

THE MODERN WORKPLACE:
CONTEMPORARY LEGAL ISSUES IN
EMPLOYMENT & LABOR LAW
LOCAL PANEL DISCUSSION

FEATURED PANELISTS: SAM JACKSON,^{*} MARY BEARD,^{**}
KARLA CAMPBELL,^{***} DAVID GARRISON^{****} & ANN
STEINER^{*****}

*MODERATED BY: PROFESSOR JEFFREY USMAN^{*****}*

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Moderator: I'd like to start us out by getting a bit more in depth in terms of how your practice intersects with labor and employment law, just a little more for the audience in terms of your work in those areas. Mr. Jackson?

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**** David Garrison is a graduate of Valparaiso University School of Law and handles complex litigation matters at Barrett, Johnston, Martin, & Garrison, with a focus on the representation of employees including workers involved in wage and overtime pay disputes, whistleblowers who have uncovered fraud, executives in severance negotiations, and employees who have suffered discrimination. He also maintains an active labor law practice, serving as counsel to several labor unions.

***** Ann Steiner is a graduate of Vanderbilt University School of Law and founded the firm of Steiner & Steiner with her father, Frank Steiner, here in Nashville in 1989. Ms. Steiner has devoted her career to representing individuals subjected to work place discrimination.

***** Professor Jeffrey Usman, B.A., Georgetown University; J.D., Vanderbilt University Law School; LL.M., Harvard Law School. Professor Usman, who serves as the faculty advisor to the Belmont *Law Review*, is an Associate Professor of Law at Belmont University College of Law in Nashville, Tennessee.

Sam Jackson: Typically, I represent employers in employment discrimination and other types of discrimination actions. I have, in the past, represented employees. A lot of my work focuses on public sector employees through school boards and other public sector entities. I kind of run the gambit of all of those issues, but generally I'm focused on counseling as well. Part of my job is to try to keep everything between the lines and hope clients don't end up in a lawsuit, so a big part of my job is counseling, trying to work through complicated issues, FMLA¹, ADA² issues, and other things like that.

Moderator: Ms. Campbell?

Karla Campbell: I guess you'd call me a labor attorney or an ERISA³ attorney depending on how you categorize it because I represent largely, partly ERISA funds, which are regulated by labor unions and controlled by the employer in the labor context. And so, I primarily represent those funds. I do some ERISA litigation based on that. I usually take plaintiffs by ERISA issue, and then lately I've been doing some organizing—that's out of my typical range—through some of the community benefits that have been negotiated here.

Mary Beard: My name is Mary Beard, I am the Senior HR Counsel for HCA. Prior to this role, I was an in-house counsel with FedEx Corporation. My comments are based on my individual professional knowledge and should not be attributed in any manner to my current or former employer. My practice focuses on all areas of labor and employment law. I have litigated cases across the United States. I am fortunate to be in a unique in-house counsel role for a labor and employment attorney. Rather than manage litigation, I advise executives on their corporate initiatives. For example, I am tasked with identifying if a particular initiative has implications in other areas of the law including, but not limited to, intellectual property, corporate governance, tax, or contract law.

Moderator: Mr. Garrison?

David Garrison: Most of my practice is representing individuals, employees, workers, in litigation. I'd say about two-thirds of that practice is representing employees in class and collective action litigation, about half of which is in Tennessee, about half of which is outside of Tennessee and around the country. I also represent individuals in negotiating severance agreements, working out disputes as they are departing a company, those are

1. Family and Medical Leave Act, 29 U.S.C. § 2601 (2012).
2. Americans With Disabilities Act of 1990, 42 U.S.C. § 12101 (2012).
3. Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002 et seq. (2012).

mainly executives who have those types of agreements. And then a smaller portion of my practice is representing labor unions and ERISA funds.

Moderator: Ms. Steiner?

Ann Steiner: My name is Ann Steiner and I have practiced employment law here in Tennessee for about, I think, 33 years, which is a long time, and primarily plaintiffs' work. We represent the workers who have been subjected to some sort of discrimination. I'm a litigator. We go in to court, whether it be state court or federal court, and try the cases. We also have a lot of cases that go up on appeal. We've made it up to the U.S. Supreme Court before, that was quite a journey. And we won, thank goodness. But that's what I do. I'm almost completely employment law except for a little bit of personal injury and then I also do equine law on the side.

Moderator: Let's start with this—in terms of getting into the discussion—we've seen the #MeToo movement⁴ has resulted in the toppling of a number of high-profile, prominent, powerful public figures. Is the #MeToo movement having an effect in workplaces beyond the spotlight? If so, what effects are arising from the #MeToo movement in the workplace beyond the glare of, for example, Hollywood? Ms. Beard?

Mary Beard: The #MeToo movement has impacted the workplace. A number of companies have not only increased their sexual harassment training, but also have developed more unique, creative training. Studies show that executives have changed their tone in the workplace. Many states have enacted laws requiring sexual harassment training and prohibiting certain clauses in sexual harassment settlement agreements. The new proposed bipartisan legislation, the EMPOWER Act,⁵ includes interesting provisions. I believe an amendment to Title VII of the Civil Rights Act of 1964, rather than the creation of a new law, would be a viable option. As the nation has placed substantial attention on the #MeToo movement, I would caution companies to consider that federal and state anti-discrimination laws cover additional protected classes that need the same type of training focus.

Moderator: Ms. Steiner?

