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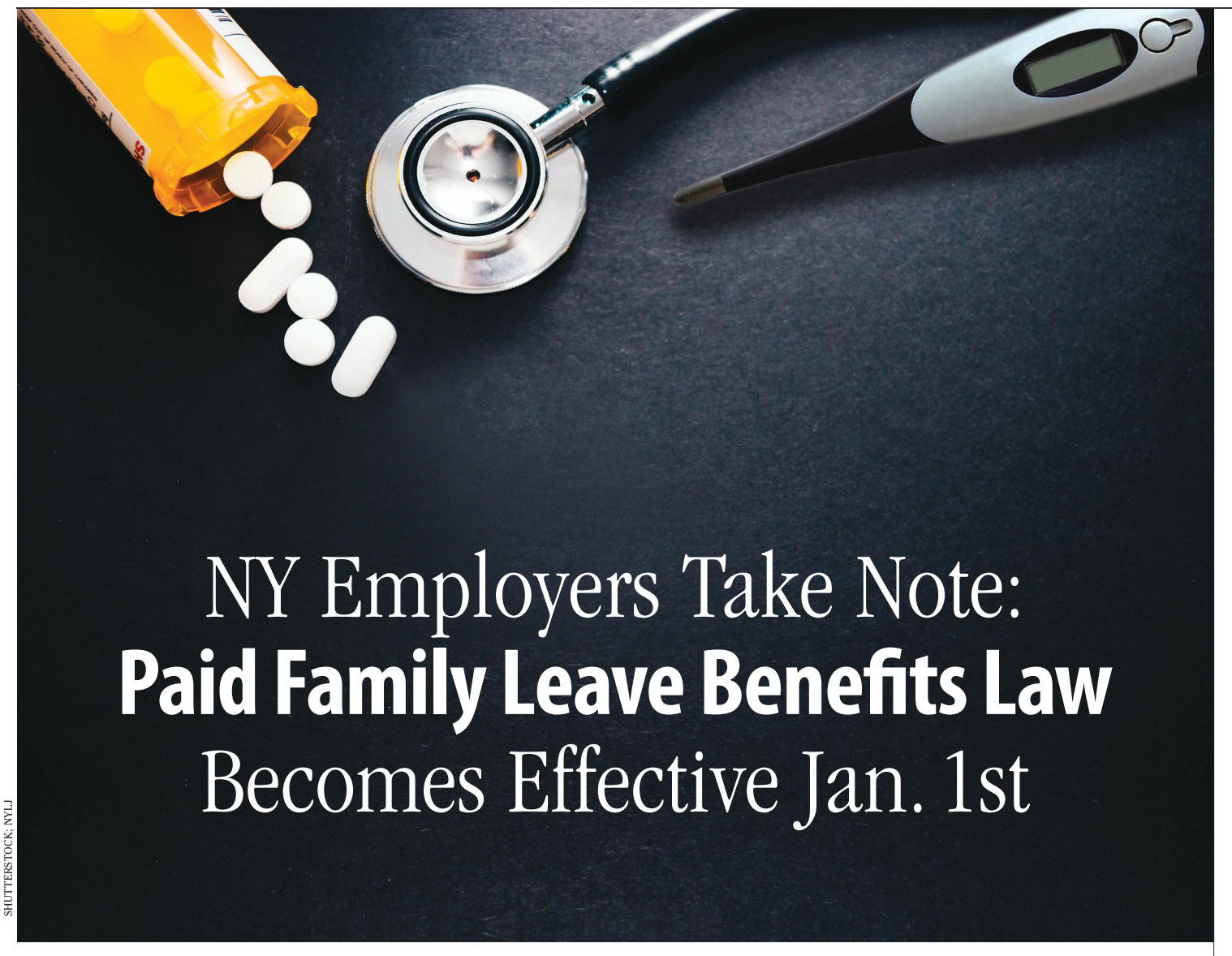

SHUTTERSTOCK; NYLJ

NY Employers Take Note: **Paid Family Leave Benefits Law** Becomes Effective Jan. 1st

BY ERIC RAPHAN
AND LINDSAY STONE

On Jan. 1, 2018, the New York Paid Family Leave Benefits Law (NYPFL) takes effect throughout New York for private-sector employers. The NYPFL, which was signed into law by Gov. Andrew Cuomo and finalized by the New York Worker's Compensation Board (WCB) in July 2017, guarantees job-protected paid time off to almost every full-time and part-time private-sector New York employee. Lisa Nagele-Piazza, "New York Paid-Family-Leave Final Regulations Are Available to Employers," Soc'y for Human Resource Mgmt. (Aug. 1, 2017).

In enacting the NYPFL, New York joined California, Rhode Island and New Jersey as the only states in the nation that provide paid family leave benefits; however, once fully implemented, the NYPFL will be the most comprehensive paid family leave law in the nation. State of N.Y., "Paid Family Leave: How It Works" (last visited Sept. 27, 2017). New York private-sector employers must adhere to the NYPFL's mandates (including its employee notice provisions) no later than Jan. 1, 2018. Therefore, it is paramount that employers make sure they are prepared to comply with the NYPFL prior to that date. This article describes the NYPFL and its requirements, and recommends steps that New York employers can take to comply with the law by January 1.

Eligible Employees

Virtually every full-time and part-time private-sector employee who works in New York will be eligible for benefits under the NYPFL, depending upon their length of service. Id. Full-time private-sector employees, or those with a regular work schedule of 20 or more hours per week, become eligible to receive benefits under the NYPFL after 26 weeks of employment. Part-time private-sector employees, or those who work less than 20 hours per week, become eligible for NYPFL benefits after 175 days of employment. Id. Freelancers and independent contractors, among other categories of workers, are not covered by the law and are thus not eligible to receive NYPFL benefits. N.Y. Workers' Compensation Board, "Laws, Regulations and Decisions—Paid Family Leave" (last visited Sept. 27, 2017). Other categories of exempted workers include volunteers, livery drivers, black car operators, recipients of charitable aid, and teachers. Id.

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Employee Benefits Provided by the NYPFL

Once effective, the NYPFL will provide three primary benefits to eligible employees: (1) paid leave, provided the reason for the leave is covered by the law; (2) job protection upon return from paid leave; and (3) continuation of health insurance during paid leave.

Paid Leave. Beginning on Jan. 1, 2018, the NYPFL will entitle eligible employees to 8 weeks of paid leave, paid at either: (1) 50 percent of the employee's average weekly wage, or (2) 50 percent of the New York State Average Weekly Wage (NYSAWW), whichever is less. Id. The NYSAWW is computed for each calendar year by the New York State Department of Labor, and is currently $1,305.92. N.Y. Dep't of Labor, "New York State Average Weekly Wage (NYSAWW)" (last visited Sept. 27, 2017). Both the length of the NYPFL's leave allocation and required wages for paid leave are set to increase each year until 2021, as follows:

- Jan. 1, 2019: 10 weeks of paid leave, paid at the lesser of 55 percent of the employee's average weekly wage or NYSAWW;
- Jan. 1, 2020: 10 weeks of paid leave, paid at the lesser of 60 percent of the employee's average weekly wage or NYSAWW;
- Jan. 1, 2021: 12 weeks of paid leave, paid at the lesser of 67 percent of the employee's average weekly wage or NYSAWW.

