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US Regional Employment

Introduction

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INTRODUCTION

Contributed by: *Michael I. Bernstein,* ***Bond, Schoeneck & King, PLLC***

Introduction

Employment law in the private sector, as with any area of the law, necessarily begins with definition. At this stage in the evolution of our labor and employment history, one might expect the fundamental concepts and definitions to be fairly well settled. To many, however, the picture at times has been somewhat unsettled. Due to the impact of COVID-19, these concerns have been magnified in ways that hardly could have been contemplated. From a positive point of view, this is arguably attributable to a vibrant economy's need, and its willingness, to adapt to the changes in our global and socio-economic, political and technological climate. At the same time, alternative solutions and the impact of COVID-19 have created not only new challenges, but, arguably, unintended consequences.

A global entity seeking to establish or enhance its presence in the United States – or, more specifically, in a given region or regions of the United States – will encounter these issues in the context of what, at times, has been referred to as today's "changing workplace." No matter the nature of the entity, the "workplace" essentially remains the focus of any dispute, but, even prior to the advent of COVID-19, the issues, relationships and considerations of today had in some measure been undergoing a redefinition and, indeed, expansion or delimitation to the point where what traditionally was viewed as the "workplace" in certain circumstances no longer was as we once knew it. As will be seen in the analyses below, the uncertainties of the impact of COVID-19 at this point cannot be overstated.

The ever-increasing use of social media and the evolution of its more sophisticated and complex vehicles have alone transformed the workplace to include or otherwise affect recipients not previously considered and to invoke entitlements and/or restrictions not previously recognized. The same applies to the impact upon the workplace of the "gig" economy, cyberspace, artificial intelligence, analytics and other technological inroads and advances. The "Me Too," "Black Lives Matter," "Pay Equity," "Whistle-blowing" and other related movements, by highlighting their own issues, have had their own impact, whether it be in areas of alleged sexual or other harassment, discrimination, retaliation, the question of implicit bias, workplace and product safety, or financial and business misconduct. All of this has occurred in the face of what had been a steady decline in the unionization of the private sector workplace, accompanied by efforts to expand the scope of the protections and restrictions of the labor laws to both the unorganized and organized employees in a workplace.

As a result of these ongoing developments, at times we see the parties, our federal, state and local governments, their agencies and the courts, arbitral and other forums, attempting to grapple with one form or another of the proverbial square peg in the round hole – struggling with what some might have considered relatively time-tested meanings of such terms as "employee," "independent contractor," "supervisor," "exempt" status, "joint employer," "franchisor"/"franchisee," "successor," "alter ego," "ally," a "primary," a "secondary," "civility" and related considerations, "privacy" and expectations of "privacy," "confidentiality," "non-disclosure" and fundamental notions of "due process," or with efforts, due to alleged misclassifications, arguably to evade wage, overtime, pension, other benefits and/or other financial obligations.

Compounding these considerations are the overlapping and conflicting definitions and applications of terms and concepts that go to the very heart of the workplace disputes before the different – and alternative – forums our system provides in each region for such dispute resolution. A definition or application in one forum, or under one constitutional provision or statute or regulation, or contract, may well differ from the definition or application accorded that term in another forum or under another statute, regulation or contract; eg, the interplay between the First Amendment of the Constitution and a key provision of the National Labor Relations Act (NLRA), or between Title VII of the Civil Rights Act and that same key provision of the NLRA.

Such issues may arise at a jurisdictional level, in the course of the discovery process, or at a procedural or substantive level. They may relate to the viability of a class or collective action, or its alleged waiver. They may surface in the attempted enforcement of a covenant not to compete or to solicit, or of a "no poaching" agreement, whether the individual is or is not otherwise covered by a collective bargaining agreement. Indeed, the global entity, when hiring an individual subject to such restrictions, may find itself faced with a duty of due diligence to ascertain whether the individual to be hired or retained is, or might be, subject to enforceable restrictions that would prevent the individual from fulfilling the duties and responsibilities for which he or she is to be hired.

