NYSBA FALL 2016 | VOL. 41 | NO. 1

Labor and Employment Law Journal

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

www.nysba.org/LaborEmployment

From the NYSBA Book Store >

New York Contract Law

A Guide for Non-New York Attorneys

Also Available as a Downloadable PDF!

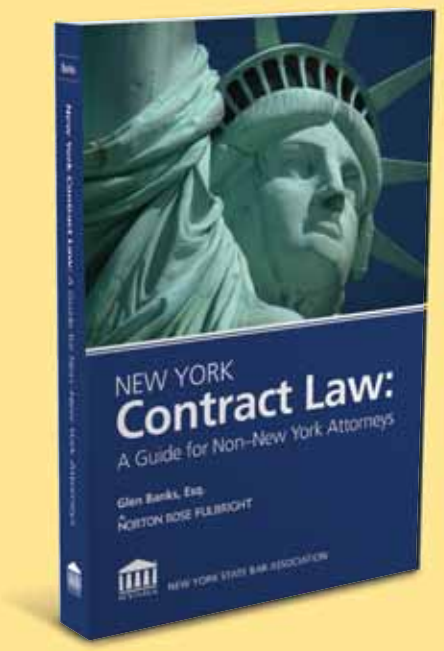
AUTHOR
Glen Banks, Esq.
Norton Rose Fulbright

New York Contract Law: A Guide for Non-New York Attorneys is an invaluable reference allowing the practitioner to quickly and easily gain an understanding of New York Contract Law. Many contracts involving parties outside the United States contain a New York choice-of-law clause and, up until now, the foreign practitioner had no practical, authoritative reference to turn to when they had a question regarding New York Law. *New York Contract Law: A Guide for Non-New York Attorneys* fills this void. In addition to lawyers outside the United States, this book will also benefit lawyers within the United States whose practice includes advising clients regarding contracts governed by New York Law.

Written by Glen Banks, Esq., a recognized authority on contract law with over 35 years' experience, this book is presented in an easy-to-read question-and-answer format to allow easy access to a wide array of topics. All aspects of contract law are covered, from the basic requirements of a valid contract to a contract's termination, assignment or repudiation. Particular agreements and clauses are discussed as well as the role of counsel when working on a transaction governed by New York Law. Resources for further study and to keep up on changes in New York Law are also provided.

For your convenience, *New York Contract Law: A Guide for Non-New York Attorneys* can be purchased in hard copy (which includes a CD containing the entire book in a searchable, pdf format) or can be downloaded as an e-book in a pdf format.

Key Discussions
Is there a binding agreement?
Is that agreement valid and enforceable?
How is meaning given to the terms of the agreement?
What constitutes a breach of the contract?
When is a breach excused?
How is action taken to enforce the contract after a breach?
What remedy can the court grant to redress a breach?



PRODUCT INFO AND PRICES
2014 • 622 pp., softbound
PN:4172 – Book & CD
PN: 4172E – Downloadable PDF

Order Now!

NYSBA Members	**$95**
Non-members	$130

A $60 fee is charged for shipping and handling outside the continental U.S. A $5.95 shipping and handling fee applies to orders shipped within the continental U.S. Prices do not include applicable sales tax.

"All told, a genuine gift to those in search of the ready, reliable New York contract law answer, whether they are located in, or beyond, our state's borders."

From the Foreword by Judith S. Kaye, Former Chief Judge of the State of New York

Get the Information Edge

1.800.582.2452 www.nysba.org/pubs

Mention Code: PUB8460N Discount good until December 31, 2016

NYSBA

Table of Contents

Message from the Section Chair 4
(Sharon Stiller)

The Evolving Joint Employer Concept and the NLRB 5
(Paul F. Millus)

Non-Solicitation of Fellow Employees: A New York Primer 9
(Evan Belosa)

How to Conduct a Global Human Resources or Labor Compliance Audit Including Cross-Border Employment Due Diligence 13
(Donald C. Dowling, Jr.)

New Challenges for Equal Pay Analysis 24
(Elizabeth Becker, Ph.D. and Charles Diamond, Ph.D.)

Pleading for Survival Under 12(B)(6): The Impact of *Littlejohn* and *Vega* on Pleading Standards Under Title VII 26
(Howard M. Wexler and Samuel Sverdlov)

Tips for Being an Effective Mediator of Employment Disputes 30
(Ruth D. Raisfeld)

The Griggs Fable Ignored: The Far-Reaching Impact of a False Premise 32
(Robert L. Douglas and Jeffrey Douglas)

Disconnect Between Liability Under Federal Law and Conduct Perceived as Harmful with Respect to Workplace Harassment 43
(Walker G. Harman, Jr. and Edgar M. Rivera)

New York Paid Family Leave: A Paradigm Shift 47
(Jessica Shpall Rosen)

Does New York's Wage Payment Law Have a Gaping Loophole? 49
(Scott A. Lucas)

Message from the Section Chair

By Sharon Stiller

In the mid-1970s when a group of union and management law practitioners founded our Section, we had 25 members. Our Labor and Employment Law Section has grown to over 2,000 members, bonded together with congeniality, sophistication, and a deep love for this area of the law.

What a rich heritage we have! We lead the NYSBA not only in numbers, but in the quality of our programs, our labor and employment updates posted on our Online Community, and in our quality webinars. Time and again we hear members of other Sections applauding our initiatives. For us, diversity is not just ensuring that our programs are representative of our membership, but also providing opportunities for all to participate in and lead our Section. This year, under the guidance and recommendations of Jill Rosenberg and Wendy Lazar, we have decided to expand our diversity fellowships from one-year into two-year fellowships so that the program can have even more impact for the participants.

My goal as your Chair is to continue these successes, and to explore new possibilities.

First, we will continue to update our members on changes to the law, in traditional and new ways. This includes our Journal, under the able leadership of its editor, Allan S. Bloom of Proskauer Rose LLP (abloom@proskauer.com). Deadlines for submissions for our next two Journals will be October 15, 2016 and March 15, 2017. We invite you to submit articles, or to enlist others to do so.

We will also continue to post on our online blog, and we welcome new postings, such as those posted by Joan Lenihan and Ralph Somma. The Online Community is a great way to share important and new information, and a great way to stay up to date. Thanks to Chris D'Angelo and others for recent postings, including "NYC Commission on Human Rights Transgender Rights Campaign," "EEOC Ups the Ante on Notice Posting Violations," and "Is 'Self-Help Discovery' the Next Big Issue in Employment Law?" If you have not already requested to be alerted about postings, you should do so. And please take a turn at adding to the Online Community when something of interest comes your way. If you want to post but don't know how, Monica R. Skanes (mskanes@woh.com), co-chair of our Communications Committee, has volunteered to walk you through it.

In early August, 2016, we began another initiative. Section member Jana Springer Behe, who is also the incoming Chair of the Corporate Counsel Section, reposted one of our Labor and Employment Law Section Online Community updates onto the newly begun Corporate Counsel Online Community. Now our updates can be shared with the Corporate Counsel Section, and its members, too, can benefit from our skill and knowledge. This is yet another reason to take the initiative to post an update or repost an article on our Section's Online Community. If you have written an article for your firm or elsewhere, consider posting it on our Online Community.

Second, as we look for new ways to reach out to potential new members, law students, the public and others, our Section continues to be involved in mentoring programs and law student awards. Under the tutelage of our able chairs, Alyssa Zuckerman and Molly Thomas-Jenson, we are finding new approaches to welcome and involve our new and potential members. We have also finished the first draft of a Section Brochure that will inform the public a bit about what we do as Labor and Employment attorneys. Many thanks to Judith A. LaManna and Sheryl Galler for their work in creating the brochure. We will continue to explore ways to provide our insight to other Sections of the New York State Bar Association, because our members have deep and varied experiences that should be shared with other sections of the NYSBA, such as the Corporate Counsel Section.

Third, we will continue to find ways to make it easy and fun for committee members to participate in our Section. Toward the end of his tenure, our amazing immediate past Chair, Bill Herbert, reached out to committee chairs for their thoughts and ideas. Topping the committee chairs' wish list was more participation by committee members. This year, we will work on this goal and invite committee members to become more active. We will also enlist existing technology to make it easy to contact committee members and engage in such activities as leading a webinar, without leaving their office.

Our NYSBA liaison, Beth Gould, tells us that more than 4200 members of the NYSBA identify their primary area of practice as Labor and Employment Law. Over half of those practitioners are members of our Section, and we hope to find ways to interest the remaining half in joining. My good friend, the late former Section chair Margery Gootnick, used to laugh about how wrong the naysayers were—those who thought that labor and management would not be able to work together in a single Section of the New York State Bar. When we get together in Washington, D.C. this fall, or in New York City in January for our Annual Meeting, we will have much to celebrate.

The Evolving Joint Employer Concept and the NLRB

By Paul F. Millus

Whether an employer is subject to joint employer liability depends on many factors. Does the case deal with a parent-subsidiary relationship? A purported independent contractor situation? A contractor/subcontracting relationship? Two separate companies with common management? A franchisor/franchisee relationship? One must then decide which factors are relevant in determining whether a joint employer relationship exists. Add to the mix the many types of cases where a court would need to determine whether joint employment is present, such as in breach of contract, Fair labor Standards Act (FLSA), Title VII or under the National Labor Relations Act (the "Act"). It is abundantly clear that this area of law is complex, and the issue is of significant importance to both employers and employees. For example, being designated a joint employer under the Act can mean the putative employer is subject to unfair labor charges and open to being included in a representative election and the unionization of its workforce.

The National Labor Relations Board (the "Board") is the tip of the spear promoting a more expansive way to evaluate whether an employer is indeed a joint employer. The impact of the Board's efforts goes far beyond the typical labor law dispute under the Act, and may eventually redefine the employer-employee relationship in other areas of the law. This evolution is in its early stages, but if the Board is ultimately successful in achieving its goal, employers will have a new set of obligations that they never thought would be imposed on them *vis a vis* workers they never viewed as employees.

What Is a "Joint Employer?"—A Brief Overview

The joint employer doctrine's history is not as long as one might think. The first time the U.S. Supreme Court used the words "joint employer" was in a 1941 NLRB case.[1] The first Second Circuit case to use the term in an employment case was in 1962.[2] The New York State Supreme Court first examined a joint employment issue in 1953, in connection with a decision by the Workman's Compensation Board.[3]

One of the first statutes to impact the joint employer analysis was the Labor Management Relations Act of 1947 (LMRA), better known as the Taft-Hartley Act. The LMRA specifically excluded "independent contractors" to ensure that the Board and the courts applied general agency principles when distinguishing between employees and independent contractors. Invariably, in such cases courts have looked to traditionally employed common-law agency concepts in joint employment cases where courts assess the amount of control the putative employer has over the worker.[4] However, in a 1961 FLSA case, the Supreme Court held that an entity that suffers or permits an individual to work may, as a matter of "economic reality," function as the individual's employer. In his opinion, Justice Douglas made it clear that "'economic reality' rather than 'technical concepts' [was] to be the test of employment."[5]

The "economic reality test" was born. After some refinement by the courts, the test came to include inquiries into: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."[6] In FLSA matters, it has long been recognized that no one factor standing alone is dispositive. The "economic reality" test encompasses a "totality of circumstances" approach—any relevant evidence may be examined so as "to avoid having the test confined to a narrow legalistic definition"[7]

In a 2003 FLSA case involving subcontracting, the Second Circuit delineated a revised test to determine whether an employer was a joint employer. The factors were: (1) whether the putative employer's premises and equipment were used for the plaintiffs' work; (2) whether the company which was the immediate employer had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to the putative employer's process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the putative employer or its agents supervised plaintiffs' work; and (6) whether plaintiffs worked exclusively or predominantly for the putative employer.[8]

Where independent contractor status is at issue in a FLSA matter, the employer's identity is also relevant. In such cases, the Second Circuit has applied a different and more expansive test, examining (1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business.[9]

In the Title VII context, the Second Circuit has stated that a four-part test developed by the Board is the appropriate guide for determining when parent companies may be considered the employer of a subsidiary's employee. This test analyzes the (1) interrelation of operations; (2) centralized control of labor operations; (3) common management; and (4) common ownership or financial control with the focus on "centralized control of labor relations."[10] From these examples it is clear that

the courts continue to outline partial bright-line tests to provide as much guidance as they can on the issue.

As far as the Board is concerned, a pair of NLRB 1984 rulings originally set the standard for what constituted a joint employer for purposes of enforcement of the Act. *Laerco Transportation* and *TLI, Inc.* held that the Regional Director correctly ruled that joint-employer status is established when there is "a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction."[11] That ruling was later interpreted by the Board to require "direct and immediate" control by the putative employer over employment matters.[12]

There is no question that courts have been guided by Board decisions in connection with joint employment issues, and have applied those concepts to other cases when joint employment is at issue. Unquestionably, what the Board does today will influence the courts, not merely in terms of their approach to appeals from Board decisions, but also in other joint employer cases.

As for the Board itself, the definition of "joint employer" is significant. As stated, it affects collective bargaining. Instead of allowing for larger collective bargaining units and the power of numbers they provide, a more narrow definition of a joint-employer limits opportunities for unionization—potential members are splintered among hundreds of small companies. As the Board is charged with investigating and prosecuting unfair labor practices under the Act, employers who believed they had no involvement with certain terms and conditions of employment are suddenly and potentially liable for violations. Accordingly, Board decisions on this issue are poised to have far reaching implications.

The Board's Gambit: *Browning-Ferris* and the McDonald's Cases

In the recent case of *BFI Industries of California, Inc. and FRR-II, LLC d/b/a Leadpoint Business Services and Local 350, International Brotherhood of Teamsters,* the Board considered whether it should adopt a different standard for what constitutes a joint employer in the context of a subcontracting case. Petitioner, Local 350, International Brotherhood of Teamsters ("Local 350") sought to represent all full time and regular part-time employees jointly employed by FRR-II, LLC d/b/a Leadpoint Business Services ("Leadpoint"), a temporary staffing agency, and BFI Industries of California, Inc. ("BFI"), the client to whom Leadpoint supplied employees. The Regional Director rejected Local 350's claim that Leadpoint and BFI were joint employers. On appeal, the sole issue before the Board was whether BFI jointly employed Leadpoint's workers.[13]

Local 350 argued that while the facts supported a finding that the employers were joint employers even under the existing standard, the Board needed to adopt a broader standard to effectuate the purposes of the Act and to conform with prior case law and "industrial realities." Local 350 maintained that "require[d] the Board to consider not merely the indicia of control exerted over the employees by each employing entity, but also the relationship, and the extent of control as between the two employing entities," which, it concluded, "require[d] consideration of indirect control." From Local 350's standpoint, the Board's narrow view of employment "ma[de] even less sense in our current economy" where "the modern worker is awash in a sea of multi-layered and dependent relationships, and the current joint employment standard leaves him or her bereft of meaningful resort to the protections and processes of the Act."

BFI's opposition was based on the argument that the proposed joint employer standard was, in reality, no standard at all and thus failed to satisfy due process. BFI posited that the "standard" argued by the union and the General Counsel provided no guidance for businesses on how to structure their operations to provide certainty as to whether they were, or were not, joint employers under the Act. Using its own version of the "industrial realities" standard, BFI and Leadpoint pointed out that business relationships typically involve agreements that indirectly, but necessarily, impact the terms and conditions of employment. They argued that service contracts often involve significant control by the customer over the service provider, and when services are performed on the customer's property the amount of control is even greater. Moreover, BFI reasoned that the standard proposed by Local 350 would violate the Act by failing to give ordinary meaning to the term "employee," namely, that "an employment relationship does not exist unless the worker is directly supervised by the putative employer." Finally, BFI argued that adoption of the new standard would violate the Taft Hartly Act. Taft Hartly directed the Board to apply common law agency principles, requiring "a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction."

On August 27, 2015, by a 3-2 margin, the Board issued its decision citing that "the diversity of workplace arrangements in today's economy has significantly expanded," pointing to the growth in the temporary help services industry from 1.1 million workers in 1990 to 2.87 million workers in August of 2014.[14] The Board noted that past decisions narrowed the joint employer definition and said it would follow a common law agency test it argued was supported by the Supreme Court's decision in *Boire v. Greyhound*.[15] It stated, "the Board may find that two or more entities are joint employers of a single workforce if they are both employers within the meaning of the common law, and if they share or co-determine those matters governing the essential terms and conditions of employment." The Board also remarked it would no longer require a joint employer to not only possess the authority to control employee's terms and conditions of employment but also to exercise that authority and do so directly, immediately, and not in a "limited and routine manner."

Thus *Laerco and TLI* as well as several other prior Board decisions were overruled. Under this new test, if the employer can "[r]eserve[] authority to control terms and conditions of employment, even if not exercised," indirect control, even through an intermediary, would suffice to establish a joint employer relationship.

The union subsequently prevailed in an election, with the Board certifying it as the collective bargaining representative of those employees. Browning-Ferris then refused the union's request to bargain. An unfair labor practice charge resulted, alleging that the refusal to bargain was unlawful. On January 12, 2016, the Board found that BFI and Leadpoint, as joint employers, had violated the Act. On February 26, 2016, BFI appealed to the District of Columbia Court of Appeals. In its "Statement of Issues to Be Raised" Browning-Ferris contended that the Board's new joint employer standard was defective for several reasons: (i) it was contrary to the definition of "employee" established by Congress in the 1947 Taft-Hartley amendments; (ii) improperly relies on a "economic realities" standard; (which was prohibited by Congress in the 1947 Taft-Hartley amendments); (iv) fails to promote stable collective bargaining relationships as required by the Acts; and (v) it is arbitrary and capricious because it is "hopelessly vague."

In July, 2014, the NLRB turned its attention to the joint employer concept in connection with franchising. It's general counsel authorized the filing of consolidated complaints against multiple McDonald's franchisees and their franchisor, McDonald's USA LLC ("McDonald's"), as joint employers. On December 19, 2014, the Regional Directors from six Regions issued Complaints or Consolidated Complaints based on charges that a multitude of franchisees were joint employers under the Act. Sixty-one separate unfair labor practice charges were filed between November 28, 2012 and September 22, 2014, involving 21 separate and distinct Independent Franchisees and a single McDonald's-owned restaurant. The NLRB alleged 181 unrelated alleged violations against McDonald's occurring at 30 separate restaurants, each with its own ownership, management, supervision, and employees, located in five states, and spanning the entire continental United States.[16]

On December 19, 2015, the NLRB's General Counsel commenced litigation alleging that McDonald's USA and its franchisees violated the rights of employees working at its restaurants around the country by, *inter alia*, "making statements and taking actions against them for engaging in activities aimed at improving their wages and working conditions, including participating in nationwide fast food worker protests about their terms and conditions of employment."[17] The Board's General Counsel transferred the cases from 5 Regions to the Regional Director for Region 2, here in New York on January 5, 2015. The following day the Regional Director for Region 2 consolidated the transferred cases for a hearing with previously consolidated cases from Region 2.

In this current McDonald's case, the focus is on franchising and the "economic realities" attendant to that business relationship. As a result, McDonald's (and its individual franchisees) must defend these 61 unfair labor practice charges involving the 31 franchisees from 30 different locations in one proceeding.

On March 9, 2016, the NLRB's counsel argued that McDonald's uses business consultants—who monitor staffing and business practices and conduct periodic reviews of implementation of those practices—to exert control over its franchisees. Pointing to McDonald's operating manual and point-of-sale and scheduling systems, the NLRB concluded that franchisees' actual control over the terms and conditions of their workers' employment is limited. NLRB counsel viewed McDonald's as the true puppet master, arguing that McDonald's set the times in which a burger should be served, the job classifications of workers, and instituted a uniform computer scheduling system across the restaurants. It thus concluded that McDonald's co-determines the working conditions of franchisees' employees thereby making it a joint employer under the NLA. McDonald's made seven requests to obtain special permission to appeal the Administrative Law Judge's procedural rulings in connection with subpoenas served by both sides, including a severance motion it filed, arguing that the joint employer allegations alone could not justify consolidation where the unlawful conduct alleged in each charge is separate and distinct, involving individual restaurants, separate actors and wholly unrelated entities. McDonald's posited that the defenses to the joint employer allegations as well as the underlying unfair labor practice charges will invariably vary from case to case. Thus far, the motion practice has not found favor with the Administrative Law Judge or the Board.[18]

McDonald's counter argument is that it is essentially doing its due diligence as a franchisor. It further stated that the company does not tell business owners whom to hire or when to schedule its employees. Rather, its counsel maintained that McDonald's exerts the level of control that any franchisor would expect in order to maintain a uniform customer experience across all franchisees, adding, "[a]ll franchisors, if they're successful, do precisely the same thing."

At this point, the NLRB's general counsel has not outlined in detail the specifics supporting his view that McDonald's USA should be deemed a joint employer. However, assuming an approach consistent to that applied in *Browning-Ferris*, the impact of what the Administrative Law Judge and, eventually, what the Board decides, cannot be understated. In addition to holding franchisors liable for unfair labor practices committed by franchisee owners across the country, the franchisors may be responsible for Workers' Compensation claims, unemployment insurance, OSHA compliance, wage and hour violations, and liability under state and federal discrimination statutes.

Potential Impact of an Evolving Joint Employer Standard

While far from settled, it is clear that courts were predisposed to identifying narrow factors in order to make the question of joint employment easier to determine. Courts often attempt to establish tests that can measure evidence with some precision in order to effectuate predictable outcomes. Predictability can serve both the courts and the litigants. If anything can be drawn from the Board's decision in *Browning-Ferris* and its stated goal of finding McDonald's to be a joint employer, it is that the NLRB eschews a formulaic approach to the issue. Almost any aspect of the relationship between the putative employer and the worker was fair game. In *Browning-Ferris*, while dismissing the dissent's position that the Board is reverting to an "economic reality test" rejected by the Supreme Court and Congress, the majority's commentary on the "diversity of workplace arrangements in today's economy" and its citation to statistics or the growth of the temporary help industry over the last two decades, seem to support the dissenters' view regarding the NLRB's motivation. Nevertheless, the Board's approach will most certainly make it easier for workers to maintain viable cases (if not win them outright) where they allege joint employment. Where in the past such cases might have been ripe for dismissal, they now may have new, longer, and more fruitful lives.

Moreover, there is no reason to think that only parties before the Board will be impacted. Indeed, the U.S. Department of Labor issued an "administrator's interpretation" on January 20, 2016, discussing the distinction between employees and independent contractors under the Fair Labor Standards Act. It emphasized the importance of whether an individual's services are an integral part of the company's business, and downplayed the importance of whether the business actually controls an individual's work—sounding very similar to the Board's approach in *Browning-Ferris*. It seems likely it will argue this in the McDonald's case.[19] Also, in a recently discovered draft of an Occupational Safety and Health Administration's (OSHA) internal memorandum, OSHA investigators advised that "a joint employer's standard may apply where the corporate entity exercises direct or indirect control of the work conditions, has the unexercised potential to control working conditions or based on economic realities."[20] The Board's actions in *Browning-Ferris* and the McDonald's case foreshadow how the court may view the issue of joint employment in a myriad of other types of cases, leaving employers and employees uncertain as to what the future holds.

Endnotes

1. *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 61 S.Ct. 908 (1941).
2. *Empresa Hondurena de Vapores, S. A. v. McLeod*, 300 F.2d 222 (2d Cir. 1962) judgment vacated 372 U.S. 10 (1963).
3. *Diaz v. Ulster Vegetable Growers Co-op.*, 282 A.D. 426, 123 N.Y.S.2d 321 (3d Dept 1953).
4. *Frankel v. Bally, Inc.*, 987 F.2d 86 (2d Cir. 1993).
5. *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961) citing United States v. Silk, 331 U.S. 704, 713, 67 S.Ct. 1463, 1468 (1947); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729, 67 S.Ct. 1473 (1947).
6. *Carter v. Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984), *citing Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983).
7. *Herman v. RSR Sec. Services Ltd.*, 172 F.3d 132 (2d Cir. 1999), *citing See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730, 67 S.Ct. 1473 (1947) (whether an employer-employee relationship exists does not depend on isolated factors but rather "upon the circumstances of the whole activity").
8. *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61 (2d Cir. 2003).
9. *See Superior Care*, 840 F.2d 1054 (2d. Cir. 1988) (citing, *inter alia, United States v. Silk*, 331 U.S. 704, 716, 67 S.Ct. 1463 (1947)).
10. *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235 (2d Cir.1995), *citing Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256, 85 S.Ct. 876 9 (1965) (per curiam).
11. *TLI, Inc.*, 271 N.L.R.B. 798 (1984), *enfd. mem.*, 772 F.2d 894 (3d Cir. (1984); *Laerco Transportation*, 269 NLRB 324 (1984).
12. *Airborne Express*, 338 N.L.R.B. 597 (2002); *Clinton's Ditch Co-op Co., Inc. v. N.L.R.B.*, 778 F2d 132 (2d Cir. 1985).
13. *BFI Industries of California, Inc.* and *FRR-II, LLC d/b/a Leadpoint Business Services* and *Local 350, International Brotherhood of Teamsters*, 32-RC-109684.
14. *Id.*
15. *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964).
16. *McDonald's USA, LLC, a joint Employer, et al. and Fast Food Workers Committee and Service Employees International Union, CTW, CLE et al.* Cases 02-CA-09893 et al, 04-CA-125567, *et al.*, 13-CA-106490, *et al.*, 20-CA-132103 *et al.*, 25-CA-114819 *et al.*, and 31-CA-127447, *et al.*—Board Decision January 8, 2016.
17. https://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-issues-consolidated-complaints-against.
18. *Id.* Board Decision March 17, 2016.
19. U.S. Dep't of Labor, Wage and Hour Division Administrators Interpretation No. 2016-1 (www.dol.gov/whd/flsa/Joint_Employment_AI.htm.
20. http://edworkforce.house.gov./uploadedfiles/osha_memo.pdf.

Paul F. Millus is a Member of Meyer, Suozzi, English & Klein, P.C. and practices in the Litigation and Employment Law Departments located in both Meyer Suozzi's Garden City, Long Island and New York City offices.

Non-Solicitation of Fellow Employees: A New York Primer

By Evan Belosa

When an employee departs from his or her position, whether by the employer's choice or the employee's, one of the most immediate and pressing questions is whether the employee may contact former co-workers. Often the question is not merely theoretical. Departing employees frequently have worked as part of teams, and when they find a new home they often wish to replicate the teams they found most congenial and profitable. The employer's central desire, however, is quite the opposite. Employers seek to protect the workforce. Accordingly, they include nonsolicitation/nonhire of employees clauses in governing employment agreements, offer letters, and separation provisions. These restrictions often state something similar to: "Employee may not, for a period of twenty-four months, solicit, induce, recruit, or encourage any other employee, agent, consultant or representative to leave the service of Employer." Employees often focus on noncompetition clauses and client-related solicitation clauses, and set aside the employee nonsolicitation clauses. The questions come up later, however. What can I do, and what can't I do? And, of course, the employer, often in a defensive move, is only too happy to point to the language of the nonsolicitation clause. But in a dispute, what precisely will a court do?

The employee nonsolicitation provisions typically found in an employment agreement alongside noncompetition and client nonsolicitation covenants have been subject to far less judicial scrutiny than the more heavily litigated client nonsolicitation covenants. And as in situations concerning clients, connections with co-workers can be exploited at the expense of the former employer. Unlike with clientele, however, there often is not a direct line between loss of an employee and loss of revenue.

