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EDITORIAL STATEMENT: The ABA Journal of Labor & Employment Law is a journal of ideas and developments in all areas of labor and employment law designed to provide balanced analysis for practitioners, judges, administrators, and the interested public. The Journal provides an opportunity for members of the labor and employment bar and others to share insights and perspectives on practical issues of current interest while encouraging discussion of their broader policy implications. The ABA Journal of Labor & Employment Law may be cited as follows, by volume and page: 33 A.B.A. J. LAB. & EMP. L. ___ (2018).

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FREQUENCY AND POSTAGE: The ABA Journal of Labor & Employment Law (ISSN: 8756-2995) is published three times per year by the American Bar Association, Section of Labor and Employment Law. Third-class postage is paid at Chicago, IL, and additional mailing offices.

ADDRESS CHANGES: Send all address changes to the ABA Journal of Labor & Employment Law, ABA Service Center, American Bar Association, 321 North Clark Street, Chicago, IL 60654-7598; phone: 800-285-2221; e-mail: service@americanbar.org.

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.

*Professor Stephen F. Befort*

*Professor Laura J. Cooper*

*Faculty Co-Editors*
The Term That Almost Was: A Look Back at the Supreme Court’s Work Law Docket in 2016–17

Christopher David Ruiz Cameron*

Introduction

The labor and employment law docket of the 2016–17 Term will be remembered less for the important questions that the United States Supreme Court answered and more for the questions it declined to address. But for many of these questions, the day of reckoning arrived during the 2017–18 Term. Part I discusses how this came to pass.

The 2016–17 Term was a quiet one in most respects. Court-watchers used words like “shrunk,”1 “transitional,”2 “holding pattern,”3 and “pretty boring”4 to describe the Term during which the justices produced only seventy opinions, of which sixty-two were issued in argued cases and thirty-five were unanimous.5 This “remarkable consensus”6 represented just the second time in modern Supreme Court history that the number of unanimous decisions surpassed the number of non-unanimous decisions.7 Overall, the Court has not produced “a lower total opinion output since the mid-1800s.”8

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2. Id.
3. Id. at 13.
5. Robinson, supra note 1, at 12.
6. Id.
7. Id. at 13.
8. Id.
The Court’s labor and employment law docket fit this pattern. Though the future may reveal otherwise, it appears the Court decided no landmark cases. And the cases for which it issued opinions were both few in number and narrow in scope. In fact, only five cases decided questions dealing directly with the law of the workplace. But the Court also denied certiorari in one significant work law case and granted certiorari in another, which could have proved to be among the most influential cases on workplace law in a generation. Part II summarizes these cases.

I. The Term That Almost Was

Justice Antonin Scalia’s death in February 2016 largely explains why the work law docket of the 2016 Term will be remembered less for the important questions that the Court answered and more for the questions it failed or refused to address. The seat occupied for almost thirty years by Justice Scalia went unfilled for fourteen months. That vacancy haunted most of the 2016 Term because the Court, evenly divided along ideological lines, tended to avoid more politically charged cases—including workplace disputes—that might have required a tie-breaking fifth vote.

Judge Neil Gorsuch of the U.S. Court of Appeals for the Tenth Circuit was confirmed as Justice Scalia’s replacement in April 2017. Justice Gorsuch is now widely expected to cast the fourth conservative vote on labor and employment matters that Justice Scalia often provided. A study of voting patterns in the Court's employment dis-

9. See infra Section II.A.
10. See infra Section II.B.
11. See infra Section II.C.
13. Id. For example, after Justice Scalia’s death during the 2015–16 Term, the Court was unable to muster a majority in a case posing this question: does requiring a public employee to pay a “fair share” or “agency” fee to cover the cost of union representation activity germane to collective bargaining violate the First Amendment rights of employees who object to joining the union or paying the fee? See Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2016) (per curiam) (affirming by an equally divided court lower court judgment upholding fee). With Justice Gorsuch confirmed, a slim majority of the Court decided to revisit the issue during the 2017–18 Term and, predictably, went on to declare all agency fees in the public sector to be unconstitutional in Janus v. AFSCME Council 31, 585 U.S. ___ (2018) (5-4 decision).
14. Id. Republicans controlling the U.S. Senate steadfastly refused to hold hearings on President Barack Obama’s nominee, Judge Merrick Garland of the U.S. Court of Appeals for the District of Columbia Circuit, until President Obama’s term ended and he was succeeded by President Donald J. Trump. See Nina Totenberg, 170-Plus Days and Counting: GOP Unlikely to End Supreme Court Blockade Soon, NPR (Sept. 6, 2016), https://www.npr.org/2016/09/06/492857860/173-days-and-counting-gop-unlikely-to-end-blockade-on-garland-nomination-soon.
15. See Liptak & Flegenheimer, supra note 12. The other reliably conservative, or pro-management, votes are usually cast by Chief Justice John Roberts and Associate
The Term That Almost Was

Crimination cases during Justice Scalia’s tenure suggests that, as the appointee of a Republican president, Justice Gorsuch is more likely to vote for employers than employees.16 During Justice Scalia’s tenure (1986–2015), the Court decided ninety-eight employment discrimination cases.17 Of these, seventy-nine produced clear outcomes:18

- Workers won forty-four cases and employers won thirty-five.
- Republican appointees voted for workers in 40% of these cases and for employers in 34%.
- Democratic appointees voted for workers in 58% of cases and for employers in 19%.
- Twelve of these cases—about 15%—were decided by a five-to-four vote.

Therefore, as one conservative Republican appointee replacing another conservative Republican appointee, it is unlikely that Justice Gorsuch will substantially alter voting patterns, at least in employment discrimination cases. On the other hand, the recently announced departure of Justice Anthony Kennedy,19 who for years was the key swing vote on most close questions, is expected to have far greater consequences, because the Court’s “‘fragile conservative majority’ [went] only as far as Kennedy [would] go.”20

II. The 2016–17 Term

Only five cases decided in the 2016–17 Term presented questions dealing directly with workplace law. But the Court also issued one notable certiorari denial and granted certiorari in another highly significant work law case during the Term.

A. Work Law Cases Actually Decided by the Court

The “sweet spot” of the Court’s docket—that is, its decision of traditional labor and employment law business—including five cases during the 2016–17 Term.


17. Id. at 65.
18. Id. at 66.
20. Robinson, supra note 1, at 15.
1. Limit on Acting Agency Head’s Ability to Continue in Acting Capacity After Nomination to Serve in Permanent Capacity

Does the Federal Vacancies Reform Act of 1998 (FVRA)21 limit the ability of the acting General Counsel of the National Labor Relations Board (NLRB) to continue to serve in that role once nominated by the President as its permanent General Counsel? The Supreme Court answered yes, by a six-to-two margin, in NLRB v. SW General, Inc.22

Article II of the Constitution requires the President to obtain “the Advice and Consent of the Senate” before appointing “Officers of the United States.”23 As a result, responsibilities of an office requiring Presidential appointment and Senate confirmation (a PAS office) may go unperformed if a vacancy arises and the President and Senate do not promptly agree on a replacement. This has occurred often in recent years at both the NLRB and other federal agencies.24 Congress has long responded to the problem by authorizing the President to direct certain officials temporarily to carry out the duties of a vacant PAS office in an acting capacity without Senate confirmation.25

The FVRA is the latest version of such legislation. Section 3345(a) permits three classes of government officials to become acting officers.26 The default rule is that the first assistant to a vacant office becomes the acting officer, but the President may override that default by directing either a person serving in a different PAS office or a senior employee within the relevant agency to become the acting officer.27 Section 3345(b)(1), however, prohibits certain persons from serving as acting officers if the President has nominated them to fill the vacant office permanently.28 The key issue in SW General was whether this prohibition applied only to first assistants who automatically assumed acting duties, or whether it also applied to PAS officers and senior employees serving as acting officers at the President’s behest.29

Writing for six justices, Chief Justice Roberts found that the prohibition in section 3345(b)(1) applies to all three acting officer categories.30 This opinion effectively invalidated the decision by Lafe Solomon, the acting General Counsel of the NLRB whom President Obama nominated to fill that position permanently for the balance of its term, to issue a complaint against an employer, a provider of

26. Id.
27. Id.
28. Id. § 3345(b).
30. Id. at 938.
ambulance services, for various unfair labor practices. President Obama could have avoided this problem by directing someone else to serve as acting General Counsel while Solomon’s nomination was pending, but did not. Writing separately, Justice Thomas concurred. Justice Sotomayor, joined by Justice Ginsburg, dissented.

This decision’s effects will not be as sweeping as those of NLRB v. Noel Canning, which caused the NLRB to review, reconsider, and reissue hundreds of decisions after the Court held that a depleted, two-member Board lacked the three-member quorum necessary to take official action. By contrast, SW General affects only unfair labor practice complaints issued by Solomon or other agency officials during Solomon’s acting appointment from January 5, 2011, to November 4, 2013, if the respondents in each case timely objected to Solomon’s action as outside his FVRA authority. Few cases meet these criteria.

2. Enforcement of Equal Employment Opportunity Commission Subpoenas

Is “abuse of discretion” or “de novo” the proper standard for reviewing a district court order enforcing or denying a subpoena issued by the Equal Employment Opportunity Commission (EEOC) as part of an investigation into a workplace discrimination claim? In McLane Co. v. EEOC, the Court ruled “abuse of discretion” is the proper standard by a seven-to-one vote.

The plaintiff in McLane, after working for eight years in a physically demanding job for a supply-chain services company, took a three-month maternity leave. When she was ready to return to work, she was subjected to a fitness-for-duty physical examination in accord with company policy. The plaintiff failed the examination three times and was terminated. Under Title VII of the Civil Rights Act of 1964, she filed a charge contending that both the examination and her discharge constituted unlawful sex discrimination. While investigating

31. Id. at 932.
32. Id. at 945 (Thomas, J., concurring).
33. Id. at 949 (Sotomayor, J. dissenting).
34. 134 S. Ct. 2550 (2014).
35. Id. at 2578.
36. The Obama administration asserted in its petition for a writ of certiorari that SW General might affect the actions of a half-dozen appointees currently serving, as well as an unspecified number of appointees who previously held temporary positions at other agencies, including the Environmental Protection Agency, the Justice Department, the Defense Department, and the Export-Import Bank. Petition for Writ of Certiorari at 27, SW Gen., Inc., 137 S. Ct. 929 (No. 15-1251), 2016 WL 1377754.
37. 137 S. Ct. 1159.
38. Id. at 1170.
39. Id. at 1165.
40. Id.
41. Id.
43. McLane Co., 137 S. Ct. at 1165.
the charge, the EEOC requested so-called “pedigree information”—the names, Social Security numbers, addresses, and telephone numbers of other employees asked to submit to the physical evaluation.44 When the company refused to comply, the EEOC issued subpoenas for the information and sought enforcement in the district court as authorized by the relevant provision of Title VII.45 The district court quashed the subpoenas on the ground that the information sought was irrelevant, but the Ninth Circuit reversed.46 Reviewing the matter de novo, the appellate court determined that the information was relevant and held that the subpoenas should be enforced.47

The Supreme Court reversed.48 Writing for seven members of the Court, Justice Sotomayor explained that the long-standing practice of the courts of appeals is to review the issuance of subpoenas for abuse of discretion, rather than de novo,49 mainly because the district judge is in a better position to develop the record and determine whether the subpoenas are proper.50 This has been true of subpoenas issued by the NLRB and other federal agencies. Justice Ginsburg concurred in part and dissented in part.51

Although this decision’s short-term effect was to withhold from the EEOC key information related to the plaintiff’s discrimination charge, the long-term effect is likely to be increased deference to district court decisions, including the more common decision to enforce such subpoenas.

3. Review of “Mixed Case” Decisions by the Merit Systems Protection Board

Is a federal district court or the U.S. Court of Appeals for the Federal Circuit the proper forum for appealing the dismissal by the Merit Systems Protection Board (MSPB) of a “mixed case” claim due to lack of jurisdiction? A “mixed case” is one in which an employment discrimination claim is joined to a civil service claim challenging a serious personnel action, such as discharge (as authorized by the Civil Service Reform Act (CSRA) of 1978).52 The Supreme Court ruled seven-to-two in Perry v. Merit Sys. Prot. Bd.53 that the proper forum in which to appeal the MSPB’s dismissal of a mixed case is a federal district court.54

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44. Id. at 1166.
46. McLane Co., 137 S. Ct. at 1166.
47. Id.
48. Id. at 1170.
49. Id. at 1167.
50. Id. at 1167–68.
51. Id. at 1170 (Ginsburg, J., concurring in part and dissenting in part).
54. Id. at 1987–88.
Writing for the majority, Justice Ginsburg carved out an exception to the general rule that an appeal from an adverse MSPB decision must be brought before the Federal Circuit. This exception for mixed cases abrogated long-standing authority directing review by the Federal Circuit. So the outcome is in accord with the Court’s 2012 decision recognizing special procedures for mixed cases in *Kloeckner v. Solis.* Justice Gorsuch, joined by Justice Thomas, dissented.

*Perry’s* effect will be limited to employees in the federal civil service. It is unclear exactly what those effects will be.

4. The ERISA “Church Plan” Exemption

May an employee benefit plan administered by an organization whose “principal purpose” is religious in nature, but that is not itself a “church,” claim the exemption granted to a “church plan” under the Employee Retirement Income Security Act of 1974 (ERISA)? Yes, the Court ruled eight-to-zero in *Advocate Health Care Network v. Stapleton,* the lead case from the Seventh Circuit, which was consolidated with cases from the Third and Ninth Circuits.

ERISA imposes on most employee benefit plans an array of rules designed to protect participants from plan insolvency and other risks. Complaining that such rules can be onerous, religious organizations successfully persuaded Congress to exempt any “church plan” from compliance. Writing for a unanimous Court, Justice Kagan explained that, although ERISA defines a “church plan” as “a plan established and maintained . . . by a church,” the exemption applies to any plan maintained for the employees of churches or church-affiliated non-profits, “even though not actually administered by a church.” This is true even if the plan originally was not “established” by a church, so long as the plan is maintained by a church-affiliated organization whose

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55. *Id.* at 1979.
“principal purpose” “is to fund or manage a benefit plan for the employees of churches or . . . church affiliates.”

Stapleton is likely to affect millions of employees of religiously affiliated organizations like schools and hospitals, and not necessarily for the better. The decision may give religious non-profits more leeway in fashioning employee benefit plans, but it may also subject exempt church plans to state-law causes of action, because such claims are not likely to be preempted by ERISA.

5. Federal Employee Health Benefits Preemption

Does the Federal Employee Health Benefits Act (FEHBA) of 1959 preempt a Missouri state law barring contractual reimbursement and subrogation provisions on the ground that such provisions “relate to” the payment of benefits to employees of the federal government? Yes, the Court ruled eight-to-zero in Coventry Health Care of Missouri v. Nevils.

FEHBA authorizes the Office of Personnel Management (OPM) to contract with private carriers to provide health insurance to federal employees. The statute’s express preemption provision states: “The terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law . . . which relates to health insurance or plans.” OPM contracts have long required private carriers to seek subrogation and reimbursement. Accordingly, OPM regulations state that a carrier’s “right to pursue and receive subrogation and reimbursement recoveries constitutes a condition of and a limitation on the nature of benefits or benefit payments and on the provision of benefits under the plan’s coverage.”

In Coventry Health Care, the plaintiff was insured under a FEHBA plan. After the plaintiff’s automobile accident injury, the defendant insurer paid the plaintiff’s medical expenses. Later, the insurer asserted a lien against part of the settlement the plaintiff recovered.
from the driver who caused his injuries. The plaintiff satisfied the lien and filed a class action in state court alleging that, under Missouri law, which does not permit subrogation or reimbursement in this context, the insurer unlawfully obtained reimbursement. The insurer countered that FEHBA’s express preemption provision barred application of Missouri’s anti-reimbursement and subrogation laws.

Writing for a unanimous Court, Justice Ginsburg reasoned that, although the plaintiff’s construction was plausible, the insurer’s reading was more consistent with the “text, context, and purpose” of the express preemption provision. In particular, the words “relate to” express “a broad, pre-emptive purpose” when applied to a host of different conflicting state laws. Justice Thomas concurred. This decision is further confirmation of Congress’s supremacy in regulating federal benefits law, which long has been recognized in ERISA litigation.

B. Work Law Case Raising Enforceability of Forum Selection Clauses in Employee Benefit Plans in Which Certiorari Was Denied

One certiorari denial in the 2016–17 Term is also significant to the law of the workplace. In Clause v. U.S. District Court for the Eastern District of Missouri, the Court declined to consider whether a forum selection provision in an ERISA-governed employee benefit plan is enforceable. This denial was notable both because a split of authority as to how to answer this question is developing in the lower federal courts, and because this was the third time in four years that the justices declined to resolve the split.

Courts commonly enforce forum selection clauses in commercial and consumer contracts, so it seems odd that the law would remain unsettled regarding forum-selection clauses in employee benefit plans. The issue is complicated by ERISA having its own venue provisions.
In the event of conflict, it is unclear whether Congress intended the parties’ agreement or the statute to prevail. The U.S. Department of Labor (DOL) has a “long and unsuccessful history” of arguing against forum selection clauses in ERISA-governed benefit plans. Despite filing four separate briefs on this topic over the past eight years, the DOL lacks a single court victory to show for its efforts. Perhaps the Court will take up the issue in the near future.

C. Work Law Case Raising Enforceability of Arbitration Agreements in Individual Employment Contracts in Which Certiorari Was Granted

Midway through the 2016–17 Term, the Court granted certiorari in a trio of cases raising the question whether an arbitration agreement purporting to waive an individual employee’s right to join co-workers in pursuing a class or collective action is an unfair labor practice under the National Labor Relations Act (NLRA), unenforceable under the Federal Arbitration Act (FAA), or both. This is one of the most important questions affecting the law of the workplace to reach the Court in a generation. In Murphy Oil USA, Inc. v. NLRB, the Fifth Circuit held that such agreements do not violate the NLRA and are enforceable. In Lewis v. Epic Systems Corp. and Morris v. Ernst & Young LLP, the Seventh and Ninth Circuits held that such agreements do violate the NLRA and are unenforceable under the FAA.

Near the end of the 2017–18 Term, the Court ended the suspense by upholding such agreements. With Epic Systems Corp. v. Lewis as

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90. Id.
92. Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1157 (7th Cir. 2016) (employer-employee arbitration agreement prohibiting class or collective arbitration violates the NLRA and is also unenforceable under the Federal Arbitration Act (FAA)), cert. granted, 137 S. Ct. 809 (2017); Morris v. Ernst & Young, LLP, 834 F.3d. 975, 984 (9th Cir. 2016) (same), cert. granted, 137 S. Ct. 809 (2017); Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013, 1019 (5th Cir. 2015) (employer-employee arbitration agreement that prohibits class or collective arbitration is valid, enforceable, and does not violate the National Labor Relations Act (NLRA) if employees would not reasonably construe the agreement as prohibiting the filing of any unfair labor practice charges with the National Labor Relations Board (NLRB)), cert. granted, 137 S. Ct. 809 (2017).
93. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991), in which the Court held that claims under the Age Discrimination in Employment Act may be subjected to compulsory arbitration, may have been the last time the Court agreed to take a case that, in retrospect, had similar potential for a sweeping impact on everyday management practice.
94. Murphy Oil, 808 F.3d at 1020.
95. Lewis, 823 F.3d at 1154–55 (finding NLRA violation, but no FAA violation); Morris, 834 F.3d. at 893 (finding NLRA violation, but no FAA violation).
the lead case, it affirmed the Fifth Circuit and reversed the Seventh and Ninth Circuits. Justice Gorsuch, writing for a five-to-four majority, explained that the right of employees under section 7 of the NLRA “to engage in . . . concerted activities for . . . mutual aid or protection”\(^97\)—which over the years has been interpreted by the NLRB to include the prosecution of group litigation—does not trump the FAA’s command to enforce arbitration agreements between employers and employees as written.\(^98\) As a result, the widespread management practice of extracting from employees a take-it-or-leave-it waiver of their right to pursue class or collective litigation before a judge and jury in a court of law, rather than to pursue individual claims before an arbitrator in a closed-door proceeding, is preserved and likely will continue to thrive. Justice Thomas concurred.\(^99\) Justice Ginsburg, in a dissent joined by Justices Breyer, Sotomayor, and Kagan, described the majority’s opinion as “egregiously wrong.”\(^100\) It should be noted that *Epic Systems* does not affect the enforcement of collectively bargained agreements to arbitrate grievances arising under a union contract.

**Conclusion**

Although the labor and employment law docket of the 2016–17 Term will be remembered less for the important questions that the United States Supreme Court answered and more for the ones it declined to address, many of these questions were answered as early as the 2017–18 Term. Unlike the relatively narrow work law decisions in the Court’s 2016–17 Term, the cases decided during the 2017–18 Term were eagerly awaited and potentially far-reaching.

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99. *Id.* at 1632 (Thomas, J., concurring).
100. *Id.* at 1633 (Ginsburg, J., dissenting).
What the Supreme Court’s Diversity Doctrine Means for Workplace Diversity Efforts

Stacy Hawkins*

Introduction

The Supreme Court’s 2003 decision in Grutter v. Bollinger,1 approving race-conscious college admissions plans (RCAPs) adopted by public higher education institutions to increase student body diversity,2 provided many lessons for pursuing diversity in other contexts, including employment. Grutter generated many predictions about whether the Court would similarly embrace in the employment context the diversity interest it had recognized in higher education. The Court’s more recent decision in Fisher v. University of Texas at Austin3 offers additional guidance on the Court’s developing diversity doctrine and its likely application beyond higher education. This Article identifies the current contours of the Supreme Court’s diversity doctrine, as developed in cases from Grutter to Fisher, and predicts the Court’s likely response to a future case adjudicating the diversity interest in employment.

The scholarly literature generated in response to Grutter cast doubt on the prospect that the Supreme Court would (or should) embrace diversity in the workplace.4 This Article takes a more optimistic view about how the Supreme Court will likely respond to workplace diversity efforts in the wake of Fisher.5 These predictions benefit

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2. Id. at 343–44.
4. See, e.g., Cynthia Estlund, Taking Grutter to Work, 7 Green Bag 2d 215 (2004). Estlund expresses skepticism about workplace diversity efforts generally but suggests that employers could possibly defend them on instrumental grounds if courts can identify proper limits to prevent these efforts from overriding claims of individual rights. Id. at 222. For a fuller discussion of these post-Grutter scholarly predictions, see generally Stacy Hawkins, How Diversity Can Redeem the McDonnell Douglas Standard: Mounting an Effective Title VII Defense of the Commitment to Diversity in the Legal Profession, 83 Fordham L. Rev. 2457 (2015).
5. Justice Kennedy’s recent retirement and replacement by Justice Kavanaugh make these predictions less certain, but not entirely foreclosed.
not only from the added lessons in Fisher, but also from a significant and growing body of cases adjudicating workplace diversity efforts that have been decided by lower federal courts since Grutter.

The predictions made in this Article—that the Court will likely continue its embrace of diversity even outside the higher education context—should be welcome news to employers who were among the chief defenders of diversity in higher education. But not all the predictions are reassuring. Synthesis of the decided cases also reveals a cautionary tale about the emerging diversity doctrine, which cuts a narrow path through the Supreme Court’s equality jurisprudence. Universities and employers alike should beware the precarious path they must tread in pursuit of diversity.

Part I of this Article reviews the Supreme Court’s diversity doctrine by looking at four cases decided over fifteen years, with particular attention to the key decisions in Grutter and Fisher. Part II compares and contrasts the pursuit of diversity in higher education with the pursuit of diversity in the workplace as a prelude to Part III, which examines the many post-Grutter lower federal court cases challenging workplace diversity efforts. Finally, Part IV offers new predictions about how the Supreme Court will likely respond to a legal challenge to workplace diversity efforts after its most recent decision in Fisher.

I. The Supreme Court’s Diversity Doctrine

The value of diversity in our increasingly multicultural society has been touted in many different contexts, from primary and secondary schools to colleges and universities, and, perhaps most often, in the workplace.6 Despite its widely recognized social value, pursuing diversity remains controversial as a matter of law.7 However, its legal status is becoming increasingly settled thanks to recent Supreme Court decisions adjudicating RCAPs designed to increase student body diversity in higher education.

RCAPs themselves are hardly new. The Supreme Court first considered them in 1978 in Regents of the University of California vs. Bakke.8 Bakke argued that the University of California, Davis Medical School violated the Equal Protection Clause by reserving sixteen of

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6. See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 726 (2007) (arguing for importance of diversity in elementary and secondary school); Grutter, 539 U.S. at 307 (arguing for importance of diversity in higher education); Petit v. City of Chicago, 352 F.3d 1111, 1114 (7th Cir. 2003) (arguing for importance of diversity in employment of police officers).


one hundred seats in its entering class for minority students. Justice Lewis Powell, writing alone in a plurality opinion, suggested that a university’s interest in achieving student body diversity could justify these RCAPs. Ultimately, the Court struck down the RCAP in *Bakke*, but there was no majority consensus on the reason for rejecting the plan. Instead, a plurality concluded that regardless of the asserted interest, the RCAP was not narrowly tailored and admonished the university to refrain from using racial quotas or outright racial balancing, which the Court has said are “patently unconstitutional.” *Bakke*’s plurality decision left universities uncertain about the precise constitutional contours restricting the use of race in college admissions. This uncertainty persisted for twenty-five years.

A. *Grutter v. Bollinger*

Then in 2003, the Supreme Court once again considered the constitutionality of RCAPs in a pair of cases involving the University of Michigan (Michigan). *Grutter v. Bollinger* challenged the Michigan Law School’s denial of admission to a white female applicant. *Gratz v. Bollinger* challenged the Michigan undergraduate RCAP. The petitioners in both cases alleged that Michigan violated the Equal Protection Clause by improperly considering race in admissions.

