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NEW YORK STATE BAR ASSOCIATION

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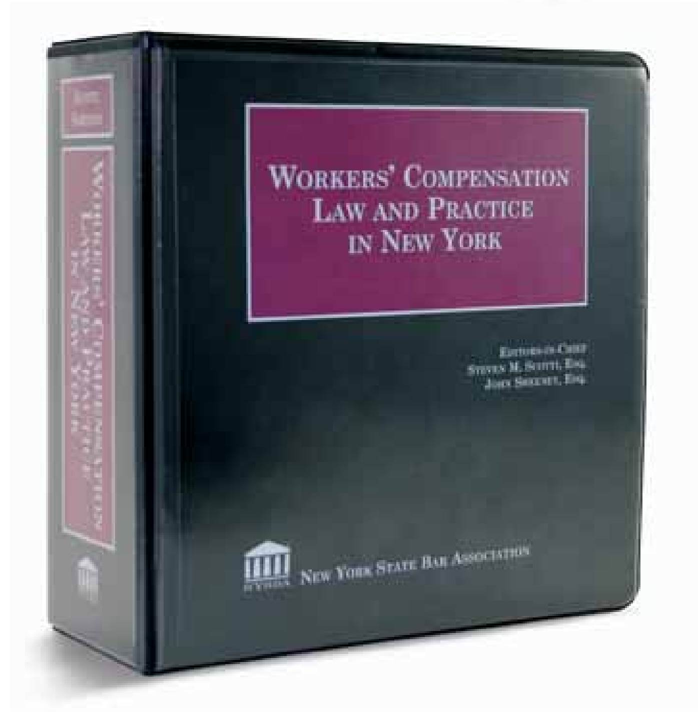

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Message from the Section Chair

By the time you read this Message, our downstate colleagues will have suffered through, and hopefully recovered from, both Super Storm Sandy and Winter Storm Nemo. We are equally hopeful that no more severe weather events have occurred in the interim. Our thoughts are with those who have been burdened by these events and we all look forward to the arrival of Spring.

While our activities since my last Message have not been quite as noteworthy as these weather events, they have nonetheless been significant. At the end of January, we held our Annual Meeting in conjunction with Bar Week in New York City. Thanks to Sharon Stiller and Seth Greenberg, co-chairs of our CLE Committee, we had another successful program, with nearly 300 people in attendance. Plenary presentations were made on both New York State wage-hour issues, with representatives from the Department of Labor (Acting General Counsel Pico Ben-Amotz and Senior Attorney Ben Shaw) on the panel, and on ethics and e-discovery, with U.S. Magistrate Judge James Francis, from the Southern District of New York, on the panel. Breakout sessions covered expatriates and secondees in the United States, restrictive covenants, and government mergers and consolidations, as well as an especially fascinating program on ADR and neuroscience (which we are considering reprising as a plenary session for next year so that everyone can attend). Also thanks to Sheryl Galler, who once again did an outstanding job of securing many sponsors for our program.

During the meeting we announced that, beginning in January of 2014, we will honor the memory each year of Past Section Chair and longtime Section and Executive Committee member Margery Gootnick with the Margery Gootnick Commemorative Lecture. I also had the pleasure of awarding our inaugural Lifetime Achievement Award to Frank Nemia. Frank, who has practiced Labor and Employment Law for more than 50 years, was instrumental in the establishment of our Section in 1975, served as its first Chair, and still chairs our Past Chairs Advisory Committee.

Our luncheon speaker that afternoon was the Hon. Mark Gaston Pearce, Chairman of the National Labor Relations Board (NLRB). There could not have been a more timely presentation given that just hours before Chairman Pearce spoke to us, the United States Court of Appeals for the District of Columbia Circuit issued its decision in *Noel Canning v. National Labor Relations Board*, holding that President Obama's recess appointments to the NLRB were unconstitutional, leaving Chairman Pearce (at least in the eyes of the D.C. Circuit) as the only validly appointed member of the NLRB. We especially appreciate Chairman Pearce's willingness to remain in New York and speak to us that day, in the midst of this breaking development.

Our luncheon also provided an opportunity for us to honor our Stein Writing Competition winners (Andrew Midgen and Amanda Jaret of St. John's University Law School and Jon Dueltgen of the University of Pennsylvania Law School) and Kaynard Award scholarship winners (Amanda Jaret, believed to be our first "double winner," and Alyssa Zuckerman, daughter of our own Past Chair, Richard Zuckerman, both of St. John's University Law School, and Elizabeth Sprotzer of CUNY Law School).

Last, but by no means least, at our Annual Business Meeting, the Section's membership elected Ron Dunn as Chair-elect of the Section, beginning June 1, 2013. Ron is a longtime Section member who, most recently, served the Section so well as co-chair of our CLE Committee. Congratulations Ron!

Our many committees continue to actively work on a variety of projects and events. Shortly after the Annual Meeting, our Mentoring Program, under the direction of Rachel Santoro and Genevieve Peeples, held a reception, hosted at the offices of Sullivan & Cromwell, featuring Karen Fernbach, Regional Director of Region 2 of the NLRB. Director Fernbach, a longtime supporter of our Section, graciously spoke to our Mentees about career paths and choices. Check our website for information on joining our next class of Mentees.

Our Diversity and Leadership Development Committee has been working on two significant events, both of which will have been held by the time you read this Message. The first is a program jointly sponsored with Albany Law School and The Sage Colleges, entitled *Further Along the Jericho Road: The Elusive Struggle for Economic Justice*. Presenters included the Honorable Dennis Davis, a Judge of High Court, South Africa and Visiting Professor of Law at Georgetown Law School; Terrence L. Melvin, President of the Coalition of Black Trade Unionists; and Professor Nicholas Creary, SUNY Albany, Department of Africana Studies. The second event was a reception for current and past Section Diversity Fellows, hosted at the offices of Orrick, Herrington & Sutcliffe. The featured speaker at this event was Chai Feldblum,

Commissioner of the Equal Employment Opportunity Commission. Special thanks to Committee members Tim Taylor and Norma Meacham for their work on the Economic Justice program and to co-chairs Jill Rosenberg and Wendi Lazar for putting together our reception. Interested candidates should check the Section's website for information about our next class of Diversity Fellows.

Finally, I encourage everyone to check our revised website content, at www.nysba.org/Labor. We are working hard to keep our content up to date so Section members have easy access to information about the Section's various events, projects and other activities. The Section exists to assist members and keeping you informed is one of the ways to do that. But of course the best way to serve you, the members, is to encourage you to become actively involved in the Section. Join a Committee and share your interest and expertise—it will make all of us better at what we do.

If you have any questions about our activities or comments about what we are doing (or not doing), drop me a note at jgaal@bsk.com.

John Gaal

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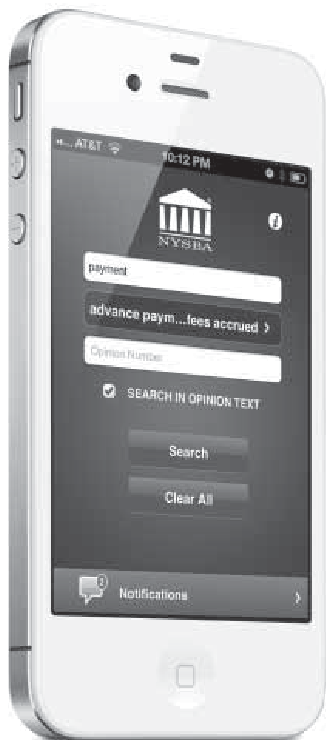

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The Future Scope of the Antitrust Exemption in Professional Sports

By Andrew Midgen

Introduction

Labor relations in the United States can currently be best described as tumultuous. Both employers and unions face significant difficulties moving forward, and they tend to blame each other. Employers confront populist backlash from the 2008 financial crisis and its ensuing recession. Corporate layoffs and bankruptcy have contributed to a high rate of unemployment. The Bureau of Labor Statistics of the U.S. Department of Labor ("BLS") calculates that the current rate is 7.7 percent, almost twice what it was at this point in 2007.[1]

Unions endure a period of drastic change as well. A foremost concern is a shift in constituency, with a significant portion of representation now taking place in the public sector. According to BLS, "Public-sector workers had a union membership rate (37.0 percent) more than five times higher than that of private-sector workers (6.9 percent).[2]" For comparison sake, in 1954 almost 35% of private sector workers were in a union.[3]

Against this backdrop, professional sports appear to operate in a vacuum, exhibiting strong unions and little serious financial concern.[4] The four major professional sports leagues in the United States [Major League Baseball ("MLB"); National Football League ("NFL"); National Basketball Association ("NBA"); and National Hockey League ("NHL")], produce billions of dollars of revenue individually. Each sport has a collective bargaining agreement ("CBA") between the teams and the players' associations. Despite a somewhat unique relationship, these CBAs have been subject to the same regulations as every other CBA in the United States.

However, mirroring the labor relations tension in the United States, three of the four professional sports leagues have recently experienced significant labor struggle. These high-profile struggles have increased the relevance of the nonstatutory labor exemption, a doctrine which provides a limited freedom from antitrust scrutiny. This freedom from antitrust scrutiny is conditioned on the status of the relationship between employer and employees.

The Supreme Court has yet to declare an exact point at which the exemption terminates, but this environment may soon result in a case warranting such an analysis. This article will consider the potential for future litigation over the scope of the nonstautory exemption. It will then attempt to construct and evaluate the positions that the players and the leagues could take in such litigation.

This Article proceeds as follows: Part I introduces the nonstatutory labor exemption and its development through professional sports litigation. Part II examines the most recently resolved sports labor conflicts. Part III explores the positions the owners and the players would most likely take in any future litigation. Finally, Part IV considers the relative merits of these arguments.

I. A Brief History of the Nonstatutory Labor Exemption[5]

The nonstatutory antitrust exemption exists to protect labor organizations and employers from being sued for violations of the Sherman Antitrust Act. Section 1 of the Sherman Act forbids "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States."[6] This presents an inherent conflict with the fundamental principles of labor law, where the concerted activities union members regularly practice, *e.g.,* boycotts, would be restricted by antitrust as unreasonable restraints of trade.

Initially, this conflict produced disastrous consequences for unions.[7] Congress appeared to respond with the passage of the Clayton Act,[8] the Norris LaGuardia Act ("NLGA"),[9] and the National Labor Relations Act ("NLRA").[10]

From this windfall of legislation, the Court fashioned the statutory labor exemption, rendering the union activities now protected from injunctions also exempt from antitrust action.[11] While the statutory labor exemption protected this selection of labor activity, it was not extended to immunize concerted action or CBAs.[12] The NLRA requirement that employers and unions bargain over "wages, hours, and other terms and conditions of employment" would therefore be futile if antitrust law applied. For example, an agreement between the parties on a mandatory subject of bargaining could violate Section 1.

Believing that Congress could not have intended to subject every CBA to antitrust scrutiny, the Court articulated a "limited nonstatutory exemption."[13] The Court initially imposed a balancing test, where the application of antitrust to a particular restraint depended on a weighing of the interests of national labor policy against the interests of the federal antitrust laws.[14] But the courts soon faced the question of whether antitrust applied to a restraint after a CBA expired. This culminated in a series of cases considering the proper scope of the labor exemption.

The exemption's scope has primarily become an issue in professional sports disputes, likely due to the unique environments in which these leagues operate. First, sports leagues utilize multiemployer agreements, which are protected under the labor exemption like any other CBA.[15] Further, leagues generally have a monopoly and a monopsony, meaning "there are no other 'sellers' equivalent to professional sports leagues and no equivalent 'buyers' for professional athletes' skills."[16] Finally, there are substantial sums of money at stake in professional sports. Athletes, on average, do not have long careers. They often cannot afford a lengthy strike that employees in another industry, where the workers' careers are much longer, may be able to weather. This is not to say that there are never cases concerning antitrust application to labor relations outside of professional sports.[17] But this article will focus on professional sports litigation because the major developments in this area of law have taken place within the sports industry.

The landmark case interpreting the scope of the labor exemption is *Brown v. Pro Football*.[18] In *Brown*, the NFL faced an antitrust action after unilaterally implementing a mandatory salary for all developmental players after bargaining with the players' union to impasse.[19] The Court's majority opinion, authored by Justice Breyer, determined that the labor exemption applied to the particular restraint as: (1) the conduct took place during and immediately after a collective-bargaining negotiation; (2) it grew out of, and was directly related to, the lawful operation of the bargaining process; (3) it involved a matter that the parties were required to negotiate collectively; and (4) it concerned only the parties to the collective bargaining relationship.[20]

According to Justice Breyer, the exemption's scope necessarily extends past impasse in order to avoid the inherent conflict in subjecting the parties to both antitrust and labor law at impasse.[21] In addition to impasse, the Court formally rejected several potential termination points for the labor exemption.[22] Justice Breyer expressly declined to name an exact point at which the nonstatutory exemption would end, but confirmed that such a limitation does exist.[23]

It is important to note that professional baseball has avoided the conflict between labor and antitrust law entirely. In 1922, the Court held that baseball was beyond the scope of the Sherman Act.[24] The Court concluded that because individual games occur on a field within a single state, and arrangement and travel should not be factors, professional baseball does not involve interstate commerce.[25] This decision has not been applied to any other sport.[26] In addition, courts have attempted to limit its effect.[27]

II. Recently Resolved Professional Sports Labor Conflicts

As previously observed, the last few years have birthed a plethora of labor conflicts in professional sports. The expiration of several CBAs resulted in the potential for an antitrust action which would finally delineate the extent of the exemption. However, while producing an extremely contentious environment, no conflict has sustained long enough for such an action to reach the Supreme Court.

