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L&E Newsletter

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A Message from the Chair

What services should the Section provide for its members? In what ways might the Section improve the services it currently provides? These are the central questions that were addressed by the member-satisfaction survey that was developed earlier this year by my able predecessor, Richard Chapman, and the Membership and Finance Committee, headed by Robert Kingsley (Kayo) Hull and William Frumkin. The survey, designed and conducted by the expert research staff of the NYSBA, received a hearty response. It has provided a tool by which we have begun to measure the degree to which the Section is meeting the needs and expectations of our membership and the ways in which we may improve and expand our services. The Membership and Finance Committee will be following up on these findings, as will the Ad Hoc Committee on Section Structure. We thank everyone who responded.

From the survey emerge several points that will help shape the future of the Section and that underscore the goals and priorities I have developed for my term as Chair. The survey confirms that, to most members, the primary values delivered by the Section are information, education, and representation. The work of our Section in these areas has received high marks, but we want to continue to expand and improve these services. CLE sessions will remain a top priority. By the time you receive this edition of the *Newsletter*, the Fall Meeting will be upon us, with a wealth of sophisticated program offerings presented in beautiful Ottawa, Ontario. Additional

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CLE programs, beginning with a full-day session on the Lawyer as Employer/Lawyer as Employee will be offered in the coming months. In response to the survey's indication that the members desire more statewide programming, this and other upcoming CLE sessions will be offered in several locations throughout the state.

"I am delighted to report that, thanks to the efforts of Janice Goodman, the luncheon address at our Annual Meeting will be delivered by The Honorable Cari M. Dominguez, Chair of the U.S. Equal Employment Opportunity Commission."

To further advance the membership's interest in information services, we will expand and improve our Section's Web site. The basics are in place now and are accessible through www.nysba.org, but so much more could be provided through this mechanism. As more and more of us become accustomed to using the Internet for information access, from the quick and simple location of an address to more complex issues of legal and policy research, we rightly expect our professional organizations to provide ready access to on-line information. In the months ahead, our Web site will expand and will begin to provide a greater wealth of information. James McCauley and Sharon Stiller, both of whom just completed productive terms as District Representatives, have agreed to serve as Co-chairs of the Web Site Project. This effort just now is taking shape, and we invite your input as Jim and Sharon work to identify the most useful additions to and functions of the Web site.

The survey also confirmed that most of our members belong to other bar associations. This underscores the merit of the initiative undertaken by our counterpart in the ABA, the Labor and Employment Law Section, headed by Chair Jana Howard Carey and Chair-Elect Stephen Gordon. Jana and Steve are promoting closer interaction between the ABA and the comparable sections of state and local bar associations. We ask our members to help with this initiative by alerting both entities to opportunities and ideas for interaction. Rocco Solimando, an active member of our Section, has been tapped by the ABA Labor and Employment Law Section to serve as liaison to our Section. Rocco is available to work with us in identifying those matters on which the two Sections might collaborate.

A recent example of such effort dovetails with the high interest our members have shown in the Section's role in providing a voice on policy matters that affect our practices. As a Section, we recently focused on the plans of the Federal Mediation and Conciliation Service (FMCS) to develop a Registry of Neutrals that would provide lists of individuals deemed qualified to serve as mediators in employment (rather than labor) disputes. (As proposed, the FMCS Registry would not relate to arbitration of either labor or employment matters.) The FMCS's proposed regulations for the Registry would limit listing on the employment mediation roster to individuals who engage in no work as advocates. Experience indicates, however, that a practicing attorney who also is trained as a mediator and respected for his or her abilities in this regard often will be the parties' first choice for mediation of employment litigation matters. Indeed, many of our members, regardless of whether their practices are devoted to management, plaintiff, or union representation, also serve, with great effectiveness and acceptability, in this neutral capacity.

Our Executive Committee discussed this issue at its May meeting and voted to submit comments expressing opposition to the FMCS's plan to exclude otherwise qualified individuals from the FMCS panel of employment mediators solely because those individuals also serve as advocates in labor or employment matters. Shortly thereafter, the ABA's Labor and Employment Law Section completed work on a thoughtful and thorough set of comments in which the ABA's Litigation, Business Law, and Dispute Resolution Sections joined. Upon reviewing these comments, our ADR in Employment Committee, co-chaired by Wayne Outten, Alfred Feliu, and Gene Ginsberg, recommended that, rather than reinventing the wheel, we endorse the comments submitted by the ABA's Labor and Employment Law Section. We have done so, and our Section's position on this matter now formally has been conveyed to the FMCS as part of the public comment process. If you would like to obtain a copy of our submission, along with the statement of the ABA Labor and Employment Law Section, please do not hesitate to contact me.

Looking toward specific future events and opportunities, please mark your calendars now for the January 30, 2004, Section meeting which will be held as part of the NYSBA's Annual Meeting in New York City. I am delighted to report that, thanks to the efforts of Janice Goodman, the luncheon address at our Annual Meeting will be delivered by The Honorable Cari M. Dominguez, Chair of the U.S. Equal Employment Opportunity Commission. In addition, Richard Zuckerman and the CLE Committee will be developing an insightful morning program. To help us identify the most meaningful sub-

stantive content for the meeting, Rich and I encourage you to convey any ideas or requests for program topics. Planning for the Annual Meeting will be underway by early fall.

I also want to highlight several personnel developments within the Executive Committee. As noted above, Jim McCauley and Sharon Stiller will continue their service on the Executive Committee by donning, with our gratitude, the hats of Web Site Project Co-chairs. In addition, Deborah S. Skanadore Reisdorph from Utica has agreed to serve as the employee-side Co-chair of the EEO Committee. Deborah moves into the position previously held by Pearl Zuchlewski, who has become Chair Elect of the Section. Also, Jean Doerr, of PERB, has accepted appointment as the neutral Co-chair of the Public Sector Book Committee. Jean replaces Gary Johnson, who stepped down after years of dedicated and outstanding service to the Section. We welcome Jean and Deborah and thank them for their willingness to be of service.

Finally, I note that the member-satisfaction survey merely is a starting point in the Section's effort to fine-tune the services it provides to the labor and employment bar. The process of acting upon the survey data and any additional input from members now is underway within the Executive Committee. Your continued communication of comments, suggestions, preferences, and ideas will be greatly appreciated.

Jacquelin F. Drucker

Did You Know?

Back issues of the *L&E Newsletter* (2000-2003) are available on the New York State Bar Association Web site.

(www.nysba.org)

Click on "Sections/Committees/Labor and Employment Law Section/ Member Materials/ L&E Newsletter."

For your convenience there is also a searchable index in pdf format. To search, click "Find" (binoculars icon) on the Adobe tool bar, and type in search word or phrase. Click "Find Again" (binoculars with arrow icon) to continue search.

Note: Back issues are available at no charge to Section members only. You must be logged in as a member to access back issues. For questions, log-in help or to obtain your user name and password, e-mail webmaster@nysba.org or call (518) 463-3200.

From the Editor

It was gratifying to read the results of our membership survey and find that 96% of you rated this *Newsletter* as good or excellent. There seems to be 4% room for improvement, though, and feedback is always welcome.

One of the benefits of being Editor is that, unlike anyone else, I am obligated to read all the articles. It's always a good learning experience, and this edition, in particular, was quite instructive. We have terrific articles: Gerald Hathaway on how to count employees for purposes of the WARN Act; Mat Paulose on year-end bonus payments; David Sapp and Amy Shulman on a new standard for health and safety; Michael Sciotti on the flag discrimination statute; Clare Sproule on the new "Professional Employer Act"; and John Gaal's usual fine column on ethics. My thanks to all the authors for a lovely issue.

In addition, we have a report from Robert Simmelkjaer, Chair of the Law School Liaison Committee. Bob revived and headed up the Section's law school competition this year, with the assistance of the Committee members. We are happy to publish the first- and second-place essay competition winners in this edition. The two third-place essays will be published in our next issue.

It has been a while since I acknowledged the two people without whom we could not do: Wendy Pike and Lyn Curtis of the Publications Department. Once again, as always, your advice and assistance are gratefully appreciated.

The Supreme Court will soon consider whether a corporation violated the Americans with Disabilities Act when it refused to rehire a former employee who was a rehabilitated substance abuser.[1] The ADA does not protect employees who are active substance abusers, but it does protect those who have been successfully rehabilitated from being discriminated against because of a history of drug addiction.[2]

The employee, Joel Hernandez, worked for Hughes Missile Systems for 25 years. He had several positions during that time, including Product Test Specialist and Calibration Service Technician. In 1991, his performance as Calibration Service Technician was rated "fair" and "good."

The company was aware that Hernandez had a history of alcohol problems and treatment. After testing positive for cocaine use in 1991, he was given a choice of resigning or having his employment terminated by the company for violating its rule against drug use. He chose to resign.

It was the company's unwritten policy not to rehire any employee who had resigned instead of being fired. In 1994, Hernandez applied to Hughes for the positions of Calibration Service Technician or Product Test Specialist. With his application, Hernandez enclosed letters from his pastor and Alcoholics Anonymous counselor, attesting to his good character, rehabilitation and commitment to recovery, but the company refused to hire him.

When Hernandez filed a discrimination charge with EEOC, a company official told the agency it had rejected Hernandez's application because of his "demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation." The company maintained it had a right to deny employment to former employees who had been discharged for violating its rules. Hernandez subsequently filed a lawsuit, the District of Arizona granted summary judgment to Hughes without a written opinion and Hernandez appealed.

In 1999, after Hernandez filed his claim, Hughes offered him the position of Product Test Specialist conditional on passing the regular examination. Although Hernandez was given time to study and prepare for the exam, he did not pass. Hughes cites this as evidence that Hernandez was not qualified when he sought to be hired in 1994. Hernandez claims that the passage of time affected his performance and that there is no evidence he would not have passed in 1994.

Hughes argued that the person who decided not to hire Hernandez was unaware of the reason he left in 1991. The company also asserted it did not discriminate against former employees with substance abuse problems because it did not treat them differently than former employees who had broken other company rules. Hernandez introduced into evidence the company's statement to the EEOC and the facts that his application contained testimonials regarding his recovery from addiction and his previous drug test results were in his personnel file.

The Ninth Circuit found that the employer's policy, "although not unlawful on its face, violates the ADA as applied to former drug addicts whose only work-related offense was testing positive because of their addiction."[3] It inferred that the labor relations representative had reviewed Hernandez's personnel file and was therefore aware of his previous alcohol and drug problems, raising an issue of fact as to whether he was denied employment

because of his previous drug addiction. However, even assuming that the official who made the decision did not know about Hernandez's record of addiction, it said, "her lack of knowledge would have been due solely to Hughes' unlawful policy which shields its employees from the knowledge that an employment decision may be illegal. . . . Having willfully induced ignorance on the part of its employees who make hiring decisions, an employer may not avoid responsibility for its violation of the ADA by seeking to rely on that lack of knowledge."[4]

In its petition for *certiorari*,[5] Raytheon argued that the Ninth Circuit decision improperly confers preferential treatment upon individuals who are fired for drug-related misconduct. The decision also questions the validity of no-rehire rules, the company said, where the position involves hazardous materials, confidential information, or demanding job requirements and the misconduct was egregious. Citing the ADA,[6] the company claimed it was entitled to apply uniform qualification standards for employment and uniform standards for job performance and behavior.

Raytheon also argued that the Ninth Circuit's decision conflicts with decisions from other circuits that employers may hold disabled employees to the same standards of law-abiding conduct as all other employees. The Ninth Circuit decision conflicts with one line of cases recognizing that "employers have the right to articulate and enforce generally applicable rules of conduct, and to discipline and terminate employees for violating those rules, without running afoul of the ADA," Raytheon said.[7] It asserted that the Ninth Circuit ruling also conflicts with a second line of cases in other circuits holding that providing a second chance to an employee who violates workplace conduct rules "is not a reasonable accommodation for a person with a disability."[8]

In his brief opposing Supreme Court review,[9] Hernandez noted that, in contrast to the company's unwritten policy about rehiring terminated employees, its written policies provide that if an applicant for employment tests positive for drugs or alcohol, the applicant is rendered ineligible for employment with Hughes for only the following 12 months. Therefore, he argued, the company gives a second chance to some job applicants with a substance-abuse disability but not to former employees. Furthermore, Hernandez argued, there were several issues of fact that were unresolved and summary disposition of the case was thus unwarranted.

The Solicitor General of the United States filed an *amicus* brief in support of Raytheon.[10] It asserts that neither the EEOC nor the Justice Department has issued guidance that specifically addresses the validity under the ADA of applying blanket policies against rehiring employees separated for misconduct to an individual lawfully discharged for drug use. Such a policy does not constitute disparate treatment on the basis of disability, it argues, because it applies equally to all former employees discharged for misconduct, regardless of the type of misconduct that was the basis for the discharge, and regardless of whether the former employee suffered a disability. Citing the ADA,[11] the Solicitor General claims that employers are explicitly permitted to hold drug users and alcoholics to the same standards of conduct as other employees. The Solicitor General argues that the Ninth Circuit's decision

> undercuts the effectiveness of workplace conduct rules, which represent a legitimate effort by employers to promote workplace safety and productivity. By preventing firms from adopting blanket rules imposing permanent consequences for serious misconduct, including drug-related misconduct, the court of appeals' decision "indirectly but unmistakably undermine[s] the [rules] that regulate dangerous behavior."[12]

Considering that many employers have no-rehire rules for employees in similar circumstances, the Court's eventual decision will have a widespread effect.

Janet McEneaney

Endnotes

1. *Hernandez v. Hughes Missile Systems Co.*, 298 F.3d 1030 (9th Cir. 2002), *cert. granted sub nom. Raytheon Co. v. Hernandez*, 123 S.Ct. 1255, 154 L.Ed.2d 1018, 71 USLW 3367 (U.S. Feb 24, 2003) (NO. 02-749). During the course of the litigation, Hughes was acquired by the Raytheon Company.
2. 42 U.S.C. Section 12114(b); see also, *EEOC Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act* §§ 8.2, 8.5 (1992) ("An employer may not discriminate against a drug addict, who is not currently using drugs and who has been rehabilitated, because of a history of drug addiction.").
3. *Id.* at 1042.
4. *Id.*
5. 2003 WL 21092587 (U.S. 02-749).
6. 42 U.S.C. Section 12114(c).
7. *Id.* at 22, *citing Kaplan v. City of N. Las Vegas*, 323 F.3d 1226 (9th Cir. 4/1/03); *Weber v. Strippit, Inc.*, 186 F.3d 907, 916-917 (8th Cir. 1999), *cert. denied*, 528 U.S. 1078 (2000); *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999); *Newberry v. E. Tex. State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998).
8. *Id.* at 23-24, *citing Siefken v. Village of Arlington Heights*, 65 F.3d 664, 666-67 (7th Cir. 1995); *Burch v. Coca-Cola Co.*, 119 F.3d 305, 320 (5th Cir. 1997), *cert. denied*, 522 U.S. 1084 (1998); *Hill v. Kansas City Area Transp. Auth.*, 181 F.3d 891, 894 (8th Cir. 1999), *cert. denied*, 528 U.S. 1137 (2000); *Burroughs v. City of Springfield*, 163 F.3d 505, 507 (8th Cir. 1998).
9. 2001 WL 34093580.
10. 2003 WL 21092541.
11. 42 U.S.C. 12114(c)(4).
12. 2003 WL 21092541 at 5, *citing Despears v. Milwaukee County*, 63 F.3d 635, 637 (7th Cir. 1995).

TNS, Inc. and OCAW: A New Standard for Assessing Employee Action for a Safe and Healthy Workplace

By David C. Sapp and Amy F. Shulman

Safety and health problems in the workplace are an ever-present and growing concern for labor, management and their lawyers. By engaging in certain activities permitted under Section 8(a)(1) of the National Labor Relations Act (NLRA),[1] and Section 502 of the NLRA,[2] employees can legally address or protest workplace health and safety problems. The National Labor Relations Board (NLRB or "the Board") announced a new standard under NLRA Section 502 for determining when employees may legally engage in work stoppages to challenge abnormally dangerous working conditions in *TNS, Inc. and Oil, Chem. and Atomic Workers Int'l Union*.[3] The Board's new statutory interpretation of Section 502 was recently approved by the Sixth Circuit in *TNS, Inc. v. NLRB*.[4]

"Does the NLRA protect an individual, whether or not a member of a collective bargaining unit, who, acting alone, acts for 'the mutual aid or protection' of other employees?"

Section 8(a)(1) of the NLRA

Section 8(a)(1) of the NLRA prohibits an employer from "interfering with, restraining or coercing employees in the exercise of the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their choosing, and *to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*" (emphasis added). "Concerted activity" encompasses activities of "'employees who have joined together to achieve common goals.'"[5] Therefore, activity done: (1) through a union; (2) by a group of employees, either unionized or non-unionized[6]; or (3) by an individual who invokes the protections of a collective bargaining agreement, is "concerted" under the NLRA.[7] Employees may protest unsafe or unhealthy conditions in the workplace by engaging in "concerted activity," as defined under the NLRA.

Does the NLRA protect an individual, whether or not a member of a collective bargaining unit, who, acting alone, acts for "the mutual aid or protection" of other employees? Such an individual may be protected under the NLRA by engaging in constructive concerted activity, if the protest activity is sufficiently related to the actions and/or welfare of other employees.[8] The Board has identified the circumstances where individual protest activity is sufficiently linked to the actions and/or welfare of other employees. In *Meyers Indus., Inc. v. Prill*, [9] the NLRB held that, for an individual's activity to be "concerted" the activity must have "'some linkage to group action. . . .'"[10] In *Meyers I*, the Board held that the complaints of a single employee about the safety of a company truck did not constitute concerted activity.[11] In *Meyers I*, the NLRB established the following objective test for determining whether an individual's activity is constructive concerted activity: "An employee's action may be deemed 'concerted' for purposes of section 7 [of the NLRA] only if the action is 'engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.'"[12] In *Meyers II*, the Board explained that this standard included: "those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management."[13]

The determination of whether activity is "concerted" is highly fact-specific.[14] The NLRB has found that an individual who alone spoke at a group meeting "held to discuss the terms and conditions of employment" had the requisite intent to initiate or induce group action.[15] In addition, a member of an employer's safety committee who complains to the employer and OSHA was also found to have acted on behalf of other employees,[16] as has an employee who testifies against an employer on behalf of another employee, even though the testimony was given pursuant to a subpoena.[17]

In *Portland Airport Limousine Co., Inc.*, however, the U.S. Court of Appeals for the First Circuit reversed the NLRB's finding of concerted activity where an employee refused to drive his assigned company truck, because the truck was unsafe, and took the truck assigned to another employee.[18] The court found that the employee, by, among other things, leaving his co-worker to drive the allegedly unsafe truck, acted purely out of his own self-interest and not on behalf of any other employees. Consequently, the court found that the employee did not engage in concerted activity.

Even if the activity at issue is "concerted," in order to be protected under the NLRA, the activity must also "'reasonably be seen as affecting the terms or conditions

of employment.'"[19] For instance, a complete work stoppage in protest over wages, hours or other working conditions is a protected activity.[20] The determination of whether an employee's conduct is related to the terms and conditions of employment is objective. It is not based upon how the employee subjectively views his actions.[21] For instance, hiring and firing of supervisory personnel is unrelated to terms and conditions of employment, unless the "identity and capabilities of the supervisor have a direct impact on the employees' own job interests and work performance."[22] In addition, an employee who is "flagrantly insubordinate to the legitimate assertion of managerial authority," such as by engaging in concerted activity in an abusive manner, is not protected by the NLRA.[23]

Although the concerted activity can occur before, after or at the same time a demand is made to remedy a specific objectionable condition,[24] it must be done in support of some demand for a desired change in the terms and conditions of employment.[25] If there is no such demand, the activity is not protected because it is not related to the terms and conditions of employment or in support of an attempt to improve objectionable conditions.[26]

Section 8(a)(1) protects employees who strike or refuse to work because of safety and health conditions, as long as the employees are acting out of a good faith fear of unsafe conditions or to improve objectionable conditions.[27]

The objective reasonableness of the concerted activity is irrelevant to a determination of whether that activity is protected under the NLRA.[28] That is, "whether the protested working condition was actually as objectionable as the employees believed it to be, or whether their objection could have been pressed in a more efficacious or reasonable manner, is irrelevant to whether their concerted activity is protected by the Act. . . ."[29]

New Test Under NLRA Section 502

Section 502 of the NLRA protects certain work stoppages arising from the existence of abnormally dangerous employment conditions. In *TNS, Inc. and Oil, Chem. and Atomic Workers Int'l Union*,[30] the NLRB announced a new test for determining when such work stoppages fall within the protections of Section 502. In *TNS, Inc. v. NLRB*, the Sixth Circuit Court of Appeals recently approved the NLRB's statutory interpretation.[31]

Section 502 of the NLRA provides: "[n]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act."[32]

Section 502 "'provides a limited exception to an express or implied no-strike obligation,' thereby insulating participants from injunctions, liability for damages, or termination when a cessation of work is necessary 'to protect employees from immediate danger.'"[33]

"Section 8(a)(1) protects employees who strike or refuse to work because of safety and health conditions, as long as the employees are acting out of a good faith fear of unsafe conditions or to improve objectionable conditions."

TNS was a manufacturer of "armor-piercing projectiles" made with "depleted uranium, a radioactive substance with carcinogenic properties when inhaled or ingested over long periods of time."[34] A joint labor-management health and safety committee performed monthly inspections of the plant and reported any problems concerning the levels of the depleted uranium to which the employees were exposed.[35] When TNS allegedly failed to rectify those problems, the union advised TNS that its members would not return to work until the safety problems were corrected.[36] At the same time, the existing collective bargaining agreement was about to expire and the union and TNS were negotiating a new collective bargaining agreement.[37] On the day the existing collective bargaining agreement expired, the union members stopped work under Section 502, citing abnormally dangerous conditions at the workplace. Approximately two months later, TNS hired permanent replacements for the union members involved in the work stoppage, and refused to rehire those bargaining unit members.[38] The union filed a charge with the NLRB alleging that TNS had engaged in an unfair labor practice by permanently replacing the workers involved in the work stoppage.

The NLRB held that the work stoppage was protected by Section 502 and that TNS had engaged in an unfair labor practice by hiring permanent replacement workers and refusing to rehire the union members who stopped work.[39] The NLRB also established a new four-part test to determine whether a work stoppage is protected under Section 502.[40] To do so,

> [t]he General Counsel must demonstrate by a preponderance of the evidence that the employees believed in good faith that their working conditions were abnormally dangerous; that their belief was a contributing cause of the work stoppage; that the employees'

> belief is supported by ascertainable, objective evidence; and that the perceived danger posed an immediate threat of harm to employee health or safety.[41]

The test is "premised on the idea that Section 502 requires a good faith belief in the existence of abnormally dangerous working conditions and that the belief be supported by ascertainable, objective evidence."[42] The test further requires only that the employees' belief in the existence of an abnormally dangerous condition contributes to, but not be the sole cause of, the work stoppage.[43]

"[T]he Board's expansion of employees' rights under Section 502 in the TNS *case enhances the measures that employees may use to avoid sustaining serious injuries due to abnormally dangerous workplace conditions."*

On appeal to the Sixth Circuit, the court addressed the issue of whether Section 502 applies when the employees are not bound by an express or implied no-strike provision in a collective bargaining agreement.[44] On appeal, the employer argued that Section 502 is inapplicable because Section 502 provides an exception to an express or implied no-strike provision. For the first time, the NLRB took the position that Section 502 protects employees who are not bound by a no-strike provision. The Sixth Circuit agreed with the NLRB.[45] Accordingly, Section 502 protects employees who are not bound by an express or implied no-strike provision in a collective bargaining agreement.

