AUTHOR'S NOTE—AN INTRODUCTION TO FEDERAL LAWS PROHIBITING EMPLOYMENT DISCRIMINATION

Enshrined in both its birthing documents (the Declaration of Independence, the Constitution, and the Bill of Rights) and its popular mythology is the guiding principle that the United States of America is united in a belief that all people are created equal; that they are endowed with certain unalienable rights including life, liberty and the pursuit of happiness; and that the Country was created to establish justice for all of its citizens. Coexisting with this popular mythology, however, are the uncomfortable facts that America was founded upon a crucible of racial, gender, and religious inequity and injustice, and that those fundamental unfairnesses continue, to this day, to haunt the American dream.

Initially, the Country sprang to life through both the unintentional and the intentional destruction of the indigenous peoples—Native Americans or Indians—living in North America at the time that the colonists from Europe arrived. The colonists unintentionally caused the deaths of massive numbers of Native Americans through the transmission of the infections that were endemic among Europeans such as smallpox, tuberculosis, measles, and influenza. The colonists intentionally killed massive numbers of Native Americans in massacres (such as The Gnadenhutten Massacre, The Mankato Executions, and The Sand Creek Massacre), wars or battles (such as The Battle of Tippecanoe, The Creek War, George Armstrong Custer's Campaigns, and Wounded Knee), the forced removal of the indigenous peoples from their lands (epitomized by the Trail of Tears), and through the enslavement of innumerable numbers of Native Americans. So many Native Americans were killed by the colonists and their descendants that many historians refer to the deaths of the Native Americans as a genocide. *See generally,* Howard Zinn, A People's History of the United States (HarperCollins 2015); Benjamin Madley, *AN AMERICAN GENOCIDE: The United States and the California Indian Catastrophe*, 1846-1873 (Yale University Press 2016); Roxanne Dunbar-Ortiz, *An Indigenous Peoples' History of the United States* (ReVisioning American History) (Beacon Press 2014); Peter Cozzens, *The Earth Is Weeping: The Epic Story of the Indian Wars for the American West* (Knopf 2016); David E. Stannard, *American Holocaust: Columbus and the Conquest of the New World* (Oxford University Press 1992); Andrés Reséndez, The Other Slavery: The Uncovered Story of Indian Enslavement in America (Mariner 2017); Dee Alexander Brown, *Bury My Heart At Wounded Knee: An Indian History Of The American West* (Turtleback Books 2007).

In order to build this Country, the colonists and the founders (and their descendents) relied, in large part, on peoples—African Americans—kidnapped from the continent of Africa, forced into slavery in the American colonies and exploited to work in all facets of the American economy from the production of crops (such as tobacco and cotton) to the construction of buildings, including the two most iconic Washington landmarks, the Capitol and the White House. As with the Native Americans, the colonists and the founders of the Country (and their descendents) caused the torture, rape, death, and abject misery of uncounted numbers of African Americans. *See generally*, Howard Zinn, *A People's History of the United States* (HarperCollins 2015); Bob Arnebeck, *Slave Labor in the Capital: Building Washington's Iconic Federal Landmarks* (The History Press 2014); Kenneth M Stampp, *The Peculiar Institution: Slavery in the Ante-Bellum South* (Knopf 1978); Nicholas Guyatt, *Bind Us Apart: How Enlightened Americans Invented Racial Segregation* (Basic Books 2016); Edward E. Baptist, *The Half Has Never Been Told: Slavery and the Making of American Capitalism* (Basic Books 2016); Sowande' Mustakeem, *Slavery at Sea: Terror, Sex, and Sickness in the Middle Passage* (University of Illinois Press, 2016); Sven Beckert, *Empire of Cotton: A Global History* (Knopf 2014); Sven Beckert, *Slavery's Capitalism: A New History of American Economic Development* (University of Pennsylvania Press 2018); Caitlin Rosenthal, *Accounting for Slavery: Masters and Management* (Harvard University Press 2018); Ned & Constance Sublette, *The American Slave Coast: A History of the Slave-Breeding Industry* (Lawrence Hill Books 2015); Andrew Delbanco, *The War Before the War: Fugitive Slaves and the Struggle for America's Soul from the Revolution to the Civil War* (Penguin Press 2018); Booker T. Washington, *Up From Slavery* (Value Classic Reprints 2016); Rachel A. Feinstein, *When Rape was Legal: The Untold History of Sexual Violence during Slavery* (Routledge 2018); Noel Rae, *The Great Stain: Witnessing American Slavery* (Harry N. Abrams 2018); Sojourner Truth, *Narrative Of Sojourner Truth* (12th Media Services 2018); Claud Anderson, *Black Labor, White Wealth: The Search for Power and Economic Justice* (Duncan & Duncan 1994); James Horn, *1619: Jamestown and the Forging of American Democracy* (Basic Books 2018); Jared Hardesty, *Black Lives, Native Lands, White Worlds: A History of Slavery in New England* (Bright Leaf 2019).

