LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

Volume 34, No. 4 **Winter 2025**

ISSUE-STATEMENT OPPORTUNITIES

Stuart M. Israel

It "can be said that the most important paragraph in a brief is the first one, in which appears counsel's formulation of the issues presented for decision." Frank E. Cooper, *Writing in Law Practice* (1963) at 77.

The *most* important? At least it can be said that issue-statements—whether required or volunteered—present brief-writers with early opportunities to influence decisionmakers. These opportunities should be taken seriously.

1. What some court rules say.

The Federal Rules of Appellate Procedure require issue-statements. The appellant's brief "must contain" a "statement of the issues presented for review." Fed. R. App. P. 28(a)(5). The appellee must present an alternative "statement of the issue" if "dissatisfied with the appellant's statement." Fed. R. App. P. 28(b)(2).

The Eastern District of Michigan requires that a brief supporting a motion or response "contain a concise statement of the issues presented." L.R. 7.1(d)(2).

Michigan appellants' briefs must contain: "A statement of questions involved, stating concisely and without repetition the questions involved in the appeal." MCR 7.212(C)(5).

Each question "must be expressed and numbered separately and be followed by the trial court's answer to it or the statement that the trial court failed to answer it and the appellant's answer to it." "When possible, each answer must be given as 'Yes' or 'No.'" *Id.*

Michigan appellees' briefs, unless they accept appellants' statements, must contain a "counterstatement of questions involved, stating the appellee's version of the questions involved." MCR 7.212(D)(3)(a).

Michigan's "yes" and "no" issue-statement answer-format, I suppose, is to ensure that judges will be clear on the various litigants' various positions—just in case the positions are unclear despite: **(1)** the litigants' designations as appellants or appellees; **(2)** appellants' "fairly stated" MCR 7.212(C)(6) "clear, concise, and chronological narrative" of "[a]ll material facts, both favorable and unfavorable," as explained by appellants' MCR 7.212(C)(7)-(8) legal-arguments and relief-requests; **(3)** the alternative perceptions and explanations presented in appellees' MCR 7.212(D) counterstatements and legal-arguments; and **(4)** the erudite lower-court decision being appealed as mistaken.

Are "yes" and "no" answers to issue-statements *substantively* necessary? The author answers "no." But some MCR bureaucrat long ago answered "yes."

Typically federal courts do not require "yes" or "no" answers to issue-statements. It seems that federal judges are expected to figure things out from the parties' arguments about what went right or wrong in the lower court. Keep this in mind. Using Michigan's "yes" or "no" format in federal court might communicate your unfamiliarity with federal practice conventions. Unfamiliarity may buy you some grace from your opposition, or from federal judges, but likely not.

Another example: the U.S. Supreme Court requires a statement of "questions presented for review, expressed concisely in relation to the circumstances of the case, without unnecessary detail." Each question "should be short and should not be argumentative or repetitive." Don't worry about being *too* concise: "The statement of any question presented is deemed to comprise every subsidiary question fairly included therein." See R. 14.1(a) and R. 24.1(a).

These "rules of thumb" emerge from the court-rule examples: *First*, you often will *need* to present issue-statements. *Second,* when you do, each statement should be concise, related to the circumstances of your case, and free of unnecessary detail, repetition, and argument.

2. C'mon, are issue-statements *really* that important?

We've all read—and perhaps written—issue-statements that go through the motions.

Some were too general or too detailed or too abstract. Some were too long or too dense. Some were too numerous, or superfluous, or unconnected to the arguments. Some were too complicated and—truth be told—impenetrable, or even unintelligible. Some were last-minute and ill-considered. Many were unilluminating, perfunctory, and useless as advocacy. Many were in the brief only because the rules said they had to be—and because omitting required issue-statements will result in non-compliance, rejection, and refiling notices from the court, which are a pain and to be avoided.

Omission of required issue-statements is rare, but flawed issue-statements are ubiquitous. That might give you the idea that issue-statement quality is not that important. Not so, say some prominent influencers. Issue-statements are *very* important, they say. Indeed, some say that for good or ill issue-statements can be *outcome-determinative*.

(Continued on page 2)

CONTENTS

STATEMENT OF EDITORIAL POLICY

Labor and Employment Lawnotes is a quarterly journal published under the auspices of the Council of the Labor and Employment Law Section of the State Bar of Michigan. Views expressed in articles and case commentaries are those of the authors, and not necessarily those of the Council, the Section, or the State Bar. We encourage Section members and others interested in labor and employment law to submit articles, letters, and other material for possible publication.

John G. Adam, *Editor*
Stuart M. Israel, *Editor Emeritus*

ISSUE-STATEMENT OPPORTUNITIES

(Continued from page 1)

3. What Justice Brennan had to say.

Justice William J. Brennan wrote about his judicial "screening" practice: "In a substantial percentage of cases I find that I need read only the 'Questions Presented' to decide how I will dispose of the case." Justice Brennan's "mere reading of the question presented" would often be enough to demonstrate to him that the question was "clearly frivolous for review purposes" or the question—even though "nonfrivilous"—was "simply not of sufficient national importance to warrant Supreme Court review." "The National Court of Appeals: Another Dissent," 40 *U. Chi. L. Rev.* 473, 477-478 (1973).

Brennan wrote that justices develop a "feel" for identifying which questions are "candidates for review" and which are not. *Id.* at 478. This brings to mind Justice Potter Stewart's earlier "I know it when I see it" standard for recognizing obscenity. I suspect that judges at all levels develop a "feel" that often leads them to quickly distinguish bad issue-statements—and briefs and cases—from good ones.

Brennan's observations reinforce the idea that issue-statements can be *very* important. As Will Rogers, or Oscar Wilde, or some other maven advised everybody—including brief-writers: "You never get a second chance to make a first impression."

4. Scalia and Garner on issue-statements.

Justice Antonin Scalia and Bryan A. Garner, in *Making Your Case—The Art of Persuading Judges* (2008), write that the questions presented "may well be the most important part of your brief." At 83.

Supreme Court Rules 14.1(a) (*cert* petitions) and 24.1(a) (merits briefs) direct: "The questions shall be set out on the first page following the cover, and no other information may appear on that page." Scalia and Garner endorse the Court's possibly-unique placement requirement, adopted in 1981, which puts the questions "on the first page of the brief, in splendid isolation from all other material." The "outcome of a case rests on what the court understands to be the issue the case presents," they write, and on "opening" your brief, *your* issue-statements are "the first things the Justices see." *Id.*at 25, 83.

They don't say so, but Scalia and Garner seem to endorse the Law of Primacy learning-principle; the military's BLUF principle; and the IRAC principle ingrained in generations of law students. The Law of Primacy holds that what is presented first may be what is best-remembered and most influential. BLUF is an acronym for *bottom line up front*. IRAC advises that effectively-communicated legal analysis begins with the *issue*, followed by the pertinent legal principles (the *rule*), *analysis*, and the *conclusion*.

Scalia and Garner endorse the practice of putting issue-statements up front even if issue-statements are optional: "Unless

the rules of your court forbid this practice (and we know of none that do), follow it religiously—even in memoranda in support of motions. Place right up front what it is you want the judges to resolve." Do this, they advise, whether you are filing a trial-court motion, or an appellate brief, or an "in-house memorandum." At 25, 83.

That "up front" advice must be tempered by court rules like Fed. R. App. P. 28(a)(1)-(5) and (b) which direct that the "statement of issues presented for review" is to come after the Rule 26.1 disclosure statement, the table of contents, the table of authorities, and the Rule 28(a)(4)(A-(D) jurisdictional statement.

On content, Scalia and Garner suggest that the question-writer "think syllogistically." This entails presenting in each question: **(1)** the major premise—the governing legal principle; **(2)** the minor premise—the pertinent facts to which the governing principle is to be applied; and **(3)** the conclusion. At 41-43.

On format, Scalia and Garner advise that a question need not be—as many seem to think—stuffed into one sentence. A question may use several sentences, but ideally should not exceed 75 words. Each question should be "clean and informative" and "honest and fair," but need not be neutral. "You want to state the issue fairly, to be sure, but also in a way that supports your theory of the case." At 83, 85, 87-88.

They don't say so, but Scalia and Garner also seem to endorse the KISS principle—*keep it simple, stupid*. In other words, draft each issue-statement to make your point clearly, succinctly, and logically, to make it likely that the decisionmakers will get your point.

4. Cooper on issue-statements.

Professor Cooper writes that when drafting issue-statements, "counsel is choosing the battleground on which the case will be fought." At 77. You want to make good choices.

Cooper reports: "Many appellate judges commence their study of a case by comparing appellant's and appellee's statements of the issues involved." Many judges, and lawyers, too, Cooper writes, have "frequently spoken of the vital role which this short statement has in influencing the ultimate decision in the case." *Id.*

Cooper's book, published in 1953 and revised in 1963, when lawyers and judges read books rather than screens and had longer attention spans, devotes an early 85 or so pages to discussion of issue-formulation and to presenting examples good and bad. Recognizing your short attention span, I summarize Cooper's advice.

Effective issue-statements, Cooper says: **(1)** use "case-specific facts," not abstractions; **(2)** have no "unnecessary detail"; **(3)** are "readily comprehensible on first reading"; **(4)** "eschew self-evident propositions"; **(5)** are stated, as possible, so "the opponent has no choice but to accept" the statement, in whole or part, as "accurate"; and **(6)** are "subtly persuasive." *Id.* at 79-103 and *passim*.

Cooper observes (at 80): "It is much easier, alas, to point out the defects in what someone else has written than to avoid like faults in one's own submissions." He recognizes that much of the art of drafting effective issue-statements must be self-taught, by learning from others' efforts, good and bad, and by applying Cooper's "six tests" to your efforts

5. Others on issue-statements.

A paper from the Georgetown University Law Center by Clay Greenberg and Matthew Weingast—"Persuasive Issue Statements" (2015)—suggests two "traditional formats": **(1)** the "Under-Does-When" format—controlling law, the legal question, and the legally-significant facts; and **(2)** the "Whether**"** format—legal question, controlling law, legally-significant facts. Applying (roughly) these *non-exclusive* formats, a defendant might phrase the issue as **either (1)** *Under the three-year statute of limitations governing negligent-driving actions, is this action time-barred because plaintiff sued five years after the collision allegedly caused by defendant's negligent-driving;* **or (2)** *Whether this negligent-driving action is barred by the governing three-year statute of limitations because plaintiff sued five years after the collision allegedly caused by defendant's negligent-driving.*

There are many ways to write effective issue-statements—clarifying content with order, emphasis, word-choice, punctuation, sentence-structure, numbering, etc. You can find much advice about the art and science of drafting issue-statements—and put that advice into practice: **(1)** adjusted by your learning from others' effective and ineffective examples and **(2)** tailored to your advocacy-style, to your philosophy, and—as the Supreme Court rule puts it—to the "circumstances" of your cases.

Conclusion

Writing *effective* issue-statements is easier said than done. And—despite the views of justices and professors—creating precisely-honed issue-statements may not *really* be all that important. After all, we live in hope that substance will determine outcome, that the facts and the law will hold sway with diligent decisionmakers and—in the words of Fed. R. Civ. P. 1— "just, speedy, and inexpensive determination" will result. Maybe good-enough issue-statements are good enough.

Still, issue-statement drafting provides a brief-writer with opportunities: **(1)** to refine the writer's thinking; **(2)** to choose the metaphorical "battleground"; and **(3)** to help persuade decisionmakers that the writer's thinking is sound—or at least sound enough to win the day. These opportunities should be taken seriously. Syllogistically-speaking:

Where clear, concise, specific, legally-sound, factually-supported, logical, subtly-persuasive issue-statements may enhance a brief-writer's chances of prevailing in litigation,

Whether the brief-writer should seize the opportunity to invest the time, thought, care, and effort necessary to drafting effective issue-statements.

The author answers: "Yes."
The going-through-the-motions brief-writer answers: "Huh?" ■

NLRB RETURNS TO "CLEAR AND UNMISTAKABLE" WAIVER STANDARD

Benjamin L. King
McKnight, Canzano, Smith, Radtke & Brault, P.C.

