KEYNOTE

LABOR IN POP CULTURE, BY SARAH FOWLER: CLE MATERIALS

SAG-AFTRA 2023 STRIKE

OVERVIEW/HISTORY

The 2023 SAG-AFTRA strike was a pivotal event in Hollywood, addressing emerging challenges in the entertainment industry. From July 14 to November 9, 2023, the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) engaged in a strike against the Alliance of Motion Picture and Television Producers (AMPTP). This action coincided with the Writers Guild of America (WGA) strike, marking the first simultaneous walkout by actors and writers since 1960. The primary issues at stake included:

- **Streaming Residuals**: Actors sought fair compensation for content distributed on streaming platforms, addressing the industry's shift from traditional media.
- **Regulation of Self-Tape Auditions**: Concerns arose over the growing practice of self-tape auditions, with calls for standardized guidelines to protect performers.
- **Artificial Intelligence (AI) Usage**: The potential for studios to use AI to digitally recreate actors' performances without consent or compensation prompted demands for protective measures.

OUTCOME

After 118 days, a tentative agreement was reached on November 8, 2023, and ratified on December 5, 2023. Key provisions of the new contract included:

- **Wage Increases**: Immediate raises of 11% for background actors and 7% for other performers.
- **AI Protections**: Measures to prevent unauthorized digital replication of actors' performances, ensuring consent and compensation.
- **Streaming Residuals**: Revised formulas to provide equitable residual payments for content on streaming platforms.

IMPACT

The strike's effects were multifaceted:

- **Economic**: The entertainment industry faced an estimated $5 billion in losses nationwide, with significant economic challenges for workers.
- **Legislative**: The strike spurred legislative action in California, leading to laws protecting actors from unauthorized AI-generated replicas, even posthumously.
- **Industry Practices**: The dispute highlighted the need for updated industry standards, influencing ongoing negotiations, such as the video game performers' strike over AI protections.

UNIONS, CULTURE, & THE AMERICAN LABOR MOVEMENT

The historical and current cultural representation of labor unions significantly shapes public perception and membership trends. Despite recent high public approval for unions, the proportion of workers in unions has been declining for decades. One less-discussed factor contributing to this decline may be the virtual absence of positive portrayals of unions in culture and structures connecting people to unions.

Historically, portrayals of unions in popular culture have often been negative. Early depictions focused on organizers as "outside agitators," such as in the 1914 film The Strike. By the 1950s, the dominant trope shifted to union leaders as corrupt, exemplified by films like On the Waterfront (1954), the second season of The Wire (2003), and biopics about Jimmy Hoffa, such as Hoffa (1992) and The Irishman (2019). More recently, unions have been portrayed as ineffectual or greedy forces that harm businesses, as seen in the documentary Waiting for Superman (2010). These negative stereotypes often echo the messages used by union avoidance consultants.

As union density declined, especially in the 1970s, cultural portrayals of unions dwindled. While some positive representations exist in movies like Norma Rae (1979), Newsies (1992), Bread and Roses (2000), and Sorry to Bother You (2018), and in one-off episodes of TV shows, the majority of these are over 20 years old. Even shows attempting realism, like Superstore (2015–2021), while depicting workplace injustices and unionization attempts, did not often show successful outcomes for workers standing up for themselves.

These sparse and often negative representations contribute to the perception of unions as being only for blue-collar factory workers or as relics of the past. This can lead to a situation where people hold a generally positive view of unions but are not interested in joining one themselves. The lack of prominent positive portrayals in mass culture means that fewer communities identify with unions, and fewer people have strong family histories with union membership as older generations pass away. This makes mass culture, including social media, even more crucial in shaping ideas about unions.

By contrast, the right wing has successfully engaged on a cultural level, addressing people's desires for meaning and community. The left needs to similarly focus on cultural representations that show how collective labor action can satisfy these deeper human needs, beyond just raising wages and improving working conditions.

To rebuild a strong labor movement, it is important to focus on cultural representations that inform how workers think about unions. Positive portrayals of successful unionization efforts and the community and purpose that union membership can provide are needed in mass culture, such as movies and TV shows, as well as through investment in labor podcasts, YouTubers, and TikTokers. Furthermore, grassroots worker-to-worker organizing can also serve to change perceptions and build solidarity.

Replacing old, negative images with new and optimistic ones through cultural messages and fostering grassroots connections could help direct people's longing for community, agency, and understanding toward unions as part of the solution.

