MARICOPA LAWYER

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EMPLOYMENT LAW SECTION

The EEOC's Final Regulation Clarifying and Interpreting the Pregnant Workers Fairness Act

By: Katya M. Lancero

In March 2023, we published an article about the Pregnant Workers Fairness Act ("PWFA"), which took effect on June 27, 2023. On April 15, 2024, the United States Equal Employment Opportunity Commission ("EEOC") issued its final regulation and interpretive guidance, which took effect on June 18, 2024, and which provided clarifying information and guidance on how to interpret the PWFA. This article explains the final regulation and highlights legal challenges to the regulation.

Recap of the PWFA

As a recap, the PWFA requires covered public and private employers with at least 15 employees to provide reasonable accommodations (i.e., changes at work) to a qualified employee's or applicant's *known* limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation would impose an undue hardship on the operations of the employer. The PWFA is similar to the Americans with Disabilities Act and the Arizona Civil Rights Act ("ACRA") which require covered employers to consider granting reasonable accommodations to qualified individuals with disabilities. Notably, the PWFA prohibits an employer from requiring an employee to go on a leave of absence, whether paid or unpaid, if another reasonable accommodation can be provided. In addition, unlike under the ADA and ACRA, the PWFA protects employees even if they are temporarily unable to perform an essential function of the job.

The EEOC's Final Regulation

The EEOC's final regulation defines "pregnancy, childbirth or related medical conditions" expansively, to include not only current, past, and potential pregnancy, but also termination of pregnancy, including by way of abortion, which has led to legal challenges. The definition also includes termination of pregnancy by miscarriage and stillbirth, as well as infertility and fertility treatment, the use of contraception, pregnancy-related sicknesses such as morning sickness and preeclampsia, labor and childbirth, lactation, menstruation, chronic migraines, dehydration, high blood pressure, depression, postpartum depression, and frequent urination, among other examples.

In addition, "limitation" is defined expansively in the final regulation to include

impediments or problems that are modest, minor, or episodic. It also includes actions that need to be taken to maintain the work-

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CourtWatch

Daniel P. Schaack

Jabberwocky and a Chicken Bone

—Wow.

Just ... wow.

Appellate opinions tend to be dry affairs. The author states the issue, presents the facts, lays out the law, applies that law to those facts, and announces the court's decision. When colleagues disagree, they usually do so in a similarly understated manner, often ending with "I respectfully dissent."

Not so much in a recent opinion from the Ohio Supreme Court. It held—by a vote of four to three—that a diner essentially had the onus of ensuring that the food that was served to him at a local restaurant was safe to eat. The three dissenting justices were astounded by the majority's ruling in *Berkheimer v. REKM, L.L.C.*, No. 2024-Ohio-2787 (July 25, 2024).

Michael Berkheimer was evidently a regular diner at Wings on Brookwood, a restaurant in Hamilton. One evening, he and his wife joined a small group of friends there, and Berkheimer ordered his usual fare, boneless chicken wings. He followed his usual practice of cutting each boneless wing into two or three pieces. As he was eating the third piece of the second wing, he felt like something had gone down the wrong pipe. He couldn't clear whatever was in his throat.

Over the next few days, he developed a fever and couldn't keep food down, so he went to the emergency room. A doctor discovered a thin chicken bone, five centimeters long, lodged in his esophagus. The bone tore his esophagus, leading to a bacterial infection in his chest.

Berkheimer sued the restaurant, its food supplier, and the company that sold the suspect chicken. At deposition, the restaurant's cook described how he prepared boneless chicken wings. It turns out they are not actually wings. Instead, they are boneless breasts that come pre-butterflied from the supplier. The cook would cut each breast into one-inch chunks: the "wings" that the restaurant served.

The defendants won summary judgment, with the trial court ruling "that common sense dictated that the presence of bone fragments in meat dishes—even dishes advertised as 'boneless'—is a natural enough occurrence that a consumer should reasonably expect it and guard against it." The court of appeals affirmed, ruling that "a reasonable consumer could have reasonably anticipated and guarded against the bone at issue in this case."

The supreme court granted review to decide whether, "as a matter of law, ... a consumer should reasonably expect, anticipate, and guard against an injurious substance that has specifically been disclaimed by the seller is a jury question." The majority concluded that it

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Judge Ronee F. Korbin Steiner

Missed opportunities

In 2011, I applied for the bench for the first time amidst the weight of my mother's advanced Alzheimer's and my father's hospice care. I remember sitting in my parents' dining room waiting for the interview, my father in his bed. I knew how proud he was of me. But, despite a promising interview with the governor, I was not selected. That moment crystallized my priorities: family over career. I chose to cherish my remaining time with my parents over chasing professional ambitions and decided not to apply for the bench during that time. Two days later my father passed away and my mother followed suit, four months later.

Though the phrase "missed opportunities" carries a negative connotation, I use it not to dwell on regrets but to underscore a positive message.

As professionals, we encounter missed chances in various spheres.

1. **Missed opportunities to prepare your judge:** As judges, we rely on well-prepared lawyers for informed decisions. We are smart and hardworking judges. At the end of the day, we are people, working hard to make the best and most legally appropriate decisions. Providing thorough pretrial statements, relevant case law, and well-prepared clients enhance the judicial process. Judges see lawyers missing chances to prepare and educate us. If you are not doing this, you are losing real opportunities. Take the time to provide this information to us. We look for it. We welcome it. You will not be sorry.
2. **Missed opportunities for networking and business growth:** How many of you attend MCBA or other bar events? Are you signed up for the Lawyer Referral Service? How many potential new clients are you "leaving on the table," by not participating in community events? Are you teaching or taking MCBA CLEs? Participation in community events is about building relationships. I myself, have participated in all of those activities as a practitioner and as a judge. Don't lose those chances to do the same. Active participation in legal community events fosters relationships and expands client bases. Engaging in bar associations, referral services, and continuing legal education cultivates professional networks. Don't miss those chances.
3. **Missed opportunities to cherish loved ones:** Reflecting on my own experience, I often prioritized work over precious time with my family. Striking a balance between professional commitments and personal relationships enriches both spheres of life. Being legal professionals is important to us. But these are just our vocations. As I relate back to the loss of my parents almost thirteen years ago, I am reminded of the missed opportunities to have time with family. I can't tell you the number of times I took calls on the beach, at Disney and other places, with my young children and husband in tow. While being available may have helped my client relationships, I missed being present with my family and friends. I don't regret my actions. After all, it made me who I am today both personally and professionally. But I can't get those moments back. While our careers are vital, they should not overshadow cherished moments with family and friends.

In essence, seize every opportunity to advocate effectively, nurture professional networks, and prioritize meaningful connections. Balancing career aspirations with personal fulfillment not only enhances professional growth but also enriches the fabric of our lives, making us better lawyers, better members of the community and better people. ■

Q&A

LAWYER LIABILITY AND ETHICS

ABA Weighs in with First Opinion on Generative AI

Joseph Brophy

AI has officially arrived in the legal profession. For about a year now, there has been a string of stories about every two months where a court has sanctioned lawyers for the use of generative artificial intelligence (GAI), usually ChatGPT, that resulted in briefing to the court that contained bogus case citations and nonsensical argument. Meanwhile, both Lexis and Westlaw are in rolling out their GAI programs, respectively called Lexis+AI and Co-Counsel.

The ABA defines GAI as AI that can create various types of new content, including text, images, audio, video, and software code in response to a user's prompts and questions. To accomplish this, these tools analyze large amounts of digital text culled from the internet or proprietary data sources. When presenting their GAI programs to prospective customers, both Lexis and Westlaw are quick to make clear their products do not carry the same risks as ChatGPT because their source material is taken from their existing databases rather than sucked up from the internet. GAI tools may assist lawyers in tasks such as legal research, contract review, due diligence, document review, regulatory compliance, and drafting letters, contracts, briefs, and other legal documents.

In July, the ABA's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 512, which is the first ABA opinion on GAI. Any lawyer who relies on GAI in their practice should read Formal Opinion 512. Below are the highlights and applicable rules.

First, under ER 1.1 (competency) a lawyer must acquire a reasonable understanding of the risks and benefits of GAI, either personally or through the use of the expertise of others. Formal Opinion 512 specifically identifies as a risk the "hallucinations" by GAI (ChatGPT is notorious for hallucinations) that have created ethical problems for some lawyers. The ABA accurately defines "hallucinations" as "ostensibly plausible responses [to a GAI prompt entered by a lawyer] with no basis in law or fact." In almost every case where lawyers have been subject to discipline for using GAI, the trouble started with the lawyer's assumption that the information generated was accurate and did nothing to verify that assumption.

Second, before lawyers input information relating to the representation of a client into a GAI tool, they must evaluate the risks that the information will be disclosed to or accessed by others outside the firm. Depending on what GAI tool you are using, the protections of confidential information (ER 1.6 – confidentiality) will vary wildly. For example, Lexis AI has a feature that will summarize up to 50 pages of deposition transcript at a time, and then will erase the uploaded information shortly after it is uploaded, which minimizes the risk that a client's confidential information will be accessed by a third-party. Not all GAI platforms are as concerned about the confidentiality of information as one that is designed specifically for use by lawyers.