Ann Steiner: I would just like to add to that Tennessee perspective. What I'm seeing in dealing with the clients is that the companies are kind of surprising me. A long time ago, when someone complained, you didn't really expect a whole lot of action on behalf of the company against the harassing

4. *History and Vision*, METOO, <https://metoomvmt.org/about> (last visited Mar. 18, 2019).

5. Ending the Monopoly of Power Over Workplace Harassment through Education and Reporting Act (EMPOWER Act), H.R. 6404, 115th Congress. (2018).

party. At least, we never really saw it. Now, you're seeing more of a situation where I think HR is taking a more proactive role. But one of the things that I've always seen in my practice is that HR always said they're looking for corroborating evidence to see whether or not there was sexual harassment or something like that going on. The problem with that is that often times if somebody's going to sexually harass somebody, you're not going to have witnesses. And so, in the past, you may have had an HR that said, "well, this person complained here, and that person complained there, but there aren't any witnesses, and they're different complaints, so we find no corroboration." I think you still have some of that going on, but I think HR is doing a better job, and I think it's because of the #MeToo movement in terms of correcting this. My only fear, representing plaintiffs, is that I worry seriously about what is going on now. I think the country in a way is a little bit split, I think everyone kind of recognizes that, and I have a fear that with the Dr. Ford incident that's going on now that you may have more women that fear that they can't come forward, because especially if they don't have that corroborating evidence. So, the #MeToo movement is great, but I think that you've got countervailing movements going on.

Moderator: One of the presentations earlier today looked at the evolving understanding of the line between an independent contractor and an employee. Ms. Campbell, I wonder if you could explain to us what the term "misclassification" means in the context of independent contractors versus employees?

Karla Campbell: Yeah, the, you know, the Fair Labor Standards Act says that the employ is the one to suffer or let work,⁶ right? Which, from my perspective, includes just about everything. But, you know, historically, you had the distinction that you raised, which is someone who should be an employee who is employed for work being misclassified, or classified, as an independent contractor in order to avoid the legal framework around employment. To me, that's what misclassification means, someone who should be an employee, and is an employee, or is working in employment under the Act who is being classified as a non-employee. I think today that is a much more difficult question in practice, because folks are coming up with new ways to misclassify people. Now you're not just an independent contractor, you might be an employee of a sub of a contractor, or you might be an employee of a friend, or you might be an employee of a labor worker, or you might be referred by a labor worker and you, and I often see people who don't really know who their employer is because there are so many entities on site and they were just referred to the job and started working. So, I think the misclassification question is an important one, but I think in a lot of ways it's kind of an outdated question because people have come up with

6. See 29 U.S.C. § 203(g) (2012).

different ways to misclassify people rather than just calling them independent contractors.

Moderator: What are the emerging issues in this area, Mr. Garrison?

David Garrison: Well, and I would add to that, I think with the changing economy, we're continuing to see more and more people who were arguably misclassified as independent contractors with employers increasingly allowing work from home, working outside of the workplace via technology, an employer often times feels an incentive to say, "well, let's make this person an independent contractor, we don't have to pay social security tax, we don't have to pay overtime, we don't have to do all these things that cost money, and maybe they'll like the independence," but then where the rub gets is most employers don't actually want their people who are working, you know, forty, fifty hours a week, you know, to truly be independent. So, the fight becomes, you know, what type of economic control does this, we would argue, employer, really have over this worker? So, I think one of the things that's causing these cases to continue to be litigated is the changing economy, the desire for people to have more flexibility, but often times the employer not really giving that flexibility. And you see these cases litigated before the NLRB, with the Fair Labor Standards Act, but even under other employment laws as well. Most often under the Fair Labor Standards Act, where the employee is saying, "Hey, I've been working 60 hours a week, I'm not allowed to work anywhere else, I have a tight schedule, I should be getting overtime because I'm actually an employee not an independent contractor."

Moderator: Mr. Jackson?

Sam Jackson: And I think one of the big examples of that is if you look at the shared services economy. Things like Uber; Uber's had that issue in California already and it was a huge fight. So, I mean that is absolutely what you're talking about seeing these types of issues and whether or not this person is not only being classified for FLSA purposes, but, you know, there's another agency out there that wants their part too and that's called the IRS—when you're not paying those taxes, those employment taxes. So when you're advising, from my perspective, when you're advising employers and they call you and they ask you this question, and I will tell you that I represent a lot of small to medium-sized employers who are either revamping or just getting started, and one of the first things they ask you is because somebody has told them, "I want to make them all independent contractors," and it takes quite a bit of time for you to walk through that discussion with them and tell them, "here's why you can't do that." So, it is an issue. I think employers are becoming more aware of it now, and are putting things in place, but absolutely there are people out there who are trying to circumvent that

classification, and until people stop doing that, we're not going to see the last litigation in this area.

Moderator: What are the incentives and consequences for misclassification in this context? Why do I want to misclassify an employee, and what are the consequences of doing so?

Sam Jackson: Well, the main reason is money. I mean, I think when it comes down to it, you don't have to provide benefits for that employee. That employee won't count toward your count,⁷ your employee count for the Affordable Care Act, so you don't have to provide health insurance. That employee, you're not paying quarterly taxes on that employee. All those things, you're not doing for that employee. And employers, especially small employers, who are just getting started, who don't have a lot of cash flow, that's pretty advantageous for them, they're looking to save money. The consequence of that is, if that employee should have been an employee versus an independent contractor, you're looking at liability under the FLSA, you're looking at the IRS doing an audit and wanting their part of the payroll taxes that come out, the social security taxes, all of those things. And quite frankly, for a small business, it is probably business-ending litigation. What people don't understand, and what I tell them when they come in, with FLSA issues, that's one of the only statutes out there where it's not terribly protective to have formed an LLC or a corporation because there is individual liability for the managers and business owners in that statute. So, those are the things that I see and talk to people about when they come and ask those questions.