A. The NFL's 2011 CBA Expiration (*Brady v. NFL*)[28]

In 1993, after a prolonged period of labor struggle giving rise to significant litigation, the NFL and the National Football League Players Association ("NFLPA") agreed to a CBA.[29] The 1993 CBA was renewed by the parties four times before the NFL opted out of the agreement in 2008, claiming costs were too high.[30] As mandated by the CBA, the NFL played the final season of the contract (2010) without a salary cap.[31] Still, the parties had not come to an agreement on a new CBA. The NFL filed Unfair Labor Practice ("ULP") charges against the NFLPA in February 2011, alleging the union failed to bargain in good faith.[32] On March 11, 2011, in the final hours of the CBA, the NFLPA disclaimed interest in its status as collective bargaining agent of the players.[33] Subsequently, following expiration, the League locked out its players.[34] The players filed an action in Minnesota district court arguing the lockout planned by the League violated Section 1.[35]

Initially, Judge Susan Nelson rejected all of the owners' arguments and enjoined the lockout on April 25, 2011.[36] The matter was appealed to the Eighth Circuit, where a three-judge panel reversed.[37] The Circuit's reversal, however, was based entirely on the ancillary question of federal court power to enjoin labor disputes under the NLGA.[38] The court expressed no view on whether the nonstatutory labor exemption applied after the union's disclaimer.[39] The NFL and NFLPA reached a new 10-year CBA on August 4, 2011, before litigation on the scope of the antitrust exemption could proceed.[40]

B. The NBA's 2011 CBA Expiration (*Anthony v. NBA*)[41]

Following unsuccessful negotiations, the NBA's CBA expired on July 1, 2011.[42] The National Basketball Player's Association ("NBPA") and its members disclaimed any collective bargaining interest, and a class of players brought a Section 1 action in California.[43] The parties reached agreement on a new CBA on December 8, 2011, before the issue could ever be examined by a court.[44]

C. The NFL's 2012 CBA Expiration with Its Officials

In June 2012, the NFL locked out the NFL Referee's Association ("NFLRA") following the expiration of their

CBA.[45] The parties were far apart in negotiations, and the first three weeks of the 2012 season were played with "replacement referees."[46]

This situation presented an interesting illustration of a union's leverage with tenuous antitrust recourse. Presumably, since the referees are employees of the NFL and lack affiliation with the individual employers of the multi-employer bargaining unit, a Section 1 violation would be difficult to prove. Fortunately for the NFLRA, the situation became quite polarizing, with replacement referees making a number of questionable officiating decisions. The parties reached agreement on an eight-year CBA on September 29, 2012.[47] Even with pressure to get a deal done from individuals as prominent as President Barack Obama,[48] and agreement being reached at the peak of the criticism, some commentators forcefully argue that the NFLRA failed to achieve its goals.[49]

II. The 2012 NHL Lockout

Professional hockey also recently faced a major labor dispute. On September 15, 2012, following the expiration of its CBA, the NHL locked out the players, despite losing an entire season to lockout just eight years ago.[50]

The 2004 NHL lockout, resulted in the imposition of a salary cap, a reduction of existing contracts for all players, and a reduction of hockey-related revenues ("HRR") going to the players.[51] Since that lockout, NHL revenue has increased from about $1.9 billion to $3.3 billion last season.[52] But the League claimed eighteen of its thirty teams were losing money.[53]

On January 6, 2013, after four months of bitter negoations, the parties reached agreeemnt on a 10-year CBA with the ability for either side to opt out after 8 years.[54] Benefits to the players were further reduced. The agreement, however, salvaged the 2013 season, with teams scheduled to play a 48-game regular season and a full playoffs.[55] This lockout resulted in the loss of 510 games, including the annual Winter Classic.[56] A staggering 2,208 regular-season games have been lost since 1993.[57]

An against the NHL antitrust action would have been especially interesting, for it is likely that the players would have filed in Canada as well as the United States.[58] A Canadian antitrust action could have resulted in litigation under an entirely different set of laws.

III. The Conflict

The question of exactly when the nonstatutory exemption ceases to prevent antitrust scrutiny remains unanswered. Recent litigation suggests that the players will argue that union dissolution should serve as that point.[59] The leagues will contend that the exemption must extend past dissolution. This section will consider the contrary positions that a hypothetical action would generate.

A. The Nonstatutory Exemption Ends Upon Union Dissolution

The players will argue that the exemption should cease when they are no longer organized as a union. Evidence of the players' support for this contention derives from the Appellee's Brief in *Brady v. NFL*.[60]

The players will claim that the nonstatutory exemption was never intended to extend past dissolution. As a result of union dissolution, the players are free to negotiate for employment as individuals. Since an employer is only obligated to bargain if a representative presents majority support, the players abandon their right under the NLRA to bring an §8(a)(5) charge.[61] As a result, individual teams are free to impose whatever terms and conditions on employment they desire, without fear of player recourse under the NLRA. Since, as previously noted, the nonstatutory exemption was created to avoid the conflict between labor and antitrust law, the exemption would no longer be necessary. Therefore, application of antitrust law is appropriate. In fact, if it did not apply, the players would be left without any statutory protection at all.

Moreover, the Taft-Hartley Act provided the right to refrain from union activity.[62] If the nonstatutory exemption extends past dissolution, former union members are obligated to adhere to labor law principles governing union/management relations. According to Professor Gabriel Feldman, this "subverts federal labor policy by effectively depriving employees of their statutorily protected right to opt out of a union by penalizing their initial involvement with a union."[63] Federal labor law operates under the fundamental presumption that union membership is a choice.[64] The players will claim that extending the nonstatutory exemption past dissolution renders such a choice futile.

The players can claim significant judicial support for their position. The rationale of Justice Breyer's majority opinion in *Brown* gives rise to the inference that dissolution concludes the exemption. *Brown* rejected impasse as the point at which the exemption terminates because of the inherent conflict in subjecting the owners to both antitrust and labor laws.[65] However, as noted above, such conflict is no longer present after dissolution; teams are not in a position where they must choose between complying with the labor or antitrust laws. Thus, there would be no reason to apply the exemption after dissolution under the *Brown* rationale.

Brown also suggested that the exemption only applies where "it would be difficult, if not impossible," to enforce the labor laws if the antitrust laws applied.[66] The Catch-22 concern *Brown* alluded to would no longer be present.[67] Thus, dissolution presents no obstacle to the enforcement of the labor laws.

Additionally, Justice Breyer did not intend for the exemption to insulate all antitrust claims against employ-

ers.[68] He explicitly declined to define the "extreme outer boundaries" at which point the exemption ends.[69] But the majority opinion cited, with apparent approval of, the D.C. Circuit's proposition that the "exemption lasts until the collapse of the collective-bargaining relationship, as evidenced by decertification of the union."[70] This appears to confirm the players' conclusion that the nonstatutory exemption no longer applies if the union dissolves.

Two circuit courts appear to support the players' position as well. *Powell v. NFL*, a case arising out of the same labor conflict as *Brown*, concluded like *Brown* that the labor exemption continues through impasse.[71] The court held that the "nonstatutory labor exemption protects agreements conceived in an *ongoing* collective bargaining relationship from challenges under the antitrust laws."[72] Moreover, allowing the players to bring an antitrust action would "improperly upset the careful balance established by Congress through the labor law" because "labor law provides a comprehensive array of remedies to management and union[s], even after impasse."[73] The Eighth Circuit stated that "as long as there is a possibility that proceedings may be commenced before the Board… the labor relationship continues and the labor exemption applies."[74]

The dissent in *Powell* read the majority opinion to mean that "the labor exemption will continue until the bargaining relationship is terminated either by a National Labor Relations Board ("NLRB" or "Board") decertification proceeding or by abandonment of bargaining rights by the union."[75] Interestingly, it appears that even the NFL conceded in *Powell* that dissolution would cease the antitrust exemption.[76]

In 1989, as a result of *Powell*, the NFLPA disclaimed its status as bargaining representative and the players returned to Minnesota district court. The court ruled in the players' favor, as anticipated by the *Powell* dissent.[77] This holding was not appealed to the Eighth Circuit as the parties settled, resulting in the formation of a new CBA.

The Second Circuit reached a similar result in *NBA v. Williams*.[78] There, the court found that the "application of antitrust principles to a collective bargaining relationship would disrupt collective bargaining as we know it."[79] The court held that "[a]ntitrust immunity exists as long as a collective bargaining relationship exists."[80]

These two decisions, it appears, would interpret dissolution as the proper point for termination of the exemption. Satisfying the Eighth Circuit's analysis, the Board could provide no remedy for the players after dissolution. Further, dissolution denotes a lack of a collective bargaining relationship, thus meeting the Second Circuit's test. Moreover, in *Powell,* the NFL essentially conceded that dissolution would end the exemption. Therefore, the players find support for their position in several jurisdictions.

Finally, the players can argue that the dramatic shift in bargaining power toward employers over the last few decades mandates that the exemption end at dissolution. Professor Feldman notes several factors contributing to the advantage employers currently maintain.[81] He details the growth of the owners' use of offensive lockouts, and the players' response of dissolution in order to neutralize the lockout.[82] The players can point to the context in which they are using dissolution, which illustrates that such action is merely an attempt to level the playing field. There may be a substantial bargaining advantage for the owners if not for this neutralizing tactic. Thus, the antitrust exemption must cease at dissolution in order to ensure fairness.

B. The Nonstatutory Exemption Continues Beyond Dissolution

The league will argue that the nonstatutory exemption bars antitrust claims brought shortly after a union disclaimer. Like above, evidence of the league's potential arguments is provided in the "Opening Brief of Appellants" in *Brady v. NFL*.[83]

The central argument the league would advance is that the *Brown* decision favors its interpretation of the law. Several statements from Justice Breyer's opinion give rise to the conclusion that the exemption must extend beyond a union's dissolution.

In holding that impasse did not serve as an end to the antitrust exemption, a controversial statement in *Brown* provided:

> Our holding is not intended to insulate from antitrust review every joint imposition of terms by employers, for an agreement among employers could be *sufficiently distant in time and in circumstances from the collective-bargaining process* that a rule permitting antitrust intervention would not significantly interfere with that process.[84]

The application of this statement would depend on the facts of the particular antitrust litigation.

In recent disputes, the temporal proximity between the action and the collective bargaining process has been relatively small.[85] Thus, permitting antitrust intervention could significantly interfere with the bargaining process. Exactly how long after a lockout the union would have to wait to bring antitrust action remains unclear. But the league can claim that antitrust action within hours, weeks, or even months, potentially, would be too soon.

The Court also appears to require sufficiently distant circumstances from the collective bargaining process. The league, in most cases, would claim that its restriction arises from the circumstances of the bargaining process

and thus is not sufficiently distant. For example, a lockout could be considered a tactic in an ongoing bargaining process, used as leverage to force concessions from the players.

Further, *Brown* provided that introducing antitrust liability after impasse would result in "instability and uncertainty, for antitrust law often forbids or discourages the kinds of joint discussions and behavior that the collective-bargaining process invites or requires."[86] The league would argue that the application of antitrust scrutiny at dissolution would discourage owners from engaging in multiemployer bargaining at the outset.

This fear of antitrust scrutiny is legitimate because a union's unilateral action could subject the employers to liability. In effect, if a union did not like the way the bargaining process was going, it could disclaim and quickly bring an antitrust action against the employers for any restriction imposed. Employers might not be able to engage in hard bargaining under these circumstances. In fact, the league could argue that this conduct by the union is a manipulation of the bargaining process.

Thus, despite an entity with which to bargain, the owners would decline because of the fear of antitrust scrutiny. This might not be an issue if the union dissolution was permanent, since multiemployer bargaining was designed to allow employers to bargain with a labor organization. Without a labor organization in existence, it does not serve any real purpose. However, given the history and circumstances surrounding these professional sports cases, the owners will argue that it is evident that the dissolution is not permanent.[87] Therefore, the NLRA's mission to encourage collective bargaining would be frustrated.

Finally, *Brown* considered that it would be inappropriate to delineate the extent of the nonstatutory exemption without "the detailed views of the [NLRB], to whose 'specialized judgment' Congress 'intended to leave' many of the 'inevitable questions concerning multiemployer bargaining bound to arise in the future.'"[88] This view was also promulgated in *Powell*, which held that the nonstatutory exemption applies "as long as there is a possibility that proceedings may be commenced before the Board or until final resolution of Board proceedings and appeals therefrom."[89] Considering, at this point, it is not entirely clear what the Board would say, the league will claim that no court should issue a judgment on the precise scope of the exemption.

Notwithstanding *Brown*, there is further evidence from the judiciary that the exemption was intended to extend beyond union dissolution. *Connell Constr. Co.* explained that the exemption is necessary for "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets[.]"[90] This indicates the existence of some sort of balancing of interests between employers and unions. Permitting unions to unilaterally dissolve and bring antitrust action shifts bargaining power to unions. The league will claim that this shift of power adversely impacts employers to such an extent that it will undermine the balance of interests intended in the nonstatutory exemption.

IV. Analysis

A. Conflict Between Labor and Antitrust Law

Both sides can agree that the exemption was intended to reconcile the inherent conflict between antitrust and labor law. Thus, an inquiry into whether these laws conflict after dissolution is fundamental.

The players argue that there is no longer purpose in applying the exemption. Had the players never unionized, antitrust would have been available. Assuming dissolution is valid, they should be placed back into their legal position prior to unionization. Their recourse to the NLRB via §8(a)(5) charges is extinguished upon valid dissolution. Thus, the purpose of the exemption, resolving the conflict between the laws, is no longer served. The counterargument states that the union's dissolution is merely a tactic used to gain bargaining power. In practice, dissolution has resulted in new CBAs through negotiation. Judge Duffy, in *NBA v. Williams*, even exclaimed: "I am convinced that this is a case where neither party cares about this litigation or the result thereof. Both are simply using the court as a bargaining chip in the collective bargaining process."[91] Thus, dissolution is not truly ending the collective bargaining relationship. And if the collective bargaining relationship still exists, the exemption still serves a purpose.