The disclosure of client confidential information requires informed consent. If you or your firm is considering using GAI, it might be a good idea to disclose that in writing to your clients and provide the risks and benefits of such disclosure. Formal Opinion 512 states: "To obtain informed consent when using a GAI tool, merely adding general, boiler-plate provisions to engagement letters purporting to authorize the lawyer to use GAI is not sufficient."

Third, beyond the disclosure of confidential information, a lawyer should inform the client (ER 1.4 – communication) if they intend to use GAI for a particular task so that the client can understand the risks and benefits. For example, if the lawyer is using GAI to evaluate potential litigation outcomes or jury selection, the client should be informed. Moreover, just as with anything else, the use of GAI is not a substitute for the lawyer exercising their independent professional judgment. Blaming GAI will not be a great defense in front of the state bar or in a malpractice suit if your GAI gives you bad information. Not all uses of GAI must be disclosed to a client. Whether and how much to disclose to the client will depend on how much influence the use of GAI has on the representation.

Fourth, as previously mentioned, the primary trouble GAI has caused lawyers arises from hallucinations that result in frivolous arguments or phony legal citations (ER 3.1 – frivolous claims or defenses). In almost every case, that trouble is compounded by the lawyer not falling on their sword and coming clean with the court when the court or opposing counsel discover the mistake (ER 3.3 – duty of candor to the tribunal).

Fifth, managerial lawyers must establish clear policies regarding the law firm's permissible use of GAI, and supervisory lawyers must make reasonable efforts to ensure that the firm's lawyers and nonlawyers comply with their professional obligations when using GAI. As law students become familiar with Lexis and Westlaw's GAI, which will be provided to them free during law school, they will be tempted to view GAI as a reliable substitute for reading and understanding the

See **ABA Weighs in** page 8

Focus on Topic Sentences

A good topic sentence introduces the subject of that paragraph. A good topic sentence will also provide a transition from one subject (or paragraph) to the next. A **GREAT** topic sentence will add the relevant detail to make the connections clear. My son's teacher called these sentences "focus sentences." A focus sentence should tell the reader not only the subject of that paragraph, but it should also help organize the overall document and relate back to the document's overall purpose (or thesis).

Consider the following topic sentence:

The employee handbook is an important document.

It signals to the reader that the subject of the paragraph is the employee handbook and (most likely) the role it plays. I would categorize this sentence as good. To make it great, I ask the questions "so what?" or "why?". Why is the handbook so important? So what about it makes it important? Incorporating this context into the topic sentence will move the sentence from good to great.

The employee handbook is important because it provides the steps to report harassment.

The employee handbook is the only document that provides the steps to report harassment.

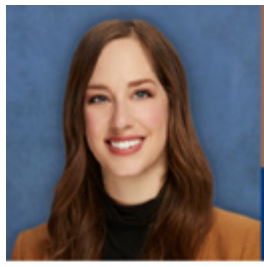
Taking time to make the topic sentences into more complete focus sentences helps the reader understand the document and its arguments. And if these sentences are written well, the document's topic/focus sentences (put in order) provide a quality outline of its arguments.

A word of caution: You can include too much "so what" or detail into a topic sentence. If you find that your sentence is no longer short and focused – it extends beyond roughly two typed lines – then check to make sure you are not combining topics that should be in separate paragraphs, as the following example shows.

The employee handbook is important because it provides the steps to report harassment, gives a notice period, and sets forth the details about what to expect after the filing.

However, if these topics are short, closely related points, I suggest using numbering and transitions for clarity. This structure allows you to address the topics all in one paragraph.

The employee handbook is important because it (1) provides the steps to report harassment, (2) gives a notice period, and (3) sets forth the details about what to expect after the filing. First, . . . ■



YOUNG LAWYERS DIVISION PRESIDENT

Mickell Summerhayes

Tell All the Young Lawyers You Know: Join the YLD!

Transitioning from law school to practicing law can be one of the most difficult periods in a young lawyer's career. The shift from academic study to the practice of law often brings unexpected challenges, including adapting to a new professional environment, building a network, and managing the pressures of a demanding job-not to mention dealing with clients, partners, and the real-world application of the law. For young lawyers in Maricopa County, joining the Maricopa County Bar Association's Young Lawyers Division (YLD) can provide invaluable support and opportunities during this time.

The YLD is more than just a professional network; it's a welcoming community designed specifically to help young lawyers navigate the complexities of early career development. Membership offers access to a broad network of peers who understand the unique pressures and challenges faced during these formative years. By connecting with fellow young lawyers, members can share experiences, seek advice, and gain insights into best practices from those who have recently faced the same hurdles.

One of the most significant benefits of joining the YLD is the chance to become involved in the division's various programs and initiatives. The YLD plans regular events and happy hours (check out the Barristers' Ball coming up this month!), which are tailored to help young lawyers, develop professionally, network, and become more involved in the community. The YLD offers numerous ways for young lawyers to build their skills, expand their professional circles, and establish a sense of belonging within the legal community.

Applying to be on the YLD board takes this involvement a step further. Board members play a crucial role in shaping the division's activities and ensuring that the needs of young lawyers are met. Serving on the board provides a unique opportunity to influence the direction of the division, implement new programs, and advocate for issues important to young lawyers. It's also a chance to develop leadership skills, gain a deeper understanding of the legal profession, and make meaningful contributions to the community.

Look for the YLD to call for nominations in the coming months, and let all your young lawyer friends know. ■

EMPLOYMENT LAW SECTION

Independent Contractor v. Employee: What Test Do I Use?

By Wendy Anderson and Denise Blommel

Your prospective client just told you in initial consultation that all workers must be "1099s." You reply, "This depends upon a number of factors including type of business, what the workers will do, and how much risk you are willing to take." Then, you think, "What about that paralegal the Firm just hired as an independent contractor?"

Why should I care?

All taxing authorities presume that all workers are employees because much governmental revenue comes from withholding tax and so that workers can benefit from the plethora of local, state, and federal laws and regulations protecting employees. (Few statutory protections exist for contractors.) All Arizona employers are required to carry workers' compensation insurance and pay unemployment tax.

For Arizona attorneys, the main concern is Ethics Rule 5.3 which requires close supervision of non-lawyer workers, particularly regarding confidentiality and Ethics Rules compliance. Given all the required statutory employee rights and benefits, it might seem easier to hire a worker without worrying about taxes, paid sick leave, insurance, and infinite paperwork. However, you cannot tell the independent contractor (IC) paralegal how to do the job and he or she cannot be economically dependent upon you. The IC can sue you for any work injury. You can be personally liable for unpaid FICA taxes and overtime pay. Further, the paralegal's work product does not belong to you as "work for hire" is only for employees.

But my CPA says the IC meets the IRS tests

The Internal Revenue Service uses the traditional "Right-to-Control" test from the Restatement of Contracts. The IRS 20 question test deals with such factors as need for supervision, set hours of work, sequence of work tasks, payment by the hour, furnishing of tools, and the right to fire. Both the IRS and the Arizona Department of Revenue focus on the behavioral (right to control how the work is performed), financial (right to control the business aspects of the worker's activities) and relationship (how the parties perceive their relationship) elements.

The IRS test may be used when evaluating whether the business can classify the worker as an IC for income tax purposes. However, the risk of a tax audit is not as great as the risk of a state or federal wage claim, an on-the-job injury, or an unemployment audit.

Wage/Hour Test

Both the federal Fair Labor Standards Act (FLSA) and the Arizona Fair Wages & Healthy Families Act use the "Economic Realities" test: (1) is the worker economically dependent upon the employer or (2) operating his/her own business. A key factor is whether the worker's services are an integral part of the employer's business. Other factors include the right to control, permanency of the relationship, the worker's opportunity for profit and loss, and level of skill. The business risks are failure to pay minimum wage, overtime, and Earned Paid Sick Time. Attorney fees are mandatory in FLSA cases and can be exponentially greater than the amount in dispute. Federal and state payroll audits are lengthy and expensive.

Workers' Compensation Test

A.R.S. §23-907 is a parade of horrors for the uninsured employer, including the risks of being sued in tort without certain defenses, a No Insurance claim, closure of business, financial penalties, and conviction of a felony. A carrier will probably cancel the business's workers' compensation insurance if it classified a worker as an IC, did not tell the carrier about the IC, and that IC gets injured and files a claim. An IC's "No Insurance" claim or lawsuit can financially ruin a business.

A.R.S. §23-902D gives a rebuttable presumption of IC status if there is a written contract between the business and the worker that, among other things, provides no authority to supervise or control the worker, no workers' compensation insurance, no requirement of exclusive work, no provision of tools, equipment, or required license, no required time of performance, and no hourly wage. This statute combines the Right-to-Control test with the Economic Realities test.

Unemployment Insurance Test

A.R.S. §23-1601 gives a rebuttable presumption of IC status for unemployment compensation purposes if the worker executes a written Declaration of Independent Business Status (DIBS). The DIBS also incorporates Right-to-Control and Economic Realities elements: the IC operates an independent business, no right to unemployment benefits, no tax withholdings, no provision of tools, licenses, wages, or expenses, and no requirement of exclusive services.

What now?

