NYSBA SPRING 2006 | VOLUME 31 | NO. 1

L&E Newsletter

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

A Message from the Chair

Welcome to the Spring 2006 issue of the New York State Bar Association's Labor and Employment Law Section Newsletter! So much has happened since our last issue: much of it good, some of it ridiculous, and part of it sad. There's also much to anticipate as the Rangers continue to occupy First Place in the NHL's Atlantic Division, pitchers and catchers report for Spring Training, and the groundhogs (at least the ones we like) are predicting an early spring.

First, the "happy recap," to borrow from the late Bob Murphy: Our Annual Meeting at the New Yorker Hotel on January 27, 2006 was a huge success, with more than 275 attendees. I had the privilege of pinch-hitting for CLE Chair **Alan Koral**, who was "stuck" on the Queen Mary 2 somewhere near Rio. Our program and speakers received rave reviews. For those of you who were not able to attend, the plenary presentations included, "Ethics: What You Can Do Now, What You May Be Able to Do in 2007," by **John Gaal** and **Professor Stephen Wechsler**, and "Separation and Severance Agreements: The Rules Keep Changing," with **Ron Longo**, **Ted Rogers**, and **Don Sapir**. We then presented four concurrent break-out workshops, including "Navigating the New Form LM-10 Enforcement Guidelines—The Essentials for Employer, Union and Benefit Fund Counsel," presented by **Pete Conrad**, **Susan Davis** and **John Fullerton III**; "The Technology of E-Discovery," presented by **Lloyd Chin**, **Joan Feldman** and **Mark Risk**; "What's Going On With Sarbanes-Oxley Whistleblowing Cases and Other Statutory Whistleblower Protections," presented by **Jill Rosenberg**, **Amber Kagan** and **Michael Manabee**; and "The Ins and Outs of Internal Revenue Code Section 409A," presented by **Robert Patterson** and **Holly Weiss**.

At our Annual Business Meeting, Nominating Committee Chair **Rachel Minter** reported that **Robert Kingsley "Kayo" Hull**, the Section's long-time Treasurer and Finance Committee Chair, was nominated to become

Inside

Section Chair-Elect. This nomination was approved by acclamation. Congratulations Kayo! The nomination of **Paul Sweeney** from Coughlin & Gerhart as the new Sixth District representative was similarly approved.

We were also honored to have the **Honorable Raymond Dearie**, Judge of the United States Eastern District of New York, join us for lunch. The Judge wisely began his remarks with a sports-related trivia question ("If you were to take all of the professional baseball players who have won back-to-back MVP awards, you would be able to field a very impressive team. Name the players, and their positions." [The answer is printed at the end of this column]), and then proceeded to provide us with some passionate personal views about the then-pending nomination of Samuel Alito to the United States Supreme Court, as well as the need for all of us to help find a better way of addressing workplace disputes, given the ever-increasing number of labor and employment law-related cases that are languishing before various State and federal administrative agencies and courts. Toward the end of his comments, **Judge Dearie** was joined by his colleague and longtime Section member and now Senior Status Eastern District Judge **Frederic Block**, who provided some of his own thoughts about the latter issue.

On January 26, 2006, immediately prior to our Section Executive Committee meeting, I was honored to attend a cocktail party, sponsored by NYSBA's ADR Committee, at which I presented former Section Chair and current President of the National Academy of Arbitrators **Margery Gootnick** with a lifetime ADR achievement award in recognition of her dedication and hard work on behalf of all of us in the field of labor and employment relations. Congratulations again, **Margery**!

In addition to the Annual Meeting, our Section presented an extremely successful full-day Employment Law Litigation Institute program entitled "Litigating Non-Compete Cases in New York" on Friday, December 2, 2005 at the Princeton Club of New York. This intermediate-to-advanced-level course focused on recommended strategies, procedures, discovery and litigation techniques for handling the increasing number of workplace non-compete cases resulting in litigation. Kudos to CLE Chair **Alan Koral** and Program Chairs **Mike Curley** and **Arnie Pedowitz** for putting it all together, and to our faculty, including the **Hon. Leonard B. Austin**, **Victoria Cundiff, Lou DiLorenzo, Ron Dunn, John Fullerton, III, Jodyann Galvin, Robert Kraus, Laurence Moy, Daryl Parker, Debra Raskin, Ted Rogers, Jr., Laura Schnell and Jonathan Wexler**, for their entertaining and informative presentations to an audience of more than 120 attendees.

On top of that, our Committee on Labor Relations Law and Procedure, Committee Co-Chairs **Peter Conrad** and **Bruce Levine** treated us to a sensational pre-Annual Meeting program during which nearly 50 attendees were able to interact with NLRB Regional Directors **Helen Marsh** (Region 3, Buffalo), **Celeste Mattina** (Region 2, Manhattan) and **Alvin Blyer** (Region 29, Brooklyn) and their Regional Attorneys, including **Karen Fernbach** (Region 2) and **Rhonda Aliouat** (Region 3).

You should also know that we have several new members of our Section's Executive Committee, including **Sharon Berlin** (co-chair and co-editor of the upcoming *Public Sector,* book third edition), **Seth Greenberg** (co-chair of the Government Employees Labor Relations Committee), **Norma Meacham** (Law School Liaison), **Marlene Gold** (1st District Representative), **Paul Sweeney** (6th District Representative), and **Abigail Pessen** (co-chair of the ADR Committee).

As for the "ridiculous" that I mentioned earlier, I was referring, of course, to what turned out to be Phase One of our Section's 30th Anniversary Fall Meeting in Long Boat Key, Florida. While more than 140 people registered to attend the program, all but a handful "chickened out," apparently concerned about something as trivial as a Hurricane named Wilma. Those of us who braved the forecast were treated to several days of wonderful weather in which we body surfed in the Gulf, played tennis and golf, sun-tanned at the pool, ate wonderful Gulf fare, received and responded to dozens of e-mails and voice mails from home (e.g., "You *are* aware that there are tornado warnings for the surrounding area, aren't you?") and had an otherwise grand time (other than during about 12 hours in which we were blasted by hurricane force winds, driving rain, windows that seemed as though they would at any moment rip out of their frames, local television reporters alerting us to tornado spottings and the Gulf parting as though Moses had returned to lead us to the Promised Land). We also ensured that attendees earned their CLE credits via a condensed program that featured the intrepid presenters including **Sharon Stiller Margery Gootnick** and **David Cohen** and enjoyed pre-hurricane after-dinner remarks by Arbitrator Emeritus **Richard Mittenthal**, who agreed to dine with us notwithstanding the circumstances. We were even joined, after the storm had passed, by Section Chair Emeritus **Frank Nemia** and his wife Linda. More on Phase Two later.

As for the sad, our Section and friends lost a number of people near and dear to us over the past several months. These included, among others, 1978-1979 Section Chair **Lester Lipkind**, 4th District Representative and Section Patriarch **Mel Osterman**, State Division of Human Rights Regional Director **Forest Cummings**, AFT President **Sandra Feldman**, former PERB Chair

(Continued on page 46)

From the Editor

Another year begins, and we hope you all had wonderful holidays. In this issue, we have articles on employment law and labor law in the public and private sector. Michael Sciotti and Jennifer Reschke write about the new criminal record check regulations; Matt Siebel updates us on the state's labor neutrality law; Matt Paulose explains discretionary clauses in employment bonus agreements; Phil Maier discusses the relationship between the Taylor Act and external law; Steve O'Beirne reports on a panel discussion about bargaining for health care benefits; Louis Basso gives us a practitioner's view of the benefits of PEOs; and we have a prize-winning article in the 2005 student writing competition, by Norah Mallam. Last, but never least, John Gaal enlightens us in his "Ethics Matters" column. I learned quite a bit from the articles in this issue and I hope you do, too.

Three years ago, in this space, I wrote about an Appellate Division decision concerning prospective waiver by a union of its members' rights under anti-discrimination statutes. A recent decision in the Southern District of New York is contrary to the state court's earlier decision on the question. In order to understand the federal court decision, it's necessary to revisit the facts and underlying issues in the state case. To do so, I will repeat parts of the editorial from the Winter 2003 issue and then report briefly on the recent federal case. Those of you to whom this is old hat may, of course, skip to the end.

In October, 2002, I wrote:

> A recent case in the Appellate Division has decided a question left undecided by the Supreme Court in *Wright v. Universal Maritime Service Corp.*: whether a union may prospectively waive its members' individual statutory rights in a collective bargaining agreement.[1] On June 20, 2002, the First Department ruled in *Garcia v. Bellmarc Property Mgt.*, compelling arbitration of an age discrimination claim under a collective bargaining agreement between Local 32B-32J, SEIU and the Realty Advisory Board.[2] The contract expressly provides for arbitration of claims of violations of the Human Rights Law (Executive Law § 296), among others, and states, [a]ll such claims shall be subject to the grievance and arbitration procedure . . . as sole and exclusive remedy for violations.

The decision in the Appellate Division revisits the tension between two different lines of cases concerning arbitration of labor and employment claims and whether collective bargaining agreements come within the purview of the Federal Arbitration Act.[3] The FAA first expressed Congress' endorsement of commercial arbitrations in 1925, although the Supreme Court had its doubts over the years about the adequacy of arbitration in resolving statutory claims.[4]

In the context of labor relations, the Court developed a strong policy favoring arbitration of collective bargaining disputes. In *Textile Workers v. Lincoln Mills*, it decided that, under section 301 of the Taft-Hartley Act, parties to a collective bargaining agreement could be required to submit labor disputes to binding arbitration.[5] The Court stressed that grievance arbitration is a substitute, not for litigation, but for a strike; agreeing to arbitrate labor disputes in return for agreeing not to strike was the bargain that was to be enforced by the federal courts.

In 1960, the Court announced that grievance arbitration would be the endorsed method for resolving industrial disputes arising under collective bargaining agreements.[6] An arbitrator's award was to be confined to interpretation and application of the collective bargaining agreement and would be enforceable only as long as it "drew its essence" from the contract.

In the *Alexander v. Gardner-Denver* case in 1974, the Court found that a union's collectively bargained agreement to arbitrate employment claims did not preclude its member from filing a Title VII claim after arbitration of a grievance arising from the same facts. It noted the possibility of conflict between the interests of the union and its individual members and found there can be no prospective waiver of an employee's "rights" because, among other reasons, "waiver of these rights would defeat the paramount congressional purpose behind Title VII."[7]

Beginning in the 1980s, the Supreme Court enforced arbitration agreements in a number of commercial, statutory cases under the Federal Arbitration Act.[8] As the Court expanded arbitration to commercial statutes, it created a presumption, based on the language of the FAA, that Congress did not intend to prohibit arbitration of statutory claims unless it was clearly prohibited by the statute in question.

The Court first compelled arbitration of a statutory employment claim under the Federal Arbitration Act in 1991, where an individual employee in a non-union setting signed an agreement waiving his rights to a judicial forum.[9] The Court distinguished *Gardner-Denver,* holding that statutory rights in a federal forum could not be waived where a collective bargaining agreement compelled arbitration. Unlike *Gilmer, Gardner-Denver* was not decided under the Federal Arbitration Act because the agreement to arbitrate was bargained for in a labor contract.[10] Thus, it found, the law in *Gardner-Denver* was that unions may not prospectively waive the rights of individual members to a judicial forum; the law in *Gilmer* was that voluntary agreements to arbitrate statutory claims are enforceable when they are made by individuals who knowingly and voluntarily waive their rights to a judicial forum.[11]

In *Wright v. Universal Maritime Service Corporation,* the Supreme Court was presented with the question of whether a general arbitration clause in a collective bargaining agreement could prevent an employee from bringing a claim under the Americans with Disabilities Act.[12] The Court found the arbitration clause unenforceable because it did not distinguish between statutory and contractual claims, the agreement did not explicitly incorporate statutory anti-discrimination requirements, and compliance with the ADA was not an express contractual commitment.[13]

The Court recognized the tension between its decisions in *Gardner-Denver* and *Gilmer*, but found it did not need to reach the question of union-negotiated waivers because there was, in fact, no waiver. In dicta, Justice Scalia wrote, "whether or not *Gardner-Denver*'s seemingly absolute prohibition of union waiver of employees' federal forum rights survives *Gilmer, Gardner-Denver* at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA."[14]

In 2001, the Supreme Court found that employment contracts are included within the ambit of the Federal Arbitration Act.[15] That decision formed the basis of an argument, now answered in the affirmative by the 4th Circuit and the Appellate Division, that collective bargaining agreements are employment contracts within the meaning of *Circuit City* and, thus, subject to the Federal Arbitration Act. Citing *Circuit City* and its own well-known decision in *Austin v. Owens-Brockway,*[16] the 4th Circuit has found that "since the right to arbitrate is a term or condition of employment, the union may bargain for this right," as well as waive it, on behalf of its individual members.[17] It made no distinction between individual statutory rights and rights that exist as a result of union membership.

The *Garcia* case is the second time the First Department has assayed this question. In 1999, it came to a different conclusion in a similar case involving Local 32B-32J and the Realty Advisory Board.[18] There was a general clause in the contract that prohibited discrimination by reason of race, creed, color, age, disability, national origin, sex or union membership. The company argued that the dispute was governed by the FAA and, therefore, the claim was arbitrable. The court declined to decide the FAA question. Instead, it looked to the language of the agreement and found that it did not meet the standards for a clear and unmistakable waiver.

Subsequently, the parties renegotiated the language of the contract to include violations of specific anti-discrimination statutes. In the instant case, Garcia conceded that the language of the waiver was clear and unmistakable and the contract was covered by the FAA, arguing only that the Union could not waive his rights.

The Court held as follows:

> While plaintiff does not concede that such a union-negotiated waiver is enforceable, we hold that it is. "[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial, forum." *(Circuit City Stores v. Adams*, 533 U.S. 105, 123; *cf. Wright*, *supra* at 79-80; *but cf.*, *Crespo v. 160 West End Avenue Owners Corp.*, 253 A.D.2d 28, 32). *Alexander v. Gardner-Denver*, relied on by the plaintiff as holding that contractual anti-discrimination claims are distinct from statutory anti-discrimination claims, and that only the former can be waived, was not decided under the FAA (*see Gilmer v. Interstate/Johnson Lane Corp.*) and does not reflect modern Federal policy favoring arbitration. *Garcia v. Bellmarc Property Mgt.*, 745 N.Y.S.2d 13, 14 (1st Dep't 2002).

Time will tell whether other jurisdictions will follow suit. If they do, there are some potential problems for practitioners. Unions must be wary of claims of the breach of the duty of fair representation and may face tough decisions if majority interests within the union conflict with those of the minority. In providing a private forum for statutory claims, the parties may also be required to provide a substantially equivalent forum in which process and remedies parallel those available in the courts.

Finally, there are the practical problems of bargaining to impasse and, in New York State, the conflict with provisions of the Civil Service Law that allow public employees, rather than unions, to elect to opt-out of the grievance and arbitration procedure. *See, e.g., Scheiner v. HHC*, 152 F. Supp. 2d 487 (S.D.N.Y. 2001). Each may pose legal challenges that will be interesting to watch.

That was the situation in New York State in the fall of 2002. Now fast-forward to October, 2005, and the case of *Beljakovic v. Melohn Properties, Inc.*[19] Mr. Beljakovic is a member of Local 32BJ who filed a claim against his employer, Melohn Properties, under the Age Discrimination in Employment Act. The employer moved to dismiss on the grounds that the grievance and arbitration procedure of the collective bargaining agreement was the plaintiff's sole and exclusive means of remedy, under the same contract provision as in *Garcia*. The court found it was not.

Judge Holwell discussed the inherent conflict between the *Gilmer* cases and the *Alexander* cases and concluded that "*Gilmer* and *Alexander* are in fact reconcilable on the following principle: an individual may prospectively waive his own statutory right to a judicial forum to litigate an ADEA claim, but his union may not do so for him."[20] Citing a number of cases from around the country, and noting that the U.S. Supreme Court declined to decide this specific question in *Wright*, the court held that "there is no compelling authority for the proposition that *Gilmer* overruled *Alexander*, and until the Supreme Court clarifies that it has, this Court will apply the law 'as it stands.'"[21] For that reason, the court denied the employer's motion to dismiss, finding that paragraph 23 of the collective bargaining agreement does not preclude subject matter jurisdiction.

Endnotes

1. 525 U.S. 70 (1998).
2. 745 N.Y.S.2d 13.
3. 9 U.S.C.A. § 1 *et seq.*
4. *See, e.g., Wilko v. Swan*, 346 U.S. 427 (1953).
5. 353 U.S. 448 (1957).
6. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567 (1960); *United Steelworkers v Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).
7. *Alexander v. Gardner-Denver*, 415 U.S. 36, 51–52 (1974).
8. *See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).
9. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).
10. *Id.* at 26.
11. *Gilmer* at 34.
12. 525 U.S. 70 (1998).
13. *Wright* at 76.
14. *Id.* at 76–77.
15. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105.
16. 78 F.3d 875 (4th Cir. 1996).
17. *Safrit v. Cone Mills Corp.*, 248 F.3d 306, 308 (2001).
18. *Crespo v. 160 West End Avenue Owners Corp.*, 687 N.Y.S.2d 79 (1st Dep't 1999).
19. 2005 WL 2709174 (S.D.N.Y.).
20. *Id.* at 3.
21. Quoting *ALPA v. Northwest Airlines, Inc.*, 199 F.3d at 484.

Janet McEneaney

Request for Articles

If you have written an article, or have an idea for one, please contact *L&E Newsletter* Editor

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

Articles should be submitted on a 3-1/2" floppy disk, preferably in Microsoft Word or WordPerfect, along with a printed original and biographical information.

New Criminal Record Check Regulations

By Michael J. Sciotti and Jennifer M. Reschke

Every day employers take a major risk when it comes to the hiring of new employees. Specifically, employers need to be concerned with whether or not the individual they are hiring has a criminal record. This is of particular importance when the employee may have access to individuals who are minors, elderly or have physical or mental disabilities. At the same time, New York state policy clearly states that employers are not allowed to discriminate against individuals who have criminal records. In this regard, several New York state agencies and offices have recently enacted new regulations which became effective on April 1, 2005. This article reviews these new regulations along with article 23-A of the New York State Correction Law.

A. New York State Department of Health

1. Scope

Pursuant to 10 N.Y.C.R.R. § 400.23, the New York Department of Health (NYSDOH) promulgated new regulations which mandate criminal history record checks (CHRC) for certain applicants seeking employment in certain types of health care facilities. Under § 400.23(a)(1), "[t]he operator of a residential health care facility, licensed home care services agency, certified home health agency, long term home health care program, personal care services agency or AIDS home care program . . . shall obtain a CHRC from the United States Attorney General . . . to the extent provided for under section 124 of Public Law 105-277, 28 U.S.C. § 534, for any prospective employee prior to any employment and a signed sworn statement from the applicant disclosing any finding of patient or resident abuse or a conviction for a crime or violation other than a traffic infraction."[1]

The regulations define an employee as "any person to be employed or used by the facility or program including, those persons employed by a temporary employment agency, to provide direct care or supervision to patients."[2] However, the regulations exclude individuals who are "licensed pursuant to Title 8 of the Education Law or article 28-D of the Public Health Law."[3] The professions excluded from the CHRC requirements which are licensed under Title 8 of the Education Law include, but are not limited to, the following: physicians, dentists, physical therapists, nurses, physician assistants, pharmacists.[4] In addition, article 28-D of the Public Health Law excludes all nursing home administrators.[5]

2. Employer Obligations

Under the new regulations covered entities must obtain certain information from applicants. This will require employers to modify their employment policies, including, but not limited to, their job applications. First, the new regulations mandate that covered operators "as part of an application for employment, obtain all information from a prospective employee necessary for the purpose of initiating a CHRC under section 124 of Public Law 105-277, 28 U.S.C. § 534**,** including, at a minimum, a fingerprint card of the prospective employee."[6]

Second, operators of covered entities are required "[a]s part of such application for employment [to] obtain from the prospective employee the following authorization:

> Authorization for Search and Exchange of Information
>
> I, _____ (Name of applicant for employment), hereby authorize _____ (Name of facility), to submit a request to the Attorney General of the United States to conduct a search of the records of the Criminal Justice Information Services Division of the Federal Bureau of Investigation for any criminal history records corresponding to the fingerprints or other identification information submitted by me. I further authorize the exchange of such information between the Attorney General of the United States, the New York State Department of Health and _____ (Name of facility). This information may be used only by _____ (Name of facility) and only for the purpose of determinating my suitability for employment in a position involved in direct patient care.
>
> Signature:_____
>
> Name: _____(print)
> Date:_____"[7]

Third, the operator of a covered entity must, "[p]rior to initiating the fingerprinting process . . . inform the prospective employee" of the following: (1) the requirement to conduct a CHRC; (2) provide a description of the process for obtaining the criminal history record; (3) they "will have an opportunity to obtain, review and explain the information contained in the CHRC"; and (4) "may withdraw his or her application for employment at any time, without prejudice,

prior to the operator's decision on employment, and that upon such withdrawal any fingerprints and criminal history record concerning such prospective employee received by the operator shall be destroyed."[8] It is suggested that these items be in writing and that the job applicant acknowledge he/she received same by executing a form acknowledging this fact.

The operator shall submit the fingerprint card, the cost of such record check charged by the Attorney General (the fee), and all other required information to the NYSDOH which shall, in turn, submit the fingerprint card, the fee, and other required information to the Attorney General for its full search of the records of the Federal Bureau of Investigation to the extent provided for in federal law.

It is important to note that neither the costs associated with obtaining the fingerprint card, nor any administrative services costs incurred in implementing the CHRC, shall be deemed an allowable cost for Medicaid rate-setting purposes, and all such costs shall be separately identified on any report of costs submitted to the NYSDOH for the purpose of determining the facility's rate of Medicaid reimbursement. However, in the event funds are specifically appropriated in any given fiscal year for such Medicaid reimbursement, then for the purposes of determining rates of payment for such fiscal year, the amount of the fee and the cost of obtaining the fingerprint card shall be a reimbursable cost to be reflected in such rates as timely as practical based on budgeted costs and subsequently prospectively adjusted to reflect actual costs.

Operators are prohibited from seeking to obtain from a prospective employee, directly or indirectly, compensation in any form for the payment of the fee or any facility costs associated with obtaining the CHRC required by this section.

