

# Labor *AND* Employment Law

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SECTION OF LABOR AND EMPLOYMENT LAW ■ AMERICAN BAR ASSOCIATION



## Where in the World Is the Gig Economy Working?

By Clement L. Tsao

**W**ith the rise of gig and on-demand work, countries around the world are grappling with how traditional labor and employment laws, based around the employee or independent contractor binary concept, can apply to businesses that rely on the gig economy. At the 12th Annual Labor and Employment Law Conference, a panel, “Where in the World is the Gig Economy Working,” presented experiences from different countries, including France, South Korea, and the United States.

In France, employees enjoy a wide range of benefits and protections that include healthcare, unemployment, and pension benefits provided by the welfare state, as well as the right to be terminated only for just cause. In contrast, independent gig workers, or self-employed workers, have not had any such benefits or protections—at least not until recently.

Mathilde Houet-Weil of Weil & Associés (France) discussed reforms that France has recently enacted to provide additional benefits and protections for independent workers working for companies that exchange or sell

goods or provide services through an electronic platform. French President Emmanuel Macron, who had campaigned on promoting a culture of start-ups and entrepreneurialism, led an effort to pass legislation giving three new rights to independent platform workers: the right to insurance against workplace occupational hazards; the right to free trainings provided by the platform company; and the right to strike.

Indeed, in response to reduced compensation, Uber drivers recently struck at train stations and airports, blocking traffic and “annoying absolutely everyone traveling.” In this regard, Houet-Weil mused that independent workers already resemble French employees, who are well known for exercising their right to strike.

In January 2018, an online service, previously available to employees, was made available to independent workers. The service provides free career advice to workers of gig and on-demand companies, and offers support around personal and professional career development. The goal of the service is to help



independent workers, whose work is often temporary and low paying, transition into long-term and sustainable careers.

In contrast, South Korea, also a just cause nation, has not implemented any new reforms for gig workers or workers not considered regular employees. According to Brendon Carr of Hwang Hong & Co. PC (South Korea),

South Korea is a particularly challenging environment to establish, and maintain, a gig workforce. Like France, South Korean labor and employment standards afford employees robust insurance protections and benefits.

In South Korea, employment brokerage is highly regulated. If an employer or platform company

*continued on page 9*

Our Midwinter Meeting season, which is one of the busiest and most productive times of the year for the Section, is now in full-swing. Over the next four months, each of our standing committees will convene a Midwinter Meeting with in-depth programming on recent developments in their respective fields at a wide range of destinations across the U.S. and Mexico. In addition, this year the International Labor and Employment Law Committee will meet in Buenos Aires, Argentina. High-level government officials will attend most of these meetings and share the latest developments inside the Beltway.

The Midwinter Meetings also offer terrific networking receptions and leave plenty of time for fun and leisure. If you have not already done so, I urge you to attend at least one of our Midwinter Meetings, which is unquestionably the best way to become engaged with the work of our great Section. Most of the Midwinter Meetings also include diversity and inclusion events, first-time attendee receptions and mentoring programs to ensure that new attendees become quickly connected with the committees' leadership and get involved. Visit the Section homepage at [americanbar.org/laborlaw](http://americanbar.org/laborlaw) to see the complete list of Midwinter Meetings and registration information.

I am pleased to announce that the Section is now accepting applications for our next Leadership Development Program, which will take place in Chicago from July 17–19, 2019. The LDP provides a pathway for leadership within the Section by offering training in leadership skills to a select group of Section members and then engaging them in a wide range of Section activities. The Section encourages applications from active Section members as well as Section members who have been active in other bar organizations and want to get involved with our Section. The LDP is in place to identify a diverse group of future leaders from all constituencies and to provide them the tools they need not only to move into leadership positions in the Section, but to become successful labor and employment lawyers. Diversity and inclusion is a key component of the curriculum, as well as effective mentoring relationships, communication skills, conflict resolution, emotional intelligence and self-assessment. Graduates of the LDP, many of whom are now Section Leaders, have raved about the outstanding opportunities the LDP provides:

Participating in the LDP and later serving as a co-chair of the LDP Committee were both great experiences for me. I've had the opportunity to work, and become friends, with attorneys from all constituencies. Lessons learned in the LDP have been extremely beneficial in my other leadership positions within the Section.

**Eunice Washington, Class of 2009**

I was interested in being part of LDP because I thought the experience would allow me to meet people and become more active in the Section. It was all those things, but what surprised me is I learned valuable skills and insights that have benefited my legal practice. I highly recommend it to anyone that is interested in becoming more effective in their legal practice or the Section.

**Scott Kelly, Class of 2009**

The 2019 LDP will take place in Chicago, and funding for travel and accommodations will be provided by the Section for those selected to participate. Visit the Section website at [americanbar.org/laborlaw](http://americanbar.org/laborlaw) to access the application form.

We also will soon be accepting applications for our Trial Institute in Chicago on September 19–22, 2019, which will again be co-sponsored by Chicago Kent Law School and the National Employment Law Council

(NELC), a minority bar association comprised of prominent management side L&E lawyers. Unfortunately, in this day and age, all too many L&E attorneys with many years of experience only have minimal trial experience. Over the course of three days, an extraordinary faculty comprised of judges and top L&E attorneys from across the country will teach participants the nuts and bolts of trial preparation and trial techniques through a combination of lectures and breakout sessions. Topics include voir dire, opening statements, witness examinations, objections, closings, effective use of technology in the court room and more. On the final day, participants will try their cases from start to finish before actual federal judges in federal courtrooms in Chicago. Throughout the Institute and at the conclusion of each mock trial, participants will receive extensive feedback from the faculty, coaches, judges and prominent employment lawyers.

On February 15, 2019, our section co-sponsored the Negotiation Institute at the Hotel Del Coronado in Coronado, California, in conjunction with our ADR in Labor and Employment Law Committee Midwinter Meeting. Our co-sponsors included the ABA Section of Dispute Resolution and the National Employment Law Council. This is yet another example of how the Section can successfully collaborate with diverse bar associations and build bridges between their membership and ours. This program featured Professor Charles B. Craver and other negotiations experts who blended lectures with hands-on mock negotiations and mediations to turn negotiation instincts into negotiation skills.

