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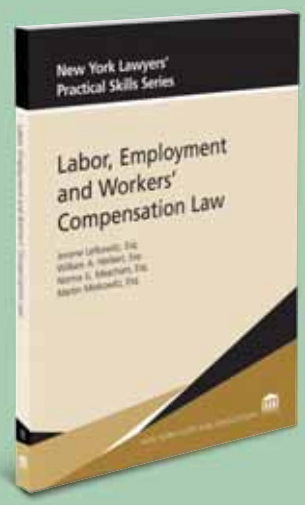

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Part One of this practice guide covers the protective legislation that deals with regulation of wages and hours of work and industrial health and safety; labor relations law, including union/management relationships and collective bargaining; and employment law statutes that prohibit discrimination on the basis of race, religion, sex, age and disabilities.

Part Two focuses on the essential questions related to workers' compensation law in New York State, including who is covered, the exclusive remedy doctrine and the waiver of benefits. This part also discusses the difference between workers' compensation and disability benefits, and the areas of administrative hearings and appeals.

Coverage of labor and employment law has been substantially revised and reorganized by the authors in an attempt to make it even more useful for the practitioner. This practice guide is current through the 2015 New York State legislative session.

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Message from the Section Chair

Albert Einstein published an essay in 1931 entitled, "The World As I See It." In that essay, Einstein set forth his views relating to social justice, social responsibility, religion, and militarism. Einstein's short but profound essay is best remembered for the following quote:

> A hundred times a day I remind myself that my inner and outer life depend on the labors of other people, living and dead, and that I must exert myself in order to give in the full measure I have received and am still receiving.

Einstein's sentiments concerning human interdependence came to mind at the 2015 Annual Meeting during former Section Chair Mike Bernstein's eloquent acceptance speech upon receiving the Section's lifetime achievement award. In his remarks, Mike highlighted the key individuals and moments that helped shape his life and career. The substance, structure, and dignity of Mike's speech will be remembered for many years.

It is safe to acknowledge that none of us has the intellectual abilities of Einstein, despite the wishful hopes of a parent or two. Nor do we have the time in our technologically driven lives to pause a hundred times a day to remember those who taught, mentored, and nurtured us. Indeed, we can only hope that most of us have the self-discipline to pause regularly during the day before responding to electronic communications.

Nonetheless, we must take care to remember that our conduct and activities reflect our values. Actions and interactions, large and small, can have intended or unintended impact on others and our society. Even the simplest of gestures, like greeting an unfamiliar attorney at a meeting, speaking to a law school graduate in search of work, or taking a call from a newer attorney with a substantive question, can have an important effect. Indeed, the smallest gestures can have the greatest long-term significance and appreciation.

Our legal training and experience enables us to represent client interests, and to advocate more broadly for social justice and civil, constitutional, and economic rights. Our training and experience also enhance our ability to author articles, participate in educational programs, and mentor other attorneys and law students.

The Labor and Employment Law Section provides our members with multiple opportunities to network, learn, write, speak, and mentor. It also provides each member with an opportunity to apply his or her unique abilities to issues that go well beyond the daily plate of work responsibilities.

Active participation in Section activities also provides an opportunity to help shape initiatives and programming. You are strongly encouraged to help make a difference by contributing your ideas, perspectives, and energy to one of our many committees. A full list of committees is included later in this *Journal*, along with the contact information for the committee co-chairs.

Below are some examples of Section activities that reflect our mission and values.

The Section's Online Community

NYSBA has developed an exciting new electronic interactive tool known as Communities. It is accessible through the NYSBA website and it enables Section members to post, interact and distribute information, comments, and questions. You are strongly encouraged to begin using Communities to communicate with the rest of the Section membership concerning issues, decisions, and activities.

NYSBA *Labor and Employment Law Journal*

This *Journal* is an important forum for articles by Section members analyzing recent case law, new statutes, and regulations, as well as the presentation of innovative or alternative approaches to the law. The articles in the current issue are indicative of the breadth and depth of the issues faced by our Section membership.

Continuing Legal Education

The Section's Continuing Legal Education (CLE) Committee, co-chaired by Seth Greenberg, Alyson Matthews, and Bill Frumkin, worked hard in developing the program for the 2015 Fall Meeting in Saratoga Springs and are already busy developing the program for the Section's Annual Meeting on January 29, 2016 in New York City. The CLE Committee is the James Brown of our Section—the hardest working of the Section! You should contact the CLE Committee with your ideas for possible future CLE programming.

Diversity and New Lawyers

Our Diversity and Leadership Development Committee co-chairs, Wendi Lazar and Jill Rosenberg, provide strong leadership toward meeting our commitment to diversity. Their creative approaches, including the work associated with the Diversity Fellowship Program, have attracted emerging leaders and increased membership diversity. At the 2015 Fall Meeting we welcomed our latest Diversity Fellows: Dino A. Bowell, Jr.; Najah A. Farley; James L. Hallman; and Olivia J. Quinto.

In the past few months, the Section has co-sponsored events with the Metropolitan Black Bar Association, the Asian-American Bar Association, and the Rochester Black Bar Association. We plan to continue to co-sponsor events with these and other bar associations.

Genevieve Peeples and Rachel Santoro, as co-chairs of the New Lawyers Committee, are working to help bridge the gap between newly admitted members and attorneys with greater experience. The Section's Mentoring Program provides junior attorneys interested in a career in the field of labor and employment law with the opportunity to interact with seasoned labor and employment lawyers. You should contact the New Lawyers Committee co-chairs to become a Section mentee or mentor.

New Webinar Series

The Section held its first free webinar on July 15, 2015 titled, "Supreme Court and NY Court of Appeals 2015 Roundup: Labor and Employment Law," presented by Jill Rosenberg and Susan Ritz. The webinar included an analysis of labor and employment decisions by the United States Supreme Court and the New York Court of Appeals over the past year. Stay tuned for future Section webinars on cutting-edge legal subjects.

We thank our Membership Committee co-chairs Molly Thomas-Jensen and Alyssa Zuckerman for their leadership in organizing the webinar and in developing other new membership services.

NLRA and NLRB Procedures

Over the past year, the Section has co-sponsored important programs relating to the National Labor Relations Act. On March 26, 2015, we co-sponsored a training seminar on the NLRB's New R-Case Rules for NLRA Practitioners at the offices of SEIU 32BJ, with NLRB Region 2 Director Karen Fernbach, NLRB Region 22 Director David Leach, and NLRB Region 29 Director Jim Paulsen. On May 8, 2015, we co-sponsored a program in Buffalo entitled, "The NLRA at 80: Is the Statute Adapting to the New Workplace?" in conjunction with NLRB Region 3 and the Cornell School of Industrial and Labor Relations.

Planning for future events and programs on traditional labor law is under way. The stellar work of the Section's Labor Relations Law and Procedure Committee is attributable to the leadership of co-chairs Allyson Belovin and Peter Conrad.

Workplace Rights and Responsibilities

Under the leadership of Geoffrey Mort and Dennis Lalli, the Section's Workplace Rights and Responsibilities Committee concentrates on legal issues applicable to individual workers and their employers, most often but not necessarily in non-union workplaces. It organized a very well-received program at the 2015 Annual Meeting entitled, "One Toke Over the Line: Medical Marijuana and Other Drug-Related Issues in the Workplace," as well as a workshop at the 2015 Fall Meeting on the enforceability of restrictive covenants when an employee is terminated without cause. The committee has established a number of substantive subcommittees that provide members with writing, speaking, and collaborative opportunities.

Equal Employment Opportunity

At the 2015 Fall Meeting, the Section's Equal Employment Opportunity Law Committee presented an excellent plenary session on gender, pregnancy, sexual orientation, and transgender issues. The Committee is led by co-chairs Chris D'Angelo and David Fish, and it is planning future programming on other important equal employment issues.

Public Sector Labor and Employment Law

Our Public Sector Labor Relations Committee, under the leadership of co-chairs John Corcoran and Nat Lambright, organized a series of CLE programs on public sector law last year. In addition, the Section is working on a new edition of the treatise Lefkowitz, *Public Sector Labor and Employment Law*. Additional Section programming concerning public sector labor and employment law, including a CLE focused on practicing before PERB and the New York City Office of Collective Bargaining is expected next year.

Outreach to Law Students

In conjunction with NYSBA's Pathways to the Profession initiative, our District Representatives and other Section leaders have participated over the past year at programs and events for law students at Albany Law School, Brooklyn Law School, SUNY Buffalo Law School, Cardozo Law School, Cornell Law School, and Syracuse Law School. Our efforts are tied with informing students and faculty about the Dr. Emanuel Stein and Kenneth D. Stein Memorial Writing Competition and the Samuel M. Kaynard Memorial Student Service Award. We thank our District Representatives Committee co-chairs Paul Sweeney and Rob Boreanaz for their work in coordinating our law student outreach efforts, as well as the many Section leaders who have participated.

This message began with a quote by Albert Einstein. I thought it should close with another quote. The following comes from the autobiography of the great poet Langston Hughes:

> I have discovered in life that there are ways of getting almost anywhere you want to go, if you *really* want to go.

I look forward to seeing you all in January at the Annual Meeting.

William A. Herbert

Enforcing Restrictive Covenants When Terminating Employees Without Cause: Is There a Clear Rule in New York?

By Tricia B. Sherno and Steven T. Sledzik

New York employment lawyers may find it surprising that New York does not appear to have a clear rule governing whether post-employment restrictive covenants are enforceable when an employee is discharged involuntarily and without cause. Some courts have concluded that there is a *per se* rule against enforcement of restrictive covenants when a termination is without cause, while others have determined that no such *per se* rule exists. In reaching such divergent conclusions, courts have cited the same New York Court of Appeals decision from 1979, *Post v. Merrill, Lynch, Pierce, Fenner & Smith*.[1] In *Post*, the Court of Appeals held that when an employee is involuntarily terminated without cause and subsequently competes with his or her former employer, it would be unreasonable as a matter of law to enforce an agreement under which the employee would forfeit earned pension benefits because of such competition.[2] New York courts confronting *Post* have not treated it consistently.

This article will analyze *Post* and the disparate case law that has evolved from that decision. Part I of the article will present a brief overview of the legal standard governing the enforcement of restrictive covenants under New York law and the jurisdiction's employee choice doctrine, which is critical to understanding *Post*. Part II will discuss the facts of *Post* and its holding. Part III will analyze cases interpreting *Post*.

In reaching a conclusion, we struggled to find an appropriate metaphor for the divergent reasoning that has developed out of *Post.* We chose the myth of the twin brothers, Romulus and Remus, without passing judgment as to which may have been the evil twin. This metaphor, discussed in more detail in the conclusion, is apt to assist in illustrating the uncertainty as to this issue.

I. New York Law Governing Restrictive Covenants and the Employee Choice Doctrine

Restrictive covenants are generally disfavored under New York law because of public policy considerations against "sanctioning the loss of a man's livelihood."[3] However, such contracts are permissible in New York and are frequently enforced. Shaped by public policy concerns, New York follows the majority of jurisdictions in applying a reasonableness standard when examining the validity and enforceability of restrictive covenants. Specifically, as articulated by the New York Court of Appeals in *BDO Seidman v. Hirshberg*, "[a] restraint is reasonable only if it: (1) is *no greater* than is required for the protection of the *legitimate* interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public."[4]

New York courts have developed the "employee choice doctrine" as an exception to the reasonableness standard and the public policy against enforcement of restrictive covenants. Under the "employee choice doctrine," restrictive covenants are generally held to be enforceable—regardless of their reasonableness—when employees who voluntarily terminate their employment have a choice between complying with the covenant and receiving compensation or benefit, or engaging in the restricted activity and foregoing the compensation or benefit.[5] In contrast, when employees are involuntarily terminated without cause, the employee choice doctrine generally does not apply and a court must determine whether forfeiture of the compensation or benefit is reasonable.[6] The employee choice doctrine "rests on the premise that if the employee is given the choice of preserving his rights under his contract by refraining from competition or risking forfeiture of such rights by exercising his right to compete, there is no unreasonable restraint upon an employee's liberty to earn a living."[7]

Employees who voluntarily depart for a competitor could attempt to circumvent the employee choice doctrine and avoid the automatic forfeiture of benefits by arguing they were constructively discharged. In *Morris v. Schroder Capital Management International*, the New York Court of Appeals expressly held that the employee choice doctrine does not apply if an employee voluntarily quit under circumstances that rise to the level of a constructive discharge.[8] An employee is constructively discharged if an employer deliberately and intentionally creates an intolerable workplace condition to "compel a reasonable person to leave."[9] Not surprisingly, employees and employers often dispute whether or not a termination was voluntary or involuntary or with or without cause. Thus, depending on whether there are any disputed facts surrounding a termination, it may not always be clear until trial whether a court will apply the employee choice doctrine.

II. A Closer Look at the *Post* Decision

In *Post*, for the first time, the New York Court of Appeals distinguished between voluntary and involuntary terminations of employment when considering the enforceability of a forfeiture-for-competition provision in an

employee deferred compensation plan.[10] The plaintiffs, Post and Maney, were employed by Merrill Lynch as account executives.[11] Both elected to be paid a salary and to participate in the firm's pension and profit sharing plan rather than take a straight commission that would have returned approximately twice the amount they earned in salary during their employment.[12] After working for Merrill Lynch for more than a decade, both employees were terminated without cause.[13] Almost immediately after their discharge, both began working for a competitor.[14] Fifteen months after their termination, following repeated inquiries by Post and Maney as to the status of their pensions, they were informed by Merrill Lynch that all of their rights in the company-funded pension plan had been forfeited pursuant to a provision of the plan permitting forfeiture in the event an employee directly or indirectly competed with the firm.[15]

The plaintiffs brought an action against Merrill Lynch for conversion and breach of contract to recover amounts owed to them under the pension plan.[16] Merrill Lynch moved for summary judgment, and the trial court denied the motion.[17] The Appellate Division, First Department, reversed and dismissed the Complaint.[18] The New York Court of Appeals reversed the Appellate Division and reinstated the Complaint.[19]

The New York Court of Appeals held that New York policies "preclude the enforcement of a forfeiture-for-competition clause where the termination of employment is involuntary [*i.e.*, not the employee's choice] and without cause."[20] More specifically, the Court of Appeals held "that where an employee is involuntarily discharged by his employer without cause and thereafter enters into competition with his former employer, and where the employer, based on such competition, would forfeit the pension benefits earned by his former employee, such a forfeiture is unreasonable as a matter of law and cannot stand."[21] In reaching its holding the Court of Appeals reasoned:

> Where the employer terminates the employment relationship without cause… his action necessarily destroys the mutuality of obligation on which the covenant rests as well as the employer's ability to impose a forfeiture. An employer should not be permitted to use offensively an anticompetition clause coupled with a forfeiture provision to economically cripple a former employee and simultaneously deny other potential employers his services.[22]

The Court reaffirmed that "[s]o potent is this policy that covenants tending to restrain anyone from engaging in any lawful vocation are almost uniformly disfavored and are sustained only to the extent that they are reasonably necessary to protect the legitimate interests of the employer and not unduly harsh or burdensome to the one restrained."[23] The *Post* Court distinguished the facts of the case from those in which an employee voluntarily leaves employment to join a competitor, thus triggering the employee choice doctrine.[24] At the outset of its opinion, the Court emphasized that its brief decision was limited to the "narrow issue" of "the efficacy of a private pension plan provision permitting the employer to forfeit pension benefits earned by an employee who competes with the employer after being involuntarily discharged."[25]

III. The Progeny of *Post*

A. Cases with a More Expansive View of *Post*

Despite the New York Court of Appeals statement that its decision in *Post* was "narrow" and applicable to "forfeiture-for-competition clauses," multiple courts have cited *Post* as authority for a *per se* rule against the enforcement of restrictive covenants when employees are involuntarily terminated. Without discussion, the Appellate Division, Second Department, has cited *Post* for the proposition that a termination without cause renders restrictive covenants unenforceable.[26] The Appellate Division, Fourth Department, has extended *Post* to stock option forfeiture provisions for employees terminated without cause who work for competitors.[27]

Additionally, three federal district court judges in the Southern District of New York (Judges Crotty and Cedarbaum and former Judge Schwartz) have concluded, relying on *Post*, that non-competition provisions are *per se* unenforceable under New York law when an employee is involuntarily terminated without cause.[28] In *SIFCO Indus. v. Advanced Plating Techs.*, the district court held that the noncompetition covenant contained in the employees' confidentiality agreements was unenforceable because the employees in question had been terminated without cause.[29] The court cited *Post* and plainly stated that "New York courts will not enforce a non-competition provision in an employment agreement where the former employee was involuntarily terminated."[30] In *In re UFG Int'l*, the court relied on *Post* and held that "an employee's otherwise enforceable restrictive covenant is unenforceable if the employee has been terminated involuntarily, unless the termination is for cause."[31] In *Arakelian v. Omnicare*, a former employee filed suit against her former employer for unpaid severance and vacation benefits after she was involuntarily terminated without cause.[32] The employee also sought a declaratory judgment that her non-competition and non-solicitation agreements signed at the commencement of her employment were not enforceable under New York law.[33] Citing *Post* and *SIFCO*, the court sided with the employee and ruled that both the non-competition and non-solicitation covenants were unenforceable as a matter of law in light of the involuntary termination.[34]

Given that the rulings in *SIFCO*, *In re UFG*, and *Arakelian* turned on whether the employee was involuntarily terminated without cause, the courts in those cases did not analyze the restrictive covenants under a reasonableness standard.

B. Cases Strictly Construing *Post*

Not all courts have agreed that a *per se* rule exists under New York law in situations when an employee is involuntarily terminated without cause. Notably, in its 2006 decision in *Morris v. Schroder Capital Management International*, the New York Court of Appeals cited *Post* and indicated that "a court must determine whether forfeiture is 'reasonable' if the employee was terminated involuntarily and without cause."[35] The Court of Appeals made no mention of any *per se* rule applicable to involuntary terminations.

More recently, in *Brown & Brown, Inc. v. Johnson*,[36] the Appellate Division, Fourth Department, rejected the argument that such a rule exists under *Post*. The Fourth Department reasoned that the *Post* holding was to "preclude the enforcement of a forfeiture-for-competition clause where the termination of employment is involuntary and without cause," and the agreement at issue in the *Brown & Brown* case did not contain such a clause. The court further stated that its earlier decision in *Eastman Kodak v. Carmosino*,[37] which cited *Post* in the context of a balancing of the equities analysis, "did not extend the *Post* holding to require a per se rule that involuntary termination renders all restrictive covenants unenforceable."[38]

Similarly, in *Hyde v. KLS Professional Advisors Group, LLC*, the United States Court of Appeals for the Second Circuit questioned the existence of a *per se* rule under New York law.[39] In *Hyde*, the Second Circuit reversed the grant of a preliminary injunction in favor of an employee against his former employer enjoining the employer from enforcing a restrictive covenant.[40] In remanding the case, the Second Circuit cautioned that *Post* should be limited to its holding regarding forfeiture-for-competition clauses and that *Post* does not support the *per se* unenforceability of restrictive covenants in circumstances where an employee has been terminated without cause.[41]

Conclusion

What is clear from *Post* and its progeny is that if an employer terminates the employment relationship with cause, restrictive covenants will have a greater likelihood of enforcement. What is also clear from *Post* and its progeny is that if an employer terminates the employment relationship without cause, there is a risk that restrictive covenants may not be enforced. While *Post* expressly states that it is a narrow decision, its *dicta* incorporate language broadly critical of restrictive covenants. Perhaps this is the source of the divergence as to its interpretation. Whether one agrees with the expanded or limited construction given to *Post* by New York courts, one needs to be aware of the divergent paths taken by courts in the jurisdiction. Until the New York Court of Appeals directly and firmly rejects or endorses one of the divergent views of *Post*, this uncertainty may remain.

In our research for this article, we reviewed dozens of cases involving *Post* and issues collateral to it, as well as the myth of the twins Romulus and Remus, one of whom (Romulus) is purportedly the founder of Rome. According to the myth, they were born of a mortal woman, a princess and Vestal Virgin, fathered by the god of war, Mars, abandoned by their mother after birth, suckled as infants by a wolf, fed as infants by a woodpecker, and then raised by shepherds. As adults, their innate leadership abilities manifested themselves and they fought about the choice of hill on which to build a city. Although they agreed to choose the location of the city by augury, they fought about its meaning and Romulus slew Remus. Augury[42] is the ancient Roman practice of the interpretation of omens by observation of the flight patterns of birds. According to the myth, the twins differed over the interpretation of what six or twelve vultures signified.

Certainly knowing the case law, the facts of any case and the purported proclivities of the judge to whom a case is assigned is critical to any attempt to enforce restrictive covenants when an employee is terminated without cause. But, as noted, the *Post* case has been offered as the basis for polar opposite holdings on the same issue. It seems that knowledge of augury or the flight patterns of birds may be equally as predictive of a result based on *Post* in any attempt to enforce restrictive covenants in cases involving a termination without cause.

Endnotes

1. 48 N.Y.2d 84, *rearg denied*, 48 N.Y.2d 975 (1979).
2. *Id.* at 89.
3. *Columbia Ribbon & Carbon Mfg. Co., Inc. v. A-1-A Corp.*, 42 N.Y.2d 496, 499 (1977) (citations omitted) ("Since there are powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood, restrictive covenants which tend to prevent an employee from pursuing a similar vocation after termination of employment are disfavored by the law.").
4. 93 N.Y.2d 382, 388-89 (1999).
5. *See, e.g.*, *Morris v. Schroder Capital Mgmt. Int'l*, 7 N.Y. 3d 616 (2006).
6. *Id.* at 621; *see also Lucente v. Int'l Business Machines Corp.*, 310 F.3d 243, 254-55 (2d Cir. 2002).
7. *See, e.g.*, *Morris*, 7 N.Y.3d at 621 (citations omitted).
8. *Id*. at 621-22.
9. *Id.* at 622 (citations omitted).
10. *Post*, 48 N.Y.2d at 88.
11. *Id*. at 87.
12. *Id*.
13. *Id*.
14. *Id*.
15. *Id*.

16. *Id*.
17. *Post v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 411 N.Y.S.2d 603 (1st Dep't 1978).
18. *Post*, 48 N.Y.2d at 87.
19. *Id*. at 90.
20. *Id*. at 88.
21. *Id*. at 89.
22. *Id*.
23. *Id*. at 86-87 (citing *Columbia Ribbon & Carbon Manufacturing Co. v. A-1-A Corp.*, 42 N.Y.2d 496, 499 (1977); *Reed, Roberts Assoc. v. Strauman*, 40 N.Y.2d 303, 307-8 (1976)).
24. *Id*. at 89.
25. *Id*. at 86.
26. *Grassi & Co., CPAs, P.C. v. Janover Rubinroit, LLC*, 82 A.D.3d 700, 702 (2d Dep't 2011).
27. *Lenel Systems Int'l Inc. v. Smith*, 106 A.D.3d 1536, 1538-39 (4th Dep't 2013).
28. *Arakelian v. Omnicare, Inc.*, 735 F. Supp. 2d 22, 41-42 (S.D.N.Y. 2010); *SIFCO Industries, Inc. v. Advanced Plating Technologies, Inc.*, 867 F.Supp. 155, 158 (S.D.N.Y. 1994); and *Nisselson v. DeWitt Stern Group, Inc. (In re UFG Int'l, Inc.)*, 225 B.R. 51, 55-56 (S.D.N.Y. 1998).
29. *SIFCO*, 867 F. Supp. at 158.
30. *Id.*
31. *Nisselson*, 225 B.R. at 55-56.
32. *Arakelian*, 735 F.Supp.2d at 25.
33. *Id.*
34. *Id.* at 41.
35. *Morris*, 7 N.Y.3d at 621.
36. 115 A.D.3d 162, 170 (4th Dep't 2014), *rev'd on other grounds*, 2015 WL 3616181 (2015).
37. 77 A.D.3d 1434 (4th Dep't 2010).
38. *Brown & Brown*, 115 A.D.3d at 170.
39. 500 Fed.Appx. 24, at *26 (2d Cir. 2012).
40. *Id.* at *24-25.
41. *Id.* at *26.
42. Webster.com, the online dictionary, defines augury as "divination from auspices or omens."

