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Labor and Employment Law Journal

A publication of the Labor and Employment Law Section
of the New York State Bar Association

- Equal Employment Opportunity and the Multinational Employer
- Immigration Basics for Expats and Secondees
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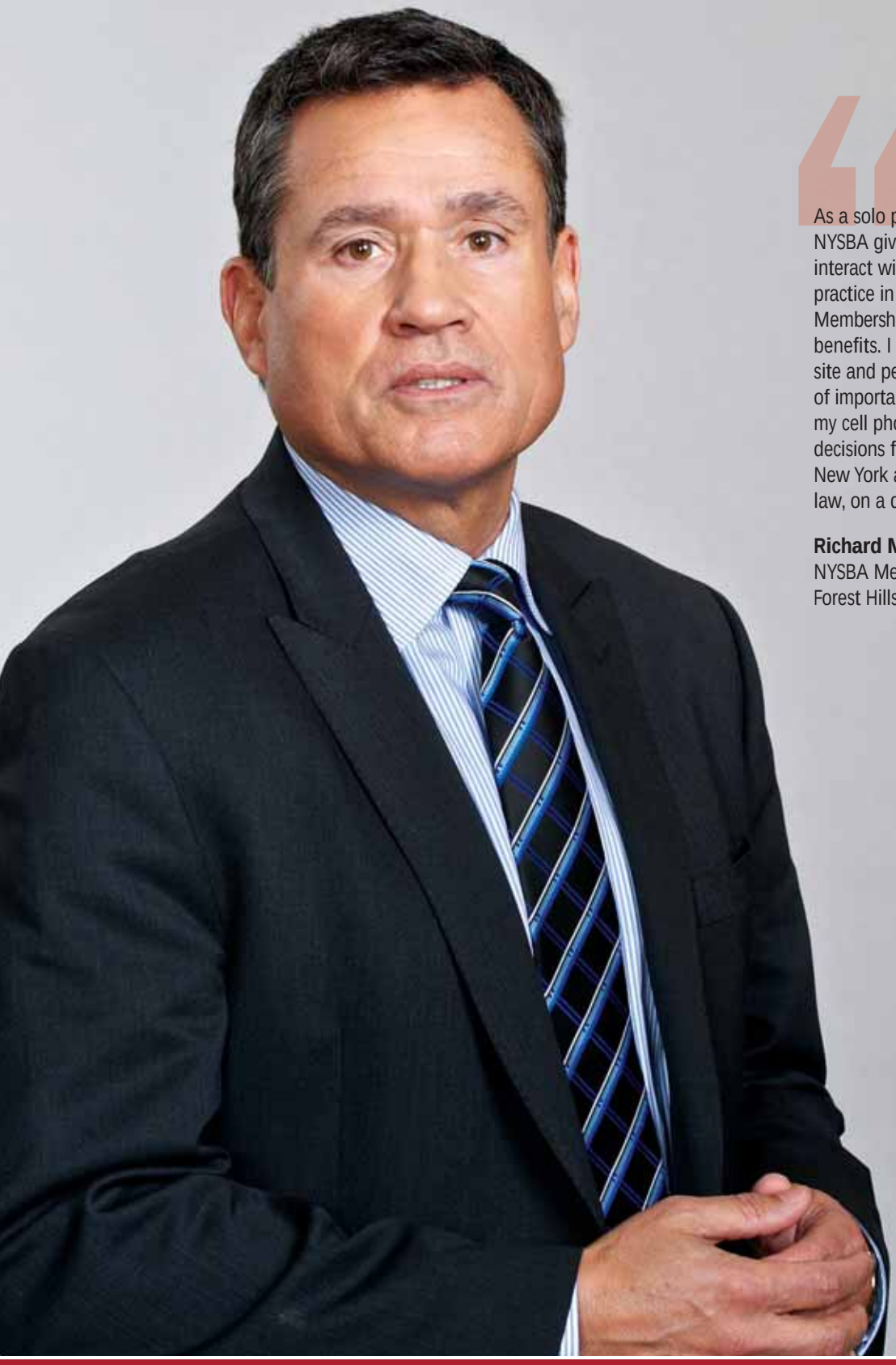

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Message from the Section Chair

This fall has been a heady time in employment and labor relations. Government workers were furloughed across the country while Congress wrestled with the government shutdown. The Affordable Care Act's employee notice and insurance exchange provisions went into effect, with major tech issues for healthcare.gov. Same-sex marriages blossomed, with significant implications for employee benefits. In New York, the New York City Council enacted the Pregnant Workers Fairness Act, expanding job protections for pregnant employees. A federal court in New York held that unpaid interns are not employees for purposes of sexual harassment claims under the New York State and City Human Rights Laws. And in Tennessee, there was a possible harbinger of significant changes in labor-management relations: management at a new Volkswagen plant sought to establish a "workers council," based on the European model in which employees share in management of the enterprise.

We are at a critical juncture over how our workplaces work. Union membership is at its lowest level in 97 years—little more than 11 percent. In 2012, union membership dropped by 400,000, even as employment grew by 2.4 million jobs. According to studies analyzed in a recent article in *The Atlantic*, when it comes to income inequality—the gap between the super-wealthy, the wealthy, and the rest of the population—we are at a ratio comparable to the scores of Rwanda and Uganda. China actually does better on this scale than we do.[1]

The eminently successful capitalist Warren Buffet says that "the American populace as a whole has not come back (from the 2008 recession). Inequality is getting wider[.]"[2]

You don't have to be a dogged liberal to be concerned when the middle class is insecure. Low wages may help employers make short-term profits, but historically, when the middle class struggles, the likelihood of political instability and political extremism gets stronger.

Ideological battles aside, why does this matter to us as labor and employment lawyers? Whatever side we practice on, it's in our clients' interests that employers' and employees' interests are fairly aligned—so the work gets done, and employees are well-treated and well-motivated. While dissatisfied employees may generate litigation which produces recoveries for plaintiffs and legal fees for lawyers, an unstable workplace isn't good for anyone. Ironically, clients on both sides often conclude that employment laws and the judicial system are skewed to favor the opposition.

While we as lawyers can't fix these structural problems, we can work to educate each other and advocate about the issues involved in workplace conflicts, while advancing our clients' goals. Our Section's CLE programs and committees provide a way to do this.

Our Fall Meeting in Niagara-on-the-Lake succeeded in presenting a great variety of CLE programs, in a beautiful setting. We had more than one hundred registrants. Our panels covered the use of medical information when employees request leave or accommodations; the NLRA's new decisions affecting at-will employment, internal investigations and the use of social media; immigration issues impacting employment law; ethical issues in FLSA cases; best practices in labor arbitration; judicial review of PERB and public sector arbitration decisions; and labor laws affecting military service members. Thanks to CLE Chairs Sharon Stiller and Seth Greenberg for all their hard work in planning the meeting, and to Beth Gould and Cathy Teeter for all their great work on logistics. Thanks also to Rachel Santoro and Genevieve Peeples, who coordinated the pairing of volunteer mentors for every first timer at the meeting.

I particularly want to highlight the work of the Communications Committee, which, in conjunction with John Gaal, fully updated the Section's website, which also has a new design in line with the redesign of the NYSBA website. The Committee is posting papers from the Fall Meeting on the site. The Committee urges members to use the website to publicize activities, and to post blog entries on the LENY blog. Please contact Mark Risk about posting announcements and David Reilly about the blog.

Finally, welcome and thanks to two new Committee chairs: Allyson Bellovin (Labor Relations) and Nathaniel Lambright (Public Sector Labor Relations).

The CLE Committee has been planning our Annual Meeting for January 31, with a great mix of panels. I hope to see you there.

Best wishes for a good 2014.

Endnotes

1. *See* http://www.theatlantic.com/international/archive/2011/09/map-us-ranks-near-bottom-on-income-inequality/245315/.
2. http://www.youtube.com/watch?v=V4oJ_X_bPCo.

Jonathan Ben-Asher

Equal Employment Opportunity and the Multinational Employer: Drafting and Enforcing Global Human Resources Policies on Discrimination, Harassment, and Diversity

By Donald C. Dowling, Jr.

As U.S. multinationals internationally align an ever-increasing list of human resources policies and "offerings," cross-border efforts at promoting fairness in the workplace have become increasingly vital. Equal employment opportunity initiatives like human resources policies, code of conduct provisions and training modules on discrimination, harassment and diversity have long been vital to domestic American employers. Now, in the global economy, the EEO issue has gone global.

In the U.S., a "zero tolerance" stand against illegal workplace discrimination and harassment is an aggressive, tough and compliant approach to assuring equal employment opportunities. And stateside, affirmatively to champion workplace diversity is important. Internationally, though, discrimination and harassment laws vary widely, and in many countries diversity is not an issue. These differences complicate the EEO initiatives that American multinationals might otherwise be inclined to launch across global operations. Multinationals ready to fight discrimination and harassment and to champion diversity on a global scale need subtlety, nuance, strategy and finesse. A one-size-fits-all American-style approach to EEO compliance does not work globally because American laws on discrimination, harassment and diversity are unique in the world. American employers' homegrown EEO initiatives, when exported, can be culturally inappropriate and legally problematic.

This article is a toolkit for a U.S.-based multinational's headquarters that needs to expand or improve its EEO (discrimination, harassment, diversity) initiatives regionally, or around the world. We discuss how U.S. headquarters needs to adjust its strategies and policies when driving a top-down global EEO compliance initiative—policy, code of conduct provision, training module—that would impose, internationally, internal rules against workplace discrimination and harassment, or that would affirmatively promote workplace diversity. In part one we address global *discrimination* programs generally. Then in parts two and three we cover a pair of particularly troublesome discrimination sub-topics—global *age* discrimination compliance and global *pay* discrimination compliance. In part four we address global initiatives for combating workplace *harassment*. Finally, in part five we address global workplace initiatives regarding *diversity*.

Part One: Fighting Workplace Discrimination on a Global Scale

Discrimination law in the United States is more evolved than anywhere else on Earth. The leading treatise on U.S. employment discrimination law[1] runs to two volumes and 3,300 pages. By now, decades after America's civil rights movement gave rise to tough, groundbreaking workplace discrimination laws, American jurisprudence has refined discrimination law concepts more complex than analogous doctrines anywhere else. Stateside employment discrimination disputes can implicate ideas as esoteric as "gender stereotyping," "third-party retaliation," "sex plus" discrimination against a protected "sub-class," "differential," "single-group" and "situational" validity in statistical adverse-impact analysis, and the requirement of a causal connection between an adverse employment action and a claim of "retaliatory animus."

In response to increasingly rarefied doctrines of U.S. discrimination law, American employers have engineered sophisticated tools to help eradicate illegal discrimination from their workplaces. These days, U.S. employer best practices for fighting discrimination include, for example: imposing increasingly tough work rules against workplace discrimination, offering comprehensive discrimination training, implementing detailed reporting and whistleblowing mechanisms, isolating alleged targets from alleged discriminators, running statistical adverse-impact analyses, and project-managing internal investigations into specific allegations and incidents.

Because sophisticated anti-discrimination tools like these have evolved to such an advanced state in the U.S., an American multinational might assume that its kit of state of the art anti-discrimination tools is ready for export to countries with simpler, less-evolved employment discrimination rules. After all, these days most countries do impose some laws against workplace discrimination, but no country's body of employment discrimination law is as intricate as that of the United States, and enforcement of discrimination laws in many countries is weak. As one example, a recent posting to an online human resources forum by someone calling himself "Tokyo-Based HR Consultant" pointed out that "we know companies are not supposed to" discriminate in Japan, but "in reality, everybody knows…that such discriminatory practices exist here…."[2]

So surely a carefully thought-out, robust American-style approach to fighting workplace discrimination must be a best practice everywhere around the world—right? Perhaps not. Prohibiting illegal workplace discrimination is of course a vital and valid objective in every country. Common-law jurisdictions, in particular, impose sophisticated laws that ban employment discrimination in ways reminiscent of our U.S. approach. Indeed, these days even civil law jurisdictions, particularly the Continental European states subject to EU anti-discrimination directives, impose strict workplace discrimination laws that in some respects are even stricter than corresponding American laws. As one example, a French law[3] requires employers of 50 or more employees to implement written gender equity action plans.

Still, the challenge in exporting U.S. anti-discrimination practices and policies to countries with less-developed equal employment opportunity doctrines is that discrimination statutes and cultural perspectives outside the U.S. differ, in their particulars, from the U.S. domestic approach. This can make a multinational's U.S.-crafted anti-discrimination toolkit, when exported, inappropriate and even suspect. Sending U.S. discrimination compliance tools to foreign workplaces is a bit like a Swiss watchmaker bringing his watchmaking equipment along on a campout: Overly refined tools can be useless in a less nuanced environment.

When adapting U.S.-honed anti-discrimination tools for use abroad (or globally), account for three issues: Context, protected status and "extraterritorial" effect. The rest of our discussion in this part one on cross-border anti-discrimination initiatives addresses these three issues.

A. Context

The first step in exporting or "internationalizing" any American-style approach to fighting workplace discrimination is to adapt the U.S. approach to different environments overseas. Workplace discrimination laws loom unusually large in the U.S. context; the other side of that coin is that overseas, discrimination laws tend to be less central in day-to-day human resources. Adjust accordingly. Be sensitive to local context. Keep discrimination compliance in local perspective.

Three matters specific (if perhaps not unique) to the U.S. environment explain why discrimination compliance is less of a priority outside the states—employment-at-will, demographics, and history:

- *Employment-at-will*. The U.S. is the world's only notable employment-at-will jurisdiction. U.S. employment law tends not to offer unfairly fired workers any viable cause of action for wrongful discharge.[4] American-style employment-at-will is in essence a legal vacuum, and nature abhors a vacuum. What rushed in to fill this particular vacuum is U.S. *discrimination* law. Indeed, some American lawyers argue that discrimination law now amounts to a sort of *de facto* U.S. wrongful termination regime. That is, there is a thesis that the U.S. employment-at-will doctrine fuels discrimination litigation in the employment dismissal context. As support for this thesis, look east to Bermuda or north to Canada. Bermudian and Canadian "human rights" laws, on paper, are quite similar to U.S. employment discrimination statutes. But the percentage of contested and litigated Bermudian and Canadian employment dismissals that lead to "human rights" claims is tiny when compared to the percentage of American employment dismissal lawsuits that assert a discrimination theory. For an aggrieved fired Bermudian or Canadian, having to meet the burden to prove a "human rights" or discrimination claim is much tougher than merely establishing a wrongful dismissal / inappropriate notice claim.

- *Demographics*. America's unusually heterogeneous population makes for broad racial diversity in U.S. job applicant pools and workplaces. In the U.S. context, demographic diversity makes laws against racial and ethnic employment discrimination vital. Legislative history shows that the U.S. Congress adopted our discrimination laws to "stir" the American "melting pot."[5] But many other countries have homogeneous populations. There is no "melting pot" in most (albeit not all) countries in Asia, Africa, Europe and Latin America. Countries from Finland to Haiti to Paraguay to Mali to China, Japan, Korea and beyond are essentially just one race. Because race discrimination in these countries is not a widespread social problem, fighting workplace race discrimination in these countries is not a top human resources priority.

- *History*. America's unusually troubled past with its overt racial and ethnic discrimination—slavery, lynchings, displacements, massacres of indigenous people—is a conspicuous scar on our history and sparked our civil rights movement that led to our employment discrimination laws. But American history is unique to the U.S. The historical underpinnings of American discrimination laws simply are a non-issue abroad.

The point is that American-style employment-at-will, demographics and history make our U.S. discrimination laws vital, but these issues are much less significant in most places abroad. Therefore, foreign workplace discrimination laws carry correspondingly less baggage, and discrimination compliance plays a more modest role in foreign human resources administration. American multinationals operating abroad might ratchet down their U.S. discrimination law compliance strategies to account for this very different context.

B. Protected Status

In any discrimination policy or provision, protected status is everything. After all, every employer can, and does, discriminate every day against employees in non-protected groups. Employers routinely discriminate against poor performers, criminals, smokers, current drug users, people with bad credit, the lazy, the incompetent, the uneducated and undereducated, the illiterate, graduates of less-prestigious schools, those with poor grades and test scores, and many other non-protected groups. Indeed, discrimination in employment is so ubiquitous (and legal) that many employers take pride in being "discriminating" in their standards. All that is illegal, of course, is discrimination against people because they belong to one of a dozen or *so protected groups*.

Therefore, well-drafted U.S. discrimination policies and provisions always list the specific protected groups, traits or statuses against which the employer prohibits discrimination—usually these are gender, race, religion, national origin, age, disability, veteran status, genetic makeup, sexual orientation and the like. U.S. employers' lists usually track the categories protected under American state and federal law.

Listing the protected statuses in a discrimination policy or provision is essential in the domestic U.S. context, because failing to list these traits would result either in an over-broad discrimination policy that prohibits discrimination on every conceivable ground or in an inscrutable policy that forces workers to go research what categories are, and are not, "protected by applicable law."

But the logic behind listing protected traits gets murkier in the international context, because protected groups differ so much by jurisdiction. When drafting a cross-border workplace anti-discrimination rule (like a global anti-discrimination policy or an anti- discrimination provision in a global code of conduct), the problem is that local lists of protected traits differ radically across jurisdictions. Gender, religion and race are protected in most places, disability and sexual preference are increasingly protected, "gender identity" and "intersex status" are protected in Australia, part-time status is protected in Europe, "traveler" (homeless) status is protected in Ireland, HIV-positive status is protected in South Africa and Honduras, infectious-disease-carrier status is protected in China, caste is protected in India, and family status and social origin are protected in Chile. Political opinion, views and beliefs are protected in Argentina, Europe, El Salvador, Mexico and Panama. Illness (in addition to disability) and language are protected in Guatemala and Peru. Economic circumstances are protected in Argentina, Guatemala and Mexico. Criminal record is protected in British Columbia, Canada. Rural (versus urban) origin is protected in China. Meanwhile, the U.S. and its states protect a few quirky traits that probably no other jurisdiction protects, chiefly veteran status, workers' compensation filings and genetic predisposition. And then there are the jurisdictions like Argentina, Belgium and Turkey with legal doctrines that actually let courts invent their own protected groups.

So a central question in drafting a border-crossing anti-discrimination rule is: Which protected traits or statuses merit explicit mention in the multinational's global discrimination policy? Which traits or statuses can a multinational afford to exclude? Can a multinational drafting a cross-border discrimination policy ever refer expressly only to some groups protected by law in certain jurisdictions without naming all groups protected everywhere?

There are no easy answers. Because whether or how to list protected statuses is the central challenge to drafting a global discrimination policy or provision, different employers address this problem in different ways. One common approach is for the global discrimination provision to list the U.S. protected groups and then to add the "catch-all" clause *"and any other category protected by applicable law."* But using this "catch-all" clause in a global discrimination policy suffers from three serious shortcomings—at the same time, this "catch-all" clause is *too vague*, *too narrow* and *too broad*:

- *Too vague*. Listing some protected traits and then using the catch-all clause ("and any other category protected by applicable law") in a global discrimination provision can be vague, impractical and insensitive, because this clause both downplays the importance of local law and it forces workers to research what "applicable law" is. This clause is actually dangerous because it signals the employer's lack of patience with local rules. In Australia, for example, a global anti-discrimination policy that fails to address Australian local discrimination law has been held inadequate.[6]

- *Too narrow*. At the same time, using this catch-all clause in a global discrimination policy can be too narrow—it can fall short. Inserting this clause into a discrimination policy demotes all the unnamed protected groups (the groups falling under the catch-all) to a second-class tier of protection. Invoking the canon of construction *expressio unius est exclusio alterius* (to express one thing is to exclude another), a court could and indeed perhaps should reason that this catch-all clause protects the unnamed protected traits (statuses) less than it protects the expressly named traits.[7]

  Imagine, for example, a U.S. age discrimination lawsuit against a U.S. employer whose anti-discrimination policy somehow happened to prohibit discrimination on the grounds of "gender, race, disability, religion, genetic predisposition, veteran status and any other ground protected by applicable law." The age discrimination plaintiff's lawyer would surely argue this policy's conspicuous omission of "age" from its list of protected statuses

betrays this employer's ambivalence toward eradicating age discrimination from its workplace. For this employer to have left "age" out of its policy's listing of named protected traits all but invites a claimant's lawyer to argue the omission evidences the employer's antipathy toward members of the omitted group. American employment lawyers, therefore, would strongly caution against listing (in drafting a discrimination policy) some but not all of the key legally protected traits or statuses. An employer that lists some protected groups in a discrimination policy should go ahead and include all of them.

Now extend this analysis abroad. Imagine, for example, an Irish plaintiff's employment lawyer representing an aggrieved fired "traveler" or a British Columbia lawyer representing a rejected felon, and arguing that the omission of "travelers" or "criminals" from a multinational's list of protected traits in a global anti- discrimination provision evidences the employer's antipathy toward travelers and criminals.

- *Too broad*. While the "catch-all" clause approach in this respect is too narrow, at the same time this approach can also be too broad, or go too far, because this approach extends named protected groups into jurisdictions where they are not otherwise protected or even appropriate. For example, U.S.-headquartered multinationals commonly list veteran status and, increasingly, genetic predisposition in their global anti-discrimination policies and code of conduct provisions, because these two groups are protected under U.S. law. But veteran status and genetic predisposition make absolutely no sense to protect outside the U.S.—these traits tend not to be protected abroad, and employees overseas tend not to consider them as analogous to the other protected categories. Separately, to include "age" in a global anti-discrimination provision raises real problems in jurisdictions where the employer imposes mandatory retirement or age ranges in staffing certain positions.[8]

There is no "magic bullet" here—no foolproof way to draft a border-crossing anti-discrimination provision that works well everywhere. Each multinational needs to think hard about the listing-protected-traits issue internationally, and then select a less-than-ideal approach.[9]

One less-than-ideal approach is to list protected groups separately for each jurisdiction. But of course that approach requires crafting separate local discrimination provisions (or separate discrimination policy or code of conduct riders or appendices), and so that approach undercuts the advantage of issuing a single global policy. Another less-than-ideal approach is to keep the global anti-discrimination policy silent as to all protected groups, and simply to prohibit "illegal" discrimination that violates "applicable law," using a clause that says something to the effect of "the company's policy is to provide equal employment opportunities among all groups, of whatever classification, protected by applicable law." This approach, though, yields a vague policy that forces employees to do their own legal research.

C. "Extraterritorial" Effect

America's major U.S. federal (and apparently some state) discrimination statutes reach abroad, to a limited extent: They prohibit a U.S. "controlled" (such as a U.S.-headquartered) employer from discriminating, on any ground protected by American law, against American citizens who work outside the U.S., whether they work overseas as local hires or as expatriates. U.S.-based multinationals need to factor this mandate into their global anti-discrimination policy and strategy.[10]

But be careful not to let the "tail wag the dog" here, as this issue is deceptively narrow. Most American-headquartered multinationals employ relatively few Americans among their overseas workforces (although there are exceptions, such as U.S. companies that provide niche services like overseas security under U.S. government contracts or subcontracts). Of course, it might be overkill to extend a full-blown U.S.-style anti-discrimination policy to all staff working outside the U.S. only to cover a tiny percentage of American citizens in an organization's foreign workplaces. So consider a more nuanced approach. Focus on complying with U.S. discrimination laws in a way targeted to the overseas managers of U.S. citizens working abroad, not necessarily targeted to the protected American citizens themselves.

Part Two: Fighting Workplace *Age* Discrimination on a Global Scale

For an American-headquartered multinational, often the toughest specific issue in crafting any international EEO compliance initiative is figuring out what to do about *age* discrimination. U.S. multinationals' cross-jurisdictional EEO provisions tend to prohibit discrimination and harassment (and sometimes promote diversity) based on specific lists of protected traits, usually including gender, race, national origin, religion, disability—and *age*. While listing most of these traits in a multinational's cross-border EEO initiative raises few problems, the mere mention of the three-letter word "age" in a global anti-discrimination provision causes tough problems that too many American multinationals overlook.

Our discussion here in part two focuses on the apparently benign, seemingly narrow but surprisingly intractable problem of whether, or how, an American multinational can afford to mention the word "age" in a global anti-discrimination policy, code of conduct clause or training module. Our discussion breaks into three parts: the *problem* (widespread age discrimination around the world); the *challenge* (crafting a cross-border age discrimi-

nation provision); and the *solution* (bringing international age discrimination initiatives into compliance).

A. The Problem: Widespread Age Discrimination Around the World

The United States imposes the world's toughest and best-developed laws against discrimination in employment, but most other countries do indeed have laws that purport to ban employment discrimination. Other countries' discrimination laws, though, differ from American discrimination laws in significant ways. One of the starkest differences between American-style discrimination laws and overseas employment discrimination laws regards *age discrimination*. The U.S. Age Discrimination in Employment Act,[11] passed in 1967, is the world's most robust, well-developed and frequently invoked age discrimination law, and it has few real counterparts overseas. Many other countries do not even bother to ban age discrimination in employment. And even the growing group of jurisdictions that now do outlaw age discrimination tend to have laws that by U.S. standards are weak, poorly conceived, lightly enforced and riddled with exceptions. Most jurisdictions that now purport to prohibit age discrimination impose no minimum protected age (age 40, under the U.S. ADEA) nor do they let employers favor the old over the young (as the U.S. ADEA does).[12] In *theory* this means foreign age laws are even broader than America's ADEA, but in *practice* this means foreign age laws are broad to the point of being blunt: Because everyone is some age, foreign age discrimination laws protect everyone. In an age-related dispute involving applicants or employees of different ages, everybody gets to claim to be equally protected. Foreign age laws favor 20-year-olds as much as 41-year-olds as much as 72-year-olds. Therefore, foreign age laws can forbid employers from favoring old applicants and employees by offering the seniority-enhanced benefits that American employers commonly use—service-enhanced pension benefits, severance pay, and vacation benefits, as well as age-plus-service-based early retirement offers.

Not only do foreign legal systems tend either not to impose any age discrimination laws or to have blunt age laws, but many jurisdictions outside the United States actually enshrine age-discriminatory concepts right in their employment laws. For example, laws in Bahrain, Oman and many other countries force employers to give all employees written employment agreements that must list employee date of birth. Italy, Germany, Turkey and many other countries let employers use the fact that an older worker has vested in social security ("state pension") to help justify a dismissal or layoff.

That said, the global trend is in the direction of better protections against age discrimination. Some common law countries, including Australia, Canada and New Zealand, passed tough age laws some years ago, and an ever-increasing pool of civil law jurisdictions including Costa Rica, Israel, Mexico and all the Continental states of the European Union now purport to outlaw "age" discrimination. As to Europe, an EU Directive[13] bans discrimination on "age" as well as on four other grounds[14] and each EU state was supposed to have passed an age discrimination law by December 2006.[15] Still, in practice most countries tolerate what to Americans look like blatantly ageist practices including, in particular, *mandatory retirement* and *age caps in recruiting*.

- *Mandatory retirement*. The United States and Canada ban mandatory retirement because firing someone for celebrating a certain birthday is indisputably a blatant act of age discrimination. But most other countries—even lots of those that purport to impose age discrimination laws—rationalize (or ratify employer rationalizations for) mandatory retirement in many contexts. For that matter, even overseas trade unions often buy in and enshrine mandatory retirement in collective bargaining agreements. Two examples are Israel and Europe.

  — *Israel*. Israel has a law that purports to ban age discrimination,[16] and Israel's legal community talks about how tough the age discrimination law is. But by American standards Israel still allows blatantly ageist mandatory retirements.[17]

  — *Europe*. Mandatory retirement is legal in much (if not all) of Europe despite the "age" discrimination prohibition in EU directive 2000/78. Mandatory retirement comes under increasing scrutiny in Europe but it remains common, widely legal and enshrined in countless collective bargaining agreements. The European Commission admits that "most [EU states] have mandatory retirement ages for particular sectors or professions."[18] The EU Court of Justice, the Italian Supreme Court, the UK Supreme Court and Germany's Federal Labor Court all tolerate mandatory retirement under many circumstances.[19]

- *Age caps in recruiting*. In addition to mandatory retirement, another pervasive and often perfectly legal ageist practice overseas is imposing age caps in recruiting. Employers abroad actually pay websites to post openly discriminatory job ads along the lines of "Wanted: Brand Manager age 30–35" or "Seeking trainees up to age 28." In Europe these age caps are technically illegal[20] but the European Commission itself concedes that "minimum and maximum age requirements [in jobs] are…extensively used across virtually all reporting [EU] States.[21]" According to one expert, in "Italy, between 60 and 70% of public recruitment ads for jobs contain an upper limit of 35–40 years. This is true also of recruitment ads for public administration, including Italian Parliament—despite the fact that it is against the law."[22]

Difference in social perspectives. From an ADEA-compliant American point of view, mandatory retirement and age caps in recruiting look starkly ageist.[23] But there is a vital cultural component here, a social gap between the rigid American position of protecting old people from the very different social concerns abroad for alleviating chronic youth unemployment. According to the *New York Times*, Europe suffers from "historically high unemployment rates—in excess of 50 percent among youths—[which] in countries like Greece, Italy and Spain [are] discouraging young people from having children."[24] In Europe and elsewhere abroad, alleviating chronic youth unemployment is so vital a social policy that opening up jobs by forcing retirements does not seem too harsh as long as society (social security or "state pensions") offers a viable safety net: In many countries outside the United States, the social security replacement rate of final average pay is so high that workers actually anticipate when their benefits will finally vest and they can stop working. And so even the European Court of Justice recognizes a worker's vesting in social security benefits as grounds that can justify firing old people.[25] Separately, another defense for mandatory retirement commonly heard abroad is that it serves as a sort of pressure release valve on tough overseas rules against no-cause firings, offering employers at least one way legally to dismiss underperformers with "dignity."

By American standards, of course, this apologia for mandatory retirement and age discrimination looks weak. In particular, to justify mandatory retirement on the ground that firing old people helps alleviate chronic youth unemployment seems bizarre—this reasoning defends discrimination because discrimination discriminates. No one would justify firing people of a thrifty race or religion so as to open up jobs for those in some less-frugal race or religion, and we now completely reject the old argument against giving a woman a job that could go to a man who heads a family.[26]

B. The Challenge: Crafting a Cross-Border Age Discrimination Provision

In their global discrimination policies, codes of conduct and training modules, American multinationals tend to proclaim zero tolerance for "age" (and other) discrimination across their worldwide workforces. But making this claim globally can be a real problem because of the difference in social perspectives, because foreign laws ostensibly prohibiting age discrimination vary widely and allow exceptions, and because many American multinationals' own foreign affiliates persist in embracing mandatory retirement, age caps in recruiting and other ageist practices.

We already noted that every multinational needs to comply both with local discrimination laws and with its own global policies against discrimination. Outside the United States, complying with the age discrimination laws of any given jurisdiction tends to be fairly straightforward at least for on-the-ground local management and human resources professionals. For American multinationals, the *cross-border* age-discrimination compliance challenge is how to craft and enforce one single workable cross-border "age" discrimination provision like a policy, code of conduct clause or training module. Merely to mention the little word "age" in a global provision risks liability exposure even in jurisdictions without age discrimination laws, because overseas, an employer's internal rules tend to be enforceable against the employer as part of each employee's employment contract. (Outside employment-at-will, a so-called "employment-at-will disclaimer" written into a human resources policy is, obviously, unenforceable.) This means a multinational that issues global age discrimination provisions may someday have to answer, in court, to overseas applicants and employees claiming the organization denied them rights under its own provision. In one case some years ago, a group of Chinese forced retirees sued in a Chinese labor court alleging that while their forced retirements did not violate any Chinese statutory law, the employer, when it retired them, breached its own guarantee of freedom from workplace "age" discrimination.

It would seem that any American multinational voluntarily claiming, in its own global anti-discrimination provision, that it does not tolerate "age" discrimination must have processes in place to comply with its own internal rule. But too often this assumption is wrong. Many American multinationals suffer from a disconnect between idealistic headquarters-drafted anti-ageism pronouncements and entrenched ageist practices overseas. A "little secret" in global human resources administration is that the overseas operations of even U.S.-based multinationals commonly impose mandatory retirement and cap job eligibility at specified ages. A German employment lawyer once estimated that more than 90% of American employers in Germany write mandatory retirement clauses right into their local German employment contracts. These days at U.S. organizations' European offices mandatory retirement and age-capped recruiting may be on the retreat, but many U.S. multinationals still use these practices widely across Africa, Asia, India, Latin America and the Middle East.

In addition, ageist practices abroad threaten to implicate an entirely separate danger: adverse consequences in a *U.S. domestic age discrimination lawsuit*. What if a U.S. domestic age discrimination plaintiff trying to prove systemic age bias (such as in a U.S. class action) tried to convince an American judge to order discovery, or to admit evidence, about a multinational defendant's overseas mandatory retirements or age-capped recruiting, on the theory that any multinational that forcibly retires its own overseas staff and disqualifies its own overseas applicants from jobs because of their ages violates its own global "age" discrimination provision—and likely harbors ageist animus?