Employers may not require employees to take all available sick or vacation leave before using NYPFL leave, but may permit employees to supplement NYPFL benefits up to their full salary amount with accrued paid time off during NYPFL leave. N.Y. Workers' Compensation Board, "Laws, Regulations and Decisions—Paid Family Leave," supra.

Eligible employees may use NYPFL leave in any of three specific situations: (1) to provide physical or psychological care to a family member who is in "close and continuing proximity" to the employee due to the family member's serious health condition; (2) to bond with a newborn child during the first year of the child's life, or with a newly placed adopted or foster child during the child's first year of placement; and (3) for any qualifying reason as provided for under the Family and Medical Leave Act (FMLA) arising from the

Virtually every full-time and part-time private-sector employee who works in New York will be eligible for benefits under the NYPFL, depending upon their length of service.

employee's spouse, domestic partner, child or parent being on active military duty, or being notified of an impending call to active military duty. ("Family member" is not defined by applicable regulations adopted by the New York Workers' Compensation Board, but the state has noted that the term includes spouses, domestic partners, children, parents, parents-in-law, grandparents, and grandchildren. A "serious health condition" is defined as "an illness, injury, impairment, or physical or mental condition that involves: (1) inpatient care in a hospital, hospice, or residential health care facility; or (2) continuing treatment or continuing super- » Page 16

Reasonable Accommodation: **Thoughts of a Cancer Survivor**

BY JAMES HOLAHAN

The sun was bright and warm as I drove home from a client meeting in the southwest corner of New York. I deliberately avoided the interstate highways so I could explore the rural beauty of the backroads. I moved in and out of cell phone range—which was fine because I didn't want to field any work-related calls. About halfway home, my cell phone began vibrating and I hit the home button, immediately recognizing the number of my primary care physician.

My physician's receptionist asked whether I could meet with the doctor. I explained that I was driving and asked if I could call her the following day. She then asked if I could stop in that afternoon—I held my breath. I told her that I was almost an hour away, and she responded that the doctor would wait for me.

Right away, I knew it was about the results of a biopsy that had been performed 10 days ago on a lump in my left side. I also knew that the news wasn't good—good news can be given over the phone. The meeting with my physician is a blur to this day. I don't know how long I was there. I don't recall driving home.

The lump was cancerous—sarcoma, to be exact.

Working at Being More Than My Diagnosis

I am a management attorney and have been advising employers about labor and employment matters for 30 years. I'm regularly asked to give advice about how to provide reasonable accommodations to employees with serious illnesses.

That experience didn't make coping with my potentially lethal disease any easier. When critical illness is the focus of legal advice, the illness is abstract and impersonal. When it becomes the arbiter of your continued existence, it is overwhelmingly concrete and close.

I hope that sharing my personal experiences in this article will help employers, and the lawyers who guide them, make better decisions when they have an opportunity to accommodate a cancer patient. Through my personal battle with cancer, I learned that my understanding of the disease and those who must confront it was seriously lacking.

Confronting Reality

My physician tried to be encouraging, suggesting that it appeared we found the cancer early. Yet, refining the diagnosis and formulating a treatment plan was difficult. The plan I ultimately » Page 19

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Lawmakers Slowly Begin to Regulate **Gig Economy**

BY MATTHEW STEINBERG
AND RAYMOND BERTI

The rise of the gig economy, alternatively termed the "on-demand" or "peer-to-peer" economy, has received heavy scrutiny in recent years. Many pundits have lauded the freedom, flexibility and entrepreneurial opportunities afforded by such work. Yet, others have been less sanguine, noting gig workers face financial uncertainty and insecurity and lack critical benefits and protections.

Indeed, the most salient—and controversial—aspect of the gig economy is that it is chiefly comprised of independent contractors, as opposed to full-time employees. This is no niche issue; the gig economy presently employs about 20 to 30 percent of the American workforce, with that estimate increasing to 40 or even 50 percent in the next three years, according to various studies.

Despite such significant statistics, lawmakers have been extremely slow to address this radical shift in the labor market. Until now.

NYC's Freelance Isn't Free Act

This past year, gig economy workers scored their first legislative victory to date in New York City, which implemented the Freelance Isn't Free Act (FIFA) on May 15, 2017. The law, which is the first of its kind in the country, requires the parties of almost every engagement of work to enter into a written agreement if that work is valued at $800 or more over a four-month period.

FIFA is written broadly; so long as the $800 aggregate threshold is reached, it appears to apply with equal force both to large corporations hiring sophisticated software developers and to parents hiring a babysitter.

The law further requires the hiring party to deliver payment to the freelance worker within the time specified in the written agreement, or within 30 days of completion of the work, if the agreement is silent on this point. The law further prohibits hiring parties from retaliating against freelancers for exercising their rights under FIFA.

Moreover, the New York City Department of Consumer Affairs recently promulgated rules prohibiting hiring parties from including class or collective action waivers, mandatory arbitration provisions, or confidentiality provisions which preclude the disclosure of the terms of the agreement to the Director of the New York City Office of Labor Standards.

Finally, and perhaps most significantly, the law creates a private right of action for freelancers, allowing them to commence a civil action for FIFA violations to recover damages, attorney fees and costs.

FIFA Portends a National Trend

The Freelancers Union, which helped champion FIFA in New York City, has publicly expressed its intent to help enact similar laws across the country.

Additionally, over the past year, there has been a flurry of state and federal legislative activity designed to extend benefits to gig economy workers.

For instance, there has been a strong push to provide "probable benefits" to independent contractors, which would allow these workers to maintain employment benefits, regardless of where they work.

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At least two states—New Jersey and Washington—have introduced legislation that would implement portable benefits programs, and another two states—New York and California—are reportedly soon to follow.

Meanwhile, over the summer, Sen. Mark Warner (D-Va.) and Rep. Suzan DelBene (D-Wash.) introduced legislation that would provide federal grants to state and local governments, as well as non-profit organizations, to experiment with portable benefits programs. At the time of this writing, these measures are all still pending.

Criticism From All Sides

Unsurprisingly, these recent legislative efforts have not gone unchallenged in the court of public opinion.

FIFA critics have expressed concerns about the law being overbroad in scope (as noted above, it could plau- » Page 16

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Inside

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HR Policy Acknowledgments Overseas: A Whole Other World Out There

BY DONALD C. DOWLING JR.


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American employers often require their U.S. domestic staff to execute—that is, to wet-ink sign or to computer mouse-click—acknowledgements that say, in essence, "I have received, and I agree to comply with" an employee handbook, code of conduct, HR policy, work rule, restrictive covenant or compensation/bonus/benefit/equity plan.

The purpose of an employee-executed acknowledgement is to reduce the chance some worker somewhere might someday claim ignorance of some employer policy. An acknowledgement can be vital, for example, when an employer needs to discipline someone for violating a rule—or needs to enforce a provision in a benefit plan—that an employee seeks to sidestep.

Locally in the United States, employee-signed acknowledgements have become routine, and collecting them under America's employment-at-will regime is fairly straightforward. Meanwhile, multinationals increasingly seek to collect employee acknowledgements *overseas*. But the mechanics for collecting acknowledgements from overseas staff raises challenges, and gets surprisingly complex. Here we discuss the need for, the legal/logistical challenges to, and the compliance strategies for international employee acknowledgements.

