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DISPUTE RESOLUTION

VIRTUAL MEDIATION FOR SMALL CLAIMS CASES: A SUCCESSFUL INNOVATION THAT MEETS THE SERVICE NEEDS OF THE COURT, PARTIES AND MEDIATION-PROVIDER

BY SETH IZEN

INTRODUCTION

In November 2020, MetroWest Mediation and the Framingham and Natick district courts worked together to develop a program for virtual mediations for small claims cases when the court was closed for in-person civil sessions because of the COVID-19 pandemic.

The development of this program was led by Seth Izen, executive director at MetroWest Mediation, and Sean Coleman, first assistant clerk-magistrate. First Justice David Cunis and Clerk-Magistrate Brian Kearney were strong supporters of this effort.

The virtual mediation option, offered when small claims sessions were paused, gave parties an opportunity to settle their dispute in a timely manner. It also helped the court reduce the backlog in its docket.

Offering virtual mediation prior to a hearing is convenient for parties and contributes to accessibility to justice. The Framingham and Natick district courts and MetroWest Mediation have continued offering virtual mediation to maintain this option for parties.

Two years later, we've found that this virtual mediation program has led to a higher use of mediation; increased agreement rates, which removed more cases from the court docket; and provided a more accessible and convenient service for both the parties and mediation-provider.

PROCESS

The virtual mediation process that was developed is the following:

1. After the filing of a small claims complaint, parties were notified by the court of a date/time to call a court conference line session for a status hearing.
2. At the status hearing, the first assistant clerk-magistrate called the docket list, explained about mediation and gave parties the option to attempt mediation.
3. A staff member with MetroWest Mediation Services was on the call. If both plaintiff and defendant agreed to mediation, the staff member collected the names and email addresses of the parties and scheduled them for a Zoom mediation — at a time of convenience to the parties — usually within the week.
4. After the call, MetroWest Mediation staff sent out the Zoom link and the agreement to participate (through DocuSign) to the parties.
5. At the date and time of the mediation, the parties logged in to the Zoom session, which was hosted by MetroWest Mediation Services.
6. If an agreement was reached in the virtual mediation, MetroWest Mediation shared the agreement with the court and asked the court to consider the case settled. If no agreement was reached, MetroWest Mediation requested that the court schedule the parties for a hearing.

Increase in Participation in Mediations

This process was very successful at giving parties an opportunity to settle their dispute and at diverting cases from requiring a hearing, thus reducing the court's backlog. Between Nov. 1, 2020, and Nov. 1, 2022, MetroWest Mediation Services virtually mediated 288 small claims cases. This represented a 27% increase in cases from the number mediated in person in a comparable period before the pandemic (Nov. 1, 2017–Nov. 1, 2019). This suggests that the virtual option with a pretrial status hearing can increase the number of cases that go to mediation.

The increase in participation is likely due to the convenience for parties who are eager to resolve their dispute without having to wait for a hearing or travel to court.

Higher Agreement Rate

In the virtual mediations, a total of 181 out of 288 cases reached agreement for an agreement rate of 63%. This was significantly higher than the agreement rate for in-person mediations. In the 226 cases mediated in person for the prior two-year period, around 50% reached agreement.

This higher agreement rate may be impacted by increased levels of comfort of the parties who are mediating from the comfort of their home and not in the physical proximity of the other side. Virtual mediations also do not have the same time constraints as mediation in the courthouse, potentially leading to more cases reaching agreement.

SETH IZEN is executive director of MetroWest Mediation Services. Izen completed his basic mediation training at Brown University, where he earned a B.A. in political science and contemplative studies. He earned an M.A. in peace and conflict studies at the University of Massachusetts Lowell, where he also taught a graduate-level course on Mediation: Theory and Practice.

BENEFITS OF VIRTUAL MEDIATION FOR SMALL CLAIMS CASES

To the Courts

Virtual mediation saves time for the court, as trials can focus on those cases in which parties are not able to reach resolution. This makes the court calendar more efficient. The scheduling of mediation shortly after the status hearing enables the court to stay within time standards even if no resolution is reached in mediation.

A goal of the court is to deliver accessibility to justice, and virtual mediation serves the court's interest through enabling mediations to take place throughout the week, at varying times. The limitations of courthouse space preclude this option for in-person mediation. Accessibility to justice is also increased through not requiring parties to travel or need to attend a court session with a set time.

To the Parties

The convenience of this virtual process is a major benefit for the parties. As the initial status hearing is held by phone, and the mediation by Zoom, a party who reaches resolution has no need to travel to the courthouse. This saves significant time for parties and alleviates the challenge of public transportation or facing rush-hour traffic to get to a court session.

The scheduling of the mediation also contributes to the convenience factor. The mediation program has time slots for virtual mediations between 9 a.m. and 7:30 p.m. on Monday through Friday, giving parties an op-

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Virtual Mediation
Continued from page 2

portunity to avoid missing work. In this way, virtual mediation is more responsive to the disputants through offering significant flexibility on scheduling.

To the Mediation Provider

During the COVID-related court closures of 2020 and 2021, this virtual mediation program enabled MetroWest Mediation Services to continue engaging its staff and volunteer mediators through providing mediation for cases.

Virtual mediation provided a way to engage volunteers for whom service during the day was not possible, such as those volunteers with full-time jobs. It also gave volunteers, who were cautious about entering an in-person space due to COVID, a chance to mediate.

Finally, mediation volunteers are accustomed to traveling to the courthouse and occasionally not receiving any cases. With prescheduled mediation sessions by Zoom, the potential loss of volunteer time of waiting in court and not receiving a case is eliminated.

CHALLENGES OF VIRTUAL MEDIATION FOR SMALL CLAIMS CASES

Challenges to the Courts

Virtual mediation for small claims cases requires a new process to hold the status hearing and work with the mediation program to schedule hearings if the case was not resolved in mediation. Courts need staff willing to put in the upfront time to create and maintain the process. Ultimately, the Framingham and Natick district courts found that the mediation process saved them time in the long term, but not all courts have the staff who are able

to handle the process change. Some courts will find it simpler to keep the small claims sessions in person and refer cases on an as-needed basis to a mediator present in the courtroom.

Challenges to the Parties

Access to the proper technology is necessary for virtual mediations. Some parties did not have smartphones or were unable to access Zoom video. To address this situation, MetroWest Mediation enabled parties to call in to the mediation using the Zoom call-in number. When this occurred, and one party was unable to join with video, mediators requested that the other party turn off their video. This helped eliminate any potential bias on the part of the mediators from seeing only one party.

Another challenge occurred when parties wanted additional information regarding a statute or court procedure. For in-person mediations, mediators would refer that party to the clerk's office to get information. For virtual mediations, mediators needed to have the party either call the court, look online, or potentially continue the mediation to a later date so they could get that information.

Challenges to the Mediation Provider

MetroWest Mediation's roster, similar to many mediation programs, is composed of many retirees who have the time to volunteer during the day. The adoption of a technological platform such as Zoom presented a challenge. It was too onerous for many volunteers to handle both the task of managing the Zoom room (e.g., creating breakout rooms, sharing their screen for agreement writing, etc.) and mediating the case.

To address this challenge, MetroWest Mediation specifically trained a core group of "Tech Lead" mediators. These are more technologically savvy mediators who are comfortable handling virtual aspects of the case.

There were other anticipated challenges that did not represent a significant problem. For instance, we anticipated that parties might be distracted since they were at home or on the worksite. We did not find that to be a substantial problem in mediations.

Another anticipated challenge was that distraught parties, in the midst of a difficult conversation, might simply leave the Zoom room to end the mediation. This happened extremely rarely, and not to a greater extent than a party might walk out of an in-person mediation session.

Finally, this virtual process requires more extensive record-keeping and communication on the part of the mediation center. On a weekly basis, MetroWest Mediation shares the results of all mediations with the Framingham and Natick district courts.

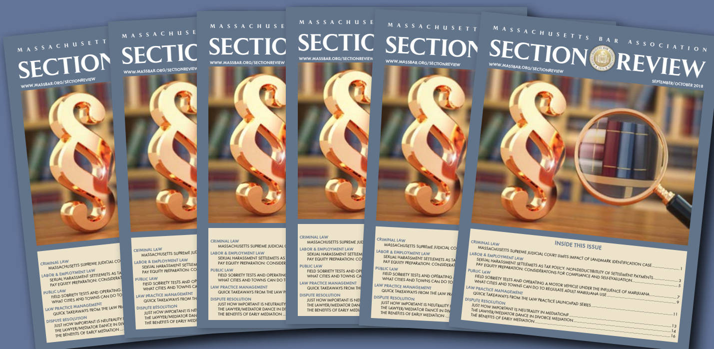
OTHER TYPES OF CASES

MetroWest Mediation and the Framingham and Natick district courts also offer virtual mediation as an option for summary process mediations and for civil mediations and conciliations. Our impression is that virtual mediation increases the likelihood that attorneys and insurance adjustors are willing to participate in alternative dispute resolution for civil cases. The ability to participate from their office, without the need to travel to court, makes mediation or conciliation a much more appealing option for advocates and disputants.

CONCLUSION

In summary, virtual mediation helped provide a better service to the court, disputants and mediation provider through being more convenient and efficient. With higher participation in mediation and increased agreement rates, virtual mediation for small claims cases seems to offer improved results compared to in-person mediation.

Given the success of this virtual process to divert cases from a hearing and allow parties an opportunity to settle the case without going into the courthouse, there is a strong case to be made for the continuation of virtual mediation in small claims cases. ■



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FAMILY LAW

HOW THE SJC DECISION IN *CAVANAGH V. CAVANAGH* COULD IMPACT A PAYOR IN THE MIDDLE CLASS

BY JULIE K. MURPHY AND ROCCO IANNACI

In *Michael D. Cavanagh vs. Lynn A. Cavanagh*, SJC-13222,[1] the Supreme Judicial Court (SJC) addressed an issue of first impression in the Commonwealth of Massachusetts and ruled that employer contributions to a child support payor's retirement account is income and should be included in child support calculations.[2] The SJC further ruled that the trial court judge abused her discretion in excluding income and capital gains on the payor's savings and 401(k) plan for the purposes of calculating child support.[3] In addition, the SJC held that health savings accounts[4] as well as second jobs are to be included in child support calculations. The SJC's decision could have a disparate impact on the lower middle-class payors.

In reaching its judgment, the SJC reiterated two principles known to family law practitioners in Massachusetts: 1) children are to be fully supported and 2) parents cannot bargain away their children's right to be supported. *White v. Laingor*, 434 Mass 64 (2001). The *White v. Laingor* court quoted C.P. Kindregan Jr., M.L. Inker, Family Law and Practice § 39.10, at 701 (2d ed. 1996), and *Knox v. Remick,* 371 Mass. 433, 437 (1976), in which the SJC stated that while Massachusetts courts encourage parties to reach their own resolutions in a matter, "[p]arents may not bargain away the rights of their children to support," *Knox v. Remick,* 371 Mass at 437, and it is public policy to ensure children are "supported as completely as possible from parental resources [which] will take precedence over the freedom of the parties to enter into a binding contract." *White v. Laingor*, 434 Mass. at 66, quoting C.P. Kindregan Jr., M.L. Inker, Family Law and Practice § 39.11 at 705.

