JOINT NEWSLETTER FOR AALS SECTIONS ON
LABOR RELATIONS AND EMPLOYMENT AND
EMPLOYMENT DISCRIMINATION
2021

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This newsletter has been compiled by the secretaries of the sections:
Matthew Bodie (Saint Louis University School of Law, Labor Relations and Employment Section) &
Danielle Weatherby (University of Arkansas School of Law, Employment Discrimination Section)
Special thanks to Katie Eyer for her discussion of the Bostock opinion.
AALS Section Events

Section Programs
Wednesday, January 6, 4:15 PM – 5:30 PM – New and Emerging Voices in Labor and Employment Law
Sections on Employment Discrimination Law and Labor Relations & Employment Law Joint Program

Moderator: Charlotte Garden, Seattle University School of Law

Commentators: Marcy Karin, University of the District of Columbia, David A. Clarke School of Law
Angela D. Morrison, Texas A&M University School of Law
Charles A. Sullivan, Seton Hall University School of Law

Speakers: Shirley Lin, New York University School of Law
Gali Racabi, Harvard Law School
Shayak Sarkar, UC Davis School of Law

This program showcases three works-in-progress by emerging workplace scholars with seven or fewer years of teaching experience. Each scholar will present a work-in-progress and receive comments from assigned commentators, after which attendee feedback is encouraged. Papers, selected from a call for papers, focus on emerging topics in labor, employment, and antidiscrimination law. Abstracts of the papers will be made available at the session.

Thursday, January 7, 11:00 AM – 12:15 PM – How Trump’s Divisive & Derogatory Rhetoric Has Affected Workplace Anti-Discrimination Enforcement
Employment Discrimination Law, Co-sponsored by Labor Relations and Employment Law, Civil Rights, and Poverty Law

Moderator: Stacy L. Hawkins, Rutgers Law School

Speakers: Sahar Aziz, Rutgers Law School
Ruth Colker, The Ohio State University, Michael E. Moritz College of Law
William Creeley, The Foundation for Individual Rights in Education (FIRE)
Katie Eyer, Rutgers Law School
Michael Z. Green, Texas A&M University School of Law

This program will explore how overtly racist and sexist discourse coming from the Trump administration infects workplaces, including a look at how such discourse has mobilized employers and employees to be more proactive in preventing pervasive sexism, racism, and religious bigotry that people bring to work. The program will also consider how this sociological phenomenon has affected the courts and case law in particular, including in the recently decided Supreme Court cases adjudicating the rights of LGBTQ+ persons under Title VII.
The Employment Discrimination Section’s business meeting will be held over Zoom on Thursday, January 7th at 12:30 PM. To access the meeting, follow this link: https://tamu.zoom.us/j/98531440782

Friday, January 8, 2020, 1:15 AM – 2:30 PM – Responding to the Pandemic at Work: Organizing, Litigation, and Enforcement
Labor Relations and Employment Law, Co-Sponsored by Employee Benefits and Executive Compensation

**Moderator:** Veena Dubal, University of California, Hastings College of the Law

**Speakers:**
Veena Dubal, University of California, Hastings College of the Law
Michael C. Duff, University of Wyoming College of Law
Beth Lyon, Cornell Law School
David Michaels, The George Washington University
Emily A. Spieler, Northeastern University School of Law

In 2019, the Occupational Safety and Health Administration had the lowest number of workplace inspectors in its history. In 2020, the COVID-19 pandemic brought new challenges related to workplace safety, while also underscoring the relationship between workers’ health and public health. This panel focuses on the range of worker-led and governmental responses to the pandemic, especially as they relate to workplace safety. Panelists will discuss legal and policy topics such as workers’ collective action; work law enforcement by agencies and in courts; and the (in-)adequacy of congressional and administrative responses to COVID-19’s devastating effects on workers and jobs.
Other AALS Programs of Interest

**Tuesday, January 5**
1:10 AM – 12:15 PM – *Federal Courts Employment Reforms*
Section on Federal Courts, Co-Sponsored by Employment Discrimination Law

**Wednesday, January 6**
1:15 – 2:30 PM – *White Terror, Then and Now: The Future of Race and Racism in Light of the Ku Klux Klan Act of 1871*
Minority Groups, Co-Sponsored by Civil Rights, Constitutional Law, Law & the Social Sciences, Legal History, National Security Law, and Socio-Economics

