

**American Bar Association  
Section of Labor and Employment Law  
Federal Labor Standards Legislation Committee  
MIDWINTER MEETING  
February 18-19, 2021**

**PROGRAM AGENDA**

***NOTE: All times listed are Eastern Standard Time.***

**Thursday, February 18**

**12:00 p.m. – 12:30 p.m.**

**Welcome, Introductions and Section Report**

**Rob Boonin**, *Employer Co-Chair, Dykema Gossett PLLC, Ann Arbor, MI*  
**Ryan Hagerty**, *Union & Employee Co-Chair, Asher, Gittler & D'Alba, Ltd.,  
Chicago, IL*  
**Laura Ho**, *Employee Co-Chair, Goldstein, Borgen, Dardarian & Ho,  
Oakland, CA*  
**Matt Shepherd**, *Public Co-Chair, U.S. Department of Labor,  
Nashville, TN*

**Samantha C. Grant**, *Section Chair, Sheppard Mullin, Los Angeles, CA*  
**Kelly M. Dermody**, *Section Chair-Elect, Lieff Cabraser Heimann &  
Bernstein, LLP, San Francisco, CA*  
**Eric W. Iskra**, *Employer Council Liaison, Spilman Thomas & Battle,  
PLLC, Charleston, WV*  
**Jason Marsili**, *Union/Employee Council Liaison, Rosen Marsili  
Rapp LLP, Los Angeles, CA*

**12:30 p.m. – 1:30 p.m.**

**Top Ten Trends Affecting Wage and Hour Practitioners:  
It All Began in the States**

These days, most of what is new and challenging in wage and hour law was born at the state level. This panel will discuss the top ten trends affecting wage and hour practitioners, all of which find their roots in state wage and hour laws. You will learn about concepts that are new and old to help you shape how to best represent your clients, including the differences involved with calculating damages and penalties under state law versus the FLSA, differences involved when determining what is or is not compensable work, differences regarding what must be included in the regular rate, and differences with respect to tip credit rules in the states versus the new Trump DOL regulations.

**Speakers:**

**Loren B. Donnell**, *Burr & Smith, LLP, St. Petersburg, FL*  
**Michael T. Garone**, *Schwabe Williamson & Wyatt PC, Portland, OR*  
**Timothy G. Williams**, *Berger, Williams & Reynolds, LLP, San Diego, CA*

**1:30 p.m. – 1:45 p.m.**

**Break**

**1:45 p.m. – 2:45 p.m.**

**The Equal Employment Opportunity Commission in the 2020s:  
What's In, What's Out and What Remains the Same**

Hear from EEOC Commissioners Charlotte Burrows and Keith Sonderling on their perspectives about what the EEOC has done over the past year, what

it will do, and what each of them hopes or fears it might do in the coming first half of the current decade.

**Speakers:** **Hon. Charlotte A. Burrows**, *U.S. Equal Employment Opportunity Commission, Washington, DC*  
**Hon. Keith E. Sonderling**, *U.S. Equal Employment Opportunity Commission, Washington, DC*

**Moderator:** **Reed L. Russell**, *Phelps Dunbar, Tampa, FL*

**2:45 p.m. – 3:00 p.m.** **Break**

**3:00 p.m. – 4:30 p.m.** **Fair Labor Standards Act Hot Topics**  
No time to read the hundreds of pages summarizing FLSA cases in the 2021 Midwinter Report? No problem! This panel will highlight what you need to know about the past year’s most significant FLSA decisions, regulations and opinion letters and their likely impact on future wage and hour litigation.

