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Labor and Employment Law Journal

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

Message from the Section Chair

By Sharon Stiller

When I wrote the first draft of this message, President Trump had nominated CKE Restaurants CEO Andy Puzder for the position of Secretary of Labor. He was famously quoted as saying, “Robots, always polite, they always upsell, they never take a vacation, they never show up late, there’s never a slip-and-fall, or an age, sex, or race discrimination case.” But the first draft had to be recalled when Mr. Puzder withdrew his name. As I write this draft, the President just announced the nomination of R. Alexander Acosta, who is anticipated to sail through the confirmation process. Much less clear is what policies he will be advocating as Secretary of Labor, and where the White House stands on labor-related issues, particularly in view of the President’s Executive Orders to reduce regulation.

Meanwhile, back in New York, Governor Cuomo completed his State of the State tour on January 12, 2017, announcing the last of his 35 proposals for the coming year. Several of the Governor’s initiatives and recent Executive Orders involve labor and employment law. While the federal increase was stayed by court order, the threshold exemption rates for several of the white collar exemptions were increased in New York State. Task forces are being formed to share information among State agencies, and to increase enforcement by holding out-of-state LLC members liable for wage claims. New York State is gearing up its regulation and enforcement, while it appears that the federal government may be gearing down.

I submit that there has never been a more interesting time for labor and employment lawyers, nor a more important opportunity for this Section. We have a duty to each other and to the clients and businesses we represent, to help them to understand this changing landscape. This Section is uniquely able to rise to the challenge, precisely because of the talent of our membership, and its diversity. Our task, then, in the coming months, will be to educate our members so that they can navigate the volatile changes in

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Looking for past issues?

Labor and Employment Law Journal

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the field, to better serve the businesses, individuals and organizations that we represent.

We discussed this challenge at our Executive Committee meeting in January, along with our interactions with the New York State Bar, as it becomes involved with areas we are familiar with, such as diversity training. We continue our commitment to diversity as a Section, voting to make our diversity fellowship a two-year program, and sending a diversity fellow to the Trial Academy, as part of our sponsorship of that program.

In the past year, we have educated our membership in many ways, including sponsoring webinars in addition to our fabulous CLE programs. Some of the recent webinars include:

- 12/1: Conducting Effective Employment Investigations;
- 11/10: BREXIT & Employment;
- 11/4: Legal & Practical Considerations in Mediating Wage and Hour Cases;
- 10/19: Clinton vs. Trump on Immigration (you may want to replay this one given the events of late January and February, 2017);
- 10/13: Wage & Hour Update; and
- 2/11: How Will Employment Litigation Be Impacted.

We continue to share information with the Corporate Counsel section, as well as our outreach to law schools students. Our Annual meeting explored such timely topics as emergency ethics, political speech involving public officials as well as sports figures, and what can be expected from the NLRB during the Trump administration.

We also experienced a first at our Annual Meeting. While we often have law students attend our conferences, Rosemary Townley, Esq., brought with her a college student fascinated by one of our timely CLE topics, political speech or conduct by sports figures. Jason Polito, a third year business student at SUNY-New Paltz, will be exploring a master's in sports business marketing and/or law, and Jason not only attended but asked questions of the panel!

None of this would be possible without the commitment and passion of our members, who constantly step up to the plate when asked, and even when not asked. I am so very proud to be a part of this special and collegial group of lawyers who help create the cutting edge of labor and employment law. When I look back at the photograph of the Section members at the Supreme Court with Justice Ruth Bader Ginsburg from our fall meeting, I could not be more proud.

Please join me in thanking Allan Bloom, Esq., *Labor and Employment Law Journal* editor, for the fabulous journals he has put together over the years. We believe that they are second to none. Allan has been our *Journal* chair for five years, quietly increasing the caliber and relevance of the articles he brings to you. This year, Allan has brought on managing editors, Laura Monaco, Esq. of Epstein Becker and Colin Leonard, Esq. of Bond Schoeneck. Although we recognize that passing the gavel assures involvement from others, we will miss Allan when he passes his duties to the managing editors, but we will be sure to call upon his talents in other ways. We thank Allan for making our *Journal* among the best NYSBA publications.

And speaking of NYSBA publications, we are proud that our brochure about the work of the Labor and Employment Law Section will join the Legalease series this year, so that the public will be better informed about the work of labor and employment attorneys.

I am deeply honored to have been your Chair, and to have accomplished what we have this year. I am also thrilled that you have selected the finest succession of Chairs, with Seth Greenberg, Esq. of Greenberg, Burzichelli , Greenberg, P.C. scheduled to take over in June, 2017 and then Cara Greene, of Outten & Golden, LLP, the following June. Our Section exemplifies the best of civility, diversity, learning, talent and achievement in the field.

Save the Dates!

Fall Labor and Employment Law Section Meeting

October 20 - 22, 2017 | The Sagamore Resort

Bolton Landing, NY

Message from the Editor

By Allan S. Bloom

Five years ago, at the kind request of former Section Chair Al Feliu, I was given the honor of succeeding Philip Maier as the Editor of the *Labor and Employment Law Journal*. Since that time, I have had the privilege of being among the first to read so many terrific articles from authors within and outside our Section, and the pleasure of sharing those articles with our readers.

Much like our Section, the *Journal* has always featured and promoted scholarship, thought leadership, insight, and opinion from across the wide spectrum of labor and employment law—not only from practitioners (representing management, individuals, and unions, as well as in government and the public sector), but from academics, students, judges, arbitrators, and mediators. Our strength has been in the diversity of viewpoints one can find within each issue.

It is time to pass the mantle of overseeing this great publication to others, with the hope that they will find it as rewarding as I have over these last five years. Colin Leonard, of Bond, Schoeneck & King, and Laura Monaco, of Epstein Becker & Green, have graciously agreed to succeed me as Editors of the *Journal*. As I transition into my future role as an avid reader of (and, with Colin and Laura's approval, occasional contributor to) the *Journal*, I know that I leave you in very good hands.

I owe a deep debt of gratitude to the esteemed Section Chairs with whom I was fortunate to work over the years—Al, John Gaal, Jon Ben-Asher, Ron Dunn, Bill Herbert, and Sharon Stiller. All were tireless supporters of the *Journal* and staunch advocates for all our Section has to offer. I am also eternally grateful to our colleagues in Albany—including Section Liaison Beth Gould and Wendy Harbour, Lyn Curtis, and Simone Smith of the Publications team—each of whom did more than their fair share of the heavy lifting. Thanks also to Karen Langer, who has served dutifully as the *Journal*'s Assistant Editor since 2015.

Finally, thank you to our loyal readers. It's been great fun, and I look forward to seeing you at the next Section meeting.

NEW YORK STATE BAR ASSOCIATION

If you have written an article you would like considered for publication, or have an idea for one, please contact the Editors-in-Chief:

Colin M. Leonard, Esq.
Bond, Schoeneck & King, PLLC
1 Lincoln Ctr
Syracuse, NY 13202-1355
cleonard@bsk.com

Laura C. Monaco, Esq.
Epstein Becker & Green
250 Park Avenue
New York, NY 10177
lcmarino@optonline.com

Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information.

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Claire P. Gutekunst
President

From Dissent to Majority: What Labor Lawyers Might Expect From the NLRB

By: Wendy M. La Manque

I. Introduction

President Trump notably has the opportunity to fill the empty seat on the Supreme Court and more than 100 other vacant federal judgeships.[1] But labor law practitioners must also be aware of (and prepared for) Trump's ability to fill two vacancies on the National Labor Relations Board (the "Board"),[2] and to choose a new General Counsel when the current GC Richard Griffin's term expires in November 2017.[3] With a new balance of power at the Board, the general expectation is that the dissenting opinions of Member Miscimarra (now Acting Chair) in major decisions under the Obama Board will likely soon be the law of the land.

Although the Board cannot go out in search of cases upon which to rule, those who practice before the Board reasonably anticipate reversals in Obama-era precedent in several major areas. This article will address three areas likely to come before the Board in the next few years: the joint employer standard; whether graduate students enjoy collective bargaining rights under the National Labor Relations Act (the "Act"); and the procedures to be followed in Representation cases.[4]

II. The Joint Employer Standard—*Browning-Ferris*

Arguably one of the most consequential decisions under the Obama Board came in *Browning-Ferris Industries of California, Inc.*[5] In *Browning-Ferris*, the Board tackled the issue of joint employment, that is, when a business entity can be considered the employer (for purposes of the Act) of workers who are technically "employed" by another entity, such as a temporary hiring agency. In brief, the issue in *Browning-Ferris* was whether BFI, which owned and operated a recycling plant, was a joint employer with Leadpoint, an entity BFI contracted with to supply employees to work at BFI's plant.

"In other words, to effectuate meaningful collective bargaining, BFI must be considered a joint employer whose presence is required at the bargaining table."

The Board majority (Chairman Pearce and Members Hirozawa and McFerran) determined that the joint employer standard then in existence—that to be a joint employer, the putative employer's control over workers must be "direct, immediate, and not 'limited and routine'"[6]—needed to be revisited, because, among other things, that standard was "narrower than statutorily necessary" in relation to the common law agency theory.[7] The Board concluded that a different test was appropriate, because over the past several decades, while "the Board's view of what constitutes joint employment under the Act has narrowed, the diversity of workplace arrangements in today's economy has significantly expanded."[8] The majority therefore announced a return to the "traditional" test used by the Board: that "[t]he Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment."[9]

Wendy LaManque is an associate at Cohen, Weiss and Simon LLP, where she provides legal representation to private and public sector unions as well as individual employees in matters involving litigation, arbitration and collective bargaining negotiations, as well as advising unions with regards to internal governance issues and organizing campaigns.

"Developing these standards necessarily involves the trademark holder designating that the product be created by some sort of consistent method."

The Board majority found that BFI was indeed a joint employer with Leadpoint because, among other things, BFI codetermined who could be hired to work at BFI's plant by imposing specific conditions on the hiring process;[10] BFI possessed the right to "discontinue the use of any personnel" Leadpoint assigned to work at the plant;[11] BFI retained unilateral control over the speed of the production lines;[12] and BFI specified the number of workers it required, the timing of employees' shifts, and determined a maximum compensation rate.[13] The majority noted there would be no unfairness "in holding that legal consequences may follow" from BFI's decision to retain ultimate authority over these and other terms and conditions of employment,[14] and that because BFI had retained such authority, it was difficult for the Board to see "how Leadpoint alone could bargain meaningfully about such fundamental working conditions as break times, safety, the speed of work, and the need for overtime imposed by BFI's productivity standards."[15] In other words, to effectuate meaningful collective bargaining, BFI

must be considered a joint employer whose presence is required at the bargaining table.

> *"Another major Obama Board decision that will likely meet resistance from a Trump Board is* The Trustees of Columbia University in the City of New York and Graduate Workers of Columbia-GWC, *UAW, where the Board revisited the issue of whether graduate students are properly considered employees under the Act."*

In light of Members Miscimarra's and Johnson's vociferous dissent in this case, however, it is likely that *Browning-Ferris* will be overturned by a Trump Board at its earliest opportunity. In the dissent's view, the Board majority had created "fundamental uncertainty"[16] by abandoning a longstanding test and replacing it with an ambiguous standard. The dissent argued that under the majority's view, indirect or potential control over terms and conditions of employment by the putative employer would now be dispositive of joint employer status, even if there is *no* evidence of actual, direct control of employees' terms and conditions of employment.[17] The dissent warned that "no bargaining table will be big enough" for all the entities that will qualify as joint employers under the majority's standard,[18] argued that the majority's test was out of line with common law agency principles,[19] and concluded that the Board had gone beyond its Congressional grant of authority by redefining the joint employer doctrine.[20]

Of particular concern to the dissent was how the *BFI* standard will affect business franchising and related federal law. The dissent cites as an example trademark law, as it relates to franchises, which requires that a company owning a trademark set up standards that must be met in order for the franchise to use the mark associated with its goods or services.[21] Developing these standards necessarily involves the trademark holder designating that the product be created by some sort of consistent method.[22] According to the dissent, the new joint employer standard could cause labor-related consequences for franchisors, whose designation of a standard method of operations may result in the franchisee becoming the "agent of its franchisor," something Congress did not intend.[23]

The majority defended its decision against the dissent's criticisms, which the majority took as an attack on the very notion of joint employers generally,[24] by insisting that "[i]t is not the goal of joint-employer law to guarantee the freedom of employers to insulate themselves from their legal responsibility to workers, while maintaining control of the workplace."[25] However, given Trump's business background, his nomination of Andrew Puzder, CEO of CKE restaurants, which owns or franchises over 3,300 fast food restaurants in the United States,[26] to be Secretary of Labor,[27] and what the dissent characterized as the "expansive, near-limitless nature of the majority's new standard,"[28] it is likely that the Board will endeavor to move to a much narrower standard that allows businesses to retain greater control over their operations and workforce without being considered joint employers under the Act.

III. Collective Bargaining Rights for Graduate Students—*Columbia University*

Another major Obama Board decision that will likely meet resistance from a Trump Board is *The Trustees of Columbia University in the City of New York and Graduate Workers of Columbia-GWC, UAW*,[29] where the Board revisited the issue of whether graduate students are properly considered employees under the Act. In *Columbia University*, the Board majority (Chairman Pearce and Members Hirozawa and McFerran) overruled the 2004 case of *Brown University*,[30] which categorically excluded graduate students employed by their universities from coverage under the Act, and which itself overruled the 2000 case of *New York University*,[31] which held that certain graduate students *were* statutory employees.

> *"Miscimarra argued that the Board majority had disregarded the potential effects of the use of economic weapons in a labor dispute at a university, citing the possibility that students may lose academic credit or fail to satisfy graduation requirements in the event of a strike or lockout, while their tuition could be retained by the university."*

In *Columbia*, the Board found that in *NYU* the Board had been on "very firm legal ground" when it concluded that graduate students were employees under the Act, given that the students had a common-law employment relationship with their university.[32] The Board in *Columbia* found that recognizing student assistants as employees would promote federal labor policy goals by permitting employee free choice to engage in collective bargaining;[33] that doing so would not unduly infringe upon "traditional academic freedoms" as demonstrated in organized public university settings;[34] and that there is ultimately no compelling reason to continue to exclude graduate students from the Act's protection.[35] In light of the foregoing, and the fact that Columbia University "directs and oversees" graduate students' teaching activities,[36] the Board overruled *Brown University*, finding that here, graduate students were properly considered employees under the Act (noting, however, that the Board would

not require *all* common-law employees to be considered employees under the Act). The Board further held that the petitioned-for unit of undergraduates, master's degree students, and doctoral student assistants shared a community-of-interest and was an appropriate unit under *Specialty Healthcare*.[37]

Member Miscimarra, dissenting, argued that Congress never intended that graduate students would be covered by the Act, and that *Brown* was rightly decided.[38] Miscimarra reiterated the Board's view in *Brown* that "[t]he 'business' of a university is education," and students are not the means of production—they are the "product."[39] In Miscimarra's view, these graduate students have a relationship to the university that is "predominantly academic, rather than economic," and that Congress intended the Act to apply to conventional workplaces, not academic settings.[40] In accordance with the *Brown* decision, Miscimarra maintained that the work done by graduate students was in furtherance of obtaining a degree, and that introducing collective bargaining to this relationship would be detrimental to students' educational process and infringe upon academic freedom.[41] Miscimarra argued that the Board majority had disregarded the potential effects of the use of economic weapons in a labor dispute at a university, citing the possibility that students may lose academic credit or fail to satisfy graduation requirements in the event of a strike or lockout, while their tuition could be retained by the university.[42] Miscimarra also noted that the Board's processes related to representation cases and unfair labor practices can take months or years, and that the students may no longer be attending school by the time Board-ordered relief becomes available to the parties in a university-centered labor dispute.[43] Miscimarra would hold that in any event, because of "fundamental dissimilarities" between master's degree students, undergraduate students, doctoral students and course assistants in terms of their pay, duties, responsibilities, and expected length of service in their positions, the petitioned-for unit would be inappropriate under any community-of-interest test, including *Specialty Healthcare*.[44]

Member Miscimarra emphasized that, with the exception of the four-year period between the decisions in *NYU* and *Brown*, "the Board has consistently held that university student assistants are *not* employees," and their relationship with their university is "primarily educational."[45] It is likely, therefore, that a Trump Board would revert to a more restrictive interpretation of the Act that categorically excludes graduate students from its coverage.

IV. Representation Case Procedures

In December 2014, the Board adopted revised rules to govern the processing of representation petitions and elections, and did so in an effort "to enable the Board to better fulfill its duty to protect employees' rights by fairly, efficiently, and expeditiously resolving questions of representation."[46] The rules were adopted through an agency rulemaking process,[47] and went into effect on April 14, 2015. Both the Fifth Circuit and D.C. Circuit Courts of Appeals have upheld these rules as within the broad discretion entrusted to the Board under the Act.[48]

The revised rules touch on many different procedural issues arising in the context of representation cases, including e-filing (the Board now permits the electronic transmission of petitions, notices and voter lists); the standardization of timing of pre- and post-election hearings; and limiting the issues that can be raised at a pre-election hearing to disputes that are necessary to determine whether it is appropriate to conduct an election.[49] The majority of the Board contended that the rule modifications will remove some of the delays inherent in the Board's process and minimize the possibility of frivolous litigation.[50]

"Among a spate of other issues, the dissent also objected to the elimination of post-hearing briefs and mandatory Board review of post-election disputes under stipulated election agreements as being without a rational basis."

The rules were not adopted unanimously, however, and the 30-page dissent from Members Miscimarra and Johnson painted a very different picture, referring to the amendments to the rules as the "Mount Everest of regulations."[51] The dissent contended that the new rules adopt an "election now, hearing later" approach, by delaying answering fundamental questions until after the election, and will encourage employees to "vote now, understand later" by shortening the "time needed for employees to understand relevant issues" and curtailing employers' rights to "engage in protected speech."[52] Specifically, the dissent focused on changes that, in their view, constitute an unjustifiably greater burden on the employer, such as the requirement that an employer's position statement be timely filed or forfeit litigating "any issue that must be contested at the pre-election stage," including questions of jurisdiction, the employer's operations, employee status, contract and other election bars, and what constitutes the appropriate unit.[53] The dissent contrasted this burden on employers with the requirements on a petitioning union during the same period, arguing that the practices of obtaining pre-hearing information from the petitioning union are essentially voluntary and informal, and the same as prior to the amendments, while the practices concerning employers were "transformed into binding legalistic requirements" with significant negative consequences for failing to timely comply.[54] Among a spate of other issues, the dissent also objected to the elimination of post-hearing briefs and mandatory Board review of post-

election disputes under stipulated election agreements as being without a rational basis.[55]

> *"The amended election rules are a likely target for a Trump Board. The Board could change the rules through another agency rulemaking process, or the rules could be repealed by Congress."*

The Board majority noted the multiple areas in which there was no substantive disagreement between the majority and the dissent—such as allowing for electronic filing and transmission of the petition and the required notice if the employer customarily communicates with its employees electronically; providing that requests for review will not stay action by a regional director unless the Board specifically orders otherwise; and requiring the employer to provide an electronic version of the voter list.[56] Still, the dissent expressed the view that the overarching problems with these provisions "infect" the final rule as a whole, they "do not approve of any aspect of the Rule," and that the majority was "mistaken in suggesting that there exists a Board consensus on *any* specific provisions" of the rule.[57]

The amended election rules are a likely target for a Trump Board. The Board could change the rules through another agency rulemaking process, or the rules could be repealed by Congress. The Board could attempt to scrap the rules entirely, as suggested by the dissent's comment that they "do not approve of *any* aspect" of the rule.[58] Still, because of the arguably universally beneficial aspects of some of the rule amendments—such as permitting the electronic filing and transmission of certain documents—it is possible that the Board may take a more targeted approach and repeal only elements of the rules. For example, the dissent expressed its belief that it would be reasonable to have a minimum "guideline" period between the filing of the petition to the election of 30-35 days, and a maximum period of 60 days.[59]

> *"These three Board issues are hardly the only ones affecting workers' rights that are likely to receive scrutiny from the Trump administration."*

The dissent also argued that one of the biggest factors contributing to delays in resolving election-related issues was not addressed by the rule amendments: the Board's "blocking charge" doctrine, which permits parties to delay representation elections by filing certain kinds of unfair labor practices charges.[60] The dissent suggested eliminating blocking charge deferrals for a three-year trial period in order to study its effects on reducing delay, which may obviate the need to change other election procedures to achieve that goal.[61]

The dissent also hinted at future attempts to limit *Specialty Healthcare*,[62] which established that unions need only show that the proposed unit (in a non-acute health care setting) consists of a clearly identifiable group of employees for the Board to presume the unit is appropriate. To overcome this presumption, an employer arguing that the unit should include additional employees must demonstrate that employees in a larger unit share an "overwhelming" community of interest with those in the petitioned-for unit.[63] The dissent argued that under that standard, "[a]lmost any petitioned-for unit conforming to classification, department, craft, or group function may be viewed as presumptively appropriate."[64]

V. Conclusion

These three Board issues are hardly the only ones affecting workers' rights that are likely to receive scrutiny from the Trump administration. At the NLRB, practitioners may also reasonably anticipate changes in the standards governing class action waivers,[65] employee use of employer email systems,[66] employer withdrawal of recognition of an incumbent union,[67] and the disclosure of confidential witness statements from workplace investigations,[68] to name a few possibilities. To paraphrase Samuel L. Jackson's warning words in the film *Jurassic Park*: "Hold onto your [hats]."[69]

Endnotes

1. *See* http://www.uscourts.gov/judges-judgeships/judicial-vacancies (last visited February 12, 2017).
2. *See* https://www.nlrb.gov/who-we-are/board (last visited February 12, 2017).
3. *See* https://www.nlrb.gov/who-we-are/general-counsel/richard-f-griffin-jr (last visited February 12, 2017).
4. The following is adapted from Ms. LaManque's contribution to a joint paper and presentation by Ms. LaManque and Jessica Katsin, partner at Jones Day, at the 2017 New York State Bar Association Labor and Employment Law Section Annual Meeting.
5. 362 N.L.R.B. No. 186 (Aug. 27, 2015).
6. *Id*. at 10.
7. *Id*. at 11.
8. *Id.*
9. *Id*. at 15.
10. *Id*. at 18.
11. *Id.*
12. *Id.*
13. *Id*. at 19.
14. *Id*. at 14.
15. *Id*. at 19.
16. *Id*. at 23.
17. *Id*. at 22.
18. *Id*. at 21.
19. *Id*. at 28.

20. *Id.* at 27-28.
21. *Id.* at 45.
22. *Id.* at 46.
23. *Id.*
24. *Id.* at 20.
25. *Id.* at 21.
26. *See* http://www.ckr.com/about.html (last visited February 12, 2017).
27. At the time this article was submitted for publication, Andrew Puzder was still the nominee for Secretary of Labor. On February 15, 2017, Puzder withdrew from consideration after several Republicans expressed doubts over voting in favor of his nomination. According to the *New York Times*, Puzder had seen intense opposition from "Democrats and liberal groups who accused him of mistreating his workers, opposing the minimum wage and supporting automation in the workplace. The attacks on his policy views were compounded by an intense scrutiny of his personal life, including allegations that he abused his ex-wife in the 1980s." The New York Times (February 15, 2017), available at https://www.nytimes.com/2017/02/15/us/politics/andrew-puzder-withdrew-labor-secretary.html.
28. *Id.* at 36.
29. 364 N.L.R.B. No. 90 (2016).
30. 342 N.L.R.B. 483 (2004).
31. 332 N.L.R.B. 1205 (2000).
32. 364 N.L.R.B. No. 90 at 4.
33. *Id.* at 6-7.
34. *Id.* at 7-9.
35. *Id.* at 12.
36. *Id.* at 15.
37. *Id.* at 18-21.
38. *Id.* at 23.
39. *Id.* at 34 (citations omitted).
40. *Id.* at 24-25.
41. *Id.* at 25.
42. *Id.* at 29.
43. *Id.* at 31.
44. *Id.* at 33.
45. *Id.* at 24 (emphasis in original).
46. Memorandum GC 15-06 (April 6, 2015).
47. *See* Representation-Case Procedures, 79 Fed. Reg. 74308 (Dec. 15, 2014).
48. *See Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215 (5th Cir. 2016); *Chamber of Commerce of United States of Am. v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015).
49. For a comparison chart of the new and old election procedures, *see:* https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3317/Comparisontable.pdf (last visited February 12, 2017).
50. *See* 79 Fed. Reg. at 74308.
51. *Id.* at 74430.
52. *Id.* at 74430-1.
53. *Id.* at 74442-3.
54. *Id.* at 74443.
55. *Id.* at 74449.
56. *Id.* at 74422.
57. *Id.* at 74441 (emphasis in original).
58. *Id.* (emphasis supplied).
59. *Id.* at 74459.
60. *Id.*
61. *Id.*
62. 357 N.L.R.B. 934, 941 (2011).
63. *Id.* at 944.
64. 79 Fed. Reg. at 74447.
65. *See D.R. Horton*, 357 N.L.R.B. 2277 (2012), *enforcement denied in relevant part*, 737 F.3d 344 (5th Cir. 2013).
66. *See Purple Communications, Inc.*, 361 N.L.R.B. No. 126 (Dec. 11, 2014).
67. *See Levitz Furniture Co. of the Pacific*, 333 N.L.R.B. 717 (2001); GC Memo 16-03.
68. *See American Baptist Homes of the West d/b/a Piedmont Gardens*, 362 N.L.R.B. No. 139 (June 26, 2015).
69. Jurassic Park (Universal Pictures 1993).

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How to Roll Out a Global HR Initiative—“Launch Logistics” for Issuing an International Code of Conduct or Ethics, HR Policy or Compensation/Benefits Plan

By Donald C. Dowling, Jr.