C. The Solution: Bringing International Age Discrimination Initiatives into Compliance

Any multinational faces a problem if it has issued a global anti-discrimination provision (policy, code of conduct, training module) that mentions the word "age" while its own overseas affiliates still impose mandatory retirement, age caps in recruiting or other locally acceptable ageist practices. Can this multinational possibly come into compliance with its own global anti-age-discrimination rule? The good news is the answer is yes, there is a solution here, if the multinational is willing to take four steps:

- *Step 1: Assess noncompliant practices abroad.* Human resources professionals and employment lawyers at a multinational's U.S. headquarters often have no idea that their own organization's overseas affiliates openly discriminate on age. Find out whether your overseas affiliates impose mandatory retirement, age-capped recruiting or other ageist practices. The answer may surprise you. Some progressive multinationals have made headway stamping out age discrimination internationally, but ageist practices remain surprisingly common in many markets around the world, often unbeknownst to U.S. headquarters.
- *Step 2*: *Align the global prohibition with actual practices*. Where headquarters imposes a global provision (policy, code of conduct, training) that purports to ban age discrimination, but where headquarters discovers that its own overseas affiliates may be violating that provision, headquarters needs to select one of five possible strategies for getting into compliance:
  - Stamp out mandatory retirement, age-capped recruiting and other non-compliant practices worldwide by better policing overseas affiliates.
  - Write an express exception into all global age discrimination prohibitions that excludes mandatory retirement and age caps in recruiting—recognizing, of course, that this exception all but swallows up the global anti-age-discrimination rule.
  - Remove from the global policy's list of protected traits all mention of the word "age."
  - Remove lists of protected traits from the global policy entirely (including references to "age"), replacing those lists of traits with a general statement that the organization tolerates no illegal discrimination under applicable law ("*our policy is to provide equal employment opportunities among all groups, of whatever classification, protected by applicable law*").
  - Replace the global discrimination policy with tailored local-country policies which, where appropriate and legal, omit references to "age" discrimination.
- *Step 3*: *Police outsource partners.* Many multinationals have contractually bound their overseas suppliers and outsource service providers to *supplier* codes of conduct that are completely separate from their internal ethics codes of conduct. Check the anti-discrimination clause in any supplier code. If a supplier code expressly prohibits "age" discrimination—as many supplier codes do—then monitor whether outsource partners actually comply with this particular prohibition. If suppliers flout the age prohibition by imposing mandatory retirement or age-capped recruiting, then either police suppliers accordingly or edit the supplier code to eliminate the reference to "age."
- *Step 4*: *Ensure practices abroad comply with local age discrimination laws.* A completely separate global age discrimination problem is how to comply with emerging foreign age discrimination laws like those in Costa Rica, Israel, the European Union and Mexico. In discussing how U.S. age discrimination laws tend to be more strictly enforced and less riddled with exceptions than age laws abroad, we mentioned that age laws abroad tend to be, in theory, much broader than the U.S. ADEA—again, the ADEA is narrowly tailored to reach only people over age 40 and the ADEA allows discrimination against young people, while age laws overseas tend to protect everybody. This means that many ADEA-compliant practices common in the United States violate these broader (if blunter) foreign age laws. For example, overseas age discrimination laws that prohibit discrimination against the young can stop an employer from imposing minimum experience levels in recruiting.[27] And overseas, lockstep and seniority-linked compensation and vacation benefits can be suspect, as can linking severance pay to years of service and offering voluntary early retirement incentives to older staff unless somehow "objectively justified."[28]

Part Three: Fighting Workplace *Pay* Discrimination on a Global Scale

A consultant at Norfolk Mobility Benefits, David Bryan, has said that as "[t]oday's multinational employer [evolves] into the transnational of tomorrow…[t]here appears to be more centralization of core corporate functions…" such as "benefits professionals implementing global benefits strategies...."[29] Indeed, at many multinationals the push to globalize the human resources function begins with aligning certain aspects of compensation and benefits across borders, such as implementing global executive rewards initiatives, regional commission plans

and sales incentive programs, broad-based global incentives / bonuses, and global stock option / equity awards. In addition, sometimes a one-time event like a merger or restructuring spawns special global offerings like retention bonus plans and severance pay plans. And multinationals that conduct global employment law compliance audits sometimes export tools like statistical adverse-impact analysis.

But multinationals launching cross-border rewards programs and compliance audits need to comply with the targeted pay-related discrimination laws of each affected country. Because the United States imposes the world's most sophisticated set of employment discrimination laws, U.S.-based multinationals may assume that we Americans enjoy a big head start in complying with employment discrimination mandates worldwide. But in the particular context of *pay/benefits* discrimination, this assumption is wrong. Foreign laws on pay and rewards discrimination can be surprisingly different from, even significantly broader than, analogous U.S. concepts. Overseas, watch for unexpected doctrines like "comparable worth," "local citizenship" discrimination, "job category" or "colleague" discrimination—even "job category comparable worth" discrimination.

Here we examine the range of issues that a cross-border rewards offering or compliance audit might trigger as to pay discrimination compliance abroad. At the broadest level, our analysis splits into two categories, "protected group" pay discrimination and "job category" pay discrimination.

A. "Protected Group" Pay Discrimination

Most every jurisdiction on Earth imposes general employment discrimination laws that prohibit employers from discriminating based on specified traits or groups such as gender, race and religion. These laws tend to reach hiring, firing and terms of employment.[30] Coming from the U.S. perspective, foreign jurisdictions' "plain vanilla" discrimination laws raise a number of issues as they apply in the pay discrimination context:

- *Adverse treatment*. Because rewards like pay, benefits, bonuses, commissions and equity grants are vital terms of employment, any employer that discriminatorily rewards its employees by favoring members of certain protected groups at the expense of others almost always runs afoul of protected group employment discrimination laws. This analysis is simple.

- *Disparate impact*. Many countries' protected group discrimination laws not only prohibit straightforward *adverse treatment* discrimination (called in Europe "direct discrimination"), but also "disparate impact" discrimination (called in Europe "indirect discrimination"). This means that even facially neutral compensation systems illegally discriminate if they disadvantage employees in one protected group. For Americans, this analysis is straightforward because "disparate impact" law in the United States is as evolved as anywhere. Indeed, some of the subtler disparate impact scenarios actionable stateside are far less likely to draw notice overseas—for example, the American government position that refusing to hire convicted criminals has an illegal disparate impact against "African American and Hispanic men...."[31]

  Disparate impact law tends to be more developed in common law jurisdictions like Australia, Canada, New Zealand, South Africa and the UK—but, by U.S. standards, largely undeveloped elsewhere. Therefore, outside of common law countries, employers rarely launch American-style statistical adverse impact "regression" analyses to verify that employees' pay and rewards comply with gender discrimination laws. For example, these statistical analyses are virtually unknown in China, Japan, Germany, the Czech Republic, Hungary and for that matter most other countries.

  That said, though, statistical-adverse-impact-on-pay analyses do get run, on occasion, in the UK and Australia—in the UK, these are called "Job Evaluation Schemes." But these may be more common in the public sector than among nongovernment employers, because in some jurisdictions equal pay claims arise mostly in the public sector. In Canada, though, statistical adverse-impact analyses of pay / rewards are increasingly common.

- *Protected group*. In auditing compliance with local rules on both adverse treatment ("direct") and disparate impact ("indirect") discrimination, be sure rewards systems fairly compensate members of each locally protected group. Expect each jurisdiction to impose its own list of protected groups or traits. Most jurisdictions protect gender, race, religion, disability and (increasingly) age and sexual orientation. In addition, individual jurisdictions protect quirky groups not normally protected elsewhere. In the European Union, to pay employee members of one political party more than employees in another party is theoretically illegal because the EU protects "political opinion or belief."[32] India protects caste, Ireland protects the itinerant homeless ("travelers"), South Africa protects HIV status, China protects rural background and laws in Yemen protect *al akhadam* (low-caste, dark-skinned servants). The United States may be unique in the world in protecting veteran status.

- *Gender*. That said, in the specific context of pay discrimination (as distinct from discrimination in hiring, firing and terms / conditions of employment beyond remuneration), the most vital protected group is inevitably *gender*. Employees and gov-

ernment enforcers are particularly likely to look for gender discrimination when analyzing "equal pay" compliance of employer rewards systems. Many countries including the United States impose targeted gender discrimination laws specific to the pay / benefits / equity context.[33] Plus, some countries impose gender-specific discrimination laws like Korea's Gender Equality Employment Act that reach—but are not specific to—compensation.

- *"Comparable worth."* Some targeted gender pay discrimination laws impose what in the United States is called "comparable worth" analysis, and in the UK is called "work of equal value." Comparable worth / equal value laws require equalizing ("validating") pay across separate job categories traditionally worked by one gender or the other. For example, an employer's secretaries might argue they contribute as much comparable worth / equal value as the company's truck drivers, and therefore deserve the same pay rate, even though the employer has completely different pay scales for secretaries and truck drivers.

  Decades ago, U.S. workers' rights advocates and law professors championed comparable worth as a possible extension of U.S. employment discrimination law. But the U.S. Supreme Court rejected the comparable worth idea. In the United States, "[t]he 'comparable worth' theory, pursuant to which plaintiffs have asserted that courts should infer an intent to discriminate based on the employer's practice of setting dissimilar salaries for jobs deemed to be of comparable worth, in reliance on market rates, has consistently been rejected since the Supreme Court's 1981 decision in *County of Washington v. Gunther* [452 U.S. 161]."[34]

  Indeed, it could be argued that comparable worth is un-American in its core assumption that experts can somehow "validate" pay rates across distinct job categories. This view rejects the basic Chicago-school free market capitalist principle that the wage differential between any two jobs is the free market economy's inherent reflection of those two jobs' relative contributions to society. To a free marketeer, market wage rates, by definition, reflect the "worth" or value of any given job. Pilots earn more than, say, cab drivers because society values pilots more, which also explains why pilots earn more than flight attendants. Do we really want to open the comparable worth Pandora's box and unleash industrial workplace experts pontificating on relative values of dissimilar jobs without regard to those jobs' actual market pay rates?

  But this is just a parochial American view. Comparable worth mandates thrive in certain other jurisdictions, imposing real burdens on local employers' compensation systems, particularly but not exclusively in the public sector. In February 2012, for example, Fair Work Australia (an adjudicatory body) issued a sweeping decision[35] under Australia's Fair Work Act 2009 that boosted pay for a class of more than 200,000 women in Australia's "Social and Community Services Sector" on a comparable worth theory. Fair Work Australia held:[36]

  > [F]or employees in the SACS industry, there is not equal remuneration for men and women workers for work of equal or comparable value with comparison with workers in state and local government employment.

  Similarly, Ontario's Pay Equity Act[37] requires employers affirmatively to run comparable worth / equal value analyses—and Ontario's increasingly proactive Pay Equity Commission launches unannounced enforcement audits. The Quebec Pay Equity Act[38] is just as strict; Quebec's pay equity law is designed "to redress systemic wage discrimination, which was seen to be the result of long-standing stereotypes and social prejudices, the undervaluation of women's jobs and the professional segregation of women in [Quebec] society."[39]

  Check whether a multinational's operations include any comparable worth jurisdictions. In those locations, be sure to comply with comparable worth mandates, however strict.

- *Local citizenship.* Moving beyond gender, another protected group subject to special scrutiny under some countries' pay-specific discrimination laws—a category unexpected to Americans—is *local citizenship*. Some developing countries prohibit employers from compensating aliens more generously than locals, resisting those multinationals that "parachute in" an expatriate and reward him better than locals who work every bit as hard. For example, the Bahrain labor law[40] mandates that "wages and remuneration" of "foreign workers" not exceed pay for local "citizens" with "equal skills" and "qualifications" unless necessary for "recruitment." The Brazil labor code[41] requires that "salary" of a local citizen not be "smaller" than pay of a "foreign employee perform[ing] an analogous function." Watch for laws like these when structuring expatriate packages.

B. "Job Category" Pay Discrimination

So far we have been discussing pay discrimination laws that are conceptually similar to U.S. employment discrimination laws in that they are triggered only if an employer disadvantages a discriminatee based on protected-group status. Moving now beyond protected-group discrimination laws, many countries outside the

United States impose separate "job category" or "colleague" pay discrimination laws—in France, called "equal work equal pay" laws—under which every employee enjoys a legal right to be rewarded the same as similarly situated colleagues in equivalent jobs, *even if both discriminatee and comparator belong to all the same protected groups.*

As applied to a single job, these laws are conceptually simple: Two colleagues working the same position enjoy a legal right to the same pay package, even if both are white 45-year-old Christian men originally from Norway or even if both are black Muslim 26-year-old women originally from Yemen. Under these job category or colleague pay discrimination laws, job category becomes, itself, a protected group. To pay different wages or benefits to two identically situated colleagues working the same job is illegal even if the two are twins. The lower-paid colleague has a legal right to "equal pay for equal work."

Going further, a rarefied version of job-category discrimination law addresses irregular—temporary / part-time / contingent—status. Indeed, every European Union member state expressly prohibits pay discrimination on the basis of *irregular status* like temporary, part-time or contingent work.[42] This means that European employers cannot legally pay their temps and part-timers lower wages or stingier medical insurance or retirement benefits. These same laws can even force European employers to credit part-time service as full-time for calculating years-of-service requirements.[43] From a U.S. perspective, this concept is a "game changer." American employers almost universally deny American part-timers and temps the full package of benefits available to regular full-timers, and American employers often pay part-timers and temps lower hourly wages than regular full-timers. As just two examples, this practice explains the huge uptick in U.S. universities' use of adjunct faculty and U.S. law firms' use of contract lawyers. In Europe, these practices could constitute illegal pay discrimination.

Another version of job-category discrimination is the equal pay law doctrine in the Czech Republic that employers operating across the country pay their employees in similar jobs equal pay rates regardless of location (irrespective of protected group status). Czech unions push employers to live up to "geographic equal pay," and so some Czech employers run internal analyses to ensure compliance. The Czech geographic pay equity rule causes headaches for employers operating across the Republic, because (not surprisingly) cost-of-living and market pay rates in the Prague area significantly outstrip pay in the Czech countryside.

Beyond Europe, two countries that impose job category discrimination rules of one type or another include Brazil and China:

- *Brazil*: The Brazil labor code[44] mandates equal pay among employees who perform "identical" work of the "same value." The text of this section of Brazil's code seems to link this mandate to protected group status—"sex, nationality or age"—but Brazilian courts completely decouple the equal pay mandate from protected group status. A 2007 case explains that "what is relevant for the purpose of [Brazilian] equal pay [analysis] is whether the identical tasks were performed by the claimant and comparable colleagues with the same quality and productivity"—*regardless* of sex, nationality or age.[45]
- *China*: China's 2008 Employment Contract Law[46] mandates that "the principle of equal pay for equal work shall be observed" (absent a union agreement to the contrary), without linking "equal pay" to gender or other protected group status. Implementing regulations are silent on equal pay; Chinese law on this point remains underdeveloped.

Job-category or colleague-discrimination laws get even trickier where they enter the realm of *comparable worth/equal value*—equating separate jobs that purportedly contribute equal value to an organization but without linking claims to comparitors' protected-group status. For example, France's job-category pay discrimination law allows for comparable worth / equal value theories but subject to employer defenses based on different lengths of service or different performance and responsibilities, and affirmative action / "positive discrimination" for nationality.[47] In one landmark French case, a lawyer won a daily lunch subsidy that the employer law firm had granted only to non-lawyer staff, on the theory that the law firm could not legally favor employees in a lower professional category.[48]

In a June 2009 decision under the Finnish Employment Contracts Act 2001,[49] Finland's Supreme Court mandated equalizing employee benefits across two very different job categories. In that case, a construction company had enrolled its *clerical* workers in a generous medical insurance plan that had excluded its *construction* workers. The construction workers sued for the medical insurance under a job category (not gender-linked) comparable worth / equal value theory—and won. The employer argued, but failed to prove, that each clerical worker contributed greater value. The court ordered the employer to extend the insurance benefit to the construction workers.

These cases, of course, require "validating" allegedly comparable jobs. Not all jobs claimed to be comparable are actually comparable. One French court ruled that a human resources job is not functionally comparable to—and therefore does not merit the same pay as—positions of "project manager" and "commercial manager."[50]

In complying with pay discrimination laws internationally, be prepared to wade into foreign discrimination waters deeper even than America's otherwise robust

body of employment discrimination law. Any multinational offering cross-border rewards schemes should verify that its cross-border (and foreign local) pay, bonus, benefits, commission and equity programs comply with each affected jurisdiction's prohibitions against both "protected group" and "job category" pay discrimination. Global human resources compliance audits that reach pay discrimination should account for the various theories in play here, including comparable worth discrimination and local citizenship discrimination. At the extreme, jurisdictions like France, Finland and Québec actually impose mandates requiring "job category comparable worth" validations; these countries prohibit pay discrimination across distinct job categories regardless of claimants' and comparators' protected group status.

Part Four: Fighting Workplace *Harassment* on a Global Scale

U.S. multinationals proactively ban illegal harassment across their operations worldwide, almost always as part of their prohibition against workplace discrimination. But the radically different harassment law landscape outside the U.S. seriously complicates global anti-harassment rules and training.

Harassment law in the U.S.: Over the past few decades, American workplace harassment law has evolved into the most intricate body of harassment jurisprudence in the world. U.S. federal and state court decisions in harassment cases now construe concepts as esoteric as a "tangible employment action requirement for vicarious liability" in *quid pro quo* harassment, an "affirmative defense of unreasonable failure to take advantage of preventive or corrective opportunities," a "severe and pervasive requirement for hostile environment harassment" and claims of "implicit *quid pro quo* third-party harassment."

These esoteric harassment law doctrines evolved in U.S. court decisions even though the texts of American statutes tend not even to prohibit workplace harassment. U.S. federal harassment prohibitions are judge-made extensions of statutes that nominally prohibit only *discrimination*. Even the U.S. EEOC defines "harassment" as "a form of employment discrimination."[51] Therefore, harassing behavior in the American workplace tends to be actionable only to the extent it is a form of discrimination. *Non-discriminatory* harassment—sometimes referred to as bullying, pestering, abusive work environment or equal opportunity harassment—tends to be perfectly legal stateside. A Washington State Department of Labor & Industries publication issued to combat abusive workplace behavior actually concedes that "[b]ullying in general is NOT illegal in the U.S. unless it involves harassment based on "protected status.'"[52]

Harassment law abroad: In contrast to the tough, well-evolved but narrow American law stance against workplace harassment, the harassment-law landscape overseas differs greatly. Singapore imposes no specific laws banning workplace harassment. Countries like China and Russia may ban harassment on paper, but they tend not to offer workplace harassment victims many tough precedents or readily enforceable remedies. (Although there are some: In February 2013, Chinese "[m]ilitary prosecutors indicted a one-star general on charges of sexually harassing a military officer."[53]) In 1997 India's Supreme Court banned workplace sex harassment,[54] but women's rights advocates say India has a long way to go in enforcement. More enlightened countries like the Netherlands and Luxembourg impose tough bans against workplace harassment, but confounding case law in these jurisdictions actually supports proven sex harassers—labor judges in these countries can be quick to hold dismissal too severe a punishment for a proven sex harasser, particularly a long-serving executive with a relatively clean prior discipline record.[55]

Meanwhile, common-law countries impose tough anti-harassment rules broadly consistent with the U.S. model. All European Union states now impose laws that prohibit certain harassment, and awareness is spreading. A January 2013 article in the German press is called "Wake Up Germany, You've Got a Serious Sex Harassment Problem."[56] Countries like France and Egypt have criminalized certain types of harassment—France reenacted its sex harassment criminal law in 2012.[57] Under a 2006 Algerian law,[58] anyone who "exert[s] pressure to obtain sexual favors" in Algeria faces two to twelve months in prison plus a fine of up to 200,000 dinars (U.S.$2,540). These days even Shari-ah law gets interpreted to criminalize workplace sex harassment—in October 2010, a judge in Arar, Saudi Arabia sentenced a sex harasser to *death*. The Saudi harasser had tried to blackmail a government employee at her workplace with revealing photographs, but she denounced him to the Saudi Virtue Police.[59]

As countries overseas get serious about stopping workplace harassment, their harassment laws mutate into new forms, some even broader (if less nuanced) than counterpart U.S. doctrines. Unfortunately, these growing differences leave our state-of-the-art American tools and training for weeding out the U.S. variety of workplace harassment increasingly unhelpful overseas. So any multinational trying to foster a harassment-free workplace internationally these days needs subtlety, nuance, strategy and finesse. Reflexively extending the rigid American "zero tolerance" approach around the world does not work.

Toward a global approach to eradicating workplace harassment: Multinationals pursuing a global approach to eliminating harassment from their worldwide workforces need to account for the international context by factoring in seven issues: alignment; protected status; affirmative

mandates; policy drafting; launch logistics; communications / training; and investigations. We address each.

- *Alignment*. A multinational must align any global approach to eradicating workplace harassment with its own approach to preventing workplace discrimination and promoting equal employment opportunity. Be sure a global harassment policy and international harassment training, as well as a cross-border anti-harassment enforcement initiative, dovetail with the multinational's global initiatives as to discrimination and diversity. Tackle these three related issues together, not in isolation.

- *Protected status*. Because American-style prohibitions against workplace harassment grow out of U.S. statutes that prohibit workplace discrimination, American employers' harassment policies and training tend to ban only *status-based* harassment linked to a victim's membership in a protected group—sex harassment, race harassment, disability harassment, age harassment, religious harassment, even theoretically veteran status harassment and genetic harassment. To date, not too many U.S. domestic employers have taken the bold step of imposing tough, enforceable workplace rules that ban status-blind harassment—bullying, pestering, equal opportunity harassment. A trend may be emerging at the U.S. state government level to outlaw so-called "abusive work environments," but state proposals here so far have little traction. (Remember even Washington State's campaign against abusive work environments concedes "[b]ullying in general is NOT illegal in the U.S.")[60]

By contrast, many other countries already prohibit infinitely broader status-blind harassment (abroad called workplace "bullying," "mobbing" "psycho-social harassment" or "moral harassment"), without regard to protected group status. A Belgian law of June 2002 prohibits workplace "pestering." A French law of June 2010 criminalizes "psychological violence." A Luxembourg law of June 2009 prohibits "bullying and violence at work." Venezuela's 2005 "Organic Law on...Work Environment" prohibits "offensive, malicious and intimidating" conduct in the workplace, including "psychological violence" and "isolation." And mushrooming case law in Brazil imposes damages for workplace "moral harassment"—Brazilian moral harassment law in recent years has become a common claim in all sorts of workplace disputes. In Brazil these days, even employers that legally assign and legally pay overtime have faced "moral harassment" litigation from overworked employees arguing the extra hours amount to a form of bullying.

In theory, foreign status-*blind* harassment laws are infinitely broader than American-style status-*based* harassment prohibitions: A doctrine that bans abusive behavior for whatever reason is infinitely broader than a targeted American-style rule that prohibits only harassment motivated by a dozen or so protected traits. For a multinational, the challenge here is how to factor these broad foreign status-blind harassment laws into a workable global workplace anti-harassment policy and training module. Expanding a U.S.-style harassment policy, and training, to account for foreign status-blind harassment prohibitions requires exponentially increasing its scope, and this expansion makes U.S. employers uncomfortable, especially if the broadened policy and training will reach into U.S. workplaces. Too many U.S. multinationals downplay this conflict and simply issue overly narrow international policies that merely ban status-based harassment. But this approach blows a huge hole in the multinational's international harassment compliance initiative, because the employer's internal harassment prohibition bans much less than all illegal harassing behavior.

- *Affirmative mandates*. Every law against workplace harassment imposes a negative *prohibition* against employers (and often co-workers) who commit illegal harassment. In addition, some jurisdictions' laws go farther and impose affirmative employer *duties* or *mandates* as to harassment compliance. Multijurisdictional harassment initiatives (policies, training, enforcement) need to account for these. A global policy or code of conduct provision that merely bans illegal harassment does not go far enough in a jurisdiction where employers have to take affirmative harassment compliance steps.

For example, like California, South Korea requires employers to offer periodic training on sex harassment, and India requires training on its sex harassment law.[61] Chile, Costa Rica, India, Japan and other countries affirmatively require employers to issue written sex harassment policies. The Austrian Supreme Court requires employers affirmatively to investigate complaints of sex harassment,[62] as do statutes in countries including Chile, Costa Rica, India, Japan, South Africa and Venezuela. Costa Rica requires employers to institute sex harassment claim procedures and to report each sex harassment claim to the Ministry of Labor Inspection Department. A 2006 Japanese regulation[63] imposes similar affirmative mandates.[64]

- *Policy drafting*. In drafting a multinational's cross-border anti-harassment policy (or code of conduct provision), be sure the policy mandates actually work overseas. Reject American-style prohibitions that are unworkable abroad. To do this, define key terms cross-culturally and ensure the policy's explicit prohibitions are enforceable in each affected jurisdiction:

  – *Define key terms cross-culturally*. Workplace harassment policies implicate concepts that are highly susceptible to being misconstrued abroad. Be sure to be clear. For example, the common harassment policy terms "inappropriate" behavior and "improper" touching get in-

terpreted very differently depending on cultural context—some behavior obviously "inappropriate" or "improper" in Atlanta, Roanoke and Milwaukee may not seem so out of line in Athens, Riyadh or Mexico City. "Kissing," prohibited by many American harassment policies and training modules, usually implies romantic mouth-kissing without distinguishing the cheek-kissing common among co-workers in many countries. Even the term "harassment" itself takes on very different meanings abroad. In Brazil, "harassment" (*assédio*, in Portuguese) is understood to mean overt and abusive acts like bullying and *quid pro quo* harassment and therefore does not reach "hostile environment" harassment. For that matter, employees abroad are not likely to understand even basic U.S. harassment terms of art like "hostile environment" and "*quid pro quo*" harassment.

– *Ensure the policy's explicit prohibitions are enforceable in each affected jurisdiction*. A harassment policy's specific restrictions may raise legal issues abroad. Be sure policy prohibitions are enforceable overseas. For example, again we have the "kissing" problem: The common U.S. harassment policy provision prohibiting on-job "kissing" is unworkable in places like France where men and women co-workers kiss one another every morning as a greeting. Also, restrictions against co-worker dating raise serious privacy law issues and spark human resources challenges overseas, especially in countries like Germany and Switzerland where birth rates are low and a third to half of married couples are believed to have met in the workplace. Society in these countries actually sees workplace romance as vital to sustaining the local population base, and so local employees and even courts push back hard against American-style co-worker dating restrictions—or, at least, passive-aggressively ignore them. In these jurisdictions, even a workplace rule that merely requires dating co-workers to disclose their relationships almost always offends. In one extreme case, a Russian judge confirmed a worker's sex harassment allegation as true but nevertheless denied her claim, reasoning that "*if we had no sexual harassment, we would have no children*."[65]

- *Launch logistics*. Be sure to launch a cross-border harassment policy in a way that complies with overseas procedures for implementing new work rules. Every harassment policy imposes a discipline or termination sanction, but we have seen that many jurisdictions get surprisingly lenient when an employer invokes an anti-harassment policy to fire a harasser for good cause. So the policy needs to stick. Harassment policies are work rules that can be subject to mandatory "information and consultation" with works councils and health-and-safety committees or mandatory bargaining with unions. Launching a new harassment policy may also require tweaking lists of local work rules, such as the work rules required in France, Japan, Korea and many Arab countries. And any harassment policy that imposes a mandatory disclosure rule—such as a rule requiring dating co-workers to disclose their relationships—can trigger employment and data privacy law challenges.

- *Communications/training*. A multinational implementing a global harassment policy should communicate its policy to employees abroad and then train on how it works. But never directly export U.S. online or live harassment training modules. Training about sex harassment, in particular, raises unique cultural challenges in places where harassment remains poorly understood. Foreign workers, male and female alike, used to mock U.S.-generated sex harassment and gender-sensitivity training. In recent years, overseas workers may have become superficially more accepting of these training sessions, but many overseas employees forced to sit through harassment modules may still see this as a puritanical American exercise irrelevant to their local environment. Indeed, in some pockets of the Arab world, Africa, Asia, Latin America and Eastern Europe, a workforce may openly scoff at training seen as too awkward, too "politically correct" and too insensitive to the local environment. For example, at a February 2013 sex harassment training session at Chinese manufacturing giant Foxconn, one "18-year-old female worker" was "often"*— during the sex harassment training session itself*—"subjected to obscene gestures and sexual harassment from three male colleagues."[66] So tailor anti- harassment communications and training for local audiences. Tone down messages likely to ruffle local feathers. Make the case for why harassment is a local problem. Show how harassment rules can work locally to improve local conditions.

- *Investigations*. U.S. employers understand the importance of thoroughly investigating credible harassment complaints, allegations and denunciations received both informally and through reporting channels like hotlines. Indeed, as already mentioned, law in Austria, Chile, Costa Rica, India, Japan, South Africa, Venezuela and elsewhere affirmatively *requires* employers to investigate allegations of sex harassment.[67] But even in these countries, an aggressive American-style workplace harassment investigation can trigger push-back and unexpected legal issues. So adapt overseas harassment investigations (and discipline for proven harassers) to comply with host-country rules and culture.

Part Five: Promoting Workplace Diversity on a Global Scale

Equal employment opportunity and diversity play a huge role in domestic American human resources administration and in U.S. employment law compliance—surely a bigger role than in any other country, particularly outside the common law world. So it might seem that, when it comes to promoting workplace diversity globally, American multinationals enjoy a clear head start. But very different demographics abroad make this head start less advantageous than it may at first appear. Indeed, in some contexts overseas, too much experience with U.S. diversity initiatives might even be a drawback.

How, specifically, does a multinational drive EEO compliance and foster workplace diversity across jurisdictions? U.S. EEO and diversity tools were originally honed for the atypical, rarefied environment of U.S. discrimination, harassment and affirmative action law, and for the unique demographics of the United States. So they do not always work well abroad, at least not without significant retooling. This is particularly true as to those American diversity tools and programs engineered to increase demographic representation in the workplace through recruiting and retention (as opposed to softer diversity training programs meant to enhance respect and tolerance among co-workers already in a workforce).

Any diversity recruiting / retention initiative will fail if the employer cannot measure its success. And no employer can measure the success of a diversity program without consensus around the meaning of the core term "diversity." Employers promoting diversity across borders must therefore begin by confronting a tough but central question: What do we mean when we say we want "diversity"? Very different demographics and "core diversity dimensions" overseas mean that the answer will not be the same abroad, as compared to domestically within the U.S.

The U.S. understanding of "diversity." In addressing "diversity," the U.S. Supreme Court has adopted the increasingly-popular "big tent" view, saying that "[m]ajor American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints."[68] This all-encompassing approach sees "diversity" as far more than the three narrow but well-defined "diversity dimensions" that U.S. government statisticians track via America's mandatory employer diversity reporting form, the EE0-1: gender, "Hispanic or Latino" ethnicity, and "race" defined as "White," "Black or African American," "Asian," "American Indian or Alaskan Native" or "Native Hawaiian or Other Pacific Islander."

U.S. diversity experts these days expand their efforts well beyond these three EEO-1 categories of gender, Hispanic / Latino ethnicity and race. Modern diversity experts, along with the Supreme Court, speak broadly (if vaguely) of "diversity of backgrounds," "diversity of opinions" and "diversity of experiences." Diversity professionals also cultivate diversity among age groups, sexual orientations, the "differently abled," and other groups, legally protected and non-legally protected alike. To a modern U.S. diversity expert, confining a corporate diversity initiative just to the three EEO-1 categories would be far too narrow.

That said, though, the fact remains that domestically within the U.S., the *sine qua non* of a "diverse" workforce *actually* is rooted in our three "old school" U.S. EEO-1 categories. To Americans, those three "diversity dimensions" stand alone in their own tier, with all other categories less important. After all, no American would consider a workplace of all white, non-Hispanic men as "diverse"—even if those Anglo white guys came from various cities, were alumni of various schools, voted for various political parties, cheered for various sports teams and were of various religions, ages, sexual orientations and physical abilities. On the other hand, we would all have to concede that a workforce is indeed "diverse" if made up of half men / half women and boasting big percentages of Hispanics, blacks, Pacific Islanders, Asians and Native Americans—even if it somehow turned out that this gender and race balanced workforce included only able-bodied, heterosexual, Ohio-born, Democrat Catholics over age 40.

- Among our three EEO-1 "diversity dimensions" (gender, Hispanic ethnicity, race), one category—race—stands above the others. According to the *Yale Journal of International Law*,[69] "U.S. judges, activists and academics have theorized extensively about how the struggle for African Americans' civil rights shapes U.S. law prohibiting discrimination against other groups."

The international understanding of "diversity." For years the importance of "diversity" has been growing outside the U.S. According to a report from the Conference Board,[70] "demographic changes in Europe, combined with…regulations, are…pressur[ing European] companies to increase the diversity of their workforces." A study by the Lee Hecht Harrison firm found that two-thirds of employers *worldwide* see employer diversity programs as key retention tools. Some countries now actually mandate specific diversity initiatives: South Africa requires workplace diversity plans, for example, and Brazil and Germany require affirmative action for the disabled. European jurisdictions are requiring gender equity on corporate boards of directors. India now imposes some caste diversity rules in the public sector.

So in today's diverse, multi-cultural world markets, all multinationals, regardless of where headquartered, should be thinking about how to foster inclusion and equality of employment opportunity within workforces worldwide, and how to recruit and retain diverse workforces.

But in propagating a diversity program abroad we come right back to our definitional question of metrics: *What do we mean by "diversity"?* Like plugs on our American electrical appliances, our U.S. EEO-1 metrics of gender, Hispanic ethnicity and race just will not fit overseas. Indeed, our American understanding of race and ethnicity is so uniquely our own that even the U.S. Census struggles—recent immigrants cannot interpret American census forms because peoples from other cultures do not "get" how Americans categorize ourselves. According to *The New York Times*:[71]

> The pattern of race reporting [to the U.S. Census] for foreign- born Americans is markedly different than for native-born Americans.... For example…a majority born in the Dominican Republic and El Salvador, who are newer immigrants, described themselves as neither black nor white.... Among all who identified themselves as Asian-Americans, which is often understood to mean born [in the U.S.], 67 percent were, in fact, foreign born.... [According to] Elizabeth M. Grieco, Chief of the Census Bureau's immigration statistics staff,…it's a part of not knowing where they fit into how we define race in the United States.