These three programs illustrate the extraordinary professional development opportunities the Section offers newer and experienced lawyers. Meanwhile, we are poised to implement our New Membership Model ("NMM"), which will radically reduce dues for newer lawyers beginning on September 1, 2019. Indeed, lawyers who have been in practice for fewer than five years will see their annual dues slashed from \$450 to \$75 per year! Annual dues will then gradually increase by \$75 to \$100 every five years of practice thereafter. Programs such as the LDP, the Trial Institute and Negotiation Institute provide tremendous value to newer Section members at a very reasonable price.

Working with my colleagues on the Section Council and In-House Corporate Counsel Committee leadership, I also have made it a priority for the Section to continue to be a welcoming environment for our many in-house corporate counsel members. To that end, we have upgraded our programming specifically for in-house corporate counsel at the Annual Section Conference and at many Midwinter Meetings, and we have appointed more in-house corporate counsel to leadership positions in our administrative committees and standing committees than ever before. Indeed, 25% of our leadership positions on the management side are now held by in-house counsel. If you are an in-house corporate counsel and are interested in taking on a Section leadership role in 2019–2020, please contact Eric Reicin [[eric.reicin@morganfranklin.com](mailto:eric.reicin@morganfranklin.com)]. In addition, our In-House Corporate Counsel Committee led by Valerie Butera [[Valerie.butera@gm.com](mailto:Valerie.butera@gm.com)], Myra McKenzie-Harris [[myra.mckenzie@walmartlegal.com](mailto:myra.mckenzie@walmartlegal.com)] and Eric Reicin [[eric.reicin@morganfranklin.com](mailto:eric.reicin@morganfranklin.com)] would welcome further feedback on suggested improvements from our in-house corporate counsel members. ■

**Joseph E. Tilson** ([jtilson@cozen.com](mailto:jtilson@cozen.com)) is a Partner with Cozen O'Connor in Chicago. He became Chair of the Section on August 4, 2018.

# Conference Attendees Get A View From the Bench

By Genaira L. Tyce

During the 12th Annual Labor and Employment Law Conference, the Honorable Waverly Crenshaw, Chief Judge of the United States District Court for the Middle District of Tennessee, the Honorable Elizabeth LaPorte, Magistrate Judge of the United States District Court for the Northern District of California, and the Honorable Rebecca R. Pallmeyer, District Court Judge of the United States District Court for the Northern District of Illinois, addressed an engaged crowd of practitioners during their panel presentation, *A View from the Bench: I Wish I Didn't Know Now What I Didn't Know Then*.

With the assistance of moderators Cynthia Sass of Sass Law Firm in Tampa, Florida, and Sean Gallagher of Polsinelli in Denver, Colorado, the judges discussed many topics. They included: crafting a compelling opening statement, using technology effectively in case presentation, filing motions for summary judgment, addressing bad facts and the issue of damages at trial, and gaining courtroom experience as a young associate. The judges also discussed the most common feedback they received from jurors and addressed a litany of impromptu questions from the floor, touching on voir dire, maintaining credibility with the court, and courtroom civility.

The following four topics were particularly helpful.

## Introducing Evidence Using Technology—Just Because it Doesn't Do What it's Supposed to Do, Doesn't Mean it's Useless (But in the Courtroom it Does)

Judges Pallmeyer, LaPorte and Crenshaw confirmed that during trial, practitioners regularly use PowerPoint presentations to show case timelines and highlight key pieces of evidence, and show video depositions to impeach witnesses. All agreed that technology



must work in order to be effective.

In this regard, Judge Crenshaw advised the audience that he requires practitioners to demonstrate that they can use their technology in advance of trial. If not mandated by the court, however, Judge Pallmeyer suggested that practitioners contact staff to request time to practice using the technology in the courtroom in order to avoid technological fumbles while on the record. Judge LaPorte reminded practitioners, however, that a low tech approach, like using a flip chart, can be just as effective with a jury if done strategically, so he cautioned practitioners not to ignore more traditional methods of introducing evidence.

## Voir Dire—That Counsellor, is the Right Question

The judges had a robust discussion about questioning potential jurors on voir dire. The judges were split on whether their courts allowed practitioners to use internet searches about potential jurors to inform their voir dire questions. However, they all acknowledged the importance of formulating pointed questions designed to ferret out those potential jurors whose personal experiences may reveal a bias. Most interestingly, Judge Pallmeyer described using a tailored questionnaire in all of her cases as a starting point to begin voir dire. In

her experience, Judge Pallmeyer found that potential jurors were much more forthcoming about their biases when they believed they were revealing them in a private manner. Judge LaPorte admitted that she had not gone so far as to use a voir dire questionnaire, but explained that she provided potential jurors with instructions that they could discuss sensitive matters that may touch on one's potential biases in private.

## You Can't Try Cases Like Nobody's Watching

Judge Crenshaw shared the top five critiques jurors shared with him after trial. In addition to highlighting that jurors were overall amazed to see that a real court proceeding was nothing like what's shown on television, Judge Crenshaw admitted that jurors expected to be entertained by lawyers. Judge Crenshaw explained that jurors wished that attorneys set a roadmap for the hearing early on in the proceeding so they could know what to expect, and lost faith in attorneys who were not organized or readily prepared to proceed at trial. Wasting time was another pet peeve expressed by jurors.

Judge Pallmeyer fully agreed with Judge Crenshaw's sentiments and further explained that jurors complained about lawyers who repeated themselves. She

also warned lawyers that the jurors notice everything. The overall takeaway was be prepared to give your best performance.

## Training Associates in the Courtroom—Someone Has to Be Responsible

When asked how firms could get young associates experience in the courtroom, Judge LaPorte quickly expressed that in the Northern District of California where she works judges are concerned about young associate development. She explained that some judges maintained standing orders suggesting that they would be more likely to give oral argument time rather than decide cases solely on the papers if practitioners intended to use young associates to argue the motion. LaPorte therefore suggested that parties be proactive, and ask a judge for leave to allow young associates to make oral arguments with minimal assistance from a partner.

Judge Pallmeyer implored firms to absorb the cost of sending young associates to court if their clients were not willing to pay for it. In Pallmeyer's view, associates need to learn how to be good lawyers, and it is everyone's responsibility to bring young lawyers along.