Perhaps for this reason courts in New York have noted that "there is scant case law on the enforceability of non-recruitment covenants."[1] All of the courts that have done so have concluded that the same general standards governing the enforceability of noncompetition clauses, their more litigated cousins, should apply.[2] These general standards have been intensely litigated in the area of noncompetition and focus most heavily on why the employer needs to enforce the clause—in other words, the employer's "legitimate interest."[3]

The first court to wrestle with the standard[4] appears to have been the Supreme Court, Monroe County in *Lazer Incorporated v. Kesselring*,[5] where a one-year nonsolicitation of employees was at issue. The plaintiff alleged damage when the defendant solicited one of plaintiff's employees. The court noted that a prior federal court case had considered both an employee nonsolicitation of client and a nonsolicitation of employees covenant, and had cryptically stated only that the covenants "do not violate public policy."

The *Lazer* court, finding no direct precedent, applied the Court of Appeals' landmark *BDO Seidman v. Hirschberg* noncompetition and nonsolicitation of customers analysis of legitimate interests to protect by using the restrictive covenant. Using this three-prong analysis, a nonrecruiting clause will be enforced only to the extent it "(1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public."[6] With respect to the first prong of this reasonableness test, the Court of Appeals defined a "legitimate interest" in keeping with public policy, allowing only the level of restriction necessary to protect the employer from unfair competition.[7] The legitimate business interests an employer may attempt to protect with a restrictive covenant are limited to (i) protection from misappropriation of the employer's trade secrets or of confidential customer information; (ii) protection of employer's customer base from unfair competition; and (iii) protection from competition by a former employee whose services are unique or extraordinary.[8]

The *Lazer* court justified its reasoning by explaining that such a covenant, by placing limits on the departed employee, is a "species, albeit a limited one, of a covenant not to compete."[9] The court then dismissed the claim as a matter of law, because by using the *BDO* test in general, the enforcement was not shown to serve any legitimate interest of the employer. The court considered the possibility that the interest was served by the fact that "any two employers would like the services of a good employee," but rejected it as an insufficient rationale. It held, "[t]o the extent that interest is affected by the alleged recruitment here, it is not one of those interests which permit enforcement of a restrictive covenant in this state."[10]

In general, New York courts have followed *Lazer* and applied the general three-part reasonability test to nonrecruitment covenants. The action, as it were, occurs in the "legitimate interest" prong. Courts have grappled with the question of whether the employer has a legitimate interest in the enforcement of such a covenant. One court, in dicta, observed that the legitimate interest must be as against "unfair competition, not simply to avoid competition in a general sense. The case law implies that if the solicitation is directed by a competitor, or if confidential or proprietary information is at stake, the restriction is for a legitimate business purposes."[11]

This test, essentially a garbled version of the well-worn *BDO* list of four discrete legitimate interests, appears to be the governing one, with the addition of

protection of client relationships as well. The Western District, in *Renaissance Nutrition, Inc. v. Jarrett and Kutz*, grappled with the issue in a motion for summary judgment by an entity against two of its former employees to enforce the nonrecruitment provision.[12] The court closely canvassed the state courts and found no Court of Appeals case discussed the standard. In fact, both sides pointed only to *Lazer* as the lone case. The court followed *Lazer,* and applied the reasonability test. But in addition to those elements noted by the Southern District in *Kelly*, it looked to *Reed Roberts* and *BDO* to note that protection of trade secrets, confidential customer lists, protection of client relationships, and unique employees were the critical legitimate interests.[13]

The plaintiff in *Renaissance Nutrition* argued that the employees allegedly solicited were valuable for two reasons: first, the plaintiff had expended resources in training and educating them, and second, client relationships were at stake. The court brushed aside the first argument, but considered the second carefully, and crafted a three-part test:

> Renaissance must show that (1) the employees diverted by Defendants posed a substantial risk that if they left, their customers would follow; 2) the departed employees would engage or did engage in competitive business with Renaissance; and that (3) it provided substantial resources and assistance in cultivating the customer base such that it would be unfair to allow employees to steal those customers to compete with it.[14]

Applying its own test, the court found that sufficient facts were shown to support the covenant, focusing mainly on the fact that the solicited employees had actually joined the defendants' new business and diverted clients to the new, competitive enterprise.[15] The Court also noted that the strong public policy against noncompetition covenants was lacking in a no-recruitment case, as the latter "does not infringe on a employee's ability to engage in an occupation, but merely infringes on his ability to recruit former co-workers to engage in competitive businesses."[16]

Despite the rigorous analysis undertaken by the *Lazer* and *Renaissance* courts, in other circumstances, often on injunctive relief motions, the Court takes a more relaxed approach. In *OTG Management LLC v. Konstantinidis,*[17] for example, the Supreme Court, New York County, granted a preliminary injunction against a former employee on the nonrecruitment covenant, using none of the more stringent analysis undertaken by *Renaissance.* It focused entirely on the section of analysis which states that a nonrecruitment covenant was "inherently more reasonable and less restrictive" than a noncompete. Similarly, the Southern District granted an injunction against a former high-ranking employee of Marsh & McLennan, finding a likelihood of success on the merits of breach. However, all that the evidence showed was that the defendant spoke to his former colleague and was responsible for the preparation of offers to others from his new perch. More recently, the Supreme Court, New York County,[18] citing the earlier cases, also enforced an injunction against a departed employee, but did so using the client relationship prong of legitimate relationships that the *Renaissance* court had promulgated earlier. Citing the allegations that the employees had been poached specifically in the hope of bringing proprietary information, the Court held that the nonrecruitment provision would protect against wrongful competition and hence, was enforceable.

Perhaps the most comprehensive analysis of nonrecruitment covenants as of this writing can be found in the recent case, *Reed Elsevier, Inc. v. Transunion Holding Company, Inc*.[19] In this case, the Southern District considered the potential enforcement of a nonrecruitment covenant. The plaintiff alleged that the defendant's hire of plaintiff's former chief technology officer breached a no-hire agreement between the companies. The court focused its analysis of reasonability entirely on the question of whether the employer had a legitimate interest in enforcement. The plaintiff made a host of arguments: that enforcement was necessary to protect trade secrets and client base; that the employee's services were unique or extraordinary; and finally, and most interestingly, that *Renaissance* had created a fifth legitimate interest—resigning and encouraging their co-workers to join a competitive business.

On a motion for preliminary injunction, the *Reed Elsevier* court rejected both the trade secret claim and the client base claim on factual grounds, noting that the responsibilities of the individual in question were "primarily managerial and supervisory, rather than client-focused."[20] The court also found that the employee was neither unique nor extraordinary—a rarely utilized prong in noncompetition cases.[21] The *Reed* court then finally turned to whether the *Renaissance* court had created another legitimate interest—risk of employee attrition to competitors—and roundly rejected it. It held that the *Renaissance* court had cited the legitimate interest in client relationships rather than the non-fungibility of employees as the legitimate interest, and distinguished its more expansive language by noting that cites to *Evolution Markets* and *Lazer* proved its more limited intent.

The court's pithy decision in *American Leisure Facilities Management Corporation v. Brutus, et al.*,[22] is perhaps the clearest guide to understanding and remembering the relevant differences in interpreting a non-recruitment covenant. The departed employees moved for summary judgment, arguing that the nonrecruitment claim could not survive the unenforceability of the covenant. Rejecting that argument, the Court cited *Lazer*, and wrote:

"In that case, the court ruled that the covenant was not enforceable based on the conclusions that there was no competition, no confidential or proprietary informa-

tion involved, no legitimate employer interest in the cause and no issues of fact, not that such a covenant could never be enforced under any circumstance. The instant case is distinguishable. Here, NFC and American Leisure are direct competitors, there are issues of fact as to whether NFC's confidential and proprietary data, such as the contents of an NFC computer, were misused; and questions regarding NFC's legitimate interest in maintaining its clients relationships and goodwill." [23]

As with noncompetition and client-facing nonsolicitation clauses, nonsolicitation/nonrecruitment clauses are subject to the prevailing reasonability analysis. Protecting the workforce on the basis of keeping good employees is not sufficient. Rather, the questions of confidential information, client goodwill, or unique employees will be outcome determinative in assessing a challenge to a nonrecruitment clause. With that in mind, employers should be cognizant of the specific duties of the employee to whom the nonrecruitment clause applies.

Endnotes

1. *Admarket Place, Inc. v. Salzman*, 2014 WL 1278504, 2014 N.Y. Slip Op. 30813 (U) (Trial Order) (Sup. Ct. N.Y. Cty., March 28, 2014).
2. *Penton Learning Systems LLC v. Defense Strategies Institute Group*, 2014 WL 3885954 (Sup. Ct. N.Y. Cty. July 28, 2014.), *28, 2014 N.Y. Slip Op. 32130(U) (Trial Order) ("As to the poaching of Penton employees and former employees, trial-level state and federal courts, observing that there is scant New York case law addressing no-hire provisions and the standards to be applied to them, have concluded that the same standards governing the enforceability of noncompete provisions apply.").
3. A restrictive covenant that prevents the hiring of an employee may be "necessary to protect an employer's legitimate interests" only if it (1) protects against the misappropriation of the employer's trade secrets, (2) protects against the misappropriation of the employer's confidential customer information, or (3) in cases where the employee's services to the employer are deemed "special, unique, and extraordinary." *Purchasing Associates, Inc. v. Weitz*, 13 N.Y.2d 267, 273, 196 N.E.2d 245, 248 (1963).
4. Note that the court in *Veraldi v. American Analytical Laboratories, Inc.*, 271 A.D.2d 599, 706 N.Y.S.2d 158 (2d Dep't 2000) did consider an employee nonrecruitment clause, but decided, without any supporting analyses, that "the restrictive covenant does not violate public policy and, therefore, is enforceable").
5. 13 Misc. 3d 427, 430 (Sup. Ct. Monroe Cty. 2005).
6. *BDO Seidman v. Hirshberg*, 93 N.Y.2d at 388–389, 690 N.Y.S.2d 854, 712 N.E.2d 1220 (1999).
7. *BDO Seidman*, 93 N.Y.2d at 391, 712 N.E.2d at 1224, 690 N.Y.S.2d at 858.
8. *BDO Seidman*, 93 N.Y.2d at 389-391, 712 N.E.2d at 1223-1225, 690 N.Y.S.2d at 857-859.
9. 13 Misc. 3d 427, 430, 823 N.Y.S. 2d 834 (Sup. Ct. Monroe Cty. 2005).
10. *Id.* at 433, 823 N.Y.S.2d at 839.
11. *Kelly v. Evolution Markets, Inc.*, 626 F. Supp. 2d 364 (S.D.N.Y. 2009).
12. 2012 WL 42171 (W.D.N.Y. Jan. 9, 2012).
13. 2012 WL 42171 at *4-5.
14. *Id.* at *4.
15. *Id.* at *5.
16. *Id.*
17. 967 N.Y.S.2d 823, (Sup. Ct. N.Y. Cty 2013).
18. *Admarket Place*, *supra* note 1, 2014 WL 1278504 at *4.
19. 2014 WL 97317 at *10 (S.D.N.Y., January 09, 2014).
20. *Id.*
21. A unique employee is virtually irreplaceable. *See, e.g. International Creative Management, Inc. v. Abate*, No. 07 Civ.1979, 2007 WL 950092 at *6 (S.D.N.Y. Mar. 28, 2007) (noting that the standard for uniqueness is "high" and that a unique employee's replacement is "impossible").
22. 2014 NY Slip Op. 32522 (U) (Sup. Ct. N.Y. Cty. Sept. 30, 2014).
23. *Id.* at *8.

Evan Belosa is a Senior Attorney with Cadwalader in New York.

How to Conduct a Global Human Resources or Labor Compliance Audit Including Cross-Border Employment Due Diligence

By Donald C. Dowling, Jr.

Globalization pushes multinationals to align ever more aspects of their internal human resources across borders. Today's multinationals globalize HR programs, workplace policies, employee benefits and staff offerings that back in another era would have been purely local. Think of, for example, global HR policies and handbooks, global codes of conduct, global intranets and HR information systems, global expatriate programs, international benefits offerings, cross-border compensation plans, regional sales incentive plans, global equity plans and supply chain codes of conduct.

Globalizing HR causes ripple effects, and perhaps the biggest ripple is *compliance*. Headquarters must stay responsible for, or retain "ownership" over, whatever it has elevated from the local to the regional or global level. As soon as a multinational raises HR policies, codes, initiatives, plans or offerings to a regional or global level, *compliance efforts* should follow.

Effective cross-border HR compliance checks or assessments—"audit" can be a disfavored term—look into various aspects of employment compliance. A multinational has obvious incentives to verify that its international HR operations adhere to foreign laws and applicable employment agreements as well as to the growing list of "extraterritorial" laws that reach workplaces internationally. In addition, multinationals have compelling business reasons to verify that their overseas operations follow in-house handbooks, codes of conduct, international HR policies and corporate values. (See *The Return of Global Employment Audit*, *Law 360*, 12/21/09).

This push to review, assess or check human resources compliance across borders comes from various constituencies within a multinational organization, such as the compliance function (obviously); upper management; the board of directors; the general counsel's office; or human resources. The push can also come from specific business units like industrial safety (assessing global safety compliance and pandemic response); global mobility (assessing visa compliance and duty of care); audit/accounting (assessing global Sarbanes-Oxley and Foreign Corrupt Practices Act compliance) or mergers and acquisition teams (due diligence assessing the human resources compliance of to-be-spun-off or to-be-acquired business units). And the procurement function increasingly needs to assess labor compliance at suppliers and contractors.

International employment compliance audits transcend human resources and implicate operations well beyond HR. For example, no one would call the U.S. Foreign Corrupt Practices Act, U.S. insider trading prohibitions or U.S. trade sanctions (trading-with-the-enemy) regulations "employment laws," but the only way a multinational can ensure it complies across borders is to propagate international HR policies requiring compliance, train staff on those HR policies and enforce them. Checking whether these steps got done right requires an audit of *HR* functions. Suddenly headquarters functions with no HR responsibilities (in this case, internal functions responsible for bribery, insider trading and trade compliance) find themselves looking into human resources practices internationally.

Now understanding why multinationals need to audit HR compliance internationally, our question becomes: How? How does a multinational efficiently assess its own ongoing compliance practices across its international HR operations? How does it isolate which rules apply internationally and verify that local foreign human resources operations actually comply? To answer these questions we need to analyze the six stages to a global HR compliance audit: (1) form the audit team and structure the project; (2) articulate audit context and scope; (3) create a master audit checklist template; (4) align local-country checklists off the master; (5) conduct the audit, and (6) report and implement remedial measures. After we discuss these six stages, we will separately consider the closely related issue of cross-border HR due diligence in an international M&A or outsourcing deal.

Six Stages to a Global Human Resources or Labor Compliance Audit

In assessing internal cross-border human resources or labor compliance, break the audit project down into six stages:

Stage 1: Form the audit team and structure the project

The first step in any global HR compliance assessment is assembling the audit project team. Consider whom to involve. Consider headquarters, foreign and local human resources staff and the in-house legal and compliance functions. Consider including subject matter experts like industrial safety staff in a health and safety or crisis policy audit, the mergers and acquisition team in a deal-related due diligence exercise or the procurement team in a *supply chain* labor audit. Involve any corporate

audit function. Consider tapping outside counsel who might bring in the attorney/client privilege (recognizing that the privilege can be hard to preserve across borders). Consider involving an outside international HR consultant or specialist labor audit firm, especially for an international supply chain labor audit. Factor in practical issues like audit team members' language fluency, availability and reporting relationships. This said, not all global HR audits enjoy the luxury of a big team—sometimes just a single person needs to assess employment compliance across two or more countries.

With international HR audit team in place, consider global *project management*—how to structure this particular cross-border HR assessment cost-effectively and efficiently. Consider practical issues like timing, budget and the audit team's power to gather data at overseas offices and later to implement recommended fixes. The temptation can be to take a quick-and-dirty approach, grabbing some global HR audit checklist off the shelf, diving in and just doing the audit. But this never works well because there are other steps involved. And because no one ever finds the chimerical one-size-fits-all, a global HR audit checklist serves as a sufficiently detailed roadmap for a particular audit project. Each global HR audit spins off in its own uncharted direction with its own specific goals, its own pool of affected countries and its own industry-specific issues: A wage/hour audit in retail is substantially different from a health and safety audit in manufacturing, which is quite different from a bribery audit in government contracting or a contractor-classification audit in the technology sector. All these are very different from a supply chain labor audit. Embrace the fact that your particular cross-border HR compliance audit requires an organic, holistic approach and a number of discrete stages. Shortcuts in managing the project compromise audit results.

Stage 2: Articulate audit context and scope

A team embarking on an international human resources compliance assessment or check should begin by articulating the context and delineating the scope of its particular audit project. This lets you weed out all irrelevant (even if auditable) issues not in play.

First, articulate context. Because HR compliance audits arise in different contexts, they end up going down very different paths. Various audit contexts include, for example, implementing a new corporate structure, preparing for a corporate restructuring, launching a merger or acquisition (spinoff or post-merger integration), responding to a lawsuit/government investigation, or simply toughening internal compliance through a robust HR check-up. Some global HR audits focus internally on specific employment law challenges like payroll compliance, health/safety, wage/hour, worker data privacy, contractor classification or—increasingly—corporate social responsibility and ethics including bribery, corrupt practices, insider trading and financial controls. Meanwhile, other global HR audits focus externally on outside supplier compliance, scrutinizing whether labor practices at overseas suppliers conform to the supply chain code of conduct. As also mentioned, some HR audits actually focus on employee compliance with issues separate from employment law like employees' compliance with data privacy, bribery, financial controls, trade and securities laws, or like an internal check into staff compliance with a global crisis plan. And as mentioned, international HR audits vary significantly by industry context (an HR compliance audit at an auto manufacturer is a lot different from one at a technology multinational). Consider industry-specific issues like human trafficking in construction and maritime, know-your-customer in financial and professional services, and immigration in retail and manufacturing.

After articulating the context of your particular international HR audit, delineate project scope—how broad and how deep this assessment needs to be. Which countries are involved? Should this global audit focus on compliance with laws, with collective agreements, with corporate policies, with best HR practices or with all of these? As to legal compliance, should this audit look at local laws, at headquarters-country laws that reach extraterritorially, or at both? What about checking compliance with individual and collective employment agreements? Should this audit confine itself to local host-country employees or should it also include expatriates, contingent staff, consultants, independent contractors and suppliers' employees?

Stage 3: Create a master audit checklist template

Compliance means following rules. Compliance audits focus on *vital* rules, which is why health and safety audits are a lot more common than dress code audits. Because the vital employment rules differ significantly across jurisdictions, leading a multijurisdictional HR compliance assessment requires isolating which important legal rules HR operations must follow. This means facilitating "apples-to-apples" comparisons across jurisdictions by crafting aligned but localized audit checklists.

Begin by drafting a single master global audit template compliance checklist. Create it organically, tailored for your particular audit project—again, because each global HR compliance audit is unique, an off-the-shelf template from some other project is at best only a starting point. Even a checklist for a similar past audit will need updating. Include in your global audit master template all topics consistent with the audit context and scope, but weed out all other topics. Depending on your audit's context and scope, topics that might merit inclusion in the global template or checklist may include:

- **Corporate, tax and financial laws reaching employment** including employer corporate entity status, employer registrations/corporate form, dual-employer exposure, "permanent establishment" exposure from "floating employees," employee powers of attorney, directors' and officers' liability insurance and corporate controls on local executive power.
- **Payroll laws** including tax and social security reporting and other payroll law compliance, vacation payments to sales staff and others with variable compensation, employee insurance payments, payroll deductions, withholding and contributions, contractual payroll payments like company cars, statutory payroll benefits like meal allowances, union dues check-off and other payroll payments to unions/employee representatives (which are legal outside the U.S.).
- **Local employment laws** including local laws that regulate candidate recruiting, interviewing and "onboarding," wage/hour or "working time" (including overtime and flat caps on hours), holidays/vacation, discrimination/harassment/diversity (including laws requiring hiring and accommodating the disabled), language laws requiring employee communications in the local language, internal HR complaint procedures, internal investigation procedures and termination/release/payout at separation.
- **Collective labor laws and agreements** including recognition of, and negotiations and consultations with, trade unions, "works councils" and other employee representatives, union "corporate campaigns" and handling of labor disputes, plus compliance with collective labor agreements including "framework"/union neutrality agreements, collective agreements to which the employer is a party, "sectoral" collective agreements applicable by force of law (employer is not a party), "works agreements" with local works councils and any European Works Council, constitutional documents of employer-sponsored staff representative bodies, "social plans" (past reduction-in-force agreements) and agreements with workplace ombudsmen, staff committees, worker committees and worker forums, health and safety committees and other non-union employee representatives—plus multi-employer bargaining group pacts.
- **Headquarters-country laws that reach staff overseas**—that is, as to a U.S. headquartered multinational, "extraterritorial" U.S. laws on audit/accounting fraud, "alien torts," bribery/foreign corruption, Sarbanes-Oxley §301 whistleblower "procedures," securities trading laws, terrorism watch list, trade sanctions and compliance with U.S. discrimination laws as to U.S. citizen staff working overseas.
- **Employment claims and litigation** including threatened, pending and past court and administrative "labor claims" brought by employees, employee representatives and government agencies on behalf of employees (breaking out any group or class claims and flagging any particularly high past awards and any court orders with ongoing effect), plus government "labor audits".
- **Benefits and compensation** offerings including employee benefits, compensation/bonus/sales incentive plans, tuition and expense reimbursement plans, equity plans, company car, housing and meal plans, pension plans/schemes, medical and other employee insurance, statutorily mandated benefits including thirteenth-month pay and mandatory profit sharing, mandatory (inflation-adjusted) raises and severance pay plans— check plan *funding* and local effects of global plans.
- **Human resources policies** including local and global HR policies, local internal workplace "regulations" and posted internal work rules, local and global employee handbooks, global health and safety protocols, crisis/pandemic plans, employee security protocols, global codes of employee conduct or ethics, performance management and succession planning systems, global employee intranet sites, whistleblower hotlines, employer-ratified industry conduct codes and insider trading, conflicts of interests policies, bribery/corruption and trade sanctions ("trading with the enemy") policies—be sure to verify that global policies were properly launched and implemented locally, and check the status of any employee policy acknowledgements.
- **Individual employment contracts** including local contract/offer letter templates and individual signed employment contracts with current employees, "onboarding" documents, fixed-term, part-time and probation provisions, "zero-hour contracts," restrictive covenants, intellectual property assignments, contract amendments, employee acknowledgments/consents/waivers, releases and "compromise agreements," computer-click intranet assents, "electronic signatures" and paperless execution of HR forms and enrollments—and check compliance with laws requiring written individual employment contracts or "statement of particulars".
- **Data privacy laws reaching employee data** like personnel files, emails and global Human Resources Information Systems, including: employee data notifications and consents, compliance with statu-

tory data retention and data purging requirements, internal HR data processing policies, registrations with government data protection authorities, processing of "sensitive" employee data, employer practices accessing staff emails and computer use, employee data security, employee data breach notification, BYOD procedures, whistleblower hotline compliance with data laws, cross-border HR data transmissions and exports—and check whether data protection and data export clauses in agreements with HRIS providers meet with applicable data law standards.

- **Contingent and irregular staffing** arrangements including as to contractor/consultant classification, compliance with local laws regulating outsourcing, secondees/leased/agency employees, secondment agreements with providers of seconded or "leased" employees, co-/dual-/joint-employer exposure as to contractors' staff and non-employee directors—and check compliance of payrolled employees seconded to third parties.
- **Expatriate compliance** including structure of expatriate agreements, "permanent establishment" exposure triggered by expatriates, internal expatriate program and repatriation documents, expatriate payroll compliance and visas/work permits for all non-citizen staff (even those not categorized as company "expatriates")—additionally, check for any so-called "stealth expatriates," look into any "global employment company" that may employ expatriates and check home country "emigration" laws that follow an expatriate on assignment (such as doctrines in Venezuela, Ghana, Brazil and the Philippines) and assess compliance with laws that cap the percentage of immigrants in a workplace (as in Brazil and the Middle East).
- **Duty of care,** that is, business travel safety and personal injury protection of business travelers, expatriates and regular employees in jurisdictions that allow staff personal injury claims (regular employees pose little threat of personal injury claims against the employer in jurisdictions like the United States that offer a robust "workers compensation bar" defense, but employer personal injury exposure is a real risk in jurisdictions like England that do not offer this defense).
- **Supply chain labor and monitoring labor conditions at overseas suppliers:** All the above topics address internal employment compliance auditing an organization's own staff employed on its own (worldwide) payroll, or contractors who might claim to be de facto employees. Completely separate is the additional challenge of a cross-border external employment compliance audit monitoring labor conditions at an organization's worldwide suppliers, contractor companies and business partners even where there is no viable threat of co-/dual-/joint-employer liability. Do not confuse or conflate these two very different labor audit "constituencies".

Three types of organizations should monitor external (supplier) labor conditions internationally: (1) those that have issued "supplier codes of conduct" or adopted industry supplier codes; (2) those subject to the California Transparency in Supply Chains Act (Cal. Civ. Code, § 1714.43), the UK Modern Slavery Act 2015 and similar laws that require attesting to suppliers' labor conditions; and (3) those party to high-risk overseas contracts like construction projects in the Middle East, or sourcing arrangements with plantations or mines in Africa or in the global shipping or fishing sector.

> *Not always an issue:* This said, keep supply chain human rights issues in perspective and discount advice from certain consultants and activists that the United Nations Guiding Principles on Business and Human Rights, International Labor Organization declarations and other aspirational labor rights protocols somehow impose binding legal obligations on supply chains. For the most part, they do not. Most of the world's companies have not tied themselves to any supplier code of conduct or taken other proactive steps regarding supply chain or contractor labor conditions, and do not necessarily need to audit labor compliance in their supply chains.

Every organization that has issued an international supplier labor conduct code needs a proactive plan for monitoring compliance. The alternative—issuing a supplier labor code but then ignoring whether anyone bothers to follow it—all but invites non-compliance. By definition, an organization that issues a supplier labor conduct code is just a customer that does not employ the workers its code protects. As a mere customer, a code-issuer has no regular (extra-contractual) right of access either to audit supplier employment records or to inspect supplier workplaces. This "privity of employment contract" challenge complicates supplier code compliance far beyond the internal HR audits we discussed. Think through how to audit any international supplier labor code or overseas contract arrangement early on, at the conduct-code-drafting and contracting stage. Do not expect access to supplier or contractor HR records or workplaces unless suppliers and contractors had previously granted audit rights in the purchase order or contract. Monitoring supplier codes in poor countries becomes more of a challenge, and gets tougher down each successive link in a supply chain. Indeed, specialist outsourcers and software providers have emerged in the niche business of monitoring international supplier labor codes:

Stage 4: Align local-country audit checklists off the master

Master audit checklist template in hand, we arrive at the trickiest stage: Localizing the master by spinning it off into a set of tailored but aligned *local* audit checklists, one for each jurisdiction subject to the audit project, anchored in local legal and contractual standards. For example, if the global master template includes "overtime pay," then each local country checklist should set out that jurisdiction's overtime hours threshold, its overtime pay rate (time-and-a-half is not universal) and address any enhanced overtime hours thresholds or enhanced overtime pay rates that applicable collective bargaining agreements may require. If, for example, the global master template includes "public holidays," then each local country audit checklist should list that country's statutory public holidays plus any extra holidays the employer may give or are required under collective labor pacts. As another example, if the global master template includes "statutory benefits," the local Venezuela checklist (for example) should address Venezuela's *cestaticket* mandatory meal coupon program as well as (for example) Latin American checklists for mandatory thirteenth month pay (*agüinaldo*, in Mexico) and mandatory profit sharing. If the global master template includes vacation laws, the local Brazil checklist (for example) would address the Brazilian requirement that employees must get 30+ vacation days per year and draw down vacation either in a 30-day uninterrupted chunk or a 20-day uninterrupted chunk plus a 10-day vacation time sell-back; meanwhile, the local France checklist (for example) addresses both France's minimum vacation benefit and France's ban on vacation year-to-year roll-over.

