



Dear Readers and Community,

The Berkeley Journal of Employment and Labor Law ("BJELL") is the leading law review for employment and labor law scholarship addressing issues of interest to both scholars and practitioners across the work law field. BJELL was recently cited in landmark workers' rights decisions by the United States Supreme Court in *New Prime v. Oliveira* (2019), and by the California Supreme Court in *Dynamex v. Superior Court* (2018).

We share this note to announce that this will be the last volume BJELL will print both online and as a physical printed copy. Although BJELL was one of the remaining three journals at Berkeley Law to have resisted online-only publication, this year, the Board voted to discontinue printing the journal moving forward. We sincerely thank our loyal subscribers for supporting our print publication thus far. We recognize this marks a significant change to previous practice, and regret any impact this has on our readership. BJELL will continue to publish online, and our archive can be found here: <https://www.law.berkeley.edu/library/ir/bjell>. We found it fitting to commemorate our last BJELL volume in print with a note on BJELL's scholarship and community activities this year.

To begin, we have the pleasure to present to you BJELL's forty-fifth volume. While each piece in this collection represents a unique contribution to the scholarly conversation, certain themes bridge across this volume's articles.

First, both *Employee Status Preconditions: A Critical Assessment*, by Pnina Alon-Shenker and Guy Davidov, and *Emancipating College Athletes from Amateurism Under the Fair Labor Standards Act*, by Michael H. LeRoy, explore avenues for broadening and bringing consistency to the "employee" designation. Professors Alon-Shenker and Davidov critically examine variations of the "preconditions" that exclude several categories of workers from employment law coverage, including volunteers, incarcerated individuals, interns, and officeholders. They propose a narrower set of

preconditions to better effectuate the purpose of workplace protections and increase predictability in their application. Professor LeRoy brings attention to another category of excluded workers: college athletes. Tracing the history of college athletics alongside historical legal developments in the slavery exception doctrine, he sheds new light on the racially biased implications of unpaid labor in college athletics.

Two other works, *Disclosing Hazards to Oil Spill Cleanup Workers: An Empirical Analysis*, by Benjamin M. Cole, Kyle J. Emich, and Brent J. Horton, and *Sustainable Labor Rights*, by Elizabeth J. Kennedy, argue for strengthening and expanding currently-existing legal frameworks to better protect employees' workplace rights. Professors Cole, Emich, and Horton analyze the warnings that entities organizing environmental cleanup activities are required to provide workers who participate in such efforts, in the form of material safety data sheets ("MSDS"). Based on their empirical findings, they articulate recommendations for improving both workers' access to MSDS, as well as the depth of such disclosures. Professor Kennedy, meanwhile, considers existing environmental, social, and governance ("ESG") standards, identifying gaps that have allowed large, publicly-traded corporations to engage in largely unfettered high-tech union-busting, and proposing specific changes to help fill those gaps and enforce sustainable labor rights.

Finally, both *At the Intersection of Federal Labor Law and Rank-and-File Activism: A Legal History of Teamsters for a Democratic Union*, by Michael Goldberg, and *The People United: Unions as Racial and Gender Justice Organizations*, by Angela Thompson, offer firsthand perspectives on the power of labor unions to advance democratic and egalitarian values not only in the workplace, but also within their own ranks and the larger community. Professor Goldberg served as General Counsel for the Teamsters for a Democratic Union ("TDU"), an organization of rank-and-file activists dedicated to freeing their union from the grip of organized crime. Presenting TDU as a case study, his article identifies lessons for organizing within unions to make them more democratic, less susceptible to corruption, and more effective in representing their members. Thompson, who served as General Counsel for the Communication Workers of America, shares her own account of the intersection between the labor and civil rights movements, describing ways in which unions empower workers and their communities to pursue goals of racial and gender justice.

BJELL had the distinct pleasure and privilege to host Angela Thompson as our 2023 Feller Lecturer. In 2006, BJELL founded the David E. Feller Memorial Labor Law Lectureship, an annual Lecture honoring David Feller, a pioneering labor lawyer and beloved labor law professor at Berkeley Law.

This annual Lectureship invites a scholar or practitioner to speak about their work in the field of labor law, with the primary goal of spurring the academic exchange of ideas about the contemporary significance of labor law in the U.S., and the related areas of employment law and arbitration.