The SJC also looked to the Massachusetts Child Support Guidelines, whose definition of income includes all sources of income, regardless of whether said income is defined as such by the Internal Revenue Code, the Massachusetts Department of Revenue or other taxing authority.[5] In determining that employer contributions to a retirement account counted as income, the SJC looked to the Superior Court of Pennsylvania, which addressed this issue for the first time in *Portugal v. Portugal,* 798 A.2d 246 (Pa. Super. Ct. 2002). The Pennsylvania court, when faced with the same question as Massachusetts as to the issue of including employer-contributed funds in child support calculations, looked to two North Dakota cases in which similar issues were addressed. The Supreme Court of North Dakota in *Shipley v. Shipley*, 509 N.W.2d 49 (N.D. 1993), examined its own statues, which stated that child support included "income from any source …." and included employer pension contributions, holding that the pension contributions along with health insurance premiums was "income from any source" under the broad definition of "gross income …." *Id.* at 52. In the second North Dakota case, the North Dakota Supreme Court determined in *Shaver v. Kopp,* 545 N.W.2d 170, 175 (N.D. 1996), that an employer's contribution to a tax-deferred savings plan qualified as gross income under the guidelines because the employee was able to "withdraw his employer's contributions, as well as his own, at any time, subject to taxes and penalties." *Id.* at 175. The Pennsylvania court agreed that this determination was proper since "children cannot wait for support ... [and] obligors should not be allowed the option of deferring income until the child reaches adulthood and no support obligation remains …." *Portugal v. Portugal,* 798 A.2d 246 (Pa. Super. Ct. 2002). The Pennsylvania cases that came after *Portugal v. Portugal* continued to a ffirm the premise that employer contributions should be included in child support calculations, and one court held ". . . children cannot wait for support that is deferred to retirement …." *Hanrahan v. Bakker,* 186 A.3rd 958 (Pa. 2018). The SJC found "persuasive the conclusion of the Superior Court of Pennsylvania that 'if we were to determine that an employer's matching contributions are not income, it would be possible for an employee to enter into an agreement with his employer to take less wages in exchange for a heightened matching contribution. This would effectively permit an employee to shield his income in an effort to reduce his child support obligation.'" *Cavanagh v. Cavanagh,* SJC-13222 (Mass. Aug 8, 2022) quoting *Portugal v. Portugal*, 798 A.2d 246, 253 (Pa. Super. Ct 2022).[6]

While these various state courts focused on high-wage earners hiding available income for child support purposes, by negotiating lower wages and higher employer contributions, we do not know how this ruling will affect lower- to middle-class income earners in Massachusetts who have a child support obligation. There are many lower- to middle-class income earners who contribute little or nothing to retirement plans but may work for employers who make contributions on an employee's behalf. That is not money the employee has immediate access to, and if they were willing to make an early withdrawal and accept penalties and potential tax increases to meet their needs, there are limits on what an employee can access.

In assessing how this ruling may affect the lower- to middle-income class in Massachusetts, it is important to understand who falls into this category. The following salaries represent a breakdown of economic class for a family of three:[7]

1. Poor or near poor: $32,048 or less.
2. Lower Middle Class: $32,048 through $53,413.
3. Middle Class: $53,413 through $106,827.

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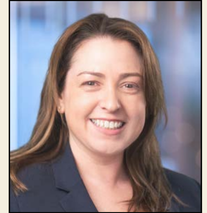

JULIE K. MURPHY is a partner of Rico, Murphy, Diamond & Bean LLP in Natick. She concentrates her practice in the Massachusetts Probate and Family Court, where she focuses on divorce, paternity, custody disputes, high-net-worth asset division, support matters and prenuptial/postnuptial agreements. Murphy is also certified as a mediator, parent coordinator and collaborate lawyer.

ROCCO IANNACI is of counsel with the law firm of Rico, Murphy, Diamond & Bean LLP. He focuses his practice in the Massachusetts Juvenile and Probate and Family courts, where he is regularly appointed as education guardian ad litem in the juvenile courts. In the family and probate courts, Iannaci's practice encompasses all aspects of family law, including litigation, negotiation and prenuptial/postnuptial cases.

Cavanagh
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4. Upper Middle Class: $106,827 through $373,894.
5. Rich: $373,894 and above.

Including employer contributions to a retirement account in the gross income of a payor may not significantly affect the ability to pay the support of a payor on the high end of the "middle class" definition or those above it; however, it could be financially debilitating to someone on the lower end of the middle class. The retirement contribution does not represent expendable and surplus cash. It in part represents contributions that a company is making as well as possible contributions of the employee. This increased "available income" for the child support calculation is a mirage that has the potential to financially impair the payor whose economic responsibilities are now spread even thinner than before due to current inflation and being split among two households.

To see how this could affect a family in the lower middle class, consider the example of a divorced family where the recipient is a homemaker and has the two children two-thirds of the time and the payor has one-third parenting time. In the following scenario:

> A payor earns $50,000 ($961.53 per week) gross per year and pays $100 per week for medical insurance and $7 for dental insurance and vision insurance. The payor's child support, based on gross wages, is $262 per week. Now assume the employer contributes 5% of the employee's salary to a 401(k) for the benefit of the payor, in the amount of $2,500 per year. Adding the $2,500 into the payor's income would increase child support to $276 per week. This is an increase of $728 per year being paid from after-tax income, which does not include access to the $2,500 per year from the employer. To a payor in the lower middle class, this number could affect an ability to make ends meet.

The point here is not that the children should not receive support or that the support of $262 per week is sufficient to meet their needs. The focus of the example is that the payor is increasing the support payment on income that they will not have access to until retirement. This example is more marked if you assume that the salary of $50,000 (also assume one child as deduction and no personal contribution to a retirement plan) results in an average net income after taxes of $35,189. This $35,189[8] will pay $14,352 per year in child support, leaving the payor with $20,837 per year for self-support.

The North Dakota court rationalized the inclusion of employer contributions to retirement in child support calculations by stating that a payor can access the employer contributions subject to a penalty. *See Shaver v. Kopp,* 545 N.W.2d 170, 175 (N.D. 1996). However, the ability to access the retirement funds early is not absolute and is subject to rules established by the Employee Retirement Income Security Act of 1974, with limits on an employee's option to make withdrawals. Moreover, the ability to make withdrawals on retirement accounts is more limited when accessing a current employment retirement account versus making withdrawals from accounts that have been rolled over from former employment or investments in non-employer-sponsored retirement plans.

In analyzing the options that may be available for the payor paying higher child support due to a retirement contribution by the employer, the first consideration is whether the employee can take a loan from his retirement plan to have access to more cash to pay child support. The first question is if an employee's plan would allow an employee to take a loan.[9] These types of loans are not taxable if they meet specific criteria. Some contributors are able to borrow up to 50% of their vested account balance with a maximum loan of $50,000. This loan must be repaid in equal, regular payments within a five-year period.[10] This option may not be practicable for a payor in the lower middle class, as the repayments of the loan would only increase monthly debt and decrease available net pay the payor has at his or her disposal.

A second potential option for accessing retirement funds for immediate cash exists in seeking a hardship distribution. The distribution is limited to the distributable amount, which is equal to total elective deferrals.[11] In order to qualify for a hardship distribution, the contributor must show there is an immediate and heavy financial need to the employee and the distribution is necessary to satisfy that financial need.[12] The following scenarios qualify as an immediate and heavy financial need allowing for a distribution:[13]

1. Expenses for medical care previously incurred by the employee, the employee's spouse, or any dependents of the employee, or that are necessary for these persons to obtain medical care;
2. Costs directly related to the purchase of a principal residence for the employee (excluding mortgage payments);
3. Payment of tuition-related educational fees, and room and board expenses, for the next 12 months of postsecondary education for the employee, or the employee's spouse, children or dependents;
4. Payments necessary to prevent the eviction of the employee from the employee's principal residence or foreclosure on the mortgage on that residence;
5. Funeral expenses; and
6. Certain expenses relating to the repair of damage to the employee's principal residence that would qualify for the casualty deduction under IRC § 165.

Child support is not included as an immediate and hardship need. In order to obtain the funds, one of the above reasons must be present. If a child support payor has retirement accounts that are not employer-sponsored or were rolled over from a former employer into a retirement account that is invested, the payor could likely make a withdrawal from those funds. If the payor is under 59 1/2 years old, that payor is subject to a 10% penalty withdrawal and will be taxed on the funds at their current tax rate. In order to avoid a 10% penalty, the withdrawal would have to be for medical expenses (IRA, SEP, SIMPLE IRA and SARSEPs), first-time purchase of a home (IRA, SEP, SIMPLE IRA and SARSEPs), higher education (IRA, SEP, SIMPLE IRA and SARSEPs), or total and permanent disability of the participant payor.[14] In order to access the retirement accounts, the payor would need to use his or her available net income to pay the child support but have one of the above needs to access retirement funds to meet these other expenses.

In addition to the above considerations, a payor participant also needs to take into consideration whether early withdrawals, if available, would further increase the payor's income for child support calculations. In looking at Pennsylvania cases that came after *Portugal v. Portugal*, the court upheld in *Barnes v. Barnes* (Pa. Super. Ct. 2015) a nonprecedential decision, the lower court's including as income for child support calculations the payor's early withdrawal of his IRA and self-employment pension. *See Barnes v. Barnes*, (Pa. Super. Ct. 2015 (page 7).

The payor who chooses to make a with-

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drawal that incurs the penalty now appears to be faced with limited choices when it comes to seeking relief from a child support order that is attributing income based on their employer contributions to retirement. In this instance, the family law practitioner may want to look at cases decided in Pennsylvania after the *Portugal v. Portugal* case for guidance. One avenue explored after *Portugal v. Portugal* was where a penalty was incurred for making a withdrawal to pay support. In the Pennsylvania case, *Murphy v. McDermott,* 979 A.2d 373, 2009 PA Super 151 (Pa. Super. Ct. 2009), the payor argued that the court had miscalculated his income for child support by using the gross amount of his employer's contributions to his 401(k). That court found that the payor was entitled to relief and that the trial court had erred by not accounting for the withdrawal penalty. That court concluded, "the trial court erred by not accounting for the withdrawal penalty when it included the employer's gross contributions to Father' 401(k) and stock accounts. *See id.* The *Portugal* Court established that in calculating income, the court shall include the amount of any employer's 401(k) and stock contributions minus any penalties incurred for withdrawal." *Murphy v. McDermott,* 979 A.2d 373, 2009 PA Super 151 (Pa. Super. Ct. 2009).