Even assuming *arguendo* that the motivation behind dissolution was solely a bargaining tactic, this does not appear to address the argument that the Sherman Act and the NLRA would no longer conflict, assuming the dissolution was valid. Thus, the league would be left to challenge the validity of the dissolution. There is evidence that the NLRB will not take union members' motivations into account in considering the merits of a disclaimer.[92] Such a ruling by the NLRB is critical, as it is indeed difficult to construe recent dissolutions as anything but a tactic.

Alternatively, a league could argue that a conflict between the laws still exists past dissolution due to the mechanics of multiemployer bargaining. Without the exemption, a union could dissolve and its members could subject the employers to antitrust liability "at the flip of a switch."[93] The union could always threaten to use this trump card if the bargaining process is not meeting ITS expectations, thus impeding the employers' ability to freely bargain. Essentially, the league would be left in a

position of acceding to the demands of the union or unilaterally implementing terms and conditions which may violate Section 1. This antitrust liability would discourage employers from ever engaging in multiemployer bargaining, a practice encouraged by labor law.[94]

These effects the league claims may be real, but the argument likely distorts the issue. Employers could be subject to antitrust liability after dissolution, but in exchange they are immune from the labor law charges they normally could face as a multiemployer group.[95] Thus, there is no direct conflict between the antitrust and labor laws. At most, there is a policy conflict, which distills into a balancing of bargaining power. The players will argue that there is no evidence Congress intended to prevent this scenario. Just because the players agreed to a limited antitrust exemption by joining a union initially does not mean the application of antitrust law would be inherently unfair to the employers at a later date.[96] Congress could have easily addressed this inevitable scenario. The league would argue that multiemployer bargaining was intended to be an available tool and the application of antitrust renders it ineffective. But if there is no union, multiemployer bargaining serves no purpose.

B. *Brown* Interpretation

Of course, the meaning of *Brown* will be a focal point in future litigation. Precedent has traditionally been extremely important in sports antitrust litigation.[97] Both sides find language supporting their respective conclusions.

The players will point to the statement that "collapse of the collective-bargaining relationship, as evidenced by decertification of the union," may serve as an example of when the exemption ends.[98] However, taken in context, this line is hardly a resounding endorsement of the players' position. The opinion immediately qualifies that statement, stating that it would be inappropriate to determine where the boundary should be drawn without the detailed views of the Board.[99] Moreover, if anything, the opinion specifically identifies decertification as a signal of the collapse of the collective bargaining relationship. Thus, one must consider whether union disclaimer, as in *Brady*, would provide the same result.[100]

Similarly, the owners find language in the majority opinion which may support their position. Justice Breyer states that an agreement among employers must be "sufficiently distant in time and circumstance from the collective bargaining process" to permit antitrust scrutiny.[101] In a situation like *Brady*, where the union disclaims before the employers impose their unilateral agreement, it would seem as though the imposition was not sufficiently distant. Such temporal proximity appears to directly offend the majority opinion's test. The players argue that Justice Breyer's statement refers solely to situations within the collective bargaining framework where it would be appropriate to lift the exemption.[102] It was not intended to apply to a situation where the union has dissolved and the collective bargaining relationship has collapsed.

An ordinary reading of Justice Breyer's opinion does not overwhelmingly favor either position. While it does appear that Justice Breyer considered that decertification may serve as the end of the nonstatutory exemption, it is unclear why much weight should be given to the language. Justice Breyer is clear that the Court found no need to decide where these "extreme outer boundaries" should be drawn.[103] In fact, he stated that it would be inappropriate to do so without the views of the NLRB.[104] Thus, his words appear to be merely potential considerations.

Aside from specific language in the opinion, the owners could allege additional support from *Brown* based on its rationale in rejecting impasse as the outer boundary. Justice Breyer reasoned that antitrust liability would discourage teams from engaging in the kind of joint discussion and behavior still desired at impasse.[105] The owners argue that even after dissolution, both the teams and players still desire to reach a new agreement. Thus, joint discussion and behavior between the employers is favorable. The players claim a legitimate desire to cease collective bargaining. However, in practice, negotiations continue through settlement discussions. Essentially, the only difference is that the players' counsel for its antitrust suit, as opposed to its union, will represent the players in negotiations. As such, forbidding joint employer action threatens the collective bargaining process by discouraging the negotiation both sides clearly favor.

This argument rests upon calling the union's dissolution a sham. The players will argue that their dissolution is completely legitimate and any settlement discussions are attempts to resolve the litigation. There is no evidence that the players desire to reach a new CBA under these circumstances. The players can mount a defense based on the lack of an operational union. While at impasse joint discussion is still encouraged, at dissolution it is no longer possible in multiemployer bargaining. Thus, Justice Breyer's statement would not provide any guidance here.

C. Freedom to Unionize

Professor Feldman argues that subjecting the players to the nonstatutory exemption after dissolution denies them the right to freely choose union membership, offending federal labor law.[106] There are a few potential counterarguments. First, this assumes that the players are really intending to withdraw from union representation. If the dissolution is a tactic to provide leverage, then the players are not really being denied their free choice. Additionally, this argument may misrepresent the position of the owners. Professor Feldman claims that the league is trying to achieve the "Shangri-la of everlasting immu-

nity from the antitrust laws."[107] This could potentially be true. But at this point, the league has only argued that the exemption should extend to "some point, once the collective bargaining process has become a sufficiently distant memory."[108] Therefore, the league's position is that the employees do have free choice to decline union membership. However, upon dissolution, there must be a certain period of time before the employees regain their ability to bring antitrust claims against that employer. This period of time does place, theoretically, at least some burden on an employee's choice to reject unionization, and thus there may be some merit to Professor Feldman's argument.

D. Balance of Bargaining Power

Both sides will argue that the balance of bargaining power will be skewed depending on the outcome of a ruling on whether dissolution ceases the nonstatuory exemption. It is clearly undesirable for either side to benefit from a significant bargaining advantage, though, as previously indicated, there is no real indication that Congress meant for there to be an exact balance.

The players will contend that collective bargaining under the NLRA already provides an advantage to the owners and revoking their ability to utilize antitrust law would make matters worse. Professor Feldman concludes that owners maintain a bargaining advantage, partially a result of the increased use of offensive lockouts.[109]

A league would contend that ending antitrust at dissolution would shift bargaining power significantly to the players' side. A union could disclaim and the owners would be subject to antitrust liability for unilateral implementation of traditionally acceptable multiemployer bargaining positions. Thus, extending the exemption to a point where collective bargaining would be a sufficiently distant memory would provide a more just outcome. Of course, termination at dissolution may be a position one is willing to tolerate considering employers are no longer subject to the restrictions of federal labor law.

Conclusion

In sum, it seems unlikely that the Supreme Court will reach the question of when the antitrust exemption expires in the near future. The NHL, NBA, and NFL each agreed to long-term CBAs within the past two years. In eight years, these leagues may again face the labor turmoil necessary to advance an antitrust case to the Supreme Court. However, this might simply be a question with so much at stake that neither party is willing to risk Supreme Court review. In fact, if the players' dissolution is truly a sham for leverage, it would serve them little purpose to allow the Supreme Court to hear the case.

Assuming an antitrust claim does reach the Court, the arguments listed above would be the primary considerations. Especially relevant is the conflict, or lack thereof, between antitrust and labor law at dissolution. While the *Brown* decision provides the most recent and controlling precedent, its importance should not be overstated. Finally, while equality of bargaining power may not be mandated under the NLRA, any decision must makes fairness a concern. The Court must weigh all of these arguments before selecting an exact point for termination of the exemption. This decision would surely have a critical impact on the collective bargaining process in professional sports and all other multiemployer bargaining relationships.

Endnotes

1. Bureau of Labor Statistics U.S. Department of Labor, The Employment Situation—September 2012 (2012).
2. Bureau of Labor Statistics U.S. Department of Labor, Union Members—2011 (2012).
3. Michael Goldfield, The Decline of Organized Labor in the United States 10 (1987).
4. This refers to financial concern as a league, not individual teams—which have frequent financial difficulties leading to sale or relocation.
5. A detailed history of the origin of the nonstatutory labor exemption is beyond the scope of this Article, and I have written such a summary in my previous paper: "Extreme Outer Boundaries: The Extent of the Nonstatutory Labor Exemption."
6. 15 U.S.C. § 1 (1890).
7. *See, e.g., Loewe v. Lawlor*, 208 U.S. 274 (1908) (holding a union's boycott of retail stores an illegal restraint of trade).
8. *See* 15 U.S.C. § 17 (1914) (declared that antitrust laws should not be construed to prohibit the operation of labor organizations).
9. *See* 29 U.S.C. § 104 (1932) (denied courts the ability to issue restraining orders and injunctions in labor disputes).
10. *See* 29 U.S.C. § 151 (1935) ("It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.").
11. *See United States v. Hutcheson,* 312 U.S. 219, 234-36 (1941).
12. *See United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 662 (1965).
13. *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616, 622 (1975).
14. *See Pennington*, 381 U.S. at 666-69.
15. *See NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 94 (1957) (noting the long history of multiemployer bargaining predating the Wagner Act in holding that members of a multiemployer organization could lock out their members to protect the integrity of their organization, for defensive purposes).
16. Gabriel Feldman, *Brady v. NFL and Anthony v. NBA: The Shifting Dynamics in Labor-Management Relations in Professional Sports*, 86 Tul. L. Rev. 831, 847 (2012) (citing *U.S. Football League v. NFL*, 644 F. Supp. 1040 (S.D.N.Y. 1986)).

17. *See, e.g., California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118 (9th Cir. 2011).

18. 518 U.S. 231 (1996).

19. *Id.*

20. *See id.* at 250.

21. *Id.* at 242 (After reaching impasse, any imposition of terms would result in antitrust liability for the employer; labor law, however, permits an imposition of the employer's last best offer. Thus, the two laws conflict if impasse permits antitrust scrutiny.).

22. *See id.* at 243-50 (*e.g.*, at expiration of the CBA).

23. *See id.* at 250 ("an agreement among employers could be sufficiently distant in time and in circumstances from the collective bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process").

24. *See Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200.

25. *See id.* at 208-09.

26. *See Radovich v. NFL*, 352 U.S. 445 (1957) (holding that professional football was subject to antitrust laws); *United States v. Int'l Boxing Club of N.Y., Inc.*, 348 U.S. 236 (1955) (holding that boxing was subject to antitrust laws); *Flood v. Kuhn*, 407 U.S. 258, 282-83 (1972) ("Other professional sports operating interstate—football, boxing, basketball, and, presumably, hockey and golf—are not so exempt.").

27. *See Flood*, 407 U.S. at 282 ("baseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball*…[has] become an aberration confined to baseball.); *Radovich*, 352 U.S. at 452 (noting that some will consider reliance on *Federal Baseball* "unrealistic, inconsistent, or illogical"); *Piazza v. Major League Baseball*, 831 F. Supp. 420, 440-41 (E.D.Pa. 1993) (holding that the *Federal Baseball* antitrust exemption did not extend beyond the reserve system).

28. 644 F.3d 661 (8th Cir. 2011).

29. This CBA was only reached after several years of litigation. In fact, the CBA was a settlement from *White v. NFL*, 822 F.Supp. 1389 (D.Minn 1993). The settlement was only reached after, essentially, a threat by Judge Doty that the two sides would not like his decision if he was forced to make one.

30. John Clayton, *NFL Owners Vote Unanimously to opt out of Labor Deal*, ESPN (May 20, 2008, 10:10 PM), http://sports.espn.go.com/nfl/news/story?id=3404596.

31. Dave Campbell, *Judge considers NFLPA collusion lawsuit vs. league*, Yahoo Sports (Sep. 6, 2012, 9:14 PM), http://sports.yahoo.com/news/judge-considers-nflpa-collusion-lawsuit-212155036-nfl.html.

32. *Brady*, 644 F.3d at 667.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 663.

37. *Id.*

38. *See id.* at 682.

39. *Id.*

40. *It's official: NFL players ratify 10-year labor deal with league*, NFL.com (Aug. 4, 2011, 4:49 PM), http://www.nfl.com/news/story/09000d5d8213be99/article/its-official-nfl-players-ratify-10year-labor-deal-with-league.

41. Complaint, No. 11-05525 (N.D. Cal. Nov. 15, 2011).

42. *Id.* at 3.

43. *Id.* at 1.

44. *NBA Board of Governors ratify 10-year CBA*, NBA.com (Dec. 8 2011, 6:44PM), http://www.nba.com/2011/news/12/08/labor-deal-reached/index.html.

45. Mike Florio, *NFL says lockout of officials has begun*, ProFootballTalk (Jun. 4, 2012, 2:56 PM), http://profootballtalk.nbcsports.com/2012/06/04/nfl-says-lockout-of-officials-has-begun/.

46. Michael David Smith, *Officials officially agree to new deal with NFL*, ProFootballTalk (September 29, 2012, 10:04 AM), http://profootballtalk.nbcsports.com/2012/09/29/officials-officially-agree-to-new-deal-with-nfl/.

47. *Id.*

48. *See* Hans Nichols and Greg Giroux, *Obama Agrees With Romney in Urging End to NFL-Referees Dispute*, Bloomberg (Sept. 26, 2012, 12:01 AM), http://www.bloomberg.com/news/2012-09-25/obama-says-nfl-needs-to-get-regular-referees-back-in-games.html.

49. *See* Joseph Gordon Hylton, *Did the NFL Referees Throw in the Towel Too Quickly?*, Marquette University School of Law Faculty Blog (Sept. 30, 2012), http://law.marquette.edu/facultyblog/2012/09/30/did-the-nfl-referees-throw-in-the-towel-too-quickly/ (noting the NFLRA must have realized the NFL was not giving in despite replacement official fiascos and settled despite losing the battle over pensions).

50. *See* Gabriel Feldman, *The Complete NHL Lockout FAQ, Part 3*, Grantland (Oct. 5, 2012 5:20 PM), http://www.grantland.com/blog/the-triangle/post/_/id/39080/the-complete-nhl-lockout-faq-part-3.

