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L&E Newsletter

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

Message from the Outgoing Chair

Ave atque vale

Alan M. Koral

"Hail and farewell"—it is a sad phrase that sums up my feelings as my year as Chair of the Section draws to a close.

First, I hail the new team. Don Sapir of White Plains, who becomes Chair on June 1, is wonderfully suited to lead the Section to new heights of achievement and effectiveness. As Chair-elect, he has been invaluable to me, and unstinting of his time, advice and support. We should all hail his succession to the position of Chair.

And with a new Chair, comes a new Chair-elect. That position will be admirably filled by Mairead Connor of Syracuse. Mairead has served the Section admirably in a number of capacities, most recently as both Secretary

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Message from the Incoming Chair

Donald L. Sapir

Despite the faltering economy, or perhaps because of it, lawyers employed in the labor and employment law ("LEL") arena seem to be busy. The EEOC reported that more charges were filed in 2008 than in any previous year. Terminated employees receive separation and release agreements prepared by employer's counsel and reviewed by employee's counsel. RIFs and reorganizations generate claims, which generate plaintiff and defense work, which generate employment mediations and arbitrations. In the organized sector, layoffs beget grievances, which beget arbitrations. ERISA lawyers have their hands full attempting to restore ailing welfare and retirement plans to health, while maintaining compliance with federal regulations. If the Employee Free Choice Act

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Message from the Outgoing Chair

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of the Section and Co-chair of our Diversity Committee. I know that her thoughtful consideration of plans to improve the Section's committee activities, among other things, will be of great value to Don and will benefit the Section immensely. Hail to Mairead.

And now for farewells. My year as Chair has flown by, happily if strenuously. I can never hope to thank all the people who have contributed to my satisfaction over the year, and I am afraid to try to name them all because I know I'll miss one or two and hate myself for years for omitting such stalwart supporters of the Section and its work.

However, there are a few who are simply impossible to pass over: First, Linda Castilla, our support genius—or genii—at the State Bar Association. Linda is tireless, attentive, totally responsive, knowledgeable and practical—she is the Section's glue, and we all owe her a mountain of gratitude. I will miss working with Linda. Farewell.

Next, I bid farewell to our retiring *Newsletter* editor, Janet McEneaney (who serves as Co-chair of our International Labor Law Committee and is putting together, with others, a wonderful program to be jointly presented with Cornell ILR June 5 and 6). Janet turned a casual and rather occasional bulletin into a very interesting and useful journal that publishes articles of serious weight on developments in the law of labor and employment. She has done this essentially on her own, until this year when Phil Maier agreed to succeed Janet and provided assistance in this transition year. Farewell, Janet. Hail, Phil.

Farewell to the hard-working committee chairs—you know who you are—who made the Labor and Employment Section stand out for the quality of its programs and activities during my tenure.

And farewell to our active and devoted Delegates to the State Bar's House of Delegates (Linda Bartlett, Dick Chapman and Evan Spelfogel), where they took a leadership role that put our Section in the leadership spotlight as never before in my experience.

And farewell to all the members of the Section who have supported our activities, given the encouraging word at the right time, and made me feel enormously proud to have been chosen to lead the Section in the last year.

After all these farewells, I realize that I won't be going far. I'll continue to be active on the Executive Committee, where I will get to see many of the colleagues who have made the last year so rewarding, and I'll continue to come to Section events. On that note I'll close. Come to the Fall Meeting October 2 to 4 at the Sagamore, where we can say "hail" once again, and don't forget that in 2010 we return to Longboat Key, Florida for our 35th anniversary meeting on October 31 to November 3.

With affection,
Alan Koral

Message from the Incoming Chair

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becomes law, more work is expected for labor lawyers and interest arbitrators.

All in all, despite layoffs at some law firms many LEL Section members feel eerily lucky to possess a feeling of job security during an era of employment insecurity. Of course, we know these are stressful times. No matter which hat we wear in the LEL community, our individual net worth has suffered and greater demands are being made upon us to increase productivity and the bottom line. Due to the high tech revolution, our work follows us everywhere. Clients, co-employees and colleagues contact us anywhere, at any time. Expected response time is "now." Having time to schmooze during the workday is as rare as lawyers who work an eight-hour day.

The LEL Section can help. During the coming year, I pledge that the Section will continue to work for you to help increase your business, improve your productivity, and reduce the stress of your work life. Here are some of the things that we will do. It is up to you to take advantage of the opportunities made available.

- Our Section's Fall Meeting will be held jointly with the Dispute Resolution Section October 2 and 3, 2009 at The Sagamore on Lake George. Enjoy accommodations at a magnificent resort during fall foliage, while taking advantage of a CLE Program that is guaranteed to improve your practice. Bring a significant other, friend, or your family to enjoy the stay with you. Use the opportunity to discuss cases and develop professional and social relationships with colleagues from the management, union and employee Bars, government agencies, and neutrals. Confidentially awarded scholarships are available to make attendance affordable for Section members having financial need.

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From the Editor

As I looked at the final line-up of articles before I sent them to press, I was really pleased to see the breadth of interests they represent. Many thanks to Galen Kirkland, the Commissioner of the New York State Human Rights Commission, for contributing an article to this issue. There are two articles about the public sector, one by Nathaniel Lambright about a public employer's statutory duty to provide information to unions, and the other by Phil Maier about negotiating public employees' health benefits. Evan Spelfogel gives us an exhaustive survey of misclassification of employees. Don Dowling's column in this issue is about cross-border age-discrimination policies, always a vexing issue. Dan Dashman writes about the interpretation of Section 8(D) in several high-profile sports cases, and we have John Gaal's usual fine ethics column. Finally, we have the first-prize winner of this year's Emanuel Stein Writing Competition, an article by Katherine Largo about New York State's lactation legislation.

This is my last issue as Editor. It has been eight years since I took up the torch. I am now passing it to Phil Maier, whom many of you know as Regional Director of the New York State PERB's downstate office and a prolific contributor to this publication.

I am leaving with mixed emotions. I have enjoyed this job very much. I learned a great deal about the law from the articles I read and wrote. I worked with terrific people. I may even eventually feel nostalgic for those midnights when I was bleary-eyed and muttering to myself, "For goodness sake! Didn't your mother teach you how to write a string cite?," while rushing to get the copy edited and up to Albany on time.

However, I have become so much busier in recent years that, lately, I haven't been able to give my full attention to the *Newsletter*. I have a new grandson who also needs attention (and yes, what you've heard is true: he *is* the smartest and handsomest baby on the planet). This is a good time to pass stewardship of the *Newsletter* on to someone who is enthusiastic about it and will endow it with his own vision.

Our paradigm of the transmission of news has changed in the past eight years, as a result of the rapid change in technology. Information that used to be mailed in a printed newsletter now reaches us via Web sites, e-mail and tweets; thus, the original model of the Section's *Newsletter* became archaic early on in my tenure as Editor. This publication has evolved in response to our changing world and has become an amalgam of scholarly and practical articles that, I hope, have been useful to our Section's members.

One thing I've always tried to remember is that our *Newsletter* goes to every member of our Section and is perhaps the most visible, tangible benefit of membership. For those who don't have the time or inclination to participate in Section activities, the *Newsletter* is our representative in their offices and homes. Several years ago, 95% of our members rated the *Newsletter* "excellent" in a NYSBA survey. I am proud of that statistic.

If this *Newsletter* has been successful, it is because I owe much to many people. The *Newsletter* could not have gone out without the cooperation of all the Section Chairs with whom I've worked, as well as the assistance of Linda Castilla and Dan McMahon. The same goes for the contributors, so many of whom have become friends over the years, and the many readers who have commented, encouraged and suggested. My predecessor, Judith LaManna, showed me the ropes in the beginning and graciously offered her help throughout.

The biggest debt of gratitude, though, is reserved for [in alphabetical order] Lyn Curtis and Wendy Harbour, the unsinkable, unflappable pair who do the real work of getting this publication to you. Wendy and Lyn produce all the Section publications. They create the actual layouts on the computer, and make sure the galleys get to the printer and the finished products get mailed. They do this with great good humor, patience and professionalism, and a philosophical attitude toward the vagaries of editors and Section chairs. Working with them has been an absolute pleasure.

I will not be completely abandoning the *Newsletter* just yet, though. I will be writing a column about dispute resolution and hope to be of some help to Phil as he gets under way as Editor. I know he will do a wonderful job.

Janet McEneaney

Update on the "Arrest and Conviction Record" Provisions of the Human Rights Law—the Legislative Activity Continues

By Galen D. Kirkland

The New York State Human Rights Law ("Law") is the oldest anti-discrimination statute in the United States, and one of the most comprehensive. The Law's predecessor statute was first enacted in 1945, and New Yorkers can be justly proud that, at a time when other states had laws in place requiring discrimination, New York took the lead in its prevention.

When first enacted, the Human Rights Law prohibited employment discrimination based on race, creed, color, and national origin.[1] Over the years, the Law has been amended more than a hundred times, adding public and private housing, places of public accommodation and educational institutions, among other areas, to its jurisdiction. In addition to the early bases of race, color, creed and national origin, the Human Rights Law, as it now stands, prohibits employment discrimination based on age, sex, disability, sexual orientation, marital status, military status, predisposing genetic characteristics, and arrest and conviction records.[2]

The Human Rights Law thus offers far broader protection for New Yorkers than does federal law, providing, for example, coverage of sexual orientation and marital status discrimination, as well as a broader definition of disability than under the Americans with Disabilities Act.

Two particularly important areas of protection afforded by the Human Rights Law, for which there are no specific federal counterparts, are the Law's jurisdiction regarding discrimination because of an individual's record of previous convictions, and the Law's jurisdiction with respect to individuals with prior arrests that have been resolved in their favor.

Though these provisions were first enacted more than thirty years ago, there has been significant legislative activity in these areas in the 2007 and 2008 legislative sessions. The recent amendments demonstrate the legislature's continued commitment to the protections provided by these sections of the Law, and provide additional important tools with which to combat these lesser known forms of discrimination.

Previous Criminal Convictions

Human Rights Law § 296.15 provides that it is an unlawful discriminatory practice to deny any license or employment because of an individual having been convicted of a criminal offense, where the denial is in violation of Article 23-A of the Correction Law. Article 23-A of the Correction Law provides that such a denial is unlawful unless there is a direct relationship between the offense and the license or employment sought, or unless granting the license or employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.[3]

Article 23-A of the Correction Law also sets out the factors to be considered by the employer in making such a hiring determination. These "weighing factors" include the recognition that it is the public policy of this state to encourage the licensure and employment of persons previously convicted of criminal offenses, a consideration of the specific duties of the job sought, the bearing the previous conviction might have on the ability to perform the job duties, the time elapsed since the offense, the age of the person at the time of the offense, the seriousness of the offense, information about the person's rehabilitation or good conduct, and the legitimate interest of the employer or licensing agency in protecting property and the safety and welfare of specific individuals or the general public.[4]

Upon approving the original bill in 1976,[5] which was codified as Human Rights Law § 296(15) and the referenced sections of the Correction Law, Governor Carey stated:

> Observers of our criminal justice system agree that the key to reducing crime is a reduction in recidivism (i.e., repeated criminal conduct by the same individuals). The great expense and time involved in successfully prosecuting and incarcerating the criminal offender is largely wasted if upon the individual's return to society his willingness to assume a law-abiding and productive role is frustrated by senseless discrimination.[6]

It thus appears that the impetus for the passage of these protections was rooted both in pragmatism and a recognition of the evils of this form of discrimination. There can be no doubt, however, as to legislative intent: the first factor set out for consideration by employers or licensing agencies is a recognition that it is the stated public policy of New York to encourage the licensure and employment of persons previously convicted of criminal offenses.

This public policy was restated by the Court of Appeals in *Bonacorsa v. Van Lindt*,[7] a case concerning the re-

application for a license by a person previously convicted of a crime:

> Article 23-A of the Correction Law was enacted in 1976 in an attempt to eliminate the effect of bias against ex-offenders which prevented them from obtaining employment. Studies established that the bias against employing or licensing ex-offenders was not only widespread but particularly unfair and counterproductive. Although ex-offenders were urged when released from prison to find employment as part of their rehabilitation, they had great difficulty in doing so because of their criminal records and this difficulty existed even though there was an absence of any connection between the employment or license and the crime committed, its circumstances and the background of the offender (*see* Meltsner, Caplan & Lane, *An Act to Promote the Rehabilitation of Criminal Offenders in the State of New York*, 24 Syracuse L. Rev. 885, 905). Failure to find employment not only resulted in personal frustration but also injured society as a whole by contributing to a high rate of recidivism (*see*, 1976 Legis. Ann. at 50).

The state's public policy was further borne out in 2007, when the legislature passed an amendment to the Correction Law, clarifying that its provisions applied to persons already employed, and not just to applicants for employment, as long as the criminal conviction record preceded the employment.[8] The Division had always taken the position that it had jurisdiction over the termination of employees, where they were terminated because of pre-employment convictions, reasoning that it would undercut the legislative purpose of section 296.15 and Article 23-A if an employer could hire an individual and subsequently fire him or her, for prior criminal offenses, without weighing the factors contained in the Correction Law.

The Division's jurisdiction had been challenged in this regard, though the Division had successfully appealed to the Appellate Division, Fourth Department, from a lower court prohibition limiting its jurisdiction.[9] However, the 2007 legislation sets the issue to rest.

There was further legislative activity in the area of protections for persons with prior criminal conviction records in 2008. A bill signed into law by Governor Paterson on August 5, 2008, while not amending the Human Rights Law, clearly is geared toward increasing awareness of the provisions of Article 23-A, as referenced in the Human Rights Law.

Thus, the General Business Law was amended to provide that the notice to a consumer of an investigative consumer report requested in connection with employment must include a copy of Article 23-A of the Correction Law, and that when a consumer reporting agency provides a consumer report that contains criminal conviction information, the entity requesting such report shall provide the subject of the report with a copy of Article 23-A.[10] Additionally, the Labor Law was amended to provide that every employer shall post a copy of Article 23-A of the Correction Law in his or her establishment in a place accessible to employees.[11]

Governor Paterson signed another bill in 2008, which amended Human Rights Law § 296.15 to provide that where an employer is sued for negligent hiring or retention of an employee, there shall be a rebuttable presumption in favor of excluding evidence of the employee's prior conviction where such employer has evaluated the factors set out on Article 23-A of the Correction Law and made a reasonable, good-faith assessment in favor of hiring or retaining the employee.[12] Although this provision is in the Human Rights Law, it does not involve enforcement by the Division; it will be utilized by employers if they are sued in court for the "negligent hiring or retention" of a person with a criminal record.

> The Division supported this legislation, the ultimate purpose of which is to reduce the barriers facing ex-offenders in re-entering the workforce. The Sponsor's Memorandum in Support of the legislation recognizes that up to 60% of ex-offenders are unemployed one year after release and states that [p]roviding some level of protection from lawsuits for an employer who complies with Article 23-A and makes a good faith, reasonable determination to hire a person with a criminal record would aid both employers, who are currently wary of any liability that may occur, and the applicant, who will have increased opportunities to obtain gainful employment and reintegrate into society.[13]
>
> While this amendment does not directly impact on the work of the Division, as it applies to a rebuttable presumption in a negligent hiring lawsuit, it will aid employers who comply with the ex-offender provisions of the Law. It is hoped that the amendment will increase an employer's willingness to weigh the factors set out in the Correction Law, as referenced in the Human Rights Law, when considering an applicant with a conviction record.

Arrest Records, Youthful Offender Status, and Sealed Records

The provisions in Human Rights Law § 296.16, which forbid discriminating or even inquiring about prior arrest records which have been resolved in an individual's favor, were also significantly amended in 2007. Added to the provisions protecting persons who have prior arrests that were resolved in their favor were provisions providing protection to individuals with youthful offender determinations or violations resulting in sealed records.[14]

> Section 296.16 of the Human Rights Law was signed into law by Governor Carey on the same day in 1976 as § 296.15 of the Law, but its purposes and application are somewhat different.[15] Section 296.16 of the Human Rights Law applies not only to licensing and employment, as does § 296.15 of the Law, but to the provision of credit and insurance as well. Moreover, unlike the criminal conviction provisions, it is unlawful for an employer even to inquire as to the categories covered by § 296.16. Thus no "weighing process" is required; the areas protected by § 296.16 may not be considered when determinations are made with respect to employment, licensing, credit or insurance.

The Sponsor's Memorandum in support of the 2007 amendment sets out the difference in the laws, elaborating on both the purpose behind the original law and the importance of the amendment:

> Section 296(15) of the Executive Law prohibits unfair employment and licensure discrimination, as provided in Article 23-A of the Correction Law, against individuals who have criminal convictions. Section 296(16)of the Executive Law provides even greater protection to individuals whose cases have been terminated in their favor, not allowing employers even to ask about or use the arrest in making employment decisions. The state enacted these laws to prevent people who have never been convicted of a crime from suffering the stigma and discriminatory consequences that so often result from the disclosure and use of criminal history information. Youthful offender adjudications, which are not judgments of convictions (see C.P.L. § 720.35), and convictions for non-criminal offenses, fall under neither of these categories, and thus individuals with these histories are entirely without protection against unfair employment and licensure discriminatory practices. Because of the failure to include them within the protection of the Human Rights Law, these two groups of individuals have no remedy if employers refuse to hire them. Indeed, it makes no sense that they have even less protection than people with adult criminal convictions. New York should correct this oversight.[16]

The amendment thus corrects the anomaly that persons with youthful offender adjudications or sealed records were without protection against discrimination under the Human Rights Law.

Conclusion

The legislature's careful attention to the Human Rights Law and related statutes has given the Division of Human Rights additional important tools with which to combat unlawful discrimination against people with conviction records or people who have arrests resolved in their favor, youthful offender adjudications or sealed records. Clearly the circumstances of the our current economic situation will not make it easier for individuals in any of these circumstances to obtain employment, and it is thus particularly timely that the enforcement of the Human Rights Law has been made more robust in this regard.

Endnotes

1. Laws of 1945, Chap. 118. Enacted as Article 12 of the Executive Law §§ 125-136, now Article 15 of the Executive Law §§ 290 *et seq.*
2. Exec. Law § 296.1.
3. Correct. Law § 752.
4. Correct. Law § 753.
5. Laws of 1976, Chap. 931.
6. Laws of 2008, Chap. 534.
7. 78 N.Y.2d 605,611 (1988).
8. Laws of 2007, Chap. 284.
9. *See Wal-Mart Stores v. Division of Human Rights*, 41 A.D.3d 1276, 837 N.Y.S.2d 470 (4th Dep't 2007).
10. Laws of 2008, Chap. 465.
11. Laws of 2008, Chap. 465.
12. Laws of 2008, Chap. 534.
13. Sponsor's Memorandum in Support, S.4956A (2008).
14. Laws of 2007, Chap. 639.
15. Laws of 1976, Chap. 877.
16. Sponsor's Memorandum in Support, S.3092 (2007).

Galen D. Kirkland is the Commissioner, New York State Division of Human Rights.

Misclassification: The Profusion, the Cost, and the Remedy

By Evan J. Spelfogel

I. Introduction

Economic instability and marketplace fluctuations have contributed to a significant movement by workers classified as independent contractors to demand the labor and employment law benefits and protections guaranteed to persons classified as employees. Individual, collective and class actions by workers against putative employers have accelerated dramatically in recent years with an ever-increasing cost to companies both in terms of lost time and legal expense incurred in defending such claims, as well as the concomitant adverse publicity and negative effect on stock prices. Similar lawsuits filed by white collar workers seeking reclassification as nonexempt employees entitled to overtime are proliferating across the legal landscape. The liability that arises from worker misclassification conjures up horror stories where businesses have paid large remedies to make the workers whole.

While it is not difficult, given our litigious society, to understand why employee misclassification is a hot topic, it is more difficult to remedy the problem. There is no universal definition of "independent contractor." Every government agency, federal and state government, and the courts often apply different definitions, rules and tests.

Work misclassification is not limited to any specific industry. The retail and hospitality industries have seen challenges by store managers and assistant store managers, concierge staff, lead persons and others to their being labeled exempt from overtime pay.

In 1996, Microsoft was faced with making whole hundreds of freelance programmers who acknowledged, when commencing work for the company, that they were independent contractors ineligible for benefits given to Microsoft employees. The benefits in question included an employee stock purchase plan that effectively gave the plaintiffs the right to purchase Microsoft stock at a fraction of its then market price. In its ruling, the Ninth Circuit focused on the actual duties, functions, and circumstances surrounding the freelancers' work and day-to-day management control, rather than on the language of the workers' contracts. Although it succeeded in dramatically reducing the district court's nearly $1 billion liability assessment, Microsoft ended up paying $100 million to litigate and settle the case.[1]

In another high profile case, the U.S. Department of Labor sued Time Warner for deliberately misclassifying as many as 1,000 persons to circumvent providing them with employee benefits.[2] In November 2000, Time Warner settled the case for $5.5 million.

The health-care industry has seen an increase in misclassification cases as well. In *Brock v. Superior Care, Inc.*, the Secretary of Labor brought an action against Superior Care, Inc., a provider of nurses to individuals, hospitals, and nursing homes, for willful violation of record-keeping and overtime pay provisions under the Fair Labor Standards Act.[3] The Court of Appeals affirmed the district court's decision that the nurses were employees, not independent contractors, and were entitled to nearly $700,000 in overtime pay, with interest.

In *Weisel v. Singapore Joint Venture, Inc.*, the appellate court reversed the trial court and held that Weisel was entitled to unpaid minimum wages and overtime pay, liquidated damages and attorney fees resulting from the hotel's failure to classify him as an employee. The hotel argued that Weisel, a parking valet, whose compensation consisted of gratuities from hotel guests and others using the parking facility, was an independent contractor. The Court of Appeals found that Weisel depended on the hotel for his employment, was controlled by the hotel, and therefore should properly be classified as an employee.[4]

Owner-operated parcel delivery drivers classified as independent contractors have successfully sought reclassification as employees before the National Labor Relations Board, the U.S. Equal Employment Opportunity Commission, state and local unemployment and workers' compensation boards, and in the courts. Although such stories exist in every industry, the question as to how to eliminate company exposure remains.

II. The Definition of Independent Contractor

No universally accepted definition of an independent contractor exists; however, there are attributes that help differentiate between an independent contractor and an employee. According to the U.S. Department of Labor, independent contractors are self employed. They are not protected by employment, labor, or tax-related laws. Characteristically, they are free from an employer's control and perform work outside the usual type of business of the employer. Preferably, the worker should be engaged in an independently established trade, occupation, profession, or business.[5]

Different agencies utilize varying "tests" when determining whether workers are properly classified as employees or independent contractors. The U.S. DOL and the IRS, both federal agencies, use different tests when

determining independent contractor status. A worker may be considered an employee according to one agency, but not the other. The DOL applies the "economic realities test," or a hybrid of the "economic realities test" and the "right to control test," while the IRS focuses solely on the "right to control."[6] Conservative companies should follow the more stringent test when classifying workers.

A. The Economic Realities Test

The "economic realities test" focuses on how economically dependent an individual is on the business served. Under this test, workers who are highly dependent on the business served, and who derive a substantial portion of income from it, may be employees rather than independent contractors. The following four factors are typically considered when applying the "economic realities test":

1) the degree of skill required in the particular occupation;
2) whether the work is an integral part of the employer's business;
3) the intention of the parties; and
4) whether the company deducts / pays Social Security and other taxes and provides fringe benefits.[7]

In *Donovan v. DialAmerica Marketing Inc.*, the Third Circuit applied the "economic realities" test and found that home researchers whose job required them to locate subscribers' phone numbers and place calls when subscriptions neared expiration, were employees. The court determined that the home researchers did not make a great investment in their work, had little opportunity for profit or loss, used little skill in their work, and refrained from working for other employers.[8]

B. The Hybrid Test

Some federal courts combine the "economic realities test" with "the right to control test," to apply the "hybrid test." This typically involves the following factors:

1) who exercised what degree of control over the manner in which the work is performed;
2) what is each party's opportunity for profit or loss;
3) has the worker made a significant investment in the materials or equipment;
4) does the work require a special skill;
5) what is the duration of the contract relationship; and
6) is the worker's service an integral part of the employer's business.[9]

C. The Common Law Test

In *Nationwide Mutual Insurance Co. v. Darden*, the U.S. Supreme Court ruled that when federal laws fail to define clearly an "employee," the relationship between the company and the worker should be evaluated according to the common law test, focusing primarily on who has the right of control.[10]

New York state courts and administrative agencies such as the state DOL and the State Workers' Compensation Board apply traditional "common law" rules to determine whether an individual is an employee or independent contractor. The IRS has also adopted the common law test. The 20 factors utilized by the IRS may be summarized generally as follows:

1) does the putative employer specify the manner and means of how the work should be done or accomplished;
2) is the method of payment regular and consistent;
3) does the worker bring his or her own tools to the job;
4) does the worker or the company choose / control the hours of work;
5) is the nature of the work temporary, permanent, continuous, or intermittent;
6) is the worker in a separate calling or occupation from the putative employer; and
7) is the work an integral part of the putative employer's business.

Reclassification as employees provides to workers, among others, the benefits and protections of state and federal nondiscrimination laws, employment rights laws, wage and hour laws, and membership in unions. Further, an employer is required to provide its employees, but not its contractors, with Social Security, workers' compensation, and unemployment insurance benefits.

Courts will consider the actual work duties, not the job descriptions in contracts. Frequently, although a contract may identify a worker as an "independent contractor," the courts have decided otherwise. It could be argued that workers who sign contracts labeling themselves as independent contractors should be estopped from later claiming that they are employees. However, courts generally refuse to hold workers to such declarations, absent other considerations. In *Abillo v. Intermodal Container Serv., Inc.*, for example, the court held that the actual working relationship was more instructive than the contract language.[11] Similarly, a court found in *Loomis Cabinet Co. v. OSHRC* that the applicable economic reality test emphasized substance over the form of the relationship.[12]

Some courts have gone even further and rejected written contracts as "adhesion contracts." In *S.G. Borello & Sons v. Dep't of Industrial Relations*, the court rejected as controlling—or even as a factor to be considered—the applicable contracts and held that cucumber farm laborers, who were contractually classified as "independent contractors," were really common-law employees covered under California's Workers' Compensation Act.[13]

III. Joint Employer Liability

There are no foolproof ways to avoid misclassification liabilities. Some companies have tried to limit their exposure by utilizing temporary agencies or employee leasing devises, by contracting out or outsourcing a segment of the business, or by contracting with outside payroll businesses. Each option creates its own set of liability and risks. Reviewing agencies and courts generally reject such devices and, at best, may find that the outside entity and the putative employer are "joint employers."[14]

IV. Liabilities to Consider

When workers are reclassified as employees, the employer will face a host of unanticipated liabilities including taxes, employee benefits, and overtime pay. Further, as employees, the workers will be protected against statutory discrimination, entitled to organize and demand union representation, and bind the employer for their own workplace wrongs under the doctrine of *respondeat superior*.

A. Taxes

When workers are successfully reclassified as employees, the employer may become liable for penalties in addition to income tax withholding, FICA (Social Security), and FUTA (federal unemployment) taxes that were never withheld or paid. The statute of limitations for imposing the additional tax penalties is three years from the time the employment tax returns specific to the misclassification periods were filed.[15] However, § 530 of the Revenue Act of 1978 allows for reduction, under some circumstances, of assessments of taxes and penalties against employers who, in good faith, misclassified employees as independent contractors.[16]

B. Overtime

Typically, independent contractors set their own hours of work and the putative employer keeps no records of their hours. When the worker is reclassified as an employee, the employer may face retroactive liability for record-keeping violations and also for unpaid minimum wages and time-and-one-half for hours worked over 40 in each work week.