On December 10, 2024, the National Labor Relations Board ("NLRB") returned to its longstanding standard for determining if an employer's failure to bargain over unilateral changes to mandatory subjects of bargaining is an unfair labor practice. *Endurance Environmental Solutions, LLC,* 373 NLRB No. 141 (2024). *Endurance Environmental* rejected the "contract coverage" doctrine established under the Trump-era NLRB in *MV Transportation, Inc.,* 368 NLRB No. 66 (2019) and returned to the "clear and unmistakable" waiver standard first articulated in *Tide Water Associated Oil Co. (Bayonne, N.J.)*, 85 NLRB 1096, 1098 (1949).

1.

In *MV Transportation, Inc.,*368 NLRB No. 66 (2019), the NLRB rejected the "clear and unmistakable waiver" standard and adopted the "contract coverage" standard established by *NLRB v. Postal Service,* 8 F.3d 832, 838 (D.C. Cir. 1993). Under the contract coverage standard, the NLRB reviewed the agreement's language to determine if the employer's actions were within the employer's authority under the contract. If the actions were "within the compass or scope" of the collective bargaining agreement, the employer's actions would be found lawful. If the employer's changes were not covered by the agreement then those changes would violate the NLRA. Notwithstanding, the employer could still avoid violating the NLRA if it established that the union "clearly and unmistakably waived its right to bargain over the change."

2.

In *Endurance Environmental Solutions, LLC,* the employer, a waste transportation company, installed surveillance cameras on trucks driven by union members. The employer installed these cameras and did not bargain with the union. The management rights clause in the parties' contract stated the employer could "implement changes in equipment."

The employer argued that its decision to install the cameras was "covered" by the collective bargaining agreement's management rights clause and that it could "implement changes in equipment" without negotiating with the union. The administrative law found that the employer's decision to install cameras that monitor unit employees while they work was a mandatory subject of bargaining. The judge also found that by agreeing to the management-rights language, the union relinquished the right to bargain over the effects of the employer's decision to install the cameras. The judge concluded that effects bargaining is precluded when the contract covers the underlying decision. The judge therefore found that the employer had no obligation to engage in further bargaining with the union, either as to the decision or as to the effects of the decision on unit employees. Accordingly, the judge dismissed both the decisional and effects-bargaining allegations. The General Counsel and the union appealed to the NLRB.

3.

In rejecting the "contract coverage" standard the NLRB majority explained that it "undermines the Act's central policy of promoting industrial stability by encouraging the practice and procedure of collective bargaining." *Endurance Environmental Solutions,* at 1. In reaching this conclusion the NLRB noted that "the majority of Courts of Appeals—the Third, Fourth, Sixth, Eighth, Ninth, and Tenth Circuits—have consistently deferred to the Board's clear and unmistakable waiver standard as a rational and permissible interpretation of the Act." *Id.* at 8, citing *Capitol Steel & Iron Co. v. NLRB*, 89 F.3d 692, 697 (10th Cir. 1996); *Bonnell/Tredegar Industry v. NLRB*, 46 F.3d 339, 346 fn. 6 (4th Cir. 1995); *Ciba-Geigy Pharmaceuticals Division v. NLRB*, 722 F.2d 1120, 1127 (3d Cir. 1983); *American Distributing Co. v. NLRB*, 715 F.2d 446, 449–450 (9th Cir. 1983), cert. denied 466 U.S. 958 (1984); *Tocco Division v. NLRB*, 702 F.2d 624, 626-627 (6th Cir. 1983); *American Oil Co. v. NLRB*, 602 F.2d 184, 188–189 (8th Cir. 1979).

Additionally, the Board explained that none of the reasons articulated in *MV Transportation* "for abandoning the waiver standard withstands scrutiny. In our view, moreover, the waiver standard better promotes the purposes and policies of the Act. The waiver standard simplifies the bargaining process by encouraging the parties to focus on matters of immediate importance. It also reduces litigation by assuring that the parties know the scope of their respective rights and obligations." *Id.* at 15.

4.

Member Kaplan argues in dissent that whether the employer had a duty to bargain under either standard was not properly before the NLRB. Member Kaplan explained that it does not matter whether or not the employer had a duty to bargain over its changes, "because the record establishes that—regardless of whether or not it was obligated to do so—the [employer] did bargain with the Union prior to any implementation that affected employees' terms and conditions of employment." *Id.* Member Kaplan went on to explain that "[m]y colleagues nevertheless reject this evidence—as they must in order to reach the contract coverage issue." *Id.* at 26, 27.

This decision could strengthen union bargaining rights by requiring employers to demonstrate that a union clearly and unmistakably waived its right to bargain over changes to employees' terms and conditions of employment. It is likely that this decision will be short-lived. On December 11, one day after the publication of *Endurance Environmental Solutions*, the U.S. Senate rejected President Biden's appointment of NLRB Chairperson and Democratic appointee Lauren McFerran. Chairperson McFerran's term expired on December 16, 2024. The NLRB will maintain a Democratic majority until President Trump fills the two vacancies with Republican appointees after his inauguration. ■

NLRB SAYS "NO" TO UNREASONABLE "STAY-OR-PAY" AGREEMENTS

Regan K. Dahle
B*utzel Long*

On October 7, 2024, the National Labor Relations Board (NLRB) General Counsel issued an advice memorandum cautioning employers about the continued use of employment agreements with "stay-or-pay" provisions. A "stay-or-pay" provision typically requires an employee to repay the employer for a benefit if the employee separates from employment before the expiration of a specified length of time. Typically, employers use stay-or-pay provisions in agreements for relocation stipends, tuition reimbursement, signing bonuses, Training Repayment Agreement Provisions ("TRAPs") and up-front retention bonuses. In their "harshest form," they impose a "quit" or "breach" fee or pass along a business loss or cost by means of liquidated damages if the employee resigns before the end of a defined timeframe.

The General Counsel's position is that "[l]ike non-compete agreements, stay-or-pay provisions both restrict employee mobility, by making resigning from employment financially difficult or untenable, and increase employee fear of termination for engaging in activity protected by the [National Labor Relations Act (the "Act")]." Thus, these provisions tend to interfere with, restrain or coerce employees' exercise of their rights under Section 7 of the Act, because employees who have a repayment obligation hanging over their heads are less likely to engage in protected, concerted activity and risk retaliatory discharge. Similarly, employees are less likely to resign to take a new job with better terms and conditions of employment when they will be liable to repay a debt if they do.

Employers have cited two business interests furthered by stay-or-pay provisions: employee retention and recouping payment for a benefit that did not yield the intended result. With respect to employee retention, the General Counsel suggests that rather than "imposing a financial barrier to separation," employers should encourage employees to stay "through longevity bonuses or offering improved terms and conditions of employment." Referencing the Thirteenth Amendment's "prohibition against indentured servitude," the General Counsel asserted that "[e]mployers do not have a legitimate business interest in forcing employees to remain in a given workplace against their will through the use of coercive contractual arrangements." The General Counsel looked more favorably on the employer's interest in recouping payments "toward employee benefits where an employee does not remain employed long enough for the business to reap its anticipated returns." To protect that legitimate business interest, the General Counsel would permit a stay-or-pay provision where repayment terms are narrowly tailored to minimize interfering with the employee's Section 7 rights.

The General Counsel will urge the NLRB to find that stay-or-pay provisions are presumptively unlawful. To rebut that presumption, the employer must prove that the stay or pay provision is narrowly tailored to minimize its impact on the employee's Section 7 rights and that it advances a legitimate business interest. To make these proofs, the General Counsel proposed a four (4) part test. The employer must show, first, that the provision "is voluntarily entered into in exchange for a benefit," meaning the provision is completely optional. For example, if the provision is included in a TRAP, the associated training must not be mandatory for the employee to keep their job. Next, the employer must show that the provision has a reasonable repayment amount that is specified up-front; a repayment amount that is greater than the cost of the benefit is unreasonable. The employer must also show that the provision has a reasonable "stay" period. Reasonableness with respect to the stay period is fact-specific and depends on the cost of the benefit, the employee's income, whether the payment amount decreases over time, and the value of the benefit to the employee. Finally, the provision must not require repayment if the employer terminates the employee without cause.

The General Counsel gave employers 60 days from the date of the memorandum to cure existing stay-or-pay agreements that were not narrowly tailored to advance a legitimate interest. For example, employers should amend existing agreements by lowering the repayment amount to no more than the cost of the benefit; shorten any unreasonably long stay periods; and remove any term that requires repayment if the employer terminates the employee without cause.

It is important to remember that even non-unionized employees have rights under Section 7 of the NLRA, so these issues can impact all employers. Additionally, some stay-or-pay agreements may also violate the Michigan Wages and Fringe Benefits Act as unlawful wage kickbacks. ■

WRITER'S BLOCK?

You know you've been feeling a need to write a feature article for *Lawnotes*. But the muse is elusive.

And you just can't find the perfect topic. You make the excuse that it's the press of other business but in your heart you know it's just writer's block. We can help. On request, we will help you with ideas for article topics, no strings attached, free consultation. Also, we will give you our expert assessment of your ideas, at no charge. No idea is too ridiculous to get assessed. You have been unpublished too long.

Contact editor John Adam at
jgabrieladam@gmail.com.

COPYRIGHT AND THE "WORK FOR HIRE" DOCTRINE: A GUIDE FOR LABOR AND EMPLOYMENT LAWYERS

Julie A. Greenberg and Kristyn C. Webb
Fishman Stewart PLLC

The "work for hire" doctrine is a foundational concept in U.S. copyright law, yet it often intersects with labor and employment law in complex ways.

For labor and employment lawyers, understanding the nuances of this doctrine is critical for advising employers, employees, and independent contractors on their respective rights and obligations concerning creative works. This article provides an overview of the doctrine, exploring its statutory basis, practical implications, and the challenges it presents in an evolving labor market.

I. Legal Framework: Defining Work for Hire

The Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.,* codifies the "work for hire" doctrine, delineating when a copyrighted work is owned by an employer rather than the individual who created it. Section 101 of the Act defines a work as being made for hire in two scenarios:

A. Works created by employees within the scope of employment

Under the doctrine of *respondeat superior*, if an employee creates a work as part of their job duties, the employer is deemed the author of the work and the copyright owner. This principle ensures that employers retain control over works integral to their business operations.

B. Commissioned works in specific categories with a written agreement

Works created by independent contractors (non-employees) can qualify as works made for hire *only if the following two conditions are met:*

- the work falls into one of nine enumerated categories (e.g., contributions to collective works, motion pictures, or instructional texts, etc.); ***and***

- the parties explicitly agree in a signed, written contract that the work is "made for hire."

Unless *both requirements are met,* all works created by a non-employee/independent contractor are owned by the creator and *not by the commissioning entity.* This may seem counterintuitive. For example, if a company hires a freelance photographer to take photos for a company brochure, and dictates the exact photos needed, and pays the photographer for the work, most people (the company and the photographer) usually assume the copyright is owned by the company because it paid for the work. However, Supreme Court has held that the copyright belongs to the photographer. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).

Thus, U.S. copyright law treats employees and independent contractors very differently from one another. This distinction determines which party owns the copyright in a work, and in turn, whether the company/employer has unlimited rights to use the work, and for example, make reprints, post the work online, or make derivative works. Ownership also determines which party may enforce those rights against infringers.

II. Key Considerations for Labor and Employment Lawyers

A. Determining employee status: the *Reid* Factors

In Community for Creative Non-Violence v. Reid, the Supreme Court clarified how to determine whether a creator is an employee or an independent contractor for copyright purposes. The Court adopted a multi-factor test grounded in agency law, that looks for "classic" employment factors, such as:

- the employer's control over the work and the creator's work schedule;

- the method of payment and provision of employment benefits (is FICA withheld?);

- the skill required for the work; and

- the duration of the relationship between the parties.

Labor and employment lawyers should consider these factors when drafting contracts or litigating disputes, as misclassification can have profound consequences, including loss of copyright ownership.

B. "Scope of employment" analysis

Even if an individual is an employee, their work must be created within the "scope of employment" to qualify as a work made for hire. Generally, courts apply the test articulated in the Restatement (Second) of Agency, asking:

1. Is the work of the kind the employee was hired to perform?

2. Did the work occur substantially within authorized time and space limits?

3. Was the work motivated, at least in part, by the purpose of serving the employer?

Disputes often arise when employees create works outside of regular work hours or use personal resources in the creative process. Some of these issues may be avoided by implementing clear policies to minimize ambiguity, such as employment agreements that specify whether works created during working hours constitute works made for hire.