The import of a regional perspective certainly compounds the issues even further, but, if all these developments seem ominous, it also may offer the global entity some insights, possibilities or options that otherwise might not be available in another region. The governance of this nation's employment law is in so many

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respects a matter of federal law, and, accordingly, that is the primary focus of this regional guide. Even so, it is vital that the global entity understands that the interpretations of the federal laws in each region may differ, whether it be in the decisions of the regional offices of the applicable federal agencies, the region's federal district courts or its circuit courts of appeals, or, ultimately, the Supreme Court of the United States in its review of regional conflicts between or among the federal courts of appeals. Certain issues, moreover, may well be governed by state or other local law and, accordingly, where especially pertinent to the specific needs and interests of a global entity, this regional guide may take note of the interplay of such federal employment law and a region's state or other local law – particularly as each state, both in conjunction with and independent of the federal government, attempts to grapple with the still-evolving impact of COVID-19 on the workplace issues unique to its regions.

Against this background and in the belief that context matters, this regional guide seeks to provide a picture of the current socio-economic, political and legal climate, both in the United States generally and in the regions here covered. It addresses, in that context, the alternative approaches and arrangements the global entity will need to consider at its inception when defining and implementing its basic structure, its relationships with those who will be servicing it (whether in a non-union, union, or potential union setting), and the import of such decisions – issues and considerations complicated all the more by the dramatic impact, financially and operationally, of COVID-19, ranging from its real estate considerations to remote and other staffing and working arrangements and relationships, the very nature and manner of its approach going forward, potential health, safety and liability exposure, and reconsideration of its needs. It emphasizes the significance, under our law, of the interviewing process, both as to the possibilities the process offers and the legal and practical constraints our laws may impose.

Among other legal developments this regional guide addresses are those terms and conditions that may be of particular importance, if not crucial, to the global entity and its decision as to where in the United States it might wish to establish or enhance its presence, inclusive of restrictive covenants against competition, solicitation or poaching (when enforceable and to what extent), confidentiality, trade secrets, benefits considerations, analytics, artificial intelligence and other privacy issues, workplace safety, immigration and related foreign workers' issues. It includes issues and developments in the areas of discrimination, harassment and retaliation, with regard to both pertinent safeguards and restrictions. Also discussed are key issues relative to the termination of the relationship, whether to be addressed at the outset of the relationship in anticipation of that possibility or at the time of the termination.

Most importantly, this regional guide also emphasizes what a global entity must understand about the types of disputes that may arise; including now as a result of COVID-19 considerations, the different internal and external alternative dispute forums and other forums in which such disputes might be heard; the options available to the entity either in anticipation of such disputes or once such disputes arise; the types of remedies it might seek or to which it might be exposed; and, to the extent relevant, whether there are any extraterritorial applications of the law that may or must be taken into consideration.

The issues, as one should expect, are real and, of course, cannot be ignored, but the choices and opportunities are many. That said, I wish to acknowledge the invaluable contributions of my colleagues who, in our preparation of this chapter, both helped identify those issues and highlighted those choices and opportunities.

Trends and Developments

This third edition, as before, attempts in this chapter to focus on certain of the most recent trends and developments of which the global entity should be aware. In one crucial sense, as indicated in the Introduction, the most obvious – and concerning – development this year has been the impact and uncertainty of the COVID-19 pandemic, but, as that permeates virtually every chapter in the guide, it will be addressed throughout the guide, rather than here.

Two developments, still in their evolutionary stages, are of such critical importance that, with some elaboration, they warrant special attention in this chapter. Perhaps surprisingly at this stage in their evolution, both involve our ability even to define, much less measure and establish, certain elements of discrimination. The first development focuses on artificial intelligence and its increased introduction of analytics to the equation; the second concerns what has been termed "implicit bias."