51. *See id.*

52. *Id.*

53. *Id.*

54. Jeff Z. Klein, *N.H.L. and Players Union Reach Tentative Agreement to End Lockout*, New York Times (Jan. 6, 2013), http://www.nytimes.com/2013/01/07/sports/hockey/nhl-players-union-lockout-agreement.html.

55. *See id.*

56. Jeff Z. Klein, *Sides Sign Agreement: Training Camps to Open*, New York Times (Jan. 12, 2013), http://www.nytimes.com/2013/01/13/sports/hockey/nhl-and-players-union-finalize-agreement.html.

57. *Id.*

58. *Id.*

59. *See, e.g., Brady*, 644 F.3d at 661.

60. *See* Brief for Appellees at 58, *Brady*, 644 F.3d 661 (No. 11-1898).

61. NLRA §8(a)(5) is subject to the provisions of §9(a), which stipulates that representatives selected by a majority of the employees of the appropriate unit will be exclusive for collective bargaining. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 596 (1969).

62. *See* National Labor Relations Act § 7, 29 U.S.C. § 157 (2006); *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639*, 362 U.S. 274, 279-80 (1960) ("[T]he Taft-Hartley Act added another right of employees…namely, the right to refrain from joining a union…").

63. Gabriel Feldman, *Antitrust Versus Labor Law in Professional Sports: Balancing the Scales after Brady v. NFL and Anthony v. NBA*, 45 U.C. Davis L. Rev. 1221, 1258 (2012).

64. *See id.* at 1254-58.

65. *See Brown*, 518 U.S. at 231.

66. *See id.* at 237.

67. *See id.* at 241-42 (labor law allowed owners to implement specific terms after their last offer, but implementing those terms would subject the owners to antitrust scrutiny). The antitrust exemption ending at impasse presented this conflict, but if it ended at dissolution this concern would not be presented.

68. *Id.* at 250.

69. *See id.*

70. *Id.*

71. *See* 930 F.2d 1293, 1303 (8th Cir.1989), cert. denied, 498 U.S. 1040 (1991).

72. *Id.* (emphasis added).

73. *Id.* at 1302.

74. *Id.* at 1303-04.

75. *Id.* at 1305.

76. *Id.* at 1303 n.12 ("The League concedes that the Sherman Act could be found applicable, depending on the circumstances… if the affected employees ceased to be represented by a certified union.").

77. *See McNeil v. NFL*, 790 F.Supp. 871 (D.Minn 1992).

78. 45 F.3d 684 (2d Cir. 1995), cert. denied, 116 S. Ct. 2546 (1996).

79. *Id.* at 693.

80. 857 F. Supp. 1069, 1078 (S.D.N.Y. 1994), *aff'd*, 45 F.3d 684 (2d Cir. 1995).

81. *Supra* note 16 at 837 (a recessionary economy, the globalization of the economy, the deregulation of vital industries, technological advances that have replaced human labor, foreign competition, the rise and legitimization of the offensive lockout, and the increased use of replacement workers during strikes).

82. *See id.* at 838-47.

83. *See* Opening Brief of Appellants at 42, *Brady*, 644 F.3d 661 (No. 11-1898). Interestingly, this brief was co-authored by David Boies, who took the opposite position in *Anthony v. NBA*, when he represented the NBA players against the League.

84. *Brown*, 518 U.S. at 250 (emphasis added).

85. *See Brady*, 644 F.3d at 663 (The players terminated their union status just before CBA expiration; filed a Section 1 action for the planned lockout later that day; and the NFL proceeded with the lockout on the next day.); *see also* Complaint, *supra* note 41, at 3-5 (on July 1, 2011 the NBA unilaterally imposed a lockout; on November 14, 2011, the NBPA disclaimed interest).

86. *Brown*, 518 U.S. at. 242.

87. The league will argue that the union dissolution is a "sham," a ploy intended to subvert the collective bargaining process, a litigation tactic. *See Brady*, 644 F.3d at 667. The consequences of dissolution can be reversed quickly by a union. Thus, the union has great incentive to use this tactic. Evidence that dissolution is a sham comes in the form of previous litigation in which unions dissolved only to reform when agreement on a new CBA was reached through settlement. The NFLPA disclaimed interest in 1987, claiming a *permanent* and *irreversible* abandonment of collective bargaining rights. *See* Opening Brief of Appellants, *supra* note 84, at 5-6. After negotiating a settlement in *White*, the union reformed. The circumstances surrounding the *Brady* litigation in 2011 mirrored those leading to the *White* settlement. The union disclaimed and reformed after a settlement resulting in a new CBA. Moreover, the *Anthony* litigation underwent a similar path after decertification.

88. *Brown*, 518 U.S. at 250.

89. 930 F.2d at 1303-04.

90. 421 U.S. at 622; *see also Pennington*, 381 U.S. at 665.

91. 857 F. Supp. 1069, 1071 (S.D.N.Y. 1994).

92. *In re Pittsburgh Steelers*, No.6-CA-23143, 1991 WL 144468, at *2 n.8 (N.L.R.B June 26, 1991) (finding disclaimer motivated by litigation strategy irrelevant and noting that for a disclaimer to be effective, it "must be unequivocal, made in good faith, and unaccompanied by inconsistent conduct.").

93. *Supra* note 84 at 44.

94. *See Truck Drivers*, 353 U.S. at 94 (describing the long history of multiemployer bargaining).

95. *See supra* note 64 at 1264 (for example, leagues could eliminate minimum salaries which would significantly harm players and likely not result in any antitrust liability).

96. Players "agree" to surrender antitrust claims by entering into a collective bargaining relationship with an employer. It can be assumed that they are fully informed that such a relationship is exempt from antitrust scrutiny due to the nonstatutory exemption.

97. Consider *Federal Baseball*, a decision continuously left standing despite the rationale having long since eroded.

98. *Brown*, 518 U.S. at 250.

99. *Id.*

100. Decertification involves a formal voting procedure after employees file a petition with the NLRB. Disclaimer of interest occurs when the union makes a sincere statement renouncing interest in representing the employees in collective bargaining. A union disclaimer can proceed much more quickly than decertification. Gabriel Feldman, *The Legal Issues Behind the NBA Players' Decertification Strategy*, Huffington Post (Nov. 8, 2011), http://www.huffingtonpost.com/gabriel-a-feldman/the-legal-issues-behind-t_2_b_1081107.html.

101. *Brown*, 518 U.S. at 250.

102. *See supra* note 61 at 60-62.

103. *Brown*, 518 U.S. at 250.

104. *Id.*

105. *See id.* at 242.

106. *See supra* note 64 at 1258.

107. *Id.* at 1225 (citing *Powell*, 930 F.2d at 1309 (Lay, C.J., dissenting)).

108. *See supra* note 84 at 48.

109. *Supra* note 16 at 838-47.

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EEOC's "Sue First, Ask Questions Later" Strategy and the Resulting Chaos in the Federal Courts

By Eric S. Dreiband

I. Introduction

The U.S. Equal Employment Opportunity Commission (EEOC) has a very different view of its authority than do many federal courts. The EEOC claims it can sue an employer and use discovery to identify, investigate, and seek relief for individuals it never heard of before it filed its lawsuit. In 2012, the U.S. Courts of Appeals for the Sixth and Eighth Circuits issued conflicting decisions about whether the EEOC has such authority. The Sixth Circuit determined that the EEOC does have such authority; the Eighth Circuit determined that the EEOC does not. And, in the past year, several other federal courts dismissed EEOC claims because the EEOC did not comply with its pre-suit obligations.

The EEOC insists that its pre-suit obligations are limited and that it can identify alleged victims after it files its lawsuits. Some courts have agreed with the EEOC. Many have not. And no matter how many times courts dismiss all or parts of the EEOC's claims because the EEOC did not comply with its pre-suit obligations, one thing remains clear: the EEOC remains defiant. The EEOC shows no signs of conforming its conduct to the standards articulated by several federal courts. And, despite four decades of case law about judicial review of the EEOC's pre-suit process, the EEOC is now pressing a novel and aggressive theory, namely, that its pre-suit conduct is not subject to judicial review at all.

What is going on here? And what does this mean for pending and future cases?

Given the EEOC's defiance, there will continue to be a lot of litigation about whether the EEOC complied with its pre-suit obligations. Courts will continue to review the EEOC's pre-suit conduct and will dismiss all or parts of the EEOC's claims when the EEOC does not satisfy its administrative obligations before it files its suit.

II. Framework for EEOC Litigation

Section 706 of Title VII of the Civil Rights Act of 1964 authorizes the EEOC to sue a private employer and seek relief for a "person or persons aggrieved" by the employer's alleged unlawful employment practices. Section 707 of Title VII authorizes the EEOC to sue an employer if it determines that an employer is engaged in a "pattern or practice" of unlawful employment discrimination.

Section 706 requires the EEOC to satisfy certain procedures before it can file a lawsuit. These procedures begin with a charge of discrimination, followed by prompt notice to the employer, an investigation, and a reasonable cause determination. Thereafter, if the EEOC determines that there is reasonable cause to believe that the charge is true, the EEOC must endeavor to eliminate any alleged unlawful employment practices by informal methods of conference, conciliation, and persuasion. The EEOC cannot file a civil action until it has discharged its administrative duties.[1]

The issue that courts are grappling with now is whether these pre-suite requirements mean that the EEOC must identify, investigate, and conciliate about individuals and claims before it can seek relief in litigation for such persons. The EEOC claims that it has no pre-suit obligation to do much of anything.

III. The Circuit Split

In *Serrano v. Cintas*,[2] the Sixth Circuit agreed with EEOC's very broad view of the EEOC's authority. The EEOC alleged that Cintas discriminated against women in its hiring practices for Service Sales Representative jobs. The district court dismissed EEOC's nationwide class claim and limited the case to Michigan because the EEOC's investigation focused only on the State of Michigan and because the EEOC's general pre-suit statements about a "class" did not support a nationwide claim. The court also dismissed the EEOC's claims for thirteen individuals because EEOC did not identify them, did not conduct any pre-suit investigation about them, and did not engage in any effort to resolve claims about them during the conciliation process. Instead, EEOC identified the thirteen after it filed its lawsuit.

The EEOC did not appeal the dismissal of its nationwide claim. Rather, the EEOC appealed only the dismissal of the thirteen individuals. The Sixth Circuit agreed with the EEOC and explained that a court should only "determine whether the EEOC made a good-faith effort to conciliate the claims it now asserts." The court found that the EEOC's pre-suit statements about a "class" and the defendant's "three-year silence in response to the EEOC's offer of conciliation" were sufficient to satisfy the EEOC's pre-suit obligations. The court therefore reversed the district court's decision.

The Eighth Circuit reached the opposite result in *EEOC v. CRST Van Expedited, Inc.*[3] In that case, the EEOC brought a class action sexual harassment case. A district court in Iowa found that the EEOC used discovery in the lawsuit to identify 67 class members and investigate their claims and that the EEOC did not identify the 67 class members before it filed suit.[4] The defendant ask the court to grant summary judgment because the EEOC did not

identify, investigate, issue cause findings, and engage in conciliation proceedings about these 67 people. The district court agreed and granted the defendant's motion. To do otherwise, the court explained, "would ratify a 'sue first, ask questions later' litigation strategy on the part of the EEOC, which would be anathema to Congressional intent."

The Eighth Circuit affirmed the dismissal of the EEOC's claim on behalf of the 67 class members. The court agreed that that the EEOC did not identify these class members before it filed suit, did not investigate their cases, did not issue reasonable cause determinations about them, and did not conduct conciliation proceedings about their claims. According to the Eighth Circuit, "[w]here the scope of the [EEOC's] pre-litigation efforts are limited—in terms of geography, number of claimants, or nature of claims—the EEOC may not use discovery in the resulting lawsuit as a 'fishing expedition' to uncover more violations. " The court found that "the EEOC wholly failed to satisfy its statutory pre-suit obligations as to these 67 women."

Several other courts have considered the same issues decided by the Sixth and Eighth Circuits, and like those courts, other courts are divided about the EEOC's pre-suit obligations.

For example, in *EEOC v. The Original HoneyBaked Ham Co. of Georgia, Inc.*,[5] the U.S. District Court for the District of Colorado limited EEOC's class sexual harassment and retaliation class claims to allegations about one supervisor because "[t]here was nothing in the EEOC's investigation, determination letter, or the subsequent conciliation that identified unlawful conduct of any manager or supervisor other than [one supervisor]."

Likewise, in *EEOC v. Swissport Fueling, Inc.*,[6] a federal judge in Arizona dismissed EEOC's claims on behalf of twenty-one claimants who EEOC first identified after it filed suit. The court found that during the pre-suit conciliation process, EEOC "refused to provide Swissport with information on the individual claims for which it sought compensatory damages." As a result, "Swissport was not afforded enough notice to meaningfully participate in the conciliation process."

Similarly, in *EEOC v. GEO Group, Inc.*,[7] another judge in Arizona determined that EEOC could not seek relief for fifteen individuals first identified after EEOC filed its lawsuit. The court observed that "the fifteen individuals were not identified (and therefore their allegations could not have been investigated, included in the reasonable cause determinations, or subject to conciliation efforts) until September 2011, more than a year after conciliation efforts had failed," and "almost a year after the EEOC filed its Complaint."

Finally, in *EEOC v. American Samoa Government*,[8] the U.S. District Court for the District of Hawaii explained that "the scope of permissible claims in a civil action is limited by what an EEOC investigation uncovers and what the EEOC conciliates." The court found that the EEOC's investigation and other pre-suit activities focused only on one department of the American Samoa Government. As a result, the EEOC's attempt to sue the entire Government was improper, and the court limited the EEOC's case to the department that the EEOC actually investigated before it filed suit.

Other decisions are consistent with the Sixth Circuit's view.