LABOR PROPAGANDA IN FILM & COURTS

NLRB's Initial Stance:

- In its early rulings, the NLRB initially took a restrictive view of employer speech during organizing campaigns. While this evolved to permit non-coercive statements, the Board viewed movies, like "...And Women Must Weep," as particularly powerful tools for influencing attitudes.
- The NLRB first directly addressed the film in the 1962 Plochman and Harrison - Cherry Lane Foods, Inc. case. The Board ruled that showing the film on the eve of an election constituted misrepresentation that exceeded permissible campaign propaganda and interfered with the election, ordering a new vote. The Board emphasized the film's potential impact and the lack of time for union rebuttal.
- This restrictive view continued in the 1963 *Carl T. Mason Co., Inc.* decision, where the Board again set aside an election, finding that the film reinforced the employer's anti-union message and jeopardized "proper laboratory conditions" for a free election. Chairman McCulloch, in a concurring opinion, argued that the film itself exceeded allowable limits of speech due to its emotionally overpowering and biased nature.
- In subsequent cases like 1966 *Southwire Company* and *1967 Hawthorn Co.*, the NLRB found the showing of the film to be an unfair labor practice under Section 8(a)(1) of the Labor-Management Relations Act, often citing the circumstances of its presentation and a demonstrated anti-union animus.

Courts' Divergent View:

- The courts, particularly the Circuit Courts of Appeals, consistently held a more permissive view of employer speech, emphasizing the protections afforded by Section 8(c) of the Taft-Hartley Amendments, which allows the expression of views without constituting an unfair labor practice unless it contains a threat of reprisal or force or promise of benefit.
- In the 1967 review of *Southwire Co.*, the Fifth Circuit Court overturned the NLRB, finding no evidence that the film misrepresented facts or contained an employer threat of reprisal or force. The court specifically rejected the idea that the film's emotional impact alone was grounds for limitation.
- The Eighth Circuit Court followed suit in the 1969 review of *Hawthorn Co.*, upholding the Board's order except for the finding that the film constituted coercion. The court analyzed the film's content itself and found that it depicted union violence, not threats by the employer. The court was unwilling to assume employees would interpret the consequences shown as resulting from employer actions.
- This pattern of the courts overturning the NLRB's findings regarding "And Women Must Weep" continued in cases like the 1970 Eighth Circuit review of *Kellwood Company* and the 1971 Second Circuit review of *Luxuray of New York*. The courts consistently found that the film, even with introductory remarks, did not constitute an explicit or implied threat by the employer and was protected as employer opinion or propaganda, especially when unions had the opportunity to present a rebuttal.

Evolution Towards Convergence:

- Beginning around 1973, the NLRB started to retreat from its strong stance against the film.
- In the 1973 *Hawesville Rolling Mill* case, the Board rejected the Regional Director's recommendation to set aside an election based solely on the film's showing.
- This shift became clearer in the 1973 *Heckethorn Manufacturing Co.* decision, where a Board panel disagreed with the Administrative Law Judge's finding that the film was a separate violation or grounds for setting aside the election.
- The explicit reversal of the NLRB's prior position occurred in the 1974 *Litho Press of San Antonio* decision. In a three-to-two ruling, the majority of the Board, citing Hawesville and Heckethorn, concluded that showing "And Women Must Weep" was neither a violation of the Act nor a sufficient basis for setting aside an election, explicitly overruling all prior decisions inconsistent with this conclusion.

SOURCES

SAG-AFTRA 2023 STRIKES

- Dani Anguiano, *Sag-Aftra Union Ratifies Strike-Ending Contract with Hollywood Studios*, The Guardian (Dec. 5, 2023), https://www.theguardian.com/culture/2023/dec/05/sag-aftra-union-ratifies-contract-hollywood-studios.
- Chris Murphy, *Influencers Have Their Own Guidelines to Follow for the SAG Strike*, Vanity Fair (July 17, 2023), https://www.vanityfair.com/hollywood/2023/07/influencers-have-their-own-guidelines-to-follow-for-the-sag-strike.
- CT Jones, *The Actors' Strike Is Already Changing TikTok. Here's How*, Rolling Stone (July 24, 2023), https://www.rollingstone.com/music/music-news/sag-wga-strike-tiktok-creators-1234793550/.

LABOR PROPAGANDA IN FILM & COURTS

- Pichler, Joseph A., & H. Gordon Fitch, *And Women Must Weep: The NLRB As Film Critic*, ILR Rev. 28, no. 3 (1975): 395–410. https://doi.org/10.2307/2522011.
- Thomas G. Field Jr., Juanita V. Field, *And Women Must Weep v. Anatomy of a Lie: An Empirical Assessment of Two Labor Relations Propaganda Films*, 1 Pepp. L. Rev. Vol. 1 (1973).

UNIONS, CULTURE, & THE AMERICAN LABOR MOVEMENT

- Valerie Ettenhofer, *The Daily Stream: Superstore Blends Romance, Bold Class Commentary, and Wacky Workplace Humor*, SlashFilm (Sept. 7, 2023), https://www.slashfilm.com/1110447/the-daily-stream-superstore-blends-romance-bold-class-commentary-and-wacky-workplace-humor/.
- Jenny Hunter, *Labor Culture Beyond Jimmy Hoffa Movies*, The American Prospect (June 13, 2024), https://prospect.org/sponsored/thegoodlife/2024-06-13-labor-culture-beyond-jimmy-hoffa-movies/.
- Clyde W. Summers, *Some Historical Reflections on Landrum-Griffin*, 4 Hofstra Lab. & Emp. L.J. 1 (1987).