Along with the oppression of Native Americans and African Americans, the Country has also, from its founding, systematically suppressed the rights of women: (1) denying women the right to vote until August 18, 1920; (2) denying women the right to a workplace free of sexual harassment until 1986 (*Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986)) or, more realistically, today as the vibrant MeToo movement shows; and (3) denying women

the right to a discrimination-free workplace until 1964 (passage of Title VII), or 1978 (passage of the Pregancy Discrimination Act), or 2009 (passage of the Lilly Ledbetter Fair Pay Act), or, more practically speaking, today as the female-to-male wage gap persists and women have tremendous difficulty penetrating the "glass ceiling." *See generally* Eleanor Flexner, *Century of struggle: The Woman's Rights Movement in the United States* (Belknap Press of Harvard University Press 1975); Sally McMillen, *Seneca Falls and the Origins of the Women's Rights Movement* (Oxford University Press 2008); Jean H. Baker, *Sisters: The Lives of America's Suffragists* (Hill and Wang 2006); Elaine Weiss, *The Woman's Hour: The Great Fight to Win the Vote* (Thorndike Press 2018); Miriam Gurko, *The Ladies of Seneca Falls: The Birth of the Woman's Rights Movement* (Schocken Books 1996).

Likewise, throughout its history the Country has also tolerated and, in too many instances, encouraged inequitable treatment of Jews, Catholics, Mormans, Muslims, Sikhs, and other religious minorities. *See e.g.*, Leonard Dinnerstein, *Anti-Semitism in America* (Oxford University Press 1994); Frederic Jaher, *A Scapegoat in the New Wilderness: The Origins and Rise of Anti-Semitism in America* (Harvard University Press 1994); Jonathan D. Sarna, *American Judaism: A History* (Yale University Press 2004); Deborah E. Lipstadt, *Antisemitism: Here and Now* (Schocken 2019); Jerome Karabel, *The Chosen: The Hidden History of Admission and Exclusion at Harvard*, Yale, and Princeton (Houghton Mifflin Harcourt 2005); Gregory J. Wallance, *America's Soul In the Balance: The Holocaust*, *FDR's State Department, And The Moral Disgrace Of An American Aristocracy* (Greenleaf Book Group Press 2012); Luke Perry and Christopher Cronin, *Mormons in American Politics: From Persecution to Power* (Praeger 2012). Similarly, the Country has not only also treated other people of color poorly but it has a long history of discrimination against its LGBT citizens. *See e.g.*, Lillian Faderman, *The Gay Revolution: The Story of the Struggle* (Simon & Schuster 2015); Eric Cervini, *The Deviant's War: The Homosexual vs. the United States of America* (Farrar, Straus and Giroux 2020); Joey Mogul, Andrea Ritchie, Kay Whitlock, *Queer (In)Justice: The Criminalization of LGBT People in the United States* (Beacon Press 2011); David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* (University of Chicago Press 2006); Douglas M. Charles, *Hoover's War on Gays: Exposing the FBI's "Sex Deviates" Program* (University Press of Kansas 2015).