As the formal discussion concluded, and attendees thanked the panel with a round of applause, I realized that the judges' remarks reflected those things which I wished I knew before trying cases of my own. Luckily, I'll be back . . . in the courtroom. ■

**Genaira L. Tyce** (*Genaira.Tyce@nlrb.gov*) is a Senior Field Attorney at the National Labor Relations Board, Region 29 in Brooklyn, New York. She is the Public Co-Chair of the Section's Outreach to Young Lawyers Committee and a Section Government Fellow.

# After the Catastrophe: Employment Issues and Fall Out

By **Brendan J. Lowd**

**B**“Be prepared.” Sure, this advice is nothing new. As Founding Father Benjamin Franklin wisely observed, “By failing to prepare, you are preparing to fail.” However, during a presentation entitled “After the Catastrophe: Employment Issues and Fall Out,” at the 12th Annual Labor and Employment Law Conference, it became evident that disaster preparedness is not just a lofty goal that employers in areas prone to natural disasters should consider abstractly. Rather, these employers must dedicate significant financial and personnel resources to making sure they are prepared to address a number of wide-ranging employment issues that take center stage once a hurricane makes landfall, a flood ravages a coastal town, a fire burns down a warehouse, or when any other natural disaster creates disarray in the workplace.

Moderator Jeffrey Heller, of JHeller Consulting, kicked off the panel by discussing his experiences as an associate general counsel at BP. The experience ingrained in him the need for employers to at least consider planning and implementing a disaster preparedness plan. Mr. Heller explained that these plans should be fine-tuned and etched

in stone at least forty-eight (48) hours before catastrophe hits. A plan is critical to ensuring that business operations continue and that the steps are in place to maintain communications with employees. It might be hard to imagine, but cell phones may be inoperable in the aftermath of a disaster and so other arrangements, such as radio broadcasts, may be used by employers to stay in contact with their employees.

Panelist Deirdre Hamilton, of the Teamsters Airline Division, echoed the need for all parties to complete advanced planning to try and mitigate the effects of a disaster. Ms. Hamilton noted that one particular document is of paramount importance—a collective bargaining agreement. A CBA should resolve some difficult issues, such as employee per diems or when “adverse weather conditions” have occurred, thereby triggering the application of certain employment terms and conditions. Ms. Hamilton stressed that employers and employees have to come together and anticipate, bargain, or at least brainstorm solutions for the thorny employee relation issues that come about with disasters, such as whether employees are excused from work.



The conversation then shifted to the employer and employee-side attorneys on the panel. Raymond E. Morales, a management attorney in Puerto Rico, emphasized the need to plan for employee pay and leave issues. Mr. Morales noted that making payroll could pose a challenge as banks often close in natural disasters. Further, employees who need medical assistance might need to travel to other areas to receive proper care. Under these circumstances, an employee may need to go on a leave of absence.

Alfonso Kennard Jr., a Texas employee-side attorney, stated that while gender and disability discrimination issues could arise, employees typically do not have statutory protection, such as the right for a job to remain open, following a natural disaster. But, employers would be wise to go the extra mile and make sure that morale is high among the workforce. Lives have likely been turned upside down and, if employees also feel that their employer is treating them unfairly, the company may not have much of a workforce in the future!

And finally, a conversation about preparedness would not complete without a discussion

about insurance needs. Marsh Risk Consulting Senior Vice President Cindy Hubert highlighted the need for employers to give serious thought to insurance needs. Property insurance is a must-have, but Ms. Hubert focused on employers evaluating the need for business interruption insurance. This insurance greatly assists with the continuing of operations as, among other things, employee wage reimbursement could be covered under the policy.

The wealth of experience and backgrounds on the panel led to an informative, detailed discussion about the do’s and don’ts for employers and employees when confronted with a natural disaster that upends the workplace. One theme, however, was present throughout the panel: Be prepared. Well thought-out planning, whether it is having a detailed, comprehensive disaster preparedness plan or the proper insurance in place, can make lives easier at a time when it appears nothing is coming easy to anybody, employers and employees alike. ■

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## ***Kudos to Young Lawyers!***

Most articles in this issue cover programs presented at the 12th Annual Labor and Employment Law Conference, held in November 2018. Many were written by newer lawyers from the ABA’s Young Lawyers Division. The Section encourages new lawyers to author articles in future LEL issues. If you are interested, please contact Sarah Fask, *sfask@littler.com*.



**We encourage everyone to mark their calendars now for the 13th Annual Conference to be conducted November 6–9 in New Orleans!**

# Updates from the NLRB and the Office of the General Counsel

By Alan H. Bowie, Jr.

The updates from the National Labor Relations Board (“The National Labor Relations Board Under the Trump Administration”) and the Office of the General Counsel (“Update From the NLRB Office of the General Counsel”) at the 12th Annual Labor and Employment Law Conference were similar stories of restoring “balance” to the Agency and the struggles of level funding.

## Update from the Office of the General Counsel

Assistant General Counsel for the NLRB Alice B. Stock reviewed statistics from General Counsel Peter Robb’s first year in office, highlighted his approach to handling cases, and discussed interpretations of the law. The program format was a NLRB-themed spinning wheel gameshow where Stock fielded questions from the panelists based on the issue the spinning wheel landed on.



## First Year Statistics

Stock revealed that the General Counsel aimed to take a methodical approach to cases in his first year. The Office saw an increase in settlement rates, merit dismissals, and deferrals. There was a decrease in the amount of complaints issued and the number of 10(j) cases, which seek temporary injunctions for unfair labor practices, that were submitted to the injunction litigation branch and to the Board. Interestingly, 22 of the 23 10(j) cases submitted to the Board were authorized. Stock noted that the only case that was not authorized was submitted by former General Counsel Richard Griffin and credited the General Counsel’s methodical approach for the high percentage of authorizations.

One of the General Counsel’s major concerns is the speed of case processing and backlogs. However, in his first year, there was an increase in the number of pending cases and the amount of

days from the filing to close of a case increased by four.

## The General Counsel’s Approach

Stock also discussed the General Counsel’s approach to Case Handling Procedures and the January 2018 conference call that garnered strong reactions from the labor community.