This disconnect between what Elizabeth Grieco calls "how we define race in the United States" and how other countries define race (and ethnicity) explains why workforce demographic diversity programs hatched from U.S. EEO-1 metrics are bound to fail if transplanted overseas. Consider:

- The "Hispanic/Latino" EEO-1 ethnicity category is unique to the U.S., is misunderstood outside the U.S., and is meaningless where there are virtually no Hispanics/Latinos—countries from Albania to Zimbabwe—as well as where there are virtually *nothing but* Hispanics/Latinos—Spanish-speaking Latin America, Spain, Equatorial Guinea.
- Concepts of race differ abroad. In England, "Asian" means Indian/Pakistani but rarely includes peoples of the Far East (who are called "Orientals"). South Africa's diversity-promoting EEA-2 form distinguishes "Whites," "Indians" and "Africans" from "Coloureds"—a mixed-blood category that looks offensive to Americans. At the same time, of course, the U.S. category "African- American" looks offensive in the many countries of the world with big populations of "Africans" who are not "American."
- Labor-pool demographics make racial diversity statistically impossible in much of the world. In 2013 the *CIA World Factbook*[72] reported that Japan is 98.5% Japanese and more than 99.4% Asian. Korea is 100% Korean ("except for about 20,000 Chinese"). Finland is 99% Finnish and Swedish. Paraguay is 95% "mestizo," and Mali is more than 95% black. Even the increasingly heterogeneous UK remains 92.1% white.
- Our three American EEO-1 categories are too coarse to account for the granular demographic distinctions necessary abroad. In India, caste status is legally protected—but in EEO-1 terms, all Indians are "Asian." In Africa, tribal ancestry is critical—but in EEO-1 terms, all tribal Africans are "black." In Spain, Basques and Catalans speak their own languages and promote separatism—but in EEO-1 terms, all Spaniards, Basques and Catalans are "Hispanic/Latino whites." In Canada, French Canadians are culturally distinct—but in EEO-1 terms, they are, like most Canadians, "non-Hispanic/Latino whites." And the same is true for the Walloons and Flemish of Belgium.
- Even workplace *gender* diversity can be impossible abroad. In Saudi Arabia, just five percent of the workforce is female and local law requires segregating women workers from men.

According to *HR Magazine*,[73] U.S. "HR directors are finding that one-size-fits-all [diversity] programs" launched overseas "will not work and might not even be understood." Andrés Tapia, serving as Chief Diversity Officer at Hewitt Associates (now AON Hewitt), once said "we're beginning to see an increasingly resentful backlash against the American version of diversity abroad."[74] Outside the U.S., the complaint Tapia heard most often was that "this diversity thing is an American thing."[75] This tension with cross-border diversity initiatives forces U.S. multinationals to confront what "diversity" means in the cross-border context.

Three viable cross-border diversity initiatives. Because U.S. diversity metrics and the American understanding of "diversity" do not travel well, any U.S.-headquartered multinational intending to launch, across regional or worldwide workforces, a diversity initiative focused on recruiting and retention should resist the urge to transplant its U.S. approach. Retool an American diversity initiative by using internationally appropriate metrics and a global understanding of "diversity." There are at least three alternate designs a multinational might use in transforming a made-in-the-U.S.A. diversity initiative into a viable international one: (1) cross-cultural understanding, (2) gender inclusion and (3) local racial/ethnic diversity.

- *Cross-cultural understanding.* International project teams with members from different countries can run into misunderstandings because of deep-rooted cultural differences. Even within a region as well-integrated as Western Europe, work styles differ and underlying assumptions and attitudes diverge across a team of, say, Britons, French, Germans and

Italians. Cross-cultural understanding sessions can address these problems with training focused on attitudes. But these soft training programs are so distinct from hard demographic "diversity" initiatives focused on recruiting and retention metrics that using the "diversity" label here is perhaps disingenuous. One human resources manager, Suzanne Bell of Toyota Financial Services, once suggested keeping the distinction clear by labeling this training "Global Cultural Competence" or "Global Cultural Awareness" programs—eschew the word "diversity" entirely.[76]

- *Gender inclusion*. Homogeneous racial demographics in many overseas markets may block efforts at racial diversity, but *gender equity* is good everywhere (except in Saudi Arabia, where in many respects it remains illegal). Women are underrepresented, especially in leadership roles, in so many overseas workforces. Gender inclusion is becoming a hot issue in many jurisdictions like Europe, which is requiring gender balance on corporate boards of directors. Some American multinationals therefore focus their outside-U.S. diversity efforts on promoting gender inclusion, reserving race and ethnicity for their domestic U.S. diversity programs. According to *HR Magazine*,[77] as far back as the early 2000s Chubb, DuPont, Eastman Kodak, Ford and J.P. Morgan were all testing gender diversity programs in Latin America.

- *Local racial/ethnic diversity*. Bold multinationals that take international workplace diversity seriously enough to confront the irrelevance of the three U.S. EEO-1 categories abroad might promote racial / ethnic inclusion by tailoring overseas diversity metrics to the different "core diversity dimensions" of their overseas workforces. It makes absolutely no sense to track the "Hispanics" and "African-Americans" within a workplace in, say, Russia, India, Chile, Thailand or South Africa. Ask instead: *Which "diversity dimensions" and demographic categorizations are locally appropriate in each of our overseas locations?* Then implement meaningful demographic benchmarking metrics on a localized basis. Does your Mexico City executive suite reflect Mexico's Indian / Mestizo majority? Is your Brussels facility equally inclusive of both Flemish and Walloons? Does your Zurich branch welcome Switzerland's French and Italian-speaking minorities? Do your Tokyo office policies fight Japan's entrenched discrimination against ethnic Koreans, Ainus and Ryukyuans?[79] Do local taboos—and data privacy laws—prevent you from learning the status quo, taking action and measuring success? Going beyond racial / ethnic categories, how can a global diversity program cultivate diversity among age groups, sexual orientations and disabilities? Bold cross-border diversity initiatives of this sort that actually focus on locally-relevant racial and ethnic distinctions remain rare. But they may be the next frontier.

"Core diversity dimensions" and the very definition of what it means to be "diverse" differ widely from one country to the next across our increasingly homogeneous "global workforce." Any multinational launching cross-jurisdictional work rules, international HR policies, global code of conduct provisions or other border-crossing initiatives that champion diversity in overseas recruiting and retention should modify existing U.S. domestic diversity policies and offerings—or even completely start over abroad.

Conclusion

While under U.S. law, workplace "harassment" tends to be a species of "discrimination" law, workplace harassment and discrimination overseas are often completely separate legal concepts. A U.S. organization with "zero tolerance" for workforce discrimination and harassment will be understandably reluctant to allow any discrimination or harassment in its overseas operations, but the concept of what behavior constitutes inappropriate and illegal discrimination and harassment needs to be flexible enough to accommodate very different foreign laws and social environments. American multinationals need to think carefully about how they extend, internationally, their U.S.-style discrimination and harassment policies, tools and training.

Equal employment opportunity plays a bigger role in U.S. human resources administration and U.S. employment law compliance than in perhaps any other country, particularly outside the common law world. And so American-based multinationals often place more emphasis on EEO issues than do multinationals headquartered elsewhere.

There are excellent reasons why all multinationals should strive to equalize employment opportunities across their workforces worldwide. But how, specifically, can headquarters control EEO compliance strategy on a *cross-jurisdictional* basis? EEO tools that American multinationals originally developed in the atypical and rarefied legal environment of U.S. discrimination, harassment and diversity laws do not work well abroad, without modification.

Any multinational launching cross-jurisdictional work rules, international HR policies, global code of conduct provisions, multi-country training modules or other border-crossing initiatives that touch upon discrimination, harassment or diversity should modify these offerings carefully to account for the special context of the global workforce.

Endnotes

1. Barbara Lindemann & Paul Grossman, Employment Discrimination Law, 4th ed. (2007 & supp.).
2. SHRM HR Talk / Global HR, at www.shrm.com.
3. Decree no. 2011-822 of July 7, 2011.
4. Outside the labor union context and outside the state of Montana.
5. In June 1963, President John F. Kennedy "proposed by far the most comprehensive civil rights legislation to date, saying the United States will not be free until all its citizens are free." Civil Right Act, History.com, www.history.com / topics / civil-rights-act.
6. *Cf. Richardson v. Oracle Corp. Aust. Pty. Ltd.*, [2013] FCA 102 (Aust.) at 163, 164 (Australia-specific "elements were absent from [a multinational's] global online [discrimination / harassment] training package…, the omission of these important and easily included [Australia-specific provisions in the multinational's] statements of its own policies is a sufficient indication that [the multinational] had not…taken all reasonable steps to prevent sexual harassment").
7. *Cf.* A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 107-11 (2012).
8. *See* Part Two.
9. Think of India, for example. A global anti-discrimination policy that lists U.S. protected groups might actually be futile in India. A U.S.-based multinational's India facility's employee and job applicant populations will show up as something like zero percent white, zero percent black (and certainly zero percent African-American), zero percent Native American / Pacific Islander, zero percent Hispanic—and 100% Asian. That looks like an imbalance, but it is only an imbalance from an *American* perspective. Meanwhile, the American perspective is blind to the real diversity dimension—apart from gender and age—that matters in India, to Indian job applicants and Indian employees, which is *caste*. Is the workforce caste-balanced or does it favor the upper castes and discriminate against lower castes? The American company will not know, because it never bothered to ask that question. The listing of protected traits, ideally, will reflect local so-called "diversity dimensions." Or else the listing of protected traits might confine discrimination and diversity concepts to gender (except in Saudi Arabia, where gender segregation rules forbid Western-style gender equity and require a separate but equal doctrine).
10. 29 U.S.C. §§ 623(h) (ADEA abroad); 42 U.S.C. §§ 2000 e-1 (a), (c), 2000e-5 (f) (3) (Title VII abroad); 42 U.S.C. §§ 12111 (4), 12112 (c) (ADA abroad).
11. 29 U.S.C. § 621.
12. *General Dynamics v. Cline*, 540 U.S. 581 (2004).
13. Directive 2000 / 78.
14. *Id.*, article 1.
15. *Id.*, article 18.
16. Israel Retirement Law 2004 § 4.
17. *See, e.g., Weinberger v. Bar-Ilan Univ.*, Israel Labor Appeal case 209-10 (6 Dec. 2012); *Zozal v. Prison Author;* Israel HCJ case 1268 / 09 (27 Aug 2012).
18. EU Commission, "Age and Employment," doc. 10.2767 / 16878 (2011), p. 5, report by D. O'Dempsey & A. Beale.
19. See *Rosenbladt v. Oellerking*, Eur. Ct. Justice case C-45 / 09 (12 Oct. 2010); *Georgiev v. Tehnicheski*, Eur. Ct. Justice case C-250 / 09 (18 Nov. 2010); *Poste Italiane SpA*, Itl. Sup. Ct. decision #10985 (9 May 2013); *Seldon v. Clarkson Write & Jakes*, [2012] UK Sup. Ct. 16 (25 April 2012); German Fed. Labor Court ruling of 5 Mar. 2013.
20. *See e.g.*, two rulings of Denmark's Board of Equal Treatment of 11 April 2012.
21. "Age and Employment," *supra* note 18, at 6.
22. Louise Richardson, Vice President of AGE Platform Europe, presentation at UNOEWG (22 Aug. 2012), *available at* www.docstore.com.
23. *See, e.g.*, M. Winerip, *Set Back by Recession, and Shut Out of Rebound*, New York Times, August 27, 2013; A. Tugend, *Unemployed and Older, and Facing a Jobless Future*, New York Times, July 27, 2013.
24. S. Daley & N. Kulish, *Germany Fights Population Drop*, New York Times, Aug. 14, 2013, at 1,6.
25. *See Rosenbladt* and *Georgiev* cases, *supra* note 19.
26. That said, Americans should remember that as recently as the late 1980s our ADEA had a (now-repealed) cap that made mandatory retirement perfectly legal stateside.
27. *See Rainbow v. Milton Keynes Council*, UK Employment Appeals Tribunal 2008.
28. *See MacCulloch v. ICI*, UK Employment Appeal Tribunal 2008. Be sure foreign practices comply.
29. D. Bryan, "Creating a Global Benefits Strategy," *available at* www.internationalhrforum.com (11 / 09).
30. Examples of these laws include: Brazil constitution art. 7 items XXX-XXXI; EU Equal Treatment Directives 76 / 207 / EC and 200 / 78 / EC; South Africa Employment Equity Act 55 / 1998; Spain labor code arts. 4.2 (c), 17.1; U.S. Title VII / ADEA / ADA.
31. *EEOC Enforcement Guidance*, "Consideration of Arrest and Conviction Records in Employment Decisions," no. 915.002 (4 / 25 / 12).
32. EU Equal Treatment Directives, *supra* note 30.
33. Examples include: EU treaty article 141 and EU equal pay directive 75 / 117; the Ontario and Quebec Pay Equity Acts; the UK Equal Pay Act of 1970; and the U.S. Equal Pay Act of 1963.
34. Barbara T. Lindemann & Paul Grossman, Employment Discrimination Law 4th ed., vol. 1 (2007 & supp.), *supra* note 1, at p. 1281.
35. [2012] FWAFB 1000.
36. ¶ 2.
37. R.S.O. 1990, chap. P7, as amended 2009.
38. RSQ c E-12.001, as amended 2009.
39. L. Granosik, *Shouldn't a Secretary Earn the Same Salary as a Truck Driver? What is the Value of a Job?* International Bar Ass'n Discrimination Law Newsletter, vol. 15 no. 1 (July 2012).
40. Art. 44.
41. Art. 358.
42. EU directive 97 / 81 / EC.
43. *Cf. Lapouge v. Assoc. ADAPEI, CCcs* case # 07-40.289 (5 / 7 / 08) (France).
44. Article 46.
45. *Fisch v. Unibanco*, 2d App. Trib. #00530-2007-201-02-00-4 (2007).
46. Articles 11 and 18.
47. *See 15 Employees v. Renault, Cour de Cassation chamber social* (France) [CCcs] case # 92-42.291 (10 / 29 / 96).
48. *Meier v. Alain Bensoussan*, CCcs case # 05-45.601 (2 / 20 / 08); *principle affirmed in Pain v. DHL*, CCcs case # 07-42.675 (7 / 1 / 09); *principle expanded in Cour d'appel de Montpellier chamber social* case # 09 / 01816 (equalizing benefits between *cadre* [executive] and *non-cadre* employees).
49. Finland Sup. Ct. case # *K Jonathan Ben-Asher KO:2009:52.*
50. *Fornasier v. Sermo Montaigu, CCcs* case # 06-46.204 (6 / 26 / 08).
51. *See* "Harassment" page at www.eeoc.gov. / laws.
52. Workplace Bullying and Disruptive Behavior: What Everyone Needs to Know, WSDLI rept. #87-2-2011, Apr. 2011 (emphasis in original).

53. Jo Yeh, "One-Star General Indicted for Sexual Harassment," chinapost.com, Feb. 26, 2013.
54. *Vishakha v. State of Rajasthan*.
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56. A. Borchardt & T. Rest in *Suddeutshe Zeitung* (English translation by WorldCrunch).
57. Law no. 2012-954 of August 7, 2012.
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59. *See* Deccan Herald, India, *deccanherald*.com, Oct. 23, 2010.
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64. In addition, some jurisdictions' harassment laws, such as China's Special Provisions on Occupational Protections for Female Employees of April 2012, affirmatively require that employers provide a "harassment-free workplace." But in practice, mandates of harassment-free workplaces differ little from simple negative prohibitions against harassment.
65. E. McKenzie, *Sex Harassment Good for Procreation: Russian Judge*, Law360, Aug. 8, 2008.
66. Ma Yujia, *Foxconn Employees Suffer Sexual Harassment*, China.org.cn, Feb. 22, 2013.
67. *See supra* text accompanying note 62.
68. *Grotter v. Bolliner*, 539 U.S. 306, 330 (2003).
69. Vol. 35, p. 116 (2010).
70. Executive Action Series #175.
71. January 22, 2010.
72. www.cia.gov.
73. Nov. 2003.
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75. *Id.*
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78. *See supra* note 9.

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Immigration Basics for Expats and Secondees

By Patricia Gannon

Transferring employees of multinational companies to other countries requires thoughtful planning and analysis. An employer must consider various factors and make strategic decisions regarding the terms of employment as well as immigration options. Once an employer has identified the employee to be transferred, the employer must make a determination regarding the type of visa the employee should obtain. Choosing the type of visa is not a one-size-fits-all approach. There are various visa options, and the suitability of each type of visa will vary on each particular assignment and employee. Deciding which visa is the most suitable requires careful analysis of the company's business reasons for the transfer as well as the foreign employee's particular situation and long-term objectives. For our purposes, we will focus on the L and E visas, but please note that there is an array of work visas, most notably the H-1B. Based on multinational transfers, the most common are the E and L visas.

I. Visa Overview

When a multinational company is seeking to transfer its employees to the United States, the most common visas are the L-1 (Intracompany Transferees) and E-1/E-2 (Treaty Traders and Investors) visa classifications. Also common is use of the H-1B (Professional Workers) visa classification. An employee may qualify for each of these visas; however, based on the overall objective of the assignment one visa may be more appropriate and/or beneficial than the others.

A. L-1 Intracompany Transferees

The L-1 visa is reserved for multinational companies seeking to transfer its executives and managers (L-1A) and specialized knowledge workers (L-1B) to the United States. To qualify for the L-1 visa, the company must prove:

1. There is a *qualifying relationship* between the entity in the U.S. and the entity employing the foreign national abroad.
2. The employee has been employed full-time abroad for one continuous year in the last three years by a qualifying organization.
3. The employee will be transferred to the U.S. to fill a position that is *executive or managerial*, or in a position that requires *specialized knowledge*.
4. The U.S. entity will continue to do business in the U.S. and in at least one other country abroad for the duration of the employee's assignment in the U.S. in L-1 status.

i. Qualifying Relationship

A *qualifying organization* is defined as a: "United States or foreign firm, corporation or other legal entity" that "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary."[1] Attention to these definitions is very useful when faced with a more complex corporate structure of various owners and ownership interests. Use of these regulatory provisions is helpful to decide the type of evidence to be included to prove a qualifying relationship. Particular attention should be given to the definition of *subsidiary* and *affiliate:*

> Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.[2]

> An affiliate means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity, or (3) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.[3]

In cases where the corporate structure is not as straightforward or transparent, in-depth analysis is required to prove that the involved entities qualify. For example, using the definition of *subsidiary*, an argument can be made where there is less than majority ownership that the parent entity controls the entity. Evidence that can be included to show control includes corporate documents that prove voting percentages.

ii. Continuous Employment

In establishing the requirement that an employee have one year of continuous employment in the last three years, it is important to note that the employee does not have to be a current employee. If the employee was a prior employee, he or she may still qualify so long as the employment has taken place in the last three years.

The *continuous* requirement, however, can pose a problem for employees who during their employment, left the company to study abroad or temporarily left the company to work for a short duration for an unaffiliated company. Any of these events will break the continuity of the employment. However, if the employee has spent time in the U.S. visiting for business or pleasure or working in the U.S. for a parent, affiliate, branch or subsidiary, such time shall not interrupt the continuous period abroad. Notwithstanding, the employee must still fulfill the one year of employment requirement.[4]

iii. Employee's Position in the U.S.: Executive, Manager or Specialized Knowledge

Whether the position qualifies for the L-1 classification (L-1A for executives and managers and L-1B for specialized knowledge employees) will be determined based on the job duties the employee will perform and not based on job title. The employee does not have to be transferred to the U.S. in the same capacity.[5] In preparing the petition and corporate documentation, the duties should be drafted carefully and with sufficient specificity. The use of a generic description to describe the job duties should be avoided as USCIS will in many of these instances issue a request for additional evidence. The following are the definitions of *executive* and *manager*, as established by the Immigration and Nationality Act (INA) in Section 101(a)(44):

> (A) The term "managerial capacity" means an assignment within an organization in which the employee primarily—(i) manages the organization, or a department, subdivision, function, or component of the organization; (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization; (iii) another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.
>
> (B) The term "executive capacity" means an assignment within an organization in which the employee primarily—(i) directs the management of the organization or a major component or function of the organization; (ii) establishes the goals and policies of the organization, component, or function; (iii) exercises wide latitude in discretionary decision-making; and (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Where the executive role is somewhat easier to identify, managerial capacity faces some additional hurdles that have to be resolved prior to classifying the employee as a manager. First of all, first-line supervisors have been specifically excluded from this category unless the employees supervised are professional.[6] Secondly, when faced with a manager who will not be supervising any direct reports and instead will be managing an essential function, careful attention to detail is required to prove the employee does in fact qualify as a manager.

This *functional manager* category has been discussed extensively and has been the source of dispute in many cases. The function itself cannot be performed by the manager. What seems to be a simple approach of explaining that the manager will supervise, and not perform, the function becomes a little more convoluted when an employer has to explain who then, if there are no direct reports, performs the function. This is particularly true when dealing with a smaller organization where the hierarchy consists of a rather small group. If the manager will in effect perform the duties of the function supervised, the employee will not qualify and will have to seek classification under the L-1B Specialized Knowledge worker, if eligible, or another nonimmigrant category.

Employers face a larger hurdle when dealing with the *specialized knowledge* category. The definition for *specialized knowledge* capacity is found in Title 8 of the Code of Federal Regulations:

> Specialized knowledge means special knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets,

> or an advanced level of knowledge or expertise in the organization's processes and procedures.[7]
>
> Specialized knowledge professional means an individual who has specialized knowledge as defined in paragraph (l)(1)(ii)(D) of this section and is a member of the professions as defined in section 101(a)(32) of the Immigration and Nationality Act.[8]

USCIS (formerly INS) has provided further guidance through various published memoranda. However, exactly how much these memorandums have helped to clarify or have served to further confuse the issue is up for debate. These memorandums include the Memo from Fujie O. Ohata[9]and the Memo from James Puleo.[10] The Ohata Memo describes specialized knowledge as knowledge that is "different from that generally found in the particular industry" and "need not be proprietary or unique." The knowledge should be "noteworthy or uncommon." Where the employee has "knowledge of company processes and procedures, the knowledge must be advanced." In addition, such specialized knowledge cannot be simply stated, it must be documented with "probative evidence that the alien's specialized knowledge is distinguished by some unusual qualification and not generally known by practitioners in the alien's industry."

The Puleo Memo provides a list of characteristics that demonstrate specialized knowledge, and includes, for example, "knowledge of a product or process which cannot be easily transferred or taught to another individual." In addition, Puleo points out that the common thread in the examples provided is that the knowledge of a "process or product, would be difficult to impart to another individual without significant economic inconvenience to the United States or foreign firm." Puleo concludes by confirming that the memo should be used as guidance only and that there are many other instances of specialized knowledge. Despite this important caveat, USCIS adjudicators have been unrelenting in issuing Requests for Evidence to further prove, rephrase and explain the specialized knowledge possessed by the employee. Getting over this hurdle is costly and time-consuming. Consequently, experienced practitioners will, upon initial filing, treat the case as if it were already being challenged in an attempt to minimize unnecessary requests from USCIS.

iv. Anti-Job Shopping Provisions

A brief word should be said by yet another hurdle related to *specialized knowledge* employees. The L-1 Visa Reform Act of 2004 created a restriction on L-1B specialized knowledge workers codified in INA 214(c)(2)(F), making employees ineligible for the specialized knowledge classification if they are to be stationed primarily at the worksite of a third party other than the employer or an affiliate thereof, and either (1) the employee will be principally under the control and supervision of the unaffiliated entity or (2) the placement at the non-affiliated worksite is essentially labor for hire for that third party.[11] To overcome this hurdle when the L-1B worker will be placed off-site, the U.S. entity can document that most of work will primarily occur within the L organization, the work will be controlled and supervised by the L organization, and/or the off-site activities do in fact require specialized knowledge of the Petitioner's product or services.[12]

v. Who Can Pay the Salary?

Under the L-1 provisions, the employee's salary can be paid by the U.S. entity or the foreign entity.[13] This provides multinational companies with flexibility to decide from which entity's payroll the salary will be paid based on lateral considerations such as continuation of pension benefits in the foreign country, tax benefits, etc. There are many reasons why a company would prefer to pay the salary from the foreign entity, and in some cases a combination payroll may be used. Despite this flexibility, whether an employee's work and activities are controlled by the U.S. entity or foreign entity does matter. It is essential that the work to be performed by an employee be controlled and supervised by the U.S. entity and that the work be for the benefit of the U.S. entity. The U.S. entity has the burden to prove that an employer-employee relationship exists.

vi. New Office

The L-1 provisions allow for multinational companies setting up new offices in the U.S. to benefit from the L-1A and L-1B classifications. Multinational companies can transfer their L-1A or L-1B personnel for a period of one year, during which time they must prove to the satisfaction of the USCIS that they have reached the level of doing business. Doing business is defined as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad."[14] The entity's mere presence and/or incorporation is not sufficient. Regulations for new office L's can be found at 8 C.F.R. §§ 214.2(l)(3):

> (v) If the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:
>
> (A) Sufficient physical premises to house the new office have been secured;
>
> (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition

in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

(vi) If the petition indicates that the beneficiary is coming to the United States in a specialized knowledge capacity to open or to be employed in a new office, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The business entity in the United States is or will be a qualifying organization as defined in paragraph (l)(1)(ii)(G) of this section; and

(C) The petitioner has the financial ability to remunerate the beneficiary and to commence doing business in the United States.

A key element in new office L-1As is to be able to document and prove that within the first year, the business will support a manager or executive position. It is recognized that the manager or executive will initially be involved in some non-managerial duties while he or she hires the necessary staff to perform the non-qualifying duties.

To be eligible for an extension of the L-1A or L-1B classification, the company must document what it has accomplished during the first year to prove it is active and operational.[15]

vii. Blanket L-1

This is a great tool for large multinational companies. The Blanket L-1 allows companies with offices in the U.S. who have been doing business in the U.S. for one year to transfer employees to the U.S. so long as the entities have been included in the approved petition. The Blanket L is filed in the U.S., and once approved, the employees can directly apply at the consulate for the L-1A or L-1B visa classifications without having to apply administratively in the U.S. Not all entities however can qualify for the Blanket L-1. The requirements are:

(A) The petitioner and each of those entities are engaged in commercial trade or services;

(B) The petitioner has an office in the United States that has been doing business for one year or more;

(C) The petitioner has three or more domestic and foreign branches, subsidiaries, or affiliates; and

(D) The petitioner and the other qualifying organizations have obtained approval of petitions for at least ten "L" managers, executives, or specialized knowledge professionals during the previous 12 months; or have U.S. subsidiaries or affiliates with combined annual sales of at least $25 million; or have a United States work force of at least 1,000 employees.[16]

A company seeking Blanket L-1 approval must be sure to include all of its branches, subsidiaries and affiliates that may at some point seek to transfer its employees to the U.S. Any entity not listed in the approved blanket cannot make use of the approved Blanket L-1 and will have to file through the standard L-1 process by filing in the U.S.[17]

B. E-1/E-2, Treaty Trader and Treaty Investor

The E visa is a useful tool for foreign investors, whether the investor is an individual or a multinational company that is ultimately majority owned by nationals of a treaty country. The E visa is available to foreign nationals from countries that have a friendship, commerce and navigation or bilateral investment treaty with the United States. To qualify, the individual or company must be seeking to enter the U.S. to carry on substantial trade which is international in scope principally between the U.S. and the country of which he or she is a national (E-1 Treaty Trader), or to develop and direct the operations of an enterprise in which the individual or company has invested or is actively in the process of investing a substantial amount of capital in a bona fide enterprise (E-2 Treaty Investor).[18]

The foreign national seeking entry to the U.S. can be the owner or a key employee or prospective employee of the enterprise, including executives, supervisors or persons whose services are essential to the operation of the enterprise.[19]

The E visa was created to promote investment in the U.S. and is of great benefit for small and large entities.

There are approximately only 80 countries eligible for the E-1 and/or E-2 visas. Therefore, when dealing with a company that holds one of these nationalities and is seeking to transfer an employee of the same nationality to the U.S., this category should not be overlooked. Among the biggest incentive, should the entity and employee qualify, is that the E visa can be extended for an indefinite period of time so long as the employment continues and the company remains majority owned by nationals of the treaty country.[20]

i. Nationality of Corporation

The principal requirement for the E visa is that the treaty trader or investor, whether an individual or company, possess the nationality of the treaty. This is determined the by the nationality of the individual, and in the case of a company, by the nationality of the ultimate owners.[21] To qualify, the entity must be owned at least 50% by nationals of the treaty country. The ownership in corporate structures should be traced as far up until establishing the 50% ownership.[22] If the corporation is sold exclusively on a stock exchange, the nationality of the company will vary on the location of the exchange.[23] The majority ownership by a qualifying national must be maintained while the E visa holder is employed. Ownership by an individual who holds U.S. lawful permanent residence or shares dual citizenship with the United States cannot be counted in the calculation.[24]

ii. Nationality of Employee Being Transferred to the U.S.

The owner or employee who is sought to be transferred to the U.S. must possess the same treaty nationality as the corporation.[25]

iii. Requirements for the E-1 and E-2 Classification

After establishing that a treaty exists and that the individual being transferred and the business possess the nationality of the treaty country, additional requirements must be satisfied for each of the categories.

The E-1 Treaty Trader requirements include:

(1) The activities constitute trade within the meaning of INA 101(a)(15)(E) (see 9 FAM 41.51 N4);

(2) Trade is substantial (see 9 FAM 41.51 N6);

(3) Trade is principally between the United States and the treaty country (see 9 FAM 41.51 N6);

(4) Applicant, if an employee, is destined to an executive/supervisory position or possesses skills essential to the firm's operations in the United States (see 9 FAM 41.51 N13); and

(5) Applicant intends to depart the United States when the E-1 status terminates (see 9 FAM 41.51 N14).[26]

The E-2 Treaty Investor requirements include:

(1) Applicant has invested or is actively in the process of investing;

(2) Enterprise is a real and operating commercial enterprise;

(3) Applicant's investment is substantial;

(4) Investment is more than a marginal one solely for earning a living;

(5) Applicant is in a position to "develop and direct" the enterprise;

(6) Applicant, if an employee, is destined to an executive/supervisory position or possesses skills essential to the firm's operations in the United States; and

(7) Applicant intends to depart the United States when the E-2 status terminates.[27]

iv. Executives and Supervisors, and Essential Employees

Once all of the above criteria has been satisfied, including ensuring the existence of a treaty and confirming that both the company and/or owner and the employee have the nationality of the treaty country of the company, analysis is required regarding the position to be filled by the employee. The E provisions allow for the transfer of the owner(s) entering to direct the enterprise, as well as employees of the company who will hold a position in an executive or supervisory capacity or essential employees.

> In evaluating the executive and/or supervisory element, you should consider the following factors:
>
> (1) The title of the position to which the applicant is destined, its place in the firm's organizational structure, the duties of the position, the degree to which the applicant will have ultimate control and responsibility for the firm's overall operations or a major component thereof, the number and skill levels of the employees the applicant will supervise, the level of pay, and whether the applicant possesses qualifying executive or supervisory experience;
>
> (2) Whether the executive or supervisory element of the position is a principal and primary function and not an incidental or collateral function. For example, if the position principally requires management skills or entails key supervisory responsibility for a large portion of a firm's operations and only incidentally involves routine substantive staff work, an E classification would generally be appropri-

ate. Conversely, if the position chiefly involves routine work and secondarily entails supervision of low-level employees, the position could not be termed executive or supervisory; and

(3) The weight to be accorded a given factor, which may vary from case to case. For example, the position title of "vice president" or "manager" might be of use in assessing the supervisory nature of a position if the applicant were coming to a major operation having numerous employees. However, if the applicant were coming to a small two-person office, such a title in and of itself would be of little significance.[28]

The requirements for the essential employee are defined at 9 FAM 41.51 N14.3, which states:

a. The regulations provide E visa classification for employees who have special qualifications that make the service to be rendered essential to the efficient operation of the enterprise. The employee must, therefore, possess specialized skills and, similarly, such skills must be needed by the enterprise. The burden of proof to establish that the applicant has special qualifications essential to the effectiveness of the firm's United States operations is on the company and the applicant.

b. The determination of whether an employee is an "essential employee" in this context requires the exercise of judgment. It cannot be decided by the mechanical application of a bright-line test. By its very nature, essentiality must be assessed on the particular facts in each case.

The U.S. Department of State will determine whether the employee qualifies as an executive or supervisor or essential employee. It is important in preparing a description of the duties that the principal duties the employee will be performing comply with the regulations. It is also important that the employee fully understand the criteria of these classifications. When the employee applies for the E-1 or E-2 visa at the consulate or embassy, the employee must prove to the satisfaction of the officer that he or she qualifies for the classification. The U.S. consulates and embassies are well versed in the E-1 and E-2 regulations, and each consulate and embassy has its own practices and procedures regarding the E visas.

Conclusion

The decision to transfer or hire an employee in the United States is just the start of the secondment process. This brief overview provides just the beginning of the many complex strategies to be worked out based on the particular circumstances of the transfer and the long-term objectives of the company and foreign national.