Need for Acknowledgements

U.S.-headquartered multinationals increasingly promulgate *global HR initiatives* like global codes of conduct/ethics and international HR policies or rules addressing bribery, antitrust, insider-trading, conflicts of interests, discrimination/harassment, workplace safety and other topics. Other global HR initiatives include staff cross-border handbooks, whistleblower hotlines, data privacy notices, restrictive covenants and intellectual property assignments, employment-contract amendments and compensation/benefit/bonus/equity plans.

Of course, a multinational cannot afford to "soft open" a global HR initiative, slipping it onto a company intranet site and expecting affiliate employees worldwide somehow to find, read, understand and comply with it. Later, when the employer needs to enforce its global HR initiative, it may bear a burden to prove it had duly communicated relevant provisions to whatever employee may have violated it and is now challenging it. Being able to produce an employee-executed acknowledgement can therefore be vital.

For example, no employer trying to enforce its anti-bribery policy wants to face an employee claiming something to the effect of: *What? I just made a huge sale to the government, and you're firing me? OK, maybe my client-entertainment expenses ran a bit high—but I was just doing my job. I didn't know about this so-called policy on entertaining government customers. Was it buried somewhere on the company intranet? I never agreed to follow this absurd rule that would prevent me from making sales!*

For that matter, employee-executed acknowledgements could actually be required. A multinational might interpret the U.S. Foreign Corrupt Practices Act, Sarbanes-Oxley, Dodd-Frank and U.S. federal sentencing guidelines as requiring organizations not only to communicate compliance policies to employees worldwide, but also to get employee "buy-in." And law and best practices in some jurisdictions (for example, Austria, Czech Republic, Finland) all but require employee-signed acknowledgements when an employer changes or adds new workplace rules. Other jurisdictions (for example, Australia, Belgium, Canada, England, Ireland, Germany, Norway) look to whether a workplace code, policy, rule or benefit is "contractual"—these jurisdictions elevate certain workplace initiatives to the level of employment contracts that employees must sign or acknowledge.

> The mechanics for **collecting acknowledgements** from overseas staff raises challenges, and **gets surprisingly complex.**

The upshot is that many multinationals feel they need to be able to produce duly-executed employee acknowledgements of certain global HR initiatives.

Legal, Logistical Challenges

When considering whether to implement any employee-acknowledgement process outside the United States as to a global (or overseas-local) HR initiative, confront the problem that the *mechanics* of staff acknowledgements abroad get difficult. Specifically, four legal and logistical challenges complicate collecting employee-executed acknowledgements abroad: (1) presumptive coercion, (2) ineffective employment contract amendment, (3) non-signers and (4) proof problems.

Presumptive coercion. Overseas, employers cannot necessarily insist all employees execute some HR document. Courts in much of Northern Continental Europe and in some countries beyond deem employee-signed agreements, including staff acknowledgments, void as presumptively coerced. The issue is the inherent inequality of bargaining power between an employer and staff—almost like a contract with a minor or someone adjudicated mentally incompetent.

Some countries actually presume workers have no free choice when their boss orders them to sign a boilerplate form; law presumes the subtext to an employee acknowledgement request is "*sign—or you're fired!,"* even if management did not state the request quite so bluntly. According to one European Union agency: "Employees are almost never in a position to freely give, refuse or revoke consent, given the dependency that results from the employer/employee relationship. Given the imbalance of power, employees can only give free consent in exceptional circumstances, when no consequences at all are connected to acceptance or rejection of an offer." EU Article 29 Working Party Opinion 2/2017 on Data Processing at Work, WP 249, 6/8/2017, at §6.2. In these jurisdictions, staff acknowledgements may be worthless, deemed void as presumptively coerced.

Ineffective employment contract amendment. We mentioned that some common law and civil law jurisdictions treat certain employer ini-

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What Emerging **Multiracial Plaintiff** Cases Suggest About **Employment Discrimination Law**

BY TANYA KATERÍ HERNÁNDEZ

With the growth of a mixed-race population in the United States that identifies itself as "multiracial," legal commentators have begun to raise concerns about how employment discrimination law responds to the claims of multiracial plaintiffs.

The U.S. Census Bureau began permitting respondents to simultaneously select multiple racial categories to designate their multiracial backgrounds with the 2000 Census. With the release of data for both the 2000 and 2010 census years much media attention has followed the fact that first 2.4 percent then 2.9 percent of the population selected two or more races. The Census Bureau projects that the self-identified multiracial population will triple by 2060. Yet mixed-race peoples are not new. Demographer Ann Morning notes that their early presence in North America was noted in colonial records as early as the 1630s.

However, the presence of fluid mixed-race racial identities within allegations of employment discrimination leads some legal commentators to conclude that civil rights laws are in urgent need of reform because they were built upon a strictly binary foundation of blackness and whiteness. Building upon the social movement for recognition of multiracial identity on the census and generally, these commentators conclude that courts misunderstand the nature of discrimination against mixed-race persons when they do not specifically acknowledge the distinctiveness of their multiracial identity. Even U.S. Supreme Court litigation has begun to associate the growth of multiracial identity with the obsolescence of civil rights policies. Particularly worrisome has been the judicial suggestion that the growth of multiracial identity undercuts the legitimacy of affirmative action policies that have long sought to pursue racial equality.

The supposition that the multiracial experience of discrimination is exceptional, and not well understood or handled by present anti-discrimination law, is evident in the publications of multiracial-identity scholars like Ken Nakasu Davison, Leora Eisenstadt, Tina Fernandes, Nancy Leong, Camille Gear Rich, and Scot Rives. I coin the term "multiracial-identity scholars" to refer to authors whose scholarship promotes the recognition of the distinct challenges that multiracial identity now presumably presents for civil rights law.

The crux of the multiracial-identity scholar critique of the emerging cases is that courts often reframe multiracial plaintiffs' self-identities by describing mixed-race plaintiffs as "monoracial" minority individuals. Specifically, in many cases, judges refer to mixed-race complainants as solely African American or black. These scholars take issue with this characterization, arguing it hinders the recognition of the racial discrimination that multiracial individuals experience. This essay disputes that premise because the cases themselves illuminate the disjuncture between the theoretical critique they make and the actual adequacy of the judicial administration of the claims.

A close examination of such claims indicates that in an overwhelming number of the cases scholars rely on, the facts present a complainant whose description of the alleged discrimination includes pointed, derogatory comments about non-whiteness and blackness in particular. The overarching commonality in the cases is the exceptionalism of blackness and non-whiteness, rather than multiraciality, as subject to victimization. Although the plaintiffs may personally identify as multiracial persons, they present allegations of public discrimination rooted in a specific non-whiteness and often black bias that is not novel or particular to mixed-race persons, nor especially difficult for judges to understand. For instance, the employment discrimination case of Marlon Hattimore in *Richmond v. General Nutrition Centers,* No. 08 Civ. 3577(LTS)(HBP), 2011 WL 2493527 (S.D.N.Y. June 22, 2011), presents a paradigmatic illustration of the adequacy of current law to address the racial discrimination that multiracial-identified persons encounter.

