Advanced Employment Law Seminar

Reference Manual
Volume No. 20-060

Rate this seminar by clicking the link below or scanning the QR code.
https://www.surveymonkey.com/r/20-060Adv-Emp-Law

OHIO STATE BAR ASSOCIATION
Connect. Advance. Succeed.

Ohio State Bar Association Continuing Legal Education
is a division of the Ohio State Bar Association.

Ohio State Bar Association CLE is a division of the Ohio State Bar Association. CLE speakers are volunteers serving the legal profession in its highest and best tradition and as recommended by the Ohio Rules of Professional Conduct.

CLE supports gender neutral language. Unless used to illustrate a specific case, all references to gender should be understood to refer, without bias, to male and female.

Books and seminar materials are published as part of the Ohio State Bar Association's educational services. Authors are given the opportunity to express their individual interpretations and opinions. These do not reflect in any way a position of CLE, the Ohio State Bar Association or its governing board. Chapters written by employees of state or federal agencies are not necessarily statements of governmental policies.

The CLE office is located at 1700 Lake Shore Drive, Columbus, Ohio 43204

Mail may be addressed to:
P.O. Box 16562
Columbus, Ohio 43216-6562

CLE telephone numbers are:
614-487-8585
800-232-7124

OHIO STATE BAR ASSOCIATION
CONTINUING LEGAL EDUCATION

The Ohio State Bar Association Mission Statement

Our Core Purpose

To promote justice and advance the legal profession.

Our Core Values

Member satisfaction, professionalism, foresight, and quality services and products.

Our Goal

To make membership in the Ohio State Bar Association indispensable to Ohio Lawyers.

THE CLE STAFF

Fran Wellington
Director
fwellington@ohiobar.org

Todd Burch
CLE Program Manager
tburch@ohiobar.org

Kerschie Byerly
Senior CLE Publications Editor
kbyerly@ohiobar.org

Deanna Freeman
CLE Program Administrator
dfreeman@ohiobar.org

Lynda Morris
CLE Program Coordinator
lmorris@ohiobar.org

Kasi Orcutt
Assistant Director of Web Education and Distance Learning
korcutt@ohiobar.org

Melissa Quick
Senior Manager of CLE Certification and Specialization
mquick@ohiobar.org

Advanced Employment Law Seminar

Vol. # 20-060

6.75 CLE Credit Hours; 6.75 Labor and Employment Law Specialization Hours

Friday, May 15, 2020

Live Interactive Webinar Only

Program Chair:
Charles C. Warner, Esq.; Porter Wright Morris & Arthur LLP; Columbus

Planning Committee:
Carl F. Muller, Esq.; Tucker Ellis LLP; Cleveland
Daniel P. Petrov, Esq.; Thorman Petrov Group Co. LPA; Cleveland

This presentation is a live simulcast. If you have a question for the speaker during the presentation, please feel free to submit your inquiry to questions@ohiobar.org with "Advanced Employment Law" in the subject line or call 1-800-232-7124, and let the operator know that you have a question for the seminar speaker.

The Supreme Court Commission on CLE *has requested that we advise you that during this seminar, phones should be muted or turned off. If you must take a call during the presentations, please take the call outside of the room.*

Out of respect for your colleagues and speakers, the Commission asks that you not read the paper or engage in other activities that may be distracting to your fellow colleagues.

Please note scheduled breaks will be offered during the seminar.

The amount of CLE credit you are eligible to receive may be reduced if you are absent during the seminar. If you need to leave during the seminar, please make the appropriate deduction from your request for CLE credit.

CLE regulations require that we submit requests for credit within 30 days of the date of the seminar or be assessed a late fee. If you leave without completing the appropriate paperwork, your credit will not be reported.

8:30 **Employment Mobility: Here Today, There Tomorrow, Gone the Next Day**
Moderator:
Charles C. Warner, Esq.; Porter Wright Morris & Arthur LLP; Columbus

Panelists:
Carl F. Muller, Esq.; Tucker Ellis LLP; Cleveland
Melissa Z. Kelly, Esq.; Tucker Ellis LLP; Cleveland

9: 30 **Theory and Practice of Pretrial Discovery Motions, Including Motions to Compel and for Protective Orders**
Moderator:
Charles C. Warner, Esq.; Porter Wright Morris & Arthur LLP; Columbus

Panelists:
Daniel P. Petrov, Esq.; Thorman Petrov Group Co. LPA; Cleveland
Michael S. Glassman, Esq.; Dinsmore & Shohl LLP; Cincinnati

10:30 Break

10:45 **Mediation Advocacy and Practice: Building Trust as a Key to Resolution**
Moderator:
Daniel P. Petrov, Esq.; Thorman Petrov Group Co. LPA; Cleveland

Panelists:
Ann-Marie Ahern, Esq.; McCarthy, Lebit, Crystal & Liffman Co., LPA; Cleveland
Jerome F. Weiss, Esq.; Mediation Inc.; Cleveland

11:45 Lunch Break

12:30 **The EEOC Speaks: Current Commissioner and Former Acting Chair Victoria Lipnic Updates Their Initiatives, Regulations, Guidance, and Practices**
Moderator:
Charles C. Warner, Esq.; Porter Wright Morris & Arthur LLP; Columbus

Panelist:
Victoria A. Lipnic, Esq.; Commissioner, U.S. Equal Employment Opportunity Commission; Washington, D.C.

1:30 **Developments and Strategy in Wage and Hour Collective and Class Actions**
Moderator:
Daniel P. Petrov, Esq.; Thorman Petrov Group Co. LPA; Cleveland

Panelists:
Jason R. Bristol, Esq.; Cohen Rosenthal & Kramer LLP; Cleveland
Fred G. Pressley Jr., Esq.; Porter Wright Morris & Arthur LLP; Columbus

2:30 Break

2:45 **Privacy Law Update: Top 10 Challenges in the Workplace**
Moderator:
Carl F. Muller, Esq.; Tucker Ellis LLP; Cleveland

Panelist:
Lisa Pierce Reisz, Esq.; Vorys, Sater, Seymour and Pease LLP; Columbus

3:30 **Everything You Wanted to Know about Damages and Other Relief in the Handling of Employment Cases**
Moderator:
Carl F. Muller, Esq.; Tucker Ellis LLP; Cleveland

Panelists:
Fred M. Gittes, Esq.; The Gittes Law Group; Columbus
Pamela S. Krivda, Esq.; Taft Stettinius & Hollister LLP; Columbus

4:30pm Program Concludes

Did you know?

The Ohio Supreme Court Continuing Legal Education (CLE) requirements have changed in order to accommodate attorneys' busy schedules. Lawyers can now earn CLE credits in bite-sized increments and even get live credit without leaving the office. Twenty-four hours of credit every two years is still the requirement but now, attorneys have more flexibility to mix and match credit types to fit their schedules.

Live CLE

In-person seminars

- Unlimited credit hours for approved live activities during a biennial compliance period
- Up to 12 hours can be carried over into the next biennium

Self-Study

Pre-recorded online courses (OSBA OnDemand CLEs for example)

- Up to 12 credit hours for approved self-study during a biennial compliance period
- Carryover hours not permitted

NEW! Live Interactive Webinar

Live seminars attended virtually that allow the viewer to interact with the program and ask the speaker questions

- Up to 24 credit hours for approved live webinar activities during a biennial compliance period
- Carryover hours not permitted

+

At the OSBA's urging, the Supreme Court has also recognized that a lot can be learned in smaller segments. Legal professionals can now earn credit for 30- and 45-minute CLE programs.

FLEXIBILITY

Visit ***OhioBar.org/CLE-Rule-Change*** for more information about the various CLE format options now available for Ohio legal professionals.

There are many ways to get to 24. The OSBA's got you covered.
How will you earn your CLE credit?

OSBA CLE
Video Order Form

Program attendees can purchase the video for just $25, a 75 percent discount off our normal price. To place your order, complete this form and submit to the registrar. Once the video has been edited, we will mail a copy to the address provided. (Please allow 2-3 weeks for editing and shipping.)

Program/Shipping information

Program name: _____

Program number: _____

Ohio attorney number: _____

Name: _____

Firm: _____

Shipping address: _____

City, state, zip: _____

Phone: _____

E-mail: _____

Form of payment

☐ Enclosed is a check for $25.00

☐ Mastercard ☐ Visa ☐ American Express

Account number: _____

Expiration date: _____

Signature: _____

Ohio State Bar Association
CLE

Be an OSBA CLE Moderator

Interested in free CLE?

APPLY TO BE A CLE MODERATOR FOR THE OHIO STATE BAR ASSOCIATION.

We are looking for moderators in the Cleveland, Columbus, Akron, Fairfield, Perrysburg, and Dayton areas.

The Supreme Court of Ohio requires providers of CLE to have a moderator any time a video replay of a live CLE program is shown.

- The moderator is there to keep the day on schedule and answer questions from the audience about what was just viewed.
- The moderator does **not** have any technical or registrar duties.
- The moderator will earn free CLE.
- Your name will be added to a list of moderators and you will be contacted with future video replay program dates and locations as they become available.

If interested, please send your contact information and a short bio to Deanna Freeman at dfreeman@ohiobar.org.

Speaker Biographies

Ann-Marie Ahern, Esq.

OSBA Certified Specialist in Labor and Employment Law
McCarthy, Lebit, Crystal & Liffman Co., LPA
Cleveland, Ohio

Ms. Ahern earned her BA from the University of Dayton and her JD, *cum laude*, from the Cleveland State University Cleveland-Marshall College of Law. As the head of her firm's Employment Practice, she has dedicated the past 20 years of her career to representing people in employment disputes. Ms. Ahern is an OSBA Certified Specialist in Labor and Employment Law and uses her extensive knowledge of all facets of employment law to represent employees at each stage of the employment relationship. The issues that she has tried to jury include age discrimination, sex discrimination and sexual harassment, race discrimination, disability discrimination/failure to accommodate, wrongful discharge, and illegal retaliation. Ms. Ahern has been at the forefront of the #MeToo and sexual harassment awareness movement, steadfastly supporting the victims of all forms of illegal discrimination. Recognizing the complexities and sensitivities involved when high-level employees transition from one company to another, she also regularly represents executives and other managers in negotiating employment agreements, severance agreements, and separation packages. Ms. Ahern is an award-winning advocate and has been named to "The Best Lawyers in America" by *US News and World Report*. Additionally, Super Lawyers recognized her as one of the Top 25 Female Lawyers in Cleveland and one of the Top 50 Female Lawyers in Ohio. National Trial Lawyers also took note of Ms. Ahern's work, naming her a Top 100 Trial Lawyer. Further, she is a former Chair of the Employment Rights Section of Association of Trial Lawyers of America (now the American Association for Justice). Ms. Ahern also works extensively with the Cleveland Metropolitan Bar Association, receiving the CMBA Women in the Law Making a Difference Award in 2014, acting as a trustee of the CMBA from 2013 to 2016, and as a former trustee of the Cleveland Metropolitan Bar Foundation. For additional information, please visit www.mccarthylebit.com.

Jason R. Bristol, Esq.

Cohen Rosenthal & Kramer LLP
Cleveland, Ohio

Mr. Bristol is an advocate for working people. *Law and Politics Magazine* has described him as a "Super Lawyer" in plaintiffs' employment litigation. Handling class and collective action under the Federal Fair Labor Standards Act and various state laws, he has recovered millions of dollars in unpaid wages and overtime compensation for workers across the United States. Mr. Bristol's cases have received coverage in the *Wall Street Journal* and in broadcasts ranging from America's Workforce Radio to Chicago Public Radio's "This American Life." He lectures widely and publishes articles on employment-related issues, and he is an adjunct professor at Cleveland State University Cleveland-Marshall College of Law, where he teaches courses on the Fair Labor Standards Act and Appellate Advocacy. In addition to his litigation practice, Mr. Bristol routinely serves as a mediator in complex wage and hour disputes. He is active in civic affairs and politics and sits on the boards of various organizations. For additional information, please visit www.crklaw.com.

Frederick M. Gittes, Esq.

The Gittes Law Group
Columbus, Ohio

Mr. Gittes received his BA from Rollins College and his JD from The Ohio State University Michael E. Moritz College of Law. He is a former president of the National Employment Lawyers Association and the Ohio Association for Justice and has served as Chair of the Ohio State Bar Association's Civil Rights Committee, as well as its Labor and Employment Law Section. Besides employment related litigation, Mr. Gittes practices in the areas of constitutional law, police misconduct, public records, privacy, defamation, medical privileging, and professional negligence. In 1996, his firm was the first firm ever presented with the ACLU of Ohio's statewide award for contributions to the preservation of civil rights and civil liberties. Other awards Mr. Gittes or his firm received include the Columbus Urban League Award for Excellence, the NAACP of Columbus' President's Award, and the Environmental Achievement Award from the Ohio Environmental Council. In 2006,

Mr. Gittes was presented with the "First Amendment Award" of the Central Ohio Chapter of the Society of Professional Journalists and the Ohio Academy of Trial Lawyers' first ever "Courage" Award for his wide-ranging public interest litigation. In 2008, he was honored with the Ohio-NOW Legal and Education Fund's "Hammer of Justice" Award. Mr. Gittes is the author of numerous publications and a frequent presenter on trial advocacy, evidence, employment law, and other topics. For additional information, please visit www.gitteslaw.com.

Michael S. Glassman, Esq.

Dinsmore & Shohl LLP
Cincinnati, Ohio

For more than 30 years, Mr. Glassman has practiced management side labor and employment law. He represents employers regionally and nationally in employment disputes and litigates matters of all types in federal and state courts, administrative agencies, and in arbitral forums. Mr. Glassman advises on matters involving discrimination, sexual harassment, wrongful discharge, OSHA, wage-hour, leave, traditional labor and union issues, collective bargaining, and other issues that involve the employer/employee relationship. He represents a wide range of clients where he partners with management, corporate counsel, and human resource personnel to develop strategies and cost-effective approaches to employment issues. Mr. Glassman is a frequent speaker and trainer on labor and employment law topics and previously taught Labor and Employment Law as an adjunct professor at Xavier University. He has been recognized by his peers s an *Ohio Super Lawyer* and as a Cincy Leading Layer by *Cincy Magazine*, is listed in *Best Lawyers,* and is recognized as a Leading Business Lawyer by *Chambers USA: Guide to America's Leading Business Attorneys*. Mr. Glassman received his BA from the University of Cincinnati and his JD from the University of Cincinnati College of Law. For additional information, please visit www.dinsmore.com.

Melissa Z. Kelly, Esq.

Tucker Ellis LLP
Cleveland, Ohio

Ms. Kelly received her BA, *magna cum laude*, from New York University and her JD, *cum laude*, from The University of Akron School of Law. She draws on her years of experience as a federal clerk to provide clients realistic and practical advice on a variety of legal issues, particularly in the areas of labor and employment, business litigation, and appellate matters. Ms. Kelly regularly defends employers in a wide range of employment lawsuits. She has experience in FLSA collective actions and employment discrimination, wrongful discharge, and employee benefits cases. Ms. Kelly has drafted briefs and motions addressing numerous issues, including collective action class certification, regulations implementing the FLSA, wage and hour claims, the fiduciary duty of ERISA trustees, personal jurisdiction over corporate defendants, the severance of existing bargaining units, the application of arbitration agreements, and court-imposed sanctions. She helps clients avoid litigation by advising them on numerous issues, including employment agreements, personnel policies, and severance agreements. Before joining Tucker Ellis, Ms. Kelly served as a judicial law clerk for Judge Peter W. Hall, Circuit Judge of the U.S. Court of Appeals for the Second Circuit, and later for Magistrate Judge Nancy A. Vecchiarelli of the U.S. District Court for the Northern District of Ohio. For additional information, please visit www.tuckerellis.com.

Pamela S. Krivda, Esq.

OSBA Certified Specialist in Labor and Employment Law
Taft, Stettinius & Hollister LLP
Columbus, Ohio

Ms. Krivda is a partner and Chief Human Resource Officer at her firm. As a former human resources executive at a prominent Columbus newspaper and through this dual role, she brings a deep understanding of employment and labor law to her clients' most complex legal needs. As an OSBA Certified Specialist in Labor and Employment Law, Ms. Krivda represents and defends public and private employers in all aspects of employment and labor relations matters. In her role as Chief Human Resources Officer, she implements and oversees human resources strategies that support the policies, practices, operations, and culture of the organization. With more than 30 years of experience to draw from, Ms. Krivda creates and delivers practical management training how-to programs specifically designed to teach effective employee management to executives, managers,

and supervisors. She has been recognized by *Best Lawyers in America* every year since 2011 and is frequently invited to speak as a thought leader at events and industry conferences across the country for the Society for Human Resources Management (SHRM) and other trade associations. For additional information, please visit www.taftlaw.com.

Victoria A. Lipnic, Esq.

Commissioner and Former Acting Chair
U.S. Equal Employment Opportunity Commission
Washington, D.C.

Commissioner Lipnic received her BA from Allegheny College and her JD from the George Mason University School of Law. She has a breadth of experience in federal labor and employment policy. Prior to her appointment to the U.S. Equal Employment Opportunity Commission (EEOC), Commissioner Lipnic worked as the U.S. Assistant Secretary of Labor for Employment Standards, Workplace Policy Counsel to the Committee on Education and the Workforce in the U.S. House of Representatives, and in-house counsel on labor and employment matters to the U.S. Postal Service. Originally appointed to the EEOC in 2010 by President Obama, she was re-nominated to serve a second term in 2015. At the beginning of 2017, President Trump tapped Commissioner Lipnic to serve as the Acting Chair of the Commission, a position she held for 2½ years. At the EEOC, she gave public hearing and guidance to several issues, including use of leave as a reasonable accommodation under the ADA, employer-based wellness programs, harassment prevention, use of social media in the workplace, and big data in employment. Commissioner Lipnic worked passionately on the 2015-2016 Select Task Force of Harassment in the Workplace and on a June 2018 report on Age Discrimination, which she highlighted as one of her signature issues as Acting Chair. For additional information, please visit www.eeoc.gov/victoria-lipnic-commissioner.

Carl F. Muller, Esq.

Tucker Ellis LLP
Cleveland, Ohio

Mr. Muller received his BA from Grinnell College and his JD from Cornell University Law School. His professional memberships include the American Arbitration Association National Panel of Employment Neutrals, American Bar Association (Labor and Employment Law Section; Equal Employment Opportunity Committee; Alternative Dispute Resolution Committee), Ashtabula Bar Association, Cleveland Metropolitan Bar Association (Labor Section), The Federation of Defense and Corporate Counsel (Employment and Civil Rights Section), Lake County Bar Association (Labor and Employment Committee; CLE Committee), and Ohio State Bar Association (Board of Governors, Labor and Employment Section; Labor and Employment Law Specialty Certification Board; *Best of Labor and Employment Law* Reference Manual Editor).Mr. Muller represents management in labor and employment law matters, general commercial litigation, and insurance defense. He appears across the State of Ohio in courts of common pleas, courts of appeals, and federal district courts. Over the course of his career, Mr. Muller has tried over 75 jury and bench trials to verdict. He defends employers in litigation involving sexual harassment, Age Discrimination in Employment Act, the Family and Medical Leave Act, non-compete and confidentiality covenants, quasi-contract/promissory estoppel claims, employee handbooks, substance abuse policies, employment-at-will, whistleblower claims, retaliation claims, public policy torts, employee intentional torts, employee privacy issues, and disciplinary actions. Mr. Muller also represents businesses with matters before the Equal Employment Opportunity Commission and the Ohio Civil Rights Commission. He has undertaken numerous EPLI defenses for major insurance carriers and reviewed and litigated both EPLI and other coverage issues. Mr. Muller is an experienced arbitrator with the American Arbitration Association's National Panel of Employment Neutrals, Ashtabula County Court of Common Pleas, Lake County Court of Common Pleas, and the Equal Employment Opportunity Commission Volunteer ADR Program. He has been involved in arbitrations of a variety of employment-related litigation with claims valued at more than $1 million, and he has served as a privately retained mediator in significant employment matters. Mr. Muller is an active educational speaker and writer on employment law and litigation. He has presented programs to attorneys, human resources professionals, managers, and students. Mr. Muller's many employment law articles appear in law reviews, textbooks, newsletters, and CLE publications. For additional information, please visit www.tuckerellis.com.

Daniel P. Petrov, Esq.

Thorman Petrov Group Co. LPA

Cleveland, Ohio

Mr. Petrov received his BA from Columbia College and his JD from Case Western Reserve University School of Law, where he served as Executive Articles Editor of the *Journal of International Law*. He represents individuals in need in whistleblower, class-action, employment, and civil rights disputes before federal and state courts throughout the United States. Mr. Petrov has successfully resolved claims of wrongful discharge, discrimination, and retaliation under nearly every federal and state equal employment opportunity law. He focuses a large portion of his practice representing whistleblowers who report fraud against the government in arenas that include health care, defense contracting, and immigration fraud. Mr. Petrov has significant experience negotiating and litigating executive employment agreements, noncompetition and non-solicitation covenants, and confidentiality agreements. For additional information, please visit www.tpgfirm.com.

Fred G. Pressley Jr., Esq.

Porter Wright Morris & Arthur LLP

Columbus, Ohio

Mr. Pressley received his BA, *cum laude,* from Union College and his JD from Northwestern University Pritzker School of Law. He is a member of the American Bar Association (Labor and Employment Law Section) and the Ohio State Bar Association and a Fellow of the College of Labor and Employment Lawyers. Mr. Pressley is a partner of his firm and chairs the firm's Labor and Employment Department. For more than 30 years, he successfully has represented clients in employment discrimination litigation, union avoidance campaigns, collective bargaining, and wage and hour matters around the country. Mr. Pressley has helped clients avoid employee-relations difficulties by providing proactive advice and counsel on the day-to-day issues that arise during the course of an employment relationship. He regularly represents employer interests in employment discrimination, wage and hour, and contract-based litigation claims in both state and federal court and before various administrative agencies. In the employment discrimination and wrongful discharge arena, Mr. Pressley's representation encompasses such common-law claims as breach of contract and public policy violations, as well as claims under employment statutes, including Title VII, the ADA, the ADEA, the FMLA, the FLSA, and many other local, state, and federal laws and regulations. In addition, he routinely represents employers facing union organizing campaigns and provides advice and advocacy on union avoidance, bargaining-unit composition, and representational proceedings. Mr. Pressley also works closely with unionized employers in connection with unfair labor practice charges before the NLRB, grievance representation, collective bargaining agreement negotiations, strike readiness activities, and so-called "hybrid" 301 actions. He is recognized in The Best Lawyers in America, Ohio Super Lawyers, and Chambers USA. For additional information, please visit www.porterwright.com.

Lisa Pierce Reisz, Esq.