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Combating Bullying in the Workplace: A Comparison of Global Approaches

By Erika C. Collins and Michelle A. Gyves

Bullying is a problem facing companies and their employees throughout the world. More than a quarter of respondents in a 2014 survey in the United States reported experiencing workplace bullying.[1]

Companies must address bullying, not only to show solidarity with their employees, but also because engendering a healthy workplace is a critical business issue. When it comes to bullying, companies suffer when their employees suffer. Studies have shown that workplace bullying leads to increased absenteeism, decreased productivity, higher health care costs, higher rates of employee turnover, and myriad other difficulties for employers.[2]

Jurisdictions vary widely in their legislative approaches to combat bullying. For example, while the United States has had status-based harassment and discrimination laws in place for decades and well in advance of most other countries, these laws generally protect those who are harassed in the workplace based on specified "protected categories."[3] There is no legislation at the federal level to assist those who are bullied or harassed in the workplace but do not have such a protected status on which to base a claim. As discussed below, however, there has been a state-level movement in recent years to address this gap in coverage. Other countries also have been proactive in combating workplace bullying. For example, new legislation has been introduced, or existing legislation interpreted, to address bullying in, among others, Sweden, the United Kingdom, France, Japan and parts of Canada and Australia.

This article provides an overview of anti-bullying legislation in the United States, Sweden, the United Kingdom, France, and Canada. It also provides suggestions for employers to address bullying in the workplace.

United States

Although the first piece of state-level anti-bullying legislation was introduced in 2003, it was more than a decade before any state enacted legislation specifically aimed at workplace harassment unrelated to a protected characteristic. Today, two states (California and Tennessee) have enacted laws related to workplace bullying, although neither provides a civil cause of action for bullying victims or otherwise expands an employee's ability to hold an employer accountable for bullying in the workplace. Bills also have been introduced in 25 other states, including New York, as well as in Puerto Rico and the U.S. Virgin Islands. Many of the introduced bills are based on the draft Healthy Workplace Bill prepared by the Workplace Bullying Institute ("WBI").

California

The introduction of the Healthy Workplace Bill in 2003 made California the first state in the U.S. to begin formally considering anti-bullying legislation. Although that legislation has not been adopted, California did adopt a law in 2014 requiring that prevention of abusive conduct be included as a component of the sexual harassment training for supervisory employees already required under California law for employers with 50 or more employees.[4] Abusive conduct is defined as "conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests" and includes "repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance."[5]

Tennessee

Earlier in 2014, Tennessee became the first state to pass a bullying-related law. The Tennessee Healthy Workplace Act encourages public-sector employers to adopt a policy that "assist[s] [the employer] in recognizing and responding to abusive conduct in the workplace" and "prevent[s] retaliation against any employee who has reported abusive conduct in the workplace."[6] If a public-sector employer adopts such a policy, the employer shall have immunity from tort suits resulting from abusive conduct by the employer's employees that results in negligent or intentional infliction of mental anguish.[7] The law that passed was significantly scaled back from that initially introduced which was based on the WBI's Healthy Workplace Bill and contained, among other points, a private right of action for bullied employees.

New York

The New York State Legislature introduced an anti-bullying bill in 2010, which passed in the Senate[8] but was put on hold in the Assembly. Since that time, similar bills have been introduced periodically in the New York State Assembly and Senate. As of the time of writing, a bill has been introduced in the Assembly for the 2015-16 legislative session with 80 sponsors.[9]

The bill would amend the New York Labor Law to provide legal redress for employees subjected to an "abu-

sive work environment," which exists when an employee is "subjected to abusive conduct that causes physical harm, psychological harm or both."[10] Abusive conduct is defined as "acts, omissions, or both, that a reasonable person would find abusive, based on the severity, nature, and frequency of the conduct."[11] A single act usually will not constitute abusive conduct unless it is "especially severe and egregious,"[12] similar to the standard for hostile work environment claims under Title VII of the Civil Rights Act.[13] Under the bill employers are vicariously liable for the abusive conduct of their employees,[14] and employers may not retaliate against individuals who participated in the complaint process.[15]

The bill does provide employers with several alternative affirmative defenses. First, an employer may have an affirmative defense against a claim if it can demonstrate that it exercised reasonable care to prevent and promptly correct the abusive conduct, and that the employee unreasonably failed to take advantage of the appropriate preventative or corrective opportunities that it provided.[16] This defense is not available if the abusive conduct culminated in an adverse employment decision with respect to the complaining employee (e.g., termination or demotion). However, the employer can assert alternative defenses that the complaint is based on "adverse employment action reasonably made for poor performance, misconduct or economic necessity," "a reasonable performance evaluation," or "an employer's reasonable investigation about potentially illegal or unethical activity."[17]

The remedies available under the bill include reinstatement, removal of the offending party from the complainant's work environment, reimbursement for lost wages, front pay, medical expenses, compensation for pain and suffering and/or emotional distress, punitive damages, and attorney's fees.[18] But in cases where there was no adverse employment decision, an employer may be held liable for emotional distress damages and punitive damages only when the actionable conduct was extreme and outrageous.[19] This is a notable departure from earlier versions of the bill which provided that, in cases where there was no adverse employment decision, emotional distress damages are capped at $25,000 and punitive damages are not available.[20] Finally, the bill also precludes employees who have collected Workers' Compensation benefits for conditions arising out of an abusive work environment from bringing a claim pursuant to the law for the same conditions.[21]

Elsewhere in the U.S.

At the time of writing, four other jurisdictions (Connecticut, North Dakota, Utah and the U.S. Virgin Islands) in addition to New York have workplace bullying bills currently under active consideration in the state legislature.

Sweden

In 1993, Sweden became the first country in the world to enact specific anti-bullying legislation. The Ordinance on *Victimization at Work*,[22] enacted as part of Sweden's occupational safety and health laws, offers protection against "victimization," which it defines as "recurrent reprehensible or distinctly negative actions which are directed against individual employees in an offensive manner and can result in those employees being placed outside the workplace community."[23]

Unlike New York's proposed law, the ordinance does not provide a private cause of action for aggrieved employees. Instead, it imposes administrative obligations upon employers to prevent victimization, to immediately intervene when such misconduct becomes apparent, and to attempt to engage in a collaborative process to resolve conflicts.[24] Employers who fail to comply with these obligations may be fined and/or imprisoned for up to one year.[25]

United Kingdom

Although the United Kingdom has not enacted legislation specifically to combat workplace bullying, British courts have interpreted the *Protection from Harassment Act*, 1997[26] (PHA), as providing redress for victims of workplace bullying.[27] The PHA prohibits individuals from pursuing a course of conduct that they know, or should know, amounts to harassment.[28]

Courts have interpreted the statute's vague definition of "harassment" as conduct: (i) occurring on at least two occasions, (ii) targeted at the claimant, (iii) calculated in an objective sense to cause distress, and (iv) that is objectively judged to be oppressive and unreasonable.[29] When harassment has occurred, vicarious liability for the conduct is not automatic. Instead, employer liability must be "just and reasonable in the circumstances."[30] Whether an employer has implemented a harassment policy and procedures is one factor courts may consider in determining whether the imposition of vicarious liability is reasonable.[31]

The PHA provides for remedies similar to those available under the New York bill, including injunctive relief and compensatory and emotional distress damages.[32] There is no cap on the damages that courts may award aggrieved employees. Significantly, a court in 2006 awarded a victim of workplace bullying GBP 800,000 (approx. $1.2 million) in damages.[33] This can be contrasted with general unfair dismissal law in the UK for which damages are capped at GBP 88,210 (approx. $135,750).

France

In 2002, France enacted the *Social Modernization Law*, which introduced provisions to the French Labor Code that provide civil and criminal penalties for "moral"

harassment.[34] The law sets a fairly high standard for actionable conduct in that it expressly provides that a single act, regardless of its severity, is not enough to constitute moral harassment.[35] In addition, the conduct must have the purpose or effect of degrading the employee's right to dignity, affecting the employee's mental or physical health, or compromising the employee's career.[36] The law places an affirmative obligation on employers to take all necessary actions to prevent moral harassment,[37] and prohibits them from retaliating against employees who report moral harassment or who refuse to be victims of moral harassment.[38]

Labor tribunals have interpreted the Social Modernization Law as holding employers strictly liable for actionable conduct, even if they implemented measures to prevent moral harassment.[39] The law also provides for the automatic nullification of any employment contract termination resulting from moral harassment.[40] Additionally, labor tribunals have ordered employers to pay damages for breach or "disloyal non-performance" of an employment contract based upon a failure to prevent moral harassment.[41]

Canada

Legislation aimed at combating workplace bullying also has been enacted in the Canadian provinces of British Columbia, Manitoba, Saskatchewan, Ontario, and Quebec. In Ontario, for example, the Occupational Health and Safety Act was amended in 2010 to strengthen protections from workplace harassment and violence. "Workplace harassment" is defined as "engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome."[42] Accordingly, harassment under the law is not limited to abusive conduct based on any particular protected characteristic. The law requires that employers develop policies and programs that include procedures for reporting, investigating, and responding to harassment, and provide employees with sufficient information and instruction on such policies and programs.[43]

Recommendations for Employers

The existence of workplace bullying—and the global trend aimed at combating it—should be of interest to both U.S. and multinational employers. To safeguard the company against the tangible and intangible costs of workplace bullying (as well as to mitigate the risk of litigation and liability as more jurisdictions adopt laws protecting bullied employees), prudent employers will consider taking the following steps:

- Broaden workplace policies to prohibit abusive conduct and retaliation against any employee raising a complaint.
- Require employees to report abusive conduct, and provide a specific and clear procedure that offers employees multiple avenues to complain about abuse.
- Train all managers on how to handle reports of abusive conduct and on the consequences of retaliation.
- Take immediate and effective action to rectify all retaliation complaints.
- Continually review and, if necessary, revise employment policies to ensure compliance with applicable workplace bullying laws and regulations.

Endnotes

1. Results of the 2014 WBI U.S. Workplace Bullying Survey, WORKPLACE BULLYING INSTITUTE, http://www.workplacebullying.org/wbiresearch/wbi-2014-us-survey/ (last visited February 20, 2015).
2. *See, e.g.,* Cunniff, L., & Mostert, K. (2012). *Prevalence of workplace bullying of South African employees*. SA Journal of Human Resource Management/SA Tydskrif vir Menslikehulpbronbestuur, 10(1), Art. #450, 15 pages. http://dx.doi.org/10.4102/sajhrm.v10i1.450 (last visited February 20, 2015).
3. Under Title VII of the Civil Rights Act of 1964, race, color, religion, sex, and national origin are protected categories. The Age Discrimination in Employment Act protects workers who are 40 and older from discrimination, and the American with Disabilities Act protects disabled workers. Under the Genetic Information Predisposition Act of 2008, employers are prohibited from using information regarding someone's genetic predisposition to disease in making employment decisions. Veteran status is also a protected category under the Vietnam Era Veterans Readjustment Assistance Act. Finally, many states also include sexual orientation as a protected category.
4. Cal. Gov't Code §12950.1
5. *Id.*
6. Tenn. Code Ann. §50-1-503.
7. *Id.* §50-1-504.
8. Sen. 1823 B, 2010 Sess. (N.Y. 2010).
9. Assemb. 3250, 2015 Sess. (N.Y. 2015)
10. Assemb. 3250 §761.
11. *Id.* (providing the following examples of abusive conduct: "repeated verbal abuse, such as the use of derogatory remarks, insults and epithets; verbal, non-verbal, or physical conduct of a threatening, intimidating or humiliating nature; or the sabotage or undermining of an employee's work performance").
12. *Id.*
13. *See* David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, 32 COMP. Lab. L. & Pol'y J. 251, 262 (2010) (describing the domestic interdisciplinary coverage of and responses to workplace bullying and discussing decision of the Healthy Workplace Bill author to base the standard on that of hostile work environment claims).
14. Assemb. 3250 §763.
15. *Id.* §762.
16. *Id.* §763. This affirmative defense is similar to the Title VII affirmative defense created by the Supreme Court in *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742 (2008) and *Faragher v. Boca Raton*, 524 U.S. 775 (1998).
17. *Id.* §765.

18. *Id.* §766.
19. *Id.*
20. *See, e.g.*, Sen. 4289 §769, 2011 Sess. (N.Y. 2011). *See also* Yamada, *supra* note 13, at 265 (stating that this safeguard "has the effect of discouraging extensive litigation and promoting quick resolution").
21. Assemb. 3250 §769.
22. Swedish National Board of Occupational Safety and Health, Victimization at Work, Ordinance (Arbetsmiljoverket [AFS] 1993-17) (Swed.).
23. *Id.* §1.
24. *Id.* §§4-6. The accompanying guidelines suggest that management set standards for good behavior by example and clearly communicate to employees that victimization in the workplace is unacceptable.
25. *See* Frank Lorho & Ulrich Hilp, Bullying at Work 15-23 (European Parliament Directorate-Gen. for Research, Working Paper SOCI 108 EN, 2001), available at http://www.europarl.europa.eu/workingpapers/soci/pdf/108 en.pdf; Helge Hoel & Stale Einarsen, *The Swedish Ordinance Against Victimization at Work: A Critical Assessment*, 32 Comp. Lab. L. & Pol'y J. 225, 240 (2011).
26. Protection from Harassment Act, 1997, c. 40, §1 (Eng.).
27. *See Majrowski v. Guy's & St. Thomas's NHS Trust*, [2005] EWCA (Civ) 251, ¶56 (Court of Appeal); *Green v. DB Group Servs.* (U.K.) Ltd., [2006] EWHC 1898 (Q.B.).
28. Protection from Harassment Act, 1997, c. 40, §1 (Eng.).
29. *See* Susan Harthill, *Bullying in the Workplace: Lessons From the United Kingdom*, 17 Minn. J. Intl L. 247, 285 (2008) (citing Green, [2006] EWHC 1898, ¶152).
30. Majrowski, [2005] EWCA (Civ) 251, ¶57.
31. *Id.* ¶59.
32. Protection from Harassment Act §3(2).
33. Green, [2006] EWHC 1898 (Q.B.).
34. C. TRAV. art. L. 122-49.
35. *Id.*
36. *Id.*
37. *Id.* art. L. 122-51. One measure that employers must take is preparing a written document displaying workplace rules, which includes a provision prohibiting moral harassment. Id. art. L. 122-34.
38. *Id.* art. L. 122-49.
39. *See* Loic Lerouge, *Moral Harassment in the Workplace: French Law and the European Perspectives*, 32 Comp. Lab. L. & Pol'y J. 109, 122-27 (2010) (analyzing moral harassment cases before French Labor Tribunals).
40. C. TRAV. art. L. 122-49.
41. Lerouge, *supra* note 39, at 123.
42. Ontario Occupational Health and Safety Act, RSO 1990, ch O.1, s 1.
43. *Id.* at ss 32.0.1, 32.0.6-7.

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Exporting "Zero Tolerance": A Multinational Employer's Guide to Overseas Equal Employment Opportunity and International Employment Discrimination, Harassment and Diversity Initiatives

By Donald C. Dowling, Jr.

Equal employment opportunity initiatives such as human resources policies, handbook and code of conduct provisions, training modules, and dispute resolution procedures that address discrimination, harassment, and diversity have long been vital to American employers. And in today's global economy, the equal employment opportunity issue has gone global. As U.S. multinationals align an ever-increasing list of human resources policies and "offerings" internationally, border-crossing efforts at promoting workplace fairness have become increasingly vital and complex.

Staking out a "zero tolerance" stand against illegal workplace discrimination and harassment can be an aggressive, tough and compliant approach to ensuring equal employment opportunities. And proactively championing workplace diversity can be laudable. Outside the United States, however, laws and cultural attitudes as to workplace discrimination and harassment vary widely. In many countries workforce diversity is not much of a priority. Equality of employment opportunities overseas lags significantly behind the United States. In Egypt—where 76% of men but only 26% of women work—gender discrimination is so severe that at least one woman, Sisa Abu Daooh, has lived as a man since the 1970s just to be able to maintain subsistence-level employment.[1] Such cultural differences complicate the EEO initiatives that American multinationals might otherwise be inclined to launch across their global operations when exported. When exported, American employers' homegrown domestic EEO initiatives can prove culturally inappropriate and legally problematic. Multinationals eager to fight discrimination and harassment and champion diversity on a global scale need subtlety, nuance, strategy and finesse. A one-size-fits-all American-style approach to EEO compliance cannot work internationally because American laws and cultural attitudes on discrimination, harassment and diversity are unique.

In this article we address a U.S.-based multinational planning to expand or improve its EEO (discrimination, harassment, diversity) initiatives outside the United States, regionally or around the world. We discuss how U.S. headquarters needs to adjust its EEO strategies and policies when driving a top-down global compliance initiative—a global policy, code of conduct provision or training module—that would impose internal rules banning workplace discrimination and harassment, or affirmatively promote workplace diversity. Part one of our discussion addresses global *discrimination* programs generally. Parts two and three focus on the particularly troublesome discrimination subtopics of global *age* discrimination compliance and global *pay* discrimination compliance. Part four addresses global initiatives for combating workplace *harassment*. Part five addresses global workplace initiatives promoting *diversity*.

I. Fighting Workplace Discrimination on a Global Scale

Discrimination law in the United States is more evolved than in any other country. The leading treatise on U.S. employment discrimination law runs to two volumes and 3,500 pages;[2] no other country has such a lengthy discrimination law treatise. Decades after America's civil rights movement gave rise to tough, groundbreaking workplace discrimination laws, American jurisprudence has refined discrimination law concepts that are more complex than analogous discrimination-law doctrines overseas. In the United States, employment discrimination disputes implicate legal concepts 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." Workplace discrimination law in other countries is not so nuanced.

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

Because American anti-discrimination tools like these have evolved to such an advanced level, a U.S. 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 impose at least rudi-

mentary laws banning workplace discrimination, even if enforcement of discrimination laws in many countries overseas is less rigorous. One query to an online human resources forum by someone calling himself "Tokyo-Based HR Consultant" points out that "we know companies are not supposed to" discriminate in Japan, but "in reality, everybody knows…that such discriminatory practices exist here."[3]

It might seem that a carefully thought-out and robust American-style approach to fighting workplace discrimination would be a good practice everywhere around the world. Prohibiting illegal workplace discrimination is of course a vital and valid objective in every country in the world, except perhaps the very few with no discrimination laws. Common-law jurisdictions in particular impose sophisticated laws banning employment discrimination in ways reminiscent of our U.S. approach. Even civil law jurisdictions, particularly the Continental European states subject to EU anti-discrimination directives, impose tough workplace discrimination laws that in some respects are even stricter than corresponding American employment equality laws (even if less frequently invoked). For example, a French law requires employers of 50 or more staff to implement written gender equity action plans.[4] Further, age discrimination law in Europe is broader than in the United States. It protects everyone—even those under age 40, and even the young—from employer actions favoring the old.[5]

The challenge in exporting American anti-discrimination practices and policies to places with less-developed equal employment opportunity doctrines is that discrimination statutes and cultural perspectives outside the U.S. differ from the U.S. domestic approach. These differences can make the export of an American multinational's sophisticated anti-discrimination toolkit inappropriate and even suspect. We might say that sending U.S. discrimination compliance tools to foreign workplaces is like a 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 in other countries, account for three issues: *context, protected status* and *extraterritorial effect.*

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 very different contexts or environments overseas. We have discussed how workplace discrimination laws loom unusually large in the U.S. context. Overseas, discrimination laws tend to be less central in day-to-day human resources. Adjust accordingly. Be sensitive to local context and culture. Keep overseas discrimination compliance in perspective. Three issues specific (if perhaps not unique) to the U.S. environment help explain why discrimination compliance tends to be *less* of a priority outside the United States than it is stateside: *employment-at-will, demographics* and *history.*

- *employment-at-will.* Aside from Nigeria, the U.S. is the world's only notable employment-at-will jurisdiction. American employment law does not tend to offer unfairly fired workers any viable cause of action for wrongful discharge (outside the labor union context and outside the state of Montana).[6] American-style employment-at-will is in essence a legal vacuum, and nature abhors a vacuum. U.S. discrimination law rushed in to fill this particular vacuum. Indeed, American employment lawyers have argued that American discrimination law now amounts to a sort of de facto wrongful termination regime. That is, there is a view in the United States that the 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. On paper, Bermudian and Canadian human rights laws are quite similar to U.S. employment discrimination statutes,[7] 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 asserting a discrimination theory.[8] For a fired Bermudian or Canadian, having to meet the burden to prove a human rights or discrimination claim is much tougher than merely establishing wrongful dismissal/inappropriate notice. This is why dismissed Bermudians and Canadians tend to sue for wrongful dismissal much more often than they allege discriminatory dismissal. The U.S. Department of Labor recently made this very point regarding Mexico when it cited "Mexican government officials" as explaining that in Mexico, "labor discrimination complaints are under-reported, in part.…because workers are sometimes encouraged to file discrimination cases under more general labor law provisions, such as the ban on unjustified firing, since *discrimination cases are hard to prove*."[9]
- *demographics.* America's unusually heterogeneous population makes for broad racial diversity in U.S. job applicant pools and workplaces. In the U.S., demographics make diversity laws banning racial and ethnic employment discrimination vital. Legislative history shows that the U.S. Congress adopted discrimination laws to "stir" the American "melting pot."[10] But many other countries have homogeneous populations. There is no racial "melting pot" in most countries in Asia, Africa, Europe and Latin America. Nations from Finland to Haiti to Paraguay to Mali to China, Japan, Korea and beyond are essentially just one race.[11] Race discrimination in these countries is correspondingly less of a social problem. Consequently, fighting workplace race

discrimination in is often a low human resources priority.

- *history.* America's unusually troubled past of overt racial and ethnic discrimination—slavery, lynchings, displacements, massacres of indigenous people, racial internments during wartime—is a conspicuous scar on our history. It led to the U.S. civil rights movement and gave rise to America's world-leading employment discrimination laws. But American history is unique to the U.S. The historical underpinnings of American discrimination laws are a non-issue abroad.

The point is that American-style employment-at-will, American demographics and American history make American discrimination laws uniquely vital in America. But because these issues are much less significant in most places abroad, workplace discrimination laws overseas carry correspondingly less baggage, and discrimination compliance plays a more peripheral role in overseas human resources administration. American multinationals operating abroad might consider ratcheting down their U.S. discrimination law compliance strategies accordingly.