1:15 – 2:30 PM – *Gender and Intersectionality in Times of Crisis*
Section on Women in Legal Education

2:45 – 5:30 PM – *Politics, Pandemic, and the Future of Civil Rights and Poverty Law*
Section on Civil Rights and Poverty Law Joint Program, Co-Sponsored by Comparative Law

**Thursday, January 7**
2:45 – 4:00 PM – *Legal and Judicial Ethics in the Post-#MeToo World*
Section on Professional Responsibility, Co-Sponsored by Civil Rights, Employment Discrimination Law, Leadership, and Minority Groups

4:15 PM – 5:30 PM – *New Voices Panel*
Section on Civil Rights

4:30 PM – 5:30 PM – *New Voices on Sexual Orientation and Gender Identity Law*
Section on Sexual Orientation & Gender Identity Issues

**Friday, January 8**
11:00 AM – 12:15 PM – *Celebrating 30 Years of Intersectionality and the ADA*
Section on Disability Law, Co-Sponsored by Civil Rights, Law and Mental Disability, Minority Groups, Sexual Orientation and Gender Identity Issues, and Women in Legal Education

1:15 PM – 2:30 PM – *The Future of Plyer v. Doe on its 40th Anniversary*
Section on Education Law, Co-Sponsored by Immigration

1:15 PM – 4:00 PM – *AALS Workshop for Pretenured Law School Teachers of Color Reception*

2:45 PM – 4:00 PM – *AALS Hot Topic Program: Disability and COVID-19 - Lessons from Disability, Lessons from the Pandemic*
2:45 PM – 4:00 PM – Working in a New World - Employee and Worker Benefits Re-examined in a Time of Crisis
Section on Employee Benefits and Executive Compensation, Co-Sponsored by Labor Relations and Employment Law, and Law, Medicine and Health Care

Sunday, January 9
11:00 AM – 12:15 PM – Implications of the 2020 Supreme Court Title VII Decision in Bostock v. Clayton County
Section on Sexual Orientation and Gender Identity Issues

2:45 – 4:00 PM – AALS Hot Topic Program: Actions Speak Louder than Words: Anti-Racism in Law Schools
Faculty News

Bradley Areheart (Tennessee) was promoted to Professor of Law. Areheart was also awarded the Wilkinson Junior Research Professor at University of Tennessee College of Law, which is given to a faculty member in their first 10 years of teaching who has engaged in “prolific and outstanding scholarship.”

Rachel Arnow-Richman (Florida) joined the University of Florida Levin College of Law, where she is a Professor of Law & Gerald A. Rosenthal Chair in Labor & Employment Law.

Sam Bagenstos (Michigan) was appointed to serve as a member and chair of the Michigan Employment Relations Commission, the State's public sector labor relations authority, by the Governor of Michigan.

Scott Bauries (Kentucky) received the 2020 Robert M. and Joanne K. Duncan Law Faculty Teaching Award.

Susan Bisom-Rapp (California Western) was Distinguished Professor in Residence at California Western School of Law and Visiting Professor (teaching remotely) at the University of Modena and Bisom-Rapp is also the chair-elect of the AALS Section on Women in Legal Education and will work with her colleagues to put the final touches on the programming for the 2021 Annual Meeting. Her longtime British co-author Malcolm Sargeant (Middlesex University, UK) passed away on November 24, 2020. Together, they produced 1 book, 3 book chapters, and 4 law review articles on age discrimination and the gendered nature of aging. He will be missed.

Stephanie Bornstein (Florida) was recently awarded tenure and promoted to Professor at the University of Florida Levin College of Law. Her article, Disclosing Discrimination (forthcoming 2021 in the B.U. Law Review), was selected for presentation at the 2020 Stanford/Harvard/Yale Junior Faculty Forum. She is also delighted to report that, for its 10th edition forthcoming in Fall 2021, she will join as a co-author on Charles Sullivan and the late Michael Zimmer’s casebook, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION (Wolters Kluwer/Aspen).

Ronald Brown (Hawaii) presented China’s BRI in Central Eastern European Countries: “17+1”: Connectivity, Divisiveness, or Pathway to EU-China? and Labor Law Adjustments for Workers in China and the U.S. during the Pandemic during China Law Week 2020 at University of Helsinki Law School.

