# Trump Labor Board Member Forgot About Conflict of Interest, Watchdog Says

National Labor Relations Board member William Emanuel violated a White House ethics pledge by participating in a closely watched case involving his former law firm, the NLRB's inspector general concluded in a report obtained by **Bloomberg Law**.

Bloomberg reporters **Chris Opfer** and **Hassan A. Kanu** write that Emanuel told Inspector General David Berry that he didn't realize former firm Littler Mendelson represented a business in the seminal Browning-Ferris Industries case, although he previously flagged the litigation for lawmakers as one that he might need to sit out, according to Berry's report. Emanuel then joined the rest of the five-member board in directing its top attorney to ask an appeals court to drop the case.

They report that Berry said the inconsistency in Emanuel's statements to Congress and the IG "is not sufficient to show that" Emanuel "intentionally lied."

**Read the Bloomberg article**.

# Former Jones Day Attorney Tapped For Position at the EEOC

The Trump administration has nominated Sharon Fast Gustafson to fill the vacant position of general counsel of the Equal Employment Opportunity Commission.

Above the Law **reports** that Gustafson spent four years at Jones Day before becoming a solo practitioner in 1995.

The GC's position at the EEOC has been vacant since December of 2016.

"The top litigator position has broad discretion in deciding what Title VII cases to pursue, and, as such, will take the lead in determining the Trump administration's stance on such hot button issues as sexual harassment and the gender pay gap," writes Above the Law editor **Kathryn Rubino**.

**Read the Above the Law article**.

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# Trump Labor Board Scrambles to Avoid Pro-Worker Ruling,

# Lawyers Claim


*Image by Annette Bernhardt*

Bloomberg **is reporting** that the National Labor Relations Board is ignoring its own guidelines and rushing to settle a major workplace action involving McDonald's Corp., lawyers for employees involved in the litigation alleged.

Reporter **Josh Eidelson** writes that, if the workers win at trial, the case could have a profound effect on how major corporations are held liable for workplace wrongdoing.

A trial on the matter was set to resume this week.

"Faced with a potential landmark decision in favor of franchise employees, NLRB lawyers have secured a deal with McDonald's Corp. and are now racing to settle employee claims by Monday, attorneys for the workers contend," Eidelson writes. "In doing so, the lawyers claim NLRB officials are wrongfully circumventing them and going straight to the workers with take-it-or-leave-it offers."

**Read the Bloomberg article**.

# Workplace Monitoring Gets Personal, and Employees Fear It's Too Close for Comfort. They're Right.

Companies are increasingly tapping into new technology designed to keep a close eye on employees. This monitoring goes beyond traditional security cameras to include portable devices worn by workers, reports the ***Chicago Tribune***.

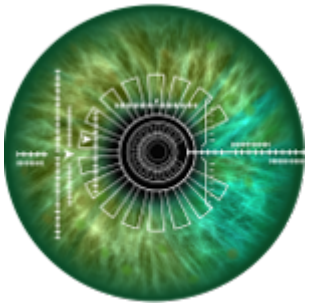
Reporter **Robert Reed** writes that some employers are getting really high-tech with following their workers, such as using time clocks that can an employee's fingerprint, retina or iris.

"Some workers are ticked off about it and fighting back. Up to 30 class-action lawsuits were filed by late 2017 accusing companies of violating the Illinois Biometric Information Privacy Act, which governs how such sensitive information is collected and used," according to Reed.

Reed also raises the possibility that employers could even provide Fitbits or another portable health monitor as part of a corporate wellness program. "Can the personal data gleaned be used to alter, or deny, access to employer-provided insurance plans?," he asks.

**Read the *Tribune* article**.

# Collection of Employee Biometric Data: Privacy and Compliance Issues



Businesses are increasingly using biometric data (i.e., measurements of a person's physical being) for a variety of identification purposes, such as to provide security for the financial transactions of their customers and for the tracking of work hours of their employees, points out the Fisher Phillips **Employment Privacy Blog**.

Partner Jeffrey Dretler discusses the privacy concerns for employees and the compliance issues for employers related to collection of biometric data.

He suggests that employers should establish safe practices and be on the lookout for new developments. And he concludes with five suggested steps employers should take to be in compliance.

**Read the article**.

# Morgan Lewis Scolded for Possible Conflict in Hotel Wage Case

A U.S. district judge in California concluded that Morgan Lewis "plainly violated" California attorney professional conduct rules by representing "both sides of the case" in a hotel workers' class action suit, **Bloomberg Law reports**.

