NYSBA FALL 2008 | VOL. 33 | NO. 1

L&E Newsletter

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

Message from the Outgoing Chair

Robert Kingsley (Kayo) Hull

"Ding!"

As I write these words in early June, a forgotten peace has returned to my office. During May, the last month of my tenure as Chair of the Labor and Employment Law Section, I received over ten Bar-related e-mails a day, and sent many more myself. So far this month, however, I have averaged just one such e-mail a day.

I know there are times we feel that we have become slaves to e-mail, and that it is difficult to get anything accomplished in an instant-response-demanding world. But I honestly don't know how I could have handled the Chair's position without e-mail. If I had had to reach everybody I needed to communicate with by telephone instead—the thought boggles the mind.

(continued on page 2)

Message from the Incoming Chair

Alan M. Koral

After a year understudying Kayo, I feel that I'm ready for the joys and thrills that come with chairing the Section. Kayo has taught me patience, which I know is a virtue; thrift, which I am told is a virtue; and charity to all, which is sometimes a virtue and which I strive every day to practice.

What can you expect during the Koral administration? Well, because I'm so heavily invested in our CLE programs, you can be sure that I'll be working closely with our brilliant CLE Co-Chairs, Stephanie Roebuck (who has been such an immense help this year as my CLE Co-Chair) and Ron Dunn (whose many services to the Section over the years make him exceptionally well qualified to take on the task). The objective will be to bring you the best, most varied and most innovative programs yet.

(continued on page 2)

Inside

NYSBA

A Message from the Outgoing Chair

Continued from page 1

Much has changed in the way we work and structure our day since I began practicing law 30 years ago. I think our productivity is vastly greater, and we (and our clients) have the electronic revolution to thank for much of it. The e-mail phenomenon enabled me to keep several State Bar balls in the air at a time, while still doing some of the work I'm paid for.

Annual Report

Looking back at my year, I see that I was in many respects a steward of the accomplishments of my predecessors. The Section has much positive inertia, and the Chair's job is to keep a good thing going. One of our best traditions is our active Continuing Legal Education Committee, and in that area I was a mere facilitator and cheerleader backing up our fine CLE Co-Chairs, Alan Koral—who has now succeeded me as Section Chair—and Stephanie Roebuck. Alan and Stephanie put together excellent, standing-room-only CLE sessions in Ithaca in September and in New York City in February.

Another long-standing tradition of our Section is the production of *Public Sector Labor and Employment Law*, which NYSBA first published in 1988 and which is now in its recently released Third Edition, co-edited by Section members Jerome Lefkowitz, Jean Doerr, and Sharon Berlin. The book (now two loose-leaf volumes in place of the original hardback) was released at an Albany conference that marked the 40th anniversary of the Taylor Law, sponsored by the Public Employment Relations Board. I had the honor of presenting a commemorative plaque to Jerry Lefkowitz, who was appointed Chair of PERB last year, acknowledging his years of leadership and hard work on the treatise project, dating back to the putting together of the First Edition.

This year, Alan and I made efforts to encourage the activities of our Section committees and communication among the Bar's Sections. The Executive Committee welcomed the launching of the Bar's 24th Section, the Section on Dispute Resolution, in which many of our members are already active. The Section has been a significant contributor to the State Bar's membership and CLE efforts, sending representatives to join several Bar-wide undertakings. I know our engagement will continue during Alan's year as Chair, with the support of Don Sapir, Chair-Elect.

Alan and Don made many major committee chair and co-chair appointments at the Executive Committee's May 30 meeting. They included the addition of Mark Risk and Mike Curley to our Communications Committee with a mandate to see through an updating of the Section's Web site. We want the Section to serve its members in every possible area. Contact information for all of our committee chairs appears on pages XX and XY of this *Newsletter*. If you are interested in joining a committee, please send the committee chair(s) an e-mail, with a copy to Alan Koral.

Thanks

I am grateful to the Executive Committee for entrusting me with the Chair's responsibilities, to Alan Koral for being an energetic and enthusiastic Clair-Elect, and to the State Bar's officers and staff, from President Madigan to the folks in the print shop, for their generous support and assistance. Thanks to you, kind reader, for being a member of the Bar and this Section and helping our voices to be heard in Albany. I hope to see many of you at our Fall Meeting in Cooperstown in September!

Robert Kingsley (Kayo) Hull is an arbitrator and mediator with his office in Penn Yan.

A Message from the Incoming Chair

Continued from page 1

We have quite a few new committee chairs, and I plan to have them assure that the committees engage in professionally meaningful activities and that committee members have attractive opportunities to make active contributions to those activities. I do not want committee membership to be something that is primarily used for Martindale-Hubbell profiles.

We're expecting to take a look at new venues for our Fall and Winter Meetings after those that are planned through 2010, when we will again be at Longboat Key, Florida. For our "fifth year" ventures we will be looking at venues other than Florida, and we also plan to try to find some new locales in New York. The new Ad Hoc Sites Committee Co-Chairs are Howard Edelman of Long Island, Jim Grasso of Buffalo and Deborah Skanadore Reisdorph of Utica, thus assuring a variety of geographical perspectives.

I am open to suggestions about anything having to do with the Section, as is my Chair-Elect in waiting, Don Sapir, who has already been of enormous help in helping me plan for a forward-looking, active and collegial year as Chair. My thanks to Don, Kayo and many others, not in the least Linda Castilla, our right hand (and left, too) at the State Bar Association. Please feel free to reach me at akoral@vedderprice.com or at (212) 407-7750.

Alan M. Koral is a shareholder in Vedder Price, P.C. and heads the firm's Labor and Employment Practice Group in the New York office.

From the Editor

Janet McEneaney

We strive to present articles of interest to varying groups within the Section. I believe we've done so in this issue.

Jack Raisner writes about counterclaims based on the plaintiffs' misuse of company computers, touching on after-acquired evidence in the post-modern age and the Computer Fraud and Abuse Act, among other topics. Ruth Raisfeld tells law firm administrators how to prevent litigation with employees of the firm. Frank Carling tells advocates how not to behave ineffectively in mediation and Barbara Deinhardt brings news from the New York State Employment Relations Board. We also have a New York employment law update and an article by William Kelleher III about the new e-discovery rules online.

Our regular columns in this issue are terrific. Don Dowling gives us an HR checklist for starting up in a new country and John Gaal answers a question about dealing with a pro sepetitioner whose pleadings are being ghost-written by an attorney.

Finally, we have two law-student articles. Anne Katz writes about how the *Register Guard* decision "convoluted" the NLRA, while Brandi Monique and Brigitte Platt take a stand on the granting of paid paternity leave.

I am sure you will enjoy them all.

Janet McEneaney

Request for Articles

If you would like to have an article considered for publication, please telephone or e-mail me. When your article is ready for submission, you can send it to me by e-mail in WordPerfect or Microsoft Word format.

Please include a letter granting permission for publication and a one-paragraph bio.

Janet McEneaney, Esq.
205-02 33rd Avenue
Bayside, NY 11361
(718) 428-8369
E-mail: mceneaneyj@aol.com

www.nysba.org/L&ENewsletter

Weighing Counterclaims Based on Plaintiffs' Misuse of Company Computers

By Jack A. Raisner

1. Introduction

The axiom "the best defense is a good offense" can refer to ways a defendant makes strategic use of evidence of the plaintiff's workplace misconduct. For example: in defending a breach of contract case, an employer may bring a counterclaim against an executive who misspends expense account funds or absconds with proprietary information; or, in a case of sexual harassment, the employer may raise the plaintiff's resume fraud to equalize the moral playing field; or, when defending against overtime claims, the employer may try to spotlight the undocumented work status of immigrant plaintiffs. Allegations such as these may be tangential to the plaintiff's claims, but provide a host of strategic options for the defendant. At a minimum, they inject into the litigation questions about the plaintiff's character and credibility. They may arm the defendant with what is known as "after acquired evidence" that cuts off potential damages. Or, if the allegations are strong enough, they may form the basis of a counterclaim against the plaintiff, making good on the hard-nosed threat: "If you sue me, I'll sue you."

Defendants who shift attention away from their own alleged failings to the plaintiff's may not only discourage witnesses from testifying and deter future plaintiffs from filing actions, they may drive down settlement amounts along the way. The chilling effects of these defense strategies, however, raise some policy questions about their deployment. In the context of civil rights and wage-and-hour litigation, private litigants play a crucial role in vindicating important statutory goals. In the case of impeachment material, courts have always balanced the use of misconduct against its prejudicial effect. Similarly, courts may stop short of declaring an open season on the plaintiffs' misconduct whenever an employee seeks to vindicate important federal rights, especially today when so few of us are without blemish—and misconduct is not hard to find. As prosecutors and civil litigators know, a company's e-mail archives provide a bounty of possible misconduct, if one is looking for it. That, combined with a recent upsurge in litigation involving statutes such as the Computer Fraud and Abuse Act (CFAA)[1] which create liability for computer misuse, suggest employers will be asking whether counterclaims can be fashioned based on allegations of the plaintiff's e-mail and computer misuse. Although the early returns are barely in, this article suggests that it may be best for employers to proceed with caution.

2. Beyond After-Acquired Evidence

Most employment lawyers are familiar with the role plaintiff misconduct has played in the context of after-acquired evidence—a doctrine clarified by the Supreme Court in *McKennon v. Nashville Banner Publishing Co*.[2] Prior to *McKennon*, some courts held that after-acquired evidence of employee misconduct could act as a total bar to the recovery of a plaintiff in a discrimination case: the Court, however, declared it a remedy cutoff. Ms. McKennon was laid off at the age of 62 and claimed her termination was motivated by her age. During discovery, she admitted having taken certain confidential company documents in order to support her claim. Although she was no longer working for the company, defense counsel informed her that she was "again" being terminated, this time for breaking company rules. The *McKennon* Court took it for granted that the plaintiff's layoff was motivated by age discrimination and that McKennon's termination would have been warranted had she still been working. The Court held that under such circumstances employees are barred from seeking remedies for periods beyond the date they could be legitimately discharged for wrongdoing, even if their infractions might have gone undiscovered absent the suit. Thus, the Court held McKennon was precluded from seeking reinstatement, front pay or back pay beyond the date she was "terminated" as a result of the after-acquired evidence.

While after-acquired evidence may be an effective tool for defendants when wrongful termination is at issue, the doctrine has limitations.[3] It requires the defendant to ultimately show that the plaintiff's transgression was a firing offense—not only on paper, but in the reality, i.e., that the company actually would have terminated the plaintiff and is not merely asserting so *post hoc*. If the plaintiff is accused of violating a rule that the company does not enforce consistently, the company may have difficulty establishing this affirmative defense, especially on summary judgment. Moreover, the doctrine will be irrelevant if the plaintiff does not seek damages for continued employment such as in most overtime actions. Given the shortcomings of the after-acquired evidence doctrine, companies defending wage-and-hour and some discrimination suits who wish to advance the plaintiff's wrongdoing from a bit part to a starring role in the litigation may wish to up the ante by leveling counterclaims.

3. Misconduct Today

The type of misconduct—taking company documents—at issue in *McKennon* occurred in the age before e-mail came to dominate the workplace. The use or abuse of e-mail is now perhaps one of the more fertile areas to probe and find misconduct. As one plaintiff's lawyer told Professor Melissa Hart:

> Employers . . . right away start trying to find anything and everything they can about the employee. Generally they will find something if they look hard enough. A recent common one is personal e-mail use. People use e-mail at work and they often do it in violation of company policy against doing personal e-mail. So all an employer has to do is get the IT person to give them a list of all e-mails ever sent. Then the employer can derail the discussion about discrimination and start talking about whether the company policy was violated.[4]

Today, a typical plaintiff might be an HR "Associate" who performs screening interviews and is paid as an exempt employee. She believes herself misclassified and eligible for paid overtime. She also has concerns that her employer's screening process is biased against female job candidates. After being denied a promotion in favor of a male, she files an EEOC charge, resigns a year later, and commences a class action with claims under both Title VII of the Civil Rights Act and Fair Labor Standards Act (FLSA). Before leaving her employment, however, she e-mails to her personal e-mail account documents received in the ordinary course of her job, which she believes support her claims of discrimination and non-payment of overtime. In the early course of litigation, the employer learns she has taken these documents. Based on her removal of the documents via the e-mail system, the employer now considers how to best frame the issue of the plaintiff's misconduct. Its potency under the after-acquired evidence doctrine may be negligible given the plaintiff is not seeking continued employment-based damages. A counterclaim, however, that keeps her misuse of company e-mail more conspicuously under the spotlight may be more advantageous in deflecting her charges.

The Associate's mere violation of a company policy proscribing personal e-mail use at work, or even sending herself the documents, might amount to a terminable offense, if such policies were consistently enforced. But could her e-mail misuse give rise to counterclaims? Fiduciary breach causes of action exist, but usually require that misappropriated property be used for some gainful, impermissible benefit not necessarily evident here. The question is then, what law if any provides a firm basis for counterclaims? One place to look would be the Computer Fraud and Abuse Act. Originally enacted as the Counterfeit Access Device and Computer Fraud and Abuse Act of 1984 (CFAA), the statute was designed to protect government computer databases from hackers. The law has been amended several times to help companies protect their trade secrets and other confidential and proprietary electronic business information. A private right of action was first created in the amendments of 1994.[5] The CFAA was further amended as part of the USA Patriot Act of 2001 to encompass damage done to computers outside the United States that affects interstate or foreign commerce or communication within the U.S.

4. Computer Fraud and Abuse Act

Most of the private litigation under the CFAA has centered on claims against competitors that hire former employees who access computers in order to steal trade secret information.[6] There are indications that courts may resist employers' attempts to target run-of-the-mill employee disloyalty absent accusations of trade secret and unfair competition violations.[7] No court has yet ruled that the CFAA protects companies against current employees who use company e-mail systems in conventional ways for non-competing purposes, even though company policies may have been violated. The case law is nascent and sparse, however, so that with some creativity a claim might be framed within the statute's somewhat murky language.

To bring a civil claim under the CFAA, a party must establish that: (1) defendant "knowingly" and with "intent to defraud"; (2) accessed a "protected computer"; (3) without authorization or by exceeding authorization that was granted; (4) defendant's conduct "furthered the intended fraud and obtained anything of value"; and (5) a loss aggregating at least $5,000.[8] To succeed on the merits of a CFAA claim, a plaintiff must plead and prove damage or loss of at least $5,000 attributable to the alleged violation of the CFAA, and this amount is a jurisdictional threshold.[9] "Loss" is defined as "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service."[10] These costs may include resources expended in hiring a computer consultant to determine if and how a computer has been compromised and any resources expended in fixing any problems caused by the unauthorized access.

Some courts count loss of business and business goodwill toward establishing the $5,000 jurisdictional.[11] In *Nexans Wires S.A. v. Sark-USA, Inc.*,[12] however, the Second Circuit held that loss does not include "non-computer related costs" like travel expenses or "investigating business losses unrelated to the actual computers." The

Nexans Wire panel rejected the plaintiff's argument that the travel costs of high-ranking executives qualified as a "loss" within the meaning of the CFAA, "because the cost was unrelated to investigating or remedying damage to a computer."[13] The purpose of the executives' travel was confined to a discussion of the importance of what information was believed to have been accessed, and the executives took no remedial measures in response to the unauthorized access. Also, such loss cannot be supported without details of how the loss was incurred.[14]

The CFAA defines "damage" as "any impairment to the integrity or availability of data, a program, a system, or information."[15] A number of cases have established that misappropriation of trade secrets or confidential information is sufficient to establish the $5,000 jurisdictional threshold.[16] In the Second Circuit, however, damage means actual damage to the computer systems. "Cases in this jurisdiction have found that 'losses' under the CFAA are compensable only when they result from damage to, or the inoperability of, the accessed computer system."[17]

The civil action provision of the CFAA provides that "[a]ny person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief."[18] The CFAA provides a two-year statute of limitations that begins to run on the date of the act complained of or the date of the discovery of the damage.[19]

Because there are few reported cases discussing civil claims under the CFAA, it is difficult to tell whether its use will be confined mainly to the trade secrets arena or will broaden to all sorts of workplace computer misuse that employers spend money investigating. Until clarity comes, defendants who bring counterclaims may succeed in diverting attention from the plaintiff's actions. But there may be a downside. Recent developments in the interpretation of the anti-retaliation clauses of the Title VII and FLSA may help plaintiffs challenge counterclaims as improper and perhaps impermissible. While everything may seem like fair game in litigation, these anti-retaliation principles suggest that employers actually violate the law when they dig and assert in court e-mail and computer use violations. It may be hard for the employer to insist on its right to do that when such litigation conduct can so plainly deter plaintiff and others from seeking to vindicate important rights under discrimination claim and wage-and-hour laws.

5. Retaliation Based on Counterclaims and Litigation Conduct

Defense litigation conduct that would chill reasonable plaintiffs from asserting their rights can serve as the basis of a claim of unlawful retaliation, by the straightforward application of principles set forth by the Supreme Court in a 2006 decision, *Burlington Northern Santa Fe Ry. Co v. White*.[20] In *Burlington Northern*, the Court recognized that the anti-retaliation provision of Title VII pertains not only to retaliatory adverse action on the job but actions not directly related to employment which cause harm outside the workplace. Thus, a retaliation claim can apply to "employer actions that would have been materially adverse to a reasonable employee or job applicant," e.g., "harmful to the point that they could well dissuade a reasonable worker from making or reporting a charge of discrimination."[21] The *Burlington Northern* standard has been applied to permit a plaintiff's claim of retaliation under the Fair Labor Standards Act after he brought an overtime claim and was hit by a counterclaim for fraud.[22] In the courts of the Second Circuit, counterclaims have been recognized as actionable retaliation when taken against an employee in response to his or her assertion of statutory workplace rights, both prior to and after *Burlington Northern*. [23] The cost of creating a diversionary tactic may be particularly stiff in the Southern District of New York, where employees have been permitted to recover punitive damages under the anti-retaliation provision of the FLSA.[24]

6. Conclusion

Defendants have ample opportunities to assert charges of wrongdoing against plaintiffs within the context of litigation over discrimination or wage-and-hour claims. These charges, which shift focus to the plaintiff's transgressions and away from the defendant's, may have nothing to do with the underlying litigation. They often are discovered only due to the commencement of litigation. These allegations of wrongdoing may not always fit within the context of the after-acquired evidence doctrine commonly found in discrimination cases. That is because defendants who mount an after-acquired evidence defense usually must establish a terminable offense; and the doctrine itself may be inapplicable in actions where the damages for wrongful termination of employment is not germane—such as overtime litigation. The most attractive means to insert plaintiff wrongdoing into litigation may therefore be a counterclaim raised against the plaintiff.

The first place defendants are likely to look for plaintiff wrongdoing is the e-mail system—and they are likely to find some infractions of company policies there, such as the use of e-mail or the Internet for personal purposes. Whether such conduct can be molded into counterclaim material is now being litigated under the Computer Fraud and Abuse Act. The CFAA provides a plausible cause of action for employee conduct especially when it is undertaken to gain competitive advantage and causes business losses and computer damage. Before setting out in this direction based on mere violations of common e-mail or computer policies, however, employers should examine recent precedents that tend to interpret such "loss" and "damage" narrowly against the claim-

ant. Also, the bringing of a counterclaim under the CFAA may well trigger the plaintiff's additional claim of retaliation under Title VII and FLSA, given the recent Supreme Court's expansive interpretation of retaliation. Such a counterclaim has been recognized in the Southern District of New York, a venue in which a plaintiff has been awarded punitive damages for retaliatory conduct. These plaintiff protections should keep in check overly aggressive use of the "best defense is a good offense" strategy when it comes to the bringing of counterclaims based on employees' objectionable use of computer systems.

Endnotes

1. 18 U.S.C. § 1030.
2. 513 U.S. 352 (1995).
3. *See* Melissa Hart, *Retaliatory Litigation Tactics: The Chilling Effects of After-Acquired Evidence,* U. of Colorado Law Legal Studies Research Paper No. 07-23, Sept. 11, 2007.
4. *Id.* at 25.
5. 18 U.S.C. § 1030(g).
6. *Shurgard Storage Centers, Inc. v. Safeguard Self Storage, Inc.*, 119 F. Supp. 2d 1121 (W.D. Wash. 2000); *see* Daniel J. Winters and John F. Costello, Jr., *The Computer Fraud and Abuse Act: A new weapon in the trade secrets litigation arena,* INTELLECTUAL PROPERTY, Newsletter of Ill. State Bar Assn., Vol. 44, No. 3, Apr. 2005.
7. *See, e.g., Winner v. Polistina,* No. 06-4865, 2007 U.S. Dist. LEXIS 40741, at *13 n. 7 (D. N.J. Jun. 4, 2007).
8. 18 U.S.C. §§ 1030(a)(4), (a)(5)(B)(i), (g).
9. *See Register.com v. Verio, Inc.*, 356 F.3d 393, 439 (2d. Cir. 2004).
10. 18 U.S.C. § 1030(e)(11).5.
11. *See Creative Computing v. Getloaded.com*, 386 F.3d 930 at 935 (9th Cir. 2004) (holding that loss of business and business goodwill as a result of the unauthorized access qualified as economic damages countable toward the $5,000 jurisdictional threshold).
12. 166 Fed. Appx. 559, 563 (2d Cir. 2006); *Nexans Wires S.A. v. Sark-USA, Inc.*, 319 F. Supp. 2d 468, 474-75 (S.D.N.Y. 2004).
13. *Nexans Wire SA v. Sark-USA, Inc.*, 319 F. Supp. 2d at 473.
14. *See Chas. S. Winner, Inc. v. Polistina,* No. 06-4865, 2007 U.S. Dist. LEXIS 40741, at *12-13 (D.N.J. Jun. 4, 2007) (granting employee's motion to dismiss the CFAA claim after finding that employer had "simply stated that they hired a computer expert without providing the type of investigation or description of how the computer system was interrupted, damaged, or restored").
15. 18 U.S.C. § 1030(e)(8).
16. *See, e.g., Four Seasons Hotel & Resorts BV v. Consorcio Barr., SA*, 267 F. Supp. 2d 1268, 1324 (S.D. Fl. 2003); *Shurgard,* 119 F. Supp. 2d at 1126-27.
17. *Civic Ctr. Motors, Ltd. v. Mason St. Imp. Cars, Ltd.*, 387 F. Supp. 2d 378, 381 (S.D.N.Y. 2005).
18. 18 U.S.C. § 1030(g).
19. *Id.*
20. 126 S. Ct. 2405 (2006).
21. *Id.* at 2409.
22. *Darveau v. Detecon, Inc.*, 515 F.3d 334 (4th Cir. 2008*) (*holding that the district court clearly erred in requiring the plaintiff who premised his retaliation on a counterclaim of fraud lodged by his employer in his FLSA action to allege that his employer retaliated against him with a materially adverse *employment* action, since such as counterclaim, while not an employment action, might dissuade a reasonable worker from bringing suit).
23. *See, e.g., Jacques v. DiMarzio, Inc.*, 216 F. Supp. 2d 139 (E.D.N.Y. 2002) (dismissing baseless and retaliatory counterclaims *sua sponte* and awarding sanctions); *Fei v. WestLB,* No. 07CV8785, 2008 U.S. Dist. LEXIS 16338 (S.D.N.Y. Mar. 5, 2008) (granting plaintiff leave to amend a retaliation claim under FLSA based on counterclaim alleging violation of Computer Fraud and Abuse Act for employee's use of e-mail system to send computer documents to his personal e-mail address.) N.B. The author represented the plaintiff in this case.
24. *Sines v. Serv. Corp. Int'l.*, 2006 U.S. Dist. LEXIS 82164 (S.D.N.Y. Nov. 8, 2006)(upholding jury award of $130,000 in punitive damages based on combined back pay and / or liquidated award of $65,020 for retaliation under § 215(a)(3)).

Jack Raisner is a Professor of Law at St. John's University's Tobin College of Business and a Partner in the firm of Outten & Golden, LLP. He can be reached at jar@outtengolden.com.

News from the New York State Employment Relations Board

By Barbara Deinhardt

Since I came on as Chair, I generally hear one of two things about the New York State Employment Relations Board—NYS ERB—even from experienced practitioners. Either they say, "Oh, NYS ERB—that is just the state NLRB and so isn't it basically out of business?" Or they say, "Is that the same as PERB?" Created in 1991 from a merger of the State Mediation Board and the State Labor Relations Board, NYS ERB is an independent gubernatorial state agency that operates essentially as a state NLRB *and* a state FMCS. Our unfair labor practice and representation jurisdiction is very limited and basically fixed (racetracks, religious schools, some musicians, some buildings—maybe if the state gives collective bargaining rights to farmworkers our jurisdiction will grow), but our conflict resolution services—arbitration, mediation, card checks, non-NLRB representation elections, training--are available to *all* private employers in the state and their unions, without regard to their size or industry. Essentially, what PERB is for the public sector, SERB is for the private sector.

One very interesting new area of jurisdiction for NYS ERB is home-based child care providers. (These are not home health aides; they are operators of family day care homes.) The Governor issued an Executive Order last May, giving these child care providers the right to vote to be represented by a union in discussions with the state about the "stability, funding and operation of child care programs, expansion of quality child care and improvement of working conditions, including subsidies, benefits or payments for child care providers." The State is not the employer—there really is no employer—but the State pays the providers. NYS ERB is charged with conducting the elections and then with directing mediation for disputes that arise under the Order. The Order sets out four different units—two upstate and two downstate. The UFT was certified after an election in one of the downstate units, a unit of about 28,000. CSEA was certified as the representative for one of the upstate units on the basis of a card check and recently won an election for the other unit and thus now represents about 24,000 childcare providers.

It is a common misconception that the New York State Employment Relations Board can provide its service only where the employer is not subject to federal jurisdiction. This is not the case. For example, pursuant to Article 20, Section 705, of the New York State Labor Law, the Board is empowered to conduct representation elections and showing of interest reviews (card counts) for private employers and unions not covered by the National Labor Relations Act, as well as for *any* private employers / unions by agreement of the parties. Certifications issued by NYS ERB for employers / unions not under the jurisdiction of the NLRB will be given comity by the NLRB, i.e., will be given the same effect as NLRB certifications. We can schedule and conduct elections quickly and according to the agreements of the parties.

As the NLRB held in the case of *We Transport, Inc.* (198 NLRB 949 (1972)),

> In the instant case the secret ballot election was held under the auspices of a responsible state government agency [i.e., the New York State Labor Relations Board]. The parties voluntarily participated in the election and, so far as it appears, such election was conducted without substantial deviation from due process requirements. In these circumstances, we shall accord the same effect to the results of the state election as we would attach to a determination of representative based on an election conducted by the Board.