B. Protected Status

Protected status is central to any well-drafted discrimination policy or provision. Every employer can and does, discriminate every day against applicants and employees in *non-protected* groups. Employers routinely discriminate both in hiring and terms of employment against graduates of less-prestigious schools, those with poor grades and test scores, poor performers, criminals, smokers, current drug users, those with bad credit, the lazy, the incompetent, the uneducated and undereducated, the illiterate and countless other non-protected groups. Discrimination in employment is so ubiquitous (and legal) that some employers might take pride in their "discriminating" standards. The law only prohibits discrimination against people who belong to one of just a dozen or so *protected* groups. This is why well-drafted U.S. domestic discrimination policies and provisions always list the specific protected groups, traits or statuses against which discrimination is prohibited. In the U.S. these protected groups are usually gender, race, religion, national origin, age, disability, veteran status, genetic makeup, sexual orientation (in some states), and at most a few other groups. U.S. employers' lists of protected traits in their anti-discrimination policies usually track the categories protected under American federal, state and municipal 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 policy that prohibits discrimination on every conceivable ground, or in an inscrutable policy that forces staff to research which 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 antidiscrimination provision in a global code of conduct, the first challenge is that protected traits differ radically across jurisdictions. Gender, religion and race are protected in most places and disability and sexual preference are increasingly protected. "Gender identity" and "intersex status" are protected in Australia; part-time and temporary status is protected in Europe;[12] "traveler" (homeless) status is protected in Ireland;[13] HIV-positive status is protected in Brazil, Honduras and South Africa;[14] infectious-disease-carrier status is protected in China;[15] caste is protected in India (in the public sector);[16] and family status and social origin are protected in Chile and Hong Kong.[17] Political opinion, views and beliefs are protected in Argentina, Europe, El Salvador, Mexico and Panama.[18] Illness (in addition to disability) and language are protected in Guatemala and Peru.[19] Economic circumstances are protected in Argentina, Guatemala and Mexico.[20] "Looks" are protected in Argentina under Law 23,593—in one case an Argentine successfully sued a U.S.-based employer that had discriminated against him because he looked like Osama bin Laden. Criminal record is protected in British Columbia, Canada.[21] Rural (versus urban) origin is protected in China.[22] Meanwhile, the U.S. and its states protect some quirky traits that few or no other jurisdictions protect—chiefly veteran status, workers' compensation filings and genetic predisposition.[23] And then there are the jurisdictions like Argentina, Belgium and Turkey with legal doctrines that actually let courts invent their own protected groups on an ad hoc basis. In Argentina a rule (constitution article. 16) states, "all inhabitants are equal before the law and eligible for employment with no requirement other than their skills.)[24]

The point is that the fundamental issues in drafting any border-crossing anti-discrimination rule are: *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 to some groups protected by law in certain jurisdictions without naming all groups protected everywhere?*

There are no easy answers. Whether or how to list protected statuses is often the central challenge to drafting a cross-border discrimination policy or provision, and different multinational employers tackle this problem in different ways. One common approach is for a global discrimination provision to list the U.S. protected groups and then to add the ubiquitous catch-all clause *"and any other category protected by applicable law."* But when drafting a global discrimination policy, never jump to the conclusion that a catch-all clause solves the drafting problem. Inserting such a catch-all clause in a global discrimination policy listing of protected traits has three serious

shortcomings—the catch-all clause is simultaneously too vague, too narrow and too broad:

- *too vague.* Listing some protected traits in a non-discrimination policy or code of conduct clause and then sticking in the catch-all clause ("and any other category protected by applicable law") can be vague, impractical and insensitive. The clause both downplays the importance of local law and forces workers to research what "applicable law" is. It can be 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.[25]

- *too narrow.* At the same time, sticking this catch-all clause into a global discrimination policy can be too narrow and can fall short. It demotes all the unnamed protected 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 logically reason that the catch-all clause protects the unnamed protected traits (statuses) less than it protects the expressly named traits.[26] Imagine, for example, a U.S. age discrimination lawsuit against a U.S. employer whose anti-discrimination policy for some reason prohibited discrimination only 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 that this policy's conspicuous omission of "age" from its list of protected statuses betrays the employer's ambivalence toward eradicating age discrimination from its workplace. For this employer to have left "age" out of its policy's listing of protected traits (even though it used the catch-all clause) 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 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 employment lawyer representing an aggrieved fired "traveler," or a British Columbia lawyer representing a rejected felon, or a Hong Kong lawyer asserting "family status" discrimination—and arguing that the complete omission of "travelers" or "criminals" or "family group" from an employer's discrimination policy list of protected traits evidences antipathy or at least ambivalence toward travelers and criminals and families.

- *too broad.* The catch-all can simultaneously be too broad, or can go too far. The listing-plus-catch-all approach extends named protected groups into jurisdictions where they are not otherwise protected or even appropriate. For example, many U.S.-headquartered multinationals have listed veteran status and, increasingly, genetic predisposition in their global anti-discrimination policies and code of conduct provisions, because U.S. law protects these two groups. But, it makes no sense to broadly protect veteran status and genetic predisposition outside the U.S. These traits tend *not* to be protected abroad, and staff overseas tend not to consider them analogous to the other protected categories. Further, as we will discuss in detail, to include "age" in a global antidiscrimination provision raises real problems in jurisdictions where the employer imposes mandatory retirement or age ranges in staffing certain positions.[27]

There is no "magic bullet" solution to this problem. There is no foolproof way to address protected status in a border-crossing, anti-discrimination provision that works right everywhere. Each multinational needs to think hard about whether or how to list protected traits internationally, and then select a less-than-ideal approach. One less-than-ideal approach is to list protected groups separately for each jurisdiction. But this requires crafting separate local discrimination provisions (or separate discrimination policy or code of conduct riders or appendices) and 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" with a clause saying 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, however, yields a vague policy that forces employees to do their own legal research.

C. Extraterritorial Effect

America's major federal (and some state) discrimination statutes reach abroad to a limited extent. They prohibit U.S. "controlled" (such as U.S.-headquartered) employers 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.[28] U.S.-based multinationals should factor this mandate into their global anti–discrimination strategy and policies. But be careful not to let the "tail wag the dog" here, as this issue is deceptively narrow. Most American-headquartered multinationals employ relatively small percentages of Americans among their overseas workforces, although there are exceptions. (For example, U.S. companies that provide niche services like overseas security under U.S. government contracts or subcontracts).

It might be overkill to extend a full-blown U.S.-style anti-discrimination policy to all staff working outside the U.S. just to cover a tiny percentage of American citizens in the organization's foreign workplaces. 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. Remember that the goal is not necessarily to educate the protected American citizens themselves about their U.S. law rights. Rather, the goal is to stop illegal discrimination against American citizens who happen to work abroad.

II. Fighting Workplace Age Discrimination on a Global Scale

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

Our three-part discussion will focus on the apparently benign, seemingly narrow, but surprisingly intractable problem of whether, or how, an American multinational might mention the word "age" in a global anti-discrimination policy, code of conduct clause or training module. The discussion breaks into three parts: the *problem*; the *challenge*, and the *solution*.

A. The Problem: Widespread Age Discrimination Around the World

We have seen that the United States may impose the world's toughest and best developed laws against discrimination in employment, but most other countries also have laws that purport to ban employment discrimination. Other countries' discrimination laws, however, differ from American discrimination law in significant ways. One of the starkest differences is regarding *age* discrimination. The U.S. Age Discrimination in Employment Act,[29] passed in 1967, is the world's most robust, best-developed and frequently-invoked age discrimination law, with few real counterparts overseas. Many other countries still have not gotten around to banning age discrimination in employment at all. Even the growing group of jurisdictions that have recently purported to outlaw age discrimination often have age laws that by U.S. standards are weak, poorly conceived, lightly enforced and riddled with exceptions—often an exception that allows the most blatant form of age discrimination of all, mandatory retirement. Other jurisdictions that now purport to prohibit age discrimination neither impose a minimum protected age, nor let employers favor the old over the young, as the U.S. ADEA does.[30] In theory this means foreign age discrimination laws are even broader than America's ADEA, but in practice this means foreign age laws are so broad as to be 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 40-year-olds as much as 70-year-olds.[31] Foreign age laws can also have unexpected consequences. For example, they can forbid employers from *favoring* old applicants and employees by offering the seniority-enhanced benefits that American employers commonly offer—service-enhanced pension benefits, severance pay and vacation benefits, and age-plus-service-based early retirement offers.

Not only do most foreign legal systems have either no age discrimination laws or blunt age laws, but many jurisdictions outside the United States actually enshrine age-discriminatory concepts in their employment laws. For example, laws in Bahrain, Oman and many other countries force employers to give all staff written employment agreements that designate employee date of birth.[32] Italy, Germany, Turkey and many other countries let employers use the fact that an older worker has vested in social security ("state pension") to justify a dismissal or layoff, targeting the older worker under so-called "social selection criteria."[33]

Nevertheless, the global trend is going in the direction of increased protections against age discrimination. Common law countries including Australia, Canada and New Zealand passed tough age discrimination 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.[34] In Europe, EU Directive 2000/78 bans discrimination on age as well as on four other grounds (article 1), and each EU state was supposed to have passed an age discrimination law by December 2006 (article 18).[35] 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, Australia, Canada, New Zealand and some other countries ban mandatory retirement because firing someone for celebrating a baseline birthday is perhaps the most egregious possible act of age discrimination. But most other countries—even many that purport to impose laws banning age discrimination—rationalize (or ratify employer rationalizations) mandatory retirement in many contexts. For that matter, 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. Its legal community talks about how tough the age discrimination law is.[36] But by American standards the Israeli law still allows blatantly ageist mandatory retirement.[37]

- *Europe.* Mandatory retirement is legal in much, if perhaps not all, of Europe despite the "age" discrimination prohibition in EU directive 2000/78. Mandatory retirement comes under increasing scrutiny but remains common, widely legal and is enshrined in countless collective bargaining agreements and in "social selection criteria" determining who gets laid off. Even the European Commission conccedes that "most [EU states] have mandatory retirement ages for particular sectors or professions."[38] 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.[39]

- *age caps in recruiting*. In addition to mandatory retirement, another pervasive and sometimes perfectly legal ageist practice overseas is imposing age caps in recruiting. Employers abroad actually pay websites to post openly ageist job ads along the lines of, "Wanted: Brand Manager age 30-35" or "Seeking trainees up to age 28." A human resources manager recently explained that "it is perfectly legal, and not uncommon, [in Dubai] for a company to post a position which is open to 'male, Arabic speaker only' or 'Indian, female, age 28-35.'"[40] In Europe, recruiting age caps are technically illegal,[41] but the European Commission concedes that "minimum and maximum age requirements [in jobs] are…extensively used across virtually all reporting [EU] States."[42] 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 the Italian Parliament—despite the fact that it is against the law."[43] That said, a 2014 case from Mexico's Supreme Court of Justice struck down age caps in recruiting,[44] and the practice may be slowly waning in many countries.

From an ADEA-compliant American point of view, mandatory retirement and age caps in recruiting look starkly ageist.[45] But there is a vital cultural component here—a social gap between the rigid American position of protecting old people versus the very different social concerns abroad for alleviating chronic youth unemployment. According to one report, 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."[46] 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 high enough that workers eagerly anticipate the day their benefits will vest so they can finally stop working. Even the European Court of Justice recognizes a worker's vesting in social security benefits as grounds to justify firing old people.[47] One justification 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 to legally dismiss long-time underperformers with "dignity."

By American standards these apologia for mandatory retirement and age discrimination look weak. To justify mandatory retirement on the ground that firing old people helps alleviate chronic youth unemployment seems bizarre. It defends discrimination because discrimination discriminates. After all, we now completely reject the old sexist argument against giving a woman a job that could go to a man who heads a family. Nevertheless, Americans should remember that as recently as the late 1980s the U.S. ADEA had a (now-repealed) cap under which mandatory retirement was perfectly legal stateside.

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

In their global discrimination policies, codes of conduct and training modules, some American multinationals proclaim zero tolerance for "age" (and other) discrimination across their worldwide workforces. But making this claim globally can be a real problem for several reasons, including the differences in social perspectives and foreign laws, and because many American multinationals' foreign affiliates persist in embracing mandatory retirement, age caps in recruiting and other ageist practices.

Every multinational should 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 local management and local 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 word "age" in a global non-discrimination 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 non-discrimination 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 conformed to Chinese *statutory* law, the employer dismissed them in breach of its own *code-of-conduct* guarantee of freedom from workplace "age" discrimination.[48]

It would seem that any American multinational voluntarily claiming in its own global anti-discrimination provision not to tolerate "age" discrimination would have processes in place to comply with its own internal rule. But it may not. American multinationals sometimes suffer a disconnect between idealistic headquarters-drafted anti-ageism pronouncements, and entrenched ageist practices across their far-flung operations overseas. A little secret in global human resources administration is that the overseas operations of many U.S. multinationals still impose mandatory retirement and still cap job eligibility at specified ages. A German employment lawyer once estimated that more than 90% percent of American employers in Germany write mandatory retirement clauses into their local German employment contracts,[49] although surely this practice is at last declining. Still, beyond Europe many multinationals continue to impose mandatory retirement across operations in Africa, Asia, India, Latin America and the Middle East.

Ageist practices abroad also threaten to implicate an entirely separate danger: possible complications 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) attempted 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 their ages violate its own global age discrimination provision, and so more 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 continue to impose mandatory retirement, age caps in recruiting or other locally tolerated ageist practices. How can this multinational come into compliance with its own global anti-age-discrimination rule? There is a solution here, if the multinational is willing to take four steps:

- *Step 1: Assess non-compliant practices abroad.* Human resources professionals and employment lawyers at a multinational's U.S. headquarters may have no idea that, or to what extent, their own organization's overseas affiliates openly discriminate on age. Find out whether foreign affiliates impose mandatory retirement, age-capped recruiting or other ageist practices. Some progressive multinationals have made headway in stamping out age discrimination internationally, but openly ageist practices remain pervasive in many markets around the world.
- *Step 2: Align the global prohibition with actual practices.* Where headquarters imposes a global provision (policy, code of conduct, training module) that purports to ban age discrimination, but discovers that its own overseas affiliates may be violating that provision (although not violating foreign law), headquarters needs to select one of five possible strategies for getting into compliance with its own global rule:
  - 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 and training modules 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 ("*we provide equal employment opportunities among all groups, of whatever classification, protected by applicable law*").
  - Replace the global discrimination policy with tailored local-country policies or riders which, where appropriate and legal, omit reference 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 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. We discussed how U.S. age discrimination laws tend to be more strictly enforced and less riddled with exceptions than age laws abroad. Overseas age laws tend to be, in theory, much broader than the U.S. ADEA, because the ADEA is narrowly tailored to reach only people over age 40 and tolerates discrimination against young people, while blunter age laws overseas (where they exist at all) tend to protect everybody.[50] This means that many ADEA-compliant practices common in the United States violate broader (if blunter) foreign age discrimination laws. For example, overseas age laws that prohibit discrimination against the young can stop an employer from imposing minimum experience levels in recruiting[51] and can interfere with lockstep and seniority-linked compensation and vacation benefits, and with the common American practices of linking severance pay to years of service and offering voluntary early retirement incentives to older staff even if not "objectively justified."[52] In short, be sure foreign practices comply with the broad overseas age discrimination laws that protect the young.

III. Fighting Workplace Pay Discrimination on a Global Scale

In addition to the special global discrimination compliance challenge of *age* discrimination, a second special challenge is *pay* discrimination. A consultant at Norfolk Mobility Benefits, David Bryan, once 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."[53] Indeed, at many multinationals the push to globalize the human resources function *begins* with aligning certain aspects of compensation and benefits across borders, like 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 American tools like statistical adverse impact analysis to verify that compensation systems do not discriminate.

Multinationals launching cross-border rewards programs and compliance audits need to comply with targeted pay-related discrimination laws in each affected country. Because the United States imposes such sophisticated employment discrimination laws, U.S.-based multinationals may assume that American employers enjoy a big head start in complying with discrimination mandates worldwide. But in the specific 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 American concepts. Overseas, watch for unexpected doctrines like comparable worth, local citizenship discrimination, job category or colleague discrimination (called "equal treatment" abroad)—even job category comparable worth discrimination. We will 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 imposes general employment discrimination laws that prohibit employers from discriminating based on specified traits or groups including gender, race and religion. These laws tend to reach hiring, firing and terms of employment.[54] From the U.S. perspective, foreign jurisdictions' plain-vanilla protected group discrimination laws raise five issues 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. The analysis is simple. Pay and benefits should not directly discriminate on protected group status.

- *disparate impact.* Many countries' protected group discrimination laws not only prohibit straightforward adverse treatment discrimination (in Europe called "direct discrimination"), but also "disparate impact" discrimination (in Europe called "indirect discrimination"). This means that even facially neutral compensation systems may 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 it is 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 discriminating against convicted criminals has an illegal disparate impact against "African American and Hispanic men."[55]

  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, disparate impact analysis is not

well developed beyond the common law world. For example, 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. These statistical analyses are virtually unknown in China, Japan, Germany, the Czech Republic, Hungary and for that matter most other civil law countries. That said, though, statistical-adverse-impact-on-pay analyses do get run, on occasion, in Australia, Canada and the UK—in the UK these are called "Job Evaluation Schemes."[56] But overseas, these are more common in the public sector than among nongovernment employers, because in some jurisdictions equal pay claims arise mostly in the public sector. In some provinces in Canada, however, statistical adverse impact analyses of pay/rewards are increasingly common among nongovernment employers.

- *local protected groups.* 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. As already mentioned, 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 illegal because the EU protects "political opinion or belief."[57] India protects caste (in the public sector).[58] Ireland protects the itinerant homeless ("travelers").[59] South Africa protects HIV status,[60] Hong Kong protects family status.[61] China protects rural background.[62] Laws in Yemen protect *al akhadam* (low-caste, dark-skinned servants).[63] The United States is unusual in protecting veteran status.[64]

- *gender*. Having said that discrimination against any protected class in compensation and benefits is illegal, in the specific context of pay and benefits 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 government enforcers are particularly likely to look for gender discrimination when analyzing the "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.[65]

- *"comparable worth."* Some targeted gender pay discrimination laws impose what in the United States is called "comparable worth" analysis. In Cyprus, the UK and elsewhere it is called "work of equal value."[66] Comparable worth/equal value laws require equalizing ("validating") pay across different 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 its mostly female secretaries and its mostly male truck drivers.

Decades ago, U.S. workers' rights advocates and law professors championed comparable worth as a possible extension of U.S. equal pay 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]."[67] Indeed, it might be argued that comparable worth is un-American in its core assumption that experts can somehow "validate" pay rates across distinct job categories. The comparable worth concept is inconsistent with the basic Chicago-school free market capitalist principle that the wage differential between any two jobs is our free market economy's inherent reflection of those two jobs' relative contributions to society. To a free marketeer, market wage rates, by definition, already fully reflect the "worth" or value of any given job. Airplane pilots earn more than cab drivers because society values pilots more—which also explains why pilots earn more than, say, 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 a parochial American view, or at least it is a capitalist, free market or libertarian view. Comparable worth mandates thrive in certain jurisdictions outside the United States, imposing real burdens on 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 comparable worth decision 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."[68] Fair Work Australia held: "[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."[69] Similarly, Ontario's Pay Equity Act requires employers affirmatively to run comparable worth/equal value analyses—and Ontario's increasingly proactive Pay Equity Commission launches unannounced enforcement audits at nongovernment employers.[70] The Quebec Pay Equity Act is just as strict.[71] It 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."[72]

Where a multinational's operations include comparable worth jurisdictions, be sure to comply with comparable worth mandates, however strict.

- *local citizenship.* Moving beyond gender and other groups protected under general employment discrimination laws, a group subject to special scrutiny under some countries' pay-specific discrimination laws is *local citizenship*. Some developing countries prohibit employers from compensating aliens more generously than locals, resisting those multinationals that "parachute in" expatriates and reward them better than locals who work every bit as hard. For example, Bahrain labor law art. 44 mandates that "wages and remuneration" of "foreign workers" not exceed pay for local "citizens" with "equal skills" and "qualifications" unless necessary for "recruitment."[73] Brazil labor code art. 358 requires that "salary" of a local citizen not be "smaller" than pay of a "foreign employee perform[ing] an analogous function."[74] Comply with foreign laws like these when structuring expatriate packages.

- *geographic equal pay*. Another group protected under pay-specific discrimination laws is *geography*. Under an equal pay law doctrine in the Czech Republic, employers operating across the country must pay their employees working similar jobs equal pay rates regardless of job location (irrespective of protected group status).[75] 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 rates in the Czech countryside. Czech unions push employers to live up to "geographic equal pay" and Czech employers run internal analyses to ensure compliance.

B. Job Category Pay Discrimination

So far we have been discussing pay discrimination laws that are conceptually similar to U.S. employment discrimination principles 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 actually impose job category or colleague pay equality laws—in France, called "equal work equal pay" and in Poland and elsewhere called "equal pay for equal work" or the "equal treatment" doctrine—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.* In a sense, perhaps, this doctrines of pay/benefits equality transcends discrimination law, because it is not grounded in the fundamental discrimination law concept of protected group status.

As applied to a single job, this equal treatment doctrine is broad but conceptually simple. Two colleagues working the same position enjoy a legal right to equal pay and benefits packages even if both are identical twins (or even if, say, both are white 45-year-old Christian men originally from Sweden or both are black Muslim 26-year-old women originally from Yemen). Under these equal treatment doctrines, job category itself becomes a protected group. To pay different wages or benefits to two similarly situated colleagues working similar jobs is illegal, regardless of protected group status. The lower-paid colleague has a legal right to "equal treatment" or "equal pay for equal work."

Going further, a rarified version of equal treatment or job-category discrimination law addresses irregular—temporary/part-time/contingent—status. Every European Union member state expressly prohibits pay discrimination on the basis of irregular status like temporary, part-time or contingent work.[76] This means that European employers cannot legally pay their temps and part-timers lower wages or stingier medical insurance or retirement benefits. This same principle can even force European employers to credit part-time service as full-time for calculating years-of-service requirements.[77] 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. In some sectors in the U.S., irregular employees can work in a distinct lower-compensated class or tier (for example, adjunct faculty at universities and contract lawyers at law firms). In Europe, this practice could constitute illegal pay discrimination under these laws that prohibit paying less to staff who are not regular full-time.

Beyond Europe and some provinces in Canada, two countries that impose job category equal treatment discrimination rules of one type or another include Brazil and China:

- *Brazil:* Brazil labor code article 461 mandates equal pay among employees who perform "identical" work of the "same value." The text of article 461

purports 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 and interpret article 461 as an equal treatment job category discrimination law.[78] 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*.[79]

- *China:* China's 2008 Employment Contract Law (articles 11 and 18) 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.[80] Implementing regulations are silent on equal pay and Chinese law on this point remains underdeveloped. But by its plain wording, Chinese law appears to impose an equal treatment job category discrimination mandate.

These equal treatment job-category or colleague-discrimination laws get even trickier where they enter the rarified realm of *comparable worth/equal value*—equating separate jobs that purportedly contribute equal value to an organization without linking the analysis to comparitors' protected-group status. For example, France's equal treatment job-category pay discrimination law allows for comparable worth/equal value theories, subject to employer defenses based on different lengths of service or different performance and responsibilities, and affirmative action/"positive discrimination" for nationality.[81] 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.[82]

In a June 2009 decision under the Finnish Employment Contracts Act 2001, Finland's Supreme Court mandated equalizing employee benefits across two very different job categories.[83] In that case a construction company had enrolled its clerical workers in a generous medical insurance plan that had excluded its construction workers.[84] The construction workers sued for the medical insurance under an equal treatment job category (not gender-linked) comparable worth/equal value theory—and won.[85] The employer argued, but failed to prove, that each clerical worker contributed greater value.[86] The employer also argued that the clerical workers' union had bargained for the medical insurance in collective bargaining, and if the construction workers wanted the medical plan their union should make concessions to get it.[87] The court nevertheless ordered the employer to give the construction workers the insurance benefit.[88]

These equal treatment cases require experts "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."[89]

* * *

In complying with pay discrimination laws internationally, be prepared to wade into foreign discrimination waters even deeper 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, local citizenship discrimination and the European rule against giving lower benefits to part time and irregular staff. At the extreme, jurisdictions like France, Finland and Québec actually impose mandates requiring "job category comparable worth" validations. These jursidictions prohibit pay discrimination across distinct job categories regardless of claimants' and comparators' protected group status.

IV. Fighting Workplace Harassment on a Global Scale

Having discussed a multinational's international initiatives fighting *discrimination*, we now turn to cross-border efforts to eliminate workplace *harassment*. U.S. multinationals proactively ban illegal harassment across their operations worldwide, almost always linking to their prohibition against workplace discrimination. But the harassment law landscape outside the U.S. differs significantly. Global anti-harassment rules, training and compliance also need to differ.