Chris Cameron (Southwestern) became the Chair of the Los Angeles County Employee Relations Commission, the agency responsible for administering the ordinance regulating labor relations between nearly 100,000 employees and the nation’s second largest municipal government employer. Cameron also joined the board of Century Housing Corporation, a Community Development Financial Institution that finances, builds, and operates affordable housing throughout California. In August, Cameron delivered the keynote address at “Harry’s Boot Camp,” the event launching the Judge Harry Pregerson Public Service Legacy Programs, which support law students who are following in the footsteps of the late Ninth Circuit jurist by pursuing careers in public interest law. In October, Cameron received the Legacy Award of the Mexican American Bar Foundation, a Section 501(c)(3) charitable corporation, for helping the Foundation award over $2.3 million in the form of 404
scholarships given to 336 individual law students, plus create an endowment to sustain this high level of giving.

Michael Duff (University of Wyoming College of Law) was named the Winston S. Howard Distinguished Professor of Law at University of Wyoming College of Law.

Michael Z. Green (Texas A&M) has been named the next director of Chicago-Kent College of Law’s Institute for Law and the Workplace. Green is currently professor of law and director of the Workplace Law Program at Texas A&M University School of Law. He will become the second director to lead the institute in fall 2021 following the retirement of ILW founder and director, Martin H. Malin. “We’re excited to have Michael Green join us and carry on ILW’s long tradition of academic excellence,” says Chicago-Kent Dean Anita K. Krug. “He built a fantastic labor and employment program at his previous university, and our students will benefit from his scholarship and practical experience.” “Michael Green is amazing. He is a highly regarded scholar and a beloved teacher. He is heavily involved with the bar and very professionally active,” Malin says. “He bridges the two worlds between the academic world and the practicing professional world. He brings communities together. He is the perfect person to lead the program.” On November 13, 2020, Professor Michael Green moderated and spoke on “Police Officer Discipline: Suggested 2020 Best Practices” at a plenary session of the ABA Section of Labor and Employment Law’s virtual program held via Zoom. His presentations for 2020 include: “Selecting Diverse Arbitrators for Employment Discrimination Disputes” at the Tarrant County Bar Association’s Labor and Employment Section’s monthly meeting in Fort Worth, Texas; “Seeking Activist Police Arbitrators?” at the Fifteenth Annual Colloquium on Scholarship in Employment and Labor Law (COSELL) at the University of Louisville, Brandeis School of Law, as part of a virtual program held via Microsoft Teams, on October 10, 2020; “Post-Bostock Implications” as part of a virtual program sponsored by the TAMU Outlaw organization; “How Bostock Expands Intersectionality Employment Discrimination Law Jurisprudence” as part of a virtual program sponsored by the Southeastern Association of Law Schools (SEALS) Employment Law Workshop Discussion Group: LGBT Rights in the Workplace, as well as “Transitions to Virtual Teaching” as part of the virtual program held by the SEALS Labor and Employment Law Discussion Group on Pedagogical Trends and Techniques in Employment Law, Employment Discrimination, and Labor Law; “Selecting Diverse Arbitrators for Employment Discrimination Disputes” for a virtual Fort Worth Society Human Resources Webinar on June 25, 2020; serving as a moderator for the TAMU Law Answers Webinar Series: Legal Issues in the Age of the Coronavirus, “Workplace Implications after the Covid-19 Crisis,” on May 12, 2020; and organizing, moderating, and presenting at the Workplace Law Conference, “Administrative Law and the Workplace Impact,” held virtually on April 3, 2020 and co-sponsored by the Aggie Dispute Resolution Program.

D. Wendy Greene (Drexel) delivered four keynote lectures at the University of South Carolina, McGill University Faculty of Law (Montreal, Quebec), Howard University School of Law, and Virginia Commonwealth University School of Dentistry.

