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The Journal of the ABA Section of Labor and Employment Law

The Editors' Page

In this issue of the *ABA Journal of Labor & Employment Law*, our authors explore an important collection of topics: the appropriate scope of joint employment; the role of collectively bargained arbitration in handling discrimination claims; the management of worker-related geospatial data; the role of ERISA in enforcing health care price transparency; the geographical location of workers for legal purposes; and the importance of income security to public health. But first we begin with the Supreme Court Review for the October 2020 term from the Honorable Donna Ryu, United States Magistrate Judge of the U.S. District Court for the Northern District of California. Serving as the 2021–2022 Secretary for the ABA Labor and Employment Law Section, Judge Ryu provides a written version of her remarks to the Section in *A Review of the Supreme Court Cases from the October 2020 Term that Impact Labor and Employment Issues*. The article focuses on four major cases: *Cedar Point Nursery v. Hassid,*[1] *Van Buren v. United States*,[2] *Mahanoy Area School District v. B.L.*,[3] and *National Collegiate Athletic Ass'n v. Alston*.[4] The only traditional labor and employment case, *Cedar Point* concerns a requirement under the California Agricultural Labor Relations Act which requires agricultural employers to admit labor organizers to their property to discuss union representation. The Court ruled that this regulatory requirement constituted a formal imposition on landowners that amounted to a physical taking. Although the other cases do not touch directly on workplace law, Judge Ryu explains how they hold special interest for labor and employment lawyers. In *Van Buren*, the Court narrowed the reach of the Computer Fraud and Abuse Act to hold that employees who were permitted to have access to information did not "exceed" their "authorized access" when they used the information for improper purposes. To exceed the authorization, the employee (or other user) had to obtain information from areas of the computer that were otherwise off-limits. The plaintiff in *Mahanoy Area School District* was a high school student, but the Court's holding about First Amendment protections for off-campus speech are relevant to public-sector employers and employees. Rather than drawing a line between speech in the classroom and outside of school, the majority created a contextualized approach looking to a variety of factors. The *Alston* case also involves students—in this case, college athletes. The Court's application of antitrust to collegiate

1. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021).
2. Van Buren v. United States, 141 S. Ct. 1648 (2021).
3. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021).
4. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

athletics—finding that student-athletes should have more control over their name, image, and likeness rights—could open the door to these athletes being treated as employees, as the NLRB General Counsel is making just such a case. Judge Ryu closes her overview with a preview of cases that will be of interest to Section members in the October 2021 term. The editors thank Judge Ryu for her service to the Section and commend to you her documentation of the term.

This year we have one submission from the 73rd Annual Conference on Labor and Employment Law, sponsored by the Center for Labor and Employment Law at New York University School of Law. Entitled *Escaping the Allure of Joint Employment: Using Fault-Based Principles to Impose Liability for the Denial of Employee Statutory Rights*, the article comes to us from Michael Harper, Professor of Law and Barreca Labor Relations Scholar at Boston University School of Law. Professor Harper stakes out new ground in his proposal on the appropriate standard for designating joint employers. Noting the expansion of the joint employer definition under the Obama administration and in progressive state legislatures and courthouses, he counsels that ultimately the limitations of the doctrine will not support the types of crosscutting responsibilities that are envisioned. Instead, the article makes the case for a fault-oriented approach to joint liability, showing how fault-based principles can impose liability on non-joint employers for the discrimination and retaliation prohibited by Title VII and other antidiscrimination statutes. Professor Harper then considers the expansion of responsibility for the denial of the minimum wage and overtime payment obligations when more powerful players are negligent in overseeing their contractual partners' adherence to the law. Finally, he argues that employers should be liable in the labor law context when they intentionally incentivize or encourage their contractual partners to deny the labor law rights of the partner's employees. For Professor Harper, the concept of joint employment is not the critical question; instead, the law should ask which parties are ultimately to blame for the legal violations.

In *One Dozen Years of* Pyett*: A Win for Unionized Workplace Dispute Resolution*, Paul Salvatore, a partner at Proskauer Rose LLP, and Timothy Lockwood Kelly, a former associate at Proskauer, examine the aftermath of the 2009 U.S. Supreme Court case that permitted arbitration provisions in a collective bargaining agreement to waive an employee's right to bring workplace discrimination claims in a judicial forum. The authors summarize the historical context of the case, its factual and procedural background, courts' reactions to the decision, and lower courts' resolution of key questions that the case left unanswered. The article argues that all parties to arbitration—courts, employers, unions, and employees—have benefited from the new regime funneling more discrimination claims into the grievance-arbitration process.

Maria Macaluso, a graduating law student at the University of Louisville Brandeis School, and Ariana R. Levinson, Professor of Law at the school, delve into the expanding role of location data in the workplace in *Collective Action, Legislation, and Creative Litigation at the Intersection of Geospatial Data and Workers' Rights*. Employees find themselves increasingly being tracked using a variety of geospatial technologies, including GPS, RFID, and microchipping implants. The authors examine how some unions have tackled the problem through their collective bargaining agreements, including the Teamsters and UPS collective bargaining agreements (CBAs) as well as professional sports CBAs. They also discuss legal efforts to protect against misuse of geospatial technology, such as laws prohibiting microchipping, regulating tracking devices, requiring notice before an employer monitors an employee, and prohibiting termination because of lawful off-duty conduct. Employees have also brought tort claims for invasion of privacy, and public-sector workers have looked to the Fourth Amendment to protect against tracking by employees during their personal time. Ultimately, however, the authors advocate for more comprehensive regulation of employer surveillance and use of geospatial data, as well as legal tools for workers to participate in how employers collect and use of such data.

The differential and obscure pricing of healthcare has received significant media scrutiny with little change over time. In *Using ERISA to Ensure Transparent Health Care Prices*, Jeffrey Harris, a partner at Consovoy McCarthy PLLC and former associate administrator at the White House's Office of Information and Regulatory Affairs (OIRA), argues that the Employment Retirement Income Security Act should be understood to require greater price transparency for health care. Harris makes the case that ERISA mandates price transparency in two separate but related ways: (1) the statute compels plan fiduciaries of employer-sponsored health plans to disclose all prices, rates, and plan terms to participants in the plan upfront; and (2) it compels plan fiduciaries to obtain negotiated rate information from insurance companies to ensure that plan assets are being utilized in the best interest of participants. The article discusses how private civil suits could—and should—be used to ensure that all participants in employer-sponsored health plans have access to accurate and comprehensive information about the cost of their care before incurring those costs. In addition, Harris advocates for the U.S. Department of Labor to promulgate regulations or guidance outlining how ERISA's duty of prudent management requires clear and complete information about the price of care.

While the debate has raged over who are employees (as opposed to independent contractors), significantly less attention has been paid to where employees are. As many white-collar employees started working from home at the onset of the pandemic, this issue became even

more complicated. Isaac Mamaysky, Partner at Potomac Law Group and Adjunct Professor of Law at Albany Law School, and Kate Lister, President of Global Workplace Analytics, seek to bring more clarity to this issue in *Working from Home: Unraveling the Employment Law Implications of the Remote Office*. The article is intended to help employers and their professional advisors understand the more common legal issues that arise when employees live and work in different cities or states. Areas considered include minimum wage and overtime laws; family, medical, pregnancy, and COVID-19 leave entitlements; home office expense and technology reimbursements; unemployment insurance, workers' compensation, and disability insurance; and tax and corporate registration obligations. The authors explain how some organizations are navigating these waters and suggest the consideration of a more comprehensive solution to answering these questions.

Our student author is Olivia Dinwiddie, who writes on the public health ramifications of precarity in *The Critical Importance of Income Security During COVID-19 and Beyond*. Her Note analyzes the importance of income security to overall happiness and healthiness, especially when drastic measures are required to lower the spread of contagious diseases. She explains the relationship between income security and public health outcomes, with an emphasis on how disease transmission in the workplace exacerbates community spread, and she proposes several policy interventions designed to address income insecurity for both working and jobless Americans. The Note argues that fixing the problem of widespread income insecurity in the United States will require significant reforms, including implementation of universal paid sick leave, an expansion of leave provisions under the Family and Medical Leave Act of 1993, raising the federal minimum wage, and ultimately a universal basic income program.

We hope you enjoy this selection of articles. Our hats off to the *Journal*'s student board, staff editors, and authors in bringing this issue to our readers.

Professor Matthew T. Bodie
Professor Miriam Cherry
Professor Marcia McCormick
Faculty Co-Editors

A Review of the Supreme Court Cases from the October 2020 Term That Impact Labor and Employment Issues

The Honorable Donna M. Ryu*

Introduction

It is my privilege as the section Secretary to comment on cases decided by the United States Supreme Court in the October 2020 Term that have a bearing on labor and employment issues. The October 2020 Term was notably light on employment-related cases. Of the four opinions that I highlight in this article, only one, *Cedar Point Nursery v. Hassid*,[1] qualifies as presenting a true labor law issue. The other three cases, however, are well worth discussion due to their implications for our section's particular area of interest. Those cases are *Van Buren v. United States*,[2] *Mahanoy Area School District v. B.L.*,[3] and *National Collegiate Athletic Ass'n v. Alston*.[4]

I. *Van Buren v. United States*

Van Buren, issued on June 3, 2021 in a 6–3 opinion, involved the Computer Fraud and Abuse Act, commonly shorthanded as the CFAA.[5] This case recounted a story of greed and human fallibility, as well as a battle of statutory interpretation that, had it come out the other way, would have greatly expanded criminal and civil liability for computer misuse. The majority opinion, drafted by Justice Barrett, was joined by Justices Breyer, Sotomayor, Kagan, Gorsuch, and Kavanaugh. Justice Thomas drafted the dissent, which was joined by Justices Roberts and Alito.[6]

Former Georgia Police Sergeant Nathan Van Buren developed a friendly relationship with Andrew Albo, a man with such a firmly

*United States Magistrate Judge, United States District Court for the Northern District of California; Secretary of the ABA Labor and Employment Law Section (2021–2022).

1. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021).
2. Van Buren v. United States, 141 S. Ct. 1648 (2021).
3. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021).
4. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).
5. 141 S. Ct. at 1651.
6. *Id.* at 1662 (Thomas, J., dissenting).

established reputation for chicanery that a deputy chief specifically warned officers to be careful in their dealings with him.[7] Sergeant Van Buren apparently ignored that advice, and he asked Albo for a personal loan. Albo quickly turned this to his advantage by secretly recording Van Buren's request, then lodging a complaint with the Sheriff's office claiming that Van Buren was "shak[ing] him down" for money.[8] Albo captured the FBI's attention; they decided to recruit Albo to participate in a sting operation "to see how far" Van Buren would go.[9] Albo's FBI handlers instructed him to ask Van Buren to conduct a license plate search on a state law enforcement database. Albo presented the backstory that he wanted Van Buren to run the plate of a woman who Albo purportedly had met at a strip club, explaining that Albo wanted to make sure that the woman was not an undercover officer.[10] He offered to pay Van Buren $5000 to obtain the information, and Van Buren accepted the deal. Using his police-issued credentials, Van Buren accessed the database through his patrol car computer and ran the license plate of the fictional woman. He reached the fake entry that had been set up by the FBI, who promptly charged him with a felony under the CFAA.[11]

The CFAA imposes criminal liability if someone "intentionally accesses a computer without authorization or exceeds authorized access."[12] The statute defines "exceeds authorized access" as "access[ing] a computer without authorization and . . . us[ing] such access to obtain or alter information in the computer that the accessor *is not entitled so to obtain or alter*."[13] The CFAA provides for criminal liability of up to ten years in prison,[14] as well as civil liability pursuant to a private right of action provision that allows persons to sue for damage or loss from CFAA violations by seeking money damages and equitable relief.[15] The prosecutor pursued the theory that Van Buren had performed a search that violated the "exceeds authorized access" clause of the CFAA.[16]

At trial, the government introduced evidence that Van Buren had been trained to understand that he was not allowed to use the database for nonofficial use.[17] The government argued that Van Buren therefore knew he was violating department policy, which, according to the government's interpretation of the statute, also amounted to a violation of

7. *Id.* at 1653 (majority opinion).
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. 18 U.S.C. § 1030(a)(2).
13. *Id.* § 1030(e)(6) (emphasis added).
14. *Id.* § 1030(c)(2)(B).
15. *Id.* § 1030(g).
16. *Van Buren*, 141 S. Ct. at 1653.
17. *Id.*

the CFAA because Van Buren had knowingly exceeded his authorized access. The jury convicted Van Buren, and a judge sentenced him to eighteen months in prison.[18] Van Buren appealed to the Eleventh Circuit, arguing that the "exceeds authorized access" clause only applies to people who obtain information beyond their authorized computer access, and did not apply to people like him who had access to the computer, but merely abused that access by using it for an improper purpose.[19] The Eleventh Circuit affirmed the conviction, reading the CFAA broadly to mean that Van Buren violated the statute by accessing the license plate database "for an inappropriate reason."[20] The circuits had been split on this issue, with the Second, Fourth, Sixth, and Ninth Circuits on one side, and the First, Fifth, Seventh, and Eleventh Circuits on the other.[21]

The Supreme Court reversed the Eleventh Circuit, as well as Van Buren's conviction. Writing for the majority, Justice Barrett explained that Van Buren's clear breach of the departmental policy prohibiting nonofficial use of the license plate database did not necessarily result in a violation of the CFAA.[22] The "exceeds authorized access" provision covers those who obtain information from specific areas in the computer to which the individual's computer access does not extend.[23] It does not criminalize the behavior or individuals like Van Buren, "who have improper motives for obtaining information that is otherwise available to them."[24]

The battle of statutory interpretation turned on whether Van Buren was "entitled so to obtain" the license plate record.[25] The parties agreed that he was entitled to obtain the record, because he had the necessary credentials to access the database. The key question was whether he was entitled "so" to obtain it. Van Buren pointed to *Black's Law Dictionary* and the *Oxford English Dictionary* to argue that "so" means "in the way or manner described."[26] Here, the manner Van Buren that he was authorized to access. Therefore, according to Van Buren, he was entitled so to obtain the fictional woman's record.[27]

The Government posited that "so" is a broad word; as used in the CFAA, it means information someone is not allowed to obtain "in the particular manner or circumstances in which he obtained it."[28] The

18. *Id.*
19. *Id.*
20. *Id.* at 1653–54; Van Buren v. United States, 940 F.3d 1192, 1208 (11th Cir. 2019).
21. *Van Buren*, 141 S. Ct. at 1653 n.2.
22. *Id.* at 1662.
23. *Id.* at 1654.
24. *Id.* at 1652.
25. 18 U.S.C. § 1030(e)(6).
26. *Van Buren*, 141 S. Ct. at 1654.
27. *Id.*
28. *Id.*

manner or circumstances in which one has a right to obtain information are defined by any "specifically and explicitly communicated limits" on that person's right to access the information.[29] Here, Van Buren specifically knew the limits on his right to access the database because the police department had an explicit policy banning him from using it for nonpolice purposes. Therefore, according to the Government, Van Buren was not entitled "so to obtain" the information.[30]

Writing for the Court, Justice Barrett found Van Buren's interpretation more plausible than the Government's "free-floating" rendition.[31] The majority opinion reasoned that, in the context of computing, access means entering the computer itself or a particular part of it, like a file, folder, or database.[32] It is harmonious to the statute as a whole to read "exceeds authorized access" to mean entering a part of the system to which the computer user lacks access privileges. That way, the "without authorization" clause of the CFAA protects computers from outside hackers who access a computer without permission. By contrast, the "exceeds authorization" clause protects against inside hackers who have permission to access the computer, but who violate the law when their access exceeds the bounds of that permission.[33]

According to the majority opinion, this interpretation also coheres with the civil liability provision of the CFAA. The statute defines damages and loss as harms to a computer system's structure or integrity or availability of data, or corruption of files. Justice Barrett pointed out that "limiting 'damage' and 'loss' in this way makes sense in a scheme 'aimed at preventing the typical consequences of hacking.'"[34] By contrast, the majority opinion went on to note, those definitions are ill-fitted to remediating misuse of the kind engaged in by Van Buren, because his improper use of the database did not impair the computer's structure or data.[35]

The majority opinion also considered the policy implications of reaching the contrary result. The general reach of the CFAA's prohibition is already broad: it "now applies—at a minimum—to all information from all computers that connect to the Internet."[36] Justice Barrett's opinion noted that the Government's interpretation "would attach criminal penalties to a breathtaking amount of commonplace computer activity," because it could criminalize every violation of a computer-use policy.[37] "[A]n employee who sends a personal e-mail or

29. *Id.* at 1654–55.
30. *Id.* at 1655.
31. *Id.*
32. *Id.* at 1657–58.
33. *Id.* at 1658.
34. *Id.* at 1659–60.
35. *Id.* at 1660.
36. *Id.* at 1652 (citing 18 U.S.C. § 1030(a)(2)(C), (e)(2)(B)).
37. *Id.* at 1661.

reads the news using her work computer" will have violated the CFAA under the Government's reading of the statute, if her employer has a policy against those uses.[38]

Websites also provide information from protected computers, so if a user violated a terms of service policy for a particular website, the Government's interpretation would criminalize that as well. Here, the majority opinion offered the example of someone who signs up with an online dating service and then lies about themselves on their profile.[39]

"In sum," the majority held, "an individual 'exceeds authorized access' when he accesses a computer with authorization but then obtains information located in particular areas of the computer—such as files, folders, or databases—that are off limits to him."[40]

The dissent authored by Justice Thomas agreed with the majority's interpretation of "so," but reached a different outcome by way of the word "entitled,"[41] and also looked to the common law.[42] Justice Thomas used the analogy of a valet who obtains lawful possession of a person's car in order to park it, but then takes it for a joyride and thereby violates the law by exceeding the scope of consent given by the car's owner.[43] According to the dissent, the CFAA extends that principle to computers and information. Using a police database to obtain information in circumstances where that use is expressly forbidden is a crime.[44]

The dissent faulted the majority for resorting to a lengthy discussion of policy and the specter of broad liability. According to the dissenting justices, the court's primary analysis should rest on the text of the statute, not on policy.[45] Writing for the majority, Justice Barrett disagreed with the dissent's statutory interpretation, which she described as essentially rewriting the CFAA.[46]

Although *Van Buren* is a criminal case, it applies to civil cases brought under the CFAA. The case should have resonance for lawyers who give advice on employer policies and who may want to tighten up the policies that govern employee computer, device, email, and Internet use, as well as access to company databases, servers, and files with sensitive business information. *Van Buren* also makes clear that plaintiffs who retrieve information or potential evidence within the scope of their computer access will not face CFAA criminal or civil liability even if they used their authorized access for an unauthorized purpose.

38. *Id.*
39. *Id.*
40. *Id.* at 1662.
41. *Id.* at 1656.
42. *Id.* at 1662–68.
43. *Id.* at 1662–63.
44. *Id.*
45. *Id.* at 1668–69.
46. *Id.* at 1656–57.

Of course, such employees may face other types of claims or counterclaims, especially if the information amounts to a trade secret.

II. Cedar Point Nursery v. Hassid

Cedar Point Nursery is a true labor and employment case, but it arises in an unusual context because it tackles a constitutional issue under the Takings Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment.[47] The Takings Clause provides, "Nor shall private property be taken for public use, without just compensation."[48]

The question raised in *Cedar Point Nursery* is whether a governmental regulation that creates a temporary and episodic easement on private property can amount to a physical taking that is a *per se* constitutional violation requiring just compensation, or whether it should be treated as a potential regulatory taking that is subject to a less strict balancing test.[49]

Cedar Point Nursery arrived at the high court on appeal from the Ninth Circuit. In it, the Supreme Court examined a regulation promulgated by the California Agricultural Labor Relations Board.[50] That regulation mandates that agricultural employees must allow union organizers onto their property for what adds up to be three hours per day, 120 days per year.[51]

The California Agricultural Labor Relations Act allows a union to file an unfair labor practice petition against an employer who interferes with agricultural workers' right to self-organization.[52] The Agricultural Labor Relations Board (Board) promulgated a regulation providing that the right to self-organization includes the "right of access by union organizers to the premises of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support."[53] Under the regulation, a labor organization may "take access" to an employer's private property for up to four thirty-day periods in one calendar year by filing written notice with the Board and serving a copy on the employer.[54] Two organizers per work crew may enter the property for up to one hour before work, one hour during the lunch break, and one hour after work.[55] Organizers cannot engage in disruptive conduct, but they can meet and talk with employees,[56] and

47. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2069 (2021).
48. U.S. CONST. amend. V.
49. *Cedar Point Nursery*, 141 S. Ct. at 2069, 2071–72.
50. *Id.* at 2069.
51. CAL. CODE REGS. tit. 8, § 20900(e)(1)(C) (2020).
52. CAL. LAB. CODE §§ 1152, 1153(a) (2021).
53. CAL. CODE REGS., tit. 8, § 20900(e).
54. *Id.* § 20900(e)(1)(A), (B).
55. *Id.* § 20900(e)(3)(A)–(B), (4)(A).
56. *Id.* § 20900(e)(3)(A), (4)(C).

interference with that right to access may constitute an unfair labor practice, resulting in employer sanctions.[57]

Cedar Point Nursery is a Northern California strawberry grower in Dorris, California, near Mount Shasta.[58] United Farm Workers (UFW) members entered the property early one morning in October 2015 without prior notice. They used bullhorns in an area where the workers were preparing strawberry plants. Some workers joined the organizers, and others left the worksite. Cedar Point filed a charge against the union for taking access without notice. The UFW fired back with its own unfair labor practices charge.[59]

Fowler Packing Company is based in Fresno, California.[60] It ships table grapes and citrus. It is a large operation with up to 2500 field workers, and 500 in its packing facility. In July 2015, UFW organizers attempted to take access pursuant to the regulation but were blocked by the company.[61]

Concerned that the UFW would try to enter their property again soon, the two growers joined together to file suit in federal district court seeking injunctive relief to prohibit the Board from enforcing the regulation, which they claimed amounted to an unconstitutional *per se* physical taking under the Fifth and Fourteenth Amendments without compensation for an easement for union organizers to enter their property.[62] The district court dismissed the case, ruling that the regulation was subject to a multifactor balancing test, which the growers had not attempted to satisfy. The court held that the regulation did not amount to a taking because it did not allow the public to access the property in a permanent and continuous manner.[63] A divided Ninth Circuit affirmed, and rehearing en banc was denied with eight judges dissenting.[64]

The Supreme Court issued an opinion in favor of the growers in a 6–3 split that reflects the current makeup of the conservative and liberal blocs of the court, with Chief Justice Roberts writing for the majority, and Justice Breyer delivering the dissent.[65] Justice Kavanaugh also filed a concurring opinion.[66] Here, the battle lines formed around the distinction between appropriation versus regulation of property rights.

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57. *Id.* § 20900(e)(5)(C).
58. Cedar Point Nursery v. Shiroma, 923 F.3d 524, 528 (9th Cir. 2019).
59. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2069–70 (2021).
60. *Id.* at 2070.
61. *Id.*
62. *Id.*
63. *Id.*; Cedar Point Nursery v. Gould, 2016 WL 1559271, *5 (E.D. Cal. Apr. 18, 2016).
64. *Cedar Point Nursery*, 141 S. Ct. at 2070; Cedar Point Nursery v. Shiroma, 923 F.3d 524 (9th Cir. 2019) (affirming district court decision); Cedar Point Nursery v. Shiroma, 956 F.3d 1162 (9th Cir. 2020) (denying rehearing en banc).
65. *Cedar Point Nursery*, 141 S. Ct. at 2069; *id.* at 2081 (Breyer, J., dissenting).
66. *Id.* at 2080 (Kavanaugh, J., concurring).

Chief Justice Roberts began by affirming that the protection of private property "is indispensable to the promotion of individual freedom. As John Adams tersely put it, '[p]roperty must be secured, or liberty cannot exist.'"[67] It "empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them."[68]

The majority opinion explained that where the government acquires private property for a public use, the Fifth Amendment imposes a requirement to provide just compensation, usually through the power of eminent domain.[69] Physical appropriations are the clearest taking, and the government needs to pay for what it takes.[70] However, the government can also engage in a taking when, instead of appropriating property, it imposes regulations that restrict owners' ability to use their property. This implicates a different legal test that was not developed until the twentieth century, and applies to regulatory takings through zoning ordinances, or regulations prohibiting the sale of certain things.[71] This test is often called the *Penn Central* balancing test after the Supreme Court opinion that established it; it looks at the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action.[72]

Chief Justice Roberts points out that the label "regulatory taking" can be misleading. Rather, the "essential question" is "whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property. . . . Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place."[73] The majority opinion's perspective was that the right to exclude is a fundamental property right, not an empty formality that can be balanced away.

According to Chief Justice Roberts, the governmental action at issue appropriated a right to invade the growers' property and was therefore a *per se* physical taking, not a regulatory taking.[74] The regulation allows a right to enter and occupy the land for a significant period of time, even though that entry is episodic rather than permanent. It appropriates the owner's right to exclude others from their

67. *Id.* at 2071 (majority opinion) (quoting *Discourses on Davila*, *in* 6 WORKS OF JOHN ADAMS 280 (C. Adams ed., 1851)).

68. *Id.* (quoting Murr v. Wisconsin, 137 S. Ct. 1933, 1953 (2017)).

69. *Id.*

70. *Id.*

71. *Id.* at 2071–72.

72. *Id.* at 2072 (citing Penn Cent. Trans. Co. v. New York City, 438 U.S. 104, 124 (1978)).

73. *Id.* at 2072 (citation omitted).

74. *Id.*

private property for the benefit of the union. And the right to exclude is "one of the most treasured" rights of property ownership.[75]

The majority pointed to earlier Supreme Court cases to illustrate that a taking can occur when there is no permanent loss of property and when there is trivial economic loss.[76] For example, in 1946, the Court found a physical taking in *United States v. Causby*,[77] which involved the invasion of private farmland by military aircraft flyovers that "graz[ed] the treetops and terroriz[ed] the poultry," even though the overflights occurred in only four percent of takeoffs and seven percent of landings in the nearby airport.[78] It also cited *Portsmouth Harbor Land & Hotel Co. v. United States*[79] from 1922, which held that a government assertion of a right to fire coastal defense guns across private property would be a taking.[80] The majority noted that the fact that these takings were temporary or intermittent did not change their character as physical takings. The duration of the appropriation simply goes to the amount of just compensation that must be paid.[81]

The majority distinguished the Court's 1980 holding in *PruneYard Shopping Center v. Robins*,[82] which applied the *Penn Central* factors test to find that no taking had occurred.[83] In that case, the court examined the right under the California State Constitution to engage in leafleting at a privately owned shopping center.[84] The majority reasoned that, unlike the grower's property in *Cedar Point Nursery*, the PruneYard shopping center was open to the public, welcoming 25,000 patrons a day. "Limitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public."[85]

Against this jurisprudential backdrop, the *Cedar Point Nursery* majority concluded that the regulation is no mere trespass because it grants a "formal entitlement to physically invade the growers' land" and is therefore a *per se* physical taking.[86]

In dissent, Justice Breyer, writing for Justices Kagan and Sotomayor, framed the key issue as whether a regulation that temporarily limits an owner's right to exclude others from property automatically

75. *Id.* (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982)).
76. *Id.* at 2073–74.
77. United States v. Causby, 328 U.S. 256 (1946).
78. *Id.* at 259, 265–67.
79. *Cedar Point Nursery*, 141 S. Ct. at 2073.
80. Portsmouth Harbor Hotel & Land Co. v. United States, 260 U.S. 327, 330 (1922).
81. *Cedar Point Nursery*, 141 S. Ct. at 2074.
82. *Id.* at 2076–77.
83. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980).
84. *Id.* at 78.
85. *Cedar Point Nursery*, 141 S. Ct. at 2076–77.
86. *Id.* at 2080.

amounts to a Fifth Amendment taking.[87] Justice Breyer reasoned that the California regulation does not appropriate anything. It regulates the owner's right to exclude, which means it should be assessed under *Penn Central*'s fact-intensive test. He said this approach makes sense for temporary invasions, which is a practical necessity for governing in our complex modern world and is also consistent with the Court's prior precedent.[88] Walking through the same cases analyzed by the majority, Justice Breyer pointed out that they focused on the question of whether there was a permanent physical occupancy or invasion.[89]

The dissenting opinion noted that in the majority's view, virtually every government-authorized temporary invasion of property would amount to an appropriation, rather than a regulation. The opinion cited a slew of existing regulations that authorize inspections related to food products, preschools, or foster care facilities, for example, and that permit entry onto private property at almost any time, and often without notice.[90] According to the dissenting Justices, the California regulation at issue does not create a permanent easement or recognized property holding. Instead, it gives union organizers a non-permanent and temporary right to access a portion of the property owners' land, thereby regulating the owner's total right to exclude.[91]

In closing, the dissent turned to remedies, a subject not discussed by the majority opinion. Justice Breyer noted that the employers did not actually seek compensation, they only sought injunctive and declaratory relief and did not allege any damages.[92] Therefore, the dissent asserted that on remand, California should be allowed to foreclose injunctive relief by providing compensation.[93]

For employers contemplating an argument that *Cedar Point Nursery* means that employers may assert their property rights to completely exclude organizers, it is worth noting that Justice Kavanaugh may not support that outcome. He wrote a short concurring opinion[94] to explain his view on *NLRB v. Babcock & Wilcox Co.*,[95] in which the Court had held that National Labor Relations Act did not require employers to allow organizers on to their property, at least outside the unusual circumstance where their employees were otherwise beyond the reach of reasonable union efforts to communicate with them.[96] Justice Kavanaugh wrote that under *Babcock*, employers have the right to exclude

87. *Id.* at 2081 (Breyer, J., dissenting).
88. *Id.* at 2087.
89. *Id.* at 2083–87.
90. *Id.* at 2087–88.
91. *Id.* at 2083.
92. *Id.* at 2089.
93. *Id.*
94. *Id.* at 2080 (Kavanaugh, J., concurring).
95. NLRB v. Babcock & Wilcox, 351 U.S. 105 (1956).
96. *Id.* at 112–13.

union organizers from their property, but it is subject to a "necessity" exception so that the right to exclude must give way in order to allow organizers to access the property when they have "no other reasonable means of communicating with the employees."[97] In other words, he would appear to hold the view that the right to total exclusion is not supportable. In this case, none of the employees of Cedar Point Nursery or Fowler Packing lived on the growers' premises, and so access on those premises was not a necessity.

Cedar Point Nursery creates a serious limitation on a union's ability to get physical access to California's large farm-worker population. More broadly, it opens the door to challenging government regulations that allow inspections or other kinds of physical access as takings that require just compensation.

III. *Mahanoy Area School Dist. v. B.L.*

The third case is *Mahanoy Area School District v. B.L.*.,[98] which you might recognize from news coverage as the foul-mouthed cheerleader case. The opinion issued on June 23, 2021, in an 8–1 decision. Justice Breyer wrote the majority opinion, joined by Chief Justice Roberts and Justices Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh and Barrett. Justice Alito wrote a concurring opinion, in which Justice Gorsuch joined.[99] Justice Thomas filed the sole dissent.[100]

Mahanoy involves the First Amendment rights of a high school student attending a public school.[101] But it has implications for public employers and their ability to regulate the First Amendment rights of public employees engaging in speech outside of work.

The respondent B.L. was a freshman at Mahanoy Area High School in Mahanoy City, Pennsylvania.[102] At the end of her freshman year, she tried out for the school's varsity cheerleading squad, as well as a right fielder position on a private softball team. She received disappointing news in both of these efforts, but she did land a spot on the junior varsity cheerleading team. She apparently had been told that she did not make the varsity squad because she needed another year of experience, but she found out that another freshman secured a varsity position.[103]

B.L. did not take any of this well. While hanging out with a friend at the Cocoa Hut, a local convenience store, B.L. posted two images to her Snapchat story, which allows a Snapchat user to let any person in the user's friend group to view the images for twenty-four hours.

97. *Cedar Point Nursery*, 141 S. Ct. at 2080.
98. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021).
99. *Id.* at 2048–59.
100. *Id.* at 2059–63.
101. *Id.* at 2042–43.
102. *Id.* at 2043.
103. *Id.*

Image 1 showed B.L. and a friend posing with matching raised middle fingers. It carried the caption "F** school f*** softball f*** cheer f*** everything." The second image was blank except for a caption: "love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else?" upside-down smiley-face emoji.[104]

B.L. had about 250 Snapchat friends, including some students who were on the cheerleading squad.[105] At least one of them used a separate cellphone to take a picture of B.L.'s posts and share them with other cheerleaders. One of the cheerleaders then showed it to her mother, who was a cheerleading squad coach, and the images spread from there. Several cheerleaders approached the coaches and were "visibly upset" about the posts, and questions about the posts came up during an algebra class taught by one of the coaches.[106]

After taking the matter up with the school principal, the coaches decided that the posts violated team and school rules because they used profanity in connection with a school extracurricular activity.[107] They suspended B.L. from the junior varsity squad. This consequence prompted B.L. to apologize, but other school officials, including the athletic director, principal, superintendent, and school board, all affirmed B.L.'s suspension.[108]

B.L. and her parents took the matter to court. The federal district court granted a temporary restraining order and a preliminary injunction ordering B.L.'s reinstatement to the squad.[109] It later granted B.L.'s motion for summary judgment, resting its reasoning on the fact that the Snapchats had not caused substantial disruption at the school, and citing the 1969 landmark decision in *Tinker v. Des Moines Independent Community School District*,[110] in which the high court had held that a public high school could not constitutionally prohibit a peaceful student political demonstration consisting of "pure speech" on school property during the school day.[111] The district court awarded nominal damages and fees, and injunctive relief in the form of an order to expunge B.L.'s disciplinary record.[112]

The Third Circuit affirmed.[113] The majority cited *Tinker*, but took a categorical approach and held that *Tinker* did not apply because the

104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 2044 (citing Tinker v. Des Moines Ind. Cmty. Sch. Dist., 393 U.S. 503 (1969)); B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429, 443–45 (M.D. Pa. 2019).
111. Tinker v. Des Moines Ind. Cmty. Sch. Dist., 393 U.S. 503, 509, 513 (1969).
112. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2044.
113. B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 175 (3rd Cir. 2020).

conduct took place off campus, and therefore could not be regulated by the school.[114] The concurring member of that panel wrote that it did not matter if *Tinker* applied, because in any event, B.L.'s speech was not substantially disruptive.[115]

The Supreme Court granted the petition for certiorari on this question: "Whether *Tinker*, which holds that public school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school, applies to student speech that occurs off campus."[116]

Writing for the majority, Justice Breyer explained that courts must apply the First Amendment by accounting for the "special characteristics of the school environment," one important aspect being that schools sometimes stand in the place of parents, or in *loco parentis*.[117] Supreme Court jurisprudence so far has recognized three categories of student speech that is subject to regulation: (1) indecent, lewd, or vulgar speech during a school assembly on school grounds; (2) speech uttered during a class trip that promotes illegal drug use; and (3) speech that others may reasonably perceive as bearing the imprimatur of the school such as speech in a school sponsored newspaper.[118]

The 8–1 majority opinion disagreed with the Third Circuit's categorical approach and refused to draw a line between on-campus and off-campus speech. The high court recognized that there may be "special characteristics that give schools additional license to regulate speech" even when it occurs off campus.[119] Justice Breyer noted the difficulties in creating an on-campus/off-campus dichotomy because it is an increasingly blurry line, especially given the advent of computer-based learning. Some examples of off-campus speech that might be subject to regulation include serious bullying or harassment of targeted individuals, the failure to follow rules concerning school assignments regarding the use of computers, participation in online activities, and breach of school security devices.[120]

On behalf of the majority, Justice Breyer articulated three typical features of off-campus speech that are important to consider when analyzing a school's efforts to regulate it. First, the school is rarely standing *in loco parentis* in regard to off-campus speech. Off-campus speech normally is in the zone that is handled by real parents, and not the school acting as parent.[121]

114. *See id.* at 178–79.
115. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2044.
116. *Id.*
117. *Id.*at 2044–45.
118. *Id.* at 2045.
119. *Id.*
120. *Id.*
121. *Id.* at 2046.

Second, efforts to regulate on-campus as well as off-campus speech 24/7 could lead to overregulation of student speech. Therefore, the court noted that "a school will have a heavy burden to justify intervention" in off-campus speech, especially where it involves political or religious subjects.[122]

Third, the school has an interest in protecting a student's unpopular expression, especially when it happens off campus.[123] Unpopular views must be included because popular ideas have less need for protection. "[P]ublic schools are the nurseries of democracy," and the First Amendment protects the "marketplace of ideas."[124]

For these reasons, even though regulation of speech does not do a hard stop at the schoolyard fence, the leeway that the First Amendment grants to schools to regulate speech is diminished when the speech takes place off campus.[125]

The court then turned to B.L.'s speech to apply these concepts. First, it set aside the swear words. They might be vulgar, but they do not trigger the legal standards relating to fighting words or obscenity. What is left is B.L.'s criticism of the team, the coaches, and the school. If she were an adult, the Court noted, the First Amendment indisputably would provide strong protection.[126]

Next, the Court considered when, where, and how B.L. spoke.[127] Her speech took place outside school hours from an outside location. She did not target the school or any individual member of the school community. She used her personal cell phone, and she broadcast her speech to the fairly limited audience of her Snapchat friends. These features of her speech diminished the school's interests in punishing her.[128]

The Court then turned to the school's interests.[129] The school's primary interest in this case was to police the use of vulgarity and bad manners aimed at other members of the school community. However, this interest was weakened by the fact that B.L. spoke outside the school and outside of school hours. She did not speak in circumstances where the school was *in loco parentis* (her behavior fell firmly in the real parent zone). Moreover, there was no evidence of efforts made by the school to prevent students from using vulgar language outside the classroom.[130]

122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 2046–47.
127. *Id.* at 2047.
128. *Id.*
129. *Id.*
130. *Id.*

The school also stated an interest in preventing disruption involving a school-sponsored extracurricular activity such as cheerleading.[131] But there was no evidence of substantial disruption of a school activity or threatened harm to the rights of others that might justify discipline. At most, the record showed that some cheerleaders were upset about the Snapchats and that the topic took up several minutes of discussion in Algebra class for a couple days. This amounted to nothing more than the "discomfort and unpleasantness that always accompany an unpopular viewpoint."[132]

Finally, the school expressed a concern for team morale. Again, there was no evidence of any serious decline in team spirit that could rise to a substantial interference in or disruption of the school's efforts to maintain team cohesion.[133]

In upholding B.L.'s free speech rights, the majority observed that "[i]t might be tempting to dismiss BL's words as unworthy of the robust First Amendment protections discussed herein. But sometimes it is necessary to protect the superfluous in order to preserve the necessary."[134]

Justice Alito's concurring opinion added his own framework for school speech cases that centered on parental consent. He focused on the public versus private dichotomy and asked a threshold question: "Why does the First Amendment ever allow the free-speech rights of public school students to be restricted to a greater extent than the rights of other juveniles who do not attend a public school?"[135] He concluded that "[t]he theory must be that by enrolling a child in public school, parents consent on behalf of the child to relinquish some of the child's free speech rights."[136]

The question then became, how much authority does a parent relinquish to the state to regulate their child's speech? According to Justice Alito, "[P]arents . . . have the primary authority and duty to raise, educate, and form the character of their children."[137] They do not relinquish that authority when they send their child to a public school. Therefore, off-premises regulation should be limited to what parents agree to relinquish.[138] For example, regulation may make sense where there are temporal or spatial expansions of the classroom, such as homework or online instruction. Regulation also makes sense with respect to school activities such as field trips where there is parental

131. *Id.* at 2047–48.
132. *Id.* at 2048.
133. *Id.*
134. *Id.*
135. *Id.* at 2049–50 (Alito, J., concurring).
136. *Id.* at 2051.
137. *Id.* at 2053.
138. *Id.* at 2053–54.

consent. Regulation might also reach abusive speech that takes place while walking to and from school.[139]

In lone dissent, Justice Thomas was having none of it. He recounted that

> B.L., a high school student, sent a profanity-laced message to hundreds of people, including classmates and teammates. The message included a picture of B.L. raising her middle finger and captioned F*** school and F*** cheer. This message was juxtaposed with another, which explained that B.L. was frustrated that she failed to make the varsity cheerleading squad. The cheerleading coach responded by disciplining B.L.[140]

According to Justice Thomas, the coaches' actions were supported by 150 years of case law on school authority.[141]

The ruling in *Mahanoy* is rooted in concepts like "*in loco parentis*" that are specific to school settings, but it may nevertheless have resonance in cases involving public employers' attempts to restrict or discipline off-work employee speech, including in social media posts. One standout lesson from the opinion is the critical importance of building a strong factual record, especially on issues such as whether the speech disrupted operations.

IV. *NCAA v. Alston*

Our final of the four is *NCAA v. Alston*, also decided on June 23, 2021.[142] Although it was an antitrust case involving college student athletes, it has attracted attention in the labor and employment world due to its implications for collective bargaining in this area.

Collegiate student athletes brought a class action alleging that the National Collegiate Athletic Association (NCAA) violated antitrust rules by restricting the compensation that student athletes could receive for their services, which for certain schools are part of a highly profitable enterprise.[143]

The unanimous opinion written by Justice Gorsuch devoted the first section to a fascinating history of college sport.[144] He started with the observation that "[f]rom the start, American colleges and universities have had a complicated relationship with sports and money."[145] He took us back to the first intercollegiate competition in 1852, a boat race between Harvard and Yale at a beautiful New Hampshire lake resort. The event was sponsored by a railroad executive in order to promote

139. *Id.* at 2054–57.
140. *Id.* at 2059 (Thomas, J., dissenting).
141. *Id.* at 2059–61.
142. Nat'l Collegiate Atheletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).
143. *Id.* at 2147, 2150–51.
144. 141 S. Ct. at 2148–51.
145. *Id.* at 2148.

train travel to the lake. Competitors were given an all-expenses-paid trip, and they were also offered "lavish prizes," as well as unlimited alcohol.[146]

Although a boat race provided the spark, it was college football that took off like wildfire. Within a quarter century, football games were attracting huge crowds and generating substantial gate revenues. Schools boosted their playing power with "graduate students and paid ringers."[147] Yale apparently nabbed a star tackle by offering tuition, free meals, a trip to Cuba, the exclusive right to sell scorecards from his games, and a job with the American Tobacco Company.[148] There were also "tramp athletes" who followed the money from school to school. A West Virginia law student transferred to Lafayette at the start of his first year in time to lead that team to victory against its rival Penn, before transferring back to his law school the next week.[149]

However, it became clear that, while watching football can be highly entertaining, it is also highly dangerous for the entertainers. There were eighteen college football related deaths in 1905.[150] President Teddy Roosevelt called a summit between Harvard, Yale, and Princeton, which led to the creation of what is now known as the NCAA. At its founding, its purpose was to set standards to make the game safer. But in recognition of the shenanigans used to lure top talent, the organization also promulgated a bylaw stating that "[n]o student shall represent a College or University in any intercollegiate game or contest who is paid or receives, directly or indirectly, any money, or financial concession."[151]

Into the twentieth century, schools continued to use their sports programs to raise their profiles, enhance enrollment, and boost revenue and alumni giving. The NCAA bylaw did little to stop the money madness.[152] Justice Gorsuch recounted the story of Hugh McElhenny, a halfback who played for the University of Washington in the 1940s. McElhenny "became known as the first college player 'ever to take a cut in salary to play pro football.'"[153] He reportedly said: "'[A] wealthy guy puts big bucks under my pillow every time I score a touchdown. Hell, I can't afford to graduate.'"[154] In 1946, a commentator offered this view: "[W]hen it comes to chicanery, double-dealing, and general

146. *Id.*
147. *Id.* (citing Andrew Zimbalist, Unpaid Professionals 7 (1999)).
148. *Id.*
149. *Id.* (citing Francis X. Dealy, Win at Any Cost 71 (1990)).
150. *Id.* (citing Andrew Zimbalist, Unpaid Professionals 8 (1999)).
151. *Id.*; Intercollegiate Athletic Ass'n of the U.S., Constitution Bylaws, art. VII, §3 (1906)).
152. *Alston*, 141 S. Ct. at 2149.
153. *Id.* at 2049 (citing Andrew Zimbalist, Unpaid Professionals 22–23 (1999)).
154. *Id.* (citing Kelly Charles Crabb, *The Amateurism Myth: A Case for a New Tradition*, 28 Stan. L. & Pol'y Rev. 181, 211 n.17 (2017)).

undercover work behind the scenes, big-time college football is in a class by itself."[155]

By the middle of the century, the NCAA adopted the Sanity Code, which provided for suspension or expulsion of those proven to break the "no compensation" rule.[156] At the same time, the Code allowed colleges to woo athletes by paying their tuition. As noted by Justice Gorsuch, for some the Sanity Code marked a move to a clear compensation system that did away with creative subterranean payment schemes. For others, it was "'the beginning of the NCAA behaving as an effective cartel' by enabling its member schools to set and enforce 'rules that limit the price they have to pay [student-athletes].'"[157]

The rules were later expanded to allow for payment for room and board, books, fees, and cash for incidentals like laundry.[158] The rules continued to evolve. More recently, the NCAA created the "Student Assistance Fund" and the "Academic Enhancement Fund" to assist those in financial need, provide academic support, or recognize academic achievement. Disbursements from these funds are sometimes well-above the full cost of attendance.[159]

At this point, the NCAA is made up of over 1000 colleges and universities split into three divisions, with the high-profile Division I comprising 350 teams across thirty-two conferences. The NCAA is big business. The March Madness basketball tournament has a $1.1 billion annual broadcast contract. The powerhouse Southeastern Conference, or SEC, had 2017 revenues exceeding $650 million. The highest annual salary for a Division I college football coach approaches $11 million.[160]

Against this backdrop, it is easy to understand why the plaintiffs, who were current and former student-athletes in certain men's and women's sports, brought a lawsuit alleging that the NCAA's rules violate section 1 of the Sherman Act, which prohibits illegal restraint of trade or commerce. The case was filed in my home district, the Northern District of California. It was decided in a bench trial by former Chief Judge now Senior District Judge Claudia Wilken.[161] As noted by the Ninth Circuit affirmance after both sides appealed, her opinion

155. *Id.* (citing Woodward, *Is College Football on the Level?,* Sport, Nov. 1946, at 35).

156. *Id.*

157. *Id.* (citing Zimbalist, *supra* note 150, at 10).

158. *Id.*; *In re* Nat'l Collegiate Athletics Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1063 (N.D. Cal. 2019).

159. *Alston*, 141 S. Ct. at 2150.

160. *Id.* at 2150–51 (citing *In re* Nat'l Collegiate Athletics Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d at 1063).

161. *In re* Nat'l Collegiate Athletics Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., No. 14-md-02541 CW, 2019 WL 1593939 (N.D. Cal. Mar. 8, 2019) (ordering permanent injunction over aid or benefit limits to student athletes); *In re* Nat'l Collegiate Athletics Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058 (N.D. Cal. 2019) (providing findings of fact and conclusions of law to support the court's permanent injunction).

engaged in a fact-specific assessment of the challenged restraint's effect on competition that accounted for the procompetitive purpose of preserving for consumers the unique product of amateur college sports, while preventing anticompetitive harm to student athletes. Judge Wilken found that the NCAA exercises monopsony power in the relevant market for athletic services in men's and women's Division I basketball and football.[162] Monopsony is the term for single buyer dominance (in this case, the NCAA as the single buyer of student athletic services) as opposed a monopoly, which is used to describe a single seller who controls a market. In the end, she kept in place the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to performance, but enjoined certain rules limiting education-related benefits, such as limitations on graduate school scholarships, paid post-eligibility educational internships and payments for tutoring.[163]

Judge Wilken earned bona fide bragging rights from this Supreme Court opinion, which repeatedly lauded her analysis of the novel and complex issues before her.[164] The Court concluded that her decision "does not float on a sea of doubt but stands on firm ground—an exhaustive factual record, a thoughtful legal analysis consistent with established antitrust principles, and a healthy dose of judicial humility."[165]

At the high court, the parties did not challenge that the NCAA has monopsony control in the labor market such that it could depress wages below competitive market levels and also restrict the quantity of student-athlete labor, because the students have "nowhere else to sell their labor."[166] It was also undisputed that the NCAA engages in horizontal price fixing where the schools engage in fierce competition for top talent, but all are subject to the NCAA's compensation limits.[167]

The Supreme Court devoted much of its analysis to upholding Judge Wilken's use and application of the "rule of reason" analysis, as opposed to a more deferential standard of review.[168] To the extent the NCAA sought exemption from the antitrust laws because of the "special characteristics of its particular industry," the Court advised the NCAA to ask Congress, which has modified antitrust laws in the past

162. *In re Nat'l Collegiate Athletics Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d at 1066.

163. *Alston*, 141 S. Ct. at 2151–54; *In re National Collegiate Athletics Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.,* 375 F. Supp. 3d at 1109–10; *see also In re* Nat'l Collegiate Athletics Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., No. 14-md-02541 CW, 2020 WL 9422404 (N.D. Cal. Dec. 30, 2020) (clarifying the scope of the order related to the cap on academic and graduation awards).

164. *See Alston*, 141 S. Ct. at 2160–66.

165. *Id.* at 2166.

166. *Id.* at 2156.

167. *Id.* at 2154.

168. *Id.* at 2160–66.

for certain industries (agricultural cooperatives, insurance, newspaper joint operating agreements).[169]

Justice Kavanaugh's lone concurrence[170] left little question about his likely position in future NCAA challenges and is essentially an arrow aimed at the heart of the remaining bulk of the NCAA compensation rules. He noted that this case reviewed a small subset of rules restricting education-related benefits and did not touch the bulk the compensation rules that generally restrict student-athletes from receiving compensation from their colleges for playing sports and from receiving money for endorsement deals. Justice Kavanaugh said that those rules raise serious antitrust questions that may fail the rule-of-reason test. According to him "[t]he NCAA's business model would be flatly illegal in almost any other industry in America."[171] "Price-fixing labor is price-fixing labor," he said, and the "bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate *billions* of dollars in revenues for colleges every year," with the money flowing to everyone except the athletes, "many of whom are African American and from lower-income backgrounds," and "end up with little or nothing."[172]

Change is already underway. In 2019, Governor Newsom signed California Senate Bill 206, the "Fair Pay to Play Act," which went into effect on September 1, 2021.[173] The first state legislation of its kind, the statute allows athletes to profit from their identities while maintaining athletic eligibility by explicitly prohibiting any college, conference, or athletic association like the NCAA from upholding rules that punish California student athletes from "name, image and likeness" (NIL) compensation.[174] Many other states have since enacted some variety of an NIL law, and a number of them went into effect during the summer of 2021.[175] On July 1, 2021, the NCAA itself adopted an interim policy allowing college athletes in all three Divisions to benefit from the commercial use of their NIL.[176]

At the National Labor Relations Board, on September 29, 2021, General Counsel Jennifer Abruzzo cited *Alston* when she issued a

169. *Id.* at 2158–60.
170. *Id.* at 2166 (Kavanaugh, J., concurring).
171. *Id.* at 2167.
172. *Id.* at 2167–68.
173. S.B. 206, 2019–20 Leg. Sess. (Cal.) (codified at CAL. EDUC. CODE § 67456 (West 2021)).
174. CAL. EDUC. CODE § 67456.
175. *See* Rudy Hill & Jonathan D. Wohlwend, *College Athletes Now Allowed to Earn Money from Use of Their Name, Image, and Likeness*, NAT'L L. REV. (July 1, 2021), https://www.natlawreview.com/article/college-athletes-now-allowed-to-earn-money-use-their-name-image-and-likeness [https://perma.cc/DVM9-DLW8].
176. NCAA, INTERIM NIL POLICY (2021), http://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf.

memorandum to the NLRB's regional offices declaring that Division I players meet the National Labor Relations Act's statutory definition of employee as well as the common-law test, and are therefore statutory employees of the school, rather than mere "student athletes."[177] According to the memo, players therefore have the right to engage in collective activity to improve the terms and conditions of their employment and are entitled to the protections of section 7.[178] Ms. Abruzzo highlighted recent attempts by athletes to argue for safer working conditions during the COVID-19 pandemic and also regarding their protests related to social justice initiatives.[179] It is worth noting that the NLRB has jurisdiction over private employers, which means private universities only. The bulk of the sports powerhouses are public universities, which are governed by state labor laws and agencies.

Conclusion

So, that concludes the labor and employment highlights from the October 2020 Term. What lies ahead in the current October 2021 Term? A quick review of the docket currently reveals six cases of interest to our section, half of them relating to arbitration issues:

Badgerow v. Walters: whether federal courts have subject-matter jurisdiction to confirm or vacate an arbitration award under sections 9 and 10 of the Federal Arbitration Act where the only basis for jurisdiction is that the underlying dispute involved a federal question.[180]

Cummings v. Premier Rehab Keller, PLLC: Whether the compensatory damages available under Title VI and the statutes that incorporate its remedies include compensation for emotional distress.[181]

Hughes v. Northwestern University: Whether allegations that a defined-contribution retirement plan paid or charged its participants fees that substantially exceeded fees for alternative available investment products or services are sufficient to state a claim against plan fiduciaries for breach of the duty of prudence under ERISA, 29 U.S.C. § 1104(a)(1)(B).[182]

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177. NLRB GC Memorandum 21-08, at 1 n.1 (2021).

178. *Id.* at 4.

179. *Id.* at 7.

180. Badgerow v. Walters, 141 S. Ct. 2620 (2021) (granting certiorari). While this issue was in the editing process, the Court issued a decision, holding that sections 9 and 10 of the Federal Arbitration Act do not allow the courts to look to the parties' substantive dispute to determine jurisdiction. Badgerow v. Walters, 142 S. Ct. 1310, 1314 (2022).

181. Cummings v. Premier Rehab Keller, P.L.L.C., 141 S. Ct. 2882 (2021) (granting certiorari).

182. Hughes v. Nw. Univ., 141 S. Ct. 2882 (2021). While this issue was in the editing process, the Court vacated the lower court decision and remanded the case, holding that, by itself, the fact that employer-provided defined contribution retirement benefit plans offered some mutual funds and annuities with lower fees did not preclude a claim for breach of ERISA's duty of prudence. Hughes v. Nw. Univ., 142 S. Ct. 737, 742 (2022).

National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration: Whether the Supreme Court should issue a stay of OSHA's vaccine-or-testing regime for all businesses with 100 or more employees.[183]

Viking River Cruises v. Moriana: Whether the Federal Arbitration Act requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under the California Private Attorneys General Act (PAGA).[184]

Morgan v. Sundance: Does the arbitration-specific requirement that the proponent of a contractual waiver defense provide prejudice violate this Court's instruction that lower courts must "place arbitration agreements on an equal footing with other contracts?"[185]

Thank you for giving me the opportunity to provide this update, and for the privilege of serving as your Secretary.

183. Nat'l Fed. of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 662–63 (2022) (staying an emergency OSHA rule requiring masking or testing for COVID-19 at large employers) (per curiam). This case was decided not on a grant of certiorari, but instead on the Court's emergency docket through an application for a stay of the OSHA rule after a multi-district litigation panel allowed the rule to go into effect. *Id.* at 663. While this issue was in the editing process, the Court held that the plaintiffs challenging OSHA's rule were likely to be successful in their challenge that the rule exceeded the agency's statutory authority, disagreeing that COVID-19 was an "occupational" or work-related risk. *Id.* at 663, 665–66. OSHA withdrew the rule as a result of the Court's decision. 87 Fed. Reg. 3928 (Jan. 26, 2022), https://www.govinfo.gov/content/pkg/FR-2022-01-26/pdf/2022-01532.pdf.

184. Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 734 (2021) (granting certiorari). While this issue was in the editing process, the Court issued a decision, holding that PAGA actions could be separated into individual and representative actions and that arbitration agreements could be enforced as to those individual PAGA actions. Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906, 1924–25 (2022).

185. Morgan v. Sundance, Inc., 142 S. Ct. 482 (2021) (granting certiorari). While this issue was in the editing process, the Court issued a decision, holding that a party could waive its rights under an arbitration agreement in the same way that it can waive other defenses by participating in litigation. Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1714 (2022).

Escaping the Allure of Joint Employment: Using Fault-Based Principles to Impose Liability for the Denial of Employee Statutory Rights

Michael C. Harper*

Introduction

Over the past decade, the debate over which businesses should be assigned liability for the denial of employee statutory rights has focused almost exclusively on the doctrine of joint employment. Progressive government[1] and academic lawyers[2] have advocated using this doctrine to expand the number of employees that economically dominant businesses are responsible for protecting. This essay contends that this focus on joint employment as the primary doctrinal tool for expanding employer responsibility for the denial of employee rights has been misguided. Rather than relying primarily on the joint employment doctrine and the associated strict imputed liability theory of *respondeat superior*, progressive lawyers should press for a more robust application of fault-based principles drawn from the common law of torts.[3]

Joint employment doctrine may seem to offer the most promising route to making economically dominant businesses responsible for the denial of employee rights. If a franchisor or economically dominant contractor is a joint employer of employees of workers formally employed by another employer, the franchisor or contractor theoretically can be assigned liability for any denial of the rights of employees, even when that denial is the fault of only the primary formal employer. Such strict liability seems to follow, at least for rights secured under

*Professor of Law and Barreca Labor Relations Scholar, Boston University School of Law.

1. *See, e.g.*, U.S. Dep't of Lab. Wage & Hour Div., Adm'r Interpretation No. 2016-1, Joint Employment Under the Fair Labor Standards Act and Migrant and Season Agricultural Worker Protection Act 5, 13 (2016); Browning-Ferris Indus. of Cal., 362 N.L.R.B. 1599 (2015) (defining joint employment under the National Labor Relations Act).

2. *See, e.g.*, Andrew Elmore & Kati L. Griffith, *Franchisor Employer as Employment Control*, 109 Calif. L. Rev. 1317 (2021); Guy Davidov, *Joint Employer Status in Triangular Employment Relationships*, 42 Brit. J. Indus. Rel. 727, 739 (2004).