Vorys, Sater, Seymour and Pease LLP

Columbus, Ohio

Ms. Reisz received her BA from Harvard University and her JD from The Ohio State University Michael E. Moritz College of Law. Her practice areas include antitrust and trade regulation, financial institutions, health care, information technology, new media and advertising, litigation, privacy, and data security. Ms. Reisz is a partner in the Vorys Columbus office and a member of the Health Care and Litigation groups. She has significant experience with state certification and licensing issues, as well as fraud and abuse compliance counseling and litigation. Ms. Reisz is an editor of the blog *HealtHITech Law*, which provides interesting and pertinent analysis of a variety of issues involving health information technology. Her professional involvements and associations include the American Health Lawyers Association (Co-Chair of the Electronic Health Records Affinity Group) and the Columbus Bar Association (President). For additional information, please visit www.vorys.com.

Charles C. Warner, Esq.

Porter Wright Morris & Arthur LLP
Columbus, Ohio

Mr. Warner represents employers in connection with discrimination charges, employment practices, related tort and benefit claims and labor arbitration. His wide litigation experience includes the defense of both "opt-out" and "opt-in" class actions. An active member of the ABA Equal Employment Opportunity Committee, Mr. Warner served as Management Co-Chair and as a contributing chapter editor of BNA's Employment Discrimination Law. He is the founding Chair of the Ohio Management Lawyers Association. A frequent speaker, moderator, and organizer of seminars on a range of employment, litigation, and ethics topics at national, state, and local seminars, Mr. Warner is the author of "Motions in Limine in Employment Discrimination Litigation" in the *University of Memphis Law Review*. He is a Fellow of the College of Labor and Employment Lawyers and listed in Chambers USA, Who's Who in America Law, and Best Lawyers in America in labor and employment law. For additional information, please visit www.porterwright.com.

Jerome F. Weiss, Esq.

Mediation, Inc.
Cleveland, Ohio

Mr. Weiss received his undergraduate degree from Syracuse University and his JD from Case Western Reserve University School of Law. His strong reputation as a Cleveland commercial mediator, with broad subject matter and facilitation expertise, is based in large measure on a previous law practice that emphasized civil litigation in a variety of cases, including representation of parties in antitrust, RICO/fraud, general commercial, civil rights litigation, employment, tort and injury, and other complex issues and subjects. Mr. Weiss is the first lawyer in Cleveland to have dedicated his practice entirely to ADR and mediation-related activities. He has successfully mediated a broad range of state and federal disputes, both regionally and nationally. Mr. Weiss is also an adjunct professor of law at Case Western Reserve University School of Law, where he co-teaches Mediation Representation: Theory, Principle and Practice, a course he conceived and designed. He frequently lectures at local and national educational events and has been a perennial presenter on mediation topics for the ABA and various litigation bar functions. Mr. Weiss serves on numerous ADR sections and committees in several professional associations, including service as a Trustee of the Cleveland Metropolitan Bar Association and Chair of that Association's ADR Committee. He is listed in *Best Layers in America, Ohio Super Lawyers,* and *U.S. News-Best Lawyers* Best Law Firms Tier 1 in ADR. Mr. Weiss has written extensively on mediation-related topics and has lectured throughout the United States and internationally. For additional information, please visit https://www.mediate.com/mediationinc.

Chapter 1: Employee Mobility: Here Today, There Tomorrow, Gone the Next Day

Carl F. Muller, Esq.
Tucker Ellis LLP
Cleveland, Ohio

Melissa Z. Kelly, Esq.
Tucker Ellis LLP
Cleveland, Ohio

Table of Contents

Chapter 1: Employee Mobility: Here Today, There Tomorrow, Gone the Next Day

Carl F. Muller, Esq.
Tucker Ellis LLP
Cleveland, Ohio

Melissa Z. Kelly, Esq.
Tucker Ellis LLP
Cleveland, Ohio

I. Why This Topic?

A. Employee mobility (teleworking, remote working) is arguably one of the most developing issues in employment law, and it presents unique opportunities and challenges for employers and employees.

B. Prior to April 2020, telework was the fastest growing form of commuting.

C. Recent events have made this topic even timelier.

D. Before the COVID-19 pandemic, only 7 percent of private-industry workers and 4 percent of state and local government workers had the option to telework. (Pew Research Center)

1. Those percentages were overwhelmingly populated by "knowledge workers," as they are the type to use computers, which obviously facilitates working from home. Twenty-four percent of individuals in management and finance reported being able to telework, as did 14 percent of "professional and related" occupations, like lawyers, engineers, software designers.

2. Those statistics demonstrate that, prior to the pandemic, the workers who could telework were overwhelmingly white collar, higher wage earners, likely exempt from the FLSA's minimum wage and overtime requirements.

E. The pandemic changed those statistics, and likely accelerated teleworking's growth in the American workplace.

1. During the pandemic, up to half of American workers are working or did work from home (Brookings Institute), which is more than double those that reported working from home in 2017-2018.

2. In an April 2020 survey, nearly 1 in 5 CFOs reported that they were considering permanently shifting some portion of their workforce to telework even after the end of social distancing measures implemented to combat the spread of COVID-19. (Forbes)

3. Studies have shown that people who telework are generally more productive, and less commuting has benefits for the environment. (Brookings)

4. This is in addition to the cost-savings reported by employers (smaller footprint, lower related expenses like parking, etc.).

F. In sum, one result of the COVID-19 pandemic will be an increase in telework, which will present new challenges to employers.

This presentation will discuss some of those challenges and highlight ways that employers can address them, particularly in a teleworking agreement.

II. FLSA Issues

A. Wage and Hour Issues.

Wage and hour issues are arguably the biggest challenge for an employer whose workforce includes teleworkers, whether exempt or non-exempt. Because the employee is remote, monitoring the hours worked and performance of job duties is difficult.

1. Exempt Workers Who Telework.

Two potential issues under the FLSA.

a. Classification.

i. FLSA § 213 provides a list of exemptions from the minimum wage and overtime provisions of the FLSA. Employees who satisfy the salary and job duties requirements of the exemptions are not subject to those provisions. Given the statistics discussed before, many teleworkers may be classified as exempt from the FLSA's overtime requirements.

ii. Job titles do not control the exemption analysis. 29 C.F.R. § 541.2. Rather, an employee's actual duties and salary must satisfy the test for whichever exemption is at issue.

iii. When an exempt employee will be allowed to telework, an employer should be careful that any related changes to the employee's duties do not cause the employee to lose the exempt status.

b. Working while on leave/salary basis requirement.

i. Under 29 C.F.R. § 541.602, an exempt, salaried employee who performs any work during the workweek must be paid for the entire week, with certain limited exceptions for days taken for personal reasons, or unpaid leave taken under an employer's bona fide sick leave or disability policy.

ii. So, exempt teleworking employees who are on leave, particularly unpaid leave, should be instructed not to perform work during that time.

2. Exempt workers.

Practical considerations in preparing a telework agreement.

a. Train them about the duties of their position and reinforce their understanding that they must perform all the duties of their jobs while teleworking, in particular those that are the basis for the relevant exemption.

Make that failure a potential basis for discipline.

b. Train them about the leave requirements and the prohibition of working while they are on leave.

i. Consider technological ways to preclude them from working while on leave—e.g., cutting off access to company email or VPN.

ii. Make it a basis for discipline if an exempt employee performs work while on unpaid leave.

c. Include provisions in the telework agreement that reflect these requirements and acknowledge the potential for disciplinary sanctions for not complying.

3. Non-exempt workers.

Teleworking does not relax the standards under wage and hour laws, particularly the minimum wage provisions at 29 U.S.C. § 206, and the overtime provisions at 29 U.S.C. § 207.

a. An employer still must pay non-exempt teleworkers at least minimum wage for all hours worked in a workweek up to and through 40 hours and must pay overtime for all hours worked in a workweek in excess of 40 hours.

This is true even if the work is performed outside of the employee's normal work schedule (e.g., an email answered at 11:00 PM).

b. Breaks and meal breaks.

The same standards apply to a teleworking employee as to employees at the employer's place of business. An employer can provide brief, paid breaks (e.g., 20 minutes) and an unpaid meal break.

i. Paid breaks.

An employer need not pay an employee for time spent beyond the permitted duration of the break so long as the employer clearly communicates to the employee: (a) the duration of the break; (b) that any extension is contrary to the employer's rules; and (c) extension of the break beyond that time will be a basis for discipline. 29 C.F.R. § 785.18

ii. Meal breaks.

A bona fide meal break is not compensable so long as the employee is "completely relieved from duty." 29 CFR § 785.19

4. Non-exempt workers: practical considerations in preparing a telework agreement.

a. Consider how non-exempt employees should track their time worked and how supervisory employees will monitor their time worked.

Develop systems and procedures for tracking time.

b. Train non-exempt employees about the importance of tracking time, including meal breaks.

c. Instruct non-exempt employees about the duration of paid breaks and the potential for discipline if that duration is exceeded.

d. Instruct non-exempt employees that they should not perform work during their meal breaks and that doing so is a basis for discipline.

e. Instruct non-exempt employees that they should not work more than 40 hours in a week without authorization and that doing so is a basis for discipline.

f. Train supervisors about these issues, including when to communicate with non-exempt employees about work so as to avoid creating compensable time outside of regular work hours. (E.g., discourage late-night emails or other communications

related to work that might instigate unexpected compensable time for the non-exempt employee.)

g. The teleworking agreement itself should clearly set forth:

i. The employee's expected work schedule, including breaks and meal periods;

ii. Instructions not to work beyond that work schedule, with acknowledgment from the employee that doing so is a basis for discipline;

iii. Instructions about the duration of paid breaks, with acknowledgment from the employee that exceeding that time is a basis for discipline;

iv. Instructions that overtime is prohibited without prior authorization and that working overtime without authorization is a basis for discipline; and

v. The process for tracking hours and reporting them to the employee's supervisor.

B. Reimbursement.

While the DOL has not directly addressed whether employers must reimburse employees for expenses incurred in the course of teleworking at the employer's request, it recently offered the following guidance in response to the COVID-19 pandemic.

1. An employer may not require non-exempt employees to pay for business expenses where doing so reduces their earnings below the required minimum wage and overtime requirements.

a. Per 29 C.F.R. § 531.35, if the employer requires the employee to "provide tools of the trade which will be used in or are specifically required for the performance of the employer's particular work," it is a violation of the FLSA's wage and hour provisions to require the employee to cover those costs when doing so "cuts into the minimum or overtime wages required to be paid" under the Act.

b. Relevant regulations and case law demonstrate that the appropriate test is whether the expense arises out of something that is "primarily for the benefit of the employer." 29 C.F.R. § 531.32; *see also* 29 C.F.R. § 531.3(d)(2) (noting that an employer cannot include the cost of "services incidental to carrying on the employer's business" in the calculation of an employee's wages). If it is, then requiring the employee to cover the cost violates the FLSA when doing so reduces the employees' wages below the minimum wage or overtime requirements.

c. Note that, given the uptick in individuals working from home, this issue is ripe for enforcement actions by the DOL.

2. For exempt employees, additional phone, internet, or other expenses may be viewed as impermissible deductions under the FLSA's salary basis test.

3. Note that some jurisdictions (California, Washington D.C., Illinois, Iowa, Massachusetts, Montana, and New Hampshire) have laws that may require employers to reimburse teleworking employees for expenses incurred as a result of teleworking. Ohio does not.

4. Practical considerations for a telework agreement:

    a. Be specific about what the employer will provide and what expenses it will reimburse, and those should be reasonably related to the employee's job.

        i. e.g., appropriate office supplies (pens, paper, etc.) as deemed necessary; business-related expenses, such as phone calls and shipping costs, reasonably incurred in carrying out the employee's job; and

        ii. Draw a clear line—e.g., exclude expenses related to setting up the employee's home work environment, such as remodeling, furniture, or lighting.

    b. Be consistent, but given the lack of specific guidance, err in favor reimbursing the employee for expenses incurred while working from home.

III. ADA Considerations

A. The ADA does not require that an employer offer a telework program to all employees.

But, where an employer does offer one, it must allow employees with disabilities an equal opportunity to participate.

B. A telework agreement may serve as a reasonable accommodation.

1. Note that the ADA's reasonable accommodation requirement, which can require an employer to modify certain workplace policies, may require that an employer waive certain eligibility requirements for teleworking in order to accommodate a disability.

For example, if an employer has a policy that an employee must have been working for the employer for one year in order to be eligible to telework, the ADA may require the employer to waive that policy for a new employee if the job can be performed at home.

2. If a telework agreement is offered as a reasonable accommodation under the ADA, an employer cannot require the employee to cover telework-related expenses.

IV. Discrimination Claims

A. Allowing employees to telework may expose an employer to claims of discrimination.

Even a facially neutral policy, or if an employer does not consistently apply its teleworking practices, could lead to claims if its effect is to preclude members of protected classes from teleworking.

B. Practical considerations for avoiding discrimination claims.

1. Develop a telework policy that addresses key issues related to teleworking.

a. Identify those positions that are eligible for telework.

b. Include a rationale for why some positions are eligible and others are not.

i. Identify practical considerations that preclude teleworking (e.g., use of special equipment, customer contact, interaction with coworkers, direct supervision of other staff members, etc.).

ii. Identify performance/conduct requirements necessary for teleworking.

(a) For example, identify a specific level of attendance or other issues related to performance/employee discipline.

(b) These must be concrete and reasonably related to the circumstances of teleworking.

2. Apply that policy uniformly to all requests to telework.

If an employer deviates from that policy, the employer should document a concrete, work-related reason for doing so.

3. Train supervisors to uniformly apply all telework requirements (e.g., tracking and reporting hours or maintaining a consistent work schedule) and related discipline to all employees who telework and to document all circumstances related to disciplinary actions.

V. Employee Safety Issues (OSHA)

OSHA Directive No. CPL-02-00-125 provides guidance regarding OSHA's oversight of home-based workspaces.

A. Home offices.

OSHA does not inspect home offices (or require employers to do so). It does not hold employer's liable for home offices. In the event of a complaint about a home office safety issue, OSHA will advise the complainant to follow up with the employer but will not follow up on an employee's behalf.

B. It is a different story if the employee is working in something other than a home office (e.g., home-manufacturing).

1. OSHA will inspect these sites if it receives a complaint that indicates a violation of a safety or health standard that threatens physical harm or that that imminent danger exists.

2. Inspection is limited to the work activities, as OSHA does not apply to employees' houses or furnishings.

3. Employers are responsible for hazards caused by materials, equipment, or work processes that the employer requires to be used in an employee's home.

   Example: an ineffective guard on an industrial sewing machine used in a home-based workspace.

C. Generally, if an employer is required to record injuries at its facility, it is required to record injuries that occur at a home office or a home-based workspace.

29 C.F.R. § 1904.5(b)(7): an injury or illness that occurs at home is work-related if it occurs while the employee is performing work for pay or compensation in the home and the injury or illness is directly related to the performance of the work rather than the general home environment or setting.

Examples in the regulation:

1. An employee dropping a box of work documents on your foot = work-related.

2. An employee who punctures a finger on a sewing machine used to perform garment work = work-related.

3. An employee tripping on the family dog while running to answer a work call = not work related.

4. An employee who is electrocuted because of faulty home wiring = not work related.

VI. Workers' Compensation Issues

A. Employers are still generally required to ensure the safety of the workplace, even when that workplace is the home.

B. The general standard is whether the injury arose out of and occurred in the course of employment activities or instead occurred while performing activities normally performed as a homeowner or household resident.

C. Practical considerations for addressing workers compensation issues in a telework agreement.

1. Limit safety issues to avoid claims.

   a. Consider designating a specific area in the home to serve as the work area during specific work hours and identifying that area in the agreement.

Impose safety requirements for the home office that are outlined in the agreement and acknowledged by the employee.

i. Require surge protectors, grounding conductors, and the appropriate maintenance of wiring.

ii. Eliminate tripping hazards by requiring safe placement of extension cords, electrical cords, or other wiring related to equipment.

iii. Require proper ventilation and lighting.

iv. Require an ergonomically appropriate chair or other arrangement.

b. Consider a virtual site check to identify potential safety issues and ensure compliance with the employer's requirements.

i. Multiple programs make this feasible, such as Zoom or FaceTime, but even photographs would suffice.

ii. Repeat this virtual site check every six months to ensure continued compliance.

2. Treat injuries sustained at home just like injuries sustained at work.

Investigate as quickly and thoroughly as possible.

VII. Security

A. Employees who telework will likely use an employer's property to do so.

B. Practical considerations for security in a telework agreement.

1. Include a provision that allows a virtual site check to ensure compliance with employer security requirements.

2. Physical security.

Include provisions in the Telework Agreement that require an employee to maintain the physical security of an employer's property.

a. Address the storage, transport, and use of external devices (e.g., USB drives and Bluetooth devices).

b. Address the proper storage of files, records, etc. (e.g., a filing cabinet capable of locking).

c. Limit use of employer property to employees only.

d. Identify the equipment provided by the employer, including serial numbers, etc., to avoid confusion and issues when seeking the return or replacement of that equipment.

3. Cybersecurity.

   Include provisions that require the employee to maintain practices that protect the employer's data and network security.

   a. For example, limit the types of internet connections an employee may use. (e.g., no public wi-fi).

   b. Require the use of private hotspots or encrypted web connections or the physical connection to a router via an ethernet connection.

   c. Require the use of VPN (virtual private network) if the employer has a VPN.

   d. Require an employee to maintain specific antivirus and security software or, for employer-owned machines, require the employee to allow access to maintain those programs via updates, etc.

VIII. Other Agreements

A. Non-competes and confidentiality agreements will become even more necessary, as teleworking may require additional or increased access to an employer's sensitive trade secret information, as well as a diminished ability to monitor how that information is used or accessed (or by whom).

B. These agreements should be tailored to the specific situation to protect the employer to the fullest possible extent.

IX. Additional Provisions to Include in a Telework Agreement

A. Employer's Discretion

Include provisions that squarely place the discretion regarding the ability to telework with the employer and state that it is within the employer's discretion to allow teleworking and to discontinue it, with or without cause. The agreement should also permit the employer to modify the teleworking arrangement at its discretion, with reasonable notice.

B. Not a Benefit.

Consider a provision that provides that teleworking is not a benefit to which all employees are entitled.

C. At-Will Employment.

To avoid ambiguity about the nature of the employment relationship, consider including a clause that specifies that the employer's decision to allow an employee to telework does not alter the employee's at-will status.

D. Dependent Care.

To clarify expectations, consider including a clause that requires the employee to acknowledge that working from home is not a substitute for outside or third-party childcare or care of other dependents.

E. Tax/Insurance Implications.

To avoid liability for employee tax or insurance issues, include a provision that places the burden on the teleworking employee to ascertain the effect of teleworking on income tax or insurance coverage.

Employee Mobility: Here Today, There Tomorrow, Gone the Next Day

Carl F. Muller, Partner
Melissa Z. Kelly, Counsel
Tucker Ellis LLP

A Growing Trend That Is Here to Stay

- Prior to April 2020, fastest growing form of commuting
- Predominately "knowledge workers," likely to use computers
- 24% in management and finance
- 14% in professional and related, e.g., lawyers, engineers, software designers
- Overwhelmingly white collar, higher-wage earners who are exempt employees

Particularly Given Recent Events

Before the COVID-19 pandemic: 7% of private-industry workers and 4% of state and local government workers had the option to telework

- During the pandemic: up to half of American workers are working or did work from home
- April 2020 survey: 1 in 5 CFOs reported that they were considering permanent shifts of some portion of their workforce to telework
- Advantages for employees and employers

FLSA Issues – Exempt Workers

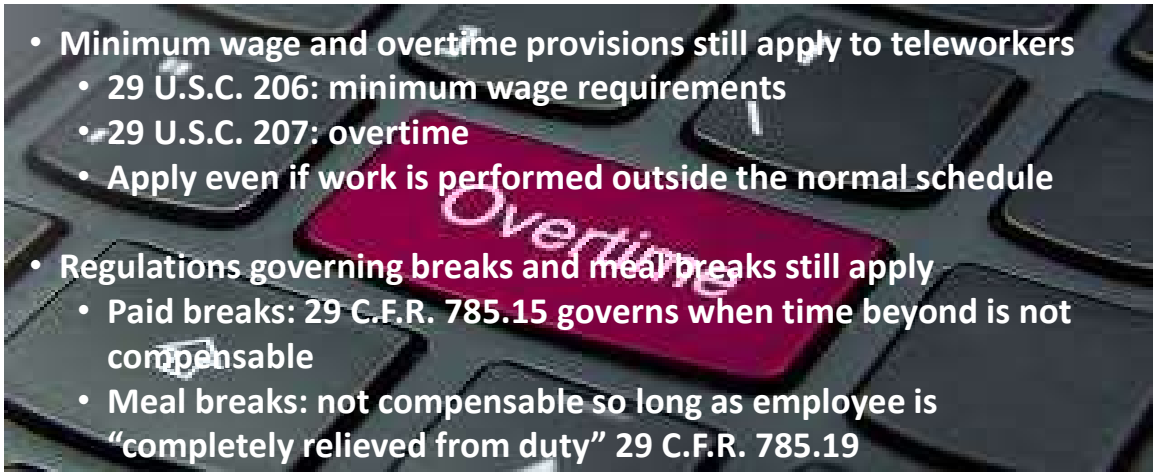
- Two potential issues with exempt workers
  - Classification: Will the employee's job change such that the exemption no longer applies?
    - Job titles do not control the analysis (29 C.F.R. 541.2)
  - Working while on leave/salary basis
    - 29 CFR 541.602: with certain limited exceptions, must be paid for a full workweek in any week in which they perform work

FLSA Issues – Exempt Workers

Practical Considerations for a Telework Agreement

- Train salaried employees about their obligations while teleworking.
- Train them about leave requirements/prohibition against working while on leave.
  - Consider technology.
- Require the employee to acknowledge that these are areas for potential discipline.

FLSA Issues – Non-Exempt Workers



- **Minimum wage and overtime provisions still apply to teleworkers**
  - **29 U.S.C. 206: minimum wage requirements**
  - **29 U.S.C. 207: overtime**
  - **Apply even if work is performed outside the normal schedule**
- **Regulations governing breaks and meal breaks still apply**
  - **Paid breaks: 29 C.F.R. 785.15 governs when time beyond is not compensable**
  - **Meal breaks: not compensable so long as employee is "completely relieved from duty" 29 C.F.R. 785.19**

FLSA Issues – Non-Exempt Workers

Practical Considerations for a Telework Agreement

- Develop systems for tracking time.
- Train and instruct employees and supervisors.
  - Importance of tracking time
  - Duration of breaks and meal breaks
  - Not working while on break
  - No overtime without authorization

- Teleworking Agreement should clearly set forth:
  - Work schedule
  - Duration of breaks and meals breaks
  - No overtime unless authorized
  - Acknowledgement of discipline
  - Process for tracking and reporting hours

FLSA Issues - Reimbursement

- Non-exempt employees: cannot require payment of expenses that reduces their earnings below the FLSA's wage and hour requirements
  - 29 CFR 531.35: "tools of the trade"
  - 29 CFR 531.32: "primarily for the benefit of the employer"

- Exempt employees: requiring them to cover some additional expenses might be impermissible deductions under the salary basis test

- Some jurisdictions impose additional reimbursement burdens on employers.