For example, in *EEOC v. United Road Towing, Inc.*,[9] the EEOC alleged that United Road Towing violated the Americans with Disabilities Act when it discharged a class of disabled employees who exhausted a 12-week leave policy. The U.S. District Court for the Northern District of Illinois determined that the EEOC's pre-suit references to a "class" enabled the EEOC to seek relief for 17 claimants first identified by the EEOC after it filed suit.

Similarly, in *EEOC v. New Hanover Regional Medical Ctr.*,[10] a North Carolina district court determined that EEOC could seek relief for individuals first identified after the EEOC filed its lawsuit. The EEOC "began investigating class claims during the pre-litigation phase" of the case, and the court found that the defendant was therefore "aware" of the scope of the EEOC's investigation "before litigation began."

In a case that involved a challenge to the sufficiency of the EEOC's complaint, *EEOC v. United Parcel Serv., Inc.*,[11] a federal judge in Chicago determined that EEOC need not include in its complaints "detailed factual allegations supporting the individual claims of every potential member of a class."

IV. EEOC's Administrative Procedures Act Argument

In several pending cases, the EEOC is now arguing that the EEOC's pre-suit conduct is not subject to judicial review because the Administrative Procedures Act commits that conduct to "agency discretion by law." So far, no court has endorsed the EEOC's position, and several have rejected it.

For example, in *EEOC v. Mach Mining, LLC*,[12] the EEOC is pursuing a class failure-to-hire sex discrimination case. The EEOC asked an Illinois federal court to grant summary judgment on the defendant's "failure to conciliate affirmative defense" because, according to the EEOC, courts cannot review the conciliation process. The court denied the EEOC's motion and concluded that the EEOC's conciliation process is "subject to at least some level of judicial review." The court rejected the EEOC's reliance on the Administrative Procedures Act because that Act limits claims to persons who suffer a "legal wrong because of an agency action." The EEOC is "not a

person aggrieved by an agency action" and therefore has no claim under the Administrative Procedures Act.

Another Illinois court reasoned the same way in a case called *EEOC v. St. Alexius Medical Center*.[13] In that case, the EEOC alleged that St. Alexius Medical Center violated the Americans with Disabilities Act when it failed to provide a former employee with a reasonable accommodation and fired her. The EEOC moved for judgment on the Medical Center's claim that the EEOC did not make a reasonable effort to conciliate the matter before EEOC filed its lawsuit. EEOC argued that courts cannot make any inquiry into the EEOC's pre-suit conciliation efforts. The district court rejected the EEOC's argument and denied the motion. The court concluded that a court has authority to evaluate the EEOC's conciliation efforts when those efforts are challenged by a defendant in an EEOC-initiated lawsuit.

Similarly, in the *Swissport Fueling* case, the EEOC spent "eight pages of its brief arguing that its pre-litigation actions are not subject to judicial review." Those eight pages did not persuade the court: "[w]hether the EEOC fulfilled its statutory prerequisites to suit is a proper issue for the Court to decide."

V. Where Will It All End?

Given the current state of the law, the EEOC will likely face challenges to its authority and its pre-suit conduct in many of its cases. Some courts may rule in the EEOC's favor; others will not, and there are several possible outcomes to the current mess.

First, the EEOC may continue its practice of using discovery in its lawsuits to identify and investigate individuals and claims it did not identify before it filed suit. If the EEOC chooses this approach, it may persuade some courts, like the Sixth Circuit, that the EEOC has broad authority to litigate its cases and that judicial review is limited. Other courts will reject the EEOC's claimed authority and dismiss parts or all of the EEOC's claims.

Second, the EEOC may actually decide that it should identify, investigate, issue reasonable cause findings, and conduct conciliation proceedings about all class members. The chances of this happening seem slim. The EEOC maintains that the Eighth Circuit's decision in the *CRST Van Expedited* case is wrong and that all other courts that reason likewise are also wrong. The EEOC also shows no indication that it will change how it acts during the pre-suit phase of its cases.

Third, some courts may agree with the EEOC that its pre-suit process is not subject to any judicial review. This seems unlikely. No court has ever determined that the EEOC's pre-suit conduct is "committed to agency discretion by law" and therefore unreviewable. Instead, courts have reviewed the EEOC's pre-suit conduct for forty years. This means that the EEOC's recently minted "committed to agency discretion" theory will have to overcome a large body of case law.

Fourth, the EEOC may decide to promulgate regulations or sub-regulatory guidance about its pre-suit obligations. Section 713(a) of Title VII authorizes the EEOC to "issue, amend, or rescind suitable procedural regulations" to "carry out" Title VII. The EEOC could issue regulations or guidance that clarify its pre-suit obligations and then argue that the courts should defer to the EEOC's regulations.

Finally, if the courts continue to issue conflicting decisions about the EEOC's pre-suit obligations, the Supreme Court may weigh in and clarify—or attempt to clarify—exactly what the EEOC must do before it files suit. Unless and until the Supreme Court weighs in, though, the EEOC and employers will continue to litigate these issues.

Endnotes

1. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977).
2. 699 F.3d 884 (6th Cir. 2012).
3. 679 F.3d 657 (8th Cir. 2012).
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Cross-Border M&A Transactions: Part I—Deal Structure Considerations and Due Diligence

By Erika C. Collins and Michelle A. Gyves

Cross-border merger and acquisition transactions give rise to a myriad of employment-related issues that, if not properly managed, can cause headaches for lawyers, human resources professionals and others involved in the transaction. In the extreme, these issues can even delay or prevent a transaction from progressing. The purpose of this article is to provide an overview of employment-related issues that should be considered any time a corporate transaction is contemplated involving a global workforce.

Particularly for U.S. practitioners, the employment issues that can arise in mergers and acquisitions are often unfamiliar, and lawyers and human resources professionals may be called upon both to spot these issues and to assist their business counterparts in understanding them and their potential impact. Most notably, the concept of "at-will" employment largely does not exist outside the United States. This means that the various parties to a transaction will encounter a workforce that enjoys certain rights and benefits by virtue of the mere existence of the employment relationships. This can have implications in terms of the costs and liabilities associated with the transaction as well as with respect to matters such as transaction structure and timing.

Deal Structure

When approaching any transaction, before delving into the employment issues, it is important first to understand the structure of the deal, including whether it involves the transfer of stock or assets as well as who the stakeholders are (e.g., sellers, purchasers, financial lenders and targets) and where such entities are located. While these facts typically are determined by tax and similar considerations, the structure chosen can have major implications for the employment issues that arise.

In stock or cash transactions, including tender offers, "going private" transactions and acquisitions of subsidiaries or business units through sales of equity, the employment issues often are less complicated than in other types of transactions. While it is still important to conduct thorough due diligence in order to understand what assets and liabilities are being acquired, transactions that involve a mere change of ownership but that do not change the identity of the employer do not raise many of the thorny employment issues discussed below. This is particularly true with regard to transfer of employees because existing employment contracts merely continue under the new ownership. In most jurisdictions, however, the new owner will not be able to change the terms and conditions of employment.

In asset transactions, on the other hand, more difficult issues can arise, particularly with regard to the transfer of employees to the acquirer and business presence requirements for employment of transferring employees. These issues are discussed in more detail below.

Due Diligence

Employment lawyers and, in some cases, human resource professionals advising the buyer in a transaction often will be called upon to conduct employment-related due diligence, usually with a goal of identifying potential liabilities or other issues that will impact the valuation and feasibility of the deal. When conducting such diligence, the following types of documents should be among those requested and reviewed:

- a census of all employees worldwide (anonymized where necessary), including part-time and contract employees, preferably including date of hire, complete compensation, and job category;
- all agreements and information concerning employee benefits, perquisites, and retirement plans. Information regarding the value of plans and how plans are funded is critical because in many countries a plan is considered legally funded with mere book reserves as opposed to cash. Unfunded or underfunded pension liabilities discovered during due diligence can be an employment-related deal killer because of the potentially high costs involved;
- information regarding change-in-control, golden parachute and other M&A-related clauses in any employment contract or other agreement;
- any agreements (such as from a target's prior business acquisitions) that affect or limit employment flexibility (e.g., agreements limiting reductions in force);
- text of all employment agreements, whether individual, collective, or with works councils, including contracts designated as "non-compete," "confidentiality," "indemnification," or "expatriate" agreements;
- pay information, including data on salary administration (to, among other things, establish that withholdings are proper and that the target complies

with any legally mandated payroll requirements such as payroll frequency, form of payment, etc.) and incentive/bonus plans;

- information on stock options or employee ownership programs (the transfer or replication of which can be particularly complicated);
- information regarding any pending employment-related lawsuits, disciplinary proceedings, potential claims, government investigations and unpaid judgments;
- information on any layoffs or other reductions in force conducted in the past several years; and
- any social plans or severance plans from previous reductions in force.

Employee Transfers and Business Transfer Laws

A key issue in any merger or acquisition transaction is whether and how the employees of the affected business will transfer to the new owner.

Typically, in stock transactions, this is a fairly straightforward process. The acquirer merely steps into the shoes of the seller. Employment contracts remain in place and the employment of the target employees is continuous, so terms and conditions of employment remain unchanged. It is necessary, however, to consider the implications of separation of the target companies from the selling parent, particularly if benefit plans such as retirement savings or health and welfare plans were maintained at the parent level. It is also important to consider whether post-close transition plans include modifying terms and conditions of employment. Many U.S.-based employers are surprised to learn that outside the U.S. they often will not be able to make changes to existing employment terms without employee consent. (In Part II of this article, we will discuss harmonizing employment benefits and other terms and conditions of employment after a transaction.)

Asset transactions present a more technically complicated situation, and different countries have very different mechanisms for employee transfers in such transactions.

Some jurisdictions have business transfer laws which operate automatically to transfer employees of a sold business from the seller to the buyer. These laws exist throughout the European Union, for example, pursuant to the EU Directive on transfers of undertakings, as well as in certain non-European jurisdictions throughout Asia and the Americas including Brazil, Colombia, India, Singapore and South Korea. Where such laws are present, a fact-specific inquiry is required to determine whether the proposed transaction amounts to a "business transfer" under the law. While the standards vary across jurisdictions, in general, a business transfer will be deemed to have occurred where an independent business unit is transferred and the activities of such unit continue with the buyer. It is also necessary to assess which employees will transfer. Typically, this inquiry is straightforward with regard to employees that work exclusively for the transferred business but can be more complicated with regard to employees that support both transferred and non-transferred businesses, particularly employees in shared services roles. Different jurisdictions have different standards for addressing whether such employees transfer automatically or would need to consent to transfer. Finally, in some countries, such as South Korea, employees transfer automatically but have the right to object to transfer.

In contrast, in other jurisdictions, including Australia, China, Japan and Hong Kong, employees do not transfer automatically. Instead, the buyer and seller determine which employees they wish to have transfer in the transaction, and such employees must consent to transfer (often by agreeing to a mutual termination of their employment with the seller and accepting new employment with the buyer). Even this seemingly simple approach can raise complex issues. Where transferring employees are important to the business, for example, the acquiring company must consider, usually in consultation with the seller, what sort of benefits should be offered to induce such employees to consent to transfer to the buyer. Usually this involves, at a minimum, replication of all existing terms and conditions of employment and recognition of years of service with the buyer for all purposes (including benefits eligibility, vacation entitlement, severance payout, etc.). Retention bonuses or other sweeteners also frequently are considered in such situations. It is also necessary to consider what will happen to employees who refuse to transfer to the buyer: will the seller be able to redeploy them in other areas of its business? If not, will it be possible to make them redundant and, if so, at what cost? Will the buyer share in those costs? In some countries, severance benefits are not owed if an employee refuses to transfer to a buyer offering identical terms and conditions of employment and recognition of years of service, so this also should be considered.

Finally, in some jurisdictions, such as the Bahamas, employees may not transfer by operation of law, at least under certain circumstances, but an employer can agree to assign or transfer employees to a new employer without such employees' consent. Typically, such transfers would require maintenance of terms and conditions and recognition of years of service, though these rules may vary to some degree by jurisdiction.

Representation and Consultation

Many corporate transactions give rise to information or consultation rights for employees, a concept that can be particularly unfamiliar to U.S. practitioners, especially those who represent clients with non-unionized work-

forces, and that can be unpalatable because of confidentiality and other concerns.

Especially in the European Union, it is common for companies to have works councils that serve as employee representatives and have the right to receive information and to be consulted on issues and decisions that can affect employees. The exact scope of the consultation obligation depends on the law of the jurisdiction. Such rights and obligations often exist with respect to transactions that will either impact employees directly (such as asset transactions where some, but not all, employees will transfer, or transactions that will result in redundancies or changes to the terms and conditions of employment) or that will affect the company in a way that ultimately might affect employees (such as where the employing company will make a large outlay of capital as a purchasing entity). Accordingly, although consultation obligations are more common in asset transactions, they can arise in all types of transactions, so it is necessary to consider each transaction, and each country, individually, to ensure compliance with these obligations.

It is also important to consider whether any pre-closing restructuring will occur that could give rise to separate information and consultation obligations. In stock transactions, for example, it is common for a number of asset transfers and other mini-transactions to take place prior to the ultimate stock transfer in order to prepare the company for such transfer (*e.g.,* creation of new subsidiaries for acquisition, movement of employees and other assets into or out of target companies, etc.). Such pre-closing restructuring transactions can give rise to information and consultation rights, even if the ultimate stock transfer does not.

While most laws are somewhat vague with regard to the exact timing of consultation, it is clear that consultation is required to occur at a time when it would be "meaningful," which is generally understood to be prior to the signing of a binding purchase agreement. This can be problematic both because of concerns regarding confidentiality and because the transaction is often in flux right up until the time of signing, making provision of accurate information to employees or their representatives difficult. It is important, therefore, to understand the potential implications of non-compliance, or late compliance, with consultation obligations, so that risks can be assessed properly. In some countries, such as the UK, the penalty for non-compliance with consultation obligations will be merely financial. In other countries, however, works councils have the ability to delay, or even kill, a deal unless and until the employer complies with its information and consultation obligations. In the Netherlands, for example, the works council can go to court to obtain an injunction preventing a transaction from moving forward until the employer complies with its consultation obligations.

