Oregon Civil Rights Newsletter

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The purpose of this publication is to provide information on current developments in civil rights and constitutional law. Readers are advised to verify sources and authorities.

PAID PARENTAL LEAVE CONTINUES TO GAIN TRACTION

by Dan Grinfas, Buchanan Angeli Altschul & Sullivan LLP

The United States remains the only industrialized nation without paid parental[1] leave for its workers.[2] But there is a strong push for change across the country and here in Oregon. The issue of paid parental leave featured prominently in the 2016 presidential campaign, on both sides of the aisle. Many jurisdictions around the United States have passed or are considering legislation to require paid parental leave. And many employers have already implemented their own generous parental-leave policies to remain competitive and retain top talent.

This article provides a look at federal and state laws that currently protect new parents in Oregon, how the paid-parental-leave trend is gathering momentum, proposed federal legislation, whether paid leave for baby bonding is a civil right and whether it is effective, the new proliferation of employer paid leave policies, and what we can expect in upcoming legislative sessions.

Existing Federal and Oregon Laws Offer Limited Protections to New Parents

The federal Family and Medical Leave Act of 1993 (FMLA) provides eligible employees up to twelve weeks of job-protected leave in the employer's twelve-month leave year.[3] One of the permissible uses of protected FMLA time off is for parental leave—time to bond with and care for a newborn, newly adopted, or newly placed foster child during the first year following birth, adoption, or placement.[4] FMLA, however, applies only to employers with fifty or more workers;[5] applies only to employees who have been employed with the employer for at least twelve months, who have worked at least 1,250 hours in the twelve months immediately preceding their leave, and who are employed at a worksite with fifty or more employees within a seventy-five-mile radius;[6] and only provides *unpaid* leave, except when the employee

1 Parental leave means time off from work available to either parent, regardless of the parent's gender, to bond with and care for a new child.
2 Of the 193 countries in the United Nations, 185 have national laws that guarantee paid leave for new mothers, fathers, or both. The only countries to offer no paid leave at all are the United States, Papua New Guinea, Lesotho, Suriname, and several small Pacific Island states. *All Things Considered: On Your Mark, Give Birth, Go Back to Work* (NPR radio broadcast Oct. 4, 2016), *available at* http://www.npr.org/2016/10/04/495839747/on-your-mark-give-birth-go-back-to-work.
3 29 C.F.R. § 825.200.
4 29 C.F.R. § 825.200(a)(1)–(2).
5 29 C.F.R. § 825.104.
6 29 C.F.R. § 825.110(a).

has available employer-provided vacation leave, personal time off, or sick leave that can be substituted and used during the FMLA-leave period.[7] Thus, many employers are not FMLA-covered, and many employees are not FMLA-eligible. And often even an eligible employee of a FMLA-covered employer does not have available paid leave and cannot afford to take twelve weeks of unpaid parental leave, though it is technically available.

Similarly, the Oregon Family Leave Act (OFLA) allows eligible employees up to twelve weeks of job-protected parental leave in a leave year,[8] typically running concurrently with any leave available to the employee under FMLA.[9] But OFLA applies only to employers with twenty-five or more employees in Oregon;[10] applies only to employees who have been employed for the 180 days immediately prior to their leave;[11] and, like FMLA, only provides *unpaid* leave, except when the employee has employer-provided paid leave available.[12] OFLA allows an additional twelve weeks of pregnancy-disability leave to an eligible female employee over and above the twelve weeks of protected leave for any covered purpose (including parental leave).[13] OFLA also allows an employee who uses twelve weeks of parental leave to use up to twelve weeks of "sick child leave" in the same leave year.[14] As with FMLA, however, many employers are not OFLA-covered, many employees are not OFLA-eligible, and even eligible employees with a new child may be unable to afford to take unpaid leave.

The federal Pregnancy Discrimination Act (PDA) of 1978,[15] an amendment to Title VII of the Civil Rights Act of 1964, applies to employers with fifteen or more employees and prohibits sex discrimination in any aspect of employment on the basis of pregnancy, childbirth, or related medical conditions. The PDA, however, only requires that women affected by pregnancy be treated the same as other employees on the basis of their ability or inability to work and does not entitle a woman to any specific period of leave or paid leave during pregnancy or after childbirth. Though Oregon's statutes barring discrimination based on sex and maternity apply even to smaller employers with one or more employees, they too do not require any particular period of leave or paid leave for new parents.[16] Since the passage of the PDA, companies that provide short-term disability benefits, either by policy or under a state disability-insurance program, must also provide such pay for pregnancy- and childbirth-related medical conditions, but that does not allow for any paid leave for fathers or adoptive parents.

Several years ago, the Patient Protection and Affordable Care Act (commonly called "Obamacare")[17] amended Section 7 of the Fair Labor Standards Act to protect the rights of nursing mothers at work and require employers to provide "reasonable break time for an employee to express breast milk for her nursing child for [one] year after the child's birth each time such employee has need to express the milk." The amendment also requires employers to provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public" for expression of breast milk.[18] Oregon law imposes similar but more stringent requirements on employers of twenty-five or more employees and allows an unpaid thirty-minute rest period for each four-hour work period to accommodate an employee who needs to express milk for her child eighteen months of age or younger.[19] But neither of these laws provides for paid leave or for bonding time away from the workplace.

Effective January 1, 2016, the Oregon statewide protected-sick-time (PST) law[20] provides most Oregon employees up to forty hours of job-protected leave per year that can be used for a wide variety of reasons—among them for any purpose covered under OFLA, even if the employer is not an OFLA-covered employer.[21] That means Oregon employees with a new child and available PST can use up to forty hours in a year for parental leave. And while this PST feature allows some Oregon employees to take one week of paid parental leave, the PST law only

7 29 C.F.R. § 825.207.
8 ORS 659A.162 (2015).
9 ORS 659A.186(2).
10 ORS 659A.153.
11 ORS 659A.156.
12 ORS 659A.174.
13 ORS 659A.162(3)(a).
14 ORS 659A.162(3)(b).
15 Pregnancy Discrimination Act of 1978, Pub. L. No. 95-955, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. §§ 2000e(k), 2000e-2 (2012)).
16 ORS 659A.029, 659A.030; OAR 839-005-0021, -0026.
17 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119–1025 (2010).
18 29 U.S.C. § 207(r) (2012).
19 ORS 653.077; OAR 839-020-0051.
20 ORS 653.601–.661; OAR 839-007-0000 to -0120.
21 ORS 653.616(3).

