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Bayer Seeks to Resolve Most Essure Claims in $1.6B Proposed Accord

BY ALAINA LANCASTER
The Recorder

Bayer AG and plaintiffs lawyers have reached a $1.6 billion proposed agreement to resolve the majority of U.S. injury claims involving its female sterilization device Essure.

The settlement includes all jurisdictions with high volumes of Essure litigation, such as the coordinated cases in California and lawsuits in the U.S. District Court for the Eastern District of Pennsylvania, Bayer reports, resolving about 90% of the nearly 39,000 total claims that the implant caused side effects such as hair and tooth loss, chronic bleeding, miscarriages and death of both Essure recipients and their infants.

A spokesperson for Bayer declined to comment on the settlement, but the company stated in a news release that there is no admission of wrongdoing or liability by Bayer in the settlement agreements.

***Essure** continues on* **9**

$4.9M Settlement for Mother of Passenger Killed in Auto Accident

BY P.J. D'ANNUNZIO
Of the Legal Staff

The mother of a young man killed while riding in a vehicle that spun out of control has settled her lawsuit with the vehicle's owner and the driver for $4.9 million.

Monica Madrazo, mother of Zachary Garcia, who died at age 22, received $4.9 million of a $7 million insurance payout to her son's estate and other passengers in the car, according to the plaintiff's representation, the firm of Eichen Crutchlow Zaslow. The defendants were the owner of the 2007 Toyota Camry at issue, Karin Minkin, and its driver, Andrew Carlon.

The accident occurred on Interstate 70 East in Brush Creek Township when Carlon tried to pass a tractor trailer at a high speed during a rain storm, according to the plaintiff's court papers.

At that time, Carlon lost control of the vehicle, it flipped over, and spun into a rock wall before coming to a stop. The firm said that the truck driver, Dale Overly, witnessed the accident.

EICHEN

"Mr. Overly stated he was in the right-hand lane when he was passed by the vehicle," court papers said. "After passing his truck, Mr. Overly stated the vehicle attempted to merge into the right-hand lane in front of him when it appeared the driver of the vehicle lost control of the vehicle, which began to spin clockwise, crashed off the rock-wall adjacent to the right-hand travel lane, flipped one and a half times onto its roof, traveled on its roof across two lanes of traffic, and struck the guard rail on the left side of the road, where it came to rest."

***Accident** continues on* **10**

Lateral Moves Pick Up in August After Hiring Slowdown

BY SAMANTHA STOKES
The American Lawyer

After an initial slowdown in Big Law lateral moves at the onset of the coronavirus pandemic, hiring in August remains active. McDermott Will & Emery; White & Case;

***Lateral** continues on* **10**

Remote School Is Now a Marathon, Not Sprint. How Will Firms Support Parents?

BY DAN PACKEL
The American Lawyer

"Back to school" has a very different meaning in the coronavirus-wracked America of 2020 than in previous years. While lawyer-parents had hoped that the end of the previous school year also meant an end to juggling work while overseeing virtual education, in the vast majority of cases their children will again be doing at least some of their learning remotely.

But compared with March, when abrupt school shutdowns forced adjustments on the fly, firms now have the ability to be more deliberate in addressing and easing the anxiety of associates, younger partners

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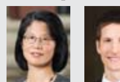
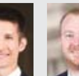
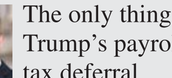
The only thing Trump's payroll tax deferral has managed to do is create another headache for employers and a mirage for employees, contributors Pauline W. Markey, Ivo Becica and Charlie L. Shute Jr. write.

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PEOPLE IN THE NEWS

SPEAKERS

Maria Panichelli, a partner at **Obermayer Rebmann Maxwell & Hippel**, is set to present **Deltek**'s webinar, "Size and Status Protests Effecting Federal Set-Aside Contracts–Bases and Procedures" on Aug. 25.

In the webcast Panichelli will cover the small-business protest process.

Attendees will learn how size and status protests differ from bid protests and government-initiated size or eligibility investigations.

Panichelli will walk attendees through the most common bases for size and status protests—affiliation and control-related issues—and explain the protest process, procedures and the eligibility criteria for each of the small business programs, including recent changes to Service-Disabled Veteran-Owned Small Business eligibility.

Panichelli is the chair of Obermayer's government contracting department.

She focuses her practice exclusively on federal government contracting and procurement, guiding her clients throughout the entire life cycle of their federal contracts.

She provides legal counseling that allows her clients to successfully navigate the legal requirements related to federal contracting while fulfilling their own business goals.

Panichelli represents her clients before federal agencies, the Government Accountability Office and the Contract Boards of Appeals, as well as the Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit and other state and federal courts.

Though her practice is not limited to construction, Panichelli has experience with a range of construction-related issues such as defective designs; defective specifications; differing site conditions; express, implied and constructive changes; suspensions; delays; and liquidated damages.

LIEUX

McNees Wallace & Nurick attorney **Renée Lieux** is slated to present the webinar "Understand a Paralegal's Role in Employee Benefits Law" for **Lorman Education Services** on Aug. 26.

Lieux will explain the importance of paralegals to an effective employee benefits department and will provide a road map to what is needed to be a productive benefits paralegal on staff.

She will also give insight on how to best utilize a paralegal's skills to improve productively.

Lieux practices in the McNees labor and employment practice group where she focuses on executive compensation and employee benefits.

She assists both private and publicly traded companies in the negotiation of employment agreements, severance agreements and plans, and director and executive compensation programs.

She designs, assists in the implementation of, and analyzes nonqualified deferred compensation plans, equity compensation plans and cafeteria plans.

She also provides assistance with the administration, compliance and termination of defined contribution plans, defined benefit plans, profit-sharing plans, 401(k) plans and employee stock purchase plans.