III. Practical Implications and Drafting Strategies

A. Employment agreements and policies

Including explicit "work for hire" clauses in employment agreements can reduce uncertainty. Employers should take care to define the scope of employment broadly to encompass foreseeable creative works, and further require employees to assign in writing all requested rights to the employer, ensuring full ownership shall vest with the employer. Employers should also establish clear intellectual property policies in employee handbooks, outlining expectations for work created using company resources.

B. Contractor agreements

These days, many works such as website design, logo development, software, etc., are created by specialty creators or programmers, who operate as independent contractors.

For independent contractors, a well-drafted agreement is essential to establish a work as a work made for hire. Best practices dictate that the parties sign a Copyright Ownership Agreement specifying the following:

- the creator is creating works for the company which are original and not copied (in a warranty clause);
- the creator agrees that the work created is a "work made for hire" and explicitly categorizes the work as falling within one of the nine statutory categories;
- the creator agrees that they will also sign a written assignment of the copyright in all works once created (a fallback provision to cover works which do not neatly fit the enumerated "work for hire" categories); and
- the creator agrees to cooperate in executing additional documents as may be requested to establish copyright ownership and register the copyright in works.

Failing to address these issues in writing with independent contractors can leave a hiring company without copyright ownership in a valuable work created (and paid) for by the company.

IV. Challenges in the Digital Age

A. Remote work and digital tools

The rise of remote work and digital collaboration platforms complicates application of the work-for-hire doctrine. Employees increasingly use personal devices and off-the-clock time to create work-related content. Employers may address these issues by implementing clear policies on the use of personal devices and software and requiring employees to document the creation of work-related content, regardless of location.

B. Freelancers and gig workers

The gig economy has expanded the prevalence of independent contractors in creative fields. Establishing work-for-hire relationships with gig workers is fraught with challenges. For instance, a court may hesitate to classify a work as made for hire if the authorizing employee exerts significant control over the creation process. In other words, a court may disregard an employment agreement that states works are categorically "made for hire" where agency principles indicate the relationship was that of an independent contractor. Often, obtaining a written copyright assignment *before final payment to the creator* will provide a backup to vest title with the employer.

V. Case Law Insights

One notable case highlights the practical application of the work-for-hire doctrine. In *Marvel Characters v. Simon*, 310 F.3d 280 (2d Cir. 2002), the court considered who owned the rights to the character "Captain America." The plaintiff, Marvel Comics, Inc. had brought a declaratory action against the defendant-illustrator Joseph Simon who had first sketched the superhero in 1940. In 1976, Congress overhauled the Copyright Act.[1] One of the revisions included a provision whereby authors could terminate a transfer of their rights after a certain period of time.[2] Simon filed and served a Notice of Termination for Captain America despite having signed a settlement agreement in 1969 stating that his contribution to Captain America was made as an employee.

The trial court agreed with Marvel and held that this prior agreement barred Simon from invoking the termination provision in the Copyright Act and granted summary judgment to Marvel. However, on appeal, the Second Circuit held that the later-made agreement did not disavow Simon of his unalienable right of termination under the Copyright Act, and remanded the case for a jury to determine whether Simon created Captain America as an employee (vesting authorship and ownership of the copyright in his employer), or whether Simon was an independent contractor (in which case, Simon would be entitled to terminate the prior agreement, reverting the copyright to Simon). The case ultimately settled in 2003 with Simon (once again) assigning any rights in Captain America to Marvel.[3] It is probably safe to assume that Simon ended up with a better royalty rate than whatever he had enjoyed prior to the termination-litigation-negotiation-settlement chain of events.

This case underscores the need for employers to establish clear agreements and maintain oversight of the creative process.

VI. Policy Implications and Future Trends

A. Legislative developments

The shifting labor landscape has prompted calls for reform of the Copyright Act's work-for-hire provisions. Advocates argue for clearer language to address ambiguities in remote work and the gig economy. Labor and employment lawyers should monitor these developments, as changes could significantly impact rights for employers, employees, and independent contractors.

B. Artificial Intelligence and copyright

The emergence of AI-generated content presents new challenges for copyright law and the work-for-hire doctrine. Courts have yet to address whether AI-created works merit copyright protection, and if so, whether any copyright in the works would be owned by the entity that deployed the AI or by the individual generating the prompts. Because this raises questions about authorship and ownership, labor and employment lawyers are cautioned to stay informed about legal developments in this area to advise clients effectively.

Conclusion

For labor and employment lawyers, the "work for hire" doctrine is a pivotal consideration when addressing copyright ownership. By understanding its legal framework, practical implications, and emerging challenges, attorneys can help clients navigate this complex area of law. As the labor market continues to evolve, staying ahead of these trends will be essential to ensuring compliance and protecting client interests.

—END NOTES—

[1] See Pub. L. No. 94-553 (1976) (codified at 17 U.S.C. §§ 101-810).
[2] 17 U.S.C. § 304(c).
[3] Dispute over Captain America is Settled, NYTimes.com, mobile.nytimes.com/2003/09/30/business/media/dispute-over-captain-america-is-settled.html (last visited Jan. 6, 2024). ■

SUPREME COURT HEARS ARGUMENTS ON STANDARD FOR PROVING FLSA EXEMPTION

Blake C. Padget
Butzel Long, PC

The Supreme Court recently heard oral arguments in *E.M.D. Sales Inc. v. Carrera*, a Fair Labor Standards Act case which may be the most anticipated employment case of this term. Under the Fair Labor Standards Act (FLSA), employees are entitled to overtime pay unless they meet one of the FLSA exemptions. Employees often bring claims against their employers alleging they were not paid overtime in accordance with the FLSA. One way to defend against such a claim is by establishing that the employee meets one of the FLSA exemptions. In *E.M.D. Sales Inc. v. Carrera*, the Supreme Court will answer the question of what burden of proof employers must satisfy to demonstrate the applicability of an FLSA exemption.

In *E.M.D. Sales Inc. v. Carrera*, sales representatives are claiming E.M.D. Sales failed to pay them for overtime hours. E.M.D. Sales argued that the employees were not entitled to overtime pay because they fell under the FLSA's "outside sales" exemption. The US District Court for the District of Maryland ruled against E.M.D. Sales on the exemption issue. In doing so, the District Court ruled that an employer was required to prove an FLSA exemption by "clear and convincing" evidence. The Fourth Circuit Court of Appeals affirmed this decision.

Contrary to the Fourth Circuit, the Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits all apply a "preponderance of the evidence" standard when reviewing an employer's FLSA exemption. The Fourth Circuit is the lone Circuit to hold that a higher burden of proof is required. As such, E.M.D. Sales appealed the Fourth Circuit's decision to the Supreme Court to resolve the circuit split. Notably, the United States Government appeared as amicus in support of E.M.D. Sales, arguing that the lower preponderance of the evidence standard should apply.

It is difficult to say for certain which way the Supreme Court will rule on this issue. Many of the justices mentioned other situations, similar to the FLSA, where issues are resolved under the preponderance of the evidence standard. This certainly suggests the Supreme Court is inclined to overrule the Fourth Circuit. The decision is of obvious importance to employers, who would benefit from a lower burden of proof to establish FLSA exemptions. Stay tuned for future issues of *Lawnotes* for resolution of *E.M.D. Sales Inc. v. Carrera* as well as other labor and employment issues addressed by the Court this term. ■

MICHIGAN EMPLOYERS: GET READY FOR EXPANDED PAID SICK LEAVE

Adam S. Forman, Nancy Gunzenhauser Popper and Daniel Glicker
Epstein Becker & Green, P.C.

Starting on February 21, 2025, every Michigan employer, regardless of size, must provide their employees with up to 72 hours of sick leave annually.

For five years, Michigan employers have been administering a paid leave law—the Michigan Paid Medical Leave Act (PMLA)—in its current form. However, the Michigan Supreme Court recently reinstated a voter initiative known as the Earned Sick Time Act ("ESTA" or "Act"), drastically changing the landscape for Michigan employers to provide sick time to employees. The ESTA is the original version of a law adopted by the Michigan Legislature that was immediately amended to create the PMLA, a more limited sick leave program applicable to many Michigan employers since 2019.

By court order, the ESTA will take effect on February 21, 2025, replacing the PMLA and covering all Michigan employers, which is just one of many differences between the PMLA and the ESTA. This article explains employers' new obligations under the ESTA.

Who Is Covered Under the ESTA?

One of the biggest differences between the PMLA and the ESTA is the ESTA's much broader application. While the PMLA applies only to employers that employ 50 or more individuals, the ESTA will apply to *all employers with one or more employees,* excluding the U.S. government.

Importantly, employer obligations and employee entitlements vary based on whether an employer qualifies as a "small business." The Act defines a small business as one with fewer than 10 employees, based on individuals, not full-time workers or equivalents, meaning that each full-time, part-time, or even temporary worker on the employer's payroll counts as an employee. If an employer employs 10 or more employees on its payroll during any 20 (or more) weeks of the current or prior calendar year, then it does not qualify as a small business under ESTA, even if the number of employees drops during that period. While the text of the ESTA is silent as to whether the 10-employee threshold is calculated based on total employees nationwide or just employees located in Michigan, guidance issued by Michigan's Department of Labor and Economic Opportunity (LEO) suggests that the threshold is based on a nationwide employee count, as the PMLA similarly was.

While the PMLA exempted certain types of employees from coverage, including those who are part-time, temporary, and exempt under the Fair Labor Standards Act (FLSA), the ESTA does not include such exemptions and, in fact, applies to all employees in Michigan (except for federal government employees). Importantly, LEO has indicated that remote workers are covered under ESTA, such as in the case where an employee is located in Michigan and teleworks for an employer with no other presence in Michigan.

Comparing Current PMLA to Coming ESTA Requirements

Accrual

The Act provides that, as of February 21, 2025, covered employees will accrue earned sick time at a rate of one hour for every 30 hours worked, faster than the rate under the PMLA, which currently requires that covered employees accrue earned sick time at a rate of one hour for every 35 hours worked. Note that "hours worked" includes all hours worked, including overtime. FLSA-exempt full-time employees are presumed to work 40 hours per week unless their normal workweek is less than 40 hours.

Significantly, while the PMLA currently allows an annual accrual cap, the ESTA does not cap sick leave accruals but does cap usage, as referenced below. Most employers under the ESTA will not be allowed to cap paid sick leave accrual (either on an annual basis or a rolling basis). Under the ESTA, only *small businesses* will be able to cap accrual of *paid* leave at 40 hours. Thereafter, *small businesses* must continue to permit accrual of unpaid leave, which is uncapped. ESTA does not require employers to pay out an employee's accrued, unused, earned sick time upon termination of employment, but employers could be obligated to do so under a written company policy.

Carryover

At present, PMLA permits carryover of a maximum of 40 hours of unused, accrued paid leave from year to year (unless the employer chooses to allow more). That limit will no longer apply under the ESTA, which instead requires employers to carry over **all** accrued, unused earned sick time. This carryover obligation applies even to temporary or seasonal employees, whose carried-over time should remain as long as the seasonal employment does not lapse for more than six months.

Frontloading

Currently, the PMLA expressly permits employers to frontload an employee's leave, meaning that the total leave that can be used in a year is made available at the start of the year. The PMLA also permits employers that frontload to require employees to wait 90 days after hire to use accrued leave and to forego carryover of unused accruals.

The ESTA does not address frontloading an employee's earned sick time, but LEO guidance states that there is nothing in the new Act that says an employer cannot frontload an employee's earned sick time so long as the ESTA's requirements are met. There is no indication, however, that employers who frontload will be able to forego carrying over unused time.

How Much Leave May Employees Take?

The Act permits all employers to require new hires to wait up to 90 days to start using accrued leave.

The ESTA allows employers to restrict the amount of earned sick time employees may use. For *small businesses*, employers must allow employees to use up to 40 hours of *paid* earned sick time and up to 32 hours of *unpaid* earned sick time per year. All other employers (those with 10 or more employees) must allow employees to use 72 hours of accrued paid leave per year. Employers may determine what time frame constitutes a "year" so long as the period is a regular and consecutive 12-month period.