The Sixth Circuit also upheld the NLRB's test for determining the circumstances in which Section 502 applies, thus negating any requirement that the working conditions actually be abnormally dangerous so long as objective evidence supports the employees' good faith belief that abnormally dangerous working conditions exist.[46]

When is a working condition abnormally dangerous? The NLRB determines whether a working condition may, in good faith, be viewed as abnormally dangerous on a "case-by-case" basis, pursuant to guidelines set forth by the Supreme Court in *Gateway Coal*.[47] The NLRB has defined "abnormally dangerous" to mean "deviating from the normal condition or from the norm or average" such as where "risks ordinarily present have been intensified."[48]

The Sixth Circuit also upheld the NLRB's ruling that an employer cannot permanently replace employees who engage in job actions protected by Section 502, as an employer may do when faced with an economically motivated work stoppage. With this decision, the Sixth Circuit relied upon the Supreme Court's recognition that the "'special protection'" afforded by Section 502 to workers who stop work in the good faith belief that their workplace is abnormally dangerous, would be negated if those workers could be replaced as though they had engaged in an economic strike.[49] Thus, where employees engage in Section 502 job actions, their employers may not permanently replace such employees or "resort to [other] weapons available in an economically-motivated work stoppage."[50]

In conclusion, the Board's expansion of employees' rights under Section 502 in the *TNS* case enhances the measures that employees may use to avoid sustaining serious injuries due to abnormally dangerous workplace conditions. Such expansion may give rise to increased litigation to define the parameters of "abnormally dangerous conditions" under Section 502, and attorneys for labor and management should be aware of the potential issues arising from the NLRB's new interpretation of this statutory provision.

Endnotes

1. 29 U.S.C. § 158(a)(1).
2. 29 U.S.C. § 143.
3. 329 NLRB No. 61, 1999 WL 818610 at *2 (Sept. 30, 1999).
4. 296 F.3d 384 (6th Cir. 2002).
5. *NLRB v. Portland Airport Limousine Co., Inc.*, 163 F.3d 662, 665 (1st Cir. 1998) (quoting *NLRB v. City Disposal*, 465 U.S. 822, 830 (1984)).
6. *Nat'l Lab. Rel. Bd. v. Lloyd A. Fry Roofing Co., Inc.*, 651 F.2d 442, 445 (6th Cir. 1981).
7. *City Disposal*, 465 U.S. 822 (1984).
8. *Id*.
9. *Meyers Indus., Inc. v. Prill*, 268 NLRB 493 (1984) (*"Meyers I"*), *rev'd sub nom*., *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir.), *cert. denied*, 474 U.S. 948 (1985), on remand, *Meyers Indus., Inc. v. Prill*, 291 NLRB 882 (1986) (*"Meyers II"*), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988).
10. *NLRB v. Caval Tool Div., Chromalloy Gas Turbine Corp.*, 262 F.3d 184, 189 (2nd Cir. 2001) (quoting *Meyers I*).
11. *See Portland Airport Limousine Co., Inc.*, 163 F.3d at 665.
12. *Id.* (quoting *Meyers I,* 268 NLRB at 497).
13. *Id.* (quoting *Meyers II*, 281 NLRB at 887).
14. *Meyers I*, 268 NLRB at 496–97.
15. *NLRB v. Caval Tool Div., Chromalloy Gas Turbine Corp.*, 262 F.3d 184, 190 (2d Cir. 2001) (citing *Whittaker Corp. and Milton E. Johnston*, 289 N.L.R.B. 933 (1988)).
16. *Cormier v. Simplex Technologies, Inc.*, 1999 WL 628120, Civ. 98-500 (D.N.H. 1999).
17. *Cormier*, 1999 WL 628120 (citing *NLRB v. Coca-Cola Bottling Co.*, 811 F.2d 82, 89 (2d Cir. 1987)).

18. *NLRB v. Portland Airport Limousine Co., Inc.*, 163 F.3d 662, 665 (1st Cir. 1998).
19. *NLRB v. Mike Yurosek & Son, Inc.*, 53 F.3d 261, 266 (9th Cir. 1995).
20. *Id.*
21. *Id.*
22. *NLRB v. Oakes Machine Corp.*, 897 F.2d 84 (2d Cir.1990).
23. *Mobil Exploration and Producing U.S., Inc. v. NLRB*, 200 F.3d 230 (5th Cir. 1999).
24. *Washington Aluminum Co.*, 370 U.S. 9 (1962).
25. *NLRB v. Marsden*, 701 F.2d 238 (2d Cir. 1983).
26. *Id.*
27. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *see Odyssey Capital Group, L.P., III and Phillip D. Demas*, 6-CA-30010, 2002 WL 1881220 (NLRB Aug. 1, 2002); *Brown & Root v. NLRB*, 634 F.2d 816 (5th Cir. 1981); *NLRB v. Modern Carpet Indus., Inc.*, 611 F.2d 811 (10th Cir. 1979).
28. *Odyssey Capital Group, L.P., III*, 6-CA-30010, 2002 WL 1881220.
29. *NLRB v. Tamara Foods, Inc.*, 692 F.2d 1171 (8th Cir. 1982).
30. 329 NLRB No. 61, 1999 WL 818610 (Sept. 30, 1999).
31. 296 F.3d 384 (6th Cir. 2002).
32. *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368 (1974).
33. *TNS, Inc. v. NLRB*, 296 F.3d 384, 390 (6th Cir. 2002) (quoting *Gateway Coal*, 414 U.S. at 385).
34. *TNS, Inc. v. NLRB*, 296 F.3d at 387.
35. *Id.*
36. *Id.*
37. *Id.* at 388.
38. *Id.*
39. *TNS, Inc.*, 329 NLRB No. 61, 1999 WL 818610 (Second Supplemental Decision and Order Sept. 30, 1999).
40. *TNS, Inc.*, 1999 WL 818610 at *8.
41. *TNS, Inc.*, 1999 WL 818610 at *7–8; *TNS, Inc v. NLRB*, 296 F.3d 384, 389 (6th Cir. 2002). This article does not address the factual findings made by the NLRB in applying the new test and interpretations.
42. *TNS, Inc. v. NLRB*, 296 F.3d at 390–391.
43. *TNS, Inc.*, 1999 WL 818610 at *8.
44. *TNS, Inc. v. NLRB*, 296 F.3d at 390–391.
45. *Id.* The standard for review, employed by the Sixth Circuit, of the NLRB's interpretation of the NLRA is set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984). *See TNS, Inc. v. NLRB*, 296 F.3d at 389.
46. *Id.*
47. 414 U.S. at 387; *TNS, Inc.*, 1999 WL 818610 at * 9.
48. *TNS, Inc.*, 1999 WL 818610 at *9.
49. *TNS Inc.*, 296 F.3d at 394.
50. *Id.*

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PEOs and the New York Professional Employer Act

By Clare M. Sproule

On September 24, 2002, Governor George E. Pataki signed into law legislation requiring professional employer organizations (PEOs) to register with the Department of Labor. This law, commonly referred to as the "New York Professional Employer Act" adds a new Article 31 to the Labor Law, and was effective as of March 23, 2003. The intent of the statute is to clearly define the rights and responsibilities of PEOs in New York, as the state legislature expressly recognized that PEOs "provide a valuable service to commerce and the citizens of the state."[1]

What Is a PEO?

A PEO is a private company that operates as an outside "human resources department" for its clients. The PEO and its client company enter into a "professional employer agreement"[2] in order to allocate some traditional employer responsibilities and liabilities, while at the same time, share others. In essence, the PEO and its client company are co-employers of the "worksite employees," which, under the New York law, can include the client's officers, directors, shareholders or partners.[3] A PEO differs from a "temporary help firm," which is defined in the statute as "a business which recruits and hires its own employees, and assigns those employees to perform services for other organizations, to support or supplement the other organization's workforce, or to provide assistance in special work situation such as, but not limited to, employee absences, skill shortages, seasonal workloads, or to perform special assignments or projects."[4]

In order to be eligible to register as a PEO under the New York statute, the PEO must assume the following responsibilities in a written agreement:

1. reserve a right of direction and control of the worksite employees;[5]
2. pay wages and employment taxes of the worksite employees out of its own accounts;[6]
3. report, collect, and deposit employment taxes with state and federal authorities;[7]
4. pay unemployment insurance as required by the unemployment law using its own state employer account number and at the contribution rate of the PEO;[8]
5. secure and provide required workers' compensation coverage for its worksite employees either in its own name or in the client's name;[9] and
6. retain a right to hire, reassign, and fire the employees.[10]

Typically, the PEO also designs and administers the employee benefits program and handles other aspects of the human resources function such as drafting policies and employee handbooks.[11] The PEO often assumes responsibility for compliance with Title VII, the National Labor Relations Act (NLRA), the Fair Labor Standards Act (FLSA), COBRA, ERISA, the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), and the Immigration Reform and Control Act (IRCA). In fact, the FMLA recognizes the PEO as the "primary" employer and looks primarily to the PEO for compliance with the statute's requirements.[12]

"The intent of the . . . [New York Professional Employer Act] is to clearly define the rights and responsibilities of PEOs in New York, as the state legislature expressly recognized that PEOs 'provide a valuable service to commerce and the citizens of the state.'"

Who Is the Employer?

The relationship the PEO and its client company have with the worksite employees is often referred to as "co-employment." Both the PEO and the client company establish common law employment relationships with the worksite employees. Each entity has a right to direct and control worksite employees—the PEO directs and controls worksite employees in matters involving human resource management and compliance with employment laws, and the client company directs and controls worksite employees in manufacturing, production, and delivery of its products and services. In other words, the PEO has responsibility for the "general" aspects of the employment relationship, such as payment of wages and provision of benefits, while the client company retains responsibility for the more "specific" aspects of the relationship, such as, the employees' daily work assignments, supervision and control of the employees, production standards, service delivery, and provision of supplies and equipment. Depending on the circumstances, the PEO, the client company, or both, are considered to be the employer of the worksite employees.[13]

Because the PEO is responsible for the payment of wages, the Internal Revenue Service considers the PEO to be the employer for the purposes of paying income and unemployment taxes. The Occupational Safety and Health Administration, on the other hand, considers the client company to be the employer for the purposes of providing a safe and hazard-free workplace. The Department of Labor views the PEO as the party that is primarily responsible for wage and hour compliance, but holds the client company responsible for the accurate reporting of hours worked by the worksite employees. The National Labor Relations Board views the PEO and the client company as joint employers, and expects both to avoid unfair labor practices.[14]

The New York statute provides that the PEO is considered to be the employer for the purposes of withholding state income tax, and requires that the PEO report and pay all required contributions to the unemployment compensation fund at the PEO's contribution rate and using the PEO's state employer account number.[15] It also provides that a registered PEO is deemed an employer for the purposes of sponsoring welfare benefit plans for the worksite employees, and that a fully insured welfare benefit plan offered by such a PEO will not be considered a multiple employer welfare arrangement.[16] A PEO is not automatically considered to be the employer of the worksite employees, however, for the purposes of general liability insurance, automobile insurance, fidelity bonds, surety bonds, employer's liability not covered by workers' compensation or liquor liability insurance carried by the PEO, unless such worksite employees are specifically referred to in the applicable prearranged employment contract, insurance contract or bond.[17]

The client company is deemed, under the statute, to be the employer of worksite employees who are required to be licensed, registered or certified, for the purpose of these requirements.[18] The statute also provides that the PEO and the client company are both considered to be the employer for the purpose of the workers' compensation law, and that both are entitled to the protection of the exclusive remedy provision, irrespective of who secures and provides such coverage.[19]

What Are the Benefits of a PEO?

According to the National Association of Professional Employer Organizations (NAPEO), both the client company and the worksite employees benefit when a PEO is involved. The biggest advantage is that the PEO is usually able to offer a better and more comprehensive benefits package than most smaller employers can afford to offer. As a result, more employees will be covered by health insurance, be able to participate in retirement savings plans and take advantage of those benefits usually enjoyed only by employees of large companies.

A PEO can also help small employers control costs, while at the same time providing professional assistance with employment-related problems and better compliance with state and federal employment laws. Worksite employees benefit from the professional human resource services a PEO provides, such as employee handbooks and policies and procedures, and particularly from better employer/employee communications, including up-to-date information on labor regulations, workers' rights and workplace safety. In addition, co-employment by a PEO will extend statutory protections to more employees than would have otherwise been covered. [20]

"[T]he PEO is usually able to offer a better and more comprehensive benefits package than most smaller employers can afford to offer. As a result, more employees will be covered by health insurance, be able to participate in retirement savings plans and take advantage of those benefits usually enjoyed only by employees of large companies."

What Does the Statute Require?

The statute requires that PEOs doing business from offices in New York or providing professional employer services to persons in the state register with the New York State Department of Labor.[21] The registration process entails providing the state with the name under which the company is doing business and the address of its principal place of business and of each office it maintains in New York. The PEO must provide its taxpayer or employer identification number and a listing of all the names under which the PEO has operated, by jurisdiction, for the past five years. In addition, if the PEO is a privately held company, it must file a list of all persons or entities that own, or have owned in the past five years, a five percent or greater interest in the company. If it is publicly traded, the PEO must file a list of those persons or entities that own a fifty percent or greater interest in the PEO at the time of the application.[22]

Each registration or subsequent annual reporting must be accompanied by a reviewed or audited financial statement of the PEO's most recent fiscal year, which was prepared within 180 days of the application or renewal. The statement must show a minimum net worth of $75,000 before the PEO will be eligible to register, and it must be accompanied by a letter from an independent CPA that certifies that the PEO has met the

requirements of this section of the statute. [23] As a substitute for this requirement, the state may require a PEO to post a bond or securities in the amount of $75,000, along with an authorization to the Department of Labor to sell the securities, if necessary, to pay wages, benefits or other entitlements due to a worksite employee.[24] In addition, within 60 days after the end of each calendar quarter, the PEO must submit a statement prepared by an independent CPA that all applicable federal and state payroll taxes have been paid for that quarter. [25]

If a PEO fails to comply with the requirements of the statute, the Department of Labor may rescind, revoke or suspend its registration, at which time the company will have to cease doing business as a PEO in New York.[26]

Endnotes

1. Ch. 565 of the Laws of 2002, McKinney's Labor Law, Ch. 31, Art. 31, §§ 915 *et seq.*, "New York Professional Employer Act."
2. A "professional employer agreement" is defined in the statute as a written contract wherein: (1) the PEO expressly agrees to co-employ all or a majority of the employees of its client on an ongoing basis; (2) the employer responsibilities for worksite employees are allocated between the PEO and the client; and, (3) the PEO expressly assumes the rights and responsibilities as set forth in the statute. N.Y Labor Law § 916(3)(a-d) (Lab. Law).
3. Lab. Law § 916(6).
4. Lab. Law § 916(5).
5. Lab. Law § 922(1)(a)(i).
6. Lab. Law § 922(3)(a).
7. Lab. Law § 922(1)(a)(ii).
8. Lab. Law § 922(3)(b).
9. Lab. Law § 922(3)(c).
10. Lab. Law § 922(1)(a)(iii).
11. Louis Basso & Kathleen Hillegas, *Using a Professional Employer Organization*, N.Y.L.J., Nov. 17, 1997 (reprint).
12. *Id.*
13. National Association of Professional Employer Organizations Web site, www.napeo.org, viewed on July 7, 2003.
14. *See supra* note 11.
15. New York Labor Law §§ 922(2); 923(2).
16. *Id.* at § 922(5).
17. *Id.* at § 922(6)(b).
18. *Id.* at § 917(2)(a).
19. *Id.* at § 922(4).
20. *See supra* note 13.
21. New York Labor Law § 918.
22. *Id*. at § 919(1)(a-e).
23. *Id*. at § 921(1).
24. *Id*. at § 921(2).
25. *Id*. at § 921(3).
26. *Id*. at § 921(5).

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"WARN" Coverage: Counting Heads, and When to Count Them

By Gerald T. Hathaway

What Employers Are Covered? (the First Headcount)

The question of whether an employer is covered by WARN (Worker Adjustment and Retraining Notification) is not as simple as it first appears. WARN defines an employer as follows: "(1) the term 'employer' means any business enterprise that employs (A) 100 or more employees, excluding part-time employees; or (B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime). . . ."[1]

The practitioner must ask: Who gets counted? And when do you count them? This first headcount is company-wide, and not site-specific. The Department of Labor regulations give the following example:

> An employer may have one or more sites of employment under common ownership or control. An example would be a major auto maker which has dozens of automobile plants throughout the country. Each plant would be considered a site of employment, but there is only one "employer," the auto maker.[2]

Foreign locations of an employer are also subject to the headcount, except that only U.S. employees assigned to the foreign locations are counted.[3] WARN does not, however, have application to plant closings or mass layoffs which occur at foreign employment sites.[4]

Should you count employees of other entities? In determining whether an employer is covered by WARN, the headcount is not necessarily restricted to employees who work for one corporate entity. WARN may require that employees of affiliated companies *and contractors* be counted as well.[5]

Once it is decided what entities make up the "business enterprise" which is the "employer" at issue, there should be an identification of all employees who are of a status other than "part-time employees" (as defined by the statute) to see if there are 100 or more employees. If that headcount indicates that WARN does not apply, then there should be a second assessment which focuses on the number of non-overtime hours worked in a week by *all* employees, including part-time employees, to see if there are more than 4,000 hours worked in a week for the employer (excluding overtime hours). WARN will be applicable if *either* the number of individuals *or* the hours-worked assessment puts the employer over the applicable threshold.

Counting employees other than "part-time employees." There are two different kinds of "part-time" employees, as defined by the statute. One type of part-time employee is "an employee who is employed for an average of fewer than 20 hours per week."[6] The other type of part-time employee is one "who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required."[7]

With respect to the type of part-time employee who works on "average" less than 20 hours per week, the statute does not indicate over what period of time the average is calculated for determining the number of hours worked in a week, but the regulations attempt to indicate the time period for measurement by stating that it is "the shorter of the actual time the worker has been employed or the most recent 90 days."[8] The regulation does not provide a reference point for determining which day is the last day of the 90-day period for determining the "most recent 90 days." The most sensible interpretation would be that the 90-day measurement period would end on the first date on which notice would be required if the employer were covered. If the "most recent" 90-day period ended at a later date, the employer's coverage would be determined based on events occurring *after* the date on which the employer should have acted if it were covered (though the drafters of WARN and its regulations seem not to be bothered by this anomaly in other contexts).

The second type of part-time employee is not by any means consistent with what is ordinarily understood by the term "part-time employee"; it means an employee who worked (regardless of the number of hours worked) less than 6 months out of the 12 months ending on the date of measurement. Under this definition, anyone first hired within the 6 months preceding the date of measurement is a "part-time employee" for purposes of counting employees to determine if WARN applies, even though the individuals recently hired may work full-time schedules. The measuring period for determining the number of months an employee works (to see if the employee worked 6 out of 12 months) is described in the statute as the 12-month period "preceding the date on which notice is required." For those employees first hired more than 6 months prior to the date of measurement, there is no guidance as to what constitutes a month worked. A conservative approach would be to assume that if an employee works any time

at all in a month, the employee has worked in the month in question, and that month should be counted toward the 6-month threshold for determining if the employee is an employee "other than a part-time employee." It also appears that the same measuring mechanism would apply to employees on assignment from temporary staffing agencies, and thus "temp" employees engaged for less than 6 months would not be counted.

As explained below, the date "on which notice is required" can shift, and will be determined *retroactively*, based on facts which will occur *after* the date in question (and the drafters of WARN seem not to have been troubled by this).

Employees on leave (such as medical or workers' compensation leave, or leave under the Family and Medical Leave Act) are counted as employees.[9] It would appear, however, that an employee on leave who has not worked 6 out of the 12 months preceding the measuring date would be regarded as a part-time employee.

Caution should be exercised when relying on counts of employers who express the size of their workforce as full-time equivalents, or "FTE's." The concept of an FTE is fairly straightforward, in that it combines the costs associated with engaging part-time employees in a way to express their cost as the equivalent of a full-time employee. Thus 20 part-time employees could be expressed in terms of a lesser number of FTE's, perhaps 12 or so. If those part-time employees work more than 20 hours in a week, reliance on the FTE number would result in an undercount of employees for purposes of determining WARN coverage.

Counting hours worked in a week (other than overtime). If, by exclusion of "part-time employees," the headcount is less than 100, the measurement is not at an end for purposes of determining if an employer is covered by WARN. The statute will be applicable if there are "100 or more employees" (regardless of status as full-time or part-time) "who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime)."[10] The phrase "hours of overtime" is not defined in WARN—neither in the statute nor in the implementing regulations.

While the term "overtime" is not technically defined in the Fair Labor Standards Act (though the statute uses the word), the term is widely acknowledged to mean hours worked in excess of 40 in a week. Some states require that a premium rate be paid for all hours worked in excess of 8 in a day, regardless of the number of hours worked in a week.[11] It is not clear whether under WARN, daily overtime would be excluded in the calculation used for determining whether 4,000 hours or more are worked by 100 or more employees in a week. WARN gives no guidance on this point.

Overtime compensation, however, need only be paid to employees who are not exempt from the FLSA (and equivalent state laws). Exempt employees are not required to be paid "overtime," and so it would appear (at least it can be argued) that *all* hours worked by exempt employees would be counted toward the 4,000. Since employers are not required to keep track of the hours worked by exempt employees, there will be no easily identifiable source for a statement of the number of hours worked by non-exempt employees (and if there is litigation, exempt employees who lost their jobs will have a financial incentive to inflate their recollections of the number of hours they put into their jobs each week).

The mechanics of the count. The regulations implementing the FLSA require that certain weekly payroll records be preserved which would indicate the amount of straight time and overtime worked each week by non-exempt employees.[12] Assuming the company is in compliance with the FLSA, the payroll records should be available to provide assistance in making the count, at least with respect to non-exempt employees. As for exempt employees, for whom there are typically no records of the actual hours worked, there should be a survey of the top executives about the hours worked by exempt employees in each department (but recognize that the executives themselves are not disinterested in the outcome of the survey, because any terminated executive may have a claim for two months' pay if WARN is applicable). For an example of a situation where the headcount includes fewer than 100 full-time employees, but there are more than 4,000 hours worked, see *UNITE, New England Regional Joint Board v. Globaltex, L.L.C.*[13]

When the Count Is to Occur

The WARN regulations say that for purposes of determining WARN coverage, the employee headcount and measurement of hours worked should occur at the "point in time" which is "the date the first notice is required to be given."[14] Never mind that the measuring stick used to determine *if* notice is required *assumes* that notice is required. By simple application, if there is a date targeted for a single layoff or plant shutdown, and there have not been (and will not be) any other involuntary terminations of employment during the 90 days preceding that targeted date, "the date the first notice is required to be given" would ordinarily be 60 days prior to the targeted date. For example, if an event is targeted for July 31, the date to count the employees to see if WARN applies would be June 1 (60 days prior to July 31).

The regulations, however, go on: "If this 'snapshot' of the number of employees employed on that date is clearly unrepresentative of the ordinary or average employment level, then a more representative number can be used to determine coverage."[15]

The same regulation would allow use of a "more representative number" over a "recent period of time" (there is no guidance with the regulation as to what is meant by "recent" or what duration is contemplated by "period of time"), and the regulation cautions *against* using alternative methods of counting employees that would "evade the purpose of WARN."[16] Given this ambiguity, if the workforce has been fluctuating in "recent" times, and in the course of that fluctuation there is a "period of time" when 100 or more employees (not counting "part-time employees") were engaged, or when more than 4,000 hours were worked in a week, there may be WARN coverage. Think not of the snapshot suggested by the regulations, but of a strip of movie film (shot during a "recent period"), and if any frame on the film yields the numbers that put the employer over the coverage threshold, the employer could be regarded as being covered by WARN.