3. *See infra* text accompanying notes 56–71, 82–89.

statutes whose definition of employment is to derive from the common law,[4] because the common law derived the definition of the employment relationship to set the boundaries of strict imputed *respondeat superior* employer liability.[5] Though the definition of employment was used primarily in the common law to set the bounds of strict imputed employer liability to third parties for employee torts committed in the scope of employment, the same arguments for employer internalization of the costs of doing business can be used to support strict employer liability for the denials of employee rights during the course of business.[6]

Yet the common law definition of employment is too constricted to reach all businesses that sometimes cause the denial of statutory employee rights. Before treating a business as an employer on whom strict *respondeat superior* liability can be imposed, the common law has required that a business have sufficient control over workers to ensure that their work is aligned with its interests.[7] Economically dominant franchisors or contractor employers may intentionally or negligently cause the denial of franchisee-employee rights without having such control. A food franchisor, for instance, that cedes control over the hiring, discipline, work direction, and compensation of a franchisee's workers may not meet the common law definition of employer for these workers. Indeed, by taking its royalties as a share only of revenues rather than of net profits,[8] a typical fast-food franchisor provides its franchisees with an incentive to not fully align personnel policies with

4. The Supreme Court has made clear that the common law provides a default definition for the employment relationship for the many federal statutes—including the antidiscrimination statutes and the National Labor Relations Act—that do not provide a meaningful alternative definition. *See, e.g.*, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992); Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989). The Court acknowledges, however, that by defining "employ" to mean "suffer or permit to work," the Fair Labor Standards Act does provide an alternative and more inclusive definition based on older child labor statutes. *See Darden*, 503 U.S. at 326.

5. *See* MARC LINDER, THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW, A HISTORICAL PERSPECTIVE 133–50 (1989); Michael C. Harper, *Using the Anglo-American* Respondeat Superior *Principle to Assign Responsibility for Worker Statutory Benefits and Protections*, 18 WASH. U. GLOB. STUD. L. REV. 161, 177–78 (2019); Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 299–300 (2001).

6. *See* Harper, *supra* note 5, at 178–84.

7. *See id.* at 179–81. Following the RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. L. INST. 1958), contemporary articulations of what is summarized as a right to control test invoke multiple factors, including those offered by the Court in *Reid* and then quoted in *Darden*, that are relevant to the existence *vel non* of an employment relationship. *See, e.g.*, *Darden*, 503 U.S. at 323 (quoting *Reid*, 490 U.S. at 750–51). As stated in the RESTATEMENT OF EMPLOYMENT LAW § 1.01 (AM. L. INST. 2015), the multifactor tests determine whether a worker renders service in alignment with the putative employer's interest or rather somewhat in his or her own or another independent business's interest. *See also id.* § 1.04.

8. *See* ROGER D. BLAIR & FRANCINE LAFONTAINE, THE ECONOMICS OF FRANCHISING (2005); G. Frank Mathewson & Ralph A. Winter, *The Economics of Franchise Contracts*, 28 J. L. ECON. 503, 503 (1985); Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927, 933 (1990).

the interests of their franchisor.[9] Nonetheless, despite their lack of control over franchisee personnel policy, franchisors that control franchisees' right to continue and expand their branded operations typically will have enough influence over their franchisees to cause particular violations of federal or state wage and hour laws or the National Labor Relations Act (NLRA).[10]

Addressing this under-inclusion by expanding joint employment from its common law dimensions to impose strict liability without fault on any business with sufficient economic power to control the personnel delinquencies of other businesses, however, may seem unfair and disruptive of efficient business relationships. It may seem unfair to many to impose strict liability on a business that has not affirmatively caused another independent business's denial of employee statutory rights. The imposition of strict liability also may cause an economically independent business without direct culpability to attempt to assert full control over any economically subordinate culpable businesses' employment relations. Whether or not this forced vertical integration of business operations[11] benefits the employees, it may also disrupt efficient relationships that have been set contractually between independent solvent businesses[12] for reasons other than the evasion of liability

9. The franchisee of course has a greater incentive to reduce labor costs, even if somewhat at the risk of reduced sales, while the franchisor is relatively more interested in expanding sales, even if somewhat at the expense of the franchisee's profits.

10. *See, e.g.*, Ochoa v. McDonald's Corp., 133 F. Supp. 3d 1228, 1236 (N.D. Cal. 2015) (testimony of John A. Gordon, restaurant advisor and consultant: "'McDonald's is able to exercise a greater degree of control over its franchisees' restaurants' . . . through control over growth and rewrite, and the ability to terminate franchise agreements for deviation from its standards."). See also the compelling case for franchisor influence over franchisees presented in Elmore & Griffith, *supra* note 2.

11. Vertical integration occurs when a dominant business takes full economic control of an upstream supplier of inputs or downstream distributor of its products.

12. Reductions of labor costs set by internal labor markets seem to be one reason for divisions of operations between firms, through subcontracting, franchising, and other forms of vertical disintegration. *See* David Weil, The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It 49–52 (2014); Hugh Collins, *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws*, 10 Oxford J. Legal Stud. 353, 354 (1990). However, firms also derive efficiencies by assigning tasks to more specialized firms with "core competencies." *See* Weil, *supra*, at 85–88; Collins, *supra*, at 360; Davidov, *supra* note 2, at 730–31.

through insolvency.[13] More conservative policy makers,[14] the business community,[15] and courts applying liability rules[16] thus predictably have resisted the expansion of joint employment and its associated strict liability.

Furthermore, no realistic expansion of joint employment doctrine can reach all businesses that are responsible for the denial of rights that employment statutes are intended to secure. Even in the absence of any continuing relationship on which a claim of joint employment could be based, a business may impair the statutory rights of the employees of other businesses through the exertion of economic leverage.[17] This possible harm seems particularly likely for businesses with market-based leverage over other independent businesses.

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13. Ensuring compensation to employees who have been denied statutory rights of course provides the strongest policy arguments for extending liability to firms other than the employers primarily responsible for the denial of the rights. These arguments apply where there is risk that the primarily responsible employers are unable to provide compensation because of insolvency. In most other cases the extension of liability to other businesses with some contractual relationship with the responsible business will have no effect on ensuring compensation or on the firm that pays. Contracts between two rationally operated businesses will almost invariably include indemnity clauses. *See* Kati L. Griffith, *An Empirical Study of Fast-Food Franchising Contracts: Towards a New Intermediary Theory of Joint Employment*, 94 WASH. L. REV. 172 (2019) (finding indemnity clauses to be common in franchise agreements).

Assigning responsibility for purposes of defining collective bargaining obligations, however, might matter significantly even where each business is fully solvent. *See infra* text accompanying notes 164–72.

14. *See* Save Local Business Act, H.R. 3441, 115th Cong. (2017) (legislation to amend National Labor Relations Act and Fair Labor Standards Act to tighten definition of joint employment); Protecting Local Business Opportunity Act H.R. 3459, 114th Cong. (2015) (legislation to amend National Labor Relations Act to tighten definition of joint employment); Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. 11,184 (Feb. 26, 2020) (President Trump-appointed Labor Board Rule tightening President Obama-appointed Labor Board definition of joint employment); Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. 2820 (Jan. 16, 2020) (Department of Labor tightening of joint employer definition).

15. *See, e.g.*, *Joint Hearing on H.R. 3441 Before the Subcomm. on Workforce Protections and the Subcomm. on Health, Emp., Lab. & Pensions of the H. Comm. on Educ. & the Workforce*, 115th Cong. 22–28 (2017) (statement of Tamra Kennedy on behalf of International Franchise Association); *Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship: Hearing Before the H. Comm. on Educ. & Lab.* (2017), https://edlabor.house.gov/hearings/redefining-joint-employer-standards-barriers-to-job-creation-and-entrepreneurship (statement of G. Roger King, Senior Labor and Employment Counsel, H.R. Policy Ass'n, https://edlabor.house.gov/imo/media/doc/king_-_testimony_7.12.17.pdf); *Hearing on H.R. 3459, "Protecting Local Business Opportunity Act" Before the Subcomm. on Health, Emp., Lab. & Pensions of the H. Comm. on Educ. & the Workforce*, 114th Cong. 51–55 (2015) (statement of Kevin R. Cole on behalf of Independent Electrical Contractors); Letter from Amanda Austin, Vice President, Pub. Pol'y, Nat'l Fed'n of Independent Bus. to the Hon. John Kline, Chairman, U.S. House Comm. on Educ. & the Workforce (Sept. 10, 2015), https://s3.amazonaws.com/NFIB/AMS%20Content/Attachments/3/2-59200-NFIB%20Letter%20of%20Support%20-%20H%20R%20%203459%20Protecting%20Local%20Buisness%20Opportunity%20Act.pdf.

16. *See, e.g.*, *infra* notes 72, 152 and accompanying text.

17. *See, e.g.*, *infra* notes 40–53, 135–43 and accompanying text.

In light of these difficulties with the use of joint employment doctrine, this essay demonstrates how fault-based principles borrowed from tort law can be better used to define the employers responsible for the denial of employee rights. By analyzing cases and hypotheticals under three types of statutory regimes, the essay contends that these principles should supplement the strict liability, joint employment doctrine. The fault-based principles explain how and when employers can and should be liable for some denials of statutory rights to workers over whom they may not exercise the kind of authority that would justify the imposition of joint employer status and its associated strict liability.[18] The essay also contends that the case for expanding the scope of liability through the application of fault-based principles has more appeal than does expanding the scope of liability by enlarging the concept of joint employment from its roots in the law of *respondeat superior*.[19]

The essay first considers how fault-based principles can impose liability on non-joint employers for the discrimination and retaliation prohibited by Title VII of the 1964 Civil Rights Act,[20] and other antidiscrimination statutes like the Age Discrimination in Employment Act (ADEA)[21] and the Americans with Disabilities Act (ADA).[22] The common law provides an alternative model to that of joint employment for the imposition of this liability. This alternative is the tort of intentional wrongful interference with a present or potential employment relationship between two other parties.[23] As some judicial decisions have recognized,[24] the language of the antidiscrimination statutes allows this model to be applied as a statutory cause of action against employers that obstruct with prohibited intent other employers from hiring particular employees. Furthermore, the statutes should permit the interference tort to be used against employers that intentionally cause other employers to discriminate or retaliate in violation of one of these statutes.[25] The essay also explains how fault-based principles can be adapted to impose noneconomic liability outside joint employment for discriminatory harassment.[26]

The essay next analyzes the expansion of responsibility for the denial of the minimum wage and overtime payment obligations imposed by the Fair Labor Standards Act (FLSA),[27] as well as many state

18. *See, e.g.*, *id.*
19. *See, e.g.*, *infra* text accompanying notes 68–73, 108–21, 144–51.
20. Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e.
21. Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634.
22. Americans with Disabilities Act, 42 U.S.C. §§ 12111–12117.
23. *See infra* text accompanying notes 56–68.
24. *See infra* text accompanying notes 39–56.
25. *See infra* text accompanying notes 57–73.
26. *See infra* text accompanying notes 74–89.
27. 29 U.S.C. §§ 201–219.

statutes.[28] The tort of intentional wrongful interference with employment or prospective employment would be of limited use in expanding liability beyond the single or joint employers assigned such obligations; few employers have the intention of preventing other employers from meeting their FLSA responsibilities. However, negligence law does provide a fault-based model for expanding FLSA liability.[29] Employers whose continuing control of other employers and their employees is insufficient for them to be treated as joint employers may nonetheless cause the denial of FLSA rights through particular affirmative acts of negligent interactions with other employers. When causation can be demonstrated, affirmative negligent acts, if not also passive acquiescence to known wage and hour violations, make a compelling case for liability, regardless of joint employment status.[30]

The essay acknowledges that using a negligence model to expand FLSA liability would require legislative action. Unlike the tort of intentional wrongful interference for the antidiscrimination laws, a negligence tort cannot be easily spliced onto the language of the FLSA. Furthermore, common law courts have not required employers to exercise reasonable care when affecting employees of other employers.[31]

The essay finally addresses the administrative law regime of the NLRA.[32] The NLRA renders illegal an employer's interference with or restraint or coercion of employees' concerted activity for their mutual aid,[33] as well as an employer's discrimination to encourage or discourage union membership or activity.[34] The National Labor Relations Board (NLRB or Board)—the agency delegated exclusive power to enforce the NLRA—has interpreted these prohibitions to apply against employers for actions that directly and intentionally affect the employees of other employers.[35]

The NLRA also requires employers to bargain with unions that demonstrate support from a majority of employees in a unit appropriate for bargaining,[36] and it allows that fault-based liability rules do not help define the employers that may be subject to such bargaining obligations.[37] However, the essay concludes that expanding the meaning

28. The FLSA does not preempt state minimum wage or wage payment laws. All but five states impose their own minimum wage, a majority at a level above that set in the FLSA. *See Consolidated Minimum Wage Table*, DEP'T OF LAB. (Jan. 1, 2022), https://www.dol.gov/agencies/whd/mw-consolidated.

29. *See infra* text accompanying notes 92–95.

30. *See infra* text accompanying notes 122–27.

31. *See infra* text accompanying note 104.

32. 29 U.S.C. §§ 151–183.

33. *Id.* § 158(a)(1).

34. *Id.* § 158(a)(3).

35. *See infra* text accompanying notes 135–143.

36. 29 U.S.C. §§ 158(a)(5), 159(a).

37. *See infra* text accompanying notes 157–65.

of joint employment also is not the best way to define the economic relationship most appropriate for collective bargaining.[38]

The alternative fault-based approach to extending liability for the deprivation of statutory rights can reach more culpable businesses, whether or not joint employers, without the disruption of efficient business relationships. This fault-based approach would allow businesses to determine the efficient level of control that they exert over the employment policies of subordinate independent businesses, but would require them to take reasonable steps to ensure that whatever control that they do exert does not result in the deprivation of the rights of the employees of the subordinate businesses.

I. Intentional Interference with Nondiscriminatory Employment

Within the first decade after passage of the 1964 Civil Rights Act, without any reference to joint employment, a panel of the District of Columbia Circuit Court of Appeals explained in *Sibley Memorial Hospital v. Wilson*[39] how Title VII's prohibition of intentional discrimination[40] applied against employers that had intentionally caused prohibited discrimination against employees of other employers. Wilson was a private duty nurse who claimed that supervisors at a private hospital had refused because of his male gender to refer him to be employed by two female patients in rooms at the hospital.[41] The parties did not contest that the hospital had sufficient employees to fit Title VII's definition of employer,[42] nor did they dispute that Wilson was not one of those employees, but would instead have been employed only by the patients. Furthermore, Wilson did not, and could not persuasively, contend that the hospital met Title VII's definition of an employment agency also subject to antidiscrimination prohibitions.[43] The issue before the panel was only whether Title VII's prohibition of intentional discrimination reached an employer's obstruction of an individual's potential employment relationships with third parties such as the two female patients.[44]

38. *See infra* text accompanying notes 166–71.

39. Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973).

40. 42 U.S.C. § 2000e-2(a)(1).

41. *Sibley*, 488 F.2d at 1339.

42. Title VII offers as its definition of employer only: "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ." 42 U.S.C. § 2000e(b).

43. Wilson in any case would not have been able to include the hospital within this definition, which "means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer." 42 U.S.C. § 2000e(c).

44. *See Sibley*, 488 F.2d at 1340–41. The parties also did not contest the court of appeals' assumption that Sibley, if referred by the hospital, could have been in employment relationships with the patients. *See id.* Later courts of appeals have declined to apply *Sibley* under similar facts because they have found plaintiffs failed to establish

Judge McGowan, writing for a unanimous panel, stressed that the prohibition of intentional employment discrimination covers an employer's discrimination against "any individual with respect to . . . privileges of employment" rather than only against present or former employees or applicants for employment.[45] He also emphasized that Title VII's objective of achieving "equality of employment opportunities"[46] could be circumvented if the statute did not constrain discrimination by businesses, like the defendant hospital, that were in control of the employment opportunities of individuals other than their employees. "To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone continued use of the very criteria for employment that Congress has prohibited."[47]

Although the *Sibley* court's liberal interpretation of the relevant statutory language has not been accepted in all other courts of appeals,[48] no court has contested the policy argument for expanding Title VII's coverage of intentional employment discrimination by influential third-party employers like the hospital.[49] Most adherents to nondiscrimination principles would agree that the hospital's discrimination, if proven, at least should be illegal and that this illegality should not turn on whether the hospital also employed Wilson. If the hospital is an employer covered by the Act,[50] if it intentionally discriminated with what would be employment relationships between Wilson and the patients, the hospital should be held responsible.[51] The same coverage

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that obstructed patient relationships were ones of employment and thus within the scope of Title VII. *See, e.g.*, Salamon v. Our Lady of Victory Hosp., 514 F.3d 217 (2d Cir. 2008); Bender v. Suburban Hosp., Inc., 159 F.3d 186 (4th Cir. 1998); Diggs v. Harris Hosp.-Methodist, Inc., 847 F.2d 270 (5th Cir. 1988).

45. *Sibley*, 488 F.2d at 1341.

46. *Id.* at 1340–41 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 429 (1969)).

47. *Id.* at 1341. Title VII defines "employer" to mean "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b).

48. *See, e.g.*, Lopez v. Massachusetts, 588 F.3d 69, 89 (1st Cir. 2009) (rejecting "interference theory" and using only common law of agency in disparate impact challenge to state test used by local police departments); Gulino v. N.Y. State Educ. Dep't, 460 F.3d 361, 374–76 (2d Cir. 2006) (refusing to apply *Sibley* in a disparate impact challenge to a state test given to local school department employees).

49. For other decisions applying the *Sibley* interference theory, see, for example, Ass'n of Mex.-Am. Educators v. California, 231 F.3d 572, 580–51 (9th Cir. 2000) (disparate impact case against state for teacher credentialing test); Christopher v. Stouder Mem'l Hosp., 936 F.2d 870, 875–77 (6th Cir. 1991) (hospital's retaliation against scrub nurse by limiting private duty and thus employment opportunities). *See generally* Andrew O. Schiff, *The Liability of Third Parties Under Title VII*, 18 U. MICH. J.L. REF. 167 (1984).

50. *See supra* note 47.

51. Other courts have found *Sibley* inapplicable to cases where the relationships were not ones of employment. *See, e.g.*, Bender v. Suburban Hosp., Inc. 159 F.3d 186, 190

of third-party interference should apply for the age discrimination in employment prohibited by similar language in the ADEA, for the disability discrimination in employment prohibited by the more capacious language in Title I of the ADA,[52] and for the retaliation prohibited by provisions in all these statutes.[53] It should apply under § 1981[54] for any obstruction of contractual opportunities, whether or not employment related,[55] and it should apply under state antidiscrimination laws that have sufficiently broad language. The political case for such application is much easier to advance than is any case for imposing strict liability on the hospital as a joint employer for any discriminatory acts of another employer of which its agents did not even have knowledge.

The common law tort of intentional wrongful interference with contractual or prospective economic relations[56] provides not only a model for the coverage of third-party interference under the antidiscrimination statutes, but also an alternative to joint employment as a way to enforce statutory antidiscrimination and anti-retaliation policies against third-party interference. Title VII and the other federal antidiscrimination statutes do not have a strong preemptive force.[57] The federal laws anticipate the involvement of state law in the eradication of discrimination and allow state laws to strengthen federal law as long as they do not prohibit what federal law requires.[58] Thus, it would be fully appropriate for state courts to apply and develop the wrongful interference tort as a fault-based tool against employment discrimination.

(4th Cir. 1998) (doctor's obstructed relationship with patients not one of employment); Diggs v. Harris Hosp.-Methodist, Inc., 847 F.2d 270, 274 (5th Cir. 1988) (same); Darks v. Cincinnati, 745 F.2d 1040, 1042 (6th Cir. 1984) (city that does not license dance hall is not interfering with employment relationship).

52. *See* Satterfield v. Tennessee, 295 F.3d 611, 617–18 (6th Cir. 2002) (*Sibley* could apply to disability discrimination case if interference with employment relationship); Carpart Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New Eng., Inc., 37 F.3d 12, 18 (1st Cir. 1994) (*Sibley* analysis the same under ADA and Title VII).

53. *See* Christopher v. Stouder Mem'l Hosp., 936 F.2d at 876.

54. "All persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a).

55. *See* Zaklama v. Mt. Sinai Med. Ctr., 842 F.2d 291, 295 (11th Cir. 1988) ("*Sibley* is equally applicable to a claim under § 1981" against a hospital for discriminatory recommendation causing discharge from residency program of another hospital).

56. Most jurisdictions, as well as the *Restatements Second* and *Third of Torts*, separate the interference tort into two torts, one covering interference with contract and the other covering interference with prospective contractual relations or economic expectations. *See* Restatement (Second) of Torts §§ 766, 766B (Am. L. Inst. 1979); Restatement (Third) of Torts: Liability for Econ. Harm §§ 17, 18 (Am. L. Inst. 2020). The *Restatement of Employment Law*, however, follows the many jurisdictions that treat intentional interference as one tort. Restatement of Emp. L. § 603 (Am. L. Inst. 2015).

57. *See* Cal. Fed. Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 282–83 (1987) ("[The] narrow scope of preemption . . . reflects the importance Congress attached to state anti-discrimination laws in achieving Title VII's goal of equal employment opportunity.").

58. *See id.*

The tort fits well as third-party intentional discrimination that causes a contractual employment relationship to be terminated or to not be formed. The elements of the tort include (1) a contractual or prospective economic relationship between the plaintiff and a third party; (2) the defendant's awareness of the relationship; (3) the defendant's action with an intent to interfere with the relationship; (4) the defendant's action causing the interference; (5) the interference resulting in foreseeable economic damages to the plaintiff; and (6) the defendant's action being "improper."[59] These elements can be satisfied in a case like *Sibley* where a business with discriminatory intent interferes with the employment or employment prospects of a worker with another employer or prospective employer.

The most problematic element of the interference tort for application to cases like *Sibley* may be the requirement that the action be "improper." However, actions taken with a discriminatory intent condemned by federal antidiscrimination law should fit this requirement, regardless of whether it is interpreted in accord with the *Restatements Second* (or *Third*) *of Torts* or the *Restatement of Employment Law*. Each of these Restatements take somewhat different approaches to defining what is "improper." The *Restatement Second of Torts* articulated a seven-factor balancing test that considered the nature of the defendant's conduct, the defendant's motive, the interests of the plaintiff, the interests of the defendant, societal interests, the proximity of the conduct to the interference, and the relations between the defendant and the plaintiff.[60] It seems improbable that any such balancing would not condemn a discriminatory interference like that in *Sibley*.

Satisfying the approach of the *Restatement of Employment Law* also should not be difficult. This *Restatement* found that most employment cases, rather than following the multifactor approach, instead focused on (1) whether the interference was privileged or justified by a legitimate business interest, and (2) whether the interference was accomplished without using some means "defined by common or statutory law as wrongful."[61] Whether or not federal antidiscrimination laws provide a cause of action against employers that interfere with a discriminatory intent in the employment or prospective employment relationships of other employers, these statutes do unequivocally define certain discriminatory intent as improper, against public policy.

The *Restatement Third of Torts*, also rejecting the multifactor balancing test offered by the *Restatement Second*, conditions the interference tort on the defendant committing "an independent and intentional

59. *See* Restatement of Emp. L. § 6.03 cmt. b.
60. *See* Restatement (Second) of Torts § 767.
61. *See* Restatement of Emp. L. § 6.03 cmt. b.

legal wrong."[62] The *Restatement Third* comments that "independent" means that the conduct "was wrongful apart from its effect on the plaintiff's contract"[63] or "in some way recognized elsewhere by the law."[64] The *Restatement Third* does not, however, require that the wrongful conduct could support a separate cause of action independent of the interference tort. It is not a significant reach to cover as independently wrongful discriminatory intent condemned by federal statutes. If most jurisdictions can recognize a common law cause of action for discharge in violation of a public policy expressed in federal and state statutes,[65] so should they be able to recognize an interference tort based on a public policy against wrongful discrimination based in such statutes. Furthermore, the *Restatement Third*'s expressed reasons for requiring independence, the protection of competitive business practices,[66] and the difficulty in determining the existence of malice,[67] do not apply to the protection of discriminatory intent.

Even if the fault-based interference tort requires further judicial or legislative development, it provides a more effective model for expanding liability for employment discrimination than does the modification of joint employment doctrine. To illustrate the comparative potential of the two doctrines, consider a typical scenario where one business, contracting with a second business to provide some service such as cleaning, then refuses to accept the second business's use of an employee because of her membership in a class protected from discrimination. Since the first "user" or client employer is at fault, it can be held responsible through intentional interference doctrine for the prohibited discrimination regardless of whether it had enough general control of the second servicing business's employees to be deemed their joint employer. By contrast, even the liberal joint employment doctrine could not cover a user or client employer that exercised no control, beyond this discriminatory action, over the hiring, compensation, supervision, or working conditions of the second employer's workers.

62. *See* Restatement (Third) of Torts: Liability for Econ. Harm §§ 17(2)(b), 18(b) (Am. L. Inst. 2020). For the separate interference with contract tort, the *Restatement Third* also defines conduct as "wrongful" when it is to appropriate the benefits of the plaintiff's contract or where the defendant engaged in the conduct for the sole purpose of causing harm to the plaintiff. *See id.* § 17(2). Neither of these additional categories of wrongfulness fit the interference with discriminatory intent application, however.

63. *See id.* § 17 cmt. e.

64. *See id.* § 18 cmt. b.

65. *See, e.g.*, Gardner v. Loomis Armored, Inc., 913 P.2d 377, 383 (Wash. 1996) (finding a public policy in favor of preserving life "evidenced by countless states and judicial decisions"); Nees v. Hocks, 536 P.2d 512, 516 (Or. 1975) (state constitution, state statutes, and judicial decisions "clearly indicate" importance of jury duty); *see also* Restatement of Emp. L. § 5.03.

66. *See* Restatement (Third) of Torts: Liability for Econ. Harm § 18 cmt. b.

67. *See id*. cmt. c.

Consider, for instance, *Greene v. Harris Corp.*,[68] a decision upholding dismissal of a complaint alleging that the agent of a business receiving services from a cleaning company had caused the cleaning company's dismissal of an employee assigned to his office and that the agent had done so in violation of state antidiscrimination law because of the employee's sexual orientation.[69] The court of appeals accepted these allegations, but nonetheless held that the plaintiff could not invoke the antidiscrimination law against Harris Corporation, the company receiving the cleaning services, because she did not allege adequate facts to establish that the company was her joint employer.[70] The dismissal seems wrong, regardless of whether the court correctly applied joint employer doctrine; the allegation of Harris's agent's discriminatory intent in causing the plaintiff's termination of employment should be sufficient to establish liability, whether under an interpretation of the state law or an application of the intentional interference tort.[71]

By contrast, despite its promise of strict liability without fault, courts resist using joint employer doctrine to impose dual liability under the antidiscrimination statutes without the involvement of both employers in the discriminatory action. Where discrimination is the fault of the agents of only one of two joint employers, where the agents of one of the employers do not even know of the discrimination, courts do not hold the other employer responsible.[72] For instance, in the *Greene*

68. Greene v. Harris Corp., 653 F. App'x 160, 161 (4th Cir. 2016).

69. *Id.*

70. *Id.* at 164.

71. The court of appeals in *Greene*, however, upheld the lower court's dismissal of Greene's claim of tortious interference with a business relationship without considering whether proof of the discriminatory intent condemned by Maryland law should be treated as proof of improper conduct. *Id.* at 165.

For another revealing example of a user firm being insulated from alleged illegal discrimination because of a finding that it was not a joint employer, see *Scott v. Sarasota Doctors Hospital, Inc.*, 688 F. App'x 878, 886 (11th Cir. 2017).

72. As stated by a panel of the Ninth Circuit Court of Appeals in *EEOC v. Global Horizons, Inc.*:

> As our sister circuits have explained, even if a joint-employment relationship exists, one joint employer is not automatically liable for the actions of the other. . . . Liability may be imposed for a co-employer's discriminatory conduct only if the defendant employer knew or should have known about the other employer's conduct and "failed to undertake prompt corrective measures within its control."

915 F.3d 631, 641 (9th Cir. 2019) (quoting EEOC, Notice No. 915.002, EEOC-CVG-1998-2, Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (Dec. 3, 1997), https://www.eeoc.gov/laws/guidance/enforcement-guidance-application-eeo-laws-contingent-workers-placed-temporary (scroll down to "Staffing Firm" under question 8)); *accord* Burton v. Freescale Semiconductor, Inc., 798 F.3d 222, 228–29 (5th Cir. 2015); Whitaker v. Milwaukee County, 772 F.3d 802, 811–12 (7th Cir. 2014); Anderson v. Pac. Maritime Ass'n, 336 F.3d 924, 928–30 (9th Cir. 2003) (dicta); Llampallas v. Mini-Cirs., Lab, Inc., 163 F.3d 1236, 1244–45 (11th Cir. 1998); Torres-Negron v. Merck & Co., 488 F.3d 34, 41 n.6 (1st Cir. 2007) ("[J]oint-employer liability does not by itself implicate vicarious liability.").

case, the serviced company, even if a joint employer, would not have been held liable for the cleaning company's discriminatory dismissal of an employee working at the serviced company if the agents of the serviced company had no part in or even knowledge of the dismissal or the discriminatory motivation.

Of course, even if joint employment doctrine does not work in the typical contracting employer case that cannot be done alone by fault-based interference doctrine, antidiscrimination law could be legislatively modified for it to do so. The law could impose the strict liability promised by the joint employer doctrine on each joint employer for discriminatory actions taken or policies set by the agents of the other. But this use of strict liability seems politically unappealing for any case in which the culpable agents are not acting within the scope of their authority for both employers. Expanding joint employment to impose liability on principles for the acts or omissions of the agents of other principals would be foreign to the principles of agency law.[73]

Because economic harm is an element of the tort of intentional interference,[74] the tort may seem less applicable to a case where the employees of one employer discriminatorily harass the employees of another. Such harassment may be sufficiently severe or pervasive to create an actionable hostile work environment under the discrimination laws,[75] but, if the hostility is not sufficiently severe to constitute a constructive discharge warranting the victim's resignation, there would be no economic harm.[76] Nevertheless, as explained below, development of fault-based tort principles also offers a more promising path to expanded employer liability for discriminatory harassment than does the joint employer doctrine alone.

The courts have used two doctrines—modified imputed strict liability and negligent supervision—to impose liability on employers for discriminatory harassment that does not include official employer actions resulting in tangible economic harm.[77] First, for cases where the harassment has been inflicted by supervisors with some degree of

73. *See* RESTATEMENT (THIRD) OF AGENCY § 7.03 (AM. L. INST. 2006) (stating ways a principal can be liable for its own agent's conduct).

74. *See supra* note 54 and accompanying text.

75. The standard for actionable discriminatory harassment under Title VII has been consistently articulated by the Court: "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986).

76. The Court's recognition of hostile work environment harassment as actionable under Title VII turned on its acceptance of Title VII's prohibition of discrimination that does not have direct tangible economic consequences, even in cases where the harassment is not sufficiently severe to justify resignation as a constructive discharge. *See Vinson*, 477 U.S. at 64.

77. After the amendment of Title VII in 1991, such liability can include general compensatory damages. *See* 42 U.S.C. §1981a(b).

control over personnel actions that could result in tangible economic harm, the Court, in its *Faragher*[78] and *Ellerth*[79] decisions, modified imputed liability under the common law of agency to hold liable any business for whom the inflicting supervisor is an agent, even where the harassment is inflicted outside the agent's scope of employment or authority.[80] The Court's common law modification, however, also allows employers to avoid liability for a supervisory agent's discriminatory harassment by proving that it acted reasonably to prevent and correct the harassment and the victimized employee failed to act reasonably to report and mitigate it.[81] Second, the Court also has approved lower court decisions using doctrine modeled on the tort of negligent supervision to impose direct, rather than imputed, liability on the employer where it knew or should have known of and did not take prompt and appropriate remedial action against discriminatory harassment inflicted by nonsupervisory co-employees.[82]

While an application of joint employment beyond a case of integrated operations with joint supervisory agents would not expand employer liability through either of these doctrines, each could be further developed to impose liability on employers with responsibility for harassment. First, the modified *Faragher-Ellerth* agency doctrine has not been, and would not be, applied where the harassing agent is not an agent of both employers, regardless of whether each had sufficient potential control over the harassed employees to be treated as their employers.[83] It would be more sensible to modify agency law doctrine further to impose liability on the principal of an harassing agent who used his or her authority to harass an employee of another employer, regardless of whether the harassing agent's principal was a joint employer of the victims. Agents of associated businesses—especially associated dominant businesses like franchisors or users of servicing contractors—may have significant influence on the continuing employment prospects of victims, even when their principals are not joint employers. In such a case, the principal, like the harassing agent, could be made liable for interfering with the victim's employment relationship.[84]

78. Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

79. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

80. *Ellerth*, 524 U.S. at 759; *Faragher*, 524 U.S. at 807.

81. *Ellerth*, 524 U.S. at 759; *Faragher*, 524 U.S. at 807.

82. *See Faragher*, 524 U.S. at 799–800; *Ellerth*, 524 U.S. at 759.

83. *See, e.g.*, Takacs v. Fiore, 473 F. Supp .2d 647, 656–57 (D. Md. 2007) (Even if human resources contractor was a joint employer, the alleged harassment could not be imputed to it because the harasser was not a supervisor within the contractor's "hierarchy."); *cf.* cases cited *supra* note 71.

84. Many lower courts have refashioned agency doctrine to impose strict liability on principals for their agents' abuse of delegated authority, outside the scope of their employment, in the commission of intentional torts, such as sexual assaults, against victims subject to such abuse. In his opinion for the Court in *Faragher*, 524 U.S. at 795–96

For instance, in a case similar to *Greene*, if an economically dominant employer's agent uses his delegated authority to discriminatorily harass a cleaner of his office who is employed, directed, and compensated by a cleaning company, the agent's employer should be subject to the *Faragher-Ellerth* modified agency rule, regardless of whether the harassed cleaner is jointly employed by the harassing agent's employer. The most cogent deterrent rationale for the *Faragher-Ellerth* modification of agency doctrine applies equally, whether or not the victim is employed by the principal.[85]

The negligent supervision model also cannot be applied against any employer, single or joint, that did not, or at least should not, have known of the harassment. On the other hand, the tort can readily be used to impose liability on employers who knew of, but failed to take feasible effective action against, the discriminatory harassing conduct of their own employees, even where the victims of that conduct were not also their employees.

The negligent supervision tort has been used, through the common law as well as through state antidiscrimination law, to impose liability on employers that negligently allow their employees to harass.[86] Furthermore, the employer's duty to supervise runs not only to its own employees, but also to third parties such as employees of other employers. As stated in section 7.05(1) of the *Restatement Third of Agency*, "[A] principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent."[87] Section 41 of the *Restatement Third of Torts* categorizes the employer's duty expressed in the negligent supervision tort as an example of a duty based on a special relationship with persons "posing risk" and states that the duty runs to third parties "when the employment facilitates the employee's causing harm to third parties."[88]

(1998), Justice Souter cited several of these cases involving police officers and therapists. For citations and discussion, see Michael C. Harper, *Fashioning a General Common Law for Employment in an Age of Statutes*, 100 Cornell L. Rev. 1281, 1322–23 (2015).

85. For elaboration of this rationale, see Michael C. Harper, *Employer Liability for Harassment Under Title VII: A Functional Rationale for* Faragher *and* Ellerth, 36 San Diego L. Rev. 41, 41–42 (1999); *see also* J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 Va. L. Rev. 273, 361–83 (1995).

86. *See, e.g.*, Patterson v. Augat Wiring Sys., Inc., 944 F. Supp. 1509, 1528–29 (M.D. Ala. 1996) (common law claim); Baker v. Weyerhaeuser Co., 903 F.2d 1342, 1348 (10th Cir. 1990) (common law claim).

87. Restatement (Third) of Agency § 7.05(1) (Am. L. Inst. 2006); *see also* Restatement (Second) of Agency § 213(c) (Am. L. Inst. 1958): "A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless: . . . (c) in the supervision of the activity."

88. Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 41(b)(3) (Am. L. Inst. 2012).

The last condition of facilitation applies to most harassment cases with related employers. In the typical discriminatory harassment case where joint employment is alleged to expand employer liability, an employee of a temporary agency or a servicing company like the cleaner in the *Greene* case[89] is subjected to harassment from employees of the serviced company. Whether or not the harassers are supervisors warranting *Faragher-Ellerth* treatment, this harassment is "facilitated" by the service company's employment at its work site of the harassers. This is true regardless of whether the victimized worker is also the employee of the harassers' employer. A duty should be imposed on the user or serviced company to reasonably supervise its own employees to avoid the discriminatory harassment of any workers at its facilities, whether or not those workers are the user company's employees.

To be sure, expanding the boundaries of joint employment would expand the number of employees that an economically dominant business, like a franchisor, had a duty to supervise and thus would augment the potential reach of the negligent supervision tort. But liability would still be based on the dominant business's fault. Finding economically dominant businesses to be joint employers of harassment victims is sufficient only to impose a duty not to negligently allow discriminatory harassment by jointly employed co-employees. Liability with proof of expanded joint employment would still also require the same proof of some failure to discharge this duty that would be sufficient alone with a pure fault-based approach.

II. Fault-Based Liability for Causing Another Employer's FLSA Violation

Fault-based torts requiring some level of intent or negligence might seem to have no potential use for the expansion of employer liability under the Fair Labor Standards Act (FLSA). Employer fault is not an element of a violation of the FLSA; unlike the antidiscrimination laws, the FLSA imposes strict liability on an employer whenever covered employees do not receive a minimum wage[90] or an appropriate bonus for overtime hours of work.[91] If a business is an employer, single or joint, of employees denied adequate wages, it is liable for the deficit.[92] If it is not such an employer, the FLSA cannot be interpreted to impose such liability, regardless of the business's role in causing the deficit.

Nevertheless, a strong argument can be made for the legislative or common law development of a cause of action against businesses that intentionally or negligently take actions that cause another business to deny its employees the wages guaranteed by the FLSA or similar

89. *See supra* note 68.
90. 29 U.S.C. § 206.
91. *Id.* § 207.
92. *Id.* § 216(b).

state wage and hour laws. The imposition of a new duty on businesses not to cause wage and violations by related businesses could provide another example of the special relationships covered by section 41 of the *Restatement Third of Torts* noted above.[93] Section 41(a) states that "[a]n actor in a special relationship with another owes a duty of reasonable care to third parties with regard to risks posed by the other that arise within the scope of the relationship."[94] Expanding the list of such special relationships to include business relationships between a dominant employer and a dependent, generally subordinate employer would be preferable on policy and more realistic on political grounds than would expanding the definition of joint employment to encompass both employers in such a relationship. The latter would make the dominant employer, regardless of its culpability, liable for any of the dependent subordinate employer's violations of the FLSA, while the former would make the dominant employer liable only for the violations that it intentionally or negligently caused by particular interactions with the subordinate business.

Consider the troublesome case of *Salazar v. McDonald's Corp.*[95] as an illustration. In this case a panel of the Ninth Circuit Court of Appeals upheld a grant of summary judgment in favor of the prominent fast-food franchisor in a class action brought by employees of one of its franchisees, Haynes Family Limited Partnership. The class action alleged that McDonald's, through the provision of scheduling, timekeeping, and payment software, had caused Haynes to deny "overtime premiums, meal and rest breaks, and other benefits in violation of the California" wage-and-hour regulations.[96] The Ninth Circuit court accepted the plaintiffs' proof that the settings in the software caused many night-shift employees who worked more than eight hours in a twenty-four hour period to not be credited with overtime in violation of California law.[97] The court also accepted the allegation that by being "set to daily and weekly overtime thresholds of 8:59 hours (instead of 8:00 hours) and 50:00 hours (instead of 40:00) hours," McDonald's software caused many workers to miss out on additional overtime pay.[98] Finally, the panel's decision noted the plaintiffs' allegation that, because the software's settings for meal periods and rest periods were not compliant with California law, Haynes employees also were denied further overtime pay.[99]

93. *See supra* text accompanying note 88.

94. Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 41(a) (Am. Law Inst. 2012).

95. Salazar v. McDonald's Corp., 944 F.3d 1024 (9th Cir. 2019).

96. *Id.* at 1027. The employees brought their claim under California Wage Order No. 5-2001.

97. *Salazar*, 944 F.3d at 1028.

98. *Id.*

99. *Id.*

The court nonetheless granted summary judgment for McDonald's by rejecting both the plaintiffs' claim that McDonald's was a joint employer of the employees at the eight restaurants operated by Haynes[100] and also plaintiffs' claim that McDonald's had breached its duty to supervise Haynes reasonably to avoid harm to these employees.[101] The decision rejected the joint employment claim in part because it concluded that the plaintiffs could not prove that McDonald's had the "right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of [Haynes's] employees."[102] The decision rejected the common law fault-based claim by holding both that McDonald's had no relevant duty of care toward the employees of Haynes and that any common law action based on harm defined by the California wage statutes would be precluded by the remedies those statutes provided.[103]

The rejection of neither claim should have been surprising. The rejection of the fault-based claim was consistent with precedent; businesses have not been held to have a general common law duty of care toward employees of other businesses.[104] And the court's finding that plaintiffs could not prove McDonald's was a joint employer was in accord with the common law not finding a business strictly liable under *respondeat superior* to third parties for the torts of employees whose work the business could not fully align with its interests.[105] Thus, absent induced reliance[106] or operations with peculiar risks,[107] franchisors have not been held liable to third parties injured by the torts of

100. *Id.* at 1029–32.

101. *Id.* at 1033.

102. *Id.* at 1032 (quoting Patterson v. Domino's Pizza, 333 P.3d 723, 739 (2014)). The court relied on a California Supreme Court decision, *Martinez v. Combs*, 231 P. 3d 259, 277–79 (2010), that provided three alternative definitions for what to "employ" means under this definition. One of them was through "creating a common law relationship" and another was "to exercise control over the wages, hours, or working conditions," which the *Salazar* court interpreted *Patterson v. Domino's Pizza*, to combine, at least for franchisor cases. *See Salazar*, 944 F.3d at 1032. Relying on *Martinez*, the *Salazar* court found that the third alternative, "suffer or permit to work," was not met because Haynes had no "power" to determine whether the Haynes employees were permitted work. *See id.* at 1031; *see also infra* note 118.

103. *Salazar*, 944 F.3d at 1033. The court also held that plaintiffs' common law "ostensible agency" claim could not be advanced under California law. *Id.*

104. *See, e.g.*, Goonewardene v. ADP, LLC, 434 P.3d 124, 139–40 (Cal. 2019) (declining to impose on payroll company the duty of care toward employees of company serviced by payroll company).

105. *See, e.g.*, Smith v. Cities Serv. Oil Co., 346 F.2d 349, 352 (7th Cir. 1965); Pack v. Mayor of City of N.Y., 8 N.Y. 222, 228 (Ct. App. 1853); Reedie v. London & N.W. Ry. Co., [1849] 4 Ex. 244, 154 Eng. Rep. 1201 (Eng.).

106. *See, e.g.*, Hofherr v. Dart Indus., Inc., 853 F.2d 259, 263 (4th Cir. 1988) (franchisor not liable because no evidence of actual control over franchisee or that plaintiffs relied on franchisee being authorized to act for franchisor).

107. *See, e.g.*, Wilson v. Good Humor Corp., 757 F.2d 1293, 1301 (D.C. Cir. 1985) (ice cream truck on busy road) (Wald, J.).

the employees of independent franchisees with economic interests in tension with those of the franchisors.[108]

But absolving McDonald's of responsibility for wage deprivations that it caused seems so obviously wrong that it begs the question of whether some of this precedent requires modification and, if so, which precedent. The most compelling response to these questions would be a legislative or judicial provision imposing a duty on dominant businesses like franchisors to not intentionally or negligently cause harm—including harm defined by statutory guarantees—to the employees of subordinate, dependent businesses like franchisees. This duty would not impose the strict liability that any employer, single or joint, has for any denial of statutory guarantees. It only would require dominant businesses not to be at fault in their affirmative exercise of any level of control that they choose to exercise in their business interests.

The *Salazar* case demonstrates the superiority of fault-based principles rather than the strict liability principles embodied in joint employment through *respondeat superior*. A fault-based approach would provide a beneficial incentive for a dominant franchisor like McDonald's to be careful before inducing a franchisee to compensate employees in accord with faulty software that could lead to legal harm. Finding McDonald's business relationship with Haynes sufficient to render McDonald's an employer of Haynes's employees, however, would mean that McDonald's could be liable for any minimum wage or overtime deprivations suffered by these employees regardless of its involvement, through software or more directly, or even the knowledge of McDonald's managers. This exposure to liability, even if insulated by indemnity clauses, could cause McDonald's and other franchisors to rethink a business model that has been efficient for reasons other than the lowering of labor costs.[109] These reasons, franchise experts suggest, include rapid expansion through dispersed investments[110] and the profit incentives offered to franchisees,[111] economic benefits that could be compromised if strict liability led franchisors to take full control of their franchisees' operations. Not surprisingly, franchisors have forcefully exerted political power against such strict liability.[112]

The attractiveness of a fault-based rather than strict liability approach to dominant employer liability is demonstrated by Chief Judge

108. *See, e.g.*, Lopez v. Motor Plan, 42 F.3d 1384, 1385 (1st Cir. 1994) (Boudin, J.).

109. *See supra* note 12 and accompanying text.

110. *See* Jeffrey L. Bradach, Franchise Organizations 75 (1998); John F. Love, McDonald's: Behind the Arches 202 (1986).

111. *See* James A. Brickley & Frederick H. Dark, *The Choice of Organizational Form: The Case of Franchising*, 18 J. Fin. Econ. 401 (1987); G. Frank Mathewson & Ralph A. Winter, *The Economics of Franchise Tying Contracts*, 28 J.L. & Econ. 503, 505–11 (1985).

112. *See supra* notes 14–15.

Thomas's concurring and dissenting opinion in *Salazar*.[113] Although Judge Thomas did not dispute the majority opinion's rejection of a common law negligence action and accepted its conclusion that McDonald's was not a common law employer of the Haynes employees, he argued that the plaintiffs had submitted sufficient evidence to prove to a jury that McDonald's satisfied one of the California Supreme Court's alternative definitions of "to employ" under the applicable wage and hour regulation: "to suffer or permit to work."[114] The "suffer or permit" definition was imported from Congress's inclusion of this phrase in the definition of "employ" in the FLSA.[115] This inclusion was intended to ensure a dominant employer's responsibility for child labor within its control through encompassing a broader scope of relationships than does the common law test of employment.[116] In the decades since the passage of the FLSA, federal courts have responded with somewhat variant multifactor tests for both single and joint employment, which may or may not be broader than the multifactor tests used to define the common law.[117] In *Salazar*, however, Judge Thomas's rejection of a finding of summary judgment based on the "suffer and permit" definition does not rely on any multifactor test that would make McDonald's strictly liable as a joint employer of the Haynes employees.[118] Rather, he stresses that the plaintiffs presented evidence that McDonald's "computer system . . . was a direct cause of their lost wages"[119] and that McDonald's "was aware that work was occurring under unlawful conditions."[120] Judge Thomas thus concludes "that McDonald's had the ability to prevent wage-and-hour violations caused by its . . . system settings yet failed to do so."[121] For Judge Thomas, McDonald's liability could and should turn on its culpability for suffering and permitting

113. *See* Salazar v. McDonald's Corp., 944 F.3d 1024, 1034 (9th Cir. 2019).

114. *See id.* at 1034–35.

115. 29 U.S.C. § 203(g); *see supra* note 4.

116. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992).

117. *See* Restatement of Emp. L. § 1.01 cmts. d–e and cases cited therein (Am. L. Inst. 2015). For examples of FLSA multifactor tests for joint employment, see, for example, Zheng v. Liberty Apparel Co. Inc., 355 F.3d 63, 66–69 (2d Cir. 2003); Torres-Lopez v. May, 111 F.3d 633, 640–46 (9th Cir. 1997).

118. Nor does he rely on the interpretation of the California law's "suffer or permit to work" definition of employ given by the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 416 P.3d 1 (Cal. 2018). This interpretation, now codified at Cal. Labor Code § 2775 (2020), conditions a hiring entity's treatment of a worker as an independent contractor on the entity proving the worker meets the following: (a) is free from the control and direction of the hiring entity; (b) performs work outside the usual course of hiring entity's business; and (c) is customarily engaged in an independently established trade, occupation, or business. *Dynamex*, 416 P.3d at 40. The *Salazar* court found the *Dynamex* test only to concern whether workers are employees, not define what businesses are employers. *See Salazar*, 944 F.3d at 1032. No one disputed in *Salazar* that the hiring party was Haynes, not McDonald's.

119. *Salazar*, 944 F.3d at 1035.

120. *Id.*

121. *Id.*

the violations; he did not and presumably could not cite evidence that McDonald's had any control over the hiring of the Haynes workers or otherwise suffered and permitted their employment as would a joint employer subject to strict liability without culpability.

The potential of fault-based analysis for the expansion of liability under wage and hour laws does not mean that economically dominant businesses, including franchisors, never have sufficient control over economically dependent, subordinate businesses to qualify as joint employers even under the common law standard for strict vicarious liability. As I have noted in other writing,[122] some franchises are sham arrangements that hide single employment relationships with franchisee-employees.[123] Furthermore, even where franchise agreements, like those prevalent in the fast-food industry, divide franchisee interests from those of their franchisors by requiring payments as a percentage of revenues rather than profits,[124] a dominant franchisor might assert sufficient control, including through mandatory software, to ensure that the franchisee employees work fully in the franchisor's interest.[125] But the case for expanding the liability of dominant businesses like franchisors is stronger under doctrine that requires proof of some level of fault rather than one that imposes strict liability because of the subordinate business's economic dependence or the dominate business's potential economic leverage.

Fault and culpability admittedly are relative concepts that require some presumed level of responsibility or duty to be meaningfully applied. Any cause of action against a dominant but non-employer business based on the business's fault, including one based on section 41 of the *Restatement Third of Torts*, thus must define the level of care that a business with economic leverage must exercise to protect the statutory rights of the employees of other businesses. That definition should not impose a duty on economically dominant businesses to monitor and avoid any and all risks that a subordinate business might abridge statutory wage guarantees of its employees. The effects of such a blanket duty on independently efficient business relationships could be close to those of the strict liability imposed by joint employer obligations. Imposing on dominant businesses a duty of care over the labor policies of dependent, subordinate businesses could require a restructuring of their business relationships.

The fault-based cause of action could instead impose a responsibility to take reasonable care only in taking affirmative actions—such

122. *See* Harper, *supra* note 5, at 205.

123. *See, e.g.*, Awuah v. Coverall N. Am., Inc., 707 F. Supp. 2d 80, 85 (D. Mass. 2010) (cleaning company denominated its cleaning workers as franchisees; misclassification under Massachusetts law).

124. *See supra* note 9 and accompanying text.

125. *See* Harper, *supra* note 5, at 206–07.

as McDonald's providing flawed software—that could result in harm defined by wage and hour statutes. Such affirmative actions, for instance, could include using economic leverage to impose cost-plus contracts on associated businesses that provide for wages that do not comply with the associated businesses statutory obligations to their employees. Such contracts presumably would both directly cause such noncompliance and communicate its inevitability to agents of the dominant businesses. These kinds of cost-plus contracts also are distinguishable from business relationships resulting in thin profit margins for the subordinate business. Since any subordinate business presumably wants to structure labor costs to maximize its profits, a causal connection between an unfavorable business relationship and wage and hour violations cannot be assumed.

A perhaps more inclusive line also might be drawn by imposing a responsibility based on a dominant business's chosen level of monitoring of subordinate businesses. This option would impose responsibility for business practices of which the dominant was actually aware[126] without also requiring additional monitoring and possible inefficient business integration because of a judgment that a dominant business could and thus should have been aware of wage and hour violations of a subordinate business. For instance, if a fast-food franchisor used monitoring software that provided it with proof that a franchisee was committing violations, the franchisor could be held responsible, without also imposing comparable monitoring responsibilities on other franchisors only because they had the economic leverage to insist upon such monitoring.[127]

III. Fault-Based Expansion of Liability Under the NLRA

Unlike the FLSA, the NLRA does not make employers strictly liable for their employees not receiving some guaranteed benefit or protection. Instead, like the antidiscrimination laws, the NLRA prohibits as unfair labor practices only employer actions taken with culpable

126. These were the allegations against the Domino's Pizza franchisor deemed sufficient to survive judgment on the pleadings in *Cano v. DPNY, Inc.*, 287 F.R.D. 251, 260 (S.D.N.Y. 2012).

127. Brishen Rogers, arguing for a fault-based expansion to dominant firms of liability for wage and hour violations in supply chains, would define the duty of such firms more broadly. He would impose a duty of reasonable care on such firms to take affirmative steps to prevent foreseeable violations by domestic low wage firms in supply chains, whether or not the dominant firms are even in direct contractual privity with the firms that are at risk for violations. *See* Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1, 33, 46–47 (2010). If politically feasible, the imposition of such a broad duty could be an effective way to ensure a compensatory remedy for wage and hour violations by low capitalized, potentially insolvent businesses in particular supply chains. But if applied broadly in all industries, including to restaurant franchising operations where the risk of insolvency is slight, it could also result in forcing inefficient vertical reintegration.

intent or at least without adequate business justification to outweigh particular effects.[128] Section 8(a) of the NLRA in particular defines the following as prohibited employer unfair labor practices: "to interfere with, restrain, or coerce employees in the exercise of the rights"[129] to engage or refrain from engaging in "concerted activities for the purpose of collective bargaining or other mutual aid or protection"[130] and "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."[131]

The NLRA, however, does not mirror the common law by providing a private right of action against culpable employer action, even—like the antidiscrimination laws—after the exhaustion of administrative remedies; employees only can file against employers charges that may or may not result in complaints pressed through NLRB processes by the General Counsel and his or her staff.[132] Furthermore, the NLRA has been interpreted to carry a strong preemptive force against any common law action that would provide additional remedies against that which is prohibited by the Act[133] or that would upset the balance in labor relations set by the Act.[134] Thus, absent some significant legislative reordering of American labor law, any imposition of responsibility on a business for unfair labor practices taken against employees of another employer would have to be based upon the interpretation of the current law.

Significantly, in a revealing set of older cases, the NLRB has made such an interpretation. The decisions extend back to 1952 when the Board held that a general contractor on a construction site, Austin, violated section 8(a)(3) by insisting, in response to union pressure, that a security guard subcontractor remove three of its employees from the site because they belonged to the wrong union local.[135] The Board acknowledged that the contractor was not an employer of the removed guards, as there was no "evidence that Austin exercised any control over the guards, who were assigned, directed, and paid entirely by Pinkerton,"[136] the security guard subcontractor. But the Board held that an employment relationship between the general contractor and

128. *See, e.g.*, NLRB v. Erie Resistor Corp., 373 U.S. 221, 236–37 (1963) (holding that employer can be found guilty of unfair labor practices in some cases even without proof of improper motive); Radio Officers' Union v. NLRB, 347 U.S. 17, 44–45 (1954) (same).

129. 29 U.S.C. § 158(a)(1).

130. *Id.* § 157.

131. *Id.* § 158(a)(3).

132. *See id.* § 160(b).

133. *See, e.g.*, Wis. Dep't of Indus. v. Gould, Inc., 475 U.S. 282, 290–91 (1986) (state cannot add penalties for unfair labor practices to those set by Congress in NLRA).

134. *See, e.g.*, Chamber of Com. v. Brown, 554 U.S. 60, 74 (2008); Lodge 76, IAM v. Wis. Emp. Rels. Comm'n, 427 U.S. 132, 149 (1976).

135. Austin Co., 101 N.L.R.B. 1257, 1259 (1952).

136. *Id.* at 1258.

the aggrieved employees was not necessary for the general contractor's coverage.[137] As the Board explained:

> It is evident, as the Trial Examiner found, and as the General Counsel concedes, that these guards were not employees of Austin. However, Austin's defense, grounded on this fact alone, finds no statutory support. Rather, the statute, read literally, precludes any employer from discriminating with respect to any employee, for Section 8 (a)(3) does not limit its prohibitions to acts of an employer vis-à-vis his own employees. Significantly, other sections of the Act do limit their coverage to employees of a particular employer. Thus, Section 8 (a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of *his* employees . . ." and Section 8 (b) (4) (B) prohibits a labor organization from striking to force or require any other employer to recognize the labor organization "as the representative of *his* employees . . ." [emphasis supplied]. Thus, the omission of qualifying language in Section 8 (a) (3) cannot be called accidental. Moreover, Section 2 (3), in defining the term "employee," provides that the term ". . . shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise . . ." The statutory language therefore clearly manifests a congressional intent not to delimit the scope of Section 8 (a) (3) in the manner urged here by Respondent Austin.[138]

The Board thereby made clear that employers covered by the Act could commit unfair labor practices by interfering with the NLRA-based rights of employees of other employers, regardless of whether the culpable employers also employed the aggrieved employees.

The Board applied the same analysis in later cases, finding violations of both sections 8(a)(1) and 8(a)(3) in the absence of an employment relationship between the culpable employer and the aggrieved employees.[139] In some of these cases, the Board found liable an economically dominant contractor that forced an independent, but subordinate subcontractor to not employ workers due to their union-related activity.[140] In other cases, the Board found liable businesses with dominance over

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137. *Id.*

138. *Id.* at 1258–59.

139. As stated by the Republican-majority Board in *International Shipping Ass'n*:

> Respondent Lederle contends that because it is not the employer of the discriminatees it cannot be found to have violated Section 8(a). This contention is without merit. The Board consistently has held that an employer under Section 2(3) of the Act may violate Section 8(a) not only with respect to its own employees but also by actions affecting employees who do not stand in such an immediate employer/employee relationship.

297 N.L.R.B. 1059, 1059 (1990) (citing Jimmy Kilgore Trucking, 254 N.L.R.B. 935, 946–47 (1981); Lucky Stores, 243 N.L.R.B. 642, 643 (1979); Dews Constr. Corp., 231 N.L.R.B. 182 n.4 (1977), *enforced*, NLRB v. Dews Constr., 578 F.2d 1374 (3d Cir. 1978); Fabric Servs., 190 N.L.R.B. 540 (1971); Neo Life Co. of Am., 273 N.L.R.B. 72, 77 (1984); Ga.-Pac. Corp., 221 N.L.R.B. 982, 986 (1975)).