Taking its cue from Justice Powell’s plurality opinion in *Bakke*, Michigan defended its RCAP by asserting an interest in realizing the educational benefits that flow from a diverse student body. In approving this interest, the Court described these educational benefits as three-fold: (1) pedagogical (improving student learning by expanding the range of perspectives and experiences represented in the classroom); (2) functional (better preparing students for work by

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9. Id. at 266. Equal protection race claims are subject to strict scrutiny, which means the university was required to (1) identify a compelling interest for adopting the RCAP; and (2) demonstrate the plan was narrowly tailored to meet that interest. Id. at 299.

10. Id. at 311–12 (attaining a diverse student body “clearly is a constitutionally permissible goal for an institution of higher education”). However, the Court rejected the university’s proffered interest in remedying societal discrimination as insufficiently compelling to satisfy the strict scrutiny standard applicable to government uses of race. See id. at 299.

11. Though Justice Powell reasoned that the plan did not satisfy equal protection strict scrutiny because it did not allow for individualized consideration, id. at 320, four justices would have decided the issue on statutory (Title VI) rather than constitutional (equal protection) grounds. Id. at 408–12 (Stevens, J., concurring in part and dissenting in part).


14. Id. at 316.

15. 539 U.S. 244.

16. Id. at 251.


fostering the cultural competence necessary to succeed in a diverse labor market; and (3) socio-political (ensuring that future civic leaders engender public trust by reflecting the diversity of the populations they serve).19 Grutter was the first time a majority of the Court held that a university’s interest in achieving the educational benefits of student body diversity is sufficiently compelling to justify the use of race in admissions.20

Although the decision in Grutter surprised many, the value of diversity is fairly uncontroversial.21 Even critics of RCAPs often acknowledge that diversity is a laudable goal.22 Instead, it is typically the race-conscious means employed to achieve diversity that elicits objections.23 Given this concern for means rather than ends, what was more shocking than Grutter’s recognition of diversity as a constitutionally compelling end was the Court’s willingness to approve the use of both numeric goals and race-conscious means in pursuit of student body diversity.24 The Court upheld the law school’s goal of reaching a “critical mass” of underrepresented minority students, finding that this quantitative goal satisfied strict scrutiny’s narrow tailoring requirement because it was not tantamount to an impermissible racial quota.25 The Court was further convinced that race-neutral alternatives would be incapable of achieving the school’s admissions goals because they “would require a dramatic sacrifice to diversity, the academic quality of all admitted students, or both.”26 Nevertheless, the Court clarified that when higher education institutions employ race-conscious means to achieve diversity, they must be as narrow as possible in scope and time.27 These scope and time limitations require that (1) race not be used as a first resort, but only after race-neutral efforts have proved unavailing; (2) even when special consideration is given to underrepresented minorities, all applicants receive individualized consideration

19. Id. at 330–32.
20. Id. at 343–44.
21. Grutter was only the second time the Court found an interest other than remediating past discrimination sufficiently compelling to satisfy strict scrutiny. The other interest was national security. See Korematsu v. United States, 323 U.S. 215 (1944). However, Korematsu has been criticized and its holding condemned by jurists and scholars alike. See, e.g., Trump v. Hawaii, 585 U.S. ___ (2018) (repudiating the decision in Korematsu); Carol J. Williams, Legal Scholars Examine the U.S. High Court’s “Supreme Mistakes,” L.A. TIMES (Apr. 2, 2011), http://articles.latimes.com/2011/apr/02/local/la-me-scotus-scandals-20110402 (citing Korematsu as one of the Court’s most glaring mistakes).
23. Id. at 1526.
24. Id. at 1516–17.
26. Notably, race-neutral alternatives need not be exhausted, or even tried, before race-conscious means can be adopted. Id. at 339–40.
27. Id. at 342.
of their ability to contribute to a diverse educational environment; and (3) RCAPs must be discontinued when they are no longer necessary to achieve student body diversity.\textsuperscript{28} In no event may RCAPs operate indefinitely.\textsuperscript{29} The Court found that Michigan Law School had satisfied each of these requirements. Still, in much cited dicta, Justice Sandra Day O’Connor predicted that there would no longer be a need for RCAPs in twenty-five years.\textsuperscript{30}

Grutter laid the foundation for the Court’s diversity doctrine by establishing unequivocally that diversity is a compelling interest sufficient to justify governmental consideration of race.\textsuperscript{31} Emphasizing the uncontroversial nature of the diversity interest, the Court stated that it would defer to a university’s good faith assertion of an interest in student body diversity,\textsuperscript{32} but the Court also affirmed that any use of race in pursuit of diversity would still face strict scrutiny.\textsuperscript{33}

B. Gratz v. Bollinger

Grutter, upholding the law school’s RCAP, contrasts with the Court’s concurrent decision in Gratz v. Bollinger,\textsuperscript{34} striking down Michigan’s undergraduate RCAP. Gratz also recognized the compelling interest in achieving the educational benefits of student body diversity but found the undergraduate program was not narrowly tailored as required by strict scrutiny.\textsuperscript{35} The difference in outcomes between these two cases highlights the precise constitutional contours of the narrow tailoring requirement. Gratz struck down the undergraduate RCAP because the university assigned a numerical value to race in evaluating applicants, resulting in what the Court called a “mechanical” use of race, rather than the flexible and individualized use of race required by narrow tailoring.\textsuperscript{36} The Court reasoned that “the factor of race [was] . . . decisive for virtually every minimally qualified underrepresented minority applicant.”\textsuperscript{37} By contrast, the law school’s RCAP considered race merely as one “plus” factor among many possible diversity considerations.\textsuperscript{38}

\textsuperscript{28} See id. at 309–10.
\textsuperscript{29} See id. at 343.
\textsuperscript{30} Id. Justice O’Connor herself has since questioned the accuracy of that prediction. See David L. Featherman et al., The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa (2010).
\textsuperscript{31} Grutter, 539 U.S. at 307.
\textsuperscript{32} See id. at 329.
\textsuperscript{33} Id.
\textsuperscript{34} 539 U.S. 244.
\textsuperscript{35} Id. at 270.
\textsuperscript{36} Id. at 280. In contrast with the more individualized and holistic review process the law school employed in Grutter, the undergraduate admissions plan was a quantitative process that automatically assigned twenty points of the 100 needed for admission to every underrepresented minority applicant. Id. at 270.
\textsuperscript{37} Id. at 272.
\textsuperscript{38} Grutter, 539 U.S. at 334.
Grutter rejected the prevailing “colorblind” view that characterized the Court’s earlier equal protection jurisprudence by approving of RCAPs, while Gratz reinforced the narrow constitutional contours within which permissible government consideration of race must operate. Given the specific context of college admissions, many questioned whether the Court’s approval of the diversity interest in Grutter, or the constitutional limits imposed on its race-conscious pursuit in Gratz, might apply in other contexts. Because a record number of amicus briefs were filed in support of Michigan in Grutter and Gratz, many arguing that student body diversity was critical for preparing students “for an increasingly diverse workforce,” the employment context in particular stood out among the possibilities. Grutter approvingly cited these corporate amici as a basis for sustaining the university’s interest in student body diversity, noting the business-driven rationale of fostering workplace cultural competence. Unsurprisingly then, much post-Grutter scholarly speculation focused on how, if at all, the Court’s decision in Grutter would apply to workplace diversity efforts.

C. Parents Involved in Community Schools

The Court’s next case, however, did not address workplace diversity efforts, but rather diversity in K-12 public schools. In Parents Involved in Community Schools v. Seattle School District No. 1, parents challenged race-based student assignment plans voluntarily adopted by the Seattle and Louisville school boards to achieve racial integration. As in Bakke three decades before, the Court issued a plurality opinion in which five justices agreed to strike down the student assignment plans, but they disagreed about why the plans were unconstitutional. As Justice Powell did in Bakke, Justice Anthony Kennedy,

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39. See id. at 343. Some praised Grutter for rejecting the prevailing colorblind view of equal protection but condemned the Court’s narrow restrictions on using race to pursue diversity. See, e.g., id. at 345 (Ginsburg, J., concurring) (approving use of race in admissions but lamenting the twenty-five-year limit predicted by Justice O’Connor). Others condemned the Court for rejecting the prevailing colorblind view of equal protection but applauded Grutter’s adoption of strict scrutiny even when race is used to pursue diversity. See, e.g., id. at 351 (Thomas, J., dissenting) (rejecting majority’s approval of race-conscious admission plans but agreeing that strict scrutiny properly applied and endorsing Justice O’Connor’s twenty-five year limit on use of race in admissions).


43. See, e.g., Estlund, supra note 4, at 215 (arguing Grutter will affect public and private employment).

44. 551 U.S. 701 (2007).

45. Id. at 709–10.

46. Chief Justice Roberts, in a plurality opinion joined by Justices Scalia, Thomas, and Alito, reasoned that student body diversity was not a compelling interest outside of
writing alone, joined the four liberal members of the Court in affirming
the compelling nature of the diversity interest even outside the context
of higher education, but he voted with the conservative justices to
strike down the particular plans at issue. Perhaps most notably, Jus-
tice Kennedy was unwilling to join the conservative plurality in finding
these race-based student assignment plans unconstitutional per se. In
a forceful response to Chief Justice John Roberts’s insistence on
constitutional colorblindness, Justice Kennedy observed: “The endur-
ing hope is that race should not matter; the reality is that too often it
does.”

Justice Kennedy acknowledged the modern realities of race while
also affirming the distinction between permissible and impermissible
uses of race as set forth in Grutter and Gratz. He emphasized that the
plan at issue involved the type of mechanical use of race proscribed in
Gratz, rather than the nuanced and flexible use of race approved in
Grutter. Thus, while acknowledging that race-conscious assignment
may sometimes be permitted to achieve the goal of student body diver-
sity, Justice Kennedy concluded that Seattle and Louisville had not
proven the need for the “crude” ways they had used race to assign stu-
dents to schools.

D. Fisher v. University of Texas at Austin

Buoyed by the Gratz win and the favorable plurality decision in
Parents Involved, opponents of diversity continued searching for oppor-
tunities to limit, or even overturn, the Court’s new diversity doctrine.

higher education. Id. at 724–25; see also id. at 771 (Thomas, J., concurring). Moreover,
the race-conscious student assignment plans at issue were not narrowly tailored to meet
any such interest in diversity. Id. at 726.

47. See id. at 787–88 (Kennedy, J., concurrence in part and concurring in the judg-
ment). Justice Kennedy reasoned that the goals of avoiding racial isolation and ensuring
racial integration among public elementary and secondary schools were distinct from,
but still related to, the interest in student body diversity recognized in Grutter. Id. at
789–90. Justice Kennedy explicitly disagreed with the plurality’s rejection of a diversity
interest as compelling outside of higher education. Id. at 791.

48. Id. at 798. Importantly, Justice Kennedy had not joined the majority in upholding
the RCAP in Grutter. 539 U.S. 306, 387–89 (Kennedy, J., dissenting). Although he
agreed that student body diversity was a compelling interest there, he disagreed with the
majority that the law school’s consideration of race was narrowly tailored. Id. Instead, he
found the law school’s use of race to be more like the racial balancing proscribed in Bakke
than the individualized and flexible use of race required by strict scrutiny. Id.

49. Parents Involved, 551 U.S. at 782–83 (Kennedy, J., concurring in part and con-
curring in the judgment).

50. Id. at 787.

51. Id. at 792–93 (“If Gratz is to be the measure, the racial classification systems
here are a fortiori invalid.”). Justice Kennedy called the Seattle plan “systematic, indi-
vidual typing by race” and found Louisville’s student assignment plan too ambiguous to
allow for judicial determination of whether it was narrowly tailored. Id. at 784–85, 789.

52. Id. at 786–87. Justice Kennedy found that Seattle failed to substantiate the
need for racial balancing in schools, while Louisville failed to demonstrate its use of race
was necessary to achieve desired diversity. Id.
RCAPs remained an obvious target because they were widely used at the country’s most selective colleges and universities.53 This opposition effort led to Fisher v. University of Texas at Austin.54 Fisher challenged the University of Texas at Austin’s (UT) RCAP by similarly arguing that it violated the constitutional guarantee of equal protection.55 The Supreme Court granted certiorari in Fisher, despite having already resolved the constitutionality of RCAPs, because UT’s RCAP differed in one material respect from the RCAP upheld in Grutter, or even the one struck down in Gratz. Unlike the plans in Grutter and Gratz, admissions at UT were largely determined by a race-neutral plan.56 Fisher argued that UT’s success in achieving student body diversity through this race-neutral plan made its supplemental RCAP unnecessary.57 In other words, Fisher contended that, despite more than a decade remaining on the twenty-five-year clock Justice O’Connor announced in Grutter, the time for RCAPs had expired at UT. The Supreme Court rejected both arguments. Fisher affirmed Grutter, and once again approved the diversity interest generally and RCAPs specifically.58 The Court in Fisher also took the opportunity to clarify and refine the precise constitutional contours of its diversity doctrine.59

53. These challenges show no signs of abating. Cases have more recently been filed against Harvard University challenging the race-conscious plan on which Powell’s plurality ruling in Bakke was based, and against the University of North Carolina. See Students for Fair Admissions, Inc. v. Univ. of N.C., 1:14-CV-954, 319 F.R.D. 590 (M.D.N.C. 2017); Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 1:14-CV-14176-ADB, 308 F.R.D. 39 (D. Mass. 2015).

54. Fisher appealed twice to the Supreme Court, generating two separate decisions. The first was a fairly uncontroversial decision clarifying the applicable standard of review. See Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (Fisher I). The second forms the basis of the Court’s refinement of its diversity doctrine and is the subject of analysis here. See Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198 (2016) (Fisher II).


56. Fisher I, 133 S. Ct. at 2416. This plan, known as the “Top Ten Percent Plan,” granted admission to the top ten percent of the state’s graduating high school seniors. It was adopted by the state legislature in response to a post-Bakke case in which the Fifth Circuit ruled the University of Texas’s RCAP unconstitutional. Id.; see also Hopwood v. Texas, 78 F.3d 932, 996 (5th Cir. 1996).

57. After the Supreme Court’s decision in Grutter effectively overruled the Fifth Circuit’s decision in Hopwood, UT once again adopted a RCAP but only to supplement, not supplant, the otherwise race-neutral Top Ten Percent Plan. See Fisher II, 136 S. Ct. at 2205.

58. Id. at 2214. The Court specifically rejected the claim that universities must support asserted interests in diversity by demonstrating some strong basis in evidence. Id. at 2210. Instead, the Court defined the more deferential standard of proof as only requiring universities to offer some “reasoned, principled explanation” for an asserted interest in diversity. Id. at 2211.

59. Fisher I clarified that judicial deference to universities pursuing student body diversity is applicable only under the first prong of strict scrutiny, when determining whether the interest in diversity is compelling. See id. at 2208 (citing Fisher I, 133 S. Ct. at 2419–20). However, universities receive no deference when a court evaluates the constitutionality of RCAPs under the second, narrow-tailoring prong of strict scrutiny. Id.
The Court clarified the meaning of “critical mass.” In rejecting Fisher’s argument that “critical mass” represents some fixed numeric quantity, the Court instead said the goal need only be measurable in some way that would permit judicial review of the university’s progress toward the goal.\(^{60}\) In once again affirming the interest in student body diversity, the Court made clear that the crux of a college or university’s defense of its RCAP is the evidentiary proof required to demonstrate how the RCAP is helping to realize the educational benefits of student body diversity.\(^ {61}\)

The Court cautioned UT that it bore an ongoing evidentiary burden to collect and analyze data about the impact of both its race-conscious and race-neutral efforts to achieve diversity to permit future determinations of its continued need to consider race in admissions.\(^ {62}\) Echoing Justice O’Connor’s concern that RCAPs be limited in time, Justice Kennedy warned that the outcome in cases challenging RCAPs, particularly those like UT’s whose race-neutral efforts might suffice to achieve its diversity goals sooner rather than later, might not be so favorable for colleges and universities in the future.\(^ {63}\)

E. The Prevailing Law of Diversity

Several key elements of the Court’s diversity doctrine emerge from these four cases. First, the Court defers to institutional decision-makers in determining the importance of student body diversity to their educational missions.\(^ {64}\) Second, notwithstanding some attention to underrepresented minorities, this is not the traditional interest in remedying past discrimination most often addressed in the Supreme Court’s equal protection jurisprudence.\(^ {65}\) Diversity is a new instrumental interest signifying the broader social import of achieving goals such as expanding viewpoints to improve learning, fostering the cultural competence necessary to succeed in the twenty-first century global workplace, and promoting the ideal of democratic equality on behalf of an increasingly diverse citizenry. Third, and perhaps most important, race may be used only as a last resort and may not be used in any systematic or mechanical way, even in pursuit of these unquestionably worthy ends.\(^ {66}\) To withstand judicial review, any consideration of race must avoid becoming outcome-determinative.\(^ {67}\) Importantly, pursuit of

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60. Id. at 2210–11.
61. Id. at 2211.
62. Id. at 2210.
63. Id. at 2214–15.
64. This deference is in part an acknowledgment of the relatively uncontroversial nature of the legitimacy of the diversity interest. See Nagel, supra note 21, at 1518.
some “critical mass” of underrepresented minorities, or other numeric goals, are not fatal. 68 Finally, consideration of race may not last indefinitely. 69 The Court continues to aspire to constitutional colorblindness, despite its willingness to acknowledge the need for temporary race-consciousness. 70

II. Race-Conscious Admissions Versus Workplace Diversity Efforts: Common Ends, Different Means

The question remains how, if at all, the Court’s diversity doctrine as developed from Grutter through Fisher will translate to other contexts outside of education. One of the most likely contexts for its application may be employment, where companies have long engaged in workplace diversity efforts, and their support of diversity was instrumental to the Supreme Court’s approval of RCAPs in higher education. 71 In trying to predict how the Supreme Court’s diversity doctrine might apply in employment, it is first important to understand the similarities and differences between RCAPs and workplace diversity efforts.

A. Common Ends

RCAPs share common goals with workplace diversity efforts, but there are also material differences between the two. What connects the two is that instrumental rather than remedial concerns motivate both. Diversity efforts, regardless of context, generally seek to achieve one or more of three instrumental goals:

• Pedagogical or Epistemic Benefit—improve classroom learning (education) and problem-solving (business);

• Functional Benefit/The “Business Case”—reduce racial isolation, break down stereotypes (education), and promote cross-cultural competence (business); and

• Democratic Equality/Corporate Social Responsibility Benefit—allow organizations to reflect the demography of relevant stakeholder populations, such as the citizenry (education) or customers (business), to generate trust or goodwill with these groups. 72

68. However, diversity goals may not be reduced to mere numbers. See Fisher II, 136 S. Ct. at 2210.
69. Grutter, 539 U.S. at 342.
70. This aspiration for constitutional colorblindness has been expressed in various forms, even by those justices who endorsed diversity’s importance. See Grutter, 539 U.S. at 337–43; Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 782–98 (2007) (Kennedy, J., concurring in part and concurring in the judgment).
71. See, e.g., Estlund, supra note 4, at 215; Hawkins, supra note 4, at 2461–62.
Despite these similar motivations, RCAPs often elicit much greater objection than workplace diversity efforts. RCAPs have been a litigation target in part because college admissions are viewed as a meritocratic process that ought to reject non-meritocratic considerations such as race. But they have also been targeted because consideration of race is more explicit, and therefore more visible, in admissions than in employment.

B. Different Means

Admissions decisions are aggregated at a single decision point, most often concentrated in the fall admissions cycle. The sheer volume of decisions college admissions officers make at this single decision point necessarily makes the admissions process data-driven and quantitative. When admissions officers must select thousands of students for admission at once out of tens of thousands of applicants, they must rely heavily on a limited number of objective selection criteria and efficient sorting methods. These sorting methods mean the criterion of race operates more uniformly, and its effect can often be quantified with statistical precision. This makes college admissions an easier litigation target because of the empirical proof available about the extent to which race affects outcomes.

Employment decisions, by contrast, are more diffuse and disaggregated. They occur much more frequently and in relative isolation from one another. Even if a single employer hires thousands of employees, it makes hiring decisions separately at many discrete decision points. Employment decisions are much more likely to involve numerous...

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73. In part, this difference may be because the debate in the educational context continues to use the unpopular term “affirmative action,” but the debate in employment largely involves the more amenable term “diversity.”


75. This objection, however, rings hollow in light of the many other non-meritocratic considerations for admission, such as legacy status, athletics, geography, and socio-economic preferences, that do not elicit similar opposition.

76. How Colleges Make Admissions Decisions, C. Data, https://www.collegedata.com/cs/content/content_getarticletmpl.jhtml?articleId=10047 (last visited Apr. 23, 2018) (large institutions file data electronically and may automatically deny applicants based on GPA or test scores).

77. In particular, many colleges and universities rely on academic credentials, such as grade point average and standardized test scores, in admissions decisions. See Gratz v. Bollinger, 539 U.S. 244, 274 (2003) (“The bulk of admissions decisions are executed based on selection index score parameters set by the [admissions committee].”)

subjective selection criteria and individualized decision-making. As a result, these more qualitative employment decisions do not so easily lend themselves to the types of statistical analyses that render admissions decisions vulnerable to legal attack. Instead of race being a quantifiable variable, race rarely figures explicitly, transparently, or statistically into individual employment decisions.\footnote{The exception is when job applicants file disparate impact claims. In such cases, courts view hiring decisions in the aggregate to permit the same statistical impact analysis of race that occurs in admissions. However, the basis for such claims is that a race-neutral policy has adverse racial effects, not that employers use race impermissibly to make employment decisions. See, e.g., Griggs v. Duke Puwer Co., 401 U.S. 424 (1971).} Of course, job applicants can and do still challenge employment decisions when disparate racial effects are identified.\footnote{Even claims that race had a less explicit, but no less harmful, impact in the hiring process can be raised under a disparate impact theory of liability. See id.} However, workplace diversity efforts operate less often in a racially explicit way.

C. Hiring for Diversity Versus Admitting a Diverse Student Body

To illustrate the difference between hiring for diversity and admitting a diverse student body, consider, for example, a U.S.-based global manufacturing company attempting to hire an employee to oversee operations in Latin America. If the employer values diversity, a legitimate business concern for cultural competence, in addition to industry-based skill and experience, might inform the hiring decision.\footnote{There might initially be hundreds of applicants for a position, but modern recruiting software allows employers to cull applicants so efficiently that only several dozen are actually considered for the position and even fewer are interviewed. See Arnie Fertig, \textit{How to Get Your Online Job Application Past the Filters}, BUS. INsIDER (Oct. 25, 2013, 7:31 AM), http://www.businessinsider.com/how-to-get-your-job-application-past-the-filters-2013-10.} The company might seek someone who is not only fluent in Spanish, but who is also sufficiently familiar with Latin American social norms and culture to negotiate effectively with local business partners and interact with personnel in the region. The company might presume that targeting Hispanic applicants will yield good candidates, but that does not mean non-Hispanic applicants are excluded from consideration.\footnote{Targeted recruitment is one of the most legally defensible race-conscious employment practices. See Hawkins, \textit{supra} note 4, at 2480–81.} More importantly, each candidate will be evaluated individually, and the company will ultimately hire a candidate based on the applicant’s qualifications and ability to serve the company’s interests in Latin America. Among a diverse group of applicants, the successful candidate could be Hispanic, but the decision will be justified not by the candidate’s ethnicity, but on the basis of skill, experience, and ability.\footnote{This is not the same as “[p]referring members of any one group for no reason other than race or ethnic origin,” which the Court called “discrimination for its own sake.” Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (citation omitted).} As explained in \textit{Gratz}, “the critical criteria [for diversity] are often indi-
individual qualities or experiences not dependent upon race but sometimes associated with it.”

By contrast, colleges and universities often make decisions collectively, not individually, when considering applicants for admission. At the nation’s most selective colleges and universities, admissions decisions are not about finding the right candidate for a single job, but about identifying hundreds or thousands of students to admit in an entering class. Admissions officers determine which criteria are most important for admission and then assign them a value allowing for numerous simultaneous admissions decisions. For instance, most colleges and universities consider an applicant’s academic credentials, such as grade point average and standardized test scores, in determining admissions. Often, students are presumptively admissible if they score above certain academic thresholds and presumptively inadmissible below other thresholds. Admissions officers may read individual applications to screen for other factors, but applicants are sorted at least in part according to grades and test scores.

Colleges and universities increasingly consider the extent to which an applicant will contribute to student body diversity. Here, too, admissions officers frequently make threshold determinations about individual qualities that will make valuable contributions to diversity. These qualities might include geographic residency, socioeconomic status, gender, race, or ethnicity. Students from distant geographic regions or from a lower socioeconomic background may be perceived as contributing to diversity in the same way as students

84. Id. at 272–73 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 324 (1978)).
85. The University of Texas, for instance, described its admissions process as sorting applicants into groups based on pre-determined admissions criteria and then deciding admission for entire groups rather than by individual applicant. Fisher II, 136 S. Ct. 2198, 2206–07 (2016).
86. In 2015, the acceptance rate for the Ivy League ranged from five percent to fifteen percent. Peter Jacobs, Ivy League Admissions Letters Just Went Out—Here Are the Acceptance Rates for the Class of 2019, BUS. INSIDER (Mar. 31, 2015, 5:00 PM), http://www.businessinsider.com/ivy-league-acceptance-class-of-2019-2015-3. Harvard University was the most selective, admitting just 1,990 students of the 37,307 who applied. Id.
87. THOMAS J. ESPENSHADE & ALEXANDRA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE 75 (2009).
88. See Arcidiacono et al., supra note 79, at 695 (“In general, academic factors alone explain about [eighty percent] of admissions decisions at selective schools.”); How Colleges Make Admissions Decisions, supra note 77.
89. See Arcidiacono et al., supra note 79, at 692 (“Many colleges and universities consider the ability to amass sufficient racial and ethnic diversity among their student bodies as essential to their educational and institutional missions.”); How Colleges Make Admissions Decisions, supra note 77.
90. See Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2206 (2016) (socioeconomic status considered along with race).
from underrepresented minority groups. Students whose overall profile does not automatically qualify or disqualify them for admission may be assessed more closely, but the sheer volume of decisions lends itself to statistical analysis of how each student’s credentials, whether grades or diversity, affect admissibility.