David Garrison: I wanted to add to that, Jeffrey, that another motivator—and this goes back to money like Sam said—but not only could it have consequences on employment issues, but it could have consequences on injury issues. A worker gets injured and the employer has no workers' comp insurance because the employer took the position that it's not an employee-employer relationship, the employee can challenge that, say that they were, that they should have been classified as an employee and should have been covered under workers' comp insurance. And so that could even cause employers to face even more liability if the injury was serious. That came up, an interesting situation I dealt with recently, is I had a Fair Labor Standards Act case involving Illinois workers. The company employed workers throughout the Midwest. I discovered that some workers in the same position in Iowa were treated as employees, the people in Illinois were treated as independent contractors. Lo and behold, I find out that they made that change

7. See *ACA Information for Employers: Counting Full-time and Full-time Equivalent Employees*, IRS, <https://www.irs.gov/affordable-care-act/individuals-and-families/aca-information-for-employers-counting-full-time-and-full-time-equivalent-employees> (last visited Mar. 18, 2019).

in Iowa because workers' comp in Iowa had deemed that, well no, these are employees in Iowa for workers' comp purposes, so they just re-classified them all as employees. Which of course was great evidence for me to say well, they knew they should re-classify them here regardless of the reason, but they should have done that everywhere. But here was an employer that was, you know, I don't know what kind of legal advice they got, but they decided to make one change in one state because of one state law, but of course there's several different laws, including federal laws, that have to do with this issue. And so, they ultimately had to re-classify folks across the country, but that was in large part due to the FLSA liability brought on.

Moderator: We heard a brief reference earlier today to the concept of a "joint employer." The National Labor Relations Board has struggled a bit in drawing the lines with regard to determining who exactly qualifies as a joint employer. What are the challenges and motivations for employers and employees in this area? Can you walk us through a little bit of this joint employer concept, Mr. Garrison?

David Garrison: Sure, well, so, it can come up with a variety of scenarios. It can come up with a franchisor/franchisee relationship, where you've got a restaurant company that's allowing franchisees to be formed, but perhaps the franchisor is maintaining such control over the franchisees' employees for employment practices that they're deemed a joint employer. We see it often in the construction industry or the cable installer industry where you'll have Comcast say, "well, we'll let all these contractors do the actual employment and direction of the workforce to install your Comcast television" or your things like that. And so, the questions become, again, kind of like the independent contractor analysis, it comes down to control and the economic realities of that employment situation. I'd say that the Boards have been somewhat inconsistent over the years, in moving from Clinton era decisions to Bush to Obama to Trump. But courts have been, I think, generally more expansive in the joint employer ruling allowing for employees to bring their claims against more than one entity, but it's something that's hotly contested and hotly litigated.

Moderator: On the litigation side here, Ms. Steiner, I'm curious, what are the considerations in strategically positioning an employment case here in Tennessee between the chancery and circuit court? What's the availability and the strategy behind seeking a bench or jury trial if you're litigating an employment case?

Ann Steiner: Well, there was a 2015 Tennessee Supreme Court⁸ case that ruled if you sue in circuit court, under the Tennessee Human Rights Act,⁹ Tennessee Whistleblower Act,¹⁰ or TPPA,¹¹ that you're not entitled to a jury trial. But if you sue in chancery court, you are. And the Court looked at whether or not there was a constitutional right to a jury trial, and ruled you have to look and see whether the cause of action existed in 1797 when the Tennessee constitution was drafted or if the statute explicitly provides for the right to a jury trial. Apart from employment law, a lot of the laws enacted which are typically brought in circuit court have come about after 1797, such as Tennessee Products Liability Act of 1978.¹² So, this has a broader effect than just in employment law. But what they basically said was, if you sue for an employment law violation and you're in circuit court in any of the counties here in Tennessee, you do not have a right to a jury trial. If you're in chancery court, you do. And that right means that if you had filed a lawsuit in Davidson County and you asked for a jury, either your opponent can contest it, you can move to withdraw the jury, or the court can—This can be raised at any point in time in the proceedings.¹³

Now, once you know that that exists, what I suggest you do—especially if you're going to represent an employee in this, because we're the ones that hold the key to where you file the case, typically. The other side can remove it, of course, if you raise a federal cause of action or if there's diversity. But if you're suing a local company, a Tennessee company, the Tennessee Human Rights Act basically mirrors federal law in a lot of different things. There are some major changes that you have to be careful about, but a lot of the provisions are exactly the same. And I would suggest, and we have done it, and I know other plaintiffs' lawyers have done it, we want the judge to try some of these cases instead of the jury. For those cases where you do not want a jury, file your lawsuit in circuit court and if you want a jury, file the case in chancery court. Some of the plaintiffs' lawyers who have done this have been quite successful. It makes the case a lot more streamlined. You need to look at what county you're in, I think everybody knows Tennessee, we've got many counties, all of them are different, and you can go to any section of Tennessee and you'll see a different culture. Whether it be in East Tennessee, where, I always think of East Tennessee as being the place where

