the plaintiffs’ bar.\textsuperscript{128}

\textbf{C. Title VII}

U.S. workers who believe they were passed over as job applicants in favor of H-1B workers may bring claims under Title VII of the Civil Rights Act of 1964.\textsuperscript{129} This was the case in the 2013 class action,


\textsuperscript{124} \textit{Tanedo}, 2012 WL 5378742 at 8–10.

\textsuperscript{125} Id.

\textsuperscript{126} Id.

\textsuperscript{127} The U.S. House of Representatives TVPA Conference Report describes the bill as “an Act to combat trafficking of persons, especially into the sex trade, slavery, and slavery-like conditions, in the United States. . . .” See \textit{Tanedo}, 2012 WL 5378742 at 7.

\textsuperscript{128} The plaintiffs’ bar is also likely to notice that in February 2015, a federal jury awarded $14 million in compensatory and punitive damages to five H2-B workers for claims that included violations of RICO and the TVPA. Press Release, ACLU, Federal Jury Awards $14 Million to Indian Guest Workers Victimized in Labor Trafficking Scheme by Gulf Coast Shipyard and Its Agents (Feb. 18, 2015), available at https://www.aclu.org/human-rights/federal-jury-awards-14-million-indian-guest-workers-victimized-labor-trafficking-scheme (“This historic verdict puts American companies on notice that if they exploit the flaws in our temporary worker program, they will be held accountable and punished. . . .”).

The plaintiff, Brenda Koehler, alleged in her complaint that Infosys used the H-1B visa system in a discriminatory fashion to avoid hiring locals, bringing in South Asians to fill its U.S. workforce of over 15,000 employees. According to the suit, while persons of South Asian descent make up less than 2% of the U.S. population, they comprise over 90% of Infosys’ U.S. workforce. Koehler points to these demographics as evidence of the company’s intentional discrimination against individuals like her who are not of South Asian descent and, further, evidence of an effort to misuse the H-1B visa program to undercut local wages in contravention of the regulations governing the program. The suit identifies as a class all individuals not of South Asian descent who were denied a job at Infosys in the United States starting in January 2009.

V. Criminal Law Issues

Many employers may look at the ALJ decisions in cases such as Limanseto and Sirsai, and feel great concern over the prospect of being ordered to pay back wages and fines that reach millions of dollars. These same employers, however, may not expect that some violations of the H-1B program may end up presented to a federal grand jury, leading to criminal indictments of both corporations and their owners. Two recent developments have increased the likelihood of criminal investigations of employers of H-1B workers: (1) the addition of the WHD as a U visa certifying agency; and (2) a string of indictments against H-1B employers for various types of fraud.

A. U Visas for Cooperating Witnesses

An important change occurred when the DOL started exercising its authority to certify U visa petitions on behalf of individuals who have been the victims of certain enumerated crimes and who have cooperated or are willing to cooperate with a criminal investigation by law enforcement. U visas allow individuals who have suffered substantial physical or mental abuse to remain in the United States for up to four years and also to apply for lawful permanent residency without the requirement of a sponsoring employer.

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131. Id. at 7.
132. Id. at 7–8.
133. Id. at 8–9.
134. Id. at 14.
137. See INA § 245(m)(1)(A) (2011); 8 C.F.R. § 214.14(g) (2013).
U Visa qualifying crimes include labor trafficking, forced labor, involuntary servitude, peonage, and witness tampering. Issues of labor trafficking are central to the Tanedo case and have also been raised in David v. Signal International, LLC. Witness tampering charges may be raised when unscrupulous employers threaten H-1B workers with referral to ICE for removal proceedings (deportation), if they report claims to the WHD. Should an employer seize H-1B workers' passports or identity documents, or withhold LCAs that must be provided to H-1B workers by regulation, as a method to control the workers and force their continued employment, the WHD may investigate the crime of forced labor or even involuntary servitude. The crime of peonage may be substantiated where H-1B employers use the repayment of forced loans or debts to compel continued service or employment.

The possibility of receiving U visa status is a powerful incentive to an H-1B worker who has suffered substantial harm. The U visa relieves the worker from maintaining H-1B status through continued employment with a specific employer, in a specified geographic location, and in a specific occupation, and instead allows the individual to receive blanket work authorization for a set amount of time, to work for any employer, in any industry, in any position, anywhere in the United States. Furthermore, the path to lawful permanent residency through a U visa may take only a handful of years, compared with the decades-long wait facing many employment-based green card aspirants. The lesson here should be obvious: Congress has provided WHD with the tools to provide cooperating H-1B workers with all of the protection they need to report criminal violations while not losing the ability to remain in the United States, as did the Filipino teachers in Prince George’s County.

B. Indictments for Fraud

An early case prosecuting an H-1B employer for fraud was United States v. Vision Systems Group, where an information technology services company filed fraudulent applications with the DOL to sponsor foreign workers, mostly from the company’s H-1B workforce, based on jobs that were claimed to exist in Iowa but in reality involved work in much more expensive locations such as New York City and other major metropolitan areas. This criminal prosecution was

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140. See supra notes 65–71 and accompanying text.
made based on attestations and filings limited to activities in the United States.\textsuperscript{142}

A more recent development involved Dibon Solutions, a Texas IT consulting company. The Company’s owners and several managers and employees were indicted for various criminal charges.\textsuperscript{143} The charges in that indictment included visa fraud and wire fraud.\textsuperscript{144} Since the H-1B program includes documents filed with the DOL online (wire fraud) and petitions submitted to USCIS through mail or courier (mail fraud), multiple criminal statutes can easily be invoked where a general claim of H-1B fraud is involved. These violations are further complicated and even more pronounced when the H-1B worker is outside the United States when sponsored for work because the worker will need to seek an H-1B visa from a U.S. embassy or consulate overseas.\textsuperscript{145} Any fraudulent statements or documents presented to a Foreign Service officer in pursuit of an H-1B visa may lead to a charge of visa fraud.\textsuperscript{146}

\textbf{VI. Conclusion}

The H-1B program is more complex and fraught with more danger for employers and employees alike than many participants appreciate. H-1B workers are, by regulation, tied to work only for their sponsoring employer, exposing them to illegal practices of unscrupulous companies who understand the powerful lure of U.S. salaries and access to the American Dream.\textsuperscript{147} On the other hand, unwitting employers, as demonstrated by \textit{North Shore School}, often enter into the H-1B program with little or no understanding of the serious and ongoing obligations required by now heavily enforced regulations.\textsuperscript{148} As the plaintiffs’ bar expands litigation of H-1B employee claims beyond cooperation with the WHD, employers are being forced to answer for claimed violations before U.S. district judges, rather than local WHD directors. Labor and employment law counsel need to be familiar with these issues properly to advise clients about the risks and

\begin{itemize}
\item \textsuperscript{142} See id.
\item \textsuperscript{144} \textit{Id.} The charges included: (1) sponsoring workers with the stated purpose of performing services at Dibon headquarters, but actually requiring them to work at third-party locations elsewhere; (2) paying the workers only upon placement at the third-party locations, and only when Dibon was actually paid by the third party; and (3) falsely representing that the H-1B workers were full-time employees being paid annual salaries. \textit{Id.} at 4. These practices are evidence of the strictly prohibited practice of “ benching,” which squarely contradicts DOL regulations. \textit{See supra} note 38 and accompanying text.
\item \textsuperscript{145} See 9 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL 41.53 n 2.
\item \textsuperscript{146} See id. at 40.63.
\item \textsuperscript{147} See 20 C.F.R. § 655.730(d) (2013).
\item \textsuperscript{148} N. Shore Sch. for the Arts, 2012-LCA-00039 (Dep’t of Labor Jan. 18, 2013).
\end{itemize}
benefits inherent in the employment of workers in H-1B status. While comprehensive immigration reform continues to fail to garner the support needed to overhaul the system, it is important to recognize the changes that now affect the relationship between employer and employees whether it is through increased enforcement or private causes of action.
The NLRA’s Religious Exemption in a Post-*Hobby Lobby* World: Current Status, Future Difficulties, and a Proposed Solution

David B. Schwartz*

The constitutional and statutory protection of free religious exercise allows an eligible employer to deny its employees their legal rights to governmental protection in the workplace, including their right to bargain collectively;\(^1\) to obtain contraception under employer-provided health insurance;\(^2\) to conceive a child through in vitro fertilization;\(^3\) or even to exercise their own religious beliefs.\(^4\) The legal hegemony of the constitutional protection of religious liberty over the statutory regulation of the employment relationship could potentially crowd out all workplace regulation unless Congress and the courts carefully define both and carefully police their interactions.\(^5\) The ideal public policy

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2. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014) (Health & Human Services regulations requiring contraceptive coverage under the Patient Protection and Affordable Care Act (ACA) violate the free exercise rights of the owners of closely held corporations under the Religious Freedom Restoration Act of 1993 (RFRA)).
4. Spencer v. World Vision, Inc., 633 F.3d 723, 741 (9th Cir. 2011) (religious charity lawfully fired employees for denying the divinity of Jesus Christ and for disavowing the doctrine of the Trinity).
5. See Gilardi v. U.S. Dep’t of Health & Human Servs., 733 F.3d 1208, 1242 (D.C. Cir. 2013), cert. granted and judgment vacated by 82 U.S.L.W. 3309 (U.S. July 1, 2014) (No. 13–567) (Edwards, J., dissenting) (warning against religious objections to the ACA’s contraceptive mandate extending to other statutes); Transcript of Oral Argument
is a legal regime in which the free exercise of religion and governmental regulation of employment can coexist; in which employers can exercise religious beliefs without requiring employees involuntarily to subsidize that exercise by relinquishing their statutory rights to fairness and personal autonomy in the workplace.

In the absence of statutory language in the National Labor Relations Act (NLRA or Act), the National Labor Relations Board (Board) and the federal courts inferred two religious exemptions from the “general purpose of the Act.” First, in *NLRB v. Catholic Bishop of Chicago*, the Supreme Court directed the Board to change its policy and decline jurisdiction over teachers in religious secondary schools based on the doctrine of constitutional avoidance. The Board implemented that decision by exempting the lay teachers of schools with a substantial religious function. Recently, however, it changed its test regarding faculty at colleges and universities to exempt institutions that present themselves as providing a religious educational environment and that also assign their faculty a specific role in creating or maintaining that environment. Second, the Board declined to assert jurisdiction over both the noncommercial activities of religious organizations and the employees of those organizations that are “essential” to their functioning. The two exemptions have spawned two perpetual issues for the Board: first, how to assess the validity of employers’ religious exercise in the workplace setting and, second, which employees the Board should exclude from its jurisdiction because they are “essential” to their employer’s religious exercise.

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This Article argues that the Board’s use of a “functional” inquiry regarding the role of an employer’s religious belief in its operations appropriately balances employers’ rights to free religious exercise with employees’ rights to governmental regulation of the workplace. This approach assesses objectively the actual role that an employer’s religious belief plays in the purpose and activities of its workplace to determine whether the employer qualifies for a religious exemption from the Board’s jurisdiction. To strengthen the post-\textit{Hobby Lobby} viability of this test, the Board should (1) limit itself to a fact-based, functional inquiry assessing readily observable religious and secular aspects of an organization’s purpose and activities and (2) drop its ancillary exemption of employees providing essential functions to religious organizations and exempt only those employees whose function is intertwined with the entity’s religious practice. Recently, in \textit{Pacific Lutheran University}, the Board took a major step in this direction, albeit only for institutions of higher education. By doing so, the Board strengthens the case that its exemption does not impose a substantial burden on the religious exercise of employers and that there is no alternative to NLRA jurisdiction less restrictive of their religious exercise.

Part I examines the constitutional landscape of employment regulation in religious settings, including the Supreme Court’s recent decision in \textit{Hobby Lobby}. Part II explores the development of the NLRA’s religious exemption, centering on the Court’s decision in \textit{Catholic Bishop}, the Board’s \textit{Jewish Day School} test, and its new test for colleges and universities in \textit{Pacific Lutheran University}. Part III suggests how the Board could improve its test to increase its post-\textit{Hobby Lobby} viability.

I. The Religion Clauses, the Supreme Court Tests, and 
Hobby Lobby

The First Amendment’s Religion Clauses forbid government from 
infringing on religious freedom either by overly favoring or involving itself with religion (Establishment) or by overly interfering with religious practice (Free Exercise). The Supreme Court has created three main tests to determine whether a violation of either the Establishment or Free Exercise Clause has occurred. In the Lemon test, a court determines whether a law (apart from one involving an explicit “sect preference”) violates the Establishment Clause by considering (1) whether the law has a secular purpose, (2) whether the primary effect advances or inhibits religion, and (3) whether the law creates an excessive entanglement between government and religion. In the Sherbert test, a court determines whether a law violates the Free Exercise Clause by considering (1) whether the plaintiff demonstrated that the law imposed a substantial burden on the exercise of religion and (2) whether there is a “compelling state interest” that outweighs “the degree of impairment of free exercise rights.” Further, the “strict scrutiny” standard requires that any governmental restrictions on fundamental rights be the “least restrictive alternative” and “narrowly tailored” to achieve the compelling interest. In addition, while the government cannot question the validity of an objector’s religious beliefs, it can question an objector’s sincerity in seeking an exemption. Finally, in the Smith test, the Supreme Court attempted to replace Sherbert, holding that a generally applicable and otherwise valid regulatory law did not violate the Free Exercise Clause if (1) the government did not intend to regulate religious conduct or beliefs and (2) the law only incidentally burdened the free exercise of religion. The Court reserved Sherbert for so-called hybrid constitutional claims in which a regulatory law impacts the free exercise of religion along with another constitutional right.

17. U.S. Const. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”).
23. Id.
24. Id. at 881.
In response to Smith, Congress passed the Religious Freedom Restoration Act (RFRA) to solidify Sherbert’s substantial-burden/compelling-interest standard as a statutory right.\footnote{42 U.S.C. § 2000bb-1(a)–(b) (2012).} The RFRA states:

Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except [that] . . . Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.\footnote{Id.}

Congress subsequently passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which extended RFRA’s definition of “exercise of religion” from “the exercise of religion under the First Amendment” to “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”\footnote{42 U.S.C. § 2000cc-5(7)(A) (2012) (discussed in Holt v. Hobbs, 135 S. Ct. 853, 860 (2015), and Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761–62 (2014)).} While the Supreme Court declared applying the RFRA to the states unconstitutional,\footnote{City of Boerne v. Flores, 521 U.S. 507, 536 (1997).} it has acknowledged its validity against the federal government.\footnote{Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 425 n.1 (2006).} Prior to the Court’s decision in Hobby Lobby, courts generally interpreted the RFRA as reinstating the Supreme Court’s pre-Smith jurisprudence regarding the substantial-burden/compelling-interest standard.\footnote{See Korte v. Sebelius, 735 F.3d 654, 679 (7th Cir. 2013) (Congress intended RFRA to codify pre-Smith free-exercise jurisprudence); Gilardi v. U.S. Dep’t of Health & Human Servs., 733 F.3d 1208, 1236 (D.C. Cir. 2013) (discussing Gonzales, 546 U.S. at 426) (Congress intended, and the Supreme Court has acknowledged, that the RFRA incorporated pre-Smith jurisprudence); Francis v. Mineta, 505 F.3d 266, 270 (3d Cir. 2007) (“RFRA was only enacted to overturn Smith and restore pre-Smith case law . . .”).} Hobby Lobby has now repudiated this interpretation of the RFRA.\footnote{Hobby Lobby, 134 S. Ct. at 2772.}

In Hobby Lobby, the Supreme Court, in a 5–4 decision, held that under the RFRA, the Health and Human Services regulations issued under the Patient Protection and Affordable Care Act (ACA) violated the free exercise rights of three closely held corporations by mandating coverage of contraceptive devices and medication as part of employee health insurance.\footnote{Id. at 2759.} The Women’s Health Amendment modifies the ACA to require providers of health insurance to include certain preventive care services free of charge to the consumer.\footnote{42 U.S.C § 300gg-13(a)(4) (2012).} The Health Resources and Services Administration (HRSA), a Department of Health
and Human Services division, issued guidelines interpreting that requirement to include all FDA-approved contraceptive methods, sterilization procedures, and related education and counseling to all women with reproductive capability. To avoid infringing on employers’ free exercise rights under the RFRA and the First Amendment, the government also issued regulations in 2011 exempting “religious employers” and then partially extended the exemption to include religious nonprofits under certain circumstances, requiring nonprofits to send the Employee Benefits Security Administration Form 700 to either its health plan issuer or its third-party administrator (for self-insured entities) to “self-certify.” Upon self-certification, the religious nonprofit’s insurer or its third-party administrator—rather than the religious nonprofit—must pay for the legally required contraceptive benefits.

(1) [t]he organization opposes providing coverage for some or all of any contraceptive services required to be covered . . . on account of religious objections; (2) [t]he organization is organized and operates as a nonprofit entity; (3) [t]he organization holds itself out as a religious organization; and (4) [t]he organization self-certifies, in a form and manner specified by the Secretary [of Health and Human Services], that it satisfies the [above] criteria . . . .
Justice Samuel Alito’s majority decision (joined by Chief Justice John Roberts and Justices Anthony Kennedy, Antonin Scalia, and Clarence Thomas) held that the three closely held corporations could sue under the RFRA to vindicate the free exercise rights of their owners because closely held corporations were within the RFRA’s definition of a person. The Court went on to hold that the contraceptive mandate substantially burdened the owners’ free exercise rights because the ACA imposes heavy financial penalties for either refusing to provide contraception under their insurance or dropping employee health insurance altogether. The Court found that the contraceptive mandate also imposed a substantial burden on the owners’ ability to conduct their businesses in accordance with their honest religious belief that facilitating their employees’ use of certain contraceptives is immoral. The Court assumed the government possessed a compelling interest in requiring the provision of contraception without cost to the patient. However, it decided the government had not demonstrated that the contraceptive mandate was the least restrictive means of fulfilling that interest, especially in light of wide exemptions already granted. Moreover, the government could either pay for the contraceptives itself or extend the accommodation provided to religiously affiliated nonprofits to for-profit corporations with religious objections. Justice Alito stated that the decision addressed only religious objections to the contraceptive mandate, not to any other insurance mandates (such as vaccinations or blood transfusions) or religious defenses to illegal discrimination.

Justice Kennedy concurred in the majority ruling, stressing that the decision relied on the government’s failure to demonstrate that the mandate was the least restrictive alternative in light of the existing accommodation for religious nonprofits. He also viewed the government’s creation of the accommodation as distinguishing the contraceptive mandate from other programs subject to religious objections. Unlike the contraceptive mandate, in which the government had already created a less restrictive alternative, prohibitive costs might prevent accommodating religious objections to other programs.