One of the major challenges for the entire Agency is that it was level funded in the most recent budget. Stock explained that labor costs comprise approximately 80 percent of the budget and that, with the rise of labor costs and inflation, the Agency is effectively operating on less money. As a result, the General Counsel is looking for creative ways to pursue the Agency’s mission with fewer resources.

Stock provided some clarification on the now infamous conference call but acknowledged she was not at the Agency at the time. The suggestions made on the call were not the General Counsel’s but instead were provided in response to his Request to the Field for advice on better case processing ideas. Stock clarified that the General Counsel would like to allow regional directors to determine how their regions will handle cases and allow for delegation of decision-making authority to supervisors. In addition, the Office is no longer requiring that parties submit a formal letter to obtain advice on an issue.

## The General Counsel’s Interpretation of the Law

Not surprisingly, one of the General Counsel’s chief concerns is that the current NLRB laws prioritize employee rights over employer or union rights. The General Counsel issued key advice memoranda on employee handbooks and mandatory submissions aimed at restoring this balance and affirming the General Counsel’s commitment to following



the law. Based on Stock’s articulation of the GC’s position, we can expect a shift toward more “balanced” and employer-friendly laws.

## The National Labor Relations Board Under Trump

NLRB Chairman Jonathan Ring and Board Members Lauren McFerran, Marvin Kaplan, and William Emanuel gave the Board’s update, covering issues from the use of rulemaking to internal ethics and the recusal process to alternative dispute resolution.

## The Rise of Rulemaking at the Board

After failing to overturn the Obama-era joint employer standard through the adjudication process, the Board turned to rulemaking. The Obama-era standard stated that a company’s indirect control over workers could make it a joint employer. The Board published the Notice of Proposed Rulemaking on September 14, 2018 and extended the comment period until December 13. Chairman Ring revealed that he is a big proponent of rulemaking and believes the process allows the Board to address rules more holistically.

The Board is looking to address the Obama-era “quickie election” rule through the rulemaking process. The rule drastically shortened the time between the date of the filing of the petition for election to the date the election is held. Chairman Ring expects that the Notice of Proposed Rulemaking will be announced this winter.

## Key Cases

The Board Members discussed (and disagreed) on key cases already decided or currently pending. Though he could not go into detail, Board Member Kaplan noted that the Board is currently considering the issue of employee use of employers’ e-mail systems. Briefing on this issue closed on October 15 and the Board



received 20 comments from a broad and diverse group.

Board Members Emanuel and McFerran disagreed strongly on the Boeing Company case. The Board articulated a new standard governing whether workplace rules, policies, and employee handbook provisions unlawfully interfere with the exercise of rights protected by the NLRA. McFerran described the case as a “hot mess” while Emanuel acknowledged that the case was not perfect but is a “giant step in the right direction.”

## Internal Ethics & Recusal Process

Chairman Ring acknowledged that Board Member recusals have been a hot topic. The case overturning the Obama-era joint employer standard had to be vacated because Board Member Emanuel’s former firm represented the employer in the case below. To prevent similar issues in the future, the Board conducted an internal review of its recusal process earlier in the summer.

## The Board’s Alternative Dispute Resolution Program

The Board’s Executive Secretary Roxanne Rothschild made a case for the Board’s ADR Program. The Program has been around since 2005 but only a handful of parties agree to it. The Board provides a mediator to help resolve cases after the ALJ issues a decision. The major benefit is that parties receive remedies sooner rather than later.

In summary, the Board and the Office of the General Counsel have made significant changes and will continue to prioritize efficiency and restoring “balance” to laws and decisions promulgated under the previous administration. ■

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# Has Wage & Hour Law Really Changed in the Trump Era?

By Benjamin H. Yormak

His election will spell doom for workers, they said. He'll dismantle the Department of Labor (DOL), they said. He'll allow workers to be exploited, they said. But thus far the widespread fear in the plaintiffs' bar of an employee-rights Armageddon does not appear to have lived up to the hype. At the 12th Annual Labor and Employment Law Conference in San Francisco, U.S. Department of Labor attorney Janet Herold, employer-side attorney David Fortney of Fortney & Scott in Washington, and union & employee-side attorney Jason C. Marsili of Rosen Marsili Rapp LLP in Los Angeles engaged in a lively discussion on the direction of wage and hour law in the Trump era.

## callout

Ms. Herold helped clarify that, despite rhetoric from naysayers, the DOL's programs and areas of emphasis continue the DOL's unwavering commitment to protecting the rights of the American worker. Ms. Herold emphasized that the DOL is presently very focused on enforcement of labor certifications of nonimmigrant visas. In fact, the DOL continues to crack down on abuses by employers, particularly where the harm is inflicted on workers who have little bargaining power in the H-1B and H-2A settings. Of particular note to employers: those kinds of visas are only supposed to be issued if American workers are not available. So, even in the Trump era, employers beware: fraud in visa applications are being referred to local U.S. Attorney's Offices by the DOL.

In spite of Trump's tough-talk on immigrants, Ms. Herold also

emphasized that the DOL remains very focused on the enforcement of safe transportation. As Ms. Herold put it, "a ridiculous number of farm workers die being transported to the fields." In combating such abuses, Ms. Herold pointed to the DOL's active enforcement role and its securing of two injunctions in 2018. In one case, the U.S. District Court for the Central District of California entered a consent judgment ordering Fisher Ranch LLC to pay \$21,168 in back wages and \$49,104 in civil money penalties for violations of the Migrant Seasonal Workers Protection Act (MSPA) following a 2017 work-related motor vehicle accident that killed one worker and injured six others outside of

Calexico, California. In another case, the DOL obtained a consent judgment after its investigation found 69 Mexican guest workers living in a life-threatening housing encampment at an El Mirage farm. The DOL discovered G Farms guest workers housed in converted school buses, truck trailers, and a shed that were overcrowded, unsanitary, and inadequately ventilated, even as daytime temperatures exceeded 100 degrees. In addition to those conditions, investigators found G Farms and Leon set up kitchen facilities in another converted school bus, with combustible gas lines dangling through windows. As a result of the DOL's aggressive prosecution of such abuses, the U.S. District Court of Arizona in Phoenix entered judgments against a grower and its recruiting agents for violations of the H-2A guest worker program.