NYS ERB administers two arbitration panels. We do not charge an administrative fee or room rental fee for any arbitration held at NYS ERB and arbitration requests may be filed online. A list of NYS ERB arbitrators is posted on our Web site (www.labor.state.ny.us / erb) and their resumes soon will be.

We administer a pro bono arbitration panel, where arbitrators who want to be listed on our regular panel first volunteer to hear cases and render decisions without charge to the parties (other than a nominal late cancellation fee where applicable). NYS ERB is the only place where aspiring arbitrators can get experience and training and where unions and employers don't have to pay for an arbitration. We are improving our training and mentoring program for new arbitrators to ensure quality.

We also administer a regular panel of arbitrators, sending out lists of qualified arbitrators who bill at their customary rates. Many unions and employers specify in their collective bargaining agreements that NYS ERB will be their arbitration administrator. If the union and the employer agree, either party may write to NYS ERB and ask that a pro bono or regular panel arbitrator be designated. We can also administer a panel agreed to by the parties in their contract. Because we are a small agency with local offices, we can provide our arbitration services in a timely and responsive manner. The parties are able to handle scheduling directly with the assigned arbitrator.

NYS ERB also provides mediation services free of charge to unions and employers to help them negotiate a new collective bargaining agreement or to resolve disputes and grievances under an existing agreement. By federal law, parties are required to send us a written notice in advance of any modification of a collective bargaining agreement. We are then able to assist them in reaching an agreement and avoiding any work disruption or stoppage.

Pursuant to state law, NYS ERB is available to assist all private employers, unions and employees in New York State in preventing or resolving employment-related disputes of any kind. In addition to the services described above, NYSERB also offers the following services:

- Contract ratification elections
- Grievance mediation
- Mediation of employment-related disputes between an employer and its employees
- Mediation of jurisdictional disputes
- Assistance in setting up a grievance mediation / arbitration procedure
- Model dispute resolution contract language (arbitration, mediation, etc.)
- Facilitation of joint labor-management meetings

From the Archives

The agency has a very long history. The current Board was created in 1991 as a merger of the State Mediation Board and the State Labor Relations Board. However, it began as the State Board of Mediation (soon renamed the State Board of Arbitration and Mediation) in 1886. We are fortunate to have copies of some of the Annual Reports of the State Board from the late 1800s. They have such fascinating stories! The Board, in its 1892 Annual Report, referred to a strike in the collar factory of Miller, Hall & Hartwell in Troy, which was caused by a disagreement about the prices to be paid starchers after a starching machine had been introduced into the factory. The parties to the controversy gave different versions of the causes of the strike, the firm claiming that the starchers were opposing the introduction of new machinery, while the employees claimed that the principal point in dispute was the question of wages.

The Report sets out a lengthy affidavit from ten of the workers (all women, mostly Irish), that explained the reasons for the starchers having "left the service" of the employer on November 2, 1891. According to the workers, the employer had changed their wage to piece work after the machine was brought in, which they calculated would have reduced their wages 56.25%. According to the Report, the Starchers' Union offered to submit the question in dispute to a local board of arbitration, to be chosen by the parties, but the firm rejected this proposition.

The Starchers' Union also went on strike in January 1892 against other factories over the same issues. Members of the Board had several conferences with representatives of the parties to the controversy and one employer, the firm of Cluett, Coon & Co., submitted a statement in reference to the strike in their factory. According to that employer, before bringing in the new collar starching machines, they had notified the starchers and had

> come to an agreement with our starchers on the matter of price. The starchers in another establishment were making ***big wages*** [emphasis added—ed.] at one and three-quarters cents per dozen, but inasmuch as our work is considerably finer and more difficult than the average, we decided to give our starchers two cents per dozen. The starchers we retained, all but three or four, at once ***cheerfully*** [emphasis added—ed.] assented to this. The few that refused said they would not work after the machine on any terms. On the second day our three machines were running successfully, and notwithstanding the excitement and action by outside pressure brought to bear on the girls they commenced earning good wages. I believe one skilled operative earned three dollars the second day and I may here state that a girl of ordinary ability can earn two dollars a day.

Notwithstanding these "big wages," a number of the starchers went on strike. "The remainder of the employes came to work as usual, but it was explained to us by several of the employes that they came with much timidity, persuasion and intimidation having been brought to bear upon them to remain away."

The employer went on.

> The complaint that this machine throws a number of people out of employment has no more weight in this case than in the case of the button-hole machine or any other labor-saving machine. . . . As advanced manufacturers, we can no more, in justice to ourselves or to the interest of an industry so important to our city, forego [*sic*] the use of the starching machine than we could twenty years ago have repudiated the ironing machine, to which now no one dreams of objecting. . . . For us to deprive ourselves of its use would be taking a step backward, and to publish to the world that a leading Troy industry had come to a standstill. We must keep in with the march of progress or step out of the ranks. But for the interference of girls who, having struck

> and left an employment paying the ***best women's wages in the world*** [emphasis added—ed.], and who are now jealous because others step in and learn in a week or ten days to make two dollars a day, we would have no trouble within the circle of our own establishment.

After having exhausted all efforts to effect an amicable settlement of the difficulty, the Board met in the city of Troy, on the second of February [1892], for the purpose of formally inquiring into the causes of these strikes. The manufacturers appeared in person, and by Davenport & Hollister and James H. Ryan [remember this name—ed.], their attorneys. The Starchers' Union was represented by a committee.

At the beginning of the proceedings, the Union advised the Board that it was not prepared to proceed. Here is the Union's explanation. [John Gaal, take note. Here is a great ethics in labor law story!]

> For the Troy laundry girls, the undersigned would respectfully state that in consequence of an unforeseen and extraordinary occurrence, the matter before your honorable Board cannot be investigated without deliberate and willful prejudice to our humble cause. Confident of its justice and believing that the truth could be best established before a tribunal where the parties interested could be represented by counsel, we engaged the services of Attorney James H. Ryan [remember him?—ed.], to whom we confided our case. He expressed the most favorable opinion possible of its merits and accepted it.
>
> At a recent interview with Mr. Ryan, we learn that he has deserted us, and having secured our side of the case is now retained by the manufacturers. Your honorable Board will see the embarrassing position in which we are placed—not only embarrassing, but defenceless [*sic*]—on the very eve of this investigation. If your honorable Board will conduct an investigation in the face of these facts, we leave our mercenary lawyer, who has disgraced the bar and his manhood, to plead both sides of the case, and whatever the outcome may be it cannot do us more injury than he has already done us through his treacherous betrayal of our interests.
>
> We owe your commission this explanation of our absence. It is no sign that we fear investigation, nor does it indicate that we have abandoned the struggle.
>
> We shall take steps at once to put our case before our city and before the whole country, and trust to a fair-minded public to secure for us the justice that we seek. Yours respectfully, Dora Sullivan, President, Starchers' Union

And what sayeth the blackguard Ryan?

> When they have charged me with playing double. . . , I might say some things that might be detrimental to them, but, by secrecy, I am bound to keep my mouth closed. . . . It is only due to me to say that these parties I now represent I have represented for years, longer than there was any starchers' union in Troy . . . . They cannot say they are embarrassed because they have nobody to represent them, for they have had ample time to get counsel. . . .

The firm, while not objecting to a postponement, asked the Board to set a date so that the investigation could proceed "speedily, because it can be readily seen that long delay demoralizes the business to a great extent." Miss Sullivan responded,

> Early in December we made a proposition of arbitration to Miller, Hall & Hartwell, the most honorable proposition that was ever made to any firm, and they would not accept it; and now that they have Mr. Ryan, who has their side and our side of it, they want an immediate investigation.

And what was the end of this story? As the Board reported, "The strike resulted in favor of the manufacturers, who succeeded in employing other hands to take the places of those who had gone on strike."

"State Labor Relations has stepped into the dispute and a settlement is expected shortly."

President Bush Signs Legislation Prohibiting Genetic Discrimination in the Workplace

By Joan Gilbride and Thomas Lookstein

DNA and federal employment law have intertwined like a double helix as President Bush has signed into law the Genetic Information Nondiscrimination Act of 2008 (GINA). Lawmakers are already calling GINA "the first major civil rights act of the 21st century."[1] A major reason that Congress passed GINA is that many employers require that their workers undergo medical examinations as a precondition to employment. For example, a 2001 study by the American Management Association showed that nearly two-thirds of major U.S. companies require medical examinations of new hires. Moreover, the study found that fourteen (14) percent of those employers conduct tests for susceptibility to workplace hazards, three (3) percent for breast and colon cancer, and one (1) percent for sickle cell anemia, while twenty (20) percent of those employers collect information about family medical history.[2] Given that GINA has just been signed into law, employers and their employment practice liability (EPL) insurers should understand GINA's scope and their possible exposure thereunder. In this piece, we summarize: (a) GINA's scope as it pertains to employers; (b) an employer's liability exposure under GINA; and (c) possible ramifications for employment practice liability (EPL) insurers in light of GINA.

"Lawmakers are already calling GINA 'the first major civil rights act of the 21st century.'"

The Scope of GINA

One of GINA's purposes, as it pertains to private employers, is to make it an unlawful employment practice for them to discriminate against any employee on the basis of his or her "Genetic Information." The law specifically prohibits employers:

(1) to fail or refuse to hire, or to discharge, any employee, or otherwise to discriminate against any employee with respect to the compensation, terms, conditions, or privileges of employment of the employee, because of genetic information with respect to the employee; or

(2) to limit, segregate, or classify the employees of the employer in any way that would deprive or tend to deprive any employee of employment opportunities or otherwise adversely affect the status of the employee as an employee, because of genetic information with respect to the employee.[3]

GINA defines "Genetic Information" as including: (1) an individual's genetic tests; (2) the genetic tests of an individual's family members; and (3) the manifestation of a disease or disorder in an individual's family members.[4]

It is also an unlawful employment practice under GINA for an employer to request, require or purchase Genetic Information with respect to an employee or an employee's family members, unless, among other things: (1) the employer inadvertently requests or requires family medical history; (2) the employee provides a knowing and voluntary authorization in connection with health services or genetic services provided by the employer; (3) the employer requests or requires family medical history from the employee in order to comply with the Family and Medical Leave Act; (4) the employer purchases documents that are commercially available; (5) the information involved is to be used for genetic monitoring of the biological effects of toxic substances in the workplace; or (6) the employer conducts DNA analysis, for law enforcement purposes, as a forensic laboratory or for the purpose of human remains identification.[5]

An employer legally in possession of an employee's Genetic Information is also required, under GINA, to keep that information confidential and not disclose the Genetic Information to anyone but certain individuals and organizations, including: (1) the employee at his or her request; (2) an occupational or other health researcher if the research is conducted pursuant to specified regulations; (3) anyone in response to an appropriate court order; (4) government officials who are investigating compliance with GINA; (5) anyone to the extent that such disclosure is made in connection with the employee's compliance with the certification provisions of the Family and Medical Leave Act; and (6) an applicable federal, state or local public health agency.[6]

An Employer's Exposure Under GINA

An employer's exposure for a claim under GINA (a "GINA Claim") is largely the same as that for any other claim under the federal civil rights laws. For example, the compensatory and punitive damages permitted a prevailing plaintiff under 42 U.S.C. § 1981a, including the limitations prescribed therein, are generally provided a prevailing plaintiff on his or her GINA claim. Furthermore, the prevailing plaintiff on a GINA claim would also be generally entitled to his or her attorney's fees as provided for in 42 U.S.C § 1988.[7]

A GINA plaintiff, as with other federal discrimination claims, will have to first file his or her GINA Claim with the Equal Employment Opportunity Commission (EEOC).[8]

"Clearly, GINA will present new challenges for employers, EPL insurers, the Courts and the EEOC and it will take some time before GINA's overall effect can be measured."

Ramifications for EPL Insurers

Although GINA is the first federal law pertaining to genetic discrimination in the workplace, according to the National Human Genome Research Institute, at least thirty-one (31) states previously adopted laws regarding genetic discrimination.[9] Nonetheless, given that President Bush has just signed GINA into law, EPL insurers should consider whether their EPL policies, as written, cover GINA Claims.

A typical EPL policy provides coverage for claims alleging: (a) wrongful termination; (b) invasion of privacy; and (c) all sorts of other prohibited discrimination, including that based on gender, race, age, national origin, religion, sexual orientation, military service, pregnancy or disability. Therefore, GINA Claims pertaining to a negative employment action (wrongful termination, demotion or refusal to hire) on the basis of Genetic Information could constitute "discrimination," "wrongful termination," and/or "invasion of privacy," depending on the particulars of the Claim. Furthermore, as explained above, an EPL insurer's exposure for a GINA Claim could largely be the same for a claim under other state and federal discrimination laws. Thus, absent exclusionary language, it is possible that most EPL policies would respond to certain types of GINA Claims.

Conclusion

President Bush signed GINA into law partly in order to protect employees from potential abuses inherent in acquiring an employee's medical information, including employment discrimination. Clearly, GINA will present new challenges for employers, EPL insurers, the Courts and the EEOC and it will take some time before GINA's overall effect can be measured.

Endnotes

1. *Congress Sends Bush Anti-Genetic Discrimination Bill*, Associated Press, May 5, 2008 (May 9, 2008) <http://www.foxnews.com/story/0,2933,354210,00.html>.
2. *Id.*
3. H.R. 493, 110th Cong, § 202 (2008).
4. H.R. 493, 110th Cong. § 201 (2008).
5. H.R. 493, 110th Cong, § 202 (2008).
6. H.R. 493, 110th Cong, § 206 (2008).
7. H.R. 493, 110th Cong, § 207 (2008).
8. *Id.*
9. Jesse J. Williams, *Anti-Genetic Testing Bill Passes*, Time, May 2, 2008 (May 9, 2008) http://www.time.com/time/nation/article/0,8599,1736970,00.html.

Joan Gilbride is a partner and Thomas Lookstein is a senior associate at Kaufman, Borgeest & Ryan LLP, an employment practices liability, professional liability, and insurance law firm with offices in New York, New Jersey and California. They can be reached at jgilbride@kbrlaw.com and tlookstein@kbrlaw.com.

Seven Habits of Ineffective Advocates in Mediation

By Francis Carling

Assume that, as a young lawyer, you are preparing to represent a client in your first mediation. Assume, too, that all that is at stake in the case is money: both parties would prefer to settle, but the plaintiff wants every penny he can get, and the defendant does not want to pay one penny more than is necessary. Here are seven common pitfalls you should avoid in your preparation and conduct of the mediation.

1. **Expecting to win.** No plaintiff should go into mediation expecting the defendant to surrender and admit he did wrong. No defendant should expect the plaintiff to capitulate and concede the case was frivolous. If either side had a slam-dunk claim or defense, they would be moving for summary judgment, not spending hours cooped up with a mediator. The goal of mediation is settlement—which means both parties must give up idle dreams of victory, and come to mediation ready to compromise.

2. **Failing to prepare.** Compromise can be painful, and you haven't done your job if you haven't prepared your client for it. Preparing for mediation is not nearly as hard as preparing for trial—indeed, that is one of mediation's advantages—but too often parties seem to show up for mediation with no clear strategy in mind. Waiting to see what the mediator comes up with, and only then starting to think carefully about settlement options, can scuttle the mediation or produce a bad result. Know your settlement parameters in advance.

3. **Treating the mediator like a judge.** It's not a mediator's job to decide the merits of the case. Indeed, generally we don't really care about the merits, except to the extent they bear on the reasonableness of the parties' settlement postures. Tell the mediator why your client's approach to settlement makes economic sense; don't waste your breath trying to persuade him that you'll win if the case goes to trial. The mediator assumes the case will never go to trial (if he does his job right), and what he wants from you are practical suggestions for compromise, not oral argument on a summary judgment motion.

4. **Lying excessively.** Much as we might wish otherwise, mediators don't expect complete candor from parties. A negotiation without bluffing is a rare experience. On the other hand, a mediator can be most effective when he has a reasonably accurate idea of where each party is heading: with that in mind, he can put all his skill into bridging the gap. Making wildly unrealistic, and untrue, claims about your client's inability to compromise just wastes time, and may cause a mediation to fail needlessly.

5. **Killing the messenger.** One of a mediator's functions is to convey messages from one party to the other. A results-oriented mediator will sometimes twist arms, and even browbeat parties, to get the job done. That a mediator presents the other side's arguments articulately doesn't mean that he agrees with them. That he pressures your side to be more flexible doesn't mean that he isn't being just as hard on the other side. Let the mediator do the job you're paying him for, and recognize that his only loyalty is to getting that job done. Don't personalize the process vis-à-vis the mediator himself: it's not personal, it's just business.

6. **Looking to the mediator for the right number.** Ideally, the settlement you reach in mediation should be the same settlement you eventually would have reached on your own with your adversary—only it should come much faster and cheaper. While creativity is an asset in a mediator, basically he is there to facilitate the process, not to tell you what the settlement should be. To be sure, there are situations in which the advocates, in the end, may feel they need the mediator to suggest a number—particularly when they think the number would be more acceptable to their clients coming from a neutral than from them—and a good mediator should be prepared to oblige. But it is a mistake to come into a mediation expecting the mediator to do the parties' work for them. When all is said and done, it is only the plaintiff who can decide what he will take, and only the defendant who can decide what he will pay.

7. **Disrespecting confidentiality.** Confidentiality is the bedrock of mediation. For the process to be effective, the parties must feel sure that they can confide in the mediator without fear that he will make unauthorized disclosures to the other side. At the same time, they must feel free to take positions on the facts and law that won't be thrown back in their faces in court if the mediation fails. I can't stop parties from taking notes in a mediation, but I often ask why they bother: other than writing down numbers so they won't be forgotten, there is no point in making notes if the parties intend to keep their pledge to ignore what happened in the mediation if it fails to produce a

settlement. The purpose of mediation is singular: it is to produce a settlement. Its purpose is not to provide discovery, provoke concessions, prompt revelations, or commit the parties to fixed positions. If, with maximum effort and good faith on all sides, the case does not settle, so be it. Forget that the mediation ever happened, and move on.

Francis Carling, a Yale Law School graduate, was an employment litigator at Sullivan & Cromwell, Winthrop, Stimson, Putnam & Roberts (now Pillsbury Winthrop Shaw Pittman) and Collazo Carling & Mish, and is now a mediator and arbitrator. His Web site is www.newyorkpeacemaker.com and his e-mail address is fcarling@gmail.com.

HR Checklist for Starting up in a New Country

By Donald C. Dowling, Jr.

A question recently posted on an international human resources Internet bulletin board asked: *"Does anyone have any reliable sources for opening branches in foreign countries?"* According to another post on that forum: *"We could begin hiring Canadian employees. What employment laws should we be aware of before going down this path?"* Yet another post: *"We are looking at opening a manufacturing plant in South Vietnam. Any information would be greatly appreciated."*

To any New York company, launching operations in a new country can be daunting, regardless of the company's overall size. A small business taking its first steps in Canada or the UK may be just as perplexed about local employment laws as a major multinational company opening its first outpost in Cameroon or Uruguay.

To bring structure to the process, this is a checklist of the HR questions that may arise when a business expands into a new country. Answers to the questions, of course, vary according to the country in question. The checklist is broken down into six stages of starting up a new operation abroad: (1) business structure and contracting (discussed here), (2) benefits / compensation, (3) expatriates, (4) local-hire issues, (5) written employment contracts, and (6) HR administration.

Stage 1: Business structure and contracting

- **Employer corporate entity**: When entering a new country, the first legal question is: "*What corporate structure to use for in-country operations?*" Although this is a corporate law question, employment issues come into play. A parent (headquarters) company entity can usually carry on business, and even employ people, directly abroad as long as it gets registered as a branch or operating entity licensed locally. However, carrying on business directly overseas may well subject the parent entity to local tax liability as a "permanent establishment" (or local equivalent) and expose parent-company assets to host-country claims. Most companies opt for the strategy of incorporating a local subsidiary. Set up any such local entity before doing hiring, to avoid later having to transfer staff into the locally incorporated entity, which can raise difficult issues of transfer liability.
- **Subsidiary structure**: Structuring a host-country subsidiary itself may trigger employment issues. Different types of host-country corporations (in Germany, *AG vs. GmbH*) can carry different collective labor / employment obligations. In Latin America, multinationals sometimes incorporate a local "services" company—separate from the local operating subsidiary—to manage liability under local employee profit-sharing laws that require paying employees a percentage of annual employer profits.
- **Agents/officers**: A host-country corporate entity presence usually requires having in-country shareholders, selecting in-country directors, issuing local powers of attorney, and appointing local agents for process. On-the-ground in-country employees are usually the most logical choices to fill these. The problems arise later. Multinational headquarters have been held hostage overseas by disgruntled ex-employees clinging onto stock interests, directorships, powers of attorney, or agency controls over a local subsidiary corporate entity: Under law in many countries, firing an employee will not dissolve these separate corporate relationships. Before bestowing corporate powers on host country employees, work out an exit strategy in case of an unfriendly separation.
- **Independent contractors**: When taking first steps in a new country, engaging "independent contractors" instead of employees may seem like an attractive strategy. However, a "freelancer" working abroad as a de facto employee can be deemed an employee by operation of law, regardless of the text of the contractor agreement—thereby exposing the principal to significant tax and other liabilities. And even if the contractor is held a self-employed

agent, local laws may still impose restrictions on termination. Plan accordingly.

- **Vendor partners**: A business entering a new country often needs to contract with local partners, if only to outsource functions like payroll, accounting, or janitorial services. Factor in the employment law exposure here if outsourced employees can later claim also to work for the principal as a "dual employer" (a particular issue in Latin America). Separately, some countries (chiefly Brazil) limit outsourcing of this sort.
- **Foreign entity monitoring**: Some multinationals' overseas heads-of-office have "gone bad" and abused autonomy, paid bribes, or embezzled money. These problems more often arise after headquarters has put the foreign office on "auto pilot." Cede no more autonomy to an overseas office head than to a domestic counterpart. From the beginning, put in place tough accounting, oversight, audit, Sarbanes-Oxley, and Foreign Corrupt Practices Act controls.

Stage 2: Benefits/compensation

- **Benchmark**: To hire people into an operation in a new country requires attracting in-country employees into a business which, as yet, lacks a market presence—and an "employment brand." Under these conditions, attracting host-country talent without overpaying requires careful benchmarking of local benefits and compensation. Get a breakdown by "minimum expected package," "standard expected package" and "rich expected package." And before setting initial compensation, factor in vested rights: Countries tend to restrict an employer's flexibility to roll back pay or benefits granted up front.
- **Statutory benefits costs**: Engage an experienced in-country payroll provider and then ask about total payroll costs, beyond wages. Budget for applicable "statutory benefits" and "social costs" like social security, housing funds, disability funds, profit sharing, provident funds, premium pay vacations and thirteenth month bonus. These add a surprising amount to base pay.
- **Customary benefits**: Many countries offer government payor ("socialized") medicine, so employer-provided health benefits may not be an issue—except that, increasingly, employees in certain countries expect supplementary health insurance. Separately, the social security systems in some countries replace a high enough percentage of final average pay that private pensions may be unnecessary. But in many countries, employers are expected to give other customary benefits, ranging from bus transportation to meals to cars to housing. Find out what benefits are customary, and how much they cost.

Stage 3: Expatriates

- **Visas and work permits**: If anyone from existing company facilities will need to move to the new country operation, start early applying for a visa and "work permit."
- **"Secondment" agreements**: Prepare an expatriate assignment agreement with an enforceable choice-of-law clause. Consider a separate intra-company secondment contract between the expat's home country and host country employer entities.
- **Local caps/rules**: Comply with host country rules on expatriates: Brazil puts a cap on the percentage of foreigners in a workplace. Middle Eastern countries prohibit paying expats more than locals. In China, different employment laws can govern expats, versus locals.
- **Worker's compensation**: A too-often-ignored but potentially big-ticket expatriate issue is the very real risk of expats (or their families) getting injured or killed, and then bringing an uncapped personal injury or wrongful death claim. Where possible, preserve the worker's compensation bar affirmative defense. Get "voluntary supplemental" workers' compensation insurance. On U.S. government jobs, comply with the Defense Base Act of 1941. Heed the duty of care. Consider waivers or acknowledgments.

Stage 4: Local-hire issues

- **Hiring strategy**: Expatriates aside, find out what strategies and tools work in the target country to attract and retain English-speaking, multinational-quality local talent. How effective are host country recruiters?
- **Job application form**: Adapt an organic in-country job application form for the new operation, or else modify the headquarters application form appropriately. Ensure any Web-based job application complies in-country.
- **Background checks**: In many countries data privacy and criminal laws tightly regulate background checks and pre-hire screening. Formulate a host country background check strategy, factoring in what can be done legally and practically.
- **Affirmative action**: Diversity has gone global. Some jurisdictions actually impose affirmative

action hiring requirements that outstrip U.S. rules. German laws can require hiring the disabled. Brazilian rules require hiring Brazilians. Indian laws promote hiring low-caste employees. South African affirmative action regulations force employers to file sensitive government reports that distinguish "African" employees from "Coloureds." Further, many multinationals have adopted their own in-house global diversity policies. Be sure to comply.

Stage 5: Written employment contracts

- **Contractual document**: Laws in many countries often require signing some employment contract or agreed offer letter, or at least giving employees written "statements of employment terms and conditions." Even where not mandated, written employment contracts can protect employers by disproving employees' claims about the employment arrangement. In many countries, a broad employment contract can also play the role that employee handbooks play in the U.S. Rather than transplant a U.S. form job offer letter with a U.S. employment-at-will clause, use an organic in-country form contract or modify a U.S. form appropriately. A new in-country start-up should add in a right to assign the relationship to an entity incorporated later (in case of any corporate shuffle), plus a right to change place of work (in case of an office move).
- **Probation**: Employee probation periods, where available, can offer employers flexibility during a short period from rigid restrictions against firing. But understand the limits: In Japan, for example, even a probationary employee is not employed at-will.
- **Fixed-term**: Fixed-term employment contracts, rolled over for successive terms as necessary, can also offer flexibility. But most countries restrict serial roll-over of consecutive fixed-term contracts. China has complex new rules in this regard.
- **Job titles**: Analogous to the U.S. law distinction between "exempt" and "non-exempt" employees, employment rights outside the U.S. can tie into job *position*. Bestowing a title like "Managing Director" can affect whether some host country employment laws, agency powers, and "sectoral" collective agreements reach an employee. Account for this.
- **Restrictive covenants**: If non-compete / confidentiality / non-solicit restrictions are important, get a locally enforceable clause. Never transplant a restrictive covenant clause from abroad, because enforceability turns on national law.
- **Employee inventions**: Japan, Argentina and some other countries grant generous rights to employees who develop and register intellectual property—even while working on the clock. Ensure employment contracts limit any such exposure.
- **Mandatory retirement clause**: In most countries—even many with age discrimination laws—mandatory retirement remains legal and widespread. (In October 2007, the EU Court of Justice affirmed that forced retirement does not violate the EU age discrimination prohibition in Directive 2000 / 78.) If mandatory retirement makes business sense for a new in-country operation and is consistent with the code of conduct, be sure to build any retirement mandate into individual employment contracts, from the beginning.