Failing to make the local checklists this granular would leave the auditors ignorant of the standards against which they need to check compliance. Needless to say, this stage requires both local legal research and a familiarity with local employment and labor agreements.

Beyond localizing topics from the master checklist for each affected jurisdiction, add into each local audit checklist all quirky local rules that, because they are inherently local, have no counterpart on the master audit checklist template. This requires involving a local lawyer or HR expert competent to issue-spot and fill gaps under local employment law. As a few random examples, a local HR audit checklist:

- for England, should address employee-signed overtime opt-outs (overtime opt-outs will not be on the master audit checklist template because few other countries allow them);
- for Brazil, should address funding local employee unemployment fund bank accounts ("FGTS");
- for Canada, should address contractually quantifying pre-dismissal common law notice and also executing English-language communication consents in Quebec;
- for Italy, Germany or Poland, should address whether the internal email system and intranet platform trigger local telecommunication laws;
- for South Africa, should address mandatory affirmative action plans;
- for Saudi Arabia, should address mandatory workplace gender segregation; and
- for Indonesia or Korea, should address the awkward issue of mandatory monthly menstruation leave.

Stage 5: Conduct the audit

At last we get to the actual audit—time to go out and conduct the global HR assessment. Take the local checklists into the field and do the global HR compliance check, gathering compliance information in each jurisdiction corresponding to each item on each local checklist. Do this by addressing five topics.

First, decide how on-site audit process logistics will work. Will auditor inspections be announced or surprise? Will local management and HR cooperate? Will headquarters auditors travel onsite, or can they conduct the field piece remotely or delegate local data gathering to local HR staff? What technological solutions are available to help? Will auditors interview individual employees? How to handle local HR staff who say they will help but then fail to respond adequately? How to handle local rank-and-file staff who refuse to cooperate? Relying too heavily on local staff can compromise the integrity of the audit if local staff is unskilled in doing audits or if the audit scope includes sensitive topics that the local office might conceal from headquarters.

Second, decide how deep to plow. How granular will the audit be? Will auditors look only at policies/protocols/agreements or will they study specific employment agreements, employee-signed acknowledgements, minutes of union/works council meetings, paycheck stubs, timesheets, safety logs and the like? Will translations of local HR documents be necessary? Will auditors get access to local outside providers like payroll outsourcers and benefits administrators?

Third, address how the international audit process itself will comply with local employment and data protection laws. Should local management-side labor liaisons notify works councils or other employee representatives about the audit? Omnibus data privacy laws restrict an audit team's ability to "export" personally identifiable audit response data to U.S. headquarters. Europeans, for

example, are quick to argue that their data privacy laws block many aspects of foreign headquarters' internal investigations—and in this regard, an internal audit is a form of internal investigation. So craft a strategy for exporting HR audit data legally.

Fourth, decide how to apply appropriate metrics in the audit. As an obvious example, any assessment of minimum wage compliance must account for locally applicable statutory and collectively bargained minimum wage rates. And any assessment of overtime pay or vacation compliance needs to factor in statutory and collectively bargained local overtime rates and vacation allowances. If the audit looks into workplace health and safety, decide whether to apply global health and safety standards or local workplace health and safety regulations. If the audit looks into diversity, it would be foolish to apply U.S. EEO-1–style diversity metrics to employee populations in, say, South Africa, Argentina, Japan or Finland.

Fifth, draw the line between this audit and a standalone investigation. Where the audit uncovers a specific act of wrongdoing that merits its own discrete investigation, stop and spin that internal investigation off as a separate project. Conducting a cross-border internal investigation into a suspicion or allegation of a discrete wrongful act is completely different from doing a cross-border HR audit.

Stage 6: Report, and implement remedial measures

The field part of the international HR audit complete, summarize the findings. The summary report should avoid identifying specific employees (to minimize data protection and defamation exposure) and account for any attorney/client privilege and evidentiary admissions issues. Think about how the report might later get used against the organization as evidence of willful noncompliance, and craft a strategy to minimize that risk. One strategy might be to avoid committing sensitive audit findings to writing. Another strategy is to involve a lawyer who confers attorney/client privilege. At least limit distribution of the audit report.

The audit team needs to propose specific remedial measures—recommended fixes—for any diagnosed compliance shortcomings. It is pointless to undergo a compliance audit to identify non-compliant shortcomings but then to take no action as to the findings. That said, be careful about how to memorialize remedial measures recommendations. Again, avoid generating documents that might later get used against the employer.

After recommending remedial measures, monitor whether the team's proposed fixes actually get implemented locally. Too many audits get done right but then the audit report languishes in a drawer without ever improving compliance. An audit like that is pointless (perhaps even dangerous), because the report proves the organization knew about a non-compliant situation it did nothing to fix.

And consider how to leverage lessons learned from this audit to use commercially available technologies to enhance ongoing compliance assessment going forward. According to one forensic consultant, "companies underutilize data analytics to support their anti-bribery and corruption compliance and monitoring activities. Only 27% of respondents at U.S. listed companies use data analytics to identify potential [anti-bribery and corruption] violations." (*Inside Counsel*, Nov. 2015, pg. 37).

Cross-Border Employment Due Diligence in International M&A Deals

We saw that international audit projects spin off in their own different directions. One specific context of a global HR compliance audit or assessment is the employment due diligence piece to a cross-border spin-off, merger, acquisition or outsourcing transaction. Cross-border employment due diligence is just a specific context or application of the international employment assessments we have discussed.

Any multinational seller preparing to divest its entire operation or spin off or outsource a line of business employing staff in more than one country—that is, any seller doing a cross-border spinoff or outsourcing deal—anticipates that prospective buyers will launch a due diligence process to audit the seller's compliance with laws, policies, agreements and business practices. The buyer needs to assess what it is and is not buying and whether the purchase is worth the price. "Due diligence" is the process by which the buyer verifies that, at closing, it will acquire compliant operations (or at least it will acquire non-compliant operations sold at a discount commensurate with the costs of getting up to compliance). An M&A *seller*, therefore, begins the divestiture, spinoff, sale or outsourcing process by conducting a sort of internal audit assembling the materials prospective buyers will demand to see related to seller legal and business practices compliance. M&A due diligence looks into a wide range of business and legal compliance including tax status, corporate registrations, antitrust analysis, accounting practices, intellectual property rights, real estate titles, environmental compliance plus threatened, pending and past business lawsuits involving the seller.

One key part of any thorough due diligence process, but only a part, is the *staffing* piece—workplace due diligence into the seller's labor practices, employment law compliance and employee benefits offerings. That is the part we address here. Employment due diligence is particularly vital outside the United States because other jurisdictions tend not to recognize employment-at-will, and outside employment-at-will an M&A buyer tends to get

locked into perpetuating the seller's employment conditions going forward after closing, whether by vested rights in a stock purchase, by acquired rights in an asset purchase or by some contractual arrangement amounting to a so-called "employer substitution." Further, law in all countries shifts pre-closing employment liabilities to a stock shares buyer after closing, and law in many countries outside the U.S. shifts pre-closing employment liabilities to an asset buyer after closing. So prospective buyers and outsourcers need to understand and get comfortable with the to-be-acquired worldwide workforces they will inherit upon consummating the deal.

The due diligence process exists to root out noncompliant problems, so the due diligence process itself cannot afford to cause its own compliance breach. Many jurisdictions including most of Europe plus Argentina, Canada, Hong Kong, Israel, Japan, Korea, Mexico, the Philippines, Singapore, South Africa, Uruguay and a growing number of others impose broad data privacy ("data protection") laws that can have unexpected consequences in the cross-border due diligence context. Electronic due diligence data rooms raise exposure under these laws if the data room offers bidders personal information about identifiable seller employees, especially where the seller hosts the data room in the cloud or otherwise makes HR data accessible across borders (even if password-protected). Bidders cannot shrug this off as the *seller's* compliance problem, because a seller's liability for breach of data protection laws can transfer to a buyer at closing, particularly in a stock deal. Compliance steps may require "anonymizing" data room employee information, entering into "onward transfer agreements" with bidders, entering into cross-border "model contractual clauses" agreements, collecting signed employee consents or other steps. Jurisdictions including Argentina, Hong Kong, Japan, Korea, the United Kingdom and some other omnibus data protection law jurisdictions have issued data law guidance specific to the M&A due diligence context. Follow it.

Because employment due diligence in a cross-border M&A or outsourcing deal is essentially the same exercise as the cross-border HR compliance audits we discussed, a global employment due diligence exercise involves the same six stages as a global HR compliance audit: (1) form the employment due diligence team (part of the M&A deal team) (2) delineate the scope and depth of the employment due diligence (3) create a master employment due diligence template checklist (4) align local employment due diligence checklists for all countries at issue off of the master (5) conduct the employment due diligence and (6) report back to the deal team and use the employment due diligence results to negotiate a better deal. In addition, after closing the deal the buyer or outsourcer should leverage employment due diligence results as a resource for post-merger integration.

Of these six stages, the second and third stages—scope of employment due diligence and crafting the master employment due diligence checklist—require some further discussion anchored to the due diligence context. As to the second stage (scope), prospective business buyers in an M&A deal and prospective outsourcers will not care about immaterial aspects of the seller's staffing operations. International HR due diligence in any merger or acquisition should therefore always be subject to some defined materiality threshold. Find out what that *materiality threshold* is and then focus HR due diligence only on compliance problems that could exceed it.

The third stage (crafting a due diligence checklist for a specific cross-border M&A deal) helps a prospective business buyer or outsourcing provider identify what data to scrutinize and also helps a prospective business seller or outsourcing principal anticipate the categories of data prospective buyers or outsourcers will ask to see. Here is an international human resources due diligence checklist template paralleling the global HR audit checklist template above, tailored to the cross-border M&A context. From this global HR due diligence template, tailor a master human resources due diligence checklist focused on your specific cross-border M&A or outsourcing deal. (Then stage four, align local-country due diligence checklists off of the master; next stage five, conduct the HR due diligence; finally stage six, report back to the deal team.)

- **Census and organization chart of employees and contingent staff.** Get a census of seller employees and directors worldwide who will transfer as part of this deal, including part-time staff and anyone out on leave. Include employees who work for the target entity and target-entity employees "seconded" out to service other organizations. Ideally this census should include dates of hire, compensation rates and job category. Identify any "shared services" employees who serve both the target unit and non-acquired units and identify the seller's contingent staff: independent contractors, consultants, agents, "leased employees" and other secondees, sales representatives, "business partner" staff dedicated to this business and anyone working from home or remotely, even overseas. Separately, get an organization chart and verify that only the employees who actually serve the target unit—regardless of title or designation—will transfer as part of the deal. (The buyer needs to avoid taking on extraneous staff.) Conversely, verify that all key workers who should transfer will indeed come over as part of the deal. (The buyer needs essential staff.)
- **Corporate employer issues.** In each affected country, identify the seller's local affiliated corporate entities that employ staff. Learn the relationships among the seller's operating entities and any "ser-

vices companies" that may employ people. Be sure staff work for the correct affiliates.

- **Payroll and government filings.** Check the seller's payroll processing compliance as to deductions, withholdings, reporting, compliance with dues check-off, mandatory payments to worker representatives and remittances to agencies including government payroll tax, social, unemployment and housing funds, and government-mandated insurance analogous to U.S. workers and unemployment compensation insurance. How does the seller issue payroll? What about vacation payments to variable compensation and sales staff? Does the seller pay statutory benefits? What payments are being made directly to staff on leave, including "garden leave"? Are any employees out on leave getting state benefits charged to the employer?
- **Employee claims, liabilities and exposure.** Is the seller subject to any pending, threatened or potential unasserted employment-related grievances, claims, lawsuits, appeals, disciplinary proceedings, government agency proceedings, investigations, inspections, government workplace audits, administrative charges, unfair labor practice charges, criminal proceedings or unpaid employee judgments? What is the employment claims history over the last few years, including settlements and judgments? What is the exposure for the seller's past noncompliance with labor/employment, payroll, safety, and HR data privacy laws? What are the seller's cash reserves set aside for these claims?
- **Wage/hour compliance.** Verify compliance with wage/hour ("working time") laws, cap-on-hours laws, vacation and holiday mandates, overtime payments, travel expense reimbursements, exempt-status designations, mandatory meal breaks, toilet breaks and rest periods. Check that vacation, leave and severance payouts get calculated correctly.
- **Health and safety; duty of care.** Check compliance with health and safety laws including recordkeeping mandates. Get accident records. Get information on duty of care/safety/evacuation and other protocols for hazardous-duty work and occupational health/safety law compliance—particularly for business travelers and expatriates, but also as to regular employees in jurisdictions like England that do not offer an employer workers' compensation bar defense to staff personal injury lawsuits.
- **Language laws.** Do employee communications comply with local laws in jurisdictions like Belgium, France, Mongolia, Quebec and Turkey that require HR communications be in the local language?
- **Discrimination/harassment.** Verify compliance with local discrimination/diversity/harassment laws including laws on pay equity, mandatory training and bullying. Check compliance with affirmative action laws as in South Africa and disability quota laws as in Austria, Brazil, Germany and elsewhere. Verify compliance with the seller's own discrimination/harassment policies. Does the seller impose mandatory retirement in violation of a no-age-discrimination provision in its own code of conduct? As to harassment, check compliance in countries like Brazil and France that prohibit "abusive work environment" harassment separate from protected group status.
- **Compliance with local HR policies.** Identify and check compliance with the seller's own internal employment policies, written and unwritten. Look at employee handbooks, written work rules, workplace internal "regulations," employee handbooks and health/safety guidelines. What special terms and conditions (beyond legal minimums and above market) does the seller extend to employees? The buyer will likely have to replicate these special terms after closing.
- **Global code of employee conduct or ethics.** Check compliance with the seller's internal ethics code of conduct or ethics and social responsibility programs including any commitment to an industry code, corporate social responsibility program or so-called "framework" (global union neutrality) agreement. Do the seller's HR practices comply? If the seller's codes of conduct incorporate International Labor Organization standards by reference—rarely a good idea—be sure the operations actually comply. Will the seller's current practices align with the buyer's practices and comply with the buyer's policies and codes? Check seller practices regarding government procurement, payment procedures to government officials and compliance with anti-bribery laws and audit/accounting rules. Verify that any seller whistleblower hotline complies with Europe's tough data protection law mandates specific to hotlines.
- **Compensation and benefits.** Using a separate compensation/benefits checklist, check the seller's benefits and compensation offerings including bonus and sales incentive plans. Are these above market? Do they comply with legal minimums? Look into the seller's compensation philosophy, compensation/benefits "schemes" or plans, severance plans, retirement plans, retention plans (which are particularly relevant in an M&A deal) and perquisites like meals, housing and expatriate benefits. How do they dovetail with local mandates? For example, are severance plans cumulative with

local severance benefits? Check individual pension promises, special agreements, grandfather clauses, death/disability benefits, cafeteria plans, service awards, profit-sharing and savings plans, tuition and adoption reimbursement plans, employee assistance programs, employee loans and guarantees and any unusual expense reimbursements. Understand the interplay between foreign pension plans and foreign social security in each affected country. Check compliance with local laws that mandate extra payments and benefits (like thirteenth-month pay and profit sharing in Latin America and paid meals in Venezuela). Get an accounting of any transferring plans, and study funding—unfunded, underfunded, and "book reserve" plans raise huge problems and occasionally even kill deals.

- **Equity.** Look at seller stock options, stock grants, restricted stock units, phantom stock and other equity plans as well as employee ownership programs, officer/director stock ownership and employee ownership in affiliates and entities doing business with the seller. Were grants to overseas plan participants done legally? (Expect compliance shortcomings here, because cross-border equity grants are complex.) What will happen to equity plans, awards and unexercised or unvested options after closing? Often the buyer will not or cannot replicate seller equity plans. What will it need to do instead?

- **Employee insurance coverage.** Study the employment-related insurance coverage the seller provides like employee life/health/accident and medical insurance, hazardous duty/kidnap insurance for business travel, payments to state-mandated insurance funds (workers' compensation and state social security insurance), expatriate coverage and "key man" policies naming the employer as beneficiary. Consider analogous insurance needs post-closing. In an asset or outsourcing deal, consider logistics—how to replicate insurance packages by the closing date.

- **Performance management.** Study the seller's performance management and succession planning systems. Focusing on key employees, collect data on job evaluations, performance appraisals and problem employees. Where the performance management system is global, does it comply with data protection laws? Consider how to integrate seller and buyer performance management approaches after closing.

- **Labor organization relationships.** What labor organizations represent the seller's workers—trade unions, independent unions, in-house unions or employer dominated "white unions"? What about pending employee requests for union recognition or organization? Separately, collect organizational data on the seller's non-union in-house or company-sponsored labor organizations like local/national works councils, any European Works Council, health/safety committees, staff consultation committees, worker committees, workplace forums, labor/management committees and ombudsmen. How cooperative or contentious are they? Collect meeting minutes and records memorializing labor disturbances and days lost to strikes. Will the buyer have to replicate any labor groups after closing an asset or outsourcing deal?

- **Collective agreements.** Look at applicable collective bargaining agreements, "industrial awards," "work agreements," "social plans" and other written agreements with employee representatives—not only union agreements but also labor accords with local works councils, and with any European Works Council, with worker committees, health and safety committees, ombudsmen and the like. Avoid the common mistake of due diligence requests for only seller "collective bargaining agreements" (a phrase usually interpreted to include only formal union agreements, excluding informal oneoff accords and arrangements with works councils). Get "social plans" (collective agreements from past layoffs) and expired collective agreements with terms that still apply. Identify all industry ("sectoral") collective agreements that bind the seller even as a non-signatory. Does the seller participate in any multiemployer bargaining associations?

- **Individual employment agreements.** Look at individual employment contracts with staff including employment agreements labeled "offer letters," "statements of particulars," restrictive covenants, non-competes and confidentiality agreements, employee indemnification agreements, invention and intellectual property agreements, resignation letters and releases. At least check these for key executives and look at form/template agreements for rankandfile employees. (Again, be alert to data protection law compliance.) Find out whether any parts of the workforce lack written agreements or "statements of employment particulars" where law requires them. Pay special attention to contracts with contingent workers—service providers like "temps," independent contractors, consultants and agents.

- **Employee consents.** Check individual employee consent forms, which come in many flavors. In jurisdictions like the UK and Korea, employees may have consented in writing to work overtime and in Quebec employees may have consented to receive communications in English. European employ-

ees may have (revocably) consented to employer processing of sensitive personal data, and employee data processing consents are vital in India, Mexico and certain other jurisdictions. Employees worldwide may have executed payroll consents or acknowledged a code of conduct or work rules in writing. If these consents are electronic, do employee assents comply with electronic signature protocols?

- **Change-in-control clauses.** Check change-in-control, golden parachute, and other transfer-related clauses in individual and collective employment and agency agreements, including M&A-ratification provisions in any labor union contracts and European Works Council agreements, as well as HR services contracts. Find transferability clauses in independent contractor agreements. These are vital.

- **External agreements.** Do any external agreements (with third parties) limit staffing flexibility? For example, in a stock purchase, are there acquisition agreements or "social plans" from earlier seller deals that limit reductions-in-force? Has the seller signed onto any supplier codes of conduct of its customers? Is the seller a government contractor that has taken on staffing-related public procurement obligations? In the United States, for example, a buyer of a government contractor can take on big "affirmative action" obligations after closing—analogous issues might arise abroad. What about "leased employee" and secondment agreements the seller may be a party to? What about independent contractors? Separately, look at the seller's outsourcing agreements with HR service providers like payroll providers, "temp" agencies, benefits providers and whistleblower hotline providers.

- **Recent layoffs and divestitures**. What layoffs or "collective redundancies" have happened in the last few years? What divestitures of business units have occurred? Did these comply with applicable laws? What lingering obligations exist in old "social plans" or accords with government labor agencies? Any recall rights?

- **HRIS**. Look into the seller's employee data-processing and human resources information systems (HRIS). Check how HRIS and email systems comply with data protection laws, especially as to crossborder data exports. Has the seller made all required notices/communications to employees about HR data processing and collected necessary employee consents? What so-called "sensitive" staff data does the seller process? Do data protection clauses in agreements with HRIS providers meet applicable data law standards? Look at the seller's contracts with HRIS providers and consider the effect post-closing. Are the seller's routine HR data exports compliant? What about staff communications regarding whistleblower hotlines? What about BYOD? Verify that seller HRIS and email systems do not trigger telecommunications laws in countries where this is an issue like Italy, Germany and Poland.

- **Powers of attorney**. Find out what powers of attorney the seller's employees, officers and directors hold. (These are particularly critical in Latin America, where there can be different levels of powers, some of which include the power to dispose of company assets.) Consider how these powers will need to work after closing. In an asset deal the buyer will need to reissue these. What controls does the seller's headquarters use to monitor local management's compliance with laws and corporate policies?

- **Expatriates and immigrants**. Gather information on the seller's expatriate and immigrant populations and programs. Who are the overseas seconddees and other posted expatriates? Which corporate entity employs each expatriate? Identify any "stealth expatriates" outside the formal expatriate program working outside their home countries. Check that expatriate employment arrangements comply with both host and home country laws (home countries may impose employment laws with "extraterritorial" reach). Does the seller employ any expatriates through a global employment company structure? Expatriates can be very expensive, so verify that packages are not above-market. Also do an "international I-9" exercise to check the visa or work permit status of non-local-citizen employees worldwide (regardless of whether categorized internally as expatriates or local hires). Does the seller comply with laws (as in Brazil and the Middle East) capping the percentage of immigrants in a workplace? How might the structure of this M&A or outsourcing deal affect visas after the deal closes? If the seller employs staff in countries where it is not registered to do business, how does it comply with host-country payroll obligations? And check "permanent establishment"—are there "floating employees" doing business in countries where the buyer is unregistered, not paying taxes, and flouting local payroll mandates?

- **Supply chain and human rights**. Beyond due diligence into the seller's own employees, decide whether to assess employment law compliance at the employees of the seller's suppliers. Where this

is an issue, get both the buyer's and the seller's supplier code of conduct, if any, and collect reports from any past social/human rights audits. Is the seller's supplier code too sweeping in scope? Collect data on labor practices in the supply chain particularly as to components and products sourced from poor countries and look at overseas construction projects. Go as far down the supply chain as necessary. Look at seller disclosures under supply chain disclosure laws like the California Transparency in Supply Chains Act and the UK Modern Slavery Act 2015. Consider post-closing exposure to workplace-context human rights claims. Consider whether the seller's supply chain practices might, after closing, breach any buyer supplier code.

As today's multinationals globalize ever more aspects of human resources across national borders, they take on "ownership" of, or responsibility for, verifying that international HR offerings comply with laws, labor agreements and workplace policies and norms. This gives rise to a need for doing global HR compliance audits or assessments. In addition, specific scenarios like preventing corrupt practices, overseeing supply-chain compliance and conducting due diligence in cross-border M&A or outsourcing deals spawn special breeds of international employment compliance verification projects. Cross-border HR audits can be complex and can take a number of stages to complete, but they are increasingly vital to today's globalized business operations.

Donald C. Dowling, Jr. practices international employment law in New York City.

New Challenges for Equal Pay Analysis

By Elizabeth Becker, Ph.D. and Charles Diamond, Ph.D.

Introduction

California and New York recently made substantive changes to their pay equity laws with the stated intention of closing what is perceived to be a gender wage gap. Although not strictly "comparable worth," California law now requires that employers group employees in substantively similar jobs together when conducting equal pay analyses, rather than comparing employees in equal jobs. New York did not move in the direction of comparable worth, but did increase the requirements of employers to justify any observed gender pay differences. Both states did indicate that the employer was now responsible for validating all factors used to explain gender pay differentials. We discuss two core issues: comparability of jobs and bona fide factors. Do the new state laws radically alter the analysis required to evaluate pay equity?

Changes to New York and California Labor Laws

Previous New York law (like federal law) required employers to pay employees of the opposite sex equal pay for "equal work" on jobs that required equal skill, effort, and responsibility, and were performed under similar working conditions. Comparators must have been at the same establishment. Exceptions were found where the employer could show differentials were based on (1) a seniority system, (2) a merit system, (3) a system that measures earnings by quantity or quality of production, and/or (4) any factor other than sex. These provisions remain intact.

The changes to the law amend Section 194(1) of the New York Labor Law as follows: (1) broaden the meaning of "same establishment" to include workplaces in the same geographic region, but that region must be no larger than a county; (2) replace the exception of "any other factor than sex" with an exception for "a bona fide factor other than sex, such as education, training, or experience"; and (3) require employers relying on this exception to defend it proactively. Employers must show that any control factor is not based on or derived from a sex-based differential in compensation; is job related; and is consistent with a business necessity.

Until 2016, California law (like federal law) required employers to pay employees of the opposite sex equal pay for "equal work" on jobs that required equal skill, effort, and responsibility, and were performed under similar working conditions. Comparators must have been at the same establishment. Exceptions existed where the employer could show differentials were based on (1) a seniority system, (2) a merit system, (3) a system that measured earnings by quantity or quality of production, and/or (4) a bona fide factor other than sex.

The California Fair Pay Act amends Section 1197.5 of the California Labor Code by changing the standard from equal pay for equal work, to instead require employers to pay employees of the opposite sex equal pay for "substantially similar" work when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions. It also eliminates the requirement that comparator employees be at the same establishment.

The existing four exceptions in California remain unchanged, but the employer must show that each factor relied upon is applied "reasonably," and that the factor(s) relied upon account for the entire wage differential. If the employer relies upon "a bona fide factor other than sex," the employer also must show the factor is not based on or derived from a sex-based differential in compensation, is job related, and is consistent with business necessity. Employees can still prevail in a pay dispute by showing that an alternative and equally effective business practice exists without producing a wage differential.

Equal Opportunity versus Equal Outcome

The changes in both New York and California law reflect a trend towards finding disparate impact from an employer's compensation practices. A muscular form of disparate impact would compare men and women's compensation without taking account of any, or very few, legally permissible factors for paying employees differently.

Under strict disparate impact, if women and men on average are paid differently it would not matter whether all men have college degrees and women do not. It would not matter if men have an average of 15 years of experience, but women on average have five. Strict disparate impact does not attempt to answer the question of why there are gender pay disparities. In a departure from the doctrine of disparate impact, the laws in both states do provide for an analysis that better describes the economic conditions of labor markets and the workplace—possibly as a practical consideration.