140. *See Dews Constr. Corp*., 231 N.L.R.B. 182 (1977); *Ga.-Pac. Corp.*, 221 N.L.R.B. 982 (1975).

a subsidiary[141] or over a staffing agency.[142] In each case, the dominant business was held liable because it intentionally caused the denial of the statutory rights of the subordinate business's employees, not because it was found to be a joint employer that could have been liable for any statutory violation committed by the subordinate.[143]

The doctrine set in those decisions, rather than joint employer doctrine,[144] is the doctrine that progressive lawyers should seek to develop to impose liability on dominant businesses that cause employees of subordinate, dependent businesses to suffer unfair labor practices. That development, for instance, could abrogate the Board's current curious interpretation of section 8(a)(3) not to prohibit an employer's "ceasing to do business with another employer because of the union or nonunion activity of the latter's employees."[145] A Democratic-majority Board first pronounced this interpretation in a 1968 decision absolving a relatively sympathetic employer's termination of a construction subcontract with an employer pressured by a union's disruptive picketing at the construction site.[146] But the interpretation has been affirmed without any persuasive justification in cases where dominant businesses terminate contracts with subordinate employers because of union activity among the subordinate's employees.[147] By allowing dominant businesses intentionally to eliminate unionized subordinates, the interpretation does more to weaken the force of sections 8(a)(3) and (a)(1) in the current fissured economy than does any strict definition of joint employment.

141. *See* Esmark, Inc. 315 N.L.R.B. 763 (1994).

142. *See Int'l Shipping Ass'n*, 297 N.L.R.B. at 1059.

143. For an excellent treatment of these cases, see Caroline B. Galiatsos, *Beyond Joint Employer Status: A New Analysis for Employers' Unfair Labor Practice Liability Under the NLRA*, 95 B. U. L. Rev. 2083, 2106–08 (2015).

144. The Board's recognition that an employer, absent joint employment status, may commit unfair labor practices against employees of other employers also is reflected in its formulation of doctrine governing the access of employees of subcontractors or tenants to solicit on an employer's property. *See* Bexar Cnty. Performing Arts Ctr. Found., 368 N.L.R.B. No. 46 (Aug. 23, 2019) (non-joint employer property owners may not exclude off-duty employees of an on-site contractor if (1) the employees work regularly and exclusively on the property; and (2) the property owner fails to show that they have one or more reasonable alternatives to communicate their message); N.Y. N.Y. Hotel & Casino, 356 N.L.R.B. 907 (2011), *enforced*, N.Y. N.Y., LLC v. NLRB, 676 F.3d 193, 196–97 (D.C. Cir. 2012) (holding modified in *Bexar*).

145. Malbaff, 172 N.L.R.B. 128, 129 (1968).

146. *See id.*

147. *See, e.g.*, Comput. Assocs. Int'l, Inc., 324 N.L.R.B. 285 (1997). In this decision, the unanimous Board panel, including Chairman Gould and Members Fox and Higgins, expressly rejected the Administrative Law Judge's use of the *Austin* line of cases, apparently blithely accepting the weapon against unions and the nondiscriminatory principles of the Act they were affording employers. Such acceptance was not necessary even without overruling *Malbaff Landscape Construction*, 172 N.L.R.B. 128, 129 (1968), which involved common situs secondary picketing more particularly regulated through section 8(b)(4) doctrine. At least one former Board Member recognized in an opinion that *Malbaff* should and could be overturned. *See* Airborne Express, 338 N.L.R.B. 597, 598 n.1 (2002) (Liebman, Member, concurring); *see also* Craig Becker, *Labor Law Outside the Employment Relation*, 74 Tex. L. Rev. 1527 (1996).

As highlighted by the *Austin* line of cases discussed above, the interpretation cannot be reconciled with the statute's language and purpose and should be overturned.[148]

The doctrine set in the *Austin* line of cases also would have been a more effective and promising tool than was joint employment for the General Counsel to have used in the complaints brought against McDonald's in December 2014.[149] Those complaints charged McDonald's with liability for unfair labor practices suffered by employees of some of its franchisees because of work actions taken by the employees in support of a campaign to raise wages.[150] The General Counsel proceeded in the McDonald's case by introducing evidence to demonstrate that McDonald's was a joint employer of the franchisees' employees and therefore strictly liable for any unfair labor practices committed by the franchisees against their employees. This evidence consisted not only of McDonald's nationwide business policies and practices, but also of McDonald's direction of a nationwide effort to coordinate the response of the franchisees to protected concerted and union activities in support of the wage campaign.[151] Had the General Counsel used the *Austin* line of cases instead of joint employment to establish McDonald's liability for any unfair labor practices committed against franchisee employees during the campaign, the latter evidence could have been sufficient. The General Counsel could have proven McDonald's culpability for any franchisee unfair labor practices without sustaining the much more difficult proof of McDonald's being a joint employer.

Proving that a dominant business, such as a franchisor like McDonald's, is a joint employer inevitably will be more difficult than proving its culpability for causing particular unfair labor practices. Regardless of how broadly joint employment is defined, proof of joint employment status will require a demonstration not of causation of particular employment decisions, but rather proof of the dominant employer's general control over the employees of the economically subordinate employer. It is this case of general control that the General Counsel in the McDonald's litigation struggled to make, whether or not successfully.

Furthermore, expansion of joint employment beyond the perimeters set by its origins in *respondeat superior* is likely to make less tenable the assumption of strict liability for joint employers that have no involvement in unfair labor practices committed by the other employer.

148. *See* Becker, *supra* note 147, at 1550–51; Michael C. Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining*, 39 B.C. L. REV. 329, 346 (1998).

149. *See* McDonald's USA, LLC, 368 N.L.R.B. No. 134 (Dec. 12, 2019).

150. *Id.* at 1.

151. *Id.* at 12 (McFerran, Member, dissenting).

Indeed, the Board in a 1993 decision, *Capitol EMI Music, Inc.*,[152] held that a temporary employment agency, though a joint employer of the workers that it supplied to a record distributor, was not liable for the distributor's discharge of one of the supplied workers because of the worker's union activity. The Board held the employment agency was not liable because it demonstrated that it did not know nor had any reason to know of the distributor's antiunion reason for the discharge.[153] Although the Board has not applied *Capitol EMI* to shield nonculpable joint employers other than staffing agencies, strong arguments would be made to do so were economically dominant businesses with no direct control of a subordinate business's managerial agents treated as joint employers of subordinate businesses' employees. It seems doubtful, for instance, that most courts would find it acceptable to impose liability on a franchisor for one of its franchisee's discharge of an employee when the franchisee's discriminatory motive was not known and the franchisor would not be liable under traditional *respondeat superior* analysis for torts against third parties. If accepted, such expanded strict liability, like an expansion of strict liability under the antidiscrimination laws or the FLSA, would provide incentives for otherwise inefficient vertical integration.[154]

The *Capitol EMI* decision also suggests how the fault-based doctrine in the *Austin* line of cases might be developed somewhat further to impose liability without regard to joint employment status on economically dominant employers for unfair labor practices committed by subordinate employers. In dicta, the *Capital EMI* Board stated that a joint employer who knew of the other employer's unfair labor practice still could escape liability by demonstrating that "it took all measures within its power to resist the action."[155] This suggests how the Board might go beyond the *Austin* line of cases to impose liability on any dominant employer, whether or not a joint employer, when it knew of a subordinate's unfair labor practices, but took no reasonable steps to prevent them. The Board, in other words, stopping short of the strict liability imposed by *respondeat superior*, could impose a duty on employers to not acquiesce in the commission of unfair labor practices by other employers that it controlled.[156] Rather than encouraging a departure from an otherwise efficient level of vertical integration, such a duty still would accept the level of vertical integration between businesses that had been determined to be otherwise efficient.

152. *Capitol EMI Music, Inc*., 311 N.L.R.B. 997 (1993), *enforced*, Capitol EMI Music, Inc. v. NLRB, 23 F.3d 399 (4th Cir. 1994) (per curiam).

153. *Id.* at 1001.

154. *See supr*a text accompanying note 109.

155. *Capitol EMI Music, Inc.*, 311 N.L.R.B. at 1000.

156. For a well-framed proposal for the formulation of such doctrine, see Galiatsos, *supra* note 143, at 2108–15.

To be sure, the NLRA does more than prohibit employers and labor organizations[157] from discriminating against or coercing or restraining employees in the exercise of their rights to engage in or refrain from union-related or other concerted activities for mutual aid or protection.[158] The Act also requires any covered employer to bargain collectively[159] with a union representative selected by a majority of "his" employees in a unit appropriate for bargaining.[160] One might infer that the General Counsel in 2014 pressed the sixty-one section 8(a)(1) interference and section 8(a)(3) discrimination complaints against McDonald's under a joint employer theory, rather than an easier to substantiate culpable non-employer theory, because the General Counsel's ultimate goal was to establish McDonald's duty to bargain with any union that achieved the support of a majority of employees at any franchisee location.[161] Bargaining an agreement with McDonald's at a few locations presumably would have facilitated achieving employee support at all other franchisee locations. It is revealing that Member McFerran's dissent from the Trump-appointed General Counsel's settlement of the McDonald's complaints expressed her concern that the General Counsel did not adequately account for the "important collateral consequences for McDonald's, in both unfair labor practice proceedings involving its franchisees and in possible representation cases, if workers employed at McDonald's franchisees sought to organize."[162] It is also revealing that the *Browning-Ferris* case[163] in which the Obama-appointed Board formulated doctrine governing joint employment, was prompted by a union petition to represent employees in bargaining with both an economically dominant business and a subordinate labor supplier as joint employers of workers hired and supplied by the subordinate.

That collective bargaining advocates would want to impose on businesses collective bargaining obligations toward workers for whose torts they would not be strictly liable as an employer through *respondeat superior* is understandable.[164] It makes little sense to use the *respon-*

157. 29 U.S.C. §§ 158(b)(1)(a), (b)(2).

158. *Id.* § 157.

159. *Id.* § 158(a)(5).

160. *Id.* § 159(a).

161. The general organization of workers at McDonald's outlets presumably was the ultimate goal of the Service Employees International Union's campaign to raise wages at these outlets, including the associated work actions that prompted the responses that were the subject of the General Counsel's complaint.

162. McDonald's USA, LLC, 368 N.L.R.B. No. 134, at 11 (Dec. 12, 2019) (McFerran, Member, dissenting).

163. Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. 1599 (2015), *aff'd in part, rev'd in part and remanded*, Browning-Ferris Indus. of Cal., Inc. v. NLRB, 911 F.3d 1195 (D.C. Cir. 2018).

164. Whether it was appropriate for the General Counsel to use sections 8(a)(1) and (a)(3) complaints to establish joint employment for purposes of collective bargaining and union organization is a different question beyond the scope of this article.

deat superior analysis that defines employer liability for wrongs of subordinates to define the businesses that should be required to bargain over benefits and working conditions with workers. As I have argued elsewhere,[165] whether a non-culpable business should be strictly liable for discrimination of or the denial of benefits to workers can be sensibly answered by asking whether it should be strictly liable for torts committed by those workers against third parties. But given the redistributive goals of the NLRA,[166] different considerations should determine whether a business's management, as a representative of the suppliers of capital, should have to submit to good-faith bargaining with a union representative of the laborers who help make that capital productive. Those different considerations should include identification of the suppliers of the capital—including perhaps the intellectual property of brands—that the workers make productive.[167] For collective bargaining to provide any leverage to workers to extract a greater share of the profits that their labor helped engender, they must be able to bargain with firms that have garnered most of those profits. As the vertical disintegration of production, distribution, and servicing has proceeded in our advanced capitalist economy, it has become more and more likely that those firms are those with some degree of oligopolistic power or brand differentiation in their market.[168] These firms, the ones with above market profits or "rents" that could be shared with labor, are not necessarily those with any formal or immediate control over the wages and terms and conditions of employment that are subject to mandatory bargaining with labor.[169]

For instance, requiring McDonald's to bargain with a union representative over the wages and working conditions of its franchisees' employees would enable the employees to have a better opportunity to capture more of the returns from the sale of what a combination of their labor with McDonald's capital, including its brand, can garner. Such a bargaining obligation between the employees of franchisees who use a brand and the franchisor company that profits from

165. *See* Harper, *supra* note 5, at 177–84.

166. *See* 29 U.S.C. § 151 (concern with "inequality of bargaining power . . . depressing wage rates and the purchasing power of wage earners").

167. *See* Harper, *supra* note 148, at 344–56.

168. For empirical support, see, for example, Richard A. Benton & Ki-Jung Kim, *The Dependency Structure of Bad Jobs: How Market Constraint Undermines Job Quality*, 75 ILR Rev. 3, 3–5 (2022); Anna Stansbury & Lawrence Summers, *Declining Worker Power and American Economic Performance* 1 (Brookings Papers on Econ. Activity 2020), https://www.brookings.edu/wp-content/uploads/2020/03/Stansbury-Summers-Conference-Draft.pdf. The latter paper provides a compelling statistical case for using the decline in worker bargaining power, rather than increases in product market monopolies and labor market monopsonies, to explain the rising share of above competitive market profits ("rents") being captured as profits for shareholders rather than shared with workers. *Id.* at 37–43. The decline in worker bargaining power of course reflects the decline in union density over the past half century. *Id.* at 9–10, 21–22.

169. 29 U.S.C. § 158(d).

the brand's product differentiation should exist regardless of the franchisor's level of control over the identity or work of the franchisees' employees.[170] Furthermore, unlike making McDonald's liable for the derelictions of its franchisees' agents and employees, requiring McDonald's to bargain about the division of the returns from the sales of its branded products with the employees of the franchisees that contribute to these sales would not impel McDonald's to reconsider otherwise efficient divisions of authority with the franchisees. Any franchising that exists only to avoid collective bargaining and a shift in the divisions of returns between capital and labor cannot be defended on the grounds of efficiency.

But the battle over defining the economic relationship appropriate for collective bargaining needs to be fought on a different field as part of the reform of the NLRA, rather than indirectly through the development of joint employer doctrine that would be inadequate for both defining collective bargaining and for governing secondary responsibility for discrimination or the denial of minimum benefits. That field has to be one of legislation that can address the incompatibility of the common law definition of the employment relationship with the purposes of the NLRA.[171] The Taft-Hartley Congress's clearly expressed intent to use the common law to define the employment relationship[172] and hence any bargaining obligation between an employer and "his" employees prevents a broadening of bargaining obligations under the current statute.

Conclusion

As explained above, the definition of joint employment is the wrong terrain on which to advance employment and labor law reform to ensure the assignment of liability to the businesses that cause the deprivation of employee rights. The focus on joint employment diverts attention from the use and development of existing fault-based doctrine that can

170. This is not to argue that the employees of McDonald's franchisees, any more than McDonald's own employees, should be able to insist on bargaining about McDonald's branding decisions and control. The NLRA sensibly does not require bargaining over how a business extracts profits from its product market; it simply requires bargaining over how those profits are divided between the providers of the capital and the providers of the labor that are combined to create that product. *See* Michael C. Harper, *Leveling the Road from* Borg-Warner *to* First National Maintenance*: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447 (1982). For similar reasons, McDonald's should be able to protect its brand without becoming a joint employer that is liable for all its franchisees' common law and statutory torts. Defining McDonald's responsibilities to bargain over the distribution of the rents garnered from its brand presents a totally different question, however.

171. I suggested what might be the outlines of such legislation in Harper, *supra* note 148, at 344–56. I hope to explore more fully in a future essay how labor law reform legislation should define bargaining responsibilities.

172. *See* H.R. Rep. No. 80-245, at 18 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 292, 309 (1948).

better ensure this liability. Businesses that discriminate on the basis of prohibited classifications against covered employees should be held responsible for that discrimination, regardless of whether those businesses are the victimized employees' employers. Similarly, businesses that intentionally or negligently cause other businesses to deny their employees legally guaranteed wages or other benefits should be held liable for that denial, regardless of the existence of joint employment. Just as joint employment has not been a sufficient basis for liability in discrimination cases, so it should not be a necessary condition of liability in either discrimination or minimum benefit cases such as those under the FLSA.

The concept of joint employment also provides the wrong goal for redefining bargaining responsibilities in the comprehensive labor law reform necessary for the rejuvenation of the U.S. labor movement. Progressive lawyers need to think more deeply and creatively about defining both the bounds of employer liability and the obligations to bargain with union-represented employees.

One Dozen Years of *Pyett*: A Win for Unionized Workplace Dispute Resolution

Paul Salvatore* & Timothy Lockwood Kelly**

Introduction

In *14 Penn Plaza LLC v. Pyett*, the United States Supreme Court held that arbitration provisions in a collective bargaining agreement (CBA) that clearly and unmistakably waive an employee's right to bring workplace discrimination claims in a judicial forum are enforceable as a matter of law.[1] In a dissenting opinion, Justice Souter admonished the majority for having empowered unions to subordinate the statutory rights of individual employees to the collective interests of the bargaining unit.[2] Justice Souter also surmised that the majority's opinion "may have little effect" because it left open the question of whether a collective waiver of a judicial forum for discrimination claims would be enforceable in cases where the union controls access to arbitration.[3] One dozen years later, it is clear that Justice Souter's apprehensions were misplaced.

*Partner, Proskauer Rose LLP. Paul Salvatore teaches collective bargaining at Cornell Law School as an adjunct professor. He represented the Realty Advisory Board on Labor Relations (the RAB) in negotiating the collective bargaining agreement language at issue in *14 Penn Plaza LLC v. Pyett*; represented the employer in that case; and then represented the RAB in drafting the "*Pyett* Protocol." Throughout this article, he relies on several of his past publications coauthored with Terry Meginniss, who represented Local 32BJ of the Service Employees International Union (32BJ or the Union). *See, e.g.*, Terry Meginniss & Paul Salvatore, *The Forum for Litigation of Statutory Employment Claims After* Pyett*: A New Approach from Management and Labor*, 66 Ann. Meeting Nat'l Acad. Arbs. 271 (2013); Terry Meginniss, Paul Salvatore & David Bayer, *Response to an Unresolved Issue from* Pyett*: The NYC Real Estate Industry Protocol*, *in* Arbitration and Mediation of Employment and Consumer Disputes, Proceedings of the New York University 69th Annual Conference on Labor 207 (Elizabeth C. Tippett & Samuel Estreicher eds., 2013); Terry Meginniss & Paul Salvatore, *The Pyett Protocol: Collectively-Bargained Grievance Arbitration as a Forum for Individual Statutory Employment Claims*, *in* Beyond Elite Law: Access to Civil Justice in America 607 (Samuel Estreicher & Joy Radice eds., 2016).

**Associate, Proskauer Rose LLP, 2020–2022.

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1. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 274 (2009).
2. *Id.* at 284 (Souter, J., dissenting).
3. *Id.* at 285.

Pyett and its progeny have created a solid foundation to guide dispute resolution processes for all stakeholders in the unionized workplace. Employers, unions, employees, and the courts have all realized substantial benefits from this now-well-established framework. Dispute resolution under *Pyett*—especially as set forth in a bargained-for "*Pyett* Protocol"—provides access to a fair, efficient, and accessible forum. An employer can mount a single defense against a workplace discrimination allegation with the confidence that it will not be hauled into court after having already expended substantial resources to combat the accusation in arbitration. Simultaneously, *Pyett* provisions solidify the union's role as employees' exclusive representative with respect to not only the negotiation of contracts but also the handling of all workplace claims. Rather than subordinating the rights of employees, as Justice Souter had feared, this system enables unionized workers, especially low-wage ones, to meaningfully pursue their discrimination claims in an arbitral forum rather than appearing *pro se* in court or having no forum at all to litigate their claims. And finally, by utilizing dispute resolution under the CBA's architecture, *Pyett* helps to ease the administrative load of an already overburdened judicial system, where employment claims often crowd the docket. *Pyett* has thus proven to be a win for all stakeholders in day-to-day labor-management relations.

This article discusses how over a dozen years *Pyett* has enhanced dispute resolution in the unionized workplace. Part I summarizes the historical context shaping the Court's frame of reference for its decisions leading up to *Pyett*. Part II explains *Pyett*'s factual background, its procedural history, and the Court's reasoning and holding. Part III explains courts' reactions to *Pyett* and the development of the "*Pyett* Protocol" and similar systems to facilitate resolution and/or arbitration of discrimination disputes. Then, in Part IV, the article discusses lower courts' attempts to address key questions that the Supreme Court left unanswered in *Pyett*, such as (A) what language must a CBA use to clearly and unmistakably waive the judicial forum? (B) if an employee already lost in arbitration, can she nevertheless take another "bite at the apple" in another forum? and (C) what happens when the union does not take the discrimination grievance to arbitration? Finally, Part V argues that *Pyett* has benefitted all stakeholders in labor-management relations—courts, employers, unions, and employees—by making justice more predictable, efficient, and accessible. The article concludes that although *Pyett* left questions unanswered, bargaining parties, courts, and arbitrators have over the last dozen years interpreted *Pyett* in ways that enable *Pyett*-based dispute resolution systems to furnish positive outcomes in the unionized workplace.[4]

4. As this article is going to publication, two recent developments are worth noting. Congress's enactment of the Ending Forced Arbitration of Sexual Assault and Sexual

I. *Pyett's* Backdrop

The Supreme Court's *Pyett* decision addressed the interplay of three statutory schemes: arbitration; regulation of labor-management relations; and employees' rights to be free from discrimination.

The Federal Arbitration Act (FAA) enforces agreements that provide for compulsory arbitration resulting in a binding decision that precludes parties from thereafter suing in courts.[5] The goal of the FAA is to make possible more efficient and cost-effective dispute resolution, while at the same time reducing judicial caseloads without compromising justice.

The National Labor Relations Act (NLRA), enacted after the FAA, empowers groups of workers to organize and elect union representation authorized as the workers' exclusive agent in negotiations with their employer about the terms and conditions of employment.[6] Traditionally this includes union control of employees' access to the CBA's grievance and arbitration procedures, union representation of employees throughout those processes, and union payment of any arbitration

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Harassment Act of 2021 invalidates mandatory arbitration clauses as applied to sexual assault or harassment claims, and, to that extent, limits the effect of the *Pyett* decision. *See* Pub. L. No. 117-90, 136 Stat. 26 (2022) (codified at 9 U.S.C. § 401). Bargainers utilizing *Pyett*-based systems will have to grapple with this new law as it impacts dispute resolution. Additionally, the House of Representatives recently passed a bill purporting to invalidate mandatory arbitration of any employment or civil rights claims, as well as of any consumer or antitrust claims. Forced Arbitration Injustice Repeal Act of 2022, H.R. 963, 117th Cong. (2022). Bargainers should pay attention to this bill's progress, if any, as it could (as currently drafted) outlaw *Pyett*-based dispute resolution systems. The publication of this article is extremely timely: the issues and mutual benefits it discusses should be of particular interest to policymakers considering legislative reform in this area of law.

5. 9 U.S.C. § 1; *see also infra* note 10 and accompanying text (explaining how the Supreme Court has interpreted section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), as an analog to the FAA in labor law).

6. *Pyett*, 556 U.S. at 255–56 ("The NLRA governs federal labor-relations law. As permitted by that statute, respondents designated the Union as their 'exclusive representativ[e] . . . for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.' As the employees' exclusive bargaining representative, the Union 'enjoys broad authority . . . in the negotiation and administration of [the] collective bargaining contract.' But this broad authority 'is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation.'" (internal citations omitted) (quoting 29 U.S.C. § 159(a); Commc'ns Workers of Am. v. Beck, 487 U.S. 735, 739 (1988); Humphrey v. Moore, 375 U.S. 335, 342 (1964)); *see also* United Dairy Farmers Coop. Ass'n v. NLRB, 633 F.2d 1054, 1066 (3d Cir. 1980) ("A basic purpose of the [NLRA] is to protect the selection of union bargaining representatives by a majority of the employees in a free and uncoerced manner. Section 7, 29 U.S.C. § 157, guarantees that employees have the right to bargain collectively through representatives of their own choosing, or to refrain from such activity. Section 9(a), 29 U.S.C. § 159(a), specifies further that 'representatives designated or selected . . . by the majority of the employees in a unit . . . shall be the exclusive representatives of all the employees.'"); Loc. 1814, Int'l Longshoremen's Ass'n v. NLRB, 735 F.2d 1384, 1399 (D.C. Cir. 1984) ("[T]he central purposes of the Act are the encouragement of collective bargaining and the protection of employees' rights to freedom of association and free choice of bargaining representatives." (citing 29 U.S.C. §§ 151, 157)).

fees. The rationale for such a system is that, although the union may on occasion take actions that fail to address some particular employee's interests, the union's obligation to employees as their exclusive agent to represent their interests fairly and uphold the interests of the group maximizes employees' well-being in the aggregate.[7] In addition, the union owes an enforceable duty of fair representation to ensure that the particular employee is being treated fairly.[8]

As the Supreme Court and commentators have long observed, labor law and arbitration have a special relationship.[9] Indeed, the Supreme Court has interpreted section 301(a) of the Labor Management Relations Act (LMRA) as functioning like an FAA equivalent in labor law.[10] Some have held up labor arbitration as a model for other areas of law on account of the benefits arbitration confers upon stakeholders in the labor-relations context,[11] while others caution against falling for this temptation, arguing that labor law and arbitration have a unique chemistry that cannot be readily replicated elsewhere.[12]

To provide rights for individual employees not dependent on collective representation, Congress passed various statutes granting employees private rights of action against workplace discrimination.[13]

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7. *Pyett*, 556 U.S. at 270–71 ("Th[e] 'principle of majority rule' . . . is in fact the central premise of the NLRA. 'In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority.' It was Congress' verdict that the benefits of organized labor outweigh the sacrifice of individual liberty that this system necessarily demands." (quoting Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 62 (1975) (footnotes omitted); Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953) ("The complete satisfaction of all who are represented is hardly to be expected")); Kenneth G. Dau-Schmidt, *Union Security Agreements Under the National Labor Relations Act: The Statute, the Constitution, and the Court's Opinion in* Beck, 27 HARV. J. ON LEGIS. 51, 59 (1990) ("[Section 9(A) of the NLRA] specifies that a union elected by a majority of the employees is the 'exclusive representative' of those employees with the right and obligation to represent all of the employees fairly . . . in negotiating and enforcing a collective agreement.").

8. Vaca v. Sipes, 386 U.S. 171, 177–78 (1967) (citing NLRA § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A)).

9. *See infra* note 31 (describing the Supreme Court's recognition in cases like Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448 (1957) and The Steelworkers Trilogy that section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), expresses a strong federal policy in favor of arbitration of labor-management disputes); Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 917 (1979) (explaining that many legal scholars view labor relations and arbitration as having a special relationship).

10. *See* Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 449–50 (citing 29 U.S.C. § 185(a) (section 301(a) of the LMRA)).

11. *See, e.g.*, Ronald L. Goldfarb & Linda R. Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 314–16 (1970).

12. Getman, *supra* note 9, at 917.

13. The Civil Rights Act of 1964 was enacted on July 2, 1964. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000e). The Age Discrimination in Employment Act was enacted on June 12, 1968. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621–634). The Rehabilitation Act of 1973

These antidiscrimination statutes, such as Title VII of the Civil Rights Act of 1964,[14] demonstrated Congress's intent to arm employees with legal recourse against an employer's discriminatory treatment. The labor movement staunchly advocated and played an integral role in lobbying efforts that led to Title VII's enactment.[15] Notably, however, the practical effect of these antidiscrimination statutes for low-wage employees would be limited absent union support for their discrimination claims, which would typically be relatively low value and so fail to attract the private bar despite the incentive from these antidiscrimination statutes' fee-shifting provisions.[16]

To properly understand the Supreme Court's ruling in *Pyett*, it is necessary to review the Court's key pre-*Pyett* opinions addressing the interaction of these statutory schemes.

A. The First Word: Alexander v. Gardner-Denver Co.

The Supreme Court's first opportunity to consider the issue of whether an employee's statutory right to adjudicate Title VII discrimination claims in a *de novo* trial could be legally "foreclosed by prior submission of [the] claim to final arbitration" pursuant to the terms of a CBA came in *Alexander v. Gardner-Denver Co*., just ten years after Title VII's passage.[17] In that case, the employee-petitioner Harrell Alexander filed a grievance against the employer, pursuant to the parties' CBA, broadly claiming that he had been "unjustly discharged" on the basis of his race.[18] The contract prohibited such discrimination and outlined

was enacted on September 26, 1973. Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. §§ 701–796). Each of these statutes proscribed some form of workplace discrimination based on a protected characteristic (*e.g.*, race, age, disability).

14. 42 U.S.C. § 2000e.

15. *Our History*, Leadership Conf. on Civ. & Hum. Rts. (2021), https://civilrights.org/about/history [https://perma.cc/6G5Y-MH7D] (discussing the Leadership Conference on Civil & Human Rights—founded by A. Philip Randolph, among others, who was the head of the Brotherhood of Sleeping Car Porters—which organization was a driving force in the passage of the Civil Rights Act).

16. Stephen A. Plass, *Using* Pyett *to Counter the Fall of Contract-Based Unionism in a Global Economy*, 34 Berkeley J. Emp. & Lab. L. 219, 254 (2013) ("[Absent representation by a union], [b]ecause of the EEOC's limited resources, most complaining employees will not get representation from this agency to pursue meritorious claims. Private attorneys are also not readily available because the prospects for success in antidiscrimination cases are very low. High burdens of proof combined with increasing judicial hostility to discrimination claims deter lawyers from taking discrimination cases."); *id.* at 255 ("Successful aggrieved workers can also expect an award of attorney's fees and costs." (citing N.Y. Gaslight Club, Inc. v. Carey, 447 U.S. 54, 71 (1980))); N.Y. Gaslight Club, Inc. v. Carey, 447 U.S. 54, 63 (1980) ("Because Congress has cast the Title VII plaintiff in the role of 'a private attorney general,' vindicating a policy 'of the highest priority,' a prevailing plaintiff 'ordinarily is to be awarded attorney's fees in all but special circumstances.'" (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416 (1978)); 42 U.S.C. § 2000e-5(k) (articulating fee-shifting provision for prevailing party of equal employment opportunity claim under Title VII). For more support for this position, see *infra* notes 191–207 and accompanying text.

17. Alexander v. Gardner-Denver Co., 415 U.S. 36, 38 (1974).

18. *Id.* at 39.

a detailed grievance procedure that referred all disputes concerning the meaning and application of the agreement to a multistep grievance process culminating in arbitration.[19] The arbitrator eventually ruled in favor of the employer, finding that the petitioner had, in fact, been terminated for cause. Notably, however, the arbitrator made no reference in his decision to the petitioner's race discrimination claim.[20]

Shortly thereafter, the employee filed suit in the federal district court in Colorado under Title VII, alleging, in pertinent part, that the employer had discriminated against him on the basis of his race.[21] The district court dismissed the complaint, holding that Alexander "voluntarily elected to pursue his grievance to final arbitration" under the terms of the CBA, and the Tenth Circuit affirmed for the same reason.[22]

On review, the Supreme Court reversed and disavowed arbitration as a legitimate mechanism for the adjudication of Alexander's statutory claims. Justice Powell, writing for the majority, held that the federal policy against discriminatory treatment of employees, as exhibited through the enactment of Title VII and other antidiscrimination statutes, indicated that aggrieved employees should have the opportunity to fully pursue their claims in a judicial forum.[23] Critical to the Court's holding was its distinction between an employee's ability to actualize *contractual* rights under a CBA via arbitration versus that employee's prerogative to vindicate his *statutory* rights by filing a lawsuit under Title VII.[24]

Notably, the Court also clarified that the individual rights provided to employees under Title VII cannot be prospectively waived via mandatory arbitration because such a waiver would "defeat the paramount congressional purpose behind" the antidiscrimination statute.[25] The Court reasoned that such a policy, whereby courts would defer to arbitral decisions on statutory discrimination claims, would "deprive" employees of their "statutory right to attempt to establish [their] claim[s] in a federal court."[26] The majority objected to the notion that

19. *Id.* at 40–41.
20. *Id.* at 42.
21. *Id.* at 43.
22. *Id.*
23. *Id.* at 59–60.
24. *Id.* at 50–51 ("The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums. . . . Where the statutory right underlying a particular claim may not be abridged by contractual agreement, the Court has recognized that consideration of the claim by the arbitrator as a contractual dispute under the collective-bargaining agreement does not preclude subsequent consideration of the claim by the National Labor Relations Board . . . the relationship between the forums is complementary since consideration of the claim by both forums may promote the policies underlying each.").
25. *Id.* at 51.
26. *Id.* at 55–56.

"arbitral processes are commensurate with judicial processes and that Congress impliedly intended federal courts to defer to arbitral decisions on Title VII issues."[27] The Court also opined that arbitrators are ill-suited to resolve disputes concerning rights created by Congress.[28] The role of the arbitrator, the Court explained, should be limited to interpretation of the governing CBA based on the arbitrator's experience dealing with the intricacies of industrial and labor relations.[29] The Court thus found it imperative that the resolution of statutory issues be left to the judiciary.[30]

Conspicuously absent from the Court's opinion in *Gardner-Denver* is any reference to the FAA or LMRA section 301. While the *Gardner-Denver* majority consistently emphasized the strong congressional policy against employment discrimination, it failed to acknowledge the similarly strong federal statutory policy liberally favoring arbitration.[31] As the Court heard more cases that implicated these countervailing statutory schemes, it progressively endeavored to reconcile its decisions' inconsistencies.

B. Evolving Precedent: Gilmer v. Interstate/Johnson Lane Corp.

Over the course of the decade following *Gardner-Denver*, the Supreme Court closely adhered to its principles set forth in that decision by preserving the rights of individuals to bring suit in federal court under various federal statutes despite otherwise valid agreements to arbitrate.[32] By the 1980s, however, judges began to recognize

27. *Id.* at 56.

28. *Id.* at 56–58.

29. *Id.* at 57.

30. *Id.* Beyond the shortcomings attributed to arbitral decision-making, the Court also cited the informality of arbitration procedure as a basis for finding the forum inappropriate for handling complex statutory claims. In particular, the Court pointed to the mismatch between arbitral fact-finding, the limited record in an arbitration, the evidentiary rules employed by arbitrators, and the significant due process concerns of plaintiffs suing under federal antidiscrimination statutes. *Id.* at 57–58. The Court's view of arbitration changed dramatically in the ensuing decades. *See infra* notes 35–50 and accompanying text.

31. That said, the Court in *Gardner-Denver* did acknowledge (in a footnote) the lower courts' citations to section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), and to case law interpreting that section as reiterating the FAA in the context of labor law by creating an obligation on the part of federal courts to facilitate and defer to the arbitration of labor disputes. *See Gardner-Denver Co.*, 415 U.S. at 46 n.6 (citing Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 458–59 (1957); Steelworkers Trilogy (United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 567–58 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960); United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 596 (1960))).

32. *See, e.g.*, Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 745 (1981) (holding that petitioners' rights to sue under the Fair Labor Standards were not precluded by an arbitration award premised on the same underlying facts, consistent with *Gardner-Denver*); McDonald v. City of W. Branch, 466 U.S. 284, 290 (1984) (finding that the arbitration mechanism "cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that [the Civil Rights Act] is designed to safeguard").

and account for the federal policy favoring arbitration embodied in the FAA. As the Supreme Court put it in the antitrust context in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*:

> [T]he congressional policy manifested in the [FAA] requires courts [to] liberally . . . construe the scope of arbitration agreements covered by that Act . . . . By agreeing to arbitrate a statutory claim, *a party does not forgo the substantive rights afforded by the statute*; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.[33]

This language stands in stark contrast to the Court's reluctance to acknowledge the legitimacy of the arbitral forum as a mechanism for handling employment discrimination claims in *Gardner-Denver*.

In 1991, the Court in *Gilmer v. Interstate/Johnson Lane Corp*. had occasion to revisit and clarify this tension in the employment context.[34] The Court examined whether a plaintiff's claim under the Age Discrimination in Employment Act (ADEA)[35] could be subjected to mandatory arbitration pursuant to an arbitration clause in a securities registration application that required the petitioner to "arbitrate any dispute" with the employer related to termination.[36] After being terminated, plaintiff Robert Gilmer filed suit in federal court under the ADEA alleging that the respondent-employer had unlawfully discriminated against him on the basis of his age. In response, the employer moved to compel arbitration pursuant to the arbitration provision and the FAA. Citing *Gardner-Denver*, the district court rejected the motion to compel arbitration.[37] On appeal, the Fourth Circuit reversed, and the Supreme Court affirmed.[38]

The Supreme Court determined that the ADEA claims were arbitrable because there was no language in the ADEA evincing congressional intent to preclude age discrimination claims from resolution in an arbitral forum.[39] The Court explained that, "[a]lthough all statutory

33. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627–28 (1985) (emphasis added).

34. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991). Professor Samuel Estreicher has done some excellent work reviewing *Gilmer*'s legacy. *See, e.g.*, Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Mandatory Employment Arbitration*, 16 OHIO ST. J. DISP. RESOL. 559 (2001) (a review of *Gilmer*'s significance a decade after that decision was published, and so before the *Pyett* decision).

35. 29 U.S.C. §§ 621–634.

36. *Gilmer*, 500 U.S. at 23–24.

37. *Id.* at 24.

38. *Id.*

39. *Id.* at 26. Similar statutory-text-based reasoning was employed by the Court in earlier cases. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) ("We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history."); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226–27 (1987) ("Like any statutory directive, the

claims may not be appropriate for arbitration, having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue," consistent with the FAA and the associated policy favoring arbitration.[40]

Gilmer revealed the Court's evolved view that arbitration is a proper forum where individual statutory rights could be fairly adjudicated. Disagreeing with Gilmer's contentions, the Court declared its support for the procedural safeguards underlying arbitration.[41] Inherent in the Court's opinion was the notion that an individual can "effectively vindicate" his or her statutory rights through that process, a position dramatically different from that the Court had taken in *Gardner-Denver*.[42]

During argument, Gilmer's attorneys pointed out the inconsistencies and contended that *Gardner-Denver* broadly prohibited the arbitration of employment discrimination claims. Rather than overruling *Gardner-Denver*,[43] the Court chose to distinguish it and its progeny on their facts. In *Gardner-Denver*, the Court explained, employees merely agreed to arbitrate *contractual* claims arising out of their CBA—not *statutory* causes of action like the one presently at issue.[44] Additionally,

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Arbitration Act's mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent 'will be deducible from [the statute's] text or legislative history,' or from an inherent conflict between arbitration and the statute's underlying purposes." (citations omitted)); Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 483 (1989) (citing *McMahon*, 482 U.S. at 226–27)).

40. *Gilmer*, 500 U.S. at 26 (citation and internal quotation marks omitted).

41. Specifically, the Court endorsed the parties' capacity to retain unbiased arbitrators, the sufficiency of the discovery accorded in arbitration, and the adequacy of the written decisions required by the governing rules incorporated by the arbitration provision in question. *Id.* at 30–32. Note that the parties' agreement in *Gilmer* invoked the New York Stock Exchange arbitration rules existing at the time.

42. *See id.* at 26–27; *see also* Circuit City Stores v. Adams, 532 U.S. 105, 123 (2001) ("[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." (quoting *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 628))); *Mitsubishi Motors Corp.*, 473 U.S. at 637 ("And so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.").

43. Although the *Gilmer* Court did not overrule *Gardner-Denver*, Justice White dropped a footnote expressing the majority's position that the distrust of the arbitral forum, which contributed to the Court's decision in *Gardner-Denver*, no longer applied. *Gilmer*, 500 U.S. at 34 n.5 ("The Court in *Alexander v. Gardner-Denver Co.* . . . also expressed the view that arbitration was inferior to the judicial process for resolving statutory claims. That 'mistrust of the arbitral process,' however, has been undermined by our recent arbitration decisions. '[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.'" (citations omitted) (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 626–27)).

44. *Id.* at 33–34.

the Court noted that *Gardner-Denver* occurred in the context of a collective bargaining relationship as opposed to the individualized employment arrangement in *Gilmer*.[45] Finally, the Court pointed out that *Gardner-Denver* was not decided under the FAA, and therefore the Court in that case did not consider the federal policy favoring arbitration.[46] These distinctions notwithstanding, tension remained between the *Gilmer* and *Gardner-Denver* decisions.[47]

C. Collision Course: Wright v. Universal Maritime Service Corp.

In the same year that *Gilmer* was decided, Congress enacted the Civil Rights Act of 1991.[48] The new law enhanced potential damages awards by making compensatory and punitive damages available and granted plaintiffs a right to request a jury trial in all cases involving intentional discrimination.[49] With this increase in plaintiffs' potential damages recovery to be decided now by juries, employment discrimination claims skyrocketed. This trend rapidly accelerated throughout the 1990s and thereafter.[50] Indeed, from 1991 to 2000, the number of employment discrimination claims filed in federal courts saw a 270% increase, such that by the early 2000s, employment discrimination

45. *Id.* at 34.

46. *Id.* at 35 (noting that the *Gardner-Denver* line of cases "were not decided under the FAA, which, as discussed above, reflects a 'liberal federal policy favoring arbitration agreements.'" (quoting *Mitsubishi Motor Corp.*, 473 U.S. at 625)).

47. *Compare* Alexander v. Gardner-Denver, 415 U.S. 36, 56 (1974) ("Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII."), *with Gilmer*, 500 U.S. at 30 ("In arguing that arbitration is inconsistent with the ADEA, Gilmer also raises a host of challenges to the adequacy of arbitration procedures. . . . Such generalized attacks on arbitration 'res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,' and as such, they are 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'" (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989))).

48. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

49. Id. § 102, 105 Stat. 1072 (codified at 42 U.S.C. § 1981a); Timothy D. Loudon, *The Civil Rights Act of 1991: What Does It Mean and What Is Its Likely Impact?*, 71 NEB. L. REV. 304, 306 (1992).

50. Douglas Robson, *Huge Surge of Sexual-Harassment Cases Hits the Courts*, S.F. BUS. TIMES (May 18, 1997, 9:00 PM PDT), https://www.bizjournals.com/sanfrancisco/stories/1997/05/19/focus6.html [https://perma.cc/5C25-LMKL] ("Among the factors commonly cited for the rise in claims is the publicity surrounding the Justice Thomas hearings and other major cases, as well as 1991 amendments to federal law, which expanded what plaintiffs could receive in employment discrimination claims."); *see also* Maryam Jameel, Leslie Shapiro & Joe Yerardi, *More Than 1 Million Employment Discrimination Complaints Have Been Filed with the Government Since 2010. Here Is What Happened to Them*, WASH. POST (Feb. 28, 2019), https://www.washingtonpost.com/graphics/2019/business/discrimination-complaint-outcomes [https://perma.cc/DAG7-5KCC] ("American workers alleged violations of federal antidiscrimination laws in more than 1 million cases filed with [the EEOC and other] agencies between fiscal years 2010 and 2017.").

cases comprised almost 10% of the federal civil docket—the largest single category of any type of case.[51]

As plaintiffs continued to file employment discrimination claims with increasing frequency, the Supreme Court was confronted with a dispute centered on the clash between *Gardner-Denver* (in a unionized setting) and *Gilmer* (in a nonunion employment context), and the resulting tension between the FAA and the rights created by civil rights statutes. In *Wright v. Universal Maritime Service Corp.*,[52] the Court determined that a broadly worded arbitration provision in a CBA does not require an employee to arbitrate claims related to an alleged violation of the Americans with Disabilities Act (ADA).[53] Plaintiff Ceasar Wright was subject to a CBA and seniority plan, which jointly provided that "[a]ny dispute concerning or arising out of the terms and/or conditions of this Agreement" would be referred to an arbitration-like process.[54] Despite this provision, he filed a complaint in federal court claiming ADA violations. The district court dismissed the case without prejudice because Wright had failed to pursue the arbitration procedure provided for in the CBA. The Fourth Circuit affirmed.[55]

On review, Justice Scalia, writing for the majority, acknowledged the tension between the Court's decisions in *Gardner-Denver* and *Gilmer*.[56] Nevertheless, the Court explained that "[a]lthough . . . we find *Gardner-Denver* and *Gilmer* relevant for various purposes to the case before us, we find it unnecessary to resolve the question of the validity of a union-negotiated waiver, since it is apparent to us, on the facts and arguments presented here, that no such waiver has occurred."[57] The Court found that discrimination disputes should not be presumed arbitrable when the ultimate issue in the case concerns the meaning of a federal statute, like the ADA, as opposed to the application of a CBA.[58] Since no such presumption exists, the Court reasoned that a party cannot be compelled to arbitrate its claims unless the party waived its statutory right to pursue those claims in a judicial forum.[59] Based on the specific contractual language in *Wright*, which the Court held failed to demonstrate the parties' intent to vest an arbitrator with the

51. Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. Empirical Legal Stud. 429, 429, 432–35 (2004).

52. Wright v. Universal Mar. Serv. Corp., 525 U.S. 70 (1998).

53. *Id.* at 78–79 (discussing the ADA, enacted on July 26, 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101–12117)).

54. *Id.* at 73–74.

55. *Id.* at 75.

56. *See id.* at 76–77 ("There is obviously some tension between these two lines of cases. Whereas *Gardner-Denver* stated that 'an employee's rights under Title VII are not susceptible of prospective waiver,' *Gilmer* held that the right to a federal judicial forum for an ADEA claim could be waived." (citations omitted)).

57. *Id.* at 77.

58. *Id.* at 78–79.

59. *Id.* at 79–81.

jurisdiction to analyze a federal statute, the Court determined that Wright's ADA claim was beyond the scope of the arbitrator's authority.[60]

The Court's holding meant that CBA language had to be "clear and unmistakable" for a union to *possibly* waive represented employees' statutory rights via an arbitration clause.[61] The Court applied this standard to the arbitration provision at issue and held that the clause was too broad to extend to any federal statutory claims.[62] Importantly, however, the Court expressly declined to address whether a CBA's clear and unmistakable waiver of employees' rights to bring federal claims of employment discrimination in a judicial forum would, in fact, be enforceable.[63]

Although *Wright* required the employer to litigate the employee's disability discrimination claim in a judicial forum, the Court's holding provided a meaningful signal as to how these ambiguities might be harmonized. If parties to a CBA could craft and agree on "clear and unmistakable" language compelling arbitration of employment discrimination claims, then the Court would have cause to revisit *Gardner-Denver*. Without such language, the practical result would be that plaintiffs would continue to take two bites of the proverbial apple—that is, a plaintiff could pursue her contractually guaranteed discrimination claim via arbitration and, if unsuccessful, could then initiate suit in court asserting the identical claim restyled under federal, state, or local antidiscrimination law.

II. *14 Penn Plaza LLC v. Pyett*

Following *Wright*, the Realty Advisory Board on Labor Relations (RAB) and Local 32BJ of the Service Employees International Union (32BJ or the Union) negotiated an arbitration provision with the specific intent of covering statutory claims when resolved through arbitration.[64]

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60. *Id.* at 79–80. Nor did the CBA language, which provided that "no provision or part of this Agreement shall be violative of any Federal or State Law," serve to incorporate federal antidiscrimination statutes into the contract by reference. *Id.* at 79.

61. *Id.* at 80–81.

62. *Id.* at 80 ("The CBA in this case does not meet that [clear and unmistakable] standard. Its arbitration clause is very general, providing for arbitration of '[m]atters under dispute,'—which could be understood to mean matters in dispute under the contract. And the remainder of the contract contains no explicit incorporation of statutory antidiscrimination requirements." (citation omitted)).

63. *Id.* at 82.

64. Brief of the Serv. Emp. Int'l Union, Loc. 32BJ, as Amicus Curiae in Support of Respondents at 13, 14 Penn Plaza LLC. v. Pyett, 556 U.S. 247 (2009) (No. 07-581), 2008 WL 2724312, at *13 ("As the bargaining history suggests and as the Defendants note, the standard no-discrimination clause in the Local 32BJ/Realty Advisory Board collective bargaining agreements was amended in 1999 to take account of this Court's decision in [*Wright*].") The union argued in its brief that while the arbitrator "would have full authority to decide any statutory discrimination claim," the respondents in the case

The RAB is a multiemployer bargaining association that negotiates CBAs on behalf of owners and operators of real property across New York City, Long Island, Westchester County, northern New Jersey, and Connecticut. 32BJ is a union local that represents tens of thousands of commercial and residential building service workers throughout New York City and collectively bargains with the RAB on behalf of those employees.[65]

Historically, whenever 32BJ brought a claim of employment discrimination on behalf of its members, the parties typically engaged in arbitration pursuant to the procedures set forth in the applicable CBA. If the grievant proved unsuccessful at arbitration, however, the employee could, and often did, proceed to file a subsequent lawsuit in court—one grounded in the same facts and legal theories that formed the basis of its case at arbitration—in hopes of taking another "bite at the apple" after arbitration proved fruitless.[66] In 1999, in an effort to avoid such duplicative litigation, the parties negotiated a new provision in their collective agreement that provided arbitration as the exclusive dispute resolution process for resolving statutory claims. Specifically:

> There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the [ADA], the [ADEA], the New York State Human Rights Law, the New York City Human Rights Code, . . . or any other similar laws, rules, or regulations. All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.[67]

This provision was put to the test in 2003, when 14 Penn Plaza—a building owner employer and RAB member—engaged a security services contractor to provide security guards to be stationed in the lobby and at the entrance of its building.[68] Although the Union expressly agreed to that restructuring, it rendered certain 32BJ members' jobs superfluous.[69] The individuals who had previously provided lobby services at 14 Penn Plaza were thus reassigned to positions as night porters and light-duty cleaners elsewhere in the building.[70] The Union proceeded to file grievances on behalf of those that were reassigned,

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should not—indeed, could not—be bound to arbitrate their claim if the union did not take their claim to arbitration. *Id.*

65. *Pyett*, 556 U.S. at 251.

66. *Cf.* Brief of the Serv. Emp. Int'l Union, Loc. 32BJ, as Amicus Curiae in Support of Respondents, *supra* note 64, at 9–14.

67. *Pyett*, 556 U.S. at 252.

68. *Id.*

69. *Id.*

70. *Id.* at 252–53.

alleging (1) age discrimination, (2) failure to promote one of the claimants, and (3) overtime violations.[71] However, because 32BJ had consented to the restructuring, the Union withdrew its age discrimination claims after the conclusion of the first arbitration hearing.[72]

In an attempt to resurrect these age discrimination claims, the employees through their private counsel filed suit in the U.S. District Court for the Southern District of New York, alleging that their reassignments violated the ADEA as well as other state and local laws that prohibit age discrimination in employment.[73] The employer moved to compel arbitration of these discrimination claims pursuant to the FAA and the exclusive dispute resolution process laid out in the parties' CBA.[74]

The district court denied the motion to compel,[75] and the Second Circuit affirmed, holding, *inter alia*, that it was barred from compelling arbitration of this employment discrimination dispute under *Gardner-Denver*.[76] Crucially, the court of appeals also observed that the *Gardner-Denver* holding potentially conflicted with the Supreme Court's decision in *Gilmer*, which held that an individual employee could waive his or her statutory right to bring federal age discrimination claims in a judicial forum under certain circumstances.[77] Further, the Second Circuit acknowledged that the Supreme Court in *Wright* did not resolve the tension between the *Gardner-Denver* and *Gilmer* holdings.[78] It went on to distinguish *Gardner-Denver* from *Gilmer* on the ground that the former arose in the context of a collective bargaining relationship. Specifically, the Court determined that compulsory arbitration provisions in CBAs, which "purport to waive employees' rights to a federal forum with respect to statutory claims, are unenforceable."[79] As such, an individual employee, acting alone, is subject to utilizing arbitration under *Gilmer*, but a labor organization lacks the authority to collectively bargain for arbitration on behalf of its members. The stage was now set for Supreme Court review.[80]

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71. *Id.* at 253.

72. *Id.* The Union continued to arbitrate the seniority and overtime claims, which were eventually denied by the arbitrator. *Id.*

73. *Id.* at 253–54.

74. *Id.* at 254.

75. Pyett v. Pa. Bldg. Co., No. 04 Civ. 7536 (NRB), 2006 WL 1520517, at *3 (S.D.N.Y. June 1, 2006), *aff'd*, 498 F.3d 88 (2d Cir. 2007), *rev'd and remanded sub nom.* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009).

76. *Pyett*, 498 F.3d at 91 n.3 (citing Alexander v. Gardner-Denver, 415 U.S. 36, 49–51 (1974)), *rev'd and remanded sub nom.* 14 Penn Plaza LLC. v. Pyett, 556 U.S. 247 (2009).

77. *Id.* (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33–35 (1991)).

78. *Id.* (citing Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 82 (1998)).

79. *Id.* at 93–94.

80. More generally, as noted in the appellant's petition for certiorari, unresolved tensions in the Supreme Court's pre-*Pyett* jurisprudence fostered splits among the circuits on various issues. Petition for Writ of Certiorari at 23, *Pyett*, 556 U.S. 247 (No. 07-581), 2007 WL 3230905, at *23 ("In sum, the lower federal courts are in irreconcilable conflict

The Supreme Court reversed the Second Circuit, holding that *Gilmer* cannot be narrowly limited to the context of individual employment agreements and fully applies to the collective bargaining context.[81] The only requirement for the waiver of a judicial forum to be enforceable, the Court explained, is that the agreement to arbitrate the statutory discrimination claims be "explicitly stated" in either the individual or the collective agreement.[82] The Court limited *Gardner-Denver* to its facts, explaining that arbitration could not supplant judicial adjudication in that case, given that the particular arbitration clause at issue did not cover statutory antidiscrimination claims.[83] Conversely, the Court explained, the grievance machinery in the parties' CBA in *Pyett* "expressly cover[ed] both statutory and contractual discrimination claims."[84]

The Court further noted that although it had originally viewed the process of arbitration with skepticism—especially in the context of adjudicating statutory rights—that misconception had been repeatedly corrected over the course of the decades since *Gardner-Denver* was decided.[85] Given the Court's by-then-longstanding endorsement of arbitration procedures, the federal policy in favor of arbitration, the requirement of a clear and unmistakable waiver of the judicial forum, and the rule in *Gilmer* that the arbitrator apply the statute and award statutory remedies if a violation is found, the Court determined that arbitration does not amount to a substantive waiver of statutory rights and that employees can effectively vindicate those rights before an arbitrator.[86]

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over whether a union-negotiated arbitration clause may be enforceable. In addition to the sharp split between the positions of the Second and Fourth Circuit, other circuits have expressed deep-seated confusion regarding the enforceability of these waivers.").

81. *Pyett*, 556 U.S. at 258 (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26–33 (1991)).

82. *Id.*

83. *Id.* at 260–64 (citing Alexander v. Gardner-Denver, 415 U.S. 36, 48–49 (1974)).

84. *Id.* at 264.

85. *Cf.* Cir. City Stores v. Adams, 532 U.S. 105, 131–32 (2001) (Stevens, J., dissenting) ("Times have changed. Judges in the 19th century disfavored private arbitration. The 1925 Act was intended to overcome that attitude, but a number of this Court's cases decided in the last several decades have pushed the pendulum far beyond a neutral attitude and endorsed a policy that strongly favors private arbitration." (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 480–81 (1989); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 225–26 (1987); Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614, 625 (1985); Southland Corp. v. Keating, 465 U.S. 1, 11, 14 (1984); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 400 (1967))).

86. *Pyett*, 556 U.S. at 265–66 ("The decision to resolve ADEA claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination; it waives only the right to seek relief from a court in the first instance.").

The *Pyett* Court made its position clear, echoing a line appellant's counsel emphasized right at the beginning of oral argument:

> The NLRA governs federal labor-relations law. As permitted by that statute, respondents designated the Union as their "exclusive representativ[e] . . . for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. § 159(a). As the employees' exclusive bargaining representative, the Union "enjoys broad authority . . . in the negotiation and administration of [the] collective bargaining contract." *Communications Workers v. Beck*, 487 U.S. 735, 739 (1988) (internal quotation marks omitted). But this broad authority "is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation." *Humphrey v. Moore*, 375 U.S. 335, 342 (1964).[87]

Applying these legal principles to *Pyett*'s facts, the Court held that examination of the "statutes at issue in this case . . . yields a straightforward answer to the question presented: The NLRA provided the Union and the RAB with statutory authority to collectively bargain for arbitration of workplace discrimination claims, and Congress did not terminate that authority with respect to" the ADEA.[88] Thus, the Court concluded, the plaintiff employees waived their rights to a judicial forum through their membership in a union that, as their exclusive bargaining representative, validly committed those employees to a collectively bargained arbitration clause.

Notwithstanding the NLRA's grant of this authority to the union, plaintiff employees argued they should not be bound by the CBA's arbitration and union control clauses because their union, 32BJ, had a conflict of interest when negotiating and subsequently implementing that CBA insofar as the Union balanced plaintiff employees' interests against those of the bargaining unit as a whole. The Court rejected this

87. *Id.* at 255–56 (cleaned up); *cf.* Transcript of Oral Argument at 3, *Pyett*, 556 U.S. 247 (No. 07-581), 2008 WL 5054056, at *3 ("First, the Second Circuit ignored section [9(a)] of the National Labor Relations Act, by which Congress empowered unions to bargain on behalf of their employees over anything germane to the working environment, including methods of workplace dispute resolution." (Paul Salvatore, attorney for appellant, speaking)); *see also* Plass, *supra* note 16, at 231 ("The *Pyett* decision confirmed that the union is the employees' exclusive representative that will make decisions about mandatory subjects of bargaining, including its members' wages, hours and other working conditions. It then broadened the union's bargaining authority by holding that the union's contractual powers extend to its members' statutory forum rights. Further, the Court reaffirmed the obligation of unions to represent their members fairly, impartially and in good faith. By affirming the traditional principles of labor arbitration, the *Pyett* rules permit a relatively painless transition to arbitrating statutory claims." (footnotes and citations omitted)); *id.* at 231 n.67 ("The Court specifically confirmed the union's status as the exclusive representative of its members, its broad bargaining authority during contract negotiations, and its obligation to represent its members fairly, impartially, and in good faith." (citing *Pyett*, 556 U.S. at 255–56)).