3. Provisional Employment

An operator may employ applicants on a provisional basis for a period not to exceed 60 calendar days from the date the operator requests a CHRC through the NYSDOH, if all of the following conditions are met:

a. Operators shall have submitted a CHRC request form and maintained a copy of the completed request forms;

b. The operator shall have no knowledge about the applicant that would disqualify the applicant from employment under this section;

c. The applicant has submitted a signed sworn statement disclosing any finding of patient or resident abuse or a conviction for a crime or violation other than a traffic infraction;

d. A residential health care facility operator shall provide direct supervision of the applicant while the applicant is in the facility or with residents. The results of the observations shall be documented in the employee's personnel file;

e. The operator of a licensed home care services agency, certified home health agency, long term home health care program, personal care services agency or AIDS home care program (home care agency) shall supervise the applicant through random, direct observation and evaluation of the applicant and care recipient by an employee who has been employed by the home care agency for at least one year. The results of the observations shall be documented in the employee's personnel file; and

f. A home care agency which has been in business for less than one year shall supervise the applicant through random, direct observation and evaluation of the applicant and care recipient by an employee with prior employment experience of at least one year with one or more home care agencies. The results of the observations shall be documented in the employee's personnel file.

If the information relating to the CHRC is received at any time during the provisional employment and reveals that the applicant is disqualified from employment in accordance with this section, the applicant shall be dismissed immediately. On the 60th day of provisional employment, the operator must determine whether or not the applicant's CHRC has been received by the operator. If the applicant's CHRC has not been received by the operator by the 60th day of provisional employment, the applicant's provisional employment shall expire. However, if the CHRC for any applicant has not been provided within 60 days due to the documented inability of the NYSDOH or the Attorney General to provide such record checks in a timely manner, the period of provisional employment may be extended at the option of the operator for no more than an additional 60 days or until the facility receives the required check, whichever occurs first. The NYSDOH shall promptly, after receiving from the Attorney General the CHRC, forward such criminal history record information to the operator.

4. Results of Criminal History Record Check

An operator shall not hire or utilize an applicant who has been convicted of any of the following criminal offenses:

a. Any Class A felony defined in the Penal Law;

b. Any Class B or C felony defined in the Penal Law occurring within ten years preceding the date of the criminal history record check;

c. Any Class D or E felony listed in article 120, article 130, article 155, article 160, article 178 or article 220 of the Penal Law occurring within ten years preceding the date of the CHRC;

d. Any crime defined in sections 260.32 or 260.34 of the Penal Law occurring within ten years preceding the date of the CHRC; and

e. Any comparable offense in any other jurisdiction.

If a CHRC reveals a conviction for any other criminal offense other than the aforementioned offenses or a traffic infraction, the operator may exercise its discretion in determining the suitability of the prospective employee in such employment position. The operator shall make such decision in accordance with article 23-A of the Correction Law to include consideration of any information produced by the prospective employee on his or her behalf as identified in Correction Law section 753(1)(g).[9] Further, in making a discretionary determination with regard to applicants for employment, the operator shall give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the prospective employee. In cases where certificates are produced, the operator, in determining the suitability of an applicant, shall make its decision in accordance with article 23-A of the Correction Law to include consideration of any information produced by the prospective employee or on his or her behalf as identified in Correction Law section 753(1)(g).

The operator shall provide the prospective employee with an opportunity to explain any criminal history record information contained in the record check and the operator shall set forth in writing the basis for not hiring the prospective employee when any such decision is based on the criminal history record information.

5. Immunity from Liability

An operator who, in denying employment for an applicant, reasonably relies upon information provided by the Attorney General shall not be liable, pursuant to federal law, in any action brought by the applicant based on the employment determination resulting from the incompleteness or inaccuracy of the information.

6. Confidentiality of Results of Criminal History Record Checks

Any criminal history record information provided by the federal government is confidential as required by federal law and, after transmission to the operator, shall be used only by the operator requesting such information and only for the purpose of determining the suitability of the applicant for employment in a position involved in direct patient care including supervision of patients as required by federal law. However, nothing shall prevent the operator from disclosing such criminal history record information at any administrative or judicial proceeding relating to a denial of an application for employment. Unauthorized disclosure of such records shall subject the operator to civil penalties.

7. Inspection of Records by Department of Health

The NYSDOH may conduct periodic inspections, as needed, to determine the compliance of the operator with the requirements of the regulations. This shall apply to applications for employment made by prospective employees on and after the effective date of this section and shall continue to be valid in whole or in part to the extent permitted by federal law or regulation.

8. Interaction with Local Laws

The new regulations are deemed to supersede and apply in lieu of any local laws or laws of any political subdivision of the state requiring a CHRC for applicants for employment in health care facilities and programs listed in this section.

B. New York State Office of Mental Health/Office of Mental Retardation and Developmental Disabilities

1. Scope

Pursuant to Mental Hygiene Law (MHL) sections 16.33 and 31.35, every provider of services who contracts with or is approved or otherwise authorized by the New York State Office of Mental Hygiene (OMH) or the Office of Mental Retardation and Developmental Disabilities (OMRDD) to provide services, is required to request criminal history record checks (CHRC) for certain operators, employees and volunteers. Both the OMH and OMRDD have promulgated new regulations necessary to implement the CHRC requirements.

The OMH and OMRDD regulations require CHRCs for all operators, employees and volunteers who will have regular and substantial unsupervised or unrestricted contact with clients.[10] However, the Mental Hygiene Law excludes the following providers from conducting CHRCs: (1) an OMH or OMRDD facility, (2) a hospital as defined under article 28 of the Public Health Law,[11] or (3) a professional licensed under Title 8 of the Education Law who does not have employees or volunteers who will have regular and substantial unsupervised or unrestricted physical contact with the clients of the provider.[12]

2. Employer Obligations

A provider of services under the OMH or OMRDD must revise their hiring policies and procedures in accordance with the new CHRC requirements. To that end, every provider is required to designate one or more authorized persons (AP) who will request, receive

and review the criminal history information.[13] The AP is responsible for furnishing the OMH or the OMRDD with the fingerprints of the applicants. The OMH and OMRDD will conduct the CHRCs by submitting the fingerprints to the Division of Criminal Justice Services (DCJS).[14]

Prior to submitting a request for a CHRC, the provider of services must obtain and maintain documentation demonstrating that the provider has informed the applicant, in writing, that the provider is required to request a check of his or her criminal history information and review the results of such check. The provider must also inform the applicant that he or she has the right to obtain, review and seek correction of his or her criminal history record information pursuant to regulations and procedures established by the DCJS. The provider must obtain written informed consent from the applicant indicating that the applicant has been informed of the right to and procedures for a CHRC and the reason for the CHRC request, and consented to the request for a CHRC and supplied a current mailing or home address.[15]

The OMH regulations also require, and it is recommended for all providers, that a statement be obtained from the applicant stating that he or she has or has not, to the best of his or her knowledge, ever been convicted of a crime in New York state or any other jurisdiction, and has or has not, to the best of his or her knowledge, any felony or misdemeanor charges currently pending against him or her that remain unresolved.[16]

A provider of services must then request a CHRC by completing and submitting a form developed and provided by the OMH or OMRDD. Only the authorized person of the provider of services shall submit such request. The OMH and OMRDD will maintain the request forms in accordance with an agreement with the DCJS.[17] The DCJS shall conduct the CHRC and the OMH or OMRDD shall review the criminal history information.[18]

3. Provisional Employment

Like the DOH regulations, the OMH and OMRDD regulations allow the provider of services to temporarily approve an applicant for employment or volunteer opportunity on a provisional basis while the results of the CHRC are still pending. However, the applicant must not have unsupervised physical contact with persons receiving services.[19]

The provider must also develop policies and procedures which address the need for an assigned employee to monitor the activities of all temporarily approved provisional employees. Furthermore, a provisional employee is not to be assigned to personal care activities, such as bathing, dressing and toileting, unless the person designated to supervise the prospective employee or volunteer is always present in the room while such personal care activities are occurring.[20]

Temporary approval of an applicant must be denied if the provider has been informed that the applicant has a pending charge or a conviction. Unless the provider can document its reasons for temporary approval, including an explanation as to why the applicant does not place any clients at risk of harm, an applicant who has a pending charge or conviction may not be granted temporary approval. Obviously, once the provider has received notification by the OMH or OMRDD to deny employment, all temporary approvals must be revoked immediately.[21]

Supervising Employee. Under the OMRDD regulations, the person designated to supervise the provisional employee must:

a. Be employed by the provider of services prior to April 1, 2005, or have had a CHRC determination issued by OMRDD;

b. Be trained in requirements concerning incidents of abuse;

c. Recognize his or her obligations to report incidents and abuse allegations;

d. Be knowledgeable about the restrictions on the activities of the provisional employees and volunteers; and

e. Know who to contact and in what manner regarding concerns that may arise.[22]

Under the OMH regulations, the person designated to supervise the provisional employee must:

a. Be employed under contract with the provider of services and have management or oversight authority over the prospective employee or volunteer; or

b. Have at least six months of experience as an employee of the provider of services and be deemed by such provider to be qualified to provide adequate oversight of temporarily approved prospective employees or volunteers.[23]

4. Criminal History Review

All requests for CHRCs shall be submitted by the provider to the OMH or OMRDD, who will in turn submit the request to DCJS.[24] OMH or OMRDD will review the criminal history information received from DCJS and make a determination whether to issue a denial. Unlike the DOH regulations, the OMH and OMRDD make the initial employment determination and not the provider.[25]

Under the OMH and OMRDD regulations, a denial will be issued for any applicant who has been convicted of any of the following crimes:

a. A felony conviction for a sex offense;

b. A felony conviction in the past ten years involving violence; and

c. A conviction for endangering the welfare of an incompetent or physically disabled person pursuant to section 260.25 of the Penal Law.[26]

When the applicant has been convicted of a crime other than those listed above, the OMH or OMRDD may issue a denial or direct the provider to issue a denial concerning the applicant.[27] If the criminal history information reveals a pending charge for any felony or endangering the welfare of an incompetent or physically disabled person pursuant to section 260.25 of the Penal Law, the OMH or OMRDD may hold the application in abeyance until the final resolution of the charges.[28] OMH and OMRDD may issue a denial or direct the agency or provider to issue a denial based on a conviction for a crime other than those specified above.[29]

Prior to making any determination to deny an application, the OMH and OMRDD must afford the applicant an opportunity to explain, in writing, within ten calendar days, why the application should not be denied. Such notification must be sent in writing, non-electronically, to the applicant prior to any determination.[30]

The OMH or OMRDD shall forward a summary of the criminal history information to the provider of services. In those cases where a denial has not been issued, the provider of services may make its own decision with respect to the applicant. All such decisions must be consistent with all applicable law and regulations, including article 23-A of the Correction Law.[31]

The OMH and OMRDD are required to promptly inform the provider of services of any subsequent allegations or convictions of its employees or volunteers. Upon notification the provider must take all necessary steps to ensure the health, safety and welfare of its clients and monitor the outcome of the allegation if the employee or volunteer remains in service. Such actions by the provider must be documented.[32]

A provider of services must immediately, but no later than 14 days after the event, inform the OMH or OMRDD when a party ceases to be a subject party. This occurs when an applicant who is subject to a CHRC withdraws the application or is no longer being considered for the position, or when any employee or volunteer who was subject to a CHRC is no longer employed by or volunteering for the provider.[33]

5. Documentation and Confidentiality Requirements

Only the AP and the relevant applicant are allowed access to the criminal history information received by the provider. The AP may, however, disclose the criminal history information to other parties who are directly participating in any decision with regard to the applicant. Any party who willfully permits the release of any confidential information obtained from a criminal background check pursuant to this section to parties not authorized to receive such information will be guilty of a misdemeanor.[34]

6. Recordkeeping

Every provider of services must establish, maintain and keep current the following records:

a. Current roster of employees and list of staffing assignments;

b. Current roster of volunteers;

c. Names of all persons for whom a CHRC was submitted to the OMH or OMRDD, identifying whether the person was a volunteer or employee applicant;

d. For each name identified, a copy of his or her informed consent form and the results of the CHRC and determination of the OMH or OMRDD; and

e. A record identifying whether the applicant was hired or permitted to engage in volunteer services, what position he or she holds, and any limitation placed on employment or volunteer activities.

All records must be maintained for at least six years after the person ceases to be an employee or volunteer for the provider.[35]

All records must be maintained in a manner that ensures security of the information, but which also assures the OMH or OMRDD immediate and unrestricted access to such information upon its request.[36]

C. Conclusion

In summary, counsel for employers covered by the new regulations must make sure that they implement the new regulations properly by modifying applicable employment policies in order to ensure compliance. The regulations are vast, so there are bound to be numerous legal issues which will arise. Attorneys must carefully

review issues that arise under the new regulations given the potential for civil and criminal liability.

Endnotes

1. 10 N.Y.C.R.R. § 400.23(a)(1). This section grants nursing facilities or home health care agencies the power to submit a request to the Attorney General to conduct a search and exchange of criminal history records regarding an applicant for employment if the employment position is involved in direct patient care.
2. *Id.* at § 400.23(a)(1).
3. *Id.*
4. *See* Education Law §§ 6500 *et seq.*, as well as the New York State Office of the Professions website, *available at* http://www.op.nysed.gov/home.html.
5. Public Health Law § 2895-a. "Nursing home administrator" means an individual who is charged with and has responsibility for the general administration of a nursing home whether or not such individual has an ownership interest in such home and whether or not his functions and duties are shared with one or more other individuals.
6. 10 N.Y.C.R.R. § 400.23(b)(1). Counsel for operators of covered entities should note that this requirement is the opposite of the general no fingerprint rule concerning job applicants. Specifically, § 201-a of the New York State Labor Law (NYSLL) states:

   > Except as otherwise provided by law, no person, as a condition of securing employment or of continuing employment, shall be required to be fingerprinted. This provision shall not apply to employees of the state or any municipal subdivisions or departments thereof, or to the employees of legally incorporated hospitals, supported in whole or in part by public funds or private endowment, or to the employees of medical colleges affiliated with such hospitals or to employees of private proprietary hospitals.

7. *Id.* at § 400.23(b)(2).
8. *Id.* at § 400.23(c).
9. Section 753 of the Correction Law sets forth the following factors to be considered by an employer when making an employment determination:
   (a) The public policy of this state, as expressed in this act, is to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
   (b) The specific duties and responsibilities necessarily related to the license or employment sought.
   (c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.
   (d) The time which has elapsed since the occurrence of the criminal offense or offenses.
   (e) The age of the person at the time of occurrence of the criminal offense or offenses.
   (f) The seriousness of the offense or offenses.
   (g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.
   (h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.
10. 14 N.Y.C.R.R. §§ 550.4, 633.5.
11. The OMH has stated in a letter dated March 21, 2005, directed to article 28 providers that the exemption was intended to apply to any mental health services that are included as part of the article 28 certification, even if those services are also certified under the Mental Hygiene Law. This would include: an in-patient psychiatric unit of an article 28 hospital or any outpatient mental health clinics that are encompassed within the article 28 license. Certain mental health services may be operated by an article 28 hospital but not included in the exemption, such as: community residences or unlicensed OMH funded mental health services. An article 28 hospital must review those services to determine whether they are included within its article 28 certification, *available at* http://www.omh.state.ny.us/omhweb/fingerprint/article28_letter.htm.
12. MHL §§ 16.33, 31.35.
13. 14 N.Y.C.R.R. §§ 550.4, 633.22(a).
14. 14 N.Y.C.R.R. §§ 550.5(e), 633.22(g).
15. 14 N.Y.C.R.R. §§ 550.5(e), 633.22(e).
16. 14 N.Y.C.R.R. § 550.5(e).
17. 14 N.Y.C.R.R. §§ 550.5(e), 633.22(g).
18. 14 N.Y.C.R.R. §§ 550.6, 633.22(e).
19. 14 N.Y.C.R.R. §§ 633.22(f), 550.5(f).
20. *Id*.
21. *Id*.
22. 14 N.Y.C.R.R. § 633.22(f).
23. 14 N.Y.C.R.R. § 550.5(f).
24. 14 N.Y.C.R.R. §§ 550.5(e), 633.22(g).
25. 14 N.Y.C.R.R. §§ 550.6, 633.22(g).
26. 14 N.Y.C.R.R. §§ 550.6(a), 633.22(i).
27. 14 N.Y.C.R.R. §§ 550.6(a), 633.22(i).
28. 14 N.Y.C.R.R. §§ 550.6(a), 633.22(g).
29. 14 N.Y.C.R.R. §§ 550.6(a), 633.22(i).
30. 14 N.Y.C.R.R. §§ 550.6(b), 633.22(g).
31. 14 N.Y.C.R.R. §§ 550.6(a), 633.22(h).
32. 14 N.Y.C.R.R. §§ 550.7(a), 633.22(k).
33. 14 N.Y.C.R.R. §§ 550.8, 633.22(l).
34. 14 N.Y.C.R.R. §§ 550.6(d), 633.22(j).
35. 14 N.Y.C.R.R. §§ 550.8, 633.22(j).
36. *Id*.

New York's Labor Neutrality Law Held Preempted by the NLRA

By Matthew Siebel

Introduction

In the Summer 2003 edition of the *L & E Newsletter*, this author discussed the 2002 amendments to New York Labor Law section 211-a,[1] the so-called Labor Neutrality Law. Essentially, the 2002 amendments ensured that employers may not use money received from the state (including Medicaid) to either encourage or discourage employees from engaging in union organizing activities.

The 2003 article hypothesized that, based upon the treatment of a similar statute by the Central District of California,[2] the New York law was likely to be held preempted by the National Labor Relations Act (NLRA).[3] In fact, New York's Labor Neutrality Law was recently held preempted by the NLRA by the Northern District of New York in the case of *Healthcare Association of New York State, Inc. v. Pataki*[4] (*Healthcare Association*). This article will examine the *Healthcare Association* decision.

NLRA Preemption[5]

Preemption of state laws has its genesis in the Supremacy Clause of the United States Constitution which provides that "the Laws of the United States . . . shall be the supreme Law of the Land[.]"[6] Under the Supreme Court's interpretation of the Supremacy Clause, federal law preempts state law in three circumstances: (1) when the federal law contains an express preemption provision; (2) when the state or local law is in actual conflict with federal law; and (3) Congress intended the federal law to occupy the field.[7]

The NLRA contains no express preemption provision.[8] However, two lines of NLRA preemption caselaw have emerged based upon Supreme Court decisions.[9]

Garmon Preemption

The *Garmon* line of preemption has its origin with the Supreme Court decision of *San Diego Building Trades Council v. Garmon*.[10] *Garmon* is an example of the actual conflict preemption.[11] Under *Garmon*, state laws will be preempted by the NLRA if the activities which the state seeks to regulate are actually or arguably protected by section 7 of the NLRA or prohibited by section 8 of the NLRA.[12] As such, *Garmon* preemption focuses on the "primary jurisdiction of the NLRB."[13] As stated by the Supreme Court, *Garmon* preemption prevents:

> Conflict between, on the one hand, state and local regulation and, on the other, Congress' integrated scheme of regulation . . . embodied in §§ 7 and 8 of the NLRA, which includes the choice of the NLRB, rather than the state or federal courts, as the appropriate body to implement the Act.[14]

"New York's Labor Neutrality Law was recently held preempted by the NLRA by the Northern District of New York in the case of Healthcare Association of New York State, Inc. v. Pataki*."*

Machinists Preemption

The second line of preemption jurisprudence stems from the case of *Lodge 76, International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission*.[15] *Machinists* is an example of field preemption as it "prohibits state and municipal regulation of areas that have been left to be controlled by the free play of economic forces."[16] In other words, *Machinists* preemption protects conduct that Congress intended to be unregulated.[17] Under this theory, the state cannot be permitted to regulate the economic weapons a party has at its disposal and such matters should be left to the free play of the market.[18] The rationale for this line of preemption is that it "preserves Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests."[19]

The Market Participant Exception

Garmon and *Machinists* preemptions are premised upon a scenario where the state has improperly attempted to regulate conduct within the exclusive purview of the federal government. The so-called Market Participant Exception, created in the *Boston Harbor* case, holds that, in some instances, the state is not acting as regulator but rather as a participant in the marketplace—just as a private actor would. In a nutshell, the Market Participant Exception is founded on the difference between "government as regulator and govern-

ment as proprietor."[20] Only when the state acts in the former capacity does preemption analysis apply.

New York's Labor Neutrality Law Is Preempted by the NLRA

New York Is Not a Market Participant

The Northern District Court began its analysis by examining defendant's claim that New York fit within the Market Participant Exception. New York specifically alleged that the Labor Neutrality Law does not regulate any activity but represents an expenditure of its funds similar to any other private entity.[21]

The Northern District dismissed this argument, holding that the Labor Neutrality Law is regulatory in nature. In so doing, the Court applied the two-part test set forth in the case of *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*,[22] used to determine the applicability of the *Boston Harbor* Market Participant Exception:

1. [D]oes the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances?[23]
2. [D]oes the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem?[24]

Applying these prongs in reverse order, the Northern District found that section 211-a "is not sufficiently narrow to overcome the inference that its primary goal was to encourage general policy rather than address a specific problem."[25] In so holding, the Court was persuaded by the fact that section 211-a does not address a specific proprietary problem.[26] Rather, the law is sweeping in its prohibition of the use of state funds to encourage or discourage union activity in any given situation. The Court was also persuaded by the fact that section 211-a mandates the maintenance and retention of financial records; contains a provision for civil penalties; and authorizes suit by the Attorney General.[27] Given these factors, the Court found that "section 211-a is 'designed to have a broad social impact, by altering the ability of a wide range of recipients of state money to advocate about union issues.'"[28]

Although admittedly a closer call, the Court also held that the Labor Neutrality Law failed the first prong of the *Cardinal* test. Here, the Legislative Memorandum discussing the need to amend section 211-a set forth a proprietary, not regulatory, purpose.[29] Specifically, section 211-a states that the "proprietary interests of this state are adversely affected" when its monies are used to encourage or discourage union organization.[30]

Despite this, the Court held that merely stating that a law reflects a proprietary interest does not mean that the state is not in fact acting in a regulatory capacity.[31] Rather, the salient inquiry is the effects of the statute under consideration.[32] Here, section 211-a is regulatory rather than proprietary as it effects the policy of neutrality in the labor arena by allowing unions to actively participate in organizing campaigns while curtailing the ability of management to express their opposition to unions.[33]

Application of Machinists Preemption

As the Market Participant Exception did not apply, the Court next addressed the issue of whether or not section 211-a was preempted under *Machinists*. Here, in addition to the above principles, the Second Circuit has held that, "state action is only preempted if it regulates the use of economic weapons that are recognized and protected under the NLRA such that the . . . government has entered into the substantive aspects of the bargaining process to an extent Congress had not countenanced."[34] In other words, federal jurisprudence recognizes a difference between state laws that have a general effect on labor conditions (such as laws relating to minimum wage) and "state regulation of the NLRA process itself, which generally is preempted."[35] As such, only "regulation that specifically targets and substantially affects the NLRA bargaining process, will be preempted."[36]

Here, plaintiffs argued that *Machinists* preemption applied because section 211-a curtails an employer's ability to exercise the economic weapons of, for example, communicating the advantages or disadvantages of joining a union.[37] Plaintiffs argued that section 211-a hampers the NLRA bargaining process by impeding the flow of such information.[38] Therefore, it was plaintiffs' position that section 211-a is preempted by the NLRA because it regulates employer speech, an economic weapon, that Congress intended to leave unregulated.[39]

Alternatively, the state argued that the types of communications which section 211-a seek to limit are forms of communication which are neither protected by NLRA section 7 nor prohibited by NLRA section 8.[40] As such, the state argued, *Machinists* preemption did not apply at all.[41]

Finding guidance in the *Lockyer* decision, the Court held that section 211-a was preempted under *Machinists*. The Court gave credence to the state's argument that section 211-a is simply its method to monitor the use of its own funds.[42] However, several reasons dictate that the statute be held preempted by the NLRA. First, the purpose and effect of the statute was to interfere with the system for organizing labor unions.[43] As such, the statute would alter the collective

bargaining and union organizing process because an employer may incur compliance costs and litigation risks under section 211-a if it decides against neutrality.[44]

Second, the law requires that an employer maintain separate accounts and make all of its records available for inspection. There are also provisions for compensatory damages to the state and civil penalties.[45] Thus, the statute imposes a punitive sanction on employers engaged in union organizing disputes.[46]

In sum, because the law directly regulates the union organizing process and imposes compliance costs and risks of litigation on employers who engage in that process, the statute "interfere[d] with an area Congress intended to leave free of state regulation."[47] For example, section 7 of the NLRA gives an employee the right to join or not join a labor union. The Court noted that it would be difficult, if not impossible, for an employee to exercise those rights intelligently if the employee only hears the union's side of the story.[48] As such, because the statute interfered with the NLRA's own system for the promotion or deterrence of union organizing, it is preempted by the NLRA.[49]

In so holding, the Court refuted the state's argument that section 211-a did not involve conduct protected by NLRA section 7 or prohibited by NLRA section 8. Specifically, the Court held that the NLRA collective bargaining process could only succeed if both employees and employers are able to fully advocate their positions.[50] The state's position also ignored another goal of the NLRA—to restore equality of bargaining power by encouraging collective bargaining and protecting worker's rights to, for example, freedom of association and expression.[51] Therefore, the statute is preempted under *Machinists* because the regulation interferes with the NLRA process itself.[52]

Conclusions

The decision of the Northern District Court is well reasoned and typical of the difficult decisions a federal court must undergo when dealing with issues of preemption of state law. By definition, such decisions interfere with a state's right to govern its own citizens. Here, the Northern District noted that it was sympathetic to the fact that New York is "financially strapped" and section 211-a is the state's way to ensure that its funds are not diverted for unintended purposes.[53] However, while a laudable goal, the Court cautioned that a state must "take care that, in its zeal to act, it does not do so unnecessarily and outside the permissible bounds of its discretion and thereby tread on the federally protected zone of labor rights."[54]

Resolution of whether labor neutrality laws such as those in California and New York are preempted by the NLRA has not yet run its course. In addition to what the Second Circuit may have to say with regards to New York's law, it is also speculated that the Supreme Court might review the 9th Circuit's recent affirmation of the *Lockyer* decision. Concerning the latter, Supreme Court review of NLRA preemption would be an excellent opportunity for a clarification of what many regard as a confusing and inconsistently applied body of law.