Under the federal Fair Labor Standards Act ("FLSA"),[17] employees may seek back pay, normally going back two years. However, if the employees can show a willful violation, they may seek back pay going back three years. Moreover, for willful violations the employer will be liable for liquidated (double) damages and attorneys' fees.[18] Further, some states have longer limitation periods: New York's is six years.[19]

In addition to independent contractor / employee misclassifications, employers must ensure that their acknowledged employees are properly classified as "exempt" or "nonexempt." Executive, administrative, and professional employees (and some others) may be exempt from overtime pay if their salary equals or surpasses $23,600 a year, and they meet a multi-factor "duties test." Employees who earn $100,000 or more a year are exempt if they meet a less stringent "duties test."[20]

Courts focus more on actual job duties than written descriptions; therefore, employers should audit positions to ensure that they are properly categorized.[21] There is also a "safe harbor" provision under the FLSA that may help insulate from violation, under some circumstances, an employer who in good faith inadvertently treats an employee as nonexempt for a short period of time.[22] "Safe harbor" protection is available when an employer clearly communicates employee status through handbooks and employer policies, provides a complaint mechanism for employees to use when questioning their status, and reimburses employees for any improper deductions.[23]

In *Joiner v. City of Macon*, the court determined that a class of city mass transit employees was entitled to liquidated damages when evidence showed the city knew or had good reason to know that the U.S. Department of Labor's policy change removed mass transit employees from FLSA exemption.[24] However, the same court held in *Dybach v. State of Fl. Dep't of Corrections* that "safe harbor" protection may be available to an employer who meets both objective and subjective determinations showing a good-faith intention to comply with the Act.[25]

C. Workers' Compensation

Proper classification is essential in workers' compensation and disability cases. Under the workers' compensation statutes of most states, including New York, employees who are injured in job related incidents (even due to their own fault or negligence) are entitled to have all of their medical and hospital bills paid for by their employer, and are entitled to be paid a weekly amount (approximately the same as unemployment insurance) for time lost from work. They may also be entitled to a lump sum payment for an injury determined to result in a permanent, albeit partial, disability.[26]

Further, if the state were to investigate and find that the worker has been misclassified as exempt and is actually an employee, the employer could be responsible for retroactive and unpaid workers' compensation premiums. In *State ex rel. Roberds, Inc. v. Conrad*, the Ohio Workers' Compensation Bureau was able to recover over

a million dollars in unpaid workers' compensation premiums retroactive to two years before the reclassification of carpet sales employees who had been improperly classified as independent contractors.[27] On the other hand, under the workers' compensation exclusivity clause, an employee injured on the job would be prevented from suing the employer for pain and suffering, emotional distress, and other consequential damages.

D. Antidiscrimination Statutes

A plethora of federal, state and local antidiscrimination laws have eroded the long-standing doctrine of "employment-at-will" in the United States. These statutes, executive decrees, and ordinances protect employees against discrimination in hiring, discipline, firing, job assignments, promotions, and other day-to-day activities in the workplace—but do not afford protection to independent contractors.

1. Title VII of the Civil Rights Act

Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, for example, protects employees from retaliation or discrimination on the grounds of race, sex, national origin, or religion. Independent contractors are not afforded the same relief. The U.S. Supreme Court has established a multi-factor test to determine whether a laborer is actually an independent contractor or an employee.[28] The factors may be summarized as follows:

1) whether the hiring party has the right to control the manner and means by which the product is accomplished;

2) whether a certain skill is required and who supplies the instrumentalities and tools;

3) where the work location is and the duration of the work relationship;

4) whether the hiring party has the right to assign additional projects;

5) what is the method of payment for the hired party;

6) whether the hired party is responsible for hiring and paying assistants;

7) whether the hired party's work is part of the regular business of the hiring party; and

8) whether the hired party is entitled to employee benefits and tax deductions.

The Second Circuit has held that, when applying the *Reid* test, the greatest weight should be placed on the first factor, "the extent to which the hiring party controls the manner and means by which the worker completed his or her assigned tasks."[29] This decision reiterates the fact that a company cannot define a work relationship based solely on the paper / documentary or financial arrangement with its workers.

2. Americans with Disabilities Act

Title 1 of the ADA prohibits private employers, state and local governments, employment agencies, and labor unions from discriminating against qualified individuals with disabilities in any part of the employment process, 42 U.S.C. § 12101. When determining whether a worker is an independent contractor or an employee for ADA coverage, the courts apply the "common law agency test." This takes into consideration the employee / employer relationship; the employer's ability to control the job; and the employment opportunities of the individual.[30] In *Wojewski v. Rapid City Reg'l Hosp.*, an independent contractor physician was unable to pursue an ADA claim, since the ADA covers only employees.[31]

3. Age Discrimination in Employment Act

The ADEA, enacted in 1967, prohibits employment discrimination against employees who are 40 years of age or older.[32] Similar to the ADA, in order to have standing to bring an ADEA claim, the worker must be an employee, and not an independent contractor. In *Shah v. Deaconess Hosp.*, the court held that a surgeon with surgical privileges was not an employee of the hospital and therefore was not entitled to bring a suit under the ADEA or under Title VII.[33]

E. National Labor Relations Act

The NLRA protects the rights of most employees in the private sector to organize and join labor unions, engage in collective bargaining, and participate in strikes and other concerted protected activities without fear of job retaliation.[34] NLRA protections do not extend to independent contractors.[35] In determining whether a worker is an independent contractor or an employee, the National Labor Relations Board ("NLRB") and the courts focus on the extent of control the putative employer may exercise over the worker.[36]

F. Occupational Safety and Health Act

Enacted in 1970, OSHA regulates work-related injuries, illnesses, and deaths by requiring that certain standards for workplace safety and health are met. All employers, regardless of the number of its employees, have a general duty to maintain a safe workplace and to comply with the Act's safety and health standards.[37] OSHA protection applies to employees, and not to independent contractors.[38] Some courts, however, have extended OSHA coverage to employees of an independent contractor (although not to the contractor) working on the employer's job site. In one such case, the Sixth Circuit concluded that "once an employer is deemed responsible for complying with OSHA regulations, it is obligated to protect every employee who works at its workplace."[39]

G. Employee Retirement Income Security Act

ERISA was signed in 1974 to guarantee minimum standards for pension and health benefits.[40] Although ERISA does not require employers to provide its employees with pension or health benefits, once in place ERISA regulates those benefits. In *Todd v. Benal Concrete Const. Co., Inc.*, the court concluded that employer contributions may only be made on behalf of "true" employees. Independent contractors are not afforded ERISA benefits, regardless of how the contractual language describes them.[41] In *Broussard v. ConocoPhillips Co.*, the plaintiff who was not on the company's direct payroll unsuccessfully claimed entitlement to retroactive benefits from a company's Retirement and Savings Plans for the period between January 1, 1979 to March 12, 1990.[42] The plaintiff had alleged that ConocoPhillips misclassified her as an independent contractor when, in actuality, she was a leased employee. Nevertheless, as discussed above, if an employee is misclassified as an independent contractor, the employer may be liable for years of retroactive employee benefit plan.[43]

V. Proposed Changes

As cases of misclassified workers continue to monopolize the courts and the media, the legislature and politicians have taken notice. On September 12, 2007, then-Senator Barack Obama and Senators Dick Durbin, Edward Kennedy and Patty Murray introduced S.2044, to crack down on employee misclassification on a national level. Titled the Independent Contractor Proper Classification Act of 2007, the bill would revise procedures for worker classification, primarily focusing on § 503 of the Revenue Act of 1978, concerning independent contractor treatment.[44]

Currently under Revenue Act § 503, employers are relieved of tax liabilities stemming from their failure to classify a worker as an employee if the employer meets three specific requirements: 1) reasonable basis; 2) substantive consistency; and 3) reporting consistency.

The proposed Obama bill would eliminate using industry practice as a "reasonable basis" defense and would prevent employers from receiving employment tax relief for any workers the IRS determines should have been classified as employees.[45] Further, under the proposed bill, workers could petition for a determination of employment status and employers would be required, prior to classifying workers as independent contractors, to notify them of their rights to: 1) seek a status determination from the IRS; 2) clarify their federal tax obligations; 3) understand that labor and employment law protections would not apply to them.

The bill would allow the IRS to issue regulations and revenue rulings on employment status whenever workers were determined to be misclassified. The IRS would be authorized to perform an employment tax audit; inform the Department of Labor of its activities and findings; notify workers of the possibility of a self employment tax refund; and instruct the employer on how to minimize the violation. The Department of Labor would identify and track complaints, enforce actions involving misclassified workers, and investigate specific industries with frequent classification violations. The Department of Labor and the IRS would share information on worker misclassification and provide that information to relevant state agencies.[46]

State governments have recognized the impact misclassification is taking on state economies. In September 2007, New York Governor Spitzer, through Executive Order No. 17, established the Joint Enforcement Task Force on Employee Misclassification to address worker misclassification. The Task Force directs state agencies charged with investigating employee misclassification to coordinate their investigations and enforcement efforts and share relevant information.[47]

The Task Force is led by the state Department of Labor and comprises representatives from the Workers' Compensation Board, the Workers' Compensation Inspector General's Office, the Department of Taxation and Finance, the Attorney General's Office, and the New York City Comptroller's Office. Working together, the Task Force is responsible for developing strategies for systemic investigations into employee misclassification as well as for creating ways to facilitate the filing of worker and agency complaints and identification of potential violators. The Task Force is challenged with working alongside business, labor, and community groups interested in reducing the perceived problem of employee misclassification, by establishing specific protocols. The Task Force will issue a report each year on February 1st describing its accomplishments throughout the previous year. On February 1, 2008, the Task Force called for legislation that would extend individual liability for workers' compensation misclassifications to corporate officers, shareholders, members of LLCs and LLPs, as well as to corporate successors and affiliated entities.[48]

Further emphasizing growing concerns of misclassification, academics are focusing on the problem and on the increase in collective actions concerning worker misclassification, and are publishing suggestions on how to curtail misclassification. One such effort, the Cornell study entitled "The Cost of Worker Misclassification in New York State," is based on an audit conducted by the state Department of Labor, Unemployment Insurance Division, between 2002–2005. The audits collected employment data from specific industries statewide. The study estimated that 9.8% (39,587 of 400,732) of New York State employers misclassify approximately 750,000 workers as independent contractors.[49]

The authors of the study argue that the broader implication of misclassification (beyond the adverse effect

on the workers) is its cost to government and the taxpayers in substantial uncollected revenues that could have been applied toward government programs, services, and maintenance. The IRS estimates that worker misclassification costs the nation $2.72 billion annually in unpaid Social Security contributions and payments (employer and employee shares), unemployment insurance taxes, and income taxes. This loss in federal revenue translates to less money for communities, school districts, hospitals, law enforcement, and other services that must make up the difference.[50]

The Cornell study made six suggestions for policymakers to consider in hopes of facilitating proper classification and protecting the rights of misclassified employees:

1) clarify guidelines;
2) presume employee status;
3) extend employee protections to independent contractors;
4) provide more resources for enforcement and promote information-sharing among agencies;
5) conduct high-profile enforcement; and
6) extend current outreach and education efforts.

The Cornell study suggests mitigating the misclassification problem by giving both independent contractors and employees the same benefits. If state labor laws were extended to all workers regardless of classification as independent contractor or employee, the study asserts, there would no longer be an issue of misclassification.[51]

The Cornell study fails, however, to take reality into consideration when outlining suggestions for misclassification disputes. Suggesting that all workers are presumed to be employees places an undue burden on employers and adversely affects the many admittedly independent contractors who provide services to putative employers. Although the Cornell study baselines important considerations, if reclassified as employees, independent contractors would no longer be entitled to deduct from gross contract compensation on their tax returns the costs of doing business and would lose the incentive to grow their businesses. Both independent contractors and employees are entitled to varying benefits specifically tailored to meet their job needs. Further, many employers would be forced out of business as the costs of litigation and back pay continue to rise.

Recently, the Massachusetts Attorney General's Office ("AGO") issued a guidance on how it will interpret and enforce that state's Independent Contractor Law. That law presumes that an individual is an employee. An employer must satisfy each part of a three-part test to establish that the worker is an independent contractor. The test is as follows:

1) the individual must be free from the employer's control;
2) the individual must perform work outside the usual course of business of the employer; and
3) the individual must be engaged in an independently established trade, occupation, profession or business.

The Massachusetts AGO is now empowered to investigate potential violations of the law, including those that may be triggered by poor record-keeping. According to the guidance, business entities, individual corporate officers, and managers may be liable for violations. The Massachusetts statutes authorize the AGO to impose substantial civil and criminal penalties, including heavy fines and imprisonment.[52]

The IRS now provides tax forms for employee misclassification. Employees misclassified as independent contractors may use a new IRS tax form 8919 to figure and report uncollected Social Security and Medicare taxes due as part of their compensation. When reclassified employees file the new form, their Social Security and Medicare taxes will be credited to their Social Security record and the named employer may expect a government agency audit of payroll, its books, and records. This new form will continue to plague employers as independent contractors seek to gain employee benefits at their discretion. With the new tax form comes the greater likelihood of increased employee investigation, litigation, and costs.

VI. Suggestions to Mend Misclassification Errors

As employee misclassification, legislation, rule making, and litigation increases, employers should take the appropriate first steps to limit liability and protect their businesses, without raising "red flags." Employers should audit their contractor and employee job descriptions, actual job duties and functions, and the degree of day-to-day control exerted by management to determine who is an independent contractor, who is an employee, and whether the employees are "exempt" or "nonexempt" under applicable wage and hour tests. The actual duties the workers perform should be scrutinized, not the title or position or statement in any contracts. On an individualized basis, employers should review 1099 forms for independent contractors and determine whether workers are correctly identified as independent contractors or whether employee status is more appropriate.

If a misclassification is determined concerning independent contractors, the employer has two options: 1) reclassifying the workers as employees going forward, making proper tax and Social Security withholdings, and providing inclusion in relevant benefit plans; or 2) restructuring their contractor relationships to reduce or eliminate the degree of control the putative employer exercises over the day-to-day activities of the contractor

and "restructuring" services by allowing independent contractors to set their own hours, perform services from home or other off site locations, supervise their own work, work for a prescribed period of time, confine work to a specific project, and perform work for other companies.[53] The company will remain potentially liable for its past misclassifications, but will cut off and eliminate ongoing liability for future misclassification.

As to past misclassifications, and depending on the number of workers and amount of dollars involved, a putative employer may elect to communicate in a carefully scripted manner with these "possibly misclassified employees" and offer them some amount of compensation for past liability.

Depending on whether the Obama bill is passed, employers should focus on § 503 of the Revenue Act of 1978 and incorporate "safe harbor" provisions into all independent contractor agreements. These provisions should spell out that independent contractors waive all rights to employee benefits and labor and employment law provisions. Furthermore, employment contracts should include a provision authorizing arbitration instead of judicial proceedings when a question concerning worker classification arises. Given the legal landscape, the judicial, government agency and political interest and trends, putative employers should be increasingly mindful of the worker misclassification issue.

VII. Conclusion

The consequences of worker misclassification, both as to independent contractors and overtime exempt employees, are a burning hot topic of the moment. Individual, class and collective actions concerning worker status are proliferating. Companies are facing larger judgments, ramifications and costs, as one case sparks another. The costs can be staggering, from back pay with interest to stock options awarded at years' old lower prices. Misclassification cases are lucrative for plaintiffs' lawyers, particularly when they can assert class and collective claims and work on a contingent fee basis. Given this landscape, prudent "employers" may elect to meet the most stringent employee tests.

Endnotes

1. *Vizcaino v. Microsoft*, 97 F.3d 1187 (9th Cir. 1996); *see also* Robert W. Wood, *Independent Contractor or Employee? The Multiple Issues Involved in Independent Contractor Status*, NYSBA Journal, June 2008, at 31.
2. *Herman v. Time Warner*, 56 F.Supp.2d 411 (S.D. N.Y. 1999).
3. 840 F.2d 1054 (2d Cir. 1988).
4. 602 F.2d 1185 (5th Cir. 1979).
5. Susan N. Houseman, *A Report on Temporary Help, On-Call, Direct-Hire Temporary, Leased, Contract Company, and Independent Contractor Employment in the United States*, August 1999 at 9.1 *available at* http://www.dol.gov/oasam/programs/history/herman/reports/futurework/conference/staffing/9.1_contractors.htm.
6. Houseman at 9.1.
7. Charles J. Muhl, *What is an employee? The answer depends on the Federal law*, Monthly Lab. Rev., Jan. 2002 at 7, *available at* http://findarticles.com/p/articles/mi_m1153/is_1_125/ai_85107273/pg_8.
8. 757 F.2d 1376, 1389 (3rd Cir. 1985).
9. Muhl at 7.
10. 503 U.S. 318, 323 (1992).
11. 266 Dkt. No. BC 17450 (Cal. Sup. Ct. Jan 14, 2000).
12. 20 F.3d 938 (9th Cir. 1994).
13. 48 Cal. 3d 341, 349 (Cal. 1989).
14. *See, e.g., Amarnare v. Merrill, Lynch, Pierce, Fenner & Smith*, 611 F.Supp. 344, 346 (S.D. N.Y. 1984) (temporary staffing agency and customer held liable jointly under Title VII when evidence showed that customer controlled the hours worked, the work place, and work assignments of worker); *M.B. Sturgis*, 331 NLRB No. 173 (Aug. 25, 2000) (both temporary employees and regular employees could be placed in the same bargaining unit, without the approval of the customer or temporary agency; *NLRB v. Western Temporary Services Inc.*, 821 F.2d 1258, 1267 (7th Cir. 1987) (applying "community of interest" test, staffing firm and customer who both exercised substantial control over employees and were involved in determining essential terms and conditions of employment held jointly liable under NLRA); *Capitol EMI Music, Inc.*, 311 NLRB No. 103, 1993 NLRB LEXIS 577, 9 (1993) (staffing agency may be liable for unfair labor practices if: 1) it knew or should have known that the customer acted against the worker for unlawful reasons; and 2) it acquiesced in the unlawful action by failing to protest or exercise a contractual right to resist).
15. *See* I.R.C. § 6501(a); *see also Day v. C.I.R.*, No. 7118-98, 2000 WL 1839398, at *1 (U.S. Tax Ct. Dec. 13, 2000) (finding that for employment tax purposes, truck drivers were employees; therefore, the employer could be assessed FICA, FUTA, and income tax withholdings).
16. *See Boles Trucking, Inc., v. United States*, 77 F.3d 236, 239, (8th Cir. 1996).
17. 29 U.S.C. §§ 206–07.
18. 29 U.S.C. §§ 260, 794a.
19. N.Y. Labor Law § 663 (McKinney 2002).
20. *See generally* 29 U.S.C. § 213(a)(1); *see also, e.g., Serrano v. Interlingual of Am. Inc.*, No. H-07-1639, 2008 WL 2944570, at *2 (S.D. Tex. Jul. 23, 2008) (employees occupying executive, administrative, or professional positions are exempt from the overtime requirements of the FLSA under the Act's "white-collar" exemptions).
21. *See Higgins v. United States*, No. 95-285C, 2005 WL 6112625, at *15 (Fed. Cl. Aug. 16, 2005) (an FLSA ruling cannot be based on the job description alone, but must be based on the duties the employee actually performs).
22. 29 U.S.C. § 260.
23. *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1272 (11th Cir. 2008).
24. 814 F.2d 1537, 1539 (11th Cir. 1987).
25. 942 F.2d 1562, 1556-57 (11th Cir. 1991).
26. N.Y. Workers' Compensation Law § 25.
27. 714 N.E.2d 390, 392 (Ohio 1999).
28. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–752 (1989).
29. *Eisenberg v. Advanced Relocation*, 237 F.3d 111, 116 (2d Cir. 2000).
30. *Swanson v. Univ. of Cincinnati*, 268 F.3d 307, 319 (6th Cir. 2001).
31. 450 F.3d 388 (8th Cir. 2006).

32. 29 U.S.C. §§ 621–634.

33. 355 F.3d 496 (6th Cir. 2004). *See also Kuehnle v. Random House, Inc.*, No. 3:07cv095-B-A, 2008 WL 907467, at *1 (N.D. Miss. Mar. 31, 2008) (plaintiff sales representative denied recovery under the ADEA since he was admittedly an independent contractor).

34. 29 U.S.C. §§ 158 *et seq.*

35. 29 U.S.C. § 152(3).

36. *See Friendly Cab Co., Inc.*, 341 N.L.R.B. 722, 725 (2004) (based on high degree of control Friendly exercised over drivers, the drivers held employees entitled to union representation).

37. 29 U.S.C. § 654(5).

38. *See Hall v. Dieffenwierth,* No. 2-07-058-cv, 2008 WL 2404462, at *2 (D.C. Tex. June 12, 2008) (refusing to enforce OSHA duties against the employer when the injured worker was found to be an independent contractor and not an employee).

39. *Teal v. E.I. DuPont de Nemours and Co.*, 728 F.2d 799, 805 (6th Cir. 1984).

40. 29 U.S.C. § 1003.

41. 710 F.2d 581, 584 (9th Cir. 1983).

42. No: 2-04-cv-1986, 2006 WL 220840, at *1 (W.D. La. Jan 24, 2006).

43. *See Vizcaino v. Microsoft*, 97 F.3d 1187 (9th Cir. 1996), *see also Herman v. Time Warner*, 56 F.Supp.2d 411 (S.D. N.Y. 1999).

44. *See generally* Robert W. Wood, *Independent Contractor or Employee? The Multiple Issues Involved in Independent Contractor Status,* NYSBA Journal, June 2008, at 29.

45. Independent Contractor Proper Classification Act of 2007, S. 2044, 110th Congress (2007).

46. *See supra* note 44 at 30.

47. State of New York Executive Order No. 17, "Establishing the Joint Enforcement Task Force on Employee Misclassification," September 5, 2007. *See* http://www.ny.gov/governor/press/ExecutiveOrderNo.17.pdf.

48. *See* Richard J. Reibstein *et al., The Risk of Using Independent Contractors,* N.Y. L.J., May 15, 2008, *available at* http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202421388098.

49. Donahue, L. H., Lamare, J. R., & Kotler, F. B. (2007), *Employee or independent contractor? Misclassification comes at a price* (ILR Impact Brief #18), School of Industrial and Labor Relations, Cornell University (2007).

50. *See* U.S. Department of the Treasury, 2006 Internal Revenue Service, *Publication 15-A, Employer's Supplemental Tax Guide,* Ca. No. 21453T *available at* http://www.irs.gov.

51. Kotler at 13.

52. *An Advisory from the Attorney General's Fair Labor Division on M.G.L. Ch. 149, § 148b,* 2008 *available at* http://www.mass.gov. Following suit, New Mexico presumes an employer/employee relationship for all workers in the construction industry, S.B. 657, 47th Leg., 1st Sess. (N.M. 2005).

53. *See, e.g.*, Richard J. Reibstein *et al., The Risk of Using Independent Contractors,* N.Y. L.J., May 15, 2008.

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Toward a Functional Cross-Border Age-Discrimination Policy

By Donald C. Dowling, Jr.

No major multinational openly tolerates illegal discrimination. But implementing antidiscrimination policies and codes of conduct across borders can be more complex than it sounds. And perhaps the trickiest piece to a global ban on discrimination is addressing the issue of *age* discrimination.

Until recently, the U.S. and Canada were among very few jurisdictions in the world with robust laws banning age discrimination in employment. Recently, though, a number of jurisdictions—notably European Union member states plus several common law countries—have passed laws that prohibit age discrimination in employment, elevating "age" to a protected class.[1]

As a protected class, "age" differs fundamentally from conceptually simpler protected groups such as gender, race, ethnicity, and even religion. "Age" differs because everyone is some age, most of us eventually reach old age, and certain entrenched workplace practices inherently implicate age (think of experience requirements in hiring, service-linked vacation benefits, and youth-discriminatory retirement plans). Indeed, the very legal systems that prohibit age discrimination in employment themselves tend to impose age-discriminatory doctrines. For example, notwithstanding its robust federal and state laws against age discrimination in employment,[2] U.S. jurisdictions impose ages floors that discriminate against the young (driving, voting, drinking) plus, at the other end, U.S. jurisdictions actually impose age caps that discriminate against the old (airplane pilots' licenses, "senior status" of judges).[3]

There is no single best strategy for reconciling these inherent inconsistencies. Therefore, the world's emerging laws against age discrimination in employment tend to resolve these inconsistencies in differing ways. The result is both that age discrimination laws differ fundamentally across jurisdictions, and that age discrimination laws differ in some fundamental ways from other discrimination laws (such as laws against discrimination on gender, race, and religion).

American-headquartered multinationals commonly issue global codes of conduct and global discrimination / harassment policies listing protected categories, almost invariably including among these categories "age." But these inconsistencies inherent in protecting "age" as a class frustrate multinationals that try to craft cross-border workplace policies banning "age" discrimination across their international operations. Perhaps too few multinationals have yet proactively confronted the problem that including "age" in a discrimination policy protected-trait list forces a multinational to resolve the inconsistencies inherent in protecting "age."

This article explores how multinationals can develop a workable approach to banning age discrimination (and, implicitly, age *harassment*) across their worldwide operations. We focus on two particularly sticky issues—youth discrimination and mandatory retirement—and we analyze four steps toward a functional cross-border age-discrimination policy.

Youth discrimination. U.S.-based multinationals face a particular challenge when they purport to ban "age" discrimination across borders because Americans inevitably look at their age discrimination prohibitions through the lens of America's circa-1973 federal Age Discrimination in Employment Act.[4] This U.S. statute is in many ways the world's toughest and best-enforced national age discrimination statute. But at the same time, by international standards the U.S. federal law is surprisingly *narrow*: It kicks in only at age 40 (leaving everyone 39 and younger completely unprotected) and it freely tolerates discrimination against the young. According to the U.S. Supreme Court, the U.S. age discrimination statute merely prohibits *favoring* the young to the *disadvantage of* the old.[5] By contrast, age discrimination laws emerging in many countries worldwide are far broader: They tend to have no age-40 floor and they tend to prohibit dis-

crimination not only against the old, but also against the young and the middle-aged. Indeed, countries outside the U.S. with broad new age discrimination laws increasingly see the U.S. age-40 floor and lack of protection for the young as blatantly discriminatory.

At this point, a domestic American employment lawyer would demur: Although America's *federal* age-discrimination law has this age-40 floor and one-way prohibition against only old-age discrimination, some American *state and municipal* age discrimination laws, in a minority of jurisdictions, go beyond the federal rule and prohibit age discrimination against employees under 40 and against the young in favor of the old.[6] This point, although valid, does not really affect our analysis here because by international standards these local U.S. "youth discrimination" doctrines remain largely underdeveloped and widely underenforced. Few significant U.S. state court decisions protect rights of young American workers victimized because of their youth at the hands of senior staff, and the little case law there is on this point almost completely fails to develop the "adverse impact" (indirect discrimination) ramifications of the local American "youth discrimination" prohibition. As a result, employers across the U.S. almost universally discriminate against young workers. For example, employers across the U.S. routinely impose experience requirements in recruitment, even though this practice shuts out the youngest entry-level workers. As another example, employers across the U.S. routinely grant stepped service-linked vacation benefits, even though this practice tends to relegate the shortest vacations to the youngest workers.

The point is that even though local age discrimination laws in a minority of U.S. jurisdictions ostensibly protect the young, U.S. employers tend to ignore the youth-discriminatory disparate impact of their human resources offerings. When these U.S. employers go abroad, they tend to export their youth-discriminatory human resources approaches. That is, U.S.-based multinationals operating outside the U.S. tend to impose practices that have an adverse impact on young workers. In doing so, they run into compliance problems in places like Europe, which recently imposed robust protections against "youth discrimination," and outlawed practices like unsupported experience requirements in hiring, stepped (service-linked) vacation entitlements, and youth-discriminatory retirement plans.

Mandatory retirement. Even as U.S. multinationals' global age discrimination policies tend to be *underdeveloped* as to discrimination against the young, at the same time (and speaking from an outside-U.S. perspective) the typical U.S. approach to age-discrimination compliance is *overdeveloped* in a different respect: mandatory retirement. "Mandatory retirement," of course, means openly firing workers solely because of their age. As such, mandatory retirement is illegal in the U.S. (although there is a narrow exception for certain high-level executives). American employers recognize it as blatant age discrimination.[7] To a U.S. employer, no human resources policy that purports to ban discrimination based on age can credibly accommodate mandatory retirement.