In this era of internationally aligned business operations, multinational employers always seem to be launching, updating, refining or tweaking some global human resources initiative or other. Indeed, global HR initiatives seem to have become a fundamental feature of how multinationals do business across borders—particularly if we define “global HR initiative” broadly to include the full spectrum of all a multinational’s (1) global HR/employment rules, (2) global staff rules on business topics beyond HR, and (3) global compensation/benefits offerings. In that respect, “global HR initiative” might include:

1. **A multinational’s global HR/employment rules—all its cross-border**
    - codes of conduct or ethics
    - employee handbooks
    - single-topic HR policies (like policies on discrimination/harassment, conflicts of interests, employee data protection, employee use of social media)
    - HR programs and guidelines (like HRIS platforms, whistleblower hotlines, expatriate/secondment programs, “bring your own device” programs)
    - health/safety protocols (cardinal safety rules, pandemic/crisis plans, duty-of-care for expatriates and international travelers, travel tracking and evacuation services)
2. **A multinational’s global staff rules on business topics beyond HR—all its cross-border directives or policies on operational matters like**
    - insider trading
    - internal audit/accounting measures
    - bribery/improper payment
    - conflicts-of-interests
    - antitrust/competition
    - intellectual property
    - environmental compliance
3. **A multinational’s global compensation/benefits offerings—all its cross-border (regional or global)**
    - executive compensation plans
    - sales compensation (commissions and incentives) plans
    - one-off employee benefit plans (like tuition reimbursement, adoption reimbursement, retention bonus and severance pay plans)
    - insurance benefits (life, disability, D&O, medical)
    - Employee Assistance Programs
    - equity plans (broad-based or executive stock grants, options, RSUs, phantom stock)
    - expense reimbursement protocols
    - expatriate benefits programs

By “global HR initiative,” therefore, we mean workplace policies and employee benefits plans that a multinational headquarters launches internationally to advance its business needs across borders. (But we are not including exceptional, large-scale, transformational workplace disruptions like international restructurings, global reductions-in-force, cross-border workforce integrations, multi-jurisdictional spinoffs, or multinational bankruptcies.)

> *“Why should a multinational spend time and resources attending to technical issues around something as seemingly simple as promulgating or updating an in-house staff rule or granting employees some new employee benefit?”*

When a multinational sets out to launch, update, refine, or tweak a global HR initiative, the organization always seems to focus primarily on content: What rules should our global HR code or policy impose? What benefits should our global benefits offering provide? If, for example, the particular global HR initiative happens to be a code of conduct, the multinational will inevitably ask: What topics should we include in our global code? If the initiative is a policy on bribery/improper payments, expect the organization to ask: How should we define “improper payment”—and should we address “facilitating payments”? If the initiative is a retention bonus plan, the multinational’s lead questions will likely be: How much should our retention bonus award? And can we have a clawback?

These are all important content questions about the global HR initiative. Answering them is vital. But content questions are not the only vital questions when launching, updating, refining or tweaking a global HR initiative. In any global HR initiative, content questions should just be stage one of a two-stage process. Equally vital—but too often overlooked or downplayed—are the stage two questions of process, what we might call launch logistics: How to launch the global HR initiative so it sticks, binding overseas staff without exposing the multinational to too much liability. We address in our discussion here the nine logistical steps a multinational should consider taking to launch any cross-border HR initiative:

- Step 1: Document that overseas staff received information about—or solicit staff acknowledgements to—the global HR initiative
- Step 2: Decide on the number of versions
- Step 3: Repeal and align older and local non-conforming policies and plans
- Step 4: Enlist overseas affiliates to adopt, ratify, and impose the headquarters initiative directly on their own staff
- Step 5: Translate employee communications about the global initiative as required
- Step 6: Comply with collective consultation obligations
- Step 7: Make any mandatory government filings and take any other legally mandated technical steps
- Step 8: Account for employee vested rights
- Step 9: Correct oversights in previous initiatives

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But before explicating each of these nine steps, we might pause to consider why. Why should a multinational spend time and resources attending to technical issues around something as seemingly simple as promulgating or updating an in-house staff rule or granting employees some new employee benefit? After all, launching a domestic HR initiative is usually straightforward (except that launch logistics get complex if the initiative is a mandatory subject of union bargaining or if it falls under ERISA employee benefits regulation). American employers under employment-at-will often just communicate their latest rule, handbook, program or benefit to stateside staff, declaring it applies from today forward, maybe collecting employee acknowledgements and reserving a right to change or discontinue the initiative at any time—sticking in the disclaimer that "this is not a contract."

Outside the U.S., though, the process around launching or even just updating an internal rule, code, program or benefit gets substantially more complex. And so a U.S. multinational headquarters intent on rolling out or tweaking some sort of internal HR initiative across foreign operations proactively needs to consider our nine logistical steps, to account for the realities of the "indefinite employment" regimes outside American employment-at-will. Failing to address these issues might mean the initiative does not "stick" (is unenforceable abroad), might make a purportedly temporary initiative permanent—and might spark legal liability.

Step 1: Document That Overseas Staff Received Information About—or Solicit Staff Acknowledgements to—the Global H.R. Initiative

Never "soft open" a new global HR initiative, slipping it onto the company intranet site and expecting affiliate employees worldwide to find it, read it, understand it, and agree to comply. Develop a proactive strategy for communicating and distributing the new cross-border HR initiative in a way that binds each affected employee worldwide.

- If the global HR initiative is a cross-border policy, rule, or code, play out the hypothetical scenario of an overseas employee later disciplined for violating it who claims ignorance: *What? I never knew about that rule you buried on the headquarters intranet site… you never told me I had to follow it—certainly, I never agreed to it!*
- If the global HR initiative is an international compensation, benefit, or equity plan, play out the hypothetical scenario of an overseas employee later held ineligible for a payout: *What? I never knew about that loophole buried in that obscure plan document tucked away on the headquarters intranet site…you never told me I was subject to that restrictive provision—certainly, I never agreed to it!*

Inevitably in all jurisdictions worldwide, an employer trying to enforce a policy, rule, code, or benefit-plan term may bear the burden to prove it had, in advance, duly communicated the relevant provision to the employee now challenging it. Be able to prove that each covered employee, including future new-hires, received notice of, and (ideally) agreed to comply with, the global HR initiative.

This leads into the ever-present issue of whether to collect wet-ink signed or electronically mouse-clicked employee acknowledgments to a global employer initiative. U.S.-headquartered multinationals often expect staff worldwide expressly to consent to a global HR initiative, particularly where the initiative is a cross-border code of conduct or an international compensation and/or benefit plan. Many American multinationals interpret the U.S. Foreign Corrupt Practices Act, Sarbanes-Oxley, Dodd-Frank and U.S. federal sentencing guidelines as requiring that employers be able to demonstrate they communicated various policies to employees and required them to comply. Consistent with that, law and best practices in certain foreign jurisdictions beyond the United States (Austria, Czech Republic, and Finland are prime examples) all but require employee-signed acknowledgements when an employer changes or adds new workplace rules. Additionally, many countries around the world look to whether a workplace code, policy, rule, or benefit is "contractual." Those legal systems (which include common law countries like Australia, Canada, England, Ireland as well as civil law jurisdictions like Belgium, Germany, Norway) elevate certain workplace initiatives to the level of executed employment contracts. A "contractual" HR policy needs to integrate into employees' written employment contracts, ideally as a signed amendment to the existing employment agreement.

"Outside the U.S. an employer should openly embrace the contractual nature of its HR initiatives."

These issues add up to an excellent reason for a multinational to collect, from staff worldwide, executed acknowledgements to a new global HR initiative. Employee acknowledgements to an initiative may not be mandated by law, but they can protect the multinational around the world. And so, perhaps, headquarters should insist that each employee worldwide expressly confirm having received and read the documents that constitute the initiative. Maybe the organization should even word the acknowledgement text to have employees affirmatively agree to comply.

Unfortunately it is not nearly so easy. The process for collecting staff signed or mouse-clicked acknowledgements outside the United States is surprisingly nuanced. But because domestically within the U.S. collecting American staff acknowledgements is fairly straightforward (facilitated as it is by management-friendly employment-at-will principles), headquarters risks overlooking the steep challenges to collecting duly executed acknowledgements abroad.

Before imposing any employee-acknowledgment requirement internationally, craft a compliance strategy that accounts for the four serious logistical challenges outside the United States: (a) presumptive coercion (b) ineffective employment contract amendment (c) non-signers and (d) proof problems.

a. Presumptive Coercion

Courts in much of Northern Continental Europe and in some countries beyond deem employee-signed agreements, including staff acknowledgments, void as presumptively coerced. The issue is the inherent inequality of bargaining power between an employer and staff—almost like a contract with a minor or someone adjudicated mentally incompetent. These countries presume workers have no free choice when their boss orders them to sign a boilerplate form; law presumes the subtext to an employee acknowledgement request is "sign—or you're fired!" even if management did not state the request quite so bluntly. In these jurisdictions, staff acknowledgements may be worthless, deemed void as presumptively coerced.

b. Ineffective Employment Contract Amendment

We mentioned that certain common law and civil law jurisdictions treat some employer initiatives as "contractual" and see an employee acknowledgement as amending the employment agreement. In these situations a properly executed acknowledgement may indeed make the HR initiative enforceable as "contractual"—but an overly casual acknowledgement, including one electronically executed, may prove unenforceable if it falls short of local employment-contract-execution strictures. So check out and comply with local contract-execution strictures. Where an employee acknowledgement is deemed "contractual," draft and execute it as a full-blown contractual amendment. Some countries may even require a government filing.

A related issue is the U.S. employer that tries to have it both ways, collecting staff acknowledgements but sticking into them (or into the underlying HR initiative documents themselves) an employment-at-will disclaimer or a "this-is-not-a-contract" disclaimer. These disclaimers are endemic to the United States, creatures of U.S. employment-at-will, and are almost always inappropriate in other countries, even Canada. Outside the U.S. an employer should openly embrace the contractual nature of its HR initiatives. The best approach may be affirmatively declaring the initiative and the employee acknowledgement are overtly "contractual."

The problem here is that outside the U.S., employment-at-will disclaimers and "this-is-not-a-contract" disclaimers can serve as an escape clause, freeing staff from having to comply with the initiative precisely because it is "not a contract." An excellent example is the 2014 Canadian case *Oliver v. Sure Grip Controls*, in which a Canadian provincial supreme court held an American employer's

employment-at-will clause in its Canadian handbook rendered a severance pay cap unenforceable.[1]

The court opinion says: "I cannot conclude the plaintiff's [severance] damages should be limited to those based in the Handbook. The Handbook… made it clear that the Handbook 'is not a contract of employment….'"[2]

c. Non-signers

When a multinational insists on collecting staff acknowledgments to a global HR initiative, headquarters far removed from "the field" may assume that, ultimately, all employees worldwide will sign on. But a 100% return rate on staff acknowledgements is all but impossible across big global employee populations. Where overseas staff prove skeptical or hostile to the underlying global HR initiative (particularly if employee representative bodies resist it), some stray employees may openly refuse to sign acknowledgements. Others may passive-aggressively neglect to return their acknowledgements, even after repeated reminders from the HR team. Indeed, hapless local HR may be all but powerless to force employees—especially powerful executives and labor representatives—to sign or click "I accept."

Local HR has little leverage here: Outside employment-at-will, an employer does not have good cause to discipline a worker just for refusing or neglecting to acknowledge something. In one case, for example, a Beijing court reinstated a chief guard who had been fired for refusing to acknowledge a handbook update. [3]

Non-signers of an employee acknowledgement raise a serious "Achilles' heel" problem. A non-signer who later violates the policy or rule, or who later seeks to escape a restrictive benefit-plan term, might argue he is exempt precisely because he never signed.

Invoking co-workers' executed acknowledgements in his own favor, the recalcitrant non-signer may argue the policy, rule, or plan reaches only those of his colleagues who signed on and agreed to it. At that point the multinational realizes—too late—it would have been better off not collecting signed acknowledgements at all. (This non-signer would not have this particular argument without the employee acknowledgement process in the first place.)

d. Proof problems

In-house human resources teams may have unimpressive records retaining and tracking employee acknowledgements over time. Three common proof problems are sloppy recordkeeping, sloppy follow-through, and sloppy computer verification:

- **Sloppy recordkeeping:** Years after staff across far-flung offices were thought to have signed or mouse-clicked some dimly remembered staff acknowledgement, it can prove maddeningly difficult for HR to dig out that one specific executed form of this one particular employee who now needs to be held accountable for complying with a provision he now claims he never saw: *Surely Pranav must have submitted an acknowledgement at some point…but where is it now?*
- **Sloppy follow-through:** New-hires who "onboard" after a cross-border code or HR policy launch may never get asked to sign acknowledgements. Even where the acknowledgement-collection process worked in the first round, the organization may fail to follow through collecting acknowledgements going forward.
- **Sloppy computer verification:** Mouse-click acknowledgements are notoriously hard to verify after the fact, when a dispute later ends up in court. Meeting the employer's burden to prove a given employee actually clicked "I accept" one day long ago can be all but impossible years later, under inflexible and antiquated evidence rules in foreign courts with changing electronic-signature proof requirements. Often the best the I.T. team can do is to say: *Eva must have acknowledged it—or else she couldn't have logged onto our system!* That might be true, but it is not likely admissible evidence of an electronic signature.

Never insist on collecting employee acknowledgements to a global HR initiative without a proactive strategy accounting for each of these four logistical challenges. One strategy, for example, is to time the employee acknowledgement process to coincide with some significant discretionary bonus payment, stock award, or pay raise—confer the bonus, award or raise only in exchange for an executed acknowledgement. Another strategy: Send the relevant documents to employees by certified mail, scrupulously retaining postal receipts.

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Where collecting staff acknowledgements worldwide is not feasible, consider alternatives. One alternative is

seeking collective buy-in from employee representatives, rather than individual employee acknowledgements, in jurisdictions where employees are represented. Another alternative: The local HR team distributes relevant documents personally to each employee (maybe handing them out during a training session); HR representatives then create (and sign) forms or log sheets memorializing the date and circumstances under which each named employee received the package.

Step 2: Decide on the Number of Versions

A multinational rolling out a new cross-border HR initiative should first decide whether it can get away with issuing one single global document worldwide, whether to bifurcate dual versions, or whether to spin off distinct local versions (or riders) for each affected country. These three possible approaches—one policy, two policies, or local country policies/riders—differ significantly. None of the three approaches works best every time. Selecting the most appropriate of the three approaches depends in large part on the topic of the cross-border HR initiative.

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Topics like ethics, insider trading, and bribery lend themselves to a single global version. Topics like discrimination, harassment, diversity, background checking/testing, and whistleblower hotline communications can be more appropriate for bifurcated dual versions, especially where the sponsor multinational employs a clear majority of its worldwide workforce at headquarters with only small pockets of staff abroad. Inherently local topics like holidays, vacation, overtime, and data protection may be most appropriate for aligned but separate local country-by-country policies—or a single high-level global policy plus local riders.

As to the pros and cons of these three approaches:

- **Single global version:** To promulgate just one single cross-border HR initiative document offers a streamlined and uniform global approach. One single global version always seems simplest and most conducive to cross-border alignment, and so the single-version approach is usually the default. Multinationals may say they need one global document to impose a uniform global rule, to streamline employee communications and to promote global unity.

  But a single global policy/code or benefits/compensation plan document is not always ideal. Rules, provisions, and benefits appropriate for headquarters employees sometimes need tweaking or reworking abroad. For example:

  - A single global data protection policy risks extending restrictive rules like the onerous data protection laws of Europe to employee populations that do not otherwise enjoy or even expect these protections.
  - A single global anti-harassment policy that ties the harassment prohibition to protected group status is too narrow for jurisdictions that prohibit so-called "moral harassment," "bullying," "mobbing," or "psycho-social harassment." But a global harassment policy that accommodates the broad "moral harassment" concept may be broader than the employer wants in jurisdictions like the U.S.
  - A single global vacation or overtime pay policy might not work internationally without local modifications because of inherently inconsistent vacation and overtime pay laws from country to country.
  - A single global severance pay plan, equity plan, or other employee benefits plan may be unworkable internationally unless modified locally to account for local employment, benefits, securities and tax laws. Clawback provisions in plan documents are particularly susceptible to varying local interpretations.

- **Bifurcated versions:** Multinationals sometimes launch a domestic HR policy at headquarters plus a separate but aligned "rest-of-the-world" version for overseas staff. The two-version approach tends to be most common at multinationals with a strong headquarters "center of gravity"—those that employ many at headquarters but only pockets of staff scattered across foreign countries. Headquarters at these organizations may want to avoid letting "the tail wag the dog" by compromising a global HR initiative to accommodate overseas complications but "watering down" the program for the majority of the organization's staff based at headquarters. This is particularly true where headquarters is in the U.S. and subject to employment-at-will and America's unique, heavily litigated discrimination laws. The bifurcated approach can be most appropriate for topics like diversity and reduction-in-force selection where U.S. principles differ intrinsically from best practices abroad. For example, a U.S. government contractor likely has no business case for promulgating a global affirmative action

policy that exports all the requirements on U.S. government contractors—but it might issue a U.S. affirmative action policy plus a broader rest-of-the-world diversity policy.

Another context where the bifurcated approach works well is the global whistleblower hotline: Restrictive hotline rules under European Union data protection law compel a multinational to make compromises for European hotline communications that headquarters often prefers to avoid making in communications outside Europe. (This said, scrupulously compliant organizations may make separate tailored hotline communications across European member states.)

- **Local versions or riders:** Employment laws differ from country to country. The most compliant way to impose any workforce initiative across more than one country is to tweak the wording locally, tailoring for each jurisdiction a version or rider that accounts for local nuances. A recent Australian case illustrates the issue. The court struck down a U.S. multinational's otherwise robust global sex harassment policy because it glossed over a few Australia-specific nuances and "made no reference to the legislative foundation in Australia for the prohibition on sexual harassment."[4] The court in that case seems to want multinationals to tweak global policies to account for nuances of local country law.

  Accounting for local differences is always a best practice to the extent that ignoring local law and custom is a bad practice. The tradeoff, of course, is that coming up with aligned local versions or riders can get unwieldy, expensive and slow, and weakens the unifying character of a single global initiative document. Also, in practice sometimes some of the local versions get crafted less thoroughly than others, leaving gaps.

Step 3: Repeal and Align Older and Local Non-Conforming Policies and Plans

Never launch a new or revised global HR initiative by imposing it "on high" from headquarters, "damn the torpedoes," heedless of whatever the organization may have done in the past. Instead, start by collecting, and then repealing or aligning, all existing global and local HR documents (policies, rules, plans) that speak to the topic of the new initiative. Even look into unwritten practices. For example, in issuing a new global severance pay plan, first repeal any earlier global severance pay plan, then align the new global plan with local severance pay plans, and finally remember to account for past unwritten severance pay practices at overseas facilities. This all sounds obvious, but multinationals often overlook this "repeal and align" step, or do it incompletely or half-heartedly.

This step breaks into three sub-issues: Repeal obsolete headquarters initiatives, align other HR policies, and harmonize formal work rules.

- Repeal obsolete headquarters initiatives: A multinational that issues, for example, a revised or updated international code of ethics, global bribery policy or regional sales compensation plan must repeal all earlier versions floating around. Do not just slap the latest and greatest updated version onto the company intranet; first, dig out and repeal each extant obsolete version. Otherwise some hapless foreign employee may later stumble across an old version and assume it controls. Worse, some clever employee threatened with discipline for breaching a new policy (or held to less-generous terms under a new compensation plan) may exploit the organization's sloppiness, insisting a looser—but still extant on the intranet—old version controls.
- Align other HR policies: A more complex scenario is reconciling the new headquarters code, rule, or plan with inconsistent local offerings. In every affected jurisdiction, repeal or reconcile dissonant local HR policies, aligning them with the new headquarters code, policy and/or plan. This can be a big job, but failing to do it gives locals leverage to flout headquarters edicts.

  Global headquarters initiatives often contain provisions that clash with existing local HR communications on similar subjects. Even absent a head-on conflict, if the subject of a headquarters policy overlaps with any local HR policies, expect the language to be inconsistent and susceptible to interpretation disputes. For example, a global code of conduct may address data protection, discrimination and harassment, conflicts of interest and nepotism, expense reimbursement, business gifts, and on-job use of alcohol and drugs in ways inconsistent with local affiliate protocols addressing these topics. As another example, a global severance pay plan may not align with severance pay clauses in overseas individual or collective employment agreements.

  Failing to harmonize a global initiative with local offerings can cause real problems. Imagine, for example, a local salesman who makes a big sale by entertaining a government customer in a way that complies with a loose local policy against overt bribery but that violates a nuanced headquarters policy on improper payments. Headquarters will argue the strict global policy trumps the local subsidiary's lax local rule but the salesman, local

management, and local labor judges may be sympathetic to the counter-argument that the local rule controls over the more distant headquarters edict—especially if the local policy is in the local language but the headquarters rule is in English (even if the global policy has the boilerplate clause saying in case of conflict the "stricter" standard applies).

Also, align the new global initiative with past overlapping headquarters initiatives. For example, a new global bribery and payments policy better not contradict the bribery and payments clause in the existing global code of conduct.

- Harmonize formal work rules: Amend local work rules to accommodate or incorporate by reference global headquarters mandates. Jurisdictions including Belgium, Chile, Colombia, France, Greece, Japan, Korea, Poland, and Slovakia force local employers to issue formal work rules (or so-called "internal regulations") listing every infraction subject to discipline. Some jurisdictions impose their written work rules mandate only at workforces exceeding a minimum size—ten employees in Japan, for example. The policy behind these mandates is workplace due process, analogous to the American criminal procedure ban on ex post facto laws: Employers should not be allowed to discipline workers for would-be infractions never previously prohibited.

  Local work rules present a real hurdle when headquarters launches a cross-border rule, code, or policy. Imagine, for example, a multinational with a tough global insider trading policy whose Seoul affiliate had issued Korean work rules containing (say) 23 listed infractions—but without a specific rule on buying and selling stock. If the husband of some employee sold company stock during a blackout period, can the employer fire the wife for his infraction? Expect the employee to argue the dismissal is illegal as not grounded in a violation of one of the 23 posted rules—the employer is invoking a rule on insider trading it never properly posted. A Korean labor court may reinstate with back pay. Headquarters forgot to require its subsidiary to amend its posted work rules to incorporate the global policy.

Step 4: Enlist Overseas Affiliates to Adopt, Ratify, and Impose the Headquarters Initiative Directly on Local Staff

Multinationals typically employ staff worldwide through a network of local subsidiary affiliates—separately incorporated overseas employer subsidiaries and affiliates. Often the text of a multinational's global HR initiative purports to address "our employees worldwide" even where the headquarters corporation does not directly employ "our" overseas staff and is merely the stockholder or parent company of separately incorporated foreign employer entities. For example, headquarters might be a Delaware corporation called "Acme Widget Company, Inc." and Acme factory workers in Mexico might be employees of a separate entity incorporated under Mexican law, perhaps "Acme Widget Companía de México, S.A. de C.V."

This reality of international business structure has profound effects on how a multinational should impose a global HR initiative. The big but often overlooked legal challenge is that a mother corporation launching a global HR initiative rarely has "privity of employment contract" with (that is, rarely directly employs) affected overseas staff. The global HR initiative will impose rules on, or deliver pay or benefits to, people with whom the sponsor has no direct legal relationship.

Too often multinational headquarters considers this issue a technicality (if headquarters thinks of it at all). Headquarters may just push ahead, issuing its global HR initiative directly, bluntly addressing it to "our employees worldwide" even though the headquarters entity, itself, does not employ anyone overseas other than perhaps a handful of seconded expatriates.

- **The problem—Why a headquarters entity should avoid imposing a global HR initiative directly on affiliate staff:** The mistake of a headquarters entity purporting to impose a global HR initiative directly on overseas affiliates' staff can trigger four potentially significant grounds for liability exposure: (a) headquarters permanent establishment (b) headquarters as co-, dual-, and/or joint-employer (c) void or impotent rule and (d) payroll law compliance:

  a. **Headquarters permanent establishment:** For corporate and tax reasons, a multinational headquarters entity often stakes out the position that it does not transact business overseas. The headquarters entity defends the position that the conglomerate transacts business in overseas markets only through its network of locally incorporated foreign subsidiaries and affiliates. Only the local entities file local corporate registrations, file local tax returns, and are subject to local court jurisdiction.

     But what if a multinational's headquarters entity sets terms and conditions of employment for staff in foreign jurisdictions by directly issuing detailed HR codes, policies, and plans for overseas workplaces? Perhaps directly setting detailed terms and conditions for overseas

workforces meets the definition of doing or "transacting" business in the jurisdiction and so triggers (or is a factor that with other factors triggers) a so-called "permanent establishment" subject to corporate registration, corporate tax filing mandates, and personal jurisdiction. Multinationals usually take steps to avoid such a potentially catastrophic result.

b. **Headquarters as co-, dual-, and/or joint-employer:** If a multinational headquarters entity sets terms and conditions of employment overseas by directly imposing HR initiatives (codes, policies, and plans) on overseas staff, then an employee in a dispute might sue both the local employer entity as well as the headquarters parent entity as co-defendants, arguing headquarters is a co-, dual-, and/or joint-employer precisely because it set terms and conditions of employment via its global HR initiatives (codes, policies, and plans). This is not just a theory; this claim gets asserted in labor courts regularly, particularly in Latin America and even in the United States.[5]

   U.S. parent companies usually avoid taking steps that could be argued to set terms and conditions of employment for staff not on the parent's own payroll—think of "double breasted" construction contractors and fast food franchisors. Be as careful when issuing global HR initiatives.

c. **Void or impotent rule:** Few jurisdictions will enforce a would-be workplace rule or policy that the employer never bothered to promulgate. A work rule issued by a foreign overseas parent—for example, an anti-bribery rule in a headquarters-issued global code of conduct—may be unenforceable if the actual employer (the local entity) never ratified, adopted, or implemented it.

   A clear example is Russia, which requires that the "management body" (board of directors) of a Russian-incorporated entity formally approve and implement any workplace policy imposed on company staff. A work rule issued by a foreign overseas parent—think of the anti-bribery provision in the headquarters global code of conduct—may be unenforceable if never implemented by the Russian subsidiary. The same analysis applies worldwide where the local subsidiary's corporate by-laws or "statutes" require a director resolution to implement a new company policy.

   For that matter, corporate law analysis aside, any employee anywhere in the world disciplined for violating a headquarters-issued mandate can raise the technical argument under employment law that a rule is unenforceable if the local employer never issued or ratified it. The would-be "rule" is just a precatory statement of a third party with no power to set employment policy in this workplace. Employment law does not force workers to comply with wishes of third parties, even those that might happen to own stock in the employer.

d. **Payroll law compliance:** Where a multinational issues a global compensation or benefits plan, even if headquarters itself will fund the benefit, the organization is likely subject to local payroll laws requiring reporting, withholding, and/or contributions to local tax and social security agencies. Without a local taxpayer identification number and with no local business presence, the headquarters entity is probably in no position to tender compensation or benefits under the plan directly to overseas staff. Headquarters may have to enlist local subsidiaries to tender payments funded by headquarters. Subsidiaries may have to ratify the plan.

- **The solution—Enlist affiliates to adopt, ratify, and impose the headquarters initiative directly on their own staff:** Fortunately there is a conceptually simple solution, almost a "magic bullet" for resolving all four of these potentially serious problems: Headquarters imposes the global HR initiative on its overseas employer affiliate entities, but not on any overseas employees as individuals. Headquarters enlists each overseas employer affiliate in the new initiative, requiring it to adopt, ratify, and impose the initiative more or less verbatim on local staff.