Endnotes

1. 8 C.F.R. § 214.2(l)(ii)(G).
2. 8 C.F.R. § 214.2(l)(ii)(K).
3. 8 C.F.R. § 214.2(l)(ii)(L).
4. 8 C.F.R. § 214.2(l)(ii)(A); *see also Matter of Kloeti*, 18 I&N Dec. 295.
5. Adjudicator's Field Manual (AFM) at 32.3(b); *see also Matter of Vaillancourt*, 13 I&N Dec. 654.
6. 8 C.F.R. § 2414.2(l)(1)(ii)(B).
7. 8 C.F.R. § 214.2(l)(1)(ii)(D).
8. 8 C.F.R. § 214.2(l)(1)(ii)(E).
9. Memo from Fujie O. Ohata, HQSCOPS 70/60.1 (Dec. 20, 2002).
10. Memo from James Puleo, CO 214L-P (March 9, 1994).
11. L-1 Visa Reform Act of 2004 (PL No. 108-447, Div J, Title IV; 118 Stat. 2809, 3351 (Dec. 8, 2004).
12. AFM at 32.3(c).
13. 9 FAM 41.54 N8.1.
14. 8 C.F.R. § 214.2(l)(1)(ii)(H).
15. 8 C.F.R. § 214.2(l)(7)(i)(A)(3).
16. 8 C.F.R. § 214.2(l)(4)(i).
17. 8 C.F.R. § 214.2(l)(4)(ii).
18. 8 C.F.R. § 214.2(e); 9 FAM 41.51.
19. 8 C.F.R. § 214.2(e)(3).
20. 8 C.F.R. § 214.2(e)(3), (19), (20).
21. 9 FAM 41.51 N2.
22. 9 FAM 41.51 N3.1.
23. 9 FAM 41.51 N3.2.
24. 9 FAM 41.51 N14.1.
25. *Id.*
26. 9 FAM 41.51 N1.1.
27. 9 FAM 41.51 N1.2.
28. 9 FAM 41.51 N14.2.

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Employee Handbooks and the NLRA: Are Unfair Labor Practices Lurking Within?

By Allyson L. Belovin, Peter D. Conrad and Rhonda P. Ley

A. NLRB Standard for Evaluating Employee Handbooks[1]

It is well established that an employer violates Section 8(a)(1) of the National Labor Relations Act (NLRA or the "Act") through the maintenance of a work rule or policy if the rule would "reasonably tend to chill employees in the exercise of their Section 7 rights."[2]

The National Labor Relations Board (NLRB or the "Board") has developed a two-step inquiry to determine if a work rule would be deemed to have such a chilling effect. *First*, a rule is unlawful if it explicitly restricts Section 7 activities. *Second*, if the rule does not explicitly restrict protected activities, it will nonetheless be found to violate the Act upon a showing that: (i) employees would reasonably construe the language to prohibit Section 7 activity; (ii) the rule was promulgated in response to union activity; or (iii) the rule has been applied to restrict the exercise of Section 7 rights.[3]

The NLRB has cautioned against "reading particular phases in isolation," and will not find a violation simply because a rule could conceivably be read to restrict Section 7 activity. The Board "will not conclude that a reasonable employee would read the rule to apply to [protected] activity simply because the rule *could* be interpreted that way."[4] Instead, the potentially violative phases must be considered in the proper context.

Rules that are ambiguous as to their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful.[5]

In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful.[6]

B. Disclosure of "Confidential" Information

Under the Act, employees have the right to discuss among themselves and with third parties—including unions—a wide range of subjects relating to terms and conditions of employment. The NLRB consistently has held that broadly defined confidentiality rules, prohibiting the dissemination of employment-related information, can have a chilling effect on employee discussion of wages, hours and other working conditions. Such rules are deemed to interfere with employee rights under Section 7 of the NLRA, even in the absence of an explicit restriction on the exercise of those rights or evidence that (i) the rule was promulgated in response to union activity, or (ii) that it actually had a chilling effect.

1. *American Red Cross Blood Services, Western Lake Erie Region*[7]

The legal principles applicable to the analysis of confidentiality rules recently were restated by an administrative law judge in *American Red Cross Blood Services, Western Lake Erie Region*, in which the employer's rule defined "confidential information" to include "personnel information" and other information "relating to…employees," without further defining either of those terms. The General Counsel took the position that employees could reasonably interpret "personnel information" to include wages, benefits and other working conditions. Therefore, the rule was facially invalid and its mere maintenance violated Section 8(a)(1) of the NLRA. Agreeing with the General Counsel, the ALJ ruled as follows:

> By defining confidential information as including information regarding "personnel" and "employees" the [Confidential Information and Intellectual Property Agreement (CIIPA)] would be reasonably understood by employees to prohibit the disclosure of information including wages and terms and conditions of employment to other employees or to non-employees, such as union representatives. It is, of course, clearly established, that employees have a Section 7 right to discuss wages and terms and conditions of employment among themselves and with individuals outside of their employer.[8]

The ALJ concluded that the savings clause of the CIIPA did not provide a defense. The clause stated that "this Agreement does not deny any rights provided under the National Labor Relations Act to engage in concerted activity, including but not limited to collective bargaining." The judge emphasized that "such a disclaimer does not make lawful content of a provision that unlawfully prohibits Section 7 activity," noting that the disclaimer "arguably would cancel the unlawfully broad language, but only if employees are knowledgeable enough to know that the Act permits employees to discuss terms and conditions of employment with each other and individuals outside of their employer."[9]

2. *Design Technology Group, LLC d/b/a Bettie Page Clothing*[10]

The employee handbook section entitled "Wage and Salary Disclosure" provided that "Compensation programs are confidential between the employee and [Bettie Page]. Disclosure of wages or compensation to any

third party or other employee is prohibited and could be grounds for termination." The NLRB held that maintenance of this rule violated Section 8(a)(1).

3. *DirecTV U.S. DirecTV Holdings, LLC*[11]

The "confidentiality" rule in the employer's handbook directed employees to "[n]ever discuss details about your job, company business or work projects with anyone outside the company" and "[n]ever give out information about customers or DirecTV employees." In addition, the rule listed "employee records" as one of the categories of "company information" that must be kept confidential. The rule was found unlawfully overbroad as it "would reasonably be understood by employees to restrict discussion of their wages and other terms and conditions of employment."

4. *Flex Frac Logistics, LLC*[12]

The employer's at-will employment agreement included a section entitled "Confidential Information," which defined that term to include "personnel information and documents" in addition to many different types of undeniably confidential business information. The rule prohibited disclosure of such information to persons "outside the organization." Violation of the rule was punishable by "termination" or "legal action." The NLRB found the rule to be unlawfully overbroad "because employees would reasonably believe that they are prohibited from discussing wages or other terms and conditions of employment with a non-employee, such as union representatives—an activity protected by Section 7 of the Act."

5. *Costco Wholesale Corp.*[13]

The employer's rule prohibiting employees from discussing "private matters of members and other employees…includ[ing] topics such as, but not limited to, sick calls, leaves of absence, FMLA call-outs, ADA accommodations, workers' compensation injuries, personal health information, *etc.*" was found to be overbroad and violative of Section 8(a)(1). The NLRB concluded that the "private matters" referred to in the rule were terms and conditions of employment. In addition, the employer's "Electronic Communications and Technology" policy, prohibiting disclosure of payroll data, was similarly overbroad and unlawful, as was a rule prohibiting employees "from sharing 'confidential information' such as employees' names, addresses, telephone numbers and email address." The Board noted that employees have the right to use, for organizational and other purposes, information acquired in the normal course of their work, but are not entitled to the employer's private records. Here, however, the rule did not distinguish between information obtained from other employees and information obtained from the employer's files.

6. *Hyundai American Shipping Agency, Inc.*[14]

In *Hyundai*, the Board found unlawful a rule that prohibited "[a]ny unauthorized disclosure of information from an employee's personnel file."

C. Confidentiality of Internal Investigations

Employers routinely require employees who are interviewed in connection with internal investigations of discrimination complaints and employee misconduct to keep the investigation and their participation in it strictly confidential. The typical justification is that confidentiality is necessary to protect the integrity of the investigation and to make employees feel comfortable participating as witnesses. However, the NLRB takes the position that employees have a right under Section 7 of the NLRA to discuss complaints of workplace discrimination and their investigation by the employer. Recently, rules requiring that participants in such investigations not discuss the issues with coworkers have come under fire at the NLRB, and unfair labor practices have been found on the basis of blanket rules that prohibit employees from discussing any workplace investigations with their coworkers and others, regardless of the circumstances bearing on the need for confidentiality in any specific investigation.

1. *Banner Health System*[15]

The employer's human resources consultant routinely and uniformly instructed all employees who voiced workplace complaints not to discuss the matter with their coworkers while the employer's investigation was in progress. The administrative law judge found that the prohibition was for the purpose of protecting the integrity of the investigation—comparing it to sequestration of witnesses during a hearing—and that it did not interfere with the exercise of any Section 7 rights in violation of Section 8(a)(1) of the Act. The Board disagreed, holding that "[t]o justify a prohibition on employee discussion of ongoing investigations, an employer must know that it has a legitimate business justification that outweighs employees' Section 7 rights." The NLRB went on to state that the employer's "generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees' Section 7 rights," and that to minimize the impact on those rights,

> [I]t was the [Employer's] burden "to first determine whether in any give[n] investigation witnesses need[ed] protection, evidence [was] in danger of being destroyed, testimony [was] in danger of being fabricated, or there [was] a need to prevent a cover up"…. The Respondent's blanket approach clearly failed to meet those requirements. Accordingly, we find that by maintaining and applying a rule prohibiting employees from discussing ongoing investigations of employee misconduct, violated Section 8(a)(1) of the Act.

2. *Verso Paper*[16]

The Acting General Counsel of the NLRB authorized a complaint against the employer alleging that its rule precluding employees from discussing information about ongoing investigations of employee misconduct was unlawful under the Board's holding in *Banner Health System*. The challenged rule read as follows:

> Verso has a compelling interest in protecting the integrity of its investigations. In every investigation, Verso has a strong desire to protect witnesses from harassment, intimidation and retaliation, to keep evidence from being destroyed, to ensure that testimony is not fabricated, and to prevent a cover-up. To assist Verso in achieving these objectives, we must maintain the investigation and our role in it in strict confidence. If we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination.[17]

As in *Banner Health System*, the prohibition was found to be overbroad as a blanket rule regarding confidentiality of employee investigations "because it does not take into account the employer's burden to demonstrate a particularized need for confidentiality in any given situation." However, the Division of Advice suggested in a footnote that, consistent with the Board's decision in *Banner Health System*, the employer could avoid an unfair labor practice by modifying the final two sentences of its rule to read as follows:

> Verso may decide in some circumstances that in order to achieve these objectives, we must maintain the investigation and our role in it in strict confidence. If Verso reasonably imposes such a requirement and we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination.[18]

D. Contact with the Media

It is settled law that Section 7 encompasses employee communications with the media concerning labor disputes.[19] The Board will find rules broadly prohibiting employees from communicating with the media to be unlawful.

In *Direct TV U.S. DirecTV Holdings, LLC*,[20] the Board found provisions in the employee handbook and a related corporate policy to be unlawful. The handbook provision instructed employees: "Do not contact the media, and direct all media inquiries to the Home Services Communications Department…." This blanket prohibition on communications with the media violated Section 8(a)(1) of the Act. Significant to that ruling was the fact that "the rule makes no attempt to distinguish unprotected communications, such as statements that are maliciously false, from those that are protected."[21] The Board added that the handbook provision is impermissible because it "broadly addresses communications but remains silent on whether an employee is impermissibly representing DIRECTV under the rule when engaged in Sec. 7 activity."[22]

The corporate policy, entitled "Public Relations," stated: "Employees should not contact or comment to any media about the company unless pre-authorized by Public Relations." The Board found that the pre-approval requirement would reasonably lead employees to conclude that it applies to protected communications concerning labor disputes and was, therefore, in violation of the Act.[23] Moreover, the policy's further statement that "[t]hese rules are in place to ensure that the company communicat[e]s a consistent message…" would "reasonably be construed as barring expression to the media of any employee disagreement with the [company] over wages, hours, and other terms and conditions of employment."[24]

In *Remington Lodging & Hospitality*,[25] the NLRB also found unlawful the employer's handbook provision that prohibited hotel employees from giving any information to the media regarding the hotel, its guests or its employees without prior authorization. The Board reiterated that employees have a right, protected by Section 7 of the Act, to publicize a labor dispute, including the right to communicate terms and conditions of employment to the media for dissemination to the public.[26] By barring employees from communicating "any information" regarding themselves, their co-workers or the employer to the media, the rule "plainly restrains such protected activity."[27]

Two recent ALJ decisions have addressed broad employer restrictions on media contact and in both cases found the restrictions to be unlawful.[28]

Note: In *Echostar*, the ALJ determined that a general savings clause in the employee handbook, which states that the handbook provisions should be interpreted and applied in a manner consistent with the law, did not save the otherwise unlawful provision.

E. Communication with the NLRB and Other Government Agencies

Section 8(a)(4) of the Act protects employees who file unfair labor practice charges or participate as witnesses or otherwise in an NLRB investigation.[29] Work rules that interfere with employee communication or cooperation with the NLRB will be found unlawful.

In *Direct TV*, the NLRB struck down an employee handbook provision stating that if "law enforcement" wanted to interview or obtain information from an employee, "the employee should contact the security department in El Segundo, Calif., who will handle contact with law enforcement agencies and any needed coordination with DIRECTV departments." The Board determined that this rule would lead reasonable employees to believe that

they are required to contact their employer's security department before cooperating with an NLRB investigation.[30] Moreover, the Board found that the rule was also unlawful as it affected employee contacts with other law enforcement officials (*e.g.*, the Department of Labor) about wages, hours and working conditions.[31] While the employer argued that it did not intend for the rule to extend to such protected communications, the Board noted that ambiguity in the rule must be construed against the employer, as issuer of the rule.[32]

F. Internal Complaint Procedures

Rules requiring employees to follow a "chain-of-command" to voice their complaints have been the basis for unfair labor practice findings because such rules restrict employees' Section 7 rights to engage in protected activity, including complaints about wages, hours and / or other terms and conditions of employment to co-workers and third parties, including unions, the public, the media or government agencies.

In *Hyundai America Shipping Agency*,[33] the Board adopted the ALJ's determination that the employer's handbook provision requiring employees to voice complaints directly to their immediate supervisors or Human Resources infringed on employees' Section 7 rights and was therefore unlawful. The Board adopted the ALJ's reasoning that the policy went beyond merely stating a preference that employees come to their supervisors or HR with their complaints but, instead, constituted a directive that implicitly prohibited employees from making complaints to other employees / entities.[34]

However, earlier this year, in *Flamingo Las Vegas Operating Company*,[35] the Board reversed an ALJ decision and held that a supervisor who directed employees to follow a chain-of-command to resolve their complaints did not violate the Act. The Board reasoned that the supervisor's statement to an employee that he should have gone to Human Resources with his complaints "could not reasonably be interpreted as implementing a new policy regarding how employee complaints were to be handled."[36]

The principle has been extended to rules that prohibit employees from communicating with the employer's clients / customers concerning workplace issues. In *Guardsmark LLC*,[37] the employer maintained a work rule that prohibited employees "dissatisfied with any…aspect of [their] employment" from "register[ing] complaints with any representative of the client." The NLRB found that the rule "explicitly trenches upon the right of employees under Section 7 to enlist the support of an employer's clients or customers regarding complaints about terms and conditions of employment."

G. Standards of Employee Conduct

Employers also may violate Section 8(a)(1) by maintaining work rules governing standards of employee conduct that reasonably tend to chill the exercise of Section 7 rights.[38]

The NLRB considered a "Courtesy" rule in *Knauz BMW*.[39] The rule instructed employees to be courteous, polite and friendly to customers, vendors, suppliers and coworkers, and then stated: "No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership." The Board found the "Courtesy" rule unlawful because employees could reasonably construe its prohibition against disrespectful language and language injurious to the image / reputation of the employer to include protected activity.[40] The decision emphasized that there is nothing in the rule, or elsewhere in the employee handbook, stating or even suggesting that communications protected by Section 7 are excluded from the "Courtesy" rule. Citing *Flex Frac Logistics*,[41] the Board reiterated that ambiguous rules, *i.e.*, those that could reasonably be read to have a coercive meaning, will be construed against the employer.[42] In response to Member Hayes's dissent, in which he characterized the "Courtesy" rule as "nothing more than a common-sense behavioral guideline for employees," the Board majority (Chairman Pearce and Member Block) noted that the rule "proscribes not a manner of speaking, but the content of employee speech—content that would damage the Respondent's reputation."[43] Thus, even if employees communicated about their terms and conditions of employment in the most genteel manner, to the extent that sharing such information would be injurious to the Employer's image / reputation, such conduct would run afoul of the "Courtesy" rule and employees would reasonably fear employer sanctions in response.[44]

In *Hyundai American Shipping Agency, Inc.*,[45] the Board reversed an ALJ's decision and upheld two work rules governing employee conduct: the first prohibiting employees from "indulging in harmful gossip," and the second prohibiting employees from "exhibiting a negative attitude toward or losing interest in your work assignment." The Board distinguished its holding in *Claremont Resort & Spa*,[46] in which it found that a rule prohibiting "negative conversations about associates and / or managers" violated Section 8(a)(1). Regarding the first rule, the Board held that it was distinguishable from the rule in *Claremont* because it does not mention managers and "merely prohibits gossip." As such, the Board held, employees would not reasonably construe the rule to prohibit Section 7 activity.[47] As for the second rule, the Board again distinguished the rule in *Claremont*, which expressly encompassed protected concerted activity by proscribing "negative conversations." That distinction, the Board said, is emphasized by the instant rule's language limiting the prohibition to negative attitude or loss of interest "in your work assignment."[48] Given these differences, the Board concluded that the rule was "significantly less likely to be construed by employees as prohibiting concerted, protected activity" than the rule at issue in *Claremont*.[49]

The Boeing Company[50]

In February of this year, the General Counsel's Office issued an Advice Memorandum that considered various provisions of Boeing's Code of Conduct, which was part of its Ethical Business Conduct Guidelines, a 43-page manual containing explanations of the Employer's business ethics policies, with illustrative examples. Among the guidelines considered in the *Boeing* case was one prohibiting employees from engaging in "conduct or activity that may raise questions as to the company's honesty, impartiality, reputation or otherwise cause embarrassment to the company." The Division of Advice determined that employees would not reasonably construe that language as a restriction on Section 7 activity when viewed in the broader framework of Boeing's Ethical Guidelines.[51] Specifically, Advice relied on the fact that the guidelines provided numerous examples of activities that would undermine the company's honesty, impartiality, reputation, *etc.*, none of which implicated activities protected by Section 7.[52] Moreover, the Advice Memo notes that while the employer did not explicitly inform employees that their Section 7 activities were not covered, it provided on its website a "Frequently Asked Questions" section that states that the Boeing Code of Conduct does not apply to employees' "constitutional, statutory, or other protected rights."[53]

A Board majority (Chairman Pearce and Member Griffin) found a rule prohibiting employees from "bearing false witness" against the Company to be unlawful in *TT&W Farm Products*.[54] The Board adopted the ALJ's reasoning that the rule was impermissibly overbroad because it did not distinguish between merely false statements about the company, which may be protected, and maliciously false statements, which are not.[55]

Also in *TT&W*, the Board considered five work rules prohibiting employees from leaving their work stations during work time. A majority (Chairman Pearce and Member Griffin) determined that two of the rules prohibiting "walking off the job" and "participating in any interruption of work," respectively, could reasonably be interpreted to prohibit participation in a protected strike and, therefore, violate Section 8(a)(1).[56] A different majority (Members Griffin and Hayes), however, determined that the three other work rules, which collectively prohibited employees from leaving the plant or their workstations without permission, were lawful because a reasonable employee would read them to prohibit only unauthorized leaves or breaks, not conduct protected by Section 7.[57]

Notably, in both *TT&W* and *Ambassador Services*, the Board considered its holding in *Wilshire at Lakewood*,[58] which upheld an employer policy prohibiting employees from "abandoning [their] job by walking off the shift without permission of [their] supervisor." In both cases, the Board majority distinguished *Wilshire* as a case involving an employer who operated a nursing home and employees who are directly responsible for patient care. The Board in *TT&W* and *Ambassador Services* specifically declined to extend the holding in *Wilshire* beyond the context of employees directly responsible for patient care.

H. At-Will Disclaimers

Virtually all employee handbooks include a statement confirming that employment is "at will," and that nothing contained in the handbook creates any contract of employment or alters the at-will nature of the employment relationship in any respect. These disclaimers also generally provide that the benefits and other conditions of employment described in the handbook may be modified or eliminated by the employer at any time and for any reason, without notice to employees. Recently, the National Labor Relations Board had the occasion to consider whether an "at-will" disclaimer in an employee handbook chilled the exercise of the Section 7 right to engage in union organizational activity and/or to participate in collective bargaining with the employer, thereby violating Section 8(a)(1) of the Act. Although one administrative law judge decision issued in early 2012 holds that an unfair labor practice could be found on that basis, the Board has yet to invalidate an at-will disclaimer on the theory that it interfered with Section 7 rights, and in several subsequent Advice Memoranda the General Counsel's Office has authorized dismissal of unfair labor practice charges challenging at-will disclaimers under Section 8(a)(1).

American Red Cross Arizona Blood Services Region[59]

This unfair labor practice case involved a claim that the employer terminated the charging party in reprisal for her protected concerted activity, *i.e.*, discussions with coworkers and complaints to management about working conditions, including the conduct of the charging party's immediate supervisor. The charging party also objected to a statement contained in the "Agreement and Acknowledgment of Receipt of Employee Handbook" that read as follows: "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way." In response to the charging party's objection, the employer permitted her to strike the quoted language from the acknowledgment form before signing.

In addition to finding that the charging party had been unlawfully discharged, the ALJ concluded that by requiring employees to agree that "the at-will employment relationship cannot be amended, modified or altered in any way," employees were forced to "relinquish[] his/her right to advocate concertedly, whether represented by a union or not, to change his at will status." The ALJ added:

> For all practical purposes, the clause in question premises employment on an employee's agreement not to enter into any contract, to make any efforts, or to engage in conduct that could result in union representation and in a collective-bargaining agreement, which would amend, modify, or alter the at-will relationship. Clearly

> such a clause would reasonably chill employees who were interested in exercising Section 7 rights.

The ALJ found that the employer's issuance of a new acknowledgment form, which did not contain the unlawful "waiver," did not cure the unfair labor practice because (i) the employer's corrective action was delayed, and (ii) the employees were not contemporaneously notified of the change or assured in any way that there would be no interference with their rights. The case never reached the Board; it was settled by the employer after the ALJ issued his decision.

Subsequent Advice Memoranda

After the ALJ's decision in *American Red Cross*, the Division of Advice confronted the issue in at least four separate unfair labor practice cases. In each case, the General Counsel directed the Regional Office to dismiss the charge absent withdrawal. The handbook language in each of those later cases was distinguished on the ground that unlike in *American Red Cross*, none involved a personal acknowledgment by the employee that their at-will status could not be changed in any way. Rather, the handbooks in all four cases reviewed by the Division of Advice simply confirmed that no supervisor or manager other than the president of the company was authorized to enter into anything other than an at-will employment relationship with employees. As such, there was no interference with employee rights to engage in organizational activity aimed at achieving a collective bargaining agreement modifying at-will status. The cases, and the language at issue in each, is as follows:

(a) *SWH Corporation d/b/a Mimi's Café*[60]

"The relationship between you and Mimi's Café is referred to as 'employment at will.'… No representative of the Company has authority to enter into any agreement contrary to the foregoing 'employment at will' relationship."

(b) *Rocha Transportation*[61]

"Employment with Rocha Transportation is employment at-will.… No manager, supervisor or employee of Rocha Transportation has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will. Only the president of the Company has the authority to make any such agreement and then only in writing."

(c) *Fresh & Easy Neighborhood Market*[62]

"Nothing in this handbook changes this at-will relationship….No representative of the [Employer] other than a[n Employer] executive has the authority to enter into any agreement or to make any agreement for employment other than at will. Any such agreement that changes your at-will employment status must be explicit, in writing, and signed by both a[n Employer] executive and you."

(d) *Windsor Care Centers*[63]

"Employment with the Company is at-will, which means the employment relationship may be terminated with or without cause and with or without notice at any time by you or the Company….Only the Company President is authorized to modify the Company's at-will employment policy or enter into any agreement contrary to this policy. Any such modification must be in writing and signed by the employee and the President."

I. Use of Social Media

The NLRB continues to give significant attention to cases involving restrictions on employee use of social media as a vehicle for exercising Section 7 rights. The Board applies the same criteria in determining whether rules restricting the use of social media interfere with employee rights to act concertedly for mutual aid or protection as it applies to other workplace rules. Thus, rules that are ambiguous and could be reasonably interpreted by employees to limit or prohibit discussion relating to wages, hours and other terms and conditions of employment are likely to be found unlawful by the NLRB.

1. *Giant Food LLC*[64]

This 2012 Advice Memorandum was released this summer by the Office of the General Counsel pursuant to a Freedom of Information Act request. The Division of Advice concluded that portions of Giant Food's social media policy, including prohibitions on (i) disclosure of confidential or non-public information, (ii) use of the Company's logo, trademark or graphics, and (iii) photographing or video-recording the Company's facilities were unlawful because "they would reasonably be construed to chill Section 7 activity."

The rules analyzed by the Division of Advice in *Giant Food* were typical of those commonly found in many social media policies today. In relevant part, those rules provided as follows:

- You have an obligation to protect confidential, non-public information to which you have access in the course of your work. Do not disclose, either externally or to any unauthorized Associate any confidential information about the Company or any related companies including Ahold USA, or about other Associates, customers, suppliers or business partners. If you have questions about what is confidential, ask your manager.
- Do not use any Company logo, trademark, or graphics, which are proprietary to the Company, or photographs or video of the Company's premises, processes, operations, or products, which includes confidential information owned by the Company, unless you have received the Company's prior written approval.
- Do not defame or otherwise discredit the Company's products or services….

- Speak up if you believe that anyone is violating these guidelines or misusing a Company-sponsored site. Please submit such reports to your manager and provide as much specific information as possible….
- Please note that the Company will not construe or apply these guidelines in a manner that improperly interferes with or limits employees' rights under any state or federal laws, including the National Labor Relations Act.

The Division of Advice considered many of the rules included in the social media policy to be problematic and authorized the issuance of a complaint against Giant Food with respect to the following:

Confidentiality—The confidentiality rule failed to include sufficient limiting language and clarification of the operative terms, *e.g.,* "nonpublic information" and "confidential information." Because of the lack of specificity in the rule, the Division of Advice concluded that employees could reasonably construe the policy to include a prohibition against disclosing information concerning working conditions in violation of the NLRA.

Logos, Trademarks, Graphics—The Division of Advice concluded that the prohibition against using the Company's logos, trademarks or graphics on social media or otherwise could reasonably be interpreted by employees to prohibit use of the same while engaging in Section 7 communications, including photos of picket signs, cartoons or electronic leaflets. Although the General Counsel recognized that the Company has a proprietary interest in its trademarks and other intellectual property (including its logo, if protectable), he concluded that none of the interests protected by trademark laws is infringed by an employee's "noncommercial use of a name, logo or other trademark to identify the Employer in the course of engaging in Section 7 activity related to their working conditions."

Photography—The General Counsel also concluded that prohibiting employees from photographing or videotaping the Company's premises could "reasonably be interpreted to prevent employees from using social media to communicate and share information regarding their Section 7 activities through pictures or videos, such as of employees engaged in picketing or other concerted activities." The Advice Memo does not offer much guidance for employers regarding the circumstances under which photographing or videotaping can be prohibited, nor does it specifically address videos and pictures taken "inside" the Company as opposed to taken of the "premises." Employers would appear to have some latitude in this area where they can articulate business concerns that do not "chill" protected activity.

Disclaimer—The disclaimer in Giant Food's social media policy informed employees that the guidelines in the handbook would not be construed or applied in a manner that interfered with its employees' rights under the NLRA. Consistent with earlier Advice Memoranda, the General Counsel found that the disclaimer did not insulate overbroad and ambiguous prohibitions included in the handbook rules at issue, noting that "a general disclaimer is insufficient where employees would not understand from the disclaimer that protected activities are in fact permitted." This suggests that a simply worded and easily understood disclaimer may be effective.

On the other hand, the Division of Advice did not find any interference with the free exercise of Section 7 rights in either of the following rules:

Defamation of Products/Services—Notably, the Advice Memo upheld the Company's rule prohibiting employees from defaming or otherwise discrediting the Company's products or services because the conduct prohibited was not protected under Section 7 of the NLRA, *i.e.*, it could not be reasonably interpreted to prohibit criticism of the Company's labor practices or treatment of employees.

"Speak Up"—Similarly, the Company's instruction that employees should "speak up" if they believed that anyone was violating the Company's guidelines also was upheld because the policy did not expressly threaten discipline or restrict employee communications. Moreover, the General Counsel concluded that once the unlawful provisions of the Company's social media guidelines were removed, employees could not reasonably construe the Company's social media guidelines as chilling lawful Section 7 activity.

The *Giant Food* case was settled without a trial, as are over 90% of unfair labor practice cases. We do not know what an administrative law judge, the NLRB on review, or a reviewing court, might have concluded. In order to minimize the risk of an unfair labor practice, work rules and policies applicable to employees should be drafted so that they are clear in their scope and application, avoid overly broad language that might be construed as "chilling" protected rights, and include specific, lawful examples of what is intended to be prohibited or required by the rules or policy.

2. *Costco Wholesale Corporation*[65]

A rule prohibiting electronic statements that "damage the Company, defame any individual or damage any person's reputation" was found to be an unfair labor practice, where there was "nothing in the rule that even arguably suggests that protected communications are excluded from the broad parameters of the rule." The Board concluded that "[i]n these circumstances, employees would reasonably conclude that the rule requires them to refrain from engaging in certain protected communications (*i.e.*, those that are critical of the Respondent or its agents)."

3. *Hispanics United of Buffalo, Inc.*[66]

The issue in this case was whether the employer violated Section 8(a)(1) of the NLRA by discharging five

employees for Facebook comments that were written in response to a co-worker's criticism of their job performance, which was posted on Facebook. In finding that the employees were unlawfully discharged for engaging in protected concerted activity, the Board noted that while the employees mode of communicating their workplace concerns may have been "novel," the proper analytical framework for resolving the allegations was "well settled."[67]

The Facebook post that was the basis for the discharge was written by Marianna Cole-Rivera and read as follows: "Lydia Cruz[-Moore], a co-worker, feels that we don't help our clients enough…I about had it. My fellow co-workers how do you feel?" Cole-Rivera's co-workers responded by posting comments on her Facebook page in which they objected to Cruz-Moore's characterization of their performance as substandard. Cruz-Moore then replied "stop with ur lies about me," and complained to her manager. Following Cruz-Moore's complaint to management, Cole-Rivera and the four employees who responded to her Facebook post were discharged for "bullying and harassment" of a co-worker.

Applying *Meyers I*, the Board concluded that the Facebook posts by Cole-Rivera and the four other alleged discriminatees were concerted and protected, that the employer knew of the concerted nature of the employees' activity, and that the discharges were motivated by that protected concerted activity. By responding to Cole-Rivera's objection to Cruz-Moore's criticism of their performance, the other employees "made common cause with her." Together, their actions were concerted within the definition of *Meyers I* because they were undertaken "with…other employees." The Facebook posts also were concerted under the expanded definition of "concerted activity" under *Meyers II* because the five employees "were taking a first step toward taking group action to defend themselves against the accusations they could reasonably believe Cruz-Moore was going to make to management."

The NLRB rejected the employer's defense that it was simply applying its "zero tolerance policy" prohibiting harassment and bullying. *First*, the Facebook comments could not reasonably be construed as a form of harassment or bullying under the employer's policy. *Second*, even assuming that the policy extended to those Facebook posts, the Board noted that "legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to…discipline on the basis of the subjective reactions of others to their protected activity."

4. *Design Technology Group LLC, d/b/a Bettie Page Clothing*[68]

The NLRB held that employees were engaged in protected concerted activity when they posted on Facebook about (i) the conduct of their supervisor as it related to their terms and conditions of employment, and (ii) management's failure to address the employees' concerns. The Facebook posts also made reference to plans to consult a treatise on worker rights in California to determine if their employer was violating the labor laws. "Such conversations for mutual aid and protection," the Board said, "are classic concerted protected activity, even absent prior action."

The Facebook posts concerning the supervisor and management's inaction in response to employee complaints included the following:

- "Its pretty obvious that my manager is as immature as a person can be."
- "The way she treats us in [sic] NOT okay but no one cares because every time we try to solve conflicts NOTHING GETS DONE!!"
- "Hey dudes its totally cool, tomorrow I'm bringing a California Worker's Rights book to work."

The employer argued that the Facebook postings were not protected because the employees had "no honest and reasonable belief" that the purpose of their conduct was for mutual aid protection of employees," and that instead the employees "schemed to entrap their employer into firing them." The administrative law judge rejected this so-called "discharge conspiracy" theory as "nonsensical" and the Board agreed, adding that "even if the employees were acting in the hope that they would be discharged for their Facebook postings, the Respondent failed to establish that the employees' actions were not protected by the Act."

Endnotes

1. All decisions of the Board, its Administrative Law Judges and the Office of the General Counsel / Division of Advice referenced in this outline are available for review on the NLRB's website (www.nlrb.gov).
2. *Lafayette Park Hotel*, 326 NLRB No. 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999).
3. *Lutheran Heritage Village-Livonia*, 343 NLRB No. 646, 646-47 (2004).
4. *Id.* at 647.
5. *See, e.g.*, *Claremont Resort & Spa*, 344 NLRB No. 832, 836 (2005) (rule proscribing "negative conversations" about managers that was contained in a list of policies regarding working conditions, with no further clarification or examples, was unlawful because of its potential chilling effect on protected activity).
6. *See, e.g., Tradesmen Int'l*, 338 NLRB No. 460, 460-62 (2002) (prohibition against "disloyal, disruptive, competitive or damaging conduct" would not be reasonably construed to cover protected activity, given the rule's focus on other clearly illegal or egregious activity and the absence of any application to protected activity); *Cf. Costco Wholesale Corporation*, 358 NLRB No. 106 (2012) (rule prohibiting electronic statements that "damage the Company, defame any individual or damage any person's reputation" was unlawful, where there was "nothing in the rule that even arguably suggests that protected communications are excluded from the broad parameters of the rule").
7. *American Red Cross Blood Servs., Western Lake Erie Region*, Case No. 08-CA-090132, 2013 NLRB LEXIS 395 (NLRB June 4, 2013).
8. *Id.* at *19-20.