Not so elsewhere. The new age discrimination laws emerging outside the U.S. tend to carve out an enormous exception that lets employers fire those who celebrate a qualifying birthday.[8] Indeed, a "little secret" in human resources outside the U.S. is the persistence of mandatory retirement, even in Europe.[9] And U.S.-based employers tend to follow local practice in this regard. For example, Germany has a new age discrimination law, but one German employment lawyer has estimated that over 90% of U.S. employers in Germany still write mandatory retirement clauses into their local employment contracts.

How can countries that prohibit age discrimination justify an exception for mandatory retirement that looks (to Americans, at least)[10] blatantly discriminatory? Mandatory retirement is entrenched outside the U.S. perhaps because there has been only light opposition to it. Although litigants such as older-workers' rights groups have been challenging mandatory retirement in some European countries, for the most part the persistence of mandatory retirement outside the U.S. seems not to anger the rank-and-file workforce. Trade unions outside the U.S. actively negotiate mandatory retirement provisions *into* collective agreements, sometimes actually seeking *younger* retirement ages. Even the EU Court of Justice has condoned mandatory retirement; notwithstanding the EU directive that purports to ban age discrimination,[11] the ECJ has upheld mandatory retirement in both Spain and (expected) the U.K.[12]

When pressed to justify mandatory retirement in light of their relatively new laws banning age discrimination, many Europeans say there is nothing wrong with firing older employees in jurisdictions where forced retirement has been customary, expected, and legal. They argue that where the social security replacement rate of final average pay is substantial, workers anticipate the day their benefits vest and they can leave the workforce with dignity and a viable guaranteed income. Some Europeans will go farther and make the ageist case that mandatory retirement is a social good because it opens up jobs for the young.[13] Other Europeans note that, with Europe's many restrictions on employment terminations which can result in enormous payoffs for no-fault dismissals, employers need some pressure release valve to foster employee turnover.[14]

Whatever the policy justification, mandatory retirement remains legal throughout most or all of Europe and the world. Therefore, a multinational—even one based in the U.S.—can legally impose mandatory retirement virtually worldwide (outside the U.S.) if it chooses to, and if it follows the procedural rules that apply.

In many cases there are indeed procedural steps. In the U.K., for example, an employer can force an employee to retire only after it:

- declares and justifies a retirement age of 65 or above
- notifies each employee approaching retirement age several months before the qualifying birthday that mandatory retirement will apply unless other arrangements are agreed; and
- hears out each employee who requests a waiver, consistent with an appropriate procedure and applies its policy fairly and consistently.[15]

While multinationals that follow these local law procedures are usually free (outside the U.S.) to impose mandatory retirement, there is a *self-imposed* hurdle here: alignment with a multinational's own in-house global code of conduct or anti-discrimination policy. Multinationals themselves (particularly those based in the U.S.) often declare in their global codes / policies that they do not tolerate "age" discrimination (listing "age" along with other protected traits). Yet often these same organizations simultaneously impose mandatory retirement outside the U.S.

These contradictory positions need to align, because there is a liability risk: Outside of U.S. employment-at-will, global codes of conduct and discrimination policies can get enforced as part of the employment contract. If some global human resources code or policy guarantees workers will not suffer age discrimination, then a forced-retiree can sue in local courts alleging a breach of contract—the policy. As such, U.S. employers need to be careful that, in saying they do not discriminate on "age," they do not give their outside-U.S. employees a contractual right to be exempt from local mandatory retirement rules. In one such claim, Chinese forced-retirees alleged to a Chinese labor court that while their forced retirements may not have violated any Chinese *statute*, their firings amounted to a contractual breach of the employer's in-house code of conduct.

A related litigation risk here arises domestically *inside* the U.S.: Any multinational that imposes mandatory retirement outside the U.S. (especially if in violation of a global code of conduct or discrimination policy) might raise an issue in a U.S. domestic age discrimination proceeding. A U.S. age-discrimination plaintiff trying to prove systemic age bias, such as in a class action, might try to convince a U.S. judge to permit discovery or admit evidence on the employer's forced retirement practices overseas, arguing that any employer openly discriminating outside the U.S. against older workers (particularly if in violation of its own global discrimination policy) more likely harbors an ageist animus stateside.

Four steps toward a functional cross-border age-discrimination policy. In short, too many multinationals create a troublesome contradiction for themselves by issuing a global code / policy that purports to ban "age" discrimination while they simultaneously impose mandatory retirement outside the U.S. where it is otherwise legal. To fix this problem—and to reconcile other inconsistencies inherent in any global human resources code / policy that expressly purports to ban "age" discrimination and harassment—a multinational should take four steps:

- Step 1: Assess non-compliant practices abroad. HR professionals and employment lawyers *at a multinational's headquarters* often remain completely unaware that their organization's own overseas affiliates routinely and openly impose mandatory retirement. Find out what really goes on overseas as to mandatory retirement (and other apparently ageist practices) abroad.
- Step 2: Align global prohibition with actual practices. Many a multinational will learn, in Step 1, that although it has issued a global code or policy banning "age" discrimination, its policy is actively being violated abroad—older overseas employees are being fired when they hit some retirement age. There are five possible compliance strategies here. Choose one:
  - Stamp out mandatory retirement in the organization worldwide where possible; or
  - Amend the organization's global "age" discrimination code / policy prohibition, writing in an express exception to allow mandatory retirement where it is otherwise legal; or
  - Rewrite the list of protected traits in the global discrimination prohibition to delete the express reference to "age"; or
  - Replace the list of protected traits with a general statement saying the multinational tolerates no illegal discrimination or harassment that violates any applicable law in any jurisdiction where it does business around the world; or
  - Replace the global anti-discrimination policy with tailored local-country discrimination policies.
- Step 3: Police outsource partners. Many multinationals have contractually bound their overseas suppliers and outsource service providers to *supplier* codes of conduct. Check the supplier code. If it expressly prohibits "age" discrimination, then in theory the principal needs to be certain that outsource partners have eradicated mandatory retirement in their own operations. In practice, this will not likely be possible; a more realistic approach

will be to rein in the age discrimination component of the supplier code.

- Step 4: Check that practices abroad comply with local age discrimination laws. A completely separate global age discrimination compliance challenge regards compliance with the emerging local age discrimination laws in many countries worldwide. As discussed, age discrimination laws outside the U.S. tend to define "age discrimination" more broadly than under the federal U.S. age- discrimination statute, and they tend to protect employees of all ages—not just those over 40. They tend to insulate the young against policies that favor the old. This means practices common and legal in the U.S. can raise problems abroad—for example, unsupported experience requirements, stepped vacation benefits, and youth-discriminatory retirement plans.

When monitoring overseas compliance with local age-discrimination laws (and, for that matter, with a multinational's own policy against age discrimination), one obvious point is to stamp out the remarkably persistent age caps and age ranges in job-wanted advertisements. Countless multinationals operating in Latin America, Asia and Africa still pay newspapers and Web sites to post job ads that blatantly discriminate on age, along the lines of "Wanted: Brand Manager age 30–35," or "Seeking Trainees up to Age 25." These ads used to be common in Europe as recently as the early 2000s; even now, according to a recent Belgian study,[16] age-discriminatory job ads in Europe remain fairly common.

To promulgate a global code of conduct or discrimination policy that in essence says *"we do not tolerate age discrimination or harassment in our worldwide operations"* is to embark on a journey far more difficult than it may at first appear. One huge problem is that most global organizations retain (in some countries) entrenched age-discriminatory practices like unsupported experience requirements in hiring, age ranges in job ads, service-linked vacation benefits, youth-discriminatory retirement plans, and mandatory retirement. To get into compliance, a multinational needs to craft a proactive global age discrimination strategy that accounts for the nuances and challenges in this surprisingly tricky area.

Endnotes

1. EU Council Directive—2000/78/EC (27 Nov. 2000) (requiring EU member states to prohibit discrimination on "age"). *See* F. Salans, K. Wiersma, K. De Schutter, *Too Old to Work? Discrimination Based on Age in Europe*, IBA International Discrimination Law Newsletter, Aug. 2008 (vol. 13 no.1), at 6. Beyond the EU, Australia, Canada, and New Zealand now have age discrimination laws.
2. U.S. Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* is the federal law.
3. *See, e.g.* Joel Stashenko, *Mandatory Retirement at Age 70 for State Judges: A 'Waste of Accumulated Wisdom' or a 'Good Thing'?*, New York Law Journal, Dec. 30, 2008, art 1.
4. *Id.*
5. *General Dynamics v. Cline*, 540 U.S. 581 (2004).
6. *See, e.g.*, New York Executive Law 296, sec. 3a (New York State age discrimination law).
7. In 1970s and 1980s America, mandatory retirement was legal because the U.S. federal age discrimination law was capped, first at 65 and then at 70 (now it is uncapped). Even during that era, though, mandatory retirement in America was acknowledged as being discriminatory—it was not, at that time, *illegal* discrimination.
8. *De la Villa v. Cortafiel Servicios*, S.A., EU Court of Justice case C-411/05, 2007/C 297/09 ("compulsory retirement clauses contained in collective agreements are lawful where such clauses provide as sole requirements that workers must have reached retirement age, set at 65 by national law, and must have fulfilled" a few other conditions); *Queen v. Secretary of State for Business, Enterprise and Regulatory Reform*, EU Court of Justice case C-388/07, opinion of Advocate General of 23 Sept. 2008 (a "rule . . . which permits employees aged 65 or over if the reason for dismissal is retirement, can in principle be justified . . ."). In some of these countries mandatory retirement is allowed only under certain circumstances, such as in Spain, where it must be authorized by collective bargaining agreement. The U.S. ADEA allows mandatory retirement only for a narrow band of high corporate officers.
9. Countries' local laws almost never require mandatory retirement; laws merely allow employers to impose it if they choose.
10. *See supra* note 7.
11. The EU directive is cited *supra* note 1; the Spain and U.K. ECJ cases are cited *supra* note 5.
12. *See supra* note 7.
13. For a European defense of this argument, *see, e.g.*, *Seldon v. Clarkon Wrights & Jakes*, [2008] UKEAT 0063-08-1912, appeal no. UKEAT/0063/08 (19 Dec. 2008) (London Employment Appeal Tribunal).
14. *Id.*
15. *See* Oliver Brettle and Donald C. Dowling Jr, *The EEAR: Not Your Uncle Sam's ADEA*, SHRM Legal Report (October-November 2007) (*available by subscription at* www.shrm.org; *reprinted at* http://www.whitecase.com/publications_10312007/).
16. This Belgian study is cited and discussed in Salans, *et al.*, *supra* note 1.

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The Negotiability of Health Insurance Issues Under the Public Employees Fair Employment Act (Taylor Law)

By Philip L. Maier

One of the more pressing issues facing both employers and employees, if not the nation, is the cost of health insurance. As employers try to rein in the ever-increasing costs of this benefit, and as employees try to retain this benefit and improve their standard of living, the issue has come to the forefront in many, if not all, collective bargaining negotiations between unions and employers in the public sector. This article provides an overview of the parties' duty to negotiate concerning this issue, relating to both current and retired employees, as it has developed under the Public Employees Fair Employment Act (Taylor Law)[1] by way of decisions from the courts and the Public Employment Relations Board (PERB). Examples of how the issue has been addressed at the negotiating table will also be discussed. Initially, the framework within which a subject is analyzed as to whether a bargaining obligation exists will be discussed.

Subjects of Bargaining[2]

The duty to negotiate in good faith as defined by the Act encompasses the obligation to bargain concerning "salaries, wages, hours and other terms and conditions of employment." The Act itself, however, does not give further guidance as to what subjects constitute "terms and conditions of employment."[3] As a result, the Board and the courts have issued, on a case-by-case basis, many decisions relating to the parties' obligation to bargain concerning a particular subject. This section sets forth the general categories within which a given subject may fall; specifically, whether a subject is a mandatory, nonmandatory but permissible, or a prohibited subject of bargaining, and the analysis the Board uses to determine into which category a particular subject falls. A recitation of all the subjects which are mandatory, nonmandatory or prohibited, however, is beyond the scope of this section.

1. Mandatory/Nonmandatory/Prohibited

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 by 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.

Pursuant to this section, it is clear that wages and hours are mandatory subjects of bargaining and that the benefits or payments by a public retirement system are prohibited subjects.

As stated above, the category into which a particular subject falls determines whether a bargaining obligation exists. The following section discusses the classification of these topics. As a preliminary matter, the Board's analysis as to the negotiability of a subject will be addressed.

2. Balancing Approach—Employer v. Employee Interests

In determining whether a demand to bargain a particular topic creates a bargaining obligation, the Board has employed a balancing approach in which it weighs the employer's interests against those of the employees. If the employer's interests are found to outweigh those of the employees, the demand is a nonmandatory subject of bargaining. Such subjects found to be nonmandatory include staffing levels,[4] decisions to eliminate or curtail services,[5] and the creation of a new position.[6] 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*:[7]

> A public employer exists to provide certain services to its constituents, be it police protection, sanitation or . . . 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.

The employees' and the union's interests include matters relating to employee comfort,[8] compensation,[9] hours of work,[10] and leaves.[11] The interests are varied and, like the interests relating to those of an employer, are examined on a case-by-case basis to determine, in the first instance, whether a demand gives rise to a bargaining obligation.

The Board applied and discussed its balancing test in *State of New York (Department of Transportation)*.[12] In that case, 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 in question. It is, therefore, necessary to identify the subject matter in issue and then to balance the competing employer and employee interests at stake.

Finding that staffing decisions are a managerial prerogative since they relate primarily to an employer's mission, the Board dismissed the charge. The union argued that in this matter the staffing change was motivated by economic factors, a factor which the Board has viewed as one leading to a bargaining obligation. The interests that the union advanced in support of its argument were that the state had a bargaining obligation related to employee comfort, safety and workload. The Board, however, stated that the determination of whether a subject is negotiable is not made based upon the facts of the specific case. To do so would undermine the certainty that should exist as to whether a topic is a mandatory or nonmandatory subject of bargaining. Certain subjects, such as staffing, have therefore been pre-balanced by prior case law, which gives the parties clear guidance as to whether or not the subject is mandatory.

3. Mandatory Subjects of Bargaining

Mandatory subjects of bargaining are those in 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.[13] By way of illustration only, those subjects include compensation- related items such as salary,[14] longevity pay,[15] and overtime pay.[16] They also include benefits such as health insurance,[17] and sick, bereavement and vacation leave.[18] Scheduling of tours of duty and hours of work,[19] work rules such as sign-in and sign-out procedures,[20] and dress codes[21] also are mandatory subjects of bargaining.

4. 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.[22] As relevant to impasse procedures, these subjects may not be placed before a fact-finding or interest arbitration panel unless they were contained in the parties' expired CBA.[23] Examples of such topics include class size,[24] staffing,[25] standards for initiating discipline,[26] qualifications,[27] and the decision to eliminate or curtail a particular service.[28]

Though a subject may be nonmandatory, it is the Board's present policy is to encourage parties to discuss such topics at the negotiating table. In *Monroe-Woodbury Central School District*,[29] the Board, at 3057, stated:

> [S]ave for prohibited subjects, all areas of concern of employees should be aired in the collective bargaining process. This is predicated on the belief that a concern phrased in the form of a collective bargaining demand is an excellent channel of communication between an employer and its employees, for it would seem important for an employer . . . to know the concerns of employees.

While the Board's policy is to encourage such discussions, given the nonmandatory nature of the subject, a party cannot press such a topic to the point of insistence. The "point of insistence" has been defined as when the demand has been presented to a fact-finder, or when it impedes the bargaining process. Additionally, a nonmandatory item not already contained in a CBA cannot be presented to an interest arbitration panel. The context in which this issue arises is discussed in later sections.

5. Prohibited Subjects of Bargaining

Prohibited subjects of bargaining "are those forbidden, by statute or otherwise, from being embodied in a collective bargaining agreement."[30] While the terms of the Act itself only preclude negotiation concerning certain retirement system issues and an employer's consent to a strike,[31] other subjects have also been found by case law to be prohibited subjects of bargaining because of a legislative intent to preclude bargaining. Such provisions cannot legally be the subject of negotiation and, if included in an agreement, are not enforceable, and may not be placed before a fact-finding or interest arbitration panel.

A statute may preclude bargaining, thereby rendering a particular subject prohibited. As stated by the Board, the legislature may "abrogate [a bargaining] obligation by the explicit terms of a statute or by implication inherent in a statute or statutory scheme."[32] Examples of such legislation are certain laws relating to police discipline,[33] the decision to transfer summer school programs to a Board of Cooperative Educational Services,[34] work rules relating to the receipt of benefits under General Municipal Law 207-c,[35] and the use of electronic recording equipment to record court proceedings.[36]

6. The Conversion Theory of Negotiability—*Cohoes*

In *City of Cohoes* (*Cohoes*)[37] the Board adopted the conversion theory of negotiability. This theory holds that a nonmandatory subject of bargaining, which is not otherwise prohibited, and which is contained in a CBA, becomes a mandatory subject of bargaining and may be placed before a fact-finding or interest arbitration panel and, therefore, subject to change. Prior to the adoption of this theory, the Board had consistently held that the negotiability of a demand is governed by the nature of the subject matter itself. As a result of this change, if a clause in a CBA addresses a subject that is a nonmandatory subject of bargaining, that clause may now be placed

before a fact-finding or an interest arbitration panel, and is subject to a determination as to whether it should be either modified or deleted from the CBA or award. This change therefore redefined the scope of demands that are subject to these processes. As explained by the Board, at 3038:

> [W]e have expanded the scope of bargaining by adopting a supplemental theory of negotiability under which nonmandatory subjects contained within a contract between two parties to a bargaining relationship can be converted into mandatory subjects for purposes of collective negotiations between those parties. This conversion theory of negotiability is, however, targeted to specific terms in the parties' agreement. We do not intend to require negotiations pursuant to demand about any and all nonmandatory subjects which might be related in some arguable way to a topic or category addressed generally in parties' contracts.

The adoption of the *Cohoes* theory of negotiability was prompted by a failure of parties to negotiate concerning nonmandatory subjects in existing CBAs despite the Board's admonition to do so. This failure to negotiate gave rise to disruptive litigation, and a greater emphasis on the parties' respective legal positions rather than on resolving the impasse at hand. Fundamentally, however, the Board was concerned about the fact that an employer was required to continue the terms of a CBA under § 209-a.1(e) while at the same time not allowing the employer the right to negotiate concerning the nonmandatory terms in those CBAs. The *Cohoes* doctrine is limited to nonmandatory subjects in existing CBAs, and has no application to prohibited subjects of bargaining.[38]

Cohoes was made applicable to school districts in *Greenburgh No. 11 Union Free School District*.[39] In doing so, the Board rejected the contentions that *Cohoes* should not be extended because of the differences between public safety personnel and school district personnel, that further litigation may ensue to clarify *Cohoes*, and that such changes should be made legislatively. In *Greenburgh No. 11 Union Free School District, supra*, the Board also addressed the issue of when is a bargaining demand sufficiently related to a provision in a collective bargaining agreement to trigger the applicability of *Cohoes*. It stated, at 3047-48:

> Our core rationale is simple. As the terms of a collective bargaining agreement define the employment related rights and obligations of the parties to that contract, those contract provisions are terms and conditions of employment. Those terms are naturally the ones most likely to be the focus of the parties' efforts to reach a successor collective bargaining agreement. The harmonious and cooperative labor relations which the Legislature sees as a means to ensure that there is no disruption of public services is best achieved by requiring the parties to a contract to negotiate about the deletion, modification or continuation of any legal term they have already agreed upon and incorporated into their contract.

The analysis requires an inquiry of whether "the demand seeks to include, alter or delete a topic or category addressed specifically, or at least generally, in the parties' contract."[40]

In *Town of Yorktown PBA, Inc.*,[41] the Board stated:

> *Cohoes* was intended to give parties an avenue to address contractual provision which deal with nonmandatory subjects of negotiations. Not only does it provide parties with the means to argue at interest arbitration that a contract provision dealing with a nonmandatory subject should be removed, it is also a tool to modify nonmandatory contract provisions, as long as the proposed modification is reasonably related to the specific language of the nonmandatory contract provision, . . . "the focus of a Cohoes-based analysis should be on the specificity of relationship between the proposal and the contract provisions and not on a difference between their independent status as negotiable items." That is the reasonable interpretation of Cohoes and effectuates the policies of the Act [citation omitted].

Health Insurance

Demands concerning health insurance and issues relating to this benefit have long been held to be mandatory subjects of bargaining for current employees. As a result, demands that relate to changes in health insurance coverage have been held to be subject to a bargaining obligation. For example, changes in the amount of premium or co-payments under a prescription drug rider to be paid by employees are mandatory subjects of bargaining.[42] The right to change health insurance carriers and a change from a carrier-provided plan to a self-insured plan are also mandatory subjects of bargaining.[43] A demand that an employee be disqualified from coverage if eligible for health insurance under a spouse's plan is mandatory, as is a proposal for a "buyout" to employees who decline coverage offered by their employer.

Health insurance as it relates to retired employees is also a subject often discussed at the bargaining table. Unique to this aspect of negotiations is that retired employees are not public employees within the meaning of the Act and therefore a union does not have the right or duty to bargain on their behalf with a public employer. For example, PERB has held that hospitalization benefits for employees who are already retired are nonmandatory since retired employees are not part of the bargaining unit.[44] Additionally, health insurance benefits for families of deceased employees are nonmandatory subjects of bargaining.[45]

PERB has held, however, that a demand for health insurance for families of current employees who die after retirement is not a prohibited subject of bargaining. In *Village of Lynbrook v. New York State Public Employment Relations Board et al.*[46] the Village contended that section 201(4) of the Act, which excludes "payments to a fund or insurer to provide an income for retirees, or payment to retirees or their beneficiaries" from the definition of the phrase "terms and conditions of employment," precluded negotiations on this demand. The Court emphasized the narrowness of its scope of review, and determined that PERB's decision was not irrational. The demand did not constitute "payments to a fund or insurer to provide an income for retirees" or "payment to retirees or their beneficiaries" as prohibited by section 201(4). Accordingly, the Court upheld PERB's determination as to the mandatory nature of the bargaining demand.

In *Della Rocco v. City of Schenectady*,[47] the Court addressed the issue of whether an employer that changes health insurance coverage for current employees is permitted to pass on such changes to retirees. This action originated with the commencement of two class actions, one of retired firefighters and the other of retired police officers from the City of Schenectady. In both actions, the plaintiffs brought declaratory judgment actions seeking a declaration that the city breached collective bargaining agreements (CBA) in effect between the between the employer and the unions by its failure to provide health insurance coverage to which they were entitled. The CBAs contained identical clauses which provided as follows: "[The City] at its own expense shall provide hospitalization and major medical insurance coverage equivalent to the plan presently in effect for each member of the Department and his family, and for retired members and their families." This clause remained in the CBAs from 1969 to 1989.

The Court, in affirming summary judgment in favor of the plaintiffs, stated that the "phrase in question means that the retiree is entitled to the same or equivalent coverage during his retirement as the coverage in effect at the time he retired." The rights of retirees were fixed by the language in the CBAs at the time that they retired. The Court found that it was a logical assumption to conclude that the unions sought to fix the rights of retirees in this matter since the retirees are not involved in subsequent negotiations.[48]

In *Aeneas McDonald v. City of Geneva*,[49] the Court of Appeals addressed the issue of whether retirees have an enforceable non-contractual right pursuant to a past practice to maintain the level of health insurance coverage granted in a city resolution in effect at the time of their retirement. The Court stated that current employees are able to contest a unilateral change in a past practice relating to health insurance since an employer has a duty to negotiate concerning mandatory subjects of bargaining. With regard to retired employees, however, no such right exists because an employer does not have an obligation to bargain concerning retired employees. Past practice, standing alone, does not create an enforceable contractual right upon which a cause of action may be based. The Court rejected the argument that a city resolution is evidence that a collective bargaining agreement relating to retiree health insurance was reached. The resolution, however, does not create any vested contractual rights, since it is a "unilateral action that is temporary in nature."[50] The Court further commented that there was no evidence of an independent agreement to supply health insurance benefits or that a prior collective bargaining agreement could be a source for the right asserted.

In *Sewanhaka Central High School District*,[51] the collective bargaining agreements between the District and unions which brought charges in this consolidated proceeding provided for health insurance for current employees, but made no reference to retiree health insurance coverage. Nevertheless, it provided the same coverage to retirees as to current employees until July 1, 1983. Collective bargaining agreements were in effect between the District and the charging parties from July 1, 1982 to June 39, 1984. The charges complained that the District violated the Act by unilaterally changing the health insurance benefits of employees who retired during the life of the agreement retroactive to July 1, 1982. In finding a violation of the Act when the District failed to bargain regarding health insurance premiums for employees who retired during the term of the existing collective bargaining agreement, the Board rejected the argument that the demand was not mandatory. In doing so, it relied upon its decision in *Old Brookville*,[52] in which it held that a demand for health insurance coverage for employees in the unit at the time of the effective date of the agreement, but who retire before the expiration of the agreement, is mandatory. It also rejected the contention that the charge alleged a contract violation and that the unions waived their right to bargain.

Additionally, a demand for health insurance coverage relating to current employees, and current employees who retire during the life of the contract, is a mandatory subject of bargaining. In this context, the Board has held that "current employees," unless otherwise defined by the parties:

> must mean all employees who were employed during the term of the contract being negotiated, even if the negotiations continue, as they so often do, beyond the term of the prior contract and the demand in issue is not first presented until well into the negotiations. Just as a demand may be retroactive, so too may its application to the class of employees covered by the demand.[53]

Pursuant to Civil Service Law 167-a, employees, retirees, and dependants who are eligible for benefits under Medicare are required to enroll in that program as their primary insurer.[54] Enrollees are entitled to full reimbursement for premiums they pay to this federal program. This reimbursement had been made from 1966 until January 2006, when the State of New York reinterpreted this statute such that it treated the Medicare part B reimbursement as a component of the total health insurance premium paid by employers and participants. In *United University Professions et al. v. State of New York et al.*,[55] the Court rejected this interpretation, finding it was contrary to the plain language of the statute. Accordingly, the court reversed the lower court's ruling dismissing the applications seeking to annul the new interpretation of the statute.[56]

One statutory limitation upon the extent to which retiree health insurance may be altered in certain educational institutions is found in chapter 729 of the laws of 1994 as amended. According to this statute, health insurance benefits to retirees and their dependents, or contributions made on behalf of those persons, may not be altered "unless a corresponding diminution of benefits or contributions is affected from the present level during this period by such [employer] from the corresponding group of active employees for such retirees."[57]

Issues at the Bargaining Table

There are a number of ways in which employers have sought to reduce health insurance costs. In the context of collective bargaining, the success in achieving this goal is dependent upon the parties being able to negotiate a mutually agreeable collective bargaining agreement. There is usually no incentive for a union to agree to terms under which the employees it represents would lose money. As a result, parties have been able to negotiate contractual provisions relating to health insurance demands which in the context of an overall agreement are beneficial to both sides. The following discussion reviews common issues relating to health insurance which have arisen at the bargaining table for employers and unions. This list is not exhaustive and can be expected to be further augmented by the creativity of parties in negotiations and changes that may occur in the field.

1. Premium Contributions

The most common demand made regarding health insurance is for unit employees to pay an increased premium contribution for family or individual coverage, or both. The level of premium contribution is a mandatory subject of bargaining.[58] This level varies throughout the state, and at times may vary among different units at the same employer. The manner by which premium contributions are calculated by a particular provider, such as the New York State Health Insurance Plan (NYSHIP), should be noted since it is not facially obvious. When calculating the amount of savings expected due to increased premiums contributions, check your plan and determine how the payments are calculated.

Generally, an employer may seek to increase the level of contribution among all affected units by getting such a concession from one unit, then utilizing that aspect of a settlement as part of a pattern applicable to all units. One difficulty in doing so is caused by the disparate levels of pay among various units. As a result of this disparity, lower paid units may be reluctant to make the same level of health insurance contribution as higher paid units since the same contribution level constitutes a higher percentage of their pay, and results in a lower net settlement in that round of bargaining.