- CA, D.C., IL, IA, MA, MN, NH
- Not Ohio

Telework Agreement Considerations

- Be specific.
  - Reasonably related to the job
  - Draw a clear line

- Be consistent.

- Err in favor of reimbursement to avoid potential enforcement actions.

ADA Considerations

- The ADA does not require an employer to offer a telework option.
  - But, if one exists, it must allow employees with a disability to participate.
- Telework may serve as a reasonable accommodation.
  - The ADA's reasonable accommodation requirement may require an employer to modify or waive certain eligibility requirements.
- Note that, where telework is offered as a reasonable accommodation, an employer cannot require the employee to cover telework-related expenses.

Avoiding Discrimination Claims

- Even a facially neutral policy can lead to claims of discrimination.
  - Must not preclude members of protected classes.
  - Must be consistently applied.

"Closing the letter with 'Very fondly yours' seems okay but let's run it by legal, to be sure it cannot be misinterpreted as sexual harassment."

Avoiding Discrimination Claims

Practical Considerations

- Develop a Telework Policy that addresses key issues.
  - Identify the positions that are eligible for telework.
  - Include rationales for inclusion or exclusion.
    - E.g., use of special equipment, customer contact, direction supervision of other employees
  - Identify performance/conduct requirements.
    - These should be concrete and reasonably related to the circumstances of teleworking.

- Apply the Policy uniformly to all requests to telework.
  - If there is a deviation, document a concrete, work-related reason.
- Train supervisors to uniformly apply all telework requirements, and to document all discipline related to telework.

Employee Safety Issues (OSHA)

- OSHA Directive CPL-02-00-125
  - Acknowledges the benefits of telework.
  - Encourages telework.
- Virtually no oversight of home offices.
  - No inspection.
  - No OSHA liability for employers.
  - Complainants are advised to follow up with the employer themselves.
- Other sites (home-manufacturing) are a different story.
  - OSHA will inspect if it receives a complaint.
  - Inspection is limited to work activities, not the house or furnishings.
  - Employer is responsible for hazards caused by materials, equipment, or work processes required by the employer.
    - E.g., an ineffective guard of an industrial sewing machine used in a home work space

Employee Safety Issues (OSHA)

- Recording requirements do not change for home offices.
  - If an employer is otherwise required to keep track of injuries, it must do so even if they occur at a home office.
  - 29 CFR 1904.5(B)(7): an injury is work-related if: (1) it occurs while the employee is performing work for pay; and (2) it is directly related to the performance of work, as opposed to the general home environment or setting.
    - Dropping a box work documents on your foot = work-related
    - Tripping on the family dog while running to answer a work call = not work-related

Workers Compensation

- Employers are still generally required to ensure the safety of home workplaces.

Generally apply the same standard for determining liability under workers compensation:

Did the injury arise out of and occur in the course of employment activities, or did it occur while performing activities normally performed as a homeowner or household resident?

Workers Compensation

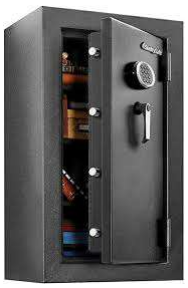
Practical Considerations for a Telework Agreement

- Limit safety issues to avoid claims.
  - Designate the home work area in the Agreement.
  - Impose reasonable, commonsense safety requirements.
    - Electrical safety (surge protectors, no frayed wires)
    - Eliminate tripping hazards
    - Proper ventilation and lighting
    - Ergonomically appropriate chair

- Consider virtual site checks to ensure compliance and identify issues.
  - Zoom, FaceTime, photographs
  - Repeat it every six months.
- Treat injuries at home just like injuries at work.
  - Investigate quickly and thoroughly
  - Include provisions in the Agreement that acknowledge this.

Security – Protecting Physical Property

- Include provisions in a Telework Agreement that protect the employer's physical property.



  - Address storage, transport and use of external devices (USB drives, Bluetooth devices).
  - Address the proper storage of files, records, documents, etc. (a filing a cabinet with a lock)
  - Limit the use of employer's property to employees only.
  - Identify the equipment provided by the employer, including serial numbers, etc.

Security – Cybersecurity

Include provisions in a Telework Agreement that require the employee to protect the employer's data and network security

- Require the employee to maintain specific anti-virus or security software and include provisions that allow employer access to maintain those programs.

- Limit the types of internet connections (e.g., no public Wi-Fi).
- Require the use of private hotspots or physical connection to a router via an Ethernet cable.
- Require the use of the employer's VPN.

Other Agreements

- Non-Compete Agreements/Confidentiality Agreements
  - Arguably even more necessary as teleworking may require additional access to sensitive information with diminished ability to monitor that access.
  - Think these through, and tailor them to the employer's specific situation to create the fullest protection possible.

Additional Provisions to Include

- Consider additional provisions
  - Employer's Discretion
  - Not a Benefit
  - At-Will Employment
  - Dependent Care
  - Tax/Insurance Implications

" MY MANAGER IS HAVING TROUBLE EMBRACING THE NEW TELEWORK POLICY."

Questions?

Chapter 2:
Theory and Practice of Pretrial Discovery Motions, Including Motions to Compel and for Protective Orders

Michael S. Glassman, Esq.
Dinsmore & Shohl LLP
Cincinnati, Ohio

Daniel P. Petrov, Esq.
Thorman Petrov Group Co., LPA
Cleveland, Ohio

Table of Contents

Chapter 2:
Theory and Practice of Pretrial Discovery Motions, Including Motions to Compel and for Protective Orders

Michael S. Glassman, Esq.
Dinsmore & Shohl LLP
Cincinnati, Ohio

Daniel P. Petrov, Esq.
Thorman Petrov Group Co., LPA
Cleveland, Ohio

I. Best Practices for Drafting Written Discovery, and Written Discovery Responses to Avoid a Discovery Dispute

A. What are the key points in discovery that a plaintiff needs to pursue to make his or her case, and what are the methods to do that?

1. Employment cases are based on proving a violation of rights.

- Contract claims
- Status-based discrimination claims
- Conduct-based retaliation claims

Contract situations are rarer than at-will employment, but union employees, as well as some executives, physicians, and "independent agent" employees work under the terms and conditions of contracts. Status-based discrimination claims include age, race, color, sex, religion, and disability claims. Conduct-based retaliation claims include retaliation claims of all sorts, including those based upon opposition to discrimination, participation in discrimination proceedings, whistleblower conduct, and exercise of rights to medical leave.

2. Plaintiffs will typically focus on central categories of documents.

In representing an employee in an employment dispute, counsel would be wise to remember how he or she is to make the case for the client. The prima facie burden will serve as a reminder of appropriate targets in discovery. How will counsel demonstrate the plaintiff was qualified? How will counsel show that the plaintiff was subjected to less favorable treatment than a similarly situated peer outside of the protected class? Where will direct evidence lie? How will counsel show that the employer's stated reason is pretextual?

- Prior drafts, versions, and communications (contract claims)
- Performance history
- Comparator performance history
- Policies and application of policies
- Application of policies to comparators
- Reduction in Force cases: other employment decisions
- Emails and communications (direct evidence)

Plaintiff's counsel should keep in mind that he or she will not know precisely where an employer stores relevant information, or how its managers and supervisors label or describe information that counsel seeks. For example, requesting a personnel file may not be sufficient to obtain all performance documentation and notes if a manager also keeps an independent "manager's file." Similarly, if an employer changes the title of a job position but changes no duties or responsibilities, it will insufficient to request the identities of all individuals with the same "title" as plaintiff. Plaintiff's counsel can overcome this issue by describing information sought in discovery by function and purpose, rather than simply by conventional description and labels.

3. Electronically Stored Information.

- ESI presents unique challenge to plaintiffs and their counsel
- Black box problem
- Search terms—a "needle in a haystack"

ESI presents special challenges to both parties that are discussed below. Plaintiff's counsel should pay particular attention in gathering of ESI to relevant time periods—i.e., is the period of the search sufficient to establish a comprehensive view of the employment situation. For example, if an employee is terminated in December 2018 after 29 years of employment but only nine months after diagnosis of a serious health condition requiring large amounts of FMLA, what would be a sufficient ESI search period? Strong plaintiff's employment cases do not arise in a

single moment, they are built over longer time scales. Be careful to ensure that your ESI search will provide sufficient information to give you that insight.

B. Discovery Employers Seek from Plaintiffs.

1. General Categories of Information to Request.

Counsel for employers should approach written discovery in an employment discrimination case with the aim of trying to ascertain information and to obtain all documents about all of the specific claims in the plaintiff's complaint. Typically, written discovery inquires about the plaintiff's potential witnesses, individuals with knowledge of one or more claims, pertinent documents, and other evidence that supports or relates to the employee's claims, employer defenses, and possible damages. Written discovery to plaintiffs in employment cases generally includes requests for items such as prior and subsequent employment records of the employee, tax returns, mitigation efforts, diaries, logs, communications between the employee and the employer and between the employee and current or former employees of the employer where the underlying circumstances of the case are discussed, comparator information, and medical records. While these are among the typical categories of written discovery requests in most employment cases, counsel always should carefully analyze the complaint and tailor the discovery requests to the specific claims in each case, rather than always relying upon the same "boilerplate" requests in every case.

A plaintiff's employment records from previous employers often can be relevant and useful for an array of reasons. For example, such information may allow an employer to determine whether the employee has made or filed against other employers, dates of employment and income for calculation of damages, or a pattern of the employee's poor performance or misconduct. Such information may also be useful in exploring the veracity of plaintiff's allegations with respect to certain claims asserted in the pending lawsuit. For example, in a case where a plaintiff is alleging that the employer failed to provide a reasonable accommodation because of an alleged disability, it may be pertinent to determine if the employee previously performed similar work without any accommodation.

Requests for personal diaries and journals in printed and electronic form can be to useful and relevant with respect to claims of emotional distress and/or physical damages and any reference or description of the allegations in the complaint. Similarly, requests for electronic communications, including emails and text messages, between the plaintiff and other individuals regarding the allegations in the complaint, including all such documents from the employer. Employers also should consider requesting records from an employee's social media accounts as such records can be particularly relevant and useful in employment cases.

Requests for a plaintiff's income and tax records are necessary in employment cases for the purposes of determining issues relating to damages and mitigation.

Many employment cases often involve claims which render the plaintiff's medical records relevant. For example, it would be important for an employer to request a plaintiff's medical records where the plaintiff has made claims of emotional distress, physical damages, or disability. This type of request will require an authorization signed by the plaintiff to have the plaintiff's healthcare provider release the plaintiff's medical records. Plaintiffs must sign a medical release form that authorizes an institution to release protected information.

2. Drafting Discovery Requests.

The nature and scope of discovery requests should be tailored for each case. In this fashion, the defendant places itself in a much better position to prevail should plaintiff object to a particular request(s) and it becomes necessary to file a motion to compel. Consequently, in preparing discovery requests, counsel should remain cognizant that under FRCP 26 the standard for permissible discovery requires that:

- The matter must not be privileged
- The matter must be relevant to any party's claim or defense
- The information need not be admissible in evidence to be discoverable
- The matter must be proportional to the needs of the case

In this vein, when preparing discovery requests, counsel should make the requests broad enough to cover all information and documents required to defend the case properly. At the same time, however, counsel should carefully consider and craft each request with "reasonable particularity," and limit the request to a defensively reasonable time frame relevant to the particular issues in the litigation.

II. The Requirement to Confer

A. Applicable Rules of Procedure.

The Federal Rules of Civil Procedure mandate that the parties cooperate in discovery. Fed. R. Civ. P. 26(c), (f), (g); 37(a) and (f). Under Rule 37(f) the court may sanction any party or attorney who "fails to participate in good faith in developing and submitting a proposed discovery plan."

FRCP 26(f) provides:

> (f) Conference of the Parties; Planning for Discovery.
>
> (1) *Conference Timing.* Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).
>
> (2) *Conference Content; Parties' Responsibilities.* In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.
>
> (3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on:
>
> > (A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;
> >
> > (B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;
> >
> > (C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;
> >
> > (D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;
> >
> > (E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and
> >
> > (F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

FRCP 37(a)(1) provides:

> Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions
>
> (a) Motion for an Order Compelling Disclosure or Discovery.

> (1) *In General.* On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. *The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.* [Emphasis added.]

Local rules of federal courts in Ohio and throughout the country contain similar "meet and confer" obligations concerning discovery disputes as a prerequisite to filing a motion to compel. For example, the Northern District of Ohio Local Rule 37.1 provides:

> **Rule 37.1 Discovery Disputes**
>
> (a) In the absence of a Judicial Officer establishing an alternative procedure for handling discovery disputes, the following procedure shall apply.
>
> (1) *Discovery disputes shall be referred to a Judicial Officer only after counsel for the party seeking the disputed discovery has made, and certified to the Court the making of, sincere, good faith efforts to resolve such disputes.* [Emphasis added.]

Likewise, Southern District of Ohio Local Rule 37.1 provides:

> **37.1 Consultation Among Counsel; Informal Discovery Dispute Conference**
>
> Objections, motions, applications, and requests relating to discovery shall not be filed in this Court under any provision in Fed. R. Civ. P. 26 or 37 *unless the parties have first exhausted among themselves all extrajudicial means for resolving their differences*. After extrajudicial means for the resolution of differences about discovery have been exhausted, in lieu of immediately filing a motion under Fed. R. Civ. P. 26 or 37, any party may first seek an informal telephone conference with the Judge assigned to supervise discovery in the case. [Emphasis added.]

And, most federal judges have incorporated their own rules regarding meet and confer obligations regarding discovery disputes in their standing orders pertaining to pretrial procedures. For example, Southern District Ohio Judge Michael Barrett's Standing Order on pretrial matters provides:

> **I. PRETRIAL PROCEDURE**
>
> ********
>
> **D. Discovery**
>
> **THIS COURT DOES NOT PERMIT DISCOVERY MOTIONS**, *i.e*. motions to compel or motions for protective order regarding discovery disputes, unless and until counsel use the following procedure: Counsel must first attempt to resolve disputes by extrajudicial means (required by S.D. Ohio Civ. R. 37.1 and 37.2). This Court defines "extrajudicial means" as requiring counsel to try to resolve the matter both in writing and telephonically. If counsel are unable to resolve the dispute between

themselves, then they must contact the Court's Courtroom Deputy, Barbara Crum by either telephone (513-564-7699) or by email at barrett_chambers@ohsd.uscourts.gov, and a telephone conference with all counsel and the Court will be scheduled as soon as possible.

B. Rule 26(f) Meet and Confer Obligation.

To make the Rule 26(f) conference meaningful and productive, before the initial meet and confer, counsel should formulate those areas on which it will want to conduct discovery. Counsel also should have information about counsel's own client's data sources and retention policies, particularly as it relates to electronically stored information (ESI) and be prepared to ask opposing counsel about such information of the opposing party. It also is helpful at the initial meet and confer conference for counsel to have information about the accessibility and degree of difficulty that will exist to review and produce information and documents requested in discovery. During the conference, counsel should make suggestions and proposals, and also resist proposals made by opposing counsel where appropriate. If discovery will involve ESI, counsel should be prepared to discuss relevant procedural issues, including items such as preservation, timelines, date ranges, data sources, custodians, keywords, and production. Always keep the proportionality standard in mind when proposing discovery parameters or opposing ones proposed by opposing counsel. It also is important to understand relevant case law when proposing or opposing specific items for inclusion in a discovery plan, particularly when ESI is involved.

It is advisable to document what was discussed and the agreements reached at the conference, so that there is a record of the discussions.

C. Rule 37(a)(1) Obligation to Make a Good Faith Effort to Resolve Discovery Disputes.

As set forth above, it is required that the parties make a good faith effort to attempt to resolve discovery disputes extra-judicially before filing a motion to compel. This is not a perfunctory obligation. The more complex the issues, the more time and effort likely will be required to be spent trying to resolve them. A court likely will be less inclined to resolve discovery disputes if the party filing a motion to compel did not make a meaningful effort to resolve the dispute before filing the motion.

If the opposing party refuses to produce requested discovery, counsel should initiate a meet-and-confer process. This process may commence with a telephone call. A telephone conversation may enable counsel to get a clearer understanding of why the opposing party actually objects to producing the requested discovery and whether some agreement may be reached to resolve the dispute. Best practice is to document any telephone call with a follow-up email or letter, and to specify in that correspondence exactly what specific discovery responses are deficient along with an explanation of the reasons they

are deficient. This correspondence can be attached to the motion to compel that ultimately may have to be filed to demonstrate to the court that the moving party made a good faith attempt to resolve the dispute prior to filing the motion. It often is advisable to set a reasonable deadline after which a motion to compel will be filed if the discovery is not produced.

III. Motions to Compel

A. Fed R. Civ. P. 37.

> Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions
>
> (a) Motion for an Order Compelling Disclosure or Discovery.
>
> (1) *In General.* On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.
>
> (2) *Appropriate Court.* A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.
>
> (3) *Specific Motions.*
>
> (A) *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.
>
> (B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:
>
> (i) a deponent fails to answer a question asked under Rule 30 or 31;
>
> (ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or (31(a)(4);
>
> (iii) a party fails to answer an interrogatory submitted under Rule 33; or
>
> (iv) a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.
>
> (C) *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.
>
> (4) *Evasive or Incomplete Disclosure, Answer, or Response.* For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

B. Practice Principles under Rule 37.

Many hard-fought pieces of employment litigation involve disagreement between the parties over the boundaries of discovery permitted by Rule 26. Employment cases routinely see discovery disputes arise over topics including:

- Comparator evidence (i.e., who is a proper comparator?)
- Medical records (i.e., has the plaintiff put some or all of his or her medical history at issue in the case?)
- Social media posts—what are the boundaries of privacy for parties? For third parties?
- Privilege issues (A/C, spousal, physician-patient)

The outcomes of these disputes over these categories of discovery can make a large difference in the eventual direction of the litigation.

For comparator evidence, the key from the plaintiff's perspective is to establish with record evidence the similarity between the plaintiff and the targeted class of comparators. Often, deposition testimony will be extremely helpful to establish that the plaintiff and the alleged comparators did share common terms and conditions of employment sufficient to show relevant comparative treatment (e.g., same supervisor, same duties, same performance standards, same expectations, same policies applied). Plaintiff's counsel should never forget to explain to the court in plain terms why the comparator evidence is relevant (e.g., "The evidence will show that the plaintiff was subjected to higher performance standards than her younger peers.").

The area of attorney-client privilege is one opportunity that many attorneys representing plaintiffs too quickly abandon. While the attorney-client privilege is sacrosanct when legitimate, employers often simply include an attorney on a communication that is not sent for the purpose of obtaining or transmitting legal advice. In these circumstances, privilege is not always applicable, although the defendant employer may assert it. Be sure to request privilege logs. Review them carefully for communications that do not appear to be legal advice based on the author and recipients. Ask foundational questions in depositions that would undermine an assertion of privilege (e.g., "Did you seek a legal opinion on that decision prior to December 1?"). Be rigorous in the assessment of whether the attorney was providing legal advice or performing some other business function, such as a human resources role or an investigator.

IV. Motions for Protective Order

FRCP 26(c).

FRCP 26(c) provides:

> (c) Protective Orders.
>
> (1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district

where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) *Ordering Discovery.* If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) *Awarding Expenses.* Rule 37(a)(5) applies to the award of expenses.

If counsel believes that certain discovery requests counsel initially should conduct the analysis of whether it would be legally appropriate to file a motion for a protective order in the context of the scope of permissible discovery under FRCP 26(b), which permits parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." As set forth above, FRCP 26(c) further permits a party resisting discovery to file a motion for a protective order which allows courts to enter an order to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Thus, the rule acts both as a source of limitations on available discovery, as well as a mechanism for a party to invoke any of the available limits on discovery, such as privilege or privacy. The undue burden and oppression factors call for the same type of analysis as the proportionality requirement. Proportionality is likely to become a factor when the plaintiff makes requests that place a disproportionate burden on the defendant relative to the issues in the case and anticipated cost, such as a request for extensive ESI or voluminous documents.

To justify restricting discovery through a protective order, the moving party should be prepared to show that the harassment, oppression, or annoyance is unreasonable. However, it is recognized that "discovery has limits and . . . these limits grow more formidable as the showing of need decreases." 8A Charles Alan Wright & Arthur R.

Miller et al., *Federal Practice and Procedure* § 2036 (3d ed. 2012). Thus, even very slight inconvenience may be unreasonable if there is no occasion for the inquiry and it cannot benefit the party making it. *Id.* The Sixth Circuit has endorsed the view that to justify a protective order, one of Rule 26(c)(1)'s enumerated harms "must be illustrated 'with a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.'" *Nemir v. Mitsubishi Motors Corp.*, 381 F.3d 540, 550 (6th Cir. 2004) (quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981). In keeping with this principle, the Sixth Circuit while sometimes having considered the need for the deposition—i.e., its potential to result in relevant testimony—in reviewing the grant or denial of a protective order, the Sixth Circuit has not abandoned the requirement that one of the harms listed in Rule 26(c)(1)(A) must be specified in order to warrant a protective order. *Conti v. Am. Axle & Mfg., Inc.*, 326 Fed. App'x 900, 907 (6th Cir. 2009) (unpublished opinion).

V. ESI and Proportionality

It is rare that parties elevate discovery disputes to a court where the information sought has no reasonable relationship to the claims or defenses at issue in the case. The dispute is almost always about the appropriate boundaries of discovery. How much is enough? What is essential and relevant? When nearly limitless electronic data, discovery can become the centerpiece of contentious collateral proceedings that threaten to dwarf the substantive litigation. And yet, when Rule 1 mandates that the rules be interpreted to deliver a "just, speedy, and inexpensive" determination in each case. Does such a thing exist?

The amended Rule 26 and its proportionality factors give the court and the parties a mechanism to objectively frame most discovery disputes. The rule provides that information is discoverable if it is not privileged, relevant to claims or defenses in the action and "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1).

Rule 26 lists six factors to be considered in evaluating proportionality:

1. The importance of the issues at stake in the case.
2. The amount in controversy.
3. The parties' relative access to relevant information.
4. The parties' resources.
5. The importance of the discovery to the issues in dispute.
6. Whether the burden or expense of the discovery outweighs any likely benefit.

With the growth of electronically stored information and the cost of reviewing and producing data, the focus on proportionality is a new battleground. In this era of big data, discovery costs can and do grow large, and can do so quickly. Even a straightforward single plaintiff employment claim can become a fight about what information each side is entitled to review or obligated to produce, sometimes eclipsing the underlying dispute itself.

For plaintiffs and their counsel, overcoming the obstacles of proportionality arguments requires developing a razor-sharp explanation of their case and why the requested information falls within the boundaries of Rule 26. Providing facts and not just a wish list of discovery requests will be much more productive in advancing the issue before a judge or a magistrate. Plaintiffs may also benefit from taking targeted depositions prior to elevating ESI disputes. Depositions can be used to gain key admissions about what information is stored where and by whom. Consider whether taking a deposition of a 30(b)(6) representative knowledgeable of an employer's IT network would be worthwhile.