Justice Ruth Bader Ginsburg, in a dissent joined by Justices Stephen Breyer, Elena Kagan, and Sonia Sotomayor, described the

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40. *Id.* at 2775–77.
41. *Id.* at 2778.
42. *Id.* at 2780–83.
43. *Id.*
44. *Id.* at 2780–82.
45. *Id.* at 2780.
46. *Id.* at 2786 (Kennedy, J., concurring).
47. *Id.*
48. *Id.* at 2787.
majority as holding that “commercial enterprises . . . can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.” The government’s compelling interest in ensuring uniform compliance with laws protecting third-party interests will always be invalidated by the presence of the less restrictive alternative of the government directly paying the offensive cost. Justice Ginsburg stated that the contraceptive mandate does not impose a substantial burden on employers because it does not force them to buy or provide contraceptives. The employees and their dependents, not the employer or the government, decide whether to claim the benefits. As for the evidence of less restrictive alternatives to the mandate, Justice Ginsburg pointed out that the majority identified the accommodation for religious nonprofits as only a possible least restrictive alternative but did not state definitively that the accommodation was lawful under the RFRA. She explained that a viable least restrictive alternative must not only satisfy the religious objection, but also carry out the ACA’s objectives of providing preventative care, at no additional cost to the patient, through existing employer-based insurance coverage (in order to minimize administrative and logistical obstacles). Neither a direct governmental payment, the accommodation for nonprofits, nor a tax credit could satisfy these compelling governmental interests. Justice Ginsburg concluded that the Court “ventured into a minefield” of potentially requiring exemptions for religiously grounded objections to any number of regulatory schemes that could result in the Court violating the Establishment Clause by preferring some religious claims over others. She read the Court’s jurisprudence as constraining employers from utilizing religious exemptions from statutory regulation in order to impose their religious faith on others, especially their employees.

49. Id. (Ginsburg, J., dissenting).
50. Id.
51. Id. at 2799.
52. Id. at 2787. Justice Ginsburg also asserted that corporate entities are artificial persons and (apart from religious organizations) cannot exercise religion. Id. at 2794–97. She maintained that the logic of the majority opinion would extend beyond closely held corporations to provide free exercise rights to all corporations. Id. at 2796–97 (citing Gilardi v. U.S. Dep’t of Health & Human Servs., 733 F.3d 1208, 1242 (D.C. Cir. 2013) (Edwards, J., concurring in part and dissenting in part)). Justices Breyer and Kagan declined to join the part of the dissent covering corporate status. Id. at 2806.
53. Id. at 2801, 2803.
54. Id. at 2801–02.
55. Id. at 2802–03.
56. Id. at 2805.
57. Id. at 2803–05 (citing United States v. Lee, 455 U.S. 252, 260–61 (1982)). In Holt v. Hobbs, 135 S. Ct. 853, 867 (2015), the Supreme Court unanimously ruled that the RLUIPA requires the Arkansas Prisons Department to allow a Muslim prisoner to grow a closely cropped beard. Justice Ginsburg concurred, noting that: “Unlike the exemption this Court approved in [Hobby Lobby], accommodating petitioner’s religious
Hobby Lobby completes the transformation of the RFRA into a quasi-constitutional alternative to the Free Exercise Clause’s traditional jurisprudence.58 Even before Hobby Lobby, free-exercise complainants could sue under the RFRA, avoiding the more government-friendly Smith standard and subjecting governmental action to the compelling-interest/substantial-burden standard.59 While the Hobby Lobby majority restricted its decision to the contraceptive mandate and declined to comment on application to other religious claims, the decision’s clear implication is that the RFRA permits plaintiffs to show a lower level of “substantiality” for burdens on religious exercise but requires the federal government to meet a higher burden in demonstrating the absence of less restrictive means. The Board, over a course of several decades, has developed a very different approach to exempting religious exercise from the NLRA.

II. The NLRA’s Religious Exemption: Early Development, Supreme Court Rejection, and Redesign

A. The Board’s Early Policy

Unlike other employment statutes, such as Title VII of the Civil Rights Act or the Americans with Disabilities Act, the NLRA does not contain an exemption for, or even a definition of, religious organizations.60 The Board has avoided providing a rigid definition of “religious organization” and uses only general descriptions such as “a religious institution with a sectarian philosophy or mission”;61 “a religious institution with a stated mission”;62 and religious institutions that operate “in a conventional sense using conventional means.”63

The Board’s early policy regarding nonprofit religious organizations was to decline jurisdiction over noncommercial activities intimately involved with religious activities but to assert jurisdiction

belief in this case would not detrimentally affect others who do not share petitioner’s belief.” Id. at 866–67.


59. See Korte v. Sebelius, 735 F.3d 654, 659 (7th Cir. 2013); Francis v. Mineta, 505 F.3d 266, 269 (9th Cir. 2007).

60. See supra note 6; see also Spencer v. World Vision, Inc., 633 F.3d 723, 760 (9th Cir. 2011) (Berzon, J., dissenting) (the NLRA, unlike Title VII, does not delineate the scope of its religious exemption).


63. Id. at 807 (quoting Faith Ctr.–WHCT Channel 18, 261 N.L.R.B. 106 (1982)) (television station of church). For an example of an entity the NLRB found to be a religious organization, see Catholic Cemeteries, NLRB Div. of Advice, No. 29-CA-29180, at 3 (2009), available at http://www.nlrb.gov/cases-decisions/advice-memos?issuance_date=2009&page=4 (cemetery association created for the completely religious purpose of providing religious burial services).
over activities that were commercial in nature. The Board applied this policy not only to religious organizations, but also to nonprofit, educational, and charitable organizations. During consideration of the Taft-Hartley amendments to the NLRA in 1947, the House Conference Report approvingly referred to the Board’s policy, noting that “only in exceptional circumstances and in connection with purely commercial activities of such [nonprofit] organizations have any of the activities of such organizations or of their employees been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act.”

The Board revised its approach in 1970 and began to assert jurisdiction over both the noncommercial and commercial activities of nonprofit entities. In an almost syllogistic progression, the Board asserted jurisdiction over a nonprofit nursing home, a nonprofit university, a religiously associated nursing home, and, finally, religiously associated schools. In 1975, the Board announced it would assert jurisdiction over parochial schools if the schools were not “completely religious,” but only “religiously associated,” because the schools did not limit instruction to religious subjects. Reliance on Christian principles in providing education alone was insufficient for exemption from Board jurisdiction because most religiously associated institutions seek to operate

64. See Cal. Inst. of Tech., 102 N.L.R.B. 1402, 1403–04 (1953); see also Sunday Sch. Bd. of the S. Baptist Convention, 92 N.L.R.B. 801, 802 (1950).
65. Cal. Inst. of Tech., 102 N.L.R.B. at 1403; Trs. of Columbia Univ., 97 N.L.R.B. 424, 425 n.3 (1951) (citing cases dating back to 1939).
67. See Drexel Home, 182 N.L.R.B. 1045, 1046 (1970) (asserting jurisdiction because nonprofit homes provide the same type of health services, participate the same way in national health care programs, and exert a “similar and substantial effect on commerce” as the for-profit homes); see also Bethany Home for the Aged, 185 N.L.R.B. 191, 193–94 (1970) (citing and adhering to Drexel); Good Samaritan Home for the Aged, 185 N.L.R.B. 198, 198–99 (1970) (same).
68. Cornell Univ., 183 N.L.R.B. 329, 332 (1970) (asserting jurisdiction over the non-commercial activities of nonprofit educational institutions, based on the effect on commerce of the increased size of commercial activities undertaken by private colleges and universities, the expanded role of federal government spending on education, and Congress’s expansion of the Fair Labor Standards Act to nonprofit private universities and hospitals).
69. Carroll Manor Nursing Home, 202 N.L.R.B. 67, 67 (1973) (In Carroll, the Board asserted jurisdiction based on a finding that the nursing home was only “religiously associated” and not “completely religious.” The Board noted that the home did not conduct religious services or religious studies, or restrict eligibility by religious faith. Further, there was no evidence the religious order operated the home any differently than would a secular nonprofit organization.).
71. Id.
in conformity with the tenets of their faith.\textsuperscript{72} In \textit{Cardinal Timothy Manning, a Corporation Sole},\textsuperscript{73} the Board further elaborated: “The schools perform in part the secular function of educating children, and in part concern themselves with religious instruction. Therefore, we will not decline to assert jurisdiction over these schools on such a basis.”\textsuperscript{74}

\textbf{B. NLRB v. Catholic Bishop: The Supreme Court Rebuffs NLRA Jurisdiction over Lay Faculty in Religious Schools}

In 1979, the Supreme Court reviewed the Board’s new standard in \textit{NLRB v. Catholic Bishop of Chicago}.\textsuperscript{75} The Board had asserted jurisdiction over two Roman Catholic diocese-operated parochial schools and found that the schools were not “completely religious,” but merely “religiously associated.”\textsuperscript{76} In both cases, the Board stated emphatically that

\begin{quote}
(1) the purpose of the [NLRA] is to maintain and facilitate the free flow of commerce through the stabilization of labor relations; \\
(2) the provisions of the [NLRA] do not interfere with religious beliefs; and (3) regulation of labor relations does not violate the first amendment when it involves a minimal intrusion of religious conduct and is necessary to obtain that objective.\textsuperscript{77}
\end{quote}

In a 5-4 decision, the Supreme Court avoided a categorical ruling that the Board had violated the dioceses’ free exercise rights by asserting jurisdiction over lay teachers in parochial schools.\textsuperscript{78} Chief Justice Warren Burger, writing for the majority, relied upon the doctrine of constitutional avoidance, in which federal courts refrain from construing federal legislation as unconstitutional in the absence of an affirmative congressional intent to enact the unconstitutional construction if an alternative permissible construction is available.\textsuperscript{79} The Court held that the Board could not assert jurisdiction over lay teachers employed by “church-operated schools” because to do so would create a “significant risk” of infringing First Amendment rights.\textsuperscript{80} The Court reviewed the NLRA’s legislative history and found no clear affirmative congressional intent to include teachers in church-operated schools within the NLRA’s jurisdiction.\textsuperscript{81} Recognizing the “critical and unique

\begin{itemize}
\item \textsuperscript{72} \textit{Id.}
\item \textsuperscript{73} 223 N.L.R.B. 1218 (1976).
\item \textsuperscript{74} \textit{Id.} at 1218 (citation omitted).
\item \textsuperscript{75} 440 U.S. 490 (1979), aff’d 559 F.2d 1112 (7th Cir. 1977), \textit{denying enforcement}, 224 N.L.R.B. 1221, 1223 (1976) (refusal to bargain after Board certified union); accord Diocese of Fort Wayne–South Bend, Inc., 224 N.L.R.B. 1226, 1228 (1976) (same).
\item \textsuperscript{76} See \textit{Catholic Bishop}, 224 N.L.R.B. at 1222.
\item \textsuperscript{77} \textit{Id.} at 1222–23; Diocese of Fort Wayne, 224 N.L.R.B. at 1227 (citing Cardinal Timothy Manning, a Corp. Sole, 223 N.L.R.B. 1218 (1976)).
\item \textsuperscript{78} \textit{Catholic Bishop}, 440 U.S. at 507.
\item \textsuperscript{79} See \textit{id.}
\item \textsuperscript{80} \textit{Id.} at 502.
\item \textsuperscript{81} \textit{Id.} at 506.
role of the teacher in fulfilling the mission of a church-operated school,\textsuperscript{82} the Court pointed to potential conflicts if the Board were to exercise jurisdiction over the schools.\textsuperscript{83} Specifically, the Court feared that asserting jurisdiction would “necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the schools' religious mission,” commenting that “[i]t is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.”\textsuperscript{84} The Court predicted that the Board would be unable to “avoid entanglement with the religious mission of the school in the setting of mandatory collective bargaining.”\textsuperscript{85} In light of these potential dangers and the absence of clear congressional intent to include the teachers of church-operated schools within the NLRA’s jurisdiction, the Court declined to construe the NLRA as bringing them within the Board’s jurisdiction, finding it unnecessary to resolve whether requiring such schools to recognize and bargain with a union representing its lay faculty would actually violate the First Amendment’s Religion Clauses.\textsuperscript{86}

Justice William Brennan, dissenting on behalf of four justices, accused the majority of creating an implausible construction of the NLRA to avoid the constitutional question.\textsuperscript{87} Indeed, he contended that the NLRA’s legislative history pointed in the opposite direction. For example, the NLRA’s definition of “employer” includes eight exceptions, none referring to parochial schools.\textsuperscript{88} Justice Brennan thought the majority should have held that Congress intended to include teachers in church-operated schools\textsuperscript{89} and, therefore, the Court could not “avoid” the constitutional questions raised.\textsuperscript{90}

C. The Board’s New Test: Jewish Day School

After Catholic Bishop, the Board declined jurisdiction over lay teachers employed in schools possessing a “substantial religious character” to avoid infringing on employers’ First Amendment rights.\textsuperscript{91} In

\textsuperscript{82} Id. at 501. The Court went on to characterize parochial schools as permeated with “religious authority,” with the teacher providing a key role in its transmission. Id. (quoting Lemon v. Kurtzman, 403 U.S. 602, 617 (1971)).

\textsuperscript{83} Id. at 504.

\textsuperscript{84} Id. at 502.

\textsuperscript{85} Id.

\textsuperscript{86} See id. at 507.

\textsuperscript{87} Id. at 508 (Brennan, J., dissenting).

\textsuperscript{88} See id. at 511. In 1974, Congress removed the exception for nonprofit hospitals it had added in 1947. See id. at 514–15.

\textsuperscript{89} Id. at 517.

\textsuperscript{90} See id. at 517–18.

\textsuperscript{91} See Jewish Day Sch. of Greater Wash., 283 N.L.R.B. 757, 761 (1987) (response to Catholic Bishop, 440 U.S. at 503). In Jewish Day School, the Board reversed its holding in Bishop Ford Central Catholic High School, 243 N.L.R.B. 49 (1979), enforcement denied, 623 F.2d 818 (2d Cir. 1980), in which the Board interpreted the Court’s use of
Jewish Day School, the Board inferred that Catholic Bishop only used the term “church-operated” as a “shorthand description of schools whose purpose and function in substantial part are to propagate a religious faith.”92 In doing so, the Board observed that the Court’s reasoning emphasized a school’s religious purpose and focused on the teachers’ central role in fulfilling the school’s religious mission rather than its affiliation with a religious organization.93

Applying the new test, the Board found that the Jewish Day School possessed a substantial religious character.94 The Board based this conclusion on (1) the school’s articles of incorporation that stated its central aims were “to teach religious subjects in accordance with the principles of the Jewish faith . . . and to establish a synagogue”; (2) the devotion of forty percent of the students’ day to religious studies; (3) its integration of Judaic studies with its program of general studies; (4) its avowed goal of encouraging students towards “an intense Jewish identity”; and (5) its daily mandatory prayer services.95 Accordingly, the NLRB declined to assert jurisdiction over the school’s teachers.96 Subsequently, in Livingstone College, the Board stated that it would apply Jewish Day School to higher educational institutions.97 In Livingstone, the Board asserted jurisdiction over a college despite church ownership of the college’s property, its appointment of one-half of the college’s board of directors, and it providing the college with financial support.98 The Board found no significant risk of constitutional conflict because the college’s purpose was primarily secular, the college did not require teachers to support the church, and the college did not involve the church in its daily administration.99

92. Id. at 761.
93. See id. (discussing Catholic Bishop, 440 U.S. at 501, 503). The Board also pointed out that the Court refers to parochial schools’ “substantial religious activity and purpose” and their “substantial religious character” and that the Court notes “the raison d’être of parochial schools is the propagation of a religious faith.” Id. at 760–61 (quoting Catholic Bishop, 440 U.S. at 503).
94. See id. at 761–62.
95. See id. (internal quotation marks omitted).
96. See id.; see also Nazareth Reg’l High Sch., 283 N.L.R.B. 763, 765 (1987) (declining jurisdiction if the school’s religious purpose and function are evidenced, inter alia, by its self-description as “attempt[ing] to transmit the teachings of Jesus Christ and His Church”; because the school expected teachers “to impart the values of the Catholic Church to students”; and because the school made religion classes “mandatory at all grade levels”). Note, however, that in Jewish Day School, the Board left open whether it could assert jurisdiction over nonteachers working for church-operated schools. Jewish Day Sch., 283 N.L.R.B. at 761 n.48.
98. Id. at 1310.
99. Id. at 1309–10.
D. The D.C. Circuit’s University of Great Falls Test

In *University of Great Falls v. NLRB*, the D.C. Circuit rejected both the Board’s *Jewish Day School* test and the test’s extension to higher education and established an alternative test. Drawing upon then-Judge Breyer’s plurality opinion in *Universidad Central de Bayamon v. NLRB*, the court held the Board’s “substantial religious character” test was similar in principle to the approach that the Supreme Court rejected in *Catholic Bishop* and raised the same constitutional concerns. The court found the Board was essentially asking whether the school’s character was “sufficiently religious” and, to determine the answer, the Board “engaged in the sort of intrusive inquiry that *Catholic Bishop* sought to avoid.” The court criticized the Board for both intrusively examining the role of the college’s religious belief in its operations and for mistrusting the college regarding the role of religious beliefs in its operations.

The D.C. Circuit then put forward its own three-prong test, exempting an institution from Board jurisdiction if it

100. 278 F.3d 1335 (D.C. Cir. 2002), denying enforcement of 331 N.L.R.B. 1663 (2000).

101. See id. at 1343, 1348. The issues before the Board in *University of Great Falls* concerned whether the RFRA applied to Board proceedings and whether the Board would, in fact, violate the RFRA by asserting jurisdiction. See Univ. of Great Falls, 331 N.L.R.B. 1663, 1663 (2000). While the Board assumed that the RFRA was constitutional and therefore applicable, it applied *Jewish Day School* pursuant to its interpretation of *Catholic Bishop*, reasoning that this standard afforded a higher degree of constitutional protection to the university’s free exercise of religion than the RFRA. Id. at 1665. The Board ultimately concluded that the university did not have a substantial religious character, that exercise of Board jurisdiction would not present a significant risk of infringing on the employer’s religious rights, and consequently that it would also not substantially burden the university’s free exercise. Id. at 1665–66.

102. 793 F.2d 383, 398–403 (1st Cir. 1986) (en banc). The First Circuit divided evenly on whether to enforce the Board’s assertion of jurisdiction over a Puerto Rican university founded by the Dominican order of the Roman Catholic Church and still administratively controlled by members of that order. Because the court was evenly divided, the court could not grant the Board’s request for enforcement and denied enforcement. In asserting that *Catholic Bishop* should apply to institutions of higher learning as well as primary and secondary schools, then-Judge Breyer primarily relied on the existence of the same “state/religion entanglement problems” that concerned the Supreme Court in *Catholic Bishop*: the possibility of unfair labor practice allegations arising from the university’s religious motivation and the Board’s need to employ “intrusive” methods of inquiry regarding the relation of religious matters to the workplace. Id. at 401–03. Further, Judge Breyer found no “unusually strong interest” in the Act that called for jurisdiction over this university because the Board had only recently asserted jurisdiction over nonprofit educational institutions. Id. at 403. (The Board first asserted jurisdiction over nonprofit schools in the 1970s). See NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 497 (1979).

103. See Univ. of Great Falls, 278 F.2d at 1341–42.

104. Id. at 1341, 1343. The court also criticized the Board for its view that the RFRA presents a separate inquiry, apart from the *Catholic Bishop* inquiry. Id. at 1347.