The key difference between higher education and employment is that admissions decisions in education are largely made in the aggregate on the basis of limited, objective criteria. By contrast, employers typically select employees on an individualized and subjective basis. Both colleges and employers may pursue diversity, but admissions decisions more often involve explicit consideration of race or ethnicity in ways far less common in the workplace. Consequently, workplace diversity efforts are likely less vulnerable to legal challenge than RCAPs because of their more nuanced and flexible consideration of race and ethnicity consistent with the limits imposed in Gratz.

III. Post-Grutter Title VII Diversity Cases

Since the Supreme Court first embraced the interest in student body diversity in Grutter, many (both practitioners and academics) have been waiting for the Court to decide a case addressing workplace diversity. That day has yet to come, but lower federal courts have decided dozens of cases adjudicating workplace diversity efforts, in part by interpreting and applying Grutter. The Court’s newest diversity decision in Fisher as well as this growing body of lower court cases offers new insights into how the Supreme Court might ultimately decide whether workplace diversity efforts are subject to the same legal standards as RCAPs, and whether they are equally likely to be sustained against challenge.

A. Analysis of the Decided Cases

Lower federal courts have decided dozens of cases challenging workplace diversity efforts under Title VII. In many of these cases, courts have sided with employer defendants in much the same way the Supreme Court sided with the defendant universities in Grutter and Fisher. In cases where workplace diversity efforts have been struck

94. See Arcidiacono et al., supra note 79.
95. A trial or appellate court in each of the federal circuits (excluding the Federal Circuit) has decided at least one case challenging workplace diversity efforts. See Hawkins, supra note 4, at 2469.
96. In a quantitative survey of forty-four cases decided between 2003 and 2014, twenty-two decisions favored the employer, nineteen favored the employee, and three had mixed results. See id. at 2468–69.
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down, courts have condemned how race was used to pursue diversity, not the interest in diversity itself, much like the decisions in \textit{Gratz} and \textit{Parents Involved}.\footnote{97. See id. at 2472–73.} In some cases, courts expressly cited \textit{Grutter} in recognizing the legitimacy of an employer’s interest in workplace diversity.\footnote{98. See, e.g., Petit v. City of Chicago, 352 F.3d 1111 (7th Cir. 2003).} Others merely affirmed the Supreme Court’s reasoning in both \textit{Grutter} and \textit{Fisher} that workplace diversity is important because it generates instrumental benefits comparable to those articulated in the higher education context, such as providing employers with a competitive edge by increasing cultural competence\footnote{99. See Bissett v. Beau Rivage Resorts Inc., 442 F. App’x 148, 152–53 (5th Cir. 2011); Roy v. Soar Corp., No. 13-2846, 2014 WL 4209549 (E.D. Pa. Aug. 25, 2014).} or generating goodwill by reflecting their community’s demography.\footnote{100. See Musa v. Soar Corp., No. 13-2847, 2014 WL 6809019 (E.D. Pa. Dec. 1, 2014).} Between 2003 when \textit{Grutter} was decided and 2014 when the Supreme Court first considered \textit{Fisher}, lower federal courts decided forty-four cases challenging workplace diversity efforts.\footnote{101. For a full explanation of the methodology behind this research and analysis, see Hawkins, supra note 4, at 2467–68 n.50.} Employers prevailed in just over half of those cases.\footnote{102. See infra Table 1.} However, the table at the end of this Article demonstrates that this average rate of success obscures employers’ much greater success defending workplace diversity efforts when they are merely race-conscious but do not explicitly consider race or ethnicity in the decision-making process, than when workplace diversity efforts involve explicit racial or ethnic preferences. Employers were successful in defending the former eighty percent of the time,\footnote{103. Employers succeeded in nineteen out of twenty-four cases adjudicating diversity plans that were race-conscious but did not involve explicit consideration of race or ethnicity. Id.} but, in the latter cases, employers’ win rate fell to just fifteen percent.\footnote{104. Employers won just three of twenty cases in which diversity plans used explicit racial or ethnic preferences. Id.} This difference in outcomes is attributable to the different standards of proof that apply, depending on whether or not plaintiffs allege employers explicitly considered race in the decision-making process.

Plaintiffs alleging violations of Title VII most often elect the indirect method of proof,\footnote{105. A plaintiff may also proceed with the direct method of proof. See Sinio v. McDonald’s Corp., No. 04 C 4161, 2007 WL 869553, at *7 (N.D. Ill. Mar. 19, 2007) (“The direct method of proving unlawful discrimination requires that the plaintiff offer evidence [that] . . . if believed, proves that the employer’s actions were motivated by discriminatory intent without reliance on inference or presumption.”).} by which the fact-finder must infer that unlawful discrimination motivated the challenged employment action.\footnote{106. DeBiasi v. Charter Cty. of Wayne, 537 F. Supp. 2d 903, 921 (E.D. Mich. 2008).} If plaintiffs elect this indirect method of proof, courts apply the \textit{McDonnell...
Douglas Corp. v. Green burden-shifting framework, which proceeds in three stages. First, the plaintiff-employee must minimally establish a prima facie showing of discrimination. The burden of production (but not of persuasion) then shifts to the defendant-employer to offer some legitimate, nondiscriminatory reason for the challenged action. Finally, the burden shifts back to the plaintiff-employee, who must ultimately persuade the trier of fact that unlawful discrimination more likely than not motivated the challenged decision.

If at the second stage the employer does not dispute that the employment decision was based at least in part on race or ethnicity, but instead asserts that the action was taken to balance the racial and/or ethnic composition of the workforce, rather than proceeding to the third step of McDonnell Douglas, the employer must instead prove that it operated pursuant to a valid affirmative action plan (AAP) by meeting the United Steelworkers of America v. Weber standard. Under Weber, employers may consider race/ethnicity in employment decisions, but they must first prove that doing so is necessary to remedy a “manifest racial imbalance” in the workforce. Additionally, employers must demonstrate that any racial or ethnic preferences used do not “unnecessarily trammel the interests of the [nonminority] employees.” Weber establishes a high burden of proof for employers.

As the table at the end of this Article demonstrates, in the majority of cases in which employers conceded their use of racial or ethnic preferences as a part of workplace diversity efforts, more often than

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108. See id. Plaintiff employees need only offer evidence that (1) they are members of a protected class; (2) they were qualified for the position sought (in the case of failure to hire or promote), or met the employer’s legitimate expectations (in the case of termination or discipline); and (3) the employer treated similarly situated employees differently or took adverse action under circumstances giving rise to an inference of discrimination. Id. In the case of some reverse discrimination claims, rather than prove membership in a protected class, plaintiffs must instead prove that background circumstances demonstrate the employer discriminated against the majority. However, only some jurisdictions require that reverse discrimination plaintiffs demonstrate “background circumstances” to establish a prima facie case. See Charles A. Sullivan, Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof, 46 WM. & MARY L. REV. 1031, 1065–71 (2004) (discussing origins of the “background circumstances” requirement and its adoption and rejection by courts).
110. Id. at 807.
112. Id. at 198–99.
113. Id. at 208. The Weber standard is analogous to the equal protection strict scrutiny standard applicable to race-conscious action, and courts often treat such claims arising under both Title VII and equal protection the same. See, e.g., Murray v. Vill. of Hazel Crest, No. 06 C 1372, 2011 WL 382694, at *2 (N.D. Ill. Jan. 31, 2011) (“[T]he standards for proving discrimination that apply to Title VII are essentially the same as those applicable to [equal protection] employment discrimination claims.”).
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not they were treated as AAPs and subjected to the Weber standard.\footnote{114} However, if employers’ workplace diversity efforts did not involve any explicit consideration of race or ethnicity, and they were able to proffer some “legitimate, non-discriminatory reason” for the challenged action, employers were overwhelmingly successful in defending these diversity efforts under the McDonnell Douglas standard.\footnote{115}

Employers have been most successful in defending workplace diversity efforts in two types of cases. First, federal courts have consistently held that race-conscious diversity efforts—such as targeted or expanded recruitment, or mere diversity goals—are not per se unlawful even when, and most often precisely because, they can be justified by legitimate business concerns.\footnote{116} In cases where plaintiffs point only to employer commitments to workplace diversity generally, without offering discrete evidence that race or ethnicity was considered in making the challenged employment decision, courts have found this insufficient to satisfy even the minimal burden of establishing a prima facie case of discrimination at the first stage of McDonnell Douglas.\footnote{117} At the second stage of McDonnell Douglas, federal courts have been unwilling to second-guess employer proffers that racial or ethnic minorities hired or promoted through workplace diversity efforts were selected for their qualifications, not because of their race or ethnicity.\footnote{118}

\footnote{114. See, e.g., Humphries v. Pulaski Cty. Special Sch. Dist., 580 F.3d 688 (8th Cir. 2009); Dean v. Shreveport, 438 F.3d 448 (5th Cir. 2006); Frank v. Xerox, 347 F.3d 130 (5th Cir. 2003); Finch v. City of Indianapolis, 886 F. Supp. 2d 945 (S.D. Ind. 2012). But cf. Shea v. Kerry, 796 F.3d 42, 46 (D.C. Cir. 2015) (affirmative action plan satisfied Weber by resting on adequate remedial predicate); United States v. City of New York, 308 F.R.D. 53, 66 (E.D.N.Y. 2015) (race-conscious remedies justified by an indisputably "long history of discrimination").}

\footnote{115. Additional cases decided since this study continue to show the same general pattern, with courts typically sustaining diversity efforts against challenge, absent evidence of explicit racial or ethnic preferences. Compare Brown v. Del. River Port Auth., 10 F. Supp. 3d 556, 566 (D.N.J. 2014) (change in hiring requirements to improve diversity of candidates considered for hire did not support an inference of discrimination), and Martin v. City of Atlanta, 579 F. App'x 819, 822–23 (11th Cir. 2014) (affirming judgment for employer because desire to achieve diversity to "roughly mirror the city in which it serves" was insufficient to establish discrimination), with Locascio v. BBDO Atlanta, Inc., 56 F. Supp. 3d 1356, 1360, 1371 (N.D. Ga. 2014) (denying employer's motion to dismiss when plaintiff alleged employer was required to hire based on race rather than qualifications to meet diversity goals), and Blakely v. Big Lots Stores, Inc., No. 2:10 CV 342, 2014 WL 4261239, at *2, *16 (N.D. Ind. Aug. 28, 2014) (allowing discrimination claim to proceed to trial when plaintiff alleged termination for refusing to hire white employees instead of black employees to racially balance staff).}


\footnote{118. See Plumb v. Potter, 212 F. App'x 472 (6th Cir. 2007); Maples v. City of Columbia, No. 3:07-3568-CMC-JRM, 2009 WL 483818, at *6 n.6 (D.S.C. Feb. 23, 2009) (granting}
B. The Prevailing Title VII Law of Diversity

Federal courts have long declared that in deciding Title VII cases, they will not “sit as a super personnel agency,” second-guessing employers’ managerial prerogatives. 119 Although the source of this judicial deference differs across the educational and employment contexts, the effect is the same. Courts have accorded equivalent deference to employers in valuing workplace diversity as they have to universities pursuing student body diversity. This should not be surprising, given the interest colleges and universities espoused in better preparing students for work, and the Supreme Court’s express citation to these corporate amicus briefs when approving the diversity interest in Grutter. 120

Moreover, workplace diversity efforts differ from RCAPs under Grutter and even traditional, remedial AAPs under Weber in how explicitly they consider race. 121 Workplace diversity efforts are race-conscious but do not (or should not) involve explicit racial or ethnic preferences. As the example above illustrates, workplace diversity efforts are characterized by individual, subjective hiring decisions based on an applicant’s ability to serve the employer’s legitimate diversity interests. They involve neither the mechanical uses of race Gratz rejected, nor the kind of racial balancing frequently struck down under Weber. 122 Rather than using race or ethnicity as a proxy for an applicant’s ability to contribute to diversity, as asserted in the admissions context, employers can assess each applicant’s individual contribution to workplace diversity. 123 This difference arguably makes workplace diversity efforts less vulnerable to legal challenge than many RCAPs have been.

IV. Post-Fisher Predictions

Predicting the future of Supreme Court jurisprudence is always difficult, and wisdom cautions prudence. Nevertheless, in the wake of Fisher, and in light of the significant number of lower court cases adjudicating workplace diversity efforts decided since Grutter, it is possible

summary judgment to employer because decision about qualifications “remains vested in the sound business judgment of the employer” and, even when combined with employer’s comments about diversity, does not prove discrimination) (citations omitted); Coppinger, 2009 WL 3163211, at *8 (“[T]he fact that an employer based a hiring decision on purely subjective criteria will rarely, if ever, prove [discrimination] under Title VII.”) (citation omitted); DeBiasi v. Charter Cty. of Wayne, 537 F. Supp. 2d 903 (E.D. Mich. 2008); Jones, 493 F. Supp. 2d 18; Keating, 2007 WL 3231437.


121. For a fuller discussion of the difference between affirmative action plans (AAPs) and workplace diversity efforts, see Hawkins, supra note 73, at 90.


to offer some renewed predictions about the future of the diversity doctrine and its likely application in employment.

A. Renewed Predictions Post-Fisher

1. Deferring to Employers

In *Grutter*, *Gratz*, and *Fisher*, the Supreme Court demonstrated its willingness to defer to universities’ asserted interest in pursuing student body diversity and to recognize that interest as presumptively legitimate. The same will likely be true of workplace diversity efforts, particularly in light of federal courts’ traditional reluctance to “second guess” employers’ personnel decisions.

2. The Legitimacy of Workplace Diversity

Businesses voiced their support for the educational benefits of student body diversity in their amicus briefs in *Grutter* precisely because they were already convinced of diversity’s value in the workplace. Justice O’Connor cited to these corporate amici when describing workplace benefits as “not theoretical but real.” Unsurprisingly, after *Grutter*, a number of federal courts recognized employers’ interest in workplace diversity as legitimate. In fact, most federal courts that have addressed the issue have refused to find that merely having a workplace diversity program, or professing a commitment to diversity, is sufficient to prove Title VII discrimination. They have instead said that diversity is a “worthy goal” and “admirable” for employers to pursue. This suggests the Supreme Court is likely to find workplace diversity as legitimate as the pursuit of student body diversity. Success or failure in future cases will instead depend on how diversity is pursued. Employers, just like colleges and universities, will need to satisfy their evidentiary burden of proving that race is not being used improperly even in pursuit of diversity.

3. Race-Conscious Without Racial Preferences

Synthesizing the Supreme Court’s diversity doctrine from *Grutter* through *Fisher*, in the equal protection context public employers must

124. *Id.* at 2214–15.
125. See *supra* note 119 and accompanying text.
126. Business support for workplace diversity efforts is overwhelming. Although these efforts began as early as the 1970s, they became widespread in the early 1990s. See Hawkins, *supra* note 73, at 84 (proliferation of corporate diversity efforts following settlement of “megacases” of racial discrimination in the early 1990s).
127. *Grutter* v. *Bollinger*, 539 U.S. 306, 330 (2003). Justice O’Connor acknowledged that the interest in student body diversity was compelling in part because diversity “better prepares students for an increasingly diverse workforce and society.” *Id.* (citation omitted).
128. See *supra* note 116 and accompanying text.
129. See *supra* note 117 and accompanying text.
130. See *supra* note 117 and accompanying text.
131. This outcome has become less certain now that Justice Kennedy, who authored the *Fisher II* decision, has been replaced on the Court by Justice Kavanaugh.
ensure they factor race into employment decisions in an appropriately narrow way. They should first investigate race-neutral alternatives and, only after showing that such alternatives are unlikely to succeed in achieving workplace diversity, should they use race in making employment decisions, and then only in an individualized and flexible way. This will prevent race/ethnicity from becoming overly determinative in the decision-making process in ways that proved fatal in both *Gratz* and *Parents Involved*. Title VII cases suggest that private employers are well-advised to ensure that diversity plans do not involve the type of explicit racial or ethnic preferences typical of AAPs. It may well be that there is greater latitude for the explicit consideration of race or ethnicity in public employment than in private employment.132

Examples of defensible race-conscious workplace diversity efforts include targeted recruitment, employee affinity groups, and adoption of diversity goals. These efforts recognize the value of racial diversity in the workplace, but do not involve explicit racial preferences. By contrast, examples of explicit racial preferences include attempts to racially balance the workforce and insisting that certain positions be filled based on race or ethnicity. When employers use explicit racial preferences, courts are inclined to treat these efforts as AAPs, as some scholars predicted they would, even if the employer justifies them in part by concerns for diversity, and these efforts rarely have been sustained when challenged.133

Similar to college admissions, race should not be the determinative factor in employment decisions.134 Race should not be used as a proxy for diversity given the discrete and subjective nature of most employment decisions. When employers evaluate each individual candidate for the ability to contribute to workplace diversity, courts will be less likely to “second guess” these decisions.135 Applying these standards, case law suggests employers will likely be just as successful defending workplace diversity efforts against legal challenges as colleges and universities have been defending RCAPs.

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132. This possibility was also raised in the scholarly predictions made in the wake of *Grutter*. See Eric A. Tilles, *Lessons from Bakke: The Effect of Grutter on Affirmative Action in Employment*, 6 U. Pa. J. Lab. & Emp. L. 451, 461 (2004). Although private employers are never subject to equal protection, public employers are subject to both equal protection and Title VII.

133. See Hawkins, supra note 4, at 2472.

134. This is true of narrow tailoring standards under the Supreme Court’s diversity doctrine and is equally true of prevailing Title VII standards as applied to workplace diversity efforts. See supra note 114 and accompanying text.

135. For example, when employers assert that candidates are chosen on the basis of individual merit, rather than simply on the basis of race, lower federal courts have overwhelmingly found employment decisions defensible under Title VII, even if the decision is motivated in part by diversity considerations. See supra note 119 and accompanying text.
B. Guiding Principles

The Supreme Court’s diversity doctrine may well have settled the normative question of diversity’s importance, but the empirical question of whether and how long race may be considered in pursuing diversity remains highly contested. The Court’s continuing aspiration for constitutional colorblindness suggests that, at some point, consideration of race will likely be proscribed regardless of reason or context. Employers should recognize these limitations in the Court’s diversity doctrine and proceed with caution.136

Two principles should guide employers’ workplace diversity efforts. First, employers should be mindful of the difference, both practical and legal, between race-conscious efforts and explicit racial or ethnic preferences. This difference may prove critical to defending workplace diversity efforts. Rather than relying on explicit racial or ethnic preferences to achieve diversity goals, employers should consider whether race-conscious efforts would suffice, or even prove superior, in realizing diversity’s instrumental benefits. For instance, employers should not assume that race or ethnicity is a suitable proxy for cultural competence, particularly if the selection process allows for individualized assessment. While employers may aspire to diversity in hiring and even recruit diverse applicants, employers should not expressly rest employment decisions on the race or ethnicity of applicants.

Second, with the normative value of diversity well-established, future cases will likely focus on empirical support for considering race or ethnicity in the particular context. Just as Justice Kennedy warned the University of Texas in Fisher, employers should take care to marshal the evidence required to demonstrate either (1) that their efforts are race-conscious without involving explicit racial or ethnic preferences; or (2) that racial and ethnic preferences are necessary to achieve diversity’s benefits.137 Perhaps most important, potential defendants must be prepared to demonstrate that their use of racial or ethnic preferences has some end in sight.

Conclusion

The Supreme Court has recognized that diversity is a constitutionally compelling interest in education. Numerous lower federal courts have extended this recognition to the workplace, and it seems

136. This is perhaps more true today given the Court’s new composition and is predicted shift even further to the right. See Phillip Bump, How Brett Kavanaugh Would Shift the Supreme Court to the Right, WASH. POST (July 10, 2018), https://www.washingtonpost.com/news/politics/wp/2018/07/10/how-brett-kavanaugh-would-shift-the-supreme-court-to-the-right/?utm_term=.323a52517c70.

137. Explicit consideration of race or ethnicity by public employers may be more defensible than in the private employment context. See supra note 133 and accompanying text.
likely the Supreme Court will endorse this judicial extension of the normative value of diversity in our increasingly multicultural society. Reviewing the diversity doctrine in the educational context offers an important window into how the Supreme Court might decide a future case challenging workplace diversity efforts. Not only is the Court likely to approve diversity in employment, it is also likely to impose the same limitations on workplace diversity efforts that it has imposed on RCAPs. Taking cues from the decided cases, colleges, universities, and employers alike now have critical insight into how best to structure their diversity efforts in the future to ensure they achieve the instrumental benefits of diversity while also insulating themselves from legal liability.
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### Outcomes of Federal Cases Challenging Workplace Diversity

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<th>Defendant</th>
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The International Labour Organization’s Innovative Approach to Ending Gender-Based Violence and Harassment: Toward a New International Framework for the World of Work

Eric Stener Carlson*

Introduction

Ending violence and harassment in the world of work is a top international objective. The International Labour Organization (ILO)\(^1\) has launched a process that could lead to the first international treaty to end violence and harassment in the world of work.\(^2\) As a part of this effort, the ILO emphasizes gendered aspects of violence and harassment, including the power imbalance between men and women and the harmful gender stereotypes that underpin violence and harassment.\(^3\)

For nearly a century, the ILO has created international labour standards.\(^4\) These standards take the form of Conventions—binding international treaties open to ratification by member States—and Recommendations that provide non-binding guidelines.\(^5\) ILO standards are created not just for the benefit of a target group, but also by

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2. See infra Part I.
3. See infra Part I.
that group. Representatives from 187 ILO member states, workers’ organizations, and employers’ organizations—which the ILO calls its “tripartite” partners—actively debate and draft these standards with equal standing and voice. This dialogue creates international labour standards grounded in the reality of work, proposed and agreed to by those most affected.

The content and form of a potential standard or standards to end violence and harassment in the world of work—whether a Recommendation, Convention, or both—will be decided through a “double discussion” by the tripartite partners. The first discussion was held at the ILO’s annual International Labour Conference (ILC) in June 2018. A second discussion will be held at the ILC in 2019. To support these discussions, the International Labour Office prepared technical reports exploring core concepts for debate and highlighting the tripartite partners’ concrete responses to violence and harassment. In addition, the ILO held a Meeting of Experts in October 2016 that produced tripartite conclusions on the topic.

Several ILO international labour standards already address violence and harassment. These include the mention of sexual harassment in the Indigenous and Tribal Peoples Convention and the amendments to the Maritime Labour Convention concerning bullying and harassment. However, these existing international labour standards cover only specific worker groups and do not define “violence and harassment” or provide guidance on responsive measures. While other international human rights instruments speak to issues of vio-

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10. See infra Part I.

11. See infra Part I.


Ending Gender-Based Violence and Harassment

violence and harassment, including gender-based violence and harassment, none offers solutions specifically designed for the world of work.

An international labour standard could change and revitalize national and international approaches to violence and harassment in the world of work. For example, the Domestic Workers Convention promotes consultation with organizations of domestic workers on matters affecting them and has made a significant impact in shaping national legislation. Further, national and regional courts have referred to the ILO’s Recommendation Concerning HIV and AIDS and the World of Work, which provides guidance relating to HIV-based discrimination and harassment. Therefore, a new international labour standard or standards on violence and harassment in the world of work could be a game changer, filling in a normative gap and providing much-needed guidance to governments, workers, and employers on how to end gender-based violence and harassment.

This Article provides an overview of the ILO’s standard-setting process that emerged from the Meeting of Experts and describes how gender is conceived of within it. Part I explains the continuum of violence and harassment in the world of work. Part II situates gender within the continuum. Part III addresses sexual harassment as a specific form of gender-based violence and harassment. Part IV describes an emerging good practice for ending sexual harassment in the garment sector through the shifting of power relations.


I. The Continuum of Violence and Harassment

The ILO’s Governing Body placed a standard-setting item on the ILC’s 2018 agenda entitled “Violence against women and men in the world of work,” and convened a tripartite Meeting of Experts to provide guidance on the subject. The word “harassment” was not referred to in either the title of the agenda item or of the meeting, but was folded into the overall discussion on violence. For example, the background paper prepared for the Meeting of Experts considered sexual harassment under the topic of gender-based violence.

However, at the October 2016 meeting, the Experts, from all regions of the world, proposed that the word “violence” be replaced by “violence and harassment.” The Governing Body approved renaming the standard-setting item as “Violence and harassment against women and men in the world of work.” Importantly, the Meeting of Experts proposed an innovative conceptual framework to illustrate this inclusiveness, called the “continuum” of violence and harassment.

The background paper prepared for the Meeting of Experts details the challenges in defining one universally accepted definition of violence in the world of work because of legal, cultural, and linguistic differences around the world. The Experts did not define violence and harassment. However, they noted that “for the purposes of the standard-setting discussion, violence and harassment should be treated as a continuum of unacceptable behaviours and practices.”

Because “an unacceptable behaviour or practice could contain elements of both harassment and violence,” the Experts suggested conceptualizing them as points along a continuum where elements could...
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Overlap. This approach is reflected in the European framework agreement on harassment and violence at work and in examples from national legislation around the world. The Experts specifically mentioned the example of sexual harassment, which could contain elements of physical, sexual, and psychological violence, as illustrated in the accompanying figure.

Gender-based violence and harassment are not the only behaviours and practices included within the continuum. Among others, the Experts discussed “physical abuse, including assault, battery, attempted murder and murder; sexual violence, including rape and sexual assault; verbal abuse; bullying; psychological abuse and intimidation; sexual harassment; threats of violence and stalking.”

