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Editors’ Page

We have been privileged to be the Faculty Co-Editors of the ABA Journal of Labor & Employment Law since 2009 when the Journal’s editorial home moved to the University of Minnesota Law School. The Journal’s current volume, Volume 33, marks our last in this role because, starting with Volume 34, the Journal’s home moves to the St. Louis University School of Law. Before our final issue, we want to express our deep gratitude and respect for all of the authors who have written articles for the Journal.

We know well that contemporary legal practice, in labor and employment law and elsewhere, is economically and professionally competitive. We also know that much of that practice is adversarial. We further know that, in planning their days, attorneys need to prioritize the needs of their clients and leave time for their personal and family lives. Yet, despite all that, over the past nine years, more than 250 authors have shared their expertise, insight, and practical guidance in writing for the Journal. They have not only sacrificed precious and uncompensated time, but also generously written for the benefit of others—including others who are their adversaries and competitors. Indeed, many articles we published were co-authored by pairs of attorneys who would otherwise sit on different sides of litigation or negotiations—for example, a union lawyer collaborating with an attorney who represents management. Sometimes such a pair of authors from opposite perspectives would each agree to write on the same legal issue so that readers could evaluate both positions in one published issue. Not surprisingly, many, if not most, of our authors have been members of the ABA Section of Labor and Employment Law in which such cooperation and professionalism is the norm.

Looking back on the last nine years, we see that our authors have emerged from diverse roles within the legal community, and beyond. Appropriately, in light of our mission to serve the needs of practicing labor and employment attorneys, the largest number of our authors have themselves been practicing attorneys. They have come from a wide variety of professional settings. While many work in law firms, the range of firms includes some that typically represent employers, as well as those representing unions and employees. Also among our authors are attorneys with more boutique specialized practices such as immigration, employee benefits, and Supreme Court litigation. While some authors, especially in large firms, have enjoyed support not only from clerical staff, but also from more junior associates or paralegals, we’ve also published the writing of a sole practitioner who didn’t even have a secretary. Union attorney authors have come from the staffs
of local and international unions, as well as from the AFL-CIO. Some authors were corporate in-house counsels. We have published articles by attorneys who work in a wide range of non-profit organizations, including the American Enterprise Institute, the Heritage Foundation, the National Alliance for Charter Schools, Legal Aid at Work, and AARP. Many authors were academics. While most of these were law school professors, we have also published articles by professors from the disciplines of sociology, history, economics, and management. Arbitrators and mediators have written articles on alternative dispute resolution. From outside the legal profession, economists and statisticians have also contributed to the Journal.

Many authors brought expertise from their roles in federal and state government. These have included a federal district judge, a Secretary of Labor, a Chairman and a Member of the National Labor Relations Board (NLRB), a Chairman of the U.S. Merit Systems Protection Board, and a former Vice Chair of the Equal Employment and Opportunity Commission (EEOC). Other writers have been staff attorneys at the EEOC, NLRB, the Federal Retirement Investment Board, and the Illinois Senate. From other countries, our authors have included a Canadian lawyer, an Australian law professor, and an official of the International Labour Organization in Geneva.

Journal issues have regularly included law student authors. Sometimes, law professors or practicing attorneys co-authored with law students. Some articles came to us as winning essays in the National Student Writing Competition sponsored by the ABA Section of Labor and Employment Law and the College of Labor and Employment Lawyers. Some of the student-authored articles were by our own University of Minnesota law students, selected as Journal staff members in a competitive process. While some might question whether law students would have the potential to produce articles of practical utility to the Section’s members, we found that with extensive diligent research and faculty guidance they could meet that standard, often by focusing on issues that practicing attorneys would never have the time or broad focus to address. For example, our students conducted original empirical research on labor arbitration awards regarding police officer discipline from across the country; used the Freedom of Information Act to obtain deferral decisions from the NLRB to assess potential results of alternative deferral standards; and conducted comprehensive state-by-state surveys of such issues as the scope of whistleblower protection, the availability of sex-plus-age discrimination causes of action, and interpretation of defenses in workers’ compensation cases.