requires employers to provide *unpaid* PST if they have fewer than ten employees (fewer than six employees, if located in Portland).[22]

Contrast these limitations in our state and federal laws with the paid parental leave guaranteed in other countries, ranging as high as one and a half years of leave to new parents.[23] Fifty nations provide at least six months of leave to new parents.[24] Of 185 nations surveyed by the International Labour Organization, 183 guarantee paid leave for new mothers and 79 guarantee paid leave for new fathers, with the majority providing at least fourteen weeks of paid maternity leave.[25]

More US Jurisdictions Now Provide Paid Parental Leave

The paid-parental-leave trend is gaining steam in the United States. Three states—California (in 2002), New Jersey (in 2008), and Rhode Island (in 2013)—have paid family-leave laws in effect that provide partial wage replacement for designated periods, funded by employees' paycheck contributions. New York recently became the fourth state to mandate paid family leave for private-sector employees, with a sweeping law that takes effect in 2018, allowing twelve weeks of partially paid time off for all full-time and part-time workers who have a new child or who must care for family members with a serious illness.[26] New York's law, the most comprehensive of the state statutes, is funded by payroll deductions of between fifty cents and one dollar per week.

California's Paid Family Leave Insurance Program, enacted in 2002 and in effect since 2004, generally allows a female employee six weeks' paid recovery time after birth, plus six weeks of additional paid family leave.[27] In April 2016, Jerry Brown, governor of California, signed legislation that, beginning next year, increases the partial wage replacement rate from its current level of 55 percent to 60 or 70 percent, depending on the worker's income.[28] California's paid leave runs concurrently with FMLA leave and leave under the California Family Rights Act (CFRA), but does not otherwise provide job protection if FMLA and CFRA do not apply to the employer or to the employee.

Washington State passed a paid family-leave law in 2007,[29] but it was tabled because it lacked a funding mechanism, and it has not yet been implemented. Last year, Washington was one of eight states to receive a substantial federal grant from the US Department of Labor (DOL), with the goal of helping to move forward its paid-leave program.[30] The DOL has been strongly committed to expanding these laws in the states, and President Obama's 2016 budget included more than $2 billion in new funds to encourage states to develop paid family- and medical-leave laws.[31]

Other states that have considered paid family leave or that have pending proposed legislation include Oregon, North Carolina, Colorado, Ohio, Oklahoma, Delaware, Hawaii, Indiana, Michigan, Virginia, Massachusetts, Nebraska, Missouri, Vermont, Illinois, Minnesota, Tennessee, Kentucky, Florida, Connecticut, Wisconsin, and New Hampshire, as well as Washington, DC.[32]

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22 ORS 653.606.

23 "Maternity at Work," International Labour Organization (Apr. 2010), *available at* http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_124442.pdf.

24 *See supra* note 2.

25 "Expecting Better," National Partnership for Women & Families (August 2016), *available at* http://www.nationalpartnership.org/research-library/work-family/expecting-better-2016.pdf.

26 Assemb. B. A.3870, 2015–2016, Reg. Sess. (N.Y. 2016), *available at* http://www.assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=A03870&term=2015&Summary=Y&Text=Y.

27 Cal. Unemp. Ins. Code §§ 3300–3306.

28 Assemb. B. 908, 2015–2016, Reg. Sess. (Cal. 2016), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB908.

29 S. B. 5659, 60th Leg., 2007 Reg. Sess. (Wash. 2007), *available at* http://www.washingtonvotes.org/2007-SB-5659.

30 Press Release, Jay Inslee, Washington Governor (Sep. 19, 2015), *available at* http://www.governor.wa.gov/news-media/washington-state-receives-federal-grant-help-launch-design-paid-family-leave-program.

31 U.S. Dep't of Labor, "DOL Fact Sheet: Paid Family and Medical Leave" (June 2015), *available at* https://www.dol.gov/wb/paidleave/PDF/PaidLeave.pdf.

32 Clare O'Connor, "As NY and SF Pass Paid Family Leave, These 20 States Could Be Next," Forbes (Apr. 6, 2016), http://www.forbes.com/sites/clareoconnor/2016/04/06/as-ny-and-sf-pass-paid-family-leave-these-20-states-could-be-next/#666c7bc947df

Earlier this year, San Francisco passed a paid-parental-leave ordinance that is perhaps the most comprehensive in the United States, in that it requires employers of twenty or more employees to provide six weeks of fully paid parental leave.[33] When the law takes effect in 2017 (2018 for certain smaller employers), employers in the city must cover the portion of the employee's pay not already covered by the state disability insurance and paid family-leave programs.

On December 6, 2016, Washington, DC, advanced another generous parental-leave proposal, the Universal Paid Leave Act, which would allow eleven weeks of paid parental leave for employees in the jurisdiction, who would receive 90 percent of their pay capped at $1,000 per week.[34]

Many public-sector employers now offer paid parental leave for their own employees, including Multnomah County[35] and the City of Portland,[36] which both passed paid-parental-leave ordinances in 2015 for workers who are new parents. The Portland ordinance, which became effective this year, applies to about 5,500 employees and allows workers six weeks of paid parental leave in any year in which they have a new child. Seattle[37] and King County[38] in Washington have passed similar ordinances for their own governmental employees. Newburgh Heights, Ohio, offers six months of paid maternity or paternity leave to its public employees.[39]

Congress and Candidates Have Proposed Federal Paid-Leave Programs

In December 2013, Senator Gillibrand (D-NY) and Representative DeLauro (D-CT) introduced legislation called the Family and Medical Insurance Leave (FAMILY) Act,[40] which would allow for up to twelve weeks of partially paid family leave. The program would be funded partly by weekly withholdings from workers' pay (0.2 percent or $2 per week, on average) and partly by employer contributions. It would entitle employees to 66 percent of their monthly wages, capped at $1,000 per week, during a period of family leave, including parental leave.