Moreover, not all forms of violence were addressed at the Meeting of Experts. The meeting’s background paper clarified that its discussion was “focus[ed] on the types of violence in the world of work where international standards are absent or limited,” and that there was a particular emphasis on psychological and sexual violence. Therefore, the background paper and the subsequent meeting did not discuss

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30. Id.
31. Id. at 5.
32. Id. at 3.
33. Id. at 6. These were some of the forms of violence and harassment mentioned by the Worker Vice-Chairperson at the Meeting of Experts. Id.
II. Understanding “Gender” Within Gender-Based Violence and Harassment

Regarding the continuum of violence and harassment, the Meeting of Experts concluded: “A particular focus needs to be placed on gender-based violence.” To understand the Experts’ position and properly situate gender-based violence and harassment within this continuum, one must understand the ILO’s vision of gender equality.

The Meeting of Experts’ agenda included “examin[ing] the gender dimensions of violence in the world of work.” This approach reflects the importance gender equality has within the ILO’s guiding concept of decent work. For example, the ILO’s resolution concerning gender equality at the heart of decent work states: “Sexual harassment and other forms of harassment are serious forms of discrimination across the world that undermine the dignity of women and men, negate gender equality and can have significant implications. Gender-based violence in the workplace should be prohibited . . . .

Gender “refers to the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men.” Gender is expressed through socially assigned roles for how men and women are expected to behave, and these roles carry over to the world of work. For example, while gender roles are changing, society has traditionally viewed women as playing a support role to men at work, and while men have been expected to play active roles as leaders, women have been expected to follow passively. In addition, women traditionally have been cast in the role of

35. Id. The Worker Vice-Chairperson mentioned trafficking during the Meeting of the Experts when she remarked that “economic vulnerability and poverty can lock women into dependence on exploitative employers, unethical recruitment agents[,] and traffickers.” See Report of the Meeting, supra note 16, at 25.
42. See id.
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unpaid care providers, while men have been expected to be remunerated workers. These restrictive roles are the result of complex power relations between and among men and women, and they are arranged, predominantly, to perpetuate male domination (also referred to as patriarchy).

The ILO’s Meeting of Experts made a link between these power relations (based on gender and other factors) and mistreatment in the world of work. “Imbalanced power relationships,” they wrote, “including due to gender, race and ethnicity, social origin, education and poverty, could lead to violence and harassment.”

Perpetrators use their power to enforce negative gender roles and to police men and women to maintain these roles. This can happen, for example, when a woman worker enters a predominantly male workplace and her colleagues use sexual harassment to assert their power. As the Experts noted: “Workplaces where the workforce is dominated by one gender or ethnicity might be more hostile to people not conforming to established gender norms or individuals coming from under-represented groups.”

While most reported cases of gender-based violence are perpetrated by men against women, the underpinning elements are socially constructed power imbalances, and not the sex of the victim or perpetrator. As the background paper to the Meeting of Experts notes, “[G]ender-based violence can be committed by or against both women and men, such as violence against non-gender conforming men, including men who are or who are perceived to be gay, bisexual or trans.”

According to this view, a homophobic attack against a gay man and the harassment of a heterosexual man perceived as “too effeminate” are all forms of gender-based violence and harassment.

From this perspective, “violence and harassment against women” and “gender-based violence and harassment” are not synonymous.

46. See Fact Sheet: Homophobic and Transphobic Violence, U.N. Human Rights Officer of the High Comm’r, Homophobic and Transphobic Violence (May 2017), https://www.unfe.org/wp-content/uploads/2017/05/Homophobic-and-Transphobic-Violence.pdf. (“Attacks on people because of their sexual orientation or gender identity are often driven by a desire to punish those seen as defying gender norms and are considered a form of gender-based violence. You do not need to be lesbian, gay, bisexual, transgender or intersex to be attacked: the mere perception of homosexuality or of transgender identity is enough to put people at risk.”).
Rather, violence and harassment against women is a specific form of gender-based violence and harassment. As mentioned above, violence and harassment against men because they are men or because of their gender roles is gender-based. Thus, the ILO delegates at a meeting in 2009 rejected the phrase “violence against women” in favor of “gender-based violence” “to avoid being gender-biased.”

III. Sexual Harassment as a Specific Form of Gender-Based Violence and Harassment

The Meeting of Experts discussed many manifestations of violence and harassment. However, the only forms they referred to directly in their final conclusions were gender-based violence, in general, and domestic violence and sexual harassment, specifically. This section explains the ILO’s understanding of sexual harassment as a form of gender-based violence and, at the same time, provides critical context for the following section on an emerging good practice.

Although sexual harassment in the world of work has been documented since at least the 1800s, and probably occurred for centuries earlier, there was no vocabulary to describe it until the 1970s. The modern women’s rights movement brought an understanding of sexual harassment against women workers, defined generally as “the unwanted imposition of sexual requirements in the context of a relationship of unequal power.” The 1993 UN Declaration on the Elimination of Violence against Women includes sexual harassment at work within its understanding of violence against women. In its General Recommendation 19 in 1992, the Committee on the Elimination of Discrimination Against Women (CEDAW) refers to “sexual harassment in the workplace” as an example of “gender-specific violence.”

48. Report of the Meeting, supra note 16, at 39–42. The Experts additionally noted their concern about “[i]nappropriate use of technology,” although they did not mention it as a separate form of violence. Id. at 40. The Experts concluded that domestic violence is “relevant to the world of work when [it] impact[s] the workplace” and also described how the workplace “provides an entry point to mitigate the effects.” Id. at 35.
The ILO’s Committee of Experts on the Application of Conventions and Recommendations (CEACR)\(^{53}\) has identified two key elements of definitions of sexual harassment in the world of work: “quid pro quo” and “hostile working environment.”\(^{54}\) “Quid pro quo” sexual harassment is understood as:

any physical, verbal or non-verbal conduct of a sexual nature and other conduct based on sex affecting the dignity of women and men, which is unwelcome, unreasonable, and offensive to the recipient; and a person’s rejection of, or submission to, such conduct is used explicitly or implicitly as a basis for a decision which affects that person’s job.\(^{55}\)

“Hostile working environment” describes “conduct that creates an intimidating, hostile or humiliating working environment for the recipient.”\(^{56}\)

Sexual harassment is one of the forms of violence and harassment in the world of work most commonly addressed by legislation.\(^{57}\) The ILO’s review of eighty countries’ legislation found that sixty-five address sexual harassment in the world of work.\(^{58}\) Of those sixty-five, the most common approach to sexual harassment (forty-eight percent) was to include both quid pro quo and hostile working environment sexual harassment.\(^{59}\) Because negative power relations and negative gender roles are at the root of sexual harassment, an effective solution will shift these power relations to transform gender roles.

IV. An Emerging Good Practice: Ending Sexual Harassment in the Garment Sector by Recalibrating the Balance of Power

The Meeting of Experts noted: “Women are disproportionately represented in low-wage jobs, especially in the lower tiers of the supply chains, and are too often subject to discrimination, sexual harassment and other forms of workplace violence and harassment.”\(^{60}\)


55. *Id.*

56. *Id.*


58. *Id.*

59. *Id.* at 11.

makes especially appropriate the ILO’s effort to design an innovative response to sexual harassment against women in supply chains within the export-oriented garment industry.

Sexual harassment has been identified as a “prevalent form of violence at work in the export-oriented garment industry.”61 This prevalence is not intrinsic to the work itself; rather, it comes from a complex convergence of risk factors and psychosocial hazards.62 For example, most garment factory workers are young women, often migrants who have moved far from their families and may not even speak the local language.63 Lacking support networks, and unfamiliar with their rights, they encounter decidedly negative power relations with (typically male) supervisors who monitor their productivity and determine bonuses.64 Consequently, “[s]upervisors can use their position to sexually harass them, and disempowered workers may interpret such conduct as a condition to their employment or promotion.”65

The ILO, in partnership with the International Finance Corporation, has a programme called “Better Work” to improve application of labour standards and competitiveness in the global garment supply chain.66 The programme, present in seven countries, includes approximately 1,500 factories.67 At the factory level, the programme provides services such as assessing application of national and international labour standards; facilitating dialogue between workers and employers; and providing training to managers, supervisors, and workers.68

In recent years, Better Work has placed particular emphasis on preventing and addressing sexual harassment.69 Through targeted training to managers, line supervisors, and workers, Better Work has raised awareness of sexual harassment and established policies and procedures that significantly reduced workers’ concerns about sexual

62. See Meeting of Experts, supra note 45, at 17–20.
63. See Rossi, supra note 61, at 37.
64. Id.
65. Id.
67. Id. The seven countries are Bangladesh, Cambodia, Haiti, Indonesia, Jordan, Nicaragua, and Vietnam. Id.
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harassment. The Better Work Supervisory Skills Training has been implemented in multiple countries. One study of twenty-four Bangladesh garment factories estimated that women were only four per cent of line chiefs and four per cent of line supervisors, while constituting seventy-eight per cent of line operators. Supervisors and managers overwhelmingly are men. Within the factories surveyed, ninety-three per cent of supervisors hired in 2013 were men. Moreover, data suggest that most supervisors were hired from outside the factories, meaning that women currently working in those factories have less of a chance to grow into managerial positions. To address the power imbalance between supervisors and workers that often underlies sexual harassment, the ILO, within its broader framework programme, “Improving Working Conditions in the Ready-Made Garment Sector in Bangladesh,” is:

- Training mid-level management on how to select, promote, and retain women workers;
- Building capacity of women machine operators so that they gain more confidence in their abilities; and
- Encouraging workers to learn how to advance colleagues’ skills, balance production lines, and calculate worker efficiency.

Training and capacity building is being rolled out as a pilot project at twenty-nine factories. As of October 2017, 169 women sewing operators from these factories had taken part in skills training to prepare for supervisory positions. Certainly, beyond promoting women there must be significant cultural change, but anecdotal evidence suggests that new women supervisors feel more empowered. The hope is that a critical mass of women supervisors and managers will lead to a shift in power relations and a reduction in sexual harassment. At the very least, placing women in positions of greater

73. Id.
74. Id.
75. Id.
77. Id.
78. Id.
79. See Babbitt, supra note 71, at 44.
power should help address the “negative societal and workplace culture, and psychosocial risks, as well as the design of the workplace” as a way to prevent violence and harassment. As with any action to correct gender inequalities, policy and legislative changes are needed to end sexual harassment. In this regard, the possible ILO standard or standards could provide a framework for how to respond to violence and harassment in the world of work, including those forms that are gender-based.

Conclusion

The first discussion of the ILO’s standard-setting process on violence and harassment took place at the June 2018 International Labour Conference. ILO representatives from governments and organizations of workers and employers from all over the world discussed a range of issues, including the responses to a questionnaire sent out to all ILO member states “on the scope and content of the proposed instrument or instruments.” The first discussion was an important step toward an international labour standard or standards for the elimination of violence and harassment in the world of work. The topic of gender-based violence and harassment has been integral to the discussion thus far, and it has been placed within the broader understanding of violence and harassment.

82. Ending Violence and Harassment, supra note 44, at 105.
A Gender Transition Primer: The Evolution of ADA Protections and Benefits Coverage

Nonnie L. Shivers*

Introduction

Issues involving the rights of lesbian, gay, bisexual, and transgender (LGBT) persons (and in particular LGBT employees) make headlines across the nation almost daily.¹ From legislation involving bathroom usage² to the evolving split in three federal appellate courts over whether federal law prohibits discrimination on the basis of sexual orientation or gender identity,³ LGBT rights are a rapidly evolving area of the law. These developments create legal and practical considerations for employers and employees as they navigate a patchwork of changing federal, state, and local laws.

Part I of this Article provides an overview of these issues under two particularly relevant statutes: Title VII of the Civil Rights Act of 1964 as amended by the Civil Rights Act of 1991 (Title VII) and the Americans with Disabilities Act of 1990 (ADA). Part II introduces the historical interpretation of the ADA regarding gender identity. Parts III and IV examine two current federal cases that depart from historical ADA interpretations. Part V explores benefits coverage for gender-transitioning employees and related employer legal challenges. Part

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VI admonishes federal contractors to appreciate enhanced employee protections, and Part VII cautions all employers to familiarize themselves with state and local disability law to avoid potential future litigation. Part VIII articulates best practices for employers of gender-transitioning employees.

I.  Brief Overview of the Evolution of Title VII and ADA Issues

The issue of whether Title VII prohibits discrimination based on gender identity and sexual orientation has been hotly contested. Since 2015, the U.S. Equal Employment Opportunity Commission’s (EEOC) position has been that Title VII’s prohibition of discrimination based on “sex” includes sexual orientation, gender identity, and transgender status.4 In 2017, the Seventh Circuit became the first federal appellate court to agree with the EEOC.5 The Second Circuit, sitting en banc, joined the Seventh Circuit later that year, also ruling that discrimination because of sexual orientation constitutes sex discrimination under Title VII.6 The Eleventh Circuit reached the opposite conclusion.7 The Supreme Court has already rejected one petition for certiorari involving this circuit split.8

By contrast, disability law has played little to no role until recently in the development of protections against discrimination for transgender individuals, at least at the federal level. This is almost certainly because the ADA specifically excludes certain gender identity disorders from its definition of “disability.”9 This exclusion has been controversial, particularly in recent years as the LGBT rights movement has gained political momentum and won significant legal victories at federal, state, and local levels.10 Some have criticized the ADA’s exclusion of gender identity disorders (GID) as discriminatory, misguided, and outdated. One commentator asserted that GID is explicitly excluded from the ADA “not because people with GID are not impaired . . . , but rather because, in 1989, several members of Congress believed

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5. Hively, 853 F.3d at 341.
7. Evans, 850 F.3d at 1255.
10. See, e.g., Hively, 853 F.3d at 341.
that people with GID were morally bankrupt, dangerous, and sick.”
Regardless, for over twenty-five years, courts uniformly interpreted the ADA’s plain language as barring disability claims based on GID, ostensibly because the statutory coverage language specifically excludes “gender identity disorders not resulting from physical impairments.”

Until 2013, the Diagnostic and Statistical Manual of Mental Disorders (DSM), published by the American Psychiatric Association (APA), classified “gender identity disorder” as a mental disorder that required a showing of: (1) strong and persistent cross-gender identification; and (2) persistent discomfort about assigned sex or a sense of inappropriateness in the gender role of that sex. This definition was criticized for stigmatizing all transgender persons with a mental disorder. But in 2013, the APA removed GID from the DSM-V and added a new mental condition of “gender dysphoria.” The DSM-V defines gender dysphoria in adolescents and adults as (1) a difference between one’s experienced/expressed gender and assigned gender; (2) that is accompanied by clinically significant distress or problems functioning; and (3) lasts at least six months and is shown by at least two of the following:

- A marked incongruence between one’s experienced/expressed gender and primary and/or secondary sex characteristics;
- A strong desire to be rid of one’s primary and/or secondary sex characteristics;
- A strong desire for the primary and/or secondary sex characteristics of the other gender;
- A strong desire to be of the other gender;
- A strong desire to be treated as the other gender;
- A strong conviction that one has the typical feelings and reactions of the other gender.

The removal of GID from the DSM and addition of gender dysphoria narrow the circumstances under which transgender persons are

15. Id.
considered to have a mental disorder.\textsuperscript{17} For the psychiatric community, the focus has shifted from identifying as transgender, which is not a mental disorder, to suffering severe distress as a result of identifying as transgender, which can be a mental condition.\textsuperscript{18} This change in psychiatric practice is starting to affect the legislative and judicial community.

II. Historical Interpretation of the ADA’s Inapplicability to Gender Identity Disorders

The ADA’s purpose, in part, is to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”\textsuperscript{19} The ADA considers persons “disabled” if they (1) have a physical or mental impairment that substantially limits one or more major life activities; (2) have a record of such an impairment; or (3) are regarded as having such an impairment.\textsuperscript{20} This is a broad, but not unlimited, definition. In fact, there are specific statutory exceptions. ADA exclusions include “transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders.”\textsuperscript{21} That provision had been uniformly interpreted as excluding gender identity claims from ADA coverage.\textsuperscript{22}

III. Case Study: Blatt v. Cabela’s Retail, Inc.

In 2006, Cabela’s, a popular sporting goods store, hired Kate Lynn Blatt, a transgender woman, as a merchandise stocker.\textsuperscript{23} Shortly after being hired, Blatt informed Cabela’s that she suffered from gender dys-

\textsuperscript{17} See Wynne Parry, \textit{Gender Dysphoria: DSM-5 Reflects Shift in Perspective on Gender Identity}, HUFFPOST WELLNESS (June 4, 2013, 2:11 PM), https://www.huffingtonpost.com/2013/06/04/gender-dysphoria-dsm-5_n_3385287.html (“This shift reflects recognition that the disagreement between birth gender and identity may not necessarily be pathological if it does not cause the individual distress. . . . Transgender people and their allies have pointed out that distress in gender dysphoria is not an inherent part of being transgender. This sets it apart from many other disorders in the DSM, because if someone is depressed, for example, he or she is, almost by definition, distressed as part of depression. In contrast, the distress that accompanies gender dysphoria arises as a result of a culture that stigmatizes people who do not conform to gender norms.”).

\textsuperscript{18} Id. (“In the old DSM-IV, [gender identity disorder] focused on the ‘identity’ issue—namely, the incongruity between someone’s birth gender and the gender with which he or she identifies. While this incongruity is still crucial to gender dysphoria, the drafters of the new DSM-5 wanted to emphasize the importance of distress about the incongruity for a diagnosis.”).


\textsuperscript{20} Id. § 12102(1).

\textsuperscript{21} Id. § 12211(b)(1).


\textsuperscript{23} Blatt Complaint, supra note 22, ¶¶ 12–13.
phoria. Cabela’s allegedly responded by prohibiting Blatt from using the female employee restroom and refusing to issue her a female uniform or a name tag with her female name. When Cabela’s fired her six months after she was hired, Blatt sued, alleging, in part, that Cabela’s had violated the ADA by discriminating and retaliating against her and failing to accommodate her disability.

Blatt alleged that she was diagnosed with “Gender Dysphoria, also known as Gender Identity Disorder, a medical condition in which a person’s gender identity does not match his or her anatomical sex at birth.” She also alleged that her “medical condition is a disability within the meaning of the ADA in that it substantially impairs one or more . . . major life activities, including, but not limited to, interacting with others, reproducing, and social and occupational functioning.”

Cabela’s moved to dismiss Blatt’s case, arguing that she failed to state a claim upon which relief could be granted because, “[b]ased upon the plain language of the ADA and corresponding regulation, Plaintiff is not disabled within the meaning of the ADA.”

In 2017, Judge Joseph F. Leeson, Jr. of the United States District Court for the Eastern District of Pennsylvania issued a groundbreaking decision denying Cabela’s motion to dismiss and challenging the historical interpretation that the ADA excludes gender identity claims. Judge Leeson interpreted the ADA’s exclusion of “gender identity disorders” narrowly. He said the ADA language should be read to refer only to “the condition of identifying with a different gender.” He concluded that it did not encompass “a condition like Blatt’s gender dysphoria, which goes beyond merely identifying with a different gender and is characterized by clinically significant stress and other impairments that may be disabling.”

Judge Leeson viewed gender dysphoria as fundamentally different from GID. Unlike GID, he reasoned, gender dysphoria is disabling because it limits Blatt’s major life activities of interacting with others,

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24. See id. ¶ 16.
25. Id. ¶¶ 18–19.
26. Id. ¶¶ 37–59.
27. Id. ¶ 10.
28. Id.
31. Id. at *2.
32. Id.
33. Id. at *4 (“[I]t is fairly possible to interpret the term gender identity disorders narrowly to refer to simply the condition of identifying with a different gender, not to exclude from ADA coverage disabling conditions that persons who identify with a different gender may have—such as Blatt’s gender dysphoria . . . .”).
reproducing, and functioning both socially and occupationally. He noted that Congress purposefully distinguished between excluding certain sexual identities from the ADA’s definition of disability, on the one hand, and not excluding disabling conditions that persons of those sexual identities might suffer from, on the other. Judge Leeson thus held that gender dysphoria is a disability under the ADA because, unlike GID, it can be a substantially limiting impairment.

IV. Case Study: Schawe-Lane v. Amazon.com.KYDC LLC

Although Blatt’s holding that the ADA’s definition of disability encompasses gender dysphoria was non-precedential, it invited future transgender plaintiffs to allege ADA claims. For example, in 2017, Allegra Schawe-Lane, a transgender woman, sued her ex-employer, alleging in part that the employer violated the ADA by failing to accommodate her reasonably, creating a hostile work environment, and retaliating. She worked at an Amazon shipping facility. She alleged that, after her colleagues and managers discovered she was transgender, they called her male pronouns, threatened her with physical violence, and looked into her stall when she used the restroom.

Her ADA claims, like those in Blatt, asserted that she suffered from gender dysphoria, which she alleged was “the formal diagnosis used by physicians and psychologists to describe people who experience significant distress with the sex that they were assigned at birth.” She alleged ADA coverage because “[d]iscrimination against transgender people diagnosed with gender dysphoria is based on disability.” Amazon denied the allegations, and the case is pending.

34. Id.
35. Id. at *3 & n.3 (citing 135 Cong. Rec. S10765-01 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin), 135 Cong. Rec. S10765-01, at *S10767, 1989 WL 183216) (“In response to inquiries about the proposed bill’s coverage of homosexuality . . . , Senator Thomas Harkin, a sponsor of the bill, clarified that although homosexuality itself would not meet the definition of a disability under the ADA, that would not prevent a person who is gay from receiving coverage under the statute if the person had a disability.”).
38. Id. ¶ 5.
39. Id. ¶¶ 73, 77, 81.
40. Id. ¶ 50.
41. Id. ¶ 54.
V. Benefits-Related Guidance and Litigation

Based on litigation and conciliation activity, the EEOC’s stance on benefits for transgender employees appears to be that partial or categorical exclusions for otherwise medically-necessary care solely on the basis of sex, including transgender status and gender dysphoria, violates Title VII. The 2016 EEOC v. Deluxe Financial Services, Inc. consent decree, for example, demonstrated the EEOC’s position. The transgender plaintiff there alleged both disparate treatment and hostile work environment discrimination. None of the plaintiff’s allegations addressed healthcare coverage. Nevertheless, the consent decree contains the following provision in which Deluxe agreed to provide such coverage:

As of January 1, 2016, Defendant’s national health benefits plan does not and will not include partial or categorical exclusions for otherwise medically necessary care solely on the basis of sex (including transgender status) and gender dysphoria. For example, if the health benefits plan covers exogenous hormone therapy for non-transgender enrollees who demonstrate medical necessity for treatment, the plan cannot exclude exogenous hormone therapy for transgender enrollees or persons diagnosed with gender dysphoria where medical necessity for treatment is also demonstrated. This plan was available to all Deluxe’s United States based employees during open enrollment for 2016 and will be available for all open enrollment periods during the term of this Decree. In addition, Defendant will notify its national plan third party administrator contracted to provide benefits to covered beneficiaries of these non-discrimination requirements. Defendant will also take steps to ensure that employees can meaningfully report health benefits related discrimination on the basis of sex (including transgender status) and gender dysphoria directly to Defendant in the same manner other complaints of sex and disability discrimination are reported.

Although this language does not appear to prohibit all health benefit exclusions affecting transgender persons, it provides an example of one exclusion the EEOC considered discriminatory. The consent decree provided no guidance on how broadly the EEOC might view such exclusions as unlawful.

In another case, Robinson v. Dignity Health, the EEOC advanced a plaintiff’s claim against her employer by filing an amicus brief.

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44. Id.
45. Id.
46. Id. ¶ 1.
47. Id. ¶ 30.
48. Id.
49. Id.
arguing that the plaintiff’s condition, gender dysphoria, makes gender reassignment surgery “medically necessary” and that the failure of the defendant’s health plan to cover reassignment surgery states a claim for sex discrimination under Title VII. The EEOC noted that the plaintiff alleged that “employees who are not transgender receive coverage for all medically necessary healthcare.” The EEOC explained that the plaintiff paid out of pocket for hormone therapy and a double mastectomy after insurance plan denials, but he could not afford other medically necessary treatment, including sex transformation surgery. Further, the EEOC stated that “[a] transgender individual, by definition, fails to act in the way expected of someone of that individual’s birth-assigned sex.” The agency added that because the plaintiff “fails to conform to socially-constructed gender expectations of how someone who was assigned the female sex at birth ought to act,” the claim should be treated no differently than any other claim for sex discrimination.

In response, the employer argued that even though sex stereotyping claims are cognizable under Title VII, the statute’s prohibition on discrimination based on sex does not encompass discrimination based on gender identity. It also argued that the EEOC’s contention that Title VII prohibits gender identity discrimination because it prohibits sex stereotyping “attempts to eradicate any distinction [between sex stereotyping and gender identity] by trying to force a transgender status theory into the sex stereotyping mold.” The case was reported by the media to have settled in 2017 for $25,000.

