COVID-19 AND ESSENTIAL WORKERS (p. 22) PREGNANT WORKERS FAIRNESS ACT (p. 50)

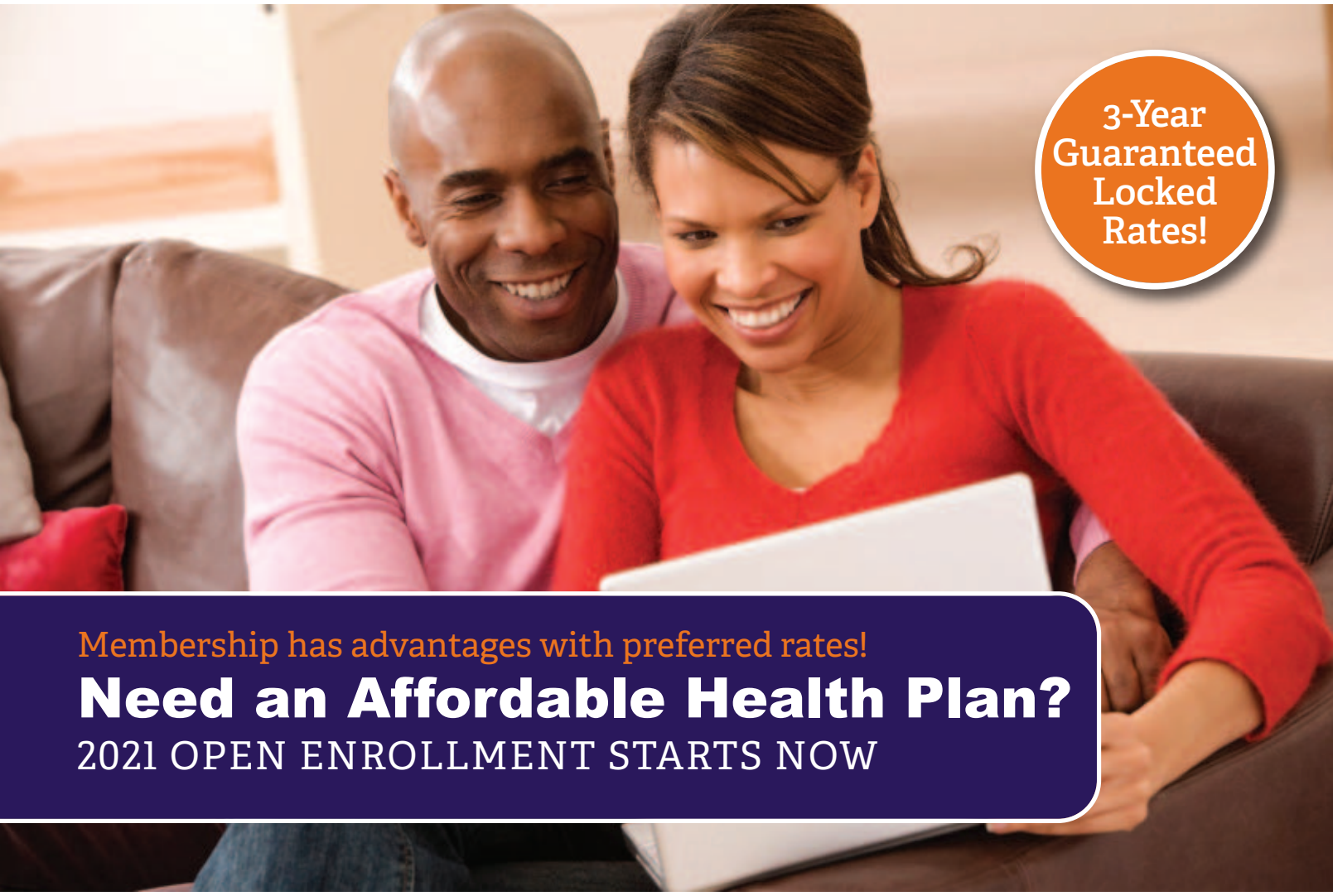
www.azbar.org/AZAttorney

ARIZONA ATTORNEY

JANUARY 2021

The Workplace in Flux

Unprecedented Employment Law Challenges



Membership has advantages with preferred rates!

Need an Affordable Health Plan?

2021 OPEN ENROLLMENT STARTS NOW

State Bar of AZ Health Insurance Exchange Plans Offer You Choices!

NON ACA Term Medical Plans

- Hospital, Office Calls, Labs, Surgeries
- Usually at least half the cost of ACA plans
- Simply answer a few medical questions
- NOT available on government healthcare website
- Full PPO network options in every county & NO tax penalty
- Critical Illness and accidents covered at 100%*
- **For COVID-19 testing, deductible and coinsurance are waived and apply toward treatment**
- Discounts for renewals. Save even more with wearable devices.
- Popular dental plan options, too!

ACA (ObamaCare) Plans

- Premium subsidies available if income is low
- No medical questions
- Most options are HMO
- Major Medical coverage
- RX Included
- Apply online only
- All pre-existing conditions are covered

STATE BAR OF ARIZONA®
Member Benefits

CONTACT US TODAY FOR A FREE QUOTE!
AZBarHealthInsuranceExchange.com
or call (866)708-6578 (toll free)

Plans are enrolled by AHIX.com, a division of JLBG Health. Plans are not available in all states. Check website for more details. In some cases we are unable to enroll you in an ACA plan because of contractual agreements. In this case you will be directed to a government website to enroll. Please consult your tax professional for more details. *No deductible for critical illness. $250 deductible applies for accidents.

Find a Better Way to Draft Documents

> "It used to take me up to 2 hours to generate an entire set of documents for my clients. In Lawyaw, I generate everything in 20 minutes tops."
>
> *- Sam, Lawyaw user*

- Automate document workflows from intake to eSign
- Use template sets and conditional logic to generate complex packets quickly
- Add client and matter information with the click of a button
- Integrates with Clio Manage, and more...

More than 1,000 law firms across North America have generated a combined 1 million documents in Lawyaw. That's at least 125,000 work days worth of manually cutting and pasting in Word docs saved by our users.
What would you do with more time in your day?

LAWYAW®

lawyaw.com/save-time

PARTNERS | ASSOCIATES | IN-HOUSE COUNSEL | MERGERS & ACQUISITIONS

AT THE CROSSROADS

As we reflect on 2020, it's hard to know where our paths will lead in the coming year. Phyllis Hawkins & Associates is ready to be with you every step of the way — wherever your next journey takes you. We are proud of the strength of our legal community, and it is our privilege to continue helping the best attorneys, firms, and companies in Arizona make successful, confidential moves.

When you are ready to move, or need to hire new talent, call on the experts at Phyllis Hawkins & Associates to find your perfect fit. Call us at **602.263.0248** or email **natalie@azlawsearch.com**.

PHYLLIS HAWKINS & ASSOCIATES
LEGAL SEARCH CONSULTANTS


Natalie Thorsen Harris
Managing Member


Phyllis Hawkins
Founder

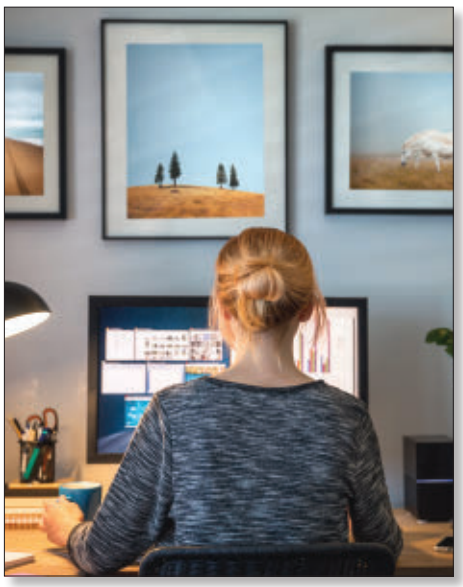
Confidential. Professional. Connected.

azlawsearch.com

ARIZONA ATTORNEY MAGAZINE

VOLUME 57 NUMBER 5

CONTENTS
JANUARY 2021



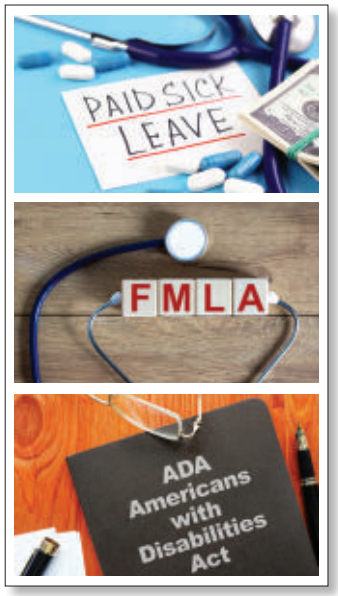
28

FRONT

4 From the Editor
6 President's Message
8 Soundoff
10 Eye on Ethics
12 Let's Practice

50

40



44

84

FEATURES

14 SPECIAL FEATURE
Employment Law

16 Post-COVID Employer Challenges
BY CHRIS M. MASON & DINA G. AOUAD

22 COVID-19 and Essential Workers
BY DR. MARTINA CARTWRIGHT & DENISE BLOMMEL

28 A Shift Toward Remote Working
BY JOSHUA C. BLACK

30 Home Injuries and Workers' Compensation
BY MATT C. FENDON & RYAN MURPHY

34 Federal Equal Employment Opportunity Law
BY JOSHUA R. WOODARD & JENNIFER R. YEE

40 Employer Duties in Wage Garnishment Orders
BY JODI R. BOHR

44 The ADA, the FMLA and Paid Sick Leave
BY HELEN HOLDEN & GAIL I. COHEN

50 The Pregnant Workers Fairness Act
BY JULIET S. BURGESS

54 Calculating Economic Damages in Ninth Circuit Cases
BY CHARLES L. BAUM II

60 Determining Earning Capacity Amid Changes
BY BRAD TAFT

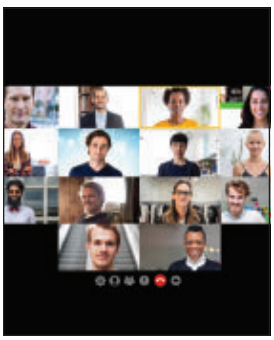
64 Cyberbullying in the Workplace
BY THOMAS A. JACOBS

BACK

68 Appellate Highlights
72 From the Board
75 Lawyer Regulation
76 People
82 Legal Marketplace
84 Breathe

ON THE COVER

As we approach a full year facing the COVID-19 crisis, the workplace challenges accumulate. In this issue, our authors address a wide variety of employment law issues—helpful any time, but achingly necessary as 2021 starts much as 2020 ended. Begin reading on page 14.



Not Guilty... On *All* Charges

Our website lists each of our 150+ complete *jury* trial acquittals

No other criminal law firm in Arizona lists more than 23.

Past success not a guarantee or prediction of future results. (Web results as of 1/1/20)

We can't do "Business Casual." We have to be dressed as if we're in trial – or ready to go to court at a moment's notice. This includes the overnight jail courts.

If you receive an emergency call from your client with an urgent criminal matter, call us and you will be directly connected to one of our attorneys – even in the middle of the night.

The DM Cantor Team consists of 10 highly trained criminal defense attorneys.

DM cantor

We Outwork The Other Guys.™

602-307-0808
www.dmcantor.com

Located at Two Renaissance Square
40 N. Central Ave., Suite 2300 Phoenix, Arizona 85004

The firm is AV® rated and listed in Martindale-Hubbell's® Bar Register of Preeminent Lawyers®

David Michael Cantor is a Board Certified Criminal Law Specialist* and was listed in the Top 100 Trial Lawyers by the American Trial Lawyers Association for 2007, 2010-2020.

4 Certified Criminal Law Specialists
The Most Criminal Law Specialists of any firm in Arizona!

DM Cantor is a boutique defense firm which handles only criminal cases. Gladly accepting referrals – from simple traffic matters and DUI to white collar and homicide. *Certified by the State Bar of Arizona Board of Legal Specialization.

FROM THE EDITOR

My grateful chalk art

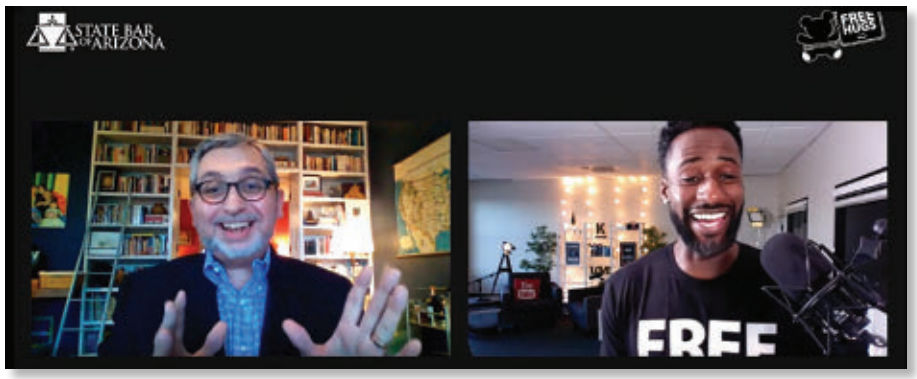
Sending hugs

It's an understandable impulse to **kick 2020 to the curb**, filled as it was with unprecedented challenge and loss. "Don't let the door hit you in the 0," many mutter, eager to move on. But as much as I get that, I'd recommend a different tack: **gratitude**.

In our house, we have two chalkable doors that we adorn depending on the season. As the pandemic wreaked havoc even into the fall, I decided to focus on a message of thankfulness, because when I looked at the whole picture, many of us have had more fortunes than misfortunes. I hope that's true for you—and that you enjoy **my attempt at mural art**.

At the magazine, I'm always pleased to thank those who make our publication possible. So, as I have in the past, I counted all those whose contribution as an author or story subject enlivened our pages in 2020. What I discovered had to be a record for us: **125 generous souls** took the time to craft their creativity into an article or other magazine content.

Thank you, all. And for those with a story idea in mind, please **join us in 2021**.



Speaking with the Free Hugs founder

Finally, I have **two other thank-yous** to mention.

Ken Nwadike, Jr., offered a moving keynote address at the State Bar's annual convention in December. I had the privilege to be asked to conduct an interview with Ken to follow his keynote. Thank you to my colleagues in the Bar's **Member Services Division** for inviting me to the conversation.

Ken is a peace activist and is best known as the founder of the **Free Hugs Project**. But as is made clear in our rollicking interview, his project is about a lot more than hugs. He's engaged in a transformative endeavor, one that requires a leap of faith from him—and from us.

As my conversation with Ken ended, I felt rejuvenated and thankful for the opportunities that lie before us. Thank you to Ken for generously sharing his time, and to you, whom **I invite to watch our interview**: https://bit.ly/3g9c8vr

Onward to 2021! AZAT

ARIZONA ATTORNEY MAGAZINE
A Publication of the State Bar of Arizona

Editor
TIM EIGO
Tim.Eigo@staff.azbar.org
602-340-7310

Art Director
KAREN HOLUB
Karen.Holub@staff.azbar.org
602-340-7303

Production Manager
MICHAEL PEEL
Michael.Peel@staff.azbar.org
602-340-7311

Communications Coordinator
CAROL ROSE
Carol.Rose@staff.azbar.org
602-340-7257

Advertising Manager
LISA BORMASTER FONTES
Lisa.Bormaster@staff.azbar.org
602-340-7230

Advertising Account Representative
MARC LEVINE
Marc.Levine@staff.azbar.org
602-340-7306

Advertising Coordinator
KIMBERLY GILLETTE
Kimberly.Gillette@staff.azbar.org
602-340-7226

Addresses
4201 N. 24th Street, Suite 100
Phoenix, AZ 85016-6266
(602) 252-4804
270 N. Church Avenue
Tucson, AZ 85701-1113
(520) 623-9944

www.azbar.org/AZAttorney

Subscriptions to this award-winning magazine are $50. Subscribe at **www.azbar.org/news-publications/arizona-attorney-magazine/subscribe/**

VOLUME 57, NO. 5

STATE BAR OF ARIZONA

Membership has advantages with preferred rates!

Need an Affordable Health Plan?

2021 OPEN ENROLLMENT STARTS NOW

State Bar of AZ Health Insurance Exchange Plans Offer You Choices!

NON ACA Term Medical Plans

- Hospital, Office Calls, Labs, Surgeries
- Usually at least half the cost of ACA plans
- Simply answer a few medical questions
- NOT available on government healthcare website
- Full PPO network options in every county & NO tax penalty
- Critical Illness and accidents covered at 100%*
- **For COVID-19 testing, deductible and coinsurance are waived and apply toward treatment**
- Discounts for renewals. Save even more with wearable devices.
- Popular dental plan options, too!

ACA (ObamaCare) Plans

- Premium subsidies available if income is low
- No medical questions
- Most options are HMO
- Major Medical coverage
- RX Included
- Apply online only
- All pre-existing conditions are covered

STATE BAR OF ARIZONA®
Member Benefits

CONTACT US TODAY FOR A FREE QUOTE!

AZBarHealthInsuranceExchange.com

or call (866)708-6578 (toll free)

Plans are enrolled by AHIX.com, a division of JLBG Health. Plans are not available in all states. Check website for more details. In some cases we are unable to enroll you in an ACA plan because of contractual agreements. In this case you will be directed to a government website to enroll. Please consult your tax professional for more details. *No deductible for critical illness. $250 deductible applies for accidents.

Supporting Access to Justice

I grew up observing my dad practice law in what was then rural Arizona. Time and time again, I saw him "give away his time" to help people who could never pay his billable rate. My father thought of it as his duty not only to the community where he made his living and served, but also to his profession, as well.

His pro bono work did not occur in isolation. For generations, many Arizona lawyers have answered the call to help those in need. Arizona lawyers "give away" hundreds of thousands of hours: performing pro bono work, mentoring, volunteering, serving on non-profit and community boards, and donating hundreds of thousands of dollars to worthwhile causes. I am proud of the members of the State Bar of Arizona who accept, as their duty, the obligation to help those less fortunate than themselves. It's a higher calling … and we always answer the bell.

Think of legal services providers when you are doing your end-of-year tax planning.

The COVID-19 pandemic did not diminish but confirmed our members' service to others. We should be proud of our profession and how we consistently stood up in times of calamities. Recognizing, because of the pandemic, the great legal need that exists with questions related to housing, employment, family law, consumer finance and domestic violence (to name a few), the State Bar of Arizona, in coordination with the Arizona Bar Foundation, created the Arizona Attorneys Respond Legal Hotline.

The Legal Hotline provided a free resource to obtain legal help during the COVID-19 global pandemic. It offered free statewide legal assistance for anyone with a legal issue created by the pandemic. Volunteer lawyers throughout Arizona staffed it; in fact, 226 attorneys volunteered their time. As of the end of October, the Legal Hotline handled more than 2,200 calls for services. And 680 referrals were made to attorneys, who provided free consultations.

In addition to the Legal Hotline, the State Bar of Arizona created the COVID-19 Information Center webpage (www.azbar.org/news-publications/coronavirus-covid-19-information-center). This page provides numerous links to helpful information for anyone with legal issues caused by the pandemic. From its inception on May 20 through the end of October, the page had 3,350 pageviews from people seeking legal information.

In addition, the Arizona Bar Foundation had its own page (https://covid19.azlawhelp.org) that generated 30,191 pageviews in the same timeframe. Given the Bar Foundation's decades-long reputation for providing legal assistance, the robustness of their numbers doesn't surprise me.

These legal services, created to assist during the pandemic, are only a few of the free and low-cost legal assistance programs offered through the State Bar and Arizona Bar Foundation. The Modest Means Project provides legal assistance to individuals who do not qualify for free legal services but cannot afford the typical cost for legal services. Attorneys who assist with the Project provide individuals with a one-hour meeting for a fee of $75. There are many other excellent programs offered through the Bar and the Foundation, including the Military/Veteran's Legal Assistance Project, Online Pro Bono Project, and Wills for Heroes Arizona.

As a legal community, I encourage each member to support these projects because it clearly confirms to others that we care deeply about our communities. Because of multiple commitments, not all of us can offer our time. However, we can offer funds—especially our tax-credit dollars. Arizona allows individuals to donate our tax-credit dollars to qualifying legal assistance programs: a donation of $800 for married-filing-joint filers and $400 for single-heads-of-household and married-filing-separate filers. Here are some of the 2020 participating charitable tax-credit-approved legal services agencies that can use your support:

- Arizona Justice Project: https://azbf.org/donate-now/general-program-support/arizona-justice-project
- Arizona Legal Women and Youth Services: https://azbf.org/donate-now/general-program-support/arizona-legal-women-and-youth-services
- Community Legal Services, Inc.; https://azbf.org/donate-now/general-program-support/community-legal-services-inc
- DNA People's Legal Services: https://azbf.org/donate-now/general-program-support/dna-people-s-legal-services
- Florence Immigrant & Refugee Rights Project: https://azbf.org/donate-now/general-program-support/florence-immigrant-refugee-rights-project
- Southern Arizona Legal Aid Inc.: https://azbf.org/donate-now/general-program-support/southern-arizona-legal-aid-inc-sala

A full list of the qualifying legal programs can be found at the Arizona Foundation for Legal Services and Education here: www.azbf.org/donate-now/participating-charitable-tax-credit-approved.

I respectfully request that you think of these organizations when you are doing your end-of-year tax planning this year. By supporting these organizations with our tax-credit dollars, we can continue to build a legal community with purpose. Wishing you the best this unique Holiday season.

OVER $100 MILLION PAID IN CO-COUNSEL FEES TO OTHER ATTORNEYS

Michael S. Burg
Founding Shareholder

Paul D. Friedman
Shareholder

Holly B. Kammerer
Shareholder

J. Tyrrell "Ty" Taber
Senior Counsel

AREAS OF EXPERTISE:

- Catastrophic Personal Injury
- Business & Commercial Litigation
- Construction Defects
- Insurance Bad Faith Litigation
- Wrongful Death
- Product Liability
- Birth Injuries
- Medical Malpractice
- Mass Tort & Class Action

CREATING POWERFUL PARTNERSHIPS

As a national trial firm, Burg Simpson has a long-standing reputation for creating powerful co-counseling relationships based on trust, fairness, and integrity. Founded in 1976, the award winning trial lawyers at Burg Simpson have the knowledge, expertise, and vast internal resources to provide you with a distinct advantage.

BURGSIMPSON.COM

BURG | SIMPSON | ELDREDGE | HERSH | JARDINE PC

Good Lawyers. Changing Lives.®

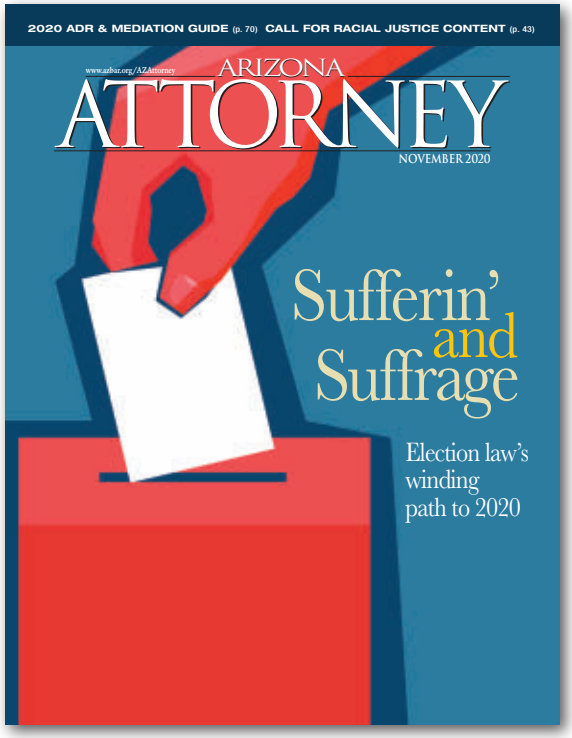
602 777 7000 | BURGSIMPSON.COM

2390 EAST CAMELBACK ROAD | SUITE 430 | PHOENIX AZ 85016

FOR MORE INFORMATION ABOUT CO-COUNSELING RELATIONSHIPS, CALL MICHAEL S. BURG OR PAUL D. FRIEDMAN

VOTING RIGHTS TESTED

The Arizona Attorney November 2020 edition omitted a court decision with major implications to Arizona voting rights. In 1973 Paul Marston, Maricopa County Recorder, was charged with managing the county's election system and presumably the task of making voting easier. Well known was his reputation of viewing the *quality* of voters more significant than the *quantity* of voters. To enforce this position, Marston devised a complicated test for applicants wishing to serve as Deputy Registrars.



On behalf of the Chair of the Maricopa County Democratic Party, I filed an action seeking to enjoin Marston from implementing that test. At trial a behavioral scientist testified the examination devised by Marston would dramatically reduce the number of less-educated and minority voters, as an elite cadre of registrars was likely to register voters primarily within its own circles.

Marston lost and appealed to the Supreme Court, which unanimously ruled he could not require deputy registrars to pass an examination (*Marston v. Superior Court, County of Maricopa* (109 Ariz. 209; 507 P.2d 971)). A different decision would have dealt a severe blow to voting rights.

Also, there is one missing point in the informative section "The Legislature Fumbles Redistricting" by David Cantelme, referencing redistricting lawsuits filed by Gary Peter Klahr, and with endnotes accurately noting the 1971 case of *Ely v. Klahr*.

Klahr originally sought assistance from the ACLU in *Klahr v. Williams*. As pro bono counsel for the ACLU, I referred him to another attorney. That relationship proved incompatible. Klahr proceeded to handle the case. It became clear that he capitulated and presented no adversarial position. Upon becoming Chair of the Arizona Democratic Party, the Court granted me permission to enter the litigation on behalf of the Party—thus the change to *Ely v. Klahr* and true advocacy.

—Herbert L. Ely, Phoenix

BAR EXAMINING DIVERSITY

Our new Bar President has taken the tradition of an obligatory once-a-year "diversity" message to a new level, upping our dosage to once a month, or so it would seem (*President's Message*, September and October 2020). He solicited comments. I hereby oblige.

The Bar's Strategic Priority 1 is to "increase the diversity of the legal profession to better reflect the community it serves." Whether it's a good idea is beside the point—it's been our self-same top priority since at least 2006.

Better-reflecting-the-community-we-serve won't happen spontaneously—we must force it. Our Board of Governors is on board, passing a Resolution to "… *dismantle* processes and structures that perpetuate bias within the legal profession and justice system." Dismantle! A plummy word of force! But dismantle what?

If our top priority is admitting subsets of individuals on bases unrelated to their aptitude to practice law, and if law school graduation and bar exam passage are required for admission, and if favored subsets have difficulty graduating law schools or passing bar exams, then we must dismantle standards.

Law schools have done their part, abasing admission standards, abandoning the LSAT and core class requirements, replacing letter grades with pass–fail, overhauling curricula to include critical race theory (amid much fanfare), etc.

It's the Bar's turn. Everything done to date has been lip service—we're no closer to our goal. The bar exam is the singular process and structure that perpetuates bias within the legal profession and justice system. Dismantle!

Who cares about more incompetent lawyers or the harm they'll cause? Heaven knows we have bunglers for lawyers aplenty today and we manage fine. At least we wouldn't be unleashing unqualified doctors or air-traffic controllers on an unsuspecting public where the consequences are life and death—just life without parole.

We've already waited too long. Our dithering closed down an Arizona law school dedicated to "improving diversity" and accepting less-qualified applicants, due to abysmal bar exam passage rates. Had there been no exam, that pioneering institution might have solved our dilemma single-handedly. No one wants to see better-reflecting-the-community-we-serve Strategic Priority 1 in 2034. Dismantle the bar exam.

—Stephen W. Baum, Phoenix

HOW TO SOUNDOFF

Arizona Attorney is proud to provide a forum for members to voice their opinions. Letters should pertain to recent articles, columns or letters to the editor, though letters of more general interest will be considered. Please limit letters to 300 words. Unsigned letters are not published. All letters are subject to editing. Send letters to tim.eigo@staff.azbar.org.

Make This *Your* Year

Happy New Year!

practice 2.0

Practice 2.0 is a free and confidential service available to all members of the State Bar of Arizona.

602.340.7332 azbar.org/practice20

STATE BAR OF ARIZONA

EYE ON ETHICS **by David D. Dodge**

Don't Impair Your Client's Right to Fire You

Our ethics rules provide that clients have an absolute right to fire us (politely known as "terminating the representation"), with or without cause.[1] This may sometimes lead to situations that can unfairly threaten a lawyer's ability to be paid for any obvious benefits conferred upon the former client prior to termination. Over the years, lawyers have attempted, through their fee agreements, to avoid such occasions—albeit with mixed results, as demonstrated below.

The usual case involving the enforceability of agreements concerning unpaid fees at the time the lawyer–client relationship ends is when the lawyer is working on a contingent fee basis.[2] Most of these cases turn on whether the lawyer, in attempting to protect himself from being stiffed, also may have included terms that have the effect of discouraging, impairing, "chilling" or penalizing the client from taking advantage of the client's absolute right to terminate before the contingency (recovery) has occurred. Because the test is an objective one, form in these instances can sometimes be just as important as substance.

Let's start with an Arizona ethics opinion.[3] Although the rules and their comments have been amended several times since the opinion was published in 1994, the precepts upon which it was based still apply for our purposes. There, the inquiring lawyer had a Personal Injury Employment Agreement that provided, in pertinent part:

> Under the law, the client has the power, but not necessarily the contract right, to discharge their attorney at any time. It is the intent of the parties herein that the client's right to discharge [the lawyer] be limited, to the extent possible by law, to situations where there is good cause for his dismissal.

Ethics Opinions and the Rules of Professional Conduct are available at https://azbar.org/for-lawyers/ethics/

Citing ER 1.16 and its Comment [4], the opinion reiterates the rule that the client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services, and cannot be circumvented by denominating the fee agreement as an "employment" contract, inferring that the client has hired the lawyer as an "employee" and limiting the occasions for termination of the "employment." The opinion states that such a provision would "likely discourage or deter a client" from discharging the lawyer and that the implied threat of a breach of contract action would act as an additional deterrent. The opinion concludes that the lawyer's attempt to limit the client's right to terminate their relationship was unethical because it would likely interfere with the client's right to have counsel of her choice.

A 1994 case from Georgia shows that the rule also may apply to non-contingent fee matters.[4] In that case, the lawyer had been retained by an insurance company under a seven-year agreement whereby the lawyer was to provide legal advice to the company on an "as needed" non-exclusive basis and was to be paid a monthly retainer for doing so. The lawyer was entitled to additional compensation on assigned projects that required an "extraordinary" amount of time and effort. The agreement further provided for automatic renewal of the representation for an additional five years unless terminated in the meantime and, more important, provided that if the company ended the representation, even for good cause, it agreed that it would pay the lawyer "as damages an amount equal to 50 percent of the sums due under the remaining terms, plus renewal of this agreement."

There was a change in the management after four years into the agreement, and the company attempted to terminate it through a declaratory judgment action challenging the validity of the damage provision. The lawyer counterclaimed, seeking more than $1 million in damages for breach of contract. After inconsistent rulings in the lower courts, the case finally found its way to the Georgia Supreme Court.

After discussing the fiduciary nature of the lawyer–client relationship and how it was manifested in the public policy requiring that a client must be free to end the relationship for any reason, the court found that the contested provision amounted to a "penalty" that "eviscerated" the client's absolute right to terminate the representation and refused to enforce it.

The bottom line here is that there are mistakes you can make in how you word your engagement letter that can leave you empty-handed in the event your client terminates the representation before it is completed as originally contemplated and in which you have provided a benefit that rightfully should be compensated. When in doubt, you might start by looking at the sample fee agreements found at the link to Practice 2.0 (Free Confidential Practice Management Help) on the State Bar website and its collection of practice forms.

David D. Dodge provides consultation to lawyers on legal ethics, professional responsibility and standard of care issues. He is a former Chair of the Disciplinary Commission of the Arizona Supreme Court, and he practices at David D. Dodge, PLC in Phoenix.

endnotes

1. ER 1.16 (Declining or Terminating Representation) at Comment [4], Arizona Rules of Professional Conduct, Rule 42, ARIZ.R.S.CT. *See also State Farm Mut. Ins. Co. v. St. Joseph's Hosp.*, 489 P.2d 837, 841 (Ariz. 1971).
2. Cases are collected in ABA/BNA LAW. MAN. OF PROF. CONDUCT at ¶31:1007, and in Annotated Model Rules of Professional Conduct (ABA Center for Professional Responsibility, 9th ed. 2019) at 286.
3. Ariz. Ethics Op. 94-02 (Retainer Agreement; Representation; Fees and Files) (March 1994) and the cases cited therein.
4. *AFLAC Inc. v. Williams*, 444 S.E.2d 314 (Ga.1994).