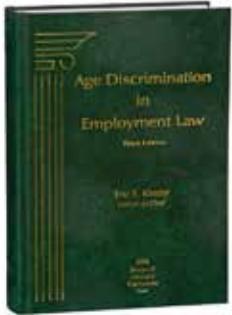
Outside of agriculture, the DOL has also made some newsworthy moves. As active wage & hour practitioners know, the DOL has begun issuing opinion letters again, a departure from its Obama-era policy of issuing only "general guidance." Beginning in January 2018, the DOL has republished 17 previously withdrawn opinion letters and has issued 13 new ones. But as Ms. Herold reminded employers: you cannot seek an opinion letter "if litigation is pending or the DOL is at your doorstep."

The same holds true for employers seeking to take advantage of the DOL's Payroll Audit Independent Determination (PAID) program, which the DOL launched earlier in 2018 and has now extended another 6 months. PAID allows employers to cooperate with the DOL to voluntarily correct errors they discover that violate the Fair Labor Standards Act (FLSA). But as Ms. Herold noted, there are clear requirements employers must meet to take advantage of the PAID program, including escaping liquidated damage claims. First, the employer must conduct a *bona fide* self-audit. Second, the employer may be required to provide the DOL with documents supporting a *bona fide* audit. Third, the DOL will oversee amounts due to employees. And fourth, the employee has the option to accept or reject the payment. Importantly, observed Ms. Herold, the DOL has done away with the previously broad Form 58 release and replaced it with a narrower version that only releases claims in the time period of the self-audit and those within the scope of the self-audit. Employers need to be aware that non-audited claims are not subject to a release. Also, a Form 58 release does not release claims under state or local law, only those under the FLSA, Mr. Fortney noted.

From the management perspective, Mr. Fortney stressed that seeking and obtaining an opinion letter from the DOL remains good practice because the opinion letters act as "a legal safe-harbor" against FLSA claims. However, he emphasized that employers need to continue to actively review DOL guidance as new opinion letters continue to come out at a rate we have not seen in nearly a decade. Two new opinion letters highlight this point. In one, the DOL addressed tip pooling and eliminated the 80/20 split. And in another, the DOL issued new guidance on how employers are to calculate an employee's regular rate. But all in all, we have not seen the wide-sweeping changes some pundits predicted.

Even employee-side litigator Jason C. Marsili agreed, remarking that any changes in the Trump era have been "more superficial than substantive" inasmuch as changes have been made to the DOL. But he noted, and Mr. Fortney and Ms. Herold agreed, change is forecasted based on Trump's nominations in the federal judiciary. All agreed: *Chevron* deference appears doomed. As Mr. Marsili observed, "with Congress failing in recent decades to legislate in meaningful fashion, recent attempts to pass Presidential agendas through the administrative process have caught the attention of the federal courts with increasing disapproval. Now, with a steady influx of judges and justices that altogether question deferential treatment to agency action, the real change from this administration will not be realized for years to come, but will ultimately challenge the authority of all administrative action, including that from the DOL." ■

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**New Edition!**

## Age Discrimination in Employment Law, Third Edition

**Eric E. Kinder**, Editor-in-Chief;  
**Federal Labor Standards Legislation Committee**

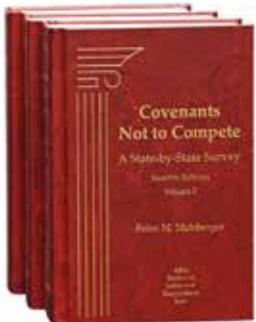
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**New Edition!**

## Covenants Not to Compete: A State-by-State Survey, Twelfth Edition

By **Brian M. Malsberger**; Board of Review Associate Editors:  
**David J. Carr, Arnold H. Pedowitz, and Eric Akira Tate;**  
**Committee on Employment Rights and Responsibilities**

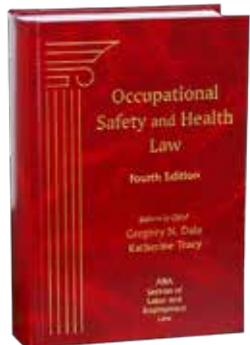
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### Executive Summary

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# What Is A.I.: What to Expect in the Future of Work

By Lindsey Wagner

“What is A.I.?” Dr. Gerlind Wisskirchen, Partner of CMS in Cologne, Germany opened up the plenary session of the Future of Work at the 12th Annual Labor and Employment Law Conference.

Led by Moderator Brian E. Koncius, Partner of Bogas & Koncius, P.C., panelists Heather Morgan, Partner of Gube Brown & Geidt LLP, Nicole Nakawaga, Deputy General Counsel at SAG-AFRA, along with Wisskirchen, tackled the discussion of artificial intelligence and its impact on work—including employment law. But first, to begin the discussion, the panelists opened with an initial question: How do we give A.I. structure? The answer? It is complicated.

The artificial intelligence we knew as children has changed to reveal something more complex and it will change more, according to Wisskirchen. As Wisskirchen explained, the present labor and employment laws were created in the 19th and 20th century. In order to understand the intersection of A.I. and employment laws in the future, we need to understand that A.I. may not fit squarely into the laws we have developed in the past.

For example, questions will arise as to status of artificial intelligence creations—like robots. Are they employees? Freelancers? Traditionally, when one conjures an idea of “robotization,” a vision of robots in a factory’s fenced-in, yellow-hat area may come to mind. But, in the future, we may think about “cobots”—or intelligent robots that work with human beings doing complex tasks. In the past, robots have been used to replace physical strengths, but the robots of the future are also intelligent. We now have the technology with algorithms that can see patterns, can learn from itself, and can bring itself to a higher level to make a decision—and it is these last two components (learning and decision making) that are

pushing our world forward.

Moderator Koncius reminded the audience that the discussion about robotics and A.I. is not just some distant future, it is here. For example, we see advanced technology in the entertainment world, Nakawaga explained. Technology like performance capture techniques can be used to record performances of actors and enhance their performance by adding special features, changing their face, or even making an actor into an avatar. We see this technology in the latest Star Wars release, *Rogue One*. In *Rogue One*, the actor who portrayed a character from an original Star Wars movie had passed away, but special effects artists were able to use archive footage from the actor’s previous roles and combine it with footage of a living performer in order to create a seamless digital character and develop the deceased’s performance in a believable way. Developments of this sort of technology can have huge impacts for actors, especially when faced with how to handle consent requests by producers to use this technology in their films.