In a third health benefits case, the EEOC determined that a transgender male stated a cognizable claim of sex discrimination under Title VII when alleging that his Federal Employee Health Benefits insurance plan denied pre-authorization for nipple-areola reconstruction. The EEOC explained that it has long held that because insurance coverage is a fringe benefit of employment, denial of coverage concerns a term, condition, or privilege of employment. Further, the

51. See Amicus Brief of the EEOC in Support of Plaintiff & in Opposition to Defendant’s Motion to Dismiss at 12, Robinson v. Dignity Health, No. 4:16-cv-03035-YGR (N.D. Cal. Aug. 22, 2016).
52. Id. at 4.
53. Id. at 2.
54. Id. at 5.
55. Id. at 6.
57. Id. at 8.
60. Id.
EEOC found that the employee’s failure to appeal the matter through the agency’s regulatory process did not preclude him from asserting a viable claim.61 Finally, the Commission noted that dismissing his disability claim would be improper because, without investigation, he had no opportunity to adduce evidence and, accordingly, the record was silent as to whether the complainant’s gender dysphoria resulted from a physical impairment.62

Gender identity discrimination cases have been appearing on court dockets as well.63 For example, in one claim commenced in 2016, Rachel Dovel sued her employer, the Public Library of Cincinnati and Hamilton County, and her health insurance provider.64 After being diagnosed with gender dysphoria, Ms. Dovel underwent hormone therapy.65 The insurer denied her coverage for sex reassignment surgery despite her healthcare providers’ determination that the procedure was medically necessary to treat her gender dysphoria effectively.66 The insurer claimed that any procedure related to gender reassignment, “regardless of origin or cause,” was expressly excluded under the library’s insurance policy.67 Dovel sued under Title VII and the Affordable Care Act, alleging that the library’s healthcare policy discriminated against her by denying her equal compensation and terms, conditions, and privileges of employment because of her birth sex.68 The case settled in February 2017.69

In Tovar v. Essentia Health,70 the Eighth Circuit held that a nurse could not pursue gender bias claims under Title VII against her employer over its refusal to cover her son’s gender reassignment surgery.71 The court found that the plaintiff’s complaint, brought on her own behalf for coverage of her son’s treatment, was not cognizable under Title VII.72 The court emphasized that her son was not a plaintiff and that no claim was being brought on his behalf.73 However, the court found that the mother had demonstrated standing to sue under the Affordable Care Act because she claimed that her health insurer’s discriminatory conduct denied her the benefits of her insurance policy

61. Id.
62. Id.
66. Id. ¶¶ 34–36.
67. Id. ¶¶ 32–34.
68. Id.
71. Id. at 775–76.
72. Id.
73. Id. at 777.
and forced her to pay out of pocket for some of her son’s medication.\textsuperscript{74} The court remanded to the trial court to assess the mother’s claims under the Affordable Care Act.\textsuperscript{75}

In October 2017, Attorney General Jeff Sessions reversed former Attorney General Eric Holder’s guidance that gender identity discrimination was protected as Title VII sex discrimination.\textsuperscript{76} Sessions’s memorandum states, “Title VII’s prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity \textit{per se}, including transgender status.”\textsuperscript{77}

VI. Enhanced Protections for Employees of Federal Contractors

Federal contractors have clearer liability for gender identity discrimination. In 2014, President Barack Obama signed Executive Order 13672, adding sexual orientation and gender identity to the categories of protected characteristics, which already included race, color, religion, sex, and national origin.\textsuperscript{78} The order also requires contractors to ensure equal employment opportunities for employees and applicants without regard to protected characteristics, to take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to protected characteristics.\textsuperscript{79}

The Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) Final Rule implementing Executive Order 13672 interprets the nondiscrimination provisions of the Order consistently with Title VII principles.\textsuperscript{80} The OFCCP specifically recognizes the sex stereotyping rationale of \textit{Price Waterhouse v. Hopkins}\textsuperscript{81} as part of its Proposed Guidelines.\textsuperscript{82} In the foreword to the Final Rule, the OFCCP acknowledges how damaging sex-based discrimination can be to LGBT applicants and employees, many of whom report that workplace discrimination has led to lower self-esteem, greater anxiety and conflict, and less job satisfaction.\textsuperscript{83} Further, OFCCP Directive 2014-02 indicates that the OFCCP agrees with the EEOC’s decision in \textit{Macy v. Holder}.\textsuperscript{84}

\begin{itemize}
\item \textsuperscript{74} Id. at 779.
\item \textsuperscript{75} Id. at 777.
\item \textsuperscript{77} Id. at 2.
\item \textsuperscript{78} Exec. Order No. 13672, 79 Fed. Reg. 141 (2014).
\item \textsuperscript{79} Id.; Exec. Order No. 11246, 30 Fed. Reg. 187 (1965).
\item \textsuperscript{80} 41 C.F.R. §§ 60-1, 60-2, 60-4, 60-50 (2018).
\item \textsuperscript{81} Price Waterhouse v. Hopkins, 490 U.S. 228, 255 (1989) (gender stereotyping is actionable under Title VII).
\item \textsuperscript{82} 41 C.F.R. §§ 60-1, 60-2, 60-4, 60-50; OFCCP Directive 2014-02, Gender Identity and Sex Discrimination (Aug. 19, 2014).
\item \textsuperscript{83} 41 C.F.R. §§ 60-1, 60-2, 60-4, 60-50.
\item \textsuperscript{84} Id.
\end{itemize}
which held that sex stereotyping transgender employees constitutes
gender discrimination in violation of Title VII (and therefore Amended
Executive Order 11246).  

In 2016, the OFCCP published final revisions to its Sex Discrimination
Guidelines (Revised Guidelines). The OFCCP says the Revised
Guidelines reflect Amended Executive Order 11246 and align it with
EEOC Title VII interpretations. The Revised Guidelines identify
issues and illuminate related areas of law for federal contractors. For
instance, the Revised Guidelines require federal contractors to per-
mit transgender employees to use the bathroom of the gender with
which they identify, which is consistent with the EEOC and OSHA
positions.

The Revised Guidelines prohibit taking adverse actions against
transgender persons for having undergone, undergoing, or planning to
undergo sex-reassignment surgery or other processes designed to facil-
itate adoption of a gender or sex other than that assigned sex at birth.
The Guidelines further state that federal contractors must provide
equal opportunity with respect to wages and other forms of compensa-
tion, including insurance and other fringe benefits, regardless of sex.
Consistent with Macy and Price Waterhouse, the Revised Guidelines
explicitly prohibit “employment decisions on the basis of sex-based
stereotypes, such as stereotypes about how males and/or females are
expected to look, speak, or act.” Finally, the Revised Guidelines clarify
that harassment on the basis of sex includes sexual harassment
based on gender identity and harassment that is not sexual in nature if
it is because of sex (including harassment based on gender identity).

The Trump Administration, in 2017, announced that protec-
tions extended to LGBT persons under Executive Order 13672 would
“remain intact.” Thereafter, the OFCCP filed its first administrative
complaint to enforce Amended Executive Order 11246’s prohibition

86. 41 C.F.R. § 60-20.
87. Id.
88. Id. § 60-20.2(b)(12), (13).
89. Baldwin v. Foxx, Appeal No. 0120133080, at 5 n.4, Agency No. 2012-24738-
FAA-03 (EEOC July 15, 2015).
(last visited Sept. 5, 2018).
91. 41 C.F.R. § 60-20.2(b)(11).
92. Id. § 60-20.4(e).
93. Id. § 60-20.7; see also Macy v. Holder, EEOC Decision No. 0120120821, at 3,
94. 41 C.F.R. § 60-20.8.
95. Mary Emily O’Hara, LGBTQ Advocates Say Trump’s New Executive Order Makes
Them Vulnerable to Discrimination, NBC NEWS (Mar. 29, 2017), https://www.nbcnews
.com/feature/nbc-out/lgbtq-advocates-say-trump-s-news-executive-order-makes-them
-n740301.
of sexual orientation discrimination. It is possible, however, for the Trump Administration to curb Executive Order 13672 without repealing or modifying it. The OFCCP may alter its enforcement priorities or modify the Revised Guidelines without the president revising or repealing Executive Order 13672.

VII. State and Local Disability Law

While it remains unclear whether employers must provide reasonable accommodations to transgender employees or employees suffering from gender dysphoria under the ADA, several states and cities have expanded or interpreted definitions of “disability” in discrimination laws to include transgender individuals and gender dysphoria. Under these laws, employers may have greater accommodation obligations than under federal law. State courts and administrative agencies in Connecticut, Florida, Illinois, Massachusetts, New Hampshire, New Jersey, and New York have ruled that their state disability laws prohibit either transgender or gender dysphoria discrimination. Additionally, gender dysphoria is considered a disability under the New York City Human Rights Law. However, state
disability laws in Idaho,109 Indiana,110 Iowa,111 Louisiana,112 Nebraska,113 North Carolina,114 Ohio,115 Oklahoma,116 Oregon,117 Pennsylvania,118 Texas,119 and Virginia120 specifically exclude either transgender persons or gender dysphoria from coverage.

VIII. Best Employer Practices for Gender-Transitioning Employees

No single model works for all employers when an employee is in the gender transition process. Each transition is unique. In establishing and applying practices and policies, employers must use common sense to create an inclusive and legally compliant workplace for employees in transition and those interacting with them. Here are some basic guidelines.

First, use a transgender person’s chosen name and inclusive terminology.121 Many transgender persons have not taken official steps to change their name legally. Allow them to use their chosen name as you would anyone else who lives or goes by a name other than their legal one.122

Second, when referring to a transgender employee, use the pronoun that the transitioning person prefers (he, she, or they) and is consistent with the person’s appearance and gender expression.123 A person identifying as a certain gender should be referred to using appropriate pronouns, regardless of whether the person has taken hormones or had some form of surgery or other gender-conforming procedure.124 If unsure of someone’s preferred gender pronoun, it is generally appropriate to ask.125 Likewise, when describing a transgender employee, use the correct terms to describe the person’s identity.126 A person born

122. Id. at 30.
123. Id. at 45.
124. Id. at 50.
125. Id. at 45.
126. Id.
male who transitions to become female is a transgender woman.\textsuperscript{127} A person born female who transitions to become male is a transgender male.\textsuperscript{128}

Third, establish an action plan for transitioning employees.\textsuperscript{129} Discuss the expected timescale of medical procedures, if known (while being cautious not to conduct improper medical inquiries prohibited by the ADA);\textsuperscript{130} the expected point or phase of name change, personal details, and social gender; dissemination of information to management and co-workers; educational and training opportunities; dress code; and use of single-sex facilities for the employee’s new gender. Consider discussing and including the following additional issues or items in the action plan:

- Time away from work required for medical treatment;
- Whether (and if so, when) the employee wishes to inform managers, colleagues, and clients, or whether the employee would prefer that the employer do so; and
- Training or briefing of colleagues or clients.

Periodically update and revisit the plan with the transitioning employee and make changes as needed.

Fourth, decide how to update internal documents and records and what limitations may exist. Determine which can and should be changed and when in the process revisions should occur. When an employee’s legal name has changed, the best practice is to reflect that name change on all documents and records possible. Employers should review the Summary Plan Descriptions and benefits policies, the Employee Retirement Income Security Act of 1974 (ERISA), the Health Insurance Portability and Accountability Act (HIPAA), and the Internal Revenue Code about what may be necessary to effectuate a change in status under health plans and other employer-provided benefits, including any additional documentation required.\textsuperscript{131} Employers should advise transitioning employees to seek information about their rights and responsibilities under these laws and policies. If an employee’s legal name does not match the name associated with the gender to which the employee is transitioning, the employer should accede to an


\textsuperscript{128} Id.

\textsuperscript{129} Transgender Inclusion in the Workplace, supra note 121, at 37.

\textsuperscript{130} Id. at 36.

employee’s desire to have the preferred new name reflected on things such as business cards, e-mail addresses, name plates, and employee directories.

Fifth, consider guidance or training for supervisors and managers. Many of them have never met a transgender person. Their lack of information and training can result in workplace unpleasantness or even illegal actions. Consider conducting a “Transgender 101” training to educate those in the workplace about the issues and their responsibilities under your policies and the law. Recognize that one’s social, political, and religious views are each employee’s own, but compliance remains the employer’s responsibility. Consider incorporating transgender information and policies into existing training modules. If the action plan designates a support team, provide the team with detailed guidance about how to provide assurances, solicit input, and develop or revise the plan. Specifically communicate to managers and supervisors how to discuss issues with the transitioning employee, how to solicit feedback from that employee, and how to discuss and implement the action plan.

Sixth, update policies to include explicit protections against transgender discrimination and harassment. Equal employment opportunity policies may be updated to state explicitly that discrimination and harassment on the basis of gender identity, gender expression, or sexual orientation are strictly prohibited. Understand the patchwork of laws and regulations that apply to each workplace to ensure compliance. Because equal employment opportunity statements are often posted in multiple places (such as in handbooks, Internet home pages, intranet home pages, employment applications, stand-alone policies, and job postings), confirm that all statements are properly revised.

Seventh, make dress code policies gender-neutral, and apply them consistently. Modify your existing dress codes to avoid sexual stereotypes. For example, requiring men to wear suits and women to wear skirts and dresses could be viewed as sexual stereotyping. Alternatively, a policy requiring “attire professionally appropriate to the office or unit in which an employee works” is gender-neutral.

134. Diversity Training on Gender Identity, supra note 132, at 2.
136. Diversity Training on Gender Identity, supra note 132, at 4.
Finally, familiarize key employees with helpful outside resources on transgender issues. While no one resource can be fully applicable for every gender transition, there are good resources to guide employers and their supervisors working with transgender employees.¹³⁷

Conclusion

The seismic legal activity involving LGBT rights has left employers and employees navigating a sometimes confusing and conflicting body of law. Whether Title VII’s prohibition on gender discrimination encompasses sexual orientation has been resolved only in the Second and Seventh Circuits. The question of whether the ADA covers transgender employees is just now beginning to be determined in courts and governmental agencies, leaving employers to wonder if they must (or should) provide insurance coverage for transition-related procedures. Employers must be vigilant to stay abreast of the patchwork of federal, state, and local discrimination laws that may inform their policies and practices. Agencies, apart from the OFCCP, have yet to announce their policies on many workplace transgender issues. Regardless of the uncertain legal landscape, employers should consider their compliance obligations—as they exist now and may exist in the future—and review and revise policies and procedures impacting LGBT employees accordingly.

Big Data and Employment Law: What Employers and Their Legal Counsel Need to Know

Darrell S. Gay* & Abigail M. Kagan**

Introduction

Technological innovation continues to change employer practices, creating new legal challenges for their legal counsel. One significant such development is employers’ growing tendency to use big data to answer their most pressing questions.¹ Once reliant on optimistic revenue predictions or sparse, anecdotal accounts of employee satisfaction, employers and legal counsel now may sift through enormous data sets to answer complex and sophisticated questions about applicants and employees.²

Harnessing the power of these massive data sets, or “big data,”³ allows attorneys to understand historical patterns of legal activity, improve existing employment practices, and even increase the efficiency and efficacy of their own law firms. Armed with these colossal resources, algorithms help employers uncover interactions behind the rise and fall of business revenue, employee productivity, hiring patterns, disciplinary pitfalls, financial risk, legal exposure, and myriad other factors that influence a business plan’s success.⁴

However, using automated machine-based outputs to understand individual human beings’ actions is fraught with risks. Potential

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exposure to serious legal action looms over every decision based on big data. Despite the risks, clear legal rules are largely absent. Lawyers’ discussions of big data are rampant with misinformation, likely because few attorneys moonlight as data scientists.

We begin this discussion by defining some terms. Artificial intelligence is the idea that computers can “carry out tasks in a way that we would consider smart,” essentially meaning that a computer is capable of being taught to think and understand the world by classifying information as humans do. By contrast, “machine learning” is a “an application of [artificial intelligence]” based on the notion that programmers should be able to provide data to computers to allow them to learn on their own. Both concepts are important for understanding analysis of “big data.”

This Article provides an introduction to the fundamentals and breakthroughs of big data and how they implicate employers and employment law. Part I offers a basic understanding of big data and artificial intelligence, focusing on some of the most common sources of big data. Part II discusses how employers can beneficially harness big data’s power. Part III explores big data’s dangers and pitfalls, particularly arising from machine learning and predictive analytics. Part IV reviews the sparse legal authority on big data. Part V focuses specifically on law firms’ potential use of big data and artificial intelligence in firm management.

I. Big Data and Artificial Intelligence
A. Big Data

For employers, “big data” refers to the mass of information created when individual employees engage in trackable activities. For example, when employees visit websites at work, employers’ computers record which URL was followed, how long the employees remained on the webpage, and what actions they took there. When employees buy lunch at work, barcode scanners note the purchase time and the chosen items. When employees open Microsoft Word documents, software tracks which documents are edited and the time spent on each

7. See id.
8. Id.
9. For an explanation of “big data,” see infra Section I.A.
page. When employees file lawsuits, legal search engines can track other complaints filed for the same reason and which causes of action are brought at the same time. The list goes on. When such trackable activities recur multiple times by multiple people, the mass of results accumulates. The aggregate result is known as “big data.” The following sections describe the process of accumulating big data and some of its uses.

1. Descriptive Analytics

In the “descriptive analytics” stage of data processing, computers gather, organize, tabulate, and depict data. As a very basic example, the calendar software Outlook generates masses of data unintelligible to the average employer. But a computer’s descriptive-analytics output can make sense of that data and translate it into employer useful reports by showing, for example, all dates on which a particular conference room is reserved.

Descriptive analytics can help identify otherwise unseen relationships between two or more data points. It can facilitate employer and attorney decision-making by translating overwhelming and amorphous data sets into actionable intelligence. Such useful information can be made available in real time. Some major sources for employment-focused big data are illustrated below.

2. Public Information

Public information from social media is a prime wellspring for big data. LinkedIn, self-described as “the world’s largest professional network,” holds a massive amount of employment-related data. For all members, LinkedIn identifies how many positions they have held, whether they received accolades in professional or academic spheres, their connections to others, and where their future professional interests lie.
Other public sources include Twitter, Snapchat, “Trending hashtags” identify hot topics in real time. City-wide launches of Uber and other ride-sharing services show how city-dwellers travel to and from work and whether they bill these trips to their personal or business accounts within each service’s mobile app. Health insurers market mobile apps that track users’ exercise, permitting insurers to provide discounts to users with healthy habits. All this information contributes to a general understanding of human behavior, from individuals to broader populations.

Some governmental agencies provide good sources of big data. The U.S. Department of Labor’s “enforcement data” website publishes raw datasets of all federal enforcement and compliance actions concluded in the prior decade, searchable by state, company name, amount of back wages owed, and dozens of other categories. Myriad other online sources demonstrate the breadth of big-data resources available on the Internet that employers may potentially harness. OpenFDA, from the Food and Drug Administration, provides transparent information on a variety of issues, including drug product labeling and recall enforcement reports, for example.

3. Company Personnel Information

Most companies permit or require employees to use some sort of company-provided data tracker, such as cell phones, laptops, corporate

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17. Twitter is an online news and social networking service that “give[s] everyone the power to create and share ideas and information instantly, without barriers.” Our Company, Twitter, https://about.twitter.com/en_us/company.html (last visited July 2, 2018).


23. See Data Enforcement: Data Catalog, U.S. DEP’T OF LAB., https://enforcedata.dol.gov/views/data_catalogs.php (last visited July 2, 2018). For example, to see all compliance actions concluded by the Wage and Hour Division since Fiscal Year 2005, scroll to the bottom of the page and click “WHD Data,” then click the .csv option under “whd_whisard.”

24. See infra Section II.G. for additional discussion on employers’ use of big data from governmental agencies.

credit cards, and digital timekeepers. These computer-based devices generate a trove of big data that employers may then harness to improve hiring, retention, compensation, and talent development. For example, employers may use Outlook calendar entries to learn the most common times for meetings, which departments are most likely to book conference rooms, and how to maximize office space use. Similarly, payroll logs show the most popular employee vacation times, the extent of annual sick day usage, and the total overtime hours each pay period.

Many employers overlook more old-fashioned information sources, such as exit interviews or employee satisfaction surveys. Such mechanisms that gather narrative information directly from employees permit more insightful analysis of collected data. Studying data points gleaned from payroll figures and other automated sources may identify the probability of two events occurring together, but only employees can explain why those events actually coincide.

4. Employee Grievances

Businesses with formal grievance processes have even richer sources of employee data. With names or other identifiers attached to grievances, employers can track which employees bring the most complaints and whether grievances were considered meritorious. Even anonymous grievances tell companies whether a particular department, supervisor, or policy causes employee problems. “Grievance tracker” websites and apps are on the rise, allowing employers, employees, and unions to file, organize, and respond to grievances online. Using dropdown menus, checkboxes, and other standardized measures, grievance process managers can more easily review and categorize complaints. This process informs employer responses and provides key insights to improve future operations and thereby avoid future grievances.

5. Case/Litigation History

As attorneys know, legal search engines are gold mines for raw data. Westlaw, Bloomberg Law, and other search engines identify

lawsuits filed against particular companies, which causes of action have historically prevailed, how particular judges rule, and even which attorneys most frequently prevail.31 Such litigation history can allow counsel to advise clients on the likelihood of success before specific judges or what potential damages to expect, while also improving law firms’ internal risk-assessments by informing decisions whether to accept particular cases initially.

B. Artificial Intelligence

Amassing data is only the first step in the process of interpretation. An overwhelming amount of information is tracked, logged, discovered, noted, and revealed every minute of every day. How is such a vast quantity of information converted into useful patterns and lessons?

Historic small-scale employer reviews of employee data, such as surveys or overtime requests, are wholly inadequate for the overwhelming quantities of big data.32 Employers and businesses that collect big data now recognize that “datasets are ripe for computer-assisted or automated analysis.”33 Artificial intelligence can fill that need.

While big data afford raw information to form the foundation for descriptive analytics, artificial intelligence provides necessary context and meaning to make sense of otherwise two-dimensional information. Artificial intelligence allows computer systems behind even everyday interactions constantly to watch everyday human interactions, identify patterns, and gain understanding by experience.34 Consider Siri, the ever-present virtual assistant inside every iPhone.35 When iPhone users pose a question to Siri, “she” listens to commands, parses meanings properly, “thinks” of which words to combine in response, and “understands” which syllables to emphasize.36

Similar technology allows employment software to understand that the best employees are those who take short lunch breaks, exhibit risk-averse traits like purchasing family-coverage health insurance, extensively use their Outlook calendars, send frequent emails but not

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pestering ones, and clock in and out right on time, but not so early or late as to incur overtime pay. Most importantly, artificially intelligent computers can make these determinations without employers needing to identify relevant factors. In fact, the computer might use factors the employer never considered. Employment software can even produce a periodic ranking of what it has determined to be top employees based on a delicate, weighted, ever-shifting balance of multiple characteristics.

II. Use of Big Data for Employers

As Part I of this Article demonstrated, big data’s uses appear limitless, especially when used in concert with artificial intelligence and machine learning. Part II focuses on some of the most beneficial ways employers can harness big data.

A. Selection, Promotion, and Discharge

The clearest applications of digital big data and machine learning in the employment context are in recruitment, training, promotion, and discharge of employees based on office-wide and population-wide statistics.

An advantage of big data is its ability to de-identify and anonymize individual persons. Computerized algorithms also can be designed to ignore certain categories, such as protected classes under Title VII. This combination helps eliminate discretion and unconscious bias, allowing employers to focus on each applicant’s fitness for the job in question. The process begins by constructing algorithms to analyze current employees’ professional characteristics from timesheets, surveys, number of emails sent per hour, or other available sources. The algorithms can then uncover patterns associated with top performers, and employers can use that information to improve business decisions. For example, if employees who arrive before 9:00 AM and send at least six emails per hour often score the highest on performance evaluations, employers can create an algorithm that highlights

37. See Marr, supra note 6.
40. Walton, supra note 5.
41. See id.
42. See id.
44. See id.
applicants who exhibit those traits or exclude from consideration applicants who do not.

The same system can evaluate current employees. Employers can use information from past evaluations to create an integrated “model employee” profile, and then compare the profile to current employees to identify weak performers. Employers then have two options: (1) train low-performing to improve; or (2) discharge the employee in favor of an applicant who, according to the algorithm, already embodies the ideal worker. Training is likely the better option because it potentially improves the overall workforce and reduces turnover.

One must, however, keep in mind the possible pitfalls within these analyses. For example, employees who arrive early and send many emails certainly appear hard-working, but perhaps they just want to ensure sufficient time to eat breakfast or email about weekend plans before finally turning to work materials an hour later. Employers must remain aware of existing workplace cultures and norms before drawing conclusions based solely on numbers.48

B. Leadership Management

Just as employers can use algorithms to spot poor performers, this information can distinguish hidden high achievers. Employers might consider promoting employees who demonstrate characteristics of the ideal performer on the assumption that their workplace attributes demonstrate superior performance. Consistent high performers might be placed into a leadership-development track, priming an ideal subset of current employees for career trajectories that include high-level managerial positions.

C. Policy Review and Revision

Just as big data about employee behavior and performance can be used to evaluate individual employees, it can also be useful to enhance and update company policies. An example of an outdated policy that requires updating is one that requires employees to telephone supervisors if they are running late. Such a policy might create problems for

46. See id.
47. Id.
48. See Katz, supra note 43.
49. Florentine, supra note 27.
50. Id.
51. Id.
supervisors who want to accommodate modern conveniences, such as email, but feel they must rule by the book.53 Personnel data may show that most late employees email or text supervisors, instead, indicating that policies should be revised.54

Employers can review data on employees’ daily habits to determine whether they are consistent with existing policies and procedures.55 If not, the employer might decide to update policies to reflect current employee practices. This approach may be practical on several levels. Certain policies can cause workplace friction, leading to arguments, grievances, and even lawsuits.56 Grievance analysis may assist revising and updating policies by better reflecting each group’s culture. Rather than retroactively addressing employee complaints as they arise, employers may improve workplace policies and procedures so that potential conflicts can be mitigated or entirely avoided.57

D. Managing Labor Relations

Employers know that grievances impose significant burdens. Aside from the effort needed to address the root of the problem, formal grievance processes remove employees and supervisors from their normal work and disrupt productivity. Union grievances may require arbitration,58 which can become lengthy, costly, and adversarial. Employers can use historical data to review which internal policies or union contract provisions have created the most disputes. They can then proactively address these concerns with the union and attempt to work out an alternative resolution before entering into a new collective-bargaining agreement.