As BJELL's 2023 Feller Lecturer, Thompson encouraged us to join the growing labor movement across the country and fight for workers' rights through a racial and gender justice lens. BJELL was truly inspired by Thompson's tireless work and honored to publish her powerful words in volume forty-five. This year, BJELL invited National Labor Relations Board Member Gwynne Wilcox as our 2024 Feller Lecturer, discussing the Board's recent landmark *Cemex* decision, which establishes a powerful new framework for determining when employers are required to bargain with unions without a representation election. Wilcox's lecture will be published in volume forty-six.

Also following cutting-edge developments in the field, longtime Writers Guild of America West General Counsel Tony Segall, of Rothner, Segall & Greenstone, joined BJELL for our annual Sarah Kenyon Kraw Fellowship Reception. Hot off WGA's successful 148-day strike and contract negotiations, Segall and employee benefit attorney George Kraw, of Kraw Law Group, discussed the future of post-strike Hollywood. We ended the year with our biannual Symposium focused on "The Current State and Future of Forced Arbitration."

On the eve of BJELL's fiftieth anniversary, we reflect on how far this journal has come and how much the working landscape has changed since the journal's founding in 1975. BJELL's very first published article was titled, "Political Aspects of Public Sector Interest Arbitration." Professor Joseph Grodin, a former justice of the California Supreme Court, examined the impact of recent legislation mandating binding interest arbitration in the public sector. The article describes the history of this legislation, which was passed in large part under calls to protect the public against the purported harm of public sector employee strikes. Professor Grodin discussed growing concerns at the time that this form of mandatory arbitration granted arbitrators too much policy-making power, especially over key employment conditions such as wages.

Around half a century later, we have seen significant growth in the use of mandatory arbitration across many types of employment disputes. This year's Symposium presented us with an opportunity to delve into these recent developments and their impact on the field. We provide highlights here.

The Symposium began with a detailed overview of forced arbitration on the ground, both in the courts and in arbitration itself. Our first panel was moderated by Professor Diana Reddy of Berkeley Law, and featured Professors David Horton of UC Davis Law and Professor Tamar Meshel of the University of Alberta in Alberta, Canada. Professor Horton presented findings based on an empirical analysis of arbitration clauses at Fortune 500 companies, highlighting, among other patterns, the rise of “mass arbitration” strategies by plaintiffs and ongoing countermeasures by companies to limit the availability of such strategies. Professor Meshel analyzed motions to compel arbitration in lower courts, offering a wealth of new data on the prevalence and relative success of such motions (as well as those of defenses to such motions) in various contexts.

The second panel of the day concerned the United States Supreme Court's recent jurisprudence around the Federal Arbitration Act (“FAA”) and the avenues, both actual and potential, that it has opened for advocates looking to limit or challenge forced arbitration. Lindsay Nako from the Impact Fund moderated this panel, featuring Jennifer Bennett from Gupta Wessler, Hannah Kieschnick from Public Justice, and Michael Rubin from Altshuler Berzon. They discussed a number of cases where worker-side advocates have successfully used a “textualist” approach to limit the contexts in which the FAA applies and to challenge “special arbitration-preferring procedural rules.” The Symposium’s final panel focused on what can be done to address forced arbitration at the state level. With Christina Chung from Berkeley Law’s Center for Law and Work moderating, Cliff Palefsky from McGuinn, Hillsman, & Palefsky, Miles Locker from the California Labor Commission, and Mariko Yoshihara from the California Employment Lawyers Association discussed recent legislative and administrative reforms that serve to protect employees’ rights to litigate their claims in court.

This year’s keynote address featured Justice Goodwin Liu of the California Supreme Court. Together with Berkeley Law’s Professor Catherine Albiston, the keynote presented us with a wide-ranging, insightful conversation regarding issues related to mandatory arbitration, including the sociological impact of arbitration, the extent to which judges balance precedent against countervailing empirical evidence in deciding whether to order arbitration, and potential avenues for enhancing the fairness of arbitration, while preserving its speed and finality.

At the conclusion of the Symposium, Professor Barry Winograd of Berkeley Law delivered thoughtful closing remarks, allowing attendees the opportunity to reflect on the lessons from the day and takeaways for our future advocacy and practice in the field. For the benefit of those who were

unable to attend this year's Symposium, we append Professor Winograd's remarks below.

We are so grateful to have had the privilege to continue the legacy of BJELL. We would like to thank all our members and the incredible 2023-2024 board that worked tirelessly to ensure the success of this volume and each of our fantastic events this year. We extend a special thank you to this year's Symposium Editor, David Beglin, for bringing such a powerful event to the Berkeley Law community.

To our readers, we hope you find BJELL's forty-fifth volume thought-provoking and helpful to your work.

In solidarity,

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Editors in Chief, 2023-2024  
Berkeley Journal of Employment and Labor Law