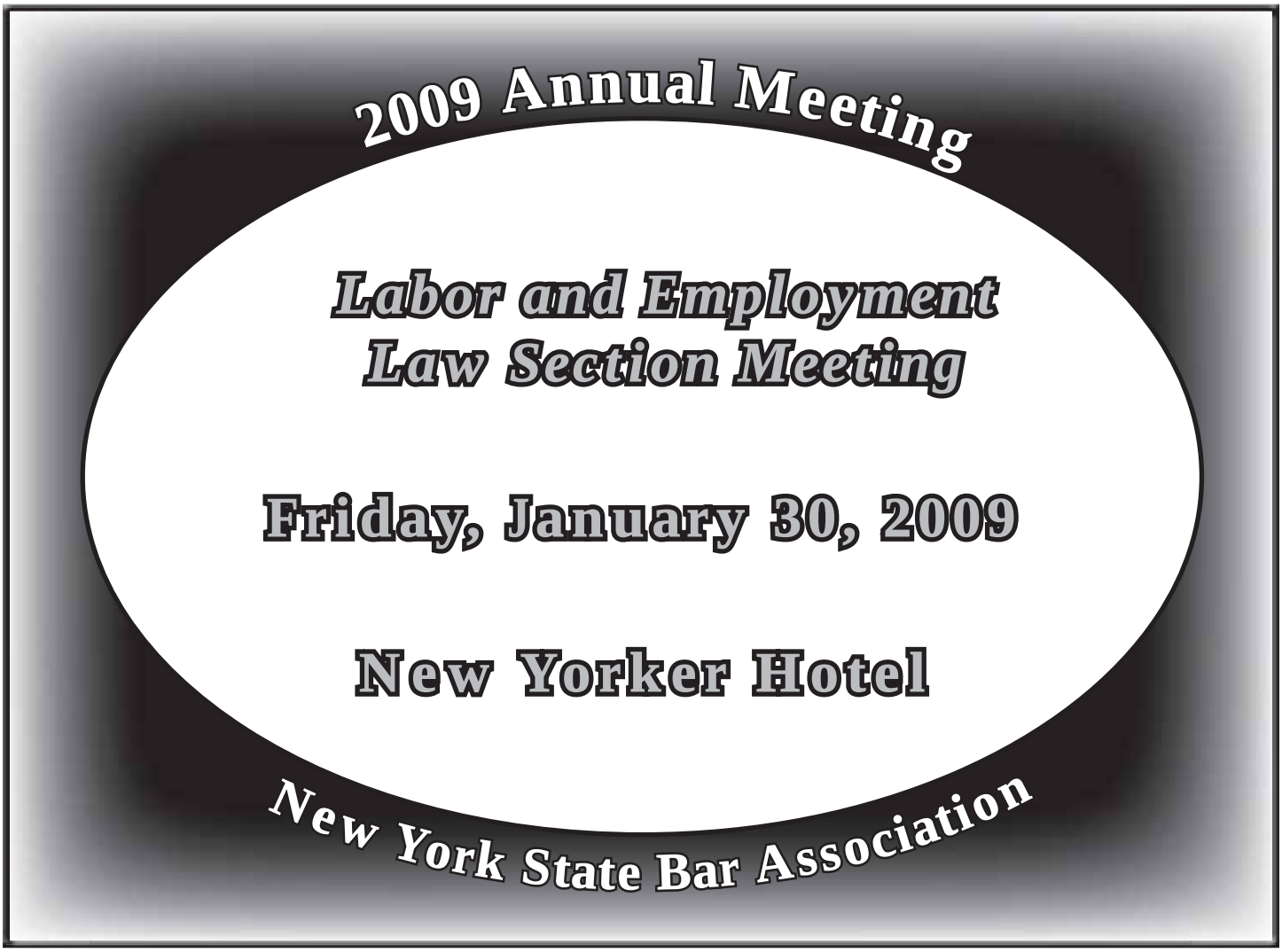
Stage 6: HR administration

- **Handbook/policies**: Bringing employees on board in a new country requires having an HR structure in place, which means *policies*. A U.S.-style employee handbook is often a bad substitute for organic in-country policies. Instead, issue locally required HR mandates such as the "work rules" of Japan and Korea. Use any locally advisable HR forms, such as the UK's overtime opt-out.
- **Translations**: English is not quite the lingua franca it may seem. Laws in some jurisdictions mandate that HR communications be in the local language. Even where there are no such laws, local-language HR communications promote comprehension and enforceability.
- **Compliance**: Comply with host-country labor / employment laws affecting "onboarding" employees, such as mandates as to: hours; breaks; holidays / vacations; weekend closings; paid days off; parental leave. In Europe it is illegal to withhold benefits from part-timers. If the new startup operation has no in-country office as yet, learn applicable laws on home work.
- **Employee representatives**: U.S. "union avoidance" strategies are rarely exportable. Overseas, worker representatives (trade unions, works councils) can be ubiquitous, and "sectoral" collective agreements often reach even non-signatory employers. In countries like Mexico, it may actually make sense to *invite in* a union. Tailor a collective employee strategy.
- **Data privacy**: Data laws in many places restrict transmitting employee data out of country, even to an employer's own headquarters. Implement com-

pliant practices such as European Union "model contractual clauses."

- **In-country insights**: The best "ounce of prevention" is learning from the mistakes of those who went in before you. When gathering answers to the questions on this checklist, ask in-country contacts a catch-all question: *What HR and compliance mistakes do you most often see incoming U.S. companies make?*

Donald C. Dowling, Jr., is International Employment Counsel at the New York City office of White & Case, the international law firm with 35 offices in 23 countries. Working daily with his firm's employment lawyers worldwide, Don project-manages for multinational employer clients international HR initiatives such as: global HR policies, codes of conduct, hotlines, compensation/equity plans, reductions in force and restructurings. He advises on offshoring, sweatshop allegations, expatriate administration, data privacy in global HR Information Systems and HR in international M&A deals.Donald C. Dowling, Jr. is international employment counsel in the global HR practice group of White & Case LLP, an international law firm with offices in 23 countries. He has practiced international employment law for over 15 years and is based in New York City. He can be reached at ddowling@whitecase.com.



What Law Firm Administrators Should Know about Preventing Litigation with Employees

By Ruth D. Raisfeld

The *New York Post* headline reads, "Bias Suit Slaps Law Firm's In-House Inter-Lewds," detailing a female attorney's allegations of sexual harassment at the hands of law partners. *The American Lawyer* describes the allegations of a Pakistani-American attorney who was fired by Clifford Chance after a Jewish female partner allegedly "set her up to fail." The *New York Times* reports that an associate has sued Sullivan & Cromwell, claiming he was harassed because he is a homosexual. If your firm were on the receiving end of a claim of employment discrimination, would you feel satisfied that the law firm administrators did all they could to prevent the employee dispute from escalating to a litigation? This article will raise ten questions about the state of employee relations at your firm that will help you assess the firm's readiness to prevent employment disputes from occurring or resolve such claims before they become expensive, demoralizing and highly publicized legal battles.

1. *Recruitment and selection*: *Is every employee involved in the hiring process aware of prohibited pre-employment inquiries?* Typically, law firms advertise in the *Law Journal*, use headhunters, or recruit on-campus. Resumes are screened, applicants are called for initial interviews, candidates meet with several attorneys, and some are even taken to lunch or dinner. The firm should be sure that everyone who meets a candidate understands that discrimination laws apply to recruitment, selection and hiring so that they avoid discussing topics like marital status, parental status, age, medical conditions or other questions of a personal nature that may be prohibited under employment laws. Sample interview questions should be circulated and interviewers should be briefed as to appropriate conversation for interviews as well as appropriate criteria for selection. If possible, firms should videotape model "mock" interviews for those on the hiring committees.

2. *Day-to-day interactions in the workplace: Have all employees and attorneys received diversity and sensitivity training?* Law firm personnel spend many hours in the office, often under pressure. Some lawyers and support staff rarely see the light of day or have time to socialize outside of work. In addition, law firms are typically hierarchical, which may result in opportunities for those with relatively greater power to exploit power imbalances between employees. Thus, there is ample possibility for inappropriate social relationships to arise, for insulting things to be said, and for bosses to treat support staff or less-experienced attorneys disrespectfully. When employees feel that they are treated unfairly, they may conclude that they are being harassed or discriminated against. Sensitivity training should be conducted at all firms for all personnel, on an ongoing basis. The recent punitive damages verdict against Madison Square Garden reflected, in part, the Garden's failure to train its managers about sexual harassment, discrimination and retaliation. In today's climate, training employees in these areas is essential to individual career development and the firm's ability to retain a diverse and global workforce.

3. *Firm response to risky conditions: Do all employees and attorneys know what to do if they see or overhear what may be discriminatory or harassing conduct?* Every employee must know whom to contact if he or she experiences, observes, or hears about potentially harassing or discriminatory conduct. Some employees feel powerless to intervene and are uncertain who has authority to receive complaints. The firm must be sure to identify and train the individuals who will be responsible for addressing problems involving employees. Whoever is designated to receive complaints must also know how to investigate and respond to them, which is essential for resolving conflict, as well as demonstrating that the firm has acted reasonably to identify, prevent and remediate potentially inappropriate situations.

4. *Expectations regarding performance: Does the firm have written job descriptions and objective performance measures?* Even after a careful interview and selection process, there may be disappointment with an employee's job performance and an employee may feel that the job is not as described during the hiring process. Such disagreements and disappointments are more easily managed when there are documented job descriptions and performance goals. Written job descriptions and models for success help to avoid a clash of expectations that may lead to employee disputes.

5. *Personal Time-Off: Does the firm have a leave policy that complies with the Family & Medical Leave Act and covers medical, pregnancy, and family care issues?* Recent surveys of employee satisfaction, including a survey of attorney attitudes toward work performed by the American Bar Association in

2007, confirm what most firms are experiencing: that employees today value time off from work and flexibility more than employees of older generations. While firms of more than 50 employees are required to have formal leave policies under the federal Family & Medical Leave Act, all firms would be well advised to have leave and flexible work policies in order to be able to recruit talented personnel, but also to motivate and retain them.

6. *How to get ahead: Does the firm have objective criteria for advancement?* With few opportunities for lawyers to advance (partner, counsel, or out the door) and with relatively few administrative departments, law firm personnel may be unsure of how to build a career path at a law firm and how they can qualify for raises and promotions. When any chance for advancement is dependent upon subjective criteria, there is a greater possibility that negative decisions may be seen as unfair or based on discriminatory criteria, like who you know rather than what you know. Thus, it is up to law firm administrators to counsel decision-makers to adopt some objective criteria for awarding bonuses, salary increases and promotions within and across departments.

7. *Politics and policies: Is there anyone who can stand up to "rainmakers" and "senior partners" if they treat support staff or junior attorneys disrespectfully?* There are some law firm personnel who just don't get it. Despite best intentions, they may be impolite, aggressive, and rude in their interpersonal interactions. Awkward incidents may take place at firm functions like holiday parties, client dinners, or other social occasions. Some people may believe that the usual policies and procedures don't apply to them, making it difficult to retain employees who work for or around them. To avoid low morale and to protect the firm against possible litigation or liability that may result from such insensitivity, there must be some employee or committee with the ability and authority to address the powerful who run afoul of ordinary rules of civility.

8. *The electronic age: Are there policies regarding appropriate usage of Internet and electronic communications systems?* Employee use of intranet and Internet, cell phones that ring all day, employees who wear earpieces and those who do not—all provide numerous occasions for miscommunicating, wasting time, and disturbing the work and concentration of others. Even more important, however, is that most employees do not realize that nothing they say or write on firm electronic communications systems is "off the record." Just recall the summer associate at Skadden Arps who inadvertently sent "to all personnel" an e-mail about doing nothing but eating expensive sushi lunches and ended up being a front-page news story! Therefore, it is absolutely essential for firms to train their employees regarding "netiquette."

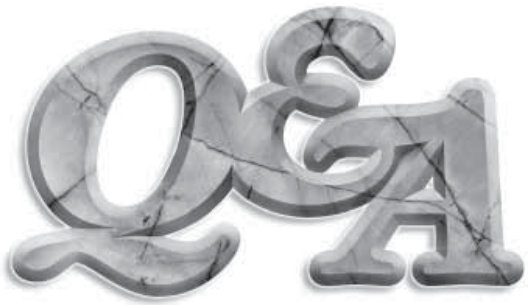
9. *The exit sign: Does the firm have a termination procedure?* Firms must be sure to have a termination procedure to prevent "knee jerk" reactions resulting in abrupt terminations of employment. Employment litigation often results from a "botched" termination: the employer believes it had legitimate grounds for terminating an employee, but no one ever stopped to communicate these reasons to the employee, nor gave the employee an opportunity to respond or plan for a respectable exit strategy that would enable the employee to transition from one place of employment to another. Firms must have a system of "checks and balances" to be sure that there is a well-documented business reason for the termination, which is clearly communicated to the employee, who is afforded the opportunity to communicate his or her side of the story.

10. *Building a respectful workplace may lead to better firm performance: Does the firm link a workplace culture of respect and dignity with excellent client service?* Studies of workplaces that follow "best practices" indicate that better employee relations really do help the bottom line. Firms that treat their personnel more respectfully enjoy better communication among employees and clients, have less turnover, and produce more work, more efficiently and effectively. Can anyone posit a good argument against that proposition?

In sum, law firm administrators who conduct the suggested 10-point audit will do themselves and their Firm an invaluable service. With data-points in hand, it will be easier to recommend measures that will improve employee relations and help to prevent or resolve distracting, unproductive, and potentially illegal employment disputes. Simply put, an ounce of prevention is worth a pound of cure!

Ruth D. Raisfeld, formerly Of Counsel at Orrick Herrington & Sutcliffe, LLP, helps her clients (including law firms) prevent and resolve employment disputes, through training, workplace investigations, mediation and arbitration. She can be reached through her Web site, www.rdradr.com.

Ethics Matters



By John Gaal

Q I am involved in litigation in which the plaintiff claims to be appearing pro se. However, there are many telltale signs indicating that his pleadings are in fact being written by a lawyer. Is it ethically permissible for a lawyer to prepare written submissions for a party without disclosing her involvement to the court and opposing counsel?

A The propriety of lawyer "ghostwriting" has been the subject of numerous ethics opinions, but there is no unanimity of view. For example, in 1990, the New York State Bar Association Committee on Professional Ethics, in Formal Opinion 613, concluded that there is nothing improper about a lawyer assisting an otherwise pro se litigant with certain pleadings but, in order to avoid any deception of the court or others, the disclosure of that lawyer's assistance is required. While generally consistent with an earlier opinion issued by the Association of the Bar of the City of New York, Opinion 1987-2, the NYSBA Committee expressly disagreed with the City Bar's view that it was sufficient that the pleading carry only a "prepared by counsel" label; rather, the State Bar concluded that the attorney providing the assistance must be identified by name. Ethics opinions in Colorado, Connecticut, Delaware and Kentucky have reached similar conclusions, at least where the lawyer's assistance is "substantial."

The rationale for requiring identification varies. In some instances, the failure to disclose is simply viewed as deceptive. In other cases, ethics authorities have been concerned that the failure to identify participation allows a lawyer to evade responsibility for the filing of frivolous litigation and pleadings. And in still other cases, there is at least some recognition that a nominal pro se litigant may undeservingly reap the advantages courts are inclined to provide real pro se litigants.

However, ethics authorities in other jurisdictions, including Arizona, Illinois, and Maine, have concluded to the contrary, finding such assistance is permissible and no identification is required.

Just recently, the ABA Committee on Ethics and Professional Responsibility addressed this issue in Formal Opinion 07-446. There the Committee concluded that a lawyer can provide "behind the scenes" assistance to a pro se litigant and that assistance does not have to be disclosed. The Committee rejected the possibility that a litigant receiving undisclosed help would be unfairly advantaged by a court's willingness to provide "special assistance" to pro se litigants. In the Committee's view, if the undisclosed assistance is effective, it is likely apparent to the court that there has been some lawyer assistance, and thus the prospect of special treatment is slim. On the other hand, if the undisclosed assistance is not apparent, it likely has not been all that effective, and thus any advantage received from special treatment is not "unfair."

The ABA Committee also rejected the view that the failure to disclose assistance is fraudulent or otherwise dishonest, at least under the provisions of the Model Rules. For the failure to disclose participation to constitute dishonesty or fraud, the Committee concluded that the assistance itself must be material to the matter. As it explained,

> In our opinion, the fact that a litigant submitting papers to a tribunal on a pro se basis has received legal assistance behind the scenes is not material to the merits of the litigation. Litigants ordinarily have the right to proceed without representation and may do so without revealing that they have received legal assistance in the absence of a law or rule requiring disclosure.

Thus, the ABA's view is that a lawyer has no obligation to see to it that a client discloses assistance. Nor is the lawyer obligated to make that disclosure directly. The Committee concluded that "absent an affirmative statement by the client, that can be attributed to the lawyer, that the documents were prepared without legal assistance, the lawyer has not been dishonest." In fact, the Committee believed that any attempt by the lawyer to make such a disclosure contrary to the wishes of the client would be a breach of the lawyer's duty of confidentiality.

Even more recently, the New Jersey Advisory Committee on Professional Ethics addressed this issue in Opinion 713. Believing these various earlier pronouncements were too "inexact and subjective" to be useful, and showing considerable deference to the permissibility of providing unbundled legal services as a way to ensure assistance to the unrepresented, the Advisory Committee concluded:

> Disclosure is not required if the limited assistance is part of an organized . . . non-profit program designed to provide legal assistance to people of limited means. In contrast, where such assistance is a tactic by a lawyer or party to gain advantage in litigation by invoking traditional judicial leniency toward *pro se*

litigants while still reaping the benefits of legal assistance, there must be full disclosure to the tribunal. Similarly, disclosure is required when, given all the facts, the lawyer, not the *pro se* litigant, is in fact effectively in control of the final form and wording of the pleadings and conduct of the litigation. If neither of these required disclosure situations is present, and the limited assistance is simply an effort by an attorney to aid someone who is financially unable to secure an attorney, but is not part of an organized program, disclosure is not required.

When, under this rule, disclosure is triggered, the disclosure must include the name of the attorney and the fact that there is a limited scope of appearance (not including an appearance as counsel of record).

While the ABA and New Jersey opinions add to the literature on this issue, they unfortunately do nothing to clarify the debate. Consequently, it is incumbent that a lawyer assisting a pro se litigant in an undisclosed fashion is aware of the specific rules of the jurisdiction that governs her conduct. In addition, the lawyer must be aware of whether any court rules or regulations, apart from provisions in the Code of Professional Responsibility, require disclosure. If such local court or other rules do exist, then disclosure will also be required as part of the lawyer's general ethical duty to abide by the rules of the tribunal.

John Gaal is a member in the firm of Bond, Schoeneck & King, PLLC in Syracuse, New York and an active Section member.

If there is a topic/ethical issue of interest to all Labor and Employment Law practitioners that you feel would be appropriate for discussion in this column, please contact John Gaal at (315) 218-8288.

One Fell Swoop: How *Register-Guard* Convoluted the NLRA[1]

By Anne Katz

I. Introduction

A. Eugene, Oregon, a modern American city

Eugene, Oregon touts itself as "The World's Greatest City of the Arts and Outdoors."[2] As the second-largest city in Oregon, Eugene has 153,690 residents.[3] Eugene hosts an annual three-day "Celebration Parade" in September, including union, cultural, and environmental group entrants.[4] Service jobs in the local government, university, and hospital make up the city's largest employment. [5]

Eugene is also home to the *Register-Guard*, the city's largest daily newspaper, published and independently owned by the Baker family.[6] With about 1/16 the circulation of the *New York Times*,[7] the *Register-Guard* produces about 70,000 copies per day.[8] Inside the newspaper's office, there is no conveyor belt, break-time whistle, or patient beds. There is only coffee, cubicles and the lifeblood of the paper—computers. Today, the same equipment that *Register-Guard* employees use to communicate with the world also restricts them from communicating with each other.

This article inquires whether the National Labor Relations Board ("Board" or "NLRB") goes too far in silencing employees' e-mail communication. Although Board precedent governing union-related communication in the workplace has changed little in the last 70 years, communication itself has made great strides. E-mail and the Internet have drastically transformed the workplace into something unrecognizable when Congress enacted the National Labor Relations Act ("NLRA" or "Act") in 1935. In *Register-Guard*, the Board sets out a laundry list of new standards favoring employer control of employee communication. The Board twists and turns precedent into a complicated and arbitrarily drawn new standard, in an attempt to adapt the Act to the unique nature of e-mail.

First, treating e-mail as company equipment fails, because e-mail shares none of the tangible qualities inherent in bulletin boards or copy machines. On the other hand, e-mail does not quite parallel oral solicitation or distribution. E-mail occupies a field of its own, requiring an adaptable standard.

Second, as the Board tightens the noose around e-mail communication, it loosens the new standard for discrimination. An employer can now pick and choose which "types" of e-mail messages they will allow on and off company time. The standard applies not only to e-mail messages, but to all modes of employee communication. Today, the employer has an almost unfettered right to bar union-related communications, amounting to *de facto* discrimination.

Third, at the time of the Act's beginnings, non-employees enjoyed fewer communication rights than employees. After the dawn of e-mail, employers' grasp on employee communication makes non-employees' rights seem generous. This employee/non-employee disparity makes organizing less effective. In addition, by regulating employee e-mail, employers—for the first time—can reach outside the four walls of the company office, infringing on the employee's right to privacy.

"This article inquires whether the National Labor Relations Board goes too far in silencing employees' e-mail communication."

Finally, the new Board standards regulating e-mail communication effectively launch an all-out attack on protected union activity, eviscerating Section 7. Without adapting the NLRA to new technology, the Board continues to restrict communication until there is nothing left to restrict. With society's ever-increasing dependence on Internet communication, the Board's present mentality ominously foreshadows future Board decisions.

B. The Facts of *Register-Guard*[9]

Guard Publishing Company ("Employer" or "Company") publishes the *Register-Guard*, a daily newspaper based in Eugene, Oregon.[10] Eugene Newspaper Guild, CWA Local 37194 ("Union"), represents an approximately 150-member unit of the Company's employees, from reporters and copy editors to photographers and secretaries.[11]

By 1997, most employees had their own Company computer and all employees had access to a Company e-mail account.[12] Commencing in October 1996, the Employer promulgated a written "Company Systems Policy" ("CSP"), stating in relevant part:

> Company communications systems and the equipment used to operate the communication system are owned and provided by the Company. . . . Communications systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes,

outside organizations or other non-job related solicitations.[13]

Ms. Prozanski ("Ms. P") worked for the Company for 17 years and served as Union president since January 2000.[14] As a copy editor, Ms. P has her own Company computer complete with Internet access and a Company e-mail account.[15] She and other employees and managers testified that they regularly sent and received non-work-related e-mails on the Company e-mail system without reprimand. Examples of such communication include jokes, breaks, birth announcements and support for a United Way campaign.[16]

In 2000, the Company disciplined Ms. P after she sent three e-mails on her Company e-mail account to coworkers at their Company e-mail addresses, providing:

E-mail 1: on May 4, Ms. P sent an e-mail from her work computer clarifying events that took place at a union rally three days earlier;[17]

E-mail 2: on August 14, Ms. P sent an e-mail from the union office—located off Company premises—advising employees to wear green in support of continued collective bargaining with the Company; and

E-mail 3: on August 18, Ms. P sent an e-mail, also from the union office, advising employees to participate in an upcoming Eugene parade as part of the Union's entry.[18]

Ms. P received two written warnings for violating the CSP by sending union-related messages on the Company e-mail system.[19]

The Union subsequently filed unfair labor practice charges with the National Labor Relations Board against the Company; the Union alleged that the Company violated Section 8(a)(1)[20] and (3)[21] of the National Labor Relations Act[22] by maintaining and discriminatorily enforcing an overly broad no-solicitation policy (that is, the CSP).[23] On February 21, 2002, the administrative law judge ("ALJ") held that the Company did not violate 8(a)(1) by maintaining a broad no-solicitation policy on the Company computer system, but violated 8(a)(3) by discriminatorily enforcing that policy.[24] Both parties filed exceptions to the ALJ's decision. The National Labor Relations Board held oral argument[25] on March 27, 2007, to which the Company, Union, and various amici filed briefs.[26] On December 16, 2007, a 3-2 member Board[27] held that the Company has an almost unfettered right to restrict Company e-mail use by employees. Additionally, the Board set out a new standard for discrimination, ruling that the Company discriminatorily enforced its policy with respect only to E-mail 1.

II. The Property Issue: Whether a company's policy of restricting all non-job-related e-mail solicitations on a company e-mail system can be evaluated under standards set by Board precedent

E-mail functions as an amorphous mixed breed of written word, verbal dialogue, and instantaneous communication—a technological beast dodged by Board ruling until the *Register-Guard* case.[28] In sum, the Majority views the Company's e-mail system as "company equipment" and therefore, upholds the Employer's property right to regulate employee use of company property. On the other hand, even without disputing the Employer's property right to e-mail, the Dissent regards company e-mails as solicitation. They argue that a balancing of employee communication rights versus employer property rights set forth in the 63-year-old Supreme Court case *Republic Aviation v. N.L.R.B.* should apply to e-mail.[29] Despite the conflicting Board opinions, the antiquated nature of the Board rules fails to adequately match the needs of the modern workplace. Regardless of property and solicitation rights, one certainty exists: e-mail communicates information among workers.

A. The Majority views the company e-mail system as equipment, allowing an almost unfettered property right to ban all non-work-related e-mail communication

The Majority relies on meager "personal property" Board cases to attach an almost unfettered property right for employers to restrict company e-mail use.[30] These cases hold that an employee has no statutory right to use an employer's company property, such as bulletin boards, televisions, telephones, copy machines, and a piece of scrap paper for purposes of Section 7 communication, absent discriminatory restrictions.[31] Similarly, *Register-Guard* adds a company's e-mail system to the list. With picayune justification, the Board simply holds that an employer can promulgate a broad rule banning all non-work-related e-mail merely because the company owns the e-mail system.[32] The Majority ventures no further on the substantive reasons for classifying e-mail as equipment instead of solicitation or distribution. In other words, the Board deems e-mail as company equipment that "just so happens" to have a solicitation function.