Jonathan Harris (NYU) co-organized a Dec. 3, 2020 conference with Sam Estreicher and the NYU Labor and Employment Law Center, Re-Training America for the Future of Work. It was a conversation on worker re-training and up-skilling, evaluating and exploring policies to help today’s and tomorrow’s workers meet the labor demands of both automating and human-touch workplaces. The discussants also highlighted inequities and other problems with the workforce development system and proposed robust ideas for future action. It featured U.S. DOL Assistant Secretary for Employment and Training John Pallasch and other discussants.
Katie Eyer (Rutgers - Camden) has received significant attention for her advocacy work (in 2019, she co-authored an amicus brief with the Constitutional Accountability Center in Bostock v. Clayton County) and scholarship, including in this article in the New Yorker.

Sharona Hoffman (Case Western Reserve) was awarded the 2020 Northeast Ohio Scholars Strategy Network Amplify & Apply Grant Program mini grant and the 2020 Jessica Melton Perry Award for Distinguished Teaching in Disciplinary and Professional Writing (awarded by Case Western Reserve University). Hoffman was also selected for the Nebraska Governance and Technology Center’s Summer Grant Program.

Nicole Porter (University of Toledo) was selected for the Paul Steven Miller Memorial Award for “outstanding academic and public contributions to the field of labor and employment law scholarship.”

David P. Oppenheimer (UC-Berkeley) is happy to announce that the Stanford EdX webcourse that he teaches with Richard Ford will be available for free after January 4, 2021. He is also happy to hear from colleagues interested in comparative anti-discrimination law and to offer them membership in the Berkeley Center on Comparative Equality and Anti-Discrimination Law (annual report).

Merrick T. (Rick) Rossein (CUNY) published a four-volume edition this year of his treatise Employment Discrimination Law and Litigation on its 30th anniversary. Employment Discrimination Law and Litigation has been cited by two United States Courts of Appeals, United States District Court, the Iowa Supreme Court (twice), the Ohio Supreme Court, and several state trial courts.


Sandra Sperino (Cincinnati) was elected into the American Law Institute. Sperino and Suja Thomas were named co-recipients of the Pound Civil Justice Institute’s 2021 Civil Justice Scholarship Award for their book Unequal: How Court’s Undermine Discrimination Law (Oxford University Press) in which they examine the ways courts have impeded private enforcement of anti-discrimination laws through civil litigation.

Liz Tippett (University of Oregon) hosts a show on YouTube, which covers emerging employment law topics through interviews with scholars in our field. https://www.youtube.com/channel/UCNJNISicpDfNhq_A9ai9g/videos If you or your students have ideas for future topics or episodes, please reach out to her at tippettt@uoregon.edu.

Danielle Weatherby (Arkansas) and colleague, Cynthia Nance, dean emeritus and Nathan G. Gordon Professor of Law, were appointed to the Arkansas Advisory Committee for the U.S. Commission on Civil Rights to provide counsel and guidance on diversity, equity and inclusion-related issues.
Deborah A. Widiss (Indiana-Bloomington) is currently the Associate Dean for Research and Faculty Affairs at Indiana.

Ruqaiijah Yearby (Saint Louis University School of Law and Executive Director and Co-Founder, Institute for Healing Justice and Equity) received the University of Iowa College of Law Innovation, Business & Law Award (with Ana Santos Rutschman), served as an Investigator, Learning From COVID-19: Generating Actions to Achieve Health Equity, Missouri Foundation for Health, chaired the AALS Law, Medicine, and Health Care Section, served as a member of the Policy Committee of the American Public Health Association, Aging & Public Health Section and a member of the Health Equity Task Force, Satcher Health Leadership Institute, Morehouse School of Medicine (2020 – present). Yearby was a panelist for the RAND Corporation Health Care Resource Allocation Decisionmaking During a Pandemic Report, served as co-sponsor and steering committee member for the Health Justice Engaging Critical Perspectives in Health Law and Policy Conference and Workshops, and served as a reviewer for the Journal of Racial and Ethnic Health Disparities, American Journal of Bioethics, Journal of Law, Medicine & Ethics, Medical Humanities, Yale Journal of Health Policy, Law & Ethics.