During the 2016 presidential campaign, candidates frequently referenced and proposed paid family- and parental-leave programs. Bernie Sanders, a co-sponsor of the FAMILY Act, has strongly advocated for twelve weeks of paid family leave, calling it an "international embarrassment" that the United States does not provide it.[41]

Hillary Clinton also made paid leave a key part of her campaign,[42] saying that every working American should be able to take paid parental leave. Her plan would allow employees who are new parents or caretakers to use up to twelve weeks of FMLA leave and receive at least two-thirds of their wages during that period; she proposed a funding mechanism that would tax the wealthy and not amount to a tax on the middle class.

Martin O'Malley, a Democratic presidential candidate, also supported the FAMILY Act and twelve weeks of paid family or parental leave.[43] Although paid-leave proposals are typically associated with Democrats, even

33 S.F., Cal., Ordinance No. 54-16 (Apr. 5, 2016), *available at* https://sfgov.legistar.com/View.ashx?M=F&ID=4408173&GUID=5B06DD01-771B-45CE-A867-933E3C82B91A.

34 Peter Jamison & Michael Alison Chandler, "D.C.'s expansive family and medical leave policy advances," Wash. Post (Dec. 6, 2016), https://www.washingtonpost.com/amphtml/local/dc-politics/dcs-expansive-family-and-medical-leave-policy-advances/2016/12/06/3473de02-bb42-11e6-91ee-1adddfe36cbe_story.html.

35 *See* "Paid Parental Leave," https://multco.us/benefits/paid-parental-leave (last visited Dec. 12, 2016); Multnomah County "Rule 2-57: Paid Parental Leave," *available at* https://multco.us/file/46454/download (Oct. 7, 2015).

36 *See* "City Paid Parental Leave Frequently Asked Questions," http://www.portlandonline.com/fritz/index.cfm?a=556770&c=49205 (Dec. 2015).

37 *See* "Paid Parental Leave," http://www.seattle.gov/personnel/benefits/paidparentalleave.asp (last visited Dec. 12, 2016).

38 *See* "Paid Parental Leave," http://kingcounty.gov/audience/employees/pay-benefits/paid-parental-leave.aspx (last updated Feb. 18, 2016).

39 Trevor Elkins, "Why My Town has the Most Generous Paid Leave Policy in America," U.S. Dep't of Labor Blog (June 7, 2016), https://blog.dol.gov/2016/06/07/why-my-town-has-the-most-generous-paid-leave-policy-in-america/.

40 Family and Medical Insurance Leave Act of 2013, S. 1810, H.R. 3712, 113th Cong. (2013–2014), https://www.congress.gov/bill/113th-congress/senate-bill/1810/related-bills, https://www.congress.gov/bill/113th-congress/house-bill/3712; *see also* Family and Medical Insurance Leave Act, S. 786, H.R. 1439, 114th Cong. (2015–2016), https://www.congress.gov/bill/114th-congress/senate-bill/786, https://www.congress.gov/bill/114th-congress/house-bill/1439/related-bills (reintroducing same).

41 *See* "Fighting for Women's Rights" (2016), https://berniesanders.com/issues/fighting-for-womens-rights/.

42 *See* "Paid family and medical leave" (May 23, 2016), https://www.hillaryclinton.com/issues/paid-leave/.

43 *See* "Worker's Bill of Rights" (Jan. 14, 2016), https://martinomalley.com/policy/workers-bill-of-rights/.

Senator Rubio (R-FL) put forward a paid-leave proposal during his presidential campaign that would provide a 25 percent tax credit to an employer choosing to offer four to twelve weeks of paid leave.[44]

President-elect Donald Trump favors a more modest paid maternity-leave law promoted by his daughter Ivanka Trump that would allow married female workers six weeks of fully paid maternity leave following childbirth,[45] funded through the unemployment-insurance program. The benefit would apply only when the employer does not offer paid maternity leave, and the proposal does not extend benefits to single mothers, new fathers, parents who adopt, parents with a foster-child placement, or parents who have children through surrogacy.[46]

Proponents View Paid Baby-Bonding Leave as a Civil Right—and Say That It Works

The state and federal statutes that provide Oregon employees with unpaid parental leave, OFLA and FMLA, function like other civil rights statutes in that they strictly prohibit discrimination or retaliation against employees who invoke leave rights.[47] Indeed, the OFLA statutes are found in ORS Chapter 659A covering civil rights laws and "Unlawful Discrimination in Employment," and they treat any violation as an unlawful employment practice that can be pursued through the Oregon Bureau of Labor and Industries (BOLI) and in court.[48] Likewise, BOLI's Civil Rights Division enforces PST, the Oregon law that allows certain Oregon employees to take up to one week of paid parental leave, and that law too prohibits discrimination or retaliation and characterizes such actions as unlawful employment practices.[49]

It can be debated whether paid parental leave is a civil right, but proponents of paid leave certainly see it that way and argue that both unpaid and paid parental-leave laws have shown positive effects. They reference the "motherhood penalty" and the "family wage gap," in that before FMLA was enacted, mothers earned seventy cents to the dollar compared with males' wages, while non-mothers earned ninety cents to the dollar.[50] They also note that women with available paid maternity leave are more likely to take twelve weeks of leave and more likely to return to their jobs.[51]

Studies also find that the availability of paid family leave is associated with lower rates of use of public welfare programs including the Temporary Assistance for Needy Families and Supplemental Food Assistance Program.[52] After California implemented its paid family-leave program, it saw maternity leaves double in length to six or seven weeks, and mothers who use paid parental leave in New Jersey have been 40 percent less likely to use public aid or food stamps.[53]

Parental leave has also been shown to decrease maternal depression and infant-mortality rates; an international study of paid family leave concluded that each additional month of leave was associated with a decrease of up to 13 percent in infant mortality.[54] Paid family leave results in mothers breastfeeding at higher rates and for longer periods, reducing the rate of childhood infections, and it also increases the odds that developmental delays will be detected earlier, when interventions will be most effective.[55]

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44 "Marco Rubio Proposes Tax Credit to Spur Paid Family Leave," N.Y. Times (Sept. 25, 2015, 1:32 PM ET), http://www.nytimes.com/politics/first-draft/2015/09/25/marco-rubio-proposes-tax-credit-to-spur-paid-family-leave/.

45 *See* "Child Care," https://www.donaldjtrump.com/policies/child-care/ (last visited Dec. 12, 2016).