However, inapposite to the Board's list of cited tangible pieces of employer-regulated equipment, e-mail can occur off company premises. Even the company telephone system, which similarly allows communication between individuals, manifests a physical nexus to the telephone port permanently within company grounds; an employee cannot make company calls outside the walls of the company. E-mail, on the other hand, is accessible[33] anytime, anywhere—on the company computer, on the employee's personal computer at home or even on a

beach in the Galapagos Islands. It maintains a merely transitory physical nexus to the Company computer.[34] Therefore, unjustifiably shifting the "company equipment" rule from tangible equipment on company property to e-mail communication off company property, off company time sounds ripe for a *Republic Aviation*[35] analysis.

B. The Dissent views an employee's e-mail use of a company-owned e-mail system as subject to a balancing of employees' Section 7 rights and employers' property rights under a *Republic Aviation* analysis

As the Majority points out, a broad no-solicitation rule on company e-mail "does not regulate traditional, face-to-face solicitation,"[36] but the modern workplace is far from "traditional." The Board seems to acknowledge e-mail as "fringe" technology.[37] However, businesses on the cutting edge no longer exclusively use e-mail. E-mail has emerged as commonplace both inside and outside of work.[38] At *The Register-Guard*, cubicles and office doors physically separate workers, conflicting with the Majority's vision of a "traditional" workplace.[39] E-mail functions as a means of communication "that to some extent . . . has replaced in-person communication."[40] Like the office water cooler[41] or company cafeteria,[42] e-mail has surfaced as the "natural gathering place" for employee communication in the workplace. In particular, for telecommuters (those employees who work solely at home) and salespersons[43] e-mail is the *only* common gathering place these employees use to communicate with each other.[44]

The Dissent asserts the 1945 Supreme Court *Republic Aviation*[45] balancing test of employees' Section 7 rights against the employers' property rights to the issue of employee use of a company-owned e-mail system. Sixty-three years earlier and on the opposite coast of the United States, workers at the Republic Aviation Corporation on Long Island grappled with a broad rule prohibiting all solicitation at any time on company premises.[46] There, an employee filed unfair labor practice charges after allegedly violating the company rule by passing out union cards on company time and premises. Consequently, the Court established a long-upheld dual standard: first, an employer may promulgate a presumably valid broad no-solicitation rule on working time, absent a showing of discriminatory purpose; and second, off company time and even on company property, a no-solicitation rule[47] is presumably invalid, absent a showing of special circumstances.[48] The Court reasoned that "inconvenience, or even some dislocation of property rights may be necessary in order to safeguard the right to collective bargaining [Section 7 rights]."[49] The bottom line is that employees presumptively enjoy more communication rights off company time and employers presumptively enjoy more property rights on company time. In *Register-Guard*, the Majority simply ignores e-mail's communication function and classifies e-mail as company equipment. They seem to forget that *Republic Aviation* expressly failed to include e-mail as a permitted form of solicitation because e-mail did not exist in 1945.[50] Therefore, the Board must be the "Rip Van Winkle of administrative agencies"[51] for failing to recognize e-mail as the 2008 version of 1945 oral solicitation.

Additionally, the Majority effectively conflagrates *Republic Aviation* into an "other reasonable channels of communication" test, in the past exclusively reserved for nonemployees' communication with employees on company property.[52] In *N.L.R.B. v. Babcock*, the Court held that an employer's property rights trump nonemployee communication with employees on company premises if "reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message."[53]

In *Register-Guard*, the Board reasons that employees have the "full panoply of rights" to engage in oral solicitation and distribute union literature in nonworking areas during nonworking time.[54] In their view, an employer may restrict e-mail communication between *employees* merely because the employer leaves other basic modes of communication unrestricted in the workplace.[55] However, the Board applies the wrong yardstick. As an employee,[56] Ms. P's communication is governed by the long-standing *Republic Aviation* standard. Under *Republic Aviation*, an employer may not interfere with *any* of an employee's Section 7 rights on company property, unless a restriction is necessary to maintain production or discipline.[57] Therefore, an employer is barred from arbitrarily picking and choosing permitted and prohibited modes of communication.

C. An attempt to apply Board precedent to e-mail communication

The Board's grappling with analyzing e-mail under a set standard sheds light on the archaic nature of the Board rules in a digitally dependent era. However, the Supreme Court agrees that the Board has a responsibility to "adapt the Act to the changing patterns of industrial life."[58] Nevertheless, in *Register-Guard*, the Board does not dust off the rules, but "simply shoehorn[s] [e-mail] into an analysis that clearly does not fit."[59]

For example, even if the Board applied a strict *Republic Aviation* analysis to e-mail, it would be like fitting a square peg into a round hole. For one, *Republic Aviation* promulgates two separate standards distinguished only on whether the solicitation or distribution took place on work time or non-work time, as well as in work areas and non-work areas. This distinction was blurry in 1945, and almost unrecognizable today, as work shifts from manufacturing to the services sector.[60] In 1945, the typical unionized employee would leave the assembly line at a

specifically scheduled break and shuffle off to a separate break room or cafeteria. Therefore, the physical set-up and nature of the work made it easier (but not easy) to delineate between work time and work areas.

Today, no "12 o'clock whistle" blows to remind employees to leave their cubicles or cash registers and take a lunch break. Alternatively, breaks may occur intermittently at varying times throughout the day. For instance, an employee can take several 30-second mini-breaks—instead of taking his allotted 15-minute break in one lump sum—to send and receive e-mails in between doing substantive work. In another instance, an employee might spend his entire lunch break at his computer desk (a working area) sending e-mails. Therefore, the e-mail system is the modern-equivalent of the "break room" or "lunch room."[61] These options, unavailable prior to computer technology,[62] distort 1945 notions of work time and non-work time.

Furthermore, in 1945 an employee usually spent non-work time in non-work areas.[63] Today, as deduced from the above examples, the work and non-work area is often one and the same. This obviates the need for a distribution distinction, which under the rules must only occur in non-work areas for fear of safety concerns.[64] E-mails leave no tangible remnants. Therefore, the current rules governing employee communications at work are not conducive to the modern workplace.

Another problem arises with classifying e-mail as oral solicitation or distribution of union literature under a *Republic Aviation* analysis, due to its unique characteristics. E-mail cannot speak,[65] nor can it litter the floor. Like solicitation, e-mail involves an ongoing dialogue between users. It can direct "conversation" to one person or multiple people. Although workers cannot "hear" e-mail, like sign language, an employee's fingers "do the talking." However, e-mail also shares common traits with distribution. Like handbills, e-mail can be "printed, edited, stored, re-sent, re-read, [and] revised."[66] Users receive e-mail "deliveries" to their "mailboxes."

At any rate, the solicitation / distribution distinction sets off a different standard for each form of communication. Solicitation carries more communication rights than distribution on company premises: absent special circumstances, Board precedent guarantees a right to solicitation on company premises during non-working time; and limits distribution to non-working time and non-working areas.[67] However, the distinction makes no sense when applied to e-mail communication. It makes no difference whether e-mail is sent / received in the user-employee's work office or in the cafeteria, or even in a product shipping area. If classified as distribution, the intangible nature of e-mails quells any danger of littering[68] or shipping literature off in a customer order. Although e-mail can be inadvertently sent to third parties, this danger has no relationship to the physical space (non-working / working area) where the e-mail was sent or received. All communication remains on the computer screen; therefore, e-mail should be subject to solicitation rules.

In *Register-Guard,* the Dissent's approach skips the work / non-work time and solicitation / distribution now-arbitrary distinction and simply focuses on the second standard of the *Republic Aviation* analysis—the presumption that a rule banning all solicitation during non-work time unreasonably restricts Section 7 rights, absent a showing of special circumstances by the employer.[69] *Republic Aviation* defines "special circumstances" as the interests of the employer to maintain production or discipline.[70] First, the cost of e-mails to the Company fails to satisfy special circumstances. The employee could send countless e-mails without imposing an additional expense on the Company.[71] Second, multiple users may simultaneously access the e-mail system, leaving work time efficiency undisturbed.[72] However, the Majority refuses to engage in a special circumstances analysis, leaving the Dissent to fill the void with guesswork about the Company's potential special circumstances.

As the Board stands today, an employer can restrict a message sent via e-mail, while the very same message verbally communicated benefits from statutory protection. For example, Employee X sits in a 6-by-6 foot cubicle in an office building that used to manufacture socks. Employee Y sits in a similar cubicle next to Employee X. Both employees have a desk and a computer equipped with a company e-mail address. The company prohibits solicitation on the company computer system. If Employee X e-mails Employee Y—both on the company e-mail system—about supporting the union, the employer could fire X for violating company policy. If, however, Employee X walks over to Employee Y on his way to the water cooler and says, "You should wear green to support the union," the solicitation is protected. According to the Board's analysis, if Ms. P had just orally communicated her message to the e-mail recipients, the case would cease to exist. The oral and e-mail communication disparity, however, runs antithetical to productivity— meaning Ms. P would waste more company time by orally notifying each of the e-mail recipients individually than by simply writing one mass e-mail. Therefore, at the very least, the Board must apply a new standard to e-mail communication.[73]

III. The Discrimination Issue: Whether a company policy against all "non-job-related solicitations" is discriminatorily enforced as applied to union-related e-mails, when the policy does not, in practice, restrict personal e-mails

Leaving the unique nature of e-mail aside, the Board goes a step further by dismantling "bedrock"[74] Board precedent on "discrimination" rock by rock. Employers

may still violate 8(a)(1), even assuming lawful policies, by discriminatorily enforcing its policies against only union-related solicitation. In *Register-Guard,* despite the CSP, the Company allowed employees to use its e-mail for sending and receiving personal messages. Relying on two Seventh Circuit decisions,[75] the Board narrows the scope of "discrimination" into a complex "unequal treatment of equals"[76] approach. That is, the Board allows an employer to bar union solicitation if the employer also bars certain non-union solicitation of a "similar character." However, the Dissent relies on a long line of Board precedent that simply finds "discrimination" when an employer allows all kinds of personal solicitations, but disallows only union-related solicitations, in practice.

A. The old standard for discrimination under 8(a)(1)

In a 2007 Board decision, the Board reiterates its long-held rule that an employer violates 8(a)(1) by allowing employees to talk about anything and everything on company time, but forbids them to discuss unionization.[77] As applied to employee use of e-mail,[78] at least two Board cases have found that an employer violates 8(a)(1) by permitting employees to send and receive "a wide variety" of non-work-related e-mail, but barring union-related messages.[79] In *Register-Guard*, employees sent and received messages on the Company e-mail system "regarding parties, jokes, breaks, community events, sporting events, births, meeting for lunch, and poker games."[80] Clearly, these subjects represent non-work-related matter violating the CSP. However, the Employer chose to reprimand only Ms. P for sending three non-work-related e-mails, specifically union-related, to fellow employees.[81] In addition, even if the union-related e-mails violated the CSP, the Employer waived the rule by ignoring it in practice.[82] That is, the Employer never reprimanded employees for sending and receiving non-work-related e-mails. Under the old standard, selectively applying an otherwise unenforced company rule to only union-related e-mails results in discrimination.

On December 15, 2007, this would have been an open-and-shut case.

B. The new standard for discrimination under 8(a)(1)

On December 16, 2007 the case was still open. The Board made it lawful for an employer to de facto "discriminate" on the basis of union status without justification. An employer could lawfully permit certain types of non-work-related communications ("Permitted Group"), but exclude other types of non-work-related communications ("Prohibited Group")—even if union-related communications fall within the Prohibited Group. The only pre-requisite: the Prohibited Group must share a "similar character," as long as that uniting factor is not merely on the basis of union or protected status. [83] For example, an employer may distinguish between:

> charitable solicitations and noncharitable solicitations . . . solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon products), between invitations for an organization and invitations of a personal nature . . . solicitations and mere talk, and . . . business-related use and nonbusiness-related use.[84]

In short, this "unequal treatment of equals" approach allows an employer to carve out exceptions to otherwise permitted non-work-related communications. As long as those exceptions bear some common non-union thread, an employer may bar union-related communications.

"As applied to employee use of e-mail, at least two Board cases have found that an employer violates 8(a)(1) by permitting employees to send and receive 'a wide variety' of non-work-related e-mail, but barring union-related messages."

As justification, the Majority relies on two Seventh Circuit decisions, earlier found to violate 8(a)(1) as Board cases, but later denied enforcement as Seventh Circuit cases.[85] In both *Fleming* and *Guardian*,[86] the Board found that the employer violated 8(a)(1) by allowing non-work-related postings on the company bulletin board, but banning union-related postings. However, on appeal to the Seventh Circuit, the courts concluded that since the employers never allowed postings of organizational meetings (including the union), the employers did not discriminate on the basis of union status. Nevertheless, despite these two isolated Seventh Circuit cases, Board decisions thereafter continue to apply the old standard for discrimination.

Furthermore, categorizing communications into classes of "similar character" creates an amorphous standard. For one, *all* non-work-related solicitations fall under the umbrella of a similar character—they are all non-work-related as opposed to work related. Breaking non-work-related communications down further allows an employer to arbitrarily distinguish between often overlapping "classes" of solicitations.

For example, despite a no-solicitation rule, employees solicit the following on the company e-mail system or bulletin board:

1) formal invitation to the Red Cross Gala Fundraiser (charitable solicitation / invitation for an organization);

2) formal invitation to a clothes drive to clothe the homeless (charitable solicitation / invitation for an organization); and

3) general posting to participate in a rally for the United Telemarketers Union (noncharitable solicitation / invitation for an organization).

The employer barred (3), but allowed (1) and (2). On the one hand, all three activities share a similar characteristic of invitations for an organization. Therefore, it appears that the employer allowed invitations for organizational activities on company premises. In that case, (3) falls on the Permitted side of the line and the employer violated 8(a)(1) by excluding (3). On the other hand, the activities possess disparate characteristics— (1) and (2) are charitable solicitations, while (3) is a noncharitable solicitation. Therefore, it appears that the employer allowed charitable solicitations, but barred noncharitable solicitations. In that case, (3) then falls on the Prohibited side of the line, complying with 8(a)(1). The difference in outcomes results from blind distinctions between categories of communications.

But, how far will the Board go to mask this effectively discriminatory policy? Adding to the above example, the employees posted formal sealed-envelope invitations or sent individualized e-mail invitations for (1) and (2). For (3), the employees posted a general photocopied notice or sent a generic non-individualized e-mail. The employer could then distinguish between "formal individualized invitations and informal general invitations," leaving (3) in the excluded pile. In virtually any discrimination case, an employer could find some common trait among communications that excludes union-related communication. Therefore, depending on how one views "similar character," the new standard chills Section 7 rights for fear of "stepping on the wrong side of the line."

Furthermore, this line-drawing standard overshadows the larger picture of whether the employer has a legitimate business reason for excluding potential protected union conduct. When the employer effectively interferes with Section 7 rights, it makes no difference which other communications share the Prohibited Group with union communications. Interfering with Section 7 rights must be weighed against a legitimate business reason.[87] The Majority merely focuses on the Prohibited / Permitted distinction without balancing Section 7 and employer rights.

1. An exception to the new standard for discrimination effectively leaving only union-related communications on the excluded side of the line

In addition, even assuming the lawfulness of the "similar character" approach, the Board carves out another limited exception to permitting certain Prohibited communications. The Board relies on one 1982 decision to allow "a small number of isolated beneficent acts as a narrow exception to a no-solicitation rule."[88] In *Register-Guard*, the Employer conducted a "periodic charitable campaign" with United Way in which supervisors e-mailed employees to solicit support.[89] Although the United Way (an outside organization) falls on the Prohibited side of the line, the Board permits the communication under this "beneficent acts" exception. After applying the exception, only union-related communications remain on the Prohibited side of the line amounting to de facto discrimination based on union conduct. Therefore, the new standard coupled with the "beneficent" acts exception wears a complex mask to disguise an otherwise blatant 8(a)(1) violation.

C. Application of the *Register-Guard* facts to the new standard for discrimination

Under the new standard for discrimination, the Majority finds that the Employer bars e-mail solicitations for "outside organizations." Specifically, the Employer permits non-work-related non-solicitations, but excludes non-work-related solicitations in support of a group or organization.[90] First, the Board classifies E-mail 1[91] as mere speech, not solicitation, therefore holding the Employer liable for discriminating on the basis of Section 7 protected activities. Second, the Board found E-mail 2 and E-mail 3[92] to solicit for the Union (an outside organization), thereby lawfully falling on the excluded side of the line. The Majority's decision begs the questions: first, what is an outside organization; and second, what is the difference between solicitation and mere union speech?

1. What is an outside organization?

The Majority categorizes solicitation about "outside organizations" in the Prohibited Group, without any further explanation. However, the Majority indicates that the Employer precluded soliciting support for any outside organization "other than the United Way."[93] Therefore, the United Way is impliedly the type of organization that the Board classifies as an outside organization.[94] Similarly, by placing union-related e-mails on the excluded side of the line, the court implicitly deems the Union an outside organization, though, the Union was already "inside" the workplace.[95] That is, the Union and the workplace maintain a strong nexus as the Union bargains for the employees' hours, wages, and terms and conditions of employment. Classifying the Union, an organization so closely tied to the workplace, as an outside organization lumps it into the same category as nonunionized workplaces without distinction. In the Majority's mind, unionized and nonunionized workplaces are of the same species. Therefore, outside organizations encompass all organizations, but the Employer.

2. Solicitation versus union speech

Black's Law Dictionary defines solicitation as "The act or an instance of requesting or seeking to obtain something; a request or petition."[96] However, long-standing Board law narrowly defines solicitation as merely "asking someone to join the union by signing his name to an authorization card."[97] Therefore, solicitation triggers an "immediate response" [98] from the target employee to actually sign a union card. For example, a shirt worn by an employee bearing the words "Sign a card . . . Ask me how" falls outside solicitation.[99] It makes a suggestion, but calls for no immediate response.

Moreover, a 2007 Board case reiterates a long line of Board precedent distinguishing between "mere union speech" and "solicitation."[100] Merely "talking about a union or a union meeting or whether a union is good or bad" falls outside the ambit of the Board's definition of solicitation.[101] Likewise, remarks such as, "Support the Union," "The [union] meeting is cancelled," or "There is a [union] meeting tonight," constitute mere union speech.[102] Brevity also plays a role in distinguishing solicitation from mere union speech. Initially, signing a union card signified solicitation because it required prolonged work stoppage. But generally, the Board has ruled that brief conversations about the union do not interfere with work.[103]

The *Register-Guard* Board, however, redefines and expands solicitation as a mere "call for action."[104] It leaves the question of immediacy of the action or the type of action unanswered. The holding suggests that the Board overrules past precedent where an employee affirmatively tells a co-worker to support the union. In *Register-Guard*, the Company prohibited only solicitation, not mere talk about the union. Regardless, the Board still classifies E-mails 2 and 3 as solicitation. Ms. P never asked for the employees' immediate response—wearing a green shirt or participating in an upcoming parade involves future requests not analogous to immediately signing a union card. Specifically, advising an employee to wear a green shirt to support the union parallels the phrase "support the union," which the Board held to be mere union speech.[105] Further, Board precedent even protects the activity of wearing a t-shirt bearing union insignia at work.[106] Additionally, urging an employee to participate in a union parade is analogous to "there is a [union] meeting tonight."[107] It merely makes the employee aware of an upcoming event. Also, the brief nature of the e-mails avoids substantial work interference, one of the dangers of signing a union card, although, the Majority rules "a call for action" encompasses both E-mails 1 and 2, despite minimal work interference. Again, the new Board standard for solicitation reaches too far in silencing employees' rights without balancing Section 7 rights with employers' rights.

IV. Ramifications of *Register-Guard*

A. The conflict between employers' property rights and employees' privacy rights in both labor and non-labor jurisdictions

Employers' free reign over employees' use of company e-mail conjures up privacy rights concerns.[108] For example, employers may meddle with an employee's use of company e-mail even when the employee sends e-mails from his own computer while vacationing on a beach in Guam. In that case, the company e-mail account functions as the only nexus between the employee and the employer. Nevertheless, the employer controls the contents of the e-mail. Conversely, a New York federal court cuts employers' property rights short. [109] It holds that an employer does not "own" e-mails sent by employees merely because the employer pays for the company e-mail system.[110] Still, at odds with the employer's minimal nexus to off-premises e-mail use and reduced property rights, the employer waives its employees' confidentiality immunities. For example, an e-mail sent by an employee to his attorney through the company e-mail system—in spite of a "no-personal e-mail policy"—waives the employee's attorney-client privilege.[111] The company functions as that distant third party with "their ear always to the door." Therefore, employers may reach beyond company walls to interfere with employees' use of the company e-mail system although employers have a minimal property interest in the e-mail itself.

Other types of employer meddling with employee use of Internet-related technology outside the employer's e-mail system reach disparate results. For one, employers may buy information from web-monitoring companies about their workers' personal Internet activity both on and off company premises.[112] Off company premises, these technology companies use tracking software to record an individual's visited web sites and even words typed into a search engine.[113] The employer may view, for example, whether employees visited the Betty Ford Clinic homepage, searched for a new job or visited a union's home page. The employer cannot discipline an employee for these personal activities on their own time. Nonetheless, this data makes it easier for employers to target employee-union supporters and extract personal information about their employee. Therefore, employers may reach into the homes of employees without regard for the individual's right to privacy.

B. The future of labor as molded by Internet-related technologies

The Board's failure to recognize e-mail in an ever-increasing digitalized world[114] is bad news for unions. Unions heavily rely on Internet technology to organize and solicit union support. [115] E-mail functions as the never-failing "other available channels of communication" unions (that is, non-employees) use to reach

employees,[116] day or night, 7 days a week—even when non-employees direct messages to employees' company e-mail addresses.

For example, in *Intel Corp v. Hamidi* the court upheld the right of a non-employee to e-mail employees at their company e-mail addresses.[117] Mr. Hamidi, a former Intel employee, sent over 200,000 e-mails over a two-year period to current Intel employees criticizing company working conditions. Plaintiff Intel argued that the e-mails constituted the tort of trespass to chattels. Applying the tort to e-mail, the court held that merely sending e-mails, absent actual injury to the computer system, fails to interfere with the employer's property right. The court reasoned that the e-mail communications only spawned discussion among the employees and supervisors, falling short of damage. Interestingly, even with actual injury, employers waive a claim for trespass to chattels against an *employee* by consenting to the employee's use of the company e-mail system.

"As society strays from manufacturing and increasingly develops into a services-based industry dependent on Internet technology—with teleportation in the not-so-distant future—the Board must reevaluate its approach."

Despite non-employees' almost-unregulated control over e-mail communications on the employer's e-mail system, employees enjoy lesser communication rights. Employers may lawfully restrict certain employee-solicited e-mails about "outside organizations," including union solicitations regardless of company time or premises.

For example, if Mr. Hamidi sent an e-mail promoting a union blog to Intel employee X on X's company e-mail account, Mr. Hamidi commits no unlawful act. However, if X forwards that very same e-mail to employee Y, the employer could lawfully terminate X under *Register-Guard* conditions. Alternatively, if X verbally communicated the substance of Mr. Hamidi's e-mail to Y (in lieu of e-mailing Y) off company time, X commits no grounds for discipline by the employer. Likewise, even if X memorized the contents of Mr. Hamidi's e-mail, typed it verbatim into X's personal non-company e-mail address and then e-mailed it to Y off company time—X would still face no discipline. Therefore, outside of oral communication, non-employees arbitrarily enjoy more rights under the Act than employees to use an employer's e-mail system for union-related purposes.

Moreover, *Register-Guard* begs the question of whether a non-company-owned Internet communication between employees can be restricted under company policy on company time. For one, assuming e-mail is solicitation, sending and receiving personal e-mail could be likened to answering a personal cellular phone call. Both communications could certainly fall under a *Republic Aviation* balancing—for example, a likely outcome would allow an employee to "check" his e-mail or use his cellular phone during non-work time, but not during work time. However, the test gets even murkier when an employer advises its employee to rely on non-company-owned Internet communication for work. For example, if a company advises its employees to use a "free" instant messenger, such as AOL Instant Messenger (AIM), in lieu of e-mail, [118] the company maintains absolutely no property right in AIM. AIM would not qualify as "company equipment," barring the employer from restricting its use as it would company e-mail under *Register-Guard*." Even if the employer balances rights under *Republic Aviation*, the employer could not restrict its use off company time.

On a related note, courts have increasingly interpreted the Act in a way that limits employers from interfering with concerted employee communication on the Internet. For instance, employers cannot discipline employees who use blogs[119] to engage in protected concerted activity—such as postings on union organization tactics, hours, wages, or working conditions off company time.[120] The blog is the 2008 equivalent of an employee talking to friends and family about work-related problems.[121] However, instead of an audience of 4 or 5, it is 4,000 or 5,000 or more.[122] Additionally, others may post responses to blogs, facilitating a dialogue analogous to talking around the "water cooler."[123] Although e-mail has similarly taken the place of oral communication, the Board refuses to apply a balancing of employees' communication rights with employers' property rights.

V. Conclusion: A proposed modification of *Republic Aviation* to adapt to all forms of communication, especially Internet communications

The Internet is here to stay. As society strays from manufacturing and increasingly develops into a services-based industry dependent on Internet technology—with teleportation in the not-so-distant future—the Board must reevaluate its approach. The *Republic Aviation* method[124] of balancing employers' property rights with employees' communication rights fails with respect to both non-Internet and Internet communication alike. The modern workplace makes distinguishing between work and non-work time and place, solicitation and distribution, and solicitation and mere speech difficult. Moreover, under the "company equipment" standard, identical solicitation verbally communicated inconsistently retains more rights than solicitation occurring on the company e-mail system.[125] Therefore, drawing from the simple nature of Section 7, the Board must overhaul its communication rules, not just in relation to Internet com-

munication, but also to oral solicitation to create a simple solution.[126]

The Board may take, in part, from the second standard of *Republic Aviation*, making all company restrictions on any type of employee communication unlawful, absent a showing of "non-profitable circumstances" by the employer. Unlike *Republic Aviation*, the proposed rule does not distinguish between whether communication is solicitation or distribution, solicitation or mere speech, or where and when it takes place. Although the restriction is per se unlawful, the employer carries the burden of showing a non-profitable circumstance that makes the rule lawful. Similar to special circumstances, a non-profitable circumstance results in decreased present or future profitability for the company. For instance, the presumption makes a no-solicitation rule on company time per se unlawful. The employer must then produce evidence that soliciting alone results in some kind of loss of profits, such as decreased customer satisfaction or work productivity. If the only incident of oral soliciting occurred, for example, 10 minutes to closing on company time by two cashiers, while no customers were present at a coffee shop, the employer would fail to rebut the presumption.