8. See *Young v. LaFollette*, 479 S.W.3d 785 (Tenn. 2015).

9. TENN. CODE ANN. § 4-21-101.

10. TENN. CODE ANN. § 50-1-304.

11. TENN. CODE ANN. § 50-1-304.

12. TENN. CODE ANN. § 29-28-101 et seq.

13. *Terry v. Jackson-Madison Cty. Gen. Hosp. Dist.*, No. W2017-00984-COA-R3-CV, 2018 WL 3013878, at *15 (Tenn. Ct. App. June 15, 2018), *superseded*, No. W2017-00984-COA-R3CV, 2018 WL 3203095 (Tenn. Ct. App. June 28, 2018), *appeal denied*, (Tenn. Nov. 16, 2018).

the state of Franklin¹⁴ got started, and I don't know if anyone else knows, but that was one of the most independent groups in this country back in the 1700s that you'll ever find. I think the United States Constitution was drafted, in part, on a constitution¹⁵ that the state of Franklin, which was in East Tennessee, drafted before our constitution—because they said they were free and independent, before anybody else in this country. And so, you have to look at the county that you're filing in. East Tennessee is different. You've got the urban areas here in Middle Tennessee. Look at your cause of action. I've had some people who have contacted me recently that I think have good causes of action for discrimination but they're really small claims. But you might be more inclined to bring that if you can bring it, streamline it, keep it without the jury, keep it a bench trial. I think there's a lot to be said for looking at your cause of action and choosing to file in circuit court if you do not want a jury or chancery court if you do want a jury.

Moderator: A number of states and cities have passed laws prohibiting employers from asking job applicants about their current or prior compensation. In jurisdictions where such questions are not banned, how much do employers make use of the answers to these salary history questions in determining compensation, what you're going to offer a new hire? What do you see as the advantages and disadvantages of these types of restrictions? Ms. Beard?

Mary Beard: Typically, companies consider three factors in determining the salary offered for a new position: (a) the company's compensation philosophy; (b) external market data; and (c) internal equity within the company. The compensation philosophy of a company is often based on its ability to recruit and retain the talent needed to execute the company's objectives. Examples of compensation philosophies include: 1) an employer pays the starting salary based on the market data median; 2) an employer pays the starting salary based on a percentage of the market data median, and 3) an employer pays the starting salary at the market data minimum. Internal equity is typically determined based on the aggregate of the employee salary in the identical position/job family within the same management hierarchy. Companies may use the prior salary to determine at least the minimum salary to be offered to the candidate. The final starting salary offered to the candidate could be increased or decreased depending on the internal equity analysis and/or the compensation philosophy. Various state laws prohibit employers from inquiring about prior wages, benefits, or other forms of compensation. Other state laws prohibit an employer from considering salary history information they discover to determine an applicant's compensation.

14. See Kat Eschner, *The True Story of the Short-Lived State of Franklin*, SMITHSONIAN.COM (Aug. 23, 2017), <https://www.smithsonianmag.com/smart-news/true-story-short-lived-state-franklin-180964541/>.

15. Articles of the Watauga Association

In light of these new laws, employers should consider paying between the minimum and maximum of their established pay ranges based on the candidate's expertise and work experience for a particular position.

Moderator: Ms. Campbell, the Maryland Personal Information Protection Act¹⁶ requires employers to implement and maintain reasonable security procedures and practices to protect employee data collected by the employer from cyber intrusions. What, in general, are the obligations of employers with regard to protecting employees and maintaining cyber security of information possessed by the employer about the employee?

Karla Campbell: I think that's a great question, and if anyone knows the answer, I'd be glad to hear it . . . [Laughter]. I think, you know, there are a series of statutes, HIPAA,¹⁷ HITECH,¹⁸ those kinds of things, that don't provide a private right of action for employees, or for anyone, certainly in any context, not the employment context in particular. We have a lot of overlap issues, which is the maintenance of employee information. This affects, do you have an ERISA plan, they may or may not, my plans are separate entities, they have those obligations as well. There has been a little bit of litigation, the Anthem Blue Cross case that was in California recently that covered a number of states on cyber security and hacking. The big barrier to those kinds of things is it's a *Spokeo*¹⁹ question. Which is, what's your standing, you know, if the damage or the harm you've suffered is theoretical, or it hasn't happened yet, or it may happen down the line? And you don't really know what's going to happen depending on how whoever took that information chooses to use it. And so, I think that's an emerging area and it's one that there will be a lot of litigation on that question in the next couple of years.

Sam Jackson: I think, to go away from that, and talk about what's coming next with that, I mean, particularly, you mentioned other statutes that don't have a private cause of action. One of the ones that I deal with all the time in my education practice is FERPA,²⁰ which protects student records, so, and that's in higher-ed and K-12 education. And we have those issues. So, what obligation do those clients have to protect the student records? But more importantly, for everybody out here who has a law license, a license that is practicing law, what's your obligation to protect your client's information? And how are you protecting that? So, there is, I mean, all, cyber security

16. See MD. CODE ANN., COM. LAW § 14-3501 (West 2018).

17. Health Insurance Portability and Accountability Act of 1996, P.L. No. 104-191, 110 Stat. 1938.

18. Health Information Technology for Economic and Clinical Health Act, P.L. No. 111-5, 123 Stat. 226.

19. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

20. Family Educational Rights and Privacy Act, 20 U.S.C.S. § 1232g (2012).

affects all of us, and it's not just our clients, it's us sometimes. So, we have to take a look at that. So, I think there have been several state bar associations that have come out with opinions on, well, I will say beginning opinions, and the ABA has addressed that issue, in short form, but we all have an obligation to protect that. So, I mean, I think this is something that's going to be litigated often in the next few years until we figure out how to stop it. And from what I'm told, by the people I talk to, I'm not a computer guy, but it's not about stopping it, it's trying to minimize it, and how to fix it once it happens. Nobody's immune. So, that's just kind of where I think that's going.