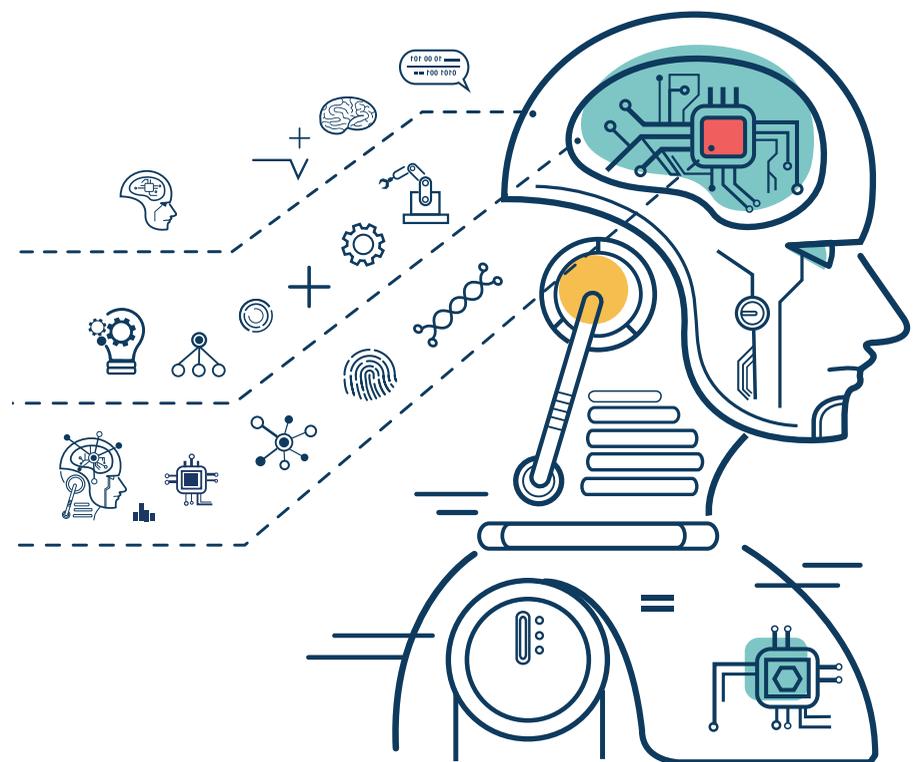
As this technology develops, Nakawaga reminds that it will be important to make sure unions are keeping their members up-to-date about their rights, such as what options they might have if they show up to set and a producer wants to digitally scan them—should they consent? If they do consent, what does that mean for the member? These are issues that must be considered.

But, it is not just the entertainment world that will be affected by developing technologies. Instead, the impact will be across the board. As Wisskirchen explains, if we look at the world, A.I. will likely produce different outcomes, creating winners and losers of A.I. in terms of advancing economies, where the United States, some South East Asian

countries, and European countries will be taking the lead. Countries that put an emphasis on investment capital and education will come out ahead.

So what does this mean for the labor market in a more narrow sense? Wisskirchen foresees that

labor market of the future, there is a “squeeze middle,” and it is not just lower-level jobs that will see the impact of A.I. For instance, even journalists, doctors, or lawyers, have tasks that are rule-based that we may see eliminated. In contrast, jobs that are



we will see a higher percentage of tasks—not jobs—that will be changing soon. This prognosis requires us to consider what we can do now to overcome mass unemployment. And still, we know there will be some jobs in certain sectors that could be eliminated overnight, like cashiers and truck drivers. After all, labor displacing technology is already here, e.g., self-checkout machines. Wisskirchen warns this could be a big blow to 10% of the workforce, which is employed in retail.

And what about tasks that will be replaced? Wisskirchen believes we will see elimination of tasks that are rule-based, repetitive, and somewhat monotonous. But, when we think about the

centered around human interaction, like caretaking, may survive, even despite A.I. development.

But, it is not all despair. As Koncius reminded the audience, with the elimination of certain positions, we will also see the creation of new jobs, including the number of freelancers, increasing dramatically. For example, at least 50% of the jobs we have now did not exist in the 1980s. And Wisskirchen believes nearly 80% of the children in elementary school will assume jobs and titles we cannot even conceive of now. Children’s studies will focus on problem solving and soft skills, including interaction with human beings that allows you to make a

*continued on page 9*



## A.I.

*continued from page 8*

decision as a team—team work will be important.

And it is not just tasks and titles we will see change, but the workplace structure itself. For instance, as Wisskirchen explained, we may see new forms of outsourcing. Whereas in the past, companies outsourced an entire department, like the IT department, in the future they may look for what tasks can be outsourced, including examining options of crowdsourcing. There may even be new company structures we have not even thought about at all.

With all of these improvements in technology and artificial intelligence, Morgan warned that practitioners should always consider how the changes may impact employment law, including the proliferation of disparate impact claims. Morgan provided an example of a disparate impact claim based on the use of algorithms in

the hiring process. Companies will need to consider: how do you validate the algorithm? If an employer has a selection procedure and you see a group, such as women, being adversely impacted by the neutral practice in a statistically significant way, the burden will be on the employer to defend the algorithm, showing the practice is job related and consistent with job necessity.

Further, disparate impact claims may arise during reductions in workforce. As Morgan explained, there may be situations where older people, who may not be as technologically savvy as millennials, will find themselves lacking skill sets required for the position. To avoid liability, employers should consider drafting job descriptions that are defensible from potential disparate impact claims and in that consideration, look at what qualifications are being set to screen candidates. For instance, what about a situation where an employer requires a degree in a certain discipline, but that it did

not exist when candidates of a certain age went to school? This could give rise to a potential age discrimination claim if workers of an older age were screened out because they do not meet criteria (like a certain degree) that did not exist when they went to school. Employers should be mindful about these aspects when developing job qualifications to ensure that a job analysis would pass muster for a potential disparate impact claim.