Lieux also advises clients on employee benefits issues arising out of mergers and acquisitions, including benefits due diligence, negotiating benefits-related issues, and the merger or termination of benefit plans.

She has experience counseling clients on ERISA and Sections 409A and 280G of the Code.

She advises compensation committees and publicly traded companies and has experience advising clients in the financial services industry.

She is a member of the employee benefits committee of the **American Bar Association** tax section, as well as member of the Pennsylvania, Dauphin County and Louisiana bar associations.

She is also part of the **National Center for Employee Ownership**.

She is director for the **Foundation for Enhancing Communities** and serves on the grantmaking committees for the **"Arts for All" Partnership** and the **Foundation for Enhancing Communities**.

ANNOUNCEMENTS

The Legal is seeking contributing authors for its weekly In-House Counsel column. Articles can cover a broad range of subjects but should be of particular interest to in-house counsel.

Contact Kristie Rearick at krearick@alm.com for more information or to submit a proposal. •

All potential items for People in the News should be addressed to **Aleeza Furman** at The Legal Intelligencer, **afurman@alm.com**

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REGIONAL NEWS

NJ Court Validates Pfizer's Emailed Arbitration Agreement

BY SUZETTE PARMLEY
New Jersey Law Journal

In a case testing the bounds of employer arbitration contracts and if "acknowledging" an agreement is the same as "assenting" to one, the New Jersey Supreme Court ruled 5-1 that a former Pfizer employee's discrimination claims must be resolved through arbitration and not the courts.

In upholding the trial court, the majority reversed the Appellate Division and determined that plaintiff Amy Skuse's employment discrimination claim was indisputably included in the Pfizer arbitration agreement's broad language.

Skuse filed suit against Pfizer, and two managers and an HR executive, asserting claims based on the Law Against Discrimination.

Skuse contended she never checked off a box in a work email she received from Pfizer some 13 months earlier in the context of a "training module" to "acknowledge" the company's arbitration agreement. Therefore, she contended, she never assented to it as required by law to waive her right to trial.

Pfizer countered that the five-page "Mutual Arbitration and Class Waiver Agreement" and related communications informed Skuse that if she remained a Pfizer employee for more than 60 days from receipt of the agreement, she was deemed to "assent to it" automatically.

"Those communications clearly and unmistakably explained the rights that Skuse would waive by agreeing to arbitration, thus complying with waiver-of-rights case law, and Pfizer's delivery of the agreement by email did not warrant its invalidation," Justice Anne Patterson wrote for the majority Tuesday.

"Pfizer's use of the word 'acknowledge' was appropriate in the circumstances of this case, given the terms of Pfizer's arbitration policy and other expressions of assent that immediately preceded that request," said Patterson.

Patterson said New Jersey case law requires that a waiver-of-rights provision be written clearly and unambiguously—and the Pfizer agreement was that, though Pfizer should have labeled the email's subject matter better, she added.

"But that is not a basis to invalidate the agreement," said Patterson. "The agreement was valid and binding, and the court concurs with the trial court's decision to enforce it."

Justices Jaynee LaVecchia, Faustino Fernandez-Vina and Lee Solomon joined in the 41-page opinion.

Patterson said New Jersey case law requires that a waiver-of-rights provision be written clearly and unambiguously—and the Pfizer agreement was that.

Justice Walter Timpone recused.

Justice Barry Albin issued an 11-page concurrence, in which he largely agreed with the majority that the "totality of evidence" suggests Skuse knew what she was agreeing to, but he said he has concerns over the ruling's impact on employment and consumer contracts moving forward. "The court will have to address a more profound question: Are such contracts of adhesion contrary to New Jersey's most fundamental public policy—the constitutional right to a civil jury trial—and therefore unconscionable and unenforceable under the Federal Arbitration Act and its state counterpart?" asked Albin. "That is the great issue that will confront the court."

Chief Justice Stuart Rabner wrote a separate 10-page dissent, in which he noted how the Appellate Division carefully parsed the online "training module" that Pfizer used to poke holes in its methodology.

Rabner said the module "lacked clear and unmistakable proof" that Pfizer's employees agreed to waive the right to have their day in court, and said he feared that the opinion will usher in a new day for arbitration agreements.

"What employer will ask an employee to agree to settle a dispute through arbitration and waive the right to proceed in court if it is enough simply to ask the employee to acknowledge she received a statement of company policy and deem consent from her continuing to show up for work?" Rabner wrote. "More is required to show clear and unmistakable assent in any context.

"More should be required before employees are asked to give up their constitutional and statutory rights to have their day in court," added Rabner.

Pfizer continues on 9

NATIONAL NEWS

New York's Bar Plan Slammed by Examinees and Lawmakers

BY KAREN SLOAN
New York Law Journal

New York's plan to administer an online bar exam in October is misguided and inequitable, according to a panel of recent law graduates, legal educators and state lawmakers who convened Tuesday for a virtual roundtable discussion about the licensing test.

Participants spent nearly two hours discussing the myriad challenges facing recent law graduates, the problems with moving the exam online, and the benefits of an emergency diploma privilege that would allow graduates to become licensed without taking the test. More than 8,000 people viewed the discussion online, an indication of how important this issue has become, said New York state Sen. Brad Hoylman, who convened the roundtable with State Assemblywoman Jo Anne Simon. Both lawmakers have introduced bills that would enact a temporary diploma privilege for law graduates.

"That suggests the concern among recent law graduates across the state and the need for the [New York State Board of Law Examiners] and the [New York Court of Appeals] to address this issue," Hoylman said.

Simon said after the discussion that her fellow legislators have been reluctant to step into the fray, in part, because the bar exam is traditionally under the purview of the court. But she added that she has seen a "growing willingness" to address the issue legislatively since bills were introduced in early July.

Hoylman said the New York State Board of Law Examiners declined an invitation to participate in the discussion. Board Executive Director John McAlary did not respond to requests for comment Tuesday.