Similarly, applying the non-profitable circumstances rule to electronic communication rests on the same employer showing—that absent the company rule, profitability declines. For example, the employer promulgates a rule that an employee cannot solicit on the company e-mail system during non-working time. First, the mere fact that the employer owns the e-mail system fails to qualify as a non-profitable circumstance—the employer loses no money whether the employee sends one e-mail or one million.

Second, borrowing from past decisions on claims for trespass to chattels, simply sending e-mail on the company e-mail system causes no actual damage. Specifically, sending e-mails from an employee's e-mail account does not dispossess the company of any property, nor does it interfere with business. The company consented to the employee use of that specific e-mail account. Therefore, if anyone is dispossessed from using that particular e-mail account it is the employee-user himself.

However, a variety of circumstances could meet the burden of nonprofitable circumstances. For one, computer slowdowns from bombarding the employer's computer system with e-mail or spam could serve as a non-profitable circumstance, especially if the employer relies on e-mail for customer orders. To solve the slowdown problem, the employer could place a limit on the number of e-mails an employee can send. For another, an employee who fails to empty e-mail "trash" might also interrupt the computer system justifying nonprofitable circumstances. An employer-made rule making employees delete e-mail trash could remedy the problem. Therefore, the high burden and flexibility of this proposal allows the employee much more communication rights off company time, while allowing the employer to flourish financially.

"Given the advances in technology, new forms of communication are right around the corner and the NLRB must remain adaptable."

In sum, there is no need for a special field of cyber labor law. Internet communication is just another way of communicating that should fit within a flexible standard. Given the advances in technology, new forms of communication are right around the corner and the NLRB must remain adaptable. The close call between Board members (3-2 decision) in *Register-Guard* reflects a conscious struggle to adapt the NLRA to modern day. As the Majority might wish, we have not seen the last of e-mail, but just the beginning.[127]

Endnotes

1. The issues presented in this article explore a limited discussion of the *Register-Guard* decision and do not intend to examine the full scope of its potential ramifications. *See Guard Publ'g Co.* (*Register-Guard)*, 351 N.L.R.B. No. 70, 108 (Dec. 16, 2007).
2. City of Eugene Home Page, http://www.eugene-or.gov/portal/server.pt (last visited Apr. 15, 2008).
3. Edward Russo, *Eugene Reclaims Second in City Size*, THE REGISTER-GUARD, Dec. 28, 2007, at A1, *available at* http://www.registerguard.com/csp/cms/sites/dt.cms.support.viewStory.cls?cid=41279&sid=1&fid=1 (approximate population).
4. Official Website of the Eugene Celebration Parade, http://www.eugenecelebration.com/ (last visited Apr. 15, 2008).
5. The *university* refers to the University of Oregon and the *hospital* refers to the Sacred Heart Medical Center.
6. Oregon Newspaper Publishers Association, http://www.orenews.com/cgibin/internal/database/directory/showGMpage.cgi?MemberID=25 (last visited Apr. 15, 2008).
7. *The New York Times* circulates about 1,120,000 weekday newspapers and about 1,160,000 Sunday newspapers. *See* Top 100 US Daily Newspapers by BurrellesLuce, http://www.burrellesluce.com/top100/2007_Top_100List.pdf (last visited Apr. 15, 2006).
8. *See supra* note 5.
9. This section includes only facts relevant to the paper.
10. *Guard Publ'g Co.* (*Register-Guard)*, 351 N.L.R.B. No. 70, 108 (Dec. 16, 2007).
11. *Register-Guard*, slip op. app at 108–109. The bargaining unit includes "employees in the editorial, circulation, business office, display and classified advertising, human relations, promotion and information systems departments." *See id.*
12. *Id.* at 109.
13. *Id.* at 7–8, 109–110.
14. *Id.* at 110.
15. *Id.*
16. *Id.* at 112–113. *See infra* note 80 and accompanying text (discussing other e-mail messages).

17. Ms. P was responding to an earlier e-mail sent by a Company Manager advising other employees to leave work early because the "police had notified the [Company] that anarchists might attend the rally," which Ms. P denied in her e-mail. *See id.* at 8.

18. *Id.* at 10, 111–113.

19. *Id.*

20. 29 U.S.C. § 158(a)(1) (2000) ("Section 8(a)(1)") (prohibits an employer from "interfer[ing] with, restrain[ing], or coerce[ing] employees" right to organize under § 157).

21. 29 U.S.C. § 158(a)(3) (2000) ("Section 8(a)(3)") (prohibits an employer from discriminating in relation to an employee's "tenure of employment . . . to encourage or discourage membership in any labor organization").

22. *See* National Labor Relations Act, 29 U.S.C. § 157 (2000) ("Section 7") (guarantees employees the "right to self-organiz[e], to form, join, or assist labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection").

23. *Register-Guard*, slip op. at 106.

24. *Id.* at 127 (McCarrick, A.L.J.).

25. The NLRB rarely holds oral argument.

26. *Register-Guard*, slip op. at 3. Amici include, inter alia, the National Employment Lawyers Association, National Workrights Institute, HR Policy Association, Minnesota Management Attorneys Association, and the United States Chamber of Commerce. *Id.* at 17–18.

27. Majority members include Chairman Robert J. Battista, Member Peter C. Schaumber, and Member Peter N. Kirsanow ("Majority"), all of the Republican Party. Dissenting members include Members Wilma B. Liebman and Dennis P. Walsh ("Dissent"), both of the Democratic Party.

28. *Register-Guard*, slip op. at 1.

29. *Republic Aviation v. N.L.R.B.*, 324 U.S. 793 (1945).

30. *See infra* note 32.

31. *See Johnson Technology, Inc.*, 345 N.L.R.B. 762, 763, 345 N.L.R.B. No. 47 (2005) (an employer may restrict employee use of the employer's scrap paper to advertise a union meeting). *See also Mid-Mountain Foods*, 332 N.L.R.B. 229, 230 (2000) (no statutory right to use a television in the employer's breakroom to show a prounion campaign video), enfd. 348 U.S. App. D.C. 75, 269 F.3d 1075 (D.C. Cir. 2001); *Eaton Technologies*, 322 N.L.R.B. 848, 853 (1997) ("It is well established that there is no statutory right of employees or a union to use an employer's bulletin board."); *Champion Int'l Corp.*, 303 N.L.R.B. 102, 109 (1991) (stating that an employer has "a basic right to regulate and restrict employee use of company property" such as a copy machine); Churchill's Supermarkets, 285 N.L.R.B. 138, 155 (1987) ("[A]n employer ha[s] every right to restrict the use of company telephones to business-related conversations. . . ."), enfd. 857 F.2d 1474 (6th Cir. 1988), *cert. denied*, 490 U.S. 1046, 109 S. Ct. 1953, 104 L. Ed. 2d 422 (1989); *Union Carbide Corp.*, 259 N.L.R.B. 974, 980 (1981) (employer "could unquestionably bar its telephones to any personal use by employees"), enfd. in relevant part 714 F.2d 657 (6th Cir. 1983).

32. *Register-Guard*, slip op. at 1.

33. *Access* refers to sending and receiving e-mails.

34. *See, e.g., Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1317 (S.D. Fla. 2002) (the court held that an airline website offering a "virtual ticket-counter," constitutes an intangible place disqualifying it from falling within a specifically enumerated category for tangible places of public accommodation under Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181).

35. *Republic Aviation v. N.L.R.B.*, 324 U.S. 793 (1945).

36. *Guard Publ'g Co.* (*Register-Guard*), 351 N.L.R.B. No. 70, 25 (Dec. 16, 2007).

37. The Majority says that "the Act does not command that labor organizations . . . under all circumstances, be protected in the use of *every possible means* of reaching the minds of individual workers," implying that e-mail is uncommon to the modern workplace. *Register-Guard*, slip op. at 25.

38. A 2004 survey of 840 U.S. businesses revealed that more than 81 percent of employees spent at least an hour on e-mail during a typical workday, and about 86 percent of employees send and receive at least some non-business-related e-mail at work. *Id.* at n.7 (citing American Management Association, 2004 Workplace E-Mail and Instant Messaging Survey (2004), http://www.amanet.org/research/pdfs/IM). Additionally, according to a 2007 survey, "Americans are emailing anywhere and everywhere. Fifty-nine percent of people emailing from portable devices are checking email in bed while in their pajamas; 53% in the bathroom; 37% are checking email while they drive; and 12% admit to checking email in church." *Think You Might Be Addicted to Email? You're Not Alone*, BUSINESS WIRE, July 26, 2007, http://www.businesswire.com/portal/site/google/index.jsp?ndmViewId=news_view&newsId=20070726005167&newsLang=en.

39. *See e.g., Republic Aviation* at 797 (workers in the Republic Aviation Company worked in the quintessential "traditional" setting in a conveyor-belt style factory manufacturing "earth-moving machinery and other products for the war").

40. *Register-Guard*, slip op. at 56.

41. *See* Martin H. Malin & Henry H. Perritt Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. Kan. L. Rev. 1, 17 (Nov. 2000).

42. *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. 483, 490 (1978) (employees solicited union support from coworkers in a hospital cafeteria and coffee shop).

43. In 1997, the Company employed 12 outside salespersons, each with their own company e-mail account. *Register-Guard*, slip op. at 109.

44. See Elena N. Broder, *(Net)workers' Rights: The NLRA and Employee Electronic Communications*, 105 Yale L.J. 1639, 1640 (1996). *See also* Jeffrey M. Hirsch, *The Silicon Bullet: Will the Internet Kill the NLRA?*, 76 Geo. Wash. L. Rev. 262, 274 (2008).

45. *Republic Aviation Corp.* at 793.

46. *Id.* at 794.

47. The same presumption applies to distribution off company time, but only in nonwork areas. *See Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615, 621 (1962).

48. *Republic Aviation* at 803 n.10.

49. *Id.* at n.8.

50. In response to the Majority's assertion of "what the employees seek here is the use of communication equipment to engage in additional forms of communication beyond **those** that *Republic Aviation* found must be permitted." *Register-Guard*, slip op. at 25.

51. *N.L.R.B. v. Thill, Inc.*, 980 F.2d 1137, 1142 (7th Cir. 1992).

52. *N.L.R.B. v Babcock & Wilcox*, 351 U.S. 105, 112. *See also Lechmere, Inc. v. N.L.R.B.*, 502 U.S. 527 (1992).

53. *Id.*

54. *Register-Guard*, slip op. at 25.

55. Even if this standard applied to employees, many employees in the modern workforce never physically enter the company premises, but telecommute instead—their only mode of communication is through fax, phone and computer system, including e-mail. *See* Broder, *supra* note 44, at 1639.

56. Even though she is also a union leader.

57. *Republic Aviation* at 795.

58. *N.L.R.B. v. Weingarten*, 420 U.S. 251, 166 (1975).

59. Hirsch, *supra* note 44, at 282.

60. *See* Frederick D. Rapone, Jr., Comment, *This is Not Your Grandfather's Labor Union—Or Is It? Exercising Section 7 Rights in the Cyberspace Age*, 39 Duq. L. Rev. 657, 658 (2001) (describing the shift in industry from "uneducated men laboring in the soot and toil of factories and mills . . . [to] high-tech laboratories staffed by men and women possessing advanced technical degrees). Additionally, this article uses the Republic Aviation Company factory and the *Register-Guard* office as representative of the modern workplace of their era.

61. *Register-Guard*, slip op. at 17 (citing the National Employment Lawyers Association's brief at oral argument).

62. A parallel comparison to a modern-day worker intermittently "checking" e-mail would be the 1945 equivalent of running back and forth to the break room to solicit or distribute.

63. For example, it is hard to imagine an auto assembly parts worker spending his lunch break (nonwork time) on the assembly line, yet realistic for an office worker to spend lunchtime at her desk.

64. The Board noted that distribution must occur in only non-work areas because leaflets might litter the floor and cause a fire or other safety hazards. *Stoddard-Quirk*, at 619.

65. Broder, *supra* note 44, at 1660–1661.

66. Susan S. Robfogel, *Electronic Communication and the NLRA: Union Access and Employer Rights*, 16 The Labor Law. 231, 242 (2000).

67. *Stoddard-Quirk Mfg. Co.*, at 615.

68. *Id.* at 621.

69. *Register-Guard*, slip op. at 65.

70. Other examples of special circumstances include safety, preventing discord, and violence between competing groups of employees, and preventing alienation of customers. *Eckert Fire Protection*, 332 N.L.R.B. 198, 202 (2000).

71. *Register-Guard*, slip op. at 76.

72. *Id.*

73. *See infra* note § V (discussing a proposed new standard).

74. *Register-Guard*, slip op. at 55.

75. *See Fleming Co. v. N.L.R.B.*, 349 F.3d 968 (7th Cir. 2003); *Guardian Industries Corp. v. N.L.R.B.*, 49 F.3d 317 (7th Cir. 1995). Incidentally, the Board must follow only Supreme Court decisions to interpret Board law; it has no obligation to follow Court of Appeals decisions. *See Nielsen Lithographing Co. v. N.L.R.B.*, 854 F.2d 1063, 1066 (1988).

76. *Register-Guard*, slip op. at 35–36.

77. *See Sam's Club*, 349 N.L.R.B. No. 94, slip op. at 3 (2007). *See also* Jensen Enterprises, 339 N.L.R.B. 877, 878 (2003).

78. The Board also applies the old discrimination rule to employer equipment. *See, e.g., Vons Grocery Co.*, 320 N.L.R.B. 53, 55 (1995) (bulletin board); *Honeywell, Inc.*, 262 N.L.R.B. 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983) (bulletin board); *Union Carbide Corporation*, 259 N.L.R.B. 974, 976, 980 (N.L.R.B. 1982) (telephone).

79. *See Media General Operations, Inc.*, 346 N.L.R.B. No. 11, slip op. at 3 (2005), enfd. 225 Fed. Appx. 144 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 492, 169 L. Ed. 2d 340 (2007); *See also E. I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 919 (1993).

80. *Register-Guard*, slip op. at 112. In addition, managers testified to e-mailing employees about a 40th birthday party, a going away party, dog walking, basketball tickets, and the United Way. *Register-Guard*, slip op. at 113.

81. The Board assumes that union-related e-mails are non-work-related. However, the union e-mails could easily encompass work-related matter as the Union represents *Register-Guard* employees, including Ms. P, with a collective bargaining agreement administering their hours, wage, and terms and conditions of employment.

82. *Union Carbide Corporation*, 259 N.L.R.B. 974, 976 (N.L.R.B. 1982) (employer waived its formal policy restrictions of "prior approval" for items posted on its bulletin boards after indiscriminately allowing employees to post personal items without prior approval).

83. *Register-Guard*, slip op. at 37.

84. *Id.* at 38.

85. *Fleming Co.* at 968 (7th Cir. 2003); *Guardian Industries Corp.*, at 317 (7th Cir. 1995).

86. *Fleming Co.*, 336 N.L.R.B. 192, 193–194 (2001) (the Board held that an employer discriminated on the basis of union activity (8(a)(1)) by removing union postings from the company bulletin board, but allowing a wide variety of other personal postings, such as wedding announcements and used car advertisements); *Guardian*, 313 N.L.R.B. 1275 (1994) (the Board held that an employer discriminated on the basis of union activity (8(a)(1)) by allowing employees' personal postings of items for sale, but disallowing union postings on the company bulletin board).

87. *Register-Guard*, slip op. at 97.

88. *Hammary Mfg. Corp.*, 265 NLRB 57 (1982).

89. *Register-Guard*, slip op. at 33.

90. The Employer brought no evidence showing that they barred any other outside organization from e-mails.

91. *See supra* at § I.B. (E-mail 1 clarified facts surrounding a union rally).

92. *See supra* at § I.B. (E-mail 2 urged employees to wear green in support of the union and E-mail 3 urged employees to participate in a local parade under the union banner).

93. *Register-Guard*, slip op. at 33.

94. Additionally, even as an "outside organization," United Way solicitations requesting support were permitted under the "beneficent nature" exception. *See supra* at § III.C.1. and accompanying text.

95. The Employer and Union had a collective bargaining agreement for October 16, 1996 to April 30, 1999. During the period that the e-mails in question took place, the Employer and Union were negotiating for a new contract. *Register-Guard*, slip op. at 109.

96. BLACK'S LAW DICTIONARY 653 (8th Pocket ed. 2004).

97. *W.W. Grainger, Inc.*, 229 N.L.R.B. 161, 166 (1977), enfd. 582 F.2d 1118 (7th Cir. 1978). ("'Solicitation" for a union usually means asking someone to join the union by signing his name to an authorization card in the same way that solicitation for a charity would mean asking an employee to contribute to a charitable organization or having the employee sign a chance book for such a cause or in the commercial context asking an employee to buy a product or exhibiting the product for him from a book or showing the product").

98. *Wal-Mart Stores, Inc.*, 340 N.L.R.B. No. 76 (2003), enfd. as modified 400 F.3d 1093 (8th Cir. 2005).

99. *Id.*; *see also Enloe Med. Ctr. & Health Care Workers Union*, 345 N.L.R.B. 874 2005 (Employer violated Section 8(a)(1) by requiring employees to remove or cover badges that stated "Ask me about our union" or "Ask me about SEIU" on non-work time. Both the ALJ and Member Liebman agreed that the badges did not constitute solicitation. The Majority invalidated the rule based on over broadness, never directly ruling on the solicitation issue).

100. *Sam's Club*, 771 N.L.R.B. No.94 (2007) (employee asked a co-worker what she thought of the union amounting to mere union speech).

101. *W.W. Grainger* at 166. *See Washington Fruit and Produce Company*, 343 N.L.R.B. 1215 (2004) (mere union speech when an employee spoke to a co-worker about the advantages of unionization during company time, but never presented him with a union card or petition to sign; *Sahara*, 216 N.L.R.B. 1039 (1975) (introducing a union representative to a co-worker and saying that the co-worker would go along with the union is not solicitation).

102. *W.W. Grainger* at 166.

103. *See Waste Management of Arizona, Inc.*, 345 N.L.R.B. No.14 (2005) (a brief conversation about the union does not materially disrupt work). *See also Flamingo Hilton-Laughlin*, 324 N.L.R.B. 72 (1997) (generally, asking a brief union-related question or simply informing another employee of an upcoming meeting is not enough time to be treated as a work interruption); *Lamar Industrial Plastics*, 281 N.L.R.B. 511, 513 (1986) (not solicitation when an employee asked a co-worker if she had an authorization card, a 10-second conversation).

104. *Register-Guard*, slip op at 46.

105. *W.W. Grainger* at 166.

106. Absent special circumstances, Section 7 extends to employees the right to wear union T-shirts while at work. *See Aldworth Company, Inc.*, 338 N.L.R.B. 137, 203 (2002). *See also DeVilbiss Co.*, 102 N.L.R.B. 1317 (1953).

107. *W.W. Grainger* at 166.

108. Individuals have a Constitutional right to privacy under the 14th Amendment and a protection against illegal search and seizure under the Fourth Amendment. However, this article only skims the surface of individual privacy rights concerns.

109. *Rozell v. Ross-Holst*, No. 05 Civ. 2936, 2006 U.S. Dist. Lexis 2277 (S.D.N.Y. Jan. 20, 2006), summary judgment granted in part, denied in part and objection overruled by 2007 U.S. Dist. Lexis 46450 (S.D.N.Y. June 21, 2007).

110. *Id.*

111. *Scott v. Beth Israel Medical Center*, N.Y.S.2d, 2007 WL 3053351 (N.Y. Sup. October 17, 2007).

112. Adam Cohen, *The Already Big Thing on the Internet: Spying on Users*, N.Y. Times, Apr. 5, 2008, http://www.nytimes.com/2008/04/05/opinion/05sat4.html?_r =1&scp= 1&sq=the+already+big+thing&st=nyt&oref=slogin. Employers also monitor employees' Internet use at work. A 2005 survey found that three-fourths of employers monitor websites visited by employees. About half of employers read and record employees' e-mail. *See* American Management Association Survey, http://www.amanet. org/ research/pdfs/EMS_summary05.pdf (last visited on Apr. 16, 2008). *See also* Hirsch, *supra* note 45, at 281 n.99 (discussing how the NLRA bans employer surveillance of protected activities, absent sufficient justification). Additionally, this article does not intend to explore how employers' surveillance of employees' e-mail implicates the NLRA.

113. Cohen, *supra* note 112, at A1. Although the Fourth Amendment and federal laws have been applied to protect telephone communications, no current federal law protects Internet activities, including e-mail. *Id.*

114. Examples of society's increasing dependency on Internet technology include e-mail, instant messenger, websites, blogs, online conferencing, online blackboards, online help desks, and online social networks (e.g., Facebook and MySpace).

115. *See, e.g., U-Haul Co. of Cal.*, 347 N.L.R.B. No. 34, slip op. at 11 (2006) (an employee commenced union organizing after downloading materials from the union's website to distribute to other employees); *see also* Hirsch, *supra* note 44, at 275 (describing SEIU's purchase of webads on the website "Yahoo!" promoting the SEIU); *Id.* at 277 (discussing how the Association of Pizza Delivery Drivers formed and organized solely over the Internet). Additionally, most unions operate highly developed websites, frequently updated with union news, events, and blog postings (*See, e.g.*, http://www.starbucksunion.org (IWW Starbucks Workers Union), http://www.wgaeast.org/ (Writers Guild of America, East) and http://www.apwu.org/index2.htm (American Postal Workers Union).

116. *See Babcock*, *supra* note 52, at 112; *See also Lechmere*, *supra* note 52, at 527; Broder, *supra* note 45, at 640 (online union communication is especially important for employees who seldom or never step foot on "brick and mortar" employer premises).

117. *Intel Corp. v. Hamidi*, 30 Cal. 4th 1342 (Cal. 2003). *See* O*mega World Travel, Inc. v. Mummagraphics*, Inc., 469 F.3d 348, 359 (4th Cir. 2006) (holding that commercial e-mails advertising cruise vacations sent by an Internet company to another Internet company constitutes "harmless intermeddlings," falling short of a trespass-to-chattels claim).

118. Notably, AIM performs nearly identical functions as e-mail, including electronic file sharing and instant communication.

119. *Blogs* refer to online personal journals.

120. *See* Carson Strege-Flora, *Wait! Don't Fire That Blogger! What Limits Does Labor Law Impose on Employer Regulation of Employee Blogs?*, 2 Shidler J. L. Com. & Tech. 11 (2005); *see also Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002), *cert. denied*, 537 U.S. 1193 (2003) (an airline pilot engages in protected concerted activity by publishing articles on a website criticizing management's wage concessions in a collective bargaining agreement). Additionally, this article does not seek to discuss the Wiretap Act.

121. Carson, *supra* note 120, at 4.

122. *Id.*

123. *See* Andrew F. Hettinga, *Expanding NLRA Protection of Employee Organizational Blogs: Non-Discriminatory Access and the Forum-Based Disloyalty Exception*, 82 Chi.-Kent. L. Rev. 997, 998 (2007).

124. *See supra* Section II.B.

125. Hirsch, *supra* note 45, at 285.

126. *Id.* at 278.

127. At the time this article was submitted, *Register-Guard* was on its way to the Circuit Court of Appeals.

Anne Katz graduated from St. John's University School of Law in 2008 and received her B.A. in English from Binghamton University in 2004. During college, she interned for the labor and employment department of Coughlin and Gerhart, L.L.P. in Binghamton, New York. She expanded on her interest in labor and employment by interning at the New York Regional U.S. Department of Labor, Solicitor's Office as well as at the National Labor Relations Board, Region 2 during law school. In addition, she served as a labor research assistant for Professor David Gregory at St. John's University School of Law. Anne would like to thank Professor Gregory and members of the National Labor Relations Board, Region 2 for their mentorship. She may be contacted at annekatz@msn.com.

The Granting of Paid Paternity Leave Is Not Enough to Substantially Affect the Rates of Leave-Taking Among New Fathers

By Brandi Monique and Brigitte Platt

I. Introduction

In recent years, considerable social and political attention has been paid to the increasing role of fathers in the upbringing of young children. While traditionally, the child-rearing responsibility has been viewed as belonging primarily to mothers, the increasing role of women in the workplace along with structural changes in the conventional notions of family have caused society to reconsider the parental role. Several legislative initiatives have been made to accommodate fathers in this new role, including the Family and Medical Leave Act of 1993 (FMLA) passed under the Clinton Administration, and recent state statues authorizing paid paternity leave. This article will demonstrate that mandating paid paternity leave through state statutes will not be enough to substantially increase paternal leave-taking rates in the United States because of the social stigma surrounding fathers taking an active role in childrearing. While the FMLA was a positive first step in securing the rights of fathers to participate in the upbringing of their children, it does not take into account the full range of factors that prohibit fathers from taking advantage of their right to paternity leave. First, this article will discuss why it is important for paid leave to be available to fathers, particularly early in the child's life. Then, it will discuss the basis for the right to paternal leave-taking prior to the FMLA. Next, it will examine state statutes that mandate paid leave for fathers, and the comparable laws of other countries, in order to gain insight into the real reasons why fathers are not exercising their newly acquired right to leave. To conclude, suggestions will be offered as to how to better encourage and facilitate fathers in taking paternity leave.

II. Why Does Paternal Leave-Taking Matter?

In the discourse surrounding policies of paternity leave-taking in the Unites States, the question arises: Why does it matter whether fathers take paternity leave? Through a substantial part of the 20th century, even developmental researchers did not recognize the importance of fathers in producing socially, cognitively, and emotionally healthy children.[1] Not until the 1960s did researchers begin to acknowledge the importance of the paternal role in the psychological development and behavioral adjustment of children.[2] Numerous studies have since demonstrated that "children with highly involved fathers, in relation to children with less involved fathers, tend to be more cognitively and socially competent, less inclined toward gender stereotyping, more empathic, and psychologically better adjusted."[3]

While fathers who opt not to take paternity leave are clearly still capable of contributing to the healthy development of their children, taking time off from work affords new fathers a greater opportunity to spend time with their young ones, allowing them to establish important emotional bonds with their children early on.[4] In addition, the results of a 1975 study spanning "the full range of the world's economic systems, political systems, household types, and other socio-cultural factors" indicate that caregivers are generally more accepting of children in households "where fathers are present on a day-to-day basis" as opposed to households where fathers are not present as frequently.[5] In other words, the more frequent presence of fathers in the home may, by itself, increase the quality of a child's development. Furthermore, fathers who are present in their children's day-to-day lives also function as role models, and can help instill social values in their children, such as courtesy, reliability, and general respect.[6]

While increased paternal presence in the home can positively influence child development on its own[7], it is still the quality of the father-child relationship that ultimately makes the largest difference in terms of child outcomes, and it is important to note that "caring for" children is not the same thing as "caring about" them.[8] Thus, it is important for fathers to engage in high-quality interactions with their children to maximize the positive influences they can have on their children during their paternity leave.