Defendants and their counsel opposing a discovery request and contending that the information sought bears no relationship to the claims must be prepared to explain exactly why. If the costs of production will be larger than the amount in controversy, include an affidavit in opposition to the motion to compel with estimated attorney hours and expert costs. Defendants must also be cautious to not "pre-search" for their own investigative efforts, but then claim that conducting such a search with coordinated search terms would be too burdensome or costly to undertake.

Chapter 3: Mediation Advocacy and Practice: Building Trust as a Key to Resolution

Ann-Marie Ahern, Esq.
McCarthy, Lebit, Crystal & Liffman Co., LPA
Cleveland, Ohio

Jerome F. Weiss, Esq.
Mediation Inc.
Cleveland, Ohio

Table of Contents

Adam Grant's Give and Take – a Short Summary

Brad Desmond, Msc., Psychologist 2 20-11-2019

Adam Grant is known as being the most popular full-time professor at the Wharton School. His popularity has gone far beyond educational institutions, as he managed to win accolades from Business Week and even Malcolm Gladwell.

Apart from being one of the best writers and sociologists of today, Grant has also shown himself to be a highly successful director of commercials, a talented ski jumper, and an extremely able and experienced magician.

This article contains:

Give and Take

Adam Grant believes that success, development, and financial well-being is usually divided into three factors – **motivation**, ability, and opportunity. But, he goes a step further and identifies a fourth component – the ability to interact with people.

Adam Grant classifies people into takers and givers.

The first category of people attempts to maximize profits in transactions, agreements, and other working points. They work exclusively for themselves. Takers are accustomed to working on themselves and they believe that taking care of themselves is the only way.

The latter put others interests ahead of their own.

> *Depending on the situation, people can adopt different behaviors—they can take, give, or exchange. But usually, everyone has a dominant model that determines their behavior.*

All three behaviors have their advantages and disadvantages. However, the author's experiences inform his belief that givers receive fewer benefits, as they are guided by the interests of others and forget about their own interests.

Giving and Positive Emotion

The link between giving and positive emotion is a cornerstone of Positive Psychology. Giving makes us happy. Studies have shown when subjects are given $5 with instructions to give the money to a stranger, their **happiness**increases more than subjects who are given $20 to spend on themselves (Dunn et.al. 2008).

Givers and Career Success

Perhaps a lesser known benefit is 'givers' enjoy more **career success**. At work, givers are the supportive people who enjoy sharing their expertise and helping the careers of others.

They share their networks and business contacts and give their time to mentoring people. Studies by Adam Grant have shown the higher we look up the corporate ladder the more givers we find.

Giving brings with it one significant risk. While more givers are found at top of the corporate ladder, a lot of givers also end up at the bottom of the ladder. Sometimes it's because they give too much and often it's because they give to the wrong people—the 'takers!'

Takers

'Takers' are those who exploit others for their own personal gain. They are the people who compete against their colleagues and are ruthless in business. For them, short-term gains are more important than long-term relationships. Other people exist for them to use—it's all about them.

In your personal life, takers are the people who always expect favors, dominate conversations, or seek attention or support without offering the same in return.

Sincerity Screening

The most common mistake, Adam Grant warns us, is making assumptions about who are givers and who are takers. Often people assume that polite, agreeable people are the givers, while disagreeable people are the takers. In hindsight, we can all think of someone who has been polite to our face, but self-centered when it suits them.

We can also think of the loud and boisterous person who would give you the shirt off their back and insist it was nothing. Politeness and manners are not the point.

So whether it's your personal life or at work, when your intuition or "gut feeling" tells you "it's all about them," it might be time to consider your relationship to this person. How often does this person make you not feel good about yourself, or doesn't put your needs into consideration?

And lastly, how do you stop being a pushover when you are so accustomed to putting others first? It's hard (but not impossible) to shift this behavior and start asserting your own boundaries and needs.

Assertiveness for Givers 101

One trick is to remember your time, your energy, and your financial resources belong, first and foremost, to the people who genuinely love you.

For example, Adam Grant reports on studies with recent MBA graduates participating in interviews to negotiate their starting salaries. When the givers were reminded their eventual income would impact the lives of their family, they negotiated significantly higher pay deals. In another variation, givers did better in salary negotiations when they pretended they were negotiating not for themselves, but on behalf of a friend they had recommended for the job.

A Take-Home Message

The ultimate recommendation is that giving is our best 'default' setting—we should extend kindness and generosity to most people most of the time. Giving promotes happiness and promotes win-win outcomes.

But when you sense you are being exploited by a born 'taker,' it's time to stop being a pushover. It's time to play what Adam Grant calls 'generous tit-for-tat.' That is, matching the competitiveness of the other person while remaining open to switching back to being generous at the first opportunity. This gives you the best of both worlds—altruism-coupled with a dose of self-care as required.

At the moment, Adam Grant has more than 60 publications on various aspects of management and psychology and his work is regularly published in prominent journals around the world.

Thanks to his revolutionary research, Adam Grant has managed to seriously increase the efficiency of labor and reduce the **burnout** among engineers and sales professionals. He has also suggested techniques that significantly improve the efficiency of doctors and professional rescuers.

Are you a giver or a taker in your work life? Leave a comment below to share your experience!

Adam Grant Videos

References

Was this article useful to you?

No Yes

About the Author

Brad Desmond is an award-winning psychologist with additional post-graduate qualifications in education and training. He is a frequent presenter at national and international conferences and a twenty-year member of the Australian Psychological Society.

Alternatives
TO THE HIGH COST OF LITIGATION
The Newsletter of the International Institute for Conflict Prevention & Resolution
VOL. 35 NO. 9 OCTOBER 2017

Special Report: Neutrals

Are Legal Disputes Just About Money? Answers from Mediators on the Front Line

BY HAL ABRAMSON, BIRGIT SAMBETH GLASNER, BILL MARSH, BENNETT G. PICKER, AND JERRY WEISS

INTRODUCTION BY HAL ABRAMSON

Are most disputes in mediation just about money? That's an old and familiar question that many lawyers still seem to reply to with an emphatic "yes." Mediated cases are frequently viewed as a clash of binary claims, subject only to a sorting out of financial winners and losers.

This popular vision was challenged by an American Bar Association panel of experienced commercial mediators. They explored the opportunities that they have seen for breaking out of this confining legal mold. Their years of practice have taught them that many disputes are not just about money even when money is the presenting issue.

When preparing the first edition in 2004 of my book, Mediation Representation, I gave attention to this persistent question when I framed a key theme as: "You have little chance of discovering whether a dispute is only about money if you approach the dispute as if it is only about money." Harold Abramson, Mediation Representation—Advocating as a Problem-Solver, 7 (Aspen, 3d edition, 2013).

Whenever I lecture on the subject, I routinely get pushback from attorneys and mediators who claim that most disputes are about money. Even though the book offers multiple responses, another way to reply is to ask experienced, highly-regarded commercial mediators.

This article is based on a panel discussion program at the annual ABA Conference on Dispute Resolution, titled "Legal Mediations Are Not Only about Money: Mediators and Advocates as Problem Solvers" (NYC; April 08, 2016). I put together the panel in my capacity as the International Academy of Mediator's Scholar-in-Residence. The contributors are all IAM Distinguished Fellows. See www.iamed.org. The panelists were co-authors Bennett Picker, of Philadelphia; Birgit Sambeth Glasner, of Geneva, and Jerry Weiss, of Cleveland. London-based Bill Marsh was asked to contribute to this article after publishing a critique of binary processes.

The article offers insights from four mediators on the front line of practice—two from the United States and two from Europe. They are not part-time mediators with safe day jobs. Mediating is their day job.

Collectively, they present a mindset for mediating that affords opportunities for uncovering needs and options that go beyond the financial demands presented by the matter. Drawing on their years of experience, each contributor describes and illustrates how mediators can and must dig beneath the presenting claims to succeed in really resolving a dispute.

Each contribution was written independently, and yet the contributions offer remarkably similar critiques and observations although each person brings to bear his or her distinctive perspective.

As a group, they are sharply critical of binary processes like courts for resolving dis-

(continued on page 133)

See the authors' credits in the box on page 133. A different version of this article by the authors will appear in the *Cardozo Journal of Conflict Resolution*. See http://cardozojcr.com for timing.

Special Report: Neutrals

(continued from front page)
putes. They see binary processes as ones that mask the complexity of disputes and nuanced solutions.

The mediators also emphasize the importance of preparing. They strongly endorse taking risks, being courageous, and probing deeply for the participants' interests. Each of them also identifies several of his or her favored techniques for moving beyond the mere financial exchange.

Bill Marsh focuses on the limitations and consequences of a binary process and the need to shape a better process that deals with the complexities of disputes.

Jerry Weiss zeroed in at the program on the need to do more than to get the job done. Mediators, he noted, should find the human beings that drive conflict and their resolution.

Birgit Sambeth Glasner gave attention to the need for courage and creativity to push participants out of their comfort zone to uncover more than presenting monetary issues.

Ben Picker saw mediation as about more than resolving a money dispute—it is an opportunity. He emphasized that mediators also should identify and overcome various non-monetary barriers to resolutions.

And I had the honor to moderate the program and incorporate their contributions into this article. Here are their insights.

* * *

BILL MARSH

The desire for the clarity and decisiveness that binary processes can produce can make them appealing. But, precisely because binary processes offer a win/lose, yes/no outcome—just like the courts—we need to be acutely conscious of their limitations and consequences.

The first is the swift descent into simplicity and caricature. Conflicts engender a descent into simplicity and caricature, and binary processes exacerbate that.

When I mediate, I am often struck by how those involved appear to have reduced the sheer complexity of the situation to a series of simple—and apparently certain—propositions.

Nowhere is this truer than with the history of events, with stories. However complex, multi-layered and nuanced they may have been at the time; however much "six of one and half a dozen of the other," and however much there may in fact be some shared accountability for what went on, both the conflict itself and the processes by which we address it—usually violence or litigation—often drive parties toward simplicity and caricature. By the way, if you doubt this, just look at the process of political elections!

Life is complex. Conflicts even more so. Do we not want conflict resolution processes that can handle complexity? Perhaps one of the great contributions mediators can make is to re-complexify—if that word really even exists—to re-introduce nuance.

The second downside of binary processes is that they make no space for a range of options. By definition, only two outcomes are possible. Win or lose. Sink or swim. Remain or leave. Being close (e.g., 48.1% to 51.9% in the Brexit referendum) is not enough. I realize that decisions need to be made. But they can also be deeply damaging.

A few years ago, it was my great privilege to mediate the long-running conflict in the Church of England about whether women could become bishops. (They couldn't then, they can now). Like many institutions, the Church of England has a governance system which is quite "parliamentary" in style.

THE AUTHORS, IN DETAIL

Here are the contributors for this article on moving mediation parties beyond the dollars to uncover the depth of the dispute:

- Hal Abramson, a law professor at Touro Law Center, Central Islip, N.Y., writes, teaches and trains on negotiations and mediation. He has trained in 18 countries on six continents. He also works as a commercial mediator and was selected for the International Who's Who of Commercial Mediation. He won the 2016 Outstanding Professional Article award from *Alternatives*' publisher, the International Institute for Conflict Prevention and Resolution, for "Nelson Mandela as Negotiator: What Can We Learn from Him?" 31 *Ohio St. J. on Dispute Resolution* 1 (2016). It was his second CPR Award. For a full bio, see Tourolaw.edu/faculty/Abramson.
- Birgit Sambeth Glasner, a partner in the Geneva office of Altenburger, is listed as the No. 1 mediator in Switzerland by Who's Who. She is a full-time mediator, the vice president of the Swiss Chamber for Commercial Mediation, a Distinguished Fellow of the International Academy of Mediators, and a member of the CPR European Advisory Board. As an International Mediator, she is accredited by the Geneva courts as well as by IMI, CEDR, the CPR Institute, SCIA and CMAP, and is listed with ICC and WIPO and as INSOL International Panel insolvency mediator. She mediates in French, German, English and sometimes Spanish.
- Bill Marsh is an international commercial mediator, based in the United Kingdom. Independently ranked as one of Europe's leading commercial mediators, he also mediates ethnic, religious and political conflicts, and advises numerous governments and other international bodies on approaches to conflict and mediation. Details at www.billmarsh.co.uk.
- Bennett G. Picker is a full-time mediator and arbitrator who is a Distinguished Fellow of the International Academy of Mediators, a member of the CPR Institute's Panel of Distinguished Neutrals, and a member of the Master Mediator Panel of the American Arbitration Association. He is author of "Mediation Practice Guide: A Handbook for Resolving Business Disputes," published by the American Bar Association Section of Dispute Resolution.
- Jerry Weiss, founder of MediationInc (an Ohio corporation), was the first lawyer in Cleveland to dedicate his practice entirely to mediation. He mediates many high stakes, emotionally driven cases throughout the U.S. He has lectured and written extensively about conflict and people in conflict both here and abroad and he teaches aspiring lawyers the art of mediation representation and problem solving. He is a Distinguished Fellow in the International Academy of Mediators and sits on its Board of Governors.

Special Report: Neutrals

(continued from previous page)

Because of that, the preceding decades had been marked by a "campaign" to permit women to become bishops, building up a head of steam toward a vote in the General Synod, which is the Church of England's "parliament."

Several times, the matter came up for a vote. In the usual way, votes were preceded by speeches. These speeches took the inevitable form of people speaking either for or against the motion.

Each time, a vote was then taken. Each time, it was defeated. On the final occasion before mediated talks began, the vote was extremely close, but the proposal was still defeated. The body was profoundly divided. The pain was great.

Some 18 months of mediated talks followed. What emerged was a series of options, far removed from the binary simplicity that had gone before. The options themselves were complex, but essentially made space for differing views, to differing degrees.

Eventually the designated group involved in the talks—about 40 representatives of all "sides," in total—arrived at near-unanimity on one of the options. They took that back to the General Synod and jointly proposed it as the way forward. It passed comfortably. I was very moved to be in the public gallery at the time.

Many of the speakers noted two things:

1) How the tone of the debate had radically altered from what had gone before, being now marked by a greater degree of mutual understanding and generosity of spirit, because of the extensive dialogue which had taken place; and

2) How much more appropriate it was to be voting on an option that had emerged from fulsome dialogue, and which attempted, successfully in the eyes of most, to make space for different views.

The third feature of binary processes is that they often engender decisions motivated, at least in part, by fear—the fear of losing. This is hardly surprising given the limited options of win or lose. I see this so often when I mediate. And it is important for us to recognize it, because as a mediator, I want people to make good decisions—whatever those may be. Decisions made out of fear are rarely sustainable or wise.

When I mediate, I often find myself encouraging parties—to think hard, to make difficult decisions, to have uncomfortable conversations, to consider risks, and so on. And I use the word "encourage" literally. To "en-courage"—in other words, to engender, build up, or enable a greater degree of courage. To try to ensure that wisdom, and not fear, becomes the primary motivating force in their decisions, or at least that fear is not the only one.

The need for courage extends beyond our role in individual disputes. The mediator's voice needs to be heard in society at large, and not just in individual disputes. We need to be "prophetic" in the best sense of that word—not as in prophesying or predicting the future, but holding up a challenge to the status quo.

True prophets in every age have done that. And it always takes courage. Perhaps we need to challenge the nature of public discourse and decision-making more. After all, there will be no shortage of it over the coming years both in private and public matters, not least on the Brexit issue.

And that task will require us first to understand the impact of binary processes—simplicity, limited options and fear—in order to be able to contribute to a discussion on a better process and results for the affected parties.

JERRY WEISS

Persistent Question

The practice issue: What is the real purpose of this mediation?

Mediators' nagging suspicion: Money changes everything.

The best path: There is more to it than dollars. Uncover the needs and options beyond the financial demands, and the resolution, including the $$$, is more likely to emerge.

The back and forth of the distributive bargaining model that we are accustomed to seems, to my experienced eye, outdated and contrary to the interests of durable solutions.

In two words, it is fatigued and fatiguing. Hand-to-hand combat too readily digresses in the "bargaining process" to the argument, thereby continuing the competition and all of its negative forces. What results is akin to "trial by mediation."

Add to this antiquated method the increasing velocity demanded by the market and supported by the warp-speed technology of our time, and what results is a toxic mix. These forces elevate goals of closing, expedience, money and commerce to the detriment of the real people who are integral to the dispute, and in whose control the terms, texture, quality and spirit of the resolution resides.

And yet, we neutrals can drift on in rote, almost mechanically, looking ahead to our "next game" and thereby running the risk of losing—badly losing—the human virtues of the one we are playing at the moment. Durable resolutions, where the parties and product and process are all served and where participants feel a sense of satisfaction, are often lost—and what results is sadly a sense of inadequate closure with people feeling they need a bath.

Mediation can be a punishing process that only continues to bruise the participants. The "fighters" in the contest, usually lawyers, are trained to battle and thereby run the risk of losing sight of those elements that make conflict and its resolution human.

We can do better. Much better! And it doesn't take much of a shift to affect the overall arc of a particular resolution process. We need only to be mindful of a few factors that are central to disputes and their resolution: intimacy, humanity, clarity and trust—none of which are usually found in the lexicon of commercial or other disputes and yet, all disputes and resolution processes are indeed intimate and human events with complex human interaction at their core.

Likewise, it is clear to many of us who have been doing this for a while that durable processes require good communication, where more than words and content matter, but rather where tone and non-verbal communication also are key. That said, clarity and articulation of express verbal message are too often missing, in the negotiation with disputants and their representatives often going at it without a clear idea of what is really intended by their

opposing counterparts. Necessary time and discipline are often ignored because of pressures to "get it done" or worse, fear of having difficult conversations.

Concentrating on these factors can help build a foundation supporting that "meditative moment" found in the best resolution processes and practices, where the people in the room begin to feel that they might be able to break the constraints of past conflict and rely on their disputant opponents as partners.

Real peace transcends a mere signature on a piece of paper. It presents the ability to move forward in a constructive way and without the burden and deconstruction of the conflict. We can refer to this shift in mediation simply as trust and as a basis for an agreement that can endure. The day after the resolution agreement, where satisfaction comes into play, whether in terms of action or simply a sense that disputants have done something they can live with, having an adequate degree of contentment, is much more important than the agreement itself. Such action and trust—a dynamic and living human process—or at least a bridge to such thinking, are goals we should aspire to.

There are no silver bullets or simple tricks that I employ in order to draw people into a more constructive and human process. Rather, I try to concentrate on some keys, exemplify them in my behavior, and count on the fact that people will recognize their virtue and maybe, to some extent, mirror and integrate these behaviors and understandings. Here are a few suggestions:

- Running the room and establishing guidelines that expect best practices and behavior. This starts with the letter of engagement and continues to the actual meeting and encounters, where the neutral can make express statements about these expectations.
- Making clear that one expects positions and opinions to be explained. Lawyers are notorious at blurring the lines between fact and opinion and position and truth. Bringing out clear distinctions goes a long way to point out how different the theater of the lawsuit—where strangers decide—may be from necessary partnerships and virtues of mediated resolution, where the disputants take control and decide.
- Talking about partnerships and how they differ from adversaries who will never agree, and describing the disputants as partners and asking them to envision themselves as such.
- Complimenting and perhaps even rewarding courageous or noble behaviors. Even polite and professional, non-adversarial conduct may merit recognition as such behaviors support desired collaboration. This may be as minor as telling people how privileged we are to have them share the dispute in a professional and collegial manner and the opportunity for us to help them. Conversely, to have the courage to politely discourage and prevent bad behaviors either directly or privately and do so with a level tone and helpful, reflective way.
- Expressly promoting the need and desire to get the conflict resolved and the parties moving forward without the burden of past dispute. Along with this goes the promotion of open doors and clear communication including attaching articulate messages to any exchange of numbers that add meaning to those numbers. In general, we need to generate clarity during the progression of the negotiating process.
- Listening better and knowing that as neutrals who think we have the idea of where the fix lies, we really may not. Pacing the process—which often translates into slowing it—so that people can "listen" with their ears and eyes is very helpful. (I have written several blogs on listening that can be found at the IAM website at www.iamed.org/page/Blogs.)
- Having courage to say "no," politely but firmly, to people who want to avoid difficult conversations because of fear or just plain bad habits, by quietly prodding and encouraging them and complimenting them once they have successfully had them.
- Being transparent about common fears that people have about disputes and their attendant processes and sharing our own concerns about those fears with disputants in order to relate and make a human connection, instead of the fighting and denying that is too often the response to these common angsts. Reassuring people in conflict that being in a "bad place" is a common feeling and may not be so bad.
- Saying hello and goodbye *together* and encouraging people that such things can't hurt and just might help in setting a tone of reciprocity, decency and fairness. Along these lines, joint sessions should be encouraged so as to begin tearing down the barriers that conflict has built up. Dining together with both sides without discussing merits can also help disputing parties become partners. I have seen it happen. If they insist on working alone during that half hour or hour, then have them work at listing those elements of an agreement that are not burdened with rancor or a high degree of contest and leaving the tough issues for later. This can be a constructive exercise as it allows a start on things people can agree to and partner on, and will set a better tone for the more challenging aspects.

None of this is easy. It all requires a disciplined integration into practice over time and awareness of oneself and the totality of the room we are in—being in the moment. It also requires us to recognize that most of what we do is based on trust-building, both vis a vis the neutral and all sides of the dispute, and also and perhaps more important, among those sides.

This, of course begs the question of whether our goals should exceed merely getting it done. It's a philosophical choice, and one that I have made as I increasingly believe that it is important to give human beings the opportunity to start viewing opponents—who they have probably been vilifying and dehumanizing by virtue of what the fight does to us—as something other than the devil.

In a somewhat vulgarized brain science nomenclature, this probably translates into allowing those reactive and primitive aspects of our beings to be tamed by elevated, human and reflective virtues.

By understanding and employing these methods and by picking away at the dispute piece by piece over time, we allow ourselves to find the human beings who drive conflict and who are responsible for its enduring resolution.

BIRGIT SAMBETH GLASNER

1. What if? Let's be creative …

What if you were requested to mediate an

(continued on next page)

Special Report: Neutrals

(continued from previous page)

international commercial case about the sale of a chemical subsidiary of a German company to an English buyer, a publicly listed company on the London Stock Exchange?

The €59 million share and asset purchase agreement between the two European companies, and the numerous related commercial contracts, ran into large problems. They included allegations about the accuracy of financial information; misleading profit transfers; overstatement of efficiency claims; and misrepresentation of building and plant, stock shortfall, and employee grievances. It also included threats of huge interest payments and damages.

Assuming you took the case, it would be the perfect time, as a mediator, to take a step back, help the parties think outside the box, and structure an appropriate process to enable the resolution of their differences, not only on the surface, but in-depth.

2. But how?

- First, recall that a conflict is not—and almost never is—about money.
- Second, be aware that positional bargaining is not an adequate dispute resolution method. As Albert Einstein once said: "We can't solve the problems by using the same kind of thinking we used when we created them."
- Third, it needs some courage on the part of the mediator to lead the parties and their attorneys through a creative process where the discussion about money is only its very final act.
- Fourth, the first step toward success is proper preparation. As "location, location, location" is the slogan of real estate agents, "preparation, preparation, preparation" should be the slogan of any mediator for whatever topic and dispute size.