"Resolution of whether labor neutrality laws such as those in California and New York are preempted by the NLRA has not yet run its course."

Endnotes

1. N.Y. Lab. Law § 211-a (McKinney Supp. 2004).
2. *Chamber of Commerce of the U.S. et al. v. Lockyer*, 225 F. Supp. 2d 1199 (C.D. Cal. 2002). This decision was affirmed at 364 F.3d 1154 (9th Cir. 2004) ("*Lockyer*"). This opinion was subsequently withdrawn and resubmitted at 422 F.3d 973 (9th Cir. 2005) upon appellant's Petition for Panel Rehearing.
3. 29 U.S.C. §§ 151 *et seq.*
4. 2005 WL 1155687 (N.D.N.Y.).
5. Plaintiffs in the *Healthcare Association* case also claimed that the Labor Neutrality Law was preempted by the Labor Management Reporting and Disclosure Act (LMRDA) as well as several constitutional challenges. The Court did not reach these arguments, finding that the New York Law was preempted by the NLRA.
6. *Healthcare Association* at *3, quoting U.S. Const. Art. VI, cl. 2.
7. *Aeroground, Inc. v. City and County of San Francisco*, 170 F. Supp. 2d 950, 954 (N.D.Cal. 2001), citing *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372–373 (2000).
8. *Healthcare Association* at *4.
9. *Healthcare Association* at *3.
10. 359 U.S. 236 (1959).
11. *Healthcare Association* at *4, quoting *Aeroground, Inc. v. City and County of San Francisco*, 170 F. Supp. 2d 950, 955 (N.D.Cal. 2001).
12. *Garmon* at 244.
13. *New England Health Care, Employees Union, District 1199, SEIA/AFL-CIO v. Rowland*, 221 F. Supp. 2d 297, 324 (D.Conn. 2002).
14. *Healthcare Association* at *4, quoting *Bldg. & Const. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass/R.I., Inc.*, 507 U.S. 218, 225 (1983)("*Boston Harbor*").
15. 427 U.S. 132 (1976).
16. *Healthcare Association* at *4 quoting *Boston Harbor* at 225–226.
17. *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 749 (1985).
18. *Garmon* at 144.
19. *Healthcare Association* at *5, quoting *Boston Harbor* at 226.

20. *Boston Harbor* at 227.
21. *Healthcare Association* at *5–6.
22. 180 F.3d 686 (5th Cir. 1999).
23. *Cardinal Towing* at 693. Note however that the Court in *Healthcare Association* declined to "require that the State . . . prove that its conduct is typical of similarly situated entities." *Heathcare Association* at *9.
24. *Cardinal Towing* at 693.
25. *Healthcare Association* at *9.
26. *Id.* at *9.
27. *Id.* at *11.
28. *Id.* at *11 quoting *Lockyer* at 1163.
29. *Id.* at *12.
30. *Id.* quoting N.Y. Lab. Law § 211-a(1).
31. *Id.* at *12.
32. *Id.*
33. *Id.* at *13.
34. *Id.* at *13. Internal citation marks and quotations omitted.
35. *Id.* at *14 quoting *Alcantra v. Allied Properties, LLC*, 334 F. Supp. 2d 336, 342 (E.D.N.Y. 2004).
36. *Id.* citing *Lockyer* at 1167.
37. *Id.* at *14.
38. *Id.*
39. *Id.*
40. *Id.* at *15.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at *16.
46. *Id.*
47. *Id.* quoting *Lockyer* at 1168.
48. *Id.*
49. *Id.*
50. *Id.* at *17 quoting *Lockyer* at 1165.
51. *Id.* quoting *Lockyer* at 1166.
52. *Id.* Having reached this decision, the Court did not discuss whether the statute was also subject to preemption under *Garmon*.
53. *Id.* at *18.
54. *Id.* quoting *New England Health Care, Employees Union, District 1199, SEIA/AFL-CIO v. Rowland*, 221 F. Supp. 2d 297, 345 (D.Conn. 2002).

Matthew Siebel is an associate with the firm of Lynn, Thomas & Mihalich, P.C. located in Burlington, Vermont.

No Discretion to Exercise Discretion: Discretionary Clauses in Employment Bonus Agreements

By Mathew Paulose, Jr.

This article addresses a dangerous trend in some New York federal and state court cases involving claims for unpaid employment bonuses. *Ferrand v. Credit Lyonnais*[1] is a troubling example. There, plaintiff, the Global Head of Foreign Exchange Options at defendant Credit Lyonnais, sued her employer for failing to pay her bonuses for the years 2000 and 2001.

The defendant conceded that the employee handbook provided for payment of bonuses to its employees. It argued, however, that the handbook made payment of any bonus at the employer's discretion. The defendant concluded therefore that it did not have to pay plaintiff the bonuses. The New York federal court agreed with the defendant and granted summary judgment. The court held that the language in the handbook, which made payment of any bonus at the employer's discretion, conclusive. The court precluded plaintiff's evidence of past practice. Indeed, the court held that as a matter of law plaintiff could not introduce such evidence.

This article argues that decisions like *Ferrand* are dangerously wrong. Specifically, courts deciding unpaid bonus claims must determine whether an employer exercised its discretion properly and consider such other available evidence, such as past practice. Part I reviews New York law on bonus claims. Part II discusses some of the cases that follow the line of thinking found in *Ferrand*—often called the "Magic Words" cases. Finally, Part III addresses the argument that courts must accept extrinsic evidence when considering whether an employer has properly exercised its discretion when declining to pay a bonus.

Part I: New York Law on Bonuses

It is now well settled that an employee's entitlement to an employment bonus is governed by the terms of the employer's bonus plan.[2] The rationale behind this rule, as explained by the New York Court of Appeals, is that at common law, "a corporation proposing to give a sum for the benefit of any person or any set of persons has the right to fix the terms of his bounty, and provide under what circumstances the gift shall become vested and absolute."[3] In other words, an employer, as any other contracting party seeking the performance of services, has the right to enter into a contract and expect the terms of that contract to govern. In the area of bonus payments, those terms are typically contained in the employer's bonus plan.

The bonus plan need not be set forth in any particular document.[4] It may be contained in a document as informal as a memorandum[5] or a document as formal as a contract.[6] It must be contained somewhere however, if not in some written form, then at least in some verbal form. Otherwise, no contract for bonuses exists and an aggrieved party must resort to softer claims such as claims for promissory estoppel or quantum meruit rather than breach of contract.[7]

In whatever form the bonus plan ultimately is found to exist, whether written or verbal, it should be read in a light most favorable to the employee. This is because New York has a longstanding policy against the forfeiture of earned wages.[8] Some 40 years ago, New York passed several relevant labor laws protecting an employee's wages paid for labor or services rendered.[9] These statutes, although independently relevant to the area of bonuses—in so far as a bonus can be classified as payment for labor or services rendered[10]—are more widely relevant in that they clearly express New York's intention to liberally protect a worker's remuneration.[11] Thus, if the bonus payment contained in the bonus plan can be construed in any way as an entitlement to an employee, then the bonus plan should be viewed in a light most favorable to the employee.

"In whatever form the bonus plan ultimately is found to exist, whether written or verbal, it should be read in a light most favorable to the employee."

A bonus plan should also be viewed in a light most favorable to the employee because of general contract principles. It is well established in New York that all forms of contractual ambiguities must be construed most strongly against the drafter of the contract.[12] Contractual language is ambiguous if a reasonably intelligent and objective person who considers the language in the context of the entire agreement and who is aware of the general customs, practices, usages, and terminology of the industry can reach more than one interpretation.[13] Bonus plans are often, if not always, drafted by the employer, and often, if not always, drafted without sufficient substance, without, for example, a section defining relevant terms. Accordingly, if there is any doubt as to the meaning of the terms used in a bonus

plan, then the terms should be construed in a light most favorable to the employee.

In light of these principles, an employee who believes he has not properly received a bonus pursuant to a written or verbal bonus plan may sue the employer for breach of contract. Care must be taken, however, that the bonus plan, although not required to be in any particular form, meets the basic elements of a contract nevertheless. Under New York law, the formation of a legally binding agreement requires an offer and an acceptance.[14] In the context of the employment relationship, these elements will often be met by the employer offering an employee employment and the employee accepting by initiating employment.[15] The terms of the employment relationship will then be covered by the employer's employment agreements, including the agreement covering bonus payments.[16]

Where, however, any of the agreements, including the bonus agreement, leaves one party's obligations as purely discretionary, there likely will not be a contract formed, at least as to that particular obligation.[17] This is because purely discretionary obligations are considered illusory and thus not tenable to enforcement by any party to the agreement.[18] As one court put it best, "One of the most common types of promise that is too indefinite for legal enforcement is the promise where the promisor retains an unlimited right to decide later the nature and extent of his performance. This unlimited choice in effect destroys the promise."[19]

In the realm of employment bonus cases, it is here where most of the tension arises. Often an employer, faced with a lawsuit for unpaid bonus compensation, argues that payment of the bonus is purely discretionary and thus illusory and unenforceable. On the other hand, the employee argues that the payment is not purely discretionary, but is rather a determinable obligation and thus enforceable. Often, these arguments present a question of fact that precludes summary judgment and preserves the issue for a jury.[20] To determine if that is so, however, the court typically has the first opportunity to review all material evidence concerning the nature of the bonus payment, including interpretative terms in other agreements governing the employment relationship and the manner in which the bonus plan itself is and has been applied.[21]

Thomson v. Saatchi & Saatchi Holdings, Inc.[22] is illustrative of an instance where a court properly handled such a task. There, the former chairman and chief executive officer of an advertising agency sued his employer for, among other things, an unpaid bonus of $101,000. According to his employment agreement with the agency, he was to "receive such Salary increases and bonuses, if any, as may, from time to time, be approved by the management of Saatchi & Saatchi Advertising Affiliates." Plaintiff argued that his past experience with the agency, where they paid him a substantial bonus each year, entitled him to the bonus for the instant year. Defendant argued, on the other hand, that past practice was of no moment as the terms of the employment agreement made clear that the bonus payment was at management's unfettered discretion. Accordingly, defendant moved for summary judgment.

The court held that there were genuine issues of material fact and denied the summary judgment motion. The court held that notwithstanding the language in the employment agreement—granting discretion to defendant to determine payment of a bonus—the agreement was ambiguous with respect to the extent of that discretion. For this proposition, the court relied on evidence presented by plaintiff demonstrating that the employer had a practice of paying a bonus for services rendered, rather than at its whim. In other words, the evidence belied defendant's argument that bonuses were paid based on its unfettered discretion. Rather, the evidence showed that bonuses were paid based on some measurable method, albeit an unwritten or otherwise uncertain method. The court concluded that the "course of dealing, while non conclusive, could be considered by a factfinder as some indication that the parties construed [plaintiff's] employment contract to mean that he would be entitled to a bonus if [defendant] reached its financial target, and if his own performance had contributed to that of [defendant's]."[23]

Part II: The "Magic Words" Cases

While cases like *Thomson* exist, cases that fail to properly consider all available material evidence also exist. These are the cases that resort exclusively to the language contained in the bonus plan, no matter how ambiguous, and nothing more. They are often referred to as the "Magic Words" cases.[24]

Welland v. Citigroup[25] is an example of one such case. There, plaintiff, a senior vice president and division executive for Citigroup Global Technology, sued Citigroup for, among other things, failing to pay him a bonus. Defendant moved for summary judgment arguing that its bonus policy clearly stated that bonuses were awarded at the discretion of management. According to its bonus plan, bonuses "aren't automatically awarded year to year and are determined at management's sole and exclusive discretion."

The court granted defendant's motion and dismissed the claim. The court held that because Citigroup's bonus policy clearly provided that bonuses awarded pursuant to the policy were discretionary, plaintiff had no enforceable right to a bonus. The court looked at no other evidence but the language in the bonus plan.

Ferrand v. Credit Lyonnais[26] is another troubling example. There, plaintiff, the Global Head of Foreign Exchange Options at defendant Credit Lyonnais, sued Credit Lyonnais for failing to pay her bonuses for the years 2000 and 2001. Credit Lyonnais had paid her a bonus in the amount of $875,000 in 1998, and $750,000 in 1999. Plaintiff argued that she was therefore due similar amounts for the years 2000 and 2001. Defendant conceded that, pursuant to the employee handbook that governed its relationship with plaintiff, bonuses could be paid to an employee. Defendant argued, however, that the handbook made payment of any bonus purely discretionary. The federal court agreed with defendant and granted summary judgment against plaintiff. The court found that the language in the employee handbook was conclusive, language that read: "Management . . . may, in its discretion, grant a bonus to any or all of its employees. . . . Payment of a bonus is not guaranteed; management may choose to grant or not grant a bonus at year-end to any or all of its employees." The court did not consider other evidence such as past practice. Indeed, the court held that as a matter of law plaintiff could not introduce such evidence. The court relied exclusively on the language contained in the employee handbook.

Miller v. Hekimian Labs[27] is yet another example. There, an account manager for an equipment supplier sued his employer for failing to pay him a bonus. The defendant, like the defendants in the above cases, argued that payment of any bonus was discretionary and therefore unenforceable. The bonus plan governing the relationship between the parties stated that the "Employee's participation in other benefits or incentive payments shall be at the discretion of the Board of Directors or the President of the Corporation or his designee." The court agreed with defendant and granted summary judgment.

The court held that the words contained in the bonus plan governed and were conclusive. It rejected plaintiff's evidence showing that bonuses were not discretionary but were in fact predetermined based on the employee's performance.

Employers have noted these "Magic Words" cases and have recently either amended their bonus plans or rewritten them entirely, including in the plans now some form of language similar to that found in these cases making payment of a bonus at the discretion of management. Employers are anticipating litigation and are unfairly attempting to preclude payment to employees.

In some instances, as in *Ferrand*, employers are attempting to avoid substantial bonus payments. While some recent cases are scrutinizing the newfound language,[28] others are not.[29] The next section takes up why these latter courts are misguided.

Part III: Considering Extrinsic Evidence

How are these courts coming to the conclusion that discretionary provisions in bonus plans are conclusive on the issue of bonus payments due? They are relying primarily on a rather outdated New York Court of Appeals case called *Namad v. Salomon*.[30] There, plaintiff was an employee of defendant Philipp Brothers, a commodities trading company. At the start of his career, he signed an employment agreement that provided the following language regarding bonuses: "The amounts of other compensation and entitlements, if any, including regular bonuses, special bonuses and stock awards, shall be at the discretion of the management."

When plaintiff did not receive a sufficient bonus during one particular year, he sued arguing that the customary practice of the company was to pay a larger bonus. Defendant argued however that the discretionary language in the employment agreement allowed it to pay whatever amount it thought was warranted, not what was the customary practice. The lower court agreed with plaintiff, but the appellate court reversed and dismissed the case. Plaintiff appealed. The issue before the New York Court of Appeals was whether evidence other than the language contained in the employment agreement could be considered.

The Court held that it could not. Extrinsic evidence, held the Court, could only be considered if the contract was ambiguous. Since plaintiff's bonus clause, particularly the word "discretion," was not ambiguous, no other evidence could be considered. Interestingly, Court went on to conclude that "in any event," plaintiff had failed to provide sufficient evidence of what he claimed was customary practice.

There are a number of problems with *Namad*. Most obviously, contrary to the Court of Appeals' opinion, the word "discretion" in the context of bonus agreements is ambiguous. For example, whose discretion? The particular employee's direct supervisor or the CEO of his company? What about the executive committee? Perhaps its board of directors? Why not the human resources division? Once that question is answered, the next question, and probably the most important, is how is that discretion exercised? By a formula? Based on the employee's performance? If not, then based on what? Is it derived randomly? In other words, at the employer's whim? Not likely.

As previously stated, contractual language is ambiguous if a reasonably intelligent and objective person who considers the language in the context of the entire agreement, and who is aware of the general customs, practices, usages, and terminology of the industry, can reach more than one interpretation.[31] The *Namad* Court ignored this rule. Instead of sitting as members of the banking industry, where even in 1989 it

was well known that bonuses were typically based on performance rather than at the whim of management, they sat isolated. It should be clear to them now at least, with the Internet bubble having come and gone and along with it its newsworthy stories on bonuses, that in the banking industry bonuses are typically paid based on performance. If the Court of Appeals were to review a case like *Namad* now, it should hold differently. Honest employers would agree.

No employer can deny that most bonus plans are based on some formula, however abstract, rather than at their whim. An employee can develop proof of such a formula through the depositions of those individuals responsible for the bonus decision-making process. An employee can also develop proof of such a formula through the production of the governing employee bonus plan and the drafts of the bonus plan. Depositions of the drafters of the bonus plan can also be sought. The drafters wrote the bonus plan; they had something in mind when they wrote it. If the drafters also included consultants or lawyers, they too should be deposed.[32] Often, these individuals are the primary information providers in the quest to determine the meaning behind a bonus plan.

There are three other problems with *Namad*. First, even if in today's environment the term "discretion" in the context of bonus plans is not deemed ambiguous, then whatever that term means should be enforced.

The first place to look for the meaning of that word should be the contract itself. But that step can easily be skipped because most if not all bonus plans fail to provide a definition of that term. *Black's Law Dictionary* is not helpful, as it defines the term as "wise conduct and management; cautious discernment; prudence; individual judgment; the power of free decisionmaking."[33] This definition begs how "wise" or "free" management can be when it exercises its "discretion," creating what *Namad* held could not be created: a jury question. Next, can a court rely on what the employer says the term is supposed to mean? Unlikely because the employer wants the term to mean "at its whim," which as already mentioned would render the bonus plan illusory and unenforceable. That result would not be tenable, as every contract must be read in a light that would avoid making it unenforceable.

It is a well settled principle that a court should not adopt an interpretation that renders a contract illusory when it is clear that the parties intended to be bound thereby.[34] If the employer did not want to be bound, it should not have enacted a bonus plan. It could easily have excluded it from its employee handbook or other document. It could easily have never mentioned it to the employee. All of these untenable options leave one end result, to do what should have been done in the first instance, allow other evidence into the record and to be considered. That is the only way to understand what is truly meant by the term "discretion."

Second, assuming for argument's sake that the term is indeed supposed to mean at "management's whim," then there is another contract principle that is triggered. That principle states that a purely discretionary clause must be read with the *proviso* that the discretion used must be used in good faith. As one court put it, the term "discretion" must be interpreted to mean "a discretion based upon fair dealing and good faith—a reasonable discretion" in other words.[35] In *Boston Road Shopping Center Inc. v. Teachers Insurance Assn.*,[36] for example, it was held that the contractual requirement that a defendant be "satisfied" with a lease required the defendant to act "on reasonable grounds or, at least, good faith."[37]

In *Sadowski v. Dell*,[38] it was held that the contractual requirement that a defendant exercise its "opinion" on whether an incentive compensation plan was triggered required the defendant to act "in a sound and honest manner and in good faith." Although *Sadowski* involved a Second Circuit court interpreting Texas law, it relied on principles similar to those clearly established in New York.[39] Thus, if a court were to believe an employer that the term "discretion" means "at its whim," then the court should in turn obligate the employer to a standard requiring it to exercise that discretion in good faith. Whether the employer did so in a particular instance requires an examination into evidence other than the mere language contained in the bonus plan.[40]

Third, as already mentioned, New York has a longstanding policy against the forfeiture of earned wages.[41] Some 40 years ago, New York passed several relevant labor laws protecting an employee's wages paid for labor or services rendered.[42] These statutes, although independently relevant to the area of bonuses—in so far as a bonus can be classified as payment for labor or services rendered[43]—are also relevant to breach of contract claims in that they clearly express New York's view as to the treatment of an employee's remuneration.[44] Thus, if a bonus payment contained in a bonus plan can be construed as an entitlement to an employee, then the bonus plan should be deemed enforceable rather than unenforceable. As the court in *Weiner v. Diebold Group*[45] stated, while "the parties to a contract are free to make any bargain they wish and are held to bargains made by them with their eyes open, they are not free to enter into contracts which violate public policy. Thus, if the incentive compensation payments were payments of earned wages, the plaintiff could not contract to forfeit them."