Fathers can also contribute to the development of their children in such unique ways by the types of play in which they tend to engage (e.g., rough-and-tumble play) with their children.[9] While fathers may engage in qualitatively different types of "roughhousing" play with male and female children, the physically stimulating contact offered by fathers is appreciated by children of both sexes.[10] Rough-and-tumble play has been found to promote the development of many important social skills, such as social cohesion and perception of emotional cues that help children understand the emotional states of individuals.[11] This important type of play is generally more prevalent in father-child interactions than mother-child interactions, suggesting that father-child interaction is particularly important in the development of certain competition and survival skills.[12]

Even though there is obvious evidence that the role of fathers in childrearing is uniquely important, one might consider the question: Why does it matter whether

fathers are able to take time to bond with their children early in life (i.e., why does the FMLA limit the father's ability to take leave during the first 12 months of a child's life or placement, in the case of adoption)? Social science research has consistently shown that the bonds children form with their caregivers early in life affect their psychological well-being later on.[13] These researchers have acknowledged the important role of infant-caregiver relationships (i.e., "attachments") in healthy emotional development, and have divided the different styles with which children "attach" to their caregivers into three general categories: secure, anxious-ambivalent, and anxious-avoidant.[14] Whether a healthy child-caregiver relationship develops depends on the caregiver's warmth toward the child, and on sensitivity and responsiveness to the child's needs.[15] Secure caregiver-child attachments are associated with warm, responsive caregivers, while anxious-ambivalent relationships are more likely to arise when caregivers respond to a child's needs inconsistently, and anxious-avoidant relationships are correlated with caregivers who are cold and unresponsive to the needs of their children.[16] Though these attachments are formed in the first few years of a child's life, they have a large and lasting impact on each child's internalized self-concept, and these attachments are the foundation for how children will relate to other people in the future.[17]

If fathers take leave to help care for their infant children, they have greater opportunity to provide the nurturance and comfort necessary to foster secure attachments in their children.[18] Fathers who take leave and assume some of the care-giving responsibility may also indirectly increase the likelihood that their children will develop secure attachments.[19] It has been proposed that mothers of anxious-ambivalent children may exhibit inconsistent, unreliable care-taking practices because they feel overwhelmed by the care-taking responsibility.[20] Thus, it is possible that fathers who play an active role in assuming some of the care-giving responsibility may relieve some of the stress on these mothers (where the children's mothers are the primary caregivers), and these mothers may in turn adjust their child-rearing practices to ones more likely to produce secure child-caregiver attachments.[21]

Fostering secure attachments is an important part of child development, and children may suffer certain negative psychological consequences if their attachments to their care-givers are insecure (i.e., anxious-ambivalent or anxious-avoidant). Researchers have found that when children are unable to form secure attachments to their caregivers early on, these children have difficulty developing healthy interpersonal relationships later in life.[22] In addition, certain types of insecure attachments have been linked with psychological symptomatology of such diseases as borderline personality disorder, anti-social personality disorder, conduct disorder, and substance abuse problems.[23] These findings provide ample reason for fathers to attempt to engage with their children in ways that promote secure attachments, and fathers have a greater opportunity to play this important role in early child development when they exercise the option to take leave.

Active involvement by fathers in child-rearing may also have a positive impact on marital relations, where the parents of the child are married.[24] Theorists have proposed that actively involved fathers contribute to a positive family context that pleases both partners in the marriage, and have also acknowledged that it may be that fathers in satisfying marriages may be more inclined to engage more actively with their children.[25] It has also been proposed that this influence is bidirectional (i.e., high marital satisfaction encourages active paternal involvement in child-rearing, and vice versa).[26] Whatever the directionality of this correlation, the link between happy marriages and paternal involvement in child-rearing may appeal to married couples as an incentive to encourage paternal leave-taking.

For all these reasons, it is clear that fathers' involvement in the lives of their children lends many benefits to a family, and there is consequently much reason to implement policies that encourage fathers to take leave and that facilitate those who already wish to do so.

III. Before the FMLA

Prior to the FMLA, the primary legal basis for the assertion of a right to paternity leave was Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Constitution.[27] Under Title VII, it is unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of individual's . . . sex."[28] The Supreme Court held, in a 1983 case, that fringe benefits (which include taking time off from work to care for a newborn) are, in fact, "compensation, terms, conditions, or privileges of employment" that must, therefore, be granted equally to men and women under Title VII.[29] In further support of this view, the Equal Employment Opportunity Commission (EEOC) declared its views on paternity leave in a set of policy guidelines, where it concluded that Title VII requires equal treatment of male and female employees in their requests for time off to care for newborn children.[30] In addition, the 14th Amendment guarantees equal protection under the law, providing that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws."[31] Thus, Title VII and the 14th Amendment laid the foundation for the more concrete right to paternity leave that would ultimately be established under the FMLA.

IV. The Purpose of the FMLA and Whom It Affects

Prior to 1993, there was no federal statute that directly addressed the concerns of family and leave-taking policies.[32] However, an increase in the number of women in the workforce, coupled with the breakdown of the traditional family, motivated Congress to enact the FMLA.[33] The FMLA allows eligible employees the right to take leave amounting to 12 workweeks for: (1) the birth of a newborn child; (2) the placement of a child as a result of an adoption proceeding;[34] (3) a spouse's, child's or parent's serious health conditions;[35] or (4) the employee's exposure to serious health conditions.[36] Essentially, through the enactment of the FMLA, Congress wanted to address the needs of families by allowing employees the opportunity to take leave where needed to tend to family members unable to care for themselves.

In passing the FMLA, Congress envisioned that men and women would share equally in the responsibility of taking care of the family.[37] The FMLA specifically attests to this intent in its congressional findings where it states: "it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing. . . ."[38] Through the FMLA, the government aimed to promote three primary goals: (1) alleviating the pressures of choosing between the workplace and the needs of the family, (2) "promot[ing] economic stability and security," and (3) encouraging a national interest in the preservation of the family.[39] In addition, the FMLA was created to ensure a gender-neutral right to leave.[40]

The Supreme Court was recently called upon to address an employer's violation of the FMLA in *Nevada Department of Human Resources v. Hibbs*.[41] Here, the Court applied Congress's objectives in enacting the FMLA to uphold a judgment in favor of the plaintiff.[42] In that case, the plaintiff, Mr. Hibbs, was terminated after taking his 12-week unpaid leave pursuant to the guidelines of the FMLA in order to care for his wife, who was recovering from a car accident and neck surgery.[43] The Court stated that one of the major concerns with the FMLA, as presented in this case, is the subtle discrimination employers practiced based on gender.[44] The Court noted that many employers hold the view that it is a woman's responsibility to take care of the family, and as a result, employers often discourage men from taking leave or deny them similar accommodations to those given to female employees.[45] The court reasoned, "By setting a minimum standard of family leave for *all* eligible employees, irrespective of gender, the FMLA attacks formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination. . . ."[46] Here, the Court upheld the judgment for *Hibbs*, and allowed him to use the FMLA to counteract discriminatory practices stemming from "sex-based overgeneralization" in the workplace.[47]

While one might have expected a lack of conservative support for the plaintiff in *Hibbs*, former conservative Chief Justice Rehnquist sympathized with the plight of the male seeking leave under the FMLA in this case.[48] His support for the plaintiff in this case was relatively unexpected, in light of his history of defending state rights, which the FMLA overrides to an extent by mandating certain leave policies.[49] In this case, Rehnquist relied heavily on the long-term discriminatory history on the basis of gender, reasoning that the frequent unconstitutional application of leave policies warranted the enactment and enforcement of the FMLA.[50] Chief Rehnquist specifically stated, "The FMLA is narrowly targeted at the faultline between work and family precisely where sex-based overgeneralization has been and remains."[51]

The FMLA explicitly provides both male and female employees the right to take an unpaid leave amounting to 12 workweeks to care for their newborn children without the fear of economic reprisal or retaliation.[52] Along with the right to take leave, the FMLA ensures job reinstatement rights to the same or an equivalent position upon return from leave, and also ensures continued employment benefits throughout the duration of the leave.[53] To make certain these rights are being made available to all eligible employees, an individual employee can bring a civil law suit on behalf of himself (as in *Hibbs*) or other employees similarly situated, or the United States Department of Labor can bring the suit against the employer on behalf of the employee.[54] Employers are prohibited from retaliating against employees who choose to exercise their statutorily imputed leave-taking rights.[55] In order to have a prima facie case for retaliation under the FMLA, a plaintiff must demonstrate that: (1) he was engaged in an activity protected by the FMLA; (2) he "suffered an adverse employment action by the employer"; and (3) there was a causal connection between the employment actions and the protected activity.[56]

In *Johnson v. Mithun*,[57] the plaintiff was able to raise an issue of material fact on her retaliation claim where she alleged that her employer gave her low-level work because she invoked her rights protected under the FMLA.[58] Johnson took leave pursuant to the FMLA because of her own serious health conditions, stemming from multiple sclerosis.[59] Johnson's claim of retaliation was based on her employer's failure to reinstate her to a position equivalent to the one she had prior to her leave.[60] Johnson alleged that when she returned to work after her leave was exhausted, she was assigned less work, which was not equivalent or similar to the work she performed prior to her leave. In response to Johnson's allegations, the employer argued that Johnson was assigned to lower-level work because there was no higher level work available for her to perform as a result of the flow of business.[61] However, Johnson was able to provide

evidence refuting this defense.[62] In addition, Johnson was told prior to her leave that she would be restored to a specific project upon her return.[63] The court here concluded that while "the restoration of salary, title, and benefits does not necessarily constitute restoration to the same position," Johnson had raised a material issue of retaliation under the FMLA, and, consequently, the court refused to grant summary judgment to the defendant.[64]

To invoke the rights and protections guaranteed by the FMLA, as Johnson did, an employee must be eligible under the FMLA. According to the FMLA, a covered employee is an employee who has worked: (1) at least for a full year prior to requesting the leave;[65] (2) a minimum of 1,250 hours during the year preceding the request for leave;[66] (3) and at a location where the employer employed 50 or more employees within a 75-mile radius of the site in which the person requesting the leave was located.[67] If one of the three requirements is unfulfilled, the employee is not covered and may not assert the right.

Courts enforce the requirements for eligibility very strictly where an employee is seeking to invoke his rights pursuant to the FMLA. For instance, in *Warren v. United States Postal Service*,[68] the court held that the employee was not an eligible employee under the FMLA because he failed to meet the minimum hours worked requirement.[69] The employee in that case had worked 1,240.49 hours, falling just short of the required 1250.[70] In addition, in *Bellum v. PCE Construction, Inc.*,[71] summary judgment was granted in favor of the employer where the plaintiff was unable to prove that the employer employed 50 employees within a 75-mile radius.[72] The employer in this case employed 55 employees between 66.5 and 69.5 linear miles.[73] However the mileage over public highways was 88.5 miles.[74] The court reasoned that the 75 miles requirement must be measured in surface miles, using surface transportation over public streets, roads, highways and waterways.[75] As evinced by these cases, courts strictly interpret the evidence to determine whether an employee is eligible under the FMLA.

Even though the FMLA provides an array of rights and protections to eligible employees, employees are still not taking advantage of the leave-taking opportunities afforded to them, which supports the notion that the FMLA, as it stands today, does not fully meet the needs of American workers.[76] The lack of leave-taking among families that may benefit from it suggests that factors not addressed through the enactment of the FMLA may play a key role in the willingness of parents to take leave.[77] Fathers may be reluctant to take leave until benefits are available beyond those proffered by the FMLA because of financial concerns.[78] Evidence also suggests that factors beyond the financial ability of the family may be the cause of the lack of leave-taking under the FMLA.[79] In addition, the vast majority of employees who are taking advantage of the leave-taking policy under the FMLA are women.[80] In light of this, the question arises: Why aren't fathers taking advantage of the gender-neutral leave policy under the FMLA at the same rate as their female counterparts?

V. Why Fathers Are Not Taking Paternity Leave

Scholars propose several major reasons as to why fathers are failing to take advantage of the new paternity leave rights granted to them under the FMLA.[81] These reasons include: (1) the notion that women are better suited to care for children than men; (2) the social stigma attached to men taking time off to rear children; (3) the lack of social support from friends and family; (4) the financial hardships associated with the family's breadwinner taking time away from the workforce;[82] and (5) men's lack of awareness that the FMLA is applicable to them.[83]

First, society holds the perception that fathers are less biologically driven to care for children than mothers.[84] However, studies have shown that mothers and fathers are equally responsive to the needs of their children.[85] Furthermore, studies have suggested that children have the most favorable developmental outcomes where both parents are actively involved in their upbringing.[86] Despite this, the notion that men are categorically inferior caregivers persists, and the media is a major contributing factor in perpetuating this misconception.[87] Specifically, the media continues to portray women in care-giving roles, to the exclusion of men in such roles.[88] However, the trends in society reflect that younger men are taking on a more active role in the home than men of previous generations.[89] For example, in a 1997 National Study, the Families and Work Institute found that the gap between the amount of time mothers and fathers spend with their children in dual-earner couples has narrowed considerably since the 1970s—a promising trend toward gender equality in care-giving.[90]

Second, the social stigma attached to paternity leave is evinced by case law and statistical findings of negative employer's attitudes toward fathers taking paternity leave.[91] As recently as 2001, a Maryland state trooper, H. Kevin Knussman, was denied the opportunity to take leave for which he was qualified under the FMLA, for discriminatory reasons.[92] In response, Knussman filed a sex discrimination claim alleging a violation of the FMLA.[93] Knussman alleged that he was subjected to ridicule by his supervisor when he attempted to take paternity leave, despite the dire post-delivery condition of his wife.[94] Ms. Knussman was bedridden as a result of prematurely giving birth, which resulted in serious health conditions.[95] As a result, Knussman was the primary care provider at the time of his leave request. However, he was allotted only 10 days of paternity leave, which is set aside for the secondary care provider by the employer.[96] When Knussman requested additional time, his superiors denied the request, stating, "God made women to have babies, not men" and "Unless your wife is dead or in a coma, you could not be the primary provider."[97] In response, Knussman filed a claim under

the FMLA to ensure his right to paternity leave.[98] A jury found his resulting emotional distress to be so great that he was awarded $375,000 in compensatory damages for mental anguish.[99] This case and others like it attest to the social stigma men face when attempting to exercise their right to paternity leave.[100]

Third, the lack of support from family and friends in a father's decision to take paternity leave is also a contributing factor to the low rates of leave-taking in America.[101] While this factor ties into the social stigma, generally, as a deterrent to take leave, the lack of support of one's family and friends is a more localized, possibly more potent and deterrent than a generalized society-wide disapproval. This lack of support typically stems from cultural stereotypes that a man belongs in the workplace while a woman belongs at home.[102] The fear of being alienated by their social support systems may be enough to preclude fathers from taking advantage of the benefits provided for in the FMLA.[103] On the other hand, encouragement by family and friends may play a pivotal role in a father's decision to go ahead and take paternity leave.[104]

Fourth, when fathers take time off from work to care for their children, it can have an adverse financial effect on the family for several reasons.[105] Unless the father is fully compensated during the leave, he will lose income that is often necessary to meet the financial needs of his family.[106] Department of Labor surveys revealed that men and women often refrain from taking FMLA leave because they cannot afford the corresponding loss of income.[107] The gender disparity in leave-taking is compounded by the fact that men are the higher wage earners approximately 80 percent of the time. [108] Men often fear that they will miss out on promotions and be looked upon negatively by their employers and co-workers.[109] This fear is well founded—a catalyst survey of employers' perceptions of paternity leave revealed that a majority of surveyed employers did not approve of men taking paternity leave.[110]

In low income households, the financial concerns are greater.[111] It is hard, if not impossible, for fathers in low income families to take off where the leave is uncompensated.[112] One study showed that fathers usually opted to use accrued personal time rather than leave under the FMLA because of their inability to afford it.[113] However, when it is essential for low-income fathers to take leave under the FMLA, they may take out loans to meet the financial demands of their families.[114] Thus, some have argued that the FMLA is "primarily a symbolic act, which afford[s] no significant assistance" to those who cannot afford it.[115]

In addition to providing financial stability, a national paid family leave program may also reduce government expenditures.[116] Paid leave programs provide employees with an incentive to remain employed, rather than depend on the government for assistance.[117] A partial or full reimbursement program would alleviate some of the financial strain of leave-taking and, as a result, working parents would be able to afford leave without the assistance of the government.[118] Thus it may benefit the government to provide employees with an incentive to remain in the workforce through a national paid leave program. [119]

Finally, if fathers are unaware of their rights under the FMLA, they will not assert their right to take leave.[120] Lack of awareness is a widespread problem that prohibits employees from exercising their right to leave. Over half of the employees in the United States are uninformed about the protections and benefits offered under the FMLA.[121] Specifically, in a 1996 study, only 58.2 percent of all men in the United States had heard of the FMLA.[122] The question then arises, how can a father assert a right that he is unaware of?

As a result of the concern of lack of awareness, the FMLA places a duty on employers to post information regarding an employee's eligibility to take the 12-week unpaid leave in conspicuous places where notices for employees and prospective employees would be placed.[123] In *Nusbaum v. CB Richard Ellis, Inc.*,[124] the plaintiff required surgery for a herniated disk, and requested a copy of the company's Medical Leave of Absence Policy.[125] She handed her leave request information to a supervisor who refused to file it, demanding to speak to her doctor directly.[126] The plaintiff brought a suit against her employer, alleging in part that her employer's failure to provide written material about FMLA leave violated the statutory notice requirement.[127] The court in this case concluded that "[t]he overall intent of the FMLA is lost when an employer fails to provide an employee with the opportunity to make informed decisions about her leave options and limitations," and denied the defendant's motion to dismiss the case.[128] Where an employer deliberately violates the notice requirement, he can be fined up to $100 for every offense.[129] However, despite the statutory requirement, unawareness of the Act's coverage and applicability remains an obstacle to paternal leave-taking.[130]

All the reasons offered above have traditionally been offered to justify why men have steered away from utilizing the paternity leave benefits offered under the FMLA. However, while theorists have separated the reasons behind fathers' reluctance in taking paternity leave into five distinct categories, the social stigma attached to fathers in caregiver roles (derived from gender stereotyping as to what a man's role in his family should be) is the underlying rationale that pervades each category. Thus, it appears that even if paid paternity leave were offered to relieve the financial strain of uncompensated leave under the FMLA has placed on many families, men still would not opt to take on the child-rearing role that has traditionally belonged to women.[131] However, in order to determine whether social stigma really would preclude fathers from taking even paid paternity leave, it is neces-

sary to consider why some employers are reluctant to give leave, to examine existing paid leave policies to see how they operate, and then to look at whether fathers are taking advantage of paid leave policies in states that have adopted them such as California.

VI. Which Employers Are Reluctant to Give Paid Paternity Leave and Why

While many fathers are reluctant to take leave, many employers are reluctant to give it. The government is not exempt from these reservations. In its Report to Congress on Paid Parental Leave, the United States Office of Personnel Management conducted surveys of human resource directors in several Federal Executive departments in order to determine whether they thought paid parental leave would be beneficial to them, particularly in the realms of: (1) curtailing the loss of federal employees to the private sector, (2) attracting and retaining employees, (3) "reduc[ing] turnover and replacement costs," and (4) encouraging parental involvement early in their children's lives.[132] The response was that the surveyed agencies overwhelmingly agreed that they did not think that offering paid parental leave would be beneficial to them in the areas of attracting and retaining employees.[133] The agencies ranked such factors as "challenging work, opportunities for training and advancement, and flexible workplace arrangements" as more important to the attraction and retention of a quality workforce than paid parental leave.[134] Further, The Office of Personnel Management expressed its belief that "employees can meet their family responsibilities with the many flexibilities that are already available to them," and emphasized that without evidence that federal employees are unable to meet their familial obligations under the current system, there may not be a need to consider a paid leave option.[135]

The Office of Personnel Management's Report, however, addressed only the reasons for reluctance to offer paid parental leave within certain government agencies, and these reasons may differ from the reasons of employers in the private sector for several reasons. For example, the Office points out that all federal employees earn a minimum of 13 days of sick leave annually, and that an unlimited amount of unused sick days can be carried over to subsequent years: a guarantee that may not be offered by many private-sector employers.[136] While the term "sick days" seems to connote that these days may be used for only personal illness, federal employees are explicitly permitted to use their allotted sick days for purposes of "family care" and "purposes related to the adoption of a child."[137] New mothers are explicitly allowed to use sick leave "for any period of incapacitation resulting from pregnancy and/or childbirth."[138] New fathers are entitled to use sick leave to attend medical appointments with their wives, to "be with [their wives] during [their] hospitalization" and to tend to their wives as they recover.[139] Thus, women and men who expect to have children in the future may use their sick days more prudently in order to accrue days off that can be used in the event of the woman's pregnancy.[140] In private-sector jobs, where sick days may not carry over to subsequent years, prospective parents and parents expecting additional children do not have the advantage of relying on accrued sick days to extend their parental leaves.

In addition, government agencies may advance "up to 30 days (6 weeks) of sick leave to an employee for a medical emergency or for adoption purposes."[141] Not all private-sector employers are required or willing to advance sick leave to their employees for these purposes. In addition, private-sector employers are not obligated to allow the use of sick days for any purpose other than the employee's own personal illness, if they do not run concurrently with the leave mandated under the FMLA, and so private-sector employees may not be entitled at all to rely on sick days to extend their parental leave time. Furthermore, the Office of Personnel Management found that "in studies comparing Federal Benefits to those in the non-federal sector . . . the total amount of paid time off available to federal employees each year meets or exceeds that which is generally available to employees in the private sector."[142] Thus, the economic disincentive to take parental leave may not be as strong for federal employees, as compared to those working in certain occupations in the private sector that offer fewer paid sick days.

Employer and institutional willingness to offer paid leave may depend not only on whether the business in question is public or private, but also on the type and status of the business for which the employee works.[143] For instance, in a study involving data from 33 law schools,[144] 73 percent of those schools offered some form of paid maternity leave to their female professors that was more generous than that afforded by the FMLA.[145] Fifty-eight percent of schools offered paternity leave benefits beyond those afforded by the FMLA to their male professors.[146] Interestingly, this study revealed that it was twice as likely for private law schools to offer paid family leave benefits to their professors (comprising 87 percent of those surveyed) than for public schools to do so (comprising 59 percent of the surveyed sample).[147] Furthermore, public schools that offered a full semester of paid family leave following the birth of a child were much more likely to require the professor to engage in "light committee work and/or research" than private law schools, which rarely required professors to engage in any duties while on leave.[148]

In addition to the difference in paid family leave offered by private and public law schools, this study revealed a difference in the prevalence of paid family leave policies in higher- and lower-ranked law schools.[149] In fact, 100 percent of the law schools surveyed that fell into the first and second tiers in the 2005 *U.S. News & World Report* offered some form of wage replacement for family leave.[150] This figure bears stark contrast to the compa-

rable figure for the surveyed third- and fourth-tier law schools, which offered some form of wage replacement for parental leave-takers in only 31 percent of cases.[151]

Even taking into account the aforementioned differences between the paid leave policies offered by higher- and lower-ranked public and private law schools, "law schools are significantly more generous than the average U.S. employer with regard to paid family leave."[152] In fact, law schools may offer even more generous paid leave policies than other institutions of higher education.[153] There are many reasons law schools may offer more generous paid family leave policies to their faculty members, among which is the "acute legal consciousness"[154] and, perhaps, the more liberal institutional view of law schools in accommodating female and male professionals who choose to expand their families and need a break from work to attend to their newly acquired familial obligations. Laura Kessler, the author of this study, suggests that market forces may contribute to the relatively generous paid leave policies law schools offer to their professors, especially higher ranked law schools.[155] On the basis of market theory, men and women with higher skill-levels also have bargaining power superior to that of low-skilled workers, and so employers may respond accordingly by providing these employees with more generous benefits to prevent these highly coveted employees from finding jobs elsewhere. However, while some reasons for the discrepancies in paid leave policies in certain types of employment are fairly certain, there is widespread acknowledgment of a need for more research into these differences, particularly those differences between the benefits offered in the private and public sector.[156]

While it is difficult to determine what specific reservations employers have about implementing paid leave policies, surveys such as the 1998 Families and Work Institute survey lend some insight into the trends as to which employers offer the most family-friendly paid leave policies and to which employees these policies are offered.[157] The study sample included 1,057 individuals, 84 percent of whom worked for for-profit employers, and 16 percent of whom worked for non-profit employers.[158] The survey reported that employers "with higher percentages of salaried and full-time workers were . . . more likely to provide paid childbirth leave,"[159] which may lend support to the notion that some employers consider the paid leave benefit important in retaining its workforce. However, it is important to note that only 20 percent of the surveyed employers with fewer than 250 employees offered any form of paid paternity leave "beyond that available from accrued sick, vacation, and personal days during an FMLA leave."[160] This reaffirms the prevailing prejudice against granting new fathers leave rights equal to those of new mothers. However, the employer bias against men in terms of providing a paid leave benefit appears to have lessened over time in certain types of institutions, such as those of higher education.[161]

This section discusses only some of the possible reasons for employer reluctance to provide paid paternity leave in certain realms of employment. Employers and economists also have concerns about implementing a national paid-leave policy, which are discussed further *infra*, in this article in section IX, "Financial Templates for Funding a National Paid Leave Policy."

VII. Paid Paternity Leave and Its Effect on the Willingness of Fathers to Take Leave

In order to counter some of the negative financial impacts of a father taking paternity leave, which were not addressed in the enactment of the FMLA, states throughout the United States have considered offering paid paternity leave.[162] After 11 years, California was the first state to implement a comprehensive state statute authorizing a paid paternity leave program for employees working in the private sector.[163] California introduced such a bill in February 2002 in response to accelerated political momentum from labor unions and women's activist groups who believed there was a strong need for a paid leave system.[164] The original bill proposed a 12-workweek paid leave that would be financed through costs split equally by employers and employees.[165] However, as a result of opposition from both businesses and lobbying groups, the bill was later curtailed and finalized in 2004.[166] In its final form the Family Temporary Disability Insurance, known as California's Paid Family Leave Program, granted "up to six weeks wage replacement benefits to workers who take time off work to care for a seriously ill child, spouse, parent, domestic partner, or to bond with a minor child within one year of the birth or placement of a foster or adoptive child."[167] As of July 1, 2004, a working parent in California—mother or father—can take up to six weeks off to care for a newborn child and receive partial income reimbursement through the state's disability insurance program.[168]

In amending California's Temporary Disability Insurance Program to include paid leave for families in instances where there is a birth or a serious illness, California took a proactive step to address the concerns of parents in the labor market. The California legislature recognized that there was, and still is, a strong public interest in providing paid leave to working parents who need to care for their family members, especially children.[169] The statute provides working parents the opportunity to "bond" with their newborn child during the most pivotal time of their children's lives without the financial strain associated with uncompensated leave-taking.[170] Bonding has turned out to be the most popular reason for leave-taking under the new statute, by far: during the first year of the program, over 88 percent of workers who took advantage of the newly established

leave program did so to bond with their newborn child.[171]

In addition, the California legislature recognized that most workers are deterred from taking family leave because they cannot afford to take time off without pay,[172] and that the need for paid leave has increased as a result of the dramatic increase of working parents entering the labor market.[173] Accordingly, California, in implementing paid family leave, addressed the financial concerns of prospective leave-takers when it introduced the idea of partial income reimbursement. While a majority of working parents cannot afford to survive off of one income after the birth of a newborn child,[174] partial income reimbursement alleviates some of the financial burdens working parents face when opting to take leave.