Harassment law in the United States: Over the past several decades, American workplace harassment law has evolved into the most intricate body of harassment jurisprudence in the world. U.S. federal and state court harassment decisions 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 American harassment law doctrines evolved in court decisions even though the texts of American statutes tend to not even prohibit workplace harassment. U.S. federal harassment prohibitions are mostly judge-made extensions of statutes that nominally prohibit only *discrimination*. This is why the U.S. EEOC

itself defines "harassment" as "a form of employment discrimination."[90] This means that harassing behavior in the American workplace tends to be actionable only to the extent it is discriminatory. *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 in 2011 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."[91]

Harassment law abroad: In contrast to the tough, well-evolved but narrow American law stance that prohibits workplace harassment only when it is discriminatory, the harassment-law landscape overseas differs greatly. Singapore imposes no specific laws banning workplace harassment.[92] Countries like China and Russia ban workplace harassment on paper but tend not to offer harassment victims tough precedents or readily enforceable remedies.[93] In 1997 India's Supreme Court banned workplace sex harassment,[94] but women's rights advocates say India has a long way to go in enforcement. Mexico bans sex harassment in theory under Federal Labor Law article 47, but according to one Mexican labor lawyer, it is "surprising….to learn that such conduct [is] not punished in Mexico, from a labor standpoint, even when the incidence of sexual harassment [is] extremely high in Mexico."[95] Enlightened countries like the Netherlands and Luxembourg impose tough-seeming bans against workplace harassment, but confounding case law in these jurisdictions actually enables 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.

Meanwhile, common-law countries impose tough anti-harassment rules broadly consistent with the U.S. model. In some of these, countries link illegal harassment to status as the U.S. does. In England, for example, the gov.uk website page on "Workplace Bullying and Harassment" concedes that"[b]ullying itself isn't against the law, but [status-based] harassment is." And all European Union states now impose laws that prohibit certain workplace harassment. The sex harassment provisions of Cyprus's Law for the Equal Treatment of Men and Women in Employment and Vocational Training are particularly tough.[96] Countries like France and Egypt have criminalized certain types of harassment—France reenacted its sex harassment criminal law in 2012.[97] Under a 2006 Algerian law, 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).[98] [99] These days even Shari-ah law can get 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.[100] (Nevertheless, a recent survey in Saudi Arabia found that "80 percent of people questioned in a national survey blamed the scourge of sexual harassment plaguing the country on the 'deliberate flirtatious behavior' of women."[101]) A January 2013 article in the German press is called "Wake Up Germany, You've Got a Serious Sex Harassment Problem."

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

Toward a global approach to eradicating workplace harassment: A multinational pursuing a global approach to eliminating harassment from its worldwide workforces needs to account for the international context by factoring in seven issues: alignment; protected status; affirmative mandates; policy drafting; launch logistics; communications/training; and investigations:

- *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.[102] 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, many American employers' harassment policies and training 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, few American employers seem to have taken the huge step of imposing tough and enforceable workplace rules that ban *status-blind* harassment—bullying, pestering, equal opportunity harassment or hostile work environments. (A trend seemed to be emerging at the U.S. state government level to try to outlaw so-called "abusive work environments," but state proposals here so far have gotten little traction.[103])

By contrast, many other countries expressly 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."[104] A French law of June 2010 criminalizes "psychological violence."[105] A Luxembourg law of June 2009 prohibits "bullying and violence at work."[106] Venezuela's 2005 "Organic Law on… Work Environment" prohibits "offensive, malicious and intimidating" conduct in the workplace, including "psychological violence" and "isolation."[107] Argentina's Law 1225 bans "mobbing" and defines workplace harassment without linking to protected group status: "acts and omissions by people…in the workplace who harass an employee…on a systematic, frequent basis." And mushrooming case law in Brazil imposes damages for workplace "moral harassment"—moral harassment has become a common claim in all sorts of Brazilian workplace disputes.[108] In Brazil these days even employers that legally assign and pay overtime have faced "moral harassment" litigation from overworked employees who argue extra hours amount to a form of bullying.[109]

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

- *affirmative mandates.* Every law against workplace harassment imposes a negative prohibition banning employers (and often co-workers) from committing 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 comes up short in jurisdictions where employers must take affirmative harassment compliance steps. For example, California, South Korea and other jurisdictions affirmatively require employers to offer periodic training on sex harassment.[110] Chile, Costa Rica, India, Japan and other countries affirmatively require employers to issue written sex harassment policies.[111] The Austrian Supreme Court requires employers affirmatively to investigate complaints of sex harassment[112] as do statutes in other countries including Chile,[113] Costa Rica,[114] India,[115] Japan,[116] South Africa[117] and Venezuela.[118] Costa Rica requires employers to institute sex harassment claim procedures and to report each sex harassment claim to the Ministry of Labor Inspection Department.[119] A 2006 Japanese regulation imposes similar affirmative mandates.[120]

- *policy drafting.* In drafting a multinational's cross-border anti-harassment policy (or code of conduct provision), be sure the document's mandates actually work overseas. Reject American-style prohibitions that may be unworkable abroad. 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 highly susceptible to being misconstrued abroad. Be sure to be clear. For example, the common harassment policy terms "inappropriate" behavior and "improper" touching get interpreted very differently depending on cultural context. Certain behaviors obviously "inappropriate" or "improper" in Atlanta, Roanoke and Milwaukee may not seem out of line in Athens, Riyadh or Mexico City. "Kissing," which is expressly prohibited by many American harassment policies and training modules, usually implies romantic mouth-kissing without distinguishing the cheek-kissing ubiquitous among co-workers in France and many other 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 not understood to reach "hostile environment" harassment.[121] 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 (and even requirements to disclose co-worker sexual relationships) 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; local employees and even courts push back hard against American-style co-worker dating restrictions—or, at least, passive-aggressively ignore them. In one extreme case a Russian judge confirmed a worker's sex harassment allegation as factually true but then denied her claim, reasoning that "*if we had no sexual harassment, we would have no children*."[122] In these jurisdictions even a workplace rule that merely requires dating co-workers to disclose their relationships almost always offends.

- *launch logistics*. Be sure to launch a cross-border harassment policy in a way that complies with overseas procedures for implementing new work rules. While every harassment policy imposes a discipline or termination sanction, we have mentioned that many jurisdictions get surprisingly lenient when an employer invokes an antiharassment policy to fire a harasser for good cause. 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, like the work rules required in France, Japan, Korea and many Arab countries. And any harassment policy that imposes a mandatory disclosure rule—a rule requiring dating co-workers to disclose their relationships—may need to survive employment law and data privacy law challenges.

- *communications/training*. A multinational implementing a global harassment policy should communicate its policy to its overseas employees and then train on how it works. Never directly export unedited 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. Years ago foreign workers, male and female alike, openly mocked U.S.-generated sex harassment and gender-sensitivity training. In recent years overseas workers have become superficially more accepting of these training sessions, but many overseas employees forced to sit through harassment modules still see this training as a puritanical American exercise out of touch with their local environment. In some pockets of the Arab world and Africa, Asia, Latin America and Eastern Europe a workforce may still openly scoff at harassment 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."[123] 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. As mentioned, law in Austria, Chile, Costa Rica, India, Japan, South Africa, Venezuela and elsewhere affirmatively *requires* employers to investigate allegations of sex harassment.[124] 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.

* * *

While under U.S. law, "harassment" is 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 harassment will be understandably reluctant to allow any harassment in its overseas operations, but the concept of what behavior constitutes inappropriate and illegal harassment needs to be flexible enough to accommodate very different, and much broader, foreign laws and social environments. Think carefully about how to internationally extend U.S.-style harassment policies, tools and training.

V. Promoting Workplace Diversity on a Global Scale

Having addressed multinationals' global initiatives as to discrimination and harassment, the final plank of

an international EEO initiative might be a cross-border diversity program, if it can be viable. We have discussed that 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 except perhaps South Africa. 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. In some contexts overseas, too much experience with U.S. diversity initiatives might actually be a drawback.

How, specifically, can a multinational driving international EEO compliance foster workplace diversity across jurisdictions? U.S. EEO and diversity tools were originally honed for the atypical, rarified environment of U.S. discrimination, harassment and affirmative action law, and for the unique demographics of the United States. So American diversity tools do not always work well abroad, at least not without significant retrofitting. This is particularly true as to those American diversity 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 workforce "diversity"?* Very different demographics and "core diversity dimensions" overseas mean that the answer will not be the same abroad as it is 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*."[125] 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 EEO-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." These days U.S. diversity experts 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.

Nevertheless, 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 other categories less important. After all, no American would consider a workplace of all white, non-Hispanic men as "diverse"—even if the 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 concede that a workforce is indeed rather "diverse" if made up of half men/half women and 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 middle-aged, able-bodied, heterosexual American-born Democrat Christians. In fact, 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*, "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."[126]

The international understanding of "diversity." For years the importance of "diversity" has been growing outside the U.S. According to a 2006 report from the Conference Board, "demographic changes in Europe, combined with…regulations, are…pressur[ing European] companies to increase the diversity of their workforces."[127] 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, Germany and other countries require affirmative action for the disabled. European jurisdictions are requiring gender equity on corporate boards of directors. India imposes caste diversity rules in the public sector.

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 do not fit overseas. Our American understanding of race and ethnicity is so uniquely our own that even the U.S. Census struggles—recent immigrants misconstrue American census forms because peoples from other cultures do not "get" how Americans categorize ourselves:

> 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."[128]

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, for example, these specific challenges:

- 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, and parts of the Philippines.

- Concepts of race differ abroad. "Race is seen differently in the Caribbean as people describe themselves by various degrees of mixed races or colors such as *moreno*, *trigueno*, and *blanco-oscuro*, but few will use the term 'black.'"[129] In England, "Asian" means Indian/Pakistani but does not always 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" can be offensive (or at least inapplicable) 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. The *CIA World Factbook* reports that Japan is 98.5 percent Japanese and more than 99.4 percent Asian. The CIA says Korea is 100 percent Korean ("except for about 20,000 Chinese"). Finland is 99 percent Finnish and Swedish. Paraguay is 95 percent "mestizo" and Mali is more than 95 percent black. Even the increasingly heterogeneous UK remains 92.1 percent white.[130]

- 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 (in the public sector)—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." Hong Kong imposes a 28-page discrimination law specific to "family status,"[131] but although family status diversity is an important metric there, it is a characteristic invisible to EEO-1 metrics.

- 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*, over ten years ago U.S. "HR directors [were] finding that one-size-fits-all [diversity] programs" launched overseas "will not work and might not even be understood."[132] Andrés Tapia, then serving as Chief Diversity Officer at Hewitt Associates (now AON Hewitt), years ago said, "we're beginning to see an increasingly resentful backlash against the American version of diversity abroad."[133] Outside the U.S., the complaint Tapia heard most often was that "this diversity thing is an American thing."[134] 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 very well, any U.S.-headquartered multinational should think hard before deciding to launch a diversity initiative focused on recruiting and retention across regional or worldwide workforces. Resist the urge to transplant the domestic U.S. approach. Retool an American diversity initiative for recruiting and retention by using internationally appropriate metrics and a global understanding of "diversity." A multinational might select one of three alternate designs for transforming a made-in-the-U.S.A. diversity initiative into a viable international program: (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, because a workforce with good cross-cultural understanding is not necessarily a diverse workplace.

- *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 for the most part it remains illegal). Women are underrepresented, especially in leadership roles, in many overseas workforces. Gender inclusion has become a hot issue in Europe, which is requiring gender balance on corporate boards of directors. Some U.S. multinationals therefore focus their overseas diversity efforts on promoting gender inclusion while reserving race, ethnicity and other "diversity dimensions" for their domestic U.S. diversity programs. According to *HR Magazine*, 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.[135] But avoid referring to gender-equity initiatives as "diversity" programs, because a gender-balanced workforce is not necessarily truly diverse. Gender equity is not the same as diversity.

- *local racial/ethnic diversity.* Bold multinationals that take international workplace diversity seriously enough to confront the irrelevance of our three U.S. EEO-1 categories abroad might promote racial/ethnic inclusion by tailoring overseas diversity metrics to the very 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, Belgium, China, Chile, India, Russia or South Africa. Ask instead: *Which "diversity dimensions" and demographic categorizations are locally appropriate in each of our various overseas locations?* Then implement meaningful demographic benchmarking metrics on a localized basis. Does your Mexico City executive suite reflect Mexico's Indian/Mestizo majority? Does your Dominican Republic operation respect employees and applicants from the victimized underclass of Dominican Haitians?[136] 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, ethnic Brazilians, Ainus and Ryukyuans? Do local taboos—and data privacy laws—prevent you from learning the status quo, taking action and measuring success? And beyond racial/ethnic categories, how can a global diversity program cultivate diversity among age groups, sexual orientations and disabilities? Bold cross-border diversity initiatives 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 else completely start over abroad.

Conclusion

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, with the possible exception of South Africa. 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 the EEO tools that American multinationals originally developed in the atypical and rarefied 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 to address workplace discrimination, harassment or diversity should adapt these offerings strategically and account for the special context of the global workforce.

Endnotes

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3. *Ask HR: Discrimination, Diversity and Inclusion in Japan*, HR Agenda Mag. Online, Dec. 13, 2010.
4. Loi 2011-822 du 7 Juillet 2011de portant reforme [Decree no. 2011-822 of July 7, 2011].
5. EU Council Dir. 2000/79, J.O. 2000 (L 303) 16.
6. Montana is unique in that it is the only state that gives fired employees a cause of action for dismissal "without good cause." Mont. Code Ann. §§ 39-2-901 *et al.* (2014).
7. Canadian Human Rights Act, R.S.C. 1985, c. H-6; Laws of Bermuda, *Human Rights Act 1981*, Title 2 Item 23, s. 13.
8. *Compare* Human Rights Comm'n, 2011 Annual Report Human Rights Comm'n Bermuda 17 (2011), *available at* http://www.gov.bm/portal/server.pt/gateway/PTARGS_0_2_11469_495_227514_43/http%3B/ptpublisher.gov.bm%3B7087/publishedcontent/publish/ministrycsr/new_hrc/hrc___reports/2011_annual_report_0.pdf *and* Canadian Human Rights Comm'n, 2013 Annual Report to Parliament 18 (2014), *available at* http://www.chrc-ccdp.gc.ca/sites/default/files/pdf/chrc-annual-report-2013.pdf *with Charge Statistics*, Equal Employment Opportunity Comm'n, http://www.eeoc.gov/eeoc/statistics/ enforcement/charges.cfm (last visited March 2, 2015).
9. U.S. Dep't Labor, Mexico Labor, Discrimination Project Initial Funding Opportunity Announcement, Oct. 14, 2014 (emphasis added).
10. 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 of its citizens are free." *Civil Rights Act*, History.com, http://www.history.com/topics/civil-rights-act.
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12. Council Dir. 97/81/EC, 1998 O.J. (L 14) 9.
13. Unfair Dismissals Act 1977 (Act No. 10/1977) (Ir.), *available at* http://www.irishstatutebook.ie/1977/en/act/pub/0010/print.html.
14. Brazil Law 12, 981 (2014); Decree No. 147-99 of 9 September 1999 (HN); HIV/AIDS Code cl. 7.2.1 (S. Afr.).
15. Article 19 of the Jiuye Fuwu yu Jiuye Guanli Guiding [Regulations on Employment Services & Employment Administration], promulgated by the Ministry of Labor & Social Security, Nov. 5, 2007, prohibits discrimination based on infectious disease.
16. India Const. art. 15.
17. Chile Labor Code art. 2; Hong Kong Family Status Discrimination Ordinance L. N. 552 of 1997.
18. For a discussion of Argentina's discrimination laws see William Keller, International Labor and Employment Laws 76-52-53 (2003). The European Union Charter forbids discrimination based on political opinion. U.N. Charter art. 21(1). For Mexico, s*ee Ley Federal del Trabajo* [LFT] [Federal Labor Law] *as amended*, art. 56 (Mex.). For El Salvador's discrimination law generally, *see* El Salvador (CCPR/C/SLV/CO/6), para. 3.
19. *E.g.,* for a discussion of Peru's discrimination laws see Constitucion Politica tit. I, ch. I, art. 2, cl. 2 (Peru).
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21. *See* Human Rights Code, R.S.B.C. 1996, c. 210; R.S.C. c. C-12.
22. Article 19 of the Jiuye Fuwu yu Jiuye Guanli Guiding [Regulations on Employment Services & Employment Administration], promulgated by the Ministry of Labor & Social Security, Nov. 5, 2007.
23. *See, e.g.,* Employment and Reemployment Rights of Members of the Uniformed Services, 38 U.S.C. §§ 4301-4335 (2012); Genetic Information Nondiscrimination Act of 2008, Pub. L. 110-233, 122 Stat. 881 (codified as amended in scattered sections of 29 and 42 U.S.C.). For an example of a state law prohibiting the discrimination against filing a workers' compensation claim, see 820 ILCS 305/4(h) (Ill.).
24. For a discussion of Argentina, Belgium, and Turkey's discrimination laws see William Keller, International Labor and Employment Laws (2003).
25. *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").
26. *Cf.* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 107-11 (2012).
27. *See* discussion *infra* Part II.
28. 29 U.S.C. §§ 623(h) (ADEA abroad); 42 U.S.C. §§ 2000e–1(a), (c), 2000e–5(f)(3) (Title VII abroad); 42 U.S.C. §§ 12111(4), 12112(c) (ADA abroad).
29. 29 U.S.C. §§ 621-634.
30. The ADEA only prohibits discrimination against those age 40 and above. *See* 29 U.S.C. § 631. The ADEA lets employers favor the old over the young. *See* Gen. Dynamics v. Cline, 540 U.S. 581 (2004).
31. *E.g*., Colombia Law 931 of 2004.
32. For Bahrain, see The Labour Law for the Private Sector, Law no. 36 of 2012, art. 37, *available at* http://www.rrc.com.bh/media/141168/labour_law_2012__1_.pdf. For Oman see Henrietta Newton Martin, *Dismissal of Employee,* Oman Labour Law Blog (Nov. 19, 2014), https://henriettanewtonmartin5.wordpress.com/.
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Student-Athletes or Athlete-Students: The Slippery Slope Presented by College Athletes as Employees

By Anthony J. Holesworth

Introduction

For decades, the interrelationship between the National Collegiate Athletic Association (NCAA), conferences, member schools, and the student-athletes at those schools, has been, at its core, a simple one. Colleges recruit and offer scholarships to athletically outstanding high school students. These high school students, in turn, select the schools they like the best, and enroll to get a free education, all while playing the sports they love. Meanwhile, the athletic success and accomplishments of these student-athletes generate prestige and revenue for their schools.

The NCAA, as the supreme governing body of college athletics, lays out the guidelines for its member schools' participation in athletic competition.[1] Individual conferences operate as subdivisions under the NCAA in the form of groups of teams in the same regional area, size range, or type of institution.[2] The revenue generated through media rights fees is distributed among the NCAA, the conferences, the teams, and ultimately, the student-athletes, in the form of their continued scholarships, stipends, athletic facilities, gear, insurance, and elite training.[3]

Until recently, this system was widely considered mutually beneficial for the major parties involved, each party benefiting in its own way, whether through revenue generation, reputation, experience, or a combination of these factors.

Over time, however, college football revenue has skyrocketed,[4] along with increased awareness of the health risks posed by the game of football.[5] These trends have disrupted the balance of benefits, causing what many student-athletes consider an inequity of treatment, based on the popular perception that the revenue the school generates from the football team does not get fairly redistributed into better conditions for the student-athletes.[6] This disruption has resulted in widespread criticism of the NCAA, taking the form of heated debate about whether the NCAA adequately protects its student-athletes' health.[7]

In the case of Northwestern University's football team, some student-athletes feel they should be legally considered employees of the organization and thus should be able to collectively bargain for improved benefits and working conditions.[8] Conversely, the University argues that the student-athletes are students first and should not be granted a change in status because it would be detrimental to their educational pursuits, along with the interests of the University itself.[9]

This past spring, the pressure boiled over, and the College Athletes Players Association (CAPA) filed an official petition with the National Labor Relations Board (the NLRB) seeking employee status for student-athletes playing football at Northwestern University.[10] The NLRB is a federal agency with jurisdiction over private employers, their employees, and the unions of those employees.[11] Northwestern University is a private university and, therefore, its relationship with potential employees and unions is within the NLRB's jurisdiction.[12] In his decision, NLRB Regional Director Peter Sung Ohr determined the student-athletes were employees, though that decision is currently under review by the full NLRB.[13] While Ohr based his decision on striking similarities between the scholarship football players and employees, legal precedent does not support the recognition of student-athletes as "employees."[14]

This article will examine the relevant law regarding what constitutes an employee, while comparing the relationship between student-athletes and their institutions to the standard employee-employer relationship. The article will establish the reasons why it would be inappropriate to legally recognize Northwestern University's student-athletes as employees. Further, the article will elucidate the undesirable ramifications of recognizing Northwestern's student-athletes as employees, including the undermining of the institution's educational focus, along with the unmanageability of the potential employment relationship.

Part I will lay out the relevant law, in the form of key NLRB decisions about the relationship between students and their institutions. Part II will discuss the *Northwestern* decision by NLRB Regional Director Ohr, including the factual details supporting each party's claims. Part III will apply the relevant law to the facts of *Northwestern* and analyze whether the student-athletes should be legally recognized as employees. Part IV will assess, from a public policy standpoint, which legal recognition (student-athlete or employee) is truly in the best interests of the student-athletes, focusing on what they are getting out of their relationship with Northwestern University, while tackling CAPA's main arguments. Part V will show that a system where student-athletes are given the rights of employees would ultimately be an unworkable system because of the difficulty with compensation and Title IX compliance. Finally, Part VI will address Northwestern's commitment to education and point out the danger that would be posed to education if student-athletes were legally recognized as employees.

