NATIONAL EMPLOYMENT LAW PROJECT

NELP's 2018 Amicus Briefs
(as of September 19, 2018)

Silva v. Cal. Unemployment Insurance Appeals Bd. And Employment Development Dept. (Oct. 20, 2017, A146977), __ Cal. App. 4th __ [2017 WL 4707713], January 8, 2018

Issue: Whether worker who quit job after determining the wages were not sufficient had good cause for leaving his work.

Summary: The Board erroneously applied an objective rather than subjective standard in determining whether claimant had good cause for leaving his job or in the alternative, whether he had good cause to refuse to accept suitable work. This ruling could result in disqualification for many unemployed low-wage workers who are looking for suitable work to support their families but are often the least equipped to understand deceptive recruiting tactics. For these claimants, unemployment benefits are most critical; and the decision below will likely make their job searches more problematic.

Janus v. AFSCME, Supreme Court, January 18, 2018

Issue: Whether fair-share fees in the public sector workplace violate the First Amendment.

Summary: NELP represents as amici a group of home care workers in Illinois who have paid fair-share fees but are not ideologically opposed to the union. Amici were subject to a lawsuit brought by a few of their coworkers who unsuccessfully sought to recover a refund of $32 million worth of fair-share fees collected by their union, in *Riffey v. Rauner*, 873 F.3d 558 (7th Cir. 2017). Amici emphasize that fair-share fee payers are not ideologically homogenous. Many workers, like amici, are strong union supporters, but simply did not realize they needed to submit additional paperwork in order to become formal union members. Like amici, many workers who pay fair-share fees have no objection to financially supporting the union and suffer no First Amendment injury in paying fair-share fees. Furthermore, strong unions benefit the economy and workers like amici, whether they are members or not. Public sector unions benefit states, workers, and the economy more broadly.

Harmon v. Unemployment Compensation Board of Review, Supreme Court of Pennsylvania, February 15, 2018

Issue: Whether workers who are serving a sentence of partial confinement, for example, weekend incarceration, are eligible for unemployment compensation if they become unemployed through no fault of their own.

Summary: The ruling below undermines judicial efforts – through issuing sentences that minimize incarceration and maximize employment – to keep people with convictions records connected to the workforce, Reading the unemployment requirements as disqualifying otherwise eligible persons for unemployment benefits merely because of incarceration following from a conviction turns the unemployment statutes into a "collateral consequence." This construction is at odds with the Legislature's customary practice of connecting collateral consequences with the offense, rather than the sentence of incarceration, and is inconsistent with other Pennsylvania statues and efforts to promote successful reentry. Finally, the ruling would put Pennsylvania out of step with states across the country that are working to mitigate, rather than multiply, the collateral consequences that stem from conviction.

Fields v. State of Washington, Supreme Court of the State of Washington, March 22, 2018

Issue: Challenging Washington's lifetime, automatic prohibition on people with certain past convictions – a list of 50 offenses – from working in childcare.

Summary: Ms. Fields, a woman of color, is barred for life from working in childcare because she attempted to snatch a purse almost 30 years ago. Lifetime, blanket bans constitute perhaps the most unreasonable form of occupational restriction facing people with records. Ms. Fields lacked any opportunity to demonstrate her qualifications and seek an exception. The amicus brief highlights the labyrinth of employment and licensing barriers facing the staggering number of people with records in the United States and Washington. In addition, the brief discusses research demonstrating that policies imposing automatic or lifetime bans on people with records are not grounded in fact. The public and economy overall benefit from increased employment among people with records. Accordingly, any criminal record policy should be tailored to legitimate goals and restricted to a defined time period.

Velox Express v. Edge, National Labor Relations Board, 15-CA-184006, April 30, 2018

Issue: Whether independent contractor misclassification in itself constitutes a violation of the National Labor Relations Act.