105. See id. at 1342, 1345.
(a) holds itself out to students, faculty and community as providing a religious educational environment; (b) is organized as a nonprofit; and (c) is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion.106

According to the court, this three-prong inquiry “does not intrude upon the free exercise of religion nor subject the institution to questioning about its motives or beliefs . . . [and] does not ask about the centrality of beliefs or how important the religious mission is to the institution.”107 The court concluded that the first prong, holding itself out as a religious educational environment, provided a “market check” that only “bona fide religious institutions” would seek exemption.108 The second prong, nonprofit status, was important because nonprofit institutions possessed a more compelling claim to exemption than for-profit entities.109 The court hedged regarding scope of the third prong, religious affiliation, stating: “We need not and do not decide whether other indicia of religious character might replace ‘affiliation’ in other cases.”110

Applying this test, the D.C. Circuit held the University of Great Falls exempt from NLRA jurisdiction.111 It found that the school met the first prong because it held itself out as “providing an education that, although primarily secular, is presented in an overtly religious, Catholic environment” as reflected in its course catalogue, mission statement, and other public documents.112 The court ruled that the school’s status as a nonprofit institution satisfied the second prong.113 The court then held that the university met the third prong because it was “sponsored by, its campus [was] owned by, and control [was] ultimately reserved to, a recognized religious organization.”114

106. Id. at 1343 (internal quotation omitted); see also Nicholas Macri, Missing God in Some Things: The NLRB’s Jurisdictional Test Fails to Grasp the Religious Nature of Catholic Colleges and Universities, 55 B.C. L. REV. 609, 633–36 (2014) (commentator praises the D.C. Circuit’s test in University of Great Falls as “[k]eeping [i]t [s]imple”).

107. Univ. of Great Falls, 278 F.2d at 1344.

108. Id.

109. See id. (citing Universidad Central de Bayamon v. NLRB, 793 F.2d 383, 403 (1st Cir. 1986)).

110. Id. at 1347 n.2. Despite hedging on how much affiliation is required, the court still concluded that the university satisfied the test’s third prong because it was undisputed that the University of Great Falls was “affiliated with . . . a recognized religious organization, . . . the Catholic Order of the Sisters of Providence, St. Ignatius Province.” Id. at 1343–44 (internal quotation omitted).

111. Id. at 1345.

112. Id.

113. Id.

114. Id.
E. Subsequent Board Treatment of Alternative Tests

Following the D.C. Circuit’s decision in *University of Great Falls*, the Board, for twelve years, neither adopted nor rejected the D.C. Circuit’s approach.115 In several non-school cases involving employers that were either religious organizations or religiously affiliated entities, however, the Board found *University of Great Falls* inapplicable and asserted jurisdiction.116 Finally, in late 2014, the Board in *Pacific Lutheran University* abandoned *Jewish Day School* for institutions of higher learning and articulated a new test incorporating aspects of both *University of Great Falls* and the religious function approach.117

In *Pacific Lutheran University*, the Board, divided three to two, asserted jurisdiction over a university’s full-time contingent faculty and rejected the university’s claim to an exemption under *Catholic Bishop* as a religious educational institution.118 For colleges and universities, the Board explicitly abandoned *Jewish Day School*, which required such institutions to possess a substantial religious character.119 The

115. *But see Carroll Coll., Inc.*, 345 N.L.R.B. 254, 254 n.8 (2005), enforcement denied, 558 F.3d 568 (D.C. Cir. 2009) (the Board found it unnecessary to consider the D.C. Circuit’s test if the employer did not contest the Board’s jurisdiction). Accepting the D.C. Circuit’s criticism in *University of Great Falls* that it had conflated the RFRA and *Catholic Bishop* analyses, the Board stated it would analyze the RFRA under a “substantial burden” test separately from the *Catholic Bishop* inquiry. *Id.* at 256–57. The Board ultimately found that asserting jurisdiction over Carroll College would not impose a substantial burden on the college’s religious exercise. *Id.* at 260. The Board has not yet addressed, in a published case, the alternative tests in a primary or secondary school setting.

116. *See e.g.*, Salvation Army, 345 N.L.R.B. 550 (2005) (jurisdiction over a prerelease transition facility for prisoners and probationers operated by a religious charity; assuming *University of Great Falls*’ validity, the employer did not meet the test’s requirements because it was supplying secular rehabilitation services and not religious education); *Catholic Soc. Serv.*, 355 N.L.R.B. 929 (2010) (2–1 decision) (Schaumber, Member, dissenting) (majority asserts jurisdiction over operator of a residential care facility for children because it provides secular social services with only limited—and nonreligious—educational activities; dissent would exempt religiously affiliated care center whose employees inculcate religious values to children); *Volunteers of Am. Greater N.Y., Inc.*, 22-RC-067527, 2011 WL 6543056 (N.L.R.B. Dec. 23, 2011) (request for review denied of a regional director’s assertion of jurisdiction over a residential community released reentry program facility affiliated with a religious organization; assuming validity of *University of Great Falls*, the employer did not provide religious education and the petitioned-for employees were not teachers).


118. Chairman Peace and Members Hirozawa and Schiffer joined in the majority decision. *Id.*, slip op. at 1–25. Member Johnson dissented, with Member Miscimarra joining in finding the Board lacked jurisdiction over the contingent faculty at issue. *Id.* at 26, 28–30. The majority also found that the faculty at issue were not exempt from Board jurisdiction as managerial employees under *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). Both dissenters found it unnecessary to reach this issue because of the university’s religious status. *Pac. Lutheran Univ.*, 361 N.L.R.B. No. 157, slip op. at 26, 28–30. Member Miscimarra, however, agreed with some qualifications to the Board’s new managerial standard, *id.* at 27, while Member Johnson expressed substantial concerns with both the new framework and the Board’s application of it. *Id.* at 30–35.

119. *Id.* at 11.
Board members disagreed over which standard to adopt and whether this university was within its jurisdiction. The majority established a new test utilizing aspects of University of Great Falls and a religious function approach.\textsuperscript{120} As a threshold requirement, the employer must hold itself out as providing a religious educational environment, thus implicating the guarantees of religious freedom under the First Amendment.\textsuperscript{121} The Board held that “[a]ppropriate evidence . . . would include, but by no means be limited to, handbooks, mission statements, corporate documents, course catalogs, and documents published on a school’s website.”\textsuperscript{122} It pointed to such evidence as providing “an accurate, but nonintrusive, way for the Board to assess a university’s assertion that it provides a religious educational environment.”\textsuperscript{123} Having met the threshold requirement, the institution must then demonstrate that it “holds out its petitioned-for faculty members as performing a specific role in creating and maintaining that environment.”\textsuperscript{124} The Board looks at evidence such as “job descriptions, employment contracts, faculty handbooks, statements to accrediting bodies, and statements to prospective and current faculty and students.”\textsuperscript{125} It also stressed that it would rely on the institution’s own statements as to its faculty’s religious function.\textsuperscript{126} The statements must demonstrate “a connection between the performance of a religious role and faculty members’ employment requirements.”\textsuperscript{127}

Applying this new test, the Board majority found that Pacific Lutheran University held itself out as providing a religious educational environment. The Board relied upon the university’s public representations—its website, articles of incorporation, bylaws, faculty handbook, course catalog, and other public documents—that discussed its Lutheran heritage, its stated purpose as a university in the tradition of Lutheran higher education, and religious activities open to students.\textsuperscript{128} The Board, however, found that the university did not hold its contingent faculty members out as playing a religious function.\textsuperscript{129} The Board observed that “there is nothing in [the university’s] governing documents, faculty handbook, website pages, or other material, that would suggest to faculty (either existing or prospective), students, or the community, that its contingent faculty members perform any

\begin{itemize}
  \item \textsuperscript{120} Id. at 5–11.
  \item \textsuperscript{121} Id. at 6–7.
  \item \textsuperscript{122} Id. at 6. While the Board referred to “oral statements” as well, it discussed only documentary evidence in relation to “appropriate evidence.” Id. at 10 n.17.
  \item \textsuperscript{123} Id. at 7.
  \item \textsuperscript{124} Id.
  \item \textsuperscript{125} Id. at 9.
  \item \textsuperscript{126} Id.
  \item \textsuperscript{127} Id. at 9 n.14.
  \item \textsuperscript{128} Id. at 11–12.
  \item \textsuperscript{129} Id. at 13.
\end{itemize}
religious function.” Accordingly, the employer was not exempt from Board jurisdiction.

Member Johnson vigorously dissented, contending that the majority failed to defer to the primacy of the First Amendment’s protection of religion over the Act’s protection of collective bargaining and union organizing. He also criticized the majority for intrusively “trolling” through the university’s religious beliefs by requiring the university to hold its faculty out “as performing a specific role in creating and maintaining” a religious educational environment. Member Johnson asserted that the majority’s test would ultimately require the Board to assess the religiosity of faculty functions. He believed University of Great Falls provided superior protection for religious freedom but would have found nonprofit status only as a helpful, not necessary, element in determining the sincerity of an institution’s religious character. Applying University of Great Falls, Member Johnson would have held that Pacific Lutheran University met all three prongs: (1) it holds itself out as providing a religious educational environment, (2) it is organized as a nonprofit, and (3) it is affiliated with the Evangelical Lutheran Church in America. Member Johnson concluded that, even under the majority’s test, Pacific Lutheran University’s “work, mission, values and community” come from its Lutheran religion and thus it met the requirement of holding out its faculty as an important part of achieving those ideals.

III. Aftermath
A. NLRB Dilemma One: Quo Vadis? Should the Board Attend Pacific Lutheran University or University of Great Falls?

The Board’s Pacific Lutheran University test, although in a developmental stage, is clearly superior to the D.C. Circuit’s University of Great Falls test in adhering to both constitutional principles and statutory construction. By focusing on the function of school employees in relation to the school’s religious purpose, Pacific Lutheran University more effectively identifies when Board regulation would truly interfere with the school’s, the students’, and their parents’ free exercise
of religion. In contrast, *University of Great Falls* less-effectively assesses the religious character of a school and its operations and has considerable constitutional vulnerabilities.

A Ninth Circuit case, *Spencer v. World Vision, Inc.*, offers a sound critique of each aspect of the *University of Great Falls* test. In *Spencer*, the question was whether Title VII’s exemption applied to a religious charity. First, an assessment of an entity’s religious function is not necessarily intrusive when it primarily examines the forms of religious observance and study that occur but does not inquire about religious doctrine or the sincerity of beliefs. Second, nonprofit status is an unreliable indicator of religious purpose because it is often used for nonreligious reasons such as secular governance or tax avoidance. Third, inquiry into an entity’s affiliation with “formally religious” organizations is itself constitutionally questionable as discrimination against nondenominational houses of worship in favor of denominational churches.

The *University of Great Falls* test has a further problem. It potentially may include schools with a substantial religious character within the Act’s jurisdiction because schools not formally affiliated with a religious structure or organization would not qualify for an exemption. The affiliation requirement is constitutionally suspect because it could require an educational institution formally to ally itself with a religious institution or organization to obtain a religious exemption and could interfere with the free exercise of religion for persons associated with the school. Applying this requirement conceivably opens the Board to allegations of sectarian discrimination (i.e., basing its treatment of different religious entities on the hierarchical character of a particular sect).

The authors of one constitutional law

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137. 633 F.3d 723 (9th Cir. 2011).
138. Id. at 735.
139. Id. at 750 (Berzon, J., dissenting) (proposed limitation of Title VII religious exemption).
140. Id. at 745–46 (Kleinfeld, J., concurring).
141. Id. at 732–33 (O’Scannlain, J., concurring).
143. See *Spencer*, 633 F.3d at 733 (O’Scannlain, J., concurring) (“As for the affiliation factor, . . . we are disinclined to afford it much weight in light of [the] potential it presents for discrimination amongst religious institutions.”); Univ. of Great Falls v. NLRB, 278 F.3d 1335, 1346 (D.C. Cir. 2002) (limiting the Catholic Bishop exemption based on degree of religious restriction at a university could constitute sectarian preference). But see *Spencer*, 633 F.3d at 759 (Berzon, J., dissenting) (“[T]he affiliation factor does not favor institutions with a denominational affiliation; an organization could present evidence of affiliation by showing that it is financially or programmatically accountable to several churches rather than just one.”).
treatise note: “If a law creates a denominational preference, it will violate the establishment clause unless its distinction between different religious denominations is necessary to promote a compelling inter-
est.”144 In University of Great Falls, the D.C. Circuit did not state or suggest that an affiliation requirement favoring hierarchical religions over congregational ones is necessary to promote any compelling inter-
est of the Act.145 The Board majority in Pacific Lutheran University agreed that the affiliation requirement “might amount to denominational preference” and declined to adopt this requirement.146

The Board in Pacific Lutheran University seeks to avoid any hint of unconstitutional intrusion by adopting the University of Great Falls “holding out” requirement in both the threshold prong and the employee-function prong of its test and restricting itself to examination of the school’s documents regarding its “contemporary presenta-
tion of itself.”147 Nonetheless, the Board should also be able to hear testimony evidence of the school’s actual operations. As suggested by Judge Berzon in her Spencer dissent, “an assessment of observable reli-
gious and secular aspects of an organization’s purpose and activities” is constitutionally permissible.148 The Board should assess, nonintru-
sively, a school’s religious purpose not only by perusing its organizational documents, handbooks for parents and students, public web-
sites, and curriculum, but also by reviewing testimony by school personnel describing a typical school day and activities. It should ex-
plicitly restrain its investigators and attorneys from questioning school officials regarding religious doctrine, conduct that both the Su-
preme Court majority in Catholic Bishop149 and the First Circuit plu-
rality in Bayamon150 found intrusive. The Board majority in Pacific Lutheran University feared that examining “the actual functions per-
formed by employees” could be seen as intrusive as questioning a school’s religious belief and therefore pledged not to “seek to look be-
hind” the evidence of the university’s public representations of the teachers’ role.151 The Board therefore limits its inquiry to a connection or link between the school’s holding out of its religious mission and its holding out of the teachers’ duties.152 The problematic aspect of relying

144. ROTUNDA & NOWAK, supra note 19, § 21.3(a).
145. Univ. of Great Falls, 278 F.3d at 1339.
146. Pac. Lutheran Univ., 361 N.L.R.B. No. 157, 2014 WL 7330993, slip op. at 7 (2014). Member Johnson disagreed, believing that the affiliation factor serves a neces-
sary purpose in determining that an educational institution is a bona fide religious as-
147. Id. at 6.
148. Spencer, 633 F.3d at 750 (Berzon, J., dissenting).
150. Universidad Central de Bayamon v. NLRB, 793 F.2d 383, 403–04 (1st Cir. 1985).
152. Id.
only on a school’s “holding out” of its religious mission and its teachers’ role in relation to that mission is whether this evidence will provide an accurate representation of day-to-day operations. The Board majority relies on the D.C. Circuit’s view that what a school projects to the public, students, and faculty about its religiosity is both sincere and accurate because of the so-called market check, that the profession of a religious mission incurs a cost on the school because it discourages more secularly inclined students and faculty from attending or working for the school. Whether the “market check” proves effective in divining religious status will emerge as the Board applies its new Pacific Lutheran University test in future cases.

A more expansive approach to assessing a school’s religious character could be justified by a comparison with Title VII jurisprudence, in which courts have long held that Title VII does not give religious organizations the latitude to discriminate on the bases of race, sex, or national origin and have assessed organizations’ motivation for adverse employment decisions. Professor Evelyn Tenenbaum has labeled this approach “the behavioral inquiry.” She urges administrative agencies—both state and federal—charged with regulating collective bargaining and employment discrimination to limit investigations by inquiring only into a religious organization’s conduct or employment practices and avoid delving into its espousal of religious doctrine. The Board should presume validity of the organization’s asserted religious belief, but then determine whether its actions are consistent with the religious belief defense. By not inquiring about religious doctrine, but simply presuming its validity, an agency could avoid chilling religious activities.

The “behavioral inquiry” approach is consistent with the Supreme Court’s doctrine not to question the validity of religious doctrine, while still allowing government to assess the sincerity of the holder’s exemption request. In a similar manner, the Board’s Wright Line test,

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153. Indeed, the reliance on documents such as handbooks or job descriptions cuts against the Board’s usual practice of not relying on “paper authority” not reflected in a workplace’s actual practice in finding either managerial or supervisory authority under the NLRA. Id. at 18; see also Lucky Cab Co., 360 N.L.R.B. No. 43, 2014 WL 670231, slip op. at 2 (2014).

154. Pac. Lutheran Univ., 2014 WL 7330993, slip op. at 9 (citing Univ. of Great Falls v. NLRB, 278 F.3d 1335, 1344 (D.C. Cir. 2002)).


157. Id. at 665–66.

used in unfair-labor-practice cases, assesses the “truth” of an employer’s asserted reason only by determining whether it actually motivated the “behavior” at issue—the adverse employment action. Thus, in the religious context, the Board would not assess the religious doctrine’s validity or the school’s belief in the doctrine in regard to an alleged unfair labor practice, but whether that doctrine motivated the school in taking its adverse employment action. The Board could follow the approach courts use in Title VII cases distinguishing between a religious entity’s right to discriminate on religious bases from discrimination on other prohibited grounds. It is important to stress that the behavioral inquiry does not exclude religious behavior from statutory or constitutional protection. Rather, this approach inquires whether religious belief actually motivated behavior. Courts can then determine whether religious organizations relied upon a religious motivation rather than a prohibited one.

Whether courts will find this approach unduly intrusive is an open question that the Board chose to avoid. The Second Circuit anticipated this “accommodation” in its decision in Catholic High School Association v. Culvert and prohibited New York’s public sector labor board from pursuing a pretext theory of religious motivation in forthcoming discharge cases involving parochial school teachers. The court believed that, if charged under such a theory, a religious employer would have to show the doctrinal validity of such motivation and “[i]nvariably [that] would lead to the degradation of religion.” The circuit court noted the state board could still utilize a dual motivation analysis to determine whether religious concerns motivated the discharge. Likewise, in its appellate review of the underlying case:

In a pretext case, the employer defends on the ground that [it] acted, not for the alleged invalid reason, but instead for a valid reason. In a dual motivation case, the employer defends on the ground that, even if an invalid reason might have played some part in [its] motivation, [it] would have taken the same adverse action in the absence of the invalid reason, i.e., [it] would have taken the action on the basis solely of some valid reason.


161. See, e.g., id. at 728.

162. See, e.g., id. at 734 (O’Scannlain, J., concurring).

163. 753 F.2d 1161, 1169 (2d Cir. 1985), reversing in part, 573 F. Supp. 1550 (S.D.N.Y. 1983). In another case, the Second Circuit explained the difference between pretext and dual motivation:

In a pretext case, the employer defends on the ground that [it] acted, not for the alleged invalid reason, but instead for a valid reason. . . . In a dual motivation case, the employer defends on the ground that, even if an invalid reason might have played some part in [its] motivation, [it] would have taken the same adverse action in the absence of the invalid reason, i.e., [it] would have taken the action on the basis solely of some valid reason.


