FOUR HOURS OF *ONLINE* CLE ON BUSINESS LAW

Re-broadcast from the live event at the
Manchester Grand Hyatt in
Downtown San Diego

Friday, October 1, 2023
8am – 12.10pm

Limited Seats! Register at _____ (Zoom link provided upon registration)

Price: $100

The Academy of Legal Studies in Business (ALSB) will host a CLE event for local attorneys as part of its annual international conference. The ALSB is an international organization of law professors who teach at business schools.

Top business law professors will present papers on new issues comprising a wide variety of topics that include corporate governance, contract law, employment law, environmental law, sports law, intellectual property law, health care law, banking law, global anti-corruption law, and data privacy law. There will be a total of twelve business law topics presented and discussed. Four subjects will be presented per session across three consecutive sessions.

CLE PRESENTATION SCHEDULE
(4.0 CLE Hours)

SESSION ONE: 8-9.15am

Caste Discrimination and Federal Employment Law in the United States

Brian Elzweig, University of West Florida

This article examines whether discrimination based on caste can be grounds to claim employment discrimination under the two principal federal employment discrimination laws, Title VII and § 1981. The article first explains the Indian caste system. The article then examines the India diaspora and how it allowed the caste system to migrate to new areas of the world, including the United States. Next, the article focuses on federal employment laws and their creation of protected classes. Then, it examines caste discrimination and its relationship to the protected classes of race, color, religion, and national origin. Separately, it examines ancestry, which is part of the definition of some of these protected classes. This article also explores caste discrimination in international law as it can be influential on interpretations of United States law. Finally, the article recommends enacting specific legislation to quickly address caste discrimination in the United States.

Climate Change and a Just Transition to the Future of Work

Stephen Park, University of Connecticut
Norman Bishara, University of Michigan

The transition to a green economy in response to climate change will have distributional and structural implications for workers across companies and sectors. Indeed, the future of work will be significantly shaped by the green transition. How can companies, workers, and society respond to these changes in a manner that enables better jobs, a safe and stable workplace, and more resilient companies? This paper draws on just transition, which is rooted in environmental justice and labor rights, and expands its scope to serve as a blueprint for ethical business conduct while addressing the need to reform the laws governing employment.

A Better Approach to Bias: Using Law to Incentivize a Turn to Behavioral Science

Leora Eisenstadt, Temple University
Todd Haugh, Indiana University

As workplace discrimination has increasingly moved from overt, intentional manifestations of prejudice to implicit bias and structural discrimination, legal solutions have become increasingly ineffective in eliminating the behavior. In this new landscape, innovations in behavioral science offer complimentary (or perhaps more effective) options for effectuating individual and organizational change. This paper examines the weaknesses in the current legal regime and the benefits of behavioral science advances including nudges and choice architecture. The paper innovates by proposing that law should incentivize or mandate data-driven behavioral science approaches lest law become irrelevant in this important and culturally dominant conversation in American society.

The Toxic Workplace and Abuse: Intercollegiate Edition

Adam Epstein, Central Michigan University

This abbreviated presentation focuses on toxic relationships in the intercollegiate sport environment primarily—but not exclusively—between coaches and student-athletes. Indeed, student-athletes are not (yet) employees. However, student-athletes (also referred to as "college athletes") are also not meant to be objects of bullying, harassment, and abuse. The presentation

explores how college coaches, and others associated with athletic departments, have crossed the line in terms of physical, mental, and emotional abuse causing a "toxic workplace" for those athletes and others who work around them.

5 Minute Break

SESSION TWO: 9.20-10.35am

Nonmedical Exemptions to Public School Vaccination Mandates in the Post-Pandemic World: Solutions Within Existing State Frameworks

Lucien J. Dhooge, Georgia Tech

This paper examines issues relating to nonmedical exemptions to vaccination as a condition of public school attendance. The paper contends that the public health impacts of exemptions may be mitigated through the application of existing state frameworks relating to procedural tightening, counseling and persuasion, assessments of sincerity and good faith, the application of public emergency laws, and transparency. The paper identifies best practices in each of these frameworks. The paper concludes that nonmedical exemptions are unlikely to be eliminated. As such, public health and educational authorities must act to prevent further erosion of the benefits associated with vaccination.

Not Child's Play: The Unique Dangers of Parody in the Edibles Market

Hannah R. Weiser, Bentley University
Daniel R. Cahoy, Penn State

Looking for a snack, a child finds a bright yellow package of "MnM's." Unfortunately, the package is a THC-laced "edible" and the child consumes an overdose, ending up in the hospital. This all-too-common occurrence is a particular problem in the growing market for cannabis-related products. It relies on the broad acceptance and expectation of parody marketing in the field. Unfortunately, trademark law and consumer safety rules may be at odds, and the boundaries are currently uncertain. This paper will consider the rapidly evolving law, including issues currently before the Supreme Court. It will recommend a legal and ethical path forward.

TL;DR: The Law and Linguistics of Social Platform Terms-Of-Use

Tim R. Samples, University of Georgia

Online terms-of-use (TOUs) are the most widely used standardized form contracts in human history. But TOUs are as poorly understood as they are ubiquitous. Their proliferation has fueled a yawning gap between contract law and consumer reality. The notion that consumers read and understand online TOUs, disproven in academic research, is the subject of pop culture mockery. Yet contract law assumes something very different. Because classic legal doctrines apply to online contracts, consumers routinely find themselves legally bound to contracts they have not—and, often, could not—read. In this paper, we evaluate the law and linguistics of a critical area of consumer contracting: smartphone-based social platforms. Our interdisciplinary study examines

an original dataset of 196 core agreements (TOUs, privacy policies, and community guidelines) for seventy-five platforms. Our analysis highlights a decoupling of contract doctrine and consumer reality in the smartphone age of online contracting. Our results show that the divergence is fueled by extraordinary volume, complexity, and asymmetries in platform-to-consumer contracts. In addition, our results offer evidence that the decoupling has widened in recent years.