  As a practical matter, this means that when launching some new global HR initiative, headquarters should engage each affiliate worldwide that employs affected staff, pushing down the task of adopting and ratifying the initiative locally, imposing it on each affiliate's own respective workforce. Instruct overseas management to take whatever steps necessary under local law and custom to implement the initiative locally. Management of each affiliate must do whatever it usually does when launching an analogous but home-grown HR initiative (whether that initiative be an advisory guideline, HR program, binding work rule, or employee benefit) so it sticks and protects the employer's interests.

Specifically which particular steps local management needs to take to adopt, ratify, and impose a new global HR initiative depends on three factors: (1) what type of HR initiative it is—advisory guideline, HR program, binding work rule, or employee benefit, (2) the requirements of local law and local past practices for launching this particular type of HR initiative, and (3) which implementation tasks headquarters retains responsibility for at the global level, versus which ones get pushed down to local affiliates.

Depending on these three factors, local overseas affiliates might have to take some or all of the following steps to adopt, ratify, and impose the headquarters HR initiative on local staff:

- **All-hands transmission memo:** At minimum, for an overseas affiliate to adopt, ratify, and impose a headquarters HR initiative on local staff requires the local country director—the local affiliate's top officer—to issue an all-hands employee communication (memo, email, intranet posting) attaching the initiative document and saying something to the effect of: Please read the attached, from our corporate headquarters. Going forward, this applies to you as our own local policy. We require you comply with the provisions in this attached document on the job every day. If headquarters wants to collect staff acknowledgements (see "Step 1," above), instruct the local HR team to get acknowledgements to this country director transmission memo.

  If the global HR initiative purports to reach not only staff but also non-employee "business partners" (consultants and independent contractors), then local management's transmission memo will also have to address non-employee services providers. Be careful not to impose the initiative on non-employees in a way that undermines the legitimacy of their classification status.
- **Standing policy going forward:** Going forward (after issuing the transmission memo), local management should include some reference to this headquarters initiative within its standing package of local HR rules, policies, and offerings. New hires might need to receive a copy.
- **Board of directors ratification:** As mentioned, corporate law in some jurisdictions (Russia, for example) and bylaws of some overseas subsidiaries require that the board of directors of a local employer affiliate pass a resolution adopting certain HR initiatives. Do this if required.
- **Local version or local rider:** The content of the particular global HR initiative might raise technical issues that push local overseas management to insist on making tweaks, spinning off a separate but aligned local version or local rider. (See "Step 2," above). As one example, a global whistleblower hotline communication will likely need local modifications in Continental Europe.
- **Local work rules/policies amendment:** As mentioned, if the global HR initiative amounts to (or contains) new staff rules, and if the local overseas affiliate has issued a formal "work rules" document, local overseas management might have to amend existing work rules to accommodate or reference the global initiative. Or a local affiliate might have to amend or repeal otherwise inconsistent local HR policies. (See "Step 3," above.)
- **Translation:** Where headquarters issues its global HR initiative document in English only, in some jurisdictions a local language translation might be advisable or mandatory. (See "Step 5," below.)
- **Employee consultation:** Local labor law may require consulting with employee representatives before imposing certain new initiatives. Whether consultation is necessary also depends on the nature of internal collective bargaining relationships. (See "Step 6," below.)
- **Government filing and other legally mandated steps:** In some countries, law requires filing or registering documents regarding certain HR initiatives with government labor or data protection agencies. Some global initiatives in some countries might require formal employee notices, employee consents, or other legally mandated steps. (See "Step 7," below.)
- **Global compensation/benefit plan:** As mentioned, where the global HR initiative is a compensation or benefits plan, even where headquarters funds the program, local overseas payroll laws might apply. Overseas subsidiaries might have to tender payments in the first instance, even if reimbursed by headquarters.

When enlisting local management to take these implementation steps to adopt, ratify, and impose a global HR initiative on local workforces, headquarters should set a firm implementation deadline. After the deadline, follow up and require local managers to prove they complied. Once they have, headquarters becomes free to post the initiative documentation on its global intranet portal or otherwise communicate globally, directly from headquarters, treating the global initiative as a headquarters program. If in the future a challenge arises overseas

alleging one of the four implementation shortcomings we discussed (headquarters permanent establishment; headquarters as co-, dual-, and/or joint-employer; void or impotent rule; payroll law compliance), the local overseas affiliate can argue that it—not headquarters—directly imposed this initiative on its own local staff. Yes, for convenience, clarity, efficiency, and global alignment headquarters adopted a sort of "shared services" model, posting or communicating information about the initiative company-wide on globally accessible platforms. And yes, headquarters administered this particular program. But (the local overseas affiliate will argue) this initiative reaches each respective local overseas employee because the local employer affiliate adopted, ratified, and imposed the program directly.

Step 5: Translate Employee Communications About the Global Initiative As Required

A multinational that believes workforces across its overseas facilities speak fluent English may prefer the speed, simplicity, and cost-savings of global HR communications in a single English-language version. Some multinationals have designated English their "official company language"—even some headquartered outside the English-speaking world.

Unfortunately, even where a single English-language package of global HR documents and communications might otherwise be practical, the texts might be subject to *language or translation mandates*. Having declared English "our official company language" does not confer a license to violate the world's language and translation laws. Depending on the nature of a global HR initiative and on the countries involved, headquarters might need a global translation strategy. Ascertain which of the affected non-English-speaking jurisdictions prohibit HR communications or work rules in a foreign language, and craft a strategy to comply.

> *"But factor in penalties for violating language and translation laws, which range widely, from stratospheric to zero."*

These language and translation mandates are nuanced—more complex than a simple yes-or-no answer to the binary question. Does local law compel us to translate? Countries around the world impose language and translation legal rules in four discrete tiers:

(1) flat prohibitions that impose a penalty if the employer communicates with staff or issues work rules in a foreign language;

(2) enforceability prohibitions that nullify an employer initiative if certain HR documents or employee communications appear in a foreign language;

(3) de facto translation requirements that do not address language/translation at all but that require employers to present certain documents to government agencies or worker representatives—and that deem foreign-language versions not to comply, and

(4) fraud, duress, and hostile reception in local proceedings; that is, legal regimes that do not invalidate foreign-language employer communications per se but that strictly construe foreign-language HR documents, reluctant to enforce them against local staff.

A multinational promulgating a global HR initiative will be primarily interested in the first- and second-tier jurisdictions—those that flatly prohibit or nullify English-only text. Depending on the content of the initiative, Belgium, Chile, France, Iraq, Kuwait, Mongolia, Portugal, Quebec, Turkey, Venezuela, much of Central America, and other places can fall into these first two tiers. But factor in penalties for violating language and translation laws, which range widely, from stratospheric to zero:

- One multinational once got fined €500,000 plus €20,000 per day for distributing English-language HR documents to French staff in violation of France's *Loi Toubon* language law.[6]
- At the other extreme, Kuwait's Arabic-language HR communications mandate does not impose any monetary penalty at all.[7]

Step 6: Comply With Collective Consultation Obligations

Management cannot necessarily implement a new HR initiative unilaterally as a *fait acompli*. Getting a global HR initiative to "stick"—making its terms enforceable against an employee who may later violate them—often requires complying with collective labor obligations, consulting or bargaining over the proposed initiative in affected countries with local worker representatives such as trade union "cells," works councils, health and safety committees, employee advocates, employee delegations, worker ombudsmen, and the like.

Labor laws worldwide impose consultation requirements analogous to the idea of a "mandatory subject of bargaining" under U.S. labor law—employers around the world cannot necessarily change terms or conditions of employment by unilaterally launching new policies, rules, or even benefits until sitting down with worker representatives and "informing and consulting" (in Germany, sometimes, "co-determining") or bargaining over the

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

proposed initiative. The consultation/bargaining obligation can be particularly daunting where management's proposal might materially *decrease* terms and conditions of employment for at least some staff.

"When launching a global HR initiative, talk to overseas management-side labor liaisons—management's local in-house teams that bargain with worker representatives on behalf of the employer."

Usually this consultation/bargaining obligation arises only where management already has an ongoing bargaining relationship with a standing body of worker representatives (which is common in many jurisdictions)—but China, Japan and under a few extreme scenarios European countries actually impose duties to consult or bargain with worker representatives over management proposals even where the employer is union-free and has no standing labor relationships.

Expect a consultation/bargaining obligation to reach most any global HR initiative that headquarters wants to launch. Labor law worldwide teems with unfair labor practice cases arising out of unilaterally implemented headquarters initiatives. Just as U.S. labor law requires unionized employers to bargain over changes to HR policies as mundane as dress codes,[8] the consultation/bargaining obligation abroad can reach routine changes in work rules.[9] In one famous case, a German labor court invalidated an American headquarters-issued code of ethics in Germany because the German subsidiary had not consulted over the code with its German works council.[10]

"A random drug testing policy might spark blowback in a data privacy-sensitive jurisdiction like Continental Europe."

When launching a global HR initiative, talk to overseas management-side labor liaisons—management's local in-house teams that bargain with worker representatives on behalf of the employer. Give them an early "heads-up" about the incoming initiative. Strategize over local labor consultation/bargaining dynamics and timing. Take the steps necessary to comply with local employee consultation obligations.

Step 7: Make Any Mandatory Government Filings and Take Any Other Legally Mandated Technical Steps

One part of launching a global HR initiative is complying with local government filing mandates. Certain jurisdictions require employers to file documents disclosing various internal HR programs. For example, publicly traded American companies often file their codes of conduct, insider trading policies, whistleblower hotline policies, and stock option plans with the U.S. Securities Exchange Commission ("SEC"), and U.S. federal government contractors routinely make government disclosures regarding their affirmative action plans to the U.S. Office of Federal Contract Compliance Programs ("OFCCP"). ERISA-regulated employee benefit plans might get filed with the IRS. Similarly, employers overseas may have to file papers disclosing certain HR programs to local government agencies. But the very American multinationals that scrupulously make all their SEC, OFCCP, and ERISA filings might resist or overlook obligations to submit internal HR documents to *foreign* governments.

Filing or registering certain HR codes, policies or plans with foreign governments may indeed be necessary to make these initiatives effective locally. For example, French employers must file codes of conduct with France's Labor Inspectorate or a French labor court. Chilean employers must file any HR policy inconsistent with company work rules (*Reglamentos Internos de Orden, Higiene y Seguridad*) with the Chilean Labor Board or Ministry of Health. And certain data protection authorities in Europe require employers to disclose internal HR systems that "process" employee data (payroll systems, human resources information systems, whistleblower hotlines, travel-tracking software, and the like). Also, global equity and stock option plans might trigger filing requirements with local tax and securities regulators.

Be sure to make whatever overseas filings are necessary as to a global HR initiative. Also take whatever other legally mandated technical steps the global initiative triggers. For example, depending on the nature of the initiative and the jurisdictions at issue, legally mandated technical steps beyond government filings may include:

- making formal notifications to employees about HR data being processed,
- collecting employee consents,
- amending subsidiary-to-headquarters data export agreements, and

• renegotiating contracts with local HR services providers.

Step 8: Account for Employee Vested Rights

In discussing how to launch a new global HR initiative, for the most part we have addressed initiatives that make neutral or forward-looking changes with no significant deleterious impact on employees—policies, rules, or codes enforceable in the future, as circumstances arise going forward, and new plans that award extra benefits. But some global HR initiatives immediately and materially reduce the pay or employment terms of at least some staff, here and now. For example, a new regional sales compensation plan might reduce commissions effective immediately. Or a new global no-smoking policy may be intolerable to heavy smokers in countries that still tolerate workplace tobacco. A global co-worker dating restriction might disrupt a branch office full of open workplace romances. A random drug testing policy might spark blowback in a data privacy-sensitive jurisdiction like Continental Europe.

> *"The new bribery policy may be fully enforceable, but that legacy ethics code could be vulnerable to real enforceability challenges."*

Outside employment-at-will, employees enjoy "vested rights" in their current terms and conditions of employment. Management cannot necessarily abrogate those rights unilaterally. Where a new global HR initiative materially cuts terms or conditions of employment abroad, the employer will have to take steps to account for the infringement on vested rights. These initiatives require a special, tailored strategy consistent with applicable law.

Step 9: Correct Oversights In Previous Initiatives

In rolling out a new global HR initiative scrupulously accounting for the above eight steps, along the way headquarters might discover that previous company initiatives launched less rigorously. For example, imagine that a headquarters team rolling out a new version of the global bribery/improper payments policy duly accounts for our eight logistical steps—but along the way realizes that, years before, headquarters had rushed out the current global code of ethics without touching all these procedural bases. The new bribery policy may be fully enforceable, but that legacy ethics code could be vulnerable to real enforceability challenges. Perhaps some salesman at the Paris office could violate the ethics code but then argue it is not binding because the Paris subsidiary entity never adopted or ratified it. Or maybe the salesman could point out the code is in English, violating the Loi Tubon French language law. Or there might be an argument management never consulted over the ethics code with the Paris works council. And perhaps the salesman's electronic assent acknowledging the code is inadmissible under French evidence rules.

We discussed the eight logistical issues above in the context of launching a new global HR initiative before it "goes live." But many global HR initiatives already promulgated and purportedly in place today originally got rolled out without scrupulous attention to all the process steps. These codes, rules, policies, and plans could suffer from shortcomings exposing them to viable enforceability challenges. Where a multinational failed properly to implement its current package of cross-border codes of conduct, work rules, HR policies, and international benefits offerings, a best practice is to "backstop"—go back and correct oversights in implementation. The alternative is to proceed unprotected, with possibly unenforceable rules and programs.

* * * * *

A multinational headquarters launching a global HR initiative—a cross-border employment rule, staff rule on a business topic beyond HR, or compensation/benefits offering—naturally focuses first on content: What should the text of our new cross-border policy, code, rule or benefits plan say? But drafting the content of the global HR initiative is merely the first stage in a two-stage process. After coming up with the documents that constitute the new initiative, headquarters needs to answer an entirely separate, often more complex question: How are we going to launch this program in a way that effectively imposes it on our staff overseas? That breaks down into a number of vital logistical steps. To overlook these process issues could threaten the entire initiative.

Endnotes

1. Sup. Ct. British Columbia, 2014 BCSC 321 (Feb. 28, 2014).
2. *Id.* at ¶ 48.
3. *Hou* case, Beijing Intermediate People's Ct. no. 4, Nov. 26, 2009.
4. *Richardson v. Oracle Corp.*, Aust. Pty. Ltd, 2013 FCA 102, at ¶¶ 161-64.
5. *Cf. Brown v. Daiken America*, 756 F.3d 219 (2d Cir. 2014) (U.S. employee states Title VII claim against both U.S. subsidiary employer and its Japanese parent corporation, held to be a "single integrated enterprise with its American subsidiary to be properly named as a co-defendant").
6. Decision of Versailles Ct. App., Mar. 2, 2006 (interpreting French Labor Code arts. R.1323-1, L.1321-6, R.5334-1, L.5331-4).
7. Kuwait Law of Labor in the Private Sector No. 6 2010, art. 29.
8. *See Salem Hospital Corp.*, 360 NLRB No. 95 (2014).
9. *See Hou* case, Beijing Intermediate People's Ct. no. 4, Nov. 26, 2009 (unilateral update of employee handbook void where implemented without consulting employee representatives).
10. Labor Court of Appeals *LAG*, Dusseldorf, Nov. 14, 2005 (affirming Labor Court of Wuppertal).

Prevailing Wage Laws: Laboring and Lobbying for Prevailing Reform

By Nicole Zolla[1]

Introduction

Prevailing wage laws aim to protect workers' rights and set a labor wage floor on public works projects in the construction industry. These laws exist on the federal, state and local levels of government, and are the subject of a great deal of litigation because of the procedural and substantive differences between their federal and state enactments. In New York, specifically, the issue of whether administrative remedies must be exhausted before commencing litigation involving a claim of wage underpayment yields different results depending on the court in which the claim is brought. Recently, in *Isufi v. Prometal Constr., Inc.*, these issues were brought to the forefront and showcased the inherent disconnect between federal and state prevailing wage laws.

> *"If the WHD concludes that a violation has occurred, it will provide the contractor with the amount of the underpayment."*

This article focuses on the differences between federal prevailing wage laws and New York State prevailing wage laws, the issues that arise because of the unresolved issue of preemption, and calls on the Supreme Court of the United States to decide a case with similar issues. This article aims to lessen the already muddy waters of this vexing problem and provide guidance to resolve the issue. First, this article will explain the history of prevailing wage laws at the federal and state levels and when they are applicable. Then, it will uncover the flaws of prevailing wage laws and how federal and state courts have differed in deciding whether laborers can bring a private right of action when they have been denied the prevailing wage rate. Finally, this article will suggest, once again, that the Supreme Court should grant certiorari to resolve this ongoing conflict of law.

Overview of Statutory Prevailing Wage Laws

Davis-Bacon and Related Acts

On the federal level, prevailing wage laws are set forth in the Davis-Bacon Act ("Davis-Bacon").[2] Davis-Bacon was first introduced in the 1930s as a measure to prevent federal projects from being awarded to cheap, immigrant work; it established a wage floor so that contractors would not cut wages in order to achieve the lowest bid by paying subminimum wages to migrant workers.[3] There are four requirements for coverage under Davis-Bacon. First, the contract must be for an amount in excess of $2,000.00.[4] Second, the contract must be one for "construction, alteration, or repair," as those terms are defined by controlling authorities.[5] Third, the construction, alteration and repair work contemplated by the contract must be performed on "public buildings and public works of the Government or the District of Columbia that are located in a State or the District of Columbia."[6] Fourth, the contract must be one which "requires or involves the employment of mechanics or laborers" directly upon the site of work. Davis-Bacon "is a minimum wage law designed for the benefit of construction workers."[7] Under the Davis-Bacon "related acts," prevailing wage provisions have also been added to numerous other laws, so that projects that receive federal aid also call upon contractors to pay the prevailing wage.[8]

New York Labor Law

New York has adopted its own "little" Davis-Bacon law to ensure prevailing wages are paid to workers on public works projects. New York's prevailing wage law provides that no "laborer, worker or mechanic, in the employ of a contractor or sub-contractor engaged in the performance of any public work, shall…be paid less than the rate of wages prevailing in the same trade or occupation in the locality."[9] Statutorily, the wages to be paid in New York on a public project "shall not be less than the prevailing rate of wages."[10] Although it is not the focus of this article, it should be noted that Article 8 of the New York Labor Law, which applies to public works projects, requires a plaintiff laborer to exhaust all administrative remedies before bringing a private right of action under § 220 of New York Labor Law.[11]

> *If a subcontractor is found to have a violation of underpayment, a prime contractor may withhold payment to the subcontractor.*

Overview of Prevailing Wage Case Law

Bringing a Claim in Federal Court Under Davis-Bacon

Laborers must exhaust all administrative remedies under Davis-Bacon before they can commence a private action against a contractor and its surety.[12] According to the Department of Labor's ("DOL") Prevailing Wage Resource Book, a laborer must go through a lengthy process in order to recover wages owed to that worker.[13]

A laborer must first file a complaint with the DOL's Wage and Hour Division ("WHD"), or the relevant administrative agency contracted on the specific project.[14] The DOL will then commence an investigation of the contractor after sending a letter to the company. This investigation includes examining the laborers' classifications, confirming that the correct wage determinations are incorporated into the prime contract, and ensuring prevailing wages are being paid by examining certified payroll records. If the WHD concludes that a violation has occurred, it will provide the contractor with the amount of the underpayment. If back wages are owed to employees, the DOL investigator will request payment of back wages.[15] The contractor will then have an opportunity to respond to the alleged violations and/or provide additional information to the WHD. If a subcontractor is found to have a violation of underpayment, a prime contractor may withhold payment to the subcontractor. If the contractor refuses to pay back wages, the file is forwarded to the appropriate WHD Regional Office for review, collection of back wages, and debarment consideration.[16]

"Although Davis-Bacon exists for the benefit of laborers who perform work on federal contracts, the ability of laborers to bring suit under the Act is limited."

In "refusal to pay" cases, if factual issues are in dispute, the WHD offers the contractors an opportunity to request a hearing before an administrative law judge.[17] If the contractor wants a review of the ruling issued by the Administrator, the contractor can file a petition for review with the Administrative Review Board within 30 days of the date of the ruling, with a copy to the Administrator.[18] If the contractor timely files an appeal, the findings and/or ruling of the Administrator shall be inoperative unless and until the decision is upheld by the Administrative Law Judge or the Administrative Review Board.[19]

The administrative process outlined above must be fully exhausted before a laborer may sue a contractor or its surety. After administrative remedies have been exhausted,

> if the accrued payments withheld [by the agency] under the terms of the contract are insufficient to reimburse all the laborers and mechanics who have not been paid the wages required under this subchapter, [then] the laborers and mechanics have the same right to bring a civil action and intervene against the contractor and the contractor's sureties as is conferred by law on persons furnishing labor or materials.[20]

Nicole Zolla is a third-year law student at Brooklyn Law School, where she serves as President of Brooklyn Law School's Labor and Employment Law Association.

This type of claim against a contractor's surety, stemming from Section 3 of Davis-Bacon, requires administrative recourse first.

> It follows that Section 3 claims must meet two requirements. First, as the text expressly states, laborers may bring a claim only if funds withheld by the agency are insufficient to fully reimburse all laborers who are entitled to prevailing wages. Second, a laborer may bring a claim only if the federal government—that is, either the contracting agency or the DOL—has administratively determined that the contractor or subcontractor has failed to pay prevailing wages. Although this second requirement is not expressly stated, it is strongly implied by both the text and the structure of the statute.[21]

The statute's requirement that "the accrued payments withheld [by the agency] under the terms of the contract [must be] insufficient to reimburse all the laborers and mechanics" assumes that there has been an administrative determination that prevailing wages were not paid; without such a determination, there would be no basis for withholding accrued payments.[22]

Exhausting all remedies "means using all steps that the agency holds out, and doing so properly (so that the agency addresses the issues on the merits)."[23] A plaintiff must invoke all available administrative mechanisms, including appeals, "through the highest level for each claim."[24] The defendants bear the burden of demonstrating that Plaintiff's claim is not exhausted.[25] "[A] motion to dismiss pursuant to Rule 12(b)(6) for failure to exhaust should be granted only if 'nonexhaustion is clear from the face of the complaint.'"[26] "[B]y characterizing non-exhaustion as an affirmative defense, the Second Circuit suggests that the issue of exhaustion is generally not amenable to resolution by way of a motion to dismiss.[27] Further, permitting a section 3 claim to go forward absent an administrative determination would raise the risk of inconsistent rulings by the DOL and the Court about whether a violation has occurred.[28]

Although Davis-Bacon exists for the benefit of laborers who perform work on federal contracts, the ability of laborers to bring suit under the Act is limited. In *Grochowski v. Phoenix Construction*, the Circuit Court held

that "the Davis-Bacon Act does not include a general, implied right of action for laborers, even if the contract is covered by the Act, and, moreover, that laborers cannot recover Davis-Bacon Act wages by bringing state law contract claims or claims under the federal Fair Labor Standards Act."[29] Such suits, the Circuit Court observed, would be inconsistent with the legislative scheme calling for administrative enforcement of the Act. "Under the [Davis-Bacon Act], an aggrieved employee is limited to those administrative mechanisms set forth in the text of the statute."

Grochowski is a landmark decision for contractors and remains good law, but its rationale is questionable at best. The *Grochowski* court distinguished itself from its previous decision in *Chan v. City of New York*, where plaintiffs were allowed to assert their Davis-Bacon rights to prevailing wages by claiming a violation of their constitutional rights under 42 U.S.C. § 1983.[30] The rationale of preemption in *Grochowski* is inconsistent with the court's willingness to allow such rights of action as in *Chan.* It is also inconsistent with cases in other circuits where Davis-Bacon claims were permitted.[31]

Bringing a Claim in State Court Under Breach of Contract

While it is well settled that there is no private right of action under Davis-Bacon, laborers have been able to litigate underpayment claims as third-party beneficiaries under a breach of contract cause of action in New York state court, since the general contractor has obligations per its contract with an agency to ensure contractors downstream are paid prevailing wages.[32] This has essentially allowed laborers to circumvent Davis-Bacon administrative remedy requirements.

> *"Frivolous lawsuits can be burdensome, defaming and expensive for contractors to defend, but this is not an acceptable defense because procedures are well settled in order to avoid frivolous claims."*

Further, defendant contractors are unable to argue that Davis-Bacon preempts state law, since the text of Davis-Bacon does not explicitly address preemption. In *Cox v. NAP Construction Company, Inc.*, the New York Court of Appeals provided: "To say that Congress, in enacting the DBA, did not intend to create a federal right of action is not to say that Congress intended to prohibit, or preempt, state claims."[33] The court in *Cox* further explained this rationale: since Davis-Bacon did not expressly preempt state claims, it was not Congress' intention for Davis-Bacon to preempt state claims, and cannot be read as such. Congress would not have ordinarily preempted state law implicitly.[34]

When a federal statute does not expressly preempt state law, there are two other instances where preemption may still be found.[35] Federal preemption exists when Congress has "completely displaced state regulation in a specific area" or where state law actually conflicts with federal law.[36] In regards to prevailing wage law, neither of these two conditions have been met. Congress has not completely displaced state regulation, since the federal statute requires Davis-Bacon prevailing wage rates to be included in federally funded contracts (for example, contracts with state or local entities). Second, prevailing wage state law does not actually conflict with federal law. Further, during the early stages of Davis-Bacon enforcement, President Hoover argued that existing state remedies were preferable to newly created federal ones. Here, it is clearly demonstrated that any breach of its stipulations can and should be treated like any other breach of any contract.[37]

Cox remains good law in New York State and has been the paramount case for laborers to see that contractors be held accountable when they were denied proper wages. The court in *Cox* noted that the defendant contractor urged them to adopt the *Grochowski* view that since Davis-Bacon, on a federal level, provides no right of action, there can be no state claim either, since allowing state claims would be "an impermissible 'end run' around [Davis-Bacon]."[38] *Cox* found no merit to this claim. This flawed reasoning does exactly what it sets out to "avoid"—that is, it creates an impermissible end-run around lawful claims made when a contractor takes advantage of his laborers and denies him proper wages. To make individual laborers file administrative claims against his employer, a detailed and lengthy process that likely takes years before coming to an administrative determination, is unduly burdensome when said laborer has a contract in which his employer contractor clearly breached. Even though the contract requires Davis-Bacon prevailing wages, the issue is simply that it is still a contract, and that contract was breached. Inclusion of Davis-Bacon principles should not delay litigation for these laborers in state court because defendant contractors attempt several different ways to deny laborers of their rights.