164. Culvert, 753 F.2d at 1168.

165. Id.
Board decision in *Catholic Bishop*, the Seventh Circuit rejected this approach—at least in *dictum*—ruling that if the Board based a discrimination violation on either a pretext or dual motivation, the Board would violate “someone’s constitutional rights” because the religious entity would ultimately have to demonstrate the sincerity of its doctrinal position in order to carry its burden in the proceeding.\(^{166}\)

**B. NLRB Dilemma Two: Which Employees Should Come Within the Act’s Religious Exemption?**

The Board also faces the issue of whether it should maintain separate religious exemptions for teaching employees of religious educational institutions and for nonteaching “essential” employees of religious organizations or combine both exemptions into one formula, based on *Catholic Bishop*.\(^{167}\) The Board has declined to apply *Catholic Bishop* to non-school operations or programs of religious organizations or religiously affiliated entities.\(^{168}\) That is, the Board has only asserted jurisdiction over such operations or programs when the employer provides essentially secular services and not religious education.\(^{169}\) The circuit courts agreed with the Board that the non-school programs provide primarily secular services (similar to those of nonreligious entities) even though religious concerns motivated the entities to offer these services or the services are provided in a religious atmosphere.\(^{170}\) The courts found no significant risk of constitutional conflict when the Board asserted jurisdiction over these employers and, in applying the Supreme Court’s tests, found no actual violation of the Religion Clauses.\(^{171}\)

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166. *Catholic Bishop of Chi. v. NLRB*, 559 F.2d 1112, 1129–30 (7th Cir. 1977).

167. The Board’s new test is limited to faculty units at colleges and universities. *Pac. Lutheran Univ.*, 361 N.L.R.B. No. 157, 2014 WL 7330993, slip op. at 8 n.11 (2014).


169. *See id.* (jurisdiction over residential program providing prerelease services for persons released from prison and for persons serving probationary sentences); *see also* *Catholic Soc. Servs.*, 355 N.L.R.B. 929, 929 (2010) (jurisdiction over religiously affiliated childcare facility); *Volunteers of Am. Greater N.Y., Inc.*, 22-RC-067527, 2011 WL 6543056 (N.L.R.B. Dec. 23, 2011) (Board can assert jurisdiction over prerelease program run by nonprofit charitable and religious corporation).

170. *NLRB v. Salvation Army of Mass. Dorchester Day Care Ctr.*, 763 F.2d 1, 5 (1st Cir. 1985); *Volunteers of Am.–Minn.–Bar None Boys Ranch v. NLRB*, 752 F.2d 345, 348 (8th Cir. 1985); *St. Elizabeth Hosp. v. NLRB*, 715 F.2d 1193, 1196 (7th Cir. 1983). *But see* *Spencer v. World Vision, Inc.*, 633 F.3d 723, 745 (9th Cir. 2011) (Kleinfeld, J., concurring) (Title VII exemption can include “performance of activities that are often performed in a secular context”).

171. *NLRB v. Hanna Boys Ctr.*, 284 N.L.R.B. 1080, *enforced*, 940 F.2d 1295, 1303–06 (9th Cir. 1991); *Salvation Army of Mass.*, 763 F.2d at 6; *Volunteers of Am.*, 752 F.2d at 349. The Ninth Circuit in *Hanna Boys* provides a particularly thorough discussion of the constitutional distinction between a religious school and a religiously affiliated entity providing secular services. *See* 940 F.2d at 1300–02. The court described *Catholic Bishop* as possessing an “exclusive focus on teachers” and, accordingly, found that the child-care, cooking, and maintenance employees of a Roman Catholic residential school for boys fell within the NLRB’s statutory jurisdiction. *Id.* at 1302–03. Regarding the Free Exercise
In *Riverside Church*,\(^{172}\) and its progeny, the Board diverged from this principle and exempted certain essential secular employees of religious organizations. The Board denied review of a regional director’s decision declining jurisdiction over service and maintenance employees (including parking garage employees) at a prominent New York City church.\(^{173}\) The Board determined these employees were performing secular tasks essential to the employer’s religious mission.\(^{174}\) Specifically, the Board stated it would decline jurisdiction if (1) the religious entity operates as such “in a conventional sense using conventional means” and (2) the secular employees are those “without whom the employers could not accomplish their religious mission.”\(^{175}\)

Regarding the definition of a religious organization, the Board tends to provide only general statements concerning what a “religious organization” operating in “a conventional sense” might be. Riverside Church clearly operated as a traditional house of worship (although on a very large scale).\(^{176}\) In *Faith Center–WHCT Channel 18*,\(^{177}\) the Board declined to assert jurisdiction over the broadcasting employees of a church that largely propagated its religious message through a radio station, finding its “purpose and function indistinguishable from ‘conventional’ churches.”\(^{178}\)

To determine which employees were exempted despite secular functions, the Board in *Riverside Church* wielded a broad brush and found service and maintenance employees essential to the church’s operation.\(^{179}\) Similarly, in *St. Edmund’s High School*,\(^{180}\) the Board reversed the regional director and declined jurisdiction over the custodial employees of a combined church/elementary school/high school based on the church’s direct employment of janitors, its close integration with the two schools, and the schools’ function as part of the

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\(^{173}\) Id. at 806.

\(^{174}\) Id. (assertion of jurisdiction was “unwarranted” on the basis that the church was engaging in commercial activities because any of its commercial activities generated only a de minimis portion of its total revenues and there was no evidence the petitioned-for employees spent a substantial portion of their time related to those activities).

\(^{175}\) St. Edmunds High Sch., 337 N.L.R.B. 1260, 1260 (2002) (internal citations omitted).

\(^{176}\) *Riverside Church*, 309 N.L.R.B. at 806.


\(^{178}\) See *The Holy Land Experience*, NLRB Div. of Advice, No.12-CA-21846, (2002) (Region advised to dismiss unfair labor charges against biblical theme park created and operated by an extension of a religious organization to reinforce the organization’s religious message, when park performers were essential to the park’s religious mission).

\(^{179}\) 309 N.L.R.B. at 807.

\(^{180}\) 337 N.L.R.B. at 1261.
church’s religious mission. The Board distinguished two other cases in which the Board asserted jurisdiction because those employers, unlike St. Edmund’s, were not religious organizations. While there is no extensive case law on this issue, the import of Riverside Church and St. Edmund’s High School is that once the Board designates an employer a religious organization, it will tend to include all employees as essential to accomplishing its religious mission. Accordingly, the Board found garage employees and janitors essential to the accomplishment of a religious mission. For the Board, the first prong of the Riverside/St. Edmund’s test seems to be decisive and the Board will likely assume the second prong satisfied.

There are strong arguments for reversing Riverside and finding secular employees with no religious function who perform essential—but nonreligious—functions for religious organizations should not be exempted from the Act’s jurisdiction. While not discussing the role of nonteaching employees, the Supreme Court in Catholic Bishop precluded the Board from asserting jurisdiction over teaching employees of a religious educational institution because of their role in inculcating religious doctrine and the consequent risk of conflict with the First Amendment’s Religion Clauses. The Ninth Circuit in NLRB v. Hanna Boys Center decided that “[b]oth the rationale and the language of the Catholic Bishop opinion . . . support the limitation of its holding to the employment relationship between church-operated schools and its teachers.” As Professor David L. Gregory commented in discussing Hanna Boys Center: “Teaching can be inextricably intertwined with doctrinal proselytization; non-teaching functions do not share such a close nexus with the doctrinal religious precepts.” Professor Douglas Laycock has similarly argued it is appropriate to treat employees of religious organizations differently based on the “religious intensity” of their work: “all church labor relations are internal matters, but a priest’s job is more intensely religious than a janitor’s.” The secular employees of religious organizations should be subject to the Board’s jurisdiction if their duties do not involve propagating the

181. Id. at 1265.
182. Id. at 1262 (citing Ecclesiastical Maint. Serv., 325 N.L.R.B. 629, 631 (1998) (diocese-founded employer was a separate corporation to clean and maintain church properties); NLRB v. Hanna Boys Ctr., 284 N.L.R.B. 1080, enforced, 940 F.2d 1295, 1304–06 (9th Cir. 1991) (employer was a home for troubled boys).
184. 940 F.2d at 1302.
185. Id.
organization’s religious ideas or functions. As Professor Laycock as-
serts, the exemption should be based on the “religious intensity” of an
employee’s work.188 The second prong of Pacific Lutheran University
similarly requires that the teacher be held out as performing a “specific
religious function” linked with the educational institution’s professed
religious mission.189 The Board should dispense with the Riverside
Church doctrine and apply a unitary, but narrow, interpretation of
Catholic Bishop to the secular employees of religious organizations
only if the employee’s work directly advances the organization’s reli-
gious mission.

IV. Hobby Lobby Applied to the NLRA Religious
Exemption

The NLRA religious exemption’s continued viability after Hobby
Lobby depends on three factors: (1) whether the Supreme Court recog-
nizes the NLRA’s protection of collective bargaining and employees’ or-
ganizational rights as a compelling governmental interest, (2) whether
the Court finds the assertion of jurisdiction by the Board imposes a
substantial burden on an employer’s religious exercise, and (3) whether
the Court finds credible the absence of a least restrictive alternative to
the assertion of Board jurisdiction.

Regarding whether the NLRA’s objectives are a compelling gov-
ernmental interest, the Court has not directly answered this question.
It avoided applying Sherbert, the source of the inquiry, in Catholic
Bishop. Nonetheless, the Ninth Circuit in NLRB v. Hanna Boys Center
confidently relied on “the compelling governmental interest in ‘promot-
[ing] the peaceful settlement of industrial disputes by subject-
ing labor-management controversies to the mediatory influence of ne-
gotiation.’”190 Several courts have recognized the compelling interest
of collective bargaining in assessing state regulation of religious
schools.191 In all likelihood, as it did with the ACA in Hobby Lobby,
the Court will at least assume arguendo a compelling governmental
interest in protecting the right to engage in collective bargaining.192
As to whether NLRA jurisdiction places a substantial burden on religious beliefs, Catholic Bishop expressed concern that the Board’s investigatory process imposed such a burden.\textsuperscript{193} \textit{Hobby Lobby} effectively reduced the “substantiality” of the burden a plaintiff must demonstrate regarding religious belief. Justice Alito advanced the principle that an employment regulation conflicting with an employer’s wish to operate its business consistently with its religious belief substantially burdens the employer’s religious free exercise.\textsuperscript{194} Judge Berzon of the Ninth Circuit pointed out the possibility to avoid inquiry into an entity’s religious character, and thus avoid a substantial burden on the entity’s religious freedom, by only examining the “observable religious and secular aspects of an organization’s purpose and activities.”\textsuperscript{195} The Board in \textit{Pacific Lutheran University} has ventured even more cautiously by limiting its inquiry to what a college or university “holds out” through primarily public documents, reducing the substantiality of the burden on religious practice.\textsuperscript{196}

Finally, is there a least restrictive alternative to NLRA jurisdiction? Justice Ginsburg’s \textit{Hobby Lobby} dissent emphasizes that a least restrictive alternative must not only answer the religious objection, but also vindicate the governmental interests of the law.\textsuperscript{197} Justice Alito’s \textit{Hobby Lobby} majority noted exceptions already allowed by the ACA, as well as other possible alternatives, and generally held the government to a high standard in demonstrating the absence of other less restrictive alternatives.\textsuperscript{198} Unlike the contraceptive accommodation, which merely shifts the cost from the employer to the insurer,\textsuperscript{199} the elimination of NLRA jurisdiction removes employees’ rights to unionize and other concerted activity. However, employer-plaintiffs could argue NLRA jurisdiction is scarcely universal as the Board already recognizes a number of religious exclusions to jurisdiction. For this and other reasons discussed here, the Board should eliminate the “essential employees” exception to its jurisdiction because it

\textsuperscript{193} NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 502 (1979) (concern in terms of an Establishment Clause analysis; specifically, whether the intrusion caused by the Board’s “process of inquiry” resembled the “pervasive monitoring” required by governmental aid to parochial schools) (citing Lemon v. Kurtzman, 403 U.S. 602, 617 (1971); Meek v. Pittenger, 421 U.S. 349, 370 (1975); Wolman v. Walter, 433 U.S. 229, 244 (1977)). Presumably, the Court’s eventual reversal on the constitutionality of such governmental aid lessened the strength of this analogy. \textit{See} Agostini v. Felton, 521 U.S. 203, 234 (1997).

\textsuperscript{194} \textit{Hobby Lobby}, 134 S. Ct. at 2759.

\textsuperscript{195} Spencer v. World Vision, 633 F.3d 723, 750 (9th Cir. 2011) (Berzon, J., dissenting).


\textsuperscript{197} \textit{Hobby Lobby}, 134 S. Ct. at 2801–02 (Ginsburg, J., dissenting).

\textsuperscript{198} \textit{Id.} at 2780 (majority op.).

\textsuperscript{199} \textit{Id.} at 2768–77.
undercuts the argument that NLRA jurisdiction requires near-universal coverage to be effective.200

V. Conclusion

The NLRB now uses two divergent approaches to jurisdictional exemption of religious organizations and religiously affiliated entities. The Board should continue to revise *Jewish Day School*, as it did in *Pacific Lutheran University*, to reduce any perceived intrusion into an employer’s religious exercise, while not excluding employees who do not perform a religious function. It should also reject *Riverside Church*’s scope of employee coverage. The Board should then apply the revised test to determine whether to exclude secular employees of religious organizations from the Act’s jurisdiction. Continuing along this path will bring the NLRA’s religious exemption into conformity with *Hobby Lobby* regarding the extent to which employment regulation may permissibly affect religious institutions.

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200. *See Pac. Lutheran Univ.*, 361 N.L.R.B. No. 157, slip op. at 3 (“Because we are charged with protecting workers’ exercise of their rights under the Act to the fullest permissible extent, we must carefully examine any claims that a group of employees is excluded from our jurisdiction and thus not afforded any of the protections of the Act, including the right to representation and collective bargaining.”).
Developing Trends in Non-Compete Agreements and Other Restrictive Covenants

By Angie Davis,* Eric D. Reicin,** & Marisa Warren***

Covenants not to compete are a common vehicle for protecting a company’s interests. From the employer’s perspective, the loss of key employees, customer lists, price lists, customers, proprietary or confidential information, or trade secrets can damage a company. From the employee’s perspective, non-compete agreements can limit an employee’s ability to find future employment or utilize various pieces of information or contacts gained during employment. In dealing with these issues, courts typically strike a balance between the employer’s need for protection and an employee’s right to work for a different employer. 1 Employment lawyers need a firm understanding of non-compete agreements and other restrictive covenants, which are the subject of complex and ever-changing legal schemes both within and outside the United States. This Article discusses developing legal trends in restrictive covenants, including best practices for negotiating restrictive covenants and defenses to enforcement of restrictive covenants. It also explores several emerging issues, such as the employee choice doctrine and

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forfeiture issues, choice-of-law, non-poaching agreements, and enforcement of restrictive covenants outside the United States.

I. Best Practices for Negotiating Restrictive Covenants

Although courts typically disfavor restrictive covenants because they restrain competition and are often unduly burdensome on an employee’s right to earn a living, in most states courts will enforce a restrictive covenant if it protects a legitimate business interest, the employee received consideration for the covenant, it is narrowly tailored, and the time and territorial limitations are no greater than necessary to protect the employer’s business interest. Although there are some common trends, no two states treat restrictive covenants exactly alike and, therefore, before drafting or enforcing restrictive covenants practitioners must conduct state-specific research.

A. How Far Should Your Geographic Restrictions Reach?

With respect to the reasonableness of geographic limitations, an evolving issue is whether a customer restriction may substitute for a geographic limitation. Imagine that your client, a company, has a salesperson with ten key accounts in seven states, and your client wants to protect and maintain those accounts. A multiyear covenant not to compete, covering all seven states, may be overly broad and thus unenforceable. Therefore, the better answer in many jurisdictions is to draft a covenant that prohibits the salesperson from soliciting customers with whom that salesperson had meaningful contact during the last year of the salesperson’s employment for a period of, say, two years after termination. Most states will allow a customer, rather than geographic, restriction. However, in Louisiana, courts will not enforce such a covenant because it lacks a geographic limitation. Other states—such as Florida, Kentucky, Nevada, New Hampshire, Oklahoma, and Rhode Island—have not yet addressed whether a customer restriction may

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2. See, e.g., McGlothen v. Heritage Envtl. Servs., LLC, 705 N.E.2d 1069, 1071 (Ind. Ct. App. 1999) (“Generally, covenants not to compete are disfavored by law because they restrain trade.”); Murfreesboro Med. Clinic, 166 S.W.3d at 678 (“These covenants are viewed as a restraint of trade, and as such, are construed strictly in favor of the employee.”); see generally BRIAN M. MALSBERGER, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY (David J. Carr, Arnold H. Pedowitz, & Eric Akira Tate eds., 9th ed. 2013).

3. MALSBERGER, supra note 2, at 115–33. But see CAL. BUS. & PROF. CODE §§ 16600–16602.5 (West 2014); OKLA. STAT. tit. 15, § 219A (2014); N.D. CENT. CODE § 9-08-06 (2013). Currently, at least twenty-one states have at least one state statute governing employee non-competes. MALSBERGER, supra note 2 at 38–55. But even with those state statutes, it is important to review the relevant evolving case law.

4. See id. at 2739.

5. See id.
substitute for a geographic limitation. This creates uncertainty and, in turn, increased risk.

B. What Should You Consider When It Comes to Consideration?

Like any other contract, a non-compete agreement must be supported by adequate consideration, i.e., a bargained-for exchange. As a general rule, consideration for a contract may be either (1) a benefit to the promisor or (2) a detriment to (or an obligation upon) the promisee. In many states, continued or initial employment is sufficient consideration for a restrictive covenant agreement. However, several states have reached a contrary conclusion. Those states—Connecticut, Kentucky, Minnesota, Montana, North Carolina, Oregon, Pennsylvania, South Carolina, Texas, Washington, West Virginia, Wisconsin, and Wyoming—reason that continued employment, without more, is not sufficient consideration because the employee/promisor is incurring an obligation, not receiving a benefit, and the employer/promissee is receiving a benefit, not incurring an obligation. Other states such
as Alaska, Hawaii, New Mexico, and Oklahoma have not explicitly addressed whether continued employment is sufficient consideration. Accordingly, in quite a few states, an employer that hopes to enter into a restrictive covenant agreement with an existing employee must offer more than just continued employment. State-specific research is, therefore, crucial.

II. Other Provisions Often Included in Restrictive Covenants

A. What Jurisdiction’s Laws Will Apply?

Although most courts recognize the parties’ abilities to choose the law they would like to govern their agreements, a handful of courts have held otherwise. Two separate New York courts recently rejected express choice-of-law provisions, ruling instead to apply New York law.

In Brown & Brown, Inc. v. Johnson, a New York appellate court acknowledged that a choice-of-law provision will generally be enforced to effectuate the parties’ intent if the chosen law bears a reasonable relationship to the parties or transaction. However, the chosen law must not be “truly obnoxious” to New York’s public policy.

10. See MALSBERGER, supra note 2, at 1130 (Alaska); id. at 2057 (Hawaii); id. at 3957 (Oklahoma). Although the Malsberger treatise states that in New Mexico “it appears that continued employment is sufficient consideration to support a covenant,” id. at 3505, that issue was not before the court in the case cited in the treatise. See Manual Lujan Ins. v. Jordan, 673 P.2d 1306, 1308 (N.M. 1983). Another New Mexico case suggests that the courts would find that continued employment is not sufficient consideration. Piano v. Premier Distrib. Co., 107 P.3d 11, 14–15 (N.M. Ct. App. 2004) (continued employment is not sufficient consideration for an arbitration agreement, citing a South Carolina non-compete case, Poole v. Incentives Unlimited, Inc., 525 S.E.2d. 898, 900 (S.C. Ct. App. 1999)).