As for determining the "point in time . . . the first notice is required to be given," the date can shift, depending on employment activity over a period of time. It is possible for an employer to learn months after having a very small layoff, that employment terminations which occurred following that single layoff could have triggered a WARN obligation for the first layoff, in which case the date "the first notice [was] required to be given" was 60 days before the first layoff. As discussed below, WARN requires scrutiny of all employment terminations over a rolling period of up to 90 days.[17]

As a practical matter, therefore, a diligent lawyer should assess the headcount (for purposes of determining if the employer is large enough for WARN to apply) no later than five months (90-day rolling period, plus 60-day notice period) before the target date for which the WARN assessment is being made. A conservative approach would look to even an earlier time, if the time of inspection follows fluctuations in the workforce, such that an earlier time might be regarded as "more representative."

Is There a WARN Event? (the Second Headcount)

The term "WARN Event" is not found in the statute or regulations, but is a term used by labor lawyers (at least this one) to describe a reduction in force, or a series of employment terminations, which triggers WARN obligations.

There are two types of WARN Events: "Plant closings" and "mass layoffs."

Plant closing: "The term 'plant closing' means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees."[18] An employment action that halts production or work is a shutdown even if a few employees remain.[19] "A 'temporary shutdown' triggers the notice requirement *only* if there are a sufficient number of terminations, layoffs exceeding 6 months, or reductions in hours of work as specified under the definition of 'employment loss.'"[20]

Mass layoff: The Act defines a "mass layoff" as a reduction in force, not the result of a plant closing, which results in an employment loss at a single site during any 30-day period for at least (a) 33% of the active employees *and* at least 50 employees, or (b) 500 or more employees.[21] In these calculations, the Act excludes part-time employees, as defined above.[22]

The important phrases above are *50 or more employees* (not counting part-time employees) and *single site of employment.* The focus of the second headcount is far narrower than the first headcount, and is limited to a single site of employment, and the number of employees (other than "part-time employees") who are experiencing an "employment loss." If at the single site of employment there are fewer than 50 employees (other than "part-time employees") experiencing an "employment loss" over certain specified period(s) of time, there is no WARN Event (whether it is a plant shutdown or layoff), and no damages are payable.

If, on the other hand, there is a plant closing (a phrase which may include the closing of a *part* of a single site of employment), and 50 or more employees (not counting "part-time employees") lose their jobs at that location as a consequence (if the job loss occurs within certain time periods), there is a WARN Event.

If there is a layoff (not associated with a plant closing) during a 30-day period (and sometimes a 90-day period) which results in employment losses at a single site of employment for 500 or more employees (not counting "part-time employees"), there is a WARN Event. If there is a layoff (not associated with a plant closing) during the same time periods (30/90 days) involving 50 or more, but less than 500, employees (not counting "part-time employees") at a single site of employment *and* that number represents 33% (not a third, but 33%) or more of the "active employees," there is a WARN Event.

The Minutiae of (and Due Diligence for) the Second Headcount

Single site of employment. Although the statute does not define a "single site of employment," the regulations are helpful, and relatively specific:

> (1) A single site of employment can refer to either a single location or a

group of contiguous locations. Groups of structures which form a campus or industrial park, or separate facilities across the street from one another, may be considered a single site of employment.

(2) There may be several single sites of employment within a single building, such as an office building, if separate employers conduct activities within such a building. For example, an office building housing 50 different businesses will contain 50 single sites of employment. The offices of each employer will be its single site of employment.

(3) Separate buildings or areas which are not directly connected or in immediate proximity may be considered a single site of employment if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment. An example is an employer who manages a number of warehouses in an area but who regularly shifts or rotates the same employees from one building to another.

(4) Non-contiguous sites in the same geographic area which do not share the same staff or operational purpose should not be considered a single site. For example, assembly plants which are located on opposite sides of a town and which are managed by a single employer are separate sites if they employ different workers.

(5) Contiguous buildings owned by the same employer which have separate management, produce different products, and have separate workforces are considered separate single sites of employment.

(6) For workers whose primary duties require travel from point to point, who are outstationed, or whose primary duties involve work outside any of the employer's regular employment sites (e.g., railroad workers, bus drivers, salespersons), the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report will be the single site in which they are covered for WARN purposes.[23]

As the regulations indicate, whether a particular employer location will be deemed a single site of employment for purposes of WARN is a fact-specific inquiry. In the comments issued with the original WARN regulations, the Department of Labor, relying on the congressional history of WARN, expressly states that this "aggregation" exception (where separate facilities are combined as a single site of employment) is a "narrow one [intended] to cover those cases where separate buildings are used for the same purpose and share the same staff and equipment."[24] Accordingly, even if facilities are geographically contiguous, so long as they produce distinct products, have different workforces, use separate equipment, and have separate management at the plant level, they may be deemed to be separate, single sites of employment rather than one site of employment.

At first glance, it may seem odd that the regulations clearly try to narrowly limit the number of facilities that can be included within a "single site of employment." That narrowing, however, leads to broader application of WARN. The determination of what workplaces are and what are not "single sites of employment" has a bearing on ultimate WARN liability, at least with respect to a mass layoff. If fewer than 500 employees (other than part-time employees) are going to be laid off, the layoff will be a "mass layoff" *only* if the number of employees (other than part-time employees) who experience the employment loss are more than 33% of all "active employees" (other than part-time employees) employed at the single site of employment. Obviously, more facilities included within a single site of employment will lead to a larger denominator, and the larger the denominator in that calculation, the more employees can be laid off without triggering WARN obligations. Thus an employer would normally prefer the single site of employment to be as broad as can be. The WARN regulations temper that preference.

Once it is determined what sites are involved in a potential plant closing or mass layoff, with respect to each site there is another headcount of employees who will suffer (or have suffered) an "employment loss."

Employment loss. When determining if there has been an employment loss large enough to constitute a WARN Event, only employees (other than "part-time employees") who (1) have been involuntarily terminated, (2) have been laid off for more than 6 months, *or* (3) have suffered a 50% reduction in hours for a 6-month period are considered.[25] Sometimes, rather than terminate an employee, a company may keep the employee on payroll, and reassign the employee. The regulations indicate that in such a situation, "an employment loss does not occur when an employee is reassigned or transferred to employer-sponsored programs, such as retraining or job search activities, as long as the reas-

signment does not constitute a constructive discharge or other involuntary termination."[26] The term "constructive discharge" is not defined in the statute or regulations. One court has indicated that reference should be made to state law for the assessment of whether a constructive discharge has occurred.[27]

An employee is not considered to have suffered an employment loss if he or she is (1) discharged for cause, (2) voluntarily leaves, or (3) retires.[28]

There is also no employment loss under WARN if a closing or layoff is the result of a business relocation or consolidation and, prior to the closing or layoff, the employer either offers (a) to transfer the employee to another facility, if the job is within reasonable commuting distance, or (b) to transfer the employee to another site, regardless of distance, and the employee accepts within 30 days of the offer or the closing or layoff, whichever is later.[29] The regulations add the requirement that the job involved in the offer of transfer must not constitute a "constructive discharge."[30]

As was the case in the first headcount set forth above to determine if an employer is covered by WARN, employees of the "business enterprise" are counted, which may include employees assigned to the employment site by other entities, such as affiliated companies, and by contractors (depending on the degree of control exercised over the employees of other entities assigned to the employment site).

Part-time employees are not counted to determine if there is a WARN Event, even though they suffer an employment loss (though these employees will be entitled to damages if a WARN Event occurs). This means that employees who have worked less than 6 months out of the previous 12 months (measured as of the date notice would be required if there was a WARN Event) would not be counted among those who suffer an employment loss to determine if there is a WARN Event. Similarly, employees who work "on average" less than 20 hours a week (with the average being calculated within the 90-day period preceding the date on which notice would be required if there was a WARN Event) would not be counted to determine if there is a WARN Event.

Fixing the dates of employment loss. "A worker's last day of employment is considered the date of that worker's layoff."[31] Thus, as is obvious, an employee who is terminated, or permanently laid off, is deemed to have suffered an employment loss on the last day of employment. An employee told of a layoff that will last at least 6 months will be deemed to have suffered an employment loss on the last day of employment preceding the layoff.

If an employee is laid off temporarily (i.e., it is *not* expected to last 6 months, or it is uncertain as to how long the layoff will be, as of the time of layoff), and the layoff is extended beyond 6 months for reasons other than an unforeseeable circumstance (i.e., "due to business circumstances—including unforeseeable changes in price or cost—not reasonably foreseeable at the time of the initial layoff"), the layoff will be deemed to have occurred at the time the layoff began.[32] This latter calculation is troubling, for it is possible for an employer to just guess wrong about an economic recovery, and find out after the passage of time that a temporary layoff is instead an "employment loss" for purposes of WARN, and worse, that the employment loss occurred in the past (6 months ago) for purposes of WARN. Thus, where the number of employees on temporary layoff are material (such that when they are added to other employment terminations within a particular 30- or 90-day period the total number of employment losses triggers a WARN Event) it is possible that a WARN Event could occur retroactively. Such an employer has the hope of a good faith defense,[33] but such a hope will only be realized in live litigation, because a good faith defense is acceptable only at the court's discretion.

The regulations offer no guidance whatsoever as to how one measures a reduction in hours of 50% (i.e., there is no guidance as to what number of hours are subject to measurement, nor the timing or duration of the periods during which the measurements for purposes of comparison are to occur). Similarly, the regulations offer no guidance whatsoever as to when it is that an employee whose hours are reduced by 50% (however measured) for a 6-month period is regarded to have suffered the employment loss (i.e., at the end or beginning of the 6 months of reduced hours, or at the end of the period, upon realization of the 50% reduction in hours for 6 months). *If* the regulations applicable to determining when layoffs occur are used for employees who experience a reduction of hours, the reduction would be an employment loss at the beginning of the 6-month period, if at that time of initial reduction it is expected that the reduction in hours will continue for at least 6 months. Also, if it is not expected at the beginning of the reduction in hours that the reduction will last 6 months, and there are no unforeseeable events intervening, the reduction in hours would be deemed to have occurred at the beginning of the 6-month period.[34] From the employer's perspective, it is safest to compute the occurrences of this type of employment loss (rare though it may be) in the most unfavorable way for the employer.

Once it becomes clear that there will be employment losses, it then becomes necessary to determine when they occur in relation to one another.

*The rolling **30-day** period.* The headcount of employment losses is not limited to a single day for purposes of determining whether a WARN Event has occurred, or will occur. The statute defines both "plant closing" and "mass layoff" by referencing employment losses that occur during "any 30-day period," a phrase which should be read to mean a rolling 30-day period. Thus where there are any employment losses on a given day, there should be an assessment of all other employment losses within 30 days of that given day (30 days plus or minus), and if in the aggregate during *any* 30-day period there are 50 or more employment losses, there is a basis for concern that a WARN Event has occurred.

*The rolling **90-day** period.* If employment loss counts taken during rolling 30-day periods do not reveal a WARN Event, the inquiry is not at an end. The statute states that an employer cannot "evade" WARN requirements by spacing out employment losses over longer periods of time, namely a 90-day measurement period:

> [E]mployment losses for 2 or more groups at a single site of employment, each of which is less than the minimum number of employees specified [for a plant closing or mass layoff, as measured during any 30-day period] but which in the aggregate exceed that minimum number, and which occur within any 90-day period shall be considered to be a plant closing or mass layoff unless the employer demonstrates that the employment losses are the result of separate and distinct actions and causes and are not an attempt by the employer to evade the requirements of this chapter.[35]

In *Hollowell v. Orleans Regional Hospital LLC*,[36] the employer argued that no terminated employee should be aggregated under the 90-day count where the employee is the only one terminated on a particular day. The court rejected the argument, which the employer based on the plain dictionary meaning of the word "group," and ruled that 14 employees terminated on 14 different days would be included in the count of employees who suffered an employment loss for purposes of determining whether the plant closing threshold of 50 had been met.[37]

The comments which accompanied the original regulations made it clear that the "90-day aggregation provision applies only to separate actions *each of which* is under the coverage threshold."[38] Thus where there is a single WARN Event on a particular day, employees terminated beyond 30 days of the WARN Event will not be included among the employees entitled to damages by virtue of the WARN provision which allows for a 90-day count.[39] This result may seem counterintuitive upon reflection on the purpose of WARN, but the result is consistent with the plain (if awkward) wording of the statute.

Anecdotal evidence indicates that in the days of the decline of the dot-com economy, it was a common practice for a fading dot-com employer to keep a daily headcount on a spreadsheet to time layoffs with a sharp focus on the 90-day rolling period of WARN. As a past layoff faded to a time longer than 90 days past, new layoffs were implemented, with careful attention by the company to keep below the WARN threshold for a mass layoff. Since WARN only punishes attempts to "evade" WARN *within* the 90-day statutory measurement period, the negative suggests that there should be no punishment for intentionally evading WARN by implementing layoffs beyond the 90-day period.

The plant closing WARN Event. In the case of a shutdown (either permanent or expected to last 6 months or more) at a single site (or portion of a single site), if there are 50 or more employment losses among employees (not including part-time employees) within either a 30-day or 90-day period (as described above) a WARN Event has occurred.

The mass layoff WARN Event. Except where there are 500 or more employment losses impacting employees other than part-time employees within the 30- or 90-day period (which by sheer volume triggers a mass layoff WARN Event), where there is no plant closing, and there are 50 or more employment losses impacting employees (other than part-time employees) in a 30- or 90-day period, there are two measurements taken which are used to create a fraction from which it can be determined if the number of employment losses equals or exceeds 33%. The numerator of the fraction would be the number of employees (other than part-time employees) experiencing employment losses in the 30- or 90-day period. The denominator of the fraction would be the number of employees (other than part-time employees) determined as of the date that notice would be required, except that there is a modifier of the word "employee" added to the statute and regulation: "Active."

Neither the statute nor the regulations provide any guidance as to what is meant by an "active employee," but surely the word must be given some meaning. Since the universe of employees other than part-time employees includes employees currently on leave (as long as they worked 6 of the last 12 months as of the date of measurement) the word "active" would suggest that an employer would not count employees on leave for this fractional determination of whether employment losses hit 33% (where the numerator is constant, a smaller denominator makes a larger fraction—thus stacking the deck somewhat in favor of a finding of a WARN Event). This latter number (the denominator) is measured on

the same "snapshot" date that would be used for the first headcount described above to determine if the employer is covered by WARN, and the date of measurement carries the same caveats as the first headcount.

While the date is normally the date on which notice would be required (again, the regulations force an employer to use a date that would only be applicable if there is a WARN Event for the purpose of determining *whether* there is a WARN Event), the date can shift if the workforce on that date is "unrepresentative."[40] This is the same regulation that would allow use of an unexplained "more representative number" over an undefined "recent period of time."[41] Thus there is room for argument for expanding or contracting the denominator used in making this calculation for determining whether the 33% threshold has been met, though the regulations caution an employer against seeking a "more representative number" which would enable the employer to "evade the purpose of WARN."[42]

With the numerator being the number of employment losses by employees (other than part-time employees) that occur during the 30- or 90-day period, and the denominator being the number of "active" employees (other than part-time employees) employed on the date of measurement (normally 60 days before the mass layoff), the division can be performed to determine if the fraction yields a percentage of 33% or more. If it does, there will have been a WARN Event.

Fixing the date of the WARN Event and the date of notice. The WARN regulations are straightforward: "When all employees are not terminated on the same date, the date of the first individual termination within the statutory 30-day or 90-day period triggers the 60-day notice requirement."[43]

A consequence of the above provision is that if a layoff of one occurs within the relevant period preceding a layoff of many, the WARN Event will be deemed to occur on the date that the one employee is laid off. The timing of the WARN Event thus will shift, as will the notice date, which is 60 days prior to the WARN Event. The shift of the notice date in turn is directly related to the timing of the headcounts discussed earlier in this article.

Conclusion

An attorney advising an employer contemplating a layoff must engage in the minutiae of headcounts described above in order to assess whether there will be WARN liability in connection with a reduction in force. Attorneys advising employees impacted by a layoff, or their union, should do the same.

Endnotes

1. 29 U.S.C. § 2101(a)(1).
2. 20 C.F.R. § 639.3(a)(4).
3. 20 C.F.R. § 639.3(i)(7).
4. *Id*.
5. 20 C.F.R. § 639.3(a)(2) (emphasis added).
6. 29 U.S.C. § 2101(a)(8).
7. *Id*.
8. 20 C.F.R. § 639.3(h).
9. 20 C.F.R. § 639.3(a)(1).
10. 29 U.S.C. § 2101(a)(1)(B).
11. *E.g.*, California Labor Code § 510 (2000).
12. 29 C.F.R. § 516.2.
13. 2001 WL 135846 (D.Me., 2001).
14. 20 C.F.R. § 639.5(a)(2).
15. *Id*.
16. *Id*.
17. See "WARN Events," below.
18. 29 U.S.C. § 2101(a)(2).
19. 20 C.F.R. § 639.3(b).
20. *Id.* (emphasis added).
21. 29 U.S.C. § 2101(a)(3).
22. *Id*.
23. 20 C.F.R. § 639.3(i).
24. 54 Fed. Reg. 16,049 (Apr. 20, 1989).
25. 29 U.S.C. § 2101(a)(6).
26. 20 C.F.R. § 639.3(f)(2).
27. *Childress v. Darby Lumber Inc.*, 126 F. Supp.2d 1310, 1319 (D. Mont. 2001).
28. 20 C.F.R. § 639.3(f)(2).
29. 29 U.S.C. § 2101(b)(2).
30. 20 C.F.R. § 639.5(b)(2).
31. 20 C.F.R. § 639.5(a)(1).
32. 20 C.F.R. § 639.4(a).
33. 29 U.S.C. § 2104(a)(4).
34. *Cf.* 20 C.F.R. § 639.4(b).
35. 29 U.S.C. § 2102(d).
36. 217 F.3d 379 (5th Cir. 2000).
37. *Id.* at 383–4.
38. 54 Fed. Reg. 16,054 (Apr. 20, 1989).
39. *Childress v. Darby Lumber, Inc.*, 126 F. Supp. 1310, 1318–19 (D. Mont. 2001).
40. 20 C.F.R. § 639.5(a)(2).
41. *See id.*
42. 20 C.F.R. § 639.5(a)(2).
43. 20 C.F.R. § 639.5(a)(1).

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Year-End Bonus Payments Under New York Labor Law

By M. Paulose, Jr.

This article discusses whether an employer may withhold or withdraw an employee's promised year-end bonus. Every year, whether because of difficult economic times or otherwise, an employer withholds or withdraws a promised year-end bonus. As this article shows, an employer who does so may face civil and criminal charges under New York Labor Law.

New York Labor Law section 191 provides that a "worker shall be paid the wages earned in accordance with the agreed terms of employment." Section 193 provides that "no employer shall make any deduction from the wages of an employee." Section 190 provides that the word "wages" means "earnings of an employee for labor or services rendered." In light of these sections, whether an employer may withhold or withdraw an employee's promised year-end bonus stands or falls on whether the bonus is for "labor or services rendered." If the bonus is for "labor or services rendered" then the employer must pay the bonus to the employee and may not make any impermissible deductions from the bonus.

No Labor Law section defines the phrase "labor or services rendered." Case law, however, provides a history of guidance. Initially, New York courts took the view that, seemingly irrespective of what the phrase meant, an employer could withhold or withdraw a bonus if the employee's employment agreement with the employer expressly permitted the employer to do so. In *Hall v. United Parcel Service of America, Inc.*,[1] for example, an employee-manager sued his employer-delivery service for failing to pay him a year-end bonus. The employee argued that, based on an informal company memorandum, the employer was required to pay the employee a year-end bonus based on the employee's yearly performance with the employer. The lower court and the Fourth Department granted summary judgment in favor of the employer and the Court of Appeals affirmed. The Court agreed with the employee that whether an employer was required to pay a bonus was governed by the terms of the employee's employment agreement. In the case at bar, however, the employment agreement, in the form of the informal memorandum, made entitlement to the bonus specifically contingent on whether the employee received a notice stating that the employee was eligible for the bonus. The employee in the case had not received such a notice and therefore was not entitled to the bonus. In other words, said the Court, "a corporation proposing to give a sum for the benefit of any person or any set of persons has the right to fix the terms of his bounty, and provide under what circumstances the gift shall become vested and absolute."[2]

This rule however did not last long. New York courts quickly recognized that, by allowing an employment agreement to dictate the terms of a promised year-end bonus, they were allowing employers to avoid the legislative mandates codified under the Labor Law, that is, to pay an employee for his or her "labor or services rendered." The first case to recognize this was *Weiner v. Diebold Group, Inc*.[3] There, an employee-consultant sued his employer-consulting company for failing to pay a year-end bonus. According to the employee's employment contract, the employee was to receive an annual salary and be eligible to participate in an incentive compensation plan. Under the incentive compensation plan, a bonus was to be paid to the employee based upon the employee's performance for the year. But whether or not the employee received the bonus was ultimately contingent upon whether the employee continued employment with the employer. At the end of the year, the employer had decided to award the employee a bonus of about $200,000, but after paying only a portion of the bonus, withdrew the rest of the bonus because the employee had decided to leave for a competitor. The lower court, on directed verdict, granted plaintiff judgment, but the First Department reversed, primarily on the ground that questions of fact precluded a directed verdict. But importantly, the court held that, notwithstanding *Hall,* an employer could not contract to forfeit earned wages. The court stated:

> While the parties to a contract are free to make any bargain they wish and are held to bargains made by them with their eyes open, they are not free to enter into contracts which violate public policy. Thus, if the incentive compensation payments were payments of earned wages, the plaintiff could not contract to forfeit them.[4]

After *Weiner*, the courts made more of a concerted effort to define the phrase "labor or services rendered." Leading the way was the federal district court sitting in the southern district of New York, which, after a string of decisions, ultimately defined the phrase to mean, "actual work performed." The leading case on the matter is *Samuels v. Thomas Crimmins Contracting Co*.[5] There, the court stated:

> [C]laims under [the Labor Law] are more problematic because New York courts have not clearly interpreted the meaning of "wages" as used in this section. The parties do not dispute that,

> under the [Labor Law], wages include not just salary but also commissions, bonuses, and other benefits. Yet, two intermediate appellate courts in New York have interpreted the term "wages" not to include supplemental or incentive compensation. Neither court has provided a definition for supplemental or incentive compensation but the courts appear to conclude that if an employee has a fixed method of compensation by salary, bonus, commission or otherwise, and additional compensation is dependent on a factor outside the employee's actual work, then such compensation is not wages but merely incentive or supplemental compensation.[6]

This definition was eventually approved by the New York Court of Appeals in *Truelove v. Northeast Capital & Advisory, Inc*.[7] There, an employee-financial analyst sued his employer-investment bank for failing to pay him a year-end bonus. According to the employee's employment agreement, the employee was to receive an annual salary of $40,000 plus a certain amount of money from a bonus pool. The bonus, if paid, was to reflect a combination of the individual's performance and the employer's performance. A subsequently drafted employer memorandum clarified that the bonus was to reflect more of the employer's performance than the individual's performance. At the end of the year, the employer awarded the employee a bonus of $160,000, but, after paying only $40,000 of the amount, withdrew the rest of the award. The lower court and the appellate court granted summary judgment in favor of the employer and the Court of Appeals affirmed. The Court held that the agreement was an incentive compensation plan unrelated to wages for "labor or services rendered." According to the Court:

> The terms of defendant's bonus compensation plan did not predicate bonus payments upon plaintiff's own personal productivity nor give plaintiff a contractual right to bonus payments based upon his productivity. To the contrary, the declaration of a bonus pool was dependent solely upon his employer's overall financial success. In addition, plaintiff's share in the bonus pool was entirely discretionary and subject to the non-reviewable determination of his employer. These factors, we believe, take plaintiff's bonus payments out of the statutory definition of wages.[8]

In other words, said the Court, for a bonus to be considered wages for "labor or services rendered" it must be for the employee's "own performance." For now, this appears to be the rule of law currently in New York regarding whether an employer may withhold or withdraw an employee's promised year-end bonus.[9] If the bonus is for an employee's own performance, then an employer cannot withhold or withdraw the bonus.