Of further consideration, but not discussed in depth here, is that should the payor choose to obtain a second job to meet these expenses, the second job will likely be increasing the child support obligation. The SJC found that as second jobs fall under the definition of child support because they generate wages, a second job will likely be included in a child support calculation, and as in *Cavanagh v. Cavanagh*, to not do so could be considered an abuse of discretion by the court.[15]

The SJC, in deciding *Cavanagh v. Cavanagh*, emphasized that children need to be fully supported, and a payor should not be able to defer income necessary to support their children. The focus is on high-wage earners; however, this decision could have significant financial consequences on a payor who is in the lower middle class. ■

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1. *Michael D. Cavanagh vs. Lynn A. Cavanagh, Hampden.* April 4, 2022.-Aug. 8, 2022, Slip Opinion.
2. *Id.* at U.S. Page 45.
3. *Id.* at U.S. Pages 42-43.
4. *Id.* at U.S. Pages 46 and 43.
5. *See* Massachusetts 2018 Child Support Guidelines, Section I: Income Definition.
6. Page 45.
7. Kerr, Emma, Snider, Susannah (2021). Retrieved Aug. 14, 2022, from "Where Do I Fall in the American Economic Class System?" (usnews.com).
8. Estimated federal and Massachusetts taxes.
9. "401(k) Resource Guide Plan Participants General Distribution Rules | Internal Revenue Service." Accessed on Aug. 14, 2022. Retrieved from irs.gov.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. Retirement Topics: Tax on Early Distributions | Internal Revenue Service (irs.gov).
15. *Michael D. Cavanagh vs. Lynn A. Cavanagh, Hampden.* April 4, 2022.-Aug. 8, 2022, Slip Opinion (page 43).

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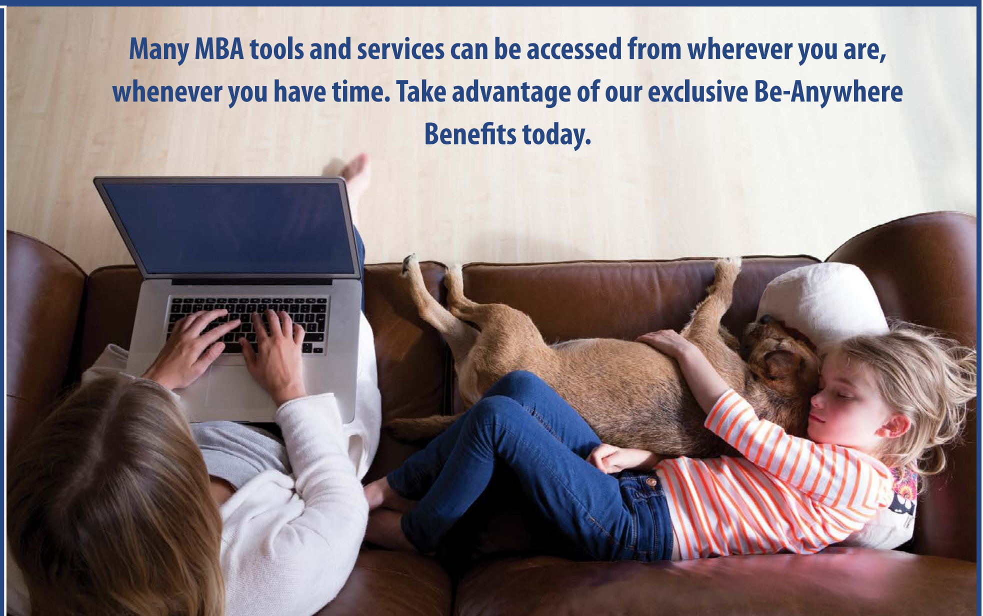

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HEALTH LAW

ADDRESSING COVID-RELATED STAFFING SHORTAGES: STRATEGIES TO RECRUIT AND RETAIN EMPLOYEES

BY YELENA GREENBERG AND SAPNA JAIN

Health care staffing continues to be a challenge for hospitals and health care systems across the country that are stretched thin due to staff burnout from COVID-19, lack of sufficiently trained staff, and high employee turnover. Failure to adequately staff for workforce needs within a hospital effectively limits the service lines or volume of services that hospitals can provide and can significantly impact the ability to provide patient care. Cost-effective, long-term solutions that support retention and recruitment of the hospital workforce are sorely needed.

THIRD-PARTY NURSE STAFFING AGENCIES

As a result of COVID-19, many hospitals continue to rely on temporary nurse staffing agencies to fill critical nursing gaps with travel nurses. Key contractual terms in agreements with temporary nurse staffing agencies that were previously nonstarters, including increasing traveler nurse compensation rates, were, and continue to be, negotiated or accepted by hospitals as staffing demands increase. Hospitals further incentivize traveler nurses to stay on for a set term with sign-on bonuses that traveler nurses would be required to repay if they voluntarily separated from the role under the applicable temporary staffing agency agreement. As travel nurse compensation exceeds that of full-time employed nurses, many directly employed nurses are incentivized to increase their compensation by seeking temporary roles, including in other locations with more pronounced shortages. This incentive has led to further turnover among the health care workforce.

And yet, for a number of reasons, contracting with temporary staffing agencies is only a short-term solution. First, these staffing arrangements are expensive and may not be feasible for cash-strapped hospitals. Second, hospital staffing needs can shift unexpectedly, and contracts with a temporary staffing agency may have unfavorable termination provisions that make early termination infeasible or expensive for the hospital. Third, compensation under these staffing arrangements is high in relation to full-time employment compensation rates, creating a dual compensation system between traveler nurses and employed staff. This disparity is a source of discontent among existing employed staff and could incentivize employed staff to seek other opportunities. Fourth, turnover or retirement of nursing leadership poses a barrier to effective mentoring for employed nurses and integration of traveler nurses into the nursing team. Fifth and relatedly, traveler nurses are not well integrated into the hospital as an organization and could undermine a hospital's other workforce retention and branding strategies. Longer-term solutions are needed to address staffing challenges.

INTERNAL STAFFING AGENCY MODEL

Hospitals and health care systems are searching for cost savings. Some hospitals have reportedly established internal temporary nurse staffing programs to recruit and hire temporary staffing directly. Doing so might help hospitals avoid some of the markup on compensation rates imposed by staffing agencies and also avoid protracted negotiations with staffing agencies and unfavorable contract terms. On the other hand, until demand for staffing moderates and travel nurse compensation decreases, this solution may not address the disparity in compensation for the same services among travel nurses and employed staff, and subsequent discontent among full-time employed staff.

Moreover, hospitals that internalize their temporary staffing function will have to address how such staff would be characterized for employment purposes, whether benefits would be included, and, if a labor union represents the hospital's similarly situated employed staff, whether the temporary staff are covered by the collective bargaining agreement. Hospitals considering establishing an internal staffing agency may try to address these barriers by: establishing an internal staffing agency through an affiliate; imposing strict parameters on the temporary nature of the roles, such as a maximum term; and offering no benefit plans or plans that meet the minimum criteria under the Affordable Care Act. Despite the potential cost savings, effectively insourcing the recruitment function might still be prohibitively expensive and administratively burdensome for many hospitals or health care systems. Hospitals and health care systems will have to manage an additional employment structure and recognize the potential for increased liability such as that faced by traditional staffing agencies. It is critical for hospital and health care system employers with unionized workforces to review the collective bargaining agreement to avoid running afoul of any provisions.

As a member of Robinson+Cole's Health Law Group, **YELENA GREENBERG** advises hospitals and health systems, as well as university health centers and clinical programs, on a broad range of regulatory compliance matters involving fraud and abuse, health care privacy, 340B compliance and determination of need. She also negotiates various vendor agreements, clinical affiliations and professional services agreements.

SAPNA JAIN, a member of Robinson+Cole's Labor, Employment, Benefits + Immigration Group, advises clients on general employment matters, including anti-discrimination and anti-harassment laws as well as restrictive covenants. Jain also has investigated complaints of discrimination and harassment and conducted trainings on these topics. She represents clients in various stages of civil litigation, including in federal and state court, and before administrative agencies.

Notwithstanding these concerns, hospitals that effectively bring the recruitment function in-house for at least part of their staffing needs can experience additional benefits, such as: (a) aligning recruitment with internal branding strategies to champion the hospital as a desirable employer; (b) aligning recruitment (e.g., including nurses, allied health professionals and environmental service personnel) with the priorities of the hospital, including the hospital's diversity, equity

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Staffing Shortages
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and inclusion goals; and (c) beginning to reestablish pay equity among similarly situated staff. These types of investments in recruiting will likely help build a more enduring and engaged health care workforce to counter potential turnover.

THIRD-PARTY RECRUITING FIRMS

In addition to temporary staffing, hospitals and health care systems are looking to increase their capacity to recruit full-time staff. Some third-party recruiting firms offer to conduct searches for specialized clinic staff, while others have begun to offer large-scale recruitment initiatives aided by software that electronically connects hospitals with available staff. Although the upfront investment to engage a firm to recruit dozens of staff members (e.g., 50 or more nurses) is not insignificant, engaging a single firm for recruiting may help streamline the recruiting process and provide a steady flow of needed staff over a designated period of time (e.g., six months to one year). Unlike the temporary staffing agency model, these firms operate more as online marketplaces for staff and do not directly employ the staff members. Although they perform basic vetting of candidates, these arrangements may provide fewer assurances as to the qualifications or competence of individual staff members, and the hospital's human resources department must maintain the responsibility of selecting individuals who satisfy the hospital's requirements and needs.

RETENTION EFFORTS

Hospitals are also making greater efforts to retain existing staff, including by offering staff nurses the opportunity to work for multiple hospitals or clinical settings, or allowing staff to choose which department(s) of the hospital they would like to work in, rather than imposing rigid requirements to specialize in a single hospital department. Allowing staff the flexibility to choose their work setting may further expand clinical training opportunities and increase job satisfaction, as staff may experience working with patients along the spectrum of health. Doing so may also help avoid burnout, particularly for nurses and allied health professionals working in high-stress emergency settings, including the COVID-19 clinic of a hospital. With these types of efforts, it is important for the hospital to understand how the relationship of its various entities will be viewed under laws such as the Fair Labor Standards Act, which could require payment of overtime compensation. Hospitals should also consider the implications of having staff work simultaneously in both a union and nonunion setting.

Hospitals are also experimenting with a number of other retention initiatives aimed at making the hospital more employee-centered, including:

- increasing opportunities for professional growth, such as offering courses and expanded tuition reimbursement;
- increasing emphasis on diversity, equity and inclusion initiatives;
- providing on-site child care;
- paying internal recruitment bonuses for referrals;
- offering retention bonuses;
- implementing wellness campaigns to encourage practices such as meditation, yoga and healthy eating;
- empowering frontline staff to improve workflows and efficiency; and
- making renewed efforts to guarantee certain work shifts or to avoid shift cancellations.