> *"It follows that this case, like many others, would benefit from a Supreme Court decision addressing the issues at hand."*

When laborers bring suit in state court on breach of contract claims, they must assert that they bring the claim because the laborers are third-party beneficiaries of the contract between the contractor and the agency granting the public work project. Although New York case law has not developed a standard for third-party

beneficiary claims, New York State courts have permitted them, despite contractors' attempts to assert that it is frivolous litigation, or a "fishing expedition" where class actions are commenced only in the hope of finding underpayment.

Frivolous lawsuits can be burdensome, defaming and expensive for contractors to defend, but this is not an acceptable defense because procedures are well settled in order to avoid frivolous claims. New York State courts have been shown to order the dismissal of laborers' underpayment claims under breach of contract if the pleadings were too broad, vague, and resembled a type of "fishing expedition" that would only show underpayment when discovery commenced.[39] It is well established that the pleadings must be particular enough to provide the court and the parties with notice of the transaction or occurrences to be proved in the action.[40] The Complaint must include that "[s]tatements…be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."[41]

"The Second Circuit's opinion stands alone: Its decision differs from the Seventh Circuit, New York Court of Appeals, and Montana Supreme Court."

Further, a motion to dismiss would be granted if the plaintiff did not perform his obligation under the contract, further protecting the contractor from laborers seeking to exploit them and misusing the legal rights afforded to them.[42]

Recent Litigation: The *Isufi* Case

Isufi v. Prometal Constr. is a recent case that demonstrates these reoccurring issues that plague prevailing wage law. In this case, the plaintiffs are a class of similarly situated laborers who were previously employed by defendant Prometal Construction.[43] The court in *Isufi* noted that "[t]he forum where plaintiffs litigate the action may be dispositive of their claims."[44] The opinion revisited the issue of preemption under *Grochowski* and *Cox*, and noted that although both cases had almost identical facts, the ability to bring a private right of action changed the outcome for each case.[45] Here, defendant argues that since the contract between them and the government agency (here, the New York City Housing Authority) was in excess of $2,000.00, the plaintiffs are statutorily barred from bringing this state law claim because Davis-Bacon preempts state law.

The decision in *Isufi* ordered remand to state court, holding in part that the fact that the employer could potentially assert that the Davis Bacon Act defensively preempted the employees' claims did not raise a disputed and substantial question of federal law that could ground removal, as federal defenses cannot be grounds for removal.[46] Essentially, the *Isufi* court could not decide the merits of the case since it decided removal to federal court was improper for lack of diversity. ("Since the motion to remand is granted, there is no point to deciding the merits.")[47]

The *Isufi* case is presently ongoing. After the case was remanded to state court, both plaintiff and defendant filed memoranda of law regarding the motion to dismiss. Although the issue of preemption is moot because of *Cox*, defendants seek to dismiss this case on new grounds, since the New York City Housing Authority has since issued a determination of underpayment, and the doctrine of collateral estoppel prevents plaintiffs from litigating any further.[48] It follows that this case, like many others, would benefit from a Supreme Court decision addressing the issues at hand.

Recent Litigation: The *Carrion* Case

In 2014, the Supreme Court reviewed and denied a petition for a writ of certiorari to reconsider the judgment of the U.S. Court of Appeals for the Second Circuit regarding federal preemption of Davis-Bacon.[49]

> The Second Circuit and the New York Court of Appeals have now both acknowledged that they are in conflict over whether the Davis-Bacon Act preempts a state law claim for breach of contract…. The conflict is particularly troublesome because suits by construction workers against their employers often involve both state and federal claims, which means that such suits can be brought in either state or federal court. Until this Court ends the standoff, the opportunities for forum-shopping are obvious."[50]

The Second Circuit's opinion stands alone: Its decision differs from the Seventh Circuit, New York Court of Appeals, and Montana Supreme Court.[51] Although the denial by the Supreme Court finalizes the decision rendered by the Second Circuit, cases similar to the *Carrion* case will still be litigated until the disconnect is resolved. The Supreme Court should grant certiorari in a similar case petitioning for a writ in order to address the issue of preemption under Davis-Bacon.

Call for Reform on Davis-Bacon Determination Methods

In addition to the need for recourse regarding opposing decisions between state and federal courts on litigating prevailing wage disputes, we must also take a closer look into the methodologies of determining

the prevailing wage of a locality. This is important to note because the Supreme Court has denied previous writs of certiorari on the issue. If these issues cannot be resolved judicially, we must unveil the problems that arise before claims of underpayment are made in an effort to fix the problem before it escalates. This can be done through proper reform of prevailing wage determinations.

"The minimum wages shall be based on the wages the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there."[52] The procedure for determining wage rates is through "the voluntary submission of wage rate data by contractors, contractors' associations, labor organizations, public officials and other interested parties."[53] The F. W. Dodge Division of McGraw-Hill Information Systems (a third-party company that WHD employs) provides a "Regional Survey Planning Report" to WHD regional offices in the third quarter of each fiscal year identifying contractors working on projects. WHD regional offices use the report to determine the county and type of construction to be included in that year's survey, if any. WHD regional offices then choose to survey the counties with the most need that year, since limited funds and resources do not allow WHD to survey each county every year. Areas are generally surveyed every three years.[54] Several of the many flaws of the current process are the unknown precise population included in the surveys, whether the contractors actually surveyed are reflective of the majority of contractors, and how it is determined that there is need in any given county at that time.

"The APA eliminates the defense of sovereign immunity in cases seeking relief other than money damages and claiming that a federal agency, officer, or employee acted or failed to act in an official capacity or under color of legal authority."

Analysts from Construction Resources Analysis ("CRA") at the University of Tennessee (a third-party) then provide WHD regional offices with projects that are appropriate for the survey. CRA identifies the projects by applying a model to the Dodge data that pinpoints projects within the parameters specified by the regional offices. The WD-10 survey is then sent out to contractors and subcontractors identified by the CRA projects with a letter requesting voluntary information. If there is no response, contractors and subcontractors receive a second letter, but there is no enforcement to participate after the second letter. These results cannot be indicative of the actual population since voluntary participation would not include every rate of pay on every project.

Completed surveys are reviewed by WHD analysts. If the survey response rate is less than 25%, the department follows up with telephone calls to increase participation by contractors. If results are still insufficient, analysts combine private wage data from a nearby county to the current sample of wage data. Establishing a threshold of 25% participation is too low to be considered adequate. If instead, as many lobbying groups have suggested, the Bureau of Labor Statistics ("BLS") was tasked with the responsibility of producing prevailing wage determinations, the results would include a larger cross-section of the population and thus ensure a more accurate representation of the population. "The method employed by the WHD to calculate the prevailing wage results in calculations that do not reflect the wages that truly *prevail* in local labor markets. The method is biased upward by survey respondents who have an interest in influencing the prevailing wage. However, data sources and methods do exist that would allow for more timely and accurate DBA prevailing wage calculations."[55]

"Support in favor of BLS to be the appointed agency to handle prevailing wage surveys was also lobbied to the United States House of Representatives."

Any interested person, including contractors, can request reconsideration of a wage determination to a specific construction project by contacting WHD in writing with supporting data or other pertinent information.[56] If reconsideration of a wage determination has been sought and denied, an appeal for review of the wage determination or its application may then be filed with the Administrative Review Board. Requests for review of wage determinations must be filed before contract award or start of construction where there is no award (or under the National Housing Act, before the date of initial endorsement, or the beginning of construction, whichever occurs first; or under Section 8 of the U.S. Housing Act of 1937, before the date of the housing assistance payments agreement, or the beginning of construction, whichever occurs first).

The Administrative Review Board was established by the Secretary of Labor in 1963 to decide, at its discretion, appeals concerning questions of fact and law related to final decisions of the Wage and Hour Division concerning controversies over the payment of prevailing wage rates, proper classifications, wage determinations issued under Davis-Bacon, and appeals of any other final decision under federal wage regulations.[57] The DOL sets forth that members of the Administrative Review Board

are appointed by the Secretary of Labor and a majority vote of the Board is necessary for a decision, except that a decision to hear any appeal may be made by one member. The Board can act as fully and finally as the Secretary of Labor concerning the matters within its jurisdiction.[58] The fact that the Administrative Review Board has significant discretion in deciding wage determinations keeps these cases out of court and arguably precludes contractors and employers from a fair and unbiased determination.

Though the Administrative Procedure Act ("APA") creates causes of action against agencies of the federal government acting under federal law, it does not provide recourse to challenge the survey process.[59] The APA eliminates the defense of sovereign immunity in cases seeking relief other than money damages and claiming that a federal agency, officer, or employee acted or failed to act in an official capacity or under color of legal authority. The threshold to eliminate the defense of sovereign immunity, however, is a high bar. Specifically, the "Binghamton Rule" prohibits review of the correctness of the Secretary of the DOL's decisions in setting prevailing wage rates for certain job classifications on a project.[60] It further prohibits review of the correctness of departmental decisions regarding proper classification of workers.[61] Federal courts may only review the Secretary's wage determination for violations of due process or statutory or regulatory violations only. Due process requires that before an administrative penalty attaches, an individual must have fair warning of the conduct prohibited by the statute or the regulation that makes such a sanction possible.[62]

Support in favor of BLS to be the appointed agency to handle prevailing wage surveys was also lobbied to the United States House of Representatives. James Sherk, Senior Policy Analyst, in labor economics at the Heritage Foundation and Research Fellow at the Labor Economics Center for Data Analytics, testified before the Committee on Education and the Workforce in 2011.[63] His research concluded that paying true prevailing wage rates instead of Davis-Bacon rates would reduce government construction costs by $10.9 billion per year.[64] The GAO has identified many severe flaws in the current process used to calculate Davis-Bacon prevailing wages. Sherk urged Congress to insist that BLS be tasked with the responsibility of producing prevailing wage estimates.

"Prevailing wage laws are necessary for protecting workers' rights."

Sherk's plea to Congress was voiced more than 30 years after the Government Accountability Office (GAO) (formerly the General Accounting Office) published a report succinctly entitled "The Davis-Bacon Act Should Be Repealed."[65] The GAO argued that significant changes in economic conditions and the economic character of the construction industry since 1931, plus the passage of other wage laws, make the act unnecessary.[66] Since its passing, the DOL has not developed an effective program to issue and maintain current and accurate wage determinations, and it may be impractical to ever do so. The Act results in unnecessary construction and administrative costs of several hundred million dollars annually and has an inflationary effect on the areas covered by inaccurate wage rates and the economy as a whole.

"Further, more accurate methods for determining prevailing wage rates need to be seriously reconsidered, since they do not reflect the true prevailing wage and drive construction costs up. Although the intention of prevailing wage laws are sound, the implementation of these laws call for reform."

Another way to contest a wage determination in New York is by commencing an Article 78 proceeding. In 2012, a court set aside the City Comptroller's prevailing wage rate determination when it relied too heavily on the provision of law that permitted the use of collective bargaining agreements to be used as the prevailing wage.[67] Notwithstanding this provision of law, the court found that the *"actual"* prevailing wage rate was much lower than the collective bargaining agreement rate which was used, since 57% of the workers in that trade were nonunion and received a smaller wage, and only 31% of workers were part of the collective bargaining agreement used as a catch-all.[68] Accordingly, the wage rate from the collective bargaining agreement was not deemed to be prevailing because it represented too small a population of the workers. In applying the same logic to Davis-Bacon survey methodologies, we can consider the population of contractors that participate in the surveys, and evaluate whether the wage rates actually represent of the majority.

Conclusion

Prevailing wage laws are necessary for protecting workers' rights. Although the Davis-Bacon Act had commendable intentions at the outset of its enactment, it currently creates more problems than it solves. Issues of preemption in litigation encourage forum-shopping and the Supreme Court should grant a writ of certiorari in order to address the disconnect between state and federal law. Further, more accurate methods for determining prevailing wage rates need to be seriously reconsidered, since they do not reflect the true prevailing wage and

drive construction costs up. Although the intention of prevailing wage laws are sound, the implementation of these laws call for reform.

Endnotes

1. This article was awarded first prize in the NYSBA Labor and Employment Law Section's 2016 Dr. Emanuel Stein and Kenneth D. Stein Memorial Writing Competition.
2. 40 U.S.C.S. §§ 3141 *et seq.*
3. Armand J. Thieblot, Jr., *Prevailing Wage Legislation: The Davis-Bacon Act, State "Little Davis-Bacon" Acts, the Walsh-Healey Act, and the Service Contract Act* (1986).
4. *See* 40 U.S.C.S. § 3142(a).
5. *See* 29 C.F.R. § 5.2(j).
6. *See* 40 U.S.C.S. § 3142(a).
7. *Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 771 (1981) (quoting *United States v. Binghamton Constr. Co.*, 347 U.S. 171, 178 (1954)).
8. *See* 40 U.S.C.S. § 3148.
9. N.Y. Const. art. I, § 17.
10. N.Y. Lab. Law § 220(3)(a).
11. *Ethelberth v. Choice Sec. Co.,* 91 F. Supp. 3d 339 (2016).
12. *Grochowski v. Phoenix Construction,* 318 F.3d 80, 87 (2d Cir. 2003).
13. The Prevailing Wage Resource Book can be located at https://www.dol.gov/whd/recovery/pwrb/Tab11.pdf.
14. 29 C.F.R. §§ 4 *et seq.*
15. 29 C.F.R. § 4.187(c)-(e).
16. 29 C.F.R. § 5.7.
17. 29 C.F.R. § 5.11.
18. 29 C.F.R. § 5.11(c)(3).
19. 29 C.F.R. § 5.11(d).
20. *United States ex rel. Krol v. Arch Ins. Co.*, 46 F. Supp. 3d 347 (2014).
21. *Id* at 353.
22. *See* 40 U.S.C.S. § 3142(c)(3).
23. *Washington v. Chaboty*, No.09 CIV. 9199 PGG, 2015 U.S. Dist. LEXIS 40245, 6 (S.D.N.Y. Mar. 30, 2015) (*quoting Hernandez v. Coffey*, 582 F.3d 303, 305 (2d Cir. 2009)).
24. *Varela v. Demmon*, 491 F. Supp. 2d 442, 447 (S.D.N.Y. 2007; *Veloz v. New York*, 339 F. Supp. 2d 505, 514 (S.D.N.Y. 2004).
25. *Key v. Toussaint*, 660 F. Supp. 2d 518, 523 (S.D.N.Y. 2009).
26. *Lopez v. Cipolini*, 2015 U.S. Dist. LEXIS 133799, 4 (S.D.N.Y. Sept. 30, 2015).
27. *Evans v. Rockland Cnty. Sherriff's Dep't*, 2016 U.S. Dist. LEXIS 57427 (S.D.N.Y. Apr. 29, 2016).
28. *Krol*, 46 F. Supp. 3d at 351.
29. *Grochowski v. Phoenix Construction,* 318 F.3d 80, 86-87 (2d Cir. 2003).
30. *Chan v.City of New York*, 1 F.3d 96 (2d Cir. 1993), *cert. denied,* 510 U.S. 978 (1993).
31. *See Frank Bros., Inc. v. Wisconsin Dept. of Trans.*, 297 F. Supp. 2d 1140, 1145-47 (W.D. Wis. 2003), *aff'd*, 409 F. 3d 880 (7th Cir. 2005); *Stampco Constr. Co. v. Guffey*, 572 N.E.2d 510, 512-13 (Ind. Ct. App. 1991).
32. *Cox v. NAP Constr. Co., Inc.*, 10 N.Y.3d 591 (2008).
33. *Id.* at 604.
34. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 41 U.S. 707, 713 (1985).
35. *Cox*, 10 N.Y. 3d at 604.
36. *Id* (quoting *Hillsborough*, 471 U.S. at 713).
37. *Id* at 605.
38. *Id* at 604 (quoting *Grochowski* 318 F. 3d at 86).
39. *Sibersky v. New York City*, 270 A.D.2d 209 (1st Dep't. 2000).
40. *Panagoulopoulos v. Carlos Ortiz Jr MD, P.C.*, 143 A.D.3d 791, 808 (2nd Dep't 2016).
41. *See* N.Y. CLS CPLR 3013.
42. *Madison Invs. v. Cohoes Assoc*., 176 A.D.2d 1021, 1021-22 (1991); *see also Tsabari v. Haye*, 13 A.D.3d 360, 360-61 (2nd Dept. 2004).
43. *Isufi v. Prometal Const.*, Inc., 927 F. Supp. 2d 50 (E.D.N.Y. 2013) (quoting Compl. ¶ 3, Oct. 18, 2012, ECF No. 1).
44. *Isufi*, 927 F. Supp. 2d at 52.
45. *Id.*
46. *Id* at 54.
47. *Id* at 53.
48. Defs. Mot. To Dismiss Pls. Second Am. Compl. at 2-5.
49. *Carrion v. Agfa Construction, Inc.,* 720 F.3d 382 (2d Cir. 2013), *cert denied*, (U.S. March 31, 2014) (No. 11-5334).
50. *Id.* at 5-6.
51. *Id.* at 11-12.
52. *See* 40 U.S.C.S. § 3142(b).
53. *See* 29 C.F.R. §§ 1.3 *et seq.*
54. Sarah Glassman, *et al.*, *The Federal Davis-Bacon Act: The Prevailing Mismeasure of Wages*, Beacon Hill Institute at Suffolk University (Feb. 2008), http://www.beaconhill.org/BHIStudies/PrevWage08/DavisBaconPrevWage080207Final.pdf.
55. *Id.* at 20.
56. Wage and Hour Division, *Davis-Bacon and Related Acts Frequently Asked Questions,* https://www.dol.gov/whd/programs/dbra/faqs/
appeal.htm.
57. *See* 29 C.F.R. §§ 1 *et seq.*
58. The rules prescribed in 29 CFR, Part 7, "Practice Before Wage Appeals Board," govern the proceedings of the Board.
59. *See* 5 U.S.C.S. § 551-559.
60. *United States v. Binghamton Constr. Co.*, 347 U.S. 171 (1954).
61. *Id.*
62. *George Campbell Painting Corp. v. Chao*, 2006 U.S. Dist. LEXIS 3318 (2006).
63. Sherk, James, *Examining the Department of Labor's Implementation of the Davis-Bacon Act*, (Apr. 14, 2011), http://www.heritage.org/research/testimony/2011/04/examining-the-department- of-labors-implementation-of-the-davis-bacon-act.
64. *Id.*
65. United States General Accounting Office, *The Davis-Bacon Act Should Be Repealed*, Comptroller General's Report to the Congress (Apr. 27, 1979), http://www.gao.gov/assets/130/126529.pdf.
66. *Id.*
67. *Matter of Metropolitan Movers Assn., Inc. v. Liu*, 95 A.D.3d 596 (1st Dep't 2012).
68. *Id.*

The Enforceability of Class Action Waivers

By Evan J. Spelfogel

One of the most current controversial issues in employment law involves the position of the National Labor Relations Board (the "Board") that an employer violates the National Labor Relations Act (the "NLRA") when it maintains an arbitration mechanism that requires employees to pursue any disputes they have with their employer on an individual, rather than on a class or collective basis with other employees. The Board's position has been adopted by two Circuit Courts—but rejected by three others, and U.S. Supreme Court review seems inevitable.

The Board contends that when an employer requires employees to sign an agreement precluding them from bringing or joining a concerted legal claim regarding wages, hours and other terms and conditions of employment, the employer deprives them of rights guaranteed under Section 7 of the NLRA to engage in concerted activities for employees' mutual aid or protection. That right, the Board argues, includes the right to join together in class and collective litigation to pursue workplace grievances in court or in arbitration.

In making this argument, however, the Board appears to be neglecting the second part of Section 7, added to the NLRA by the Labor Management Relations Act of 1947 (better known as the Taft-Hartley Act), which guarantees employees an equal right to *refrain* from engaging in concerted activities for their mutual aid and protection.[1] It would seem that if employees have the right to refrain from engaging in concerted activities, employees could waive their right to participate in class and collective actions.

> *"One of Congress's goals in enacting the Taft-Hartley Act was to allow employees to choose whether to engage in protected concerted activities."*

While the Board's argument appears flawed, the Seventh Circuit in *Lewis v. Epic Systems Corporation*[2] and the Ninth Circuit in *Morris v. Ernst & Young, LLP*[3] recently agreed with the Board, holding that where such agreements are a condition of employment, they deprive employees of their Section 7 rights to engage in "concerted activities" for their mutual aid and benefit. These decisions conflict with other decisions of the Second, Fifth and Eighth Circuits, which reject the Board's position.[4]

In the Ninth Circuit's *Ernst & Young* decision, dissenting Judge Sandra Ikuta stated that the majority decision was "breathtaking in its scope and in its error."[5] She noted that the majority decision was directly contrary to Supreme Court precedent interpreting the Federal Arbitration Act (the "FAA"),[6] and in her view, therefore, the individual arbitration mandate should have been enforced according to its term under the FAA.[7] Notably, the Ninth Circuit, it should be noted, previously held that an arbitration agreement with a class and collective action waiver did not violate the NLRA where the employee could opt out of the individual arbitration agreement, but chose not to do so.[8]

This article leaves aside for others to argue whether the right to proceed collectively or as a class is a substantive rather than merely a procedural right. Rather, this article will focus on the Board's failure to recognize and give equal weight to the second part of Section 7 of the NLRA.

The Taft-Hartley Act amendments were expressly added to the NLRA to curtail union power over employers and union coercion of employees in the workplace, and to protect the rights of employees *not* to participate in union or other concerted activities. This historical context, coupled with the Supreme Court's ruling in *14 Penn Plaza LLC v. Pyett*[9] (holding that a union could waive an employee's statutory rights to bring claims under the Age Discrimination in Employment Act), demonstrate that employees may exercise their NLRA statutory rights by waiving or refraining from activity that might otherwise arguably allow for class actions in arbitration.

The legislative history of the 1947 amendments speaks to these circumstances:

> [T]aken in conjunction with the provisions of section 8(b)(1) of the conference agreement…wherein it is made an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of rights guaranteed in section 7, it is apparent that many forms and [varieties] of concerted activities which the Board, particularly in its early days, regarded as protected by the act will no longer be treated as having that protection, since obviously persons who engage in or support unfair labor practices will not enjoy immunity under the act.[10]

Since the 1947 amendments to the NLRA, Section 7 have provided:

> Employees shall have the right to self-organization, to form, join, or assist

> labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities.* (new language in italics).[11]

One of Congress's goals in enacting the Taft-Hartley Act was to allow employees to choose whether to engage in protected concerted activities. The amendments expressly give employees the right to refrain from engaging in protected concerted activities,[12] whether those activities involve refusing to march on a picket line or agreeing to resolve their employment-related disputes in single rather than class arbitration.

"The issues before the Supreme Court in all three of these cases are whether the NLRA prohibits an employer from requiring employees to agree to waive their rights to arbitrate class and collective disputes, or whether the FAA, which favors arbitration, controls; in short, whether class and collective waivers in arbitration agreements are enforceable."

If there were any doubt as to the applicability of the second part of Section 7 of the NLRA to this argument, the legislative history addresses that precise point: "As has already been pointed out in the discussion of Section 7, the conference agreement guarantees in express terms the right of employees to refrain from collective bargaining or concerted activities if they choose to do so."[13] If, as the Board contends, employees have a substantive right to participate in Section 7 protected concerted activities, then employees have an equal substantive right to refrain from participating in Section 7 protected concerted activities. The memorialization of that right in the form of a collective action waiver in a pre-dispute arbitration agreement does not alter the analysis.

Notably, the Supreme Court held in *Pyett* that employees may delegate to their unions, pre-dispute, the right to decide their substantive statutory claims in individual arbitration.[14] While the Board has attempted to differentiate *Pyett* on the ground that the employees had already exercised their Section 7 rights by certifying a union that could then bargain away those rights, this would appear to be a distinction without difference. An employee who is empowered to delegate such a right to a union clearly may choose to exercise that right personally. In the exercise of that individual right, there would appear to be no reason why the employee may not agree, pre-dispute, in a contract with an employer, to resolve a substantive statutory right in single employee arbitration.

Evan Spelfogel is a member of the firm of Epstein Becker & Green, P.C. in its New York office. He is a past Chair of the Labor & Employment Law Section of the New York State Bar Association and a Fellow in the College of Labor and Employment Lawyers.

Finally, although there is an express prohibition in the NLRA against an employee signing an agreement that requires the employee waive the right to join a union as a condition of employment,[15] there is no comparable prohibition anywhere in the NLRA (or in the Norris-LaGuardia Act) limiting an employee's right to enter into an agreement with an employer to accept individual arbitration of employment-related disputes and to forgo class and collective arbitration.

The arguments outlined above were not raised or argued in the *Lewis* or *Ernst & Young* cases before the Seventh or Ninth Circuits, which were decided in the Board's favor, as described above. Some of the arguments have been raised by the employer and by amici in the Second Circuit *Raymours Furniture* case; but the Court found it unnecessary to decide the issue because it ruled that it was bound to reject the Board position based upon its three year old *Southerland* decision.[16]

In summary, in those jurisdictions covered by the Seventh and Ninth Circuits, class and collective action waivers are likely unenforceable to the extent they are a condition of employment. In jurisdictions covered by the Second, Fifth and Eighth Circuits, class and collective action waivers would appear to be enforceable. Other Circuits have yet to rule on the issue, leaving district courts to weigh conflicting arguments on both sides.

On January 13, 2017 the Supreme Court granted petitions for certiorari filed by the Board in *Murphy Oil* and by the employers in *Ernst & Young* and *Epic Systems*.[17] The issues before the Supreme Court in all three of these cases are whether the NLRA prohibits an employer from requiring employees to agree to waive their rights to arbitrate class and collective disputes, or whether the FAA, which favors arbitration, controls; in short, whether class and collective waivers in arbitration agreements are enforceable. President Donald Trump has nominated—and the Senate has confirmed—Judge Neil Gorsuch of the Tenth Circuit to the seat formerly held by Justice Anthony Scalia, who died in early 2016. As many will recall, it was Justice Scalia who wrote the majority opinions in *AT&T Mobility v. Conception* and *American Express v. Italian Col-*

ors. In these cases, the Supreme Court upheld class action waivers, albeit in the commercial, and not in the employment setting. It remains to be seen how Justice Gorsuch's elevation will impact the law in this area. Certainly a full court will now be likely to resolve the Cirtuit split over the Board's position.