PANEL 1

ARTIFICIAL INTELLIGENCE SHIFTING PROTOCOLS: CLE MATERIALS

REGULATION AND GOVERNANCE OF ARTIFICIAL INTELLIGENCE IN EMPLOYMENT

OPINION

Artificial intelligence can make hiring more inclusive, but regulation is necessary

Artificial intelligence can be used to create job descriptions and ads that are more inclusive.

By **JAMES COOPER** and **KASHYAP KOMPELLA**

UPDATED: April 27, 2023 at 12:50 AM PDT

"Artificial intelligence can make hiring more inclusive, but regulation is necessary." This article addresses the increased use of artificial intelligence (AI) in hiring processes and the potential benefits and risks associated with it. This article offers a timely and relevant snapshot of the challenges and regulatory responses surrounding the use of AI in hiring, making it important for understanding the practical implications.

Key understandings:

- Illustrates the practical application and potential pitfalls of AI in a crucial area of employment: hiring
- Emphasizes the growing importance of AI regulation in the employment context
- Underscores the need for transparency and accountability in AI systems

Source

James Cooper & Kashyap Kompella, *Artificial intelligence can make hiring more inclusive, but regulation is necessary*, The San Diego Union-Tribune, (Apr. 27, 2023, 12:50 AM), https://www.sandiegouniontribune.com/2023/04/26/artificial-intelligence-can-make-hiring-more-inclusive-but-regulation-is-necessary/.

EU LAW AND DIGITALISATION OF EMPLOYMENT RELATIONS by: Iacopo Senatori

INTRODUCTION: DIGITAL TRANSFORMATION OF THE WORLD OF WORK AND EU LAW'S REGULATORY COMPETENCE

This paper begins by establishing that the relationship between technological transformation and employment relations falls within the regulatory competence of the European Union. More broadly, the paper argues that the changed employment and organizational patters resulting from enabling technologies in workplaces cut across EU labour law, including fundamental rights and economic freedoms, potentially rendering the current EU *acquis* inadequate.

STATE OF THE ART IN EU LAW AND POLICY

The EU regulatory framework presents an ambivalent approach to protecting the rights of "digital workers." This category is used for simplification, acknowledging the diversity of situations. On one hand, instruments like non-discrimination law and information and consultation rights possess strong potential to address the needs arising from new organizational and contractual arrangements. These may gain central systemic roles. On the other hand, rules based on concepts misaligned with digitalisation, such as the Working Time Directive, pose challenges. Antitrust law, until recent developments, had also threatened collective bargaining rights for increasing sectors of the workforce. A key question is whether the unavoidable influence of EU law on technological transformation will be a booster or a brake for the quality of working conditions.

OUTLINE/OVERVIEW

This paper highlights the EU's multi-faceted approach to addressing the challenges and opportunities of digitalisation in the realm of employment relations. The paper analyzes existing legal instruments, discusses recent policy initiatives, and proposes a framework for understanding the evolving landscape of EU labour law in the digital age.

Source:

Iacopo Senatori, *EU Law and Digitalisation of Employment Relations, in* Decent Work in the Digital Age. European and Comparative Perspectives, 57-81 (T. Gyulavàri, E. Menegatti eds., 2022).

ARTIFICIAL INTELLIGENCE IN LABOR DISPUTE RESOLUTION

This presentation will compare and contrast the way artificial intelligence is being used in labor and employment disputes in the two countries. Richard Bales & Wenwen Ding, *Using AI in Arbitrating Labor & Employment Disputes in China and the U.S.*, 56 Cal. W. Int'l L.J. (forthcoming 2025). The entire PowerPoint presentation will be made available to attendees.

PANEL 2

SOCIAL MOVEMENTS & WORKPLACE INCLUSION: CLE MATERIALS

HOME DEPOT USA, INC. & ANTONIO MORALES

CASE OVERVIEW

The National Labor Relations Board (NLRB) ruled on February 21, 2024, that Home Depot violated the National Labor Relations Act (NLRA) by constructively terminating an employee, Antonio Morales, for refusing to remove “BLM” initials from his required work apron. The NLRB determined that his display of “Black Lives Matter” was a form of protected concerted activity (PCA) under Section 7 of the NLRA because it was tied to employee complaints about workplace racial discrimination.

Morales and other employees had repeatedly raised concerns about a co-worker’s discriminatory behavior and the vandalism of Black History Month materials at their store. Morales argued that his display of “BLM” was in response to these issues and aimed to support employees of color. Home Depot enforced its dress code, which banned political messages unrelated to workplace matters, and told Morales he could not work unless he removed the initials. Morales refused and ultimately resigned.

The NLRB found that Home Depot unlawfully applied its policy in a way that interfered with Morales’ Section 7 rights. The Board ordered Home Depot to cease unfair labor practices, reinstate Morales, and provide back pay and compensation for tax consequences. Home Depot may appeal the ruling in federal court.