From a plaintiff-employee's perspective, the rule is sound. Indeed, from any employee's perspective, the rule is rightfully in touch with reality. Can any employee point to an employer that does not pay a year-end bonus to an employee without considering the employee's performance for that year? True, there are some employers who pay a year-end bonus based on a lockstep method, such as some law firms and accounting companies. But most employers pay a year-end bonus based on an employee's yearly performance, such as investment banks and consulting businesses. These employers acknowledge that by tying a bonus to the employee's yearly performance, employee productivity is increased and, in turn, employer performance is also increased. In other words, these employers, as the Court of Appeals' language in *Truelove* recognizes, find it valuable to tie a bonus with an employee's "labor or services rendered."

An employer who has unlawfully withheld an employee's bonus will be liable for costs and attorney's fees. If the employer willfully withheld the bonus, then the employer is also liable for liquidated damages in the amount of 25% of the total amount of the bonus due. The employer may also be subject to criminal penalties and fines. Unlawful withholding of a bonus properly due is thus a rather serious matter and employees should be vigilant about their rights.

Endnotes

1. 76 N.Y.2d 27 (1990).
2. *Id.* at 36–37.
3. 568 N.Y.S.2d 959 (1991).
4. *Id.* at 167.
5. 1993 U.S. Dist. Lexis 1336, *18–20 (S.D.N.Y. 1993).
6. *Id.* at 19–20.
7. 95 N.Y.2d 220 (2000).
8. *Id.* at 224.
9. *See, e.g., Fiorenti v. Central Emergency Physicians PLLC*, 187 Misc. 2d 805 (Sup. Ct., Nassau Co. 2001).

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The New York State Flag Discrimination Statute

By Michael J. Sciotti

The New York State legislature, in direct response to the events of September 11, 2001, enacted section 215-c of the New York State Labor Law.[1] This new statute, which passed both the Assembly and the Senate unanimously,[2] protects employees from being discharged or discriminated against for displaying the American flag on the "employee's person or work station."[3] The Act took effect on September 17, 2002. The legislative justification for this new statute was set forth in a memorandum prepared by the New York State Senate which indicated in part:

> Due to the recent tragic events in New York City and Washington D.C., and the current war on terrorism, our Nation's citizens have experienced a resurgence of patriotism not seen since World War II. This renewed patriotic spirit can be seen on every home or automobile with an American flag, sticker or banner. People are proud of their Country and wish to display this feeling of patriotism at every opportunity, including wearing the flag on their person or displaying the flag at their work station. These people should not be discriminated against for showing pride in their Country.[4]

The statute applies to all employers, both public and private, without regard to how many employees they have.[5] Therefore, all types and sizes of employers need to be aware of the statute in order to avoid violating it. In addition, employers with a multi-ethnic workplace must be prepared for the potential adverse and hostile situations this statute may cause. For instance, what if your client has a large Bosnian workforce who did not think too fondly of the NATO, and more particularly, American, military actions in Croatia in the late 1990s? Your client also has a veteran in the workforce who proudly displays a lapel pin of the American flag every day on his shirt. The Bosnian workers complain about the flag, claiming it is offensive. Your client, even if it wanted to, could not prohibit the displaying employee from wearing the lapel pin.

Another employer has a workplace rule in its employee handbook which prohibits employees from wearing on their person or displaying in their work area[6] any type of flag. This policy is effectively unenforceable as it relates to the American flag. Therefore, clients should be directed to review their employee handbooks to make sure they are in compliance with this new statute. An interesting question raised by the passage of this Act is whether an employer can have a workplace rule which prohibits all employees from displaying on their person or in their work area a flag of any other country. On its face this statute would not prohibit such a rule. However, practitioners must remember to evaluate such a handbook provision in light of the requirements of federal, state and local discrimination statutes.

"'People are proud of their Country and wish to display this feeling of patriotism at every opportunity, including wearing the flag on their person or displaying the flag at their work station. These people should not be discriminated against for showing pride in their Country.'"

The substantive portion of the statute provides that no employer[7] may "discharge or discriminate against any employee in compensation or in terms, conditions or privileges of employment for displaying an American flag on the employee's person or work station."[8] However, the displaying of the American flag cannot "substantially or materially interfere with the employee's job duties."[9] For instance, if an employee wants to bring a flag into work that is 50 x 25 feet and display it in his/her work area that is 8 x 10 feet, this would most likely qualify, whereas placing a small American flag on the employee's desk would not. What if displaying of the flag causes an unsafe workplace because the displaying employee or other employees could trip over a large flag? Could the company act to prevent such a display even though the flag was not interfering with the displaying employee's job duties? What if the company claimed that the Occupational Safety and Health Act[10] mandated that the flag not be displayed given the health and safety issue it posed? These are just some of the potential issues raised by this seemingly innocuous statute.

It also appears that in the event the displaying of the American flag has an impact on another employee's job duties, the statute does not allow an employer to take action against the employee displaying the flag unless it substantially and materially interferes with the displaying employee's job duties. For instance, an employee

displays a small American flag on his/her desk which does not interfere with his/her job duties. Another employee who sits at the desk next to the displaying employee lost a brother because of American military action in Iraq, and has a problem looking at the American flag. The non-displaying employee cannot work because he is angry that the American flag is being displayed in the workplace. He requests the employer to remove the flag and claims it is creating a hostile work environment based on religion and national origin. It appears the employer cannot take action against the employee displaying the flag. However, employers must remember their obligations to protect workers from hostile work environments and discrimination under federal, state and local laws. Accordingly, if the displaying employee were engaging in other conduct which could be construed as a hostile work environment, the employer must act.

An employee who believes he/she has been aggrieved under the statute may file a complaint with the Commissioner of Labor, who "may, by an order which shall describe particularly the nature of the violation, assess the employer a civil penalty of not less than $200 nor more than $2,000."[11] In addition, an employee may bring a civil action in New York State Supreme Court or any other "court of competent jurisdiction" for a violation of this statute.[12] The statute contains a two-year statute of limitations.[13] The damages available under the Act include: 1) injunctive relief; 2) reinstatement or rehiring to the employee's "former position with restoration of seniority"; 3) back wages; and 4) reasonable attorney's fees.[14]

In addition, although the Act appears silent on its face, an individual may also recoup 9% interest on his/her back wages.[15] For instance, if this statute is interpreted like the New York State Human Rights Law, interest may be awarded. In *Aurecchione v. N.Y. Div. of Human Rights*,[16] the plaintiff was successful in her hearing before the Division of Human Rights and was awarded back pay. "The Division refused, however, to award 'pre-determination interest'—interest accruing from the date of discrimination."[17] The Court indicated:

> Although the Human Rights Law, like Title VII, makes no specific reference to pre-determination interest, a liberal reading of the statute is explicitly mandated to effectuate the statute's intent. Clearly, a central concern of the Human Rights Law is to make such victims "whole." This Court has repeatedly acknowledged that as the purpose of an interest award. Pre-determination interest awards are consistent with such concerns. This is so because an award of interest is often appropriate from the time at which a party was deprived of the use of money, since without the addition of interest, the aggrieved party is not made whole.[18]

The failure of the Division to award prejudgment interest was an abuse of discretion in this case.[19] However, the Court of Appeals stopped short on mandating prejudgment interest in every case stating:

> We reject petitioner's argument, however, that pre-determination interest must in every case be awarded as a matter of law, and hold that the Commissioner is afforded some discretion in determining the extent of appropriate compensation for violations of the Human Rights Law, subject to appellate review for abuse.[20]

"[C]ounsel must make sure their employer clients know about this law so they can modify their practices and handbooks and, to the extent they engage in training, modify their training programs."

One of the more peculiar aspects of the Act concerning damages is that it indicates that, in addition to the before-mentioned relief, a court can grant "damages."[21] Does this mean punitive damages?[22] Does this mean compensatory damages for mental anguish and emotional distress? The Act is silent in that regard. Plaintiffs will be sure to ask for these damages given the vagueness of the term, and defense counsel must be prepared to argue that these damages are not available under the statute.[23]

The Act does contain what at first glance could be described as an administrative prerequisite to the commencement of a lawsuit. The statute indicates that the plaintiff must, before or at the time of commencement of the action, serve notice upon the New York State Attorney General of the suit.[24] The Act does not explain what, if any, role the New York State Attorney General has beyond being provided with notice. What happens if the Act is not complied with on this point? The statute does not discuss what happens. Arguably, the suit would be subject to dismissal.

In summary, counsel must make sure their employer clients know about this law so they can modify their practices and handbooks and, to the extent they engage in training, modify their training programs. It is antici-

pated that this claim will be brought along with a discrimination or harassment claim under federal, state and local laws, so employment counsel should become acquainted with the statute in order to properly defend or prosecute a claim.

Endnotes

1. The purpose of the statute according to the sponsor's memorandum is "to impose liability on employers for discharging or discriminating against employees for displaying the American flag on their person or work station." *N.Y. State Senate Introducer's Memorandum In Support*, p. 1. It "provides further for violators to pay a fine and be liable to the employee for damages, including reasonable attorney's fees and lost compensation." *Id.*
2. The bill passed the New York State Senate on June 19, 2002 by a vote of 60-0, and in the New York Assembly by a vote of 147-0 on June 25, 2002. *Id*.
3. N.Y. Labor Law § 215-c(1) (LexisNexis 2003).
4. *N.Y. State Senate Introducer's Memorandum In Support*, p. 1.
5. N.Y. Labor Law § 215-c(1).
6. An interesting question presented by the statute is the meaning of "work station." The statute does not define it. What if you have multiple individuals sharing a work area? What if you have a company that has three shifts running twenty-four hours a day where you have three different employees sharing the same "work station" albeit at different times? The statute simply fails to give guidance on these issues.
7. Remember the law applies to both public and private employers and their "duly authorized agent." *Id*.
8. *Id.*
9. *Id.*
10. 29 U.S.C. § 651, *et al.*
11. *Id.*
12. N.Y. Labor Law § 215-c(2).
13. *Id.*
14. *Id.*
15. N.Y. Civ. Prac. L & R. § 5004 (LexisNexis 2003).
16. 98 N.Y.2d 21, 771 N.E.2d 231, 744 N.Y.S.2d 349 (2002).
17. *Id.* As indicated by the Court of Appeals "the issue of prejudgment interest awards on back pay in the employment discrimination context has been addressed on numerous occasions in the Federal courts. The Human Rights Law, while unique in many respects, seeks to remedy the same type of discrimination as its Federal counterpart—Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq*.). We have acknowledged the similarities and attempted to resolve Federal and State employment discrimination claims consistently. . . . Because both the Human Rights Law and Title VII address the same type of discrimination, afford victims similar forms of redress, are textually similar and ultimately employ the same standards of recovery, federal case law in this area also proves helpful to the resolution of this appeal." *Id.* (citations omitted).
18. *Id.* (internal quotes and citations omitted).
19. *Id.*
20. *Id.*
21. N.Y. Labor Law § 215-c(2).
22. Assuming punitive damages are available under the Act, which the author maintains they are not, counsel should advise the client to add a provision about the Act to the employee handbook. In addition, employers who conduct harassment and discrimination training should include the Act in their training in order to avoid punitive damages. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999).
23. An attempt was made to obtain the Bill Jacket for the statute. However, at the time this article was submitted for publication, the Bill Jacket was not ready.
24. N.Y. Labor Law § 215-c(2).

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Ethics Matters

By John Gaal

Q In the course of representing my client in a transaction, I learned that the opposing party had recently committed an illegal act. Am I required to report that act to the appropriate authorities?

A Not only are you not required to report it under the circumstances, you may be prohibited from doing so, at least without your client's consent.

Two provisions of the Code of Professional Responsibility impose an obligation upon a lawyer to report wrongdoing to outside authorities, and those provisions are very narrowly drawn.

Disciplinary Rule 1-103 sets out a lawyer's obligation to report certain types of misconduct involving other lawyers. Under this provision, if you possess knowledge, regardless of how that knowledge is obtained, that another attorney has committed a violation of DR 1-102 (which defines attorney misconduct), and that violation raises a substantial question as to that other lawyer's honesty, trustworthiness or fitness as a lawyer, you are obligated to report that information to the appropriate authority so long as that information is not protected as a client confidence or secret.

While absolute certainty of wrongdoing is not needed to trigger this obligation, there must be at least a "clear belief" of a rules violation; a "mere suspicion" is not sufficient.[1] Even then the violation must raise a "substantial question" as to the lawyer's integrity. Thus, only serious violations of the Code must be reported.[2] And, perhaps most significantly, reporting is only required when doing so would not improperly reveal a client confidence or secret.[3] Of course, this rule is not applicable to your situation because the individual who you have learned committed the unlawful act in this case is not an attorney.

The other reporting requirement in the Code appears in Disciplinary Rule 7-102, which sets out a lawyer's obligation with respect to certain types of wrongdoing by non-lawyers. Specifically, DR 7-102(B)(1) provides that a lawyer who receives information clearly establishing that her *client* has, in the course of the representation, perpetrated a fraud on a person or tribunal must call upon the client to rectify the fraud and if the client is unable to or refuses to do so, the lawyer must reveal the fraud to the affected person or tribunal, except when that information constitutes a client confidence or secret. Again in your situation this provision is not applicable because the wrongdoing was committed by a person other than your client.

Moreover, the exception for client confidences and secrets included in this rule is significant, and nearly swallows the rule itself. Since, most often, information acquired about a client's fraud (or any other unlawful activity) is likely to constitute a client confidence or secret, the exception will generally apply, eliminating any obligation to report. In addition, if your knowledge of this conduct does constitute a client secret or confidence, not only are you not required to report it, except in extremely limited circumstances, you are not even *permitted* to report it. Disciplinary Rule 4-101 basically provides that you may not reveal a client confidence or secret without your client's consent. A very narrow exception exists for confidences or secrets which reflect an intention of a client to commit a crime in the future. (Even in those instances, however, revelation of those facts is only permitted, it is not required.)

Disciplinary Rule 7-102(B)(2) comes closest to your situation and provides that when a lawyer receives information clearly establishing that a person other than her client has perpetrated a fraud upon a tribunal, she shall reveal that fraud. But even here you have no requirement to report unlawful conduct under this provision unless it actually amounts to a fraud on a tribunal. And although it is not stated in the rule itself, the New York State Bar Association has opined that a lawyer is not required to disclose (and should not disclose) such misconduct by another if that information constitutes a client confidence or secret and the client does not wish it to be disclosed.[4]

In this regard it is important to keep in mind that the definition of "secret" is very broad and extends to any "information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."[5] Thus it is sufficient if the information is obtained "in the course of" the professional relationship, even if it is not actually obtained from the client himself. This same Opinion also reads into DR 7-102(B)(2) the second limitation which appears explicitly in subsection (B)(1), namely that a reporting obligation only arises in the event the fraud relates to the representation with which the lawyer is involved. Consequently, if a lawyer learns of fraud committed by another in a prior matter, there is no duty to report.

Endnotes

1. NYSBA Formal Opinion 635 (1992); EC 1-4.
2. NYSBA Formal Opinion 635.
3. *Id.; see, e.g.,* Nassau County Bar Opinion 98-6 (1998) (lawyer may not report another's lawyer's embezzlement of his client funds where his client has requested that the information be kept confidential).
4. NYSBA Formal Opinion 523 (1980); NYSBA Formal Opinion 742 (2001).
5. DR 4-101.

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The 2002-2003 Law School Liaison Committee Report

By Robert T. Simmelkjaer

In every respect the Law School Liaison Committee (LSLC) was successful in achieving its goals for the 2002-2003 period. Following a year in which input was solicited from the deans and faculty of the New York State law schools as well as from the Executive Committee of the Labor and Employment Law Section regarding ways in which the relationship between the law schools and the LSLC could be improved, the LSLC restored the Dr. Emanuel Stein Memorial Writing Competition and initiated the Law School Student Awards.

The results of the writing competition have been gratifying not only in terms of the unprecedented number of essays submitted but also with respect to the high quality of research and analysis displayed by the participants.

The LSLC awarded the first prize to Jennifer White, a student at St. John's Law School, for her essay entitled: "Religion in the Workplace: The Conflict Between the Religion Clauses of the First Amendment." The second prize was awarded to Carol Abdelmesseh and Deanne DiBlasi, students at Hofstra Law School, for their essay entitled: "Why Punitive Damages Should Be Awarded for Retaliatory Discharge Under the Fair Labor Standards Act." Two third prizes were awarded. Laura Marino, a student at St. John's Law School, received a third prize for her essay entitled: "Mandatory Arbitration Agreements in Employment Contracts: A Necessary Evil?" A third prize was also awarded to Jennifer Stone, a student at Brooklyn Law School for her essay entitled: "The Bottom Line of the 'Bottom Line' Defense."

A significant part of the Committee's success can be attributed to the work of its members and volunteers who read and evaluated the essays. For their diligence, the LSLC extends its appreciation to Richard Adelman, Robert L. Douglas, Howard C. Edelman, Norma Meacham, and Caryn Stein. The Committee is also grateful for the highly professional support provided by Linda Castilla, without whom the Committee's work would have been considerably less effective.

The Labor and Employment Law Section Law School Student Awards are conceptualized as a means of rewarding exemplary student performance in the field of Labor and Employment other than essay writing. Considering the range of activities in which students could excel, the LSLC was equally impressed with the accomplishments of these awardees.

The first prize was awarded to Anderson ("Tosh") Brown, a student at the CUNY School of Law at Queens College, both for his outstanding performance in all labor-related courses and his volunteer efforts on behalf of National Mobilization Against Sweatshops and Chinese Staff and Workers Association.

The second prize was awarded to Marisa Rossi, a student at St. John's Law School, for her general excellence in labor and employment law courses, and leadership in the field of labor law, including her service as President of the Labor Law Society and law clerk with AFTRA.

The third prize was awarded to Thomas C. Burnham, a student at SUNY Buffalo School of Law, for his exemplary performance in several labor and employment law courses, culminating with a Certificate in the Labor and Employment Law Concentration.

In restoring the student writing competition and initiating the student service awards, the LSLC maintains that it has renewed a positive relationship between the state's law schools and the Labor and Employment Law Section—a relationship which has proven to be mutually beneficial. We intend to expand the frequency of academic and professional interaction between the Labor and Employment Law Section and the law schools in order to maximize the opportunities available for students to explore career options within labor and employment and, at the same time, foster the growth and continuity of labor and employment in the legal community. Given the supportive feedback the committee has received from several law school deans and faculty, our expectations of future success seem reasonable.

For Your Information

Benetar Bernstein Schair & Stein announces that **Lisa M. Brauner** has become associated with their firm.

Gerald T. Hathaway left Bingham McCutchen LLP, where he headed that firm's New York labor and employment practice, and has joined the New York office of Littler Mendelson as a shareholder.

Gregory Mattacola has joined the firm of McMahon, Grow & Getty in Rome, New York.

Matthew Siebel has joined the firm of Lynn & Associates in Burlington, Vermont.

Religion in the Workplace: The Conflict Between the Religion Clauses of the First Amendment

By Jennifer N. White

I. Introduction

The First Amendment to the Constitution provides that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof."[1] The grant of free exercise of religion and protection from government establishment of religion seem to be the perfect complement to one another. However, courts sometimes have to choose between a person's free exercise of religion and the state's goal of maintaining separation between church and state.[2] This conflict has resulted in a lack of uniformity in considering Religion Clause cases and a failure to apply a bright-line rule to situations involving potential First Amendment violations.

The Supreme Court has taken many different routes in determining the outcome of cases involving the Religion Clauses. *Lemon v. Kurtzman*[3] is the seminal case for Religion Clause issues and the standard the Court applied in that case is now referred to as the *Lemon* test. Since 1971, there has been much debate over the appropriateness of the *Lemon* test and whether substitute tests should be applied to cases involving the Religion Clauses.

Religion has become an important aspect of the workplace. Employees wishing to freely exercise their religion often request personal leave for religious holidays and observances. Employers must grapple with making the decision to permit or deny an employee's request. This decision is of concern to the employer because it can offend an employee's First Amendment right to free exercise of religion,[4] but may also be seen as furthering the establishment of religion prohibited by the First Amendment.[5] Freedom of religious speech in the workplace is also an issue. Religious speech in the workplace presents legal questions for both employers and employees in determining what should be permitted and when the speech has gone too far as to offend other employees.

Religion in schools is also a major issue in public-sector employment. Conflict often arises when potentially religious material is taught in the classroom or teachers speak out on topics of a religious nature. In schools, the First Amendment is also implicated when teachers request time off for religious observances.

II. The Interpretation of the Religion Clauses in the Court

A. The *Lemon* Test

In *Lemon v. Kurtzman*,[6] state statutes providing governmental aid to church-related schools were declared unconstitutional.[7] The Court stated that the language of the Religion Clauses of the First Amendment is "opaque" and a law "respecting the establishment of religion is not always easily identifiable."[8] Justice Burger stated that Establishment Clause analysis must begin with the cumulative criteria developed by the Supreme Court over many years.[9] The first question considered is whether the statute must have a clear legislative purpose.[10] Second, the statute's principal or primary effect must be one that neither advances nor inhibits religion.[11] Lastly, the statute must not foster "an excessive government entanglement with religion."[12] If the statute does not have a clearly secular purpose, then the second or third criteria need not be considered.[13] These three tests, gathered from *Board of Education v. Allen*[14] and *Walz v. Tax Commission*,[15] now form what is referred to as the *Lemon* test.

In determining the first prong of the test, inquiry into the legislative purpose of the statute in question is conducted.[16] If it can be concluded that the legislative intent was to advance religion, then the statute is in violation of the Establishment Clause.[17] It is rare that governmental action will be found to lack a secular purpose where there is no question that such action was motivated solely by religious considerations, therefore examination of the first prong is not always vital to a final determination of constitutionality.[18] The Court in *Lemon* declared that there was no legislative intent to advance religion because the statutes clearly articulated that they were intended to enhance the quality of the secular education in all schools.[19] A later case following the *Lemon* test interpreted the first prong to mean that it is appropriate to ask whether government's actual purpose is to endorse or disapprove of religion.[20]

The second prong of the test, the principal or primary effect of the statute must be one that neither advances nor inhibits religion,[21] is a necessary subsequent to the first prong. A determination must be made as to the legislative purpose first, then the effect of the

statute can be considered.[22] The necessary effects of the statute must be compared with its stated purpose in order to determine if the effect of the statute advances or inhibits religion.[23]

In order to determine whether the government entanglement with religion is excessive, an examination of the following is warranted: the character and purposes of the institutions that are benefited, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority.[24] Prior Supreme Court holdings do not call for a total separation between church and state, for total separation is not absolutely possible.[25] Justice Burger cautions that judicial interpretations of entanglement must recognize that the line of separation is a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[26]

The *Lemon* case was decided on the entanglement issue with the Court concluding that the cumulative impact of the entire relationship arising under the statutes involves excessive entanglement between government and religion.[27] The Court's use of the three combined factors from *Allen*[28] and *Walz*[29] has been debated and discussed in most of the cases involving the Religion Clauses following the *Lemon* decision until the present day. These various modifications and considerations will be discussed in the following section.