11. Among other important topics, whether reformation or “blue penciling” by a court is permitted or a preferred approach also is state specific. Several states—including Oklahoma, Virginia, and Nebraska—do not permit blue penciling. Management law firm Seyfarth Shaw recently assembled an in-house counsel, client-friendly, fifty-state survey on many of these issues. 50 State Desktop Reference: What Employers Need to Know About Non-Compete and Trade Secrets Law, SEYFARTH SHAW 1 (2014), http://www.seyfarth.com/uploads/siteFiles/practices/141926_ChartofTradeAgreementsbyState_FINAL.pdf.

12. The majority court view is based upon the Restatement (Second) of Conflicts test. RESTATEMENT (SECOND) OF CONFLICTS § 187 (1988). Section 187 provides that a court will generally enforce a contractual choice-of-law provision so long as (1) there is a substantial relationship to the parties or the transaction and the law selected and (2) the law chosen is not contrary to the fundamental public policy of a state with a materially greater interest than the chosen state in the dispute. Id.


15. Id. at 166.

16. Id.
The court in *Brown & Brown* found that the choice-of-law provision expressly chosen in the governing agreement, Florida law, bore a reasonable relationship to the parties and transaction, but the law differed too vastly from the policy underlying New York’s treatment of restrictive covenants. In New York, restrictive covenants are disfavored and are enforced only to the extent necessary to protect the employer’s legitimate interests, if the restrictive covenant is not unduly harsh or burdensome to the employee and is not injurious to the public. Thus, a covenant that imposes an undue hardship on an employee is unenforceable. Conversely, “Florida law expressly forbids courts from considering hardship imposed upon an employee in evaluating the reasonableness of a restrictive covenant.” Florida courts are required to construe covenants in favor of the party seeking to protect its business interests. Based on these substantial differences, the New York court found that Florida’s treatment of restrictive covenants was “truly obnoxious” to New York’s public policy and rejected the choice-of-law provision. On May 2, 2014, this decision was appealed and New York’s highest court, the Court of Appeals, will soon decide this issue.

Similarly, another New York appellate court rejected a Delaware choice-of-law provision. Even without finding that the underlying policy in Delaware differs significantly from the policy in New York, the court elected, without analysis, to apply “the law of New York, the forum state.”

New York is not alone. In *Cardoni v. Prosperity Bank*, the U.S. District Court for the Southern District of Texas considered a Texas choice-of-law provision in light of Oklahoma public policy and set aside the parties’ express choice of law. Prosperity Bank had acquired a Tulsa bank, F & M Bank and Trust Company. Following the merger, F & M Bank employees signed a non-compete agreement with a Texas choice-of-law provision. The Oklahoma employees were unhappy and sought a declaratory judgment that their non-compete agreements were unenforceable. The district court, sitting

17. Id. at 167.
18. Id. at 167–68.
19. Id.
20. Id. at 168.
21. Id.
22. Id.
25. Id. at 572.
27. Id., slip op. at 2.
28. Id.
in diversity, applied Oklahoma law, finding that Oklahoma had a greater interest since “[p]rosp[erity s]ought to restrict the employment of Oklahoma residents at an Oklahoma bank and protect relationships with clients in Oklahoma.”

The court also considered “whether fundamental Oklahoma public policy would be contravened if the court were to apply Texas law,” focusing on “whether the law in question is a part of state policy so fundamental that the courts of the state will refuse to enforce an agreement contrary to that law, despite the parties’ original intentions, and even though the agreement would be enforceable in another state connected with the transaction.” According to the Texas-based court, applying Texas law would contravene Oklahoma public policy. The court held that the non-compete was unenforceable under Oklahoma law. The precedential value of the Cardoni case may be limited due to the highly specific facts.

These cases illustrate that courts may closely scrutinize choice-of-law provisions in restrictive covenant agreements. According to the choice-of-law principles developed within their own jurisdiction, courts may set aside a particular restrictive covenant, finding that the selected choice-of-law clause contravenes public policy.

B. Is Everything Confidential or Only Trade Secrets?

A non-compete agreement seeks to restrict an employee from working for the competitor of a company. These agreements contain a time limitation and a geographic scope or customer restriction. A confidentiality or non-disclosure agreement, on the other hand, seeks to prevent employees from sharing confidential, proprietary, or trade secret information with their new employer, or anyone else. For those advising employees and employers alike, confidentiality agreements can be a trap for the unwary and should be reviewed carefully for scope and duration under applicable state law. A few states impose time and scope restrictions on certain non-disclosure agreements. For example, a Florida statute provides that “[i]n determining the reasonableness in time of a post-term restrictive covenant not predicated upon the protection of trade secrets . . . a court shall

29. Id. at 8.
30. Id. at 9–10.
31. Id. at 11.
32. Id. at 25.
33. As a general matter, courts are more willing to enforce a forum selection clause than a choice-of-law clause. Practitioners who find themselves in a jurisdiction hostile to non-competes might use forum selection clauses to direct cases to jurisdictions more hospitable to enforcement of restrictive covenants. Such efforts will not always succeed, but a recent U.S. Supreme Court decision may move the law further in that direction. See Atl. Marine Constr. Co., Inc. v. U.S. Dist. Ct. for the W. Dist. of Tex., 134 S. Ct. 568, 581 (2013) (contractual forum selection clauses should be enforced in all but the most exceptional cases).
presume reasonable in time any restraint of 6 months or less and shall presume unreasonable in time any restraint of more than 2 years in duration.”34 Wisconsin likewise requires employers to limit non-disclosure agreements.35 However, Wisconsin employers need not limit confidentiality agreements covering information that qualifies as a trade secret.36 Accordingly, one solution is a bifurcated confidentiality agreement, one that defines both “confidential information” and “trade secret,” and limits the former but not the latter. In any event, one should not assume that confidentiality agreements are immune from the rules governing restrictive covenants.

In most cases, the determination of whether information is a “trade secret” is decided under state laws, which were often modeled on the Uniform Trade Secrets Act (UTSA).37 The definition of a “trade secret”

36. Nordson Corp. v. Thomas, 406 N.W.2d 170, 1987 WL 267088, at *3 (Wis. Ct. App. 1987) (“We do not hold that there may never be a nonspecific time limitation. True trade secrets, like the Coca-Cola formula, may remain trade secrets until they need no longer be secret.”).
37. Uniform Trade Secrets Act with 1985 Amendments, Nat’l Conference of Comm’rs on Uniform State Laws 1 (1986), http://www.uniformlaws.org/shared/docs/trade%20secrets/utsa_final_85.pdf. All but three states—New York, Massachusetts, and North Carolina—have adopted some version of the UTSA and North Carolina has its own statute on the topic. Legislative Fact Sheet—Trade Secrets Act, Uniform Law Comm’n, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trade%20Secrets%20Act (last visited Jan. 23, 2014). While one of the intents of the UTSA is to promote uniformity among the states, those representing plaintiffs in misappropriation of trade secret cases may file a wide range of alternative common law claims—such as breach of fiduciary duty, confidence, or contract; intentional interference with contracts; conversion; unfair competition; promissory estoppel; and civil and/or criminal theft—to bolster their cases. See Uniform Trade Secrets Act with 1985 Amendments, Nat’l Conference of Comm’rs on Uniform State Laws 1, 3 (1986), http://www.uniformlaws.org/shared/docs/trade%20secrets/utsa_final_85.pdf.; see also Orca Comm’ns Unlimited, LLC v. Noder, 314 P.3d 89, 98 (Ariz. Ct. App. 2013) (unfair competition tort claim). Of those forty-seven states that have thus far adopted the UTSA, forty-four have adopted the UTSA express preemption provision, section 7(a), which many believe is intended to preempt most common law claims. Iowa, Nebraska, and New Mexico have not yet adopted section 7(a), See Iowa Code §§ 550.1 to .7, Neb. Rev. Stat. §§ 87-501 to -507; N.M. Stat. Ann. §§ 57-3A-1 to -3A-7. Even with such adoption, there appears to be a split regarding the scope of such preemption. The minority approach advocates a narrow application of preemption, to the extent they are based upon additional or slightly different facts than the trade secret misappropriation claim. The result is that common law claims survive if the court does not find the alleged “misappropriated” information rising to the level of a trade secret but protectable under an alternative claim. See, e.g., Orca Comm’ns, 314 P.3d at 97 (only trade secret information is preempted); Stone Castle Fin., Inc. v. Friedman, Billings, Ramsey & Co., 191 F. Supp. 2d 652, 659 (E.D. Va. 2002) (same). The majority approach is to apply the section 7(a) preemption fairly broadly to preempt all alternative civil tort claims predicated on the same nucleus of facts as a misappropriation of trade secrets UTSA claim. See Angelica Textile Servs., Inc. v. Park, 220 Cal. App. 4th 495, 507 (Cal. Ct. App. 2013) (applying California’s UTSA); Diamond Power Int’l Inc. v. Davidson, 540 F. Supp. 2d 1322, 1345 (N.D. Ga. 2007) (applying Georgia UTSA). Whether information that does not constitute a trade secret under the UTSA (and its state law equivalents) is still protected in ways that do not result in UTSA preemption is a development of the law that employment law practitioners should watch.
varies from state to state; however, most states have adopted some form of the UTSA, which defines a “Trade Secret” as information, including a formula, pattern, compilation, program, device, method, technique, or process, that

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.38

Congress is considering whether to “federalize” trade secret law. The House of Representatives’ Trade Secrets Protection Act39 and the Senate’s Defend Trade Secrets Act40 have the support of several global companies as well as bipartisan support.41 The legislation would permit private civil lawsuits under the Economic Espionage Act,42 which currently provides for criminal trade secrets cases only when filed by government prosecutors.43

III. Defenses to Enforcement of Restrictive Covenants:
Recent Trends

Outside the context of executive employment agreements and sales of businesses or practices, restrictive covenant agreements are often entered into with very little, if any, negotiation between the employer and employee. Usually, covenants are included in the new-hire

during the next few years. Compare Silvaco Data Sys. v. Intel Corp., 184 Cal. App. 4th 210, 219 (Cal. Ct. App. 2010) (discussing whether defendant may be liable for misappropriation that “does not comprehend the specific information comprising the trade secrets”), with SunPower v. SolarCity Corp., No. 12-CV-00694-LHK, 2012 U.S. Dist. LEXIS 176284, at *13 (N.D. Cal. Dec. 11, 2012) (discussing whether propriety information that does not rise to the level of a trade secret is protectable by contract). For more information on this subject, see Bradford K. Newman’s recently published treatise PROTECTING INTELLECTUAL PROPERTY IN THE AGE OF EMPLOYEE MOBILITY: FORMS AND ANALYSIS (Am. Law Media 2014), which goes into far greater detail on these concepts.

41. On September 17, 2014, the U.S. House Judiciary Committee reported out the Trade Secrets Protection Act, setting up a full House vote on the bill. As of December 2, 2014, it appears that the legislation is likely to be reintroduced in early 2015 and its primary sponsor in the Senate, U.S. Senator Chris Coons, was “optimistic” about its speedy passage. See, e.g., Anne L. Kim, Expect to See Trade Secret Legislation Re-Introduced Next Congress, ROLL CALL (Nov. 18, 2014), http://blogs.rollcall.com/technocrat/expect-to-see-trade-secret-legislation-re-introduced-next-congress/?dez=.
43. 18 U.S.C. § 1836.
paperwork or are part of a written employment agreement or offer letter and must be signed as a condition of employment.\textsuperscript{44} When the employee leaves the company, the restrictive covenant agreement may be an obstacle to future employment and could potentially prevent the employee from engaging in certain work.\textsuperscript{45} Again, courts are likely to uphold a restrictive covenant agreement if it is reasonable in scope and duration and protects a legitimate interest of the employer.\textsuperscript{46} Although legal defenses vary among states, there are several common defenses to enforcement of restrictive covenants.\textsuperscript{47}

A. \textit{Is the Agreement Too Broad in Terms of Scope or Duration?}

To be enforceable, a restrictive covenant agreement must be reasonable in its time and geographic restrictions.\textsuperscript{48} What constitutes a reasonable duration of the agreement is decided on a case-by-case basis. In general, agreements extending beyond one or two years are scrutinized more closely, particularly when the sale of a business is not involved.\textsuperscript{49} Many jurisdictions have limited the geographic scope to a region, state, or even a particular mile-radius from the location of employment.\textsuperscript{50} For instance, if an employer targets a particular market, courts may refuse to enforce covenants extending beyond that market.\textsuperscript{51} The boundaries of a market, however, are increasingly difficult to calculate with today’s global economy and the rise of e-commerce.

B. \textit{Does the Employer Have a Protectable Interest?}

Courts will only uphold a restrictive covenant if it is reasonably necessary to protect the employer’s legitimate confidential and proprietary interests and if the departing employee poses a risk of disclosure.

\textsuperscript{44} E.g., BDO Seidman v. Hirshberg, 712 N.E.2d 1220, 1222 (N.Y. 1999) (covenant presented as a condition of receiving a promotion).
\textsuperscript{45} E.g., Davies & Davies Agcy., Inc., v. Davies, 298 N.W.2d 127, 131 (Minn. 1980) (covenant included a prohibition against employment in the insurance business within a certain geographical range).
\textsuperscript{46} Id. at 131 (test of reasonableness of a noncompetition contract).
\textsuperscript{47} States also vary substantially as to whether a court will blue pencil or otherwise modify a restrictive covenant agreement. For example, a federal court in Virginia, applying Virginia law, ruled that “there is no authority for courts to ‘blue pencil,’” Lanmark Technology, Inc. v. Canales, 454 F. Supp. 2d 524, 529 (E.D. Va. 2006), while the North Carolina Court of Appeals ordered a lower court to blue pencil, Beverage System of the Carolinas, LLC v. Associated Beverage Repair, LLC, COA14-185 (N.C. Ct. App. Aug. 5, 2014).
\textsuperscript{48} E.g., Davies, 298 N.W.2d at 131 (limiting restriction to one county).
\textsuperscript{49} See Part VA of this Article for further discussion of the recent corporate use of extended vesting and forfeiture provisions in equity plans, long-term incentive plans, bonus plans, severance agreements, and ERISA benefit plans to extend the duration beyond the typical one- or two-year period.
\textsuperscript{50} E.g., Davies, 298 N.W.2d at 131 (limiting to one county).
\textsuperscript{51} Id. (prohibition outside of the country was unreasonable because the agency did little international work).
or use of confidential or proprietary information. Among others, “legitimate protectable interests” often include an employer’s goodwill and customer relationships, client contact information, and an employee’s unique skill or knowledge. Employers should consider articulating the particular interests they are seeking to protect to increase the likelihood of enforceability.

C. Has the Employer Waived Its Right to Enforcement?

Most courts hold that a company’s decision not to enforce a restrictive covenant in one situation, or its decision to not immediately seek injunctive relief, does not impact the employer’s ability to enforce the restrictive covenant in the future. The minority view is that an employer’s conduct prior to enforcing a restrictive covenant may waive its right to enforce the restrictive covenant or compromise the employer’s ability to obtain injunctive relief. This so-called waiver defense is

52. See, e.g., PolyOne Corp. v. Kutka, No. 1:13 CV 2717, 2014 WL 6673858, at *2 (N.D. Ohio Nov. 24, 2014); SKF USA Inc. v. Okkerse, 992 F. Supp. 2d 432, 450 (E.D. Pa. 2014); Gaver v. Schneider’s O.K. Tire Co., 856 N.W.2d 121, 133–34 (Neb. 2014); Brown & Brown, Inc. v. Johnson, 115 A.D.3d 162, 171 (N.Y. App. Div. 2014). Technology is increasingly part of this analysis. Social media websites—like LinkedIn, Facebook, Twitter, and Instagram—and cloud computing providers pose particular employer risks. See, e.g., Cellular Accessories for Less, Inc. v. Trinitas, LLC, No. CV 12-06736 DDP (SHx), 2014 WL 4627090, at *3 (C.D. Cal. Sept. 16, 2014) (LinkedIn contacts and other social media connections could be protectable as trade secrets if the methods used to compile the contact information are “sophisticated,” “difficult,” or “particularly time consuming.” The purported trade secret holder also must establish that the contacts were not made public.); Sasqua Grp., Inc. v. Courtney, No. CV 10-528(ADS)(AKT), 2010 WL 3613855, at *4 (E.D.N.Y. Aug. 2, 2010), report and recommendation adopted, No. 10-CV-528 ADS ETB, 2010 WL 3702468 (E.D.N.Y. Sept. 7, 2010) (employee argued that customer lists were not confidential because the customers’ information was readily available online and through social media websites such as LinkedIn and Facebook). There is anecdotal evidence that non-compete agreements are gaining ground in nontraditional industries. Certain employers are employing restrictive covenants in an attempt to restrict relatively low-wage workers, such as camp counselors, hairdressers, and sandwich makers. Neil Irwin, When the Guy Making Your Sandwich Has a Noncompete Clause, N.Y. TIMES (Oct. 14, 2014), http://www.nytimes.com/2014/10/15/upshot/when-the-guy-making-your-sandwich-has-a-noncompete-clause.html?_r=0; see also Steve Greenhouse, Noncompete Clauses Increasingly Pop Up in Array of Jobs, N.Y. TIMES (June 8, 2014), http://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html?_r=1.

53. See BDO Seidman v. Hirshberg, 712 N.E.2d 1220, 1225 (N.Y. 1999) (BDO had a legitimate business interest in its client relationships); see also Clark’s Sales & Serv., Inc. v. Smith, 4 N.E.3d 772, 781 (Ind. Ct. App. 2014) (“Our courts have held that ‘the advantageous familiarity and personal contact which employees derive from dealing with an employer’s customers are elements of an employer’s ’good will’ and are a protectable interest which may justify a restraint. . . .’”) (citations omitted).

54. See, e.g., Gleeson v. Preferred Sourcing, LLC, 885 N.E.2d 164, 180 (Ind. Ct. App. 2008); see also Peconic Surgical Grp., P.C. v. Cervone, 31 Misc. 3d 1240(A), at *3, 930 N.Y.S.2d 175 (N.Y. Sup. Ct. 2011) (rejecting employee’s affirmative defense of laches, holding that the two-month delay between the employees’ resignations and the application for injunctive relief was not unreasonable or inexcusable, nor did it result in prejudice to the defendants creating an equitable estoppel; the defendants’ claim of unclean hands was referred to a hearing).
rarely successful because, to prove this defense, the employee must show that the waiver was “clear, unequivocal, and decisive,” which is difficult to prove.\footnote{55}

A recent case illustrates this minority view. In \textit{Ally Financial, Inc. v. Sandra Gutierrez and Homeward Residential},\footnote{56} employee Sandra Gutierrez participated in an equity compensation incentive plan with Ally. This plan’s clawback provision required Gutierrez to repay award payments and forfeit the vesting of future payments if she solicited Ally employees after her departure.\footnote{57} After Gutierrez left the company, she recruited former co-workers to join her new employer, an Ally competitor.\footnote{58} Ally sent Gutierrez a letter “reminding” her of the terms of the compensation incentive plan and warning that it would take “enforcement action.”\footnote{59} Six weeks later, Ally paid Gutierrez the next installment under the incentive plan.\footnote{60} The court concluded that Ally’s intentional conduct was inconsistent with its attempted enforcement and, therefore, it waived its right to seek enforcement of the restrictive covenant.\footnote{61} Although the \textit{Ally} case is a cautionary tale, a company may have many legitimate reasons not to enforce a restrictive covenant agreement or immediately pursue injunctive relief against a particular former employee and other legitimate reasons to enforce against another former employee.