Marlon Hattimore was hired as a sales associate in 2004 for GNC (General Nutrition Center) in its Newburgh, N.Y. store. After Hattimore was hired, the regional manager visited the store and upon seeing Hattimore he told the store manager that too many black people worked in the store and that Hattimore should thus be fired. Only after the regional manager was informed that Hattimore was biracial, did he desist from firing Hattimore and begin to treat him with greater civility.

Hattimore was eventually assigned to work at a different GNC store location and promoted to a store manager position. However, while Hattimore's biracial status somewhat insulated him from the regional manager's hostility against black people as a group, Hattimore was still paid less than two subordinate, less experienced white employees and was subjected to a racially hostile workplace. Indeed, during his two-year tenure as a store manager Hattimore endured a relentless pattern of hearing racially charged statements from the regional manager. For instance, the regional manager referred to another employee who was black as "ghetto black trash" and remarked, "you can't take a hoodlum and put him in a business suit." Hattimore also indicated that the regional manager compelled him to terminate a black employee by threatening to fire Hattimore if he did not comply. Finally, Hattimore claimed he was terminated and replaced by a white individual and that the regional manager and GNC headquarters refused to tell him the reason he was fired.

> The presence of **fluid mixed-race racial identities** within allegations of employment discrimination leads some legal commentators to conclude that **civil rights laws are in urgent need of reform.**

Hattimore then decided to join three other GNC employees in filing a joint lawsuit for racial discrimination. Hattimore's three co-claimants identified as black men from Jamaica and Ghana respectively. GNC requested that the claims be dismissed outright on a motion for summary judgment. The court denied GNC's petition to have the disparate pay and discriminatory termination claims dismissed. Here the judge denied the motion due to evidence in the record of unequal pay and the existence of a factual dispute as to whether the claimant was officially terminated. With the denial of the employer's motion for summary judgment, the parties entered into a favorable settlement for Hattimore. Simply having a racial discrimination case "survive" employer requests for dismissal before a trial is scheduled is a victory in of itself given the phenomenon of disproportionate early dismissal of vast numbers of racial discrimination cases across the country.

Nevertheless, the significance of this legal victory for Hattimore is lost in the multiracial-identity scholar concern with the lack of a judicial elaboration of mixed-race identity. For the multiracial-identity scholars, Hattimore's case represents yet another court again treating a biracial claimant with African ancestry as solely black. However, the court's references to Hattimore as being in the targeted group of blacks correlated with Hattimore's claim of being treated poorly because of his black ancestry, not because he is racially mixed. In fact, his biracial status was at times a mitigating factor in the discrimination against workers the regional manager identified as solely "black." More importantly, it was a workplace where "whiteness" was rewarded and blackness was ultimately penalized in whatever proportion it represented in an employee's ancestry. In turn, the court focused on the salience of blackness that the claimant himself articulated and viewed the claimant's allegations as warranting further judicial inquiry. The court treated his discrimination claim with respect and Hattimore was able to resolve the dispute directly with an out-of-court settlement. Multiracial-identity scholars do not articulate how Hattimore's case would have benefitted from the court focusing on Hattimore's personal identity as biracial when his allegations were rooted in the anti-black bias that he and other employees experienced.

The case then is inappropriately labeled by multiracial-identity scholars as illustrating a judicial confusion about the nature of multiracial discrimination or the inadequacy of the existing anti-discrimination legal framework. Instead, the case demonstrates the coherence of judicially focusing on blackness when the claimant articulates a factual pattern enmeshed in anti-black bias. Like Hattimore's case the vast majority of multiracial stories of discrimination entail allegations of non-white or specifically anti-black bias rather than prejudice rooted in hostility towards racial mixture itself.

In short, the increase in the number of individuals identifying as mixed-race or multiracial does not present unique challenges to the pursuit of equality inasmuch as the cases are mired in a long existing morass of bias against non-whiteness and its intimate connection to white privilege. Well-meaning but misplaced critiques of how multiracial claims are processed should not serve as a basis for questioning the formulation of traditional employment discrimination law. Rather than point to a need for a shift away from the existing civil rights laws, the cases instead indicate the need for further support of the current structures. The multiracial discrimination cases highlight the continued need for attention to white supremacy and for fortifying the focus of civil rights law on racial privilege and the lingering legacy of bias against non-whites. Multiracial persons and all other victims of discrimination are better served when judges hone in on the direct source of discrimination. Our current climate needs such judicial clarity now more than ever.

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Family

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vision by a health care provider." "Paid Family Leave: How It Works," supra. Employers may require employees to use NYPFL leave concurrently with leave provided by other statutes, such as the FMLA. N.Y. Workers' Compensation Board, "Laws, Regulations and Decisions—Paid Family Leave," supra.

Job Protection. Employers are required to reinstate an employee returning from leave under the NYPFL to either: (1) his or her prior position; or (2) a comparable position with comparable pay, benefits, and other terms and conditions of employment. State of N.Y., "New York State Paid Family Leave: Employers" (last visited Sept. 27, 2017). Additionally, employers are prohibited from discriminating or retaliating against employees who use leave to which they are entitled under the NYPFL. N.Y. Workers' Compensation Board, "Laws, Regulations and Decisions—Paid Family Leave," supra.

Health Insurance Continuation. Employers are also prohibited from discontinuing health insurance coverage for employees who are out on paid leave pursuant to the NYPFL. N.Y. Workers' Compensation Board, "Laws, Regulations and Decisions—Paid Family Leave," supra. However, employers may ask that employees continue to pay any health plan premiums throughout the duration of leave. Id. In the event that an employer's health plan or benefits change while an employee is using NYPFL leave, the employee on leave is entitled to the new plan or benefits. Id.

NYPFL Benefit Funding

NYPFL leave is intended to be fully employee-funded through payroll deductions, and regulations promulgated by the WCB require all insurance carriers who provide short-term disability benefits to also provide NYPFL benefits. State of N.Y., "Paid Family Leave: How It Works," supra; N.Y. Workers' Compensation Board, "Laws, Regulations and Decisions—Paid Family Leave," supra. The New York Department of Financial Services has determined that maximum employee contributions for NYPFL coverage will be set at 0.126 percent of an employee's weekly wage, up to and not exceeding the statewide average weekly wage. N.Y. State Dep't of Fin. Servs., "Decision on Premium Rate for Family Leave Benefits and Maximum Employee Contribution for Coverage Beginning January 1, 2018" (June 1, 2017). An employer's failure to provide coverage for NYPFL leave benefits may result in the imposition of a fine equal to 0.5 percent of the employer's weekly payroll for the period of such failure, along with a separate penalty not to exceed $500. N.Y. Workers' Compensation Board, "Laws, Regulations and Decisions—Paid Family Leave," supra.

Employer Notice Obligations

The NYPFL explicitly obligates employers to provide employees with clear notice of their rights under the law. Id. Employers who maintain written guidance regarding employee benefits and rights, including employee manuals, handbooks or policies, must include "information concerning leave under [the NYPFL] and employee obligations under [the NYPFL]" in those materials. Id. Employers without handbooks or similar documents must provide stand-alone written guidance of employee rights and obligations under the law. Id. Finally, employers must display or post a printed notice concerning employee rights under the NYPFL, which may be obtained from a disability insurance carrier, "in plain view where all employees and/or applicants can readily see it." Id.