B. The Aftermath of *Lemon v. Kurtzman*

The Supreme Court seems to have difficulty in finding the proper test for Religion Clause situations. While some cases follow the *Lemon* test, most Justices have modified it in some way.

A major case following the *Lemon* test is *Wallace v. Jaffree*.[30] In concluding that Alabama statutes authorizing moments of silence in public school for prayer and meditation were unconstitutional, the Court discussed the criteria for the *Lemon* test.[31] It found that consideration of the second and third criteria were necessary because the statutes did not have a clearly secular purpose.[32] The Court stated that the presence of voluntary prayer indicates that the state intended to characterize prayer as a favored practice.[33] Such an endorsement is not consistent with the principle that the government must pursue a course of complete neutrality toward religion.[34]

Wallace[35] is not only important because of the majority's consideration of *Lemon*,[36] but also due to Justice O'Connor's concurring opinion discussing the endorsement test modifying the *Lemon*[37] criteria.[38] The endorsement test provides a more analytic content to the first two prongs of *Lemon*,[39] easing the difficulty of the inquiry into legislative purpose and effect.[40] When considering the purpose and effect of a statute under the endorsement test, the court examines whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement.[41] The endorsement test seems to be more lenient than the *Lemon* test because it takes into account that government and religion can interact without violating the Religion Clauses. Rather than precluding government from acknowledging religion or from taking it into account when making policy, the endorsement test precludes government from conveying a message that religion or a particular religious belief is favored or preferred.[42] Justice O'Connor summarized the test in stating: "the relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools."[43]

Perhaps the most influential portion of Justice O'Connor's concurring opinion in *Wallace*[44] is the discussion of the relationship between the Free Exercise Clause and the Establishment Clause.[45] Few Justices have mentioned the importance of this conflict in consideration of Establishment Clause cases, but Justice O'Connor seems to realize that the outcome of cases dealing with one of the Religion Clauses directly affects cases concerning the other Clause. The challenge lies in how to define the proper Establishment Clause limits on voluntary government efforts to facilitate the free exercise of religion.[46]

O'Connor proposes that the solution to the conflict between the Religion Clauses is to identify "workable limits to the government's license to promote the free exercise of religion."[47] Free exercise of religion, in relation to the Establishment Clause, is generally fostered when the government lifts an imposed burden on free exercise.[48] O'Connor then logically concludes that an Establishment Clause test requiring a statute to possess a purely secular purpose inherently violates the Free Exercise Clause.[49] O'Connor's standard is rational because it is virtually impossible for a statute dealing with religion to have a purely secular purpose; and it appears that the existence of the Free Exercise Clause would justify the constitutionality of statutes possessing some religious purpose.

Other Justices have proposed alternatives to the *Lemon* test and endorsement test, including Justice Kennedy's coercion test in *County of Allegheny v. ACLU*.[50] He adamantly rejects the *Lemon* test in stating that it provides a view of the Establishment Clause reflecting an unjustified hostility toward religion that is inconsistent with our history and precedents.[51] The first part of this test requires that government may not coerce anyone to support or participate in any religion or its exercise.[52] The second principle is that government may not give direct benefits to religion in such a degree that it establishes a state religion or religious faith.[53]

These principles are derived from the need for diligent observance of the border between accommodation and establishment of religion in a society with a "pervasive public sector" so that religion can be accommodated effectively.[54] It has been common practice of the Court to invalidate government actions that further the interests of religion through coercive power.[55] Kennedy provides that "coercion" does not have to mean direct coercion in the classic sense, thus symbolic recognition or accommodation of religious faith may violate the Establishment Clause in an extreme case.[56] However, the risk of violation of the Religion Clauses by passive or symbolic accommodation is minimal without the presence of coercion.[57] The coercion test represents a movement toward a workable approach in determining the outcome of Religion Clause cases because it is in direct relation to the standard of coercion that led to the original adoption of the Establishment Clause.[58] The founding fathers wanted to create a nation free from religious oppression; and the creation of the Establishment Clause shows that preventing the government from coercing its citizens into religious beliefs and practices was vital to the free exercise of religion.

C. The Position of the Second Circuit

The Second Circuit has shown a general pattern of following the *Lemon* test in deciding Establishment Clause cases.[59] This court, unlike the Supreme Court, seems to be able to agree on the standards that should be applied. However, the use of the *Lemon* test is not followed strictly, rather, other factors are included into the original three prongs. The Court also includes language from other cases, including *Lynch v. Donnelly*[60] and *County of Allegheny v. ACLU*[61] in describing the application of the *Lemon* test.

The most recent case in the Second Circuit dealing with the Religion Clauses is *Commack Self-Service Kosher Meats, Inc. v. Weiss*.[62] Plaintiffs, involved in the meat business, brought an action against the Director of the Kosher Law Enforcement Division of the New York State Department of Agriculture and Markets claiming that certain laws of the Department regulating kosher meats violate the Establishment Clause.[63] The court found the New York kosher fraud laws challenged in the action to be in violation of the Establishment Clause and therefore deemed unconstitutional.[64] The court followed the *Lemon* test in holding that the laws fostered an "excessive State entanglement with religion and produced a primary effect that both advances and inhibits religion."[65] The court goes through a step-by-step analysis of the facts as they apply to the principles set forth in the *Lemon* test.[66] However, within its discussion of the secular-purpose prong of the test, the Court includes principles set forth in *Lynch*[67] in stating: "government action will only be found to lack a secular purpose where there is no question that the statute or activity was motivated wholly by religious considerations."[68] This case, decided in May 2002, provides a perfect example for the way the Second Circuit approaches Establishment Clause issues.

Another major case decided by the Second Circuit recently is *Altman v. Bedford*.[69] The court found that an Earth Day celebration did not violate the Establishment Clause because an objective observer would not view the celebration as endorsing religion.[70] Similar to *Commack Self-Service Kosher Meats*,[71] the court followed the *Lemon* test but included speech from other cases in its analysis. In applying the first prong of the *Lemon* test, the court asked whether the government's actual purpose is to endorse or disapprove of religion, following language from *Edwards v. Aguillard*.[72] In considering the second prong of the *Lemon* test, the court considered whether a reasonable observer would find that the Earth Day celebration had the effect of endorsing religion, borrowing principles from *County of Allegheny v. ACLU*.[73] This case shows that the Second Circuit believes the *Lemon* test provides the general guidelines for deciding Establishment Clause cases. However, in applying each prong of the test, the court incorporated principles from other cases, further illustrating that the law is not yet settled on this issue.

III. Religious Leave in the Workplace: An Employer's Nightmare?

Problems often arise in the workplace when an employee requests leave for religious reasons because there can be a major conflict between the Free Exercise Clause and the Establishment Clause. Religious leave is often a part of collective-bargaining agreements and is usually mentioned in the employment contract. The employer bears the major burden of establishing guidelines that do not show an endorsement of religion, but also must be sure not to infringe upon employees' free exercise rights.

A. The Supreme Court and Title VII

Title VII of the Civil Rights Act of 1964[74] safeguards religious freedom in the workplace by declaring it unlawful for an employer to discriminate on the basis of religion.[75] The scope of Title VII was amended in 1972 to include public employers.[76] The Act requires employers to "reasonably accommodate an employee's "religious observance or practice without undue hardship on the conduct of the employer's business."[77] Title VII is important because it protects employees' rights under the Free Exercise Clause and seeks to prevent religious discrimination. Also, it would be reasonable to assume that it would be harder to prove an employer violated the Establishment Clause when accommodating an employee's religious observance because they are mandated to do so by federal law.

A major Supreme Court case dealing with religious leave in the workplace and Title VII accommodation issues is *Ansonia v. Philbrook*.[78] Ronald Philbrook, a member of the Worldwide Church of God, was employed as a business teacher in the Ansonia School District.[79] As a member of this church, he was required to refrain from secular employment during designated holy days, which had caused him to miss a certain number of school days each year.[80] The school board's collective-bargaining agreements with the teachers' union granted a certain number of leave days per year, including three days for observance of mandatory religious holidays.[81] Personal business leave days were also specified in the contract, but an employee could not use those days for "any religious activity or religious observance."[82] Philbrook observed mandatory holy days by using the three days granted in the contract and then by taking unauthorized leave for which his pay was reduced accordingly.[83] He then asked the school board to either allow personal business leave days for religious observance or pay the cost of a substitute and receive full pay for additional religious observance days.[84] The school board rejected his proposals, and in response Philbrook brought an action alleging that the policies and practices of the school board violated his free exercise rights and the prohibition on the use of "necessary personal business leave for religious observances" violated Title VII of the Civil Rights Act of 1964.[85]

The Court addressed whether an employer must accept the employee's preferred accommodation absent proof of undue hardship.[86] The Court found that there is no basis, either in the statute or its legislative history, for requiring an employer to choose any particular accommodation because the statute provides that any reasonable accommodation is sufficient to meet the obligation.[87] Therefore, where the employer has already reasonably accommodated the employee's religious needs, the employer need not further show that each of the employee's alternative accommodations would result in undue hardship.[88]

The Court held that the school board policy requiring Philbrook to take unpaid leave for holy day observance exceeding the amount allowed by the contract is a reasonable accommodation.[89] The Court reasoned that allowing unpaid leave eliminates the conflict between employment requirements and religious practices.[90] This also shows that by permitting unpaid leave, the employer may be shielded from accusations of endorsing religion. Taking unpaid leave is the personal choice of the employee, and if that leave is for religious reasons, the employer is showing a lack of religious endorsement by not paying the employee. However, the Court stated that unpaid leave is not deemed a reasonable accommodation when paid leave is provided for all purposes except religious ones.[91] The Court remanded to the District Court to determine this issue because the school board contends that the "personal business" category is limited, while Philbrook maintains that the category is open-ended to be used for a wide range of secular purposes but not for any religious purposes.[92] The Court stated that the answer turns on an in-depth factual inquiry into the administration of "personal business leave provisions."[93]

This case is important because it provides guidelines for determining when an employer is liable under Title VII for failing to provide a reasonable accommodation. It seems as though once the employer has provided any sort of reasonable accommodation, it has met its obligations under Title VII. This case provides a perfect example of how difficult it is for employers to approach religion in the workplace. The conflict between the Religion Clauses especially arises in a situation where leave is given for religious reasons. Paid leave could be a violation of the Establishment Clause by the employer because it may be seen as endorsing religion. On the other hand, unpaid leave could be seen as a violation of an employee's right to free exercise of religion because the employer may be accused of taking a position against religion. The employer's hands are tied in these situations and no matter how careful they are in crafting the language of the contract, there will always be some employee who feels his rights were violated. This conflict is further discussed in the following sections.

B. The Constitutionality of Paid Leave in the Public Sector in New York

In New York, allowing employees use of paid personal time for religious purposes is a mandatory subject of bargaining under the Taylor Law.[94] This provides more reason for contracts to contain provisions on religious leave. However, it may also be why there are so many cases arising over dissension with religious leave in the workplace. Despite the bargaining rule, various New York courts and the Public Employment Relations Board (PERB) are following a general trend of finding paid leave for religious reasons to be unconstitutional. The rule seems to be that providing paid leave time for religious holidays is a violation of the Establishment Clause because employees who claim to be religiously observant are rewarded.[95]

In *Civil Service Employees Association, Inc., Local 1000 v. Eastchester Union Free School District*,[96] the cause of action arose as a result of the school district rescinding a past practice allowing employees days off with pay on request for religious observance.[97] Employees who followed a religion were granted paid time off upon demand to practice that religion.[98] These paid days for religious leave were in addition to the paid leave days all employees were granted for other reasons.[99] The

result of this practice was to deny "agnostics, atheists and religious non-practitioners the benefit of additional days off with pay, and without charge to leave credits, while granting religious practitioners such benefits."[100] Therefore, employees maintaining some religious belief and practice receive a monetary benefit from the District's policy.[101] Favoring one religion, or non-religion, over another is exactly what the Religion Clauses of the Constitution seek to prevent. It is for this reason that the Board found the District's practice unconstitutional.[102] The Board concluded that paid leave from work upon request conditioned exclusively upon participation in religious activity violates the Establishment Clause.[103]

The Second Department followed a similar line of reasoning as the PERB decisions in *Port Washington Union Free School District v. Port Washington Teachers Association*.[104] The collective-bargaining agreement between the District and the Association provided that, upon written request, members could receive paid leave for "any of the religious holidays designated by the New York State Commissioner of Education."[105] In 1997, the District decided to no longer follow the provision in the agreement because it was unconstitutional.[106] The Board found that the provision violated the Establishment Clause because it rewarded those who claimed to be religiously observant with more paid days off than "those afforded to agnostics, atheists, and members who are less observant."[107]

Some employers have said that no religious leave at all is permitted in the workplace. For example, in *Clarkstown Central School District v. Clarkstown Educational Secretaries Association*,[108] the District unilaterally eliminated religious observance as a reason for personal leave.[109] The District argues that elimination of religious leave is necessary in order to avoid violating the Establishment Clause because the provision provides a financial benefit to public employees based on their religious practices.[110] The court mentioned *Lemon*,[111] in stating that the provision in question would require the government to "become engaged in excessive entanglement with religion and to possibly favor one religion over another."[112] The provision would require the District to determine whether "compelling reasons require the employee to be absent from work."[113] The court found that this would place the District in the position of interpreting religious faiths, an involvement that is unconstitutional.[114] The provision was deemed unconstitutional and the District was permitted to cease its enforcement.[115] This court's finding, that denial of any religious leave is permitted, shows that excessive entanglement with religion is not justifiable. When an employer must consider each employee's personal religious beliefs as compared to the beliefs of others, it is clearly a violation of the Establishment Clause. The Clarkstown School District would have endorsed religion by choosing which particular religious belief deserved paid leave. It would almost seem as if the District would be taking a position that certain religions are superior to others.

Most courts seem to have the attitude that paid leave is unconstitutional because it is a clear endorsement of religion. Paid leave appears discriminatory because the employer is almost saying that practicing religion is better than not practicing, and an employee who does not practice will not reap the benefits of extra paid leave.

IV. Religious Speech in the Workplace

Religious speech in the workplace presents legal questions for both employers and employees, and often creates a conflict between the Free Exercise and Establishment Clauses. Speech of a religious nature is problematic because it can be offensive to co-workers, and can even be seen as harassment. An employer seeking to prohibit all religious speech could be accused of violating the Free Exercise Clause because employees would not have the right to express and discuss their religious beliefs. On the other hand, allowing some religious speech could be seen as a violation of the Establishment Clause because the employer may be favoring one religion or belief over another, therefore supporting an endorsement of religion.

A. Employer Concerns Arising from Religious Speech

When examining the use of religious speech in the workplace, it is important to compare the employer's policies restricting speech with the employee's First Amendment speech and religion protections.[116] Upon consideration of these policies, the employer must balance the employee's right to free speech and free exercise of religion, with the rights of other employees who find the speech offensive.[117] The employees who find the speech offensive are usually those who wish to avoid attacks on their own religion.[118] These employees should be protected from mistreatment of harassment at work on the basis of their religious faith or the lack thereof.[119]

Speech of a religious nature is generally of utmost concern to the employer because the employer has to look out for the best interest of the workplace environment. The employees' speech can be regulated when their speech interests are outweighed by the employer's interest "in promoting the efficiency of the public services it performs through its employees."[120] Often an individual employee's rights must be sacrificed for the greater good of the productivity of the workplace environment. An employer not only has to protect the work environment, it must also be aware of constitutional issues. Employers may also have to limit the speech of employees and officials when the speech can be reason-

ably perceived as a state endorsement of religion or as putting pressure on others to engage in a religious practice.[121] If this practice occurs, the employer will be in violation of the Establishment Clause.

An employer can try to prevent harassment and constitutional violations by placing fair restrictions on the employees' speech.[122] Employer policies could limit employees from speaking on certain subjects, from speaking in certain areas of the workplace, or from displaying personal religious messages in open spaces.[123]

B. Where Courts Stand on the Issue

The Supreme Court has said that free speech rights can be abridged when the state's compelling interest is in avoiding an Establishment Clause violation.[124] In cases involving religious speech, the Court first considers the constitutionality of the challenged action under the Establishment Clause.[125] When free speech issues are involved, the examination of the religious issues is more fact-specific and in-depth because the Court must determine whether an employee's right to free speech can be sacrificed by the employer's Establishment Clause concerns.[126]

In *Lamb's Chapel v. Center Moriches Union Free School District*,[127] the Supreme Court found that a church would be permitted to show a film presentation on school grounds because it was not a violation of the Establishment Clause and prohibiting the activity would be a Free Speech Clause violation.[128] The Court decided that permitting District property to be used for the film was not an establishment of religion under the *Lemon* test because it did not foster an excessive entanglement with religion.[129] The Court specifically considered each fact in making its determination, because in order for the church's right to free speech to be abridged, the District must have had a compelling interest.[130]

The Second Circuit has recently grappled with this issue in *Knight v. State of Connecticut Department of Public Health*.[131] Plaintiffs Jo Ann Knight and Nicolle Quental were, respectively, a nurse consultant with the Department and a sign language interpreter for the Commission on the Deaf and Hearing Impaired.[132] Both women describe themselves as born-again Christians and were reprimanded for speaking out on and promoting their religious beliefs while working with clients that were receiving government services.[133] Plaintiffs argue that the state violated their right to free speech and free exercise of religion.[134]

The court found that religious speech was a matter of public concern, but permitting religious speech when working with clients was disruptive to the work environment, and this disruption outweighed the free speech interests.[135] Knight and Quental promoted religious messages while in their capacity as state employees, and the harmful side effects of their speech justified the employer to take adverse action.[136] The state raised Establishment Clause concerns in limiting the use of religious speech because the Clause "prohibits government from appearing to take a position on questions of religious belief."[137] The court said that the interest of the state in avoiding an Establishment Clause violation was compelling in this case, therefore justifying an abridgement of free speech.[138]

Religious speech in the workplace not only presents a conflict between the Free Exercise and Establishment Clauses, but also involves the fundamental right to free speech. When dealing with numerous constitutional fundamental rights, it is difficult to decide which one should prevail, and why certain rights should be abridged for the sake of others. A lengthy discussion could ensue from this issue, but it is not necessary here, for the focus is on the religious nature of the speech.

V. The Impact of the Religion Clauses in Schools

The Establishment and Free Exercise Clauses are applicable to the schools as subdivisions of the state through the Fourteenth Amendment.[139] The Supreme Court has emphasized that the special nature of public schools gives rise to "the need for affirming the comprehensive authority of the states and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[140] The Religion Clauses become an issue in employment in schools when the behavior of the teachers is regulated. School districts are in danger of violating the Establishment Clause when teachers present or teach issues that are highly religious in nature. Also, when a teacher expresses his or her religious beliefs to students, it may be seen as an endorsement of religion. The teachers' actions are under such scrutiny because when they are in the classroom, they are acting within the scope of their employment, therefore essentially acting on behalf of the school district. Courts have said that a public school teacher is not any ordinary citizen, for he "is clothed with the mantle of one who imparts knowledge and wisdom and his expressions are all the more believable as a result."[141] It is common for parents of children attending the schools to find teachers' statements and curriculum offensive, and this can lead to actions filed against the school district. However, the Free Exercise Clause can also play a role in schools when a teacher is restricted from certain practices. Teachers may be able to bring a cause of action against their employer when their right to the free exercise of religion is violated.

A. Establishment Clause Issues in Schools

Alleged Establishment Clause violations are the most common problem relating to religion in public schools. These issues can arise from material the teacher covers in the curriculum and religious speech used in the classroom. With regard to this issue, courts have struck down school-sponsored religious activities as an official endorsement of religion, and have also held that public school officials have the authority to prevent teachers from giving the impression that the school prefers a particular religion, or religion in general.[142]

These principles were examined by the Second Circuit in *Marchi v. Board of Cooperative Educational Services*.[143] Dan Marchi is a certified special education teacher who alleges that he underwent "a dramatic conversion to Christianity."[144] He shared his religious experience with students and went so far as to modify his instructional program to include topics such as forgiveness, reconciliation, and God.[145] A "cease and desist letter" was issued to Marchi by his supervisor, directing him to stop using religion as part of his instructional program; and Marchi refused to abide by the directive because to do so "would be detrimental to his students and would violate his conscience before God."[146] Following a disciplinary hearing, Marchi received six months' suspension for his actions and his return to teaching was conditioned upon his commitment, in a written affirmation, to follow his supervisor's instructions.[147] Marchi brought this action alleging that the Board of Cooperative Educational Services violated his rights to free speech and free exercise of religion.[148]

The court found that the directive is a restraint on Marchi's First Amendment[149] rights, but not all restraints on free exercise and free speech rights are invalid.[150] Due to the fact that public schools have a greater interest in maintaining a secular environment, "schools have a constitutional duty to make certain that teachers do not inculcate religion."[151] Accordingly, schools may direct teachers to refrain from expressing religious viewpoints.[152] Mr. Marchi must therefore adhere to the directive and refrain from including religion in his instruction.[153]

The court also made broad statements concerning governmental employers and the Religion Clauses. It stated that when the government seeks to prevent Establishment Clause violations, it must be accorded some leeway, even though the limitations it imposes might restrict an employee's right to free speech.[154] The court also emphasized the difficulty government agencies encounter when determining if they are at risk of Establishment Clause violations because they cannot be expected to resolve the tensions between the Establishment Clause and the Free Exercise Clause.[155] In relation to school districts specifically, the court emphasized that the scope of the employees' rights must sometimes yield to the legitimate interest of the school district in avoiding litigation by those alleging an Establishment Clause violation.[156] A school district has a heightened interest in avoiding litigation due to its budget restrictions and lack of funding.

The *Marchi*[157] case is important because it shows that, due to the highly influential nature of their employees, school districts have a greater interest in regulating free exercise of religion in the workplace. As discussed in Section II above, *Altman v. Bedford*[158] is another Second Circuit case involving religion in schools.[159] The case followed the *Lemon* test in determining that an Earth Day celebration did not violate the Establishment Clause.[160] School districts as employers may have the most difficult time of all the government employers because the religious behavior of their employees has an influential and sweeping effect on the people they interact with. A school district must be careful in monitoring its employees and in drafting agreements so as to avoid the threat of litigation.

B. The Free Exercise of Religion in Schools

Another source of conflict in schools involving the Religion Clauses can be potential violations of employees' right to free exercise of religion. As examined in Section III above, request for religious leave is a source of debate in schools.[161] Praying or practicing religious beliefs at school is also a topic of interest for teachers. Teachers are required to be neutral concerning religion while carrying out their duties.[162] They must refrain from using their position in the public school to promote their outside religious activities.[163] With respect to prayer, teachers are not permitted to pray with or in the presence of students.[164] However, teachers are generally permitted to participate in religious activities at the school as long as those activities take place during non-school hours and such involvement is undertaken in the teacher's capacity as an individual, not as a representative of the school.[165] In taking part in these activities, teachers must make sure that others do not view them in their capacity as a teacher and do not view the activity as endorsed by the school.[166]

It is probable that free exercise issues arise frequently in the school setting. A major issue of concern today may be what to do when a student asks questions about religious beliefs. These are all sensitive subjects that the school district as a governing body and employer must handle with care. In public employment, it seems that teachers are those who are most likely to have their free exercise rights set aside for the compelling interest of their employers.

VI. Conclusion

Religion is a personal issue that forms differing opinions, which are often a source of conflict. Religious practices vary greatly, and it is common for a person to make religion an integral part of his or her lifestyle, thus desiring to carry on such a lifestyle at work. The Establishment Clause and Free Exercise Clause, although seeking to prevent the same evils, often clash and create difficulties for employers when trying to regulate religion in the workplace. Employers and employees need to work together in understanding that a bright-line rule does not exist for determining Religion Clause violations. Employees must realize that the Establishment Clause prevents an employer from allowing an absolute right to the free exercise of religion, and that right may be overshadowed by the need to preserve a stable work environment.