California's Paid Family Leave Program is financed through the state's preexisting disability insurance system,[175] and the cost of California's paid leave program is financed exclusively through employees' contributions.[176] The process requires deductions from employees' checks through a payroll tax system.[177] Deductions are mandatory.[178] As of January 1, 2004, all employees contributing to the state's disability insurance program must contribute to the paid family leave program.[179] The contribution rate is only 0.06 percent as of January 2007.[180] The program does not provide full income reimbursement as a result of your contribution.[181] However, according to the statutory provisions, the employee is entitled to half of his weekly salary for up to six weeks.[182] According to recent statistics, the maximum amount an employee can receive is $882 per week while the minimum is $50.[183]

In order to receive reimbursement through the program, the employer must be eligible.[184] To be eligible for Paid Family Leave the worker must: (1) file a claim under the regulations governing the temporary disability benefits; (2) show that he was unable to perform his work function during the seven-day waiting period; and (3) file a certificate provided by a medical provider attesting to the employee's need to take leave pursuant to the statute.[185] An employee in California will not be able to take advantage of the paid leave program unless all three requirements are fulfilled.

In conclusion, the adoption of California's Paid Family Leave Program was intended to afford parents the opportunity to develop strong parent-child relationships with their children without the apprehension of being unable to financially support their families. The next question that arises is whether a paid leave program is the solution to paternal leave-taking across the nation. One must first look at the difference between California's Paid Family Leave Program and the FMLA, and then look at the rate of paternal leave-taking under the newly established law to be able to determine whether paid leave is the solution.

VIII. The California Paid Paternity Leave Statute versus the FMLA

California's Paid Family Leave Program went a step further than the FMLA to help facilitate fathers in taking leave by implementing a paid leave program. The FMLA and the state of California's new comprehensive paid leave policy differ in such respects as what employers must abide by, what employees are eligible for coverage, and length of leave.[186]

In essence, the California Paid Family Leave Program extends coverage to a greater number of employees (virtually all employees in the private sector) and makes leave available to a greater number of employees who, without partial wage re-imbursement, could not afford to take advantage of the leave afforded to them. Unlike the FMLA, California's Paid Leave Program does not require that the employer employ a certain number of employees or that the employee work a certain number of hours before he or she can become eligible under the statute.[187] The FMLA, on the other hand, restricts eligibility by requiring an employer to be of a certain size, and requires an employee to work a certain number of hours in order to be able to file a claim.[188] Essentially, the paid leave program has a more expansive pool of eligible employees because of the lack of additional restrictions. It was estimated that 13 million California workers would be covered by this program at the time of its commencement on July 1, 2004.[189]

It is important to note that while the California leave statute may afford more progressive benefits than the FMLA, the FMLA was a huge first step by the federal government with regard to a gender neutral leave-taking policy.[190] Further, unlike California's program, the FMLA provides eligible employees with job reinstatement to a similar or equivalent position upon their return to work, after the leave has been exhausted.[191] California's Paid Family Leave Program does not provide such job security to employees.[192] However, one way to circumvent the lack of protection under the paid leave policy is for an employee to file concurrently for leave under the FMLA and the California Family Rights Act, if eligible for both.[193] According to the policy under California's paid leave program, an employee who is eligible under the FMLA or the California Family Rights Act must take leave under the paid leave program concurrent with the leave of the FMLA and California Family Rights Act.[194] Thus, job protection for employees acting under the paid leave program is only a concern where employees fall outside of the eligibility requirements of FMLA and California Family Rights Act. Also, California employers can require their employees to exhaust their unused vacation time before collecting benefits under the paid leave program, not exceeding two weeks.[195]

In spite of California's progressive stance toward family leave-taking, promulgated by its new paid leave policy, the Program still faces some challenges. Offering

partial reimbursement was not quite as great an incentive for fathers to take leave as might have been supposed. Out of the 88 percent of parents who requested leave during the first year of the Act, only 17 percent of requests were from fathers who wanted time off to bond with their newborn children.[196] Additionally, in the Golden Bear Omnibus Survey (GBO) conducted in 2003, a lower percentage of men than women anticipated taking leave in order to take care of a new child or sick family member under the new law within the next five years.[197] This suggests that factors other than economic ones still stand in the way of fathers eligible to take leave.

One explanation for the low percentage of fathers taking leave is their lack of awareness of the benefits available to them under the Paid Leave Program.[198] According to the GBO survey, only a nominal percentage of Californians were aware of California's paid leave program.[199] In particular, only 22 percent of those who responded answered affirmatively when asked, "Have you seen, read or heard anything about a new California law scheduled to go into effect next year, that provides up to six weeks of paid family and medical leave for eligible workers . . . ?"[200] Furthermore, according to a 2005 survey, only 29 percent of Californians were aware of this new program, while 65 percent of California residents were aware of the FMLA.[201] As fathers cannot assert a right of which they are unaware, active efforts must be made to make them aware of the family leave benefits that are available to them.[202]

Surveys suggest that where an employee's environment is more accepting of parental leave-taking, the employee is more likely to take advantage of leave policies.[203] One survey found that a higher percentage of employees took advantage of the newly established paid leave program in instances where their employers offered family friendly leave benefits that went beyond California's paid leave program.[204] Even though this suggests that financial concerns play a role in the working parent's decision to take leave, it is not enough just to provide paid leave. As these statistics have evidenced, an employer's attitude toward leave-taking and the employee's work environment are also critical influences over a father's decision whether to take leave. Thus, it seems that if employers provided more family-friendly policies, employees would probably be more inclined to take advantage of their opportunity to take leave.[205] Therefore, employers must put forth an effort to encourage fathers to take leave in order for fathers to be more willing to embrace their roles in the child-rearing process.

IX. Financial Templates for Funding a National Paid Leave Policy

Three sources have been proposed through which national paid leave policies can be funded: (1) unemployment insurance, (2) temporary disability leave, and (3) tax incentives.[206] When using unemployment insurance to fund leave, parents receive wage replacement during the leave period.[207] Under this funding method, states reinterpret their eligibility guidelines to include parents of newborns or recently adopted children.[208] On the other hand, temporary disability insurance schemes provide funding by expanding the already existing temporary disability insurance in each state to the paid family leave program.[209] This program has already been implemented by California, New York, New Jersey, Rhode Island and Hawaii.[210] Finally, tax incentives allow parents who take advantage of parental leave to credit the cost incurred as a result of the leave against their salaries, similar to a child care tax credit.[211] Out of all three possible funding mechanisms, temporary disability insurance is the most favored among the states, for several reasons.[212] For instance, the implementation of this program does not require the state to create a separate and distinct program to fund paid leave, as it is merely an extension of an already existing program.[213] Also, several states have already shown that this funding mechanism can be successful through their own paid leave policies.[214]

Even though these funding mechanisms seem appealing to proponents of a national paid leave system, economists have pointed out flaws in each program. Primarily, with regard to funding leave through unemployment insurance, critics argue that Congress did not intend for unemployment insurance to be used to fund paid leave, but rather to address unemployment issues.[215] Based on this argument, the intent of the legislature is ignored when funds are drained from unemployment insurance for purposes unrelated to involuntary separation from employment. Furthermore, economists criticize temporary disability insurance as a funding source because there will be employees who will not be able to reap the benefits of the paid leave, but will be forced to contribute to it.[216] Finally, tax incentives are criticized because the employee does not receive the benefits of the program during the leave, but rather the following year, when he files for taxes.[217] It is also important to note that economists are not the only ones with concerns about funding parental leave on the national level—employers have concerns as well.[218] Employers fear that national paid leave will negatively impact the economy.[219] They argue that paid leave will result in substantial cost to the company because of increased administrative and productivity cost.[220]

Although progressive policies that expand rights and benefits for fathers who wish to take leave typically appeal to left-wing constituents, evidence supports that paternal involvement in young children's lives may precipitate growing conservative acceptance of expanding these rights.[221] The Bush administration, in light of its particularly strong emphasis on building strong, lasting marriages that provide nurturing environments for children, may have an increased interest in progressive paternity leave policies, as evidence of the important role of fathers taking an active role in family life comes to

the forefront. As stated above, paternal involvement has already been correlated with marital satisfaction.[222] Also mentioned earlier is the importance of the unique role of fathers in the healthy psychological development of children, which should be considered by parties reluctant to support progressive paternity leave policies, as children are a public good[223] and their healthy development is of great interest to us all, regardless of political orientation. However, getting individuals to recognize the benefits of implementing policies that promote paternity leave-taking (i.e., instituting paid leave policies) is only the first step toward increasing their actual rates of leave-taking. Until the financial concerns about funding leave are addressed, at the national and individual levels, the federal government will not be able to focus on the social stigma that deters fathers from taking leave.

X. Other Countries' Parental Leave Policies as Compared to Those of the United States

The United States is far behind the times with regard to its parental leave policy in comparison to other countries.[224] European countries have long since recognized the need to address the financial barrier which precluded fathers from taking leave.[225] Contrarily, it was not until President Clinton took office in 1993 that the United States even guaranteed *unpaid* federal maternity and paternity leave.[226] Before that, then-President George Bush vetoed two bills similar to the Family and Medical Leave Act,[227] and even today the United States maintains one of the least generous family leave policies.[228]

In contrast to the United States, foreign countries have recognized employees' reluctance to take parental leave without financial security, and, accordingly, these countries have provided family-friendly benefits that make taking leave more appealing.[229] Canada, Colombia, Denmark, Finland, Great Britain, Italy, Norway and Sweden all provide some form of paid parental leave.[230] Parents who take advantage of these generous policies are compensated by the state for a portion of their weekly salary ranging from 30 to 100 percent, depending on the country.[231] In France, parents have the option of working part-time up until their child is three years of age.[232] In Germany, Italy, and Luxembourg, the government is completely responsible for subsidizing these paid leaves.[233] Employee insurance premiums cover the cost of paid parental leave in Switzerland.[234] These countries have all proactively addressed the issues concerning their citizens with regard to leave-taking.

Perhaps the most progressive family-leave policies have been enacted in Scandinavia.[235] Norway, for example provides a 52-week paid parental leave where the employee is compensated 100 percent of his salary for the first 48 and 80 percent for the remaining 10 weeks.[236] In addition, the leave is available to parents who were not gainfully employed prior to the time of their leave request.[237] Also, Sweden pays its employees 80 percent of their wages for 360 days, and provides a flat rate for the remainder of the leave.[238] Even though the amount of leave provided by these two countries may seem excessive to employers in America, a paid federal leave policy spanning 12 weeks or so (like the FMLA) may seem reasonable to both employees and employers.[239]

In addition to paid leave, countries have created policies specifically to encourage fathers' leave-taking in conjunction with providing paid leave. In Norway, out of the 52 weeks allotted to parents for parental leave, four weeks of it must be used by fathers or it is lost to the family as a whole.[240] Sweden has also set aside 10 days of paid leave after childbirth for fathers, in addition to the 12-month paid parental leave allotted in its parental leave policy.[241] In Italy, if fathers take at least three months of the parental leave allowed to parents, the parental leave is extended by one month.[242] Furthermore, England has recently adopted the Work and Families Act in an attempt to "create a flexible labor market that serves employers and employees alike."[243] The legislation aims to ease the burden imposed on parents who are trying to remain part of the workforce while simultaneously maintaining active roles in rearing their children.[244] The efforts extended by these countries to encourage paternity leave provide evidence that the underlying reason fathers are not taking leave is not purely economic, because even these countries still do not have high rates of paternal leave-taking.[245]

XI. Recommendations and Conclusion

For the many reasons discussed, it is unlikely that rates of paternity leave-taking will substantially increase until some proactive measures are taken to encourage fathers to take advantage of their opportunity to take leave—both paid and unpaid. In light of this, we proffer several recommendations as to how individuals, employers, and state and federal governments can increase rates of paternal leave-taking.

Starting with the home-front, we propose that the friends and family members of fathers seeking paternity leave attempt to be more open-minded and supportive, in light of the empirical research supporting the importance of the fathers' involvement in child development as discussed in Section II of our article: "Why Does Paternal Leave-Taking Matter?" We previously discussed how lack of social support for and social stigma against fathers taking leave can be a strong deterrent to leave-taking,[246] and we believe heightened awareness of the negative consequence this has on children will have a positive effect on fostering acceptance and even encouragement of fathers taking leave. Additionally, we encourage current and expectant fathers, as well as others in favor of paid leave policies, to become politically involved in the movement to achieve paid paternity leave in states that haven't yet adopted paid leave policies. Even in California, which currently boasts the most comprehensive statewide family leave program, advocates of paid family

leave may try to encourage the legislature to extend the duration of the Paid Family Leave Program to 12 instead of six weeks, for which lobbyists had originally advocated.[247] Individuals in California may also lobby for the program to be funded through a method other than state disability insurance,[248] as we propose later in this section, in order to allay the concerns about whether adequate funding will remain for individuals with disabilities if paid family leave funding is taken from the same pool.[249]

Employers should also attempt to foster workplace environments that validate fathers in their roles as caretakers. As uncovered in our research regarding paid parental leave policies in the workplace, private institutions in certain fields generally have more progressive paternity-leave policies than their public counterparts.[250] The federal government has shown considerable reluctance to adopting a national paid leave policy,[251] but the current trend in the private sector, and in states like California, toward increasing benefits for fathers who want to take leave is a promising step toward a national paid leave program.

State and federal governments can encourage rates of paternal leave-taking by creating financial incentives to do so. We propose that certain pre-existing financial plans that have already been implemented by state and federal governments can provide an alternative to funding state-paid leave programs (or a federal program) that will be less harshly criticized than the current SDI template used by California. In particular, we contend that the pre-existing 401(k) scheme[252] can serve as a template for an innovative financial planning mechanism that allows individuals (males and females) or couples anticipating a family at some time in the future to have a percentage of their paycheck automatically deducted and placed into a "tax-qualified deferred compensation plan."[253] We will refer to this 401(k)-styled plan for families planning for children as the "Family Plan." While many of us are already familiar with 401(k) plans, generally, we provide some information to lend some basic insight into how they work and how they would have to be modified to become appropriate for future parents, as opposed to retirees.[254]

The concept of a 401(k) plan was introduced in the late 1970s, when Congress decided there was a need to encourage Americans to take a more active role in adequately planning for retirement.[255] The Tax Reform Act ultimately authorized the creation of a tax deferred savings plan for employees, and the 401(k) plan first became available to taxpayers in 1982.[256] The 401(k) plan offers many advantages to individuals who choose to contribute. First, any money contributed to the plan is taken out of the individual's paycheck and directly deposited into the account before the calculation of taxes.[257] In this way, employees fund their own retirement, while with the Family Plan, families would be funding some or all of their paid parental leaves. With 401(k)s, taxes are not deducted until the person cashes out on the plan and withdraws the money.[258] For retirees, this creates a great incentive to participate, because by the time most people retire they are in a lower tax bracket and so the taxes taken out of the 401(k) are less than they would have been at the time the income was acquired.[259] In adapting this policy to apply to parents planning for children, on the other hand, the tax incentive is not quite the same, because under the Family Plan, the money would be withdrawn at the time of the birth of the child, and many families would not be in a lower tax bracket at that time.[260] However, if one partner in a married couple had taken time off from work significantly before the conception or birth of a child, perhaps in anticipation of all the preparatory work that is necessary before one's home is suitable for an infant child, the family then might fall into a lower tax bracket at the time of the child's birth and cashing out of the plan.[261] In that scenario, the tax-deferred feature of the 401(k)-styled Family Plan would still be beneficial to those families. Furthermore, individuals who cash out of their 401(k)s do not have to pay a state income tax on any of the money if they now live in a state with no income tax, even if all of the income contributed to the 401(k) was earned in a state that does have a state income tax.[262] If those states were to recognize and implement the Family Plan and offer the same incentive, individuals moving to the state before cashing out on the plan would greatly benefit.

In the event that families are not in a significantly different tax bracket at the times of earning the income and cashing out on the plan, and assuming they do not move from a state with state income tax to a state without state income tax, there may still be many great financial incentives to contribute to the Family Plan. With current 401(k) plans, many employers offer matching contributions (i.e., they contribute an additional amount to the employee's plan, which is some percentage of what the employee contributes himself or herself).[263] These contributions are essentially free monetary rewards for the employee's responsible investment in the plan.[264] Matching contributions don't count toward the overall limit on how much each employee can contribute to his or her plan.[265] While there is a cap on how much money can go into the plan, total, this amount is significantly greater than the amount the employee himself or herself can contribute.[266] Thus, the total cap rarely substantively affects the overall contribution to the employee.

Particularly progressive family-minded companies may be inclined to make matching contributions under the proposed Family Plan. Not only would this confer a financial benefit on families that planned responsibly to subsidize part of their paid family leave, but it would also emphasize the company's commitment to helping prospective parents make responsible financial choices and reducing workplace stigma against fathers taking leave. This more supportive work environment would encourage fathers to take advantage of paternity leave

benefits more frequently, and would allay some of their concerns about losing the respect of their colleagues.[267]

One particularly favorable feature of the 401(k) plan is that the IRS requires the plan to meet certain criteria established in "nondiscrimination tests" to establish that the employer is not discriminating against certain employees by making only certain people aware of the plan,[268] or having only certain "key employees"[269] taking advantage of the plan. The goal of these tests is basically to ensure that the wealthiest members of the company or most financially savvy employees are not the only ones aware of, benefiting from, and taking advantage of the policy.[270] As previously discussed, awareness is a key issue in increasing paternal leave-taking.[271] If employers that offered the Family Plan were subjected the same type of nondiscrimination tests as employers offering 401(k)s, that would play a major role in ensuring that employers are actively attempting to raise awareness and participation in the Plan, and would lead to an overall increase in fathers' awareness of their rights under parental leave statutes.

The 401(k)-structured Family Plan would probably also receive less criticism than the paid family-leave programs funded by state disability insurance, because the Family Plan would eliminate the concern over resources being drained from a program that was not intended to fund paid family leave,[272] as employees could actively participate in funding their own paid leaves in an account entirely separate from state disability insurance, and progressive employers could encourage this responsible financial family planning by providing matching contributions, which could ultimately provide employees with more funding for their leaves than they would have achieved through a state disability scheme. Also, if the individual that contributed to a Family Plan ultimately ended up not bearing or adopting children, the money could be rolled over into his or her existing 401(k) or converted to a 401(k) account for withdrawal at retirement.[273]

The Family Plan is just one of many suggestions that can help foster a socially and financially supportive environment in which fathers feel free to take advantage of paid leave without facing an abundance of negative consequences. We hope that this article has helped to raise concern and awareness about the issues affecting rates of leave-taking among fathers, and we hope that individuals and state and federal governments begin to more actively pursue an agenda in furtherance of the healthy development of children and families.

Endnotes

1. Ronald P. Rohner & Robert A. Veneziano, *The Importance of Father Love: History and Contemporary Evidence*, 5 Rev. Gen. Psychol. 382, 386 (2001).
2. *See id.* at 387–88.
3. *Id.* at 392.
4. *See id.* at 387.
5. *Id.* at 387.
6. Cynthia R. Mabry, *Who Is the Baby's Daddy (and Why Is It Important for the Child to Know?)*, 34 U. Balt. L. Rev. 211, 230 (2004).
7. *Id.*
8. *Id.* at 392.
9. *See* Daniel Paquette, *Theorizing the Father-Child Relationship: Mechanisms and Developmental Outcomes*, 47 Human Dev. 193, 205 (2004).
10. Inge Bretherton et al., *Involved Fathers of Preschool Children as Seen by Themselves and Their Wives: Accounts of Attachment, Socialization, and Companionship*, 7 Attachment and Human Development 229, 244 (2005).
11. Catherine S. Tamis-LeMonda, *Conceptualizing Fathers' Roles: Playmates and More*, 47 Human Development 220, 221 (2004).
12. *See id.* at 221–23.
13. Lucy Scott Brown & John Wright, *The Relationship Between Attachment Strategies and Psychopathology in Adolescence*, 76 Psychology and Psychotherapy: Theory, Research, and Practice 351, 352 (2003).
14. Collins et al., *Psychosocial Vulnerability from Adolescence to Adulthood: A Prospective Study of Attachment Style Differences in Relationship Functioning and Partner Choice*, 70 Journal of Personality 965, 967–68 (2002). While attachment theory was initially viewed as applicable to only mothers of young children, the theory evolved to include actively involved fathers as parties to whom children could form these types of attachments. Bretherton et al., *supra* note 10, at 229–31. Also, while social science researchers have more recently proposed attachment types other than the three presented, including "disorganized" type attachment, the three types discussed above encompass the attachment styles of the great majority of children, and discussion is thus limited to these three types in this article. Sidney J. Blatt & Kenneth N. Levy, *Attachment Theory, Psychoanalysis, Personality Development, and Psychopathology*, 23 Psychoanalytic Inquiry 102, 107–09, 116–17 (2003).
15. *Id.* at 968.
16. *Id.*
17. *Id.* at 967–68.
18. *See id.*
19. *See* Ofra Mayseless, *Maternal Caregiving Strategy: A Distinction Between the Ambivalent and the Disorganized Profile*, 19 Infant Mental Health Journal 20, 29–30 (1998).
20. *Id.* at 29.
21. *Id.* at 29–30.
22. Brown & Wright, *supra* note 13, at 352.
23. *Id.* at 352–53.
24. Bretherton, *supra* note 10, at 248.
25. *Id.*
26. *Id.*
27. 29 U.S.C.A § 1601(b)(4) (2000).
28. 42 U.S.C.A. § 2000e(2)(a)(1) (West 2006); Katherine Patterson, *Discrimination in the Workplace: Are Men and Women Not Entitled to the Same Parental Leave Benefits under Title VII?*, 47 SMU L. Rev. 425, 426 (1994).
29. *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 682 (1983); Patterson, *supra* note 28, at 434.
30. Patterson, *supra* note 28, at 433–34.
31. U.S. Const. amend. XIV, § 1.

32. Kathryn Kroggel, *Absent Fathers: National Paid Paternity Leave for the United States—Examination of Foreign and State-Oriented Models*, 23 PENN. ST. INT'L L. REV. 439, 444 (2004).

33. Yoora Pak, *History, Structure, and Administration of the FMLA*, *in* THE FAMILY AND MEDICAL LEAVE ACT 16–17 (Michael J. Ossip et al. eds., 2006); Kroggel, *supra* note 32, at 447.

34. Where the 12-week leave is the result of child placement through an adoption proceeding or childbirth, the leave expires 12 months after the date of the birth or placement. 29 U.S.C.A. § 2612(a)(2).

35. If the employee is taking advantage of the leave opportunity to attend to serious medical conditions of a child, the child must be, according to the statute, a foster child, stepchild, legal ward or a "child standing in loco parentis" who is under the age of 18. If the child is older than 18, to be considered a child under this statute the child must be incapable of self-care because of a disability. 29 U.S.C.A. § 2611(12).

36. 29 U.S.C.A § 2612(a)(1)(A)–(B).

37. Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL'Y 17, 18 (2004).

38. 29 U.S.C. § 2601(a)(2) (West 2006).

39. Rosemarie Feuerbach Twomey & Gwen E. Jones, *The Family and Medical Leave Act of 1993: A Longitudinal Study of Male and Female Perceptions*, 3 EMP. RTS. & EMP. POL'Y J. 229, 229 (1999).

40. *Id.*

41. *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (The Supreme Court held that an individual can sue a state in federal court to recover money damages where the state failed to comply with the provisions of the FMLA without violating the Eleventh Amendment); Grossman, *supra* note 37, at 18.

42. *Id.* at 736–40.

43. *Id.* at 725.

44. *Id.* at 736.

45. *Id.* at 736.

46. *Id.* at 737.

47. *Id.* at 738.

48. Allison K. Slagle, *Nevada Department of Human Resources v. Hibbs: Regulation or Simply Encouragement?*, 33 CAP. U. L. REV. 869, 887–88, 890–91 (2005).

49. *Id.*

50. *Id.*

51. *Id.* at 738.

52. Grossman, *supra* note 37, at 19.

53. 29 U.S.C.A. § 2614(a)(1)(A)–(B); *id.* at 20.

54. 29 U.S.C.A. § 2617(a)(2)(A)–(B); Grossman, *supra* note 37, at 20.

55. Retaliation claims consist of cases where: (1) the employer unlawfully interfered with, restrained or denied the employee the opportunity to exercise his rights under the FMLA; (2) the employer unlawfully terminated or discriminated against an employee because he exercised his rights under the FMLA; (3) an employer terminated or discriminated against an employee who filed a complaint pursuant to the FMLA; or (4) an employer terminated or discriminated against an employee who participated in a legal proceeding as a result of a claim filed pursuant to grounds laid out in the FMLA. 29 U.S.C.A. § 2615. The damages recoverable for these types of cases are, but are not limited to, "damages equal to the amount of wages, salary, employment benefits, or compensation lost or denied." 29 U.S.C.A. § 2617(a)(1)(A)(i).

56. *Johnson v. Mithun*, 401 F. Supp. 2d 964, 972 (D. Minn. 2005).

57. 401 F. Supp. 2d 964 (D. Minn. 2005).

58. *Id.*

59. *Id.* at 966.

60. *Id.*

61. *Id.* at 972.

62. *Id.*

63. *Id.*

64. *Id.* at 971 (citing *Cooper v. Olin Corp.*, 246 F. 3d 1083, 1091–92 (8th Cir. 2001)).

65. 29 U.S.C.A. § 2611(2)(A)–(B). To satisfy the year requirement, the 12 months need not be consecutive. As long as the employee has worked a total of 52 weeks prior to the leave request, the requirement is satisfied. Carolyn M. Coleman, *Eligibility of Employees for Leave*, *in* THE FAMILY AND MEDICAL LEAVE ACT 74–75 (Michael J. Ossip et al. eds., 2006).