The authors whose work appears in this issue continue the tradition established by our authors over the past nine years by using their diverse backgrounds and expertise to bring to our readers thoughtful analysis of current critical issues in labor and employment law.
In The Term That Almost Was: A Look Back at the Supreme Court’s Work Law Docket in 2016–17, the Section’s Secretary, Southwestern Law School Professor Christopher David Cameron, explains how the Court, deeply divided on ideological grounds, and waiting fourteen months for a new associate justice to fill the seat left vacant by Justice Antonin Scalia’s death, had to put aside several important and controversial labor and employment law issues. Nevertheless, as Professor Cameron describes, there were five narrower workplace law cases decided, and the term also brought important grants of certiorari that presented much more significant issues for resolution in the 2017–18 term.

In What the Supreme Court’s Diversity Doctrine Means for Workplace Diversity Efforts, Rutgers Law School Professor Stacy Hawkins insightfully assesses the legality of workplace diversity efforts by analyzing precedents governing affirmative action in college student admissions. She explores both similarities and differences in practical and legal contexts of affirmative action programs and workplace diversity efforts while showing how, more broadly, higher education precedents can guide employers in designing lawful workplace diversity programs.

Preventing and remedying workplace gender-based harassment and violence have recently received heightened interest in the United States. These concerns are not limited to the United States, however, as seen by an International Labour Organization (ILO) initiative designed to draft the first international treaty to end gender-based workplace violence and harassment. In his article, The International Labour Organization’s Innovative Approach to Ending Gender-Based Violence and Harassment: Toward a New International Framework for the World of Work, Geneva ILO official Eric Stener Carlson describes the ILO’s drafting process, its conception of the issues, and one innovative effort to prevent sexual harassment in the export-oriented garment industry by focusing on structural workplace power imbalances.

The workplace presence of transgender persons presents new uncertainties for employers about the application of laws regulating disability accommodations, employment discrimination, and employee benefits. In A Gender Transition Primer: The Evolution of ADA Protections and Benefits Coverage, management attorney Nonnie L. Shivers brings attorneys up to date on fast-changing federal legal developments, warns of the need to determine application of state and local laws, highlights heightened responsibilities of federal contractors, and offers useful practical guidance for employers working with transitioning employees.

Employers today have access to vast quantities of data and increasingly sophisticated tools to analyze that information. What new
opportunities for employers to improve human resources management are now possible? To what extent do these developments create new legal risks for employers? Management attorneys Darrell S. Gay and Abigail M. Kagan explain the nature of “big data” and offer answers to these questions in *Big Data and Employment Law: What Employers and Their Legal Counsel Need to Know*.

The #MeToo movement continues to bring to light accusations of sexual misconduct against high-ranking corporate executives. Law enforcement efforts of state and federal agencies also often focus on behavior in executive suites. Corporations conducting internal investigations on such issues require expert legal advice. Corporate executives often hire their own attorneys when they become witnesses or targets of investigations. In *Issues in Internal Investigations of Executives*, Jonathan Ben-Asher, who represents executives and professionals in such investigations, identifies the scope of relevant attorney-client privilege and work-product protections and offers guidance on tricky practice issues for both corporate attorneys and those representing executives.

One need not look far in popular media or professional journals to encounter articles about work-life balance. Employees desire more flexible work schedules. Employers acknowledge that flexible schedules may improve recruitment and retention of employees, but fear flexibility may reduce productivity and profit. The article, *Requesting Balance: Promoting Flexible Work Arrangements with Procedural Right-to-Request Statutes*, identifies multiple ways in which both employers and employees benefit from flexibility. Author Paul D. Hallgren Jr., a 2018 graduate of the University of Minnesota Law School and Lead Managing Editor of Volume 33 of the *ABA Journal of Labor & Employment Law*, reviews current U.S. laws and some from other countries before concluding that laws that mandate procedures for employees to request schedule changes are preferable to ones granting employees substantive rights to flexible schedules. The article details a model right-to-request law designed to balance the needs of employers and employees.

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