Discrimination: artificial intelligence – the import of its increased introduction of analytics and the algorithms they entail

Artificial intelligence, to be sure, poses the obvious concerns about job displacement, globally and here in the United States. None of that displacement, short-term or otherwise, can be minimized, particularly as to the impact on those least able to cope with it. How and the extent to which that displacement is addressed will present its own challenges, problems and solutions, including as to the innovative and effective internal and external education and training programs such anticipated and actual displacements will require.

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What is clear, and hopefully somewhat encouraging, is a heightened awareness on the part of our business and educational institutions of the roles they can – and must – play in the development and implementation of such education and training programs, and of the benefits these programs can provide both to the recipients and to the institutions themselves, including diversity and inclusion. Indeed, more employers today not only have adopted diversity goals, but are incentivizing those involved in the hiring process to meet such goals.

That said, of concern at this relatively early stage of artificial intelligence is – as some commentators have observed – its "revolutionary" incorporation of analytics, and the algorithms they entail, into so many aspects of the employment process that most of us could hardly have foreseen. Whether in job postings and the formulation of job descriptions and responsibilities, the reviewing of resumes, the screening of video interviews, testing and other aspects of the hiring, job placement and promotional processes, more and more these algorithms are being used as predictors of behavior, working traits, qualifications or future performance – ostensibly to promote diversity and inclusion or otherwise to mitigate the possibility of unlawful bias. In part, this may be a further outcome of the Me Too, Time's Up, Pay Equity and other such movements.

While potentially productive and generally adopted in good faith, the introduction of these algorithms in certain material respects may be problematic, if not outright questionable. The good intentions notwithstanding, the reliability of such algorithms as predictors of behavior or to ascertain the motivations of the decision-makers is, as will be seen, far from clear and very much the subject of ongoing challenge and debate, both among the social psychologists who helped develop the concept and the legal community, including our judicial system, involved in its application.

Algorithms, we know, are dependent upon the decisions made when choosing, collecting and coding the information that will be the predicate for the models to be used, and then formulating these models. Actual or potential abuses of artificial intelligence, however, have manifested themselves in various contexts; eg:

- the utilization of technological "data points" as measurements of reaction times without regard to the relevance of such reaction times to the actions or decisions in question;
- non-verbal cues in the form of facial expressions;
- the substitution of presumed objectivity for human assessments in the decision-making process (eg, eye and body movements, voice nuances and clothing) to "see" what the human factor presumably cannot see (whether due to conscious or unconscious bias);
- the postings of employment opportunities through social media platforms that may have been selected because of the demographics of a target audience that, it has been claimed, unwittingly or otherwise discriminatorily failed to include representative numbers of women, the aged, minorities, the disabled and/or other protected categories of potential candidates; and
- large datasets that, also unwittingly but disproportionately, similarly omitted such protected classes.

So, too, even where there exists a certain linkage, have questions been posed as to whether the linkage is merely one of correlation, rather than causation, and as to our ability, using the data points selected and the models created, even to *measure* what we are trying to determine.

In short, the concern has been that the very process of introducing a presumably neutral model to avoid conscious or unconscious biases may well result in the substitution of a subjective process of its own that unintentionally reflects the very same or other biases that the analytics were designed to minimize, if not avoid.

In the words of David Lopez, former and longest-serving General Counsel of the US Equal Employment Opportunity Commission (EEOC), when testifying on 4 March 2019, before a Congressional Subcommittee, "[b]ad data inputs lead to bad results," and "these digital tools present an even greater potential for misuse if they lock in and exacerbate our country's long-standing disparities based on race, gender, and other characteristics" (House Subcommittee on Consumer Protection and Commerce of the US House Committee on Energy and Commerce: "Inclusion in Tech: How Diversity Benefits All Americans").