While the concept of works councils is fairly specific to the EU, consultation obligations also can arise in other jurisdictions, particularly with regard to unionized workforces. It is relatively common for collective bargaining agreements to require at least notice, and sometimes consultation or negotiation, regarding transactions that transfer ownership or involve the transfer of employees.

Business Presence Issues

Another issue that can arise in certain transaction structures is whether the purchasing entity can legally employ acquired employees in a given jurisdiction. This issue arises, in particular, in asset sales that involve the sale of one or more but not all business units of the selling entity in a particular jurisdiction when the acquiring company does not have existing operations in that jurisdiction prior to the transaction. In such cases, the employees will transfer to, and become directly employed by, the acquiring entity. Often, the acquirer will be a foreign entity, such as the global parent or a special subsidiary incorporated to acquire the assets that are the subject of the transaction, resulting in the transferred employees being employed directly by a foreign entity.

In some countries, including the United Kingdom and Australia, direct employment by a foreign entity is possible, but the foreign entity must register with tax and social security authorities, a process that, in some cases, can be particularly onerous. Italy and Spain are examples of jurisdictions in which the registration process for foreign employers can be particularly onerous, such that establishing a branch or subsidiary may be a more straightforward approach. In other countries, a foreign entity is not permitted to employ employees directly, and a local business presence must be established in order to employ the transferred employees. In order to employ employees in China, for example, a foreign company must establish either a wholly foreign-owned enterprise ("WFOE") or a joint venture, and in India a foreign company must establish a branch office, liaison office, project office, joint venture or subsidiary in order to hire employees directly. Similarly, in Brazil, although it is technically legally permissible for a foreign employer to hire employees directly, practically speaking it is necessary for a foreign company to establish either a branch or a subsidiary in order to make the required enrollments to pay taxes and other social charges.

It is important to be cognizant of the business presence issue, both because of the implications it can have for deal pacing and structure and also due to the potential liabilities for the acquiring entity if this issue is not addressed.

In some jurisdictions, including India, it can take several months to establish a local branch or subsidiary that legally can employ the transferred employees. In such cases, it may be necessary either to have a sufficiently

long period between signing and closing to establish a local business presence or to carve out of the transaction the employees, and possibly other assets, of the implicated jurisdiction and to have a later closing with respect to that particular jurisdiction once the business presence can be established. In such situations, acquiring companies sometimes will resort to engaging third-party service providers or obtaining services through a transition services agreement with the seller (to the extent permissible) in order to manage this waiting period. Buyers should beware, however, that some countries prohibit employee leasing, which can be an issue with respect to transition services agreements. Even in countries in which only registration is required, the acquiring entity may need to be prepared to move quickly to comply with the registration requirements.

The employment of individuals in a jurisdiction without registration or a formal business presence, where required, can lead to fines and penalties (sometimes criminal) both for the unregistered employment itself and for the consequent nonpayment of taxes and social charge contributions.

Conclusion

The employment issues that can arise in cross-border M&A transactions are myriad and complex. These issues can be further complicated by the tight timelines and constantly evolving deal structures that characterize many M&A transactions today. Successful management of the employment issues requires careful tracking of the many moving pieces and constant communication with the deal team to keep track of transaction structure and other business decisions. Employment practitioners working on cross-border transactions should always consult with jurisdiction and subject-matter experts as necessary to ensure compliance with the various and complex requirements.

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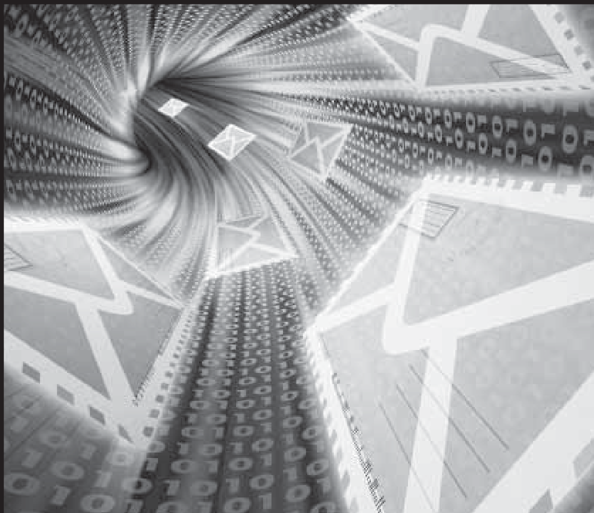

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Employee Today, Copyright Gone Tomorrow? The Purged Existence of Graduate Workers and the Effects of Achieving "Employee" Status

By Joshua D. Seidman

"…Doom'd for a certain term to walk the night,
And for the day confined to fast in fires…"[1]

As Hamlet learned from the spirit of his deceased father,[2] purgatory—an intermediate realm between heaven and hell that imprisons souls for an indefinite time to atone for certain sins or right certain wrongs[3]—is worth avoiding. While the concept of an actual state of purgatory has weaved its way in and out of both history and literature for the last 900 years,[4] there are those in the modern-day Catholic community who believe the stage has been set for the doctrine of purgatory to be abandoned.[5] Even though Catholicism's support is waning and other religions discarded the notion of purgatory centuries ago,[6] American graduate and doctoral students across the country have been, and continue to be, trapped in a seemingly perpetual quasi-purgatory state.

On one hand, graduate students are at universities to pursue degrees of higher education.[7] Yet while the students are there, they teach courses, grade assignments, and produce scholarly work. Despite this professorial façade, graduate students are not currently considered university employees in terms of being able to unionize and collectively bargain.[8] Thus, enter the apparent purged existence of countless graduate students—teaching assistants, research assistants, doctoral students, and medical residents—who have ascended beyond the ranks of everyday students, but have not yet reached the level of professors.[9]

The framework of modern research universities recognizes teaching and research assistants as vital components.[10] To earn a Master's and/or Doctoral degree, many graduate programs require participants to develop teaching and research skills based on participation as either teaching assistants in large undergraduate courses,[11] or research assistants for a professor.[12] In many cases, these students receive "compensation, tuition remission, or both" for performing the research and teaching duties of their respective programs.[13]

The principal issue surrounding graduate worker unionization at private universities is whether graduate workers fall under the definition of "employee" as outlined in the National Labor Relations Act (NLRA) § 2(3).[14] Not surprisingly, the primary reason graduate students want NLRA protection for their unionization efforts is so they can effectively bargain with the university over "questions of wages, hours, and the terms and conditions of employment."[15] However despite the workers' legitimate goals, in almost every graduate worker unionization case before the National Labor Relations Board (NLRB or "Board") over the last forty years[16] the Board has found that graduate students do not fall under the umbrella definition of "employee" and thus are not entitled to the NLRA's collective bargaining rights.[17]

From the university's perspective, there are several key reasons that support the exclusion of graduate workers from the NLRA. One such argument is that graduate students should not be deemed employees because their employment with the school will always be temporary since it is solely based on their transitory existence as graduate students.[18] Furthermore, universities generally contend that their relationship with graduate students is predominantly educational, not economic.[19] In addition, the university administration will usually argue that classifying graduate students as employees will limit private universities' academic freedom because the schools and the design and implementation of the schools' graduate programs would become subject to regulation by the NLRA.[20]

On the other side of the debate, a common graduate worker argument supporting efforts for NLRA recognition is that it is possible to distinguish between the aspects of the workers' relationship with the university that are educational, and those that are economic.[21] Moreover, graduate students posit that since their duties and services are governed by the university and since the university pays the graduate students for these services, their relationship resembles that of "a traditional master-servant relationship."[22] Lastly, graduate students argue that "students" are not one of the several categories of workers who are directly excluded from the NLRA's definition of "employee,"[23] and thus they should fall within the broad reach of § 2(3).[24]

After nearly thirty years of losing efforts, the graduate workers' arguments received legal traction in the late 1990s and early 2000s when the Board granted graduate workers NLRA protection in its *Boston Medical Center* and *New York University* ("*NYU*") decisions.[25] Yet merely four years after *NYU*, the Board issued a decision in *Brown University* ("*Brown*") where it reverted to its initial position on the matter and once again removed graduate students from the NLRA's "employee" sphere. While *Brown* stymied graduate student attempts to unionize at several

universities,[26] certain recent decisions and actions by the Board and its regional offices have preheated the oven for a potential reversal of *Brown*.[27]

The first sign that *Brown* may be reversed came on June 16, 2011 when the NLRB's New York office (Region 2) found that 1,000 New York University graduate assistants "have a dual relationship with the Employer, which does not necessarily preclude a finding of employee status."[28] About two-and-a-half months later the NLRB's Brooklyn Office (Region 29) reached a similar conclusion when it found that the graduate, research and teaching assistants at Polytechnic Institute of New York University have an economic relationship with the university and that the students' collective bargaining rights are not precluded simply because the work they perform is temporary.[29] In light of language in the Regional Offices' decisions, the NLRB granted review of the two cases on June 22, 2012,[30] and while no decision has been issued yet, graduate students at the schools are confident that their right to collectively bargain under the NLRA will soon be restored.[31]

The following discussion is based on the belief that the Democrat-dominated NLRB,[32] coupled with the aforementioned graduate students' arguments in favor of their right to unionize under the NLRA,[33] will lead to a reversal of *Brown*. In light of this presumption, the article's primary focus is that while classifying graduate workers as "employees" under the NLRA is ultimately in the workers' best interest, the workers need to be fully aware of the ramifications that could result from being labeled "employees." Specifically, this classification could simultaneously trigger some unexpected difficulties for graduate students in terms of securing copyright ownership of their scholarly work. As a result, a favorable decision from the NLRB could effectively replace the workers' collective bargaining war with an intense copyright battle. Therefore, if the second-coming of *NYU* once again grants graduate students NLRA coverage, understanding the interplay between the students' right to collectively bargain and how copyright ownership operates at the university level will give graduate students a much better chance of protecting copyright ownership in their "original works of authorship"[34] and emerging victorious in future copyright disputes.

To explore these matters, the article is divided into three main sections. Part I summarizes key NLRB holdings from the last forty years that have impacted graduate student unionization. Part II shifts momentarily away from graduate student unionization and focuses on specific areas of U.S. copyright policy, namely A) the work for hire doctrine, B) the teacher's exception to that doctrine, and C) certain components of university copyright policies and how these policies handle copyright ownership of graduate student scholarly work. Lastly, Part III begins by summarizing *NYU II* and *Polytechnic Institute*, and then proceeds to assess whether an "employee" classification of graduate workers under the NLRA will set off a similar classification under copyright law. Finally, the section concludes with a discussion on why it is in graduate students' best interest to be classified as "employees" under the NLRA, even at the risk of losing copyright ownership of their scholarly works, and how graduate workers can attempt to retain copyright ownership despite being classified as "employees" under both labor and copyright law.

I. NLRB Decisions on Graduate Student Unions

A. Dark Days for Graduate Student Unions

The initial wave of NLRB decisions regarding graduate student unionization was extremely one-sided in favor of the universities. Time and again the NLRB issued rulings that kept graduate students' collective bargaining efforts outside the NLRA's scope of protection.[35] The first notable decision came in 1970 in *Cornell University*,[36] where the NLRB's decision that private university activities affect commerce[37] within the meaning of the NLRA[38] enabled the Board to preside over future graduate assistants' unionization attempts at these universities. Two years later,[39] the Board found that graduate workers were primarily students and consequentially they could not piggyback on regular faculty members' unions in order to bargain with the university over the terms and conditions of their employment.[40] In 1974 the NLRB thwarted another graduate worker unionization effort when it rejected their hybrid existence argument. [41] The Board found the graduate workers' argument—that they should be categorized as employees under the NLRA because they are hybrids of students and employees who are paid by the school through its normal payroll system—was not enough to bring the workers under NLRA coverage.[42] The next notable NLRB decision preventing graduate workers from unionizing was issued in 1976 when the Board ruled that medical interns and residents at Cedars-Sinai Medical Center in Los Angeles were also outside the NLRA's scope of covered employees.[43]

B. The Long-Awaited Breakthrough: *Boston Medical Center Corporation* (1999)

After decades of disappointment, in 1999 the NLRB's *Boston Medical Center* decision gave graduate workers their first breakthrough in achieving the right to unionize.[44] *Boston Medical Center* involved a group of medical housestaff who wanted their collective bargaining efforts to be covered by the NLRA.[45] The Board emphasized the common law master-servant test as the main justification for classifying the medical housestaff as employees deserving of NLRA coverage.[46] Under the master-servant test, the court emphasized that the activities performed by the medical housestaff, namely providing direct patient care for the employer, were evidence that the housestaff were employees.[47] As the ink from *Boston Medical Center* dried, graduate assistants at New York University (NYU) were gearing up for their day before the NLRB

and what they hoped would continue the momentum gained by their medical housestaff brethren.

C. Back and Forth: *NYU* and *Brown*

1. New York University (2000)

In *NYU*[48] the NLRB picked up right where it left off in *Boston Medical Center*. From the onset of the decision, the Board emphasized that "unless a category of workers is among the few groups specifically exempted from the Act's coverage, the group plainly comes within the [NLRA's] definition of 'employee.'"[49] Since graduate students are not an explicitly excluded group as listed in NLRA § 2(3), the Board found them to be within the scope of NLRA coverage for employees.[50] Further, the NLRB noted that there is no statutory prohibition against covering a group of employees that are simultaneously students, thereby quelling the argument that the educational focus of the graduate assistants' relationship with the school removes them from NLRA coverage.[51] In addition, in *NYU* the Board echoed *Boston Medical Center* by highlighting that the 1,700 NYU "graduate assistants' relationship with the Employer is…indistinguishable from a traditional master-servant relationship" because the graduate assistants performed services[52] that were controlled by the University, and were compensated by the University for these services.[53] Using the same reasoning, the NLRB distinguished graduate workers' compensation from students who simply receive financial aid.[54] As a result, the NLRB found that the fundamental element of a master-servant relationship, the performance of work in exchange for compensation, existed in *NYU*[55] and used that finding to reverse thirty years of anti-graduate worker Board decisions.