E. Union Avoidance

Employers may be able to use big data to avoid union certification altogether. Union organizing generally arises from employee discontent over current working conditions or bad management.59 As

54. See Survey, supra note 52.
56. See, e.g., id. (discussing claim employees may make in response to employee monitoring); see also, e.g., Lucas, supra note 53 (discussing issues with employer’s attendance policy).
57. See, e.g., Straz, supra note 2 (big data helps employers understand why employees leave).
mentioned above, employee satisfaction surveys and exit interviews provide key insight to real-time employee grievances, concerns, and other factors that can lead employees to seek union representation. This information, if created and maintained in electronic forms and properly analyzed, can allow an employer to make a timely corrective response before any organizing effort begins. To be useful for this purpose, employee satisfaction surveys need to call for detailed answers that allow employers to identify problems with particularity.

F. Benefits

Big data can help employers refine employment benefits to boost productivity. By comparing payroll information and work output, employers can determine whether factors such as taking vacation, or the length of vacations, affects productivity in surrounding work-weeks.60 Employers might also determine whether employees denied paid vacation become less productive.

G. OSHA Issue Prevention

The Occupational Safety and Health Administration (OSHA) recently mandated information from employers that produces a new source of useful big data.61 Since August 10, 2016, OSHA has required many private employers to report to it any fatality, hospitalization, loss of limb, and certain other work-related injuries.62 The regulation does not change any recordkeeping rules. It simply requires employers to submit electronically certain information they are already required to maintain.63

The OSHA regulation may be a harbinger of things to come. While the Trump administration generally opposes new regulations,64 the current rules may increase public access to big data on workplace incidents. The OSHA database provides the necessary foundation for groundbreaking analyses. If other government agencies follow OSHA’s lead, the country may see massive data sets not only about workplace injuries, but also about such things as payroll systems, employee benefit plans, and tax returns. The federal government has already granted access to a significant amount of information through data.gov,65

60. See Florentine, supra note 27.
63. See id. §§ 1902, 1904.
openFDA, and the entire Bureau of Labor Statistics website. Interested employers need only review those and other government-provided sources to uncover troves of data, waiting to be deployed.

III. The Dangers of Using Big Data

Using descriptive analytics to maximize efficiency, productivity, and employer-employee relations has its limits. It is the next step—machine learning and predictive analytics—that allows employers truly to harness the power of artificial intelligence and advance workplaces into the twenty-first century.

A. Machine Learning and Predictive Analytics

Machine learning is a form of artificial intelligence that occurs when algorithms use data to improve themselves beyond initial human programming. If an employer wants to identify employees with particular traits—from punctuality to the ability to manage large projects or do creative problem-solving—machine learning would allow the algorithm to fine-tune the criteria to identify relevant traits to identify more accurately employees exhibiting those traits. Further, machine learning enables employers to make decisions based on more accurate algorithms.

Machine learning can refine an employer’s original instructions to achieve a more functional result. For example, an original one-dimensional instruction may have categorized successful employees as those who use Outlook for scheduling. The algorithm, as self-enhanced, would instead compare Employee B’s calendar, filled with personal appointments and errands, to Employee C’s calendar, which has only one or two meetings each day, but all business related. The original simple algorithm armed with the capacity for descriptive analytics would rank Employee B higher than Employee C, because Employee B scheduled every minute of the day. However, the enhanced algorithm is “smarter” because it can determine that Employee C’s infrequent meetings with more junior employees, labeled “supervision discussion” or “review of training materials,” are more indicative of a high-performer than Employee B’s active days of “doctor’s appointment” and “coffee with Mom.”

A computer capable of machine learning—meaning an artificially intelligent computer—also applies predictive analytics to its ever-growing neural network, enabling it to review information, track that information’s movement, and anticipate an employee’s or employer’s

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66. See openFDA, supra note 25.
68. Faggella, supra note 39.
next move. An employer uses a form of predictive analytics when, seeing how quickly Employee C rose through the ranks and hoping for similar star workers, tells the computer to look for more job applicants like Employee C. This approach, however, could backfire. Perhaps Employee C is the junior employee requiring daily meetings for “supervision” and “training,” meaning that Employee C requires extensive oversight, a trait that businesses hope to avoid. The employer is counting on the artificially intelligent computer to learn to examine a more holistic picture of Employee C that includes more than just the employee’s scheduling patterns to avoid filling the workforce with needy employees.

Machine learning at its best should enable computers to “learn” how to process data on their own. The introduction of a self-propelled feedback loop tells the computer’s algorithm whether it correctly classified incoming information, and, if not, how to correct the classification in the future—absorbing information from purposeful (human) and incidental sources with little interruption. The computer provides feedback to itself to adjust its own algorithms and methods of processing various data points constantly, until they are no longer data points but data “lines,” “shapes,” “histories,” or “futures.”

B. Impact of Input Source

Machine learning has to start somewhere. While computers equipped with artificial intelligence employ self-propelled feedback loops, humans are necessary for initial coding and data input. However, human oversight can be riddled with mistaken assumptions, and consequent input errors may originate in multiple ways. Some errors might be correctable early, but, if undetected for too long, the computer’s self-education may manipulate input improperly. Awareness of these potential vulnerabilities may be insufficient to mitigate their effects. Too often, the software engineer who regulates the computer’s self-education is not sufficiently related to the people inputting information. For example, if only a small proportion of employees click on an incorrect answer when completing a survey, inaccurate analysis may result. Software that scans employees’ Internet searches may be misdirected if employees spend lunch hours planning upcoming vacations. Occasional unexpected data points entering the software’s algorithm from one or two employees may not make much difference, but

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69. See Marr, supra note 6.
70. Id.
71. See id.
72. Id.
74. Id.
75. Id. at 680.
errors can multiply. When this happens, the entire algorithm becomes premised on faulty information.

C. What Questions Are Asked and How

A potential problem in the process arises if managers’ questions do not translate well to computer algorithms. An employer may want to understand the circumstances affecting employee productivity, but this question may not be sufficiently specific to produce useful results. The algorithm may initially look for strong correlations among a variety of data sets without any assessment of the functionality of such data. A serious risk occurs if algorithms leave excess gaps between data points. Human brains will naturally try to fill the gaps and may, as a result, draw erroneous conclusions. It is also difficult for employers to assess the legal validity of algorithms used by third-party vendors because they typically seek to protect their algorithms as proprietary information.

D. Question Validity and What Is Not Being Asked

Without sophisticated machine learning, algorithms can use only the information their creators provide. The resulting analysis will be faulty if a crucial factor is missing from the algorithm. Employers should evaluate algorithms' accuracy and completeness against current information about the employer's workforce. Testing how algorithms manipulate and analyze familiar sets of big data can help employers identify simple errors. Algorithms can only highlight preexisting connections between data points. They cannot explain why relationships exist or what external factors might affect these relationships. Without understanding origins of relationships among various data, it is impossible to predict what external factors will affect the analysis and how long an algorithm's results will remain valid.

76. Id. at 652.
77. Id.
78. See id.
81. See EXEC. OFF. OF THE PRESIDENT, BIG DATA: A REPORT ON ALGORITHMIC SYSTEMS, OPPORTUNITY, AND CIVIL RIGHTS 15 (2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/2016_0504_data_discrimination.pdf (reliance on one or more factors over others in programming can lead to discrimination) [hereinafter REPORT ON ALGORITHMIC SYSTEMS].
82. Marr, supra note 6.
Each employer should consider not only the information it hopes to learn, but also the information it does not care about or even hopes to avoid. In the workplace, this is key for employers covered by statutes prohibiting consideration of legally protected characteristics when making workforce decisions. Keeping in mind that “we often don’t know what we don’t know” can go a long way in preventing algorithms from fabricating baseless connections among unrelated points of information.

E. Disparate Impact Exposure

Perhaps the most common misconception about using artificial intelligence in employment decisions is that if employers enter no demographic information into their computer-based algorithms, the algorithms will provide fair and equal opportunity for all demographics.84 There is potentially great liability in allowing algorithms to take control without human oversight.85 Indeed, at its core, disparate impact liability—the idea that a facially-neutral policy still has a disproportionately negative impact on a particular group or groups, when a truly neutral alternative is readily available—is premised on unintentional but palpable discrimination.86 Employers who use current employees as models for designing algorithms on how to screen applicants must be sure that their existing employee base does not itself reflect biases. Absent such discernment, artificially intelligent algorithms that work through machine learning can magnify existing biases and discrepancies.87

Here is an example of how such magnification of bias might occur. Suppose an employer determines that employees with shorter commuting times are more productive, presumably because they get more sleep or have more relaxed commutes.88 As a result, the employer instructs an algorithm to select for interviews only applicants who live

86. Id. (facially neutral algorithms may unintentionally harm vulnerable classes).
87. “The efficacy of data mining is fundamentally dependent on the quality of the data from which it attempts to draw useful lessons. If these data capture the prejudicial or biased behavior of prior decision makers, data mining will learn from the bad example that these decisions set. If the data fail to serve as a good sample of a protected group, data mining will draw faulty lessons that could serve as a discriminatory basis for future decision making.” Solon Barocas & Andrew D. Selbst, Big Data’s Disparate Impact, 104 Calif. L. Rev. 671, 697 n.113 (2016).
in two nearby zip codes.\textsuperscript{89} The unbiased computer dutifully narrows the employer’s pool of applicants to those two zip codes, which are home to predominantly white, affluent college graduates. Title VII lawsuits ensue.\textsuperscript{90} Similarly:

If the training phase for a big data algorithm happened to identify a greater pattern of absences for a group of people with disabilities, it might cluster the relevant people together to create a “high absenteeism risk” profile. The profile need not be tagged as “disability”—rather it might appear to be based on some group of financial, consumer, or social media behaviors.\textsuperscript{91}

If a rejected disabled applicant fitting this profile learned of this program, a failure-to-hire lawsuit could follow.\textsuperscript{92}

An employer must ensure that the composition of its workforce reflects the qualified population from which that workforce draws.\textsuperscript{93} Without advanced machine learning, computers and algorithms do not easily make such nuanced judgments. An algorithm can learn the population makeup of various protected groups, and it can learn the traits that an employer seeks in new employees. However, it cannot adequately balance those potentially competing factors. To defend against allegations of hiring discrimination, employers generally must be able to explain why one employee was hired rather than another qualified applicant who is a member of a protected class.\textsuperscript{94} When employers rely too heavily on algorithms that, even innocently, do not receive proper “instruction” and oversight, there is potential legal exposure.

The possibility of liability raises several concerns for employers. For example, algorithm development is usually outsourced to a third party,\textsuperscript{95} but liability for any discriminatory effects of the algorithm’s use falls on the employer.\textsuperscript{96} The algorithm developer’s liability, if any,
is unclear.97 Further, the “black-box” nature of algorithmic decision-making means that employers may be penalized for disparate impacts they could not avoid because they were unaware that such outcomes were likely.98 If employers do not know the assumptions underlying an algorithm’s decision-making, they cannot address any problem with the algorithm’s output. Machine learning further distances results from employer oversight because its fundamental purpose is to operate without employer participation.99 The enormous volume of data means that there is no practical way for employers (or third parties) to spot or correct misdirected algorithms.100

Employers should be alert for other areas of law that change in response to the growing use of big data. For example, one current concern is the ability to apply predictive analytics to data from employer-sponsored health insurance plans to determine whether certain categories of employees are likely to develop illnesses or incur claims.101 In response, some have advocated amending the Americans with Disabilities Act (ADA) to ensure continuing shelter for persons regarded as disabled, or even as potentially disabled.102 It may be only a matter of time before lawmakers recognize such risks of big data and update the ADA and other laws.

IV. Current and Future Legal Implications

The lack of relevant legal authority compounds the legal risks arising from employer use of big data analytics. With no comprehensive case law or policy directives available, employers and their counsel can find only piecemeal legal guidance.

Kronos Inc., 620 F.3d 287, 296 (3d Cir. 2010) (administrative subpoena enforced against non-party provider of assessment used by employer in disparate impact case).

97. Peter Siegelman, Contributory Disparate Impacts in Employment Discrimination Law, 49 WM. & MARY L. REV. 515, 521 (2007) (“The problem of two-party causality in disparate impact suits has not been widely recognized or adequately addressed by either courts or scholars.”). A possible solution for employers could be to seek prior indemnification from the algorithm developer. However, this would likely increase development costs. See King & Mrkonich, supra note 79, at 583.

98. Barocas & Selbst, supra note 87, at 674 (“Discrimination may be an artifact of the data mining process itself, rather than a result of programmers assigning certain factors inappropriate weight.”).

99. T.C., supra note 80.


Big Data and Employment Law

A. Governmental Agency Oversight and Directives

Several federal authorities have begun to recognize the benefits and risks of big data. A 2016 Federal Trade Commission (FTC) report highlighted issues relevant to employer use of employee and applicant credit reports. In that report, the FTC promised to continue to monitor how big data could potentially violate the Fair Credit Reporting Act and the Equal Credit Opportunity Act. Indeed, the FTC has urged data brokers, who supply employers with reports on applicants’ digital lives, to give applicants access to their own reports. The Obama White House also published several reports warning of big data’s impact on discrimination, noting that algorithms have the potential to “encode discrimination in automated decisions.” In October 2016, the Equal Employment Opportunity Commission (EEOC) hosted a special meeting titled “Big Data in the Workplace: Examining Implications for Equal Employment Opportunity Law.”

While government agencies have recognized multifaceted concerns about big data, they have provided little guidance in statutes or regulations. Instead, employers and their attorneys must rely on case law from old-fashioned employment disputes and hope their predictions prove accurate.

B. Existing Authority

One resource that highlights the disparity between legal authority and the technological advances of big data is the Uniform Guidelines for Employee Selection Procedures. Published in 1978, the Guidelines are the joint product of the EEOC, the Civil Service Commission, the Department of Labor, and the Department of Justice, and “are designed to assist employers . . . to comply with requirements of Federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin.” For forty years, various federal agencies have applied the Guidelines to determine


104. Id. at 33.


106. Seizing Opportunities, supra note 85, at 45; see also Report on Algorithmic Systems, supra note 81, at 15.


108. See Kroll et al., supra note 73, at 698 (“The United States has a long history of dealing with these ambiguities [in legislation and guidance] through after-the-fact and retroactive oversight by the courts.”).


110. Id. § 1607.1(B).
whether employee-selection procedures comply with various anti-discrimination provisions.111 If an agency finds a selection procedure discriminatory, to mitigate its liability the employer must validate the procedure in accord with the Guidelines or other applicable authority.112

However, there is a disconnect between the basic premise of the Guidelines and contemporary use of computer-based algorithms. The Guidelines—published before the existence of the internet—assume employers can explain the basis of their selection procedures.113 With computer-based decision-making, employers simply are not able to delineate each step of the process. As a result, validating selection procedures against the Guidelines is at best complicated and, at worst, impossible.114 Employers can present a rationale they hope will suffice, but black-box algorithms can provide only results of internal processes, not a map of how results were reached.115

Case law is equally lacking. In June 2018, a Westlaw Boolean search for “adv: ‘big data’ and ‘disparate impact’” returned no employment-related cases. This result suggests either no case law addresses these topics or that existing cases have used different terminology. If different terms are used in litigation to describe relevant technological processes, the relevant case law will be harder to research, and it will take longer to build coherent guidance. Before employers, judges, and scholars coalesce upon the correct terminology, courts and enforcement agencies may see increased disparate-impact proceedings brought under existing anti-discrimination laws and policies.116

V. Use of Big Data and Artificial Intelligence by Law Firms

Beyond the legal and policy concerns of applying big data and machine learning to employment decisions, big data has extraordinary applications in business more generally. For example, law firms increasingly rely on big data and artificial intelligence.117

Firms may use big data and predictive analytics to determine the potential actions, reactions, and legal needs of current and potential clients. Predictive analytics can triangulate data from court e-filing systems, mergers, and other sources to alert attorneys to client

111. Id.
112. See id. § 1607.5.
113. Id. § 1607.4(A) (“Each user should maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group . . . in order to determine compliance with these guidelines.”).
115. Id.
116. See King & Mrkonich, supra note 79, at 563.
needs. Attorneys can also use big data in deciding whether to accept a new client, case, or practice area. The information may even illuminate potential work volume and profitability.

Attorneys may also use big-data analytics to learn more about their own performance so they can serve and understand clients more efficiently. Some law firms retain entire teams of analytics specialists to mine general and firm-specific data to maximize efficiency. Attorneys can use big data to evaluate their success in particular types of cases to understand where best to invest their time and what areas are best left to others. Big data may also be used to analyze how clients receive and use information the firm distributes. Analytics companies can, for example, tell a firm which recipients have opened the firm’s e-mails and which unsubscribed. Artificial intelligence and machine learning are playing an ever-growing role in e-discovery, particularly in document review. Once known as the drudgery assigned to junior associates, document review is increasingly accomplished by computers.

**Conclusion**

Big data and computer-based analytics have great potential to optimize workforces, provide equal employment opportunities, and streamline general business and employment practices. However, in applying these new tools, employers and their counsel must exercise constant vigilance to ensure compliance with current and evolving legal authority. Even as lawyers grapple with new legal issues facing employer-clients, attorneys themselves are benefitting from new ways of practicing law. With proper understanding of big data and analytical tools, employers and their attorneys can use big data and analytics to thrive in this burgeoning world of new technologies.

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121. See Pfeifer, supra note 118.


123. Id.

Issues in Internal Investigations of Executives

Jonathan Ben-Asher*

Introduction

Companies face increasing pressure, both internal and external, to investigate allegations of workplace misconduct by executives. Executive investigations have gotten enhanced attention in the wake of several high-profile stories of misconduct and the #MeToo movement. Employees may complain of discrimination, sexual harassment and assault, retaliation, financial improprieties, misconduct by management and members of the Board of Directors, and simply boorish behavior. At the same time, government agencies, including the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ), may aggressively scrutinize companies' actions. Executives are often at the center of these investigations, either when they lodge complaints or are the subject of complaints. Their reputations and careers may be at stake, and the outcome of any subsequent litigation could hinge on how well employers conduct internal investigations.

Under Faragher v. City of Boca Raton, employers must investigate and promptly remediate claims of sexual harassment to avoid

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4. See, e.g., Chai R. Feldblum & Victoria A. Lipnic, Select Task Force on the Study of Harassment in the Workplace, EQUAL EMP. OPPORTUNITY COMM’N (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm (workplaces, including executives and administrative support staff, have increased likelihood of encountering a harassment claim).

corporate liability for employees’ harassing conduct.6 But the increased need for internal investigations comes from many sources. The Sarbanes-Oxley Act (SOX)7 and the Dodd-Frank Act8 created and expanded whistleblower protections that shield employees who complain about particular corporate frauds, securities violations, and financial improprieties.9 The Supreme Court broadened SOX protections to cover employees of non-publicly traded companies.10 The SEC Office of the Whistleblower has aggressively pursued securities violations and given substantial awards to whistleblowers.11 Meanwhile, federal prosecutors and the Department of Health and Human Services Office of Inspector General have ramped up investigations and prosecutions of fraudulent billing by health care providers and other federal contractors in qui tam suits under the False Claims Act.12

Companies can hire outside expert investigators to conduct investigations. If litigation results from the subject of the investigation, companies and executives can retain experts to testify about whether the investigation was properly conducted. Opinions differ about whether these experts have true expertise and whether there is an objective standard for judging the propriety of investigations. Companies may seek additional expertise from outside counsel, forensic accountants, forensic technology experts, and data analysts. For companies and executives involved in investigations, the potential financial, business, and reputational costs loom large.

When executives are either witnesses in or targets of investigations, they need advice from counsel on some critical issues: how they should respond to companies’ demands for information; what aspects of the investigation they will attempt to control through negotiation; and

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6. Id. at 807.
10. See Lawson v. FMR, LLC, 134 S. Ct. 1158, 1176 (2014) (whistleblowing protections under the Sarbanes-Oxley Act also protect employees of private contractors and subcontractors).
issues in internal investigations of executives

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What legal, professional, and career risks they face and how to navigate them, as their careers and reputations may hang in the balance.¹³

Part I of this Article analyzes crucial issues of privilege that affect how investigations proceed. These include attorney-client privilege, DOJ and SEC instructions to federal prosecutors concerning investigations of corporate misconduct and privilege waivers, “Upjohn warnings” by corporate counsel to potential employee witnesses, work-product protection, and corporate waivers of privilege when relying on an investigation’s propriety to defend a discrimination claim. Part II discusses how investigations can backfire against companies. Part III provides practical pointers to executives’ counsel about protecting clients during investigations.

I. Privilege Issues

Executives who are witnesses in, or targets of, investigations need to understand their potential protections for statements made to company investigators. Executives often believe they can refuse to cooperate with investigations or, without penalty, invoke Fifth Amendment rights when interviewed.¹⁴ Unfortunately, most executives’ employment contracts, and most company policies, require employees to cooperate with internal investigations and permit employers to discipline or terminate employees for noncooperation.¹⁵ While noncooperation might be a rational choice for some executives, it could cost them their jobs.¹⁶ Counsel for such clients should therefore consider how best to negotiate the terms of executives’ participation in investigations.

Executives often wrongly assume that their statements to investigators are confidential and can be disclosed only with their consent. They may assume that the company’s lawyer is simultaneously representing them or will somehow seek to protect them. If litigation ensues, issues usually arise concerning discoverability of investigations based on the attorney-client privilege and work-product protection.

A. Attorney-Client Privilege

1. Extent of the Privilege in Internal Investigations

The attorney-client privilege protects communications between clients and their attorneys that are intended to be, and actually are, kept confidential for the purpose of obtaining or providing legal assistance.¹⁷ Privilege encourages full and frank communication between

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¹³. See Model Rules of Prof’l Conduct r. 2.1 (Am. Bar Ass’n 2014) (lawyer shall give “candid advice” and “may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation”).
¹⁴. See, e.g., Gilman v. Marsh & McLennan Cos., 826 F.3d 69, 76 (2d Cir. 2016).
¹⁵. See, e.g., id. at 73.
¹⁶. See id.
¹⁷. See Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep’t of Justice, 697 F.3d 184, 207 (2d Cir. 2012).
attorneys and clients.\textsuperscript{18} Parties asserting the privilege have to prove requirements for its application have been met, and courts construe ambiguities against them.\textsuperscript{19}

If the client is a corporation, analyzing applicability of the protection starts with the Supreme Court’s opinion in \textit{Upjohn Co. v. United States}.\textsuperscript{20} Upjohn’s general counsel had learned that a foreign subsidiary made questionable payments to foreign government officials.\textsuperscript{21} The general counsel sent questionnaires about the payments to, and interviewed, the subsidiary’s managers.\textsuperscript{22} When the Internal Revenue Service (IRS) issued an administrative subpoena for the questionnaires and interview notes, Upjohn resisted, and the IRS sought enforcement.\textsuperscript{23} The Supreme Court held that communications between managers and in-house counsel were protected by the attorney-client privilege because the employees provided the information to counsel so that the company could obtain legal advice.\textsuperscript{24}

Under \textit{Upjohn}, the fact that employees provide information to company lawyers during investigations does not necessarily insulate employees’ statements from disclosure.\textsuperscript{25} Similarly, investigative reports prepared by or for the company’s counsel are not automatically protected.\textsuperscript{26} The critical question is whether obtaining or providing legal advice was one of the internal investigation’s significant purposes.\textsuperscript{27} If so, the privilege applies, even if the investigation had other purposes.\textsuperscript{28} Courts have also required that the primary or dominant purpose of the communication be to seek legal advice.\textsuperscript{29}

Courts most readily apply the privilege to corporate investigations that were clearly conducted in connection with a formal legal proceeding. In \textit{Farzan v. Wells Fargo Bank},\textsuperscript{30} for example, the plaintiff sought to depose a non-attorney “Equal Employment Opportunity Consultant” who investigated the plaintiff’s discrimination claims at the direction

\begin{itemize}
\item[18.] See \textit{Upjohn Co. v. United States}, 449 U.S. 383, 390 (1981) (“[A]ttorney-client privilege) exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer . . . .”).
\item[19.] See \textit{In re Grand Jury Proceedings}, 802 F.3d 57, 65 (1st Cir. 2015); \textit{Shaffer v. Am. Med. Ass’n}, 662 F.3d 439, 446 (7th Cir. 2011).
\item[20.] 449 U.S. 383.
\item[21.] \textit{Id.} at 386–87.
\item[22.] \textit{Id.} at 387.
\item[23.] \textit{Id.} at 388.
\item[24.] \textit{Id.} at 394.
\item[25.] \textit{Cf. id.} at 384 (employee communications were protected because made at direction of corporate superiors to secure legal advice).
\item[27.] See \textit{In re Kellogg Brown & Root, Inc.,}, 756 F.3d 754, 758–59 (D.C. Cir. 2014).
\item[28.] \textit{Id.}
\item[29.] \textit{See Alomari v. Ohio Dep’t of Pub. Safety}, 626 F. App’x 558, 570 (6th Cir. 2015); \textit{Pritchard v. Cty. of Erie}, 473 F.3d 413, 420 (2d Cir. 2007).
\end{itemize}
of in-house counsel. The court held that the attorney-client privilege applied because the consultant “conducted the internal investigation on behalf of Wells Fargo’s in-house counsel for the purpose of representing Wells Fargo in its proceedings before the [Equal Employment Opportunity Commission].”

In evaluating these issues, courts consider these factors:

- A primary purpose of the communication must be obtaining legal advice.

- Communications seeking business, as opposed to legal, advice will not be shielded by the privilege.

- In-house counsel are protected by the privilege. But because in-house counsel regularly serve in both legal and business capacities, courts examine the nature of the communications before applying the privilege.

- Internal investigations conducted by non-attorneys acting as agents for company attorneys are privileged to the same extent as if the investigators were attorneys.

- The privilege does not apply to communications with clients in furtherance of committing a fraud or other criminal act.