Moderator: Ms. Steiner?

Ann Steiner: We actually have a case that's pending right now where—that had to do with my clients' social security numbers being disclosed. From what I've seen on that, Tennessee's got a statute that basically states that the employers are supposed to take reasonable means to protect that type of information.²¹ And we sued under that, we also—a basic violation of that is a violation of Tennessee Consumer Protection Act—and we also said that there was an implied contract for the employer to keep certain information confidential, or keep it secure, to keep it secure and not engage in negligence, gross negligence in disclosing it.

Moderator: Is this a question that employers are starting to ask? Are employers starting to ask about cyber security obligations? Mr. Jackson?

Sam Jackson: Yes. And there are several insurance companies that are operating cyber protection, cyber insurance for lack of a better term. But they also, along with that, are operating education and kind of an audit of your system. So, they'll take a look at what you will do and they will also send somebody in who will do fake attacks to your system, they'll email. The easiest way—from what I understand about this—is to make contact with an employee in the organization and get access to the system that way. We've all gotten a letter from a Saudi Arabian prince . . . [Laughter]. So those are the easiest attacks. So, a company that the insurance company will likely hire will come in and try to do that and see how your employees respond to that and determine if they have good cyber security skills or not. You know, having been through that on both ends, I think I didn't pick up on, I've probably clicked on a couple of links I probably shouldn't have, you know, with regard to “hey, look at this.” But the big thing, if you do any transactional work, a big thing is closing funds, right, wire transfers. My firm does those types of transactions that we get and the title insurance companies send us alerts almost weekly now of new scams of how someone can

21. Tennessee Identity Theft Deterrence Act of 1999 (TITDA), TENN. CODE ANN. §47-18-2101.

intercept a wire transfer, or divert a wire transfer, hundreds of thousands, millions of dollars. So yes, it's a big issue. Employers are asking about it, and the insurance industry has kind of stepped up to try to figure out a way to give employers and companies some cover, but also to help educate. The less claims they have, right, the more money they keep.

Karla Campbell: Just to show how big a production this is, you've probably seen one, but when you have one, you call your insurance company, they send in a hack team, their computer specialists, you have to make required disclosures to CMS within a certain amount of time with PHI,²² it's this huge production. So, the insurance is not only a scheme like most insurance is, but it's also kind of necessary if you don't have an internal IT department.

Sam Jackson: Absolutely, if you're not protected in that way, I mean, one of those things, I mean, we talked about business-ending litigation, just the expense can be business-ending for some start-ups. Cause everybody has some type of e-commerce right now. You're either keeping your employees' or your clients' information in some type of database or you are putting yourself out into the world and getting that information on a website so when you do all of that there's little or no protection for you from hackers. And one of the big schemes is to shut down your entire system and tell you, "unless you pay us ten thousand, a hundred thousand, two million dollars, we won't release your system." It's all your data. So, some of these insurance policies, believe it or not, basically will pay that ransom so that you can get your system back. There was a company in California, I heard on NPR the other day, I can't remember who it was, maybe somebody remembers, but it was discovered that they, that company, had that type of ransom request and responded to it, paid the ransom, and didn't notify, didn't make notice to their clients or their customers or their employees. And under California law they're in pretty deep water. But, I think they would be anywhere in the United States for not doing that. So, it's something that's real, and it's happening a lot.

Moderator: Switching gears here a little bit here. In a May 2018 decision *Epic Systems Corporation v. Lewis*,²³ a decision authored by Justice Gorsuch, the Supreme Court wrestled with the intersection of the Federal Arbitration Act and the National Labor Relations Act. The Supreme Court concluded that employers can include a clause in their employment contracts that requires the employees to arbitrate their disputes individually and to waive the right to resolve those disputes through joint legal proceedings. How important is this decision? Why does this decision matter? Mr. Garrison?

22. Protected Health Information.

23. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

David Garrison: So, this decision has been the most impactful on my practice. So, what Jeffrey said is accurate. So, an employer can require all of its employees to enter into an agreement that says you have to bring all of your legal claims under any statutes dealing with your employment or otherwise in an arbitration form. And what had been challenged, what was before the Court, was that the National Labor Relations Board had decided that that violated the part of the National Labor Relations Act that said that that was protected concerted activity protecting collective action like forming a labor union. The Court said no, that's not protected. That's not what the Labor Relations Act said. So, as a practical matter I think that it shifts the litigation in this area back to what had been litigated for years which is basic contract principles--whether these arbitration agreements that are seeking to be enforced are actual contracts. We've been litigating this issue in the context where employers are requiring, or trying to enforce, unsigned agreements. We have seen where this has been litigated, where the allegations are that the employers acted in retaliation because Fair Labor Standards Act claims have been brought and, since *Epic Systems*, the employer is seeking in the middle of litigation to force its current employees to sign arbitration agreements and then seeking to compel those people to arbitration.