IMPACT

This decision underscores the limits of employer control over workplace speech, particularly when it relates to working conditions. While companies may regulate certain types of speech, such as obscenities or political statements unrelated to the workplace, this ruling clarifies that expressions tied to workplace conditions—including racial discrimination concerns—are protected under the NLRA. Employers should carefully assess how they enforce dress codes and other policies to avoid unlawfully restricting employees’ rights to collective action.

Source

Home Depot USA, Inc., and Antonio Morales, 373 N.L.R.B. No. 25 (2024).

DIEMERT V. CITY OF SEATTLE

CASE OVERVIEW

Joshua Diemert, a white employee of the City of Seattle, sued the City, alleging that its Diversity, Equity, and Inclusion (DEI) program created a hostile work environment and discriminated against him based on race. He argued that workplace policies, including race-based affinity group trainings, violated his rights under the Equal Protection Clause and Title VII.

In August 2023, the court allowed some of Diemert's claims to move forward, ruling that he had a plausible Equal Protection claim regarding the City's training policies and a potential hostile work environment claim. However, it dismissed other claims due to the statute of limitations.

In August 2024, the City moved for summary judgment, contending that Diemert had not been penalized and had voluntarily resigned. Diemert countered that material facts remained in dispute, thus warranting a trial. On February 10, 2025, the district court ruled in favor of the City, finding that its DEI initiatives were not inherently discriminatory against white employees and that Diemert's claims lacked sufficient factual support to establish a hostile work environment.

IMPACT

This decision reinforces that DEI programs aimed at addressing racial inequities do not automatically constitute discrimination against dominant groups. The court emphasized that addressing systemic racial disparities in the workplace is a legitimate effort, rather than a violation of Equal Protection rights. This ruling may serve as precedent in future challenges to DEI initiatives, particularly in workplaces navigating legal scrutiny over diversity programs.

While this ruling favors employers implementing DEI strategies, it also signals that courts will still assess claims of workplace hostility on a case-by-case basis. Employers should ensure that DEI policies are structured to withstand legal challenges by avoiding coercive participation or policies that could be perceived as exclusionary.

Source

Diemert v. City of Seattle, No. 2:22-cv-1640, 2024 U.S. Dist. LEXIS 120326 (W.D. Wash. Feb. 10, 2025).

PALSGAARD V. CHRISTIAN

CASE OVERVIEW

In response to a lawsuit from the Foundation for Individual Rights and Expression (FIRE), the California Community Colleges system and a local district affirmed in court that faculty members are not required to endorse or teach state-mandated Diversity, Equity, Inclusion, and Accessibility (DEIA) views in the classroom.

The lawsuit, filed in August 2023, challenged new tenure and evaluation policies requiring faculty to incorporate DEIA and anti-racist principles into their teaching. Six Fresno-area community college professors opposed these requirements, arguing they imposed a political ideology on their instruction.

During litigation, the state chancellor and district disavowed any intent to penalize faculty for not adopting DEIA viewpoints, confirming that professors could teach their courses without fear of discipline for presenting alternative perspectives. Relying on these assurances, U.S. District Judge Kirk E. Sherriff dismissed the case on January 28, 2025, ruling that because faculty were not being forced to conform to a specific ideology, they had not suffered a legal harm sufficient to challenge the regulations.

IMPACT

This ruling reinforces the principle that academic freedom protects professors from being compelled to promote specific political or ideological viewpoints. While DEI policies remain a contentious issue in higher education, the court's decision clarifies that such policies cannot be enforced in a way that mandates ideological conformity.

The case also reflects a broader national trend, as universities such as Harvard, MIT, and the University of Michigan have recently moved away from requiring faculty to pledge commitment to DEI in hiring and promotion. FIRE and other academic freedom advocates view this outcome as a safeguard against potential viewpoint discrimination in public higher education. However, continued scrutiny is likely, as FIRE has pledged to monitor whether institutions uphold their commitment to faculty free speech rights.

Source:

Palsgaard v. Christian, No. 1:23-cv-01228-KES-CDB, 2025 U.S. Dist. LEXIS 15043 (E.D. Cal. Jan. 27, 2025).

AMAZON.COM SERVICES LLC & DANA JOANN MILLER & AMAZON LABOR UNION

CASE OVERVIEW

On November 13, 2024, the National Labor Relations Board (NLRB) issued a major ruling that prohibits employers from requiring workers to attend meetings where they discuss unionization. This decision, which arose from a case involving Amazon.com, marks a major departure from over 75 years of precedent. Moving forward, employers can no longer hold these mandatory "captive audience" meetings.

Historically, a 1948 NLRB decision in *Babcock & Wilcox Co.* allowed employers to conduct mandatory meetings about union organizing, as long as they did not threaten or coerce employees. These meetings became a common tool for employers during union campaigns. However, in the Amazon case, the NLRB overturned this precedent, determining that requiring employees to attend such meetings violates their rights under the National Labor Relations Act (NLRA).