\textbf{D. Has a Material Change Impacted the Employer’s Ability to Enforce?}

The so-called material change doctrine holds that a material change in an employee’s job can void an existing restrictive covenant between the employee and the employer.\footnote{62} This defense, which had not been used in many years, is resurging in Massachusetts. In 2012, for example, two Massachusetts trial court judges ruled that pre-existing restrictive covenant agreements were voided by subsequent

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material job changes. Both *Grace Hunt IT Solutions, LLC v. SIS Software, LLC* and *Protégé Software Services, Inc. v. Colameta* involved materially adverse changes to the employees’ compensation structure. In *Grace Hunt*, the employer asked the employees to sign new restrictive covenant agreements at the time of the changes, but the employees refused. The court found that the employee’s refusal to sign showed that the old employment relationship had ended. In *Grace Hunt* and *Protégé*, the courts focused on whether there had been a material job change and not whether the change was positive or adverse for the employee.

**E. Does the Employer’s Prior Breach Prevent Enforcement?**

An employee may be able to attack the enforceability of a non-compete agreement if an employer has breached the agreement. For example, if the employer included the non-compete provision in an employment contract that contains terms—such as compensation, benefits, job description or duties, and other conditions of employment—and the employer later breached those provisions by failing to pay all compensation due, failing to provide the stated benefits, or failing to meet other obligations, a court may relieve the employee of obligations under the employment agreement, including the non-compete provision. Typically, if the employer is the first to violate the terms of the agreement, employees will argue that the company cannot later seek to enforce the benefits of that agreement. For employees making this argument, it is vital to determine whether a material breach occurred and that the breach goes to the root of the parties’ agreement. When seeking injunctive relief, equitable defenses such as unclean hands may prevent an employer from obtaining relief.

**F. Do You Have Enough (or Sufficient) Consideration?**

As discussed above, most states hold that continued employment is sufficient consideration. However, a minority require additional

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66. Id. at *4.


69. See *Kaufman v. Kehler*, 808 N.Y.S.2d 764, 765 (N.Y. App. Div. 2006) (employer is not entitled to injunctive relief based on unclean hands because it violated the same restrictive covenant it seeks to enforce against the employee).

70. See Part I, supra.
independent consideration. Moreover, some courts may consider the length of employment following the restrictive covenant agreement’s execution to determine whether the consideration was “illusory.”

For that handful of states, offering incentives such as bonuses, equity, participation in certain benefit plans, or severance packages increases the likelihood of enforceability.

**IV. Enforcing Restrictive Covenants Abroad**

Large employers often seek restrictive covenants that are enforceable in other countries. Laws vary drastically from country to country. In the United Kingdom, restrictive covenants, such as covenants not to compete, are generally viewed as a restraint of trade. A U.K. covenant not to compete must be reasonably necessary to protect a legitimate business interest, reasonably limited to a certain geographic area, and reasonably limited in duration. In comparison to U.S. courts, U.K. courts are less likely to enforce a non-compete covenant. One author explained that “the U.K. courts have upheld a 12-month restriction as being reasonable in certain circumstances but suggested it would be very unlikely that restrictions longer than 12 months would be enforceable.” Accordingly, many U.K. employers rely on “garden leave” provisions, which are generally enforceable. A standard “garden leave” provision requires an employee to give notice several (three to twelve) months before leaving to work for a competitor. During that time, the employee is paid but does not work and, in turn, does not compete or have access to confidential information. Although expensive, “garden leave” provisions are likely to be enforced and, in the end, prevent competition for a significant amount of time.

Other European countries have different legal schemes. In France, covenants not to compete are unenforceable unless employees are paid as much as two-thirds of their former monthly salary during

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71. *Id.*
74. *Id.*
75. *Id.*
76. Wendi S. Lazar, *Confidentiality, Trade Secret and Other Restrictive Covenants in a Global Economy*, AMERICANBAR.ORG 1, 13 (2009), http://apps.americanbar.org/labor/intlcomm/mw/papers/2010/pdf/lazar.pdf. This method is often set out in a more formal employment agreement prior to job separation. Compared to in the United States, it is far more common for “rank and file” employees in the United Kingdom to have formal employment agreements identifying garden leave. *Id.* at 12.
77. *Id.*
78. *Id.*
the non-compete period. Additionally, the covenant must be reasonably necessary to protect a legitimate business interest, reasonably limited to a certain geographic area, and reasonably limited in duration. Stated differently, a covenant not to compete must not prohibit employees from engaging in their chosen profession. In Germany, a covenant not to compete must meet the traditional requirements—reasonably necessary to protect a legitimate business interest, reasonably limited to a certain geographic area, and reasonably limited in duration—and the employer must “pay[] compensation throughout the duration of the restriction equal to at least one-half of the employee’s most recent contractual remuneration at termination (including all parts of salary and monetary benefits in addition to base salary).”

Japan takes a similar approach. As a general rule, restrictive covenant agreements are unenforceable unless the employee receives significant compensation (often as much as fifty percent of the employee’s annual salary). However “payment may only be required when the restrictive covenant did not exist during the term of employment but rather was created upon termination.” When determining whether a covenant not to compete is enforceable, Japanese courts balance the employer’s legitimate business interest, if any, and the employee’s right to work. Specifically, they consider the employee’s position, the activities that are prohibited, the obligation’s duration and geographic scope, the amount of compensation the employer pays for the covenant, and any other relevant facts.

A choice-of-law provision may, or may not, avoid the restrictions outlined above. The European Union (EU) takes the position that a choice-of-law provision is unenforceable if it is “manifestly incompatible with the public policy of the forum.” For example, a French court might ignore a provision stating that U.S. law governs a restrictive covenant if it is incompatible with French law, which requires the employer to pay a significant portion of the employee’s salary during the non-compete period. In Duarte v. Black and Decker Corp., a U.K. court refused to recognize a choice-of-law provision applying Maryland law because the covenant’s enforcement would have run afoul of U.K. law.

79. Pulliam et al., supra note 73.
80. Id.
81. Id.
82. Lazar, supra note 76, at 17.
83. Id.
84. Id.
86. Lazar, supra note 76.
public policy concerning non-compete agreements. In sum, every country has different rules governing restrictive covenants, and choice-of-law provisions are not cure-all solutions, highlighting the importance of diligent research prior to drafting.

In addition to choice-of-law, practitioners also need to be aware of new restrictions on where employers may seek to enforce covenants not to compete. EU Regulation 44/2001 requires employers to litigate individual employment contract claims only in the country where the employee lives. It is possible that in the future this regulation may be held to trump arbitration agreements.

V. New Trends in Restrictive Covenants

A. What Are Forfeiture Clauses and “Employee Choice” Principles?

Another evolving issue relates to forfeiture clauses as an alternative means for employers to deter competition when an employee voluntarily departs. Employers are increasingly using such clauses to obtain broad protections, even in states that are hostile to non-compete agreements. Typically, these clauses are used in stock agreements as well as incentive, profit-sharing, ERISA, and other executive compensation plans. They use extended vesting or clawbacks if the employee breaches a restrictive covenant, like a confidentiality, non-compete, or non-solicitation covenant. While a majority of states appear to review these matters under restrictive covenant statutes or common law principles related to restrictive covenants, a handful recognize the “employee choice principle.” Under the employee choice principle, the clawback or forfeiture is deemed an employee choice of losses and benefits and not a prohibition on the employee engaging in competitive work. Thus, the employee can choose to work for a competitor and

87. [2007] EWHC (QB) 2720, [2008] 1 All E.R. (Comm) 401 (Eng.).
88. Lazar, supra note 76, at 18.
89. Practitioners should also watch developments in the European Union. Considering the differences between European member states’ rules on trade secrets, as well as the lack of a common definition of intellectual property, the European Union recently initiated a draft directive on trade secret protection. Commission Proposal for a Directive of the European Parliament and of the Council on the Protection of Undisclosed Know-How and Business Information (Trade Secrets) Against Their Unlawful Acquisition, Use and Disclosure, COM (2013) 813 final (Nov. 28, 2013). The EU Council of Ministers (Competitiveness Council) adopted the draft directive on May 26, 2014, but, as of December 2, 2014, it had not been adopted by the European Parliament. As a directive does not have the force of law in the EU member states, after its adoption each member state must transpose the directive by passing local legislation. For more information, see The EU Single Market, Trade Secrets and Confidential Business Information, EUROPA. eu, http://ec.europa.eu/internal_market/ipreinforcement/trade_secrets/index_fr.htm (last visited Jan. 1, 2015).
forfeit stock or remain loyal to the employer and retain the stock. Given this state-specific view of the employee choice principle, choice-of-law provisions and how courts interpret those provisions are quite important.\textsuperscript{92}

B. No-Poaching Agreements: Apple, Google, and What You Need to Know

During the tech boom, employers have creatively expanded their control over their employees beyond utilizing traditional restrictive covenant agreements. Employers entering into and utilizing no-poaching agreements have recently garnered much attention.

Unlike traditional restrictive covenant agreements, which are entered into between an employer and an employee, no-poaching agreements are entered into between employers, cutting the employee out of the equation altogether. The practice is rumored to have originated when Apple’s then-CEO Steve Jobs directly contacted Google’s then-CEO Eric Schmidt to discuss Google’s pirating of Apple’s employees. The practice of entering no-poaching agreements spread to other large technology companies, and the parties agreed (1) not to cold-call each other’s employees; (2) to notify each other when making an offer to the other company’s employee, even if employees applied for jobs on their own initiative; and (3) that any offer would be final and would not be improved in response to a counteroffer by the employee’s current employer.\textsuperscript{93}

This practice has garnered the attention of the Department of Justice (DOJ). In 2010, the DOJ investigated agreements between several high-profile technology companies on the basis that these restraints on employee recruitment and hiring violated antitrust laws.\textsuperscript{94} While appellate courts have not yet ruled whether these agreements are per se illegal, several lower court rulings clearly indicate that employers should seek appropriate counsel on the issue.\textsuperscript{95} For example, in

\textsuperscript{92} See, e.g., Exxon Mobil Corp. v. Drennen, No. 12-0621, 2014 WL 4782974, at *11 (Tex. Aug. 29, 2014) (applying New York law in Texas case overturning Texas appellate court; case related to approximately $5 million worth of company equity shares). Given the preemption of state law in ERISA plans, one might be able to avoid this issue if the clawback is placed in such an ERISA retirement plan document. See, e.g., Thomas v. Bostwick, No. 13-cv-02544, 2014 WL 4364816, at *1 (N.D. Cal. Sept. 3, 2014). The authors expect the law to evolve in this area in the next few years.


\textsuperscript{94} ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING 219 (2013).

denying a motion to dismiss in an action against eBay, the district court found that the agreement, if proven as alleged, would constitute a naked and “horizontal market allocation agreement” that was “manifestly anticompetitive” and “lacking in any redeeming virtue.”

More recently, a California federal court rejected a proposed $324.5 million settlement of a class action against Adobe, Apple, Google, Intel, Intuit, Lucasfilm, and Pixar. Judge Lucy H. Koh of the U.S. District Court for the Northern District of California criticized the figure for being too low. She reasoned that based on settlements previously reached prior to attaining class action status, the parties should consider a settlement of at least $380 million. On March 3, 2015, Judge Koh preliminarily approved a settlement for $415 million, although the settlement is still subject to class member objections and a final approval hearing. Of course, it should come as no surprise to practitioners that these no-poaching agreements were made in California, where restrictive covenant agreements are extremely difficult to enforce.

During the DOJ’s investigation related to this litigation, it found emails disclosing Walt Disney, Pixar, and other animation studios utilizing similar no-poaching agreements. George Lucas testified that the purpose of a non-solicitation agreement was to suppress wages and keep the visual effects industry out of “a normal industrial competitive situation.” The agreement was explicitly intended to avoid “a bidding war with other companies because we don’t have the margins for that sort of thing.”

No-poaching agreements have been scrutinized in other states. Rather than viewed as an unlawful restraint of trade, courts have subjected them to a typical “restrictive covenant” analysis. In Reed

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96. eBay, Inc., 968 F. Supp. 2d at 1037, 1039.
98. Id.
99. Id. at *4.
101. Antitrust Class Action Complaint ¶ 1, Nitsch v. DreamWorks Animation SKG, Inc. (N.D. Cal. Sept. 8, 2014) (No. 5:14-cv-04062), 2014 WL 4412375. In addition to executive conversations, the complaint alleges that there were emails and meetings among human resource professionals at the various companies to set certain terms and conditions of employment, particularly relating to compensation and raises. On September 23, 2014, upon motion, this case was reassigned to U.S. District Judge Koh as a related case to the In re High-Tech Employee Antitrust Litigation matter discussed above. In October 2014, other similar cases were reassigned to Judge Koh, with more expected. See Notice of Motion & Unopposed Motion to Consolidate, Nitsch v. DreamWorks Animation SKG, Inc. (N.D. Cal. Oct. 30, 2014) 2014 WL 5891375.
102. Antitrust Class Action Complaint, supra note 101, ¶ 12.
103. Id.
Elsevier, Inc. v. TransUnion Holding Co., Reed and TransUnion entered into an agreement restricting TransUnion’s right to hire Reed’s senior management for a period of time. Reed’s chief technology officer joined TransUnion and Reed sued, alleging a violation of this agreement. Judge P. Kevin Castel of the U.S. District Court for the Southern District of New York stated that the same “reasonableness” test that applied to restrictive covenant agreements (that the agreement must be reasonable in time and duration, necessary to protect the employer’s legitimate interest, not harmful to the public, and not unreasonably burdensome to the employee) applies to non-hire agreements between two entities. The court was concerned about the two-year no-hire window, yet the court focused on the “legitimate interest” being protected by the employer. Judge Castel concluded that simply being a member of a company’s senior management did not mean the employee knew or possessed a company’s proprietary trade secrets, was likely to lure away clients, or had provided unique or extraordinary services to the prior company. The court also made clear that it would not recognize the risk of employee attrition as a protectable interest.

VI. Conclusion

Non-compete agreements and other restrictive covenants are subject to complex and ever-changing legal schemes both within and outside the United States. Practitioners must be aware of the relevant jurisdiction’s rules. The question of whether an agreement is enforceable often turns on what law the court will apply. Experienced attorneys should narrowly tailor the agreements to protectable interests and be alert to revisit such agreements if the law changes or the employee provides services for the organization in a different capacity or geographical region.

105. Id. at *6–7.
106. Id. at *10.
107. Id. at *13.
108. Id.
Permissible Coordinated Action by Employers in Labor Negotiations

By Evan J. Spelfogel*

I. Introduction

Competing companies occasionally cooperate in collective bargaining with a union.¹ This may occur when weaker companies sign “me too” agreements to accept terms negotiated by an industry leader, or when several companies of relatively equal bargaining power join in multiemployer bargaining to bargain from strength or to avoid any individual company obtaining more favorable terms and conditions of employment.² Typically such “multiemployer” bargaining requires the consent of all union and employer parties, leads to a single collective bargaining agreement with similar terms and conditions of employment, and, if carefully structured, is deemed to be an exception to antitrust restrictions on competing companies.³ There is, however, a lesser-known tactic, “coordinated bargaining,” a company may utilize either to improve its collective bargaining position with a union that represents its employees and competing companies’ employees or when the union refuses to consent to multiemployer bargaining.⁴ This alternative still preserves perceived bargaining advantages, aids in avoiding industry-wide strike-related shutdowns, and prevents antitrust problems.⁵

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¹ See, e.g., Int’l Ass’n of Bridge Structural & Ornamental Iron Workers, Local 625, 211 N.L.R.B. 128, 128 (1974) (an agreement between four employers in the building and construction industry).

² See id. at 139.

³ See id. at 134 (“[T]he basis of multi-employer bargaining unit[s] is both original and continuing consent by both parties . . . .”) (quoting The Evening News Ass’n, 166 N.L.R.B. 219, 222 (1967), enforced sub nom. Newspaper Drivers & Handlers’ Local No. 372 v. NLRB, 404 F.2d 1159 (6th Cir. 1968)).

⁴ See, e.g., id. at 134–35.

⁵ Id.
This Article addresses the actions, consistent with the requirements of the National Labor Relations Act (NLRA) and federal antitrust laws, that companies may take when engaged in coordinated bargaining with a union and ways those companies may protect their interests if the union launches a strike against one or more participating companies.

II. Permissible Coordinated Bargaining Under the NLRA

A group of employers may lawfully engage in coordinated bargaining with a union without the mutual consent required to engage in multiemployer unit bargaining. In such cases, the NLRA prohibits unions from refusing to meet and negotiate with each company’s representative who is engaged in coordinated bargaining, even if the representatives are the same individuals on each company’s bargaining team. However, when coordinating their bargaining efforts with the union, including any agreements related to multiemployer lockouts or the provision of financial or other aid to members of the group, each company must not place undue restrictions on its ability to make its own bargaining decisions.

If companies engaged in coordinated bargaining enter into agreements with one another, the National Labor Relations Board (NLRB) may find these companies unlawfully insisted on a multiemployer bargaining unit if they entered into agreements such as a “Mutual Aid Pact,” which places significant restrictions on the companies’ ability to negotiate independently with the union. In Don Lee, a group of companies engaged in negotiations with the union and entered into a mutual aid pact that established certain inflexible terms and required the companies to insist on these terms in any negotiations with the union. The pact also imposed a $400,000 penalty on each member of the employer group for every term in excess of the group’s terms in the company’s final agreement with the union. The NLRB and the Sixth Circuit found the pact created an unlawful multi-employer bargaining relationship without union consent because the pact effectively prevented companies from making individual bargaining decisions.

In contrast, the NLRB’s Office of the General Counsel concluded that an agreement in which companies pledge to lend financial support
in the event of a strike does not violate the NLRA if the agreement does not require the companies to agree to certain bargaining goals or otherwise cede individual decision-making authority to the group.\textsuperscript{12} Even if individual companies share bargaining strategies with one another, use the same bargaining team, and ultimately present nearly identical bargaining proposals, they will not have engaged in unlawful multiemployer bargaining if each company retains its right to make individual decisions in union negotiations.\textsuperscript{13}

III. The Nonstatutory Labor Exemption to the Antitrust Laws

In addition to labor law considerations, mutual aid pacts implicate federal antitrust laws. Section 1 of the Sherman Act prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states.”\textsuperscript{14} There are “two distinct exemptions to the anti-trust laws—a statutory exemption based on various sections of the Clayton and Norris-LaGuardia Acts, and a nonstatutory exemption based on an accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets.”\textsuperscript{15} The statutory exemption, which emanates from the Norris-LaGuardia Act and the Clayton Act, applies only to unions.\textsuperscript{16}

The nonstatutory exemption is a judicially created doctrine that reconciles federal antitrust and labor law to: (1) foster collective bargaining, including multiemployer bargaining, and (2) keep “instability and uncertainty [from entering] into the collective bargaining process.”\textsuperscript{17} The Supreme Court explained that “a limited nonstatutory exemption from anti-trust sanctions” for certain labor-related agreements is necessary to make “a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets.”\textsuperscript{18} The Supreme Court inferred the exemption from several statutes, including sections 6 and 20 of the Clayton Act and the Norris-LaGuardia Act.\textsuperscript{19}

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\textsuperscript{12} King Soopers, supra note 6, at 3–4.
\textsuperscript{13} Id.
\textsuperscript{16} See id.
\textsuperscript{18} Id. at 254 (quoting Connell Constr. Co., 421 U.S. at 622).
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The NLRB and the courts have permitted various forms of mutual aid pacts under labor and antitrust laws in the context of informal coordinated bargaining, as well as more formal multiemployer bargaining.