There are a number of common techniques used to reconcile the conflict which necessarily arises between a union and an employer seeking increased health insurance contributions. One such method is to have the contribution be based upon a specific dollar figure as opposed to a percentage of the insurance premium. The obvious advantage to the union is that the cost is fixed for the life of the agreement and until another amount is mutually agreed upon, while the disadvantage to the employer is that it continues to bear any increases in the insurance cost. An advantage, however, is that this method is usually a less onerous way by which to introduce a cost-sharing of health insurance coverage. It is especially helpful to lower paid employees, who naturally want an increase in wages that is not devoured by an increase in their health insurance costs.

It is also not unusual for parties to agree to an increase in health insurance costs for new hires which is greater than that paid by current employees. Depending upon the hiring needs of the employer, this may or may not result in immediate cost savings, but does enable an employer to achieve that goal. Current employees are shielded from this greater burden, and are able to resolve this issue and obtain any other negotiated benefits under the agreement. One detriment which may result from this resolution is that unless there are subsequent negotiations on this issue, there will be a split in the level of health insurance premiums paid by employees in the unit. This split will ultimately make it more difficult to resolve bargaining disputes since the net pay increase, if

any, for employees will be different when taking in the disparate levels of health insurance contributions.

Parties have also agreed to either dollar or percentage contributions for health insurance, but have the maximum amount payable subject to a cap. For example, parties may agree that employees' contributions to health insurance not exceed a given percentage of their gross salary. This technique has the advantage of granting employees a level of security with regard to spiraling health insurance costs, while granting an employer a greater contribution to a certain extent. Additionally, the more an employee earns, the greater will be the contribution until the cap is reached.

2. Changing the Plan

As mentioned previously, the type of health insurance plan is a mandatory subject of bargaining.[59] A change from one plan to another, or changes to the plan, is sought commonly by both sides. If a union files an improper practice charge alleging a change in a different health insurance plan, and the source of right complained of is based upon a contractual claim of right, that matter is subject to the grievance and arbitration procedure. If the contract is in effect, the charge will be deferred. If the contract has expired, and the grievance procedure ends in binding arbitration, that matter too will be deferred.[60]

3. Dual Coverage

Employers may submit as demands to preclude individuals who are married and both work for the same employer from each having health coverage. Demands are also made to preclude an employee from being eligible for health insurance when a spouse has insurance form another source. Check with your health insurance provider regarding plan requirements affecting this type of negotiated clause.

4. Health Insurance Buyout

Parties have also negotiated clauses in agreements which provide that an employee who declines coverage is eligible for a heath insurance "buyout." The issues which arise in negotiating these clauses deal with the amount of the buyout, and the ability of the employee to "opt back in." At times, an employer may require proof of other insurance as a prerequisite for an employee being eligible for this benefit. Generally, this type of clause is mutually beneficial to all parties to the negotiation.

5. Vesting—Retiree Benefits

Employers are able to negotiate concerning the length of time for an employee to vest in order to be eligible for retiree health insurance benefits. Employers seek to negotiate a longer vesting period, thereby limiting eligibility for this benefit and reducing their future costs.[61]

Pre-Tax Contribution Program

If an employer participates in a pre-tax contribution program, an employee's share of the health insurance premium costs is deducted from wages before taxes are withheld. An employee therefore pays taxes on a lower salary, resulting in a cost savings to the employee. The savings are realized in the lowering of the federal, state and Social Security tax deductions. An employer is charged a minimal administrative fee for this program. The implementation for this type of plan alleviates the burden on an employee for a health insurance contribution, thereby making such a concession more palatable.

Endnotes

1. Civil Service Law section 200 *et seq.*
2. The following discussion regarding the scope and subjects of bargaining is reprinted with permission from *Impasse Resolution Under the Taylor Law,* Copyright 2008, published by New York State Bar Association, 1 Elk Street, Albany, New York, by Philip L. Maier, Esq.
3. Sections 201.4 and 204.3 of the Act.
4. *City Sch. Dist. of the City of New Rochelle*, 4 PERB ¶ 3060 (1971).
5. *Churchville-Chili Cent. Sch. Dist.*, 17 PERB ¶ 3055 (1984).
6. *Orange County Community Coll. and the County of Orange*, 9 PERB ¶ 3068 (1976).
7. *Supra,* n. 4.
8. *See Great Neck Water Pollution Control Dist*, 36 PERB ¶ 3013 *confd* 36 PERB ¶ 7015 (Sup. Ct., Nassau County 2003).
9. *See Huntington Union Free Sch. Dist. No. 3*, 16 PERB ¶ 3061 (1983).
10. *See City of White Plains*, 5 PERB ¶ 3008 (1972); *Starpoint Cent. Sch. Dist.*, 23 PERB ¶ 3012 (1990).
11. *See Triborough Bridge and Tunnel Auth.*, 27 PERB ¶ 3076 (1994); *City of Albany*, 7 PERB ¶ 3078 (1974).
12. 27 PERB ¶ 3056 (1994).
13. *See Bd. of Educ. of the City Sch. Dist. of the City of New York v. PERB,* 75 N.Y.2d 660, 23 PERB ¶ 7012 (1990).
14. *Churchville-Chili Cent. Sch. Dist.*, 17 PERB ¶ 3055 (1984).
15. *Triborough Bridge and Tunnel Auth.*, 27 PERB ¶ 3076 (1994).
16. *Town of Stony Point*, 6 PERB ¶ 3030 (1973).
17. *Town of Haverstraw v. Newman*, 75 A.D.2d 874, 13 PERB ¶ 7006 (2nd Dep't 1980).
18. *City of Albany*, 7 PERB ¶ 3078 (1974); *Triborough Bridge and Tunnel Auth.*, 27 PERB ¶ 3076 (1994).
19. *City of White Plains*, 5 PERB ¶ 3008 (1972); *Starpoint Cent. Sch. Dist.*, 23 PERB ¶ 3012 (1990).
20. *Port Jefferson Union Free Sch. Dist.*, 33 PERB ¶ 3047 (2000).
21. *State of New York (Dep't of Taxation and Finance)*, 30 PERB ¶ 3028 (1997).
22. *Bd. of Educ. of the City Sch. Dist. of the City of New York v. PERB*, 75 N.Y.2d 660, 23 PERB ¶ 7012 (1990).
23. *See* section 6.
24. *Onteora Cent. Sch. Dist.*, 16 PERB ¶ 3098 (1983).
25. *Town of Carmel*, 31 PERB ¶ 3006 (1998).
26. *Poughkeepsie City Sch. Dist.*, 19 PERB ¶ 3046 (1986).
27. *Inc. Village of Hempstead*, 11 PERB ¶ 3072 (1978).
28. *State of New York*, 31 PERB ¶ 3053 (1998).

29. 10 PERB ¶ 3029 (1977).

30. *Board of Educ. of the City Sch. Dist. of the City of New York v. PERB*, 75 N.Y.2d 660, 23 PERB ¶ 7012 (1990).

31. Section 210(2)(c); *Niagara Falls Police Captains and Lieutenants Assn.*, 33 PERB ¶ 3058 (2000).

32. *New York City Trans. Auth.*, 30 PERB ¶ 3030, at 3074 (1997), *conf'd sub nom. New York City Trans. Auth. v. New York State Public Employment Relations Board*, 276 A.D.2d 702, 33 PERB ¶ 7020 (2d Dep't 2000).

33. *New York State Public Employment Relations Board v. Patrolmen's Benevolent Assn. of the City of New York, Inc.*, 6 N.Y.3d 563 (2006); *Town of Greenburgh v. Assn. of the Town of Greenburgh*, 16 PERB ¶ 7510, 94 A.D.2d 771 (2d Dep't 1983).

34. *Webster Cent. Sch. Dist. v. PERB*, 75 N.Y.2d 619, 23 PERB ¶ 7013 (1990).

35. *Schenectady Police Benevolent Assn. v. PERB*, 85 N.Y.2d 480, 28 PERB ¶ 7005 (1995).

36. State of New York (Unified Court System), 28 PERB ¶ 3044 (1995).

37. 31 PERB ¶ 3020 (1998), *conf'd*, 32 PERB ¶ 7026 (Sup. Ct., Albany County), *aff'd*, 276 A.D.2d 184, 33 PERB ¶ 7019 (3d Dep't 2000), *lv. denied*, 96 N.Y.2d 711, 34 PERB ¶ 7018 (2001).

38. *City of White Plains*, 33 PERB ¶ 3051, at 3139 (2000).

39. 32 PERB ¶ 3024 (1999).

40. *Town of Fishkill*, 39 PERB ¶ 3035, at 3118 (2006).

41. 35 PERB ¶ 3017, at 3041 (2002).

42. *Town of Chili*, 16 PERB ¶ 3110 (1983); *Newark Valley Central Sch. Dist.*, 18 PERB ¶ 3056 (1985); *Triborough Bridge and Tunnel Authority*, 27 PERB ¶ 3076 (1994); *County of Yates*, 22 PERB ¶ 3017 (1989).

43. *City of Batavia*, 16 PERB ¶ 3092 (1983); *City of Newburgh*, 18 PERB ¶ 4571 (1985).

44. *Village of Hudson Falls*, 14 PERB ¶ 3021 (1981); *City of Oneida*, 15 PERB ¶ 3096 (1982).

45. *City of New Rochelle*, 10 PERB ¶ 3042 (1977); *City of Troy*, 10 PERB ¶ 3015 (1977).

46. 12 PERB ¶ 7021, 48 N.Y.2d 398 (1979). *See also City of Cohoes*, 27 PERB ¶ 3058 (1994).

47. 252 A.D.2d 82, 683 N.Y.S.2d 622 (1998).

48. See also *Myers v. City of Schenectady*, 244 A.D.2d 845, 665 N.Y.S.2d 716 (App. Div. 1997) in which the court affirmed a Supreme Court decision holding that retirees are entitled to receive health insurance benefits pursuant to the terms of the collective bargaining agreement under which they retired.

49. 92 N.Y.2d 326, 703 NE2d 745, 680 N.Y.S.2d 887 (1998).

50. *Citing Jewitt v. Luau-Nyack Corp.*, 31 N.Y.2d 298, 306 (1973).

51. 17 PERB ¶ 3049 (1984).

52. 16 PERB ¶ 3094 (1983).

53. *Triborough Bridge and Tunnel Authority*, 29 PERB ¶ 3012 (1996); *City of Cohoes*, 27 PERB ¶ 3058 (1994).

54. This statute states: Upon exclusion from the coverage of the health insurance plan of supplementary medical insurance for which an active or retired employee or a dependent covered by the health insurance plan is or would be eligible under the federal old-age, survivors and disability program, an amount equal to the premium charge for such supplementary medical insurance benefits for such active or retired employee and his dependents, if any, shall be paid monthly or at other intervals to such active or retired employee from the health insurance fund. Where appropriate, such amount may be deducted from contributions payable by the employee or retired employee; or where appropriate in the case of a retired employee receiving a retirement allowance, such amount may be included with payments of his retirement allowance. Employee contributions to the health insurance fund shall be adjusted as necessary to provide for such payments.

55. 36 A.D.3d 297, 826 N.Y.S.2d 447 (3d Dep't 2006).

56. *See Jefferson-Lewis-Hamilton-Herkimer-Oneida-BOCES and JLHHO BOCES Professional Association*, 219 A.D.2d 801 (4th Dep't 1995), 631 N.Y.S.2d 962 *lv. to appeal den.* 87 N.Y.2d 812 845.

57. The statute, as originally enacted, states: 1) Section 1 of chapter 729 of the laws of 1994 relating to affecting the health insurance benefits and contributions of retired employees of school districts and certain boards, as amended by chapter 25 of the laws of 2004 is amended to read as follows: 2) From on and after June 30, 1994 until May 15, 1995, a school district, board of cooperative educational services, vocational education and extension board or a school district as enumerated in section 1 of chapter 566 of the laws of 1967, as amended, shall be prohibited from diminishing the health insurance benefits provided to retirees and their dependents or the contributions such board or district makes for such health insurance coverage below the level of such benefits or contributions made on behalf of such retirees and their dependents by such school district or board unless a corresponding diminutions of benefits or contributions is effected from the present level during this period by such district or board from the corresponding group of active employees for such retirees.

    Every year subsequent to its adoption, the Legislature has repealed the sunset date and replaced it with a new date. It has been renewed for the school year 2008-09. *See Jones v. Bd. of Educ. of Watertown City Sch. Dist.*, 30 A.D.3d 967 (4th Dep't 2006); *Bryant v. Bd. of Educ., Chenango Forks Cent. Sch. Dist.*, 21 A.D.3d 1134 (3d Dep't 2005).

58. *Town of Chili*, 16 PERB ¶ 3110 (1983).

59. *City Sch. Dist. of the City of Corning*, 16 PERB ¶ 3056 (1983) (Change in the level and kind of health insurance or plan administration mandatory subject of bargaining); *City of Batavia*, 16 PERB ¶ 3092 (1983) (Change from or to self insured to carrier-provided plan mandatory subject of bargaining); *Compare Unatego Cent. Sch. Dist.*, 20 PERB ¶ 3004 (1987), *aff'd* 21 PERB ¶ 7002, 134 A.D. 2d 62, *appeal denied*, 21 PERB ¶ 7010, 71 N.Y.2d 805. (Changes in what plan itself offers is not a change by employer which would give rise to a cause of action under the Act.).

60. *Herkimer County BOCES*, 20 PERB ¶ 3050 (1987); *New York City Transit Auth.* (Bordansky), 4 PERB ¶ 3031 (1971).

61. Pursuant to the NYSHIP, health insurance in retirement currently vests after five years of employment.

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The Public Employer's Statutory Duty to Provide Relevant Information to Employee Associations, Including Witness Statements and Documents That Will Be Introduced During a Discipline Hearing

By Nathaniel G. Lambright

The free flow of documents and information which are related to the administration of a collective bargaining agreement is vital for a successful partnership between an employee association and an employer. The exchange of documents and information is particularly important when a bargaining unit employee has been disciplined and the employee association is investigating the facts and circumstances surrounding the discipline. A thorough review and analysis of documents and information helps fulfill the association's duty of fair representation to the disciplined employee, and it allows associations to make decisions on whether to grieve and arbitrate matters based on the actual merits of the grievance. Further, where these grievances are arbitrated, pre-hearing disclosure provides clarity to the issues to be determined, thereby expediting the hearing.

The Public Employment Relations Board ("PERB" or the "Board") has held that public employers have a statutory obligation to provide information requested by an employee organization for use in negotiations and in policing the administration of a negotiated agreement. Disputes arise, however, as to the employer's obligation to provide documents and information when the association demands witness statements and documents that will be introduced during a discipline hearing. Employers also have resisted providing documents and information when the collective bargaining agreement's discipline procedure is similar to a statutory disciplinary procedure. This past year PERB decided two cases, *District Council 37, AFSCME, Local 1070 and State of New York-Unified Court System*[1] and *Hampton Bays Teachers' Association, NYSUT, AFT, AFL-CIO and Hampton Bays Union Free School District*,[2] which addressed these and other defenses made by the employers in resisting the associations' demands. The following is a discussion of these two decisions.

State of New York—Unified Court System

District Council 37, AFSCME, Local 1070 ("DC 37") filed a charge alleging that the State of New York—Unified Court System ("UCS") violated § 209-a.1(a) and (d) of the Public Employees' Fair Employment Act (the "Act") when the UCS refused DC 37's request for documents and information related to a unit member who had been disciplined. The parties' collective bargaining agreement contained detailed discipline procedures. The procedures included policies for discipline notification to the disciplined employee and DC 37, as well as hearing procedures. The agreement was silent, however, on the issue of pre-hearing exchange of information. Furthermore, with limited exceptions, UCS had a practice of denying requests for documents and information prior to the hearing. Finally, the agreement permitted individual legal representation by counsel in a disciplinary matter, to the exclusion of employee organization representation.

DC 37 had requested documents related to the discipline charge including: (1) memorandum "between or among its agents referring or relating to the allegations"; (2) evidence that UCS might rely on at the hearing; (3) statements and contact information of potential witnesses and UCS employees; (4) copies of rules that were allegedly violated; and (5) the names and contact information of the UCS employees that investigated the allegations. UCS refused to provide the documents and DC 37 responded with an improper practice charge.

The Administrative Law Judge concluded that UCS violated the Act. UCS filed exceptions to the Administrative Law Judge's decision arguing that: (1) the charge was untimely; (2) DC 37 waived its right to the documents; (3) UCS satisfied its duty to bargain; (4) the negotiated policy was only a restatement of the Chief Judge's regulatory procedures; (5) the request was unrelated to contract administration; (6) the request violated public policy because it would create pre-hearing discovery and because the contract permitted bargaining unit members to retain individual counsel; and (7) the request was unreasonable and overbroad because it sought confidential, unnecessary and irrelevant materials.

Timeliness

PERB found that the charge was timely despite UCS's history of denying similar requests in the past. PERB held that "the timeliness of a charge alleging a violation based upon the refusal to provide such information may be measured from the date of the last, not first, refusal to provide information."

Waiver and Duty Satisfaction

The Board ruled that the prior denials of information requests do not amount to a clear, unambiguous and unmistakable waiver by DC 37 to such information. This was because DC 37 neither accepted nor acquiesced to UCS's policy. PERB similarly rejected UCS's duty satisfaction defense as the collective bargaining agreement contained no reference to any obligation to provide information.

Request Related to Contract Administration

PERB rejected UCS's argument that the documents were unrelated to the contract's administration and that the disclosure would amount to a violation of public policy. The Board noted that whether or not the agreement creates a contractual obligation to provide information is dependent on the terms of the agreement and the association's role in the disciplinary procedure. In this case, PERB found that the obligation to provide the requested information remained despite the fact that the procedures promulgated by the Chief Judge were part of the contract. PERB stated that the contract expanded on the Chief Judge's procedures by granting additional rights and roles for the employee and the Union. Therefore, the duty to provide information was triggered because the association would not be pursuing an individual's statutory rights and claims but the employee's contractual rights and claims.

Public Policy[3]

PERB rejected UCS's argument that the requirement to produce materials violates public policy because it constitutes the creation of a pre-hearing discovery procedure. The Board stated that pre-hearing procedures similar to New York or federal civil procedure rules were not being created by its decision and, indeed, these civil procedures were inconsistent with the Act. Further, the fact that the collective bargaining agreement permitted individual legal representation by counsel in a disciplinary matter, to the exclusion of employee organization representation, did not make the provision of documents and information to DC 37 in violation of the Act. Instead, PERB found that a grievant who opts for individual representation would not be entitled to information pursuant to the Act as well as other "benefits associated with employee organization representation."

Confidential and Privileged

PERB held that the party relying on the defenses that the documents and information are confidential or privileged must explain and fully and clearly set forth the facts upon which this defense is based. The generalized confidentiality and privilege defenses made by the UCS in this case did not meet this standard.

Reasonable, Necessary and Not Overly Burdensome

PERB reiterated that in order for an information request to be lawful it must be reasonable and must be seeking relevant and necessary information. Further, it must be specific and particular enough so that the necessity and relevancy of the information and documents may reasonably be discerned.

In this case, PERB held that the demand that UCS provide memorandum "between or among its agents referring or relating to the allegations" was overbroad, unnecessary and unduly burdensome. This demand failed to identify who constitutes an agent and it "would require UCS to conduct a multi-borough search of its offices and computers aimed at finding every memorandum, whether hard copy or electronic, that may make some reference, regardless of relevancy." As such, it is seeking materials that are not needed to defend the employee. In contrast, the remaining requests seeking, *inter alia*, the identity of witnesses, witness statements and documents that UCS will rely on were reasonable, relevant and necessary to enable DC 37 to defend the employee. As such, the Employer had an obligation to provide the documents.

Hampton Bays Union Free School District

The Hampton Bays Union Free School District ("District") filed exceptions to the Administrative Law Judge's ruling that it had violated § 209-a.1(a) and (d) of the Act when it refused the request by the Hampton Bays Teachers' Association, NYSUT, AFT, AFL-CIO ("Teachers' Association") for documents and information. The request involved the Teachers' Association's representation of a bargaining unit member who had been disciplined for allegedly taking an underage student to a club where the student consumed alcohol.

The collective bargaining agreement provided that employees would serve the minimum probationary period pursuant to Education Law and that non-contract renewals could not be reviewed under the grievance procedure unless the District acted capriciously, arbitrarily, or in a discriminatory way. The Teachers' Association investigated the allegations and concluded that the District may have been acting in an arbitrary, capricious, or discriminatory manner toward the employee. The Teachers' Association thereafter requested information about the District's investigation including the identity of all individuals who had been interviewed together with the questions and their responses. Further, the Teachers' Association sought copies of cards and notes allegedly written by the teacher to the student. The District refused to provide the requested information.

The District argued that it was not obligated to provide the Teachers' Association with the requested infor-

mation because it was unrelated to contract administration due to the fact the termination was pursuant to the statutory procedures of Education Law § 3031. Further, argued the District, the information need not be provided because it was confidential under the Family Education Rights and Privacy Act of 1974 ("FERPA").

Request Related to Contract Administration

In analyzing the obligation to provide the information, PERB stated:

> An agreement that contains negotiated terms and conditions that reiterate, expand, modify or touch upon statutory rights or procedures, does not eliminate the obligation under the Act to provide requested information and documents bearing on those negotiated terms. . . . For the purposes of administering a negotiated agreement, an employee organization is not precluded under the Act from receiving requested information and documents with respect to contract provisions that reiterate or modify statutory rights.

PERB ruled that the request was reasonable, relevant and necessary to the Teachers' Association's investigation into the grievance based on the Teachers' Association's information that the District's investigation may have been conducted in an arbitrary, capricious or discriminatory manner which would be in violation of its contractual obligation. PERB rejected the District's claim that that the information sought was solely related to procedures under Education Law § 3031. This was because the contract codified the procedures and criteria for evaluation of probationary teachers, which was not the subject of Education Law § 3031. PERB noted that evaluation procedures and limitations on the right to discharge a teacher prior to the expiration of the probationary period, unlike tenure determinations under Education Law § 3031, are not prohibited subjects of negotiations.

Confidential and Privileged

PERB reiterated that information requests may be refused when the employer can demonstrate a legitimate claim that such production is prohibited by a specific statute, regulation or the common law. However, prior to refusing to "release requested information or documents on such grounds, the party must first engage in a good faith effort with the requesting party aimed at accommodating the need for the requested information." In this case, PERB found that FERPA's prohibition on releasing education records about a student would not be violated by the release of the documents requested. As a result, PERB concluded that the employer should have released the information and its failure to do so violated § 209-a.1(a) and (d) of the Act.

Endnotes

1. 41 PERB 3009 (2008).
2. 41 PERB 3008 (2008).
3. *Id.*

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ETHICS MATTERS

New York's "New" Rules of Professional Conduct: The Essentials for Labor and Employment Lawyers

By John Gaal

New "Rules of Professional Conduct" ("Rules") were announced by Chief Judge Judith Kaye on December 17, 2008, and took effect April 1, 2009. These Rules are the culmination of a comprehensive review of New York's Code of Professional Responsibility ("Code") which began in 2003. The Rules are significant both for some of the changes that were made as well as for some of the changes that were not made. This article is the first in a series of articles which will focus on those changes most important to labor and employment law lawyers.

I. Background

The first set of professional conduct rules for lawyers was adopted in Alabama in 1887. These rules provided the foundation for the American Bar Association's ("ABA") initial Canons of Ethics adopted in 1908. In 1969, the ABA issued the Model Code of Professional Responsibility ("Model Code"), providing more detailed guidance to lawyers. By the early 1970s, virtually every state adopted the Model Code, albeit sometimes with some variations, with New York's Code adoption effective January 1, 1970.

In 1983 the ABA moved away from the Model Code and adopted Model Rules of Professional Conduct ("Model Rules"), reflecting both significant substantive and format changes. New York was poised to be one of the first states to adopt the new Model Rules when they were narrowly voted down by the Bar Association's House of Delegates. Now, 26 years later, 47 states and the District of Columbia have adopted the Model Rules, again sometimes with some variations. While California and Maine continue to have their own unique set of rules, New York remains the last state to cling to the Model Code.

There have been modifications to New York's Code over the years, with the most significant coming in 1990 and 1999, and in 2007 a comprehensive set of advertising guidelines was added. But the basic format and many of the substantive provisions of the original Code have remained in place, at least until now.

In 2003, the New York State Bar Association empanelled the Committee on Standards of Attorney Conduct (COSAC) to look at a substantial reworking of the Code, both from a substantive and a formatting perspective, in an effort to bring it more into line with the Model Rules and the rest of the country. The Committee completed its work in 2005 and throughout much of 2006 and 2007 COSAC presented its recommendations to the Bar Association's House of Delegates for review. Ultimately changes were approved by the House and submitted to the Appellate Divisions with the recommendation that they be adopted as the Courts' rules. (Our Code consisted of Disciplinary Rules [DRs] and Ethical Considerations [ECs]. The DRs are mandatory standards of conduct which exist as court rules [found in 22 N.Y.C.R.R. Part 1200 and jointly adopted by the four Appellate Divisions], while the ECs are aspirational standards established by the Bar Association.) The submission to the Appellate Divisions included both new Rules, to replace the DRs, and supporting and explanatory Comments, to take the place of the ECs. The Bar Association recommended that the Courts adopt both.

On December 17, 2008, the Courts announced adoption of new "Rules of Professional Conduct" based (mostly) upon the Bar Association's recommendations. While the Courts' version reflects the formatting changes proposed by the Bar Association and many of the substantive changes, it does not reflect all of the proposed substantive changes. And unfortunately, the Courts have yet to explain why some changes were adopted and some were not, so lawyers are left to guess as to the Courts' thinking. In addition, the Courts neither adopted nor commented on their decision not to adopt the explanatory Comments proposed by the Bar Association. Presumably the Courts opted to leave it for the Bar Association to separately implement the Comments as "nonmandatory" guidance, in the same vein as the ECs.

II. Formatting Changes

First, the name of our professional conduct standards has been changed. Currently, we operate under the "Code of Professional Responsibility." As of April 1, 2009, New York's rules are called the "Rules of Professional Conduct."

In addition, the Code consisted of DRs and ECs. These provisions are tied to nine fundamental Canons. These provisions are numbered DR 1-101, DR 2-101, DR 2-102, etc. and EC 1-1, EC 2-1, EC 2-2, etc. While consistent with the original Model Code, this numbering and formatting system bears no resemblance to the Model Rules system used in virtually every other state. Thus, it was often difficult to do even basic comparative ethics research with other jurisdictions.

The most basic change reflected in the Rules is new formatting which uses the same numbering system as the Model Rules and most of the rest of the nation. Thus Rules now appear as Rule 1.1, 1.2, 1.3 through 8.5. Eventually, following each Rule will be a series of "Com-

ments" numbered [1], [2], [3], etc. In addition, the new Rules follow exactly the grouping of concepts found in the Model Rules.

Thus, one of the first challenges for New York lawyers will be locating even unchanged substantive provisions under this new formatting.

III. Rule 1.6 and Confidentiality

The first substantive provision of the new Rules which this series will address deals with changes to the provisions on client confidentiality. The Rule's basic confidentiality provision is found in Rule 1.6.

a. Definitions

The Code's DR 4-101 defines two types of confidential information. A "confidence" is information covered by the attorney-client privilege. A "secret" is any other information acquired in the professional relationship the disclosure of which would be likely detrimental or embarrassing to the client or which the client has asked be held inviolate.

New Rule 1.6 contains a single concept of "Confidential Information" which is defined as:

- information gained during or relating to the representation of a client
- whatever its source
- which
- is protected by the attorney-client privilege,
- is likely to be embarrassing or detrimental to the client if disclosed, or
- the client has requested be kept confidential.

Thus, it contains in a single term the prior two concepts of "confidences" and "secrets."