KEY TAKEAWAYS

COVID-19 has exposed weaknesses in the overall health care workforce staffing. Hospitals and health care systems can respond by implementing new strategies to increase recruitment of temporary and permanent staff, and retention of existing staff members. This article outlines strategies and key factors to consider, including:

- Utilization of third-party temporary staffing agencies, and the associated costs and short-term benefits;
- Opportunities associated with bringing the recruitment function in-house with the establishment of internal staffing agencies;
- Renewed emphasis on third-party search firms that can scale recruiting efforts using technology to offer a large number of full-time candidates in a relatively short period of time; and
- New strategies to retain existing staff.

As COVID-19 appears to continue to challenge hospitals and health care systems, these strategies may become more commonplace to ensure hospitals and health care systems can adequately staff their health care workforce needs to enable the provision of patient care in a cost-effective manner. ■

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LABOR & EMPLOYMENT LAW

PAY TRANSPARENCY LAWS: WHAT EMPLOYMENT COUNSELING ATTORNEYS (AND THEIR CLIENTS) NEED TO KNOW

BY KATHLEEN A. BERNEY AND SARAH E. RUTER

INTRODUCTION

"We are a Massachusetts-based shipping company. We have employees who drive to New York City to pick up packages, employees who live in Rhode Island and commute to work in Massachusetts every day, employees working in a small warehouse in Connecticut, and one remote employee in Colorado — do the New York City, Rhode Island, Connecticut and Colorado pay transparency laws apply to us?"

This is a mashup of the flurry of questions we received from participants at a recent webinar our firm presented on 2023 "hot" employment law topics. Questions about pay transparency laws far exceeded those about any other topic. One of our biggest takeaways as employment lawyers was that pay transparency laws ("PTL" or "PTLs") are top of mind for our clients and potential clients, and we should expect questions to keep on coming as more states and localities pass these laws. Clients will need us, and undoubtedly expect us, to help them understand and navigate the legal risks, identify steps for compliance, avoid pitfalls and implement best practices. The goal of this article is to highlight commonalities and differences between and among the patchwork of pay transparency laws and impart basic guidelines and practice tips for counseling attorneys analyzing these laws.

BACKGROUND

In January 2021, Colorado's Equal Pay for Equal Work Act (C.R.S. §8-5-101 et seq.) was the first PTL to require covered employers (defined as those with at least one employee in Colorado) to publish compensation ranges and benefits in job postings, the aftermath of which provides some "lessons learned" for employers. In an effort to avoid disclosing pay ranges, some employers that did not have any employees located in the state began posting for jobs that could be performed remotely anywhere within the United States — except the state of Colorado. The Colorado Department of Labor (DOL), in short order, responded by issuing a notice directed at those employers warning that "remote jobs are clearly covered by the Act's pay disclosure requirements, regardless of an employer's expressed intent not to hire Coloradans." In addition, a Colorado-based software engineer created a "name and shame" website dubbed Coloradoexcluded.com listing employers that excluded Colorado workers from their job postings, creating publicity and reputational concerns for certain employers. Reprimand by the state's DOL and being called out on a website as evading wage laws with dubious employment practices are not a good look for any employer!

Since then, at least some of the shock and awe have worn off for employers as they recognize (or perhaps resign themselves to the fact) that PTLs are here to stay. This "new normal" is driven in part by the demand for transparency by younger Gen Z and millennial workers, a shift in power from employers to workers in a tightened labor market, and the recognition that even if the state in which the employer is based does not have a PTL in effect or on the horizon, PTLs may apply to that employer's remote employees. As of the writing of this article, eight states (California, Colorado, Connecticut, Maryland, New York (effective 9/12/23), Nevada, Rhode Island and Washington) and seven cities/counties (Toledo, Cincinnati, Ithaca, Jersey City, New York City, and Albany and Westchester counties) have PTLs in effect or going into effect in 2023.

PREPARE FOR A MASSACHUSETTS PAY TRANSPARENCY LAW IN THE FUTURE

At this time, Massachusetts does not have a pay transparency law in effect. As a practical matter, the requirements of the Massachusetts Equal Pay Act, M.G.L. c. 149, § 105(b)(i)-(vi) (MEPA), have the effect of encouraging greater transparency in potential pay for many positions, but do not explicitly require the posting of salary ranges or other compensation information. The wheels are, however, in motion for an eventual PTL to be passed in Massachusetts. On Jan. 19 of this year, Bill HD.2814, An Act Relative to Salary Range Transparency, was presented to the Senate and House of Representatives by State Reps. Josh S. Cutler and Brandy Fluker Oakley. The bill would require covered employers (defined as any employer, public or private, that employs 15 or more employees in Massachusetts) to disclose the pay range within the advertising or posting of the position to an employee offered a promotion or transfer to a new position and/or to an employee holding such a position, or to an applicant, upon request.

KATHLEEN A. BERNEY is an associate at Boston-based law firm Hirsch Roberts Weinstein, where she counsels employers in all aspects of the employment life cycle. Her practice also includes training, employment litigation and collective bargaining. Berney chairs the Massachusetts Bar Association's Paid Family Medical Leave Work Group, and she is a member of the MBA's Labor & Employment Section Council. Berney is also the vice president of the Boston chapter of the International Network of Boutique Law Firms (INBLF) and an INBLF board member.

SARAH E. RUTER practices employment law at Boston-based firm Hirsch Roberts Weinstein. She counsels small and large businesses, schools and educational programs, and nonprofit organizations in recruiting, hiring, employee handbooks and documentation, performance improvement plans, and terminations. Ruter also provides manager and employee trainings and litigates employment cases both in court and before various administrative agencies.

OBJECTIVES OF PAY TRANSPARENCY LAWS

Similar to equal pay laws, the goal of PTLs is to deter wage discrimination and to attempt to remedy the pay gaps between genders and the even greater gender pay disparities among Black and Hispanic women (according to the U.S. Department of Labor, women are paid, on average, 83 cents to every dollar paid to men. Women of color were paid even less; Black women were paid 64% and Hispanic women (of any race) were paid 57% of what white non-Hispanic men were paid). Generally speaking, in addition to requiring that employers disclose compensation ranges and, in some instances, other compensation and benefits, PTLs prohibit employers from

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requesting a candidate's compensation history, prevent employers from relying on compensation history in making job offers, and prohibit discrimination or retaliation against employees who inquire about, disclose or discuss their wages with others — all prohibitions that are already present in the commonwealth through the Equal Pay Act.

ANALYZING PAY TRANSPARENCY LAWS

As we have swiftly learned, there is no "one size fits all" response to questions about PTLs, and a robust factual and legal analysis is necessary to determine whether a particular PTL applies to a particular employer. Here is a brief overview of the questions you will need to think about and prepare to ask clients when performing a PTL analysis:

1. *Who is a covered employer?* Generally, a covered employer is one that has employees performing work in the state or location where the PTL is in effect, although the total number of employees working anywhere may also matter. Thus, the first step is to determine the employer's total number of employees working anywhere and the number working in the PTL location as that is defined in the PTL. Under Colorado's PTL, for example, an employer with at least one current employee working in Colorado, whether remote or in-office, is a covered employer. Under New York City's PTL, a covered employer is one with a minimum of four employees, at least one of whom works in the city. In California, a covered employer has 15 or more employees working anywhere for the law's job-posting requirements to apply; however, California employers with 100 or more employees, only one of whom must reside in California, are "covered employers" for California's PTL reporting requirements.
2. *Who is a covered employee/candidate? Does the PTL apply to remote workers?* Once an employer determines whether they are a covered employer, they must determine which covered individuals (employees/applicants) they must disclose the required information to. An analysis of where applicants or employees live and work, both in person and remotely, is necessary for this determination. For example, if you are advertising for a job that could be performed remotely and the person performing the job could live anywhere, you would need to comply with the New York City PTL because "all or part of the job *could be* performed in New York City."

3. *What are the job posting and other disclosure obligations?* PTL requirements vary greatly. For example, subject to certain caveats, covered employers in California, Colorado, Washington and New York state must publish salary ranges or hourly rates (minimum and maximum) in job postings. Conversely, Rhode Island, Connecticut, Nevada and Maryland PTLs do not require pay range in job postings. Instead, they vary in requiring pay range disclosure to an applicant after an interview, upon applicant or employee request, or at the time of offer. Some PTLS expressly require disclosure of *all* compensation (commissions, bonuses, etc.) as well as benefits, such as Maryland, Colorado and Washington, while others are silent on such requirements (California, Connecticut, Nevada, Rhode Island, New York, and the municipalities in Ohio and New York). At this time, only two states, California and the pending New York PTL, address employer reporting and record-keeping obligations, although many employers will include retention of these records as part of their retention policies.
4. *Risks of noncompliance?* Clients may ask what the risks are if they do not comply with pay transparency laws. Eight of the 11 PTLs (California, Connecticut, Rhode Island, Washington, Toledo, Ithaca, and Westchester and Albany counties) expressly provide individuals a private right of action to address alleged violations, while the remainder are either silent on penalties or permit a complaint to be filed with an administrative agency such as the state's DOL. The range of potential civil penalties for noncompliance range from $100 for a first offense to up to $250,000 for a "willful, wanton or malicious violation" (New York). Under some PTLs, an employer is given a period to ameliorate the violation before civil penalties are imposed. As more states and locations legislate pay transparency laws, employers will also need to be mindful of the reputational risks of violations, as illustrated in the rollout of Colorado's PTL, which backfired when employers seeking to avoid pay transparency were publicly called out. An employer may unintentionally lose good candidates by seeking to carve out exceptions to exempt themselves from PTLs. Over time, Gen Z candidates and employees may demand this level of transparency from employers around compensation and other employer programs.

TIPS FOR COUNSELING CLIENTS ON PAY TRANSPARENCY LAWS

As management-side attorneys, we are confident that most, if not all, of our clients agree that changes are needed to close inequitable pay gaps — yet many employers remain resistant to disclosing wages for a host of reasons. These include fears of revealing confidential company information, of being recognized as paying less than peers, of being driven to increase wages to command talent, of the overall perceived loss of control and power in the hiring process, of the amount of perceived work required, and of the unknown.

As counseling attorneys, part of our job is to recognize and empathize with these concerns and then pivot to strategizing with our clients about lawful, business-savvy ways to comply. As a starting point, we can remind our clients that pay transparency laws do not vitiate lawful wage differences based on valid reasons such as experience/education/training, seniority, merit, location, production/sales or revenue-based systems of pay, travel requirements and other such factors. These are the permissible articulated factors for differences in pay to employees of a different gender for comparable work under the MEPA. In addition, although there is no denying that PTLs will create work for clients, we can emphasize that auditing current compensation practices and identifying and correcting existing pay discrepancies is already important for Massachusetts employers to ensure compliance with the MEPA. Moreover, given the very tight labor market over the past three years, some employers may have veered outside of their typical compensation ranges to win the war on talent. There is no better time than the present to fix any inequities that have crept in during the pandemic. You can also be very helpful to potential clients who tell you that they are not ready to disclose pay ranges because they do not actually have internal pay scales in place and simply pay what the market demands or what competitors will pay by counseling them on compensation strategies and the steps required for MEPA and pay transparency compliance. Finally, PTLs may ultimately result in more efficient hiring processes, as applicants are aware of pay and benefits from the outset and self-select to

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WEBSITE ACCESSIBILITY: THE ADA AND ACCESS IN CYBERSPACE

BY JEFFREY T. COLLINS

This past decade has seen a growing trend in lawsuits filed by both individuals and advocacy groups against public and private entities claiming disability discrimination under the Americans with Disabilities Act (ADA) for failure to provide access to web content. This growing trend in claims has been directly linked to the increase in e-commerce, and services provided online, particularly during the COVID-19 pandemic.