The Court of Appeals in late March announced that it was postponing New York's in-person exam from July to September. Then on July 16, it announced the cancellation of that September exam without an alternative in place. A week later, the court said it would give the Oct. 5 and 6 online bar exam being designed by the National Conference of Bar Examiners. The diploma privilege movement has gained momentum in recent weeks—the deans of the state's 15 law schools are now on board—but the court has thus far resisted calls to allow law graduates to bypass the test. Louisiana, Oregon, Utah and Washington have adopted temporary diploma privileges. About 30,000 people are expected to take the October online test in jurisdictions such as New York, California, Illinois, New Jersey and Pennsylvania.

Five recent law graduates discussed the impact those exam delays and the uncertainty over the test's format have had on their lives amid a pandemic, from delayed start dates for jobs they have lined up and a loss of income, to lapses in health insurance, the challenges of studying for the bar while caring for children, and worries that the planned online exam will run into the same technical problems that this week forced Florida to postpone its test with two days' notice. Several became emotional speaking about their worries that they can't contribute financially to their households and the mental strain they carry.

AP photo by Hans Pennink

New York state Sen. Brad Hoylman.

"It seems like the test itself is being prioritized over actual graduates," said Kayla Smith, a recent graduate of Brooklyn Law School who argued that her cohort has put in the necessary work over three years of law school and months of studying for the bar exam and should be licensed. She said graduates are open to a provision that would require them to perform 100 or more hours of legal work under the supervision of a licensed attorney were they granted a diploma privilege.

Law graduates have been adrift as they wait months for a path to licensure, said Cornell Law Dean Eduardo Peñalver, who spoke as a representative of all the law deans in the state. Recent Cornell grads, for instance, are struggling to find places to live with their leases ending this month as their bar exam studies drag into the next academic year. Not all of them can temporarily move in with family members, he noted.

Ohio State University law professor Deborah Jones Merritt, who co-authored an influential white paper in March that urged states to quickly find alternatives to the in-person July bar due to COVID-19, said that New York's reputation as the gold standard for the bar exam is under threat.

"The reputation of New York has really declined in the past few months because of how this has been handled," she said. "New York has a chance to reclaim its leadership here."

Legal aid offices and the clients they serve will suffer without the traditional influx of new attorneys that follow the July bar exam, said Jared Trujillo, president of the Association of Legal Aid Attorneys. An October bar exam will delay their entry into practice for months, he noted.

And numerous panelists aired concerns over the online exam format, ranging from technical failures to the potential for discrimination in how the test is proctored. Several speakers pointed to software and security issues that plagued the first online exams in Nevada, Indiana, and Michigan. And Florida's last-minute postponement is yet another signal that online exams aren't feasible, they said.

Mike Machado, a recent graduate of the University of Pennsylvania Carey Law School, said that there is no evidence that software vendor ExamSoft's servers can handle the load of 20,000 or more people taking an online bar exam at the same time in October. And several panelists raised concerns that the artificial intelligence used to proctor remote exams is discriminatory against people of color and those with disabilities.

"Diploma privilege is the only equitable option right now," said Tara Roslin, a recent graduate of Boston University School of Law and the director of research at the National Disabled Law Students Association.

Karen Sloan can be contacted at ksloan@alm.com. •

Longtime In-House Pharma Attorney Hired by Zai Lab

BY DAN CLARK
Corporate Counsel

The Shanghai-based biopharmaceutical company Zai Lab announced Monday the hiring of F. Ty Edmondson to serve as the company's chief legal officer.

"Bringing important therapeutics to people around the world is one of the great callings of our time and the outstanding Zai Lab leadership team is dedicated to this task," Edmondson said in the press release.

It is not clear who preceded Edmondson as the company's chief legal officer or general counsel. According to his LinkedIn profile, Edmondson began work for the biopharmaceutical company earlier this month and is based in Cambridge, Massachusetts.

The move comes shortly after the company announced its 2020 second quarter earnings. According to a transcript of the call, over the past three months the company achieved revenues of $19.2 million during the second quarter of 2020. During that call, the company said over the next three years it looks forward to having a steady stream of drug approvals in China. Right now, the company has four Food and Drug Administration Assets and two approvals launched in China.

"I am honored to now be a part of this mission and to help Zai Lab expand into a fully integrated biopharmaceutical company discovering, developing and commercializing innovative medicines for patients around the world," Edmondson said in the press release.

Edmondson was not immediately available for comment beyond the press release Monday.

Edmondson has spent most of his career in-house in the pharmaceutical industry. Most recently, he worked as chief corporation counsel at Biogen and before that he served as chief compliance and international counsel. He has also held in-house roles at Sunovion Pharmaceuticals, Dainippon Sumitomo Pharma, Eisai, Boston Scientific and Bristol-Myers Squibb. Edmondson also served as an associate at Royston Rayzor. He is a graduate of Widener University School of Law.

"Ty brings decades of biopharmaceutical legal and compliance experience, having advised global companies, management teams and boards of directors in a diverse range of markets around the world," Dr. Samantha Wu, founder, chairwoman and chief executive officer of Zai Lab, said in the press release.

Dan Clark can be contacted at dclark@alm.com. •

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IMMIGRATION LAW

Maintaining Permanent Resident Status During the COVID-19 Pandemic

BY F. OLIVER YANG
Special to the Legal

COVID-19 has impacted many things we took for granted for decades as it reverberates through every corner of the world and disrupts every aspect of our lives. Green card holders (lawful permanent residents, or LPRs) overseas who plan to come back to the United States will not only have to deal with health concerns associated with international travel, but also many practical and economic inconveniences caused by the imposition of significant governmental restrictions in many regions of the world. As a result, many are forced to stay overseas for a protracted period. This presents a unique challenge when it comes to maintaining their permanent resident status.