Preparing for the mediator means, of course, becoming knowledgeable about the dispute, including the interests and needs of each of the parties, the risks they are facing, and the opportunities afforded by the mediation process. A mediator needs to sincerely dig deep, listen and understand.

Moreover, preparing for the parties and their attorneys means not only investing time and energy in understanding their own interests, needs, risks and opportunities, but also those of the other side. It is also means assessing each one's Best Alternatives to a Negotiated Agreement, better known as Batna, by means of objective criteria, such as time, costs, consequences, damages, and to make a first "reality check."

Preparing can take place with all the attorneys, and possibly with their clients, during a joint phone call when organizational issues as well as parties' expectations toward the mediation process and the mediator's role are discussed in structuring, together, an efficient and realistic process.

Subsequent private preparation meetings or calls with each of the parties will enhance the overall understandings of the mediator and the parties. Furthermore, this direct communication in a safe environment usually fosters the necessary trust toward the mediator and the mediation process, allowing creative tools and risk-taking in the process.

If, at this early stage of meetings where the focus is on preparation, it is still important to talk about money, it will finally be the time!

3. Let's not talk about money yet!

In the case study outline above, the parties and their attorneys were focused on the financial features of their dispute while fighting over accounting issues. One of the parties had requested no less than 16 legal, accounting and financial specialists to sit at the mediation table.

After thorough preparation, we met in Paris at an impressive roundtable accommodating 21 persons. The other party appeared at the mediation table with two counsels. At the start, I recalled the strict confidentiality of the mediation process, and we jointly fixed the time limit of our mediation day until 8:00 pm.

Immediately after the opening of the joint session and the parties' opening statements, I suggested taking the next two hours to "discuss anything but money."

If so agreed, what would the 18 other persons in the room do during this time, other than question their remuneration during that "lost" time?

Boosted by parties' trust gained during the preparation phase, I started asking some open questions to the principals on how they usually conduct their respective business and which values they have in doing so.

Astonishment—and for the attorneys in the room, even some polite and less courteous discontentment—was the response to my inquiry. I stayed this course by assisting the principals to enter into a meaningful discussion leading to a comprehensive expression of their shared values, interests, and needs around the troubled deal.

Later in the discussion, the seller stood up and said with a trembling voice: "If you are questioning the financials of the deal, it is as if I would have lied to you and I am a crook! You should know that this is intolerable to me as we have a strict code of conduct in our family business which I am very proud of." He then sat down, emotionally exhausted.

The purchaser immediately realized that it was time to reply: "I am sincerely sorry. This is not what I wanted to say and certainly not the message I wanted to convey to you, but I have some questions about the way you did your calculations and your representations. I would like to discuss those openly with you."

Trust was rehabilitated in the room. This had an immediate positive impact on the process and my role as mediator was almost over.

I spent the rest of the day facilitating this discussion, assisting the parties in structuring a new deal and organizing their tasks, responsibilities and timing for finalizing it. And the mediation concluded the same day with a settlement at 7:30 pm.

4. Some lessons learned:

Each of us as mediators use favored techniques to uncover interests and options that go beyond presenting financial demands.

The more creative mediators dare to be, however, the more trust in the mediator and process is needed in the room for the parties. Obviously, their attorneys need to follow that path. And therefore, preparation is key.

We as mediators are hired to take risks to push parties to do what they may resist doing. Otherwise, the process is just positional bargaining with no real added value.

Attorneys may be not be at ease with a process that often pushes them out of their comfort zone, as the mediation addresses non-legal components of the dispute where attorneys can fear losing control over their clients. But

lawyers play an important role in mediations, especially in coaching their clients and performing reality checks.

Good preparation with the attorneys and active engagement in the process enhances its effectiveness and gives the attorneys a sense of understanding and engages them. Good preparation also offers mediators a benefit that they worry about losing when pushing participants—the likelihood of repeat business.

BENNETT PICKER

Regrettably, in too many mediations today, both advocates and party representatives view mediation with the same lens as they view litigation. With a one-dimensional perspective, their focus is on the summary judgment issues, the risks, the costs and the dollars.

In private meetings and caucuses, too many mediation advocates focus exclusively upon the strength of their legal positions. When we get to the negotiation stage, too many mediation advocates seem to be inspired by a line from the movie "Jerry Maguire": "Show Me the Money."

So, if it's not just about the money, what else is it about?

Of course, Mediation 101 teaches us that the process offers an opportunity to explore underlying interests and search for interest-based, creative solutions—solutions unavailable in the win-lose environment of litigation.

In a recent employment case that was framed in terms of money, after an exchange between a tenured professor who had been summarily dismissed and the university provost, the university rehired the professor after concluding that it had acted prematurely, based on incomplete information.

Similarly, commercial agreements can be renegotiated, patent disputes can be resolved by pooling agreements, and outdated partnership agreements can be reformed to reflect current business realities.

While the potential for business solutions should be obvious to disputants, it is often less so to their lawyers, who need to be reminded to take a multi-dimensional view of a dispute that appears to be all about money.

Even when mediation advocates and business clients recognize the potential for business solutions to business disputes, they are far less aware of the numerous barriers to resolution

Given that many mediations that initially appear to be only about the money turn out to be otherwise, what are the techniques a mediator can employ to uncover the underlying needs and opportunities for resolving disputes?

that often are not about the legal issues and not even about the money.

In my experience, uncovering these hidden barriers is often the most critical work that we, as mediators, must do. While the list of possible hidden non-monetary barriers to resolution includes a host of process, psychological and merit obstacles, I have found the following to be the most prevalent.

Barriers Resulting from Relationships between Counsel and Client. Prof. Gerald R. Williams studied the negotiating behavior of more than 20 lawyers for seven years and concluded that, in rank order, the principal barrier to resolution was not a disconnect between plaintiff and defendant.

Rather, it was a disconnect between lawyer and client. Lawyers can inflate expectations made at the outset of the relationship, be unwilling to report to the client the weaknesses in a case, or fail to report the status of litigation as the litigation unfolded.

On many occasions, counsel have turned to me at the end of a mediation and said "Thank you for telling my client what I could not say" or "I told my client about the weaknesses and was told 'I thought you were my lawyer.'"

Interestingly, Prof. Williams found that counsel's interest in fees often affected the recommendation of counsel or the decision of the client. I have found this to be the case, especially when the arrangement is a contingent fee.

Emotional Barriers. Quite often, anger, frustration, resentment, guilt, jealously and so many other emotions are at the heart of a dispute. As just one example, I mediated a dispute between two brothers who owned a large, closely held business for decades. Over the years, the brother who was not in control repeatedly filed suits alleging breaches of fiduciary duties.

In mediation, I met alone with the two brothers and, after a while, the brother who filed the action said "You know, mother really liked you better." This response led to the first meaningful conversation between the two brothers in years.

With this on the table, we were able to resume negotiations and find a lasting resolution. In other mediations, I have found that apologies, when sincere, have reduced the anger of the other side and opened the door for meaningful settlement discussions.

Barriers Resulting from Disagreements between Stakeholders on One Side. Quite often, disagreements among several party representatives on one side can be the principal barrier to settlement. Each party representative may have a different priority.

In a recent dispute involving a long-term supply agreement, the general counsel was looking for a large sum of money for the plaintiff, the business manager was looking for a court decision to vindicate her decision to pull out of the agreement, and the CEO was looking for a restructured agreement, arguing that Wall Street values long-term revenue streams more highly than large sums of cash.

Again, this dispute was not about how much money the defendant would pay. Instead, much of my work focused on mediation among the representatives of one side.

Cognitive Barriers. In almost every mediation, I have observed that cognitive illusions and irrational attachments to positions distort objective evaluations and affect settlement decisions.

These barriers are usually invisible to the other side. Studies at the Program on Negotiation at Harvard Law School and at the Wharton School of the University of Pennsylvania demonstrate that advocacy bias makes it difficult for a party with an interest in the outcome or their lawyers to make a completely objective evaluation of a dispute.

Parties view their facts selectively—"selective perception"—and spend almost all of their time mining their own best arguments. Their evaluations are distorted by optimism bias, certainty bias, assimilation bias, hindsight bias, reactive devaluation and so many other errors of judgment.

Special Report: Neutrals

(continued from previous page)

Techniques to Overcome the Hidden Barriers: Given that many mediations that initially appear to be only about the money turn out to be otherwise, what are the techniques a mediator can employ to uncover the underlying needs and opportunities for resolving disputes?

While the answer would constitute a syllabus for a one-week course, I would like to offer a few big-picture approaches that I have found to be helpful in uncovering the hidden barriers and drivers of resolution.

1. *Preparation*: In addition to any possible exchanges by the parties, I invariably insist on confidential, "eyes only," submissions which go well beyond the claims and defenses and the "money." In this confidential submission, I ask counsel to address potentially hidden barriers that need to be addressed. Among these are personality issues, the need for confidentiality, links to an unrelated dispute, strategic issues, accounting and audit issues, emotional issues, need for vindication, internal company issues, and future implications.
2. *Conferencing before Mediation Session*: In almost every dispute, after I have read the submissions, I meet by phone with counsel to further explore the interests and potential barriers that may exist. Aside from the merit issues, I encourage candid responses to questions such as "can you tell me more about your client"? At times, I receive replies such as "My client is the real problem," or "I need your help," or "My client is so angry with the other side that I'm not sure we can be in the same room" or "An apology would go a long way in helping to get this matter resolved," or "Let me tell you about the other side's private agenda."
3. *Mediation Session—Ex-Parte Meetings before Joint Session*: Many years ago, I began the practice of meeting with parties before commencing a joint session. I quickly learned how powerful these meetings can be for building trust. I typically engage the decision-maker, and we talk about anything other than the dispute. We can talk about sports, opera, travel or our families. On more than one occasion, party-representatives have shown me pictures of their grandchildren. With a bond formed at the outset, I have found that parties will be far more open with me once we reach the caucus and resolution stages.
4. *Caucus Sessions—Probing for Drivers and Barriers of Resolution*: With a dose of coaching, I begin exploring with each side the potential for settlement. Regardless of the path we take in negotiations, I continue to explore whether there are psychological, relational or cognitive issues that need to be addressed. If the parties need to vent, I will listen, acknowledge and empathize. If there are relational issues—either party-to-party or within one side—I will take the time to address these issues. If the evaluations of one or both parties are distorted, I will employ various techniques to spur parties to reconsider their assessments.

I was once asked to explain mediation in one word. Without hesitation, I said "opportunity." Mediation can afford the opportunity to develop issues that otherwise would take months or years in litigation; save time and money; preserve relationships; and search for solutions not available in litigation or arbitration.

I often mention the opportunities in mediations because no one wants to lose an opportunity. In order to maximize the mediation opportunity, it is incumbent upon the mediator, in addition to addressing the legal issues, and focusing on the money, to work with the parties to address the other issues, concerns, and interests for a successful and enduring resolution.

* * *

CONCLUSION BY HAL ABRAMSON

The experiences and insights of these mediators may inspire others who are not so inclined to look beyond the financial dimension of disputes. For those mediators who tend to function like private settlement judges, the guidance suggests a pathway for doing much more. Their comments and techniques should give reticent mediators confidence to trust the mediation process and employ more daring techniques that may produce more enduring and satisfying resolutions.

Litigation

(continued from page 130)

The result in the case could mean more employment arbitration for workplace disputes.

Or the process could disappear entirely from U.S. business. If the Court adopts the employees' view that the NLRA includes joining for class actions as a protected "concerted activity," some experts predict the demise of the ADR process from the workplace. They say that businesses will fall back on their experience under Federal Rule of Civil Procedure 23, which governs class action litigation, rather than offer arbitration.

The consolidated cases represent the most significant clash between the FAA and another federal statute the Court has faced, and the most important employment case before the Court, since *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)(available at http://bit.ly/2lnRc7b), which allowed compulsory employment arbitration. *Gilmer* also saw the FAA squaring off against a federal statute, the Age Discrimination in Employment Act.

But the NLRA has a much longer and deeper workplace history than the ADEA. The employees in the consolidated cases say that the NLRA's protection of concerted activities includes the right to join together in class action suits to vindicate their rights.

Employers, in a move to avoid big litigation costs, have warmly adopted waivers of class rights as a condition of employment. Instead, employees must agree to proceed individually, without a class, in arbitration. Employers say that their workers get a better, more efficient, dispute resolution system.

The trend has put arbitration and the FAA in the crosshairs of corporate strategies to avoid class action litigation. The ADR community has argued about the cases and their consumer arbitration corollary for years. Does

TRANSFORMATIVE MEDIATION – CAN YOU FIND HEART AND SOUL (AND ADVENTURE) IN AN INCREASINGLY NUMERICAL WORLD?

Eric Galton, [*] ***Kimberlee Kovach,*** [**] ***Jerry Weiss*** [***] ***and Tony Willis*** [****]

Cet article est la version éditée de la communication présentée par les auteurs en mars 2016, à Queenstown (NZ) lors de conférence Annuelle de Arbitrators' and Mediators' Institute of New Zealand, Inc (AMINZ) de l'International Academy of Mediators (IAM). Les auteurs retracent l'historique et l'évolution du concept de 'Transformative Mediation' et l'importance qu'il revêt aujourd'hui au sein des médiateurs.

This essay is a reflection on the presentation given by the authors at the 2016 Annual conference of Arbitrators' and Mediators' Institute of New Zealand, Inc (AMINZ) and International Academy of Mediators (IAM) in Queenstown, New Zealand under the same title. The original format of the panel was an attempt to track Transformative Mediation from its origins to its meaning and use today: its evolution and changing differences in meaning, use, application and general and specific relevance to the profession of mediation. Discussions included the practical application of these different approaches, and potential for future considerations.

[*] Eric Galton has been a mediator since 1986 and has mediated over 8000 disputes around the United States. Eric is a founder of the Lakeside Mediation Center in Austin, Texas, and is a Past President of the International Academy of Mediators. Eric Galton can be contacted at eric@lakesidemediation.com.

[**] Kimberlee K Kovach has been a leader and visionary in the modern mediation and alternative dispute resolution movement for over 35 years. She is a prominent teacher, trainer, scholar and practitioner in the field of mediation and other dispute resolution processes. She was a founding officer and Chair of the ABA Section of Dispute Resolution. Kimberlee Kovach can be contacted at k2kovach@yahoo.com.

[***] Jerome F Weiss is the founder of Mediation Inc, an Ohio corporation. Jerry Weiss can be contacted at mediator@mediationresolve.com.

[****] Tony Willis is a commercial mediator, based in London practising in the UK and other jurisdictions and since his call to the Bar in 2004 he has practised from Brick Court Chambers. Tony Willis can be contacted at tony.willis@brickcourt.co.uk.

I INTRODUCTION

This paper is therefore a compilation and synthesis, in more organised fashion, of the presentation and exchange at the Queenstown conference.

From a structural perspective, the live presentation adopted a format of the reasons for and difficulties with transformative mediation approaches. In doing so, the use of a transformative style was advocated by Kimberlee Kovach with difficulties and downsides articulated by Tony Willis. Eric Galton acted as the general moderator (while also providing his perspectives) and Jerry Weiss served as a reconciler/ mediator of the divergent positions. During what was a lively free-ranging, hop-scotch course of this one hour exchange, what emerged was that not only had the definition and application of Transformative Mediation changed since it first appeared in the literature and practice, but also that the panel participants perhaps agreed more than their initial opposing roles suggested. In the end, all were able to acknowledge that not only is there a place for transformative mediation in the current practice, but also a need for more awareness and potential use, particularly given the current market and environment.

II MEDIATION AS TRANSFORMATIVE

Even before its introduction into the literature in 1994 by Robert A Baruch Bush and Joseph P Folger,[1] elements of a transformative mediation model no doubt existed in thought and use. For example, some early mediators as well as mediation programs emphasized the empowerment of the parties as important and dominant goals of the process.[2] Yet at that time, little detail in terms of any literature on the topic existed, other than perhaps in some training materials. The early detailed articulation of the model in terms that were socially and psychologically based, caused some stir for those advocates and other professionals who had traditionally viewed conflict and its solution within the usual binary boundaries of the legal dispute. While mutual interest-based negotiation[3] was on the rise, along with a mediation model that focused on the parties interests, Bush and Folger went a good step beyond these basic views, and framed mediation as a process that provided the

1 See Robert A Baruch Bush and Joseph P Folger *The Promise of Mediation* (Jossey-Bass, 1994). The revised edition, *The Promise of Mediation: The Transformative Approach to Conflict, Revised Edition*, was published in 2004.

2 This was one of the co-author's (Kovach) personal experience when she served as a mediator with the Columbus Ohio Night Prosecutor Program 1978-1980, as well as when she conducted early mediation trainings in Texas commencing in 1980.

3 The first book to explore this in detail was the best-selling and seminal work in the field published in 1981. See Roger Fisher and William L Ury *Getting to Yes: Negotiating Agreement without Giving In* (Penguin, 1981).

individuals involved both empowerment and recognition. Bush and Folger set forth transformative mediation as a distinct and separate model of mediation, which was compared to other models and professed to offer much more than settlement or satisfaction, or social justice.[4] In other words, the transformative model as discussed and proposed was to be adopted in whole, rather than a view of mediation as a process with transformative potential. Additionally, several practitioners took on an "all-or-nothing" view of mediation as being conducted completely and solely in the transformative model. Likewise, some institutions and mediation programs required that all mediators conducting the process do so only within the bounds of a transformative approach.[5]

Simply stated, for many if not most legal disputants and their advocates, there was little place for what they considered to be the antithetically based "Aha" moments of such psychologically oriented notions as "empowerment" or "recognition" in the context of legal dispute settlement. It was difficult – if not impossible for those in the process to consider those "humanizing" factors that were conducive to placing the transformation of the human conflict interaction itself as the superior process goal, as opposed to closure, settlement or resolution. For some mediators, particularly those tasked with the settlement of pending litigation, "transformative" was not part of understanding the mediation process – and in other cases was almost viewed as a dirty word. Some of those thought that this approach to mediation was – or should be - confined to a very small arena of disputes that by definition required human interaction. These matters consisted of cases in the area of domestic relations being the most obvious, where issues of children and well-being resided at the core of the relationships.

As a 'middle ground approach', some of us took a selection of the various ideals and principles of Transformative Mediation and approached matters on a 'case-by-case" basis. The thinking was that the value of such an approach can best be acknowledged, without the necessity of a wholehearted adoption.[6] The view was that

---

4 Above n 1.

5 Likely the most well-known is the United States Postal Service and its employment programme, entitled REDRESS or Resolve Employment Disputes Reach Equitable Solutions Swiftly. For additional discussion in greater detail, see Bingham, Lisa B and Nabatchi, Tina "Transformative Mediation in the USPS REDRESS Program: Observations of ADR Specialists" (2001) 18(2) Hofstra Labor and Employment Law Journal available at: <http://scholarlycommons.law.hofstra.edu/hlelj/vol18/iss2/4>.

6 See for example Irvine, Charlie, Transformative Mediation: A Critique (September 1, 2007). Available at SSRN: <ssrn.com/abstract=1691847> or <dx.doi.org/10.2139/ssrn.1691847> which

such movement could be achieved in some cases, but surely not all. Such an approach would allow the goals of empowerment and recognition to emerge when and if so desired by the parties and as part of the mediation process. Alternatively, however, in those instances where the parties themselves, as well as their representatives, had other goals in mind, mediators would not pursue the elements of the transformative model.

III EVOLUTION OF THE CONCEPT AND APPLICATION OVER RECENT DECADES

Around the same time as Bush and Folger wrote about Transformative Mediation, mediation professionals began defining roles, styles and approaches. Some of these were descriptive of the practice observed, while others may have been more prescriptive, and perhaps had the effect of limiting how the disputes as well as ourselves as mediation professionals were viewed. Perhaps foremost among these models was the "Riskin Grid", which confined styles of mediation and mediators to a matrix based on two sets of values; one being a range of style/role from Evaluative to Facilitative and the other pertaining to how problems were defined, from Narrow to Broad.[7] There is little doubt that these models reflected a result and resolution orientation as opposed to the human value criteria of the transformative model. Some of these descriptors continue in use today.

Just as Transformative Mediation was often misunderstood and the subject of some skepticism as well as criticism, more "practical" models such as Riskin's Grid were subject to a large amount of stereotyping, over-simplification, and criticism as well.[8] Yet mediators continued to evolve and search for descriptors. Given some people's inclinations, whether because of inherent characteristics such as model preference or bias, process goals, or market force and demand, mediation had certain features, and such were considered nearly indispensible to the process.

---

examines the beneficial features of the process, as well as some of the critiques, and concluding that there is, in fact, room for middle ground.

7 The initial paper was Leonard L Riskin "Mediator Orientations, Strategies, and Techniques" *Alternatives to the High Cost of Litigation* 111 (1994). In response, some challenged these descriptors. See Kimberlee Kovach & Lela Love "'Evaluative Mediation' is an Oxymoron" 14 *Alternatives to the High Cost of Litigation* 31 (March 1996). Thereafter, Riskin continued with additional expansion of the ideas, see Leonard L "Riskin Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed" July 1, 1996 (1997) 1(7) Harvard Negotiation Law Review available at SSRN <http://ssrn.com/abstract=1506684>. At this point, another response was put forth: Lela Love & Kimberlee K Kovach "Mapping Mediation: The Risks of Riskin's Grid" (1998) 3 Harv Negotiation L Rev 71. These dialogues have continued to the present.

8 Above n 7.

Simultaneously, a strong necessity arose among mediators to find a place in the lexicon for the style, approaches to and /or goals of mediation.

Many of us, as practicing mediators, have more than a few dramatic stories with respect to a transformative process moment, such as an important emotional breakthrough or moment in mediation that was key to the successful closure of a dispute. Upon a more reflective analysis, it may be observed that these shifts that occur and emerge serve as foundational to durable resolutions - those that serve process, product and people. These usually consist of smaller, harder to discern events and interactions which are nevertheless quite important for the process. Certainly, we all agree that effective mediators should be vigilant and mindful of these opportunities. "Shifts happen" and they need not be events of high drama that some people think of when they think of Transformative Mediation with its perceived primary goals of moral growth, better relations, and empowerment of individuals.

While recognition and empowerment of human relations may not be apparent on the radar of many mediators or mediation participants, particularly those involved in 'commercial disputes', they are, in fact, elements that most conflicts and mediations contain. Additionally, such perspectives often hold the very answers to some of the more stubborn challenges of conflict and its resolution.

IV CONFLICTS AS WE KNOW THEM CONSIST OF HUMAN BEINGS, FIRST AND FOREMOST

In his novella *Being There*, the author Jerzy Kosinski's protagonist Chance the Gardener is mistakenly presumed to be a sophisticated and highly educated businessman, instead of the simpleton he really is; incapable of uttering more than confused or simple expressions or stating the obvious. In his transition from the foolish Chance the gardener to Chauncy Gardiner, advisor to a US President, he becomes a national hero whose confusion and simple statements resonate with the public as allegorical brilliance. It would not be unlike Chauncy to observe that "human conflict is about humans" or that "it is difficult to have difficult conversations".