Web accessibility for people with disabilities is also a stated priority for the U.S. Department of Justice (DOJ). According to the DOJ's recently published "Guidance on Web Accessibility and the ADA," inaccessible web content means that people with disabilities are denied equal access to information, including finding up-to-date health and safety resources, and being able to look up mass transit schedules and fares and voting information.

The ADA does not directly address whether places of public accommodation include websites, mobile applications, or other emerging web-based technologies. The DOJ has also thus far declined to enact regulations establishing accessibility standards (although the DOJ recently announced its intent to establish new regulations providing technical standards for website accessibility under Title II of the ADA). Nonetheless, state and local governments, and businesses open to the public, should be aware of the trending awareness and legal activity in this area, and consider taking proactive steps to increase accessibility to their websites.

This article will discuss examples of website accessibility barriers, web accessibility under the ADA, and landmark website accessibility lawsuits.

EXAMPLES OF WEBSITE ACCESSIBILITY BARRIERS

Individuals and advocates generally argue that people with disabilities are unable to use a business's website and that they are thereby denied equal access to the goods and services of a place of public accommodation. The DOJ has provided the following as examples of website accessibility barriers:

Inaccessible online forms. People with disabilities may not be able to fill out, understand and accurately submit forms without:

- Labels that screen readers can convey to their users (such as text that reads "credit card number" where that number should be entered);
- Clear instructions; and
- Error indicators (such as alerts telling the user a form field is missing or incorrect).

No captions on videos. People with hearing disabilities may not be able to understand information communicated in a video if the video does not have captions.

Poor color contrast. People with limited vision or color blindness cannot read text if there is not enough contrast between the text and background (for example, light gray text on a light-colored background).

Lack of text alternatives ("alt text") on images. People who are blind will not be able to understand the content and purpose of images, such as pictures, illustrations and charts, when no text alternative is provided. Text alternatives convey the purpose of an image, including pictures, illustrations, charts, etc.

WEB ACCESSIBILITY UNDER THE ADA

The ADA applies to state and local governments (Title II) and businesses that are open to the public (Title III).

State and Local Governments (Title II)

Title II of the ADA prohibits discrimination against people with disabilities in all services, programs and activities of state and local governments. In its guidance, the DOJ has stressed that a website with inaccessible features can limit the ability of people with disabilities to access a public entity's programs, services and activities available through that website. As a result, the DOJ takes the position that the ADA's requirements apply to all the services, programs or activities of state and local governments, including those offered on the web (and has announced its intent to establish new regulations under Title II).

Businesses Open to the Public (Title III)

Title III of the ADA requires that places of public accommodation provide equal access to their goods, services and facilities to disabled individuals. At the time the ADA was enacted, places of public accommodation were typically physical locations, such as storefronts and restaurants. With the explosion of e-commerce, and increased use of the internet for services, some courts (including the First Circuit) have found that websites are places of public accommodation (irrespective of whether the business in question also has a public-facing brick and mortar presence), while other courts (recently the Eleventh Circuit) have ruled they are not. The U.S. Supreme Court has thus far declined to consider an ADA website accessibility case, leaving, for now, a split among the federal circuits.

JEFFREY T. COLLINS is counsel at management-side labor and employment firm Morgan, Brown & Joy LLP. He is an experienced trial lawyer and litigator who represents management in all aspects of employment law, including advice, counseling and litigation in state and federal courts, as well as before administrative agencies. Collins' practice involves working closely with clients to provide practical advice on hiring, discipline, termination, personnel policies, discrimination, retaliation, leave, contract disputes, and wage and hour compliance. When litigation and trial are unavoidable, Collins brings his considerable courtroom experience to bear and provides zealous representation and advocacy on behalf of his clients. Collins also works with employers to provide comprehensive workplace trainings.

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Web Content Accessibility Guidelines

The Web Content Accessibility Guidelines (WCAG), developed by the Web Accessibility Initiative of the World Wide Web Consortium (a private organization), are a set of recommendations for making web content more accessible for people with disabilities.

The WCAG have emerged as an acceptable standard for judging website compliance with the ADA. Some, but not all, courts have stated that if a website is compliant with the content accessibility standard, that satisfies the requirements of the ADA. In its guidance, the DOJ references the WCAG as technical standards that provide helpful guidance concerning how to ensure accessibility of website features. The ADA itself, however, makes no reference to the WCAG.

LANDMARK WEBSITE ACCESSIBILITY LAWSUITS

Carparts Distribution Center Inc. v. Automotive Wholesaler's Association of New England Inc., 37 F.3d 12 (1st Cir. 1994). While not a website accessibility case, the First Circuit's ruling laid the groundwork for website accessibility cases that followed. Here, the

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Website Accessibility
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plaintiffs brought suit under the ADA against a private association that operated a health plan. The First Circuit considered whether "establishments of public accommodations" are limited to actual physical structures. The court found that "they are not so limited," and went on to say that an insurer who provides services over the telephone or by mail could be considered a place of public accommodation under the ADA.

National Association of the Deaf v. Netflix, 869 F.Supp.2d 196 (D. Mass. 2012). The plaintiffs alleged that much of the content on the streaming platform's "Watch Instantly" feature did not include closed captions or subtitles, and thus violated the ADA. In denying Netflix's motion to dismiss, the judge ruled that Netflix's video streaming website was a place of public accommodation within the meaning of the ADA, despite the company's contentions that the ADA did not include web-based services as a specific example of a public accommodation, and that the website could only be accessed in private residences.

Robles v. Domino's Pizza, LLC, 913 F.3d 898 (9th Cir. 2019). The plaintiff, who was blind, filed a lawsuit accusing the pizza chain of violating Title III of the ADA. Specifically, he claimed that Domino's website and mobile app were inaccessible for screen reader users. In defense, Domino's argued that because the ADA doesn't contain technical requirements for web accessibility, Title III did not apply. In reversing the lower court's decision dismissing the plaintiff's action, the Ninth Circuit wrote, "while we understand why Domino's wants the DOJ to issue specific guidelines for website and app accessibility, the Constitution only requires that Domino's receive fair notice of its legal duties, not a blueprint for compliance with its statutory obligations."

National Association of the Deaf v. Harvard University, 377 F.Supp.3d 49 (D. Mass. 2019). The plaintiffs alleged that the university's failure to provide accurate and timely captioning of online audiovisual content hosted by university and third-party websites constituted discrimination against deaf persons in violation of the ADA. In denying the university's motion to dismiss, the judge ruled that online audiovisual content hosted by the university's website, including video recordings of class lectures made freely available to general public, was subject to the antidiscrimination requirements in Title III of the ADA, notwithstanding any lack of nexus to a physical place, and regardless of whether the audiovisual content originated with a third party, where the university was a public accommodation.

Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266 (11th Cir. 2021). The plaintiff, who was legally blind, brought suit against Winn-Dixie claiming he was unable to use the grocery store's website. In ruling that websites are not places of public accommodation, the Eleventh Circuit noted that the ADA "describes twelve types of locations that are public accommodations. All of these listed types of locations are tangible, physical places. No intangible places or spaces, such as websites, are listed. Thus, we conclude that, pursuant to the plain language of Title III of the ADA, public accommodations are limited to actual, physical places."

TAKEAWAYS

Plaintiffs have experienced consistent success in website accessibility lawsuits across multiple jurisdictions, including Massachusetts, in recent years. In addition, the DOJ recently published website accessibility guidelines, and has made clear that web accessibility is a priority.

Massachusetts businesses, and state and local governments, with public-facing websites should be mindful of the trends, growing legal precedent, and the DOJ's stated priority in this area, and seek to avoid potential exposure under the ADA by ensuring that their websites are compliant with commonly accepted standards of accessibility. ■

Pay Transparency
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apply or pass on applying, saving employers the headache of being on completely different pages as far as compensation when an offer is made.

Although pay transparency laws may highlight for employers the ongoing challenge of wage compression between the wages of incoming employees and longtime employees, this too provides counseling attorneys the opportunity to advise clients on getting creative in determining compensation and benefits packages. The trend toward PTLs provides good business opportunities for counseling attorneys to be there with present and future clients at each step in the process, from determining pay scales, identifying and correcting existing pay discrepancies, and updating job positions with pay scales, benefits and compensation; to updating policies and procedures and existing job descriptions; to training HR and managers. ■

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FEDERAL TRADE COMMISSION PROPOSES RULE TO BAN NONCOMPETITION CLAUSES

BY MICHELLE DE OLIVEIRA AND GREG VANDEN-EYKEL

On Jan. 5, 2023, the Federal Trade Commission (FTC) proposed a rule to ban noncompetition clauses. If promulgated, this new rule will also require employers to rescind all existing noncompetition agreements and clauses, in writing. The proposed rule is based on, among other things, the FTC's preliminary findings that noncompetition clauses constitute an unfair method of competition and that the current regulatory environment concerning noncompetition clauses allows for serious and unchecked anti-competitive conduct that harms the labor and service markets.

To issue the rule, the FTC relied on purported authority under the Federal Trade Commission Act. Specifically, the FTC cited Section 6(g), which authorizes it to make rules and regulations to carry out the act's provisions. According to the FTC, Section 6(g) allows it to make rules prohibiting unfair methods of competition — including noncompetition clauses.

Public comment concerning the rule was open until March 10, 2023. On Jan. 31, 2023, 100 business organizations submitted a letter to the FTC requesting a 60-day extension of the public comment period, through May 10, 2023. Business organizations supporting the extension request include organizations in, among other things, commerce, retail, insurance, health care, technology, financial services and construction.

Although the FTC's proposed rule and noncompete ban is months away from implementation (if at all), the mere fact that such a significant change is being contemplated is sending shockwaves throughout the business and legal communities.

A. NONCOMPETITION CLAUSES AND THE REACH OF THE PROPOSED RULE

The FTC's proposed rule defines a noncompete clause as a contractual provision between an employer and a worker that prevents the worker from "seeking or accepting employment with a person, or operating a business" after the employment relationship ends. The proposed rule does not stop there, however.