Recommendations For Compliance

There are several steps that New York employers can take to become compliant with the NYPFL by Jan. 1, 2018. As an initial matter, employers who have not already done so should contact their disability insurance carriers to understand the terms of the insurer's NYPFL coverage and confirm the cost of related premiums in order to determine the proper timing and amount of employee payroll deductions. Unionized employers should also contact appropriate union representatives in order to obtain authorization to begin making payroll deductions as necessary, including communicating any proposed deduction amounts. Once the calculation and method of NYPFL-related payroll deductions has been established, New York employers should obtain, distribute, and collect completed versions of any necessary forms provided by their disability insurance carriers.

Employers should additionally prepare to provide proper notice to their employees of their rights and obligations under the NYPFL. For instance, employers who maintain written policies regarding benefits should be sure to adopt a NYPFL policy for inclusion in those materials. Employers without handbooks or similar materials should prepare a stand-alone policy regarding employee NYPFL rights and obligations for distribution beginning Jan. 1, 2018. Finally, all employers with eligible employees should obtain the required printed notice concerning the NYPFL from their disability insurance carriers, and prominently post them.

Most significantly, employers should prepare for lengthier or new employee leave requests in 2018 and beyond. As an initial matter, many employees who would already be eligible for several weeks of leave under other statutes—most notably, the FMLA—will also be entitled to an additional eight weeks of paid leave under the NYPFL, which will not run concurrently unless the employer maintains a policy to this effect. Additionally, many employers who are not covered by other leave statutes will now be required to prepare for, provide and account for the paid leave required under the far less restrictive terms of the NYPFL. Preparation for new or increased employee leave should also include thorough communication to management, including in the form of training, regarding how to administer leave and how to avoid actual or perceived discrimination on the basis of NYPFL leave use.

While the NYPFL may impose new or unfamiliar obligations upon New York employers, compliance with the law's requirements by Jan. 1, 2018 is essential. Fortunately, regulations adopted by the WCB provide useful guidance for employers, who also have valuable compliance allies in existing disability insurance carriers. Employers should ensure that payroll deduction programs are in place and that they have properly communicated the rights and obligations imposed by the NYPFL to their employees by Jan. 1, 2018. Additionally, employers should review existing leave policies and understand how potentially extended leaves will affect their workforce. With a thorough plan of action in place, New York employers both can and should be prepared for the NYPFL to take effect on the first day of the new year.

Gig

« Continued from page 13

sibly apply to traditionally informal arrangements like babysitting or dog-walking); counterproductive (to avoid liability, New York-based companies may seek to hire freelancers beyond city limits); and unduly burdensome on employers (a dispute over $800 could potentially cost an employer tens of thousands of dollars). Nevertheless, it is still too early to evaluate whether these criticisms will prove to have merit.

On the other hand, many have argued these recent legislative measures do not go far enough, contending that the vast majority of workers in the gig economy cannot plausibly earn enough to make a living wage or to obtain the health insurance and retirement benefits available to their full-time counterparts.

Accordingly, these critics have called for more sweeping solutions like the elimination of the legal distinction between full-time employees and independent contractors, or, in the alternative, the creation of a third category of worker akin to a "dependent contractor."

In addition, advocates of the universal basic income have also entered the fray, arguing that providing every citizen with a guaranteed, standardized paycheck can offset the negative aspects of the gig economy. Similarly, proponents of a single-player healthcare system have relied upon the rise of the gig economy to make their case that tying healthcare benefits to employment is outdated and an ineffective means of providing such benefits to Americans.

Still others have observed that the increasing use of digital labor platforms, which rely heavily on data transparency, may soon render laws like FIFA largely unnecessary, at least to more skilled and/or sophisticated freelancers, such as software developers.

The reasoning behind such criticism is that these technology-based platforms deliver precisely the accountability sought to be imposed by legislation like FIFA, by providing freelancers the ability to review and compare potential employers. For instance, should an employer fail to pay a freelancer, or pay late, that information will become public on the platform, and freelancers will be less likely to work with that employer in the future. In short, the argument is that the same technologies that created the gig economy may be able to solve the very problems it produced.

(It should be noted that, if this technology-based critique proves to be correct, then going forward, FIFA may be used primarily not to resolve disputes between corporations and full-time freelancers, but to settle conflicts arising from traditionally informal agreements between unsophisticated individuals, i.e., lawsuits filed by babysitters against parents.)

Looking Ahead

In sum, the rise of the gig economy, along with the increasing number of independent contractors in the workforce, presents unique social and economic challenges. Although these challenges have been widely covered by the media over the past few years, lawmakers have only recently begun to engage with them, and with limited success. Nevertheless, as calls for reform inevitably grow louder, we can expect to see more legislative action across the country. Though it remains uncertain just how sweeping such reform may be, one thing is clear: the gig economy is here to stay.

The Future of **Class Action Waivers** In **Employment Arbitration Agreements**

BY DAVID S. FEATHER

For the past several years, management-side employment and labor law attorneys have felt relatively confident in advising employers that it was lawful to have class/collective action waivers in arbitration agreements with their employees.

This belief was based, in large part, on two relevant, although not entirely on-point, U.S. Supreme Court decisions, as well as a number of subsequent district and circuit court decisions. However, a recent split within the Circuit Courts on this issue has placed that confidence in doubt. The Supreme Court granted certiorari in three such recent Circuit cases, consolidated those cases, and heard oral argument on them on Oct. 2, 2017. A decision, which should definitely resolve the issue of the enforceability of such waivers, is not expected until late Spring at the earliest.

Prior Supreme Court Decisions

In *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011), the Supreme Court held that the Federal Arbitration Act (FAA) preempted state law doctrines that "disfavor arbitration" if those laws required the availability of class-wide arbitrations. According to the Supreme Court, such statutes interfere with the fundamental attributes of arbitration and create a scheme which is inconsistent with the FAA.

This was followed by *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013), in which the Supreme Court held that congressional approval of Fed. R. Civ. P. 23 did not establish an entitlement to class proceedings for the vindication of statutory rights. In *Italian Colors* the Supreme Court also rejected the respondents' argument that the waiver of the right to proceed via class action violated the "effective vindication" exception to the FAA. This exception allows a court to invalidate, on public policy grounds, arbitration agreements which effectively prevent a party from actually or effectively pursuing his or her statutory rights/remedies. In so finding, the court held that the fact that waiving one's right to proceed via class action, while perhaps not making it worth the expense involved in proving a statutory remedy, does not constitute the elimination of the right to pursue that remedy. Simply put, the court stated that a class action waiver merely limits arbitration to the two contracting parties, and does not eliminate those parties' right to pursue their statutory remedy.