66. 29 U.S.C.A. § 2611(2)(A)–(B). In determining this requirement, paid and unpaid leaves are not considered—the only hours taken into account are those actually worked by the employee. Coleman, *supra* note 65, at 74, 77.

67. 29 U.S.C.A. § 2611(2)(A)–(B). The employer's payroll is typically used to determine whether this requirement is met. Coleman, *supra* note 65, at 74, 81.

68. 2005 U.S. App. Lexis 16069, at *12 (Fed Cir. Aug. 4, 2005).

69. *Id.* at *12.

70. *Id.*

71. 407 F.3d 734 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1150 (2006).

72. *Id.* at 737.

73. *Id.*

74. *Id.*

75. *Id.* at 738.

76. Kroggel, *supra* note 32, at 450.

77. *Id.*

78. *See* Twomey, *supra* note 39, at 229.

79. Patterson, *supra* note 28, at 440.

80. Grossman, *supra* note 37, at 53.

81. *Id.*

82. *Id.*

83. Chuck Halverson, *From Here to Paternity: Why Men Are Not Taking Paternity Leave Under the Family and Medical Leave Act*, 18 WIS. WOMEN'S L.J. 257, 265 (2003).

84. *Id.*

85. *Id.*

86. *See* Marin H. Malin, *Fathers and Parental Leave Revisited*, 19 N. ILL. U. L. REV. 25, 29 (1998).

87. Halverson, *supra* note 83, at 262.

88. *Id.*

89. *See* Malin, *supra* note 86, at 34.

90. *Id.* at 35.

91. Halverson, *supra* note 83, at 262–63; Patterson, *supra* note 28, at 439.

92. Halverson, *supra* note 83, at 262–63.

93. *Id.*

94. *Knussman v. Maryland*, 272 F.3d 625, 629–30 (4th Cir. 2001); Halverson, *supra* note 83, at 262–63.

95. Halverson, *supra* note 83, at 262–63.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Knussman*, 272 F.3d at 652; *but see Knussman v. Maryland*, 73 Fed. Appx. 608, 616 (4th Cir. 2003) (the plaintiff's award was later reduced).

100. Halverson, *supra* note 83, at 263. Also, studies suggest that many employers are opposed to paternity leave. One study found that even where employers offered a form of paternity leave to their employees, 41 percent of the employers felt it was unacceptable for fathers to actually take the leave. Malin, *supra* note 86, at 39.

101. Patterson, *supra* note 28, at 440.

102. *Id.*

103. *See id*.

104. *Id.*

105. *Id.*

106. *Id.*; Halverson, *supra* note 83, at 264–65.

107. Halverson, *supra* note 83, at 264.

108. *Id.*

109. *Id.* at 263.

110. Patterson, *supra* note 28, at 439.

111. Halverson, *supra* note 83, at 264.

112. *Id.*

113. *Id.* at 265.

114. *Id.*

115. *Id.*

116. ARINDRAJIT DUBE & ETHAN KAPLAN, PAID FAMILY LEAVE IN CALIFORNIA: ANALYSIS OF COSTS AND BENEFITS 12 (June 19, 2002), http://www.paidfamilyleave.org/pdf/dube.pdf.

117. *Id.* If a national paid leave program is implemented for working parents, parents will be less inclined to rely on governmental assistance programs such as Temporary Assistance of Needy Families and Medicaid when they need to take leave but cannot afford to take it. *Id.*

118. *Id.*

119. *Id.*

120. Halverson, *supra* note 83, at 265.

121. *Id.*

122. *Id.*

123. 29 U.S.C.A § 2619(a).

124. 171 F. Supp. 2d 377 (D.N.J. 2001).

125. *Id.* at 379.

126. *Id.* at 379–80.

127. *Id.* at 380–81.

128. *Id.* at 386–88.

129. 29 U.S.C.A. § 2619(b).

130. *Id.* at 265; *see also Saroli v. Automation & Modular Components, Inc.*, 405 F.3d 446, 454 (6th Cir. 2005) (holding that an employer has a duty to inform an employee of her rights under the FMLA upon her request for leave).

131. Halverson, *supra* note 83, at 261, 270.

132. U.S. Office of Pers. Mgmt., *Report to Congress on Paid Parental Leave*, I. Executive Summary, http://www.opm.gov/oca/Leave/HTML/ParentalReport.htm (last visited Feb. 2, 2007). While these surveys examined the concept of paid parental leave, generally, the results reflect a rationale for the reluctance of the surveyed employers to offer paid leave to fathers, specifically. The list of surveyed agencies appears in Appendix 2 of the Report.

133. *Id.*

134. *Id.*

135. *See id.*

136. *See id.* at III. Current Federal Leave Benefits. The rate of accruing sick days depends on length of service, and an employee may ultimately earn as many as 26 sick days a year.

137. *Id.*

138. *Id.* Generally, mothers may use sick days to recuperate from childbirth or pregnancy from six to eight weeks after the birth of the child. After this period, mothers may rely on the FMLA to extend the amount of time they are permitted to stay home without the possibility of losing their jobs.

139. *Id.* New fathers may use their leave for these purposes for a maximum of 12 weeks.

140. *See id*.

141. *Id.*

142. *Id.*

143. *See* Laura T. Kessler, *Paid Family Leave in American Law Schools: Findings and Open Questions*, 38 ARIZ. ST. L.J. 661, 682, 689, 694 (2006) (discussing paid family policies for law professors as compared to those of employees working in private law firms, and the difference in paid leave policies for higher-ranked law schools as compared to those of lower rank).

144. *Id.* at 685. The number of law schools surveyed comprised approximately 18 percent of all law schools that were ABA approved at the time of the study.

145. *Id.* at 689–92.

146. *Id.* at 692.

147. *Id.* at 692–93.

148. *Id.* at 693.

149. *Id.* at 693–94.

150. *Id.* at 694.

151. *Id.*

152. *Id.* at 701.

153. *Id.* at 702. Also, a 1997 study suggests that law schools are "significantly more generous than colleges and universities, especially with regard to paid family leave for men." *Id.* at 703.

154. *Id.* at 689.

155. *See id.* at 693–94, 704. Kessler notes that the similarity between the generous paid leave policies of law schools for their professors and large, national law firms for their attorneys is to be expected, as the employees that occupy these positions share a similar set of skills.

156. *Id.* at 689.

157. *Id.* at 701.

158. *Id.*

159. *Id.*

160. *Id.* at 702. As discussed earlier, the FMLA does not mandate any form of paid family leave. However, when the employer's policy is to offer pay during sick, vacation, and personal days, employees will be paid during their concurrent use of FMLA leave.

161. *See id.* at 702–03.

162. Halverson, *supra* note 83, at 272; K. Nicole Harms, *Caring for Mom and Dad: The Importance of Family-Provided Eldercare and the Positive Implications of California's Paid Family Leave Law*, WM. & MARY J. WOMEN & L. 69, 88–89 (2003).

163. Halverson, *supra* note 83, at 272–73; Harms, *supra* note 162, at 88.

164. Ruth Milkman & Eileen Applebaum, *Paid Family Leave in California: New Research Findings*, THE STATE OF CALIFORNIA LABOR, 45, 51 (2004) (discussing the differences between the FMLA and California state statute governing paid paternity leave).

165. *Id.*

166. *Id.* The law became operative on January 1, 2004. However, benefits were payable for claims on and after July 1, 2004. § 3302 within the historical and statutory notes.

167. CAL. CODE ANN. § 3301(a)(1). The six weeks allotted for leave do not have to be taken consecutively. The leave can be divided up as long as the employee exhausts the full amount allotted within twelve months of the original leave request. Paid Family Leave in Review, July 1, 2004–July 1, 2005, *available at* http://www.edd.ca.gov/direp/pflanniv.asp (last visited Feb. 2, 2007).

168. Paid Family Leave in Review, *supra* note 167.

169. CAL. CODE ANN. § 3300-7(a) (West 2006).

170. Section 3302(a)(1).

171. Paid Family Leave in Review, *supra* note 167.

172. Section 3300-7(d). Harms, *supra* note 162, at 87–88 (While this statute applies to both men and women seeking to take leave, this article focuses exclusively on how the availability of paid leave affects male rates of leave-taking.).

173. *See* CAL. CODE ANN. § 3300(a).

174. *See* Halverson, *supra* note 83, at 264–65.

175. Section 3300-7(g); Harms, *supra* note 162, at 87–88.

176. California's Paid Family Leave Law, at 1, *available at* www.duanemorris.com/alerts/static/A.EBICAFamilyLeave2004.pdf (last visited Feb. 2, 2007).

177. Milkman, *supra* note 164, at 45. Self-employed workers can be eligible for the paid family leave program if they participant in the states disability insurance elective coverage program. Frequently Asked Question: Paid Family Leave Insurance: Employees, *available at* http:www.edd.ca.gov/direp/pflfaq1.asp. (last visited Feb. 3, 2007).

178. Employment Development Department: Frequently Asked Questions, *available at* http://www.edd.ca.gov/rdsgnfaq.htm (last visited Mar. 2, 2007).

179. *Id.*

180. Employment Development Department: Quick Statistics, *available at* http://www.edd.ca.gov/eddquickstats.asp (last visited Mar. 2, 2007).

181. California's Paid Family Leave Law, *supra* note 176, at 1. There is a limit to the amount of income that can be taxed for the state disability insurance program. In 2005, the taxable wage limit was $79,418 compare to $68,829 in 2004. Paid Family Leave in Review July, *supra* note 167.

182. CAL. CODE ANN. § 3300-7(g); Harms, *supra* note 162, at 87–88.

183. Employment Development Department: Quick Statistics, *supra* note 204.

184. Section 3303.

185. Section 3303; Medical Provider Information, *available at* http://www.edd.ca.gov/direp/pflmedical.asp (last visited Feb. 3, 2007) (discussing the role medical providers play in leave taking under the paid leave program in California).

186. California's Paid Family Leave Law, *supra* note 176, at 2. The California Department of Fair Employment and Housing has formulated a chart comparing the difference of California's Paid Family Leave Program against both the FMLA and California Family Right Acts/Family Medical Leave Act, *available at* California Department of Fair Employment & Housing, *Employment Bulletin*, Dec. 21 2003, http://www.dfeh.ca.gov/News/Bulletin-Paid%20Family%20Leave%2012-31-03%20web.htm. California Family Rights Act/Family Medical Leave Act was established in 1993. It is not the same as California's paid leave program. It provides that both male and female employees are allowed to take a 12-week unpaid family or medical leave if their employer employs 50 or more employees. This act is very similar to the FMLA, in which the leave is not paid. Milkman, *supra* note 164, at 50.

187. California's Paid Leave Law, *supra* note 176, at 2.

188. 29 U.S.C.A. § 2611(2)(A)–(B); Coleman, *supra* note 65, at 74.

189. About the Paid Family Leave Insurance Program, *available at* http://www.edd.ca.gov/direp/pflind.asp (last visited Feb. 2, 2006).

190. *See* California Department of Fair Employment & Housing, *available at* http://www.dfeh.ca.gov/News/Bulletin-Paid%20Family%20Leave%2012-31-03%20web.htm (last visited Oct. 2, 2006).

191. *Id.*

192. *Id.*

193. Paid Family Leave in Review, *supra* note 167.

194. CAL. CODE ANN. § 3303 within historical and statutory notes.

195. Section 3303(g).

196. Paid Family Leave in Review, *supra* note 167.

197. Milkman, *supra* note 164, at 54. The GBO survey was conducted by making random telephone calls to adults throughout California. There were approximately 1,050 participants. The survey was designed to examine the public's attitude, awareness and expectation of the new program. *Id.* at 2 n.2.

198. *See* Paid Family Leave: New Survey Findings (May 10, 2006), *available at* http:familyleave.ucla.edu/motherday2006v2.pdf (May 10, 2006).

199. Milkman, *supra* note 164, at 54.

200. *Id.* at 54. Also, women were more likely to be aware of their new statutory rights. *Id.*

201. *Id.*

202. Some argue that employers could be a major instrument in disseminating information about the new paid leave program if they actively took the effort to make their employees aware of such information. *Id.* at 63.

203. *See id.* at 60.

204. *Id.*

205. *Id.*

206. Anne Wells, *Paid Family Leave: Striking a Balance between the Needs of Employees and Employers*, 77 S. Cal. L. Rev. 1067, 1070–74 (2004).

207. *Id.* at 1070.

208. *Id.* at 1070.

209. *Id.* at 1072.

210. *Id.*

211. *Id.* at 1074.

212. *Id.* at 1073.

213. *Id.*

214. *See id.* at 1072.

215. *Id.*

216. *Id.* at 1073.

217. *See id.* at 1074.

218. *Id.* at 1078.

219. *Id.*

220. *Id.*

221. *See* Linda A. White, *Institutions, Constitutions, Actor Strategies, and Ideas: Explaining Variation in Paid Parental Leave Policies in Canada and the United States*, 4 INT'L J. CONST. L. 319, 338–41 (2006).

222. Bretherton, *supra* note 10, at 248.

223. Vicky Barham et al., *Public Policies and Private Decisions: The Effect of Child Support Measures on Marriage and Divorce*, 35 J. LEGAL STUD. 441, 457 (2006).

224. Kroggel, *supra* note 32, at 451.

225. Carol Daugherty Rasnic, *The United States' 1993 Family Medical Leave Act: How Does It Compare with Work Leave Laws in European Countries?*, 10 CONN. J. INT'L L. 105, 105 (1994).

226. *Id.*

227. *Id.* at 106.

228. Kenneth G. Dau-Schmidt & Carmen Brun, *Protecting Families in a Global Economy*, 13 IND. J. GLOBAL LEGAL STUD. 165, 200 (2006).

229. John W. Budd & Karen Mumford, *Trade Unions and Family Friendly Policies in Britain*, 57 INDUS. & LAB. REL. REV. 204, 205 (2004).

230. *Id.*; Kelly M. Zigaitis, *The Past, Present and Future of the Working Woman: Solutions for Substantive Inequality in the Workplace*, 81 WASH. U. L.Q. 1147, 1158 (2003); Kroggel, *supra* note 32, at 459.

231. Kroggel, *supra* note 32, at 459.

232. Dau-Schmidt & Brun, *supra* note 228, at 200.

233. U.S. Office of Pers. Mgmt, *supra* note 132, at V. Parental Leave Policies in Europe.

234. *Id.*

235. *See* Kroggel, *supra* note 32, at 461.

236. *Id.*

237. *Id.* However, unemployed individuals are compensated at a lower rate than those who are employed prior to the leave request. *Id.*

238. *Id.*

239. Wells, *supra* note 206, at 1099–1100.

240. Kroggel, *supra* note 32, at 461.

241. Zigaitis, *supra* note 230, at 1158.

242. Kroggel, *supra* note 32, at 461.

243. Grace James, *The Work and Families Act 2006: Legislation to Improve Choice and Flexibility?*, 35 INDUS. L.J. 272, 272 (2006).

244. *Id.* at 272.

245. Malin, *supra* note 86, at 31.

246. *See also* Melinda Ligos, *The Fear of Taking Paternity Leave*, N.Y. TIMES, May 31, 2000, at G1 (in which Attorney James Strauss discusses his choice not to take an extended paternity leave for fear "that his co-workers would question his machismo," and author Suzanne Braun Levine contends that "[m]en are terrified to take parental leave.")

247. CAL. CODE ANN. § 3301(a)(1); *see* Milkman, *supra* note 164, at 51.

248. *See* Milkman, *supra* note 164, at 51.

249. Section 3300-7(g); Harms, *supra* note 162, at 87–88.

250. *See generally* Kessler, *supra* note 143 (analyzing the differences in paid family-leave policies between law professors and employees working in private law firms, and those differences between higher- and lower-ranked law schools).

251. *See generally* U.S. Office of Pers. Mgmt., *supra* note 132 (in which the U.S. Office of Personnel Management surveyed certain government agencies as to whether they thought that paid family leave policies would aid in the attraction and retention of quality employees, and the agencies overwhelmingly responded it did not).

252. Internal Revenue Service, *Topic 424—401(k) Plans*, http://www.irs.gov/taxtopics/tc424.html (last visited Mar. 1, 2007).

253. *Id.*

254. Lee Ann Obringer, *How 401(k) Plans Work*, http://money.howstuffworks.com/401k.htm/printable (last visited Mar. 1, 2007).

255. *Id.* The name "401(k)" is derived from its section number (401) and paragraph (k) in the Internal Revenue Code. *Id.*

256. Obringer, *supra* note 254.

257. *Id.*

258. *Id.*

259. *Id.* The IRS penalizes anyone who withdraws the funds from his or her 401(k) before the age of 59 and a half. The penalty is that 10% of the plan goes to the IRS, and taxes are deducted from the plan at the time of withdrawal. *Id.*

260. *Id.*

261. *See id.*

262. *Id.* These states include Alaska, Texas, Florida, Nevada, Washington, South Dakota, and Wyoming, and Tennessee and New Hampshire only tax dividends and interest income when money is withdrawn from a 401(k). *Id.*

263. *Id.*

264. *Id.* While matching contributions are of great benefit to many employees, there are some caveats, including vesting schedules, where ownership of the matching contribution increases year-to-year until it reaches 100%. *See id.*

265. *Id.* The amount an individual can contribute to a 401(k) was $15,000 in 2006. *Id.*

266. *See id.* In 2006, the amount an employee could contribute to his or her 401(k) was either 100% of his or her annual salary, or $44,000, whichever is less. This means that if an employee contributed the maximum $15,000 in 2006, the employer could contribute almost twice that amount to the employee's plan before reaching the cap. *Id.*

267. *See* Halverson, *supra* note 83, at 265. Another incentive for employers to contribute to the Family Plan with matching contributions is that employer contributions, as well as overhead and administrative 401(k) costs, are tax-deductible expenses. Obringer, *supra* note 254.

268. *Id.*

269. "Key employees" are "employees that are at least 5% owners of the company, earn more than $85,000 [annually], or had a salary that ranked in the top 20% of salaries within the company." *Id.*

270. *Id.* Employers can even forgo nondiscrimination testing by fully vesting their employees and meeting certain contribution requirements. *See id.*

271. Halverson, *supra* note 83, at 265.

272. *See* Milkman, *supra* note 164, at 51; *see also* Wells, *supra* note 206, at 1070–74 (discussing concerns about funding paid family leave programs with disability insurance).

273. *See* Obringer, *supra* note 254.

Brandi Monique is a third-year law student at Hofstra University School of Law and a graduate of the University of Maryland. Monique is presently an Associate Editor of the *Hofstra Labor & Employment Journal* and can be reached by e-mail at Brandi_Monique@yahoo.com. Brigitte Platt is currently a third-year law student at Hofstra University School of Law and has an undergraduate degree from Cornell University. Presently, she serves as an Articles Editor for the *Hofstra Labor & Employment Law Journal*. Brigitte can be reached by email at brigitte.f.p@gmail.com.

Section Committees and Chairpersons

You are encouraged to participate in the programs and on the Committees of the Section.
Feel free to contact any of the Committee Chairs for additional information.

Ad Hoc Arbitrator Mentoring
John E. Sands
Arbitrator and Mediator
200 Executive Dr., Suite 100
West Orange, NJ 07052-3303
JESands@aol.com

Ad Hoc Future Meeting Sites
Deborah S. Skanadore Reisdorph
Skanadore Reisdorph Law Offices
P.O. Box 536
Whitesboro, NY 13492
ladylaw@nysbar.com

Howard C. Edelman
119 Andover Rd.
Rockville Centre, NY 11570-1533
hcearb@aol.com

James R. Grasso
Phillips Lytle LLP
3400 HSBC Center
Buffalo, NY 14203-2887
jgrasso@phillipslytle.com

Ad Hoc Scholarships and Other Financial Support
Wayne N. Outten
Outten & Golden LLP
3 Park Avenue, 29th Floor
New York, NY 10016-5902
wno@outtengolden.com

Ad Hoc Journal and Newsletter Committee
Janet McEneaney
205-02 33rd Avenue
Bayside, NY 11361
mceneaneyj@aol.com

Alternative Dispute Resolution
Abigail J. Pessen
Mediation Services, Inc.
80 Broad Street, 30th Floor
New York, NY 10004
abigail@pessenadr.com

Glen P. Doherty
McNamee, Lochner, Titus & Williams, P.C.
677 Broadway
Albany, NY 12207
doherty@mltw.com

Jonathan Ben-Asher
Beranbaum Menken Ben-Asher & Bierman LLP
80 Pine Street, 32nd Floor
New York, NY 10005
jb-a@bmbblaw.com

Communications
James N. McCauley
701 West State St.
Ithaca, NY 14850
jmccauley@clarityconnect.com

Michael A. Curley
Morgan, Lewis & Bockius LLP
101 Park Avenue, Suite 4500
New York, NY 10178
mcurley@morganlewis.com

Mark Daniel Risk
Mark Risk, PC
60 East 42nd Street, 47th Floor
New York, NY 10165
mdr@mrisklaw.com

Continuing Legal Education
Ronald G. Dunn
Gleason Dunn Walsh & O'Shea
40 Beaver Street
Albany, NY 12207
rdunn.j5hzj@gdwo.net

Stephanie M. Roebuck
Keane & Beane, PC
445 Hamilton Avenue, Suite 1500
White Plains, NY 10601
sroebuck@kblaw.com

Diversity and Leadership Development
Jill Rosenberg
Orrick Herrington et al
666 5th Ave.
New York, NY 10103
jrose@orrick.com

Mairead E. Connor
Law Offices of Mairead E. Connor, PLLC
440 South Warren St., Suite 703
Syracuse, NY 13201-0939

Employee Benefits
William D. Frumkin
Sapir & Frumkin LLP
399 Knollwood Road, Suite 310
White Plains, NY 10603
wfrumkin@sapirfrumkin.com

Equal Employment Opportunity Law
Patricia Ann Cody
Wormser Kiely Galef & Jacobs LLP
825 Third Avenue
New York, NY 10022
pcody@wkgj.com

David Fish
David M. Fish Attorney At Law
500 Fifth Avenue, Suite 5100
New York, NY 10110
fish@davidmfish.com

Ethics and Professional Responsibility
John Gaal
Bond, Schoeneck & King, PLLC
One Lincoln Center
Syracuse, NY 13202-1355
jgaal@bsk.com

Philip L. Maier
PERB
55 Hanson Pl.
Brooklyn, NY 11217-1579
plmbox@aol.com

Rachel J. Minter
Law Office of Rachel J. Minter
28 West 44th Street
Suite 1208
New York, NY 10036-7410
rminter@rjminterlaw.com

Finance
Robert T. Simmelkjaer
160 West 97th Street, Suite 8A
New York, NY 10025
simmelkjaer@worldnet.att.net

Individual Rights and Responsibilities
Dennis A. Lalli
Bond, Schoeneck & King, PLLC
330 Madison Avenue, 39th Floor
New York, NY 10022-2705
Dlalli@BSK.com

International Labor and Employment Law
Janet McEneaney
205-02 33rd Avenue
Bayside, NY 11361
mceneaneyj@aol.com

Pearl Zuchlewski
Kraus & Zuchlewski, LLP
500 5th Ave.
Suite 5100
New York, NY 10110-5197
pz@kzlaw.net

Robert Paul Lewis
Baker & McKenzie
1114 Avenue of the Americas, 4th Floor
New York, NY 10036-7703
robert.p.lewis@bakernet.com

Labor Arbitration
Barbara C. Deinhardt
State Employment Relations Board
345 Hudson St.
New York, NY 10014
bdeinhardt@aol.com

Labor Relations Law and Procedure
Bruce S. Levine
Cohen, Weiss and Simon LLP
330 West 42nd St.
New York, NY 10036
blevine@cwsny.com

Peter D. Conrad
Proskauer Rose LLP
1585 Broadway
New York, NY 10036-8200
pconrad@proskauer.com

Law School Liaison
Norma G. Meacham
Whiteman Osterman & Hanna LLP
One Commerce Plaza, 19th Floor
Albany, NY 12260
ngm@woh.com

Legislation
Timothy S. Taylor
NYS United Teachers
800 Troy Schenectady Road
Latham, NY 12110
ttaylor@nysutmail.org

Troy L. Kessler
510 Broadhollow Road, Suite 110
Melville, NY 11747
kesslertl@yahoo.com

Keith Gutstein
Kaufman Schneider & Bianco LLP
135 Crossways Park Drive, Suite 201
Woodbury, NY 11797
kjg@managementattorney.com

Membership
Theodore O. Rogers Jr.
Sullivan & Cromwell LLP
125 Broad St., 35th Floor
New York, NY 10004
rogerst@sullcrom.com

Public Sector Labor Relations
Seth Greenberg
Greenberg Burzichelli Greenberg PC
3000 Marcus Avenue, Suite 1w7
Lake Success, NY 11042
sgreenberg@gbglawoffice.com

Union Administration and Procedure
Robert L. Boreanaz
Lipsitz Green Scime Cambria LLP
42 Delaware Ave., Suite 300
Buffalo, NY 14202-3901
rboreanaz@lglaw.com

Steven A. Crain
CSEA
Legal Department
143 Washington Avenue
Albany, NY 12210
steven.crain@cseainc.org

Public Sector Book
Jerome Lefkowitz
Public Employment Relations Board
80 Wolf Road, 5th Floor
Albany, NY 12205
jlefkowitz@perb.state.ny.us

Publication—Editorial Policy—Non-Member Subscriptions

Persons interested in writing for the *L&E Newsletter* are welcomed and encouraged to submit their articles for consideration. Your ideas and comments about the *L&E Newsletter* are appreciated.

Publication Policy: If you would like to have an article considered for publication, please telephone or e-mail me. When your article is ready for submission, you can send it to me by e-mail in WordPerfect or Microsoft Word format. Please include a letter granting permission for publication and a one-paragraph bio.

Editorial Policy: The articles in the *L&E Newsletter* represent the author's viewpoint and research and not that of the *L&E Newsletter* Editorial Staff or Section Officers. The accuracy of the sources used and the cases cited in submissions is the responsibility of the author.

Non-Member Subscriptions: The *L&E Newsletter* is available by subscription to non-attorneys, libraries and organizations. The subscription rate for 2009 is $105.00. For further information, contact the Newsletter Department at the Bar Center, (518) 463-3200.

Deadlines for submission are January 15th, May 15th and September 15th of each year. If I receive your article after the submission date, it will be considered for the next issue.

Thank you for your cooperation.

Janet McEneaney
Editor

L&E Newsletter

Editor
Janet McEneaney
205-02 33rd Avenue
Bayside, NY 11361
mceneaneyj@aol.com

ISSN 1530-3950 (print) ISSN 1933-8481 (online)

NEW YORK STATE BAR ASSOCIATION
LABOR AND EMPLOYMENT LAW SECTION
One Elk Street, Albany, NY 12207

ADDRESS SERVICE REQUESTED

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155