This is an evolving issue and it is possible that the law may never be settled as new issues arise. The fate of the Religion Clauses lies in the hands of the courts and legislatures, who will hopefully provide concrete guidelines in the near future.

Endnotes

1. U.S. Const. amend. I.
2. *See* Alan H. Greenburg, *The Second Circuit Review—1987-1988 Term: First Amendment: A Misguided Analysis of a Free Exercise Claim: Smith v. Board of Education*, 55 Brook. L. Rev. 653, 653–54 (1989).
3. 403 U.S. 602 (1971).
4. See U.S. Const. amend. I.
5. *Id.*
6. 403 U.S. 602 (1971).
7. *Id*. at 606. The statutes at issue were Pennsylvania and Rhode Island state statutes. The "Pennsylvania Nonpublic Elementary and Secondary Education Act" authorizes the state to reimburse nonpublic schools for their actual expenditures for teachers' salaries, textbooks, and instructional materials. Reimbursement is limited to subjects taught in the public schools. Reimbursement is prohibited for any course that contains subject matter expressing religious teaching or the morals of any religion. *Id*. at 609. The "Rhode Island Salary Supplement Act" supplements the salaries of teachers of secular subjects in nonpublic elementary schools by paying a maximum of 15% of the current annual salary. Such teachers must only teach subjects taught in the public schools and must agree in writing not to teach a course in religion while receiving the salary supplements. *Id*. at 607.
8. *Id*. at 612 (referring to the language of the First Amendment: "no law respecting the establishment of religion" and stating that "a law may be one respecting the forbidden objective while falling short of its total realization").
9. *Id*.
10. *Lemon*, 403 U.S. at 612. *See Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968) (holding that a New York State statute requiring school boards to provide free textbooks to public and parochial schoolchildren was not unconstitutional because the purpose and effect of the statute did not advance or inhibit religion).
11. *Id*. at 612. *See Bd. of Educ. v. Allen*, 392 U.S. at 243.
12. *Id*. at 613. See *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970) (holding that "a grant of tax exemption, by the Tax Commission of the City of New York, to religious organizations was not unconstitutional because the grant was not sponsorship of religion").
13. *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).
14. 392 U.S. 236 (1968).
15. 397 U.S. 664 (1970).
16. *Lemon*, 403 U.S. at 613.
17. *Id*. at 613.
18. *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 431 (2d Cir 2002) (citing *Lynch v. Donnelly*, 465 U.S. 668 (1984)).
19. *Id.* (providing that there was no reason to believe the legislatures intended anything else because a state always has a legitimate concern for maintaining minimum standards in its schools).
20. *See Wallace*, 472 U.S. at 56 (holding that Alabama statutes authorizing time for a moment of silence in all public schools for meditation or voluntary prayer violated the Establishment Clause because there was no clearly secular purpose).
21. *Lemon*, 403 U.S. at 612. The Court in *Lemon* concluded that the primary effect of the statutes were not necessarily in favor of advancing or inhibiting religion. However, statutory restrictions created by the states designed to guarantee the separation between secular and religious education were not considered in determining the principal effect because the Court concluded that there each statute as a whole involved an excessive entanglement with religion. *Id*. at 613–14.
22. *Id*.
23. *See Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968) (finding that the effect of the statute did not undermine its stated legislative intent).
24. *Lemon*, 403 U.S. at 615.
25. *Id*. at 614.
26. *Id*.
27. *Id*. at 613–14. The Court said that the Rhode Island statute resulted in excessive entanglement due to the religious character of the schools through its administration and rules. The Pennsylvania statute resulted in excessive entanglement because the schools were controlled by religious organizations, promoted particular faiths, and conducted operations for the purpose of furthering such faith. Also, the Court noted that, for both states, the restrictions and surveillance necessary to ensure that the "teachers play a nonideological role give rise to entanglements between church and state." *Id*. at 615–21.
28. 392 U.S. 236 (1968).
29. 397 U.S. 664 (1970).
30. 472 U.S. 38 (1985).
31. *Id*. at 55–56.
32. *Id.* The court found that the legislative purpose, based on statements inserted into the record, was to return voluntary prayer to public schools. The state failed to present evidence showing the statutes possessed any sort of secular purpose. *Id.* at 57.
33. *Id*. at 60.
34. *Id*.
35. 472 U.S. 38.
36. 403 U.S. 602 (1971).
37. *Id*.
38. 472 U.S. at 67 (O'Connor, J., concurring). See also *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O'Connor, J., concurring) (proposing a refinement to the *Lemon* test suggesting that the religious liberty

protected by the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community).

39. 403 U.S. 602.
40. *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring).
41. *Id*.
42. *Id*. at 70 (stating that an endorsement infringes religious liberty when the "power, prestige and financial support of government is placed behind a particular religious belief").
43. *Id*. at 76. See also *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (following the endorsement test, in holding that a creche outside a county courthouse violated the Establishment Clause, by stating that the county government endorsed religion in lending its support to the communication of a religious message).
44. 472 U.S. 38 (O'Connor, J., concurring).
45. *Id*. at 82–84.
46. *Id*. at 82. A rigid application of the *Lemon* test could invalidate legislation exempting religious observers from generally applicable government obligations because such legislation would be seen as having a religious purpose and effect in promoting the free exercise of religion. However, O'Connor reasons that judicial deference to all legislation that seems to facilitate the free exercise of religion would degrade the Establishment Clause. *Id*. at 82.
47. *Id*. at 83.
48. *Id*.
49. *Wallace*, 472 U.S. at 83 (O'Connor, J., concurring).
50. 492 U.S. 573 (1989) (Kennedy, J., dissenting).
51. *Id*. at 655 (providing the belief that the approach is hostile to religion because it ignores our heritage and forces government to acknowledge only the secular, to the exclusion and detriment of the religious).
52. *Id*. at 659.
53. *Id*.
54. *Id*.
55. *Id*. at 660. *See, e.g., Engel v. Vitale*, 370 U.S. 421 (1962) (forbidding coercing participation or attendance at a religious activity); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (invalidating the delegation of government power to religious groups).
56. *County of Allegheny*, 492 U.S. at 660-61 (Kennedy, J., dissenting).
57. *Id*. at 662.
58. *See* Craig L. Olivo, *Grumet v. Board of Education of the Kiryas Joel School District—When Neutrality Masks Hostility: The Exclusion of Religious Communities from an Entitlement to Public Schools*, 68 Notre Dame L. Rev. 775, 816 (1993).
59. *See, e.g., Commack Self-Service Kosher Meats, Inc. v. Weiss*, 284 F.3d 415 (2d Cir. 2002); *Altman v. Bedford*, 245 F.3d 49 (2d Cir. 2002); *Marchi v. BOCES*, 173 F.3d 469 (2d Cir. 1999).
60. 465 U.S. 668 (1984).
61. 492 U.S. 573 (1989).
62. 294 F.3d 415 (2d Cir. 2002).
63. *Id*. at 418. The laws were alleged to violate the Establishment Clause by defining "kosher" to mean food that is "prepared in accordance with orthodox Hebrew religious requirements." Plaintiffs also contend that the laws deprive non-Orthodox Jewish kosher consumers of their First Amendment right to the free exercise of religion. Commack Self-Service Kosher Meats, Inc. has been cited for violations of New York's kosher fraud laws at least four times over a period of sixteen years. *Id*. at 418–21.
64. *Id*. at 432.
65. *Id.*
66. *Id*. at 425–31.
67. 465 U.S. 668 (1984).
68. *Commack Self-Service Kosher Meats*, 294 F.3d at 431 (quoting *Lynch*, 465 U.S. at 668).
69. 245 F.3d 49 (2d Cir. 2001).
70. *Id*. at 79. At issue in the case was whether the Earth Day celebration endorsed the Gaia religion. The court found that the school district did not sponsor the celebration with any intent to endorse religion. Also, the celebration was not coercive because no statements were made indicating that the Earth should be "worshipped." *Id*. at 76–77.
71. 294 F.3d 415.
72. *Altman*, 245 F.3d at 75. *See Edwards v. Aguillard*, 482 U.S. 578 (1987) (finding a Louisiana law unconstitutional for forbidding the teaching of evolution in public schools unless accompanied by teaching creationism).
73. *Id*. at 75. *See County of Allegheny v. ACLU*, 492 U.S. 573 (1989).
74. 42 U.S.C. § 2000e (2002).
75. *See* Andrew M. Zeitlin, *A Test of Faith: Accommodating Religious Employees' Work-Related Misconduct in the United States and Canada*, 15 Comp. Lab. L.J. 259, 260 (1994).
76. Public Sector Labor and Employment Law 170 (Jerome Lefkowitz, Esq., Melvin H. Osterman, Esq. & Rosemary A. Townley, Esq. Eds., 2d ed. 1998). The Civil Rights Act of 1991 then made it unlawful for an employer or employment agency to "discriminate against applicants or employees based on their race, color, religion, national origin or sex." *Id*.
77. 42 U.S.C § 2000e (j). *See Ansonia v. Philbrook*, 479 U.S. 60, 62 (1986) (providing that the term "religion" under the statute includes all aspects of religious observance, practice and belief, unless an employer demonstrates that he is "unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business").
78. 479 U.S. 60. *See also Cosme v. Henderson*, 287 F.3d 152 (2d Cir. 2002) (discussing a postal employee's right to observe the Sabbath by refraining from work on Saturdays); *Equal Opportunity Comm'n v. Delta Airlines*, 2002 U.S. Dist. LEXIS 17259 (E.D.N.Y. 2002) (stating that the employee did not establish a *prima facie* case of discrimination because he was never disciplined for his failure to work on the Sabbath).
79. *Id*. at 62.
80. *Id*.
81. *Id*. at 63 (stating that absences for religious holidays were not charged against the teacher's annual or accumulated leave).
82. *Id*. at 64.
83. *Id*. at 64 (providing that Philbrook later stopped taking unauthorized leave and instead scheduled required hospital visits on church holy days).
84. *Ansonia*, 479 U.S. at 64–65.
85. *Id*. at 65. *See* 42 U.S.C. §§ 2000e–2(a)(1), (2).
86. *Id*. at 66.
87. *Id*. at 68. *But see Philbrook v. Ansonia*, 757 F.2d 476 (2d Cir. 1985) (holding that where the employer and the employee each propose a reasonable accommodation, Title VII requires the employer to accept the proposal the employee prefers unless that accommodation causes undue hardship on the employer's conduct of business), *aff'd*, *Ansonia v. Philbrook*, 479 U.S. 60 (1986). The Second Circuit found support for its decision in the EEOC's guidelines on religious discrimination providing that "when

there is more than one method of accommodation available which would not cause undue hardship, the employer must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities." *Philbrook*, 757 F.2d at 485 n.7 (quoting 29 C.F.R. § 1605.2(c)(2) (1984)).

88. *Id*. at 68–69. The employer violates the statute unless it demonstrates that it is unable to reasonably accommodate an employee's religious observance or practice without undue hardship on the conduct of the employer's business. *Id*. *See also Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

89. *Ansonia*, 479 U.S. at 70 (reasoning that in enacting section 701(j), Congress was motivated by a desire to assure individuals the opportunity to observe religious practices, but not to impose a duty on the employer to accommodate at all costs).

90. *Id*.

91. *Id*. at 71.

92. *Id*.

93. *Id*.

94. School Law 240 (Barbara Bradley & Pilar Sokol, eds., 28th ed. 2000).

95. *See Port Washington Union Free Sch. Dist. v. Port Washington Teachers Ass'n*, 268 A.D.2d 523, 524 (2d Dep't 2002) (finding that a provision giving paid leave for religious holidays rewarded those who claimed to be religiously observant). *Cf. Binghamton City Sch. Dist. v. Andreatta*, 30 P.E.R.B. 7504 (1997) (finding that a leave provision granting paid days for religious observance in accordance with a list agreed to by the Parties was constitutional because it neither forces nor prohibits religious participation, nor does it favor one religion over another).

96. 29 P.E.R.B. 3041 (1996).

97. *Id*. The Board began their discussion by stating their reluctance to decide the constitutional issue because Establishment Clause cases have "occasioned perhaps more split and arguably irreconcilable decisions than any other jurisprudential question." *Id*.

98. *Id*.

99. *Id*.

100. *Id*.

101. *Eastchester Union Free Sch. Dist*, 29 P.E.R.B. 3041.

102. *Id*. (stating that the District's practice at the very least influences an employee's choice as to whether to adopt and maintain a set of religious beliefs by "conditioning a substantial economic benefit solely on religious exercise").

103. *Id*. See *Griffin v. Coughlin*, 88 N.Y.2d 674 (1996) (finding that the government's conditioning of a benefit upon an inmate's participation in a religious activity constituted coercion and therefore violated the Establishment Clause). The Court of Appeals in *Griffin* explained that the "Establishment Clause is violated by any governmental action, whether subtle or overt, which coerces, pressures or influences a person's choices regarding religious belief or practice." *Id*.

104. 268 A.D.2d 523 (2d Dep't 2000).

105. *Id*.

106. *Id*.

107. *Id*. (holding that the stay of arbitration granted to the District was properly granted and the District was permitted to no longer enforce the provision). See generally School Law 240 (Barbara Bradley & Pilar Sokol, eds., 28th ed. 2000) (providing that the general practice of a school district is to treat absence for religious reasons as an unexcused absence without pay or it can deduct the absence from vacation or personal time). A school district only has the duty to make reasonable accommodations for teachers who desire time off for religious observance and it is not required to provide paid leave. *Id*.

108. No. 3829–99, slip op. (N.Y. Sup. Ct. 2000).

109. *Id*. at 1.

110. *Clarkstown Central Sch. Dist*., No. 38299–99, slip op. at 4 (citing *Port Washington Uniion Free Sch. Dist. v. Port Washington Teachers' Ass'n*, 268 A.D.2d 523 (2d Dep't 2000)).

111. 403 U.S. 602 (1971).

112. *Clarkstown Central Sch. Dist*, No. 3829-99, slip op. at 5.

113. *Id*.

114. *Id*. *See Lemon*, 403 U.S. 602.

115. *Id*.

116. *See* Thomas C. Berg, *Religious Speech in the Workplace: Harassment or Protected Speech?*, 22 Harv. J.L. & Pub. Pol'y 959, 960 (1999) (providing an in-depth examination of religious speech in the workplace, concerning when the Free Speech Clause should control).

117. *See id*. at 961.

118. *Id*. at 962.

119. *Id*. at 955.

120. *See id*. at 968 (citing *Pickering v. Bd. of Educ*., 391 U.S. 563, 568 (1968)).

121. *Id*.

122. Berg, *supra* note 116, at 964.

123. *Id*. In the private workplace, no First Amendment issue arises when a private employer simply imposes restrictions on employee speech on his own initiative, without being compelled or influenced to do so by civil rights laws. However, recent Supreme Court decisions have made it clear that employers, in order to avoid Title VII liability, should take steps to prevent and correct promptly any presumably religiously harassing behavior. A First Amendment issue would therefore arise when a private employer defends its policies on the basis that it is necessary to avoid Title VII liability for permitting harassment. Although the private employer cannot coerce employees to listen to religious speech in some circumstances, the remedy in such situations would be to exempt the particular employee from the rule, not to prohibit the speech altogether. Unlike a private employer, a public employer faces First Amendment restrictions when it limits its employees' speech, but may be required to limit employees' speech when the endorsement of religion is involved. *Id*. at 966–69.

124. *See Widmar v. Vincent*, 454 U.S. 263, 271 (1981) (stating that the interest of the state in avoiding an Establishment Clause violation may be a compelling one justifying an abridgement of free speech otherwise protected by the First Amendment).

125. *Id*. at 271–72 (discussing *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

126. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist*., 508 U.S. 384 (1993) (finding that denying a church access to school premises to exhibit a film violates the church's right to freedom of speech, thereby outweighing the District's Establishment Clause concerns).

127. 508 U.S. 384.

128. *Id*. at 395. The church applied to the District twice for permission to use school facilities to show a six-part film series containing lectures by Dr. James Dobson. Dr. Dobson is a licensed psychologist whose films discussed his views on "the undermining influences of the media that could only be counterbalanced by returning to traditional, Christian family values instilled at an early stage." *Id*. at 388.

129. *Id*. at 395.

130. *Id*. at 395. The Court discussed the fact that the showing of the films would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. *Id*.

131. 275 F.3d 156 (2d Cir. 2001).

132. *Id*. at 160.

133. *Id*. The accusations against Ms. Knight arise from an incident involving care at the home of a homosexual couple. She discussed salvation, mentioned the holy spirit, and told them that "God doesn't like the homosexual lifestyle." Ms. Quental verbally prayed for a client in his presence, informed the client that she had "a relationship with the Lord" and that God could help this patient with his problems. *Id*. at 161–62.

134. *Id*. at 163.

135. *Id*. at 164.

136. *Knight*, 275 F.3d at 164.

137. *Id*. at 165.

138. *Id*. at 165. The court then discussed religious discrimination issues and said that for the plaintiffs to make out a *prima facie* case, they must show: they held a bona fide religious belief conflicting with the employment requirement; they informed the employer of this belief; and they were disciplined for a failure to comply with the conflicting employment requirement. The burden then shifts to the employer to show that it could not accommodate the employees' religious beliefs without undue hardship. *Id*. at 167.

139. U.S. Const. amend. XIV, § 1 (providing: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

140. *See Marchi v. Bd. of Cooperative Educational Services*, 173 F.3d 469, 475 (2d Cir. 1999) (quoting *Tinker v. Des Moines Indep. Cmty School Dist*., 393 U.S. 503, 507 (1969)).

141. *See id*. at 477 (quoting *Peloza v. Capistrano Corp.*, 93 F.3d 327 (7th Cir. 1996)).

142. *Id*. at 475. *See, e.g., Lee v. Weisman*, 505 U.S. 577 (1992) (holding that prayers at a graduation ceremony were inconsistent with the Establishment Clause); *Wallace v. Jaffree,* 472 U.S. 38 (472) (holding that Alabama statutes authorizing time for a moment of silence in all public schools for meditation or voluntary prayer violated the Establishment Clause because there was no clearly secular purpose).

143. 173 F.3d 469 (2d Cir. 1999).

144. *Id*. at 472.

145. *Id*.

146. *Id*. at 473. Relevant excerpts from the directive letter are: "As you know, public schools are prohibited from offering instruction in support of religious beliefs or practices. Your personal beliefs about the role of religion in our society and its value to families and their children cannot be a part of the instruction given to your students. Consequently, you are to cease and desist from using any references to religion on the delivery of your instructional program unless it is a required element of instruction and has prior approval by your supervisor." *Id*.

147. *Id*.

148. *Marchi*, 173 F.3d at 473 (providing that Marchi also raised claims for violation of his rights to academic freedom, free association, and his right to due process).

149. *See* U.S. Const. amend. I.

150. *Marchi*, 173 F.3d at 475 (stating that the validity of a particular restraint depends on the context in which the expression occurs).

151. *Id*. at 475 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971)).

152. *Id*.

153. *Id*. at 477.

154. *Id*. at 476.

155. *Id*. (providing that when government is both the initiator of religiously related actions, through the conduct of its employees, and the regulator of the extent of such actions, through the conduct of its supervising employees, it need not determine precisely where the line would be drawn if its employees were not involved).

156. *Marchi*, 173 F.3d at 476.

157. 173 F.3d 469 (2d Cir. 1999).

158. 245 F.3d 49 (2d Cir. 2001).

159. *Id*.

160. *Id.*

161. *See, e.g., Ansonia v. Philbrook*, 479 U.S. 60 (1986); *Port Washington Union Free Sch. Dist. v. Port Washington Teachers Ass'n*, 268 A.D. 523 (2d Dep't 2002).

162. *See* Charles C. Haynes & Oliver Thomas, *Finding Common Ground: A Guide to Religious Liberty in Public School 81* (First Amendment Center 2001) (endorsed by the National Education Associationn as a guide for teachers).

163. *Id.* at 82.

164. *Id.* at 81.

165. *See* The Anti-Defamation League, *available at* http://www.adl.org/issue_religious_freedom/ABC_Poster.asp (last visited Mar. 6, 2003) (providing guidelines for religion in schools).

166. *Id.*

Why Punitive Damages Should Be Awarded for Retaliatory Discharge Under the Fair Labor Standards Act

By Carol Abdelmesseh and Deanne DiBlasi

> Government must have some control over maximum hours, minimum wages, the evil of child labor, and the exploitation of unorganized labor . . . to protect the fundamental interest of free labor and a free people.[1]
>
> **Franklin D. Roosevelt**
> **May 24, 1937**

I. Introduction

The Fair Labor Standards Act (FLSA) was originally enacted in 1938. The purpose of the Act was to set a federal minimum wage, require overtime work, and prohibit child labor.[2] Section 215(a)(3) of the FLSA specifically prohibits employers from firing or discriminating against an employee because the employee has asserted his or her rights under the Act.[3] In 1977, Congress amended section 216(b) of the Fair Labor Standards Act, which added the language that:

> [a]ny employer who violates the provisions of section 15(a)(3) of this Act [29 U.S.C. § 215(a)(3)] shall be liable for such legal and equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3), including without limitation employment, reinstatement or promotion and the payment of wages lost and an additional equal amount as liquidated damages.[4]

Upon this amendment, a question arose as to whether the new language of section 216(b)[5] includes the awarding of punitive damages within its list of prescribed remedies.

Currently, there is a circuit split as to whether the language, as amended, warrants an interpretation that punitive damages should be granted to victims of retaliatory discharge. The Seventh Circuit supports the position that the grant of punitive damages under this section is permitted,[6] yet the Eleventh Circuit disagrees.[7] Notwithstanding this split, only the Seventh and Eleventh Circuits have conclusively reached a decision as to whether section 216(b) of the FLSA warrants the award of punitive damages. The Eleventh Circuit's conclusion that punitive damages should not be awarded to an employee, arose mainly from their belief that section 216(b) does not include any damages that are punitive in nature.[8] The Seventh Circuit on the other hand, concluded that punitive damages are generally appropriate for retaliatory discharges and are included in the remedies contemplated by section 216(b).[9]

Very few other courts have decided the issue of whether this section of the Act allows for punitive damages. The Seventh Circuit Court of Appeals in *Soto v. Adams Elevator Equipment Co*.[10] stated that punitive damages are permissible. Similarly, in *Perez v. Z Frank Oldsmobile*, the Seventh Circuit Court of Appeals maintained its position that punitive damages were permissible.[11] Two other jurisdictions followed the Seventh Circuit's decision. In *Marrow v. Allstate Security & Investigative Services, Inc.*[12] and *Martin v. American International Knitters Corp.*,[13] the district courts allowed for punitive damages under section 216(b) of the FLSA. In opposition to this trend, a few courts have also taken the position that punitive damages should not be awarded. In *Lanza v. Sugarland Run Homeowners Assoc., Inc.*,[14] the district court held that punitive damages should not be permitted under the FLSA. This rejection of such damages was also exhibited in *Johnston v. Davis Security,*[15] where the district court decided against punitive damages as well.

In analyzing this particular section of the FLSA, in conjunction with the history and trends of our legislature, one is compelled to take the position that section 216(b) of the FLSA[16] does and should include the awarding of punitive damages as a remedy for retaliatory discharge as defined by section 215(a)(3)[17] of the statute.