For all these reasons, *Namad* is outdated and its relevance in today's bonus disputes diminished.

Conclusion

A recent trend has developed in some New York federal and state court cases involving claims for unpaid employment bonuses. These cases hold that an employee bringing a breach of contract claim for an unpaid bonus is precluded from introducing evidence other than the employer's bonus plan when the plan states that bonuses will be paid at the discretion of the employer. These cases are relying on outdated precedent and on the same note failing to recognize clearly established contract principles. While some courts are appreciating this mishap, others are not. This article presented several grounds to support the conclusion that extrinsic evidence must be considered when determining whether an employer failed to properly pay an employee a bonus.

"This article presented several grounds to support the conclusion that extrinsic evidence must be considered when determining whether an employer failed to properly pay an employee a bonus."

Endnotes

1. 2003 WL 22251313 (S.D.N.Y. Sept. 30, 2003).
2. *Weiner v. Diebold Group*, 173 A.D.2d 166, 167 (1st Dep't 1991).
3. *Hall v. U.P.S.*, 76 N.Y.2d 27, 37 (N.Y. 1990).
4. *Thomson v. Saatchi*, 958 F. Supp. 808, 825 (W.D.N.Y. 1997).
5. *Hall*, 76 N.Y.2d at 37.
6. *Namad v. Salomon Inc.*, 74 N.Y.2d 751, 752 (N.Y. 1989).
7. *Sathe v. Bank of New York*, 1991 WL 102614, *3–4 (S.D.N.Y. 1991).
8. *Weiner,* 173 A.D.2d at 167.
9. N.Y. Labor Law § 190 *et seq*. (McKinney's 2002).
10. *Bentley v. ASM Communications, Inc.,* 1991 WL 105220 at 7 (S.D.N.Y. 1991).
11. *Weiner*, 173 A.D.2d at 167.
12. *See Leninger v. Gibbs & Hill, Inc*., 730 F.2d 903, 905 (2d Cir. 1984).
13. *Nowack v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1192 (2d Cir. 1996).
14. *Ladau v. The Hillier Group*, 2004 WL 691520 (S.D.N.Y. 2004) at 3.
15. *Id.* at 4.
16. *See, e.g., Blair v. CBS Inc.*, 662 F. Supp. 947, 948 (S.D.N.Y. 1987).
17. *Xu v. J.P. Morgan*, No. 01CV8686, slip op. at 8 (S.D.N.Y. 2003).
18. *Sadowki v. Dell Computer Corp*., 268 F. Supp. 2d 129, 136 (D. Conn. 2003).
19. *Id.* at 136.
20. *See, e.g.*, *Weiner*, 173 A.D.2d at 167.
21. *Id.*
22. 958 F. Supp. at 808.
23. *Id.* at 826.
24. *Culver v. Merrill Lynch & Co., Inc.*, 1995 WL 422203, *3 (S.D.N.Y. July 17, 1995) (first case to use the phrase "magic words" when describing bonus claims where employer's discretion in issue).
25. 2003 WL 22973574, *15 (S.D.N.Y. Dec. 17, 2003).
26. 2003 WL 22251313 (S.D.N.Y. Sept. 30, 2003).
27. 257 F. Supp. 2d 506, 516 (N.D.N.Y. 2003).
28. *See, e.g., Patterson v. J.P. Morgan Chase & Co.*, 2004 WL 1920215, *10 (S.D.N.Y. Aug. 26, 2004).
29. *See, e.g., Arrouet v. Brown Brothers Harriman & Co.*, 2005 WL 646111 (S.D.N.Y. Mar. 18, 2005) at 4.
30. 74 N.Y.2d 751, 752 (N.Y. 1989).
31. *Nowack v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1192 (2d Cir. 1996); *see also Zurakov v. Register.com, Inc*., 304 A.D.2d 176, 179 (1st Dep't 2003), citing *Horby v. Yarmouth*, 270 A.D. 696, 697 ("Parol evidence is admissible to explain the meaning which custom or usage has given to words or terms as used in any particular trade or business.").
32. *See, e.g., Kamfar v. New World Restaurant Group Inc*., 347 F. Supp. 2d 38, 42 (S.D.N.Y. 2004) (discussing general counsel's role in establishing bonus compensation plan).
33. Black's Law Dictionary (8th ed. 2004).
34. *Zurakov*, 304 A.D.2d at 179.
35. *Bruce v. Simpson & Co*., 40 Misc. 2d 501, 504 (N.Y. Sup. Ct. 1963).
36. 13 A.D.2d 106 (1st Dep't 1961).
37. *Bruce*, 40 Misc. 2d at 504.
38. 268 F. Supp. 2d 129, 136 (D. Conn. 2003).
39. *Cross v. Everett*, 886 F.2d 497, 502 (2d Cir. 1989) ("Courts applying New York law repeatedly have recognized the duty of good faith and fair dealing, the 'implied obligation to exercise good faith not to frustrate a contract into which one has entered.'").
40. *But see Arrouet v. Brown Brothers Harriman & Co.*, 2005 WL 646111 (S.D.N.Y. Mar. 18, 2005) at 5 ("It is doubtful whether defendant owed [duty of good faith]" in bonus context.); *Sathe v. Bank of New York*, 1990 WL 58862 (S.D.N.Y. 1990) at 5 (same holding). These cases are not good law in that their analysis lacks merit and fails to acknowledge clearly established New York precedent.
41. *Weiner*, 173 A.D.2d at 167.
42. *See* N.Y. Labor Law §§ 190 *et seq*. (McKinney's 2002).
43. *Bentley v. ASM Communications, Inc*., 1991 WL 105220 (S.D.N.Y. 1991) at 7.
44. *Weiner*, 173 A.D.2d at 167.
45. 173 A.D.2d at 167.

Mathew Paulose, Jr. is an employment attorney at Koehler & Isaacs LLP, New York, New York. He can be reached for comment at Mpaulose@Koehler-Isaacs.com.

External Law: The Interplay Between the Taylor Law and Other Statutory Provisions

By Philip L. Maier

Statutory Provisions—Public Employees' Fair Employment Act, Civil Service Law, Article 14, §§ 200 *et seq.*

Section 209-a.1 of the Public Employees' Employment Act (Act) states: It shall be an improper practice for an employer or its agents deliberately . . . (d) to refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees, . . .

The definition of the duty to bargain in good faith has been codified in section 204.3 of the Act. That section states:

> For the purpose of this article, to negotiate collectively is the performance of the mutual obligation of the public employer and a recognized or certified employee organization to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Subjects of Bargaining

The obligation to bargain encompasses "wages, hours and terms and conditions of employment." Section 201.4 of the Act defines the phrase "terms and conditions of employment" as:

> salaries, wages, hours and other terms and conditions of employment provided, however, that such term shall not include any benefits provided or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees, or payment to retirees or their beneficiaries. No such retirement benefits shall be negotiated pursuant to this article, and any benefits so negotiated shall be void.

The Act itself does not give further guidance as to what subjects constitute "terms and conditions of employment."

In *Board of Education of the City School District of the City of New York v. PERB*,[1] the Court of Appeals stated, "the obligation under the Taylor Law to bargain as to all terms and conditions of employment is a 'strong and sweeping policy of the State.'[2] This obligation may be abrogated if "a statute . . . direct[s] that certain action be taken by the employer, leaving no room for negotiation."[3] A statute may so direct either by its explicit terms or by implication inherent in either the statute or the statutory scheme itself.

Mandatory Subjects of Bargaining

Mandatory subjects of bargaining are those about which a bargaining obligation exists, thereby precluding unilateral action prior to negotiation, or those in which a bargaining obligation exists once a demand to bargain has been made.[4] By way of illustration only, those topics include compensation-related items such as salary,[5] longevity pay,[6] or overtime pay.[7] They also include benefits such as health insurance,[8] sick, bereavement and vacation leave.[9] Scheduling of tours of duty and hours of work,[10] work rules such as sign in and sign out procedures,[11] and dress codes[12] are also mandatory subjects of bargaining.

Nonmandatory Subjects of Bargaining

A nonmandatory, or permissive, subject is a subject about which a party may choose to bargain, though there is no legal obligation to do so.[13] Examples of such topics include class size,[14] staffing,[15] standards for initiating discipline,[16] qualifications,[17] and the decision to eliminate or curtail a particular service.[18]

Prohibited Subjects of Bargaining

Prohibited subjects of bargaining "are those forbidden, by statute or otherwise, from being embodied in a collective bargaining agreement."[19] They cannot legally be the subject of negotiation and, if included in an agreement, are not enforceable. While the Act itself only precludes negotiation concerning certain retirement system issues,[20] other subjects have also been found to be prohibited subjects of bargaining because of a legisla-

tive intent to preclude bargaining. One result of a subject being deemed prohibited is that it may not be placed before a fact-finding or interest arbitration panel, and is not enforceable if contained in a CBA.

The Balancing Approach: Employer vs. Employee Interests

The Board employs a balancing approach to determine the negotiability of a subject. If the employer's interests are found to outweigh those of the employees', the demand is a nonmandatory subject of bargaining. The employer's interests generally can be said to relate to determining the direction and means by which to fulfill its governmental mission. As stated by the Board, at 3706, in *City of New Rochelle*:[21]

> A public employer exists to provide certain services to its constituents, be it police protection, sanitation or, as in the case of the employer herein, education. Of necessity, the public employer, acting through its executive or legislative body, must determine the manner and means by which such services are to be rendered and the extent thereof, subject to the approval or disapproval of the public so served, as manifested in the electoral process. Decisions of a public employer with respect to the carrying out of its mission, such as a decision to eliminate or curtail a service, are matters that a public employer should not be compelled to negotiate with its employees.

Employees' and unions' interests relate to varied terms and conditions of employment defined on a case-by-case basis.

In *State of New York (Department of Transportation)*,[22] the union sought to bargain concerning a staffing decision made by the employer. The Board stated that in order to determine the mandatory or nonmandatory nature of a work rule, a balancing of interests is undertaken directed toward the nature of the subject matter at issue. It is therefore necessary to identify the subject matter at issue and then to balance the competing employer and employee interests at stake.

Examples of Statutory Preemption of Bargaining Obligations

Education

In *Honeoye Falls-Lima Central School District v. Honeoye Falls-Lima Educ. Assoc.*,[23] the Court stated, "[I]t is beyond the power of a school board to surrender through collective bargaining a responsibility vested in the board in the interest of maintaining adequate standards in the classroom as, for example, the granting or withholding of tenure."[24]

In *Webster Central School District et al. v. PERB et al.*,[25] the Court of Appeals held that the decision to transfer summer school programs to a Board of Educational Cooperative Services (BOCES) did not constitute a mandatory subject of bargaining. The Court found that the statutory amendments to the Education Law were part of a major reform seeking to improve the quality of education in the state. The legislation sets forth a detailed procedure for utilizing BOCES' services, time frames for these procedures, and the criteria by which the Commissioner would approve a program. Of significance, the Court of Appeals found that it was not surprising that the amendment was not more specific in demonstrating the legislative intent that the subject not be mandatory since "the unions had not, in the several decades of BOCES' operation, previously demanded bargaining of requests for shared services . . ."[26] Further, the Court of Appeals discerned a legislative intent to preclude bargaining by the inclusion of a provision governing teachers' rights in the event of a BOCES' providing the program. In this regard, the Court of Appeals, at 7018-9, stated:

> The BOCES statute neither explicitly mandates nor explicitly prohibits collective bargaining (*see*, by contrast, Retirement and Social Security Law § 470). While legislative expression is the best evidence of legislative intent, it is not the only evidence; legislative intent may also be implied from the words of an enactment. It should be apparent, however, that in order to overcome the strong State policy favoring the bargaining of terms and conditions of employment, any implied intention that there not be mandatory negotiation must be "plain and clear" (*Syracuse Teachers Assoc., Inc. v. Board of Educ.*, 35 N.Y.2d 743, 744), or "inescapably implicit" in the statute (*In re Cohoes City School Dist. v. Cohoes Teachers Assn.*, 40 N.Y.2d 774, 778; *see also In re City School Dist. of City of Elmira v. New York State Pub. Employment Relations Bd.*, 74 N.Y.2d 395). Anything less threatens to erode and eviscerate the mandate for collective bargaining.
>
> Given this statutory scheme, we are satisfied that the Legislature's deliberate incorporation of 3014-a governing teacher's rights in the event of a BOCES' takeover manifested an inten-

> tion to establish, within the Education Law, a comprehensive package for a school district's decision to contract for a BOCES program, and thus to withdraw that decision from the mandatory negotiating process.

Financial Disclosure Statements

In *Board of Education of the City School District of the City of New York, supra*, the Court held that Education Law section 2590-g(14) does not exempt the Board of Education from an obligation to bargain concerning the adoption of a work rule requiring certain financial disclosure information by virtue of being either a prohibited or permissive subject of bargaining. The Court of Appeals concluded that negotiations were not prohibited since the statute does not contain a prohibition concerning bargaining, or that its terms are "so unequivocal a directive to take certain action that it leaves no room for bargaining."[27] With regard to whether the disclosure requirements constitute a permissive subject of bargaining which is reserved for the Board of Education as a management prerogative, the Court of Appeals stated:

> We reject the Board's contention that the decision to promulgate these disclosure requirements represents such a managerial prerogative as a matter of law . . . . [u]pon our independent review of the statute we see no evidence—let alone clear evidence—that the Legislature intended to withdraw the subject of disclosure requirements from the mandatory negotiating process despite their evident impact upon the employees forced to reveal voluminous information on pain of discipline and even dismissal.

In *State of New York (Department of Health)*, the Board affirmed an Administrative Law Judge's (ALJ) decision finding a violation of section 209-a.1(d) of the Act when the state implemented a financial disclosure policy requiring employees to disclose any interests they may have in any organizations regulated by the Department of Health (DOH).[28] In rejecting the state's argument that it could act unilaterally because of Executive Law section 94(9)(j), the Board stated:

> Executive Law § 94(9)(j), the claimed source of DOH's authorization to promulgate its disclosure policy, sets forth one of several duties imposed upon the State Ethics Commission. Section 94(9)(j) requires the State Ethics Commission to advise and assist agencies in establishing conflict of interest rules. Even if Executive Law § 94(9)(j) were to be read to indirectly authorize DOH to promulgate conflict of interest work rules, it would not be a source of statutory mandate. Nothing in § 94(9)(j) required DOH to promulgate its disclosure policy or any other conflict of interest rule. Rather, DOH's promulgation of its disclosure policy was merely discretionary. The exercise of that discretion is mandatorily negotiable to the extent that the subject matter of the disclosure policy embraces terms and conditions of employment.

General Municipal Law § 207-c

In *Schenectady Police Benevolent Association v. PERB*, the Court of Appeals held that General Municipal Law (GML) section 207-c preempted bargaining of three work rules regulating receipt of benefits under that statute.[29] The specific rules in question were that in the event a police officer was entitled to benefits pursuant to GML section 207-c because he or she became injured or sick as a result of the performance of his or her duties, the City could require an officer to assume a light duty position,[30] submit to surgery,[31] and execute a form waiving medical confidentiality when the officer appears before the City's examining physician for examination.[32] After reiterating the state's strong policy in favor of the negotiability of terms and conditions of employment, the Court of Appeals nevertheless found that the statutes in question clearly evidenced a statutory intent to authorize the employer's unilateral issuance of the rules in question, and therefore found that the work rules were not mandatorily negotiable.[33]

In *City of Watertown v. PERB*, the Court of Appeals held that General Municipal Law section 207-c granted municipalities the right to make an initial determination of an employee's right to section 207-c benefits.[34] Since the statute was silent regarding the procedures to be utilized to review such determinations, the court held, PERB's decision that review procedures were a mandatory subject of negotiations was correct.

Discipline

In *Patrolmen's Benevolent Assoc. of the City of New York v. New York State Public Employment Relations Bd.*, the Court affirmed a Board decision relating to the mandatory nature of certain proposals regarding the discipline of New York City police officers.[35] The provisions related to (1) the expungement of records following certain disciplinary matters; (2) disciplinary procedures, i.e., the timing of charges and trials; (3) guidelines for interrogation of members; (4) the time period within which a police officer who witnesses an incident has to confer with counsel before being questioned by

the department; and (5) the continuation of a program whereby disciplinary matters may, at the discretion of the New York City Police Commissioner, be referred outside the department for resolution. The Court concluded that section 434(a) of the New York City Charter and the New York City Administrative Code "commit the issue of police officer discipline to the authority of the Commissioner."

Section 434(a) of the Charter states that, "[t]he Commissioner shall have cognizance and control of the government, administration and discipline of the department, and of the police force of the department." Section 14-115(b) of the Code provides that the Commissioner, or a deputy thereto, has the authority to examine, hear and investigate all written charges against a member "in such manner or procedure, practice, examination and investigation as such [C]ommissioner may, by the rules and regulations, from time to time prescribe" section 14-115(a) grants the Commissioner the sole discretionary authority over the appropriate punishment for an employee who, for example, neglects his duty, violates a rule, or commits a disciplinary infraction.

In *In re City of New York v. MacDonald*,[36] the court stated that the Charter and Code disclose "a legislative intent and public policy to leave the disciplining of police officers . . . to the discretion of the Police Commissioner, subject, of course, to review by the courts pursuant to CPLR article 78."

In *State of New York (Division of State Police),* the Board rejected a recommended declaratory ruling, finding that certain subjects were prohibited subjects of bargaining.[37] Specifically, the issues related to members' rights, disciplinary action, discipline, and providing documents relating to the investigation of administrative charges. The Board stated that discipline of the New York State police is governed by Executive Law section 215(3), which is a statutory grant of authority to the superintendent of police that is sufficiently clear to indicate that his authority is not to be supplanted by collective bargaining agreements. The broad grant of authority to make rules includes the authority to develop procedures.

Executive Law section 215(3) states, in part, "[t]he superintendent [of the State Police] shall make rules and regulations, subject to the approval by the governor for the discipline and control of the New York State police." Civil Service Law section 76(4) states, in part:

> Nothing contained in section seventy-five or seventy-six of this chapter shall be construed to repeal or modify any general, special or local law or charter provisions relating to the removal or suspensions or offices or employees in the competitive class of the civil service of the state or any civil division.

The Board concluded that "while the statute does not explicitly state so, it is 'inescapably implicit' that the grant of authority to make rules and regulations governing discipline includes the authority to make rules and regulations governing the procedures relating to that subject."

Disciplinary procedures involving members of town police departments in Westchester and Rockland Counties are prohibited subjects because the Westchester County Police Act and the Rockland County Police Act establish disciplinary procedures for such employees.[38]

In *New York City Transit Authority*, the Board held that the Vehicle and Traffic Law section 509-j(b) does not prohibit bargaining, and is not so unequivocal as to indicate an intent to preclude bargaining.[39] Work rules issued which were more stringent than these statutory standards were therefore mandatorily negotiable.

Miscellaneous

Electronic Recording Equipment

In *State of New York (Unified Court System),* the Board held that the use of electronic recording equipment to record court proceedings, in lieu of stenographers, was "plainly and clearly" removed as a mandatory subject of bargaining.[40] Finding no express legislative prohibition to bargain this issue,[41] the Board looked to legislative history and judicial interpretation of the statute authorizing the use of electronic recording equipment and discerned an intent to permit the unilateral implementation of this equipment. The Board, at 3103, found that the Report of the Fiscal Committees of the New York State Legislature on the Executive Budget (Report) "articulate[d] an intent by the Legislature to vest the Chief Administrator with the unfettered discretion to implement the use of mechanical recording equipment." Also leading to this conclusion was an Appellate Division decision[42] which stated that "the Chief Administrator was imbued with express statutory authority to implement the directive at issue." The Board further noted, at 3103, that the decision stated:

> These projected cost savings simply could not be expected to be achieved other than through a mandatory program for, absent such, the reassignments, which would generate the cost savings, could not be effected. To this end, the Report concluded that realization of the projected cost savings "presume[d] the full implementation of section 414.

Endnotes

1. 75 N.Y.2d 660 (1990) at 7013.
2. Section 414 of Chapter 55 of the Laws of 1992 states:

   > Notwithstanding any other provision of law, the chief administrator of the courts may authorize the use of mechanical recording of testimony and other proceedings in each cause, in lieu of the taking of stenographic minutes thereof, in : (1) Surrogate's court in any county; and (ii) the court of claims.

3. *Id.* at 7013.
4. *Board of Education of the City Sch. Dist. of the City of New York v. PERB*, 75 N.Y.2d 660 at 666 (1990).
5. *Churchville–Chili Cent. Sch. Dist.*, 17 PERB ¶ 3055 (1984).
6. *Triborough Bridge and Tunnel Auth.*, 27 PERB ¶ 3076 (1994).
7. *Town of Stony Point*, 6 PERB ¶ 3030 (1973).
8. *Town of Haverstraw v. PERB*, 13 PERB ¶ 7006, 75 A.D.2d 874 (1980).
9. *City of Albany*, 7 PERB ¶ 3078 (1974); *Triborough Bridge and Tunnel Auth.*, 27 PERB ¶ 3076 (1994).
10. *See City of White Plains*, 5 PERB ¶ 3008 (1972); *Starpoint Cent. Sch. Dist.*, 23 PERB ¶ 3012 (1990).
11. *Port Jefferson Union Free Sch. Dist.*, 33 PERB ¶ 3047 (2000).
12. *State of New York*, 30 PERB ¶ 3028 (1997).
13. *Board of Education of the City Sch. Dist. of the City of New York v. PERB*, 75 N.Y.2d 660 at 666 (1990).
14. *Onteora Cent. Sch. Dist.*, 16 PERB ¶ 3098 (1983).
15. *Town of Carmel*, 31 PERB ¶ 3006 (1998).
16. *Poughkeepsie City Sch. Dist.*, 19 PERB ¶ 3046 (1986).
17. *Inc. Village of Hempstead*, 11 PERB ¶ 3072 (1978).
18. *State of New York*, 31 PERB ¶ 3053 (1998).
19. *Board of Education of the City Sch. Dist. of the City of New York v. PERB*, 75 N.Y.2d 660 at 666 (1990).
20. *See Niagara Falls Police Captains and Lieutenants Ass'n.*, 33 PERB ¶ 3058 (2000).
21. 4 PERB ¶ 3060 (1971).
22. 27 PERB ¶ 3056 (1994).
23. 49 N.Y.2d 732, 734 (1980).
24. *See also Cohoes City School District v. Cohoes Teachers Association*, 40 N.Y.2d 774 (1976) wherein the court stated that, :"[i]n our view the authority and responsibility vested in a school board under the several provisions of the Education Law to make tenure decisions cannot be relinquished"; *see also Patchogue-Medford Union Free School District*, 29 PERB ¶ 4553 (1996) (charge alleging change in procedure concerning granting or denial of tenure dismissed).
25. 75 N.Y.2d 619 (1990) at 7018 (decided the same day as *Board of Education of the City School District of the City of New York*).
26. *Id.*
27. 75 N.Y.2d 619 (1990) at 7013.
28. 25 PERB ¶ 3002 (1992).
29. 28 PERB ¶ 7005 (1995).
30. GML § 207-c(3) states that in the event an officer does not receive accidental or retirement disability, and is nevertheless:

    > unable to perform his regular duties as a result of such injury or sickness but is able, in their opinion, to perform specified types of light duty, payment of the full amount of regular salary or wages , . . . , shall be discontinued with respect to such policeman if he shall refuse to perform such light police duty if the same is available and offered to him . . .