Upon each entry into the United States, an LPR is required to present a valid green card and show that he is "returning to an unrelinquished lawful permanent residence after a temporary visit abroad." If the absence is less than a year but more than 180 days, the LPR will be subject to more scrutiny at the port of entry. If it can be shown that the absence was caused by COVID-19 restrictions, the LPR will likely be admitted into the United States.

If the absence is more than a year without a reentry permit (the reentry permit is a travel document that allows LPRs to maintain permanent residence status when traveling abroad for up to two years. It is not an option for LPRs who are currently overseas because it can only be applied from within the United States), the green card will technically be invalidated under the regulations. In this case, an LPR will typically have two choices: apply for an SB-1 visa or arrive at the border and assert no LPR abandonment.

F. OLIVER YANG, *an attorney at Klasko Immigration Law Partners, manages the process to obtain long-term residence through E-2 visa/Grenada citizenship. He also manages all stages of the EB-5 process. As a native Mandarin Chinese speaker, he guides Chinese investors with I-526 petitions, as well as investors from Taiwan, Canada, Singapore, India, Indonesia and South Africa.*

APPLYING FOR A RETURNING RESIDENT (SB-1) VISA AT A US CONSULATE OVERSEAS

Under the Immigration and Nationality Act, the SB-1 visa is a "special immigrant" visa for an immigrant who is returning from a temporary visit abroad. An SB-1 visa applicant must demonstrate that he departed the United States with the intention of returning to an unrelinquished residence and that the alien's stay abroad was for reasons beyond the alien's control and for which the alien was not responsible.

We will discuss relevant case law regarding the first prong later in this article. The second prong is relatively easy to satisfy if it can be shown that traveling from the LPR's foreign residence to the United States has been impacted by COVID-19, or if traveling would place the LPR at risk given his health conditions.

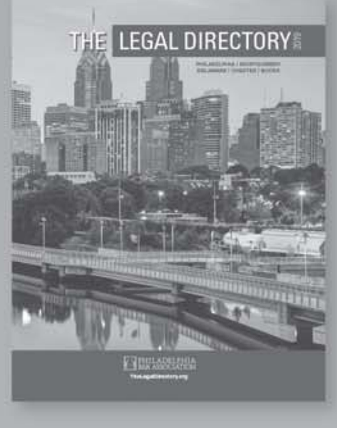
> *With the right strategy and forethought, an LPR should be able to reenter the United States without abandoning their hard-earned green card.*

COMING BACK TO THE US DIRECTLY AND ASSERT NO ABANDONMENT AT THE PORT OF ENTRY

An LPR who has been absent for more than a year can choose to appear at the port of entry and assert no abandonment. The Customs and Border Protection (CBP) officials at the port of entry can waive the LPR into the United States if there is a convincing reason for his absence. In this case, the LPR may be asked to complete Form I-193 to apply for a SB-1 visa waiver and pay the $585 filing fee. While this appears to be a less onerous endeavor than applying for a SB-1 visa at a U.S. Consulate, it is a much riskier approach as the CBP officials at the port of entry have the full discretionary power to grant or deny the waiver. It is also worth noting that even if the waiver is not granted, an LPR has the right to a hearing before an immigration judge, which would afford him a chance to relitigate the abandonment issue in an immigration court proceeding.

In determining whether an LPR has abandoned the permanent resident status, both options above will look at whether the

***Immigration Law** continues on* **8**



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by Stewart M. Weintraub, Jennifer Weidler Karpchuk, and Adam M. Koelsch, of Chamberlain Hrdlicka

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EMPLOYMENT LAW

Trump's Payroll Tax Deferral: Another Headache for Employers

BY PAULINE W. MARKEY, IVO BECICA AND CHARLIE L. SHUTE JR.
Special to the Legal

On Aug. 8, President Donald Trump signed several presidential memoranda, including a memorandum, which allows employees earning less than $104,000 to defer certain payroll tax obligations beginning Sept. 1 through Dec. 31. The purpose of this deferral was to "put money directly in the pockets of American workers and generate additional incentives for work and employment, right when the money is needed most." However, the only thing Trump has managed to do is create another headache for employers and a mirage for employees.

The COVID-19 pandemic was declared a federal disaster by Trump on March 13. Under Section 7508A of the Internal Revenue Code, the secretary of the Treasury has the authority to defer the payment of tax if a taxpayer is affected by a presidentially declared disaster. This is the same authority the secretary invoked to push back the 2019 income tax filing and payment deadline from April 15 to July 15 earlier this year. Notably, this authority does not permit the secretary to forgive the payroll tax obligations deferred by Trump's memorandum. Only a congressional act can accomplish this.

MARKEY

BECICA

SHUTE

PAULINE W. MARKEY *is a tax partner at Obermayer Rebmann Maxwell & Hippel. She focuses her practice on U.S. federal income tax. She is also the co-chair of the firm's diversity and inclusion committee.*

IVO BECICA *is a partner in the firm's labor relations and employment law department. He focuses his practice on representing employers, including advising companies on how to handle employee issues, and defending employee claims when they are filed.*

CHARLIE L. SHUTE JR. *is an attorney in the firm's labor and employment department. He focuses his practice on representing management in all aspects of labor and employment law.*

Recognizing the limits of his executive authority, Trump instructed Treasury Secretary Steven Mnuchin to "explore avenues" to eliminate the payroll tax obligations. As reported by the media, Trump has indicated that if he is reelected as president he will forgive the payroll tax obligations and terminate payroll taxes going forward. He has since backpedaled from these statements, ostensibly, because reducing payroll taxes means reducing funding to the Social Security program, which is generally an unpopular political move. This is especially true since the presidential memorandum only defers the Social Security tax portion of the employees' portion of the payroll tax.