**News from University of Louisville Brandeis School of Law:** Louisville Brandeis hosted the 15th Annual Colloquium on Scholarship in Employment and Labor Law. Two awards were bestowed. The Paul Steven Miller award to **Nicole B. Porter** & the Michael J. Zimmer award to **Sunjukta Pau**
2020 Advocacy and Publications

Advocacy Efforts


D. Wendy Greene served as a legal expert in Arnold v. Barbers Hill Independent School District: a high-profile civil rights case brought by the NAACP-Legal Defense Fund on behalf of two Black male students who challenged a school grooming policy that barred male students from wearing shoulder-length hairstyles and effectively required Black male students to cut off their locs in order to matriculate and participate in high school graduation. In August, the district court issued a groundbreaking decision enjoining enforcement of the school’s grooming policy on the grounds that it violated students’ constitutional rights to be free from sex discrimination, racial discrimination and arbitrary infringement upon their cultural expression.

In support of the C.R.O.W.N. Act of 2020 (also known as Creating a Respectful and Open World for Natural Hair Act)—federal legislation that Professor Greene co-drafted—Professor Greene authored a letter garnering 253 legal academics and law school administrators signatories from across the country. The letter of support was entered into the legislative record during the United States House Judiciary Committee mark-up held in September and the United States House of Representatives passed the C.R.O.W.N. Act also in September. Professor Greene also provided testimony on behalf of four C.R.O.W.N. Acts in Philadelphia, Maryland, New Orleans, and Wisconsin.


Ruqaijah Yearby submitted comments to the U.S. House of Representatives, Ways & Means Committee regarding the disproportionate impact of COVID-19 on communities of color.

Books


Chris Cameron, Doug Ray, and Bill Corbett, LABOR-MANAGEMENT RELATIONS: STRIKES, LOCKOUTS AND BOYCOTTS (2020-21 ed. West Publishing Co.).


**Book Chapters & Articles**

Bradley A. Areheart, Organizational Justice and Antidiscrimination, 104 Minn. L. Rev. 1921 (2020).


Michael Z. Green, Framing the Debate to Show How Big Guys Insist that Little Guys Arbitrate as a “Corporate Tool,” in DISCUSSIONS IN DISPUTE RESOLUTION: THE FORMATIVE ARTICLES (Cole, Hinshaw & Schneider, eds.) (Oxford University Press, forthcoming 2021).


Ann McGinley, Intersectional Cohorts, Dis/ability, and Class Actions, 47 FORD. URB. L. J. 293 (2020) (with Frank Rudy Cooper) (solicited for symposium).


Sandra Sperino, Caught by the Cat's Paw, 2019 BYU L. REV. 1219 (2020).


Danielle Weatherby, Student Discipline and the Active Avoidance Doctrine, 54 UC DAVIS LAW REV. 491 (November 2020).


**Upcoming Conferences, Lectures & Symposia**

- Equality Law Scholars’ Forum, to be held in the Fall of 2021 at Boston University, the organizers are Tristin Green (San Francisco), Leticia Saucedo (UC Davis) and Angela Onwuachi-Willig (Boston University).

**Recent Legal Developments**

**Employee Benefits:**

The Supreme Court held in *Thole v. U.S. Bank, N.A.* that participants and beneficiaries in defined-benefit plans do not have standing to bring claims for fiduciary breach, at least in the absence of catastrophic plan and sponsor failure. The plaintiffs, retirees from U.S. Bank, alleged that plan
fiduciaries breached their duties of loyalty and care, causing the plan to lose more than $748 million. The 5-4 majority affirmed the 8th Circuit’s holding that the plaintiffs had received all the benefits to which they were entitled and therefore lacked standing. Justice Kavanaugh, writing for the majority, found that the plaintiffs not have a sufficient stake in the outcome of the lawsuit because, win or lose, they would receive the same amount of monthly pension benefits from the plan. Justice Sotomayor, writing in dissent, argued that the rights of defined-benefit plan participants and beneficiaries were similar to the rights of those entitled to benefits from defined-contribution plans or grantor trusts. If defined benefit plan participants and beneficiaries were not entitled to the “equitable title” in the plan’s assets, then no one would hold that title. The dissent also would hold that a financial injury is not necessary to establish standing, as trust beneficiaries have standing to bring claims for a breach of loyalty even in the absence of any loss to the trust.

**Employment Discrimination:**

*Bostock v. Clayton County, 590 U.S. __ (2020)*

In three consolidated cases, the Supreme Court held that discrimination on the basis of sexual orientation or gender identity is “because of…sex” within the meaning of Title VII, and thus prohibited. In prior cases, the Supreme Court had held that the words “because of?” as a matter of ordinary meaning connote “but for” causation, and thus that the statute is violated where protected class status is a but for cause of the discrimination. In Bostock, the Court built on this holding, holding that Title VII’s text required a finding in favor of LGBT employees.