All of these tests are fact intensive. The best way to avoid risk is to hire all workers as employees. Before engaging an IC, discern whether you can function without supervising the IC and can handle the IC working for others. The bottom line for lawyers is whether you can meet your supervisory obligations under E.R. 5.3 with an IC. If so, draft a contract incorporating all the applicable tests. If not, it's time for the W-2s. ■

Avoiding FMLA Mishaps

By Jodi R. Bohr

We all know that the Family and Medical Leave Act ("FMLA") provides eligible employees with up to 12 weeks of unpaid medical leave to care for a serious medical condition of the employee or the employee's family member. Despite the fact that FMLA is celebrated its 30 anniversary last year, employers are still grappling with its proper administration. This column will address common FMLA mishaps and suggest best practices with respect to implementing FMLA in your workplace.

Recognizing the need for leave

I regularly receive calls from clients who want to terminate an employee based on excessive absenteeism. One of my first questions to those clients is to ask whether the absent employee is eligible for FMLA and whether the employee's absences have indicated a need for medical leave.

As a reminder, employees don't have to specifically request FMLA to qualify for the leave. Make sure managers and HR are properly trained to recognize when an employee may need FMLA leave, so the employee is provided with the opportunity to exercise that right to leave. Courts have held that if an employee provides enough information to indicate a need for leave (i.e., a serious health condition) and the manager fails to recognize the need for leave, the employer could be liable for an FMLA violation.

Implement a proper FMLA policy

While FMLA leave is largely governed by statutory requirements, FMLA allows employers to decide whether to calculate the 12 weeks of leave on a calendar year or rolling basis. If the FMLA policy is not clear how the FMLA is calculated, the employee may choose the calculation method.

Another benefit of a proper FMLA policy is to educate employees on their FMLA rights and how to go about requesting FMLA. This removes some of the onus on employers to recognize the need for leave.

Finally, the FMLA policy should be clear that employees will be required to exhaust other available paid leave (e.g., PTO, paid sick leave, or vacation) concurrently with their FMLA leave. Employees cannot stack these leaves one after the other. The policy should also be clear that employees do not accrue paid leave while on FMLA leave.

Communication is key

Communications between the employer and the employee throughout the FMLA process is paramount to avoiding liability. To start, employees must be informed of their rights under FMLA. This may include providing the employees with the necessary forms to certify FMLA leave. When providing these forms to the employee, be clear on when the employee must return the forms. Explain to the employee when the leave starts, and if the full twelve weeks appears necessary, when the leave will expire.

If the employee has not returned the forms and the deadline is approaching or just passed, remind the employee of the looming deadline or give the employee a few more days to return the forms. Don't be too rigid with respect to this deadline, as the employee may have a legitimate need for more time.

As the employee's leave is set to expire, communicate your expectations with respect to the employee's return. When is the employee expected to return? Will the employee need a work release prior to returning? What happens if the employee cannot get the work release or fails to return when the leave time expires? All expectations need to be communicated before the leave expires.

Don't forget the ADA

Communication during leave will allow an employer to anticipate potential implications under the Americans with Disabilities Act ("ADA"). The employee may be able to return with certain restrictions. Or the employee may need one more week of leave. Both scenarios implicate the ADA, which requires employers to provide qualified employees with a disability with a reasonable accommodation. Employers must consider whether the ADA applies to the situation before outright terminating an employee who is unable to return when FMLA leave expires.

Be prepared

The Department of Labor (the FMLA enforcing agency) has issued an Employer's Guide to the Family and Medical Leave Act. Employers should familiarize themselves with this Guide, which can be found at www.dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf. Create an FMLA checklist or flow chart on how to handle FMLA leave requests. Finally, if questions arise, consult with experienced employment counsel for guidance. ■

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EMPLOYMENT LAW SECTION

Overcoming the Retention and Recruiting Hurdle Created by a Hot Job Market

By Jodi R. Bohr

In May 2024, the unemployment rate in Arizona was 3.4%, the lowest jobless rate since 1976. Arizona remains among the stronger local job markets in the U.S., so recruiting and retaining top talent takes center stage with employers. As it should, since the costs associated with recruiting and training new employees are significant, especially with the challenge of finding skilled individuals in a job market marked by historically low unemployment rates. While competitive salaries and benefits are crucial retention factors, employers must recognize that other elements play a pivotal role in employee satisfaction and loyalty. What things should employers consider as they take steps to recruit and retain employees in this hot job market?

Retention

The cost of hiring new employees can be considerable. And, with historically low unemployment rates, top talent is hard to find, potentially increasing this cost. As a result, human resources should place their focus on retaining their top talent to avoid likely turnover.

While salary and benefits are generally a key retention point, oftentimes, other factors are just as important for employee retention. Employers should recognize their employees for a job well done. Doing so is vital to ensuring that employees stay engaged. Employees frequently give their employers low marks when it comes to receiving recognition for their achievements. Employers should work on improving this perceived failure by employees. Recognition does not cost anything, and can go a long way toward making a hardworking employee feel appreciated.

Offer your employees a means to further their professional development. Learning opportunities allow employees to grow and expand, which keep employees engaged and motivated. It also creates a pool of potential new leaders to select from within the company. Leaders groomed from within the company are more likely to succeed than leaders brought in from outside the company. They also know about and are able to continue contributing to the positive company culture created when employees are developed from within.

Work flexibility carries significant weight for candidates. If the position allows for flexibility, be sure to communicate the type of flexibility available. This goes a long way towards improving the candidates impression of the company and will be an instrumental factor in the candidate's decision.

Recruiting

Of course, hiring the right person from the start plays a pivotal role in retention. This starts with the job posting as it's the first contact the company has with the potential applicant. The job posting should adequately reflect what the job will entail and the necessary skill set to perform the job. Employers should use current job descriptions when preparing the job posting to ensure receipt of applications from the right pool of applicants. Job postings should also give candidates an idea of the company and its culture, so they have a clear idea about the type of company with which they are applying.

The company should work to identify candidates who will stay the course. Start by reviewing the resume to determine whether the applicant has longevity with previous employers. This indicates loyalty and engagement. Applicants who have moved around a lot tend to indicate a retention risk and repeating past behaviors.

Applicants who list activities outside of work on their resume may provide additional insight to indicate whether they will stay the course through ups and downs. Has the candidate committed to volunteer or invested in a cause? If so, this may show a willingness to stick with something he cares about.

Best practices

Even the best retention efforts are not 100% successful. Employers should have a recruiting process established to be prepared for an eventual loss. The recruiting process should be customized to meet the needs of the company. Following this process is essential, as the recruiting process was established for a reason. ■

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The EEOC's Final Regulation

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er's health or the health of their pregnancy, including merely seeking healthcare for their pregnancy. Thus, workers with healthy and normal pregnancies are entitled to accommodations under the PWFA based on the final regulation.

If an employer has reasonable concerns about whether a limitation is related to pregnancy, childbirth, or related medical conditions or whether the worker needs an accommodation, the employer may request reasonable supporting documentation from a healthcare provider. The final regulation sets forth examples of when it would not be reasonable to request supporting documentation—for example, if the limitation and need for an accommodation are obvious and the employee provides self-confirmation (meaning a simple statement in which the employee confirms the limitation and need for an accommodation) or if the employer already has sufficient information to make a determination. The documentation requested must be reasonable as well, which is defined as the minimum needed to confirm the limitation, connection to pregnancy, childbirth, or a related medical condition, and/or accommodation.

Employers are required to engage in the "interactive process" as they are under the ADA and ACRA to evaluate reasonable accommodations. Furthermore, employers are in violation of the PWFA if they unnecessarily delay in providing an accommodation. If an employee rejects a reasonable accommodation and is therefore unable to perform an essential function of the job, the employee is not protected under the Act. Furthermore, the final regulation provides examples of potential accommodations such as:

- Allowing sitting or standing and providing a means to do so;
- Frequent breaks
- Schedule changes;
- Providing a reserved parking space;
- Telework;
- Leave;
- Obtaining or modifying devices that assist with lifting; and
- Temporarily suspending one or more essential functions of the job.

Undue Hardship

Employers are not required to provide accommodations under the PWFA if they would impose an undue hardship on the company. In determining whether an accommodation would impose an undue hardship, the final regulation sets forth various factors employers can take into consideration, including:

- The nature and net cost of the requested accommodation;
- Overall financial resources of the facility and the number of people employed at the facility;
- Overall financial resources of the employer;
- Type of operation of the employer;
- The impact of the accommodation on the operation, including on the ability of other employees to perform their duties.

When an employee needs to temporarily suspend an essential function of her job as an accommodation under the PWFA, the final regulation sets forth factors that may be taken into consideration in evaluating whether such an accommodation would impose an undue hardship, such as:

- The length of time the employee is unable to perform the essential function;
- Whether there is work for the employee to accomplish;
- The nature of the essential function, including its frequency;
- Whether the employer has provided other employees in similar positions temporary suspensions of an essential function;
- Whether there are other employees who can perform the essential functions that need to be temporarily suspended;
- Whether the essential function can be postponed or remain unperformed for a length of time, if so, for how long.

Legal Challenges and the High Court's Decision to Strike Down the *Chevron* Doctrine

In addition to the legal challenges noted above, on February 27, 2024, a federal district court in Texas ruled the passage of the PWFA violated the United States Constitution, but the ruling is limited to the State of Texas and its agencies.