Noncompetition clauses also include *"de facto"* noncompete clauses — or clauses that have the "effect of" prohibiting a worker from "seeking or accepting employment with a person or operating a business" after the employment relationship ends. The proposed rule includes two examples of a *de facto* noncompete clause:

(a) a broad nondisclosure agreement that does not allow a worker to work in the same field after an employment relationship ends. Although not further detailed in the proposed rule, it is not difficult to see how this language may also apply to confidentiality agreements, nonsolicitation agreements or intellectual property agreements that employers often employ to protect their trade secrets and goodwill.

(b) a contractual provision that requires a worker to pay training costs to the employer or to a third-party entity if the worker's employment ends within a specified time period in circumstances in which the required payment "is not reasonably related to the costs the employer incurred for training the worker." The proposed rule contains no additional language explaining this *de facto* clause. However, employers who provide education assistance programs that require a certain time commitment from employees after completion of the program may be directly impacted by this provision.

These are merely examples — and there could be other contractual terms that have the "effect of" prohibiting a worker from "seeking or accepting employment with a person or operating a business" after the employment relationship ends. The FTC has proposed a "functional test" to determine if a clause in an employment agreement, regardless of how it is labeled, constitutes a noncompetition clause.

However, the proposed rule does not include any factors or criteria for employers to consider when drafting employment agreements. The breadth of any restrictive covenant will likely be considered a determinative factor in evaluating the enforceability of any such agreement, and judicial decisions will inevitably turn on the specific facts of a given dispute.

B. TO WHOM DOES THE PROPOSED RULE APPLY?

The proposed rule prohibits "employers" from requiring "workers" to enter into noncompetition clauses. Therefore, practically all individuals, corporations, partnerships, associations and other legal entities are prohibited from entering into noncompete clauses.

Under the proposed rule, the FTC defines the term "worker" as "a natural person who works, whether paid or unpaid, for an employer." It includes employees, independent contractors, externs, interns, volunteers, apprentices, a sole proprietor who provides a service to a client or customer, and a natural

MICHELLE DE OLIVEIRA is a director at Kenney & Sams in Boston. She focuses her practice on litigation and counseling aspects of employment-related matters, including without limitation, wage and hour, restrictive covenants, leaves of absence, retaliation, discrimination and sexual harassment. She counsels employers and HR professionals on issues relating to disciplinary actions, internal investigations, and the drafting of employment policies, handbooks and contracts. De Oliveira conducts trainings relating to discrimination, sexual harassment, and management practices. In addition to her employment practice, De Oliveira maintains a general litigation practice, representing clients in general commercial litigation matters. She is currently serving as the chair of the Massachusetts Bar Association's Labor & Employment Section Council. De Oliveira is a graduate of Northeastern University and Northeastern University School of Law, and is a member of the Northeastern University School of Law's Alumni/Ae Association's Board of Directors.

GREG VANDEN-EYKEL is a partner with Kenney & Sams and an employment lawyer who counsels companies and individuals on all aspects of the employer-employee relationship. Often serving as outside general employment counsel, Vanden-Eykel guides management in all employment-related needs, including contracts, employee handbooks, personnel policies, noncompetition agreements, workplace safety, employee discipline, and hiring and terminations. Vanden-Eykel also handles administrative matters, restrictive covenants, wage and hour, regulatory issues, and employee and independent contractor classification matters. Vanden-Eykel also represents employers in litigation matters in state and federal courts, as well as before the Massachusetts Commission Against Discrimination and the Rhode Island Commission for Human Rights.

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person who works for a franchisee or franchisor. However, franchisees in the context of a franchisee-franchisor relationship are excluded from the FTC's "worker" definition and, therefore, would not be subject to the noncompete ban. Absent further revision of the rule after public comment, franchisees appear to be the only exception in the context of the "employer / employee" relationship.

With this said, the proposed rule includes a significant exception related to the sale of a business. Specifically, noncompete clauses are still enforceable under the proposed rule if a person is:

(a) selling a business entity or otherwise disposing of all of the person's ownership interest in the business entity; or

(b) selling all or substantially all of a business entity's operating assets, when the person restricted by the noncompete clause is a substantial owner of, or substantial member or substantial partner in, the business entity at the time the person enters into the noncompete clause.

For the second exception to apply, the person who is subject to the noncompete clause must hold at least a 25% ownership interest in the business entity. The 25% threshold leaves open the possibility that individuals with a significant ownership interest in a business (up to 24.9%) who have access to substantial confidential and propriety information and trade secrets could compete with their former employers with little to no limitation. This threshold greatly impacts small businesses with fewer owners. As such, this portion of the proposed rule may be subject to extensive public comment and is prime for revision in any final rule.

C. EXISTING NONCOMPETE CLAUSES

Not only does the proposed rule prohibit employers from entering or *attempting to enter* into noncompete clauses with workers after the enactment of the rule, but it also renders unenforceable those noncompete clauses that were in place **before** the final rule.

Employers that entered into a noncompete clause with a worker before the implementation of the new rule will be required to:

(a) rescind the noncompete; and

(b) provide written notice to the worker that the noncompete clause is no longer in effect and cannot be enforced. Notice must be provided to each affected employee on an individualized basis and within 45 days of rescinding the noncompete clause.

Current and former workers must receive written notice. As to former workers, notice need only be provided if the employer has the worker's contact information readily available. As drafted, the proposed rule applies to **all** former workers for whom the employer has contact information readily available, an apparent broad and onerous obligation. The rule does not define the meaning of "readily available" or whether the employer has any duty to obtain contact information. If the rule is promulgated, employers will need to consider implementing best practices regarding notice and documentation of the same.

D. IMMEDIATE AND LONG-TERM IMPACT OF THE PROPOSED RULE

If enacted, the proposed rule will become effective 180 days *after* the final rule's publication. Accordingly, the proposed rule has no immediate impact on noncompete clauses.

If the proposed rule becomes final, it will supersede and trump inconsistent state laws and regulations. In Massachusetts, this will almost certainly lead to the repeal or substantial amendment of M.G.L. c. 149, § 24L, which permits noncompetition agreements under specific circumstances. Further, it is quite possible that a final rule will eliminate many of the exceptions to the definition of noncompetition agreements under current Massachusetts law (e.g., nondisclosure or confidentiality agreements, noncompetition agreements made outside of the employment relationship, and noncompetition agreements made in connection with the cessation of or separation from employment). Accordingly, in the long term, the enactment of this rule will significantly change the nature of employer/worker relationships in Massachusetts.

Further, if the final rule is enacted, employers who attempt to enter into noncompete clauses or who fail to rescind existing noncompete clauses (including a failure to comply with the notice requirements) may violate M.G.L. c. 93A and become subject to multiple damages and attorneys' fees related to such violations. Specifically, M.G.L. c. 93A, § 2 requires courts to be guided by the FTC's interpretations of unfair or deceptive practices, as amended from time to time. Although courts do not typically find violations of M.G.L. c. 93A in the employer/employee context, the proposed rule may alter this precedent given the FTC's clear statement that noncompete agreements constitute unfair competition.

With all of this said, litigation appears inevitable, as business advocacy groups have pledged to sue the FTC if the proposed rule is implemented. Legal questions remain open as to whether the FTC has the authority to issue substantive rules such as imposing a nationwide noncompete ban — an issue that has been largely left to the states. Further, a recent U.S. Supreme Court case, *West Virginia v. EPA*, could apply to limit the FTC's rulemaking authority if this proposed rule triggers the "major question doctrine," which requires specific congressional authority or a "clear statement" of congressional authority for an agency or commission such as the FTC to enact a rule with "political and economic significance." These are only a couple of examples of the legal challenges facing the proposed rule. Undoubtedly, the proposed rule will be scrutinized closely and is likely to undergo several revisions before any final rule is enacted, if at all.

Businesses and employment attorneys across the nation will be keeping a close eye on further developments given the significant consequences that the FTC's proposed rule may have. ■

SIGNIFICANT 2022 YEAR-END NATIONAL LABOR RELATIONS BOARD DECISIONS

BY RYAN MCGOVERN QUINN

The union-side labor bar had high expectations for the Biden administration after the new president fired President Donald Trump's National Labor Relations Board (NLRB or "the Board") General Counsel Peter Robb the day he took office. With the 2021 appointments of Jennifer Abruzzo as general counsel, and Gwynne Wilcox and David Prouty to serve with Chair Lauren McFerran as the Democratic members of the Board, the president's party has had the majority since Prouty's confirmation on July 28, 2021.

After more than a year with a Democratic majority but few reversals of the many significant Trump-era Board decisions, some in the union-side labor bar were beginning to question the delay. In mid-December, it became clear that one reason was that the Board was holding onto decisions to permit Member John Ring to draft dissents before his term expired on Dec. 16, 2022. There are, of course, other reasons for the perceived delay: the Board has, consistent with McFerran's routine dissents during the Trump era, solicited notice and invitation for amicus briefs in a number of high-profile cases; and, setting aside rule-making, the Board can only act when there is a case in front of it that raises the question. In a flurry of orders that month, the Board issued significant decisions regarding the scope of make-whole remedies, the standard for an appropriate bargaining unit employer interrogation of Section 7 conduct to prepare for a Board proceeding, and access of off-duty employees of a contractor to a worksite owned by a different employer. Each is discussed below.

MAKE-WHOLE REMEDIES

In *Thryv, Inc.,* 372 NLRB No. 22 (Dec. 13, 2022), the Board clarified the scope of make-whole relief under the National Labor Relations Act ("NLRA" or "the Act"), holding that its standard "make whole-whole remedy shall expressly order respondents to compensate affected employees for all direct or foreseeable pecuniary harms that these employees suffer as a result of the respondent's unfair labor practice." The majority described a number of potential pecuniary harms, including "interest and late fees on credit cards, or penalties [for] early withdrawals from her retirement account in order to cover her living expenses[,] [loss of] her car or her home, if she is unable to make loan or mortgage payments . . . [,] increased transportation or childcare costs . . . out-of-pocket medical expenses, credit card debt, or other costs simply in order to make ends meet."

The determination of such remedies is left largely to the compliance stage, and the Board confirmed that the procedures and burdens of proof for compliance proceedings are otherwise unchanged: for instance, the Board will not award remedies for foreseeable losses that are "unquantifiable, speculative, or non-specific," and ambiguities will be resolved against the respondent.

APPROPRIATE BARGAINING UNITS

In *American Steel Construction,* 372 NLRB No. 23 (Dec. 14, 2022), the Board returned to the Obama-era standard from *Specialty Healthcare & Rehabilitation Center of Mobile,* 357 NLRB 934 (2011), enf'd sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013) ("*Specialty Healthcare*") for cases where a union petitions to represent only some of the job classifications at a workplace (sometimes referred to as "micro-units"). This overrules the Trump-era standard under *PCC Structurals, Inc.,* 365 NLRB No. 160 (2017), and *The Boeing Co.,* 368 NLRB No. 67 (2019) (collectively, "*PCC-Boeing*").

