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Houston Law Review's annual Frankel Lecture explores how contractual restrictions hinder equality and innovation

Nov. 1, 2019 - An employment and labor law expert outlined how non-disclosure agreements, non-compete clauses and similar measures negatively impact equality and innovation in the workplace at the 24th Annual Frankel Lecture held last Friday at the Hotel Alessandra in downtown Houston.

Orly Lobel, Warren Distinguished Professor of Law at the University of San Diego School of Law, served as the lecture's keynote speaker in her presentation, "Exit, Voice & Innovation: How Human Capital Law Impacts Equality (& How Inequality Hurts Growth)."

"If an employee believes her organization is failing, she can take action using one of two strategies: exit -leaving the company - or voice -striving to bring change from within," Lobel said. "In employment, non-disclosure agreements, non-compete agreements, innovation assignment clauses, non-disparagement agreements, mandatory arbitration and secrecy policies all create exit constraints.



Orly Lobel of the University of San Diego School of Law served as the keynote speaker of the 24th Annual Frankel Lecture.

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"They also silence employees, inventors, creators and entrepreneurs from speaking up and from expressing themselves creatively."

Lobel continued that these trends create impediments to mobility in the job market while also suppressing voice and harming innovation.

"The steep rise in restrictive terms shapes human capital in ways that are harmful to all workers as well as to industries at large, and the burden of these restrictions is not equally distributed," she said.

Commentators included Lisa Larrimore Ouellette, Associate Professor of Law and Justin M. Roach, Jr. Faculty Scholar at Stanford Law School, and Todd Rakoff, Byrne Professor of Administrative Law at Harvard Law School.

Rakoff agreed with Lobel's claim that restrictive agreements harmed employee liberty, but argued that this fell short of actionable discrimination.

"Professor Lobel and I agree on what should be done, but maybe we vary on why it should be done," Rakoff said. "There is certainly a claim that covenants not to compete work out to have unequal results. But is it a claim of discrimination? Because rightly or wrongly we have very different cultural balances to those two arguments.

"Our society is notoriously accepting of social inequality, while we are at the same time strongly opposed to invidious discrimination."

In her commentary, Ouellette said that some companies that use non-disclosure agreements can be resistant to accountability and a change in culture, and can potentially create a hostile work atmosphere.

"Professor Lobel has set forth what I think is an intriguing hypothesis - that non-competes, non-disclosure agreements and other legal restrictions on employees exit and voice exacerbate the innovation gender gap," Ouellette said. "Many of the claims that have emerged through the #MeToo Movement have been hidden by NDA protected settlement agreements and mandatory arbitration. Lack of transparency about these claims may have allowed harassers to continue in their employment and contributed to hostile work environments in which women did not feel welcome or comfortable and making them less likely to join or remain at these firms."

Professor Dave Fagundes, Baker Botts LLP Professor of Law and Assistant Dean for Faculty Development, moderated the discussion.



University of Houston Law Center Professor David Fagundes, left, Orly Lobel, Lisa Larrimore Ouellette and Todd Rakoff, right, listen to a question from an audience member at the Frankel Lecture.

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