The Board found that forcing employees to listen to an employer's views on unionization under the threat of discipline or termination created an environment of coercion. The decision also established a new standard: employers may only discuss union-related topics with employees during work hours if attendance is completely voluntary, employees are notified in advance, and the employer does not track attendance.

IMPACT

This ruling significantly shifts labor law in favor of workers by restricting a key employer strategy during union campaigns. It strengthens employee rights to make independent decisions about union representation without undue pressure. Additionally, it limits how employers can communicate their stance on unionization in the workplace.

The decision may not remain in place permanently, as political changes could impact the NLRB's direction. While the Board operates independently, a new presidential administration could influence future rulings. Legal challenges are also expected, with Amazon planning to appeal, arguing that the decision violates employers' First Amendment rights. Beyond federal changes, employers must also be aware of state laws that already restrict captive audience meetings.

Source:

Amazon.com Services, LLC, Dana Joann Miller, & Amazon Labor Union, 373 N.L.R.B. No. 136 (2024).

KEYNOTE

WHEN COMPENSATED LABOR ISN'T EMPLOYMENT, BY KIT JOHNSON: CLE MATERIALS

THE LLC SOLUTION FOR THE UNAUTHORIZED NONCITIZEN WORKFORCE

OVERVIEW/HISTORY

The business entity formation–such as the use of limited liability companies–has the potential to not only expand opportunities for undocumented immigrants but also to significantly benefit the U.S. economy. This discussion seeks to introduce immigration scholars and lawyers to concepts of business entity formation that can radically change the lives of undocumented persons in the United States and introduce corporate scholars and lawyers to the ways in which their work can intersect with immigration law to effect social and economic change.

OUTCOME

The intended outcome of this paper is to demonstrate that the strategic use of business entities, particularly limited liability companies (LLCs), can lead to several positive outcomes for undocumented migrants and the U.S. economy.

IMPACT

Goal is to:

- Expanded lawful work opportunities for undocumented migrants - forming business entities, undocumented individuals can work without directly triggering employer sanctions under IRCA
- Improved working conditions and economic well-being for undocumented workers - business entities can shield undocumented workers from exploitation such as low wages, hazardous conditions, and wage theft
- Increased economic benefits for the U.S. - higher tax revenue, job creation, and revitalization of neighborhoods, etc.
- Unlocking untapped entrepreneurial potential - providing a pathway for lawful work through business ownership could simulate greater entrepreneurial activity

Overall, facilitating the formation of business entities by undocumented migrants has the potential to be a significant step towards providing lawful work, improving their lives, and generating substantial benefits for the U.S. economy.

Source:

Kit Johnson, Lawful Work While Undocumented: Business Entity Solutions (March 1, 2022). 64 Arizona L. Rev, 89 (2022).

Presentation will be made available to all attendees. Professor Kit Johnson has publication forthcoming in California Western School of Law's International Law Journal.

PANEL 3

MODERN-DAY LABOR ACTIVISM: CLE MATERIALS

LEVERAGING CONSUMER LAW TO PROTECT WORKERS' RIGHTS

THE NEW NONCOMPETE: THE TRAINING REPAYMENT AGREEMENT PROVISION (TRAP) AS A SCHEME TO RETAIN WORKERS THROUGH DEBT

"There's a good chance that, over the past couple of years, you've considered quitting your job. One thought that probably crossed your mind was whether you could afford it. But what if you took the plunge, as tens of millions of workers have done since the beginning of the pandemic? You may have planned for other ways to cover housing costs, food, medical needs, ongoing loan payments, and perhaps childcare. But imagine, after your careful planning, receiving a letter that says you owe your former boss thousands of dollars for quitting. That's exactly what happened to BreAnn Scally after leaving her grooming job at a Salinas, California PetSmart because of unsustainable working conditions."

Source:

Jonathan Harris, *The New Noncompete: The Training Repayment Agreement Provision (TRAP) as a Scheme to Retain Workers Through Debt*, Nw. U. L. Rev. Online (2022), https://blog.northwesternlaw.review/.

For the full article, please visit: Https://Blog.Northwesternlaw.Review/?P=2730

GLACIER NORTHWEST, INC. V. TEAMSTERS

CASE OVERVIEW:

Glacier Northwest, a concrete company, experienced a work stoppage by its truck drivers, who are members of the International Brotherhood of Teamsters Local Union No. 174, after their collective-bargaining agreement expired. The strike occurred while Glacier was in the process of mixing substantial amounts of concrete and making deliveries. The Union directed drivers to ignore Glacier's instructions to complete deliveries.

RULING:

The Supreme Court reversed the Washington Supreme Court's decision, holding that the NLRA did not preempt Glacier's tort claims.