Under the ESTA, employees will be able to use earned sick time incrementally in the smaller of (i) hourly increments or (ii) the smallest increment that the employer's payroll system uses to account for absences or use of other time. This provision is somewhat different than the PMLA rule, which has required usage in one-hour increments unless an employer's written time-off policy allows different increments (which could be greater than one hour).

Permitted Reasons for Using Earned Sick Time

As under the PMLA, Michigan employees may take time off under the ESTA to use their earned sick time for a permitted reason. The permitted reasons are as follows:

1. The employee's mental or physical illness, injury, or health condition; medical diagnosis, care, or treatment of the employee's mental or physical illness, injury, or health condition; or preventative medical care for the employee[;]

2. For the employee's family member's mental or physical illness, injury, or health condition; medical diagnosis, care, or treatment of the employee's family member's mental or physical illness, injury, or health condition; or preventative medical care for a family member of the employee[;]

3. If the employee or the employee's family member is a victim of domestic violence or sexual assault, for medical care or psychological or other counseling for physical or psychological injury or disability; to obtain services from a victim services organization; to relocate due to domestic violence or sexual assault; to obtain legal services; or to participate in any civil or criminal proceedings related to or resulting from the domestic violence or sexual assault[;]

4. For meetings at a child's school or place of care related to the child's health or disability, or the effects of domestic violence or sexual assault on the child; or

5. For closure of the employee's place of business by order of a public official due to a public health emergency; for an employee's need to care for a child whose school or place of care has been closed by order of a public official due to a public health emergency; or when it has been determined by the health authorities having jurisdiction or by a health care provider that the employee's or employee's family member's presence in the community would jeopardize the health of others because of the employee's or family member's exposure to a communicable disease, whether or not the employee or family member has actually contracted the communicable disease.

Most of the permitted reasons to use earned sick time under the ESTA are similar to those under the PMLA, but the ESTA includes the addition of reason "(d)" above.

Administrative Details

Significantly, the ESTA has expanded categories of individuals considered to be "family members" of employees that are not included under the PMLA. The ESTA's definition of

(Continued on page 10)

MICHIGAN EMPLOYERS: GET READY FOR EXPANDED PAID SICK LEAVE

(Continued from page 9)

"family member" includes a "domestic partner," meaning "an adult in a committed relationship with another adult, including both same-sex and different-sex relationships." The Act further clarifies that a "committed relationship" means "one in which the employee and another individual share responsibility for a significant measure of each other's common welfare, such as any relationship between individuals of the same or different sex." Another category of individuals included as "family members" under the ESTA are other individuals "related by blood or affinity whose close association with the employee is the equivalent of a family relationship."

When an employee plans to take leave for any reason above, employers may require advance notice of seven days or less prior to the date the leave is to begin, only if the employee's need to use the sick time is foreseeable. If the employee's use of sick time is not foreseeable, employers may only require that the employee give notice of their intention to use the sick time as soon as practicable under the circumstances.

If usage exceeds three consecutive workdays, an employer may require "reasonable documentation," which the ESTA provides may include a document signed by a health care professional that need not explain the nature of the illness. If an employer requires medical documentation, then the employer is responsible for all out-of-pocket expenses the employee incurs to obtain such documentation. If the leave is used due to reasons related to domestic violence or sexual assault, a police report, court document, or signed statement from a victim and witness advocate constitutes reasonable documentation and need not provide details regarding the underlying incident.

Discrimination and Retaliation Prohibited

Similar to the requirements under the PMLA, the ESTA prohibits discrimination or retaliatory personnel action against an employee because the employee has exercised a right protected under the ESTA. The ESTA includes a detailed definition of "retaliatory personnel action" that encompasses denial of any right guaranteed under the ESTA, adverse employment actions (including against former employees), sanctions against an employee who is a recipient of public benefits, and interference with, or punishment for, participation in an investigation, proceeding, or hearing under the ESTA.

In contrast to the PMLA, the ESTA establishes a "rebuttable presumption" that an employer retaliated in response to an individual's exercise of rights under the Act. This presumption exists if an employer takes adverse personnel action against an individual within 90 days after that individual files an administrative complaint with or civil action alleging a violation of the ESTA, informs any person about an employer's alleged violation of the ESTA, cooperates with an investigation or prosecution of any alleged violation of the ESTA, opposes any policy, practice, or act prohibited under the ESTA; or advises any person of their rights under the ESTA.

Enforcement Provisions

Another stark difference between the PMLA and the ESTA is the breadth of remedies available to aggrieved employees, including expanded time to file an administrative claim as well as a new right to file a private civil action.

While the PMLA grants employees up to six months to file a claim with Michigan's Department of Licensing and Regulatory Affairs (LARA), the ESTA allows three years to file a claim. Both laws allow LARA to impose various penalties and civil fines against employers and award aggrieved employees earned time previously withheld; however, the ESTA will also allow for the recovery of damages, such as back pay, and other remedies, including reinstatement if the employee lost their job.

The ESTA sets forth detailed procedures for complaints filed with LARA, including requirements for investigation and mediation and a procedure for an employer to appeal a decision, if LARA issues a notice of violation and/or imposes a penalty.

The state's enforcement powers do not end there. If the agency determines that there is reasonable cause to believe that an employer violated the ESTA and is unable to obtain voluntary compliance by the employer within a reasonable period of time, LARA may bring a civil action on behalf of an employee. Available remedies include payment for used earned sick time, reinstatement, back pay with benefits, liquidated damages, costs, and reasonable attorney fees. The agency not only has the power to bring a civil action on behalf of the aggrieved employee but may both investigate and file a class action.

Further, unlike the PMLA, the ESTA permits a private right of action. Under the ESTA, employees have three years to file a lawsuit seeking redress. The statute expressly provides that filing a claim with LARA is "neither a prerequisite nor a bar to bringing a civil action," meaning that a plaintiff's failure to exhaust administrative remedies is not grounds for dismissal of a suit brought under ESTA.

Lastly, the ESTA imposes civil fines on top of the potential civil remedies noted above. Employers that fail to provide earned sick time in violation of the ESTA or take retaliatory personnel action against an employee or former employee are subject to civil fines of up to $1,000.

Notice, Posting, and Recordkeeping Requirements

When the ESTA takes effect, all Michigan employers must provide each current employee with written notice advising of their rights under the ESTA. This notice must also be provided to new hires going forward and must explain how much earned sick time may accrue, list the employer's designated "year," and explain how earned sick time may be used. LEO will prepare a notice for this purpose that will be made available in multiple languages since the ESTA requires employers to provide the notice in English and Spanish as well as any other language that is the first language spoken by at least 10 percent of the employer's workforce.

Employers are also required to display a poster providing the above information in a conspicuous place that is accessible for viewing by all employees. Employers that willfully fail to provide

the required notice to employees or post the required posting in their place of business are subject to a civil fine of up to $100 for *each separate violation*.

In addition, employers must retain records documenting hours worked and earned sick time taken by employees for at least three years. The Act requires employers to allow LARA access to records at a mutually agreeable time and with appropriate notice. It is key that employers maintain adequate records documenting employees' hours worked and earned sick time taken, as failure to do so creates a rebuttable presumption that an employer has violated the ESTA. That presumption can only be rebutted by "clear and convincing" evidence.

Interaction with Other Leave Policies

The ESTA expressly provides that it does not prevent an employer from providing greater accrual or more generous terms for the use of sick leave than the Act requires. In a webinar given on August 27, 2024, LEO officials stated that employer paid time off (PTO) policies that provide at least as much paid leave as is required under the ETSA and provide employees with time off for covered reasons will be deemed compliant with the ESTA. The law also does not obligate employers to create or maintain separate banks of PTO.

Finally, the ESTA does not preempt any existing, currently operative collective bargaining agreement (CBA). The ESTA's requirements, however, will apply to employees on the date that a CBA expires, even if the agreement contemplates remaining in force pending the execution of a new CBA.

What Employers of Michigan Employees Should Do Now

Although the ESTA is not scheduled to go into effect until February 21, 2025, Michigan employers can mitigate their risk by taking steps now to make sure they are in compliance with the ESTA come the effective date. To that end, the following actions are recommended:

- Review and revise leave-related policies and procedures, including onboarding notices, timekeeping, and payroll mechanisms, to comply with the ESTA's requirements.
- Ensure that human resources personnel understand the rights and protections afforded to employees under the ESTA, including administration of all leave policies, notice and posting requirements, and recordkeeping obligations.
- Train managers to avoid retaliating against an employee because the employee has exercised a right protected under the ESTA.
- Obtain and timely display copies of the required ESTA posters.
- Calendar any CBA expiration date and prepare for negotiating compliance with the ESTA.
- Watch for additional ESTA guidance and regulations. ■

This article first appeared on the website of Epstein Becker & Green, P.C (perma.cc/G6LW-ZKXV)

SUMMARY OF CHANGES

Category	Current PMLA	New ESTA	
		Small Business	All Other Employers
Covered Employers	50+ employees (anywhere)	Small business = 10+ individuals at any time	All employers
Covered Employees	Non-exempt employees	All employees	All employees
Accrual Rate	1 hour for every 35 hours worked	1 hour for every 30 hours worked	1 hour for every 30 hours worked
Accrual Cap	40 hours/year	40 hours of paid leave; unlimited cap for unpaid leave	Unlimited cap
Carryover	40-hour cap	No cap – all time carried over	No cap – all time carried over
Frontloading	Permitted – 40 hours, no carryover required	Permitted; carryover still required	Permitted; carryover still required
Use	40 hours/year	40 hours of paid leave; 32 hours of unpaid sick leave	72 hours of paid sick leave

WHAT ARE CHRONIC DISEASES AND CAN MAHA HELP?

Dr. Joel Kahn

For the first time, public policy out of Washington, DC is focusing on the root causes of poor health, health expenses and longevity. It appears that Robert F. Kennedy, Jr will lead this important effort under the head ing of MAHA or Make America Healthy Again.

What does Robert F. Kennedy, Jr say about chronic diseases on his website?

> "An epidemic of chronic disease is engulfing our nation. Obesity, diabetes, autoimmune diseases, autism, cancer, and mental illness is at record levels, especially among young people. These diseases cause untold misery and drain the vitality from our nation's economy. Chronic disease costs the economy over $4 trillion a year, and dwarfs even defense as the big drain on the federal budget.

Kennedy knows how to turn it around, and he will bring that knowledge into the Trump administration. With President Trump's backing, he will reorient federal health agencies toward chronic disease and rid them of Big Pharma's influence.

Kennedy will ban the hundreds of food additives and chemicals that other countries have already prohibited. He will change regulations, research topics, and subsidies to reduce the dominance of ultra-processed food. He will clean up toxic chemicals from our air, water, and soil. He will ensure that research into pharmaceutical drugs, pesticides, additives, and environmental chemicals is scientifically unbiased.

Just two generations ago, America was the healthiest country in the world. It can be that way again. We can Make America Healthy Again."

A popular meme that is circulating on the Internet indicates that on January 20, 2025 there may be executive orders to abolish all vaccine mandates, repealing of the 1986 vaccine immunity law, bans on fluoride in the water system, reorganization of the FDA, FTC and CDC, banning toxic ingredients in food, recognition of vaccine injury and death, banning GMO foods and toxic pesticides, and allowing natural remedies to flourish.

What can we think about all of this? There is no doubt that American health is suffering. Some statistics that might shock you include that 74% of Americans are dealing with overweight and obesity, 40% of children are dealing with the same, 52% of American adults suffer from prediabetes or Type 2 diabetes, 30% of teens have prediabetes, 1 in 36 children have autism, 34% of young adults have mental or behavioral disorders, early onset cancers have increased by 79%, 1 in 2 Americans are predicted to get cancer, autoimmune disease are rapidly rising, 18% of teens have fatty liver disease, 20-25% of women are on anti-depressant medications, early onset dementia has tripled since 2013, American girls are starting puberty years earlier, infertility is rising rapidly, the highest infant mortality rate for a high income country, life expectancy on a decline, and, finally, 77% of young Americans are not able to qualify for military service. Is that enough?