**Speakers:** **Allison Balus**, *Baird Holm LLP, Omaha, NE*  
**David Ricksecker**, *McGillivray Steele Elkin LLP, Washington, DC*  
**Juno Turner**, *Towards Justice, New York, NY*

**4:30 p.m. – 4:45 p.m.** **Break**

**4:45 p.m. – 5:45 p.m.** **The Impact of COVID-19 on WARN Act and Wage and Hour Claims**  
There have been a number of cases and issues that have arisen this year under the WARN Act and state “mini-WARN” laws due to the large numbers of furloughs and layoffs caused by COVID-19. Such issues include failing to provide “as much notice as practicable” to affected employees (e.g., some courts have held that even when 60 days’ advance notice is not possible, some notice must be given, even for immediate layoffs), the failure to give notices when the employer could reasonably anticipate continued business loss and corresponding job losses as the pandemic progressed, and the proper interpretation of the unforeseeable business circumstances exception. Additionally, a number of states have issued guidance that protects employers from liability under state “mini-WARN” laws related to COVID-19 job losses when certain criteria are met.

COVID-19 also has raised a number of wage and hour issues, including the Department of Labor’s recent guidance on counting all hours worked for remote employees, determining whether time spent in daily health screenings and COVID testing is compensable time, new pay incentives and the regular rate, whether exempt employees are still meeting the duties test, salary deductions and the salary basis test, and outside salespeople no longer selling outside.

**WARN Act Speakers:** **Matthew S. Disbrow**, *Honigman LLP, Detroit, MI*  
**Matthew C. Helland**, *Nichols Kaster PLLP, San Francisco, CA*

**Wage & Hour Speakers:** **Sally J. Abrahamson**, *Werman Salas P.C., Chicago, IL*  
**R. Nelson Williams**, *Thompson Coburn LLP, St. Louis, MO*

**6:00 pm – 7:00 pm** **Committee Reception**

**Friday, February 19**

**12:00 noon – 1:00 p.m.**

**The Biden Department of Labor: What to Expect and How to Prepare**  
As the Biden administration takes over the White House, it is expected that the principles and initiatives set forth in Build Back Better will result in evolving national labor and employment policy. Panelists will discuss many of the initiatives – either anticipated or that have occurred in the first thirty days under the new administration – including changes in wage and hour laws, employee leave initiatives, department enforcement initiatives, and other areas in which the DOL may impact the substantive legal areas covered by the FLSL Committee. Within this discussion, we will explore the various ways in which the Biden Administration’s anticipated agenda may be pushed – whether it will be achieved via legislative action, regulatory action, Executive Orders, or other sub-regulatory methods such as opinion letters, fact sheets and/or directives. This will be an interactive session in which the panelists will engage in some “point/counter-point” as they share what they may hope to see or fear come out of the DOL in these areas, depending on what they see in their crystal balls, as soon as within the next few months, to as long as a few years from now.

**Speakers:** **Paul DeCamp**, *Former Wage and Hour Administrator; Epstein Becker & Green, P.C., Washington, DC*  
**Catherine Ruckelshaus**, *National Employment Law Project, New York, NY*

**Moderator:** **Elizabeth Bradley**, *Fortney & Scott, LLC, Washington, DC*

**1:00 p.m. – 1:15 p.m.**

**Break**

**1:15 p.m. – 2:15 p.m.**

**Update on the Equal Pay Act and Age Discrimination in Employment Act**

This program will provide an update on and analysis of *Rizo v. Yovino*, the long-running Ninth Circuit case that was remanded by the U.S. Supreme Court involving whether prior salary is a legal basis for a wage differential under the Equal Pay Act. Panelists also will discuss current trends in EPA litigation with a focus on the shifting scope of defenses available to employers under the EPA and other related state laws.

In addition, the panel will provide an update on this year’s seminal cases under the Age Discrimination and Employment Act as well as address litigation and non-litigation considerations of COVID-19’s impact on the workplace (i.e., claims, OWBPA disclosures, RIFs and adverse impact analyses, release timing, etc.).