The way we work will change. Wisskirchen believes that the notion of someone working a 9-to-5 factory job will (soon?) be over. From today and in the future, the discussion of wage and hour laws will revolve around remuneration, and not in the sense of time versus money, but about productivity. The lines between freelancers and employees will continue to blur. This will happen as part of a global phenomenon and Wisskirchen warns that policy makers will need to be aware of what is happening now

to get a grasp on how our laws will have to change for the future. There will be great opportunities for unions to use the potential threat of unemployment, at least for certain people, like the under-educated or the elderly, to have a new value proposition. Maybe unions will consider adding more than just permanent employees—expanding to including freelancers, as well. We have already seen this development of a global collective bargaining agreement in Denmark for household services worldwide, called Helper. Wisskirchen considers that this may be the way to move forward for unions, giving them the opportunity now to speak up about the high risk of unemployment in order to consider solutions to the problem now. ■

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## Gig Economy

*continued from page 1*

engages in brokering an employment relationship, then it must comply with a broad set of regulatory obligations. Employers that are found to have misclassified employees as self-employed are not only just subject to civil liability, but will also face criminal penalties. Consequently, Carr believes South Korean laws have “chilled the marketplace.”

Because there are such serious consequences for engaging in employee misclassification, Carr usually advises his management clients against classifying platform workers as non-employees.

With as much as forty percent of the South Korean workforce considered self-employed and another thirty percent considered to be non-regular, Carr believes that South Korea would be well-served to adopt alternative

frameworks beyond the current labor statutory scheme to address the nature of the gig workforce.

Here in the United States, gig and on-demand companies, such as Uber and Handy, have lobbied state governments, attempting to reshape the employment relationship. These state-by-state efforts have sought to strip protections for all those who perform work through “marketplace platforms,” or using technology to dispatch work and provide services.

As many as seven states have passed legislation classifying all platform workers as independent contractors, who lack minimum wage, overtime, unemployment insurance, workers’ compensation, and anti-discrimination protections.

Nayantara Mehta of the National Employment Law Project highlighted that, in many cases, these new laws were passed with little discussion and often with little to

no notice to the public or the affected workers. These laws, and the lack of transparency in which they were passed, she argues, have implications not just for platform companies. They affect all companies that might wish to change their business models to avoid obligations of paying into state programs like unemployment insurance or workers’ compensation.

In New York City, the Independent Drivers Guild (IDG), an affiliate of the International Association of Machinists and Aerospace Workers (IAMAW) union, has created a unique model and labor organization for Uber drivers. Because Uber drivers do not have legal employee status, IDG is not a labor union. Owen Herrstadt of IAMAW discussed how IDG has, nevertheless, been able to organize and represent IDG drivers like traditional unions.

Over the last two years, IDG

has provided drivers with a hearing when they were deactivated, represent drivers with Uber management through a council of drivers, provide legal support and professional training, and offered access to low cost insurance and benefit packages. In addition, IDG actively promoted policy and legislative changes, such as allowing customers to add tips.

To conclude, the panelists offered their predictions for the future of the gig and on-demand workforce. Everyone seemed to agree that legal reforms to achieve clarity and consistency will be necessary for the sake of both the gig workers and the companies. How long will it take? Stay tuned. ■

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# Ethical Approaches to Dealing with Difficult People

By Keith Greenberg

In a session at the 12th Annual Labor and Employment Law Conference entitled, “It’s You, Not Me: Tips and Strategies for Dealing with Difficult People,” panelists provided guidance for the ethical handling of challenging circumstances, including encountering an unethical opposing counsel, ending the representation of a difficult client, and the pitfalls, for judges, in utilizing social media. Catherine Creighton, Esq., a Buffalo, New York union-side attorney with Creighton, Johnsen & Giroux, moderated the panel, which included Stacey A. Campbell, Esq., a management attorney with Campbell Litigation, P.C., in Denver; R. Scott Oswald, Esq., an employee-plaintiff attorney with The Employment Law Group in Washington, D.C.; and the Hon. Virginia M. Hernandez Covington of the United States District Court for the Middle District of Florida.

The panel addressed a number of situations where an opposing counsel’s behavior could prove challenging—for example, making extended speaking objections in a deposition—and provided ideas for appropriate responses. Although Campbell suggested involving the judge in response to inappropriate conduct at a deposition, Judge Covington noted, “Most judges won’t take the call. They’ll tell you to work it out. . . . It’s tough, if you’re not there observing it, to figure it out.” The panel recommended, in a videotaped deposition, training the camera on an obstreperous adversary in order to encourage better behavior. Campbell also noted that the use of speaking objections may be an appropriate measure to protect the record if the attorney taking the deposition asks less than straightforward questions.

The panel considered situations where attorneys may wish to end their representation of a client, and discussed how to ethically do so. Oswald noted that,

“This comes up . . . in the context where the attorney-client relationship has gone sour. . . [for example,] where the client says that they did not do something and they in fact did. . . and their deposition is coming up . . . , or where the client is not meeting [their] obligations [to pay fees].” He highlighted that the rules governing an attorney’s conduct with respect to a difficult client—for example, a client who is committing fraud—may vary. Oswald explained that, depending on the



forum, an attorney may need permission from the court before terminating representation of a client. Judge Covington opined that, in her experience, absent unusual circumstances, motions by attorneys to withdraw are typically granted, particularly where an attorney gives an indication that the case presents ethical concerns. “Sometimes [a lawyer] says to us, ‘I’ve consulted with the [Bar] . . . I have no option but to withdraw here,’ [and] we’re going to let [them] withdraw,” remarked Judge Covington.

The panel provided tips to practitioners for handling termination of a representation, with an emphasis on giving timely and reasonable notice to clients that an issue exists that the client has

not addressed, and providing the client with a fair opportunity to correct the problem, if possible. “The earlier in the case, the better,” suggested Oswald. He recommended promptly returning a client’s property, including the case file, unless the attorney’s retainer agreement includes language allowing the attorney to retain such property. The panel advocated preparing a close-out memorandum for the client’s new counsel summarizing the status of the case. Oswald recommended

taking steps to minimize any prejudice to the client as a result of the termination, including being mindful of pending deadlines, pursuing a dismissal without prejudice to allow the client a clean start with new counsel, and honoring the continued duty of confidentiality to the client even after the conclusion of the representation. The panel warned against conducting a “noisy withdrawal” where possible, particularly where doing so puts information in the record that could result in harm to the client. Oswald advocated informing the court that the attorney is “obligated to withdraw based on a professional disagreement” with the client, and to file any documents necessary to support the withdrawal under seal

with an opportunity for in camera review by the judge.