Under the Internal Revenue Code, employees are required to pay what are generally referred to as payroll taxes. Payroll taxes consist of two different components: Social Security tax (6.2%) and Medicare tax (1.45%). Under current law, even though these payroll taxes are the employees' obligations, employers are legally required to withhold such payroll taxes from their employees' paychecks and hand those funds to the IRS periodically during the tax year. If employers fail to collect the payroll taxes or fail to hand those collected funds to the IRS, the employers are liable to the IRS for those funds. To encourage compliance and discourage embezzlement, the IRS has the authority under certain circumstances to even hold officers of the employers personally liable for the tax obligations.

Unless the payroll taxes deferred by the presidential memorandum are forgiven before Dec. 31, employers, on behalf of their employees, will be required to pay those taxes to the IRS in a lump sum at the end of the year. For an employee earning $104,000 annually, the deferred tax amount will be approximately $2,149. If employers stop withholding payroll taxes from Sept. 1 through the end of the year, they may be stuck holding the bag for the entire tax obligation. Employers could withhold the entire deferred amount at the end of the year from their employees' paycheck, but some employees may not be able to afford the lump sum payment, or some employees may no longer be employed at that time.

Employers are left with the difficult task of deciding to either stop or continue to withhold payroll taxes from their

Employment Law continues on **8**

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Immigration Law

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LPR's visit abroad was temporary in nature. In *Chavez-Ramirez v. INS* the court clarified the exact meaning of "temporary visit abroad" after reviewing decades of sparse case law on abandonment:

A permanent resident returns from a "temporary visit abroad" only when the permanent resident's visit is for "a period relatively short, fixed by some early event," or the permanent resident's visit will terminate upon the occurrence of an event having a reasonable possibility of occurring within a relatively short period of time. If as in, the length of the visit is contingent upon the occurrence of an event and is not fixed in time and if the event does not occur within a relatively short period of time, the visit will be considered a "temporary visit abroad" only if the alien has a continuous, uninterrupted intention to return to the United States during the entirety of his visit. See *Chavez-Ramirez,* 792 F.2d at 936-37.

The big takeaway from *Chavez-Ramirez* is that COVID-19 does not confer blanket protections if an LPR does not possess continuous uninterrupted intent during his absence. Further, in *Singh v. Reno*, it is well settled that "an alien's desire to retain his status as a permanent resident, without more, is not sufficient; his actions must support his professed intent." Therefore, it is important for an LPR seeking admission to provide documents to show his intent when pursuing the options above. Factors *Chavez-Ramirez* provided that to be considered generally include family ties, property holdings and business affiliations in the United States and abroad. It is also helpful to provide relevant documentation if the LPR initially booked flights (or made any other documentable efforts) to return to the United States at the onset of the COVID-19 outbreak that later got canceled due to travel restrictions.

Last but not least, as more and more countries have now started to ease travel restrictions, LPRs overseas should start making plans to come back to the United States sooner rather than later. *Khoshfahm v. Holder* is a case worth examining. In *Khoshfahm*, the LPR (aged 13) traveled back to Iran with his parents right before the terrorist attacks of Sept. 11, 2001. The terrorist attacks prevented the family from getting a ticket for two or three months thereafter. In November 2001, Salar Khoshfahm's father was hospitalized due to a heart condition. The condition lasted several years and restricted his ability to travel. Khoshfahm's mother had to stay in Iran to care for the father, and Khoshfahm stayed in Iran with his family until 2007. In determining whether Khoshfahm's parents ceased to maintain their continuous uninterrupted intent before Khoshfahm turned 18, the court found that it is critical to examine if the father failed to purchase a ticket after his condition improved. The court eventually decided the case in Khoshfahm's favor because the government did not meet its burden of proof with respect to the father's failure to purchase a ticket after traveling became possible for him. However, *Khoshfahm* demonstrates that the timing of return is also important, and procrastination may negatively impact the case. Even if one has a strong case now due to COVID-19-related reasons, an LPR can be found to have abandoned his permanent residence if the trip back to the United States gets delayed beyond a reasonable timeframe after the COVID-19 restrictions are lifted.

The unique challenges for LPRs created by the COVID-19 pandemic are not impossible to overcome. With the right strategy and forethought, an LPR should be able to re-enter the United States without abandoning their hard-earned green card. It just may take a little more effort and paperwork during these unprecedented times. •

Employment Law

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employees. On the one hand, stopping withholding would mean much-needed financial assistance to employees. On the other hand, continuing to withhold payroll taxes would safeguard employees (and the employers) from a large year-end tax liability. Unless the law changes or the secretary of the Treasury provides additional guidance, most employers will likely continue to withhold the payroll taxes and either remit the funds to the IRS immediately or set them aside. This means employers will need to explain to their disappointed (and perhaps angry) employees why they will not see an increase in their paychecks despite the media hype of a "payroll tax holiday."

What is also unclear is how much control employees would have over the decision to continue to withhold or defer payroll taxes. Mnuchin has indicated that employers are not required to defer the payment of the payroll tax, but has provided no guidance to employees. Additional guidance from either the Treasury or the IRS is needed for this issue. If it is ultimately determined that employees control the decision to withhold or defer payroll taxes, employers may struggle to accommodate their employees' requests. Employers generally rely on administrative programs to generate payroll and these programs likely do not have the flexibility needed to implement individual changes for each employee quickly.

If the purpose of the payroll tax deferral is to put "money into the hands of Americans" it was poorly thought out. Without an act of Congress forgiving the payroll taxes (which is not expected, especially now that the House and Senate have adjourned), Trump's memorandum has not only failed to achieve its purpose, but also created another headache for employers in the midst of the COVID-19 pandemic. •

Employers generally rely on administrative programs to generate payroll and these programs likely do not have the flexibility needed to implement individual changes for each employee quickly.