Although the United States of America is still struggling to treat Native Americans, African Americans, women, and other minorities equally to heterosexual Caucasian men, the Country has gradually, in fits and starts, attempted to ameliorate the systemic discrimination that has persisted since its founding. In this regard, and with respect to employment law, America has seen three eras of significant federal anti-discrimination legislation. During the Reconstruction era, Congress used the newly ratified Thirteenth, Fourteenth, and Fifteenth Amendments to pass a number of statutes in order to benefit the recently freed slaves. The first major anti-discrimination employment statute was Section 1981 of the Civil Rights Act of 1866, 42 U.S.C. §1981, which prohibited employment discrimination based on race. *See* §1:210. Several years later, Congress passed Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. §1983, which prohibited certain types of public sector employment discrimination (race, national origin, sex and religion). *See* §1:240. Unfortuntely, the Supreme Court quickly eviscerated the protections brought by these statutes and, with few notable exceptions, the entire field of civil rights law in general, and anti-employment discrimination legislation in particular, lay moribund for nearly a century.

The 1960s represent the second era—a second Reconstruction—during which significant federal anti-discrimination legislation took place. It was during this time that President Lyndon Baines Johnson—in the wake of the assassination of President John F. Kennedy, exhorting Congress to pass Kennedy's civil rights bill — "No memorial oration or eulogy could more eloquently honor President Kennedy's memory than the earliest possible passage of the civil rights bill for which he fought so long"—successfully pressured the legislators into passing the Country's most comprehensive and potent weapon against employment discrimination—Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e–2000e-17 ("Title VII") which outlawed employment discrimination on the basis of race, color, religion, sex and national origin. *See* §1:01. Ironically, the bill to establish the civil rights law—which initially only outlawed employment discrimination because of race, color, religion or national origin—came to include sex as a protected class through the efforts of a segregationist congressman's attempt to kill the bill. Virginia's Democratic Rep. Howard W. Smith, who was chairman of the House Rules Committee, deployed numerous tactics to kill the bill including adding "sex" to the types of classes that it would protect. But for the efforts of this staunch segregationist, which backfired, the civil rights act would not have protected women.

Following on the heels of Title VII, Congress passed the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§621–634, which outlawed age discrimination [§1:70], and the Rehabilitation Act of 1973, 29 U.S.C. §§701-797b, which prohibited discrimination against disabled federal employees and employees of certain government contractors [§1:261]. Perhaps emboldened by the civil rights movement, the Warren Court (1953-1969) not only upheld these civil rights laws, but also revived the earlier Reconstruction era laws.

The 1990s represent the third era of significant anti-discrimination legislation. In 1990, Congress passed the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§12101–12213), which not only prohibits discrimination against individuals with disabilities, but also imposes an affirmative obligation on employers to accommodate applicants and employees with known disabilities. *See* §1:90. In 1991, following a series of Supreme Court decisions that weakened Title VII (*see e.g.*, *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363; *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775 (1989)), Congress amended Title VII to restore and strengthen the country's civil rights laws in order to further deter unlawful harassment and discrimination in the workplace. In 1993, Congress passed the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. §§2601–2654, requiring covered employers to give employees temporary leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. *See* §1:176.

The late 2000s appeared likely to represent a fourth era of significant anti-discrimination legislation. On May 21, 2008, President George Walker Bush signed the Genetic Information Nondiscrimination Act of 2008 ("GINA") into law and then on September 25, 2008, in the waning months of his presidency, President Bush, signed the Americans with Disabilities Act Amendments Act of 2008 ("ADA Amendments Act" or "Act"). The Act, which went into effect on January 1, 2009, was specifically designed to reject the holdings of several Supreme Court decisions (*see e.g., Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S.Ct. 2139 (1999); *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 122 S.Ct. 681 (2002)) that had incorrectly narrowed the broad scope of protection originally intended by Congress to be afforded under the ADA.