In discussing the ethical issues raised by the use of social media, Judge Covington explained that, “It is ingrained in us [as judges] not to be on social media.” She noted that Canon 2 of the Code of Conduct for United States Judges—“a judge should avoid impropriety and the appearance of impropriety in all activities”—is relevant to a judge’s activity on social media. Judge Covington focused on the potential for participation in social media to create the appearance of impropriety, and suggested that the safest option for a judge is to stay off of social media entirely. The panel addressed inconsistent rulings from state bars and supreme courts regarding the implications of being “Facebook friends”; while some jurisdictions have come to view Facebook friendship with an individual as reflecting, on its own, a less significant status than actual friendship, other jurisdictions treat friendship in real life and on social media identically. The panel noted a number of situations in which a judge’s posting on social media—even, for example, posting a restaurant review on Yelp—could under certain circumstances give rise to the appearance of impropriety or an obligation on the part of the judge to recuse themselves. Although Judge Covington acknowledged that she herself had a Facebook account, she told the audience that she avoided “liking” posts on controversial topics and kept her own posts limited to three subjects—“pictures of food, sunsets, and pets.” ■

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# Understanding Cultural Differences of Working Class and Professional Americans

By Kate Swarengen

In the wake of the 2016 Presidential election, the role of social class in American political life can no longer be ignored. While much of the media coverage of the topic has left something to be desired—think reporters descending on diners in Middle America and cornering white men in baseball caps—it cannot be denied that Americans are now learning to openly discuss the issue of class in the same way they have learned to openly discuss the issues of race and sex.

Professor Joan C. Williams, the Director of the Center for WorkLife Law at UC-Hastings College of Law and the author of *White Working Class: Overcoming Class Cluelessness in America*, spoke at the 12th Annual Labor and Employment Law Conference about social class and the need for greater understanding of the cultural divide between urban professionals and non-urban working people. The topic is of special importance to labor and employment lawyers, whose professions bring them into daily contact with workers from all class backgrounds.

Williams' premise is as follows: the relevant conflict in American political life is the clash between the working class (the middle 53% of the population often called "middle class," whose median income falls around \$75,000) and the predominantly urban, predominantly coastal professional-managerial elite (the 17% of the population with a median income of around \$173,000 and whose households include at least one college graduate). The conflict between the working class and the PME has driven American politics since 1970, when the longstanding connection between greater productivity and rising wages began to erode and the middle class' share of the national income began to

fall in tandem with the decline in union density. At the same time, "social honor for working class men plummeted."

The decline can be seen by contrasting the portrayal of working class men in the San Francisco Art Institute's Diego Rivera Mural, *The Making of a Fresco Showing the Building of a City*, which celebrates blue collar workers, with less flattering representations in the characters of Archie Bunker, Homer Simpson (stupid, fat) and Pennsatucky (bad teeth) from the series *Orange Is the New Black*. In other words, the working class has gotten poorer and the PME, rather than doing something to fix it or sympathizing with them, sees them as objects of ridicule. Or, as Williams put it, PMEs act on "liberal feeling rules that mandate intense empathy to immigrants and intense condescension to middle class whites."

Ultimately, the working class feels condescended to by teachers, doctors and lawyers. Accordingly, they "resent professionals, yet admire the rich." Williams attributed this to a case of "order-takers dreaming of being order-givers"—as she put it, to "be exactly as they are, just with Donald Trump's money." But because the working class tends to have little contact with the truly wealthy, PMEs end up "catching their class anger."

The class conflict is exacerbated by opposing value systems, which produce what Williams described as a "class culture gap." Williams theorized that the working class prizes self-discipline and hard work—"the kind that gets you up early in the morning to work at an unfulfilling job." Accordingly, they value institutions that aid self-discipline, such as church and the military. They place a higher value on community and family (from which they derive



respect and a sense of identity they might not find at work) than on individual achievements. PMEs, on the other hand, place lower value on community and a higher value on self-development. They cultivate a taste for "artisanal coffee, spiritualities and sexualities," which they display as evidence of their sophistication. They root their identity in their work and subscribe to an ethic of work devotion whose unhappy result is that their idea of small talk at a party is bragging about how important their jobs are.

PMEs may ask of the working class, "Why don't they go to college? Why don't they push their kids harder to succeed? Why don't they just move?" But, as Williams explained, "Many of our 'truths' just don't make sense in the context of their lives." College is financially risky, and universities transmit class structure—fewer than 3% of the middle three quintiles of income go to elite universities, and Harvard has as many students from the top 1% as the bottom 60%. With respect to PMEs' view that their job as parents is "to

discover their children's micro-talents and develop them—yesterday," the working class "thinks we're kind of nuts in the same way that Europeans and South Americans do." To fault the working class for not moving to an urban area where there are better jobs ignores the reality of housing prices and that for the working class, whose social standing and access to scarce jobs is dependent on clique networks composed of family and neighbors, "social honor is not portable."

According to Williams, part of social honor for the working class is being part of a "high status" group—hence their pride in identifying as American and opposition to immigration policies they fear will degrade that status. ■

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# Calendar of Events

## 2019

March 14 – 16

### Workers' Compensation Committee Seminar & Conference

The Biltmore Hotel  
Coral Gables, Florida

March 19 – 23

### Employment Rights & Responsibilities Midwinter Meeting

Four Seasons Hotel  
Las Vegas, Nevada

April 3 – 6

### National Conference on Equal Employment Opportunity Law

*Presented by the EEO Committee*

The Biltmore Hotel  
Coral Gables, Florida

April 10 – 12

### National Symposium on Technology in Labor & Employment Law

*Presented by the Technology in the  
Practice & Workplace Committee*

Hotel Monaco  
Chicago, Illinois

May 5 – 9

### International Labor and Employment Law Committee Midyear Meeting

Park Hyatt  
Buenos Aires, Argentina

July 17–19

### Leadership Development Program

ABA Offices  
Chicago, Illinois

August 9 – 10

### ABA Annual Meeting

Westin St. Francis  
San Francisco, California

September 19 – 22

### 2nd Labor and Employment Law Trial Institute

IIT Chicago-Kent College of Law and U.S.  
Courthouse for the Northern District of  
Illinois

For more event information,  
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