ARE YOU EARNING / CHARGING ENOUGH?

FIND OUT

IN THE 2019

ECONOMICS OF LAW PRACTICE REPORT!

$150
(plus tax and shipping)

STATE BAR OF ARIZONA

IT'S A SNAPSHOT OF ATTORNEYS IN ARIZONA:

- COMPENSATION
- HOURLY BILLING RATES
- LAW SCHOOL DEBTS
- TRACKS TRENDS FROM 2010, 2013, 2016 REPORTS

ORDER ONLINE: AZBAR.ORG/ORDERECONOMICSREPORT

MORE INFO? CONTACT ALBERTO RODRIGUEZ AT 602.340.7337 OR ALBERTO.RODRIGUEZ@STAFF.AZBAR.ORG.

LET'S PRACTICE **by Roberta Tepper**

This column provides tips on starting, building and running your law practice. Send your column ideas and questions to **practice2.0@staff.azbar.org.**

New Year's Resolutions

Whew, 2020 is finally behind us. Let's all take a deep cleansing breath and engage together in the annual ritual of making resolutions for the new year. Sure, we all make "pie in the sky" personal resolutions—lose weight, exercise more, win the lottery. Your personal resolutions aside, let's take some of the lessons we've learned in 2020 and make some professional resolutions.

2021 Resolution 1: Create, or update, your business continuity and succession plans

It's never been more important to pay attention to our physical wellness and overall well-being.

I know I suggested this as a 2020 new year's resolution. Yet so many lawyers still haven't thought about "what if." We all need both business continuity and succession plans; solo practitioners and small firm lawyers need them more than most. If we have learned nothing else from the pandemic, it is that. Law offices closed on short notice at the beginning of the pandemic; in-person meetings became Zoom calls; remote working became a necessity. Some were prepared for the changes wrought by the pandemic. Others were less prepared and had to scramble to re-invent their practice settings.

Although lawyers were considered essential workers and could go into the office, suddenly having too many people in one place became undesirable at best and dangerous at worst. Even lawyers who chose to go into the office had to do without support staff who were now reluctant to be in the office or home because schools and daycares had closed. Clients were unable or unwilling to meet in person as the crisis grew. In addition to dealing with the technology issues, including cybersecurity concerns, more mundane issues arose such as blocking our personal cell phone numbers now that we were using them and not office lines.

Even those lawyers who were prepared for these issues should take stock of how their plans worked—and update or revise.

Sadly, many lawyers needed succession plans in 2020. No one wants to think about it, but if you are hospitalized or die, please don't leave it to your grieving family and friends to deal with closing your practice. It's understandable that some feel superstitious about this. But having a plan will not bring on bad luck any more than having a will might cause your death. Lawyers are the ones who help our clients prepare for "what if." We owe it to them and to our families to make those plans for our professional lives as well.

2021 Resolution 2: Embrace cyber-hygiene

Cybercrime flourished in 2020—some say it increased by 600 percent or more. Phishing, malware and ransomware abounded, and lawyers and law firms are prime targets for malicious activity. The need to work remotely, perhaps on short notice, left many vulnerable as they now relied on home WiFi or networks that did not have enough cybersecurity features in place and no longer had IT staff on hand.

For 2021, how about implementing some basic steps:

- Use a VPN (virtual private network)—essentially a private tunnel between you and the internet that protects your data from interception. Is it foolproof? No (phishing is not deterred by a VPN), but it helps.
- Be cautious about what you open or click. In 2020, malicious emails purporting to be from lawyers sharing files relating to cases or asking lawyers to review documents spiked. We all got dozens. Be wary and ensure your staff is trained on when to click and when not to click.
- Try a password manager. How can we remember the dozens of individual passwords we're encouraged to have in the name of cybersecurity? A password manager lets you remember only one (hopefully appropriately difficult) password—the master password to your virtual vault. The manager does the rest and makes accessing sites and apps safer.
- Enable multifactor authentication. You've heard this advice multiple times. At its simplest, this requires your password and then some additional information—usually a code sent to your cellphone—before you can access your accounts. It's a reliable extra layer of protection against cyber-intrusions.

2021 Resolution 3: Resolve to be well

I would be remiss not to include this in the list. On the best of days it's a delicate balance that 2020 has caused to teeter even more than usual. It's never been more important to pay attention to our physical wellness and overall well-being. Find what works for you—riding your bike, hiking, reading or meditation. Either way, stay safe and stay well. And happy New Year.

Roberta Tepper is the Lawyer Assistance Programs Director for the State Bar of Arizona. She is the Immediate Past President of the Arizona Women Lawyers Association Board of Directors and serves on the American Bar Association's Law Practice Division Council and Techshow Board.

CONNECT WITH OUR CONTENT

Website: www.azbar.org/practice20

Twitter: @AZPractice2_0

Blog: https://readysetpracticeaz.wordpress.com

IN THIS ISSUE

16
Employer Challenges in COVID-19's Wake
BY CHRIS M. MASON & DINA G. AOUAD

22
Risk Management, COVID-19 and Essential Workers
BY DR. MARTINA CARTWRIGHT & DENISE BLOMMEL

28
Employment Law and a Shift Toward Remote Working
BY JOSHUA C. BLACK

30
Are Home Injuries Covered by Workers' Compensation?
BY MATT C. FENDON & RYAN MURPHY

34
Federal Equal Employment Opportunity Law
BY JOSHUA R. WOODARD & JENNIFER R. YEE

40 Ignoring Wage Garnishment Orders Can Be Perilous for Employers — BY JODI R. BOHR

44 The Interplay Between the ADA, the FMLA and Paid Sick Leave — BY HELEN HOLDEN & GAIL I. COHEN

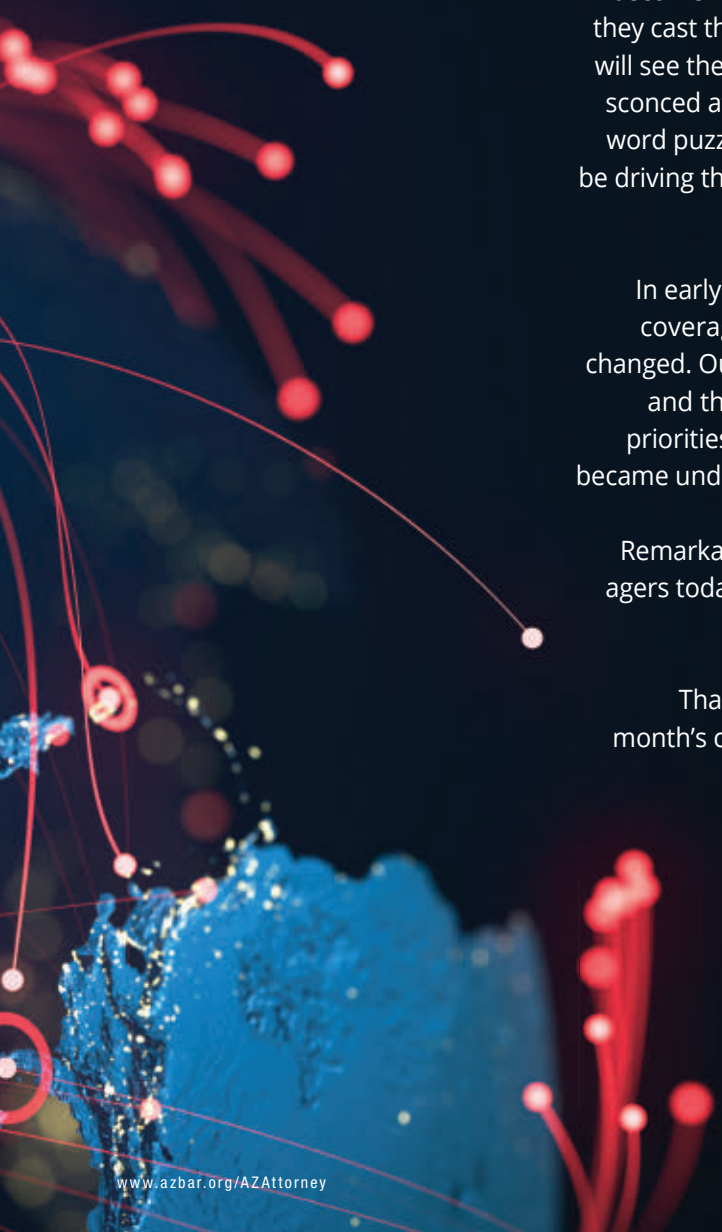
50 The Pregnant Workers Fairness Act — BY JULIET S. BURGESS

54 Calculating Economic Damages in Ninth Circuit Employment Cases — BY CHARLES L. BAUM II

60 Determining Earning Capacity in a Changing Labor Market — BY BRAD TAFT

64 Cyberbullying in the Workplace — BY THOMAS A. JACOBS

Employment Law in a Rapidly Changing World



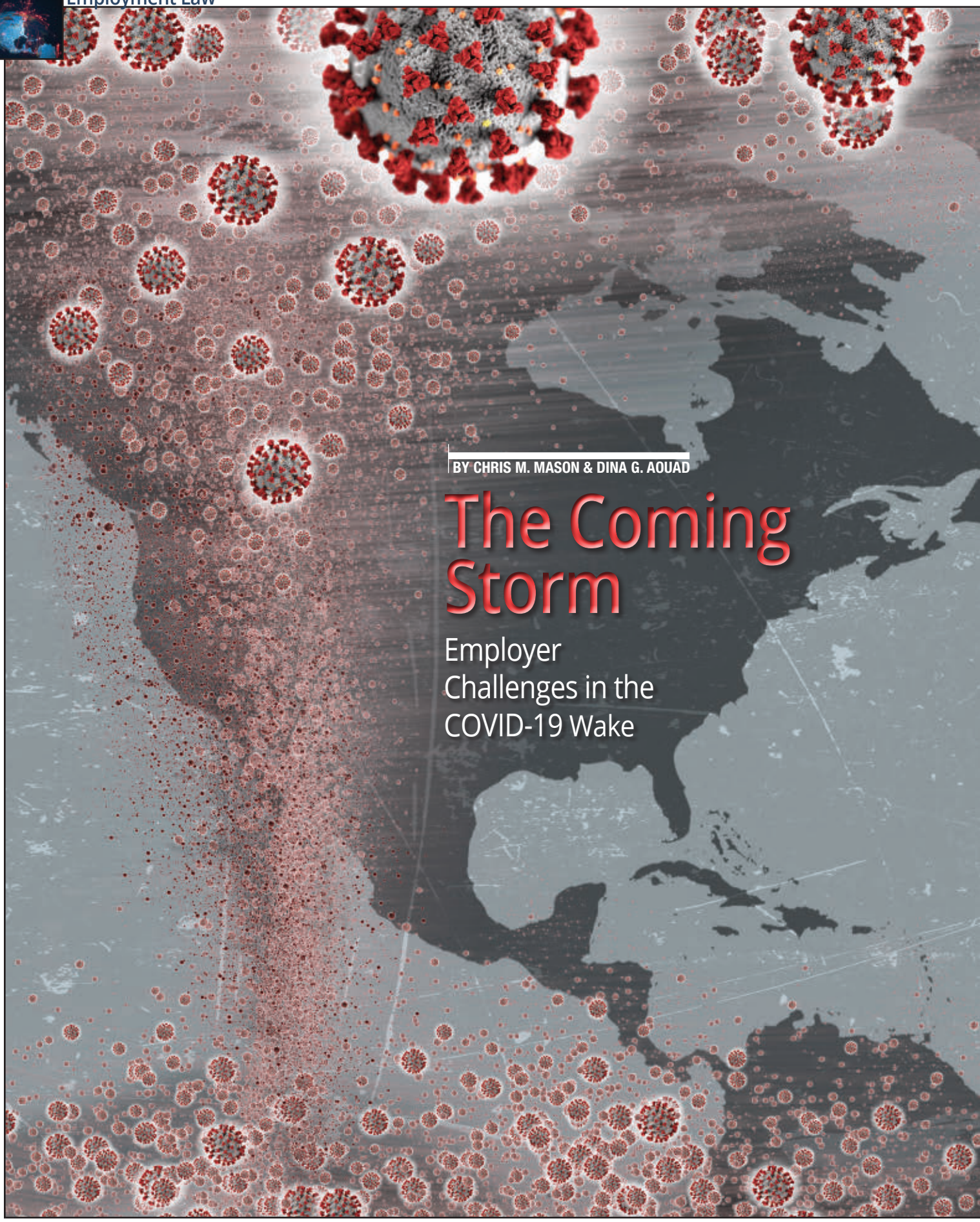
Those seeking a sign of how different the workplace has become in 2020 need only look about them. What is it that many will see as they cast their gaze? If they are like millions of Americans—and we are—they will see the workspace they have carved out of their own home. Whether ensconced at their dining room table, sharing a card table with boxes of crossword puzzles, or perched on the edge of their bed, the worker of today may be driving the economy just steps from where they sleep, eat dinner, and help kids with schooling—for those fortunate enough to be employed.

In early 2020, we had a particular vision for this month's employment law coverage. Early planning nearly always bears fruit, but this year all that changed. Our expectations about likely workplace topics—sexual harassment and the #MeToo movement, changes to overtime rules, shifting OSHA priorities—began to be upended in March. That's when a global pandemic became undeniable, and all segments of the economy started to feel its brunt.

Remarkably, among the threshold questions facing practitioners and managers today are "Where is the workplace?" and "How do we keep employees and clients physically safe?"

Thank you to the authors who engaged on some hard questions. This month's content includes a focus on issues as novel as the coronavirus, but also coverage of nuts-and-bolts topics that will aid practitioners and the companies they serve.

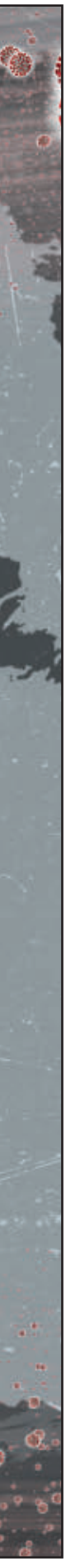
Of course, the workplace remains open after this issue, so don't wait a year if you have another employment law idea. Whether you're in your office or at your kitchen table, write to us with suggestions for future content, at **tim.eigo@staff.azbar.org.**



BY CHRIS M. MASON & DINA G. AOUAD

The Coming Storm

Employer Challenges in the COVID-19 Wake



"Change is the law of life, and those who look only to the past and present are certain to miss the future."

—John F. Kennedy

Few words other than these immortalized by President Kennedy could better capture the needed attention to the future that employers face in the inevitable aftermath of the COVID-19 pandemic. Change is the unmitigated constant, but it often flows so gradually and imperceptibly that we can see it only on reflection, whereas at other times it erupts suddenly and violently, shaking the foundation of our worldview.

The recent dramatic upheavals we've experienced in our personal and professional lives have imposed lasting changes that will continue to reverberate throughout our economy and in our working lives, not just in the coming months, but for years, and possibly decades. The law, which normally lumbers slowly, has repositioned seemingly overnight. And the changes it brings are not at an end. They will project long into the future, beyond even the cessation of COVID-19 as a global threat. Employers need to prepare now and adjust to these changes permanently.

Greater Expectations for Workplace Safety

Those employers that faced strong vocal opposition in the past nine months to keeping their offices and workplaces open, or that sustained more nuanced critiques of workplace mask requirements and social distancing practices, know all too well that the standard for workplace safety has shifted. Outside of highly specialized industries, most employers have not had to justify the minutia—like their particular choice of workplace sanitizer—but must do so now and likely will need to continue well into the future. So many governmental and intergovernmental agencies, from the World Health Organization to the Centers for Disease Control (CDC) and the Occupational Safety and Health Administration (OSHA) have issued varying guidelines and advisories in the past nine months to help protect employees and workplaces from COVID-19. Many of these guidelines, while not necessarily legally binding in themselves, create new expectations for the standard of care. This stems from the employer's generalized duty to provide a safe workplace.

Beginning long before the rise of the pandemic (in addition to facing detailed and precise regulations on workplace safety adopted by OSHA and corresponding state agencies), employers have had the responsibility to comply with the General Duty Clause of the Occupational Safety and Health Act. The General Duty Clause creates an amorphous expectation that evolves with the changing workplace. Specifically, 29 U.S.C. § 654(a)(1) mandates that employers provide a place of employment "free from recognized hazards that are causing or likely to cause death or serious physical harm" to employees. While this vague language provides little specific guidance, it implicitly imposes a standard of care, based on contemporary perceptions of "recognized hazards" and reasonable safety practices. Any guidance advanced by the relevant agencies may be used to show what hazards should be recognized and what safety practices should be expected. Failure to meet these standards could result in fines or litigation.

Amidst the present pandemic, that likely means at a minimum shutting down facilities when required by government order, adopting face-covering requirements where imposed, enforcing social distancing expectations, encouraging remote working where possible, instructing ill employees to remain home, adopting cleaning and sanitization practices encouraged by the CDC, and adhering to the myriad other requirements to protect employees from contagion.

But what of requirements after COVID-19 passes? Will these expectations remain?

Some measure of these precautions may continue and be necessary. Many other virulent pathogens abound, posing their own threats to health and safety. The next pandemic is widely perceived as simply a question of time. While face-covering requirements are more likely to subside in many workplaces as COVID-19 passes, employers should be mindful that some of the other precautions adopted during the pandemic will serve well against other pathogens like influenza and even the common cold. Engineering controls providing for better air circulation, and physical barriers are more likely to remain in place.

Thus, for those employers that have not already done so, they should adopt and implement a proper and realistic contagion Preparedness and Response Plan addressing workplace precautions against the spread of contagious illness. Moreover, employers should evaluate leave policies and expectations for sick workers. Even after the threat of COVID-19 abates, the general consensus appears to support keeping ill workers outside of the workplace, which reflects a dramatic shift from the past in which employees were expected to "tough out" illness in the workplace if possible. The new expectations may require expanded sick leave. In fact, it

CHRIS M. MASON is a Member with Jennings, Strouss & Salmon, P.L.C. He counsels employers on all aspects of labor and employment law, including collective bargaining and union organizing, restrictive covenants, employment discrimination, sexual harassment, whistleblowing, retaliation, wrongful termination, personnel policies, reductions in force, trade secrets, restrictive covenants, duty of loyalty, and drug and alcohol testing.

DINA G. AOUAD is an Associate with Jennings, Strouss & Salmon, P.L.C. She works in the firm's Business Litigation department, focusing her practice on commercial litigation and labor and employment.

may even drive many jurisdictions to adopt more extensive sick leave requirements, some of which may require paid leave.

Increased Workers' Compensation Claims for Contagious Disease

Among other claims, workers' compensation claims for employees exposed to COVID-19 and potentially any other pathogen in the workplace could be on the rise. Traditionally, workers' compensation claims based on contagious diseases have proven difficult to sustain, but that is not always the case. Moreover, the Industrial Commission of Arizona (ICA) announced earlier this year that COVID-19 workers' compensation claims *cannot* be categorically denied. Arizona law *requires* all denials to be well grounded in fact and warranted by existing law. The ICA advised carriers and self-insured employers to evaluate COVID-19 claims bearing in mind factors such as: the nature of the employment and the risk of contracting COVID-19; whether an identifiable exposure occurred at work; the timing between an identifiable exposure and the development of COVID-19 symptoms; the reliability of evidence that the work-related exposure caused the disease; and the like.

In addition to facing workers' compensation claims if an employee contracts COVID-19 on the job, employers are also potentially at risk for negligence claims from customers, clients or visitors who contract COVID-19 in the worksite. If a business seriously disregards federal or state guidelines and a number of nonemployees become infected, this could potentially give rise to a negligence claim.

Expanded FFCRA Paid Leave Requiements

The Families First Coronavirus Response Act (FFCRA) became effective on April 1, 2020, and its paid leave requirements remain in effect through December 31, 2020, at which time they will expire on their own terms. At the time of this article's drafting in late October 2020, this deadline has not been extended, but given the COVID-19 resurgence in recent weeks, there is good reason to suspect that the FFCRA's paid leave requirements could be extended or even enhanced.

Currently, the FFCRA requires, among many other things, that covered employers provide their employees with paid sick leave and expanded family and medical leave for qualified reasons related to COVID-19. Generally, the Act mandates that covered employers must provide up to 80 hours of paid sick leave to all employees who qualify for expanded leave. An employee is qualified for paid sick leave if the employee is unable to work or telework and the employee meets *any* of the qualifying reasons under the Act, including:

1. the employee is subject to a federal, state or local quarantine or isolation order related to COVID-19
2. the employee has been advised by a health care provider to self-quarantine related to COVID-19
3. the employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis
4. the employee is caring for an individual subject to an order described in (1)

or self-quarantine as described in (2)
5. the employee is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19
6. the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury

> The recent dramatic upheavals we've experienced in our personal and professional lives have imposed lasting changes that will continue to reverberate throughout our economy and in our working lives.

Up to 12 weeks of expanded family and medical leave (10 of which may be paid) also may be used for an employee to care for his or her child, akin to reason 5 (above) for paid sick leave.

The administration of these requirements, exacerbated by emergency adoption of regulations, disagreements between early court interpretations and the Department of Labor, and perceived gaps in the statutory language itself, expose many employers to the risk of a lawsuit if they have misapplied the applicable standards. Employees who are denied the full measure of their leave rights could bring suit, claiming denial of those rights, or even retaliation for requesting leave. Some early lawsuits already have been filed. Indeed, significant legal disagreement abounds over issues such as whether employees on furlough may qualify for paid leave under the FFCRA. Consequently, employers should adopt a very deferential approach to administering these programs.

Presently, the paid leave opportunities from the Act are available as a one-time use benefit. Despite congressional talks of expanding the Act or implementing a second stimulus package that would extend the applicability of the Act, no concrete steps have been taken to guarantee that the FCCRA will extend this past December 31, 2020. However, employers should be on the lookout if any such extension is granted so as to ensure they are in compliance with all federal laws and not in danger of facing any potential lawsuits.

Continued Teleworking and ADA Accommodations

Employers have long struggled with striking the appropriate balance between providing reasonable accommodations under the Americans with Disabilities Act (ADA) while also meeting reasonable workplace expectations, the challenge of which has only increased in recent years. With the measures taken during the pandemic, employers that wish to transition their employees back into

the office may face a greater burden of proving that teleworking or added leave time is unreasonable or that they cause undue hardship in the future.

The ADA requires most employers to provide reasonable accommodations to qualified employees with disabilities who require accommodations to perform the essential functions of their job, so long as the requested accommodations do not impose an undue hardship on the employer. Employers must engage in an interactive dialogue with employees over possible accommodations that strike the balance between addressing the employee's needs and the needs of the workplace.

Teleworking and additional leave time are often asserted as reasonable and necessary accommodations, subject to various limits. During the height of the pandemic, many businesses allowed or even required their workforce to telework. As many businesses have reopened, the reactions of employers have varied, with some expecting a full return to the workplace, while others have allowed or expanded teleworking.

Employers that wish to transition their employees back into the office may face a greater burden of proving that teleworking or added leave time is unreasonable or that they cause undue hardship in the future.

If employers have been able to allow for these adjustments for the pandemic, how forcefully can they assert that these measures are not reasonable or that they cause an undue hardship once the threat has diminished? Few would question employers that made these adjustments to meet legal requirements, such as for businesses deemed non-essential and which were ordered to close. Where these measures were taken voluntarily, employees are now motivated to force continued teleworking or added leave rights (under the auspices of an ADA accommodation request) and could exploit the adjustments their employers have made.

Employers should consider now how expansively they should permit continued teleworking and expanded leave rights. At the very least, employers should consider and retain information revealing any inefficiencies or decline in performance during the pandemic while it can still be tracked. This information may prove to be instrumental later in demonstrating that extended leaves or teleworking arrangements do in fact create costs and losses that would render them an undue hardship. Granted, these issues and determinations are always made on a case-by-case basis, but employers should be aware now how their adjustments today may affect their obligations tomorrow.

Also, permitting continued teleworking raises questions about the employer's obligation to protect not only its sensitive information, but possibly customer or client confidential information. With increased teleworking over the past nine months, which was generally adopted suddenly and without detailed preparation in light of the pandemic, data systems have become increasingly vulnerable to hacking. Employees routinely dialing in from remote locations may not understand or undertake important precautions against cyberattacks and may unwittingly grant hackers access to protected information through their remote connections. Employers should revisit their policies and training and consider additional data security measures.

Teleworking, Wage and Hour Concerns, FLSA Claims

The Fair Labor Standards Act (FLSA) requires employers to pay covered non-exempt employees at least the federal minimum wage for every hour worked and provide overtime pay for all hours worked over 40 hours in a work week. The Arizona Minimum Wage Act similarly requires payment of minimum wage, albeit at a higher rate than that mandated by federal law. Tracking hours and ensuring that non-exempt employees are paid for all hours that they are not working off the clock, and that they have been fully compensated for all overtime hours, is challenging enough in a traditional brick-and-mortar business. Employers are suddenly thrust into unexpected teleworking arrangements, and other job modifications may have been ill prepared to track hours and ensure full FLSA compliance. Now is the time for them to review their practices and correct any mistakes or oversights, as these errors may lead to costly litigation and possible class action claims.

Underreported work time

Many employers were unprepared to adequately track work hours for non-exempt employees and may have assumed hours based on traditional work schedules, or they may have taken other measures that do not fully account for actual hours worked. Legal claims may be on the horizon for those employers.

Because telework is treated the same as work performed at the primary worksite under the FLSA, an employer is still required to compensate its employees for all hours of telework actually performed, including overtime, provided that the employer knew or had reason to believe the work was being performed, even if those hours were not previously authorized.

Conversely, if an employee does not report their hours of telework and the employer had no reason to believe the work had been performed, then an employer is not required to compensate the employee for those unreported hours. But an employer cannot bury its figurative head in the sand on the issue. The duty rests with the employer to track the hours and maintain proper records. If an employer does not work with their employees to create effective time-reporting procedures, employers could potentially face wage payment claims from employees alleging they weren't paid for all hours worked from home.

The employee cost of teleworking

Teleworking also has exacerbated concerns over who must bear the cost of equipment and services needed for remote work. Employees may have concerns that they are using their personal computers or laptops to work from home, and may be paying for internet access, cellphone service and a host of other business expenses on their own. Aside from the practical strain this may

place on the relationship between employer and employee, the FLSA may require some amount of reimbursement depending on the circumstances.

Generally speaking, employers are not required to reimburse employees for business-related expenses under the FLSA, although certain states have laws mandating certain reimbursements. However, even under the FLSA, employers cannot require employees to bear costs associated with necessary "tools of the trade," including equipment "used in or … specifically required for the performance of the employer's particular work," if those costs dip into the employee's minimum wage or overtime wages. For employers that pay sufficiently above minimum wage, the risk is minimal. However, many employers that made rapid changes and conversions to teleworking should evaluate employee wages to ensure that they are not using minimum wage earnings to pay for tools of the trade.

FLSA exemptions

Finally, under the FLSA, some employees are exempt from federal minimum wage and overtime pay requirements, such as executive, administrative, professional and outside sales employees, although many must meet salary requirements and rigorous-duties tests depending on the particular exemption. These exemptions have confusing requirements and are frequently misunderstood and misapplied, and this problem could easily have been exacerbated by well-intentioned employers adjusting schedules, leaves and salary reductions in the wake of the pandemic. Employers may face litigation if they reduced salaries below the minimum salary requirements, or repeatedly adjusted salaries during the pandemic such that they might not be considered true or consistent salaries needed for application of some of the exemptions.

One particular FLSA overtime exemption, the one for outside sales personnel, may be put to an even greater test, in part because of stay-at-home orders. To qualify as an outside sales employee, the employee's primary duty must be making sales, and the employee must be customarily and regularly engaged away from the employer's place of business. "Away from the employer's place of business" is defined under the FLSA as an employee making sales at a customer's place of business or home. If an outside sales employee is working at a fixed location, such as his or her own home office, which can understandably be the case during the pandemic with the accompanying stay-at-home orders, that location is considered an extension of the employer's place of business. Those traditionally and justifiably considered outside sales personnel arguably may not qualify for this exemption during those periods.

Summary

Expectations for employers will continue to evolve as the nation navigates through the pandemic and into recovery, some perhaps making the future workplace more flexible and responsive to employee needs. Many changes, though, are likely to create difficult hurdles that employers should master now, before they become overwhelming, destructive problems. Being prepared for these expectations now will help employers and employees navigate through these challenges during these changing times, and into the future.

Risk Management and COVID-19

What Essential Workers and Their Bosses Need to Know

BY DR. MARTINA CARTWRIGHT & DENISE BLOMMEL

Coronaviruses are a large family of infectious viruses that appear "studded" like a crown—hence the name "corona." Coronaviruses cause a number of illnesses in animals, including birds, bats, cats and other mammals. In the 1960s, research showed some coronaviruses "jump" from animal to human. Most are relatively harmless to humans, with some strains responsible for a third of common colds. Yet in 2002, a more serious and unknown form of human coronavirus emerged causing Severe Acute Respiratory Syndrome (SARS), and in 2012 another novel strain was linked to Middle East Respiratory Syndrome (MERS).[1] In December 2019, the third novel human coronavirus, dubbed Coronavirus Disease 2019 or COVID-19 by the World Health Organization (WHO),[2] was first discovered in Wuhan, China, and by February 2020[3]it traveled the world, creating a global pandemic.[4]

COVID-19's Impact

COVID-19 is highly contagious. Studies show people are most contagious just before showing symptoms,[5] and risk of transmission is higher in those in close contact with each other—six feet. The primary means of transmission is through airborne respiratory droplets from the infected person to another; coughs, sneezes, talking or even breathing can release droplets into the air. Secondary transmission is through contact (touch) with surfaces that have viral droplets; however, the length of time the virus can live on surfaces varies.

People can test positive or negative for COVID-19 and not experience symptoms; alternatively, some may test negative and be symptomatic. Much depends on the type of test (nasal or blood) as well as the viral load—meaning just because traces of virus are present does not mean there is enough to cause illness. Vague symptoms like fever, chills, cough, shortness of breath, fatigue and headache may appear 2-14 days after exposure to the virus.

Fortunately, most infected individuals remain asymptomatic throughout the COVID-19 disease course, yet others develop a flu-like illness with viral pneumonia that may progress to acute respiratory distress syndrome and require hospitalization and place-

ment on a ventilator. Those with underlying medical conditions, like diabetes or heart disease, or of advanced age, are at greater risk for COVID-19 hospitalization, medical complications and death. Recovery from severe COVID-19 can be prolonged and result in severe neurological, pulmonary and cardiac issues. A recent study showed 80 percent of COVID-19 patients discharged from the hospital had at least one symptom persisting 60 days after initial symptoms, with over half reporting fatigue and 43 percent experiencing shortness of breath.[6]

The Centers for Disease Control and Prevention (CDC), located in Atlanta, Georgia, is the nation's health protection agency focusing on disease prevention and control. CDC is part of the U.S. Department of Health and Human Services (HHS), and both agencies work together to track COVID-19 information as part of "HHS Protect," a data collection system that gathers COVID-19 information from federal, state and commercial sources.[7]

In March, to address the COVID-19 outbreak, state governments, using CDC guidelines, took basic epidemiology steps, like closing schools and "non-essential" businesses, suggesting personal protective equipment and social distancing, and requiring employees to work from home.[8] As scientists learn more about the virus, guidelines have and will change or adjust accordingly. Expect federal, state and local authorities to continue to make recommendations based on geographic location. Standards of practice that will likely remain consistent include: social distancing; proper wearing of masks (over nose and mouth); frequent and thorough handwashing—meaning 20 seconds with soap and water or use of a ≥60 percent alcohol-based hand sanitizer with vigorous rubbing. Outdoor venues with spaced seating will continue based on information about how temperature, humidity and UV light affect decay of the virus.[9]

The mass shutdown had a profound effect on America's workers. The country's gross domestic product took a nosedive, and unemployment increased to levels not seen since the Great Depression.