The Court reasoned that while the NLRA protects the right to strike, this right is not absolute. The National Labor Relations Board has long held that the NLRA does not shield strikers who fail to take "reasonable precautions" to protect their employer's property from foreseeable, aggravated, and imminent danger due to a sudden work stoppage.

IMPORTANCE/IMPACT:

The Supreme Court's decision clarifies that the NLRA does not necessarily preempt state tort claims related to property destruction during a strike if the union fails to take reasonable precautions to prevent foreseeable and imminent harm to the employer's property, especially when the strike is conducted in a manner that appears designed to cause such harm.

SOURCE:

Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174, 598 U.S. 771 (2023).

History Absolves the FTC: A Defense of the Rule on Non-Competes and Functional Non-Competes

JONATHAN F. HARRIS

“The Federal Trade Commission’s (FTC’s) Non-Compete Clause Rule (the “Rule”), finalized in spring 2024, effectively bans all non-compete effects on labor markets. The FTC issued the Rule under its Unfair Methods of Competition (UMC) authority under Section 5 of the FTC Act. Employers and their trade groups immediately filed legal challenges, and the Rule was subsequently enjoined by two federal judges but upheld by a third. The injunctions were generally based on disagreement with the FTC’s ability to issue substantive rules and on the major questions doctrine. This blog post offers a historical overview of FTC actions to argue that the injunctions were improper, especially with regard to the Rule’s prohibition of ‘functional’ non-competes that operate to prohibit or penalize workers for obtaining other work.”

This article notes that employers and trade groups immediately challenged the Rule, and it was subsequently enjoined by two federal judges but upheld by a third. Harris argues that the injunctions were improper, particularly concerning the Rule’s prohibition of “functional” non-competes that operate to prohibit or penalize workers for obtaining other work.

SOURCE:

Jonathan F. Harris, *History Absolves the FTC: A Defense of the Rule on Non-Competes and Functional Non-Competes,* Harv. L. Rev. Online, (2025) (https://harvardlawreview.org/blog/2025/01/history-absolves-the-ftc-a-defense-of-the-rule-on-non-competes-and-functional-non-competes/).

EMPLOYER ANTI-UNION CAMPAIGNS

NLRB
National Labor
Relations Board

Board Issues Decision Announcing New Framework for Union Representation Proceedings

August 25, 2023

Today, the Board issued a decision in Cemex Construction Materials Pacific, LLC announcing a new framework for determining when employers are required to bargain with unions without a representation election. The new framework will both effectuate employees' right to bargain through representatives of their own choosing and improve the fairness and integrity of Board-conducted elections.

Under the new framework, when a union requests recognition on the basis that a majority of employees in an appropriate bargaining unit have designated the union as their representative, an employer must either recognize and bargain with the union or promptly file an RM petition seeking an election. However, if an employer who seeks an election commits any unfair labor practice that would require setting aside the election, the petition will be dismissed, and—rather than re-running the election—the Board will order the employer to recognize and bargain with the union.

The Board explained that the revised framework represents an effort to better effectuate employees' right to bargain through their chosen representative, while acknowledging that employers have the option to

The NLRB's CEMEX decision, issued on August 25, 2023, significantly changes the process for union recognition and bargaining obligations under U.S. labor law. Overall, this decision strengthens union rights and makes it harder for employers to resist organizing efforts through delaying tactics or labor law violations.

Source:

Board Issues Decision Announcing New Framework for Union Representation Proceedings, NLRB National Relations Board (Aug. 25, 2023), https://www.nlrb.gov/news-outreach/news-story/board-issues-decision-announcing-new-framework-for-union-representation.

PANEL 4

LEGAL CHALLENGES IN A POST-PANDEMIC WORLD: CLE MATERIALS

WORKPLACE VACCINE MANDATES

During the COVID-19 pandemic, many employers, especially in healthcare, implemented mandatory workplace vaccination policies. While the EEOC has stated that such mandates are generally lawful, employers must accommodate employees with bona fide medical concerns under the Americans with Disabilities Act (ADA) and sincerely held religious beliefs under Title VII of the Civil Rights Act of 1964.

Medical Exemptions (ADA):

- Employees claiming a medical disability prevents vaccination must provide medical evidence of their condition and the risks associated with the vaccine.
- Employers are required to engage in an interactive process with the employee to explore potential reasonable accommodations that would allow them to perform their essential job functions without being vaccinated.
- Reasonable accommodations are not required if they pose an undue hardship to the employer.
- The employee is not automatically entitled to their preferred accommodation, such as continued telework.
- If no reasonable accommodation exists and allowing the unvaccinated employee in the workplace constitutes a direct threat to the health and safety of others, termination may be considered, but other leave entitlements should be explored.

Religious Exemptions (Title VII):

- Employees refusing vaccination due to a sincerely held religious belief or practice are entitled to a reasonable accommodation unless it poses an undue hardship on the employer.
- Employers do not have to automatically accept the validity of an employee's claimed religious belief and may request additional supporting information if there is an objective basis for questioning its religious nature or sincerity.
- Under Title VII, undue hardship is defined as more than a de minimis cost or burden on the employer, a less stringent standard than under the ADA. Allowing an unvaccinated employee in the workplace during a pandemic could likely be considered more than a de minimis cost.
- Even if an undue hardship exists, employers should still explore other viable accommodations short of termination, such as teleworking or enhanced safety measures.