2. Cooperating with Prosecutors, Implications of the Yates Memo, and Dealing with the SEC

For executives who are witnesses in, or targets of, investigations, the company’s claim of attorney-client privilege over executives’ statements to investigators is particularly important. Corporations often have an interest in providing government investigators with

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31. Id.
32. Id. at *2.
33. See In re Kellogg Brown & Root, 756 F.3d 754, 758–59 (D.C. Cir. 2014) (documents created in investigation of fraudulent billing not privileged because federal regulations and company’s compliance code required investigation); see also Alomari, 626 F. App’x at 570–71.
34. See Mac-Ray Corp. v. Ricotta, No. 03-CV-5248(F), 2004 WL 1368857, at *6–7 (W.D.N.Y. June 16, 2004) (e-mail from human resources to in-house counsel reciting facts of employee’s resignation not protected because not seeking legal advice). But see FTC v. Boehringer Ingelheim Pharm., Inc., 180 F. Supp. 3d 1, 33 (D.D.C. 2016) (spreadsheets prepared by company employees at request of in-house counsel for use in negotiating settlement were privileged, although they referred “to both legal and business matters”).
35. See In re Kellogg, 756 F.3d at 758.
37. See In re Kellogg, 756 F.3d at 758.
38. See In re Chevron Corp., 633 F.3d 153, 166 (3d Cir. 2011).
information and in waiving the privilege to obtain “cooperation” credit under federal prosecution guidelines.39

Since September 2015, DOJ has required federal prosecutors investigating corporate misconduct to focus on individual wrongdoing, rather than entering into plea agreements with corporations that dismiss charges against individuals.40 Sally Yates, former Deputy Attorney General, wrote this DOJ directive, known commonly as the “Yates Memo.”41 The Yates Memo increases the pressure on companies to provide information about executives accused of criminal acts rather than shield or seek protection for them. It has six basic directives:

- For corporations to receive “cooperation credit” (a reduction in corporate sentencing), they must identify everyone involved in the misconduct, regardless of position, and provide the DOJ all relevant facts.42
- Both criminal and civil prosecutors should focus on individual wrongdoing from the beginning of an investigation.43
- Unless there are extraordinary circumstances, no settlement with a company should include dismissal of charges against individuals.44
- Every resolution of a case against a company should include a plan for handling possible individual misconduct.45
- Prosecutors with the DOJ Civil Division should focus on prosecuting individuals, even if those individuals cannot pay civil fines.46
- Criminal and civil prosecutors should regularly communicate with each other concerning investigations.47

The Yates Memo gives companies strong incentives to thoroughly investigate allegations of misconduct and provide prosecutors with the results. Counsel representing clients whose alleged misconduct may have criminal implications should consult with a white-collar criminal defense attorney experienced in dealing with the local U.S. Attorney’s

40. Id.
41. Id.
42. Id. at 2.
43. Id.
44. Id.
45. Id. at 2–3.
46. Id. at 3.
47. Id. at 2.
office. Counsel should also be mindful of attorney-client privilege issues throughout investigations.

The SEC’s current guidelines also incentivize companies to cooperate and disclose information to the agency. The SEC uses four broad factors to evaluate a company’s eligibility for cooperation credit. Cooperation credit may result in no enforcement action or reduced charges and sanctions, depending upon:

- The extent to which the company “self-policed” before misconduct was discovered;
- The extent to which the company reported misconduct when upon discovery, it thoroughly reviewed the circumstances, and disclosed them to the public, regulatory agencies, and self-regulatory agencies;
- The company’s remedial actions, such as dismissing or disciplining wrongdoers, improving internal controls, and “appropriately compensating those adversely affected;” and
- The company’s “cooperation with law enforcement authorities, including providing [SEC] staff with all information relevant to the underlying violations and the company’s remedial efforts.”

Similarly, when representing a person subject to possible SEC prosecution, counsel may be able to work with the SEC to reduce or eliminate the client’s potential liability. The SEC evaluates a person’s cooperation by considering:

- The value and nature of the person’s cooperation with the agency;
- The importance of the underlying issues, including the danger to investors;
- The societal interest in holding cooperating persons fully accountable for their misconduct; and
- The person’s “personal and professional profile,” including “history of lawfulness,” the degree to which the person has accepted responsibility for the misconduct, and the degree to which the

49. Id. at 98.
50. Id. Examples of self-policing include maintaining effective compliance procedures and “an appropriate tone at the top.” Id.
51. Id. at 98–99.
52. Id. at 99.
53. Id.
54. Id. at 95.
55. Id. at 96–97.
56. Id. at 97.
person will have an opportunity to commit future violations of the federal securities laws.\textsuperscript{57}

3. Ethical Obligations of Corporate Counsel and \textit{Upjohn} Warnings

Executives in internal investigations should expect to be given an “\textit{Upjohn} warning” by the investigator.\textsuperscript{58} An \textit{Upjohn} warning, named for the Supreme Court’s decision in \textit{Upjohn Co. v. United States},\textsuperscript{59} satisfies the lawyer’s ethical obligations to make the lawyer’s role clear to the witness.

ABA Model Rule of Professional Conduct 1.13(f) states: “In dealing with an organization’s directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.”\textsuperscript{60} Comment 10 to Rule 1.13 notes that if the company’s interests become adverse to those of a witness, the lawyer should advise the witness that the lawyer cannot represent the witness and that the witness may want to retain counsel.\textsuperscript{61}

Central to \textit{Upjohn} warnings is Comment 10’s caution: “Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.”\textsuperscript{62} Similarly, ABA Model Rule 4.3 requires that, in dealing with an unrepresented person, the company’s lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.\textsuperscript{63}

The exact wording of an \textit{Upjohn} warning was not mandated by the Supreme Court’s decision, but it is an outgrowth of the Court’s interpretation of the attorney-client privilege.\textsuperscript{64} In a typical \textit{Upjohn} warning, investigating counsel will tell the witness that the lawyer represents

\textsuperscript{57} Id. at 98.
\textsuperscript{58} See \textit{Upjohn} Warnings, supra note 1, at 2–3.
\textsuperscript{60} \textit{Model Rules}, supra note 13, r. 1.13(f).
\textsuperscript{61} Id. at cmt. 10.
\textsuperscript{62} Id.
\textsuperscript{63} \textit{Model Rules}, supra note 13, r. 4.3.
\textsuperscript{64} See \textit{Upjohn} Co. v. United States, 449 U.S. 383, 390 (1981) (“[Attorney-client privilege] exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer . . . .”).
the company and not the witness; that the lawyer is interviewing the witness to obtain facts for the purpose of giving legal advice to the company; that the witness’s statements to the investigator are protected by the attorney-client privilege, but that the privilege belongs to the company; that the company may choose to waive the privilege and disclose the witness’s statements to a third party, including government authorities, without advising the witness; and that, to maintain the privilege for the company, the witness is expected to keep interview contents confidential.65

Two developments have increased pressure on companies to broaden *Upjohn* warnings. First, the Yates Memo and SEC cooperation guidelines penalize companies for not fully disclosing information to prosecutors.66 Second is the Ninth Circuit’s decision in *United States v. Ruehle*.67 Ruehle, the CEO of Broadcom, was indicted for participating in a scheme to backdate stock options.68 He sought to suppress, as attorney-client privileged, statements he had made to the company’s outside counsel during a related investigation.69 The company’s lawyers testified that they had given Ruehle *Upjohn* warnings, but he testified that he did not remember them.70 The Ninth Circuit held that the statements were not privileged because they were not made in confidence, but rather for disclosure to outside auditors.71 However, the Ninth Circuit noted that the district court did not credit the investigating attorneys’ testimony that they had given Ruehle an *Upjohn* warning because they took no notes and did not memorialize the conversation.72 *Ruehle* reminds investigators to provide witnesses with written *Upjohn* warnings and obtain signed acknowledgments that witnesses received, read, and understood them.

B. Work-Product Protection

Even if documents generated during investigations are not attorney-client privileged, the employer may not have to disclose them if they are protected as counsel’s work product. Work-product protection restricts access to materials “prepared in anticipation of litigation or for trial by or for another party or its representative.”73 The protection is designed to give lawyers a zone of privacy to formulate and prepare legal strategies without intrusion from opposing counsel.74

67. 583 F.3d 600 (9th Cir. 2009).
68. *Id.* at 602.
69. *Id.*
70. *Id.* at 605.
71. *Id.* at 609.
72. *Id.* at 604 n.3.
There are two categories of work product: (1) ordinary “fact” work product; and (2) “core” work product. To obtain disclosure of ordinary “fact” work product, a party must show it has a substantial need for the information and cannot obtain the substantial equivalent of the information without undue hardship. “Core” work product consists of an attorney’s mental impressions, conclusions, opinions, or legal theories and is “virtually sacrosanct.” It remains protected unless the requesting party can demonstrate a “highly persuasive showing of need.” Work product protection can extend even to materials generated before the events giving rise to litigation if the documents were created with an eye toward expected litigation.

In Farzan v. Wells Fargo Bank, for example, the plaintiff sought to depose a non-attorney outside consultant who investigated his discrimination claims at the direction of in-house counsel. The court held that all information obtained in the preliminary investigation was work product because, before the plaintiff filed his Equal Employment Opportunity Commission (EEOC) charge, he told his supervisor that he would “consider taking legal actions” against the employer if he were not given a job as a full-time employee.

C. Waiver of Attorney-Client Privilege and Work-Product Protection

In discrimination cases, executives’ statements to internal investigators may lose the protection of the company’s privilege if the company raises the defense that it took prompt and appropriate action to investigate and correct discriminatory conduct. This strategy is known as a Faragher-Ellerth defense. As one district court explained:

75. See In re Cendant Corp. Sec. Litig., 343 F.3d 658, 663 (3d Cir. 2003) (differentiating between two different types of attorney work product).


77. McGrath, 204 F.R.D. at 243–44.

78. Id.; see also Appleton Papers, 702 F.3d at 1023–24.

79. McGrath, 204 F.R.D. at 244.


81. Id. at *1.

82. Id. at *2.


84. See id. at *2; see also Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (To avoid vicarious liability for hostile work environment, employer may affirmatively defend that it: “(a) . . . exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (same).
When a Title VII defendant affirmatively invokes a Faragher-Ellerth defense that is premised, in whole or in part, on the results of an internal investigation, the defendant waives the attorney-client privilege and work product protections for not only the report itself, but for all documents, witness interviews, notes and memoranda created as part of and in furtherance of the investigation.85

In Angelone v. Xerox Corp.,86 for example, the employer used members of its general counsel’s office to investigate an employee’s claims of sexual harassment.87 The general counsel concluded that company policies were violated and recommended remedial measures.88 In later litigation, the employer raised as affirmative defenses that it exercised reasonable care to correct any harassment, and that the plaintiff unreasonably failed to take advantage of the employer’s corrective opportunities.89 The plaintiff sought all documents related to the investigation.90 The employer contended that the attorney-client privilege and work-product protection precluded discovery.91

On the plaintiff’s motion to compel, the court held that the employer waived both protections by asserting a Faragher-Ellerth defense.92 The court ordered production of any document or communication that Xerox “considered, prepared, reviewed, or relied on” in creating or issuing its investigative report.93 However, the court found Xerox had not waived protections for numerous other documents that the court believed were unrelated to the Faragher-Ellerth defense.94 The court ordered that if Xerox referenced any such documents in that context it would have to produce them immediately.95

In Koumoulis v. Independent Financial Marketing Group, Inc.,96 plaintiffs alleged a hostile work environment and discrimination based on religion, national origin, race, color, disability, and age.97 One plaintiff had made several internal discrimination and retaliation

86. Angelone, 2011 WL 4473534.
87. Id. at *1.
88. Id.
89. Id.
90. Id. at *2.
91. Id.
92. Id. at *3 ("Xerox cannot rely on the thoroughness and competency of its investigation and corrective actions and then try and shield discovery of documents underlying the investigation by asserting the attorney-client privilege or work product protections.").
93. Id. at *3.
94. Id.
95. Id. at *3.
97. Id. at 33.
complaints.98 The company’s investigation concluded the claims were unfounded, and the company fired him.99 Defendants pled a Faragher-Ellerth affirmative defense.100 When plaintiffs sought documents related to the investigation, the employer asserted attorney-client and work-product protections.101

The court found that neither applied.102 It rejected the attorney-client privilege claim because the employer’s outside counsel did not primarily act as a consultant on legal issues, but rather helped supervise and direct the internal investigation as an adjunct member of the human resources team.103 Further, even if attorney-client privilege applied, defendants waived it for “any documents relating to the reasonableness of defendants’ efforts to correct the allegedly discriminatory behavior and the reasonableness of its investigative policies and practices by asserting a Faragher/Ellerth defense.”104 Concerning work product, the court found the documents were created “simply in the course of a human resources investigation” and that advice concerning anticipated litigation “was occasionally included as an aside.”105

II. How Investigations Can Backfire

There are some investigations that are likely to backfire on an employer. This section addresses the pitfalls company counsel should be careful to avoid.

A. Biased Investigators

Investigations tinged with bias against alleged wrongdoers may give rise to independent discrimination claims. In Sassaman v. Gamache,106 the plaintiff was fired after being accused of sexually harassing another employee.107 He sued under Title VII, alleging that defendants pressured him to resign based on a sex stereotype of men’s purported propensity to harass female colleagues.108 The plaintiff testified in his deposition that the investigator said “you probably did what [the female colleague] said you did because you’re male and nobody

98. Id.
99. Id. at 34.
100. Id. at 33.
101. Id.
102. Id. at 44.
103. Id.
106. 566 F.3d 307 (2d Cir. 2009).
107. Id. at 311.
108. Id. at 312.
would believe you anyway,” and “I really don’t have any choice. [The female colleague] knows a lot of attorneys; I’m afraid she’ll sue me.”

Reversing the district court’s grant of summary judgment, the Second Circuit held that “fear of a lawsuit does not justify an employer’s reliance on sex stereotypes to resolve allegations of sexual harassment, discriminating against the accused employee in the process.”

The court found that the investigator’s discriminatory remarks could reasonably be construed to explain why defendants forced plaintiff to resign. Furthermore, making only minimal efforts to verify the female colleague’s accusations could be evidence of discriminatory intent.

B. Investigators Involved in the Alleged Misconduct

In McLaughlin v. National Grid USA, one investigator of the plaintiff’s failure-to-promote claim was also involved in a challenged hiring decision. Another investigator told the plaintiff at the end of the inquiry that “[e]very time black people don’t get the position that they think they deserve, the first thing they cry is discrimination.” The court held these facts were evidence of discriminatory intent and a possibly invalid, non-independent investigation and denied defendant’s summary judgment motion.

C. Failure to Investigate as Retaliation

In most cases, an employer’s failure to investigate a discrimination claim will not itself be considered an adverse employment action taken in retaliation for filing the claim. In Fincher v. Depository Trust & Clearing Corp., the Second Circuit found that employees whose claims are not investigated are in the same position they would have been if they had not filed any claim. It reasoned that the employer’s failure to investigate could not create any threat of future harm.

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109. Id. at 311.
110. Id.
111. Id. at 313.
112. Id. at 314.
113. Id.
115. Id. at *1.
116. Id. at *4.
117. Id. at *14.
118. Daniels v. United Parcel Serv., 701 F.3d 620, 640 (10th Cir. 2012) (“[A]dopting a contrary rule and finding a failure to investigate establishes a prima facie case of retaliation would open employers to retaliation claims even where they failed to investigate because of a good faith belief the complaint was meritless.”); see also Scoppettone v. Mamma Lombardi’s Pizzico, Inc., 523 F. App’x 73 (2d Cir. 2013); Fincher v. Depository Tr. & Clearing Corp., 604 F.3d 712 (2d Cir. 2010).
119. Fincher, 604 F.3d at 712.
120. Id. at 721.
121. Id.
Nevertheless, if the failure to investigate is in retaliation for a separate, protected act by the employee, the failure to investigate can itself give rise to a discrimination claim.122

D. Retaliation Against Investigation Participants

Title VII prohibits employer retaliation against an employee “because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has . . . participated in any manner in an investigation . . . under this subchapter.”123 Employee participants in internal discrimination investigations may be found to have “opposed” discrimination depending on the nature of their participation.124 However, to be protected under Title VII’s “participation” clause, employees must participate in investigations conducted in connection with formal EEOC charges.125 Employers therefore should be cautious before taking an adverse action against an employee who participated in a discrimination investigation.

III. Practical Pointers for Executives’ Counsel

Counsel for executives obviously have a different role in investigations than company attorneys. This section provides some guidelines for counsel representing executives in internal investigations.

A. Understand What Is at Stake

Executives’ counsel first need to determine why their client is being investigated. Executives’ counsel should contact the company’s counsel to develop professional rapport. Counsel then must ascertain whether the executive client is a target of the investigation or simply a witness. Counsel should learn as much as possible about the issues and who will be present during interviews.

B. What Obligations Does the Company Have to Executives?

Senior executives are normally covered by companies’ indemnification policies, either through employment contracts, company bylaws, or relevant state statutes. Counsel should review these potential indemnification sources carefully because they may not be as favorable as counsel would prefer. Some require reimbursement of an executive’s attorney fees only after the executive has been formally charged with a legal violation or has been subpoenaed. Some advance legal fees to the executive, but generally mandate that the executive repay them if the executive admits to, or is found guilty of, a crime.

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122. Id. at 722.
C. Be Present

In investigations by company attorneys, executives should be able to have their own counsel attend, because it is unethical under most states' rules for an attorney to contact a party without the party's consent, if the attorney knows the person is represented by counsel.\textsuperscript{126} Investigating counsel may assert they are not functioning as lawyers, but in a human resources role. Executives' counsel should scrutinize the underlying circumstances to be able to challenge this claim where it may be inconsistent with the facts.

If an attorney is not conducting the investigation, employees in most states do not possess the right to have an attorney present.\textsuperscript{127} Counsel may certainly push to be present regardless, and, in many cases, the employer will agree. If the company will not permit the lawyer to attend, counsel should carefully advise the executive about the implications of refusing to be interviewed, because many employers have policies providing for discipline or termination of employees who refuse to cooperate with an investigation.

D. If Executives' Counsel Will Not Be Present, They Must Counsel Executives Appropriately

If the executive's counsel will not be present at a company interview (either because the company's counsel is not conducting it or the executive's lawyer has a strategic reason not to participate), counsel should advise the executive about privilege issues and ensure the client understands the implications of the anticipated \textit{Upjohn} warnings—that the interviewing lawyer is representing only the company; that while the client's answers may be protected by attorney-client privilege, the privilege is the company's and may be waived by the company; and that the client's statements may be disclosed to the government or in litigation.\textsuperscript{128}

E. Review Documents

Many companies provide documents to executives' attorneys before an executive is interviewed. Lawyers for executives must review these documents with their clients to decide if there are others they should request. Counsel should alert clients to any inconsistencies between documents and statements the client made previously or between documents the client prepared. If apparent discrepancies exist, counsel should discuss with the client any possible explanations for them.

\textsuperscript{126} \textit{Model Rules, supra} note 13, r. 4.2.


\textsuperscript{128} See generally \textit{Upjohn Co. v. United States}, 449 U.S. 383 (1981); \textit{Upjohn Warnings, supra} note 1, at 2–4.
F. Be Careful About Public Disclosure Requirements

If the client is an officer or director of a publicly traded company and is under threat of termination, the employer must file Form 8-K with the SEC within four business days of a change in status. The employer may use the threat of the filing to pressure an executive to resign to avoid an embarrassing public disclosure of a termination for cause. Lawyers should talk with these clients to determine if this issue is critical for them. Counsel should also consider whether the client could invoke a “Good Reason” resignation clause in the client’s employment contract to avoid an adverse disclosure.

Similarly, if the client is a financial services employee who is a registered representative, the employer must file Form U5 with the Financial Industry Regulatory Authority (FINRA) describing a termination of employment within thirty days of the employee’s departure. If the employer files a U5 that contains damaging information about the circumstances of the termination, the executive’s career may be stalled or ended. If termination seems likely, counsel should seek to negotiate the language of the company’s disclosure.

G. Counsel the Executive on Both Substance and Style

Lawyers should counsel executives that an investigation is not an occasion to argue, be bellicose, jump to legal conclusions, or pontificate. Many instructions given prior to depositions are useful here:

- Pause and think before answering a question.
- Do not generalize, estimate, assume facts, or offer specific dates unless you are completely sure of yourself.
- Do not quote others unless certain they can be quoted accurately.
- Do not argue with the interviewer.
- If you do not understand a question, ask for clarification.
- Do not answer questions that call for legal conclusions—just state facts.
- If given a document, read it over before answering questions about it.

129. See SEC Form 8-K Instructions, § 5.02(b) (Apr. 2017), https://www.sec.gov/about/forms/form8-k.pdf.
130. Laura D. Richman, Reporting Consequences and Other Considerations for Changes in Directors or Executive Officers of a US Public Company 3–4, MAYER BROWN (June 9, 2015), https://m.mayerbrown.com/files/Publication/07ba14b6-65c1-4cb6-b06b-0598e8fc905/Presentation/PublicationAttachment/01d3bcf6-e542-4967-b666-1fea3f8c3b79/150609-UPDATE-CS.pdf.
• Do not answer questions to which you do not know the answer.
• Do not try to please the investigator.

Executives should be counseled to be extremely cautious if they are asked to sign a statement the investigator prepares. It may not contain the executive’s complete answers or reflect critical factual nuances, and it is likely to distort what the executive said.

If the company insists upon a written statement, the executive can first request time at home to draft one. If there are relevant documents that the investigator has omitted, the executive should note those documents in the written statement.

If the company insists on the executive signing a statement that the investigator prepared, the executive may want to ask to review it at home so that the executive can propose changes. However, the executive should keep in mind that the company may seek to characterize the executive’s refusal to go along with the company’s demand as a failure to cooperate and a terminable offense.

Conclusion

How an investigation is handled, and how lawyers represent their clients during it, will have a major impact on both the company and the executive. The investigation will influence the employer’s potential defenses, strategies used in negotiating with the executive or prosecutors, and possible outcomes. For the executive, the investigation may determine whether the executive will be terminated, the circumstances of any departure, and future career prospects. Counsel for both sides must be mindful of the legal, financial, and professional ramifications and nuances involved. Attorneys must be focused, strategic, aggressive when appropriate, and careful when required to shepherd their clients safely to a positive resolution.
Requesting Balance: Promoting Flexible Work Arrangements with Procedural Right-to-Request Statutes

Paul D. Hallgren Jr.*

Introduction

Today’s workforce increasingly prioritizes work-life balance.1 Employers and their human resources departments are noticing.2 However, many employers view flexible working arrangements3 (FWAs) with trepidation, thinking the practice might harm workplace dynamics and employee productivity.4 Even those employers that offer some flexibility typically afford the most generous arrangements to highly skilled or professional employees, rather than lower-wage workers.5 Employees who take advantage of flexible options are often stigmatized.6 Such problems preclude employees from experiencing lifestyles

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3. “Workplace flexibility is a Universal Strategy that can meet the needs of employers and their employees, which includes when, where, and how work is done.” Workplace Flexibility Toolkit, U.S. DEPT. OF LABOR, https://www.dol.gov/odep/workplaceflexibility (last visited Nov. 19, 2017). The concept is also sometimes referred to as “alternative work arrangements,” “teleworking,” “flextime,” or “telecommuting.”

4. Some experts say that flexible working arrangements (FWAs) are not more widespread because they require a leap of faith that productivity will not be impaired. See Tara Siegel Bernard, For Workers, Less Flexible Companies, N.Y. TIMES (May 19, 2014), http://www.nytimes.com/2014/05/20/business/for-workers-less-flexible-companies.html.

5. Id.; see also Robert C. Bird, Precarious Work: The Need for Flextime Employment Rights and Proposals for Reform, 37 BERKELEY J. EMP. & LAB. L. 1, 4 (2016) (Low-wage workers would benefit most from FWAs because they “are disproportionately faced with the broader demographic challenges of the rise in single parenting, two working spouses, and extended care for elderly parents.”) [hereinafter Bird, Precarious Work].

with desired time for family care and proper rest and rob employers of productive and loyal workers.\(^7\)

Part I of this Note explains how employees and employers benefit from FWAs. Part II offers several examples of “right-to-request” statutes and ordinances already in place in the United States and abroad. Part III describes a model right-to-request law designed to both (1) ensure employer good faith review of employees’ FWA requests and (2) avoid imposing an undue burden on employers. Part IV considers some obstacles to widespread adoption of FWA statutes.

I. The Benefits of FWAs for Employers and Employees

Employers and employees both benefit from FWAs. Flexibility allows employees to care for children and elderly parents and get proper rest without sacrificing income and risking their livelihoods.\(^8\) In return, employers retain happy employees who are more productive and positive about their workplaces.\(^9\)

A. The Impact of FWAs on Employees

The advantages of FWAs for employees are obvious. FWAs can help employees achieve work-life balance that limits stress and permits family care.\(^10\) Flexible working hours and arrival times have important health implications as well. Inflexible schedules interfere with medical care.\(^11\) Lack of balance can weaken immune systems, exacerbate medical conditions, and put employees at risk of substance abuse.\(^12\) FWAs, in turn, allow employees to remain productive and employed while still engaging in meaningful aspects of family life, such as transporting children to and from school.\(^13\)

Thus far, FWAs have most often been provided to white-collar office workers,\(^14\) largely because computers and mobile phones allow...
employees to accomplish work tasks outside the office. The legal profession has taken notice, and law firms are increasingly affording attorneys flexible work options. Electronic communication methods for white-collar workers facilitate connections to clients and the office. Open communication is critical to the success of such arrangements.

The growing prevalence of FWAs among professional employees may mask the lack of flexibility for low-wage workers. Arguably, the most glaring problem for low-wage employees is unpredictable schedules. Unpredictable work schedules negatively affect these employees’ ability to plan for childcare and recover from illness without risking much-needed income. While e-mail and cell phone technology permits white-collar employees to vary start times and work remotely, these technologies increase the ability of employers to cancel shifts and impose overtime on low-wage workers.