FFCRA and the CARES Act

In late March, Congress passed two laws, the Families First Coronavirus Response Act (FFCRA)[10] and the Coronavirus Aid, Relief, and Economic Security (CARES) Act.[11]

The FFCRA, enforced by the U.S. Department of Labor (USDOL), mandated that employers of less than 500 and all public employers pay emergency paid sick leave in six eligibility categories[12] and provide expanded paid Family Medical Leave Act (FMLA) coverage for up to 10 weeks in the case where an employee had to care for his/her minor child, could not telework, and school or childcare was unavailable due to COVID-19.[13]

The $2.2 trillion CARES Act provided SBA-forgivable loans to business entities through the Paycheck Protection Program, an additional $600 per week in unemployment insurance benefits through the Pandemic Unemployment Assistance program,[14] and major funding to federal agencies, states and the airlines.

Essential businesses and workers were permitted to continue to operate during the pandemic. Arizona lifted restrictions in May, paused reopening in July, and is gradually beginning the phases of return to school and business.[15] Unemployment rates have plummeted. However, some businesses will never recover.[16]

Other State and Federal Laws

As more employees return to the traditional "in-person" workplace, both employers and workers need to know the best practices for dealing with COVID-19.[17] Some fundamental federal and Arizona laws are important to keep in mind.

All Arizona employers are required to provide their employees with a workplace free of recognized hazards that cause or are likely to cause death or serious physical harm.[18] COVID-19 is such a hazard.

All Arizona employers are required to purchase, or self-insure[19] for, workers' compensation coverage.[20] If an employee contracts COVID-19 at work, the employee's sole claim is for workers' compensation as it is an exclusive remedy for workplace injuries.[21] A notable exception to exclusivity is when an employer fails to have workers' compensation coverage, in which case the injured worker can either sue the employer in tort or file a No Insurance claim with the ICA.[22] The ICA issued a Substantial Policy Statement on May 14, stating that workers' compensation insurance carriers and self-insured employers cannot categorically deny COVID-19 claims.[23] In addition, federal OSHA directed that employers had to reasonably and in good faith investigate such claims before recording them on the OSHA 300 logs.[24]

The Americans with Disabilities Act (ADA), which applies to employers of 15 or more, and the federal Rehabilitation Act, which applies to the federal government, federal contractors and federal funds recipients, both provide that employers must reasonably accommodate qualified disabled employees.[25] CDC identified several underlying diseases, such as Type 2 diabetes, cancer, chronic kidney disease, cardiac conditions and severe obesity, as comorbidities with COVID-19, meaning that infection could lead to an increased risk of serious illness or death in individuals with these diseases.[26] The U.S. Equal Employment Opportunity Commission (EEOC), which enforces the ADA, issued guidance for employers to reasonably accommodate employees with underlying disabilities when work from home was not available.[27]

If an employer identifies being present at the workplace as an essential function of the

DENISE M. BLOMMEL, a Scottsdale sole practitioner, represents employers and employees in federal and Arizona labor and employment matters. The State Bar of Arizona awarded her Member of the Year in 1999 and the Employment & Labor Section named her Member of the Year in 2014. Denise belongs to the State Bars of Arizona and Nevada, the American Bar Association, the Scottsdale Bar Association, the Arizona Employment Lawyers Association, and serves on the Executive Council of the Senior Lawyer Division of the State Bar, as well as the Advisory Board of the Honors College at the University of Arizona.

MARTINA CARTWRIGHT is a registered dietitian (R.D.) with a Ph.D. in Nutritional Science and Biomolecular Chemistry from the University of Wisconsin–Madison. She has more than 24 years' experience in medical education, scientific research and clinical practice in both academic and pharmaceutical settings. Martina's interests include infectious diseases, intensive care medicine, malnutrition and sepsis. An accomplished public speaker, she is frequently invited to present at scientific–medical conferences. For over 20 years, Dr. Cartwright has been an adjunct faculty member in the Department of Nutritional Sciences at the University of Arizona. She is president of Beacon Science Inc. Consulting and serves as an independent biomedical consultant to several well-known companies.

job, reasonable accommodations would be (a) job modification such as extra personal protective equipment (PPE) (b) leave from work,[28] or, as a last resort (c) reassignment. The ADA prohibits discrimination against an employee who associates with a disabled individual but does not require accommodation for that employee. COVID-19 presents a thorny dilemma when the employee lives with a non-employee who has one of CDC's identified risky comorbidities.

The most thorough general reopening guide is from OSHA, which outlines the steps to identify and mitigate workplace risks.[29] Employers need a plan to prepare and respond to infectious diseases; implement basic prevention measures; identify and isolate those who are ill; clearly communicate with workers; and implement engineering and administrative workplace controls, safe work practices and PPE. An informative brochure outlines those controls, practices and PPE for each identified risk level.

Reopening and Return-to-Work

The most extensive specific workplace reopening guides are from CDC.[30] That agency also has return-to-work from COVID-19 criteria upon which employers regularly rely.[31] For those who have had symptomatic COVID-19, they cannot come out of isolation until (a) at least 10 days since the symptoms first appeared, (b) at least 24 hours with no fever without fever-reducing medication and (c) other symptoms are improving. Those with asymptomatic COVID-19 can return to work 10 days after their positive test.[32]

The more difficult cases are those who have been exposed to someone with COVID-19. Exposure means being within six feet for 15 minutes or more, providing homecare to a COVID-19 patient; having direct physical contact; sharing eating or drinking utensils, or having the infected person sneeze or cough on one. If exposed, the employee must quarantine for 14 days after the last contact.[33]

What if an employee refuses to return to work? Section 7 of the National Labor Relations Act (NLRA) gives private-sector employees the right to engage in concerted activity for mutual aid and protection.[34] The U.S. Supreme Court held that workers who walked off the job due to bitter cold were protected by the NLRA.[35] Section 502 of the NLRA permits an employee to stop working "in good faith because of abnormally dangerous conditions for work."[36] The U.S. Supreme Court interpreted this language to require a good faith belief based upon objective evidence.[37] Workers do not enjoy the protection of Section 502 if they act from irrational fear or are relying upon social media hyperbole. If the employer is following CDC guidelines and OSHA best practices, it will be difficult to prove COVID-19 as an abnormal danger.

An employee is free from retaliation for exercising rights under the federal and Arizona occupational safety and health laws.[38] One of those rights is to refuse to work when confronted with a serious injury or death arising from an assigned task.[39] However, any refusal to work must be proved through objective and subjective evidence and meet all the criteria in the Arizona rule, which matches the federal regulation.[40] Again, if the employer has adequate risk mitigation methods in place, the worker will

have a difficult time claiming retaliation.

If an employee refuses to return to the workplace due to an underlying medical condition identified as high risk by the CDC, the employer must engage in the interactive process under the ADA to ascertain whether reasonable accommodation is feasible and effective. The employer needs to consider job modification, leave and reassignment before "giving up" on the employee.

For employers and employees, the current flux of guidelines and advice can be overwhelming and confusing, particularly to restaurant owners, school personnel, religious organizations and others. The CDC remains the national authority on infection control, though state and local municipalities will assess current trends in virus cases and track "hot spots."[41]

Reopening Guidance

We found a helpful seven-step program for reopening in *Control Engineering Magazine*.[42] Combining that program with the excellent OSHA and CDC resources, here is our checklist for employers reopening during the pandemic:

1. Assemble the team
   a. Assign monitor for governmental mandates, CDC guidelines and local public health dashboards
   b. Human Resources
   c. Safety/Risk Management
2. Rally the employees
   a. Be transparent with plans
   b. Reassure that all safety measures will be taken
   c. Train supervisors
3. Establish safety protocols
   a. Assess risk using OSHA and CDC guidelines for industry
   b. Engineering controls
      - Workplace arrangement: ventilation, placement of furniture, walkways
      - Signage for social distancing
      - Temperature checking
      - Plexiglass shields
      - Handwashing, sanitation, cleaning protocols
   c. Administrative controls
      - Facial covering
      - Entry standards for employees, customers, clients, visitors
      - Job descriptions
      - Employee policies: work from home, others
      - Return to work standards
      - Government posters and mandates

Stay safe out there! AZ AT

endnotes

1. *See:* www.cdc.gov/coronavirus/types.html; we refer frequently to the Centers for Disease Control and Prevention throughout this article.
2. "CO" means corona, "VI" means virus, and "D" means disease. *See* www.cdc.gov/coronavirus/2019-ncov/cdcresponse/about-COVID-19.html.
3. All dates are 2020 unless otherwise noted.
4. As of mid-November, COVID-19 has claimed 1.31 million lives, including over 245,000 in the United States.
5. *See* www.nature.com/articles/s41591-020-0869-5.
6. Angelo Carfi, Roberto Bernabei & Francesco Landi, *Persistent Symptoms in Patients After Acute COVID-19*. JAMA, 2020; 324(6) at 603-605. https://jamanetwork.com/journals/jama/fullarticle/2768351
7. *See* www.cdc.gov/media/releases/2020/s0716-covid-19-data.html.

endnotes —continued

8. *See* www.azgovernor.gov/executive-orders.
9. *See* www.dhs.gov/science-and-technology/sars-airborne-calculator.
10. Pub. Law 116-127 (Aug. 18, 2020).
11. Pub. Law 116-136 (March 27, 2020).
12. *See* www.dol.gov/agencies/whd/pandemic for details.
13. *Id.* Tax advantages also applied. FFCRA expires on Dec. 31, 2020.
14. PUA was available through July 26, 2020, and additional unemployment benefits were extended by presidential memorandum.
15. *See* www.azgovernor.gov/executive-orders.
16. The Worker Adjustment & Retraining Notification Act, 29 U.S.C. § 2101, has played a major role with employers of 100 or more who have had to lay off/furlough workers because of COVID-19.
17. As of this writing, no vaccine has been released to the public. It is unknown when sufficient vaccination will significantly mitigate the national risks of COVID-19.
18. A.R.S. § 23-403 is called the "general duty clause." Federal and state safety statutes and standards are enforced by the Arizona Division of Occupational Safety and Health (ADOSH) of the Industrial Commission of Arizona (ICA). *See* www.azica.gov/divisions/adosh.
19. With permission from the ICA.
20. A.R.S. § 23-961.
21. *Id.* § 23-1022. The injured worker carries the burden of proving that the exposure arose from the employment and was suffered in the course and scope of employment.
22. *Id.* § 23-907. The other exceptions are when the worker rejects coverage before the injury, if the employer fails to post the coverage poster and the worker had no knowledge of the right to reject, or if the employer intentionally caused the injured worker to suffer the industrial injury in question. *Id.* §§ 23-906, -964, -1022.
23. *See* www.azica.gov/sites/default/files/SPS%20-COVID-19%20FINAL.pdf.
24. *See* www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19.
25. The ADA begins at 42 U.S.C. §12101; the Rehabilitation Act begins at 29 U.S.C. §701. The Arizona Civil Rights Act also prohibits disability discrimination. A.R.S. § 41-1463(B).
26. *See* www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (updated October 6, 2020). There are other comorbidities with potential risk such as asthma, immunocompromising diseases, Type 1 diabetes and pregnancy.
27. *See* www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.
28. Like FMLA if the employer is covered and the employee is eligible.
29. www.osha.gov/Publications/OSHA3990.pdf.
30. www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html.
31. For general workplaces see www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-in-home-patients.html; for healthcare workers see www.cdc.gov/coronavirus/2019-ncov/hcp/return-to-work.html.
32. *See* www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/isolation.html.
33. *See* www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/quarantine.html; CDC redefined "close contact" on October 21, 2020, at www.cdc.gov/coronavirus/2019-ncov/php/contact-tracing/contact-tracing-plan/appendix.html#contact.
34. 29 U.S.C. § 157.
35. *NLRB v. Washington Aluminum*, 370 U.S. 9 (1962).
36. 29 U.S.C. § 143.
37. *Gateway Coal Co. v. United Mine Workers of America*., 414 U.S. 368 (1974).
38. A.R.S. § 23-425, whose federal analogue is 29 U.S.C. §660(c). There is no private right of action under either law. The worker has only 30 days to file a charge of discrimination with ADOSH.
39. As delimited in the federal regulation 29 C.F.R. § 1977.12, which was upheld by the U.S. Supreme Court in *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980).
40. A.A.C. R20-5-680E: If the employee, with no reasonable alternative, refuses in good faith to expose himself to a dangerous condition, the employee is engaged in protected activity. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the dangers through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer and been unable to obtain a correction of the dangerous condition.
41. For updates regarding local COVID-19 reports visit the Arizona Department of Health Services at www.azdhs.gov/preparedness/epidemiology-disease-control/infectious-disease-epidemiology/index.php#novel-coronavirus-schools.
42. *See* www.controleng.com/articles/seven-steps-to-plan-for-re-entering-the-workplace/?oly_enc_id=0573F4152045A0T.

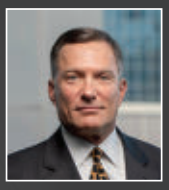
GENUINE PARTNER

Jennings Strouss' management-oriented labor and employment practice provides full-service support to both public and private employers as they navigate the ever-changing regulatory landscape. Whether you are looking to improve compliance and reduce risk, or address current claims, our team of experts is here to help. Our depth of experience and knowledge includes:

- Arbitration and Mediation Services
- COVID-19 Related Employment Issues
- Discrimination and Wrongful Discharge Claims
- Employee Compensation Programs and Benefits Plans
- Employee Handbooks and Policies
- Employee Investigations
- Federal and State Leave Compliance
- Traditional Labor Issues
- Training
- Wage and Hour Litigation

Jennings Strouss
LAW FIRM

One East Washington Street, Suite 1900
Phoenix, Arizona 85004-2554
jsslaw.com



John J. Balitis
Chair
602.262.5928
jbalitis@jsslaw.com

Julia S. Acken
602.262.5950
jacken@jsslaw.com

Dina G. Aouad
602.262.5836
daouad@jsslaw.com

Alexander J. Egbert
602.262.5970
aegbert@jsslaw.com

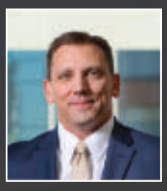
John J. Egbert
602.262.5994
jegbert@jsslaw.com

John J. Kastner, Jr.
520.618.1051
jkastner@jsslaw.com

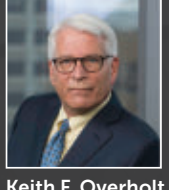
Jordan T. Leavitt
602.262.5855
jleavitt@jsslaw.com

Linsday G. Leavitt
602.262.5825
lleavitt@jsslaw.com

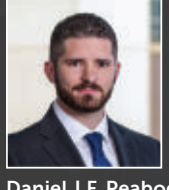
Richard Lieberman
602.262.5935
rlieberman@jsslaw.com



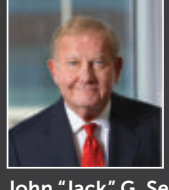
Chris M. Mason
602.262.5817
cmason@jsslaw.com



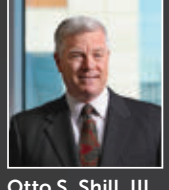
Keith F. Overholt
602.262.5837
koverholt@jsslaw.com



Daniel J.F. Peabody
602.262.5839
dpeabody@jsslaw.com



John "Jack" G. Sestak, Jr.
602.262.5827
jsestak@jsslaw.com



Otto S. Shill, III
602.262.5956
oshill@jsslaw.com

Richard C. Smith
602.262.5972
rsmith@jsslaw.com

Employment Law and the Shift Toward Remote Working

BY JOSHUA C. BLACK

An unprecedented shift toward nontraditional working arrangements occurred in the year 2020, as employers and employees alike have grappled with the effects of the coronavirus pandemic ("COVID-19"). Many employers throughout Arizona and the nation have elected to socially distance employees in an effort to slow the spread of the virus among the workforce. Investments in virtual meeting technology and cloud-based resources such as Zoom and Microsoft Teams have made it possible for many employees to work from home instead of coming into the office each day. Indeed, companies such as Google, Uber and Salesforce have already committed to extending this remote work arrangement well into 2021.[1]

Unique Employment Issues

As more and more employees transition to working from home, companies are struggling to implement new policies and procedures to address growing concerns about employee conduct while working remotely. Primary among the concerns raised is how to address conduct by remote employees that may have a negative impact on the company's brand or goodwill.

Arizona is one of many states that has a presumption of at-will employment.[2] This means that an employer may terminate an employee's employment at any time for any lawful reason, including a failure to follow company policy. Employees must remember that company policies apply in equal force when working from home, especially when those policies are related to the company's image or the conduct of its employees. An employer's ability to make reasonable demands about how an employee presents herself and what type of speech or activity she engages in remains the same regardless of whether she is working in a physical or virtual workspace.

For instance, it is within the rights of a private (non-government) employer to have a policy limiting the political speech of its employees while engaged in work for the company. This is because the First Amendment right to free speech in the workplace applies only to government actors, and therefore is inapplicable to the workplace unless you happen to work for the govern-

JOSHUA C. BLACK is the managing attorney at the Law Office of Joshua Black PLC, a boutique law firm focusing exclusively on employment disputes. Joshua regularly represents clients in both state and federal court as well as in agency proceedings related to employment. When Joshua is not in court he is a frequent guest on local television news and makes media appearances discussing current hot topics in employment law.

ment.[3] Workplace policies regarding speech and conduct extend to remote workers. If an employee is working remotely and displaying political speech in the background of her home office, it would be within the employer's right to discipline the employee if it determined the speech being displayed were harmful to the company's image or goodwill.

While an Arizona employer may not discriminate against an employee on the basis of her race, religion, age, gender, disability or membership in other protected classes,[4] it can make reasonable requests as to what type of conduct occurs at its business and what image is displayed by employees while representing the company. This includes employee conduct while on Zoom or other videocalls.

What Employers Should Address

With more employees working from home than ever before, it is a great time for employers to review handbooks and procedures and ensure that policies related to employee conduct, use of technology, and employee speech are up to date and address the reality of the current working situation.

In addition, employers should take this as an opportunity to have a "refresher" with employees about expectations and policies. Important topics to cover with employees this year include: (1) updates to anti-harassment policies, specifically addressing the addition of LGBTQ coworkers to the list of those protected from discrimination at work[5]; (2) leave of absence policies, which should be updated to include new employee rights under the Emergency Paid Sick Leave Act and the Emergency Family Medical Leave Expansion Act[6]; and (3) expectations related to employee conduct while representing the company from home.

After refreshing employees' expectations concerning conduct while working from home, an employer would be wise to focus on its workers' compensation coverage. The bedrock principle of workers' compensation law is to provide benefits to those who suffer an injury or illness that arises out of and in the course of employment.[7] Workers' compensation law also incentivizes employers to provide safe workspaces for their employees. Because we can reasonably expect to see significant surges to the already millions working "at-home," it is important to know how to manage potential liability to an employee who gets injured at home and asserts the injury is related to the performance of her job duties.

endnotes

1. Rachel Sandler, *Here's when major companies plan to go back to the office*, Forbes, August 27, 2020, www.forbes.com/sites/rachelsandler/2020/08/27/heres-when-major-companies-plan-to-go-back-to-the-office/#1c8e13fd361c, last visited Nov. 15, 2020.
2. A.R.S. § 23-1501.
3. U.S. Const. amend. I.
4. *See* 42 U.S.C. § 2000e-2.
5. *Bostock v. Clayton County*, 590 U.S. ____ (2020).
6. Families First Coronavirus Response Act, Public Law 116-127 (FFCRA). The FFCRA is a temporary measure that is set to expire on Dec. 31, 2020, though this measure or similar measures are likely to be extended into 2021 should the COVID-19 pandemic not subside.
7. *See e.g.*, A.R.S. § 23-1021.

Are Home Injuries Covered by Workers' Compensation?

BY MATT C. FENDON & RYAN MURPHY

MATT FENDON is Board Certified in Workers' Compensation by the State Bar, and Founder and Managing Member of Matt Fendon Law Group (MFLG), one of Arizona's largest plaintiff worker's compensation law firms in Arizona with offices statewide. Matt has lectured on many worker's compensation related topics for the State Bar, county bars, and the Arizona Association for Justice (AzAJ). He is the former President and a board member of the Arizona Association of Lawyers for Injured Workers (AALIW).

RYAN MURPHY is completing his final year as a law student at the Sandra Day O'Connor College of Law at Arizona State University. Ryan has spent the last year and a half working on behalf of injured workers in Arizona, striving to secure clients social security disability benefits, short- and long-term disability benefits, and workers' compensation. Upon passing the bar, he plans to serve injured and disabled workers who have had their lives' hampered by a disability or injury.

The current dynamic shift to remote working will challenge an unsettled area in workers' compensation law: whether injuries suffered at home are compensable. Workers' compensation covers injuries "arising out of *and* in the course of employment" when caused or contributed to by a risk related to employment.[1] "Arising out of" concerns causation and generally covers injuries that are "work connected."[2] "In the course of employment" refers to "time, place and circumstances" from which the injury occurred.[3]

Generally, workers' compensation statutes should apply to "work at home" cases.[4] However, the "going and coming rule" says that injuries incurred "going and coming" to and from the place of employment are non-compensable.[5] The going and coming rule falls un-

der the "in the course and scope of employment" analysis. There are a number of exceptions to this rule developed by Arizona law, but currently there is not a formal "home office" exception.

Accordingly, courts in other jurisdictions have often denied compensation on the theory that the employee was not performing services for the employer, and the employer exercises no control over the employee at the time of injury. Unfortunately, Arizona workers' compensation law is underdeveloped when it comes to injuries at home. Thus, we have to look at other states and the late Professor Arthur Larson—the preeminent scholar on workers' compensation—for guidance on how Arizona courts should analyze injuries incurred while telecommuting.

Although the distinctive nature of the at-home work environment limits coverage,[6] courts have granted compensation for at-home injuries when the employee has a specific work assignment or if there is so regular a pattern of work at home that the home achieves the status of a place of employment.[7] Absent direction of the employer to do work at home, an employee who consistently works at home, even with employer knowledge, does not establish the home as a place of employment per se. It must be shown that the employer indirectly or directly guided the employee to work from home. If one can establish these factors, then one could likely show the home was "truly a place of employment."[8]

Synthesizing myriad court opinions, Professor Larson developed a three-part test to determine whether the home qualifies as a worksite.[9] The "Larson test," adopted by multiple states, focuses on the following factors to analyze the issue:

1. The presence of work equipment in the home;
2. The regularity and quantity of work performed at home; and
3. Whether special circumstances rendered work from home necessary, rather than personally convenient for the employee.[10]

Once the "home office" exception to the coming and going rule is established,[11] a claimant still needs to prove that the injury "arose out" of their employment. That is, did the injury stem from a risk related to the employment? Where the employee is at home, but in the course and scope of their employment at the time of injury, a workers' compensation claim could still be challenged.[12] Employees could have a hard time proving their claim for injuries sustained at home because employers generally have no control over employees' conduct while off work premises. Employees are also able to switch between work and personal tasks without detection.[13] By the same token, there is often no witness to contradict an employee's claim of a work-related injury.

Courts have granted compensation for at-home injuries when the employee has a specific work assignment or if there is so regular a pattern of work at home that the home achieves the status of a place of employment.

Finally, Arizona implements the positional-risk doctrine, which includes random risks, but the employee establishes the "arising out of" element based on their work placing them in the spot (e.g., their home) where the injury occurs.

Typically, courts analyze whether the employee is working from home out of necessity or for personal convenience. These concerns have led some courts to require the injury to have occurred within the employee's regular work hours and while actually performing their work duties.[14] As such, proving an at-home injury's compensability requires an intensive "understanding of the facts and circumstances surrounding the nature and extent of the work performed."[15]

Some case law from other jurisdictions provide illustrations of how courts analyze at home injuries.

For instance, in *Ae Clevite v. Labor Comm'n*,[16] plaintiff was a district sales manager in Utah who used his personal residence as a home office because his employer did not have an office location in Utah. Plaintiff was injured one day while pouring salt over the icy driveway to make a safe clearing for the mail carrier, who was attempting to deliver a package in connection with plaintiff's work. Finding that the injury occurred within the course of employment, the court asserted that although the injury was not caused by a work-related duty, it arose out of employment because the employee was performing a task to serve the employer's interests. The court awarded compensation because plaintiff was attempting to "remove a hurdle" that could have prevented normal business from being carried out.[17]

Other courts also have granted compensation for at-home injuries where the activity was not part of the worker's job duties. For example, in *Estate of Sullwold v. Salvation Army*,[18] Maine's highest court awarded death benefits after finding plaintiff's husband's death arose out of and within the course of employment. In this case, the plaintiff died while exercising on his treadmill at home.[19] Plaintiff's employer allowed him to work from home, and on the date of injury plaintiff had been working all day and was found dead with his work-provided BlackBerry. The court held the injury arose out of and within the course of employment because it happened during work hours, in a place the employer sanctioned for work, and while the decedent was using the BlackBerry his employer provided to him for his work.[20] Lastly, the court found the decedent's death arose out of employment because his employment caused severe amounts of stress.[21]

The issue of whether at-home injuries are compensable and what test to use for this issue will be a matter of first impression for an Arizona tribunal. While no court has directly addressed this issue, Larson's principles and decisions such as *Findley v. Industrial Comm'n of Arizona*[22] lend guidance to how a court would potentially rule on this issue.

In *Findley*, plaintiff sought death benefits through workers' compensation after her husband, the employee, committed suicide at home.[23] The facts and medical testimony proved the decedent was suffering immense

stress resulting from his job and that stress was a significant contributing cause of decedent's suicide.[24] The court rejected the employer's argument the suicide was not compensable and ruled that even though the manifestation of his work-related injury occurred at home, the injury still arose out of and within the course of employment.

Findley can be read to imply that Arizona courts will address compensability issues of at-home injuries with leniency. By contrast, the Arizona Supreme Court held in *Peetz v. Industrial Comm'n*[25] that an off-duty police officer was not entitled to worker's compensation benefits when his gun discharged while showing off the weapon to his wife at home because his actions were not for his employer's "benefit."

In addition, Arizona case law has established that an employee performing an act for the mutual benefit of the employer and employee (here, working from home to thin out the crowd in the office and limit contagions) means compensability.[26] And Arizona law validates the notion that overnight business travelers remain within the course and scope of their employment during travel even when sleeping and eating.[27] Overall, cases like the ones discussed above should help guide Arizona courts in developing the home office exception.

Surely, employers face increased exposure to liability as more and more employees will work from home post-COVID-19. Therefore, it is highly probable that Arizona courts will enter a phase of heavy development in the case law on injuries incurred while working at home. Based on the totality of circumstances, courts should find for compensability of these claims here in Arizona, especially since the workers' compensation statute is to be given "liberal construction" when considering issues related to compensability of claims.[28] AZAT

endnotes

1. *See* Ariz. Const. art. 17, § 8 (emphasis added).
2. *Royall v Industrial Comm'n of Ariz.*, 106 Ariz. 346 (1970).
3. *Goodyear Aircraft Corp. v. Gilbert*, 65 Ariz. 379 (1947).
4. *See* 4 A.L.R.6th 57 (originally published in 2005).
5. *See Butler v Industrial Comm'n*, 50 Ariz. 516 (1937).
6. *See* Alex C. Dell & Edward Obertubbesing, *Workers' Comp and Working at Home*, NYSBA Bar J. (July 10, 2020).
7. *See, e.g.*, Tracy Bateman Farrell, George Blum et al., 82 Am. Jur. 2D Workers' Comp. § 259 (explaining where the home has achieved a sufficient status as a place of employment so that travel from the employer's premises to the home constitutes traveling from one workplace to another); 110 N.Y. Jur. 2d Workers' Comp. § 447 (warranting compensation in cases where the home has achieved the status of an additional place of employment).
8. *See, e.g.*, *Freebern v. North Rockland CDA*, 64 A.D.2d 300 (N.Y. App. Div. 3d Dep't 1978).
9. Employees can also be covered under the Workers' Compensation Act if an employment contract expressly or impliedly establishes the home as a worksite. *See Borough of Aldan v. Workmen's Compensation App. Bd.*, 422 A.2d 733, 735 (Pa. Cmwlth. 1980) (holding that where the employer didn't provide a facility for employee to perform gun maintenance, the employer impliedly encouraged its employees to perform the task from home).
10. *See* Larson's workers' compensation law § 16.10[2] at 16-24.
11. *See generally id.* at § 16.10[4] (explaining that once the home is established as a work environment the hazards of home premises encountered in connection with the performance of the work are also hazards of the employment).
12. *See* 75 Tex. Jur. 3d Workers' Comp. § 320 (August 2020).
13. *See Matrix Absence Management*, N.Y. Wrk. Comp. Lexis 4888 (2019).
14. *Id.*
15. *Id.*
16. 996 P.2d 1072 (Utah App. Ct. 2000).
17. *See id.* at 1076.
18. 108 A.3d 1265 (Me. 2015).
19. *Id.* at 1266.
20. *Id.* at 1269.
21. *Id.* at 1270.
22. 660 P.2d 874 (Ariz. Ct. App. 1983).
23. *Id.* at 876.
24. *Id.* at 874-76.
25. 124 Ariz. 324 (Ariz. 1979).
26. *Johnson Stewart Min. Co. Inc. v. Industrial Comm'n of Ariz.*, 133 Ariz. 424 (Ct. App. Div.1 1982).
27. *Bergmann Precision Inc. v Industrial Comm'n of Ariz.*, 199 Ariz. 164 (Ct. App. Div. 1 2000).
28. *Superstition Constr. v. Industrial Comm'n of Ariz.*, 139 Ariz 337 (Ct. App. Div. 1 1984).

Arizona Workers' Compensation Attorneys

Molly O'Campo Attorney | **Bobby Greene** Attorney | **Erica Melendez** Attorney | **Nick Wearne** Partner | **Chad Snow** Founding Partner | **Brian Weekley** Partner | **Alex Carpio** Partner | **Diana Robles** Attorney | **Dennis Kurth** Attorney

Your "Go-To" Statewide firm for Workers' compensation referrals, consultation and association.

When experience matters.

SNOW, CARPIO & WEEKLEY, PLC

WORKERS' COMPENSATION ATTORNEYS

PHOENIX (MAIN OFFICE) 602-532-0700 | TUCSON 520-647-9000 | FLAGSTAFF 928-226-1000
LAKE HAVASU 928-733-6106 | YUMA 928-783-7000 | STATEWIDE/TOLL-FREE 855-325-4781

www.workinjuryaz.com

Association Fees Paid in Accordance with E.R. 1.5

Federal Equal Employment Opportunity Law

Recent Developments

BY JOSHUA R. WOODARD & JENNIFER R. YEE

2020 brought employment law practitioners several federal court decisions that proved to be interesting, instructive and, at times, entertaining. Some decisions were victories for employees, and others were victories for employers. No matter the outcome, however, all the opinions continue to shape the employment landscape. Below are summaries of nine of these key cases, along with "Practical Takeaways."

Sexual Orientation Discrimination

Perhaps the most significant employment case from the Supreme Court's last term is ***Bostock v. Clayton County, Georgia***,[1] where the Court considered three cases in which employees alleged that their employers violated Title VII of the Civil Rights Act of 1964 by firing them because of their sexual orientation or transgender status.

Gerald Bostock was fired by the Clayton County court system for "conduct unbecoming a county employee" only months after he joined a gay softball league; skydiving instructor Donald Zarda was fired for failing to provide an "enjoyable" experience for the customer after he had told a customer that he was gay; and Aimee Stephens was fired because of her gender transition.

The Court decided whether Title VII's prohibition against discrimination "because of … sex" covers sexual orientation and gender identity, including transgender status. In a resounding victory for the LGBTQ community, the Supreme Court held that it does. The 6–3 majority held that both sexual orientation and gender identity are "inextricably bound up with sex … because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex."[2]

Practical Takeaways

Bostock holds great significance in jurisdictions that do not have local anti-discrimination laws protecting employees based on sexual orientation or gender identity. Of course, many employers earlier elected to protect employees based on LGBTQ status, as a matter of company policy—a wise move from an employee morale, public relations and, now, legal standpoint.

Sex-Plus Claims

In ***Frappied v. Affinity Gaming Black Hawk LLC***,[3] the Tenth Circuit held "sex plus" claims are cognizable even where the "plus" characteristic is *not* protected under Title VII.