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Essure

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Plaintiffs attorneys from Motley Rice; Fibich Leebron Copeland Briggs; Wexler Wallace; and Grant & Eisenhofer primarily negotiated for plaintiffs in the resolution, with DLA Piper largely stepping in for Bayer, according to a spokesperson from Motley Rice.

Motley Rice's Fidelma Fitzpatrick, who is lead counsel of the plaintiffs' executive committee for the California Joint Council Coordinated Proceedings and helped to negotiate the deal, said the proposed settlement would provide expedited relief to thousands of women.

"While we would have been ready for trial if needed against Bayer, to be able to get the assistance Essure's victims need while avoiding putting their very personal lives on trial is reassuring for many," Fitzpatrick said in a statement. "Women have suffered for years not only physically, but also emotionally and financially from the often enormous Essure-related medical bills they face. We look forward to working through the details of the settlement terms as quickly as possible to finalize the agreement."

As of December 2018, the FDA received 32,773 medical device reports related to Essure, a permanent implant inserted into the fallopian tubes. Side effects have included hair and tooth loss, chronic bleeding, miscarriages and death of both Essure recipients and their infants. Bayer took the product off the market in July 2018.

The deal follows the company's $10.9 billion agreement to resolve claims alleging its Roundup weed killer causes cancer.

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Pfizer

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In reversing the trial court last year, Appellate Division Judges Jack Sabatino, Michael Haas and Stephanie Ann Mitterhoff took issue with: Pfizer's use of emails to disseminate the agreement to employees already inundated with emails; its use of a "training module" or a training "activity" to explain the agreement; and its instruction that Skuse click her computer screen to "acknowledge" her obligation to assent to the agreement rather than "agree" to the agreement.

The case was argued before the court on Feb. 3.

Thomas Linthorst of Morgan, Lewis & Bockius in Princeton, New Jersey, represented Pfizer. Through a spokeswoman, Pfizer issued this statement Tuesday: "We are pleased with the decision, which reflects that our arbitration program was appropriately implemented and communicated to our employees, consistent with applicable legal requirements."

Alan Schorr of Schorr & Associates in Cherry Hill, New Jersey, represented Skuse.

"We are disappointed and very concerned that, as Chief Justice Rabner stated in his dissenting opinion, the Supreme Court has now made it much easier for employers to force employees to abandon their rights under the Law Against Discrimination without the employee ever actually agreeing to do so," Schorr said. "This is a serious setback for the workers of New Jersey who have long looked to the Supreme Court for protection of their civil rights."

Among the amici in support of Pfizer were New Jersey Business & Industry Association, Commerce and Industry Association of New Jersey, New Jersey Chamber of Commerce, Chamber of Commerce of the United States of America and Employers Association of New Jersey.

David Kott of McCarter & English in Newark represented the NJBIA, Commerce and Industry Association of New Jersey, and New Jersey Chamber of Commerce. Andrée Laney, legal adviser at EANJ, represented her group. Korr and Laney declined requests for comment.

Other amici supported Skuse's position, contending that "there must be a meeting of the minds for an agreement to exist before enforcement is considered."

William Wright of the Wright Law Firm in Stafford Township represented the New Jersey Association for Justice, and the National Employment Lawyers Association of New Jersey was represented by Richard Schall of Schall & Barasch in Moorestown, New Jersey.

Wright said the majority ruling "continues the gradual erosion of our citizens' constitutional right to a jury trial," adding that the court "has the opportunity to address the issue raised in Justice Albin's concurrence, because contracts of adhesion that strip New Jerseyans of their constitutional rights are unconscionable and contrary to New Jersey's most fundamental public policy."

Wright also said he shares Rabner's "concern that in the future, employers will not ask an employee to agree to settle a dispute through arbitration, when by this court's ruling, it is enough to simply ask the employee to acknowledge she received a statement of company policy and deem consent from her continuing to show up for work."

Schall, in an email Wednesday, said: "The court has unfortunately given employers a free hand to force arbitration agreements on their employees whether they agree to them or not. In no other area of contract law can you have one party decide for another party that they have agreed to a contract. Now, the Supreme Court has vested in employers a unique power to tell their employees what they have agreed to. Judge Sabatino at the Appellate Division had gotten it right in his decision, and there were no legitimate grounds for the court to reverse."

On May 6, 2016, four years after it hired Skuse, Pfizer's HR department sent her an email announcing a new arbitration agreement, including a link to the document of frequently asked questions, according to the decision.

The last page stated: "You understand that your acknowledgement of this agreement is not required for the agreement to be enforced. If you begin or continue working for the company 60 days after receipt of this agreement, even without acknowledging this agreement, this agreement will be effective, and you will be deemed to have consented to, ratified and accepted this agreement through your acceptance of and/or continued employment with the Company."

One of the FAQs was: "Do I have to agree to this?" to which the response was, "The arbitration agreement is a condition of continued employment with the company. If you begin or continue working for the company 60 days after receipt of this agreement, it will be a contractual agreement that binds both you and the company."

Additional emails followed, including a different link to launch Pfizer's module-based training program, which consisted of four slides.

The third slide contained language similar to the final page of the agreement; a box with an arrow pointing upward to that language instructed the employee to "CLICK HERE to acknowledge." The fourth slide thanked the employee for reviewing the agreement, provided an email address for questions, and included a means to exit the "course," the court said.

On June 9, 2016, Pfizer sent Skuse an email confirming that she had completed the "Mutual Arbitration and Class Waiver Agreement" training module at 7:33 p.m. on that date.

Fast-forward a year later. Pfizer terminated Skuse's employment Aug. 11, 2017, after she refused to take a vaccine for yellow fever that was required for corporate flights. Skuse, a practicing Buddhist following a strict vegan diet, claimed she couldn't receive the vaccine based on her religious beliefs, and because the vaccine contained animal products.