88. *Pyett*, 556 U.S. at 260.

argument as a political one more appropriate for Congress than the Supreme Court,[89] opining:

> Labor unions certainly balance the economic interests of some employees against the needs of the larger work force as they negotiate collective-bargaining agreements and implement them on a daily basis. But this attribute of organized labor does not justify singling out an arbitration provision for disfavored treatment. This "principle of majority rule" to which respondents object is in fact the central premise of the NLRA. "In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority." It was Congress' verdict that the benefits of organized labor outweigh the sacrifice of individual liberty that this system necessarily demands. Respondents' argument that they were deprived of the right to pursue their ADEA claims in federal court by a labor union with a conflict of interest is therefore unsustainable; it amounts to a collateral attack on the NLRA.[90]

Still, the plaintiff employees argued that their statutory rights had been substantively waived because 32BJ had refused to pursue their age-bias claims at arbitration. Since the Union refused to engage in the exclusive dispute-resolution procedure for these claims, the plaintiffs argued, they were entitled to pursue those claims in court.[91] The *Pyett* Court expressly declined to resolve this issue, however, choosing instead to remand the case to the district court to determine whether the parties' CBA permitted the Union to prevent its members from vindicating their statutory rights in the arbitral forum.[92]

Justice Souter and the other dissenting justices suggested, in connection with the majority's "reserve[d] question" regarding situations when the union declined to pursue arbitration of the employee's claims, that the Court's holding would have limited practical effect because unions typically control access to the arbitral forum created in a CBA.[93] Therefore, at least with respect to those claims that the union chooses not to arbitrate, employees would have to be granted access to court

89. *Id.* at 270 ("This is a 'battl[e] that should be fought among the political branches and the industry. Those parties should not seek to amend the statute by appeal to the Judicial Branch.'" (quoting Barnhart v. Sigmon Coal Co., 534 U.S. 438, 462 (2002))).

90. *Id.* at 270–71 (citing Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953) ("The complete satisfaction of all who are represented is hardly to be expected.")) (citations omitted).

91. *Id.* at 273–74.

92. *Id.* Notably, the employer 14 Penn Plaza was willing to arbitrate the claim with the employees, even without union support and contended that the CBA permitted such individual arbitration. *See* Transcript of Oral Argument, *supra* note 87, at 9–12.

93. *Pyett*, 556 U.S. at 285 (Souter, J., dissenting).

so that their substantive statutory claim would not be altogether extinguished.[94]

III. *Pyett's* Aftermath, the "*Pyett* Protocol," and Other CBA Dispute Resolution Systems

A. *Initial Responses to* Pyett *among New York's District Courts*

In the months that followed the Court's decision, lower courts—picking up on the unresolved issue in *Pyett*—confronted cases where 32BJ-represented employees sought litigation of their discrimination claims in a judicial forum after the Union declined to pursue the claims in arbitration.[95] While the *Pyett* majority acknowledged the risk of a substantive waiver of an employee's statutory right to sue if a union were to refuse to advance a discrimination claim in arbitration,[96] both *Kravar v. Triangle Services* and *Borrero v. Ruppert Housing Co.* highlighted another related issue: whether the arbitration clause in the RAB and 32BJ's CBA could compel an individual employee to pursue her discrimination claims through arbitration even if the Union were not involved in the litigation.[97] In both cases, the U.S. District Court for the Southern District of New York found that if the Union refused to represent the employee in question in arbitration, then the agreement's arbitration provision would not be enforceable as to that individual's discrimination claims.[98]

Importantly, however, although the CBA at issue in both of these cases was negotiated between the RAB and 32BJ, neither were parties to, nor in any meaningful way involved in, either of these cases. Indeed,

94. *Id.* ("On one level, the majority opinion may have little effect, for it explicitly reserves the question whether a CBA's waiver of a judicial forum is enforceable when the union controls access to and presentation of employees' claims in arbitration, . . . which 'is usually the case.'" (quoting McDonald v. City of W. Branch, 466 U.S. 284, 291 (1984))).

95. *See, e.g.*, Kravar v. Triangle Servs., Inc., No. 1:06-cv-07858-RJH, 2009 WL 1392595, at *3 (S.D.N.Y. May 19, 2009); Borrero v. Ruppert Hous. Co., No. 08 CV 5869(HB), 2009 WL 1748060, at *1 (S.D.N.Y. June 19, 2009).

96. *Pyett*, 556 U.S. at 273–74 ("[A]lthough a substantive waiver of federally protected civil rights will not be upheld, we are not positioned to resolve in the first instance whether the CBA allows the Union to prevent respondents from 'effectively vindicating' their 'federal statutory rights in the arbitral forum.'" (citations omitted)).

97. *See, e.g.*, *Kravar*, 2009 WL 1392595, at *3–4 (permitting plaintiff to proceed with her claim in federal court because the union did not advance the claim at arbitration); *Borrero*, 2009 WL 1748060, at *2–3 (allowing the union an opportunity to pursue a claim at arbitration, but reserving the plaintiff's right to reassert the claim in court if the union declined to advance the claim at arbitration).

98. *Kravar*, 2009 WL 1392595, at *4 ("The arbitration provision that the Court must enforce is the one the union and the realty board entered into, not a hypothetical agreement in which the employer's rather than the union's consent is critical. Absent some ambiguity in the agreement, . . . it is the language of the contract that defines the scope of disputes subject to arbitration." (citations and internal quotation marks omitted)); *Borrero*, 2009 WL 1748060, at *2 ("I dismiss the complaint without prejudice, however, because if Borrero is prevented by the Union from arbitrating his claims, the CBA's arbitration provision will not be enforceable." (citing *Kravar*, 2009 WL 1392595, at *3)).

as each case progressed to conclusion, the RAB and 32BJ were left as mere onlookers—watching from the sidelines as the courts interpreted their CBA completely bereft of any evidence concerning the extensive bargaining history between the parties surrounding the arbitration clause at issue.[99]

*B. The "*Pyett *Protocol"*

To this day, the RAB and 32BJ have not resolved the issue of whether their CBA "requires" an individual employee to submit his or her discrimination claim to arbitration when the Union has declined to pursue the claim in the typical arbitral forum. However, in acknowledging the risk that courts would continue to decide these issues without input from either of them, the RAB and 32BJ chose to adopt a "No-Discrimination Protocol" (the "*Pyett* Protocol").[100] Although the *Pyett* Protocol expressly avoided the reserved question,[101] it provided instead a due process procedure to resolve any and all discrimination claims—including those that were asserted by employees but that the Union refused to pursue.[102]

The *Pyett* Protocol, the terms of which are now incorporated into the RAB and 32BJ's master CBAs,[103] establishes a mediation process

99. Terry Meginniss & Paul Salvatore, *The Forum for Litigation of Statutory Employment Claims After Pyett: A New Approach from Management and Labor*, 66 Ann. Meeting Nat'l Acad. Arbs. 271, 282 (2013) ("Neither the RAB nor the Union (the bargaining parties in *Pyett*) was a party to *Kravar*, *Borrero*, or *Morris*. A central question in those cases—whether the bargaining agreement provided that an individual employee must submit his or her claim to arbitration when the union has declined to pursue it to the regular contractual arbitration forum—is an issue that remains in dispute between the RAB and 32BJ. In each of these cases, the RAB and 32BJ were left in the very uncomfortable position of watching the courts interpret their bargaining agreement without the benefit of the evidence on bargaining history and context that only the union and the employer could provide.").

100. To minimize the risk of collateral construction of their CBAs by arbitrators, the parties included, in the text of the Protocol, language to protect against the issuance of arbitration awards that could adversely affect CBA interpretation: "Any mediation and/or arbitration outcome shall have no precedential value with respect to the interpretation of the CBAs or other agreement(s) between the Union and the RAB." *Id.* at 292.

101. *See* Wilson v. PBM, LLC, 140 N.Y.S.3d 276, 287–88 (App. Div. 2021) (citing Espada v. Guardian Serv. Indus., Inc., No. 18-CV-5443(ILG)(JO), 2019 WL 5309963, at *5 (E.D.N.Y. Oct. 18, 2019), *appeal dismissed* (Dec. 20, 2019) ("The Union and the RAB agree that the provisions of this Protocol do not resolve the reserved question. Neither the inclusion of this Protocol in the CBAs nor the terms of the Protocol shall be understood to advance either party's contention as to the meaning of the CBAs with regard to the reserved question, and neither party will make any representation to the contrary." (quoting Art. XIX, § 23(B)(1) of the CBA between the RAB and 32BJ))).

102. *See* Michael Z. Green, *A Post-*Pyett *Collective Bargaining Agreement to Arbitrate Statutory Discrimination Claims: What Is It Good For—Could It Be Absolutely Nothing or Really Something?*, *in* The Challenge for Collective Bargaining: Proceedings of the New York University 65th Annual Conference on Labor, at ch. 12 (Michael Z. Green & Samuel Estreicher eds., 2013).

103. *See, e.g.*, Loc. 32BJ SEIU & RAB, 2020 Commercial Building Agreement Effective January 1, 2020 to December 31, 2023, at 111–18 (2020), https://www.seiu32bj.org/contracts-page (scroll down to "New York" and select "2020–2023 RAB Commercial

for all discrimination disputes and assists individual employees and employers seeking to arbitrate discrimination claims in instances where mediation has failed and where the Union has declined to pursue arbitration of the claims.[104]

The mediation process is a compulsory first step for all such claims.[105] The *Pyett* Protocol specifies a list of potential mediators selected by the RAB and 32BJ from which the parties may choose, and all mediation costs are borne equally by the RAB and Union, though the Union is not involved in conducting the mediation.[106] Pursuant to the *Pyett* Protocol, the mediator is empowered to require production of evidence and position statements, and the mediator has the leeway to flexibly conduct the mediation process and to separately confer with each party for the sake of promoting the vigorous pursuit of settlement.[107] To that end, the mediator is authorized to make a comprehensive settlement proposal to the parties at the conclusion of the mediation process.[108] The mediator also has authority to order sanctions if she believes one or both of the parties failed to comply with the mediator's directives in good faith.[109] These "muscular mediation" processes have been effective: since the program's inception, the vast majority of claims have been successfully resolved in the mediation phase.[110]

In the event that mediation fails, however, the claimants are then permitted to pursue their claims in arbitration.[111] As with the mediator panel referenced above, the *Pyett* Protocol also provides a separate list of qualified employment-discrimination-trained attorney arbitrators from the American Arbitration Association to arbitrate the claims.[112] However, since the Union has declined to participate in the proceedings, it is not required to share in the costs of the arbitration.[113] All terms of the arbitration, such as financial compensation for the

Building Agreement"). Specifically, in the current version of the commercial building CBA between the RAB and 32BJ, Article XXI(24)(B) lays out the *Pyett* Protocol.

104. Terry Meginniss & Paul Salvatore, *The* Pyett *Protocol: Collectively-Bargained Grievance Arbitration as a Forum for Individual Statutory Employment Claims*, *in* Beyond Elite Law: Access to Civil Justice in America 607, 611 (Samuel Estreicher & Joy Radice eds., 2016); *see also* Michael Z. Green, *Reconsidering Prejudice in Alternative Dispute Resolution for Black Work Matters*, 70 SMU L. Rev. 639, 663–66 (2017).

105. Meginniss & Salvatore, *supra* note 104, at 611; Green, *supra* note 104, at 664.

106. *Id.*

107. Meginniss & Salvatore, *supra* note 104, at 611; Green, *supra* note 104, at 664–65.

108. Meginniss & Salvatore, *supra* note 104, at 611; Green, *supra* note 104, at 665.

109. *Id.*

110. Green, *supra* note 104, at 665.

111. Meginniss & Salvatore, *supra* note 104, at 611; Green, *supra* note 104, at 665.

112. Meginniss & Salvatore, *supra* note 104, at 611–12; Green, *supra* note 104, at 666.

113. Meginniss & Salvatore, *supra* note 104, at 612; Green, *supra* note 104, at 666. Instead, the RAB's position is that employers generally will bear the cost of arbitration, although there may be circumstances where the employee would be expected to pay.

arbitrator, are to be negotiated between the parties to the arbitration (with the RAB typically representing the employer and covering the cost of arbitration).[114]

Since the adoption of the *Pyett* Protocol, a number of courts and governmental agencies have deferred to these processes. Just a few months after the parties agreed to the *Pyett* Protocol, the SDNY stayed an individual's claim pending arbitration, holding that arbitration should proceed despite the fact that the Union declined to bring the claim on behalf of the employee.[115] Similarly, in later cases, New York federal courts have almost uniformly held that the *Pyett* Protocol, in conjunction with the parties' arbitration provision, does not constitute a prospective waiver of employees' substantive statutory rights since they are entitled to bring their grievances to arbitration even without the Union's support.[116]

New York state courts, too, defer to the *Pyett* Protocol. The Appellate Division, Second Department, recently held that the combination of the CBA and *Pyett* Protocol "requires individual employees to arbitrate their statutory discrimination claims when the Union has declined to pursue such claims."[117] Similarly, in another case, the New York State Supreme Court deferred to the Protocol, ordering parties

114. Meginniss & Salvatore, *supra* note 104, at 612; Green, *supra* note 104, at 666.

115. *See* Duraku v. Tishman Speyer Props., Inc., 714 F. Supp. 2d 470, 474 (S.D.N.Y. 2010).

116. *See, e.g.*, Ukshini v. Comity Realty Corp., No. 15-cv-6124 (PKC), 2016 WL 1733468, at *3 (S.D.N.Y. Apr. 29, 2016); Glover v. Colliers Int'l NY, LLC, No. 13-CV-8843 (JMF), 2014 WL 5410016, at *4 (S.D.N.Y. Oct. 24, 2014); Germosen v. ABM Indus. Corp., No. 13-cv-1978 (ER), 2014 WL 4211347, at *7 (S.D.N.Y. Aug. 26, 2014); Acevedo v. Tishman Speyer Props. L.P., No. 12 Civ. 1624 (LTS) (AJP), 2013 WL 1234953, at *3 (S.D.N.Y. Mar. 26, 2013); Bouras v. Good Hope Mgmt. Corp., No. 11 Civ. 8708 (WHP), 2012 WL 3055864, at *4 (S.D.N.Y. July 24, 2012); Gildea v. Bldg. Mgmt., No. 10 Civ. 3347, 2011 WL 4343464, at *5–6 (S.D.N.Y. Aug. 16, 2011); Pontier v. U.H.O. Mgmt. Corp., No. 10 Civ. 8828 (RMB), 2011 WL 1346801, at *3 (S.D.N.Y. Apr. 1, 2011); Garcia v. Newmark Knight Frank, No. 09 Cv. 4599 (BSJ), 2010 WL 11713071, at *4 (S.D.N.Y. July 28, 2010).

One unpublished recent decision from the Eastern District of New York is an exception to this overwhelming trend: Espada v. Guardian Serv. Indus., Inc., No. 18-CV-5443 (ILG)(JO), 2019 WL 5309963, at *6 (E.D.N.Y. Oct. 18, 2019). The *Espada* court acknowledged that its opinion is "counterintuitive" and expressly disregarded multiple published opinions from the District Court for the Southern District of New York as "unpersuasive" because those published opinions interpreted the *Pyett* Protocol as legally meaningful rather than meaningless. *Id.* at *6. But, as discussed *infra*, text accompanying note 117, the most recent—and only—New York appellate decision on this topic rejected *Espada*'s reading of the *Pyett* Protocol because that reading not only contravenes prior case law but also violates several basic principles of contract interpretation. Wilson v. PBM, LLC, No. 2017-08428, 2021 WL 400400, at *9 ("To read the CBA as if the No-Discrimination Protocol was in fact absent flies in the face of case law that requires an agreement to be read in its entirety, so as to give full meaning to intent, yet the *Espada* court in 'put[ting] on blinders' ignored these basic tenets of contract law. To do so, and to arrive at the *Espada* court's result, requires a strained reading of the CBA." (citations omitted)); *accord* Rodriguez v. Newmark & Co. Real Estate, Inc., No. 158325/2019, 2021 BL 105727, at *4 (N.Y. Sup. Ct. Mar. 18, 2021) (quoting *Wilson*, 2021 WL 400400, at *9).

117. *Wilson*, 2021 WL 400400, at *4; *see also Rodriguez*, 2021 BL 105727, at *4.

to proceed to mediation and arbitration consistent with the Protocol prior to commencement of a public hearing at the New York State Division of Human Rights (NYSDHR).[118] Additionally, the court in that case enjoined the NYSDHR from proceeding on any of the underlying allegations pending the outcome of arbitration, adding that claim preclusion would apply to all proceedings following the arbitration.[119]

Since the establishment of the *Pyett* Protocol, both the RAB and 32BJ agree that the prescribed processes have been a success insofar as they facilitate the resolution of disputes often without any need for arbitration or costly litigation.[120] Indeed, the fact that the parties have not yet resolved the open issue of arbitrability expressly passed over by the *Pyett* majority contributes a sense of uncertainty as to whether the individual employee's claim would be entitled to a judicial forum in the first instance. That uncertainty, in turn, creates an added incentive for the parties to resolve their dispute in mediation, before briefing on the legal merits of that issue becomes necessary.[121]

Even setting aside these savings with respect to the costs of litigation, members of the RAB and 32BJ have found that the *Pyett* Protocol leads to fair outcomes that are mutually agreeable in the aggregate. Although the RAB's litigants prevail in many Protocol arbitrations, generally speaking, disputes are resolved during mediations wherein 32BJ litigants receive appropriate and fair compensation.[122] The fact that these parties continue to abide by the *Pyett* Protocol more than a decade after its inception reveals that they appreciate its value and promotion of just results.

C. Similar Dispute Resolution Provisions in Other CBAs

Dispute resolution frameworks resembling the *Pyett* Protocol have been adopted by parties to other CBAs beyond that between the RAB and 32BJ, to the benefit of all stakeholders. For example, the RAB and the International Union of Operating Engineers AFL-CIO Local Union 94 (Local 94) have adopted a grievance and arbitration procedure as the exclusive remedy for covered employees' claims of discrimination

118. *See* Bd. of Managers of Bay Club v. Hayes, No. 714/2012 (N.Y. Sup. Ct. Queens Cnty. 2012) (on file at SLU Law).

119. *Id.*, slip op. at 2.

120. Green, *supra* note 104, at 669 ("While personally working with the attorneys from the RAB and SEIU Local 32BJ on various presentations about the Protocol, . . . the attorneys highlighted how much the mediation process employed by the Protocol had further enhanced the opportunities for employees to resolve fairly their disputes with their employers without even getting to the arbitration stage.").

121. *Id.* at 665.

122. *See id.* at 669 ("While personally working with the attorneys from the RAB and SEIU Local 32BJ on various presentations about the Protocol, I have learned that the parties' motivations have been to provide the fairest dispute resolution process for employees covered by their CBA."); *see also supra* note 120.

prohibited by their CBA.[123] Article XII(24) of their CBA provides that claims under federal, state, and local antidiscrimination statutes—such as Title VII, the New York State Human Rights Law (NYSHRL), and the New York City Human Rights Law (NYCHRL), among others—must be filed under the CBA's grievance and arbitration procedures, and employees "shall not file suit or seek relief in any other forum."[124] The CBA's arbitration procedure also includes claims alleging violations of the Fair Labor Standards Act (FLSA), the New York Labor Law (NYLL), and any other federal, state, or local wage payment statutes or regulations.[125] Notably, however, this CBA's scope differs from the *Pyett* Protocol in various respects, such as that it does not require mediation as a prerequisite to arbitration and that it prohibits class or collective actions of such claims brought under Article XII(24).[126]

The CBAs in some major healthcare industries, by contrast, contain dispute resolution procedures bearing more of a resemblance to the *Pyett* Protocol. For instance, Local 1199 National Health Care Workers' Union, Service Employees International Union, has negotiated *Pyett*-Protocol-like mediation and arbitration systems by which claims alleging violations of wage and hour statutes—including the FLSA and NYLL—are subject exclusively to the parties' CBA dispute resolution procedure.[127] (Notably, this system does not speak to employment discrimination claims.) Under this protocol, wage-hour and wage-parity claims that are not resolved in the contractual grievance procedure must be submitted to mandatory mediation before a party may proceed to arbitration. A party may submit a demand for arbitration only if issues remain unresolved when the mediation process is complete. As under the *Pyett* Protocol, individual employees are bound to this mediation and arbitration procedure, even when the union declines to process their grievance. When that happens, an employee may submit his or her claim to mandatory mediation and then, if left unresolved, to mandatory arbitration.[128] Similar language appears in CBAs negotiated by Local 1660 Home Healthcare Workers of America involving

123. Loc. 94 Int'l Union of Operating Eng'rs AFL-CIO & RAB, 2019 Engineer Agreement 57–58 (Jan. 1, 2019), http://www.local94.com/media/151435/RAB2019_%20 2022EngineerAgreement.pdf (effective until Dec. 31, 2022).

124. *Id.*

125. *Id.* A recent decision from the District Court for Southern District of New York enforces this provision. *See* Chung v. 335 Madison Avenue LLC, 1:21-cv-03861-LJL, at 7–8 (S.D.N.Y. Oct. 7, 2021) (on file with SLU Law) (wage and hour claims sent to arbitration).

126. *Id.*

127. This provision of the parties' agreement was recently enforced by a decision of the District Court for the Southern District of New York. *See* 1199SEIU United Healthcare Workers E. v. PSC Cmty. Servs., 1:20-cv-03611-JGK, at 5 (S.D.N.Y. Feb. 18, 2021) (on file with SLU Law ("All such claims if not resolved in the grievance procedure . . . or mediation as described below shall be submitted to final and binding arbitration.").

128. *Id.*

the important claims of wage discrimination.[129] That CBA likewise lays out a grievance procedure for statutory wage and hour claims that begins with mediation and possibly leads to arbitration.[130] Although the SDNY rejected that procedure when challenged, the Second Circuit reversed that decision and upheld the CBA's system for the resolution of statutory disputes.[131]

CBAs with *Pyett* Protocol-like alternate dispute resolution processes can also be found outside of New York. In *NBCUniversal Media, LLC v. Pickett*, the Central District of California granted NBCUniversal Media, Universal City Studios, and an individual employee-defendant's motion to compel arbitration of, among other claims, a unionized employee's harassment, discrimination, retaliation, and related claims brought under California's Fair Employment and Housing Act (FEHA).[132] The union's CBA with NBCUniversal included a mandatory dispute resolution program[133] and a nondiscrimination provision.[134] In

129. Abdullayeva v. Attending Homecare Servs. LLC, 928 F.3d 218, 220–21 (2d Cir. 2019) ("To ensure the uniform administration and interpretation of this Agreement in connection with federal, state, and local wage-hour and wage parity statutes, all claims brought by either the Union or Employees, asserting violations of or arising under the Fair Labor Standards Act, . . . New York Home Care Worker Wage Parity Law, or New York Labor Law . . . in any manner, shall be subject exclusively, to the grievance and arbitration procedures described below. . . . All such claims if not resolved in the grievance procedure, including class grievances filed by the Union, or mediation as described below shall be submitted to final and binding arbitration . . . . In the event an Employee has requested, in writing, that the Union process a grievance alleging a violation of the Covered Statutes and the Union declines to process a grievance regarding alleged violations of the Covered Statutes, through the grievance/mediation process or to arbitration following the conclusion of mediation, an Employee solely on behalf of himself/herself, may submit their individual claim to mediation, or following the conclusion of mediation, to arbitration.").

130. *Id.*

131. *Id.* at 223–25; *see also id.* at 220 ("We conclude that the arbitration clause (1) mandated arbitration of the claims at issue here; and (2) did not deny due process to Attending's employees. Accordingly, we reverse the judgment of the district court.").

132. NBCUniversal Media, LLC v. Pickett, No. LA CV17-01404 JAK (MRWx), 2017 WL 4708019, at *1 (C.D. Cal. July 19, 2017), *aff'd*, 747 F. App'x 644 (9th Cir. 2019).

133. Answering Brief of Petitioner-Appellees NBCUniversal Media, LLC et al. at 4–5, *NBCUniversal Media, LLC*, 747 F. App'x 644 (No. 17-56077), 2018 WL 1308476 (noting that the CBA provides that the mandatory dispute resolution is "the sole and exclusive procedure" for resolution of claims arising under the nondiscrimination clause, that "neither the Union nor any aggrieved employee may file an action or complaint in court on any claim that arises under [the non-discrimination clause], having expressly waived the right to so file," that the arbitrator's decision in the case of a claim brought by the employee through the dispute resolution procedure "shall provide the final, binding and exclusive determination of such claim, subject only to appeal in accordance with the Federal Arbitration Act," that "Covered Employees and the Company are not allowed to litigate a Covered Claim in any court," and that the term "Covered Claim" is "defined to include '[e]mployment discrimination and harassment claims, based on, for example, age, . . . handicap/disability, or other characteristic protected by law'" (citing excerpts of the record in that case)).

134. *NBCUniversal Media, LLC*, 2017 WL 4708019, at *2 ("Neither the Union nor [NBCUniversal] will discriminate against any employee because of race, creed, age, sex, sexual orientation, disability, color, national origin, religion, or any other characteristic

considering the employee's statutory FEHA claims, the court found the CBA's mandatory dispute resolution program required the FEHA claims be arbitrated, as the CBA expressly provided that it applied to all employment discrimination claims brought against NBCUniversal, including those based on violations of FEHA.[135] Helpfully, the court also addressed whether the dispute resolution program applied in cases where the employee does not file a grievance with the union. The court observed that the CBA provided that, in such situations, the procedures "shall provide the sole and exclusive procedure for resolution of such claims, and neither the Union nor any aggrieved employee may file an action or complaint in court on any claim that arises under [the non-discrimination provision], having expressly waived the right to so file."[136] Ultimately, the court concluded the CBA's nondiscrimination and mandatory dispute resolution provisions governed the employee's FEHA claims and compelled arbitration.[137]

Also in California, *Coleman v. Southern Wine & Spirits of California, Inc.* involved an employee who sued his employer, union, and the union's business representative.[138] The employee alleged several claims, including racial discrimination under FEHA, violation of the California Constitution, retaliation, and wrongful termination "in violation of well-established public policies, as set forth in various statutes and Constitutional provisions including, but not limited to, [California] Government Code § 12940, § 12948, [and] § 12926."[139] The CBA between the employer and its California Teamsters Local Unions (Northern California Hourly Employees) included an "Agreement to Arbitrate," which stated:

> It is the desire of both parties to this Agreement that disputes and grievances arising hereunder involving interpretation or application of the terms of this Agreement, including any statutory or common law claims of sex, race, age, disability or other prohibited discrimination, shall be settled amicably or if necessary, by final and binding arbitration as set forth herein.[140]

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protected by applicable federal, state or local law, in violation of such law, including but not limited to the Age Discrimination in Employment Act of 1967, as amended, Title VII of the Civil Rights Act of 1964, as amended, Sections 1981 through 1988 of Title 42 of the United States Code, the Americans with Disabilities Act of 1990, the Rehabilitation Act of 1973, . . . California Fair Employment and Housing Act, . . . or any other federal, state or local law prohibiting discrimination.").

135. *Id.* at *8. The Court also granted the motion to compel as against Universal City Studios and the individual employee-defendant, finding both parties were intended beneficiaries of the CBA with a right to enforce its terms. *Id.* at *10.

136. *Id.* at *8.

137. *Id.*

138. Coleman v. S. Wine & Spirits of Cal., Inc., No. 11-501 SC, 2011 WL 3359743, at *1 (N.D. Cal. Aug. 2, 2011).

139. *Id.* at *3 (N.D. Cal. 2011); *see also* Notice of Removal Exh. A, Complaint at ¶¶ 51–136, *Coleman*, 2011 WL 3359743, (No. 11-501) (quoted material appears in ¶ 103).

140. *Coleman*, 2011 WL 3359743 at *3.

The court found this language "clearly and unmistakably requires arbitration of Plaintiff's claims premised on racial discrimination."[141] The court therefore found that all of the plaintiff's claims concerning racial discrimination were subject to binding arbitration and dismissed the statutory claims of racial discrimination, retaliation, wrongful termination in violation of public policy, and violation of the California Constitution.[142]

Similar language mandating arbitration of employees' statutory claims appeared in the CBA at issue in *Maldonado v. SecTek, Inc.143* There, an employer moved to compel arbitration of an employee's disability discrimination claims brought under the Americans with Disabilities Act and the Pennsylvania Human Relations Act, pursuant to the parties' CBA.[144] The union and employer were parties to a CBA which included a section titled "Grievance Mediation and Arbitration Procedure."[145] The section detailed a multistep grievance procedure and included the following sections upon which the court relied:

> The parties expressly acknowledge that the duty to use this grievance procedure, including binding arbitration, includes any and all disputes between any employee and the Company (and the Union and the Company) arising out of or relating to any employee's employment with the Company, whether grounded in contract, tort or statutory law (including but not limited to federal, state and local civil rights and employment laws such as . . . the Americans with Disabilities Act . . .). This duty to arbitrate shall apply to all claims that the employee believes he/she may have against the Company, its affiliated companies or any of its officers, owners, directors, employees or agents.[146]

With respect to noncontract claims, the section stated:

> [T]he following rules shall apply whenever an employee covered by this Agreement or the Union asserts a common law or statutory claim other than solely a claim that the Company has failed to comply with the terms of this Agreement. . . .
>
> If the dispute has not been resolved pursuant to the procedures outlined in [the Grievance Mediation and Arbitration Procedure], the resolution of this claim shall be resolved exclusively by means of binding arbitration . . . .[147]

The CBA also contained the following antidiscrimination provision:

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141. *Id.*
142. *Id.* at *8.
143. Maldonado v. SecTek, Inc., No. 19-693, 2019 WL 3759451 (E.D. Pa. Aug. 8, 2019).
144. *Id*. at *1
145. *Id.* at *2.
146. *Id.* at *7.
147. *Id.*

> The Company and the Union agree that they shall each comply with all federal, state, and local . . . employment discrimination laws, . . . and will not discriminate against any employee with regard to race, color, religion, age, sex, national origin, or disability in violation of such laws. Such laws shall include, but not be limited to . . . the Americans with Disabilities Act. . . . Any claim that the foregoing provision has been breached, or that the Company has breached any federal, state, or local civil rights law, shall be resolved exclusively pursuant to binding arbitration . . . after exhaustion of the parties' internal dispute resolution procedures. . . .[148]

The court found that the language in these sections clearly waived plaintiff's right to bring his statutory claims in a judicial forum.[149] However, instead of dismissing the claims, the court elected merely to stay the proceeding, finding in part that the CBA did not contain any alternative path for the plaintiff to pursue their claims independently if the union were to decline to arbitrate.[150]

As these examples show, bargaining parties are negotiating about and experimenting with the use of mediation-arbitration systems for the resolution of disputes regarding individuals' statutory rights as they become increasingly aware of the value such systems present for all stakeholders.

IV. How Have Courts Filled *Pyett*'s Gaps?

The *Pyett* Court expressly declined to address several questions, such as whether the contract language was sufficient to meet *Wright*'s "clear and unmistakable" waiver standard or whether the CBA could function as a waiver of employees' substantive rights in the event that the union refuses to pursue arbitration.[151]

Although the opinions expressed on some of these questions so far have generally been those of academics writing in law reviews, lower courts principally have grappled with three questions in *Pyett*'s wake: (A) what language must a CBA use to clearly and unmistakably waive the judicial forum?; (B) if an employee already lost in arbitration, can she nevertheless take another "bite at the apple" in another forum?; and (C) what happens when the union does not take the discrimination grievance to arbitration?

A. What Language Must a CBA Use to Clearly and Unmistakably Waive the Judicial Forum?

Many courts have addressed the gateway issue of what language a CBA must use to render employees' statutory discrimination claims a subject of binding arbitration. Although some have taken a fairly

148. *Id.* at *7–8.
149. *Id.* at *8.
150. *Id.*
151. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 273 (2009).

narrow view of *Wright*'s "clear and unmistakable" standard, thereby limiting the application of *Pyett*'s arbitration-friendly holding, more recent opinions approve CBA language broadening *Pyett*'s application.

In a recent opinion, *Darrington v. Milton Hershey School*, the Third Circuit surveyed many of its sister circuits' approaches to identifying clear and unmistakable waivers of the right to bring statutory discrimination claims in federal court.[152] The *Darrington* Court explained that the First Circuit, taking a strict interpretation of *Wright*'s standard, "finds a clear and unmistakable waiver when a [CBA] 'explicitly mentions employee rights under [the relevant statute] or any other federal anti-discrimination statute[.]'"[153] Similarly, the Sixth and Seventh Circuits also endorse this approach.[154] In *St. Aubin v. Unilever HPC NA*, a district court in the Seventh Circuit held that where a CBA's language falls short of *Wright*'s standard, an employee may be entitled to bring his Family and Medical Leave Act (FMLA) claim in federal court even after having lost that claim in an earlier arbitration, at least absent any argument that the employee had voluntarily submitted his FMLA claim to that earlier arbitration—a *Gardner-Denver*-like result.[155]

Although omitted from the Third Circuit's survey in *Darrington*, the Ninth Circuit's only post-*Pyett* opinion on this topic (albeit unreported) similarly held that a CBA must explicitly refer to the claims that are supposed to be arbitrable, which requires something more than mere historical practice, evidence of the parties' unexpressed intent, or comprehensive language stating that "all grievances or questions" in dispute are subject to arbitration.[156] Another unreported decision from a district court in the Ninth Circuit further explains that this explicit-reference requirement cannot be satisfied merely by the fact that the CBA uses language that "mirrors" or "parallels" that of some implicitly referenced antidiscrimination statute.[157]

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152. Darrington v. Milton Hershey Sch., 958 F.3d 188, 194 (3d Cir. 2020).

153. *Id.* (quoting Quint v. A.E. Staley Mfg. Co., 172 F.3d 1, 9 (1st Cir. 1999), and citing Cavallaro v. UMass Mem'l Healthcare, Inc., 678 F.3d 1, 7 n.7 (1st Cir. 2012) (asserting that the "clear and unmistakable" standard required "something closer to specific enumeration of the statutory claims to be arbitrated")).

154. *Id.* at 194 n.6 (citing Bratten v. SSI Servs., Inc., 185 F.3d 625, 631 (6th Cir. 1999) (asserting that "a statute must specifically be mentioned in a CBA for it to even approach" the "clear and unmistakable" standard); Vega v. New Forest Home Cemetery, LLC, 856 F.3d 1130, 1135 (7th Cir. 2017) (holding that a CBA did not clearly and unmistakably waive a judicial forum for rights under the FLSA when neither the arbitration provision nor the CBA more generally expressly mentioned the FLSA)).

155. St. Aubin, No. 09 C 1874, 2009 WL 1871679, at *2-4 (N.D. Ill. June 26, 2009).

156. Wawock v. CSI Elec. Contractors, Inc., 649 F. App'x 556, 558–59 (9th Cir. 2016) (citing Ibarra v. United Parcel Serv., 695 F.3d 354, 356–60 (5th Cir. 2012) (asserting that a CBA must at least "identify the specific statutes the agreement purports to incorporate or include an arbitration clause that explicitly refers to statutory claims" to provide a clear and unmistakable waiver)).

157. Martinez v. J. Fletcher Creamer & Son, Inc., No. CV 10-0968 PSG (FMOx), 2010 WL 3359372, at *4 (C.D. Cal. Aug. 13, 2010).

By contrast, other circuits take a more liberal view of the "clear and unmistakable" standard. The Fourth Circuit, for example,

> finds a clear and unmistakable waiver when (1) an arbitration provision requires employees "to submit to arbitration all federal causes of action arising out of their employment," or (2) a general arbitration clause "referring to 'all disputes' is accompanied by "an 'explicit incorporation of statutory antidiscrimination requirements' elsewhere in the contract."[158]

Similarly, the Second, Fifth, and Eighth Circuits also embrace this approach.[159]

Explaining its own position on the matter, however, the Third Circuit stated:

> In our view, *Wright* requires nothing more than it says. The clear-and-unmistakable-waiver standard is satisfied if a [CBA], interpreted according to applicable contract-interpretation principles, clearly and unmistakably waives a judicial forum for statutory claims. An arbitration provision's waiver of a judicial forum for statutory claims must merely be "particularly clear" and "explicitly stated."[160]

Applying this view to the facts before it, the Third Circuit held that the CBA in *Darrington* satisfied *Wright*'s "clear and unmistakable" standard with broad and nonspecific language stating that the union and employees waived "*any* right to institute or maintain *any* private lawsuit alleging employment discrimination in *any* state or federal court."[161]

Supporting a more generous approach to defining "clear and unmistakable" is the September 2019 decision of the National Labor Relations Board (NLRB) in *MV Transportation, Inc*.[162] There, the NLRB rejected the "clear and unmistakable" standard altogether, at least as it relates to employers' authority to make unilateral changes to the terms and conditions of employment, replacing it with a "contract

158. *Darrington*, 958 F.3d at 194 (quoting Carson v. Giant Food, Inc., 175 F.3d 325, 331, 332 (4th Cir. 1999) (quoting Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 80 (1998)) and citing Aleman v. Chugach Support Servs., Inc., 485 F.3d 206, 216 (4th Cir. 2007)).

159. *Id.* at 194 n.7 (citing Lawrence v. Sol G. Atlas Realty Co., 841 F.3d 81, 84 (2d Cir. 2016); Abdullayeva v. Attending Homecare Servs. LLC, 928 F.3d 218, 223–24 (2d Cir. 2019) (finding a clear and unmistakable waiver when the CBA required arbitration of claims under specifically listed statutes); Ibarra v. United Parcel Servs., 695 F.3d 354, 360 (5th Cir. 2012); Thompson v. Air Transp. Int'l Ltd. Liab. Co., 664 F.3d 723, 726 (8th Cir. 2011) (holding arbitration clause regarding employment discrimination "alleged to be violations of state or federal law" clearly and unmistakably waived right to bring claims under FMLA and Arkansas Civil Rights Act, even though CBA did not mention specific statutes or civil rights)).

160. *Id.* at 194 (quoting Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 79–80 (1998) (citation omitted)).

161. *Id.* at 195 (emphasis in original).

162. MV Transp., Inc., 368 N.L.R.B. No. 66 (Sept. 10, 2019).

coverage" standard requiring employers to demonstrate only that such unilateral changes fell within the scope of their management rights under contract.[163] The longevity of that standard—announced by the NLRB's Republican majority over Member (now Chair) Lauren McFerran's lengthy dissent—is questionable, however, hence likely limiting its relevance to the *Pyett* CBA analysis.[164]

B. If an Employee Already Lost at Arbitration, Can She Nevertheless Take Another "Bite at the Apple" in Another Forum?

One of the first post-*Pyett* cases to address the effect of a CBA's arbitration clause on the right of an employee to bring a statutory discrimination claim in federal court was *Mathews v. Denver Newspaper Agency*.[165] John Mathews alleged that his employer violated Title VII by demoting him for discriminatory reasons.[166] After an arbitral panel found no violation of Title VII and dismissed the claim, the employee brought an action in the District of Colorado.[167] The district court granted the employer's motion for summary judgment on the basis of claim preclusion, explaining that although the CBA would have permitted the employee to file his claim directly in a judicial forum, the employee waived that right by voluntarily submitting the claim to arbitration in accordance with the CBA's optional arbitration provision, which, under *Pyett*, enabled the employee to vindicate his substantive Title VII rights via the CBA's grievance and arbitration processes.[168] Accordingly, although the district court denied the employee's attempt to take a second "bite at the apple," this did not constitute an impermissible waiver of his substantive Title VII rights because he already exhausted his procedural right to seek enforcement of those substantive rights

163. *Id.*; *see also* Elec. Workers IBEW, Loc. 43 v. NLRB, No. 20-1163-ag, 2021 BL 303984 (2d Cir. Aug. 12, 2021) (affirming the contract coverage standard).

164. President Joseph R. Biden recently flipped the Board's majority to Democrats. Given that the NLRB, a political agency, is well known for modifying labor policy according to political partisanship, there is a good chance the newly constituted Board may do away with the contract coverage standard. *See* Mark J. Foley, Daniel Dorson & Ryan J. Funk, *Not Just "Clear and Unmistakable": NLRB and Courts Embrace Contract Coverage Waiver Standard,* FAEGRE DRINKER (May 28, 2020), https://www.faegredrinker.com/en/insights/publications/2020/5/not-just-clear-and-unmistakable-nlrb-and-courts-embrace-contract-coverage-waiver-standard ("With . . . vacan[cies] . . . and a presidential election . . . , the NLRB's composition may change significantly in the coming years. The uncertainty makes it difficult for employers to predict how long the contract coverage standard will remain effective."). Additionally, the NLRB's new General Counsel identified the contract coverage standard in a recent memorandum as one of several matters that she hopes to revise. *See* NLRB GC MEMORANDUM 21-04, at 5 (2021).

165. Stuart M. Boyarsky, *Not What They Bargained for: Directing the Arbitration of Statutory Antidiscrimination Rights*, 18 HARV. NEGOT. L. REV. 221, 254–71 (2013) (citing Mathews v. Denver Newspaper Agency LLP, No. 07-CV-02097-WDM-KLM, 2009 WL 1231776, at *5 (D. Colo. May 4, 2009), *aff'd in relevant part*, *rev'd in part on different grounds*, 649 F.3d 1199 (10th Cir. 2011)).

166. *Mathews*, 2009 WL 1231776, at *1.

167. *Id.*

168. *Id.* at *5–6.

during his earlier arbitration. By contrast, as noted earlier, the court in *St. Aubin* held that, where a CBA lacks any clear and unmistakable waiver of an employee's right to a judicial forum, the employee can bring his FMLA claim in federal court even if that employee already lost that claim in an earlier arbitration.[169]

Where, unlike in *Mathews*, an earlier arbitration did not include the employee's statutory discrimination claim, the District Court for the Southern District of New York in *Pontier v. U.H.O. Management Corp.* dismissed the employee's discrimination claim while nevertheless permitting the employee to seek vindication of that claim pursuant to the terms of the CBA and the *Pyett* Protocol via a second arbitration, deferring the question of claim preclusion for consideration in that second arbitration.[170] Moreover, in *Borrero*, a factually similar case prior to the development of the *Pyett* Protocol—and so in a context contractually akin to those where no such protocol exists—the district court reached the same result as did *Pontier* before explaining, in dicta, that the employee would have the option to return to federal court with his discrimination claims if the union thwarted his attempts to vindicate his Title VII rights via arbitration.[171]

These cases suggest that lower courts interpreting *Pyett* require a fair arbitral or other adequate forum to be available for a worker to have an opportunity to "effectively vindicate" her rights—otherwise the judicial forum will be open.

C. What Happens when the Union Does Not Take the Discrimination Grievance to Arbitration?

Perhaps the most vexing issue with which lower courts struggle post-*Pyett* is union control over access to the CBA's grievance and arbitration machinery. Where a CBA gives the union exclusive control over whether to pursue enforcement of an employee's statutory discrimination claims but the union declines to do so, must courts enforce the CBA's arbitration clause? Would that refusal deny the employee the possibility of "effectively vindicating" her antidiscrimination rights?

Justice Thomas's *Pyett* majority opinion explained in dicta, based on *Pyett*'s facts, that "although a substantive waiver of federally protected civil rights will not be upheld, we are not positioned to resolve in the first instance whether the CBA allows the Union to prevent respondents from 'effectively vindicating' their 'federal statutory rights in the arbitral forum.'"[172] Elsewhere, however, in another *dictum*, Thomas

169. St. Aubin, No. 09 C 1874, 2009 WL 1871679, at *2–4 (N.D. Ill. June 26, 2009).

170. Pontier v. U.H.O. Mgmt. Corp., No. 10 CIV. 8828 (RMB), 2011 WL 1346801, at *3-4 (S.D.N.Y. Apr. 1, 2011).

171. Borrero v. Ruppert Hous. Co., Inc., No. 08 CV 5869(HB), 2009 WL 1748060, at *2 (S.D.N.Y. June 19, 2009).

172. 14 Penn Plaza v. Pyett, 556 U.S. 247, 273–74 (2009) (citations omitted).

explained that other remedies are available and suggested that they might suffice for "effective vindication" where the union declines to arbitrate a worker's discrimination claim:

> [A] union is subject to liability under the ADEA if the union itself discriminates against its members on the basis of age. Union members may also file age-discrimination claims with the [Equal Employment Opportunity Commission (EEOC)] and the [NLRB], which may then seek judicial intervention under this Court's precedent. In sum, Congress has provided remedies for the situation where a labor union is less than vigorous in defense of its members' claims of discrimination under the ADEA.[173]

Notwithstanding Justice Thomas's suggestion, the *Pyett* majority left open the question whether the union not taking the claim to arbitration denies "effective vindication."[174] Subsequent courts that have addressed this issue head-on take diverse approaches. In a recent decision from the Eastern District of New York, the judge decided the reserved question, finding that the plaintiff employee was still bound and had the right to go to arbitration on his own under the protocol.[175] By contrast, in *de Souza Silva v. Pioneer Janitorial Services, Inc.*, for example, the District Court of the District of Massachusetts concluded that where a CBA entrusts a union with sole discretion as to whether and how to pursue enforcement of an employee's statutory discrimination claims but the union refuses to take action, the employee would have no way to effectively vindicate her discrimination claim.[176] In such cases, the court held, the CBA's waiver of the employee's right to bring that claim in a judicial forum is unenforceable, and the employee can bring her claims in federal court.[177] This holding resembles the District Court of the Southern District of New York's handling of this situation when, before the advent of the *Pyett* Protocol, 32BJ refused to bring its members' statutory discrimination claims against members of the RAB.[178]

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173. *Id.* at 272 (citing 29 U.S.C. § 623(d); EEOC v. Waffle House, Inc., 534 U.S. 279, 295–96 (2002)) (other citations omitted).

174. *See infra* notes 211–12 and accompanying text, regarding the effective vindication standard and how the Supreme Court has altered that standard.

175. *See* Nelson v. Park City 3&4 Apartment, Inc., 1:16-cv-03533-ERK-RLM, at 11–12 (E.D.N.Y. Nov. 15, 2021) (on file with SLU Law).

176. de Souza Silva v. Pioneer Janitorial Servs., Inc., 777 F. Supp. 2d 198, 206–07 (D. Mass. 2011).

177. *Id.*

178. *See, e.g.*, Morris v. Temco Serv. Indus., Inc., No. 09 Civ. 6194 (WHP), 2010 WL 3291810, at *5–6 (S.D.N.Y. Aug. 12, 2010); Kravar v. Triangle Servs., No. 1:06-cv-07858-RJH, 2009 WL 1392595, at *3 (S.D.N.Y. May 19, 2009); *see also* Borrero v. Ruppert Hous. Co., Inc., No. 08 CV 5869(HB), 2009 WL 1748060, at *2 (S.D.N.Y. June 19, 2009) ("Should Borrero's attempts to arbitrate his claims be thwarted by the Union, the CBA will have operated as a 'substantive waiver' of his statutorily created rights and he will have the right to re-file his claims in federal court." (citing *Kravar*, 2009 WL 1392595, at *3)).

The District Court of the Eastern District of Pennsylvania took a more draconian approach in *Drake v. Hyundai Rotem USA, Corp.*[179] There the court held that the CBA's arbitration clause was unenforceable *per se* as to the employee's statutory discrimination claims—regardless of any evidence that the union would refuse to pursue the employee's claims—simply because the CBA gave the union exclusive control over whether to seek enforcement of those claims.[180] The court reasoned that because the CBA's exclusive control provision took the decision to seek vindication out of the employee's hands, that provision constitutes an impermissible "prospective waiver" of the employee's substantive antidiscrimination rights no matter what actions the union does or does not actually take.[181]

Several district courts in Ohio have taken the opposite view in an analogous context, where a state age discrimination statute's arbitration-exhaustion provision[182] denied employees the ability to arbitrate their claims because their CBAs gave their unions exclusive control over whether to pursue arbitration but their unions declined to do so.[183] The courts in those cases enforced the CBAs' forum-waiver clauses based on a finding that the employees could effectively vindicate their substantive rights by means other than arbitration.[184] These courts held that so long as the CBA articulates some procedure for arbitration of employees' statutory discrimination claims, the fact that the union prevents an employee from making use of that procedure and thereby renders arbitration unavailable does not change the legal status of the employee as having a *de jure* opportunity to arbitrate her claim.[185] Even under this analysis, analogous to Justice Thomas's dicta, employees are not without a forum through which to vindicate

179. Drake v. Hyundai Rotem USA, Corp., No. CIV.A. 13-0868, 2013 WL 4551228 (E.D. Pa. Aug. 28, 2013).

180. *Id.* at *5.

181. *Id.* ("Defendants counter by noting that in both *De Souza* and *Morris*, the union expressly declined to pursue the plaintiff's respective claims, whereas here there is no indication that Ms. Drake or any Class Plaintiff pursued arbitration but was denied by the Union. We find this argument unconvincing. As noted above, the Union could decide for reasons completely unrelated to the merits of Plaintiffs' claims to deny the opportunity for arbitration. To argue that an arbitration clause is not a prospective waiver of substantive statutory rights when it has not yet been enforced by the Union is to misunderstand the word 'prospective'—the provision is unconstitutional because an employee is forced to waive the right to a federal forum *before* knowing whether the claim will even be heard in the first place." (emphasis in original)).

182. Ohio Rev. Code Ann. § 4112.14(C) (LexisNexis 2020).

183. *See, e.g.*, DeShetler v. FCA US LLC, No. 3:18 CV 78, 2018 WL 6257377, at *12 (N.D. Ohio Nov. 30, 2018), *aff'd*, 790 F. App'x 664 (6th Cir. 2019); Hopkins v. City of Columbus, No. 2:12-CV-336, 2014 WL 1121479, at *5 (S.D. Ohio Mar. 20, 2014); Dobrski v. Ford Motor Co., 698 F. Supp. 2d 966, 984–85 (N.D. Ohio 2010); Cramton v. Siemens Energy & Automation, Inc., No. C-1-08-579, 2009 WL 2524689, at *4 (S.D. Ohio Aug. 17, 2009).

184. *See supra* note 183 and accompanying text.

185. *See supra* note 183 and accompanying text.

their statutory rights: They can bring hybrid claims in federal court against their employers for violation of their statutory antidiscrimination rights and against their unions for breach of the duty of fair representation.[186]

V. *Pyett* Benefits All Labor-Management Stakeholders

The passage of time has demonstrated that the resolution of statutory claims through a CBA grievance-arbitration process derived from *Pyett* benefits all labor-management stakeholders. As one commentator explains, stakeholders "should embrace the *Pyett* decision and push it to its interpretive extremes. If this is done, unions, their members, and employers can all benefit, and a new revolution in unionism and labor arbitration can occur."[187]

Perhaps the most obvious beneficiary of *Pyett* is the judicial system itself. Trial courts—both federal and local—are consistently flooded with employment discrimination claims.[188] *Pyett* gives those courts some relief as a portion of those claims are diverted to arbitral and other processes. This practical upshot for courts, however, is accompanied by a jurisprudential one as well: through *Pyett*, the Supreme Court managed to harmonize Congress's FAA, NLRA, and antidiscrimination statutory schemes and reconcile the purposes of each.[189] Courts should continue to embrace this policy result.

Pyett also benefits the parties to CBAs—the employer and the union—by requiring enforcement of their CBAs' arbitration clauses, thereby dignifying their freedom of contract and enabling them to reap the benefits of arbitration's efficiencies. Additionally, *Pyett* promises employers a predictable litigation framework, minimizing the risk of defending against the same claim more than once in different fora. With respect to unions, *Pyett* reaffirms their important role as the exclusive representative of employees in the negotiation and administration of CBAs. Especially as an increasingly diverse workforce has potential civil rights claims, unions can provide an attractive dispute resolution benefit and take the lead in advancing such claims in a fair and efficient CBA forum.[190]

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186. *See supra* note 183 and accompanying text; *see also Dobrski*, 698 F. Supp. 2d at 990 ("To prove a hybrid § 301 claim, an employee must demonstrate that: (1) the employer breached the CBA; and (2) the union breached its duty of fair representation. These two claims are 'inextricably interdependent.'" (quoting Garrison v. Cassens Transp. Co., 334 F.3d 528, 538 (6th Cir. 2003) (citing DelCostello v. Teamsters, 462 U.S. 151, 164 (1983)))).

187. Plass, *supra* note 16, at 222–23.

188. *See supra* note 55 and accompanying text.

189. *See supra* notes 5–16 and accompanying text.

190. Plass, *supra* note 16, at 255 (describing one of *Pyett*'s two "key" benefits as the fact that "it can help unions who are struggling to prove their continuing importance in the workplace"). In addition to these observations, some have argued that *Pyett* did more for unions than simply reaffirm their authority under the NLRA, but actually enhanced union authority so as to offset societal factors that have for decades been eroding the

Although some argue that *Pyett* undercuts employees' antidiscrimination rights and suppresses potential claims based on violations of those rights,[191] others contend that the arbitration of statutory discrimination claims is not only a byproduct of a broader collective bargaining system that empowers workers but also a feature that itself improves workers' situations in manifold ways.[192] Both the attorney for the appellant in *Pyett* (one of this article's authors, who was also counsel for the RAB) and the attorney for the counter-poised union (32BJ) presented together at the 2013 Annual Meeting of the National Academy of Arbitrators arguing that *Pyett* and their subsequently developed Protocol promotes a fair system that affords low-wage workers an accessible forum for the resolution of discrimination claims that those workers might not otherwise have had a realistic chance to pursue.[193] Similarly, at an earlier meeting of the National Academy of Arbitrators in 2010, Academy President Michel Picher suggested that *Pyett* may enhance employee access to justice.[194]

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ability of unions to fulfill the role envisioned for them under the NLRA. *See, e.g.*, *id.* at 224 ("The article concludes that the *Pyett* principles' success will require a reformulation of the union's role in the workplace but that the survival of unions depends on such changes. Structural changes in the economy and global wage competition have made traditional contract-based unionism bankrupt; unions must evolve and provide legal services in order to remain important to workers." (footnote and citation omitted)).

191. Martin H. Malin & Jon M. Werner, 14 Penn Plaza LLC v. Pyett*: Oppression or Opportunity for U.S. Workers; Learning from Canada*, 2017 U. CHI. LEGAL F. 347, 349 ("The Court's employment arbitration jurisprudence has been roundly criticized as advantaging employers by stripping employees of their rights to sue over discrimination and other statutory claims. Not surprisingly, many scholars reacted to *Pyett* with similar criticism." (citing Kenneth M. Casebeer, *Supreme Court without a Clue:* 14 Penn Plaza LLC v. Pyett *and the System of Collective Action and Collective Bargaining Established by the National Labor Relations Act*, 65 U. MIAMI L. REV. 1063 (2011); Melissa Hart, *Procedural Extremism: The Supreme Court's 2008-2009 Labor and Employment Cases*, 13 EMP. RTS. & EMP. POL'Y J. 253 (2009); Alan Hyde, *Labor Arbitration of Discrimination Claims After* 14 Penn Plaza v. Pyett*: Letting Discrimination Defendants Decide Whether Plaintiffs May Sue Them*, 25 OHIO ST. J. DISP. RESOL. 975 (2010); Margaret L. Moses, *The Pretext of Textualism: Disregarding Stare Decisis in* 14 Penn Plaza v. Pyett, 14 LEWIS & CLARK L. REV. 825 (2010); Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71 (2014); David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239 (2012); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U.L. REV. 1017 (1996)).

192. *See* Plass, *supra* note 16, at 223–24 ("*Pyett*'s expansion of labor arbitration rules to include statutory claims need not produce doomsday results for discrimination victims. In fact, the decision has the potential to do the opposite. . . . [N]ational antidiscrimination policy may be advanced by arbitral resolution of discrimination disputes.").

193. *See* Malin & Werner, *supra* note 191, at 350 & n.18 (citing Meginniss & Salvatore, *supra* note 104). Academics have expressed a similar view. *See, e.g.*, Plass, *supra* note 16, at 255 (describing one of *Pyett*'s two "key" benefits as the fact that it can "help workers who want a remedy for their discrimination claims but face long odds in court").

194. *See* Malin & Werner, *supra* note 191, at 351 & n.20 (citing Michel G. Picher, *Presidential Address: Access to Justice: The Silver Lining in* Pyett, 62 ANN. MTG. NAT'L ACAD. ARBITRATORS 1 (2010)).

To test this prediction, Picher encouraged United States labor law scholars to look to the longer-established Canadian procedure of *Pyett*-style arbitration of statutory discrimination claims under CBAs.[195] After undertaking a quantitative analysis of Ontario's experience with a *Pyett*-like legal framework in response to Picher, Professors Martin H. Malin and Jon M. Werner concluded that the empirical evidence available generally confirms this view that post-*Pyett* arbitration systems provide a "fast, inexpensive[,] . . . [and] accessible forum for low-wage workers whose claims might otherwise never be brought because of their low dollar value."[196]

This reality that the arbitral forum is not so bad for employment discrimination plaintiffs should be viewed alongside another: that these plaintiffs have very limited success even in the forum commonly thought to be their gold standard—the jury trial. For one thing, the percentage of employment discrimination claims filed in court that actually make it to trial is extremely small.[197] About fifteen percent of those that do not make it to trial are resolved on a pretrial motion, ninety-eight percent of which favor the employer.[198] Of those that settle before trial, only about a third do so before the costly process of discovery—a little over half the frequency by which this occurs for other civil cases.[199] Additionally, substantial literature documents employment discrimination plaintiffs' miserable odds at trial,[200] a reality that some claim is attributable in part to the unconscious biases that inform jurors' and judges' decisions regarding employment discrimination

195. *See* Michel G. Picher, *Presidential Address: Access to Justice: The Silver Lining in* Pyett, 62 ANN. MTG. NAT'L ACAD. ARBS. 1 (2010).

196. Malin & Werner, *supra* note 191, at 376–77 & n.53 (citing Meginniss & Salvatore, *supra* note 104); *see also id.* at 351 ("Michel Picher called on his colleagues south of the border to look to the Canadian experience and suggested that *Pyett* may increase employee access to justice. . . . This Article takes up Mr. Picher's invitation.").

197. Clermont & Schwab, *supra* note 51, at 438–39 (observing that only about 3.7% of employment discrimination cases filed between 1979 and 2001 made it to trial).

198. Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 559–60 (2001).

199. Clermont & Schwab, *supra* note 51, at 440 ("[F]ar fewer employment discrimination cases end early in the litigation process (37 percent, compared to other cases at 59 percent).").

200. *See, e.g.*, generally Clermont & Schwab, *supra* note 51; Selmi, *supra* note 198, at 561; Sean Captain, *Workers Win Only 1% Of Federal Civil Rights Lawsuits At Trial*, FAST COMPANY (July 31, 2017), https://www.fastcompany.com/40440310/employees-win-very-few-civil-rights-lawsuits [https://perma.cc/2G27-QEZD] ("[A]ccording to a new analysis of employment cases by legal research service Lex Machina, very few employees who file federal job discrimination, harassment, and retaliation claims even make it to court, and only 1% of those claims eventually succeed in court. A majority of cases are settled, employers prevailed on summary judgment roughly 13 percent of the time, and only 192 damage awards out of 72,000 cases included punitive damages.").

claims.[201] Furthermore, employees' chances in judicial fora grow even worse in the likely event that the matter is appealed.[202]

Thus, what was once just an apparently controversial but practical prediction now enjoys some quantitative empirical support: *Pyett* not only benefits employers, unions, and the judiciary, but also renders antidiscrimination justice more accessible to low-wage and diverse workers who need such protections.