JOSHUA R. WOODARD is licensed in Arizona, California and Nevada, with a practice concentrated in labor and employment law. He advises and represents employer/management clients before state and federal agencies, including the United States Equal Employment Opportunity Commission and the United States Department of Labor. Josh has extensive litigation experience in both state and federal jurisdictions in wage and hour issues, non-competition/non-solicitation matters, discrimination and harassment, and related matters. Josh has been recognized in *The Best Lawyers in America*; *Ranking Arizona: The Best of Arizona Attorneys*, Labor & Employment Law; and Arizona's Top Lawyers.

JENNIFER R. YEE is a partner with Snell & Wilmer L.L.P. whose practice is concentrated in labor and employment law and commercial litigation, with significant emphasis on representing employers in counseling, contract drafting, administrative and internal investigations, and litigation. Her litigation experience includes federal and state court practice in a variety of employment-related issues. Yee has been recognized in *Southwest Super Lawyers*, Rising Stars Edition, Employment & Labor (2018-2021) and by various organizations such as the *Arizona Capitol Times* (Inaugural Women Achievers of Arizona, Unsung Heroes Category, 2019) and Greater Phoenix Chamber of Commerce (ATHENA Award Young Professional Finalist, 2019) for her commitment to community service through Kiwanis International and mentoring younger attorneys.

A number of female workers who were over 40 years old sued their employer after being terminated. The former employees alleged their employer discriminated against them on the basis of age *and* sex, in violation of Title VII and the Age Discrimination in Employment Act. The employer claimed that the plaintiffs were terminated based on performance, misconduct and poor attitude.

In the first federal appeals court to recognize that workers can bring "sex-plus-age" claims under federal employment discrimination laws, the *Frappied* court held that employees may sue their employers for discrimination based upon a combination of sex *and* age. In other words, "sex-plus" claims are viable—at least in the Tenth Circuit—in cases even where the "plus" characteristic is not protected under Title VII. Notably, the court based its decision on the recent United States Supreme Court ruling in *Bostock v. Clayton County, Georgia*[4] and held that employers violate Title VII whenever the discrimination is "based *in part* on sex."[5] Under this standard, an older female employee need only show that she personally faced bias, not that her employer discriminated against *all* older women at the company.

Practical Takeaways

Plaintiffs who can allege "sex-plus-age" or "sex-plus-any-characteristic" may now have a viable claim even though a non-protected characteristic factored into an adverse employment action. Plaintiffs must simply show that they were subjected to unfavorable treatment as compared to employees of the other sex who share the same "plus" characteristic.

Equal Pay

In Rizo v. Yovino,[6] the Ninth Circuit, in an important Equal Pay Act win for women, held that employers cannot justify disparity in compensation based on employees' pay history.

Plaintiff, a female math consultant for the Fresno County Office of Education, sued her employer alleging a violation of the Equal Pay Act ("EPA"). The employer automatically gave new employees a five percent raise over the salary earned with their previous employer and, thereafter, adhered to predetermined wage increases. No other factors were considered in pay decisions. Plaintiff learned that male employees—with less tenure and fewer qualifications—were nevertheless earning more than plaintiff.

Male employees were paid more solely because of their previous higher earnings.

The Fresno County Office of Education argued that the salary paid to Ms. Rizo was not based upon her gender and, rather, was "based on any other factor other than sex," an affirmative defense under the EPA. The "other factor" according to the employer was the plaintiff's prior salary. The Ninth Circuit disagreed and held that employers cannot justify disparity in pay based on employees' prior pay history.[7] The court recognized, "The express purpose of the Act was to eradicate the practice of paying women less simply because they are women[,]" and that "[a]llowing employers to escape liability by relying on employees' prior pay would defeat the purpose of the Act and perpetuate the very discrimination the EPA aims to eliminate."[8]

Practical Takeaways

Employers should be cautious about factoring an employee's salary history into the decision concerning what the employee will be paid. There are several states (e.g., California) that statutorily prohibit employers from asking an applicant about prior salary history. Although nothing bars an employer from considering it if the applicant voluntarily offers the information during the interview process, such consideration could be a fine line that may create exposure.

In addition, while there is nothing wrong with an employer asking an applicant what their *desired* salary is, studies suggest that women and minorities tend to lowball themselves, thus possibly creating an unlawful disparity.

Race and National Origin Discrimination

In Morris v. BNSF Ry. Co.[9] the Seventh Circuit held that Title VII protects employees who violate workplace rules but receive harsher discipline because of their protected status.

Ron Morris, a Black train conductor, had two speeding violations while transporting hazardous materials and, as a result, he was terminated. Mr. Morris alleged he was punished more severely than non-Black employees and brought a race-based Title VII claim. Although the employer offered an informal resolution process for disciplinary issues to other employees who ultimately were able to keep their job, Mr. Morris was denied the opportunity to participate in such a process and was terminated.

The *Morris* court recognized that Title VII protects employees who violate workplace rules but receive harsher discipline because of their protected status. The employer argued that Mr. Morris offered insufficient evidence comparing himself with other, non-Black employees. The court rejected the argument as the employer's attempt "to criticize the quality of its own records."[10] In upholding the jury decision in favor of Mr. Morris, the court noted there was evidence that his supervisor directed non-Black employees toward informal resolution (which was more likely to result in ongoing employment) but directed Mr. Morris toward formal resolution (which was more likely to result in a termination, and, here, actually resulted in his termination.

Practical Takeaways

Employers should mete out discipline, and

offer opportunities for resolution, consistently among employees of all protected classes. All aspects of employment, including the adherence or non-adherence to company policies and practices, are subject to Title VII scrutiny. And employers would be well served to keep accurate records setting forth legitimate business reasons for all adverse employment actions.

> Plaintiffs who can allege "sex-plus-age" or "sex-plus-any-characteristic" may now have a viable claim even though a non-protected characteristic factored into an adverse employment action.

In ***Vega v. Chicago Park Dist.***[11] the Seventh Circuit affirmed a jury verdict in Ms. Vega's favor on a Title VII claim where the employer was shown to ignore plaintiff's long successful employment and dismiss her explanations of the purported concerning behavior during investigations.

Lydia Vega, a Hispanic woman, sued her employer, the Chicago Park District, alleging, in part, national origin discrimination in violation of Title VII. The employer argued she was terminated for timesheet falsifications and for being untruthful. The employer conducted investigations but was, in large part, dismissive of Ms. Vega.

The *Vega* court noted, "The jump straight to termination was not only in tension with [plaintiff's] long, favorable record, it violated multiple union commitments. That in itself was important evidence" because "[s]ignificant, unexplained or systematic deviations from established policies or practices" can be probative of discriminatory intent."[12] The court further noted that a report tainted by discriminatory animus may be a proximate cause of a termination decision unless it is determined that that the adverse action was entirely justified absent the report.

Practical Takeaways

When conducting investigations, employers should keep an open mind, listen, carefully evaluate input from employees, and then—and only then—make rational, evidence-supported decisions. When employers do not take into account employees' tenure, good evaluations, promotions and merit increases and, instead, jump to conclusions and have a disproportionate response of "we've got to get rid of them right away," they do so at their own peril.

Disability Discrimination and Retaliation

Disability discrimination claims are on the rise. According to statistics of the U.S. Equal Employment Opportunity Commission ("EEOC") for fiscal year 2019, 33.4 percent of all charges filed were based on

disability discrimination.[13] Last fiscal year, disability claims with the EEOC were second only to retaliation.[14] By extension, federal circuit courts have been busy interpreting the nuances of these claims under the Americans with Disabilities Act ("ADA").

In ***Anthony v. TRAX International Corp.***,[15] the Ninth Circuit handed employers a win when it considered whether an employee who lied on a job application about having a bachelor's degree could be a "qualified individual" entitled to sue under the ADA. The answer was no.

Sunny Anthony was hired as a Technical Writer by TRAX, a contractor for the Army. Ms. Anthony suffered from PTSD, anxiety and depression, for which she took FMLA leave. TRAX denied a work-from-home request. TRAX extended the time of her FMLA leave but notified Ms. Anthony that she would be fired unless she provided a doctor's work release stating her ability to return to work with no restrictions by the time her leave expired. Ms. Anthony never submitted such release, and TRAX discharged her. Ms. Anthony brought a disability discrimination suit under the ADA. Only after Ms. Anthony filed suit did TRAX learn—through discovery—that, contrary to her representation on her job application, she lacked the bachelor's degree required of all technical writers under TRAX's government contract.

TRAX successfully argued that Ms. Anthony was not a "qualified individual" for the position. In light of the after-acquired evidence that Ms. Anthony lacked the required bachelor's degree, she was not a "qualified individual" within the protection of the ADA. The Ninth Circuit made clear that, even though after-acquired evidence cannot establish a superseding, nondiscriminatory justification for an employer's challenged actions, after-acquired evidence can be used for other purposes—including to show that an individual is not qualified under the ADA, which is required to establish a *prima facie* case of disability discrimination.

Practical Takeaways

Employers facing disability discrimination claims should carefully review their file and look out for any information, including after-acquired evidence, that may disqualify the employee from being a "qualified individual" who may bring suit under the ADA.

In ***Clark v. Champion National Security Incorporated***,[16] the Fifth Circuit handed employers another win when it considered whether a diabetic employee was entitled to reasonable accommodation for sleeping on the job, or to pursue harassment or retaliation claims, after his employment was terminated. The answer was no.

Employers should keep careful records of what accommodations are requested and when, and when such accommodations are granted or denied.

George Clark, a personnel manager at a security company, was a Type II diabetic and claimed that he was harassed and fired because of his disability. His employer, Champion, had engaged in the interactive process and granted Mr. Clark two requested accommodations by providing him a refrigerator in his office to store insulin and flexibility to leave work to attend doctor's appointments. However, an employee reported that Mr. Clark "was closing his office door for long periods of time" and "often [heard] snoring."[17] Eventually, Mr. Clark's manager observed and photographed him sleeping on the job. In response to the photograph, a superior said, "perfect … let him go."[18] Champion argued that it had an alertness policy and that sleeping on the job was a terminable offense. Despite Mr. Clark's claim that he passed out due to low blood sugar, Champion discharged him. The court affirmed the district court's ruling of summary judgment in favor of the employer.

According to Champion's handbook, maintaining alertness was an essential function of the job. The evidence suggested that Mr. Clark could not perform the job's essential functions with or without accommodation. Mr. Clark also never requested an accommodation for loss of consciousness due to diabetes and failed to show that a reasonable accommodation would have allowed him to perform his job.

Practical Takeaways

Employers should keep careful records of what accommodations are requested and when, and when such accommodations are granted or denied. Such information can make or break an employee's ADA claim. In addition, having clear handbook policies on unacceptable conduct strongly supports employers' legitimate reasons for termination. Finally, an employer's consistent practice of engaging in the interactive process helps rebut any circumstantial evidence of discrimination.

In ***López-López v. Robinson School***,[19] the First Circuit clarified what is necessary for an employer to meet the business necessity test after requiring a mentally distressed employee to undergo a medical examination and treatment. However, the court stopped short of holding that an employer has a right to require an employee to receive a medical examination or treatment whenever the employer is concerned about the employee's mental state.

Sandra López-López, a teacher of young special needs children, had numerous performance issues and suffered (by her own account) a "temporary nervous breakdown" at work when she said, among other things, "I want[ ] to kill myself."[20] A supervisor who witnessed her breakdown stated that he would take Ms. López to a crisis center to speak with someone and that her "job would depend on it."[21] Ms. López refused to voluntarily admit herself for treatment, and the supervisor obtained a court order for her involuntary admission. Ms. López was treated, released and certified to return to work two weeks later. Before Ms. López's return, she filed an action alleging disability discrimination and retaliation. Although she was permitted to return to work, she was placed on a Teacher Improvement Plan (TIP) to address her previously identified performance issues, but she had no reduction in compensation or duties.

In affirming summary judgment for the employer, the court first held that Ms. López failed to establish an adverse employment action because her compensation remained the same and she continued to work. And even if Ms. López had established a *prima facie* case, the school established that Ms. López's nervous breakdown was a legitimate, non-discriminatory reason for its actions of conditioning her continued employment on a medical examination and treatment, which was job-related and consistent with business necessity. The court held that Ms. López's breakdown and statement of suicidal intent were clear indications that she could not perform her job at the time. In light of Ms. López's breakdown, no juror could reasonably find that the school lacked a sufficient basis for concluding that Ms. López was a safety risk. The court further held that her receipt of the TIP following her EEOC charge was not an adverse employment action that could support her retaliation claim.

Practical Takeaways

It is still risky for employers to take a paternalistic approach to employees' mental welfare. Only in the most necessary of circumstances, similar to those that unfolded in *López-López*, should employers consider requiring a medical examination and treatment after an employee exhibits symptoms of mental distress.

In ***Kitchen v. BASF***,[22] the Fifth Circuit reiterated employers' right to enforce policies that prohibit intoxication in the workplace and underscored the importance of documenting second and third chances given to employees.

Jeff Kitchen struggled with alcoholism. Mr. Kitchen was twice convicted of driving while intoxicated ("DWI"), and he admitted to consuming alcohol while working, which he knew was against BASF policy. BASF allowed Mr. Kitchen to take several leaves for inpatient and outpatient alcohol abuse treatment. On one of these leaves, Mr. Kitchen was, again, convicted of DWI. That same year, BASF allowed Mr. Kitchen to return to work under special conditions outlined in a Return to Work Agreement, which included future breath alcohol testing. Nearly a year later, Mr. Kitchen appeared intoxicated when arriving to work and his ensuing breath test revealed an elevated blood alcohol level. Mr. Kitchen was terminated, and he sued for disability discrimination.

In affirming summary judgment for the employer, the court held that Mr. Kitchen could not show that his disability was connected to his discharge. The ADA allows employers to hold alcoholic employees to the same work standards as non-alcoholics, even if the problematic behavior is related to the alcoholism.[23] "Firing Kitchen for arriving to work under the influence of alcohol is not equivalent to firing Kitchen because of a prejudice against alcoholics."[24]

Finally, the court stated in *dictum* that the company "had done more than" enough under the ADA by granting him several leaves despite his multiple DWIs and his admitted drinking on the job.[25]

Practical Takeaways

Employers have a right to enforce policies that prohibit intoxication in the workplace. The employer here was wise to give the employee multiple chances and memorialize in writing the employee's understanding and commitment to the rules.

endnotes

1. 140 S. Ct. 1731 (2020).
2. *Id.* at 1742.
3. 966 F.3d 1038 (10th Cir. 2020).
4. 140 S. Ct. 1731, n.1.
5. *Frappied*, 966 F.3d at 1050.
6. 950 F.3d 1217 (9th Cir. 2020).
7. *Id.* at 1232.
8. *Id.* at 1219.
9. 969 F.3d 753 (7th Cir. 2020).
10. *Id.* at 761.
11. 954 F. 3d 996 (7th Cir. 2020).
12. *Id.* at 1004.
13. *EEOC Releases Fiscal Year 2019 Enforcement and Litigation Data*, January 24, 2020, *available at* www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2019-enforcement-and-litigation-data.
14. *Id.*
15. 955 F.3d 1123 (9th Cir. 2020).
16. 952 F.3d 570 (5th Cir. 2020), *petition for cert. filed* August 20, 2020.
17. *Id.* at 577.
18. *Id.* at 579.
19. 958 F.3d 96 (1st Cir. 2020).
20. *Id.* at 102.
21. *Id.*
22. 952 F.3d 247 (5th Cir. 2020).
23. 42 U.S.C. § 12114(c)(4).
24. 952 F.3d at 252.
25. *Id.* at 254.

Ignoring Wage Garnishment Orders Can Be Perilous for Employers

BY JODI R. BOHR

The garnishment process was established in most states more than a hundred years ago as a way for creditors to circumvent debtors' ploys to avoid paying debts.[1] The wage garnishment process that we are familiar with today was enacted by Congress in May 1968.[2] Arizona followed suit with its own legislation in 1986.[3] Arizona's garnishment procedures are detailed and extremely complicated. Employers are expected to understand these complexities and initiate the garnishment procedures in short order. Failure to do so could result in severe consequences, including liability for the full debt owed by the employee.

While the Arizona Judicial Branch[4] offers a 92-page informational booklet, the guidance merely demonstrates how complicated the process is and doesn't necessarily eliminate the risk of error. It is for this reason that azcourts.gov issues the following warning: "All parties to a garnishment are strongly urged to obtain legal advice from an attorney" (the original is in all-caps). Many employers don't follow this advice and either fail to answer the garnishment altogether or initiate the wage garnishment later than required. The former can and does result in liability for the full judgment. The latter can be corrected if the employer is diligent in its fix and subsequent garnishment procedures.

What is a garnishment?

A garnishment is a legal process by which one party (judgment creditor) may collect money from another, after a monetary judgment has been entered. A garnishment becomes necessary if the judgment debtor fails to pay voluntarily. Once this happens, the judgment creditor can use certain financial or employment information to initiate garnishment proceedings. Garnishments may be collected from earnings (wages, commissions, bonuses) or non-earnings (money or property owed to the judgment debtor that is in the possession of another, such as a bank account). An Arizona garnishment proceeding may only be used to collect money or property in Arizona.

Nationwide, about 11 million Americans have their wages garnished each year.[5] Most

garnishments were due to child support (over 40 percent), which have special requirements that garnishees must follow under Arizona law. According to a recent report,[6] wage garnishments were up 121 percent in Phoenix in 2013, compared to pre-recession (2005) levels.

What are my obligations as the garnishee?

It's happened. An employer received a Writ of Garnishment and Summons directing the company to garnish the wages of a current employee. As the entity garnishing the judgment debtor's (aka employee's) wages, the employer is responsible for navigating the process without error; otherwise, the employer risks liability for monetary penalties, up to the full amount of the judgment against the judgment debtor. The employer responsible for garnishing the wages of the judgment debtor/employee is known as the garnishee. As the garnishee, the employer must review the writ of garnishment and summons, determine the identity and employment status of the judgment debtor, and determine whether the employee has any other existing garnishments.

Once the employer has gathered this information, the garnishee must complete the garnishee's answer and file it with the Court Clerk within 10 business days of being served with the writ of garnishment.[7] Failure to do so may result in an order being entered against the company for the full amount of the debt owed by the judgment creditor, even if you do not owe the judgment debtor any earnings.

Trust me, this happens. It's very important that employers have a system in place when writs of garnishment are received to ensure the proper handling of each garnishment.

What if the judgment debtor is not an employee?

The garnishee must still file a garnishee's answer, even if the company does not employ the judgment debtor. Complete the garnishee's answer, explaining that the company does not owe the judgment debtor wages, does not expect to owe the judgment debtor wages within 60 days, and that the company is entitled to be released from the garnishment. Once the garnishee's answer is filed with this information, the garnishee will not need to do anything further unless one of the other parties objects to the answer.

What if the judgment debtor is a current employee?

If the company does owe or will owe earnings to the judgment debtor, it must now begin withholding non-exempt earnings from the judgment debtor's pay. The company also must complete the garnishee's answer and file it with the Court Clerk within 10 business days of being served with the writ of garnishment. Within 10 business days of receiving the writ of garnishment, the company also must provide the employee a copy of the garnishee's answer and other documents providing the employee with various notices related to the garnishment. The company also must provide a copy of the garnishee's answer to the judgment creditor.

It's very important that employers have a system in place when writs of garnishment are received to ensure the proper handling of each garnishment.

Employers are prohibited from retaliating against an employee who is subject to a wage garnishment.

How should a garnishee inform an employee of the garnishment?

Wage garnishments can take an emotional toll on employees and should be handled with compassion. Employers should maintain the confidentiality of the garnishment and understand the sensitive nature of the matter. An employer's legal obligation is limited to providing the employee with the Garnishee's Answer and some other accompanying documents. Employers, however, should consider going a step further. Consider meeting with the employee to inform him or her of the receipt of the garnishment, taking into account whether the employee is prone to anger or violence prior to doing so.[8] During this meeting, an employer should explain to the employee the process it is taking to garnish the wages and the amount to be garnished.

If the employee disputes the garnishment, the employer should explain that it is required to follow this process and that it is up to the employee to challenge the garnishment through the court. Employers should not, otherwise, attempt to assist the employee in the dispute process. In addition, employers are required to follow the instructions even if the employee assures the employer that the judgment has been addressed.

How does an employer determine the amount of wages that must be garnished?

For each pay period, an employer must complete a Nonexempt Earnings Statement to determine how much money to withhold and then withhold that amount from the judgment debtor's paycheck. The company may, but is not required to, claim a $5 fee on each Nonexempt Earnings Statement that it completes. A copy of the statement must be included with the employee's paycheck, even if the amount withheld is $0. A copy also should be delivered to the judgment creditor as proof of the garnishment calculation. The company should keep the original statement for its records, but it does not need to file a copy with the court.

When does an employer release the garnished wages to the judgment creditor?

While employers are required to begin garnishing wages almost immediately after being served with the Writ of Garnishment, the company must not deliver any withheld earnings to the judgment creditor until it receives a signed Order of Continuing Lien from the Court. If no objections are filed on

JODI R. BOHR is a shareholder at Tiffany & Bosco, P.A. She practices employment law representing management and executives in all their employment legal needs. Her practice focuses on human resources counseling, workplace investigations, administrative audits and litigation.

the Writ of Garnishment or Garnishee's Answer and a signed Order of Continuing Lien is not entered within 45 days after the filed Garnishee's Answer, the company may be discharged from any liability on the garnishment. If the company is discharged, it must return any earnings it has withheld to the judgment debtor/employee.

Once the company receives a signed Order of Continuing Lien, it then pays the judgment creditor the nonexempt earnings that have been withheld to date. Going forward, for every pay period in which the Order of Continuing Lien is in effect, an employer must (1) complete a Nonexempt Earnings Statement; (2) withhold the nonexempt earnings from the judgment debtor; (3) provide a completed copy of the Nonexempt Earnings Statement to the judgment debtor and judgment creditor; and (4) deliver the nonexempt earnings you withheld to the judgment creditor.

How will an employer know when to stop garnishing an employee's wages?

It is the judgment creditor's responsibility to keep track of the remaining obligation as payments are received and take reasonable action to assure that the garnishee does not withhold more non-exempt earnings than necessary to satisfy the underlying judgment. Toward that end, the judgment creditor must complete a Creditor's Garnishment Report and report this information to the garnishee and judgment debtor. When the balance of the judgment is in excess of $500, the report must be submitted quarterly, within 21 days after the end of each quarter. Once the balance due drops below $500, the report must be sent before the 10th of each month.

How is an employer/garnishee released from the garnishment?

Once the judgment creditor has been paid in full, he or she must file a Petition and Order Discharging Garnishee with the court and deliver a copy of this form to the garnishee. If the judgment has not been paid in full, but the judgment debtor is no longer working for the company, the garnishee should report this change in circumstances to the judgment creditor right away, or at least by the next time payroll is processed. A judgment creditor must release the garnishee once notified that the judgment debtor is no longer working for it.

What if the judgment debtor has more than one garnishment?

If an employee is subject to more than one garnishment, employers must determine the order of priority of payments. A.R.S. § 12-1598.14 establishes the priority of payments that must be honored when more than one garnishment is received. If the wage garnishments are from court judgments, the priority is determined by date of service of the writ of garnishment. Employers cannot split the garnishment in two and send some garnishment to each creditor. The second judgment creditor must wait in line based on the priority rules. If there are other garnishments with priority, the garnishee should notify the judgment creditor. Typically, that information is provided in the Garnishee's Answer. However, some judgment creditors alter the proposed answer form provided by azcourts.gov. If that information is not included in the answer, the garnishee should revert to the form provided by the court or contact the judgment creditor in writing regarding the garnishment priority.

What should a garnishee do if it missed the answer deadline?

The answer to this question depends on when the missed deadline is discovered.

If the deadline is missed by just a few days, a late answer may satisfy the judgment creditor and not result in further action against the garnishee. If, however, the answer is so delayed such that several payrolls have been missed, the garnishee may want to retain counsel to address the potential pushback by the judgment creditor for the missed collection of wages. It may be sufficient to answer and start the garnishment. If the judgment creditor is more aggressive, the employer may need to pay the un-garnished payrolls directly to the creditor to resolve the issue.

If the garnishee fails to file an answer and the judgment creditor has requested an order to show cause, the garnishee is at high risk of being liable for the full judgment. At that point, counsel should be retained to assist in responding to the order to show cause. A thorough and thoughtful response may be all that is necessary to avoid liability for the full judgment. Failure to respond almost guarantees the garnishee will be held liable for the full judgment. For example, in *Miller v. National Franchise Services, Inc.*,[9] a default judgment in excess of $10,000 was entered against the garnishee/employer after it failed to appear in court in response to the Order to Show Cause issued. When that happens, the garnishee becomes responsible for the judgment in addition to the judgment debtor. Typically, the judgment creditor will focus its collection efforts on the garnishee and has little incentive to negotiate down the amount of the judgment, as the garnishee typically can afford to pay the complete judgment. As a result, the judgment creditor will expect full payment from the garnishee.

In closing.

As you can see, the garnishment process is an extremely involved and complex process. Following the steps is imperative. Employers who are unsure of what to do at any part of this process should contact employment counsel for assistance right away. A misstep by the garnishee could be costly.

endnotes

1. *See* ADP Research, *Garnishment: The Untold Story* 8 (2014). www.adp.com/tools-and-resources/adp-research-institute/insights/~/media/RI/pdf/Garnishment-whitepaper.ashx.
2. Congress enacted Title III of the Consumer Credit Protection Act to safeguard debtors from excessive garnishments. As a result, the garnished amount may not exceed the lesser of 25 percent of disposable earnings or the amount by which disposable earnings are greater than 30 times the federal minimum wage for ordinary garnishments.
3. *See* A.R.S. § 12-1598 *et seq.* for wage garnishment statutes.
4. Garnishment instructions and forms may be found at www.azcourts.gov/selfservicecenter/Self-Service-Forms/Garnishment-of-Earnings
5. The study conducted by ADP found that 7.2 percent of employees had their wages garnished in 2013. See ADP Research, *supra* note 1.
6. *Id.*
7. In 2019, A.R.S. § 12-1574 was amended to allow judgment creditors to serve a writ of garnishment by certified mail, return receipt requested. The service date is the date the employer/garnishee receives the writ. Under these circumstances, employers have 30 days from the date of service to file the Garnishee's Answer.
8. If so, consider putting security on alert that the employer is having a difficult conversation with an employee and may need assistance or a prompt response.
9. 807 P.2d 1139 (Ariz. Ct. App. 1991).

the 2021 creative arts competition

Share ***your*** artistry with us. Entries currently being accepted in these categories:

fiction
nonfiction
humor
photography
sculpture
poetry
painting/drawing
music
(original compositions only)

Submissions accepted through **January 13, 2021** | Publication in **Spring 2021**

Questions **Tim.Eigo@staff.azbar.org** | Submissions **ArtsContest@staff.azbar.org**

For a list of rules and how to submit your work, visit **www.azbar.org/azattorney**

Leaving Confusion Behind

BY HELEN HOLDEN & GAIL I. COHEN

The Interplay between the ADA, the FMLA and Paid Sick Leave

Since July 2017, Arizona's Fair Wages & Healthy Families Act ("AZ PSL" or "Arizona Paid Sick Leave") has afforded employees the ability to obtain statutorily protected paid sick leave. The Act provides several reasons for which an employee can use his or her earned, accrued time. Sometimes, an employee's report of need for leave can present a red flag that he or she may have other legal entitlements, including the possibility that the request to use AZ PSL also constitutes a need for leave under the federal Family and Medical Leave Act ("FMLA") or puts the employer on notice of the potential need for an accommodation under the Americans with Disabilities Act ("ADA").

This article briefly reviews employer leave obligations under each statute and then uses hypothetical scenarios to explore the interplay between these laws. The scenarios provide concrete examples that Arizona lawyers who advise employer clients may use to understand how the laws interact and to direct clients in using best practices to ensure compliance.

HELEN HOLDEN, ESQ., is an Of Counsel attorney with the Phoenix office of Spencer Fane LLP.

GAIL COHEN, J.D., is the Senior Director of Employment Law & Compliance at Matrix Absence Management, Inc., at its Phoenix corporate headquarters. Matrix is a third-party administrator of leaves of absence under state and federal laws, as well as disability claims under short- and long-term disability plans and requests for accommodations under the Americans with Disabilities Act.

Hypothetical Scenarios

Care for a Family Member

Kathleen works in a call center. She has been in her position for a number of years. She tells her supervisor and the human resources department that her grandmother has been diagnosed with dementia and that Kathleen is seeking time off to care for her. What leaves may be available to Kathleen?

First, Kathleen is likely entitled to take any accrued and earned Arizona Paid Sick Leave as of the date her leave begins, because this leave expressly includes care for family members including grandparents.[1] In addition, there may be other laws that the company should consider, such as ADA and FMLA.

The ADA does not require employers to provide accommodations to employees for family member conditions, although employees with family caregiving responsibili-

ties may be protected under the ADA under associational discrimination. This means that employees are protected from adverse employment decisions on the basis of the employee's association with an individual with a disability.

For Kathleen, that means that the ADA protects her from any decisions or assumptions her employer might make about, for example, her reliability, as a result of her need to take time off to care for her grandmother.

But what about FMLA? In the spring of 2019, the Department of Labor issued an opinion letter[2] confirming its perspective that, once an employee informs her employer that she needs to take time off for an FMLA-qualifying reason, the employer is obligated to follow the FMLA regulations, including providing the employee with the a notice of eligibility,[3] and upon receipt of a "complete and sufficient certification," to designate any time she takes for that FMLA qualifying reason as FMLA.[4]

In Kathleen's case, all the employer knows is she seeking a leave of absence to care for a "family member." The FMLA defines family member narrowly and does not by its specific terms include care for a grandparent.

The absence of this specific definition, however, does not end the inquiry, because FMLA includes *"in loco parentis"*[5] relationships. Under the FMLA, an employee can take time to care for a parent, which includes "any individual who stood *in loco parentis* to the employee"[6] when he or she was a child. This means someone who had daily responsibilities to financially support and care for the employee.

As a result, the employer should take steps to ensure that a person who understands the FMLA and the concept of *in loco parentis* has a conversation with Kathleen to understand whether that is the relationship she has had with her grandmother when she was a child. To help employers better understand this concept, the Department of Labor has produced a fact sheet outlining the factors that should be considered.[7]

In Kathleen's case, if she discloses that her parents were absent and her grandmother provided financial support and care until adulthood, then Kathleen has established that her grandmother is a qualifying "family member." As a result, if the employ-

Summary of Employer Legal Obligations

Arizona Paid Sick Leave: Under AZ PSL,[1] employers must provide all employees with a minimum amount of paid leave for a variety of purposes.[2] These purposes include the employee's own illness, or the need to obtain preventive care. AZ PSL also applies when the employee seeks leave for the illness or to obtain preventive care for a family member.[3] The statute also contains strong antiretaliation protections for employees, providing that employers are presumed to retaliate if an adverse employment action is taken within 90 days after the employee exercises any right under the AZ PSL statute.

Family Medical Leave Act (FMLA): The FMLA obligates covered employers (those with 50 or more employees) to provide employees with certain notices under the law, and obligates employers to provide eligible employees[4] with up to 12 weeks of job-protected leave for protected purposes.[5] These purposes include the employee's own serious health condition, the need to care for a family member with a serious health condition, or as a result of birth, or placement of a son or daughter for adoption or foster care.

Americans with Disabilities Act (ADA): The ADA is an antidiscrimination law that prohibits employers from discriminating against employees with disabilities. Under the ADA, a disability is defined as a physical or mental impairment that substantially limits one or more major life activities.[6] The law obligates employers to provide those with qualifying "disabilities" with reasonable accommodations that will allow those employees to perform the essential functions of their positions, unless the employer shows that the accommodation would cause "undue hardship."[7]

endnotes

1. A.R.S. § 23-371-23-381 (2020).
2. Employees must accrue paid sick leave at a rate of at least 1 hour for every 30 hours worked. Depending upon employer size, the employer may cap accrual at either 24 hours (for smaller employers with fewer than 15 employees) or 40 hours. A.R.S. § 23-371 (2020).
3. The purposes for which employees may take AZ PSL are specified in A.R.S. § 23-373 (2020).
4. Eligible employees are those who have been employed for 12 months and who have also provided 1,250 hours of service work at a worksite where there are 50 or more employees within a 75-mile radius. 29 U.S.C.A. § 2611(2) (2020).
5. 29 U.S.C. § 2612 (2020).
6. 42 U.S.C. § 12102 (2020).
7. *Id.* §§ 12112-22 (2020).

er has not already done so, it should give Kathleen an FMLA certification form and at least 15 days to return the completed form to support her request for leave to care for her grandmother.