Under both standards, the petitioned-for unit had to have an internal community of interest, and consideration had to be given to the Board's approach to the particular industry involved; the difference between the approaches lies in what constitutes a "sufficiently distinct" unit. The rule in *Specialty Healthcare* and affirmed in *American Steel Construction* requires that an employer that contends that a petitioned-for bargaining unit is underinclusive make a heightened showing that the petitioned-for unit shares an "overwhelming community of interest" with the additional employees it argues should be included in an appropriate bargaining unit. In the absence of such a showing, an otherwise-appropriate unit would be considered "sufficiently distinct." *PCC-Boeing*, in contrast, held that a petitioned-for group was sufficiently distinct from excluded employees only where "excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members."

This issue — which was hotly contested following the Board's decision in *Specialty Healthcare* — is likely to continue to be a source of litigation before the Board and in the Circuit Courts of Appeals.

RYAN MCGOVERN QUINN is an associate at Segal Roitman LLP. He represents unions, employee benefit plans and employees in collective bargaining, arbitration, administrative hearings and litigation. Before attending law school, Quinn represented early childhood education, higher education and human services workers as vice president of United Auto Workers Local 2322 in Western Massachusetts. Quinn is an adjunct professor at Northeastern University, teaching labor and employment law. He is a graduate of the Northeastern University School of Law and the UMass Amherst Labor Center.

EMPLOYER INTERROGATION REGARDING SECTION 7 ACTIVITY

In *Sunbelt Rentals*, 372 NLRB No. 24 (Dec. 15, 2022), the Board reaffirmed the standard from *Johnnie's Poultry*, 146 NLRB 770, 775 (1964), enf. den'd 344 F.2d 617 (8th Cir. 1965) for evaluating whether an employer interrogation regarding Section 7 conduct in preparation for a Board proceeding is coercive. *Johnnie's Poultry* requires that the employer give specific safeguards and warnings to the employee or else engage in a per se violation of the Act when it conducts an interrogation to prepare its defense for a Board proceeding. The Board had previously solicited briefs on whether to adopt *Johnnie's Poultry* or another approach such as the "totality of the circumstances" standard from *Rossmore House*, 269 NLRB 1176 (1984), enf'd sub nom. *Hotel & Restaurant Employees, Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985), under which the employer can construct post hoc arguments about whether a reasonable person would be coerced by the questioning.

Under the current standard, "the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an

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employee's subjective state of mind, or otherwise interfering with the statutory rights of employees."

Noting that "such interrogations are highly likely to be coercive because they are conducted by an employer that is accused of unlawfully interfering with employees' Section 7 rights and is seeking information to vindicate itself," and that such interrogations potentially implicate the Board's own interests in preventing Section 8(a)(4) violations, the Board held that an employer that fails to abide by the requirements set out in *Johnnie's Poultry* while questioning an employee to prepare for a Board proceeding commits a per se violation of Section 8(a)(1). Because of these special interests, the per se rule set out in *Sunbelt Rentals* does not extend to interrogations other than those undertaken for an employer's preparation for a Board proceeding.

ACCESS FOR OFF-DUTY EMPLOYEES OF AN ON-SITE CONTRACTOR

The Board, in *Bexar County Performing Arts Center Foundation,* 372 NLRB No. 28 (Dec. 16, 2022) ("*Bexar II*"), overruled a Trump-era decision in the same case (368 NLRB No. 46 (2019) ("*Bexar I*")), and returned to the access standard for off-duty employees of an on-site contractor set out in the Obama-era Board decision *New York, New York Hotel & Casino,* 356 NLRB 907 (2011), enf'd 676 F.3d 193 (D.C. Cir. 2012), cert. denied 568 U.S. 1244 (2013). *Bexar II* brings back the standard that a "property owner may lawfully exclude [off-duty contractor] employees only where the owner is able to demonstrate that their activity significantly interferes with his use of the property or where exclusion is justified by another legitimate business reason, including, but not limited to, the need to maintain production and discipline (as those terms have come to be defined in the Board's case law)."

Property access under the Act is, of course, a complex subject with varied rules depending on the employer's interest (e.g., property interests versus managerial interest), the identity of the purported trespasser (i.e., on- vs. off-duty employee, nonemployee union organizer), the nature of the conduct (e.g., leafletting, authorization card solicitation, picketing), and even the type of employer (hospital, retail) or location within the workplace (working vs. nonworking areas). Conceptually, *Bexar II* grounds the property-owning employer's interest primarily in its managerial — rather than property — interest, and seeks to accommodate that interest with the contractor employees' nonderivative Section 7 rights to engage in protected concerted activity in their own workplace. The *Bexar II* majority stressed the practical issues of securing Section 7 rights in a workplace owned and controlled by a different employer, noting that "[t]he right of employees to engage in Section 7 activity at their workplace is critical for them to realize the protections afforded under the Act . . . . A law designed to empower employees to improve working conditions at their workplaces must provide employees with rights at those workplaces."

In opposition, the dissent by Members Ring and Kaplan, who were in the *Bexar I* majority, argues that the Board should apply the analysis in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), which addresses the access rights of nonemployee union organizers to a worksite and sets out a rule that permits access only where no reasonable nontrespassory alternative exists. As the majority points out, this approach would collapse the distinction between the derivative Section 7 rights nonemployee union organizers possess under the Act and the nonderivative rights employees of a contractor possess, effectively treating employees of a contractor as strangers even when their only workplace is on a site owned by the property-owning employer.

As the Board noted, the issue addressed in *Bexar I* and *Bexar II* — under what circumstances a property-owning employer violates the Act by expelling off-duty employees of a contractor exercising their Section 7 rights — is likely to arise more and more as the workplace grows more fissured.

WHAT TO EXPECT IN 2023

These Board decisions issued in rapid succession in mid-December leave out several potentially significant cases that are expected to be released soon. The Board has invited and received amicus briefs in cases involving the standard for evaluating confidentiality clauses in arbitration agreements and savings clauses to except Board charges from arbitration agreements, *see Ralphs Grocery Company* 371 NLRB No. 50 (2021); the standard for determining whether an employer's work rules — including investigative confidentiality rules — violate the Act, *see Stericycle, Inc.* 371 NLRB No. 48 (2021); and the standard for distinguishing employee and independent contractor status under the Act, *see The Atlanta Opera, Inc.* 371 NLRB No. 45 (2021). Decisions in these cases may reverse precedent set by the Trump-era Board on a broad range of issues under the Act. ■

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PROBATE LAW

U.S. SUPREME COURT MAY TACKLE FBAR WILLFULNESS STANDARD

BY RITA RYAN

Case: *United States v. Bedrosian,* 42 F.4th 174, 2022 WL 2899266 (3rd Cir. July 22, 2022), en banc reh'g denied (Sept. 27, 2022), pet. for cert. filed (Dec. 29, 2022), aff'g 505 F.Supp.3d 502, 2020 WL 7129303 (E.D. Pa. 2020), on rem'd from 912 F.3d 144 (3rd Cir. 2018)

Analysis: Mr. Bedrosian, the petitioner, held two foreign bank accounts at UBS in Switzerland. The petitioner initially disclosed one of his offshore accounts on the required Foreign Bank Account Report (FBAR) form, but not the other. Instead of participating in the IRS' Offshore Voluntary Disclosure Programs to disclose this noncompliance, Bedrosian filed a quiet disclosure by amending and filing prior tax returns and FBAR forms back to 2003; the amended filings included the previously omitted account. Bedrosian paid all back taxes and penalties associated with these amendments.

The IRS rejected the quiet disclosure and notified Mr. Bedrosian of its intent to audit his returns. The original IRS agent assigned to the investigation was satisfied that Mr. Bedrosian did not act willfully in his failure to disclose the second UBS account and intended to close the matter without penalty assessment. Before the case was closed, however, a new IRS agent was assigned and determined that Mr. Bedrosian acted willfully and assessed a penalty of $975,789, representing 50% of the undisclosed account balance.

Mr. Bedrosian filed a complaint in District Court, and a one-day bench trial was held to determine if Mr. Bedrosian acted "willfully" in failing to disclose the second UBS account on his 2007 FBAR. The District Court ultimately ruled in the petitioner's favor, concluding that he did not willfully violate the FBAR statute (Bank Secrecy Act). The District Court found that the petitioner's conduct was "unintentional" and "at most negligent." The government appealed.

On the initial appeal, the Third Circuit held that "the usual civil standard of willfulness applies for civil penalties under the FBAR statute" and that this includes "both knowing and reckless conduct." Unsure of the standard used by the District Court to evaluate the evidence, the Third Circuit vacated the judgment and remanded for further proceedings.

Though it did not receive any additional evidence, the District Court reversed, holding that Mr. Bedrosian had willfully violated the FBAR statute. Mr. Bedrosian appealed; both the decision and penalty were upheld. Mr. Bedrosian moved for a hearing *en banc*, and his petition was denied on Sept. 27, 2022. A petition for writ of certiorari was filed and docketed on Dec. 29, 2022.

Tax practitioners should monitor this matter, as the decision will provide guidance as to what the proper standard of review is for determining willfulness in the FBAR penalty space. As elaborated in the petition filed, the question becomes whether willfulness under 31 U.S.C. § 5321(a)(5)(C) should be determined according to a subjective, rather than objective, standard that focuses on an individual's knowledge and intent in failing to disclose a foreign account.

Should certiorari be granted in this matter, this will be the second case focused on FBAR penalties to be heard by the U.S. Supreme Court. The Supreme Court granted certiorari and recently heard oral arguments on Nov. 2, 2022, in *Bittner v. U.S. Bittner* seeks to address "whether a 'violation' under the Bank Secrecy Act is the failure to file an annual FBAR (no matter the number of foreign accounts), or whether there is a separate violation for each individual account that was not properly reported." A decision is still pending.

Both cases essentially seek to cool IRS enforcement action and make this previously painful FBAR penalty landscape more palatable. Pending the outcome in both matters, taxpayers would face less-draconian penalties, leading to faster resolutions in disclosure cases, reducing compliance costs, and unburdening an already-taxed IRS. ■

RITA RYAN, J.D., LL.M. leads Wolf's International Tax Services Practice, where she focuses on tax planning and compliance for international holdings. Ryan has extensive experience advising clients on the tax aspects of cross-border business activities, structuring international investments, and the United States compliance obligations relating to these activities and investments for both entities and individuals. Ryan also works with other tax professionals as a trusted advisor to identify necessary reporting, advise on filings, or review work papers and prepared forms to ensure accuracy in this evolving international compliance landscape.

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YOU'RE OUT! GOOD CAUSE, NO CAUSE OR JUST BECAUSE!