I think other issues that are going to continue to be litigated even more are, you know, what is it the arbitration agreement ultimately says? What's the price of entry for arbitration? So, under the employment rules of AAA,²⁴ for example, the employer pays for all the costs associated with paying the arbitrator, which can be quite expensive. And so, from my standpoint, what we're trying to do is organize, and part of our practice has become kind of like a labor organizer. So, our case is going to be more successful if, instead of having two or three or four plaintiffs, we have four hundred plaintiffs. And so, then we can, you know, especially if the employer is going to seek to compel arbitration—okay well we're going to file 400 hundred arbitrations and by the way we want 400 different arbitrators and you're going to pay for that.

So, I do think that some of the reaction I think on the employers' side after *Epic Systems* was like well let's sign everybody up and outsource this litigation. You know it's not public, the decisions really aren't public, and so you know I think some employers that you know it's easy for Wal-Mart to afford that or some of the giant employers, but I've had a number of cases where the employer that initially wanted to seek arbitration basically can't afford it and then has to settle and then, oh by the way, wants to settle on a class basis because they want this over and then we're like well I mean it's kind of like a disease that just won't go away. It's contagious right? Because

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when four hundred people receive overtime pay guess what--another 10 or 20 want to pursue it or maybe hundreds more. So, it's not, I think, as attractive as maybe some employers think at first blush. Now there's no doubt that there's some types of cases that the plaintiff's lawyers don't have the appetite to file dozens of individual cases or perhaps even hundreds. But so, it's no doubt I think putting, you know, slowing down some of the, especially wage-and-hour litigation, but also gender discrimination cases that are brought on a classified basis, race, and otherwise.

And so that's kind of my summary of where it's shifting. I think another thing that as employment lawyers we should think about is if the impact is as great on employment litigation as I've heard some employer side lawyers taut--think about the body of employment case law that is being drafted by private pay arbitrators and the decisions are confidential. Right now, you know, there's an amendment to the FMLA there may be litigation for five to ten years since the amendment. All of us as practitioners can look at back at this publicly available case law where district courts follow circuit courts, etcetera and there's a body of case law. If you know the FMLA is amended in the coming years but most of those cases are moved over to arbitration, those are confidential decisions that we don't have the benefit of. But I think there will still be a lot of litigation about this, about arbitration, but until Congress amends the Federal Arbitration Act, if they ever do, to exclude employment claims, then I think we're going to continue to see employers, especially large employers, adopt these policies.

Moderator: Mr. Jackson, how important is this decision?

Sam Jackson: Well I mean I think you're right. I think the—in Ginsburg's—I think she had, in her dissent, she specifically said this is something that needs to be addressed by Congress. In other words, the FAA needs to be amended and they should take that action. But I will agree with you that for lawyers right now, maybe it's the cat's pajamas. I mean, I agree with you and that's yet to be seen. I think there are several issues out there we don't know what's going to happen. Mostly, I see employers bring me arbitration agreements that they have had signed, and/or they want to have signed, and you want to have a conversation with them to make sure, number one, that it's a contract, right? That it's something that can be enforced because that's where those tactics come first into those agreements. So, I think it's going to change the face of what we deal with on a daily basis as employment lawyers. I'm just not sure what's going to happen. But I will tell you that I don't see any slowdowns for employers about trying to get those agreements in place. So, it's going to come to a head eventually, I just don't know what the result's going to be.

David Garrison: We should all become AAA arbitrators. [Laughter] There will be a lot more arbitrations.

Moderator: There were almost a million and a half votes cast in Missouri with regard to Proposition 8. Two-thirds of the electorate of Missouri voted in favor, or voted supporting a measure, that essentially prevented Missouri from becoming a right to work state. A third of the voters voted in opposition there. Where do we currently stand in this country with regard to right to work laws? Do you see any significant movement likely on that front in the near future? Ms. Campbell?

Karla Campbell: I think this is a trend that's just going to keep playing out. We now have more than half the states that have gone "right to work" if you want to call it that, I think that's a misnomer. But, you know, I mean, yes. What happened in Missouri was heartening. I don't—I guess I'm enough of a cynic—I don't think that's going to happen everywhere. There is a legal challenge to protecting the right to work and also drawing the prevailing wage at the same time. Last year in special session, that being challenged on the state Supreme Court on a state constitution. And I don't think things are going to change. I do think—I think the discussion about that has evolved so that people are learning and understanding that it's not just about what the, you know, the misnomer is, the packaged belief, that oral argument Kentucky was very interesting I thought because several of the Justices asked about First Amendment implications because of this being a direct attack on labor unions. So, I think, I think there is a shift in conscience about what right to work laws do, but I don't think that that legislation is going to slow down.

David Garrison: I think one thing we may see is, I'm a glass-half-full-kind-of-guy, so—and I'm not drunk—[Laughter] this is water, but, so we may see more union activity in the south. Let me tell you why I think that's the case. So, you look at the last 10 or 20 years. Texas has boomed, the southeast has boomed, the southwest has boomed. Those were all quote-unquote right to work states. If you're a labor union and you're, you know, unfortunately, I would say most labor unions are run from on high, just like corporate organizations. So, you're the head of an international union headquartered in D.C. or Chicago or New York and you're looking at where to spend your organizing resources, even though areas of the country where the economy is booming the most, where you might see the most jobs most people still being paid subpar wages having very little rights and everything, you might still say well you know we need to organize in Michigan or Wisconsin, even though those economies have struggled and the populations have dwindled—Pennsylvania included, Indiana, etcetera. And the reason why is because once you've formed a bargaining unit, they're all dues paying members that increases the power of the union of course from the international perspective. That's better as well. But if you if it's going to be an opt-in union or an open

shop union whether you're in Detroit or Houston then you're going to look at where there's the most organizing activity for a potential period not based on whether the state has passed a law to opt out of that part of the provision.