Employee Time Off for His Own Condition

Clyde is a new employee and is within his first 90 days of employment. He reports the need for time off to his supervisor, telling her he has frequent migraines.

Arizona Paid Sick Leave allows employers to adopt a policy that employees cannot use any earned accrued AZ PSL within the first 90 days of employment.[8] Clyde's company has such a policy, which means the employer may decline his request to take AZ PSL.

But even though the request for paid leave has been declined, a knowledgeable employer should not end the inquiry.

First, each request for leave should trigger an analysis under FMLA. Here, Clyde is not an "eligible employee" because he has not been employed for 12 months and worked at least 1,250 hours.[9] Following best practices, Clyde's employer may choose to provide him with an eligibility notice, in writing, telling him so.[10]

The employer also should consider its obligations under the ADA. An employer may have an obligation to consider reasonable accommodation(s) for an employee when it is on notice of a potential need for accommodation. Some readers may suggest that it is preferable not to raise the issue. Reasonable minds may certainly differ, but we believe that careful and proactive counsel will advise the employer that Clyde's disclosure to his supervisor presents an excellent opportunity to begin the interactive process, treating his disclosure as a potential request for reasonable accommodation(s).

The ADA allows an employer to obtain supporting medical evidence of the employee's qualifying "disability," how that disability affects his or her ability to perform essential job functions, and what accommodation(s) may be needed for him to do so.[11] Clyde's employer is entitled to this information when it begins the interactive process, and should ask for it. The advantages to doing so include the ability to ascertain how much time away from work may actually be necessitated and to probe for potential alternative accommodation(s) that will enable Clyde to come to work.

Under the ADA, the employer need not grant the employee his choice of accommodation. Rather, if there is an accommodation that may be effective, the employer can decline the employee's preferred accommodation and choose that alternative.[12]

Notably, once Clyde works long enough to become an "eligible employee," the employer will have missed the opportunity to probe alternatives to leave because FMLA is an entitlement. If Clyde wants to take intermittent FMLA for his condition and is able to obtain medical certification, he will be able to do so. Understanding Clyde's leave needs early on allows the employer to obtain information that will allow it to best manage his FMLA when he is eligible.

For example, if Clyde's supporting certification far exceeds the amount of time his health care provider previously certified he would need to be absent in connection with his ADA request, this could pose an oppor-

tunity to pursue a second opinion under the FMLA.

Extended Leave

Susan is an X-ray technician for a hospital. She has worked for the hospital for over a year and is pregnant. She requests 12 weeks off starting July 1 and provides the appropriate certifications for leave beginning July 1, which is approved. Susan gives birth on June 15. On August 30, she contacts the hospital's human resources department and states that she has had complications from her pregnancy and will not be able to return to work as planned after her leave. She does not provide a return date.

The hospital has had trouble covering Susan's shifts with other personnel and has been unable to hire a temporary technician to cover her position.

If the hospital's policy provides for AZ PSL to run concurrently with FMLA, then Susan may take leave under both statutes, so long as Susan has accrued and unused time available under AZ PSL. If the policy does not provide for leave to run concurrently, however, then if Susan has accrued but unused leave, she may be entitled to take an additional week of paid leave following her 12 weeks of unpaid FMLA.

> There is no magic bullet that will avoid EEOC charges or litigation in all circumstances.

The hospital should therefore review its policies before responding to Susan's request for additional leave.

Also, because the additional leave request relates to Susan's own health condition, the hospital also should analyze what is required under the ADA and treat Susan's notice that she cannot return as a request for an accommodation under the ADA. The hospital's human resources department may be familiar with case law under the ADA which states that the employer need not provide indefinite leave under the ADA[13] and be tempted to deny the requested leave. However, it should not do so, as it does not yet have enough information to determine whether Susan can return.

Instead, the hospital should request more information from Susan's doctor, as it is permitted to do under the ADA.[14]

After the hospital requests the additional information, Susan provides a note from her doctor that she suffers from postpartum depression and needs additional leave to receive treatment. Her doctor states that she cannot return to work as planned in September but may be able to return within three months. The radiology department of the hospital is frustrated by the extended absence of one of its technicians and is putting pressure on human resources to start working to fill the position.

In response to Susan's request, the hos-

pital should carefully analyze whether additional leave or other accommodations should be provided under the ADA.

In the Ninth Circuit, the employee need not show that extended leave "is certain or even likely to be successful" to show that it would be a reasonable accommodation.[15] Rather, Susan only needs to satisfy the "minimal requirement" that a leave of absence could "plausibly" enable her to perform her position.[16] In Susan's case, the hospital might be able to show that a request for extended leave might pose an undue hardship. However, whether an undue hardship is presented is a fact-intensive inquiry, so the hospital should ensure that it has significant documentation supporting its decision if it is going to rely on undue hardship to deny the request for leave.[17]

Conclusion

In many situations, there is no simple answer to how an employer should proceed when dealing with requests for leave that may implicate one, two or all three of the laws discussed in this article. Of course, there is no magic bullet that will avoid EEOC charges or litigation in all circumstances. However, the authors believe that a thorough understanding of all three laws, coupled with thoughtful and careful analysis, will provide employers with the tools needed to avoid liability.

endnotes

1. A.R.S. § 23-371(F).
2. U.S. Department of Labor, Wage and Hour Division Opinion letter FMLA 2019 1-A, found at www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019_03_14_1A_FMLA.pdf.
3. 29 C.F.R. § 825.300(b)(2).
4. *Id.* § 825.300(d).
5. *Id.* § 825.122(d)(3).
6. *Id.*
7. U.S. Department of Labor Fact Sheet #28C, at www.dol.gov/agencies/whd/fact-sheets/28C-fmla-eldercare.
8. A.R.S. § 23-372(D)(2).
9. 29 C.F.R. § 825.110.
10. *Id.* § 825.300(b)(2).
11. 29 C.F.R. pt. 1630 app. § 1630.9 (1997); *see also* EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, Question 6 (2002), at www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada.
12. *See* 29 C.F.R. pt. 1630, *supra* note 11; *see also* EEOC Enforcement Guidance Question 9, *supra* note 11.
13. *See Dark v. Curry County*, 451 F.3d 1078, 1090 (9th Cir. 2006).
14. *See* EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations under the ADA (2002) at www.eeoc.gov/laws/guidance/enforcment-guidance-disability-related-inquiries-and-medical-examinations-employees.
15. *Kachur v. NAV-LVH, LLC*, 817 Fed. Appx. 359, 361 (9th Cir. 2020).
16. *Id.* (quoting *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1136 (9th Cir. 2001)).
17. *See Zaki v. Banner Pediatric Specialists LLC,* CV-16-01920-PHX-DLR, 2018 WL 4637276, at *4 (D. Ariz. Sept. 26, 2018), *on reconsideration*, CV-16-01920-PHX-DLR, 2018 WL 5982634 (D. Ariz. Nov. 14, 2018), *appeal dismissed*, 18-17402, 2019 WL 1306145 (9th Cir. Jan. 24, 2019).

ARIZONA ATTORNEY MAGAZINE
seeks your contribution on racial justice in America and Arizona.

We seek full-length articles, shorter essays, and even submissions as brief as 200 to 500 words. We particularly welcome BIPOC (Black, Indigenous and people of color) lawyers to participate in this dialogue.

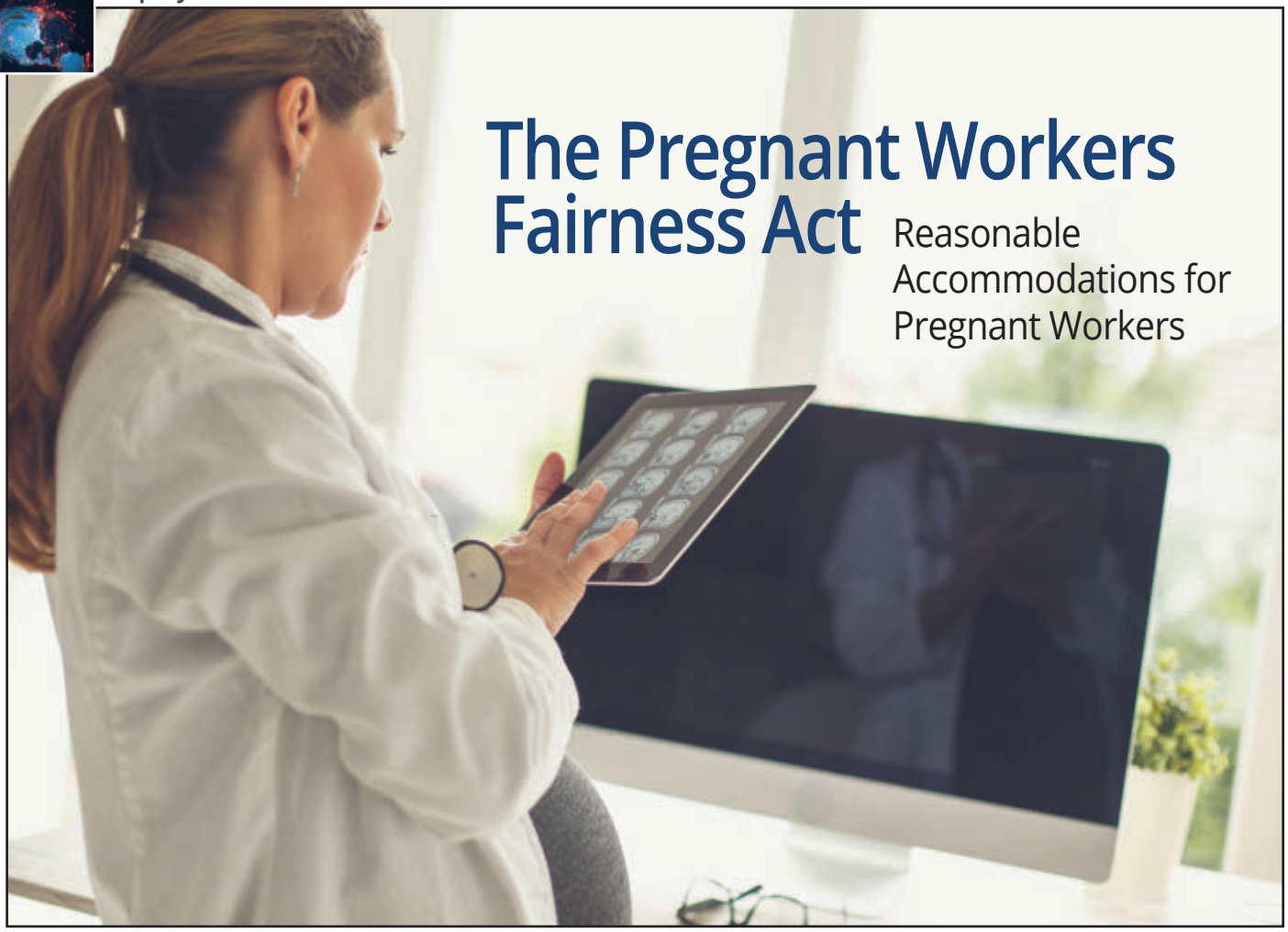
As a starting point, consider sharing your:

- *Personal narrative of your experience with the legal system — policing, law school, legal practice or the courts*
- *Insights of what needs to change in the legal system or in the community more broadly*
- *Thoughts on what we all should be doing now to advance change*

Send content or questions to **Tim.Eigo@staff.azbar.org**.

Confidential submissions will be considered by the Editor.

ARIZONA ATTORNEY MAGAZINE



The Pregnant Workers Fairness Act

Reasonable Accommodations for Pregnant Workers

The Pregnant Workers Fairness Act ("PWFA" or "the Act") (H.R. 2694) is bipartisan legislation establishing a pregnant worker's affirmative right to reasonable accommodations in the workplace. On September 17, 2020, the U.S. House of Representatives passed the PWFA with a 329–73 vote. Although the Act has not yet passed through the U.S. Senate, it has broad support from both Democrats and Republicans, and if enacted will create uniform federal guidance in evolving area of employment law.[1]

According to the U.S. House of Representatives Committee on Education & Labor, the Act also has broad support from voters (81 percent of Republicans, 86 percent of Independents, and 96 percent of Democrats), 250 worker advocates, civil rights groups and the business community. For example, the PWFA is backed by the Society for Human Resource Management (SHRM), the American Civil Liberties Union, and the U.S. Chamber of Commerce. Moreover, several companies such as Microsoft, Patagonia, Unilever, Salesforce and Mastercard have signed a letter in support of the PWFA.

If enacted, the PWFA would require employers to reasonably accommodate qualified pregnant workers[2] and employees with pregnancy-related conditions. Specifically, the PWFA would establish that:

- Private sector employers with more than 15 employees as well as public sector employers must make reasonable accommodations[3] for pregnant workers (employees and job applicants with known limitations related to pregnancy, childbirth or related medical conditions) unless the accommodation would impose an undue hardship on an entity's business operation.[4]
- Employers may not require a qualified employee affected by such condition to accept an accommodation other than any reasonable accommodation arrived at through an interactive process.
- Pregnant workers cannot be denied employment opportunities, retaliated against for requesting a reasonable accommodation, or forced to take paid or unpaid leave if another reasonable accommodation is available.
- Employers may not take adverse action in terms, conditions or privileges of

JULIET S. BURGESS is the founder and principal attorney at Burgess Employment Law. She has been an active member of the Phoenix community and practicing labor and employment law and commercial litigation in Arizona for over 16 years. She has been recognized by *Southwest SuperLawyers*; was named one of the *Phoenix Business Journal*'s 2020 Outstanding Women in Business; and is currently the Arizona Chapter Representative for the Federal Bar Association's Labor & Employment Section. www.burgessemploymentlaw.com.

employment against a qualified employee requesting or using such reasonable accommodations.

- Workers denied a reasonable accommodation under the PWFA will have the same rights and remedies as those established under Title VII of the Civil Rights Act of 1964 (including lost pay, compensatory damages and reasonable attorneys' fees).[5]

Current State of the Law

Currently, Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act of 1978 ("PDA"), and the American with Disabilities Act of 1990 as amended in 2008 ("ADA"), protect pregnant employees against certain forms of discrimination. As of September 2020, 30 states, as well as Washington, D.C., and at least four cities also have passed laws that specifically require certain employers to provide reasonable accommodations to pregnant workers.

Nonetheless, there is no federal law that explicitly and affirmatively guarantees pregnant workers the right to a "reasonable accommodation" so they can continue working without jeopardizing their pregnancy.

By way of background, the PDA: (a) amended the definition subsection of Title VII of the Civil Rights Act of 1964 to provide that Title VII's prohibition of discrimination on the basis of sex included a prohibition of discrimination on the basis of pregnancy, childbirth, and related medical conditions; and (b) required that employers treat "women affected by pregnancy … the same for all employment-related purposes … as other persons not so affected but similar in their ability or inability to work."[6]

More recently, in *Young v. UPS*,[7] the U.S. Supreme Court determined how the protection provided by the PDA "applies in the context of an employer's policy that accommodates many, but not all, workers with nonpregnancy-related disabilities."[8] In the opinion, Justice Breyer, joined by all three female Justices on the Court and Chief Justice Roberts, reversed the district court and Fourth Circuit. The landmark ruling held that the PDA requires courts to consider the extent to which an employer's policy treats pregnant workers less favorably than it treats nonpregnant workers similar in their ability or inability to work.[9] The Supreme Court further held that as in all cases in which an individual plaintiff seeks to show disparate treatment through indirect evidence, courts must consider any legitimate, nondiscriminatory, nonpretextual justification for these differences in treatment.[10] Ultimately, the court must determine whether the nature of the employer's policy and the way in which it burdens pregnant women show that the employer has engaged in intentional discrimination.

Proponents of the Act argue that the existing state of the law, as articulated in *Young*, makes it extremely difficult for a pregnant worker to successfully bring a pregnancy discrimination claim. This is compounded by the fact that many pregnant workers do not have the time, resources or bargaining power to enable them to demonstrate that they are being treated less favorably than their nonpregnant co-workers. Indeed, according to the U.S. House of Representatives' Committee on Education & Labor, in two-thirds of the cases decided after *Young*, courts ruled against pregnant workers who were seeking accommodations under the PDA.[11]

Legal and Practical Implications

In addition to the legal issues discussed above, the practical reality (as noted by the House committee) is that: women are increasingly becoming the breadwinners in American households; a growing number are working later into their pregnancies to maintain their family's financial security; and

Justice Ruth Bader Ginsburg's Legacy

"I ask no favor for my sex. All I ask of our brethren is that they take their feet off our necks." —*Justice Ruth Bader Ginsburg*

In an ironic twist of fate, the Pregnant Workers Fairness Act (first introduced in 2012) passed in the House of Representatives the day before U.S. Supreme Court Justice Ginsburg died of complications from metastatic cancer of the pancreas. The timing is poetic in that Ginsburg, or, as she is sometimes referred to, "the notorious RBG," was the second female Supreme Court Justice and a renowned advocate and historical icon for gender equality.

Ginsburg's role as a public figure on the issue of gender discrimination evolved not only from her professional work, but also from her personal experiences as a female law student and attorney in the 1950s and 60s. In the 1970s, Ginsburg successfully argued five of six cases before the Supreme Court. (*Reed v. Reed* 404 U.S. 71 (1971), striking down a gender-based statute on the basis of the equal protection clause; *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), striking down the gender-based distinction under 42 U.S.C. § 402(g) of the Social Security Act).

While on the Supreme Court, Ginsburg authored some of the Court's most notable opinions on gender discrimination, including the majority opinion in *U.S. v. Virginia Military Institute*, 518 U.S. 515 (1996) (holding the men-only admission policy of VMI violated the equal protection clause). She also authored several strongly worded dissenting opinions, including in *Gonzales v. Carhart,* 550 U.S. 124 (2007) (dissenting from the majority that upheld the federal Partial-Birth Abortion Ban Act); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (dissenting from the holding that a women could not bring a federal suit against her employer for paying her less than it paid men); as well as in *Shelby County v. Holder,*133 S. Ct. 2612 (2013) and *Burwell v. Hobby Lobby Stores Inc.*, 573 U.S. 682 (2014).

At the time of her passing, Ginsburg had served on the Supreme Court for 27 years. Although the PWFA has not yet been enacted, in the words of Justice Ginsburg, "Real change, enduring change, happens one step at a time."

—Juliet S. Burgess, Esq.

88 percent of first-time mothers worked during their last trimester.[12] This reality is further compounded by the increased number of women working while simultaneously managing virtual learning and familial obligations resulting from school closures and the coronavirus pandemic.

If enacted, the PWFA will provide eligible pregnant workers with an affirmative right to workplace accommodations and ensure that the requirements relating to the accommodations are clear and uniform for both employers and employees.[13]

Providing accommodations to pregnant workers is not only good practice, from a legal perspective, but also from a business standpoint. For example, advocates of the Act have pointed out that it reduces employee turnover and absenteeism, boosts employee morale and productivity, and decreases the number of pregnancy discrimination claims filed.

> If enacted, the PWFA would require employers to reasonably accommodate qualified pregnant workers and employees with pregnancy-related conditions.

Best Employer Practices

In any event, and regardless of whether the Act becomes law, employers should take certain steps.

First, employers should review their workplace policies pertaining to relevant topics (e.g., leaves of absences, ADA/reasonable accommodations, attendance, telecommuting, lactation, light duty) to ensure compliance with applicable federal, state and local pregnancy accommodation laws. For example, employers should ensure that their "light duty" policies, which may apply to some categories of employees such as those with on-the-job injuries, also apply to pregnant workers. In some cases, the solution may be as simple as amending existing policies to include accommodations made "on the basis of" pregnancy, childbirth, or related medical conditions (including lactation). In other cases, the policies may need to be expanded to establish the procedure for determining what accommodations are necessary and appropriate.

Employers also will want to review and, if necessary, update employee job descriptions to ensure that the essential job functions for each position accurately describe the role being performed. For example, the essential functions of any given position should accurately address any physical requirements (e.g., standing, bending, lifting, pushing, pulling) for which an accommodation might be requested. Once all relevant policies and procedures have been updated, employers should ensure all employees are familiar with the company's policies and train their supervisory-level employees on how to address a pregnant workers' need and/or request for a reasonable accommodation. Finally, employers should continue to monitor the practical realities affecting their workplaces and legal developments relating to this dynamic area of the law—including but not limited to the PWFA.

endnotes

1. As of November 15, 2020, the PWFA has not been enacted.
2. "Qualified employee" is defined as an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the position, with specified exceptions.
3. "Reasonable accommodations" is defined as it is in the ADA and involves making discrete changes in the work environment or work practices so that individuals may enjoy equal employment opportunities. Also, like the ADA, the employer and employee must typically engage in an interactive process to determine the appropriate reasonable accommodation, and a one-size–fits-all solution is not required.
4. "Undue hardship" is defined as it is in the ADA, as a difficulty or expense that is significant given the resources and circumstances of the particular employer.
5. Public sector employees have similar relief available under the Congressional Accountability Act, Title V of the United States Code, and the Government Employee Rights Act of 1991.
6. 42 U.S.C. § 2000e(k).
7. 575 U.S. 206 (2015).
8. *Id.* at 210.
9. The petitioner in *Young v. UPS*, Peggy Young, worked as a part-time pickup and delivery driver for respondent United Parcel Service. During her pregnancy, her doctor restricted her from lifting more than 20 pounds during her first 20 weeks of pregnancy and 10 pounds for the remainder of her pregnancy. UPS informed Young that she could not work because the company required drivers in her position to be able to lift parcels weighing up to 70 pounds. Young was placed on unpaid leave and eventually lost her employee medical coverage. Young claimed that her coworkers were willing to help her lift any packages weighing over 20 pounds and that UPS had a policy of accommodating other, non-pregnant drivers (i.e., drivers who: were injured on the job, lost their Department of Transportation certifications, or suffered from a disability under the ADA). UPS claimed that its decision not to provide an accommodation to Young was nondiscriminatory because it followed a company policy that does not take pregnancy into account.
10. *Young*, 575 U.S. at 210-211 (2015) (*citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).
11. PWFA (H.R. 2694): A bipartisan proposal to guarantee basic workplace protections for pregnant workers, U.S. House of Representatives Committee on Education & Labor Fact Sheet. https://edlabor.house.gov/imo/media/doc/PWF%20Act%20-%20Fact%20Sheet.pdf
12. *Id.*
13. The PWFA sets forth enforcement procedures and remedies. It also tasks the Equal Employment Opportunity Commission with providing examples of reasonable accommodations that shall be provided to affected employees unless the employer can demonstrate that doing so would impose an undue hardship.

Calculating Economic Damages in Ninth Circuit Employment Cases

BY CHARLES L. BAUM II

The 1964 Civil Rights Act protects workers from discrimination in employment on the basis of race, color, national origin, gender and religion.[1] The U.S. Supreme Court, during its 2019-20 term, reviewed several conflicting circuit court rulings to determine whether protections from discrimination through the Civil Right Act extend to workers on the basis of sexual orientation and gender identity.[2] The Supreme Court determined (in *Bostock v. Clayton Cty., Ga.*, No. 17-1618 (June 16, 2020)) that protections extend to these workers. This will likely make economic damage awards in employment cases more prevalent.

Attorneys may ask a forensic economist to calculate the pecuniary value of a plaintiff's economic damages in employment cases to assist the court. This article reviews case law from the Ninth Circuit for eight key factors to be addressed in those calculations: pay, employee benefits, damage duration, mitigation and collateral benefits, wage growth, discounting to present value, prejudgment interest, and tax gross-ups.

This article is intended to help attorneys and forensic economists identify permissible approaches when calculating economic damages.

Back and Front Pay

In employment cases, federal courts allow the recovery of pecuniary damages from lost earnings to make plaintiffs wrongfully injured whole.[3] Lost back pay[4] (which is damage from the discriminatory act until final judgment[5]) and lost front pay[6] (prospective damage after the trial for training or relocating to find another position[7]) are both recoverable. However, reinstatement is a substitute remedy preferred to an award of front pay.[8] Nevertheless, if reinstatement is not feasible, then front pay is awardable.[9] Reinstatement would not be feasible if the employer–employee relationship is hostile

CHARLES L. BAUM is a professor of economics at Middle Tennessee State University, where he has taught since 1999. Baum received his Ph.D. in economics from the University of North Carolina-Chapel Hill. He is a member of the National Association of Forensic Economists and the American Academy of Economic and Financial Experts. Baum has served as an economics expert for plaintiffs and defendants in numerous cases. Contact: cbaum@baumeconomics.com or 615-556-9287.

or the former position is not available due to "a reduction in force."[10] Front pay should be the monetary equivalent of reinstatement.[11] Awards for lost pay in termination cases should be calculated as the amount the plaintiff would have earned absent the termination with the amount actually earned or that could have been earned after the termination deducted.[12]

Economists have calculated the pecuniary value of economic damages from lost past and future pay for the Ninth Circuit.[13] They may obtain information about what a worker had been earning from income tax returns, W-2 forms, and pay statements. For example, the economist in *Kelly v. Am. Standard, Inc.* used income tax returns.[14] When earnings had been rising, the amount of economic damages calculated will be smaller when using an average across multiple preceding years. This will benefit the defendant. The plaintiff would benefit in this example from basing damages on earnings at the termination. On the other hand, when earnings had been falling over time, the economic losses will be smaller using earnings at the termination and larger using an average across multiple years.

Employee Benefits

On average, about 30 percent of compensation is provided in the form of employee benefits.[15] The pecuniary value of lost employee benefits is recoverable in federal employment cases.[16] Examples of such benefits include "sick leave, vacation leave, pension or retirement benefits, [and] seniority benefits."[17] Economists have calculated the pecuniary value of lost employee benefits, such lost pension benefits, for the court.[18]

The pecuniary value for employee benefits is typically measured by the actual cost to employers.[19] Health and life insurance in the Ninth Circuit are valued differently—as out-of-pocket replacement costs incurred by the terminated plaintiff, rather than the cost of the premiums to the terminating employer.[20] If the terminated worker did not replace the lost health insurance, then the medical costs while uninsured that would have been paid by the defendant's insurance plan may be awarded as damages as well.[21] Other federal circuits are divided over whether to award plaintiff out-of-pocket costs or defendant premium contributions for lost health insurance benefits.[22]

Damage Duration

Compensation for lost front pay should be "temporary in nature"[23] and should not be "an annuity to age 70."[24] The Ninth Circuit otherwise provides no stipulations for the duration of lost front pay. Courts in the Ninth Circuit have awarded lost front pay for short periods, such as three years,[25] and long periods, such as 11 years.[26] An economist may testify to a plaintiff's remaining worklife when calculating lost front pay.[27] Economists define "worklife expectancy" to be a worker's number of years remaining in the labor force before retirement. Worklife expectancies are based on federal government survey data and published by researchers in academic journals.[28] Economists also have presented economic loss calculations for lost front pay to typical retirement ages. For example, in *Velasco v. Broadway Arctic Circle LLC*,[29] the economist presented the court with three economic damages calculations—one to age 62, a second to age 66, and a third to age 68.

Mitigation and Collateral Benefits

Terminated workers must exercise "reasonable care and diligence" searching for reemployment to mitigate damages in employment cases.[30] The plaintiff's actual earnings from alternative employment or the amount the plaintiff would have earned from alternative employment with a reasonable search should be deducted from the pecuniary value of losses for lost pay.[31] Damage awards for lost back and front pay are not forfeited by a failure to mitigate, but they should be reduced by what the plaintiff could earn with reasonable mitigation efforts.[32] The plaintiff "need not go into another line of work, accept a demotion, or take a demeaning position" to mitigate.[33]

For example, in *Traxler v. Multnomah County*,[34] the court concluded that it was unreasonable to assume the plaintiff would not be able to find comparable employment over the remainder of her life or worklife. The plaintiff's damages expert had calculated lost front pay over a 16.64-year period, which was approximately four years longer than her remaining worklife. The court deemed this expert's calculations to be a worse-case scenario and lacking in specific evidence. Ultimately, the court provided a damage award based on reduced earning capacity for a more limited period of time.

The burden to prove the plaintiff did not adequately mitigate damage resides with the defendant.[35] In the Ninth Circuit, the defendant must prove both the availability of substantially equivalent positions the plain-

tiff could have obtained and that the plaintiff did not use reasonable diligence seeking them.[36] This differs from several other federal circuits that no longer require evidence of substantially equivalent jobs when the plaintiff has failed to use reasonable diligence searching.[37] Unlike these circuits, the Ninth Circuit's requirements to prove failure to mitigate remain more stringent.

A collateral source rule stipulates damages caused by a defendant should not be reduced by benefits provided to the plaintiff from a third-party source—a source other than the defendant.[38] This is to prevent the defendant from receiving a windfall from benefits for the plaintiff.[39] In employment cases, if the benefit is financed entirely by the defendant employer, as with workers' compensation, then it may be used as an offset, but not otherwise.[40] However, rulings among Ninth Circuit courts are mixed. For example, unemployment benefits have been deducted in some employment cases—with the court maintaining the discretion to apply the collateral source rule[41]—but not in other cases.[42] Other federal circuits are more definitive. For example, the Eighth Circuit treats the offset of collateral benefits as a legal matter where collateral sources, such as unemployment benefits, are not to be deducted.[43]

Wage Growth

Economic studies show that wages increase over time with prices and worker productivity and over careers with training and work experience. Courts in the Ninth Circuit permit awards for lost pay to include inflation and future raises.[44] This circuit does not specify an appropriate wage growth rate to use, and the factfinder is assumed to be sufficiently qualified to determine this rate without expert testimony.[45]

Economists have included salary increases in their damage calculations based on past increases documented from income tax returns.[46] For example, the economist in *Kelly* calculated the plaintiff's average rate of wage growth across the prior four, seven and 12 years and ultimately used the smallest of the three rates in his analysis to be conservative.[47] If sufficient information on the plaintiff's prior earnings is unavailable, economists have based future wage growth on historical growth rates for the labor force using government data or on wage growth forecasts for the labor force provided by the Congressional Budget Office, the Council of Economic Advisers, or the Social Security Advisory Board.

Ninth Circuit courts have not made adjustments for wage growth absent evidentiary support. For example, the court denied a damages expert's projected yearly merit-based pay increases because the terminated plaintiff had reached the top of her pay scale and budget reductions made subsequent pay raises unlikely.[48] Other federal circuits have deemed wage growth too speculative absent evidence of past increases or expert testimony.[49]

Discounting to Present Value

Future economic losses should be discounted to present cash value in federal employment cases.[50] This is because an amount of money paid today if invested can grow over time with interest. The present value of a future loss is the amount today needed to equal that future sum with growth from in-

vestment interest. Higher interest rates result in more investment growth and, consequently, smaller present values. The U.S. Supreme Court has determined the rate of interest used for present-value discounting should be that on "the best and safest investments."[51] The Ninth Circuit does not specify a rate for present-value discounting, and several approaches may be used.[52] Expert testimony is not required for the calculations,[53] although experts have been used.[54]

> The pecuniary value for employee benefits is typically measured by the actual cost to employers. But note that health and life insurance in the Ninth Circuit are valued differently.

Many economists consider government treasuries (e.g., bills, notes or bonds) to be the "best and safest investments" and use current rates, historical average rates or forecasted future rates on them for their present value calculations. Current rates (and rates over the past, say, 10 years) on treasuries are below long-term (say, 20- and 30-year) historical averages and extended forecasts, so the plaintiff would likely benefit from present value calculations based on current rates. The defendant would benefit from present value calculations based on longer-term historical averages and rate forecasts.