Endnotes

1. 29 U.S.C. § 157.
2. 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 2017 U.S. LEXIS 691 (U.S. Jan. 13, 2017).
3. 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 2017 U.S. LEXIS 689 (U.S. Jan. 13, 2017).
4. *See Patterson v. Raymours Furniture Co.*, 659 Fed. Appx. 40 (2d Cir. 2016) (summary order); *Cellular Sales of Missouri, LLC v. Board*, 824 F.3d 772 (8th Cir. 2016); *Murphy Oil USA, Inc. v. Board* , 361 N.L.R.B. 72 (2014), *enf. denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, 2017 U.S. LEXIS 680 (U.S. Jan. 13, 2017); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *D. R. Horton, Inc. v. Board* , 357 N.L.R.B. 184 (2012), *enf. denied in relevant part*, 737 F.3d 344 (5th Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).
5. *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 990 (9th Cir. 2016) (Ikuta, S. dissenting), *cert. granted*, 2017 U.S. LEXIS 689 (U.S. Jan. 13, 2017).
6. *See, e.g.*, *AT&T Mobility LLC v. Conception*, 563 U.S. 333 (2011); *American Express Co. v. Italian Colors Restaurant*, 133 Sup. Ct. 2304 (2013).
7. *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 991-98 (9th Cir. 2016) (Ikuta, S. dissenting), *cert. granted*, 2017 U.S. LEXIS 689 (U.S. Jan. 13, 2017).
8. *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072 (9th Cir. 2014). *See also Mohamed v. Uber Techs., Inc.*, 836 F.3d 1102, 1112 n. 6 (9th Cir. 2016) (finding that Uber included in its mandatory arbitration agreements an opt-out provision whereby Uber drivers were not required to accept a class action waiver as a condition of employment, and so Uber had not, in arguable violation of the NLRA, required or coerced its drivers to waive rights they might otherwise have had to file a class action).
9. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009).
10. H.R Rep. No. 3020, at 40 (1947) (Conf. Rep.).
11. 29 U.S.C. § 157.
12. *Id*.
13. H.R Rep. No. 3020, at 47 (1947) (Conf. Rep.).
14. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009).
15. *See* 29 U.S.C. § 103 (prohibiting "yellow dog" contracts).
16. *Patterson v. Raymours Furniture Co.*, 659 Fed. Appx. 40 (2d Cir. 2016) (Summary Order).
17. Case numbers 16-307, 16-300, and 16-285 respectively.

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Winners and Losers: Employment Discrimination Trials in the Southern and Eastern Districts of New York: 2016 Update

By Vivian Berger

In 2012, the author published an article entitled *Winners and Losers: Employment Discrimination Trials in the Southern and Eastern Districts of New York.*[1] The genesis of the study was scholars' and practitioners' widespread perception that employment discrimination plaintiffs have a difficult row to hoe. They fare poorly, both as compared with plaintiffs in other types of action and absolutely—losing much more often than winning. This is true at all stages of litigation: pre-trial, trial and appeal.[2]

Some writers have speculated about the causes of this phenomenon. Reasons cited have ranged from biased decision makers and overly defendant-friendly doctrine[3] to multiple practical considerations lending an advantage to the employer.[4] Parties, advocates and neutrals, however, are usually less concerned with the "why" than the "who" and "how much:" who prevails and to what extent? The better the players can quantify the risk-adjusted value of a case (or, from the opposite viewpoint, the defendant's exposure), the better they can decide the terms on which they should settle. Moreover, the sooner they can do so, the more they can save in transaction costs—above all attorneys' fees.

"On reconsideration, the numbers did not strike the author as very useful."

With data compiled from two years' worth of entries on the PACER system (2004 and 2005), the piece made a number of tentative conclusions about the success of plaintiffs in establishing liability and recovering emotional distress and, occasionally, punitive damages. Results were given for the districts combined as well as by individual district and were further broken down by public versus private defendant. In addition, the writer computed average and median times from filing to verdict. Our primary finding was that plaintiffs prevailed in slightly under one-third of the cases, a result that drew general support from a variety of other sources discussed in the article.[5]

As we will see, the updating numbers confirm this conclusion. Moreover, instead of a total of just 57 trials over two years, we now have 160 trials culled from a seven-year data base. This increase gives us more confidence in our numbers. We hope, therefore, that our targeted audience, mainly attorneys and neutrals in the employment area, will feel comfortable relying on our present findings for general guidance in assessing the likely risks and rewards of trial versus settlement.[6]

The Revised Study: Methodology

Using PACER's online service, as before, the author retrieved all lawsuits under the titles 442 ("Civil Rights: Jobs") and 445 ("Americans With Disabilities—Employment"), filed from the start of January, 2004 through the end of December, 2010—an expansion of seven years of the data originally mined. We tabulated all cases culminating in jury verdicts or judicial findings after bench trials (the latter were few and far between). Our inquiry yielded 160: 70 in the SDNY and 90 in the EDNY.[7] We also determined the number of plaintiffs represented by the cases. Because of some multi-plaintiff trials, the figures were larger: 106 in the Southern District and 94 in the Eastern District, making for a combined total of 200 plaintiffs.[8]

"The 160 cases in our data set yielded 48 verdicts for the plaintiff (30.0%), 108 verdicts for the defense (67.5%) and 4 mixed verdicts11 (2.5%)."

As earlier, we give win-loss results on both a per-case and per-plaintiff basis and separately analyze success rates for plaintiffs in public versus private actions. In the prior study, we only reported win-loss statistics that reflected a truly final resolution—after post-trial motions and appeals. This time, we also recount verdicts (though, as before, not directed ones). Attorneys may be concerned with what the fact finder does, irrespective of finality, because it affects the parties' relative bargaining power. For example, a winning plaintiff may relinquish some of her recovery if the defense forgoes post-trial motions.

Once again, we report average and median emotional distress and punitive damages numbers. But, deviating from the original piece, this update does not relate the amount of attorneys' fees and costs. On reconsideration, the numbers did not strike the author as very useful. They do not reflect juror proclivities since they are determined by the judge; often, too, they are settled by the parties before any award is made. Further, we again report the average and median number of months from the date of filing to the date of verdict;[9] we also give outlying maximum and minimum figures.

A closing word needs to be said about the so-called censored data. These are data that may be altered by events after the study's completion, which have the potential to change outcomes. At the time of writing, 13 cases from the data set remain open: six in the SDNY, seven in the EDNY. This is a fairly small proportion of the closed cases that we examined. Their ultimate disposition, moreover, is unlikely to change our results meaningfully. Even though "elderly" actions are likelier than average to go to trial, in all probability very few, if any, will do so. For one thing, consider the statistical landscape. Very few lawsuits culminate in trials: between October 1, 2014 and September 30, 2015, only 3.4% of employment discrimination cases in the Southern and Eastern Districts of New York were tried to verdict: 2.3% in the former and 5.3% in the latter.[10] Then, too, take account of these matters' individual characteristics. Four of them have pro se plaintiffs; the problems of dealing with such litigants may well explain these actions' longevity. Several of the suits are pending on summary judgment. One matter returned to the trial court after partial reversal of an earlier dismissal. In other words, not many of these cases reflect an orderly march toward trial. Hence, we consider our findings quite stable.

The Study: Results

Who Wins, and How Often?

Win-Loss Rates

The 160 cases in our data set yielded 48 verdicts for the plaintiff (30.0%), 108 verdicts for the defense (67.5%) and 4 mixed verdicts[11] (2.5%). Post-verdict adjustments produced lower numbers for plaintiffs: 45 wins (28.1%); there were 111 defendants' victories (69.4%) and, as before, 4 mixed results (2.5%).[12] Notably, excluding pro se matters, which are likelier to lead to plaintiff defeats, plaintiffs prevailed 30.3% of the time (reduced to 29.0%, on remittitur or appeal). That is hardly surprising since unrepresented parties are extremely likely to lose at trial.[13] Notably, the plaintiff victory rates in the two districts were fairly close: 28.6% (25.7%)[14] in the SDNY and 31.1% (30.0%) in the EDNY.[15] As can be seen, the latter, as well as the overall net of pro se figures, more nearly approximate a roughly one-third success rate than the former.

> *"Is the picture altered when we perform an analysis based on number of plaintiffs rather than number of cases? The answer is yes."*

Another way in which the author looked at the data was to examine success rates by number of plaintiffs rather than number of cases. This was to see whether the presence of multiple plaintiffs bore any relationship to the outcome. In fact, to a small extent, it appeared to do so. Of the total of 200 plaintiffs (106 in the SDNY, 94 in the EDNY), 69, or 34.5%, won at trial; post-trial, there were 66 winners, or 33.0%.[16] (Omitting the pro se cases, 34.9% (33.8%) of plaintiffs prevailed.) Corresponding figures for the Southern and Eastern Districts of New York were 35.8% (34.0%) and 33.0% (31.9%), respectively.[17] Although correlation is not tantamount to causation, it makes sense that plaintiffs would fare better in tandem than alone: each one's story reinforces the others. Yet the likely "spillover" effect has its limits. Hearing the testimony of several claimants may attune the jury to the relative merits of their cases, with the result that some suffer by comparison with others. For example, in the SDNY there were mixed results in three multi-plaintiff suits.[18]

Vivian Berger, Esq. is the Nash Professor of Law Emerita at Columbia Law School. She has conducted hundreds of mediations since the mid-1990s and been designated an Advanced Practitioner in employment mediation, her focus, by the ACR. She thanks Michael O. Finkelstein, Esq. for his assistance on statistical matters.

Finally, a word should be said regarding the incidence of different types of claims appearing in the plaintiff's victory column. Of the 61 discrimination-related claims prevailing at the verdict stage,[19] 24 were for retaliation—almost 40%. (The next two highest, sex at 13 and race/national origin[20] at 12, did not come close.) One cannot draw too much from these numbers since no effort was made to calculate how often each claim was brought. Yet the relatively outsize number of retaliation victories suggests the correctness of the common wisdom: it is often easier to win on this ground than on a discrimination charge.[21]

Private Versus Public Defendants

Our study also divides cases according to whether the defendant is a private entity or governmental body. Overall, of 160 cases, 86 were public and 74 were private.[22] Excluding the four mixed verdicts, plaintiffs prevailed in 21 (17) of the public cases: 25.3% (20.5%).[23] In the private cases, they were victorious in 27 (28): 37.0% (38.4%).[24] Again excluding the mixed verdicts (all of which occurred in the Southern District), plaintiffs in public suits won at trial in seven out of 29 cases, or 24.1%, in the SDNY; after post-verdict adjustments, the figure was four out of 29, or 13.8%.[25] Plaintiffs won 13 (14) out of the 37 private actions: 35.1% (37.8%).[26] Corresponding figures for the EDNY were as follows: 14 (13) wins out of 54 public cases, or 25.9% (24.1%); 14 victories in 36 private actions, or 38.9%; there were no post-verdict changes.[27]

What do these data tell us? Clearly, plaintiffs fared much better in suits against private entities. Is the picture altered when we perform an analysis based on number of plaintiffs rather than number of cases? The answer is yes.

The apparent disadvantage suffered by plaintiffs suing the government largely vanishes when the results are examined according to number of plaintiffs. Out of 113 total public cases, plaintiffs prevailed in 39 (35): 34.5% (31.0%); they won 30 (31) of the 87 private matters: 34.5% (35.6%).[28] Thus, the putative "mutual reinforcement effect" evinced in multi-plaintiff trials seemingly neutralized any hypothesized negative effect encountered by plaintiffs suing governmental entities.

This leads to the question whether the public-private distinction makes an actual difference or whether it is merely an artifact of our data set. The reality that very large bodies like New York City, the Port Authority, and school districts are sued very often benefits them in litigation: "Repeat players" tend to do better than "one-shotters."[29] However, there are private defendants as well as plaintiffs with little or no litigation experience—at least, in the specialized employment arena. Given the data's mixed signals, we can arrive at no firm answer.

What Do Prevailing Plaintiffs Win?

Pain and Suffering Awards

Combined figures for the two districts yielded 63 awards for pain and suffering, 37 in the SDNY and 26 in the EDNY. The average emotional distress award was $200,682 ($156,103).[30] The figures for the SDNY were higher than the ones for the Eastern District: $209,470 ($168,966),[31] as opposed to $182,644 ($137,798).[32] On account of their sensitivity to outliers, especially large ones, averages tend to be misleading. For example, a $4,000,000 verdict in the SDNY[33] was $3,000,000 higher than the next highest verdict; in its absence, the average would have been only $108,173—slightly under half of the actual average. In the EDNY as well, the highest verdict, $2,150,000, skewed the average; without it, the average would have been only $56,110, less than a third of the actual one.

> *"Based on a survey of local federal and New York trial court awards of punitives, that study reinforces this one's finding that their prospects are dicey."*

Hence, a much more informative statistic for someone who wants to calculate the probability of an emotional damages award falling within a certain range is the median dollar amount. (The median is the middle value or values of a distribution.) The combined median for the two districts was $60,000–$30,000 after post-verdict changes.[34] The median for the SDNY was $40,000 ($15,000) and, for the EDNY, $69,375[35] ($50,000).[36]

Plainly, most plaintiffs, even if they win, cannot expect to obtain a huge amount for pain and suffering. Since media reports often exaggerate both success rates and monetary recoveries of plaintiffs, these litigants frequently need emphatic reality checks from their lawyers and neutrals.[37]

Punitive Damages

Mediators often hear plaintiffs' lawyers predict a punitive damages award in the event a case goes to trial—even in quite routine matters. The numbers do not bear them out. In a total of only 22 cases, 13.8% of our 160 cases, was the jury even asked to assess punitives. The average amount granted at verdict was $466,413 overall: $314,250 in the SDNY[38] and $583,462 in the EDNY.[39] In four instances, the jury gave $0, resulting in a ratio of punitive awards to total cases of merely 11.3%. After post-verdict adjustments, the overall average declined to $261,586. In the EDNY, the figure was $113,500; in the SDNY, $375,498.[40]

> *"Stake asymmetry arises when repeat players in litigation confront opponents who are not. Because of concerns such as precedent and reputation, habitual litigants have greater stakes than 'one-shotters'; they also have a better chance of victory."*

The more significant median award at trial was $125,000 for the two districts combined. For the SDNY it was $45,000;[41] for the EDNY, it was $200,000.[42] As usual, post-verdict events brought disappointment to plaintiffs: the overall median declined to a mere $40,000-$30,000 in the Southern District[43] and $50,000 in the Eastern District.[44]

Notably, at about the same time as the original piece on employment discrimination trials, the author published an article devoted solely to the subject of exemplary damages.[45] Based on a survey of local federal and New York trial court awards of punitives, that study reinforces this one's finding that their prospects are dicey. We wrote there that "only in 27 of the 34 actions yielding punitives (79.4%) did the prevailing party or parties hold onto at least part of the award; the figure was 14 out of 34 (41.2%) for awards that survived unchanged."[46] Thus, among plaintiffs who did garner substantial punitive damages verdicts, more ended up as weepers than keepers.

How Long Does It Take From Filing to Verdict?

The average time from filing of the complaint to verdict in the two districts was 34.9 months; only slightly less, the median was 32 months.[47] The figures for the Southern and Eastern Districts were: 30.1 months average and 29 median (SDNY); 38.7 months average and 35 median (EDNY).[48] The original article, with numbers from only 2004-05, reported a combined average of 33.7

months; 30 months was the combined median.[49] The elapsed time from filing to verdict has, therefore, grown only slightly with the increase in years included.

> *"In closing, we stress that our claims for our work are fairly modest."*

Parties should, thus, be counseled to expect the passage of two and three quarter years or more before they can hope to obtain a trial on the merits. But meaningful plaintiffs' wins, in particular, will likely elicit post-verdict motions and, if the defense loses, appeals. Often these will extend considerably the time for parties to achieve closure.

Yet even if a prevailing plaintiff clears post-trial legal hurdles with verdict unscathed, other factors may cause complications that keep the victor from enjoying the spoils. For instance, in one unappealed case, a plaintiff obtained satisfaction of judgment more than 11 months after the verdict. In another matter, affirmed on appeal, a plaintiff had her judgment satisfied almost three years following the verdict. Some judgments are never collected.[50] Hence, the time from filing to verdict provides a most inadequate measure of how long it actually takes to secure a final disposition of the action.

Conclusion

Both theory and practical experience counsel that the suits that survive to verdict do not represent disputes in general. The seminal Priest-Klein hypothesis predicts that the extreme cases—ones that plainly favor the plaintiff or the defendant—will tend to be resolved by settlement.[51]

The model also posits that the weeding out of cases at either end of the spectrum will lead to an approximately even split in verdicts for plaintiffs and defendants.[52] Granted, our findings of a plaintiff success rate approaching one-third do not bear out the 50-50 outcome prediction. Yet this conclusion applies only to parties who have an equal stake in the dispute and "equivalent information, experience and skill."[53] Stake asymmetry arises when repeat players in litigation confront opponents who are not.[54] Because of concerns such as precedent and reputation, habitual litigants have greater stakes than "one-shotters";[55] they also have a better chance of victory.[56] As compared with the average plaintiff, the mainly institutional defendants in employment discrimination cases are typically seasoned, high-stakes repeaters.[57] Hence, it comports with theory as well as common sense that they win, and plaintiffs lose, more than half of the time. Further, as recounted in the predecessor to this study, other research corroborates our ballpark conclusions.[58]

In closing, we stress that our claims for our work are fairly modest. Statistics can do no more than provide a useful background, not substitute, for detailed analysis of one's own case. Experienced practitioners should have a fairly good idea of their own witnesses' likely appeal to a jury, the range of potential damage awards, the proclivities of the presiding judge, and all of the other tangible and intangible factors affecting the decision when to settle and on what terms. We hope that our findings will usefully contribute to the overall efforts of attorneys and neutrals to provide a reality check to their clients confronted with the daunting prospect of trial.

Endnotes

1. *See* Vivian Berger, *Winners and Losers: Employment Discrimination Trials in the Southern and Eastern Districts of New York*, 37 NYSBA LAB. & EMP. L.J. 42 (Spring 2012). The United States District Courts for the Southern and Eastern Districts of New York will be abbreviated as SDNY and EDNY.
2. *See, e.g*., Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 110 (2009); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUDIES 429 (2004); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555 (2001). The data are better for federal courts, which generally keep more reliable statistics.
3. Minna Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1445 (2009).
4. See Vivian Berger, *Employment Mediation in the Twenty-First Century: Challenges in a Changing Environment*, 5 U. PA. J. LAB. & EMP. 489, 499-503 (2003).
5. While this article replicates much of the original one in format and substance, though substituting updated numbers, it does not repeat the material on other studies reporting verdicts in employment actions. Interested readers are referred to Section IV of the previous article ("Prior Verdict Studies"). *See supra* note 1, at 44-46.
6. The findings have less immediate relevance to state court trials. But as we have previously noted, other sources tend to support the ballpark reliability of the win-loss ratios we identify. *See* text accompanying note 5 and note 5, *supra*.
7. We excluded class actions. It is interesting to note that Judge Leonard D. Wexler—who virtually never grants summary judgment in employment matters—heard a total of 19 of the 90 cases in the Eastern District—21%. Of the 2006 tried cases, Judge Wexler was responsible for seven, almost 44%. Taking his cases out of the mix would reduce the EDNY trial rate for the whole period from 3.2% to 2.5%, bringing it much closer to the SDNY figure.
8. In the earlier study, we had only 78 plaintiffs, 50 in the SDNY and 28 in the EDNY.
9. Our reasoning for choosing the time of verdict as an endpoint instead of other possible dates (e.g., judgment, or appellate decision, if any) are detailed in the earlier piece. *See supra* note 1, at 42-43.
10. Personal communication on Nov. 9, 2016 from Joe S. Cecil in the Division of Research, Federal Judicial Center (FJC), Wash. DC. (based on an analysis of the FJC's Integrated Data Base). These are employment discrimination actions, not involving a U.S. plaintiff or defendant (Pacer designation of Nature of Suit: 442).
11. The study counts as a plaintiff victory any action in which the plaintiff won at least one discrimination (or retaliation) claim. Mixed verdicts involved cases with multiple plaintiffs, in which some won and some lost. *See* Table IA.
12. *I*d. An approximate 95% confidence interval for the 30.0% proportion of plaintiff wins is 22.6%-37.4%; for the adjusted figure of 28.1%, it is 20.8%-35.4%.

13. In the EDNY there was one pro se who actually did prevail at trial. However, on appeal, the defendant was granted judgment as a matter of law.

14. Henceforth, where numbers appear in parentheses, they indicate the tally after any post-verdict adjustments.

15. *See* Table IB, IC.

16. *See* Table IIA.

17. *See* Table IIB, IIC.

18. In one case, seven plaintiffs lost and four prevailed. In another, seven plaintiffs won; two lost. In a third, two plaintiffs were victorious and five were not. In the two remaining multi-plaintiff lawsuits, two plaintiffs won and two plaintiffs lost. In the EDNY, by contrast, all plaintiffs rose and fell together. In one case, two plaintiffs won; in another, three plaintiffs prevailed. In a third, two plaintiffs lost.

19. These were taken on a per-case basis from our 160 total cases.

20. The study lumped race and national origin together since often, as the complaint was framed, it was hard to distinguish one from the other.

21. *But cf.* V. Berger, M. Finkelstein & K. Cheung, *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 59-63 (2005) (with respect to surviving summary judgment, sex claims did substantially better than other claims—including those of retaliation).

22. *See* Table IIIA.

23. *Id.*

24. *Id.*

25. *See* Table IIIB.

26. *Id.*

27. *See* Table IIIC.

28. *See* Table IVA. In the SDNY, plaintiffs in public cases won 40.4% (35.1%) of the time; in private cases, they prevailed 30.6% (32.7%) of the time. *See* Table IVB. Corresponding figures for the EDNY were 28.6% (26.8%) and 39.5%; there were no post-verdict adjustments in the latter. *See* Table IVC.

29. *See generally* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

30. *See* Table V.

31. *Id*. One remittitur was granted by the trial court because a federal fee cap applied. (Such caps do not pose a risk to plaintiffs who prevail under either New York State's or New York City's anti-discrimination laws.) In two instances, prevailing plaintiffs ended up with no emotional distress damages because the defendant was later awarded judgment as a matter of law. In another case, the appellate court vacated seven plaintiffs' pain and suffering awards; the parties ultimately settled. Indeed, a confidential settlement was reached post-verdict in several cases. There may, in addition, be more settlements that do not appear in the record. Settlements, moreover, may allocate sums differently than the fact-finder did. Hence, the import of the verdict numbers is limited. But they at least give some indication of the plaintiff's bargaining power in negotiating a resolution.

32. Two settlements were included under this heading since, contrary to the usual practice, the record revealed the reduced amounts of pain and suffering.

33. *See Osorio v. Source Enterprises, Inc.*, 2007 WL 683985 (SDNY) (stating reasons for court's denial of judgment as a matter of law, new trial, and remittitur).

34. *See* Table V.

35. This was the average of $63,750 and $65,000. An average had to be taken because the number of awards was odd: i.e., there was no one middle value. In tallying both averages and medians (with respect to punitives as well as emotional distress damages), the author included verdicts of $0 where it appeared that the jury had been given the option of returning a pain and suffering (or punitive damages) verdict but had simply chosen not to do so or had expressly awarded nothing. Judgment calls in a number of cases may have reduced our numbers' reliability.

36. *See* Table V.

37. *See* Laura Beth Neilsen & Austin Beim, *Media Misrepresentation: Title VII, Print Media, and Public Perceptions of Discrimination Litigation*, 15 STAN. L. & PUB. POL'Y REV. 237 (2004).

38. In one case (not part of the tabulation), the judge withdrew punitives from the jury's consideration because the plaintiff had also won $3,500,000 on a defamation claim. Had the jury had the option, it likely would also have rendered a substantial award of punitives on her retaliation claim. In a second, the jury found that punitive damages were warranted but left it to the court to determine the amount; the matter ended up settling. As with pain and suffering, post-verdict settlements make it impossible to know what many plaintiffs actually received in the end. *See supra* note 31. Moreover, on account of the paucity of cases in which the fact finder was permitted to award punitives, even medians are not very meaningful; averages, of course, are still less so.

39. *See* Table VI.

40. *Id.*

41. $45,000 was the average of $40,000 and $50,000. *See supra* note 35.

42. *See* Table VI.

43. $30,000 was the average of $20,000 and $40,000. *See supra* note 3. In one case, a $125,000 punitive damages verdict was remitted to $50,000 because of a fee cap. As previously noted, *see supra* note 20, neither New York State nor New York City law has such caps. The former, however, does not authorize punitive damages.

44. *Id.* On account of a statutory cap, one $500,000 punitive damages verdict was remitted to $50,000.

45. *See Punitive Damages in Employment Discrimination Cases*: *Myth or Reality*, 37 NYSBA LAB. & EMP. L.J. 6 (Fall/ Winter 2012).

46. *Id.* at 8.

47. *See* Table VIIA.

48. *See* Table VIIB, VII C.

49. *See* Berger, *supra* note 1, at 44.

50. If the defendant declares bankruptcy, it may often take years for the plaintiff to recover, in the end, little or nothing. It is worth noting that the six cases tried to the court in the SDNY were heard 38, 36, 16, 17, 43, and 11 months after filing. The three cases tried to the court in the EDNY were heard 22, 27 and 84 months after filing. Significantly, neither the average elapsed time, 32.7 months, nor the median elapsed time, 27 months, is far out of line with the overall statistics – getting a bench trial, thus, took only slightly less time than obtaining a trial by jury.

51. *See* George L. Priest & Benjamin Klein, *The Selection of Disputes For Litigation*, 13 J. LEGAL STUD. 1 (1984). In real life, though, stubborn, inexperienced or poorly represented litigants may furnish the exception to the rule.

52. *Id*. at 4-5. *See also* Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 116 (2007); Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 912-13 (2006).

53. *See* Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases For Trial*, 90 MICH. L. REV. 319, 325 (1991).

54. *See* Peter Siegelman & Joel Waldfogel, *Toward a Taxonomy of Disputes: New Evidence Through the Prism of the Priest/Klein Model*, 28 J. LEGAL STUD. 101, 109-11 (1999).

55. *Id.*

56. *See* Priest & Klein, *supra* note 51, at 24-25. Explanation of why higher stakes influence victory falls beyond the scope of this article.

57. *See* Siegelman & Waldfogel, *supra* note 54, at 109.

58. *See* text accompanying note 5 and note 5, *supra*.