With the election of Barack Obama as the Nation's 44th President and with the control of Congress by the Democratic Party, a wholesale expansion of the Nation's anti-discrimination laws seemed probable. Indeed, the first act signed into law by President Obama was the Lilly Ledbetter Fair Pay Act, which was initiated by Congress in reaction to the Supreme Court's controversial 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 127 S. Ct. 2162 (2007). Next, President Obama signed into law the Patient Protection and Affordable Care Act ("Obamacare"), which, among other things, amended the Fair Labor Standards Act to require employers to provide rest breaks and space for employees who are nursing mothers, created protections for those with preexisting health conditions against discrimination by health insurance companies, and established protections for transgender patients against discrimination by doctors, hospitals and health insurance companies. President Obama also signed the American Recovery and Reinvestment Act of 2009 and the Dodd-Frank Wall Street Reform and Consumer Protection Act into law, thereby providing some minimal protections against retaliation as well as rewards for whistleblowers. In addition to this legislation, the Department of Labor extended Family and Medical Leave Act coverage to same-sex and non-traditional partners. Further bolstering employee rights in the late 2000s was the "Al Franken Amendment" to the 2010 U.S. Defense Department Budget (the "Franken Amendment"), which prohibited federal contractors receiving more than $1 Million from the federal government from: (1) entering into any agreement with any of its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention; or (2) taking any action to enforce any provision of an existing agreement with an employee or independent contractor that mandates that the employee or independent contractor resolve through arbitration any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention.

Two additional pieces of legislation desperately needed to protect employees that seemed likely to become law during the Obama administration were: (1) the Employment Non-Discrimination Act, which was designed to prohibit discrimination against employees on the basis of sexual orientation; and (2) the Civil Rights Act of 2009, which would have: (a) eliminated the 1991 Civil Rights Act damage caps under Title VII and the Americans with Disabilities Act; (b) amended the Equal Pay Act ("EPA") to allow the "bona fide factor other than sex" defense only if an employer shows that the factor was job-related and actually used to further legitimate business purposes; (c) added compensatory and punitive damages to the Fair Labor Standards Act's ("FLSA") remedial framework (which includes the EPA); (d) amended the Federal Arbitration Act ("FAA") to prohibit clauses requiring arbitration of federal constitutional or statutory claims, unless parties knowingly and voluntarily consented after the dispute arises, or as part of a collective bargaining agreement; (e) allowed winning plaintiffs to recover expert fees and expand the definition of "prevailing party"; (f) given the NLRB authority to award backpay to undocumented workers; (g) provided individuals the right to sue federally-funded programs under Title VI, Title IX, the

Rehabilitation Act, and the ADA; (h) required that ADEA disparate impact claims be analyzed the same as Title VII claims; and (i) conditioned states' receipts of federal funds on states' waiver of sovereign immunity against individual claims for monetary damages under the Age Discrimination in Employment Act ("ADEA"), the FLSA, and Uniformed Services Employment and Reemployment Rights Act ("USERRA"). The Republican minority (and then, as of 2014, majority) in the Senate and the Republican majority in the House blocked the passage of these desperately needed laws.

Nevertheless, two unexpected developments took place in the waning years of the Obama administration which, at first glance, appeared poised to expand protections for workers.