BY KATHRYN M. BARRY

The Appeals Court recently examined the intersection of a beneficiary's desire to remove a co-trustee and provision 706(b)(4) of the Massachusetts Uniform Trust Code (MUTC), *In the Matter of the Leo Kahn Revocable Trust.* The settlor, Leo Kahn, appointed his wife Emily and stepson Joseph as co-trustees. When Leo died, the trust was divided into the spousal share and the donor's family share. Emily and Joseph worked as co-trustees for nine years until Emily sought to remove Joseph as co-trustee of the spousal share. Emily argued that provision 706(b)(4) of the MUTC provided the basis for removing a trustee. The provision states: "The court may remove a trustee if . . . removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust and a suitable co-trustee or successor trustee is available."[1] Joseph argued that he could only be removed for cause and that provision 706(b)(4) did not apply to him under the terms of the trust.[2] Joseph relied on two articles of the trust: article 16.06, which listed the reasons for removing a trustee; and article 16.11, which draws a distinction between for-cause removals and removals without cause. Most reasons listed under article 16.06 are very specific and could not apply to Joseph. However, the last reason is a catch-all and states that a trustee can be removed for "any other reason for which a state court of competent jurisdiction would remove a trustee." Joseph argued that provision 706(b)(4) did not fall into this last category and, when read with article 16.11, could not provide a basis for him to be removed. The Probate and Family Court judge agreed and dismissed Emily's claim.

The Appeals Court decided that a two-pronged approach was necessary to determine if provision 706(b)(4) could be used as a basis to remove Joseph as co-trustee. The first question is, if the trust language is inconsistent with the MUTC, does the trust language or the code provision prevail? The general rule is that the language of the trust prevails over a provision of the MUTC, but there are a few exceptions. For example, trust language cannot override powers granted to the courts. However, this exception does not apply to 706(b)(4), as it "'can only be invoked if it is not inconsistent with the material purpose of the trust.'"[3] This is the second prong of the test: examine the trust language to see if provision 706(b)(4) can be applied. The Appeals Court states that when examining the clarity of trust language, the process is the same as the process used when reviewing written contracts. The first step is to "'examine the language … by itself, independent of any extrinsic evidence ….'"[4] If ambiguity exists, does the phrase "'support a reasonable difference of opinion as to the meaning of the words employed'"?[5] The words are not to be read in isolation; they should be considered within the context of the article and the trust as a whole. Finally, the "goal always is to 'strive to discern' and give effect to 'the settlor's intent.'"[6]

After applying this method, the Appeals Court concluded that provision 706(b)(4) could be used as a basis to remove a trustee, despite the fact that the trust was executed six years before the MUTC was adopted in 2012. The MUTC applies to all trusts regardless of execution date and all judicial proceedings concerning trusts regardless of starting date. The Appeals Court rejected Joseph's argument that provision 706(b)(4) could not be invoked because it was equal to a removal without cause. There are four prerequisites that must be met to remove a trustee under provision 706(b)(4). Therefore, using it as a basis could not be considered a removal without cause. In addition, Joseph could not cite any authority stating that provision 706(b)(4) should be classified as a without-cause removal. Finally, the broad catch-all clause in article 16.06 was read to include provision 706(b)(4).

KATHRYN M. BARRY is an attorney focusing on estate administration and estate planning. She is the legislative liaison for the Massachusetts Bar Association's Probate Law Section Council. She received her J.D. from New England Law Boston and her LL.M. from Boston University School of Law.

Although the Appeals Court concluded that provision 706(b)(4) could be a potential basis for removing a trustee, the question of whether Joseph could be removed as co-trustee remains unanswered. When article 16.06 and article 16.11 are read together, it is clear that the settlor meant to distinguish between removal for cause and removal without cause. However, there is no definition of without-cause removal. There is also no explanation as to why two different types of removal were created. The Appeals Court determined that because the trust contains ambiguity, Emily's claim should not have been dismissed. The case was remanded so that evidence may be presented to clarify the settlor's intent and resolve the ambiguity. ■

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1. *In The Matter of the Leo Kahn Revocable Trust*, N0.21-P-929,2 (2022).
2. *Id.* at 3
3. *Id.* at 7
4. *Id.* at 8
5. *Id.*
6. *Id.*

PUBLIC LAW

PUBLIC BIDDING AND THE FIRST AMENDMENT

BY DAVID R. KERRIGAN

During its review of the low bidder for a public works project, a city learns that the bidder has engaged in litigation against other municipalities and has a reputation for filing a large number of change orders and claims on past projects. The municipality decides to deny the low bidder the public works contract because it is concerned that litigation and excessive claims can add unanticipated costs and slow the project, which has a tight schedule. Is this lawful? In light of the protections afforded under the First Amendment to the U.S. Constitution and Article 19 of the Massachusetts Declaration of Rights, the answer should be no.

Massachusetts public officials have an obligation to determine if a public works project bidder is a "responsible and eligible" low bidder under the state bid laws. M.G.L. c. 30 § 39M(a) provides that every contract for the "construction, reconstruction, alteration, remodeling or repair of any public work … by any county, city, town … shall be awarded to the lowest eligible responsible bidder on the basis of competitive bids…" The statute defines "lowest responsible and eligible bidder" in relevant part as the bidder who possesses the "skill, ability and integrity necessary for the faithful performance of the work." To determine the "responsibility" of low bidders, municipalities gather information through several sources, including conducting reference checks on past projects.

A municipality may learn during that information-gathering process that a bidder has a history of engaging in litigation with towns it has worked with on past projects, as well as filing claims seeking additional payments for any number of reasons. While various statutes and most public works contracts afford contractors the right to seek more money through "change orders" or "claims," municipalities may become concerned that these claims add unexpected cost and effort to address during the project, and some municipalities use these findings as a reason to find bidders "not responsible."

These decisions run counter to protections afforded under the First Amendment to the Constitution and Article 19 of the Massachusetts Declaration of Rights. Filing a civil action against a city or its public officials is protected by the First Amendment, which guarantees every citizen's right "to petition the Government for a redress of grievances." U.S. Constitution, Amendment I. The First Amendment guarantees the fundamental right to file a lawsuit as a constitutionally protected speech: "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 741 (1983).

The Supreme Judicial Court (SJC) recently affirmed the importance of petitioning activity under our state constitution in *Barron v. Kolenda*, citing Article 19's provisions that "[t]he people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer." Although Article 19 refers to petitioning "legislative bodies," the *Barron* court stated that "this provision has also not been interpreted to be limited to State representatives or legislative bodies … but rather has been interpreted to be directed at the people's interaction with government officials more generally, including in particular town officials."

There is little question that a lawsuit constitutes petitioning activity, but do the First Amendment and Article 19 protect asserting claims or seeking change orders from a city for additional work? A review of the law confirms that protections extend to these activities. The right of access to the courts is indeed one aspect of the right of petition, but there are others. *Duracraft Corp. v. Holmes Prod. Corp.*, 42 Mass. App. Ct. 572, 576 (1997) *aff'd.* 427 Mass 156 (1998). For example, the Legislature has defined "a party's exercise of its right to petition" in the anti-SLAPP (strategic lawsuits against public participation) statute, M.G.L. c. 231 § 59H, as follows:

> Any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding …

DAVID R. KERRIGAN is a director at Kenney & Sams PC. He works as a trial attorney with experience representing individuals and groups in challenges to state regulations and statutes and defending and asserting civil rights claims. In addition, his practice also focuses on bringing and defending claims in construction and employment matters.

The SJC has stated that "the right of petition protected in the anti-SLAPP statute is that right enumerated in the First Amendment to the United States Constitution … and in art. 19 of the Massachusetts Declaration of Rights." *Kobin v. Gastfriend*, 443 Mass. 327 (2005). The right of petition contemplated by the Legislature in the statute is one in which a party seeks some redress from the government, such as a formal written request addressed to a public official praying for some relief.

That is precisely what the contractual-claim and change-order processes entail. When contractors file claims or change order requests on a public works project, they seek extra money by asserting in writing that unforeseen conditions, extra work being ordered, or extra quantities being used entitle them to funds beyond their contract amount. The processes to seek extra money through claims or change orders can be found in statutes and are written into most contracts in one form or another. For example, the Legislature has codified the claims process for one type of claim in M.G.L. c. 30, § 39N, which mandates that a change-order clause be included in all public contracts allowing a contractor to make a claim for unforeseen or latent conditions. Notably, the process requires that these contract adjustment requests "be in writing and shall be delivered by the party making such claim to the other party as soon as possible after such conditions are discovered…" M.G.L. c. 30, § 39N. The statute defines a specific type of conflict — the encounter of

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unexpected conditions; lays out a procedure for initiating the dispute resolution process — a prompt request in writing; and establishes the remedy — an equitable adjustment in the contract price.

The Appeals Court likewise describes the use of the statutory change-order process as an "invocation of remedies" — language that reflects petitioning. *Glynn v. City of Gloucester,* 21 Mass. App. Ct. 390, 397 (1986). These types of written requests for price adjustment, whether styled a claim or change order request, constitute written petitions for relief and should be protected under the First Amendment and Article 19 just as litigation is protected petitioning activity.

Once one accepts that these activities are constitutionally protected, it is easy to understand why a city cannot deny a contract for written claims or change orders. This conclusion logically follows from case law protecting public employees from discharge in violation of their constitutional rights when they speak on matters involving public concern. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977) (First Amendment prohibits discharge of a public school teacher for speaking out against school policies with a local radio station.) In 1996, the Supreme Court extended this rule beyond employment, granting First Amendment protections to an independent contractor whose waste-hauling contract was terminated because of his public criticism of the county commissioners. *Board of County Com'rs, Wabaunsee County, Kan. v. Umbehr,* 518 U.S. 668 (1996).

The only remaining issues are whether this rule should apply to prospective bidders rather than to contract holders, as in the *Umber* case, and whether the protections extend to petitioning activity involving strictly private concerns in addition to issues of public concern. As to the first issue, the Supreme Court has already made clear that the government cannot refuse to hire prospective lower-level public employees because of political party affiliation. *Rutan v. Republican Party of Illinois,* 497 U.S. 62 (1990). It is only logical to conclude that failing to award a contract to bidders based on First Amendment activities is likewise prohibited. This conclusion is confirmed by the U.S. District Court for the District of Puerto Rico, which has already found that the Puerto Rico Ports Authority could not, consistent with the First Amendment, deny a prospective bidder a construction contract because the contractor had engaged in prior litigation against the Port Authority. *Del Valle Group v. Puerto Rico Ports Authority,* 756 F. Supp. 2d 169 (D.P.R. 2010). This case confirms not only that prospective bidders deserve First Amendment protections, but that the rule applies to litigation and petitioning over purely private concerns. This rule is consistent with Massachusetts cases where the right to petition under the anti-SLAPP statute is found to apply to parties seeking vindication of purely private rights. *Duracraft Corp. v. Holmes Prod. Corp.*, 42 Mass. App. Ct. 572 (1997), *aff'd*, 427 Mass. 156 (1998).

As a result, it should be illegal to reject a bidder on a public works project because it engaged in a prior exercise of the right to petition to seek extra funds from other municipalities through written requests. Both litigation and asserting rights to relief through written claims and change orders constitute petitioning activities, and awarding authorities should not be able to withhold valuable government benefits or contracts to prospective bidders because the contractor has in the past asserted these fundamental rights. ■

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