Employees' increased access to justice takes various forms. For instance, employees benefit from union representation in the negotiation of the terms and conditions of the CBA—including the terms of a fair and just arbitration clause.[203] Relatedly, that the employee's contract was collectively rather than individually bargained also could benefit the employee insofar as there generally are no class action waivers in arbitration under CBAs—indeed, many CBAs permit unions to assert class claims in arbitration.[204]

Additionally, employees proceeding with their claims under a CBA's grievance and arbitration procedure may enjoy union support, in which case they benefit from the presence of the union as a repeat player familiar to the arbitral body.[205] Unionized employees in such a situation also need not find legal representation or pay forum costs or the arbitrator's fee.[206] None of these benefits would ordinarily be available

201. Selmi, *supra* note 198, at 561 ("The primary reason discrimination cases are so hard to prove has to do with the bias courts bring to their analyses.").

202. Clermont & Schwab, *supra* note 51, at 449–50 ("In employment discrimination cases, the clear fact is that the defendants' reversal rate far exceeds the plaintiffs' reversal rate. That is, the appellate courts reverse plaintiffs' wins below far more often than defendants' wins. As shown in [graphs appearing in the cited source], this differential prevails for appeals from wins at the pretrial stage (54 percent to 11 percent), and it becomes somewhat more pronounced for appeals from wins at the trial stage (42 percent to 8 percent). These differences are highly statistically significant." (footnote omitted)).

203. Plass, *supra* note 16, at 253–54 ("Unions are well-equipped to represent their members with antidiscrimination claims. For example, unionized employees have an experienced bargainer to negotiate their forum waiver provision. Having a union representative working in this capacity protects against employer overreaching that has been observed in the at-will context. Unions can ensure that employees' substantive rights are not diluted or eliminated in the forum waiver agreement. They can also ensure that procedural tricks are not used to tip the scales in favor of the employer. Such policing by the union will guarantee that the process for filing claims is fair, that substantive protections remain intact, and that the decision-maker is impartial." (footnotes and citations omitted)).

204. Malin & Werner, *supra* note 191, at 350 & n.19 (citing Fed. Bureau of Prisons, 135 Lab. Arb. Rep. (BNA) 1215 (2015) (Heekin, Arb.)).

205. Sarah Rudolph Cole, *Let the Grand Experiment Begin:* Pyett *Authorizes Arbitration of Unionized Employees' Statutory Discrimination Claims*, 14 Lewis & Clark L. Rev. 861, 862–63 (2010); Malin & Werner, *supra* note 191, at 349–50; *see also* Plass, *supra* note 16, at 254.

206. Cole, *supra* note 205, at 862–63; Malin & Werner, *supra* note 191, at 350 ("Employees covered by CBAs need not worry about securing representation because they have their union to represent them. Employees covered by CBAs also incur no forum costs and are not responsible for any portion of the arbitrators' fee. . . . In employer-imposed arbitration systems, the employer is the only repeat player, whereas in CBA-established

to those employees if they were litigating in court or under arbitration clauses in non-collectively bargained employment contracts.[207]

Significantly, union support for employees' statutory discrimination claims is valuable to employees notwithstanding the fact that antidiscrimination statutes typically include fee-shifting provisions. Many union members are lower wage workers—meaning their recovery, in terms of backpay, may be modest. Although fee-shifting provisions no doubt help these employees find counsel to bring discrimination claims absent union support, where the union is most likely to decline an employee's claim—where that claim is unlikely to be successful—a fee-shifting provision also is least likely to persuade independent counsel to take the case.[208] Thus, having union representation in litigation is a significant benefit for aggrieved employees. Still, as discussed, there are other mechanisms—such as grievance procedures, mediation, or individual arbitration—that the employee may be able to pursue under the CBA even without union support in arbitration.

Furthermore, where the relevant CBA and/or applicable law enables employees to arbitrate their claims against the employer on their own without union support, these employees enjoy the benefits of an arbitral forum and its efficiencies,[209] even when it requires shouldering the burden of arbitration costs on their own. Where the employee faces the prospect of having to bear those costs, and the union's refusal to pursue the employee's claim was not justified, the

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arbitration systems both the employer and the union are repeat players."); *see also* Plass, *supra* note 16, at 254 ("With respect to the 'repeat player' problem, unions can provide continuity in monitoring whether arbitrators are biased in favor of employers who fund the forum by arbitrating multiple cases." (footnote and citation omitted))

207. Malin & Werner, *supra* note 191, at 350 ("The CBA itself is the product of active negotiation between two relatively sophisticated parties, as opposed to the arbitration system imposed on a take-it-or-leave-it basis by an employer on employees who lack bargaining power to resist.").

208. *Cf. id.* at 376–77 (noting that "low-wage workers['] . . . claims are frequently not of sufficient value to attract legal representation" absent union support); Plass, *supra* note 16, at 242–43, 249–50 & n.182, 254 ("[W]hile private or pro se advocacy is the employee's legal right, sanctions remain a real concern if the case is not prosecuted properly. The prospect of sanctions will therefore affect the union's, the employee's, or the private counsel's decision whether to undertake advocacy. . . . Cost concerns can be offset by the fact that a prevailing employee is entitled to attorney's fees and costs. This means that union attorneys should get fees in cases they successfully prosecute. The fee rules also expose unions to a fee penalty for bringing frivolous cases. This coerces unions to carefully evaluate cases and drop those that lack merit. In effect, unions can drop meritless or weak claims with little risk of being sued, and they can also prosecute meritorious claims without worrying about the expense of investigation and advocacy. . . . [Absent representation by a union], [b]ecause of the EEOC's limited resources, most complaining employees will not get representation from this agency to pursue meritorious claims. Private attorneys are also not readily available because the prospects for success in antidiscrimination cases are very low. High burdens of proof combined with increasing judicial hostility to discrimination claims deter lawyers from taking discrimination cases." (citing 42 U.S.C. § 2000e-5(k))).

209. Cole, *supra* note 205, at 862–63; Malin & Werner, *supra* note 191, at 350.

employee may have the opportunity to recoup such costs by means of a claim against the union for discrimination and/or breach of the duty of fair representation.[210]

Similarly, if under the CBA and/or applicable law the union's refusal to participate in arbitration legally precludes the employee from pursuing arbitration because the employee has no right to arbitrate its claims against the employer without union support, the employee still has available several avenues by which to vindicate her rights. Other features of the CBA system can provide a forum for resolution or adjudication of workers' statutory claims. Ideally a CBA would provide something like the *Pyett* Protocol, but reasonable alternatives include other systems involving adequate grievance procedures, mediation, or an individual right to arbitrate. Indeed, as Justice Thomas intimated in *Pyett* dicta, the effective vindication standard might be satisfied even if the unionized employee's options were to file a discrimination claim against the union or employer with the EEOC or state or local antidiscrimination agencies, or to file claims for discrimination or breach of the duty of fair representation against the union either in federal court or with the NLRB.[211]

While even the mere availability of, without real access to, a CBA arbitration forum may satisfy the legally sufficient minimum

210. Plass, *supra* note 16, at 243 ("If the union does not believe that the employee's claim has merit and drops it, the forum waiver agreement will permit the employee to proceed pro se or with private counsel, and a claim for the breach of the duty of fair representation is available if the union's decision was not made in good faith. This formulation allows unions to waive their member's judicial forum and deliver bias-free representation without significant additional costs.").

211. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 271–72 (2009) ("In any event, Congress has accounted for [any] conflict of interest [between union and employee] in several ways. As indicated above, the NLRA has been interpreted to impose a 'duty of fair representation' on labor unions, which a union breaches 'when its conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith.' This duty extends to 'challenges leveled not only at a union's contract administration and enforcement efforts but at its negotiation activities as well.' Thus, a union is subject to liability under the NLRA if it illegally discriminates against older workers in either the formation or governance of the collective-bargaining agreement, such as by deciding not to pursue a grievance on behalf of one of its members for discriminatory reasons. . . . In addition, a union is subject to liability under the ADEA if the union itself discriminates against its members on the basis of age. Union members may also file age-discrimination claims with the EEOC and the National Labor Relations Board, which may then seek judicial intervention under this Court's precedent. In sum, Congress has provided remedies for the situation where a labor union is less than vigorous in defense of its members' claims of discrimination under the ADEA." (citations and paragraph break omitted)); *see also* Plass, *supra* note 16, at 222 ("[T]he *Pyett* Court assured us that . . . employees will lose no substantive right in the arbitral forum; that Congress placed several checks in the [NLRA] and antidiscrimination law on unions sacrificing individual rights to promote group interests; and that the duty of fair representation will ensure union accountability for processing statutory claims. . . . [W]orkers therefore need not feel threatened by the prospect of union control of their antidiscrimination rights." (footnotes and citations omitted)).

for purposes of the effective vindication standard,[212] it is better policy to afford unionized employees cost-free access to arbitration, with or without the union—or, still better, to afford them frameworks like the *Pyett* Protocol where the CBA prescribes "muscular mediation" and then, only if necessary, arbitration of discrimination disputes with or without union participation. Such frameworks for mediation and

212. *See supra* note 173 and accompanying text. For more than thirty-five years, the Supreme Court has maintained that arbitration can be an effective means for vindicating statutory rights. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 235 (2013) ("The 'effective vindication' exception to which respondents allude originated as dictum in *Mitsubishi Motors*, where we expressed a willingness to invalidate, on 'public policy' grounds, arbitration agreements that 'operat[e] . . . as a prospective waiver of a party's *right to pursue* statutory remedies.' Dismissing concerns that the arbitral forum was inadequate, we said that 'so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.'" (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 & n.9 (1985))). As *Gilmer* explained, *Gardner-Denver* must not be read to suggest that arbitration is somehow less effective for that purpose with respect to the vindication of statutory rights against employment discrimination. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991). In the years since *Gilmer*, moreover, the ways to effectuate effective vindication were consistently broadened. *Cf.* Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 131–32 ("Times have changed. Judges in the 19th century disfavored private arbitration. The 1925 Act was intended to overcome that attitude, but a number of this Court's cases decided in the last several decades have pushed the pendulum far beyond a neutral attitude and endorsed a policy that strongly favors private arbitration." (Stevens, J., dissenting) (citing *Gilmer*, 500 U.S. 20) (other citations omitted)). Indeed, as the Supreme Court emphasized as recently as 2018, every time that the Court has been asked whether some particular arbitration process was sufficient to justify dismissing a claim from federal court, it has confirmed that dismissal was appropriate because the rights under that claim could be effectively vindicated through arbitration. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1627–28 (2018) ("What all these textual and contextual clues indicate, our precedents confirm. In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes. In fact, this Court has rejected *every* such effort to date (save one temporary exception since overruled)." (citing *Italian Colors*, 570 U.S. 228; CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012); *Gilmer*, 500 U.S. 20; Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987))); *see also* Judith Resnik, *Revising Our "Common Intellectual Heritage": Federal and State Courts in Our Federal System*, 91 NOTRE DAME L. REV. 1831, 1881 (2016) [hereinafter Resnik I] ("'Effective vindication' became the mantra thereafter, but the Court has since deemed that test to be satisfied without individually negotiated contracts, international transactions, or federal administrative oversight. Indeed, the Court has imputed effective vindication in a host of settings and has declined to scrutinize the arbitration systems that consumers and employees are now required to use."); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2886 (2015) [hereinafter Resnik II] ("[T]he U.S. Supreme Court has not produced a single decision finding arbitration inadequate, inaccessible, or ineffective to vindicate rights." (footnote omitted)). To date, the only examples of arbitration failing the "effective vindication" standard have been hypothetical ones. *See* Resnik II, *supra* at 2886–87 ("Justice Scalia . . . offered hypotheticals about what would constitute inadequacy. He reiterated the phrasing from *Randolph* about a 'prohibitively expensive' process and added another example—that 'a provision in an arbitration agreement forbidding the assertion of certain statutory rights' could render arbitration 'impracticable.'" (quoting Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 92 (2000); *Italian Colors*, 133 S. Ct. at 2310, 2310–11, 2315)).

arbitration optimize the interests of labor-management stakeholders. Like any alternative dispute resolution procedure, these protocols relieve the federal judiciary of a significant caseload burden that might otherwise clog courts at great cost to the speedy resolution of employment and other civil proceedings. Furthermore, these mediation-arbitration protocols are being negotiated and experimented with by unions and employers entering into CBAs, having been included in the CBAs of nursing home workers, operating engineers, and even California utilities workers.[213] Bargaining parties are adapting *Pyett* with different systems designed to meet the parties' needs. Finally, as has been shown, the idea that a jury trial is the be-all and end-all for low wage workers with discrimination claims is a myth; mediation-arbitration protocols significantly increase employees' access to justice in the aggregate.

Thus, although a range of options can satisfy the effective vindication standard where necessary, in the post-*Pyett* world of labor relations, the best way to balance and serve the interests of all stakeholders simultaneously is by means of a mediation-arbitration *Pyett* Protocol.

Conclusion

One dozen years of *Pyett* have disproven Justice Souter's gloomy prediction: to the contrary, *Pyett* is reshaping labor-management dispute resolution of statutory claims, benefitting union and employer stakeholders, relieving the judiciary, and enhancing justice to diverse low-wage workers. With these benefits in mind, stakeholders should continue to embrace *Pyett* as a rare development whereby everyone involved can win.

213. *See supra* Parts III.B, C.

Collective Action, Legislation, and Creative Litigation at the Intersection of Geospatial Data and Workers' Rights

Maria Macaluso & Ariana R. Levinson*

"Geospatial data" is a term familiar to most geographers but much less familiar to most attorneys, employment law scholars, and workers' rights activists. In this article, we explain what geospatial data is and provide examples of the types of geospatial technology being used to track employees, including geopositioning system (GPS), radio frequency identification (RFID), and microchipping implants. We illuminate the various ways that unionization protects employees from misuse of geospatial data, such as providing the right to bargain over implementation of new surveillance technologies and protection to be disciplined based on geospatial data only for cause. Examples of contractual provisions, such as those in the Teamsters and UPS collective bargaining agreements and professional sports contracts, that establish joint decision-making processes over the use of geospatial technology are identified. We illustrate state laws that protect against misuse of geospatial technology, such as laws prohibiting microchipping, regulating tracking devices, requiring notice before an employer monitors an employee, and prohibiting termination because of lawful off-duty conduct. We provide examples of cases brought in tort for invasion of privacy and under the Fourth Amendment for unlawful search by employees whose employers were tracking them during their personal time. We discuss and endorse other scholars' proposals advocating employer implementation of best practices and passage of federal legislation. We conclude by calling for more comprehensive regulation of employer surveillance and use of geospatial data and more legal protection for workers to collectively define the appropriate employment processes and procedures.

*Ariana R. Levinson is a Professor of Law at the University of Louisville Brandeis School of Law where Maria Macaluso is a 2022 J.D. candidate. They thank Alex Dunn, 2022 J.D. candidate, and Will Hilyerd, Professor of Legal Bibliography, for research assistance and the American Association of Geographers, chairs Bill Herbert and Rich Applebaum, and panelists Jenny Chan, Christina Colclough, and Dragana Kaurin, for the opportunity to share this research at a GeoEthics Webinar, No Direction Home: Labor Rights and Geospatial Data.

Introduction

"Geospatial data" is a term familiar to most geographers but less familiar to most attorneys, employment law scholars, and workers' rights activists. Yet, many employers in the United States are collecting geospatial data about their employees. Employers use GPS to track drivers, sensors to monitor athletes, and cell phone apps to alert coworkers when they are within six feet of another worker, thereby violating pandemic precautions.[1]

In this article, we explain what geospatial data is and some ways that employers collect and use it. In Part II, we outline the legal protections that unionized workers have from misuse of geospatial data, the statutes that protect employees and some independent contractors from geolocation tracking, and potential causes of action against tracking that invades employees' privacy. In Part III, we describe proposals to protect workers from misuse of geospatial data by their employers and endorse employer implementation of best practices and passage of federal legislation. We then conclude by advocating for more comprehensive regulation of employer surveillance and use of geospatial data and more legal protection for workers to collectively define the appropriate employment processes and procedures.

I. Background

A. What Is Geospatial Data?

The geospatial industry is defined as "an information technology field of practice that acquires, manages, interprets, integrates, displays, analyzes, or otherwise uses data focusing on the geographic, temporal and spatial context," according to the U.S. Department of Labor.[2] To put it another way, when using the term *geospatial*, most mean that they are referring to "an awareness of one's surroundings on Earth as viewed through the lens of various data, maps, and social interactions."[3] The information collected from geospatial technology contains geographical information linked to it, such as coordinates, addresses, cities, and ZIP codes. Geospatial data is much more than just geographical information, combining three types of information: (1) location information, which gives specific latitude and longitude coordinates on the earth; (2) attribute information, which describes characteristics of an object,

1. *See infra* Part I.D.

2. Briann Klinkenberg, *Geospatial Technologies and the Geographies of Hope and Fear*, 97 Annals Ass'n Am. Geographers 350, 351 (2007).

3. Eric Nolan, Brooke A. Whitworth & Lori Rubino-Hare, *A Lesson in Geospatial Inquiry*, Sci. Teacher, Nov./Dec. 2019, at 26, 26, https://tigerprints.clemson.edu/cgi/viewcontent.cgi?article=1014&context=teach_learn_pub.

element, event, or phenomenon; and (3) temporal information, which relates to the space and time at which the location and attributes exist.[4]

From the U.S. Department of Labor's definition, "we can infer that geographic information systems, [global positioning systems], photogrammetry, remote sensing, cartography, surveying, and other related fields are all considered part of geospatial technologies."[5] Geospatial data is constantly evolving and expanding, and advances in microchip tracking technology push the privacy boundaries of location tracking, especially in the workplace.

B. What Are Examples of Geospatial Technology?

There are many different types of geospatial technology, and each offers a different way in which people produce and use geographic information.

1. GIS

The most common way that geospatial data is processed and analyzed is by using a Geographical Information System (GIS). GIS is used for "geographically oriented computer technology" and "integrated systems used in substantive applications."[6] Simply put, GIS is an information technology system that stores, manipulates, analyzes, and displays geospatial data.[7] However, due to the constant evolution of technology, academics debate GIS's central focus of activity and application, making the term difficult to define. GIS is in some way related to specific locations on the earth's surface, known as locational data.[8] However, GIS extends much further than merely using locational data for digital mapping. For instance, "[a]lthough often regarded as a mapping tool, GIS is perhaps better thought of as a type of database" because GIS is able to store a location for each item of data and instantly map the data distribution of any variable in any chosen format, which allows GIS to amplify mapping into a "dynamic exploratory process."[9] This makes the geospatial data with GIS much more complex because the data is not only spatially referenced to enable researchers to "produce maps quickly, easily, and potentially in large volumes" but it is also able to

4. Kristin Stock & Hans Guesgen, *Geospatial Reasoning with Open Data*, *in* Automating Open Source Intelligence: Algorithms for OSINT 171, 171 (Robert Layton & Paul A. Watters eds., 2016).

5. Klinkenberg, *supra* note 2, at 151.

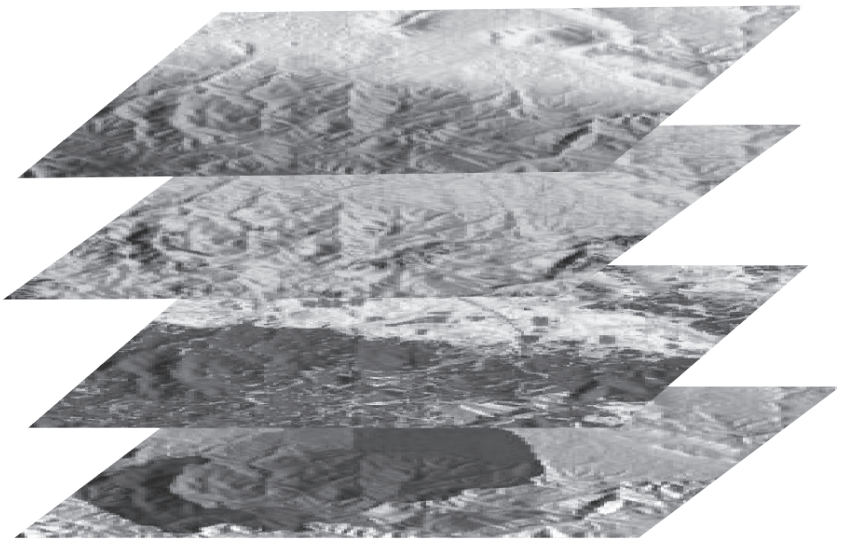
6. D J Maguire, *An Overview and Definition of GIS*, *in* Geographical Information Systems: Principles and Applications 9, 9 (David J. Maguire, David Rhind & Michael F. Goodchild eds., 1991), http://www.gisresources.com/wp-content/uploads/2013/09/BB1v1_ch1.pdf.

7. *What Is GIS?*, Ariz. Univ. Libs., https://data.library.arizona.edu/geo/what-gis [https://perma.cc/Y4A5-FMHR].

8. Caitlin Dempsey, *What Is GIS?*, GIS Lounge (Mar. 16, 2021), https://www.gislounge.com/what-is-gis [https://perma.cc/P49F-AAC9].

9. Donald A. DeBats & Ian N. Gregory, *Introduction to Historical GIS and the Study of Urban History*, 35 Soc. Sci. Hist. 455, 455 (2011).

analyze the geographies of the past by making "dimensions of historical reality and change that no other mode of analysis can reveal."[10] There are many ways that GIS data can be collected.[11] For instance, GIS data is created by drones, satellites, and other kinds of technology using spatial location to create layers of data imagery.[12] The illustration below demonstrates a GIS model and how it layers the data from the earth's surface.[13]

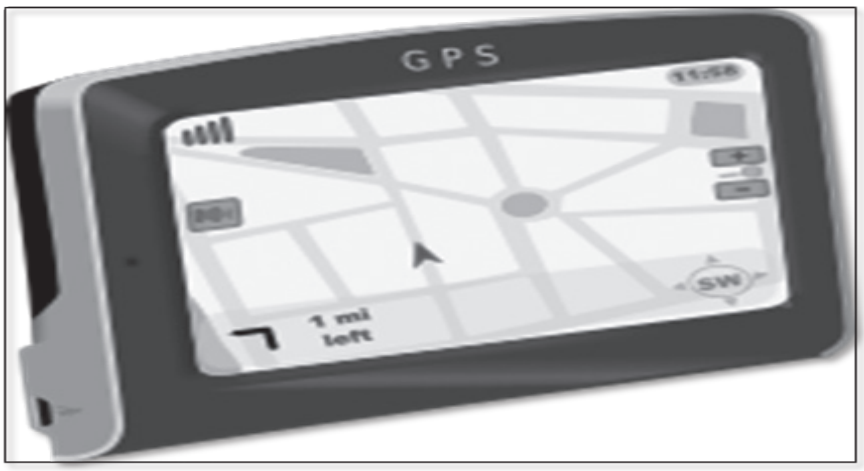


2. GPS

Global Positioning Systems (GPS) are another example of geospatial technology. GPS is different than GIS because the technology tracks an object's location rather than consolidating different types of data about a location. For instance, GPS uses satellites to track exact locations on the Earth's surface, whereas GIS uses various geographic data that can be layered on top of one another to make a comprehensive map.[14] However, similar to GIS, GPS technology has expanded and evolved throughout

10. *Id.* at 456.
11. Dempsey, *supra* note 8.
12. *Id.*
13. Engelbert Niehaus, https://en.wikiversity.org/wiki/File:GIS_Layers.png. Note that this work is from LibreOffice Draw with 4 Screenshots of GRASS GIS Layers and licensed under the Creative Commons. Attribution ShareAlike 3.0 Unported.
14. *Difference Between GIS and GPS*, GrindGIS (Nov. 8, 2017), https://grindgis.com/gis/difference-between-gis-and-gps [https://perma.cc/2D74-QBAQ].

the years.[15] October 4, 1957, marked the beginning of GPS technology when the Soviet Union released Sputnik 1, a "low-Earth orbit satellite," into space.[16] Scientists were able to track the position of this satellite through "the relative strength of its radio signals" received by GPS technology on Earth.[17] In other words, by using radio signals, scientists were able to track the positions of satellites in space, which means they also had the ability to track fixed points on the Earth's surface. The satellite produces a unique radio signal to Earth, and these radio signals are received by what is known as a "GPS receiver."[18] The GPS receiver creates the same "unique code at the same time as each satellite, [and] it is able to measure the time lag between the radio signals sent and received," which means that the GPS receiver can determine a person's locational position and display it electronically.[19] This data is usually expressed in latitudes and longitudes to help people determine their locations.[20] The image below is an example of GPS tracking commonly found on a smart phone or other device.[21]



15. Nathaniel J. Dominy & Brean Duncan, *GPS and GIS Methods in an African Rain Forest: Applications to Tropical Ecology and Conservation*, Conservation Ecology, Nov. 2001, art. 6, at 1, 1.

16. Sameer Kumar & Kevin B. Moore, *The Evolution of Global Positioning System (GPS) Technology*, 11 J. Sci. Educ. & Tech. 59, 59 (2002).

17. *Id.*

18. Dominy & Duncan, *supra* note 15, at 2.

19. *Id.*

20. *Id.*

21. ClkerFreeVectorImages; source: https://commons.wikimedia.org/wiki/File:Gps-304842.svg. This file is from Pixabay, where the creator has released it explicitly under the license Creative Commons Zero.

GPS and other "location-based services applications" are used by employers to monitor their vehicles. Employers can thereby "follow their employees through the day."[22] Doing so means that they may learn the employees' habits during breaks and lunch and the location of their personal errands.[23] While the technology is valuable to ensure that work is going as planned, to the extent employers find themselves "in possession of personal details of their employees that might be totally unrelated to their jobs," the technology is overly broad in scope.[24] Many employers also monitor employees through GPS applications on the employees' phones, which again can track their movements when off the job.[25]

Professor Ifeoma Ajunwa provides some specific examples of how employers use GPS to monitor employees:

> At the University of California-San Francisco Medical Center, pediatric nurses wear electronic locators that monitor them wherever they go. Nurses at Wyckoff Hospital in Brooklyn are required to wear personal tracking devices, which even record the time they take a break or go to the bathroom, all for the purpose of improving care. The city of Aurora, Colorado, puts tracking devices inside its sweepers and snowplows to monitor the workers and it has seen an overall fifteen percent increase in productivity. Employers also monitor workers' activities by installing spyware and GPS trackers on desktops and company-issued laptops. GPS trackers especially record enough data to make detailed profiles of individual employees and to create "biometric CVs" that prove how well an employee is suited to a job.[26]

3. Remote Sensing

Remote sensing, or remote sensors (RS), collects data by recognizing energy that is reflected from the Earth through airplanes or satellites.[27] Through remote sensing, imagery is acquired with a sensor, and a picture is then recorded and interpreted.[28] There are two types of sensors involved with remote sensing: (1) active sensors and (2) remote sensors.[29] Active sensors use "internal stimuli to collect data about the Earth."[30] An example of an active sensor is a laser-beam system that

22. Francoise Gilbert, *No Place to Hide? Compliance & Contractual Issues in the Use of Location-Aware Technologies*, 11 J. INTERNET L. 3, 10 (2007).

23. *Id.*

24. *Id.*

25. Richard A. Bales & Katherine V.W. Stone, *The Invisible Web at Work: Artificial Intelligence and Electronic Surveillance in the Workplace*, 41 BERKELEY J. EMP. & LAB. L. 1, 17 (2020).

26. Ifeoma Ajunwa, *Algorithms at Work: Productivity Monitoring Applications and Wearable Technology as the New Data-Centric Research Agenda for Employment and Labor Law*, 63 ST. LOUIS U. L.J. 21, 24 (2018).

27. *What Is Remote Sensing?*, NAT'L OCEAN SERV. (Feb. 26, 2021), https://oceanservice.noaa.gov/facts/remotesensing.html [https://perma.cc/8MGG-2X9V].

28. *Id.*

29. *Id.*

30. *Id.*

sends a laser to the Earth's surface and observes the timeframe that it takes for the laser to reflect back to the sensor.[31] Remote sensors, on the other hand, "respond to external stimuli" by recording natural energy that is reflected from the Earth's surface, usually from reflected sunlight.[32] Remote sensing imagery is used for "producing conventional maps, thematic maps, resources surveys, etc."[33] The images acquired through remote sensing "have special properties that offer unique advantages for the study of Earth's surface."[34] This is because of the observed patterns and relationships, instead of isolated points of data, between characteristics that otherwise seem independent. The image below demonstrates how remote sensing imagery detects energy from the Earth's surface.[35]

4. RFID

Radio-Frequency Identification (RFID) is another type of geospatial data technology that uses radio waves to track and identify objects, animals, or people through data-encoded tags.[36] Originally, this technology was used for military purposes to distinguish friendly ships and

31. *Id.*

32. *Id.*

33. James B. Campbell & Randolph H. Wynne, Introduction to Remote Sensing 3, 6 (5th ed. 2011).

34. *Id.* at 4–5.

35. Latuha1, https://commons.wikimedia.org/wiki/File:2020-01-08,_Sentinel-2A_L2A_-_volcanoes,_Custom_script.jpg.

This image was uploaded as part of Commons: Science Photo Competition 2020 in Ukraine.

36. Franklin Dehousse & Tania Zgajewski, *RFID: New "Killer Application" in the ICT World, New Big Brother, or Both?* 1, 6 (Egmont Royal Inst. for Int'l Rels. Paper 30, 2009), https://www.egmontinstitute.be/content/uploads/2013/09/ep30.pdf?type=pdf.

planes from the enemy.[37] RFID is still used for military purposes but has expanded since the 1970s.[38] For instance, the RFID system is part of "different types of data carriers and identification techniques, generally attributed to automatic identification and data capture (AIDC)."[39] There are three elements within RFID data collection: (1) one or several RFID tags, (2) one or several RFID readers, and (3) a computer system.[40] The RFID tag has a microchip, which can be placed within a product, animal, or a person.[41] The RFID tags communicate with one or several RFID readers through radio wave frequencies, and "the reader transforms the transmitted data by the RFID tags into digital data and transfers them into a computer."[42] This data is then stored within the computer system to be directed by further action.[43]

RFID is used by employers in building-entry cards.[44] They are able to keep precise records of when an employee is at work.[45] If RFID readers are in different locations throughout an employer's building, the employer can monitor how much time an employee spends outside their own work area or in a specific location, such as the cafeteria.[46] RFID can be used in this way to ensure that an employee is in a building and working during work hours. The employee badge may also employ other technologies in addition to or instead of RFID. Professors Richard Bales and Katherine Stone point to a specific example:

> The company Humanyze requires its employees to wear an ID badge containing a microphone that records conversations, a Bluetooth and infrared sensor that monitors where they are (how long do they spend in the break room? Outside the building smoking?), and an accelerometer that notes when they move. The company's software collects data on how much time each worker spends with talking with people and the proportion of time spent speaking versus listening.[47]

5. Microchipping Implants

Microchip implants are small circuits embedded under the skin that use RFID.[48] They are much smaller than GPS trackers, which are larger devices.[49] For instance, microchip implants are commonly

37. *Id.* at 8.
38. *Id.*
39. Dehousse & Zgajewski, *supra* note 36, at 5, 6.
40. *Id.* at 6.
41. *Id.*
42. *Id.* at 8.
43. *Id.*
44. Gilbert, *supra* note 22, at 10.
45. *Id.*
46. *Id.*
47. Bales & Stone, *supra* note 25, at 18–19.
48. Sophie, *Facts About Microchip Technology and GPS Tracking for Pets*, Trackimo, https://trackimo.com/gps-versus-microchip [https://perma.cc/56E8-6L9K].
49. *Id.*

used to track the location of a lost or stolen pet.[50] The benefits of using microchip implants for location tracking are that they do not require batteries, they are resistant to the elements, and they are permanent.[51] Microchip implants have existed for over twenty years; however, this technology is expanding into the workplace.[52] For example, "a small technology firm in Wisconsin held a 'chip party' where many employees were implanted with microchips . . . . The chips replace key cards and passwords, allowing employees to enter the building, sign into computers, and purchase food with a wave of a hand."[53] This example shows that microchipping has efficiency benefits; however, some employers are using microchipping to intense means. For instance, "Amazon recently patented a wristband to track warehouse employee hand movements and vibrate when an employee is reaching the wrong bin."[54] Although microchipping implants have efficiency benefits in the workplace, many states have explicitly prohibited employers from chipping employees. This ban is discussed further below.[55]

C. What Is Geospatial Data Typically Used For?

Geospatial data is used for many purposes. For instance, geospatial technology provides data for many different types of entities including the military, utility companies, urban planners, and industrial engineers.[56] Furthermore, the use of geospatial data is very beneficial for environmental conservation, maintaining biodiversity, forest fire regulation, agricultural monitoring, humanitarian relief, and other fields that could benefit from better visualization and analysis of geographic data.[57] For instance, analysis of geospatial data has been immensely useful for planning growing cities' water infrastructure by observing patterns or particular events in data that are too large to scan visually.[58] Like most technology, geospatial data is constantly expanding to adapt to human needs.[59] However, some may argue that the expansive usage of geospatial data is an invasion of privacy. For example, some argue that "geospatial technologies are enabling far more people to abuse their powers, from the caring parent monitoring their child or aging

50. *Id.*
51. *Id.*
52. Wes Turner, *Chipping Away at Workplace Privacy: The Implantation of RFID Microchips and Erosion of Employee Privacy*, 61 WASH. U. J.L. & POL'Y 275, 275 (2020).
53. *Id.*
54. *Id.* at 276.
55. *See supra* Part II.B.
56. Roger M. Downs, *Coming of Age in the Geospatial Revolution*, 57 HUM. DEV. 35, 36 (2014).
57. Nolan, Whitworth & Rubino-Hare, *supra* note 3, at 27.
58. Michael Flaxman, *3 Ways Geospatial Data is Changing the Way We Manage the Environment Around Us*, GIS LOUNGE (Aug. 5, 2019), https://www.gislounge.com/3-ways-geospatial-data-is-changing-the-way-we-manage-the-environment-around-us [https://perma.cc/68D2-LRE4].
59. Downs, *supra* note 56, at 37.

mother, to the suspicious husband tracking his wife, to the employer monitoring employees even outside of working hours."[60] Some fear that this expansive use of geospatial technology on employees is unethical and invasive.[61] They raise valid concerns and propose ethical employer action, worker input, and legal reform to address these fears.[62]

D. How Are Employers Using Geospatial Data in the Workplace?

1. Pre-COVID Uses

The use of geospatial data tells employers exactly where an employee is working and when they are working.[63] Before COVID-19, more and more employers were looking into geospatial data to track an employee's location at work.[64] Employers using geospatial data in the workplace might become more of a common practice because geospatial tracking technologies are now easy to use, more accessible, and more affordable.[65] For example, employers might track the location of any company-owned vehicle used by an employee, distribute tracking devices, such as Fitbits, or require employees to download tracking apps on their mobile devices to monitor employee movement and location.[66]

The reason employers use these tracking technologies is to ensure productivity and compliance; however, using GPS, microchipping, and other geospatial data technologies in the workplace risks invading employee privacy.[67] As mentioned above, the use of geospatial data is seemingly expanding in the workplace. With the onset of the COVID-19 pandemic, some employers have found new pressing reasons to use tracking and monitoring technologies on employees.

2. Post-COVID Uses

The COVID-19 pandemic led to many employers allowing employees to work from home. However, because of the pandemic, many employers feared that work productivity would be hindered, which could potentially decrease company revenue. After the pandemic, the companies that initially resisted remote work have now adopted

60. Klinkenberg, *supra* note 2, at 355.

61. Jerome E. Dobson & Peter F. Fisher, *Geoslavery*, IIEE TECH. & SOC. MAG., Spring 2003, at 47, 47, https://www.usna.edu/EE/ee354/Homework/Geoslavery.pdf [https://perma.cc/6V3L-2367].

62. *See infra* Part III.

63. Lindsay Sommers, *Is It Legal to Track Employees Using GPS?*, TIMESHEETS J., https://www.timesheets.com/blog/2019/08/is-it-legal-to-track-employees-using-gps [https://perma.cc/6Y8N-7GA4].

64. Kaveh Waddell, *Why Bosses Can Track Their Employees 24/7*, ATLANTIC (Jan. 6, 2017), https://www.theatlantic.com/technology/archive/2017/01/employer-gps-tracking/512294 [https://perma.cc/UNA3-PPV7].

65. Paul Bishop, *Tracking Your Employees with GPS: Is It Legal?*, HUBSTAFFBLOG (Mar. 6, 2020), https://blog.hubstaff.com/employee-tracking-policy [https://perma.cc/M7EG-X5NL].

66. *Id.*

67. *Id.*

geospatial data and other monitoring technologies to oversee work productivity.[68] For example, some employers have used time-tracking systems that "generate itemized records" of job activities such as "keystrokes, time spent on specific applications, documents opened, and emails read."[69] Furthermore, as businesses have opened up and are increasing capacity, geospatial technology has been used to help reduce the risk of spreading COVID in the workplace by tracing the proximity between workers to track whether they are less than six feet apart.[70] After COVID, employers reason that these monitoring technologies are important for "protecting assets, managing risk, controlling costs, enforcing protocols, and ensuring productivity."[71]

III. Legal Protections

A. Unionized Employees

In the United States, unionization guarantees workers some voice in decisions about surveillance and tracking technologies and can result in contractual protections for workers. Labor law requires that changes to terms and conditions of employment, including implementation of surveillance or tracking, must be bargained.[72] Almost all union contracts in the United States contain a provision guaranteeing employees will only be disciplined for just cause,[73] and just cause

68. Katitza Rodriguez & Svea Windwehr, *Workplace Surveillance in Times of Corona*, Elec. Frontier Found. (Sept. 10, 2010), https://www.eff.org/deeplinks/2020/09/workplace-surveillance-times-corona [https://perma.cc/PE7G-SWHW].

69. Aiha Nguyen, *On the Clock and at Home: Post-Covid-19 Employee Monitoring in the Workplace*, People & Strategy, Summer 2020, at 30, 31.

70. Rodriguez & Windwehr, *supra* note 68.

71. Nguyen, *supra* note 69.

72. *In re* Belleville Educ. Ass'n, 190 A.3d 487, 495 (Super. Ct. N.J. 2018) (directing employer to "negotiate the establishment of notice protocols if data collected from RFID badges are used to support disciplinary charges" and other RFID-related issues); *In re* City of Springfield, No. MUP-12-2466, 2015 WL 4061666, at *3 (Mass. Lab. Rels. Comm'n June 30, 2015) ("The increased monitoring of, and information about, employee job performance and productivity affected employees' underlying terms and conditions of employment such that the City was required to bargain over whether to install the devices and whether and how it intended to use the constant stream of information before installing them."). *But see* NLRB Advice Memo, Shore Point Distrib. Co., Inc., Case 22-CA-151053, at 4–5 (Oct. 15, 2015), https://www.nlrb.gov/case/22-CA-151053 (click "Related Documents") (advising that employers must generally bargain over the installation and use of GPS, but, in the instant case, bargaining was not required because the employer normally had private investigators monitor employees so the use of GPS tracking was not a significant change).

73. Ariana R. Levinson, Erin O'Connor O'Hara & Paige Marta Skiba, *Predictability of Arbitrators' Reliance on External Authority?*, 69 Am. U. L. Rev. 1827, 1833 (2020); William A. Herbert & Alicia McNally, *Just Cause Discipline for Social Networking in the New Gilded Age: Will the Law Look the Other Way?*, 54 U. Louisville L. Rev. 381, 386 (2016).

provides protection from being terminated or otherwise disciplined for conduct related to or discovered by surveillance and tracking.[74]

Some union contracts contain more specific provisions that explicitly provide workers, through their union representatives, a voice in determining tracking technology and protection against discipline based solely on geospatial data. The International Labour Organization's Code on Protection of Workers' Personal Data can be a starting point for collective bargaining for explicit provisions governing geospatial data.[75] For instance, the Code provides definitions of "personal data," "processing," and "monitoring" that can be easily incorporated into collective bargaining agreements (CBAs).[76] "Monitoring" includes various methods of establishing identity and location.[77] The Code then provides principles that can easily be integrated into CBAs. These principles include, for example, notice to the union of collection and use of geospatial data, a requirement that workers who process data be regularly trained in privacy principles, and confidentiality for personal data.[78] The Code suggests including provisions guaranteeing individual workers' rights to access their personal data, which could be expanded to include geospatial data more generally and to have a union representative "assist them in the exercise of their right of access."[79]

One long-standing example of an explicit provision is Article 6, Section 6 of the Teamsters national bargaining agreement with United Parcel Service (UPS). Section 6 protects drivers from UPS using tracking data from the GPS in their truck or on packages as the sole basis of discipline.[80] The section provides in pertinent part: "No driver shall be discharged based solely upon information received from GPS, telematics, or any successor system that similarly tracks or surveils a driver's movements unless he/she engages in dishonesty."[81] Arguably more importantly, given the rapid pace of technological advancement, Article 6 requires that when issues about misuse of geospatial and other technology for disciplinary purposes arise, the union and the employer will meet and confer regarding the issues. The section provides in pertinent part:

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74. Ariana R. Levinson, *What Hath the Twenty First Century Wrought? Issues in the Workplace Arising from New Technologies and How Arbitrators Are Dealing with Them*, 11 Transactions: Tenn. J. Bus. L., 9, 30–31, 37 (2010).

75. Int'l Lab. Off., Protection of Workers' Personal Data 1–7 (1997), https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/normativeinstrument/wcms_107797.pdf.

76. *Id.* at 1.

77. *Id.*

78. *Id.* at 2.

79. *Id.* at 6.

80. National Master United Parcel Service Agreement for the Period August 1, 2018 through July 31, 2003, at 20, https://teamster.org/wp-content/uploads/2018/12/ups18nationalmaster.pdf [https://perma.cc/V2P8-GZHS].

81. *Id.*

> The Company acknowledges that there have been problems with the utilization of technology in the past. Therefore, at the request of the Union's Joint National Negotiating Committee Co-Chair a meeting will be scheduled with the Company Co-Chair to discuss any alleged misuse of technology for disciplinary purposes and what steps are necessary to remedy any misuse.[82]

Another more high-profile context in which employers track their employees is sports. Data analytics is used by sports teams to improve recruiting, which is often referred to as the "Moneyball" approach.[83] Originating in baseball, Oakland A's general manager Billy Beene used then-unconventional statistics to recruit a winning team "on a shoestring budget."[84] Almost all professional sports now collect player statistics, including geospatial data. Resultantly, sports CBAs explicitly address geospatial data. For instance, the National Football League (NFL) and the National Football League Players Association (NFLPA) CBA contains detailed provisions governing the use of sensors.[85] These sensors, worn by players during games and practices, as well as at other times, collect geospatial data such as distance, velocity, acceleration, deceleration, jumps, and changes of directions. The contract defines sensors broadly: "(a) For purposes of this Subsection 'Sensors' shall mean any sensor, device or tracking device worn by an individual player used to collect, monitor, measure or track any metric from a player (e.g., distance, velocity, acceleration, deceleration, jumps, changes of direction, player load). . . ."[86] There are a wide array of sensors on the market.[87] One example is the Titan 2+ which touts its "supercharged GPS technology."[88] The union has negotiated for a collective process to determine which sensors are reviewed and approved for use. The contract provides in pertinent part:

> The Joint Sensors Committee shall be responsible for: (i) Reviewing any and all NFL or Club use of Sensor(s) for purposes of collecting . . . (ii) any data and/or information, including player performance and movement, during NFL practices, including, without limitation, considering whether a particular Sensor would be potentially harmful to anyone if used as intended . . . .[89]

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82. *Id.*

83. Matthew T. Bodie, Miriam A. Cherry, Marcia L. McCormick & Jintong Tang, *The Law and Policy of People Analytics*, 88 U. Colo. L. Rev. 961, 968 (2017).

84. *Id.* at 962, 968.

85. NFL-NFLPA Collective Bargaining Agreement 290 (Mar. 15, 2020) [hereinafter NFL CBA], https://nflpaweb.blob.core.windows.net/website/PDFs/CBA/March-15-2020-NFL-NFLPA-Collective-Bargaining-Agreement-Final-Executed-Copy.pdf [https://perma.cc/5J2J-34XW].

86. *Id.*

87. *Id.* at 291 (listing Catapult, Zebra, Titan, Polar, Statsports, and Kenexon).

88. *New! Titan 2+*, Titan Sports (2021), https://titansensor.com/titan_gps.html [https://perma.cc/E5MQ-MLCK].

89. *Id.*

The National Basketball Players Association (NBPA) and Major League Baseball Players Association (MLBPA) have negotiated even more protective provisions regarding tracking of players via wearable technology.[90] The NBPA contract provides for a joint committee to set cybersecurity standards and to retain experts.[91] The experts are paid for half by the NBA and half as part of the union benefits for which the NBA pays.[92] While the NFL Joint Sensors Committee can retain experts, the pay of the experts is not specified.[93] A NBPA player has the right to decline to use a sensor.[94] The CBA also guarantees notice and employee access to the collected geospatial data.[95] "[T]he Team shall be required to provide the player a written, confidential explanation of: (i) what the device will measure; (ii) what each such measurement means; and (iii) the benefits to the player in obtaining such data."[96] The contract limits the purposes for which the collected data can be used,[97] and provides for a fine of up to $250,000 dollars on any team found by an arbitrator to have violated the stated protections.[98] The data can be used "for player health and performance purposes and Team on-court tactical and strategic purposes only."[99] The NFL CBA provides for lower fines unless a team engages in a "second knowing and material failure to comply" with the governing provisions.[100]

The MLBPA CBA, like the NBPA CBA, guarantees that use of sensors by players is completely voluntary and further specifies that a player cannot be retaliated against for declining to use a sensor.[101] An employer must provide players notice of technology and notice of which employees will have access to the data.[102] The collected data must be kept confidential and may not be disclosed to anyone not listed in the provided notice.[103] The employer must honor a player's request to delete or destroy any collected data.[104] Like the other sports' CBAs, the

90. 2017 NBA-NBPA Collective Bargaining Agreement 359-61 (Jan. 19, 2017) [hereinafter NBA CBA], https://cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e-94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf [https://perma.cc/3L37-F8HP]; Major League Clubs and MLBPA 2017-2021 Basic Agreement 334–36 (Dec. 1, 2016) [hereinafter MLB CBA], https://d39ba378-ae47-4003-86d3-147e4fa6e51b.filesusr.com/ugd/b0a4c2_95883690627349e0a5203f61b93715b5.pdf [https://perma.cc/H9VJ-NVKM].

91. NBA CBA, *supra* note 90, at 359–60.

92. *Id.* at 360.

93. NFL CBA, *supra* note 85, at 291.

94. NBA CBA, *supra* note 90, at 360.

95. *Id.* at 360, 361.

96. *Id.* at 360.

97. *Id.* at 361.

98. *Id.*

99. *Id.*

100. NFL CBA, *supra* note 85, at 293.

101. MLB CBA, *supra* note 90, at 334.

102. *Id.* at 334–35.

103. *Id.* at 335.

104. *Id.*

contract establishes a joint committee to review proposals to use new technology.[105]

Unionization provides employees significant protections from misuse of geospatial data by their employers. Yet, the unionization rate in the United States is around eleven percent,[106] so in the next section we consider laws that are applicable to all employees, unionized or not, as well as, in some instances, to independent contractors. Unions do propose and lobby for legislation and should be considered as organizations with which to partner by any attorney working towards passing legislation addressed at regulating employer surveillance or the misuse by employers of geospatial data.

B. Statutes Addressing Geospatial Data

Unlike in Europe, there is no comprehensive data protection regime in the U.S.[107] Some state statutes provide protections that could be adopted by other states or the federal government, and creative litigation is an available avenue to protect workers from surveillance and tracking technology. At least ten states expressly prohibit microchipping. California, Maryland, North Dakota, Oklahoma, and Wisconsin prohibit requiring microchip implantation in any person, including employees and independent contractors.[108] Arkansas, Indiana, Missouri, Montana, and Nevada specifically prohibit employers from microchipping employees.[109] For instance, Nevada's statute explicitly states that "[i]t is unlawful for" an employer to "require another person to undergo the implantation of a microchip" as a condition of

105. *Id.* at 335–36.

106. *Union Member Summary*, U.S. Bureau of Lab. Stat. (Jan. 22, 2021, 10:00 AM), https://www.bls.gov/news.release/union2.nr0.htm [https://perma.cc/H9VJ-NVKM].

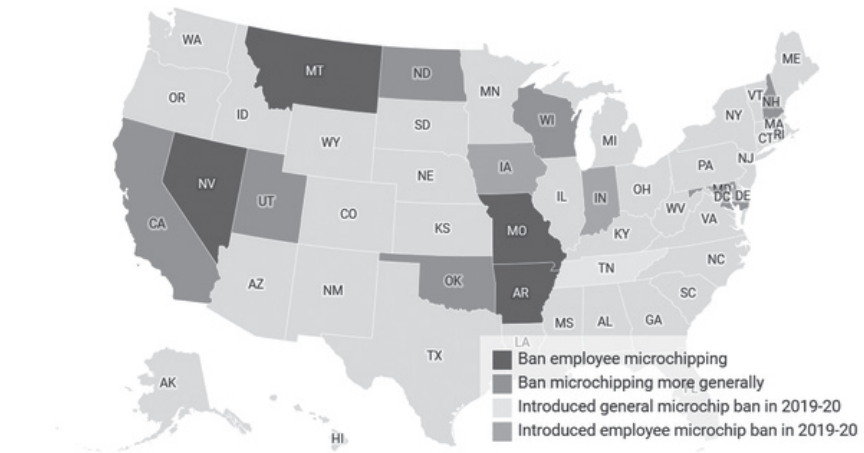
107. Jerome E. Dobson & William A. Herbert, *Geoprivacy, Convenience, and the Pursuit of Anonymity in Digital Cities*, *in* Urban Informatics 567, 577–78 (Wenzhong Shi, Michael F. Goodchild, Michael Batty, Mei-Po Kwan & Anshu Zhang eds., 2021), https://link.springer.com/content/pdf/10.1007%2F978-981-15-8983-6_32.pdf.

108. Chris Marr, *Forced Worker Microchipping Faces Growing Preemptive Strike*, Bloomberg L. (Mar. 19, 2020, 9:28 AM), https://news.bloomberglaw.com/daily-labor-report/forced-worker-microchipping-faces-growing-preemptive-strike [https://perma.cc/MEZ3-UJF8]; Cal. Civ. Code § 52.7(a) (2020); Md. Code Ann. Health-Gen. § 20-1902(a) (West 2020); N.D. Cent. Code § 12.1-12-06 (2021); Okla. Stat. tit. 63, § 1-1430(A) (2020); Wis. Stat. §146.25(1) (2021); *see also* Jill Clark, *Location Tracking: Getting Under the Skin*, Spatial Rsrvs. (Mar. 11, 2019), https://spatialreserves.wordpress.com/2019/03/11/privacys-e.

109. Dave Royse, *States Just Saying No to Employee Microchipping*, LexisNexis: State Net Capitol J. (Mar. 13, 2020), https://www.lexisnexis.com/en-us/products/statenet/news/2020/03/13/states-just-saying-no.page [https://perma.cc/F67T-4MTH]; Stefanie K. Vaudreuil, *Implanted Microchips: The (Dystopian?) Future of Employee Monitoring*, Liebert Cassidy Whitmore: Cal. Pub. Agency Lab. & Emp. Blog (July 12, 2019), https://www.calpublicagencylaboremploymentblog.com/employment/implanted-microchips-the-dystopian-future-of-employee-monitoring [https://perma.cc/N6FV-YKWC]; Ark. Code Ann. § 11-5-501 (2020); Ind. Code §§ 22-5-8-1 to 22-5-8-4 (2020); Mo. Rev. Stat. § 285.035 (2020); Mont. Code Ann. §§ 39-2-1501 to 39-2-1503 (2021); Nev. Rev. Stat. § 200.870(1)(b) (2020).

employment.[110] Indiana's statute contains detailed provisions that prohibit microchipping "as a condition of employment, as a condition of employment in a particular position, or as a condition of receiving additional compensation or other benefits."[111] The statute also contains an anti-retaliation provision prohibiting discriminating against an employee who refuses to be microchipped.[112]

In Iowa, Rhode Island, and Tennessee, legislation prohibiting microchipping was introduced but did not pass.[113] An attorney living in one of these states or any of the others that do not yet have laws prohibiting microchipping has a unique opportunity to become involved by proposing or supporting legislation aimed at regulating this unique technology which collects geospatial data. A map from Lexis illustrates which states enacted or introduced laws prohibiting microchipping.[114]



Map: LexisNexis State Net • Source: National Conference of State Legislatures • Get the data • Created with Datawrapper

According to the National Conference of State Legislatures, "at least 18 state legislatures have addressed privacy concerns raised when individuals track the movements of others without their knowledge. For example, Delaware, Illinois, Michigan, Rhode Island, Tennessee, Texas, and Wisconsin prohibit installing a location tracking device on a motor vehicle without the consent of the vehicle owner."[115] Illinois's

110. Nev. Rev. Stat. § 200.870.
111. Ind. Code § 22-5-8-2 (a).
112. *Id.* § 22-5-8-2 (b).
113. H.F. 2361, 88th Gen. Assemb., Reg. Sess. (Iowa 2020); S.B. 1418, 111th Gen. Assemb., Reg. Sess. (Tenn. 2020); H.B. 8027, 2008 Gen. Assemb., Jan. Sess. (R.I. 2008).
114. Royse, *supra* note 109.
115. Pam Greenberg, Nat'l Conf. of State Legis., LegisBrief Briefing Paper, Private Use of Mobile Tracking Devices (2016), https://www.ncsl.org/research/telecommun

and Michigan's laws permit an employer to place a tracking device on their own employee-driven vehicle but prohibit putting such a device on a worker's car, whether employee or independent contractor, without that worker's permission.[116] Rhode Island's law requires that, when the vehicle is not owned by the employer, the operator and all occupants in the vehicle must consent to the tracking.[117]

Florida prohibits tracking devices and tracking applications on another person's property without the person's consent.[118] The Florida law is not limited to addressing tracking of vehicles. The prohibition on tracking applications in addition to devices is significant because at least one court has interpreted a statute prohibiting tracking devices not to prohibit software installed on a cell phone.[119] The Florida statute does explicitly exempt the owner or lessee of a vehicle, which permits employers to track drivers of company-owned vehicles.[120] The law also exempts a "person acting in good faith on behalf of a business entity for a legitimate business purpose."[121]

Six other states—California, Hawaii, Louisiana, Minnesota, North Carolina, and Virginia—prohibit the use of electronic tracking devices when they are used to determine the location or movement of a person without consent.[122] Rather than solely prohibiting tracking devices on another person's vehicles or property, these statutes focus on the use of the technology to track people's movements. At least some of these statutes do permit employers to place tracking devices on their own vehicles.[123] Iowa has a concise statute that emphasizes the dangers of tracking location data:

> 1. A person commits unauthorized placement of a global positioning device when the person, without the consent of the other person, places a global positioning device on the other person or an object in order to track the movements of the other person without a legitimate purpose.
>
> 2. A person who commits a violation of this section commits a serious misdemeanor.[124]

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ications-and-information-technology/private-use-of-mobile-tracking-devices.aspx; Del. Code Ann. tit. 11, § 1335(a)(8) (2021); 720 Ill. Comp. Stat. §5/21-2.5 (2020); Mich. Comp. Laws § 750.5391 (2020); 11 R.I. Gen. Laws § 11-69-1 (2020); Tenn. Code Ann. § 39-13-606 (2020); Tex. Penal Code. Ann. § 16.06 (2021); Wis. Stat. § 940.315 (2021).

116. 720 Ill. Comp. Stat. §5/21-2.5(c)(3); Mich. Comp. Laws 750.39l(1)(b).

117. 11 Rhode Island Gen. Laws § 11-69-1(a)(1), (b)(5).

118. Fla. Stat. § 934.425(2) (2021).

119. *In re* Google Location Hist. Litig., 428 F. Supp. 3d 185, 193–94 (N.D. Cal. 2019) (interpreting California Invasion of Privacy Act).

120. Fla. Stat. § 934.425(4)(e).

121. *Id.* § 934.425 4(d).

122. Greenberg, *supra* note 115; Cal. Penal Code § 637.7 (2021); Haw. Rev. Stat. § 803-42 (2021); La. Stat. § 14:323 (2021); Minn. Stat. § 626A.35 (2021); N.C. Gen. Stat. § 14-196.3 (2021); N.H. Rev. Stat. Ann. § 644-A:4 (2021); Va. Code Ann. § 18.2-60.5 (2020).

123. *See, e.g.*, Va. Code Ann. § 18-2-60.5(A)(1)–(6).

124. Iowa Code § 708:11A (2021).

Penalties for violation of the other state laws range from civil remedies to misdemeanor punishments or fines.[125]

Connecticut requires employers to provide prior notice of electronic monitoring to employees.[126] The law does not mention specific technologies or devices but defines "electronic monitoring" by employers as the collection of employee activities or communications "by any means other than direct observation, including the use of a computer, telephone, wire, radio, camera, electromagnetic, photoelectronic or photo-optical systems."[127]

California is the only state that has passed a data protection law, the California Consumer Privacy Act (CCPA). The California Privacy Rights Act (CPRA), passed by ballot initiative in 2020, amends the CCPA. The CCPA gives consumers the right to ask businesses for the types and categories of personal information being collected.[128] Furthermore, if a business does collect a consumer's personal information, the business must inform the consumer of the purposes for collecting the information and identify the third-party organizations receiving the information to the consumer.[129] Consumers can also delete any personal information collected, upon request, and initiate a civil action if they believe that an organization failed to protect their personal information.[130] Unfortunately, the CCPA is not geared towards the protection of employees or independent contractors, both of whom fall within an exemption that makes the title inapplicable to them.[131] It may provide a cause of action when an employer tracks an employee or independent contractor during personal time.[132]

A small number of states provide protections from being terminated at will for off-duty conduct, similar to the protection provided unionized workers by a just cause clause in a CBA. These laws protect against termination or some type of discipline based on geospatial data collected during an employee or independent contractor's off-work time. In three states, Colorado, New York, and North Dakota, statutes protect against discharge or adverse action because of any lawful off-duty conduct.[133] The level of protection varies, with North Dakota protecting

125. GREENBERG, *supra* note 115.

126. *Id.*; CONN. GEN. STAT. § 31-48d (2021).