9. *See Allied Mech.*, 349 NLRB No. 1077,1084 (2007) ("employer may not specifically prohibit employee activity protected by the Act and then seek to escape the consequences of the specific prohibition by a general reference to rights protected by law").
10. *Design Tech. Group, LLC d/b/a Bettie Page Clothing*, 359 NLRB No. 96 (2013).
11. *DirecTV U.S. DirecTV Holdings, LLC*, 359 NLRB No. 54 (2013).
12. *Flex Frac Logistics, LLC*, 358 NLRB No. 127 (2012).
13. *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012).
14. *Hyundai American Shipping Agency, Inc.*, 357 NLRB No. 80 (2011).
15. *Banner Health System*, 358 NLRB No. 93 (2012).
16. *Verso Paper*, Case No. 30-CA-089350, NLRB GCM LEXIS 11 (NLRB GCM Jan. 29, 2013).
17. *Id.* at *1-2 (NLRB GCM Jan. 29, 2013).
18. *Id.* at *5 n.7.
19. *See Valley Hosp. Medical Ctr.*, 351 NLRB No. 1250, 1252 (2007); *Hacienda de Salud-Espanola*, 317 NLRB No. 962, 966 (1995).
20. *Direct TV U.S. DirecTV Holdings, LLC*, 359 NLRB No. 54 (2013).
21. *Id.*, slip op. at 2 (2013).
22. *Id.* at n.5.
23. *Id.* at n.6.
24. *Id.* at 2.
25. *Remington Lodging & Hospitality, LLC*, 359 NLRB No. 95 (2013).
26. *Id.*, slip op. at 4 (2013).
27. *See id*.
28. *Echostar Techs.*, 2012 NLRB LEXIS 627 (NLRB Sept. 20, 2012); *Portola Packaging, Inc.*, 2012 NLRB LEXIS 605 (NLRB Sept. 13, 2012).
29. *E.g.*, *NLRB v. Scrivener*, 405 U.S. 117, 122–125 (1972).
30. *Direct TV*, 359 NLRB No. 54, slip op. at 2.
31. *See id.* at 3.
32. *Id.; see also Lafayette Park Hotel*, 326 NLRB No. 824, 828 (1998).
33. *Hyundai America Shipping Agency*, 357 NLRB No. 80 (2011).
34. *Id.*, slip op. at 22.
35. *Flamingo Las Vegas Operating Co.*, 359 NLRB No. 98 (April 25, 2013).
36. *Id.*, slip op. at 2.
37. *Guardsmark LLC*, 344 NLRB No. 809 (2005).
38. *See Lafayette Park Hotel*, 326 NLRB 824, 825 (1998).
39. *Knauz BMW*, 358 NLRB No. 164 (2012).
40. *Id.*, slip op. at 1 (2012).
41. *Flex Frac Logistics*, 358 NLRB No. 127, slip op. at 2 (2012).
42. *See id.*
43. *Id.*, slip op. at 3.
44. *See id; see also Quicken Loans*, 359 NLRB No. 141 (June 21, 2013).
45. *Hyundai American Shipping Agency, Inc.*, 357 NLRB No. 80 (2011).
46. *Claremont Resort & Spa*, 344 NLRB No. 832 (2005).
47. *Hyundai*, 357 NLRB No. 80, slip op. at 2 (2011).
48. *See id.* at 2-3.
49. *Id.* at 3.
50. *The Boeing Co.*, Case No. 19-CA-088157, 2013 NLRB GCM LEXIS 8 (NLRB GCM Feb. 28, 2013).
51. *Id.* at *5-6 (NLRB GCM Feb. 28, 2013).
52. *Id.* at *7-8.
53. *Id.* at *15-16.
54. *TT&W Farm Prods.*, 358 NLRB No. 125 (2012).
55. *Id.*, slip op. at 15 (2012).
56. *Id.* at 2. *See also Ambassador Services*, 358 NLRB No. 130 (2012) (holding unlawful a work rule prohibiting employees from "walking off the job" without permission because it would reasonably be construed as prohibiting Section 7 activity, including protected strike activity).
57. *See id.* at 2. *See also Costco*, 358 NLRB No. 106 (2012) (holding rule prohibiting "[l]eaving Company premises during working shift without permission…" would not reasonably be construed to prohibit protected strikes or other Section 7 activity).
58. *Wilshire at Lakewood*, 343 NLRB 141 (2004).
59. *American Red Cross Arizona Blood Services Region*, Case No. 28-CA-023443, 2012 NLRB LEXIS 43 (NLRB Feb. 1, 2012).
60. *SWH Corp. d/b/a Mimi's Café*, Case No. 28-CA-084365, 2012 NLRB GCM LEXIS 40 (NLRB GCM Oct. 31, 2012).
61. *Rocha Transp.*, Case No. 32-CA-086799, 2012 NLRB GCM LEXIS 39 (NLRB GCM Oct. 31, 2012).
62. *Fresh & Easy Neighborhood Market*, Case No. 21-CA-085615, 2013 NLRB GCM LEXIS 7 (NLRB GCM Feb. 4, 2013).
63. *Windsor Care Ctrs.*, Case Nos. 32-CA-087540 and 21-CA-087575, 2013 NLRB GCM LEXIS 5 (NLRB GCM Feb. 4, 2013).
64. *Giant Food LLC*, Case Nos. 05-CA-064793, 05-CA-065187 and 05-CA-064795.
65. *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012).
66. *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37 (2012).
67. *Id.*, citing *Meyers Indus.*, 268 NLRB 493 (1983) ("*Meyers I*") and 281 NLRB 882 ("*Meyers II*").
68. *Design Tech. Group LLC, d/b/a Bettie Page Clothing*, 359 NLRB No. 96 (2013) .

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New York City Acts to Further Protect Pregnant Employees, but State and Federal Measures Lag

By Geoffrey A. Mort

I. Introduction

Congress passed the Pregnancy Discrimination Act (PDA) in 1978, amending Title VII of the Civil Rights Act of 1964 to explicitly prohibit discrimination on the basis of pregnancy. In the roughly 35 years since passage of the PDA, courts repeatedly have interpreted the statute to provide "pregnancy-blind" equality, but not special treatment, for pregnant employees. Thus, under the PDA—as well as the New York State Human Rights Law (HRL)—on-the-job accommodations and leaves of absence are only required to the extent they are available to similarly situated, non-pregnant employees.[1] That the PDA included no entitlement to post-birth leave and even prevented women from obtaining workplace accommodations during their pregnancy led some commentators to conclude that the PDA "provide[d] very limited protection."[2]

The era of unavailability of reasonable accommodations for pregnant employees in New York City ended in October 2013, when Mayor Bloomberg signed a law amending the New York City Human Rights Law (CHRL) and requiring that such accommodations employers provide.[3]

II. The New City Law

Specifically, the 2013 amendment makes it unlawful for an employer to refuse to provide reasonable accommodations for an employee for conditions related to pregnancy, childbirth or related medical conditions.[4] The purpose of an accommodation, as with the federal Americans with Disabilities Act (ADA), is to permit the employee to perform "the essential requisites of the job." An employer is only permitted to decline to provide an accommodation to a pregnant employee if it can demonstrate that the accommodation would impose an undue hardship on its business or that the employee could not perform the essential functions of the job even with a reasonable accommodation.[5] The amendment also requires employers to give employees and new hires written notice of their right not to be discriminated against on the basis of pregnancy, childbirth or a related medical condition. The notice is to be developed by the New York City Commission on Human Rights (CCHR).[6]

Unlike the law passed earlier in 2013 prohibiting discrimination in hiring on the basis of being unemployed and several other recent measures, the new City pregnancy accommodation law is not the first statute in the country providing individuals with a private right of action if they are the object of this newly recognized form of discrimination. Eight states have already have enacted similar pregnancy accommodation statutes, and several others, including New Jersey, have introduced them.

Prior to passage of the accommodations amendment to the CHRL, the City statute prohibited pregnancy discrimination and also mandated the provision of accommodations to disabled employees, which it essentially defined as those employees with a physical, psychological or mental impairment or a record of having had one. Although the CCHR interpreted the CHRL as including pregnancy in its definition of disability, many courts did not agree. Further, a number of employers did not provide accommodations to pregnant employees, and some even suspended or discharged pregnant employees who sought accommodations. The ambiguity in the CHRL prior to the accommodations amendment that caused some employers to believe they had no obligation to accommodate pregnant employees has, obviously, been resolved by the new law.

The accommodations amendment is similar to the reasonable accommodation requirement for employees with disabilities under the ADA, HRL, and pre-amendment CHRL. Notably, however, and in contrast to the ADA and HRL, courts have generally ruled that there are no accommodations for disabled employees under the CHRL that are *per se* unreasonable[7] short of those that impose an undue hardship on an employer. Extending this principle to the accommodations amendment, employers will now be required to provide whatever accommodation a pregnant employee seeks unless it can prove that the requested accommodation will pose an undue hardship. One can, therefore, reasonably expect an increase, perhaps substantial, in litigation over the undue hardship issue in coming years.

What kinds of reasonable accommodations are pregnant employees likely to request once the new law goes into effect on January 30, 2014? Even healthy pregnancies are likely to give rise to requests for such accommodations as frequent bathroom breaks, periodic rest periods for pregnant employees whose jobs require them to stand for long periods of time, breaks to facilitate increased water intake, assistance with manual labor or limitations on the weight of objects that one must lift, and perhaps leave for a period of disability arising from childbirth. With the possible exception of very small employers, it may be difficult to successfully argue that any of these accommodations are so costly, disruptive or otherwise problematic that they genuinely present an undue hardship for an employer.

III. New York State and Federal Legislation

Efforts in both the New York State Legislature and in Congress to address the issue of reasonable accommodations for pregnant women have to date proven less successful. Protections for pregnant employees similar to those in the City accommodations amendment were included in the Women's Equality Act (WEA) promoted by Governor Cuomo in early 2013. Due to a number of factors, including its broad scope, the WEA floundered in the legislature, failing to pass in the Senate. It is currently unclear whether and when (and in what form) the bill will be reintroduced.

Another measure emanating from the State Legislature is a bill that originated in the Investigations and Government Operations Committee entitled "[A]n act to amend the executive law, in relation to requiring the provisions of reasonable accommodations for pregnant women."[8] The Pregnancy Accommodation bill,[9] introduced in January 2013, is considered to be more expansive than the WEA because it does not include the concept that an accommodation must allow an employee to perform the "essential functions" of her job. The bill addresses the undue hardship issue, discussed above, by stating that "pregnancy is only temporary, and pregnancy accommodations are often less costly to employers since additional equipment is usually unnecessary."[10] No action has yet been taken on the bill in committee, and its future is considered to be uncertain.

The Pregnant Workers Fairness Act (PWFA),[11] which was introduced in both houses of Congress and is now in committee, is the proposed federal legislation on pregnancy accommodation. In several respects, the PWFA provides pregnant employees with more protection than even the City law. For example, under the PWFA, employers would be prohibited from denying job opportunities to an employee or applicant as a way of avoiding making a reasonable accommodation, or from compelling an employee to accept a particular accommodation. Perhaps not surprisingly, there is considerable skepticism—notwithstanding that the bill has 101 co-sponsors—about whether the PWFA has a realistic chance of passing in the House of Representatives.

IV. Conclusion

Because no anti-discrimination law applicable to New York has to date required that pregnant employees be provided with reasonable accommodations, New York City employers will be confronting a changed legal landscape at the outset of 2014. They will need to be certain that their managers and supervisors are aware of the new law and that their policies comply with it.

In this regard, the CCHR intends to develop and implement training programs both for employers and others.[12] The reach of these programs, however, is uncertain, and it may well be many months or longer before most female employees are aware of their rights under the new law. In the interim, employers will bear the responsibility for advising their employees of their right to reasonable accommodations during pregnancy and discussing with them in good faith what particular accommodation is most suitable for both. Nonetheless, the accommodations amendment represents a significant achievement for advocates of enhanced rights for pregnant employees in New York City and, its supporters hope, sets a precedent for similar legislation in Albany.

Endnotes

1. *See Mazzella v. RCA Global Communications, Inc.*, 642 F. Supp.1531 (S.D.N.Y. 1986).
2. Rachael Langston, "Post-Partum Problems and Emerging Solutions: The Evolution of Working Women's Post-Birth Rights," *The Summit For Workers' Rights 2013 Annual Convention*, June 26-29, 2013, Denver, CO.
3. N.Y.C. Admin. Code § 8-107(22).
4. *See id.*
5. *See* David Wirtz, *et al.*, "New York City Law Provides Reasonable Accommodation for Pregnancy, Childbirth, and Related Conditions," Littler Publications (October 9, 2013), http://www.littler.com/publication-press/publication/new-york-city-law-provides-reasonable-accommodation-pregnancy-childbir (citing New York City Local Law Int. No. 974-A).
6. Jerika Morris, "New York City Increases Protections for Pregnant Employees," *Hofstra Labor & Employment Law Journal Official Blog*, n.12 (October 10, 2013), http://thelejer.wordpress.com/2013/10/07/new-york-city-increases-protections-for-pregnant-employees/.
7. *Phillips v. City of New York*, 66 A.D.3d 170, 182 (1st Dep't 2009).
8. S. 1479 (NY 2013).
9. *Id.*
10. *Id.*
11. Pregnant Workers Fairness Act, H.R. 1975/S. 942, 113th Congressional Session (2013).
12. Morris, *supra* note 6, n.14.

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New York City Office of Collective Bargaining, Board of Collective Bargaining: A Review of 2012-13 Decisions

By Philip L. Maier

The New York City Office of Collective Bargaining (OCB) administers the New York City Collective Bargaining Law (NYCCBL).[1] Established pursuant to Sections 207 and 212 of the Public Employees' Fair Employment Act (the "Taylor Law"), the OCB is responsible for resolving disputes concerning representation issues and improper practices that arise between employers covered by the NYCCBL and employee organizations that represent approximately 200,000 unionized employees in the City of New York. The OCB also resolves petitions challenging the arbitrability of grievances filed under any one of the collective bargaining agreements that cover those employees.[2] The OCB consists of two boards: the Board of Collective Bargaining and the Board of Certification (each a "Board").

This article summarizes decisions of interest issued by the OCB during the period October 2012 through September 2013.

Good Faith Bargaining[3]

In re The Improper Practice Proceeding Between Organization of Staff Analysts—and—The City of New York and the New York City Department of Design and Construction, 6 OCB2d 26 (BCB 2013)

The Board found a violation of NYCCBL § 12-306(a)(1) when the Department of Design and Construction sent an email instructing employees to disregard a Union representative's advice and stated that the representative's email was inappropriate. The Board explained that speech or conduct that has the potential to chill or discourage an employee from participating in union activities is a violation of NYCCBL § 12-306(a)(1). While Respondents argued that the email acknowledged the employees' rights under the act by telling employees to "obey now, grieve later," the Board found that this email discouraged employees from following the Union's advice and participating in a grievance and, therefore, discouraged employees from engaging in protected activity.

In re The Improper Practice Proceeding Between Local 333, United Marine Division, International Longshoreman's Association, AFL-CIO—and—The City of New York and the New York City Department of Transportation, 6 OCB2d 25 (BCB 2013)

The Board granted in part, and denied in part, a petition which alleged that the City violated the NYCCBL § 12-306(a)(1) and (4) when it unilaterally created new procedures for conducting performance evaluations and related appeals of represented employees. The Board found that DOT's imposition of a substantively and materially new appeal procedure for performance evaluations is a unilateral change which violates NYCCBL § 12-306(a)(4) and derivatively violates §12-306(a)(1), but that the City Department of Transportation's implementation of the remaining performance evaluation criteria did not violate the statute. Additionally, the Board determined that the Union's petition as originally filed encompassed the claim concerning the appeal procedures.

In re the Improper Practice Proceeding Between District Council 37, AFSCME, AFL-CIO on Behalf of Its Affiliated Locals 1322 & 376—and—The City of New York and the New York City Department of Environmental Protection, 6 OCB2d 24 (BCB 2013)

The Board granted the petition in part, finding that the City violated the NYCCBL by applying a new licensing requirement to certain incumbents without bargaining. An employer cannot unilaterally impose a requirement that an incumbent employee obtain a particular license as a condition of employment. The Board denied the petition in part because the City did not violate the duty to bargain by revising job specifications, and did not repudiate the contract, retaliate against Union members, or otherwise interfere with the exercise of their rights.

In re The Improper Practice Proceeding Between New York State Nurses Association—and—The City of New York and New York City Health and Hospitals Corporation, 6 OCB2d 23 (BCB 2013)

The Board found that Respondents did not breach the duty to bargain in good faith by presenting a modified proposal concerning the duration of the contract and wage increases to the Impasse Panel that had not been presented to the Union prior to impasse. The Board determined that, considering the totality of the circumstances, the Respondents' conduct did not amount to bad faith bargaining. Furthermore, the Board noted that an Impasse Panel retains jurisdiction to hear and consider any and all arguments concerning a party's bargaining proposal. Therefore, the Impasse Panel will afford Petitioner ample time and opportunity to be heard with regard to its position on all terms that the panel considers, including Respondents' modified proposal.

In re The Improper Practice Proceeding Between District Council 37, AFSCME, AFL-CIO, and The New York City Department of Citywide Administrative Services, 6 OCB2d 14 (BCB 2013)

The Board granted in part, and denied in part, a petition which alleged that the City violated the NYCCBL by unilaterally adopting a new work rule applicable to time

and leave policies during City-wide emergencies. Specifically, the rule required employees to charge absences to leave time without the opportunity for excusal, and altered the circumstances under which lateness is charged to leave balances. This policy unilaterally changed existing time and leave policies, mandatory subjects of bargaining, in violation of the City's duty to bargain. The Board dismissed, however, that portion of the petition which required employees to report to work, to report to alternate work locations and have alternate work schedules because such directions are managerial prerogatives which need not be bargained.

In re The Improper Practice Proceeding Between District Council 37, AFSCME, AFL-CIO, and Its Affiliated Local 299—and—The City of New York and the Department of Parks and Recreation, 6 OCB2d 8 (BCB 2013)

The Board found a violation of NYCCBL § 12-306(a)(1), (a)(4), and (c)(4) due to the Respondents' failure to provide, upon the Union's request, information concerning the staffing of certain programs and the conversion of independent consultants to City employees. The Board found that the information requested, which related to wages, civil service classifications and whether unit work was being performed by non-unit members, was required by the Union to fulfill its bargaining obligations. The Respondents did not provide some of the information in a timely manner, only complying with the request after Petitioner filed an improper practice petition five months after the initial request. The Board rejected the defense that the information request was moot. The delay in providing the information until after the petition was filed, without providing a defense, was a failure of the Respondents to comply with their obligations under the NYCCBL and the petition was thus not moot.

In re The Improper Practice Proceeding Between District Council 37, AFSCME, AFL-CIO—and—The New York City Housing Authority, 6 OCB2d 3 (BCB 2013)

The Board found that the unilateral adoption of a paycard program, pursuant to which employees could voluntarily have their wages placed on a paycard, constituted a method of payment which could not be unilaterally implemented. The Board dismissed, however, that portion of the petition which alleged that the employer engaged in direct dealing. The Board rejected the contentions that the voluntary nature of the program or the involvement of the third party bank constituted defenses to the employer's action.

In re The Improper Practice Proceeding Between District Council 37, AFSCME, AFL-CIO, and its Affiliated Locals 371, 375, 420, 924, And 1549—and—The New York City Office of Labor Relations, The New York City Department of Citywide Administrative Services, The New York City Department of Health and Mental Hygiene, and The New York City Department of Housing Preservation and Development, 6 OCB2d 2 (BCB 2013)

The Board found a violation of NYCCBL § 12-306(a)(1), (a)(4), and (c)(4) due to the failure to provide, upon the Union's request, memoranda that the Department Of Health and Mental Hygiene (DOHMH) and the Department Of Housing Preservation and Development were required to submit to the Mayor's office. The Board determined that the requested information concerned the decision to create, delete or modify the parameters of work units to be used in layoff plans. The Union sought the requested information to ensure that the seniority rights of its members were not being violated. The City did not contend that the memoranda did not exist, were available elsewhere, were confidential, or would be burdensome to provide. Accordingly, the Board ordered the production of the documents.

In re The Improper Practice Proceeding Between Local 1182, Communications Workers of America—and—The City of New York and the New York City Police Department, 5 OCB2d 41 (BCB 2012)

The Board dismissed a petition which alleged that the City violated the NYCCBL when it refused to bargain over the practical impact of the safety of traffic enforcement officers when they were directed to no longer issue tickets for traffic and moving violations. The Board dismissed that portion of the petition which alleged a change in duties because the City, pursuant to 12-307(b) has the right to assign duties. The Board also dismissed the remaining portion of the petition. Though the proper method to challenge a claim of practical impact is through a scope of bargaining petition, the Board exercised its discretion and addressed the merits of this petition. The Board rejected the argument that there was a per se impact on safety because the change was made for the protection of the members. A union needs to show a present or future adverse threat to safety. The petition does not allege with specificity how the change in duties meets this standard. The holding is without prejudice to the Union's right to submit a petition alleging specific facts in the future.

In re The Improper Practice Proceeding Between Local 621, Service Employees International Union, AFL-CIO—and—The City of New York and the New York City Department of Environmental Protection, 5 OCB2d 38 (BCB 2012)

The Union filed a petition alleging that the City and the New York City Department of Environmental Protection violated NYCCBL § 12-306(a)(1), (3), and (4) by unilaterally eliminating the past practice of having Supervisors of Mechanics (Mechanical Equipment) (SMME) respond on overtime to off-hour road calls. The Union further alleged that this action was taken in retaliation for filing a meritorious improper practice petition and for filing a grievance. The Board dismissed the petition, finding that the employees responded to these road calls

on overtime and the elimination of the assignment is not a mandatory subject of bargaining. Consistent with the Board's interpretation of NYCCBL § 12-307(b), the City has the unilateral right to determine assignments of duties and whether or not to assign overtime. The Board also dismissed the remaining retaliation claims finding that there were legitimate business reasons for Respondents' decisions. The Board found that the Union established a prima facie case because the filing of a grievance and an improper practice petition constitutes protected activity. The Board considered the temporal proximity of the adverse action to the protected activity, that the grievance and retaliatory action concern the same issue, together with this Board's prior decisions in favor of this same group of employees. However, the City provided a legitimate business reason for its decision.

Interference and Discrimination

In re The Improper Practice Proceeding Between District Council 37, Local 376, AFSCME, AFL-CIO, on Behalf of Kevin Harris—and—The City of New York and The New York City Department of Environmental Protection, 6 OCB2d 18 (BCB 2013)

The Board found that the employer retaliated against a Union shop steward, who also filed a safety report, by scheduling him to work 8 days in a 9 day period and refusing to permit him to swap shifts with another employee without a legitimate business reason. The Board found that after being elected shop steward, the supervisor threatened to make life "hard" if he caused problems. Furthermore, the Board determined that within a short time of being elected shop steward and submitting the safety report, the retaliatory employment actions occurred. The Board found that the steward was engaged in protected activity, known to the supervisor, and did not find that the proffered legitimate business reason persuasive. The Board dismissed, however, that portion of the charge which alleged that the steward was required to work prior to donating blood. The Board stated that the evidence did not demonstrate that there was an established past practice pursuant to which unit members would not be required to work on days they donated blood. Accordingly, that portion of the charge was dismissed.

In re The Improper Practice Proceeding Between District Council 37, AFSCME, AFL-CIO, and Its Affiliated Local 1757—and—The City of New York and The New York City Department of Finance, 6 OCB2d 13 (BCB 2013)

The Board found a violation of NYCCBL § 12-306(a)(1) and (3) when the Local president was transferred because she engaged in protected activity. The Board found that the Union established a *prima facie* case by showing that the president had testified at public hearings in which she was critical of the Department of Finance, had discussed Union concerns with her supervisor and had filed a grievance. The Board found that the asserted legitimate business reason, specifically the need for more supervisors in a particular office, was pretextual, and therefore found that the City did not refute the Union's *prima facie* case.

In re The Improper Practice Proceeding Between Local 375, District Council 37, AFSCME, AFL-CIO—and—The City of New York and The New York City Department of Health and Mental Hygiene, 6 OCB2d 15 (BCB 2013)

The Board dismissed a petition which alleged that a union officer was reassigned because of his union activities. The Union alleged that an employer representative stated that the Union officer could not be placed in a particular position because of his Union position, and other employees in the work location were not represented. The Board found that the credible evidence did not demonstrate that the statement was made, and therefore there was an insufficient factual basis upon which to find interference with the exercise of union activities.

In re The Improper Practice Proceeding Between District Council 37, AFSCME, AFL-CIO, and Its Affiliated Local 983—and—The City of New York and The New York City Police Department, 6 OCB2d 10 (BCB 2013)

The Board granted in part, and denied in part, a petition alleging that Respondents discriminated against a Union official for engaging in protected activity. The Board held that the City violated the NYCCBL by denying the Local's Vice President overtime opportunities, and disciplining him for using release time. However, the Board dismissed allegations that the City violated the NYCCBL by assessing a 10-day penalty when the Vice President was determined partially at fault for an accident, changing his work location and meal time, and issuing a letter of instruction because of his union activity. The Board determined that the Union established a *prima facie* case, except with regard to the change in work location and meal time, which were not deemed adverse employment actions. The Union official was engaged in protected activity which was known to the actors who took the actions at issue. The Board found that the denial of overtime and letter of instruction concerning release time was caused by the exercise of protected activity. In contrast, the Board found that the Respondents demonstrated legitimate business reasons for the finding that he was partially at fault and the imposition of the penalty, and for the issuance of a letter of instruction and therefore dismissed those allegations.

In re The Improper Practice Proceeding Between District Council 37, AFSCME, AFL-CIO and Its Affiliated Local 436—and—The City of New York and The New York City Department of Health and Mental Hygiene, 5 OCB2d 39 (BCB 2012)

The Union filed an improper practice petition alleging that the City and DOHMH violated NYCCBL *§§* 12-306(a)(1) and (4) by directly dealing with a unit member when it asked her to change her bargained-for work schedule

and meal period. The employee refused to change her shift and was thereafter transferred. The Board, in finding a violation, stated that direct dealing occurs when an employer obtains or seeks to obtain an employee's agreement to a subject affecting a term and condition of employment, whether by a threat of reprisal or promise of benefit, or by otherwise subverting organizational and representational rights. The employer never contacted or discussed the schedule issue with the Union, evidencing that it bypassed the employee's collective bargaining representative. These actions had the effect of circumventing the Union and subverted the member's right to representation. The fact that the member did not agree to change her schedule does not provide a defense to the employer's actions.

In re The Improper Practice Proceeding Between the Sergeants Benevolent Association of the City of New York et al.—and—The City of New York and the New York City Police Department, 5 BCB2d 35 (2012)

The Board denied a petition alleging that the City and the New York City Police Department (NYPD) violated §§ 12-306(a)(1), (4) and (5) of the NYCCBL by unilaterally implementing a requirement that all officers undergo breathalyzer testing in every case where the discharge of a firearm resulted in injury or death. The parties do not dispute that in September 2007, the NYPD issued Interim Order (IO) 52, which requires all police officers who discharge their weapon resulting in death or injury to undergo a breathalyzer test. Prior to the issuance of this policy, the NYPD did not require automatic testing, but had policies regarding the investigation of the discharge of a firearm which resulted in death or injury. The Board held that based upon *Matter of City of New York v. Patrolmen's Benevolent Association of the City of New York*,[4] the City could unilaterally implement IO 52 because it is related to discipline and merely established new "circumstances prompting testing; i.e., so-called testing triggers."[5] As a result, the Board held that requiring mandatory breathalyzer testing under IO 52 may be unilaterally implemented and therefore dismissed the charge.

In re The Improper Practice Proceeding Between Local 376, District Council 37, AFSCME, AFL-CIO—and—The City of New York and The New York City Department of Transportation, 5 OCB2d 31 (BCB 2012)

The Board dismissed a petition in which the Union alleged that the City and the Department of Transportation violated NYCCBL §§ 12-306(a)(1) and (3) by retaliating against an employee because she invoked her right to contest disciplinary charges with the representation of her union. The Department of Transportation initiated discipline against the employee after a physical altercation occurred, and the parties ultimately proceeded to the Office of Administrative Trials and Hearings (OATH). After unsuccessful settlement discussions at OATH, another charge was brought against the employee due to insubordination, based upon an incident which had occurred prior to the OATH conference. The Board stated that the employee was engaged in protected activity when she sought the Union's assistance to appeal the disciplinary charges brought against her. The facts demonstrated, however, that the Department of Transportation did not have an interest in bringing the second charge against the employee until after the OATH conference. Though the Union established a *prima facie* case, the Board found that the employer had a legitimate business reason for its actions. The Board found that the insubordination was substantiated, and that the employee would have been disciplined for this valid reason despite any improper motivation on the part of the employer.

Arbitrability

In re The Arbitration Between The City of New York and The New York City Department of Transportation—and—Local 333, United Marine Division, International Longshoremen's Association, AFL-CIO, 6 OCB2d 22 (BCB 2013)

The Board denied a petition challenging the arbitrability of a grievance which alleged that the Department of Transportation violated the parties' collective bargaining agreement by refusing to expunge informal discipline resolved under EO 16 and 78 from Grievant's personnel file. The City argued that there was no nexus between the collective bargaining agreement and the subject matter of the grievance. Additionally, the City argued that the Grievant waived his right to challenge the discipline and failed to reserve any right he may have had to expunge the disciplinary record from his personnel file. The Board found that Grievant did not waive his right to arbitration of the issue and that the Union showed a plausible nexus between EO 16 and 78 and Grievant's right to have the 2010 discipline expunged from his personnel file. Accordingly, the petition was denied.

In re The Arbitration Between The City of New York and The New York City Department of Parks and Recreation—and—District Council 37, LOCAL 983, AFSCME, AFL-CIO, 6 OCB2d 17 (BCB 2013)

The Board denied a petition challenging the arbitrability of a grievance which alleged that the employer violated the terms of the Working Conditions Agreement and the Blue Collar Agreement. The Union grieved the allegedly improper assignment and transfer of certain employees when they were not selected for promotion after they took a promotional examination. The Union grieved on the basis that the transfers were to be made on the basis of seniority. The Board found that there was a nexus between the grievance and the Agreement. It rejected the employer's argument that the City's Personnel Rules precluded the grievances from proceeding to arbitration, since the Rules did not address transfers.

In re The Arbitration Between The City of New York and The New York City Department of Health and

Mental Hygiene—and—Social Service Employees Union, LOCAL 371, 6 OCB2d 16 (BCB 2013)

The Board granted a petition challenging arbitrability finding that there was no nexus between the grievance and the contract clause at issue. Specifically, the Union contended that an employee was being harassed by an employee of another agency, and that the employer did not take action to remedy the situation. However, the Board found that the clause at issue addressed only such actions between an employee and employer. Employer inaction did not establish a nexus between the grievance and the clause at issue. Accordingly, there was no reasonable relationship between the grievance and the clause, and no colorable argument of such a nexus.

In re The Arbitration Between The City of New York and The Fire Department of The City of New York—and—District Council 37, AFSCME, AFL-CIO, LOCAL 2507 & 375, 6 OCB2d 9 (BCB 2013)

The Board granted a petition challenging arbitrability on the grounds that there was no nexus between the subject matter of the grievance, gainsharing, and the terms of an Agreement between the parties. The Union asserted that the matter was arbitrable based upon a nexus between the subject of the grievance and a written memorandum addressed by the agency to an assistant commissioner, and a clause in the parties' Agreement. The Board has held that a document will not be accorded the status of a written policy or rule unless it sets forth a generally applicable policy. The memo relied upon only addressed the specific employees at issue and was not directed to future employee rights. The memo also was not a plan of future action, but a recommendation. The Board rejected the contention that the petition should be granted, however, because the Union failed to cite specific contractual language in its request for arbitration. The Respondents were on clear notice of the nature of the opposing parties' claims prior to arbitration, and therefore had a sufficient opportunity to resolve the matter. The Board also stated that there was no provision in the Agreement with which the grievance had a nexus. Further, to the extent that the Union contended that there was a past practice, there was no showing that the practice had a nexus with the Agreement.

In re The Arbitration Between The New York City Health and Hospitals Corporation—and—Manish Garg, M.D., 6 OCB2d 11 (BCB 2013)

The Board granted a petition challenging arbitrability on the grounds that an individual does not have the right to file a request for arbitration under the parties' Agreement. Further, the Agreement had specifically excluded the subject matter of the grievance from arbitration.

In re The Arbitration Between The City of New York and The Fire Department of The City of New York—and—District Council 37, AFSCME, AFL-CIO, LOCAL 2507 & 3621, 6 OCB2d 6 (BCB 2013)

The Board denied a petition challenging arbitrability, finding that there was a nexus between the subject matter of the grievance and the cited contractual provisions. The parties entered into an agreement pursuant to which both would support legislation to change a five-year recertification program for emergency medical services employees, and would meet to negotiate for alternate savings in the event it was not implemented. The Union alleged that the Fire Department of the City of New York (FDNY) violated the terms of the collective bargaining agreement and a side letter to that agreement when it rescinded the five-year recertification program it had implemented. The City argued that the matters are not arbitrable because neither the agreement nor the side letter requires the FDNY to bargain in order to implement, change, or rescind the program. The Board found on these facts that a nexus existed and therefore denied the petition.