46 Allen Smith, "Trump's Maternity Leave Proposal May Not Be Popular on Capitol Hill," Soc'y for Human Res. Mgmt. (Nov. 16, 2016), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/trump-maternity-leave-proposal.aspx.

47 ORS 659A.183; OAR 839-009-0320; 29 C.F.R. § 825.220.

48 ORS 659A.800, .820, .870, .885.

49 ORS 653.641; ORS 653.651; OAR 839-007-0065.

50 Jane Waldfogel, "The Family Gap for Young Women in the United States and Britain: Can Maternity Leave Make a Difference?" 16 J. of Lab. Econ. 505 (July 1998), *available at* http://www.academicroom.com/article/family-gap-young-women-united-states-and-britain-can-maternity-leave-make-difference.

51 "Parental Leave Statutes and Maternal Return to Work After Childbirth in the United States," 33 Work & Occupations 73 (Feb. 2006), *available at* http://wox.sagepub.com/content/33/1/73.

52 *See, e.g.*, JiYoung Kang et al., "Washington State Paid Family Leave Analysis Report" (Nov. 7, 2016), *available at* http://www.governor.wa.gov/sites/default/files/documents/2016-11-22_WAPaidLeave_UW_Final_Report.pdf.

53 Claire Cain Miller, "The Economic Benefits of Paid Parental Leave," N.Y. Times, Jan. 30, 2015, http://www.nytimes.com/2015/02/01/upshot/the-economic-benefits-of-paid-parental-leave.html.

54 *See supra* note 25.

55 "The Child Development Case for a National Paid Family & Medical Leave Insurance Program," ZERO TO THREE & Nat'l P'ship for Women & Families (Dec. 2013), *available at* https://www.zerotothree.org/document/139.

Employers Are Implementing New Paid Parental-Leave Policies

An increasing number of employers are choosing to offer generous paid parental-leave benefits to certain workers, even in the absence of applicable state and federal legislation. The business case for voluntarily offering paid parental leave is based on the long-term strategy of retaining talent and avoiding employee turnover, which costs employers more than paying a worker's wages for the weeks following the birth of a child.

The hi-tech sector has led the way with generous paid-leave policies, and employers in other sectors, like hospitality and manufacturing, are following suit. In January 2015, Intel's CEO announced a new paid parental-leave or "bonding-leave" program for its employees, which offers eight weeks' paid time off with benefits for new mothers and fathers, in addition to the company's existing pregnancy-leave policy, which allows new mothers fully paid time off for up to thirteen weeks.[56] Intel noted it was competing with Silicon Valley companies, including Apple, Google, Yahoo, Twitter, and Reddit, that offer generous paid-leave programs and employee benefits.

Last year, Amazon updated its policy to provide twenty weeks of paid maternity leave for new mothers, adding six weeks of leave for new parents regardless of gender, and companies including Microsoft, Adobe, and Netflix have similarly upgraded their parental-leave benefits.[57] Spotify now offers its full-time employees six months of fully paid parental leave, which can be used up through a child's third birthday, similar to the leave available in Sweden where the company has its headquarters.[58]

It made news when Mark Zuckerberg, the chief executive officer of Facebook, announced in November 2015 that he was taking two months of parental leave after the birth of his daughter and posted pictures of himself bonding and enjoying the time off. Facebook offers four months of paid parental leave to employees with a new child, and the leave can be taken any time, including intermittently, during the year after the birth or adoption.[59]

Other employers with generous paid-parental-leave policies include Coca-Cola, Braun Medical, Nike, Hilton, Laughing Planet, Vodafone, Deloitte, Johnson & Johnson's, Goldman Sachs, Nestle, and Chobani. Coca-Cola recently decided to augment its paid-leave policy after a request from its millennial-employees group representing 35 percent of the employee population to provide more paid leave to new fathers. The company recognized that offering parental leave only for women "had the unintended consequence of hurting women's career advancement and deepening the gender gap, since women were seen as 'opting out' of the workforce," and that offering parental-leave benefits to new fathers helps to shift the childrearing responsibilities and create an equal balance.[60]

The downside to many employer policies, say paid-leave proponents, is that they typically cover only highly compensated, high-skill, or full-time workers and not low-wage or part-time employees, and this in turn furthers economic, racial, and gender divides.[61]

The Push for Paid Parental Leave Shows No Sign of Abating

With Republican majorities in Congress and new President-elect Trump, a progressive agenda is less likely to advance quickly on the federal level. Nonetheless, given the prominence of paid leave as an issue during the presidential campaign and the pace at which individual state legislatures and local jurisdictions are considering and enacting new paid-leave legislation around the country, we can expect that they will continue to lead in advancing these laws.

Oregon has attempted to pass legislation for paid family and parental leave, in various forms, in five different legislative sessions since 2005.[62] In 2007, the Oregon House of Representatives passed paid family-leave legislation,

56 Steve Johnson, "Intel offers male and female employees 'bonding leave' for new children," The Mercury News, http://www.mercurynews.com/2015/01/16/intel-offers-male-and-female-employees-bonding-leave-for-new-children/ (last updated Aug. 12, 2016, 3:54 AM).

57 Julia Greenberg, "Amazon's New Parental Leave Policy is Good—And Good PR," Wired, https://www.wired.com/2015/11/amazons-new-parental-leave-policy-is-good-and-good-pr/ (Nov. 2, 2015, 9:12 PM).

58 Tessa Berenson, "Spotify Announces Six-Month Parental Leave Policy," Time, http://time.com/4120828/spotify-parental-leave-policy/ (Nov. 19, 2015).

59 Stephen Miller, "Facebook, Coca-Cola, Braun Medical Offer Paid Parental Leave Tips," Soc'y of Human Res. Mgmt., https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/facebook-coca-cola-braun-medical-paid-parental-leave.aspx (Oct. 24, 2016).

60 *Id.*

61 *See supra* note 25.