And importantly, on June 28, 2024, the Supreme Court of the United States ("SCOTUS") overturned the *Chevron* doctrine of judicial deference to a federal agency's interpretation of ambiguous laws, giving courts greater discretion in accepting or rejecting an agency's interpretation of a law. Thus, the EEOC's (a federal agency) final regulation interpreting the PWFA may come under greater scrutiny in light of the SCOTUS' ruling on the *Chevron* doctrine.

Recommendations for Employers

Despite the legal challenges in other jurisdictions, the final regulation is in effect for covered employers operating in Arizona. Unless and until the PWFA or its final regulation are no longer applicable in Arizona, employers in Arizona should abide by the interpretations of the EEOC in its final regulation of the PWFA, train its Human Resources to understand and implement the Act, and update its employer policies. ■

Please call or email Katya M. Lancero at 480-425-2621 or katya.lancero@sackstierney.com or Shar Bahmani at 480-425-2611 or shar.bahmani@sackstierney.com of Sacks Tierney P.A. if you would like assistance complying with for more information about the Pregnant Workers Fairness Act or if you feel your rights have been violated as an employee or applicant under the PWFA.

EMPLOYMENT LAW SECTION

Job Descriptions: Worth Doing or a Tedious Waste of Time?

By Jodi R. Bohr

Job descriptions – usually seen as just another to-do for human resources ("HR") professionals – are generally the most underused resource. They can be used for a variety of reasons (e.g., recruiting, reviews, reasonable accommodations, and employee classifications). This oft overlooked human resources process, if done correctly, can add significant value to employers. On the contrary, an outdated job description can not only cost a company money due to inefficient business practices, but can also open an employer up to significant liability. When was the last time that you reviewed your company's job descriptions? Are your job descriptions an asset or liability to your company? It's time to put more thought into your job descriptions.

As a recruiting tool

Job descriptions set the expectations for the position and should be viewed as a key element to the hiring process. Use of outdated job descriptions in the hiring process creates risk of receiving applications from the wrong (read under-qualified) pool of applicants. On the other hand, updated and accurate job descriptions allow applicants to determine whether they are interested in the job and whether their skill set is a match with the position. Determining what the job will entail and the necessary skill set to perform the job can help minimize poor hires and result in hiring the right candidate the first time around.

Conducting performance evaluations

Supervisors should review job descriptions when completing a performance evaluation. On the one hand, an accurate job description will help supervisors complete the various rating factors on the evaluation form. On the other hand, evaluating an employee on an outdated job description could result in a lower evaluation and damage morale. The job description should be used to provide a structure from which to review an employee's performance as it relates to the various tasks and responsibilities of the job.

Employers should also go over an employee's job description with the employee during the review. Doing so will allow supervisors to remind employees of the requirements and expectations of the position. It will also provide employees with the opportunity to remind supervisors of various duties or aspects of a position that may not have been considered as part of the evaluation process.

Creating ADA accommodations

Job descriptions are also helpful from a liability perspective in complying with Americans with Disabilities Act ("ADA"). Outdated job descriptions can be a determent if an employer relies on them when denying an applicant a position on the basis of his or her inability to perform a stated "essential function" of the position. HR professionals should review the job description's essentials functions and make a determination as to whether they are in fact essential. Updated job descriptions are also necessary in determining if a reasonable accommodation can be made for an employee or applicant with the disability. Liability will likely ensue against an employer who declines to: (1) hire an applicant unable to perform a task that is not truly an essential function; or (2) make a reasonable accommodation.

Determining FLSA classifications

Employers also use job descriptions to categorize positions as "exempt" or "non-exempt" under the Fair Labor Standards Act ("FLSA"). Job duties must be accurately described in order to properly determine whether that position is eligible for overtime or meets any of the FLSA exemptions. Failure to properly classify a position could mean an employee is misclassified. If the Department of Labor makes this determination it could result in liability for back pay of overtime, liquidated damages, and possibly penalties.

The time is now.

Were these reasons enough to get started on your job description audit? They should be. To get started, identify someone who will manage this process internally and work with outside experts. Determine position requirements by engaging and observing employees throughout the process. Base the descriptions on current job requirements; don't tailor the description to what an incumbent is doing. ■

Jodi R. Bohr is a shareholder with Tiffany & Bosco, P.A., and a contributor to Arizona Employment Law Letter. She practices employment and labor law, with an emphasis on counseling employers on HR matters, litigation, and workplace investigations. She may be reached at jrb@tblaw.com or 602-255-6082.

Assaults Are the Fifth Leading Cause of Work-Related Deaths

By Jodi R. Bohr

The Occupational Safety and Health Act ("OSHA") General Duty Clause requires employers to provide a safe and healthful workplace for all covered workers. This includes the duty to protect employees from workplace violence. Although many workforces have asked remote workers to return following their COVID-19 hiatus, many employers continue to let their guard down on possible workplace violence. This is a cause for concern, as the physical, mental, and emotional stress resulting from the COVID-19 pandemic means employers more than ever need to be prepared. Disagreements over politics, vaccinations, and mask wearing fueled violent workplace conflicts. While those discussions appear to be a thing of the past, the number of instances of workplace violence do not appear to be decreasing. Based on the most recent available statistics from the National Safety Council, physical assaults in the workplace in 2022 resulted in 57,610 injuries, a significant increase from the 11,690 assault related injuries reported in 2011. Physical assaults in the workplace resulted in 524 fatalities in 2022, a rise from the 454 fatalities reported in 2019, when less people worked remotely. With these statistics, employers must be prepared to confront the potential for workplace violence in their workplace.

What is workplace violence? According to OSHA workplace violence is "any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the work site. It ranges from threats and verbal abuse to physical assaults and even homicide."

When must an employer report workplace violence to OSHA? It depends. OSHA does not have specific workplace violence reporting requirements. Rather, its general reporting requirements apply. Employers must report any worker fatality to OSHA within 8 hours and any amputation, loss of an eye, or hospitalization of a worker within 24 hours. Therefore, if the workplace violence results in a reportable injury, as defined by OSHA employers must report the situation to OSHA accordingly.

What measures should be taken to prevent workplace violence? According to OSHA, "the best protection employers can offer is to establish a zero-tolerance policy toward workplace violence against or by their employees." A zero-tolerance policy allows the employer to remove the violent offender at the first sign of violence, potentially preventing an escalation of violence down the road. Employers should implement a workplace violence prevention program and incorporate training into regular workplace safety meetings or other periodic policy training for employees.

What should an employer do if workplace violence strikes? Immediately triage the situation. Depending on the circumstances, building security or your local police department may need to get involved. Provide prompt medical evaluation and treatment as necessary, including calling paramedics or sending the employee to urgent care for necessary medical care.

When the emergency is resolved, encourage employees involved to report the circumstances of the incident. Use this information to learn from the situation and institute corrective measures to avoid similar situations in the future.

Be prepared.

Don't forget to be prepared for the aftermath. Depending on the circumstances, employees involved may need stress debriefing sessions or post-traumatic counseling services to help them recover from the violent incident. Understand what services are available to employees, have referrals at the ready, and encourage employees to utilize the services available.

Assess whether there is a possibility of an ongoing threat. If so, consider whether an Injunction Against Workplace Harassment (aka order of protection) against the violent offender is warranted. In Arizona, an Injunction Against Workplace Harassment may be obtained at your city, county, or justice courts. ■

Jodi R. Bohr is a shareholder with Tiffany & Bosco, P.A., and a contributor to Arizona Employment Law Letter. She practices employment and labor law, with an emphasis on counseling employers on HR matters, litigation, and workplace investigations. She may be reached at jrb@tblaw.com or 602-255-6082.

EMPLOYMENT LAW SECTION

A Lawyer's Guide to Advising on and Conducting Internal Employment Investigations

By Melissa Costello and Jay Zweig

In the dynamic landscape of corporate law, attorneys often find themselves at the helm of internal employment investigations. These investigations are crucial for resolving conflicts, addressing misconduct and ensuring compliance with legal and ethical standards. Drawing from our experience as independent third-party investigators for companies of all sizes, and as outside employment counsel for clients who have sought guidance on their own investigation of sexual harassment, discrimination, wage and hour, whistleblower and "hotline" complaints by current and former employees, we wanted to share touchpoints and lessons learned over the course of scores of these investigations to assist in-house and outside counsel in navigating complex and even seemingly straightforward employment law related investigations. These guidelines apply whether your client chooses to conduct the investigation internally or decides due to conflicts or other reasons to hire independent investigators.

When to Consider Hiring an Independent Investigator

While in-house lawyers, HR professionals and regular outside counsel are often well-positioned to handle many internal investigations for their clients, there are specific scenarios where involving an independent third-party investigator can be particularly beneficial:

- **Conflicts of Interest:** If the investigation could impact individuals with close ties to key decision-makers or if there's a risk of perceived bias, or even the potential to damage long-term working relationships regardless of the result of the investigation, an independent investigator provides a neutral perspective.
- **Specialized Expertise:** Complex issues such as alleged fraud or financial misconduct, regulatory breaches, or intricate legal matters might require specialized knowledge that external investigators possess.
- **High-Profile Cases:** For sensitive or high-profile issues, or matters involving executives and companies in the public eye, an independent investigator may offer an additional layer of objectivity and discretion.

Fundamentals of Conducting an Internal Investigation

Effective internal investigations, by inside or outside investigators involve several key steps:

1. **Planning and Scoping:** Begin by clearly defining the investigation's objectives, identifying key individuals for interviews, and setting a timeline. Effective planning helps ensure that the investigation remains focused and efficient.