IV. Lockouts

A. Lockouts in Response to Strikes Against One or More of the Companies in the Bargaining Group

In the event of a strike against one or more of the companies engaged in coordinated bargaining with a union, the companies may engage in a concerted lockout to support their individual interests. A group lockout will not violate the NLRA if: (1) the companies have advanced a common bargaining position, either individually or through a single designated representative; (2) the union, in turn, makes common (or virtually identical) demands on each of the companies; (3) the companies have bargained with the union in good faith; (4) the companies have not insisted on bargaining only on a multiunit basis; (5) the union and each of the companies in the coordinated bargaining group have reached an impasse over the common position advanced by the companies or by the union; (6) each of the companies that will engage in the group lockout continues in bargaining negotiations with the union or is subject to common demands or threats of strike by the union; and (7) the companies have not engaged in the group lockout to evade bargaining with, discourage membership in, or destroy the union.

Allina Health System is the most recent NLRB decision addressing whether a group of companies engaged in coordinated bargaining with a union may collectively lock out union-represented employees in response to a strike or threatened strike against one of the group members. In Allina Health System, several hospitals negotiating with the same nurses’ union formed an advisory committee, closely coordinated


22. Capital Dist. Sheet Metal, 185 N.L.R.B. at 714–16; Evening News Ass’n, 166 N.L.R.B. at 222; Weyerhaeuser Co., 166 N.L.R.B. at 302.


24. Id.

25. Capital Dist. Sheet Metal, 185 N.L.R.B. at 716–18; Evening News Ass’n, 166 N.L.R.B. at 222; Weyerhaeuser Co., 166 N.L.R.B. at 302.


28. 343 N.L.R.B. 498.
their bargaining strategy, and agreed they would refuse to employ any striking nurses if the union went on strike against one or more of the hospitals. 29 Ultimately, all hospitals except one, Fairview Hospital, reached an agreement with the union before the union strike deadline. 30 The Fairview nurses struck, but the strike did not extend to the other coordinating hospitals. 31 In response to the Fairview strike, the other hospitals refused to employ the striking nurses, many of whom worked part-time shifts at the other hospitals in addition to their regular shifts at the struck hospital. 32 The NLRB concluded the hospitals had violated the NLRA because, at the time they refused to hire the striking nurses, none of the other hospitals were actively negotiating with the union or were subject to a strike or threatened strike. 33 The NLRB found that, because the other hospitals had already fully resolved their disputes with the union, they had no legitimate interests to support their action against the striking Fairview nurses. 34

Allina Health System did not impose a bar on the right of companies conducting coordinated bargaining with the same union to engage in a group lockout in response to a strike or threatened strike. 35 However, it did require each company participating in the group lockout to be actively engaged in negotiations with the union and be subject to or threatened with a strike, or subject to the union’s continuing demands that were identical or virtually identical to the demands made on the other group members at the time of the lockout. 36 Allina Health System also suggests that the NLRB likely would require any company engaging in a group lockout to end its lockout upon reaching an agreement with the union, even if the union had not yet reached an agreement with one or more other companies engaging in the lockout.

To limit the possibility of one or more companies reaching agreements with the union before the others, companies engaged in coordinated bargaining may use the same bargaining team members and allow representatives of each of the other companies to attend an individual company’s negotiations. However, it is unlikely that the NLRB would allow any pact preventing finalization of an agreement with the union if any other companies in the group had not reached an agreement. 37 The NLRB could find that such an arrangement significantly restrains companies’ rights to negotiate individually with the union,

29. Id.
30. Id.
31. Id. at 498–99.
32. Id. at 499.
33. Id. at 500–01.
34. Id.
35. Id.
36. Id.
establishing a claim of unlawful insistence on multiemployer bargain-
ing under Don Lee.

B. The Hiring of Temporary Replacements During a Group Lockout

Although no NLRB or court decision has expressly addressed the issue of hiring temporary replacements during group lockouts, a strong argument exists that the companies involved in a group lockout may replace their locked-out employees with temporary workers.38 In NLRB v. Brown, the Supreme Court held that the NLRA did not prohibit companies in a recognized multiemployer unit from collectively locking out their employees and replacing them with temporary workers when there was no evidence that the companies’ actions were motivated by anti-union animus.39 The Court noted that hiring temporary replacement workers had a comparatively slight tendency to discourage union membership.40 The Court also required the employers to come forward with a legitimate business explanation for their decision to hire temporary replacements—namely, the preservation of their multiemployer bargaining unit in the face of a union “whip-
saw” strike.41

Although companies engaged in coordinated bargaining cannot rely on the same justification to support hiring temporary replacement workers during a lockout as did the employers in Brown, they can rely on their individual interests in pursuing a common bargaining position within their coordinated bargaining group. The NLRB held that an employer’s interest in using economic pressure to further its bar-
gaining position—even when that bargaining position is shared by other coordinating companies—is significant and legitimate.42 Accordingly, given this legitimate interest and the “comparatively slight” tendency of discouraging union membership by hiring replacement workers, companies ought to be allowed to hire temporary replacements during a lockout, absent independent evidence that their actions were motivated by anti-union animus.

C. Group Lockouts and Federal Antitrust Law

Federal courts have rejected the argument that a group lockout that is permissible under the NLRA might be illegal under federal antitrust law.43 The Supreme Court ruled that the implicit labor

39. Id.
40. Id.
41. Id.
42. Evening News Ass’n, 166 N.L.R.B. 219, 222 (1967).
43. See Plumbers and Steamfitters Local 598 v. Morris, 511 F. Supp. 1298, 1307 (E.D. Wash. 1981) (“Arm[']s length bargaining with use of strike and lockout for the purpose of requiring a term in a collective bargaining agreement does not upset the economic competitive balance and tension built into the Sherman Act.”); Clune v. Publishers’ Association
exemption to federal antitrust law protects an employer’s acts that: (1) “took place during and immediately after a collective-bargaining negotiation”; (2) “grew out of, and [were] directly related to, the lawful operation of the bargaining process”; (3) “involved a matter that the parties were required to negotiate collectively”; and (4) “concerned only the parties to the collective-bargaining relationship.” A lockout by a group of employers engaged in coordinated bargaining with a union would meet each of these requirements.

V. Financial Mutual Aid Pacts

A. Federal Labor Law Permits Employers Engaged in Coordinated Bargaining to Enter Financial Mutual Aid Pacts

Companies engaged in coordinated bargaining may also enter into mutual aid pacts agreeing to provide financial assistance to one another if the union strikes against one or more of them. At least two federal appellate courts have expressly permitted such agreements. In W.P. Kennedy v. Long Island Rail Road Company, the Second Circuit held lawful a “strike insurance” agreement requiring each employer in a group to contribute to a fund to aid any group employer subject to a strike. Similarly, in Air Line Pilots Association International v. Civil Aeronautics Board, the D.C. Circuit upheld a mutual aid pact requiring group employers to pay, during a strike, a percentage of any increase in profits earned to any struck group member.

Although both W.P. Kennedy and Air Line Pilots Association arose under the Railway Labor Act, the courts based their analyses on national labor policy generally and relied on NLRA cases. Indeed, in an advice memorandum on February 17, 2005, the NLRB General Counsel authorized mutual aid pacts, in which coordinating employers agreed to share revenues with any struck group members. The memorandum called the pacts a “defensive economic weapon in response to the Union’s own use of an economic weapon.” The memorandum noted that “[t]he use of various types of economic weapons by parties engaged in labor negotiations has long been held lawful” and that
“[e]ven employers bargaining separately, outside a multiemployer unit, may band together in mutual aid pacts in order to enhance their economic weapons.”51

B. Mutual Aid Pacts May Implicate Federal Antitrust Laws

It remains an open question whether a mutual aid pact that requires coordinating employers to make payments to any struck group members violates federal antitrust laws. There is support for the position that an agreement to create a strike insurance plan does not violate federal antitrust laws. The Second Circuit reached this conclusion in W.P. Kennedy.52 The Ninth Circuit agreed with the Second Circuit and indicated that it, too, would find a strike insurance agreement between a group of employers engaged in coordinated bargaining permissible under federal antitrust law.53

The Ninth Circuit, however, also suggested that federal antitrust law might not exempt a mutual aid agreement that required several companies to share a percentage of their profits with a struck employer member.54 The Ninth Circuit refused to hold that the mutual aid pact involving the profit-sharing scheme was a per se violation of federal antitrust law.55 Instead, it remanded the case to the district court for discovery with respect to the validity of the mutual aid pact and its effects to allow the district court to determine if there were significant anticompetitive effects and, if so, whether those effects outweighed any legitimate justifications for the agreement.56 Thus, while federal antitrust laws might subject a mutual aid pact containing a profit-sharing requirement to scrutiny, the pact would not necessarily violate federal antitrust laws unless there was evidence that the pact had significant anticompetitive effects outweighing its legitimate justifications.

Furthermore, the Ninth Circuit never disavowed the earlier statement of its three-judge panel in Safeway that the strike insurance plan approved in W.P. Kennedy was permissible under federal labor and antitrust laws.57 In fact, the en banc court drew a clear distinction between: (1) an insurance scheme requiring participating companies to

51. Id. (citing Capital Dist. Sheet Metal, 185 N.L.R.B. 702, 715–16 (1970); Evening News Ass’n, 166 N.L.R.B. 219, 222 (1967), enforced, 404 F.2d 1159 (6th Cir. 1968); Newspaper Drivers & Handlers’ Local No. 372 v. NLRB, 404 F.2d 1159, 1161 n.2 (6th Cir. 1968); Allina Health Sys., 343 N.L.R.B. 498, 502 (2004)).
52. 319 F.2d at 373 (“[I]t cannot be said that the instant form of railroad cooperation in combating the risks of labor unrest effects an unnatural and anticompetitive regulation of the pricing, supply, or distribution of goods or services.”).
53. See Cal. ex rel. Brown v. Safeway, Inc., 615 F.3d 1171, 1199–200 (9th Cir. 2010), aff’d en banc, 651 F.3d 1118 (9th Cir. 2011).
54. Id. at 1202.
55. Id. at 1182.
56. Id. at 1202.
57. Id. at 1129.
make a specific premium payment to an insurance fund and establishing a specific daily payout in the event of a strike (as in W.P. Kennedy) and (2) an agreement to limit the profit margin of companies.\footnote{Id. at 1135–37.} Thus, it appears that the establishment of a “strike insurance plan” like the one in W.P. Kennedy would be lawful under federal antitrust law, while a revenue-sharing plan might be problematic.\footnote{See W.P. Kennedy v. Long Island R.R. Co., 319 F.2d 366, 369 (2d Cir. 1963). See also Safeway, 615 F.3d at 1199–1200.}

VI. Conclusion

Coordinating companies may collectively lock out unionized employees and hire temporary replacement workers during the lockout, provided that each company retains the right to negotiate individually with the union. This leaves open the possibility, however, that an entity engaged in the lockout could reach an agreement with the union before the others. Allina Health System requires that entity to cease its lockout after reaching agreement with the union, thereby blunting the effect of the group lockout.\footnote{Allina Health Sys., 343 N.L.R.B. 498, 500–01 (2004).}

The establishment of a strike insurance policy with specifically defined premiums for coordinated bargaining group members and a defined payout for each struck member may be the simplest and safest approach for protecting group members from a potential strike. The Second and Ninth Circuits have held that such plans are permissible under the NLRA, and the Second Circuit has held that they do not violate federal antitrust laws. Additionally, compared to joint lockout or revenue-sharing plans, strike insurance plans are easier and less costly to administer.

Alternatively, employers could combine a mutual aid pact with a strike insurance plan, and lock out the union-represented employees after the parties reach an impasse. The companies engaged in the lockout could also hire temporary replacements. While this approach may be the most comprehensive for protecting employers from the harm of strikes, it could also impose on employers the most expense and administrative burden.

58. Id. at 1135–37.
Evolving Causation Standards and Their Post-Nassar Application to Retaliation Claims Under the False Claims Act

Andrew M. Witko*

A successful retaliation claim generally requires an employee to prove three elements: first, that the employee engaged in protected conduct; second, that the employer initiated an adverse employment action against the employee; and third, that an impermissible relationship existed between the protected conduct and the adverse employment action.1 The focus of this Note is on this final element in retaliation claims under the False Claims Act (FCA).2 Specifically, this Note considers whether courts should apply a “but-for” or “motivating factor” causation standard in cases arising under the FCA’s anti-retaliation provision.

Part I provides a historical overview of the FCA. Part II discusses the evolution of the Supreme Court’s jurisprudence regarding causation standards, primarily in the context of antidiscrimination and anti-retaliation statutes. Part III returns to the FCA and discusses how lower courts apply the Court’s causation analysis in antidiscrimination cases to claims arising under the FCA’s anti-retaliation provision. Finally, Part IV argues that courts should adopt a motivating-factor causation standard rather than the heightened but-for standard to employees’ retaliation claims. This standard would reflect the FCA’s unique position at the intersection of whistleblower protection and employment discrimination, clear congressional intent at the time of the FCA’s enactment and subsequent amendments, and the plain

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language of the statute itself. This Note concludes by theorizing that, despite a trend that would seem to favor the application of but-for causation, the Supreme Court decision in *Lawson v. FMR LLC* may actually provide a glimmer of hope for FCA whistleblowers.

### I. History and Importance of the FCA

Widely recognized as the first whistleblower protection law, the FCA was proposed by President Abraham Lincoln and enacted by the Thirty-Seventh U.S. Congress to protect the federal government from fraud and abuse by defense contractors during the Civil War.3 Leading up to the FCA’s enactment, opportunistic government contractors sold diseased mules4 and munition crates full of sawdust to the Union Army.5 As the Supreme Court observed:

Testimony before the Congress painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war. Congress wanted to stop this plundering of the public treasury.6

The FCA sought to slow the tide of corruption by allowing private citizens to bring lawsuits on behalf of the federal government.7 Congress amended the FCA in 1986 to include a cause of action for employees whose employers initiated an adverse employment action “because of” the employee engaging in activity protected by the Act.8 Between the adoption of the anti-retaliation provisions in 1986 and June 2012, the government recovered more than $33 billion in FCA settlements and judgments.9 In 2012 alone, the U.S. Department of Justice collected almost $5 billion prosecuting government contractor fraud.10

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7. Act of Mar. 2, 1863, *supra* note 3 (“Such suit may be brought and carried on by any person, as well as for himself as for the United States . . . .”).
It is difficult to imagine similar levels of success without company insiders who “bring the information forward.”

II. The Causation Evolution: From McDonnell Douglas to Nassar

A. The Supreme Court Announces a Burden-Shifting Framework and Adopts Motivating Factor Causation

In McDonnell Douglas Corp. v. Green, the Supreme Court announced a new regime for analyzing Title VII discrimination cases. Specifically, the Court required the plaintiff to carry the initial burden of establishing a \textit{prima facie} case of discrimination, and if a plaintiff met such a burden, “[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.” The plaintiff is then provided “a fair opportunity to show that [employer’s] stated reason for [the adverse action] was in fact pretext.”

Mount Healthy City School District Board of Education v. Doyle was the first in a line of cases to address the causation standard for employment disputes. Doyle alleged that his school violated the First and Fourteenth Amendment prohibitions on restricting speech by refusing to renew his teaching contract after he made critical remarks about the school’s dress code policy in a call to a radio station. The district court found that while the school may have had other legitimate reasons to fire Doyle, his comments were protected by the Constitution and played “a substantial part” in the school’s decision. The district court entered judgment for Doyle. The Supreme Court took issue with the district court’s apparent lack of consideration for the employer’s legitimate reasons, stating:

Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a “substantial factor”—or, to put it in other words, that it was a “motivating factor” in the Board’s decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent’s reemployment even in the absence of the protected conduct.

13. \textit{Id.} at 802.
14. \textit{Id.} at 804.
17. \textit{Id.} at 284.
18. \textit{Id.} at 287.
This decision not only reaffirmed a burden-shifting framework, it implicitly authorized a plaintiff to allege mixed-motive retaliation theories.

B. Price Waterhouse Illustrates the Divide Among the Justices on Burden Shifting

In *Price Waterhouse v. Hopkins*, the Court sought to determine “the respective burdens of proof of a defendant and plaintiff in a suit under Title VII when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives.” As the fractured decision demonstrates, however, the justices found little common ground. The case produced a four-justice plurality, two single-justice concurrences, and a three-justice dissent.

The plurality focused on Congress’s precise meaning in using “because of” when linking an individual’s protected status with an adverse employment decision. Noting that “‘because of’ [does] not mean ‘solely because of,’” the plurality concluded that when an employer considers legitimate factors and the employee’s protected status, the decision reached is “because of” the employee’s protected status—a mixed-motive standard. Recognizing the employer’s right to make decisions about its workforce, the Court provided that “an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person” by a preponderance of the evidence.

As will become critical in understanding later Supreme Court decisions, the *Price Waterhouse* Court refused to conceptualize mixed-motive and but-for as inherently contradictory causation standards. To this point, the Court concluded:

> [O]nce the plaintiff had shown that his constitutionally protected speech was a “substantial” or “motivating factor” in the adverse treatment of him by his employer, the employer was obligated to prove “by a preponderance of the evidence that it would have reached the same decision as to [the plaintiff] even in the absence of the protected conduct.” A court that finds for a plaintiff under this standard has effectively concluded that an illegitimate motive was a “but-for” cause of the employment decision.

Thus, for the plurality, a plaintiff could still satisfy the but-for standard by showing that the protected conduct was a motivating factor in the employment action. The Court did not draw bright lines between the but-for and motivating factor causation standards. This

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22. *Id.* at 242.
23. *Id.* at 253.
point is underscored by Justice Byron White’s concurrence, in which, relying heavily on Mt. Healthy City, he notes that a plaintiff is “not required to prove that the illegitimate factor was the only, principal, or true reason for petitioner’s action. Rather . . . her burden was to show that the unlawful motive was a substantial factor in the adverse employment action.”

C. The Supreme Court Addresses the 1991 Amendments to Title VII in Desert Palace

The Civil Rights Act of 1991 amended Title VII to include the plurality’s motivating factor standard articulated in Price Waterhouse. The amendment states: “Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”

A second statutory provision provided that, if a plaintiff could prove a violation under 42 U.S.C. § 2000e-2(m), the employer could “demonstrate[] that [it] would have taken the same action in the absence of the impermissible motivating factor . . . .” and thus restrict the remedies available to the plaintiff to injunctive relief and attorney’s fees. In Desert Palace, Inc. v. Costa, the Supreme Court construed the 1991 amendments for the first time and sought to determine whether a plaintiff needed to introduce direct evidence of discrimination to receive a mixed-motive jury instruction in a Title VII discrimination case. Relying on the language of the 1991 amendments, the Court unanimously concluded that courts could provide a mixed-motive jury instruction even if a plaintiff did not offer direct evidence of discrimination.