62 S. B. 565, 73rd Or. Leg. Assemb., 2005 Reg. Sess. (Or. 2005); H. B. 2575, 74th Or. Leg. Assemb., 2007 Reg. Sess. (Or. 2007); H. B. 3160, 75th Or. Leg. Assemb., 2009 Reg. Sess. (Or. 2009); H. B. 2355, 76th Or. Leg. Assemb., 2011 Reg. Sess. (Or. 2011); H. B. 2645, 77th Or. Leg. Assemb., 2013 Reg. Sess. (Or. 2013).

but the bill failed by three votes in the Oregon State Senate. Governor Brown, who as a former legislator helped to enact OFLA, also supports instituting paid family leave, which she describes as "the next step for Oregon."[63]

Paid parental leave could be coming to a workplace near you soon. Small-business advocates expect new proposed paid family-leave legislation in the upcoming 2017 Oregon legislative session.[64]

Dan Grinfas is of counsel to the Portland employment-law firm Buchanan, Angeli, Altschul & Sullivan LLP.

SUPREME COURT UPDATE

by Alyssa Engelberg, Dunn Carney, and Kirsten Rush, Busse & Hunt

***Bosse v. Oklahoma*, No. 15-9173 (October 11, 2016)**

The US Supreme Court reversed the Oklahoma Court of Criminal Appeals in this per curiam decision. The petitioner, who had been convicted and sentenced to death, argued that his constitutional rights were violated when the victim's family members testified about the underlying crime and explicitly asked the jury to sentence him to death. The court of appeals relied on *Payne v. Tennessee* to reject the argument. The Supreme Court vacated and remanded the decision, holding that the lower court had erred in presuming that *Payne* overturned *Booth v. Maryland*, in which the Court had previously held that "the admissions of a victim's family member's characterization and opinions about the crime, the defendant, and the appropriate sentence violated the Eight Amendment."

***Bravo-Fernandez v. United States*, No. 15-537 (November 29, 2016)**

The Court unanimously held that the issue-preclusion component of the double jeopardy clause does not bar the government from retrying criminal defendants where the jury has returned inconsistent verdicts in a multi-count criminal case and the convictions are later vacated for legal error completely unrelated to the inconsistency. The petitioners were unable to meet their burden of establishing that "the jury necessarily resolved in their favor" where the prior trial resulted in acquittals on some counts and a conviction on another. The Court also took care to distinguish between a hung jury (where the jury did not supply any decision at all) and an inconsistent verdict.

Alyssa Engelberg is an associate at Dunn Carney, where she represents closely held companies in employment law. Kirsten Rush is an associate at Busse & Hunt, which represents employees in employment cases.

The Oregon Civil Rights Newsletter is recruiting new members for its editorial board.

If you are interested in serving as a board member, please contact Megan Lemire at megan@lhpclaw.com or 971.717.6577.

63 *See* The Oregonian, "Gov Kate Brown Pushes for Paid Family Leave," YouTube (Aug. 26, 2015), https://www.youtube.com/watch?v=kDQIArEnOo4.

64 "2017 Challenges in the Oregon Legislature," National Federation of Independent Business (Apr. 5, 2016), http://www.nfib.com/content/issues/oregon/2017-challenges-in-the-oregon-legislature-73590/.

CIVIL RIGHTS IMPLICATIONS OF EMPLOYERS' USE OF ARTIFICIAL INTELLIGENCE AND BIG DATA

by Matthew Scherer, Buchanan Angeli Altschul & Sullivan LLP

The Emergence of AI in the Workplace

Ever since the financial crisis and Great Recession shook the labor market, companies' human resources (HR) departments have become a popular target for layoffs and budget cuts as businesses seek to control costs. Some companies have reduced HR staffs by more than 50 percent or outsourced HR services altogether.[1] It seems all but inevitable that the downward pressure on HR departments will soon collide with another unmistakable trend in corporate America—companies' increasing use of artificial intelligence systems and "big data."[2]

Big data is a term commonly used to describe both the massive amounts of data available to companies in the information age and the various methods for sifting through that data. Many of these methods are grouped under the equally loose term *artificial intelligence* (AI), which is often used to describe, among other things, systems that use and construct algorithms to identify patterns and relationships within a given data set. One major branch of artificial intelligence, called *machine learning*, describes a process by which AI systems can actually improve their analytical and predictive capabilities when exposed to new data without being explicitly programmed to do so.

The potential significance of these emerging fields to the world of HR is obvious. The Internet, social media platforms, and public databases contain a plethora of potential information about each job applicant and employee. Big data thus gives companies an opportunity to combine "traditional information such as work experience and education with nontraditional data including consumer and financial data and internet browsing history" to "sketch an ideal candidate for a job and weigh how well an applicant would fit an opening."[3] The same techniques can be used to evaluate the past and potential future performance of current employees.

Likewise, the appeal of AI will be immense as HR budgets come under increasing pressure. Automating initial assessments of applicants' qualifications and employees' performance would both reduce costs and remove the human biases and prejudices that continue to affect personnel decisions all too often. As a result, and as Jenny Yang, chair of the Equal Employment Opportunity Commission, noted at a recent public meeting, these technological developments have "the potential to drive innovations that reduce bias in employment decisions and help employers make better decisions in hiring, performance evaluations, and promotions."[4]

That, at least, is the promise. But delegating traditional HR tasks to automated systems might prove far trickier than the hype suggests. Although AI offers the tantalizing hope of reducing discrimination in the labor market, it likely will prove exceptionally difficult to program AI systems to make personnel decisions that reliably conform with state and federal anti-discrimination laws.

Civil Rights Concerns with AI

Start with the basics. Anti-discrimination laws generally prohibit two different types of discrimination. The first type of discrimination is called *disparate treatment*, which, as those words suggest, prohibits treating someone differently because he or she is a member of a protected class.[5] Examples of disparate treatment might include refusing to hire anyone who was not born in the United States (disparate treatment based on national origin)

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1 Phyllis Korkki, "When the H.R. Office Leaves the Building," N.Y. Times, Dec. 1, 2012, http://www.nytimes.com/2012/12/02/jobs/more-companies-are-outsourcing-their-human-resources-work.html.

2 The Equal Employment Opportunity Commission (EEOC) recognizes that employers' use of "data scraping" of the internet and social media platforms, and evaluation of tens of thousands of pieces of information about an individual, is already occurring and that the use and scope of big data are expected to grow exponentially in the future. Press Release, EEOC, "Use of Big Data Has Implications for Equal Employment Opportunity, Panel Tells EEOC," Oct. 13, 2016, *available at* https://www.eeoc.gov/eeoc/newsroom/release/10-13-16.cfm.

