The Editors' Page

The student editorial staff adds value to the *ABA Journal of Labor & Employment Law* in many ways. The students cite check and edit articles accepted for publication. They review the papers created for the Section's mid-winter meetings and the fall continuing education conference to identify those best-suited for publication. And very significantly, they prepare notes for potential publication.

When the *Labor Lawyer* transitioned to the University of Minnesota Law School, we queried a student focus group about how to entice the best and brightest to apply for the *Journal* staff. One of the loudest messages we received was that students would be attracted to the *Journal* if given the opportunity to prepare articles for possible publication. The Faculty Co-Editors decided on a competition in which all second-year student staff members would author research notes with the best three accepted each year for publication.

The *Journal* editors created a detailed process designed to produce high-quality student notes of practical utility to Section members. Each summer, the Faculty Co-Editors and the third-year student Note and Article Editors prepare a list of potential note topics to identify cutting-edge issues of interest to practicing attorneys. Particular attention is given to issues that are timely, important, and that spawn different viewpoints. While students sometimes select other topics of personal interest, the list provides a ready source of interesting and dynamic topics.

In writing their notes, the second-year students are divided into two teams, each supervised by one Faculty Co-Editor and one Note and Article Editor. Under their supervision, the students research possible topics and, by late September, each student submits a list of three proposed topics. Over the next few weeks, these lists are adjusted and pared through further research and discussion, and by mid-semester, the students finalize their topic selections.

Note-writing proceeds in three stages. In the first stage, second-year students draft the background or fact sections of their notes accompanied by an outline of anticipated analysis. After receiving feedback from team editors, second-year students complete a first full draft of their note over winter break. Following another round of feedback, the second-year students refine their drafts and submit a final version by the end of February.

In the third stage, six editors (two Faculty Co-Editors, the Editor-in-Chief, the Lead Managing Editor, and the two Note and Article Editors) review each of the notes and select three for publication. The notes that we just selected for publication in 2016–17 illustrate the diversity of note topics: an empirical study of arbitration outcomes in police misconduct cases, an analysis and comparison of risk standards underlying workers' com-

pensation coverage, and an examination of courts' competing proof constructs in retaliation cases arising under the Family and Medical Leave Act. You can look forward to reading these excellent and helpful notes in coming issues.

Among the seven articles in this issue, you will find two student notes written and selected by this process. The *Journal*'s annual Supreme Court review opens this issue. Professor Scott A. Moss, of the University of Colorado Law School and Secretary of the ABA Section of Labor and Employment Law, summarizes the nine labor and employment law decisions from the Court's most recent term in **Labor and Employment Law at the 2014–2015 Supreme Court: The Court Devotes Ten Percent of Its Docket to Statutory Interpretation in Employment Cases, But Rejects the Argument That What Employment Law Really Needs Is More Administrative Law**. Professor Moss discusses all the cases, their implications, and later histories. He also revisits two decisions from the prior term to examine how they have fared in the lower courts.

Whether an employee benefit plan receives church-plan status under the Employee Retirement Income Security Act of 1974 (ERISA) is crucial for the millions of employees and beneficiaries enrolled in plans maintained by religiously-affiliated organizations, such as schools and hospitals. In **Resolving ERISA's "Church Plan" Problem**, management attorney Jeffrey A. Herman addresses federal courts' inconsistent textual interpretations of the church plan exemption. Using basic canons of statutory construction, Herman argues that ERISA's plain text and agency interpretations warrant broad construction of the church plan exemption.

Recent media attention to workplace bullying has raised the question of whether bullying victims have legal remedies. While sexual harassment law may assist some victims, bullying targets will most often look to common law for relief. In **Tackling Workplace Bullying in Tort: Emerging Extreme and Outrageous Conduct Test Averts Need for Statutory Solution**, Sarah E. Morris, adjunct professor at the University of Minnesota Law School, describes the nature of workplace bullying and explains why it is actionable under the common law tort of intentional infliction of emotional distress (IIED). Morris argues that the developing standard for defining extreme and outrageous conduct is best suited to these claims. This standard accounts for bullying that occurs continuously over time as well as single incidents of particularly egregious conduct. Morris concludes that proposed anti-bullying statutes are unnecessary, would not strengthen IIED doctrine, and would undermine other statutory claims, such as Title VII sexual harassment claims.

Four articles in this issue focus on important legal issues arising under the National Labor Relations Act (NLRA). In **The NLRB's Evolving Joint-Employer Standard: *Browning-Ferris Industries of California, Inc.***, management attorney, Daniel B. Pasternak, and union attorney, Naomi Y. Perera, summarize the National Labor Relation Board's (NLRB

or Board) 2015 decision overturning longstanding precedent to redefine when firms are joint employers under the NLRA. The authors analyze NLRB and Regional Director decisions in the wake of *Browning-Ferris* and present different perspectives on the decision's likely impact on franchisee-franchisor and contract labor relationships and its broader implications for labor-management relations.

Fifty years ago, the Supreme Court held an employer could legally lock out employees in support of its bargaining demands—the so-called offensive or bargaining lockout. Since then, courts and the NLRB have expanded the offensive lockout doctrine allowing employers to lock out employees who have not threatened to strike and are willing to work while negotiations continue. Law professors Douglas E. Ray and Christopher David Ruiz Cameron argue in **Revisiting the Offensive Bargaining Lockout on the Fiftieth Anniversary of *American Ship Building Company v. NLRB*** that this expansion was unwarranted and unsupported by the Court's *American Ship* decision. The authors assert that precedent has turned the offensive lockout into a "nuclear option" for employers, contrary to national labor policy promoting collective bargaining. The authors propose that the Court return to permitting offensive lockouts only in the limited circumstances of *American Ship*.

Board precedent analyzing employer handbook policies has caused confusion and uncertainty for employers drafting workplace civility rules to promote positive work environments. Arielle A. Dagen-Sunsdahl, a third-year student at the University of Minnesota Law School and a Managing Editor of the *Journal*, analyzes the legality of these policies in **Navigating Through *Hills & Dales*: Can Employers Abide by the NLRA While Maintaining Civil Work Environments?** After reviewing a 2014 Board decision demonstrating employers' risks in implementing overbroad and ambiguous workplace civility rules, she provides employers guidance in drafting NLRA-compliant policies.

In **Third-Party Inflammatory Appeals to Prejudice: Race, Religion, and Union Elections**, Marc J. Shinn-Krantz, a third-year student at the University of Minnesota Law School and the *Journal*'s Lead Managing Editor, focuses on regulation of third-party inflammatory appeals to racial or religious prejudice occurring during representation election campaigns. On the basis of his review of Board and court decisions and conflicting policy objectives, he concludes that the Board should give less weight to third-party inflammatory appeals than those made by primary parties when deciding whether to overturn election results.

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