Tables

I. U.S. DIS. COURTS, SDNY AND EDNY: CASES FILED 2004-10—
PLAINTIFF AND DEFENSE VERDICTS, BY NO. OF CASES
A. SDNY AND EDNY COMBINED: CASES FILED 2004-10—
PLAINTIFF AND DEFENSE VERDICTS, BY NO. OF CASES

Year	Verdict for P	Verdict for D	Mixed Verdict	Total Cases
2004	8 ➔ 7	20 ➔ 21	0	28
2005	11 ➔ 10	16 ➔ 17	2	29
2006	6	17	1	24
2007	8 ➔ 7	9 ➔ 10	0	17
2008	2	21	0	23
2009	7	14	1	22
2010	6	11	0	17
2004-10	48 (30.0%) ➔ 45 (28.1%)	108 (67.5%) ➔ 111 (69.4%)	4 ➔ 4 (2.5%)	160 (100%)

NOTE: The symbol "➔" in this and succeeding tables introduces a post-verdict adjustment.

B. SDNY: CASES FILED 2004-10—PLAINTIFF AND DEFENSE
VERDICTS, BY NO. OF CASES, AND WINNING CLAIMS

Year	Verdict for P	Verdict for D	Mixed Verdict	Total Cases
2004	2 ➔ 1	9 ➔ 10	0	11
2005	9 ➔ 8	10 ➔ 11	2	21
2006	1	6	1	8
2007	4	1	0	5
2008	1	9	0	10
2009	2	9	1	12
2010	1	2	0	3
2004-10	20 (28.6%) ➔ 18 (25.7%)	46 (65.7%) ➔ 48 (68.6%)	4 (5.7%)	70 (100%)

C. EDNY: CASES FILED 2004-10—PLAINTIFF
AND DEFENSE VERDICTS, BY NO. OF CASES

Year	Verdict for P	Verdict for D	Mixed Verdict	Total Cases
2004	6	11	0	17
2005	2	6	0	8
2006	5	11	0	16
2007	4 ➔ 3	8 ➔ 9	0	12
2008	1	12	0	13
2009	5	5	0	10
2010	5	9	0	14
2004-10	28 (31.1%) ➔ 27 (30.0%)	62 (68.9%) ➔ 63 (70.0%)	0	90 (100%)

II. U.S. DIS. COURTS, SDNY AND EDNY: CASES FILED 2004-10—
PLAINTIFF AND DEFENSE VERDICTS, BY NO. OF PLAINTIFFS
A. SDNY AND EDNY COMBINED: CASES FILED 2004-10—
PLAINTIFF AND DEFENSE VERDICTS, BY NO. OF PLAINTIFFS

Year	Verdict for P	Verdict for D	Total Ps
2004	9 ➔ 8	29 ➔ 30	38
2005	27 ➔ 26	23 ➔ 24	50
2006	8	22	30
2007	8 ➔ 7	9 ➔ 10	17
2008	3	21	24
2009	8	15	23
2010	6	12	18
2004-10	69 (34.5%) ➔ 66 (33.0%)	131 (65.5%) ➔ 134 (67.0%)	200 (100%)

B. SDNY: CASES FILED 2004-10—PLAINTIFF
AND DEFENSE VERDICTS, BY NO. OF PLAINTIFFS

Year	Verdict for P	Verdict for D	Total Ps
2004	2 ➔ 1	18 ➔ 19	20
2005	23 ➔ 22	17 ➔ 18	40
2006	3	11	14
2007	4	1	5
2008	2	9	11
2009	3	10	13
2010	1	2	3
2004-10	38 (35.8%) ➔ 36 (34.0%)	68 (64.2%) ➔ 70 (66.0%)	106 (100%)

C. EDNY: CASES FILED 2004-10—PLAINTIFF
AND DEFENSE VERDICTS, BY NO. OF PLAINTIFFS

Year	Verdict for P	Verdict for D	Total Ps
2004	7	11	18
2005	4	6	10
2006	5	11	16
2007	4 ➔ 3	8➔ 9	12
2008	1	12	13
2009	5	5	10
2010	5	10	15
2004-10	31 (33.0%) ➔ 30 (31.9%)	63 (67.0%) ➔ 64 (68.1%)	94 (100%)

III. U.S. DIS. COURTS, SDNY AND EDNY: CASES FILED 2004-10,
PLAINTIFF AND DEFENSE VERDICTS, BY NO.
OF CASES, AND PUBLIC OR PRIVATE DEFENDANT

A. SDNY AND EDNY COMBINED: CASES FILED 2004-10,
PLAINTIFF AND DEFENSE VERDICTS, BY NO.
OF CASES, AND PUBLIC OR PRIVATE DEFENDANT

Year	Pub.: P Verdict	Pub.: D Verdict	Priv.: P Verdict	Priv.: D Verdict	Mixed Verdict	Total Cases
2004	3 ➔ 2	10 ➔ 11	5	10	0	28
2005	7 ➔ 5	8 ➔ 10	4 ➔ 5	8 ➔ 7	2	29
2006	3	7	3	10	1	24
2007	3 ➔ 2	8 ➔ 9	5	1	0	17
2008	0	13	2	8	0	23
2009	2	9	5	5	1	22
2010	3	7	3	4	0	17
2004-10	21 (25.3%) ➔ 17 (20.5%)	62 (74.7%) ➔ 66 (79.5%)	27 (37.0%) ➔ 28 (38.4%)	46 (63.0%) ➔ 45 (61.6%)	4 (2.5%)	160 (83 pub., 73 priv., 4 mixed)

NOTE: Three of the mixed verdicts were in public cases; one was in a private case. To calculate percentages of plaintiffs' and defendants' victories in public and private cases, the denominators used were, respectively, total public (83) and total private (73) cases. The denominator used for mixed cases was total cases: 160. The same method was applied in the two succeeding tables.

B. SDNY: CASES FILED 2004-10, PLAINTIFF
AND DEFENSE VERDICTS, BY NO. OF CASES,
AND PUBLIC OR PRIVATE DEFENDANT

Year	Pub.: P Verdict	Pub.: D Verdict	Priv.: P Verdict	Priv.: D Verdict	Mixed Verdict	Total Cases
2004	1 ➔ 0	4 ➔ 5	1	5	0	11
2005	5 ➔ 3	3 ➔ 5	4 ➔ 5	7 ➔ 6	2	21
2006	0	1	1	5	1	8
2007	0	1	4	0	0	5
2008	0	5	1	4	0	10
2009	0	6	2	3	1	12
2010	1	2	0	0	0	3
2004-10	7 (24.1%) ➔ 4 (13.8%)	22 (75.9%) ➔ 25 86.2%	13 (35.1%) ➔ 14 (37.8%)	24 (64.9%) ➔ 23 (62.2%)	4 (5.7%)	70 (29 pub., 37 priv., 4 mixed)

C. EDNY: CASES FILED 2004-10, PLAINTIFF AND DEFENSE VERDICTS, BY NO. OF CASES, AND PUBLIC OR PRIVATE DEFENDANT

Year	Pub.: P Verdict	Pub.: D Verdict	Priv.: P Verdict	Priv.: D Verdict	Mixed Verdict	Total Cases
2004	2	6	4	5	0	17
2005	2	5	0	1	0	8
2006	3	6	2	5	0	16
2007	3 ➔ 2	7 ➔ 8	1	1	0	12
2008	0	8	1	4	0	13
2009	2	3	3	2	0	10
2010	2	5	3	4	0	14
2004-10	14 (25.9%) ➔ 13 (24.1%)	40 (74.1%) ➔ 41 (75.9%)	14 (38.9%)	22 (61.1%)	0 (0.0%)	90 (54 pub., 36 priv.)

IV. U.S. DIS. COURTS, SDNY AND EDNY: CASES FILED 2004-10, PLAINTIFF AND DEFENSE VERDICTS, BY NO. OF PLAINTIFFS, AND PUBLIC OR PRIVATE DEFENDANT

A. SDNY AND EDNY COMBINED: CASES FILED 2004-10, PLAINTIFF AND DEFENSE VERDICTS, BY NO. OF PLAINTIFFS, AND PUBLIC OR PRIVATE DEFENDANT

Year	Pub. P: Verdict	Pub. D: Verdict	Priv. P: Verdict	Priv. D: Verdict	Total Ps
2004	3 ➔ 2	10 ➔ 11	6	19	38
2005	23 ➔ 21	15 ➔ 17	4 ➔ 5	8 ➔ 7	50
2006	5	12	3	10	30
2007	3 ➔ 2	8 ➔ 9	5	1	17
2008	0	13	3	8	24
2009	2	9	6	6	23
2010	3	7	3	5	18
2002-10	39 (34.5%) ➔ 35 (31.0%)	74 (65.5%) ➔ 78 (69.0%)	30 (34.5%) ➔ 31 (35.6%)	57 (65.5%) ➔ 56 (64.4%)	200 (113 pub., 87 priv.)

NOTE: To calculate percentages of plaintiffs' and defendants' victories in public and private cases, the denominators used were, respectively, total plaintiffs in public cases (113) and total plaintiffs in private cases (87). The same method was applied in the two succeeding tables.

B. U.S. DIS. COURTS, SDNY: CASES FILED 2004-10, PLAINTIFF AND DEFENSE VERDICTS, BY NO. OF PLAINTIFFS AND PUBLIC OR PRIVATE DEFENDANT

Year	Pub. P: Verdict	Pub. D: Verdict	Priv. P: Verdict	Priv. D: Verdict	Total Ps
2004	1 ➔ 0	4 ➔ 5	1	14	20
2005	19 ➔ 17	10 ➔ 12	4 ➔ 5	7 ➔ 6	40
2006	2	6	1	5	14
2007	0	1	4	0	5
2008	0	5	2	4	11
2009	0	6	3	4	13
2010	1	2	0	0	3
2004-10	23 (40.4%) ➔ 20 (35.1%)	34 (59.6%) ➔ 37 (64.9%)	15 (30.6%) ➔ 16 (32.7%)	34 (69.4%) ➔ 33 (67.3%)	106 (57 pub., 49 priv.)

C. U.S. DIS. COURTS, EDNY: CASES FILED 2004-10, PLAINTIFF AND DEFENSE VERDICTS, BY NO. OF PLAINTIFFS AND PUBLIC OR PRIVATE DEFENDANT

Year	Pub. P: Verdict	Pub. D: Verdict	Priv. P: Verdict	Priv. D: Verdict	Total Ps
2004	2	6	5	5	18
2005	4	5	0	1	10
2006	3	6	2	5	16
2007	3 ➔ 2	7 ➔ 8	1	1	12
2008	0	8	1	4	13
2009	2	3	3	2	10
2010	2	5	3	5	15
2004-10	16 (28.6%) ➔ 15 (26.8%)	40 (71.4%) ➔ 41 (73.2%)	15 (39.5%)	23 (60.5%)	94 (56 pub., 38 priv.)

V. U.S. DIS. COURTS, SDNY AND EDNY AND COMBINED: CIVIL CASES FILED 2004-10—AVERAGE AND MEDIAN AMOUNTS OF PAIN AND SUFFERING AWARDED

District	Av.: Verdict	Av.: Post Verdict	Median: Verdict	Median: PostVerdict
SDNY	209,470	168,966	40,000	15,000
EDNY	182,644	137,798	69,375	50,000
Combined	200,682	156,103	60,000	30,000

VI. U.S. DIS. COURTS, SDNY AND EDNY AND COMBINED: CIVIL CASES FILED 2004-10—AVERAGE AND MEDIAN AMOUNTS OF PUNITIVE DAMAGES AWARDED

District	Av.: Verdict	Av.: Post Verdict	Median: Verdict	Median: PostVerdict
SDNY	314,250	113,500	45,000	30,000
EDNY	583,462	375,498	200,000	50,000
Combined	466,413	261,586	125,000	40,000

VII. US DIS. COURTS, SDNY AND EDNY: CIVIL CASES FILED 2004-10 –
AVERAGE AND MEDIAN TIMES FROM FILING TO VERDICT, IN MONTHS

A. SDNY AND EDNY COMBINED: CIVIL CASES FILED 2004-10 –
AVERAGE AND MEDIAN TIMES FROM FILING TO VERDICT, IN MONTHS

Year	Combined Average	Combined Median
2004-10	34.9	32

B. SDNY AND EDNY: CIVIL CASES FILED 2004-10 –
AVERAGE TIMES FROM FILING TO VERDICT, IN MONTHS

Year	SDNY	EDNY
2004-10	30.1	38.7

C. SDNY AND EDNY: CIVIL CASES FILED 2004-10 –
MEDIAN TIME FROM FILING TO VERDICT, AND SHORTEST
AND LONGEST TIMES, IN MONTHS

Year	SDNY Median	SDNY Shortest (Longest)	EDNY Median	EDNY Shortest (Longest)
2004-10	29	9 (97)	35	7 (95)

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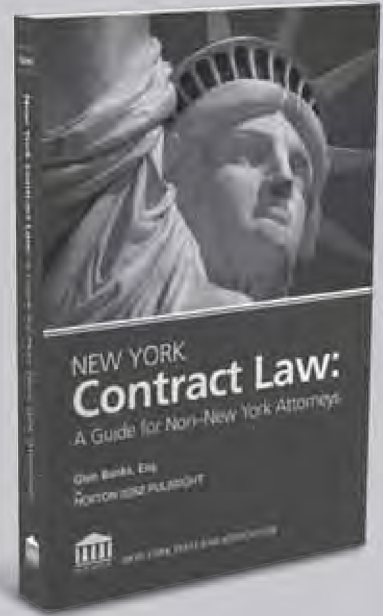

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Demystifying the Regular Rate of Pay

By Allan S. Bloom

Even at a gathering of employment lawyers, one of the easiest ways to clear the room is to begin a discussion on the regular rate of pay. Few other topics, even within the general subject of wage and hour law, evoke such a universal sense of bewilderment, if not unbridled disdain. Unlocking the mysteries of the regular rate is not a fool's errand. To the contrary, it requires little more than the willingness to become familiar with a handful of discrete rules that share some consistent principles and themes. In this article, we'll explore the fundamentals of the regular rate and its application in a variety of circumstances.

Sources of Authority

Section 7 of the Fair Labor Standards Act (FLSA) generally prohibits employment of overtime-eligible (i.e., non-exempt) employees for a workweek longer than 40 hours unless the employee receives overtime pay at a rate "not less than one and one-half times *the regular rate* at which he is employed."[1] The "regular rate" is "deemed to include all remuneration for employment paid to, or on behalf of, the employee" except for the eight categories of excludable compensation that are listed in the statute.[2]

"The employee receives one and one-half times his or her hourly rate for each overtime hour worked."

The principles for calculating overtime pay based on the regular rate are set forth in Part 778 of Title 29 of the Code of Federal Regulations. Additional guidance from the U.S. Department of Labor (DOL) with respect to the regular rate is included in Chapter 32 of the agency's Field Operations Handbook.[3] DOL opinion letters—which the agency stopped issuing in 2009, but which are still available online—address various regular rate and overtime calculation issues.[4]

This article focuses on the FLSA and federal rules, that apply in all 50 states. State and local laws may require additional or different considerations, provide additional rights to employees, and impose additional obligations on employers.[5]

General Principles

The Supreme Court, in *Walling v. Youngerman-Reynolds Hardwood Co.*, described the regular rate as an "actual fact."[6] It is generally not subject to negotiation—to the contrary, "[o]nce the parties have decided upon the amount of wages and the mode of payment[,] the determination of the regular rate [is] a matter of mathematical computation[.]"[7]

The regular rate is calculated on a workweek basis. In other words, each workweek stands alone for regular rate and overtime purposes. The workweek is a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. The employer can determine when the workweek begins.

While the FLSA does not require employers to pay employees on an hourly rate basis, the regular rate is *always* an hourly rate. Employers are permitted to pay overtime-eligible employees on a salary, commission, daily rate, piece rate, or other basis, but in each case overtime pay "must be computed on the basis of the hourly rate derived therefrom."[8] In all circumstances, the regular rate can never be less than the minimum wage.

Calculating the Regular Rate

The regular rate is determined by dividing the employee's "total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid."[9] For employees paid solely on an hourly basis, the calculation is simple: the hourly rate is the regular rate. The employee receives one and one-half times his or her hourly rate for each overtime hour worked. If the employee earns other compensation during the workweek (e.g., bonuses, commissions, etc.) that is paid with the regular pay for the workweek, it is added to the hourly earnings for the workweek and then divided by the total number of hours worked in the workweek to arrive at the regular rate. The employee receives one and one-half times the resulting regular rate for each overtime hour worked.[10]

"An employer can also pay an overtime-eligible employee a flat sum for a day's work of for doing a particular job, without regard to the number of hours worked in the day or at the job, provided that the average hourly rate of pay for all hours worked is at or above the minimum wage."

For salaried employees who receive no other compensation during the week, the regular rate is the weekly salary divided by the number of hours that the salary is *intended to compensate*,[11] which may be more or less than the number of actual hours worked. For example, the regular rate of a salaried employee whose salary is in-

tended to compensate for a workweek of 35 hours is the weekly salary divided by 35. In weeks where the employee works more than 40 hours, he or she would be entitled to overtime pay based on the regular rate as calculated above—the denominator remains 35, even though the employee worked 40 straight-time hours. If an employee's salary is intended to compensate him or her for 40 hours of work per week, or for all hours worked up to 40 in the week, the regular rate is the weekly salary divided by 40.[12] The regular rate, and therefore the overtime rate, decreases as the number of hours the salary is intended to compensate increases.

"If the calculation and payment of the commission cannot be completed until sometime after the regular payday for the workweek, the employer may disregard the commission in computing the regular rate until the amount of commission can be ascertained."

Salaries for periods other than a workweek must be reduced to their weekly equivalent to calculate the regular rate. For example, a monthly salary is multiplied by 12 and divided by 52, and a semi-monthly salary is multiplied by 24 and divided by 52.

Under the FLSA, an employer may designate a salary to cover a *fixed* number of hours in excess of 40 per week,[13] or a *fluctuating* number of hours above and below 40 hours per week,[14] provided in either case that the average hourly rate of pay for all hours worked is always at or above the minimum wage. Under the first arrangement (fixed salary for fixed hours), the employer only owes a *half-time* premium for each overtime hour worked up to the fixed number of hours the salary is intended to compensate, and a time-and-a-half premium for any additional overtime hours worked. Under the second arrangement (fixed salary for fluctuating hours), the employer only owes a *half-time* premium for each overtime hour worked. The rationale underlying both arrangements is that by virtue of the salary, the employee has already been paid for the straight-time portion of some or all of the overtime work (i.e., the "time" in "time-and-a-half).[15]

An employer can also pay an overtime-eligible employee a flat sum for a day's work of for doing a particular job, without regard to the number of hours worked in the day or at the job, provided that the average hourly rate of pay for all hours worked is at or above the minimum wage. In either situation, if the employee receives no other compensation for the workweek, the regular rate is the total of all of the day rates and job rates received that workweek divided by the total number of hours actually worked that week. Under either a day rate or a job rate arrangement, the employer owes a half-time premium for each overtime hour worked.[16]

Employee Working at Two or More Rates

The regular rate for an employee working at two or more different straight-time rates for different types of work is the weighted average of such rates. The employee's total earnings for the workweek (except statutory exclusions) are divided by the total number of hours worked to arrive at the regular rate.[17] There is an alternate method to pay for overtime hours in this situation, under section 7(g)(2) of the FLSA. The employer and employee may agree in advance of the performance of the work that the employee will be paid during overtime hours at a rate not less than one-and-one-half times the straight-time rate for the *particular type of work* the employee is performing during such overtime hours.[18]

Commissions

Commissions are included in the regular rate, regardless of when and how they are calculated or paid. Commissions earned and paid on a weekly basis are simply added to the employee's other earnings for the workweek and divided by the total number of hours worked to arrive at the regular rate. The employee receives one-half of the resulting regular rate (in addition to his or her base pay) for each overtime hour worked.[19]

If the calculation and payment of the commission cannot be completed until sometime after the regular payday for the workweek, the employer may disregard the commission in computing the regular rate until the amount of commission can be ascertained. When the commission can be computed, any overtime pay owed on the commission is paid at that time.[20] To calculate the amount of overtime pay due on a deferred commission, the employer must determine the workweek(s) during which the commission was earned. The employee then receives an additional overtime payment for any such workweek(s) in which he or she worked overtime, at one-half the regular rate attributable to the commission multiplied by the number of overtime hours worked. The regular rate attributable to a commission is the amount of the commission earned that workweek divided by the total number of hours worked in the workweek.[21]

"Accordingly, holiday pay for an employee who performs no work on the holiday does not go into the numerator in the regular rate calculation."

If it is not possible or practicable to allocate the commission among certain workweeks in proportion to the amount of commission actually earned (or reasonably presumed to be earned) each week, some other reason-

able method of apportioning the commission—such as allocating equal amounts to each workweek in the period, or allocating equal amounts to each hour worked in the period—is permissible.[22]

Regular Rate Exclusions

Section 7(e) of the FLSA lists eight categories of payments that can be excluded from the regular rate.[23] No overtime pay is owed with respect to these eight categories of payments. Conversely, such payments may not be credited toward overtime pay that is owed. The list of statutory exclusions is an exhaustive list, and not an illustrative list.[24]

Gifts

Gifts or "payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency" are excluded from the regular rate.[25] If the payment is so substantial that it can be assumed that employees consider it a part of the wages for which they work, it cannot be considered to be in the nature of a gift. If the bonus is paid pursuant to contract (so that the employee has a legal right to the payment and could bring suit to enforce it), it is not in the nature of a gift.

Gifts can be excluded even though they are paid with regularity such that the employees are led to expect them. Gifts can be excluded even though the amounts paid to different employees vary based on level of compensation or length of service. For example, a holiday bonus paid (not pursuant to contract) in the amount of two weeks' salary to all employees and an equal additional amount for each five years of service with the employer would be excludable from the regular rate.[26]

Payments for Non-Working Hours

The FLSA does not require employers to give their employees time off for holidays, vacations, or sick leave—either with or without pay. Payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; expense reimbursements; and "other similar payments to an employee which are not made as compensation for his hours of employment" are excluded from the regular rate.[27]

Accordingly, holiday pay for an employee who performs no work on the holiday does not go into the numerator in the regular rate calculation. Similarly, holiday hours during which no work is performed, even if paid, do not go into the denominator. On the other hand, if the employee actually performs work during the holiday, both the pay for the working hours (anything up to one-and-one-half times the regular rate, as discussed below) and the working hours go into the regular rate equation.[28]

Allan S. Bloom is a Partner at Proskauer Rose LLP in New York City and co-head of the firm's Wage and Hour Practice Group.

Some states have laws providing for a minimum number of hours' pay in the event an employee reports for work but is then sent home without working a full shift. Such "show up," "reporting," or "call-in" pay is excluded from the regular rate to the extent it exceeds payment for hours actually worked.[29] The portions of such pay (whether at straight-time, overtime, or other rates) representing payment for hours actually worked are included in the regular rate and may be credited toward straight-time and overtime pay due.

Certain idle time (e.g., "on call" time, travel time, breaks, sleeping time) may be considered "hours worked" under the FLSA and if so, pay for such time must be included in the regular rate.[30] If so, the pay goes into the numerator of the regular rate equation, and the compensable hours (*i.e.*, the "hours worked") go into the denominator.

"A weekly bonus that is not excluded from the regular rate is simply added to the total compensation for that workweek when calculating overtime."

Examples of excludable "other similar payments to an employee which are not made as compensation for his hours of employment" include loans or advances made by an employer to an employee and the cost of "conveniences" furnished to the employee, such as parking spaces, recreational facilities, and on-the-job medical care.

Certain Bonuses

Under the FLSA, "[s]ums paid in recognition of services performed during a given period if … both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly" are excluded from the regular rate.[31]

The FLSA regulations expand on this statutory exclusion with several examples:

- [I]f an employer announces to his employees in January that he intends to pay them a bonus in June…[s]uch a bonus would not be excluded from the regular rate.
- [A]n employer who promises to… employees that they will receive a…bonus…whenever, in [the

employer's] discretion, the financial condition of the firm warrants such payments, has abandoned discretion with regard to the amount of the bonus though not with regard to the fact of payment. Such a bonus would not be excluded from the regular rate.

- On the other hand, if a bonus such as the one just described were paid without prior contract, promise or announcement and the decision as to the fact and amount of payment lay in the employer's sole discretion, the bonus would be properly excluded from the regular rate.[32]

Under the regulations, any bonus promised to employees upon hiring or that is the result of collective bargaining; bonuses that are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the company; and attendance bonuses, production bonuses, bonuses for quality and accuracy of work, and bonuses contingent upon the employee's continuing in employment until the time the payment are included in the regular rate.[33]

"Under some arrangements, employees receive additional pay for working additional hours beyond their regular daily or weekly schedule."

The DOL, in its Field Operations Handbook, takes the position that "regularity and/or repetitive payment of a bonus is not in itself sufficient to destroy the discretionary character of a bonus" and render it includable in the overtime calculation.[34]

Bonuses that are calculated as a percentage of total earnings (straight-time and overtime earnings) may be excluded from the regular rate.[35] The reasoning is that the employer has, by structuring the bonus as such, already paid any overtime compensation due on the bonus.

Two other types of "bonus" payments are addressed in the FLSA and are excluded from the regular rate. The first are "[s]ums paid in recognition of services performed during a given period if the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Secretary of Labor [set forth in 29 C.F.R. Part 549]…, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency."[36] The second are "[s]ums paid in recognition of services performed during a given period if…the payments are talent fees…paid to performers, including announcers, on radio and television programs."[37]

A weekly bonus that is not excluded from the regular rate is simply added to the total compensation for that workweek when calculating overtime.[38] Where payment of a bonus is deferred over a period of time longer than a workweek (such as an annual bonus), the employer may disregard the bonus in computing overtime pay until such time as the amount of the bonus can be ascertained. When the amount of the bonus can be ascertained, it must be apportioned back over the workweeks of the period during which it may be said to have been earned (e.g., ratably over 52 weeks for an annual bonus). The employee then receives an additional overtime payment for any workweek(s) in the period in which he or she worked overtime, at one-half the regular rate attributable to the bonus multiplied by the number of overtime hours worked. The regular rate attributable to the bonus is the amount of the bonus allocated to that workweek divided by the total number of hours worked in the workweek.[39]

Benefit Plan Contributions

An employer may exclude from the regular rate "[c]ontributions irrevocably made by [the] employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees."[40]

Premium Pay for Hours in Excess of a Daily or Weekly Standard

Under some arrangements, employees receive additional pay for working additional hours beyond their regular daily or weekly schedule. Employers may exclude from the regular rate such "[e]xtra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or [40 hours a week] … or in excess of the employee's normal working hours or regular working hours."[41] In addition, this extra compensation may be credited toward any overtime owed for the workweek.[42]

"The FLSA provides a floor for compensation, but not a ceiling."