Mr Lopez, citing "mishaps," "abuses" and even "horrors," "highlight[ed] the need to examine algorithms and big data in the context of their effects on society and the need to have a framework in place that supports its ethical and just use." He offered an abundance of " cautionary tales... about the failure of predictive analytics to live up to our ideals of nondiscrimination, opportunity, and privacy," and spoke of the need for a "better under[standing]" and "increased scrutiny of outcomes" in light of the relatively new-found "prominence of predictive analytics and algorithms in decision-making and other aspects of society." Mr Lopez noted "*an alarming number of mishaps with employment screening emanating from the elevation of statistical correlation between some variable*" and *"purported job performance, qualifications or qualities*" and the "*tendency of search results themselves to reflect stereotypes and bias*" (emphasis added).

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Clearly, Mr Lopez's research indicated a genuine concern about the reliability of these analytics as the predictors they have been held out to be. If anything, his concern was that their introduction has exacerbated, rather than ameliorated, the problem of discrimination. Again, in his own words, " *algorithms are often predicated on data that amplifies rather than reduces the already present biases in society – racial, ethnic, and socio-economic – in part because these issues may not be noticed or a consideration to the people creating the technology*" (emphasis added). *"Subjective judgements are made,*" he pointed out, and *"with those judgements comes the innate biases of the individuals making the decisions"* (emphasis added).

Discrimination: implicit bias

In his analysis of his concerns about the reliability of analytics and its algorithms as a predictor of discriminatory behavior, Mr Lopez observed: "Despite many large tech companies actively trying to increase the diversity of their workforce, there are still factors at play leading to sub-optimal results that need to be discovered and ameliorated. One of these issues is likely 'implicit bias' in the hiring and employment context."

Implicit bias defined

As social psychologists have defined the term "implicit bias," we all are subject to our own inherent "unconscious" or "indirect" biases that, though devoid of a conscious intent, are, in their opinion, nonetheless probative of discriminatory behaviors. As Mr Lopez expressed it in his testimony before the House Subcommittee, the "science of implicit bias" is predicated upon *"the more subtle"* and *"automatic association of stereotypes or* [subjective] *attitudes about particular groups"; "[p]eople can have conscious values that are still betrayed by their implicit biases"* (emphasis added). Notwithstanding the real, and serious, concerns about the reliability of the relatively new-found predictive analytics and algorithms in decision-making and other aspects of society to which he testified, Mr Lopez somehow assumed that *"implicit biases"* – unconscious though they may be – *"are frequently better at predicting discriminatory behaviors than people's conscious values and intentions"* (emphasis added). As seen below, Mr Lopez's assumption, in the context both of the social science community's current thinking and the legal framework within which the issue of implicit bias arises, is very much the subject of ongoing debate.

Disparate treatment; disparate impact

The US Supreme Court has made it clear that reliance upon stereotypical and subjective assumptions or judgments can occur in two distinct but, from a legal standpoint, crucially different contexts – one of "disparate treatment" and one of "disparate impact" (*Employment Discrimination Law*, ABA Section of Labor and Employment Law, Fifth Edition, Vol.I, Ch 3.I.. The distinction is especially pertinent to the issues of conscious and unconscious bias.

- A claim of disparate treatment, by definition, is one asserted in the context of intentional discrimination and, accordingly, is subject to a burden of proof imposed upon the claimant that requires actual evidence of the employer's intent to discriminate against the claimant because of the claimant's race, religion, gender, age, disability or other protected legal status; "[t]he ultimate question in every [disparate treatment] employment case is whether the plaintiff was the victim of intentional discrimination" (Reeves v Sanderson, Plumbing Prods., Inc., 530 U.S. 133, 153 (2000)); "[p]roof of discriminatory motivation in such cases is critical" (Teamsters v United States, 324, 335, n. 15 (1977)).
- A claim of disparate impact, unlike disparate treatment, is one asserted not on the basis of intent, but rather upon the impact of the decision or action in question. Accordingly, the claimant's burden of proof in no way is predicated upon the element of intent. More precisely, the issue posed is whether the consequences of a policy, action or decision in question – otherwise neutral on its face but measured by statistically significant criteria or by other objective means – are such that the claimant has been adversely affected in a way that cannot be explained other than by the discriminatory *impact* of the policy, action or decision; ie, "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' " (Griggs v Duke Power Co., 401 U.S. 424, 432 (1971)).