Basic Statistical Model

Up until now, the basic statistical approach for evaluating pay equity has been to use regression analysis to model employee wages as a function of reasonable factors measuring performance and productivity. Included factors should be job related, and not tainted by the influence of discrimination in the determination of the attribute (such as allegedly biased performance reviews or job assignments). In equal pay studies, we have undertaken to model employee pay comprehensively from the standpoint of labor markets, workplace conditions,

an organization's pay schedule, employee productive characteristics, and other relevant and reasonable factors. Regression produces in one statistical model a comprehensive picture of pay that includes all factors simultaneously to determine if there is a gender pay gap. The New York and California labor law revisions have not radically altered the basic statistical approach. In our view the changes in the law tweak the basic statistical model, but impose more onerous requirements of documentation and validation.

Job Grouping

As discussed above, unlike the attempts in California, New York law does not revise the basic unit of analysis. In essence, the New York law allows an analysis where employees in the same job are compared to determine if there is a gender pay gap. New York adheres to the principle of comparing employees with equal skill effort and responsibility, and thus allows for separating employees by job where relevant. California law requires a grouping of substantially similar jobs. This represents a more challenging standard for employers evaluating pay equity. For many employers (whether in New York or California), we think that this grouping of jobs is already provided in the pay schedule itself.

Let's examine for a moment the Federal government's general schedule (GS).[1] This schedule is used by the various federal agencies to determine starting and ongoing pay for millions of federal employees.[2] It is an attempt, in one comprehensive list, to combine all the various pay factors relevant to attracting and retaining employees. Before a new position is added to the list, a detailed analysis of function, responsibility, education and training requirements, experience and other factors is undertaken.

Most well-established employers have a pay schedule similar to the GS schedule. Most human resource departments spend considerable time and resources studying various characteristics of jobs and have grouped like jobs in the pay schedule. In terms of our basic statistical model, the pay schedule itself becomes an important factor to include in a model to determine if a pay gap exists. Of course there are exceptions for new and fast-growing companies without a formal structure, those committed to the use of a broadband system, or firms with a strong market orientation to compensation decisions. It may be that a retreat from the recent trend of establishing broad pay bans and a return to more structured pay levels is called for to meet the recent changes to the laws.

Bona Fide Factors

Previously, both New York and California allowed all reasonable and relevant factors to be included in a statistical model of the pay gap. Employees had to prove that a factor in the pay gap model was irrelevant or tainted if they wanted it removed from the analysis. Both states have shifted the burden of proving that all proffered pay determinate factors are valid, and require evidence that the factors are bona fide—moving us in the direction of testing for strict disparate impact.

Some economists believe that disparate impact theory allows for determining an alleged pay gap merely by comparing the pay of men and women without applying any economic factors. With the change in both states' laws, unless an employer can validate productive factors to include in a comprehensive pay analysis, the employer is stuck with making simple comparisons of average male and female pay—the disparate impact model.

Questioning the validity of a factor to be included in a pay gap analysis has been around for a while. When plaintiffs successfully challenged a factor, the burden to prove that the factor was a business necessity and irreplaceable shifted to the employer. Fortunately, there are examples of factor validation from past cases.

In *Ottaviani v. State University of NY at New Paltz*,[3] the allegations were, inter alia, that there was a gender pay gap for female professors. Defendant's experts proffered a pay model that included faculty rank as a relevant factor. Plaintiffs contested the model asserting that faculty rank itself was discriminatory and thus invalid, and tended to obscure estimates of a gender gap. Defendant's experts examined the validity of rank as a determinant of pay. A statistical model of the probability of women and men in various academic ranks showed no difference between men and women. Thus the inclusion of the factor was permitted.

Conclusion

The changes in the New York and California equal pay labor laws do not seem as dramatic as first thought by employers and counsel. The answer to the California law, where pay gap comparisons must be made across similar jobs, may be centered on using employer's pay levels and schedules which combine similar jobs according to function and responsibility. In both states this must be independently validated, but this varies little from a well-established practice of affirming that no tainted variables are included in a statistical model.

Endnotes

1. https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2016/general-schedule/.
2. U.S. Office of Personnel Management The Classifier's Handbook TS-107 August 1991.
3. *Ottaviani v. State Univ. of New York at New Paltz*, 679 F. Supp. 288 (S.D.N.Y. 1988).

Elizabeth Becker, Ph.D. and Charles Diamond, Ph.D. are both Vice Presidents in the New York offi ce of Charles River Associates.

The opinions expressed are the authors' and do not reflect the views of CRA or any of its respective affiliates.

Pleading for Survival Under 12(B)(6): The Impact of *Littlejohn* and *Vega* on Pleading Standards Under Title VII

By Howard M. Wexler and Samuel Sverdlov

Introduction

Employers have long utilized Federal Rule of Civil Procedure 12(b)(6) motions to dismiss based on failure to state a claim ("12(b)(6)") as a shield in the face of frivolous and unsubstantiated litigation. When faced with a complaint that makes baseless allegations under the law, employers have the strategic advantage of a motion to dismiss, which, if granted, relieves the employer of hefty costs and expenditure of undue time arising from defending litigation. However, two recent Second Circuit decisions, *Littlejohn v. City of New York*[1] and *Vega v. Hempstead Union Free School Dist*rict,[2] have arguably cracked the employer's shield.

In this article we will examine the jurisprudence and evolution of the burden-shifting framework employed in cases under Title VII.[3] We will then discuss the holdings of *Littlejohn* and *Vega*, and address how subsequent Title VII cases incorporated these holdings in their decisions.

Background

In 1973, in *McDonnell Douglas Corporation v. Green*,[4] the Supreme Court of the United States ("SCOTUS") addressed, for the first time, the nature of the *prima facie* case of discrimination under Title VII. In that case, the Court laid out the now familiar tripartite "burden-shifting framework" which sets forth the order plus allocation of proof in a race discrimination case under Title VII. Notably, under the *McDonnell Douglas* test, the Plaintiff has the burden of first establishing a *prima facie* case:

> (i) that he was a member of a protected class; (ii) that he applied and was qualified for a position; (iii) that, despite his qualifications, he suffered an adverse employment action; and (iv) some minimal evidence suggesting an inference that the employer acted with discriminatory motive. [5]

It should be noted that at the first phase of the case, the Plaintiff's *prima facie* requirements are generally perceived by the courts to be relaxed. Courts reason that the Plaintiff should not be required to risk early dismissal of his/her case merely due to the inability to bring forth extensive evidence of the employer's discrimination prior to discovery. In *Texas Department of Community Affairs v. Hicks*,[6] the Court described the Plaintiff's burden as "not onerous," and "minimal," and held that it was sufficient for Plaintiff to show that she applied for a job and that it went to someone outside of her protected class.

It is only after the Plaintiff satisfies the *prima facie* burden that a "presumption" of discrimination is created. The burden then shifts to the Defendant to articulate a legitimate, non-discriminatory reason for the adverse employment action against the Plaintiff. The Plaintiff must then be afforded a fair opportunity to show that the employer's stated reasons were pretextual. Plaintiff bears this final burden of proof.

The Supreme Court began clarifying the pleading requirements of the *prima facie* case of employment discrimination under Title VII in 2002 in the case, *Swierkiewics v. Sorema, N.A.*[7] Swierkiewics dealt with a Hungarian national who alleged national origin discrimination under Title VII, and age discrimination. The Plaintiff's complaint was barren of any factual support for his allegations of discrimination—he merely asserted that he was of Hungarian nationality and working for a French company. Due to the "conclusory"[8] and "insufficient"[9] allegations, the District Court could not infer discrimination of any kind. The complaint was dismissed. The Plaintiff thereafter appealed the District Court's decision, but the Second Circuit affirmed.

The Supreme Court felt otherwise, however. On appeal from the Second Circuit, the Court decided that under a "notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a *prima facie* case."[10] Rather, it would be sufficient if the Complaint "[gave] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[11] In so holding, the Court reversed the Second Circuit's decision and asserted that the Hungarian plaintiff gave his employer fair notice of the nature of his lawsuit and upon what grounds it rested. This case was very illustrative of the Plaintiff's evidentiary burden at the initial stage of the *prima facie* showing—little is required.

Subsequently, in *Bell Atlantic Corporation v. Twombley*,[12] the Supreme Court considered under what circumstances it was appropriate to dismiss a complaint for failure to state a claim, and appeared to some extent erode the teaching of *Swierkiewics*. Under *Twombley*, to survive a motion to dismiss under 12(b)(6), a complaint must contain facts sufficient to "state a claim to relief that is plausible on its face."[13] The Plaintiff must allege sufficient facts to raise a right to relief above the speculative level; it is not enough to simply create a mere suspicion of a legally cognizable right of action.[14] Hence, a complaint is properly dismissed for failure to state a claim when the plaintiff fails to provide the grounds for entitlement to relief. A complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[15] In the Court's opinion, when a complaint fails to "possess enough heft" to show that the pleader is entitled to relief, "this basic deficiency

should...be exposed at the point of minimum expenditure of time and money by the parties and the court."[16]

Later on in 2009, in the landmark case of *Ashcroft v. Iqbal*,[17] the Court helped mold a functional approach to the pleading requirement. In that case a Plaintiff of Pakistani origin and Muslim religion claimed that the United States detained him under harsh conditions, depriving him of his constitutional rights. The Court held that

> [t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"[18]

This holding extended the Supreme Court's decision of *Bell Atlantic Corporation v. Twombley*, and further illustrated that the complaint must allege "enough factual matter to suggest" plausibly that "an agreement" was made.[19] The complaint must thus allege facts that "nudge his claims…across the line from conceivable to plausible."[20]

Second Circuit Decisions

In *LittleJohn*, an African-American female working as the Director of the Equal Opportunity Office ("EEO") of the New York City Administration for Children's Services ("ACS") alleged that during her employment she was "subjected to a hostile work environment and disparate treatment on the basis of [] race, and retaliated against because of complaints about such discrimination, both in violation of Title VII."[21] The Defendants filed a 12(b)(6) motion and moved to dismiss all of the Plaintiff's claims. The District Court granted Defendants' motion in its entirety, claiming that the Plaintiff inadequately pleaded her hostile work environment, disparate treatment, and retaliation claims. The Plaintiff thereafter appealed to the Second Circuit.

The first question before the Second Circuit was "whether *Iqbal*'s [plausibility] requirement applies to Title VII complaints falling under the *McDonnell Douglas* framework."[22] The court concluded that

> *Iqbal*'s requirement applies to Title VII complaints of employment discrimination, but does not affect the benefit to plaintiffs pronounced in the *McDonnell Douglas* quartet. To the same extent that the *McDonnell Douglas* temporary presumption reduces the facts a plaintiff would need to show to defeat a motion for summary judgment prior to the defendant's furnishing of a non-discriminatory motivation, that presumption also reduces the facts needed to be plead under *Iqbal*. [23]

The court then considered what "in the Title VII context must be plausibly supported by factual allegations when the plaintiff does not have direct evidence of discriminatory intent at the outset."[24] In this regard, the court held that

> absent direct evidence of discrimination, what must be plausibly supported by facts alleged in the complaint is that the plaintiff is a member of a protected class, was qualified, suffered an adverse employment action, and has at least minimal support for the proposition that the employer was motivated by discriminatory intent. The facts alleged must give plausible support to the reduced requirements that arise under *McDonnell Douglas* in the initial phase of a Title VII litigation. The facts required by Iqbal to be alleged in the complaint need not give plausible support to the ultimate question of whether the adverse employment action was attributable to discrimination. They need only give plausible support to a minimal inference of discriminatory motivation.[25]

As a result, the Second Circuit vacated the District Court's granting of the Defendants' 12(b)(6) motion regarding the Plaintiff's disparate treatment and retaliation claims under Title VII.

Shortly after *LittleJohn*, the Second Circuit, in *Vega v. Hempstead Union Free School District*, once again considered the appropriate pleading standard under the *McDonnell Douglas* burden-shifting framework for Title VII claims. In *Vega*, an Hispanic schoolteacher alleged claims of discrimination and retaliation for complaining about discrimination, in violation of Title VII. The Plaintiff claimed he was given a workload that was disproportionate to his non-Hispanic colleagues, and that when he complained of the discriminatory conduct, the Defendants retaliated against him.

In response to the Plaintiff's claims, the Defendants moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) ("12(c)"). Addressing the *McDonnell Douglas* burden-shifting framework, the District Court held that "[b]ecause plaintiff has not demonstrated that he suffered an adverse employment action, he has not established a *prima facie* case of discrimination and consequently, his Title VII [claim]…must fail."[26]

The Plaintiff in *Vega* thereafter appealed to the Second Circuit. The Second Circuit, citing *LittleJohn*, held that

> a plaintiff is not required to plead a *prima facie* case under *McDonnell Douglas*, at least as the test was originally formulated, to defeat a motion to dismiss. Rather, because "a temporary 'presumption' of discriminatory motivation" is created under the first prong of the *McDonnell Douglas* analysis, a plaintiff "need only give plausible support to a minimal inference of discriminatory motivation." [27]

The question remained, however, of what was "plausibility" in the context of an employment discrimination claim. The Second Circuit concluded that in order for the Plaintiff to state a claim upon which relief may be granted in an employment discrimination case,

> a plaintiff must plausibly allege that (1) the employer took adverse action against him, and (2) his race, color, religion, sex, or national origin was a motivating factor in the employment decision… At the pleadings stage…a plaintiff must allege that the employer took adverse action against her at least in part for a discriminatory reason, and she may do so by alleging facts that directly show discrimination or facts that indirectly show discrimination by giving rise to a plausible inference of discrimination.[28]

Accordingly, the Second Circuit vacated the District Court's opinion and remanded the case for further proceedings consistent with its holding.

Post-*LittleJohn* and *Vega*

In the aftermath of *LittleJohn* and *Vega*, both employees and employers are eager to understand how the lower courts will react to the "clarified" pleading standard.

An analysis of the case law within the Second Circuit following *LittleJohn* and *Vega* reveals that defendants are still moving to dismiss cases based on 12(b)(6), and both Circuit and District Courts are still granting these motions.[29] This is true despite the arguably "reduced" burden on Plaintiffs in pleading an employment discrimination case under Title VII. The case of *Moore v. Verizon*[30] is particularly instructive. In *Moore*, the plaintiff alleged, in relevant part, discrimination under Title VII.[31] The court held that "even under the minimal pleading standard" the plaintiff failed to state a claim for discrimination.[32] Even though the plaintiff alleged that two African American co-workers were subjected to excessive monitoring, the Plaintiff did not allege that those two employees were the only African Americans working in the office, or that they represented a large percentage of the African Americans employed by Verizon.[33] As the court explained,

> [o]f course, Plaintiff alleges many instances of what she considered to be "unfair" conduct by her supervisors, including their "refus[al] to address [Plaintiffs] work-related equipment and software issues;" "misus[ing] authority by targeting [Plaintiff] for elimination;" "speaking to [Plaintiff] in a threatening manner and falsely accusing [Plaintiff] of using inappropriate racial language in the office;" and causing Plaintiff to be "constantly monitored." But these factual allegations, as pled, bear no link to a protected characteristic and reflect no cognizable adverse employment action. Rather they demonstrate " 'workplace difficulties entirely consistent with non-race[based], non-gender-based personality disputes—disputes that are plainly not actionable under statutes intended to root out discrimination on the bases of certain statutorily defined protected characteristics.'"[34]

It is thus evident that courts will still not tolerate factually baseless claims of discrimination.

We have also begun to see the effects of *LittleJohn* and *Vega* outside of the Title VII context, such as in claims under the New York State Human Rights Law ("NYSHRL"), which has historically been adjudicated under the same standards as Title VII.[35] In *Powell*, a former employee brought action against Delta Airlines, alleging wrongful termination and discrimination on the basis of age and race under the NYSHRL. In addressing the Plaintiff's pleading burden in employment discrimination cases under the NYSHRL, the court first established that "[c]laims of discrimination on the basis of race under the NYSHRL are analyzed based on the same standard as claims under Title VII,"[36] and therefore applied the holdings of *LittleJohn* and *Vega*—that the Plaintiff must allege facts that "give plausible support to the reduced requirements of the *prima facie* case."[37] As such, *LittleJohn* and *Vega* must also be kept in mind when litigating claims in the context of local employment discrimination laws.

Outlook for the Future

At this point it is unclear whether (and to what extent) litigating employment discrimination claims will change based on the Second Circuit's decisions in *LittleJohn* and *Vega*. One thing that is clear is that employers are wise to keep in mind the "refined" pleading standard, and address in a motion to dismiss the Second Circuit's holding in *Vega* that "court[s] must be mindful of the 'elusive' nature of intentional discrimination,"[38] and how "clever men may easily conceal their motivations."[39]

If employers decide to move forward with a dispositive motion, they should take care to denounce any of

the Plaintiff's factual allegations as impossible so as to remove any possibility the court could find the Plaintiff's allegations "plausible." (Importantly, employers should not rely on a boilerplate motion to dismiss language, but rather should address the holdings of *LittleJohn* and *Vega* in their briefs.) Even considering the reduced pleading standard, employers should not hesitate to move to dismiss a complaint that is barren of factual support.[40]

Endnotes

1. 795 F.3d 297 (2d Cir 2015).
2. 801 F.3d 72 (2d Cir 2015).
3. Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq (1964) ("Title VII").
4. 411 U.S. 792, 93 S.Ct. 1817 (1973).
5. 411 U.S. at 802.
6. 450 U.S. 248, 253, 101 S.Ct. 1089, 1094 (1981).
7. 534 U.S. 506, 122 S.Ct. 992 (2002).
8. 534 U.S. at 514.
9. *Id.* at 509.
10. *Id.* at 511.
11. *Id.* at 512.
12. 550 U.S. 554 (2007).
13. 550 U.S. at 570.
14. *Id.* at 555.
15. *Id.* at 555.
16. *Id.* at 557-58.
17. 556 U.S. 662, 129 S.Ct. 1937 (2009).
18. 556 U.S. at 678 (internal citations omitted).
19. *Bell*, 550 U.S. at 545.
20. *Iqbal*, 556 U.S. at 680.
21. 795 F.3d at 305.
22. 795 F.3d at 309, fn. 7.
23. *Id.* at 310.
24. *Id.*
25. *Id.*
26. *Vega*, 801 F.3d at 78.
27. *Id.* at 84, fn. 7.
28. *Id.* at 87.
29. *See, e.g., Johnson v. Andy Frain Services, Inc.*, 2016 WL 210098 (2d. Cir. Jan. 16, 2016) (affirming motion to dismiss Title VII discrimination claim); *Dooley v. JetBlue Corp.*, 2015 WL 9261293 (2d. Cir. Dec. 18, 2015) (same); *Brown v. City of New York*, 622 Fed. Appx. 19 (2d Cir. Nov. 17, 2015) (same); *see also Jones v. Target Corp.*, 2016 WL 50779 (E.D.N.Y. Jan. 4, 2016) (granting motion to dismiss Title VII discrimination claims); *Thompson v. Odyssey House*, 2015 WL 5561209 (E.D.N.Y. Sept. 21, 2015) (same).
30. 2016 WL 825001 (S.D.N.Y. Feb. 5, 2016).
31. *Id.*
32. *Id.*, 2016 WL 825001, at *7.
33. *Id.*
34. *Id.* (internal citations omitted.)
35. *See Powell v. Delta Airlines*, No. 15-CV-2554 (MKB), 2015 WL 6867185 (E.D.N.Y. Nov. 6, 2015).
36. *Id.*, 2015 WL 6867185, at *8.
37. *Id.*
38. *Vega*, 801 F.3d at 86.
39. *Id.*
40. *See supra*, note 29.

Howard M. Wexler and Samuel Sverdlov are Associates in Seyfarth Shaw LLP's New York City office and members of the firm's Labor & Employment Law Practice Group.

Tips for Being an Effective Mediator of Employment Disputes

By Ruth D. Raisfeld

Mediation has become an integral process in the life of labor and employment disputes. Each of the federal courts and an increasing number of state courts not only have ADR programs, but may require mediation of pending cases right out of the box or later during a litigation. More and more attorneys have an opportunity to serve as a mediator, either through court-annexed appointments, volunteer assignments or when retained by parties who believe they can help serve as an honest broker in a private or pending matter.

The bridge from being a litigator to becoming an effective mediator, however, is neither straight nor short! It is essential to be mindful of the transition from the role of advocate to that of a neutral third party dedicated to resolving the dispute. Here are some tips that may help in making it easier to wear the hat of "mediator."

1. Be Neutral

The mediator's role is to facilitate negotiations leading to a settlement of a pending litigation. It is not to be the lawyer for one side or the other or both. This is true even if you would handle the case differently for one side or the other or believe that the attorneys who have appeared are not as prepared or thoughtful as you would be. Strive to be neutral!

2. Respect the Attorney-Client Relationships

The mediator is there to help but not to commandeer the negotiations. It is important not to criticize or critique the performance of each side's lawyer or to do anything that would undermine the lawyer in front of his or her client. If you believe a lawyer is an obstacle to effective negotiations, in certain circumstances you might consider talking to the lawyer outside the presence of the client or calling for an "all lawyers" meeting and attempt to put the lawyers on a more productive and constructive path, but it is rarely appropriate to diminish the lawyer in the eyes of his or her client.

3. Be Prepared

The parties should provide submissions in advance of the mediation. Read them in advance. You can also call each attorney in advance especially if you have an inkling that they haven't prepared. This does not mean you need to do extensive research: ask them to send you cases they think you should read. Further, encourage counsel to get you important documents or testimony before the mediation; it is very hard to get the essence of the argument when things are read for the first time at the mediation.

4. Encourage Parties to Calculate Best Case/Worst Case Damage Scenarios

If the parties haven't done this in advance, work with each side separately prior to and during the mediation to do damage estimates depending on the nature of the case, remedies available, whether plaintiff has lost employment or become reemployed, out-of-pocket expenses, medical expenses, emotional distress, attorneys' fees, etc. This helps to get the parties "reality testing" on their own before the mediation, so some of the hard work of getting to a settlement zone is done without you.

5. Do Not Put a Value on the Case

Sometimes inexperienced counsel and clients will turn to the mediator and say *"What do you think the case is worth?"* This is not your job. Whatever you say, one side will think you don't believe them or you are taking sides. While at some point you might offer a mediator's proposal to break impasse, you should be careful to say, "This is not what I think the case is worth, but this is what I think both sides can agree to and live with."

6. Listen

Be sure to give both sides an opportunity to share their side of the story with you before you start to reality test. Remind the participants that you are not the judge or the jury but simply there to discuss some of the strengths and weaknesses that they may wish to factor into their settlement analysis. Be sensitive to the needs of the parties and remember that there are potential emotional issues on both sides. A plaintiff's emotional state will probably be different in a sexual harassment case than it would be in a wage case. Similarly, a large employer will often have different needs and requirements than a small employer. Don't size up the situation without fully listening and letting participants speak.

7. Mix It Up

Be creative in conducting joint and separate sessions. Sometimes it is helpful to speak with counsel separately from their clients; it is never appropriate to speak with clients without counsel present. Sometimes it may be helpful to reconvene a joint session or to allow clients to speak with each other privately.

8. Keep Track of Time

Do not burn through the entire day discussing the facts and the law. At some point, state, "Well, it sounds like the parties can agree to disagree," and move to a discussion of the future. With a plaintiff, ask questions such as: Have you found a job? Are you getting emotional support and/or medical attention? Do you understand how long and complicated lawsuits can be? With a defendant, ask questions such as: Has the employee and/or supervisor been replaced? Are potential witnesses available? Do you have access to documents? Does the defendant understand how much time, effort and expense goes into defending an employment decision?

9. Be Persistent

Do not give up on settling just because the parties are far apart at 2 p.m. Mediation of employment disputes takes a long time but MOST disputes do settle within one day.

10. It Ain't Over 'til It's Over

If the parties come to an agreement, assist in the preparation of a terms sheet, or if there is time, an agreement. If the parties do not sign a final agreement in your presence, then set a schedule for drafting the agreement, notifying the court, and filing a stipulation. After the mediation, follow up. Many settlements are derailed by delay and remorse.

Ruth D. Raisfeld is a mediator and arbitrator in the New York Metro area.

The Griggs Fable Ignored: The Far-Reaching Impact of a False Premise[1]

By Robert L. Douglas and Jeffrey Douglas

Introduction

In the landmark decision of *Griggs v. Duke Power Co.*, the United States Supreme Court expanded the scope of employment discrimination law under Title VII of the Civil Rights Act of 1964 ("Civil Rights Act") by adopting, authorizing, and endorsing disparate impact[2] as an independent cause of action in addition to the preexisting disparate treatment theory of discrimination.[3] In the critical paragraph in the opinion of the Court, Chief Justice Burger used the fable of *The Fox and the Stork* as an analogy to explain the Court's expanded definition of employment discrimination.[4] For over forty years, many legal scholars have analyzed and criticized the Court's activist role in creating disparate impact. However, not a single scholar recognized the importance of examining the Court's flawed, manipulative interpretation of the pivotal fable.[5] The Chief Justice's cunning use of the fable enabled the Court to create the legal fiction of disparate impact under the Civil Rights Act.[6] Congress codified this disparate impact theory in the Civil Rights Act of 1991—twenty years after the *Griggs* decision.[7]

Part I of this article analyzes the adoption of disparate impact in *Griggs v. Duke Power Co.* and the Supreme Court's interpretation of section 703(h) of the Civil Rights Act. Part II examines *The Fox and the Stork* to demonstrate the Supreme Court's misuse of the fable, revealing its activist approach to interpreting Title VII of the Civil Rights Act. Part III addresses the present effects of the *Griggs* decision.