Similarly, we in the neutral community too often engage in the obvious while participating in the process in less than a mindful manner. When we do so, we miss what might be opportunities with respect to building better relations. Approaching mediation in a thoughtful manner and mediating in a way that is mindful of its human participants may be obviously important to the reader; however there is much more modeling and use of methodologies based upon the competition and style of the

courtroom than one might think about at first. As a result, these approaches and perspectives have found their way into mediation as it is actually employed, by the participants, their representatives and even the neutral. There sometimes even exists a digression to the "hand to hand combat" of the trial, instead of other more human and, dare we write, "transformative" opportunities that might exist in the mix of the people and the issues that constitute the dispute.

We think that it may be quite beneficial to consider how we, as mediators, may in simple, small ways, stick our toes into the water of humanity without the grand gestures or process changes so often related to transformative mediation. Can mediators take simple steps to mediate with more reflection as to the human elements and condition? How can these small, albeit important, steps help avoid fear, build trust and save wear and tear of important human good will? And how might these simple elements be vital, if not *transformative* in terms of the overall benefit to the process and participants? As initial considerations, let us consider the following:

- Conflict and its resolution are intimate processes. For mediators and advocates to engage in earnest in a respectful manner with people who are at odds on issues that might well be all-consuming to them requires all of us in the process to be up close and personal. This emotional dynamic, when combined with additional factors such as differing concerns, beliefs, values, needs, and fears that are not just personal but in turn, are intimate requires much focus on inter- and intra- personal matters. Perhaps the simplest, but yet the most difficult and necessary is that of listening. It is essential that mediators proceed with awareness and respect for those conditions and their accompanying factors, arguably even in the most seemingly detached and commercial of disputes.

- Clarity and communication are too often lost in a mix where the neutral is either used as - or incapable of becoming more than - a simple "water carrier" or sheep dog. In such cases, the mediator's role consists of ever harrying parties in from the margins of the dispute toward that area where there might more likely be agreement. As mediators, we must always strive to help disputants in using a process that assists them to be more clear and communicative from beginning to end and in a step-by-step manner. Although this may not be considered transformative, such goals advance a more positive human interaction between and among the participants. Little things like complimenting and even rewarding noble and polite behaviors can go a long way in providing an opportunity for a shift in dynamic, and opening up the process to real, authentic communication.

Conversely, while a certain "directiveness" may be desired or constructive, it needs to be done in a respectful manner that is mindful of the human beings who are involved in the process, along with all of their attendant perspectives. Assertiveness may have its place, both for advocates and neutrals, but empathy is a cornerstone of trust-building and one should always err in the direction of empathy. It is desirable not only in the neutral. Empathy should be promoted by neutrals, so that perhaps in some instances the participants can view the mediators as a model, and even begin to make some attempts at demonstrating some empathy themselves.

- Trust...true and real trust...is essentially at the basis of all successful, lasting resolutions. Mediators should continually remain aware of how all words and gestures have an effect on the parties and the process. Just as those that we coach throughout a process, we must remain mindful that trust is between humans and cannot be imposed or adjudged. "Transformation" from mere language to human conduct is part of any durable resolution. This is so even in the commercial dispute where the final pivot to agreement depends so much on people trusting or at least, beginning to trust, that they might have a prospect and partner for resolution. And in particular, a durable and lasting resolution. We should be mindful of Mencken's admonition, which may be eye-opening for many mediators: "It is mutual trust, even more than mutual interest, that holds human associations together".[9]

  This quote, although supporting trust, almost appears to make trust and interest mutually exclusive. But trust and interests coexist; they are related, it seems to us. Much of what is promoted by some of the best mediators is interest -based negotiation; and to go a step further, mutual interest -based negotiation. And such interest-based negotiation is quite often predicated upon trust. In either event, the notion of the necessary compromises for resolution without continuing conflict entails its own whole set of emotional and "human" dynamics that needs to be attended to for positive outcomes that are durable and lasting. Nonetheless, the strictly positional, sometimes combative style that we see so often - what some call "trial by mediation" - depending on culture and various other factors, is indicative of a totally self-

9 The entire quote is as follows: "For it is mutual trust, even more than mutual interest that holds human associations together. Our friends seldom profit us but they make us feel safe. Marriage is a scheme to accomplish exactly that same end." HL Mencken Read more at: <www.brainyquote.com/quotes/quotes/h/hlmencke157545.html>.

interested format and approach. In these situations, the participants, whether lawyer representatives or the parties seek very little, if any, investment of trust in opposing parties, thereby taking the humanistic, and potentially transformative elements out of the equations, with result of potential partnership and other collaborative opportunities founded on trust completely absent from the table.

This essay posits that collaborative engagement, with its implicit elevated tone and content of respect, even if not totally similar to definitions of transformative mediation of two plus decades ago, may provide a healthier and more durable model of negotiation and mediation with the resultant lasting outcome. Acknowledging disagreement may exist, and even if one doesn't agree – in whole or in part - with this premise, we need to carefully examine what we are espousing throughout the course of our contact with the parties in mediation. Specifically, if we are talking the talk of collaboration, mutual interest and their inherent human qualities, then it is important to walk the walk, if even in only minor ways. For example, by undertaking to conduct the mediation in a way that expresses an expectation of best practices of respectful and courteous behaviour, a tone is set. Such action can clearly have an impact, and affect the minor shifts in a trajectory that may sweep into a broader and more impactful arc later in the process. Furthermore, we need to be ever mindful of underlying emotions and their drivers; we also need to be aware and deliberate about the manner in which we address them, that being with a sensitivity and intellect that may make a difference. Should such factors be ignored as irrelevant to the way problems are solved, when they are clearly a force behind those problems, the problem isn't really resolved. Enduring and durable outcomes require human, if not transformative considerations and indications throughout the process, which brings us to our next point.

- The manner through which we as neutrals teach aspiring mediators and advocates, and coach disputants can often have a considerable impact on outcome. In the former case, it may affect a lifetime of work. In the latter, it may well affect the outcome of the dispute; not merely whether it is resolved, but how durably it is resolved and in what kind of condition the disputants will be left in the aftermath. While most law school texts and courses in negotiation, mediation, and mediation representation are inclined toward a collaborative bias, ironically there is more often than not little hint that many of the 'legalized' disputes resolved in mediation, perhaps most, are resolved through a process that reflects a digression to the litigative, adversarial process. When this occurs, little attention is paid to the parties and the human

and emotional dynamics or circumstances that they find themselves surrounded by. Focus on "legal mediation" often forgets or even purposely ignores the opportunities for the parties to step beyond the competition in a more collaborative manner, and move to resolution in a more constructive fashion.

Likewise, similarities arise with how mediators coach disputants and their representatives. Perhaps too often do we as mediators focus on the lawyers and their idea of bargaining, including the pressures we see in various regions to not convene a joint session.[10] But when everyone is 'in the room' with its opportunities to get the collective "humanity" of the dispute at the same table, additional possibilities may emerge. These include the chance to speak, in terms of elevated tone, content and conduct, and in so doing we may even be able to explore both directly and indirectly some of the keys to the conflict. Such an exchange - one that is perhaps more attuned and sensitive to the human, maybe even transformative potential - may provide additional room for moves or shifts. We believe that movement and shifts do not need to be monumental or profound; rather it is those small shifts that might lead to prouder moments than someone sitting at the end of the day with no more than a settlement based upon an evaluation or mediator's proposal and a stale tuna salad sandwich. Mindfulness of the dignity of the human beings and the privilege we enjoy in serving them should not be an unattainable aspiration or goal.

- Fairness and perceptions of it can also profoundly affect the durability of resolution. Once again, while notions of fairness are persuasive in life, they often also have a very unique role in, and relationship to, conflict. The promotion and understanding of fairness are clearly conducive to the small....and large shifts and "transformations" necessary for durable conflict resolution. The deeper satisfaction of human beings should be important to

10 This has been discussed a great deal in the last few years, as a trend in some jurisdictions within the United States, where the joint session is absent, and in many cases, the parties never even see one another. Matthew Rushton "The Long Goodbye: Is Mediation Evolving or Regressing?" (June 17, 2015). There is considerable data to support this view. See eg JAMS study showing data base group of JAMS mediators, who 4-20 years earlier had utilised a joint session at the rate of 80%, only using it in 2015 in 45% of mediations. Likewise, while showing a diminished usage throughout the US, its use in Southern California was a mere 23%. There is a strong suggestion in actual data and anecdotally that the trend is moving East...and beyond. See also Jay Folberg "The Shrinking Joint Session: Survey Results" (Winter 2016) 22(2) Dis Resol Mag.

us neutrals as should be the fact that force and might do not provide the returns that a fairer process will almost certainly yield.

V A WORD ON HINDRANCES TO SMALL AND LARGE SHIFTS

Being open to, and aware of, opportunities for small shifts throughout the mediation, let alone more profound transformational opportunities, clearly is complicated and challenging work. But it can be deeply gratifying. Beyond some cultural aversion to such a process as described above, there also remain environmental impediments Legal disputes many times consist of formats and rudimentary process and an educational foundation that creates representatives who are very deeply steeped in the limited binary choices of the win and lose, right-wrong paradigm. This is the law, where there is a "rectangularity" and process that lends itself to decision making by others who are strangers to the dispute. Yet the responsibility for making those decisions for the disputants and their lawyers falls to strangers. Moreover, the nomenclature of causes of action alone can be cold and offensive to the humanity we may be seeking to instill. And the legal profession can often attract a certain emotionally avoidant type of person who finds shelter in the profession and away from those places where real life events and people rub up against each other.[11]

It is no different for those who find their way to law and litigation. Although lawyers were, and maybe still are in some jurisdictions considered 'counselors at law', in the world of litigation much of that counseling role seems lost. The role of the lawyer advocate to persuade strangers to a dispute of one side or the other, requires excellent in advocacy and persuasion of a particular perspective. Conversely, helping disputants reach accord among themselves in a manner that allows them to get past the competitive narrative is a completely separate and distinct process, that requires a very different skill set. Yet rarely is such acknowledged in theory let alone observed in practice.

Moreover, the legal model too often provides a form of bargaining, usually positional or distributive, that has become predictable, and offers a very limited ability to provide clarity or advancement beyond the conflict. Instead, such approaches are based upon argumentation and an extension of that conflict, where there is little room for real communication. The argumentative model does not provide a framework for necessary civility, which point increasingly is by complaints from judges and advocates alike, who complain about the diminution of civility and collegiality.

---

11 See for example, David Maister Charles H Green and Robert M Galford "The Trusted Advisor" (2001).

Add to all of this the "velocity" demanded by present commerce, communication and markets and it becomes very clear that the intimacies required for the shifts we think might be important are hugely challenged by an environment where there is little time for the important narrative, craft, art and communication needed for the "stitching together" and "connection making" that remain so important to those relations. This includes discussion of all aspects of conflict, which are so uniquely human. Insert into that mix of bustle and increasing energy electronic devices as a preferred form of communication (and too often diversion and distraction) and the aversion, if not escape, from necessary intimacies becomes almost complete.[12]

These challenges are certainly daunting, and no doubt many more exist. Yet, the mindful neutral, through diligence and perseverance can still help design and manage a process that maintains a transparency in tone and content in a room where people are respectful and polite. Bad – or non-productive behaviour may be prevented before it starts; and people and their inherent dignities are given a chance. This does take some courage.

VI CONCLUSION

As mediators, we are bridges of sorts with a gift and privilege to help people in conflict. We should strive, even if in small ways, to help human beings conduct the processes for resolution of their disputes in a manner and with a quality befitting of their humanity. Although this may not consist of a widespread and total adoption and implementation of the transformative model of mediation as initially proposed and discussed by Bush & Folger and advocated by others, it may indeed provide increased awareness that the more human aspects of conflict should be identified, considered and honoured.

12 Sherry Turkle "Alone Together: Why We Expect More from Technology and Less from Each Other" (2012) Sherry Turkle "Reclaiming Conversation: The Power of Talk in a Digital Age".

Chapter 4: U.S. Equal Employment Opportunity Commission

Victoria A. Lipnic, Esq.
Commissioner, U.S. Equal Employment Opportunity Commission
Washington, D.C.

Table of Contents

U.S. Equal Employment Opportunity Commission
May 2020 Update

Victoria A. Lipnic
Commissioner
U.S. Equal Employment Opportunity Commission

Status of EEOC Operations

2

Three Members:

Janet Dhillon, Chair
(term ending July 1, 2022)

Victoria A. Lipnic, Commissioner
(term ending July 1, 2020)

Charlotte A. Burrows, Commissioner
(term ending July 1, 2023)

Vacancies: Two Commissioner seats

General Counsel: Sharon Fast Gustafson (term ending August 5, 2023)

Corona Virus Covid-19 Resources:

3

- *All EEOC materials related to COVID-19 are collected at www.eeoc.gov/coronavirus.*
- What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws
- Pandemic Preparedness in the Workplace and the Americans With Disabilities Act [PDF version]
- Ask the EEOC Webinar on Corona Virus, March 27, 2020 (YouTube video and transcript)
- EEOC Chair's statement re discrimination against Asian Americans and people of Asian descent in the workplace during the pandemic

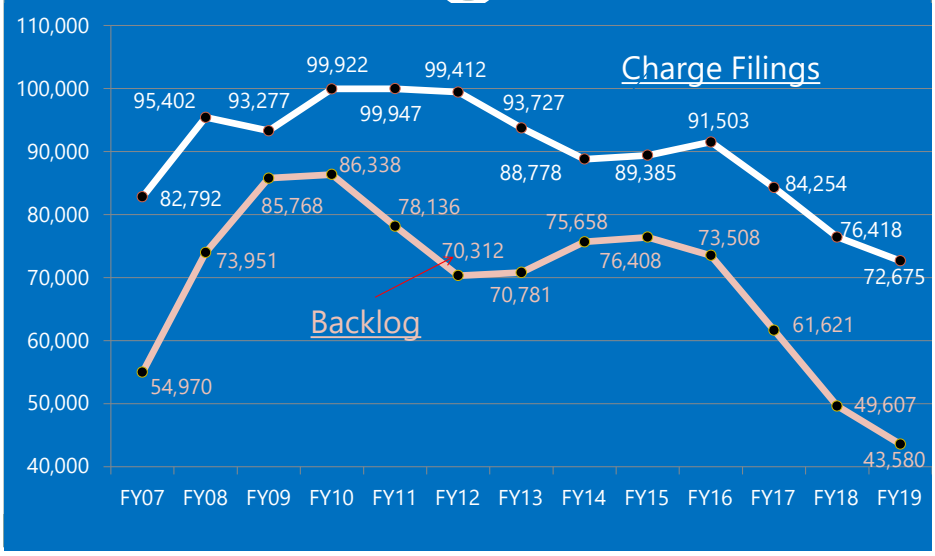
CHARGE STATISTICS

4

FY18	FY19	
554,000+		CONTACTS
200,000+		INQUIRIES
40,000+		INTAKE INTERVIEWS
76,418	72,675	CHARGE FILINGS ↓
90,558	80,806	CHARGE RESOLUTIONS ↓
$354(MIL)	$385.75 (MIL)	IN MONETARY BENEFITS ↑
49,607	43,580	PENDING CHARGE INVENTORY ↓

EEOC CHARGE FILINGS TO BACKLOG (FY2007 – FY2019)

7



FY2019 CHARGE ALLEGATIONS

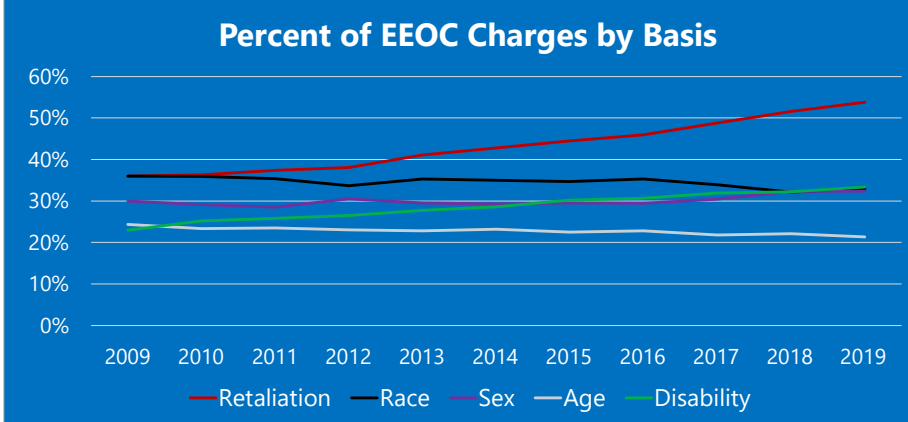
6

Retaliation:	39,110 (53.8%)
Disability:	24,238 (33.4%)
Race:	23,976 (33.0%)
Sex:	23,532 (32.4%)
Age:	15,573 (21.4%)
National Origin:	7,009 (9.6%)
Color:	3,415 (4.7%)
Religion:	2,725 (3.7%)
Equal Pay Act:	1,117 (1.5%)
Genetic Information:	209 (0.3%)

*https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm

Trends in EEOC Charge Filings by Basis

7



ENFORCEMENT
FY2019 LITIGATION STATISTICS

8

144 MERITS SUITS FILED

172 MERITS SUITS RESOLVED

$38.6(MIL) IN MONETARY BENEFITS in CASES RESOLVED

CHARACTERISTICS:

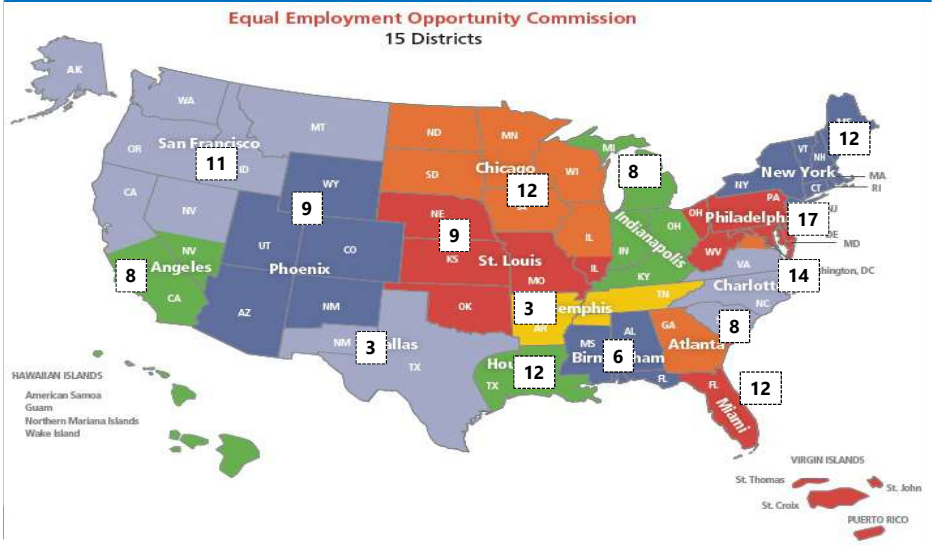
100 Individual Suits
27 Non-Systemic Class Suits
17 Systemic Suits

BY STATUTE

Title VII	87
ADA	55
ADEA	7
EPA	7

FY19 Lawsuit Filings by District Office

9



EEOC MERITS SUITS FILED (FY2005 – FY2019)

10

Major Recent EEOC Lawsuits

11

- Jackson National Life Insurance (1/9/20)
  - Harassment, Unequal Pay, Denials of Promotions, Retaliation
  - 21 Class members
  - $20.5 million
  - 4 year consent decree including internal and external monitors and training
- United Airlines (12/20/19)
  - Alleged that pilot repeatedly harassed a flight attendant by posting explicit images of her to multiple websites without her consent
  - EEOC maintained that United knew about the pilot's misconduct but took no action to stop it
  - United allowed the pilot to retire with benefits despite the initiation of criminal prosecution for violation of federal internet stalking laws
  - $321,000 plus attorneys' fees to the flight attendant's private lawyer

Major Recent EEOC Lawsuits

12

- Uber (12/18/19)
  - Lipnic Commissioner Charge alleged a culture of harassment and retaliation against individuals who complained of harassment based on sex
  - $4.4 million class fund to compensate those who experienced sexual harassment or retaliation for complaining about sexual harassment from Jan. 1, 2014 to present.
  - 3 year consent decree with monitors, plus the creation of an internal system for identifying repeat harassers, updating of policies and procedures and climate surveys
- CRST (8th Cir. 12/10/19)
  - 8th Circuit upheld trial court's award of $3.3 million in attorneys' fees against the EEOC, following remand from S.Ct., 136 S.Ct. 1642 (2016)
  - S.Ct. held that a favorable ruling on the merits is not a necessary predicate to finding that a party prevailed.

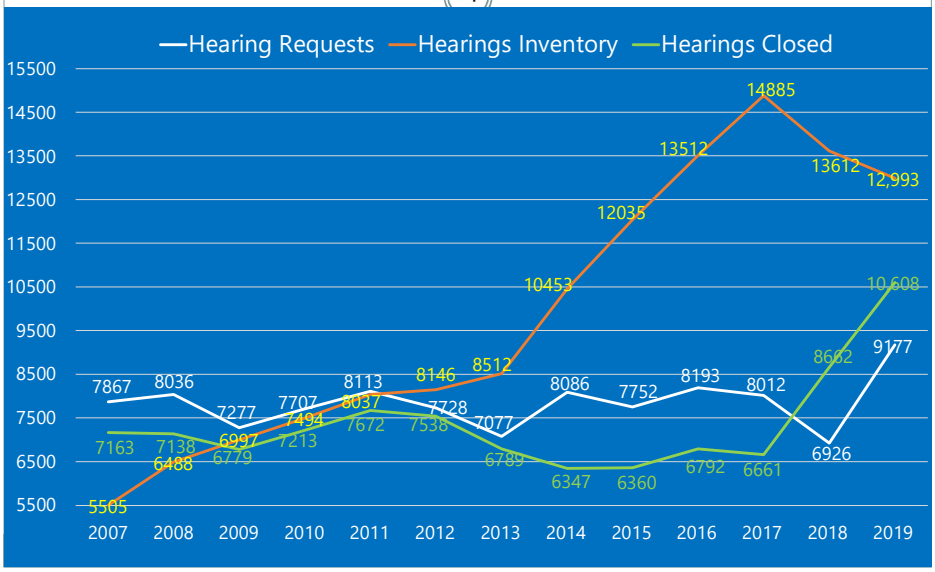
Data Points on the EEOC Federal Sector Process

13

- 3 million federal employees (under EEOC's jurisdiction)
- 35,000 instances of EEO counseling (1.1% of the federal workforce)
- 16,000 formal complaints filed after EEO counseling (54% of matters resolved in the informal process)
- 11,000 investigations conducted
- 8,000 hearings requested
- 4,000 appeals requested

Federal Sector Enforcement
Federal Employees and Agencies' Hearings with EEOC AJs

14



2019 Hearing Inventory Progress

15

- Decrease in pending inventory by 5.0%
- Increase in resolutions to 10,608, by 22.5%
- Secured more than $87.7 million in relief for federal sector employees who requested hearings, a 3.2% increase.