II. FLSA: History and Purpose

In 1937, at the urging of President Franklin D. Roosevelt, the 75th Congress of the United States held several hearings to discuss the effects of substandard labor conditions on interstate commerce.[18] The House and Senate Labor Committees found that substandard labor conditions, even by only a few employers, lowered the standards of the whole industry and led to lower wages, dissatisfaction of employees, and an increase in labor disputes.[19] They required Congress to exercise its power to remedy these conditions.[20] In June 1938, both Houses of Congress adopted the Fair Labor Standards Act[21] and it was signed into law by President Roosevelt.[22]

Over the years, Congress has made various amendments to the FLSA, several of which were highly significant.[23] The first amendment was the Portal-to-Portal Act of 1947, which defined "work" and "workweek," allowed for compromise or waiver of liquidated dam-

ages, gave judicial discretion in awarding liquidated damages, limited the availability of class actions, and added a statute of limitations of two years in length.[24] In 1966, it was amended again to extend protection under the FLSA to include all employees, if two or more employees were engaged in commerce or in the production of goods for commerce.[25] This extended coverage to public employees and included both schools and hospitals as well.[26] Congress later added the Age Discrimination in Employment Act (ADEA) as part of the FLSA.[27] In 1974, Congress again amended the FLSA to extend coverage to most government employees. Finally, three years later, the FLSA was further improved and it was at this point that Congress created an individual cause of action for violations of section 215(a)(3).[28]

The aim of the FLSA was to achieve "certain minimum labor standards."[29] Under section 215(a)(3), it is illegal to "discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding."[30] The Supreme Court, in *Mitchell v. Robert DeMario Jewelry, Inc.*,[31] found that this particular section allowed for employees to be secure in reporting all violations of labor standards and it was deemed as the "anti-retaliatory" provision.[32] The effect of such anti-retaliatory provisions is to deter employers from retaliating against employees as well as to serve as an incentive by encouraging employees to report violations and in effect enforce the Act.[33] Even prior to the 1977 amendment,[34] the Supreme Court in *Robert DeMario Jewelry, Inc.*[35] explained the importance of section 215(a)(3):

> The provisions of the statute affect weekly wage dealings between vast numbers of business establishments and employees. For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances. . . . [I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions. . . . Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced.[36]

Congress' amendment of section 216(b) of the FLSA codified the Supreme Court's dicta in *Robert DeMario Jewelry, Inc.* by adding remedies for violations of section 215(a)(3). The 1977 amendment added the language "[a]ny employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to *effectuate the purposes of section 215(a)(3) of this title*."[37] Further, in adding the language "without limitation" to the remedies made available, Congress furthered the effectiveness of the provisions.[38] The use of punitive damages would best serve the purpose of the anti-retaliation provision. The availability of punitive damages maximizes the incentive for employees to enforce the statute and their rights.[39] It also serves as a great deterrent to employers in two ways. First, it serves to deter employers from wrongfully discharging employees that assert their rights. Second, it deters employers from other violations under the FLSA because employees will serve as watchdogs and enforcers of the FLSA.

The history of the FLSA is important in understanding the reasons for its enactment. The Act, when read in its totality, allows for a better and clearer understanding of each of the individual sections found within the Act. Fundamentally, the purpose of the FLSA's enactment was to protect employees from any abuses by their employers. To further comprehend the specific Congressional amendment of section 216(b), it is important to look to the plain language of that section specifically.

III. The Plain Language of Section 216(b): Punitive Damages Are Permitted

Statutory interpretation begins with reference to the exact language of the statute.[40] The Supreme Court has specifically said that "[i]t is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed."[41] A court can elicit the exact meaning of a particular federal act through the plain language of a statute. If a court makes the determination that the language of the statute itself gives the act its definitive meaning, the court must ensure that it considers the language of the alleged ambiguous section fully.[42]

When interpreting amendments, the question often arises as to whether the amended language changes the meaning of the statute, or simply clarifies it. As a result, courts will often look to the plain language of the statute, in addition to other factors, in order to make this determination.[43] Thus, we turn to the plain language of section 216(b) to decide the intended purpose of these amendments.

The FLSA, enacted in 1938, had established statutory wages and overtime compensation, plus "an addi-

tional equal amount as liquidated damages," in addition to attorneys' fees, as remedies.[44] At that point, compensatory and punitive damages were not included and thus were unavailable.[45] This remedial section of the statute was later amended by Congress through the appended language. From these amendments it is clear that Congress has authorized other forms of relief and it is these very changes that lead to the controversy: Does section 216(b) warrant an interpretation that permits the granting of punitive damages for a successful claim brought for retaliatory discharge? And if it does, would the inclusion of punitive damages serve the purposes of the FLSA?

A. "Legal Relief:" Congressional Intent to Include Punitive Damages?

To support its interpretation or to make a determination as to the meaning of a specific statute, a court may rely on the interpretative maxim *ejusdem generis*. This doctrine of statutory interpretation stipulates that where general words follow specific words in a statutory enumeration, those words that are general may be construed to be understood as objects that are only similar in nature to those objects expressly enumerated by the preceding specific and unambiguous words. [46] In other words, the ambiguous words can only be interpreted to be of the same nature as the explicit words. In applying this doctrine to the text found in the 1977 amendments of section 216(b) of the FLSA, it once again can be concluded that Congress did in fact authorize the grant of punitive damages for victims of retaliatory discharge.

The addition and authorization of "legal" relief is the first issue to be dealt with. This term, "legal relief," is one that is commonly understood to mean both compensatory and punitive damages.[47] More specifically to the issue at hand, it has been stated that in regard to a case involving a retaliatory discharge claim, "legal relief" includes both compensatory and punitive damages for emotional distress[48] that may result from such discharge. Therefore, the inclusion of this term in the 1977 amendments suggests that Congress intended the authorization of punitive damages, as may be appropriate, as a form of relief for victims of retaliatory discharge.[49]

The inclusion of punitive damages is also suggested by turning to the principle of *ejusdem generis.* As described above, this rule dictates that general words are viewed as extending the statute's provisions to include everything included in that class that is not explicitly enumerated.[50] Therefore, through the application of this doctrine, its proponents suggest that a "general statutory term[s]" should be interpreted "in light of the specific terms that surround it."[51] In applying this principle of *ejusdem generis* to section 216(b), it becomes clear that Congress authorizes and enumerates specific forms of relief in this section, although it does not limit the authorized forms to only those expressly listed. These forms, which are those that surround the term "legal relief," are "employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages."[52] Based on the principle of *ejusdem generis,* the courts that have mistakenly interpreted section 216(b) to not warrant the granting of punitive damages have declared these explicitly enumerated forms of relief as compensatory in nature. These courts use an incorrect characterization as indicia of Congressional intent.[53] As a result, they do not interpret section 216(b) to include the authorization of punitive damages, declare all the enumerated forms of relief as belonging to a class that is compensatory in nature, and suggest that the term "legal relief" should be deemed as compensatory as well.

To the contrary, the specific terms that surround "legal relief" can be deemed as possessing punitive, as well as compensatory traits.[54] This list includes liquidated damages, which the Supreme Court itself has depicted as being punitive in nature.[55] These specific terms belonging to both the classes of compensatory and punitive damages therefore, "legal relief" is Congressional authority deeming all forms of relief in both classes to be appropriate. Congress grants the court the authority to grant any form of relief it deems necessary and where it finds it would effectuate the purposes of the prescribed section.[56] Thus, punitive damages are both permissible and warranted according to this doctrine.

B. Liquidated Damages v. Punitive Damages

It is pertinent to note that in determining the meaning of a statute the legislature's intent is determined by its action, not by its failure to act.[57] Therefore, we must turn to the next issue, which is Congress's clear distinction between liquidated damages and punitive damages, as set out in the first and second sentences of section 216(b). The first sentence of the this particular section reads:

> [a]ny employer who violates the provision of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.[58]

This language is unambiguous and limits the authorized remedies to very specific forms. In contrast, the second sentence does not provide such limitations, for it reads:

> [a]ny employer who violates the provisions of section 215(a)(3) of this title

> shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including *without limitation* employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.[59]

Thus, the remedies here are not finite and Congress clearly intended for the authorization of unlimited forms through its inclusion of the phrases, "without limitation" and "legal or equitable relief."[60] These differences and the implementation of broad language both indicate that Congress certainly intended to authorize different remedies based upon the specific section of the FLSA that is being violated.[61]

In section 216(b), Congress does clearly act (i.e., via the express language of the statute) and distinctly sets out the forms of remedies that it authorizes. In conjunction with this issue, many courts that are not in support of awarding punitive damages have held that if Congress wanted to include punitive damages then it would have done so as it clearly did in section 216(a), by stipulating specific punitive sanctions.[62] These courts have failed to see that Congress has actually done so through the amended language and through the distinctions between relief for violations of section 215(a)(3) alone, and sections 206 and 207 together. In sections 206 and 207, Congress does not include broad language and limits the relief, but it does just the opposite for section 215(a)(3). Therefore, it is clear that where there is a violation under section 216(b), a victim of retaliatory discharge is entitled to a broader range of relief, including punitive damages, and it is so authorized by Congress and by the language of this statute.[63]

In addition, the courts that purport this argument involving section 216(a) fail to notice an important distinction between the two sections. Section 216(a) deals with punishing the offender by way of fines and imprisonment,[64] where section 216(b), in contrast, deals with damages and the relief that should be granted to a victim.[65] It would therefore be logical for Congress to treat both of these sections quite differently, as it does.

IV. The *Franklin* Presumption: Does It Apply Here?

In addition to the number of canons of construction that may be used to interpret the language of a statute, including those previously stated, there are other tools a court can use. One such tool is the *Franklin* presumption. In *Franklin v. Gwinett County Public Schools*,[66] the Supreme Court held that federal courts may use the available forms of relief to remedy a wrong, where the legal rights of an individual have been invaded and where the federal statute in question, provides for a general right to sue.[67] The Supreme Court specifically states that the general rule is that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute."[68] This principle has come to be known as the *Franklin* presumption.[69] Based on this definition by the Supreme Court, it is clear that this presumption does apply to section 216(b). This section of the FLSA deals with the invasion of the rights of an individual to enforce the FLSA without being punished by his or her employer for doing so and it also sets out a general right for such individuals to sue. Therefore, in retaliatory discharge cases, a court is permitted to grant punitive damages in the appropriate circumstances.[70]

Section 216(b) clearly falls within the *Franklin* presumption. As stated above, in regards to retaliatory discharge claims, which section 216(b) deals with, the issue of an individual's rights being invaded arises.[71] In addition, section 216(b) certainly provides a general right to sue since, as expressed above, it authorizes a broad range of relief, including both punitive and compensatory forms.[72] This section cannot be depicted as just setting out a specified set of enumerated remedies, as the Eleventh Circuit suggests,[73] because of its expansive language of "including without limitation" and "legal relief."[74] Therefore, it is not a distinct and limited set of relief that Congress prescribes here.

Therefore, the *Franklin* presumption is applicable to section 216(b). Furthermore, it also compels a finding that punitive damages are permitted under the statute. Punitive damages are a form of available relief under this statute and the courts are therefore permitted to use them in remedying the wrongs that an individual who is a victim of retaliatory discharge has incurred.[75]

V. The Legislative History of Section 216(b): An Unhelpful Tool

Another more common tool in the interpretation of a statute is the use of legislative history. Typically, in determining the meaning of a statute where the meaning of it remains ambiguous or is argued to have various meanings, it is often proper and helpful to turn to the legislative history of that particular statute. Therefore, the legislative history often indicates the action and intent of the legislature in drafting the corresponding law. In addition, it is a well-settled rule that the intent of the legislature is revealed by its action and not by its failure to act.[76] Unfortunately, the legislative history for this particular section, section 216(b), is very unhelpful.[77]

The language of section 216(b) originated in the Senate, yet the committee reports fail to discuss it. From analyzing the legislative history, it is also noted that the Conference Committee adopted the Senate's proposal,

however their remarks are limited and ambiguous themselves.[78] The Conference Committee reports simply state that the bill authorizes claims for "appropriate legal or equitable relief," but they fail to describe or clarify what might actually be considered appropriate relief.[79]

The legislative history is unhelpful here and offers no clarification. In addition, it fails to show the intent of the legislature in regards to section 216(b) and therefore, it can only be viewed as an unhelpful tool for the statutory interpretation needed here. The limited and simplistic history that is available compels us to turn to other forms of interpretation such as the ones previously discussed.

VI. Retaliatory Discharge: A Tortious Act

To better understand the purposes of section 216(b) of the FLSA, the conduct that is being condemned must be understood. Section 215(a)(3) prohibits retaliatory discharges.[80] Section 216(b) provides the remedy that a court may grant to an employee if their employer has violated 215(a)(3). In this specific instance, section 215(a)(3) prohibits firing or discriminating against any employee because they have asserted any of their rights included within the FLSA.[81] Generally, retaliatory discharge consists of the firing of an employee that is undoubtedly violative of public policy and that is made in retaliation for the employee's conduct. One example of retaliatory discharge is an employer discharging his or her employee for reporting the employer to the government as a result of that employer committing an unlawful activity, usually one that is proscribed in the FLSA. Many states have drafted statutes in response to this type of discharge in order to protect the victims and allow them to recover punitive damages.[82]

Employment relationships are most commonly developed through contractual agreements, yet there are many circumstances where this is not so. In these excepted circumstances, the employee and employer choose not to agree, expressly or impliedly, on a specified period depicting the length of their relationship, nor do they agree to end their relationship on the occurrence of a particular event. Therefore, these individuals do not agree as to when there will be "good cause" for dismissal of the employee. This leads to the presumption that such employees are considered "at-will" employees.[83]

Under the doctrine of at-will employment, an employer may discharge an employee for any reason, or no reason, and therefore has a "free hand" in firing or retaining an employee without incurring liability to that employee.[84] Although the employer fundamentally can dismiss the employee as he chooses, the courts have carved out exceptions to the doctrine.[85] In limited circumstances, the employee is permitted to commence a tort action against his or her employer.[86] These exceptions include situations where the discharge is retaliatory and conflicts with the state's public policy,[87] especially when it is related to public health, welfare, or safety.[88] Some courts also permit employees to bring claims for retaliatory discharge for in-house complaints that deal with issues of the internal health and safety of the place of employment as well.[89]

Retaliatory discharge has been deemed an intentional tort.[90] Generally, punitive damages are awarded for intentional torts.[91] This type of damage is granted for the purposes of punishment and deterrence of the wrongdoer and other potential wrongdoers. However, punitive damages can only be awarded in circumstances where they are an appropriate remedy for certain harms that such conduct has resulted in. Customarily, they are granted in instances where there is outrageous conduct either because the defendant's acts are executed with an evil motive or because they are performed with a reckless indifference to the rights of other individuals. In addition, punitive damages may be awarded because of, and are measured by, the defendant's wrongful purpose or intent.[92] Reckless indifference to others' rights and deliberate disregard of them can be deemed as the necessary circumstances to justify the granting of punitive damages.[93] Retaliatory discharges are situations in which the employer is acting in an outrageous manner, with an evil motive to impermissibly punish his or her employees, in a conscious disregard of their rights to report unlawful conduct engaged in by their employers.

VII. Punitive Damages: Remedy for Retaliatory Discharge

Punitive damages have been defined by the Supreme Court as "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."[94] Punitive damages have also been defined as "damages, other than compensatory or nominal damages, awarded against a person to punish him for similar conduct in the future" by the Restatement of Torts.[95] In *Smith v. Wade*, the Supreme Court explicitly stated that "[f]irst, punitive damages 'are assessed for the avowed purpose of visiting a punishment upon the defendant.' Second, the doctrine is rationalized on the ground that it deters persons from violating the rights of others. Third, punitive damages are justified as a 'bounty' that encourages private lawsuits seeking to assert legal rights."[96] Generally, the purposes of punitive damages are to further an interest by punishing "unlawful conduct and deterring its repetition."[97] Punitive damages may also "certify" the existence of rights or interests of plaintiffs, as well as the legal duty of a defendant to respect that right.[98]

The uses of punitive damages as retribution are inherent in their nature because of the effect of punish-

ing a wrongdoer. The justification for the retribution is that the punishment pays back society, as well as the victim for what he has "taken."[99] Moreover, the use of punitive damages also highly increases the likelihood that these violators will be identified and justifiably punished.[100]

The use of this type of damages in employment cases, where the employee is an "at-will employee," has been recognized and expanded by the courts over the years.[101] The general rule regarding at-will employment, as described above, is that employers can discharge employees for essentially any reason that they have.[102] To restrain this unbounded power of employers, federal and state laws were enacted to prevent discharges that violated important public policies.[103] Therefore, these laws provided exceptions and worked to curtail the power that these employees had with regards to their "at-will" employees.

The exception to the broad and unlimited at-will rule deals with the instances when the discharging of an employee violates public policy. This exception has been created by the courts and is founded in the area of tort law.[104] Therefore, these exceptions are implemented in cases where the employee is discharged for refusing to commit an illegal act, for performing a legal duty or invoking a statutory right, or where employees assert their rights and alert authorities as to illegal acts of the employer.[105] It is pertinent to note that punitive damages are awarded when the employer's conduct is "willful, wanton, malicious, reckless, oppressive, grossly negligent . . . fraudulent . . . [or in] bad faith."[106] Essentially, courts that use punitive damages in cases of wrongful discharge do so when the claim is recognized as an intentional tort.[107] The need for a deterrent effect occurs in these cases since they are occasions where important public or social policy is threatened by the wrongful discharge of the employee.[108]

The objective for a cause of action, such as the entitlement to punitive damages, for wrongful discharge is to protect the public interest from interference and deter unwanted behavior.[109] Under this public policy tort theory, the plaintiff is required to plead and prove "the existence of a clear public policy manifested in a state or federal constitution, statute of administrative regulation, or common law," dismissal for conduct that would jeopardize the public policy, or that the dismissal was motivated by conduct related, and finally, that the employer lacked a legitimate justification for the dismissal.[110]

The Supreme Court has said that "[p]unitive damages may properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition."[111] This concept can and should be extended to the interests of the federal government. The FLSA was enacted for the purpose of protecting employees from their employers, by keeping the power of both entities balanced. Section 215(a)(3) specifically makes it unlawful for an employer to retaliate against an employee if that employee asserts his rights under the FLSA.[112] In essence, section 215 (a)(3)[113] provides a mechanism by which employees can facilitate and ensure the enforcement of the FLSA. In allowing punitive damages to be awarded under section 216(b),[114] this furthers Congress' interests in punishing the unlawful conduct and deterring its repetition,[115] as well as promoting Congress' intent and purpose for enacting the FLSA.

VIII. Punitive Damages in Retaliatory Discharge Claims: Is There a Limit?

The use of punitive damages, however, brings about concerns as to their overuse or misuse. One such concern that many courts have had, and still do, is that if punitive damages are permitted, then they would be awarded in every case of retaliatory discharge and a jury would find it almost impossible not to award these damages. They believe this to be because they allege that in retaliatory discharge claims, the defendant's act is almost always willful or intentional, motivated by a conscious desire to retaliate against an employee who exercised his or her right to report the employer.[116] In addition to this concern, these courts also fear that there will be no limit on these damages and that they will far exceed the boundaries set out in section 216(a).[117]

This contention is without merit or justification. First, it is a clear and well-settled rule that courts should make certain that awards for punitive damages do not exceed an amount that will suffice to punish and deter. In achieving this goal, courts are instructed to assess the defendant's financial position and take that into consideration, while determining an amount that clearly reflects and mirrors the harm incurred.[118] In addition to this regulation, courts must decide, when challenged, whether a punitive damage award violates state common law, or whether it is extraordinarily excessive and in violation of a defendant's due process rights. Therefore, when a punitive award is challenged as excessive and unconstitutional, the court must review the award granted and assure that it is not.[119] Therefore, it is evident that certain safeguards have been developed in order to deal with the very problem and concern that most of the courts, which oppose the granting of punitive damages, have expressed.

In addition to these commonly followed principles that act as safeguards, the plain language of section 216(b) itself also makes certain that punitive damages will not always be awarded and that they will not be excessive or unfair. These internal safeguards are contained within the statute, by the limiting language of "as may be appropriate to effectuate the purposes of section

15(a)(3)."[120] This very language indicates that although Congress authorizes a broad range of relief for victims of retaliatory discharge, it only does so to the extent that the award or the relief is in congruence with the purposes of the statute and it does not prescribe any relief that exceeds that boundary or goes beyond the scope of section 216(b). Therefore, there is a third safeguard in place to guarantee that only fair grants of punitive damages are made.

Moreover, by amending the statute to add the language of "including without limitation,"[121] Congress is also permitting the courts to have discretion as to what forms of relief should be granted, based on what the courts deem as appropriate, depending on the facts of the case. Thus, the courts must engage in a case-by-case analysis and this makes it very likely, therefore, that a court may not deem punitive damages as appropriate for every victim. Based on the unique circumstances of each case, it would be impossible for one to conclude that punitive damages will always be a form of relief that is indefinitely granted to all victims of retaliatory discharge. Through the inclusion of this language, in both instances, Congress has actually limited the forms of relief available in an explicit manner. It has done so in order to protect against violations of a defendant's rights, and more specifically, to ensure that the awards and damages granted are constitutional and that they do not offend the due process rights of that very individual.

IX. Punitive Damages for Retaliatory Discharge in State Claims

To further determine whether punitive damages are appropriate under the FLSA, we turn to the uses of punitive damages in other areas. One such area is the use of punitive damages in state law. More specifically, many states have recognized retaliatory discharge as a tort claim and have therefore allowed for the recovery of punitive damages.[122]

In *Kelsay v. Motorola, Inc.*,[123] the Supreme Court of Illinois held that an award of punitive damages may be awarded where the plaintiff was discharged in retaliation for filing a workmen's compensation claim.[124] The court found that the purpose of the enactment of the state Workmen's Compensation Act was to further public policy.[125] The court stated that in order to "uphold and implement this public policy" a cause of action for retaliatory discharge must exist.[126] Further, the court also determined that a cause of action for retaliatory discharge is necessary because it found that the threat of discharge would seriously undermine the purpose of the statute, since the employees would be fearful of asserting their rights without the necessary protection.[127] The court rejected the argument that the legislature never intended civil remedies because of the absence of such a provision in the Act.[128] It explained that not only were civil remedies appropriate, but that also punitive damages were also included because the court noted that in the absence of punitive damages, "there would be little to dissuade an employer from engaging in the practice of discharging an employee" from filing a claim.[129]

In *Hansen v. Harrah's*,[130] the former employees brought an action similar to the above case, claiming that their employer wrongfully discharged them because they filed workmen's compensation claims. The state of Nevada, through this court in this matter, also held that punitive damages were appropriate where the employees could successfully demonstrate "malicious, oppressive, or fraudulent conduct." This court found that by permitting the granting of these damages it would create a threat and that it was this very threat of punitive damages that would be the most effective way of deterring such conduct.[131]

In addition to these state claims, even in cases where an action is brought under a federal statute, which generally does not recognize punitive damages, the courts have awarded punitive damages. One example is illustrated by *Cancellier v. Federated Dept. Stores*,[132] where a former employee brought an action for wrongful discharge based on the Age Discrimination in Employment Act and on state law. The court, in this case, recognized that under the federal statute, punitive damages were unavailable, but it proceeded to uphold the jury award of punitive damages under the state claim still.

It is clear that many of the states allow punitive damages as an award in cases where employees have been wrongfully discharged for asserting their rights.[133] To do so, the courts have adopted the public policy exception to the at-will doctrine. The presence of a law or statutory right, such as this, indicates that there is clear public policy favoring that right.

X. Conclusion: Section 216(b) of the FLSA Warrants the Interpretation that Punitive Damages Are Permitted

The purpose of sections 215(a)(3) and 216(b) of the FLSA were clearly enacted by Congress in order to implement certain safeguards and afford certain employees protection against retaliation by employers. In amending the language of section 216(b), in 1977, Congress specifically added the text, "without limitation,"[134] to further effectuate the policies and purpose of the FLSA and the remedies provision. The circuit split between the Seventh and Eleventh Circuits indicates that the courts are faced with the dilemma as to whether Congress had intended to include punitive damages within the prescribed remedies that are authorized by

this section.[135] Based on the above analysis, the most compelling argument is that section 216(b) does in fact authorize the granting of punitive damages in cases where willful violations of the anti-retaliation provision of the FLSA are found.