I. The Creation of Disparate Impact

A. The Background of *Griggs v. Duke Power Co.*

In *Griggs v. Duke Power Co.*, the Supreme Court interpreted section 703(h) of the Civil Rights Act[8] to prohibit employers from using professionally prepared examinations that had the effect of discriminating against members of a protected class regardless of the employer's intent—even though section 703(h) twice used the word "intent."[9] The Court's holding established disparate impact as a cognizable cause of action under Title VII.[10] Prior to *Griggs*, plaintiffs could only sue pursuant to the disparate treatment theory of discrimination, which required a plaintiff to demonstrate an employer's intent to engage in discriminatory activity.[11]

The key issue in *Griggs* was whether Duke Power Company, the respondent-employer, could legally require employees to perform satisfactorily on two professionally prepared exams before they could qualify for employment in specific departments within the company.[12] The petitioner-employees,[13] a class of African-American workers, sued Duke Power Company claiming that the use of the professionally prepared examinations had the present effect of continuing acknowledged past discrimination in violation of Title VII.[14]

B. The District Court's Narrow Analysis

The United States District Court for the Middle District of North Carolina dismissed the petitioner-employees' claim and found that the Duke Power Company lacked the requisite intent to discriminate against the African-American employees.[15] The district court observed that since the Civil Rights Act of 1964 had gone into effect,[16] the Duke Power Company had applied the testing requirement "fairly and equally" to black and to white employees.[17] The district court interpreted Title VII to apply to present actions and not to serve as a remedy for the present effects of past discrimination.[18]

The district court also concluded that the requirements of a high school degree and satisfactory scores on two professionally prepared exams served the employer's interest of having an educated workforce.[19] According to the court,

> The Act does not deny an employer the right to determine the qualities, skills, and abilities required of his employees. But the Act does restrict the employer to the use of tests which are professionally developed to indicate the existence of the desired qualities and which do not discriminate on the basis of race . . . .[20]

District Court Judge Eugene Gordon analyzed the plaintiff's claims under a disparate treatment theory of discrimination.[21] He looked to the employer's intent for imposing both requirements.[22] Because Duke Power Company had applied the high school and testing requirements fairly to black and white employees for the purpose of improving the quality of its workforce, the district court found no violation of the Civil Rights Act.[23] In commenting on the subject, Professor Michael Gold observed that Judge Gordon "rejected the heart and soul of [disparate] impact, for he held the diploma and testing requirements were lawful because they were intended to serve a legitimate purpose and were administered fairly."[24] In Judge Gordon's analysis, "discrimination depended on the reasons for, not the effects of, an employer's act."[25]

C. The Court of Appeals' Groundbreaking Analysis

On appeal, the Court of Appeals for the Fourth Circuit found that the district court had erred in refusing to acknowledge that the Civil Rights Act prohibited employers from instituting testing requirements that had the effect of continuing past discrimination.[26] The court analyzed the timing of each of the plaintiffs' applications for employment and how the Duke Power Company's first racial and then educational requirements had affected the present employment status of each employee.[27] For the purpose of understanding the origin of the disparate impact concept, only the Fourth Circuit Court of Appeals' analysis of the effect of the testing policy will be examined in depth.[28]

Writing for the Court, Circuit Judge Herbert Boreman determined that "while it is true that the Act was intended to have prospective application only, relief may be granted to remedy present and continuing effects of past discrimination."[29] The Fourth Circuit based its interpretation of the Act on *Quarles v. Philip Morris, Inc.*, which the United States District Court for the Eastern District of Virginia decided in 1968.[30] *Quarles* held that "Congress did not intend to freeze an entire generation of [African-American] employees into discriminatory patterns that existed before the act."[31] Furthermore, the Fourth Circuit noted that the Fifth Circuit had approved the *Quarles* court's interpretation of the Act in *Local 189, United Papermakers v. United States*.[32] Consequently, the Court of Appeals for the Fifth Circuit declared that a seniority system that continued past discrimination violated the Act.[33]

While the Court of Appeals for the Fourth Circuit recognized that the Act may provide relief to members of a protected class who suffer the continuing effects of past discrimination, it still applied a disparate treatment analysis.[34] The Court examined the intent of Duke Power Company to determine if the employer had engaged in discriminatory activity.[35] Judge Boreman concluded that in section 703(h) Congress had intended to protect general intelligence and ability tests as long as an employer applied the test fairly.[36] Judge Boreman's analysis sought to discern the intent of the employer for using the general intelligence and ability examination as a requirement for promotion.[37] The Court concluded that the Duke Power Company had a legitimate motive to increase the educational capacity of its workforce, and that it had applied the policy in a good faith manner.[38]

In his dissent, Circuit Judge Simon Sobeloff applied a disparate impact analysis to *Griggs* which provided the basis for the Supreme Court's subsequent analysis.[39] Judge Sobeloff focused on the language of section 703(a) of the Civil Rights Act of 1964.[40] He reasoned:

> The statute is unambiguous. Overt racial discrimination in hiring and promotion is banned. So too, the statute interdicts practices that are fair in form but discriminatory in substance. Thus it has become well settled that "objective" or "neutral" standards that favor whites but do not serve business needs are indubitably unlawful employment practices. The critical inquiry is *business necessity* and if it cannot be shown that an employment practice which excludes blacks stems from legitimate needs the practice must end.[41]

Under Judge Sobeloff's interpretation of the Act, a policy that has the effect of discriminating against African-Americans must have a legitimate purpose regardless of the employer's intent for instituting the policy.[42]

D. The Supreme Court's Analysis

The United States Supreme Court granted a writ of certiorari to examine whether Title VII of the Civil Rights Act of 1964 prohibited an employer from using a high school diploma and satisfactory scores on two professionally developed tests as requirements for promotion or transfer under three conditions, when

> (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify [African-Americans] at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.[43]

The addition of these three criteria to be examined, along with the initial issue as set forth in the decisions of the district court and the court of appeals, provided the factual predicate for the Court's disparate impact analysis in *Griggs*.[44]

The Court concluded that both the high school diploma and the professionally prepared aptitude tests failed to measure potential job performance in any of the departments.[45] The Court reached this conclusion even after the decisions of the district court and the majority for the court of appeals clearly had demonstrated that the Tower Amendment,[46] in the form of section 703(h), did not require that professionally prepared tests directly relate to the job in question.[47] The Court explained that the Clark-Case Memorandum indicated that an employer may use a bona fide examination to elevate the quality of the workforce.[48] It decided that the Act required tests to directly relate to business necessity.[49]

The Court felt that the overarching purpose of Title VII was as a tool to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[50] It continued, "[u]nder the Act,

practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[51] This analysis paralleled the reasoning in the dissenting opinion of the Fourth Circuit Court of Appeals.[52]

At the crucial, decisive, and pivotal point in its opinion, the Supreme Court reasoned:

> Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [African-Americans] cannot be shown to be related to job performance, the practice is prohibited.[53]

This critical paragraph enabled the Court to justify the creation of the disparate impact theory of discrimination. The Court utilized the fable of *The Fox and the Stork* as the linchpin to affirm the new concept of disparate impact.[54] It relied on the fable's logic to conclude that job qualification tools must provide for all members of society, regardless of their race, color, sex, national origin, or religion, to have an equal opportunity to qualify for a job.[55] The Court held that the requirements of the high school diploma and the professionally prepared aptitude tests had an "adverse impact" on African-Americans because, although Duke Power Company did not intend to prohibit them from obtaining jobs in the non-labor departments, they actually led to African-Americans not receiving these jobs.[56]

As explained by the *Griggs* Court, intent does not constitute an element in disparate impact discrimination.[57] The Court found that the purpose of Title VII of the Civil Rights Act of 1964 was to prevent the end result of discrimination, regardless of employer motivation.[58] As a consequence, disparate impact differs significantly from the more traditional concept of disparate treatment, which requires a plaintiff to prove the intent of the defendant.[59]

In the over forty years since the Supreme Court issued the *Griggs* decision, many academics have elaborately and painstakingly analyzed the case and its impact on employment discrimination law. However, not a single commentator has examined the use of *The Fox and the Stork* and its role in the creation of disparate impact.[60] While many scholars have gone to great lengths to verify that the Court broadly interpreted Title VII to justify disparate impact as a form of discrimination, none has evaluated or recognized the decisive use of the fable in creating the disparate impact option for plaintiffs.

II. The Griggs Fable Ignored

In the critical paragraph in *Griggs* in which the Court declared its acceptance of disparate impact as a form of discrimination, Chief Justice Burger referred to the fable.[61] His somewhat subtle use of *The Fox and the Stork* may appear accurate on its face, but a deeper analysis definitively reveals that intent actually plays a crucial role in the fable as well as in employment discrimination law.[62]

A. Fables in Brief

The prominent fable scholar Christos A. Zafiropoulos defined a fable as a "brief and simple fictitious story with a constant structure, generally with animal protagonists...which gives an exemplary and popular message on practical ethics and which comments, usually in a cautionary way, on the course of action to be followed or avoided in a particular situation."[63] Authors and storytellers typically employ fables to relay specific moral or life lessons.

In modern times,[64] scholars have worked to find similarities among fables to create classification systems based on motifs, messages, and actions.[65] In standardizing the analysis of fables, scholars observe the actions and qualities of certain animals and interpret them on a human scale.[66] The animals used in a particular fable are not random; they represent specific character traits that the fabulist intends to criticize or evaluate.[67] For example, the fox, a key actor in the *Griggs* fable, represents a cunning character.[68]

Like other literary devices, such as similes or comparisons, fables reveal certain aspects of human nature and the values of a particular culture. The concept of competition or, in fable literature, the *agon*, appears frequently;[69] a confrontation between characters is common in fables.[70] In many instances, the weaker of the two animals outwits the stronger.[71]

Reciprocity constitutes the fundamental feature of *The Fox and the Stork*.[72] Professor Zafiropoulos defined reciprocity in fables as a "voluntary exchange of goods and services between two or more parties. In essence, it poses the following demands to the ethical agent: to help those who helped him, to harm those who harmed him[,] and not to injure those who helped him."[73]

Two types of reciprocity exist: positive reciprocity and negative reciprocity.[74] The concept of negative reciprocity applies to the *Griggs* fable.[75] One form of negative

reciprocity—hostile reciprocity—can be found in *The Fox and the Stork*e.[76] In instances of hostile reciprocity, the characters engage "in the promotion of self-interest at the expense of the other party; it breaches the mutuality of the relationship because the agent takes something and gives nothing in return."[77] Hostile reciprocity relies on the concept of *lex talionis*, "the repayment of the harm by harm often of identical value."[78] As a core consequence, the essential element of hostile reciprocity focuses on the intent of a party to deliberately inflict a hardship or unpleasant act on the other party.[79] An accurate literary analysis of *The Fox and the Stork* reveals the failure of the Court to recognize the presence of hostile reciprocity in the fable, creating a misunderstanding of the role of intent in the creation of disparate impact.[80]

B. *The Fox and the Stork*

The most typical version of this fable specifies:

> A Fox invited a Stork to dinner, at which the only fare provided was a large flat dish of soup. The Fox lapped it up with great relish, but the Stork with her long bill tried in vain to partake of the savoury broth. Her evident distress caused the sly Fox much amusement. But not long after the Stork invited him in turn, and set before him a pitcher with a long and narrow neck, into which she could get her bill with ease. Thus, while she enjoyed her dinner, the Fox sat by hungry and helpless, for it was impossible for him to reach the tempting contents of the vessel.[81]

Another version replaces the stork with a crane:

> The fox invited the crane (the stork in Ph.)[82] to eat and served him a broth or a soup, which he poured onto marble, so that the stork could not drink it. But he in turn invited the fox and served him in a bottle with a narrow neck, from which he too could not drink. Closing statement by the stork: we must draw the consequences of what we do.[83]

Although many versions of *The Fox and the Stork*, or *The Fox and the Crane* exist, the general sequence of events and the outcome remain the same: The fox invites the bird for a meal, intentionally serving it in a shallow dish to prevent the bird from eating. The bird reciprocates and invites the fox for a meal, intentionally serving it in a tall, slender vessel—the fox is unable to eat.[84] The moral: "one bad turn deserves another."[85]

Professor Francisco Rodriguez Adrados described the sequence of events in *The Fox and the Stork* as an exchange with "two *agones* of action with the result inverted: punishment of the wicked fox..."[86] The key aspect of each animal's actions involves the deliberateness and malicious intent to prevent the other from consuming the meal. While the fox's initial intentional act represents its malicious and cunning nature, the stork's intentional act represents justice and punishment for the fox's deliberate act.[87]

The cunning fox deliberately served dinner in a shallow bowl to prevent the stork from eating.[88] In the end, the stork actually outwitted him by intentionally reciprocating the fox's malicious action to ensure he suffered the same embarrassment.[89] This interaction and negative reciprocity to transform the fox into the victim of his own behavior is a common punishment for the cunning animal in fables.[90]

The stork in this fable represents justice. It recognized the deliberate act and intent of the fox to embarrass him.[91] The key element in the stork's action is the use of *lex talionis* to punish the fox.[92] In the realm of fables, the appropriate punishment for inappropriate behavior requires the initial wrongdoer to suffer in the same manner he had intended for his victim.[93]

At first glance, the actions of the fox and the stork may appear quite innocent. A more thorough literary analysis reveals that every action contains a clear intent on the part of the actors. The qualities of the fox and the stork, as well as the several versions of the fable demonstrate that the actual intent of the parties is a fundamental and pivotal feature of the fable.[94]

III. The Far-Reaching Impact of the False Premise

After analyzing the history of *Griggs*, the origin of disparate impact, and the true meaning of *The Fox and the Stork,* the evidence demonstrates that the Court either misunderstood the fable or improperly manipulated its true meaning to bolster the disparate impact concept of discrimination.[95] Disparate impact may appear to involve a neutral act, but as the layers are peeled away, an intentionally discriminatory act may be revealed. While on the surface Chief Justice Burger's interpretation of the fable may appear to be an accurate reading, he omitted the crucial point: the fable deals exclusively with intent![96] Quite strikingly, the Court succeeded in justifying a newly announced, non-intentional form of discrimination by using as its critical foundation a fable whose essence involves the explicit intent of the two characters.[97] And for over forty years, no one has exposed this error![98]

By writing with the sweeping authority that the Supreme Court commands, the Court successfully created and concealed an artificial distinction within the definition of discrimination as specified in Title VII.[99] Whereas the Act proscribed one form of discrimination in which an employer intentionally attempts to prevent a protected class from having the same opportunities as the majority, the *Griggs* ruling created a cause of action that Congress

originally did not intend.[100] Just as the Court created a distinction not found in Title VII about the nature of discrimination, the context in which the Court interpreted the fable represents an inaccurate distinction. By only using the fable's vessel to define discrimination, the Court omitted the fable's key aspect: the intentional actions of the characters.[101] By stating that the vessel must be one from which all members of society can eat, the Court ironically failed to truly relay the most important message of the fable: intentional inhospitality reciprocated.[102] It artificially manipulated the fable, using only the part that justified its goal: the creation of the disparate impact theory.[103]

The district court, the majority of the Court of Appeals for the Fourth Circuit, and the commentary of Professor Michael Gold reveal that Congress never intended to create a disparate impact definition of discrimination.[104] Not only does the Act specifically include the word "intent" in section 706(g),[105] the congressional record has several forceful examples of Congress's view of discrimination.[106] The Tower Amendment, the Clark-Case Memo, and comments made by several lawmakers on the floor of Congress reveal that Congress only had in mind the elimination of intentional discrimination in the workplace at the time of the passage of the Civil Rights Act of 1964.[107]

Even after the district court and the majority of the Court of Appeals for the Fourth Circuit accurately demonstrated Congress' intent for the meaning of discrimination,[108] the United States Supreme Court decided to reach beyond and create a new form of discrimination—disparate impact.[109] But the Court failed to adequately justify its new creation. It improperly interpreted the fable it used as the foundation for the creation of the concept of disparate impact.[110]

A. Disparate Impact's Negative Effect on Disparate Treatment Claims

The Court's failure to properly justify the creation of disparate impact has had long-lasting effects on employment discrimination law. As seen in the statistical evidence presented by Professor Selmi, disparate impact actually may have hurt members of protected groups by reducing the value and the ease of proving disparate treatment.[111] Disparate impact has arguably functioned to limit the number of successful claims of disparate treatment.[112]

Professor Selmi suggests that the Court's sanction of disparate impact as a cause of action under Title VII effectively constrained and limited the development of the disparate treatment theory of discrimination.[113] He hypothesizes that in the absence of the disparate impact cause of action, disparate treatment would have developed into a broad cause of action encompassing many claims that are now brought under the disparate impact theory.[114]

Professor Selmi showed with statistical evidence that plaintiffs generally fail to win suits claiming disparate impact.[115] Of the 130 appellate cases he analyzed, plaintiffs prevailed in only 19.2% of the claims.[116] Furthermore, several of these cases also succeeded under a disparate treatment interpretation of discrimination.[117] Thus, the disparate impact theory of discrimination has not only not fulfilled its potential of eradicating the present effects of past discrimination, but has also reduced the potential value of the disparate treatment theory.

B. Codification of Disparate Impact in the Civil Rights Act of 1991

In 1991, Congress amended the Civil Rights Act of 1964 and codified the judicially created disparate impact theory of employment discrimination[118] to nullify the Supreme Court's decision in *Wards Cove Packing Co., Inc. v. Atonio.*[119] In *Wards Cove Packing Co., Inc.*, the Supreme Court determined that the proper analysis for demonstrating *prima facie* cases of disparate impact involved comparing "the racial composition of the at-issue jobs and the racial composition of the qualified population in the relevant labor market."[120] Congress's reaction to the decision to modify the mechanism for calculating disparate impact was to codify the *Griggs* method.[121]

While Congress codified the method for demonstrating disparate impact, it also specifically added the concept of disparate impact in the section addressing unlawful employment practices.[122] This addition reveals by implication that the 88th Congress did not intend for disparate impact to be included in the definition of discrimination in the Civil Rights Act of 1964.

After the Supreme Court's decision in *Griggs*, disparate impact became a fundamental element of employment discrimination law.[123] The Court extended the foundation in *Griggs* in subsequent cases by creating the standards for demonstrating disparate impact.[124] By the time Congress codified disparate impact in the Civil Rights Act of 1991, disparate impact had existed as a recognized form of discrimination for twenty years.[125] Although many scholars demonstrated that the Court inappropriately created disparate impact, perhaps if scholars, jurists, or lawmakers had discovered the erroneous use of *The Fox and* the *Stork*, Congress would have questioned in greater depth the disparate impact theory.[126]

C. The Ongoing Tension Between Disparate Treatment and Disparate Impact

The interplay between disparate treatment and disparate impact arose in *Ricci v. DeStefano*.[127] In *Ricci*, the Court determined that the City of New Haven's decision to refuse to implement the results of a professionally prepared examination due to the fear of a potential disparate impact lawsuit from African-American firefighters constituted disparate treatment against the white and Hispanic firefighters who had sued the City.[128] This case

represented a fundamental paradigm shift by the Court concerning the interaction between disparate treatment and disparate impact discrimination.[129] In instances when disparate treatment and disparate impact conflict, the Court specified that the defendant must justify engaging in disparate treatment with a strong basis in evidence demonstrating the likelihood of a potential disparate impact lawsuit.[130] It determined that the defendant lacked the necessary strong basis in evidence to prove that the exam results had a disparate impact on African-American applicants.[131] "[A] 'strong basis in evidence' means an employer finding of potential disparate impact *liability*, as opposed to a mere *prima facie case*."[132] The *Ricci* decision refocused the priority of disparate treatment claims over disparate impact claims unless the defendant satisfied the strong basis in evidence standard.[133]

Ricci revealed the inevitable tension an employer faces when using a professionally prepared exam that yields potentially disparate results.[134] On the one hand, an employer must establish that the examination is demonstrably job related.[135] On the other hand, an employer faces a legal dilemma if the results have a disparate impact on a protected class of test-takers.[136] The employer can either implement the results of the exam and face a disparate impact claim, or the employer can intentionally reject the results, thereby precluding promotions for the test takers who passed.[137]

The tension addressed in *Ricci* reveals another unforeseen consequence of the *Griggs* decision.[138] *Griggs* shifted the legal focus from the explicitly enacted theory of disparate treatment to the originally judicially created theory of disparate impact.[139] As demonstrated by Professor Selmi, there is an inaccurate perception that disparate impact is easier to prove[140] which causes plaintiffs to more likely argue disparate impact to prove discrimination claims, rather than disparate treatment.[141] Disparate impact requires statistical evidence to show that a professionally prepared examination yielded disparate results for a protected class.[142] Disparate treatment requires proof of intent or the use of circumstantial evidence, which may be difficult to uncover.[143] Prior to *Ricci*, employers lacked legislative or judicial guidance for dealing with a potential conflict between disparate treatment and disparate impact.[144]

The tension between disparate treatment and disparate impact recently reached reasonable accommodation cases.[145] The EEOC Compliance Manual on Religious Discrimination explicitly provides that "[a] religious accommodation claim is distinct from a disparate treatment claim, in which the question is whether employees are treated equally. An individual alleging denial of religious accommodation is seeking an adjustment to a neutral work rule that infringes on the employee's ability to practice his religion."[146]

In *EEOC v. Abercrombie & Fitch*, the U.S. Supreme Court clarified how to analyze reasonable accommodation cases in the context of the statutorily provided unlawful employment practices.[147] Samantha Elauf, a Muslim woman who wore a headscarf, applied for a job at the retailer, Abercrombie & Fitch.[148] Abercrombie denied her employment because her headwear violated its "Look Policy."[149] Factual disputes existed concerning whether Abercrombie knew or suspected she wore the headscarf as part of her religious observance.[150] The EEOC, on behalf of Ms. Elauf, initiated an action that alleged Abercrombie's practices were "intentional and designed to deprive Samantha Elauf of equal employment opportunities and otherwise adversely affect her status as an employee."[151] The EEOC's complaint failed to identify the theory of discrimination Abercrombie allegedly had violated, including the word "intentional" as well as the phrase "adversely affected" to implicate both the disparate treatment and the disparate impact theories.[152]

The U.S. Supreme Court held that Abercrombie & Fitch had violated Title VII by denying Ms. Elauf a job, finding that her religion was a "motivating factor" in Abercrombie's decision to deny her the position.[153] Justice Scalia, writing for the Court, recounted that disparate treatment and disparate impact "are the only causes of action under Title VII." The Court then clarified that religious accommodation claims must be brought under a disparate treatment analysis.[154] The holding therefore rejected the EEOC's guidance that religious accommodation claims are distinct from disparate treatment claims.[155]

In an opinion concurring in part and dissenting in part, Justice Thomas agreed that only two unlawful employment practices exist. But he challenged the majority's assessment that religious accommodation cases must be analyzed under a disparate treatment theory.[156] He accurately observed that disparate impact "[c]onceived by this Court in *Griggs v. Duke Power Co....*provides that a 'facially neutral employment practice may be deemed illegally discriminatory without evidence of the employer's subjective intent to discriminate that is required in a disparate-treatment case.'"[157] Justice Thomas would have held that Abercrombie's action did not constitute disparate treatment because it had applied a neutral policy even though the effect fell "more harshly on those who wear headscarves as an aspect of their faith."[158] He noted that "cases arising out of the application of a neutral policy absent religious accommodations have traditionally been understood to involve only disparate-impact liability."[159]

As yet another perpetuation of the original confusion created by *Griggs*, the ramifications of categorizing certain religious accommodation cases under the disparate treatment or the disparate impact theories have a significant impact on the damages available for recovery by prevailing employees. 42 U.S.C. § 1981a(a)(1) permits courts to award both compensatory damages and punitive damages to complaining parties who suffer intentional unlawful

employment practices.[160] However, 42 U.S.C. § 1981a(a)(1) specifically excludes complaining parties who experience disparate impact from recovering compensatory and punitive damages.[161] Employees who prevail under the disparate impact theory only may recover equitable relief that includes reinstatement, back pay, and attorney fees.[162] This ongoing tension between the application of disparate treatment theory and the disparate impact theory ultimately causes significant practical and quantifiable distinctions that affect potential recoveries for prevailing employees.

D. Griggs' Impact on European Union Non-Discrimination Law

Not only has *Griggs* forever changed U.S. employment discrimination law, but it has also played a significant role in shaping the European Court of Justice's analysis of non-discrimination laws.[163] While the United States was enacting civil rights legislation to protect a number of different classes from employment discrimination, the European Union and its member countries were enacting sex discrimination laws.[164] Unlike the United States, Europe in the 1960s and 1970s had a fairly homogeneous population.[165] Therefore, its early non-discrimination laws were enacted in the context of equal pay laws for men and women.[166]

In the 1970s, the Labour Government in the United Kingdom enacted equal pay laws and sex discrimination laws.[167] In the process of enacting the Sex Discrimination Act of 1975, British Home Secretary, Roy Jenkins, visited the United States.[168] While in the United States he discovered the then recent decision in *Griggs v. Duke Power Company*.[169] Upon returning home, Jenkins brought with him the concept of disparate impact, which was included in the Sex Discrimination Act of 1975 as a form of indirect discrimination.[170]

In the mid 1970s and 1980s, the European Court of Justice expressly adopted the *Griggs* analysis of disparate impact, calling it "indirect discrimination."[171] Like the U.S. Supreme Court, it adopted the theory of indirect discrimination without an explicit European Union legislative mandate.[172] Indirect discrimination existed as a form of protection in the context of equal pay.[173] The European Court of Justice expanded the theory of indirect discrimination in the 1970s and 1980s in cases such as *J.P. Jenkins v. Kingsgate (Clothing Productions) Ltd.*[174] and *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz*.[175]

In the 1990s and 2000s, the Council of the European Union issued legislative directives that codified the concept of indirect discrimination in the context of nationality, religion or belief, disability, age, and many other protected classes.[176] In 2000, the Council enacted Directive 2000/78/EC, which created a "general framework for equal treatment in employment and occupation."[177] This directive provided a uniform definition for indirect discrimination, which had been created through the European Court of Justice's adoption of *Griggs* and subsequent EC directives that codified indirect discrimination in directives dealing with specific types of discrimination.[178] As a consequence, the false premise of *Griggs* has not only shaped U.S. employment discrimination law, but also the non-discrimination laws of all European Union member countries.[179]

Conclusion

Although the fable may appear to represent just a minute detail in the *Griggs* decision, the effects of the failure of the Court to properly interpret and understand the true meaning of *The Fox and the Stork* has had a lasting impact on employment discrimination law.[180] The Court's use of the fable, which involved intentional inhospitality reciprocated as the underpinning for the creation of disparate impact, and the Court's failure to understand it as a lesson based solely on intent, revealed its determination to lend validity to the concept of disparate impact.[181] Unfortunately, since 1971, scholars, judges, and legislators have failed to recognize the Court's serious interpretational blunder. They have also ignored the fact that the Court extended its reach beyond the legislative history, which revealed the original congressional intent to limit Title VII to intentional discrimination.[182]

In recent years, scholars have focused on multidisciplinary studies that incorporate facets from different fields.[183] In its *Griggs* decision, the Court unexpectedly incorporated a literary fable into its legal analysis.[184] Its improper use of the fable represents the genuine problem when experts in one area of study attempt to incorporate aspects of a different field of study in which they do not have the necessary training and expertise.[185]

Additionally, over the course of the past forty-five years many scholars have written about *Griggs* and disparate impact, but to date all have ignored the role that the fable played in the Court's approval of the concept of disparate impact.[186] If judges or scholars had noticed the manipulated interpretation of the fable at an earlier time, the amendments to the Civil Rights Act in 1991 may have developed differently.[187]

A broader point to consider based on the Court's failure to properly interpret the fable involves the concept of checks and balances. Why did the misinterpretation of the fable go unnoticed for so long? Many scholars have cited the creation of disparate impact as one of the most important developments in employment discrimination law,[188] yet not one has analyzed the fable by which the Court justified the creation of disparate impact in sufficient depth. Scholars and members of the government must hold the Court accountable for making intentional or inadvertent mistakes like this in the future—especially in situations that have such a lasting impact on the law in the United States and abroad.