Although *AT&T Mobility* arose in the context of a consumer class action matter, and *Italian Colors* dealt with an alleged violation of the Sherman Act by a credit card company, following these decisions many (but not all) federal district courts considered them dispositive of the issue of whether class/collective action waivers in employment arbitration agreements were lawful. See, e.g., *Chambers v. Groome Transp. of Ala.*, 41 F. Supp. 3d 1327 (M.D. AL 2014); *Porreca v. Rose Group*, 2013 U.S. Dist. Lexis 173587 (E.D. PA 2013); but cf. *Sutherland v. Ernst & Young*, 847 F. Supp. 2d 528 (S.D.N.Y. 2012) (finding the agreement at issue would operate as a waiver of the plaintiff's right to pursue her statutory remedies pursuant to the FLSA, and thus holding that the doctrine articulated by the Supreme Court in *AT&T Mobility* was inapplicable to the facts therein).

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Unanimity in Circuit Courts

Courts deciding whether waivers of class/collective actions in employment arbitration agreements are enforceable typically discuss, and resolve, two key issues. First is the inherent tension between two statutes, the FAA and the National Labor Relations Act (NLRA). On one hand, §2 of the FAA provides that arbitration agreements shall be "valid, irrevocable, and enforceable." The Supreme Court has continually stressed that this section reflects a liberal federal policy favoring arbitration, that the enforceability of arbitration agreements/clauses is a matter of contract, and that courts must enforce them according to their terms. On the other hand, however, §7 of the NLRA guarantees employees the right to engage in concerted activities for the purpose of mutual aid or protection, while §8 of the same act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

The second key issue is whether, under any circumstances, such arbitration clauses run afoul of the "effective vindication" exception to the FAA due to the relatively high cost of arbitration vis-à-vis the small damages of many individual claims in the employment law context, and in particular claims brought pursuant to the Fair Labor Standards Act (FLSA).

Prior to May 2016, all federal circuit courts which dealt with the enforceability of class/collective action waivers in employment arbitration agreements had concluded that they are, indeed, enforceable. For example, in *Vilches v. Travelers Cos.*, 413 Fed. Appx. 487 (3d Cir. 2011), the Third Circuit upheld an arbitration clause with a waiver of class actions, holding that there was no suggestion in the text, legislative history or purpose of the FLSA that Congress intended to confer a nonwaivable right to a class action under that statute. Likewise, in *D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013), the Fifth Circuit, concluding that the use of class action proceedings is a procedural and not a substantive right, and that neither the statutory history of the NLRA nor its legislative history contain a congressional command to override the FAA, held that an employment arbitration agreement's waiver of class procedures was lawful. See also *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

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In *Owen v. Bristol Care*, 702 F.3d 1050 (8th Cir. 2013), the Eighth Circuit, in finding that employment-based arbitration agreements containing class waivers were enforceable, held that the FLSA contained no contrary congressional command as required to override the FAA, nor was there any inconsistency between either the FLSA text or its legislative history and the conclusion that such waivers were lawful. The Eight Circuit reiterated that holding in *Cellular Sales of Mo. v. NLRB*, 824 F.3d 772 (8th Cir. 2016). Finally, in *Walthour v. Chipio Windshield Repair*, 745 F.3d 1326 (11th Cir. 2014), the Eleventh Circuit concluded that the enforcement of collective action waivers in arbitration agreements is not inconsistent with the FLSA, and that the FLSA does not provide a non-waivable, substantive right to bring a collective action.

The U.S. Court of Appeals for the Second Circuit has decided this issue on at least three recent occasions, and has joined the Third, Fifth, Eighth and Eleventh Circuits in holding that employees may waive the right to proceed via collective/class action in arbitration. In *Sutherland v. Ernst & Young*, 726 F.3d 290 (2d Cir. 2013), the court, following the reasoning of Supreme Court in *Italian Colors*, supra, held that while the effective vindication doctrine could be used to invalidate a provision in an arbitration agreement if it precluded the assertion of certain statutory rights, employees cannot use the doctrine to invalidate a class-action waiver provision by showing that they had no economic incentive to pursue their FLSA claims individually through arbitration.

In *Rainiere v. Citigroup*, 533 Fed. Appx. 11 (2d Cir. 2013), the Second Circuit overruled both of the lower court's conclusion: *First*, that a waiver of the right to proceed collectively under the FLSA is unenforceable as a matter of law, and *second*, that if one if any one potential class member meets the burden of proving that his costs preclude him from effectively vindicating his statutory rights in arbitration, the clause is unenforceable as to the entire class or collective. See also *Patterson v. Raymours Furniture*, 659 Fed. Appx. 40 (2d Cir. 2016) (citing *Sutherland*, supra in upholding an arbitration waiver of a collective or class action in an FLSA matter).

Split in the Circuits

The unanimity of the circuit courts was shattered by the Seventh Circuit in *Lewis v. Epic Sys.*, 823 F.3d 1147 (7th Cir. 2016). In that case, the court, holding that §7 of the NLRA should be read broadly to include resort to representative, joint, collective or class legal remedies, concluded that any contract provision which strips employees' rights to engage in concerted activities, such as class or collective actions, was unenforceable.

That decision was followed by the Ninth Circuit's decision in *Morris v. Ernst & Young,* 834 F.3d 975 (9th Cir. 2016), in which the court held that by forcing an employee to proceed individually, such waivers prevented the initiation of concerted work-related legal claims, thus violating §§7 and 8 of the NLRA. Finally, in *NLRB v. Alt. Entm't.*, 858 F.3d 393 (6th Cir. 2017), the Sixth Circuit reached the same conclusion for basically the same reasons.

Supreme Court Grants Certiorari

The Supreme Court granted certiorari in the matters of *National Labor Relations Board v. Murphy Oil USA*, *Epic Systems v. Lewis* and *Ernst & Young v. Morris*, consolidated these matters for purposes of oral argument, and heard oral argument on Oct. 2, 2017.

Conclusion

As set forth above, in deciding the three consolidated cases before them, the justices will have to resolve the inherent tension between the FAA's liberal policy on arbitration and the NLRA's protection of collective activity. In addition, the court will have to determine whether, in forbidding class/collective actions, such arbitration clauses may run afoul of the "effective vindication" exception to the FAA due to the relatively high cost of arbitration and the small monetary amounts of many individual claims in the employment law context, and in particular claims under the FLSA. Whatever its final holding(s), the court's decision will provide much-needed clarity for management-side employment and labor law attorneys regarding this issue.

HR Policy

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tiatives as "contractual" and see an employee acknowledgement as amending the employment agreement. In these situations, a *properly executed* employee acknowledgement may indeed make an HR initiative enforceable as "contractual"—but an overly-casual acknowledgement, including one electronically executed, may prove unenforceable if it falls short of local employment-contract-execution strictures. So check out and comply with local contract-execution strictures. Where an employee acknowledgement is deemed "contractual," draft and execute it as a full-blown contractual amendment. Some countries even require government filings here.

A related issue is the U.S. employer that tries to have it both ways, collecting up staff acknowledgements but sticking into them (or into the underlying HR initiative documents themselves) an "employment-at-will" or "this-is-not-a-contract" disclaimer. These disclaimers are endemic to the United States, creatures of U.S. employment-at-will—and are almost always inappropriate in other countries. Outside the U.S., these disclaimers can serve as escape clauses, freeing staff from having to comply with an initiative precisely because it is "not a contract." An excellent example is the Canadian provincial supreme court case *Oliver v. Sure Grip Controls*, holding an American employer's employment-at-will disclaimer rendered a severance pay cap unenforceable. The judge in that case said: "I cannot conclude the plaintiff's [severance] damages should be limited to those based in the Handbook. The Handbook…made it clear that the Handbook 'is not a contract of employment … .'" Sup. Ct. British Columbia, 2014 BCSC 321 (2/28/14), at ¶ 48.