I. The Relevant Law

The National Labor Relations Act (NLRA) provides the legal basis for employees and employers to form and dissolve collective bargaining units, namely unions, in the workplace.[15] The NLRA states that "the term 'employee' shall include any employee…."[16] Since the NLRA uses the word itself as the basis of the definition, it effectively establishes little to no guidance for determining what constitutes an employee. The common law provides a more specific definition of employee: "a person who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment."[17] Being subject to the control of another is not sufficient, on its own, to constitute employee status.[18] Further, the word "payment" has been construed to mean compensation based on the skill or function involved in the work being done, rather than merely the transfer of money from one party to another.[19]

Because the NLRB carries out and enforces the NLRA, the NLRB's decisions are relevant to understand what constitutes an employee under the Act.[20] Fortunately, there are several key NLRB decisions examining the relationship between students and institutions of higher education, from *Adelphi University*,[21] in 1972, which established that graduate assistants are not employees, to *Brown University*, in 2004,[22] which re-affirmed that holding.[23] With the exception of one decision,[24] which has since been overruled,[25] the NLRB has consistently held that individuals enrolled at universities are not employees.[26]

A. NLRB Decisions

Adelphi University is the seminal case addressing whether students at universities are employees.[27] There, 125 graduate assistants claimed they were actually employees of Adelphi University because they spent more hours performing work for the school than actually taking classes.[28] The Board found that the hours spent working did not confer employee status on the students, as they were being instructed and guided along the way by faculty members, and their student status was a prerequisite to any and all work they were performing.[29] Even though the students were receiving full-tuition scholarships and payments directly from the school, the Board did not find such compensation sufficient, on its own, to make them employees.[30] However, the Board did not explicitly state why the payments did not confer employee status on the graduate assistants.[31]

Applying *Adelphi University*, the NLRB in *Stanford* more explicitly provided that the payments graduate research assistants (RAs) received were not wages,[32] and those students were thus not "employees" under the NLRA,[33] reasoning that:

> [T]he payments to the RA's are in the nature of stipends or grants to permit them to pursue their advanced degrees and are not based on the skill or function of the particular individual or the nature of the research performed. Accordingly, we conclude that the payments are not wages and the RA's are not "employees" as defined in Section 2(3) of the Act.[34]

The *Stanford* distinction comes down to whether the amount paid is based on the skill and work performed or is simply based on the cost of attendance.[35] Thus, recipients of scholarship payments based on the cost of attendance are not employees of the institutions giving out the scholarships.[36]

The NLRB did not break precedent when it granted employee status to interns, residents, and fellows in *Boston Medical*.[37] There, the Board granted employee status to individuals working in a hospital, who had already completed their degrees.[38] The Board in that case limited its scope to individuals who were not registered for any classes at an institution of higher education but, rather, were spending all their time in question in the professional setting of a hospital.[39] Further, the individuals in that case were being paid by the hospital and were already being taxed on those payments, in the same manner of a traditional employee-employer relationship.[40]

In 2004, following a four-year departure from precedent,[41] the Board in *Brown University* reaffirmed the *Stanford* decision that students enrolled in universities are not employees,[42] holding that money received by graduate students, in the form of grants and stipends, is not "consideration for work,"[43] but is rather simply financial aid to enable the student to attend the university.[44] The Board in *Brown* reiterated the notion that the academic enrollment prerequisite for graduate assistantships was evidence that the individuals in question were, in fact, students.[45] Going a step further, the Board addressed a major policy concern, stating: "Imposing collective bargaining would have a deleterious impact on overall educational decisions by the Brown faculty and administration."[46] This is because collective bargaining would affect decisions of class sizes, professor selections, and other subjects that are traditionally left to the judgment of the educational institutions, which are the most appropriate decision-makers on such matters.[47] Because a determination that students are employees would have given the students the right to collectively bargain, the Board eliminated that potential by not granting them employee status.[48]

II. The *Northwestern* Decision

This established precedent has been called into question in the *Northwestern* decision. *Northwestern* represents the latest attempt to garner employee status for college students.

The highly publicized campaign began on September 21, 2013, when Northwestern University's starting quarterback, Kain Colter, wore a wristband with the letters "A.P.U." (All Players United) during the team's game

against the University of Maine.[49] This simple act was the seminal event in the current effort to unionize college student-athletes.

Four months later, Colter joined forces with former college athletes Ramogi Huma and Luke Bonner to form CAPA, an organization devoted to increasing college athletes' bargaining power with their schools, in order for the student-athletes to ultimately have a greater say in the terms and conditions of their participation on athletic teams.[50] Upon its founding, CAPA filed a petition with the NLRB, claiming that the student-athletes receiving scholarships on the Northwestern University football team are employees of the institution,[51] within the meaning of "employee" under the National Labor Relations Act.[52] CAPA supported its claim by asserting that the quantity of hours the players spend doing football-related activities, along with the scholarships and special control the coaching staff exerts over the players, constitutes an employment relationship, as these factors—specifically payment and control—represent fundamental defining characteristics of an employee.[53]

The alleged employer in this case, Northwestern University, disagreed with CAPA, contending that student-athletes are students, first and foremost, and should not be legally considered employees.[54] Northwestern claimed the student-athletes receiving scholarships are most similar to graduate students,[55] just like those in *Brown University*.[56]

In an unprecedented decision, NLRB Regional Director Ohr determined that the football players receiving scholarships are employees of Northwestern University, rather than student-athletes.[57] Ohr based the decision on the significant number of hours the members of the football team commit to the sport, along with the facts that the students are compensated for their participation in the form of scholarships,[58] and the football program exerts a high level of control over its members through restrictions on outside employment and drug and alcohol policies.[59] The ruling is subject to the review and approval of the full NLRB,[60] and may thereafter be appealed to federal court before taking effect.[61]

In the meantime, the Regional Director's decision enabled the applicable members of the football team to cast a vote on whether they even want to unionize and be represented by CAPA.[62] The eligible players were those players receiving scholarships, not walk-on players (players who try out and make the team after already enrolling in the school), as walk-ons do not receive any scholarships and are thus dissimilar to scholarship players.[63]

Before the vote was cast, Northwestern's head football coach, Pat Fitzgerald, took it upon himself to help the student-athletes on his team make the most informed decision possible.[64] Said Fitzgerald:

> I believe it's in their best interests to vote no. With the research that I've done, I'm going to stick to the facts and I'm going to do everything in my power to educate our guys. Our university is going to do that, to give them all the resources that they need to get the facts.[65]

Fitzgerald, whose relationship with Northwestern dates back to 1993, when he was a student-athlete on the football team,[66] went on to say, "We have to educate [the student-athletes] to help them understand the whole aspect of what this decision is. That's what their parents entrusted us to do…and we'll continue to work with them to do that."[67]

Fitzgerald's words did not fall on deaf ears. Northwestern's starting quarterback, Trevor Siemian, heeded Fitzgerald's advice, saying, "I think at this university I'm really fortunate to be in the position I'm in. I don't think union is the answer for my team, or my university."[68] Siemian went on to say, "I've been treated unbelievably, far exceeding my expectations."[69]

The vote was held and the results impounded, pending the review by the full NLRB in Washington D.C.[70] If the NLRB decides the student-athletes are not employees, the results of the vote will be discarded.[71]

Although the results are unknown, one member of the team, who requested to remain anonymous out of fear of repercussions, told the *Chicago Tribune* that almost the entire group eligible to vote did so, and that he was 80% sure the players voted "no" to unionizing.[72] Still, though, regardless of whether the players voted for or against the union, the vote itself will be irrelevant if the full NLRB finds the student-athletes to be students, rather than employees.[73]

III. Analysis

The scholarship athletes on Northwestern University's football team enrolled as students as a prerequisite to their participation on the football team. Although they receive scholarships and commit a great number of hours to football, they are students "first and foremost,"[74] and their scholarship money is not "consideration for work," but is merely financial aid to enable them to attend the school.[75] Thus, Regional Director Ohr's finding that they are employees is improper.

A. Student Status

Just like the graduate students in *Brown*, the scholarship athletes on Northwestern's football team must be enrolled as students to play on the football team. Not only must they be enrolled as students, they must also maintain a minimum grade point average or they will be suspended from the football team until their grades improve,[76] suggesting that academics are of primary importance.

Even before potential football scholarship recipients are offered scholarships to Northwestern, the school's Dean of Admissions, Christopher Watson, must review

their high school transcripts, standardized test scores, letters of recommendation, and senior year schedules to determine if they can be academically successful at Northwestern.[77] To ensure Dean Watson is not unduly influenced to pre-approve potential football scholarship recipients for admission, none of Northwestern's football coaches are allowed to communicate with him during the recruitment process.[78] All of this is done to ensure academic performance remains the chief objective at Northwestern University.

Northwestern's commitment to maintaining academics as its first and foremost priority is demonstrated by the student-athletes' performance in the classroom. The NLRB Regional Director made note of some salient statistics to this end in his decision:

> It should be noted that the players have a cumulative grade point average of 3.024 and a 97% graduation rate. The players likewise have an Academic Progress Rate (APR) of 996 out of 1000 [APR is a measure of a university's retention of its student-athletes]. The players' graduation rate and their APR both rank first in the country among football teams. In addition, the players have about 20 different declared majors, with some of them going on to medical school, law school, and careers in the engineering field after receiving their undergraduate degree.[79]

If education has taken a back seat to college sports participation, Northwestern University is certainly not a place where that has happened. In fact, the above statistics show that Northwestern is the least likely school to compromise its academics in favor of its football program.

In CAPA's petition to the NLRB, it claims that players on the football team are discouraged from taking courses they need if they conflict with proposed practice times.[80] However, only one Northwestern football player, Kain Colter (the co-founder of CAPA), claimed to have changed his academic course of study because of the rigorous football schedule,[81] and the accuracy of his claim is disputed.[82] In contrast, Northwestern University and Coach Fitzgerald have gone the extra mile to accommodate student-athletes' academic studies,[83] including moving football practice to a different time during one academic quarter for the sole purpose of accommodating several players' class schedules.[84] A scholarship player confirmed this fact, noting the school's commitment to accommodating its student-athletes' class schedules.[85] If anything, Northwestern University sets the example for education being a foremost priority at colleges with football programs.

B. Consideration for Work

The NLRB has held that student scholarships and grants are simply financial aid to enable the student to attend the institution, and are thus not "consideration for work."[86] The scholarships given to the student-athletes on Northwestern University's football team are likewise financial aid. In holding otherwise, Regional Director Ohr contradicts precedent.

The grant-in-aid scholarships provided to the student-athletes are based on the cost of attendance,[87] and are consistent across the team, regardless of whether a scholarship player plays the whole game every week, or is a third-string player who almost never plays.[88] These scholarships are financial aid to facilitate the education of the student-athletes. They are not wages in exchange for work done. Thus, the payment falls outside of the realm of compensation that would liken the student-athletes to employees.

C. Additional Distinguishing Factors

Other significant factors distinguishing Northwestern University's student-athletes from employees include the hours worked, the multifaceted nature of the student-athletes' experience at Northwestern, and the fact that they do not pay taxes on their scholarships and grants. These three factors widen the gap between what constitutes an employment relationship and what is merely a student-school relationship.

1. Hours of Work

In an effort to compare Northwestern's scholarship football players to employees in a standard employee-employer relationship, CAPA has asserted that the student-athletes spend upwards of 40 hours per week "working" for the football team.[89]

However, CAPA's determination of work hours is misleading for two reasons. First, to arrive at its figure of over 40 hours per week, CAPA factored in commuting and travel time to and from football games,[90] even though the student-athletes are not doing football-related activities on the bus or plane, and they are permitted to work on academic studies during that time.[91] Considering commuting time to determine the number of hours student-athletes are "working" for their school's football team is inconsistent with an employee-employer relationship, in which employees are typically not paid for their commutes but, rather, are paid once they arrive at their places of work.

Secondly, CAPA factored mealtimes into its determination of hours.[92] This, too, is inconsistent with a standard employee-employer relationship, as an employer does not typically pay its employees for their mealtimes.[93] While CAPA pointed out that certain meals were mandatory, that distinction does not mean meals should be considered hours worked, as employers are often required by law to provide their employees with mandatory lunch breaks, which are typically unpaid, even though the breaks are mandatory.[94]

Even further, CAPA's objective of limiting practice time for Northwestern's football players undermines its

own argument to the NLRB.[95] The time commitment is arguably the main reason for Regional Director Ohr's determination that scholarship football players are employees.[96] However, CAPA is openly seeking to reduce that commitment, apparently undermining its own argument and approach.

2. The Campus and Classroom Component

The student-athletes at Northwestern must be registered as full-time students,[97] suggesting not only that the classroom component is a vital part of their Northwestern experience, but also that their student status is indisputable.

Unlike the individuals in *Boston Medical*, the student-athletes at Northwestern conduct their activities solely on school campuses, while the residents, interns, and fellows in *Boston Medical* were working exclusively at a hospital.[98] The scholarship athletes at Northwestern study in classrooms and play football on the school's campus, as well as the campuses of other schools. All locations at which football activities take place are school campuses,[99] namely, locations that are primarily institutions of education, unlike hospitals.

An additional point of dissimilarity from the individuals in *Boston Medical* is the required classroom component of the student-athletes' experience at Northwestern. While the individuals in *Boston Medical* had no classroom component and thus did not have to register for any classes, the student-athletes at Northwestern must be registered as full-time students,[100] making the classroom component a major part of their Northwestern experience.

IV. Legitimate Best Interests?

Moving outside of the classroom, some may think employee status would put these student-athletes in the best possible position vis-à-vis their universities. Such a conclusion, however, falls apart when one examines the core exchange between the student-athletes and Northwestern University.

In order to not miss the forest for the trees, one must consider what these student-athletes are getting out of their relationship with Northwestern University. The student-athletes receive full scholarships to attend a prestigious university and play their favorite sport at the same time. Virtually all of them (99.6%) retain their scholarships for the entirety of their time at Northwestern,[101] and 97% of them go on to graduate.[102] Graduating from Northwestern is no small matter either. The school is one of the top universities in the United States,[103] giving its graduates a world-class education, effectively enhancing their academic experience and, ultimately, boosting their earning potential.[104] For virtually all student-athletes, the fruits of a college diploma far exceed those of a professional athletic career.[105] Stated simply, a professional career in football typically only lasts for a few years and can end in a blink of an eye,[106] while an education lasts a lifetime and can never be taken away.

CAPA has claimed that student-athletes have a significant interest in the terms of their scholarships.[107] One of CAPA's chief objectives is to improve scholarship security and terms for Northwestern's football players.[108] As a matter of perspective, though, the "job security" of a Northwestern football scholarship is far greater than that of most employment relationships.[109] Northwestern's scholarship-receiving football players receive four-year scholarships that *cannot* be reduced or removed due to a player being injured, even if that injury is a career-ending one.[110] Further, the school does not reduce or remove scholarships based on a player's position on the depth chart,[111] even if the player is the last person on the bench.

In contrast, most employees in the United States have far less security in their jobs than Northwestern's student-athletes have in their scholarships. The majority of American employees are employed on an employment-at-will basis,[112] meaning the employees can be fired for any reason or no reason, as long as such reason is not illegal.[113] In 49 of the 50 states, employment contracts are presumed to be employment-at-will.[114] Therefore, to the extent that the student-athletes' scholarships contain protections from reduction or removal, they exceed the protection offered to employees in standard employment relationships.

V. An Unworkable System

This article has set forth the legal precedent supporting the contention that Northwestern University's scholarship football players are students, not employees. This article has also expressed legitimate doubts as to whether it would be in the student-athletes' best interests to be anything other than student-athletes. But beyond all that, granting employee status to student-athletes would be simply unmanageable, as it would bring about a complicated compensation problem. Further, it would create a departure from Title IX compliance in that it would cause unequal treatment between female and male students.

A. Compensation Problem

CAPA claims its main goal is to provide a voice for the student-athletes through collective bargaining.[115] CAPA intends to bargain within the bounds allowed by the NCAA, which restricts permissible activities by schools and student-athletes alike and currently forbids payment to student-athletes beyond scholarships and stipends.[116] However, collective bargaining could bring about NCAA rule changes, allowing bargaining on subjects currently barred by the NCAA, namely compensation based on revenue generation.[117]

Regardless of whether CAPA maintains that it intends to bargain primarily for medical care, the recognition of college athletes as employees would open the door for athletes demanding monetary compensation, namely a larger piece of the revenue generated by their respective sports. Even looking narrowly at the business relationship between schools and their athletes, and ignoring the fact

that the NCAA does not allow direct payment, such a system of payment would be unmanageable.

Ken Feinberg, a mediator and proponent of greater college athlete compensation,[118] acknowledged some of the potential manageability hurdles of distributing payments to college athletes:

> I would think a former football player at Michigan or Southern California is probably entitled to more funds than a former football player at Harvard or Yale. But I don't think it's feasible or wise to allocate different funds among football players at a particular team. I don't think Johnny Manziel, when he graduates, should receive more money than his teammates because he helped Texas A&M appear on TV seven times. Football is a team game. Now, if Texas A&M is selling his shirt that says Manziel, that's different.[119]

Essentially, Feinberg suggests that college athletes should be paid relative to the revenue their respective teams are generating and not based on individual contribution to those programs.[120] While this may seem to be a feasible, safe approach, such a system would likely create unrest and unfairness within a team. For example, consider a starting quarterback playing an entire game, throwing touchdowns, and getting sacked multiple times (a standard game day in the life of a starting quarterback). The quarterback would be shouldering much of his team's offensive load while only getting paid the same as the team's backup punter whose day might consist of inactivity or, at most, simply punting the ball on a few occasions, likely without enduring a single hit.[121] An arrangement of that nature would certainly not be fair. It is the college sports analogue of a professional team's starting quarterback getting paid no more than the same team's punter, which virtually *never* happens.[122] Such a proposition would be preposterous in the professional context and would thus be no less preposterous on a college football team of "employees."

Despite the flaws in the above arrangement, the opposite system, (paying college athletes based on their individual statistics and performances) while likely more fair from an individual standpoint, would be nearly impossible to calculate. Consistently changing factors, such as playing time, difficulty of opponents, statistics measuring efficiency, and fluctuations in ticket and merchandise sales, along with a myriad of other contributing variables, all affect revenue generation and make for difficult calculation.

A system of negotiating salaried contracts with signing bonuses prior to joining teams would present similar issues of unworkability, even if such a system were modeled after existing systems in professional leagues.[123] There would simply be too much conflicting control to replicate the professional model at the college level, due to the countervailing interests of the teams, conferences, and the NCAA. Unlike the professional leagues, in which athletes negotiate their contracts with teams directly, subject to standards established by a league governing body, college athletics consists of athletes themselves (who are often minors), teams, conferences, and the multi-divisional NCAA governing body. While similar in overall structure, the college level simply has more hoops to jump through and a less straightforward bargaining landscape.

If college athletes were recognized as employees on their teams, they could only bargain directly with their colleges, while still being subject to the NCAA prohibition on payment, and without any right to bargain with the NCAA,[124] due to Regional Director Ohr limiting the scope of his decision to the relationship between students and their schools.[125] For example, while professional athletes negotiate through agents, the NCAA does not allow its student-athletes to hire agents. The NCAA is not likely to change the existing system, certainly not on its own volition.[126] Thus, college players, even if granted employee status, could not mirror the payment system of professional leagues.

In short, no matter how a potential revenue distribution scheme is constructed, it will be inherently flawed, deficient, and unmanageable for those tasked with calculating such distribution.

B. Title IX

Beyond the unmanageable revenue distribution systems lurks another barrier of arguably greater magnitude: Title IX.[127] As Paul M. Anderson, the Associate Director of the National Sports Law Institute at Marquette University Law School, observed in his reflection of Title IX's 40-year history, "Perhaps no law has received more attention in the sports industry, specifically within high school and collegiate sports, than Title IX. Forty years after its enactment, this educational statute has truly reshaped the landscape of American sport."[128] Anderson's assessment of Title IX's impact on sports sums it up perfectly, as the law has truly become an inescapable force in college sports.[129]

Title IX provides, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity…"[130] In the college sports landscape, Title IX requires that aid and benefits provided to male student-athletes must be proportionately granted to female student-athletes.[131] Thus, to the extent that Northwestern's male student-athletes receiving scholarships on the football team are granted employee status and are allowed to collectively bargain, the school's female student-athletes will be entitled to equal treatment as a matter of law under Title IX.[132] The grant of employee status could be considered a benefit, and the exclusion of female athletes from employee status would certainly be an exclusion from participation.[133]

Thus, such exclusion, and the denial of that benefit to female athletes, will constitute illegal discrimination under the statute.[134]

Although Regional Director Ohr limited his grant of employee status to student-athletes on the football team who receive full scholarships, Title IX would, in effect, ultimately expand that scope by its very nature.[135] Hence, Title IX poses a direct barrier to the workability of schools granting employee status to student-athletes because the NLRB only approved the grant of employee status for the 85 male scholarship football players.[136]

VI. Education

The ascent of college football to the forefront of the American sports entertainment market,[137] along with the explosion of revenue generated by college sports over the past decade,[138] has caused many to claim that institutions of higher education are really just becoming businesses powered by, and centered around, sports teams.[139] Nonetheless, some schools, like Northwestern, TCU, and UCLA, maintain a sharp focus on education, while developing their athletic programs.[140] Northwestern University is a prime example of an institution of higher education that has steadily built its athletics without compromising its educational mission. The school's stalwart commitment to education as its first and foremost priority is evidenced by its renowned educational prestige and, specifically, the immense academic success of its student-athletes.[141]

While it may be appropriate to question some universities' educational commitment, there is no question about Northwestern University; the institution represents a quintessential balance between education and athletics, with education as its paramount concern.[142] A representative from Northwestern's Athletic Department confirmed the school's education-first focus, saying, "Every year we have to pass on kids that become exceptional performers elsewhere because their grades didn't meet NU standards."[143] This willingness to pass up on exceptional talent in order to maintain academic excellence should serve as a sign of hope to those who fear all has been lost in the pursuit of college sports dominance.

For a large portion of these exemplary student-athletes to suddenly become employees of Northwestern would not just be a stark departure from precedent; rather, it would further isolate them from their peers, effectively diminishing their educational experience by making it an afterthought. Donald Remy, the NCAA's Chief Legal Officer, put it best in his response to the initial union proposal: "This union-backed attempt to turn student-athletes into employees undermines the purpose of college: an education."[144]

Conclusion

Granting employee status to Northwestern University's scholarship student-athletes on the football team would represent an unprecedented step toward universities ceasing to exist as educational institutions.

The legitimate interest of maintaining the educational focus of colleges and universities, along with the weight of legal precedent and public policy concerns, vastly outweighs the potential benefits of granting employee status to student-athletes. The idea that people should accept the demise of education by allowing the "student" in "student-athlete" to be legally relegated to a secondary role is a frightening notion. In many instances, this relegation has already taken shape on its own, without the force of the law. But rather than allowing that shameful phenomenon to set the standard for the future, this moment in time should serve as a wakeup call that higher education is in jeopardy. Let Northwestern University's current litigation serve as a guiding light, a turning point for student-athletes and institutions everywhere to reexamine and realign their commitments to education.

Endnotes

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80. *Id*. at 11.
81. *Id*. (Colter claimed that he was discouraged from taking a class he needed to stay on track for his pre-med major, which resulted in him not taking the class and, ultimately, changing his major).
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Friedrichs: The End of Public Sector Labor Relations as We Know It?

By James A. Brown

This past June, the United States Supreme Court granted certiorari to hear a constitutional challenge to the requirement that non-union employees must contribute financially to public sector unions that bargain on their behalf. By agreeing to hear *Friedrichs et al. v. California Teachers Association, et al.*,[1] the Court seized the opportunity to overturn a nearly 40-year-old precedent by declaring that such "agency fee" arrangements are invalid.

A victory for the *Friedrichs* plaintiffs has the potential to cripple public sector labor unions. At present, bargaining unit employees may either join a public sector union and pay dues, or reject membership and pay agency fees. If agency fees can no longer be charged, non-membership becomes more attractive, driving down the ranks and revenue of unions.

This article examines how agency fee arrangements are now on the brink of elimination, and also briefly highlights the recent experience of Wisconsin's public sector unions, which can no longer charge agency fees. The article concludes with an analysis of how Justice Antonin Scalia, in *Friedrichs,* may be the unlikely bulwark to protect public sector unions from significant losses.

Agency Fee Origins

In 1977, the Supreme Court in *Abood v. Detroit Bd. of Ed.*[2] first considered the legality of compulsory agency fees in the public sector. The plaintiffs argued that being required to pay agency fees violated their First Amendment rights, and cited their opposition to public sector collective bargaining and the union's various political and ideological activities.

Abood heavily relies on two decisions involving service fees charged to non-union employees in the private sector. In *Railway Employees' Dept. v. Hanson*,[3] the Supreme Court upheld the Railway Labor Act's authorization of union shop agreements that require all bargaining unit employees to share the costs of union representation. In *Machinists v. Street*,[4] the Court limited such fees to "core expenses" related to collective bargaining, contract administration, and adjusting grievances, which were "the reasons…accepted by Congress why authority to make unionshop agreements was justified."[5]

The *Abood* plaintiffs gained a limited but meaningful victory. The Supreme Court unanimously ruled that public employees have a constitutional right to opt out of paying any part of an agency fee intended to finance a union's political or ideological activity. As the Court stated, an employee may not be forced "to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher."[6]

Abood also upheld properly circumscribed agency fees based, in part, on a union's "exclusive representative" status, which was described as follows:

> The designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money.[7]

Referencing a union's duty of fair representation, the Court explained that an agency fee "counteracts the incentive that employees might otherwise have to become 'free riders'—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees."[8]

Abood Reconsidered

In its 2012 decision, *Knox v. Service Employees International Union, Local 1000*,[9] the Supreme Court's more conservative Justices expressed their lack of support for *Abood*. *Knox* involved a union's temporary, special assessment which was intended to fund a campaign to defeat two ballot initiatives and to elect sympathetic political candidates. Those opposed to paying the assessment could only opt out during the 30-day objection period the following year.