2. **Document Review:** Preserve, collect and review all relevant documents, such as employment records, emails, text messages, call records, and company policies. Thorough document analysis is essential for understanding the context and identifying evidence. To maintain admissibility in the event of litigation, ensure that documents are collected and preserved in a manner consistent with legal standards.

3. **Witness Interviews:** Conduct structured interviews with witnesses to gather accurate information while maintaining confidentiality, clarity as to the relationship between the investigators and witnesses, and neutrality in fact-finding. Proper interviewing techniques by trained interviewers and investigators who take thorough notes are vital for obtaining reliable accounts. We generally do not audiotape recordings and make it clear to witnesses that they are not to do so. Special consideration need to be given if the employee is represented by a union or demands counsel or a representative be present. Consistency is key.

4. **Analysis and Reporting:** Objectively evaluate the findings and prepare a comprehensive report detailing the investigation process, conclusions, and recommended actions. A well-documented report supports informed decision-making and provides a clear record of the investigation. Establish the format for the report and if there will be a readout of the report.

Potential White Collar Implications

Internal investigations sometimes uncover issues that could involve white-collar crimes such as fraud, embezzlement, government contracts, laws of foreign jurisdictions, or regulatory violations. Recognizing these issues early and understanding the legal implications is crucial. In such cases, external investigators with experience in white-collar criminal defense are valuable partners with employment lawyers to collaborate and help navigate complex legal terrain.

Preserving Attorney-Client and Work Product Privilege

Maintaining attorney-client privilege is fundamental throughout the investigation process. Lawyers should define their role as legal counsel rather than as fact-finders, to help ensure that communications and findings remain confidential. Independent investigators can help maintain this separation, safeguarding sensitive information. Consideration should also be given to work product privilege as it applies to drafts and interview notes.

Best Practices and Considerations

- **Ensure Impartiality:** Whether managing an investigation internally or externally, maintaining neutrality and avoiding conflicts of interest is essential for preserving the investigation's integrity.
- **Protect Confidentiality:** Safeguarding sensitive information is vital for protecting all parties involved.
- **Adhere to Compliance:** Follow relevant employment laws, company policies, and ethical guidelines.

Conclusion

Conducting internal employment investigations requires careful planning, intentional adherence to best practices, and a keen understanding of legal and ethical considerations. By evaluating the when and how of engaging independent investigators and adhering to established investigation protocols, attorneys can navigate these challenging situations effectively, ensuring fair and credible outcomes.

For attorneys dealing with complex cases, conflicts of interest, or challenges in maintaining attorney-client privilege, consulting with or hiring an independent investigator can be highly beneficial. As attorneys with decades of experience in employment law and related white collar criminal investigations, we recognize that investigations are an art, and that we learn by listening and preparing before doing to conduct fair, efficient, and impartial investigations. What the client chooses to do with the results and conclusions of the investigations can have a lasting impact on the business. Knowing that the investigation was done properly provides a strong basis for management and boards of directors to make sound decision. ■

ABA Weighs in

continued from page 3

statutes and cases relied upon in a brief. Lexis and Westlaw will be the first to tell you, they do not claim their GAI products have that capability. And even if they did the judge and the state bar will not care. Supervise your lawyers accordingly.

Finally, any fees charged by a firm are subject to ER 1.5 and therefore must be reasonable.

Formal Opinion 512 comes in at a breezy 15 pages, so check it out. If this is overwhelming to you, fear not. In 20 years when the robots have taken all our jobs, you will no longer have to worry about anything in this article or care what the ABA thinks. ■

Joseph Brophy is a partner with Jennings Haug Keleher McLeod Waterfall in Phoenix. His practice focuses on professional responsibility, lawyer discipline, and complex civil litigation. He can be reached at jab@jkwlawyers.com.

PARALEGAL CONFERENCE

LEGAL MINDS unleashed

EMPOWERING PARALEGAL INTELLIGENCE

OCTOBER 25, 2024 **7:30AM-5:00PM**

DESERT WILLOW CONFERENCE CENTER | 4340 EAST COTTON CENTER BLVD., | PHOENIX

conference schedule

7:15-8:00 A.M. **REGISTRATION & BREAKFAST BUFFET**
Visit Valued Partners

8:00-8:30 A.M. **OPENING ANNOUNCEMENTS & INTRODUCTIONS**
Paralegal Day Proclamation

8:30-9:30 A.M. **ETHICS SESSION**
Ethical Use of AI in Your Law Practice
PRESENTERS:
Kent Berk, Kent S. Berk, Berk Law Group, PC
Lynda Shely, Lynda C. Shely, Klinedinst PC
Hon. David Gass, Arizona Court of Appeals

9:30-9:45 A.M. **MORNING BREAK**

9:45-10:45 A.M. **1ST BREAKOUT SESSION**

A) Family Court Updates
PRESENTER:
Hon. Ronda Fisk, Family Law Presiding Judge, Superior Court in Maricopa County

B) Criminal Law: C.A.R.S. Method of Communication—How to Effectively Communicate with Upset Clients
PRESENTERS:
David Cantor, DM Cantor
Christine Whalin, DM Cantor

C) In Our Jury Trial Era
PRESENTERS:
Jennifer Rebholz, Zwilliger Wulkan, PLC
Kelsey Brophy, Law Offices of Collin T. Welch
Jennifer Elias, Breyer Law Offices P.C.

10:45-10:55 A.M. **BREAK**

10:55-11:55 A.M. **2ND BREAKOUT SESSION**

A) Probate and Estate Planning—When? Why? And How?: An Introduction to Probate Administrations
PRESENTER:
Chelsea Hesla, Tiffany & Bosco, PA

B) Solving Real Estate Issues in Family Law, Probate, and Other Joint Ownership Disputes
PRESENTER:
Beth Jo Zeitzer, ROI Properties

C) Public Law—Appeals and Post Conviction Proceedings
PRESENTER:
Phillip Garrow, Maricopa County Attorney's Office

11:55 A.M.-12:40 P.M. **LUNCH BREAK**

12:40-1:40 P.M. **3RD BREAKOUT SESSION**

A) Civil Litigation—Care and Feeding of Trial Counsel–A Paralegal's Guide
PRESENTER:
Tom Moring, Jaburg Wilk

B) Treatment Courts
PRESENTER:
Robin Hoskins & David Hintze

C) Bankruptcy: The Differences Between the Chapters from Chapter 7 to Chapter 15
PRESENTER:
Adam Nach, Lane & Nach, P.C.

1:40-1:55 P.M. **BREAK**

1:55-2:20 P.M. **VALUED PARTNERS RAFFLE!**

2:20-2:30 P.M. **AFTERNOON BREAK**
LEARN MORE ABOUT A NEW LEAF

2:30-3:30 P.M. **GENERAL SESSION**
Writing to Persuade and Build Expertise
PRESENTER:
Tim Eigo, State Bar of Arizona

3:30-3:45 P.M. **2023 PARALEGAL MEMBER OF THE YEAR AWARD RECIPIENT**

3:45-4:45 P.M. **KEYNOTE SESSION**
Different Viewpoints of the Paralegal Profession
PRESENTER:
Kendalyn Cheney, Law Office of Katherine Kraus, PLC,
Danielle Miller & Meagan Holmes, PetSmart

4:45-5:00 P.M. **CLOSING ANNOUNCEMENTS**

PRO BONO PROFILES

VLP Award-Winning Attorneys Promote Pro Bono Service

Please help us help our clients—
join our VLP Pro Bono Team today!
Contact: Roni Tropper, VLP Director at rtropper@clsaz.org &
Konnie K. Young, VLP Pro Bono Attorney Coordinator, at kyoung@clsaz.org
Visit our website: https://clsaz.org/volunteer-lawyers-program/

By: Konnie K. Young, Attorney
VLP Pro Bono Attorney Coordinator

In last month's *Maricopa Lawyer* article, ***Go Pro Bono with VLP***, we featured four attorneys who shared their rewarding experiences as pro bono attorneys in various Volunteer Lawyers Program (VLP) Clinics. This month, three more VLP Pro Bono Attorneys explain their pro bono experiences and provide more reasons to join our VLP Attorneys Team. Please reach out to these attorneys—**Don Powell, Robert Hahn,** and **Kevin Walsh**—to learn more about the pro bono services they provide to our clients and the many benefits they receive as VLP Pro Bono Attorneys.

Donald Powell
VLP Bankruptcy Attorney
Financial Distress Clinic (FDC)
602-390-0653
d.powell@cplawfirm.com

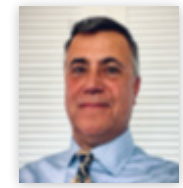
Don has dedicated pro bono service to VLP clients for more than 25 years and currently serves as VLP's Advisory Committee Chair. Don was recently recognized as a *Top Arizona Pro Bono Attorney* and earned the *Defender of Justice & Best Friend to VLP Award* for 2023. He has represented individuals on a pro bono basis for bankruptcy cases for a myriad of years, and he continues to volunteer monthly for **VLP's Financial Distress Clinic (FDC)**. Don describes the many rewards he reaps from serving as a VLP Pro Bono Attorney.