Premium Pay for Weekend and Holiday Work

Some employers provide additional pay to employees who work on weekends, holidays, or other days on which they would normally not work. Such "[e]xtra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in non[-]overtime hours on other days," is excluded from the regular rate.[43] This extra compensation may also be credited toward any overtime owed for the workweek.[44]

"Clock Pattern" Premium Pay

Employers may also exclude from the regular rate so-called "clock pattern" premium pay, which is "[e]xtra compensation provided by a premium rate paid to [an] employee, in pursuance of an applicable employment contract or collective bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding [40 hours]), where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek."[45] This extra compensation may also be credited toward any overtime owed for the workweek.[46]

Certain Equity-Related Compensation

Employers may exclude from the regular rate "[a]ny value or income derived from employer-provided grants or rights provided pursuant to a [qualifying] stock option, stock appreciation right, or bona fide employee stock purchase program."[47]

Final Thoughts

The FLSA provides a floor for compensation, but not a ceiling. Employers can always include *more* compensation in the regular rate calculation than the law requires, which would have the effect of increasing the regular rate and thereby increasing the amount of overtime pay. But employers who include *less* than what the law requires do so at their peril.

Now that wasn't that bad, was it?

Endnotes

1. 29 U.S.C. § 207(a)(1) (emphasis added). The FLSA, nearing 80 years of age, often refers to both employer and employee as "he." Its interpretive regulations, codified in Title 29 of the C.F.R., often utilize the same convention.
2. 29 U.S.C. § 207(e).
3. Available at <https://www.dol.gov/whd/FOH/FOH_Ch32.pdf>.
4. Available at <https://www.dol.gov/whd/opinion/opinion.htm>.
5. *E.g.*, 29 U.S.C. § 218(a) ("No provision of [the FLSA] or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under [the FLSA] or a maximum work week lower than the maximum workweek established under [the FLSA].").
6. 325 U.S. 419, 424 (1945).
7. *Id.* at 424-25.
8. 29 C.F.R. § 778.109.
9. 29 C.F.R. § 778.109.
10. 29 C.F.R. § 778.110.
11. 29 C.F.R. § 778.113. Employers should be mindful of state laws, such as California's, that place restrictions on the number of hours a salary can be intended to compensate.
12. 29 C.F.R. § 778.113.
13. 29 C.F.R. § 778.325.
14. 29 C.F.R. § 778.114.
15. Again, state laws may prohibit these kinds of arrangements. *See supra* n.11.
16. 29 C.F.R. § 778.112.
17. 29 C.F.R. § 778.115.
18. 29 U.S.C. § 207(g)(2); 29 C.F.R. § 778.419.
19. 29 C.F.R. § 778.118.
20. 29 C.F.R. § 778.119.
21. *Id.* For example, an employee is paid $500 in commissions in March for work performed in a 50-hour workweek in January. The regular rate attributable to the commission is $500 ÷ 50, or $10. The overtime pay owed on the commission is one-half that regular rate ($5), multiplied by the number of overtime hours worked in the workweek (10 hours), or $50. The employee will have already received overtime pay based on his or her non-commission earnings back in January, and will receive an additional $50 in overtime pay once the commission has been calculated in March.
22. 29 C.F.R. § 778.120.
23. 29 U.S.C. § 207(e).
24. *See* 29 C.F.R. § 778.200(c).
25. 29 U.S.C. § 207(e)(1); 29 C.F.R. § 778.212.
26. 29 C.F.R. § 778.212(c).
27. 29 U.S.C. § 207(e)(2); 29 C.F.R. §§ 778.216-24.
28. 29 C.F.R. § 778.203.
29. 29 C.F.R. §§ 778.220-22.
30. 29 C.F.R. § 778.223. *See also* 29 C.F.R. pts. 785 & 790 (hours worked).
31. 29 U.S.C. § 207(e)(3)(a); 29 C.F.R. §§ 778.208-12.
32. 29 C.F.R. § 778.211(b).
33. 29 C.F.R. § 778.211(c).
34. DOL Field Ops. Handbook 32c01.
35. 29 C.F.R. § 778.210.
36. 29 U.S.C. § 207(e)(3)(b); 29 C.F.R. §§ 778.213-15; 29 C.F.R. pt. 549
37. 29 U.S.C. § 207(e)(3)(c); 29 C.F.R. § 778.225; *see also* 29 C.F.R. pt. 550.
38. 29 C.F.R. § 778.209(a).
39. 29 C.F.R. § 778.209. For example, an employee receives a $5,200 annual bonus for her work throughout the year. The bonus is allocated in equal amounts to all weeks during the year, resulting in $100 in additional compensation per week ($5,200—52 weeks). In any week during that year in which the employee worked 50 hours, the regular rate attributable to the bonus is $100 ÷ 50, or $2. The overtime pay owed on the bonus for each such week is one-half that regular rate ($1), multiplied by the number of overtime hours worked in the week (10 hours), or $10. The employer would perform a similar calculation for every workweek in the bonus period in which the employee worked overtime. Although the bonus amount allocated to each week in our example will be the same ($100), the amount of additional overtime pay owed will differ from week to week depending on the number of overtime hours worked.
40. 29 U.S.C. § 207(e)(4); 29 C.F.R. §§ 778.214-15.
41. 29 U.S.C. § 207(e)(5); 29 C.F.R. §§ 778.201-02.
42. 29 U.S.C. § 207(h); 29 C.F.R. §§ 778.201(a), (c).
43. 29 U.S.C. § 207(e)(6); 29 C.F.R. §§ 778.203, 205-06.
44. *See supra* n.42.
45. 29 U.S.C. § 207(e)(7); 29 C.F.R. §§ 778.201, 206.
46. *See supra* n.42.
47. 29 U.S.C. § 207(e)(8).

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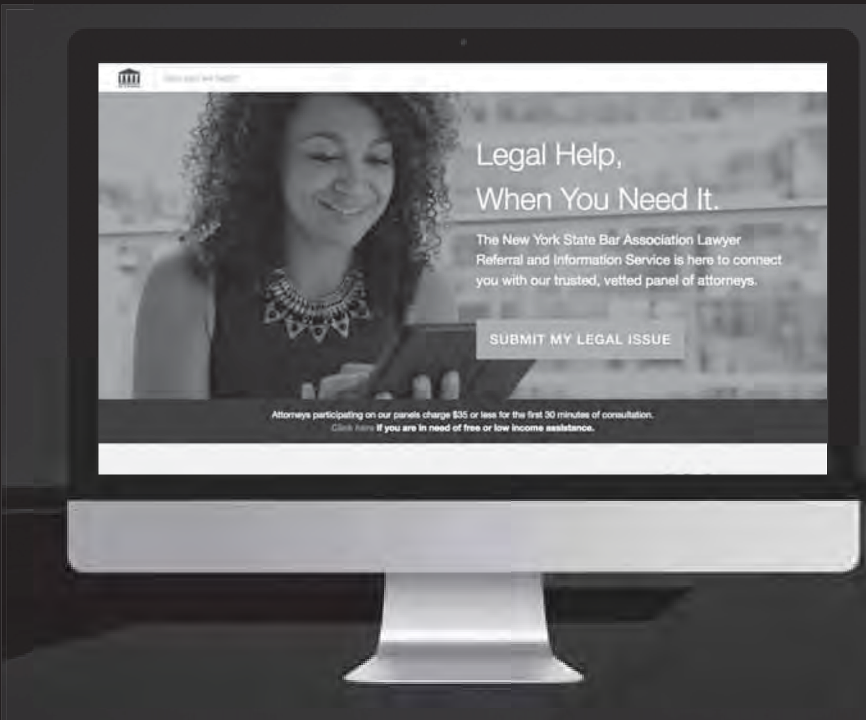

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Gender Equality: Why Women Can Play in the Big Leagues

By Kimberly Livingstone

I. Introduction

In 1972, Congress enacted 20 U.S.C.A. § 1681, commonly referred to as Title IX. This statute proclaims that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]"[1] Once heralded as an innovative piece of legislation to combat the disparity between men and women's college athletic programs, the law now lacks the specificity necessary to give women the opportunity to breach the professional sports barrier. Thus, the statute's broad language has allowed the courts to narrowly define Title IX, limiting the role of women in professional sports.

Opponents of Title IX reform contend that the current legislation has been effective in providing women with the same athletic opportunities that men enjoy.[2] Moreover, opponents argue that the lack of women's participation in male dominated professional sports is due to their inferior athletic ability. Societies adage that "[n]o woman could ever hope to compete on a pro level; it's a male game, and always will be" is still the formidable argument used by the opposition.[3] Additionally, court decisions such as *Lafler v. Athletic Bd. of Control*, have helped fuel the view that women are physically incapable of competing with men.[4] Courts justify this disparate treatment on the basis that the inclusion of women in male professional contact sports would have a "detrimental effect[] on women's safety if participation was allowed."[5]

"Specifically, it addresses the tactics implemented by the public safety industry, which granted women the opportunity to achieve a career in law enforcement."

Unfortunately, the interpretation of Title IX by the courts has developed and reflected societal limitations for young women. Young women who develop outstanding athletic skills and compete at the same level as the *boys*, understand that society will never allow them to play at a pro-level. These athletes eventually curtail their efforts to a more gender appropriate path. In 2014, at the Little League World Series, an outstanding athlete emerged. The world was in awe of 13-year-old Mo'ne Davis, the first female pitcher in the Little League World Series.[6] Mo'ne successfully led her team to the finals with her 70-mph fast ball.[7] When her team was eventually eliminated, the media asked her what she wanted to be when she grew up, and she answered, "point guard in the WNBA." Mo'ne understood that as a woman, a career in baseball would not be an option.[8]

Thus, to challenge the archaic societal views and governmental mandates hindering women's opportunities in athletics, aggressive legislative reform must be implemented within educational institutions and the professional sports industry to provide an avenue for gender equality.

"In Cohen, *Brown University argued that women were less interested in sports than their male counterparts. Thus, the failure to offer female athletic programs was due to this lack of interest. The courts rejected the university's argument, and directed it to adhere to the Title IX policies."*

This article will examine how the proposed reform of Title IX will energize the social change necessary for gender equality in male dominated athletics. This proposed reform will provide women with the opportunity to develop the specialized skills necessary to obtain employment in male professional sports. Part II of this article will provide a brief overview of Title IX by analyzing the current legislation, case law, and societal mindset. Part III will explore the issue of gender discrimination within the sports industry. It will also examine the disparate impact towards women and the substantial pay gap female athletes receive in comparison to their male counterparts. Part IV will examine the legislative reform developed to address gender discrimination in other male dominated industries. Specifically, it addresses the tactics implemented by the public safety industry, which granted women the opportunity to achieve a career in law enforcement. Part V will explore how the effective desegregation tactics used by the public safety industry could serve as a foundation for the implementation of an affirmative action plan for the sports industry. Part VI will conclude the discussion of the governing factors restricting women's roles in professional sports and the proposed solutions for rectifying gender discrimination in athletics.

II. A Brief History of Title IX

Title IX: The Good, the Bad, and the Ugly

On June 23, 1972, Congress enacted several educational amendments. Among those amendments was Title IX, which prohibited gender discrimination in any educational program or activity receiving federal funds.[9] Soon after Title IX's enactment, members of the legislative body attempted to amend the statute to exempt athletics and men's "revenue producing sports" from the scope of Title IX.[10] These attempts failed to surpass both houses. However, in 1975 opponents of gender equalization in athletics were finally successful in enacting an educational amendment which limited women's involvement in contact sports.[11] This amendment was named the contact sports exemption ("CSE").[12] The CSE held that if a sport is offered to one sex but is not offered to another, the excluded gender must be allowed to try out for the existing team unless the sport is a contact sport.[13] This policy limited women to gender-specific athletics.

"Another athlete challenging societal norms is the aspiring high school senior playing as wide receiver for Halifex West. Kenny Cooley is the first transgender football player to be welcomed onto the playing field."

By 1978, the Department of Education had received approximately 100 gender discrimination complaints from aspiring female athletes. In an effort to provide guidance to educational institutions in complying with Title IX, the agency developed a three-prong test.[14] The first prong developed the requirement of equal participation opportunities for male and female athletes.[15] The second prong addressed the allocation of athletic scholarships in proportion to the number of female and male students participating in college athletics.[16] The final prong discussed the overall treatment and benefits the athletic programs receive as a whole.[17] In response to these restrictions many universities began to rely on the same arguments that the university argued in *Cohen v. Brown University*.[18] In *Cohen*, Brown University argued that women were less interested in sports than their male counterparts.[19] Thus, the failure to offer female athletic programs was due to this lack of interest.[20] The courts rejected the university's argument, and directed it to adhere to the Title IX policies.

Regardless of the court's ruling, the university's arguments provided the foundation driving the opposition towards women's participation in male dominated athletics. Therefore, to combat these social stigmas and advance the inclusion of women in male dominated professional sports, further legislative reform of Title IX must be enacted.

Society's Historical and Ideological Views of Title IX

In the mid-19th century, organized sports emerged in the United States. These modern versions of the gladiator games fueled the masculine identity and women were excluded from this arena. As society progressed, the view of the feminine figure and the inclusion of women in sports changed. Women were encouraged to participate in beautifying sports such as the backstroke, gymnastics, and figure skating.[21] However, after the feminist movement in 1848 and the accompanying 19th Amendment in 1920, the view of women participating in physical activities slowly began to evolve.[22] Throughout history women have been discouraged from participating in athletics, especially with men. The female frame has been labeled as too delicate to withstand physical contact and assertion. In fact, renowned 19th century doctor Edward Clark indicated that even higher education would be too stressful for women and could cause additional detrimental health effects on women's reproductive systems.[23] Despite the modern "progressive" views today, women are still excluded from male dominated professional sports. The majority of society continues to argue that the female body is far too delicate to engage in athletics. Furthermore, many believe that lack of interest in sports is clearly the logical rationale for the gender bias.

However, this archaic view is slowly being challenged by athletes like Mo'ne Davis and Kenny Cooley. In 2014, Mo'ne Davis became one of the first women to successfully play in the Little League World Series.[24] Her 70-mph fastball set her apart from her male counterparts.[25] She was wildly successful throughout the Series, making it onto the cover of *Sports Illustrated* and highlighting that girls can succeed in a boy's sport.[26] Many believed that she would be placed on the fast track to becoming the first woman in Major League Baseball. However, Mo'ne understood that her career in baseball would end with the Little League World Series.[27] Instead, Mo'ne intends to follow a more traditional plan and pursue a career in women's basketball.[28] It is difficult to determine if young women will succeed in challenging these conservative views of athletics if programs are not redesigned to give women the opportunity to succeed in these *fields.*

"Prior to the civil rights movement in the 1960s, the idea represented the segregation of black people."

Another athlete challenging societal norms is the aspiring high school senior playing as wide receiver for Halifex West.[29] Kenny Cooley is the first transgender football player to be welcomed onto the playing field.[30]

Cooley's school looks forward to demonstrating that it's not about your gender, it's about the game.[31]

Although these athletes are attempting to break down the gender barrier, little has been accomplished in pursuit of that goal. Only through legislative reform will the attitudes towards gender equality be influenced to change.

Judicial History: The Court's Attitudes Towards Title IX

The 1979 regulations set forth by Congress were intended to have an institutional-wide effect upon those institutions receiving federal funds.[32] In 1981, the Seventh Circuit's holding in *O'Connor v. Board of Educ. of School Dist. No. 23* distinguished the court's attitude towards co-ed sports.[33] In *O'Connor*, ten-year-old Karen O'Connor wished to try out for the boys' basketball team to improve her already outstanding basketball skills.[34] The school district denied her request and proclaimed that she had the opportunity to try out for the girls' basketball team.[35] Karen, who was understandably upset by this discrimination, brought the matter before the United States Supreme Court. The majority disagreed with Karen's gender based discrimination claim.[36] The Court reasoned that the two-team approach implemented by the school served to encourage girls to participate in sports and thus the policy was an important governmental interest.[37] The Court emphasized that the separation of the two genders in athletic programs was a compelling state interest in that it prevented male domination of the girls' programs and protected the girls' right to develop.[38] Although Title IX does not exclude co-ed teams, the Court in this case demonstrated that separate but equal is good enough. Separate but equal has been a common phrase used throughout America's legislative history. Prior to the civil rights movement in the 1960s, the idea represented the segregation of black people. After the Court's decision in *O'Connor,* the term was revolutionized to apply to the segregation of female athletes.

> *"Furthermore, it was discovered that this trend of unlawful hiring practices extended throughout the industry's leagues."*

In 1984, the United States Supreme Court decided to put on its boxing gloves and enter the ring with Title IX when it addressed the gender discrimination issues in *Grove City College v. Bell.*[39] In *Grove City,* the Department of Education terminated the federal financial assistance it provided to the college due to the school's failure to comply with the statute (Section 901(a), Title IX) prohibiting gender discrimination in any educational program.[40] The Court determined that the statute applied only to specific programs receiving federal funding and any programs not receiving this funding were exempt from Title IX restrictions.[41] As most athletic programs are not federally funded, the Supreme Court essentially excluded gender equality from athletic programs. However, three years after this disheartening decision, Congress implemented a clear definition of the institutional-wide application of Title IX.[42]

Today the courts have maintained a rigid view of gender equality in athletics. However, the inclusion of talented female and transgender athletes in male dominated sports after the reform of Title IX will likely impose a new point of view on the courts. This social change policy will slowly persuade the courts that female athletes are protected from segregation in sports through the Equal Protection Clause of the Constitution. Furthermore, this change in policy would lead to the inclusion of women in the sports industry.

III. Athletics: A Gender War: Organizations in the Sports Industry Are Employers, Too

An Overview of the Statutory Regulations Imposed on Employers

Despite the common belief that there are regulations prohibiting women from entering professional sports, no such statute exists. These companies (the NFL, NHL, NBA, and MLB) are governed by the same Title VII and employment discrimination statutes. Yet women are severely underrepresented in every position, on and off the field. Employers in the sports industry have frequently violated such employment discrimination statutes. Pursuant to 42 U.S.C.A. § 2000e-2(a)(1) (commonly referred to sec 704 of Title VII):

It shall be an unlawful employment practice for an employer—

> to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin...[43]

Last year, the Institute for Diversity and Ethics in Sport at the University of Central Florida revealed a study analyzing the gender hiring practices of the NFL.[44] The study revealed that the NFL has been reluctant to hire women outside of its executive offices.[45] Additionally, of the 330 employees in the league headquarters, only 30% of the positions are held by women.[46] Furthermore, it was discovered that this trend of unlawful hiring practices extended throughout the industry's leagues.[47]

Kimberly Livingstone is a second-year law student at Albany Law School.

Despite the blatant discrimination of women in this industry, court decisions such as the one in *Lafler v. Athletic Bd. of Control*, have developed legal excuses for the sports industry's unlawful hiring practices.[48] The courts justify this disparate treatment on the basis that the inclusion of women in male professional contact sports would have a "detrimental effect[] on women's safety if participation was allowed."[49]

> *"However, cases like* Jenson *forge avenues of relief and progression toward a gender-neutral workplace in male dominated industries."*

However, pursuant to 42 U.S.C.A. § 2000e-2(k), a disparate impact case could develop if a class of women could prove that the unlawful hiring practices of the sports industry are not a business necessity. The statute sets forth that:

> (1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if--
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity[.][50]

Employers in numerous male dominated industries have attempted and successfully used the business necessity defense to justify unlawful hiring practices and discrimination of seasoned employees. In *Jenson v. Eveleth Taconite Co.*, a female employee successfully established a prima facie case that the "employer's practice of promotions to step-up foreman, which was based on subjective and ambiguous selection criteria, had a disparate impact on women[.]"[51] Women working in male dominated industries, such as the construction industry, endure a magnitude of adversity. However, cases like *Jenson* forge avenues of relief and progression toward a gender-neutral workplace in male dominated industries.

Similarly, case law and the CSE have established the business necessity argument as a lawful defense for the unlawful hiring practices within the sports industry. However, the court's perception began to change in 2001, when it decided, *Mercer v. Duke University*.[52] In *Mercer*, the United States District Court of North Carolina became the first court to hold a college football team liable for discriminating against a female athlete solely based on her gender.[53] Although the court has started to recognize the possibility of women's participation in college football, they have yet to discuss the gender discrimination issues within the big leagues.

> *"In 2015, Jen Welter became the first female hired by the NFL to fill an assistant coach position."*

Therefore, the reform of Title IX will be paramount to the establishment of a gender-neutral workplace within the sports industry. Once society's perception is modified to accept women's athletic capabilities, the next step would be to break down the gender barrier in professional sports. Thus, the next section will demonstrate the disparate impact towards women employed within the sports industry.

Proving Disparate Impact

Gender Discrimination in Executive and Managerial Positions

On January 21, 2016, the *Daily News* released an article praising eight women for their persistence in acquiring executive positions within the sports industry.[54] The article applauded these women for orchestrating the destruction of the gender barrier in male dominated professional sports.[55] However, the gender barrier is far from demolished and seems to be an impenetrable wall as demonstrated by the role each of these women play or played in the sports industry.

> *"Women began to change these views by litigating the disparate impact on women and turning to the Equal Protection Clause of the Constitution."*

In 2015, Jen Welter became the first female hired by the NFL to fill an assistant coach position.[56] Welter was highly recommended. She not only has a master's degree in sports psychology and a doctorate in psychology, she also played as a running back for the "Texas Revolution of indoor football men's league."[57] Welter was commended by the head coach of the Arizona Cardinals as being a fireball and full of energy.[58] Yet, despite this glowing review of her performance at the end of the preseason, her position expired. Welter was positive and commented

on her enjoyment in coaching in the NFL, even though it was brief.[59]

Moreover, in 2015, Justine Siegal made her debut as the first woman hired in the MLB as a batting coach for the Oakland Athletics.[60] Similarly to Welter, Siegel was highly qualified for the position, holding a master's degree in sport studies and a Ph.D. in sport and exercise psychology.[61] Additionally, she is the founder of "Baseball for All," a program promoting gender neutrality in baseball.[62] Siegal was specifically hired for the instructional league to teach young players on and off the field about the intellectual side of baseball.[63] However, once again the presence of a woman thriving in the male dominated profession of baseball was short lived, as Siegal's two-week contract ended with the close of the training camp.[64]

Perhaps the sports industry's recent initiative to hire women on a temporary basis is a step towards establishing a role for women in the industry. However, it seems unlikely as history is riddled with examples of including a member of a segregated class to placate governmental and/or societal pressures. Such examples, as demonstrated below, were prevalent in the civil rights era.

In comparison, on February 9, 1960, Little Rock Central High School appeased the United States Supreme Court by allowing nine newly admitted black students to attend classes at an all-white school.[65] This action came shortly after the Supreme Court's landmark decision in *Brown v. Board of Education*, which declared state laws establishing separate public schools for white and black students unconstitutional.[66] It took several years after the order to desegregate before integration took its full effect. However, due to the Court's ruling and the government's public polices, de jure racial desegregation became a reality.

> *"Julie Croteau, a young woman from Virginia, became the first woman to play first baseman for her college's NCAA Division III baseball team."*

Similarly, in *Goesaert v. Cleary*, the Court upheld a law barring women from working as bartenders, except when their husbands owned the bar.[67] The courts defended such laws in an effort to protect women from being morally degraded for working in these occupations.[68] Rulings similar to *Goesaert* were labeled as protective labor laws that rested on the socially proper occupations for women.[69] Women began to change these views by litigating the disparate impact on women and turning to the Equal Protection Clause of the Constitution.[70] The Supreme Court joined the fight against gender discrimination in *United States v. Virginia.* The court held that the "all-male admissions" policy at Virginia Military Institute ("VMI") violated the Equal Protection Clause of the Constitution.[71] The complaint was filed by a female high school student interested in attending VMI. The school denied the student's entrance and proposed admission to the school's female equivalent institution.[72] The Court reasoned that the proposed remedy did not provide the applicant with the same opportunities as those offered at VMI. Thus, the Court required the admission of female cadets into the all-male school.[73]

These cases illustrate the essential elements necessary to prove a disparate impact case. The successful litigation of a disparate impact case will rely on the female claimant proving that the hiring practices for executive and managerial positions within the sports industry create a discriminatory impact on women. As there is not a significant physical requirement for these positions, it is likely that litigation would be successful. However, successfully litigating a disparate impact claim in player positions will likely be more difficult, as the physical component is the very nature of the job.

Gender Discrimination in Player Positions

The common societal arguments for the segregation of the sexes in these modern gladiator games have always been that women are the weaker sex. This view is the foundation for employers in the sports industry to discriminate against women using the business necessity excuse. However, women have been challenging these notions for years by competing and surpassing men in these athletic fields.

For example, on September 23, 1992, Manon Rheaume became the first woman to play competitively in any male dominated professional sport when she appeared in an exhibition game as the goalie for the NHL Tampa Bay Lightings.[74] Rheaume effectively stopped seven of the nine attempted scoring shots and left the game after the first period with the score tied.[75] This outstanding player would never again play in an NHL game merely due to the fact that she was a woman.[76] Although the exhibition game launched a publicity campaign which inspired an increase in women's participation in hockey, no woman since Rheaume's successful appearance has established a professional athletic career in the NHL.[77] Another prime example of women's ability to "play with the boys" occurred in 1989. Julie Croteau, a young woman from Virginia, became the first woman to play first baseman for her college's NCAA Division III baseball team.[78] Additionally, she became the first woman to try out and successfully play for a men's semipro baseball league in Virginia.[79] Despite her success in baseball, Croteau has pursued a career in sports administration, working to "break down the gender barriers in sports."[80] Croteau

pointed out that the gender barrier begins in high school sports programs. Although girls are permitted to play baseball in little league, teenage girls are cut off from this opportunity in high school and college.[81]

"This disparate distribution of funds in educational institutions is the foundation for the unequal pay burden placed on female professional athletes."

Therefore, the reform of Title IX will break down the gender barriers in educational institution's athletic programs. This legislation will provide women with the opportunity to explore a career in professional sports without gender-based restrictions. Although proving a disparate impact case for women in player positions will be more difficult, the development of talented female athletes creates the likelihood of a successful litigation.

The next section will examine the disparate treatment of women in gender specific sports in relation to their male counterparts.

IV. Separate but Not Equal

The Unequal Allocation of Funds in Educational Institutions

According to Title IX, as long as high schools and colleges have sports programs that are equally available to each gender, the educational institutions have met their legal responsibility, even if those opportunities are separate. Furthermore, girls who hope to continue their participation in non-traditional female sports in high school or college are not afforded the opportunity, even in non-coed programs.[82] Moreover, analyzing the financial breakdown between male and female collegiate athletes, it is alarming to discover that male athletes receive "55% of NCAA college athletic scholarship dollars (Divisions I and II), leaving only 45% allocated to women."[83]

"Regardless of this fact, only 1.6% of the network news and ESPN Sports Center is dedicated to coverage of women's sports whereas 96% is dedicated to men's sports."