Summary: The brief sets out the public policy concerns that favor a finding that independent contractor misclassification is in itself an unfair labor practice. Misclassification is rampant and employers have economic incentives to misclassify employees, imposing significant costs to public coffers in the form of uncollected tax income. Misclassification also harms law-abiding employers by forcing them to compete with scofflaw companies that are able to artificially lower their labor costs. And misclassification harms workers, depriving them of essential workplace protections and depressing workers' income. Finally, employers have long been operating under various statutes that render independent contractor misclassification unlawful, including statutes that are broader than the NLRA. The legal landscape has not resulted in a diminution of independent contractor arrangements, as claimed by the employer's *amici*.

Curry v. Equilon Enterprises LLC, California Supreme Court, No. S249179, July 3, 2018

Issue: Whether the ABC test for employment as laid out in *Dynamex* applies equally to cases involving independent contractors and cases involving joint employment

Summary: Major brands in America are shifting to a "fissured" workplace model, and our economy is in the midst of a major restructuring in the way business operates. This case is a prime example of that phenomenon. The "suffer or permit" language in the California Wage Order was intended to apply broadly to both single and joint employer cases. The lower court misapplied the "suffer or permit" test in a way that undermines this breadth. The practical and policy reasons behind the Court's rationale in *Dynamex* are equally relevant in single and joint employer cases.

New Prime v. Oliveira, Supreme Court, July 25, 2018

Issue: Whether a dispute over applicability of the Federal Arbitration Act's Section 1 exemption is an arbitrability issue that must be resolved in arbitration pursuant to a valid delegation clause; Whether the FAA's Section 1 exemption, which applies on its face only to "contracts of employment," is inapplicable to independent contractor agreements

Summary: The brief lays out the policy background regarding independent contractor misclassification, particularly in the trucking industry. Misclassification is a rampant and growing problem, and a ruling in favor of the petitioner will reward misclassifying employers. Bad actor employers misclassify workers in attempts to avoid tax and other liability. This imposes significant societal costs to public coffers, harms law-abiding employers, and harms workers, depriving them of essential workplace protections and depressing their income. Finally, should the Court find that the "contract of employment" analysis requires a determination of whether a worker is an independent contractor, the determination must not be limited to the unilaterally imposed terms of the contract, and must consider all incidents of the relationship.

Razak v. Uber, Third Circuit, August 1, 2018

Issue: Whether drivers are employees under the FLSA and Pennsylvania labor law

Summary: The District Court misapplied key considerations in this case, including factors leading to a determination that drivers are not running their own business. Research shows that Uber drivers are permanently integrated into the Uber business model. Uber directly shapes its drivers' profits and losses, and effectively prohibits them from running their own businesses. Research also shows that Uber uses its unique technology to retain the right to control, meeting even common law employment standards under more narrow statutory tests. Additionally, the FLSA and Pennsylvania's labor laws protections are broad and remedial in nature and should be read to apply broadly to workers in this case.

Texas v. EEOC, Fifth Circuit, September 12, 2018

Issue: Whether the EEOC properly issued a 2012 guidance that describes how an employer's use of criminal history may violate Title VII and advises employers not to categorically refuse to hire anyone with a criminal history.

Summary: In this case, amici became the lone defenders of the EEOC's view of disparate impact under Title VII after the DOJ abandoned the EEOC and changed their previous position on the issue. While the DOJ's position has drastically changed, the relevant statutory provisions of Title VII have not, and there have been no significant developments in Title VII jurisprudence that would support a departure from the EEOC's views on disparate impact liability as articulated in the guidance.

The brief also details the real-world consequences flowing from employment policies that categorically exclude people with records. Through this case, Texas seeks federal court approval of such exclusionary policies. The brief explains how such blanket policies – which affect millions of people living in Texas, and disproportionately people of color – weaken the economy, make it more difficult for employers to find qualified workers, undermine public safety, and harm families, particularly given that nearly half of all children in the U.S. have one parent with a record.

The brief was filed on behalf of Beverly Harrison, a Texas worker, the Texas State Conference of the NAACP, the NAACP Legal Defense and Educational Fund, Inc. ("LDF "), and the National Employment Law Project ("NELP"), by attorneys from LDF, NELP, Cloutman & Cloutman LLP, and Levy Ratner P.C.