It is clear that status quo is not acceptable in the American health system. In my opinion, while the Kennedy agenda is hopeful, it is missing components of early disease detection including access to free or low-cost coronary artery calcium CT scoring at age 45 to detect heart disease decades before clinical tragedies strike, and, perhaps, access to full body non-contrast MRI and "blood biopsy" lab testing that both can detect cancer at an early stage.

Finally, massive re-education of medical students, residents, fellows, and practicing doctors, dentists, dieticians, and the food industry on the critical importance of whole food diets, largely or exclusively plant based, at as an early age as possible, coupled with fitness, sleep advice, and stress management skills, for prevention of chronic diseases at their root causes. Go MAHA ■

Where is your article?

LOOKING FOR *Lawnotes* Contributors!

Lawnotes is looking for contributors.

Contributions may address legal developments, trends in the law, practice skills or techniques, professional issues, new books and resources, veganism, pilates, yoga, etc. They can be objective or opinionated, serious or light, humble or (mildly) self-aggrandizing, long or short, original or recycled. They can be articles, outlines, opinions, letters to the editor, cartoons, copyright-free art, or in any other form suitable for publication.

For information and publication guidelines, contact *Lawnotes* editor John Adam at jgabrieladam@gmail.com.

COLLECTIVE BARGAINING AGREEMENTS AND THE EARNED SICK TIME ACT

John G. Adam

Michigan's Earned Sick Time Act (ESTA), MCL 409.961 to 409.972 (perma.cc/73PC-GLMW**),** goes into effect on February 21, 2025, pursuant to the Michigan Supreme Court's ruling, *Mothering Justice v. Attorney General*, ___ Mich.___; 2024 WL 3610042, at *15 ("we hold that…the Earned Sick Time Act" will go "into effect 205 days after this opinion's publication date").

ESTA has two sections that address collective bargaining agreements: Sections 11 and 12, MCL 408.971 and MCL 408.972.

As discussed ahead, the February 21, 2025 effective date of the ESTA is delayed until any current CBA expires unless that CBA is completely silent on sick leave. The Wage and Hour Division (part of the Michigan Department of Labor and Economic Opportunity says that the effective date is delayed even if the CBA provides a sick leave benefit that is less than that required by ESTA.

A. ESTA Sections 11 and 12

Section 12 states that if "employees are covered by a [CBA] on the effective date of this act, this act applies beginning on the stated expiration date in the [CBA] notwithstanding any statement in the agreement that it continues in force until a future date or event or the execution of a new" CBA. MCL 408.972. In other words, even if the CBA has a rollover clause or the parties agree to extend the CBA, the original CBA expiration date governs.

Section 11 states ESTA "provides minimum requirements pertaining to earned sick time and shall not be construed to preempt, limit, or otherwise affect the applicability of any other law, regulation, requirement, policy, or standard, including a collective bargaining agreement, that provides for greater accrual or use of time off, whether paid or unpaid, or that extends other protections to employees."

Section 11(b) and (c) drive home this point, stating ETSA does not "(b) diminish any other rights provided to any eligible employee under" a CBA and (c) "preempt or override the terms of any [CBA] in effect prior to the effective date of this act." MCL 408.971.

B. Wage Department's Two Categories

The Wage and Hour Division interprets sections 11 and 12 as follows (perma.cc/YHH8-43VE; bold added):

Applying these sections depends on the specific terms and conditions of the [CBA], and these two sections preclude interference with current agreements when the parties have negotiated sick leave benefits. Thus, the Wage and Hour Department has identified two scenarios that determine whether the ESTA applies to employees beginning on Feb. 21, 2025:

1. The [CBA] **includes** terms regarding sick time or sick leave benefits:

   Provided that the [CBA] **includes terms** related to sick leave, sick time, PTO with uses for sick time, or a similar benefit, the [CBA] terms apply, **even if the benefit is less than what is required by the ESTA,** until the agreement expires or is renewed, extended, or otherwise renegotiated. **The agreement also applies in situations where the agreement expressly excludes sick leave benefits.**

2. The [CBA] **is silent** as it relates to sick time or sick leave benefits:

   Employees covered by a [CBA] t**hat is completely silent on sick leave,** either for the entire unit or for specific classifications covered by the agreement, a**re covered by the ESTA and begin accruing benefits on Feb. 21, 2025.**

Wage and Hour does not explain the reasons for the two categories. It might be that where the parties to the CBA addressed sick leave the effective ESTA date is delayed but if not addressed, there is no reason to delay the effective date. ■

MERC NEWS

Sidney McBride, Bureau Director
Bureau of Employment Relations

MI Home Help Caregiver Council Act (2024 PA 177)

On April 2, 2025, new legislation becomes effective that permits individual home help caregivers to organize and form a single bargaining unit of "public employees" who are subject to many of the protections under PERA. The new statute creates a public sector "council" which serves as employer for collective bargaining purposes with this unit. Especially unique to this "home help-care givers" bargaining unit is its ability to seek binding arbitration should the mediation process not result in a fully ratified collective bargaining agreement. This binding arbitration route is a shift from the factfinding process available to most public sector bargaining units that fall under PERA. Links to more details on this new law and other recent legislation are listed in a summary chart posted on the agency's website at www.michigan.gov/merc.

Detroit ALRA Conference a Huge Success

Detroit's Greektown area was the site of a 4-day conference of the Association of Labor Relations Agencies (ALRA) in late July 2024. The international event had attendees from across the USA and Canada who were very impressed with the growth and vibrancy of the Motor City. Each day of the event focused on the processes, case activity, concerns and best practices used by the respective agencies in the administration of its labor relations laws. Key topics common to many of the jurisdictions related to—(i) meeting the diverse needs of multiple generations of workers; (ii) expanding the use of workplace technology including AI and ChatGPT, (iii) faster case dispositions in light of diminishing resources and (iv) gender identity issues in collective bargaining.

One special day—"Advocates' Day" invited local representatives to participate in a full day focused on current day issues experienced by local unions, employers and workers. Advocates' Day

presenters comprised of industry and agency practitioners respected within the labor relations arena including national personalities-- NLRB General Counsel Jennifer Abruzzo, NLRB Vice GC Peter Ohr, FLRA Deputy GC Charlotte A. Dye, Kevin Mapp from USW International and Brittani Murray from the National AFL-CIO. The bulk of the Advocates' Day attendees and presenters comprised a cross section of local labor and management representatives from noted organizations such as-- Miller Johnson Law, Clark Hill Law, Thrun Law, Miller Cohen Law, White Schneider Law, Michigan Nurses Association, Michigan Education Association, American Federation of Teachers, IBEW Local 58, Michigan Association of Police, MRCC/Carpenters Local 687, Teamsters Local 214, Teamsters Local 243, SEIU Local 517, UM House Officers Assoc., United Steel Workers, Walter Reuther Library, MSU Law School and MI Attorney General's Office. This agency is proud to have hosted the 72nd ALRA International Conference and to have experienced the tremendous involvement from local participants and attendees. Above are a few photos from the event currently posted on our website under the "2024 Detroit ALRA Conference". ■

"CAPTIVE AUDIENCE" MEETINGS AND THEIR INTERSECTION WITH THE NLRA AND THE FIRST AMENDMENT

Bryan Davis, Jr.
Michigan Department of Attorney General
Assistant Attorney General

Within the context of labor relations, the term "captive-audience" meeting is often used to describe mandatory meetings held by employers, during which time employers express their views regarding union organization efforts as well as the implications of unionization within the workplace. Given the often mandatory nature of such meetings, employees can be subject to disciplinary action up to and including discharge for their refusal to attend.

With its recent decision in *Amazon.com Services LLC*, (2024), 373 NLRB No. 136, slip op. (2024) the National Labor Relations Board (NLRB or Board) has overruled *Babcock & Wilcox Co.*, 77 NLRB 577 (1948), holding that employers interfere with the rights of employees as provided under the National Labor Relations Act (the Act), 29 USC § 151, et seq., when that employer requires employees attend a captive-audience meeting wherein the employer expresses its views regarding unionization. 373 NLRB No. 136, slip op. at 1-2.

With *Amazon.com Services LLC*, the Board explains, within the context of a captive-audience meeting, an employer's expression of views regarding unionization will be found unlawful irrespective of whether the union is indicating support or opposition to the unionization efforts. *Id*. at 19. The Board's basis for such a conclusion is grounded, in part, in its view that, when employees are compelled to attend a "captive-audience" meeting, such employees may be left with the reasonable conclusion that they lack free choice with respect to union representation. *Id*. at 14.

With its decision, the Board addresses a unique intersection between the NLRA and the First Amendment, directly addressing both the statutory language of Section 8(c), as well as implications regarding the First Amendment.

As background, in *Babcock & Wilcox Co.*, 77 NLRB 577 (1948), the Board relied upon the legislative history as well as the language of Section 8(c) of the NLRA in establishing that a violation of the NLRA did not exist in those cases where an employer required employee attendance at a "captive-audience" meeting. The Board also detailed that the conduct at issue in Babcock did not contain "any threat of reprisal or force or promise of benefit" and, as such, was protected by the guarantees provided by the First Amendment. *Babcock*, 77 NLRB at 578.

Notably, Section 8(c) of the Act provides: "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). And, it is the language within Section 8(c) which effectively "implements the First Amendment." *NLRB* v *Gissel Packaging Co*, 395 US 575, 617 (1969).

In *Amazon.com Services LLC*, the Board indicates that neither Section 8(c) nor the First Amendment preclude the Board from finding captive-audience meetings unlawful, with Section 8(c) enabling employers and unions to "noncoercively" express their respective views on unionization. 373 NLRB No. 136, slip op. at 12. However, the Board found that this same text does not go further in enabling employers to require that employees listen to such views on unionization, and, in fact, would not align with the First Amendment either, as such Amendment does not provide an employer with the right to compel employee attendance to hear the employer's views on unionization. *Id*. at 12-13. Notably, the Board raises a distinction between persuasion and coercion—while an employer has the right to persuade employees regarding their decision to join or not join a union and such right is found within the guarantees of the First Amendment, once the employer has crossed a certain threshold, persuasion turns to coercion, and the limits of the First Amendment's guarantees have been exceeded. *Id*. at 9-10 (citing *Thomas v. Collins*, 323 U.S. 516, 537-38 (1945).

Notably, in *Amazon.com Services LLC*, the Board provided a safe harbor for those employers who wish to express their views on unionization within the workplace, providing, in essence, that a voluntary meeting which occurs during work hours within the workplace would not serve as a violation of the Act. Specifically, the Board indicates that an employer will not be found in violation of Section 8(a)(1) so long as the employer informs employees, reasonably in advance of any such meeting, that:

1. There is an intention by the employer to express its views on unionization at a meeting where employee attendance is voluntary;
2. There will be no discipline, discharge, or "other adverse consequences" against employees who do not attend such meeting or choose to leave such meeting, and;
3. No records will be kept regarding which employees do or do not attend such meeting or which employees choose to leave such meeting.

An employer who provides the above assurances to employees and follows through on its word may carry out such voluntary meetings, during work hours, for the purposes of non-coercively expressing its views on unionization. 373 NLRB No. 136, slip op. at 19.

While the Board's recent decision and its implications may be short-lived, the ramifications of such decision on unionization rates and voter turnout in union elections may certainly be areas of interest for unions and employers to analyze moving forward. ■

The views and opinions expressed herein are my own and may not reflect the views and opinions of the Michigan Department of Attorney General nor the Attorney General themselves.

CONFIDENCE IN COURTS

"A Gallup survey published Tuesday [December 17, 2024] found that public confidence in America's courts had fallen by 24 percentage points since 2020, to a historic low of 35%." Reported in The Wall Street Journal, December 18, 2024, page A4.

OVERVIEW OF ADVERSE INFERENCES IN LABOR ARBITRATION

Lee Hornberger
Arbitrator

This is an overview of adverse inferences in labor arbitration. This includes reviewing rules of administering bodies; labor arbitration awards; case law; St. Antoine, *The Common Law of the Workplace* (2d ed); Abrams, *Inside Arbitration* (2013); Elkouri & Elkouri, *How Arbitration Works* (8th ed, 2016); Nolan, *Labor and Employment Arbitration* (1998); and the Michigan Rules of Professional Conduct, Rule 3.4.