127. GREENBERG, *supra* note 115; CONN. GEN. STAT. § 31-48d.

128. CAL. CIV. CODE § 1798.100 (2021).

129. *Id.* § 1798.120.

130. *Id.* §§ 1798.105, .150.

131. CAL. CIVIL CODE § 1798.145 (h)(1) (effective through Dec. 2022; that provision will become (m)(1), effective in Jan. 2023 and stating the title does not apply to "personal information that is collected . . . in the course of the natural person acting as . . . an employee of . . . or independent contractor of" the business collecting the data "so long as the data is used within the business relationship").

132. *Id.*

133. Ariana R. Levinson, *Industrial Justice: Privacy Protection for the Employed*, 18 CORNELL J.L. & PUB. POL'Y. 609, 622 (2009).

any activity "not in direct conflict with the essential business-related interests of the employer,"[134] and Colorado protecting only that activity which does not present "the appearance of . . . a conflict of interest."[135] The enforcement mechanisms also vary considerably. In one state, Montana, employers are required to show just cause for discharge.[136] The same is true in Puerto Rico.[137]

At the federal level, the National Labor Relations Act prohibits employers from surveilling employees who are acting together to discuss and better their working conditions.[138] The purpose of the prohibition is to ensure that workers who are attempting to organize into a union do not feel as though their employer is watching and intimidating them from organizing.[139] The protection is arguably broad enough to apply to workers engaging in other types of collective activity as well.[140]

C. Creative Litigation

In addition to bringing a claim for violation of a statute, a worker who is subjected to geo-tracking can consider whether any common-law suit is available. At least one case has been brought challenging an employer's 24/7 tracking of an employee using a common-law invasion of privacy, intrusion on seclusion claim—*Arias v. Intermex Wire Transfer*.[141] While state laws vary, generally to prove the tort of an intrusion on seclusion, a plaintiff must show: (1) an unauthorized intrusion, (2) that is highly offensive to a reasonable person, (3) involves a matter where the plaintiff had a reasonable expectation of privacy, and (4) resulted in damage to the plaintiff.[142] The *Arias* complaint alleged that Intermex Wire Transfer "instructed its employees to download the Xora application to their company-issued smartphones."[143] The Xora app "provides the location of every mobile employee on a Google Map 'with detailed information such as arrival times, break status, the

134. *Id.*; N.D. Cent. Code § 14-02.4-03 (2020).

135. Levinson, *supra* note 133, at 622; Colo. Rev. Stat. § 24-34-402.5 (2022).

136. Levinson, *supra* note 133, at 622; Colo. Rev. Stat. § 24-34-402.5.

137. Levinson, O'Hara & Skiba, *supra* note 73, at 1875 n.283.

138. 29 U.S.C. §§ 157, 158(a)(1); James R. Glenn, *Can Friendly Go Too Far? Ramifications of the NLRA on Employer Practices in a Digital World*, 2012 U. Ill. J.L. Tech. & Pol'y 219, 219–20.

139. Glenn, *supra* note 138, at 220, 224.

140. *Cf. id.* at 230–31 (noting that permitting an employer to require an employee to divulge a social media password as a condition of employment should be prohibited because it allows the employer to engage in outward surveillance of employees' concerted activity).

141. Complaint at ¶ 4, Arias v. Intermex Wire Transfer, LLC, No. S1500CV284763, 2015 WL 2254833 (E.D. Cal. May 5, 2015).

142. Ariana R. Levinson, *Social Media, Privacy, and The Employment Relationship: The American Experience*, 2 Spanish Lab. L. & Emp. Rel. J. 15, 23 (2013).

143. Ajunwa, *supra* note 26, at 25.

route driven and more.'"[144] The plaintiff alleged that having to have her phone available at all times, with the tracking application on it, made her feel like a prisoner wearing an ankle bracelet.[145] The claims raised, including the tort claim, ended in a settlement.[146]

A similar creative approach can be used by public-sector employees bringing challenges pursuant to the Fourth Amendment. To prove an unlawful search and seizure, a plaintiff must establish that they had a reasonable expectation of privacy and that their employer violated this expectation with an unreasonable intrusion.[147] The courts will consider whether the employer's intrusion was reasonable in inception and scope.[148] Several courts have ruled that, similar to many of the state statutes regulating tracking devices, an employee cannot contest their employer placing a tracking devices, such as GPS, on an employer's own vehicle.[149] For instance, in *Brookshire v. Buncombe County*, an employee used a county-issued truck for much of his workday.[150] The employer became concerned that the employee was reporting hours he had not actually worked so installed a GPS on the truck.[151] The GPS tracked the truck's location for three weeks without the employee's knowledge.[152] The court held the installation of the GPS device was not a search, implying that the employee had no reasonable expectation of privacy in the whereabouts of the truck.[153] In *Asbury v. Ritchie County Commission*, the plaintiff was a deputy sheriff who drove a vehicle owned by the defendant for work purposes.[154] Because plaintiff did not seem to accomplish as much as his coworkers, the employer placed a GPS on the vehicle.[155] The court held that installing the GPS and monitoring the vehicle's speed and location were not a violation of the Fourth Amendment.[156] The court reasoned that the plaintiff had no reasonable expectation of privacy because the employer's policies made clear that he could use the vehicle only for work use and had to regularly report his whereabouts via portable radios.[157] When an employer tracks an employee during nonwork time, however, a plaintiff likely

144. *Id.* at 26.
145. *Id.*
146. *Id.*
147. Ariana R. Levinson, *Workplace Privacy and Monitoring: The Quest for Balanced Interests*, 59 Clev. St. L. Rev. 377, 395 (2011).
148. *Id.* at 395–96.
149. Brookshire v. Buncombe Cnty., No. 1:10CV278, 2012 WL 136899 (W.D.N.C. Jan. 18, 2012); Asbury v. Ritchie Cnty. Comm'n, No. 1:16CV132, 2018 WL 445110, at *6 (N.D.W. Va. Jan. 16, 2018).
150. *Brookshire*, 2012 WL 136899 at *1.
151. *Id* . at *2.
152. *Id.*
153. *Id.* at *3.
154. *Asbury*, 2018 WL 445110, at *1.
155. *Id.*
156. *Id.* at *6.
157. *Id.*

will be able to successfully sue for an unlawful search. In *Cunningham v. New York State Department of Labor*,[158] the government employer placed a GPS on the employee's vehicle. The court reasoned doing so constituted an unreasonable search.[159] The employer's tracking in that case was excessively intrusive because the GPS device tracked the employee on evenings, weekends, and vacation.[160]

IV. What Can Be Done?

Given the complexity of legal regulation of employers' surveillance of employees and use of collected geospatial data, various scholars have proposed different solutions. Francoise Gilbert has proposed addressing legal issues raised by location technology in contractual terms.[161] One issue that she has discussed is that employers may use location technology to snoop or monitor employees.[162] She has explained that RFID tags in building access cards permit discovering how much time an employee spends outside of their work area and that location technology on employer vehicles can discover personal errands, such as stopping at a liquor store for lunch.[163] She has suggested that employers set policies for managing geospatial data collected about company vehicles "to ensure a balance between the legitimate need of the company to collect information about fleet location or employee location in order to ensure efficiency, and the need to avoid snooping on employee's personal lives."[164] Policies should govern the purposes for which geospatial data is collected and how long the information will be retained and ensure inaccurate data does not negatively impact the employees.[165] Policies should also provide notice of tracking technologies used and the purposes for which they are used.[166] The employer should notify the employees that personal information will be collected and that they do not have any expectation of privacy, and obtain employee consent to the surveillance.[167] Finally, she has suggested other best practices for employer policies based on France's regulation of tracking vehicles. Tracking can be used only when other ways of "ensuring security and efficiency objectives are unavailable" and cannot be used to monitor an employee's driving habits, such as speeding. The tracking devices must

158. Cunningham v. N.Y. State Dep't of Lab., 997 N.E.2d 468, 468 (N.Y. 2013).
159. *Id.* at 470.
160. *Id.* at 473.
161. Gilbert, *supra* note 22, at 3.
162. *Id.* at 5.
163. *Id*. at 10.
164. *Id*.
165. *Id*.
166. *Id*.
167. *Id*.

allow employees to manually turn them off when the vehicle is used during breaks.[168]

Professors Bales and Stone have written about how artificial intelligence transforms geospatial and other data collected by various surveillance devices into "a permanent electronic resume that can identify and predict an individual's performance as well as their work ethic, personality, union proclivity, employer loyalty, and future health care costs."[169] They have proposed "expanding worker privacy rights to give workers more protection in the collection and use of their personal and professional data" and imposing "a clear duty on employers" to "bargain with unions over workplace monitoring and data collection."[170] Specifically, they have suggested that the U.S. Congress "should enact a national omnibus privacy statute." The starting point for the statute should be the General Data Protection Regulation, but the statute should be augmented "to specifically address data collection in the employment context."[171] The statute should provide employees a right to access and correct personal data, to have the information forgotten, and to be free of employment decisions based solely on automated processing.[172] The statute should also prohibit employers from sharing the data and require prior notice and consent for electronic monitoring.[173]

Professor Ifeoma Ajunwa has written about the new legal controversies that wearable technology and productivity monitoring applications in the workplace will raise.[174] She has explained that wearables risk challenging traditional privacy principles, such as the Fair Information Practice Principles. These principles include "collection limitation, purpose specification, use limitation, accountability, security, notice, choice, and data minimization."[175] She has proposed establishing a legal standard for admissibility and interpretation of data in workers' compensation claims.[176] She also has implied that courts should interpret the Fourth Amendment to provide a reasonable expectation of privacy from monitoring by devices that collect geospatial data during nonwork times.[177]

Professors Matthew Bodie, Miriam Cherry, Marcia McCormick, and Jintong Tang have written about people analytics, the use of big data for personnel management.[178] They have proposed that employ-

168. *Id*.
169. Bales & Stone, *supra* note 23, at 1.
170. *Id.* at 4.
171. *Id.* at 60.
172. *Id.* at 61.
173. *Id.*
174. Ajunwa, *supra* note 26, at 23.
175. *Id.* at 42.
176. *Id.* at 51–52.
177. *Id.* at 50.
178. Bodie, Cherry, McCormick & Tang, *supra* note 83, at 962.

ers follow the values of "transparency, disclosure, and autonomy."[179] They have emphasized that employees must have a voice and understand the processes being implemented by the employer.[180] They have explained that, on an "instrumental level, employee input can lead to better decisionmaking."[181] Providing voice also conveys to employees "that they have importance and worth to the decisionmakers."[182]

Each of these proposals holds value for addressing the complex issue of location tracking and geospatial data in employment. We agree that employers should voluntarily implement best practices, such as those specified by Gilbert and Professor Bodie et al. These policies should address more than monitoring of vehicles because of the broad range of geospatial data being collected by employers. As noted by Professor Bodie et al. and demonstrated by the Teamsters and sports CBAs, collectively negotiated workplace policies can provide robust protections specific to the technology used in particular workplaces. Collectively bargained policies are flexible and can be changed through negotiation as workers point out problems as they arise and as technologies change. They also foster the transparency about tracking technology and geospatial data necessary to address any overreach by employers.

Ultimately neither employer-implemented best practices nor collectively bargained policies will suffice to ensure that employers use geospatial data for legitimate purposes and only when necessary. The law must set minimum requirements to ensure that workers are fairly treated and that some businesses do not undercut others, just as is done for work issues ranging from minimum wage to antidiscrimination.

The issues raised by surveillance in the employment context differ from that in other contexts, as demonstrated by the different treatment of employer surveillance than police surveillance of private citizens under the Fourth Amendment and by the focus of the California Consumer Protection Act on consumer data in a way that does not explicitly consider data collection from employees. The lack of a comprehensive employment statute addressing surveillance and use of geospatial and personal data results in employees and employers having different rights in different locations depending on the types of protection offered by the laws that this article has discussed. A federal law would eliminate variations, making it easier for businesses to comply with the law and to protect employees from unnecessary and potentially dangerous uses of geospatial data by employers.

179. *Id.* at 1032.
180. *Id.*
181. *Id.* at 1033.
182. *Id.* at 1034.

Conclusion

Technology continues to advance at a rapid pace, and employers continue to expand the types of geospatial data that they collect and the purposes for which they use the data.[183] In this article, we explained what geospatial data is and how the technologies that collect it operate. We then explored the protections from misuse of geospatial data available to unionized employees. We provided an overview of the existing laws that govern some of the technologies involved in collection of geospatial data from employees and independent contractors and examples of creative litigation addressing employers' misuse of geospatial data. Because these laws are limited in scope, we advocate for more comprehensive regulation of employer surveillance and use of geospatial data.

To the extent that we have stronger labor rights, worldwide, we will have better ways and legal protections to address privacy and other concerns with surveillance and tracking technologies. Unions, worker-owned co-ops, worker centers, mutual aid, and solidarity movements provide ways for workers to work together to address employment issues. Legal structures that encourage and support these types of organizations make a difference.

183. William A. Herbert, *No Direction Home: Will the Law Keep Pace with Human Tracking Technology to Protect Individual Privacy and Stop Geoslavery?,* 2 I/S: J. L. & POL'Y FOR INFO. SOC'Y 409, 455 (2006).

Using ERISA to Ensure Transparent Health Care Prices

Jeffrey M. Harris*

Introduction

Although health care spending comprises nearly twenty percent of the U.S. economy, this sector remains plagued by a lack of meaningful transparency over the prices providers charge for care. This shortfall results in significant waste, inefficiency, and market distortion: consumers are unable to shop for care based on price; high-cost providers face little downward pressure on their prices; wide disparities exist in price, both within and across different regions; and prices and spending have inexorably trended upward.

Over the last few years, the U.S. Department of Health & Human Services (HHS) has promulgated two landmark regulations that seek to address these issues.[1] Those regulations require hospitals and health insurance plans, respectively, to disclose critical price information such as cash prices and the rates negotiated between insurers and providers.[2] Although some states had previously experimented with transparency initiatives, these regulations ensure that consumers throughout the United States have a federal-law right to know the cost of their care. At the same time, however, there are limitations to these regulations, most notably the fact that the regulations are enforced solely by HHS and there is no mechanism for private parties to bring suit to address violations.

The federal Employment Retirement Income Security Act of 1974 (ERISA) provides an independent basis for price transparency and a

*The author is a partner at Consovoy McCarthy PLLC where his practice focuses on litigation involving constitutional and regulatory issues. He previously served in the White House as Associate Administrator of the Office of Information and Regulatory Affairs (OIRA), and as a partner at Kirkland & Ellis LLP and Bancroft PLLC. Mr. Harris served as a law clerk to Chief Justice John Roberts of the U.S. Supreme Court and Judges David Sentelle and Laurence Silberman of the U.S. Court of Appeals for the D.C. Circuit. Mr. Harris serves as outside counsel to PatientRightsAdvocate.org, a nonprofit, nonpartisan organization that advocates for transparency and accountability in the healthcare system. The author thanks Steven Begakis for his assistance with this article.

1. *See* Price Transparency Requirements for Hospitals to Make Standard Charges Public, 84 Fed. Reg. 65,524, 65,524 (Nov. 27, 2019) (to be codified at 45 C.F.R. subch. E) [hereinafter Hospital Rule]; Transparency in Coverage, 85 Fed. Reg. 72,158, 72,158 (Nov. 12, 2020) (to be codified at 26 C.F.R. pt. 54) [hereinafter Insurance Rule].

2. *See* Insurance Rule, 85 Fed. Reg. at 72,158.

way to close this regulatory gap.[3] This article argues that ERISA compels price transparency in two separate but related ways: (1) it compels plan fiduciaries of employer-sponsored health plans to disclose all prices, rates, and plan terms *upfront* to participants in the plan; and (2) it compels plan fiduciaries to obtain negotiated rate information from insurance companies to ensure that plan assets are being utilized prudently and in the best interest of the participants. Critically, ERISA not only authorizes private civil suits to enforce its terms but also provides for civil penalties and attorneys' fees for successful plaintiffs. In short, ERISA can—and should—be used to ensure that all participants in employer-sponsored health plans have access to accurate, upfront, comprehensive information about the cost of their care.

I. Background on Health Care Price Transparency and Recent Regulatory Initiatives

Controlling the costs of health care spending should be a paramount concern for every person and company in the United States. The United State spends far more than other countries on health care without obtaining better outcomes.[4] Sixty years ago, health care comprised 5% of the U.S. economy, but that share had more than tripled by 2018, to 17.7% of the economy.[5] Other countries like the United Kingdom (9.6%) and Italy (9%) spend roughly *half* what the United States spends as a percentage of GDP yet perform better in terms of life expectancy.[6]

The total cost of health care for employees at large companies averaged more than $15,000 per employee in 2019—approximately $7,000 for a single plan and more than $20,000 for family coverage.[7] And those costs are increasing at a rapid and unsustainable rate. The Centers for Medicaid and Medicare Services predicted that health costs would grow at an annual rate of 5.4% between 2019 and 2028—more than double the rate of inflation.[8]

In addition to high and rapidly growing health care expenditures, there is massive variation *within* the U.S. health care system about how much services cost. A C-section delivery costs an average of approximately $4,000 in Knoxville, $10,000 in Milwaukee, $12,000

3. *Id.*

4. *See* RYAN NUNN, JANA PARSONS & JAY SHAMBAUGH, THE HAMILTON PROJECT–BROOKINGS INSTITUTE, A DOZEN FACTS ABOUT THE ECONOMICS OF THE U.S. HEALTH-CARE SYSTEM 1 (2020), https://www.brookings.edu/wp-content/uploads/2020/03/HealthCare_Facts_WEB_FINAL.pdf) [hereinafter BROOKINGS REPORT].

5. *Id.*

6. *Id* at 8 (referencing fig. 2).

7. *See* Stephen Miller, *Employers' Health Costs Could Rise 6% in 2020*, SHRM (Sept. 19, 2019), https://bit.ly/3deoUsp [https://perma.cc/P2LG-R3UJ].

8. *See* CTRS. FOR MEDICARE & MEDICAID SERVS., NAT'L HEALTH EXPENDITURE PROJECTIONS 2018–2027 (2019), https://go.cms.gov/32c3oOR.

in Indianapolis, and $20,000 in San Francisco.[9] Even within a single city, prices vary significantly: one study found that the price of basic blood tests in El Paso ranged from $144 to $952 for identical services.[10] A key driver of these disparities is a lack of transparency about how much the services will be priced. No reasonable patient (or health plan) would pay $952 for a blood test when they could obtain the same test from another provider down the street for $144. But when patients do not know the real price of their care *upfront*, they are deprived of the ability to make fully informed decisions.

There is no question that price transparency works by empowering consumers, controlling the growth of health care spending, and rewarding providers that offer high-quality service at reasonable prices. After New Hampshire began requiring negotiated rates to be posted on a publicly accessible website, consumers who used the website to shop for medical imaging services (such as X-rays, CT scans, and MRIs) saved approximately 36% per visit (an average of $200) compared to what they would have paid if they were unable to shop for the best price.[11]

Recognizing the importance of transparency, HHS recently promulgated two major regulations that require the upfront disclosure of certain price information. In November 2019, HHS promulgated a regulation (Hospital Rule) requiring that hospitals make public a list of their "standard charges" for the items and services that they provide.[12] In particular, this rule requires that hospitals disclose the negotiated rates that they charge patients who pay with insurance; the discounted cash prices for customers who pay out-of-pocket; and the prices for a list of 300 "shoppable" services.[13] The Hospital Rule was based on extensive empirical research showing that "price transparency leads to lower and more uniform prices."[14]

Then, in November 2020, HHS promulgated another regulation (the Insurance Rule) that requires similar disclosures by health insurance plans in the individual and group markets.[15] The Insurance Rule mandates that health plans and issuers disclose information about any cost-sharing obligations as well as in-network-provider negotiated rates, historical out-of-network allowed amounts, and drug pricing information.[16] This rule, too, was based on extensive evidence showing

9. *See* Brookings Report, *supra* note 4, at 1 (referencing fig. 7b).

10. *Id.*

11. *See* Zach Y. Brown, An Empirical Model of Price Transparency and Markups in Health Care 30 (Aug. 2019) (unpublished manuscript), https://bit.ly/2vi9nUV.

12. *See* Hospital Rule, 84 Fed. Reg. 65,524 (Nov. 27, 2019) (to be codified at 45 C.F.R. subch. E).

13. *Id.* at 65,525.

14. *Id.* at 65,526.

15. *See* Insurance Rule, 85 Fed. Reg. 72,158 (Nov. 12, 2020) (to be codified at 26 C.F.R. pt. 54).

16. *Id.*

that transparency empowers consumers to shop for care; reduces the risk of surprise billing; incentivizes the selection of cost-effective care; and increases competition while constraining costs.[17]

Hospital groups brought suit to challenge the Hospital Rule shortly after it was promulgated, arguing that the Rule exceeded HHS's statutory authority, was arbitrary and capricious in violation of the Administrative Procedure Act because it was confusing and unduly burdensome, and unconstitutionally compelled speech in violation of the First Amendment.[18] Those challenges were uniformly rejected by every federal judge to consider them. U.S. District Judge Carl Nichols rejected all of the hospitals' statutory and constitutional challenges to the rules, and the D.C. Circuit affirmed the district court's ruling in full in *American Hospital Ass'n v. Azar*.[19] In particular, the courts held that the rules were within HHS's statutory authority; that the hospitals' complaints about feasibility and administrative burdens were meritless; and that it did not violate the First Amendment to require hospitals (like companies in every other industry) to disclose their prices upfront.[20] The court also agreed with HHS that pricing information was critical to consumers and that transparency would ultimately lead to lower prices.[21]

Two industry groups have also challenged various aspects of the Insurance Rule. In August 2021, the U.S. Chamber of Commerce and the Tyler Chamber of Commerce brought suit in federal district court in Texas alleging that the Insurance Rule was arbitrary and capricious and in excess of statutory authority, but the groups dropped that suit just two weeks later.[22] The Pharmaceutical Care Management Association—an industry group representing pharmaceutical benefit managers—also filed suit in Washington, D.C., challenging certain aspects of the Insurance Rule regarding disclosure of drug prices.[23] That suit, too, was voluntarily dismissed without explanation just four months after being filed. The plaintiffs in these suits may have concluded that their

17. *Id.* at 72,160–63.

18. Am. Hosp. Ass'n. v. Azar, 983 F.3d 528, 530 (D.C. Cir. 2020).

19. *See id.* at 542. Judges David Tatel and Harry Edwards were on the D.C. Circuit panel that issued the decision. Judge Merrick Garland was on the panel for oral argument but later withdrew from the case following his nomination as Attorney General.

20. *Id.* at 535–36.

21. *Id.* at 539.

22. *See* Complaint at 26, Chamber of Com. of the U.S. v. U.S. Dep't. of Health & Hum. Servs., No. 6:21-cv-309 (E.D. Tex. Aug. 10, 2021, voluntarily dismissed Aug. 25, 2021); *see also* Anna Wilde Mathews, *Business Groups Withdraw Suit Challenging Health-Price Transparency Rule*, Wall St. J. (Aug. 26, 2021, 1:29 PM), https://www.wsj.com/articles/business-groups-withdraw-suit-challenging-health-price-transparency-rule-11629998986 [https://perma.cc/8K4Z-U3LX] (noting that prominent members of the Tyler Chamber were questioning the litigation because "why would a self-funded employer not want transparency in healthcare pricing?").

23. *See* Complaint at 9, Pharm. Care Mgmt. Ass'n v. U.S. Dep't. of Health & Hum. Servs., No. 1:21-cv-2161 (D.D.C. Aug. 12, 2021), *voluntarily dismissed* Dec. 1, 2021.

suits faced long odds of success in light of the D.C. Circuit's *American Hospital Ass'n* decision, which rejected many similar arbitrary-and-capricious arguments in the context of the Hospital Rule.

II. Using ERISA to Bolster Price Transparency Efforts

The Hospital Rule and Insurance Rule are critical steps in empowering consumers and injecting price competition into the health care sector. But there are also some limitations on the scope and efficacy of these rules. Most notably, these rules are enforced solely by HHS.[24] Private parties have no ability to take action against hospitals or health plans that are not in compliance. For example, there have been many recent reports of non-compliance with the Hospital Rule,[25] but affected consumers lack any ability to seek remedies for those violations. Any enforcement or penalties are solely in the discretion of HHS.[26]

ERISA, however, can be used as an independent statutory basis for ensuring price transparency for participants in employer-sponsored health plans. Critically, unlike the HHS rules, ERISA can be enforced through private suits by plan participants whose employers fail to provide them with accurate, upfront information about the price of their care.[27] The Department of Labor (DOL) could also issue rules or guidance under ERISA confirming that fiduciaries of employer-sponsored health plans must ensure that beneficiaries have access to clear, transparent price information.[28] Whether invoked through private suits, DOL actions, or both, ERISA represents a powerful independent statutory tool for ensuring price transparency in health care.

A. Background ERISA Principles

ERISA was enacted in 1974 to protect participants in employer-sponsored benefit and welfare plans by ensuring that such plans are managed prudently and in participants' best interests. The statute allows participants, beneficiaries, or fiduciaries to bring suit: "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of

24. Hospital Rule, 84 Fed. Reg. at 65,604 (to be codified at 45 C.F.R. §180.70); 42 U.S.C. §300gg-22; *see* 45 C.F.R. §150.203.

25. *See* Tom McGinty, Anna Wilde Matthews & Melanie Evans, *Hospitals Hide Pricing Data from Search Results*, Wall St. J. (Mar. 22, 2021, 5:30 AM), https://on.wsj.com/2TlEFWY [https://perma.cc/WU9X-DDVT]; PatientRightsAdvocate.org, Semi-Annual Hospital Price Transparency Report 1 (2021), https://bit.ly/38gz34z (finding based on analysis of 500 hospitals' price disclosures that only 5.6% were fully compliant with the Hospital Rule's requirements).

26. Hospital Rule, 84 Fed. Reg. at 65,604.

27. *See* 29 U.S.C. § 1132(a)(1)(A).

28. *See id.* § 1135 ("[T]he Secretary may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this subchapter.").

this subchapter or the terms of the plan . . . ."[29] The statute also makes plan administrators "personally liable" for up to $100 per day for a "failure or refusal" to furnish information that must be disclosed under ERISA.[30] ERISA further authorizes awards of attorneys' fees to the plaintiff in the discretion of the district court.[31] Under ERISA, a party need not necessarily prevail to be eligible for attorneys' fees, but need only achieve "some degree of success on the merits."[32]

The central unit of analysis in ERISA is the "employee benefit plan" or (more simply) "plan." A "plan"—a term for which ERISA gives no substantive definition—is properly understood as "an unwritten 'scheme' or 'set of rules' regarding the provision of employee benefits."[33] Although ERISA requires a plan to be "established and maintained pursuant to a written instrument,"[34] this is a regulatory requirement, not a prerequisite for a plan to exist, nor is the "plan" as such necessarily identical with any specific document.[35]

Plans come in two kinds: "welfare benefit plans" and "pension benefit plans."[36] The kind relevant here is the welfare benefit plan, which includes any "plan, fund or program . . . established or maintained by an employer or by an employee organization" (such as a labor union) to provide, "through the purchase of insurance or otherwise," healthcare benefits to employees who participate in the plan (known as "participants") and/or other "beneficiaries" (such as family members) who may be eligible through participants.[37]

Notably, "[n]othing in ERISA requires employers to establish employee benefit[] plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan."[38] Rather, ERISA's primary goal is simply to hold employers to the benefit promises that they choose to make.[39] To that end, ERISA treats an employee benefit plan as akin to a trust. The plan's "sponsor"—the employer (or

29. *Id.* § 1132(a)(3).

30. *Id.* § 1132(c)(1)(B).

31. *See id.* § 1132(g)(1) ("In any action under this subchapter [with one exception not relevant here] by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.").

32. Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 245 (2010); *see also* Martin v. Ark. Blue Cross & Blue Shield, 299 F.3d 966, 969 n.4, 974 (8th Cir. 2002); *see id.* at 970 (collecting cases).

33. Larson v. United Healthcare Ins. Co., 723 F.3d 905, 911 (7th Cir. 2013) (quoting Pegram v. Herdrich, 530 U.S. 211, 223 (2000)); *see also* Donovan v. Dillingham, 688 F.2d 1367, 1373 (11th Cir. 1982) (en banc).

34. 29 U.S.C. § 1102(a)(1).

35. *Larson*, 723 F.3d at 911–12; *Donovan*, 688 F.2d at 1372; *see also* 29 U.S.C. § 1003(a).

36. 29 U.S.C. § 1002(1), (2)(A), (3).

37. *Id.* § 1002(1); *see id.* § 1002(4), (7), (8).

38. Lockheed Corp. v. Spink, 517 U.S. 882, 887 (1996).

39. *See id.*

other organization) that decides to create the plan[40]—is akin to the settlor of the trust.[41] The plan "administrator," akin to a trustee, is responsible for managing the plan in accord with its terms and with governing law.[42] Among other obligations, plan administrators must comply with ERISA's reporting and disclosure requirements[43] and are subject to the fiduciary duties defined by the statute.[44]

While the plan administrator is the paradigmatic ERISA fiduciary, it is not necessarily the only fiduciary that a plan has. ERISA defines "fiduciary" in functional rather than title-specific terms, "thus expanding the universe of persons subject to fiduciary duties."[45] As relevant here, a person (which includes an entity[46]) is a plan fiduciary "to the extent" that "he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets" or "has any discretionary authority or discretionary responsibility in the administration of such plan."[47]

This function-specific approach to fiduciary duties is of paramount importance in ERISA litigation. "In every case charging breach of ERISA fiduciary duty," the Supreme Court has explained, "the threshold question is not whether the actions of some person [with duties] under a plan adversely affected a plan beneficiary's interest, but whether that person was acting *as* a fiduciary (that is, *was performing a fiduciary function*) when taking the action subject to complaint."[48] Thus, an employer who also serves as the plan administrator (which is not only permissible,[49] but is in fact the default arrangement unless the plan instrument provides otherwise[50]) has fiduciary duties only when acting *as* the administrator, not when acting as the plan sponsor.[51] Conversely, a third party that renders services to a plan (such as an insurance company) may or may not be a fiduciary, depending on whether it exercises "the same discretionary authority as the original plan administrator."[52]

The application of these principles to the world of health plans is complicated by the significant variety of plan structures and

40. *See* 29 U.S.C. § 1002(16)(B).
41. CIGNA Corp. v. Amara, 563 U.S. 421, 437 (2011).
42. *Id.*; *see* 29 U.S.C. § 1002(16)(A).
43. *See* 29 U.S.C. §§ 1021–1031.
44. *See id.* § 1104.
45. Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993).
46. *See* 29 U.S.C. § 1002(9).
47. *Id.* § 1002(21)(A)(i), (iii).
48. Pegram v. Herdrich, 530 U.S. 211, 226 (2000) (emphases added).
49. *See id.* at 225.
50. *See* 29 U.S.C. § 1002(16)(A)(i)–(ii).
51. *Pegram*, 530 U.S. at 225–26.
52. Larson v. United Healthcare Ins. Co., 723 F.3d 905, 916–17 (7th Cir. 2013) (quoting Semien v. Life Ins. Co. of N. Am., 436 F.3d 805, 811–12 (7th Cir. 2006)).

administrative arrangements that exist in the market.[53] "[W]hen Congress wrote ERISA . . . most employer-based health plans were fully insured, not self-funded."[54] In a "fully insured" plan, the employer contracts with a company like Blue Cross or Aetna to *both* transfer the insurance risk to the third party *and* delegate administrative and claims-processing functions.[55] By contrast, in a "self-insured" plan the employer itself retains the insurance risk and is ultimately responsible for paying all claims.[56] These self-insured plans have become increasingly common, particularly with large employers.[57]

Many self-insured plans, however, will still contract out administrative and claims-processing functions to a third party in what is known as an "administrative services only" or "ASO" model.[58] This arrangement can give rise to confusion because it is often the very same companies—Blue Cross, Cigna, Aetna, etc.—that will serve as an ASO even if the employer is bearing the insurance risk through a self-funded plan. Thus, even though it is often the same "insurance companies" that are involved in managing health plans, it is important to keep in mind the distinction between fully insured plans and ASO arrangements.

B. The Importance of Negotiated Rates to an ERISA Health Plan

Whether a health plan involves a fully insured arrangement or an ASO arrangement, all such plans operate through a system of agreements with health care providers that dictate how much the providers will be paid for providing service to participants in the plan.[59] These negotiated "in-network" rates are at the very core of the benefits provided by the plan: for participants who have not yet met their deductibles (or who have a coinsurance obligation), the negotiated rates directly dictate what the participants will pay out-of-pocket for care.[60]

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53. *See generally* PHYLLIS G. BORZI, CTR. FOR HEALTH SERVS. RSCH. & POL'Y, SCH. OF PUB. HEALTH & HEALTH SERVS., G.W. UNIV. MED. CTR., ERISA HEALTH PLANS: KEY STRUCTURAL VARIATIONS AND THEIR EFFECT ON LIABILITY 6 (2002), https://bit.ly/355cqyL.

54. Erin C. Fuse Brown & Elizabeth Y. McCuskey, *Federalism, ERISA, and State Single-Payer Health Care*, 168 U. PA. L. REV. 389, 451 (2020).

55. *See, e.g.*, United States v. Anthem, Inc., 236 F. Supp. 3d 171, 188 (D.D.C. 2017); *see also Administrative Services Only (ASO): 5 Reasons for Self-Funding*, DINSMORE/STEELE (2021), https://bit.ly/3pORGos [perma.cc/H4X2-NCDC].

56. *Anthem*, 236 F. Supp. 3d at 188.

57. "Larger employers tend to purchase ASO plans because they can spread the risk of the medical costs over a larger number of covered lives, and smaller employers tend to purchase full insurance because they cannot." *Id*. at 188–89.

58. *See id.* at 188.

59. *See, e.g.*, Michael Batty & Benedic Ippolito, *Mystery of the Chargemaster: Examining the Role of Hospital List Prices in What Patients Actually Pay*, 34 HEALTH AFFS. 689, 694 (2017), https://www.healthaffairs.org/doi/epdf/10.1377/hlthaff.2016.0986; Sammy Mack, *They Paid How Much? How Negotiated Deals Hide Health Care's Cost*, NPR (Nov. 15, 2014, 7:48 AM), https://n.pr/3cvyJ4M [perma.cc/Z7UQ-8TY8].

60. *See, e.g.*, Hospital Rule, 84 Fed. Reg. 65, 524, 65,547 (Nov. 27, 2019) (to be codified at 45 C.F.R. subch. E) (transparency about negotiated rates is "highly beneficial

But, even after a participant has met his or her deductible, the negotiated rates also dictate the amount that the employer (in a self-insured plan) or the insurer (in a fully insured plan) will pay for the care.[61] The negotiated rates are thus integral to understanding both the employees' rights and benefits under the plan as well as determining whether the employer is managing plan assets prudently and in the best interest of participants.

For fully insured plans, the insurance products that they purchase generally come already associated with negotiated-rate networks.[62] In principle, self-insured plans could attempt to negotiate their own pricing agreements, but in practice they often rely on the networks of insurance companies that they hire in ASO arrangements. As the Insurance Rule explains, such plans "rent networks from issuers and contract with those issuers as TPAs to administer plan benefits."[63] To again state the obvious, such "rental" agreements are contracts that self-insured plans enter into for administrative convenience and that (to be effective at all) necessarily establish rights to the benefit of the plan. For this reason, any ERISA theories are at their strongest when dealing with a *self-insured* ERISA plan.

Negotiated rates are also highly relevant to the primary healthcare consumer, the plan participant. Ultimately, it is the plan participant who contracts for and receives healthcare from a provider; even if plans often end up *paying* participants' bills, they are still *participants'* bills. And in the world of high-deductible health plans, this is clearer to participants than ever before.[64] When participants are responsible for 100% of their medical bills prior to meeting the plan's deductible, the negotiated rates are the prices that the participants will *actually pay out of pocket*.[65] It is only natural, then, to think of the negotiated rates

for consumers in [high-deductible insurance plans] and in plans where the consumer is responsible for a percentage (that is, co-insurance) of the negotiated rate"); Batty & Ippolito, *supra* note 59, at 694; Ge Bai & Gerard F. Anderson, *Extreme Markup: The Fifty US Hospitals with the Highest Charge-to-Cost Ratios*, 34 HEALTH AFFS. 922, 923 (2015); *see also* Melinda Beck, *How to Cut Your Health-Care Bill: Pay Cash*, WALL ST. J. (Feb. 15, 2016, 10:11 PM), https://on.wsj.com/3vdpXyD [perma.cc/L68B-7JQT].

61. *See, e.g.*, Gloria Sachdev, Chapin White & Ge Bai, *Self-Insured Employers Are Using Price Transparency to Improve Contracting with Health Care Providers: The Indiana Experience*, HEALTH AFFS.: HEALTH AFFAIRS BLOG (Oct. 7, 2019), https://bit.ly/35ciXYp [https://perma.cc/52G4-MJXP]; Zach Y. Brown, *Equilibrium Effects of Health Care Price Information*, 101 REV. ECON. & STATS. 699, 701–03 (2019), https://bit.ly/3geFRoq.

62. Brown, *supra* note 61, at 704.

63. Insurance Rule, 85 Fed. Reg. 72,158, 72,262 (Nov. 12, 2020) (to be codified at 26 C.F.R. pt. 54).

64. *See, e.g.*, Hospital Rule, 84 Fed. Reg. at 65,547; Tiffany Y. Kim & Anna D. Sinaiko, *Cost-Sharing Obligations, High-Deductible Health Plan Growth, and Shopping for Health Care: Enrollees with Skin in the Game*, 176 JAMA INTERNAL MED. 395, 395 (2016), https://bit.ly/3zjbp3N (select "PDF").

65. Beck, *supra* note 60.

that are bundled with participation in a plan as being a critical component of participants' *benefits* and *obligations* under the plan.

There is ERISA caselaw in both the Seventh and Eleventh Circuits to support this common-sense understanding of negotiated rates. Those courts have held that amounts such as copayments and deductibles qualify as plan terms or plan benefits.[66] It is a straightforward application of these holdings to conclude that negotiated-rate contracts, which directly affect how far each deductible dollar goes toward medical services, are also plan terms or plan benefits. As the Eleventh Circuit explained in *Heffner*:

> [T]he existence and amount of a plan's deductible directly affects the value of benefits offered under the plan. All other things being equal, imposing a deductible decreases the value of the plan's benefits, and the value of those benefits varies inversely with the amount of the deductible. Viewed in these real economic terms, not having to pay a deductible is a benefit of a plan.[67]

Almost exactly the same could be said of the "existence and amount" of negotiated rates. In "real economic terms," the value of a plan with a deductible varies based on the negotiated rates that participants will pay out-of-pocket until they have met their deductibles.[68]

As further support for the central role of negotiated rates in health plans, a number of state courts have held that insureds are intended third-party beneficiaries of—and therefore can sue to enforce their rights under—provider agreements between their insurers and healthcare providers.[69] Based on these holdings, it seems quite clear that negotiated rates count as "rights" under the plan just as much as any other term of a plan's insurance policy.

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66. *See* Larson v. United Healthcare Ins. Co., 723 F.3d 905, 917 (7th Cir. 2013) (explaining that copayment requirements are "policy terms" and hence part of "the content of the plan" (quoting Pegram v. Herdrich, 530 U.S. 211, 226 (2000))); Heffner v. Blue Cross & Blue Shield of Ala., Inc., 443 F.3d 1330, 1338 (11th Cir. 2006) (holding that an action to recover improperly applied deductibles is an action "to enforce . . . rights under the term of the plan" for purposes of § 1132(a)(1)(B), because "[a] statement that there will be no deductible is a right under the plan").

67. *Heffner*, 443 F.3d at 1338.

68. *See also* Frulla v. CRA Holdings, Inc., 543 F.3d 1247, 1253 (11th Cir. 2008) (holding that any plan term that directly affects the "total economic value" of plan benefits is itself a benefit subject to ERISA).

69. *See* Beverly v. Grand Strand Reg'l Med. Ctr., LLC, 839 S.E.2d 468, 470–73 (S.C. Ct. App. 2020), *cert. granted* (S.C. Nov. 25, 2020); West v. Shelby Cnty. Healthcare Corp., 459 S.W.3d 33, 45 (Tenn. 2014) (citing Benton v. Vand. Univ., 137 S.W.3d 614, 620 (Tenn. 2004)); Jennings v. Rapid City Reg'l Hosp., Inc., 802 N.W.2d 918, 920–23 (S.D. 2011); Dorr v. Sacred Heart Hosp., 597 N.W.2d 462, 475–76 (Wis. Ct. App. 1999); Nahom v. Blue Cross & Blue Shield of Ariz., 885 P.2d 1113, 1117–18 (Ariz. Ct. App. 1994); *cf.* Smallwood v. Cent. Peninsula Gen. Hosp., 151 P.3d 319, 325–27 (Alaska 2006) (holding that Medicaid recipient was third-party beneficiary of provider agreement between the state and a hospital).

C. ERISA Requires Disclosure of Negotiated Rates to Participants in the Plan

Even though, as explained, negotiated rates are an integral component of any employer-sponsored health plan, many insurance companies or ASOs refuse to provide this information to plan participants (or, remarkably, even to plan sponsors). Insurance companies or ASOs often take the position that these rates are "confidential" and thus need not be disclosed. Such arguments are untenable under ERISA for two independent reasons, from the perspective of both participants and plan sponsors.

Beginning with participants, ERISA provides a clear informational right that entitles participants to disclosure of the prices that will be charged by each provider who participates in the plan. Section 1024(b)(4), one of ERISA's disclosure requirements, obligates plan administrators to provide a copy of certain documents to a participant upon the participant's written request:

> The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, *contract, or other instruments under which the plan is established or operated*. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies.[70]

Failure to comply with this obligation is redressable by injunctive relief under § 1132(a)(3), in addition to statutory penalties of "up to $100 per day" under § 1132(a)(1)(A), (c)(1)(B) for every day past the thirtieth day after the request.[71] Both the imposition of the statutory penalty and the appropriate amount are in the district court's discretion.[72] "Appropriate factors to be considered" by the district court "include 'bad faith or intentional conduct on the part of the administrator, the length of the delay, the number of requests made and documents withheld, and the existence of any prejudice to the participant or beneficiary.'"[73] Although prejudice and damages are "often factors, neither is a *sine qua non*."[74]

To enforce price transparency through § 1024(b)(4), a participant in an ERISA health plan should first make a written request to the plan administrator for copies of all negotiated-rate agreements applicable to the health plan. Since the right to make a request under § 1024(b)(4) turns on participant or beneficiary status alone, *any* participant or

70. 29 U.S.C. § 1024(b)(4) (emphasis added).
71. *See id.* § 1132(a)(3), (1)(A), (c)(1)(B).
72. *See, e.g.*, Algie v. RCA Glob. Commc'ns, Inc., 891 F. Supp. 839, 868–69 (S.D.N.Y. 1994) (collecting cases).
73. Romero v. SmithKline Beecham, 309 F.3d 113, 120 (3d Cir. 2002) (Alito, J.).
74. *Id.* (collecting cases across circuits).

beneficiary should have equal standing to make the request; there should be no requirement, for instance, that the requesting party have a special need for price information concerning a particular procedure or provider. Because participants do not know in advance what care they will need, they are well within their rights to request upfront disclosure of the prices charged by *all* providers who participate in the plan.

This request must be addressed to the plan administrator, since the administrator is the only party on whom § 1024(b)(4) imposes duties.[75] Additionally, the request should be made with as much specificity as possible, as many circuit courts have held that a vague request does not trigger the administrator's duty to disclose.[76]

If a request is properly made, the primary question will be whether the negotiated-rate agreements are the types of documents covered by § 1024(b)(4). Although there do not appear to be any previous cases specifically raising such a theory, negotiated rates plainly fall within the scope of the disclosure provision under bedrock principles of ERISA law. Most disputes about whether § 1024(b)(4) requires the disclosure of a particular document have turned on the scope of the residual phrase, "other instruments under which the plan is established or operated."[77] The circuits are substantially in accord about the meaning of this phrase: it covers (1) formal legal documents that (2) confine or govern a plan's operation by (3) establishing rights, obligations, or binding procedures under the plan.[78] This understanding flows from construing the word "instruments" to refer to formal legal documents, interpreting the phrase "under which the plan is established or operated" to denote something more specific than merely affecting the plan, and applying the *ejusdem generis* canon to construe the residual phrase in light of the preceding kinds of enumerated documents.[79]

The most relevant case law directly supports a duty to disclose negotiated rate information under ERISA. In the *Mondry* decision, for example, the Seventh Circuit held that ERISA mandates disclosure

75. *See, e.g.*, Nechis v. Oxford Health Plans, Inc., 421 F.3d 96, 104 (2d Cir. 2005) (dismissing § 1024(b) claim against non-plan administrator).

76. *See, e.g.*, Kollman v. Hewitt Assocs., LLC, 487 F.3d 139, 144–45 (3d Cir. 2007) (collecting authority from the Second, Fifth, Seventh, and Tenth Circuits).

77. *See id.* at 143–44.

78. *See* Mondry v. Am. Fam. Mut. Ins. Co., 557 F.3d 781, 796–98 & n.7 (7th Cir. 2009); Cotton v. Mass. Mut. Life Ins. Co., 402 F.3d 1267, 1274 n.8 (11th Cir. 2005); Brown v. Am. Life Holdings, Inc., 190 F.3d 856, 861–62 (8th Cir. 1999); Doe v. Travelers Ins. Co., 167 F.3d 53, 60 (1st Cir. 1999); Allinder v. Inter-City Prods. Corp., 152 F.3d 544, 549–50 (6th Cir. 1998) Bd. of Trs. of CWA/ITU Negotiated Pension Plan v. Weinstein, 107 F.3d 139, 142–46 (2d Cir. 1997); Faircloth v. Lundy Packing Co., 91 F.3d 648, 653–56 (4th Cir. 1996); Hughes Salaried Retirees' Action Comm. v. Adm'r of Hughes Non-Bargaining Ret. Plan, 72 F.3d 686, 689–91 (9th Cir. 1995) (en banc); *see also* Murphy v. Verizon Commc'ns, 587 F. App'x 140, 142–45 (5th Cir. 2014). The Third and D.C. Circuits have not addressed § 1024(b)(4)'s scope in any detail.

79. *E.g.*, *Weinstein*, 107 F.3d at 142–44.

of agreements between plan sponsors and third-party administrators where such agreements "govern the operation of the Plan" and provide "basic information that a plan participant needs to know," even if they do not "define what rights or benefits are available to" participants.[80] This reasoning applies with full force in the context of negotiated rates, which unquestionably involve "basic information that a plan participant needs to know," especially when participants have not yet met their deductibles and will be responsible for paying for their care out of pocket, up to the deductible amount.

Mondry arose when a self-funded plan participant requested documents that the third-party administrator, CIGNA, had invoked when denying her claim for benefits.[81] The court first held that the participant was entitled under § 1024(b)(4) to the claims administration agreement between the plan administrator and CIGNA.[82] Next, it turned to the "closer question" of whether the participant was entitled to internal documents that CIGNA had used to determine that the medical services she received were not covered.[83] As the Seventh Circuit acknowledged, other courts have held that internal documents used in administering a plan need not be disclosed if they are merely advisory and do not obligate the administrator.[84] Assuming without deciding that those cases were correct, *Mondry* distinguished them, holding that when a claims administrator "expressly relie[s]" on an internal document "and treats that document as the equivalent of plan language in ruling on a participant's entitlement to benefits, the [claims] administrator renders that document one that in effect governs the operation of the plan for purposes of section 1024(b)(4), and production of that document is required."[85]

Importantly, *Mondry* then confronted the "wrinkle" that the relevant documents were in the exclusive possession of the claims administrator, "not the plan administrator with the statutory obligation to produce plan documents."[86] While the plan administrator had contacted CIGNA to request the documents, it argued that it could not be liable for penalties because its failure to turn the documents over to the participant "result[ed] from matters reasonably beyond [its] control."[87] The Seventh Circuit rejected this argument, explicitly holding that the plan administrator's lack of possession of plan documents "did

80. *See Mondry*, 557 F.3d at 796; *accord* Griffin v. TeamCare, 909 F.3d 842, 847 (7th Cir. 2018).

81. *Mondry*, 557 F.3d at 783–84.

82. *Id.* at 796.

83. *Id.* at 797.

84. *See id.* at 797–98 (discussing, *e.g.*, Faircloth v. Lundy Packing Co., 91 F.3d 648, 652–54 (4th Cir. 1996); *Weinstein*, 107 F.3d at 142–45).

85. *Id.* at 799–801.

86. *Id.* at 801.

87. *Id.* (quoting 29 U.S.C. § 1132(c)(1)(B)).

not excuse its statutory obligation" to produce those documents under § 1024(b)(4):

> What matters, in our view, is that American Family [the plan administrator] contracted with CIGNA to handle claims administration as its agent, and if American Family did not include in the contract a provision entitling it to copies of any documents that might be covered by section 1024(b)(4), it certainly could have done so. Access to such documents thus was not a matter "reasonably beyond the control" of American Family as the plan administrator.[88]

This is another highly pertinent holding in the context of negotiated rates, since many plan administrators may not have access to their ASO's negotiated-rate information and may thus be inclined to raise a "beyond our control" defense. But *Mondry* confirms that this type of defense to an ERISA disclosure claim is untenable—and, as explained below, there are strong arguments that a plan fiduciary would *itself* violate ERISA if it contracted with an insurer or ASO without insisting upon the production of all negotiated rate information.

The Seventh Circuit's 2018 *Griffin* decision further reinforces this reasoning. In that case, a physician outside the patient's plan network obtained an assignment of all the patient's plan and ERISA rights, thus stepping into the shoes of a plan participant for all relevant purposes.[89] The physician submitted a claim and, following a dispute about the appropriate reasonable fee due to an out-of-network provider for the claim, requested plan documents including "the documents used to determine her payment, like rate tables and fee schedules."[90] The plan responded that it used "pricing methodology" from a third party to set the physician's fee, but maintained that it had no duty under ERISA to turn over the relevant documents.[91] The Seventh Circuit disagreed.[92] After holding that the physician enjoyed all of the patient's ERISA rights pursuant to the assignment, it held that the plan administrator was required to produce the third party's fee schedules "used to calculate [the physician's] payment," as they were "the basis of [the plan's] benefits determination," which (implicitly) made them plan documents under *Mondry*.[93]

Griffin extended *Mondry*'s rule from its original context (an eligibility decision) to a variable price determination.[94] Because the physician was suing in the shoes of the patient as plan participant, this holding necessarily suggests that a plan *participant* is entitled to

88. *Id.* at 802.
89. Griffin v. Teamcare, 909 F.3d 842, 844 (7th Cir. 2018).
90. *Id.*
91. *Id.* at 844–45, 847.
92. *Id.* at 847.
93. *Id.* (citing *Mondry*, 557 F.3d at 800).
94. *Id.*

documents that govern the price at which his health plan reimburses a provider. And there is no plausible reason to distinguish the documents governing *out*-of-network pricing determinations (as in *Griffin*) from those governing *in*-network pricing determinations (as in the case of negotiated-rate contracts).

To recap, *Mondry* and *Griffin* together establish the following: (1) § 1024(b)(4) is not limited to documents that define individual participant rights, but more broadly includes all documents that govern plan administration; (2) § 1024(b)(4) covers documents that are applied to determine pricing; and (3) a plan administrator's statutory duty to produce § 1024(b)(4) documents upon request is not excused by non-possession. Together, these holdings form a very strong foundation for the conclusion that plan administrators are obligated to produce, upon a participant's written request, all negotiated-rate contracts that establish the prices that will be paid for care.

Although *Mondry* and *Griffin* provide strong support for requiring disclosure of negotiated rate information under ERISA, some other circuit precedent is less helpful. Most notably, in *DeLuca v. Blue Cross Blue Shield of Michigan*, the Sixth Circuit held in a 2–1 split decision that Blue Cross—which served as the ASO for a self-insured health plan—was not a fiduciary of the plan with respect to negotiating provider rates.[95] The plaintiff alleged that Blue Cross abused its discretion in managing the plan by agreeing to raise rates for two provider networks while decreasing rates for other networks; the effect of these price changes was to benefit Blue Cross's affiliated plans at the expense of self-insured plans.[96] In a somewhat muddled and conclusory opinion, the majority held that the plaintiff's claim failed because Blue Cross's rate negotiations "were not directly associated with the benefits plan at issue here but were generally applicable to a broad range of health-care consumers."[97] The court found—without any meaningful explanation—that this approach made rate negotiation no longer "'management' or 'administration' *of the plan*," but "merely a business decision that ha[d] an effect on an ERISA plan not subject to fiduciary standards."[98]

Judge Kethledge's dissent reflects a far better approach to the law. He argued that Blue Cross was not entitled to summary judgment because a jury could have found that Blue Cross's negotiated rates were "highly discretionary and have a direct impact on the Plan's bottom line" and that Blue Cross was accordingly an ERISA fiduciary when it negotiated those rates.[99] For the reasons discussed above and in Judge

95. DeLuca v. Blue Cross Blue Shield of Mich., 628 F.3d 743, 747 (6th Cir. 2010).
96. *Id.* at 746, 748.
97. *Id.* at 747.
98. *Id.*
99. *Id.* at 751.

Kethledge's dissent, the Sixth Circuit majority opinion in *DeLuca* did not properly analyze the role of negotiated rates within a self-insured health plan, and it should not be followed by other courts or treated as persuasive authority.

D. Plan Sponsors Have an Independent ERISA Duty to Obtain Negotiated Rate Information to Ensure the Prudent Management of Plan Assets

For all the reasons discussed above, I believe that § 1024(b)(4) of ERISA confers on participants a *right* to obtain negotiated rate information about each provider that provides health care under the plan. But that is not the only relevant obligation. ERISA, properly construed, also imposes a duty on *employers* or plan sponsors to obtain negotiated-rate information from their insurer or ASO to ensure that plan assets are being managed prudently and in the best interests of participants.

ERISA tasks all fiduciaries with the highest duties of loyalty and care. Under the duty of loyalty, a fiduciary must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries . . . for the exclusive purpose of (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan."[100] And the duty of care obliges fiduciaries to apply "the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."[101] The Supreme Court has held that this "same standard of prudence applies to *all* ERISA fiduciaries" regardless of the type of benefit plan.[102] That includes fiduciaries of healthcare plans.[103]

Critically, moreover, an employer that delegates or outsources certain fiduciary functions regarding a health plan retains an ongoing duty to monitor and supervise the exercise of those functions. An ERISA fiduciary "normally has a *continuing duty* of some kind to monitor" the plan.[104] Moreover, "[u]nder ERISA, fiduciaries who have appointed other fiduciaries have a continuing duty to monitor the actions of the

100. 29 U.S.C. § 1104(a)(1)(A).

101. *Id.* § 1104(a)(1)(B).

102. Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 418–19 (2014) (emphasis added).

103. *See, e.g.*, Pegram v. Herdrich, 530 U.S. 211. 222–24 & n.6 (2000) (ERISA fiduciary over healthcare plan is subject to standard of prudence); AMA v. United Healthcare Corp., No. 00 CIV. 2800, 2001 WL 863561, at *8 (S.D.N.Y. July 31, 2001) (same).

104. Tibble v. Edison Int'l, 575 U.S. 523, 530 (2015) (emphasis added); *see, e.g.*, Stegemann v. Gannett Co., Inc., 970 F.3d 465, 475 (4th Cir. 2020) (emphasis added); *see also* Langbecker v. Elec. Data Sys. Corp., 476 F.3d 299, 321 (5th Cir. 2007) (an ERISA fiduciary has a "duty to ensure that each investment option is *and continues to be* a prudent one" (emphasis added)).

appointed fiduciaries."[105] And the continuing duty to monitor "carries with it" the continuing "duty to take action upon discovery that the appointed fiduciaries are not performing properly."[106] "A failure to monitor appointees and to remove non-performing fiduciaries thus renders the appointing fiduciary jointly and severally liable for the appointed fiduciaries' breaches."[107]

Simply put, plan sponsors have a federal-law obligation to ensure that the plan's assets are being spent prudently and in the best interests of the participants. Given those paramount fiduciary obligations under ERISA, it is imperative for plan sponsors to have access to information about negotiated rates, even when they have outsourced certain plan functions to another company through an insurance arrangement or ASO arrangement. After all, agreements between an ASO or insurance company and in-network providers directly dictate the terms under which providers will receive payment from the plan.

Without access to this information, employers are unable to meaningfully supervise and monitor how plan assets are being deployed. For example, without negotiated-rate information, the plan sponsor would be unable to determine whether and to what extent the plan is paying more than other payors (such as Medicare or Medicaid) for identical services. It would be unable to determine if plan participants could receive superior care at lower prices by using a price-transparent provider such as the Surgery Center of Oklahoma,[108] or a CVS Minute Clinic.[109] It would be unable to determine if certain providers are charging more than others for identical routine services (such as blood tests, x-rays, and MRIs). And it would be unable to determine if providers in one region are charging more than providers in other areas of the country.

Without knowing providers' prices, plan sponsors would also be unable to implement innovative new types of benefit designs that promote high-value spending while decreasing low-value spending. For example, Safeway has used a "reference pricing" system for laboratory tests, CT scans, and MRIs, in which the company's insurance plan

105. *In re* Bausch & Lomb Inc. ERISA Litig., No. 06–CV–6297, 2008 WL 5234281, at *10 (W.D.N.Y. Dec. 12, 2008) (citing Coyne & Delany Co. v. Selman, 98 F.3d 1457, 1465 (4th Cir. 1996)); *see, e.g.*, *In re* MedStar ERISA Litig., No. 20-CV-0689, 2021 WL 391701, at *7 (D. Md. Feb. 4, 2021).

106. *Bausch & Lomb*, 2008 WL 5234281, at *10 (quoting Liss v. Smith, 991 F. Supp. 278, 311 (S.D.N.Y. 1998)); *see, e.g.*, Crocker v. KV Pharm. Co., 782 F. Supp. 2d 760, 787 (E.D. Mo. 2010) (same).