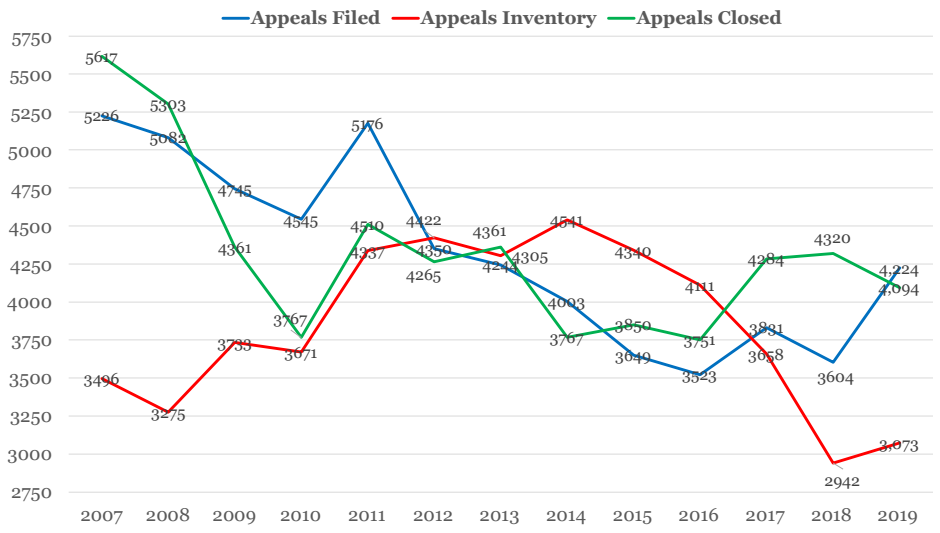
September 2019 Hearing Inventory Status

16

- Further decrease in pending inventory by 5.0% over 2018
- Increase in resolutions to 10,608, by 22.5% over 2018
- Secured more than $87.7 million in relief for federal sector employees who requested hearings, a 3.2% additional increase as compared to 2018.

Appellate Progress

17



September 2019 Appellate Inventory Status

18

- A slight 4.5% increase in pending inventory over September 2018, while open appeals 501 days or older decreased by 83.9 %
- Appeals receipts increased by 17.2% over September 2018
- Appeals resolution decreased by 5.2 % over September 2018
- Average processing time in days decreased by 41 days from September 2018
- Secured more than $12.7 million in relief for federal sector employees who requested appeals, a 6% decrease as compared to September 2018.

Appellate Aged 500 Day Inventory Progress

19

Workplace Harassment

20

- EEOC Select Task Force on the Study of Harassment in the Workplace – 2016 Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic
- Hits on EEOC's sexual harassment page **doubled in wake of Weinstein allegations – NYT Oct 5., 2017**
- Charges alleging sexual harassment up by 13.6% in FY18
- Reasonable cause findings on harassment charges increased by 24% from FY17
- 66 lawsuits filed alleging harassment in FY18 - 50% increase from FY17; filed 48 and resolved 48 harassment suits in FY19 (10 more resolutions than FY18)
- $70 million recovered overall in FY18 for victims of sexual harassment – 47% increase from FY17

Workplace Harassment

21

- EEOC Leads the Way in Preventing Workplace Harassment (October 2018).
- A Reconvening of the Select Task Force on the Study of Harassment in the Workplace (June 11, 2018).
- Breaking the Silence (Harvard Business Review Jan. 2018).
- Promising Practices for Preventing Harassment

EEOC's Respectful Workplaces Training

22

- ✓ **Interactive, skills-based training**
- ✓ **Separate modules for supervisors and employees**
- ✓ **Reviews acceptable conduct in the workplace**
- ✓ **Teaches how to create respectful workplaces**
- ✓ **Provides tools for responding to harassing conduct**
- ✓ **Teaches bystanders when and how to intervene**

EEOC RW Trainings Since October 2017…

23

- Provided over 1,000 sessions
- Trained over 32,000 employees and supervisors in private, public and federal workplaces

➢ Issues to Watch – Harassment

24

➢ **Harassment**

- Retaliation - concerns about blacklisting of those who come forward
- General Motors v. (NLRB) – EEOC amicus argued that employers should be able to address offensive statements or conduct that violate or may violate Title VII or other antidiscrimination laws.

➢ Issues to Watch – Supreme Court

25

- **LGBT** – Supreme Court cases (Argued Oct. 8, 2019)
  - *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC and Aimee Stephens*
  - *Bostock v. Clayton County*
  - *Altitude Express, Inc. v. Zarda*

- **Ministerial Exemption -** *Our Lady of Guadalupe School v. Agnes Morrissey-Berru* consolidated with *St. James School v. Darryl Biel*, No. 19-267;
  - Issue presented: Whether the Religion Clauses prevent civil courts from adjudicating employment discrimination claims brought by an employee against her religious employer, where the employee carried out important religious functions;
  - Oral argument (by phone) May 11, 2020

Sixth Circuit Cases on EEOC's Radar:

26

- *EEOC v. West Meade* (6th Cir. 2020): whether ADA "regarded as" protections extend to employee who is fired based on employer's belief that a serious medical condition rendered her unable to perform her job.
- EEOC *Amicus Brief* in *Thompson v. Fresh Products, LLC*, No. 20-3060 (March 2, 2020) (challenging handbook's shortening of period in which to file an ADA or ADEA complaint to 6 months as contrary to statutes)
- EEOC *Amicus Brief* in *Logan v. MGM Grand Detroit Casino*, No. 18-1381 (Aug. 2018) (challenging handbook's shortening of period in which to file Title VII complaint to 6 months as contrary to statute)

Issues to Watch - Pay

27

- **EEO-1/Component 2 Pay Data Collection**
  - Public Hearing – Nov. 20, 2019

- NWLC v. OMB lawsuit – 1:17-cvm-02458-TSC (D.D.C.)
  - Government's Motion to_dismiss_case_as_moot.pdf (May 4, 2020) requested that the trial court order be vacated
  - ORDER – Finding data collection complete (Feb. 20, 2020).pdf
  - Order directing EEOC to collect pay data (April 25, 2019)
  - Order vacating OMB's stay of EEOC's revised EEO-1 form and Sept. 15, 2017 Fed. Reg. Notice; reinstituting previous approval of the EEO-1 form (March 4, 2019)

Issues to Watch - Age

28

- June 2018 Report of EEOC Acting Chair Victoria A. Lipnic, *The State of Age Discrimination and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act (ADEA)*

- But-For Causation
  - Babb v. Wilkie, 140 S.Ct. 1168 (2020) federal employee causation standard
  - House passed Protecting Older Workers from Age Discrimination Act (POWADA) on Jan. 15, 2020

- Disparate Impact Claims by Applicants (Rabin v. PWC pending in 9th Cir)

- Horizontal Well Drillers to Pay $650,000 to Settle EEOC Age And Disability Discrimination Suit (failure to hire older applicants; plus unlawful medical exam)

- EEOC v. White River Health System – insurability of older drivers (filed Feb. 2020)

EEOC on Defense – Litigation

29

- *AARP v. EEOC* (D.D.C.) (challenging EEOC's 2016 ADA and GINA final rules on employer wellness programs; court issued order vacating incentive sections of rules, effective Jan. 1, 2019; EEOC published conforming rule Dec. 20, 2018)
- *Texas v. EEOC*, 2019 WL 3559629 (5th Cir. Aug. 6, 2019) (enjoined enforcement against the State of Texas of EEOC's 2012 revised guidance on employer use of arrest and conviction records.)
- *BNSF v. EEOC* (N.D. Tex.) (challenging EEOC administrative enforcement action pursuant to a 2012 Commissioner Charge)
- *Nat'l Women's Law Center v. OMB & EEOC* (D.D.C.) (challenging OMB's stay of EEOC's 2016 revisions to the EEO-1 form to collect pay data)

Spring 2020 Regulatory Agenda

A1

30

1. Pay Survey – amendments to 29 C.F.R. § 1602
2. Joint Employer Status under the federal EEO statutes
3. Official Time in Fed Sector EEO Process
4. 2020 Adjustment of the Penalty Violation of Notice Posting Requirement
5. Updating Procedural Regs. Re Digital Charge System, 29 C.F.R. §§ 1601, 1626

Slide 30

A1 udpate
Author, 5/4/2020

Spring 2020 Regulatory Agenda

31

6. Fed Sector Time Limits for Filing a Civil Action, 29 C.F.R. §1614.407
7. Fed Sector EEO Process – 15 specific changes, 29 C.F.R. §1614.407
8. Sec. 504 update, 29 C.F.R. Part 1615
9. Updating Procedures for complaints under Sec. 304 of the Govt. Employee Rights Act (GERA)
10. Revising ADA regs. re wellness programs
11. Revising GINA regs. re wellness programs

EEOC 2020 Update

19

Questions?

Chapter 5: Developments under the Fair Labor Standards Act

Prepared and Presented By:
Fred G. Pressley Jr., Esq.
Porter Wright Morris & Arthur LLP
Columbus, Ohio

Presented By:
Jason R. Bristol, Esq.
Cohen Rosenthal & Kramer LLP
Columbus, Ohio

Table of Contents

Chapter 5: Developments under the Fair Labor Standards Act

Prepared and Presented By:
Fred G. Pressley Jr., Esq.
Porter Wright Morris & Arthur LLP
Columbus, Ohio

Presented By:
Jason R. Bristol, Esq.
Cohen Rosenthal & Kramer LLP
Columbus, Ohio

I. Stage I: Pre-Complaint

The best way for an employer to defend itself from FLSA liability is to self-audit its policies and correct any potential violations of its practices.

A. Protection from Discovery.

There are a number of protections an employer can invoke to protect the audits from discovery. As you can see, some protections are easier to invoke than others.

1. Attorney-client privilege.

Lewis v. Wells Fargo & Co., Case No. C-08-02670 CW (N.D. Cal. Mar. 12, 2010).

a. In *Lewis*, Wells Fargo reclassified many of its employees as non-exempt under the Fair Labor Standards Act (FLSA), which meant they were required to be paid overtime. After the reclassification, several employees filed a class-action lawsuit seeking backpay they alleged Wells Fargo owed them for work done before the reclassification.

b. During discovery, Wells Fargo invoked the attorney-client privilege and the work-product privilege. Specifically, Wells Fargo invoked the privileges when it refused to produce documents from internal FLSA audits that were conducted to determine the proper classification of certain positions.

c. The U.S. District Court for the Northern District of California held that communications among non-attorneys at Wells Fargo regarding the FLSA audits were protected by the attorney-client privilege because the non-attorney who originated the communication had notice from counsel that the audit (to which the communication was related) was initiated by counsel and subject to the privilege.

2. Work-product privilege.

Lewis v. Wells Fargo & Co., Case No. C-8-02670 CW (N.D. Cal. Mar. 12, 2010).

a. As stated above, Wells Fargo also invoked the work-product privilege when it refused to produce the documents.

b. The district court determined that the documents were not subject to the privilege, however, because they were not created in anticipation of litigation. The court reasoned that the documents would have been created in substantially similar form even if no litigation was anticipated.

c. The court also considered the fact that no litigation was filed until at least a year after the audits were conducted. Finally, the court found that "a generalized fear of litigation odes not turn a compliance audit into attorney work product."

3. Self-critical-analysis privilege.

Deel v. Bank of Am., N.A., 227 F.R.D. 456, 457 (W.D.Va. 2005).

a. In *Deel*, an employee sought to compel the production of documents held by Bank of America, including documents related to an audit the bank conducted to improve its payroll practices.

b. The bank sought to protect the documents from disclosure on the grounds of the self-critical-analysis privilege.

c. The bank argued that the information sought by the plaintiff resulted from an audit to improve its payroll practices that was intended to remain confidential. It also asserted that discovery of these documents would deter other employers from reviewing their compensation practices before they are subject to litigation.

d. The court found that the bank had not developed sufficient facts to justify the application of the self-critical-analysis privilege with respect to the information from the audit.

e. The court could not conclude that the possible discovery of these documents would deter employers from reviewing their payroll practices to ensure compliance with federal law.

B. Arbitration/Litigation Waivers.

1. Employer considerations.

Employers should consider requiring employees to sign arbitration agreements that require claims to be brought individually under the FLSA.

2. Beware of challenges.

However, employers should beware of challenges from plaintiff's counsel that the agreement is a contract of adhesion and/or procedurally unconscionable.

Billingsley v. Citi Trends, Inc., 560 Fed. App'x 914, 915 (11th Cir. 2014).

a. In this case, the plaintiffs filed a putative collective action under the FLSA against defendant Citi Trends, Inc. The plaintiff's claimed they were improperly classified as exempt and, therefore, denied overtime pay.

b. Citi Trends moved to compel arbitration based on the terms of an arbitration agreement executed after the filing of the action but before the district court certified the FLSA collective action.

c. The plaintiffs challenged the employer's actions in obtaining the arbitration agreements, which provided for individual actions, and asked the court for a corrective order. The plaintiff's argued that the agreements were unconscionable.

d. Specifically, the arbitration agreements were given to store managers by the company's HR representatives during individual meetings styled as the issuance of a new "employee handbook."

e. Citi Trends informed the store managers that the arbitration agreement was a condition of continued employment. Opt-in plaintiffs testified that they signed the documents but felt intimidated by the human resources representative. They also felt pressured to sign the arbitration agreements to avoid losing their jobs. Even when specifically requested, Citi Trends did not give the store managers copies of the documents that the store managers signed.

f. The district court found that the arbitration agreements were unconscionable as a matter of law and denied the motion to compel arbitration.

g. The Eleventh Circuit affirmed the district court's denial of the employer's motion to compel arbitration, finding that the court's decision was within its authority.

3. Recent case law developments.

a. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 200 L.Ed.2d 889 (2018).

i. In this case, the U.S. Supreme Court held in a 5-4 decision that the National Labor Relations Act does not prohibit class and collective action waivers. In other words, arbitration agreements in which an employee agrees to arbitrate claims against an employer on an individual basis—rather than on a class action or collective basis—are enforceable and do not violate the NLRA.

ii. The decision guided the Sixth Circuit holding in *Gaffers v. Kelly Services, Inc.*

b. *Gaffers v. Kelly Servs., Inc.*, 900 F.3d 293 (6th Cir. 2018).

i. Plaintiff Jonathan Gaffers was a former employee of Kelly Services, Inc. Gaffers worked from home in a virtual call center.

ii. Gaffers alleged that Kelly Services underpaid him and his fellow virtual employees. Specifically, he alleged that Kelly Services shortchanged them for time spent logging in to Kelly Services' network, logging out, and fixing technical problems that arose. Gaffers brought suit on behalf of himself and his coworkers, seeking backpay and liquidated damages under the collective-action provision of the FLSA.

iii. About half of the employees that Gaffers sought to represent signed an arbitration agreement with Kelly Services (Gaffers himself did not sign one, but his is the representative of the collective action). Those agreements stated that individual arbitration was the "only forum" for employment claims, including unpaid wage claims.

iv. Kelly Services moved to compel individual arbitration under the Federal Arbitration Act. In response, Gaffers contended that the National Labor Relations Act and the Fair Labor Standards Act rendered the arbitration agreements unenforceable. The district court denied Kelly Services' motion to compel arbitration. Kelly Services appealed.

v. The Sixth Circuit held that arbitration agreements that require claims to be brought individually are enforceable under the FLSA.

vi. The Sixth Circuit relied on the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, which held that a federal statute does not displace the Arbitration Act unless it includes a "clear and manifest" congressional intent to make individual arbitration agreements unenforceable.

vii. The court held that the FLSA "gives employees the option to bring their claims together. It does not require employees to vindicate their rights in a collective action."

c. *Klatte v. LaserShip, Inc.,* S.D. Ohio No. 1:17-cv-00516, 2019 U.S. Dist. LEXIS 157334 (Sept. 16, 2019).

i. In *Klatte*, the plaintiff brought a purported class action against LaserShip for alleged violations of the FLSA, the Ohio Constitution, the Ohio Minimum Fair Wage Standards Act, and the Ohio Prompt Pay Act. He alleged that LaserShip misclassified him and other similarly situated individuals as independent contractors and, in doing so, avoided paying minimum wage and overtime payments.

ii. At the time he began his employment, Plaintiff signed an independent contractor agreement, which included an individual arbitration provision.

iii. LaserShip moved to dismiss Plaintiff's complaint and compel arbitration pursuant to the independent contractor agreement and the Federal Arbitration Act.

iv. The court dismissed the complaint and held that Plaintiff's claims are subject to arbitration.

v. "To the extent that Plaintiff argues that the [independent contractor agreement] includes an illegal class waiver, he is incorrect."

d. *Pankey v. Hi-Tek Mfg., Inc.,* S.D. Ohio No. 1:18-cv-00702, 2019 U.S. Dist. LEXIS 152166, at *5 (Sept. 6, 2019).

> Plaintiff does not . . . address Defendant Aerotek's argument that the Agreement's class action waiver is valid and enforceable under *Epic Systems Corp. v. Lewis.* The Court will construe Plaintiff's silence as to the property of individual arbitration as a concession. Accordingly, the Court finds that Plaintiff and Defendant Aerotek agreed to individual arbitration.

e. *Townsend v. Stand Up Mgmt.,* N.D. Ohio No. 1:18CV2884, 2019 U.S. Dist. LEXIS 133653, at *21-22 (Aug. 8, 2019).

> Here, the parties expressly agreed to waive any rights to bring claims arising out of employment disputes collectively. Because parties are free to waive such rights, the Court holds that Plaintiffs have waived any rights to assert their FLSA and Ohio State law claims on behalf of a class or as a collective action against movants.

4. Something to consider.

If employees are required to sign these waivers, an employer may face a scenario where a litany of individual employees simultaneously bring individual arbitrations. This could result in an employer having to pay the cost of defending multiple arbitrations simultaneously. Is the cost of the class/collection action wavier worth that cost? Perhaps, but beware the risk of "death by a million paper cuts."

II. Stage 2: Attacking the Complaint

A. First Step: Review.

When served with a complaint, the first step is to carefully review the complaint and its accompanying exhibits/affidavits.

Sometimes the attached exhibits and affidavits will consist of legal conclusions, which are insufficient to establish a claim.

B. Attack the Complaint.

Basses to attack the complaint include, but are not limited to:

1. Is the worker an independent contractor?

a. Department of Labor Guidance.

i. On April 29, 2019, the Department of Labor issued and opinion letter regarding whether gig economy workers can be classified as independent contractors under the FLSA.

ii. In determining whether workers of a "virtual marketplace company" were employees or independent contractors under the FLSA, the DOL applied the "economic realities test." This test analyzes the following six factors:

(a) The nature and degree of potential employer's control;

(b) The permanency of the worker's relationship with the potential employer;

(c) The amount of the worker's investment in facilities, equipment, or helpers;

(d) The amount of skill, initiative, judgment, or foresight required for the workers' services;

(e) The worker's opportunities for profit or loss; and

(f) The extent of integration of the worker's services into the potential employer's business.

iii. The DOL found that all of the factors weighed in favor of an independent contractor relationship. For example, workers have "autonomy" to choose the hours of work that are most beneficial to them, pursue other jobs while working for the business, and work as much or as little as they want.

b. Case law.

With the expansion of the gig economy over the past decade, cases have begun to pop up regarding whether workers in the gig economy are employees or independent contractors.

i. *Lawson v. Grubhub Inc.,* 302 F. Supp. 3d 1071, 1072 (N.D. Cal. 2018).

(a) In this matter, the plaintiff was a restaurant delivery driver for Grubhub.

(b) He complained that Grubhub improperly classified him as an independent contractor rather than an employee under California law and therefore violated the state's minimum wage, overtime, and employee expense reimbursement laws.

(c) A federal magistrate judge held that the plaintiff was an independent contractor, not an employee.

(d) The magistrate judge reasoned that Grubhub did not control how plaintiff made deliveries, supervise plaintiff's appearance while he was making deliveries, require plaintiff to undergo training, control his hours, or dictate which routes to take or which car to use.

ii. *Hood v. Uber Techs., Inc.*, M.D.N.C. No. 1:16-CV-998, 2019 U.S. Dist. LEXIS 670, at *1 (Jan. 3, 2019).

(a) This was the first national misclassification case brought against Uber.

(b) The court granted conditional class certification for everyone who worked or continues to work for Uber.

(c) Approximately 5200 class members opted in to the litigation.

(d) The class alleged that Uber misclassified them as independent contractors and deprived them of wage and hour protections under the FLSA.

(e) The parties settled the matter for $1.3 million.

2. Failure to state a claim.

a. *Bell atlantic v. Twombly,* 550 U.S. 544 (2007).

i. In *Twombly*, the U.S. Supreme Court held that a complaint must "five the defendant fair notice of what the . . . claim is and the ground upon which it rests."

ii. The Court further explained that a complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."

b. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

i. In *Iqbal*, the Supreme Court amplified *Twombly*, requiring courts to distinguish factual contentions from "[t]hreadbare recitals of the elements of a cause action, supported by mere conclusory statements."

ii. Following the Supreme Court's decision in *Iqbal* and *Twombly*, the Sixth Circuit (which covers Ohio) has recognized that courts may not accept conclusory legal allegations that do not support specific facts necessary to establish the cause of action. *See Smith v. Wrigley Mfg. Co., LLC*, 6th Cir. No. 18-5397, 2018 U.S. App. LEXIS 29236 (Oct. 18, 2018) (holding that a plaintiff who alleged age discrimination did not survive a motion to dismiss where she offered no names, ages, or qualifications for the younger employees she claimed were treated differently and failed to give any examples of how their treatment differed).

3. Jurisdictional grounds.

There have been a number of cases in federal court that state if an Ohio-based company is confronted by a nationwide class or collection action, non-Ohio residents can be excluded from the case on jurisdictional grounds. Here are a few examples.

a. *Rafferty v. Denny's, Inc.*, N.D. Ohio No. 5:18-cv-2409, 2019 U.S. Dist. LEXIS 112727 (July 8, 2019).

i. Plaintiff filed a complaint against Denny's under the FLSA on behalf of herself and all others similarly situated (the "collective members").

ii. Rafferty alleged, on behalf of the collective members, that Denny's violated the FLSA by paying servers sub-minimum, tip-credit wages without informing them of the tip-credit provisions of the FLSA.

iii. Denny's filed a motion to dismiss, seeking dismissal of the complaint for lack of personal jurisdiction.

iv. Denny's argued that the court lacked jurisdiction over any FLSA claims from putative collective members that did not arise from employment with Denny's in Ohio.

v. It should be noted that Denny's did not challenge the court's exercise of personal jurisdiction over claims of putative collective members who worked in its Ohio restaurants. The challenge was directed solely to the claims of the non-Ohio putative collective members.

vi. The court agreed with Denny's and concluded that exercising personal jurisdiction over Denny's for the claims of any out-of-state putative collective member would violate due process.

b. *Maclin v. Reliable Reports of Tex., Inc.*, 314 F. Supp. 3d 845, 849 (N.D. Ohio 2018).

i. In *Maclin*, the plaintiff was a resident of Cuyahoga County, Ohio and an employee of the defendant-employer, Reliable Reports of Texas, Inc. (Reliable Reports).

ii. Reliable Reports was, unsurprisingly, incorporated and headquartered in Texas.

iii. Plaintiff filed a complaint in the Northern District of Ohio, purporting to bring a collective overtime action against Reliable Reports under the FLSA and a Rule 23 class action under the Ohio Minimum Fair Wage Standards Act.

iv. Reliable Reports filed a motion to dismiss plaintiff's complaint, arguing that Reliable Reports is not subject to personal jurisdiction in Ohio with respect to the FLSA claims of non-Ohio plaintiffs.

v. In *Maclin*, the Northern District of Ohio held that the court could not exercise personal jurisdiction over FLSA claims of nonresident claimants against a defendant where the claims had no connection to the State of Ohio. The court granted the motion to dismiss the FLSA claim of non-Ohio plaintiffs for lack of personal jurisdiction.