American Arbitration Association Rules

The American Arbitration Association Labor Arbitration Rules and the American Arbitration Association Employment Arbitration Rules do not explicitly mention adverse inferences.

American Arbitration Association Consumer Arbitration Rule 23 "Enforcement Powers of the Arbitrator" indicates:

> The arbitrator may issue any orders necessary to enforce the provisions of rules R-21 and R-22 and to otherwise achieve a fair, efficient, and economical resolution of the case, including, but not limited to: …
>
> (d) **in the case of willful non-compliance with any order issued by the arbitrator, drawing adverse inferences, excluding evidence and other submissions, and/or making special allocations of costs or an interim award of costs arising from such non-compliance**; … . Emphasis added.

American Arbitration Association Commercial Arbitration Rule 24 says:

> The arbitrator shall have the authority to issue any orders necessary to enforce the provisions of Rules R-22 and R-23 and any other rule or procedure and to otherwise achieve a fair, efficient and economical resolution of the case, including, without limitation: …
>
> (d) in the case of willful non-compliance with any order issued by the arbitrator, **drawing adverse inferences**, excluding evidence and other submissions, and/or making special allocations of costs or an interim award of costs arising from such non-compliance; … . Emphasis added.

National Arbitration and Mediation

National Arbitration and Mediation Employment Rules and Procedures, Rule 14(D), says:

> The Arbitrator shall have the power to award sanctions against a Party for the Party's failure to comply with these Rules or with an order of the Arbitrator. **These sanctions may include an assessment of costs, prohibitions of evidence or, if justified by a Party's wanton or willful disregard of these Rules, an adverse ruling in the Arbitration against the Party who has failed to comply**. Emphasis added.

Financial Industry Regulatory Authority (FINRA)

Financial Industry Regulatory Authority (FINRA) Code of Arbitrators for Industry Disputes Rule 13212 says:

> (a) The panel may sanction a party for failure to comply with any provision in the Code, or any order of the panel or single arbitrator authorized to act on behalf of the panel. Unless prohibited by applicable law, sanctions may include, but are not limited to:
>
> - Assessing monetary penalties payable to one or more parties;
> - Precluding a party from presenting evidence;
> - **Making an adverse inference against a party**;
> - Assessing postponement and/or forum fees; and
> - Assessing attorneys' fees, costs and expenses.
>
> (b) The panel may initiate a disciplinary referral at the conclusion of an arbitration.
>
> (c) The panel may dismiss a claim, defense or arbitration with prejudice as a sanction for material and intentional failure to comply with an order of the panel if prior warnings or sanctions have proven ineffective. Emphasis added.

Adverse inferences in labor arbitration awards

Heinz, NA, 132 LA 1089 (Hornberger, 2013) [cited at Elkouri & Elkouri, *How Arbitration Works* (8th ed. 2016), p. 8-51], stated:

> Elkouri & Elkouri indicates:
>
> There is a question of whether an adverse inference should be drawn against a party whose witness does not produce contemporaneous notes at a hearing. One arbitrator [*Chevron Phillips Chemical Co*, 121 LA 1386 (Eisenmenger, 2005)] rejected that contention where the witness testified without notes and appeared to have adequate recall of his interview of the grievant, and the union did not ask at any time that his notes be produced for examination. Elkouri & Elkouri, p 8-37. …
>
> The Union argues that the fact that the Company failed to produce ___ and ___ to testify supports the Union's position concerning the creditability of witnesses. This argument does not control for a number of reasons. First, ___ and ___ are bargaining unit employees who may or may not have witnessed the activity in the vicinity of the ___ Room. The record is silent as to whether they are Union officials. Second, they were equally available to both sides as witnesses. They were not peculiarly within the Company's control. Third, given the fact that these bargaining unit employees were equally assessable to the Union, I do not make an adverse inference against the Company for not calling them.

The **failure of a party to call as a witness a person** who is available and should be able to provide important testimony may permit an arbitrator to form an inference that the testimony would have been adverse to the party that did not call such person as a witness. Elkouri & Elkouri, pp. 8-51 to 8-52.

Sometimes a party argues that the fact that the other party failed to call certain employees to testify supports the party's position concerning the credibility of witnesses. One looks at whether these employees were equally available to both sides as witnesses. Were the witnesses peculiarly within the other party's control? Were these unit employees who were equally assessable to the party?

Michigan case law concerning adverse inferences in arbitration

In ***UHG Boca, LLC v Medical Mgt Partners, Inc***, unpublished per curiam opinion of the Michigan Court of Appeals, issued January 18, 2024, Docket No. 361539, lv den ___ Mich ___ (2024), after the arbitrator issued the final award, the plaintiff moved to vacate in part the award, asserting the arbitrator improperly applied the **wrongful conduct rule** when the arbitrator refused to enforce the agreements. The arbitrator had concluded that the revenue that plaintiff was seeking from defendants was the result of illegal patient billing or other illegal business practices, and, in the arbitrator's viewpoint, it would be contrary to public policy to enforce the agreements. The plaintiff also argued the arbitrator improperly applied the **adverse inference rule** when the arbitrator concluded, on the basis of **adverse inference**, that the parties were conducting an illegal enterprise. The Circuit Court disagreed with the plaintiff and confirmed the award. The Court of Appeals affirmed the Circuit Court.

The arbitrator assigned an **adverse inference** to the decision of certain witnesses not to testify regarding stolen police reports. The Court of Appeals indicated:

> The privilege against self-incrimination permits a defendant to refuse to answer official questions in any other proceeding, no matter how formal or informal, if the answer may incriminate him or her in future criminal proceedings." *In re Blakeman*, 326 Mich App 318, 333; 926 NW2d 326 (2018). However, "the **Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the amendment does not preclude the inference where the privilege is claimed by a party to a civil cause.**" *Id*. at 334 n 4 (quotation marks and citation omitted). While plaintiff is correct that certain witnesses that did not testify were defendants, individuals associated with plaintiff also refused to testify at the hearing. Moreover, contrary to plaintiff's assertion, the arbitrator did not rely solely on the adverse inferences when he made his determination that the businesses were operating in an illegal fashion. Accordingly, the arbitrator did not err when it applied the adverse interest rule. Emphasis added.

Lustig v Dep't of Health and Human Services, unpublished per curiam opinion of the Michigan Court of Appeals, issued March 12, 2020, Docket No. 346447, lv den ___ Mich ___ (2020). Defendant employer argued that plaintiff employee's due process rights were not violated by the employer's failure to produce all of the requested documentation because he had the opportunity to be heard and to defend himself by subpoenaing the testimony of other employees to provide the information he sought. Plaintiff employee argued that he was unable to present an adequate defense because he lacked requested documentation regarding his work requirements and objectives in comparison to other similarly situated employees and thus he was denied procedural due process. The Court of Appeals agreed with defendant, reversed the Circuit Court's order, and reinstated the Michigan Civil Service Commission's decision upholding the Hearing Officer's determination that defendant had just cause to terminate plaintiff's employment. The Court of Appeals indicated: "[T]he record belie[d] plaintiff's contention that he was not afforded a fair opportunity to present an adequate defense without receiving all of the documentation that he had requested."

In ***Santamauro v Pultegroup, Inc***, unpublished per curiam opinion of the Michigan Court of Appeals, issued December 20, 2016, Docket No. 328404, the plaintiff employee agreed to arbitrate claims arising from his employment. He was discharged. He initiated an employment arbitration alleging wrongful discharge. The arbitrator found the plaintiff employee had **deliberately spoiled evidence by removing the hard drive** of his employer-owned laptop computer before returning it to the employer, and dismissed the action. The Circuit Court ruled that the parties' arbitration agreement intended that the arbitrator could exercise the same powers as a judge, and found no legal basis for disturbing the arbitrator's award. The Court of Appeals affirmed the Circuit Court's confirmation of the award. The Court of Appeals indicated that plaintiff was placed on notice that a discovery sanction was sought, was afforded ample opportunity to submit evidence on his own behalf, and no due process violation occurred.

***The Common Law of the Workplace* (2d ed., St. Antoine)**

The Common Law of the Workplace has helpful discussions concerning adverse inferences. *The Common Law of the Workplace* indicates the following concerning adverse interests.

> **§ 1.14. Subpoenas**
>
> **Arbitrators, the AAA under its rules, and, in some jurisdictions, attorneys can sign subpoenas for persons and things to demand their presence at the arbitration hearing.**
>
> **Comment:**
>
> … **If subpoenaed material is not turned over by a party, or if a subpoenaed witness controlled by a party-such as a supervisor or management official-does not appear, the other party can either enforce the subpoena in court or ask the arbitrator to draw adverse inferences against the offending party**. … *Id*. at pp. 12-13. Emphasis in original.
>
> **§ 1.45. Nonappearance of Subpoenaed Witnesses**
>
> **Comment:**
>
> … **[I]f the witness is within the control of a party, an alternative method of "enforcing" a subpoena is to ask the arbitrator to draw adverse inferences against the party that did not bring the witness after it is proven a subpoena was properly served**. *Id.* at p. 30. Emphasis in original.

(Continued on page 18

OVERVIEW OF ADVERSE INFERENCES IN LABOR ARBITRATION

(Continued from page 17)

Abrams, ***Inside Arbitration*** **(2013)**

Inside Arbitration reviews adverse inference issues in labor arbitration. *Inside Arbitration* says the following concerning adverse inferences.

> If a witness refuses to answer a proper question, a party can ask the arbitrator to direct the witness to answer. The arbitrator cannot order the witness to answer and hold him or her in contempt for not answering, as would a trial judge. **If the witness still refuses to answer, the arbitrator properly presumes that the testimony would not have been favorable to the party who called the person as a witness**. *Id*., p. 139. …
>
> … **If the missing witness appears to the arbitrator to have played a critical role in the events raised in the grievance, the neutral will draw a negative inference that the missing witness would not have testified in support of the claim**. *Id*., p. 147. …
>
> Regarding missing witnesses, arbitrators know that there often are good reasons for someone not attending a hearing. A witness may have relocated or may be in jail. A key witness may decide that it is better as a matter of discretion not to testify in a particular case. **Although an arbitrator can certainly draw an inference from the failure to present testimony about the case, unexplained circumstances of an absence do not necessarily mean that a case is over.** … . *Id*., p. 193. …
>
> … **[A]rbitrators will generally draw an adverse inference from the fact that the grievant does not offer his or her side of the story directly to the arbitrator.** That does not mean that management must prevail if the grievant does not testify. It means, rather, that an arbitrator expects to hear from the accused party. … *Id*., p. 215. Emphasis added.

Nolan, ***Labor and Employment Arbitration*** (1998)

Labor and Employment Arbitration contains a useful discussion concerning adverse inferences. *Id*., p. 225-226. Nolan indicates, in part:

> As a practical matter, arbitrators cannot force a reluctant employee to testify. They may issue a subpoena but enforcing a subpoena requires court action. Arbitrators can and frequently do draw adverse conclusions from a failure to testify … . *Id*., p. 225.
>
> ... Most arbitrators do draw negative inferences... . They are particularly likely to do so when the reluctant employee faces no risk of a subsequent criminal proceeding. … *Id*.

Michigan Rules of Professional Conduct

Michigan Rules of Professional Conduct, Rule 3.4, states:

> Rule 3.4. **Fairness to Opposing Party and Counsel**.
>
> **A lawyer shall not**:
>
> **(a) unlawfully obstruct another party's access to evidence; unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value; or counsel or assist another person to do any such act**;
>
> (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
>
> (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
>
> (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party;
>
> (e) during trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or
>
> (f) request a person other than a client to refrain from voluntarily giving relevant information to another party, unless:
>
> > (1) the person is an employee or other agent of a client for purposes of MRE 801(d)(2)(D); and
> >
> > (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Spoliation and adverse inference

Under Michigan law, a negative presumption arises where the complaining party can establish "intentional conduct indicating fraud and a desire to suppress the truth." *Trupiano v Cully*, 349 Mich 568 (1957); *Lagalo v Allied Corp*, 233 Mich App 514 (1999). Under federal law, a **spoliation sanction** is appropriate if 1) there was an obligation to preserve evidence at the time it was destroyed; 2) the accused party destroyed the evidence with a culpable state of mind; and 3) the evidence destroyed is relevant to the other side's claim. *Beaven v US Dept of Justice*, 622 F3d 540, 553 (6th Cir 2010). An employer destroying or concealing evidence can be evidence of pretext. *Byrnie v County of Cromwell, Bd of Ed*, 243 F3d 93 (2d Cir 2001).