So, you know the other thing is, and Karla and I of course, represent more unions in the South than elsewhere, you know when you represent a union in the South everybody that shows up at a membership meeting is choosing to pay their dues. When you represent a union in California you show up to a membership meeting, I mean their dues are being paid no matter what. And so, in right to work states the membership and the people that are running that local union, the people choosing to join and organizing are, I think on average, or arguably, are more committed because they made an affirmative choice to have a deduction made out of their paycheck every month to be a part of this organization and use that power to negotiate at the bargaining table. So, it'll be interesting 10 or 20 years from now if we see any shift in where organizing is happening.

Karla Campbell: I appreciate David's optimism—it's worn off on me a little bit. I will say I think there is a plus—and you're exactly right—labor unions are growing particularly in the southeast and a lot of that has to do with people realizing that they're hitting rock bottom and right to work is part of that and it forces unions to become better understanding and organizing, at connecting with their members and thinking outside the box as far as workers that are in [inaudible].

Moderator: There have been studies suggesting an uptick in state preemption of local laws over the past few years and labor, or employment law I should say, being a particular area of preemption by the state. Ms. Beard, where should the line be with regards to local versus state control in addressing employment law?

Mary Beard: As there is uncertainty if a line should be drawn, various states have enacted preemption laws to prevent municipalities in that state from creating ordinances that impose additional obligations on employers. Since 1999, states have passed laws to preempt minimum wage increases higher than the state minimum wage. Other state laws preempt the municipalities from passing new legislation that would offer paid sick leave or paid family or medical leave. For example, California implemented its ban the box law on January 1, 2018. San Francisco implemented its version of the law in 2014 and recently amended it effective October 1, 2018. The San Francisco law is still not in alignment with the California state law. In light of the lack of preemption laws, companies with multiple locations within that state must comply with both laws. Should a city increase the minimum wage when its cost of living is higher than a more rural city in the state? It is definitely a question asked as more states enact preemption laws.

Moderator: Can you explain what ban the box laws are?

Mary Beard: Ban the box laws require companies to ask job applicants conviction criminal history questions after (a) a conditional offer has been made, (b) the candidate has been selected for an interview, or (c) the initial interview. The goal of the legislation is to encourage selection of candidates based on qualifications rather than criminal history. The EEOC issued guidance that when an employer knows of a previous criminal conviction, the employer should consider several factors in making the hiring decision, including the job-relatedness of the conviction and mitigating circumstances.

Moderator: Ms. Steiner, I'm curious, when an attorney is conducting an investigation of an employee, who's represented by an attorney, and where the employee is still remaining at the company, what are the obligations of the investigating attorney to communicate that internal investigation and the report that the attorney is conducting to the certain employer or his attorney?

Ann Steiner: Well I think that that issue arises, of course, under the *Faragher* case.²⁵ And of course *Faragher* says the employer, if it is a hostile work environment, can raise this affirmative defense that it has an internal procedure in place to investigate these claims of discrimination. Most of the time, the employers are hiring outside counsel to come in and conduct investigations. But if it's a hostile work environment claim, of course, those things take many years, can take many years to just occur. So often times an employee may already have an attorney representing them. Under the disciplinary rules, I cannot believe that you can have a lawyer come in and interview the employees represented by counsel without telling the counsel about that and having counsel present for the interview. But then the issue becomes, when you have the employee's counsel show up for the internal investigations, what I've seen the employers do then is they turn around and they say "okay, you're a witness." So, there the attorney is with the case that's either EEOC level or you're already in trial with the case and the employer is still conducting investigations. With hostile work environment claims, if the employees are still employed with the same employer the hostile actions may continue to occur as the case proceeds. So, if the employer is still investigating, you're the counsel for the workers, what happens then? And I've actually had this issue come up where my opponent said I was a witness due to an internal investigation. And so, the best way to handle that, what we found out, is to file a motion in limine with the court. Ask the court to strike you as a witness and the case law on states, if there's any other way to obtain the information outside of calling the lawyer, you have to use the other

25. *Faragher v. Boca Raton*, 524 U.S. 775 (1998).

method of doing that²⁶. But it's still, it is fraught with all kinds of unknowns whenever you file the motion, you never know what's going to happen. And everything happens that you don't expect, most of the time. What the judge did in our situation, I thought it was a very good ruling, he conditionally granted my motion in limine to strike me as a witness but then he left it open that the issue could be revisited at trial. So, I think with these internal investigations I wish the board would set out some rules about what should occur with internal investigations. For instance, requiring the employers have to have a court reporter there; and I wish that there were some rules in place and I think this, hopefully, will be something will be solved in the future with these internal investigations.

Moderator: Mr. Jackson, I'm curious, could you walk us through a little bit the intersection between an employer's ability to terminate, the FMLA, and the ADA, with regard to issues of alcohol and drug abuse, for employment termination regarding drug and abuse verses discrimination against an employee who suffers from addiction?