Knox held that non-members cannot be required to pay such assessments unless they first express their "affirmative consent." Writing for the 5-4 majority, Justice Samuel Alito observed that the opt-out system used in *Abood*, was a "remarkable boon for unions" with significant constitutional implications:

> By authorizing a union to collect fees from nonmembers and permitting the use of an optout system for the collection of fees levied to cover nonchargeable expenses, our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate.[10]

Continuing its broadside against *Abood*, the Court added that public sector unions have no "right" to agency fees

and that the collection of such fees from nonmembers was "authorized by an act of legislative grace" which was "unusual" and "extraordinary."[11] Moreover, the "free rider" rationale used to justify agency fees was deemed "generally insufficient to overcome First Amendment objections" and an "anomaly" to achieving the state's interest in furthering labor peace.[12]

Abood's Near Reversal

Given the Supreme Court's pronouncements in *Knox*, many expected public sector agency fees to be invalidated two years later in *Harris v. Quinn*.[13] While *Abood* managed to survive, the Court left little doubt that the future of agency fees remains imperiled.

In *Harris*, the Court invalidated agency fees for Illinois home care attendants because they were not "full-fledged public employees." The Court noted that the employees' terms and conditions of employment were largely determined by the individual home care customers and were not subjects of collective bargaining. Agency fees, according to the Court, were not intended for *Harris'* non-public employees for whom collective bargaining was "sharply limited."[14]

The narrow holding in *Harris* did not slow the attack on *Abood*. Justice Alito, again writing for a 54 majority, posited that all union speech in the public sector is political, and inquired if a meaningful distinction still exists between "union expenditures that are made for collective bargaining purposes and those that are made to achieve political ends."[15] The Court continued: "[I]n the public sector, both collectivebargaining and political advocacy and lobbying are directed at the government."[16] Bolstering its argument, the Court added that the demand for wages and benefits in *Harris* "would almost certainly mean increased expenditures under the Medicaid program" which is a matter of "great public concern."[17]

Harris also observed that the "free rider" rationale, essential to the outcome of *Abood*, "rests on an unsupported empirical assumption"[18] that a union cannot discharge its duty of fair representation without agency fees, and cautioned that said duty and agency fees are "not inextricably linked."[19] Finally, in what some perceived to be an invitation for another challenge to agency fees, the Court observed that *Abood* was decided on "questionable" grounds which "have become more evident and troubling in the years since."[20]

Wisconsin: The Future?

The recent experience of Wisconsin's public sector unions may foretell what can be expected nationwide if the *Friedrichs* plaintiffs prevail. In 2011, Wisconsin enacted a Budget Repair Bill ("Act 10")[21] that invalidated agency fees for most of the state's public sector unions. Act 10 also sharply limits the unions' collective bargaining to the subject of wages (provided pay raises never exceed the rate of inflation); bars public employers from using payroll deductions to remit union dues; and requires unions to submit to an annual vote in order to maintain their certification.

As anticipated, public sector union membership in Wisconsin swiftly declined. Various factors explain the decline besides the loss of agency fees (including Act 10's gutting of collective bargaining and its increase in employee contributions for retirement and health benefits). Nonetheless, the statistics are striking. One year after Act 10 was passed, the membership of the Wisconsin State Employees Union declined from 22,000 to fewer than 10,000 members.[22] In the three-year period after Act 10's passage, the combined membership in AFSCME Councils 40 and 48 (representing city and county employees) declined by more than half.[23] By 2014, the percentage of all Wisconsin public employees who were union members decreased from fifty percent in 2011 to less than one-third.[24] Certainly, these are sobering statistics for supporters of public sector unions.

Scalia as Swing Vote

The petition for certiorari in *Friedrichs* presents two questions for the Court this term: (1) whether *Abood* should be overruled and public sector agency fee arrangements invalidated under the First Amendment; and (2) whether the First Amendment is violated by requiring public employees to opt out of paying for non-chargeable speech (rather than requiring them to affirmatively consent to paying for such speech).

Justice Scalia may very well be the deciding vote in *Friedrichs*. He joined the majority in *Harris*, but also previously endorsed agency fee arrangements in *Lehnert v. Ferris Faculty Association*,[25] in which he observed that such fees are a necessary outgrowth of a union's duty of fair representation:

> Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them, or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost.[26]

Scalia also observed that a labor union—unlike a civic organization—is obligated to represent everyone, *i.e.*, all employees in the bargaining unit:

> What is distinctive, however, about the "free riders" who are nonunion members of the union's own bargaining unit is that in some respects they are free riders whom the law requires the union to carry–indeed requires the union to go out

> of its way to benefit, even at the expense of its other interests.[27]

Will Justice Scalia, having joined the majority in *Harris*, now abandon his past support of agency fees? *Harris* offers no conclusive answer. This is because virtually no collective bargaining was conducted on behalf of the *Harris* employees whose terms and conditions were determined by the home care customers and Illinois law and regulations. As *Harris* states, no showing was made that the homecare attendants' benefits "could not have been achieved" without agency fees.[28] Thus *Harris*, because of its unusual facts and lack of any potential free rider problem, offers little proof that Scalia has abandoned agency fees.

The other looming question is whether Justice Scalia now accepts the assertion that all union activity in the public sector is political speech and thus not chargeable to non-members. The colloquy between Scalia and plaintiffs' counsel during the *Harris* oral arguments is revealing. Scalia asked counsel whether a police commissioner who refuses to meet with a police officer petitioning for a pay raise violates that officer's First Amendment rights? Counsel's response that a "collective" must make the bargaining demand in order for it to qualify as political speech did not seem to persuade Scalia, who expressed skepticism in response to the distinction drawn by counsel: "It seems to me it's always a matter of public concern…, whether it's an individual policeman asking for that or a combination of policemen or a union."[29]

Conclusion

For nearly forty years, the Supreme Court has permitted contractual arrangements that compel bargaining unit employees to make financial contributions to public sector unions to defray the costs of collective bargaining and contract administration. This term, the Court in *Friedrichs* may decide that such agency fee arrangements violate a public employee's First Amendment rights. In the alternative, the Court could rule that non-members cannot be required to pay for a union's political activities without first providing their consent. Recent Supreme Court decisions suggest that the *Friedrichs* plaintiffs, alleging constitutional violations, are well-positioned to see agency fees invalidated. Such an outcome is not assured, however. Witness Justice Scalia's past support of agency fees. Despite the long odds, Scalia may cast the swing vote that upholds the nearly 40-year-old precedent and preserves agency fees for public sector unions.

Endnotes

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2. 431 U.S. 209 (1977).
3. 351 U.S. 225 (1956).
4. 367 U.S. 740 (1961).
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7. *Id.* at 221.
8. *Id.* at 222.
9. 132 S.Ct. 2277 (2012).
10. *Id.* at 2290-2291.
11. *Id.* at 2291.
12. *Id.* at 2289-2290.
13. 134 S.Ct. 2618 (2014).
14. *Id.* at 2635.
15. *Id.* at 2632.
16. *Id.* at 2632-2633.
17. *Id.* at 2642-2643.
18. *Id.* at 2634.
19. *Id.* at 2640.
20. *Id.* at 2632.
21. 2011 Wis. Act 10.
22. Verburg, Steven, *Rift in WSEU Widens as Prison Guards Try to Break Away, Form New Union*, Wisconsin State Journal, December 2, 2012.
23. U.S. Department of Labor, LM2 forms.
24. http://www.unionstats.com (Union Membership, Coverage, Density and Employment by State, 2011 and 2014).
25. 500 U.S. 507 (1991).
26. *Id.* at 556.
27. *Id.*
28. *Harris,* 134 S.Ct. at 2641.
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New York's Medical Marijuana Law: How It Originated and What Is Next

By Geoffrey Mort

In the summer of 2014, New York became the 23rd state to pass a statute allowing the use of medical marijuana.[1] In doing so, New York, albeit belatedly, is becoming part of what appears to be a national trend toward legalizing marijuana for medical as well as recreational purposes.[2] Although New York's statute, due to be implemented in 2016, is considered to be one of the more restrictive such laws in the country,[3] growing support for marijuana legalization may mean that it is only a matter of time before medical marijuana becomes more widely and easily available to those who need it in New York. This article reviews the history of medical marijuana statutes in the United States and discusses New York's new law, the Compassionate Care Act, how it compares to other states' medical marijuana laws, what it provides and how it is likely to work once it goes into effect.

I. Medical Marijuana Laws in the U.S.

A. Gradual but Steady Acceptance of Medical Pot

State medical marijuana laws date back to 1996 when California voters approved a proposition bringing into being the Compassionate Use Act. The California Act is a broad one, permitting the use of marijuana for medical purposes as long as a physician approves it. Nearly twenty years after the groundbreaking statute's passage, there are more than 2,000 locations in California where medical marijuana can be obtained.

Washington, Oregon and Alaska passed their own medical marijuana laws two years after California's and by 2000 Maine, Colorado, Hawaii and Nevada had joined their ranks. No Eastern state other than Maine enacted a medical marijuana statute until Rhode Island's legislature did so in 2006. Since then, however, all of the states in the Northeast have passed medical marijuana laws.

B. Common Elements of Medical Marijuana Statutes

Virtually all of the medical marijuana statutes currently in place share several important components. First, they provide for the establishment of a network of licensed dispensaries where marijuana can be purchased. (Colorado, where the state constitution was amended to legalize medical marijuana, now has more than 500; New York's new law permits no more than twenty). Second, they require anyone using medical marijuana to register with the state and obtain an identification card or, at a minimum, be listed on a patient registry. Finally, the statutes specify what conditions medical marijuana may be used to treat. These commonly include cancer, AIDS, Parkinson's Disease, epilepsy and multiple sclerosis. Several states, however, permit medical marijuana use for such conditions as insomnia, anxiety and even loss of appetite.

C. Conflict With Federal Law

In 1937, passage of the Marijuana Tax Act made prescriptions for pot illegal. That law's successor, the Controlled Substances Act,[4] goes much further and not only criminalizes marijuana at the federal level but even makes it a Schedule I drug—the same classification as heroin. In view of the fact that many medical researchers have increasingly found beneficial uses of marijuana—particularly as a pain suppressant and an aid in the treatment of glaucoma and nausea[5]—considering marijuana a dangerous drug is increasingly seen by many as an anachronism. In 2009 U.S. Attorney General Eric Holder notably distributed a memorandum to all United States Attorneys suggesting that they not prosecute any cases under the Controlled Substances Act ("CSA") against individuals using pot in states with medical marijuana laws. Nevertheless, the tension between the Controlled Substances Act and state medical marijuana laws remains, and has been the subject of litigation in several states.

D. The *Coats* Case

Coats v. Dish Network LLC[6] is the most prominent case concerning the use of medical marijuana in the last few years, and represents a dispute that could arise in most states with medical marijuana statutes. The plaintiff in this closely watched action, Brandon Coats, was paralyzed in an automobile accident and suffered from daily, painful spasms. He made use of Colorado's medical marijuana law, obtained an identification card, and smoked marijuana in the evening to relieve his pain and enable him to sleep. He then was able to obtain a job with a satellite television provider that entailed speaking with customers on the telephone, which he ably performed. Mr. Coats never used marijuana at work and never came to the office while under the influence of pot.[7]

Mr. Coats's employer then decided to subject all of its employees to drug testing. Predictably, Mr. Coats tested positive and as a result was fired. He then sued Dish Network under Colorado's Lawful Off-Duty Activities Law, which provides that employers may not discriminate against employees for "engaging in any lawful activity off the premises of the employer during working hours."[8]

Mr. Coats lost at both the trial court level and before Colorado's intermediate appellate court. The issue was not a complex one: whether Mr. Coats's use of medical marijuana was a lawful activity protected by his state's

legal activities law. Both courts ruled that it was not, reasoning that pot's status as an illegal substance under the CSA made its use unlawful, notwithstanding the fact that medical marijuana is authorized by Colorado's constitution. However, a dissent on the appellate panel argued that the CSA, which does not govern employment relationships in the states, was not a proper basis for declaring medical marijuana use unlawful in view of the State constitution's protection of it.[9]

The Colorado Supreme Court settled the issue in June 2015, affirming the lower courts' decision and holding that medical marijuana use—which continues to be prohibited by federal law—is not a "legal activity" for purposes of Colorado's legal activities statute.[10] The decision is likely to be cited by attorneys and courts in other states, including New York, in future litigation involving the same or a similar issue.

II. The Compassionate Care Act

A. What the New Statute Provides

New York's Compassionate Care Act is one of the more narrow and restrictive of the various medical marijuana statutes that have been enacted.[12] Nonetheless, it shares a number of core components with sister laws in other states.[11]

1. Conditions Covered

A patient qualifies to obtain marijuana under the New York law only if currently under treatment for the "serious condition" for which medical marijuana is sought. The law defines serious condition as a severe, debilitating or life threatening condition, including cancer, HIV, amyotrophic lateral sclerosis, Parkinson's Disease, nerve damage to the spinal cord, epilepsy, inflammatory bowel disease, neuropathies or Huntington's Disease.[13]

Significantly, within eighteen months from the effective date of the Act, the Commissioner of the Department of Health has the discretion to add other conditions to this list. These include Alzheimer's Disease, muscular dystrophy, dystonia, Post Traumatic Stress Disorder and rheumatoid arthritis. Moreover, the Commissioner is permitted to expand the list of "serious conditions" to others not specified in the statute.[14]

2. Identification Cards

To be covered by the Act, eligible employees—who must be certified by their physicians as being able to benefit from the use of medical marijuana—are required to obtain registration identification cards from the Department of Health.[15] The cards must be renewed annually, and carried whenever the individual is in possession of marijuana. The Department of Health must begin issuing patient identification cards as soon as possible, but in no case less than eighteen months after the law takes effect.

3. Kinds and Quantity of Marijuana That May Be Obtained

Here as well, the DOH Commissioner has been given the latitude to determine what forms of marijuana (such as extracts, edibles or oils), as well as their strength and strains, may be sold. However, the law specifically prohibits smoking medical marijuana by excluding it from "certified medical use."[16] Patients are permitted to possess up to a 30-day supply of marijuana, as are caregivers, and may replenish their supply in the last week of each 30-day period.[17] Medical marijuana, however, may not be consumed in a public place.[18]

III. Discrimination Against Users and Drug Testing

One area in which the Compassionate Care Act is in the forefront of medical marijuana statutes is the degree of protection it affords users. Patients and caregivers are immune from arrest and prosecution for using pot so long as they are complying with the Act.

Further, certified patients are considered persons with a disability under state law. Among other things, that means that employers may be required to provide reasonable accommodations to individuals protected by the Act and to engage in the interactive process when an employee who uses medical marijuana requests an accommodation.[19]

More importantly for labor and employment lawyers, employers may not discriminate against employees who lawfully use medical marijuana. Accordingly, an employee who is terminated or subjected to other adverse action for legally using marijuana is likely to have a discrimination claim against the employer. And, the fact that one is acting in accordance with the Compassionate Care Act may not be used in a proceeding under the Family Court Act, social services law or domestic relations law.

Several types of drug testing are permissible under the Act, but in a more limited fashion than was the case prior to its passage. "Reasonable suspicion" drug testing, which involves conducting a drug test based on a suspicion that an employee is under the influence of marijuana while on the job, is not prohibited due to the fact that the Act excludes from protection employees who are working while "impaired." An employer who has reason to believe that an employee is under the influence of marijuana in the workplace could technically take adverse action against that individual after a positive test, although the fact that marijuana can remain in one's bloodstream for weeks after use casts doubt on the legality of such adverse action.

Random drug testing may still be conducted under the Act, but an employer's ability to take adverse action against a protected user is even more constrained than in the case of reasonable suspicion drug testing. In the absence of "suspicion," there is little or no basis for disciplining a protected employee who tests positive.

Thus, before taking adverse action against any employee who tests positive in a random test, an employer should first ascertain if the employee is using marijuana legally. Employers with "zero tolerance" drug policies would be well advised to revise them once the Act goes into effect.

Conclusion

Proposed regulations were adopted on April 15, 2015. If the process goes as anticipated, the Compassionate Care Act should be fully in effect by early 2016. To the extent that the experience of other states is any indication, the Act may be but the first step to wider legalization of marijuana. The Compassionate Care Act, notwithstanding criticisms that it "falls far short of what thousands of patients seeking the drug need,"[20] promises to alter the legal landscape with regard to marijuana use and present attorneys with a host of new issues and challenges in the coming years.

Endnotes

1. *See* Haimy Asseta, *New York Legalizes Medical Marijuana*,CNN.COM (February 16, 2015), http://www.cnn.com/2014/07/07/health/new-york-medical-marijuana/index.html.
2. To date, Washington, Colorado, Oregon and Alaska all have all fully legalized marijuana and another fourteen states have decriminalized marijuana for personal use to a limited extent.
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5. *See New York Laws & Penalties*, NORML.ORG (February 16, 2015), http://norml.org/laws/item/new-york-penalties-2.
6. 303 P.3d 147 (Co. Ct. of Appeals 2013).
7. Jack Healy, *Legal Use of Marijuana Clashes With Job Rules*, N.Y. Times, September 7, 2014.
8. Colo. Rev. Stat. § 24-34-402.5 (2004).
9. 303 P.3d 147 (Co. Ct. of Appeals 2013).
10. *Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. 2015).
11. State Senator Jeffrey D. Klein conceded that the Compassionate Care Act will be "one of the…most tightly regulated medical marijuana programs in the country."
12. One feature that the New York statute does not share with medical marijuana laws in any other state is that the law gives the State Department of Health the power to determine pricing of the drug, which the state will tax at 7%. This aspect of the statute has been the subject of much criticism on the grounds that it could be wasteful and create unfair pricing.
13. S*ee* Medina, *supra* note 3.
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15. *Id.*
16. *See N.Y. Becomes 23rd Medical Marijuana State!,* MPP.ORG (February 16, 2015), http://www.mpp.org/states/new-york/.
17. *See About the Medical Marijuana Program, supra* note 13.
18. *See New York Laws & Penalties, supra* note 5.
19. 23 N.Y. Pub. Health Law 5-A (2014).
20. *See* Medina, *supra* note 3.

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Purple Fog: The Need for the National Labor Relations Board to Clarify *Purple Communications, Inc.*

By Emily Marie Bisnauth

Section 7 of the National Labor Relations Act (NLRA) guarantees private sector employees the right to unionize, self-organize, and otherwise engage in concerted activities for the purpose of protection or mutual aid within the workplace.[1] Recently, the National Labor Relations Board (NLRB) issued a split ruling expanding employee Section 7 email rights. Under *Purple Communications, Inc.*,[2] employees who are given access to workplace email "during the course of their work" now have a presumptive right to use that same email account during "nonworking time" for Section 7 purposes.[3] This presumption remains valid unless an employer can demonstrate "special circumstances" to justify restrictions.[4] The decision surprised many, as the NLRB openly recognized its past deficiencies. In doing so, the NLRB overturned its prior decision in *Register Guard*, which held that employers could legally ban employees from using workplace email for Section 7 purposes, provided the ban was not applied discriminatorily.[5] Although the NLRB's intention of advancing employee Section 7 rights is clear, the decision itself is an enigma. Without education and clarification with regard to the decision's numerous ambiguities, *Purple Communications, Inc.* will fail to effectuate meaningful change.

Purple Communications, Inc. is a sign-language interpretation servicing company whose employees "provide two-way, real-time interpretation of telephone communications between deaf or hard-of hearing individuals and hearing individuals."[6] The company's employee handbook contained an electronic communication policy limiting employee use of internet, intranet, voicemail, and electronic communications to solely business purposes.[7] The policy also prohibited employees from "engaging in activities on behalf of organizations or persons with no professional or business affiliation with the company…[] [and] sending uninvited email[s] of personal nature."[8] The main issue in *Purple Communications, Inc.* was whether the electronic communication policy was unlawful or objectionable.

The company argued, in part, that *Register Guard* should be upheld, as employers' property interests outweigh the need for employees to engage in Section 7 email communications.[9] The company's employees, however, filed petitions arguing that *Register Guard* failed to adequately balance employee Section 7 rights against employer property interests.[10] The employees contended that employees who are given access to workplace email by their employer should be allowed to use those email accounts for Section 7 communications.[11] In advancing their position, the employees highlighted the pragmatic benefits of email communication: it is less disruptive to the work environment and faster than face-to-face interactions.[12]

The NLRB sided with the employees, overturning *Regional Guard* for three reasons: 1) *Regional Guard* gave too much weight to employer property interests, while undervaluing employee's Section 7 rights; 2) the Board failed to recognize the importance of email communication as the predominant means of workplace communication; and 3) the Board was misguided in the weight given to previous equipment cases.[13] The Board found emails to be the contemporary water-cooler, i.e., a modern gathering place.[14] Although the ruling provides a monumental shift in employee rights, the NLRB must now focus on educating both employers and employees for the decision to be meaningful.

Many Americans operate under the misguided assumption that the NLRB only seeks to protect the rights of employees represented by unions. This is patently false. The NLRB is charged with protecting the rights of most private sector employees, including union and non-union workers.[15] Therefore, as a threshold matter the NLRB must educate employees on their fundamental rights. Next, the NLRB must clarify the numerous undefined terms used in *Purple Communications, Inc.* For example, employees must understand what "nonworking time" means in order to effectively use their newfound communication rights without fear of being insubordinate. On the other hand, while employers await possible appeals, they must abide by *Purple Communications, Inc.* This may require updating employee handbooks, manuals, and policies, a difficult task considering the decision leaves key phrases such as "within the course of their work" undefined. Consequently, both employers and employees are left scratching their heads as to how to effectively proceed under *Purple Communications, Inc.* The NLRB should therefore issue a clarification memorandum addressing the ambiguities within the decision.

The NLRB occasionally issues clarification memoranda providing insight and guidance on Board decisions. Considering the dramatic shift in employee communication rights established by *Purple Communications, Inc.*, the Board should issue a companion memorandum explaining the numerous ambiguities within the decision. The companion memorandum must: 1) clarify the meaning of the phrase "within the course of their work" 2) explain what situations constitute "special circumstances" for which an employer may ban all Section 7 emails during

nonworking time; and 3) define "nonworking time." If the NLRB fails to take affirmative steps to ensure that both employers and employees understand *Purple Communications, Inc.*, further litigation will be needed to understand the decision's basic terms, resulting in an unnecessary waste of time and resources.

Endnotes

1. *See* The National Labor Relations Act, 29 U.S.C. § 157 (West 2015) (guaranteeing employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"); *see also Beth Israel Hospital v. NRLB*, 437 U.S. 483, 491-92 (1978) (Section 7 Rights "necessarily encompass the right effectively to communicate with one another regarding self-organization at the job site.").
2. *See Purple Communications, Inc.*, 361 NLRB 126 (2014).
3. *Id.*
4. *Id.* at 130.
5. 351 NLRB 1110 (2007), *enf'd in relevant part and remanded sub nom. Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009) (holding that an employer may completely ban employees from using employer email for Section 7 purposes, despite employees being otherwise permitted to use their work email, without any justification so long as the ban is not applied discriminatorily).
6. *Purple Communications, Inc.*, 361 NLRB at 127.
7. *Id.*
8. *Id.*
9. *Id.* at 129.
10. *Id.* at 128.
11. *Id.*
12. *Id.*
13. *Id.* at 129-30.
14. *Id.* at 133.
15. *See generally*, *supra* note 1, 29 U.S.C. §§ 151-169; *see also* National Labor Relations Board, About Us, http://www.nlrb.gov/who-we-are. (2015).