Other federal circuits have provided more guidance. For example, the Second Circuit suggests a "net discount rate" (defined as the market interest rate used for discounting minus the rate of price inflation) of 2 percent.[55] The Fifth Circuit suggests a range of one percent to three percent for the net discount rate.[56] The Eleventh Circuit uses a "below-market discount rate" (defined as the market interest rate on investments otherwise used for discounting, adjusted for the taxes that would be paid on investment earnings, minus the rate of general price and wage inflation as measured by the Consumer Price Index).[57] Some courts in the Eighth and Tenth Circuits have used the "total offset" method, where the market discount rate is assumed equal the wage growth rate and the two cancel each other out.[58]

Pre-Judgment Interest

Awards of pre-judgment interest on lost back pay may be authorized at the discretion of the court in Ninth Circuit employment cases.[59] Pre-judgment interest compensates the plaintiff because "money has a time value."[60] The plaintiff has had to go without the monetary value of the damages for a time during which this amount could have been invested and grown with interest. The court in the Ninth Circuit also retains discretion over the rate to use for pre-judgment interest.[61] Although different interest rates have been used (including state statutory rates and the IRS rates in 26 U.S.C. § 6621), the federal post-judgement rate specified in 28 U.S.C. §

1961—the rate on 52-week treasury bills—is preferred for pre-judgment interest in the Ninth Circuit.[62] The federal statute for post-judgment interest indicates interest should be compounded annually.[63]

Tax Gross-Ups

A large, lump-sum damage award may push a terminated plaintiff into a higher federal income tax bracket than would have applied to the pay if incrementally earned over the years absent the termination.[64] Several other federal circuits allow the court to "gross-up" awards for economic losses to compensate plaintiffs for differential tax liabilities, and the Ninth Circuit has recently joined them in leaving tax gross-ups to the discretion of the court, to make the plaintiff whole, after previously not authorizing compensation for tax differentials.[65] Tax adjustments may not be provided in some cases where it is difficult to determine the proper gross-up or where the gross-up would be a negligible amount.[66] The court in one case denied the plaintiff a tax adjustment when her damages expert failed to provide his methodology and the tax adjustment was 10 times the size of the back pay award without the adjustment.[67] In other federal circuits, the plaintiff bears the burden of quantifying the needed tax adjustment, which can be satisfied with testimony from an economist.[68]

endnotes

1. Similarly, the Age Discrimination in Employment Act (ADEA) protects workers from employment discrimination on the basis of age, the Americans with Disabilities Act (ADA) does on the basis of disability, and the Family and Medical Leave Act (FMLA) on the basis of pregnancy.
2. *Altitude Express Inc. v. Zarda,* 139 S. Ct. 1599 (2019), addresses sexual orientation in the Second Circuit, *R.G. & G.R. Harris Funeral Homes v. EEOC,* 140 S. Ct. 1731 (2020), addresses gender identity in the Sixth Circuit, and *Bostock v. Clayton County,* 140 S. Ct. 1731 (2020), addresses sexual orientation in the Eleventh Circuit. All three cases involve an employment termination.
3. *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 415, 416 (1975).
4. *Id.*
5. *Thorne v. City of El Segundo,* 802 F.2d 1131, 1136 (9th Cir. 1986).
6. *Cassino v. Reichhold Chemicals Inc.,* 817 F.2d 1338, 1346 (9th Cir. 1987).
7. *Fadhl v. City and County of San Francisco,* 741 F.2d 1163, 1167 (9th Cir. 1984).
8. *Pollard v. E.I. du Pont de Nemours & Co.,* 532 U.S. 843, 852 (2001).
9. *Thorne,* 802 F.2d at 1137.
10. *Cassino,* 817 F.2d at 1346.
11. *Traxler v. Multnomah County,* 596 F.3d 1007, 1012 (9th Cir. 2010).
12. *Gotthardt v. Nat'l R.R. Passenger Corp.,* 191 F.3d 1148, 1158 (9th Cir. 1999).
13. *Velasco v. Broadway Arctic Circle LLC,* 2012 WL 2505291 at *4 (D. Idaho 2012).
14. 640 F.2d 974, 985 (9th Cir. 1981).
15. Bureau of Labor Statistics, "News Release." U.S. Department of Labor, Employer Costs for Employee Compensation – September 2019. Washington, D.C.: U.S. Bureau of Labor Statistics.
16. *Cassino,* 817 F.2d at 1348.
17. *Murphy v. City of Elko,* 976 F. Supp. 1359, 1365 (D. Nev. 1997).
18. *Kelly,* 640 F.2d at 985.
19. *Galindo v. Stoody,* 793 F.2d 1502, 1517 (9th Cir. 1986).
20. *EEOC v. Farmer Bros. Co.,* 31 F.3d 891, 902 (9th Cir. 1994).
21. *Id.*
22. *Tolan v. Levi Strauss & Co.,* 867 F.2d 467, 470 (8th Cir. 1989).
23. *Cassino,* 817 F.2d at 1347.
24. *Gotthardt,* 191 F.3d at 1157.
25. *Traxler,* 596 F.3d at 1014.
26. *Gotthardt,* 191 F.3d at 1157.
27. *Jadwin v. County of Kern,* 2010 WL 1267264 at *11 (E.D. Cal. 2010).
28. Gary R. Skoog, James E. Ciecka & Kurt V. Krueger, *The Markov Process Model of Labor Force Activity: Extended Tables of Central Tendency, Shape, Percentile Points, and Bootstrap Standard Errors,* J. OF FORENSIC ECON. 22 (2): 165-229 (2011).
29. 2012 WL 2505291, at *4.
30. *Jackson v. Shell Oil Co.,* 702 F.2d 197, 201 (9th Cir. 1983).
31. *Cassino,* 817 F.2d at 1345.
32. *Thorne,* 802 F.2d at 1137.
33. *Ford Motor Co. v. EEOC,* 458 U.S. 219 (1982).
34. 596 F.3d at 1014.
35. *Odima v. Westin Tuscon Hotel,* 53 F.3d 1484, 1497 (9th Cir. 1995).
36. *Id.*
37. *Greenway v. Buffalo Hilton Hotel,* 143 F.3d 47, 53 (2d Cir. 1998).
38. *McLean v. Runyon,* 222 F.3d 1150, 1155 (9th Cir. 2000).
39. *Id.* at 1156.
40. *Id.*
41. *Naton v. Bank of California,* 649 F.2d 691, 700 (9th Cir. 1981).
42. *Kauffman v. Sidereal,* 695 F.2d 343, 347 (9th Cir. 1982).
43. *Salitros v. Chrysler Corp.,* 306 F.3d 562, 573 (8th Cir. 2002).
44. *Cassino,* 817 F.2d at 1347.
45. *Id.*
46. *Kelly,* 640 F.2d at 985.
47. *Id.*
48. *Traxler,* 596 F.3d at 1014.
49. *Kolb v. Goldring Inc.,* 694 F.2d 869, 873 (1st Cir.1982).
50. *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 533 (1983).
51. *Id.* at 537.
52. *Gauthier v. Eastern Oregon Correctional Inst.,* 2006 WL 2728957 at *4 (D. Ore. 2006).
53. *Cassino,* 817 F.2d at 1345.
54. *Velasco,* WL 2505291 at *4.
55. *Buckley v. Reynolds Metals Co.,* 690 F. Supp. 211, 217 (S.D.N.Y. 1988).
56. *Rhodes v. Guiberson Oil Tools,* 82 F.3d 615, 622 (5th Cir. 1996).
57. *Shealy v. City of Albany,* 137 F. Supp. 2d 1359, 1368 (M.D. Ga. 2001), *based on Deakle v. John E. Graham & Sons,* 756 F.2d 821, 832 (11th Cir. 1985) *and Culver v. Slater Boat Co.,* 722 F.2d 114 (5th Cir. 1983), which are personal injury cases.
58. *Ogden v. Wax Works Inc.,* 29 F. Supp. 2d 1003, 1021 (N.D. Iowa. 1998); *Fitzgerald v. Sirloin Stockade Inc.,* 624 F.2d 945, 956 (10th Cir. 1980).
59. *Domingo v. New England Fish Co.,* 727 F.2d 1429, 1446 (9th Cir. 1984).
60. *Arnold v. Pfizer Inc.,* 2015 WL 1262775 at *1 (D. Ore. 2015).
61. *W. Pac. Fisheries, Inv. V. SS President Grant,* 730 F.2d 1280, 1288 (9th Cir. 1984).
62. *Blankenship v. Liberty Life Assur. Co. of Boston,* 486 F.3d 620, 628 (9th Cir. 2007).
63. *Murphy,* 976 F. Supp. at 1364.
64. *Clemens v. Centrylink Inc.,* 874 F.3d 1113, 1116 (9th Cir. 2017).
65. *Id.*
66. *Id. at 1117.*
67. *Lane v. Grant County,* 2013 WL 5306986 at *10 (W.D. Wash. 2013).
68. *Eshelman v. Agere Systems, Inc.,* 554 F.3d 426, 441 (3d Cir. 2009).

LAW OFFICE OF
JOSHUA BLACK PLC

- ✓ Wrongful Termination
- ✓ Discrimination
- ✓ Retaliation
- ✓ Sexual Harassment
- ✓ Disability Discrimination
- ✓ Whistleblower Claims
- ✓ Wage Disputes

...and many more!

WORK PROBLEMS WORKING SOLUTIONS

CONTACT *us today*

623-738-2225

2999 North 44th Street, Suite 308
Phoenix, AZ 85018

www.azemploymentlawyer.com

Determining Earning Capacity in a Changing Labor Market

BY BRAD TAFT

Changes in the labor market, including the effect of the pandemic, have resulted in the continued growth of contingency positions—jobs that do not fit traditional, full-time occupations. This complicates the identification and analysis of employment options and valid compensation data by vocational experts to provide opinions on individuals' earning capacity in order to mitigate damages in employment, personal injury and workers' compensation cases and to opine on the earning capacity of spouses in family law matters. The continued growth of the number and scope of occupational categories in the labor market also creates challenges in determining earning capacity.

The Expansion of the Gig Economy

Full-time jobs continue to be replaced with gig jobs, defined as jobs that are labeled as contingent positions which are project-oriented, part-time to full-time, and usually do not include benefits. Independent contractors are included in this category.

Gig jobs started to proliferate in the late 1990s when the outsourcing of jobs in a number of functions became a major employment trend. The growth of information technology-enabled services is linked to the availability of large amounts of reliable and affordable communication infrastructure following the telecommunication and internet expansion of the late 1990s. Coupled with the digitalization of many services, it was possible to shift the actual production location of services either to low-cost countries or to external U.S.-based companies. Services include administrative functions such as finance, accounting and human resources; customer service, marketing and sales call centers; IT infrastructure and application development; and other knowledge services including engineering support, product design, research and development, and analytics.

An article in the September 2018 issue of *Human Resource (HR) Executive* magazine titled "Shifting for the Gig Economy" discusses the increased need for on-demand workers in part-time, project, seasonal and

BRAD TAFT, MBA, CMF, SPHR, SHRM-SCP, CFLC, is Managing Director of Taft Vocational Experts LLC in Scottsdale, Ariz., where he specializes in Vocational Evaluation, Earning Capacity, Labor Market Analysis, Employability, Job Search Campaign Effectiveness, and Human Resource policies and procedures regarding Hiring, Discrimination, Harassment, Retaliation, and Termination. Mr. Taft can be reached at btaft@taftvocationalexperts.com, 480-315-0372.

interim jobs including rideshare drivers, warehouse and store shelf stockers, restaurant workers, and sales representatives. A 2018 report by Intuit estimated that 34 percent of American workers had gig jobs—a number it anticipates will grow to 43 percent in 2020. While the pandemic may change that percentage, remote work arrangements support a trend toward the increase of gig labor in areas of the economy where such labor has not been prevalent so far, such as for workers in white-collar, business services industries. Therefore, there are many factors involved in changes to the labor market that have resulted in the increase of independent contractors.

There are many factors involved in changes to the labor market that have resulted in the increase of independent contractors.

Determining Employability

The vocational evaluation process starts by determining an individual's current employability: what occupation or occupations are they qualified to do. Issues that need to be addressed in determining employability include constraints and restrictions on the individual in the workplace due to health issues, their tenure of unemployment or underemployment, and the need for additional training. What can complicate this assessment is determining the vocational readiness of an individual who has not followed a traditional career path in the past. Individuals who have changed jobs and have shifted career focus from one function to another or have gone from one industry to another provide challenges to the vocational evaluator in matching up the talent base and experience of these individuals with the qualifications for traditional jobs.

Another challenge in evaluating independent contractors is that they are entrepreneurs. They are hired under contract by an organization to provide a service or produce a product, earn income in the form of an hourly fee or project fee, do not receive benefits in most situations, and do not get reimbursed for any or most of the expenses they incur in their work. They in effect are running their own business. Vocational evaluators are not experts in business valuation, and it is beyond the scope of their expertise to determine the earning capability of a business owner due to the variable nature of the revenues and expenses that business owners incur in the course of their work. However, vocational evaluators are called upon to determine the earning capacity of an individual whose work history includes being an independent contractor by matching their talent base and experience to the qualifications of comparable occupations.

Determining Earning Capacity

Using the example of an independent contractor who is an IT professional and provides programming services to companies, the vocational evaluator would conduct a Labor Market Analysis to determine what a programmer providing services in a specific software application earns per hour in a specific geographical region. Three main sources of compensation data can be used to determine a programmer's earning capacity.

Wage and Salary Surveys

Compensation surveys from a number of sources provide income data on a variety of occupations. Those sources include the U.S. Department of Labor's Bureau of Labor Statistics' Occupational Employment Statistics Program; private compensation consulting firms including Mercer, Economic Research Institute, Willis Towers Watson and CompAnalyst; employee survey companies such as PayScale.com and Glassdoor.com; and nonprofit organizations including trade and professional associations.

Benchmarking Surveys of Published Jobs

An analysis of current job postings that include compensation data can provide a range of income for a number of occupations. Descriptions of full-time jobs may list salary ranges, while descriptions of part-time jobs may state hourly wage ranges.

If the work of an independent contractor can be matched to a traditional programming occupation that has empirical compensation data available and if related jobs can be identified, then a foundation exists for opinions of the earning capacity of the independent contractor. However, if the work of the individual cannot be matched with a traditional occupational category and similar jobs are not published, then additional benchmarking needs to take place to determine if compensation data exists.

Benchmarking Surveys of Employers

By researching companies to determine if they employ individuals in programming jobs that match the scope of responsibilities of the individual being evaluated, the compensation that they report can be used as a basis for developing opinions on earning capacity. Recruiting firms and staffing agencies also can be surveyed.

However, the issue of the programmer working as an independent contractor and running their own business still needs to be considered.

Reasonable Compensation

The amount of time independent contractors who are programmers spend producing services and getting paid for them needs to be measured over a certain time span, as does the time an independent contractor spends in non-earning yet essential functions such as administration and sales/marketing. A self-employed programmer who charges $75 per hour but is only able to provide services 60 percent of the time over a one-year period would have gross annual earnings of $93,600 compared to a programmer who is an employee earning $75 per hour on a full-time basis resulting in annual earnings of $156,000. Typically, independent contractors earn more per hour than employees earn in the same function due to the fact that independent contractors are not receiv-

ing benefits and may not work full-time. Other factors that complicate the actual earning capability of independent contractors are the costs that they personally incur in providing their services.

Same Title, Different Level of Responsibility

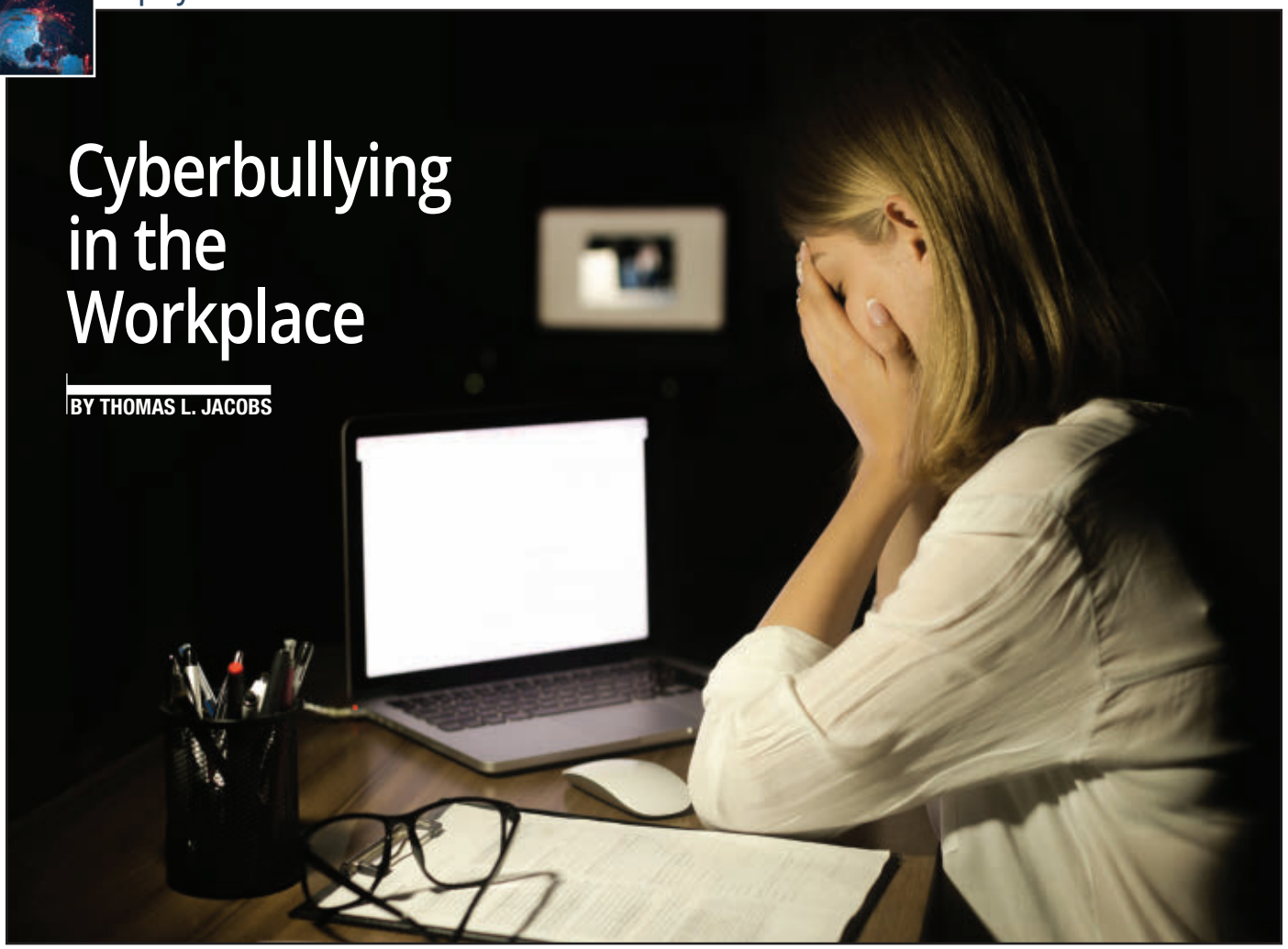
Another challenge in determining the earning capability of an individual occurs when their job title fits a certain occupation but their level of responsibility results in a differential of typical earnings for that position. For example, while the compensation range for a controller of a small company in the retail industry differs from that of a controller at a large company in the high-technology sector, some widely used compensation surveys only provide one compensation range for controllers. The Bureau of Labor Statistics' Occupational Employment Statistics Program is criticized because the occupational categories in its surveys are sometimes too broad. Its survey for controllers also lists reported job titles including comptroller, corporate controller, corporate treasurer, regional controller and treasurer.

Vocational evaluators need to identify other compensation surveys that use more specific parameters to define the compensation range of a position based on the scope of its responsibilities, the size of the company and its industry. In fact, compensation professionals recommend the use of multiple surveys to allow for statistical validation. As previously stated, sources of these compensation surveys include government agencies, private compensation and benefits consulting firms, trade and professional associations, and companies that report data from a large number of employees in different organizations.

The changing labor market, with the growth of nontraditional occupations and the trend away from employing individuals in full-time positions to part-time, project-oriented, contingency jobs, continues to present challenges in determining the employability and earning capacity of individuals involved in legal matters. Vocational evaluators need to define appropriate occupational categories and be nontraditional in their approach to gain valid compensation information to effectively determine the earning capacity of all workers.

Cyberbullying in the Workplace

BY THOMAS L. JACOBS



"There is no constitutional right to be a bully."

—*Sypniewski v. Warren Hills Regional Bd. of Educ.,* 307 F.3d 243 (3d Cir. 2002)

The word "cyberbully" brings to mind a teenager or celebrity. However, the word has grown to include many areas of law including civil, criminal, family, juvenile, employment and First Amendment law. Although not codified in most states under "cyberbully," the underlying acts of harassment, stalking, intimidation and threatening have evolved into a growing body of law. The COVID-19 pandemic is also contributing to an increase in cyber abuse due to the exponential growth of users on digital platforms at home, in school and at work.

Cyberbullying in the workplace is no longer a minor incident to be ignored. Cyber abuse by an employee that creates a hostile work environment may result in a lawsuit by the victim. Unlawful acts by a supervisor may lead to employer liability. Explicit text messages from a superior sent outside work hours may be litigable. And derogatory comments posted to a company's online bulletin board may create a duty to address the harassment. Also, employers may be held responsible for employee behavior beyond the physical limits of the workplace.

Cyberbullying has become an unfortunate reflection of the 21st century and, in fact, its first pandemic. Resorting to legal action may be one way to strike back and achieve justice. The cases presented here are a few examples of civil and criminal cyber abuse litigation.

Stalking

- **Daily text blast from ex-boyfriend received at work leads to firing of victim and stalking conviction of sender**—*People v. Makboul*, 2019 WL 2082049 (Cal. App. 4th Dist. 2019)

The victim in this case testified that she dated Makboul for six months before ending the relationship. Makboul told her that relationships with him do not end until he ends them. He began text-messaging and

TOM JACOBS spent 23 years as a Maricopa County Superior Court family and juvenile court judge pro tem/commissioner. He writes for Thomson Reuters/WestLaw, Free Spirit Publishing, Inc., and the American Bar Association, which published *Cyberbullying Law* in July 2020.

calling her approximately 20 times a day. A restraining order was issued against Makboul, but he repeatedly contacted the victim's employer attempting to have the restraining order dropped. He started driving by the victim's work and threatened a coworker with whom the victim carpooled. The victim's employer eventually terminated her employment due to Makboul's frequent "visits." Makboul was charged and pleaded guilty to stalking, violating a protective order and making criminal threats. He was sentenced to an aggregate term of 10 years four months of incarceration. The conviction and sentence were affirmed on appeal.

Cyberbullying has become an unfortunate reflection of the 21st century and, in fact, its first pandemic. Resorting to legal action may be one way to strike back and achieve justice.

Harassment

- **Can digital interference with another's business support an order of protection and injunction against harassment?**—*Trotter v. Paiano*, 2020 WL 639195 (Ariz. Ct. App. Div. 1 2020)

In 2018, Dennis Trotter filed a petition for an order of protection against his ex-wife, Virginia Paiano, and a petition for an injunction against harassment against her new husband, Anthony Paiano. In both petitions, Trotter accused the Paianos of intentionally and maliciously engaging in a scheme to interfere with online advertising for Trotter's business. Trotter stated that he advertised his business using a "pay per click" model, in which he paid his advertiser every time his advertisements were clicked by a user, up to a pre-determined limit. When the limit was reached, his advertisements no longer appeared online until the budget was replenished.

Trotter claimed that the Paianos admitted to him that they were repeatedly clicking on his advertisements, exhausting his budget in a short period of time each day so that potential customers would not be able to see his ads. Trotter's petitions were granted, and the Paianos petitioned for reversal of both lower court orders.

On appeal, the court found that there was sufficient circumstantial evidence to show that the defendants were, in fact, engaged in the ad-clicking in an attempt to anonymously harm Trotter financially. Separate and apart from the Google advertisement clicking, the evidence demonstrated that the defendants had also harassed Trotter, primarily by email. The court held that the alleged "malicious clicking" provided an independent basis for the orders of protection and injunction against harassment. The lower court's orders were affirmed.

- **Employer liable for employees' online harassment of a disabled co-worker**—*Espinoza v. County of Orange*, 2012 WL 420149 (Cal. App. 4th Dist. 2012)

Ralph Espinoza was born with no fingers or thumb on his right hand. It contained only two small stubs. He was self-conscious about people seeing it and often kept his hand in his pocket.

At the time of the harassment at work, Espinoza was a corrections officer at juvenile hall in California. Coworkers referred to Espinoza as "rat claw" and "claw hand." A corrections officer admitted to creating a blog where he posted, "I will give anyone 100 bucks if you get a picture of the claw. Just take your hand out of your pocket already!" Although not created on a county computer, the blog was accessed from work computers located in the probation department. Espinoza found the word "claw" written in several places in the workplace, including an electric utility cart he used for his work. Other incidents of harassment took place including damage to the electric cord on his cart.

Espinoza reported these incidents to his supervisors, with no response. Coworkers were not interviewed, and no formal investigation was conducted, even though up to 15 suspects were named. "Neither human resources nor upper management ever contacted plaintiff about any of his complaints. None of the individual defendants were ever interviewed." Plaintiff suffered physical and emotional trauma from these events. He was demoted to a transportation position and continued under a doctor's care. His treating physician testified that he could not work due to the hostile work environment and Espinoza was placed on disability.

Espinoza filed a complaint against the county for discrimination based on disability, harassment, retaliation, failing to prevent harassment and intentional infliction of emotional distress. "For there to be liability for harassment, the 'conduct … [must be] severe or pervasive enough to create an objectively hostile or abusive work environment. … T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'"

A jury found the county liable for having knowledge of the harassment and failing to take remedial action to correct it. In the damages phase, Espinoza was awarded $700 for medical expenses, $320,000 in lost earnings, and $500,000 for mental distress. The judgment and award were affirmed on appeal.

Order of Protection

- **Harassment of cashier leads to one-year restraining order**—*Herrington v. Rogers*, 400 MT 559, 2020 WL 2730959 (Mont. 2020)

A customer at Walmart, thinking he upset a cashier, attempted to make amends by sending her and her supervisor letters of apology. In one letter to the Walmart customer service manager, Rogers reiterated that he had a concealed weapon permit and stated, "I carry my 9mm 24/7 everywhere and I don't want to lose that privilege because of Debbie" (Herrington).

He found her profile on Facebook and tried to add her to his friends list, but she blocked him. Rogers then looked up Herrington's home address and sent a rose to her house with a note. Later, when he approached her in the store, she asked him not to follow her. Afraid he may come to her home when she was alone, Herrington filed a petition for a protective order. They both testified, and the petition was granted effective for one year.

On appeal, the court held that "Although Rogers may not have intended his letter to sound threatening, the Justice

Court did not commit clear error when it found that Herrington was reasonably in fear for her safety." The issuance of the protective order was not an abuse of discretion by the lower court.

Discovery

- **An order to produce two years of Facebook photos was not onerous; they were easily accessible and "powerfully relevant" to the case**—*Nucci v. Target Corp.*, 162 So.3d 146 (Fla. Ct. App. 4th Dist. 2015)

Note: Although not a cyberbullying case, the discovery issues in *Nucci* are relevant to litigation involving social media and internet platforms.

In her personal injury lawsuit, Maria Nucci claimed that she slipped and fell on a foreign substance on the floor of a Target store. The trial court entered an order compelling discovery of photographs from Nucci's Facebook account. The photographs sought were reasonably calculated to lead to the discovery of admissible evidence and Nucci's privacy interest in them was minimal, if any. Because the discovery order did not amount to a departure from the essential requirements of law, the state court of appeals denied her petition for certiorari.

In analyzing the facts and applicable law, the court considered an individual's expected right of privacy versus discovery in a civil lawsuit. It began, "In a personal injury case where the plaintiff is seeking intangible damages, the fact finder is required to examine the quality of the plaintiff's life before and after the accident to determine the extent of the loss."

It commented that social networking sites such as Facebook are free websites where an individual creates a "profile" that functions as a personal web page and may include, at the user's discretion, numerous photos and a vast array of personal information, including age, employment, education, religious and political views, and various recreational interests.

Through the use of these sites:

> Users can share a variety of materials with friends or acquaintances of their choosing, including tasteless jokes, updates on their love lives, poignant reminiscences, business successes, petty complaints, party photographs, news about their children, or anything else they choose to disclose. … We agree with those cases concluding that, generally, the photographs posted on a social networking site are neither privileged nor protected by any right of privacy, regardless of any privacy settings that the user may have established.

Cyberbullying among employees and supervisors is of growing concern. Electronic harassment occurs regularly between current and former workers in all professions.

Such posted photographs are unlike medical records or communications with one's attorney, where disclosure is confined to narrow, confidential relationships. Facebook itself does not guarantee privacy. By creating a Facebook account, a user acknowledges that her personal information would be shared with others. "Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist."

As a result, social networking sites can provide a "treasure trove" of information in litigation. The scope of discovery in civil cases is broad and discovery rulings by trial courts are reviewed under an abuse of discretion standard. The information sought—photographs of Nucci posted on Nucci's social media sites—is highly relevant. Nucci has but a limited privacy interest, if any, in pictures posted on her social networking sites. Following the court's ruling, the case was settled per 2015 WL 4597100, Final Order May 25, 2015.

- **Cyber materials of multiple parties are discoverable if relevant to a pending case**—*EEOC v. Original Honeybaked Ham Co. of Georgia*, 2012 WL 5430974, 116 Fair. Empl. Prac. Cas. (BNA) 743 (Dist. Ct. Colo. 2012)

The Equal Employment Opportunity Commission brings claims of sexual harassment and hostile environment and retaliation under Title VII of the Civil Rights Act of 1964. In this case, it alleged that the Honeybaked Ham Co. subjected a class of female employees (between 20 and 22 persons) to sexual harassment and retaliated against the employees when they complained about the harassment.

Defendant sought numerous categories of documents designed to examine the class members' damages—emotional and financial—as well as documents going to the credibility and bias of the class members. The relief the class members sought varied from claimant to claimant but included (1) back pay, (2) emotional damages and (3) front pay or reinstatement. The court acknowledged a balance between relevant discovery and a party's privacy rights in stating that "the whole area of social media presents thorny and novel issues with which courts are only now coming to grips." The court further commented:

> If there are documents in this folder that contain information that is relevant or may lead to the discovery of admissible evidence relating to this lawsuit, the presumption is that it should be produced. The fact that it exists in cyberspace on an electronic device is a logistical and, perhaps, financial problem, but not a circumstance that removes the information from accessibility by a party opponent in litigation.

Conclusion

Cyberbullying among employees and supervisors is of growing concern. Electronic harassment occurs regularly between current and former workers in all professions and at all levels of industry. Occasionally, text messages, emails and other social media posts lead to violence in the workplace or elsewhere. Ongoing attempts to stem the incidents of harmful digital behavior bode well for workplace environment, productivity and morale.

APPELLATE HIGHLIGHTS

by Eric M. Fraser and **Joseph N. Roth** (civil), **Patrick C. Coppen** (criminal), and **James M. Susa** (tax). Family Law summaries are prepared by the **Case Law Update Committee of the Family Law Section** of the State Bar of Arizona.

SUPREME COURT CIVIL MATTERS

The 100-word description of the Invest in Education Act initiative was complete enough to qualify for the 2020 ballot. In Arizona, an initiative may be placed on a ballot if enough signatures are gathered. Sponsors of an initiative named "Invest in Education Act" circulated petition sheets to gather signatures and then sought to place the initiative on the November 3, 2020 ballot. Under state law, petition sheets must describe "the principal provisions" of the proposed initiative in 100 words or less. A.R.S. § 19-102(A). This description need only meet two requirements. First, the description must cover all "principal provisions" of the initiative—i.e., the "most important," "consequential," and "primary" features. The description is similar to an elevator pitch and need not cover all provisions. Second, the description cannot be misleading. This means it cannot include "objectively false or misleading information" or "obscure the principal provisions' basic thrust." Applying this standard, the 100-word description of the Invest in Education Act initiative covered all the principal provisions and was not misleading. Although the description could have been clearer or more detailed in certain ways, additional clarity and detail were not required, and potential signatories were free to read the full text of the initiative. *Molera v. Hobbs*, CV-20-0213, 10/26/20.

SUPREME COURT CRIMINAL MATTERS

Law enforcement's failure to collect putative fingerprint and DNA evidence did not warrant a court-delivered *Willits* instruction. Such an instruction informs jurors that they may draw an inference unfavorable to the state where the state has failed to preserve obviously material and reasonably accessible evidence that could have had a tendency to exonerate the accused and prejudice results. When a *Willits* instruction is given, it may create a reasonable doubt as to the defendant's guilt. Evidence is "obviously material" when, at the time the state encounters the evidence during its investigation, the state relies on the evidence or knows the defendant will use the evidence for their defense. The obvious materiality of the evidence must be apparent at the time the state encounters the evidence during its investigation. The state's failure to gather every conceivable piece of physical evidence does not require a *Willits* instruction. *State v. Hernandez*, CR-19-0193-PR, 10/27/20.