Skuse filed suit claiming LAD violations, and the defendants, invoking the Federal Arbitration Act and the New Jersey Arbitration Act, moved to dismiss the complaint and to compel arbitration.

Skuse opposed the motion, contending that she was not bound by Pfizer's agreement, arguing that she was asked only to acknowledge, not to assent to, the agreement.

The court granted certification late last year.

On Tuesday, Patterson wrote, "New Jersey contract law recognizes that in certain circumstances, conduct can constitute contractual assent," referring to Skuse's showing up for work way beyond the 60-day threshold.

In its ruling, the Appellate Division noted a distinction between this case and *Leodori* from 2003, in which the employer sought but did not obtain the employee's physical signature on an "agreement" form. Like the arbitration agreement in *Leodori*, the panel said the arbitration agreement in this case was not agreed to and was thus unenforceable.

The majority saw it differently.

"This appeal raises no such considerations," Patterson wrote. "No form intended to confirm the employee's assent was left unsigned.

"Instead, the prescribed form of assent here was the employee's decision to remain employed after the effective date of the arbitration policy," and "Pfizer's May 5, 2016 email under the agreement states arbitration will replace state and federal courts as the place where certain employment disputes are ultimately decided and that arbitrators, rather than judges or juries, would resolve their disputes."

The agreement, Patterson added, "complied with the court's mandate in *Atalese* that a waiver-of-rights provision clearly and unambiguously state that the plaintiff is 'waiving her right to sue or go to court to secure relief.'"

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Accident

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Overly approached the vehicle and saw that the occupants were distressed and that Garcia in particular was gravely injured. Garcia died before the paramedics reached the scene.

"Zachary suffered a crush injury to the right side of his head and suffered a broken jaw," court papers said.

In the answer to the plaintiff's complaint, the defendants issued boilerplate denials of liability.

The plaintiff's attorney, Barry Eichen of Eichen Crutchlow in Edison, New Jersey, did not respond to a request for comment.

The defendants' lawyer, J. David Zeigler of Dickie, McCamey & Chilcote, also did not respond to a request for comment.

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Lateral

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McGuireWoods; Gibson, Dunn & Crutcher; Mayer Brown; and Alston & Bird, among others, have all announced new attorney hires in the last week.

McDermott brought on Michael Siekman and Jenny Chen as partners in the firm's intellectual property practice. Based in Boston, the pair joined the firm from Polsinelli and earlier practiced at Wolf, Greenfield & Sacks.

The pair's hiring highlights an increased demand for patent prosecution expertise during the pandemic—a turnaround from previous years when firms shed lower-billing-rate patent prosecution groups. The hiring also reflects the broader need among firms to expand their life sciences practices.

"The last few years have shown an increasing need for breakthrough innovations in the life sciences market," said Bill Gaede, leader of McDermott's global IP practice, said in a statement. "Patent protection is essential for bringing necessary technology to market, and Michael and Jenny truly understand what it takes to be a fearless client advocate during every stage of the IP lifecycle."

Siekman's practice focuses on patent prosecution strategies, life sciences partnering and transactions, licensing, post-grant proceedings and litigation for biotechnology and pharmaceutical industry clients. Chen's practice focuses on cell and gene therapies, antibodies, diagnosis and pharmaceutical formulations for biotech and life sciences spaces.

Several firms have also hired litigators this past week, including White & Case, Goldberg Segalla, FisherBroyles and Gibson Dunn. Matthew Devine joined White & Case's commercial litigation practice in Chicago. Devine, who arrived from a 16-year stint as a Jenner & Block partner, focuses on class action defense, trade secrets and contracts and partnership disputes.

Gibson Dunn added New York-based Karin Portlock as of counsel in its white-collar defense, investigations and litigation practice. Portlock was an assistant U.S. attorney in the Southern District of New York in the last five years.

Bryana Blessinger, a Portland, Oregon-based insurance coverage litigator, joined Goldberg Segalla's global insurance services practice in Chicago and Los Angeles offices from Portland-based Markowitz Herbold. FisherBroyles picked up Delaware and New York litigator Carl Neff from Fox Rothschild as a partner in its litigation practice.

Meanwhile, law firms continue to have an appetite for restructuring as clients look for advice in navigating the pandemic and recession.

McGuireWoods last week added James Donnell, a New York- and Houston-based partner in the firm's restructuring and insolvency group. Donnell, who joined from Baker McKenzie in New York, who advised clients on distressed mergers and acquisitions and out of court restructurings and advised hedge funds, banks and creditor committees in oil and gas bankruptcies and restructurings.

In its own energy sector hiring, Mayer Brown brought on Carl von Merz as a partner in its corporate and securities practice in Houston. The partner, who joined from Bracewell, will head the firm's U.S. upstream oil and gas group.

"Carl is a widely recognized and highly respected energy lawyer, who has built a robust practice in M&A and private equity investments in the energy industry," said Alex Chequer, leader of the Mayer Brown's oil and gas group, in a statement.

Multiple other firms have snatched up corporate and finance partners recently, including Arnold & Porter Kaye Scholer, which hired Ben Fackler, formerly the head of Allen Matkins Leck Gamble Mallory & Natsis' San Francisco M&A group as a corporate finance partner based in San Francisco; and Taylor English Duma, which hired Harold "Sonny" Cohen as a partner in its corporate finance practice in Atlanta.

In addition, Thompson Hine hired two lawyers to its investment management practice—senior counsel Marc Minor, who focuses on fintech, and member Eric Miller, who focuses on broker-dealer regulation and fund governance—in Columbus, Ohio.

For its part, Alston & Bird hired Vivian Maese as a New York-based fintech partner who arrived from Cadwalader, Wickersham & Taft. Maese had moved to Cadwalader in early 2019 after serving as co-chair of Latham & Watkins' financial institutions and fintech practice groups.