In any organization relying on volunteers, there is always an extraordinary and continuous need to find and engage volunteers because, quite simply, they will not be paid for their efforts. This is why volunteering is so important and fulfilling; you are taking your time and expertise to guide a person in need of help. Volunteering is the act of presenting yourself, without pressure and on your own, and offering your abilities and knowledge for a need without payment.

As attorneys, we are blessed to have had the opportunity to procure a law degree. Giving of your skills is rewarding, humbling, and gratifying, all wrapped up in one. Every study demonstrates overwhelmingly that volunteering creates a sense of well-being, improved emotional health and happiness. Just try volunteering with VLP; you will concur.

Don shares some of his favorite quotations, which inspire him to continue providing pro bono service and helping VLP clients, who otherwise would not have access to legal assistance or justice:

- *We make a living by what we get, but we make a life by what we give.*
  Winston Churchill
- *Service to others is the rent you pay for your room here on earth.*
  Muhammad Ali
- *You get satisfaction out of doing something to give back to your community that you never get in any other way.*
  Ruth Bader Ginsburg
- *As you grow older, you will discover you have two hands; one for helping yourself and the other for helping others.*
  Audrey Hepburn
- *The best way to find yourself is to lose yourself in the service of others.*
  Mahatma Ghandi



Robert Hahn
VLP Family Law Attorney
Family Lawyers Assistance Project (FLAP)
602-692-6365
robertazdivorce@yahoo.com

Robert has been volunteering with **VLP's Family Lawyers Assistance Project (FLAP)** for 20 years. He was recently recognized as one of *Arizona's Top Pro Bono Attorneys* in 2023. Robert describes the benefits of his pro bono service for the clients, as well as for himself.

My pro bono volunteer work mostly consists of providing five to six telephonic initial consultations, which each run around 30 minutes. The VLP FLAP staff arrange everything and offer flexible scheduling to meet my needs and schedule. It is great! For me, volunteering has not been rough or time consuming. Instead, volunteering brings me new fact patterns all the time, as well as relevant questions and issues. Volunteering also sharpens my legal skills. There really is no substitute for my FLAP sessions.

There is humble satisfaction as a VLP volunteer in working to try to provide a voice to a person who often is not able to fully express themselves. As a volunteer you speak directly with people who have an immediate need for exactly what lawyers always have handy: an opinion. The gift we have as lawyers to be able to express opinions can easily be shared as a volunteer, and the time required to work as a VLP volunteer can be as little as an hour or two every few weeks or months.

Just being able to have a conversation with a legal professional can be immensely helpful and often leaves the client with an understanding of the size and scope of the issues. Often, being able

to prioritize issues and understand that there are several possible choices – some of which may not involve litigation – can bring peace of mind to many people.

Kevin Walsh
VLP Adult Guardianship Attorney
Adult Guardianship Clinic
602-229-5297
Kevin.Walsh@quarles.com

Kevin has served as a VLP Pro Bono Attorney for 10 years and also serves as the Pro Bono Coordinator for Quarles' Office in Phoenix. He was recently named as one of Arizona's *Top Pro Bono Attorneys* and nominated as *Arizona Business Angel of the Year by AZ Big Media*. Kevin primarily helps VLP clients with **Adult Guardianships** and provides his expertise to assist them in obtaining guardianships for adult relatives or friends.

*There is a huge need to help families obtain **Adult Guardianships** for family members whose mental or physical disabilities prevent them from taking care of themselves. This is especially true for families with children who are turning 18 and cannot take care of themselves, nor make medical or legal decisions for themselves, due to their mental or physical disabilities.*

Providing pro bono assistance with Guardianships can mean the world to clients, and they are immensely appreciative for the assistance. The legal system can be intimidating and inaccessible to many VLP Clients, but VLP has extensive resources that really make it a smooth process for VLP Pro Bono Attorneys.

VLP offers a wide array of opportunities for attorneys to provide pro bono service for clients who desperately need legal assistance in many areas of law, including—but not limited to—**Bankruptcy Law, Consumer Law, Contracts & Warranties, Debt Issues, Landlord/Tenant Law, Social Security Issues, Tax Assistance, Family Law, Juvenile Law, Probate Law, Adult Guardianships, Federal Court Advice, Real Estate law,** and more.

Roni Tropper, VLP Director, encourages attorneys to join VLP's Pro Bono Attorney Team:

We are so grateful for the services our Pro Bono Attorneys provide to our VLP Clients, who otherwise would not have the legal assistance they so desperately need and the access to justice they most certainly deserve. Please contact us to join our VLP Pro Bono Attorney Team and experience the many benefits of providing pro bono service to our VLP Clients. ■

SUBMISSIONS POLICY

Members and non-members are encouraged to submit articles for publication. The editorial deadline for each issue is generally the 8th of the month preceding the month of issue.

MEMBER SPOTLIGHT

ALISA GRAY

Tiffany & Bosco

HOW LONG HAVE YOU BEEN A MEMBER OF THE MCBA?

Since 1992. Fun Fact: Before law school, in 1988 (or so), I actually worked at MCBA as an administrative assistant. The office was located on Roosevelt Street in an old historic home. Among various duties, I helped with Lawyer Referral Services and creating the newsletter. I also called attorneys to get their lunch orders. (This was before email!)

HAVE YOU EVER BEEN INVOLVED WITH ANY SECTIONS OR DIVISIONS?

I have been a presenter at several seminars for the Estate Planning and Probate Section.

HOW LONG HAVE YOU BEEN PRACTICING IN YOUR FIELD?

30+ years.

WHAT WAS YOUR FIRST AREA OF PRACTICE?

Insurance Defense and Probate Litigation.

WHAT DO YOU SEE AS THE FOCUS FOR THE MCBA THIS YEAR?

Enhancing member services.

WHAT ISSUES DO YOU SEE FACING THE LEGAL COMMUNITY IN ARIZONA?

Maintaining balance with the client/court demands, and keeping up with technological advances.

IF YOU HADN'T BEEN AN ATTORNEY, WHAT ELSE WOULD YOU BE?

I currently have a side hustle as a yoga and mindfulness teacher. I'd like to do that more. Or a backup singer for a 70's and 80's cover band.

IF YOU COULD BE ANY FICTIONAL CHARACTER—ON TV, IN BOOKS, IN MOVIES—WHO WOULD IT BE AND WHY?

Hmmm, not feeling this one.

WHAT'S THE STRANGEST JOB YOU'VE EVER HELD?

When I was 14, I worked on a tobacco farm in North Carolina. I drove a tractor and helped get the tobacco up into the barns. I was also a waitress at Bob's Big Boy, and on occasion I put on the big costume and went to parades. ■

Volunteer Lawyers Program Thanks Attorneys

The Volunteer Lawyers Program thanks the following attorneys and firms for agreeing to provide pro bono representation on cases referred by VLP to help people with low incomes. VLP supports pro bono services of attorneys by screening for financial need and legal merit and provides primary malpractice coverage, verification of pro bono hours for CLE self-study credit, donated services from professionals, training, materials, mentors and consultants. Attorneys who accept cases receive a certificate from MCBA for a CLE discount. For information on rewarding pro bono opportunities, please contact Roni Tropper, VLP Director, at 602-258-3434 x 2660 or Rtropper@clsaz.org or enroll with us at https://clsaz.org/volunteer-lawyers-program/. ■

VLP THANKS THE FOLLOWING ATTORNEYS AND FIRMS FOR ACCEPTING CASES FOR REPRESENTATION:

ADOPTION

Shawnna R. Riggers
Arizona Family Law Attorneys

ADULT GUARDIANSHIP/ CONSERVATORSHIP

Susan Bassal – Two Cases
Law Firm of Susan Bassal

Alicia Alexandra Corona
Dentons US LLP

Kevin John Walsh – Two Cases
Quarles

BANKRUPTCY/DEBTOR RELIEF

Nature Michele Lewis
Lexington Law

Kenneth L. Neeley
Neeley Law Firm PLC

CONSUMER

Cassie Arntsen
Quarles

Christian Luis Fernandez
Snell & Wilmer LLP

Katelyn A. Giel
Greenberg Traurig LLP

Ryan R. Johnson – Two Cases
Ryan Johnson PLLC

Christina D. Jutzi
Snell & Wilmer LLP

Kevin John Walsh
Quarles

HOUSING

Alexis Janae Eisa
Zwillinger Wulkan, PLC

VLP THANKS THESE VOLUNTEERS WHO PROVIDED OTHER LEGAL ASSISTANCE DURING THE MONTH:

ATTORNEY OF THE DAY
Nancy Anger
Andrew Jacob

CHILDREN'S LAW CENTER
Shanna Dawson-Fish
Stewart Gross
Edwin Ramos
Shawnna Riggers

EMPLOYMENT
Shifa Alkhatib
Morgan Bigelow
Clara Bustamante
Joel Mueller
Krista Robinson
Alden Thomas
Necole Walloch

FAMILY LAWYERS ASSISTANCE PROJECT
Alicia (Ali) Abella Korte
Michael Crane
Greg Davis
Charles Friedman
Stuart Gerrich
Robert Hahn
Lowen Jones
Katherine Kraus
Elizabeth Langford
Christopher Lazenby
Shannon Lewis
Susan McGinnis
Daniel Rodriguez
Heather Stewart
Lisa Stone
Aurora Walker
Robert Walston
Marie Zawtocki

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Gabriel Hartsell
Alisa Lacey
Daniel Ortega Jr.