In three consolidated cases, the Arizona Supreme Court held that **consecutive sentences imposed for separate crimes, whose cumulative sentences exceed a juvenile defendant's life expectancy, do not violate the Eighth Amendment's prohibition against "cruel and unusual punishments."** Though these are de facto life sentences, they do not violate the Eighth Amendment as interpreted in *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). Because the Arizona defendants were sentenced to consecutive sentences for multiple crimes, the cumulative life sentences do not violate the U.S. Supreme Court rulings that prohibit the imposition of life sentences against juvenile defendants. The Arizona Supreme Court concluded that the SCOTUS rulings do not constitute "a significant change in the law" under Arizona Rule of Criminal Procedure 32.1(g). The Arizona Supreme Court also opted to express its "concern with the Court's reliance on international laws and judgments to resolve an issue raised under the United States Constitution." *State v. Soto-Fong*, CR-18-0595-PR, 10/9/20.

COURT OF APPEALS CIVIL MATTERS

A defendant who obtains summary judgment may be an indispensable party to a co-defendant's later appeal seeking a new trial so that it may name the dismissed defendant as a non-party at fault. A cross-appeal may be dismissed for lack of jurisdiction if the cross-appellant fails to include an indispensable party or provide adequate notice of the appeal to the indispensable party. A party is indispensable on appeal if the party has an interest in opposing the appeal's objective. When one defendant obtains summary judgment on the theory that he could not be at fault as a matter of law, a co-defendant's later appeal seeking reversal of the trial court's refusal to allow the dismissed defendant to be named as a non-party at fault necessarily would require vacating the summary judgment ruling regarding fault. The dismissed defendant therefore has an interest in opposing the objective of the appeal and is an indispensable party who must either be named in the appeal or be provided notice of the appeal. *McDaniel v. Payson Healthcare Mgmt.*, 2 CA-CV 2019-0150, 10/30/20.

A citizen taxpayer has standing to sue over alleged non-compliance with open-meeting and conflict-of-interest laws but lacks standing to seek an official's removal from office. Arizona's open meeting laws provide standing to sue to "any person affected by an alleged violation." A taxpayer has standing to challenge an illegal expenditure of public funds if the funds were raised through taxation. Because a violation of the open meeting laws may cause "improper expenditures by hiding from the public eye the processes leading to them," a taxpayer is a "person affected by" the violation and therefore may sue for violations of the open-meeting laws. The same is true for alleged violations of Arizona's conflict-of-interest laws, which provides standing to "any person affected by" a public agency's decision. A taxpayer, however, may not seek removal of a county official. Under A.R.S. § 12-2043, only the attorney general, county attorney, or a person alleging a right to hold the office may seek removal. *Welch v. Cochise Cnty. Bd. of Supervisors*, 2 CA-CV 2019-0101, 10/9/20.

COURT OF APPEALS CRIMINAL MATTERS

A.R.S. § 13-1204(A)(8)(i), under which a simple assault becomes an aggravated assault, should be interpreted to include the type of assault that occurred here, where a private-practice attorney was doing court-appointed criminal-defense work. The attorney, whose private practice consisted primarily of that contract work, was being paid by Cochise County to represent appellant, who qualified for the attorney's services because he was indigent. At the conclusion of the interview, appellant punched the attorney in the face in an attempt to create a conflict that would force the court to appoint him new counsel. Appellant was charged with aggravated assault on a public defender under § 13-1204(A)(8)(i), a class six felony. The term "public defender" is not defined in the statute, but numerous statutory examples evince a legislative intent to protect those who serve as counsel for indigent criminal defendants, whether they are official government employees or private-practice attorneys working under contract with the government. *State v. Wilson*, 2 CA-CR 2020-0071, 10/29/20.

The trial court did not err in denying appellant's motion to preclude the state and its witnesses from referring to the complaining witness as the "victim," or in denying his motions for change of venue, mistrial and new trial after declining to separately question jurors as to whether they had seen a midtrial newspaper story related to his case. One juror admitted reading a news headline about the case and was sub-

Eric M. Fraser and **Joseph N. Roth** are attorneys at Osborn Maledon PA, where their practices include civil appeals and appellate consulting with trial lawyers. They may be reached at efraser@omlaw.com, jroth@omlaw.com, and are ably assisted with this column by Osborn Maledon PA's appellate group, which maintains www.omlaw.com/azapp-blog/. AzAPP contributors include **Payslie M. Bowman, Emma J. Cone-Roddy, Hayleigh S. Crawford, Travis C. Hunt, Phillip W. Londen** and **Joshua M. Whitaker.**

Patrick C. Coppen is a sole practitioner in Tucson.

James M. Susa is a shareholder in the Tucson office of DeConcini McDonald Yetwin & Lacy PC.

sequently designated an alternate juror who did not participate in deliberations. Absent an allegation that other jurors had read the newspaper, the trial court was not required to question them about exposure to the article. *State v. Bolivar*, 2 CA-CR 2018-0088, 10/27/20.

On remand from the Arizona Supreme Court on the issue of whether an ordered restitution amount was correct, the Arizona Court of Appeals, Div. One, granted defendant's widow's motion to intervene, allowed supplemental briefing, considered the arguments in the original and supplemental briefs, and affirmed the restitution award. Defendant had been convicted of voyeurism and appealed a restitution order awarding the victim attorneys' fees, but he died during the appeal. The Court of Appeals found that: the fees awarded were economic losses recoverable as restitution, not consequential damages exempt from restitution; appellant had not shown the superior court failed to assess the reasonableness of the restitution award; the victim was obligated to pay the fees; and the widow showed no basis to vacate the restitution award. Therefore, **the superior court properly awarded the victim restitution for attorneys' fees she reasonably incurred.** *State v. Reed*, 1 CA-CR 17-0620, 10/20/20.

The Arizona Court of Appeals, Div. One, affirmed appellant's sentences for two convictions of attempted participation in a criminal street gang, Class 3 felonies. The court rejected appellant's argument that the aggravating circumstance of receipt, or expectation of receipt, of pecuniary value as stated in A.R.S. § 13-701(D)(6) is unconstitutionally vague. Therefore, the enhanced sentences on remand were legally applied. **Section 13-701(D)(6) provides for an enhanced penalty if an offense is committed for pecuniary gain, which describes appellant's convictions here. Due process requires only that the language of a statute convey a definite warning of the proscribed conduct. Accordingly, the failure of § 13-701(D)(6) to specify who must receive or expect to receive the pecuniary gain does not make the reach of the statute unclear to a reasonable person.** *State v. Hernandez*, 1 CA-CR 19-0462, 10/13/20.

Following appellant's conviction for first-degree murder and conspiracy to commit first-degree murder, the Arizona Court of Appeals, Div. Two, affirmed the trial court's dismissal of appellant's motion for post-conviction relief. In this case, **appellant's claims of ineffective assistance of counsel, which fall under Ariz.R.Crim.Pro. 32.1(a), are not time-barred because the untimeliness of the notice was not his fault. His claims raised under Rule 32.1(g) are exempt from the time limits.** Regarding appellant's ineffective assistance of counsel claims, however, appellant failed to present a colorable claim that counsel's decisions lacked a reasoned basis—and the trial court therefore did not abuse its discretion in denying relief on these claims without an evidentiary hearing. The Court of Appeals also affirmed the trial court's ruling that rejected appellant's claim that *Perry v. New Hampshire*, 565 U.S. 228 (2012), was a significant change in the law entitling him to relief. Furthermore, appellant was actually seeking relief in reliance on *State v. Nottingham*, 231 Ariz. 21, ¶ 13 (App. 2012), which changed Arizona law regarding eyewitness testimony. But because appellant's case had become final before *Nottingham* was decided, and because that ruling was procedural rather than substantive, it did not apply retroactively. The trial court therefore did not abuse its discretion in summarily denying relief. *State v. Bigger*, 2 CA-CR 2019-0012, 10/14/20.

SUPREME COURT PETITIONS

compiled by Lisa Perry Banen, Chief Staff Attorney Arizona Supreme Court

The Arizona Supreme Court accepted review or jurisdiction of the following petitions on November 2, 2020:*

State of Arizona v. William Craig Miller,
CR-19-0061-PC; Maricopa County Superior Court CR2006-112056-001

- Petition for Review granted:
  Did the post-conviction court misapply *Strickland* by finding counsel constitutionally deficient for failing to identify a misworded RAJI that also went unnoticed by the entire capital defense bar and by finding prejudice without assessing whether the jury would have reached the same sentencing result in this quintuple murder case had it received an accurately worded instruction on the substantial impairment mitigating circumstance?

Beth Fay v. Hon. Fox/State/Jordan Hanson,
CR-20-0306-PR; Court of Appeals, Div. One, 1 CA-SA 20-0123

- Petition for Review (Petitioner Fay) granted as to this rephrased issue:
  Is a victim entitled to be heard on a Rule 32.1(f) Request for Delayed Appeal concerning restitution?

State of Arizona v. Keyaira Porter,
CR-20-0147-PR; Court of Appeals, Div. One, 1 CA-CR 18-0301

- State of Arizona's Petition for Review granted as to this issue as rephrased:
  Did the court of appeals err by holding that in ruling on a challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986), and when confronted with a pattern of strikes against minority jurors, the trial court must determine expressly whether the racially disproportionate impact of the pattern is justified by non-pretextual, race-neutral reasons?

Michelle Sampson et al. v. Surgery Center et al.,
CV-20-0024-PR; Court of Appeals, Div. One, 1 CA-CV 18-0113

- Petition for Review granted:
  1. Did the Court of Appeals err in holding Dr. Greenberg could establish the standard of care for SCP/Nurse Kuchar?
  2. Did the Court of Appeals err in holding that plaintiff was not required to introduce expert testimony to establish proximate causation of death—and the jury could instead infer causation—if plaintiff's medical causation expert established the standard of care was breached?

Banner Medical v. Hon. Gordon/Jeremy Harris et ux.
CV-20-0179-PR; Court of Appeals, Div. Two, 2 CA-SA 19-0051

- Petition for Review of a Special Action Decision of the Court of Appeals (Petitioners Banner University Medical Center Tucson Campus LLC et al) granted:
  Does the lower courts' refusal to dismiss the vicarious liability claim contravene Rule 41(b) and stare decisis, treat agents' dismissals with prejudice in an arbitrary manner depending on the status of the principal, eviscerate the individuals' notice of claim rights, and render meaningless their dismissal with prejudice?

**Unless otherwise noted, the issues are taken verbatim from either the petition for review or the certified question.*

When a single act of strangulation constituted the actus reus for both the kidnapping and murder charges, the state may proceed on a felony first-degree murder theory, relieving it of the burden to show that the defendant intended, with premeditation, to kill the victim. The Arizona Supreme Court has found that kidnapping may operate as a predicate to felony murder, and that it is not necessary for a "predicate offense to be separate or independent from the homicide." Thus, the trial court did not err when denying appellant's motion for a judgment of acquittal even if the evidence supported only a single act – specifically, strangulation – that constituted both restraint and homicide. Appellant knowingly restrained the victim by strangling her with the intent to kill her. While accomplishing this kidnapping, he did actually kill the victim. *State v. Lelevier*, 2 CA-CR 2019-0041, 10/9/20.

The Arizona Court of Appeals, Div. Two, affirmed the revocation of appellant's probation after a contested hearing, as well as his sentence of imprisonment for possession of a dangerous drug imposed after the revocation. The trial court did not err in admitting his urinalysis results at his probation revocation hearing, despite appellant's allegation that multiple violations of § 6-110 of the Arizona Code of Judicial Administration rendered the results unreliable; the trial court relied on evidence sufficient to establish the reliability of the urinalyses. **The Court of Appeals also rejected appellant's contention that A.R.S. § 13-917(B) unconstitutionally mandates a term of imprisonment upon a trial court's finding, by a preponderance of the evidence, that an intensive probationer has committed an additional felony. Section 13-917(B) neither mandates punishment for a new offense nor unconstitutionally deprives a defendant of the right to trial by jury.** Rather, it revokes an offender's privilege of probation and imposes a prison sentence for his original offense. *State v. Brown*, 2 CA-CR 2019-0302, 10/2/20.

COURT OF APPEALS SPECIAL ACTION MATTERS

When a family court has no jurisdiction over a petition for dissolution of marriage, the court is required to dismiss the petition. Any legal decision-making and parenting time orders the court has made are consequently void unless a parent moves to continue the proceeding as one for legal decision-making and parenting time under A.R.S. § 25-404(B). *Tanner v. Marvil/Tanner*, 1 CA-SA 2020-0145, 10/20/20.

COURT OF APPEALS JUVENILE MATTERS

In appeals by two natural fathers to the juvenile court's orders terminating their parental rights to their respective children with the same mother, the Arizona Court of Appeals, Div. One, affirmed the juvenile court's determination that termination was in the best interests of the children as it relates to one father, but vacated the finding and termination order as it relates to the other. **Under A.R.S. § 8-533(B)(4), requiring that the state meet its burden in proving the statutory ground of length of incarceration such that "the sentence … is of such length that [the child] will be deprived of a normal home for a period of years," the juvenile court erred in strictly applying a narrow concept of "normal home," as a less rigid definition may be appropriate, and the court should have the discretion to consider that a normal home may include a parent with a non-traditional presence.** In the best-interests analysis, the juvenile court must balance the interests of both the child and the parent, as even "a parent already found unfit maintains some interest in the care and custody" of his child. Although the interests of the children must remain paramount to those of the parent, the juvenile court may not entirely ignore the parent's interest. *Timothy B., Michael M. v. Ariz. Dep't of Child Safety et al.*, 1 CA-JV 2020-0075, 10/8/20.

* *indicates a dissent*

BAR COMMUNITY

BOARD OF GOVERNORS SEPTEMBER MEETING REVIEW

The State Bar of Arizona Board of Governors held its regular meeting on Sept. 25, 2020, via GoToMeeting.

- President Denis Fitzgibbons called the meeting to order at 8:32 a.m. and reviewed the protocol for virtual meetings.
- **Call to the Public**—President Fitzgibbons made a Call to the Public and, hearing nothing, moved to the next item on the agenda.
- **President's Report**—Denis Fitzgibbons:
  - The Collaborative Bar dialogue event that was co-sponsored with ASU and held on September 9 was successful. The Task Force on Social Justice, Bias and Inclusion met on September 17th; more about this later on in the meeting.
  - Announced the co-chairs for the 2021Convention – Hon. Colleen McNally of the Maricopa County Superior Court and Mr. Kiilu Davis of kdlaw PC in Scottsdale. Spoke highly of Jared Adam, the keynote speaker at the National Conference of Bar Presidents virtual August conference. Mr. Adam's personal story of incarceration and life afterwards is quite powerful and inspirational. He would be a great addition to a Bar Convention.
  - The virtual Bar Leadership Institute Kickoff Retreat is this weekend. Both CEO Joel England and Diversity & Outreach Advisor Elena Nethers will also be participating.
- **CEO's Report**—Joel England:
  - Introduced the Employee of the second quarter, Mabel Ramirez, and spoke about two of her major contributions to the State Bar of Arizona: helped to develop solutions to address Member Services feedback from the Bar-wide employee survey; and coordinated and helped train the Legal Information Hotline volunteers who are assisting Arizonans with COVID-19-related legal questions.
  - Operating posture: This remains the same as it has been for several months. Maret Vessella and her team provided him with guidelines for the next phase.
  - HR Manager Candice French's last day was last Friday.
    - Lisa Panahi is in charge of recruiting for the position and applications have been received.
    - The applications are being vetted, and CEO Joel England will interview the recommended candidates.
    - Staff members are pitching in to assist in covering the HR-related needs of the organization.
  - The benefits broker was replaced by Hays Company, which immediately began negotiating a benefits package with providers. A flat rate with no increase in health care costs has been secured, which is a huge win.
  - The team is working on the 2021 State Bar budget, which will be discussed later during the Finance & Audit Committee report.
  - Reaching out individually to board members through Zoom to discuss Bar matters and to stay more connected.
  - Recent opportunity to meet individually with the Chief Justice of the Supreme Court and ABA President Trish Refo.
  - By invitation of Past President Brian Furuya, presented a CLE to county attorneys.
  - Triennial Member Survey has been distributed; hoping results will provide insight into what members expect from their Bar, especially in a COVID reality.
  - The virtual Convention is moving forward; Lisa Deane and her team are hard at work.
- **Highest Score on February 2020 Unified Bar Exam**—Denis Fitzgibbons:
  - President Fitzgibbons introduced Philip Michael Dodd, who received the highest score on the February 2020 Unified Bar Exam. Mr. Dodd graduated from the University of San Diego School of Law in 2018, took and passed the California Bar and worked there for one year, and has been in the Business and Transactions department at Ballard Spahr LLP in Phoenix since October 2019.
  - Mr. Dodd expressed his appreciation at being invited to the meeting and acknowledged for his efforts.
- **Rocky Mountain Mineral Law Foundation Trustees Council**—Amy Mignella:
  - Ms. Mignella reported on the annual RMMLF Trustees Council meeting. She thanked the board for appointing her to represent the State Bar on the Council to a three-year term.
  - There has unfortunately been a decline in revenue due to seminar fee losses and the historic revenue nexus to the profit fluctuations of the oil/gas sector, all related to the pandemic. Staff continue to work remotely.
  - Attended two seminars—on Maui water rights decision and the recent *McGirt* case—which were timely and excellent.
  - Greater gender diversity attendance at 2019 events was noted and marked a peak in attendance at all in-person attendance for the prior five years. Shifted all remaining 2020 in-person seminars to virtual format.
  - The Foundation received a $279,000 loan through the payroll protection program of the CARES Act.
  - New organizational strategic and marketing plan includes a new online community platform and job board, integrating more renewable energy programming, increasing program topic diversity and the number of women and young speakers, and redesigning committees.
- **American Bar Association (ABA)**—Margarita Silva:
  - President Fitzgibbons thanked Margarita Silva for her 12 years of service—2008 to 2020—as one of the State Bar's ABA Delegates.
  - Ms. Silva reported that approximately 600 people attended the annual House of Delegates Meeting, the first to be held virtually. It was an efficient process as there were practice runs with speeches and voting. There were 58 Resolutions to consider, many of which were COVID-related.
  - ABA Delegate Lori Higuera indicated there is a growing awareness and continual dialogue about what the House is going to do with State Bars that are unable to vote—for moral or political reasons—to keep them in line with *Keller*.
    - Amendments to §§ 45.1 and 45.2 of the Rules of Procedure of the House of Delegates were considered to add the requirement that a resolution must advance one or more of the ABA's four goals.
  - CEO England reviewed the process: General Counsel Lisa Panahi analyzes the resolutions to determine which may violate *Keller* before meeting with the Bar's Delegates so they are aware on which resolutions they are able to vote.
- **State Bar of Arizona Strategic Plan (draft)**—Jessica Sanchez:
  - Carrie Sherman mentioned that the comments would be recorded to share with the consultant who was unable to attend the board meeting.
  - Jessica Sanchez started by thanking both Past President Brian Furuya and CEO Joel England for the statewide listening tour they undertook that provided input from members for the Strategic Plan. She also thanked consultant Jennifer Lewin for her work in organizing the considerable feedback received through the tour, focus groups and surveys.
  - Voting on the Strategic Plan will take place at the October board meeting.

- Of the four strategic priorities, no priority is given more importance over the others.
- Diversity and inclusion are embedded throughout the plan.
- Question: David Byers referred to Priority 1, under "New/continuing ideas and approaches," and asked what is being done in response to COVID? How are we going to assist in the competence and professionalism of lawyers? What are the gaps and what worked? What resources are needed? Are we providing these resources? What is working well, and was this Bar- or Court-generated?
- CEO Joel England spoke about the larger issues: What did the Bar do? What are the innovations that might continue after the pandemic? The State Bar is happy to partner with the Court to assist in the evaluation of changes. What things will continue after the pandemic, and what will go away when we return to normal operations.
- Comments:
  - Sharon Flack suggested that, with the upcoming changes in 2021 according to the Task Force on the Delivery of Legal Services, the lawyer-oriented language might be changed to reflect member-oriented language. Jessica Sanchez suggested changing the language to "general membership."
  - Ted Schmidt spoke about the SBA certification process and suggested that this might be incorporated into the Find-a-Lawyer platform with an explanation about why it is important. CCO Joe Hengemuehler indicated that this enhancement is currently being addressed.
- **Action:** The draft plan will be emailed out to the membership next week with a comment box. The comment period ends 10/16/20, with a final draft submitted to the board for a vote at its 10/23/2020 meeting.
- President Fitzgibbons thanked Jessica Sanchez for spearheading this effort.
- **Appointments Committee**—Jessica Sanchez:

Arizona Supreme Court Committee on Character and Fitness

- There are three openings. The Appointments Committee recommends sending the top nine candidates to the Court.
- **Motion:** Coming from the committee with no seconded required, the motion to approve the committee's recommendation to send the top nine candidates in ranked order to the Court carried unanimously.
  - Tamika N. Wooten, Law Office of Tamika Wooten
  - Ashley D. Adams, Adams & Associates PLC
  - Gary J. Cohen, Mesch Clark & Rothschild PC
  - Donna Lee Elm, Law Practice of Donna Elm
  - David Nicolas Hernandez, David N. Hernandez
  - Joseph A. Brophy, Jennings Haug & Cunningham
  - Troy P. Foster, The Foster Group
  - Boyd T. Johnson, Esq.
  - Colleen Marie DiSanto, DiSanto & DiSanto PLC

Arizona Supreme Court Committee on Examinations

- There are two openings. The Appointments Committee recommends sending the top six candidates to the Court.
- **Motion:** Coming from the committee with no seconded required, the motion to approve the committee's recommendation to send the top six candidates in ranked order to the Court carried unanimously.
  - Donna Lee Elm, Law Practice of Donna Elm
  - Ashley D. Adams, Adams & Associates, PLC
  - Boyd T. Johnson, Esq.
  - Amber Danielle Hughes, Dickinson Wright PLLC
  - Jeremy Adam Rovinsky, National Paralegal College
  - Gary J. Cohen, Mesch Clark & Rothschild PC
- Jessica Sanchez added that

there were several excellent applicants that were not selected as they were young in their career. She will reach out to these candidates to avoid any sense of discouragement, keep them involved, and build a future pipeline.

- **State Bar of Arizona Board of Legal Specialization–Public Member**
  - Two applications were received for the one position.
  - **Motion:** Coming from the committee with no seconded required, the motion to approve the committee's recommendation to send the two candidates, unranked, to the Court carried unanimously.
    - Kimberly Heldt, Legal Assistant, City of Apache Junction
    - Steven Jeras, Assistant Superintendent of Leadership, PV Unified School District
- **Awards Working Group**—Denis Fitzgibbons presented the recommended award recipient(s) for each State Bar award:
  - Award of Appreciation: Rick DeBruhl—approved by acclamation
  - Award of Special Merit: Co-recipients Prof. Stacy Butler and Denice Shepherd
  - **Question:** Lori Higuera asked about the thought process and how two winners were nominated in five categories.
    - Denis Fitzgibbons responded that there were a lot of qualified people, and the Working Group thought it was appropriate based on the contributions of the nominees. The board could decide to vote today and select one winner in those categories.
    - Ms. Higuera indicated that the decision of the Awards Group is trusted but suggested that the board discuss at a future meeting the number of recipients for each award.
    - Approved by acclamation to give the Award of Special Merit to Prof. Stacy Butler and Denice Shepherd.
  - Lori Higuera suggested that the board vote on the remaining slate of nominees rather than taking them one-by-one. Denis Fitzgibbons asked if there were any objections. Hearing none, the board voted unanimously to give the following awards to the recipients recommended by the Awards Working Group:
  - Diversity and Inclusion Leadership Award: Co-recipients Hon. David Gass and Ashley Villaverde Halvorson
  - Hon. John R. Sticht Disability Achievement Award: Rose Daly-Rooney
  - James A. Walsh Outstanding Jurist Award: Hon. Diane M. Johnsen
  - Member of the Year Award: Greg Gautam
  - Michael C. Cudahy Criminal Justice Award: Bill Hughes
  - Outstanding In-House Counsel of the Year Award: Co-recipients Lisa Bossard Funk and Michael J. Minnaugh
  - Sharon A. Fullmer Legal Aid Attorney of the Year Award: Co-recipients January Contreras and Florence Immigrant & Refugee Rights Project
  - Tom Karas Criminal Justice Award: Co-recipients Richard Lougee and Randall S. Papetti
  - Each winner will be featured in a video that will posted on the Bar's website and on the Convention webpage as well as being featured in Arizona Attorney Magazine and recognized (hopefully in person) at the 2021 Convention.
- **Finance and Audit Committee**—Benjamin Taylor and Kathy Gerhart:
  - Benjamin Taylor reviewed the 2021 Budget Guidelines Memorandum.
  - **Motion:** Jennifer Rebholz moved and Jonathan Martone seconded the motion to approve the 2020-2021 Budget Guidelines.
    - Amendment: Dave Byers offered a friendly amendment to change the language in the first bullet from "as of January 1, 2021" to "resume in 2021." Accepted by Jennifer Rebholz and Jonathan Martone. The motion as amended carried unanimously.
  - The 2021 Budget Timeline was reviewed.
  - The following were then reviewed: the financial statements for the Client Protection Fund (CPF), ending June 30, 2020, and the State Bar, ending July 31, 2020, as well as the 2019 Audit of the CPF and State Bar, which was given a clean opinion by the auditing firm.
- **Consent Agenda** – Denis Fitzgibbons asked if anything should be removed from the Consent Agenda. Hearing nothing, a motion was made.
  - **Motion:** D. Christopher Russell moved, Jessica Sanchez seconded and the motion carried unanimously to approve the Consent Agenda:
    - Approval of July 24, 2020, board meeting minutes
    - Approval of resignations in good standing and in lieu of reinstatement
    - Approval of reinstatements of members suspended for noncompliance with: MCLE Requirements (Rule 45, Ariz. R.S.Ct.); annual membership fee and/or Trust Account Compliance (Rule 32(c)(10) and/or Rule 43, Ariz.R.S. Ct.).
- **Status Reports:**
  - **Task Force on Social Justice, Bias & Diversity:** Lisa Deane reported that following the approval of the Task Force, President Fitzgibbons appointed Lonnie Williams as Chair and 13 members. They have an aggressive agenda, with a report and recommendations scheduled for submission to the board at its December meeting.
    - Three subcommittees—programs/events, Bar leadership and Bar operations—have been formed and have already met.
    - Ted Schmidt, chair of the programs/events subcommittee, reported that they have draft recommendations, which include CLE, town halls and leadership conferences. Regarding a Bar petition to amend Rule 45(A)(2), which would require that 0.5 of the required three hours of ethics be a course on diversity and inclusion, the subcommittee is recommending that the 0.5 hour be increased to a one-hour course.
    - Jessica Sanchez, chair of the Bar operations subcommittee, has researched diversifying the Bar's vendors and contractors. The Bar's hiring practices are well crafted but need to be formally adopted/institutionalized.
    - Suzanne Diaz chairs the third subcommittee.
    - Bob McWhirter suggested that the task force look at the lawyer discipline process with regard to racial disparities.
  - **Delivery of Legal Services Implementation Team**—Joel England:
    - Following the Court's approval of the Petition regarding delivery of legal services, in August, CEO England decided to form an internal team to work with the Court on implementing the changes.
    - He appointed General Counsel Lisa Panahi to lead the Bar's internal team to study the issues and make implementation recommendations for the Alternative Business Structures (ABS) and Legal Paraprofessionals (LPs), formerly known as Limited License Legal Practitioners (LLLPs), when the rules go into effect January 1, 2021.
    - On September 28 a Bar/Court team meeting will consider a list of recommendations to be accomplished.
    - Dave Byers: There are now more detailed Code sections, and final Comments are open for another week. In addition:
      - Two committees have been formed: One to review the ABS applications and recommend approval and monitor operations, and the other one to oversee the document preparers (similar to a Character & Fitness Committee).
      - Court team has met with the two law schools' universities regarding their legal paraprofessional programs
      - Court is on the verge of hiring a testing company for the LPs certifications
      - There is a new manager's

position open to implement these programs. See the Supreme Court website for the link.
  - There is a lot of interest from law firms regarding the ABSs.
  - Universities are doing a certification program for LPs.
  - The Bar will have to recommend membership fees for the LPs who will become associate members of the State Bar.
- **Bar Exams**—Dave Byers:
  - The first online Unified Bar Examination will occur October 5; 250 have registered.
  - The July 2020 Bar exam results are expected mid-October; it was well-organized and executed in light of the extra security and safety measures in place due to the pandemic.
- **Correspondence/Reports**
  - Executive Council Meeting – August 21, 2020
  - 2019 State Bar Annual Report
  - S. 3321 – Congressional Letters with BOG Resolution
  - Thank You from Dee-Dee Samet
- Adjourned at 11:04 a.m.
- **Obituaries**

To honor our members who have passed, death notices and obituaries are posted at https://azbar.org/news-publications/in-memoriam.

LAWYER REGULATION

RESINSTATED ATTORNEY
DAVID ALAN DICK

Bar No. 013518; File No. 20-1544-R

PDJ No. 2020-9056-R

By order of reinstatement dated July 28, 2020, the presiding disciplinary judge reinstated David Alan Dick, Chandler, Ariz., to the active practice of law effective immediately.

TRANSFER TO DISABILITY INACTIVE STATUS
PAUL R. BAYS

Bar No. 013479; File No. 20-1806

PDJ No. 2020-9069

By order dated August 27, 2020, the presiding disciplinary judge accepted an agreement transferring Paul R. Bays, Sierra Vista, Ariz., to disability inactive status, effective immediately.

SANCTIONED ATTORNEYS
JIMMY BORUNDA

Bar No. 019683; File No. 20-0230

PDJ No. 2020-9053

By final judgment and order dated July 23, 2020, the presiding disciplinary judge accepted an agreement for discipline by consent by which Jimmy Borunda, Phoenix, was suspended for six months and one day retroactive to Jan. 27, 2020, the

effective date of his suspension in PDJ 2019-9092. Mr. Borunda was also ordered to pay the State Bar's costs and expenses of $1,200.

In 2017, Mr. Borunda represented a client in a personal injury matter and thereafter engaged in a pattern of neglect including failing to supervise his paralegal staff, failing to adequately communicate and diligently represent his client, failing to obtain complete medical records, failing to timely engage in settlement discussions, and failing to properly withdraw from the lawsuit. Mr. Borunda also failed to notify clients of his suspension in PDJ 2019-9092.

Aggravating factor: prior disciplinary offenses.

Mitigating factors: full and free disclosure to the disciplinary board and physical disability.

Mr. Borunda violated Rule 42, ARIZ.R.S.CT., ERs 1.2(a), 1.3, 1.4, 1.16(d), 3.2, 5.3(c), and 8.4(d); and Rule 72, ARIZ.R.S.CT.

ANDRE E. CARMAN

Bar No. 021448; File No. 20-0288
PDJ No. 2020-9076

By final judgment and order dated September 16, 2020, the presiding disciplinary judge accepted an agreement for discipline by consent by which Andre E. Carman, Prescott, Ariz., was reprimanded and placed on probation for one year. Mr. Carman's probation requires that he complete CLE programs on probate and conflicts of interest in estate administration and litigation. Mr. Carman also was ordered to pay the State Bar's costs and expenses of $1,200.

Mr. Carman represented the adult daughter in the probate of her father's will in which she was named personal representative. With Mr. Carman's acquiescence, she violated her statutory duties. Mr. Carman bought a car willed to her brother (the brother knew of the sale but not the identity of the buyer) and failed to pay the registration fees for the rest of the year. She kept the sale proceeds in her personal bank account and did not open an estate account. They withheld from the brother a copy of the will and failed to provide inventories, appraisals and accountings. The daughter failed to transfer the deed to a Houston condominium willed to the brother, which created problems for the brother with the HOA due to owner-occupation rules. The brother retained counsel and sought orders compelling disbursement of assets, surcharges, attorney's fees and damages. The daughter testified that her deficient estate administration owed in part to not knowing what was required of her and in part to trusting Mr. Carman to guide her. The judge warned Mr. Carman she would deem the attorney–client privilege waived to the limited extent necessary to determine who should pay the brother's attorney's fees. Mr. Carman did not withdraw from the representation or advise his client to retain new counsel. The court awarded more than $11,000 in legal fees and expenses jointly and severally against the daughter and Mr. Carman. Mr. Carman paid the entire award and agreed not to seek reimbursement or contribution from his client.