Sheraton workers in San Francisco won class action status for their claim that their employer created a culture that encouraged staff to work through breaks without pay.

Reporter **Jon Steingart** writes that Judge William Alsup criticized the way lawyers from Morgan, Lewis & Bockius LLP obtained statements from three former employees that were used to argue against certification of the class. The same lawyers also represented the former workers in depositions conducted later.

A Morgan Lewis lawyer responded to a show cause order with an apology and a pledge that the firm wouldn't repeat the conduct in any court.

**Read the Bloomberg Law article**.

# *Tackett Redux*: Ordinary Principles of Contract Interpretation Mean No Inference of Vesting

The U.S. Supreme Court recently reaffirmed that collective bargaining agreements (CBAs) must be interpreted according to "ordinary principles of contract law," according to **a post** in the Proskauer Rose Employee Benefits & Executive Compensation Blog.

The ruling again rejected the Sixth Circuit's inference from silence that CBAs vested retiree benefits for life.

Three years ago, the Supreme Court held in *M&G Polymers USA, LLC v. Tackett* that CBAs must be interpreted according to ordinary principles of contract law, and the court rejected the Sixth Circuit's so-called "*Yard-Man*" inference that if a CBA did not specify that retiree medical and other welfare benefits had a limited duration, the benefits were presumed to be vested.

The article's authors explain: "The Supreme Court unanimously reversed the Sixth Circuit, holding that the Sixth Circuit's inference of vesting could not be squared with *Tackett* because it did not comply with *Tackett's* direction to apply ordinary contract principles."

**Read the article**.

# Conflict of Interest Causes NLRB to Vacate Pro-Corporation Ruling


The National Labor Relations Board threw out its most important ruling of 2017 – a 3-2 victory for major U.S. corporations – following an internal agency report that found that a potential conflict-of-interest had tainted the vote, reports Bloomberg, via the ***Chicago Tribune***.

Bloomberg reporter explains that the discarded ruling, called *Hy-Brand*, had reversed a controversial Obama-era "joint employer" decision empowering workers to pursue claims against, or seek collective bargaining with, major corporations that don't sign their paychecks, such as franchisors or clients of contractors.

"The vote overturning that 2015 case included support from Trump-appointed William Emanuel, whose former law firm had represented one of the companies in the original case, Browning-Ferris," Eidelson reports.

**Read the *Tribune* article**.

# For the Third Time, Supreme Court to Hear Mandatory Union Dues Arguments

Next week the Supreme Court will hear oral argument on whether to reverse a 41-year-old ruling that allows states to require government employees to pay union dues even though they don't want to be union members.

"It's a familiar question for eight of the nine justices, who have already heard oral argument on the issue twice," writes **Amy Howe** in **SCOTUSblog**. "The court did not resolve the issue the first time; the second time, in the wake of the death of Justice Antonin Scalia, they deadlocked. This means that the outcome in [petitioner Mark] Janus' case could hinge on the vote of the court's newest justice, Neil Gorsuch."

The case, appealed by Janus, an employee of the state of Illinois, comes after the U.S. Court of Appeals for the 7th Circuit rejected his argument that the agency fee violated his rights under the First Amendment.

**Read the SCOTUSblog article**.

# Attempting to Insert New Term into Collective Bargaining Agreement Not Agreed to in Negotiations Violates the Law


A case heard by the National Labor Relations Board discusses the law concerning the legal duty to reduce a collective bargaining agreement to writing, and then sign it, according to **a post** on the Proskauer Labor Relations Update.

Partner **Mark Theodore** explains:

"Among other things, a signed agreement serves as an absolute bar to employees filing a decertification petition during the term of the agreement (with some timing limitations), while an unsigned agreement does not bar such a petition. A signed agreement also, obviously, is more easily enforced as it signifies to the entire world that this is the deal, and that the parties signed it after evaluation of its terms."

**Read the article**.

# Hunton & Williams Adds Team to National Labor and Employment Practice

**Hunton & Williams LLP** announces the expansion of its national labor and employment practice with the addition of partners Michele J. Beilke and Julia Y. Trankiem and two associates in Los Angeles.

“As employment laws become increasingly complex, we are focused on growing the capabilities of our national practice, especially in geographic regions that are important to our clients,” said Emily Burkhardt Vicente, co-chair of Hunton & Williams’ labor and employment group and a partner in the Los Angeles office. “Michele and Julia are exceptional lawyers who bring a wealth of experience to our already robust employment practices in Los Angeles and San Francisco. Their team’s strong commitment to client service mirrors our own, and we are excited to have them join our team in California.”