31. GML § 207-c(1) states in relevant part:

    > Provided, however, and notwithstanding the foregoing provisions of this section, the municipal health authorities or any physician appointed for the purpose by the municipality, after a determination has first been made that such injury or sickness was incurred during, or resulted from, such performance of duty, may attend such injured or sick policeman, from time to time, for the purpose of providing medical, *surgical*, or other treatment . . . (emphasis supplied)

32. With regard to the waiver issue, the Court stated (at 7013) that, "the Appellate Division reached the correct result by narrowing the City's waiver requirement to only those items necessary for determination of the nature of the officer's medical problem and its relationship to his or her duties."
33. *See also City of Schenectady*, 28 PERB ¶ 3077 (1995).
34. 33 PERB ¶ 7007, 95 N.Y.2d 73 (2000).
35. 37 PERB ¶ 7012 (2004), appeal pending.
36. 202 A.D.2d 258, 259 (1994).
37. 38 PERB ¶ 3007 (2005).
38. *Town of Greenburgh v. Ass'n of the Town of Greenburgh*, 16 PERB ¶ 7510, 94 A.D.2d 771 (1983); *Rockland County PBA v. Town of Clarkstown*, 22 PERB ¶ 7516, 149 A.D.2d 516 (1989).
39. 30 PERB ¶ 3030, *conf'd*, 33 PERB ¶ 7020 (1997), *motion to appeal denied*, 34 PERB ¶ 7022 (1998).
40. 28 PERB ¶ 3044 (1995).
41. Section 414 of Chapter 55 of the Laws of 1992 states:

    > Notwithstanding any other provision of law, the chief administrator of the courts may authorize the use of mechanical recording of testimony and other proceedings in each cause, in lieu of the taking of stenographic minutes thereof, in: (i) Surrogate's court in any county; and (ii) the court of claims.

42. *Bloom v. Crosson*, 183 A.D.2d 341 (3d Dep't 1992).

Philip L. Maier is the Regional Director for the New York City office of the New York State Public Employment Relations Board. He also serves as Administrative Judge and Chief Regional Mediator for the agency. He is a graduate of Vermont Law School.

Health Care Crisis? What's New?

By Stephen F. O'Beirne

In May, 2005, the New York City Chapter of the Industrial Relations Research Association (now known as the Labor and Employment Relations Association or "LERA") hosted a panel discussion on negotiating health benefits. The panel had two management representatives, Michael Bernstein of Bond, Schoeneck & King and Clifford Chaiet of Naness, Chaiet & Naness; and two labor representatives, Robert Croghan, President of the Organization of Staff Analysts and Franklin Moss of Spivak, Lipton, Watanabe, Spivak & Moss. Stephen O'Beirne was the moderator and has rendered the following faithful summary of the proceedings.

The issues involved in negotiating health care benefits have grown quite complex, as unions and employers struggle to keep pace with exponentially rising costs and an increasingly competitive global economy. Luckily, the panelists had over 100 years of negotiating experience among them. And while they may not have provided bright-line solutions, they did offer a wealth of insight into the challenges facing today's negotiators.

In an attempt to focus the discussion, I began by posing a hypothetical based on a true story. When I was a young man growing up in the Bronx, I worked at a hot dog/pizza stand on Fordham Road called Snack Happy. The bargaining unit employees at Snack Happy were represented by a small retail clerks' union whose name I have long forgotten. Perhaps because of my facility with frankfurter tongs, my co-workers chose me to serve on the negotiating committee. I remember once asking the owner of the store, Murray, whether he would be willing to include a dental plan in the new contract. Murray's answer, which has become legend in the annals of labor negotiations, was, "I've got a dental plan for you kid—chew on the other side of your mouth." We've come a long way since those dark days of health care negotiations, where today we have a seemingly endless stream of options to consider in structuring a benefits package, each with its advantages and disadvantages, and each with its costs.

By virtue of a shrewd investment strategy, and the magic of make-believe, I have recently acquired ownership of Snack Happy. My bargaining unit consists of approximately 25 pizza makers, hotdog wrappers, bun warmers and knish cutters. It includes the young and the old, some with pre-existing conditions such as cancer, kidney disease and AIDS, and many with dependent children and spouses. There is an existing collective bargaining agreement which provides head-to-toe coverage for all employees, spouses, dependents and domestic partners, through a multi-employer Taft-Hartley fund with no co-payments, no deductibles, and no employee premium contributions. The contract has equally generous benefits for retirees. Although I believe I have assumed a collective bargaining obligation through my purchase of the business, I have been advised I do not have to assume the obligations of the collective bargaining agreement, which had expired several months before my purchase.

I want to do the right thing by my employees, but I also want to ensure that Snack Happy remains profitable in the increasingly competitive world of fast food. I have asked this team of experts to assist me in obtaining that loftiest of goals: the win/win solution.

Wisely ignoring my hypothetical, Michael Bernstein started us off by urging everyone to keep an open mind. He suggested soaring health care costs were caused by a multitude of factors, and that there was plenty of blame to go around. In an attempt to set the tone of the discussion, he posed the following series of questions:

- Do you believe there is no real health crisis in the United States, i.e., it's business as usual?
- Do you believe the problem in this country is that we don't spend enough on health care?
- Do you believe the United States health care system is not cost-effective because of any one factor in particular, e.g., employers' refusal to bear a greater portion of the cost? Would your thinking change if you owned or managed a business or business unit?
- Do you believe what you as an individual may want or need in terms of health care protection may differ from what I may want or need?
- Do you believe you should play a significant role in determining your health care protection? Do you believe other individuals should play a significant role regarding their protection? Or do you believe most of us are not sufficiently qualified or experienced to make those determinations for ourselves?
- Do you drive a sports utility vehicle?
- What is your reaction when you see a twenty-second tape of landlord/tenant hearings on rent increases on television? Would your thinking change, depending on whether you were a landlord or a tenant?

- Would you like to be able to pick your health care benefit options?
- Do you believe one who adopts an ownership role is more or less likely to end up with a more cost-effective approach to health care that is more tailored to his or her own particular needs? Do you believe you are more likely to pay greater attention to your health care choices the greater cost to you?
- Do you believe you are more likely to play a more proactive role in treating your own malady (e.g., cancer, diabetes, obesity, asthma, depression, congestive heart failure) if your health care program discounted your costs based upon your doing so? Do you believe those who choose not to do so, despite their maladies and the options available, should pay a premium?

Mr. Bernstein suggested these questions were both relevant and necessary to how the discussion evolves, even before the parties step into the negotiating room, and questioned whether once in the room, people's perceptions could be changed.

Organization of Staff Analysts President Robert Croghan began by answering the first of Mike Bernstein's questions, stating that union representatives were well aware of the seriousness of the problem concerning health care costs. He also suggested that union members were, by necessity, becoming more aware of the problem. He noted that several municipal labor unions have had to increase the co-pay members are required to pay for prescription drugs and doctor visits. Also, many municipal benefit plans now require participants to purchase generic versions of drugs and/or obtain their prescriptions by mail order.

Departing somewhat from Mike Bernstein's assertion, Mr. Croghan maintained that the crisis in health care could be traced to one overriding factor: the dramatic increase in the cost of prescription drugs. He noted this was nothing new, recalling a Municipal Labor Committee conference in 1989 that drew an overflow crowd of union representatives he described as terrified by the ever-increasing cost of drugs. He also noted that the big pharmaceutical companies spent inordinate amounts of money on marketing (as opposed to research and development) and opined that they have become quite proficient at handling government entities charged with regulating them. According to Mr. Croghan, collective bargaining negotiations have been totally skewed by the disproportionate impact of high drug prices. He cited as an example the recent negotiations between the City and the Municipal Labor Committee to save PICA, the benefit program that provides psychotropic, injectable, chemotherapy, and asthma drugs to City workers.[1]

Management Attorney Clifford Chaiet echoed Bob Croghan's assertion that the crisis in health care was nothing new. He quoted a 1990 labor and employment law article bemoaning the steep rise in health costs, and forecasting increased pressure on employees to assume more of those costs and on health funds to trim benefits. He suggested that what might be new is that skyrocketing costs may now be causing those outside the negotiating room to sit up and take notice.

In reality, according to Mr. Chaiet, small- and medium-sized employers have little or no ability to affect a multi-employer Taft-Hartley fund. He described a typical negotiation wherein the union representatives present the dollar amount the fund's actuaries forecast is needed to maintain benefits. The employer representatives are told this is the amount they will have to pay, and the parties move on to discuss the remaining contract issues. While conceding that larger employers may have more ability to influence a Taft-Hartley fund, he said the result is more properly characterized as lose-lose rather than win-win, as employers' costs increase and employees' benefits decrease.

Franklin Moss agreed that both sides of the bargaining table have been talking about a crisis in health care since at least the late 1980s or early 1990s. He said the parties were able to work through that crisis for essentially two reasons. First, although Hillary Clinton's attempt to reform the United States health care system in the early 1990s failed, it did have the effect of shining a spotlight on the health care industry. As a result, "big medicine" was forced to moderate its price increases for about five years. He suggested this is no longer the case, as evidenced by annual increases in drug costs averaging approximately 15 to 20 percent, and in hospital/doctor visits averaging about 12 to 15 percent. Assuming patterned wage increases of three to four percent, this means inflation in medical costs at roughly four times that of wages. Second, at least as it concerns Taft-Hartley funds, the parties have previously been able to amend their collective bargaining agreements to divert money from pension funds, which were relatively healthy due to the stock market boom. However, since the stock market collapse of 2001-2002, the parties no longer have that luxury. Indeed today, there is a crisis in pension funds, with many unable to meet the minimum funding standards of ERISA.[2]

According to Mr. Moss, the reality today is that the negotiating parties are under tremendous pressure to divert money that might otherwise be used for pay increases to the health funds. And there is concomitant pressure on the fund trustees to reduce and/or eliminate benefits. This obviously fosters resentment from employees. But in his view, employees benefit far more from every dollar spent on health care as opposed to wages, if only because of the tax consequences. More-

over, employee participants benefit from the funds' significant bargaining power, which helps secure far better rates than individual health insurance policies. He concluded by reiterating that there was indisputably a crisis in health care in this country but said he was unsure of what the answers were.

At this point in the discussion, an audience member questioned whether the collective bargaining process was up to the challenge. He asked why an employer such as General Motors, faced with an aggressive union and a defined benefit contribution plan (which he characterized as "the worst thing in the world" from an employer's perspective) wouldn't simply pull a "United," i.e., file for bankruptcy, scuttle the collective bargaining agreement, and eliminate, or at least significantly reduce, the company's obligation to provide fringe benefits to its employees. Another audience member also suggested that any solution to the crisis was beyond the power of labor and management. In his view, the big pharmaceutical companies were calling the shots in the United States. He cited the recent Medicare prescription bill prohibiting Medicare from negotiating drug prices as evidence that the government was beholden to the drug companies. He predicted that without a united effort to rein in the pharmaceutical industry, the parties would continue to spin their wheels at the negotiating table.

I believe this was when I began thinking that, notwithstanding my earnest desire to continue providing comprehensive health benefits to the Snack Happy staff, and my lifelong commitment to providing high quality fast food at an affordable price, the people of the Bronx might be better served if I were to simply bulldoze the store and convert the property into a multi-tier parking lot.

But just as it seemed all was lost, Mike Bernstein offered a ray of hope. He said the crisis in health care had necessarily led to creativity in terms of plan options, many of which were just beginning to develop. He conceded that many of these new plans have had limited track records, but noted that there have been some promising signs.[3] Most, if not all, of these new plans are predicated on the belief that employees have to assume more responsibility for, and/or ownership of, their health insurance plans. Mr. Bernstein said the parties need to continue to explore these options, with an emphasis on using pre-tax dollars and improving communication. But he cautioned that the discussion was not just about money but about heath care. He envisioned companies building retention and recruitment programs around their health care plans.[4]

Franklin Moss singled out one such plan option—the health savings account—for analysis. In his estimation, these accounts have not been very successful. He said that although the Bush Administration has been pushing this type of plan, only three-tenths of one percent of the population is covered by them. He conceded that their tax advantage concept could be attractive to younger/healthier individuals, but he warned that someone who faced a chronic illness could face bankruptcy.[5] He agreed with Mike Bernstein that there were any number of plan options out there, but cautioned that each has its drawbacks.

Another option Mr. Moss cited is the high deductible plan model,[6] which he suggested was tantamount to a two or three thousand dollar pay cut for the average worker (such high deductible plans are often combined with a health savings account). To make matters worse, the dollars spent by the employees are after-tax dollars. And the reality is that employees who have to pay significant co-pays and deductibles simply will not go to the doctor.

Bob Croghan advised the parties to be vigilant when dealing with so-called ownership plans because they tend to lead to adverse selection, with younger and healthier employees shouldering less of the burden than the elderly and the infirm.[7]

Admitting he did not have a solution to the overall crisis, Clifford Chaiet warned that, given the competitive global economy, it is inevitable that employees will be forced to pay more for their health costs, whether in the form of reduced benefits, increased co-payments, higher deductibles, lower wages, or some combination thereof. Otherwise, employers faced with mounting health costs might be forced to turn to more unpalatable options like outsourcing and relying more on temporary workers and independent contractors.

Conclusion

The panelists agree there is a crisis in health care, albeit one that has been building for the past 15 to 20 years. They also seemed to agree that the skyrocketing costs will continue to have a disproportionate impact on collective bargaining for the foreseeable future. But other than Mike Bernstein, the panelists did not express much optimism about reaching a solution to this national problem. It seems for now the parties are destined to return to the bargaining table and continue to allocate resources according to their priorities. There will be continued pressure on funds to cut benefits and on employees to assume greater responsibility for costs.[8] There may even be a concerted effort by the parties to seek a political solution.[9]

As for my Snack Happy employees, my wife has a cousin who practically finished medical school in Cancun several years ago. So for now, I'll be doing all of my stuff in-house. Regrettably, I will also be forced to eliminate the ten percent discount for LERA members.

Endnotes

1. Under an agreement announced on April 5, 2005, the City will continue to provide injectable and chemotherapy drugs through its Health Insurance Stabilization Fund. Co-payments will increase from $5 to $10 for all generic injectable and chemotherapy drug prescriptions; from $15 to $25 for brand name drugs on the plan's preferred list; and from $35 to $45 for other brand name drugs. Effective January, 2006, there will be an annual deductible of $100 per person. From July 1 through December 31, 2006, the City will be relieved of its obligation, agreed to in an earlier contract, to contribute $65 per month to the Health Stabilization Fund, but will be required to make a $100 per person contribution to the union administered welfare funds. Source: N.Y. Civil Service Leader, 4/15/05.
2. For insight into just how precarious this country's pension plans are *see The End of Pensions*, New York Times Magazine, October 30, 2005, p. 56.
3. The January 26, 2005, Daily Labor Report provides an excellent survey on developing trends in health care negotiations, and includes a description of various plan models available. The National Center for Policy Analysis web site also provides useful publications regarding some of the newer insurance plan models.
4. A recently discovered internal memorandum from Wal-Mart's executive vice-president for benefits to the company's board of directors seems to turn this idea on its head. In the memorandum, the vice-president expresses concern that the generous benefits the giant retailer provides to its workers may cause employees to stay with the company longer. This results in higher labor costs since the benefits package for an employee with seven years of experience is approximately 55 percent more than an employee with one year of tenure, although there is no difference in their productivity. The memorandum proposes incorporating physical activity into all job descriptions and promoting health savings accounts in an effort to dissuade unhealthy people from coming to work at Wal-Mart. *See Wal-Mart Memo Suggests Ways to Cut Employee Benefit Costs*, New York Times, October 26, 2005, p. C1; and *Everyday High Health Costs*, New York Times, October 29, 2005, p. C1.
5. For a sobering account of the financial impact chronic illness can have on a family, *see When Health Insurance Is No Safeguard*, New York Times, October 23, 2005, p. A1.
6. *See A New Health Plan May Raise Expenses for Sickest Workers*, New York Times on the Web, December 6, 2001.
7. Adverse selection typically occurs when high-risk individuals (older and/or sicker) buy health care coverage and low-risk employees do not, or when those who are at high risk select plans with generous benefits and low-risk individuals select plans with limited coverage. Those in the high-risk group utilize more plan services, driving up the premiums. Since there are fewer healthy people in the generous plan to offset its costs, the plan becomes unaffordable. Source: AFSCME Publications at research@afscme.org.
8. Cf. *Demands for Labor Givebacks Grow More Aggressive*, Wall Street Journal, October 27, 2005, p. A1.
9. For an example of one such effort, see the Universal Health Care Action Network website, *available at* www.uhcan.org.

Stephen O'Beirne is a labor and employment arbitrator.

For Your Information

Our former Newsletter editor, **Judith LaManna Rivette,** has published her third book, "State Fair Stories: The Days and People of the New York State Fair." It is a history and reminiscence of the Fair told by Judith and others who shared their memories with her. You can reach Judith at www.solvaystories.com.

The Nassau County Bar Association's Committee on Labor and Employment recently announced that **B. Frank Flaherty** was the 2005 recipient of the Professional Achievement Recognition Award. The Committee established this award in 2001 to honor its members who "through service and professional accomplishments have brought honor and esteem to the organization and our Profession."

Jay M. Siegel, formerly of Shaw & Perelson, LLP, has started his own labor and employment arbitration and mediation practice. Jay can be reached at jaysiegel@optonline.net.

Legal Ramifications of the PEO/Co-Employer Relationship

By Louis Basso

Introduction

The Professional Employer Organization (PEO) industry has become a significant force in American business. Today, an estimated 700 PEOs offer a wide array of employment services and benefits for companies in 50 states. Anyone who still isn't convinced should know that PEOs annually generate an estimated $43 billion. While still predominantly a tool for smaller, growing businesses, the PEO concept is now recognized and utilized by businesses of varying sizes, corporate structures and industries. Regardless of their differences, many organizations recognize the benefits derived from outsourcing various human resource and employee-related functions such as employee benefits, payroll and tax administration, workers' compensation and regulatory compliance. In addition to the growing endorsement of PEOs as an effective HR outsourcing resource, this concept is also being embraced by other professional sectors such as the American Society of Pension Actuaries (ASPA), which demonstrated its support in a letter to Congress pertaining to PEO legislation then pending.

In letters to Senator Bob Graham and Representative Benjamin L. Cardin, bill sponsors of The Professional Employer Organization Workers Benefits Act of 2001 (i.e., S. 1305 and H.R. 2807, respectively), the ASPA's Brian H. Graff wrote, "Professional employer organizations represent an innovative way to deliver retirement benefits to many small business employees without any retirement plan coverage." In the continuation of Mr. Graff's letter, he called for the legislation to be passed explaining, "However, there are a number of current legal uncertainties that prevent small businesses from taking advantage of the retirement benefits provided through PEOs. S. 1305/H.R. 2807 clarifies these uncertainties in a way that fully protects the interests of rank-and-file small business employees. In doing so, S. 1305/H.R. 2807 will not only expand small business retirement coverage, it will encourage quality small business retirement plan coverage."

Even before the Enron and Worldcom scandals rocked the nation and the impacts on their employees' retirement funds was reported, there had been great concern for how worker benefits were being managed and protected. Within the health insurance arena, there has been growing anxiety about how businesses could continue to sustain the increases being passed on by the insurance carriers. The small business segment, in particular, has become troubled. In its annual report on employer-based insurance, the Kaiser Family Foundation reported that 45 percent of employers with three to nine workers now offer no health benefits and current estimates place the number of Americans without health insurance at a sobering 40 million.

Affordable benefits are one of the primary reasons businesses enter into a relationship with a PEO. Understanding all of the incentives for the PEO relationship, the associated responsibilities of the PEO and affiliated company, the nature of the co-employer relationship and the legal issues pertaining to PEOs, is a must for all attorneys, corporate counsel and general counsel, who may be asked to provide advice on this prevalent business strategy.

Defining the PEO

As previously noted, PEOs are organizations that serve other businesses as an extension of their management, functioning as the Human Resources administrative arm. The PEOs' affiliated companies (i.e., their clients) outsource their payroll administration, tax filings, employee benefits (including health and life insurance, workers' compensation and unemployment insurance), regulatory compliance and related risk management functions. Additionally, the PEO provides other value-added services such as: tuition reimbursement plans, scholarship programs, adoption services, discounts for shopping, travel and entertainment and fitness clubs and employee assistance programs (EAPs).

Clearly, there are benefits to be gained from the PEO relationship. They enable a business owner and management team to focus on day-to-day operations and the company's growth and development rather than administrative tasks for which they are typically ill-prepared. A PEO relationship provides peace of mind regarding regulatory compliance and adherence to the complex and extensive array of workplace legislation. In view of how litigious the workplace has become, it is imperative that all companies be cognizant of the various laws governing the workplace. It is no longer sufficient that companies have a general understanding of common law. There is now a long list of employment and labor laws covering every aspect of operations, employer-to-employee relations and employee-to-employee relations.

The list of statutes governing the workplace, including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), Consolidated Omnibus Budget Reconciliation Act (COBRA), Employee Retirement Income Security Act (ERISA), Fair Labor Standards Act (FLSA), Family and Medical Leave Act (FMLA), National Labor Relations Act (NLRA), Occupational Safety and Health Administration Act (OSHA), and various state and local laws, is long and ever-increasing. Keeping up with the changes is difficult and burdensome for many employers. Failing to comply, however, doesn't come cheap as anyone who has faced a discrimination suit or sexual harassment claim and the associated litigation, or a penalty levied by a regulatory agency such as OSHA, can attest. Employment Practices Liability Insurance (EPLI) notwithstanding, the best route to avoid costly litigation is to promote a lawful workplace, a responsibility assumed by the PEO.

Perhaps the most compelling reason why businesses contract with PEOs is their ability to provide attractive, cost-effective employee benefits. The employee benefits package, as we all know, is an important tool for attracting and retaining the best employees. Without a sound benefits package, many small businesses simply could not compete with their larger competitors. In this way, the PEO serves as an equalizer. They provide high-quality, flexible benefit options to their clients at affordable costs leveraged through the economies of scale realized from the larger labor pool of their combined clients' employees.