In re The Arbitration Between The City of New York and the New York City Human Resources Administration—and—District Council 37, Local 1549, AFSCME, AFL-CIO, On Behalf of Alvin Williams, et al., 6 OCB2d 4 (BCB 2013)

The Board granted in part and denied in part a petition challenging the arbitrability of a grievance which alleged that the parties agreement was violated when the New York City Human Resources Administration failed to include employees working in titles covered by the agreement in the unit, assigned bargaining unit work to non-bargaining unit workers, and filled unit positions with non-bargaining unit employees without posting the position. The Board found that the portion of the grievance seeking the placement of the employees in the unit is not arbitrable, because there is no nexus between the grievance and the agreement. The Union did not contend that the employees held a title which is in the unit. The Board found, however, that there was a nexus between the remaining portion of the grievance and the agreement. The Board has permitted "reverse out of title" grievances to be brought when there is a claim of assignment of duties to employees who are claimed to be doing work which is substantially different than that which is in their own job specifications. The Board also found that it is for the arbitrator to determine whether the term "City employees" in the agreement encompassed the temporary employees in question, and whether the vacancy notice should have been posted.

In re The Arbitration Between The New York City Health and Hospitals Corporation—and—District Council 37, AFSCME, AFL-CIO, Local 1549, 6 OCB2d 7 (BCB 2013)

The Board granted in part and denied in part a petition challenging the arbitrability of a grievance which alleged that the parties' agreement was violated when HHC failed to include employees working in titles cov-

ered by the agreement in the unit, assigned bargaining unit work to non-bargaining unit workers, and filled unit positions with non-bargaining unit employees without posting the position. The Board found that the portion of the grievance seeking the placement of the employees in the unit is not arbitrable, because there is no nexus between the grievance and the agreement. The Union did not contend that the employees held a title which is in the unit. The Board found, however, that there was a nexus between the remaining portion of the grievance and the agreement. The Board has permitted "reverse out of title" grievances to be brought when there is a claim of assignment of duties to employees who are claimed to be doing work which is substantially different from that which is in their job specifications. The Board noted that the Union alleged that job descriptions were issued to the employees. It further found that it is for the arbitrator to determine whether this term, and the term "City employee" in the agreement, encompassed the temporary employees in question, and whether the vacancy notice should have been posted.

In re The Arbitration Between The City of New York and The New York City Department of Parks and Recreation—and—District Council 37, AFSCME, AFL-CIO, LOCAL 1505, 5 OCB2d 32 (BCB 2012)

The Board granted a petition challenging the arbitrability of a grievance which claimed a violation of the parties' Blue Collar Agreement. The claimed violation was that the employer failed to consider certain seasonal employees for rehire. The Union claimed that a nexus existed between the Agreement and the grievance due to the employers' use of a seasonal evaluation form used by supervisors in which they recommend whether the employee should be rehired. The Union claimed that the employer changed a longstanding practice of rehiring seasonal employees who were so recommended. The Board granted the Petition, finding that no such nexus existed. The Board stated that in essence the Union was alleging a violation of a past practice, and that the Agreement did not encompass violations of past practice. Similarly, the Board stated that the evaluation form did not provide employees with an arguable claim that they had a right, or preference, to be rehired.

Duty of Fair Representation

In re The Improper Practice Proceeding Between Lewis Walker—and—International Brotherhood of Teamsters, Local 237 and The New York City Housing Authority, 6 OCB2d 1 (BCB 2013)

The Board dismissed a petition which alleged a violation of the Union's duty of fair representation by not representing the petitioner properly in response to the way he was treated by his supervisors who reviewed and denied his leave request, and by not sufficiently responding to his inquiries. The Union intervened on Walker's behalf and was able to have the employer change its position and approve his leave request so that his pay would not be docked as the employer had previously intended. The Union explained to Walker that because the leave request had been granted and his pay not docked, there was no further action which it could pursue on his behalf. Walker continued to contact the Union. The Board explained that the Union, having successfully intervened on Walker's behalf, was not under a further duty to file a grievance, especially when it reasonably concluded that there was no basis to do so. The Board also concluded that the Union in fact did respond to Walker's inquiries, and that there was no prejudice to him under the facts presented.

In re The Improper Practice Proceeding Between Debra Ann Thomas—and—Local 237, International Brotherhood of Teamsters and The New York City Health and Hospitals Corporation, 5 OCB2d 40 (BCB 2012)

The Board dismissed a charge alleging that the Union breached its duty of fair representation by not filing a Step 1 grievance after her termination, and not keeping promises made to her such as helping her obtain another job. The Board also dismissed the charge to the extent that it alleged that the employer discriminated against her. The Board found that pursuant to § 12-306(e) the charge against the employer was untimely because it was filed more than 4 months after her termination, and that any allegations against the Union filed after that period were also untimely. The Board further concluded, however, that the portions of the charge against the union which were timely were without merit. The Board stated that the Union correctly concluded that it could not successfully process a grievance because she was a provisional employee not entitled to grievance rights. No additional facts were presented to substantiate any other alleged violation and the charge was dismissed.

Deferral and Jurisdiction

In re The Request for a Declaratory Ruling Between New York City Detective Investigators Association, District Attorney's Office New York City—and—The City of New York; The District Attorneys' Offices of The Bronx, Kings, New York, Queens, and Richmond Counties; and The Office of the Special Narcotics Prosecutor, 6 OCB2d 20 (BCB 2013)

The Board found that the City of New York and the District Attorneys' (DA) offices of the Bronx, Queens, Kings, New York, Richmond and the Office of the Special Prosecutor were not joint employers within the meaning of the NYCCBL. The Board found that, in accordance with the Court of Appeals' decision *In Matter of the New York City Public Library v. Public Employment Relations Board*,[6] funding alone is not a sufficient basis upon which to find a joint employer status. Additionally, the day-to-day control of the terms of conditions of employment of the detective investigators was determined by the DA offices themselves. The DA offices were responsible for

discipline, scheduling, training, hiring, firing, promoting and supervising the employees. Further, the statutory structure itself demonstrated that the DA offices were intended to be separate employers. The NYCCBL did not intend to create a duty to bargain on behalf of the City with unions representing employees of the DA offices, and section 12-303(g)(2) specifically identifies the DA offices as employers. Finally, the Board did not find any basis upon which to have the City continue as the collective bargaining agent for the DA offices.

In re The Improper Practice Proceeding Between District Council 37, Local 375, AFSCME, AFL-CIO—and—The City of New York and The New York City Department of Design and Construction, 6 OCB2d 12 (BCB 2013)

The Board deferred to arbitration a petition which alleged that the City hired outside consultants to perform bargaining unit work without first bargaining with the Union. The Board stated that the allegations in the improper practice petition arise out of the same transaction as its contractual claims. Because the claims are inextricably intertwined, it was appropriate to defer this matter to the pending arbitration proceeding.

In re The Improper Practice Proceeding Between District Council 37, AFSCME, AFL-CIO, Local 2507 & 3621—and—The City of New York and The Fire Department of The City of New York, 6 OCB2d 5 (BCB 2013)

The Board issued an interim decision deferring to arbitration two grievances which alleged that the employer violated its duty to bargain by unilaterally discontinuing a five-year certification program and replacing it with a three-year program. Because the subject matter of the petition was raised in a pending grievance, and the petition challenging arbitrability was denied, the matter was deferred to the pending arbitration proceeding. The Board retained jurisdiction, subject to a motion to reopen in accordance with *United Prob. Officers Assn.*[7]

In re The Improper Practice Proceeding Between District Council 37, AFL-CIO, AFSCME, and Its Affiliated Local 1549—and—The City of New York and The New York City Human Resources Administration, 5 OCB2d 37 (BCB 2012)

The Board deferred an improper practice petition to the parties' grievance and arbitration procedure. The charge alleged a change in the flexible schedule options available to the employees in Human Resource Administration's food stamp centers. The City argued that the matter should be deferred because the alleged improper practice arises from the Citywide Agreement. The Board found that deferral was warranted because a pending grievance raises the same claims as the charge and an arbitration proceeding would resolve the claims raised in both forums. The Board rejected the City's argument to dismiss the charge that it had a managerial right to schedule employees because the Citywide Agreement indicates that the parties bargained over the schedules in issue and the matter should therefore be deferred.

Remedy

In re The Improper Practice Proceeding Between United Federation of Teachers, Local 2, AFL-CIO—and—The City of New York, 6 OCB2d 19 (BCB 2013)

In this third decision issued by the Board in this case, the Board calculated the amount of damages to which employees were entitled who had the number of hours they were able to work unilaterally reduced by the City. In its prior decisions, the Board held that the City violated the NYCCBL by unilaterally establishing a limit on the number of hours a hearing officer may work, and in its second decision, the Board devised a formula to best approximate which employees were eligible for back pay. In this decision, the Board calculated the back pay due each employee and rendered a number of holdings relevant to that determination. It held that it was appropriate to award damages to employees only for those periods of time when they were available to work. The Board further stated that while generally employees have a duty to mitigate, under the circumstances in this case, no duty to mitigate exists. Here, only seven of the 34 affected hearing officers did not search for work, and it was extremely improbable that employees could find comparable work for the short period of time in which they were deprived of the opportunity to work additional hours. Further, the Board held that where employees had their hours reduced, though no duty to mitigate existed, interim earnings will be applied as an offset. Earnings from outside employment held prior to an improper practice generally will not be counted as an offset. Any increase in outside earnings, however, earned in order to supplement the loss of hours, will be deducted from gross back pay. The Board also held that gross back pay shall be reduced by the amount of unemployment compensation each received. Finally, the Board concluded that back pay shall be reduced by net earnings from self-employment, and gross earnings from other outside employment. Applying these holdings, the Board calculated the back pay due each hearing officer.

Endnotes

1. N.Y.C. Admin. Code, Tit. 12, Ch. 3.
2. NYCCBL § 12-305 provides, in pertinent part, that: "Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities."

   NYCCBL § 12-306(a) provides that:

   > It shall be an improper practice for a public employer or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in [§] 12-305 of this chapter;

(2) to dominate or interfere with the formation or administration of any public employee organization;

(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;

(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees;

(5) to unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization as defined in subdivision d of section 12-311 of this chapter.

NYCCBL § 12-306(b) provides that:

> It shall be an improper practice for a public employee organization or its agents:
>
> (1) to interfere with, restrain or coerce public employees in the exercise of rights granted in section 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so;
>
> (2) to refuse to bargain collectively in good faith with a public employer on matters within the scope of collective bargaining provided the public employee organization is a certified or designated representative of public employees of such employer;
>
> (3) to breach its duty of fair representation to public employees under this chapter.

3. NYCCBL 12-306(c) sets forth specific statutory criteria regarding the duty to bargain. That provision states:

> The duty of a public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation:
>
> (1) to approach the negotiations with a sincere resolve to reach an agreement;
>
> (2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on all matters within the scope of collective bargaining;
>
> (3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;
>
> (4) to furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining;
>
> (5) if an agreement is reached, to execute upon request a written document embodying the agreed terms, and to take such steps as are necessary to implement the agreement.

4. 14 N.Y.3d 46 (2009) (*City v. PBA*).
5. *Id.* at 49.
6. 37 N.Y.2d 752 (1975), *aff'g* 45 A.D. 2d 271 (1st Dep't 1974).
7. 47 OCB 38 (BCB 1991).

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Revisiting Management Compensation in LBOs

By Matthew Friestedt and Henrik Patel

With the Dow Jones Industrial Average having broken the 15,000 point threshold and the debt markets having been reopened for the past year, leveraged buyouts or "LBOs" are popping up again. Of the many issues that arise in connection with LBOs, perhaps none is as critical as properly incentivizing management. With the rekindling of the LBO market, as seen by Silver Lake's pursuit of Dell, Berkshire Hathaway and 3G Capital's acquisition of H.J. Heinz, Apax's acquisition of rue21, Madison Dearborn's acquisition of National Financial Partners and KKR's acquisition of Gardner Denver thus far in 2013, it is time to reexamine the current state of play for executive compensation in connection with LBOs.

In most LBOs, the private equity buyer will rely on the existing management team to run the business after the transaction. In order to properly incentivize management and align management's interests with the new buyer's interests following the LBO, management often receives various forms of compensation which will be discussed in detail below. These include: (1) new equity awards that are granted in connection with the closing of the LBO (the "New Equity Awards"), (2) existing stock options that are rolled over in connection with the closing of the LBO (the "Rollover Options") and any shares of stock that are either purchased in connection with the closing of the LBO or through exercise of Rollover Options (the "Purchased Shares," and together with the Rollover Options, the "Rollover Equity"), (3) new or revised employment agreements' and (4) certain other protections through shareholders agreements and the like. While many of these forms of compensation are similar in name to the compensation used in public companies, they often contain materially different terms.

Timing of Entry into New Compensation Arrangements

Before mid-2007, management typically would finalize new post-closing compensation arrangements concurrently with the LBO negotiations and before the merger agreement was signed up. However, partially as a result of the *Lear* and *Topps* cases in mid-2007, target boards of directors began greatly restricting management's discussions of post-closing arrangements during the LBO negotiations so that management compensation negotiations often occurred well after signing up the merger agreement.[1] For a period, target boards of directors rarely allowed management to sign definitive agreements concerning post-closing employment arrangements until well after the deal was signed up. However, the tide has turned again in recent transactions due to pressure from LBO buyers who have insisted on negotiating with target management prior to signing of the merger agreement. Thus, it is once again common for target boards of directors to allow management to negotiate post-closing arrangements with LBO buyers before signing the merger agreement but after primary deal terms (including price and principal deal protections) have been agreed.

Size of New Equity Award Pool

The pool of New Equity Awards will often encompass approximately 10% of the fully diluted shares outstanding immediately after closing but it can be as high as 20% or as low as 5%. The percentage is typically calculated on a "fully diluted" basis, which results in the equity pool being larger than if it were instead calculated as a simple percentage of the shares outstanding. In addition, the equity pool size is calculated from the number of shares outstanding immediately after the closing, so that if the buyer is funding a portion of the purchase price through debt, the number of shares outstanding immediately after the closing typically will be a lot smaller than the number of shares outstanding immediately prior to closing.

Timing and Allocation of Grants

Often over 80% of the entire new equity pool will be granted at closing, with the size of the grants being determined by the LBO buyer in consultation with the CEO. Typically, New Equity Awards are issued only to a select group of senior management who have a direct ability to influence company performance.[2] Depending upon the number of employees receiving New Equity Awards, it is not unusual for the CEO to receive 40% or more of the entire pool and for the second-in-command to receive 20% of the pool. Any portion of the pool that is not granted at closing (and any awards that revert to the pool upon forfeiture) is typically reserved for future grants as determined by the board of directors in consultation with the CEO.

Types of New Equity Awards

New Equity Awards most commonly take the form of stock options (or profits interests if a partnership structure is used), although, in certain transactions, restricted stock or restricted stock units are also used.[3] If the New Equity Awards consist of options, the options are typically granted with an exercise price that is equal to fair market value ("FMV")[4] on the date of grant (which is the deal price for the initial grants made at closing). Occasionally, a portion of the options is granted with an exercise price in excess of FMV (*e.g.*, half granted at FMV and half granted at 150% of FMV).[5]

Regular Vesting of New Equity Awards

New Equity Awards generally are subject to vesting on both time-based and performance-based conditions. Generally, between one-third and one-half of the New Equity Awards are subject to annual time-based vesting over four or five years (typically matching the LBO buyer's investment horizon) and, although not unusual in the public company and tech start-up context, it is unusual to see quarterly or monthly vesting. The remaining New Equity Awards typically performance-vest over four or five years based upon (1) the money on money ("MoM") cash return to the LBO buyer,[6] (2) the internal rate of return ("IRR") to the LBO buyer, or (3) the budgeted EBITDA (and can also require continued employment through the four- or five-year term[7]). Target management may require guidance in understanding the performance metrics as these conditions are different than what public companies use, which generally relate to stock price or total shareholder return rather than actual investor cash return.

The MoM cash return is the actual cash return to the LBO buyer, whether in the form of distributions or equity sales, relative to the LBO buyer's cash investment, so that if an LBO buyer invests $1 billion and gets $3 billion cash back, it has achieved a 3x MoM return. When the LBO buyer makes vesting of New Equity Awards contingent on the target company reaching specific MoM hurdles, the MoM hurdles usually are calculated on an aggregate basis for all shares the LBO buyer holds (and usually exclude management fees received by the LBO buyer, usually are calculated net of dilution from the New Equity Awards and do not include any debt funding provided by the LBO buyer), but in some instances they can be calculated on each individual sale of equity in the company by the LBO buyer. In situations where MoM returns are calculated on each individual sale by the LBO buyer, there may be a "catch up" provision for instances when initial sales by the LBO buyer do not hit the vesting targets but the aggregate sales across later years do achieve cumulative targets. It is also common that MoM hurdles will range from 1.5x to 3x the invested money (equating to a 50% to 200% cash profit). In some LBOs, different MoM schedules may be used for meeting the hurdles based upon when cash is received by the LBO buyer. In these cases, if full vesting would occur at a 3x MoM return and the investment horizon is four years, then, for example, if the sale by the LBO buyer occurred after two years, a 2x MoM return could result in full vesting. If EBITDA targets are used, it is not uncommon for there to be a "catch up" provision for prior year misses.

Additionally, LBO buyers should give careful consideration to whether the IRR is an adequate measure of performance for incentive-based compensation in connection with an LBO. If an LBO buyer is able to sell its equity stake in a company within only a short period after the close of the purchase, the LBO buyer's IRR will be deceptively high. In this circumstance, management could be rewarded in a situation where its performance did not achieve any significant returns on the LBO buyer's cash investment. Conversely, where as a 3x MoM cash return over four years yields a 31% IRR (obviously a home run), a 3x cash MoM return over 10 years yields only an 11% IRR (more like a double). To address this perceived flaw, an IRR floor could be added to a MoM hurdle.

Special Vesting of New Equity Awards

Time-vested awards usually fully vest in the event of a change in control (single trigger), although occasionally such awards will only vest upon a termination without cause or resignation for good reason following a change in control (double trigger). There will sometimes be an additional year (or pro-rata current year) vesting upon death, disability, termination without cause or resignation for good reason (each a "Good Leaver Event"). There is usually no accelerated vesting specifically upon an IPO. For the performance-vested awards, full vesting (single trigger) only occurs if either a specified MoM or IRR target has been achieved or a cumulative budgeted EBITDA target has been achieved (in other words, the performance-vesting condition needs to be satisfied in connection with such change in control). Additionally, performance-vested awards may provide for a deemed sale at the then-FMV for purposes of determining vesting of performance-vested awards in a Good Leaver Event or may leave a pro-rata portion of the award outstanding to see if performance vesting conditions are achieved in the 6-12 months after termination of employment.

When awards have single trigger or double trigger CIC provisions, the definition of "change in control" can be heavily negotiated. On one end of the spectrum a change in control could be triggered only when an unrelated third party acquires over 50% of the company's stock and the LBO buyer has also sold a majority of its stock. On the other end of the spectrum, a change in control could be triggered once the LBO buyer has lost control of the company even if it still holds a material amount of the company's stock (this in theory could be triggered in connection with an IPO). There are also endless middle ground alternatives.[8]

Other New Equity Award Terms

If options are awarded, they typically will have a term of 10 years and a relatively short exercise period following a termination of employment (typically 30 to 90 days following a resignation without good reason, 90 to 180 days following a termination without cause or resignation for good reason and one to two years following death or disability). One key item for target management to be aware of when negotiating the terms of the option awards is whether and how the options will be adjusted in the case of cash distributions to common stock holders. Unlike public companies where options generally do not expressly provide for an adjustment upon a cash divi-

dend, in portfolio companies LBO buyers often monetize their investment through dividends of excess cash or dividend recapitalizations. Thus, LBO portfolio company options generally will provide for some form of an adjustment in the event of an extraordinary cash dividend. This is typically done either by (1) reducing the option exercise price (but not below 20% of the FMV of a share) or (2) paying a cash dividend equivalent either immediately or upon vesting of the option. It is worth noting that because Section 409A issues are raised if an option's exercise price was to be reduced or adjusted in respect of "regular" cash dividends, private companies generally only are able to reduce the option exercise price in respect of "extraordinary" dividends. Since LBO portfolio companies usually do not pay "regular" dividends (choosing instead to dividend out excess cash on an irregular, "when available" basis), this distinction between "regular" and "extraordinary" dividends is of less practical effect than in the public company context. As is common in public companies, employees often are permitted to satisfy the option exercise price and all associated taxes with shares underlying options based on the FMV on the exercise date, provided, however, that the company must ensure that its credit agreement allows for such cashless exercise and tax withholding.[9] New Equity Awards may also be subject to post-termination non-compete and non-solicit provisions that can be enforced through an injunction and/or clawback.[10]

Put/Call Rights Associated with New Equity Awards

Unlike public companies, generally, LBO portfolio companies usually retain broad call rights to repurchase stock awarded pursuant to the New Equity Awards from an executive after his/her termination of employment. Upon a termination for cause, the company typically can call shares acquired upon the vesting or exercise of New Equity Awards (the "New Shares") at "lower of" cost and FMV and all outstanding New Equity Awards are cancelled. Sometimes a resignation without good reason is also subject to such a "lower of" call provision.[11] However, even in such circumstances, upon a resignation without good reason following a specified period of time (*e.g.*, three years after closing), it is not unusual for the call on New Shares to be at FMV (this ensures that if the employee works for the company for a reasonable period of time he/she will be entitled to retain the appreciation achieved while he/she worked for the company). Upon a Good Leaver Event or retirement, a company can typically call New Shares at FMV. Occasionally there will be a "tail top up" right (so-called "schmuck insurance") where additional consideration will be paid to the employee in the event that a company undergoes a change in control within three to six months after the employee terminates employment or the call right is exercised (note that a similar issue could arise from an IPO that occurs shortly after termination or exercise of the call). Call rights usually terminate on an IPO or change in control and may also terminate or be modified in a Good Leaver Event. Call rights may have a limited duration (*e.g.*, one year after termination of employment) or unlimited duration. Typically the call right is only exercisable by the company, but occasionally the shareholders (and/or other management holders) will be permitted to exercise the call right if the company does not do so. The call right is applied to options based on the intrinsic value of the option at the call price.

Additionally, executives sometimes have limited rights to sell or "put" stock to a company after their termination of employment. Upon death or disability, executives typically can put New Shares at FMV and vested options at spread based on FMV. Upon termination without cause, resignation for good reason or retirement, there occasionally are limited put rights but there would not be any put rights on a resignation without good reason or termination for cause. As with call rights, put rights usually expire upon a change in control or IPO. Typically a put right is exercisable only for a limited period of time after termination (*e.g.*, one year after termination).

It is common for the Company to have the ability to force exercise of options and have any put/call rights occur six months after such forced exercise in order to avoid unfavorable accounting expense (the FMV should be based on the value on the date of the actual put or call, as opposed to the value on the date of employment termination).[12] Most often the put/call exercise price is paid in cash, but it is not unusual when a company is prohibited from buying the shares for cash under its credit agreement either for (1) the put/call exercise period to be extended until the company is permitted to repurchase the shares for cash or (2) the company to be permitted to purchase the shares in exchange for a subordinated non-transferable note (the interest rate on these notes can vary from as low as the applicable Federal rate to as high as the company's average effective borrowing rate on its subordinated debt).

Rollover Equity

It is typical for a handful of the top executives to be required to roll over a portion of their existing options and other existing equity compensation awards that are outstanding at closing. A common formulation is for 25% to 50% of the after-tax value of the outstanding options and equity compensation awards to be rolled over, with the final rollover amount often linked to how generous the LBO buyer is in granting New Equity Awards. Additionally, some LBO buyers will also require existing executives to purchase an amount of shares equal to 25% to 50% of the after-tax value of any other equity in the company that the executives own outright. This "Rollover Equity" is designed to ensure that these executives have "skin in the game," just like the LBO buyer. In addition, certain other mid-level executives may be permitted to elect to roll over their existing equity awards and/or buy

shares of the company at the deal price. To the extent that executives are rolling over a portion of the shares they own and selling the balance of their shares, careful attention needs to be paid to ensure that the rollover is tax-free (and that the separate sales proceeds do not taint the rollover). In fact, management's decision to sign post-buyout employment agreements may be contingent on an acquisition structure where the Rollover Equity is actually tax-free. This typically is achieved either through a merger where the rollover shares remain outstanding or through the use of a holding company acquisition structure where the rollover shares are contributed to the holding company.

Rollover Options will have the same spread value as existed immediately prior to closing, but the exercise price and number of options typically will often be reduced to the maximum extent permitted under applicable tax rules. For example, 100 outstanding options with a $30 exercise price and $50 FMV ($2,000 aggregate spread) will often be converted into 50 Rollover Options with a $10 exercise price and $50 FMV (still with a $2,000 aggregate spread). This sort of conversion essentially deleverages the options and will result in underwater options being cancelled and slightly in-the-money options being converted into a very small number of current options.[13] Rollover equity awards will either fully vest on closing or have vesting that matches the terms of the equity awards that were rolled over. Rollover Options should be subject to the same anti-dilution and net exercise provisions as the New Equity Awards. For Rollover Equity, the events triggering a company call right will typically be significantly more limited than for New Equity Awards and the call price will typically be at then-current FMV. Additionally, for Rollover Equity, it is more likely that executives will have put rights, the events triggering an executive's put right will often be more generous than for New Equity Awards, and the put price will almost always be the then-current FMV.[14]

Revised Employment Agreements

Executives' current employment and severance agreements usually continue unchanged, although it is not unusual for the LBO buyer to request that good reason triggers relating to going from a public company to a private company be waived.[15] Occasionally, potential severance entitlements that are triggered in connection with closing will be restructured, although, in the event of any restructuring, careful attention needs to be paid to Section 409A of the Code.

Other Shareholder Agreements

Executives will often be prohibited or severely limited in their ability to sell or transfer their shares prior to an IPO or complete sale of the company (and where sales are permitted the LBO buyer will often have a right of first refusal or right of first offer).[16] In addition, executives will usually be subject to being dragged along on sales of over 10% to 25% by the LBO buyer and executives will usually have certain rights to tag along on sales of over 25% to 50% by the LBO buyer. Typically, executives will have certain rights to piggyback on share registrations by the LBO buyer. Given that LBO buyers often use holding companies to own company shares, it is important to address any change in control, IPO and tag / drag impacts that could occur if shares of a parent holding company are sold instead of shares in the portfolio company (since management typically only owns shares in the portfolio company). Management usually does not receive any preemptive rights.

Options will be continued after an IPO, but, if a partnership structure is used, it is possible that the partnership will be liquidated in connection with the IPO. This would mean that any profits interests would be cashed out at the time of the IPO and would not be entitled to participate in any post-IPO appreciation, and this fact needs to be balanced against the preferential tax treatment that profits interests currently enjoy. If profits interests are cashed out in connection with an IPO, management could receive new equity grants in the public company to replace cashed-out profits interests. In this manner, management would continue to have a financial interest in the performance of the company and would be rewarded for continued future performance (although there is no guarantee that the New Equity Awards will cover the same portion of the company's capital structure that the profits interests initially covered).

Super-Capitalizations

Super-capitalization transactions (*i.e.*, where a small or start-up company is overcapitalized in order to fund future growth or acquisitions), which have been occurring in recent years, especially in the banking world, raise similar issues as LBOs. However, these super-capitalization transactions also raise a host of different issues. In super-capitalization transactions, sometimes only a portion of the sponsor money comes in upfront (and subsequent money is committed to be invested over the next few years). In these circumstances, it is common for the new equity pool size to be calculated off the entire committed amount and the company will hold a clawback right to equity granted to management if a portion of the money committed is not actually invested. Additionally, these super-capitalizations sometimes provide executives with "founder's equity" that is intended to not be compensatory. Finally, in bank super-capitalizations, contingent value rights or convertible preferred stock may be used to protect against excess loan losses. In those bank super-capitalization transactions, careful attention needs to be given to both the economic and Section 409A tax issues associated with letting management participate in such contingent value rights or convertible securities.

Conclusion

While only time will tell if the stock market rebound will mark another "golden age" of private equity deal-making, one thing remains clear—the fundamental need to compensate management teams will endure. Accordingly, even as the LBO market continues to evolve, the compensation of management teams in such LBO transactions is likely to continue to be a topic of much discussion and debate.

Endnotes

1. *See In re Lear Corp. Shareholder Litigation*, 926 A2d 94 (Del. Ch. 2007) and *In re Topps Co. Shareholder Litigation*, 926 A2d 58 (Del. Ch. 2007). The *Topps* and *Lear* cases both involved "going private" transactions where, rather than conducting an auction, the target company signed up with an LBO buyer that then gave the target companies a "go-shop" window to seek other bids. In both of these cases, plaintiffs alleged that the target boards of directors allowing the LBO buyer to negotiate post-closing employment arrangements with certain members of senior management before signing the merger agreement was inadequately disclosed and also violated directors' fiduciary duties. The Court accepted plaintiffs' claims that the deficient disclosure in these cases would require the target companies to amend their proxy statements but did not find violations of fiduciary duties. However, in the immediate wake of these decisions, target boards of directors often sought to prohibit target management from negotiating their post-closing employment arrangements with an LBO buyer until after closing of a transaction or after the shareholder vote so as to limit any possible fiduciary duty or disclosure claims in shareholder strike suits. Moreover, the SEC's renewed emphasis on "going-private" transactions under Rule 13e-3 around this time may also have led some target boards to refuse to allow management to negotiate directly with potential LBO buyers in order to hopefully avoid the enhanced disclosure required by Rule 13e-3.
2. Rank and file employees who historically received equity compensation awards will often receive long-term cash awards instead on a going forward basis.
3. In Europe, it is common for an LBO buyer to fund acquisitions through stapled common and fixed-rate preferred stock, where the common stock is expected to generate super-sized returns. In this type of structure, the LBO buyer may grant New Equity Awards by allowing the management simply to buy the supercharged common stock (often referred to as "sweet" equity) without having to also buy the fixed-rate preferred stock.
4. LBO buyers often request that FMV be determined by the board of directors in good faith after consultation with the CEO. However, it is not unusual for management to request that (a) FMV be determined by an independent third party appraisal or (b) they have the right to challenge the board's FMV determination based upon an independent third party appraisal (in the latter case, management is often asked to pay the appraisal fees if the appraised price is not materially different than the board's determination). The FMV may or may not expressly include or exclude minority and lack of transferability discounts and control premiums. The FMV definition is often a point that is highly negotiated.
5. If an increased exercise price is used, this will typically take the place of the performance vesting conditions discussed below.
6. Because private equity funds typically get paid off with the actual cash profit they make (as opposed to the IRR), it is more typical to see MoM hurdles.
7. *Note*, if there are separate performance and timed-based vesting conditions, then this means that if there is a four-year vesting period and the MoM return is fully achieved after three years, the performance awards would only be 75% vested after three years and the remaining portion would vest on the fourth anniversary of grant.
8. *Note*, if there are single trigger payments of non-qualified deferred compensation, then a Section 409A change in control override or a Section 409A compliant change in control definition may be necessary.
9. *Note*, the payment of the exercise price through a net exercise does not cost a company any cash but the payment of the withholding taxes through a net exercise does cost a company cash because the company has to remit the withholding amount to the IRS.
10. If awards are granted to lower-level employees, it is possible that the non-compete will be eliminated or limited to a very short period.
11. *Note*, a "lower of" call right effectively means that the employee will not receive any economic value from the equity award, even if the employee had previously vested in all or a portion of the award. If a resignation without good reason does trigger a "lower of" call right, then the stock is still subject to a substantial risk of forfeiture under Section 83 of the Code and an 83(b) election should be made at the time of option exercise to ensure no further compensation income is recognized with respect to the stock.
12. *Note*, the put/call provisions should be vetted by a company's accountants to ensure that these provisions do not give rise to variable/liability accounting. This is one of the reasons that the put/call provisions terminate upon an IPO.
13. The exercise price will typically not be reduced below 20% of the deal price in order to ensure that the option remains treated as an option for tax purposes.
14. While the put/call rights in respect of Rollover Equity are usually at then-current FMV, some LBO buyers have asked that the put/call rights be at either (i) the lower of deal price or FMV or (ii) 80% of FMV if the executive terminates without good reason within a limited period of time after closing.
15. *Note*, such a waiver (and any new awards or enhancements) would need to comply with the Section 409A substitution rule.
16. In a right of first refusal ("ROFR"), a member of management who receives an offer from a third party to buy his or her shares must first offer his or her shares to the LBO buyer at the same price as the third party offer before selling to the third party. Third-party buyers may be less willing to invest the time and money in pursuing the purchase of New Equity from executives where the LBO buyer holds the ROFR. As an alternative to the ROFR, LBO buyers may possess a less restrictive right of first offer ("ROFO") over the shares, whereby the holder of shares must first offer the shares to the LBO buyer before attempting to sell them to a third-party buyer.

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Work Visas in Canada: The Basics, and the Latest Issues Affecting Work Visas in Canada

By Evan J. Green

There are a number of different options available to employers considering Canadian work visas for their employees. Each work visa has particular criteria and requirements, which should be assessed with caution by the employer. One work visa may be more appropriately suited to a specific situation or project than another. It is important for the employer to consider the purpose of each work permit against the objectives of the particular project or assignment, and the broader goals of the employer. Further, recent changes to immigration laws and policies have had a considerable impact on the processes and procedures for obtaining a work permit. This article will focus on three kinds of work permits: Business Visitors, Labour Market Opinion Work Permits, and Labour Market Opinion exempt Intra-company transferees and NAFTA Professionals. In the second portion of this article, new reforms to Canada's temporary foreign worker program will be outlined and explored.

1. Business Visitors

A Business Visitor is a foreign national who enters Canada to conduct international business activities. It is crucial that the individual will not engage in employment that will provide services, create competition within the Canadian labour market or remove opportunities from it, as such activities require Work Permits. Examples of acceptable business activities of an individual with a Business Visitor Visa include: purchasing or taking orders for Canadian goods or services for a foreign business or government; attending meetings, conferences, conventions or trade fairs; providing after-sales service (supervision, and not hands-on labour); receiving training by a Canadian parent company the individual works for outside Canada; training employees of a Canadian subsidiary of a foreign company; receiving training by a Canadian company that has sold the individual equipment or services; and finally, attending Board of Director Meetings (this can include meetings for the purposes of selecting and appointing a chief, governing the organization or accounting to shareholders).