Maese has said that the coronavirus pandemic prompted her decision to join Alston because of its robust payments practice, which complements her work advising clients on tech-related transactions and regulatory issues.

Demand for new hires also extended to some employment practices. Seyfarth Shaw hired Thomas Posey as a partner in its labor and employment department and labor-management relations practice group. Posey, who will be based in Los Angeles and Chicago, joined from Reed Smith and also practiced at Fagre Baker Daniels, now Fagre Drinker, and Franczek Radelet.

Firms are not only hiring lawyers to meet client needs. Cozen O'Conner last week expanded its government relations and public affairs capabilities into Western Pennsylvania by hiring Kevin Kerr as a principal to help grow the firm's presence in Harrisburg and Philadelphia. Karr was previously a public policy and government affairs leader at Uber.

"Recognized as one of the state's top up-and-coming government relations professionals, [Kerr will] provide comprehensive advocacy and lobbying services to a range of clients," said Howard Schweitzer, CEO of Cozen O'Connor public strategies. "He's the perfect choice to help us plant our flag in Western Pennsylvania."

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Remote

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and staff who face this dual burden. They're responding with partnerships with organizations devoted to supporting children and parents, heightened roles for internal parents groups, and—in some cases—a message that no one should worry about missing billable-hours targets.

The spring might have been a "sprint," according to Nina Markey, co-chair of the staffing, independent contractors and contingent workers practice group at Littler Mendelson and parent of two elementary schoolers. But "most of the parents now are preparing for a marathon," she said.

To that end, firms are looking to line up resources to make the race more manageable, like the organizers who line marathon routes with stations for hydration and carbohydrates.

"One of the things we felt we could offer was how to educate people to make wise decisions," said Akin Gump Strauss Hauer & Feld chairperson Kim Koopersmith.

For one source of insights, her firm has turned to the Child Mind Institute. A recent firmwide "fireside chat" with founding president Harold Koplewicz generated a number of questions about parenting challenges that received direct responses. Further sessions, two targeted at parents of younger children and two for parents of older children, are scheduled for later in August. The firm also contracted with a retired Centers for Disease Control and Prevention epidemiologist at the start of the pandemic to deliver podcasts based on common questions, which recently included a discussion of schooling options.

Koopersmith said she recently received an email from an attorney at the firm who was facing an immediate decision about school, noting that the information garnered from the Child Mind Institute and the epidemiologist prompted him and his wife to reverse course.

"We don't always know how to make the best decisions, and as lawyers we want to feel that we're making the best decision we can," Koopersmith said.

Firms are also enlisting outside partners for aid in providing emergency or ongoing child care options. Perkins Coie this year has twice doubled the number of days of backup child care it offers through Bright Horizons, from 20 to 40 and now 80 over the course of 2020. Foley & Lardner is offering paid memberships for attorneys and staff to Care.com, which helps families find, manage and pay for child care.

"We're getting a consistent ask for two things," said Reed Smith chief talent officer Casey Ryan. "One is any sort of help that the firm can provide to make difficult things easier. Two, there's an ask for empathy and understanding from leadership that this is a difficult situation."

GROUPING UP

Reed Smith unveiled its new family support initiative Wednesday, joining a growing list of firms formalizing parents' groups. According to Ryan, the group—a product of discussions between the firm's associates' committee, women's initiative and board—is an attempt to gather resources in one place and start a dialogue among parents at the firm.

"I want people to know that we have things like flexible work and resources so they can work full-time, if they want to," Ryan said.

Blank Rome was on the ball with the timing of its own affinity group for parents, which launched in March. Co-chairs Ariel Glasner and Lauren Wilgus said the plans had already been in the works, but the pandemic lent urgency to a program that would provide support and networking opportunities to fellow parents.

The pair have used surveys to solicit feedback from parents to determine specific challenges and areas of need. They've used the feedback to develop resources for support and to guide their discussions with firm management. A recent conversation with the firm's managing partner about challenges presented by the new school year prompted a reminder from the top about the firm's openness to alternative work arrangements, including transitions to part-time status.

"If we have those questions, we can easily give them answers," said Wilgus, a parent of 9- and 7-year-olds who has been working from home three days a week for the past five years and was promoted to partner at the start of 2020.

Littler's parents initiative also predates the pandemic, with a January launch date. The goal is similar: compile resources and interface with the firm's leadership. And Perkins Coie has also used feedback from parents to curate links to services like child care and tutoring.

"When you're a stressed-out parent trying to homeschool your kids, the last thing you want to do is have to go online and hunt for resources," said Perkins Coie chief talent officer Jennifer Bluestein.

'JUST TELL US WHAT YOU NEED'

For many lawyer-parents—particularly those in two-earner households, single parents and those caring for children with special needs—webinars and links on a firm's intranet aren't nearly enough.

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Bluestein said Perkins Coie recognizes this and is urging lawyers and staff to reach out with regard to their own capabilities and needs.

"Rather than focusing on accommodations, we're trying to focus on transparency," she said. For associates that means "you don't need to give us any explanation. Just tell us what you need from us." That could be unusual hours or a part-time schedule.

"We're also letting people know that if you need a reduced work schedule or a leave of absence, you're not tanking your career," Bluestein said.

She and other leaders are aware that billable hours targets are a key source of anxiety among associates and counsel with school-age children. They're pledging to be flexible and recognize the exceptional nature of 2020.

"We know we can't judge people simply based on an outlier year around billable hours," Bluestein said. "There are some people who got COVID themselves, others with parents with COVID. That's apart from parents who are just home taking care of children. Then there's been the violence and activity around racial justice. That has had an impact on everybody's mental health. Some people aren't able to focus."

Koopersmith had a similar message.

"I repeat it every time I speak to associates and counsel, and in every email I send: 'Take this off the list of things you're worried about.' There's enough on everybody's mind," she said. "Just be the best you can."

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