Statistics that Add Up

All told, businesses gain measurable benefits from using a PEO. Consider these industry figures:

- A national survey commissioned by the Society for Human Resource Management Foundation found that nearly 9 in 10 PEO clients said that having a PEO significantly reduced their time demands. Small businesses with one to nine employees saved an average of seven hours weekly. Their larger counterparts with 50-99 employees saved an average of 23 hours per week.
- That same study reported that 68 percent of PEO clients realized significant savings. When you consider that, based on a study by the Small Business Administration (SBA), the typical small business spends about $2,000 per employee for tax and workplace regulatory compliance, that figure is considerable. Placed in the context of the fact that small businesses (i.e., those with less than 20 employees) spend 60 percent more per employee than larger firms for federal regulation compliance and twice as much for tax compliance, the savings are even more dramatic.
- Approximately 40 percent of businesses engaged in a PEO relationship are able to enhance their employee benefits package.
- The National Association of Professional Employer Organizations (NAPEO) reports that 84 percent of small businesses served by a PEO are able to offer their employees a 401(k) plan, in stark contrast to the drop from 28 percent to 19 percent of non-PEO served clients able to provide this employee benefit.

The PEO as Co-Employer

From a legal standpoint, the PEO becomes a co-employer, assuming various responsibilities and risks. Simply stated, the PEO's responsibilities can be broken down as follows:

- Assuring compliance with all workplace legislation;
- Overseeing and implementing the general aspects of the employer's role such as managing employee payroll, taxes and workers' compensation coverage; and
- Administrating employee benefit programs (i.e., retirement plans; cafeteria and health plans; life, disability, accidental death and dismemberment insurance; credit unions; fitness club membership; child care programs; college tuition reimbursement programs; travel and entertainment benefits; etc.).

Clients' responsibilities in this relationship can be generally assigned as follows:

- Managing their company's day-to-day operations and production;
- Determining employees' daily work assignments; and
- Providing employees with supplies, furnishings and equipment necessary for their various tasks.

There are also some responsibilities which are shared between the PEO and client and which pertain to various legal and fiduciary responsibilities. How these are allocated depends upon the governing body and jurisdiction.

The New York Professional Employer Act

On September 24, 2002, Governor George Pataki signed into law the New York Professional Employer Act. The legislation, which was sponsored by Senator

Dean Skelos, R-Rockville Centre, and Assemblyman Paul Tonko, D-Amsterdam, requires PEOs operating in New York to be registered with the New York State Department of Labor. This law prohibits unregistered organizations from referring to themselves as professional employer organizations, PEOs or other terms associated with the profession (e.g., staff leasing company), or from acting as a PEO within the state.

To register, an organization must provide certain information to the Department of Labor, including reviewed financial statements accompanied by a cover letter from an independent certified public accountant (CPA) attesting to the fact that the PEO has satisfied minimum net worth requirements. The Act also contains bonding and reporting requirements. All PEOs currently operating in the state must complete their initial registration within 180 days after the Act becomes law. Thereafter, renewals are required annually. PEOs must also provide a statement prepared by a CPA within 60 days after the end of each calendar quarter, attesting to the fact that the PEO has paid all federal and state payroll taxes on a timely basis.

In light of this legislation, which is hailed as a major milestone for the PEO industry and the thousands of businesses it serves, the broader use of this form of outsourcing is expected. Through its stringent registration requirements, it removes what may have been the last barrier to businesses' contracting with a PEO. Specifically, it provides businesses with evidence of an organization's financial and professional integrity. Moreover, the registration process alleviates the possible concerns regarding a relationship where trust and integrity are paramount.

Louis Basso is President of the Alcott Group (www.alcottgroup.com), a Professional Employer Organization (PEO) with offices in Farmingdale, NY and Buffalo, NY. Mr. Basso recently received the Small Business Champion award from the National Federation of Independent Businesses (NFIB) in recognition of his advocacy on behalf of small businesses. An active member of the PEO industry, Mr. Basso has served as NAPEO Vice President, President-Elect, President and Chairman of the NAPEO Federal Legislation Committee. Today, he remains an active member of the NAPEO Board of Directors and ESAC and serves as President of the New York Chapter of NAPEO. In 1999, Mr. Basso was awarded NAPEO's prestigious "Michaeline A. Doyle Award" for his consistent demonstration of leadership in the PEO industry, and exemplary performance of his duties in association with the PEO industry on both a regional and national level. Mr. Basso was also named a Delegate to the National Small Business Summit.

ERRATA

We regret that we inadvertently omitted an attribution in the last issue. **James M. Rose,** the author of the article entitled "Administrative Hearing Rules: Are There Any?," is an attorney in White Plains who has been practicing labor law for over 25 years. He is a former adjunct professor at Pace University School of Law and the Cornell School of Industrial and Labor Relations. He is an editor of the *Westchester Bar Journal*.

Ethics Matters

By John Gaal

Q I am representing a plaintiff in an employment case and I have had no success in getting my opponent to even begin discussing settlement. Although I think my client's case has both merit and value, my client is very open to a reasonable settlement at this particular time, if only I could get my opponent's attention. I do know that the defendant employer has insurance coverage for this case. I have the name and phone number of the adjuster handling the matter for the carrier and I was wondering if it would be permissible for me to speak directly with the adjuster to try to settle the case?

A As I am sure you know, it is not permissible for a lawyer to communicate with a represented party without the consent of that party's attorney. DR 7-104(A). It doesn't matter that the opposing party is willing to speak directly with counsel; only the party's attorney can waive this prohibition against contact.

In employment cases involving a corporate defendant, a frequent question is whether various individuals associated with that corporate defendant are also considered represented by virtue of the corporation's representation. Under New York law, for example, certain employees of the corporation, generally those who can bind the corporation, are deemed represented as a result of the corporation's representation. As a result, opposing counsel may not engage in ex parte communications with those individuals without the consent of the corporation's counsel. On the other hand, former employees of that corporation are not usually considered represented simply because the corporation is represented, and direct ex parte contact by opposing counsel with former employees is generally permitted.

In your case, the question is whether the corporate defendant's insurance carrier is deemed "represented" because the corporation is represented. In some states, when a lawyer is appointed by an insurance carrier to represent an insured, the lawyer is automatically deemed to represent both the insured and the carrier. That is not the case in New York. Instead, even when a lawyer is appointed to represent a client under an insurance policy, that lawyer is deemed to represent only the insured, unless the lawyer specifically undertakes a dual representation (which is fraught with its own problems). *See* NYSBA Formal Opinion 721.

Consistent with this general rule, the Committee on Professional Ethics of the New York State Bar Association recently reaffirmed that a lawyer representing an insured is not, as a result, also considered the attorney for the carrier. Thus direct communication between a plaintiff's attorney and the defendant's insurance adjuster in those circumstances is not prohibited under DR 7-104 and the corporate defendant's consent to such discussions is not necessary. NYSBA Formal Opinion 785. Unless there are additional facts at play here, you may directly communicate with the adjuster.

Of course, if you know that the insurance carrier is represented by its own counsel with respect to the matter at hand (i.e., someone other than the corporate defendant's counsel), then the consent of that attorney will be necessary before you can directly communicate with the adjuster. While you may not have an affirmative obligation to investigate that issue, it is advisable to make that inquiry of the adjuster at the start of your discussions. *See* NYSBA Formal Opinion 663 ("This Committee has previously found that, in some circumstances, a lawyer must confirm that an individual is not represented by counsel in the particular matter before communicating directly with that individual. For example, where a party was known at one time to be represented, but it is reasonable to question whether there is continued representation, 'a lawyer must undertake a complete and thorough inquiry to determine the ultimate fact of existing or continuing representation' before communicating directly with the opposing party. N.Y. State 663 (1994) (where opposing party claims to be represented by counsel, but the putative lawyer fails to respond, a lawyer may communicate directly with the party only after a complete and thorough inquiry into the question of whether the party is represented); *cf.* N.Y. State 650 (1993) (lawyers staffing corporation's 'help line' telephone as part of corporation's 'compliance with the law' program are correctly 'require[d] to inquire if the caller is represented by counsel in the matter about which the caller is reporting'); N.Y. State 607 (1990) (lawyer representing person injured in an automobile accident who has no information whether the driver is represented may send correspondence to the driver, but must inform that party to refer the documents to counsel if the party is represented.).")

In addition, even if you don't make an explicit inquiry, you should caution the adjuster that if in fact the carrier is represented in connection with this matter, you should be referred to that counsel. *See* NYSBA Formal Opinion 607. Moreover, if in the course of your discussions with the adjuster you are put on notice, directly or even indirectly, that the carrier is represented by its own counsel, you will have to end those discussions

until that attorney's consent to continue is secured. Even if the adjuster has not explicitly indicated that the carrier is represented, you cannot ignore indications that that is the case. And, although if not represented you may communicate directly with the adjuster, you may not offer "advice" to the adjuster, other than the advice to secure counsel. DR 7-104(A)(2).

Finally, in talking with the adjuster, you need to be careful that you do not elicit confidential information from the adjuster. As the Bar Association's Committee on Professional Ethics observed in Formal Opinion 785, much of what is contained in the adjuster's file on this case is likely to be privileged information (either as attorney-client privilege or as work product), and attempts by you to elicit such information would be inappropriate. Again, while not required, you would be well advised to make it clear to the adjuster at the start of your discussions that you are not seeking any confidential information and that he or she, in having these discussions, should take care not to impart any.

John Gaal is a member in the firm of Bond, Schoeneck & King, PLLC, in Syracuse, New York, and an active Section member. If there is a topic/ethical issue of interest to all Labor and Employment Law practitioners you feel would be appropriate for discussion in this column, please contact John at (315) 218-8288.

This article tied for third place in the Section's annual Dr. Emmanuel G. Stein Student Writing Competition.

America Should Be Outraged! Employment Discrimination Against the Hardest Working, Lowest Paid and Most Indispensable Workers in the Country: Farm Laborers

By Norah K. Mallam

I. Introduction

> *In 1995 David and I worked at a beef farm outside of Bridgeport, N.Y. We stayed there for almost 3 years. David received $210 per week and a good home. He worked from 4:30 a.m. to 6 p.m. every day of the week including Saturday and Sunday. Sometimes he had time off to get breakfast and lunch, but not if they were doing hay. So his hourly pay came out to less than $3 per hour. He worked this schedule for 3 years with no day off. He had Workers' Compensation at this job, but no sick days. So when he got hurt—kicked in the face by a cow—he still worked. David took a half day off a week later to go to the doctor and they docked his pay. When he severed his wrist on a machine and was taken to the hospital for reconstructive surgery he was out of work for three days and they docked his pay. On many dairy and beef farms, the barn is near your house so you can use the toilet in your house, but sometimes, like on this farm, the barn is not close. On this farm, one of the barns was 4 miles away so as most workers can tell you, we go to the bathroom in the gutter.*[1]

The above testimony given by Linda, at the January 2000 Senate Hearings on Farmworkers in Albany, N.Y., provides a sobering introduction to the horrific working conditions experienced by migrant workers across New York State and the entire country. The conditions Linda speaks of—hourly wages well below the state mandated minimum wage, seven-day workweeks, and a lack of toilets or clean water near the work site—are merely several of the atrocities farmworkers face every day. Many farmworkers are also denied the right to collective bargaining or overtime pay or unemployment and disability insurance. They also frequently face exposure to unsafe pesticides, as well as unsafe transportation and unsanitary housing. These are working conditions normally associated with developing Third World countries, not with the richest country in the world, and certainly not with a multi-billion dollar industry.[2]

Without the work done by farmworkers, millions of Americans would not be able to buy fresh fruits, vegetables and milk every day. Despite the critical role farmworkers play in the U.S. economy, they continue to be subjected to substandard working conditions, excluded from labor laws, and in some cases are even treated as slaves. For nearly half a century, advocates have fought for better working conditions for farmworkers, often to no avail or with little success. Experts seem to agree that the farmworker today is no better off than he was 30 years ago, and he may even be worse off today than at any other time in history.[3]

Before it is possible to comprehend the injustice and discrimination farmworkers face, it is necessary to understand who farmworkers are today and how they contribute to the agricultural industry. Farmworkers labor on dairy farms, beef farms, cultivate and harvest fruits, nuts, vegetables, and horticulture and field crops, for both market and storage.[4] Traditionally, there have been three categories of farmworkers: migrant, seasonal and guestworkers.

Migrant farmworkers live in temporary housing and travel more than 75 miles during the year to follow crops.[5] Approximately 900,000 adult and 400,000 child migrant farmworkers live in the U.S. today.[6] Migrants follow various streams, usually starting in California, Texas or Florida, and then move north to follow crops from various harvests.[7] Unlike migrants, seasonal farmworkers reside in one place and work for the season.[8] Approximately 44 percent of all farmworkers in the U.S. are seasonal workers.[9] The third category of farmworker, the guestworker, comprises the smallest percentage of farmworkers in the U.S.[10] Guestworkers are foreign workers who are permitted to work in the U.S. under the H2-A program. They are bused directly from their home countries to the farm where they work and then are returned to their home country when their contract is over.[11] The U.S. Department of Agriculture estimates that there are now a total of two to three million farmworkers in the U.S.[12]

Although there are millions of farmworkers across the country, the vast majority are invisible to most Americans,[13] and few of us ever consider where the fresh fruits

and vegetables that we buy at grocery stores come from. As Deborah Miller, Director of the Migrant Education Outreach Program in Cortland, New York, observes, people "don't think of how their food gets from the field to the table."[14] Janie, a migrant worker in New York State, echoes this sentiment saying, "most people don't even know we exist," and that she has encountered people who are "running the country who don't know about the migrant life."[15]

Nearly 90 percent of farmworkers in the U.S. today are of Latino or Hispanic decent and a large majority of these workers speak Spanish as their native language.[16] Fifty-two percent of farmworkers are married, 20 percent are women,[17] and as a group they are among the hardest working[18] and lowest paid in the country.[19] Sixty percent of farmworkers have incomes below the poverty level[20] and 70 percent of migrant children live in poverty.[21] Yet, while nearly all farmworkers live in poverty, as a labor force, they have been and continue to be "indispensable to the success of American Agriculture."[22]

Part II of this article will review the history of discrimination against migrant workers in the U.S. and Part III will look at why migrants have been—and continue to be—excluded from the majority of federal labor laws in this country. This section will also provide an analysis of the various governmental programs which have irreparably harmed farmworkers. Part III will focus on discrimination against migrant workers in New York State. This article will conclude, in Part IV, by offering suggestions for reform.

II. A Long History of Discrimination and Exclusion

I Rise
I rise above hate
I rise above race
I rise above being poor
I rise above having a handicap
I rise above no education
I rise above being picked on
I rise above all people who don't like me
I rise above injustice
I rise above not being equal
I rise above people talking about me
I rise
I rise
I rise!!!
By Jarvis Freeman[23]

For well over a century farmworkers have been rising above hate, racism, inequality and injustice.[24] Although today nearly 90 percent of all farmworkers in the U.S. are Latinos,[25] this has not always been the case.[26] Since the 1860s farmworkers have included various groups of people who have immigrated to the U.S. in hopes of finding a better life.[27] However, rather than finding a better life, many farmworker immigrants have instead been victims of serious abuse and discrimination.[28] Part A of this section will discuss federal labor laws that both exclude and protect farmworkers. Part B will examine federal government guestworker programs. In addition, this part will consider how governmental programs have prevented or hindered the improvement of working conditions for farm laborers.

A. Farmworker Exclusions and Protections Under Federal Law

During the progressive era of the 1930s, for most workers, especially industrial laborers, working conditions improved dramatically with the enactment of the New Deal legislation. The National Labor Relations Act (NLRA), which was passed in 1935, gave employees the right to collectively bargain for fair wages and better employment conditions.[29] Three years later the Fair Labor Standards Act (FLSA) established federal minimum wage standards, overtime pay, equal pay, record keeping, and child labor laws.[30] The Social Security Act and legislation providing unemployment and disability insurance were also enacted during this era.[31]

The New Deal legislation sought to improve working conditions and to enable workers to earn a livable wage. Senator Robert Wagner argued in favor of the NLRA on the grounds that it would help employees to negotiate fair terms and conditions. He claimed that ". . . the right to bargain collectively . . . is a veritable charter of freedom of contract; without it there would be slavery by contract."[32] Wagner also argued that he hoped to enable workers to earn "an income sufficient for comfortable living . . . " and to provide them with an "equitable share in our national wealth."[33] Although farmworkers were clearly one group of employees who were not being paid "an income sufficient for comfortable living," they were explicitly initially excluded from all of the major New Deal legislation. Since the enactment of the NLRA and the FLSA, farmworkers have slowly gained some labor rights and protections that are offered to almost all other workers, but many farmworkers are still lacking some of the most basic labor rights.

1. Farmworker Exclusion Under National Labor Relations Act

It has been argued that the right to organize is a fundamental human right.[34] Under the NLRA, employees in the U.S. are given the right "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."[35] However, section two of the NLRA excludes farmworkers from this basic human right by stating "that the term 'employee' . . . shall not include any individual employed as an agricultural laborer . . . "[36]

Ironically, when Senator Wagner first introduced the NLRA to Congress, the agricultural laborer exclusion was not part of the bill.[37] However, two months after it was first introduced, the agricultural laborer exclusion was included without an explanation as to why it had been added.[38] Although overall there is little evidence of debate about the addition of the agricultural exclusion in the minority report of the House Committee on Labor, Representative Vito Marcantonio argued vigorously against the agricultural laborer exclusion:

> there is not a single solitary reason why agricultural workers should not be included under the provisions of this bill. The same reasons urged for the adoption of this bill in behalf of the industrial workers are equally applicable in the case of agricultural workers, in fact more so as their plight calls for immediate and prompt action.[39]

Unfortunately, Representative Marcantonio's attempt to remove the agricultural laborer exclusion from the NLRA was defeated.[40]

Ultimately Congress cited "administrative reasons" for excluding farmworkers from the NLRA.[41] However, it is believed the real reason that agricultural workers were excluded was because farmers and growers vehemently opposed their inclusion in it.[42] Since 1935 attempts have been made to amend the NLRA so that it would include agricultural workers.[43] These attempts have failed, in large part, due to the extremely well organized and politically well connected farmer associations. In 1965 and 1966 the Senate Subcommittee on Migratory Labor held hearings on a proposed bill that would have provided farmworkers with the same rights as other employees under the NLRA.[44] However, this bill was defeated after the American Farm Bureau Federation (AFBF) argued against it.[45] The AFBF claimed that farmworkers should be treated differently than industrial workers because unlike industry, which may close its operations and wait a strike out, farms cannot shut down for a strike.[46] They argued that perishable crops must be harvested and cows must be milked or the farmer will be disastrously affected.[47] Further, Matt Trigs argued on behalf of the AFBF, that unlike the manufacturer, the farmer may not pass on the added costs of a strike to the consumer.[48] Rather, the farmer can only earn what the market will pay for his product and he must compete with other products not only in his own area, but also in other states and foreign countries.[49]

In contrast to the well organized and powerful farm organizations, farmworkers and their advocates have remained relatively unorganized and politically powerless.[50] Several factors have been blamed for farmworkers' lack of organization and lack of political power: racism,[51] a transient lifestyle, language barriers, general political inactivity, poverty and the need to focus on immediate survival rather than on long-term goals. These are all reasons why farmworkers have not been able to achieve more political clout and thus bring about reform in labor laws.[52] However, in several states farmworker advocates have overcome significant barriers and have successfully lobbied for collective bargaining rights for farmworkers at the state level.[53] Farmworker unions in California won major reforms for California's farm laborers: medical benefits, seniority and grievance provisions, increased wages, unemployment insurance and public awareness of the dangers of pesticides.[54]

It is important to note that the farmworker exclusion under the NLRA does not prohibit farmworkers from creating unions. Rather, the exclusion means that farmworkers are denied legal protections that are provided to other employees. Longtime farmworker activist Mary Ellen Beavers has explained the practical implications of the farmworker exclusion under the NLRA: "They can organize all they want to, but off with their heads. They hire new people the next day."[55] In other words, farm laborers may attempt to create and join unions, but they have no legal recourse if their employer fires them because of union involvement. Thus many farmworkers cannot risk joining a union and are therefore effectively excluded from the important protections that collective bargaining provides.