It is important to note the meaning of "training" and "after-sale services," which are mentioned above. Training of clients is limited to a pre-existing contract. Further, a client must be a seller or purchaser of foreign goods and services to be used within or outside of Canada. After-sale services are activities that are derived from warranty and after-sales contracts. The after-sales contract must be part of an original sale or lease agreement, and an extension of the original contract, and services must be performed during the validity of the warranty / after-sales contract. In order enter into Canada under the after-sales service category, the Business Visitor must be either an installer, repair or maintenance worker or supervisor who has specialized knowledge that is key to a vendor's service requirements. Further, services cannot include hands-on installation. The contract must state the categories of service that will be performed by the employee. The employee must bring a copy of the contract with him / her to present to Canadian Immigration officials upon entry to Canada. Although sensitive and confidential information (i.e., pricing) may be omitted, the complete service and warranty section of the contract must be with the employee. More specific requirements of after sales-services relating to third parties and lease agreements should be examined in more detail with the employer.

There are a number of requirements which must be met in order to obtain a Business Visitor Visa. First, an individual who wishes to acquire a Business Visitor Visa must determine whether he or she also requires an accompanying Temporary Resident Visa (TRV) in order to enter Canada as a visitor. Citizenship and Immigration Canada has published a list of countries which are exempted from the TRV requirement, including the US, UK, France, Italy and Spain. However, those individuals who wish to acquire a Business Visitor Visa and are not foreign nationals of an exempted country will be required to apply for a TRV abroad, and include documentation for a Business Visitor Visa in their application.

Another requirement to obtain a Business Visitor Visa is that the foreign national must not have any admissibility issues. Potential inadmissibility issues include:

- security
- human or international rights violations
- criminality
- organized criminality
- health grounds
- financial reasons
- misrepresentation
- non-compliance with the Immigration and Refugee Protection Act, or
- having an inadmissible family member

In addition to the above requirements, a Business Visitor must not have any intent to enter the Canadian

labour market: the individual must not be gainfully employed in Canada. Moreover, the activity must be international in scope—essentially the activity should be a cross-border business activity, and one intended to benefit the foreign employer. An activity conducted for the benefit of the Canadian entity is considered work in Canada, even if there is no remuneration or if the remuneration is from a foreign source. Where a company is engaged in contractual negotiations with a client in Canada, any Business Visitors entering Canada must leave prior to the execution of the contract. Further, the primary source of the worker's remuneration, the principal place of the worker's employer, and the accrual of profits must all be located outside of Canada.

Documents typically included in a request for Business Visitor status are as follows:

- Proof of remuneration outside of Canada
- Copies of an after-sales agreement (if applicable)
- Letters from the Canadian parent / subsidiary stating the purpose of the visit
- Promotional / training materials
- Valid travel document (*e.g.*, passport) valid for a minimum of 6 months
- Return airline ticket
- Sufficient funds for visit and return trip

Business Visitors may be permitted to stay in Canada for a few days to a few weeks. The Immigration Officer will consider how long the foreign national intends to stay, the activity to be performed, and previous entries to Canada.

It is very important that Business Visitors do not receive any form of remuneration from the Canadian company; participate in any hands on installation generally performed by construction or building trades; or do any repairs or specialized services not listed in the original or extended sales agreement, warranty or service contract. In addition it is important that a Business Visitor does not do any work where a Canadian employer has directly contracted for services from a foreign company in which they are employees.

2. Labour Market Opinion (LMO)-Based Work Permits

In most cases, an employer needs to apply for a LMO from Service Canada before an employee may apply for a Work Permit. The LMO is a labour certification process, which involves demonstrating that local recruitment has been unsuccessful and there is a need to hire foreign workers. The recruitment process may differ depending on whether the position falls under National Occupational Classifications (NOC) 0, A, or B, or under low skilled workers. The NOC is a classification system set up by the government organization, Human Resources and Skills Development Canada (HRSDC), to provide a standardized language for describing the work performed by Canadians in the labour market. Each NOC category provides a list of duties and responsibilities which are to be performed by an individual in that position.

For skilled positions (NOC 0, A, or B positions), there are very specific advertising and recruitment requirements for an employer before it is able to hire a foreign worker. The employer must conduct recruitment activities consistent with the practice within the occupation until an LMO has been issued, and the employer must advertise the job for 4 weeks prior to applying for an LMO in three separate sources, including the Canada Job Bank or its provincial / territorial counterpart. One advertising method must be national in scope for these higher skilled positions.

Employers can choose one or more recruitment methods consistent with the normal practice of the occupation, among the following: Advertisement on recognized Internet employment sites such as Monster, Workopolis; on the website of a professional association; in national newspapers, professional journals or newsletters. Further, the advertisement must include the following information:

- Company operating name
- Wage / salary or salary range
- Location of work
- Nature of the position and contract duration length
- Job duties
- Skills / Requirements

After 4 weeks of advertising, if the employer cannot find a suitable candidate who is a Canadian citizen or permanent resident, the employer may apply for an LMO. Service Canada will look at several factors in the LMO application, such as:

- Whether the job offer is genuine;
- Whether there is a need for the foreign worker in the local labour market;
- Whether the employer has demonstrated that the employee will be paid the prevailing wage;
- Whether the employer is in compliance with employment standards (including with other foreign nationals previously recruited).

However, under the recent changes to the LMO procedure, the genuineness of the job offer will be examined carefully. Immigration officers will now assess whether a job is "genuine" on an expanded parameter. Immigration officers will examine the employer's past compliance with employment and recruitment laws, whether the employer can reasonably meet the terms of the job

offer, whether the employer is "actively engaged" in the business, and whether the job offer is congruent with the employer's reasonable employment needs and is consistent with the type of business the employer is engaged in.

However, recent changes to the LMO process will be examined in more detail in the following section below entitled "New Reforms to the Temporary Foreign Worker Program."

3. Labour Market Exempt Intra-Company Transferees and NAFTA Professionals

Foreign Workers who are issued Work Permits as Intra-Company Transferees (either under NAFTA or the Immigration Refugee Protection Act) are exempt from having to obtain a Labour Market Opinion (LMO). The wages to be paid to the foreign worker must be similar to Canadian wages for the same occupation. The requirements are as follows: First, the Foreign Worker must be currently employed by a multi-national company and seeking entry to work in a parent, subsidiary, branch, or affiliate of that enterprise. This means that the foreign national must be transferring to an enterprise that has one of these qualifying relationships with the enterprise where he or she is currently employed, and will be undertaking employment at a legitimate and continuing establishment of that company. Second, the foreign worker must have been employed continuously (via payroll or by contract directly with the company), by the company that plans to transfer him or her, outside Canada in a similar full-time position (not accumulated part-time) for at least one year in the three-year period immediately preceding the date of initial application. Third, the individual's employment must fall under one of the following categories:

- Executive: direct management of the organization or a major component, establishing goals and policies, exercising wide latitude in discretionary decision-making and receiving only general supervision board of directors, stockholders or higher level executives;
- Senior Managerial: manages organization or departments, supervisors and controls the work of other mangers, has authority to hire and fire and exercises discretion over day-to-day activities;
- Specialized Knowledge: involves many years of experience and advanced level of knowledge which is uncommon in the industry or expertise in the organization's processes and procedures (including product, process and service which can include research, equipment, techniques, management, or other interests). This complex knowledge should be demonstrated as difficult to transfer. Its role must be critical to the enterprise.

Fourth, the foreign worker must be entering Canada for a temporary period. Finally, the foreign worker must comply with all immigration requirements for temporary entry, including the admissibility requirements which were outlined above in the discussion on Business Visitors.

NAFTA Professionals are also eligible to be issued a work permit without having to obtain an LMO. In order to be a NAFTA Professional, the individual must be a citizen of the U.S. or Mexico; engaged in a profession as identified in Appendix 1603.D.1 of Annex 1603 of the NAFTA; be qualified to work in that profession (as evidenced by a degree or certification in a related educational program); have evidence of pre-arranged employment with a Canadian employer; provide a professional level of services in the field of qualification as indicated in Appendix 1603.D.1 of Annex 1603 of the NAFTA; and comply with all existing immigration requirements for temporary entry (including admissibility requirements, outlined above). NAFTA Qualified Professions include the following:

- Accountant
- Engineer
- Scientist
- Research Assistant
- Medical / Allied Professional
- Architect
- Lawyer
- Teacher—College, University or Seminary
- Technical Publications Writer
- Economist
- Social Worker
- Mathematician
- Hotel Manager
- Interior Designer
- Librarian
- Animal Breeder
- Sylviculturist
- Range Manager
- Forester
- Graphic Designer
- Land Surveyor
- Landscape Architect
- Nutritionist
- Dietician

- Computer Systems Analyst
- Psychologist
- Scientific Technician / Technologist
- Disaster Relief Insurance Claims Adjuster
- Management Consultant

4. New Reforms to the Temporary Foreign Worker Program

In April 2013 and July 2013, the federal government introduced legislative, regulatory and administrative changes to the process for hiring temporary foreign workers. These changes have had an impact on LMO processing. To avoid any delays in obtaining a work permit, employers must be very careful in ensuring compliance with the new requirements.

Prevailing Wages

In a LMO application, the Temporary Foreign Worker Program reviews the wages offered by the employer and compares them to wages paid to Canadians and permanent residents in the same position and geographical area. As of April 29, 2013 the federal government introduced the following changes.

Effective as of April 29, 2013, employers are required to pay temporary foreign workers at the prevailing wage by removing the existing wage flexibility. This means that employers are no longer able to pay temporary foreign worker wages up to 15% below the prevailing wage for a higher-skilled occupation, and 5% below the prevailing wage for a lower-skilled occupation, even when they could demonstrate that the wage being paid to a temporary foreign worker was the same as that being paid to their Canadian employees in the same job and in the same location.

Other Changes to the LMO Process of April 2013

In addition, the Government has increased authority to suspend and revoke work permits and LMOs if the program is being misused. This could occur if, for example, new information becomes available indicating that the entry of a temporary foreign worker would have a negative impact on the labour market or if it is determined that the LMO or work permit was fraudulently obtained. Suspending an LMO would stop the issuance of work permits. In cases where an LMO is suspended or revoked, Citizenship and Immigration Canada will review the work permits that were issued under that LMO on a case-by-case basis to determine whether the work permits should also be revoked.

In addition, there are new questions which have been added to employer LMO applications with the objective to ensure that the temporary foreign worker program is not used to facilitate the outsourcing of Canadian jobs. Additional information will be required from employers and their partner companies before issuing an LMO.

Employers will also need to ensure that they have a firm plan in place to transition to a Canadian workforce over time through the LMO process. The employer must submit the transition plan to HRSDC as part of its LMO application. The transition plan will generally include an employer's intended actions in recruitment, training, and residency. A review of the employer's progress against the transition plan will occur if the employer applies for another LMO in the future. Employers will be required to document their ongoing efforts to transition to a Canadian workforce

As of April 2013, the Accelerated LMO process was suspended, and employers are now subject to the regular processing. Finally, the fees for work permits have increased. The objective of this increase is to ensure that taxpayers are no longer subsidizing the costs of these work permits.

Changes as of July 31, 2013

As of July 31, 2013 a new set of legislative, regulatory and administrative changes has been introduced by the federal government to the LMO process. These changes are as follows.

Firstly, a new language assessment has been introduced. English and French are the only languages that can be identified as a job requirement both in LMO requests and in advertisements by employers, unless employers can clearly demonstrate in writing that another language is essential and consistent with the regular activities of the job.

In addition, there are new advertising requirements for employers. Employers are required to make greater efforts to hire Canadians before they will be eligible to hire temporary foreign workers. Employers must advertise positions for at least four weeks before applying for an LMO. This requirement applies to all advertising methods. This is different from the previous requirements, which carried recruitment and advertising obligations depending on the skill level of the positions. For example, NOC 0 and A positions required a minimum of two weeks of advertisement in the three months before the LMO application in the National Job Bank, whereas NOC B positions required two weeks of advertisement in the National Job Bank.

Employers must also now advertise in 3 separate sources. In addition to advertising on the National Job Bank website (or the equivalent provincial websites), employers must prove they have used at least two other recruitment methods. Recruitment methods depend on the skill level for the occupation. If hiring for a higher-skilled occupation, one method must be national in scope. If hiring for a lower-skilled occupation, employers must

demonstrate that they made efforts to target under-represented groups in the workforce.

Notably, employers must show ongoing recruitment efforts until an LMO has been issued. In addition, employers must re-institute all recruitment advertisements to show an ongoing recruitment effort of three types of recruitment.

Moreover, and as mentioned previously, employers must answer additional questions on LMO applications regarding the impacts of their hiring of a temporary foreign worker on the Canadian job market, based on available labour market information for the region and occupation. A negative LMO will be issued if an assessment indicates hiring a temporary foreign worker will have a negative impact on the Canadian Labour Market or if an employer has not complied with program requirements.

The Labour Market Impact Questionnaire will cover issues relating to offshoring, outsourcing and layoffs. Offshoring describes the relocation by a company of a business process from one country to another—typically an operational process, such as manufacturing, or supporting processes, such as accounting or IT services. More recently, offshoring has been associated primarily with technical and administrative services supporting domestic and global operations from outside the home country, by means of internal (captive) or external (outsourcing) delivery models. Outsourcing describes the contracting out of an internal business process to a foreign or domestic third-party organization. Layoffs describes the temporary suspension or permanent termination of employment of an employee or a group of employees for business reasons.

Based on the proposed definition of "offshoring," employers are asked to declare whether the job offer related to a contract / subcontract will facilitate offshoring. Employers are also required to provide a summary of contractual agreements between the employer and the company receiving goods and / or services. Employers will be required to provide details of how Canadians or permanent residents within the company will be positively and / or negatively affected over the next 2 years by such hiring of foreign workers. In addition, employers are also being asked to account for the hiring of any foreign workers through work permit exempt or LMO-Exempt processing streams.

Further, new processing fees have been introduced for LMO processing: Employers applying to hire temporary foreign workers must now pay a processing fee of $275 for each position requested. However, employers hiring workers for on-farm primary agricultural positions (under NOCs codes 8251, 8252, 8253, 8254, 8256, 8431, 8432 and 8611), under the Seasonal Agricultural Worker Program, or the Agricultural Stream, are exempted from the fee.

Compliance Reviews: Requirements and the Consequences of Non-Compliance

It should be noted that under the new regime, all employers hiring foreign workers on LMOs are subject to potential employer compliance reviews. There are no appeal rights, and the determinations are final once rendered. Items that will be subject to review include the following:

- Wages and Working Hours: Temporary foreign workers should receive working hours and wages that are substantially the same (STS) as those set out in the LMO confirmation letter and annex. Substantially the same is a mandate from Citizenship and Immigration Canada and Service Canada in which they determine whether the employer has had foreign workers employed in positions that are substantially the same as what was specified in their offers of employment in the two years prior to the opinion request / work permit. The wages, working conditions, and occupation must be STS. An examination of a variety of documents including T4s may be used to see if employees actually worked in the jobs and under the conditions intended when the LMO or Work Permit was issued. There are limited reasons of justification that can be used by the employer.
- Job duties: Temporary foreign workers should spend the majority of their time performing job duties that are consistent with the occupation specified in the LMO confirmation letter and annex.
- Working conditions: Employers should be complying with Canada's employment and occupational safety standards.
- Recruitment: Recruitment and job advertising efforts should be made in accordance with Service Canada's requirements.

If it appears that employers did not fully respect the terms and conditions of employment set out in the LMO confirmation letters and annexes, the employer will have the opportunity to provide a rationale. HRSDC has indicated that it will accept limited justifications for any non-compliance.

All returning employers must demonstrate that they have met the terms and conditions of employment set out in previous LMO confirmation letters and annexes. In addition, some employers may be required to submit documentation to support a more detailed employer compliance review, including any or all of the following documents: Payroll records; time sheets; job descriptions; copies of the employer-employee contract; collective agreements; temporary foreign worker's work permit; provincial workers compensation clearance letter or other appropriate provincial documentation; receipts for private health insurance (if applicable); receipts for trans-

portation costs; and information about accommodations provided by the employer.

In some cases, HRSDC will work with the employer to implement the appropriate corrective action, which may include providing compensation to the temporary foreign worker. However, employers may be found non-compliant if they refuse to provide a rationale and / or provide only partial compensation to the temporary foreign worker. If an employer is found to be non-compliant, it may result in severe consequences for an employer. The employer may be prohibited from obtaining a new Work Permit or a renewal of a Work Permit for any foreign national for a period of two years. Additionally, a non-compliant employer would be placed on an "ineligible employers list," which is published on a website for the public to view. Moreover, an employee can risk losing his or her status by extending or entering into employment agreements with an ineligible employer. Due to the information-sharing program, an employer could also be found to have violated employment laws and thus, may suffer other consequences that transcend these immigration issues.

It is important for employers to understand the liabilities associated with LMOs and non-compliance. If employers are found to not have paid employees wages substantially the same as those set out on the LMO, they may need to reimburse foreign workers for the difference in order to maintain compliance. Due to government information-sharing, employers may also be subject to sanctions and penalties from employment regulators for violations of employment laws discovered during compliance reviews.

Conclusion

In light of the recent changes and developments, and the particular characteristics of each work permit, it is important for employers to be well informed when making the assessment of the most appropriate work permit. The long- and short-term objectives of the employer should be evaluated alongside the obligations, procedural requirements, time commitment, and consequences of the work permit of their choice.

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Employee Requests for Medical Leaves of Absence or Accommodations

By Laurie A. Giordano

Employee requests for medical leaves of absence or accommodations to perform essential functions of a position often raise various issues that both the employee and employer should be aware of. This article will focus on the employee's rights and obligations under such circumstances. Specifically, what information should an employee provide to substantiate the request(s), when can an employer contact an employee's medical provider, when can an employee be required to submit to a medical examination, the scope of permissible inquiry under disability discrimination statutes, and other privacy issues.

When an employee requests leave or an accommodation it is his or her responsibility to provide proper medical documentation and / or certification to support the request. The federal Family and Medical Leave Act (FMLA) allows up to 12 weeks of unpaid leave for a "serious health condition." The FMLA governs employers with 50 or more employees for each working day during each of 20 or more calendar work weeks in the current or proceeding calendar year.[1]

A "serious health condition" under the FMLA is defined as illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider. The "continuing treatment" test for a serious health condition under the regulations may be met through: (1) a period of incapacity of more than three consecutive, full calendar days plus treatment by a health care provider twice, or once with a continuing regimen of treatment; (2) any period of incapacity related to pregnancy or for prenatal care; (3) any period of incapacity or treatment for a chronic serious health condition; (4) a period of incapacity for permanent or long-term conditions for which treatment may not be effective; or (5) a period of incapacity to receive multiple treatments (including recovery) for restorative surgery, or for a condition which would likely result in an incapacity of more than three consecutive, full calendar days absent medical treatment.[2]

To qualify for FMLA protection, the employee must work for the covered employer, work at least 1,250 hours during the 12 months prior to the start of the leave, work at a location with 50 or more employees work at that location or within 75 miles of such location, and have worked for the employer for at least 12 months.[3] The 12 months of employment are not required to be consecutive.[4] With respect to notice, when the leave is foreseeable an employee must give 30 days' notice to his or her employer.[5] If 30 days' notice is not possible, an employee is required to provide notice "as soon as practicable."[6] Further, if need for leave is unforeseeable, employees are required to provide notice as soon as practicable under the facts and circumstances.[7] The regulations clarify that this is generally within the employer's usual and customary notice requirements applicable to leave.[8]

When seeking leave for the first time for an FMLA qualifying reason, the employee does not have to specifically assert his or her rights under the FMLA.[9] The employee must provide, however, "sufficient information" to establish the qualifying reason for the leave.[10] Depending upon the situation, that may include that a condition renders the employee unable to perform the function of the job, that the employee is pregnant or has been hospitalized overnight or that the employee's family member has a qualifying condition or is unable to perform daily activities. The employee must also provide the anticipated duration of the absence, if known. If the employee is seeking leave for which the employer has already provided FMLA leave, then the employee must reference specifically the qualifying reason for leave or the need for FMLA leave. If the employer needs more information, it should inquire further.

If an employer requests it, an employee is required to provide complete and sufficient medical certification to substantiate the need for FMLA-protected leave.[11] However, an employee is not required to give the employer his or her medical records. The medical certification should contain sufficient medical facts to establish that a serious health condition exists.[12] With respect to timing, if the employer requires certification then it should ask for it at the time of the request or within five business days.[13] Of further note, an employer may request certification at a later date if there is reason to question the duration of the leave.

With respect to certification, the employer must provide the employee a reasonable opportunity to cure any deficiencies in a medical certification. The deficiencies must be articulated in writing to the employee with specification of what additional information the employer is seeking. The regulations state that seven calendar days should be given to cure any deficiencies.[14] Recertification can be required no more than every 30 days.[15]

If an employer seeks to have contact with an employee's medical provider, it must comply with the Health Insurance Portability and Accountability Act (HIPAA) privacy regulations. Under the FMLA and HIPAA, employers may contact an employee's health care provider for authentication or clarification of the medical certification by using a health care provider, a human resource professional, a leave administrator, or a management official—not the employee's direct supervisor. A written

HIPAA authorization will need to be provided by the employee if individually identifiable health information is to be provided to the employer. Notably, an employee does not have to sign a medical information release as part of the FMLA certification process. It is the employee's responsibility to provide sufficient certification or an authorization to the employer. In some cases, the employee may wish to sign the authorization to ensure that the information will be available to support the certification.

Can an employer require an employee to submit to a medical examination as a condition of a leave of absence? No. However, to return to work, an employee who was absent on FMLA leave due to an employee's own serious health condition may be subject to an employer's uniform policy or procedure (if in place) requiring all similarly situated employees to submit a certification from the employee's own health care provider that the employee is able to resume work.[16] Failure to submit a properly required fitness to return to work certification could delay reinstatement or he or she may be denied reinstatement.[17]

If an employee is unable to work because of a work-related accident and is collecting Workers' Compensation benefits, he or she may also be using concurrent FMLA leave.[18] Pregnant employees may have rights under the FMLA (including the right to reinstatement) as well as the Pregnancy Discrimination Act of 1978.[19] The Act does not mandate a specific time for leave, but provides for equal treatment of pregnant employees and other employees of the company unable to work due to temporary disability.

Smaller employers not covered by the FMLA are not required to provide the same protected unpaid leave. However, other statutes and protections may be implicated, including an employer handbook or policies. Furthermore, Section 291 of the New York State Human Rights Law (HRL) provides for the right "to obtain employment without discrimination because of…disability[.]" Further, HRL section 296(3) provides that it is an unlawful discriminatory practice for an employer to refuse to provide reasonable accommodations for the known disabilities of an employee. In order for an employer to be subject to the HRL it must have at least four employees.[20]

The HRL defines the term "disability" to mean:

> (a) physical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities in the job or occupation sought or held.[21]

"The term reasonable accommodation means actions taken which permit an employee…to perform in a reasonable manner the activities involved in the job or occupation sought or held…"[22]

Additionally, when a work accommodation is requested by an employee, the Americans with Disabilities Act (ADA) may be implicated. According to the U.S. Department of Justice's Civil Rights Division,

> The ADA is one of America's most comprehensive pieces of civil rights legislation that prohibits discrimination and guarantees that people with disabilities have the same opportunities as everyone else to participate in the mainstream of American life—to enjoy employment opportunities, to purchase goods and services, and to participate in State and local government programs and services. Modeled after the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, religion, sex, or national origin—and Section 504 of the Rehabilitation Act of 1973—the ADA is an "equal opportunity" law for people with disabilities.[23]

The U.S. Equal Employment Opportunity Commission (EEOC) enforces the ADA in the employment context. Title I of the ADA provides that it applies to employers (including State and local governments, employment agencies and labor organizations) with fifteen or more employees.[24] To be protected by the ADA, the employee must have a disability, which is defined by the ADA regulations as a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment.[25] The ADA does not specifically name all of the impairments that are covered. An employee with a qualifying injury has the right to request a reasonable accommodation for the hiring process and on the job. The law requires an employer to provide reasonable accommodation to an employee or job applicant with a disability, unless doing so would cause significant difficulty or expense for the employer ("undue hardship").[26]

A reasonable accommodation is any change or adjustment to a job, the work environment, or the way things usually are done that would allow an employee to apply for a job, perform job functions, or enjoy equal access to benefits available to other individuals in the workplace.[27] There are many types of adjustments that may help

people with disabilities work successfully. Some of the most common types of accommodations include:

- physical changes, such as installing a ramp or modifying a workspace or restroom;
- sign language interpreters for people who are deaf or readers for people who are blind;
- providing a quieter workspace or making other changes to reduce noisy distractions for someone with a mental disability;
- training and other written materials in an accessible format, such as in Braille, on audio tape, or on computer disk;
- TTYs for use with telephones by people who are deaf, and hardware and software that make computers accessible to people with vision impairments or who have difficulty using their hands; and
- time off for someone who needs treatment for a disability.

An employee has to request the accommodation and need only advise the employer that he or she needs an adjustment or change because of the disability. He or she does not need to complete any special forms or use technical language to do this. For example, according to the U.S. Department of Labor website, if an employee uses a wheelchair and it does not fit under his or her desk at work, he or she should tell the supervisor as it is a request for a reasonable accommodation. Further, it states that a doctor's note requesting time off due to a disability or stating that an individual is able to work with certain restrictions is also a request for a reasonable accommodation.

The law places strict limits on employers when it comes to asking job applicants to answer medical questions, take a medical exam, or identify a disability.[28] For example, an employer may not ask a job applicant to answer medical questions or take a medical exam before extending a job offer.[29] An employer also may not ask job applicants if they have a disability (or about the nature of an obvious disability).[30] An employer may ask job applicants whether they can perform the job and how they would perform the job, with or without a reasonable accommodation.[31]

After a job is offered to an applicant, the law allows an employer to condition the job offer on the applicant answering certain medical questions or successfully passing a medical exam, but only if all new employees in the same type of job have to answer the questions or take the exam.[32] However, an employer cannot reject an applicant because of information about a disability revealed by the medical examination, unless the reasons for rejection are job-related and necessary for the conduct of the employer's business.[33] The employer cannot refuse to hire you because of your disability if you can perform the essential functions of the job with an accommodation.

Once a person is hired and has started work, an employer generally can only ask medical questions or require a medical exam if the employer needs medical documentation to support an employee's request for an accommodation or if the employer believes that an employee is not able to perform a job successfully or safely because of a medical condition. Thus, when a disability-related inquiry or medical examination of an employee is "job-related and consistent with business necessity" it may be permitted.[34] This requirement may be met when an employer has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition. Thus, for example, inquiries or medical examinations are permitted if they follow a request for reasonable accommodation when the need for accommodation is not obvious, or if they address reasonable concerns about whether an individual is fit to perform essential functions of his / her position. In addition, inquiries or examinations are permitted if they are required by another Federal law or regulation.[35] In these situations, the inquiries or examinations must not exceed the scope of the specific medical condition and its effect on the employee's ability, with or without reasonable accommodation, to perform essential job functions or to work without posing a direct threat.

As a side note, the ADA requires that employers keep all medical records and information confidential and in separate medical files. Of further note, a family member, friend, health professional, or other representative may request a reasonable accommodation on behalf of an individual with a disability.[36] Helpful information for employees, employers, and medical providers is available at www.eeoc.gov.

Endnotes

1. 29 C.F.R. § 825.400.
2. 29 C.F.R. § 825.113. For a description of certification of need for FMLA leave, *see* U.S. Department of Labor, Wage and Hour Division, *Nonmilitary Frequently Asked Questions and Answers About the Revisions to the Family Medical Leave Act* at http: / / www.dol.gov / whd / fmla / finalrule / NonMilitaryFAQs.pdf (last visited Oct. 18, 2013).
3. 29 C.F.R. § 825.104.
4. *See* U.S. Department of Labor, *see* note 3.
5. 29 C.F.R. § 825.302.
6. 29 C.F.R. § 825.302(a)-(b).
7. 29 C.F.R. § 825.303.
8. *Id.*
9. 29 C.F.R. § 825.301(b).
10. *Id.*
11. 29 C.F.R. § 825.305.
12. *See* U.S. Department of Labor, Wage and Hour Division, *Nonmilitary Frequently Asked Questions and Answers About the Revisions to the Family Medical Leave Act* (*see* note 2).

13. 29 C.F.R. § 825.300(b).
14. 29 C.F.R. § 825.305(c).
15. 29 C.F.R. § 825.308(a).
16. 29 C.F.R. § 825.312(a).
17. 29 C.F.R. § 825.312(e).
18. *See* Sharon P. Stiller, Employment Law in New York § 4:240 (West Group 2001).
19. 42 U.S.C.A. § 2000e(k).
20. N.Y. Exec. Law § 292(5) (2010).
21. N.Y. Exec. Law § 292(21).
22. N.Y. Exec. Law § 292(21-e).
23. "Intro to the ADA," available at http://www.ada.gov/ada_intro.htm (last visited Oct. 18, 2013).
24. 29 C.F.R. § 1630.2(e).
25. 29 C.F.R. § 1630.2(g).
26. 29 C.F.R. § 1630.2(p); 29 C.F.R. § 1630.9.
27. 29 C.F.R. § 1630.2(o).
28. 29 C.F.R. § 1630.10, *et seq.*
29. 29 C.F.R. § 1630.13.
30. *Id.*
31. 29 C.F.R. § 1630.14.
32. 29 C.F.R. § 1630.14(c).
33. 29 C.F.R. § 1630.14(c)(2).
34. 42 U.S.C. § 12112(d)(4) (1994); 29 C.F.R. § 1630.14(c) (1996).
35. 29 C.F.R. § 1630.15 (e) (1996) ("It may be a defense to a charge of discrimination…that a challenged action is required or necessitated by another Federal law or regulation….").
36. *Beck v. Univ. of Wis.*, 75 F.3d 1130 (7th Cir. 1996) (assuming, without discussion, that a doctor's note requesting reasonable accommodation on behalf of his patient triggered the reasonable accommodation process).

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Mezonos Brooklyn Bakery: A Bridge Too Far for *Hoffman Plastics*

By Jon L. Dueltgen[1]

Several months after the terrorist attacks of September 11, 2001, the Supreme Court held that someone who violated the Immigration Reform and Control Act (IRCA) by fraudulently using Jose Castro's papers in his employment application at Hoffman Plastics was ineligible to recover the backpay typically awarded under § 10(c) of the National Labor Relations Act (NLRA). Backpay is typically awarded under the NLRA when terminated for engaging in protected "concerted activities for the purpose of collective bargaining or other mutual aid or protection."[2] However, the 5-4 majority opinion by Justice Rehnquist, if broadly interpreted, strips away already limited labor remedies to some 11.2 million unauthorized immigrants.

Before its ruling in *Hoffman Plastics v. NLRB*, the Supreme Court had already resolved the legal dilemma of providing remedies to undocumented workers in *Sure-Tan, Inc. v. NLRB*,[3] which held that in "computing backpay, employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States" and that backpay "'must be conditioned upon the employees' legal re-admittance to the United States."[4] The Court in *Sure-Tan* affirmed the National Labor Relations Board's (NLRB) decision to categorize undocumented workers as employees under § 2(3) of the NLRA because it would help effectuate both labor and immigration policy. If undocumented workers were not afforded legal protection from intimidation and employer violations of labor law, "there would be created a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining."[5] However, between the decision in *Sure-Tan* and *Hoffman Plastics*, Congress enacted IRCA to further restrict unlawful immigration by focusing on the workplace with I-9 verification processes and criminal sanctions for non-compliance, but there is no indication that IRCA was written or intended to counteract pre-existing labor and employment statutes beyond strengthening the outmoded Immigration and Naturalization Act (INA).[6]

By expanding the Supreme Court's review beyond the precedent set forth in *Sure-Tan*, the majority in *Hoffman* sought to send a strong signal against unauthorized immigration and to punish Castro's criminal behavior in submitting fraudulent working papers to the employer. The question arises, however, whether the Court's decision should be limited to its facts, or whether the broad-sweeping dictum included in Justice Rehnquist's opinion should be understood as the holding of the case.[7] In resolving this question using a fault-based analysis in *Mezonos Maven Bakery, Inc.*, Administrative Law Judge (ALJ) Steven Davis distinguished from *Hoffman* those cases in which the employee did not actually violate IRCA in the exercise of her traditional labor rights.[8]

The NLRB, however, reversed ALJ Davis's finding that *Hoffman* required a fault-based analysis, and chose to rescind backpay for the undocumented workers despite the employer's failure to check for immigration papers. The five-year delay in issuing this decision is important because the Board's decisions during the period from 2007 to 2009 were legally insignificant because the Board had only two members and operated without a quorum.[9] When the Board finally issued its decision in August 2011, the agency was marred by three further controversies. First, House Republicans made a serious effort to defund the NLRB, which amounted to an unprecedented attack on an independent agency.[10] Second, there had been intense political scrutiny of the Board's adjudication in the case involving the Boeing Company's decision to move one of its plants from Washington state to South Carolina allegedly due to antiunion animus. Third, its adoption of new rules to expedite unionization elections became the fodder for a right-wing assault on the Board's operations.[11] These political factors doubtlessly influenced the Board's decision to shy away from a view which would be seen as defending undocumented aliens at the expense of American workers. In protest of the peculiar result of their own majority opinion, outgoing Chairwoman Liebman and incoming Chairman Pearce concurred in an "unusual critique"[12] of *Hoffman*.