Rafael Tumanyan and Sonya Goodwin are also joining the firm as associates in the Los Angeles office. All four came to the firm from Reed Smith LLP.

Beilke has nearly two decades of experience representing employers in California. Her practice focuses on the defense of state and national wage and hour class and collective actions, and single- and multi-plaintiff discrimination and harassment claims. She also counsels and trains employers on a wide range of employment law issues, including compliance with state and federal leave laws, accommodation requirements for workers with disabilities, sexual harassment prevention and managing reductions in force. Beilke has successfully tried numerous cases to verdict in both state and federal court and in arbitration. Beilke received both her undergraduate and law

degrees from the University of Southern California.

“Our experience is a perfect match for Hunton’s practice and growing footprint in Los Angeles and the San Francisco Bay area,” Beilke said. “We have all spent our careers in California litigating many of the same types of cases Hunton’s practice is known for, so we are thrilled to be part of the team here with a national platform,” Trankiem added.

Trankiem has represented employers in class, collective, representative and hybrid actions brought under the Fair Labor Standards Act and state wage and hour laws. She also has defended employers in countless single- and multi-plaintiff discrimination, harassment and retaliation claims. Trankiem advises and counsels her clients regarding every facet of the employment relationship. She is active in local and national organizations, including the California Minority Counsel Program and the National Employment Law Council. She received her undergraduate degree from University of California, Los Angeles, and her law degree from University of Michigan Law School.

“Michele’s and Julia’s practices align with Hunton’s strengths in several leading industries, including financial services, retail and consumer products, and real estate development and finance,” said Ann Marie Mortimer, managing partner of the firm’s Los Angeles office and head of the energy and environmental litigation practice.

The firm’s national labor and employment practice has successfully litigated thousands of high-profile, high-risk matters in federal and state courts, hearings before federal and state law enforcement agencies, and mediations and arbitrations. The lawyers in the group represent clients in nearly every form of traditional and emerging labor and employment disputes, concerning issues at the forefront of new employment class and collective litigation trends across the country.

# Will the Supreme Court Deal a Blow to Trade Unions?

Of all the blockbuster cases at the Supreme Court this year, *Janus v American Federation of State, County and Municipal Employees (AFSCME)* is expected to hold the fewest surprises, according to ***The Economist***.

*Janus*, which is due to be argued on Feb. 26, asks whether public employees who choose not to join their designated union may nevertheless be charged "agency fees" to support collective bargaining. Non-members of a union may be required to subsidize contract negotiations over salary, benefits and working conditions. But those workers can't be charged fees for a union's political efforts, such as lobbying.

*The Economist* explains: "*Janus* is at bottom a bid to undermine America's labour movement. The case is not presented that way; it arrives at the Supreme Court in First Amendment wrapping by express invitation from Justice Samuel Alito in a pair of recent cases."

**Read *The Economist*'s article**.

# Employer's Notice of Mandatory Arbitration Program May Be Insufficient to Compel Arbitration


A Sixth Circuit ruling in a recent case shows that an employer's notice of its institution of a mandatory arbitration policy or program is, without more, insufficient to compel an employee to arbitrate a subsequent dispute, writes **Gilbert Samberg** in Mintz Levin's **ADR: Advice From the Trenches** blog.

He explains that something more is required in order to be able to infer the employee's knowing assent to the new term of employment. The new "Employment Dispute Resolution Process" (EDRP) was promulgated after the plaintiffs had commenced employment.

Samberg writes that the appellate court "determined that the employer's failure to notify the employees expressly that 'they would accept the terms of the EDRP by continuing their employment' was a critical omission, and thereupon held that the employees had not manifested knowing assent merely by continuing to work at FCA."

**Read the article**.

# Tech Start-Up Fires Engineers Amid Union Organizing Effort

Bloomberg **is reporting** that a group of Lanetix Inc. software engineers in San Francisco and Washington, D.C., were laid off for trying to join a union, according to organizers working with the group and a complaint obtained by Bloomberg Law.

"The move came less than two weeks after the workers filed a petition to join a CWA unit and days before a union election hearing scheduled for Jan 31," according to the report by Hassan A. Kanu and Josh Eidelson. "The workers said the company told them the layoffs were due to lackluster fourth quarter performance last year, Fiedler said."

A CWA executive director told the reporters the company said it was "looking at moving their engineering operations overseas."