First, with the Supreme Court's June 26, 2015 5-4 decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), holding that laws precluding same-sex marriages are unconstitutional, there was hope that there might be a successful effort in Congress to amend Title VII to expressly prohibit discrimination on the basis of sexual orientation and gender identity/expression. Indeed, the Obama EEOC took the position that Title VII prohibits sexual orientation discrimination. *See Baldwin v. Dep't of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015). Likewise, the Obama EEOC also held that discrimination against an individual because that person is transgender (also known as gender identity discrimination) is discrimination because of sex and, therefore, is covered under Title VII of the Civil Rights Act of 1964. *See Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012). Applying *Macy*, the EEOC also held that an employer's restrictions on a transgender woman's ability to use a common female restroom facility constitute disparate treatment, *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Mar. 27, 2015); that intentional misuse of a transgender employee's new name and pronoun may constitute sex-based discrimination and/or harassment, *Jameson v. U.S. Postal Service*, EEOC Appeal No. 0120130992, 2013 WL 2368729 (May 21, 2013); and that an employer's failure to revise its records pursuant to changes in gender identity stated a valid Title VII sex discrimination claim, *Complainant v. Dep't of Veterans Affairs*, EEOC Appeal No. 0120133123, 2014 WL 1653484 (Apr. 16, 2014). However, the Republicans in Congress again thwarted any legislative efforts to protect the LGBTQI community from employment discrimination.

Second, President Obama's 2014 directive to the Secretary of Labor to update the Country's overtime regulations to reflect the original intent of the Fair Labor Standards Act, appeared likely to bear fruit for workers. On May 18, 2016, the Department of Labor issued a new rule that would update the regulations determining which white-collar, salaried employees are entitled to the Fair Labor Standards Act's minimum wage and overtime pay protections. The rule would have increased the salary threshold below which most white-collar, salaried workers are entitled to overtime from the current $455 per week (or $23,660 for a full-year worker) to $913 per week (or $47,476 for a full-year worker). This new rule was estimated to affect 4.2 million workers. In addition, this new rule would have ensured that the salary threshold is automatically updated every three years, based on wage growth over time, increasing predictability. The new rule also was supposed to raise the overtime eligibility threshold for highly compensated employees from $100,000 to $134,000. The new rule was supposed to become effective on December 1, 2016. Unfortunately, prior to the December 1st effective date, two events took place which precluded the rule from becoming effective. First, on November 22, 2016, the U.S. District Court for the Eastern District of Texas granted an emergency motion for preliminary injunction and enjoined the Department of Labor from implementing and enforcing the overtime on December 1, 2016. Second, on November 8, 2016, Donald J. Trump was elected to be the 45th President of the United States and his Department of Labor largely dropped its defense of the Obama administration's overtime regulation pending the issuance of new regulations.

With the election of Donald Trump (despite losing the popular vote by nearly 2.9 million votes—the largest popular vote loss of any winning presidential candidate in U.S. history), his appointment of two anti-employee justices to the Supreme Court, and with the control of Congress held by the Republican Party, an unfortunate demolishing of the Nation's anti-discrimination and employee protection laws began:

- When candidate Trump ran for President, he promised to be a workers' champion who would deliver "better wages" for America's working people. As President, however, Trump has taken multiple steps to reverse actions taken by President Obama that actually would have resulted in significantly higher wages. Thus, while the Obama DOL rule would have increased the salary threshold below which most white-collar, salaried workers would be entitled to overtime from $455.00 per week (or $23,660.00 for a full-year worker) to $913.00 per week (or $47,476.00 for a full-year worker), Trump's DOL dramatically scaled back the Obama wage increase so that the salary threshold below which most white-collar, salaried workers are entitled to overtime is only $684.00 per week (or $35,568.00 for a full-year worker). According to the Economic Policy Institute, approximately 8.2 million workers were left behind under the Trump DOL rule. The 8.2 million workers left behind by the Trump DOL rule include 3.1 million workers who

would have gotten new overtime protections under the Obama DOL rule and 5.1 million workers who would have gotten strengthened protections under the Obama DOL rule. Moreover, because the Trump DOL rule does not automatically index the salary threshold going forward, the number of workers left behind will grow from approximately 8.2 million in 2020 to an estimated 11.5 million over the first 10 years of implementation. The annual wage gains from workers who get new protections under the Trump DOL rule are $1.2 billion dollars less than what they would have received under the Obama DOL rule. These annual earnings losses will grow from $1.2 billion to $1.6 billion (in inflation-adjusted terms) over the first 10 years of implementation due to the fact that the Trump DOL rule does not include automatic indexing. *See* Heidi Shierholz, *More than eight million workers will be left behind by the Trump overtime proposal*, Economic Policy Institute (April 8, 2019) accessible at https://www.epi.org/publication/trump-overtime-proposal-april-update/.