The new Rule also explicitly excludes from the definition of confidential information:

- legal knowledge or legal research or
- information that is generally known in the local community or in the trade, field or profession to which the information relates.

No similar explicit exclusions exist under the Code.

Based on the Bar Association's proposed Comment [4A], "gained during or relating to" the representation of a client does not include information gained before a representation begins or after it ends, presumably even if the information otherwise "relates to" the representation. The Comment also defines "relates to" as "has any possible relevance to the representation or is received because of the representation."

b. Disclosure or Use of Confidential Information

Rule 1.6 prohibits knowingly revealing confidential information *or* using such information to the disadvantage of a client or for the advantage of another, unless

- the client provides informed consent,
- the disclosure is impliedly authorized to advance the interests of the client and is either reasonable or customary,
- or as otherwise provided in the Rules.

On its face Rule 1.6 continues the New York rule (which is different than the Model Rules) prohibiting both the disclosure of client confidential information and the use of that confidential information (without regard to disclosure).

c. Exceptions to Confidentiality

Rule 1.6 continues the Code standard which permits, but does not require, a lawyer to reveal or use confidential information to:

- prevent the client from committing a crime;
- withdraw a representation previously given by the lawyer which is believed to still be relied upon by others, where the lawyer has discovered that the representation was based on materially inaccurate information or is being used to further a crime or fraud;
- defend the lawyer (or her employees or associates) against an accusation of wrongful conduct;
- establish or collect a fee; or
- when otherwise permitted or required under the Rules or to comply with other law.

The prefatory language of Rule 1.6 expressly provides that confidential information can be so disclosed or used only to the extent the lawyer reasonably believes it is necessary to do so to achieve these objectives. While a similar limitation on disclosures was likely implicit under the Code, now it is explicit.

Significantly, Rule 1.6 adds two new exceptions to confidentiality. First, a lawyer may reveal confidential information as reasonably necessary to secure legal advice about compliance with the Rules or other law. While such disclosure has been recognized in the past by "practice and custom" (*see* ABA Formal Opinion 98-411 (1998) (recognizing limited disclosures implicitly permitted without client consent provided no disclosure of attorney-client privileged information and the disclosure is not prejudicial to the client), this recognition is now explicit in the Rules.

In what may be one of the most significant changes in the Rules, Rule 1.6 will permit a lawyer to reveal or use confidential information to prevent reasonably certain death or substantial bodily harm to anyone. While this provision has been a part of the Model Rules for years, a comparable exception has never been a part of the New York Code. But even this new basis for permissive disclosure is very limited. As explained in the Bar Association's proposed Comments [6B], harm is reasonably certain to

occur only if it will be suffered imminently or if there is a present and substantial risk that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. The Comments provide the following illustrations of the scope of this provision:

- A client accidentally discharged toxic waste into a town's water supply. The lawyer *may* reveal confidential information to protect against harm if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease *and* the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.
- If the harm the lawyer seeks to protect against is merely a statistical likelihood that something is expected to cause some injuries to unspecified persons over a period of years, there is no present and substantial risk justifying disclosure.
- Wrongful execution of a person is a life-threatening and imminent harm permitting disclosure *but only* once the person has been convicted and sentenced to death.
- That an event will cause property damage but is unlikely to cause substantial bodily harm does not provide a basis for disclosure.

The Model Rules are broader still in that they permit disclosure to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from a client's commission of a crime or fraud, if the client has used the lawyer's services to further that crime or fraud. New York's Rule 1.6 will not permit disclosure "merely" to protect property or financial interests (unless the "future crime" exception otherwise applies).

In the case of permissive disclosure to prevent reasonably certain death or substantial bodily harm, to prevent the client from committing a crime, and/or to withdraw a lawyer's representation, the proposed Comments [6A] set out a number of factors for a lawyer to consider in deciding whether to disclose or use confidential information:

- the seriousness of the potential injury to others if the prospective harm or crime occurs;
- the likelihood that it will occur and its imminence;
- the apparent absence of any other feasible way to prevent the potential injury;
- the extent to which the client may be using the lawyer's services in bringing about the harm or crime;
- the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action; and
- any other aggravating or extenuating circumstances.

d. Related Impact—Representing an Organization

DR 5-109 sets out an attorney's special obligations when representing an organizational client. One of those obligations is that when the lawyer knows that someone associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to that representation which involves a violation of a legal obligation to the organization or a violation of law and it is likely to result in substantial injury to the organization, the lawyer must proceed "as is reasonably necessary in the best interests of organization." This explicitly includes in appropriate circumstances reporting that action/inaction up the organizational chain of command, even to the Board of Directors if necessary. Under the Code, reporting outside the organization is not permitted, unless the report falls within the "future crimes" exception of DR 4-101's confidentiality requirements.

New Rule 1.13 exactly follows DR 5-109. However, because new Rule 1.6 (the analog to DR 4-101) permits the disclosure or use of confidential information to prevent reasonably certain death or substantial bodily harm (as well as to prevent the client from committing a future crime), the effect of this scheme is to now allow reporting outside the organization to prevent reasonably certain death or substantial bodily harm.

e. Confidentiality and the Obligation of Candor to a Tribunal

DR 7-102(B)(1) provides that if a lawyer learns that a client, in the course of a representation, has perpetrated a fraud upon a person or the tribunal, the lawyer must call upon the client to rectify it. If the client refuses or is unable to do so, the lawyer must reveal the fraud to the person/tribunal *except* to the extent that that information is protected as a client confidence or secret under DR 4-101. In most instances this exception—disclosure unless the information is a client confidence or secret—swallows the rule. Thus, for example, if a lawyer comes to learn that a client has committed perjury (an obvious fraud upon the tribunal), that information is almost by definition a client confidence or secret which cannot be disclosed even under this provision. See NYSBA Formal Opinions 674 (1995) and 523 (1980); New York County Opinion 706 (1995); New York City Opinion 1994-8 (1994). In such a case, and assuming the client does not rectify the perjury, the lawyer's choices may be to nonetheless continue the representation without disclosure to the tribunal, but only if continued representation can be accomplished without reliance on that perjured testimony or, in most cases, to withdraw from the representation.[1] But under the Code, disclosure is not permitted.

Disciplinary Rule 7-102(B)(2) also provides that if a lawyer learns that someone other than a client has perpetrated a fraud upon a tribunal, the lawyer shall reveal that fraud. There is no similar exception, in the language of the rule, for protecting client confidences and secrets in that circumstance. Nonetheless, in NYSBA Formal

Opinion 523 (1980), the Bar Association's Committee on Professional Ethics held that the explicit exception to the disclosure obligation for client confidential information found in DR 7-102(B)(1) applies by implication in the circumstances covered by DR 7-102(B)(2).

In what is perhaps the second most significant change in the new Rules, Rule 3.3 provides that if a lawyer, a lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer must take reasonable remedial measures, including , if necessary, disclosure to the tribunal. In other words, Rule 3.3 requires disclosing client / witness perjury, as a last resort, even if that knowledge is otherwise "protected" as client confidential information.

Similarly, Rule 3.3 provides that if a lawyer represents a client before a tribunal and that lawyer knows that anyone intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding, he must take reasonable remedial measures, including if necessary disclosure to the tribunal, even if that information is otherwise protected by Rule 1.6 as confidential information.[2]

Both Model Rule 3.3 and the Bar Association's proposal to the Courts explicitly provide that this disclosure obligation "continues to the conclusion of the proceeding," defined by Model Rule Comment [13] to mean "when a final judgment in the proceeding has been affirmed on appeal or the time for review, if any, has passed." Rule 3.3 as adopted by the New York Courts, however, contains no such temporal limitation. Thus, we have no indication whether this omission is intended to signal that the obligation to disclose continues "forever."

[The next article in this series will discuss conflicts of interest, prospective clients and the inadvertent receipt of an adversary's confidential information.]

Endnotes

1. *See* New York County Opinion 712; *People v. Andrades*, 4 N.Y.3d 355 (2005).
2. Rule 3.3 contains two other changes from the current provisions of the Code that are worthy of some mention:

   Rule 3.3 continues the Code's prohibition against a lawyer knowingly making a false statement of fact or law to a tribunal, but now also expressly prohibits a lawyer from failing to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

   - Rule 303 now expressly provides that in an ex parte proceeding, a lawyer must inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not those facts are adverse to the lawyer's client.

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

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

Message from the Incoming Chair

(Continued from page 2)

- The LEL Section is redesigning its Web site (www.nysba.org/labor) to one that you will want to visit each day. It will keep you informed of the latest decisions, statutes and agency initiatives affecting New York's LEL community and will provide other legal and Section news of interest.
- Our Standing Committees will continue to produce outstanding CLE content, quality publications, reports of interest to the LEL Bar, and will weigh in on issues relevant to our practices and our clients. Initiatives are being taken to infuse the Committees with new members who want to get involved. Let me know if you want more information.
- On January 29, 2010, our Section's Annual Meeting will be held at New York City's Hilton Hotel, where the entire NYSBA is meeting. The Annual Meeting's CLE program and luncheon can provide a starting point for an exciting weekend in Manhattan.

Many thanks to our outgoing Chair, Alan Koral, who has worked without respite over the last year to invigorate our Section's Committees, to produce high quality affordable CLE programs and publications, to increase the size and the diversity of LEL Section membership, and who delivers the Section running on all of its cylinders with a strong balance sheet. I am fortunate to have learned at the feet of a master. I look forward to continuing Alan's initiatives and building on them. If you take advantage of one of the Section's programs or activities and it does not in some way contribute to the growth of your business, the success of a case, increase your productivity, or ease your stressful work life, let me know. For the next year, the buck stops here. Contact me, Don Sapir, at: dsapir@sapirfrumkin.com.

Donald Sapir

Arbitrator Mentoring Program

The Section's Arbitrator Mentoring Program has three new graduates. Their biographical sketches are published here.

David Kramer has been practicing labor law for almost fifty years, with experience in both the private and public sector. After graduation from Brown University and New York University Law School, he spent four years as an attorney with the National Labor Relations Board in Kansas City, Washington and Newark. Thereafter, he worked in private practice with firms in Manhattan representing employers and unions. Since 1983, he has been a sole practitioner. He has extensive experience in all phases of labor and employment law as well as ERISA. Since 2006 he has served as an employer trustee on ERISA funds. He is currently counsel for welfare, pension and annuity funds. He maintains offices in White Plains and New Preston, Connecticut.

Since 2005, David has worked as an arbitrator, serving on panels including the American Arbitration Association, Federal Mediation and Conciliation Service, New York State Employment Relations Board, and New Jersey State Board on Mediation. His mentors in the Arbitrator Mentoring Program were Howard Edelman, Dick Adelman, Herbert L. Marx, Jr., and Alan Viani. David can be reached at (914) 328-0366.

Haydeé Rosario is a full-time neutral with over sixteen years of experience in labor-management relations. She has been recognized by the labor-management bar for maintaining a balanced approach when working with management and unions. She has considerable experience in both the private and public sectors with issues relating to discharge, disciplinary matters, discrimination, contract interpretation / application, management rights, past practice, subcontracting, bargaining units, hiring halls, lay off / bumping / recall, and seniority rights. She is member of the American Arbitrators Association's Labor Roster of Arbitrators, the Federal Mediation and Conciliation Service and the New York State Employment Relations Board.

Haydee also serves as a permanent member on the following panels: U.S. Postal Service and American Postal Workers Union, AFL-CIO, Expedited Panel of Arbitrators; New York City Department of Education and District Council 37, AFSCME, AFL-CIO, Expedited Panel of Arbitrators; Guild For Exceptional Children, Inc. and Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO; Local 342, United Food & Commercial Workers and Various Employers; and United Mine Workers of America and the Bituminous Coal Operators' Association, District 17.

In 2006, after working for over fourteen years as an attorney at the National Labor Relations Board, Region 29 ("NLRB"), she joined the New York City Department of Education, Office of Labor Relations ("DOE"), where she represented the agency in legal and labor relations matters related to all the collective bargaining agreements between the agency and scores of labor organizations representing approximately 135,000 employees.

Haydeé was recently selected by Barbara C. Deinhardt to serve on the Transition Advisory Committee for the New York State Employment Relations Board ("SERB"). Under the chairmanship of Hezekiah Brown, she has been an active participant in the Transition Advisory Committee's efforts to improve SERB's services.

She is currently a member of the New York State Bar Association ("NYSBA"), Labor and Employment Law Section and the Dispute Resolution Section. As an active member of the NYSBA, Diversity Committee of the Dispute Resolution Section, she has joined the committee's efforts to foster and encourage the development of diverse talent and inclusion in the alternative dispute resolution field. She is also a member of the AAA Media Bureau and a member of the New York City and Philadelphia Chapters of the Labor and Employment Relations Association. Haydeé also serves as an Associate Pro Bono Mediator for the U.S. Equal Employment Opportunity Commission, New York District Office.

Haydeé was born and raised in Rio Piedras, Puerto Rico. She was admitted to the New York Bar in 1991. She holds a BA in Cultural Anthropology from the University of Connecticut and J.D. from Queens College, CUNY Law School. She has also participated in numerous trainings for arbitrators and mediators, including the NYSBA Mentoring Program for Arbitrators established by the Labor and Employment Law Section, the U.S. Equal Opportunity Commission, Program for Mediators, the AAA Labor Arbitrator II Advanced Case Management, and the NYSBA Commercial and Federal Litigation Section, Mediation and Advocacy Training for Women and Minorities. As a bilingual arbitrator and mediator, she has an extensive experience with the needs of a diverse clientele. She can be reached at HaydeeRosarioEsq@gmail.com

A full-time neutral since 2005, **Dave Weisenfeld** brings over 25 years of experience to his practice as an arbitrator and mediator of labor, employment and commercial disputes. Prior to becoming a neutral, Dave practiced labor and employment law in New York City for over 20 years, including 10 years as a partner at Thelen Reid & Priest LLP, where he represented clients in all aspects of labor and employment law, including collective bargaining, labor arbitration, employment law counseling and litigation, and alternative dispute resolution.

Beginning in 2005, Dave has mediated employment and commercial disputes in federal and state courts and at the Equal Employment Opportunity Commission, and has served as an arbitrator for the Federal Mediation & Conciliation Service, the New York State Employment Relations Board, and the Financial Industry Regulatory Authority. In addition to his work as an arbitrator and mediator, Dave has served as an Adjunct Professor of Law at Emory University (Atlanta, GA) and Fordham University (New York) teaching Employment Law, Labor Arbitration Practice, and Fundamental Lawyering Skills (Interviewing, Counseling & Negotiating).

Dave is active in various bar and professional organizations, and has spoken on arbitration and mediation issues at meetings of the Committee on Alternative Dispute Resolution of the American Bar Association, Labor & Employment Section.

Dave is a 1978 graduate of Trinity College (Hartford, CT), where he earned a B.A. with honors in Political Science, Economics, and General Scholarship, and was elected to Phi Beta Kappa. He earned his law degree, cum laude, at Harvard Law School in 1981. In 1981-1982, he served as law clerk to Justice Christopher Armstrong at the Massachusetts Appeals Court.

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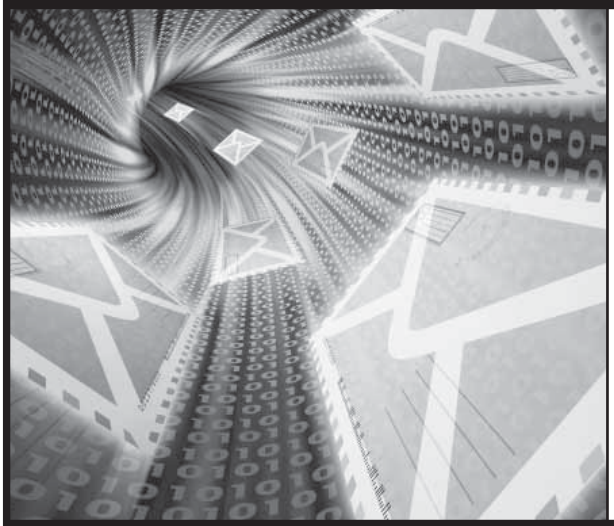

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How Have *Silverman v. MLB Player Relations Committee* and *Clarett v. NFL* Changed the Rule of the Game?

By Daniel D. Dashman

Section 8(d) of the National Labor Relations Act (NLRA) requires parties to a collective bargaining agreement to bargain in good faith.[1] *Silverman v. Major League Baseball Player Relations Committee*[2] (PRC) and *Clarett v. National Football League*[3] (NFL) are controversial cases because of the apparent expansion of the scope of Sec. 8(d) of the NLRA. Did these cases expand Sec. 8(d), and if so, how narrowly will that expansion be construed?

I. The Baseball Strike of 1994 and Mandatory Subjects of Bargaining in *Silverman*,[4] as Considered by the Federal District Court and the Second Circuit Court of Appeals

In 1994, the Baseball World Series was cancelled because of an acrimonious strike by the Major League Baseball Players Association (PA) against both leagues competing in the series. By the spring of 1995, the situation had deteriorated. The PRC had implemented some of its bargaining proposals having to do with wages and later rescinded them. Then, on February 3, 1995, the PRC announced that all bargaining with players was to be done solely by the PRC, creating a tight monopoly in the market, unilaterally ending the anti-collusion clause of the contract, and effectively ending free agency. The PRC also imposed a salary cap and ended salary arbitration to settle disputed contracts for younger players.[5] Free agency had been agreed to under the expired contract for players with over six years in the league, as was salary arbitration for those with three to six years in the league, and to promote salary competition for players, there was an anti-collusion clause.[6] This created the situation where, despite the multi-employer bargaining unit, each team was responsible for negotiating its own contracts with its players.[7]

On February 3, the same day the PRC was informing the National Labor Relations Board (NLRB) that it had rescinded its previous unilaterally imposed rules, in an act of breathtaking bad faith, it was implementing the above rules.[8] At that point, Daniel Silverman, the Regional Director of Region 2 of the NLRB, filed for an injunction in federal court under Section 10(j)[9] to return the employer/employee relationship between the parties to its state under the expired contract, that status to be maintained until a new agreement was forged or a real impasse was reached.[10]

Silverman claimed that the PRC had committed three unfair labor practices. First, the PRC failed to bargain to impasse before abrogating the free agency provisions of the expired contract. Second, the PRC failed to bargain to impasse before abrogating the anti-collusion provisions of the expired contract. Third, the PRC failed to bargain to impasse before abrogating the salary arbitration provision of the expired contract.[11]

The PRC responded that free agency and salary arbitration are permissive and not mandatory subjects of bargaining and impasse need not be reached before implementation or abrogation.[12] In the papers submitted to the federal District Court, the PRC asserted that it had bargained to impasse with the PA, but in oral argument it abandoned that claim.[13] Section 8(d) requires the parties to a collective bargaining agreement to bargain "in good faith with respect to wages, hours and other terms and conditions of employment."[14] The U.S. Supreme Court has interpreted this statement to mean that the parties to a collective bargaining agreement are required to meet in a regular and timely fashion to discuss all proposals regarding these three items. They are not required to agree and may insist upon their position even if an impasse is reached. On all other subjects the parties are not required to bargain at all, but they may not utilize the tools of economic coercion to force their viewpoint on these "permissive" subjects. The permissive subjects are not prohibited subjects, that term being reserved for illegal subjects of bargaining. Permissive subjects may be bargained for and incorporated into a collective bargaining agreement if both sides agree to do so.[15]

The PRC had different reasoning for each of the three issues. The PRC argued that free agency bargaining, whether competitively or collectively, must be a permissive subject because, if it were mandatory, the owners would have to give up their statutory right to bargain collectively.[16] The PRC claimed that the anti-collusion provision did not prevent the PRC representatives from negotiating all individual free agent contracts or reserve player salaries. In essence, the PRC advised the owner clubs that the PRC would simply ignore the collective bargaining agreement provision prohibiting club collusion.[17] Regarding salary arbitration as prescribed in the collective bargaining agreement (CBA), the PRC reasoning was based on the assertion that it was a form of interest arbitration, and interest arbitration has been long held to be a permissive subject of bargaining.[18]

Federal District Judge Sotomayor held for Silverman on all three claims and the court issued the injunction.[19] The PRC appealed the case to the Second Circuit Court of Appeals.[20] At the Second Circuit Court of Appeals, the PRC raised the same claims, but refrained from asserting that it had bargained to impasse. This left the three

basic questions of mandatory and permissive subjects of bargaining as the foundation for the decision.[21]

The Second Circuit collapsed the anti-collusion and free agency issues together. It then spent the majority of its decision discussing the rationale for declaring free agency a mandatory subject of bargaining.[22] This was a disservice to the parties as they were left with a decision on the anti-collusion clause without reasoning to address the specific problems that could arise. It also was a disservice to the lower courts which have been left to infer the Second Circuit Court of Appeals' meaning by extrapolating from the free agency decision reasoning. While the free agency decision is a clear response to the questions raised and, as will be discussed below, simply consolidates all of the previous decisions into one overarching rule, the anti-collusion decision is not. The anti-collusion clause in the same collective bargaining agreement that requires inherently collusive multi-employer bargaining creates a tension that deserves further discussion and analysis.

II. The Reserve/Free Agency System Decision Does Not Expand the Scope of Section 8(d) of the NLRA Beyond the Very Narrow Confines of Professional Sports

The reserve / free agency system grew out of the early days of major league baseball.[23] The teams reserved a player by including in the contract an automatic renewal of the contract clause. When the contract was renewed, so was the renewal clause. This gave the team the right of renewal in perpetuity. The perpetual right of renewal prevented the player from negotiating with another team, thereby discovering the player's true market value. The owners working together had an effective monopsony on the market for player services.[24] With *Flood v. Kuhn*, the players began to agitate to regain control of their careers, culminating in the arbitration agreement of 1975.[25] The arbitration held that the renewal clause was only effective for renewing the original contract and was not included in the renewed contract. This gave the team one year of renewal in which to decide whether to renegotiate with the player.[26]

The free agency system grew out of this decision. Once a player had played out the one renewal year after the expiration of his contract, the player was free to negotiate with any team in either league for the use of the player's services. The player thereby became a "free agent" available to the highest bidder.[27] If there was no reserve system at all, the players would have an effective monopoly of the labor market for providing players.[28] Through the collective bargaining process, the major professional leagues of the dominant sports in the United States of America (baseball, football, basketball, hockey, and soccer) have developed different systems to balance the players' need for an open market to maximize their value during their short professional sport lives with the owners' need to obtain the best talent for the least money while earning a good return for the risk entailed.[29]

The free agency and reserve systems, which take on various forms in the field of professional sports, have long been considered mandatory subjects of bargaining by parties on both sides of the question.[30] Professional sports have special issues that differ from the usual industrial workplace. For the employee there is a limited market for the employee's skills and a limited window of time before those skills degrade, both of which impact the employee's value. For the employer there is an investment in the training of the employee to operate at the high level of attainment necessary to succeed in professional sports, the publicity and the fan loyalty to be maintained in order to profit from the enterprise. Courts have recognized these and other special circumstances and tailored their decisions to forward the intent of the NLRA. It is the vast range of skills available that have necessitated the competitive bidding for some player services and collective bargaining for others.[31]

The owners needed a method of balancing the various team strengths to maintain competitive play. There had to be control of the labor market to raise customer satisfaction with the product or what is more commonly referred to as fan loyalty. The reserve system was the result. The combined reserve / free agency system was the collectively bargained solution to both sides' needs.[32] Numerous citations in the professional sports context to cases where the constituent parts of the reserve / free agency system were held to be mandatory subjects of bargaining supported the District Court's holding that the reserve / free agency system as a whole was a mandatory subject of bargaining.[33] The Second Circuit Court of Appeals concurred in that holding.[34]

The real question regarding the reserve / free agency system is whether the Second Circuit's rule can be applied in other labor arenas. In a case of first impression, *Retlaw v. NLRB*,[35] the Ninth Circuit Court of Appeals answered in the negative.

Retlaw Broadcasting operated a television station in Fresno, California. Upon expiration of its contract with the union, the American Federation of Television and Radio Artists (AFTRA), Retlaw bargained until it declared an impasse over the issue of personal service contracts (PSC) along with other issues. During a collective bargaining negotiation, the parties are allowed to hold their positions concerning mandatory subjects of bargaining (wages, hours and terms and conditions of employment) until an impasse is reached. Upon reaching an impasse the employer is allowed to implement its last, best and final offer and the union is allowed to employ its methods of economic coercion, such as a strike. Neither party may create an impasse over a permissive subject of bargaining.[36] Retlaw wanted to insert language into the PSC clause of the contract that would allow it to undercut

the "minimum terms of employment" as embodied in the collective bargaining agreement if the overall value of the PSC exceeded the overall value of the collective bargaining agreement (CBA) or if the employee's salary exceeded the CBA minimum salary by 20% or more.[37] Upon declaring the impasse, Retlaw implemented its last, best, and final offer regarding PSCs along with other issues. AFTRA filed unfair labor practice charges with the NLRB, contending that the PSC is a permissive subject of bargaining and cannot be the subject of a declaration of impasse. The NLRB agreed and this litigation ensued.[38]

Retlaw contended that the PSC is the equivalent of free agency in the professional sports arena and, citing *Silverman*, maintained that just as free agency agreements in baseball are a mandatory subject of bargaining so are PSCs in the world of television broadcasting.[39] The Ninth Circuit Court of Appeals addressed this argument in two parts. First, the court discussed the union's "central statutory role as [the employees'] representative in dealing with the Employer," as held in *Toledo Typographical Union No. 63 v. NLRB*[40] and elsewhere. Second, the court addressed *Silverman* directly and refused to apply its holding beyond the severe limit of the specific facts of that case.[41]

The court held the PSC clause permissive because it would allow the employer to bypass the union and negotiate directly with the employee.[42] The court traced the essential principle of collective bargaining—i.e., that the union is the exclusive representative of the employees regarding wages, hours and working conditions—to the Supreme Court's statement of that principle in *Medo Photo Supply Corp. v. NLRB.*[43] The Ninth Circuit then listed five cases[44] over the years and from different circuits that, while different in detail, all stood for the principle that any "proposal that weakens the union's status as the exclusive bargaining representative is permissive."[45] The proposals that Retlaw insisted upon to impasse would have allowed the employer to bypass the union and undercut the CBA minimums regarding the core mandatory subjects of wages, hours and working conditions. As a permissive subject the PSCs could be agreed to by the union as had been done in the previous CBA, but that did not create a new mandatory subject over which the employer could hold out to impasse.[46]

Retlaw presented a single case, *Silverman*, to bolster the argument that the PSCs were a mandatory subject of bargaining. It analogized the free agency of professional sports with the PSCs in the broadcast industry.[47] As similar as the *Retlaw* situation in the broadcast industry may be to the professional sports situation in *Silverman*, it differs in two crucial ways. In professional sports there is a limited market for the players' services, which created the reserve system with its balance of the free agency system. The two systems work together in a manner negotiated and settled upon by both parties.[48] In *Silverman*, there was no attempt to undercut the core mandatory collective representation responsibilities of the union. It was the owners who were attempting to assert a right to collective negotiation.[49]

The Ninth Circuit took exception with the *Silverman* court for not looking into the possible application of its decision to the situation raised in *Toledo*.[50] In *Toledo*, the employer bargained to impasse over the right to negotiate individually with the employees, without the union's participation, over buyouts of the lifetime employment agreements that were contracted for in exchange for the ability to mechanize the workplace. The union filed an unfair labor practice claim with the NLRB. The NLRB held for the employer, stating that since the lifetime employment agreements were terms or conditions of work they were mandatory subjects of bargaining.[51] The D.C. Circuit took the unusual step of rejecting the NLRB's holding because the determination was "fundamentally inconsistent with the structure of the Act."[52] The *Toledo* court recognized that there are times when direct dealing between the employer and employee is appropriate, but only with the prior consent of the union. When it does so without the consent of the union, it violates Section 8(a)(5) of the NLRA.[53] The court distinguished between the employer negotiating to impasse over alterations in the lifetime employment agreement, which is a mandatory subject of bargaining, and what it calls the "first derivative," the employer's demand to negotiate directly with the employees on that subject. While negotiation with the union on lifetime employment is a mandatory subject,[54] negotiation with the union to exclude the union from the negotiation of a mandatory subject is strictly permissive.[55]

The Ninth Circuit in *Retlaw* rejected the application of *Silverman* because of the *Toledo* analysis. Because *Silverman* was dealing with the employers' assertion of the right to collectively bargain, a right that does not exist, and not the employees' assertion of the right, which is embodied in Section 7 of the NLRA, the application of the *Toledo* analysis to *Silverman* was missed.[56] *Silverman* held that because there were "abundant cases" holding the constituent parts of the reserve / free agency system to be mandatory subjects that the NLRB was correct in holding all of the constituent parts of the reserve / free agency system to be mandatory.[57] The Second Circuit went further than the District Court when it stated, "To hold that any of these items, or others that make up the mix in a particular sport, is merely a permissive subject of bargaining would ignore the reality of collective bargaining in sports."[58]

The evil the Ninth Circuit perceived in the *Silverman* holding, and that *Toledo* foresaw, was placing the imprimatur of "mandatory" upon certain of the subjects contained in the reserve / free agency system. Under the Second Circuit holding in *Silverman*, the employers can hold out to impasse for the right to bargain individually with the employees (players) since individual negotiation

is a part of the package that makes up the reserve/free agency system. According to the D.C. Circuit in *Toledo,* as later endorsed by the Ninth Circuit in Retlaw:

> The practical result would be a license for the employer to go to impasse over whether it has to deal with the union; that is the antithesis of good faith collective bargaining, which requires the employer to accept the legitimacy of the union's role in the process.[59]

The Ninth Circuit did question whether the *Silverman* court would have held the same way if the "direct dealing inquiry" had been raised. It can only be assumed that the Ninth Circuit believed the evils to be visited on the collective bargaining process by including individual negotiation as a mandatory subject of bargaining offset the benefits derived in the particular and difficult case *Silverman* raised. This assumption naturally arises from the Ninth Circuit's two specific statements: first, that any "proposal that weakens the union's status as the exclusive bargaining representative is permissive"; and second, that "*Silverman* cannot fairly be extended beyond its facts."[60]

III. The Anti-Collusion Clause in a Professional Sport Collective Bargaining Agreement Is a Mandatory Subject of Bargaining as Long as It Is Embedded in a Reserve/Free Agency System for Wage Determination

The appellate court included the anti-collusion argument parenthetically in the reserve/free agency discussion.[61] There is a tension between the permissive subject of multi-employer bargaining units which specifically endorse collusion between the employers[62] and the court's declaring the anti-collusion clause of the baseball agreement to be a mandatory subject of bargaining.[63] This is the unresolved tension harking back to the *Toledo* argument above that both the District Court and the Second Circuit failed to address.