Endnotes

1. This article is a significantly condensed version of the article that the Hofstra Labor and Employment Law Journal previously published. *See The Griggs Fable Ignored: The Far-Reaching Impact of a False Premise*, 33 Hofstra Lab. & Empl. L.J. 41 (2016) http://www.hofstralelj.org/wp-content/uploads/2016/04/Douglas-Final.pdf.
2. This article uses the term "disparate impact" instead of "adverse impact" to refer to facially neutral/unintentional discrimination. Congress used the term "disparate impact" to refer to facially neutral/unintentional discrimination in the Civil Rights Act of 1991, which codified the judicially created theory of facially neutral/unintentional discrimination. *See* 42 U.S.C. § 2000e-2(k) (2012).
3. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Prior to the Supreme Court's decision in *Griggs*, disparate treatment, the only recognized form of discrimination under Title VII of the Civil Rights Act of 1964, required a plaintiff to demonstrate the discriminatory intent of an employer. *See also* Michael Evan Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 Indus. Rel. L.J. 429, 431 (1985).
4. *Griggs*, 401 U.S. at 431 ("Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proffered be one all seekers can use.").
5. *See, e.g.*, Gold, *supra* note 3, at 432; Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. Rev. 701, 748 (2006). *See generally* Herbert N. Bernhardt, Griggs v. Duke Power Co.: *The Implications for Private and Public Employers*, 50. Tex. L. Rev. 901 (1972).
6. *See Griggs*, 401 U.S. at 431.
7. *See* 42 U.S.C. § 2000e-2(k) (2012) (amending Title VII of the Civil Rights Act of 1964 in 1991 to include disparate impact).
8. *Id.* § 2000e-2(h). Section 2000e-2(h) is also referred to as section 703(h) of the Civil Rights Act of 1964.
9. *Griggs*, 401 U.S. at 431-32 ("The [Civil Rights] Act [of 1964] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory operation.").
10. Gold, *supra* note 3, at 477-78.
11. Selmi, *supra* note 5, at 702.
12. *Griggs*, 401 U.S. at 425-26. Duke Power Company utilized the Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test in addition to its pre-existing high school diploma requirement. *Id.* at 428.
13. Griggs v. Duke Power Co., 292 F. Supp. 243, 244 (M.D.N.C. 1968).
14. *Griggs*, 401 U.S. at 426-27 ("[Duke Power] Company openly discriminated on the basis of race in the hiring and assigning of employees" prior to the effective date of the Civil Rights Act of 1964).
15. *Griggs*, 292 F. Supp. at 251.
16. *Id.* at 247. The Civil Rights Act of 1964 took effect on July 2, 1965. On the same date, Duke Power Company instituted its testing requirement. *Id.* at 245.
17. *Id.* at 248.
18. *Id.* The district court distinguished the facts in *Griggs* from the restrictions utilized by the employer in *Quarles v. Philip Morris, Inc. Id.* at 249; *see also* Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).
19. *Id*. at 250.
20. *Id.*
21. Gold, *supra* note 3, at 469.
22. *Id.*
23. *See id.*
24. *Id.* at 470-71.
25. *Id.* at 471.
26. Griggs v. Duke Power Co., 420 F.2d 1225, 1230 (4th Cir. 1970).
27. *See id.* at 1230-31.
28. *See id.* at 1230-35.
29. *Id.* at 1230.
30. *Id.*
31. *Id.* (quoting Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 516 (E.D. Va. 1968)).
32. *Id.*; Local 189, United Papermakers v. United States, 416 F.2d 980, 995 (5th Cir. 1969).
33. *Local 189*, 416 F.2d at 995 (quoting *Quarles*, 279 F. Supp. at 517).
34. *Griggs*, 420 F.2d at 1230, 1232.
35. *Id.* at 1232.
36. *Id.* at 1234-35.
37. Gold, *supra* note 3, at 473.
38. *Id.*
39. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); *Griggs*, 420 F.2d at 1238 (Sobeloff, J., dissenting).
40. Griggs, 420 F.2d at 1238 (Sobeloff, J., dissenting).
42. U.S.C. § 2000-2(a) (2012).
41. *Id*.
42. *Id*. at 1246.
43. *Griggs*, 401 U.S. at 426.
44. *See id.* at 424-29.
45. *See id.* at 433.
46. *See* Michael Rothschild & Gregory J. Werden, *Title VII and the Use of Employment Tests: An Illustration of the Limits of the Judicial Process*, 11 J. Legal Stud. 261, 261, 266-69 (1982), at 268-69 (discussing the legislative history of section 703(h)).
47. *See* 42 U.S.C. § 2000e-2(h) (2012); *Griggs*, 420 F.2d at 1231-34; Griggs v. Duke Power Co., 292 F. Supp. 243, 250 (M.D.N.C. 1968).
48. *See* Gold, *supra* note 3, at 487. Senators Case of New Jersey and Clark of Pennsylvania were the co-managers of the Act in the Senate. *Id*. The two Senators issued a memorandum explaining that "the proposed Title VII 'expressly protects the employer's right to insist that any prospective applicant . . . *must meet the applicable job qualifications*.'" *Id*. (quoting *Griggs*, 401 U.S. at 434).
49. *Griggs*, 401 U.S. at 431.
50. *Id.* at 429-30.
51. *Id*. at 430.
52. *See Griggs*, 420 F.2d at 1247 (Sobeloff, J., dissenting).
53. *Griggs*, 401 U.S. at 431.
54. *See Griggs*, 401 U.S. at 431.
55. *See id*.
56. *Id*. at 427, 432.
57. *Griggs*, 401 U.S. at 432.
58. *Id*.

59. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

60. *See, e.g.*, Gold, *supra* 3; Rothschild & Werden, *supra* note 46; Selmi, *supra* note 5.

61. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

62. Without reference to the fable of *The Fox and the Stork*, the critical paragraph in the *Griggs* decision would read as follows:

> Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account . . . . The Act proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [African-Americans] cannot be shown to be related to job performance, the practice is prohibited.

Id. (omitting the Court's reference to the fable).

63. Christos A. Zafiropoulos, Ethics in Aesop's Fables: The *Augustana* Collection 1 (2001). Zafiropoulos's definition builds on the description of the Greek scholar Theon, who stated that the fable is a "fictitious narration that portrays reality." *Id.*

64. *See* 1 Francisco Rodriguez Adrados, History of the Graeco-Latin Fable 24, 48 (Leslie A. Ray trans., 1999).

65. Two major classification systems exist for fables; the first was created by fable scholar Ben Edwin Perry in his book *Aesopica*. *See* 1 Adrados, *supra* 64, at 48. The second system, the AT-Number, named after Antti Aarne and Stith Thompson, used a numbering system that refers to specific types of fables. *AT Types of Folktales*, The Gold Scales, http://oaks.nvg.org/folktale-types.html (last visited Sept. 21, 2015). "AT-numbers are practical tools of folklore." *Id.* "The initial catalogue was developed and published in 1910 by Aarne under the title 'Index of Types of Folktale.'" *Id.*

66. Zafiropoulos, *supra* note 63, at 28, 39.

67. *See id.* at 37-39.

68. *Id.* at 29.

69. *See id.* The importance of competition in Greek culture can be observed in the legacy of the Olympic Games. *See The Athlete*, olympic.org, http://www.olympic.org/ancient-olympic-games?tab=the-athlete (last visited Sept. 16, 2015). Furthermore, one of the most widely known fables of Greek origin, *The Tortoise and the Hare*, revolves around a race. *See* Aesop, *The Hare and the Tortoise*, Lit2Go, http://etc.usf.edu/lit2go/35/aesops-fables/612/the-hare-and-the-tortoise/ (last visited Sept. 16, 2015).

70. 1 Adrados, *supra* note 64, at 186.

71. *Id.*

72. *See* Zafiropoulos, *supra* note 63, at 81; *see also* Aesop, *The Fox and the Stork*, Bartleby.com, http://bartleby.com/17/1/19.html (last visited Oct. 5, 2015).

73. Zafiropoulos, *supra* note 63, at 81.

74. *Id.*

75. *See id.*

76. *See id*.

77. *Id.* at 82.

78. *Id.* at 82. *See also Lex talionis*, Black's Law Dictionary (10th ed. 2014) ("The law of retaliation, under which punishment should be in kind—an eye for an eye, a tooth for a tooth, and so on—but no more.").

79. *See* Zafiropoulos, *supra* note 63, at 114-17.

80. *See infra* Part III.A-B (discussing the far-reaching impact of the Court's misapplication of *The Fox and the Stork*).

81. Aesop, Aesop's Fables 23 (V.S. Vernon trans., 1916) [hereinafter Aesop's Fables].

82. "Ph." refers to the fabulist Phaedrus, who told the version of the fable as "[a]n *agon* of the two animals, in two acts, with the stork (or crane) triumphing: the fox serves soup on a plate that is not very deep, the bird in a bottle with a narrow neck." 2 Francisco Rodriguez Adrados, History of the Graeco-Latin Fable 144 (Leslie A. Ray trans., 2000).

83. 3 Adrados, *supra* note 82, at 387.

84. *See, e.g.*, *id*.; Aesop's Fables, *supra* note 81, at 23.

85. Aesop, *supra* note 81.

86. 3 Adrados, *supra* note 82, at 387.

87. In fables, the fox generally represents a cunning individual, whose behavior epitomizes the conduct of an actor who would deliberately serve a meal in a shallow vessel to an animal with a long, narrow beak. *See* 1 Adrados, *supra* note 64, at 158, 353.

88. *See, e.g.*, 3 Adrados, *supra* note 82, at 387; Aesop's Fables, *supra* note 85, at 23.

89. *Id.*

90. 3 Adrados, *supra* note 82, at 387; *see also* Zafiropoulos, *supra* note 62, at 81-82.

91. 3 Adrados, *supra* note 82, at 387.

92. *See* Zafiropoulos, *supra* note 63, at 82.

93. *See id.*

94. *See, e.g.*, 3 Adrados, *supra* note 82, at 387-88 (depicting various examples of the fox's mischievous nature throughout several fables including *The Fox and the Stork*).

95. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (comparing actions of parties with the fable of *The Fox and the Stork* without considering the character of either creature). *But cf.* Selmi, *supra* note 5, at 722 (discussing whether disparate impact should have been implemented).

96. *See Griggs*, 401 U.S at 431; *see also* 3 Adrados, *supra* note 82, at 387-88.

97. *See* 3 Adrados, *supra* note 82, at 387-88.

98. *See, e.g.*, Gold, *supra* note 2, at 478-80.

99. *See* 42 U.S.C. § 2000e-2(k) (2012) (amending Title VII of the Civil Rights Act of 1964 in 1991 to include disparate impact as discussed by the *Griggs* court).

100. Gold, *supra* note 3, at 492.

101. *Griggs*, 401 U.S. at 431; Aesop, *supra* note 81.

102. *Compare Griggs*, 401 U.S. at 431 ("the vessel in which the milk is proffered [must] be one all seekers can use."), *with* Zafiropoulos, *supra* note 63, at 82 (explaining the importance of *lex talionis* in the fable), *and* Aesop, *supra* note 81 (illustrating that the stork's response that "each bad turn deserves another" evinces inhospitality reciprocated).

103. In *Griggs*, the Court's analogy to the vessel and the employee skills tests omits the fable's central theme of *lex talionis* and inhospitality reciprocated in order to conclude that Congress intended a disparate impact definition of discrimination. *Griggs*, 401 U.S. at 431.

104. Gold, *supra* note 3, at 492; *see also* Griggs v. Duke Power Co., 420 F.2d 1225, 1234 (4th Cir. 1970); Griggs v. Duke Power Co., 292 F. Supp. 243, 250 (M.D.N.C. 1968).

105. 42 U.S.C. § 2000e-5(g) (2012) ("If the court finds that the respondent has intentionally engaged in or is intentionally

engaging in an unlawful employment practice...the court may enjoin the respondent from engaging in such unlawful employment practice...").

106. *See* Rothschild & Werden, *supra* note 46, at 267.
107. *See id.* at 268 (discussing the legislative history of § 703(h)).
108. *See supra* note 108 and accompanying text.
109. *See Griggs*, 401 U.S. at 430, 432.
110. *See id.* at 431; *see also* Aesop, *supra* note 81.
111. *See* Selmi, *supra* note 5, at 706-07.
112. *Id.* at 705.
113. *Id.* at 706-07.
114. *Id.*
115. *Id.* at 738-39.
116. *Id.* at 738.
117. *See id.* at 742.
118. *See* 42 U.S.C. § 2000e-2(k) (2012).
119. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 Fordham L. Rev. 523, 525 (1991); *see also id.* § 2000e-2(k).
120. *Wards Cove*, 490 U.S. at 642 (citing Hazelwood School Dist. v. United States, 433 U.S. 299, 308).
121. Perry, *supra* note 119, at 525 & n.14; *see also* 42 U.S.C. § 2000e-2(k).
122. 42 U.S.C. § 2000e-2(a)(2).
123. *See* Mack A. Player, Employment Discrimination Law 356 (Student ed. 1988).
124. *See* Washington v. Davis, 426 U.S. 229 (1976).
125. *See* Perry, *supra* note 119, at 525.
126. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); Selmi, *supra* note 5, at 722 (discussing how there was little discussion regarding whether intent was a required element of proof for disparate impact cases).
127. Ricci v. DeStefano, 557 U.S. 557 (2009).
128. *See id.* at 579.
129. *See id.* at 584.
130. *See id.*; *see also* Roberto L. Corrada, *Ricci's Dicta: Signaling a New Standard for Affirmative Action Under Title VII?*, 46 Wake Forest L. Rev. 241, 255 (2011).
131. *Ricci*, 557 U.S. at 586.
132. Corrada, *supra* note 134, at 255.
133. *Ricci*, 557 U.S. at 592.
134. *Id.* at 592-93.
135. *Id.* at 578.
136. *Id.* at 578-79.
137. *See id.*
138. *See id.* at 578.
139. *See id.* at 577-78.
140. *See* Selmi, *supra* note 5, at 734, 738-39, 742, 768, 776-80.
141. *See id.* (illustrating the effect that different burdens have on plaintiffs' claims).
142. *See id.* at 780.
143. *See Ricci*, 557 U.S. at 577.
144. *See id.* at 580 (stating that the task of the Court is to provide guidance to employers where no rule exists in order to reconcile the conflict between the disparate treatment and disparate impact).
145. *See, e.g.*, EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015).
146. EEOC Compliance Manual, No. 915.003, Directives Transmittal: § 12-IV Reasonable Accommodation (2008).
147. *See Abercrombie*, 135 S. Ct. at 2033.
148. *Id.* at 2031.
149. *Id.*
150. *See* EEOC v. Abercrombie & Fitch Stores, Inc., 798 F. Supp. 2d 1272, 1283 (N.D. Okla. 2011).
151. Complaint at 3, EEOC v. Abercrombie & Fitch Stores, Inc., 798 F. Supp. 2d 1272 (N.D. Okla. Sept. 17, 2009) (No. 09-CV-602-GKF-FHM).
152. *Id.*
153. *See Abercrombie*, 135 S. Ct. at 2032.
154. *Id.* Justice Scalia further reasoned that:

> Abercrombie's argument that a neutral policy cannot constitute "intentional discrimination" may make sense in other contexts. But Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not "to fail or refuse to hire or discharge any individual . . . because of such individual's religious observance and practice."

Id.

155. *See* EEOC Compliance Manual, No. 915.003, § 12-IV Reasonable Accommodation (2008).
156. *Abercrombie*, 135 S. Ct. at 2037 (Thomas, J., concurring in part, dissenting in part).
157. *Id.* (citing Raytheon Co. v. Hernandez, 540 U.S. 44, 52-53 (2003)).
158. *Id.* at 2038.
159. *Id.* at 2039.
160. 42 U.S.C. § 1981a(a)(1) (2012).
161. *Id.*
162. *See* 42 U.S.C. § 2000e-5(g).
163. *See* Christa Tobler (an Authority of the European Network of Legal Experts in the non-discrimination field), *Limits and Potential of the Concept of Indirect Discrimination*, at 23, Eur. Commission, Directorate-Gen. for Emp't, Soc. Aff. and Equal Opportunities (Sept. 2008).
164. *See id.*
165. *See U.S. Immigration Since 1965*, History (2010), http://www.history.com/topics/us-immigration-since-1965.
166. Tobler, *supra* note 163, at 23.
167. *See* Simon Forshaw & Marcus Pilgerstorfer, *Direct and Indirect Discrimination: Is There Something in Between?*, 37 Indus. L. J. 347, 350 (2008).
168. *Id.*
169. *Id.*
170. *Id.*
171. *See* Tobler, *supra* note 163, at 23-24.
172. *Id.*
173. *See* Forshaw & Pilgerstorfer, *supra* note 167, at 350.

174. Case 96/80, Jenkins v. Kingsgate Ltd., 1981 E.C.R. 911. In *Jenkins*, the Court found that the fact that work paid at time rates was remunerated at an hourly rate which varied according to the number of hours worked did not expressly violate equal pay laws. *Id.* at 917. However, the Court further held that if the difference in pay was really a mechanism to indirectly reduce the pay of part-time workers, who tended to be women, the policy would violate the equal pay law. *Id.*

175. Case 170/84, Bilka-Kaufhaus GmbH v. Weber von Hartz, 1986 E.C.R. 1607. In *Bilka-Kaufhaus*, the European Court of Justice held that an employer could not prevent part-time workers from participating in pension programs. *Id.* at 1627. The Court reasoned that women are more likely to be part-time workers than men, and therefore preventing women from participating in pension programs would have a disparate impact on women. *Id.* The Court also held that access to pension programs constituted pay under European Union law. *See id.* Therefore, the indirect result of women not having access to pension programs constituted indirect discrimination under the equal pay principle. *See id.*

176. *See* Tobler, *supra* note 163, at 5.

177. *Id.* at 8 n.4.

178. Council Directive 2000/78, art. 2, 2000 O.J. (L 303) 16, 17 (EC); *see also* Tobler, *supra* note 163, at 5.

179. *See* Tobler, *supra* note 163, at 23-24.

180. Selmi, *supra* note 5, at 703 ("The *Griggs* decision has been universally hailed as the most important development in employment discrimination law.").

181. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); *see also* Aesop, *supra* note 81.

182. *See Griggs*, 401 U.S. at 432; *see also* Selmi, *supra* note 5, at 748.

183. *See Definition of Multidisciplinary*, Oxford Dictionaries, http://www.oxforddictionaries.com/us/definition/american_english/multidisciplinary (last visited Nov. 1, 2015) ("several academic disciplines or professional specializations in an approach to a topic or problem.").

184. *See Griggs*, 401 U.S. at 431.

185. *See* Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 Colum. L. Rev. 523, 552-53 (1995) (discussing the unfortunate misapplication of historical fact by a former Chief Justice of the Supreme Court).

186. *See supra* note 4 and accompanying text.

187. *See supra* Part III, notes 99-114.

188. *See* Selmi, *supra* note 5, at 701.

Robert L. Douglas is a full-time labor arbitrator and labor and employment mediator. Jeffrey Douglas is an attorney in the Labor and Employment Practice Group at Meltzer, Lippe, Goldstein & Breitstone, LLP in New York.

Disconnect Between Liability Under Federal Law and Conduct Perceived as Harmful with Respect to Workplace Harassment

By Walker G. Harman, Jr., and Edgar M. Rivera

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits discrimination against any individual with respect to his or her compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex, or national origin.[1] At the time of Title VII's passing, the statute was afforded a "liberal construction" so that it could fulfill its purpose of eliminating the inconvenience, unfairness, and humiliation of discrimination. Over time, however, jurisprudence has retreated from that ideal.[2] Today, much discriminatory and harmful conduct is not actionable because judges interpret Title VII to only prohibit "severe or pervasive" harassment. Yet one body of law has gotten it right: The New York City Human Rights Law (NYCHRL).[3] As discussed below, Title VII jurisprudence should be aligned with the NYCHRL so it can once again fully carry out its noble purposes.

I. Hostile Work Environment Under Federal Law

Harassment was first recognized as a form of discrimination in *Rogers v. EEOC*. Josephine Chavez, the sole Spanish-surnamed employee, alleged that her employer, a group of optometrists, segregated its patients by ethnicity, and that this discrimination resulted in an environment of "[abuse] by her Caucasian peers."[4] The Fifth Circuit recognized that these employment practices could violate Title VII because "the [statutory] phrase 'terms, conditions, or privileges of employment' . . . is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily."

Today, harassment is actionable upon a finding of the following: (1) unwelcome conduct that is based on race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information; (2) the unwelcome conduct creates a work environment that a reasonable person would consider intimidating, hostile, or abusive; and (3) such conduct is so severe or pervasive as to alter the conditions of the complainant's employment and create an abusive working environment.[5] Simple teasing, offhand comments, and isolated incidents—unless extremely serious—will not amount to discriminatory changes in the 'terms and conditions of employment.'[6]

In *Meritor Savings Bank v. Vinson*, the Supreme Court articulated the elements of a *prima facie* case of a hostile work environment: (1) the employee belongs to a protected class, (2) the employee was subjected to unwelcome harassment, (3) the harassment was based on employee's membership in a protected group, (4) the harassment affected a term, condition, or privilege of employment, and (5) there is some basis for establishing employer liability.[7]

In evaluating whether a plaintiff has been subjected to a hostile work environment, courts consider the following: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it 'unreasonably interferes with the employee's work performance.[8] In assessing the degree of severity and pervasiveness, courts must consider the totality of the harassing incidents, not each incident in isolation.

Accordingly, there is a wide range of conduct—all of which involves the treatment of one person less well than another because of a protected characteristic—that Title VII tolerates.

II. Microaggressions

As more brazen forms of workplace discrimination slowly become less common, employees may more often experience subtler forms of discrimination which are not prohibited under the present interpretation of Title VII. Much of this subtle, pervasive discrimination is captured in the concept of "microaggressions."

Chester Pierce, M.D. of Harvard University, developed the concept of microaggressions in the 1970s and describes microaggressions as "brief and commonplace daily verbal, behavioral, or environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial slights and insults toward people of color."[9] Although microaggressions were first described in the context of racial hostility against African Americans, academics have since extended the theory to include remarks and conduct directed against individuals from a socially "disadvantaged" identity group— a group of people who face special problems or are politically deemed to lack sufficient power or other means of influence, such as[10] members of racial minority groups, women, disabled people, older people, and undocumented immigrants. "Disadvantaged group" overlaps but is not identical to protected characteristics.

Today, many academics define microaggressions as "everyday slights insults, indignities and denigrating messages" aimed at socially disadvantaged groups by people who are usually unaware of the hidden messages that they send.[11] In other words, microaggressions are the "small act[s] of non-physical aggression based on stereotypes" or "the negative assumptions we make about people that limit their humanity and value." Microaggressions assail the mental health of recipients, create a hostile and invalidating work or campus climate, perpetuate stereotypes, create physical health problems, saturate the broader society with cues that signal devaluation of social group identities, lower work productivity and problem solving abilities, and create inequities in education, employment, and health care. In sum, what one person may view as an offhand comment can have a significant impact on another's life, especially when he or she is subjected to these comments repeatedly and from multiple sources.

Derald Wing Sue, Ph.D of Columbia University, classified microaggressions based on their degree of severity. According to Dr. Sue, there are three types of microaggressions: microassaults, microinsults, and microinvalidations.[12] Microassaults are conscious and intentional discriminatory actions; the speaker intends to harm the victim.[13] Examples include calling someone a racial epithet, discouraging interracial interactions, and deliberately serving a white client before a client of color. This is the most explicit and violent form of microaggression. Microinsults are a more subtly aggressive communication—an individual, consciously or not, conveys rudeness and insensitivity that demean a person's heritage or identity.[14] One example is commenting on a woman's appearance. "You look tired, it must be all of those kids you've had," implies that the employee, by virtue of being a mother, was neglecting her job duties. Microinvalidations are communications that subtly exclude, negate or nullify the thoughts, feelings, or experiential reality of a person.[15] For instance, white Americans asking Latinos where they "really" come from implies that Latinos are perpetual foreigners in the United States.[16] Although these three types of microaggressions vary in severity, all three cause minority or otherwise disadvantaged individuals to feel excluded and maintain a discriminatory status quo.

Microaggressions may be made verbally (stating "You speak good English" to a Latino or Asian coworker, suggesting that because of their ethnicity, Latino and Asian Americans are foreigners and not "real Americans," regardless of their birth place), nonverbally (clutching one's belongings more tightly when a black man passes on the sidewalk, conveying the belief that black people are prone to crime), and environmentally (using American Indian mascots during football games, suggesting that American Indians are savages or otherwise outsiders, thereby demeaning their culture and traditions).[17]

The microaggressor need not intend to hurt the person to whom the remark is made or at whom the conduct is aimed.[18] For example, Matt Lauer, journalist and host of NBC's *The Today Show*, was criticized for a remark he made during an interview with Mary Barra, the first female CEO of a major global automaker, shortly after she became General Motors' CEO.[19] Mr. Lauer asked Ms. Barra whether she could be both a good mother and an effective CEO of a major company.[20]

Mr. Lauer's statement revealed a judgment about the competence of a female executive that would never be made about a male executive; it would be strange for a journalist to ask a male CEO whether he could be a good father and an effective CEO of a major company.[21] Mr. Lauer's question assumed that by virtue of being female, Ms. Barra was doing her children a disservice by taking the CEO position.[22] Although Mr. Lauer probably did not mean to insult or demean Ms. Barra, his question came from and reinforced the stereotype of women as mothers above all else. This example shows that although overt sexism in the American workforce appears to be on the decline, it is instead becoming "more subtle and ambiguous."[23]

III. Microaggressions and Their Relation to Civil Rights Law

Under Title VII, prohibited discrimination includes subjecting an employee to a hostile work environment and unlawful employment practices. Unsurprisingly, examples of all three forms of microaggressions (microinsults, microinvalidations, and microassaults) are reported in a variety of judicial opinions brought under Title VII. However, as Title VII does not prohibit conduct that is "merely" offensive, not all microassaults are actionable (and neither are most microinsults and microinvalidations despite their impacts on their targets). Indeed, the Supreme Court held that "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" does not sufficiently affect the conditions of employment to implicate Title VII.[24] Certain extreme racial and ethnic epithets, such as "nigger," "kike," "spic," or "wetback," depending on the frequency and context of their use, may be found to be severe or pervasive, but not always.[25]

According to a study conducted by the American Psychological Association analyzing U.S. District Court opinions from bench trials between 2000 and 2008, there is "a disconnect between the experiences of targets of discrimination and the legal system in which recourse is sought." In other words, the courts are not taking notice of behaviors and conducts that employees clearly believe

are discriminatory. For example, the word "boy" without an explicit racial indicator (such as "black boy") could be evidence of racial animus because "[t]he speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom and historical usage";[26] the use of facially neutral "code words" that imply racial animus may provide the basis for a Title VII claim for a racially hostile work environment.[27] The key, apparently, is whether the conduct is intentional, even though that is not the standard set by Title VII. Only "behaviors that were clearly intended to cause harm" to members of protected classes are consistently correlated with favorable decisions for employees. In sum, courts are not giving a textualist interpretation to Title VII. The "disconnect" can be explained by the regulatory regime, which requires that in order to succeed on a disparate treatment claim, a plaintiff must prove that the employer *intentionally* discriminated.

In light of this, it is unsurprising that judges give greater weight to microassaults, which are often intentional, than to microinsults and microinvalidations, which are not necessarily intentional although may be as hurtful. Judges are seldom convinced that conduct which only the target perceives as harmful evidences unlawful discrimination.

IV. Hostile Work Environment Under New York City

The New York City Human Rights Law (NYCHRL) prohibits discrimination based on the following characteristics: age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation, or alienage or citizenship status.[28] Unlike Title VII, there is no requirement that harassment be severe or pervasive in order to be actionable under the NYCHRL.