- President Trump's Justice Department took the position before the Supreme Court that, irrespective of Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act, that employers should be free to fire certain religious school teacher employees because of their race, color, religion, sex, national origin, age, and disability. In *Our Lady of Guadalupe School Morrissey-Berru St. James School v. Biel*, 2020 WL 3808420 (2020), the Supreme Court agreed.
- President Obama signed the Affordable Care Act ("Obamacare") into law and, through implementating regulations, required covered employers to provide health insurance coverage to their employees, including providing female employees with coverage at no cost for all methods of contraception approved by the Food and Drug Administration. President Trump's Departments of Health and Human Services, Labor and the Treasury promulgated rules exempting employers with religious or moral objections from providing contraceptive coverage to their employees. In *Little Sisters of the Poor Saints Peter and Paul Home Pennsylvania Trump v. Pennsylvania*, 2020 WL 3808424 (2020), the Supreme Court upheld the Trump Administration's decision to allow employers with religious or moral objections to deny contraceptive coverage to their employees.
- Under President Obama, the EEOC announced that it would begin to use its EEO-1 employer information report to collect pay data information based on race, ethnicity, and sex. Such pay data would have been extremely important in efforts to eliminate pay discrimination in the workplace. Under President Trump, the EEOC announced that it would not use its EEO-1 or any other method to collect pay data information based on race, ethnicity, and sex.
- For more than 60 years, the Fair Labor Standards Act ("FLSA") relatively broadly defined "joint employers" such that an entity which benefits from the work of another company's employee could be considered a joint employer of that employee. The "joint employer" rule had significant positive consequences for employees because, as a joint employer, the entity could be held jointly and severally liable for FLSA wage and hour obligations such as the payment of minimum wages and overtime. Thus, for example, if the employer failed to pay its employees, the "joint employer" rule would allow the employees to recover their unpaid wages from the entity which benefited from their work. Under President Obama, the DOL issued guidance expanding the "joint employer" rule stating that a finding of joint employment hinges on numerous factors that look at the "economic realities" of the employment relationship, such as the nature of the work being performed, whether workers were integral to a company's business, and whether companies could potentially control working conditions. The Trump DOL withdrew the Obama-era guidance and then substantially revised, narrowed and otherwise weakened the "joint employer" rule. Believing that the new Trump DOL "joint employer" rule "would unlawfully narrow the joint employment standard under the Fair Labor Standards Act, undermine critical workplace protections for the country's low- and middle-income workers, and lead to increased wage theft and other labor law violations," the Democratic attorneys general of 17 states and Washington D.C. filed a lawsuit on February 26, 2020 claiming the U.S. Department of Labor's rule should be struck down. *See New York v. Scalia, U.S. District Court* for the Southern District of New York, No. 20-cv-1689, accessible at http://www.marylandattorneygeneral.gov/news%20documents/022620_cv_1689_USDOL.pdf.
- Just as the Trump DOL substantially revised, narrowed and otherwise weakened the "joint employer" rule as it existed during the Obama Presidency, the Trump NLRB also substantially weakened the "joint employer" rule from where it stood under the Obama Presidency.
- Although candidate Trump promised on the campaign trail to "fight for" both the LGBTIQ community and the American worker, President Trump quickly abandoned those promises and, instead, launched