Even though the general student population is comprised of 57% women, female athletes only receive "43% of participation opportunities at NCAA schools."[84] Examining the financial devotion to Division I athletic programs, women's teams only received 40% of the budgeted funds.[85] Additionally, head coaches' salaries at Division I schools for men's teams totaled $3,430,000 and a total of $1,172,400 were allocated for women's teams.[86]

This disparate distribution of funds in educational institutions is the foundation for the unequal pay burden placed on female professional athletes.

How the Glass Ceiling Affects Women in Professional Sports

Although Title VII was developed to protect employees from employment discrimination and retaliation, sections of the statute seem to dilute the effectiveness of this purpose. Pursuant to 42 U.S.C.A. § 2000e-2(h):

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.[87]

Furthermore, 29 U.S.C.A. § 206(d)(1) illustrates that:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions…[88]

"Today, women represent approximately 15-20% of the law enforcement population."

Although these laws limit the employer's ability to provide employees unequal wages based on gender, professional female athletes witness the disparate treatment on a daily basis.

Currently, female professional athletes receive a lower pay wage than their male counterparts. For example, the maximum salary for a WNBA player is $109,500 and the team salary cap is $878,000.[89] The maximum salary for a NBA player is $16.4 million, and the team salary cap is $70 million.[90] Additionally, the U.S. men's soccer team finished in eleventh place and collected $9 million, which

is four times more than the U.S. women's championship team.[91]

Furthermore, women's sports are rarely televised and are subjected to cancellation for more popular male dominated athletics, even though women may have been more successful in the particular industry. About 3.1 million high school girls participate in interscholastic sports, which has inched ever closer to the 4.4 million high school boy participants.[92] Regardless of this fact, only 1.6% of the network news and ESPN Sports Center is dedicated to coverage of women's sports whereas 96% is dedicated to men's sports.[93]

"Social media and innovative technologies also allowed the TF to inform the populous more efficiently of the employment opportunities in the public safety industry."

While there have been many discussions within the legislature to address the inequality issue, there has yet to be reform in this area. Therefore, unequal pay based on gender is likely to continue unless the government intervenes. Once again the need for social change and legislative reform will be necessary to address the disparate treatment of women in this industry. In comparison, affirmative action plans and governmental mandates have been used in other male dominated industries to address gender discrimination in the workforce. The next section will examine these successful tactics.

V. Legislative Reform in Other Male Dominated Industries: The History of Segregation in Male Dominant Professions

The Public Safety Industry

Perhaps one of the most male dominated industries in the United States is the public safety industry. Although women have had a presence in law enforcement agencies since the early 1900s, their roles were limited to supervising juvenile and female prisoners.[94] The limited roles of women in law enforcement slowly began to change after the enactment of the Civil Rights Act of 1964.[95] The law required police departments to hire women on an equal basis as their male counterparts.[96] After a year of observing women in patrol-related positions, it was discovered that women patrol officers were more effective than their male counterparts in avoiding and defusing violent situations.[97] Additionally, women were less likely than their male counterparts to engage in serious misconduct.[98] Despite their efficiency in patrol positions, women were still limited to low-ranking positions and were constantly passed over for promotions to high ranking positions.[99]

Today, women represent approximately 15-20% of the law enforcement population.[100] This relatively low representation of women is attributed to three main factors: recruitment, hiring, and retention practices.[101] The problem begins with the recruitment practices of law enforcement agencies which are not tailored to enticing women and minorities to apply for employment opportunities. Women routinely avoid these positions due to the negative reputation and operational practices associated with these agencies.[102] The second issue that attributes to the disproportionate representation of women in law enforcement pertains to current hiring practices. Many agencies rely on antiquated examinations as a screening process which excludes qualified individuals from the applicant pool.[103] Furthermore, agencies rely on multiple screening and selection criteria, such as physical tests, written tests, and height requirements.[104] These factors often disproportionately impact women, excluding them from employment in this field.[105] Lastly, agencies find it difficult to retain women in law enforcement positions due to the offensive and negative culture women face within these agencies.[106] Furthermore, women have difficulty in achieving promotions, which can be attributed to a lack of due process in selection procedures.[107] Very few women hold high ranked positions, which makes it difficult to break the glass ceiling and obtain professional development opportunities.[108]

Although women are still impacted by gender discrimination practices within this male dominated industry, the enactment of recent policies are addressing these issues. As such, the administrative policies of the United States Department of Justice ("DOJ") and the Equal Employment Opportunity Commission ("EEOC"), coupled with influential decisions by the courts, are slowly breaking down these barriers.

The Desegregation of Male Dominated Professions

The Policy Steps Implemented to Desegregate the Public Safety Industry

Combating the historical and prevalent gender discrimination employment practices discovered throughout the country's policing agencies has not been an easy task. However, in 2014, President Obama announced his "Task Force on 21st Century Policing" ("TF"). [109] The TF initiative brought together both Federal and State law enforcement agencies to discuss a multitude of issues, including the enactment of policies to desegregate the agencies.[110]

In an effort to recruit women, the TF implemented community outreach programs and hiring workshops in more diverse areas, partnering with the community's

universities, faith-based organizations and minority businesses.[111] Social media and innovative technologies also allowed the TF to inform the populous more efficiently of the employment opportunities in the public safety industry.[112] The TF's next step was to re-evaluate the selection criteria law enforcement agencies used in their hiring practices.[113] The selection criteria consisted of height and weight requirements, which had no relation to the requirements of the job.[114] These factors had often excluded highly qualified women from employment opportunities.[115] After an evaluation of these selection requirements, agencies tailored their physical ability tests around the specific duties of the position.[116] These physical ability fitness exams mirrored those used in our high school gymnasiums.[117]

Lastly, the TF developed programs and incentives to combat the retention issues and difficulties women faced in the workplace. The TF identified that women struggled to identify mentors who foster employment development.[118] The opportunity for advancement is critical to retaining employees; thus, mentor and support programs needed to achieve promotions were implemented.[119] Furthermore, "incentive programs—including providing temporary housing, allowing officers to work towards college credit while on the job, and providing financial bonuses"—have helped entice women to remain in the field.[120]

"Despite the creation of these guidelines, many law enforcement agencies applied the business necessity exception to the selection procedures for candidates applying to law enforcement agencies."

Since the implementation of these tactics, the public safety industry has seen a significant increase in the representation of women in law enforcement. In 2015, the Worchester Police Department was happily surprised that, "out of all the men taking the civil service exam, 37% were men of color and out of all the women who took the exam 56% were women of color."[121] Moreover, in an effort to retain women and minority officers, the Atlanta Police department implemented a retention incentive payment program, offering $3,000 to officers who remain on the force for five years.[122] Although these administrative policies are beginning to break down the gender barrier, these policies are often not enforced until a gender discrimination claim is litigated.

Litigating the Desegregation of the Public Safety Industry

In the 1970s the EEOC released "The Uniform Guidelines on Employee Selection Procedures ("UGESP")." These guidelines were created to be used by employers "to evaluate their selection practices and assess whether they are in compliance with the law."[123] Despite the creation of these guidelines, many law enforcement agencies applied the business necessity exception to the selection procedures for candidates applying to law enforcement agencies. Once these guidelines were implemented, the EEOC began to challenge the "facially neutral job screening devices that have an adverse impact on protected groups and are not job related or consistent with business necessity."[124]

"As demonstrated by the examples above, the implementation of guidelines set forth by the EEOC and the language of Title VII were meaningless without the enforcement and interpretations of the courts."

In 1992, the Ninth Circuit began to strike down the employment discrimination practices within the public safety industry when the majority held that, "[B]efore utilizing a [selection] procedure that has an adverse impact on minorities, the City has an *obligation* pursuant to the *Uniform Guidelines* to explore alternative procedures and to implement them if they have less adverse impact and are substantially equally valid [to other options]."[125]

Furthermore, in 2009, the United States Supreme Court held that, "the City officials lacked strong basis in evidence to believe that city's promotional examinations for firefighters were not job-related and consistent with business necessity, and that use of examination results therefore would have disparate impact on minorities, and, thus, officials failed to establish defense on such basis to liability under Title VII's disparate-treatment provision, where written examinations were devised after painstaking analyses of captain and lieutenant positions, examination's developer drew questions from source material approved by fire department, developer addressed challenges to particular questions, and city turned blind eye to evidence that supported examinations' validity."[126] Two years after this landmark decision, the EEOC successfully litigated the elimination of New Jersey's written examination policy for police sergeants.[127] As a result, the New Jersey State Police promoted its first female African American to the position of sergeant.[128]

As demonstrated by the examples above, the implementation of guidelines set forth by the EEOC and the language of Title VII were meaningless without the enforcement and interpretations of the courts. With the combined efforts of the legislative and judicial branches, the public safety industry has begun the reform necessary to include women in every aspect of the field. This col-

laborative effort will be essential in the desegregating the sports industry.

VI. Proposed Reforms for America's Pastimes: Title IX Reform: Necessary for Social Change

In 1972, the enactment of Title IX was a pivotal moment for women. This educational amendment gave women the hope that sports would become a gender-neutral environment. However, societal opinions that women will never be better than men continue to plague the dreams of female athletes. Perhaps Title IX's pivotal moment was that it was a step towards gender equality and thus another step towards reform must be made.

> *"This reform would provide the majority of the female population with the opportunity to develop the necessary skills to qualify for player positions in the sports industry."*

The problem today is the ever-growing talent of girls ages five to eighteen who are not given the opportunity to play male dominated sports with the *boys.* If they are afforded this opportunity they are met with opposition and hate. Once women enter college, those same separate but not equal examples continue. Accordingly, Title IX and the courts have declared that women are too delicate to play contact sports with men. These stipulations limit women from pursuing a career in the NFL and the NHL.

To adjust public perceptions and advocate for a gender-neutral sports industry, the reform must start in educational institutions. To pursue a career in sports, women will need the same financial and athletic opportunities men are afforded in their secondary educational institutions. Although affirmative action policies are subject to debate among the courts, their effectiveness at combating the adverse impact of a segregated class has been paramount. In 1978, the United States Supreme Court held that the University of California's special admissions programs reserving seats for minority students were constitutional.[129] The school's effort to diversify the student population was held to be a "lawful affirmative action" policy.[130] To combat the unequal opportunities for female athletes in primary and secondary educational institutions, Title IX would need to be amended to include a quota or affirmative action policy. This policy would create opportunities for women and men to participate in any sport they are qualified to play. Gender would be eliminated from the equation and athletes would be considered for a sport based on their athletic ability.

The proposed Title IX reform would include: (1) reserving fifteen percent of the positions on gender exclusive teams for the opposite sex; (2) collegiate scholarships would be equally distributed to both female and male athletes; and (3) a separate investigation board would be created to provide students with the opportunity to safely report acts of rape, sexual assault, etc. This reform would provide the majority of the female population with the opportunity to develop the necessary skills to qualify for player positions in the sports industry. Additionally, to make the transition from college athletics to employment in professional sports, there will likely need to be affirmative action policies implemented within the industry.

Implementing Policies to Reduce the Gender Disparity in the Sports Industry

Throughout history, the courts have upheld affirmative action policies that equalize the disparate impact among segregated classes. In *Johnson*, the United States Supreme Court upheld the employer's affirmative action policy that allowed gender to be considered when hiring candidates for positions where women were underrepresented.[131] The employer's policy was consistent with Title VII's policy of eliminating discrimination in the workplace.[132] As women are significantly underrepresented in the sports industry, an affirmative action policy would be beneficial in eliminating the disparate impact towards women.

> *"The second issue the affirmative action plan would address would be the hiring practices of the organizations in the sports industry."*

The policies recently implemented in the public safety industry have developed helpful strategies to address the disparate impact on women in physically taxing occupations. These strategies will provide guidance to the necessary reform of the sports industry. The proposed reform would create an affirmative action plan addressing the recruitment, hiring, and retention practices of organizations in the sports industry.

The first step the affirmative action plan would address would be the recruitment practices for a league's executive and player positions. Recently, on February 2016, the President of the NFL announced the implementation of the Rooney Rule for women.[133] The Rooney Rule is a policy requiring "interviews of women for executive positions."[134] The new policy also created a resume database for the franchisees, allowing them easy access to highly qualified female candidates.[135] This policy is only one of many necessary to increase the recruitment of female employees for executive positions in the industry. As for the recruitment practices for player positions, it is likely that player training and recruitment camps would need to be held in diverse areas to attract female ath-

letes.[136] Furthermore, the leagues would need to invest in community outreach programs which will advise and train female athletes in specialized skills needed to secure player positions.

The second issue the affirmative action plan would address would be the hiring practices of the organizations in the sports industry. To address the gender exclusive nature of the executive and player positions, a quota system would most likely need to be implemented. This would require employers to set aside approximately 30% of the industry's executive and player positions for minority genders, such as women and transgender. Furthermore, physical fitness tests would need to be tailored to represent the actual physical components of the position. The enactment of these hiring policies would provide women with the opportunity to explore a career in the sport of their choosing and skillset.

"Opponents proclaim that women are the weaker sex and are unable to meet the physical demands of these types of occupations."

Lastly, the affirmative action plan would develop retention policies for these employers. Currently, the number of women occupying positions in male dominated professional sports is dismal. Thus, the policies set forth will attempt to address the potential adversity women will endure. Under the affirmative action plan, the recruitment and hiring policies would open the door for women in this industry. However, for the plan to be effective, it would be imperative that employers encourage women to remain in the industry once employed. Thus, mentor programs would need to be implemented to provide women with opportunities for employee development and advancement. Furthermore, monetary incentives would be provided to women who remain in the industry for a term of years. Additionally, the CBA should include provisions specific to its female members that would promote and enforce the retention of these employees.

Therefore, as demonstrated in the desegregation of the Public Safety Industry, male dominated industries will retain their gender exclusive employment practices unless aggressive reform is implemented and enforced.

Conclusion

In conclusion, to attain a gender-neutral work environment within the sports industry the current societal norms will need to be adjusted. As demonstrated during the civil rights era, change in societal mindset will not be obtained without aggressive legislative mandates and a like-minded judicial branch. Although the desegregation of the sports industry will most likely take a significant amount of time, the reform of Title IX will be necessary to implement social change.

Thus, to challenge the archaic societal views and governmental mandates hindering women's opportunities in athletics, aggressive legislative reform must be implemented within educational institutions and the professional sports industry to provide an avenue for gender equality. Opponents to such reform voice the same ignorant arguments heard during the movement to include women in law enforcement agencies. Opponents proclaim that women are the weaker sex and are unable to meet the physical demands of these types of occupations. However, these opinions are misguided as women are proving their capability and interest in occupying positions in these male dominated industries.

This article has demonstrated the apparent disparate impact on women in the sports industry and the proposed solutions for imposing gender equality. As sports are the microcosm of society it is imperative that each gender is equally represented, including the transgender community. By addressing the gender issues in sports, transgender athletes will enjoy unlimited access to athletic programs. Therefore, legislative reform is crucial to eradicating the current injustice inflicted upon female and transgender athletes.

Endnotes

1. 20 U.S.C.A. § 1681 (1972)
2. Currently, opponents of Title IX reform argue that male athletes are now being discriminated against and the inclusion of women in every sport would cause further hardship towards male athletes. This argument is brought about by the removal of certain male dominated athletics from college sports programs. A few educational institutions have removed wrestling, bowling, and male gymnastics with the excuse that the Title IX forces the institution to fund female dominant athletic programs. However, the schools also illustrated that without Title IX, the institutions would have cut back on female athletic programs.
3. Sara Stewart, *Will a Woman Ever Play in the Major Leagues?*, http://nypost.com/2014/08/23/will-a-woman-ever-play-major-league-baseball/, August 23, 2014.
4. *Lafler v. Athletic Bd. of Control*, 536 F.Supp. 104 (D.C. Mich. 1982).
5. *See id*. at 107; *see also Mercer v. Duke Univ.*, No. 99-1014, 1999 WL 492650, at *1 (4th Cir. July 12, 1999) (holding that pursuant to Title IX, a female football player could have been excluded from men's varsity team, but once she was permitted on the team, she had to be treated equally); *Lantz by Lantz v. Ambach*, 620 F. Supp. 663, 665 (S.D.N.Y 1985) (holding that football is a contact sport so qualified female need not be allowed to try out).
6. *See supra* note 3.
7. *Id*.
8. *Id*.
9. 20 U.S.C. §§ 1681-88 (1994).
10. Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 Conn. L. Rev. 381, 388 (2000).

11. See *supra* note 10.
12. 34 C.F.R. § 106.41(b) (2011).
13. *Id*.
14. *See supra* note 10
15. *Id*.
16. *Id*.
17. *Id*.
18. *Cohen v. Brown University*, 101 F.3d 155, 165 (1st Cir. 1996) (Developed three prong test to "provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs." 44 Fed. Reg. 71,413. "The Policy Interpretation was specifically designed to answer questions from the university community and to provide a framework for investigating the nearly 100 complaints of sex discrimination in college athletics filed by 1978."). Note that "general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation." *Id*.
19. *Id*.
20. *Cohen,* 101 F.3d at 167.
21. *See supra* note 10.
22. *Id*.
23. Edward H. Clarke, *Sex in Education,* 38-39, 62-63 (1873).
24. Sara Stewart, *Will a Woman Ever Play in the Major Leagues?*, *supra* note 3.
25. *Id*.
26. *See supra* note 23.
27. *Id*.
28. *Id*.
29. Marissa Payne, *Transgender teen on joining high school football team: "They accept you for who you are,"* https://www.washingtonpost.com/news/early-lead/wp/2016/09/20/transgender-teen-on-joining-high-school-football-team-they-accept-you-for-who-you-are/?utm_term=.e0f26c18aaa0, September 20, 2016.
30. *Id*.
31. *Id*.
32. *Id*.
33. *O'Connor v. Board of Educ. of School Dist. No. 23*, 449 U.S. 1301, 1301 (1980).
34. *Id.* at 1307; *see also O'Connor,* 645 F.2d at 579 (acknowledging that Karen had played on organized basketball teams with boys outside of school since the age of seven, had frequently been her team's leading scorer, and had won numerous awards for her play on those teams).
35. *O'Connor,* 449 U.S. at 1307.
36. *Id*.
37. *Id.* at 1305.
38. *Id*.
39. *Grove City College v. Bell*, 465 U.S. 555, 556 (1984).
40. *Id.* at 556.
41. *Id.* at 577-78.
42. *See* 20 U.S.C. §§ 1681-88 (1994).
43. 42 U.S.C.A. § 2000e-2(a)(1) (1964).
44. Ken Belson, *N.F.L Will Require Interviews of Women for League Executive Positions,* http://www.nytimes.com/2016/02/05/sports/football/nfl-women-rooney-rule-super-bowl.html?_r=0, (Feb. 4, 2016).
45. *Id*.
46. *Id*.
47. *Id*.
48. *Lafler v. Athletic Bd. Of Control*, 536 F.Supp. 104 (D.C. Mich. 1982).
49. *Id*. at 107.
50. 42 U.S.C.A. § 2000e-2(k)(1)(A)(i) (1964).
51. *Jenson v. Eveleth Taconite Co.,* 824 F.Supp. 847 (D. Minn. 1993).
52. *Mercer v. Duke University*, 181 F. Supp. 2d 525, 528 (M.D.N.C. 2001).
53. *Id.* at 548.
54. Kate Feldman, *Eight women breaking barriers in men's sports as coaches, referees and broadcasters,* NY Daily News, January 21, 2016.
55. *Id*.
56. *Id*.
57. Jill Martin, *Jen Welter on coaching in the NFL: 'Now it's possible,'* CNN, http://edition.cnn.com/2015/09/06/us/jen-welter-nfl-coaching-experience/, September 7, 2015.
58. *Id*.
59. *See supra* note 57.
60. Alyson Footer, *A's Hire First Female Coach in MLB History*, http://m.mlb.com/news/article/152329548/justine-siegal-first-female-coach-in-majors/, September 29, 2015.
61. *Id*.
62. *Id*.
63. *Id*.
64. *Id*.
65. Elizabeth Jacoway, *Turn Away Thy Son: Little Rock, The Crisis That Shocked The Nation,* New York: The Free Press (2007).
66. *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954).
67. *Goesaert v. Cleary,* 335 U.S. 464, 464 (1948).
68. *Id*.
69. *Id*.
70. Examples of Title VII Disparate Impact cases involving gender: *Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979) (The Ninth Circuit struck down the height requirements utilized by the Los Angeles Police Department because they were not job related and had a disparate impact on women, who tend to be shorter than men); *Equal Employment Opportunity Comm'n v. Dial Corp.*, 469 F.3d 735 (8th Cir. 2006) (The Eighth Circuit struck down a newly implemented strength test used for workers in a sausage factory, finding that the test was more physically demanding than the actual job and had a gross disparate impact on women); *Johnson v. AK Steel Corp*, 2008 WL 2184230 (S.D. Ohio May 23, 2008) (The court struck down a construction site policy prohibiting bathroom breaks for crane operators. The employer told its female crane operators to follow the example of their male colleagues and urinate off the back of the crane while working. This policy was not job-related and had a disparate impact on women).
71. *United States v. Virginia*, 518 U.S. 515, 516 (1996).
72. *Id.* at 516-17.
73. *Id.* at 518.
74. Apron Basu, *Part 1: Manon Rheaume Shatters the Gender Barrier*, https://www.nhl.com/news/part-1-manon-rheaume-shatters-the-gender-barrier/c-642005, September 23, 2012.
75. *Id*.
76. *Id*.

77. *Id.*
78. Barbara Gregorich, *Women at Play: The Story of Women in Baseball*, http://www.coloradosilverbullets.org/Players/CroteauStory.html, 1993.
79. *Id.*
80. *Id.*
81. *Id.*
82. Sean Gregory, *Why Can't Girls Play Baseball?*, http://time.com/3144240/mone-davis-girls-baseball/, August 19, 2014.
83. *Pay Inequity in Athletics*, https://www.womenssportsfoundation.org/research/article-and-report/equity-issues/pay-inequity/, 2016.
84. *Id.*
85. *See supra* note 83.
86. *Id.*
87. 42 U.S.C.A. § 2000e-2(h) (1974).
88. 29 U.S.C.A. § 206(d)(1) (2016).
89. *See supra* note 83.
90. *Id.*
91. *Id.*
92. Michael A. Messner, *Gender In Televised Sports,* Center for Feminist Research, 3, 1-33 (2010).
93. *Id.* at 4.
94. Adam Eisenberg, *A Different Shade of Blue: How Women Changed the Face of Police Work,* policefoundation.org, 2016.
95. *Id.*
96. *See supra* note 92.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Advancing Diversity in Law Enforcement*, EEOC, https://www.justice.gov/crt/case-document/file/900761/download, October 2016.
102. *Id.* at 17.
103. *Id.*
104. *Id.*
105. *Id.* at 19.
106. *Id.*
107. *Id.* at 24.
108. *Id.*
109. *See supra* note 101 at i.
110. *Id.*
111. *Id.* at 26.
112. *Id.*
113. *Id.* at 30.
114. *Id.*
115. *Id.* at 33.
116. *See supra* note 101 at 33.
117. *See supra* note 101 at 34.
118. *Id.*
119. *Id.*
120. *Id.*
121. *See supra* note 101 at 35-36.
122. Code of Ordinances City of Atlanta, Division 3: Pay Plan – §§ 114-139, 140, https://www.municode.com/library/ga/atlanta/codes/code_of_ordinances?nodeId=COORATGEVOII_CH114PE, (2007).
123. 29 C.F.R. Part 1607; *see also Albemarle Paper Co. v. Moody,* 422 U.S. 405, 431 (1975).
124. EEOC, *Diversity In Law Enforcement: A Literature Review,* https://cops.usdoj.gov/pdf/taskforce/Diversity_in_Law_Enforcement_Literature_Review.pdf, (2015).
125. *Officers for Justice v. Civil Serv. Comm'n*, 979 F.2d 721, 728 (9th Cir.1992).
126. *Ricci v. DeStefano,* 129 S.Ct. 2658, 2660 (2009).
127. EEOC, *Diversity In Law Enforcement: A Literature Review,* https://cops.usdoj.gov/pdf/taskforce/Diversity_in_Law_Enforcement_Literature_Review.pdf, (2015); *see* Press Release, U.S. Dep't of Justice, Justice Department Settles Allegations of Employment Discrimination in Promotion of Police Sergeants in New Jersey (Aug. 1, 2011), http://www.justice.gov/opa/pr/justice-department-settles-allegations-employment-discrimination-promotion-police sergeants.
128. *Id.* at 2.
129. *Regents of the University of California v. Bakke*, 438 U.S. 265, 270 (1978).
130. *Id.* at 271.
131. *Johnson v. Santa Clara County Transportation Agency,* 480 U.S. 616, 642 (1987). ("We therefore hold that the Agency appropriately took into account as one factor the sex of Diane Joyce in determining that she should be promoted to the road dispatcher position. The decision to do so was made pursuant to an affirmative action plan that represents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's work force. Such a plan is fully consistent with Title VII, for it embodies the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace.")
132. *Id.*at 643.
133. Kevin Patra, *Roger Goodell: NFL creating a Rooney Rule for Women,* http://www.nfl.com/news/story/0ap3000000632320/article/roger-goodell-nfl-creating-a-rooney-rule-for-women, Feb. 4, 2016.
134. *Id.*
135. *Id.*
136. Diverse areas would include, but not be limited to, high schools, colleges, female dominant athletic camps, etc.

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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

District Representatives (continued)
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
685 Third Ave, 25th Floor
New York, NY 10017
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

Ethics and Professional Responsibility (continued)
Cara E. Greene
Outten & Golden LLP
685 Third Avenue, 25th Floor
New York, NY 10017
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

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 Floor 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

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

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
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

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Labor and Employment Law Journal

Editor-in-Chief
Allan S. Bloom
Proskauer Rose LLP
Eleven Times Square
New York, NY 10036
abloom@proskauer.com

Managing Editors
Colin M. Leonard
Bond, Schoeneck & King, PLLC
One Lincoln Ctr
Syracuse, NY 13202-1355
cleonard@bsk.com

Laura C. Monaco
Epstein Becker & Green
250 Park Avenue
New York, NY 10177
lcmarino@optonline.com

Assistant Editor
Karen Langer
New York, NY

Section Officers

Chair
Sharon P. Stiller
Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf LLP
160 Linden Oaks, Suite E
Rochester, NY 14625
sstiller@abramslaw.com

Chair-Elect
Seth Greenberg, Esq.
Greenberg Burzichelli Greenberg PC
3000 Marcus Avenue
Suite 1-W-7
Lake Success, NY 11042
sgreenberg@gbglawoffice.com

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

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Authors

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.

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