Williams v. New York City Housing Authority[29] is the seminal case on the differences between Title VII and the NYCHRL with respect to harassment. In *Williams*, the court observed:

> Experience has shown that there is a wide spectrum of harassment cases falling between "severe or pervasive" on the one hand and a "merely" offensive utterance on the other. The NYCHRL is now explicitly designed to be broader and more remedial than the Supreme Court's "middle ground," a test that had sanctioned a significant spectrum of conduct demeaning to women.[30]

In *Constantin v. New York City Fire Dept.*, the Southern District of New York agreed with the central thesis of *Williams*: "Less egregious conduct than that required under Title VII may support a hostile work environment claim under the NYCHRL."[31] The focus of the NYCHRL is on making certain that discrimination does not play any role in the workplace. Its aim is to remove the inhibitions that prevent victims from coming forward, and to accept the cost of trial for covered entities as a necessary price of doing everything possible to eliminate all forms of discrimination.[32]

V. Conclusion

The courts currently interpret Title VII's prohibition of discrimination against employees narrowly. This interpretation retreats from Title VII's purpose: eliminate discrimination in U.S. workplaces and from the text of the statute. The NYCHRL deters discriminatory harassment and redresses employees better than Title VII, based on the most current psychology.

Endnotes

1. 42 U.S.C. § 2000e-2(a)(1).
2. *United States v. Med. Soc. of S. Carolina*, 298 F. Supp. 145, 151 (D.S.C. 1969).
3. New York City Human Rights Law, Tit. 8 N.Y. Admin. Code §§ 8-101 *et seq.*
4. 454 F.2d 234, 236 (5th Cir. 1971).
5. *Oncale v. Sundowner Offshore Services, Inc*., 523 U.S. 75, 81 (1998) ("Sexual harassment is actionable under Title VII only if it is so severe or pervasive as to alter the conditions of [the complainant's] employment and create an abusive working environment …. simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment," and, "The objective severity of sexual harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances.'").
6. *Id*.
7. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65-66 (1986).
8. *Constantin v. New York City Fire Dept*., No. 06 Civ. 04631(GBD) (THK), 2009 WL 3053851, at *18 (S.D.N.Y. September 22, 2009).
9. Sue DW, Capodilupo CM, Torino GC, Bucceri JM, Holder AM, Nadal KL, Esquilin M. (2007).*Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, American Psychologist, No. 62, No. 4, 271-286.
10. *Id*.
11. *Id*.
12. *Id*.
13. *Id*.
14. *Id*.
15. *Id*.
16. *Id*.
17. *Id*.

18. *Id*.

19. Pamela Kirkland, *Matt Lauer's producer says she prepared controversial question for Mary Barra*, Wash. Post, July 3, 2014, https://www.washingtonpost.com/blogs/she-the-people/wp/2014/07/03/matt-lauers-producer-says-she-prepared-controversial-question-for-mary-barra/.

20. *Supra* at 15.

21. *Id*.

22. *Id*.

23. *Racism's Cognitive Toll: Subtle Discrimination Is More Taxing on the Brain*, Association for Psychological Science, ScienceDaily, September 24, 2007, www.sciencedaily.com/releases/2007/09/070919093316.htm.

24. *Meritor Savings Bank*, 477 U.S. at 65-66.

25. *See, e.g.*, *Cerros v. Steel Tech., Inc.*, 288 F.3d 1040, 1047 (7th Cir. 2002) ("While there is no 'magic number' of slurs that indicate a hostile work environment, we have recognized before that an unambiguously racial epithet falls on the 'more severe' end of the spectrum.").

26. *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006).

27. *See Aman v. Cort Furniture Rental Corp*. 85 F.3d 1074, 1081-83 (3d Cir. 1996).

28. N.Y. Admin. Code § 8-107(1).

29. 61 A.D.3d 62 (1st Dep't 2009).

30. *Id.* at 76.

31. *Constantin*, 2009 WL 3053851, at*19 (quoting *Williams*, 61 A.D.3d at 79-80).

32. Craig Gurian, *A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law*, 33 Fordham Urb. L.J. 255, 300 (2006).

Walker G. Harman, Jr. is a Founding Partner and Edgar M. Rivera is an Associate at The Harman Firm, LLP in New York City.

New York Paid Family Leave: A Paradigm Shift

By Jessica Shpall Rosen

On April 4, 2016, Governor Cuomo signed into law groundbreaking paid family leave legislation that will cover most New York employees. The law amends the current employee disability benefits law by creating new paid leave benefits and job protection for employees who need a leave of absence to care for family members. This is a significant development in New York, which previously did not have its own state family leave law to supplement the federal Family Medical Leave Act (FMLA). Although the new paid family leave provisions do not go into effect until January 1, 2018 and regulatory guidance will likely be promulgated in the interim, employers should start considering how these changes will affect their company policies and procedures.

Scope of Leave

The law provides up to 12 weeks of paid, job-protected leave to employees who need a leave of absence to (1) care for a family member with a serious health condition, (2) bond with a new baby or a child after foster or adoptive placement, or (3) address family needs due to the active military duty of a close family member. "Family member" is defined broadly to include children, parents, grandparents, grandchildren, spouses, and domestic partners, and is not limited to blood relatives.

Eligibility

Employees are eligible for paid family leave if they have worked 26 or more consecutive weeks for an employer. Part-time employees are also eligible. To be able to receive paid family leave, employees must provide employers with written notice and a medical certification.

All employers, regardless of size, are covered. The original statutory definition of "employer" has not been amended, so all entities with at least one employee must comply with the law.

Amount of Leave Benefits

Paid family leave benefits will be phased in starting in January 2018, according to the following schedule:

Effective date	Number of weeks of leave that may be taken within any 52-week calendar period	Amount of paid leave
January 1, 2018	8 weeks	50% of the employee's weekly pay, capped at 50% of the New York State Average Weekly Wage. The State Average Weekly Wage for 2015 was $1,296.48.
January 1, 2019	10 weeks	55% of weekly pay, capped at 55% of the State Average Weekly Wage.
January 1, 2020	10 weeks	60% of weekly pay, capped at 60% of the State Average Weekly Wage.
January 1, 2021	12 weeks	67% of weekly pay, capped at 67% of the State Average Weekly Wage.

The state Superintendent of Financial Services has the authority to examine the financial impact of the family leave benefits and delay the implementation of the above schedule as necessary.

The benefits will be funded by employees themselves, in the form of payroll deductions. The actual amount of the deductions will be decided by the Superintendent of Financial Services by June 1, 2017, but it is estimated that the cost to employees will be approximately $1 per week. Benefits plans will be administered by the state insurance fund or private insurers, similar to the existing employee disability benefit scheme.

Nature of Leave

Eligible employees may take intermittent leave and receive paid benefits in increments as low as one full day. Similar to the FMLA, during New York paid family leaves of absence employers must maintain health insurance benefits under the same terms and conditions that apply while the employee is working.

The new law requires employers to allow eligible employees to *choose* whether to apply all or part of any accrued but unused paid time off during the state-mandated paid family leave period. This suggests that employers may be prohibited from requiring employees to exhaust

accrued but unused paid time off during a leave of absence, which is allowed under the FMLA.

Employers that pay full salary during the family leave period may request reimbursement of the amount due from the insurer. Paid family leave benefits may run concurrently with FMLA leave. No employee may receive more than 12 weeks of paid family leave in any 52-week period. If the employee also needs to take disability leave, the maximum duration of the combined leaves is 26 weeks in any consecutive 52-week period.

If the need for leave is foreseeable, the employee must provide 30 days' notice to the employer. If not, the employee must provide as much notice as is practicable.

Job Protection

Similar to the FMLA, eligible employees who take state paid family leave are entitled to be restored to their position or to a comparable position with "comparable employment benefits, pay and other terms and conditions of employment." However, unlike the FMLA, there are no exemptions from this reinstatement requirement; employers may not take advantage of the "key employee" exemption. *See* 29 U.S.C. § 2614(b).

The new law also prohibits retaliation against employees who seek to take or do take family leave.

Interplay With Other Laws

Employers will need to carefully examine the interplay between the myriad federal, state, and local leave laws when addressing requests for leave. In addition to the FMLA and state disability and family leave laws, the New York State Human Rights Law has recently been amended to require employers to accommodate pregnancy and childbirth-related disabilities—this could include a leave of absence, unless doing so would place an undue burden on the employer. And the Americans with Disabilities Act, as well its state and local counterparts, also address the interplay between leaves of absence and reasonable accommodations.

Takeaways:

- All New York employers, regardless of size, will need to comply with the new paid family leave benefits law.
- New York employers should carefully review their existing leave policies.
- New York employers should be mindful of the interplay of federal, state, and city leave laws when addressing requests for leave and disability or pregnancy accommodation.

Jessica Shpall Rosen is an attorney at Manatt, Phelps & Phillips, LLP and is based in its New York City office.

Does New York's Wage Payment Law Have a Gaping Loophole?

By Scott A. Lucas

Article 6 of the New York Labor Law (Labor Law §§ 190-199-a) is a fee-shifting statute, the overall intent of which is to protect employees from having their rightful wages kept from them.[1] The statute "reflects the state's 'longstanding policy against the forfeiture of earned but undistributed wages.'"[2] To protect employees and remedy the imbalance of power between employers and employees,[3] it allows prevailing plaintiffs to recover unpaid wages, attorney fees and, unless the employer proves a good faith basis to believe that its underpayment of wages was legal, liquidated damages.[4]

Although passed "to strengthen and clarify the rights of employees to the payment of wages,"[5] Article 6 is poorly drafted, and courts have struggled to discern its meaning.[6]

Two of Article 6's key provisions are Labor Law §§ 193 and 198. Labor Law § 193 prohibits any deductions from an employee's wages unless the deduction is authorized and for the employee's benefit.[7] Labor Law § 198 provides that "All employees shall have the right to recover full wages, benefits and wage supplements and liquidated damages accrued during the six years previous to the commencing of such action[.]"[8]

Some courts narrowly construe § 193 by drawing a purported distinction between deducting and failing to pay wages. These courts also overlook § 198's rights-affirming language. As a result, these courts have concluded that Article 6 does *not* give all employees the right to recover unpaid wages.

The purported distinction between deducting and failing to pay wages is illusory and contrary to Labor Law § 193's text and purpose. Although "deduction from wages" is suggestive of a deduction notation on a pay-stub, the purported distinction between "deducting" and neglecting to pay wages was implicitly rejected by the Court of Appeals in *Ryan v. Kellogg Partners Institutional Services*.[9]

The plaintiff in *Ryan* sued under Labor Law § 193 to recover an unpaid, nondiscretionary $175,000 bonus and attorney fees under Labor Law § 198(1-a). The plaintiff won at trial, and the Appellate Division affirmed, as did the Court of Appeals, which held, *inter alia*, "Since Ryan's bonus…constitutes 'wages' within the meaning of Labor Law § 190(1), Kellogg's neglect to pay him the bonus violated Labor Law § 193…"[10]

Not all courts agree with *Ryan's* holding, however. As a result, there is uncertainty about whether § 193—the law that prohibits employers from taking even a small part of an employee's wages—has a gaping loophole that exempts employers who take *all* of an employee's wages.[11] As detailed herein, Article 6 does not contain any such loophole, gaping or otherwise.

Before exploring whether there is a meaningful distinction between deducting and failing to pay wages, one must ask whether it matters.

Does It Matter Whether There Is a Distinction Between Deducting and Failing to Pay Wages Under Labor Law § 193?

No. A different section of Article 6, § 198, was amended in 1997 as part of the Unpaid Wages Prohibition Act to include the following rights-affirming or rights-creating language:

> *All employees shall have the right to recover full wages, benefits and wage supplements* accrued during the six years previous to the commencing of such action[.][12]

Why was that amendment necessary? Four years earlier, in *Gottlieb v. Kenneth D. Laub & Co.*,[13] the Court of Appeals concluded that the then-existing version of Labor Law § 198 was not "substantive." *Gottlieb* held that an employee who asserted a common-law contract claim but did not allege a violation of any substantive provision of Article 6, could not collect attorney fees under Labor Law § 198(1–a).[14]

The narrow holding in *Gottlieb* was understandable because § 198's rights-affirming language did not yet exist, and because the plaintiff apparently never invoked Labor Law § 193. But *Gottlieb* caused much confusion by implying in *dicta* that Article 6 does *not* protect the right of employees to receive the fruits of their labor (i.e., the wages owed under their employment agreement) *unless* the plaintiff is covered by § 191, which regulates the frequency of wage payments for certain classes of employees.[15]

That *dicta* was incorrect. With limited exceptions,[16] the earnings (wages) protected by Article 6 are determined by the parties' employment agreement.[17] Thus, a contractual right to the wages at issue is not a *bar* to a Labor Law § 193 claim, but a *prerequisite*.

In its first post-*Gottlieb* amendment to Article 6, the Legislature enacted the "Unpaid Wages Prohibition Act." Among other things, it amended § 198 to make clear that "*All* employees *shall* have the *right to recover* full wages, benefits and wage supplements accrued during the six

years previous to the commencing of such action[.]" McKinney's Labor Law § 198(3) (emphasis added).[18] The Legislature later enacted the Wage Theft Protection Act[19] which, *inter alia*, added "liquidated damages" to the list of things "[a]ll employees shall have the right to recover" in § 198(3).

Since Labor Law § 198(3) is part of Article 6 and mandates full payment of wages, § 198(1-a)'s reference to the "failure to pay the wage *required by this article*" encompasses § 198(3)'s mandate that "[a]ll employees shall have the right to recover full wages, benefits and wage supplements and liquidated damages[.]"

While the much narrower version of Labor Law § 198 in effect in 1993 was purely remedial, i.e., non-substantive, that does not mean the current version is as well. The Court of Appeals has explained that labels such as remedial, substantive, etc. are not very important in construing statutory amendments.[20] Thus, "even so-called 'remedial' statutes may in effect impose a liability where none existed before[.]"[21]

Bearing this in mind, it is hard to imagine a clearer expression of rights-affirming or rights-creating language than "*All* employees *shall* have the *right to recover* full wages, benefits and wage supplements and liquidated damages[.]"[22] It does not really matter what label one attaches to Labor Law § 198, however. Courts must give effect to a statute's "plain meaning,"[23] and § 198(3)'s meaning could hardly be plainer.

Further, statutes are to be harmonized and not interpreted in a way that would leave one section without meaning or force.[24] Labor Law § 198(3)'s rights-affirming language would be left without force unless one or more of Article 6's "substantive" provisions could be harmonized with § 198(3)'s command that "[a]ll employees shall have the right to recover full wages, benefits and wage supplements and liquidated damages[.]" If the "[a]ll employees shall have the right to recover" language of § 198(3) did not create substantive rights, then § 193 would then be left as the *only* "substantive" Article 6 provision through which employees not covered by § 191 could recover unpaid wages. Therefore, excluding the failure to pay earned wages from the universe of "any [unauthorized] deduction" from wages under § 193 would nullify § 198(3)'s guarantee that "*[a]ll employees shall have the right to recover full wages benefits and wage supplements and liquidated damages*"—an unacceptable result.

Although *Gottlieb* was effectively superseded by 1997's Unpaid Wages Prohibition Act, and criticized as "ambiguous" and as having "perhaps unintended" consequences,[25] the confusion it caused was not contained until the Court of Appeals held in *Pachter v. Hodes*[26] that employees are covered by Article 6's provisions except where expressly excluded.[27]

Nonetheless, while some courts now acknowledge Labor Law § 198 as a source of substantive rights,[28] few seem to notice that it now has unequivocal rights-affirming language. And one court that did notice § 198's unequivocal rights-affirming language (*Malinowski v. Wall Street Source, Inc.*[29]) apparently did not realize it was added *after Gottlieb* was decided, and as a result, it cited *Gottlieb* for the proposition that this *post-Gottlieb* statutory language does not mean what it says.[30]

Since there is no telling how long it will take before most courts give effect to Labor Law § 198(3)'s rights-affirming language, one must still explore the purported distinction between deducting and failing to pay wages under § 193—it is the only other Article 6 provision through which employees not covered by § 191 can recover their unpaid wages and liquidated damages.

The Purported Distinction Between Deducting and Failing to Pay Wages Contravenes § 193's Purpose

"[Labor Law § 193] was derived from former sections 10–13 of the Labor Law (L. 1909, ch. 36, §§ 10–13), which required employers to '*full[y]* and prompt[ly]' *pay earned wages*."[31] "[T]he inequity that the Legislature sought to prevent" in enacting § 193 was employers benefitting from employees' earned wages.[32]

This begs the question: What could be more destructive of Labor Law § 193's purpose than to exempt from liability employers who benefit the most from employees' wages, i.e., those who keep *all* of an employee's earned wages? If one were to accept the purported distinction between deducting and failing to pay wages, the employer in *Ryan* that owed a $175,000 nondiscretionary bonus could be liable for withholding $10, $1,000 or even $174,999 from the bonus paycheck (at least if those sums were noted on a paystub), but *not* for withholding the entire $175,000.

Courts adopting this myopic view of Labor Law § 193 fail to ask the critical question—"*Why?*" As in, "*Why* is it wrong for an employer to make an unauthorized deduction from an employee's wages?" Surely it is not because deducting part of the employee's paycheck is worse than taking the entire paycheck. Rather, it is because an employee's wages represent the fruits of his labor and have been deemed worthy of special protection. The idea that § 193 exempts total wage deprivations is irreconcilably inconsistent with the law's goal of preventing employers from benefiting from employees' wages.

Mistaking The "Shadow on the Wall of the Cave" for the Real Thing

The purported distinction between deducting and failing to pay wages misapprehends the concept of a "deduction" and the intangible nature of what is being

deducted. As a result, it wrongly assumes a deduction is something that can be seen—like a notation on a paystub.[33] While the phrase "deduction from…wages" in Labor Law § 193 is suggestive of a notation on a paystub denoting a subtraction from wages, a paystub notation is not a "deduction" at all; it is only a *manifestation* of a deduction—a proverbial shadow on the wall of the cave.

Upon further analysis, one can see why deducting and failing to pay wages are really the same thing. "A 'deduction' is literally an act of taking away or subtraction."[34] How are wages taken away or subtracted? To answer that one must answer a more basic question: What are wages?

Wages are "a specialized type of property"[35] that "belong to the wage earner until they are pledged or committed to another."[36] Labor Law § 190(1) defines "wages" as the "earnings" of an employee for labor or services rendered, and "earnings" means "any economic good to which a person becomes entitled for rendering economic service."[37]

"As a right, claim or interest against the employer, wages yet to be received are intangible property."[38] The question then is: How does one "take away" something with no physical existence?

The word "take" has several meanings, including "to deprive one of the use or possession of; to assume ownership."[39] Since a "deduction" is "an act of taking away or subtraction,"[40] and a "taking" is a deprivation, an employee's earned and due wages are "deducted" when the employee is "deprived" of them.[41]

The Term "*Any* Deduction" Is Sweeping in Its Scope, and Encompasses "Indirect" and "Constructive" Deductions

Even if one assumes a failure to pay earned wages is an "indirect" rather than "direct" deduction (a dubious assumption), the deductions barred by Labor Law § 193 are not limited to "direct," "specific" or "payroll" deductions. Instead, § 193 applies "*any* deduction from the wages of an employee" except for deductions that are authorized and for the employee's benefit.

As the Court of Appeals has observed, "the word 'any' means 'all' or 'every' and imports no limitation,"[42] and "is as inclusive as any other word in the English language."[43] In this regard, the Second Circuit has concluded:

> [T]he word 'any' has an expansive meaning," and thus, so long as "Congress did not add any language limiting the breadth of that word," *the term 'any' must be given literal effect*.[44]

Since the word "any" generally indicates a legislative "intent to sweep broadly to reach *all varieties of the item referenced*,"[45] it encompasses "indirect" or "constructive" varieties of the items referenced. Accordingly, just as a law concerning "'any payment' is clearly sweeping in its scope and embraces both direct and indirect payments,"[46] the phrase "any deduction" is clearly sweeping in its scope and embraces both direct and indirect deductions.[47]

Further, Article 6's drafters were familiar with the more restrictive term "payroll deductions" because it is found in Personal Property Law Article 3-a, which is referenced in Labor Law § 193(4).[48] But they chose not to use that more restrictive term when drafting § 193's prohibition against "any deduction from the wages of an employee[.]"

In addition, Article 6's substantive provisions should be liberally interpreted in favor of the employee.[49]

Finally, one must give the term "*any* deduction" its plain meaning in order to maintain the consistency of purpose between Labor Law § 193(1) and § 193(3[a]) (formerly subdivision (2)), which was added in 1974 to "prohibit wage deductions by *indirect means* where direct deduction would violate the statute."[50]

The Idea That a Specific Mental State Must Be Proved to Establish a § 193 Violation

The purported distinction between deducting and failing to pay wages seems to assume that the statute is violated only when the employer is shown to have acted with a culpable mental state[51]—one that apparently can only be shown by a deduction notation on a paystub.[52] However, even employers who prove they acted in good faith are subject to Article 6 liability for unpaid wages and attorney fees (but not liquidated damages).[53]

A wage is either owed or it isn't. Employers have a statutory duty to provide employees with enough information to know what they will be paid for the work they perform.[54] An employer is thus actually or constructively aware that an employee's wages will not be paid unless certain conditions are met, and that ignoring those conditions will cause the employee's wages to be unpaid and the employer to be correspondingly enriched by the fruits of the employee's labor.

Even if Labor Law § 193 had an intent requirement, it is naïve to suppose an employer that enriches itself by keeping the fruits of another person's labor does so with no intent. "[T]he common law rule [is] that a man is held to intend the foreseeable consequences of his conduct,"[55] and it is foreseeable that an employee's wages will not be paid if the employer fails to carefully define, keep track of, and honor its wage payment obligations.

Finally, grafting an intent requirement onto Labor Law § 193 would make § 193 incompatable with Article 6's other provisions which contain no such intent requirement.[56]

Case Law Outside the Article 6 Context

Case law outside the Article 6 context also casts doubt on the purported distinction between deducting and failing to pay wages. For example, in the due process case of *Sniadach v. Family Finance Corp. of Bay View*,[57] the Supreme Court found an employer's "interim freezing" of wages pursuant to a wage garnishment to be a "taking of one's property [that] is so obvious[.]"[58] If a "taking away" is a "deduction,"[59] and a temporary wage deprivation of indefinite duration is an obvious "taking," then the *permanent* deprivation of one's earned wages is an even more obvious "taking," i.e., "deduction."

Similarly, courts interpreting federal wage and hour laws generally refuse to distinguish between a deduction and a failure to pay. Typical in this regard is *De Leon-Granados v. Eller & Sons Trees, Inc*.[60] In holding an employer liable for willfully violating federal wage and hour laws, the *De Leon-Granados* court explained that "Department of Labor officials made clear that there was no difference between deducting an expense and failing to reimburse the expense."[61]

Likewise, a California appeals court in *Grier v. Alameda-Contra Costa Transit Dist.* held that "to withhold wages for work actually performed *** constitutes a deduction from wages."[62]

Examples Showing Why The Distinction Between Deducting and Failing to Pay Wages Is Illusory

To illustrate why the distinction between deducting and failing to pay wages is illusory and leads to uncertain and indefensible results, consider the variations on the following fact pattern:

Joy is hired as a warehouse manager for her employer, Acme Corp., a glassware manufacturer. Acme agrees to pay Joy an annual salary, plus an end-of-year performance-based commission of $1 for each and every crate of glassware she ships from the warehouse. Throughout the year she ships 11,000 crates of glassware. 1,000 of these are later found to have contained broken glassware when they left the warehouse.

Wage Deprivation 1

Joy's paystub notes the following:

Commission:	$11,000
Damaged merchandise deduction:	-$1,000
Wages included in this check:	$10,000

Wage Deprivation 2

Joy's paystub simply notes "Commission: $10,000." In other words, the $1,000 Acme deducted is not noted on Joy's paystub. When Joy asks about the $1,000 shortfall, Acme's owner tells her he "*decided to subtract*" $1 for each crate that contained broken glassware.

While there is no difference to either Joy or Acme in these two examples, the mere absence of a deduction notation on Joy's paystub in Deprivation 2 could lead at least some judges to deny Joy's § 193 claim on the ground that it involves "merely a failure to pay wages."[63]

However, if confronted with Deprivations 1 and 2 side by side, most jurists who believe a failure to pay is not a deduction would presumably retreat to a more "defensible" position, perhaps arguing that Acme's verbal reference to a "subtraction" is the equivalent of a paystub notation.

OK then, let us slightly alter the facts of Wage Deprivation 2. Let us now suppose the following:

Wage Deprivation 3

Upon being sued for violating § 193, Acme denies the conversation about a "subtraction" ever happened (as it likely would), and falsely claims that Joy's commission was purely discretionary. What then? The jurists who had taken a step away from the wall of the cave and towards the outside world might then retreat back to the safety of the wall of the cave, asserting that "[t]his dispute as to the calculation of the net amount does not reflect a deduction from wages within the meaning of section 193[.]"[64]

But let us suppose some of these jurists would be willing to take another step away from the wall of the cave and towards the outside world, and allow a jury to decide whether Acme's owner mentioned the word "subtract." And let us suppose that at trial it was proved that Acme's owner didn't use the word "deduct" or "subtract," but simply told Joy she "*didn't deserve*" $1 for each crate with broken glassware. Or something vaguer still, like he "*expects more from her*." Where does one draw the line?

Next consider this example:

Wage Deprivation 4

Acme's owner tells Joy her work is outstanding and that he has chosen to exercise his (alleged) discretion to pay her a $10,000 commission. When Joy points out that she is owed $11,000, Acme's owner says he disagrees. Since Joy's wages (i.e., her right to be paid her earnings) are $11,000, when Joy receives a check for gross wages of only $10,000 can it be said that $1,000 has *not* been deducted from her wages?

If a deduction from wages is something other than a deprivation of the wages due and owing, then what is it? Must there be a deduction notation on a paystub before the employer can be liable for violating Labor Law § 193? If so, why? Must there be some trace of employer rumination about damaged goods? If so, why? What quantum of cognition would be needed? How would that quantum of cognition be verified? What if the employer's disappointment about damaged goods was one of two reasons motivating the employer (or one of three, four, or five reasons)?

What if the employer is not thinking about damaged goods, but simply prefers to keep Joy's earned wages because it can? Even if intent were an issue, isn't the employer's intent to keep Joy's property readily inferable by the employer enriching itself with the fruits of Joy's labor?

Or what if Acme is cash-strapped and promises Joy a $30,000 bonus if she meets certain performance targets. When Acme makes that promise to induce added labor on Joy's part, doesn't it have a duty to ensure it is not making a promise it cannot keep?[65] Next consider this example:

Wage Deprivation 5

Acme's owner never pays Joy any commission, but issues her a check for $0 and a paystub with the following notations:

$11,000
-$11,000

A deduction, right? So what's the difference if Joy receives the same amount ($0) without receiving the piece of paper? One could argue that pairing the written manifestation of a deduction with a written admission of the wages otherwise due and owing (i.e., a paystub listing both gross pay and the sum deducted) proves the employer's awareness that $11,000 was owed. But even if that were true, it wouldn't make the reverse true, i.e., the absence of an "$11,000" notation wouldn't prove the employer was not aware it owed $11,000.

Conversely, the written deduction notation by itself does not prove the deduction was from "wages."[66] A deduction notation on a paystub may be helpful, but is by no means necessary, to prove a deduction from wages.

Now let us suppose Acme is determined to withhold 50% of Joy's wages from the next two paychecks. Knowing this, Acme's counsel advises Acme to try to avoid Labor Law § 193 liability by withholding one of the two paychecks altogether. Is that a defensible outcome?