FWAs can also improve workplace gender equity. FWAs allow family caregivers (who even today tend to be women) to work during hours that better fit their personal needs. Potential employees with hectic family demands routinely reduce hours or take part-time jobs,

17. But see Mary C. Noonan & Jennifer L. Glass, *The Hard Truth About Telecommuting*, 135 MONTHLY LAB. REV. 38, 45 (2012) (“The ability of employees to work at home may actually allow employers to raise expectations for work availability during evenings and weekends and foster longer workdays and workweeks.”).
23. Id. (inflexible work “disproportionately impacts women”).
a practice that disproportionately affects women. Normalizing FWAs would reduce the stigma (which again, disproportionately affects women) of visibly juggling career and family life. FWAs avoid forcing employees to choose between work and family and empower men to take a more active family role, furthering gender equity.

In sum, employees have much to gain from FWAs, most obviously improved work-life balance and accommodation of family needs. However, FWAs are not just for white-collar workers who can log in to offices remotely. FWAs also enhance balance and job longevity for low-wage workers and improve gender equity.

B. The Impact of FWAs on Employers

Compared to benefits for employees, employers’ gains from FWAs are arguably subtler. Employers that offer FWAs experience improved employee recruiting and retention. One study found that a third of employees considered workplace flexibility the most important factor when choosing an employer. Another study reported that ninety-one percent of human resources professionals agreed that FWAs “positively influence employee engagement, job satisfaction, and retention.” Employers can attract top talent by marketing their flexible worktimes and workplaces. Other studies identified a correlation between flexibility and job satisfaction.

Perhaps most important for employers, FWAs tend to increase employee productivity. Indeed, there is a correlation between employee productivity.
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satisfaction and productivity promoted through FWAs because they erode conflicts between non-work issues and work demands. Specifically, “[f]lextime also improves healthy employee behaviors, which in turn can reduce medical costs, decrease employee absenteeism, and improve productivity.”

In certain fields, productivity benefits are greater. In short, employers that implement FWAs see positive results. Offering prospective employees flexible working options makes a workplace attractive, and increased employee satisfaction reduces turnover. Employers do not experience decreased productivity. Instead, facilitating a better balance between home and work makes employees more productive.

II. FWA Statutes

Statutes can play different roles in encouraging employers to adopt FWAs. Some FWA statutes provide substantive rights to employees, while others offer only procedural safeguards. Substantive statutes guarantee flextime in the absence of valid extenuating circumstances. Procedural laws guarantee employees only procedural rights, such as a right to request flexibility without fear of retaliation. Some laws protect both substantive and procedural rights.

33. Id. at 337; see also Ravi S. Gajendran et al., Are Telecommuters Remotely Good Citizens? Unpacking Telecommuting’s Effects on Performance Via I-Deals and Job Resources, 68 PERSONNEL PSYCHOL. 353, 384 (2014) (“Managers can treat [FWAs as] mutually beneficial to the employee and the organization and as a form of work redesign that generates autonomy perceptions, a valuable job resource that could improve employee productivity and contextual performance.”).


35. See generally Finkel, supra note 16 (benefits of FWAs in law firms); Riva Poor, How and Why Flexible Work Weeks Came About, 42 CONN. L. REV. 1047, 1053–55 (2010) (listing various occupations that may see greater productivity from alterations in standard workweek schedules, including oil truckers and certain manufacturers and retailers).

36. See GEORGETOWN UNIV. LAW CTR., FLEXIBLE WORK ARRANGEMENTS (FWAs): POSSIBLE PUBLIC POLICY APPROACHES (2009) (“labor standards that provide employees with substantive rights to receive FWAs compared to “labor standards that create structures or processes in which FWAs are easier to receive”).


38. See id.

39. For example, Germany grants a substantive right to reduced work hours while also requiring employers and employees to discuss proposed changes. See Model Work-Time Policies, BERKELEY FLEXIBLE WORK-TIME INITIATIVE, http://www.flexibleworktime.com/models.html (last visited Nov. 19, 2017) [hereinafter Model].
A. Statutes Providing Substantive Rights

The hallmark characteristic of substantive FWA statutes is an employee right to reduced hours.50 Five countries recognize such a right.41 This section reviews four such notable statutory schemes.

1. Germany

German employees obtained the right to reduced work hours starting in the Part-Time and Fixed Term Contract Act.42 The Act allows those employed at their current job for at least six months to request reduced hours.43 Requests must be made three months before the change would take place, and the employer and employee must discuss barriers the employer has identified.44 The employer must grant requests “unless ‘there are operational reasons standing in the way of such reduction . . . [such as when] the reduction of working time would fundamentally impair the [employer’s] organization, working process, or safety or incur unreasonable costs.’”45 Employees may request reduced hours every two years, and employers that fail to follow prescribed procedures are subject to judicial review of their decisions and reduction of their workers’ hours to those initially proposed.46 The Act allows even high-level employees to reduce hours.47 It seeks to prevent discrimination against part-time and contract workers and to promote part-time work and employees’ choice of hours.48

While the general concept of flextime covers where, when, and how employees work (allowing for changes not only in working hours but in remote working as well), Germany’s Act grants rights only for reduced hours.49 Germany’s law thus guarantees narrower rights than statutes in other countries that promote a broader range of flexibility options.

2. The Netherlands

Dutch workers gained a right to request both reductions and extensions of working hours in the Adjustment of Working Hours Act.50

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40. See Hegewisch & Gornick, supra note 37, at 21 (differentiating between substantive FWA statutes ensuring flextime and those that protect only the right to request without retaliation and provide procedures for reviewing requests).

41. Id. at 5, 19 (Germany, France, the Netherlands, Belgium, and Finland).


44. Id. at 72.

45. Id. (quoting Anne Freckmann, Business Laws of Germany § 9.27 (2012)).

46. Id.

47. Model, supra note 39.

48. Id.


Act covers employees who have worked for the employer for at least one year before the requested changes would begin.\textsuperscript{51} Requests must be submitted in writing four months before the proposed change. Employees may make requests every two years, and employers must meet with employees before providing a “well-reasoned” written response.\textsuperscript{52} Employers must grant requests absent significant business or service reasons for rejection.\textsuperscript{53} The Act does not apply directly to employers with nine or fewer employees, but those employers must develop their own rules for adjusting working hours.\textsuperscript{54}

The Dutch government cites several policy reasons for protecting working hours adjustments, including increasing worker supply, easing employees’ combination of work and other responsibilities, and facilitating workforce flexibility.\textsuperscript{55} The Dutch government clearly does not view the right to flexible working hours as a benefit only for employees.

3. France

France also allows employees to reduce working hours.\textsuperscript{56} French law dictates that, if a collective agreement is in place, employees’ requests may be rejected for objective reasons articulated in the contract.\textsuperscript{57} However, similar to Germany and the Netherlands, “[i]n the absence of a collective agreement, the employer may only refuse such request if it can demonstrate the absence of available employment within the employee’s professional category or show that the change requested by the employee would result in prejudicial consequences on the proper operation of the company.”\textsuperscript{58} Thus, French law presumes that employees may reduce their hours.

France provides employees several other substantive rights. For example, employees may on multiple occasions reduce work hours for one week to provide family care, and employees also may obtain reduced hours for caretaking to allow them to maintain employment.\textsuperscript{59} With such broad rights, it is no surprise that France boasts a comparatively high rate of women in the workforce while also maintaining a higher birth rate than other European countries.\textsuperscript{60}

\begin{thebibliography}{9}
\bibitem{51} Model, supra note 39.
\bibitem{52} Visser et al., supra note 50, at 206.
\bibitem{53} Model, supra note 39.
\bibitem{54} Visser et al., supra note 50, at 206.
\bibitem{55} Id. at 204–05. (These policy justifications are listed in the Explanatory Policy Document to the Working Hours Amendment Act.)
\bibitem{57} Id.
\bibitem{58} Id.
\bibitem{59} Id.
\end{thebibliography}
4. New South Wales (Australia)

New South Wales, an Australian state, created a unique substantive right “to promote the widest possible use of flexible work practices to promote optimal agency performance and enable employees to balance work and personal responsibilities.”61 New South Wales categorized caregivers as a protected class62 under the Anti-Discrimination Amendment (Carers’ Responsibilities) Act of 2000.63 The law bans discrimination against employees caring for children or immediate family members in the absence of justifiable employer hardship.64 New South Wales employers must accommodate working parents and adult children of elderly parents.65 Necessary accommodations may include reduction to part-time hours or FWAs.66

In sum, the law in New South Wales applies only to employees who fit within the protected class, but it covers those who stand to benefit most from FWAs. The law’s narrowed scope and categorization of caregivers as a protected class distinguish it from other substantive FWA statutes.

B. Procedural Statutes

Several jurisdictions have procedural laws, also known as right-to-request statutes.67 To understand these statutes, it is helpful to review their origins.

1. United Kingdom’s 2002 Amendment to the Employment Rights Act

The first right-to-request statute appeared in a 2002 amendment to the United Kingdom’s Employment Rights Act (ERA) of 1996.68 The ERA was amended to address the growing need for workplace flexibility.69 The Act allows employees to request modifications to hours,

63. C2001-26, supra note 61.
64. Id.
65. Id.
67. Right-to-request statutes prevent employers from retaliating against employees who submit FWA requests and establish procedures governing employer review of FWA requests. See, e.g., 21 VT. STAT. ANN. § 309 (2017) (effective Jan. 1, 2014); see also Bird, Precarious Work, supra note 5, at 28 (“Right-to-request legislation grants an employee the right to ask for flexible work arrangements from her employer.”).
68. Bird, Precarious Work, supra note 5, at 28 n.178.
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working days, and work location (at home or in the office). However, the statute has a “caretaker requirement”—the request must be designed to care for a child up to age six or, if the child is disabled, eighteen. The statute suggests several non-exclusive grounds upon which employers may refuse requests, and, if denied, employees may not submit another request for twelve months. Before making a decision, however, the employer must meet with the employee within twenty-eight days of submission. The employer must provide written notice of its decision within fourteen days of the meeting, and the employee has fourteen days to appeal. Appeals go to an Employment Tribunal empowered to order employers to reconsider applications and to levy fines to be paid to employees for employers’ failure to comply with procedural requirements. Notably absent from the Employment Tribunal’s available remedies is the ability to grant employee FWA requests.

2. Vermont Statute

Vermont’s right-to-request statute has much in common with the United Kingdom’s ERA. Vermont also allows employees to request changes to hours, days of work, and working remotely. However, Vermont also gives employees the right to request job-sharing, and it specifies that FWAs do not include “vacation, routine scheduling of shifts, or another form of employee leave.” Another key difference is that Vermont has no caretaker requirement—any employee may submit FWA requests.

The Vermont statute also has a meeting requirement, though it does not set a deadline for employer-employee meetings. Employers
simply must meet with employees to consider requests in “good faith.”

Comparable to the ERA, a Vermont employer may deny an employee’s request if “inconsistent with business operations or its legal or contractual obligations.” There is no deadline for employer responses, but, if the request is written, the employer’s response must also be in writing. Vermont’s Attorney General, State Attorney, or the Human Rights Commission (in the case of state employers) may investigate and restrain employers’ actions if they violate these procedural provisions. The governmental agent may then sue, and remedies include injunctive relief and costs. The court cannot overturn an employer decision, and the statute does not create a private cause of action. Finally, the statute explicitly prohibits retaliation against employees who request FWAs.

3. Family Friendly Work Ordinance (San Francisco)

San Francisco’s right-to-request ordinance was designed to support single parents, combat gender pay inequity, and reduce traffic and commute times. Workers employed within San Francisco city limits who have worked for their employers for at least six months may request changes to hours, dates of work, work location, changes to work assignments, and predictable work schedules. There is a caretaker requirement. The employee must be making the request to care for a child under eighteen, a family member with a serious health condition, or a parent at least sixty-five years old. The request must be submitted in writing, and employees may make two requests within twelve calendar months unless a “serious life event” necessitates another request.

85. Id.
86. Id. § 309(b)(2). Factors that might make a request inconsistent with business operations include “(A) the burden on an employer of additional costs; (B) a detrimental effect on aggregate employee morale unrelated to discrimination or other unlawful employment practices; (C) a detrimental effect on the ability of an employer to meet consumer demand; (D) an inability to reorganize work among existing staff; (E) an inability to recruit additional staff; (F) a detrimental impact on business quality or business performance; (G) an insufficiency of work during the periods the employee proposes to work; and (H) planned structural changes to the business.” Id. § 309(b)(3).
87. Id. § 309(c).
88. Id. § 309(e).
89. Id.
90. Id.
91. Id. § 309(f).
93. Id. § 12Z.1(6).
94. Id. § 12Z.4(a). Employers must also employ at least twenty workers. See also id. § 12Z.3.
95. Id. § 12Z.4(a). Employers may request verification of employee caretaker status. Id. § 12Z.4(c).
96. Id. § 12Z.4(b), (d), (e).
The ordinance grants employers twenty-one days to meet with employees concerning requests and twenty-one days thereafter to respond. Denials must be in writing and must identify a “bona fide business reason” for rejection. Within thirty days of rejection, employees may request reconsideration, giving employers another twenty-one days to meet and twenty-one days thereafter to respond. The ordinance outlaws retaliation against a requesting employee, and the Office of Labor Standards Enforcement may investigate potential procedural violations and levy small fines.

4. New Hampshire

The barest right-to-request statute belongs to New Hampshire, executed on June 3, 2016, in Senate Bill 416 and effective September 1, 2016. It simply reads:

No employer shall retaliate against any employee solely because the employee requests a flexible work schedule. Nothing in this section shall be construed to require any employer to accommodate a flexible work schedule. Nothing in this section shall be construed to create a cause of action for failure to provide a flexible work schedule at an employee’s request.

The enacted legislation is far narrower than the original legislative proposal. It mirrored Vermont’s procedural requirements and included substantive protections for hourly workers.

III. Considering the Ideal FWA Statute

Existing FWA statutes and ordinances share common features but also key differences. Assessing existing provisions offers guidance in designing a model FWA law.

97. Id. § 12Z.5(a).
98. Id. § 12Z.5(b), (d).
99. Id. § 12Z.5(c). Bona fide business reasons under the ordinance include, but are not limited to, “(1) The identifiable cost of the change in a term or condition of employment requested in the application, including but not limited to the cost of productivity loss, retraining or hiring Employees, or transferring Employees from one facility to another facility. (2) Detrimental effect on ability to meet customer or client demands. (3) Inability to organize work among other Employees. (4) Insufficiency of work to be performed during the time the Employee proposes to work.” Id.
100. Id. § 12Z.6.
101. Id. § 12Z.7(b).
102. Id. § 12Z.10(a)(2) (up to fifty dollars for each employee whose review procedure was violated).
104. Id.
106. N.H. SB 416.
A. Federal or State Law?

A key foundational question concerning FWAs is whether the law should be federal or state. In short, should the United States pass national legislation or enact incremental, individually tailored state laws? This question is important because it affects how soon employees might gain protections of any FWA law and whether employees have equal rights to FWAs, if any at all.

Speed of passage, fairness, and ease of administration are important factors to consider when selecting the proper level of legislation. Despite congressional inaction, federal law would likely be fastest in ensuring all employees have access to some FWA protection. It is unlikely that all states could each pass a law before Congress could do so.

What level of legislation could best assure fairness to employees and employers? For employees, a federal law would ensure that workers in all states have uniform protection. The issue is more interesting from the employers’ perspective, however. The United States is geographically large and diverse economically and culturally, especially compared to other countries with FWA statutes. Therefore, fairness might best be achieved if states devise FWA statutes that meet the needs of their industries and residents.

FWA laws should offer speedy review and cost-effective administration. States may address issues more quickly within their borders than the often-stretched federal government, though such a result is far from guaranteed. However, FWA law administration may unduly strain some state budgets. This concern could preclude some states from passing any FWA law.

Both federal and state legislative options present serious challenges. The best option is likely for states to follow New Hampshire and Vermont in crafting their own FWA statutes. That way, state representatives may craft provisions responsive to their own particular needs and desires. Further, divisive national politics may make passage of federal law unlikely.


B. Substantive or Procedural Rights?

With the exception of the ERA, there is a divide between the United States and other nations on whether to offer substantive or procedural FWA rights. While current U.S. laws are right-to-request statutes, some countries have offered substantive flexibility rights to employees. What type of system best fits the United States?

Opponents of substantive FWA laws might resist them as government marketplace intrusion. Even a procedural law allowing employers to deny requests only if required procedures are followed could significantly benefit employees. Employers that frivolously deny requests will have difficulty attracting and retaining talent, especially as workers continue to value flexibility.111 However, a substantive right to FWAs, similar to Germany or the Netherlands, will likely result in more flextime requests granted and, potentially, more dramatic improvement in work-life balance. Nevertheless, if a large number of workers seek FWAs, it could strain businesses and burden human resources and administration.

Ultimately, a procedural law is ideal because it encourages a broader notion of flextime and facilitates conversations. Substantive laws enacted so far generally ensure the right only to reduced hours.112 FWAs can include more than reduced hours, such as remote working and alternative arrival times and schedules. A substantive law presuming employees' rights to work remotely or make significant scheduling changes would certainly be more burdensome to employers. Yet, only allowing the substantive right to reduced hours fails to encompass all benefits FWAs may offer. Therefore, a procedural law that guarantees employees the right to discuss with employers a broad range of flexible options strikes the best balance for both sides. Inevitably, employers will grant fewer requests, but approved requests will create better results. In addition, technological improvements, the growing popularity of flexible working, and employee demand should lead, over time, to granting more requests.

C. Who Should Qualify for FWAs?

Additional issues in statutory design include whether all employees or just certain groups qualify, how long employees must have been with their employers, when rejected employees may make another request, and how large an employer must be to be subject to the law. All or some of these answers likely depend upon the needs of the region, particularly if the statute is state-level.

112. See Model, supra note 39.
FWAs should be accessible to employees generally, even those who work part-time. If a particular statute is available to only a particular group, such as the caregiver requirement in New South Wales, there will be an unequal distribution of work-life balance opportunities. As a practical matter, targeting a certain demographic may help repair a single important issue (such as gender equity) and make legislators less apprehensive about enacting the law, but an ideal act should be broader. In addition, protection should not be limited to full-time employees. America’s part-time workforce has exploded, and many people work multiple jobs and odd hours to earn a living wage. Balancing a schedule is just as, if not more, important in such cases.

Laws enacted in the United States and abroad illustrate a range in how long an employee must work for an employer before qualifying for a request. Germany and San Francisco require the shortest tenure, six months. A minimum of six months to a year is likely suitable. When considering a possible minimum, it is important to note that it can take up to six months, or even longer, for employees to grow accustomed to the rigors of a new position. Six months should allow both employers and employees to gauge the employee’s fit in the position. Even if a new position is particularly challenging, most workers adjust by the first year’s end, at which time they should have the opportunity to request FWAs.

FWA laws also present a range of options for when employees can make subsequent requests. Again, a period between six months and one year appears appropriate. Waiting as long as two years to make a second request, as employees must do in Germany, seems excessive. Circumstances often change dramatically in two years, both for the employee and for the company. It likely will not take as long for an employer to become better equipped to handle flexible workers, but it is likely that an employee could lose an opportunity to care for children or a relative in the meantime. Especially in a system utilizing procedural statutes, the costs are rather low for an employer simply to read, meet, and respond to employees’ requests.

114. Patrick Gillespie, America’s Part-Time Workforce Is Huge, CNN Money (Apr. 25, 2016), http://money.cnn.com/2016/04/25/news/economy/part-time-jobs (“[T]he 6 million Americans who work part-time but want full-time jobs today are at the highest level in about 30 years or so, . . . [and] some experts believe America now has a ‘new normal’—a permanently high number of part-timers.”).
Finally, there is a question of how many employees an employer must have to be subject to FWA laws. Admittedly, the question is difficult to answer, and there is a range not just in current FWA laws, but also U.S. employment laws generally. The Netherlands’ example, requiring employers below the minimum to develop their own systems for reviewing FWA requests, should be considered. There is a benefit to promoting flexibility for all employees, including those at small companies. Small companies and start-ups often require flexibility and task juggling from employees anyway, so allowing remote work, for example, will often fit the model.

D. Notification Period

For requesting employees, the notification period could be a crucial component of an FWA statute. For example, San Francisco’s municipal ordinance sets a maximum number of days that may pass before employers meet with employees to discuss requests and respond. Timing is important because employees will often request changes to provide immediate care to a child or aging parent. A prompt response could determine whether the employee can remain in the job, regardless of the answer.

However, the notification period must be sensitive to employer needs as well. Strict response times might be impractical for large employers with multiple unique requests. Granting a single request might require rearranging several employees’ schedules. Legislators should investigate the time employers actually need to determine a reasonable deadline for employer responses. The final notification period should ultimately reflect the needs of both parties.

E. Penalties

Employer penalties raise an engaging law-and-economics issue. How can law best promote “good” behavior? Current FWA laws provide examples. Germany allows courts to overturn denials. United Kingdom and Vermont employers may need to review a request again and pay a nominal fine for noncompliance with procedural requirements. However, both types of statutes present challenges. The German model makes FWAs a substantive right, and the latter two models could create long delays for employees.


119. Visser et al., supra note 50, at 206.

120. Bird, Precarious Work, supra note 5, at 5; Schawbel, supra note 13.


122. Bird, Precarious Work, supra note 5, at 5.
An ideal penalty system should be triggered only if an employer fails to comply with procedural requirements and should impose fines related to employer revenue or operating budgets. Drafters should determine a percentage that best discourages violations without unduly punishing innocent employer errors. Wronged employees should receive all or some of the fine to encourage reporting, but there should be no private right of action. An agency or government representative is the best advocate to argue a noncompliance claim before an administrative agency tribunal or a trial court.

Some would argue that having relatively minor remedies that do not order a second review or overturn a decision are toothless and unfair to employees. However, laws help advance cultural norms by altering perceptions of legitimacy and normality, especially when public opinions are already shifting. Simply put, penalties need not be severe to promote change. The goal, especially in the early stages of FWA legislation, is to facilitate discussion between employers and employees. Enactment of FWA laws might depend on their initial reception, and stiffer penalties could jeopardize passage. FWA laws should offer flexible means to create flexible workplaces. An FWA provision that imposes minimal penalties for procedural violations will still further positive outcomes.

IV. Potential Challenges to FWAs

Employers may oppose FWAs. The FWA legislative process will commonly require some level of compromise between the interests of employers and employees. Potential objections include the cost of accommodating flexing employees, office disruption, frivolous requests, and political ideology. In actuality, the stakes are lower than employers might anticipate if FWA laws are solely procedural. Ultimately, potential benefits to employers and employees outweigh these risks.

A. Cost to Employers

One key challenge to FWAs is the cost to employers. Employers may require specialized equipment to accommodate a remote worker or need to hire or reassign an employee to assume a requesting employee’s hours. Employers will invest time and money hiring and training

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124. See Goldsborough, supra note 18, at 35 (identifying the importance of communication between employees and employers).
125. See, e.g., Thompson et al., supra note 30, at 743 (worktime and workplace flexibility give employers a “competitive edge” in recruiting employees).
new employees and may have to purchase software and cameras for video chats, for example, to keep employees connected with co-workers and customers. This potential cost of creating a flexible workplace is likely a deterrent for some legislators.

Procedural laws impose fewer costs on employers. Such laws allow employers that follow required procedures to reject employee requests. The cost of reviewing a request is rather low, and it is the only requirement of this model. The hope is that employers, after conversing with requesting employees, will understand the mutual benefits of flexible working arrangements for employee health, productivity, and retention. Of course, not every job permits flexibility. Employers need not shoulder any costs they view as unwise because there is no substantive right to flextime.

B. Office Disruption

Employers that feel anxious about FWAs might fear workplace disruption. Inconsistent arrival and leave times and issues with remote workers could interrupt work flow. Jealous employees without FWAs might create morale problems. Nervous employers may tend to deny flextime on these grounds alone.

Procedural FWA laws allay these concerns because employers can simply deny flextime requests after following the required review protocol. However, technological and cultural changes may ease employers’ fears over time. Constant connectivity is altering traditional workplaces. Remote workers adjust quickly to communicating with one another. There may be some office jealousy, but as more employees gain access to flexibility and social norms change, potential office culture problems will be reduced.

C. Frivolous Requests

Employers may fear having to devote time to frivolous requests. While a substantive FWA statute might force an employer to choose needless absenteeism over risking penalties for wrongly denying FWAs, this is not a risk with procedural statutes. With procedural laws, employers need not decide whether employees are entitled to flextime or simply desire it. Employers retain full discretion over whether to grant all requests.

D. Current Political Climate

Some might view efforts to enact FWA laws as hopeless in the current political climate. Advocates will need to explain the mutually beneficial nature of FWAs and the modest demands of procedural

128. Gall & Kulwicki, supra note 15, at 5.
129. Id.
mandates. Providing information to lawmakers should make FWAs a bipartisan issue because procedural FWA laws protect employees with little burden on employers.

Conclusion

Flexible working arrangements promote and improve employee health, productivity, and retention. Employees want flexible work opportunities, and employers ought to regard them favorably as well. Current U.S. and foreign FWA models are helpful in constructing an ideal FWA statute. While a fundamental issue is whether FWA laws should be substantive or only procedural, other details of statutory design will depend on the needs of enacting jurisdictions. A model statute should be procedural and allow reasonably situated employees to request flextime. Deadlines for review of requests must respect the potential urgency of employees’ needs while recognizing employers’ time constraints. Modest penalties should be imposed only for failure to comply with procedural requirements. The objective is to facilitate conversations between employers and employees. Procedural FWA laws are a flexible solution for more flexible workplaces that can meet the needs of all.