This article argues the Board erred in failing to distinguish *Mezonos* on the basis of its facts. When future courts confront an instance of an employee who has not actually violated IRCA, they should view an award of backpay as reconcilable with *Hoffman* because *Hoffman* should be controlled by the fact that Castro fraudulently submitted papers in violation of IRCA.

The Statutory Purposes of the NLRA and IRCA

In determining that *Hoffman* should be limited to its critical facts, it is important to evaluate the comparative purposes of IRCA and the NLRA, and whether they are compatible as a comprehensive immigration control scheme in the workplace. The answer to this question colors whether one would side with the majority or dissent in *Hoffman*.[13] The following discussion maintains that the middle path of a fault-based rule would align the

goals and enforcement of national immigration and labor policy, while remaining in line with *Hoffman's* precedent. Furthermore, a rule that associates liability with fault is morally superior and has a strong basis in common law doctrines from tort and contract law. Finally, the outcome of this discussion will be applied to the recent *Mezonos* decision, where the NLRB rejected the proposed fault-based rule.

Enacted during the Great Depression, the NLRA was sponsored by Senator Robert Wagner to empower workers with rights and privileges in the workplace in order to promote the flow of commerce.[14] Unlike any other piece of New Deal legislation, the NLRA endowed mostly collective, rather than individual, rights in a "process under which firms and their employees could define their own rights and obligations…[and] in which workers would have to channel their efforts into a collective voice in order to advance their interests."[15] Under this landmark statute, the NLRB is the independent agency charged with investigating and enforcing violations of § 7 employee rights before the agency's impartial ALJs, whose decisions can be appealed to a five-member Board that is nominated by the President and confirmed by the Senate.[16] Central to exercising these collective rights is that notion that employees must have "full freedom of association or actual liberty of contract," and that their rights to "organize and bargain collectively" must be protected through the provision of appropriate remedies under federal law.[17]

In pursuing these aims and weighing them against the interests of immigration control, the Court had already determined in *Sure-Tan* that the INA and NLRA were "reconcilable":

> Application of the NLRA helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment. If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws.[18]

The question arises of whether the adoption of IRCA in 1986 prioritized immigration control over other statutory objectives. In *Hoffman*, the majority's decision to abandon the rationale of *Sure-Tan* indicated that the Court believed immigration concerns trumped labor rights. To understand this ruling, it is useful to investigate how IRCA compared to the INA and what the legislature intended to change in pre-existing labor law through IRCA's implementation.

In addition to providing amnesty for already present undocumented workers and boosting border patrols, IRCA focused on limiting the "employment magnet"[19] of the United States by regulating employers so that they would have to verify an individual's eligibility for employment authorization using I-9 forms and supporting documentation or face possible criminal sanctions for non-compliance.[20] Cognizant that employment was one of the factors luring migrants to the United States, Congress purposefully prescribed "employer sanctions" in IRCA as a "deliberate legislative choice that grew out of many years of congressional studies and commissions and the recognition that Congress could not hope to influence the supply of undocumented workers."[21] Taking into account the inadequacy of the INA in regulating employer demand for undocumented workers, Congress fully intended to shift to the employer the burden of complying with immigration laws after IRCA because employers were in the best position to be deputized given their relative information and agency costs. Although the *Hoffman* majority correctly perceived that the employment relationship between an undocumented worker and an employer is necessarily founded on someone's illegal act, the congressional intent expressed in the IRCA was limited to punishing rogue employers (and later amended to punish undocumented workers like Jose Castro who committed fraud in acquiring their jobs). It did not penalize undocumented individuals merely for seeking employment.

When enforcing the Board's decision in *Hoffman*, the D.C. Court of Appeals had cited a House Education and Labor Committee Report in the Congressional Record indicating that IRCA should not impinge upon pre-existing labor law or standards and that IRCA was in a sense a codification of the majority's rationale in *Sure-Tan* about avoiding a race to the bottom:

> No provision of the law should limit the powers of State or Federal labor standards agencies such as the Occupational Safety and Health Administration, the Wage and Hour Division of the Department of Labor, the Equal Employment Opportunity Commission, the National Labor Relations Board, or Labor arbitrators, in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies. To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.[22]

Nevertheless, when this legislative history was raised again on appeal by Justice Breyer in his vociferous dissent, Justice Rehnquist dismissed it as a "slender reed," which in the majority's view showed only that Congress endorsed the *Sure–Tan* holding that undocumented aliens are employees. The majority accepted that undocumented workers remain § 2(3) employees as defined under the NLRA and as interpreted in *Sure-Tan*, but at the same time maintained that these very workers would not be entitled to the legal protections of an "employee" so long as they were in violation of IRCA during their employment.[23] In eliminating the Board's critical remedy of backpay, the Court gutted the legal significance of the title "employee" for this subclass of workers by only leaving available the nominal relief of notice-posting (and, theoretically, reinstatement).

The *Hoffman* decision was emblematic of two divergent views on the immigration control and labor rights dilemma. The majority considered it necessary to reconcile what it perceived as "conflicting immigration law policies" whereas the dissent believed that the "implicit assumption" that the NLRA and the IRCA are at cross-purposes was simply "not justified."[24] The canons of statutory interpretation establish that "[w]hen two statutes appear to be in conflict they should be construed in a harmonious manner if at all possible," and "[i]f there is a question as to whether the statutes are in conflict with one another, the intent of the legislature will be looked at if it is possible."[25] Here, the legislative history clearly sought a harmonious reading, and the *Sure-Tan* decision had already explained why the two statutes would help reinforce the other in a comprehensive legal scheme.

"Certainly not in any statutory language"[26] did the majority have a basis to read IRCA so dominatingly as to suggest that it had carte blanche over a pre-existing labor regime that has existed since 1935, particularly when both statutes should be read complementarily and in support of each other's goals. Although the philosophy presented by the dissent in *Hoffman* is preferable in effectuating Congress's intent for either statute individually or for both acting together, this does not necessarily suggest that the result in the case was incorrect, but rather that it should be construed as being limited to the critical facts on which it was decided. Highlighting the narrow holding of the case, Justice Rehnquist stated, "[w]hat matters here, and *what sinks* both of the Board's claims, is that Congress has *expressly made it criminally punishable for an alien to obtain employment with false documents*."[27]

So far as law shapes rational economic behavior on the margins, the current legal regime incentivizes employers to replace authorized American workers, who would not accept "unconscionable" working conditions or pay, with undocumented workers who are more willing due to their opportunity costs.[28] Put differently, "[c]urrent law and practice creates a perverse economic incentive for employers to employ undocumented workers, because employers can deny undocumented workers the most basic workplace protections and escape responsibility by simply calling for an immigration inspection."[29] With this unprecedented level of power over illegal immigrants, employers are discouraged from hiring the very American workers these immigration laws were designed to protect.[30] Justice Breyer aptly noted, "the Court's rule offers employers immunity in borderline cases, thereby encouraging them to take risks, i.e., to hire with a wink and a nod those potentially unlawful aliens whose unlawful employment (given the Court's views) ultimately will lower the costs of labor law violations."[31] Some may argue that IRCA provides sanctions for employers, too, for knowingly committing the crime of "unlawfully employing illegal aliens," and not immediately terminating them should the employer find evidence of undocumented status in the course of the employment relationship. However, the limited "good faith" adherence requirement and high "knowing" culpability requirement narrows liability, and fines range from as little as $250 to $10,000 per unauthorized worker, which amounts to little more than an extra expenditure for employers keen on flouting more costly labor protections.[32] Although repeated violations may result in a "pattern of practice" and increased criminal sanctions, practitioners have noted that employers often evade significant liability and that immigration authorities are perceived to operate at employers' behest.[33] Justice Breyer summarized that the "denial [of backpay] lowers the cost to the employer of an initial labor law violation (provided, of course, that the only victims are illegal aliens). It thereby increases the employer's incentive to find and hire illegal-alien employees."[34]

Based on these inequitable outcomes, courts and commentators have sought out ways to either make the best of or distinguish cases from *Hoffman* altogether. ALJ Fish agreed with legal scholars who found an "estoppel or balancing of the equities argument" to be applicable in the circumstances presented in *Mezonos*.[35] In this regard, he noted, "in my view that is what the Supreme Court did in *Hoffman*…the court viewed IRCA violations by the employee as more substantial, and found that the Board was foreclosed from awarding backpay."[36] In the converse situation, where the employer, through misfeasance or nonfeasance, is more at fault than the employee, the more blameworthy violator should bear the responsibility for the violation. It is important to weigh relative levels of fault and the severity of a violation in determining accountability for the violation of immigration and labor laws, rather than having a violator-neutral rule with respect to backpay. Ultimately, a fault-based approach protects the quality of American jobs, held by American workers, rather than enabling their deterioration. Employers' incentives will be aligned with both statutes because, to the extent that they undermine immigration policy by either turning a blind-eye to fraudulent documents or failing to ask for them, employers shall properly

be held liable under both immigration and labor law. Moreover, undocumented workers will truly be held accountable for their own intentional violations, rather than being blamed for the nonfeasance of their employers, thereby linking liability with fault. Although initially proposed as an instrumentalist argument because it incentivizes compliance, this approach is heavily grounded in traditional moral justifications because it relies on notions of intentionality and fault from relevant doctrines of law.

Adopting a Fault-Based Regime

In establishing the moral superiority of a fault standard, it is helpful to first identify the other doctrines of law that can be beneficial to this labor-immigration law intersection. Labor law, in its regulation of contracts and duties between bilateral parties, has its main basis in private law, while IRCA, with its criminal sanctions, stems from public policy. In the public law realm, a *mens rea* requirement satisfies society's interest in punishing only those who are morally blameworthy and thus fortifying the law's role in shaping behavior with its normative authority. On the other hand, this intent requirement is also apparent in bilateral adjudications of private law and is manifested in the notion of "fault," which serves to hold accountable only those who fall beneath a standard of care and do not satisfy their correlative duties to other individuals. The public-private confusion is accentuated here because it involves an intersection of the two realms, where national immigration (and labor) public policy bears upon what would traditionally be viewed as a private employment contract between individuals, thus lending itself to comparison with contract and tort law.[37]

A fitting analogy to the public-private law dilemma can be found in the contract doctrine of invalidity on grounds of illegality, where a private law claim is voided on account of public law. A "promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed by in the circumstances by a public policy against the enforcement of such terms," such that in balancing the interests, courts should weigh "(a) the parties' justified expectation, (b) any forfeiture that would result if enforcement were denied, and (c) any special interest in the enforcement of the particular term."[38] This result is underscored by the common law principle of *in pari delicto potior est conditio defendentis*, suggesting that in cases of substantially equal fault, the party holding the benefits (in this case, the employer) would win without judicial interference[39] because "courts should not lend their good offices to mediating disputes among wrongdoers; and second, that denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality."[40] However, the Restatement and case law both provide that if the parties are not equally blameworthy, or if public policy requires, the plaintiff's recovery should not be barred by *in pari delicto* because society is "best served by insuring that the private action will be an ever-present threat to deter anyone contemplating [illegal] business behavior."[41] In IRCA, Congress has determined that the behavior of unscrupulous employers would be most responsive to deterrence and, arguably, that it would be optimal for the party breaching both labor and immigration laws to be held accountable for both violations. Even if the undocumented worker is in some general or imputed sense at fault for seeking unauthorized employment when she does not actually violate a provision of IRCA, her extreme "inequality of condition" and public policy suggest that society would be better served in deterring the employer from violating IRCA and the NLRA through the imposition of backpay.[42]

The *Hoffman* majority advances a standard akin to strict liability where the state of mind of the actors is irrelevant: the fact that there is a violation of some sort, no matter who is actually at fault, prematurely causes the employee to assume the burdens for the violation. In the view of the majority, the undocumented worker assumes a sort of strict liability for backpay remedies because, merely by virtue of applying for or holding a job, she has gone against the spirit of IRCA. In tort law, strict liability is a standard usually applied to firms, and sometimes persons, "who pursue permissible but dangerous activities: storing explosives, running nuclear power stations, keeping wild animals, marketing drugs or other dangerous products…."[43] In this case, the Supreme Court has perceived unauthorized immigration as a dangerous activity, especially in light of the foreign-based terrorist attacks which shadowed its decision and should be properly quelled. However, when the moral blameworthiness of the crime is disjoined from legal blameworthiness, even the Supreme Court has said that "strict liability should be prudently and cautiously attributed to criminal statutes"[44] and for "limited circumstances"[45] because excluding an intentionality requirement, as in strict liability, erodes the important norm-shaping virtue of the law. If strict liability were to be applied at all, the legislative history of IRCA would suggest that it should apply against employers, though any strict liability regime would nonetheless be improper.

From time immemorial, the nexus between fault and liability has connected the various disciplines of law. The dilemma in this labor law context can best be analogized to the strict liability and fault-based negligence standards in tort law because tort law is the traditional basis for private law causes of action concerning bilateral parties and their duties to one another. In tort law, a fault-based negligence scheme has been found preferable since it determines accountability for violations of the law on the basis of specific states of mind, rather than presuming some sort of general or imputed intent via strict liability. Hart explains that the idea behind intention is as

> …one of the principal determinants both of liability to punishment and of its se-

> verity. All civilized penal systems make liability to punishment…dependent not merely on the fact that the person to be punished has done the outward act of a crime, but on his having done it in a certain state of frame of mind or will.[46]

In other words, the inclusion of an intentionality requirement, i.e., a fault-based scheme, is central to the justification of any punishment or deprivation, and would similarly help justify an equitable remedy as in the instant case.

Likewise, an examination under the comparative fault scheme of tort law would doubtlessly suggest that the unscrupulous employer should bear a more significant share of the legal punishments due to the violation of not one, but two sets of federal statutes, as opposed to the single immigration-based violation of the undocumented worker. Even in contributory negligence jurisprudence, the "last clear chance doctrine" mitigates the harshness of the plaintiff forfeiting recovery should she be found to be only minimally at fault. Contributory negligence tracks the *Hoffman* and *Mezonos* reasoning since the worker forfeits backpay just for being somewhat at fault. Under the last clear chance doctrine, however, even a

> …plaintiff who has negligently subjected himself to a risk of harm from the defendant's subsequent negligence may recover for harm caused thereby if, immediately preceding the harm, (a) the plaintiff is unable to avoid it by the exercise of reasonable vigilance and care, and (b) the defendant is negligent in failing to utilize with reasonable care and competence his then existing opportunity to avoid the harm, when he (i) knows of the plaintiff's situation and realizes or has reason to realize the peril involved in it or (ii) would discover the situation and thus have reason to realize the peril, if he were to exercise the vigilance which it is then his duty to the plaintiff to exercise.[47]

The reasoning behind this doctrine is relatable to the situation of the undocumented worker. Although a worker may have put herself at risk by illegally entering the country, the employer had the last clear chance to avoid the violation by virtue of exercising reasonable care with regard to IRCA by verifying her employment authorization. If the employer exercises the good faith reasonable care mandated by IRCA, and the employee fraudulently submits papers, then the reasoning behind this doctrine would not protect the undocumented worker; conversely, where the employer fails to exercise reasonable care as mandated by IRCA and then abuses labor rights, the employer should be held liable under both IRCA and the NLRA. If the undocumented worker is unable to accept backpay based on her status, then the punitive effect of the award should suffice to deter employers, and could still benefit other workers who are owed backpay in other labor violations where funds could not be recovered.

Mezonos as Case Study

At this point, it is useful to revisit the NLRB's first opportunity to distinguish *Mezonos* from *Hoffman* on a fault-basis and to evaluate the reasons the Board put forth in finding *Mezonos* to be controlled by *Hoffman*. With Member Becker recused, the three remaining members of the Board were understandably unwilling to spring a political hot potato in a deeply anti-labor and anti-illegal immigrant climate, where the very agency's existence and its ability to continue enforcing the NLRA were jeopardized by partisan wrangling and the subversive influence of the Tea Party movement. Instead, they searched for guiding language that could cover for their cowed ambition, that "[t]he [Supreme] Court's every word and sentence cannot be read in a vacuum; its pronouncements must be read in light of the holding of the case and[,] to the degree possible, so as to be consistent with the Court's apparent intentions and with other language in the same opinion."[48] As often the case in the law, there is language which goes both ways in the *Hoffman* majority's decision.

On the one hand, the *Mezonos* decision drew from the "key passage setting forth the policy rationale upon which the Court's holding is based," which stated that "*some party* directly contravene[d] explicit congressional policies" and "that awarding backpay to illegal aliens runs counter to policies underlying IRCA."[49] Inasmuch as the majority harped on past precedents limiting the Board's remedial powers, such as "hav[ing] consistently set aside awards of reinstatement or backpay to employees *found guilty of serious illegal conduct* in connection with their employment" and that "the Board had no discretion to remedy those violations by awarding reinstatement with backpay to employees who themselves had committed serious criminal acts,"[50] ALJ Fish astutely noted that this language foremost "emphasized the misconduct of Castro[ ] in its decision not to defer to the Board's choice of remedy and to find that the Board's choice conflicted with the federal statute (IRCA)."[51]

Nevertheless, the Board pointed to language in the *Hoffman* majority opinion that indicated that "misconduct includes 'remain[ing] in the United States illegally'[52] (a violation of the law independent of IRCA) and 'continu[ing] to work illegally.'"[53] However, this may be an "interpretation of a statute so far removed from its expertise" as to be entitled to no deference.[54] Although Congress has great authority to regulate immigration matters, the conclusion that "undocumented immigrants working in the United States are party to an employment relationship the Court deems criminal"[55] begins to border on unconstitutionality if the mere fact of being an undocumented worker, like being a vagabond, results in a "status offense," as

opposed to a finding of actual misconduct in light of a specific action.[56]

Regardless, to read *Hoffman* more broadly than its controlling facts, as the NLRB did with *Mezonos*, would be to undermine the moral credibility of the law and the protection offered by labor rights, and to perversely increase the demand for undocumented workers as they become more attractive to unscrupulous employers who can capitalize on the vulnerability of undocumented employees to stifle labor disputes. Examples from contract law and tort law, such as the last clear chance doctrine and exceptions to *in pari delicto*, provide a jurisprudential basis for a fault-based analysis. With the adoption of this approach, moral credibility and economic incentives synergize to promote compliance with both of Congress's laws in formulating a compatible, if not comprehensive, immigration-labor scheme, which keeps both employers and undocumented workers accountable.

Endnotes

1. This article was awarded third prize in the NYSBA Labor and Employment Law Section's 2012 Dr. Emanuel Stein and Kenneth D. Stein Memorial Writing Competition.
2. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (holding that an unauthorized worker using fraudulent immigration papers was foreclosed under IRCA from backpay remedies, despite being terminated for supporting a labor union's organizing campaign and distributing authorization cards to coworkers, which are protected activities under the NLRA). *See also Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984) ("[T]he Court has repeatedly interpreted this statutory command as vesting in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review."). *But cf. National Labor Relations Act*, 29 USCS § 157 *et seq.* (guaranteeing statutory remedies, including backpay and reinstatement, for employees engaging in either union-related or other protected concerted activities under § 7 of the NLRA).
3. 467 U.S. 883 (1984).
4. 467 U.S. at 901("By conditioning the offers of reinstatement on the employees' legal reentry, a potential conflict with the INA is thus avoided."); *see also Immigration and Naturalization Act*, 8 USCS § 1101 *et seq.* (The INA, which is the immigration statute in question in *Sure-Tan*, made it illegal for non-citizens to enter the United States without authorization, but did not make it illegal to find work without documentation.).
5. *Sure-Tan*, 467 U.S. at 894 (arguing that the rights of authorized workers are likewise infringed upon by the chilling effect resulting from the non-punishment of labor law violations involving undocumented workers).
6. *See Immigration Reform and Control Act*, 8 USCS §§ 1324a, 1324c (imposing sanctions on employers that fail to receive and verify documents from workers, establishing that the documents appear to be genuine and to correspond to the person presenting them and that the person is permitted to work in the United States).
7. Kati L. Griffith, Case Comment, *A Supreme Stretch: The Supremacy Clause in the Wake of IRCA and Hoffman Plastic Compounds*, 41 Cornell Int'l L.J 127, 129 (2008) ("IRCA made it unlawful for undocumented workers to knowingly use fraudulent documents to obtain employment…[but] specifically did not make it unlawful for an undocumented worker who did not use fraudulent documents to work or accept employment."). But cf. *Hoffman Plastics Compounds, Inc.*, 1991 NLRB LEXIS 372, *16 (Feb. 28, 1991) (finding that the person who assumed Castro's identity was "hired in May 1988," before IRCA specifically criminalized the fraudulent submission of documents for employment).
8. *Mezonos Maven Bakery, Inc.*, 2006 NLRB LEXIS 491 (N.L.R.B., Nov. 1, 2006).
9. *See New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010) (finding that two years of a two-person Board membership did not fulfill the requirements for a quorum, while Justice Kennedy writing for the dissent argued that Congress surely did not intend for a defunct Board).
10. *See* Melanie Trottman, *NLRB Defunding Fails But Agency Remains GOP Target*, available at http://blogs.wsj.com/washwire/2011/02/17/nlrb-defunding-fails-but-agency-remains-gop-target (commenting on the GOP's continued targeting of the NLRB).
11. *See* Felicia Sonmez, *House passes bill to limit NLRB authority, in battle over Boeing ruling*, available at http://www.washingtonpost.com/blogs/2chambers/post/house-passes-bill-to-limit-nlrb-authority-in-battle-over-boeing-ruling/2011/09/15/gIQAtL9LVK_blog.html (summarizing a Republican-spearheaded effort to legislatively preempt the outcome of an NLRB adjudication of Boeing's relocation of a factory allegedly based on antiunion animus, though this case was later settled through a new collective bargaining agreement); *see also* Jeffrey Hirsch, *Hayes To Quit To Block Election Rules?* http://lawprofessors.typepad.com/laborprof_blog/ (noting the rumors that Member Hayes would resign in order to block the election rule changes such as to create an inadequate quorum), Chris Isidore, *NLRB could be shut down in new year*, available at http://money.cnn.com/2011/12/23/news/economy/nlrb/ (describing the Republican intent to block recess appointments to the Board, such that it would again lack a quorum adequate to function).
12. *Mezonos*, 2011 NLRB LEXIS 422, at *17. It is likely that the substance of the NLRB's concurrence would have been the source of a majority decision but for the political turmoil and the fact that there were only three members sitting for the case.
13. Catherine Fisk and Michael Wishnie, *The Story of Hoffman Plastic Compounds, Inc. v. NLRB: Labor Rights without Remedies for Undocumented Immigrants*, in Labor Law Stories 352, 382 (Laura J. Cooper & Catherine L. Fisk, eds., 2005) ("[T]he Court faced a choice between reading the labor and immigration laws as contradictory or, as the legislative history of IRCA seemed to indicate, as part of a comprehensive congressional scheme designed to protect wage levels in the U.S. while diminishing the incentive for outlaw employers to prefer unauthorized immigrants to legal workers.").
14. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 1 (1937) ("The National Labor Relations Act is an exercise of the power of Congress to protect interstate commerce from injuries caused by industrial strife.").
15. *See* Laura Cooper & Michael Wishnie, *supra* note 13, at 1 ("Workers could gain substantive rights under the NLRA only by joining together in labor organizations and using their collective economic power to persuade employers to grant employees' rights in collective bargaining agreements.").
16. *See National Labor Relations Act*, 29 USCS § 157.
17. *Id.*
18. *Sure-Tan*, 467 U.S. at 893-94.
19. *Hoffman Plastic Compounds, Inc. v. NLRB*, 208 F.3d 229, 240 (D.C. Cir. 2000) (When the Court of Appeals ruled for Castro, it noted that the legislative history indicated that the statute appropriated funds to the Department of Labor "'in order to deter the employment of unauthorized aliens and remove the economic incentives for employers to exploit and use such aliens.'" (quoting Pub. L. No. 99-603, § 111(d), 100 Stat. 3359 (1986))).
20. *See* 8 USCS § 1324a ("[Violators] shall be fined not more than $3,000 for each unauthorized alien with respect to whom such a

violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels.").

21. *See* Fisk and Wishnie, supra note 13, at 358-59 (citing Brief *Amici Curiae* of ACLU et al., No. 00–1595, 2001 WL 1631648) ("Employer organizations such as the U.S. Chamber of Commerce opposed the employer sanction provisions as a costly, burdensome, and inefficient strategy to compel the private sector to enforce public immigration laws…. IRCA did not create penalties for unauthorized workers who accepted employment; instead, Congress chose a scheme of civil and criminal penalties for employers who knowingly hired or employed them.").

22. *Hoffman*, 208 F.3d at 239-40 (quoting H.R. Rep. No. 99-682(II) at 8-9 (1986), reprinted in 1986 U.S.C.C.A.N. 5758).

23. *Hoffman*, 535 U.S. at 137.

24. *Id.* at 156-61 (Breyer, J., dissenting) ("[T]he immigration law foresees application of the Nation's labor laws to protect 'workers who are illegal immigrants.'" (quoting H. R. Rep. No. 99-682.)).

25. 2B SUTHERLAND STATUTORY CONSTRUCTION § 51:2 n. 17 (7th ed.) (citing *Watt v. Alaska*, 451 U.S. 259 (1981) and *Calhoun v. FDIC*, 653 F. Supp. 1288 (N.D. Tex. 1987)) (finding that a 'newer' controls the 'latter' statutory construction takes hold only when the statutes are completely irreconcilable); *see also* Christopher David Ruiz Cameron, *Borderline Decisions:* Hoffman Plastic Compounds, *The New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1, 6 (2003) ("In selected cases, the Court has set up an apparent conflict between the NLRA and some other federal legislative scheme, then resolved that conflict by effectively abrogating federal labor policy in favor of federal 'other' policy."). *But cf. Southern Steamship Co. v. NLRB*, 316 U.S. 31(1942) (holding that the Board should undertake a "careful accommodation" of other statutes and their purpose).

26. *Hoffman*, 535 U.S. at 154 (Breyer, J., dissenting).

27. *Hoffman*, 535 U.S. at 149 (emphasis added); *see also* Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 506-8 (2004) ("[T]he Board is precluded from awarding backpay to an undocumented worker who has fraudulently obtained employment by tendering false documents, even if the worker is still within the United States.").

28. *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 NLRB 408, 414 (1995).

29. *Id.*

30. Brief *Amici Curiae* of Employers and Employer Organizations in Support of the NLRB, No. 00-1595, 2001 WL 1631729 (arguing in support of the NLRB's position that law-abiding employers are disadvantaged by these perverse economic incentives).

31. *Hoffman*, 535 U.S. at 156 (Breyer, J., dissenting).

32. *N.L.R.B. v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 57 (2d Cir. 1997) (explaining, in a case involving a knowing employer, that "employers…may consider the penalties of the IRCA a reasonable expense more than offset by the savings of employing undocumented workers or the perceived benefits of union avoidance." (quoting *A.P.R.A. Fuel*, 320 N.L.R.B. at 408, 415 (1995)).); *see also Mezonos*, 2011 NLRB LEXIS 422, at *25 (concurring opinion) (articulating, further, that the "employer already may have realized, or may be anticipating, savings that offset the risk of IRCA penalties. They will recognize that even if their employer incurs those penalties, it will escape backpay liability, and most likely it will have enjoyed labor-cost savings as a result of employing undocumented workers.").

33. Rebecca Smith and Julie Martínez Ortega, *Iced Out: How Immigration Enforcement Has Interfered with Workers' Rights*, available at http://www.nelp.org/page/-/Justice/ICED_OUT.pdf. (documenting numerous incidents where ICE agents targeted undocumented workers shortly after or during their exercise of workers' rights).

34. *Hoffman*, 535 U.S. at 155 (Breyer, J., dissenting). Justice Breyer's parenthetical note is alluding to the chilling effect on even authorized workers described in the text accompanying note 4.

35. *See Majestic Rest.*, 2009 NLRB LEXIS 277, *218.

36. *See id. See also* Wishnie, *supra* note 27, at 512 ("[I]t is consistent with both immigration and labor policy to conclude that such an employer had waived, and is estopped from raising, any objection to an award of backpay based on an employee's immigration status); *see also Singh v. Jutla*, 214 F. Supp. 2d 1056, at 1061 (N.D. Cal. 2002) (immunizing a knowing employer from backpay liability for undocumented workers under the FLSA undermines IRCA statute's purpose).

37. *See* Jerome Hall, *Interrelations of Criminal Law and Torts*, 43 COLUM. L. REV. 760, 779 (1943) (There at least "appears to be a close correspondence between the entire law of crimes and that of torts by reference to a common set of principles of culpability.").

38. RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

39. *Accord Bateman-Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 306 (1985) (elucidating the doctrine of *in pari delicto*, while applying it in this case to Securities Law); *see also Black's Law Dictionary* 1535 (9th ed. 2009).

40. *See also* JOSEPH STORY, 1 COMMENTARIES ON EQUITY JURISPRUDENCE 300 (1886) ("One party may act under circumstances of oppression, imposition, hardship, undue influence, or great *inequality of condition* or age; so that his guilt may be far less in degree than that of his associate in the offence.") (emphasis added); *Bateman-Eichler*, 472 U.S. at 306 ("inequality of condition").

41. *See Bateman-Eichler*, 472 U.S. at 308 (quoting *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968)).

42. *Id.*

43. *See* Tony Honore, *Responsibility and Luck*, 104 L.Q.R. 530, 533-4, 537-8 (1988) ("Historically negligence, like intentional wrongdoing, has been regarded as a species of fault. Nearly all writers continue so to regard it, and the equivalent terms in other systems (culpa, Fahrlässigkeit, etc.) all connote fault.").

44. *Berrios-Centeno*, 250 F.3d at 298 (5th Cir. 2001).

45. *Staples v. United States*, 511 U.S. 600, 607 (1994) (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978). *But cf. United States v. Garrett*, 984 F.2d 1402, 1409 (5th Cir. 1993) (declaring that "Congress is fully capable of creating strict liability crimes when" it actually intends to do so).

46. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY, at 114 (Oxford University Press, 1968).

47. RESTATEMENT (SECOND) OF TORTS § 478 (1977). *See also Davies v. Mann*, 152 ENG.REP. 588 (1842) (holding that even though plaintiff had carelessly and illegally bound a donkey in the roadway, the plaintiff could still recover because the defendant should have used ordinary care to avoid the accident).

48. *Mezonos*, 2011 NLRB LEXIS 422, *8 n. 9 (quoting *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1291 (D.C. Cir. 1998) (en banc); *see also Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996) ("We adhere…not to mere obiter dicta, but rather to the well-established rationale upon which the Court based the results of its earlier decision. When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.")).

49. *Mezonos*, 2006 NLRB LEXIS 491, *9 (quoting *Hoffman*, 535 U.S. at 148-49) ("Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations.").

50. *Hoffman*, 535 U.S. at 142-43 (discussing two cases, *Fansteel* and *Southern Shipping*, where the NLRB's remedies were set aside because employees had violated criminal laws in the exercise of their rights) (emphasis added).

51. *Majestic Rest.*, 2009 NLRB LEXIS 277, *197.

52. *See* 8 U.S.C. § 1182(a)(6)(A)(i) ("An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible."); *id.* § 1227(a)(1)(B) ("Any alien who is present in the United States in violation of this chapter or any other law of the United States…is deportable.").

53. *Hoffman*, 535 U.S. at 149 (majority opinion).

54. *Id.* at 143-44. ("Although the Board had argued that the employees' conduct did not in fact violate the federal mutiny statute, we rejected this view, finding the Board's interpretation of a statute so far removed from its expertise entitled no deference from this Court.").

55. *Mezonos*, 2006 NLRB LEXIS 491, *9 (citing *Hoffman*, 535 U.S. at 146) ("characterizing the proffer of fraudulent documents as 'misconduct that renders an underlying employment relationship illegal under explicit provisions of federal law'").

56. Complaint at ¶ 23, *United States v. Arizona*, 2010 WL 2653363 (D.Ariz. July 6, 2010). The United States argued:

> Congress, which holds exclusive authority for establishing alien status categories and setting the conditions of aliens' entry and continued presence, has affirmatively decided that unlawful presence—standing alone—should not subject an alien to criminal penalties and incarceration although unlawful presence may subject the alien to the civil remedy of removal. See 8 U.S.C. §§ 1182(a)(6)(A)(i), 1227(a)(1)(B)&(C). However, unlawful presence becomes an element of a criminal offense when an alien is found in the United States after having been previously removed or after voluntarily departing from the United States while a removal order was pending. See 8 U.S.C. § 1326. Further, unlawful entry into the United States is a criminal offense, see 8 U.S.C. § 1325.

Id. Cf. Robinson v. California, 370 U.S. 660 (1962) (standing for the proposition that the due process clause of the Fourteenth Amendment prohibits as cruel and unusual the punishment of status); *see also* U.S. CONST. amends. VIII § 1("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"), U.S. CONST. amend. XIV § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

Jon L. Dueltgen wrote this article while attending the University of Pennsylvania Law School, where he graduated in May 2013. A graduate of Cornell University's School of Industrial and Labor Relations, Jon has previously worked for the U.S. Department of State Office of the Legal Adviser, National Labor Relations Board Division of Judges, and American International Group. Earlier versions of this article were recognized by the American Bar Association/College of Labor and Employment Lawyers and Louis Jackson National Writing Competitions.

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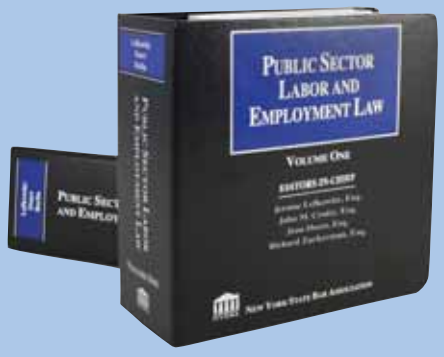

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