The import of Mr Lopez's observations: where conscious bias alleged; where implicit (or unconscious) bias alleged

As noted above, when speaking generally about the accuracy or reliability of the relatively new-found prominence of analytics and algorithms as predictors of discriminatory behaviors or motivations, Mr Lopez expressed very serious concerns. The gravity of his concerns cannot be overstated.

The "[a]lgorithms," Mr Lopez stressed, "are often predicated on data that *amplifies rather than reduces the already present biases in society* " (emphasis added). He based these concerns on a number of factors – common to both conscious and unconscious bias claims – including the "tendency of search results themselves to reflect stereotypes and bias"; inaccuracies in "statistical correlations" drawn; and the reality that "the people creating the technology" themselves might not even notice the problems or might even produce results reflective of their own individual "[s]ubjective judgments" and "innate biases."

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Mr Lopez's misgivings about the questionable or misplaced reliance upon stereotypical assumptions and subjective judgments made clear he was referring both to claims of conscious and unconscious (implicit) bias. Indeed, he defined the "science of implicit bias" in terms of "the more subtle" and automatic association of such stereotypes or [subjective] attitudes about particular groups."

If, by his own assessment, the predictive reliability of the analytics and their algorithms is clearly questionable when attempting to assess the conscious behaviors and motivations at issue in a disparate treatment claim, at the very least, one might well presume – expect – the same reserved/guarded assessment when attempting the more difficult task of unmasking or "betray[ing]" those supposedly bona fide conscious values and intentions on the basis of an asserted unconscious (implicit) bias. Quite the opposite, however, Mr Lopez concludes that these same analytics and algorithms, when assessing these "implicit biases" – unconscious though they may be – "*are frequently better at predicting discriminatory behaviors than people's conscious values and intentions*" (emphasis added).

On what basis Mr Lopez reaches this conclusion, and how the predictive determinations of which he speaks will be made or measured, remains to be seen. As briefly discussed below, however, the very nature and definition of the doctrine of implicit bias, the assumptions upon which it is based, how and under what circumstances it can or cannot be measured, and its reliability as a predictor of behavior are very much in a state of flux, including on the part of those who were very much involved in the creation and development of the doctrine.

To be resolved

Whether Mr Lopez's more optimistic assessment of implicit bias as a better predictor of discriminatory behavior will prove valid will turn on a number of considerations in the evolution of the doctrine, including the following issues.