Overall Considerations:

- Employers should have clear processes for handling both medical and religious exemption requests, including the requirement for supporting documentation and engaging in an interactive dialogue.
- Consistency and fairness in applying these processes are crucial.
- State laws may also provide additional guidance or limitations on mandatory vaccination policies and the grounds for exemptions.

Regarding a different approach in future pandemics, exhausting voluntary vaccination efforts through education, accessibility, incentives, and respecting informed consent should be prioritized. However, if persistent inadequate immunization coverage poses a significant public health risk, some form of mandatory vaccination policy may again be considered necessary. The decision ultimately rests with local institutions and may be subject to state policies. Preemptive legislation in California could provide clearer guidelines and legal frameworks for handling vaccine mandates and exemption requests during public health crises. This could offer more certainty for employers and employees but would need to carefully balance public health imperatives with individual rights and religious freedoms.

INCREASED EMPLOYEE MONITORING

The pandemic introduced a division among kinds of workers - those deemed essential workers and non-essential. Essential workers were those whose presence in the workplace was generally required. It included workers in the healthcare sector, in food and agriculture, critical retail (grocery stores, hardware stores), and public transportation. Non-essential workers were often those in sectors of the economy that lent themselves to remote work. The increased use of employee monitoring has significant legal implications for employers, including a potential rise in lawsuits.

Several legal risks are associated with these practices:

- **Unfair Labor Practice Charges**: Surveillance of employees engaged in protected concerted activity, such as labor organizing, is legally prohibited under the National Labor Relations Act (NLRA) of 1935. Employers may face unfair labor practice charges if their monitoring uncovers and potentially interferes with these efforts. For unionized workforces, the National Labor Relations Board has held that employers must obtain the union's consent before conducting video surveillance of unionized workers.
- **Employment Discrimination**: Employee monitoring tools, including facial recognition software and smart cushions, can inadvertently reveal an employee's legally protected characteristics like age, sex, race, or disability. This knowledge can then lead to claims of discrimination if adverse employment actions are taken based on these characteristics. Furthermore, monitoring may uncover discrimination or harassment complaints, creating a legal obligation for the employer to investigate and prevent retaliation.
- **Unpaid Wages and Overtime**: Monitoring software that doesn't accurately account for all working time, such as time spent away from the computer reading documents or on phone calls, can lead to unpaid wage and overtime claims for nonexempt employees working over 40 hours a week. In recent case, *DrinkPAK LLC v. Paylocity Corp*., DrinkPAK, a canned beverage manufacturer, sued Paylocity, a cloud-based payroll software company. The lawsuit claims that Paylocity's software caused errors in calculating employees' regular rates of pay for overtime, as well as meal and rest premiums, highlighting the potential risks for company monitoring systems.
- **Workplace Injuries**: Employee surveillance focused on productivity can pressure employees to overwork themselves, potentially leading to workplace injuries. Washington state's Department of Labor and Industries fined a major e-commerce company for "knowingly putting workers at risk of injury," identifying a "direct connection" between employee monitoring software and employees' joint and muscle disorders due to overexertion to meet quotas. This demonstrates the potential for legal repercussions and financial penalties related to the impact of monitoring on employee health.
- **State Privacy Laws:** Varying state laws add another layer of complexity. Only a few states currently have specific legislation requiring notice of monitoring (Connecticut, Delaware, New York). However, states with constitutional rights to privacy (California, Florida, Louisiana, South Carolina) or strict data privacy laws (like the California Consumer Privacy Act) may see increased scrutiny of employee monitoring practices and potential legal challenges. The withdrawn legislation in California (Workplace Technology Accountability Act) indicates a potential future direction for stricter state regulations.

MISCLASSIFICATION ISSUES

During the pandemic, many essential workers in the app-based transportation and delivery sectors, such as Uber, Lyft, and DoorDash drivers, were classified as independent contractors. In California, the passage of Proposition 22 in 2020 further solidified this classification for these gig economy workers. Post-pandemic, the problem of worker classification continues to be a significant issue.