Conclusion

The use of adverse inferences is alive and well in labor arbitration. Adverse inference issues can arise from failure to call a relevant witness, produce relevant documentation, silence, and/or the destruction of evidence. ■

DEFINING CORRUPTION DOWN

Barry Goldman

Robert McDonnell was the Governor of Virginia in 2014 when the federal government indicted him and his wife on bribery charges. A Virginia businessman named Jonnie Williams provided the McDonnells with over $175,000 in "loans, gifts and other benefits." In exchange, the Governor "arranged meetings, hosted events, and contacted other government officials" in an effort to advance the fortunes of Anatabloc, a nutritional supplement manufactured by Williams' company.

Mr. and Mrs. McDonnell were convicted and sentenced to prison terms of two years and one year respectively. McDonnell appealed, and the Court of Appeals affirmed. He petitioned the Supreme Court, they granted certiorari, and we have the case of *United States v. McDonnell*.

I don't want to be accused of spinning the facts here, so I'll take my language directly from the Court's decision. Here are two examples of the conduct at issue:

> Governor McDonnell's wife, Maureen McDonnell, offered to seat Williams next to the Governor at a political rally. Shortly before the event, Williams took Mrs. McDonnell on a shopping trip and bought her $20,000 worth of designer clothing. The McDonnells later had Williams over for dinner at the Governor's Mansion, where they discussed research studies on Anatabloc.
>
> At a subsequent meeting at the Governor's Mansion, Mrs. McDonnell admired Williams's Rolex and mentioned that she wanted to get one for Governor McDonnell. Williams asked if Mrs. McDonnell wanted him to purchase a Rolex for the Governor, and Mrs. McDonnell responded, "Yes, that would be nice." Williams did so, and Mrs. McDonnell later gave the Rolex to Governor McDonnell as a Christmas present.

There is no dispute that McDonnell "arranged meetings, hosted events, and contacted other government officials" on behalf of Williams and Anatabloc. The question the court addressed was whether those were "official acts." Here is more language from the Court's opinion:

> [T]he federal bribery statute… makes it a crime for "a public official or person selected to be a public official, directly or indirectly, corruptly" to demand, seek, receive, accept, or agree "to receive or accept anything of value" in return for being "influenced in the performance of any official act." An "official act" is defined as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit."

So let's review. Williams wants to see universities in Virginia conduct trials of Anatabloc so he can get FDA approval to market it as a drug. He takes the Governor's wife out and buys her $20,000 worth of clothes and a Rolex. The Governor invites him to the Mansion and also invites top health officials from his administration and executives from Virginia universities involved in drug research. What do you think is happening?

Exactly. Textbook public corruption is happening. And that's what the District Court and the Court of Appeals thought too. But the Supreme Court found otherwise. According to the court, arranging meetings, hosting events, and contacting other government officials is just what public officials *do*. Without more, the court said, those are not "official acts."

The decision contains a lot of what purports to be textual analysis and there is the invocation of the Latin maxim *noscitor a sociius* to establish that introducing people at a dinner at the Governor's Mansion is not "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending" because, um, reasons. Then there is this:

> [C]onscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time. The basic compact underlying representative government *assumes* that public officials will hear from their constituents and act appropriately on their concerns – whether it is the union official worried about a plant closing or the homeowners who wonder why it took five days to restore power to their neighborhood after a storm. The Government's position could cast a pall of potential prosecution over these relationships if the union had given a campaign contribution in the past or the homeowners invited the official to join them on their annual outing to the ballgame. Officials might wonder whether they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse.
>
> Oh *please*.

Anyway, McDonnell's conviction was reversed and we were left with a dramatically narrowed definition of "official act." (At least until *Trump v. United States* where the court needed a very broad definition of official acts so it could find Trump immune from prosecution for the crimes he committed in office. But that's a different essay.)

That was a few years ago. This year we got *Snyder v. United States*. James Snyder was the mayor of Portage, Indiana. He "steered" a contract for over $1 million to a local truck dealership who subsequently wrote him a check for $13,000. A jury convicted Snyder of bribery, and once again the case made its way to the Supreme Court.

The law in question (Section 666 of Title 18) makes it a crime to:"corruptly" solicit, accept or agree to accept "anything of value from any person intending to be influenced or rewarded" for an official act.

The Court did more of its highly sophisticated textual analysis and discovered that the conduct prohibited by the statute included only bribes, not gratuities. Bribes, you see, are paid to a corrupt public official before he performs the desired official act. Gratuities are paid afterward. You might think the language in the statute that says it's unlawful if the public official was "intending to be influenced or rewarded" meant it covered both, but you would be wrong. "Rewarded" does not mean rewarded. It's complicated.

But the policy reasons for this finding are not complicated. I am not making this up. Here is language from the decision:

> [I]s a $100 Dunkin' Donuts gift card for a trash collector wrongful? What about a $200 Nike gift card for a county

(Continued on page 20

DEFINING CORRUPTION DOWN

(Continued from page 19)

> commissioner who voted to fund new school athletic facilities? Could students take their college professor out to Chipotle for an end-of-term celebration? And if so, would it somehow become criminal to take the professor for a steak dinner? Or treat her to a Hoosiers game?
>
> [U]nder the Government's approach, families, students, constituents, and other members of the public would be forced to guess whether they could even offer (much less actually give) thank you gift cards, steak dinners, or Fever tickets to their garbage collectors, professors, or school board members, for example.

This is complete horseshit, of course. But there it is. The court ruled 6 to 3 along the predictable lines that Section 666 does not prohibit gratuities. The question is why. Why is the court systematically dismantling the law of public corruption?

The obvious answer is that the members of the court benefit from public corruption. Justice Thomas, for example, appears to be a world-class *schnorrer*. And the Federalist Society that gave us the current court majority also gave us *Citizens United* and the idea that corporations are people and money is speech. What used to be considered egregious corruption is now the ordinary course of business.

But there is also another answer. I'm thinking here of Daniel Patrick Moynihan's famous essay Defining Deviancy Down. In it, Moynihan cited Emile Durkheim for the idea that, "the number of deviant offenders a community can afford to recognize is likely to remain stable over time." He proffered the thesis that:

> [O]ver the past generation… the amount of deviant behavior in American society has increased beyond the levels the community can "afford to recognize" and that, accordingly, we have been redefining deviancy so as to exempt much conduct previously stigmatized, and also quietly raising the "normal" level in categories where behavior is now abnormal by any earlier standard.

If this idea is correct, society seeks a state of equilibrium with regard to what is considered normal, what is considered deviant, what is criminal and what is tolerable. If public corruption is de-stigmatized, it creates room in the system to criminalize something else, say, abortion or homelessness.

I don't know if this is happening because of Moynihan's principle. I note only that it is happening. So, what comes next ? After public corruption has been thoroughly normalized, where else might we expect to see similar reconfiguration?

The separation of church and state is a promising area. We have seen that the court is sympathetic to doctors who oppose reproductive healthcare on religious grounds, bakers and web designers who oppose same sex marriage, and coaches who like to lead prayers at public high school football games. If nothing is done about the direction of the court we are likely to see far more.

And then it is easy to imagine this court justifying limits on free speech and free association when they conflict with what the court perceives to be national security. The supermajority on the Supreme Court was engineered by the same radical conservative ecosystem that created Project 2025. Ideas that were "abnormal by any earlier standard" are now in play. ■

MICHIGAN DEPARTMENT OF LABOR AND ECONOMIC OPPORTUNITY

Jennifer Fields, BER
Wage and Hour Division Manager

It is the mission of the Wage and Hour Division to provide public service through the fair, effective, and efficient administration of laws that protect the wages and fringe benefits of Michigan workers including paid medical leave, provide for the safe and legal employment of minors, and require posting of notices related to human trafficking, youth employment, paid medical leave, and minimum wage.

The Wage and Hour Division does speaking engagements at many different events. We partner with the United States Department of Labor and The Michigan Department of Treasury to conduct joint webinars on Wage and Hour information. These events are well attended. You may sign up to join future events at michigan.gov/wagehour. Upon invitation, the Division will also attend your event and speak on Wage and Hour Topics.

Dates to remember in 2025

January 1, 2025, Michigan Minimum Wages increases to $10.56
February 21, 2025, Michigan Minimum Wage increases to $12.48
February 21, 2025, The Earned Sick Time Act becomes effective.

You may view the required posters and Frequently Asked Questions at michigan.gov/wagehour, available in English, Spanish and Arabic.

Minors in Performing Arts in Michigan

An Approved Application for Performing Arts Authorization form is needed from Michigan Wage and Hour for all minors between the ages of 15 days old to 17 years, prior to any rehearsal or performance - modeling, live stage, dancing, singing, filming, taping, etc. The company, the payroll company that is paying the minors and the extras, and the production company must submit a current and valid workers' compensation insurance certificate along with the Application for Performing Arts Authorization form for each minor at least 10 days prior to the start date and time of rehearsal and performance to this office for processing.

The Approved Application for Performing Arts Authorization form is needed for each minor, written parent/guardian permission statement, and the Posting Requirements must be kept on-site at the minor's place of employment/performance. All records required by Public Act 90 of 1978, The Youth Employment Standards Act, as amended, must be maintained and made available for inspection by an authorized representative of the Department and the employment must follow all provisions of the Act. ■

LIVIN' LA VIDA LOCA: SIXTH CIRCUIT INVOKES ENGLISH COMMON LAW TO EXPAND FMLA ELIGIBILITY

Clayton J. Prickett
Henn Lesperance PLC

It's well-settled that an employee cannot take leave under the Family and Medical Leave Act (FMLA) to care for their sibling. But a recent published Sixth Circuit ruling has the potential to expand employee FMLA eligibility to care for someone with a sudden-onset, debilitating medical condition.

Invoking the English common law, the Sixth Circuit interpreted an FMLA eligibility statute broadly and held that "in loco parentis relationships can develop during adulthood when one adult becomes unable to care for themself." Sticking with the common law tradition, the Sixth Circuit announced a new, prospective multi-factor test in determining "whether such a relationship has indeed formed between two adults." *Chapman v Brentlinger Enterprises*, ___F.4th __, 2024 WL 5103053, at *7 (6th Cir., 12/13/2024) (Moore, Kethledge, and Bloomekatz, J.).

1.

In *Chapman,* the plaintiff-employee's adult sister was diagnosed with terminal cancer. The employee took paid time off to be her sister's "primary caregiver" in her final days. The employee gave financial support by paying some of her sister's bills and buying groceries. She also cooked her sister's meals, fed her, assisted with personal hygiene and toileting, and performed other household tasks. The plaintiff's other sister (Alecia) also provided care to their sick sister, so the plaintiff was not the sole caregiver. *Id*. at *1-*2.

Once the plaintiff exhausted her PTO, she requested FMLA leave to continue caring for her sister. The Ohio-based employer denied the request, explaining that the FMLA did not cover leave to take care of siblings. When the employee disputed the denial, the employer supported its decision with a legal opinion from its attorney, which was provided to the plaintiff. Ultimately, the plaintiff did not show up on time for her next scheduled shift, and the employer fired the plaintiff via text message. The employee's sister died two days after she was fired. *Id*.

She sued in the Southern District of Ohio, alleging FMLA interference, among other claims. Judge Michael H. Watson granted summary judgment to the employer on the FMLA claims because plaintiff was not eligible for leave to care for a sibling.

To avoid summary judgment, plaintiff tried to argue that she was the "in loco parentis" parent of her sick sister and, therefore, eligible for FMLA leave. Relying on Department of Labor regulations and case law from other jurisdictions, the district judge held that an in loco parentis parent-child relationship must be established when the child is a minor or, at the very least, before the onset of a disability that renders the child incapable of self-care.

As a practical consideration, the district judge expressed concern that the plaintiff's interpretation would impermissibly expand FMLA eligibility: "[I]f merely caring for someone with a serious ailment could create an 'in loco parentis' relationship, then anyone who took time off to care for a seriously ill nephew, cousin, or friend would have an 'in loco parentis' relationship with that person and be protected by the FMLA." See *Chapman v Brentlinger Enterprises*, 2023 WL 11938836, at *4 (S.D. Ohio).