This contention is supported through the use and analysis of a variety of interpretative tools, but the greatest arguments for awarding punitive damages in cases of retaliatory discharge is the public policy argument. The purpose of the anti-retaliatory statute is to protect employees, as well as to serve as an enforcement mechanism for illegal acts that government itself cannot completely monitor. Punitive damages serve as both a deterrent to employers from engaging in illegal conduct and as an incentive for employees to assert their rights and support the rights of others. The employer who willfully violates federal law and then adds insult to injury by retaliating against employees who stand up against the illegality should be punished!

Endnotes

1. The Fair Labor Standards Act 12 (Ellen C. Kearns *et al.* eds., 1999). President Franklin D. Roosevelt sent a message to Congress containing this quote to urge the enactment of a law that would establish fair labor standards. *Id*. at 11.
2. *Id*. at 10.
3. 9 U.S.C. § 215(a)(3) (2002). "[I]t shall be unlawful for any person . . . (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act [29 USCS §§ 201 et seq., generally; for full classification, consult USCS Tables volumes], or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." *Id.*
4. *Travis v. Gary Cmty. Mental Health Ctr., Inc*., 921 F.2d 108, 111 (7th Cir. 1990). The statute in its entirety reads:

   > (b) Damages; right of action; attorney's fees and costs; termination of right of action, Any employer who violates the provisions of section 6 or section 7 of this Act [29 USCS §§ 206 or 207] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 15(a)(3) of this Act [29 USCS § 215(a)(3)] shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3) [29 USCS § 215(a)(3)], including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 [29 USCS § 217] in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act [29 USCS §§ 206 or 207] by an employer liable therefore under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 15(a)(3) [29 USCS § 215(a)(3)]. 29 U.S.C.A. § 216 (1998).

5. 29 U.S.C. § 216(b) (2002).
6. *Id*.
7. *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928 (11th Cir. 2000).
8. *Id*.
9. *Travis v. Gary Community Mental Health Center, Inc*., 921 F.2d 108.
10. 941 F.2d 543 (1991).
11. 223 F.3d 617 (2000).
12. 167 F. Supp. 2d 838 (E.D. Pa. 2001).
13. 1992 U.S. Dist. LEXIS 3888 (N. Mar. 1992).
14. 97 F. Supp. 2d 737 (E.D. Va. 2000).
15. 2002 U.S. Dist. LEXIS 16859 (Utah 2002).
16. 29 U.S.C. § 216(b).
17. 29 U.S.C. § 215(a)(3).
18. The Fair Labor Standards Act at 12.
19. *Id*. at 12–13 (citing Joint Hearings on H.R. 7200 and S. 2475, H.R. Rep. No. 75-2182, at 6 (1937)).
20. *Id*. at 13. *See also* Jeff Le Richie, Note, *Protection for Employee Whistleblowers Under the Fair Labor Standards Act and Missouri's Public Policy Exception: What Happens if the Employee Never Whistled?*, 60 Mo. L. Rev. 973, 975–76; 29 U.S.C. § 202(a) codifies the Congressional policy and purpose in enacting the FLSA as well as the Congressional findings which led to the enactment.
21. 29 U.S.C. § 200–19.
22. The Fair Labor Standards Act at 15.
23. The Fair Labor Standards Act at 16.
24. *Id*. at 16–22. *See* Portal-to-Portal Act of 1947, Pub. L. No. 80-99, 61 Stat. 84 (1947) (codified as amended at 29 U.S.C. §§ 251–62 (1994)).
25. *Id*. at 25. See also *id*. at 24, for a table showing the extension of coverage under the 1966 amendments.
26. *Id*.
27. *Id*. at 27.
28. *Id*. *See also* 29 U.S.C. 216(b).
29. *Mitchell v. Robert DeMario Jewelry, Inc*., 361 U.S. 288, 292 (1959).
30. 29 U.S.C.A. § 215(a)(3) (1998).
31. *Robert De Mario Jewelry, Inc.*, 361 U.S. at 292.
32. *Id.*
33. *Id*.
34. Fair Labor Standards Act, Pub.L. 95-151, § 10 (1977) (codified as amended at 29 U.S.C. § 216 (1994)).

35. 361 U.S. 288.

36. 361 U.S. at 292.

37. 29 U.S.C.A. § 216(b) (emphasis added).

38. *See* 29 U.C.S.A. § 216(b).

39. *See* 31 U.S. at 292. *See also* Robert Belton, Remedies In Employment Discrimination Law, § 13.1 (John Wiley & Sons 1992). Belton cites to *Smith v. Wade*, 461 U.S. 30, 41 (1983) where the Court endorsed the policy objectives of punitive damages. The Court said that punitive damages punish the defendant, "deters persons from violating the rights of others . . . [and] encourages private lawsuits seeking to assert legal rights." *Id*.

40. *United States v. Monsanto Co*., 858 F.2d 160, 167 (4th Cir. 1988) (1989) (quoting *Blum v. Stenson*, 465 U.S. 886, 896 (1984) (noting that when "resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear").

41. Abner J. Mikva & Eric Lane, An Introduction to Statutory Interpretation and the Legislative Process 9–10 (1997) (citing *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

42. *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994). See generally *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 557–58 (1990) (explaining that statutory interpretation begins with text of statute); *Central Mont. Elec. Power Coop., Inc. v. Bonneville Power Admin*., 840 F.2d 1472, 1477 (9th Cir. 1988) (holding that statutory interpretation begins with language of statute itself).

43. *See* 73 Am. Jur. 2d *Statutes* § 65 (2002) (discussing that in determining whether an amendment changes the meaning of a statute or just clarifies it, courts will look at the plain language, legislative history, time, and circumstances of an amendment); *Corsentino v. Cordova*, 4 P.3d 1082 (Colo. 2000) (looking towards the plain language of the 1996 amendments of § 42-4-108(2)(c) to conclude that the General Assembly sought only to clarify that the "endanger life or property" condition of that section applied to the emergency vehicle exception). *Id.* at 1091.

44. 29 U.S.C. § 216(b) (2002).

45. *Travis,* 921 F.2d at 111.

46. *Circuit City Stores*, 121 S. Ct. at 1308–09 (quoting 2 A.W. Singer, Sutherland on Statutes and Statutory Construction § 47.17 (1991)).

47. *Travis,* 921 F.2d at 111; *see, e.g., Johnson v. Railway Express Agency, Inc*., 421 U.S. 454 (1975) (stating that an individual who establishes a cause of action under section 1981 is entitled to legal relief, including compensatory and punitive damages).

48. 48A Am. Jur. 2d *Labor and Labor Relations* § 4682 (2002).

49. *See Travis,* 921 F.2d at 111. (suggesting that by authorizing "legal" relief that Congress was also authorizing punitive damages).

50. *See United States v. Faudman*, 640 F.2d 20, 23 (6th Cir. 1981).

51. *Hughey v. United States*, 495 U.S. 411, 419 (1990).

52. 29 U.S.C.A. § 216 (1998).

53. *See Snapp*, 208 F.3d at 934 (declaring that in turning to the principle of *ejusdem generis*, all the relief in § 216(b) is compensatory in nature and that punitive damages have nothing to do with compensation.); *Lanza v. Sugarland Run Homeowners Ass'n*, 97 F. Supp. 2d 737, 740 (2000) (claiming that to allow punitive damages, which are designed to "punish and deter the wrongdoer," would therefore be inconsistent with the statute's compensatory scheme); *Looney v. Commercial Union Assurance Cos*., 428 F. Supp 533, 537 (E.D.M.I. 1977) ("The word 'legal' refers to the liquidated damages award which the preceding sentence of the ADEA makes available and the principle of *ejusdem generis* limits the available unlisted forms of relief to the same kind of relief as that enumerated. The remedies contained in the list are, without exception, equitable remedies.") *Id.*

54. *See Travis,* 921 F.2d at 111.

55. Robert Belton, Remedies in Employment Discrimination Law 455–58 (Wiley Law Publications 1992) (1935) (stating that the remedy of liquidated damages has a different nature in employment law than it does in contracts, where it takes a compensatory nature.); *Trans World Airlines v. Thurston*, 469 U.S. 111, 125–126 (1985) (discussing how liquidated damages have a punitive nature and are designed to "furnish an effective deterrent to willful violations.") *Id.* at 458.

56. *See Marrow v. Allstate Sec. & Investigative Servs*., 167 F. Supp 2d 838, 842–43 (2001); *Travis,* 921 F.2d 108, 111–12.

57. *See cert. denied*, *Nawrocki v. Macomb County Road Com'n*, 463 Mich. 143 (2000); *Bottomly v. Ford*, 117 Mont. 160 (1945).

58. 29 U.S.C. § 216(b) (2002).

59. *Id.* (emphasis added).

60. *Id.*

61. See *Martin v. Am. Int'l Knitters Corp*., 1992 U.S. Dist. LEXIS 3888 at *3 (N. Mar. I. Feb. 3, 1992) (discussing that victims under section 216(b) have a full range of remedies available to them, including punitive damages, as opposed to victims of sections 206 and 206).

62. *See Snapp,* 208 F.3d at 935 (stating that Congress provided for punitive damages in 216(a)); 29 U.S.C. § 216(a) (2002) ("Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.").

63. *See Travis v. Knappenberger*, 2000 U.S. Dist. LEXIS 18398 *36–*37 (D. Or. October 6, 2000); *Travis,* 921 F.2d 111–112 (discussing that the statute provides that legal and equitable relief available is "without limitation," so it therefore may include compensatory and punitive damages)

64. 29 U.S.C. § 216(a).

65. *Id.* at section 216(b).

66. 503 U.S. 60 (1992); *see Bell v. Hood*, 327 U.S. 678, 684 (1946) (stating that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. [n6] And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.") *Id. See also* 3 William Blackstone, Commentaries *23 (1783) (explaining that this principle originated in English common law and this Commentary, described it as a indisputable and general rule, which where there is a legal right, there is also a remedy, whenever the right in question is infringed upon).

67. *Franklin*, 503 U.S. 66.

68. 503 U.S. at 70–71 (emphasis added).

69. *Snapp,* 208 F.3d at 937 (explaining the *Franklin* presumption and declaring that it applies to circumstances where a right of action exists to enforce a federal right).

70. *See Travis,*921 F.2d 108 at 112 (claiming that courts are required to award relief to a prevailing party even if the party did not rely on the right statute or if they did not request the specific relief).

71. *See id.* at 111–12.; *see also Snapp,* 208 F.3d at 937.

72. *See Travis,* 921 F.2d at 111.

73. *Snapp,* 208 F.3d at 937 (claiming that a stating that section 216(b) offers a general right to sue is a laughable contention and that Congress specifically laid out a statutory scheme here with a distinct set of "circumscribed remedies") *Id.*

74. 29 U.S.C. § 216(b).

75. *See Franklin*, *supra* note 66.

76. 73 Am. Jur. 2d *Statutes* § 84 (2002).

77. See *Snapp,* 208 F.3d at 933 (deeming the legislative history as unhelpful); *see also Travis*, 921 F.2d at 112 (also deeming the legislative history as unhelpful in interpreting this section).

78. *Id.*

79. H. R. Conf. Rep. No. 95–497, 95th Cong., 1st Sess. 16 (1977).

80. 29 U.S.C. § 215(a)(3) (2002).

81. *Id.*

82. Black's Law Dictionary 476 (7th ed. 2000).

83. Richard E. Kaye, Annotation, *Liability Under Common Law For Wrongful or Retaliatory Discharge of At-Will Employee For In-House Complaints or Efforts Relating to Health or Safety,* 93 A.L.R. Fed. 269 (2002).

84. 82 Am. Jur. 2d Wrongful Discharge § 1 (2002).

85. *Id.* at section 11.

86. *Id.*

87. *Id.*

88. *See Green v. Ralee Engineering Co.*, 19 Cal. 4th 66 (Cal. 1998) (upholding the employee's claims, where employee was fired subsequent to complaining about the company shipping parts that failed inspection, noting that there were FAA regulations that prohibited the employer's conduct which employee specifically complained of).

89. See, e.g., Kaye, *supra* note 83 (discussing how some courts view in-house complaints as sufficient to state a claim, but other courts have held the opposite, which is that these internal complaints do not suffice).

90. *See* Paul Berks, *Social Change And Judicial Response: The Handbook Exception To Employment-At-Will*, Empl. Rts. & Employ. Pol'y J. 231, 49 (2000) (discussing that common law courts developed a "public policy exception" to the at-will rule. The "public policy" exception made judicial redress available to employees whose discharges were sufficiently outrageous that, if proven, would give rise to a cause of action for an intentional tort)**;** Robert C. Lockwood, *Alabama's Statutory Exception to the Employee At-Will Doctrine: Retaliatory Discharge Claims Under Alabama Code Section 25-5-11.1,* 47 Ala. L. Rev. 541, 32 (1996) (discussing how tort actions require jury trials and therefore so too should an action for retaliatory discharge since it is a tort action); Nancy Lee Firak & Kimberly A. Schmaltz, *Choice Of Law For Intentional Torts Occurring In Flight Over International Waters,* 63 Alb. L. Rev. 1, 127 (1999) (recognizing that a retaliatory discharge contravenes public policy and the court stated that the employer's retaliatory discharge is properly characterized as an intentional tort entitling the seaman to damages caused by the abusive firing); and *Hinton v. Pacific Enters.*, 5 F.2d 391, 394 (9th Cir. 1993) (applying state wrongful discharge statutes of limitations under either contract or tort theories).

91. Restatement (Second) of Torts § 908, cmt. b (1979).

92. *Id.*

93. *See id.* at section 500.

94. Robert Belton, Remedies In Employment Discrimination Law, § 13.1 (John Wiley & Sons 1992) (citing *Gertz v. Robert Welch Inc.*, 418 U.S. 30, 41 (1983)).

95. *Id.* (citing Restatement (Second) of Torts § 908(1) (1979)).

96. *Id.* (citing *Smith v. Wade*, 461 U.S. 30, 58 (1983)).

97. *BMW of North America v. Gore*, 517 U.S. 559, 568 (1996).

98. David G. Owen, *Symposium: Punitive Damages Awards in Product Liability Litigation: Strong Medicine or Poison Pill?: A Punitive Damages Overview: Functions, Problems and Reform,* 39 Vill. L. Rev. 363, 374 (1994). This article also provides a brief historical background on the origination of punitive damages and the controversy around their use. *See also* Jane P. Mallor, *Punitive Damages for Wrongful Discharge of at Will Employees*, 26 Wm. & Mary L. Rev. 449, 472–80 (1985) for a discussion of the history of punitive damages.

99. *Id.* at 375.

100. *Id.* at 380–81.

101. *See* Jane P. Mallor, *Punitive Damages for Wrongful Discharge of At Will Employees*, 26 Wm. & Mary L. Rev. 449, 451 (1985). *See also Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167 (1980); *Kelasay v. Motorola, Inc.*, 85 Ill.2d 124 (1978); *Adler v. Am. Standard Corp.*, 538 F. Supp. 572 (DC Md. 1982); *Nees v. Hocks*, 272 Or. 210 (1975).

102. *Id.* at 455. *See also* Richard E. Kaye, Annotation, *Liability Under Common Law For Wrongful or Retaliatory Discharge of At-Will Employee For In-House Complaints or Efforts Relating to Health or Safety,* 93 A.L.R. Fed. 269 (2002).

103. *Id.* at 456.

104. *Id.* at 458.

105. *Id.* at 462–464.

106. *Id.* at 476.

107. *See id.* at 480. See also *See* Paul Berks, *Social Change And Judicial Response: The Handbook Exception To Employment-At-Will*, Empl. Rts. & Employ. Pol'y J. 231, 49 (2000)**;** Robert C. Lockwood, *Alabama's Statutory Exception to the Employee At-Will Doctrine: Retaliatory Discharge Claims Under Alabama Code Section 25-5-11.1,* 47 Ala. L. Rev. 541, 32 (1996) (discussing how retaliatory discharge is a tort action).; Nancy Lee Firak & Kimberly A. Schmaltz, *Choice Of Law For Intentional Torts Occurring In Flight Over International Waters,* 63 Alb. L. Rev. 1, 127 (1999) (recognizing that a retaliatory discharge contravenes public policy and the court stated that the employer's retaliatory discharge is properly characterized as an intentional tort entitling the seaman to damages caused by the abusive firing); *Hinton v. Pacific Enters.*, 5 F.2d 391, 394 (9th Cir. 1993) (applying state wrongful discharge statutes of limitations under either contract or tort theories).

108. *Id.*

109. *Id.* at 489–90.

110. 1 Henry H. Perritt, Jr., Employee Dismissal Law and Practice 4 (4th ed. 1998).

111. *BMW of North America v. Gore*, 517 U.S. 559, 568 (1995).

112. 29 U.S.C. § 215(a)(3) (2002).

113. *Id.*

114. *Id.* at section 216(b).

115. *Gore* at 568.

116. See *Snapp,* 208 F.3d at 936 (stating that punitive damages would inexorably flow from any finding for the plaintiff); *Johnston v. Davis Sec., Inc.*, 217 F. Supp.2d 1224, 1230 (2002); *Lanza,* 97 F. Supp 2d 737.

117. *See id.*

118. *Owens-Corning Fiberglass Corp. v. Malone*, 972 S.W.2d 35, 40 (Tex. 1998) (discussing that the jury can consider many factors in determining the proper punitive damage award, such as fines already imposed on the defendant, their financial status, past awards actually paid by the defendant for similar violations, as well as factors. The court also indicates that the jury can also consider evidence introduced by the defendant to mitigate the damages.); *see* Restatement (Second) of Torts, § 908 cmt. e (stating that OCF relies on a part of comment e that suggests that it is appropriate to consider both punitive damages awarded in prior suits and those that may be granted in future suits).

119. *See Owens-Corning Fiberglass Corp.*, 972 S.W.2d at 35; *see BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (setting constitutional limits on the amount of punitive damage awards.);*see also* Owen, *A Punitive Damages Overview: Functions, Problems, and Reform*, 39 Vill. L. Rev. 363, 384–85 (1994) (indicating that adequate jury instructions and review of punitive damages help assure that the standards and procedures are applied in the most fair and accurate manner); Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 Fordham L. Rev. 37, 59 (1983) (noting that a bifurcated trial procedure and review on the appellate level lead to juries having a voice as to how much of an award should be granted, but also ensure that there are safeguards which will protect a defendant from unfairness).

120. 29 U.S.C. § 216(b).

121. *Id.*

122. *See e.g., Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167 (1980); *Kelasay v. Motorola, Inc.*, 85 Ill.2d 124 (1978); *Adler v. Am. Standard Corp.*, 538 F. Supp. 572 (DC Md. 1982); *Nees v. Hocks*, 272 Or. 210 (1975); *Webner v. Titan Distribution, Inc*. 101 F. Supp. 2d 1215 (N.D. Iowa 2000); *Murphy v. Topeka-Shawnee County Dep't of Labor Services*, 6 Kan. App. 2d 488 (1981); *Hansen v. Harrah's*, 272 Or. 210 (Nev. 1984); *Harless v. First Nat'l Bank*, 289 S.E.2d 602 (W. Va. 1982).

123. 74 Ill.2d 172 (1978) (holding that trial court's award of compensatory damages affirmed for public policy reasons, and punitive damages could be awarded for retaliatory discharge. They also stated that in the absence of the deterrent effect of punitive damages there would be little to dissuade an employer from engaging in the practice of discharging an employee for filing a workmen's compensation claim.).

124. *Id*. at 178, 189.

125. *Id*. at 181. The Illinois Workmen's Compensation Act was amended in 1975, making it unlawful for an "employer to interfere with or coerce the employee in the exercise of his rights under the Act." *Id*. (citing Ill. Rev. Stat. 1975, ch. 48, par. 138.4(h)).

126. *Id*.

127. *Id*. at 182.

128. *Id*. at 185.

129. *Id*. at 186.

130. 675 P.2d 394 (1984) (discussing how the court disagreed with the employer, holding that it recognized a public policy exception to the at-will rule making retaliatory discharge for filing a workmen's compensation claim actionable in tort).

131. *Id.* at 397 (discussing that the threat of punitive damages may be the most effective means of deterring conduct which would frustrate the purpose of our workmen's compensation laws).

132. 672 F.2d 1312 (9th Cir. 1982) (holding that a separate verdict form for punitive damages, are preferred, and that the trial judge did not commit reversible error in instructing the jury on "determining factor" under the ADEA, in using a general verdict, or in allowing tort damages on pendent state claims).

133. *Hansen*, 675 P.2d at 396. (claiming that many other states have adopted or recognized a public policy exception to the at-will rule making retaliatory discharge for filing a workmen's compensation claim actionable in tort. Stating that it would provide employers with an inequitable advantage if they were able to intimidate employees with the loss of their jobs upon the filing of claims for insurance benefits as a result of industrial injuries.).

134. 29 U.S.C. § 216(b).

135. *See Travis*, 921 F.2d 108; *Snapp*, 208 F.3d 928.

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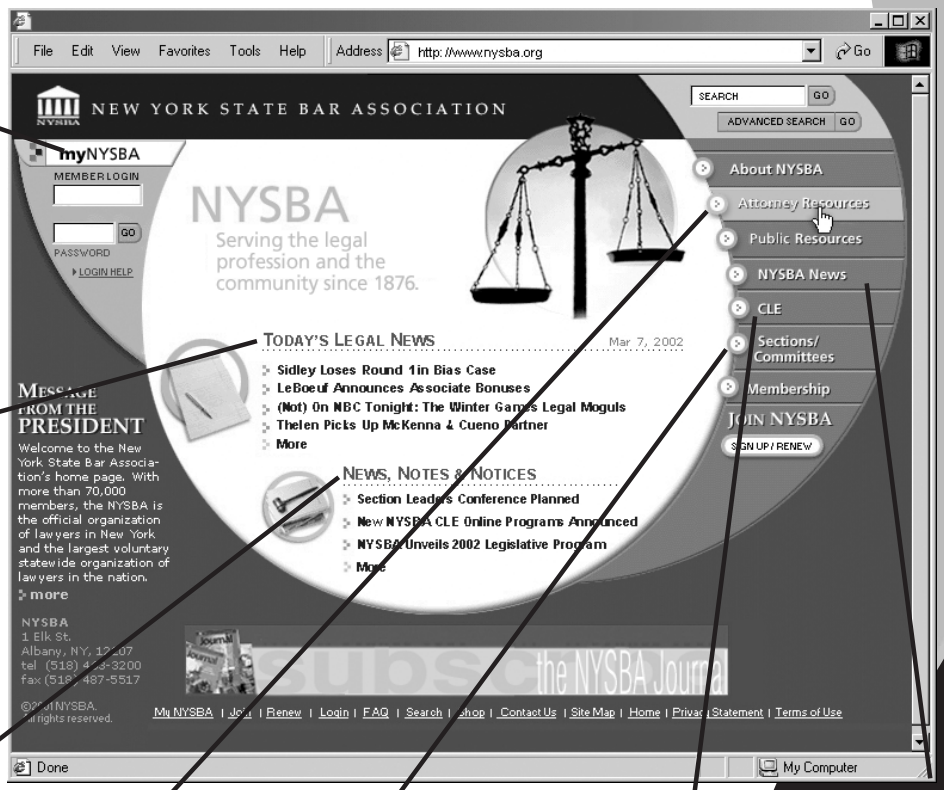

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