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The Applicability of Federal Employment and Labor Statutes to Tribal Businesses: The Balance Between Sovereignty and Protection of Non-Indian Employees in the Workplace

By Christine Catherine Bird

Introduction

Native American tribes and their reservations are located across the entire United States. The Bureau of Indian Affairs (BIA) is responsible for "providing services (directly or through contracts, grants, or compacts) to approximately 1.9 million American Indians and Alaska Natives." In addition, the BIA cites that there are 566 federally recognized American Indian tribes within the United States.[1] There are also countless smaller tribes that have merged with other tribes which are not recognized by the federal government.[2] The BIA estimated that in 2010 there were nearly 500,000 American Indians who were members of federally recognized tribes living in Oklahoma alone.[3]

Due to initiatives[4] and other programs to "empower tribal governments,"[5] Native American tribes have vastly diversified their economic enterprises over the last few decades.[6] "Tribes are becoming economic and political power houses."[7] Today, tribes have a substantial presence in the business community nationwide, and have made great strides to reduce levels of poverty and unemployment within their jurisdictions.[8]

The most recognizable types of tribal business are casinos or other gaming facilities. "[T]ribal gaming operations emulate large-scale, Las Vegas style resorts and contain casinos, lodging, dining, dance clubs, wedding chapels, golf courses, spas and salons, retail shops, conference centers and performing arts centers that attract high-profile entertainers."[9] However, tribal business is no longer limited to gaming. Tribes now run everything from hospitals and grocery stores to chocolate factories.[10] Several tribes are making efforts to manage and leverage natural resource development. For example, the Osage Tribe has been developing large interests in oil and natural gas enterprises.[11] There are tribal corporations involved in "agriculture, forestry, fishing, mining, construction, manufacturing, transportation, public utilities, wholesale and retail trade, finance, insurance, real estate, lodging, recreation and amusement, personal and business services, entertainment, education, health, legal and social services, and public administration."[12]

An expansion of tribal presence in the business world brings an expansion of the workforce. In some Oklahoma counties, tribal business and tribal governments are the largest employers.[13] If tribes are to engage in employment relationships with non-Indians it is important to understand that "any time nonmembers voluntarily enter an Indian reservation for economic gain…by taking up employment for a tribe, they trigger this essential attribute of tribal sovereignty."[14] In addition to the expansion of economic development, there is also an increase of potential litigants and costly employment disputes. In tribal businesses, as in all other places where human interactions take place, there is an inherent risk that people will say or do something that violates the rights or dignity of another with sexual harassment, gender discrimination, disability discrimination, religious discrimination, racial discrimination, a hostile work environment, or other types of generally prohibited activity under our current federal statutory scheme.

When a tribal business is the largest employer in the area, as often happens in states with large tribal populations such as Oklahoma, it is likely that non-tribal members will find themselves, even unknowingly or unintentionally, as employees of the tribe. Tribes own businesses such as hospitals or auto-repair shops that are not immediately recognizable as tribal entities. When a non-Indian accepts employment with a tribally owned business that may not on the surface bear any markings of tribal parentage, it is possible the non-Indian employee may not implicitly understand he or she may be waiving certain rights under the federal employment and labor statutes by accepting the job. This raises a question. Do federal employment statutes apply to non-member employees working for tribal businesses? This is what this article seeks to answer.

The basic answer to this question currently is: it depends. Cases are fact-intensive and situation specific. The type of businesses in question, the specific tribe's tribal laws, and the location within the federal circuit system are all factors to consider. The circuit courts have come to different conclusions on the issue, causing a split, especially when non-tribal members are the complaining party. "Over the past two decades, the federal courts have been moved steadily to regulate tribal enterprises in many ways, including employment."[15] "The federal court's decisions have made it clear that Native American tribes are not going to be allowed to engage in business indistinguishable from those operated by non-Indians

but free of any of the regulatory laws to which their non-Indian competitors are subject."[16] But even this statement tends to be misleading and overly simplistic.

Employment and labor lawyers are generally not as familiar with the intricacies of Native American law, Tribal law, or sovereignty considerations as they are with the more nuanced caveats of employment and labor law such as the McDonnell-Douglas burden shifting framework. However, in today's economic landscape, and especially in the state of Oklahoma, it is necessary for practitioners to become familiar with the area.

This article will examine this issue by first outlining the basics of Native American sovereignty and statutes of general applicability. Second, this article will discuss the possible ways tribes can structure their businesses. Third, there will be an individualized analysis of the statutes in question. This article will examine Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act of 1991 and as Amended in 2008 (ADA), the Genetic Information Nondiscrimination Act of 2008 (GINA), the Age Discrimination in Employment Act (ADEA), the Equal Pay Act (EPA) and the Fair Labor Standards Act (FLSA) and the National Labor Relations Act (NLRA). Finally, this article will outline the best ways for tribes to approach the problem that applicability of these statutes presents to their sovereign immunity.

I. The Basics of Native American Sovereignty and Statutes of General Applicability

1. Sovereignty: The Basics

Tribes are in a unique position to engage in business activities due to their inherent sovereign immunity. No part of Native American law can be fully understood without a basic knowledge of and familiarity with sovereign immunity. On its most basic level, sovereign immunity simply prevents citizens from bringing suit against a government. "Generally, tribes as governmental entities are not subject to suit unless they clearly waive immunity, or Congress has waived their immunity."[17] "Sovereign Immunity is a common law doctrine affecting jurisdiction and may be asserted as a defense to lawsuits as long as the tribe has not unequivocally waived immunity or Congress has not abrogated immunity."[18] The "sovereign power is 'intimately tied to a tribe's ability to protect the integrity and order of its territory and the welfare of its members.'"[19] This sovereignty provides protection for tribes' "limited and irreplaceable resources."[20] "Some of the inherent rights tribes retain include: the power to determine their own form of government, to levy taxes, to regulate property within the jurisdiction, to manage domestic affairs, to enact laws, to establish a judiciary, to claim immunity from suit, and to administer justice."[21] The importance of tribal sovereignty lies in the importance of self-government and autonomy to each individual tribe. There are also many cultural preservation arguments to be made in favor of tribal sovereignty.

Initially, the Marshall court outlined Native American sovereignty in three cases: *Johnson v. McIntosh, Cherokee Nation v. Georgia, and Worcester v. Georgia*. Many scholars refer to them as the "Marshall Trilogy."[22] *Johnson v. McIntosh* relied on the doctrine of discovery when the Court refused to allow tribes to convey land.[23] The discovery doctrine, in the context of European conquest "necessarily diminished" tribes' "rights to complete sovereignty, as independent nations."[24] Essentially, *Johnson v. McIntosh* held that the tribes had no true possessory rights in the land which they had always occupied. The ruling maintained that Native Americans only had a right to use the land and therefore had no title or right to transfer it. In *Cherokee Nation v. Georgia,* the Cherokee tribe brought suit in the Supreme Court asking for an injunction against Georgia to keep the state from enforcing laws within Cherokee land.[25] The Court held that tribes were not distinct sovereign nations, but "domestic dependent nations… completely under the sovereignty and dominion of the United States."[26] However, the Court did acknowledge tribes are "distinct political [societies], separated from others, capable of managing its own affairs and governing itself," but with supervision by the United States.[27] Later, in *Worchester v. Georgia*, John Marshall set the stage for the limitation of state law and regulations' applicability to Indian tribes, while continuing to recognize that federal law still applied, and that the federal government still had a right to interfere in Indian affairs. The holding in *Worchester* did not allow states to impose their regulatory schemes upon Indian tribes in the same manner as the federal counterparts.[28]

"Like federal and state governments, tribes are immune from lawsuits, unless they have waived their sovereign immunity, or a federal treaty or statute has abrogated or limited tribal sovereign immunity. Tribal sovereign immunity extends to off-reservation activities [like business activities] and applies to both governmental and commercial activities."[29] Congress has plenary power and authority over Native American tribal affairs.[30] The dictionary definition states "plenary" means "absolute" or "total."[31] This definition of the word is misleading because "congressional power is broad, [and] is subject to procedural and constitutional limitations."[32]

Recently, there has been a trend toward limiting Tribal sovereignty over non-Indians, even if they are acting within a reservation. There is a severe distinction between criminal and civil jurisdiction when it comes to events on reservations that requires in-depth analysis too broad for the subject matter of this article. "Such sovereign powers Indian tribes possess are limited to what is needed for self-government."[33] In the criminal context, federal and state courts have jurisdiction over nonmembers even if the criminal act was committed on a reservation.[34] If the

criminal defendant is a tribal member and the criminal act was committed on a reservation, the tribe retains jurisdiction.[35] However, in the civil context, "tribal courts generally retain civil jurisdiction over suits resulting from acts of nonmembers occurring within their jurisdictional boundaries."[36] The term "civil" here, however, does not simply mean anything that is not criminal. It has a much more specialized context in Native American law.

a. Abrogation

Tribal sovereign immunity can be either abrogated by Congress or waived by the tribe itself. Because of European conquest, "Native Americans' sovereignty no longer inherently exists, but is permitted by the government. Under this theory, the federal government has the ability to abrogate tribal immunity as it wishes."[37] *Black's Law Dictionary* defines "abrogate" as "to abolish (a law or a custom) by formal or authoritative action; to annul or repeal."[38] "Abrogation" essentially amounts to a waiver of tribes' sovereign immunity by Congress.[39] There are those that argue Congress can simply take away tribal sovereignty with a stroke of a pen.[40] However, many tribes would vehemently argue, "Indian tribes have never needed Congress to '*grant*' them any authority whatsoever regarding labor relations on their own lands. They had and still have such authority—as part of their residual, inherent sovereignty—*unless and until* it may have been, or may yet be, *taken away*, by Congress."[41] These arguments are in a constant state of ebb and flow.

b. Waiver

Absent abrogation, a tribe can waive its sovereign immunity, but that waiver "must be viewed as clear, express, and unequivocal."[42] Waivers do not have to be total and complete, but may be used for limited circumstances. A tribe may agree to a waiver for several reasons. One of the main reasons is to encourage other businesses to enter into contracts with tribal businesses. It is more likely for a non-tribal business to agree to engage in dealings with tribal businesses if it is assured that all dealings will be fair and on equal footing.[43] Many businesses feel that tribal courts will favor tribal entities.

Tribes are not obligated to give complete waivers to their immunity of an entire statute. "A waiver can be limited to (1) a specific tribal asset or enterprise revenue stream, (2) a specific type of legal relief sought by performance or contract and not money damages, (3) a claim limited to the amount borrowed, or (4) a specific enforcement mechanism, such as court or arbitration."[44] "[I]n *C & L Enterprises, Inc. v. Citizen Band Potowatomi Indian Tribe of Oklahoma*, the U.S. Supreme Court determined that the inclusion of an arbitration provision in a form contract constituted a clear manifestation of the intent to waive sovereign immunity."[45] "In addition to obtaining a clear and unequivocal written waiver of sovereign immunity, a franchisor should confirm that the waiver is a valid act of the tribal governing body and is not the result of 'unapproved acts of tribal officials.'"[46]

2. Trust

Although the Trust Doctrine has been a highly studied subject in Native American law, there is still no clear consensus on what "trust" means. The doctrine is referred to by many names including: "trust, trust doctrine, trust duty, trust relationship, trust responsibility, trust obligation, trust analogy, ward-guardian, and beneficiary-trustee."[47] In the 1830s, the same string of opinions dubbed the "Marshall Trilogy" that described sovereign immunity, also described the concept of "trust."[48] In *Cherokee Nation v. Georgia*, "the court concluded that the tribe was neither a state nor a foreign nation under the Constitution and therefore was not entitled to bring the suit initially in the Supreme Court."[49] *Seminole v. United States* articulated, "This Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people…Under a humane and self imposed policy which has found expression in many acts of Congress, and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust."[50] The BIA also cites to *Seminole* when describing the trust doctrine on its website's "FAQ" page.[51]

As one scholar explains, "in modern day Indian law, the trust relationship, although not constitutionally based and thus not enforceable against Congress, is a source of enforceable rights against the executive branch and has become a major weapon in the arsenal of Indian rights."[52] Also, *Worcester v. Georgia* "reaffirmed the status of Indian tribes as self-governing entities."[53] Through the Trust Doctrine, the federal government has created rights, duties, and obligations between the government and the tribes it has recognized.[54]

3. Statutes of General Applicability

The statutes at issue in this article are federal labor and employment statutes. These statutes are applicable to "all persons and entities that fall within the statutes' definitions of 'employers' and 'employees,'"[55] and are known as "statutes of general applicability."[56] Courts have developed two major schools of thought regarding these statutes' applicability: the *Tuscarora/Coeur D'Alene* doctrine, and the *Donovan* rule. The largest tension is between the Tenth Circuit and the Ninth Circuit. The Supreme Court of the United States has yet to return a definitive ruling on how these statutes are to be applied to Tribal businesses and their employees. Therefore, when analyzing which doctrine to apply, it is especially important to identify where the tribe lies within the circuit courts. The Indian Canons of Construction can provide some light on how these statutes could be applied.

a. The *Tuscarora/Coeur d'Alene* Rule

In 1960, the Supreme Court issued a decision in *Federal Power Comm'n v. Tuscarora Indian Nation* that held statutes which are silent on the issue of applicability to Native American Tribes of statutes that are "general and broad [in] application applies to all persons, including Indian Tribes."[57] Subsequently, a variety of courts have explicitly recognized three exceptions to the *Tuscarora* rule. The ruling held that federal statutes of general applicability which are silent on the issue of Indian Tribal sovereignty will not apply if: "1) the law touches 'exclusive rights of self-governance in purely intramural matters' 2) the application of the law of the tribe would abrogate rights guaranteed by Indian treaties; or 3) there is proof by legislative history or some other means that Congress intended the law not to apply to Indians on their reservations."[58]

"The *Coeur d'Alene* doctrine [a Ninth Circuit ruling] which expanded on *Tuscarora* has been strongly endorsed by the Second, Seventh, and Eleventh Circuits, among the six other circuits that have considered similar issues regarding the application of general federal laws to Indian tribes. The Eighth and D.C. Circuits have embraced it a bit less clearly. Only one circuit, the Tenth, has offered some wavering resistance to it."[59] Oklahoma lies within the Tenth Circuit.

"*Coeur d'Alene* is a mere three-judge panel opinion. It has never been confirmed by an en banc decision of the Ninth Circuit."[60]

d. The *Farris* Rule

The Ninth Circuit adopted a separate approach in *United States v. Farris*. "The *Farris* court set forth two basic principles for determining whether a federal law of general application applies to Indians. First, *Farris* said that actual congressional consideration must be found only when applying the law will interfere with specific treaty rights. Second, *Farris* established a rebuttal presumption that Congress intends laws of general applicability to apply to Indian tribes…[by showing] that applying the law to the tribe would interfere with tribal self-government."[61]

c. The *Santa Clara Pueblo* Rule

Santa Clara Pueblo v. Martinez requires Congress to have affirmatively expressed its intent to include tribes in the statute before the court will apply a federal law to a tribe if there is a conflict with tribal self-government.[62]

f. The Tenth Circuit's Approach

The Tenth Circuit's decision is much more favorable to tribal sovereignty than the Ninth Circuit's doctrine. *Donovan v. Navajo Forest Products Industries* essentially held that the *Tuscarora* approach was "'limit[ed] or, by implication, overrule[d]' by *Merrion*."[63] The Tenth Circuit held *Merrion* to "settl[e] the issue [of a need for an express exception from the statute of general applicability] in favor of the tribes."[64] *Donovan* held that the Occupational Safety and Health Act (OSHA), did not apply to Indian tribes even though it was silent on the issue of applicability to Indians.[65]

Recently there has been a large shift in 10th Circuit doctrine. The District Court of Kansas concluded in *Johnson v. Harrah's Kan. Casino Corp.* that "tribal sovereign immunity does not extend to [a] Nevada corporation conducting tribal business pursuant to a contract with the tribe."[66] *Sommerlott v. Cherokee Nation Distributors, Inc.* held that the subordinate economic entity test did not apply because the entity was legally distinct from its members.[67] The *Sommerlott* court held that a tribally held corporation incorporated under state law waives sovereign immunity by "voluntarily subject[ing] themselves to the authority of another sovereign."[68] The corporation in question in the *Sommerlot* case failed to qualify for sovereign immunity because of its status as a "separate legal entity organized under the laws of another sovereign, Oklahoma [and] cannot share in the Nation's immunity from suit."[69] "Although the immunity extends to entities that are arms of the tribes, it apparently does not cover tribally chartered corporations that are completely independent of the tribe."[70] "If a tribal corporation is chartered under state law, as opposed to tribal law, that tribal incorporation is generally not immune from suit under the doctrine of tribal sovereignty and may be sued in state court."[71]

e. The Indian Canons of Construction

American Indian Law has its own set of Canons of Construction that govern interpretation of statutes relating to Indian tribes. Some of the pertinent Canons are: "(1) ambiguities in a federal statute must be resolved in favor of Indians, and (2) a clear expression of Congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty."[72] In a law review article titled "Labor and Employment Laws in Indian Country: How the Ninth Circuit Overruled a Century of Supreme Court Indian Jurisprudence—And Has So Far Gotten Away With It," Bryan Wildenthal advocates using the Canons over the *Tuscarora* and *Coeur D'Alene* jurisprudence. He states "[t]hese Indian law canons [embody] a presumption that federal laws should not be construed to limit tribal sovereignty or tribal rights unless Congress clearly, intentionally, and unambiguously chooses to do so—a presumption diametrically opposed to the *Couer D'Alene* approach."[73]

Naturally, tribes would likely prefer to see the Canons of Construction applied to the federal labor and employment law statutes because they best serve to protect Native American sovereignty, and tribes would not have to spend their time, money, and effort to rearrange their business structure to comport directly with the federal laws.

4. Tribal Business Structures and Their Implications

Determining in what form the tribal business functions is an important threshold question to this analysis. Tribes can form business entities in the same way that any other group of people can, and have even more options. Tribal businesses can be partnerships, unincorporated business associations, or corporations (tribally chartered, Section 17 federal charters under the Indian Reorganization Act, or state chartered). "The power to charter business organizations is yet another aspect of sovereign power. Indian tribes possess the authority to establish, through charter or otherwise, business organizations for the purpose of managing tribal assets."[74] Should a tribe choose a corporate structure, it can choose to form under federal, state, or tribal law.[75] There are also extensive tax considerations that should be considered by tribes when selecting a business structure.

Courts frequently classify a tribal business as a "political subdivision of tribal governments." Tribes enjoy this classification because of the "close link between economic development (a governmental function) and tribal ownership and conduct of businesses."[76] "If the tribe conducts its own activities, either directly or through an unincorporated political subdivision of the tribal government, the activities will be exempt from state and federal taxation."[77] In some cases a tribal business has been described as an "instrumentality of the tribe." These businesses are usually characterized by the Tribal Council sitting on the Board and are involved in the day-to-day activities and management of the business.[78] The form of the business entity may also have an effect on which federal employment statutes apply to the business. As with any suit involving a corporate entity, the organization's governing documents should be examined. When dealing with an entity involving a tribe, the specific tribe's "organic laws" should be consulted and dissected as well.[79]

The specific tribe's governmental structure is also an important component of this analysis. "Treatment of these issues varies widely among tribes, depending on their history, culture, and sources of power. For example, Indian Reorganization Act tribes are governed by written constitutions. Non-IRA tribal governments derive their powers from a variety of sources such as constitutions, tribal history, custom, resolution, or ordinance."[80] Often, without a close inspection of the corporation's governing documents, it would be impossible to discern that a tribe is actually the sole owner and operator of the enterprise. Unlike the requirement that a corporation carry an indicator of its limited liability status, there is no requirement of an indication that a tribe owns the entity.

II. The Federal Employment Statutes

As discussed previously, the federal employment statutes are statutes of general applicability because Congress intended these statutes to apply generally to most employers in the United States as long as the entity falls within the definitions provided by the specific statute. Felix Cohen notes in his treatise, *Federal Indian Law*, "Whether these statutes of general applicability limit tribes is a question of congressional intent in each case."[81] In this section, I will examine each of the relevant statutes and their applicability to tribes. It is important to recognize that a number of tribes have actually agreed to abide by a few of these statutes, which is reflected in tribal law. There are several incentives for tribes who agree to subject themselves to federal laws. By agreeing to comply with federal legislation and requirements, tribes are eligible to receive grant money and contract funding. Also, when interacting with other, non-tribal businesses, these businesses are more likely to be willing to work with a Tribal business if it has voluntarily subjected itself to the same standards.[82]

1. Title VII of the Civil Rights Act of 1964 (Title VII) and the Pregnancy Discrimination Act (PGA)

The Civil Rights Act of 1964 (CRA) was one of the most pivotal pieces of legislation in the United States of the last two hundred years. One of the provisions of the CRA, Title VII, restricts employers from discriminating against employees "on the basis of race, color, religion, national origin or sex."[83] More recently, Congress enacted the Pregnancy Discrimination Act (PDA) as an amendment to Title VII's provision on gender. The PDA "make[s] it illegal to discriminate against a woman because of pregnancy, childbirth, or a medical condition related to pregnancy or child birth."[84] This statute also prohibits retaliation against an employee who engaged in the protected activity of complaining of discrimination.[85]

Title VII expressly excludes Indian tribes from its definition of an "employer."[86] The statute reads: "the term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term *does not* include…*an Indian tribe*."[87] Also, employers who operate on or near an Indian reservation cannot be held liable for "treating non-Indians differently than Indians if such treatment is pursuant to 'any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.'"[88] While federal law strictly prohibits discrimination on the basis of race when it comes to outside businesses, tribal businesses have been historically permitted to implement Indian preference practices in hiring as a means of promoting tribal economic development.

While most courts will hold that Title VII does not apply to Indian tribes, a limited body of case law says

otherwise. A district court decision out of the District of North Dakota holds the exemption language "does *not* exempt tribal businesses from Title VII claims by non-Native Americans.[89] One source states that "it does not make any sense for Indian tribes as employers to be privileged to engage in race, sex, religious, and other forms of discrimination, including harassment, against non-Indian employees and applicants for employment."[90] However, this view is misguided. Title VII's express exemption clearly indicates Congress' intent for the statute to carry an exception for Indian tribes.

"Courts have broadly interpreted what constitutes an 'Indian tribe' under Title VII's statutory exemption….The Tenth Circuit court has held that a council comprised of 39 tribes constituted an 'Indian tribe' under Title VII."[91] In that case, the court held the entity was an Indian tribe under Title VII because it "promoted tribal economic development, was entirely comprised of member tribes, and tribal representatives made all decisions."[92]

2. The Americans with Disabilities Act (ADA)

The ADA was enacted in 1990 and went through an extensive amendment process in 2008.[93] This statute "makes it illegal to discriminate against a qualified person with a disability."[94] An employer is required to "reasonably accommodate the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless doing so would impose an undue hardship on the operation of the employer's business."[95] There is a retaliation provision in the statute as well.[96]

The ADA and Title VII have very similar legislative histories and statutory language. One of the most similar sections is the definition of employer. Like Title VII, the ADA contains an express waiver of the statute's applicability to Indian tribes under the definition of "employer." "The term 'employer' does not include the United States, a corporation wholly owned by the government of the United States, or an Indian tribe."[97] This express exclusion of Indian tribes is interpreted by the courts in the same manner as the Title VII exclusion.

However, there is a stray case in the Eleventh Circuit that found the ADA was applicable to an Indian tribe. The Eleventh Circuit held that "a restaurant and entertainment facility operated by the Miccosukee Tribe was subject to the ADA…[because] the ADA is a law of general applicability, that the facility was not an intramural tribal function,…and that the ADA has no exclusion of Indian tribes or their enterprises" in its ruling in *Florida Paraplegic Association v. Miccosukee Tribe of Indians of Flordia*.[98] For the most part, however, courts have held that the ADA does not apply to tribal businesses that have not expressed a waiver of their sovereign immunity rights.