The Supreme Court has referred to the importance of collective bargaining on a number of occasions. In *Steel Foundries v. Tri-City Central Trades Council*, the Supreme Court noted that unions are "essential to give laborers opportunity to deal on equality with their employer."[56] Again, in 1937, in *NLRB v. Jones & Laughlin Steel Corp.*, a landmark case which upheld the constitutionality of the NLRA, the Supreme Court reasoned that employees' right to organize and select representatives is as "clear a right" as that of employers "to organize a business and select its own officers and agents."[57] It has also been argued that unions are "indispensable to a complex industrial society that adheres to democratic norms. Unions can help broker an equitable distribution of resources and rewards, serve as advocates for individuals and groups of workers, provide a bulwark against fear in the workplace and promote egalitarian values."[58] Further, Dolores Huerta, a founding member of the United Farm Workers Union in California, has observed that, "the only way workers can defend themselves from abuse is through a union. . . ."[59] The right to collective bargaining has become a fundamental labor right provided to almost all workers in the U.S. Other seasonal and temporary workers, such as resort and construction workers, are now protected by the NLRA.[60] It is outrageous that nearly 70 years after the passage of the NLRA, farmworkers continue to be excluded from its protections. Indeed, as author Maralyn Edid exclaims, "no rational reason exists

to deny farmworkers the benefits that attach to a vital union movement."[61]

2. Farmworkers and the Fair Labor Standards Act

"The people who feed us should earn enough so that they can nourish their own bodies."[62] Clearly, this statement should reflect reality. Farmworkers across the country should be able to earn enough to feed themselves, but the farmworker exclusion in the FLSA, which created federal minimum wage requirements, mandatory overtime pay, a 40-hour work week, and child labor laws, has made it almost impossible for farmworkers to earn a decent living to support themselves and their families. Sixty percent of farmworkers live below the poverty line, with the average farmworker earning $7,500 per year, and some migrant workers earning as little as $3,500 per year.[63]

Enacted in 1938, the FLSA attempted to create fair labor standards for employees. At Senate hearings for the FLSA in 1937, the U.S. Commissioner of Labor Statistics, Isador Lubin, explained that the purpose of the FLSA was to create:

> . . . a competitive system which gives to every business enterprise an equal opportunity in the struggle for existence by set[ting] the rules of the industrial game . . . it . . . determines the manner in which competition will take place. . . . It incorporates into law standards which, even though acceptable to the majority, could not be put into effect without governmental authority as long as a handful of men in any given industry refused to conform to them.[64]

However, despite its aim to give "every business enterprise an equal opportunity," the FLSA, when enacted in 1938, specifically excluded "any employee employed in agriculture . . . "[65] Further, the FLSA defined the term "agriculture" in an extremely broad manner, thus ensuring that the agricultural exemption applied to a wide variety of farmworkers.[66] Like the NLRA, the farmworker exclusion in the FLSA has historically been viewed as, "a necessary political compromise without which it would have been impossible to inaugurate a most important reform in American institutions."[67]

In 1966, after nearly three decades of relentless work by activists, some farmworkers were finally included in the minimum wage provision of the FLSA.[68] However, only "agricultural employers who employ more than 500 man-days[69] of labor in any calendar quarter of the preceding calendar year" are required to pay the minimum wage; all other agricultural employers are exempt from this requirement.[70] Thus, a number of farmworkers who labor on smaller farms continue to be excluded from federal minimum wage requirements. In addition, farmworkers continue to be exempted from overtime pay, which most other employees are entitled to for hours they work in excess of 40 hours in a given work week.[71]

3. The Migrant and Seasonal Agricultural Worker Protection Act

Enacted in January 1983, the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) sought to establish specific protection for migrant and seasonal agricultural workers and to remove "the restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers."[72] Under MSPA farm labor contractors[73] are required to register with the U.S. Department of Labor.[74] Theoretically if a labor contractor does not adhere to the MSPA, then the Department of Labor may issue fines or revoke the contractor's license. The MSPA requires agricultural employers to inform each worker in writing, in a language in which the worker is fluent, of all living and working conditions, including the location of work site, wages, housing facilities, transportation and insurance, the time period of employment, charges for the services provided, and any kickback arrangement between the farm labor contractor.[75] Employers are also required to post the employees' rights under the act in a "conspicuous place at the place of employment" and to keep payroll records for each employee. Further, the MSPA institutes safety standards for motor vehicles used to transport farmworkers.[76]

Although the MSPA attempts to protect farmworkers, it has actually done little to improve working conditions, and in some cases it has led to worse conditions for farmworkers. Part of the problem is that enforcing the regulations does little to stop farm contractors from committing abuses. Under the current laws, labor contractors may continue to employ farmworkers until they have exhausted the appeal process, which can take several years.[77] Further, even when the Department of Labor does revoke a contractor's license, it is easy for the contractor to reapply using the name of a spouse or relative.[78] Thus it is relatively easy for abusive operations to continue, even if the Department of Labor revokes a labor contractor's license.[79]

Another problem with enforcing the MSPA is the lack of funding the Department of Labor receives. Saul Sugarman, who works at the Department of Labor, maintains, "we don't have what it would take to really do the job. We use the equivalent of twenty-seven full-time employees to ensure compliance nationwide. It's a pittance. We're not a threat to anyone."[80]

However, an even greater problem than lack of funding lies in the political influence that farm associations have. Since the Department of Labor is a governmental agency, and since the growers and farmers are politically powerful, there seems to be pressure on the Department

of Labor to ignore violations of MSPA. As Sugarman observes, "No one in the Department of Labor has ever wanted to know what it would take to improve the situation of farmworkers. There's never been an interest in developing a long, continuous program that would help farmworkers."[81] Farmworker advocate Mark Schacht summarizes the enforcement problem, explaining that the Department of Labor in California " . . . has cited slightly over fifty growers in the last ten years for minimum-wage violations. This is astonishing. The industry has eighty thousand farms. We have cases for groups of workers involving hundreds of thousands of dollars in unpaid wages and the state can't seem to find these violations."[82]

On the other hand, farmers claim that it is impossible for them to comply with federal laws and regulations. Farm advocate Lily Whitely notes, "they do what they can and then they cross their fingers and pray, because you can't be in full compliance one hundred percent of the time."[83] Whitely further claims that labor contractors are subjected to too many regulations and that "if you make it impossible for a farmer to get labor or to hire labor, the industry will die . . ."[84]

One way farmers protect themselves from liability under the MSPA and other labor laws is by hiring contractors to provide them with farm laborers.[85] Sometimes there are several layers of contractors; for example, one may provide transportation, while another provides temporary housing, and another supervises workers in the field.[86] Although this protects the farmers from liability, it often leads to worse conditions for farmworkers because it forces them ". . . to become dependent on an informal, shadowy world that offers limited options and few protections."[87]

Contractors use several methods to avoid the laws that attempt to protect farmworkers. Some simply do not register with the Department of Labor. As one contractor explains, "the laws are only imposed on the contractors that are visible. The ones that are invisible continue to be invisible no matter what you do. The more laws you pass, the more difficult it becomes to comply with the law, the more contractors will become invisible."[88] Another way contractors evade the laws is by recording and paying the worker for fewer hours than he actually works. Under the law, farmworkers must now be paid at least minimum wage even if they are paid at piece rate,[89] and their total earning must not be less than the hourly minimum wage. Billy, a contractor in Florida, describes how contractors violate the law and cheat workers:

> Ninety-nine percent of all contractors break the law. They lie on the wages. If you work eight hours a day at four twenty-five an hour, that's thirty-four dollars a day you're supposed to make. If you only earned twenty-five, the contractor turns around and writes down that you worked six hours. If your workers can't make minimum wage, you've got to lie on your payroll.[90]

Contractors also cheat farmworkers by failing to pay taxes and Social Security for all of their workers. Manuel Gomez, a contractor in California, who estimates that he personally made $100,000 in profits one year,[91] claims that contractors "have to break the law" in order to make money.[92]

> Breaking the laws is the only way you can make decent money. . . . What we do is keep part of the payroll off the computer. . . . By keeping some workers off the computer we don't have to pay taxes or Social Security deductions. We pay the workers out of our pockets and keep the taxes we should have paid for their work. Deductions and taxes add up to a large percentage of the workers' wages. . . . if you bring a hundred people to the field you can hide the wages of ten or even twenty workers. If you pocket a hundred dollars for each of those workers you can make some money. . . . Of all of the contractors I know, there isn't one around here that's on the level. . . . Everyone knows we're doing this.[93]

When an employer fails to pay taxes and Social Security for a worker, the worker is then unable to qualify for unemployment insurance, disability insurance, workers' compensation and Social Security benefits. In some cases, the farmworker doesn't find out that the contractor failed to report him until years later when he tries to collect benefits.[94]

B. How Guestworker Programs Prevent Progress

The low wages and poor working conditions farmworkers experience are frequently blamed on an oversupply of labor and an endless stream of illegal immigrants. Guestworker programs, which have been equated to "legalized slavery," have prevented wages from rising, led to more undocumented workers in the U.S. and have created an indentured servant system.[95] Real reform will not be able to occur for farmworkers until the federal government ends guestworker programs.

The first major guestworker program was formed after an agreement between Mexico and the U.S. in 1942, and it allowed 400,000 Mexican workers to come to the U.S. to work on sugar beet farms in California.[96] Initially this program, which became known as the Bracero program, was only intended to exist during World War II because U.S. farmers were concerned about labor shortages resulting from domestic workers leaving for the

war.[97] Instead the Bracero program lasted from 1942 until 1964 and grew to allow more than four million foreign farmworkers to work in the U.S.[98] The Bracero program provided almost no protection to foreign workers, and in 1964, after the abuse workers experienced was exposed by the media, Congress refused to reauthorize it.[99]

The second major U.S. guestworker program was the H-2 program. Enacted in 1952 with the Immigration and Nationality Act, the H-2 program provided nonimmigrant visas to some foreign workers. Unlike the Bracero program, the H-2 program required that the Department of Labor certify labor contractors before they could bring in H-2 workers. In order to receive certification, the labor contractors were required to prove that U.S. workers were unavailable for the jobs, and that the wages and working conditions that were offered to H-2 workers would not adversely affect U.S. workers.[100]

In 1986, the Immigration Reform and Control Act (IRCA) replaced the Immigration and Nationality Act, and the H-2 program was replaced with the H-2A program.[101] The IRCA allowed undocumented workers who had lived in the U.S. for five years to apply for permanent residency. It also provided two year temporary residency, followed by permanent residency, to anyone who had worked for 90 days in agriculture during the previous year.[102] Although the IRCA was enacted in part to decrease the number of illegal immigrants coming to the U.S., it actually increased illegal immigration because significant numbers of friends and family members of the newly legalized workers immigrated illegally to the U.S.[103]

Today the H-2A program allows approximately 20,000 workers to enter the U.S. every year.[104] The H-2A program provides in theory, a number of protections to U.S. farmworkers and guestworkers.[105] In reality, few of these protections are enforced, and many guestworkers are unaware of the U.S. laws that protect them. Further, a study conducted by the U.S. General Accounting Office found that even when H-2A workers are aware of their rights they ". . . are unlikely to complain about worker protection violations . . . fearing they will lose their jobs or will not be hired in the future."[106] Another investigation revealed that "growers have threatened workers at gunpoint, refused them water in the fields, housed them in crumbling, rat-infested buildings where sewage bubbles up through the drains, and denied them medical care after exposing them to pesticides."[107] Further, it has been charged that the H-2A program has had the effect of turning "NAFTA inside out," in other words, "since U.S. farms can't go to the Third World, the federal government allows agribusiness to bring the Third World to U.S. farms."[108]

The H-2A program has not only created horrific conditions for guestworkers, but has also prevented wages from increasing for American workers. Although labor contractors are supposed to try to recruit American workers before the jobs may be filled by H-2A workers, the Department of Labor has done little to enforce this provision and after a labor contractor has been certified to use H-2A workers, he has no incentive to recruit U.S. workers.[109] Farmers argue that there would be a labor shortage without H-2A workers and that Americans simply will not do the work that is done by foreign farm laborers.[110] However, the United States General Accounting Office has reported that there is a surplus of agricultural labor in the U.S., and studies have found that "even at the seasonal peak in September, one-third of farmworkers are still not working in U.S. agriculture."[111] Author Daniel Rothenberg has observed that people would be outraged if a guestworker program was permitted in any other industry in this country:

> one can imagine the public response if convenience-store owners, automakers, construction companies, or fast-food restaurants were allowed to bring workers from the developing world into the U.S. to be housed and fed by their employers and promptly sent home if they complained.[112]

Although it would seem obvious that one way to help end the poor wages and poor working conditions experienced by farmworkers would be to end, or to at least to cut back, guestworker programs, President Bush has instead proposed the creation of a new, expanded temporary worker program that will not provide any of the protections workers are now entitled to under the H-2A program. Farmworker advocates are strongly opposed to the president's program, claiming that "he is essentially proposing a new era of indentured servants."[113]

The president's proposed plan would allow a temporary worker to obtain up to a three-year nonimmigrant work visa as long as he or she could find an employer who would participate in the program.[114] One major problem with this plan is that the labor contractor would control whether or not the farmworker may remain in the U.S.[115] Workers would be unlikely to complain about poor wages and working conditions for fear of being deported.[116] As Guillermo Meneses, spokesman for the AFL-CIO, explains, "guest-worker programs give the employers the upper hand. If I'm an employer and I know you're working for me, and if you stop working for me you have to go back to your country of origin, this opens itself up to abuses."[117] However, President Bush claims that the temporary worker plan will "create a system that is fairer, more consistent and more compassionate."[118] The president's intended outcome, however, seems unlikely, based on the results of previous guestworker programs. Further, the president's proposed Tem-

porary Worker plan is only supposed to provide temporary workers for jobs that "no Americans will take."[119] However, as Representative Thomas Tancredo notes, "with approximately eight to twelve million people unemployed in the U.S., there is no such thing as a job that no American will take." Rather:

> There is only a job no American will take for the amount of money the employer is willing to pay. If you can restrict the supply of this sort of labor . . . we could at least eliminate the downward pressure on wages that now exists as a result of the fact that we've got 8 [million] to 12 million people who are here illegally looking for any job they can get for any amount of money they can get. . . . For the sake of cheap labor the president is willing . . . to open the floodgate.[120]

Since 1942, with the advent of the Bracero program, federal guestworker programs have played a key role in preventing farmworkers from obtaining fair wages and improved working conditions. Although farmworkers continue to be the victims of severe labor abuses, the federal government continues to expand guestworker programs and thus continues to play a major role in preventing reform in this industry.

III. Discrimination Against Migrant Workers in New York State

When most people think about the abusive treatment of migrant and seasonal farmworkers, they usually think this injustice is occurring hundreds or thousands of miles away in Florida, Texas, and California. However, the truth is that some of the worst abuse of farmworkers occurs in our own state, practically in our own backyard. Every year approximately 47,000 migrant farmworkers and their families come to work in New York State from Mexico, Jamaica, Haiti, Guatemala, Honduras, Puerto Rico, the Dominican Republic and other U.S. states.[121] Farmworkers labor across the entire state, many working 12 hour days, 7 days a week.[122] Migrant and seasonal workers harvest fruits and vegetables in Long Island and the Hudson Valley; apples in the Champlain Valley; vegetables in central New York; and a variety of fruits in western New York: they also labor on dairy farms across the state.[123]

Farmworkers in New York are excluded from many state labor laws, including disability insurance, a day of rest, overtime pay and collective bargaining.[124] However, hard work and perseverance by advocates have led to some significant changes for farmworkers in New York in the last decade. In 1996 a law requiring drinking water for each worker was passed; in 1998 toilets were required near worksites; and in 1999 farmworkers in New York were finally guaranteed the same minimum wage as other workers in the state.[125] A Status Report by the Alliance for Farmworker Rights found that while "agriculture in New York is large and profitable . . . this thriving agricultural industry is dependent on farmworkers who live and work under conditions which are often compared with developing nations."[126]

In June 2002, farmworkers in western New York received national media attention after Marcia Garcia, her husband, Jose I. Garcia, and their son, Jose J. Garcia, were the first people ever to be charged with violating the anti-slavery provisions of the federal Victims of Trafficking and Violence Prevention Act of 2000.[127] Maria Garcia and five other labor contractors were accused of transporting 41 Mexican boys and men from Arizona to live in "crowded unsanitary migrant labor camps and perform agricultural work in Orleans and Genesee Counties."[128] Garcia and her cohorts have also been charged with "holding workers in a condition of forced labor, trafficking workers into forced labor, transporting and harboring aliens, and violating the transportation safety provision of the Migrant and Seasonal Worker Protection Act."[129] The indictment against Garcia claims that she "engaged in verbal abuse and threats of physical harm, deportation and arrest," took deductions from the earnings of her workers, and refused to let them leave her premises until they had paid her for transportation, food and housing.[130] In addition the indictment alleges that Garcia charged the workers $1,000 each for transportation to western New York, crowding 30 people into a single van that was "stiflingly hot . . . had no seats and inoperable windows."[131] Miguel, one of the workers whom Garcia brought from Arizona, reported that Garcia and others " . . . threatened us that if we didn't work harder they would lock us in a small truck for a month without feeding us."[132]

Garcia was investigated only after six workers managed to escape and then, after spending the night in the woods, contacted legal services, who then contacted the Justice Department.[133] The criminal case against Garcia has not yet been resolved, but if convicted, the defendants face up to 20 years in prison.[134] Hopefully this case and the media attention it has drawn will lead to more federal investigations of labor contractors in New York State. Stuart Mitchell, Chief Executive of Rural Opportunities Inc.,[135] estimates that there are as many as 10,000 to 15,000 migrant farm laborers in western New York, "with many living in unsatisfactory conditions."[136]

Treating farmworkers as slaves or keeping them in debt peonage are practices that arose in the Southern U.S. after the Civil War and did not dramatically decrease until government crackdowns in the 1970s.[137] However it remains "common knowledge among African American farmworkers that there are places throughout the rural South where you can be taken, forced to work in the fields, and paid no wages for your labor."[138] It is shocking

that workers in western New York State are now experiencing the same abusive treatment.

IV. Conclusion: Proposals for Reforming Farm Labor

It is clear that immediate action must be taken to end the injustice and inequality farmworkers suffer every day. First, farmworkers should be included in the NLRA. This could be achieved through an amendment to specifically include farmworkers.[139] After farmworkers are included under the NLRA, other changes to the NLRA could also help. For example, multi-employer bargaining units would enable farmworkers to carry their job rights and benefits with them from one employer to the next.[140] If farmworkers are provided with the right to bargain, as are almost all other workers, then they will be empowered to effectively fight for higher wages and better working conditions.

Legislative action must also be taken to include farmworkers under all of the protections provided by the FLSA. One way to help to help farmworkers achieve equality would be to provide them with overtime pay and to increase the federal minimum wage to a livable wage. Farmworkers' wages comprise a small percentage of a farmer's total production costs for most fruits and vegetables, so even if the farmworkers' wages were to rise, this should not create a significant increase in prices.[141]

Wages will not increase and conditions will not improve for farmworkers until the surplus of labor is dramatically reduced. To achieve this goal, federally sponsored guestworker programs must begin to be cut back and eventually eliminated. Further, the government must enforce existing labor and immigration laws and hold both farmers and contractors strictly liable for employing illegal workers. As long as a constant stream of illegal workers willing to work for practically nothing is available, wages will not rise and conditions will not improve.

The government must also provide more funding to the Department of Labor to enable it to enforce the MSPA. Perhaps a separate entity should be created by the government to enforce labor laws that protect farmworkers. The Department of Labor has proven to be ineffective, often caving into political pressure. A new entity that is federally funded, but not otherwise connected to the government, would help to eliminate the conflict of interest that currently exists.

Finally, consumers must take action and must demand reform. Consumers can take action every time they go to the grocery store by boycotting foods from companies that buy products from farmers who mistreat their workers. Advocates must raise public awareness of the injustice against farmworkers by educating the public about this issue. Consumers can also help by writing letters to their representatives to show their concern about discrimination against farmworkers. Perhaps most importantly, consumers can help farmworkers through their willingness to pay more for food so that farmers will be able to pay workers a decent wage. The horrific conditions that farmworkers face every day should create outrage among consumers and it should be a subject of debate in the upcoming presidential election. Advocates believe that, "Solidarity between academic institutions, community-based farmworker organizations and consumers could advance farmworker advocacy significantly."[142] Finally, consumers must be willing to pay more for food so that farmers will be able to pay workers a decent wage.

There is no question that the injustice against farmworkers must end. There is no excuse for the injustice and discrimination that farmworkers continue to suffer. For real change to occur there must be increased consumer awareness and activism, increased enforcement of current laws as well as systemic legal changes. We must begin to treat farmworkers with the honor, respect and dignity they deserve by paying them a fair wage and providing them with the same legal protections afforded to all other employees.

Endnotes

1. Testimony provided by a woman identified only as "Linda," at the Jan. 26, 2000, N.Y. State Senate Hearings on Farmworkers in Albany, N.Y.
2. Maralyn Edid, Farm Labor Organizing: Trends & Prospects 17 (Cornell University) (1994).
3. Daniel Rothenberg, With These Hands: The Hidden World of Migrant Farmworkers Today 244 (Harcourt Brace & Company) (1998); Maralyn Edid, Farm Labor Organizing: Trends & Prospects 4 (Cornell University) (1994).
4. The Human Cost of Food: Farmworkers' Lives, Labor and Advocacy 3 (Charles D. Thompson, Jr., and Melinda F. Wiggins ed., University of Texas Press) (2002).
5. Kala Mehta et al., *Findings from the National Agricultural Workers Survey (NAWS) 1997-1998: A Demographic and Employment Profile of United States Farmworkers*, U.S. Department of Labor Research Report No. 8 (2000). The term "migrant agricultural worker" has also been defined by the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) as an "individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence." MSPA, 29 U.S.C. § 1802; 29 CFR § 500.20.
6. Kala Mehta et al., *Findings from the National Agricultural Workers Survey (NAWS) 1997-1998: A Demographic and Employment Profile of United States Farmworkers*, U.S. Department of Labor Research Report No. 8 (2000).
7. Truman Moore, The Slaves We Rent 17 (Random House) (1965).
8. The term seasonal agricultural worker is defined by the MSPA as an "individual who is employed in agricultural employment of a seasonal or other temporary nature and is not required to be absent overnight from his permanent place of employment." 29 U.S.C. § 1802(10); 20 CFR § 500.20.
9. Mehta, *supra* note 6.
10. *Id.*
11. The Human Cost of Food: Farmworkers' Lives, Labor and Advocacy, *supra* note 4, at 4.