The creation of an employee bargaining unit may be imposed upon an employer through the exercise of the rights encompassed in the NLRA.[64] The creation of a multi-employer bargaining unit whereby several employers may bargain through a single representative is controlled by the whim of the union.[65] The dissolution of the multi-employer bargaining relationship can be occasioned by the union's timely notice prior to the commencement of bargaining that it unequivocally has decided to bargain with each employer on an individual basis.[66] The employer equivalent would be for all of the member employers in the multi-employer bargaining unit to give similar timely notice, thereby effectively dissolving the relationship.[67] Any single employer also has the freedom to withdraw from a multi-employer bargaining unit in a timely manner with proper notice, but that would only dissolve that employer's relationship alone and leave the rest of the bargaining unit intact.[68]

The importance of the bargaining unit being a permissive rather than a mandatory subject of bargaining resides in the language of Section 7 of the NLRA. If the employer could demand a certain unit consistency to impasse and the imposition of economic coercion, employees would effectively lose the right to choose their representation.[69]

The formation of a multi-employer bargaining unit requires the agreement of all of the parties. It requires the collusion of the employer members of that unit to choose a representative and to bargain as a single unit with the union.[70] The coercion by the union of the employers in the choice of their representation is specifically prohibited in the NLRA.[71] If the coercion of the employers in their choice of representative is prohibited, then it can only be concluded that the choice of representative for the employers in the multi-employer unit must also be a permissive subject of bargaining, as the Second Circuit has held.[72]

In this context, the anti-collusion contract provision presents a problem. If, as a part of the reserve/free agency system, an anti-collusion clause is a mandatory subject of bargaining, then the employers can be required to bargain to impasse upon it. The employers can also require the union to bargain to impasse against it, as was made clear in the case below.[73]

The problem arises once there is an anti-collusion clause as part of a reserve/free agency system in a multi-employer collective bargaining agreement. If the union timely notices its intent to withdraw from the multi-employer bargaining unit and bargain individually with each employer, the employers have the right, as a mandatory subject of bargaining, to bargain to impasse for the right to continue to collude in the reserve/free agency system. This situation constructively forces the union to give up its section 7 rights to choose how to collectivize. This was foreseen in *Idaho Statesman*: "If [the scope of the bargaining unit represented by a union] were a mandatory subject, an employer could use its bargaining power to restrict (or extend) the scope of union representation in derogation of employees' guaranteed right to representation of their own choosing."[74] The employers could use their economic power to force the union to maintain a multi-employer bargaining unit when the union has decided to withdraw its consent. The employers now have the right to bargain to impasse to force the union to accept their collusion.

As with the equating of personal service contracts with professional sports free agency in *Retlaw* above, *Silverman*'s holding that anti-collusion clauses are mandatory subjects of bargaining must be limited to the specific facts of the case.[75] Where there exists the unique conditions that currently hold in professional sports, then

an anti-collusion clause included in a reserve / free agency system will acquire the characteristics of a mandatory subject of bargaining to the extent it does not impact the employees' section 7 right to collectivize. The mandatory nature of the anti-collusion clause when part of a reserve / free agency system is an extension of the list of mandatory subjects of collective bargaining, but the necessary limitation of that extension so that the union does not forfeit its control over the existence of a multi-employer bargaining unit must severely limit that extension.

IV. Holding That Salary Arbitration as Incorporated in the *Silverman* Decision Is a Mandatory Subject of Bargaining and May Not Be Unilaterally Abrogated Without Bargaining to Impasse Does Not Expand the Scope of Mandatory Subjects of Bargaining Under the NLRA

The PRC used a different tactic to reach the conclusion that salary arbitration is a permissive subject of bargaining. The PRC equated salary arbitration to interest arbitration which has generally been held to be permissive.[76] The claim made was based on the Second Circuit's recognition of two types of labor arbitration: interest and rights. Interest arbitration is defined by the court as "concern[ing] disputes over terms of new or renewal contracts." Rights arbitration is defined by the court as "over the interpretation or application of a contract."[77]

The lower court held in two parts. First, it held that salary arbitration as included in the Major League Baseball contract was not interest arbitration. The court reached this conclusion because the decision did not go before the arbitrator until there was a signed agreement complete in every particular except the amount of salary. According to the court, there is no question that the player will be playing for the team, with the only question being how much the player will be paid. Second, it held that even if it was interest arbitration, under two previous NLRB decisions interest arbitration clauses can survive the expiration of the agreement when they are "so intertwined with and inseparable from the mandatory terms and conditions for the contract . . . as to take on the characterization of the mandatory subjects themselves."[78]

The Second Circuit only affirmed the first part of the lower court decision. It summarily rejected the second part of the holding by stating, "We will assume, but not decide, that if [salary arbitration] is a form of interest arbitration, it may be unilaterally eliminated."[79] It is settled law that if the parties intended to enter a contract that the court should take a flexible approach and look to the broad framework of the contract.[80] Here there is the clear intent to form a contract. It is only the amount to be paid that is in dispute. The method of determining the appropriate wage to be paid has been determined by collective bargaining between the parties. The subject of the negotiation, wages, is a mandatory subject of bargaining. Unlike the free agency and anti-collusion holdings above, there is no real expansion to the mandatory subjects of bargaining being perpetrated by this holding. The agreed-upon wage is that which is decided by the system set up by the parties. Further, the union has not been put in the position of having to bargain to impasse for rights guaranteed by the NLRA, as the previous holdings required. There is no expansion of the mandatory subjects list engendered in this holding.[81]

V. Mandatory Issues of Bargaining Discussed in *Clarett*[82] and Problems Arising from Internal Logic Used by the Appellate Court

In 2002, Maurice Clarett was the freshman running back for the Ohio State University (OSU) football team. He led the team to an undefeated season and in January, 2003, scored the winning touchdown in OSU's double-overtime victory in the Fiesta Bowl to claim the 2002 national college football championship. In 2003, Clarett was suspended from college play by OSU. Having sat out his sophomore year, Clarett wanted to enter the National Football League (NFL) draft to be held in April 2004. Since 1925, the NFL has had a wait period between a student graduating high school and being able to be drafted by an NFL team. For the majority of that time the wait period was at least four full football seasons. Clarett did not fulfill that requirement. The NFL had an alternative requirement known as "Special Eligibility," which could be received from the NFL Commissioner. "Special Eligibility" still required the prospect to wait three full football seasons after having graduated high school. Clarett did not fulfill the "Special Eligibility" requirement either.[83]

The eligibility and Special Eligibility requirements are to be found in Article XII of the NFL Constitution and Bylaws. The NFL Constitution and Bylaws are incorporated into the NFL collective bargaining agreement with the National Football League Players Association (PA). Any change to the NFL Constitution and Bylaws that "could significantly affect the terms and conditions of employment" of the NFL players has to be noticed to the PA and bargained upon in good faith.[84]

Clarett sought to force the NFL to allow him to participate in the 2004 draft by claiming an anti-trust violation. Summary judgment was moved for by both parties, Clarett on his anti-trust claim and the NFL on the basis of the non-statutory labor exemption from the anti-trust laws. The district court granted Clarett's motion and denied the NFL's.[85] The district court, applying the *Mackey* test[86] from the Eighth Circuit Court of Appeals, found that the NFL did not meet even one of the three requirements of the *Mackey* test and held for Clarett.[87] The NFL appealed to the Second Circuit.

VI. In *Clarett*, the Second Circuit Rejects All Three Elements of *Mackey* Despite the Supreme Court's Holding in *Brown v. Pro Football*[88] Having Found Both Mandatory Subject and Parties to the Agreement Are Two of the Specific Reasons for Granting Protection Under the Non-Statutory Labor Exemption

The curious relationship between this case and the *Silverman* case discussed above does not depend solely upon their labor law roots. The district court judge in *Silverman*,[89] whose holding was affirmed by the Second Circuit, was the same Judge Sotomayor who now, as a Second Circuit appellate judge, wrote the *Clarett* decision.[90] It therefore is not surprising that the *Publishers' Association of N.Y.* decision[91] declaring that the permissive nature of the creation of a multi-employer bargaining unit, the creation of which rests on the "whim" of the union,[92] has been ignored again.

Clarett is at heart an anti-trust case with the NFL's defense resting squarely on the non-statutory labor exemption to the anti-trust laws. Until *Clarett*, no court had held the non-statutory exemption to apply where the actions at issue did not have any of the three elements of the *Mackey* rule. In *Clarett* the district court carefully went through all of the elements of *Mackey* and held that the NFL in *Clarett* had not satisfied any of them.[93] The Second Circuit circumvented that problem by stating that it had never agreed with the *Mackey* rule.[94] Further, the court stated that the Eighth Circuit assumed that the boundaries of the non-statutory exemption were the Supreme Court decisions in *Connell* (1975), *Jewel Tea* (1965), *Pennington* (1965), and *Allen Bradley* (1945). The Second Circuit disputed this on the basis that it involved employers who were excluded from the product market and not employees who were excluded from a labor market.[95] The court went further, using *National Basketball Association (NBA) v. Williams*[96] to explain that it was concerned with "imperil[ing] the legitimacy of multi-employer bargaining . . . a long-accepted and commonplace means of giving employers the tactical and practical advantages of collective action."[97]

The problem, as discussed above in the *Silverman* case, is that employer collective action is not protected by the statute.[98] The Second Circuit is basing its decision on an error that counters its own holdings in earlier cases which have been neither challenged nor overruled. The fundamental structure of the NLRA is for the employees to have the right without hindrance to collectively negotiate in good faith on wages, hours, and terms and conditions of employment. The NLRA does not contain any protection for the employers to negotiate collectively, only to choose their representative once the union and the NLRB allow them to act collectively.[99] If the employers upon being timely noticed that the National Football League Players Association (NFLPA) unequivocally was to negotiate with each employer individually, the league would be powerless to prevent it.[100] Yet, it is apparent that Judge Sotomayor in citing *Williams* is creating a right of the employer to collectivize and placing it ahead of the union's right to control that relationship.

The *Mackey* rule requires that actions taken by the union and employer be based upon mandatory subjects of bargaining.[101] Being unable to declare the eligibility rules of the NFL a mandatory subject of bargaining, the Second Circuit creates the phrase "a permissible, mandatory subject of bargaining."[102] The phrase is used twice on the same page to justify squeezing the eligibility rules of the NFL into the non-statutory labor exemption. First, "Nevertheless, such an arrangement constitutes a permissible, mandatory subject of bargaining despite the fact that it concerns prospective rather than current employees. Wood, 809 F. 2d at 960." (This citation does not refer to a "permissible, mandatory subject of bargaining.") Second, "As a permissible, mandatory subject of bargaining, the conditions under which a prospective player, like Clarett, will be considered for employment as an NFL player are for the union representative and the NFL to determine."[103]

The question raised is not whether the union and the NFL could negotiate such an eligibility requirement. The union and employer may negotiate any clause, whether permissive or mandatory, into a contract. The only difference is whether or not the parties maintain their differing positions to impasse during negotiations.[104] The question raised is whether a subject must be mandatory to protect the parties under the non-statutory labor exemption or does the non-statutory labor exemption cover permissive as well as mandatory subjects.

The U.S. Supreme Court answered this question in the affirmative in *Brown v. Pro Football*, where it stated:

> For these reasons, we hold that the implicit ("nonstatutory") antitrust exemption applies to the employer conduct at issue here. That conduct took place during and immediately after a collective-bargaining negotiation. It grew out of, and was directly related to, the lawful operation of the bargaining process. *It involved a matter that the parties were required to negotiate collectively. And it concerned only the parties to the collective-bargaining relationship* (emphasis added).[105]

The Second Circuit, while extensively referencing the *Brown* decision[106] and discussing various details, incorrectly states that the Supreme Court "left the precise contours of the exemption undefined."[107] The Supreme Court specifically stated that it held the way that it did because the subject was a mandatory subject of bargaining and it concerned "only the parties" to the agreement.[108] By extending the exemption to *Clarett*, the

Second Circuit has created in draft eligibility a mandatory subject of bargaining out of what previously had been merely permissive. It is in this redefinition of the eligibility rule as mandatory that the Second Circuit uses its unique "permissible, mandatory" locution.[109]

VII. The *Clarett* Decision Rests Uneasily on the *General Dynamics Land Systems* Case Regarding the Age Discrimination in Employment Act, and Unfairly Enriches the NFL and College Football at the Expense of Young, Top-Quality Athletes

Had *General Dynamics Land Systems, Inc. v. Dennis Cline*[110] been decided by the present Supreme Court, rather than the Court sitting in 2004, there is a very good possibility that we would be discussing the problem of age discrimination based on youth that this case would then present.[111] In *Cline*, the Supreme Court held that the Age Discrimination in Employment Act[112] protects older workers from being discriminated against in favor of younger workers, but has no reciprocal protection for younger workers being discriminated against in favor of older workers. The dissent by Justice Scalia[113] and the more detailed and scholarly dissent by Justice Thomas that was joined by Justice Kennedy[114] make a clear case for the protection of younger workers from discrimination based upon their age. In *Clarett*, the young man was discriminated against because of his age. He was not "three full football seasons" past his high school graduation. The qualification of any number of seasons past high school graduation is arguably a proxy for a restriction based upon age. There was no other qualification that Clarett was lacking.[115]

The NFL argued that the eligibility rules are to protect young, immature players from being injured in the professional ranks.[116] Baseball has player draft eligibility requirements. A high school student must have graduated to enter, a four-year college student must have completed the junior year, senior year or reached 21 years of age to enter, and any junior college player at all may enter.[117] It is significant that Major League Baseball has an extensive farm system of minor league teams to develop players for the professional ranks.[118] The NBA and NFL depend largely upon the ranks of college basketball and college football players to develop the majority of their prospects.[119] The college basketball and college football industry brings in over $3.5 billion in media fees, ticket sales, concessions, licensed merchandise and donations.[120] Unlike the Baseball farm system, the NCAA schools do not pay the players and do not receive money from the teams that benefit from the development of prospects.[121]

Since the *Clarett* decision the National Basketball Association (NBA) has acted in such a way as to reinforce the notion that the "years after graduation" qualification was a mere proxy for age discrimination which enriches the league and the college programs. For ten years up through the 2005 NBA draft, a player was eligible to be drafted directly out of high school.[122] By the time the draft occurred in 2005 and after the decision was handed down in *Clarett*, the NBA Players Association had compromised in negotiations with the league's demand for a minimum age of 20, by agreeing to a minimum age of 19 and one NBA season past high school graduation, making the 2005 class the last with high school players.[123] It is notable that the NBA has actually put the age of 19 as a mandatory co-requirement to the one-season-out-of-high-school rule.[124] This recreated the constructive necessity of a prospective professional basketball player going to college, playing for no wages, and risking a career- ending injury, before being allowed to enter the NBA.

The Second Circuit acknowledges that "the NFL and its players union can agree that an employee will not be hired or considered for employment for nearly any reason whatsoever so long as they do not violate federal laws such as those prohibiting . . . discrimination."[125] In light of *Cline*, *Clarett* has no case for illegal discrimination, but one must contemplate where Maurice Clarett, who is currently serving a seven-and-a-half year sentence in prison,[126] would have been if he had been allowed to play the sport he was so gifted at when he was at the height of his powers.

Conclusion

The *Silverman* decision has expanded mandatory subjects of bargaining exclusively in the area of professional sports to include the entire reserve / free agency system. The anti-collusion clause is a mandatory subject of bargaining as long as it is embedded in a reserve / free agency system. The salary arbitration system, as an integral and collectively bargained part of the reserve / free agency system, does not expand the mandatory subjects of bargaining.

The *Clarett* decision does expand the mandatory subjects of bargaining by specifically including the prospective, unrepresented players through their eligibility to participate in the NFL draft. Further, the *Clarett* decision rejects all three elements of the *Mackey* rule and creates a new category of "permissible, mandatory" subjects of bargaining that contradicts the holding in *Brown*. Finally, if the holding in *Cline* is ever overruled, the NFL and NBA must be wary of a possible challenge to their draft eligibility structures on the basis of the ADEA.

Endnotes

1. "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . ." 29 U.S.C.A. § 158(d).
2. The PRC is the committee designated by Major League Baseball to represent all of the employers in negotiations with the Major

League Baseball Players Association (PA). While the PRC is neither the owner of any team nor the employer of any players, it is the organization representing all of the owners against the PA. 67 F. 3d 1054, 1061 (2nd Cir. 1995); 880 F. Supp. 246 (S.D.N.Y. 1995).

3. 369 F. 3d 124 (2nd Cir. 2004).
4. 880 F. Supp. 246 (S.D.N.Y. 1995) and 67 F. 3d 1054 (2d Cir. 1995).
5. 880 F. Supp. at 252.
6. *Id.* at 254.
7. *Id.* at 252
8. *Id.*
9. 29 U.S.C. A. § 160. "The Board shall have power . . . to petition any United States district court . . . for appropriate temporary relief or restraining order."
10. 880 F. Supp. at 252.
11. *Id.* at 250.
12. *Id.*, at 252.
13. 880 F. Supp. at 254, fn. 5.
14. 29 U.S.C.A. § 158(d).
15. *NLRB v. Wooster Division of Borg Warner Corporation*, 356 U.S. 342, 349 (1958).
16. *Id.* at 256.
17. *Id.*
18. *Id.* at 257.
19. *Id.* at 261.
20. 67 F. 3d 1054, 1056.
21. 67 F. 3d at 1060.
22. *Id.*
23. *Flood v. Kuhn* 407 U.S. 258, 259 Fn.1 (1972) ("The reserve system publicly introduced into baseball contracts in 1887. . .").
24. 67 F. 3d at 1061.
25. The Second Circuit incorrectly dates the arbitration award in the *Messersmith* case to 1976. The actual date of the award was December 23, 1975. *K.C. Royals v. Major League Baseball Players Association*, 409 F. Supp. 233, 235 (W.D. Mo. 1976). This case is commonly referred to as the *Messersmith* case after the name of the pitcher, John A. (Andy) Messersmith, who was one of the grievants before the arbitrator. *Id.* at 236, fn. 1.
26. 409 F. Supp. at 261.
27. 409 F. Supp. at 261, *aff'd*, 532 F. 2d 615, 630–31 (8th Cir. 1976).
28. 67 F. 3d at 1061.
29. *Id. See also* 880 F. Supp. at 264.
30. *Flood v. Kuhn* 309 F. Supp. 793, 805–06 (S.D.N.Y. 1970) [baseball]; *Mackey v. NFL* 543 F.2d. 606, 615 (8th Cir. 1976) [football]; *McCourt v. California Sports, Inc*. 600 F. 2d. 1193, 1198 (6th Cir. 1979) [hockey].
31. 880 F. Supp. at 256.
32. *Id.* at 255–56.
33. *Id.* at 257.
34. 67 F. 3d at 1061–62.
35. 172 F. 3d 660, 666 (9th Cir. 1999).
36. 48A Am. Jur. 2d *Labor and Labor Relations* § 2326 at 1–2 (2008).
37. Realistically, Retlaw wanted to ignore the "terms and conditions" in the CBA if it paid an employee under a PSC 20% more than the CBA minimum or if the PSC "when considered as a whole provides more favorable terms for the artist than [the CBA]." 172 F. 3d at 663.
38. *Id.* at 663–664.
39. *Id.* at 668.
40. *Id.* at 666, citing *Toledo*, 907 F. 2d 1220, 1223 (D.C. Cir. 1990).
41. *Id.* at 668.
42. *Id.* at 667.
43. *Medo*, 321 U.S. 678, 684 (1944).
44. *Retlaw*, 172 F. 3d at 667, fn. 5.
45. *Id.* at 667–68.
46. *Id.* at 666.
47. *Id.* at 668.
48. *Id.* at 669.
49. *Id.* at 668.
50. *Toledo Typographical Union No. 63 v. NLRB*, 907 F. 2d 1220 (D.C. Cir. 1990).
51. *Id.* at 1221–22.
52. *Id.* at 1222.
53. *Id.* (citations omitted).
54. *Id.* at 1223.
55. *Id.* at 1224.
56. 172 F. 3d at 668.
57. 880 F. Supp. at 257.
58. 67 F. 3d at 1062.
59. 907 F. 2d at 1224.
60. 172 F. 3d at 668.
61. 67 F. 3d at 1060.
62. *Publishers' Association of New York City v. NLRB*, 364 F. 2d 293, 295 (2d Cir. 1966) ("The Board held that since multiemployer bargaining may be initiated only on consent of the parties, it may be terminated by timely withdrawal of consent by either party. The only limitation would appear to be that the withdrawal must be genuine, that is, 'unequivocal.'").
63. 880 F. Supp. at 257, *aff'd*, 67 F. 3d at 1060–61.
64. 29 U.S.C.A. § 157.
65. *Retlaw*, 172 F. 3d at 668.
66. *New York Typographical Union No. 6*, 156 NLRB 210, 216 (1965).
67. *Id.*
68. 364 F. 2d at 294.
69. *The Idaho Statesman v. NLRB*, 836 F. 2d 1396, 1400-1401 (D.C. Cir. 1988).
70. 880 F. Supp. at 256, *citing NLRB v. Johnson Sheet Metal, Inc*., 442 F. 2d 1056, 1059 (10th Cir. 1971).
71. 29 U.S.C.A. § 158(b)(1)(B).
72. *NLRB v. Local 964, United Brotherhood of Carpenters and Joiners of America, AFL-CIO*, 447 F. 2d 643, 645 (2d Cir. 1971).
73. 880 F. Supp. at 257.
74. 836 F. 2d at 1400-01, *cf*. fn. 2, 'Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in Section 7 of the NLRA. 29 U.S.C. § 158(a)(1). Among the rights guaranteed by Section 7 are the "right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing. . . ." 29 U.S.C. § 157. Section 9(a) endows the union chosen by a majority of employees in an appropriate bargaining unit with the status of "the exclusive representative[ ] of all employees in such unit for the purposes of collective bargaining in respect to

rates of pay, wages, hours of employment, or other conditions of employment. . . .” 29 U.S.C. § 159(a).

“In explaining the interplay of these provisions in the case of an employer’s insistence to impasse upon changing the scope of the bargaining unit, the Court of Appeals for the Fourth Circuit has noted:

> It is well settled that insistence on a change in the scope of the unit certified by the Board violates § 8(a)(5) of the Act. This is so because § 8(a)(5) makes it unlawful for an employer to refuse to bargain collectively with the representatives of his employees and § 9(a) provides that the representatives elected by the majority of the employees in the unit found to be appropriate by the Board . . . shall be the exclusive representatives of all the employees in the unit. *Newport News Shipbuilding & Dry Dock Co. v. NLRB*, 602 F. 2d 73, 76 (4th Cir.1979).”

75. *Retlaw*, 172 F. 3d at 668.
76. 880 F. Supp. at 257.
77. *Id.* at 258 (citations omitted).
78. *Id.*
79. 67 F. 3d at 1062.
80. 17 *Corpus Juris Secundum* Contracts § 42 (2008).
81. 67 F. 3d at 1062.
82. 369 F. 3d 124 (2d Cir. 2004).
83. *Id.* at 126–27.
84. *Id.* at 127.
85. *Id.* at 128.
86. *Mackey v. National Football League*, 543 F. 2d 606 (8th Cir. 1976). The *Mackey* test for the non-statutory exemption is that the “restraint must: (1) primarily affect only the parties to the collective bargaining relationship, (2) concern a mandatory subject of collective bargaining, and (3) be the product of bona fide arm’s-length bargaining.” 369 F. 3d at 133, *citing Mackey* 543 F. 2d at 614.
87. 369 F. 3d at 129, 133.
88. 518 U.S. 231 (1996).
89. 880 F. Supp. at 249.
90. 369 F. 3d at 125.
91. *Publishers’ Association of NY v. NLRB*, 364 F. 2d 293 (2d Cir. 1966). The union timely noticed the individual employers of the Publishers' Association that they would unequivocally negotiate individually and not as a multi-employer bargaining unit even though the multi-employer unit was of long standing. The employers refused to bargain individually. The NLRB found the employers guilty of unfair labor practices and the Second Circuit affirmed and enforced the NLRB decision.
92. *Retlaw*, 172 F. 3d at 668.
93. 369 F. 3d at 133.
94. *Id.*
95. *Id.* at 134 (citations omitted).
96. 45 F. 3d 684 (2d Cir. 1995).
97. 369 F. 3d at 134, *citing* 45 F. 3d at 688-93.
98. *See* Section III.
99. *See supra*, note 74.
100. *Publishers’ Association of New York City v. NLRB*, 364 F. 2d 293, 295 (2d Cir. 1966).
101. *Mackey v. NFL*, 543 F. 2d 606, 614 (8th Cir. 1976).
102. 369 F. 3d at 141. A search of the Westlaw Federal Labor & Employment Cases (FLB-CS) and Federal Labor & Employment—National Labor Relations Board—Board and ALJ Decisions Combined (FLB-NLRB) turned up no other case that used the “permissible, mandatory” language.
103. *Id.*
104. *NLRB v. Wooster Division of Borg Warner Corporation*, 356 U.S. 342, 349 (1958).
105. 518 U.S. 231, 250 (1996).
106. 369 F. 3d at 130–38.
107. *Id.* at 138.
108. 518 U.S. at 250.
109. 369 F. 3d 141.
110. 540 U.S. 581 (2004).
111. The shift in the Court can be seen in the lineup of Justices in *Kentucky Retirement Systems v. EEOC*, 128 S. Ct. 2361 (2008), another ADEA case. In this case the Justices broke 5-4, with Kennedy writing a dissent joined by CJ Roberts, Scalia, and Alito. Thomas joined the majority presumably because *Cline* was specifically denied as a factor in this decision.
112. 29 U.S.C.A. §§ 621 *et seq.*
113. *Id.* at 601.
114. *Id.* at 602.
115. 369 F. 3d at 126.
116. *Id.* at 129.
117. Major League Baseball First Year Draft Rules, *available at* http://mlb.mlb.com/mlb/draftday/rules.jsp.
118. National League, *About the Farm*, at http://www.minorleaguenews.com/baseball/affiliated/farms/NLfarm.html (“The Farm” is the nickname of the system of the “minor” leagues and teams used by Major League Baseball to develop players. The joke among[ ] major league players in th[e] 1930s, when the system was created by Cardinals GM Branch Rickey, was that they used to “grow ‘em down on the farm like corn.” The farm system largely replaced the system of horse-trading at fixed contract prices between independent leagues and the majors. Major League clubs sign a contract with a player and then assign [him] to a farm club within their system. There are some independent leagues outside of the farm system that still deal in player contracts to Major League clubs, but more than 99% of the players are usually developed within the farm systems, even when purchased from an independent ball club.).
119. Last year’s NBA College Draft was broadcast in 115 countries in 18 languages. http://answers.yahoo.com/question/index?qid=20080617193048AA3Lnuw. The 2008 NFL College Draft was broadcast from Radio City Music Hall over the NFL Network and ESPN. http://www.chiff.com/recreation/sports/NFL-draft.htm.
120. Timothy Liam Epstein, *Splinters from the Bench: Feasibility of Lawsuits by Athletes Against Coaches and Schools for Lack of Playing Time*, 4 Virginia Sports and Entertainment L.J. 174, 177 fn. 14 (2005).
121. NCAA Eligibility, http://www.ncaa.org/wps/ncaa?ContentID=273.
122. Chris Broussard, *INSIDE THE N.B.A.; Draft Becoming Refuge For Young and Restless*, N.Y. Times, June 20, 2004. Kobe Bryant of the Lakers and Lebron James of the Cavaliers were both drafted out of high school with no college experience.
123. Howard Beck, *N.B.A. Draft Will Close Book on High School Stars*, N.Y. Times, June 28, 2005.
124. NBA/NBAPA collective bargaining agreement, Article X, *Player Eligibility and NBA Draft*, § 1(b)(1).
125. 369 F. 3d at 141, *citing* 42 U.S.C. §§ 2000e *et seq.*
126. Frank Litsky, *Clarett Pleads Guilty and Receives Prison Term*, N.Y. Times, Sept. 19, 2006.