Sam Jackson: How long do you have? [Laughter] You know, that's an issue that comes up quite a bit in a workplace. Addiction is not something that you don't see. Typically, there are two differences. You're not allowed to discriminate against somebody who has a disability. If they come to you and tell you that they have a drug problem or alcohol problem, that is something that you need to address under the ADA analysis. But there is also, typically what we see in this situation though is the employee who shows up to work impaired, right? If you're impaired at work performing your duties that becomes a problem, again, if the employer has reasonable suspicion of which to have you tested for drug or alcohol abuse, you go and have that test performed, and that could be the basis for termination if they are acting at the place of business impaired. But I think what I have seen more recently is that there is quite a bit of compassion around this issue, at least in-regards-to the clients I represent. Absent somebody coming in to the place of employment enough intoxicated in whatever way, if an employee comes to the employer and tells them that there is an issue, or it is determined that there is an issue, that can be something that can be addressed through the ADA. Most employers now especially that have health insurance as a benefit, most of those insurance companies will also have what's called an "employee assistance program," EAP. That allows employers to monitor the employee's participation in a treatment program, but not be so involved in it that they are finding out what I would call privileged information. In other words, EAP

26 "For a lawyer to be a necessary witness, his testimony must be relevant, material, and unobtainable elsewhere. . . . [t]hus, an attorney is a 'necessary witness' only if 'there are things to which he will be the only one available to testify.'" Rothberg v. Cincinnati Ins. Co., No. 1:06-CV-111, 2008 WL 2401190, at *2 (E.D. Tenn. June 11, 2008) (internal citations omitted).

providers have services referred to employee on such and such date, he had a meeting on March 5th. He showed up, he was timely for that meeting and that goes on for a period of 30, 60, 90 days. The employer gets a report. So, there are several different ways to deal with that. I think we value—and those practicing in employment law will tell you that—the interactions between the FMLA, someone being out for a twelve week, or up to twelve weeks under the FMLA, and then coming back; that interaction between the FMLA and the ADA, that intersection between coming back with the FMLA and the employer deciding if there's something that needs to be done under the ADA is a dangerous place for employers because they often go bankrupt. I don't know if that answered your question, I think I talked too much.

Moderator: With the time remaining for this panel, one of the things I'd like to do is for each of you to look at currently unsettled issues that are being contested or something you see on the horizon. What is it that you're looking at, that you're intrigued by, in the area of labor or employment law that you see as either a currently unsettled question or an issue that you think is looming on the horizon? We'll start with Ms. Steiner.

Ann Steiner: Well, if I had to choose, I'd probably pick issues with the FMLA. And I think it's because there's a lot of issues there with government regulations. And how, what actually constitutes interference. And, how the employee should apply the time limits for getting certifications in, the procedures for asking for recertifications, and, what I think are issues, sometimes you see an employer may ask for, for instance, for multiple certifications. They may have, instead of a person handling the FMLA, they have a computer. So, every time someone goes out on intermittent leave, they get a form that says, "you have to recertify; here's the deadline for this." I personally think that when you start sending out multiple forms like that, that is interference. But my issue with it is that, under the law now, to constitute interference you have to show that somehow or another it affected their right to take FMLA.²⁷ And so, if the employer sends out all of these forms and the employee rushes around with the doctor to comply with five forms a month, it doesn't constitute interference unless it affects that FMLA right. I think that the issue that I see is why can't you have interference right, even if you give them FMLA if you make it so difficult get it? That's what I see.

David Garrison: I guess I'd circle back to what I spoke about earlier. So, post *Epic Systems*, I think we're going to see increasing litigation on what has to be included in an arbitration agreement. Yes, you can require your employees to arbitrate. But so, the Sixth Circuit, for example, if the arbitration clause has a severability provision, which they almost all do, the judge can essentially rewrite that agreement. You can be litigating about what

27. *Walton v. Ford Motor Co.*, 424 F.3d 481, 485 (6th Cir. 2005).

does it cost the claimant to file the arbitration? Who's going to pay the arbitrator? Where does the trial have to occur? What discovery rules apply? Issues like that. The subpoena power of the arbitrator to third parties. And so, I think those issues are going to continue to be litigated. I think that there's going to be some uniformity by circuits about what has to be included in arbitration processes in order for it to not violate the plaintiff's due process rights.

Mary Beard: I am quite intrigued with artificial intelligence. Multigenerational concerns is a significant issue in labor and employment law. As more millennials enter the workplace, the focus on individual performance may shift to a team performance approach. How do companies develop a team performance review versus an individual performance review? In employment discrimination litigation, one of the main factors a plaintiff must show is an adverse employment action to establish a claim. Can an entire team be subjected to an adverse employment action? Intriguing issues to come.

Karla Campbell: Yeah, I think I would pick up on the misclassification issue. And someone mentioned a lot of the litigation, the development, of that happening through the context of the Fair Labor Standards Act. And I think you see case law in other areas, in ERISA in particular, employee benefits such as unemployment, workers comp not evolving on the same standards. We're having different standards evolve about who is a joint employer, who is an alter-ego? At what point do those standards catch up to what's happening with the FLSA? And at what point, if they don't catch up, do they become so diverted that we begin to rethink the way we provide ancillary benefits to employees?

Sam Jackson: Something we haven't talked about, but I think you're talking about it, I can't remember from the program, either you did this morning or you're going to this afternoon, is whether or not Title VII is going to be, whether part of Title VII is going to be redefined to include gender identification or sexual orientation as a protected class. And I think a lot of states, a lot of localities have already done that with their contracting union, with their local ordinances. But I think once that becomes a national issue, I think it's going to create a whole new body of case law. So, I think that's coming. I don't know when it will happen or what it's going to entail, but I think that's going to be the next thing I'm going to be looking at.

Moderator: Our panel has been extremely generous in sharing their time and insight. Please join me in thanking them. [Applause].