3 Braden Campbell, "Employers Must Use Analytics With Care, EEOC Panel Warns," Law360, Oct. 13, 2016, http://www.law360.com/articles/851267/employers-must-use-analytics-with-care-eeoc-panel-warns.

4 *Supra* note 2.

5 The characteristics protected by anti-discrimination laws can vary. At the federal level, Title VII of the Civil Rights Act of 1964 protects against discrimination based on race, color, religion, sex, or national origin. Separate statutes—the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA)—prohibit discriminating against people because of age and disability. In Oregon, ORS 659A.030 and other statutes in ORS Chapter 659A prohibit discrimination on those same bases and several others.

or promoting only men to high executive positions at a company (disparate treatment based on gender). Such disparate treatment is what people usually think about when they hear the term discrimination.

But Title VII and Oregon civil rights laws also prohibit policies that have an adverse *disparate impact* on members of a protected class.[6] A well-known example of disparate-impact discrimination is adopting a blanket policy against hiring people who have a criminal record. While such a policy seems neutral on its face, if the employer fails to establish appropriate safeguards, the policy may disproportionately result in the exclusion of racial and ethnic minorities.[7]

Courts have long recognized that these two prohibitions can pull in different directions. Facially neutral and seemingly meritocratic criteria, such as educational attainment, prior work experience, and salary history,[8] can mask the fact that those criteria are often themselves the products of previous discrimination and therefore heavily correlated with protected characteristics. White applicants are far more likely to have graduated from college than black or Hispanic applicants, for instance. As a result, an unyielding reliance on such "objective" criteria can lead to personnel decisions that have an illegally disparate impact.

The most obvious ways to reduce the disparate impact of such hiring practices, however, are often illegal as well because *they* constitute disparate treatment. Perhaps the simplest way to ensure diversity would be to use a quota—for example, by setting aside a certain proportion of the positions for applicants from underserved minority groups. But the prohibition against disparate treatment means that companies cannot use such quotas, even when the reason for implementing is not to discriminate but instead to ensure a diverse workforce. Likewise, companies cannot use numerical assessments that explicitly assign "bonus points" to individuals from disadvantaged groups.[9]

Nothing prevents an employer from using race as a subjective "plus factor" to help ensure diversity. But it cannot assign a specific numerical value to the race or gender of an applicant. In other words, the law prefers to keep employment-related assessments subjective when they involve sensitive personal characteristics, such as race or gender.

Challenges of Lawfully Using Algorithm-Driven Systems

Which brings us back to AI. It is difficult, if not impossible, to directly program a truly subjective set of criteria into AI systems that use algorithms to analyze data and make predictions—a description that encompasses virtually all AI systems in commercial use today. Algorithm-driven AI systems are invariably run through digital computers that operate using binary code. This makes them singularly ill-suited for making truly subjective assessments because a "subjective algorithm" is almost a contradiction in terms; using an algorithm necessarily requires that subjective criteria be formalized in some way so that they can be reduced to computer code and incorporated into the algorithm. As a result, while you can design an algorithm that closely approximates or simulates a subjective assessment, you still have to find a way to reduce the subjective assessment to an objective and concrete form.

Therein lies the problem with delegating personnel decisions to an AI system. As noted above, when companies rely exclusively on seemingly objective sets of desirable criteria to make personnel decisions, disparate-impact discrimination may result because the desirable criteria are often the result of the structural advantages enjoyed by people from dominant social and economic groups. But courts would likely rule that companies cannot counteract the disparate impact by directly programming an AI system to rate people from disadvantaged groups more favorably.

The rise and increasing sophistication of machine learning would seem to offer some hope of avoiding these pitfalls. Whereas earlier algorithm-based AI systems needed humans to explicitly tell them which criteria matter, learning AI systems are provided with "seed sets" or "training sets" of data that they use to identify the criteria

6 *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); *see also* OAR 839-005-0010(2).

7 *See* EEOC, No. 915.002, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII (2012), *available at* https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

8 Recognizing that employers' use of salary history in the hiring process may have an adverse impact, several jurisdictions have introduced equal-pay legislation that bars such inquiries. A Massachusetts law that takes effect in 2018, the Act to Establish Pay Parity, prohibits employers from requiring job candidates to divulge their prior salary. The District of Columbia introduced similar legislation, the Fair Wage Amendment Act of 2016, B21-0878, on September 20, 2016. Jerry Brown, governor of California, recently signed Assembly Bill 1676, which prohibits pay differentials based solely on prior salary history. Similar legislation has been introduced in New York and New Jersey.

9 *See* 42 U.S.C. § 2000e-2(1) (prohibiting employers from altering the results of "employment related tests on the basis of race, color, religion, sex, or national origin"). In the public sector, the Supreme Court has also held that such "bonus point" systems violate the Equal Protection Clause of the Fourteenth Amendment. *Gratz v. Bollinger*, 539 U.S. 244, 271–72 (2003). Note, however, that state and federal laws often allow—and sometimes even require—public employers to award preference points to veterans. *See* ORS 408.225–408.238.

that might have predictive value. For an AI system to learn how to identify a cat in photographs, for example, it is given a set of images and told "these images contain cats" and "these images do not contain cats." By comparing the "cat" and "not a cat" images, the system can discover features (for example, size, coloring, shape) that are distinctive to cats. Armed with this knowledge, the system can then examine other photographs and predict whether they contain cats by looking for the cat-distinctive features it learned from the training set.

But as that description suggests, machine-learning systems are only as good as the seed sets humans provide them. Unless the system is given representative and well-curated data to learn from, its output will not be reliable—garbage in, garbage out. In the example above, if the only "cat" images in the seed set are photographs of orange tabby cats, the system is likely to develop an algorithm under which it marks every cat that lacks an orange tabby fur pattern as "not a cat."

In HR settings, AI systems will be vulnerable to the same sort of seed-set bias. A company wishing to identify desirable candidates for a sales position might wish to have a seed set that consists of the current employees with the best sales performance. But if this seed set is dominated by white men, then the AI might conclude that being white or male is itself a positive and desirable trait and a predictor of strong job performance.