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Tracy S. Essig
Nature Michele Lewis
Donald W. Powell

INTEL
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Scott C. Uthe

PROBATE LAWYERS ASSISTANCE PROJECT
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Mark Bregman
Emily Burns
Scott Ferris
Lauren Garner
Thomas Hickey
Kelly L. Kral
Michelle Lauer
Tracy M. Marsh
Carla Miramontes
Ryan Talamante
Shannon Kavanagh – ASU Intern
Alexandra Wilson – ASU Intern

SNELL & WILMER
M. Lawrence Brown
John T. Habib
Amanda Z. Weaver

TENANTS' RIGHTS CLINIC
John Gordon
Nature Lewis
Diane Mihalsky
Judy O'Neill
Robert Walston

VLP THANKS THE FOLLOWING INDIVIDUALS WHO RECENTLY HELPED OR ENCOURAGED COLLEAGUES TO VOLUNTEER WITH VLP:

Michael Jones
Katherine Kraus
Brian Merdinger
Thomas Moring
Donald Powell, Advisory Committee
Gus Schneider
Nina Targovnik

PRO BONO SPOTLIGHT ON CURRENT NEED FOR REPRESENTATION
Attorneys are needed to help consumers with contract matters.
Attorneys' fees can be claimed if litigation is required.

The Volunteer Lawyers Program provided $2,034,915 in measurable economic benefit to families in 2022, in addition to improving safety and well-being for children and adults.

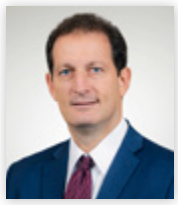
The Volunteer Lawyers Program is a joint venture of Community Legal Services and the Maricopa County Bar Association

THE BULLETIN BOARD

News from the legal community

The *Maricopa Lawyer* invites members to send news of moves, promotions, honors and special events to post in this space. Photos are welcome. Send your news to maricopalawyer@maricopabar.org.

SNELL & WILMER



Howard Sobelman

Snell & Wilmer Partner **Howard Sobelman** Elected to the Board of Directors for One Step Beyond.

One Step Beyond, Inc. (OSBI), a Phoenix-based nonprofit organization that provides comprehensive programming and services for adults (18+) who have intellectual disabilities, elected Snell & Wilmer Partner Howard Sobelman to the Board of Directors.

"I am deeply honored to join the board of this incredible organization," said Sobelman. "Empowering individuals with intellectual disabilities is a mission I am passionate about and I am committed to leveraging my experience and resources to help One Step Beyond further its community services."

GALLAGHER & KENNEDY

Gallagher & Kennedy is pleased to announce the addition of a family law practice group, with two accomplished attorneys, a paralegal, and their legal support professional joining the Phoenix office. This expansion strengthens the firm's full-service capabilities and marks the establishment of a dedicated Family Law Practice.

Melissa Benson

Melissa F. Benson joins the firm as a shareholder with extensive experience in all aspects of family law. She brings over 17 years of experience working in Arizona's criminal justice system as a victim advocate, a probation officer, and a sex crimes and domestic violence prosecutor. Melissa is a certified mediator, often helping resolve her client's most personal disputes before they go to trial.

Elizabeth Nañez

Elizabeth Nañez joins the firm as an associate attorney. Bringing a dynamic and diverse background, Liz assists individuals with a wide range of domestic relations law issues including divorce, spousal maintenance, child support, third-party rights, guardianship, and relocation, among others.

Karen L. Duckworth-Barnes is a paralegal with the family law group. With over 11 years of paralegal experience, Karen serves as an effective point of contact for clients. She is knowledgeable and resourceful in stages of case management, from initial disclosures and discovery to all items necessary for complex trial litigation. She works directly with attorneys to develop case management and strategy, and is experienced in Superior, Justice, and Municipal Courts.

Steve Boatwright

The law firm of Gallagher & Kennedy announced today that **Stephen R. Boatwright** has been elected to the firm's Board of Directors. Steve joins current Board members Kevin O'Malley, Tim Brown, Shannon Clark, Jennifer Cranston, and Mike Ross.

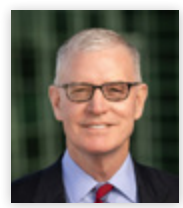
"Steve brings a wealth of fresh ideas and valuable insights from his extensive experience in advising corporate boards. His addition strengthens our commitment to progress and innovation," said Managing Partner Kevin O'Malley.

Joe Perotti

Gallagher & Kennedy is pleased to welcome **Joseph J. Perotti, Jr.** to its Phoenix office. Joseph is experienced in commercial real estate transactions, zoning, and land use.

Dean Short

Gallagher & Kennedy announces the retirement of long-time shareholder and managing partner **Dean C. Short**, II. **Kevin E. O'Malley**, a 44-year veteran of the firm, will assume the role of managing partner, effective April 1, 2024.



Kevin O'Malley

Short joined Gallagher & Kennedy in 1988 and was elected managing partner in 1998.

"I am honored to continue the firm's 46-year legacy, started by our founders in 1978 and preserved by Dean [Short] over the last 36 years. Gallagher & Kennedy's success and community impact are a result of the character of the people we hire and the exceptional legal work we do for clients. That is a foundation we will continue to build on," said O'Malley.

As head of the firm's Board of Directors, O'Malley will continue working alongside long-time board members and shareholders Tim Brown, Shannon Clark, Jennifer Cranston, and Mike Ross.

"I've worked with Dean and Kevin for almost 30 years and want to wish Dean a well-deserved retirement. I am proud to have Kevin as our new managing partner and chair of the board of directors. Kevin is a steadfast leader, and his operational perspective will serve the firm well," said Brown, who also leads the firm's tax department.

O'Malley will maintain his role as chair of the firm's litigation and public bidding teams. ■

Jabberwocky and a Chicken Bone

CourtWatch, continued from page 1

was for judges, not juries, to decide.

Writing for the court, Justice Joseph T. Deters first set out the usual elements of a negligence cause of action: duty, breach, and resulting injury. Under the court's 1960 opinion in *Allen v. Grafton*, he wrote, "the question of negligence [is] whether the seller, 'in the exercise of ordinary care, should have known that the food was unfit to eat.'" But he answered that question by examining what the consumer—not the seller—knew or should have known.

In *Allen*, the court ruled against a diner who had been injured when he ingested a piece of shell lodged in a fried oyster. The court had adopted a blend of two tests. One was the "foreign–natural test," which examines whether the injurious substance was foreign or natural to the particular food. The *Allen* court was hesitant to adopt this test wholesale.

The other test—which *Allen* favored—was the "reasonable-expectation test." Under it, "if a reasonable consumer would expect to encounter and thus would guard against the injurious substance—that is, if the substance is within a consumer's reasonable expectation of what might be present in the food," the supplier is not negligent.

Deter reaffirmed the blended *Allen* test. First, "we look to whether the presence of the substance was something that the consumer could have reasonably expected and thus could have guarded against." Second, "whether the substance was foreign to or natural to the food is relevant to determining what the consumer could have reasonably expected."

You might think that such a question—the reasonableness of a consumer's expectation—is a fact issue for the jury. Berkheimer thought so, arguing that "whether a consumer should reasonably expect to encounter an injurious substance that the seller specifically avers has been removed should, at a minimum (and assuming the averment is bona fide) always be a jury question." Deter called this a "broad line," which the court "decline[d] to paint." He wrote that "Berkheimer has demonstrated no reason why a negligence case involving an injurious substance in food should be treated differently from any other negligence case for purposes of summary judgment."

Thus applying the usual summary-judgment rule, Deter concluded there was no genuine jury issue—holding, in essence, no rational jury could find that reasonable consumers would be surprised to find bones in boneless chicken wings. He pointed to the process the restaurant used for preparing its boneless wings: cutting breasts down into smaller chunks. He likened the boneless wings to fish filets and wrote that "everyone knows that tiny bones may remain in even the best fillets of fish." "Like the oyster shell at issue in *Allen*," he continued, "it is apparent that the bone ingested by Berkheimer was so large relative to the size of the food item he was eating that, as a matter of law, he reasonably could have guarded against it."

Berkheimer protested that this reasoning failed to duly consider "the fact that the food item was advertised as a 'boneless wing' and there was no warning given that a bone might be in the boneless wing." Deter tossed the argument aside, writing that "a supplier of food is not its insurer."

"Regarding the food item's being called a "boneless wing,'" Deter wrote, "it is common sense that that label was merely a description of the cooking style." An alert reader might notice that the opinion never mentioned whether Berkheimer—or any other diner, for that matter—was aware of the preparation process. Deter evidently believed everybody knows or should know how restaurants prepare boneless chicken wings. "A diner reading 'boneless wings' on a menu," he wrote, "would no more believe that the restaurant was warranting the absence of bones in the items than believe that the items were made from chicken wings, just as a person eating 'chicken fingers" would know that he had not been served fingers."

"The food item's label on the menu described a cooking style; it was not a guarantee," Deter added. Thus, he concluded, "reasonable minds could come to but one conclusion—that [the defendants] did not breach a duty of care."

In dissent, Justice Michael P. Donnelly expressed astonishment at the majority's ruling. Asserting that "the majority has taken it upon itself to decide the facts of this case," he wrote that "the result in this case is another nail in the coffin of the American jury system."