III. Stage 3: Conditional Certification

A. Conditional Certification is typically a low bar. As a result, courts often allow the case to move forward once the case gets to this stage.

B. Once the case gets to the conditional certification stage, the employer is required to turn over the names and addresses of individuals in the class. These individuals will be notified that the case is filed.

1. If it is a collective action, then individuals must file written consent to opt-in.

2. If it is a class action, individuals must opt-out of the class.

C. Is it a good strategy to attack precertification?

1. If employers choose to attack here, they should demonstrate that no FLSA violations took place because there was no underlying policy that violates the FLSA. Alternatively, employers can obtain affidavits from individuals or records that show workers were paid in accordance with the FLSA.

   The problem for employers is that courts will often permit the case to go forward, sot it may not be worth the financial cost of putting up a fight here.

2. This is often a good time to settle the case.

D. When attacking conditional certification, what arguments should an employer make? The following cases illustrate a few successful arguments made by employers.

1. *Brown v. Barnes & Noble, Inc.*, S.D.N.Y. No. 1:16-cv-07333 (RA) (KHP), 2018 U.S. Dist. LEXIS 106098 (June 25, 2018).

   a. In *Brown*, the plaintiffs brought a putative collective action under the FLSA against Barnes & Noble on behalf of the company's café managers. The plaintiffs alleged they were improperly classified as exempt executives, thereby depriving them of overtime pay under the FLSA.

   b. The plaintiffs moved for conditional certification, but the court denied the motion because the plaintiffs had not provided the allegedly improper company policies.

   c. The plaintiffs then filed a renewed motion for conditional certification.

   d. Again, the court denied the motion. The court found that the café managers were not similarly situated because the managers performed different amounts of non-exempt work and had varying levels of input on hiring and firing. In short, the facts obtained through discovery made clear that the plaintiffs were not similarly situated.

2. *Cross v. AMC Detroit, Inc.*, E.D.Mich. No. 18-11968, 2019 U.S. Dist. LEXIS 103542 (June 20, 2019).

   a. In *Cross*, the plaintiffs brought a collective action under the FLSA on behalf of bartenders working at Buffalo Wild Wings franchises, alleging that bartenders were required to perform a significant number of janitorial claims. As a result, the plaintiffs alleged that the franchises improperly took advantage of the FLSA's tip-credit provision.

b. Following discovery, the plaintiffs moved for conditional certification. The company sought to attack certification by arguing that it had policies in place that required bartenders to clock into a different, FLSA-compliant rate when doing janitorial work.

c. The court denied conditional certification of the plaintiffs' claims, reasoning the plaintiff's declarations did not establish that they had personal knowledge of other similarly situated bartenders, nor could they establish a company-wide policy that violated the FLSA.

d. Although the court noted that the existence of a written policy was not required to obtain conditional certification, Plaintiffs still failed to produce evidence to support their contention that the company's cleaning policies violated the FLSA.

IV. Stage 4: Motion for Summary Judgment/Trial

A. Discovery Plays a Critical Role Leading Up to This Stage.

Written discovery, like interrogatories and requests for document production, are critical.

B. How Many Depositions Are Worth It?

1. Although depositions are the most important tool an employer can use to obtain information regarding the merits of a claim, remember that they can be very costly. Additionally, courts may be reluctant to permit an exorbitant number of depositions.

2. *Scott v. Bimbo Bakeries, USA, Inc.*, E.D.Pa. No. 10-3154, 2012 U.S. Dist. LEXIS 175016 (Dec. 11, 2012).

   a. In *Scott*, the plaintiffs filed a collective action against their employers, alleging violations of the FLSA and the Pennsylvania Minimum Wage Act (PMWA).

   b. By way of background, the plaintiffs delivered fresh baked goods across the country for the defendants pursuant to agreements that identified the plaintiffs as "independent contractors." The plaintiffs claimed that, although they were classified as "independent contractors," the defendants controlled and managed their work and thereby treated them as their employees. The plaintiffs contended that under the defendants' alleged "nationwide policy" of misclassifying their drivers in this manner, they were denied benefits owed to employees under the law.

   c. After the court conditionally certified the collective action, 650 individuals opt-in to the class.

d. The defendant sought leave to serve written discovery on all 650 opt-in plaintiffs and depose 260 opt-in plaintiffs. The named plaintiff, meanwhile, wanted to limit written discovery to no more than 10 percent of the class and to prohibit more than 15 deposition of the opt-in plaintiffs.

e. After reviewing the evidence, the court prohibited the defendants from serving written discovery on more than 10 percent of the opt-in plaintiffs. Additionally, the court limited the defendants to 20 total depositions, including the named plaintiff.

The court reasoned that the defendants' position on the number of depositions was "entirely unreasonable" and would likely result in "duplicative data [that would] place an unreasonable burden upon plaintiffs' counsel."

C. Timing.

Although employers often wait until after discovery is completed to file a motion for summary judgment, they are not required to wait that long.

D. Trial Plans.

1. Great strategy for employers to use.
2. What is a trial plan?
   a. Employers can require plaintiffs to produce a trial plan.
   b. A trial plan details how plaintiffs intend to prove their claim at trial without being overly burdensome or having to prove all of the individual damage issues.
3. In a recent Seventh Circuit decision regarding trial plans, Judge Posner held:

> Although each class member claims to have lost several thousand dollars as a result of [the employer's] alleged violations, that isn't enough to finance a modern federal lawsuit; and in such a case, where it is class treatment or nothing, the district court must carefully explore the possible ways of overcoming problems in calculating individual damages. Yet there may be no way if for example there are millions of class members each harmed to a different extent (and many not harmed at all). . . . [If] class counsel is capable of proposing a feasible litigation plan though asked to do so, the judge's duty is at an end. And that's what happened.

Espenscheid v. DirectSat USA, LLC, 705 F.3d 770, 776 (7th Cir. 2013).

E. Recent High-Profile FLSA Cases.

Navarro, et al. v. Encino Motorcars LLC, No. 16-1362.

1. Although the Supreme Court issued this decision in April 2018, the litigation surrounding this case began back in 2012.
2. This case involved service advisors employed by Encino Motorcars, LLC, a Mercedes-Benz dealership in California.
3. Service advisors perform various job functions, including consulting with customers about their servicing needs and selling them services for their vehicles.
4. Service advisors are required to work at least 55 hours per week on the dealership's premises.
    a. In this action, the service advisors south time-and-a-half compensation for hours worked beyond the 40 per week maximum prescribed by the FLSA.
    b. Both parties agreed that the issue in this case was whether service advisors qualify as salesmen who are primarily engaged in servicing automobiles.
5. The Supreme Court held that service advisors are exempt from overtime pay under the FLSA.
6. The most important part of this decision, however, came at the end of the opinion. The Supreme Court rejected the Ninth Circuit's conclusion that exemptions to the FLSA should be construed narrowly. According to the majority opinion, courts interpreting the FLSA should construe the exemptions fairly because the FLSA gives no "textual indication" that its exemptions should be construed otherwise.

    This means that courts are now permitted to interpret FLSA exemptions more broadly than before, potentially leading to fewer employees being entitled to overtime under the FLSA.

V. Stage 5: Settlement

A. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval.

B. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

1. The class representatives and class counsel have adequately represented the class;
2. The proposal was negotiated at arm's length;

3. The relief provided for the class is adequate, taking into account:

    a. The costs, risks, and delay of trial and appeal;

    b. The effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

    c. The terms of any proposed award of attorney's fees, including timing of payment; and

    d. Any agreement required to be identified under Rule 23(e)(3); and

4. The proposal treats class members equitably relative to each other.

C. *Zivkovic v. Laura Christy LLC,* 329 F.R.D. 61, 66 (S.D.N.Y. 2018).

1. This matter arose from alleged wage and hour violations of federal and New York State employment laws.

2. Plaintiffs, former and current employees of the Valbella Meatpacking and Valbella midtown restaurants, asserted that Defendants maintained company-wide policies that resulted in minimum wage and overtime violations of the FLSA and minimum wage, overtime, spread of hours, and wage notice violations of the New York Labor Laws.

3. Specifically, Plaintiffs claimed that the defendants:

    a. Paid their employees the "tip credit" minimum wage, but that they were not entitled to do so because they did not give employees the required notice;

    b. Failed to pay employees overtime rates and the spread of hours premium for days that employees worked double shifts;

    c. Failed to provide employees with the pay rate notices required by law; and

    d. Utilized paystubs that did not include all hours worked, overtime rates, or mention tip credits.

4. The plaintiffs filed a motion seeking class certification for their NYLL claims. Plaintiffs requested that the court certify two subclasses, one for each Valbella restaurant.

5. The court granted the motion after analyzing seven factors.

    a. Numerosity.

    Here, it was clear that there were over 40 potential class members in each of the plaintiffs' proposed subclasses.

    b. Commonality.

    Here, the court held that the plaintiffs raised common questions relating to the defendant's payroll practices, overtime policy, and compliance with minimum wage requirements. The court reasoned that the issue here—whether Defendants illegally took

the tip credit, whether the class members were paid spread of hours pay when entitled to it, and whether the class members received wage notices and statements that were in compliance with the law—will produce answers that apply to all plaintiffs within each subclass and drive the resolution of this litigation.

c. Typicality.

The court held that this factor was satisfied for "substantially the same reasons" that the commonality requirement was satisfied. The members of the putative subclasses were subject to the same policies regarding the tip credits, overtime, spread of hours pay, and wage notices and statements.

d. Adequacy of representation.

i. The court found that Zivkovic was an adequate representative to advance the interests of each of the subclasses. He was an employee at both restaurants and was, therefore, subject to the employment policies of each restaurant.

ii. The court also found that the alternative plaintiffs and class counsel were adequate.

e. Whether the questions of law or fact common to class members predominate over any questions affecting only individual members.

The court held this requirement was satisfied. The court reasoned that whether Valbella Meatpacking and Valbella Midtown maintained unlawful common payment policies were questions common to all members of each subclass and predominate any individual damages assessments. The question of whether class members were properly paid could be addressed by class-wide proof regarding the defendant's payroll records, financial records, and testimony.

f. Whether a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

The plaintiffs "easily" met this requirement. The court held it was unlikely that the class members would engage in individual action because the amount of potential recovery is low and likely to be outweighed by the individual cost of litigation. Moreover, the fact that class members were still employed by Defendants and concerned about potential retaliation further diminished the likelihood of individual action.

g. The class is ascertainable, meaning it is "defined using objective criteria that establish a membership with definite boundaries."

i. Here, Plaintiffs provided objective definitions for each subclass with clear temporal limitations that easily allowed the identities of potential class members to be determined. The subclass definitions were unambiguous:

the suit was brought on behalf of "all tipped employees, including captains, servers, runners, bussers, and bartenders" who worked at Valbella Meatpacking and Valbella Midtown from May 25, 2014, through July 24, 2017.

ii. Furthermore, Defendants produced a list of all individuals employed by the restaurants within the relevant time period, and class membership could be ascertained by reviewing those lists.

Chapter 6: Privacy Law Update: Top 10 Challenges in the Workplace

Lisa Pierce Reisz, Esq.
Vorys, Sater, Seymour and Pease LLP
Columbus, Ohio

Table of Contents

Privacy Law Update: Top 10 Challenges in the Workplace

Ohio State Bar Association's Advanced Employment Law Seminar
May 15, 2020

Presented By:

Lisa Pierce Reisz
614.464.8353 | lpreisz@vorys.com
Vorys, Sater, Seymour and Pease LLP

VORYS

Challenge #1: Limits of Employer's Monitoring of Employees

- Employers can generally monitor their employees in the workplace, and employees' expectation of privacy is generally limited on the job. For instance, employers can:
  - Monitor activity on a workplace computer or workstation
  - Review the contents of emails or instant messages when received on a work computer or workstation.
  - Listen to an employee's phone calls at work.
  - Monitor use of employer-provided mobile phones or devices.
  - Implement video monitoring on the premises, with some exceptions (i.e. bathrooms or locker rooms).
  - Use GPS devices to track employees in company-owned vehicles.
  - Open mail addressed to employees at the workplace.

VORYS

Challenge #1: Limits of Employer Monitoring of Employees (cont'd)

- Limits of monitoring:
  - 4th Amendment to Constitution
  - Collective Bargaining Agreements
  - Stored Wire Electronic Communications and Transaction Act
  - Internet Privacy Protection Act
  - State Law
- Best Practices:
  - Have a policy
  - Have a justification for monitoring
  - Be reasonable

VORYS

Challenge #2: Protecting Privacy of Employee Medical Records

Employers may be subject to a patchwork of privacy laws which could dictate how they must treat employee medical records.

- Americans with Disabilities Act ("ADA")
- Family Medical Leave Act ("FMLA")
- Fair Credit Reporting Act ("FCRA")
- Health Insurance Portability and Accountability ACT ("HIPAA")

VORYS

Challenge #2: Protecting Privacy of Employee Medical Records (cont.'d)

Recommendations:

- Keep employee medical records in a separate file from employee personnel records.
- Store employee medical records in locked filing cabinets.
- Implement policies regarding authorized disclosures of employee medical records
- Train HR staff regarding their obligations to protect the confidentiality of employee medical records.

VORYS

Challenge #3: Drug Testing Policies After the Legalization of Marijuana

- Should employers continue to test for marijuana use after it has been legalized in some form in the majority of
- Federal law – marijuana use is still illegal
- BUT more than 33 states have legalized marijuana for medical purposes and 11 states have legalized it for recreational use.
- Employers should do a careful state by state analysis as they implement their policies:
  - Some states provide protections for users especially for registered medical marijuana users
  - Some states provide no protections and require no accommodations for use.

VORYS

Challenge #3: Drug Testing Policies After the Legalization of Marijuana (cont'd)

Americans With Disabilities Act ("ADA"):

- Courts have consistently found that the ADA does not shield an employee from adverse employment actions if they are using marijuana to treat a disability, even where the employee is using medical marijuana under the supervision of a licensed health care professional.
- The ADA explicitly exempts from its scope the "illegal use of drugs." This includes any substances that are unlawful under the federal Controlled Substances Act, which still lists marijuana as a banned substance. As a result, employers can terminate an employee who tests positive for marijuana—even if that employee is disabled, prescribed medical marijuana and only uses marijuana on his or her own time—and avoid risking liability under the ADA.

State Law:

- Employers should be aware that state disability claims often differ significantly from the ADA, and employers could be held liable under state law for failing to accommodate an employee who is treating a disability with medical marijuana.
- In Ohio, an employer is not required to accommodate an employee's use or possession of medical marijuana. O.R.C. § 3796.01, et seq.

VORYS

Challenge #3: Drug Testing Policies After the Legalization of Marijuana (cont'd)

Recommendations:

- Define the terms "marijuana," "cannabis" or any other derivation of the drug. Simply prohibiting the use of "illegal drugs" can create ambiguity because of marijuana's legal status in various jurisdictions.
- State explicitly that the use of marijuana, whether recreationally or on the job, is strictly prohibited.
- Articulate drug-testing policies and procedures, including penalties for failing a drug test.
- Educate employees on clinical issues relating to marijuana.
- Include the written policy in recruiting and new-hire onboarding materials.
- Ensure that your drug testing program is always administered in a consistent manner.

VORYS

Challenge #4: Can Employers Lawfully Inquire Into an Employee's Pay History?

During the application/interview process, many employers historically asked for a "salary history."

Traditionally, a salary history typically included the name of a former employer, former job title, and past salary and benefits.

Salary history is different from salary requirement which generally is asking a job applicant about their salary expectations for the new job.

VORYS

Challenge #4: Can Employers Lawfully Inquire Into an Employee's Pay History? (Cont'd)

This question is now often **prohibited as part of new pay equity laws designed to help close the pay gap by preventing future salaries from being based on past ones.

- Massachusetts became first state to prohibit employers from asking about salary history in hiring in 2016.
- 14 other states and territories now have restrictions in place curtailing such inquiries, including Alabama, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, New Jersey, New York, Oregon, Puerto Rico, Vermont, and Washington.
- Several other states, including Michigan, North Carolina, Pennsylvania, and Virginia have provisions in place regarding candidates for jobs with state agencies.

VORYS

Challenge #4: Can Employers Lawfully Inquire Into an Employee's Pay History? (Cont'd)

- In addition, the cities of San Francisco, New York, Kansas City, Cincinnati, Toledo, and Philadelphia, as well as the counties of St. Louis, Missouri and Albany, New York, all have regulations in place curtailing the practice of asking about salary history by most employers.
- Several other municipalities including Chicago, Atlanta, Pittsburgh, Salt Lake City, New Orleans, and Louisville prohibit city agencies from making inquiries about the salary history of job candidates.

VORYS

Challenge #5: Acquisition and Use of Employee Biometric Data

Biometric data:

Measurements of a person's physical being for a variety of identification purposes, such as to provide security for the financial transactions of their customers or for tracing work hours of their employees. This data includes fingerprints, retina or iris scans, voiceprints or scans of hand or face geometry.

Collection and use of biometric data is governed by state law.

VORYS

Challenge #5: Acquisition and Use of Employee Biometric Data (cont.'d)

Recommendations:

- Employers should provide written notice to employees and obtain written consent before collecting, using or storing biometric data. The notice should describe the type of biometric data that is being collected, the specific purpose of the collection, and the time period during which the biometric data will be collected, used and stored.
- Employers should consider developing and implementing a policy about the retention and disposal of biometric data.
- Employers should protect the biometric data collected in at least the same manner as other sensitive and confidential information. For example, employers should use reasonable safeguards, such as encryption, in the storage or transmittal of this information.
- Employers should establish safeguards against the sale, lease or sharing of the biometric data that they collect from their employees.
- Employers who use third parties to collect and store biometric data should include these third parties in the notice and consent provided to employees and ensure that the third parties follow appropriate standards of security.

VORYS

Challenge #6: Duty of Care in Storage of Personally Identifiable Information

- PII is any data that could potentially identify an individual, including SSNs, names and addresses.
- All 50 states and D.C. have a law in place requiring individual and/or government agencies to notify employees of security breaches of PHI.
- Some states expressly limit and/or prohibit the use of all or part of a social security number as a computer password or employee ID.
- Some states also limit whether a social security number can be used on an itemized wage statement.

VORYS

Challenge #7: Cybersecurity Challenges

Cybersecurity threats to data continues to rise each year.

Businesses which do not adequately address these cybersecurity risks could lose sensitive employee and company data, risk significant interruption to their business, and are likely to be the subject of regulatory enforcement as well as costly class action litigation.

Every employer should have a robust information governance plan, which includes the following:

- Inventories the businesses confidential/sensitive/proprietary data, including where it resides and who has access to it.
- Inventories the businesses entire computer network including all devices (computers, routers, mobile devices, copiers, etc.) which connect or otherwise interface with the network.
- Periodic risk assessment which identifies and mitigates vulnerabilities and risks to data as well as a plan to mitigate these risks.
- Employee security awareness training.

VORYS

Challenge #7: Cybersecurity Challenges (cont.'d)

Biggest Cyber Risks for Businesses:

1. Employees
2. Passwords
3. Patch Management
4. Your Business Partners
5. BYOD

VORYS

Challenge #8: Providing Clear and Conspicuous Notice Under the Federal Fair Credit Regulating Act

- The Fair Credit Reporting Act is a federal law that helps to ensure the accuracy, fairness and privacy of the information in consumer credit bureau files. It regulates the way credit reporting agencies can collect, access, use and share the data they collect in your consumer reports.
- An employer must notify its employees if it intends to check their credit and must get their written permission. The Fair Credit Reporting Act requires the notice to be "clear and conspicuous" and not mixed in with other language.

VORYS

Challenge #9: Applicability of New Privacy Laws

Employers must be aware of constantly changing patchwork of data privacy and security laws being enacted throughout the United States that are potentially applicable to their operations:

- GDPR, May 2018
- California Consumer Privacy Act, January 2020
- Others to follow: Nevada (May 2019), New York (March 2020)
- Others that failed: Texas and Washington
- Federal Privacy Law?

VORYS

Challenge #10: Employee Privacy During a Pandemic

The COVID-19 outbreak presents challenging medical privacy issues for employers.

Employers must attempt to balance:

(1) Employee privacy rights (HIPAA and ADA) and

(2) The need to maintain a safe and healthy workplace (OSHA).

VORYS

Challenge #10: Employee Privacy During a Pandemic (cont'd)

Most Common Issues:

1. What information can an employer ask an employee about a potential COVID-19 exposure?
2. Can an employer require an employee to undergo temperature checks prior to returning to work?
3. Can an employer require an employee to undergo a COVID-19 test?
4. Does HIPAA govern employee COVID-19 information collected from employees?
5. Can an employer disclose to its workforce that an employee has tested positive for COVID-19?
6. How does sick leave or FMLA leave apply to employees who have tested positive or otherwise self-quarantine?

VORYS

Challenge #10: Employee Privacy During a Pandemic (cont'd)

Recommendations:

- Employers can require employees to self-report any COVID-19 positive test or the fact they the employee has symptoms.
- Employers should contact any co-employees, vendors, or customers who might have been exposed to this employee to alert them to potential exposure.
- Employers should NOT obtain any COVID-19 information about their employees from their health plan.
- Employers should maintain the confidentiality of any individual employee COVID-19 information, and only disclosed as permitted under the ADA.
- Employers can provide limited information to their workforce that an employee has tested positive. Employers should NOT identify the employee.

VORYS

QUESTIONS?

VORYS

THANK YOU!

Lisa Pierce Reisz

Vorys, Sater, Seymour and Pease LLP
614.464.8353 | lpreisz@vorys.com

VORYS

Chapter 7: Everything You Wanted to Know about Damages and Other Relief in the Handling of Employment Cases

Fred M. Gittes, Esq.
The Gittes Law Group
Columbus, Ohio

Pamela S. Krivda, Esq.
Taft Stettinius & Hollister LLP
Columbus, Ohio

Separate materials for this chapter will be available as a handout at www.ohiobar.org/handouts.