Aggravating factors: prior disciplinary offenses, selfish motive, a pattern of misconduct (conflicts), multiple offenses, and substantial experience in the practice of law.

Mitigating factors: absence of a dishonest motive, personal or emotional problems, timely good faith effort to make restitution or to rectify consequences of misconduct, full and free disclosure to disciplinary board or cooperative attitude toward proceedings, character or reputation, imposition of other penalties or sanctions, and remorse.

The parties consented, and the presiding disciplinary judge agreed, that the presumptive sanction of suspension should be mitigated to reprimand with probation.

Mr. Carman violated Rule 42, ARIZ.R.S.CT., ERs 1.3, 1.7(a), 1.8(a), 1.15(a) and (d), 3.4(a) and (c), and 8.4(c) and (d); and Rule 54(c), ARIZ.R.S.CT.

GREGORY J. MEELL

Bar No. 012526; File Nos. 19-0960, 19-1447
PDJ No. 2020-9033

By final judgment and order dated September 21, 2020, the presiding disciplinary judge accepted an agreement for discipline by consent by which Gregory Meell, Phoenix, was reprimanded and placed on one year of probation. The terms of probation require Mr. Meell to undergo counseling, complete at least six hours of Continuing Legal Education besides his annual requirement, and complete the State Bar's CLE programs "Ten Deadly Sins of Conflict" and "Candor, Courtesies and Confidences." Mr. Meell must complete the CLE within 90 days from the final judgment and order. He also was ordered to pay the State Bar's costs and expenses of $1,200 within 30 days of the final judgment and order.

Mr. Meell engaged in conflicts of interest while representing his niece in a family court matter and gave "incomplete" statements to the court regarding his prior representation of a family member that testified adversely to his niece.

Aggravating factor: prior discipline history.

Mitigating factors: full and free disclosure and absence of a dishonest or selfish motive.

Mr. Meell violated Rule 42, ARIZ.R.S.CT., ER 8.4(d).

WILLIAM JAMES RITCHEY

Bar No. 033588; File No. 19-2907
PDJ No. 2020-9015

By final judgment and order dated Sept. 3, 2020, the presiding disciplinary judge accepted an agreement for discipline by consent by which William James Ritchey, Mesa, Ariz., was suspended for four years effective 30 days from the date of the order. Mr. Ritchey also was ordered to pay the State Bar's costs and expenses totaling $1,208.29.

Mr. Ritchey represented a client in a personal injury case. Using Photoshop software, he deliberately altered medical bills to increase his client's damages claim before sending a settlement offer to the insurer.

Aggravating factor: dishonest or selfish motive.

Mitigating factors: absence of prior discipline, personal or emotional problems, full and free disclosure or cooperative attitude toward proceedings, inexperience in the practice of law, imposition of other penalties, and remorse.

Mr. Ritchey violated Rule 42, ARIZ.R.S.CT., ERs 8.4(c) and (d).

CAUTION!
Nearly 17,000 attorneys are eligible to practice law in Arizona. Many attorneys share the same names. All discipline reports should be read carefully for names, addresses and Bar numbers.

PEOPLE, PLACES, HONORS & AWARDS

Jennings Haug Cunningham, Phoenix, announced that **James L. Ugalde** joined the firm as a partner with the firm's Banking, Financial Services and Creditors' Rights practice. He previously practiced at JHC early in his career from 2004-2006 as an associate. Mr. Ugalde provides various legal services to banks, other lenders, lessors, secured creditors and investors with respect to the perfection and enforcement of their rights under security documents and the Uniform Commercial Code, including asset-based financing and leasing. He has been recognized in *Southwest SuperLawyers* in the Creditor Debtor Rights category.

Jones Skelton & Hochuli PLC, Phoenix, welcomed associate **Michael C. Stone** to its Construction Defect Group. He focuses his practice in the areas of construction defect litigation, and he represents construction companies, contractors, subcontractors and design professionals. Before joining the firm, Stone served as a Judicial Law Clerk for Hon. Jennifer B. Campbell at the Arizona Court of Appeals.

Jaburg Wilk, Phoenix, named **Alden Thomas** as a partner of the firm effective July 1, 2020. Her practice focuses on employment and education law, and she assists clients with federal and state compliance issues, discrimination and

harassment claims, wage and hour disputes, and COVID issues. In her education law practice, she assists students with residency, tuition and disciplinary matters. She graduated from Arizona State University Sandra Day O'Connor College of Law and completed a one-year clerkship with Hon. Patricia Orozco at the Arizona Court of Appeals before beginning private practice in 2015. She was named a *Southwest Super Lawyers* Rising Star in 2020, and she serves on the board of directors for Audrey's Angels, which provides music and art by bringing live music and craft programs to enrich the lives of elderly who are living in small residential care homes in Maricopa County.

Snell & Wilmer announced that **Joann Thach** joined the firm as its new Director of Diversity, Inclusion and Community Outreach. In this role, she will oversee the firm's commitment to expanding and supporting diversity, fostering an inclusive culture and supporting initiatives that positively impact the greater


THACH

community. This includes working with the firm's Women's Initiative Committee and its efforts to retain and promote female attorneys.

Prior to joining the firm, she spent a number of years leading recruiting, training and corporate social responsibility efforts with a lens for diversity and inclusion at an AmLaw 100 firm. She received her undergraduate degree at UCLA in sociology and philosophy and recently completed an intensive Critical Race Theory & Intersectionality summer school program sponsored by the African American Policy Forum, in partnership with Columbia Law School and UCLA School of Law.


MILEWSKI

In September Pinal County announced the promotion of **Kate Milewski** to **Pinal County Public Defender**. She is a 2004 graduate of DePaul University College of Law and is licensed in Illinois and Arizona. She is involved in numerous county and statewide initiatives concerning the juvenile justice system and currently handles a juvenile caseload, specializing in juvenile sex crimes.

Spencer Fane LLP announced that **Kelly Mooney** joined the firm as of counsel. She is part of the Tax, Trusts & Estates practice group and works out of the firm's Phoenix office. She regularly assists clients with tax planning and analysis for partnerships, LLCs and corporations; real estate joint ventures organized as LLCs and general and limited partnerships; and individuals.


MINDER

Sacks Tierney, Scottsdale, announced that attorney **Sierra Minder** joined the firm's Bankruptcy Practice Group. She practices in the areas of bankruptcy and restructuring and litigation. Minder earned her law degree, magna cum laude, at Gonzaga University School of Law. Before joining the firm, she served as Legislative Correspondent for economic and judicial issues for U.S. Sen. Dan Sullivan.

In August, **Jay Zweig** and **Melissa**

Costello joined the Labor and Employment Group at **Ballard Spahr**. They are based in Phoenix. Both attorneys have been active in advising clients on federal and local laws relating to COVID-19.

Zweig represents businesses in avoiding and resolving employment law disputes. He assists employers with human resources policies, confidentiality and non-compete agreements, wage-and-hour, FMA, and leave law issues, whistleblower cases, sexual harassment and employment discrimination administrative charges and litigation, internal investigations, ADA matters, and OSHA citations. Costello advises clients regarding disciplinary issues, employee handbooks, non-compete agreements, separation agreements, harassment, ADA, and discrimination matters.

Ashley M. Mahoney joined the Commercial Litigation and Attorney Ethics practices at **Jennings Strouss & Salmon PLC**, Phoenix, as an associate. She focuses her practice on commercial litigation and attorney ethics matters.

At the Arizona State University, Sandra Day O'Connor College of Law, she was involved with the *Arizona State Law Journal* and the Women Law Students' Association. Mahoney recently served as a Judicial Law Clerk to Hon. Paul J. McMurdie at the Arizona Court of Appeals.


LOGAN


TINUCCI

In September, **Jones Skelton & Hochuli**, Phoenix, announced the addition of associates **Mariah Logan** and **Alexis Tinucci**.

Logan joined the firm's General Liability and Auto Trial Group, where she focuses her practice in the areas of commercial and business litigation, general civil litigation, intellectual property, premises liability, and wrongful death and personal injury defense. Previously, she worked for a year as a law clerk at Division Two of the Court of Appeals.

Tinucci joined the firm's Transportation, Auto, Products and General Liability Trial Group, where she focuses her practice in the areas of automobile and commercial trucking defense, personal injury and wrongful death, and general liability defense. Prior to joining the firm, she worked in the areas of insurance defense and civil litigation, and before that she served as a legal extern at the U.S. District Court for the District of Arizona for Hon. Michelle H. Burns.


WHITAKER

Business litigation attorney **Philip B. Whitaker** joined **Frazer Ryan Goldberg & Arnold LLP**, Phoenix. He is a 1987 graduate of the Hastings College of Law at the University of California, and he devotes his practice to a wide spectrum of commercial disputes, including shareholder and partner disputes, commercial torts, and employment disputes.

Active in the community, Whitaker is a Scottsdale Leadership alumnus and a member of the Central Arizona Dental Society Foundation board of directors and serves as a community member of the Banner Good Samaritan Hospital institutional review board.


NEWELL

Joel F. Newell joined the Bankruptcy practice at **Jennings Strouss & Salmon PLC** as an associate. He focuses his practice on Chapter 11 and 13 bankruptcies.

Newell has extensive experience in all areas of creditor rights in both commercial and consumer bankruptcy law including Chapter 7, 11, and 13, matters, adversary litigation, relief from stay matters, proofs of claim, plan objections, and other substantive bankruptcy motions. He currently serves as the Chair of the State Bar of Arizona Bankruptcy Section and is the former Chair of the Maricopa County Bar Association Bankruptcy Section.

MacQueen & Gottlieb PLC announced the hiring of **Corey Robert Feltre** as a new attorney.

Before joining the firm, he handled primarily criminal defense work and also focused his practice in union-side labor law and class and collective actions.

Feltre earned his Juris Doctor cum laude in 2018 from the James E. Rogers College of Law at the University of Arizona, where he earned CALI Awards in Securities Regulation and Legal Research, and a Certificate for Outstanding Performance in Oral Advocacy.

In September, **Osborn Maledon PA**, Phoenix, announced the addition of new associates **Luci Davis, Shannon Mataele** and **Bryce Talbot**.

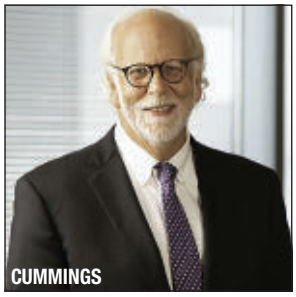
Davis joined the firm as a litigator. Previously, she served as a law clerk for Hon. Andrew D. Hurwitz of the Ninth Circuit Court of Appeals and Hon. David G. Campbell of the District Court for the District of Arizona.

Mataele and Talbot joined the firm's litigation group. Mataele's practice focuses on education, government/regulatory, and administrative law. She previously served as Arizona Supreme Court Justice Andrew Gould's senior law clerk, and she also clerked at the Court of Appeals and worked in public and private practice. Before joining the firm, Talbot was a law clerk for Utah Supreme Court Justice John A. Pearce, and he served as a judicial extern to Hon. David C. Bury of the U.S. District Court for the District of Arizona in Tucson.


DAVIS


MATAELE


TALBOT


CUMMINGS

Gust Rosenfeld PLC, Phoenix, announced that **Frederick M. Cummings** joined the firm's Health Care Group and Insurance Group. He has extensive trial experience in the areas of health care, medical malpractice and medical products liability defense litigation, as well as significant experience in all aspects of complex litigation. In addition, he has represented many physicians and dentists in malpractice suits before federal and state courts and in disciplinary and licensing proceedings before the state licensing boards; defended lawsuits on behalf of major Arizona hospitals; and defended medical products manufacturers, distributors and retailers against products liability claims.

HONORS AND AWARDS

Chad Schexnayder, a partner at Jennings Haug & Cunningham, is the new chair of the Fidelity & Surety Law Committee (FSLC), of the **American Bar Association**'s Tort Trial & Insurance Practice Section. His appointment extends through July 2021. During that time, he will collaborate with industry colleagues throughout the country to produce national conferences and publications, enhance communications among industry

peers and promote the professional development of FSLC's membership.

The FSLC, founded in 1933, is widely recognized as the industry's pre-eminent organization. It is dedicated to the development, study of, and expertise in practice and improvement of the application of justice relating to fidelity and surety matters.

Cozen O'Connor attorney **Gary Gassman** was named Chair-Elect of the **American Bar Association** Tort Trial & Insurance Practice Section (TIPS)—one of the ABA's largest, most active sections. He will become the TIPS Chair in the 2022-23 bar year.

Gassman is a member of the Illinois and Arizona bars. At the firm, he Co-Chairs the Professional Liability Coverage Practice. He focuses his practice in the areas of insurance coverage counseling and litigation and handles cases involving directors' and officers' liability, employment practices liability, fiduciary liability, other types of professional liability and general liability. He also serves as national coverage counsel for several domestic and international insurance clients, and he leads the Cozen O'Connor LGBTQ attorney resource group.

The **Hon. Maurice Portley** (ret.), formerly a Judge on the Arizona Court of Appeals, was honored by **Arizona Legal Women and Youth Services** (ALWAYS) as its Heart of Justice legal professional of the year. Honorees are recognized for their committed role in bringing attention to those in the juvenile justice and foster care systems.

ALWAYS' mission is to open the doors to justice for young people who have experienced some of life's most difficult circumstances. It helps clients gain employment, achieve legal immigration status, repair criminal history, and obtain family court orders that help themselves and their children stay safe.

Jennings Strouss & Salmon PLC, Phoenix, announced that **John J. Balitis**, Chair of the firm's Labor and Employment Department, was elected as a Fellow of **The College of Labor and Employment Lawyers**. Election as a Fellow is the highest recognition by one's colleagues of sustained outstanding performance in the legal profession, exemplifying integrity, dedication, and excellence. At the firm, he counsels clients on a broad range of employment law and labor

relations matters. He was recently listed as an AZ Big Media AZ Business Leader for 2020 and a *Southwest SuperLawyer* in the category of Employment and Labor for 2020. He's recognized by *Best Lawyers in America* in his practice area and has been ranked in Chambers USA as a top Labor & Employment lawyer since 2015.

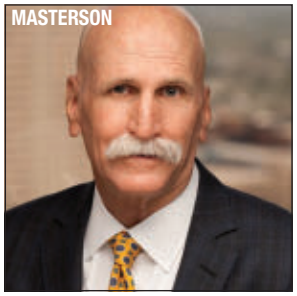
Cindy Villanueva, who is Of Counsel in the Phoenix office of Dickinson Wright PLLC, was named Regional President of the Year by the **Hispanic National Bar Association**. She was honored during the 2020 HNBA/VIA Corporate Counsel Conference & Annual Convention National Awards Reception in September.

At the firm, she practices in the areas of domestic and international trademark and copyright prosecution, licensing and enforcement. She assists clients with brand development and with identifying various protectable aspects of the clients' products, services and concepts.

Burch & Cracchiolo announced that, in August, partner **Wendi A. Sorensen** was appointed by the Arizona Supreme Court to Chair the State Bar of Arizona **Board of Legal Specialization**. Sorensen joined the board in 2018 and will serve a two-year term until June 30, 2022.

Sorensen's practice focuses on providing mediation services and defending aggravated liability and damages matters, including Federal Motor Carrier (trucking accident) cases, vehicular products liability matters, construction site injury and death matters, and premises liability cases. She is licensed to practice in California and Arizona.

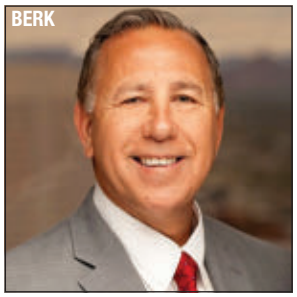
Jones Skelton & Hochuli PLC, Phoenix, announced that the National Committee of the **America College of Trial Lawyers** inducted partner **John Masterson** to its Fellowship. ACTL is one of the premier legal associations in North America, with Fellowship by invitation only and not exceeding one percent of the total lawyer population in any state.



Masterson has been practicing law since 1982 and joined the firm in 1989. He represents governmental entities in issues involving civil rights law, government and constitutional law, police defense, prison matters, insurance defense, wrongful death and personal injury law, general civil litigation, and appeals.

Bryan Cave Leighton Paisner, Phoenix, announced that Phoenix partner **George Chen** was appointed by the State Bar of Arizona to the **American Bar Association House of Delegates**. His three-year term began on August 5. The House serves as the policy-making body of the ABA.

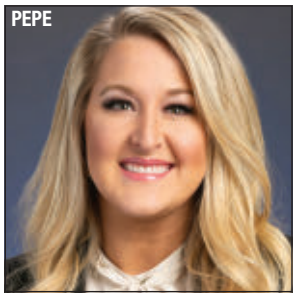
Chen's intellectual property practice at the firm encompasses litigation, licensing, counseling, and prosecution of patent, trademark, copyright, trade secret, unfair competition, Internet, cybersquatting, and other intellectual property matters. He serves on the firmwide international Board at BCLP and is the leader of the intellectual property practice for the Phoenix office.



Jones Skelton & Hochuli announced that **Robert Berk** was elected into the **American Board of Trial Advocates**, an invitation-only organization in which members must have at least five years of active experience as trial lawyers, have tried at least 10 civil jury trials to conclusion and possess additional litigation experience. ABOTA members also must exhibit the virtues of civility, integrity and professionalism.

Berk joined the firm in 1989 and focuses his practice in the areas of commercial and contract litigation, and professional liability defense and insurance coverage litigation.

Snell & Wilmer announced that Phoenix counsel **Erica J. Stutman** was appointed to the **Arizona Theatre Company** Board of Trustees. At the firm, she concentrates her legal practice on commercial litigation, and earned both her J.D. and B.S. magna cum laude from Northwestern University.



Micalann C. Pepe was elected Vice-Chair of the Board of Directors of **Gabriel's Angels**. Founded in 2000 in response to the pressing and documented need in the community, the organization's mission is to inspire confidence, compassion, and best behaviors in at-risk children through Pet Therapy.

Pepe is an insurance law attorney and partner at Jaburg Wilk, Phoenix.

Phoenix attorney **Scott David Stewart** has updated **The Arizona Divorce Handbook**, his book aimed at couples considering divorce in Arizona. The second edition answers questions about avoiding costly court battles, agreeing on child custody and negotiating spousal support payments. The book is available on Amazon or can be downloaded at www.arizonalawgroup.com/blog/books.

Attorney **Michelle Ronan** was named to the Board of Directors of **Ryan House**, whose mission is to embrace children and their families as they navigate life-limiting or end-of-life journeys through palliative and respite care. Ronan is an insurance law attorney and partner at Jaburg Wilk, Phoenix.

RECENTLY DECEASED

Wayne N. Howard, Phoenix
Brian J. Pollock, Phoenix


Send items for the People column to
people@staff.azbar.org
Items run free of charge, but because we receive many submissions, we cannot guarantee when an item will run. If you also send a photo with the item, we try to use it, depending on that month's space and the photo quality (high-resolution required).

EXPERT WITNESSES

Urology & Mesh Medical Consulting, PLLC: Matthew E. Karlovsky, M.D. Double Board certified – Urology and Female Pelvic Medicine. Case reviewer, Arizona Medical Board in urology/urogynecology. Surgical complications. Injury of Male or Female Genitalia or Urinary Tract. Mesh complications. Case review, testimony-deposition/trial, IMEs. Defense or plaintiff. KarlovskyM@yahoo.com; www.ExpertInUrology.com; 480-272-0499. Free 20 minute initial phone consult.

More Experts
at www.azbar.org/for-lawyers/practice-tools-management/find-an-expert

FINANCIAL SERVICES

Student Loan Refinancing: State Bar of Arizona members, family, and friends receive a $300 welcome bonus when refinancing their student loans with SoFi, the market leader of student loan refinancing. Must apply at SoFi.com/AZBar or call 855-456-7634.

INSURANCE

AHERN Insurance Brokerage, a State Bar of Arizona Approved Member Discount Provider since 2003, has partnered with AXA XL, an A+ Superior-rated insurance carrier (A.M. Best rating as of 5/2020) and Slice Labs to offer SBA members access to a FREE on-demand cyber risk score to consider affordable cyber insurance. This comprehensive coverage from AXA XL and Slice Labs protects your firm from breach response, business interruption, ransomware and much more. Apply online and receive your policy in just minutes! Call 800-282-9786 or visit www.aherninsurance.com/associations/sba.

Cyber Insurance offered by 360° Coverage Pros, an industry leading insurance company that will help protect your firm against the costs of a data breach. The Cyber and Data Breach Insurance program is specifically designed for small to midsized businesses and offers special access to affordable cyber and data breach insurance. Rapid breach response services help your firm quickly react and recover from a cyber or data breach event. Protect against the high costs of cyber and data breaches. Easy online quote and purchase process. Call 866-389-0024 or visit www.360CoveragePros.com/AZBar.

Major Medical Coverage is now available through the State Bar of AZ Health Exchange. This program provided by AHiX, a division of JLBG Health, can help supply members, their employees, and families with options to lower health insurance costs. Shop for plans on and off the Public Health Insurance Exchanges, and apply for the health plan of your choice with or without subsidies. Get an instant rate online, or call for details, member rates, and a 15-minute phone enrollment. Call 866-708-6578 or visit AZBarHIX.com.

LEGAL RESEARCH

Need assistance with legal research and writing projects? Former member of *Law Review Journal* and Judicial Law Clerk, and current practicing attorney in Arizona, can assist at an affordable price. Contact me at rcb42midway@yahoo.com or 602-377-2471.

Memos, briefs, and appeals from a 25-year trial lawyer in Arizona and in Oregon. $75/hr., rogerperry@live.com; www.rogerwperry.com; 520-332-0132.

LEGAL SERVICES

Can't settle auto accident case on a demand letter and don't want to litigate it? Former in-house defense counsel for major insurance carrier and experienced Plaintiff attorney, Daniel S. Brill, Esq., MBA will litigate it for you and we'll split the fee in accordance with E.R. 1.5. Great references available. 480-361-2757.

Turn more callers and visitors into clients! Ruby's team of live receptionists and online chat specialists create stellar first impressions. From how we greet your callers to how we route your calls, Ruby's service is tailored to suit the unique needs of your firm. Receive a 10% discount using promo code: AZBAR. Call 855-827-7829 or visit ruby.com/azbar.

More Legal Services
at www.azbar.org/for-lawyers/practice-tools-management/find-an-expert

OFFICE SPACE

Downtown Phoenix Historic District, small furnished office available, $525 – in established law firm, close to courts/freeway, internet/conference room/kitchen, nonsmoker, virtual office $100, 910 W. McDowell Road. alan@bklawaz.com; 602-402-7952.

Executive office space – N. Phoenix, Loop 101 & Cave Creek Road. Private office and reception. Walk-up garden style property with easy parking. $975/Month with utilities and internet included. Perfect for small firm or satellite office. michael.marsh@colliers.com.

4th Avenue & Roosevelt – ½ Building (upstairs), beautifully renovated, excellent views, tons of parking, priced to lease now; 602-738-8707.

Beautiful garden-style office complex in a great environment in North Phoenix. Easy access to SR 51 and SR 101; near Tatum and Shea. Executive office $800. Ample parking, beautiful conference rooms and seminar room. Copier, telephone, internet ready. Includes Receptionist to greet clients. Contact Clara or Mary 602-953-5000.

Central Phoenix furnished office for sub-lease at 3838 N. Central, Suite 100. Excellent location on the ground floor with easy access and very limited contact with other tenants in the building. Office Suite includes reception, conference room (with access to other conference rooms if needed), workstation and kitchen. Excellent office environment. Terms negotiable; will consider short leases. Call Jess at 602-385-6818 or email jess@loronamead.com.

Lux Offices offers premium office locations in both the West and the East Valley. Lux provides full-service receptionist with physical offices, conference and meeting rooms, as well as Virtual Membership options tailored to your firms needs. Visit www.LuxOffices.com or call 480-265-4515.

To place a classified ad, contact Marc Levine at 602-340-7306 or marc.levine@staff.azbar.org

Luxury Class-A with 10 private offices – Mesa: www.GalleryPlazaAZ.com, 5,335 SF (may be subdivided). Travertine flooring, custom iron doors, conference room with TVs, surround sound, kitchen, breakroom, two bathrooms. Reception area with lobby, covered parking, prominent monument signage. 1310 E. Southern Ave. – mile north of Highway 60. Free rent, TI Allowance available. From $18/SF modified gross. Dr. Singh, 602-380-8080; david.singh@pruthiProperties.com.

POLYGRAPH

Polygraph tests can help win your case. Widely used and trusted by attorneys and law enforcement. WellsPolygraph.com; Free consultation; 602-635-3233.

POSITIONS AVAILABLE

Insurance defense law firm seeking associate attorney with 5+ years and jury trial experience. Compensation commensurate with experience with competitive benefits package. Interested candidates should send resumes with references to: Childers Hanlon & Hudson, PLC, 722 E. Osborn Road, Phoenix, AZ 85014 or lindi@chhazlaw.com.

REAL ESTATE

Divorce/Estate Liquidation/Probate. Realtor, Special Commissioner, Attorney. Jeffery Hall, Russ Lyon Sotheby's Int'l Realty – 480-390-7490; jeffery.hall@russlyon.com; www.jefferymhall.com.

SOFTWARE – PRACTICE MANAGEMENT

Every case detail in one place: MyCase is an affordable, intuitive and powerful legal case management software designed for the modern law firm. Get organized with contacts, calendars, cases, documents, time tracking, and billing. MyCase also includes a first of its kind integrated client portal so everyone stays informed and connected. State Bar of Arizona members get a 10% lifetime discount. Call 800-571-8062 or visit http://bit.ly/MyCaseArizona Bar.

Clio is the most widely-used, cloud-based practice management system in the world. Every day, tens of thousands of lawyers use Clio to schedule meetings, organize cases, track time, and invoice their clients. Accessible from Mac or PC, Phone or Tablet. Take control of your practice from any device, in any location, at any time. Clio integrates seamlessly with applications like Fastcase, LawPay, QuickBooks Online, Gmail, and Office 365. State Bar of Arizona members receive a 10% lifetime discount on Clio. Call Clio, 888-858-2546, or visit landing.clio.com/azbar.

For a preview of next month's marketplace, go to www.azbar.org/for-the-public/advertising-opportunities/legal-marketplace

"Hope smiles from the
threshold of the
year to come,
whispering, 'It will be happier.'"
—Alfred, Lord Tennyson

DAISY FROM BELOW IN MACRO. PHOTO BY AARON BURDEN ON UNSPLASH.

LARSEN ART AUCTION

2020 Larsen Art Auctions were huge successes with 90% of lots sold and artwork shipped to 20 different countries

Larsen Art Auction will now be adding an annual Spring Auction
to be held on Saturday, April 17th, 2021

Andy Warhol *General Custer* Est: $30,000/45,000 **SOLD**: $50,400
Paul Jenkins *Phenomena High Born* Est: $10,000/15,000 **SOLD**: $33,000

Esteban Vicente *By the Side* Est: $25,000/35,000 **SOLD**: $45,000
Ed Mell *Cactus* Est: $4,000/6,000 **SOLD**: $11,875

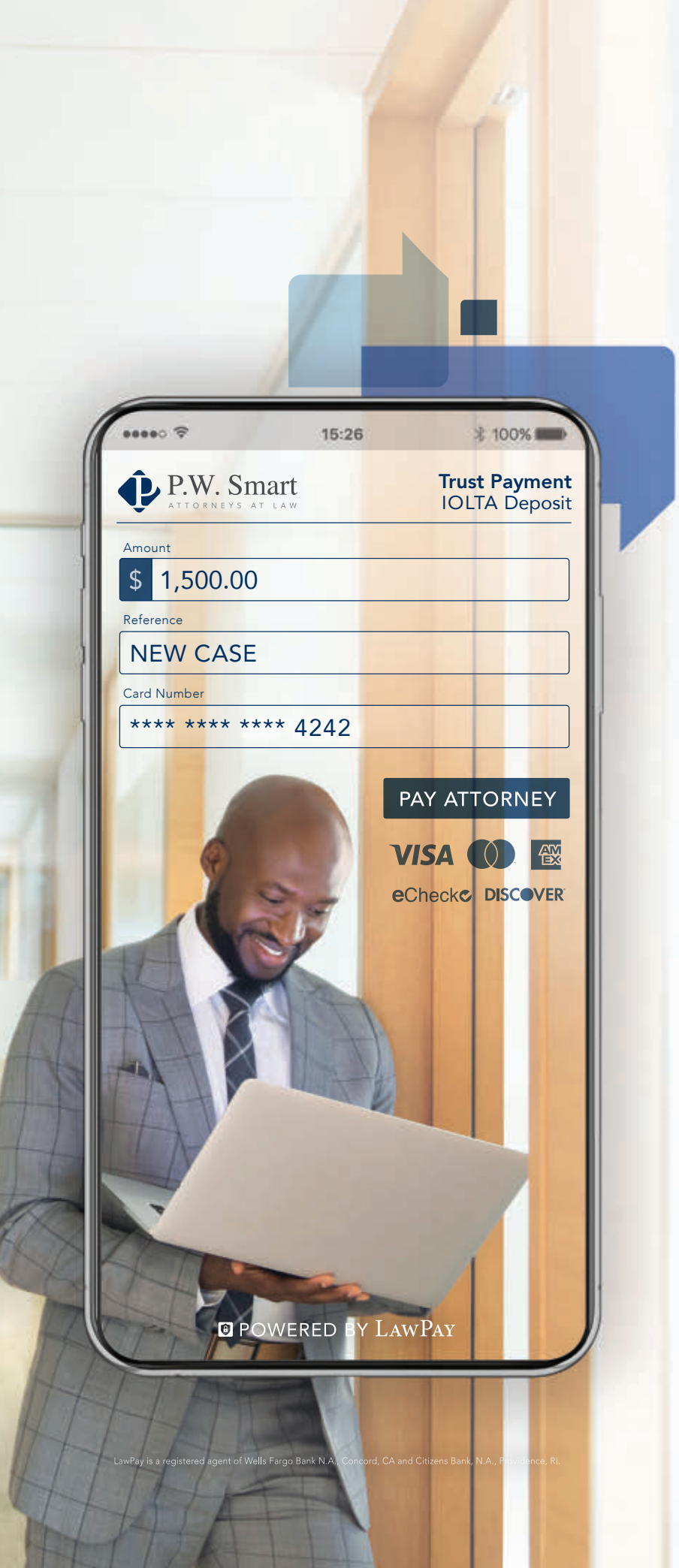
Logan Maxwell Hagege *Sun to the West* Est: $15,000/25,000 **SOLD**: $26,400
Allan Houser *Mountain Echoes* Est: $20,000/40,000 **SOLD**: $57,000

Earl Biss *Twilight in the Sweet Grass* Est: $4,000/6,000 **SOLD**: $13,200
Pablo Picasso *Projet d'affiche...* Est: $2,000/4,000 **SOLD**: $11,250

Now accepting consignments for 2021 Auctions

Please send visuals, dimensions, and information to consignments@larsengallery.com
or schedule an appointment at (480) 941-0900

3705 N. Bishop Lane Scottsdale, Arizona 85251 480-941-0900
larsengallery.com larsenartauction.com



LawPay®

AN AFFINIPAY SOLUTION

POWERING PAYMENTS FOR THE LEGAL INDUSTRY

The easiest way to accept credit, debit, and eCheck payments

The ability to accept payments online has become vital for all firms. When you need to get it right, trust LawPay's proven solution.

As the industry standard in legal payments, LawPay is the only payment solution vetted and approved by all 50 state bar associations, 60+ local and specialty bars, the ABA, and the ALA.

Developed specifically for the legal industry to ensure trust account compliance and deliver the most secure, PCI-compliant technology, LawPay is proud to be the preferred, long-term payment partner for more than 50,000 law firms.

STATE BAR OF ARIZONA
Member Benefits

ACCEPT MORE PAYMENTS WITH LAWPAY

877-705-6383 | lawpay.com/azbar