3. Genetic Information Nondiscrimination Act (GINA)

GINA, which only became effective in 2009, has little applicable case law. "This law makes it illegal to discriminate against employees or applicants because of genetic information. Genetic information includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as any disease, disorder or condition of an individual's family members." There is a retaliation provision in this statute as well.[99]

This statute uses the same definition of employer as Title VII. "The term 'employer' means—an employer (as defined in section 701(b) of the Civil Rights Act of 1964)."[100] Therefore, the express exemption applying to tribes in Title VII and the ADA is present in GINA as well.

4. Age Discrimination in Employment Act (ADEA)

The ADEA was enacted in 1967 to protect individuals "who are 40 or older from discrimination because of age."[101] This statute, like Title VII and the ADA, contains a retaliation provision.[102] The ADEA is codified in a completely different section of the United States Code than Title VII, the ADA, and GINA. The previous three statutes are codified in the section on civil rights. The ADEA is codified in Title 29, which pertains to labor laws. Because the second set of statutes discussed here are codified under a different section, they cannot be interpreted as analogously to the civil rights statutes as some might wish. The ADEA is treated as separate from Title VII and is administered separately by the EEOC.[103] "Congress's failure to address the application of the ADEA to tribes leaves some uncertainty about the application of the law to tribes and their enterprises, at least where the Equal Employment Opportunity Commission (EEOC) brings the action, because, in that setting, a number of federal courts have said tribes cannot claim sovereign immunity from suit."[104]

Two lines of cases reach different conclusions on the applicability of the ADEA to tribes. The first string of cases concludes that the ADEA is not applicable to tribes. In *EEOC v. Fond du Lac Heavy Equipment & Construction Co.* the Eighth Circuit held that the ADEA or a similar statute would only be applicable to tribes if it "demonstrated that the legislation specifically intended Native American tribes to be included."[105]

In addition, the *Fond du Lac* decision relied heavily on the court's finding that the dispute was a "strictly internal matter." The court stated: "The dispute is between an Indian applicant and an Indian tribal employer. The Indian applicant is a member of the tribe, and the business is located on the reservation."[106]

5. Fair Labor Standards Act (FLSA)

FLSA was enacted in 1938 as part of the New Deal.[107] The statute "authorizes the Secretary of Labor to set and enforce standards for minimum wages and terms of payment for overtime work of the nonprofessional labor force, prohibits sex discrimination in compensation [(EPA)], and regulates employment of children."[108] The law allowed Congress to "establish [] minimum nationwide standards for wages and overtime pay, and administrative procedures through which workers may seek compensation for qualifying work time."[109] Unlike Title VII, ADA, ADEA, EPA, and GINA, FLSA is not under the EEOC's authority.[110]

The Supreme Court applied the FLSA to a corporation owned and operated by a member of an Indian tribe on an Indian reservation.[111] When applying the *Coer d'Alene Tribal Farm* standards, the Court found: "…the Mathesons do not argue that the Puyallup Tribe enacted a different wage and hour law that applied in place of the FLSA, nor do they assert the FLSA does not preempt any such law. Thus, there is no evidence in the record that the Puyallup Tribe has acted on its right of self-governance in the field of wage and hours laws and specifically with respect to overtime."[112] The court held the overtime provisions of the FLSA applied to the business even though there was no direct mention of application to Indian tribes within the statute itself.[113]

6. The Equal Pay Act of 1963 (EPA)

This law makes it illegal to pay different wages to men and women if they perform equal work in the same workplace." There is an affirmative retaliation provision.[114] This law, even though it is codified as part of the FLSA, is enforced by the EEOC.[115] As of this writing,[116] there has not been an issue on whether this law applies to tribal businesses or not.

7. The National Labor Relations Act (NLRA)

The NLRA's purpose is "to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions… and protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment."[117]

Until 2006, the applicable body of case law consistently refused to hold tribal entities accountable under the NLRA or to the National Labor Relations Board (NLRB). *NLRB v. San Manuel Band of Mission Indians*, "held tribally owned casino and bingo businesses, operating within reservations, are subject to the NLRA."[118] The board decided that since "tribes are not either part of the federal government or States or their political subdivisions and therefore they are not covered by the governmental exemption from the National Labor Relations Act. Moreover, there is no express exclusion of tribes or their businesses from the coverage of the NLRA."[119] "The San Manuel Casino is not a small business. It is not an 'Indian' business in any other sense than its ownership by the San Manuel Band of Serrano Mission Indians. The vast majority of the casino's approximately 1,400 employees are made up of non-Indians who reside in California, off the Band's property…. It conducts gambling operations patronized almost entirely by non-Indians."[120]

"In Sac and Fox Industries, the Board [NLRB] distinguished Fort Apache Timber and Southern Indian Health Council when it held that a business operated by a tribal governmental agency at an off-reservation facility was subject to Board jurisdiction."[121]

The D.C. Circuit in *San Manuel Indian Bingo & Casino* overruled earlier precedent and applied the NLRA to Indian tribes and tribal enterprises.[122] The holding also articulated that for future cases, the court would apply the Donovan tests.[123] The court based its holding on the reasoning that "because application of the NLRA would simply have a modest effect on tribal revenue from a purely commercial enterprise whose employees *and* consumers were overwhelmingly *non-Indian*… the NLRA does not impinge on the Tribe's sovereignty enough to 'demand a restrictive construction of the NLRA.'"[124]

"Like various other Federal employment-related statutes which have been held to be of general applicability, [fn. om.] the NLRA's jurisdictional definitions of 'employer,' 'employee' and 'commerce' are of 'broad and comprehensive scope,' [fn. om.] containing only a few specified exemptions. Nowhere in the list of exemptions or elsewhere in the statute is there any mention of Indians or their off-reservation enterprises."[125]

"In abandoning their previous thinking about tribal casinos, the Board said, 'Apart from its ownership and location, the casino is a typical commercial enterprise operating in and substantially affecting, interstate commerce. Further, some, if not many of the casino's employees are not members of the tribe…Running a commercial business is not an expression of sovereignty.'"[126] While some courts have held that the NLRA is applicable to tribes, others have not. This makes this particular statute risky to litigate under on both sides of the aisle.

III. Proposed Solution

Culturally, Native Americans and their tribal governments are ardent about protecting the people under their jurisdiction. Native American culture mandates that their elders be taken care of and treated with the highest level of respect. The elderly members of tribes are revered and valued. It is a great honor to be considered an "elder" of a tribe in Native American tradition. Women hold a high place in native American society. In fact, anthropologically speaking, many tribes conform to matriarchal constructions of society rather than the western version

of patriarchy.[127] Women and elders also play a significant role in tribal politics. They are looked to for advice. Due to this tradition of respect, it might be less likely for a woman, a disabled individual, or an elder to experience status-based discrimination in a tribal workplace, thus rendering the need for a Title VII/PGA/ADEA/ADA remedy unneeded. However, there is still risk.

Retaining sovereignty is a prime concern for all tribes. The last five-hundred years in tribal history have been marked by tribes fighting for self-governance and the right to choose their way of life. There are several reasons for tribes to cling to sovereign immunity. "There can be no legal right against the authority that establishes rights."[128] "Lawsuits against a government [tribe] would interfere with the government's ability to carry out its official duties and enforcement of judgments would cause economic losses that could impair or destroy government functions."[129]

A growing issue is how tribes will treat non-tribal members employed by businesses under their jurisdiction. One answer is to apply the federal employment laws to tribes. However, there is a persuasive argument against federal interference even when non-members are employed by tribal businesses:

> nonmembers are engaged in the process of extracting value from the reservation, and the right, remedies, and procedures for governing labor and employment laws directly affect the allocation of such value to the 'host' tribe and its members. Thus, the authority of tribes to regulate the labor and employment relations of nonmember enterprises and employees is tied directly to the inherent authority of tribes to exclude and govern nonmember activity within their reservations.[130]

Tribal employees and non-member employees deserve a workplace free from discrimination. The following three proposals are designed to remedy the concern of how to treat non-member employees while retaining the highest levels of sovereign immunity for tribes.

1. Require Tribal Businesses to Have Internal Employee Policies That Address the Same Issues as the Federal Statutes

In order to continue to grow tribal economic development, tribes must recognize the importance of a cohesive and loyal workforce.[131] "Employee loyalty is earned through personnel policies and practices that employees perceive as fair as necessary to the conduct of the business. Use of such policies will better enable tribes to diffuse and resolved disputes with their employees while maintaining good employee relations. Tribes with strong workforces and sound labor policies will be best equipped to exercise their sovereign power to manage their government and business affairs."[132] "It is not in tribes' best economic interests as sovereigns to subject their employees to employment practices and policies that are perceived by employees as unfair or arbitrary. Employees who perceive they or others have been treated unfairly are not likely to participate productively in the workforce."[133]

"The Shoshone-Bannock Tribal Court explained the advantages of using a grievance procedure to resolve employment disputes:…'An effective administrative process should be able to resolve personnel disputes in a timely, inexpensive, and informal manner. The development of such expertise within the community would become a valuable asset in the future for the whole tribe.'"[134] "Fair treatment also requires a forum for complaints of equal protection violations and failure to properly administer the grievance procedures, as well as a remedy for rights that have been violated."[135]

In employment contracts it may be helpful to have provisions that require the non-member employee to consent to "submit to tribal procedures and forums for the resolution of employment disputes."[136] This is essentially just a choice-of-law provision subject to basic contract principles. Also, tribes can require that non-member employees exhaust "administrative remedies through grievance procedures as a perquisite to suit in tribal court."[137] This requirement is similar to the requirement that federal employees must exhaust all administrative remedies before they are allowed to bring claims in federal court on matters of employment disputes with a federal employer. Another limitation tribes could put on their procedures would be to limit recovery of an aggrieved employee to compensatory damages, or damages that make the plaintiff "whole."[138] A similar prohibition on damages can be demanded of federal employers. Federal employees cannot recover punitive damages against the federal government and their damages are also restricted to $300,000.[139]

2. Encourage Tribal Lawmakers to Enact Their Own Employment Laws

It is in the tribes' best interest to create an internal structure for non-tribal member employees to air grievances and find relief without resorting to federal courts. "There is no impediment to tribal lawmaking in these areas."[140] "Tribes have the 'power to make their own substantive law in internal matters, and to enforce that law in their own forums.'"[141] Even if tribes can mount a successful defense on sovereign immunity, they might not be able to escape liability if the statutes are held to apply to tribes. "The Equal Employment Opportunity Commission (EEOC), the Department of Labor (DOL), and the National Labor Relations Board (NLRB) have aggressively sought to impose a general labor and employment law regime upon tribes in those instances where Congress has failed to expressly exclude tribes from coverage. As agencies of the United States, they are free from the

barrier of tribal sovereign immunity and can sue tribes in federal court to seek to impose such laws, even while individuals cannot."[142] "The workers, customers, and businesses dealing with tribal enterprises are citizens of the federal government, not of the tribe. They cannot participate in tribal government in any way. Because they are constituents of the federal government and not of the tribal government, it is only natural that the federal government will tend to exercise its right and ability to protect them."[143]

In his book *Labor and Employment Law in Indian Country*, Kaighn Smith Jr. encourages tribes to institute internal tribal regulations in three major areas: 1) civil rights and employment discrimination; 2) labor unions and collective bargaining; and 3) wages, hours, and working conditions.[144] "The more tribes govern these [employment] relations, the better situated they may be to resist attempts by federal agencies to impose laws from the outside."[145] "Insofar as a federal agency asserts claims on behalf of an employee against a tribal employer under federal law, if the tribe has enacted its own law governing the issues, it may argue that the federal law claims must be stayed or dismissed pending the employee's exhaustion of tribal remedies."[146]

There is an argument to be made that, "[b]y expressly excluding tribes from the most central federal employment discrimination laws, Title VII and the ADA, Congress respected the authority of tribes to decide, under their own community norms and policy judgments, whether and how to remedy tribal workplace discrimination on the basis of sex, race, national origin, color, and disability."[147] Smith lists several reasons for tribal enactment of anti-discrimination laws: 1) "the enactment of such laws can foster harmony in accordance with tribal values";[148] 2) "the enactment of such laws may fill a void and stem pressures from outside to impose federal laws on tribes";[149] and 3) these laws would "generate new avenues for litigation."[150] "The legitimacy of the system is particularly enhanced if it provides for the protection of rights and the advancement of justice for individuals or groups [like non-tribal member employees] who are unable to protect their basic rights and interests through majoritarian politics."[151]

Due to the unique structure and culture of every tribe, each tribe must individually assess how it wants to address the enactment (or failure to enact) of its own employment laws. The structures of tribal governments are different. The form or forms chosen to conduct business can vary widely, even within one tribe. There is no "one size fits all" model for these laws on a tribal level. Even more than the individual states of the United States, "[e]very tribe is unique, and will design its laws to reflect its own priorities and values."[152] State governments have historically been allowed to make policy decisions that best fit their specific constituencies. Like any area of tribal law, each tribe will create a different and possibly nuanced model. This variation in law can be difficult to discern for the typical employment lawyer. But open and steady communication between lawyers and the specific tribe can create an environment to solve this problem.

There are individuals that believe that free market principles should be embraced over Native sovereignty principles because they do not comport with a fair and equal economic environment. These individuals may cite the argument that "[t]he essential tenet of free enterprise is that all competitors will struggle in the same regulatory environment so that it is their resources and ingenuity that provide the advantage. If the government gives one type of competitor a special regulatory advantage, competition is compromised."[153] However, sovereignty does not have to, nor does it often interfere with free market principles.

Conclusion

If the current rulings discussed in this article are used to predict how courts will rule on the issue of the general applicability of federal employment statutes to Indian tribal businesses, it is only a matter of time before rulings come down in favor of applicability. Tribes can best prevent this occurrence by taking proactive steps to extend protections to their non-Indian employees. Many tribes have already taken the initiative and have implemented internal policies and even tribal laws that seek to protect non-Indian employees within tribal businesses.

> For the price of developing fair personnel policies and procedures…tribes will strengthen their sovereign rights in two important ways. First, they will have taken an affirmative step to prevent further congressional erosion of sovereignty…, and, second, they will have gained a more committed and loyal workforce that will provide a solid foundation for tribal government and commerce. Tribal nations with strong governments and economies will be best able to protect their sovereignty.[154]

Above all, tribes should do what they can to delay the erosion of their sovereign rights as independent nations while they develop economic diversity and stability.

Endnotes

1. Bureau of Indian Affairs, http://www.bia.gov/WhoWeAre/index.htm.
2. *Id.*
3. *Id.*, http://www.bia.gov/cs/groups/public/documents/text/idc1-024782.pdf (14).
4. "According to the 2014 *Casino City's Indian Gaming Industry Report*, Indian tribes received $28.1 billion in gaming revenue in 2012." *See*

Heidi McNeil Staudenmaier and Michael Coccaro, Negotiating with a Tribe or Tribal Entity: Practical Tips for Franchisors, 34 Franchise L.J. 35 (2014).

5. The Indian Gaming Regulatory Act was enacted in 1988 in reaction to the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).
6. Kaighn Smith Jr., Labor and Employment Laws in Indian Country: Tribal Self-Determination and Judicial Restraint: The Problem of Labor and Employment Relations within the Reservation, 2008 Mich. St. L. Rev. 505, 507.
7. Karen J. Atkinson, Kathleen M. Nilles, Tribal Business Structure Handbook—A Tribal Self Governance Project of the Tulalip Tribes, Office of the Assistant Secretary, Bureau of Indian Affairs, I-1 (2008).
8. Shivani Sutaria, Employment Discrimination in Indian-Owned Casinos: Strategies to Providing Rights and Remedies to Tribal Casino Employees, 8 J.L. & Soc. Challenges 132, 133 (2006). *See also* Karen J. Atkinson, Kathleen M. Nilles, Tribal Business Structure Handbook—A Tribal Self Governance Project of the Tulalip Tribes, Office of the Assistant Secretary, Bureau of Indian Affairs, I-1 (2008). "There are still high levels of poverty and unemployment in Indian country and a lack of the basic infrastructure crucial to the building blocks of economic success. There are, however, increasingly more examples of tribes breaking their dependence on federal programs and creating the necessary legal infrastructure to build the foundations for economic development."
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13. Karen J. Atkinson, Kathleen M. Nilles, Tribal Business Structure Handbook—A Tribal Self Governance Project of the Tulalip Tribes, Office of the Assistant Secretary, Bureau of Indian Affairs, I-1 (2008).
14. Kaighn Smith Jr., Labor and Employment Laws in Indian Country: Tribal Self-Determination and Judicial Restraint: The Problem of Labor and Employment Relations within the Reservation, 2008 Mich. St. L. Rev. 505, 508.
15. Richard G. McCracken, 21 The Labor Law. 157 (2008).
16. *Id.*
17. *Supra* 6.
18. *Supra* 8.
19. Smith, 2008 Mich. St. L. Rev. 505, 508.
20. *Supra* 6, II-3.
21. 27 Dayton L. Rev. 189, 197, citing Felix S. Cohen, Handbook of Federal Indian Law 122.
22. Limas, Denv. U. L. Rev. 359, 365.
23. *Id.*
24. *Id.*
25. *Id.* at 366.
26. *Id.*
27. *Id.*
28. *Id.*
29. Cohen's § 21.02[2] 1285.
30. *Supra* 15.
31. *Id.*
32. *Id.*
33. McCracken, 21 The Labor Law. 157; *see also Montana v. Blackfeet*, 450 U.S. 544 (1981).
34. Limas, *supra* note 12, Denv. U. L. Rev. 359, 367.
35. *Id.*
36. *Id.*, n. 60.
37. Scott. D. Danahy, License to Discriminate: The Application of Sovereign Immunity to Employment Discrimination Claims Brought by Non-Native American Employees of Tribally Owned Businesses, 25 Fla. U. St. L. Rev. 679, 683 (1998).
38. Black's Law Dictionary, p. 7 "abrogate."
39. Cohen's, § 21.02[2].
40. This is, of course, subject to the political process and the checks and balances system set up by the United States Constitution.
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42. Heidi McNeil Staudenmaier and Michael Coccaro, Negotiating with a Tribe or Tribal Entity: Practical Tips for Franchisors, 34 Franchise L.J. 35, 38 (2014).
43. *Supra* 6.
44. *Supra* 6, II-4.
45. *Supra* 42; *see also* 532 U.S. 411 (2001).
46. *Supra* 42, *quoting Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1286-87 (11th Cir. 2001).
47. Wilkins and Lomawima, Uneven Ground: American Indian Sovereignty and Federal Law, 65 (2002).
48. *Id. at* 76.
49. *Supra* 15.
50. *Supra* 47.
51. Bureau of Indian Affairs, http://www.bia.gov/FAQs/index.htm.
52. *Supra* 47 at 75, *quoting* Nell Newton, 1984, 232-33.
53. *Supra* 15.
54. *Id. at* 18
55. Vicki J. Limas, Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency, 26 Ariz. St. L.J. 681, 710 (1994).
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57. *Vandever v. Osage Nation Enter., Inc.*, 2009 WL 702776 (N.D. Okla. 2009). *Quoting Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, (1960).
58. *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, (10th Cir. 1989).
59. 2008 Mich. St. L. Rev. 547, 551; *see also Smart v. State Farm Insurance Co.*, 868 F.2d 929 (7th Cir. 1989), *Reich v. Mashantucket Sand and Gravel*, 95 F.3d 174 (2d Cir. 1996), *Equal Employment Opportunity Commission v. Fond du Lac Heavy Equipment and Construction Co.*, 986 F.2d 246, (8th Cir. 1993), *Navajo Tribe v. NLRB*, 288 F.2d 162 (D.C. Cir 1961).
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61. Alex Tallchief Skibine, Applicability of Federal Laws of General Applicability to Indian Tribes and Reservation Indians, 25 U.C. Davis L. Rev. 85, 90 (1991).

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63. 2008 Mich. St. L. Rev. 547, 556.
64. *Id.* at n. 7, *quoting* 692 F.2d 709, 713 (10th Cir. 1982).
65. Heidi McNeil Staudenamier and Michael Coccaro, 34 Franchise L.J. 35, 40 (2014)
66. S*ommerlot v. Cherokee Nation Distributors, Inc.*, 686 F.3d 1144 (10th Cir. 2012).
67. *Id.*
68. *Id.* at 1150.
69. *Id.* at 1150.
70. *Id.*
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73. *Id.*
74. *Supra* 15 at 29.
75. Cohen's § 21.02[1][b] at 1284.
76. *Supra* 6 at II-13.
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81. *Id.* at 961.
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83. Laws We Enforce, http://www.eeoc.gov/laws/statutes/titlevii.cfm.
84. *Id.*
85. *Id.*
86. *Supra* 15 at 121.
87. U.S.C. § 2000(e)(b)(1) (2006) (emphasis added).
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89. Danahy at 686.
90. McCracken *supra* note 15, at 157.
91. Shivani Sutaria, Employment Discrimination in Indian-Owned Casinos: Strategies to Providing Rights and Remedies to Tribal Casino Employees, 8 J.L. & Soc. Challenges 132, 140 (2006). *See Dille v. Council of Energy Resource Tribes*, 801 F.2d 373 (10th Cir. 1986).
92. *Id.*
93. *Id.*
94. Laws We Enforce, http://www.eeoc.gov/laws/statutes/titlevii.cfm.
95. *Id.*
96. *Id.*
97. 42 U.S.C. § 12111(5)(b)(i).
98. McCracken at 157, *see also* 166 F.3d 1126 (11th Cir. 1999).
99. Laws We Enforce, http://www.eeoc.gov/laws/statutes/titlevii.cfm
100. 122 Stat. 881 §201(2)(b)(i)
101. Laws We Enforce, http://www.eeoc.gov/laws/statutes/titlevii.cfm
102. *Id.*
103. Smith, *supra* note 6, at 125.
104. Smith, *supra* note 6, at 180; *see also* Smith at 180 n. 15.
105. Danahy at 688.
106. McCracken, *supra* note 15, at 157.
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111. Smith, *supra* note 6, at 139.
112. *Id.*
113. *Id.*
114. Laws We Enforce, http://www.eeoc.gov/laws/statutes/titlevii.cfm.
115. Laws We Enforce, http://www.eeoc.gov/laws/statutes/epa.cfm.
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122. Cohen's § 21.02[5][c][i].
123. *Id.*
124. *Id.,* emphasis added.
125. McCracken at 157.
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127. In her review, Ranya Green, described Native American women as "elusive." The accounts Europeans provided described "distant princesses and saints" because that archetype was acceptable to European patriarchies. The truth, however, was that many Native American societies were "matriarchal, matrifocal, and matrilineal" which were not "acceptable nor comprehensible to members of European patriarchies." Ranya Green, Native American Women, Studies in Change, Signs, 250 (Vol. 6 No. 2, Winter 1980).
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131. Limas, Denv. U. L. Rev. 359, 364.
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133. *Id.* at 390.
134. *Id., quoting Gonzales v. Allen*, 16 Indian L. Rep 6048, 6050 (Shoshone Bannock Tribal Ct. 1989).
135. *Id.*
136. *Id.*
137. *Id.*

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147. *Id.*
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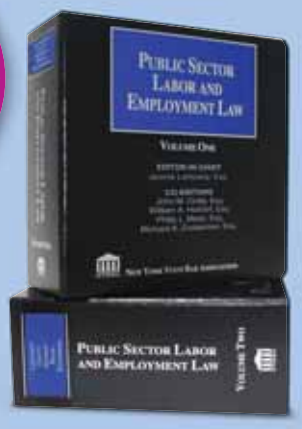

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