2.

In an opinion by Judge Blommekatz, the Sixth Circuit reversed, ruling that an in loco parentis, parent-child relationship can be established, in the first instance, when the child is over the age of 18. Such a relationship may also be established *after* a disability renders the "child" incapable of self-care.

The Sixth Circuit first concluded that the text of the FMLA does not address the circumstances under which "in loco parentis" relationships are established. Even though the statute uses "child," it does not follow that the "child" must be a minor when the parent-child relationship is established. Department of Labor regulations were also not persuasive on the ultimate question.

The Sixth Circuit then looked to out-of-jurisdiction FMLA cases which involved in loco parentis relationships that were established before the child reached the age of 18. Those cases, do not establish that "as a matter of law, the child *must* be under eighteen when the relationship forms." *Chapman*, 2024 WL 5103053, at *5.

Absent guidance from these sources, the Sixth Circuit looked to English common law. Relying on precedent rooted in the writings from Lord Eldon, Lord Cottenham, and Sir William Grant, the Sixth Circuit found that the common law understanding of "in loco parentis" does not prevent a parent-child relationship forming in adulthood.

Having found that an in loco parentis relationship could arise under these circumstances, the Court announced a four-factor test, again rooted in the common law, to determine whether a parent-child relationship has arisen for purposes of FMLA eligibility. Factors include "whether the loco parentis parent **(1)** is in close physical proximity to the adult loco parentis child; **(2)** assumes responsibility to support them; **(3)** exercises control or has rights over them; **(4)** and has a close emotional or familial bond with them, akin to that of an adult child." *Id*. at *11.

The panel made clear that these factors are non-exhaustive and should not be applied like a math formula. Indeed, even on remand the district court is not bound to consider only those four factors. It will be interesting to see how the district court rules on the remand.

3.

So, what now? *Chapman* certainly has the potential to expand the class of employees eligible for FMLA protection. Employment lawyers should understand *Chapman* and monitor how lower courts apply the new test. The four listed factors appear to be inherently subjective. They may require the employer (and, ultimately, the courts) to determine and apply a uniform standard under which uniquely personal familial relationships are evaluated, during a sensitive time when an employee is caring for a close relative with a serious medical condition.

(Continued on page 22

LIVIN' LA VIDA LOCA: SIXTH CIRCUIT INVOKES ENGLISH COMMON LAW TO EXPAND FMLA ELIGIBILITY

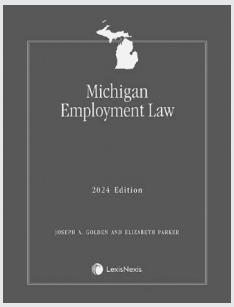
(Continued from page 21)

Employers may also consider revisiting their FMLA policies. Recall that the *Chapman*-plaintiff initially requested leave to care for her *sister*—not an "in loco perentis" *child*. The former remains outside the scope of the FMLA, and the latter was seemingly raised *after* the plaintiff-employee sued.

To avoid potential FMLA issues employers should think twice before categorically rejecting an FMLA leave request to care for an adult relative before inquiring into a potential in loco parentis relationship.

4.

Courts applying Michigan's Earned Sick Leave Act, however, likely would not have reached the in loco parentis issue discussed in *Chapman*. In contrast to the FMLA's text, Michigan's ESLA allows eligible employees to take a leave of absence to care for a "family member" with a serious medical condition. "Family member" includes a biological or foster sibling under Michigan law; the FMLA, in contrast, does not extend to siblings. ■



THE GOLDEN-PARKER BOOK ON MICHIGAN EMPLOYMENT LAW

Check out the 2024 edition of Michigan Employment Law! The book has seven chapters covering: entering into the employment relationship (chapter 1), hours compensation and fringe benefits (chapter 2), maintaining the employment relationship (chapter 3), disability and whisteblower (chapter 4), workplace safety (chapter 5), ending employment (chapter 6) and unions and collective relations (chapter 7).

This book is a valuable resource for labor and employment attorneys. It will save you hours of work and is worth the investment.

John G. Adam

WHAT ARBITRATORS WISH ADVOCATES KNEW: BEST PRACTICES FOR LABOR AND EMPLOYMENT ARBITRATION

Lisa W. Timmons

Arbitration in labor and employment law presents unique challenges that require advocates to be strategic, precise, and respectful of both the process and the participants. Arbitrators in these cases often observe common missteps that can be avoided with a thoughtful, streamlined approach. This article provides advice from the perspective of an arbitrator on how advocates can prepare and participate more effectively, ultimately making a positive impression on the arbitrator and strengthening their case.

Labor and employment disputes typically involve complex issues such as collective bargaining agreements, workplace policies, and sensitive employee matters. Given the nuanced nature of these cases, arbitrators emphasize the importance of careful preparation and clear presentation of evidence. They advise advocates to understand and be able to explain the contract, gather and present strong evidence, focus on key issues, and maintain a respectful and professional demeanor throughout the hearing.

1. Thoroughly Review the Contract

Advocates should review the CBA or employment contract well in advance, identifying the specific clauses that apply to the case. This may include clauses related to termination procedures, grievance procedures, discipline, and employee/management rights. A strong understanding of these terms is essential because labor disputes often hinge on precise contractual language. Each word or phrase in a contract can carry significant implications, and arbitrators expect advocates to be ready to explain and interpret these nuances effectively.

Identify Relevant Clauses and Interpretations

When reviewing the contract, advocates should consider multiple interpretations of relevant clauses, especially those with vague or open-ended language. Anticipating how the opposing side might interpret a clause allows advocates to prepare counterarguments in advance, adding depth to their case. Arbitrators appreciate advocates who present a balanced perspective, acknowledging ambiguities in the contract and offering reasoned interpretations or evidence of past practice that supports their case. By demonstrating a command of the contract language, advocates build credibility and lay the groundwork for persuasive arguments.

2. Present Strong Evidence

A strong case is built on a foundation of solid evidence and arbitrators rely on advocates to present credible, well-organized evidence that supports their arguments. Advocates should gather all supporting documentation, including relevant employment records, communications, policies, and other materials directly related to the dispute. In addition to these documents, ensure that every essential piece of evidence is readily accessible in the case file, as arbitrators value a well-prepared file that eliminates unnecessary delays or gaps in the case.

Establish Credibility and Relevance

In selecting evidence, advocates should focus on relevance and credibility. Highlight the most compelling documents and witness testimony without overloading the case with superfluous details. Each piece of evidence presented should be clearly tied to the case's main arguments, allowing the arbitrator to easily connect the evidence with the advocate's theory of the case.

Agree on Joint Exhibits When Possible

To streamline proceedings, advocates should work with opposing counsel to establish joint exhibits wherever possible. Agreeing on joint exhibits reduces redundancies and allows the arbitrator to focus on the core evidence efficiently. Visual aids, if used, should enhance the arbitrator's understanding of complex information without adding unnecessary volume to the presentation.

Address Attorney Fees Early

In many employment law cases, advocates may seek attorney fees as part of the remedy. Discussing attorney fees early provides clarity on the potential entitlement basis—whether statutory or contractual—and allows the arbitrator to set a scheduling order that includes provisions for post-hearing briefs if fees are awarded. Establishing a framework for attorney fees at the outset helps streamline the process, reducing the likelihood of disputes or procedural delays after the award.

3. Structure Arguments Logically

While advocates know their case, they need to appreciate the art of telling the story. Meaning, presenting arguments in a logical sequence. Opening with a clear statement of the case theory, followed by a methodical presentation of evidence and witness testimony, helps the arbitrator grasp the key points without distraction. Avoiding unnecessary tangents or lengthy asides is essential. Instead, advocates should focus on delivering a structured presentation that flows naturally from one point to the next.

4. Focus on Key Issues

Employment and labor cases often involve multiple points of contention, but not all issues carry equal weight in the final decision. Advocates who successfully identify and emphasize the most critical issues are better positioned to persuade the arbitrator. This may include disputes over specific contract terms, interpretations of workplace policies, or the justification for disciplinary actions. Focusing on these central issues prevents advocates from diluting their arguments by addressing peripheral matters that have minimal impact on the arbitrator's final decision.

5. Maintain a Professional Demeanor

Professionalism extends beyond the arbitrator to include respect for opposing counsel, witnesses, and other participants in the hearing. Advocates should avoid personal attacks, overly aggressive tactics, or inflammatory language, as these behaviors detract from the case's focus and can hinder productive dialogue. Even when opposing views or decisions are contested, maintaining a respectful approach strengthens the advocate's credibility and reinforces their commitment to a fair process.

Avoid Excessive Objections and a Combative Tone

Arbitration often involves a more relaxed standard for the admissibility of evidence than traditional court proceedings. Advocates should avoid excessive objections and refrain from an overly combative stance. The arbitrator is a trained, neutral decision-maker who can assess the relevance and weight of evidence as it is presented. By allowing a broader scope of evidence and maintaining a cooperative approach, advocates demonstrate respect for the arbitrator's role and create a smoother, less confrontational hearing process.

6. Communicate Effectively

Effective communication is essential in arbitration. Advocates should strive to present information clearly and avoid excessive legal jargon that may obscure their points. Arbitrators welcome advocates who focus on clarity, simplicity, and precision in their language.

Use Plain Language

While legal terminology is sometimes unavoidable, advocates should aim to use plain language wherever possible. By speaking directly and avoiding overly technical language, advocates make it easier for the arbitrator to follow their arguments. Clear language also reduces the risk of misinterpretation, ensuring that the arbitrator grasps the main points without confusion.

Explain Technical Terms When Necessary

If specialized terms or industry-specific jargon are essential to the case, advocates should take the time to explain these terms in plain English. This approach demonstrates consideration for the arbitrator's understanding and helps bridge any potential knowledge gaps that might otherwise impact the arbitrator's understanding of the case.

7. Consider the Bigger Picture

Labor and employment disputes often involve ongoing relationships between employees, employers, and unions. Advocates who keep the bigger picture in mind help create a more constructive process that can support future interactions. While advocates should vigorously represent their clients, they should also be mindful of the lasting impact of the dispute on the relationship between the parties. Advocates who approach arbitration with an understanding of these long-term dynamics demonstrate a balanced perspective.

Conclusion

Labor and employment arbitration requires advocates to prioritize preparation, clarity, and professionalism. By understanding the contract, presenting strong evidence, focusing on key issues, and respecting the arbitrator's role, advocates can strengthen their case and contribute to an effective arbitration process. These practices not only enhance the advocate's credibility but also foster a respectful and efficient environment that benefits all parties involved. ■

Labor and Employment Law Section
State Bar of Michigan
The Michael Franck Building
306 Townsend Street
Lansing, Michigan 48933

Presorted Standard
U.S. Postage
PAID
DETROIT, MI
Permit No. 1002

INSIDE *LAWNOTES*

Winter is here!

- Stuart Israel writes about issue-statement opportunities for brief-writers.
- Learn about NLRB rulings from articles by Regan Dahle, Benjamin King and Bryan Davis.
- Learn all about Michigan's Earned Sick Time Act in detailed overview by Adam S. Forman, Nancy Gunzenhauser Popper, and Daniel Glicker.
- Learn about adverse inferences in arbitration from Lee Hornberger.
- MERC news from Sidney McBride.
- Learn about the work for hire copyright doctrine from Julie Greenberg and Kristyn Webb.
- Updates about Wage and Hour issues from Jennifer Fields.
- Clayton Prickett writes how the Sixth Circuit invoked the English common law to interpret FMLA eligibility to cover "in loco parentis relationships."
- Learn how existing CBAs may delay when Earned Sick Time Act goes into effect.

Authors: John G. Adam, Ahmed Chehab, Regan Dahle, Bryan Davis, Jennifer Fields, Adam Forman, Daniel Glicker, Julie A. Greenberg, Ashley Higginson, Barry Goldman, Joel Kahn, Stuart M. Israel, Benjamin L. King, Sidney McBride, Blake Padget, Nancy Gunzenhauser Popper, Clayton J. Prickett, Lisa W. Timmons, and Kristyn C. Webb.