107. *Liss*, 991 F. Supp. at 311 (citing Lowen v. Tower Asset Mgmt., Inc., 829 F.2d 1209, 1220 (2d Cir. 1987)); *see, e.g.*, Stockwell v. Hamilton, 163 F. Supp. 3d 484, 491 (E.D. Mich. 2016) (citing cases).

108. *See Surgery Pricing*, Surgery Ctr. of Okla. (2022), https://bit.ly/3e5eQl3 [https://perma.cc/4ZRB-Z7BV].

109. *See Price List*, CVS Pharmacy (2022), https://bit.ly/3ggQTIl [https://perma.cc/7NG4-5ELC].

would pay for these services only up to the sixtieth percentile of the price distribution; if a patient chose a higher-cost provider, he or she would pay the additional costs above the reference price.[110] The reference pricing system, combined with full price transparency, enabled robust price shopping, resulting in a twenty-seven percent decrease in spending on laboratory tests and a thirteen percent decrease in spending on imaging tests.[111] But it is impossible for an employer to consider a program like this one in the absence of accurate upfront information about providers' prices.

In sum, even when a plan sponsor outsources certain components of plan administration as a matter of administrative convenience, the ultimate responsibility for ensuring the prudent management of plan assets belongs to the sponsor alone. And there is simply no way that the sponsor can adequately discharge those functions if it does not know upfront how much the plan has agreed to pay providers who offer care to plan participants.

This same conclusion applies to both fully insured plans and self-insured plans that contract with an ASO. In the ASO/self-insured context, the analysis is very straightforward. Because the plan sponsor ultimately *pays all claims* arising out of the plan, the sponsor has a clear fiduciary obligation to ensure that this money is being spent prudently and in the best interests of participants. Without knowing up-front the prices charged for care under the plan, the sponsor cannot ensure that it is meeting its fiduciary obligations to participants and cannot adequately monitor the actions of the ASO. One plan sponsor is raising a claim along these lines in a pending case in Massachusetts.[112] Count III of the complaint alleges that the ASO is violating its fiduciary duties to the plan by refusing to provide the sponsor with "provider contracts, payment policies, and other supporting documentation" regarding how claims are paid.[113] Although that case is still in its early stages, the legal theory is sound and should prevail on the merits under a proper view of ERISA.

The analysis is somewhat different for fully insured plans, in which an insurance company like Blue Cross both processes claims and bears the ultimate insurance risk. In that situation, the employer does not bear ultimate financial responsibility for the claims, so there is a less direct need for negotiated rate information. But plan sponsors should still have strong grounds to demand this information based on the need

110. *See* Christopher Whaley, Timothy Brown & James Robinson, *Consumer Responses to Price Transparency Alone Versus Price Transparency Combined with Reference Pricing*, 5 AM. J. HEALTH ECON. 227, 230 (2019).

111. *See id.* at 246.

112. *See* Complaint at 7, 8, 11, 12, 21, 22, Mass. Laborers Health & Welfare Fund v. Blue Cross Blue Shield of Mass., No. 1:21-cv-10523 (D. Mass. Mar. 26, 2021).

113. *Id.* at 22.

to fulfill their fiduciary obligation to keep *participants* apprised of the terms of the plan. Even if the employer in a fully insured arrangement does not ultimately pay the claims, this arrangement does not change the fact that negotiated rate information remains highly pertinent to participants, especially those with coinsurance or a deductible.[114] Any prudent plan sponsor would insist on the disclosure of this information, and ERISA requires them to do so.

Finally, many ASOs or insurance companies have taken the position that their agreements or payment arrangements with providers are confidential. But this is not a sufficient basis to withhold this information, for several reasons. First, because ERISA imposes fiduciary duties as a matter of federal law, ERISA's obligations would override any contractual clauses that attempt to withhold material information from the plan sponsor or participants.[115] Indeed, the Consolidated Appropriations Act of 2021 recently amended ERISA to expressly prohibit such gag clauses.[116] Under the new provision, any "group health plan or health insurance issuer . . . may not enter into an agreement with a health care provider, network, or association of providers" that would restrict the health plan from "providing provider-specific cost or quality of care information or data" to the plan sponsor or beneficiaries.[117] Insurers and employer health plans must also submit annual disclosures to the HHS Secretary attesting that they are in compliance with this requirement.[118] ERISA itself thus overrides any contractual gag clauses that would deprive beneficiaries of price and quality information.

Second, as the D.C. Circuit recently emphasized in upholding the federal price transparency rules for hospitals, all patients will eventually learn the cost of their care when they receive an "Explanation of Benefits" from their insurer (or ASO) that shows "the insurer's negotiated rates and the patient's out-of-pocket costs."[119] In its Hospital Rule, HHS similarly emphasized that explanations of benefits "are designed to communicate provider charges and resulting patient cost obligations, taking third party payer insurance into account, and *the payer-specific negotiated charge is a standard and critical data point found on*" them.[120]

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114. *See supra* Section II.B.

115. *See*, *e.g.*, Mondry v. Am. Fam. Mut. Ins. Co., 557 F.3d 781, 802 (7th Cir. 2009) (holding that certain plan documents must be produced even though they were in possession of CIGNA, not the plan administrator, because the administrator's lack of possession "did not excuse its statutory obligation" to produce those documents).

116. *See* Pub. L. 116-260 §201.

117. 29 U.S.C. § 1185m.

118. *Id.*

119. Am. Hosp. Ass'n v. Azar, 983 F.3d 528, 531 (D.C. Cir. 2020).

120. Hospital Rule, 84 Fed. Reg. 65,524, 65,543 (Nov. 27, 2019) (to be codified at 45 C.F.R subch. E) (emphasis added).

Thus, the question is not *whether* negotiated rates with providers are confidential—they plainly are not, since they are disclosed repeatedly every time a claim is processed—but *when* they will become public. Any claims by an insurer or ASO that this information is "confidential" does not withstand scrutiny and does not diminish the clear duties under ERISA to make this information available to both participants and plan sponsors.

Conclusion

For all the reasons discussed above, ERISA is a powerful statutory tool that can be used to supplement and reinforce the new federal price-transparency regulations. ERISA imposes on the sponsors of employee health plans the highest duties of care and loyalty, and a sponsor simply cannot discharge those duties if employees are left in the dark about the true cost of their care. Employees whose health plans do not include transparent prices should consider filing private ERISA actions against their plan sponsors, and DOL should consider promulgating regulations or guidance reaffirming that prudent management of a health plan under ERISA requires that employees be provided access to clear, comprehensive, upfront information about the price of their care.

Working from Home: Unraveling the Employment Law Implications of the Remote Office

Isaac Mamaysky* & Kate Lister**

Introduction

"At the onset of the Covid-19 crisis," begins an article in the *Harvard Business Review*, "talent literally left the building, and we're now beginning to realize that in many places, it is unlikely to come back. Technology is moving humanity away from the office and back into homes across our nation every day."[1] The pandemic has created an unprecedented shift towards remote work.[2] Large segments of the workforce are unlikely to return to anything like the traditional pre-COVID office.[3] In our new normal, many experts predict employers will "conceptualize office space as an add-on to virtual work, as opposed to the default for where people work."[4]

While remote work has numerous benefits for both employees and employers—such as improving employee happiness, boosting workplace productivity, and reducing office costs[5]—remote work also creates a web of new legal obligations for employers and new entitlements for

*Partner, Potomac Law Group (https://www.potomaclaw.com), Adjunct Professor of Law, Albany Law School. In his practice, the author advises multinational corporations, privately held businesses, and national nonprofits on wide-ranging employment law matters.

**President, Global Workplace Analytics (http://GlobalWorkplaceAnalytics.com). The author leads a research-based consulting firm that has been helping organizations optimize hybrid remote work strategies for over seventeen years. She has written or coauthored five business books and was one of only three witnesses invited to testify before a U.S. Senate committee on the expansion of telework in government post-COVID-19.

1. Becky Frankiewicz & Tomas Chamorro-Premuzic, *The Post-Pandemic Rules of Talent Management*, Harv. Bus. Rev. (Oct. 13, 2020), https://hbr.org/2020/10/the-post-pandemic-rules-of-talent-management [https://perma.cc/YFK5-7CFS].

2. *See, e.g.*, Susan Lund, Wan-Lae Cheng, André Dua, Aaron De Smet, Olivia Roberson & Saurabh Sanghvi, *What 800 Executives Envision for the Postpandemic Workplace*, McKinsey Glob. Inst. (Sept. 23, 2020), https://www.mckinsey.com/featured-insights/future-of-work/what-800-executives-envision-for-the-postpandemic-workforce#[https://perma.cc/75Q2-32S2].

3. *See id.*

4. Ethan Bernstein, Hayley Blunden, Andrew Brodsky, Wonbin Sohn & Ben Waber, *The Implications of Working Without an Office*, Harv. Bus. Rev. (July 15, 2020), https://hbr.org/2020/07/the-implications-of-working-without-an-office.

5. Isaac Mamaysky, *The Future of Work: Exploring the Post-Pandemic Workplace from an Employment Law and Human Resources Perspective*, 21 U.C. Davis Bus. L.J. 257, 265–67 (2021).

employees.[6] This is because both employers and employees may become subject to the employment, tax, and corporate laws of the states in which remote employees live and spend their workdays.[7]

Let us take as an example an employer that is based in New York City and has employees who live in Connecticut and New Jersey. When those employees work from Manhattan, their employer is subject to New York employment laws.[8] When some of those same employees work from home, the employer becomes subject to Connecticut and New Jersey employment laws in addition to those of New York.[9] If we further assume that this employer has a District of Columbia office with employees who live in Maryland and Virginia, then the employer, which was once obligated to comply with the employment laws of just two states, must now comply with those of six.[10]

The sudden shift to working from home during the pandemic untethered "work" as a verb—what people *do*—from "work" as a noun—*where* people do it. While we cannot predict the extent to which current events will permanently reshape the future of work, it is clear from innumerable public declarations of large employers that many employees will have more choice about where they work than they did before the crisis. This paper is intended to help employers and their professional advisors understand what they need to know about some of the more common legal issues that arise when employees work in a state or city that is different from their own. In the pages that follow, we consider the following areas of employment law in the context of remote work:

- Minimum wage and overtime laws
- Family, medical, pregnancy, and COVID-19 leave entitlements
- Home office expense and technology reimbursements
- Antidiscrimination laws, policies, and training requirements
- Workplace notices
- Unemployment insurance, workers compensation, and disability insurance
- Tax and corporate registration obligations

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6. *See* Julia E. Judish & Ian S. Wahrenbrock, *Pandemic Work-From-Home Arrangements Have Tax and Employment Law Consequences*, Pillsbury (Nov. 30, 2020), https://www.pillsburylaw.com/en/news-and-insights/Remote-Work-Tax-Employment-Concerns.html [https://perma.cc/U9YX-4EQW]; *6 Compliance Considerations for Remote Employees*, Wolters Kluwer (Sept. 1, 2020), https://www.wolterskluwer.com/en/expert-insights/6-compliance-considerations-for-remote-employees [https://perma.cc/6P8Y-PLKM].

7. *See* Judish & Wahrenbrock, *supra* note 6.

8. *See id.*

9. *See id.*

10. *See id.*

We conclude with a discussion of how organizations are navigating these waters and meeting the new compliance challenges that stem from having a partially or fully remote workforce. While most of the laws and regulations we address are not new, many have yet to be tested in the context of widespread remote work. We expect that the ways in which these laws are interpreted, along with employer solutions to compliance, will continue to emerge and evolve in the months and years ahead.

I. Background: The New "Where" of Work

Before the pandemic, less than five percent of the workforce considered home their primary place of work,[11] and, for many, those homes were in the same state as their employer.[12] By contrast, seventy-five percent of office workers and fifty-six percent of all U.S. workers were working from home, at least some of the time, in June of 2020.[13] Notably, more than twenty-eight percent of employees who worked remotely during the pandemic did so in a state or country that was not the same as that of their employer.[14]

Among those employees who worked from a new location during the pandemic, a full two-thirds failed to notify their employer of their interstate work status for some or all of that time—putting both employers and employees at risk of noncompliance with the laws and regulations of the host states.[15] While some jurisdictions agreed to not pursue pandemic-related relocations that would otherwise make employees and their employers subject to their laws, early indications suggest the gloves will be off when the crisis is over.[16]

A survey of over 30,000 employees, conducted in waves, by the Becker Friedman Institute found that seventy-six percent of employees whose jobs can be done at least partially from home want to work remotely at least once a week after the pandemic is over.[17] A full

11. This figure was calculated from figures provided in the *American Community Survey*, conducted by the U.S. Census Bureau and reported in Report B08128, *Means of Transportation to Work by Class of Worker* for, 2019: ACS 1-Year Estimates Detailed Tables. The data can be retrieved from the U.S. Census Bureau's data portal, https://data.census.gov/cedsci (select "Tables," under "Years," select 2019 to filter, and browse under "Results." The table is on approximately the thirty-first screen).

12. Brian McKenzie, U.S. Census Bureau, Out of State and Long Commutes: 2011, at 10 tbl. 6 (2013), https://www2.census.gov/library/publications/2013/acs/acs-20.pdf.

13. Lydia Saad & Jeffrey M. Jones, *Seven in 10 U.S. White-Collar Workers Still Working Remotely*, Gallup (May 17, 2021), news.gallup.com/poll/348743/seven-u.s.-white-collar-workers-still-working-remotely.aspx [https://perma.cc/AD5E-Q25E].

14. Topia, Adapt to a Flexible New Normal10 (2021), https://www.topia.com/adapt-survey-report-2021(register for a free copy of the report).

15. *Id.* at 10, 12.

16. *Covid-19 Telework Triggers State Tax Withholding Guidance*, JDSupra (Apr. 21, 2020), https://www.jdsupra.com/legalnews/Covid-19-telework-triggers-state-tax-61603.

17. Jose Maria Barrero, Nicholas Bloom & Steven J. Davis, *Why Working from Home Will Stick* 13–14, 38 (Ronzetti Initiative for the Study of Lab. Mkts., Becker

twenty-seven percent want home to be their permanent place of work.[18] Corporate support for remote work has been changed by the pandemic too. According to McKinsey, nine out of ten executives envision a hybrid model, one where people spend some time working at home and some in the office, for their future.[19]

II. "The Perils of Multistate Employment"[20]

In a recent article in *The Week*, National Correspondent Ryan Cooper argued that the "basic fact standing in the way of a remote work boom is the federal structure of the United States."[21] Many business leaders do not realize just how much our employment laws, tax obligations, business registration requirements, and other legal regimes vary between states and localities. "Each state has its own unemployment system, its own tax laws, its own labor regulations, its own legal requirements for businesses, and so on," said Cooper.[22] "Having an employee move to another state can thus trip a whole slew of regulatory and tax requirements that businesses might not even know about."[23]

Large employers that already had employees working in numerous states and countries are likely comfortable with expanding the "where" of work, but many small and medium-size companies, and even some large ones whose presence in multiple states was limited before the pandemic, will be new to the game and have yet to learn the rules. Many do not even realize that they are out of compliance with relevant laws and regulations until, for example, an employee files for unemployment in a state where the employer does not have coverage, a wage and hour complaint is filed, or an audit brings the violation to the surface.

A. Minimum Wage and Overtime

The applicability of new state laws may require salary increases for employees whose home states have higher minimum wage and

Friedman Inst. Working Paper No. 2020-174, 2020), https://bfi.uchicago.edu/wp-content/uploads/2020/12/BFI_WP_2020174.pdf.

18. *Id.*

19. Andrea Alexander, Rich Cracknell, Aaron De Smet, Meredith Langstaff, Mihir Mysore & Dan Ravid, *What Executives Are Saying About the Future of Hybrid Work*, McKinsey & Co. (May 17, 2021), mckinsey.com/business-functions/organization/our-insights/what-executives-are-saying-about-the-future-of-hybrid-work [https://perma.cc/FSR8-23ZB].

20. *See* Jathan Janove, *The Perils of Multistate Employment*, SHRM (May 1, 2012), https://www.shrm.org/hr-today/news/hr-magazine/pages/0512legal.aspx [https://perma.cc/AMR6-C4CU].

21. *See* Ryan Cooper, *America Needs a Remote Workers Law*, The Week (Mar. 1, 2021), theweek.com/articles/967313/america-needs-remote-workers-law [https://perma.cc/THS7-R4XZ].

22. *Id.*

23. *Id.*

overtime requirements than those of their employer.[24] The current federal minimum wage is $7.25 per hour.[25] While that figure sets a floor across states, many states and cities have set the bar much higher.

For example, if an employee lives in New York State, they are entitled to a minimum wage of $12.50 per hour. That increases to $15 per hour if they live in New York City.[26] Consider the case of an employee who lives in Hancock, New York, and works for a company that is based five minutes away in Starlight, Pennsylvania. When that employee worked from Pennsylvania prior to the pandemic, they were entitled to $7.25 per hour. However, when they work from home, just over the Pennsylvania border, they become entitled to $12.50 per hour.[27]

Likewise, federal law creates a baseline by which employees earn time-and-a-half if they work more than forty hours in a particular week.[28] But like the minimum wage, many states impose more stringent overtime requirements. For example, employees who work in California are entitled to double-time when they exceed a twelve-hour workday or work more than eight hours on their seventh weekday of work.[29] This is a substantially different requirement from that of neighboring states, many of which mirror the federal overtime approach.[30]

Other wage and hour obligations that vary by state include meal and break requirements, pay-rate notifications, and the timing of pay at separation.[31] Connecticut, for example, requires a thirty-minute meal break for certain employees who work more than seven and a half hours per day. It must be given after the first two hours of work and before the last two.[32] By contrast, in New Jersey, mandatory breaks only apply to minors.[33] As another example, New York requires something that many states do not: namely, employers must provide their employees with a notice of wage rate form, which includes the

24. Paul E. Cirner, *Multistate Compliance for Employers With Out-of-State Remote Employee*, Nat'l L. Rev. (Apr. 23, 2021), https://www.natlawreview.com/article/multistate-compliance-employers-out-state-remote-employee [https://perma.cc/X3GV-MTWZ]; *New York State's Minimum Wage, Business Responsibilities Under the Law*, N.Y. State, https://www.ny.gov/new-york-states-minimum-wage/new-york-states-minimum-wage (last visited Apr. 23, 2022) (scroll down to "Business Responsibilities Under the Law").

25. *State Minimum Wage Laws*, U.S. Dep't of Lab. (Aug. 1, 2021), https://www.dol.gov/agencies/whd/minimum-wage/state [https://perma.cc/S7X5-MF8E].

26. *Id.*

27. *Id.*

28. *Overtime Pay*, U.S. Dep't of Lab., https://www.dol.gov/agencies/whd/overtime [https://perma.cc/V3DE-HUFC].

29. *See State Minimum Wage Laws*, *supra* note 25.

30. *Id.*

31. *See* Cirner, *supra* note 24.

32. Conn. Gen. Stat. § 31-51ii(a) (2021).

33. *Wage and Hour Compliance FAQs (for Workers)*, N.J. Dep't of Lab. & Workforce Dev., https://www.nj.gov/labor/wageandhour/support/faqs/wageandhourworkerfaqs.shtml [https://perma.cc/C78L-73UJ].

employee's hourly rate, overtime pay, pay date, and related information.[34] To further complicate matters, the form and content of this type of notice may differ in each locale that requires it.

B. Family, Medical, Pregnancy, and COVID-19 Leave Entitlements

Family, medical, and COVID-19 leave laws vary significantly between states.[35] Under federal law, employees may be entitled to job-protected *unpaid* leave for certain medical and family events by the Family and Medical Leave Act.[36] Again, this creates a baseline across states, but multiple states and dozens of localities require paid time-off to address short-term health needs and preventative care, serious illnesses, caring for an ill family member, or welcoming a new child.[37] According to The Kaiser Family Foundation:

> Since the first law was passed by voter initiative in 2006 in San Francisco, 12 states, plus D.C., and 21 other localities have passed laws requiring that eligible employees get paid time off to care for themselves or sick children. Two additional states (ME and NV) have general paid leave laws that allow employees to use accrued leave for any reason, including illness. Eight states' and eleven localities' requirements explicitly apply to public health emergencies, such as closure of a business or child's school to protect public health. All state and all local paid sick leave laws permit use of accrued leave for reasons associated with sexual assault, domestic violence, and stalking, except Pittsburgh's. Current paid sick leave laws generally work on an accrual basis, dependent on previous hours worked. The pay rate and the amount of paid sick time that can be accrued varies by policy.[38]

While there has been much talk about the Biden administration implementing a federal paid leave law, it is highly likely that many states will continue to impose their own, more stringent requirements.[39]

COVID-19 leave also varies across states. While the federal Families First Coronavirus Response Act created paid leave for certain

34. *Notice of Pay Rate*, N.Y. State DEP'T OF LAB., https://dol.ny.gov/notice-pay-rate [https://perma.cc/X76U-Q68V].

35. *Family Medical Leave,* NAT'L CONF. OF STATE LEGIS., https://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx [https://perma.cc/X56W-XUZG].

36. U.S. DEP'T OF LAB., WHAT'S THE DIFFERENCE? PAID SICK LEAVE, FMLA, AND PAID FAMILY AND MEDICAL LEAVE (2016), https://www.dol.gov/sites/dolgov/files/oasp/legacy/files/paidleavefinalrulecomparison.pdf [https://perma.cc/R8QV-E6DX]; *Women's Health Policy: Paid Leave in the U.S.*, KAISER FAM. FOUND. (Dec. 17, 2020), https://www.kff.org/womens-health-policy/fact-sheet/paid-family-leave-and-sick-days-in-the-u-s [https://perma.cc/TKB8-LAUC].

37. U.S. DEP'T OF LAB., *supra* note 36.

38. *Women's Health Policy: Paid Family and Sick Leave in the U.S.*, *supra* note 36.

39. Barbara E. Hoey, *Paid Sick Leave Trends: States and Localities Step in Where Federal Law Falls Short*, KELLEY DRYE: LABOR DAYS (Apr. 8, 2021), https://www.laborday sblog.com/2021/04/paid-sick-leave-trends-states-and-localities-step-in-where-federal-law-falls-short.

COVID-related reasons, its paid leave obligations have now expired.[40] Now employers have the option to receive a tax credit for providing paid COVID leave, but it is not mandated.[41] By contrast, dozens of states and localities have adopted COVID-specific leave laws, all with their own rules, requirements, and end dates.[42] For example, New York provides paid sick leave and job protections to employees who must quarantine due to the pandemic, while Pennsylvania has no comparable law.[43]

C. Home Office Expense and Technology Reimbursements

Under federal law, employers must reimburse nonexempt employees for any business-related expenses that would effectively result in a pay rate that is lower than the minimum wage.[44] In many states, nothing more is required.[45] However, some states require employers to compensate employees for Internet, phone service, and other equipment used in furtherance of their work, regardless of minimum wage considerations.[46] As one practitioner explains:

> Employees may be incurring necessary expenses for tools and equipment incidental to their working remotely, such as personal cell phone and computer usage, high-speed internet access, use of telecommunications and timekeeping applications, printer consumables like ink or toner cartridges and paper, and day-to-day office supplies and related equipment that are typically provided by the employer and used by

40. *Id.* (noting that Congress did extend the entitlement to tax credits for employers that voluntarily provide sick leave).

41. *Id.*

42. *Id.* ("As a result of the gaps left by the federal response, state and local lawmakers have stepped in to legislate paid sick leave for workers. While we will focus on California and New York, other states and localities have also adopted new COVID-19 leave laws or expanded or supplemented existing paid sick leave laws, such as Arizona, Colorado, Connecticut, Chicago, Illinois, Cook County, Illinois, Massachusetts, Michigan, Duluth, Minnesota, Minneapolis, Minnesota, St. Paul, Minnesota, Nevada, New Jersey, Oregon, Philadelphia, Pennsylvania, Pittsburgh, Pennsylvania, Rhode Island, Vermont, Washington, and Washington D.C."); *Family Medical Leave*, *supra* note 35.

43. Lisa Nagele-Pazza, *States and Cities Update COVID-19 Paid-Sick-Leave Laws*, SHRM (Apr. 13, 2021), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/states-and-cities-update-covid-19-paid-sick-leave-laws.aspx [https://perma.cc/R6TA-BR3D].

44. *See COVID-19 and the Fair Labor Standards Act Questions and Answers*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/flsa/pandemic#q11 [perma.cc/XG9A-5XKN]; Carter L. Norfleet & Shareef Farag, *FAQs: Expense Reimbursement Amidst the New Work-From-Home Normal*, LEXOLOGY (Aug. 24, 2020), https://www.lexology.com/library/detail.aspx?g=4f55a3c6-96c5-44ea-8fc8-25384680c882 [perma.cc/4SS3-Y8QD].

45. *Navigating Expense Reimbursement for "Work From Home" Employees*, MCGUIREWOODS (Mar. 30, 2020), https://www.mcguirewoods.com/client-resources/Alerts/2020/3/navigating-expense-reimbursement-for-work-from-home-employees [perma.cc/YFE6-MC36]; Christina Jaremus, Kyle Petersen, Daniel Small & Gena Usenheimer, Seyfarth Shaw LLP, *Expense Reimbursements in the Era of Remote Working*, JD SUPRA (Jan. 22, 2021), https://www.jdsupra.com/legalnews/expense-reimbursements-in-the-era-of-3350909 [perma.cc/FFW2-ST42].

46. Jaremus, Petersen, Small & Usenheimer, *supra* note 45.

> the employee when not working remotely (*i.e.*, pens, pads, paperclips and staples). For instance, an employee working from home who uses his or her personal cell phone to make and receive work-related calls, or personal printer paper and ink for business-related correspondence, may need to be separately reimbursed for these types of expenses, depending on the jurisdiction.[47]

In California, for example, "the statutory language requires employers to reimburse 'all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of the employee's duties' or at the direction of the employer."[48] California courts have held that this "require[s] reimbursement of a 'reasonable percentage' of the employee's monthly cellular data and internet costs even if the employee had unlimited data plans and home internet network for personal use and even if the employee's monthly bills did not increase as a result of the business use."[49] A Baker McKenzie partner tells Society for Human Resource Management (SHRM):

> In California, reimbursement also may extend to the use of an employee's car for work purposes . . . but not to expenses that employees would incur under normal circumstances. Some plaintiffs' counsel have suggested that employers also have an obligation in today's workplace to reimburse employees for overhead expenses, such as utilities, rent or mortgage, and the cost of furniture. These claims are not likely to succeed.[50]

By contrast, remote employees in New York are not entitled to any expense reimbursement.[51] So while California employers are obligated to offset work-related expenses, New York employers have no such obligation unless they made a promise to the contrary.[52] A January 2021 *JD Supra* article identifies ten states that have expense reimbursement laws.[53] As is the case with minimum wage laws and leave entitlements, employers may have very different obligations depending on the state in which each employee works from home.

D. Antidiscrimination Laws, Mandatory Policies, and Trainings

Various federal laws, including Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Pregnancy Discrimination

47. *Navigating Expense Reimbursement for "Work from Home" Employees*, *supra* note 45.

48. Jaremus, Petersen, Small & Usenheimer, *supra* note 45.

49. *Id.*

50. Kylie Ora Lobell, *When Should Employers Reimburse Expenses for Remote Workers?*, SHRM (Nov. 5, 2020), https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/when-should-employers-reimburse-expenses-for-remote-workers.aspx [perma.cc/BMU4-VLYG].

51. N.Y. LAB. LAW § 198-c (McKinney 2021) (requiring reimbursement of expenses for some but not all employees where an employer is party to an agreement to pay them).

52. *Id.*

53. Jaremus, Petersen, Small & Usenheimer, *supra* note 45.

Act, and the Americans with Disabilities Act, protect employees from discrimination in the workplace on the basis of characteristics including race, color, religion, sex, national origin, disability, and pregnancy.[54] However, many states go much further. Federal antidiscrimination laws exclude certain smaller employers and leave out certain protected characteristics, so state and local laws often fill those gaps by including employers of all sizes in their mandates and protecting vulnerable groups that are not included in the federal laws.[55]

For example, some states explicitly prohibit discrimination on the basis of gender identity and gender expression.[56] Neither of these was protected under federal law until a recent landmark Supreme Court decision held that sexual orientation discrimination and gender identity discrimination were often discrimination on the basis of sex under Title VII of the Civil Rights Act.[57] By contrast, California statutorily protects sexual orientation and gender identity, making the protection immune from the ebbs and flows of judicial interpretation.[58]

Along the same lines, some states require certain types of employee training that are not required by federal law or neighboring states. New York employers must train their employees on preventing sexual harassment,

> whereas other [states] may require training for certain occupations or employees engaging in certain activities, such as Maine's law requiring video display terminal training. There may also be individual and employer obligations to ensure the training of certain licensed occupations, such as Texas' requirement that licensed childcare facilities provide various clock hours of training.[59]

Employers need to be aware of these expanded protections and training obligations in the states where their employees work, even if the state where the employer is located does not have corresponding obligations or protections.

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54. *Managing Equal Employment Opportunity*, SHRM Toolkit (June 17, 2020), https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/managingequalemploymentopportunity.aspx.

55. *Id.*

56. *Id.*; *see also State Equality Index 2020*, Hum. Rts. Campaign, https://www.hrc.org/resources/state-equality-index [perma.cc/G4DC-W8NZ].

57. Bostock v. Clayton County, 140 S. Ct. 1731, 1734 (2020). The Court limited its holding to situations where an employer takes an adverse action against someone simply for being homosexual or transgender and left undecided a number of issues about the scope of its decision and situations where LGBTQ individuals might not be protected. *Id.* at 1753–54.

58. *See also* Lisa Nagele-Piazza, *Not All State Employment Discrimination Laws Are Created Equal*, SHRM (Sept. 15, 2017), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/state-employment-discrimination-laws.aspx [perma.cc/QL5B-UH9U].

59. *What Training Must Employers Provide to Employees?*, SHRM, https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/whattrainingmustemployersprovidetoemployees.aspx [perma.cc/SL9J-V9DN].

E. Workplace Notices

Both state and federal laws mandate that various physical posters be visibly displayed in the workplace. This raises two distinct issues: First, which state's posting obligations apply to a remote employee working from home? Second, how should employers meet the posting obligation for employees who work remotely? Let us consider both issues.

Federal law requires various posters regarding topics such as minimum wage and equal employment opportunity, among many others.[60] Many cities and states have their own posting obligations that are both different from each other and different from federal law.[61] A SHRM article uses New York and California as examples: "New York's Department of Labor requires certain posters for minimum wage information, job safety and health protection, and the like. California requires employers to post information related to medical leave and pregnancy disability leave, minimum wage, and workplace discrimination and harassment."[62] Employers need to comply with both federal and local requirements in each location where they have employees working.[63]

With respect to the posting requirement for remote employees, the U.S. Department of Labor (DOL) has issued guidance that SHRM summarizes as follows:

> Employers may satisfy one-time notice requirements by e-mail delivery if employees customarily receive e-mails from the employer. . . . For continuous-posting requirements, the guidance makes a distinction between employers with only some remote employees and employers with an entirely remote workforce. For employers with some remote workers, physical posters are required for onsite employees, and the DOL encourages electronic posting for the teleworking employees. Employers with an entirely remote workforce may satisfy continuous-posting obligations using electronic-only means if all employees exclusively work remotely, customarily receive information from the employer via electronic means and have readily available access to the electronic posting at all times.[64]

60. 29 C.F.R. § 516.4 (2021).

61. Susan Gross Sholinsky, Eric I. Emanuelson & Cynthia J. Park, *How to Comply with Notice and Posting Requirements During the Age of Remote Working*, EPSTEIN, BECKER & GREEN, P.C. (Jan. 8, 2021), https://www.workforcebulletin.com/2021/01/08/how-to-comply-with-notice-and-posting-requirements-during-the-age-of-remote-working [perma.cc/6ZZK-9XSB].

62. *Id.*

63. Judisch & Wahrenbrock, *supra* note 6.

64. Roy Maurer, *DOL Issues New Guidance on Posting Notices for Remote*, SHRM (Jan. 25, 2021), https://www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/DOL-Issues-New-Guidance-Posting-Notices-Remote-Hybrid-Workplaces.aspx [perma.cc/ZU5A-6WUN] (internal citations omitted).

Like so many elements of employment law, state requirements may be more stringent.[65] Moreover, since this is such a new consideration for legislatures, many states are still silent on the topic. "[M]any of these laws were passed decades before the first portable computer," explains a practitioner, "and few of them specifically address the concept of distributing notices using electronic means."[66]

To be safe, we advise clients to comply with federal DOL guidance *and* mail all relevant postings to each remote employee by sending one consolidated poster.[67] In this way, employees have the physical poster in their home office, and employers can show a good-faith effort to comply with posting requirements despite a particular state's silence on the topic.

F. Unemployment Insurance, Workers Compensation, and Disability Insurance

Federal and state requirements for Unemployment Insurance, Workers Compensation, and Disability Insurance must also be considered when employees work in a locale other than that of their employer.

1. Unemployment Insurance

Unemployment insurance provides benefits to eligible employees who are unemployed or underemployed.[68] "Each state administers a separate unemployment insurance program, but all states follow the same guidelines established by federal law."[69] Those guidelines dictate that employers only need to obtain coverage in one state, and state laws provide uniform guidance about which state that should be.[70] Simply put, employers should obtain coverage in the state in which each employee works, rather than the state where the employer is located.[71]

Regardless of where an employer obtains coverage, employees benefit from the unemployment insurance program of the state in which they work. The New York Department of Labor's guidance may be representative of the guidance employees receive in other states:

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65. *Id.*

66. *Id.*

67. Consolidated posters can be purchased from a number of companies, like the Labor Law Center, a company offering compliance-related products and services. *See, e.g.*, *2021 Labor Law Posters*, Lab. L. Ctr., https://www.laborlawcenter.com/labor-law-posters (last visited Apr. 18, 2021).

68. *Multi-State Rules for Remote Employees*, Halpern & Scrom (Nov. 10, 2020), https://www.halpernadvisors.com/multi-state-rules-for-remote-employees [https://perma.cc/8QR6-QA7Q].

69. *Id.*

70. *Localization of Work Provisions*, U.S. Dep't of Lab. (May 10, 2004), https://wdr.doleta.gov/directives/attach/UIPL20-04_AttachI.html [https://perma.cc/NN8K-QCK8].

71. Stephen Miller, *Out of State Remote Work Creates Tax Headaches for Employers*, SHRM (June 16, 2020), https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/out-of-state-remote-work-creates-tax-headaches.aspx [https://perma.cc/WTB8-RUDK].

"To receive unemployment insurance benefits, you need to file a claim with the unemployment insurance program in the state where you worked."[72]

In practice, employees often file for unemployment in the state where they live. For this reason, states have processes to facilitate "interstate claims" for employees who worked in a state other than where they live.[73] For example, the District of Columbia Department of Employment Services instructs applicants as follows:

> Initial claims against the District of Columbia may . . . be filed at a State Workforce Agency in any of the 50 states . . . . These are called "interstate" claims. An example of an interstate claimant would be an individual who relocated to the state of New York after being laid off from employment in the District of Columbia. That individual would file an unemployment claim against the District of Columbia through a State Workforce Agency in the state of New York. . . .[74]

While the above is fairly straightforward, the opposite situation is far less so. Consider an employer based in the District of Columbia that has an employee working remotely from New York. Having little experience with a multistate workforce, that employer may only carry unemployment insurance in the District of Columbia. So, when their New York employee applies for unemployment coverage in New York, the New York Department of Labor will not find any evidence of a policy in New York. An interstate claim also would not apply because the employee did not work from the District of Columbia.

Here is how all this might play out. The *NY Employer's Guide to Unemployment Insurance, Wage Reporting, and Withholding Tax* states that employers who do not pay unemployment insurance contributions at the time they are due are charged interest at twelve percent.[75] While this penalty may apply, the provision really contemplates late payments to New York, rather than timely payments to the wrong state.[76] What happens when an employer made a good-faith effort to pay into unemployment insurance but did not pay in the right state? This, and many questions like it, have yet to play out in the courts.

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72. *Unemployment Insurance Relief During COVID-19 Outbreak*, U.S. DEP'T OF LAB., https://www.dol.gov/coronavirus/unemployment-insurance# [https://perma.cc/7URW-NWZW].

73. *Multi-State Rules for Remote Employees*, *supra* note 68.

74. D.C. DEP'T OF EMP. SERVS., FREQUENTLY ASKED QUESTIONS (FAQS) FOR CLAIMANTS 1, https://does.dc.gov/sites/default/files/dc/sites/does/page_content/attachments/UI%20Website%20FAQs%20-%20For%20Benefits%20%28Updated%204-30-2015%29.pdf [https://perma.cc/Q3XM-XK8S].

75. N.Y. DEP'T OF TAX'N & FIN., DEP'T OF LAB., EMPLOYER'S GUIDE TO UNEMPLOYMENT INSURANCE, WAGE REPORTING, AND WITHHOLDING TAX 14 (2020) [hereinafter N.Y. EMPLOYERS GUIDE], https://www.tax.ny.gov/pdf/publications/withholding/nys50.pdf [https://perma.cc/M2CR-ZJTS].

76. *See id.*

Reflecting on this very situation, RSM, a global tax and audit services firm, shares: "If an employee's wages were reported to the incorrect state, most states will waive interest and penalty charges associated with an amended filing. Additionally, employers who overpaid unemployment tax, or paid the tax to the incorrect jurisdiction, may be eligible for refunds."[77] So in the best-case scenario, New York waives the interest, and the District of Columbia refunds the payments for the New York employee; the employer is left with a big administrative headache, but no real harm has been done.[78]

However, that is the best-case scenario. The *NY Employer's Guide* also explains that New York imposes a potentially significant penalty for failing to register as a New York employer.[79] New York does create a safe harbor for employers that voluntarily fix the issue *before* receiving notification from the state.[80] However, this requires employers to catch the problem before the state becomes aware of it.[81] In practice, many employers only become aware that they paid into the wrong state's program when an employee files for coverage in a state where no coverage exists.

Unemployment offices have been inundated with these types of issues due to the pandemic. One would hope leniency would prevail in cases where an honest mistake was made, but relying on that is a poor replacement for compliance. Paying into the right program from the start—that is, the programs of the states in which their employees work—is the only way sure way to avoid penalties.

2. Workers' Compensation

Workers' compensation insurance provides cash benefits and medical care for employees who are injured as a result of their job.[82] Employers are typically required to have workers' compensation in the states where an employee's work is localized.[83] "The determination of where an employee's work is localized is typically fact-dependent and includes considerations of whether an employee works regularly at an employer's place of business and the location where an employee is domiciled and spends a substantial part of his or her working time."[84]

77. Tim Ellenwood, Lorraine Bodden, Eric Oscarson & Joe Grimes, *Navigating Multistate Unemployment Tax Reporting and Remittance*, RSM (Feb. 8, 2018), https://rsmus.com/what-we-do/services/tax/state-and-local-tax/payroll-and-employment-tax/navigating-multistate-unemployment-tax-reporting-and-remittance-.html [https://perma.cc/6RH2-VUG4].

78. *See id.*

79. N.Y. Employers Guide, *supra* note 75, at 37–39.

80. *Id.*

81. *See id.*

82. *What Is Workers' Compensation?* N.Y. Governor's Off. of Emp. Rels., https://goer.ny.gov/workers-compensation [https://perma.cc/T33E-225U].

83. Cirner, supra note 24.

84. *Id.*

Remote employees are typically "localized" in the state where they live and work, rather than the state where their employer is located.[85]

According to Workers' Compensation provider Society Insurance, "A common mistake an employer can make is to buy workers compensation insurance in one state while having employees working and/or living in another state. This creates a liability exposure in which the policy [the employer] purchased may not have coverage for claims generated by these employees."[86] Employees are entitled to choose the jurisdiction in which they file a workers compensation claim, generally choosing from (1) the state where their work is principally located; (2) the state where they were injured; and (3) the state where they live.[87]

In most cases, the state is the same for all three. For example, when employee's job is principally localized in the state of Wisconsin, she lives in Wisconsin, and she was injured in Wisconsin, the injured worker's only available recourse is to file her claim in Wisconsin.

However, if the employee's job is principally localized in Wisconsin, he lives in Illinois, and he was injured in Indiana, the employee could file his claims against the employer in any one of these three states. Unless the employer's policy specifically lists all three states, they may have a gap in coverage.[88]

"States generally require that the employer register for and obtain workers' compensation insurance in the state where the employee is performing the services," says SHRM.[89] "Failure to do so may expose the employer to liability, including penalties for noncompliance with the state's workers' compensation laws."[90] Much like our discussion of unemployment insurance above, many employers do not realize they need to have workers' compensation coverage in the states in which their remote employees work, rather than the state where the employer is located.

3. Disability and Paid Family Leave Coverage

Certain states have additional insurance requirements beyond unemployment and workers' compensation. A handful of states mandate disability insurance,[91] and others require specific riders such

85. *Id.*

86. SOC'Y INS., WHITEPAPER: WORKERS COMPENSATION: OUT OF STATE 1 (2021), https://societyinsurance.com/wp-content/uploads/2021/08/Society-CaseStudy-Workers-Comp-OutState.pdf.

87. *Id.*

88. *Id.*

89. Miller, *supra* note 71.

90. *Id.* (internal citations omitted).

91. *Which States Require Employers to Have a Short-Term Disability Plan?,* SHRM (Feb. 11, 2019), https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/stateswithstd.aspx.

as paid family-leave coverage.[92] Employers should check the specific insurance coverage obligations in the states where their employees work.

G. Tax and Corporate Registration Obligations

While we have focused on the employment law implications of having a multistate workforce, we would be remiss not to mention that employers with a remote workforce may also have new corporate and tax obligations in the states where their employees work. Remote employees establish a business presence in their home state, which may obligate employers based in other states to withhold state and local payroll tax, corporate income tax, franchise tax, and sales and use tax in the states where their employees work.[93]

Also, seven states and some cities tax employees based on the location of their *employer* regardless of where the *employee* is working.[94] Those that do not may see a substantial loss of employment-related tax revenue if employees formerly based there now live and work in another locale.[95] The whole battle over tax revenue is likely to trigger increased scrutiny from tax authorities. As one example, in early 2021, New York began sending employees of New York-based entities reminders of their tax obligations with the state regardless of where they worked last year.[96]

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92. *Employer Responsibilities and Resources*, N.Y. Paid Fam. Leave, https://paidfamilyleave.ny.gov/employer-responsibilities-and-resources [https://perma.cc/M8BU-HETK]; Jackson Brainerd, *Paid Family Leave in the States*, Nat'l Conf. of State Leg. (Aug. 2017), https://www.ncsl.org/research/labor-and-employment/paid-family-leave-in-the-states.aspx [https://perma.cc/7HZA-A3L2].

93. Randle B. Pollard & Deborah Andrews, *Multi-State Payroll Withholding Issues and Potential Relief for Telecommuting Employees*, Nat'l L. Rev. (May 8, 2020), https://www.natlawreview.com/article/multi-state-payroll-withholding-issues-and-potential-relief-telecommuting-employees [http://perma.cc/X2L8-GQKE]; *see also* Miller, *supra* note 71 ("When an employee is working outside of the state or states where the employer operates, it 'creates physical nexus, subjecting the employer to the tax regimes of that jurisdiction' . . . . Employers could be subject to state income taxes, gross receipts taxes, and sales and use taxes . . . . Tax requirements imposed at the city or county level could come into play.").

94. Jared Walczak, Tax Found., Fiscal Fact No. 724: Teleworking Employees Face Double Taxation Due to Aggressive "Convenience Rule" Policies in Seven States 1 (2020), https://files.taxfoundation.org/20200812115626/Teleworking-Employees-Face-Double-Taxation-Due-to-Aggressive-%E2%80%9CConvenience-Rule%E2%80%9D-Policies-in-Seven-States.pdf.

95. *Id.*; *see Talent on the Move: Where People Will Live & Work After Covid-19*, Cushman & Wakefield (May 2021), https://www.cushmanwakefield.com/en/united-states/insights/talent-on-the-move-where-people-live-and-work-after-covid-19 [https://perma.cc/6YHD-CZYV].

96. Jimmy Vielkind, *New York Tax Officials Crack Down on Remote Workers*, Wall St. J. (May 6, 2021, 11:23 AM), https://www.wsj.com/articles/new-york-tax-officials-crack-down-on-remote-workers-11620314590 [https://perma.cc/X2GY-TFHW].

Remote employees may also trigger the requirement for their employer to register as a foreign corporation. A Wolters Kluwer article explains:

> In order to transact business in a foreign state, [companies] are required by the foreign state's business entity statute to obtain the state's authorization first. . . . A statutory entity doing business without authority is subject to penalties that can be severe. There are monetary penalties for the entity, and under some statutes, for the people doing business on its behalf. Additionally, it will not be able to maintain an action in the courts of the state until it is properly qualified.[97]

Along with the various filing obligations, employers that are required to register in a new state may also need to maintain a registered agent in the state, an office location, and a local mailing address.[98]

Once again, it is critical that an employer—even if they only have one employee working full-time or part-time in a *foreign* city or state—take the time to understand not just the tax and corporate registration laws, but the related case law as well.[99]

III. How Organizations Are Approaching Compliance

According to a PWC survey of 300 companies conducted in late 2020, sixty percent of employers indicated they would restrict remote work to locations in which they already have an established business presence.[100] For example, in announcing its new flexible approach to remote work, Novartis included the caveat that employees may only be allowed to work in states and countries in which the employer is located, so as not to trigger "corporate tax, individual tax and social security regulations" that "require special attention" in foreign jurisdictions.[101] Since most employers already have compliance programs

97. Sandra Feldman, *Does a Remote Workforce Trigger Foreign Qualification Requirements?*, WOLTERS KLUWER (Dec. 21, 2020), https://www.wolterskluwer.com/en/expert-insights/does-a-remote-workforce-trigger-foreign-qualification-requirements [https://perma.cc/NQT8-6RVK].

98. *Id.*

99. Pollard & Andrews, *supra* note 93; *see also* Miller, *supra* note 71. ("When an employee is working outside of the state or states where the employer operates, it 'creates physical nexus, subjecting the employer to the tax regimes of that jurisdiction' . . . . Employers could be subject to state income taxes, gross receipts taxes, and sales and use taxes . . . . Tax requirements imposed at the city or county level could come into play.").

100. *Remote Work Policies: Why Leading Companies Are Opting in*, PWC, https://www.pwc.com/us/en/services/tax/hr-international-assignment-services/global-mobility-remote-workforce-policies.html [http://perma.cc/GR6W-NRCG] (among the respondents: twenty-eight percent of employers said they would allow remote work in another country; twenty-four percent said they would allow remote work within the same country including across state lines; and forty-six percent said they would not allow any cross-border remote work).

101. *Choice With Responsibility: Reimagining How We Work*, NOVARTIS (July 29, 2020), https://www.novartis.com/news/choice-responsibility-reimagining-how-we-work [https://perma.cc/7TTQ-TH7U].

focused on the employment laws of the states in which they have a physical presence, allowing employees to work from home only in those states minimizes the creation of new compliance obligations.

Regardless of whether an employer restricts remote work to states where they have an existing presence, many larger employers will address their new compliance obligations the same way they address all their compliance needs: by relying on in-house attorneys and compliance teams, and turning to outside counsel and other external compliance consultants as needed.[102] Of course, larger companies have access to resources to which smaller companies do not; this solution is untenable for a company without a significant in-house legal and compliance team.[103]

Smaller employers often outsource various elements of their HR compliance function to external service providers that, through economies of scale, provide affordable compliance solutions for smaller multistate employers.[104] A related solution involves the use of Employers of Record (EORs) or Professional Employment Organizations (PEOs), which, as one provider advertises, allow employers to "build distributed teams without registering in multiple states."[105] The skyrocketing number of remote employees has created fertile ground for entrepreneurial third-party providers and their backers, some of which are rapidly growing and raising tremendous funding to expand their business model.[106] These third parties will play an increasingly prominent role in remote work compliance coming out of the pandemic.

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102. *Remote Work & Multistate Compliance*, SHRM, https://www.shrm.org/resourcesandtools/tools-and-samples/exreq/pages/details.aspx (last visited on July 22, 2021).

103. *See generally* Isaac Mamaysky, *Understanding Ethics and Compliance: A Practitioners Guide to Effective Corporate Compliance Programs*, 6 J. Regul. Compliance 58 (2021), https://www.compliancelawjournal.com/compliancelawjournal/issue_vi/MobilePagedReplica.action?pm=2&folio=59#pg62.

104. *HR Compliance*, SHRM, https://vendordirectory.shrm.org/category/hr-services/hr-compliance [https://perma.cc/W3KP-B5A9].

105. *Employee Management Services: Choosing Between a PEO and EOR—Pros and Cons of Each*, Pivotal Sols., https://www.pivotalsolutions.com/employee-management-services-choosing-between-peo-and-eor-pros-and-cons-of-each [http://perma.cc/LX6G-WRM3]; *Hire Talent Anywhere in the U.S.*, Velocity Glob., https://explore.velocityglobal.com/contact-gs-eor-us.html [https://perma.cc./BG89-YFV8].

106. Press Release, Topia, Topia Raises $15 Million in Series D Funding (Apr. 28, 2020), topia.com/company/news/topia-raises-15-million-in-series-d-funding [https://perma.cc/S8M8-DMC4]. Topia cut its teeth in the employee relocation business. In April 2020, just a month into the global pandemic, Topia topped off its over $100 million in venture funding with a $15 million Series D round that included Workday Ventures and paved the way for an approved software integration with the HR software behemoth. *Id.* "'A smart global talent mobility strategy is no longer optional for businesses to remain competitive,' said Jazmin Medina, principal, NewView Capital who also participated in the 2020 round. 'Companies must think and act like global citizens and move from a micro to a macro approach to talent acquisition and management.'" *Id.*; *Velocity Global Acquires iWorkGlobal to Accelerate Remote Work and Global Expansion Platform*, Velocity Glob. (Apr. 6, 2021), https://velocityglobal.com/blog/velocity-global-acquires-iworkglobal-to-accelerate-remote-work-and-global-expansion-platform-re

Regardless of how an employer achieves compliance, a common approach is to craft employment policies that comply with the most stringent laws of each applicable state.[107] Implementing uniform policies across the workforce often results in providing benefits in excess of those legally required in individual states. For example, implementing a uniform sick-leave policy typically means giving an individual employee more paid leave than their state requires—because another employee works in a state with a more significant paid-leave entitlement. By operationalizing the strictest requirement of each applicable state, certain employees receive more benefits than are required by state law. The alternative is to have different policies for employees in different locations, which can create a significant administrative challenge for employers with a large and distributed workforce.[108] The former approach not only simplifies the administrative burden of having a multistate workforce but makes for happier employees in the process.

Conclusion

Perhaps as remote work continues to be accepted as "just the way we work," the federal government will take steps to simplify employers' obligations. Indeed, a federal solution would not be without precedent. In 1990, Congress solved a similar challenge for transportation employees who could otherwise have been liable for state taxes in all the states through which they travel as part of their work.[109] Since making transportation workers file in dozens of states made little sense, the Amtrak Act, which was passed more than thirty years ago, allows them to file only in their home state.[110]

The reality is that regulations have not kept pace with where, when, and how people have been working for decades. It is ironic that it has taken a pandemic—the very reason the federal government wrote that employees were to telework to the maximum extent possible into its continuity of operations plan more than two decades ago[111]—to reveal the disconnect between modern workplace strategies and

ceives-100m-growth-investment-from-ffl-partners [https://perma.cc/4ULA-QVWK]. PEOs and EORs have been around since the 1960s but are enjoying renewed attention from investors as the world of remote work expands. Both are professional service organizations that help companies hire, manage, and maintain compliance in places the employer does not have a presence. Velocity Global became the largest U.S. domestic and global EOR following a $100 million investment that funded a strategic acquisition in April 2021. "'This strategic acquisition combines scale and expertise in a single platform for companies to employ top talent in another state or another country, quickly and compliantly,' said Ben Wright, Velocity Global founder and CEO in the company's press release announcing the transaction." *Id.*

107. Hoey & Agnostak, *supra* note 39.

108. *Id.*

109. Cooper, *supra* note 21.

110. *Id*

111. *Telework Legislation*, U.S. Off. of Pers. Mgmt., telework.gov/guidance-legislation/telework-legislation/legislation [https://perma.cc/53NY-QY85].

the local, state, and federal regulatory frameworks that govern how we work. Unfortunately, a recent Supreme Court decision to *not* hear arguments related to double taxation of remote workers keeps us one step further from a federal solution.[112]

The increase in remote work did not increase the complexity of multistate tax and regulatory compliance, but it certainly revealed a complex compliance puzzle that many organizations had not attempted to solve before. The bottom line is, whether an organization has five employees or five thousand, it is critical that the employer understands and complies with the legal and regulatory requirements of all the places in which its people work.

112. *Supreme Court Punts on State Tax Question About Remote Work*, Tax Pol'y Ctr. (June 28, 2021), https://www.taxpolicycenter.org/taxvox/supreme-court-punts-state-tax-question-about-remote-work [http://perma.cc/HZ3D-DE58].

The Critical Importance of Income Security During COVID-19 and Beyond

Olivia Dinwiddie*

"I'm a 63-year-old widow laid off from my restaurant job of 34 years. . . . I'll never be able to make the money I was making before COVID. . . . I don't have a lot of savings as I worked paycheck to paycheck, I have about $40,000 in my 401(k). I owe $100,000 on my house. I'm kind of lost right now, no job and afraid to go back because I'm in the high-risk category. Advice would be appreciated."[1]

Introduction

The COVID-19 pandemic has had devastating financial effects on lives and livelihoods across the country. In 2020, unemployment rates in the United States skyrocketed to 14.8%, the highest ever in recorded history,[2] as regulatory closures resulted in companies laying off employees.[3] Since COVID-19 came to America, one in four adults have struggled to pay their bills,[4] and about one in three have had to dip into their savings or retirement accounts to make ends meet.[5] Another one in six

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1. Alessandra Malito, *I'm 63, a Widow and Lost My Job Because of COVID. I Don't Have Much in Savings and Feel Lost. What Can I Do?*, MarketWatch (Aug. 15, 2020, 11:26 AM), https://www.marketwatch.com/story/im-63-a-widow-and-lost-my-job-because-of-covid-i-dont-have-much-in-savings-and-feel-lost-what-can-i-do-2020-07-28 [https://perma.cc/4USU-GAU8] (quote from the MarketWatch "Help Me Retire" advice column; the reader was struggling to find her way after losing her job due to the pandemic).

2. Cong. Rsch. Serv., Unemployment Rates During the COVID-19 Pandemic: In Brief, at ii (2021), https://fas.org/sgp/crs/misc/R46554.pdf [perma.cc/XQY6-PQSQ].

3. News Release, Bureau of Lab. Stats., U.S. Dep't of Lab., The Employment Situation—April 2020, at 1–2 (2020), https://www.bls.gov/news.release/archives/empsit_05082020.pdf [https://perma.cc/MAT9-938K].

4. Kim Parker, Rachel Minkin & Jesse Bennett, *Economic Fallout from COVID-19 Continues to Hit Lower-Income Americans the Hardest*, Pew Rsch. Ctr. (Sept. 24, 2020), https://www.pewresearch.org/social-trends/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest [perma.cc/5MWJ-BEGA].

5. *Id.*

report having to borrow money from friends or family or have had to use relief resources in their communities, such as charitable organizations and food banks.[6] Clearly, the COVID-19 pandemic created and exacerbated financial burdens borne by the average worker. For many workers, the question was, "How am I going to make it through this?"

The fact is, however, that Americans were living in financial precarity long before COVID-19.[7] The pandemic was the tipping point. If a silver lining is to be found in the grief and misery of 2020, perhaps it is that the pandemic created a unique context for considering the critical importance of income security in the United States. On a broad scale, we are forced to contend with the fact that income and wealth inequality are a significant problem in the United States, one that requires policy intervention. More acutely, however, the events as they unfolded forced us to consider how we expected Americans to be healthy, and, to help flatten the curve, when they were too stressed about paying their bills to do their part? Because, in addition to those Americans left jobless because of the virus, others who have remained employed have been forced to choose between exposure to illness and their paycheck.[8]

For these reasons, this Note will analyze the critical importance of income security generally and in flattening the curve and lowering the spread of contagious diseases specifically. In Part I, this Note will explain the relationship between income security and public health outcomes, with emphasis on how disease transmission in the workplace exacerbates community spread. Part II will propose a number of government policy interventions designed to address income insecurity for both working and jobless Americans and how such interventions can target income insecurity beyond the COVID-19 pandemic.

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6. *Id.*

7. *See generally* POLICYLINK & USC PROGRAM FOR ENV'T & REG'L EQUITY, 100 MILLION AND COUNTING: A PORTRAIT OF ECONOMIC INSECURITY IN THE UNITED STATES 5, 13 (2018), https://www.policylink.org/sites/default/files/100_million_and_counting_FINAL.PDF ("[A]bout 106 million people —one-third of the population—live in households with incomes of less than 200 percent of the poverty level," and between 2000 and 2015, "the economically insecure population has grown more than twice as fast as the nation's overall population."); *see also* Eric Rosenbaum, *Millions of Americans Are Only $400 Away from Financial Hardship. Here's Why*, CNBC (May 23, 2019), https://www.cnbc.com/2019/05/23/millions-of-americans-are-only-400-away-from-financial-hardship.html [perma.cc/9DVX-LKJX].

8. Ian C. Schaefer, *Rule 6: If You're Sick, Stay Home—Return to Work in the Time of COVID-19*, NAT'L L. REV. (Sept. 17, 2020), https://www.natlawreview.com/article/rule-6-if-you-re-sick-stay-home-return-to-work-time-covid-19-video [perma.cc/22LL-TNC4] ("A fall 2019 survey suggests . . . that approximately 90% of workers generally "push through" and come to work [when they are feeling unwell]. The reality is that employees come to work when they are sick for a myriad of reasons: to stay atop long to-do lists, meet production goals, because they think the business would crumble without them, or that somehow taking a sick day and staying home might be a sign of weakness. Given the current environment, there is also the very real financial reality and concern of missing a day's worth of pay, particularly for those in economically vulnerable positions.").

More specifically, this Note argues that fixing the problem of widespread income insecurity in the United States starts with government policy interventions, including implementation of universal paid sick leave (the federal government and over half of states in the United States have no legislation to this effect), an expansion of leave provisions under the Family and Medical Leave Act of 1993, raising the federal minimum wage, and even more radical ideas (that are becoming more mainstream) such as exploring the viability of a universal basic income program. In Part III, this Note will conclude with a brief summary.