"The majority declares as a matter of law that no reasonable person could consider the facts of this case and reach a conclusion contrary to the one it reaches," he wrote. "This is, of course, patently untrue given that I and two other justices of this court dissent from the majority's judgment."

Donnelly did not disagree with the majority's legal standard, which was essentially the *Allen* test. *Allen* had "specifically declined to adopt the 'foreign–natural' test," which another court has criticized because "it assumes that all substances which are natural to the food in one stage or another or preparation are, in fact anticipated by the average consumer in the final product served."

Calling the case "incredibly straightforward," Donnelly lamented that the majority "has decided this case on the facts, circumventing the right to trial by jury in a way that ignores an 'important bulwark against tyranny and corruption,'" he wrote, quoting Justice William Rehnquist and citing Ohio's constitutional guarantee of the right to a jury trial. "Instead of relying on the collective wisdom of the jurors," he wrote, "the majority opinion makes a factual determination to ensure that a jury does not have a chance to apply something the majority opinion lacks—common sense."

"Did the majority construe the evidence most strongly in favor of Berkheimer?" he asked. "If it did, then I suggest that the majority suffers from a serious, perhaps disingenuous, lack of perspective in opining that there is only one conclusion that can be reached, even as it confronts this dissent, which obviously reaches a different conclusion."

He wrote that that an "appropriate" fact-finder could determine that "chicken bones can be very delicate, even those that are 1⅜ inches long—the size of the bone that harmed Berkheimer." He compared such bones to needles, which, he wrote, "are famously good at hiding."

"Imagine how well a slender chicken bone can remain hidden in something that is not easily picked apart, especially when the person ... does not expect it to be there," he continued. The majority "concludes that Berkheimer alone bore the burden and expense of finding the bone in the boneless wing." Although not totally convinced of the defendants' negligence, Donnelly nevertheless was "not so confident in their policies and practices as to declare that reasonable minds could come only to the conclusion that they were not negligent."

Having almost, but not quite, accused the majority of disingenuousness, Donnelly stopped mincing his words. "The absurdity of this result is accentuated by some of the majority's explanation for it, which reads like a Lewis Carroll piece of fiction," he wrote. "The majority opinion states that 'it is common sense that [the label 'boneless wing'] was merely a description of the cooking style.' Jabberwocky. There is, of course, no authority for this assertion, because no sensible person has ever written such a thing."

He continued: "The majority opinion also states that '[a] diner reading "boneless wings" on a menu would no more believe that the restaurant was warranting the absence of bones in the items than believe that the items were made from chicken wings, just as a person eating 'chicken fingers' would know that he had not been served fingers.' More utter jabberwocky."

He didn't let up. He accused the majority of ignoring common sense in saying "that no person would conclude that a restaurant's use of the word 'boneless' on a menu was the equivalent of the restaurant's 'warranting the absence of bones.'"

"Actually, that is exactly what people think," he retorted. And "it is, not surprisingly, also what dictionaries say. 'Boneless' means 'without a bone.' It means 'without bones.' And it means '(of meat or fish) without any bones.'" he added, quoting various dictionaries.

Donnelly wasn't finished with his judicial barbs. "Does anyone really believe that the parents in this country who feed their young children boneless wings or chicken tenders or chicken nuggets or chicken fingers expect bones to be in the chicken?" he asked. "Of course they don't," he answered. "When they read the word 'boneless,' they think that it means 'without bones,' as do all sensible people. ... The reasonable expectation that a person has when someone sells or serves him or her boneless chicken wings is that the chicken does not have bones in it."

He continued: "Instead of applying the reasonable-expectation test to a simple word—'boneless'—that needs no explanation, the majority has chosen to squint at that word until the majority's sense of the colloquial use of language is sufficiently dulled, concluding instead that 'boneless' means 'you should expect bones.'"

He believed the court should grant Berkheimer a jury trial. "Because the majority does otherwise," he wrote, "I dissent."

He didn't say "respectfully." ■

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THURSDAY ▪ SEPTEMBER 12
5:30-7:30 PM

Speed Networking with the Criminal Law Judges

Phoenix Country Club, 2901 N 7th St, Phoenix, AZ 85014

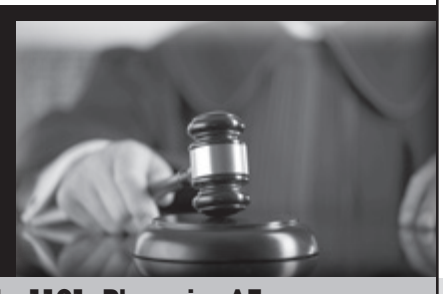
Please join us for the Annual Criminal Bench Speed Networking event on September 12, 2024, from 5:30–7:30 pm at the Phoenix Country Club. This event allows practitioners to meet with Judges in a casual yet organized setting and learn about their likes and dislikes on the bench, suggestions in practice, and even their favorite food! Socializing from 5:30–6 pm. Speed Networking begins promptly at 6 pm.

JUDICIAL OFFICERS ATTENDING:

Comm. Samin Adib	**Comm. Therese Gantz**	**Comm. Rodney Mitchell**
Judge Stasy Avelar	**Comm. Monica Garfinkle**	**Judge Sam Myers**
Judge Justin Beresky	**Judge Jennifer Green**	**Judge Suzanne Nicholls**
Comm. Joshua Boyle	**Judge Joseph Kreamer**	**Comm. Anne Phillips**
Comm. Lindsey Coates	**Judge Margaret LaBianca**	**Judge Aryeh Schwartz**
Judge Bruce Cohen	**Judge Todd Lang**	**Comm. Annielaurie Van Wie**
Judge Max Covil	**Judge Kerstin LeMaire**	**Judge Tracey Westerhausen**
Judge Pamela Dunne	**Judge Michael Mandell**	**Judge Kevin Wein**
Judge Geoffrey Fish	**Judge Suzanne Marwil**	& more to come!

FRIDAY ▪ SEPTEMBER 13
9-10:30 AM

Top Ten Do's and Don'ts in Civil Court



MCBA, 3550 N. Central, Suite 1101, Phoenix, AZ

From proposed orders to voir dire. Learn one civil court Judge's Top 10 Do's and Don'ts.

PRESENTER: **Hon. Frank Moskowitz**

THURSDAY ▪ SEPTEMBER 19
12-1:30 PM

Family Law Case Updates 2024

ONLINE

This program will provide a comprehensive review of the latest decisions from the Arizona Court of Appeals and the Arizona Supreme Court over the past year. Attendees will gain valuable insights into how these recent rulings impact family law practice, including updates on custody, support, property division, and procedural changes. Don't miss this opportunity to stay current with the evolving legal landscape and enhance your practice with expert analysis and practical guidance.

PRESENTERS: **Taylor S. House,** Reardon House Colton PLC
Giancarlo A. Sapelli, Warner Angle Hallam Jackson & Formanek
Travis J. Owen, Cantor Law Group

WEDNESDAY ▪ SEPTEMBER 25
12-1:30 PM

The Leave Law Playbook

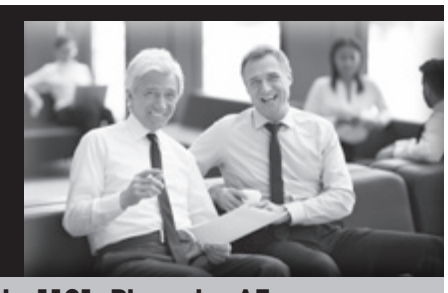
ONLINE & IN-PERSON AT MCBA, 3550 N. Central, Suite 1101, Phoenix, AZ

A frequent issue that comes up for both employers and employees is navigating federal and state leave laws. As lawyers, we need to know how to spot when requesting, denying, or forcing leave might be an issue, and how to best advise our clients. In this presentation, we will cover Federal and Arizona state employment laws that will affect nearly anyone in Arizona.

PRESENTER: **Gina E. Carrillo,** Partner at Gammage & Burnham

THURSDAY ▪ SEPTEMBER 26
4:30-6:30 PM

War Stories and Lessons Learned



MCBA, 3550 N. Central, Suite 1101, Phoenix, AZ

Every litigator has a moment they wish they could take back, been in a tough spot, or had to learn a lesson "the hard way." Fortunately, these experiences make for better lawyers (provided we learn from our experiences and the experiences of others). The MCBA Litigation section is thrilled to have some of our favorite experienced trial lawyers share their most memorable experiences and let us all share a laugh at the profession we have chosen.

PRESENTERS: **Hon. Peter Swann (Ret.),** Retired Arizona Court of Appeals Judge at Convergent ADR
Cory Tyszka, Partner at Jones, Skelton & Hochuli, PLC
Melissa Ho, Associate Director- Regulatory Counsel at Microchip Technology Inc.
Hon. Julie LaFave, Commissioner of the Maricopa County Superior Court
MODERATOR: **Reid Potter,** Counsel at Klinedinst PC

Happy Hour to Immediately Follow the Presentation

The State Bar of Arizona does not approve or accredit CLE activities for the Mandatory Continuing Legal Education requirement. The activities offered by the MCBA may qualify for the indicated number of hours toward your annual CLE requirement for the State Bar of Arizona, including the indicated hours of professional responsibility (ethics), if applicable.

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