Limiting principles are nowhere to be found in the ill-fated quest to distinguish a deduction from a failure to pay wages. That is because oft-cited examples of unauthorized deductions are only particularized manifestations of the inequity sought to be remedied, namely, employers benefiting from employees' earned wages.

Conclusion

All courts construing Article 6 should respect the Legislature's command that "[a]ll employees shall have the right to recover full wages, benefits and wage supplements and liquidated damages[,]"[67] and bid farewell to the false dichotomy between deducting and failing to pay wages. Only then will Article 6's goal of protecting earned wages be fully realized.

Endnotes

1. *In re CIS Corp.*, 206 B.R. 680, 687 (Bkrtcy. S.D.N.Y. 1997).
2. *Dreyfuss v. eTelecare Global Solutions-US, Inc.*, 2010 WL 4058143, at *5 (S.D.N.Y. 2010) (citations omitted).
3. *Chu Chung v. New Silver Palace Restaurants, Inc.*, 272 F. Supp. 2d 314, 317 (S.D.N.Y. 2003) ("The New York Labor law was enacted to protect employees, and to remedy the imbalance of power between employers and employees.") (citation omitted).
4. N.Y. Lab. L. 198(1-a), (3).
5. *Angello v. Labor Ready, Inc.*, 7 N.Y.3d 579, 583-84, 825 N.Y.S.2d 674, 676 (2006), citing, *inter alia*, *Truelove v. Northeast Capital & Advisory,* 95 N.Y.2d 220, 223, 715 N.Y.S.2d 366 (2000) and Mem. of Indus. Commr., June 3, 1966, Bill Jacket, L. 1966, ch. 548, at 4.
6. *Cf. Chu Chung v. New Silver Palace Restaurants, Inc.*, 272 F. Supp. 2d 314, 316 (S.D.N.Y. 2003) (stating that "[some] cases that deal with different provisions of Article [6] … do so narrowly, without looking at other provisions of Article [6] of the New York Labor Law.").
7. N.Y. Lab. L. § 193 (2012); *See also Pachter v. Bernard Hodes Group, Inc.*, 10 N.Y.3d 609, 616, 861 N.Y.S.2d 246, 249-50 (2008) (holding that executives are covered by the provision of Article 6 unless expressly excluded).
8. N.Y. Lab. L. § 198(3) (2010).
9. 19 N.Y.3d 1, 16, 945 N.Y.S.2d 593, 602 (2012).
10. *Ryan*, *supra*, 19 N.Y.3d at 16, 945 N.Y.S.2d at 602 (citation omitted).
11. *See*, *e.g.*, *Gold v. American Medical Alert Corp.*, 2015 WL 4887525, at *2-5 (S.D.N.Y. 2015) (Stating that "Plaintiff has not pled 'any deduction' from wages because the deduction Plaintiff claims is merely the total withholding of wages, which is the essence of the breach of contract claim.").
12. *See* Labor Law—Unpaid Wages Prohibition Act, 1997 Sess. Law News of N.Y. Ch. 605 (S. 5071–C) (McKinney's) (emphasis added); *See also* Labor Law—Wage Theft Prevention Act, 2010 Sess. Law News of N.Y. Ch. 564 (S. 8380) (McKinney's) (adding the words "and liquidated damages" to Labor Law § 198(3)).
13. 82 N.Y.2d 457, 462, 605 N.Y.S.2d 213 (1993).
14. *See Pachter v. Bernard Hodes Group, Inc.*, 861 N.Y.S.2d 246, 250, 10 N.Y.3d 609, 616 (2008) (discussing limitation of holding in *Gottlieb*).
15. *Gottlieb*, 82 N.Y.2d at 462 (implying that agreed upon wages are not "statutory wages" protected by Article 6, and incorrectly stating that some employees are "in all … respects … excluded from wage enforcement protection under … article 6."
16. *See*, *e.g.*, McKinney's Labor Law § 194 (2016) (prohibiting unequal compensation between the sexes for substantially equal work).
17. *See*, *e.g.*, *Hammond v. Lifestyle Forms and Display Co., Inc.*, 2009 WL 10313837, at *3 (E.D.N.Y. 2009).
18. Labor Law—Unpaid Wages Prohibition Act, 1997 Sess. Law News of N.Y. Ch. 605 (S. 5071–C) (McKinney's).
19. Labor Law—Wage Theft Prevention Act, 2010 Sess. Law News of N.Y. Ch. 564 (S. 8380) (McKinney's).
20. *Becker v. Huss Co., Inc.*, 43 N.Y.2d 527, 540-41, 402 N.Y.S.2d 980, 984, 373 N.E.2d 1205, 1209 (1978), citing Judge Cardozo's "penetrating discussion" of the issue in *Berkovitz v. Arbib & Houlberg*, 230 N.Y. 261, 268 130 N.E. 288, 289 (1921).
21. *Anonymous v. Anonymous*, 40 Misc.2d 492, 498, 243 N.Y.S.2d 630, 636-37 (N.Y.Fam.Ct. 1963), citing *Jacobus v. Colgate*, 217 N.Y. 235, 111 N.E. 837 (1916).
22. N.Y. Lab. L. § 198(3) (2010) (emphasis added).
23. *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 583, 673 N.Y.S.2d 966, 968 (1998).
24. McKinney's Cons.Laws of New York, Book 1, Statutes, § 98; *Matter of Albano v. Kirby*, 36 N.Y.2d 526, 530, 369 N.Y.S.2d 655 (1975).

25. *Hart v. Dresdner Kleinwort Wasserstein Securities, LLC*, 2006 WL 2356157, at *4 (S.D.N.Y. 2006), *quoting Miteva v. Third Point Management Co., L.L.C.*, 323 F.Supp.2d 573, 581 (S.D.N.Y. 2004); *See also Monagle v. Scholastic, Inc.*, 2007 WL 766282, at *1 (S.D.N.Y. 2007) (observing that "Judge Marrero's scholarly analysis in [*Miteva*], has persuaded most courts that th[e] position [set forth in *Gottlieb*] is incorrect[.]").

26. 10 N.Y.3d 609, 861 N.Y.S.2d 246 (2008).

27. *Id.*, 10 N.Y.3d at 616, 861 N.Y.S.2d at 250.

28. *See*, *e.g.*, *Tini v. AllianceBernstein, L.P.*, 108 A.D.3d 409, 410, 968 N.Y.S.2d 488, 489 (1st Dep't 2013) ("as unpaid salary and commission constitute [w]age' under Labor Law § 190(1), plaintiff has stated a claim under Labor Law § 198.") (citation omitted).

29. 2012 WL 279450, at *2 (S.D.N.Y. 2012).

30. *Id.*

31. *Marsh v. Prudential Securities Inc.*, 770 N.Y.S.2d 271, 274, 1 N.Y.3d 146, 153 (2003) (Emphasis added), citing *Matter of Hudacs v. Frito–Lay, Inc.*, 90 N.Y.2d 342, 347, 660 N.Y.S.2d 700 (1997).

32. *Angello v. Labor Ready, Inc.*, 825 N.Y.S.2d 674, 678, 7 N.Y.3d 579, 586 (2006).

33. *See*, *e.g.*, *Strohl v. Brite Adventure Center, Inc.*, No. 08–CV–259, 2009 WL 2824585, at *9 (E.D.N.Y. Aug. 28, 2009) (dismissing claim where the plaintiff alleged the defendant violated § 193 by adjusting her total hours downward as a penalty for punching in before or after her 8:00 a.m. start time because the "defendants did not 'deduct' any amount from [the plaintiff's] wages, but simply failed to pay her all the wages she had earned.").

34. *Angello v. Labor Ready, Inc.*, 7 N.Y.3d 579, 584 (2006).

35. *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 340 (1969).

36. *Epps v. Cortese*, 326 F.Supp. 127, 133 (E.D. Pa. 1971), *vacated on different grounds*, *Fuentes v. Shevin*, 407 U.S. 67 (1972); *see also U.S. v. Larson*, 2013 WL 6196292, at *2 (W.D.N.Y. 2013) ("'wages and benefits pursuant to a labor contract' constitute extortable property" because, *inter alia*, "a contract and contractual rights can be assigned, and therefore constitute something of value that can be exercised, transferred or sold").

37. *Strand v. Hansen Seaway Service, Ltd.*, 614 F.2d 572, 576 (7th Cir. 1980), citing Webster's New International Dictionary, 2d Ed., unabridged 1937.

38. *American Standard Life & Accident Co. v. Speros*, 494 N.W.2d 599, 605, n. 9 (N.D. 1993).

39. *Black's Law Dictionary* (6th ed. 1990) p. 1453; *see also Black's Law Dictionary* (6th ed. 1990) p. 1453 (defining "take" to mean, *inter* alia, "to deprive one of the use or possession of; to assume ownership."); *State v. G.C.*, 572 So. 2d 1380, 1382 (Fla. 1991) ("Deprive is defined as 'to take away'; 'to take something away'; 'to keep from the possession, enjoyment, or use of something.'"), citing *Webster's Third New Int'l Dictionary* 606-607 (1986); *People v. Banks*, 75 Ill. 2d 383, 389, 388 N.E.2d 1244, 1247 (1979) ("*Webster's Third New International Dictionary* 606 (1971) defines 'deprive' as 'to take away: remove, destroy; to take something away from: divest, * * * to keep from the possession, enjoyment, or use of something.'"); *State v. Smith*, 2001 WL 283388, at *5 (Conn. Super. Ct. Mar. 7, 2001) ("*Webster's Third New International Dictionary* defines 'take away' as meaning *** 'to cause deprivation of,' ***.'") (emphasis added).

40. *Angello*, *supra*, 7 N.Y.3d at 584.

41. *See*, *e.g.*, *Ryan*, *supra*, 945 N.Y.S.2d at 602, 19 N.Y.3d at 16 (employer's neglect to pay nondiscretionary bonus violated § Labor Law 193); *Tuttle v. Go. McQuesten Co., Inc.*, 227 A.D.2d 754, 642 N.Y.S.2d 356, 357-58 (3d Dep't 1996) ("…withheld moneys constituted 'wages' pursuant to Labor Law § 190 and, thus, under Labor Law article 6, defendant was not entitled to withhold these payments as a matter of law.") (citing § 193).

42. *Zion v. Kurtz*, 50 N.Y.2d 92, 104, 687, 428 N.Y.S.2d 199, 205 (1980).

43. *New Amsterdam Casualty Co. v. Stecker*, 3 N.Y.2d 1, 5, 163 N.Y.S.2d 626 (1957); *see also Dep't of Hous. and Urban Dev. v. Rucker*, 535 U.S. 125, 131-32 (2002) ("[T]he word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'").

44. *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 174 (2d Cir. 2005) (emphasis added; citation omitted).

45. *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 117 (2d Cir. 2007) (emphasis added), citing, *inter alia, United States v. Gonzales,* 520 U.S. 1, 5 (1997).

46. *U.S. v. Lanni*, 466 F.2d 1102, 1108-09 (3d Cir. 1972); *see also Charles v. Diamond*, 47 A.D.2d 426, 430, 366 N.Y.S.2d 921, 926 (4th Dep't 1975) (law conferring jurisdiction over claims for the appropriation of "any real or personal property" extends to a claim arising out of an unconstitutional "*de facto* appropriation of private property") (citation omitted); *Procter & Gamble Co. v. Chesebrough-Pond's Inc.*, 747 F.2d 114, 118-19 (2d Cir. 1984) (phrase "any false description or representation" in Lanham Act embraces false "innuendo, indirect intimations, and ambiguous suggestions"); *Ennabe v. Manosa*, 319 P.3d 201, 212, 168 Cal.Rptr.3d 440, 453, 58 Cal.4th 697, 714 (Cal. 2014) ("Use of the term 'any' to modify the words 'transaction' and 'consideration' demonstrates the Legislature intended the law to have a broad sweep and thus include both indirect as well as direct transactions."); *U.S. v. Quong*, 303 F.2d 499, 503 (6th Cir. 1962) ("The term 'any interest' must be defined in the broadest sense and includes any interest whatsoever, direct or indirect."); *Grogan v. Hillman*, 930 So.2d 520, 523 (Ala.Civ.App. 2005) ("Given its natural and plain meaning, the term 'any possession' includes 'constructive possession.'"); *State v. Bradley*, 782 N.W.2d 674, 679, 2010 S.D. 40, ¶ 15 (S.D. 2010) (phrase "any custody" includes "constructive" custody), citing *Murphy v. United States,* 481 F.2d 57, 61 (8th Cir.1973); *Harris v. New Castle County*, 513 A.2d 1307, 1309 (Del. 1986) (phrase "any recovery" includes "indirect" recovery of damages from a third party).

47. *See*, *e.g.*, *Martinez v. Alubon, LTD.*, 111 A.D.3d 500, 501, 978 N.Y.S.2d 119, 121 (1st Dep't 2013) ("The protections of section 193 extend not only to completed deductions, but also to 'attempted wage deductions' that would violate the statute if consummated.") (citations omitted).

48. *See* Personal Property L. §§ 46.2 and 48-d. Personal Property Law Article 3-a is referred to in Labor Law § 193(4), which means that § 193's drafters were presumably familiar with the more restrictive term "payroll deductions" and chose not to include it in § 193(1).

49. *See*, *e.g.*, *Samiento v. World Yacht Inc.*, 10 N.Y.3d 70, 78, 854 N.Y.S.2d 53 (2008) ("[Section 196-d] should be liberally construed in favor of the employees."); *Martinez v. Alubon, LTD.*, 111 A.D.3d 500, 501, 978 N.Y.S.2d 119, 121 (1st Dep't 2013) ("The protections of section 193 extend not only to completed deductions, but also to 'attempted wage deductions' that would violate the statute if consummated.") (citations omitted).

50. *Angello v Labor Ready, Inc.*, 7 N.Y.3d 579, 585, 825 N.Y.S.2d 674 (2006) (emphasis added; citations omitted).

51. *See*, *e.g.*, *Gold v. American Medical Alert Corp.*, 2015 WL 4887525, at *4 (S.D.N.Y. 2015) (conceding that § 193 "is plausibly susceptible to a broader interpretation" that encompasses an employer's failure to pay earned wages, but rejecting that "broader interpretation" because it "would include an employer withholding the entire amount of a salary because it contends, as here, that it fired an employee for good cause").

52. *See*, *e.g.*, *Strohl v. Brite Adventure Center, Inc.*, No. 08–CV–259, 2009 WL 2824585, at *9 (E.D.N.Y. Aug. 28, 2009) (dismissing an improper deduction claim where the plaintiff alleged the defendant violated § 193 by adjusting her total hours downward as a penalty for punching in before or after her 8:00 a.m. start time because the "defendants did not 'deduct' any amount from [the plaintiff's] wages, but simply failed to pay her all the wages she had earned.").

53. N.Y. Lab. L. § 198(1-a).

54. *See* N.Y. Lab. L. § 195.

55. *Radio Officers' Union of Commercial Telegraphers Union, A. F. L. v. N. L. R. B.*, 347 U.S. 17, 45 (1954) ("This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common law rule that a man is held to intend the foreseeable consequences of his conduct."); *see also Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 583, n.6 (2010) ("If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent."). In *Jerman*, the Supreme Court approvingly cited W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 110 (5th ed. 1984) for the proposition that "[I]f one intentionally interferes with the interests of others, he is often subject to liability notwithstanding the invasion was made under an erroneous belief as to some...legal matter that would have justified the conduct[.]" 559 U.S. at 583. *Jerman* also approvingly cited the Restatement (Second) of Torts § 164, and Comment *e* (1963–1964) for the proposition that the intentional tort of trespass can be committed despite the actor's mistaken belief that she has a legal right to enter the property. *Id.*

56. *See*, *e.g.*, *People v. Vetri*, 309 N.Y. 401, 406 (1955) (construing predecessor to § 191) (citations omitted); *Polyfusion Electronics, Inc. v. Promark Electronics, Inc.*, 108 A.D.3d 1186, 1187-88, 970 N.Y.S.2d 651, 652-53 (4th Dep't 2013) (construing Labor Law § 191-c). Section 194 is also a strict liability statute because it is analyzed under the same standards as the federal Equal Pay Act. *Belfi v. Prendergast*, 191 F.3d 129, 135 (2d Cir. 1999).

57. 395 U.S. 337 (1969).

58. *Sniadach*, *supra*, 395 U.S. at 342.

59. *Angello v. Labor Ready, Inc.*, 7 N.Y.3d at 584.

60. 581 F. Supp. 2d 1295 (N.D. Ga. 2008).

61. *Id.*, 581 F. Supp. 2d at 1315; *see also Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228, 1236 (11th Cir. 2002) ("there is no legal difference between deducting a cost directly from the worker's wages and shifting a cost, which they could not deduct, for the employee to bear.").

62. 127 Cal.Rptr. 525, 532, 55 Cal.App.3d 325, 335 (Cal.App. 1976).

63. *See Kane v. Waterfront Media, Inc.*, 2008 WL 3996234 (Sup. Ct., N.Y. Co. 2008) ("The court rejects plaintiff's contention that defendants' reduction of the commission percentages to which she was entitled under the contract supports a claim under Labor Law § 193. At most, plaintiff only alleges a failure to pay wages. To state a claim for violation of Labor Law § 193, a plaintiff must allege a specific deduction from wages and not merely a failure to pay wages.") (citation omitted).

64. See Kletter v. Fleming, 32 A.D.3d 566, 567, 820 N.Y.S.2d 348, 349-50 (3d Dep't 2006).

65. *See*, *e.g.*, *Polyfusion Electronics, Inc. v. Promark Electronics, Inc.*, 108 A.D.3d 1186, 1187-88, 970 N.Y.S.2d 651, 652-53 (4th Dep't 2013) (imposing double damages against manufacturer under § 191-c where, due to financial difficulties, it failed to pay earned commissions within five days of the date the parties' contract was terminated).

66. *See*, *e.g.*, *Pachter v. Bernard Hodes Group, Inc.*, 861 N.Y.S.2d 246, 252, 10 N.Y.3d 609, 618 (2008).

67. N.Y. Lab. L. § 198(3).

Scott A. Lucas is the principal of the Law Offices of Scott A. Lucas.

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.

Alternative Dispute Resolution
Ann Lesser
American Arbitration Association
120 Broadway
21st Floor
New York, NY 10271-5643
lessera@adr.org

Andrew Paul Marks, Esq.
Littler Mendelson P.C.
900 3rd Avenue
20th Floor
New York, NY 10022-4883
amarks@littler.com

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

Monica R. Skanes
Whiteman Osterman & Hanna LLP
One Commerce Plaza
Albany, NY 12260
mskanes@woh.com

Continuing Legal Education
Robert L. Boreanaz
Lipsitz Green Scime Cambria LLP
42 Delaware Ave.
Suite 120
Buffalo, NY 14202-3901
rboreanaz@lglaw.com

Alyson Mathews
Lamb & Barnosky, LLP
534 Broadhollow Road, Suite 210
P.O. Box 9034
Melville, NY 11747-9034
am@lambbarnosky.com

William D. Frumkin
Frumkin & Hunter LLP
1025 Westchester Avenue, Suite 309
White Plains, NY 10604
WFrumkin@frumkinhunter.com

District Representatives
Lindy Korn
Electric Tower
535 Washington Street / 9th Floor
Buffalo, NY 14203
lkk75atty@aol.com

Howard Mark Wexler
Seyfarth Shaw LLP
620 8th Avenue
New York, NY 10018
hwexler@seyfarth.com

Diversity and Leadership Development
Jill L. Rosenberg
Orrick Herrington & Sutcliffe LLP
51 West 52nd Street
New York, NY 10019-6119
jrose@orrick.com

Wendi S. Lazar
Outten & Golden LLP
3 Park Avenue, 29th Floor
New York, NY 10016
wsl@outtengolden.com

Employee Benefits and Compensation
Stanley Baum
Cary Kane, LLP
1350 Broadway, Suite 1400
New York, NY 10018
sbaum@carykane.com

Susan E. Bernstein
Schulte Roth & Zabel LLP
919 Third Avenue
New York, NY 10022
susan.bernstein@srz.com

Equal Employment Opportunity Law
David M. Fish
David M. Fish, Attorney At Law
3 Park Avenue, 28th Floor
New York, NY 10016-5902
fish@davidmfish.com

Christopher A. D'Angelo
Michelman & Robinson, LLP
800 THird Avenue
24th Floor
New York, NY 10022
cdangelo@mrllp.com

Ethics and Professional Responsibility
Laura H. Harshbarger
Bond, Schoeneck & King, PLLC
One Lincoln Center
Syracuse, NY 13202
harshbl@bsk.com

Cara E. Greene
Outten & Golden LLP
3 Park Avenue, 29th Floor
New York, NY 10016
ceg@outtengolden.com

Finance
Sheryl B. Galler
275 West 96th Street
Apt. 7P
New York, NY 10025-6270
sbgesq@yahoo.com

International Employment and Immigration Law
Patricia L. Gannon
Wormser, Kiely, Galef & Jacobs, LLP
825 Third Avenue
New York, NY 10022
pgannon@wkgj.com

Donald C. Dowling Jr.
K&L Gates LLP
599 Lexington Ave
New York, NY 10022
don.dowling@klgates.com

Labor Arbitration
Sheila S. Cole
80 Huntersfield Road
Delmar, NY 12054
ss.cole@verizon.net

Judith A. LaManna
Arbitrator & Mediator
224 Harrison Street
Suite 306
Syracuse, NY 13202-3052
LaManna@rivette.us

Howard Schragin
Sapir Schragin LLP, Suite 310
399 Knollwood Road
White Plains, NY 10603-1936
hschragin@sapirschragin.com

Labor Relations Law and Procedure
Peter D. Conrad
Proskauer Rose LLP
Eleven Times Square
New York, NY 10036-8299
pconrad@proskauer.com

Allyson L. Belovin
Levy Ratner, PC
80 8th Ave Fl 8th
New York, NY 10011-5126
abelovin@levyratner.com

Legislation and Regulatory Developments
Joanne Seltzer
9 Heyward Lane
Rockville Centre, NY 11570
joanne.seltzer@gmail.com

Jonathan Weinberger
Law Offices of Jonathan Weinberger
880 Third Ave.
13th Floor
New York, NY 10022
jweinberger@verizon.net

Membership
Molly Anne Thomas-Jensen
Public Advocate for the
City of New York
1 Centre Street
15th Floor North
New York, NY 10007
mollytj@gmail.com

Alyssa L. Zuckerman
Lamb & Barnosky LLP
534 Broadhollow Rd., Suite 210
Melville, NY 11747
alz@lambbarnosky.com

Mentoring Program
Rachel Philion
Proskauer Rose LLP
11 Times Square
New York, NY 10036
rsantoro@proskauer.com

Genevieve E. Peeples
Greenberg Burzichelli Greenberg, P.C.
3000 Marcus Avenue
Suite 1-W-7
Lake Success, NY 11042
gpeeples@gbglawoffice.com

New Lawyers
Jeremy Ginsburg
CSEA, Inc.
143 Washington Avenue
Albany, NY 12210
jeremy.ginsburg@cseainc.org

David Mou
1633 Broadway
20-118
New York, NY 10019
dmou@kasowitz.com

Public Sector Labor Relations
Nathaniel G. Lambright
Blitman & King LLP
Franklin Center, Suite 300
443 North Franklin Street
Syracuse, NY 13204
nglambright@bklawyers.com

Paul Jude Sweeney
Coughlin & Gerhart, LLP
PO Box 2039
Binghamton, NY 13902-2039
psweeney@cglawoffices.com

Technology in Workplace and Practice
Michael A. Curley
Curley, Hessinger & Johnsrud LLP
5 Penn Plaza, 23rd Floor
New York, NY 10001
mcurley@curleyhessinger.com

Eric E. Wilke
CSEA, Inc.
143 Washington Avenue
Albany, NY 12210
Eric.Wilke@cseainc.org

Wage and Hour
Patrick J. Solomon
Thomas & Solomon LLP
693 East Avenue
Rochester, NY 14607
psolomon@theemploymentattorneys.com

Robert Whitman
Seyfarth Shaw LLP
620 8th Ave
New York, NY 10018-1618
rwhitman@seyfarth.com

Workplace Rights and Responsibilities
Dennis A. Lalli
Bond Schoeneck & King PLLC
600 3rd Avenue, 22nd Floor
New York, NY 10016
Dlalli@bsk.com

Geoffrey A. Mort
Kraus & Zuchlewski LLP
500 5th Avenue, Suite 5100
New York, NY 10110-5199
gm@kzlaw.net

Publication and Editorial Policies

Persons interested in writing for the *Labor and Employment Law Journal* are welcomed and encouraged to submit their articles for consideration. Your ideas and comments about the *Labor and Employment Law Journal* 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, please send it to me by e-mail in Microsoft Word format. Please include a letter granting permission for publication and a one-paragraph biography.

Editorial Policy: The articles in the *Labor and Employment Law Journal* represent the author's viewpoint and research and not that of the *Labor and Employment Law Journal* Editorial Staff or Section Officers. The accuracy of the sources used and the cases cited in submissions is the responsibility of the author.

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.

Allan S. Bloom
Editor

Non-Member Subscriptions: The *Labor and Employment Law Journal* is available by subscription to non-attorneys, libraries and organizations. The subscription rate for 2016 is $125.00. For further information, contact the Newsletter Department at the Bar Center, (518) 463-3200.

Accommodations for Persons with Disabilities:
NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at (518) 463-3200.

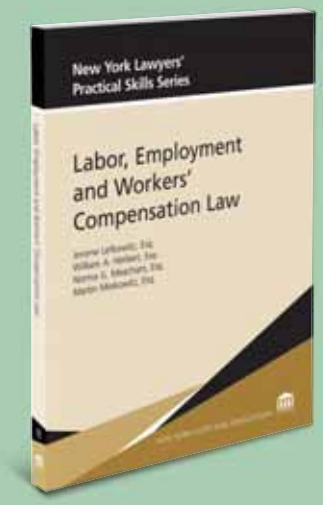
Labor and Employment Law Journal

Section Officers

ISSN 2155-9791 (print) ISSN 2155-9805 (online)

From the NYSBA Book Store

Labor, Employment and Workers' Compensation Law



PRODUCT INFO AND PRICES

2016-2017 / 402 pp., softbound
PN: 41037

NYSBA Members	**$80**
Non-members	$95

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total.

AUTHORS

Jerome Lefkowitz, Esq.
Willam A. Herbert, Esq.
Norma G. Meacham, Esq.
Martin Minkowitz, Esq

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

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

Coverage of labor and employment law has been substantially revised and reorganized by the authors in an attempt to make it even more useful for the practitioner. This practice guide is current through the 2016 New York State legislative session.

Get the Information Edge

NEW YORK STATE BAR ASSOCIATION
1.800.582.2452 www.nysba.org/pubs
Mention Code: PUB8461N Discount good until December 31, 2016

NYSBA

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

ADDRESS SERVICE REQUESTED

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

NEW YORK STATE BAR ASSOCIATION

ANNUAL MEETING 2017

JANUARY 23–28, 2017

NEW YORK CITY

New York Hilton Midtown

LABOR AND EMPLOYMENT SECTION PROGRAM
January 27, 2017

REGISTRATION OPENS SOON. BOOK YOUR HOTEL TODAY!
www.nysba.org/am2017