2. Brown University (2004)

Unfortunately for graduate workers, it took the NLRB barely four years to revert back to the jurisprudence from its earlier decisions. *Brown* involved a factually similar scenario to that in *NYU*, particularly a union aiming to represent 450 of the university's graduate research and teaching assistants.[56] However, in this decision the Board revisited its reasoning from *Leland Stanford*,[57] and classified the Brown University graduate assistants as primarily students.[58] The NLRB based its decision on several factors, including 1) graduate assistants must be enrolled as students in order to work as graduate assistants, 2) graduate assistants spend a small amount of time working for the University, and 3) graduate assistants' primary objective is to earn a degree.[59] Additionally, the Board referenced the fact that graduate assistants' relationship with the University is "primarily educational,"[60] rather than economic, to justify not extending them NLRA coverage.[61]

Another key factor in the NLRB's decision was the compensation the University paid its graduate workers. Similar to the stipends earned by the graduate workers in *NYU*,[62] in *Brown* the graduate students received identical stipends, "regardless of whether they 'work' for those funds as a TA, RA, or proctor, or whether they receive funding for a fellowship, which does not require any work."[63] Unlike *NYU*, in *Brown* the NLRB weighed the receipt of identical stipends as evidence that the graduate assistants' pay was simply financial aid masquerading as compensation based on their work product, and thus served as additional proof that the graduate assistants were nothing more than students.[64] When the dust from *Brown* finally settled, graduate assistants at private universities found themselves in a depressingly similar situation to the one they were in before *NYU*.

II. U.S. Copyright Law

As stated earlier, although classifying graduate workers as "employees" would likely be the best overall outcome for the students, it could trigger a new wave of disputes between graduate workers and their universities that focuses on copyright ownership. Specifically, in their capacity as graduate workers, graduate students create a wide range of products—homework assignments, quizzes and exams, research and thesis papers—that could become the university's, not the student's, intellectual property if graduate workers achieve "employee" status under the NLRA.

A. Work Made for Hire

The general principle of copyright ownership in America is that the author or creator of a work owns the copyright in the work.[65] While this principle has both Constitutional[66] and public welfare[67] support, a vital exception exists in the form of "works made for hire."[68] If a work is classified as being for hire and the actual creator of the work is an employee, which is typically the case, he or she will not become the copyright owner of the work when it is complete. Instead, "the employer or other person for whom the work was prepared is considered the author" and "owns all of the rights comprised in the copyright."[69]

A work will not fall under the work for hire doctrine unless its creator is considered an employee within the realm of copyright law, which according to the Supreme Court is determined using "the conventional master-servant relationship."[70] In terms of graduate workers, they are viewed as students in the work for hire context. Generally speaking, "when the student creates material entitled to protection under federal intellectual property laws while engaged in educational or training activities, 'the autonomy of the university prevails and the student is not afforded the status of employee.'"[71] Furthermore, many of the reasons for classifying graduate workers as students, rather than employees, under copyright law parallels the reasoning used by the NLRB in making the same decision under labor law.[72] For instance, the primary reasons graduate workers are classified as students under copyright law are: 1) the graduate workers' relationship with the university is primarily educational; 2) most

of the work done by teaching and research assistants is in furtherance of their degrees; and 3) the monetary amount of and the frequency that the graduate workers receive the stipends from the university is "not analogous to the compensation an employee might receive."[73]

B. The Teacher's Exception

Just as the work made for hire doctrine was an exception to the general notion of copyright law, within the doctrine exists a further subdivision of works that fall under what is known as the teacher's exception.[74] Between the enactment of the 1909 and 1976 Copyright Acts, professorial works were generally held not to be works made for hire and consequentially the professors were granted copyright ownership of their creations.[75] During these years the main support for the teacher's exception came from two cases, *Sherrill v. Grieves*[76] and *Williams v. Weisser*,[77] both of which recognized that works composed by professors did not qualify as works made for hire.[78]

Despite the holdings in *Sherrill* and *Williams*, the merits of a teacher's exception to the work for hire doctrine came into question following the enactment of the Copyright Act of 1976. The debate arose because in the 1976 Act Congress failed to codify or even mention the teacher's exception.[79] As a result, over the last several decades legal practitioners have remained split on whether the teacher's exception still shields copyright ownership in professorial scholarly work from the university.

Despite the teacher's exception's Houdini-esque disappearance[80] from the 1976 Act,[81] supporters of the exception's continued existence generally base their argument on two cases, *Weinstein v. University of Illinois*[82] and *Hays v. Sony Corp of America*.[83] The *Weinstein* court ultimately found that an article written by three university professors[84] did not fall under the university's meaning of work for hire[85] because 1) the university conceded that its policy was meant to recognize and continue the teacher's exception tradition,[86] and 2) the professors did not need university permission to publish the disputed article.[87] A year after *Weinstein*, Judge Richard Posner wrote the *Hays* opinion and used the case as an avenue to try to dispel the notion that the teacher's exception no longer exists. In particular, Judge Posner explained that the only reason the teacher's exception has not received more coverage and recognition in American legislation is due to the fact that no one questioned the right[88] of professors and educators to own the copyright in their scholarly works.[89]

While at this point it may appear that the teacher's exception is alive and well in the twenty-first century, some academics continue to doubt the exception's survival.[90] Many of the arguments presented to prove the teacher's exception no longer exists are described in great detail in Elizabeth Townsend's 2003 article in the *Minnesota Intellectual Property Review*.[91] The primary arguments raised by opponents of the teacher's exception are: 1) Congress' failure to codify or even mention the teacher's exception in the Copyright Act of 1976; and 2) the increasing commercial value of professors' academic work, including scholarly articles and class lecture notes, over the last twenty years.[92] Despite the arguments on both sides, congressional silence and a lack of definitive case law have left the teacher's exception, much like graduate assistants, in a *Hamlet*-like state of purgatory.

C. University Copyright Policies

Although the teacher's exception has not officially been erased from the pages of copyright law, the uncertainty surrounding its continuation has forced many university professors to shift their focus toward university copyright policies in order to receive copyright protection for their works. Various law review articles, published respectively in 1992,[93] 2002,[94] and 2009,[95] have synthesized the key components of university copyright policies as they existed at the time the articles were written.

The author of the most recent of the articles, Anthony Luppino, consolidated his findings into ten major categories, one of which involved student works.[96] Luppino noted that university copyright policies can rope in anyone, including students, who is "working on research and creative works that are sponsored or directed by the university or involve some measure of use of university resources."[97] In many cases "if the student is… performing work for hire or sponsored or commissioned research, or has made significant use of university resources, the university reserves the right to claim ownership in the student's creation."[98] Moreover, most schools presume that the student is the copyright owner of the work if he or she creates a scholarly work that does not fall within the scope of the previous sentence.[99]

D. The Better Classification: Employee or Student?

1. And Back Again—Graduate Students as "Employees" Resurfaces

As long as universities continue to use graduate workers as part of the overall educational network, graduate workers will continue to campaign for employee status under the NLRA. Most recently, the summer of 2011 saw two separate NLRB regional offices conduct evidentiary reviews of whether graduate workers at two different universities should be granted the right to collectively bargain under the NLRA.[100]

The first of these decisions was issued in June 2011 by the NLRB Region 2 following a petition for review filed by NYU's graduate student organization, GSOC/UAW.[101] The regional director in *NYU II* noted that the Board is bound by the decision in *Brown*,[102] but at the same time laid the foundation for a possible NLRB overruling of *Brown* in the coming years.[103] For support, the regional director emphasized that: 1) the university maintains control and supervision over the services and responsibilities carried out by the graduate assistants;[104]

and 2) the graduate workers receive compensation from the university for the work they perform as teaching or research assistants, which makes them more in line with employees.[105] Based on this evidence, the regional director stated that although "the graduates have a dual relationship with the Employer, [this] does not necessarily preclude a finding of employee status."[106]

In August 2011, NLRB Region 29 issued a similar decision regarding graduate worker unionization, which involved a campaign by the UAW union to represent 555 graduate workers from Polytechnic Institute of New York University.[107] Similar to *NYU II*, the Region 29 director noted that he was bound by *Brown* and thus that the graduate workers "are not statutory employees under the [NLRA]."[108] However, the *Polytechnic Institute* decision also states that the University's graduate workers clearly had both an academic and economic relationship with the school.[109] Another notable part of the decision arises when the regional director counters Polytechnic's argument that the students are not NLRA employees because their relationship with the school is fleeting and intermittent.[110] The regional director points out that "in many industries employees with little or no expectation of continued employment with a particular employer engage in stable and successful collective bargaining—for example actors, and construction workers."[111] Instead of simply deferring to the Board's 2004 precedent, *Polytechnic Institute* followed *NYU II* and continued to chip away at *Brown,* thereby setting the stage for the Democratically-controlled NLRB to once again determine graduate workers' unionization status.

2. Making the Most of Purgatory

Even if graduate workers are reclassified as employees under the NLRA, it is doubtful that graduate workers will ever fully free themselves from purgatory. The student-employee duality will constantly leave graduate workers arguing that they are primarily employees when collective bargaining rights are at issue and arguing that they are primarily students if copyright ownership is being contested. This chasm is what will keep graduate workers in a state of limbo, existing as neither complete students nor complete employees.

Knowing that a total escape from purgatory is highly unlikely, graduate workers must implement a Plan B, which in this case is finding ways to use purgatory to their advantage. Specifically, it is in the graduate workers' best interest to reclaim their *NYU* employee status under the NLRA because of the broad benefits that come with being able to collectively bargain. These benefits not only include negotiating with the university over wages and hours, health care coverage, general job responsibilities and how to handle employment disputes, but also having those negotiations protected by federal law.

While the benefits of having the NLRB use *NYU II* and *Polytechnic Institute* to overrule *Brown* are clear, such a ruling will also have negative ramifications on the graduate workers. As highlighted earlier, if graduate workers are awarded the right to unionize as employees, the university could then argue that graduate workers should also be deemed employees under copyright law. If these allegations gain legal traction, universities could become the copyright owners of graduate students' scholarly works, thereby leading to an influx of copyright disputes between graduate workers and universities.

Whether a university's argument regarding copyright ownership will be successful depends on several factors. Initially, graduate workers can argue that whether a worker is an employee under copyright law, or more specifically under common law agency principles,[112] is notably different from whether a worker is an employee under the NLRA. Under NLRA §2(3), the definition of employee states that "[t]he term 'employee' shall include any employee…,"[113] while the Restatement (Second) of Agency narrows the definition of employee to include the additional analysis of what constitutes "the performance of…services" and when this performance is "subject to [an]other's control or right to control."[114]

Yet despite the varying scope of the NLRA's and Restatement's definitions of "employee," a university still has a sturdy leg to stand on. Particularly, the school can argue that if graduate workers are considered employees under the NLRA, the same should hold true under copyright law because the reasoning used to deny graduate workers employee status under the NLRA mirrors that used to deny graduate workers employee status under the Restatement (Second) of Agency.[115] In categorizing graduate workers as students, both fields of law have focused on: 1) the graduate workers' temporary relationship with the university; 2) the clear relationship between the graduate workers' compensation and their education; and 3) the various differences between the work required of a professor and the work required of a graduate worker.[116] Because of these commonalities, future courts faced with copyright ownership disputes over graduate workers' scholarly articles would have good reason to use NLRB decisions classifying graduate workers as employees for guidance. For instance, the *NYU II* reasoning that graduate workers are employees because they "are performing services under the control and direction of [the University], for which they are compensated"[117] could be used as evidence to reach the same conclusion under the Restatement's definition of an "employee."[118]

3. Copyright Protection for Graduate Workers

Assuming that universities can successfully persuade courts to re-categorize graduate workers as employees under copyright law, graduate workers will not necessarily have to hand over copyright ownership of their scholarly work. In the higher education setting, a variety of factors will dictate who or what owns the copyright in graduate assistants' scholarly articles. These factors include, whether the teacher's exception described in

Sherrill, *Williams*, and *Hays* still exists, the language of the university's copyright policy, and the graduate workers' scope of employment.

In a future copyright ownership dispute between graduate assistants who have been recognized as university employees and the university itself, the first argument graduate assistants can make to retain copyright ownership is that the teacher's exception still exists. As mentioned above, under the teacher's exception to the work for hire doctrine professors emerge as the copyright holders of their scholarly work.[119] By extension, graduate students who work as teaching assistants and lead recitations or lectures of a particular course can argue that they too are privy to the benefits of the teacher's exception.

Unfortunately for graduate workers—and many professors—given the teacher's exception's lack of statutory recognition, the exception has arguably been reduced to a mere relic from the days of the 1909 Copyright Act. Therefore, if a teacher's exception argument fails, the next place graduate workers can turn to for support is their university's copyright policy. A university copyright policy is a powerful tool for graduate workers depending on the policy's language. Given the binding power of a university's copyright policy, it is vital for graduate assistants to make sure their voices and needs are represented in their university's policy. Even if the current policy explicitly addresses graduate workers copyright ownership, graduate workers or their union representatives should actively confer with their school's administrative faculty to ensure that any potential additions or amendments to the policy continue to account for the graduate assistants' evolving needs.