Even if the system is explicitly programmed to ignore protected characteristics, such as race and gender, the system still might focus on criteria that nevertheless are heavily influenced by—and therefore the product of—previous discrimination. Consequently, if the seed set of high-performing incumbents is not sufficiently diverse, the characteristics of the employees who make up that seed set "may more reflect their demographics than the skills or abilities needed to perform the job."[10] These dangers are especially acute in the age of big data, which gives companies access to credit scores[11] and other non-traditional data points that might be irrelevant as predictors of future performance but strongly correlated with protected characteristics, such as race and gender.

The Path Forward

None of this is meant to suggest that it is impossible to incorporate AI into HR. Rather, it demonstrates that when AI systems are used in HR settings, they will need to be trained and supervised to ensure that their decisions and recommendations comply with anti-discrimination laws—which, of course, is also true of human HR workers. With an AI system, this means that both the inputs (seed sets) and outputs (personnel recommendations and decisions) of the system must be reviewed regularly. Managers must also be trained to understand both the capabilities and limitations of each system and taught how to interpret the outputs each system generates.

The task of training and supervising AI in HR might seem daunting, but many of the tools needed to monitor AI systems' compliance with anti-discrimination laws already exist. Most notably, a number of commercially available software products allow companies to analyze their affirmative action plans (AAPs) and personnel decisions to check for potential disparate impacts. Companies could easily use such AAP software to audit an AI system's outputs—or the AI system's designer could build such auditing features in the AI system itself. In either case, if an audit suggests that the AI system's algorithms are having a disparate and adverse impact on protected groups, the system's seed sets then could be modified accordingly.

Indeed, companies should not wait until a problem arises to conduct such reviews. The demographics of the labor market are constantly changing, as are companies' performance expectations for their employees. Companies would be well-advised to review, update, and curate the seed sets on a regular basis to ensure that they remain suitably representative and reflect the company's current goals, regardless of whether audits reveal a specific problem. As with human HR workers, some form of continuing education will be necessary for AI in HR.

The promise of AI and big data is real. Used properly, these technological developments can help identify the characteristics that are truly important in predicting the suitability of a particular candidate for a particular position. Over time, these advances should help create a labor market that is more efficient and less afflicted by human limitations and biases.

10 EEOC Public Meeting on Big Data in the Workplace, Oct. 13, 2016 (Written Testimony of Kathleen K. Lundquist), *available at* https://www.eeoc.gov/eeoc/meetings/10-13-16/lundquist.cfm.

11 Numerous states, including California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont, and Washington, already bar the use of credit history for employment purposes, with narrow exceptions. Similar federal legislation was introduced in Congress in 2013. The EEOC has expressed the belief that relying on applicants' credit histories may disproportionately exclude minority groups and has sued employers on that basis. *See, e.g.*, Letter from Dianna B. Johnston, Assistant Legal Counsel, EEOC (Mar. 9, 2010), *available at* https://www.eeoc.gov/eeoc/foia/letters/2010/titlevii-employer-creditck.html.

But despite this promise, it is critical to recognize that AI has not yet advanced to anything close to the point where companies can blindly rely on AI systems to make personnel decisions. In that sense, we are not yet ready to take humans out of human resources.

Matthew Scherer is an associate with the Portland employment-law firm Buchanan, Angeli, Altschul & Sullivan LLP and a blogger on artificial-intelligence issues at www.lawandai.com. A version of this article originally appeared in the Winter 2016/2017 issue of *The SciTech Lawyer*.

RECENT LEGAL DEVELOPMENTS

by Richard F. Liebman and Anthony Kuchulis, Barran Liebman LLP

Current Supreme Court Docket

***G.G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *cert. granted*, 85 U.S.L.W. 3202, 85 U.S.L.W. 3208 (U.S. Oct. 28, 2016) (No. 16-273)**

The Fourth Circuit Court of Appeals deferred to the Department of Education's interpretation of Title IX, which provides for the protection of transgender students and provides for student-restroom access congruent with gender identity. Title IX forbids education programs that receive federal funding from discriminating on the basis of sex. The DOE issued guidance in a December 2014 letter explaining that discrimination can include treating students a certain way based on gender stereotypes, similar to the EEOC's strategic enforcement of Title VII. The county school board passed a resolution that contravened the DOE's guidance, stating that "students with gender identity issues shall be provided an alternative appropriate private facility." The court of appeals held that the county school board's regulations were unlawful and enforced the DOE's guidance, reasoning that Title IX contained ambiguity on the matter.

***EEOC v. McLane Co., Inc.*, 804 F.3d 1051 (9th Cir. 2015), *cert. granted*, 85 U.S.L.W. 3114, 85 U.S.L.W. 3137 (U.S. Sept. 29, 2016)**

In this subpoena-enforcement action, the EEOC was attempting to determine whether a strength test had a discriminatory impact on women. In a traditionally broad approach to EEOC subpoenas, the Ninth Circuit held that the EEOC was entitled to compel production of "pedigree information" of other applicants who took the test. Such information included names, social security numbers, and last-known addresses and telephone numbers, which would have allowed the EEOC to contact the applicants.

Federal Case Law

***EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 14-13710, 2016 WL 4396083, 2016 U.S. Dist. LEXIS 109716 (E.D. Mich. Aug. 18, 2016)**

The first two suits filed by the EEOC against private-sector employers that alleged that discrimination based on transgender status was sex discrimination under Title VII reached conflicting results. In the first case, *Lakeland Eye Clinic in Florida*, there was a $150,000 settlement following a previous district court ruling in 2015 when the court had rejected the Title VII claim based on transgender status or gender identity, holding that those categories were not protected categories under Title VII, but that the employee could pursue a claim under a sexual stereotyping theory. In *Harris Funeral Homes*, the employer was granted summary judgment because prohibiting the employer from requiring the plaintiff to dress as a man at work would infringe on the employer's rights under the Religious Freedom Restoration Act (RFRA). The court found that the EEOC had not explored the possibility of accommodation under the two statutes and never discussed such an option. The court found that the EEOC had a "demanding burden" under the RFRA to show that its position furthered a compelling governmental interest through the "least restrictive means."