**Read the Bloomberg article**.

# Workplace Litigation Report: The Good and the Bad


*Image by [Alpha Stock Images]*

Employers can find good news and some bad news in Seyfarth Shaw's 14th Annual Workplace Class Action Litigation, which analyzes 1,408 rulings.

The firm has posted the **57-page report** on its website and has created a **microsite** that provides a brief overview of the survey's findings.

**David Shadovitz** of Human Resource Executive also has written **a summary** of the report.

Shadovitz offers the good news for employers from the report: "Legal precedents and new defense approaches resulted in better statistical outcomes for employers in opposing class-certification requests for the second straight year. For instance, in wage-and-hour litigation—one of the more active categories of employment law—employers won 63 percent of decertification rulings, a success rate of nearly 20 percent from the year before."

On the other side of the coin, he writes, the monetary value of the top workplace class-action settlements jumped more than $1 billion to a record high of $2.72 billion.

**Read the Seyfarth report**.

# New Labor Board GC's Restructuring Plan Worries Senior Officials


Senior officials with the National Labor Relations Board have expressed concern over a plan outlined by the board's new general counsel to demote the senior civil servants who resolve most labor cases, reports ***The New York Times***.

Peter B. Robb, the agency's general counsel and a Trump appointee, outlined the proposal this month in a conference call with the civil servants

"Under the proposal, those civil servants – considered by many conservatives and employers to be biased toward labor – would answer to a small cadre of officials installed above them in the National Labor Relations Board's hierarchy," explains **Noam Scheiber**.

The result could be result in a system friendlier to employers named in complaints of unfair labor practices or facing unionization drives.

**Read the *Times* article**.

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# Workplace Lawyers Race Against the Trump Clock

Litigators are settling more cases as labor agencies and federal courts fill up with business-friendly appointees, **reports Bloomberg**.

"While employers across the U.S. paid a record amount in settlements for workplace violations last year, don't expect this to mark the beginning of a trend. Think of it more as the storm before the calm, as labor lawyers rush to lock in payouts ahead of a shifting legal landscape," writes **Rebecca Greenfield**.

She quotes Paul DeCamp a lawyer at Epstein Becker & Green who represents employers:

> "I think that what we see is a race to settle. I've seen it in my practice. Cases that plaintiffs' counsel felt very strongly about and seemed more bullish and willing to go to trial—since the election they were more eager to settle those cases."

**Read the Bloomberg article**.

# Labor Board Burns Through Obama-Era Rules

***The Hill* reports** that the National Labor Relations Board is delivering a flurry of wins to businesses now that it has a Republican majority under President Trump.

In recent days, the independent board tasked with enforcing fair labor practices and collective bargaining rights overruled three Obama-era rules in a series of 3-2 rulings, writes reporter **Lydia Wheeler**.

One of the rules, which employers had opposed for years, was a controversial NLRB decision that changed the definition of a joint-employer. That rule could have put employers on the hook for labor law violations committed by their subcontractors in some cases.

**Read *The Hill* article**.

# Can You Really Shut Down Your Company a Week After Your Workers Unionize?

American labor laws normally protect workers from retaliation for unionizing, but billionaire CEO Joe Ricketts seems to have used a dramatic exception when he closed his news websites after some workers voted to unionize: A business may always close its operations entirely.

**Francie Diep**, a reporter for the ***Pacific Standard***, writes that all of the publcations' offices – including those in San Francisco, Los Angeles, Chicago and Washington, which had not voted to unionize – are now closed.

"If lawyers decide to pursue a case charging that Ricketts acted illegally, they'll have to prove that some part of the business is still operating – say, if Ricketts were tied to another media company somehow – or that, after the shutdown, Ricketts opened up a similar business elsewhere," Diep writes.

**Read the *Pacific Standard* article**.

# Billionaire CEO Shuts Down Publications After Vote to Unionize

The CEO of a group of digital local news sites shut down the publications a week after reporters and editors in the combined newsroom of DNAinfo and Gothamist voted to join a union, reports ***The New York Times***.

Joe Ricketts, the billionaire founder of TD Ameritrade, owned the sites.

“For DNAinfo and Gothamist, the staff’s vote to join the Writers Guild of America East was just part of the decision to close the company, write **Andy Newman** and **John Leland**.

“The decision by the editorial team to unionize is simply another competitive obstacle making it harder for the business to be financially successful,” said  a spokeswoman for DNAinfo.

**Read the *NYT* article**.