As the Court recognized, this conclusion followed logically from the fact that “it is impossible to discriminate against a person for being [gay] or transgender without discriminating against that individual based on sex.” For example, if a woman is terminated because of her intention to marry her female partner, she would not have been fired “but-for” her sex—if a man were to undertake similar conduct, the employer would not object. So too, all of the conduct that an employer might object to in a transgender employee—dress, appearance, self-identification—is conduct that an employer would not object to if the employer perceived the employee’s sex differently.

Bostock represents a major advance in LGBTQ rights, for the first time providing clear nationwide employment discrimination protections to LGBTQ employees. But it is also includes language helpful to all anti-discrimination litigants, including language recognizing that the “but for” standard is an expansive one that can be satisfied even where other substantial and legitimate factors played a role in the decision, provided protected class status made the difference. Other language that may be useful to all anti-discrimination litigants includes language suggesting that any “intent” requirement under Title VII does not entail a self-aware perception of the role of protected class status, and language reaffirming that stereotype-based decisions violate the Act.

*SPECIAL THANKS TO KATIE EYER FOR THIS SUBMISSION!*

**Labor Law:**

In February 2020 the House of Representatives passed the Protect the Right to Organize (PRO) Act. The PRO Act would beef up federal labor law in a number of key respects. It would provide a private right of action for unfair labor practices, along with civil penalties and compensatory damages; the Board would also be required to seek an injunction (along the lines of NLRA’s § 10(l)) to reinstate
workers fired for union activity. Employers would have less involvement in the setting and scheduling of elections and would not be permitted to hold mandatory employee meetings advocating against the union. The PRO Act also would eliminate the “right to work” provision allowing states to prohibit union security clauses, eliminate current prohibitions on secondary boycotts, and prohibit employers from permanently replacing striking employees. Unions and employers engaged in first-contract negotiations would have to go to mandatory interest arbitration if they could not reach an agreement. The Act also would modify definitions of employee and joint employment to be more inclusive. After passage by the House, the Senate did not consider the bill. Much of President-Elect Biden’s labor law platform is based on PRO Act reforms.

The National Labor Relations Board responded to the coronavirus pandemic by shutting down representation elections for a short period, followed by mail-in balloting. In November the Board issued guidance on situations in which mail ballots should be used in the context of the pandemic. The circumstances include: the Board is operating under “mandatory telework” status; coronavirus cases in the region have surpassed certain benchmarks; an in-person election would violate mandatory state or local health orders relating to maximum gathering size; the employer fails or refuses to commit to abide by the Board’s suggested election protocols; the employer is experiencing a COVID-19 outbreak at the facility; or other similarly compelling circumstances.

Because of the pandemic, the Board delayed its December 2019 election rule changes from April 16 to May 31. On May 30, 2020, the United States District Court for the District of Columbia issued an injunction in _AFL-CIO v. NLRB_ that prevented five of the Board’s planned changes to its election rules from going into effect, ruling that the NLRB failed to follow the proper administrative procedure in issuing the new regulation. The Court ruled that certain of the Board’s rule changes are substantive rather than procedural in nature and cannot go into effect until the Board engaged in the proper rulemaking procedure. The invalidated changes are: (1) giving parties the right to litigate eligibility issues prior to an election, instead of after; (2) instructing Regional Directors to normally not schedule an election prior to the 20th business day after the direction of election; (3) serving the voter list within 5 business days, instead of 2 days; (4) limiting election observers to those in the voting unit; and (5) instructing Regional Directors not to issue certifications, if a request for review is pending or the time to file such request has not yet passed. The Court’s injunction, however, will not halt implementation of the other rule changes announced by the Board.

A new rule on joint-employment status was issued and went into effect this year. The rule restores the joint-employer standard that the Board applied for several decades prior to its 2015 _Browning-Ferris_ decision. To be a joint employer under the final rule, a business must possess and exercise substantial direct and immediate control over one or more essential terms and conditions of employment of another employer’s employees. The final rule defines key terms, including “essential terms and conditions of employment,” “direct and immediate control,” and “substantial” direct and immediate control.