I. Background

Income security, or the lack of it, can have a profound effect on public health outcomes. Studies have affirmed that, when working adults have the financial flexibility to remain home when ill, rates of presenteeism—the phenomenon associated with coming to work while sick—are reduced, as is the risk of exposing one's coworkers, who could potentially spread contagions to their families, and social circles.[9] After all, the warnings about practicing social distancing and isolating as necessary during the COVID-19 pandemic were backed up by other research on contagious disease, for example, the advice that "one of the best ways to reduce the spread of flu is to keep sick people away from healthy people."[10] However, this is easier said than done; "one of the most frequently cited major obstacles to compliance with quarantine is loss of income."[11] Many Americans cannot afford to miss work when ill. This is not just speculation—it is reality.

Data from the Centers for Disease Control and Prevention (CDC) and the Bureau of Labor Statistics indicate that work attendance by employees who were infected with the H1N1 virus, or "swine flu," in 2009 "are estimated to have caused the infection of as many as 7 million co-workers."[12] This was due, in no small part, to further estimates that "two of five private sector employees [had] no access to paid sick

9. Supriya Kumar, John J. Grefenstette, David Galloway, Steven M. Albert & Donald S. Burke, *Policies to Reduce Influenza in the Workplace: Impact Assessments Using an Agent-Based Model*, 103 Am. J. Pub. Health 1406, 1406 (2013) ("Presenteeism (going to work or school when ill) leads to further spread of illness by infectious people. Employees who lack [paid sick days] may go to work ill, leading to the spread of infection at work.").

10. Lisa M. Koonin, *Guest Columnist: During the H1N1 Pandemic, Please Allow Sick Workers to Stay Home*, Univ. of Minn. Ctr. for Infectious Disease Rsch. & Pol'y (Sept. 10, 2009), https://www.cidrap.umn.edu/news-perspective/2009/09/guest-columnist-during-h1n1-pandemic-please-allow-sick-workers-stay-home [perma.cc/Y8VJ-F4ZR].

11. Mark A. Rothstein & Meghan K. Talbott, *Job Security and Income Replacement for Individuals in Quarantine: The Need for Legislation*, 10 J. Health Care L. & Pol'y 239, 243 (2007).

12. Robert Drago & Kevin Miller, Inst. for Women's Pol'y Rsch. Briefing Paper No. B264, Sick at Work: Infected Employees in the Workplace During the H1N1 Pandemic 1 (2010), https://iwpr.org/wp-content/uploads/2020/11/B284.pdf.

days" and that "about 8 million employees took no time away from work while infected."[13] It is not yet known to what extent presenteeism perpetuated the spread of COVID-19, but "findings that people frequently continue to work while experiencing infectious diseases raise particularly serious concerns for public health during the . . . [COVID-19] pandemic."[14]

It simply cannot be overstated: many Americans are too financially insecure to take time off from work when they are sick. On a fixed income, working paycheck to paycheck, "[t]hey don't want to risk a smaller amount in a pay period as that small deduction could mean reduced food, leisure, and overall standard of living to still cover housing, utilities, travel, phone bills, and other modern necessities."[15] As this Note will explore, one major way to mitigate community spread of infectious disease is to address the main reason employees are coming into the workplace sick: income insecurity. The following policy interventions are a necessary step in relieving Americans of financial insecurity and encouraging them to embrace their personal responsibility for stopping community spread of contagious diseases in society at large.

II. Analysis

The following proposals are discussed because of their effect on alleviating income insecurity. It has been said—and the author of this Note agrees—that "beating the coronavirus and returning to our normal lives will benefit all Americans. *What is good for the jobless, the poor, and the disadvantaged in this case will also be best for everyone else*."[16]

A. Paid Sick Leave

Access to paid sick leave is perhaps the most important factor in predicting whether an employee will heed public health guidance to remain home while sick. Although every major public health agency, including the World Health Organization (WHO) and the CDC,

13. *Id.*

14. Gail Kinman & Christine Gant, Editorial, *Presenteeism During the COVID-19 Pandemic: Risks and Solutions*, 71 OCCUPATIONAL MED. 243, 243 (2020), https://doi.org/10.1093/occmed/kqaa193 [perma.cc/GAW4-GQV2] (click on "PDF").

15. David Salisbury, *Flu Season & Presenteeism: You're Not Saving Anyone Money*, CAL. MGMT. REV. (Feb. 28, 2020), https://cmr.berkeley.edu/2020/02/presenteeism [perma.cc/QD3T-R78K]. *See generally* Alina Selyukh, *Paycheck-To-Paycheck Nation: Why Even Americans with Higher Income Struggle with Bills*, NPR (Dec. 16, 2020), https://www.npr.org/2020/12/16/941292021/paycheck-to-paycheck-nation-how-life-in-america-adds-up [perma.cc/U3CL-BNNM].

16. Scott Winship, *At-Home COVID-19 Testing: Why We Need It*, NAT'L REV. (Oct. 29, 2020, 11:33 AM), https://www.nationalreview.com/magazine/2020/11/16/at-home-covid-19-testing-why-we-need-it [perma.cc/B4AM-JEM9].

recommends staying home when sick with infectious disease,[17] for many workers in the United States and abroad, compliance with this guidance is largely determined by access to paid sick leave.[18] Paid sick leave is a public health issue because studies have found that "workers who lack paid sick leave are 1.5 times more likely to go to work contagious," often because they cannot afford to stay home.[19]

Right now, paid sick leave in the United States is contingent upon the "discretionary benevolence" of individual employers.[20] In practice, ninety-three percent of workers in the top ten percent of wage earners, typically those in management or business, have access to paid sick leave, compared to only thirty percent of the lowest wage workers, those who are most likely to be in public-facing occupations.[21] The result is that the most vulnerable populations, those with low income, in low-wage occupations with high exposure to the general public, are without the financial ability to remain home when sick. America is only as healthy as its most vulnerable members, which is why policy interventions should be used to prop them up. Despite the obvious problems with leaving paid sick coverage up to employer discretion, the United States is one of only two Organization for Economic Co-operation and Development (OECD) member nations that do not provide paid sick leave at the federal level.[22] For a limited time only, however, that changed.

In March 2020, Congress passed the Families First Coronavirus Response Act (FFCRA), which briefly provided paid sick leave and expanded family and medical leave for "specified reasons related to

17. *Advice for the Public: Coronavirus Disease (COVID-19)*, World Health Org. (Apr. 13, 2022), https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public [perma.cc/4VJX-ZCXZ]; *COVID-19, What to Do If You Are Sick*, Ctrs. for Disease Control & Prevention (Mar. 22, 2022), https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/steps-when-sick.html [perma.cc/ZPX6-343M].

18. Jody Heymann, Amy Raub, Willetta Waisath, Michael McCormack, Ross Weistroffer, Gonzalo Moreno, Elizabeth Wong & Alison Earle, *Protecting Health During COVID-19 and Beyond: A Global Examination of Paid Sick Leave Design in 193 Countries*, 15 Glob. Pub. Health 925, 925–26 (2020); *see also* Rothstein & Talbott, *supra* note 11, at 243 ("One of the most frequently cited major obstacles to compliance with quarantine is loss of income.").

19. Heymann et al., *supra* note 18, at 925.

20. Diana Boesch, *The Urgent Case for Permanent Paid Leave*, Ctr. for Am. Progress (Sept. 1, 2020), https://www.americanprogress.org/issues/women/reports/2020/09/01/489914/urgent-case-permanent-paid-leave [perma.cc/Z4VU-KVSQ].

21. Gary Claxton & Larry Levitt, *Paid Sick Leave Is Much Less Common for Lower-Wage Workers in Private Industry*, Kaiser Fam. Found. (Mar. 10, 2020), https://www.kff.org/coronavirus-covid-19/issue-brief/paid-sick-leave-is-much-less-common-for-lower-wage-workers-in-private-industry [perma.cc/T69X-RJWV].

22. OECD, Paid Sick Leave to Protect Income, Health and Jobs Through the COVID-19 Crisis 1, 4 (2020), https://read.oecd-ilibrary.org/view/?ref=134_134797-9iq8w1fnju&title=Paid-sick-leave-to-protect-income-health-and-jobs-through-the-COVID-19-crisis ("All OECD countries except the United States and Korea as well as all non-OECD G20 countries have a statutory paid sick leave system in place for employees in standard dependent employment.").

COVID-19."[23] The expansion provided for two weeks of paid sick leave at employees' full rate of pay and two weeks of paid sick leave at two-thirds employees' rate of pay if they were unable to work for a qualifying reason.[24] Qualifying reasons included if the employee was subject to a quarantine order by government officials or a healthcare provider, was experiencing symptoms of COVID-19 and awaiting a medical diagnosis, was caring for an individual subject to an isolation order, or was caring for a child whose normal place of care, such as a school or daycare, was closed due to the virus.[25] The FFCRA also provided for up to ten weeks of paid family and medical leave at two-thirds the employee's rate of pay if they were unable to work "due to a bona fide need for leave to care for a child whose school or child care provider [was] closed or unavailable for reasons related to COVID-19."[26] This leave appears to have helped safeguard public health. Early estimates found that "states where employees gained access to paid sick leave because of the FFCRA had a statistically significant decrease of approximately 400 fewer confirmed new cases per state per day."[27] This research would suggest that paid sick leave is strongly correlated with reducing the spread of infectious disease.

Like the Family and Medical Leave Act (which was *not* amended by the FFCRA and will be discussed in more detail in the next subpart), there were important limitations on the FFCRA. First, regarding private employers, coverage extended only to those employers with fewer than 500 employees.[28] Because of this, the nation's largest employers, like Walmart, which largely employs low-wage workers in public-facing positions, were not required to provide paid sick leave to their employees except where state laws required them to do so. The FFCRA's scope was also limited by an exemption for small employers. Of those employers covered by the FFCRA, those with fewer than fifty employees were able to claim an exemption to the mandate and further limit the scope of covered employees.[29]

The FFCRA, as originally passed, only applied through December 31, 2020,[30] and Congress replaced it with temporary incentives. Under

23. U.S. Dep't of Lab., Wage & Hour Div., Families First Coronavirus Response Act: Employee Paid Leave Rights (2020), https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave [perma.cc/L3R7-XPD9].

24. *Id.*

25. *Id.*

26. *Id.*

27. Stefan Pichler, Katherine Wen & Nicolas R. Ziebarth, *COVID-19 Emergency Sick Leave Has Helped Flatten the Curve in the United States,* 39 Health Affs. 2197, 2202 (2020).

28. Families First Coronavirus Response Act: Employee Paid Leave Rights, *supra* note 23.

29. *Id.*

30. News Release, U.S. Dep't of Lab., U.S. Department of Labor Publishes Guidance on Expiration of Paid Sick Leave and Expanded Family and Medical Leave for

the American Rescue Plan, signed into law on March 11, 2021, employers covered by the FFCRA became eligible to receive a tax credit for electing to provide qualified employees with the expanded leave through September 30, 2021.[31] The protections afforded by the COVID-era law were important for protecting the American worker in the short term, but they were just that—narrowly tailored to the COVID-19 pandemic and not more broadly to public health emergencies generally. Arguably, given the urgent need for swift legislation to address COVID-related work absences, it is understandable that comprehensive, permanent paid sick leave legislation was not at the top of the agenda in Capitol Hill, but it seems to have received a promising trial run.

Once the trial run is over, legislators must contend with the fact that paid sick leave has shown itself to be an important safety net from which American workers greatly benefit. While it is certainly a positive sign that paid sick leave has seen some game time in responding to the financial burdens created by the COVID-19 pandemic, the usefulness of sick leave does not end with the emergence of a COVID-19 vaccine. Americans would continue to benefit if a paid sick leave policy became a permanent part of United States federal law.

Congress has seen other efforts to address the lack of federal paid sick leave even outside of the pandemic. Most notable is the Healthy Families Act (HFA), which first debuted on Capitol Hill in 2005[32] and was again proposed in March of 2019.[33] The stated purpose of the proposed HFA was "[t]o allow Americans to earn paid sick time so that they can address their own health needs and the health needs of their families."[34] As applied, the HFA would have required employers with fifteen or more employees to provide employees up to fifty-six hours of paid sick leave per year.[35] That the HFA has struggled to find its footing for almost sixteen years could be construed as damning, but its supporters have not given up. Perhaps the pandemic and the temporary expanded paid sick leave provisions will provide the catalyst for the enactment of the HFA.

Even if Congress has been resistant to create federal paid sick leave policy so far, a handful of the states have not been. And the result has been overwhelmingly positive. One study on the effect of state sick

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Coronavirus (Dec. 31, 2020), https://www.dol.gov/newsroom/releases/whd/whd20201231-1#:~:text=The%20FFCRA's%20paid%20sick%20leave,after%20Dec.%2031%2C%202020. [perma.cc/EBP5-QTC9].

31. Amy L. Bess & Aaron A. Bauer, *New Paid Sick and EFMLA Leave Provisions in the American Rescue Plan Act of 2021*, Nat'l L. Rev. (Apr. 22, 2021), https://www.natlawreview.com/article/new-paid-sick-and-efmla-leave-provisions-american-rescue-plan-act-2021 [perma.cc/5U7U-Z3P6].

32. Healthy Families Act, H.R. 1902, 109th Cong. (2005).

33. Healthy Families Act, S. 840, 116th Cong. (2019).

34. *Id.*

35. *Id.* § 5(a).

leave laws found an eleven percent reduction in influenza-like-illnesses in the first year after implementation.[36] Imagine what that would look like at the federal level!

Most state sick leave laws generally provide up to forty hours of paid leave to employees of covered employers.[37] While this is less than the two weeks or more of paid leave provided in other countries,[38] it is still better than nothing. Also, although state paid sick leave is typically accrued over time,[39] this also means that employees who do not use their accrued time off can *usually* roll it over into the following years and accumulate more paid sick leave for when it is really needed.[40]

Coverage by state laws varies. In Arizona, California, D.C., New Jersey, Vermont, and Washington, "covered employer" has an expansive definition and typically includes *all* private and public employers, not just those with a certain number of employees.[41] Other states with paid sick leave laws, such as Connecticut, Maryland, Massachusetts, Michigan, Nevada, Oregon, and Rhode Island, have varying requirements on the threshold number of employees required to trigger their provisions.[42] These state-level paid sick leave programs have allowed researchers to perform small-scale studies on the effects of such programs on the economy, and the results seem to combat some of the biggest arguments against paid sick leave.[43] These arguments are briefly discussed below.

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36. Stefan Pichler, Nicolas Robert Ziebarth & Katherine Wen, *Positive Health Externalities of Mandating Paid Sick Leave* (IZA Discussion Paper No. 13530, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3660277 (select download pdf) [perma.cc/C8V6-D6SN].

37. ARIZ. REV. STAT. ANN. § 23-372(A) (2016); CONN. GEN. STAT. § 31-57s(a) (2015); MD. CODE ANN., LAB. & EMPL. § 3-1304(c)(1) (2020); MASS. GEN. LAWS ch. 149 § 148C(d)(4) (2020); MICH. COMP. LAWS § 408.963(2) (2020); N.J. REV. STAT. ANN. § 34:11D-2(a) (2020); N.Y. LAB. LAW § 196-b(1) (2020); OR. REV. STAT. § 653.606(1)(a)–(b) (2017); 28 R.I. GEN. LAWS § 28-57-5(a) (2018); VT. STAT. ANN. tit. 21, § 482(c) (2017).

38. Heymann et al., *supra* note 18, at 929.

39. As opposed to vesting at the start of each year. CAL. LAB. CODE § 246 (West 2020).

40. In some cases, employees need to use their paid leave, or they lose it—or perhaps a portion of it. *See generally Final Pay: Getting Your Last Paycheck*, WORKPLACE FAIRNESS, https://www.workplacefairness.org/final-pay (last visited Apr. 13, 2022) (scroll down to question 3 and click to expand).

41. ARIZ. REV. STAT. ANN. § 23-372 (2020) (However, employers with fewer than fifteen employees are not required to provide employees with more than twenty-four hours of sick leave per year); CAL. LAB. CODE § 246 (West 2020); D.C. CODE § 32-531.02 (2020); N.J. REV. STAT. § 34:11D-2 (2018); VT. STAT. ANN. tit. 21, § 482 (2017); WASH. REV. CODE ANN § 49.46.020 (West 2021).

42. CONN. GEN. STAT. § 31-57r(4) (2019) (fifty or more employees); MD. CODE ANN., LAB & EMPL. § 3-1304 (West 2020) (fifteen employees); MASS. GEN. LAWS ch. 149, § 148C (2015) (eleven employees); MICH. COMP. LAWS § 408.962(f) (2019) (fifty employees); OR. REV. STAT. § 653.606 (2017) (ten employees); 28 R.I. GEN. LAWS § 28-57-5 (2018) (eighteen employees).

43. COUNCIL OF ECON. ADVISERS, OFF. OF THE PRESIDENT OF THE UNITED STATES, THE ECONOMICS OF PAID AND UNPAID LEAVE 2 (2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/leave_report_final.pdf [perma.cc/5UK8-Y7LG].

The challenge with relying on the states to pass their own paid sick leave laws is in some ways the same as relying on individual employers to offer such benefits: uniformity of coverage. The most common source of paid sick leave comes directly from employers themselves. However, as discussed, private employers have a great deal of discretion in offering paid sick leave to their employees, and many low wage workers are left without coverage. Clearly, the issue with relying on individual employers to provide sick leave is that it is not a guaranteed employment benefit by any measure (unless the employer happens to be operating under a state with a paid sick leave law). A federal universal paid sick leave law would widen the net and bring the United States closer to parity with its international counterparts who have mandated such benefits for workers for years.[44]

Some of the arguments that have been mounted in opposition to federal paid sick leave law include concerns that legislating sick days will open the door to abuse by employees, that requiring paid sick days will make American employers less competitive, that employers will have to cut costs by reducing wages or other benefits, that small businesses will be driven out of business by rising costs, and that competitiveness will suffer.[45] A thorough discussion of the merits of these arguments requires more attention than can be given here, but it is worth noting what some of the obstacles have been to achieving federal paid sick leave.

B. Expansion of the Family and Medical Leave Act of 1993

The Family and Medical Leave Act of 1993 (FMLA) is often looked to as the source of employment protection for employees who need to take leave for personal illness or to care for ill family members. At its most basic level, the FMLA attempts to provide the peace of mind that workers can take long-term job-protected leave without fear that doing so will undermine their job security or force them to choose between employment and their health or family obligations.[46] And though the FMLA seems to promise a welcome respite to many during public health crises like a global pandemic, its scope is fairly limited.

First, many workers are not covered by the FMLA. While the FMLA applies to all public employees, such as those working in government positions, it only applies to private sector employers "who employ[] 50 or more employees for each working day during each of 20

44. Jody Heymann, Hye Jin Rho, John Schmitt & Alison Earle, *Ensuring a Healthy and Productive Workforce: Comparing the Generosity of Paid Sick Day and Sick Leave Policies in 22 Countries*, 40 Int'l J. Health Servs. 1, 1 (2010).

45. Tom W. Smith & Jibum Kim, Pub. Welfare Found., Paid Sick Days: Attitudes and Experiences, 1, 7 (2010), https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-sick-days/paid-sick-days-attitudes-and-experiences.pdf [perma.cc/DA59-PC4G].

46. *See* Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2610 (2020).

or more calendar workweeks"[47] and thereby "exempt[s] employers who have hundreds of employees but less than fifty in any one geographic location."[48] The end result is that the more than forty percent of private sector employees whose employment situations do not meet that threshold do not receive the protections offered by the FMLA.[49] In this way, the FMLA has wide gaps in coverage.

Second, qualifying reasons to take the leave are limited. Under the FMLA, leave may only be taken for the following reasons: the arrival of a new child in the household by birth, adoption, or through foster care; caring for and bonding with the new child within the first year of birth or placement; a serious health condition experienced by the employee; the employee caring for a spouse, child, or parent with a serious health condition; and/or certain exigent circumstances created by the fact that the spouse, child, or parent of the employee is on covered active duty in the Armed Forces.[50] The limited use of FMLA leave is further circumscribed by the definition of "serious health condition," which the employee satisfies by suffering "an illness, injury, impairment or physical or mental condition" requiring inpatient care or continuing medical treatment by a healthcare provider.[51] Continuing medical treatment is characterized by a period of incapacity[52] lasting more than three consecutive days and requiring at least two or more in-person visits to the employee's healthcare provider within thirty days.[53] In light of these requisites, it is clear that qualifying for FMLA leave, especially as an ailing employee, is no small feat. And, moreover, FMLA leave cannot be used for shorter-term illnesses, such as the common cold or flu, with the same flexibility as regular sick leave.

Third, the leave provided is unpaid. The FMLA does not require that employees be compensated throughout the duration of their leave (which can last for up to twelve weeks—nearly three months—in a twelve-month period).[54] This limitation means that, while employees will still have a job to come back to at the end of their leave, they cannot expect their regular, steady income throughout its duration. The

47. *Id.*

48. Marianne DelPo Kulow, *Legislating a Family-Friendly Workplace: Should It Be Done in the United States*, 7 N.W. J. L. & Soc. Pol'y 88, 93 (2012).

49. Helene Jorgensen & Eileen Appelbaum, Ctr. Econ. & Pol'y Rsch., Expanding Federal Family and Medical Leave Coverage: Who Benefits from Changes in Eligibility Requirements? 1, 3 (2014), https://cepr.net/documents/fmla-eligibility-2014-01.pdf [perma.cc/38YS-FDYK]; *see also* Jennifer Ludden, *FMLA Not Really Working for Many Employees*, NPR (Feb. 5, 2013), https://www.npr.org/2013/02/05/171078451/fmla-not-really-working-for-many-employees [perma.cc/5CSS-KGFH].

50. *See* 29 U.S.C. § 2612(a)(1)(A)–(E). The qualifying exigent circumstances created by a family member's covered activity duty in the Armed Forces will not be discussed at length here, but they are determined by the Secretary of Labor through regulations.

51. 29 C.F.R. § 825.113 (2021).

52. *Id.*

53. *See id.* § 825.115.

54. Jorgensen & Appelbaum, *supra* note 49, at 9.

resulting problem is that employees who could take advantage of family and medical leave may not be able afford it. A quick Google search on financing FMLA leave provides strategies to "survive" unpaid leave and similar rhetoric implying the financial struggle that many individuals face when taking unpaid leave.[55] The proposed strategies range from looking into short-term disability insurance to, sadly, launching a crowdfunding campaign.[56]

In law and policy, it is imperative to ask whether the system as it exists functions to serve the needs of society or, if not, what areas need to be improved. That Americans feel the need to crowdfund to afford taking family and medical leave indicates that the provisions of the FMLA should be expanded to meet the challenge of reducing income insecurity.

Some suggestions for achieving this goal include broadening the FMLA net to include more private sector employers. Extending coverage to Americans not presently covered would provide the flexibility to even take time away from work while they are ill, or to care for family, without worrying about losing their job. The more Americans that can be encouraged, and able, to remain home during contagious disease outbreaks, the sooner that community spread can be controlled. The expansion of the FMLA to include more employees than it presently does would help to accomplish this goal.

However, giving more Americans the ability to take leave might not be effective if they still cannot afford to use it. The next step would be to improve the practical application of FMLA by implementing a system of paid family and medical leave at the federal level. Research has shown that around seventy-five percent of Americans support such an idea—the issue is how to pay for it or, rather, who will pay for it.[57] Retaining the above FFCRA provisions with the caveat that they "could only be triggered during a declared public health emergency" is one narrowly tailored policy recommendation.[58] Making the FFCRA's emergency family-leave provisions a lasting part of the FMLA would mean that some of the necessary infrastructure would remain in place should the country face a similar public health crisis in the future. However, it is important to recall that the FFCRA only provides paid

55. Fairygodboss, *7 Strategies to Survive Unpaid Maternity Leave*, Motherly (Jan. 9, 2017), https://www.mother.ly/work/7-strategies-to-survive-an-unpaid-maternity-leave [https://perma.cc/79GF-9VY6]. It bears mentioning that many of the search results for affording unpaid leave discuss maternity leave specifically, as taking time off to care for a newborn is one of the most common reasons FMLA is utilized.

56. *Id.*

57. Abby Vesoulis, *Millions of Americans Could Finally Get Paid Family Leave—If Lawmakers Can Agree on Who Pays*, Time (May 16, 2019, 6:47 AM), https://time.com/5590167/paid-family-leave-united-states [perma.cc/6HAA-BCSX].

58. Amy L. Major, *An Exercise in Backwards Logic: How Expanding the Family and Medical Leave Act Can Enhance Business Continuity & Productivity during a Public Health Emergency*, 27 J. Contemp. Health L. & Pol'y 251, 273 (2011).

family leave to cover childcare responsibilities and not serious illness of the child or any caregiving needs for other family members more generally. Addressing that component would require further legislation, as discussed below.

In February 2021, the Family and Medical Insurance Leave Act (FAMILY Act) was introduced into both houses of Congress, proposing the creation of a national insurance program, funded by employer and employee payroll contributions and housed within the Social Security Administration, that would allow employees to take up to twelve weeks of partially paid leave for their own serious health condition, that of a relative, or the birth or adoption of a child.[59] As this Note has speculated about the Healthy Families Act, it will be interesting to see the effect, if any, that the COVID-19 pandemic will have in furthering this type of legislation that would protect the lives and livelihoods of sick and caregiving Americans.

C. Improved Unemployment Systems and Expansion of Unemployment Coverage

During a public health emergency like the COVID-19 pandemic, it is hard to imagine a scenario where rising unemployment rates could be avoided altogether—but that does not mean that American workers should suffer needlessly for it. The federal and state governments would be wise to bolster their unemployment systems infrastructure, so to avoid the delays and inundation experienced at the peak of pandemic unemployment, when millions of Americans tried to access the Pandemic Unemployment Assistance programs.

In late March 2020, the Coronavirus Aid, Relief, and Economic Security (CARES) Act was passed by Congress and signed into law by former President Trump with the purpose of providing economic assistance for American workers, families, and small businesses.[60] Provisions within the CARES Act created the Pandemic Unemployment Assistance (PUA) program, which provided that individuals who did not qualify for regular unemployment compensation and were unable to continue working as a result of COVID-19 could be eligible for unemployment benefits.[61]

By mid-May 2020, at least thirty-seven states were able to begin distributing PUA payments to unemployed Americans after budgetary constraints, technological limitations, and outdated unemployment

59. FAMILY Act, H.R. 804, 117th Cong. (2021); FAMILY Act, S. 248, 117th Cong. (2021).

60. *The Treasury Department Is Delivering COVID-19 Relief for All Americans*, U.S. Dep't of the Treasury, https://home.treasury.gov/policy-issues/cares [perma.cc/SZD6-3M8Y].

61. Press Release, U.S. Dep't of Lab., U.S. Department of Labor Publishes Guidance on Pandemic Unemployment Assistance (Apr. 5, 2020) https://www.dol.gov/newsroom/releases/eta/eta20200405 [https://perma.cc/28XQ-CJ2W].

systems increased benefit wait times.[62] The unemployment systems, bogged down by claims and ill-equipped to handle the influx, resulted in weeks-long wait times before any funds could be distributed—weeks that not many Americans, whose bills and other expenses had piled up, had the luxury of waiting.[63] Access to PUA payments was also slowed down by some state requirements that individuals file for traditional unemployment compensation, receive a rejection letter, and then refile for PUA.[64] These delays were not only harmful to the families facing them, but research shows that it was detrimental to the economy generally.[65] State and federal governments should overhaul their unemployment systems to streamline the process of accessing relief to prevent these kinds of delays in the future.

The problems surrounding the implementation of PUA also highlighted an important gap in unemployment protections. The program extended coverage to individuals not eligible for regular unemployment compensation, including gig economy workers, who were absolutely essential to the United States economy during the COVID-19 pandemic.[66] While the discussion of benefits for gig workers deserves more justice than can be given here, it is critical to note the relationship between the protections offered to essential workers and income security and public health.[67] Before PUA made unemployment benefits available to gig workers, these individuals had to rely on the promises of gig companies, like Uber and Instacart, that purported to offer paid sick leave to their drivers and shoppers, respectively, but ultimately

62. Andrew Soergel, *Most States Are Finally Getting Unemployment Benefits to Gig Workers Affected by Coronavirus*, U.S. News & World Rep. (May 15, 2020), https://www.usnews.com/news/economy/articles/2020-05-15/unemployment-benefits-finally-begin-to-reach-gig-workers-hit-by-covid-19 [https://perma.cc/7TND-PJHJ].

63. Ben Zipperer & Elise Gould, *Unemployment Filing Failures: New Survey Confirms That Millions of Jobless Were Unable to File an Unemployment Insurance Claim*, Econ. Pol'y Inst. (Apr. 28, 2020, 7:00 AM), https://www.epi.org/blog/unemployment-filing-failures-new-survey-confirms-that-millions-of-jobless-were-unable-to-file-an-unemployment-insurance-claim [perma.cc/QK69-5FG3] ("[W]idespread reports indicate that long-neglected state UI systems are unable to handle the volume of applications, preventing laid-off or furloughed workers from receiving necessary unemployment benefits.").

64. Nicole Clark, *INSIGHT: Gig Workers Can Qualify for CARES Act Unemployment Aid*, Bloomberg L. (May 6, 2020, 8:01 AM), https://news.bloomberglaw.com/daily-labor-report/insight-gig-workers-can-qualify-for-cares-act-unemployment-aid [perma.cc/5N6H-NNCE].

65. Jonnelle Marte, *Americans on COVID-19 Jobless Benefits Spent More Than When Working, Study Shows*, Reuters (July 15, 2020), https://www.reuters.com/article/us-usa-economy-benefits/americans-on-covid-19-jobless-benefits-spent-more-than-when-working-study-shows-idUSKCN24H0IG [perma.cc/U39D-5JB3].

66. Ben Penn, *Uber, Lyft Drivers Eligible for Jobless Aid Under New Law*, Bloomberg L. (Apr. 6, 2020, 7:52 PM), https://news.bloomberglaw.com/daily-labor-report/uber-lyft-drivers-now-eligible-for-jobless-aid-under-new-law [perma.cc/LL4F-KCWC].

67. For an in-depth discussion of the challenges facing gig workers, see Miriam A. Cherry, *Employment Status for "Essential Workers": The Case for Gig Worker Parity*, 55 Loy. L.A. L. Rev. (forthcoming 2022).

fell flat.[68] In the absence of unemployment protections, gig workers were left with no recourse but to continue serving the public by delivering food, groceries, and medicines, and putting themselves at risk of exposure so that others would not have to.[69] Gig workers who relied on their platform work to pay their bills did not have the luxury of taking time off because, in the absence of unemployment benefits, they were without means of support. America needs to do better for the workers that it considers essential, and that means a discussion of extending protections to the most vulnerable and critically important workers.[70] Furthermore, the system of unemployment was especially difficult for gig workers to navigate, as many had some traditional W-2 income, in addition to their gig wages, that significantly slowed their ability to take advantage of the PUA payments.[71]

D. Switch to Telework

In 2019, about twenty-four percent of employed Americans were engaged in telework, meaning they "did all or some of their work from home," typically via the Internet.[72] Following the COVID-19 pandemic, that number is likely to be much higher. In April 2020, sixty-two percent of employed Americans reported that they had worked from home during the pandemic.[73] A Pew Research report from December 2020 suggested that many who had the choice to work from home, and did, were largely motivated by concerns about being exposed to, or spreading, the coronavirus in the workplace.[74] It appears that the option to telework can play an important role in enabling employees to exercise their responsibility for curing the spread of contagious diseases, while also balancing concerns about missing work.

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68. *See* Lia Russell, *Uber's Bait and Switch on Paid Sick Leave*, AM. PROSPECT (May 5, 2020), https://prospect.org/coronavirus/uber-bait-and-switch-on-paid-sick-leave [perma.cc/MD9T-WSMH]; *see also Instacart's COVID "Sick Pay"—The Reality*, PAYUP CAMPAIGN, https://payup.wtf/instacart-covid-sick-pay [perma.cc/4RCU-K7JE].

69. Miriam A. Cherry & Ana Santos Rutschman, *Gig Workers as Essential Workers: How to Correct the Gig Economy Beyond the COVID-19 Pandemic*, 35 ABA J. LAB. & EMP. L. 11, 11–12 (2020).

70. *Id.*

71. David Brancaccio, Nova Safo & Alex Schroeder, *Why Some Gig Workers Are Getting Less in Unemployment Benefits*, MARKETPLACE (May 14, 2020), https://www.marketplace.org/2020/05/14/gig-workers-covid-19-unemployment-insurance-pandemic-unemployment-assistance [perma.cc/VYR7-ELKJ].

72. Press Release, U.S. Bureau of Lab. Stats., American Time Use Survey Summary (June 25, 2020), https://www.bls.gov/news.release/atus.nr0.htm [perma.cc/EL4F-Z8VM].

73. Megan Brenan, *U.S. Workers Discovering Affinity for Remote Work*, GALLUP (Apr. 3, 2020), https://news.gallup.com/poll/306695/workers-discovering-affinity-remote-work.aspx [perma.cc/X76N-6R63].

74. Kim Parker, Juliana Menasce Horowitz & Rachel Minkin, *How the Coronavirus Outbreak Has—and Hasn't—Changed the Way Americans Work*, PEW RSCH. CTR. (Dec. 9, 2020), https://www.pewresearch.org/social-trends/2020/12/09/how-the-coronavirus-outbreak-has-and-hasnt-changed-the-way-americans-work [perma.cc/JT8V-NBWG].

Moving more jobs to telework can give employees more flexibility about how and when to work—gone are the days of the traditional nine to five.[75] As a result, employees can more readily remain home to care for themselves, or a dependent, while still being able to meet their work obligations. This arrangement can also be important for employees with school-aged children at home who, absent telework options, might have to forgo employment entirely or choose between sending an ill child to school or missing work and losing pay. However, telework is far from a one-size-fits-all solution. One estimate suggests that only thirty-seven percent of jobs could be performed entirely from home,[76] and those are typically positions that pay higher wages, such as those in technology, management, administration, finances, and engineering.[77] Workers in low-wage and low-skill positions, such as those in service industries with a high level of interaction with the public, are unlikely to benefit from telework and are less likely to have the resources to otherwise protect themselves.[78] These workers are generally "very limited in their ability to work away from the physical location of their work, are more likely to be hourly workers, and are concentrated in occupations that suffer from high turnover and poor working conditions."[79]

Furthermore, a large-scale shift to telework raises questions about the ability of existing infrastructure to support the migration to online work. From a business standpoint, telework seems to be an attractive financial choice. In a survey of 317 chief financial officers, 74% reported their intention to "move at least 5% of their previously on-site workforce to permanently remote positions."[80] But what of telecommunications providers, whose services were essential to connecting Americans everywhere in a time of mandatory isolations? The influx of teleworkers across the country raised concerns regarding the ability of the companies to meet demands for bandwidth, increased traffic on

75. While many workers enjoy this flexibility, early scholarship in this area cautions that the ability to work from home has also made it difficult for many teleworkers to maintain an appropriate work-life balance. Unfortunately, an in-depth analysis of this issue is beyond the scope of this note.

76. Jonathan I. Dingel & Brent Neiman, How Many Jobs Can Be Done at Home? 1 (2020).

77. Marissa G. Baker, *Nonrelocatable Occupations at Increased Risk during Pandemics: United States, 2018*, 110 Am. J. Pub. Health 1126, 1128–30 (2020).

78. *Id.*

79. Amit Kramer & Karen Z. Kramer, *The Potential Impact of the COVID-19 Pandemic on Occupational Status, Work from Home, and Occupational Mobility*, 119 J. Vocational Behav. 1, 2 (2020) (citing Alan Berube & Nicole Bateman, *Who Are the Workers Already Impacted by the Covid-19 Recession?*, Brookings (Apr. 3, 2020), https://www.brookings.edu/research/who-are-the-workers-already-impacted-by-the-covid-19-recession [https://perma.cc/Q5T7-9VD7]).

80. Press Release, Justin Lavelle, President Commc'ns, Gartner, Gartner CFO Survey Reveals 74% Intend to Shift Some Employees to Remote Work Permanently (Apr. 3, 2020), https://www.gartner.com/en/newsroom/press-releases/2020-04-03-gartner-cfo-surey-reveals-74-percent-of-organizations-to-shift-some-employees-to-remote-work-permanently2 [perma.cc/55KK-XTA8].

virtual private networks (VPNs), and the robustness of cybersecurity to protect sensitive and confidential business information transmitted online.[81]

While moving jobs to telework may not have as direct an effect on income security as some of the other proposals discussed in this Note, the usefulness of telework for accommodating modern lifestyles and reducing presenteeism should be noted. It does raise its own concerns about the boundaries between work and home life, but that is a topic outside the scope of this Note.[82]

E. Universal Basic Income

Universal basic income (UBI) is an old idea—almost as old, if not older, than America herself. Over 500 years ago, Sir Thomas More wrote *Utopia* and philosophized that "it were much better to make such good provisions by which every man might be put in a method how to live, and so be preserved from the fatal necessity of stealing and of dying for it."[83] In the utopic society imagined by More, people would not be driven to crime, or to death, because of poverty, and would instead be furnished with means to survive. Another one of UBI's earliest proponents was Thomas Paine, who, in his 1797 work, *Agrarian Justice*, proposed a universal and unconditional "single lump sum . . . to every person on attaining adulthood."[84] Over the years, other notable historical figures have promoted some version or another of universal basic income, including Martin Luther King, Jr.[85] and, to a lesser extent, former U.S. president Richard Nixon.[86] Though it has taken various names and forms over the years, universal basic income refers generally to a recurring "individual guaranteed minimum income without either a means test or a work condition."[87] Despite its past failure to

81. Daniel Bukszpan, *Working Remotely Due to Coronavirus? This Technology from Your Employer Is Key*, CNBC (Mar. 10, 2020, 10:54 AM), https://www.cnbc.com/2020/03/10/working-remotely-due-to-the-coronavirus-this-technology-is-key.html [perma.cc/UPA5-NFMF]; Shannon Bond, *Internet Traffic Surges as Companies and Schools Send People Home*, NPR (Mar. 17, 2020, 3:54 PM), https://www.npr.org/2020/03/17/817154787/internet-traffic-surges-as-companies-and-schools-send-people-home [perma.cc/2VS5-XWZM].

82. *See* Nick Ustinov, *How to Maintain Work-Life Balance When Working from Home*, FORBES (June 23, 2020, 8:40 a.m.), https://www.forbes.com/sites/forbestechcouncil/2020/06/23/how-to-maintain-work-life-balance-when-working-from-home [perma.cc/A4XC-D4SK] (discussing tips on how to maintain a work-life balance at home).

83. THOMAS MORE, UTOPIA 18 (Gilbert Burnet trans., 2016).

84. J. E. King & John Marangos, *Two Arguments for Basic Income: Thomas Paine (1737–1809) and Thomas Spence (1750–1814)*, 14 HIST. ECON. IDEAS 55, 61 (2006).

85. *See* Susan R. Jones, *Dr. Martin Luther King, Jr.'s Legacy: An Economic Justice Imperative*, 19 WASH. U. J. L. & POL'Y 39 (2005).

86. *See also The Family-Assistance Plan: A Chronology*, 46 SOC. SERV. REV. 603, 603 (1972) (President Nixon "called for a family-assistance plan through which a family with one or more children would be guaranteed a minimum payment from federal funds.").

87. Philippe Van Parjis, *Why Surfers Should Be Fed: The Liberal Case for an Unconditional Basic Income*, 20 PHIL. & PUB. AFFS. 101, 102 (1991); *see also What Is Basic Income?*, STAN. BASIC INCOME LAB, https://basicincome.stanford.edu/about/what-is-ubi

launch, universal basic income proposals have gained some traction in recent years.

In the 2020 United States presidential election, universal basic income was a cornerstone of Democratic candidate Andrew Yang's, platform; one that he termed the "Freedom Dividend."[88] In the most basic terms, Yang's plan included guaranteeing every U.S. citizen, eighteen and older, $1,000 per month, regardless of income or employment status.[89] The Freedom Dividend would be necessary, according to Yang, "for the continuation of capitalism through the wave of automation and worker displacement."[90] Yang is far from alone in this belief. Some of UBI's most widespread support comes from billionaire technology executives and business magnates who also believe technological unemployment is an inevitable result of job automation.[91]

A universal basic income, or something akin to it, might be necessary to meet income insecurity not just caused by automation, but also the loss of work due to a public health emergency of epic proportions—such as a pandemic. While smaller-scale basic income experiments, some within the United States[92] and some without,[93] have been implemented in previous years, the COVID-19 health crisis put the spotlight on the idea of UBI. In June 2020, Spain launched a program similar to that of UBI, called the "guaranteed minimum income," in which 850,000 Spanish households, some of the nation's poorest, were given a no-strings-attached monthly payment to "meet their basic

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[perma.cc/LP74-LX2N] (identifying the defining characteristics of UBI as universal, individual, unconditional, periodic cash payments).

88. *The Freedom Dividend, Defined*, YANG 2020 (2020), https://www.yang2020.com/what-is-freedom-dividend-faq [perma.cc/U5ST-P6XU].

89. *Id.*

90. *Id.*

91. *See* Chris Weller, *Elon Musk Doubles Down on Universal Basic Income: "It's Going to Be Necessary,"* BUS. INSIDER (Feb. 13, 2017, 11:53 AM), https://www.businessinsider.com/elon-musk-universal-basic-income-2017-2 [perma.cc/J4KV-Z9V6] (Elon Musk, CEO of Tesla, has stated his belief that "we'll end up doing a universal basic income" because "it's going to be necessary" as a result of there being "fewer and fewer jobs that a robot cannot do better."); *see also* Danielle Wiener-Bronner, *Richard Branson: Universal Basic Income Is Coming*, CNN BUS. (Feb. 15, 2018, 2:04 PM), https://money.cnn.com/2018/02/15/news/companies/richard-branson-basic-income/index.html [perma.cc/QX4U-U3D9] (Richard Branson, founder of the Virgin Group, believes that universal basic income will come about one day "out of necessity" due to the "amount of jobs [automation] is going to take away.").

92. Victor Luckerson, *Why Everyone Who Lives in Alaska Is Getting $1,884 Today*, TIME (Oct. 2, 2014, 7:00 AM), https://time.com/3453788/alaska-oil-dividend [perma.cc/5R3W-8J7M]; *Mayor of Stockton, Calif., Discusses Universal Basic Income Program Results*, NPR (Oct. 19, 2019, 5:06 PM), https://www.npr.org/2019/10/19/771599494/mayor-of-stockton-calif-discusses-universal-basic-income-program-results [perma.cc/QT6G-2ELR].

93. *See* Laura Paddison, *Finland Gave People $640 a Month, No Strings Attached. Here's What Happened.*, HUFFPOST (Mar. 7, 2019), https://www.huffpost.com/entry/universal-basic-income-finland-ontario-stockton_n_5c5c3679e4bgo00187b558e5ab [perma.cc/C37H-HZE5].

needs without trapping them in poverty in the same way as existing welfare programs that offer support only to those without jobs or other income."[94] Reportedly, the decision to implement the program had been discussed for some time but was accelerated in light of the economic emergency spurred by the 2020 pandemic.[95]

Like Spain, other countries have started to explore whether a basic income program might become necessary to combat the growing income insecurity exacerbated by the pandemic.[96] But where does the United States fall on that discussion?

At first blush, the thought of a universal basic income coming from the federal government to *all* of America—not just one city or state—seems a distant possibility in a country deeply divided upon ideological lines and strongly committed to neoliberal capitalist principles. But the Economic Impact Payments, or "stimulus checks," distributed to American citizens to alleviate some of the financial hardship caused by the pandemic, suggest otherwise.[97] The federal stimulus payments share some important characteristics with universal basic income, as all adult U.S. citizens within certain income limitations received a payment of $1,200 with (for the most part) no strings attached—that is, no guidelines dictating where the money should go.[98] However, important caveats to payment eligibility included caps on adjusted gross income, dependent status (for adult children still being claimed as a dependent on their parents' taxes), and the requirement of a Social Security Number valid for employment.[99] In the year following the coronavirus pandemic, three rounds of federal stimulus checks were distributed to Americans—payments of $1,200 and $600 went out in March and December 2020, respectively, from the Coronavirus Aid Relief and Economic Security Act,[100] and payments of $1,400 were included in the American Rescue Plan, passed in March 2021.[101]

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94. Carrie Arnold, *Pandemic Speeds Largest Test of Universal Basic Income*, Nature (July 10, 2020), https://www.nature.com/articles/d41586-020-01993-3 [perma.cc/TP3P-D4EA].

95. *Id.*

96. *See* Anne Décobert, *From Toilet Paper Wars to #ViralKindness? COVID-19, Solidarity and the Basic Income Debate in Australia*, 27 Anthropology in Action 51, 53 (2020).

97. Zack Friedman, *$2,000 A Month Stimulus Check? Andrew Yang Proposed $1,000 A Month—Forever*, Forbes (May 13, 2020), https://www.forbes.com/sites/zackfriedman/2020/05/13/stimulus-check-univer-basic-income [perma.cc/S5ZR-LC74].

98. *Questions and Answers about the First Economic Impact Payment—Topic A: Eligibility*, IRS (Feb. 16, 2022), https://www.irs.gov/newsroom/economic-impact-payment-information-center-topic-a-eip-eligibility [perma.cc/RU65-QXWQ].

99. *Id.*

100. Internal Revenue Service, Press Release, Treasury and IRS Begin Delivering Second Round of Economic Impact Payments to Millions of Americans (Dec. 29, 2020), https://www.irs.gov/newsroom/treasury-and-irs-begin-delivering-second-round-of-economic-impact-payments-to-millions-of-americans [perma.cc/JE58-HGAX].

101. President Joe Biden, Remarks by President Biden on the American Rescue Plan and Signing of Executive Orders (Jan. 22, 2021), https://www.whitehouse.gov

As a general matter, basic income proposals are criticized as providing a disincentive to work, allowing people to become lazy and dependent.[102] This critique is colorfully known as the Malibu Surfer problem.[103] There might be some conventional wisdom to this critique—after all, on a very basic level, it follows that if a person could generate income without needing to work for it, why would they not resign themselves to more leisure time? However, studies have shown that not only would a universal basic income of the kind proposed by Andrew Yang and his contemporaries be insufficient to cover all expenses, there is actually no significant relationship between basic income payments and a decrease in labor supply—that is, most people still choose to work (or at the very least, they still need to).[104] To that end, a universal basic income provides people the freedom to pursue more meaningful, but perhaps less lucrative, areas of work.[105] UBI is also thought to give individuals license to be more creative and take risks, and to make investments in small business and projects that they might otherwise forgo.[106] Furthermore, UBI has been associated with the financial flexibility to go back to school and become qualified for higher skilled jobs. The cost of post-secondary education dissuades many Americans from pursuing a college degree because of the difficulty posed by juggling class attendance, readings and assignments, working part- and full-time jobs to pay for it (and other living expenses), and managing family obligations.

/briefing-room/speeches-remarks/2021/01/22/remarks-by-president-biden-on-the-american-rescue-plan-and-signing-of-executive-orders [perma.cc/4ZA7-C83X] ("The American Rescue Plan also includes economic relief for most Americans who are in need. We're going to finish the job of getting a total of $2,000 in direct payments to folks. Six hundred dollars, which was already passed, is simply not enough if you still have to choose between paying your rent and putting food on the table."); Ron Lieber & Tara Siegel Bernard, *What Is in the Stimulus Bill: $1,400 Checks, Expanded Unemployment and Tax Rebates*, N.Y. Times (June 2, 2021, 10:57 AM), https://www.nytimes.com/live/2021/stimulus-check-plan-details [perma.cc/WC32-N736].

102. *See* Cynthia Estlund, *Three Big Ideas for a Future of Less Work and a Three-Dimensional Alternative*, 82 L. & Contemp. Probs. 1, 17 (2019) ("On the face of it, there is no getting away from the fact that a subsistence level UBI would subsidize individuals' choice to forego work.").

103. *Id.*

104. Abhijit V. Banerjee, Rema Hanna, Gabriel E. Kreindler & Benjamin A. Olken, *Debunking the Stereotype of the Lazy Welfare Recipient: Evidence from Cash Transfer Programs*, 2 World Bank Rsch. Observer 155, 157 (2017); Estlund, *supra* note 102, at 16 ("First, most people with marketable skills will still seek paid work to supplement a subsistence-level income. Second, a UBI would enable some people to develop those skills, to wait for a work opportunity that better fits their skills and interests, or to launch or join in a new independent enterprise.").

105. Shawn Achor, Andrew Reese, Gabriella Rosen Kellerman & Alexi Robichaux, *9 Out of 10 People Are Willing to Earn Less Money to Do More-Meaningful Work*, Harv. Bus. Rev. (Nov. 6, 2018), https://hbr.org/2018/11/9-out-of-10-people-are-willing-to-earn-less-money-to-do-more-meaningful-work [perma.cc/BT52-LLUM].

106. Banerjee et al., *supra* note 104, at 158.

In the United States, universal basic income as a reality has a long way to go, as well as far-reaching implications. To be sure, implementation of a universal basic income in the United States cannot, and should not, be expected to alleviate income insecurity on its own. However, it is discussed in this Note as one of many ways for law and policy makers to address income insecurity in America—at all times, but especially during a pandemic.

F. Raising the Minimum Wage

Another policy debate surrounding income security has been centered on the minimum wage. The "Fight for $15" movement has coalesced to increase the present minimum wage. Although this discussion was relevant long before the pandemic, the growing wage gap has only exacerbated the financial hardships felt by workers across the United States as a result of the pandemic. This is especially true because many minimum wage earners are those that, during the pandemic, were considered "essential." Recognizing the significant risk and the stark disparity between that risk and the compensation for such essential workers, most Americans have come to agree on an increase in the minimum wage.[107]

At present, the federal minimum wage of $7.25 an hour has neither been changed since 2009 nor been adjusted to meet inflation.[108] This means that the minimum wage has not kept up with the rising cost of living in over a decade, and the purchasing power of minimum wage workers continues to decrease over time.[109] Thus, it is no surprise that there has been a rallying cry to boost the federal minimum wage,

107. Molly Kinder, *Even a Divided America Agrees on Raising the Minimum Wage*, BROOKINGS (Nov. 13, 2020), https://www.brookings.edu/blog/the-avenue/2020/11/13/even-a-divided-america-agrees-on-raising-the-minimum-wage [perma.cc/MWA5-BRF2] ("Even before COVID-19, most Americans agreed that low-wage workers deserved to earn wages that meet their basic needs. As infections soar once again, raising the wages of essential workers who are risking their lives—and their families' lives—has grown even more urgent.").

108. Matthew Michaels, *If the US Minimum Wage Had Kept Up with the Economy, Many Low-Wage Earners Could Earn Double What They're Making Now*, BUS. INSIDER (Dec. 22, 2017, 12:15 PM), https://www.businessinsider.com/how-much-higher-the-federal-minimum-wage-should-be-2017-12 [perma.cc/8A5N-8R26]; David Cooper, *The Federal Minimum Wage Has Been Eroded by Decades of Inaction*, ECON. POL'Y INST. (July 25, 2016) https://www.epi.org/publication/the-federal-minimum-wage-has-been-eroded-by-decades-of-inaction [perma.cc/6AXK-G5UJ] ("Prior to 1968, the federal minimum wage was raised at roughly the same pace as growth in labor productivity—i.e., the rate at which the average worker can produce income from each hour of work. This makes sense—if the economy as a whole can produce more income per hour of work, it means there's capacity for wages across the distribution to grow at a similar rate. Had the minimum wage risen at the same pace as productivity after 1968, it would be nearly $19 per hour today.").

109. David Cooper, *Raising the Federal Minimum Wage to $15 by 2024 Would Lift Pay for Nearly 40 Million Workers*, ECON. POL'Y INST. (Feb. 5, 2019), https://www.epi.org/publication/raising-the-federal-minimum-wage-to-15-by-2024-would-lift-pay-for-nearly-40-million-workers [perma.cc/D5TF-7JJF].

organized by the Fight for $15, that has acted in many ways akin to a union since its inception in 2012.[110] The Fight for $15 website boasts having won "raises for 22 million people across the country—including 10 million who are on their way to $15 [an hour]."[111]

In the 2020 election cycle, Fight for $15 backed Amendment 2 on the Florida ballot, an initiative to raise Florida's minimum wage up from $8.56 an hour to $10 an hour by September 2021, and then an increase of an additional $1 per hour each year until 2026, incrementally bringing Florida's minimum wage to $15 an hour over the next five years.[112] The result? Coming from "a red state with two Republican Senators, a Republican-controlled state legislature, and a Republican governor who opposed the minimum wage hike," it might be surprising that Amendment 2 passed with sixty percent of the vote.[113]

Like paid sick leave, minimum wage law is another area where states have taken matters in their own hands. In addition to Florida, Connecticut, California, Illinois, Maryland, Massachusetts, New Jersey, New York, and the District of Columbia have passed similar laws requiring state minimum wages to reach $15 by 2025.[114]

The American Rescue Plan, discussed throughout this note, sought to nationalize this trend by raising the national hourly minimum wage to $15.[115] After the bill passed the House of Representatives in February 2021, the section regarding raising the federal minimum wage was left at the door after the Senate's nonpartisan parliamentarian found that Senate rules required it "to be dropped from the COVID-19 bill."[116] While the relief bill was then passed absent any mention of raising the federal minimum wage, lawmakers have continued to push for a higher minimum wage through other pieces of legislation.

In January 2021, the Raise the Wage Act (RWA) of 2021 was introduced in both chambers of Congress.[117] As the title of the proposed bill would suggest, the stated purpose of the RWA is to "provide for

110. *About Us*, Fight for $15 (2021), https://fightfor15.org/about-us [perma.cc/8EQ8-TS38].

111. *Id.*

112. Natalie Storch & Kimberly Doud, *Florida Passes Amendment 2, Gradually Increasing Florida's Minimum Wage to $15 an Hour*, Littler (Nov. 9, 2020), https://www.littler.com/publication-press/publication/florida-passes-amendment-2-gradually-increasing-floridas-minimum-wage [perma.cc/28LD-28Y9].

113. Kinder, *supra* note 107, at 1.

114. Chris Marr, *States with $15 Minimum Wage Laws Doubled This Year*, Bloomberg L. (May 23, 2019, 5:17 AM), https://news.bloomberglaw.com/daily-labor-report/states-with-15-minimum-wage-laws-doubled-this-year [perma.cc/62SB-JUBG].

115. Tami Luhby, *Biden Signs Orders to Get Checks and Food Aid to Low-Income Americans—Plus a Federal Pay Raise*, CNN (Jan. 22, 2021, 4:57 PM), https://www.cnn.com/2021/01/22/politics/executive-orders-biden-15-dollar-minimum-wage-federal-workers/index.html [perma.cc/2JGG-ER9T].

116. *Id.*

117. Raise the Wage Act of 2021, H.R. 603, S. 53, 117th Cong. (2021).

increases in [f]ederal minimum wage."[118] The text outlines a process similar to the incremental approach passed by Florida voters in the 2020 election cycle, in which the federal minimum wage would initially be increased to $9.50 per hour, then $11.00 per hour the next year, $12.50 per hour the year after that, $14.00 per hour the following year, and then finally to $15.00 an hour, four years after the $9.50 per hour effective date.[119]

The Original Living Wage Act (OLWA) was also introduced into the House of Representatives in January 2021 and provides another means of raising the minimum wage and combatting the growing wage gap in the United States.[120] The OWLA suggests raising the minimum wage using a formulaic approach, linked to economic indicators, where it is increased "to the minimum hourly wage sufficient for a person working for 40 hours per week, 52 weeks per year, to earn an annual income 25.5% higher than the federal poverty threshold for a four-person household, with two children under age 18, and living in the 48 contiguous states."[121]

Even before the pandemic, raising the minimum wage was hot on the radars of many activist groups and legislators. Like many of the topics discussed in this note, the pandemic and the need for income security added urgency to an already concerning policy problem.

III. Conclusion

This note recommends that law and policy makers implement government interventions that address the most pressing issue facing American workers: income security—or, for many, the lack thereof. Income insecurity has long been a problem in the United States—one of the richest nations in the world—when it really should not be.

From COVID-19 to the seasonal flu, access to paid sick leave is a huge determinant of whether employees heed government guidance that have an impact on the nation's health. American workers who do not have the security net of paid sick leave, paid medical leave, unemployment benefits, or high enough wages to forgo working when ill, are more likely to engage in presenteeism that results in poor public health outcomes.

It has been suggested that the United States join its international counterparts that already offer two weeks of universal paid sick leave. Some legislation to that effect has been introduced into Congress but, as of yet, has not advanced any further. Amid the short-lived protections of the FFCRA, the handful of states that provide about one week of sick leave, and the spotty coverage of private employers, paid sick

118. *Id.*
119. *Id.*
120. Original Living Wage Act, H.R. 122, 117th Cong. (2021).
121. *Id.*

leave in America is piecemeal at best. A single, federal universal paid sick leave law might at least provide minimum protections for most, if not all, American employees.

Furthermore, the FMLA, which is often looked to as providing leave protection for Americans unable to work due to an illness, contains significant gaps. An expansion of the law is recommended to include more American workers and to implement a paid family and medical leave component. One recommendation is to make permanent the emergency provisions of the FFCRA, which would provide some level of paid sick time over what is currently offered (which is, at present, nothing).

Other ways of promoting income security in the United States include a serious consideration of a universal basic income and its utility in an increasingly precarious workforce. What used to seem like a far-fetched, somewhat radical notion—the government handing out "free money" to every citizen—has seemed less so after three rounds of federal stimulus checks have supplemented the incomes of Americans.

Discussions about raising the federal minimum wage to $15 an hour has also become more promising in recent months. An increase in minimum wage has long been talked about as a means of addressing growing wage inequity in America but, like paid sick leave, has seen the most activity at the state level.

Some of the proposals discussed in this Note seem closer to reality than ever before. The COVID-19 pandemic has certainly caused a lot of heartache and hardships, but it could jumpstart meaningful change for American workers. It has already made America's need for income security glaringly obvious to the point that it can no longer be ignored. The hope is that this Note will someday become irrelevant and that the policy goals—to make sure American workers across the country have enough money to live, and even thrive, in the good times and bad—will be recognized.