D. Gross and Nassar Reject Application of Price Waterhouse to ADEA and Title VII Retaliation Cases

In 2009 and 2013 respectively, the Supreme Court heard Gross v. FBL Financial Services, Inc. and University of Texas Southwestern Medical Center v. Nassar. Gross was an Age Discrimination in Employment Act (ADEA) lawsuit in which the plaintiff, a fifty-four-year-old claims director employed by FBL Financial Services, Inc., alleged that his demotion to a manager position was “because of” age. In

25. Id. at 259 (White, J., concurring).
27. Id. § 2000e-5(g)(2)(B)(i).
29. Id. at 99–101.
Nassar, a physician alleged that his constructive discharge was in retaliation for having complained of religious and racial harassment. Rather than carrying forward the motivating factor standard articulated by Price Waterhouse and adopted by Congress in the 1991 amendments to Title VII's antidiscrimination provisions, Gross and Nassar embrace the but-for standard advanced by the Price Waterhouse dissent.

1. Gross Relieves Defendants of Their Burden

In Gross, a five-justice majority concluded that the plaintiff had to carry the burden of persuasion at all times, that the burden never shifted to the defendant, and that the plaintiff was not entitled to a mixed-motive jury instruction under any circumstances in an ADEA claim. The majority began by noting that Congress amended Title VII in 1991 explicitly to authorize mixed-motive claims and to adopt the Price Waterhouse plurality's burden-shifting framework. The Court reasoned that Congress's failure to make similar changes to the ADEA, however, meant that it implicitly rejected such mixed-motive claims in age discrimination cases. Turning to the statute's text, the majority determined that the words “because of such an individual’s age” meant that the “plaintiff retains the burden of persuasion to establish that age was the but-for cause of the employer’s adverse action” and that “[t]he burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.” Thus, the Court’s definition of “because of” changed dramatically from 1989 to 2009. In Price Waterhouse, the words “because of” (in the context of Title VII) allowed a plaintiff to demonstrate that the plaintiff’s protected class motivated the employment decision and then required the defendant to carry the burden of persuasion. Twenty years later, the Gross Court, relying on the very same words, “because of,” held that the burden of persuasion never shifted to the defendant in an ADEA claim.
2. The *Nassar* Court Applied *Gross’s* But-For Standard to Title VII Retaliation Claims

In *Nassar*, the Court turned its attention to claims of retaliation under Title VII.\(^{42}\) Specifically, the Court sought to determine whether the burden ever shifted to the defendant and, consequently, whether mixed-motive jury instructions were proper.\(^{43}\) Again in conflict with *Price Waterhouse*, the *Nassar* Court ruled that the phrase “because of” in Title VII’s anti-retaliation provision\(^ {44}\) precluded a plaintiff from prevailing on a mixed-motive theory.\(^ {45}\) As with *Gross*, the Court reached this conclusion in part by referring to the 1991 amendments and noting that Congress failed expressly to include the motivating factor language in 42 U.S.C. § 2000e-3(a) that it did in 42 U.S.C. § 2000e-2(m).\(^ {46}\)

3. The *Gross* and *Nassar* Decisions Have Led to Perverse Consequences

The Court’s decisions in *Gross* and *Nassar* reflect a perverse irony. The Court used Congress’s 1991 attempt to strengthen Title VII’s antidiscrimination provision to weaken the antidiscrimination protections in other major employment statutes. More specifically, the Court attributes to Congress an intent to give meaning to a dichotomy between but-for and motivating factor standards that, at the time Congress borrowed the language from the *Price Waterhouse* plurality, did not exist because, at the time, the concepts were still intertwined.\(^ {47}\) Had Congress not amended Title VII’s antidiscrimination provision in 1991, the Court would likely have had little justification for redefining the words “because of” in the ADEA and Title VII retaliation contexts. In other words, despite Congress finding that “additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace,”\(^ {48}\) the Court’s views in *Gross* and *Nassar* seem to be that Congress only meant discrimination based on “race, color, religion, sex, or national origin” and that Congress actually sought to weaken protections afforded to plaintiffs who allege age discrimination or retaliation for disclosing discrimination.\(^ {49}\)

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\(^{43}\) Id. at 2522–23.


\(^{45}\) Nassar, 133 S. Ct. at 2534.

\(^{46}\) Id. at 2528–29.


III. Retaliation Under the FCA

Generally, the FCA imposes liability upon an individual who “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval.” To the extent that an employer retaliates against an employee for disclosing an FCA violation, the statute provides relief for any employee experiencing retaliation “because of” the protected. The Supreme Court has yet to articulate the appropriate causation standard in an FCA retaliation case. As a result, most circuits have developed their own three-part tests for determining whether an employer is liable to an employee for retaliation. Generally, for a plaintiff to prevail, he must demonstrate that (1) he engaged in protected conduct, (2) the employer knew the plaintiff engaged in protected conduct, and (3) an impermissible relationship exists between the employee’s protected conduct and the employer’s adverse action.

In 2012, the First Circuit held that the McDonnell Douglas burden-shifting framework applies to retaliation cases under the FCA. The court embraced the familiar elements of the McDonnell Douglas framework: employees must first make their prima facie case as set forth above; then the employer must proffer a legitimate, non-retaliatory reason for the adverse employment action; and finally, if the employer produces evidence of a non-retaliatory reason for the employment action, the employee must demonstrate “that the employer’s proffered reason is a pretext masking retaliation.”

Since Nassar, at least one district court has applied the Supreme Court’s interpretation of but-for causation to FCA retaliation claims. In United States ex rel. Schweizer v. Océ North America, Schweizer, a contracts administrator, alleged that Océ terminated her for disclosing the company’s noncompliance and potential fraud associated with its contract with the U.S. General Services Administration. Her lawsuit in the D.C. District Court alleged FCA retaliation. Relying on Nassar, the district court noted that a plaintiff must demonstrate retaliation by the employer “because of” the plaintiff’s protected activity.

51. Id. § 3730(h)(1).
52. See, e.g., Brandon v. Anesthesia & Pain Mgmt. Assocs., Ltd., 277 F.3d 936 (7th Cir. 2002).
53. Id. at 944.
54. Harrington v. Aggregate Indus. Ne. Region, Inc., 668 F.3d 25, 30 (1st Cir. 2012) (“We hold, therefore, that the FCA’s anti-retaliation provision is amenable to the use of the McDonnell Douglas framework.”).
58. Id. at 1231.
Stating that there was “some confusion as to the nature of the causation requirement,” the district court concluded that “a plaintiff must show that retaliation for protected activities was a ‘but-for’ cause of the adverse action.” To reach this conclusion, the court relied heavily upon what it deemed a “text-driven interpretation of Title VII’s anti-retaliation provision” as employed in Nassar and Gross. The district court reasoned:

The combined lesson of Nassar and Gross is clear: where Congress has given plaintiffs the right to sue employers for adverse actions taken against them by their employers “because of” X, plaintiffs may succeed only by showing that X was a “but-for” cause of the adverse action, not merely one of several “motivating factors.” Notwithstanding the circuit’s statements to the contrary in this case, because the False Claims Act’s retaliation provision includes the same key language as the Title VII retaliation provision recently interpreted by the Supreme Court in Nassar, and the ADEA discrimination provision interpreted in Gross, the Court must apply the same heightened causation standard here.

Though Schweizer’s claim of retaliation survived Oce’s summary judgment motion, the district court’s opinion looms as a specter haunting would-be whistleblowers alleging retaliation under the FCA.

IV. Argument for Motivating Factor Causation in FCA Retaliation Cases

While the district court’s analysis in Schweizer might at first appear to be a tempting reason to apply a but-for causation standard in FCA retaliation cases, it should be rejected. Logically, the argument proceeds under the theory that the FCA’s anti-retaliation language is similar to that in Title VII and the ADEA. Each statute deals with employment disputes and each uses the “because of” language to link the adverse action with the protected status or activity. Courts, however, should resist the analogy because the FCA’s history, its purpose, and a review of analogous legislation distinguish it from discrimination statutes.

60. Id. at 12.
61. Id. at 14.
62. Id. at 13.
63. Id.
64. Id. at 16–17.
65. See id.
A. Whistleblower Protection Statutes Are Inherently Different from Antidiscrimination Statutes

1. The Stakes Are Higher in Whistleblower Cases

Aside from the markedly different subject matter at issue in FCA cases, as compared to discrimination cases, there are also dramatically different consequences for defendants in FCA cases. If an employee complains of a manager’s discriminatory act, the company’s potential liability extends no further than the employee or class of employees who experienced the discrimination. Moreover, Title VII punitive damages are capped at $300,000 for an employer with more than 500 employees, and smaller companies are subject to even lower damage ceilings.

Damages in FCA cases, however, are significantly greater. First, unlike Title VII, the FCA’s anti-retaliation provisions do not cap damages, and successful plaintiffs are entitled to “2 times the amount of back pay.” The real issue, however, is the scope of the defendant’s liability should a court find the defendant guilty of the underlying fraud that the whistleblower sought to reveal. Settlements in FCA cases have reached billions of dollars and can lead to debarment proceedings against contractors, leaving them ineligible for future federal funding. Such consequences are likely a death sentence for all but the largest contracting companies. By contrast, one of the largest judgments ever in a discrimination case—a 5,600-plaintiff class action against Novartis Pharmaceuticals Corporation—was $250 million in punitive damages. The case eventually settled for $175 million.

2. The FCA Is Designed to Protect Against Fraud

For the last 150 years, the FCA has sought to protect the U.S. government from fraud. Recognizing that it could not do this without help from company insiders who “may be the only [people] who can bring

74. Id.
the information forward, Congress enacted section 3730(h) as an ancillary provision to the FCA to fulfill its primary purpose to prevent fraud. It is unlikely Congress only wished to provide protection to employees whose performance was so impeccable that they could blow the whistle on suspected wrongdoing without fear of reprisal. Congress wanted to protect everyone who disclosed fraud upon the government. What of the employee with substandard performance evaluations? Should the substandard employee who suspects fraud remain silent? Application of the but-for standard and a plaintiff’s inability to attain a mixed-motive jury instruction will inevitably chill would-be whistleblowers from disclosing what they know and will hinder FCA enforcement.

It is also proper to place the burden of persuasion on the employer to prove its motives were non-retaliatory. Absent this burden shift and a mixed-motive instruction, the employee, whose motive is to assist the government, must prove but-for causation. Otherwise the employer, the one actually suspected of defrauding the government and silencing whistleblowers, will never be required affirmatively to demonstrate that it did not discharge an employee for reporting a false claims violation.

B. Congress Did Not Intend for Courts to Apply a But-For Causation Standard to FCA Retaliation Claims

Congress’s 1986 amendment to the FCA was designed “to enhance the Government’s ability to recover losses sustained as a result of fraud against the Government.” The 1986 Senate Report states that “[t]he proposed legislation seeks . . . to encourage any individual knowing of Government fraud to bring that information forward.” To this end, Congress created a private cause of action for whistleblowers who experience retaliation under 31 U.S.C. § 3734. Congress sought to “make whole” anyone “discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against by his employer due to his involvement with a false claims disclosure.” In discussing the causation element, the Senate report noted:

77. See NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 403 (1983) (“It is fair that [the employer] bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.”), abrogated on other grounds by Dep’t of Labor v. Greenwich Collieries, 512 U.S. 267 (1994).
79. Id. at 2.
80. Id. at 34. The current formulation of the FCA’s anti-retaliation provisions is now found at 31 U.S.C. § 3730(h) (2012).
Under other Federal whistleblower statutes, the “because” standard has developed into a two-pronged approach. One, the whistleblower must show the employer had knowledge the employee engaged in “protected activity” and, two, the retaliation was motivated, at least in part, by the employee’s engaging in protected activity. Once these elements have been satisfied, the burden of proof shifts to the employer to prove affirmatively that the same decision would have been made even if the employee had not engaged in protected activity.82

This passage contains several important takeaways. First, it makes clear that Congress understood the “because standard” to embrace a so-called mixed-motive theory of retaliation. In other words, a plaintiff’s claim stands if the plaintiff alleges that retaliation by an employer was motivated by both permissible and impermissible reasons, and it is the employer’s burden to demonstrate that the employee’s disclosures did not contribute to the adverse employment action. The Senate report’s “at least in part” language clearly prescribes a motivating factor, and not what has become a but-for, causation standard.

Undergirding this point is the second important takeaway, that Congress relied upon “other Federal whistleblower statutes” in its crafting and understanding of the causation standard in the FCA’s anti-retaliation provision. Indeed, in the preceding paragraphs of the Senate Report, the Committee specifically identified eight other statutes upon which it relied in developing the FCA’s retaliation protections.83 Statutory language defining the causation element of each of these whistleblower statutes varies between “by reason of”84 and “because,”85 yet courts interpreting this language routinely ascribe a motivating factor meaning to the terms.86

C. Recent Congressional and Judicial Action Suggests a Desire to Broaden, Not Contract, Whistleblower Protections

1. The 2009 FERA Amendments Provide Strong Protections for Whistleblowers Under the FCA

On May 20, 2009, President Barack Obama signed into law the Fraud Enforcement and Recovery Act (FERA).87 The FERA’s purpose was “to improve enforcement of mortgage fraud, securities and

82. Id. at 35.
83. Id. at 34.
86. See, e.g., Consol. Edison Co. of N.Y. v. Donovan, 673 F.2d 61, 62 (2d Cir. 1982); Ellis Fischel State Cancer Hosp. v. Marshall, 629 F.2d 563, 566 (8th Cir. 1980).
commodities fraud, financial institution fraud, and other frauds related to federal assistance and relief programs, for the recovery of funds lost to these frauds, and for other purposes. Section 4 of the FERA significantly expanded the scope of FCA liability for individuals and entities receiving government funds. Moreover, FERA extended the FCA's protections to permit contractors and agents to sue for retaliation under section 3730(h) and broadened the scope of protected activity. Congress signaled with the FERA's passage that it wanted to enhance whistleblower protections and provide more expansive liability for those defrauding the government.

The timing of FERA's enactment is also significant. President Obama signed the law in May 2009, a month before the Supreme Court decided Gross and determined that "because of," in an employment context, required a showing of but-for causation. Congress cannot be expected to have predicted that the Court would overturn years of precedent and increase a plaintiff’s burden under the causation standard in employment cases.

2. The Lawson v. FMR LLC Plurality Indicated the Courts' Willing to Examine Congressional Intent

Recent Supreme Court jurisprudence recognizes Congress's intent to protect whistleblowers. In Lawson v. FMR LLC, the Supreme Court was asked to determine the extent to which the anti-retaliation provisions of the Sarbanes-Oxley Act (SOX) extend beyond just employees and to contractors of publicly traded companies. SOX provides that an employer may not retaliate against an employee for disclosing what the employee reasonably believes to be violations of securities laws. The Court majority determined that the whistleblower protections in SOX extended beyond just employees to contractors of publicly traded companies. In so finding, the Court relied upon "the text of § 1514A, the mischief to which Congress was

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88. Id. at 1617, 1619.
89. Id. at 1621–25.
90. Id. at 1624–25 (a plaintiff may sue for retaliation as a result of "lawful acts done . . . in furtherance of other efforts to stop 1 or more violations of this subchapter").
93. 18 U.S.C. § 1514A (2010); Lawson, 134 S. Ct. at 1161.
94. 18 U.S.C. § 1514A (2010) ("No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee to provide information . . . which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. . .").
95. 18 U.S.C. § 1514A (2010); Lawson, 134 S. Ct. at 1161.
responding, and earlier legislation Congress drew upon. The divide among the justices provides a glimmer of hope that the Court may recognize a distinction between whistleblower and traditional employment cases.

Based on the split in Nassar and in Lawson, it seems reasonable to predict that when the Court analyzes retaliation claims under the FCA, Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan will look to congressional intent and apply the motivating factor standard to FCA whistleblowers. Likewise, one would expect that Justices Antonin Scalia, Anthony Kennedy, Samuel Alito, and Clarence Thomas will follow the more text-driven approach articulated in Gross and Nassar. Though Chief Justice Roberts applied the but-for standard to Title VII retaliation claims as part of the majority in Nassar, he joined a plurality in Lawson that explicitly relied upon congressional intent and analogous legislation. This suggests that the Court could provide greater protection to FCA whistleblowers based on congressional intent.

D. Congress’s Choice of Words in 31 U.S.C. § 3730(h) Permits a Standard Other Than But-For Causation

There must be some modicum of textual ambiguity to permit the Supreme Court’s more conservative members to consider congressional intent. Indeed, the Court has stated that it will first look at the explicit language of a statute to determine its meaning before making any other attempt to discern congressional intent. If, as with Gross and Nassar, the Court wishes to engage in a strictly textualist interpretation of section 3730(h), the statutory language itself will reveal the propriety of a motivating factor standard.

In Burlington Northern & Santa Fe Railway Co. v. White, the Court sought to determine “whether Title VII’s antiretaliation provision forbids only those employer actions and resulting harms that are related to employment or the workplace.” The Court examined the language of Title VII’s substantive provision and its anti-retaliation provision. Distinguishing between the substantive provision’s limiting language and the lack of limiting language within

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96. Lawson, 134 S. Ct. at 1161.
98. Lawson, 134 S. Ct. at 1177 (Justices Ginsburg, Roberts, Breyer, and Kagan joined the plurality, with Justices Scalia and Thomas concurring in the judgment; Justices Sotomayor, Kennedy, and Alito dissented).
101. Id. at 61.
102. Id. at 61–62.
the anti-retaliation provision, the Court found that the provision’s differing purposes justified a “difference of interpretation.” Moreover, the Court observed: “We normally presume that, where words differ as they differ here, ‘Congress acts intentionally and purposely in the disparate inclusion or exclusion.’”

Returning to the FCA’s anti-retaliation provision, the statute says:

(1) In general.—Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

(2) Relief.—Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys’ fees.

Similar to the interpretive issue in Burlington Northern, these two provisions have markedly different purposes. Section 3730(h)(1) defines the elements a plaintiff must prove to state a claim of retaliation. Section 3730(h)(2) governs the relief to which a prevailing plaintiff is entitled. It is instructive that Congress expressly used the phrase “but-for” in discussing the relief for the successful plaintiff but not in identifying the elements that a plaintiff must prove to state a claim. When faced with a statute that employs both phrases, the Court should assume that Congress’s choice of words was deliberate and look to the FCA’s history and purpose to determine congressional intent—an intent that demands application of a motivating factor standard.

V. Conclusion

The role of private citizens in protecting the United States from contractor fraud cannot be overstated. For more than 150 years, individuals have put their jobs and livelihoods on the line to blow the whistle on unscrupulous contractors. The law should allow employees who suffer retaliation for assisting the government with its enforcement

106. Id. at 63 (citing Russello v. United States, 464 U.S. 16, 23 (1983)).
efforts to rely on mixed-motive theories of causation. Unfortunately, the trend of the Supreme Court’s jurisprudence is toward a heightened but-for causation standard in employment cases, and the opinions’ language suggests that the Court may require FCA whistleblowers to make the same showing—a requirement clearly in conflict with congressional intent. Fortunately, the plurality opinion in *Lawson* suggests that the Court may look beyond the mere statutory language to the FCA’s purpose. With the military’s increased reliance on defense contractors and the expansion of government programs like the Affordable Care Act, the risk of fraud against the federal government is, perhaps, at an all-time high. A motivating factor standard is necessary to ensure that potential whistleblowers are not afraid to come forward and aid the government in combatting fraud.