The Board issued final rules with further changes to the election processes based on rules proposed in 2019. The amendments would change the current blocking charge policy to either a vote-and-count or a vote-and-impound procedure. Elections would no longer be blocked by pending unfair labor practice charges, but the ballots would be either counted or impounded—depending on the nature of the charges—until the charges are resolved. However, the certification of results (including, where appropriate, a certification of representative) would not issue until there is a final disposition of the charge and its effect, if any, on the election petition. With respect to the voluntary recognition bar, the
new rule adopts the rule of Dana Corp., 351 NLRB 434 (2007), which requires employees to receive notice that voluntary recognition has been granted and to be given a 45-day open period within which to file an election petition before the recognition bar takes effect. In addition, the amendments would change certain construction-industry rules to require positive evidence of majority employee support. These rule changes became effective on June 1.

In General Motors LLC, 14-CA-197985 369 NLRB No. 127 (2020), the NLRB modified the standard for determining whether employees have been lawfully disciplined or discharged after making abusive or offensive statements in the course of otherwise protected activity. The ruling shifted cases involving offensive or abusive conduct in the course of otherwise-protected activity to the Wright Line standard, long used by the Board in mixed-motive cases. The standard announced replaced a variety of setting-specific standards—one for encounters with management (Atlantic Steel), another for exchanges between employees and postings on social media (a “totality of the circumstances” test), and a third for offensive statements and conduct on the picket line (Clear Pine Mouldings).

In 800 River Road Operating Company, LLC d/b/a Care One at New Milford, 369 NLRB No. 109, the Board overruled Total Security Management Illinois 1, LLC, 364 NLRB No. 106 (Aug. 26, 2016) and determined that employers have no statutory obligation to bargain before imposing discretionary discipline that is materially consistent with the employer’s established policy or practice. Total Security Management had required an employer, with limited exceptions, to provide a union with notice and opportunity to bargain about discretionary elements of an existing disciplinary policy before imposing “serious discipline,” such as suspension, demotion or discharge. 800 River Road returns to the prior rule that did not require bargaining.

In Bethany College, 369 NLRB No. 98, the Board held that it has no jurisdiction over the faculty at religious institutions of higher education, overruling the prior jurisdictional standard set forth in Pacific Lutheran University, 361 NLRB 1404 (2014). The Board adopted the jurisdictional test announced by the District of Columbia Circuit in University of Great Falls v. NLRB, 278 F.3d 1335 (D.C. Cir. 2002).

In 2020 the Board also invited briefs on the current “contract bar” doctrine as well as the use of large inflatables such as Scabby the Rat in picketing and protests. At present the Board has not issued rules on these issues, although the General Counsel has repeatedly expressed his concern that the use of inflatables can be coercive.

CNN agreed to pay $76 million in backpay, the largest monetary remedy in the history of the National Labor Relations Board, in January 2020. The dispute originated in 2003 when CNN terminated a contract with a company that had been providing CNN video services and hired new employees to perform the same work without recognizing or bargaining with the two unions that had represented the company’s employees. The settlement came amidst continuing litigation over whether CNN had failed to live up to its obligations as a successor employer and joint employer to bargain with the two unions.

**State Law Developments:**

California voters passed Proposition 22, which changed the status of app-based transportation (rideshare) and delivery drivers from employees under California’s AB 5 (and the Dynamex decision) to a version of independent contractors. The ballot initiative defined app-based drivers as workers who (a) provide delivery services on an on-demand basis through a business’s online-enabled
application or platform or (b) use a personal vehicle to provide prearranged transportation services for compensation via a business’s online-enabled application or platform. Prop 22 stripped traditional employment protection from these workers but also imposed certain requirements on ride-sharing companies. These requirements include: insuring that drivers make at least 120% of the minimum wage during their “engaged time;” limiting drivers to 12 hours during a 24-hour period, unless the driver has been logged off for an uninterrupted 6 hours; providing healthcare subsidies for drivers who drive at least 25 hours a week for three months, and a lesser subsidy for those driving 15-25 hours per week; and requiring companies to provide or make available occupational accident, death, and disability insurance. Prop 22 also required the companies to: develop anti-discrimination and sexual harassment policies; develop driver training programs; have zero-tolerance policies for driving under the influence of drugs or alcohol; and require criminal background checks for drivers.