**EPA Speakers:** **Rebekah Bailey**, *Nichols Kaster PLLP, Minneapolis, MN*  
**Tracey Holmes Donesky**, *Stinson LLP, Minneapolis, MN*

**ADEA Speakers:** **Roxana Bell**, *University of Detroit Mercy School of Law, Detroit, MI*  
**Steven A. Smith**, *Nichols Kaster PLLP, Minneapolis, MN*  
**Martine T. Wells**, *Brownstein Hyatt Farber Schreck, LLP, Denver, CO*

**2:15 p.m. – 2:30 p.m.**

**Break**

**2:30 p.m. – 3:30 p.m.**

**The Family and Medical Leave Act:**

**A 2020 Retrospective and Plans for the Future**

The past year has seen significant changes to the Family and Medical Leave Act, most predominantly the passage of the Families First Coronavirus Response Act (FFCRA). The panel will discuss the impact of those changes on employee leave requests, resulting litigation trends and common leave issues related to remote work, and the status of the FFCRA in 2021. Panelists also will provide insights on what the Biden Administration's priorities may be in the coming year and other significant legal developments in the past year.

**Speakers:**

**Sara Faulman**, *McGillivray Steele Elkin LLP, Washington, DC*

**C. Andrew Head**, *Head Law Firm, LLC, Chicago, IL*

**Jennifer T. Williams**, *Cozen O'Connor, Miami, FL*

**3:30 p.m. – 3:45 p.m.**

**Break**

**3:45 p.m. – 4:45 p.m.**

**Recent Developments under USERRA and the Future of Sarbanes-Oxley under the Biden Administration**

This panel will review judicial developments applying USERRA as well as provide an update on Department of Labor investigations and Department of Justice enforcement trends.

This panel also will explore the changes that can be expected for Sarbanes-Oxley and Dodd-Frank whistleblower protections and the SEC whistleblower program. While more than 280 federal judges received lifetime appointments during the Trump Administration, the Biden Administration will have the power to appoint at least three, and as many as five, members of the DOL's Administrative Review Board (ARB) early during his term. While the ARB's decisions are not binding on federal courts, they are highly influential, and the expansion or contraction of protections by the ARB will have a significant impact on the future of SOX. An administration's enforcement priorities and staffing of OSHA and other enforcement agencies can also significantly impact the breadth of SOX employee protections.

**USERRA Speakers:** **Channah Broyde**, *U.S. Department of Labor, Philadelphia, PA*

**George R. Wood**, *Littler Mendelson P.C., Minneapolis, MN*

**SOX Speakers:**

**Michael Filoromo**, *Katz, Marshal & Banks LLP, Philadelphia, PA*

**Greg Keating**, *Epstein Becker & Green, P.C., Boston, MA*

**4:45 p.m. – 5:00 p.m.**

**Break**

**5:00 p.m. – 6:00 p.m.**

**The Ethical Boundaries of Publicity**

Sometimes our cases become newsworthy or make a compelling human interest story. News outlets contact you about doing an interview about your client or a production company is interested in doing a documentary and wants to include your client. What information are you permitted to share about clients and your role in the case? When is the appropriate time to share information: while the case is pending or upon completion of the case? Reviewing ABA Model Rules of Professional Conduct as well as ethics opinions from various jurisdictions, this panel will explore the ethical boundaries of publicity from using client testimonials in advertising your private practice to interacting with production companies interested in buying

rights to your client’s story. Panelists will further explore how practitioners give less consideration to these ethical boundaries with respect to vulnerable clients, including clients who are low income, have less education, are limited English proficient (LEP), are immigrants, and/or are detained/incarcerated. The panel will discuss best practices with respect to obtaining consent from clients to share information with the press or other media as well as determining when it is ethically permissible to share your client’s information and story. In addition, panelists will discuss ethical considerations when responding to press inquiries, including advice to employers on whether they should provide comments, or some level of cooperation in such a documentary.

**Speakers:** **Shelly C. Anand**, *Sur Legal Collaborative, Decatur, GA*  
**Jennifer Keating**, *Leonard Carder LLP, Oakland, CA*

**6:00 p.m. – 6:30 p.m.** **Committee Business Meeting**

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The ABA will seek 9.5 hours of CLE credit in 60-minute states and 11.4 hours of CLE credit for this program in 50-minute states including 1 hour of ethics credit in 60-minute states and 1.2 hours of ethics credit in 50minute states. Credit hours are estimated and are subject to each state’s approval and credit rounding rules. Visit [www.americanbar.org/mcle](http://www.americanbar.org/mcle) for general information on CLE at the ABA.

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