attacks on the rights of that group. Indeed, President Trump had his Justice Department (Attorney General William Barr, Assistant Attorney General Joseph H. Hunt, Acting Assistant Attorney General John M. Gore, Solicitor General Noel J. Fransisco, and others) take the position that employers should be free to fire, demote, and harass employees based on their sexual orientation and/or because they are trans individuals arguing to the U.S. Supreme Court that Title VII does not protect those individuals (the Obama EEOC had taken the position that Title VII does, in fact, protect against employment discrimination based on sexual orientation and trans status). Fortunately, in *Bostock v. Clayton County, Georgia*, 2020 WL 3146686 (2020), in a 6-3 decision authored by Justice Neil McGill Gorsuch, the Supreme Court rejected the Trump administration's argument and held that Title VII prohibits employers from discriminating against employees "simply for being homosexual or transgender."

- President Trump proclaimed, in a tweet, that transgender people will no longer be allowed to serve or enlist in the military (*i.e.*, President Trump ensured that the United States would discriminate against military service member who are employees of the Country). It remains to be seen precisely how this "tweet" will affect an Obama-era policy that allowed trans men and women to serve openly and to receive transition-related medical care while enlisted.
- Although candidate Trump promised on the campaign trail that he would replace Obamacare with a new health care act providing broader coverage to more Americans at cheaper rates, while preserving protections for those with preexisting health conditions and ensuring no cuts to Medicaid, President Trump has completely abandoned those positions. Indeed, his Justice Department is currently arguing before the Supreme Court that Obamacare should be struck down in its entirety. If successful, this, among other things, will allow employers to provide cheaper, less comprehensive coverage to their employees, as insurance companies would be allowed to sell health insurance policies that (1) exclude from coverage preexisting health conditions; (2) place annual and lifetime limits on coverage; and (3) reimpose cost sharing for preventative services.
- The Trump Justice Department has taken affirmative action to torpedo efforts by the Obama NLRB to make employment class and collective action waivers unenforceable.
- With respect to both the LGBT community and the American worker, President Trump succeeded in replacing Justice Scalia and Justice Kennedy with justices (Justice Gorsuch and, Justice Kavanagh) who are likely to be even more pro-employer and hostile to employees than were Justices Scalia and Kennedy. Indeed, in his first year on the bench, Justice Gorsuch has joined the majority in two important anti-employee decisions: *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018)(holding that the Federal Arbitration Act allows employers to force their employees, as a mandatory condition of employment, to forfeit their decades-old right to join together with co-workers in class or collective actions to pursue claims for stolen wages, sex, race, age, or other discrimination and other workplace claims) and *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 2018 WL 3129785 (2018)(reversing a precedent—*Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 97 S. Ct. 1782 (1977), decided without a single dissent by a conservative Court composed of seven justices nominated by Republicans and only two justices nominated by Democrats—that had stood for more than 40 years through multiple iterations of an ever-changing Court and holding that public employees have a fundamental First Amendment interest in not being compelled to support public-sector labor-management systems that states choose to erect). In addition, Justice Gorsuch dissented in a case that favored employees: *Artis v. D.C.*, 138 S. Ct. 594 (2018)(Justice Gorsuch dissented from the holding of the Court that the federal supplemental jurisdiction statute, which provides that state law claims are "tolled" while they are pending in federal court, means that the clock is stopped and does not begin to run on a statute of limitations until 30 days after a state-law claim is dismissed by the federal court; Justice Gorsuch would have held that the word "tolled" does not mean to "stop the clock" from running on a statute of limitations).

Looming over the Country as the 15th revision of this treatise goes to print are the 2020 presidential election; the videotaped and widely seen slow-motion, eight minute and 46 second, killing of George Perry Floyd Jr. which reinvigorated not only the Black Lives Matter movement, but also multiple civil rights and social/racial justice campaigns; and a vacancy on the Supreme Court, following the death of Justice Ruth Bader Ginsburg. If President Trump is reelected, the Nation's protections for workers will continue to recede. If Vice-President Joseph Robinette Biden Jr. is elected and if the Democrates retain control of the House of Representatives and retake control of the Senate, a wholesale expansion of workers' rights is likely.