12. Mehta, *supra* note 6.
13. This is because labor camps are usually deep inside large farms and workers are not likely to be seen by others in the community. Migrants are also invisible because they are constantly moving, they lack any political base and have almost no representation in Congress and state legislatures. Brent Ashabranner, Dark Harvest: Migrant Farmworkers in America 10 (Dodd, Mead & Company) (1985).
14. Kathy Hovis, *Growing Up on the Move: Children of migrant workers face special challenges, but programs in this region cater to their needs,* The Ithaca Journal, Sept. 8, 2001, at 8A.
15. Gayle Forman, *We Are Invisible*, 58 Seventeen 174, 177 (Nov. 1999).
16. Mehta, *supra* note 6.
17. *Id.*
18. Daniel Rothenberg, With These Hands: The Hidden World of Migrant Farmworkers Today 16 (Harcourt Brace & Company) (1998).
19. *Id.* During the 1990's the average annual wage of an individual farmworker was $7,500, while farmworker families earned an average of $10,000 per year. Mehta, *supra* note 6.
20. Mehta, *supra* note 6.
21. *See* Rothenberg, *supra* note 18, at 6.
22. Nano Riley, Florida's Farmworkers in the Twenty-First Century 7 (University Press of Florida) (2002).
23. Jarvis Freeman is a student in the Cortland Migrant Education Outreach Program.
24. The first migrant workers in the U.S. were Native Americans and poor whites who worked on large grain farms in California in the mid 1800s. *See generally* Rothenberg, *supra* note 18, at 31-57. *See also* Ronald E. Seavoy, The American Peasantry: Southern Agricultural Labor and Its Legacy, 1850-1995, A Study in Political Economy (Greenwood Press) (1998), for a general history of migrant workers in the U.S.
25. Mehta, *supra* note 6.
26. During the 1930s the majority of farmworkers were whites and African Americans. During this time over 300,000 farmworkers migrated from the East to the Midwest and West coast when farmworker jobs in the East were greatly reduced as a result of the increased use of tractors. These workers became known as dust bowl migrants. Because of large numbers of dust bowl migrants and fewer farmworker jobs, the U.S. stopped issuing visas to Mexican farmworkers and deported over 300,000 Mexican farmworkers. Significant numbers of dust bowl migrants left farmwork when the U.S. entered World War II and fear of a labor shortage which led the U.S. government to create the first guest-worker program, which was originally intended only to exist during the war, but continued until 1964. *See* Rothenberg, *supra* note 18.
27. On the West coast, from the 1860s to the 1890s, the majority of farmworkers were Chinese immigrants. Japanese immigrants were later recruited as farm laborers, when the Chinese workers moved to urban neighborhoods. After the Immigration Act of 1924 terminated Japanese immigration, Mexican and Filipino workers replaced Japanese workers. On the East coast, farmers relied on African Americans, and Irish, Italian, Scandinavian, and Polish immigrants for farmwork after slavery was abolished. *See* Rothenberg, *supra* note 18.
28. Edid *supra* note 2, at 89.
29. 29 U.S.C. § 151 (2004).
30. 29 U.S.C. § 201 (2004).
31. The Social Security Act initially excluded agricultural workers. *See* 49 Stat. § 210 (1935). "When used in this title– . . . (b) The term employment means any service, of whatever nature, performed within the United States by an employee for his employer, except– (1) Agricultural labor . . . " *Id.*
32. 78 Cong Rec. 3678 (1934) (speech by Sen. Wagner), reprinted in 1 NLRB, Legislative History Of The National Labor Relations Act, 1935, at 20 (1985).
33. 78 Cong Rec. 3678 (1934) (speech by Sen. Wagner), reprinted in 1 NLRB, Legislative History Of The National Labor Relations Act, 1935, at 19 (1985).
34. Symposium, *Workers on the Fringe: Exploring the Legal Status of America's Most Marginalized Workers, Organizing the Traditionally Unorganized*, sponsored by U. Pa. J. Lab. & Emp. L., Feb. 25, 2003.
35. 29 U.S.C. 157 (2004).
36. 29 U.S.C. 152(3) (2004). The NLRA did not provide any definition of the term agricultural laborer when it was first enacted. 49 Stat. § 210 (1935).
37. S. 2926, 73rd Cong., 2nd Sess., § 3(3) (1934), reprinted in 1 NLRB, Legislative History Of The National Labor Relations Act, 1935, at 2 (1985). This draft defined "employee" as "any individual employed by an employer under any contract of hire, oral or written, express or implied. . . ." The only exclusion in this draft applied to an "individual" who had "replaced a striking employee." Further, the draft stated that "Wherever the term "employee" is used, it shall not be limited to mean the employee of a particular employer, but shall embrace any employee unless the Act explicitly states otherwise." *Id.*
38. Section 2 defines the terms used in the act. The most important of these definitions are those of "employer" and "employee." "These words are so defined as to exclude from the operation of the act . . . agricultural workers." S. Rep. No. 1184, 73rd Cong., 2d Sess. 1 (1934), reprinted in 1 NLRB, Legislative History Of The National Labor Relations Act, 1935, at 1102 (1985). For a more detailed discussion regarding the exclusion of Agricultural laborers from the NLRA, *see generally* Austin P. Morris, *Agricultural and National Labor Legislation*, 54 Cal. L. Rev. 1939 (1966).
39. H.R. Rep. No 969, 74th Cong., 1st Sess. 27-28 (1935), reprinted in 2 NLRB, Legislative History Of The National Labor Relations Act, 1935, at 2937 (1985).
40. During Congressional Hearings Senator Connery noted, "the committee . . . decided not to include agricultural workers. We hope that the agricultural workers eventually will be taken care of . . . I am in favor of giving the agricultural workers every protection, but just now I believe in biting off one mouthful at a time. If we can get this bill through and get it working properly, there will be opportunity later, and I hope soon, to take care of agricultural workers." 2 NLRB, Legislative History Of The National Labor Relations Act, 3202 (1949). Further, it has been argued that the agricultural laborer exclusion was added as a compromise in order to obtain votes for it from Southern congressmen. *See* The Human Cost of Food: Farmworkers' Lives, Labor and Advocacy, *supra* note 4, at 143.
41. 2 NLRB, Legislative History Of The National Labor Relations Act, 2306 (1949).
42. The Human Cost of Food: Farmworkers' Lives, Labor and Advocacy, *supra* note 4, at 141-42.
43. *See* Edid, *supra* note 2, at 11 " . . . reformers have been stymied at nearly every turn by farmers and corporate agricultural interests whose powerful lobbies in the national and state capitals have long argued vociferously and triumphantly for agricultural exceptionalism."
44. Migratory Labor Hearings, 89th Cong., 1st Sess. S. 1866 (1965-66), reprinted in Amending Migratory Labor Laws: Hearings Before the Subcommittee on Migratory Labor of the Committee on Labor and Public Welfare in the United States Senate 11 (1966).
45. *Id.* at 85-107.
46. *Id.*

47. *Id.* The AFBF also argued that because a farmers' work for the entire year may be tied up in his crop, that he is not in a fair position to bargain with the farmworkers. *Id.*

48. *Id.*

49. *See* Edid, *supra* note 2, at 11. Seasonality, vulnerability to nature, make-or-break harvests, and an intensely competitive industry structure were, and still are, promoted as reasons why farming should be treated differently from other kinds of economic enterprises. *Id.*

50. *See* Edid, *supra* note 2, at 11.

51. *See generally* Marc Linder, Migrant Workers & Minimum Wages: Regulating the Exploitation of Agricultural Labor in the United States (Westview Press) (1992).

52. *See* Dorothy Nelkin, On the Season: Aspects of the Migrant Labor System 39, (Ithaca, N.Y.: New York State School of Industrial and Labor Relations) (1970).

53. California, Arizona, Kansas, Idaho, and Ohio are several states that have state labor laws providing agricultural workers with the right to collective bargaining.

54. *See* Edid, *supra* note 2, at 50. Caesar Chavez was a major proponent of farmworker rights in California in the 1960s. Unions in California later lost much of the ground they had gained because farm organizations fought against farmworker rights. *Id.* at 55.

55. Activists Speak Out 176 (Marie Cieri & Claire Peeps ed., Palgrave) (2000).

56. *Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921).

57. *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1, 33 (1937).

58. Edid, *supra* note 2, at 103.

59. Rothenberg, *supra* note 18, at 242.

60. Edid, *supra* note 2, at 50.

61. *Id.*

62. Rothenberg, *supra* note 18, at 244.

63. *Id.* at 6; *see also* Mehta, *supra* note 6.

64. Linder *supra* note 51, at 79.

65. Emphasis added. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (1938), 1067. Section 13(a) provided that the provisions relating to wages and hours "shall not apply with respect to . . . (6) any employee employed in agriculture; or . . . (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing, in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products." *Id.*

66. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (3)(f) (1938). The FLSA defined agriculture to include "farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market." *Id.*

67. *Romero v. Hodgson*, 319 F. Supp. 1201, 1203 (N.D. Cal. 1970). Others believe that farmworkers were excluded from the FLSA because of racism; *see generally* Linder *supra* note 51.

68. The Human Cost of Food: Farmworkers' Lives, Labor and Advocacy, *supra* note 4, at 44.

69. 29 U.S.C. § 213(a)(6)(A). A "man-day" is any day during which an employee performs agricultural labor for at least one hour. Five hundred man-days is approximately equivalent to seven employees employed full-time in a calendar quarter (7 employees x 5.5 days per week x 13 weeks = 546 days). Bernard L. Erven & Eric E. Barett, *Federal Minimum Wage Law*, *available at* http://www-agecon.ag.ohio-state.edu/resources/docs/pdf/7ED6D7D0-2C44-4D6D-8CF779E683628F23.pdf.

70. 29 U.S.C. § 213. Farmworkers must be paid the minimum wage whether they are working piece rate or by the hour. 29 U.S.C. § 213 (a)(6)(C).

71. 29 U.S.C. 201 (2004).

72. *Compliance Assistance: Migrant and Seasonal Workers Protection Act (MSPA)*, U.S. Department of Labor Employment Standards Administration Wage and Hour Division, *available at* www.dol.gov/esa/whd/mspa/index.htm; Migrant and Seasonal Workers Protection Act, 29 U.S.C. § 1801 (2004).

73. A "Farm labor contractor" is defined as, "any person, other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity." 29 U.S.C. § 1802 (7) (2004). "Agricultural employment" is defined broadly, to include, workers " . . . handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state." 29 U.S.C. § 1802 (3) (2004).

74. 29 U.S.C. § 1801 (2004).

75. Migrant and Seasonal Workers Protection Act, 29 U.S.C. § 1802 (2004).

76. 29 U.S.C. § 1821(b) (2004).

77. *See* Rothenberg, *supra* note 18, at 216.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. Rothenberg, *supra* note 18, at 207.

83. Rothenberg, *supra* note 18, at 210.

84. *Id.* at 211.

85. *Id.* at 117.

86. *Id.*

87. *Id.* at 99.

88. Rothenberg, *supra* note 18, at 94.

89. To be paid by piece rate means to be paid per barrel or basket picked.

90. Rothenberg, *supra* note 18, at 102.

91. Rothenberg, *supra* note 18, at 98.

92. *Id.* at 98.

93. *Id.*

94. *See* Rothenberg, *supra* note 18, at 98.

95. The U.S. Department of Labor officer in charge of the program, Lee G. Williams, has described the Bracero program as a system of "legalized slavery." Paul de la Garza, *Mexican Workers Seek Answers on Missing Fund; Laborers who came to the U.S. under a program begun in WWII allege they are owed $3 billion from savings plan*, Chi. Trib., Oct. 6, 1999, at N6.

96. The Human Cost of Food: Farmworkers' Lives, Labor and Advocacy, *supra* note 4, at 115.

97. *See* Rothenberg, *supra* note 18.

98. de la Garza, *supra* note 95.

99. The Human Cost of Food: Farmworkers' Lives, Labor and Advocacy, *supra* note 4, at 116.

100. The Human Cost of Food: Farmworkers' Lives, Labor and Advocacy, *supra* note 4, at 116.

101. Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a (2004).

102. Rothenberg, *supra* note 18, at 235. Over one million workers were given permanent residency status as a result of this program. *Id.*

103. *Id.* at 236.

104. Rothenberg, *supra* note 18, at 219.

105. Under the H-2A program guestworkers must be paid either the Adverse Effect Wage Rate (AEWR) or the applicable prevailing wage rate, whichever is higher. The employer is also required to provide his guestworkers with free housing to all workers who are unable to return to their residence in the same day. The employer must also provide either three meals a day for each worker, or provide free and convenient cooking and kitchen facilities. The employer must also pay for the worker to be transported to his next job when the contract is complete. Further, an employer must provide his workers with workers' compensation insurance. The employer is also required to offer his workers employment for a minimum of three-fourths of the workdays in the work contract period. *See* 8 U.S.C. § 1188 (2004).

106. United States General Accounting Office: Report to Congressional Committees, *H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers* 9-10 (Dec. 1997).

107. Barry Yeoman, *Silence in the Fields*, Mother Jones 42, 43 (Jan./Feb. 2001).

108. *Id.*

109. The Human Cost of Food: Farmworkers' Lives, Labor and Advocacy, *supra* note 4, at 297.

110. Sherry Kiesling Fox, *Don't Tell Farmers There's No Labor Shortage*, The voice of Agriculture Views, Feb. 16, 1998, *available at* http://www.fb.org/views/focus/fo98/fo0223.html.

111. Yeoman, *supra* note 107, at 44.

112. Rothenberg, *supra* note 18, at 220.

113. *The President's Temporary Foreign Worker Proposal is Ill-Conceived*, Farmworker Justice Fund Inc., (2004) *available at* http://www.fwjustice.org.

114. *Id.*

115. *Id.*

116. *Id.*

117. Kelly Patricia O'Meara, *Do Borders Matter to Bush?: Critics of his proposed "guest-worker" program claim it will open the floodgates to more illegal immigration and endanger the ideal of a stable middle class in America*, The Nation, March 15, 2004, at 30.

118. *Id.*

119. O'Meara, *supra* note 117.

120. *Id.*

121. Cornell University, *Coming up on the Season: Migrant Farmworkers in the Northeast*, *available at* http://www.farmworkers.cornell.edu/pdf/facts_on_farmworkers.pdf (2001). While it is unknown exactly how many children of migrant workers are currently in New York State, there are 13,592 children under age 22 who are enrolled in Migrant Education Outreach Programs in New York State. *Id.* There are currently 200 labor contractors licensed by the Department of Labor in New York and in the year 2000, 1,903 migrant workers came to New York State under the H-2A program. *Id.*

Denis M. Hughes, *New York State AFL-CIO Legislative Alert: President's message, Farmworkers are Vital to New York Farms*, March 10, 2003, *available at* http://www.nysaflcio.org/legislative_dept/legislative_alert/2003/alert_3-10-2003.htm.

122. Denis M. Hughes, *New York State AFL-CIO Legislative Alert: President's message, Farmworkers are Vital to New York Farms*, March 10, 2003, *available at* http://www.nysaflcio.org/legislative_ dept/legislative_ alert/2003/alert _3-10-2003.htm.

123. Cornell University, *supra* note 121. New York is third in the nation among dairy producers and apple production, fourth in fresh cauliflower, second in sweet and silage corn. *Id.*

124. Farm laborers are excluded from overtime pay in New York; "employee," in the Act, does not include "any individuals employed as farm laborers." N.Y. Labor Law § 701(3) (McKinney 2004). In New York, farm laborers are not entitled to a day of rest. *See* N.Y. Labor Law § 161 (McKinney 2004). Farmworkers are also excluded from workers compensation in N.Y. *See* N.Y. Workers' Compensation Law § 2 (McKinney 2004).

125. N.Y. Labor Law § 212 (McKinney 2004) (law requiring growers to provide safe drinking water in portable containers that is accessible to every site where farm laborers are working); N.Y. Labor Law § 212-d (McKinney 2004) (law requiring growers to provide toilets and hand washing facilities to workers); Farm Worker Equity Wage & Reform Act, N.Y. Labor Law § 652 (McKinney 2004) (law guaranteeing farmworkers in New York State a wage equal to the federal minimum wage).

126. The Alliance For Farmworker Rights, *Labor Laws in New York State: Unequal and Unjust Treatment for Farmworkers: A Status Report* (1993).

127. *Uncle Tom's Cabin in Upstate New York*, New York Daily News, June 24, 2002, editorial.

128. *Six Indicted in Conspiracy for Trafficking and Holding Migrant Workers in Conditions of Forced Labor in Western New York*, Department of Justice (June 19, 2002), *available at* http://www.usdoj.gov.

129. *Id.*

130. *Id.*

131. Steven Greenhouse, *Migrant-Camp Operators Face Forced Labor Charges*, N.Y. Times, June 21, 2002, at B5.

132. *Id.*

133. *Sandra Tan, 'A Lot of Guts' By Escapees put Them on Path to Justice*, Buffalo News, June 21, 2002, at B1.

134. *Uncle Tom's Cabin in Upstate New York*, New York Daily News, June 24, 2002 (editorial).

135. Rural Opportunities Inc. is a nonprofit organization that helps train and house farmworkers.

136. Greenhouse, *supra* note 131.

137. Rothenberg, *supra* note 18, at 159.

138. *Id.* at 154.

139. Edid *supra* note 2, at 98.

140. Edid *supra* note 2, at 97.

141. Marc Linder, Migrant Workers & Minimum Wages: Regulating the Exploitation of Agricultural Labor in the United States 278 (Westview Press) (1992).

142. The Human Cost of Food: Farmworkers' Lives, Labor and Advocacy, *supra* note 4, at 297.

The author is a third-year law student at the State University of New York at Buffalo Law School. This paper is dedicated to her mother, Dorothy Mallam, who is currently the Director of the North Country Migrant Education Outreach Program, and who has spent over twenty-five years working with children of migrant workers in Northern New York.

Message from the Chair
(Continued from page 2)

Harold Newman, and former Section Chair John Canoni's wife **Kay**. We extend to their families our Section members' heart-felt condolences.

On a much more upbeat and positive note, our Section has decided to seize the moment and go for it: Phase Two of our Section's 30th Anniversary Fall Meeting in Long Boat Key will take place on March 19-23, 2006. We will be reprising much of the extraordinary Program that was "blown away" by Hurricane Wilma, and adding some new presentations as well. Specifically, we will begin the festivities on Sunday evening the 19th with a Welcoming Cocktail Reception. The CLE program will begin on Monday the 20th with a welcome from NYSBA President **A. Vincent Buzard**, followed by plenary sessions entitled "Retaliation: The Elements of Liability Under Federal and State Employment Laws" (presented by **Mike Bernstein**, **Evan Spelfogel**, **Erin Sobkowski** and **Allegra Fishel**) and "Reporting a Client's or Colleague's Unlawful Conduct: New York Ethics Rules, ABA Proposals, Sarbanes-Oxley, and Common Sense" (presented by **Pearl Zuchlewski**, **Sharon Stiller** and **Lou DiLorenzo**). Monday's concurrent Break-out Workshop Sessions will include "Employee Privacy in the Workplace: The Impact of New Technologies" (featuring **Bruce Millman**, **Dennis Lalli** and **Robert Boreanaz)**, "Strategic Turning Points in EEO Litigation" (featuring **Mike Bernstein**, **Peter Shapiro** and **Peter Nelson**), "Fiduciary Issues in 401(k) Plans" (featuring **Mona Glanzer**, **Bill Frumkin** and **Myron Rumeld**). Our 30th Anniversary Celebration Banquet will be held Monday evening and feature a Tribute to the recently deceased Former Section Chair **Lester Lipkind** and a return address by Keynote Speaker **Richard Mittenthal**.

Tuesday the 21st will feature a plenary session entitled "Health Care Issues in Collective Bargaining," to be presented by **Margery Gootnick**, **Rachel Minter** and **Dan Driscoll**. The first round of concurrent Workshop programs will be "What Works and What Doesn't Work in the Mediation of Employment Cases, Part I" (featuring **Margery Gootnick**, **Jonathan Ben-Asher**, **Stefan Berg**, **Dan Murphy**, **Abigail Pessen**, **Ruth Raisfeld** and **O. Peter Sherwood**), "New Developments at the NLRB" (starring **John Canoni**, **Dan Silverman**, **Matt Fusco** and NLRB Tampa Office Regional Director **Rochelle Kentov**), and "Statutory Preemption of Disciplinary Issues in the Public Sector" (presented by **Jim Sandner**, **Phil Maier**, **Sharon Berlin** and **Ron Dunn**).

The second round of Workshops will be "What Works and What Doesn't Work in the Mediation of Employment Cases, Part II" featuring speakers from Workshop D, "Anticipating the Personal Disaster: Why You Should Have a Plan of Action for Your Practice, and How To Do It" (presented by **Rich Zuckerman**, **Pearl Zuchlewski** and **Geri Krauss**), and a repeat of the "Employee Privacy in the Workplace: The Impact of New Technologies" program featuring speakers from the previous day's presentation. These will be followed by our golf and tennis tournaments, and an evening cocktail reception.

The Program concludes on Wednesday the 22nd with a plenary presentation entitled "Overtime Payment Violations: The Practicalities of Enforcement, Correcting Errors and Recordkeeping" (starring **John Canoni**, U.S. D.O.L. Wage & Hour Advice Counsel **Diane Heim**, **Justin Swartz** and **James Grasso**), followed by Workshops entitled "The Nuts and Bolts of International Labor and Employment Law: How New York Law Practice is Affected" (presented by **Bruce Millman**, **Phil Berkowitz** and **Robert P. Lewis**), a reprise of the "Strategic Turning Points in EEO Litigation" Workshop featuring speakers from Workshop B and "When Is a Contractor Not a Contractor? When (S)he's an Employee: The Ins and Outs of Employee Status" (featuring **Ike Perlman**, **Neil Block**, **Karen Morinelli** and **Deborah Skanadore Reisdorph**). There will be an evening cocktail reception to wind up the Program.

Local forecasters are promising (yes, I know) clear skies and warm temperatures. I hope to see many of you there!

Until next time, be safe, be well, and be sure to enjoy as much of life as you can, as often as you can!

Richard K. Zuckerman

Answer to the trivia question: "P: Hal Newhouser; C: Yogi Berra; 1b: Jimmy Foxx/Frank Thomas; 2b: Joe Morgan; SS: Ernie Banks; 3b: Mike Schmidt; LF: Barry Bonds; CF: Mickey Mantle; RF: Dale Murphy/Roger Maris."

Section Committees and Chairs

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

Alternative Dispute Resolution
Jonathan Ben-Asher
(212) 509-1616

Abigail J. Pessen
(212) 961-0668

Jill Rosenberg
(212) 506-5215

Communications
James N. McCauley
(607) 257-0121

Sharon P. Stiller
(585) 899-2930

Continuing Legal Education
Alan M. Koral
(212) 407-7750

Diversity and Leadership Development
Louis P. DiLorenzo
(646) 253-2315

Allegra L. Fishel
(212) 245-8909

Employee Benefits
Mark E. Brossman
(212) 756-2050

Equal Employment Opportunity Law
Deborah S. Skanadore Reisdorph
(315) 768-1896

Peter T. Shapiro
(212) 527-1394

Ethics and Professional Responsibility
John Gaal
(315) 218-8288

Nancy E. Hoffman
(518) 257-1443

Finance
Robert Kingsley Hull
(315) 536-9820

Future Sites (Ad Hoc)
Theodore O. Rogers, Jr.
(212) 558-3467

Government Employee Labor Relations Law
Seth Howard Greenberg
(516) 570-4343

Stephanie M. Roebuck
(914) 946-4777

Individual Rights and Responsibilities
Dennis A. Lalli
(212) 644-1010

Mimi C. Satter
(315) 471-0405

International Labor and Employment Law
Philip M. Berkowitz
(212) 940-3128

Wayne N. Outten
(212) 245-1000

Labor Arbitration and Collective Bargaining
Rachel Minter
(212) 643-0966

Labor Relations Law and Procedure
Peter D. Conrad
(212) 969-3020

Bruce Levine
(212) 563-4100

Law School Liaison
Norma G. Meacham
(518) 487-7735

Legislation
Howard C. Edelman
(516) 764-4316

Timothy S. Taylor
(518) 213-6000

Membership
William D. Frumkin
(914) 328-0366

Study the Proposed ADR Section (Ad Hoc)
Richard K. Zuckerman
(631) 694-2300

Public Sector Book
Sharon N. Berlin
(631) 694-2300

Jean Doerr
(716) 847-3449

Jerome Lefkowitz
(518) 257-1443

Scholarships and Other Financial Support
William D. Frumkin
(914) 328-0366

Union Administration and Procedure
Robert L. Boreanaz
(716) 849-1333

Publication—Editorial Policy—Non-Member Subscriptions

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

Publication Policy: I would appreciate it if you would call or e-mail me to let me know your idea for an article. You can reach me at (718) 428-8369 or mceneaneyj@aol.com.

After we've discussed it, the article should be submitted by e-mail along with a letter granting permission for publication and a one-paragraph bio. The Association will assume your submission is for the exclusive use of this *Newsletter* unless you tell me otherwise in your letter.

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

Non-Member Subscriptions: The *L&E Newsletter* is available by subscription to non-attorneys, libraries and organizations. The subscription rate for 2006 is $75.00. For further information, contact the Newsletter Department at the Bar Center, (518) 463-3200.

Deadlines for submission are the 1st of January, April, July and October each year. If I receive your article after that date, it will be considered for the next edition.

Thank you for your cooperation.

Janet McEneaney
Editor

L&E Newsletter

ISSN 1530-3950

Labor and Employment Law Section
New York State Bar Association
One Elk Street
Albany, NY 12207-1002

ADDRESS SERVICE REQUESTED

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