***Kowitz v. Trinity Health*, 839 F.3d 742 (8th Cir. 2016)**

The Eighth Circuit held that the employer may have been aware of an employee's need for an accommodation to complete CPR recertification or a job reassignment while she continued to recover from neck surgery. The decision was significant because it reaffirmed, and arguably extended, the concept that an employee need not use "magic words" to invoke the ADA's interactive job-accommodation process. The court held that, in addition to not needing to use specific words, a request for an accommodation may be implied from the circumstances and context of the situation. In this matter, the employee's doctor's note that the employee would have continuing medical restrictions should have been sufficient to initiate the interactive process and explore potential accommodations. The dissent argued that the court's decision essentially eliminates the standing requirement that an employee take some affirmative action to request an accommodation.

***Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958 (11th Cir. 2016)**

The Eleventh Circuit held that federal age-bias law does not allow disparate-impact claims by older applicants, who can only sue for intentional bias. The case involved a 49-year-old applicant who was not selected for a territory manager position targeted toward applicants "2–3 years out of college" and recruiters were told to avoid applicants "in [the] sales force for 8–10 years." The court held that the EEOC's contrary interpretation of the Age Discrimination in Employment Act (ADEA) was not entitled to deference because it contradicted the plain language of ADEA, which limited disparate-impact claims to employees, to the exclusion of applicants.

***Nevada v. U.S. Dep't of Labor*, ___ F.Supp.3d ___, Civil Action No. 4:16-CV-00731, 2016 WL 6879615 (E.D. Tex. Nov. 22, 2106).**

A federal judge blocked the US Department of Labor from implementing its new overtime rule, just a few days before it was to take effect on December 1, 2016. The case related to claims brought by several states against the overtime rule that effectively doubled the minimum salary level for executive, administrative, and professional employees required to be exempt from federal overtime requirements. Finding that the group of twenty-one states who sued the Department of Labor would suffer irreparable harm if the rule took effect as planned, a federal district court judge in Texas issued an injunction prohibiting the rule's implementation and enforcement. The judge held that the salary level and automatic updating mechanism in the rule exceeded the Department of Labor's authority. The nationwide injunction means the rule did not take effect anywhere on December 1, 2016. Employers who have been planning for the rule's implementation can delay those plans but should not yet count on the rule being prohibited indefinitely. The preliminary injunction may be modified or dissolved by a further order from the court.

Oregon Court of Appeals

***Goings v. Calportland Co.*, 280 Or. App. 395 (2016)**

ORS 656.018 provides that the workers' compensation system within the state of Oregon is the exclusive remedy for employees suffering injuries on the job. Subsection (3)(a), however, provides an exception for "willful and unprovoked aggression" that is a substantial factor in the injury. In the *Goings* case, a particular supervisor had been aware of Mr. Goings's injury and allegedly assigned him to perform certain work that same afternoon, knowing that the possibility of injury was great. The court of appeals allowed his claim to proceed against the supervisor under subsection (3)(a).

Traditional Labor Law

***Trump Ruffin Commercial, LLC*, 364 N.L.R.B. No. 143, Case 28-CA-181475 (2016)**

On the eve of the presidential election, the National Labor Relations Board dealt a blow to a major enterprise of Donald Trump by ordering management of the Trump Hotel in Las Vegas to bargain with its newly certified union representatives. Thought not significant in itself, this case is another example of now President-elect Trump's long and often tumultuous relationship with the unionization at his properties and businesses. Mr. Trump is expected to select conservative members to the Board, which will cause a significant shift in the politics of the Board from the last eight years. In addition, Mr. Trump is entitled to appoint at least one Supreme Court justice and possibly up to three over his tenure. Based on those appointments, it would not be surprising for the Court to re-hear a case similar to *Friedrichs v. Cal. Teachers Association*, which considered the issue of whether a public employees union can require its members to pay union dues even if the member opts out of the barging unit. That

case previously resulted in a split by the Court, which issued its decision shortly after Justice Scalia died. A ruling against the union on this issue in the future could have far-reaching consequences. In short, expect significant changes in labor-relations policies and the law under the new administration.

Administrative Agencies

OSHA Drug Testing Guidance

In May 2016, the Occupational Safety and Health Administration (OSHA) issued final rules to "Improve Tracking of Workplace Injuries and Illnesses" and to deter retaliation against workers who report injuries. The rule, which goes into effect January 1, 2017, requires certain employers to submit workplace-injury-and-illness data electronically to OSHA. The new rule also includes provisions that went into effect on August 10, 2016, which seek to deter retaliation against workers who report injuries, including (1) employers must advise employees of their right to report injuries by posting a qualifying poster or conveying its content; (2) procedures for reporting work-related injuries and illnesses must be reasonable and not deter or discourage employees from reporting; and (3) employers may not retaliate against employees for reporting work-related injuries or illnesses. Although the new rule does not specifically address drug testing, the commentary associated with the rule warns employers that mandatory post-accident testing programs may violate the new rule if they are a pretext for retaliation against employees who report injuries. OSHA warns that, although post-accident testing may be reasonable in some circumstances, mandatory drug testing after every accident is a form of intimidation that discourages employees from reporting workplace injuries. OSHA explained that post-accident employee drug testing and incentive programs are still possible under the new rule and that employers do not need to specifically suspect drug use before testing; however, employers should only require drug testing if there is a reasonable possibility that drug use by the employee who reported the accident contributed to the injury. Additionally, if the method of drug testing only indicates recent use of the drug but not actual impairment, it may also unreasonably deter reporting.

EEOC Guidelines on National-Origin Discrimination

On November 21, 2016, the EEOC released new enforcement guidance on national-origin discrimination. The guidelines apply to employers with fifteen or more employees, as well as employment agencies, state and local employers, and unions. Updates respond to workplace situations, such as language issues, segregation, immigration, and human trafficking. The guidelines clarify that an employer may not base an employment decision on an accent unless the ability to communicate in English is required to perform the job effectively and the accent materially interferes with performance. Employees of a certain national origin may not be segregated to work in lower-paying jobs away from public contact because of a customer preference for sales representatives of a different national origin. Individuals are protected regardless of their immigration status or authorization to work. Use of fraud, force, or coercion to exploit workers based on their national origin may violate federal discrimination laws in addition to criminal laws prohibiting human trafficking.

Richard F. Liebman is a partner and Anthony Kuchulis is an attorney with Barran Liebman LLP, representing employers in labor and employment law.