Outside the United States, an employer might consider *embracing* the contractual nature of its HR initiatives, affirmatively declaring the initiative and acknowledgement to be overtly "contractual."

Non-signers. When a multinational insists on collecting staff acknowledgments to a global HR initiative, headquarters far removed from "the field" may assume that, ultimately, all employees worldwide will sign on. But a 100% return rate on staff acknowledgements is all but impossible across big global employee populations. Where overseas staff prove skeptical or hostile to the underlying global HR initiative—particularly where employee representative bodies resist it—some stray employees may openly refuse to sign acknowledgements. Others may passive-aggressively neglect to return their acknowledgements, even after repeated reminders from the hapless local HR team, which may be all but powerless to force employees—especially powerful executives and labor representatives—to sign or click "I accept."

Local HR has little leverage here: Outside employment-at-will, an employer does not have good cause to discipline a worker just for refusing or neglecting to acknowledge something. In one case, for example, a Beijing court reinstated a chief guard who had been fired for refusing to acknowledge a handbook-update. Hou case, Beijing Intermediate People's Ct. no. 4, 11/26/09.

Non-signers of an employee acknowledgement raise a serious "Achilles' heel" problem. A non-signer who later violates the policy or rule, or who later seeks to escape a restrictive benefit-plan term, might argue he is exempt *precisely because* he never signed. Invoking co-workers' executed acknowledgements in his own favor, the recalcitrant non-signer may argue the policy, rule or plan reaches only those of his colleagues who signed on and agreed to it. At that point the multinational realizes—too late—it would have been better off not collecting signed acknowledgements at all. (The non-signer would not have this particular argument without the employee acknowledgement process in the first place.)

Proof problems. In-house human resources teams may have spotty records retaining and tracking employee acknowledgements over time. Three common proof problems are sloppy recordkeeping, sloppy follow-through and sloppy computer verification:

• *Sloppy recordkeeping*: Years after employees across far-flung offices were thought to have signed or mouse-clicked some dimly-remembered staff acknowledgement, it can prove maddeningly difficult for HR to dig out that one specific executed form of the one particular employee who now needs to be held accountable for complying with a provision he claims never to have seen. *("Surely Pranav must have executed this acknowledgement at some point … but where is it now?")*

• *Sloppy follow-through*: Newhires who "onboard" after a cross-border code or HR policy launch may never get asked to sign acknowledgements. Even where the acknowledgement-collection process was fastidious in its first round, the organization may fail to follow through and collect acknowledgements going forward.

• *Sloppy computer verification:* Mouse-click acknowledgements are notoriously hard to verify after the fact when a dispute later ends up in court. Meeting the employer burden to prove a given employee actually clicked "I accept" one day long ago can be all but impossible years later, under inflexible and antiquated evidence rules in foreign courts with changing electronic-signature proof requirements. The I.T. team might insist: *"Eva must have acknowledged it—or else she couldn't have logged onto our system!"* Do not expect that statement to be admissible court evidence of an electronic signature.

Compliance Strategies

Never insist on collecting employee acknowledgements to an HR initiative outside the United States without a proactive strategy that accounts for each of the four logistical challenges. One strategy is to time the employee acknowledgement process to coincide with some significant discretionary bonus payment, stock award or pay raise—confer the bonus, award or raise only in exchange for executed acknowledgements.

Where collecting staff acknowledgements worldwide is not feasible, consider *alternatives*. One alternative is seeking collective buy-in from employee representatives, rather than individual employee acknowledgements, in jurisdictions where employees are represented. A second alternative is sending the relevant documents to employees by certified mail, scrupulously retaining postal receipts. A third alternative is having local HR teams distribute relevant documents personally to each employee (maybe handing them out during a training session); HR representatives then create and sign forms or log sheets memorializing the date and circumstances under which each named employee received the package.

Cancer

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approved (of course, my only other option was to let the cancer grow unchecked) involved:

- Multiple scans looking for cancer in other parts of my body, including two thyroid biopsies.
- Adding two oncologists, a thyroid specialist, and two surgeons to my physician list.
- Surgery to remove the cancerous lump in my side followed by surgery two months later to remove my thyroid.
- Biopsies on several spots in my lungs (while I was fully conscious)—all negative.
- Twelve weeks of radiation treatment followed by 12 weeks of chemotherapy.

The good news is that I am writing this article more than two years after my last chemotherapy treatment.

Disclosure, Discussion And Denial

At the point of my diagnosis, I didn't really understand what was ahead. In fact, I only understand it slightly better now having walked the broad path of cancer with hundreds of others at the Wilmot Cancer Center. As such, I told the important people in my life that I had "cancer" and responded "sarcoma" when they asked what kind—with no one—least of all me—understanding exactly where I stood on the cancer spectrum of life and death. I said that I was going to have surgery, radiation and chemotherapy—but I had no idea what that actually would mean for me and my family.

In some ways, leaving the discussion of my diagnosis at this superficial level was better. I decided early on that I would rely on the advice and instruction of my physicians in whom I had great confidence. Others may feel differently, but I did not believe that becoming an expert in my particular cancer and its treatment was going to help me face the battles ahead any more effectively. I told my physicians that I wanted to hear everything I needed to know to fight the good fight but had no intention of becoming a cancer expert—that was their job.

This point is important in understanding how I interacted with my partners, family and friends about my cancer. About one-third of the caring people with whom I spoke would ask detailed and personal questions about my disease. I responded with basic information (sarcoma in my abdomen) but deliberately avoided the details they requested. If they pressed harder for details, they often didn't react well when I told them that I was relying on my physicians to tell me everything I needed to know and had decided not to rely on the Internet or other resources. Several asked whether I was giving up and whether I needed counseling. I appreciated their concern, but assured them this was a personal decision that I had made about getting ready for battle. In fact, until I started writing this article, I had never looked up the word "sarcoma" on Web MD or in any other resource.

• Be careful about how hard you press employees with cancer about the particulars of their disease. Understand that everyone takes a different path toward preparing for the fight of, and for, their lives.

This point is important for employers. Get the medical information you need and are entitled to for evaluating leave requests, FMLA and disability applications, and other accommodations, but don't be surprised or disturbed if your employee is not completely immersed in the particulars of their disease, or is cautious about what is shared with you.

Telescopic Focus on Life And Death

Often, a cancer diagnosis is based on scan results or biopsies that are fairly definitive. The time between diagnosis and the formulation of a treatment plan, however, can be a prolonged period in limbo, waiting on further tests, consultations with specialists, and opting for second opinions.

With this in mind, I told my wife about the diagnosis right away, and we decided not to tell anyone else until we could also tell them about the planned course of treatment. For several weeks, only my wife and I knew about my diagnosis. We tried to attend to our work and engage in our normal routine—I honestly don't know if anyone sensed that there was something wrong.