Lactation Frustration: How New York's New Breastfeeding Legislation Fails to Express Protection for Employees

By Katherine R. Largo

Several states have recently enacted legislation to protect employees' right to engage in breastfeeding activities at the workplace.[1] On August 15, 2007,[2] the New York legislature amended New York's labor law to include the "Nursing Mothers in the Workplace Act" (NMWA),[3] making New York the fourteenth state to pass such legislation.[4] The NMWA is especially important because it protects a right which employers have inconsistently provided to their employees, and which courts have denied under both state and federal legislation.

This article proposes a broad interpretation of the NMWA, which requires that employers make reasonable efforts to accommodate both female and male employees' various arrangements to breastfeed their children. Protected breastfeeding activities should include expressing breast milk at the workplace, breastfeeding or bottle-feeding breast milk at the workplace, or leaving the workplace to breast or bottle-feed breast milk at a nearby childcare center.[5] A broad interpretation is preferable, because the plain language of the statute fails to 1) protect breastfeeding employees, 2) achieve the purposes of the NMWA, and 3) eliminate gender stereotypes at the workplace.

The plain language of the statute does not provide real protection for breastfeeding employees. For example, the statute does not define what "reasonable efforts" employers must make to accommodate breastfeeding employees. As courts have strictly construed existing legislation and demonstrated unwillingness to protect breastfeeding employees,[6] courts and employers are likely to interpret the NMWA according to its plain language and deny employees the right to engage in breastfeeding activities at the workplace.

Additionally, a restrictive interpretation of the statute's express terms will not achieve the purposes of the statute as expressed in its legislative history. The NMWA serves two main purposes:[7] to allow women who choose to breastfeed to the return to work after childbirth, and to allow mothers and infants to take advantage of the numerous health benefits associated with breastfeeding.[8] In order to fully accomplish these purposes, all breastfeeding activities should be protected.

Finally, the public policy concern of eliminating gender discrimination from the workplace supports broad protection of breastfeeding activities. Gender stereotypes continue to exist in the workplace. These stereotypes are traditional ideas, based on biology and social norms, that men should work and women should care for families. Although women have entered the workplace in large numbers, employers and social norms have discouraged men from becoming more involved with their families.[9] The NMWA should be read liberally to encompass breastfeeding activities that both women *and* men can do to support the health of their children. This interpretation would encourage and protect men who choose a non-traditional role. This broad protection is a small, yet important, step toward eliminating gender stereotypes from the workplace.

This article critiques the NMWA within a historical, biological, social and legal context. Part I discusses the law's historical biology-based rationale for excluding women from the workplace. Part II reviews the health and economic benefits experienced by mothers, fathers, children, and employers, when employees breastfeed their children. Part III discusses the challenge of breastfeeding and returning to work. Part IV analyzes the role of employment in disparate breastfeeding rates based on race and social class. Part V examines courts' treatment of employees' right to breastfeed or express breast milk under federal and state law, and compares recent legislation that protects breastfeeding activities at the workplace. Part VI examines the vague and incomplete language of the NMWA and suggests a broad interpretation of the NMWA. Part VII discusses future implications and suggestions.

I. The Law's Emphasis of Biology to Exclude Women from the Workplace

Women's unique ability to produce children has been emphasized to restrict women to domestic and care-giving work in the home. Courts historically upheld legislation restricting women's choice of employment as protective legislation for women. This legislation effectively restricted women's employment choices, including choice of occupation[10] and work hours.[11]

Protective legislation excluded women from the workplace in order to protect and prioritize women's role of producing and raising children. In *Muller v. Oregon*, the Court considered women's physiology in upholding legislation that prohibited women from working more than ten hours per day in a factory or laundromat.[12] In rendering its decision, the Court looked to public opinion[13] as well as legislation and research, at both the national and international level.[14] The Court found that "[l]ong hours of labor are dangerous for women, primarily because of their special physical organization."[15] Further, the Court expressed its view that the maternal role of women was necessary to sustain the human race.[16] Because the Court viewed women's bodies as weaker than and inferior to those of men, the Court held that the different treatment of women was justified, and therefore did not violate the Fourteenth Amendment.[17]

Courts have also historically restricted women's choice of occupation. In *Bradwell v. Illinois*, the Supreme Court upheld state legislation that prohibited women from practicing law as a profession.[18] The Court held that the right to practice law in a state court was not a federally protected right of citizenship under the Fourteenth Amendment.[19] Like the *Muller* decision, Justice Bradley's concurrence focused on the biological or natural characteristics of women.[20]

More than half a century later, the passage of Title VII began to provide protection against discriminatory legislation and acts of private employers[21] based on these traditional, stereotypical views of women.[22]

II. Beneficial Effects of Breastfeeding

Only women are able to produce breast milk, breastfeed, and express breast milk. Both women and men, however, can provide their children the benefits of breast milk by bottle-feeding expressed breast milk.[23] Because infants accrue significant benefits from breast milk, whether they receive it by breastfeeding and / or bottle-feeding expressed breast milk, it is important that employees are able to engage in all breastfeeding activities during the workday.

The benefits of breastfeeding are widespread; breastfeeding has positive effects on children, mothers, fathers, and even employers. According to the American Association of Pediatricians (AAP), breastfeeding is beneficial for children because it reduces the occurrence and severity of infectious diseases.[24] The AAP recommends exclusive breastfeeding for at least the first six months of an infant's life.[25] Infants who are breastfed experience long-term health benefits, such as a decreased risk of becoming obese[26] and a decreased risk of acquiring diseases such as diabetes, lymphoma, and leukemia.[27]

The act of breastfeeding provides health benefits to mothers as well. Immediate benefits include decreased postpartum bleeding, more rapid contraction of the uterus to its original size, and more rapid loss of weight gained during pregnancy.[28] Mothers also experience long-term health benefits, including a decreased risk of osteoporosis, breast cancer and ovarian cancer.[29]

While fathers do not physically benefit from breastfeeding, it is important for fathers to be involved in breastfeeding because both fathers and their infants benefit as a result.[30] By bottle-feeding infants expressed breast milk, fathers have the opportunity to play an active parenting role and bond with their children.[31] Perhaps most significantly, children benefit when fathers are involved in breastfeeding because when new parents "act as a team," they have an easier time achieving the AAP breastfeeding recommendation.[32]

Breastfeeding also has a positive impact on employers. Studies have found that employers receive economic benefits when they accommodate employees' choice to breastfeed. For example, one study indicates that infants of employees who breastfed had lower rates of illness and less severe illnesses.[33] As a result, employees who breastfed took leave less often and for shorter periods of time than did employees who fed their infants formula.[34] Further, by accommodating breastfeeding employees, employers may experience increased employee retention, productivity, and morale.[35] Companies that accommodate breastfeeding employees have reported a "cost savings of three dollars per one dollar invested in breastfeeding support."[36]

Despite the widespread positive effects of breastfeeding, however, less than twenty percent of women continue exclusive breastfeeding six months postpartum.[37]

III. The Challenge of Breastfeeding While Returning to Work

Women's increased participation in the workplace and employers' insufficient provision of leave policies likely contribute to these low breastfeeding rates. Significantly more women are members of the workforce today than in the past.[38] Because of insufficient leave policies, women go back to work soon after childbirth; one-third of new mothers resume work within three months, and two-thirds return within six months.[39]

Likewise, research studies have found that returning to work after having a baby affects women's decision to continue breastfeeding. One study, for example, shows that less than twenty percent of women who resumed full-time work after childbirth breastfed exclusively for six months, compared to nearly fifty percent of women not employed outside the home.[40]

Further, the fast-paced nature of many workplaces does not readily accommodate working parents who choose to breastfeed their infants, which requires breastfeeding about every two to four hours.[41] Breastfeeding mothers must express breast milk frequently throughout the day to maintain a complete supply to feed their infant(s).[42] Therefore, for employees to even have the choice to breastfeed their children, employers must provide breaks during the workday for breastfeeding employees to breastfeed or express breast milk.

IV. Inconsistent Employer Support Marked by Race and Class

Studies have found that workplace environment is a factor that contributes to the disparate breastfeeding rates among women of different races[43] and social classes.[44] The lack of employer support for breastfeeding at the workplace may explain why many women are not breastfeeding in accordance with the AAP recommendations. In general, working-class women experience less employer support for breastfeeding than do women employed in positions of wealth and power. This trend even occurs among employees of the same corporation.[45]

Some corporations have implemented lactation programs to accommodate corporate employees who

breastfeed.[46] In addition to providing time and privacy for employees to express breast milk at work, some corporate employers also provide a hospital-grade breast pump[47] and access to a professional lactation consultant both before and after birth.[48] Employer breastfeeding-support programs can be quite successful; at CIGNA, for example, seventy-five percent of employees in a breastfeeding-support program continued to breastfeed for six months after childbirth, which is more than three times the national average.[49]

Working-class women, however, do not typically receive these same accommodations from their employers. Women in retail and service jobs find it particularly difficult to breastfeed at the workplace because, unlike corporate employees, they lack flexible scheduling and privacy.[50] Some of these women report having to breastfeed or express breast milk in closets and even toilet stalls.[51]

Research has also suggested that breastfeeding rates vary based on race. Several studies have found that African-American women are less likely to breastfeed than white women.[52] This trend may be explained in part by findings that African-American women return to the workplace sooner than other women and that they are more likely than Caucasian women to have jobs that do not accommodate breastfeeding.[53] The workplace emerges as one of several important factors which could improve the breastfeeding rates among African-American and working class women.[54]

The NMWA has the potential to equalize the breastfeeding rates among different racial groups and social classes, allowing a larger and more diverse group of parents, children, and employers to take advantage of the benefits of breastfeeding.

V. Federal and State Legislative Breastfeeding Protection

A. Federal Legislation and Case Law

Employees who claim breastfeeding discrimination[55] by their employers have been unsuccessful under existing federal law, such as Title VII[56] and the Pregnancy Discrimination Act (PDA).[57]

In *General Electric v. Gilbert*,[58] the Supreme Court held that an employer's denial of health benefits to pregnant employees was not sex discrimination under Title VII. The Court found that General Electric's (GE) health plan did not provide benefits for a condition "unique to women."[59] The court viewed GE's different treatment of male and female employees as between pregnant persons, a group consisting solely of women, and non-pregnant persons, a group consisting of both women and men.[60] Because there was "[n]o risk from which men [were] protected and women were not," and "no risk from which women [were] protected and men [were] not,"[61] the Court held there was no Title VII sex discrimination. Two years after the *Gilbert* decision, Congress amended Title VII to include the PDA, which expressly prohibits discrimination against pregnant women because it is a form of sex discrimination.[62]

Despite Congress's disapproval of the *Gilbert* rationale—as demonstrated by its timely passage of the PDA—courts have continued to apply the *Gilbert* rationale, or "comparability analysis,"[63] to deny relief to employees who have experienced breastfeeding discrimination by their employers. Under this analysis, women cannot state a claim for breastfeeding discrimination as Title VII sex discrimination. Because men do not produce breast milk or breastfeed, there is no similarly situated comparison group of men;[64] any different treatment is not based on sex, and is, therefore, not sex discrimination. The Sixth Circuit Court of Appeals has noted that "no judicial body thus far has been willing to take the expansive interpretive leap to include rules concerning breast-feeding within the scope of sex discrimination."[65]

Courts have applied the comparability analysis to employees' claims of breastfeeding discrimination. Expressly referring to *Gilbert*, in *Wallace v. Pyro Mining Co.*, the Kentucky District Court employed the comparability analysis to determine that an employee did not state a claim for sex discrimination under either Title VII or the PDA where her employer refused to grant her leave when she was unable to wean her child from breastfeeding.[66]

In addition, courts have narrowly interpreted the PDA, based on its plain language and legislative history, to find that it provides protection based on the condition only of the mother, and not that of the child.[67] The Fourth Circuit Court of Appeals, in *Barrash v. Bowen*, further narrowed this definition, finding that "[p]regnancy and related conditions must be treated as illnesses only when *incapacitating*."[68] This restrictive interpretation of the PDA rejects breastfeeding discrimination claims based on an overly technical interpretation.

In holding that breastfeeding is not covered by the PDA, courts express disapproval of breastfeeding and ignore the health benefits of breastfeeding. For example, in *Fejes v. Gilpinventures*, the Colorado District Court equated breastfeeding with childcare in stating that "[b]reast-feeding and child rearing concerns after pregnancy are not medical conditions related to pregnancy or childbirth."[69] Other courts have belittled breastfeeding mothers and their choice to breastfeed by describing them as "young mothers *wishing* to nurse little babies."[70] Some courts have even referred to breastfeeding as merely a "personal need."[71] In light of the widespread health and economic benefits of breastfeeding,[72] the courts' language misconstrues breastfeeding. Further, such derogatory language is evidence of the unwillingness of the courts to interpret the PDA to protect employees' choice to breastfeed.

B. New York State and Federal Courts Deny Relief

State and federal courts in New York have also held that women's choice to breastfeed or express breast milk at the workplace is not protected under either federal or state law. Federal courts in New York use the comparability analysis and narrowly interpret the language of federal legislation to deny protection even where a compelling health condition exists. Similarly, state courts have denied plaintiffs relief for breastfeeding discrimination under New York law.

In *Martinez v. N.B.C., Inc.*, the United States District Court for the Southern District of New York applied the comparability analysis and confirmed that neither Title VII nor the PDA provides protection against discrimination for the expression of breast milk at the workplace. The court denied the plaintiff's claim, stating that "[t]he drawing of distinctions among persons of one gender on the basis of criteria that are immaterial to the other . . . is not the sort of behavior covered by Title VII."[73] Additionally, the court rejected the possibility of a claim for breastfeeding discrimination under a "sex-plus" theory.[74] The court held that neither the plaintiff, nor any woman seeking to express breast milk or breastfeed at the workplace, could state a "sex-plus" claim because there is no similarly situated class of men, as men cannot breastfeed or express breast milk.[75]

In *McNill v. New York City Dept. of Correction*, the U.S. District Court for the Southern District of New York narrowly interpreted the PDA to find that that it does not protect employees from discrimination where the child has a medical condition that "require[s] the mother's presence."[76] The plaintiff's child was born with a cleft palate and lip,[77] making it "a medical necessity that the child be breast-fed" by the plaintiff. [78] Despite these compelling facts, because the infant's illness neither "directly involve[d] the condition of the mother"[79] nor was a "consequence of pregnancy,"[80] the court held the plaintiff could not state a claim under the PDA for extended leave to breastfeed.

Only a few cases of employment discrimination based on breastfeeding or expressing breast milk have been litigated under New York law. Most of the state's courts have been unwilling to find that New York law protects employees against discrimination by their employers based on their choice or even *need* to breastfeed.[81]

Unlike the majority of New York State courts, the court in *Kallir v. Friendly Ice Cream* found that breastfeeding is protected under New York law. The court broadly interpreted section 205 of the New York Workers' Compensation Law to accomplish the statute's humanistic purpose.[82] The court found that the purpose of the statute in providing benefits for disability, "resulting from or arising in connection with"[83] complication of pregnancy, was "to meet the human needs of workers"[84] who relied on such benefits because they were unemployed or disabled.[85] The court interpreted the statute broadly where the plaintiff-mother was required to breastfeed her infant due to the infant's allergic condition, which was "both biologically and realistically inextricably connected with the pregnancy."[86]

More consistent with the majority of state and federal decisions than the workers' compensation exception in *Kallir*, the court in *Bond v. Sterling* held that breastfeeding is not a disability under New York Human Rights Law, Executive Law § 296 (HRL).[87] The court refused to interpret the HRL to include breastfeeding, where the HRL defined "disability" as "a physical mental or medical impairment . . . which prevents the exercise of a normal bodily function."[88] The court found breastfeeding presents no "impairment" to a breastfeeding mother.[89] Furthermore, the court held that breastfeeding, even if medically necessary as in *Kallir*,[90] would not qualify as a disability.[91]

As of 1994, New York Civil Rights Law (CRL) has provided that "a mother may breast feed her baby in any location, public or private, where the mother is otherwise authorized to be."[92] In *Landor-St. Gelais v. Albany Intern. Corp.*, the court narrowly interpreted the CRL and held that it does not protect the expression of breast milk at the workplace.[93] The court found that because the CRL was unambiguous, it should be interpreted according to its plain language.[94] The plain language of the CRL certainly does not exclude the expression of breast milk, which is an act performed by mothers so that parents may feed their infants breast milk. This interpretation ignored the legislative history of the CRL. Legislative history provides that breastfeeding mothers have an "absolute right" to breastfeed[95] and recognizes the health benefits of breastfeeding.[96] Several health organizations sponsored the CRL.[97] Each of these organizations submitted a memorandum in support discussing how breastfeeding[98] benefits the health of both mothers and infants. However, because the plain language of the CRL only referred to "breast feed[ing],"[99] the court refused to interpret the CRL as including the expression of breast milk.[100]

Because almost all federal and state courts have read existing legislation narrowly and have unambiguously expressed their unwillingness to protect women's choice to breastfeed, women who experience breastfeeding discrimination at work are left without a legal remedy. By expressly forbidding such discrimination, the NMWA serves an important purpose. Nonetheless, the vague and incomplete language of the statute provides employers no practical guidelines for accommodating employees who choose to breastfeed their children. Instead, the law leaves courts with the discretion to continue to deny breastfeeding employees legal protection and remedies.

C. State Legislation Protecting Employees' Right to Breastfeed at the Workplace

In response to the courts' dismissal of breastfeeding discrimination claims under both federal and state law, many states have passed laws to allow employees to

breastfeed and / or express breast milk at the workplace. While perhaps small in number—only fourteen states have passed such laws[101]—the language of these statutes appears to provide substantial protection for the right to breastfeed at the workplace.

Generally, these statutes state that an employer must allow employees unpaid time to express breast milk and make reasonable efforts to provide a private room, other than a restroom, for the expression of breast milk.[102] In some cases, the legislature specifically defined the statute's terms. For example, several states expressly define "employer" as a business with one or more employees.[103] As a result, employees in nearly all workplaces are covered. Connecticut's statute provides that "reasonable efforts" are "any effort that would not impose an undue hardship on the operation of the employer's business;" and "undue hardship" is "any action that requires significant difficulty or expense when considered in relation to factors such as the size of the business, its financial resources and the nature and structure of its operation."[104] This language is beneficial because it clearly communicates what measures employers must take to accommodate breastfeeding employees.

The language of some state statutes provides unambiguous protection for employees. Three states—Connecticut, Hawaii, and New York—explicitly prohibit an employer from discriminating against employees who express breast milk at the workplace.[105] The legislation of four states expressly protects the right to pump breast milk *and* breastfeed at the workplace: Connecticut, Hawaii, Oklahoma, and Rhode Island.[106]

Many of these statutes, however, provide only questionable protection. For example, many statutes state that employers must accommodate breastfeeding employees who "*need*[] to express breast milk."[107] Employers and courts may narrowly interpret this subjective language; while breast milk provides several widespread benefits, breastfeeding is not *necessary* for all infants because other options are available, i.e., formula. If this issue were to be litigated, the courts would likely maintain their view that breastfeeding remains a choice and is not necessary, even when it is medically necessary.[108] Other statutes minimally protect employees because they provide complete discretion to the employer or only apply to some employers. Georgia's statute gives the employer great discretion in stating that they "*may* provide reasonable . . . time [and] *may* make reasonable efforts to provide a room . . . ."[109] Breastfeeding legislation in Montana does not afford statewide protection as it only applies to employees working in the public sector.[110] Montana's statute, therefore, grants private sector employers complete discretion to accommodate, or not to accommodate, breastfeeding employees.

A few state legislatures have recognized that breastfeeding is advantageous, yet they have not created legislation protecting employees' right to do so.[111] For example, a Texas statute recognizes "[b]reast-feeding a baby is an important and basic act of nurture that must be encouraged in the interests of maternal and child health . . . [and that] breast-feeding [is] the best method of infant nutrition."[112] Breastfeeding legislation in Texas, however, merely encourages businesses to provide employees the right and means to express breast milk by permitting these businesses to describe themselves as "mother-friendly" in their promotional materials.[113]

While many states provide legislation protecting employees' rights or encouraging employers to provide these rights, they do not consistently provide reliable protection for employees who wish to breastfeed or express breast milk at the workplace. Similarly, the plain language of the NMWA does not fully protect the rights of breastfeeding employees because it does not describe how employers should accommodate employees.

VI. New York's New Breastfeeding Legislation

The NMWA has been praised as a "win-win for businesses and families" and a "major victory."[114] The NMWA applies to all employers in New York State, regardless of size.[115] While the statute serves an important purpose in protecting employees' right to breastfeed, the plain language of the statute provides only questionable protection.

The Nursing Mothers in the Workplace Act reads:

> Right of Nursing Mothers to Express Breast Milk. An employer shall provide *reasonable unpaid break time* or permit an employee to use paid break time or meal time each day to allow an employee to express breast milk for her nursing child for up to three years following child birth. The employer shall make *reasonable efforts to provide a room* or other location, in close proximity to the work area, where an employee can express milk in privacy. No employer shall discriminate in any way against an employee who chooses to express breast milk at the work place.[116]

A. The NMWA, by its Plain Language, Fails to Provide Protection

The New York legislature provided some unambiguous protection in the plain language of the NMWA. In express and absolute language that "*no* employer shall discriminate in *any* way,"[117] the NMWA theoretically protects women from discrimination for their choice to express breast milk at the workplace. Only two other states provide such explicit protection.[118] Additionally, New York's statute is the only state statute that provides a definite time period during which breastfeeding employees are protected.[119] The statute clearly specifies that employees have three years to continue breastfeeding,

which exceeds the minimum breastfeeding time recommended by the AAP. The generous time provision allows women greater choice and freedom should they find it medically necessary to breastfeed for an extended period of time or have difficulty weaning their infants from breastfeeding.

While the language of the NMWA expressly prohibits discrimination, it provides no real guidance as to how employers should accommodate breastfeeding employees. Although the statute provides that employers must provide reasonable break time and a private room, it does not define what actions constitute "reasonable" efforts for either provision.[120] This allows employers great discretion; an employer could interpret the legislation as only requiring it provide employees ten minutes in a restroom to express breast milk. As the courts have read existing legislation narrowly, it is likely they will narrowly interpret these NMWA terms and find any effort of the employer to be "reasonable."

The statute also does not provide other practical guidelines about storage of expressed breast milk. For example, it does not state that the employer must provide a refrigerator for the storage of expressed milk.[121] Expressed breast milk may only be kept at room temperature for six to eight hours;[122] therefore, an employer may need to provide a refrigerator to prevent the expressed milk from being wasted. Additionally, assuring that there is proper storage for expressed milk ensures a sanitary workplace.

Perhaps most significantly, the statute does not provide an effective remedy for employees. Employees may sue if their employer violates the NMWA. But litigation seeking enforcement of the statute is not a fruitful remedy for an employee whose employer has denied her or him the right to engage in breastfeeding activities at the workplace. Typically, employment discrimination litigation takes between fifteen months, in arbitration, and two-and-a-half years, in the court system.[123] By the time the arbitrator or court renders a decision, the employee may have been forced to resolve his or her breastfeeding claim by choosing whether to a) resign from employment and engage in breastfeeding activities, or b) continue to work and ignore the desire or need to breastfeed his or her child. In either scenario, the employee cannot later be placed in the same position he or she would have been in if the employer had not denied his or her accommodation request.

Fines for employers who violate the NMWA would act as a more beneficial remedy for employees. Fines would give employers a real, monetary incentive to accommodate breastfeeding employees.[124]

For all of these reasons, the legislature should amend the statute to provide more substantial and reliable protection to breastfeeding employees.

B. Interpretation of Breastfeeding Rights According to Legislative Intent and Commentary

Although the plain language of the NMWA refers to the expression of breast milk, the statute should be interpreted, either alone or in conjunction with the CRL, to accomplish the intent of the legislature as stated in the legislative history of the NMWA. An analysis of the legislative history of both the NMWA and the CRL, and the governor's commentary, reveals that the intent of the legislature was to ensure that infants and mothers receive health benefits associated with breastfeeding.[125]

The best way to achieve this intent is to interpret the statute as protecting all breastfeeding activities, subject to limitation based on danger and distraction at the workplace that is caused by the activity. Beyond allowing employees to express breast milk, an employer should also allow employees to use their break time to breastfeed their child in a private room at the workplace or at a childcare center on-site or near work. This flexibility is necessary to protect the right of *all* employees to breastfeed their children, including those employees in diverse workplaces, with different physical needs, and with various childcare arrangements.

There are important reasons for accommodating breastfeeding, the expression of breast milk, and bottle-feeding expressed breast milk at the workplace. If employers accommodate only the expression of breast milk, some women, men, and infants, are prevented from experiencing the benefits of breastfeeding.[126] Additionally, some women have difficulty expressing breast milk and may only breastfeed.[127] Accommodating a broad range of breastfeeding activities increases the likelihood that employees will actually breastfeed their children, and therefore, that breastfeeding rates will rise. As a result, a greater number of parents, children, and employers would experience the benefits of breastfeeding.[128] A broad interpretation, therefore, best accomplishes the legislative intent to allow individuals to experience the benefits of breastfeeding.