- In California, the California Supreme Court upheld Proposition 22 on July 25, 2024, which means that gig economy businesses like Uber and Lyft can continue to classify their drivers as independent contractors rather than employees. This decision reaffirmed that Proposition 22 does not infringe upon the California Legislature's authority to regulate workers' compensation systems, though the court did not explicitly state whether the Legislature could extend these benefits to app-based workers. This ruling alleviates regulatory uncertainty for gig companies but does not end their regulatory battles.
- Despite the upholding of Proposition 22, the decision leaves open questions about the California Legislature's ability to extend workers' compensation benefits to app-based workers without violating the proposition. Some anticipate further legal challenges and legislative responses in this area.
- Meanwhile, in March 2025, rideshare drivers in California held demonstrations amid ongoing negotiations with Uber and Lyft to settle thousands of claims of wage theft from drivers who allege they were misclassified as independent contractors between 2016 and 2020, prior to the passage of Proposition 22. These drivers estimate being owed tens of billions of dollars in unpaid wages and benefits.
- Nationally, misclassifying workers as independent contractors leads to workers losing critical protections, benefits, and labor rights, including minimum wage, overtime pay, unemployment insurance, the right to form a union, and anti-discrimination protections. They also bear the full financial costs of Social Security and Medicare contributions. It is estimated that significant annual losses in income and job benefits for workers in various occupations due to misclassification.
- Misclassification results in losses to social insurance funds because while the full cost of Social Security and Medicare contributions shifts to the worker, no contributions are made to unemployment insurance and workers' compensation funds by the employer.

Regarding changes to the regulatory approach to misclassification, there are several recommendations for policymakers at the federal, state, and local levels:

- Establish or expand the use of a strong, uniform protective legal test for determining employee status, such as the ABC test.
- Pass the Protecting the Right to Organize (PRO) Act, which aims to make it harder for employers to misclassify employees to prevent unionization.
- Strengthen enforcement of wage theft and misclassification and fully fund the relevant federal and state agencies.
- Require employers to provide workers with transparent statements of their employment status and the justification for their classification.
- Extend basic labor protections (wage and hour, workplace safety, paid sick leave) to independent contractors to discourage misclassification.
- Improve coordination among state and federal tax and labor enforcement agencies by establishing interagency misclassification task forces.

ROMAN V. HERTZ LOCAL EDITION CORP

CASE OVERVIEW

A California federal court ruled that mild, temporary COVID-19 symptoms do not qualify as a disability under the Fair Employment and Housing Act (FEHA). Michelle Roman, a Hertz management associate, experienced fatigue and body aches in September 2020 but initially attributed them to work and exercise. After testing positive for COVID-19, she was terminated for violating company protocols.

Roman sued for disability discrimination under FEHA, arguing her infection should be considered a protected disability. The court disagreed, finding her symptoms were mild, had little to no lasting effects, and did not significantly limit a major life activity. The judge cited California regulations and federal ADA interpretations, concluding that short-term COVID-19 with common cold-like symptoms falls outside FEHA's disability protections.

IMPACT

This case sets an important precedent in California by clarifying that mild and temporary COVID-19 symptoms do not constitute a disability under FEHA. Employers facing similar claims can rely on this decision, which aligns with existing DFEH regulations and federal interpretations of disability law under the ADA. The ruling reinforces that only conditions that substantially limit major life activities qualify as disabilities, ensuring that routine illnesses with minor or short-lived symptoms do not trigger FEHA protections.

SOURCES

WORKPLACE VACCINE MANDATES

- *Ethical Issues in Mandating COVID-19 Vaccination for Health Care Personnel*: Robert S. Olick, et. al., Am. J. Bioethics (2022), https://pmc.ncbi.nlm.nih.gov/articles/PMC8633920/.
- Collin Barnacle, *COVID-19 Vaccination: Key Employment Law Issues,* Nelson Mullins (2022).
- *Disability-Related Remote Work Accommodation Requests – First COVID, Then the Deluge*, Employers' Lawyers Blog (Feb. 2025), https://www.employerslawyersblog.com/2025/02/disability-related-remote-work-accommodation-requests-first-covid-then-the-deluge.html.

INCREASED EMPLOYEE MONITORING

- *Clocking In from Home: Post-COVID-19 Employee Monitoring in the Workplace*, SHRM (Mar. 2023), https://www.shrm.org/topics-tools/research/clock-home-post-covid-19-employee-monitoring-workplace.

MISCLASSIFICATION ISSUES

- Mark S. Spring, *California Supreme Court Upholds Proposition 22: What It Means for Gig Economy Workers and Companies*, California Labor & Employment Law (Feb. 2025), https://www.callaborlaw.com/entry/california-supreme-court-upholds-proposition-22-what-it-means-for-gig-economy-workers-and-companies.
- Micheal Sainato, *California Uber and Lyft Drivers Push for Settlement in Wage Theft Claims*, The Guardian (Mar. 26, 2025), https://www.theguardian.com/us-news/2025/mar/26/uber-lyft-drivers-wage-theft-settlement-california.
- Adewale A. Maye, *Misclassifying Workers as Independent Contractors is Costly for Workers and States*, Economic Policy Institute (Feb. 2025), https://www.epi.org/publication/misclassifying-workers-2025-update/.
- Levi Sumagaysay, *Uber, Lyft, Doordash Workers Remain Contractors due to Caliifornia Supreme Court Ruling*, CalMatters (July 25, 2024), https://calmatters.org/economy/2024/07/prop-22-california-gig-work-law-upheld/?.