During this limbo, I remember watching a television program with my wife and teenage daughter. The program involved a father who was battling cancer, but ultimately died of the disease. My daughter cried because of the strong emotions that the program evoked in her. My wife cried because she was uncertain how much of that program she might live during the coming months. I stared at the screen—only occasionally glancing at my wife and daughter—trying desperately not to cry and praying that my wife and daughter would not suffer much, no matter what the outcome was for me.

For about a month, I wasn't sure if I had two months to live or two decades. I wondered if I should cancel the week we had planned at the Jersey shore; I thought about whether I would live to see my first grandchild, or see my youngest daughter graduate from college or get married.

As the delay in making and implementing a treatment plan increased, I imagined that the tumor was growing at an accelerated rate and wondered why my surgery wasn't scheduled immediately—don't they know that I have cancer? These thoughts raised my anxiety level, and no doubt affected my concentration at work.

• Employers need to realize that a cancer diagnosis often throws employees and their family into a serious state of uncertainty. It certainly affects their work availability and attention, but it also affects parts of their lives that previously were as solid as granite.

My treatment plan was finalized in late July. Once I knew the plan, I met with the managing partners in our office, the colleague who would absorb most of my work, our office manager and my administrative assistant (and friend of more than 30 years) to explain what was happening. They were shocked and extremely supportive. I transitioned most of my work to my colleague, but continued to take telephone calls and respond to emails while I waited for my first surgery. I asked my partners to make the appropriate communications to the firm leadership team, but also told them that I did not believe an office-wide communication about my situation was necessary.

Given the nature of my work and the ability to work from home, I was able to interact with my clients and colleagues throughout my treatment and recovery, making sure that the more demanding work was handed off to my colleagues.

• Whether, how and to whom an employer communicates about an employee with cancer who will have a protracted absence or require a sporadic work schedule is an important consideration.

Of course, without the employee's permission, employers generally may not disclose information about an employee's medical condition. I don't believe that this general prohibition, however, should discourage employers from discussing with employees who have cancer what, if anything, they would like disclosed about their situation.

Financial Pressure, LTD Benefits, Health Insurance

Many employers provide critically ill employees only with statutory disability benefits, plus a limited number of paid sick or paid time-off days—frequently just enough to cover the one-week waiting period for disability benefits. In New York, disability benefits are 50 percent of an applicant's average weekly wage capped at $170 per week for a maximum of 26 weeks. An upstate New York employee working 35 hours per week in a minimum wage job earns $339.50 per week—*which is twice the maximum weekly disability benefit*. This example should suggest just how weak this statutory financial safety net really is.

Cancer patients or others with serious illness face an even bigger challenge 26 weeks into their battle when their short-term disability benefits end. I urge employers to carefully investigate and evaluate the costs and benefits of offering long-term disability (LTD) benefits. The odds are good that many of your best employees will need those benefits at some point in their careers. Providing LTD benefits as an option is good—providing LTD benefits as part of your standard benefit package is better.

Employers should carefully investigate and evaluate the costs and benefits of the health care options they offer, particularly as those plans relate to the treatment of cancer and other life-threatening illness.

For many cancer patients, the financial pressures, emotional pain and anxiety caused by absence from work and the cost of treatment can be as excruciating as the treatment itself. For individuals without insurance or those with insurance plans that include high co-pays or substantial deductibles, the pressure of paying for what you hope will be treatment that will save your life can be unbearable.

The Long Road Back

I *know* the dates of my surgeries, the date my radiation therapy ended, the date of my last three-day hospital visit for chemotherapy.

What I *don't know* is whether or when I will be finished with cancer.

Admittedly, I wasn't a beacon of health before my cancer treatment, but my body has never felt the same since. It's difficult to explain even some of the after-effects:

- Scars and adhesions from my surgeries
- Continued impact of radiation that destroyed any lingering cancer cells (but also radiated healthy cells and unaffected organs)
- Cell-by-cell devastation caused by massive doses of chemicals that were pumped through my body for three days straight on four separate occasions

Somedays, I feel as if I'm experiencing the world through a full-body hazmat suit. Understand, I'm not complaining but trying to explain. My point is that cancer patients can return to work and be highly productive, but physically may never be the same after cancer treatment.

• Everyone's cancer, treatment and recovery are different—so I will not make sweeping judgments.

The emotional road back is long as well. Describing the emotional impact of this experience is complex, but one illustration stands out: I now notice reports about cancer patients, particularly obituaries for cancer patients who lost their battles, when I rarely did so before my own diagnosis.

Perhaps, this means that I was simply oblivious to others' pain and suffering before; perhaps, this is evidence of a fear that I am walking on the same path, only hours, days—or hopefully—years behind. Charles Dickens (*A Christmas Carol*) described Christmas as the one day of the year when all men and women of every station in life realize that they are "fellow passengers to the grave." Cancer has had the same effect on me—for good or bad, I'm not yet sure.

Beginning Anew

About five days after I returned home from surgery to remove the sarcoma, a client called me because she was struggling with how to deal with a long-term good employee who had recently received a cancer diagnosis. We discussed what reasonable accommodations, if any, the company was required to provide. Inwardly, I questioned whether my personal experience might color my judgment and advice (although, it didn't seem so). Nevertheless, I disclosed my cancer and treatment to the client who was extremely kind and supportive. In return, she shared that her 30-year-old son had an aggressive cancer and was being treated at the same hospital as I was.

We returned to our discussion about how to accommodate this employee's cancer. This time, however, we evaluated and discussed, not what the law required, but rather all the ways that the company could reasonably support the employee. We eventually answered the legal question, but got there using a process that truly reflected this company's high regard and respect for its employees. Making judgments and giving advice about "reasonable accommodation" is difficult and imprecise, but *starting with what you can do, instead of focusing only on what you must do, can lead to better outcomes for both the employer and employee.*

Sidebar

Cancer Is a Short Word With an Infinite Number of Meanings. Although my father and other family members and friends have had cancer, I never had any need or desire to press past the generic label for this disease toward a more precise definition and understanding. The National Cancer Institute provides a description of those key characteristics which classify a particular physiologic anomaly as "cancer":

> Cancer is the name given to a collection of related diseases. In all types of cancer, some of the body's cells begin to divide without stopping and spread into surrounding tissues. Cancer can start almost anywhere in the human body, which is made up of trillions of cells. Normally, human cells grow and divide to form new cells as the body needs them. When cells grow old or become damaged, they die, and new cells take their place. When cancer develops, however, this orderly process breaks down. As cells become more and more abnormal, old or damaged cells survive when they should die, and new cells form when they are not needed. These extra cells can divide without stopping and may form growths called tumors. Many cancers form solid tumors, which are masses of tissue. Cancers of the blood, such as leukemias, generally do not form solid tumors.

More than 100 cancer types are known and most are named after the organs or tissues where the cancer forms. Cancers also may be described by the type of cell that formed them, such as an epithelial cell or a squamous cell. My cancer was "sarcoma," which may have existed in my body for a long time growing slowly, or not growing at all. Somehow these particular cells changed and, as my surgeon described, became "hyperactive and angry" growing at a very rapid pace compared to the other cells in my body.

There are an infinite number of permutations on these 100 cancer types because they impact their inhabitants (medically, emotionally and physiologically) in different places, at different times, with different velocities and toxicity, and with different levels of resistance. Cancer is a short word, but it has infinite meaning and impact.