Following the enactment of the NMWA, former Governor Eliot Spitzer provided commentary that supports a broad interpretation. The governor's press release states that employers are required to "provide private space for women to express milk or *nurse their children*."[129] This suggests that Governor Spitzer views *both* breastfeeding and the expression of breast milk for later bottle-feeding as being important and protected by the NMWA. Even local newspapers have adopted this interpretation of the NMWA.[130] This broad interpretation is not uniformly held. For example, according to at least one New York law firm, Bond, Shoeneck & King, PLLC, the law "[a]ddresses only the expression of breast milk, and not the right to breastfeed a baby in the workplace."[131]

To balance the employers accommodating a range of breastfeeding activities, "reasonable efforts" should also allow employers to consider concerns such as distrac-

tion and danger at the workplace. For instance, bringing children into a factory to breastfeed is likely unsafe for children and employees. In such a case, a broad interpretation of reasonable efforts would allow an employer to limit employees' options to either expressing breast milk in a private room or breastfeeding their child in a nearby childcare center.

C. Public Policy of Eliminating Gender Stereotypes in Employment

Biology prevents men from expressing breast milk or breastfeeding. Men are physically capable, however, of bottle-feeding their children expressed breast milk. Therefore, a plain language interpretation of the NMWA, or the CRL, excludes men from participating in breastfeeding activities. By denying men the opportunity to be involved in this early, important aspect of raising children, this interpretation mirrors how protective labor legislation limited women's choice to work.[132]

The plain language interpretation is dangerous because it subtly reinforces traditional gender stereotypes and the dichotomy of separate spheres; men should work and women should raise families. These stereotypes are already strongly imprinted in the workplace. Men are reluctant to choose family over work, even where gender-neutral legislation, such as the Family and Medical Leave Act (FMLA), clearly provides them the right to do so.[133]

The stereotype that men should work rather than actively participate in raising their families reinforces the stereotype that women should actively participate in their families, rather than work.[134] Because the workplace itself reinforces traditional gender stereotypes, New York's breastfeeding legislation should not be interpreted by its plain language, which would *legally* reinforce such stereotypes by preventing men from engaging in breastfeeding activities at the workplace.

Both women and men deserve "the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life."[135] Therefore, courts should not interpret breastfeeding legislation in a narrow and exclusionary way. Rather, broad interpretations of the NMWA and CRL allow and encourage both women *and* men to participate in breastfeeding activities.

VII. Future Implications and Suggestions

Because the NMWA contains vague and uncertain language, it is foreseeable that employees and employers will litigate claims to determine what accommodations are required by, and who is protected under, the NMWA. Courts are likely to narrowly interpret the NMWA as requiring employers to make only a minimum effort to provide break time and a room where women can express breast milk. This interpretation fails to accomplish the legislature's intent to facilitate women's return to work after childbirth and to encourage breastfeeding due to its positive health effects. Further, this restrictive interpretation fails to protect employees throughout the state of New York, and therefore, the NMWA is unlikely to resolve the disparate rates of breastfeeding by race and class. For these reasons, the NMWA should be amended to provide actual, substantial protection for all employees who choose to breastfeed their children.

Finally, employers should not accept this legislation as the only necessary accommodation for women and men following the birth of a child.[136] The NMWA and similar legislation stand as only a first step towards allowing women and men the important opportunity to actively participate in both work and their families.

Endnotes

1. The breadth of breastfeeding activities covered varies from state to state. *See* discussion *infra* Section V(C).
2. Employers to Permit Nursing Mothers to Express Breast Milk, ch. 575, 2007 N.Y. Sess. Laws 1193 (McKinney).
3. N.Y. LAB. LAW § 206-c (McKinney 2007).
4. National Conference of State Legislatures, *Fifty State Summary of Breastfeeding Laws*, October 2007, http://www.ncsl.org/programs/health/breast50.htm. New York was also the first state to pass breastfeeding legislation by decriminalizing breastfeeding. La Leche League International, *A Current Summary of Breastfeeding Legislation in the U.S.*, http://www.llli.org/Law/Bills30.html (last visited Apr. 20, 2008).
5. *See* discussion *infra* Part VI.
6. *See* discussion *infra* Section V.
7. *See* DAVID NOCENTI, RE: S.5596 / A.1060, A. 230–1060, 230th Sess. (N.Y. 2007) ("lack of support for breastfeeding mothers at work . . . [makes] full-time employment one of the strongest predictors for the discontinuence of breastfeeding . . . this legislation will help to remedy this problem and will create healthier children and mothers.").
8. *Id.*; NEW YORK CITY BAR, THIS BILL IS APPROVED, A. 230–1060, 230th Sess. (N.Y. 2007).
9. There have been legislative efforts, such as the FMLA, to provide both men and women the opportunity to participate in their families.
10. *See Bradwell v. Illinois*, 83 U.S. 130, 133 (1872).
11. *See Muller v. Oregon*, 208 U.S. 412, 419 (1908). The Court upheld state maximum hours legislation targeting many different workplaces. *See also Miller v. Wilson*, 236 U.S. 373 (1915) (hotels); *Bosley v. McLaughlin*, 236 U.S. 385 (1915) (hospitals); *Riley v. Massachusetts*, 232 U.S. 671 (1914) (factories).
12. *Muller*, 83 U.S. at 416–17, 422–23.
13. *Id.* at 412, 420.
14. *Id.* at 412, 419 n.1.
15. *Id.* at 419. To support its assertion, the court cites protective legislation in nineteen other states and seven European countries, as well as statistics and reports. *See id.*
16. *Id.* at 421 ("That woman's [sic] physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.").
17. *Id.* at 422–23.

18. *See also Goesart v. Cleary*, 335 U.S. 464, 466 (1948) (upholding a Michigan law prohibiting a woman from working as a bartender unless the bar is owned by her husband or father, to "minimize[s] the hazards that may confront a barmaid without such protecting oversight").

19. *Bradwell*, 83 U.S. at 139.

20. *Id.* at 141–42 ("There [sic] nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career . . . The paramount destiny and mission of woman [sic] are to fulfil [sic] the noble and benign offices of wife and mother . . . *It is the prerogative of the legislator to prescribe regulations founded on nature.*") (emphasis added).

21. *See, e.g.*, *UAW v. Johnson Controls*, 886 F.2d 871 (7th Cir. 1989) (the court struck down the employer's fetal protection policy, which excluded female employees from certain jobs because of the employer's concern that exposure to lead would negatively affect the fertility of female employees).

22. *See infra* discussion at Part IV.

23. Expressed breast milk is considered the second best form of nutrition for infants, after breastfeeding. Kathy Kuhn, *Exclusively Pumping Breastmilk*, http://parenting.ivillage.com/newborn/nbreastfeed/0,,98xx-4,00.html (last visited Dec. 14, 2007).

24. American Academy of Pediatrics, Policy Statement: Breastfeeding and the Use of Human Milk 496 (2005) (infectious diseases such as "bacterial meningitis, bacteremia, diarrhea, respiratory tract infection, necrotizing enterocolitis, otitis media, urinary tract infection and late-onset sepsis in preterm infants").

25. American Academy of Pediatrics, *supra* note 24, at 499.

26. Roni Rabin, *Breast-fed Babies May Have a Leg Up in the Battle Against Childhood Obesity*, N.Y. Times, June 13, 2006, *available at* http://www.nytimes.com/2006/06/13/health/13sbre.html?_r=1&fta=y&oref=slogin.

27. American Academy of Pediatrics, *supra* note 24, at 496–97. Moreover, breastfeeding lowers the U.S. infant mortality rate. *Id.* at 496.

28. American Academy of Pediatrics, *supra* note 24, at 497.

29. *Id.*

30. Robina Riccitello, *Breastfeeding: How Can Dads Help?*, *available at* http://www.breastfeeding.com/reading_room/dad_help.html (last visited Apr. 20, 2008).

31. *Breastfeeding: Great For Babies and Moms, MU Expert Says*, U.S. St. News, July 18, 2007.

32. Robina Riccitello, *supra* note 30.

33. Rona Cohen, Marsha B. Mrtek & Robert G. Mrtek, *Comparison of Maternal Absenteeism and Infant Illness Rates Among Breast-feeding and Formula-feeding Women in Two Corporations*, Am. J. Health Promotion 151–52 (1995).

34. *Id. See also* Press Release, Breastfeeding Task Force of Greater L.A. (Aug. 18, 2004), *available at* http://www.breastfeedingtaskforla.org/PR/081804.htm (presenting survey results that breastfeeding friendly workplaces decrease absenteeism by fifty-seven percent); United States Breastfeeding Committee, Economic Benefits of Breastfeeding 2 (2002) ("If a parent misses 2 hours of work for the excess illness attributable to formula feeding, greater than 2,000 hours—the equivalent of 1 year of employment—are lost per 1,000 never-breast fed infants.").

35. *See* Press Release, Breastfeeding Task Force of Greater L.A., *supra* note 34.

36. United States Breastfeeding Committee, Workplace Breastfeeding Support 1 (2002).

37. American Academy of Pediatrics, *supra* note 24, at 498.

38. Eduardo Porter, *Stretched to the Limit, Women Stall March to Work*, N.Y. Times, Mar. 2, 2006, *available at* http://www.nytimes.com/2006/03/02/business/02work.html?_r=1&oref=slogin. Approximately seventy-five percent of women between the ages of twenty-five and fifty-four are working or actively seeking work, which is nearly double the number of women working in the late 1950s. *Id.*

39. United States Breastfeeding Committee, Workplace Breastfeeding Support, *supra* note 24. Also, the majority of women with children under three work full-time. *Id.*

40. Alan S. Ryan & Gilbert A. Martinez, *Breast-Feeding and the Working Mother: A Profile*, 83 Pediatrics 524, 527 (1989).

41. American Academy of Pediatrics, *supra* note 24 at 499. Exclusive pumping, or only feeding an infant expressed breast milk, requires a mother to express milk at least eight times, or 100 minutes per day. Kathleen B. Bruce, Medela, *Exclusive Pumping*, http://www.medelabreastfeedingus.com/tips-and-solutions/15/exclusive-pumping (last visited Apr. 20, 2008).

42. Kathy Kuhn, *Exclusively Pumping Breast Milk*, http://parenting.ivillage.com/newborn/nbreastfeed/0,,98xx-4,00.html (last visited Apr. 20, 2008). In addition, when mothers breastfeed or express breast milk infrequently, they may develop mastitis, a painful and serious breast infection. Amy Spangler, Mastitis: Signs, Causes, Treatment, and Prevention, http://www.breastfeeding.com/all_about/all_about_mastitis.html (last visited Apr. 20, 2008).

43. Suzette O. Oyeku, M.D., *A Closer Look at Racial/Ethnic Disparities in Breastfeeding*, 118 Pub. Health Reports 377, 377 (2003) (other factors include the media, marketing of formula, hospital policies, family, advice from medical and other professionals).

44. *See* Rabin, *supra* note 26.

45. Jodi Kantor, *On the Job, Nursing Mothers Find a 2-Class System*, N.Y. Times, Sept. 1, 2006, *available a*t http://www.nytimes.com/2006/09/01/health/01nurse.html?pagewanted=1&_r=2 ("When a new mother returns to Starbucks' corporate headquarters in Seattle after maternity leave, she learns what is behind the doors mysteriously marked "Lactation Room." Whenever she likes, she can slip away from her desk and behind those doors, sit in a plush recliner and behind curtains, and leaf through InStyle magazine as she holds a company-supplied pump to her chest, depositing her breast milk in bottles to be toted home later. But if the mothers who staff the chain's counters want to do the same, they must barricade themselves in small restrooms intended for customers, counting the minutes left in their breaks.").

46. In 1993, the *New York Times* reported that corporate employees who chose to breastfeed were actually hiding their breast pumps when they returned to work and women who "punch a time clock [had] it rougher." Patricia Leigh Brown, *Breast-Feeding Strategies for Busy Mothers*, N.Y. Times, March 11, 1993, *available at* http://query.nytimes.com/gst/fullpage.html?res=9F0CE7DA1439F932A25750C0A965958260&sec=&spon=&pagewanted=all. Now, companies are more successful at accommodating both corporate and hourly employees. According to the 2007 Working Mothers Survey of the 100 Best Employers to work for, ninety-six percent of the 100 Best Employers provide lactation rooms "to the majority of their workforce," and ninety-seven percent provide flexible scheduling to accommodate hourly employee breastfeeding. AOL Money & Finance, Survey: Corporate Lactation Programs Increase Retention, http://money.aol.com/news/articles/_a/survey-corporate-lactation-programs/n20070925090609990068 (last visited Apr. 20, 2008).

47. Breast pumps can cost anywhere between $30, for a manual pump, to over $1,000, for a hospital-grade electric pump. *See* BabyCenter.com, *Choosing a Breast Pump*, http://www.babycenter.com/0_choosing-a-breast-pump_429.bc (last visited Apr. 20, 2008).

48. *See* Press Release, *CIGNA Corp. Lactation Prog. Honored by Nat'l Healthy Mothers, Healthy Babies Coal.*, May 8, 2000, *available at* http://www.csrwire.com/PressRelease.php?id=243.

49. *Id.*

50. *See* Press Release, Breastfeeding at Work is Toughest for Younger Moms and Retail Workers (May 2, 2007) Medela and National Women's Health Resource Center, *available at* http://www.medela.com/SurveyofWorkingMoms_Press Relase_FINAL.pdf.
51. *Id.*
52. DEP'T OF HEALTH & HUMAN SERVICES, HHS BLUEPRINT FOR ACTION ON BREASTFEEDING, 9 (2000) (reporting that in 1998, less than half black women breastfed in the early postpartum period whereas at least two-thirds of both white and Hispanic women breastfed). *See also* Eric Nagourney, *VITAL SIGNS: PATTERNS; Breast-Feeding Found to Vary by Race*, Aug. 7, 2001, *available at* http://query.nytimes.com/gst/fullpage.html?res=9403E2D7113CF934A3575BC0A9679C8B63. (reporting that black women are half as likely as white women to breast feed); Joyce Howard Price, *Blacks Less Likely to Breast-feed; Babies Put at Higher Risk for Infections, Study Finds*, WASH. TIMES, Apr. 2006 (finding that black women are twenty-one percent less likely to breastfeed, and breastfeed for shorter amount of time).
53. *See* DEP'T OF HEALTH & HUMAN SERVICES, *supra* note 52 at 16.
54. Carol Lewis, HHS Blueprint to Boost Breast-Feeding, http://www.fda.gov/FDAC/features/2003/303_baby.html (last visited Apr. 20, 2008).
55. Although this article focuses on accommodation and discrimination, breastfeeding employees also experience harassment at the workplace. In *Fortier v. U.S. Steel Group*, an employee who previously received no complaints about her performance was fired after she announced her pregnancy and intent to breastfeed her child. No. 01-CV-2029, 2002 WL 1797796, at *3 (W.D. Pa. June 4, 2002).
56. 42 U.S.C. § 2000e-2.
57. At least one court, however, has found that breastfeeding is a protected liberty interest. *Dike v. School Bd. of Orange County*, 650 F.2d 783, 787 (5th Cir. 1981).
58. 429 U.S. 125 (1976).
59. *Id.* at 139 (*quoting Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974)).
60. "The program divides potential recipients into two groups pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." 429 U.S. at 135 (*quoting Geduldig*, 417 U.S. at 496-97).
61. *Id.* at 138 (*quoting Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974)).
62. *See* 42 U.S.C. § 2000e(k) (prohibiting discrimination "'because of sex' or 'on the basis of sex' includ[ing], but [] not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions").
63. *Derungs v. Wal-Mart Stores, Inc.* 374 F.3d 428, 438 (6th Cir. 2004).
64. *See Martinez v. N.B.C., Inc.*, 49 F.Supp.2d 305, 309 (S.D.N.Y.1999) ("The drawing of distinctions among persons of one gender on the basis of criteria that are immaterial to the other, while in given cases perhaps deplorable, is not the sort of behavior covered by Title VII."); *Coleman v. B-G Maint. Mgmt. of Colorado, Inc.*, 108 F.3d 1199, 1204 (10th Cir. 1997) ("gender-plus plaintiffs can never be successful if there is no corresponding subclass of members of the opposite gender. Such plaintiffs cannot make the requisite showing that they were treated differently from similarly situated members of the opposite gender.").
65. 374 F.3d at 439.
66. 789 F. Supp. at 868-70 (W.D.Ky. 1990) ("We see no significant difference between the situation in *Gilbert* and the case here. Pyro's decision does not deny anyone personal leave on the basis of sex—it merely removes one situation, breast-feeding, from those for which personal leave will be granted. While breast-feeding, like pregnancy, is a uniquely female attribute, excluding breast-feeding from those circumstances for which Pyro will grant personal leave is not impermissible gender discrimination, under the principles set forth in *Gilbert*.").
67. *Fejes v. Gilpinventures*, 960 F. Supp. 1487, 1492 (D. Colo 1997); *Wallace*, 789 F. Supp. at 869, 870.
68. *Barrash v. Bowen*, 846 F.2d 927, 931 (4th Cir. 1988).
69. *Fejes*, 960 F. Supp. at 1492.
70. *Barrash*, 846 F.2d at 931 (emphasis added).
71. *Jacobson v. Regent Assisted Living, Inc.*, No. CV-98-564-ST, 1999 WL 373790, at *15 (D. Or. Apr. 9, 1999).
72. *See* discussion *supra* Section II.
73. *Martinez*, 49 F. Supp. 2d at 309.
74. This theory was first articulated in *Phillips v. Martin Marietta*, 400 U.S. 542, 544 (1971) (the Court held under Title VII, a company could not have different hiring policies for men with pre-school-age children and women with pre-school-age children).
75. *Martinez*, 49 F. Supp. 2d at 310. "([G]ender-plus plaintiffs can never be successful if there is no corresponding subclass of members of the opposite gender."). *Id.* at 309, n.20 (*quoting Coleman*, 108 F.3d at 1204).
76. 950 F. Supp. 564, 570 (S.D.N.Y. 1996).
77. *Id.* at 566.
78. *Id.* at 571.
79. *Id.* at 570.
80. *Id.*
81. *See Bond v. Sterling, Inc.*, 997 F. Supp 306 (N.D.N.Y. 1998); *Landor-St. Gelais v. Albany Intern. Corp.*, 763 N.Y.S.2d 369 (App. Div. 2003). *But see Kallir v. Friendly Ice Cream*, 463 N.Y.S.2d 56 (App. Div. 1983).
82. *Kallir*, 93 A.D.2d at 247.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Bond*, 997 F. Supp. at 306.
88. *Id.* at 309.
89. *Id.* at 310. ("It is simply preposterous to contend a woman's body is functioning abnormally because she is lactating."). *Id.* at 311.
90. *See supra* text accompanying notes 101-05.
91. "Plaintiff fails to allege, nor can she, that breast-feeding her child (whether by choice or necessity), constitutes a disability within the meaning of the HRL." *Bond*, 997 F. Supp at 310.
92. N.Y. CIV. RIGHTS § 79-e (McKinney 2007).
93. 307 A.D.2d 671, 673 (2003).
94. *Id.* at 672, 673.
95. An Act to Amend the Civil Rights law, in Relation to Granting Mothers an Absolute Right to Breast Feed, ch. 98, 1994 N.Y. Laws 2199.
96. § 1, 1994 N.Y. Laws 2199. The session law discusses how "breast milk" benefits infant health, *id.*, which infants may receive either through breastfeeding or bottle-feeding of expressed breast milk.
97. *See* State of New York Department of Health, Memorandum in Support, S. 217-3999-A, 217th Sess., at 12 (N.Y. 1994); New York State Nurses Association, Memorandum in Support, S. 217-3999-A, 217th Sess., at 14 (N.Y. 1994); State of New York Division for Women, Memorandum in Support, S. 217-3999-A, 217th Sess., at 15 (N.Y. 1994); Medical Society of the State of New York, Memorandum in Support, S. 217-3999-A, 217th Sess., at 16 (N.Y. 1994); American College of Obstetricians and Gynecologists, Memorandum in Support, S. 217-3999-A, 217th Sess., at 20 (N.Y. 1994).
98. Some of the Memoranda in Support simply refer to *breast milk*, which infants benefit from through both breastfeeding and bottle-feeding expressed breast milk. S. 217-3999-A, at 12, 14.
99. 307 A.D.2d at 672.
100. *Id.* at 673.
101. Cal. Lab. Code § 1030 (West 2001); Conn. Gen. Stat. § 31-40w (2001); Ga. Code Ann. § 34-1-6 (1999); Haw. Rev. Stat. § 378-2

(1999); 820 Ill.Comp. Stat. Ann. 260 (West 2001); Minn. Stat. § 181.939 (1998); Mont. Code Ann. §39-2-216 (2007); N.M. Stat. § 28-20-2 (2007); N.Y. Lab. Law § 206-c (2007); Okla. Stat. tit. 40, § 435 (2006); R.I. Gen. Laws § 23-13.2-1 (2003); Tenn. Code Ann. § 50-1-305 (1999).

102. Conn. Gen. Stat. § 31-40w (2001); Ga. Code Ann. § 34-1-6 (1999); Haw. Rev. Stat. § 367-3 (1999); 820 Ill.Comp. Stat. Ann. 260 (West 2001); Minn. Stat. § 181.939 (1998); Mont. Code Ann. §39-2-216 (2007); N.M. Stat. § 28-20-2 (2007); Okla. Stat. tit. 40, § 435 (2006); Tenn. Code Ann. § 50-1-305 (1999); R.I. Gen. Laws § 23-13.2-1 (2003).

103. Conn. Gen. Stat. § 31-40w (2001); Ga. Code Ann. § 34-1-6 (1999); 820 Ill.Comp. Stat. Ann. 260 (West 2001); Minn. Stat. § 181.939 (1998); Okla. Stat. tit. 40, § 435 (2006); R.I. Gen. Laws § 23-13.2-1 (2003); Tenn. Code Ann. § 50-1-305 (1999).

104. Conn. Gen. Stat. § 31-40w (2001).

105. Conn. Gen. Stat. § 31-40w (2001); Haw. Rev. Stat. § 378-2 (1999); N.Y. Lab. Law § 206-c (2007).

106. Conn. Gen. Stat. § 31-40w (2001); Haw. Rev. Stat. § 378-2 (1999); Okla. Stat. tit. 40, § 435 (2006); R.I. Gen. Laws § 23-13.2-1 (2003).

107. Ga. Code Ann. § 34-1-6 (1999); 820 Ill.Comp. Stat. Ann. 260 (West 2001); Minn. Stat. § 181.939 (1998); Okla. Stat. tit. 40, § 435 (2006); R.I. Gen. Laws § 23-13.2-1 (2003); Tenn. Code Ann. § 50-1-305 (1999). *But see* Cal. Lab. Code § 1030 (West 2001) (requiring employers to accommodate employees "desiring to express breast milk."); Conn. Gen. Stat. § 31-40w (2001) ("any employee may, at her discretion").

108. *See supra* text accompanying notes 68–72, 77–81.

109. Ga. Code Ann. § 34-1-6 (emphasis added).

110. Mont. Code Ann. § 39-2-216.

111. Tex. Health & Safety Code Ann. § 165.001, -.003 (1995); Wash. Rev. Code Ann. § 43.70.640 (West 2001).

112. Tex. Health & Safety Code Ann. § 165.001.

113. Section 165.003.

114. Press Release, Governor Signs Into Law Legislation Protecting Rights of Nursing Mothers in the Workplace, Aug. 22, 2007, *available at* http://www.ny.gov/governor/press/0822072.html.

115. This is not expressly stated in the statute, but in the Definitions section of New York's Labor Law. *See* N.Y. Labor Law § 2 (McKinney 2007). *See also* Gregory B. Reilly & Lisa M. Brauner, *Nursing Mothers Now Protected Under New York's Labor Law*, ASAP EAST COAST EDITION, Sept. 2007, *available at* http://www.littler.com/collateral/17220.pdf.

116. N.Y. Lab. Law § 206-c (McKinney 2007) (emphasis added).

117. *Id.* (emphasis added).

118. Conn. Gen. Stat. § 31-40w; Haw. Rev. Stat. § 378-2.

119. See Fifty State Summary of Breastfeeding Laws, *supra* note 4.

120. See *supra* text accompanying note 104. Some states expressly prohibit employers from having employees express breast milk in closets or restrooms. See Conn. Gen. Stat. § 31-40w, Ga. Code Ann. § 34-1-6, Haw. Rev. Stat. § 367-3, 820 Ill.Comp. Stat. Ann. 260, Minn. Stat. § 181.939, Mont. Code Ann. § 39-2-216, N.M. Stat. § 28-20-2, Tenn. Code Ann. § 50-1-305, R.I. Gen. Laws § 23-13.2-1, Okla. Stat. tit. 40, § 435. Organizations reviewing the bill noted that it was deficient in this respect. *See also* State of New York Department of Civil Service, Memorandum, A. 230-1060, 230th Sess., at (N.Y. 2007) ("This bill leaves many questions unanswered which could make this legislation difficult and costly to implement . . . what is 'reasonable' break time, what constitutes a 'reasonable effort' to provide a private space, what if no close private space is available and who decides the scheduling of time to be used.").

121. See N.Y. Lab. Law § 206-c.

122. Centers for Disease Control and Prevention, Proper Handling and Storage of Human Milk, http://www.cdc.gov/breastfeeding/recommendations/handling_breastmilk.htm (last visited Apr. 20, 2008).

123. Theodore O. Rogers Jr., *Arbitration of Employment Claims*, Litigation and Administrative Practice Course Handbook Series, Oct./Nov. 1998.

124. The New York City Bar Sex and Law Committee recommended the bill be amended to subject employers to a $500 fine for each violation. NEW YORK CITY BAR SEX AND LAW COMMITTEE, MEMORANDUM IN SUPPORT, S. 230-5596, 230th Sess. (N.Y. 2007).

125. The New York City Bar memorandum in support discusses at length the beneficial health effects experienced by mothers and infants. *Id.*

126. While men do not experience health benefits as do mothers and children, they may benefit in other ways. *See* discussion *infra* Section II; *see also* discussion *supra* Section VI(C).

127. Debbi Donovan, Difficulty Expressing and Overabundant Supply: Why?, http://parenting.ivillage.com/baby/bbreastfeed/0,,3x43,00.html (last visited Apr. 20, 2008).

128. *See* discussion *supra* Section II.

129. *See* Press Release, Governor Signs Into Law Legislation Protecting Rights of Nursing Mothers in the Workplace, *supra* note 114.

130. *New Law Protects Breastfeeding in Workplace*, N. COUNTRY GAZETTE, *available at* http://www.northcountrygazette.org/news/2007/08/22/workplace_feeding/ (last visited Apr. 20, 2008).

131. *New York Enacts Law Protecting Rights of Nursing Mothers in the Workplace*, LAB. & EMP. LAW INFO. MEMO (Bond, Shoeneck & King, PLLC), Sept. 2007, *available at* http://www.bsk.com/pdfinfomemos/09-2007 im labor.pdf.

132. *See* discussion *supra* Section I.

133. 29 U.S.C. § 2601; *see also* Naomi Cahn, *The Power of Caretaking*, 12 YALE J. L. & FEMINISM 177, 184–85 (2000) ("Despite the fact that men are 'equally entitled' to take leave to care for their child(ren) under the FMLA, they are less likely than women to do so . . . [they] may be reluctant to leave the workforce because of the substantially greater penalties imposed on fathers."); Amy Joyce, *More Fathers Figure on Family Time*, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/06/17/AR2006061700071_2.html ("there's still a stigma attached to men [taking flex time and leave].").

134. *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) ("[s]tereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers [continue] to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes [create] a self-fulfilling cycle of discrimination that [force] women to continue to assume the role of primary family caregiver.").

135. *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 289 (1987) (*quoting* Senator Williams, 123 Cong. Rec. 29658 (1977)).

136. *See* Judith Galtry, *Extending the 'Bright Line': Feminism, Breastfeeding, and the Workplace in the United States*, 14 GENDER & SOC'Y 295, 304 (2000) ("[E]conomic considerations [may] mean that employers are more likely to provide facilities for the pumping/expressing and storage of breast milk than they are to offer employees the paid leaves, job flexibility, and on-site child care.").

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This article won first place in 2009 Emmanuel L. Stein law student writing contest. Katherine Largo is a student at Albany Law School.

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