- Implicit bias substitutes an assumed stereotypical or subjective bias against or about another group for the evidence of intent our law requires in a case of disparate treatment. In Price Waterhouse v Hopkins, 490 U.S. 228 (1989), however, the US Supreme Court indicated that such a stereotypical assumption, in and of itself, cannot establish the requisite discriminatory intent; rather, the test is whether the evidence establishes that in the particular situation at hand, the accused in fact " *act[ed]* on the basis of the stereotypical assumption in question" – in this case, "on the basis of a belief that a woman cannot be aggressive, or that she must not be" (id at 250 (emphasis added)).
- As to the issue of intent, how does one measure an unconscious bias? Without here discussing the specifics, suffice it to say that the tests generally used to measure unconscious bias focus on assumptions based upon testing of other individuals of the same generic class (eg, same race or gender) but not of the employment entity in question. What is often tested, moreover, are the millisecond reactions of these sample individuals to certain situations; generally, the proffered experts have not even met, much less tested, the accused individual(s) and often have not even examined the deposition or other record evidence; and, most importantly, the nature of the tests in no way mirrors or otherwise reflects the manner or time in which the alleged discriminatory decisions or actions in question occurred; ie, decisions as to hiring, termination or lesser discipline, promotion, assignment, compensation or the like are generally deliberative and often collaborative, and, quite simply, are not made in a matter of the milliseconds measured by the tests in question.
- Of late, there has been a radical change in the thinking of many in the social science community – beginning with those who created the implicit association test (IAT) (the type of test generally used) – regarding the IAT's ability to serve as a predictor of the unconscious bias such tests were designed to establish. As now modified, their public position, as stressed in the website that promotes research based upon their testing, warns: "the IAT should not be used to make decisions about others, to measure somebody else's automatic racial preference, or to decide whether an individual should or should not serve on a jury"; "[u]sing the IAT as the basis for making significant decisions about self or others could lead to undesired and unjustified consequences"; "attempts to diagnostically use such measures for individuals risk undesirably high rates of erroneous classification" (Tony Greenwald, Mahzarin Banaji and Brian Nosek, Understanding and Interpreting IAT Results, Implicit Association Test).
- Consider, as well, the comments of Dr Greenwald and his colleague, Calvin K. Lai, in their paper, "Annual Review of Psychology, Implicit Social Cognition," 2020, 71: 419-445: "In the last 20 years, research on implicit social cognition has established that social judgments and behavior are guided by attitudes and stereotypes of which the actor may lack awareness. Research using the methods of implicit social cognition has produced the concept of implicit bias, which has generated wide attention not only in social, clinical and developmental psychology, but also in disciplines outside of psychology, including business, law, criminal justice, medicine, education, and political science. Although this rapidly growing body of research offers prospects of useful societal application, *the theory needed to confidently guide those applications remains insufficiently developed* (emphasis added)."

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These and other poignant quotes and excerpts further emphasize, by way of example, the basis for what appears to be a newfound consensus among many social psychologists, including and led by its creators, that an individual's score on the tests in question is not a reliable predictor of that individual's likelihood of engaging in discriminatory behavior; that a fairly large number of studies do not support the conclusion that a group of persons showing higher bias on implicit measures of bias are more likely to discriminate than the group of persons showing lower bias on such measures; and that, if anything, further research is needed to examine the possible accumulative effects of implicit bias on employment outcomes. Many studies, in fact, not only do not find a positive correlation between implicit bias and discriminatory behavior even when looking at aggregate data, but, instead, indicate the very opposite behavior that implicit data would have predicted.

If, as it continues to evolve, the social psychologists and authors of the IAT themselves cannot confirm the reliability of the IAT or other tests to measure or otherwise predict an individual's behavior and, indeed, caution against its use for such purposes even when compared with aggregate data, it remains to be seen whether the continued use of the implicit association tests as a basis for social framework "evidence" will be regarded instead as an improper substitution of one stereotype for another – particularly where the individual in question has not even taken the test in question and no such proffer is made.

Mindful of these developments, in this connection see "The Paradox of Implicit Bias and a Plea for a New Narrative" (Michael Selmi), 50 Ariz. L.J. 193 (Spring, 2018), noting behavior that often is labeled as "implied" could "just as easily be described as 'explicit.'" There, moreover, Professor Selmi urges a "move away from a focus on the unconscious, and the IAT, to concentrate instead on field studies that document discrimination in *real world settings*" (emphasis added). The idea of defining implicit bias as "unconscious, pervasive, and beyond one's control," he states, "is a message... that can be difficult to reconcile with our governing legal standards, which often turn on one's ability to control one's behavior," and "is difficult to square with traditional notions of legal proof." "Implicit bias," he further notes, "has its greatest effect on spontaneous decisions but plays a lesser role in deliberative decisions" and is "most commonly identified with the controversial disparate impact theory where proof of intent is not required." He cautions, implicit bias is tied to the IAT, and that test *"has limited predictive ability"* (emphasis added).

What the future narrative will be remains to be seen.

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