The Global Anticorruption Regime Is Neither, and How to Comply With It

Philip M. Nichols, University of Pennsylvania

This article argues that the global anticorruption regime is neither universal nor focused on corruption in general. It focuses for the most part on bribery related to business transactions, and business firms face the majority of its requirements. Those requirements go beyond simply not paying bribes; the global anticorruption regime also requires business firms to created and meaningfully implement antibribery programs. This article reviews available guidance on the standards to which business firms will be held in the implementation of those programs. Business firms should also engender strong ethical cultures, which will steer persons associated with the firm away from decisions to offer or pay bribes. This article concludes by reviewing two business firms whose anticorruption programs failed, and who demonstrated weak ethical cultures.

5 Minute Break

SESSION THREE: 10.40-12.10pm

The Conundrum of Compliance Officer Liability

Jennifer M. Pacella, Indiana University

As the compliance industry has boomed in the last decade, the role of compliance officers has evolved in important ways. Chief compliance officers today enjoy ever-increasing prestige, power, and impact across a wide range of organizations and fields. Despite these notable advances, numerous questions pertaining to chief compliance officer liability still remain desperately unanswered, making the extent to which they are at risk for personal liability for the acts and omissions of the organizations that they monitor essentially unknown. While the Securities and Exchange Commission has provided some guidance to determine when chief compliance officers are personally liable, it is largely devoid of any schema of predictability or reliable expectations upon which such questions are actually based. As this Article highlights, the recent trend of enforcement actions against chief compliance officers in the financial sector is likely to create a concerning ripple effect into various other industries in which compliance officers operate, thereby prompting the need for an appropriate standard of care to determine when and how personal liability ensues. This Article will offer the first scholarly endeavor attempting to carve out a definitive path forward to determine questions of chief compliance officer liability through a novel analysis that is based on an adaptation of the business judgment rule. In doing so, this Article will analyze the role of the chief compliance officer through agency law by considering the posture of chief compliance officers as agents and employees of the organizations for which they work; their

unique duties; and their impact on culture, resulting in much-needed clarity about the standards of conduct to which they should be held.

The New *Caremark* Responsibility for Directors: Operational Governance

Robert C. Bird, University of Connecticut
Julie Manning Magid, Indiana University

For over twenty-five years, the *in re Caremark* case has guided the predominant standard for director liability arising from stockholder derivative litigation. Cases involving financial mismanagement or regulatory violations, once dominant in the *Caremark* lexicon, are now sharing the spotlight. Operational risk cases, whereby a board arguably neglects a concrete physical or tangible risk that generates a sudden harm to life, property, or the natural environment, are taking center stage. This manuscript defines operational risk, identifies how operational risk is becoming an increasing presence in *Caremark* cases, and presents four recommendations for boards to follow in light of this emphasis on a new category of corporate governance.

The Macroprudential Myth

Jeremy C. Kress, University of Michigan

According to conventional wisdom, the 2008 financial crisis fundamentally changed how policymakers approach financial regulation. Before the crisis, regulators sought to prevent individual financial institutions from collapsing, but this "microprudential" strategy proved inadequate to stop the market-wide meltdown. In response, policymakers purportedly turned to a new "macroprudential" approach that prioritizes the stability of the financial system as a whole instead of individual institutions in isolation. Regulators in the United States and abroad enthusiastically embraced macroprudential policy, implementing stress tests, capital buffers, liquidity requirements, and other supposed macroprudential tools. As the United States' top bank regulator declared in 2015, "We are all macroprudentialists now."

There is just one problem, though, with using the term "macroprudential" to describe modern financial regulation: it is a myth. Despite the macroprudential label, the prevailing regulatory framework is still predominantly microprudential in nature. Although some post-2008 policy innovations nudged financial oversight in a macroprudential direction, the dominant tools financial regulators use today are just super-sized versions of the microprudential approaches that have existed for decades. This Article contends that the inaccurate portrayal of modern financial regulation as macroprudential has serious consequences. Since financial oversight remains primarily microprudential, authorities are prone to overlook interconnections and vulnerabilities within the financial system, risking a repeat of the 2008 collapse. Accordingly, the Article proposes a roadmap to reorient the regulatory framework toward the macroprudential approach that the modern financial system demands.

The CCPA, "Inferences Drawn," and Federal Preemption

Jordan M. Blanke, Mercer University

In 2018, California passed an extensive data privacy law. One of its most significant features was the inclusion of "inferences drawn" within its definition of "personal information." The law was significantly strengthened in 2020 with the expansion of rights for California consumers, and new obligations on businesses, including the incorporation of GDPR like principles of data minimization, purpose limitation, storage limitation, and the creation of an independent agency to enforce these laws. In 2022, the Attorney General of California issued an Opinion that provided for an extremely broad interpretation of "inferences drawn." Thereafter, the American Data Privacy Protection Act was introduced in the United States Congress. This law does not provide nearly the protection for inferences that California law does, and this federal bill threatens to preempt almost all of California's data privacy law. This article argues that, given the importance of California being able to finally regulate "inferences drawn," any federal bill must either provide similar protection, exclude California law from preemption, or be opposed.