If a university's copyright policy denies or is silent toward graduate students' copyright ownership, graduate workers can raise a scope of employment argument for assistance. The basis for such an argument is that graduate workers, not the universities, own the copyright in their scholarly works because the works fall outside the scope of the graduate workers' employment.[120] This argument can succeed because the work for hire doctrine only applies to creations that fall within the scope of an employee's employment.[121] To determine if a work falls within an employee's scope of employment, it is useful to look to the Restatement (Third) of Agency for guidance. Accordingly, "[a]n employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control."[122]

To buttress the argument that graduate workers' scholarly creations fall outside the scope of their employment, the graduate workers can use their purged existence as both students and employees to their advantage. For instance, full-time professors' scope of employment usually includes both the generation of course materials, such as syllabi and lecture notes, and the production of scholarly research.[123] In contrast, graduate assistants can point to their duties as teaching or research assistants, which generally include leading their own basic introductory courses or recitations of larger lectures or aiding professors in gathering information on and analyzing a particular topic that the professor is researching,[124] to form the outer shell of their scope of employment. Such employment will not likely include conducting scholarly research. Instead, composing an analytical thesis or research paper will most likely fall within the "student" realm of the graduate worker's dual existence and therefore will land outside the scope of the graduate worker's employment. Under this argument, while graduate workers may have to relinquish copyright ownership of the lesson plans, homework assignments, and exams they create in future copyright disputes with the university because these items fall within the scope of their employment, it is highly probable that the same will not hold true for graduate workers' personal research and thesis papers.

Conclusion

Being classified as employees, rather than students, is more favorable to graduate students' overall relationship with the university because collectively bargaining and unionizing under the NLRA protects a larger amount of graduate workers' employment rights than does being deemed students. Comparatively, being classified as students merely ensures that graduate workers receive copyright ownership of their graduate assistant-generated works because these works fall outside the work for hire doctrine. Yet if graduate workers are considered employees under both labor and copyright law, in the face of copyright ownership disputes with the university graduate workers can introduce several arguments—exemption under the teacher's exception, beneficial language in the university's copyright policy, and the scope of graduate workers' employment—to maintain copyright ownership over some, or all, of their scholarly works. Thus, while graduate workers may never completely escape their purged existence as both students and employees, fighting for and achieving employee status under the NLRA is clearly the way graduate assistants can maximize their rights to both collectively bargain over the terms and conditions of their work and maintain copyright ownership in their scholarly articles.

Endnotes

1. William Shakespeare, Hamlet, act 1, sc. 5, line 756-57, ***available at*** http://www.opensourceshakespeare.org/views/plays/play_view.php?WorkID=hamlet&Scope=entire&pleasewait=1&msg=pl#a1,s5.
2. Hamlet, act 1, sc. 5, line 745.
3. Webster's Third New International Dictionary of the English Language, Unabridged 1845 (3d ed. 1993).
4. ***Purgatory***, Encyclopædia Britannica. Encyclopædia Britannica Online, (2012), http://www.britannica.com/EBchecked/topic/483923/purgatory/260348/Origins-of-the-doctrine (last visited Feb. 13, 2013) (noting that "[a]ccording to the French historian Jacques Le Goff, the conception of purgatory as a

physical place dates to the 12th century, the heyday of medieval otherworld-journey narratives and of pilgrims' tales about St. Patrick's Purgatory"); *see also* Karen Kay, *Concepts of Heaven, Hell, and Purgatory in Hamlet*, Shakespeare Online Study Tools, http://www.britaininprint.net/shakespeare/study_tools/heaven_hell.html.

5. Edmond Macareg, *The Pope Abandons Limbo! Will Purgatory Follow?*, United Church of God (Apr. 26, 2007), http://www.ucg.org/commentary/pope-abandons-limbo-will-purgatory-follow/; *See* also Encyclopædia Britannica, *supra* note 4.
6. Encyclopædia Britannica, *supra* note 4.
7. *Brown Univ.*, 342 N.L.R.B. 483, 484 (2004).
8. *See* Sheldon D. Pollack & Daniel V. Johns, *Graduate Students, Unions, and Brown University*, 20 Lab. Law. 243, 246 (2004).
9. *See id.* at 246.
10. *See* Pollack, *supra* note 8, at 245-46.
11. Pollack, *supra* note 8, at 246.
12. *Id.*
13. Josh Rinschler, *Students or Employees? The Struggle over Graduate Student Unions in America's Private Colleges and Universities*, 36 J.C. & U.L. 615, 615-16 (2010). *See also History Department: Admissions and Financial Aid*, Brown University, http://brown.edu/Departments/History/grad/grad-finaid.html (stating that "[t]he Graduate School grants incoming doctoral students five years of guaranteed support, which includes a stipend, tuition remission, and a health-insurance subsidy"); *Mathematics: Financial Aid*, Harvard University, http://www.gsas.harvard.edu/programs_of_study/mathematics.php (stating that "[a]ll students in the Department of Mathematics receive substantial financial support during their graduate training. This support may be in the form of grants or teaching fellowships from Harvard, or fellowships and research assistantships from outside organizations such as the National Science Foundation"); *Stanford Facts: Graduate Program*, Stanford University, http://facts.stanford.edu/graduate.html (stating that "[a]bout 85 percent of Stanford graduate students receive financial assistance, aside from loans, from Stanford or external sources…In 2010-11, the annual stipend is $33,400").
14. National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (1935), *available at* https://www.nlrb.gov/national-labor-relations-act [hereinafter NLRA]. There is a distinction between how graduate student unionization efforts are treated at private universities, which is outlined in cases brought before the NLRB, versus how they are treated at public universities. A clear discussion of the differences can be found in Grant Hayden's 2001 article. *See* Grant M. Hayden, *"The University Works Because We Do": Collective Bargaining Rights for Graduate Assistants*, 69 Fordham L. Rev. 1233, 1234-35 (2001).
15. *See* Hayden, *supra* note 14, at 1233.
16. *Cornell Univ.*, 183 N.L.R.B. 329 (1970); *Adelphi Univ.*, 195 N.L.R.B. 639 (1972).
17. *See infra* notes 35-64.
18. *Brown Univ.*, 342 N.L.R.B. at 486; *Adelphi Univ.*, 195 N.L.R.B. at 640.
19. *Brown Univ.*, 342 N.L.R.B. at 486.
20. *Brown Univ.*, 342 N.L.R.B. at 486; *see also New York Univ.*, 332 N.L.R.B. 1205, 1208 (2000); Pollack, *supra* note 8, at 246.
21. *Brown Univ.*, 342 N.L.R.B. at 486.
22. *New York Univ.*, 332 N.L.R.B. at 1206.
23. *See* NLRA, *supra* note 14.
24. *Boston Med. Ctr. Corp.*, 330 N.L.R.B. 152, 160 (1999) (stating that "[t]he exclusions listed in [NLRA § 2(3)] are limited and narrow, and do not, on their face, encompass the category 'students'").
25. *Boston Med. Ctr. Corp.*, 330 N.L.R.B. at 159; *New York Univ.*, 332 N.L.R.B. at 1206.
26. Pollack, *supra* note 8, at 244.
27. Steven Greenhouse, *Graduate Students Ask N.Y.U. to Recognize Union*, N.Y. Times, Apr. 27, 2010, *available at* http://www.nytimes.com/2010/04/28/nyregion/28grad.html; Steven Greenhouse, *N.Y.U. Teaching Assistants' Unionizations Hopes to Get a Boost*, City Room (June 20, 2011, 12:49 PM), http://cityroom.blogs.nytimes.com/2011/06/20/n-y-u-teaching-assistants-unionization-hopes-get-a-boost/.
28. *New York Univ. & GSOC/UAW*, No. 2-RC-23481, at 26 (N.L.R.B. Region 2, June 16, 2011), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d4580509ccd [hereinafter *NYU II*].
29. *Polytechnic Institute of New York Univ. & UAW*, No. 29-RC-12054, at 14, 18 (N.L.R.B. Region 29, August 30, 2011), *available at* http://www.nacua.org/documents/PolyInstNYUniversity_v_InternationalUnion.pdf [hereinafter *Polytechnic Institute*].
30. *Board Grants Review, Invites Briefs of Question of Graduate Student Assistant Status in Two Cases*, National Labor Relations Board (June 22, 2012), http://www.nlrb.gov/news/board-grants-review-invites-briefs-question-graduate-student-assistant-status-two-cases.
31. Nicole Roland, *1,100 NYU Graduate Employees Reiterate Majority Support of UAW Unionization*, Union Circle News (Dec. 15, 2012), http://news.unioncircle.com/1100-nyu-graduate-employees-reiterate-majority-support-of-uaw-unionization/.
32. Despite the recent debate regarding President Obama's recess appointments to the N.L.R.B. in January 2012, all three of the current N.L.R.B. members—Mark Gaston Pearce, Sharon Block, and Richard F. Griffin, Jr.—listed on the N.L.R.B. website were appointed by Democratic President Barack Obama. *See The Board*, National Labor Relations Board, http://www.nlrb.gov/who-we-are/board (last visited Feb. 10 2013). *See also* Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. Pa. J. Lab. & Emp. L. 707, 727-30 (2006) (noting that in *NYU* the three-member majority were all appointed by Democratic President William Clinton).
33. *See supra* notes 21-24.
34. 17 U.S.C.A. § 101 (2006).
35. *See infra* notes 36-64.
36. *Cornell Univ.*, 183 N.L.R.B. at 334.
37. *Id.* at 334.
38. NLRA § 2(7), 29 U.S.C. § 152(7) (1935), *available at* https://www.nlrb.gov/national-labor-relations-act. "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."
39. *Adelphi Univ.*, 195 N.L.R.B. at 639.
40. *Id.*
41. *Leland Stanford Junior Univ.*, 214 N.L.R.B. 621 (1974).
42. *See id.*
43. *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251(1976).
44. *See Boston Med. Ctr. Corp.*, 330 N.L.R.B. at 152.
45. *See id.* at 156.
46. *See Boston Med. Ctr. Corp.*, 330 N.L.R.B. at 160.
47. *See id.* at 160-61.
48. 332 NLRB 1205 (2000).
49. *New York Univ.*, 332 N.L.R.B. at 1205 (citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891-892 (1984)).
50. *See New York Univ.*, 332 N.L.R.B. at 1205.
51. *See id.* at 1205, 1207.

52. See Hayden, *supra* note 14, at 1236; Sandip H. Patel, *Graduate Students' Ownership and Attribution Rights in Intellectual Property*, 71 IND. L.J. 481, 483 (1996).

53. *New York Univ.*, 332 N.L.R.B. at 1205.

54. *Id.* at 1207.

55. *See id.* at 1205-06.

56. *See Brown Univ.*, 342 N.L.R.B. at 483.

57. *See id.* at 486-87.

58. *See id.* at 483, 488.

59. *See id.* at 488.

60. *See id.* at 488-89.

61. *See id.* at 489.

62. *See New York Univ.*, *supra* notes 53-54.

63. *Brown Univ.*, 342 NLRB at 484.

64. *See id.* at 488.

65. 17 U.S.C.A. § 201(a) (2006); *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989).

66. U.S. CONST. art. I, § 8, cl. 8. Congress has the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.*

67. ROBERT A. GORMAN ET AL., COPYRIGHT: CASES AND MATERIALS, 14-15 (8th ed. 2011).

68. *See Cmty. for Creative Non-Violence*, 490 U.S. at 737. Under the 1976 Copyright Act, a work for hire is either (1) "a work prepared by an employee within the scope of his or her employment or (2) a work specially ordered or commissioned" that falls under one of the Act's nine enumerated categories of copyright and is expressly agreed to by the parties in a signed written instrument. *See* 17 U.S.C. § 101 (2006).

69. 17 U.S.C. § 201(b) (2006). A written agreement signed by the parties can supersede the employer's ownership of the copyright under the work made for hire doctrine. *Id.*

70. 490 U.S. 730, 739-40 (1989). The Restatement (Second) of Agency defines servant as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control. RESTATEMENT (SECOND) OF AGENCY § 220(1) (1958).

71. Patel, *supra* note 52, at 502 (citing Kathleen M. Capano et al., Note, *In re Cronyn: Can Student Theses Bar Patent Applications?,* 18 J.C. & U.L. 105, 115 (1991)).

72. *See id.*

73. *Id.*

74. *See* Chanani Sandler, *Copyright Ownership: A Fundamental of "Academic Freedom,"* 12 ALB. L.J. SCI. & TECH. 231, 240 (2001).

75. *See* Laura G. Lape, *Ownership of Copyrightable Works of University Professors: The Interplay Between the Copyright Act and University Copyright Policies*, 37 VILL. L. REV. 223, 233 (1992); Ashley Packard, *Copyright or Copy Wrong: An Analysis of University Claims to Faculty Work*, 7 COMM. L. & POL'Y 275, 282 (2002) (citing Rochelle Cooper Dreyfuss, *The Creative Employee and The Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 591 (1987)).

76. 57 Wash. L. Rep. 286 (D.C. Sup. Ct. 1929). The Supreme Court of District of Columbia in 1929 noted that it "does not know of any authority holding that such a professor is obliged to reduce his lectures to writing or if he does so that they become the property of the institution employing him." *Williams v. Weisser*, 78 Cal. Rptr. 542, 548 (Cal. Ct. App. 1969) (quoting *Sherrill v. Grieves*, 57 Wash. L. Rep. 286 (D.C. Sup. Ct. 1929)).

77. 78 Cal. Rptr. at 542-43.

78. *See Williams v. Weisser*, 78 Cal. Rptr. at 548 (quoting *Sherrill v. Grieves*, 57 Wash. L. Rep. 286 (D.C. Sup. Ct. 1929)).

79. *See Hays v. Sony Corp. of Am.*, 847 F.2d 412, 416 (7th Cir. 1988).

80. *See* Barbara Isenberg, *Harry Houdini as a Man and Magician Before His Time*, CULTURE MONSTER: ALL THE ARTS, ALL THE TIME (Apr. 23, 2011, 10:33 AM), http://latimesblogs.latimes.com/culturemonster/2011/04/harry-houdini-as-a-man-and-magician-before-his-time.html.

81. *See Hays*, 847 F.2d at 416 (stating that Congress' silence regarding the teacher's exception in the 1976 Copyright Act indicates its intent for the exception to continue beyond the Act's implementation), *abrogated by Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990); *see also Weinstein v. Univ. of Illinois*, 811 F.2d 1091, 1094 (7th Cir. 1987).

82. 811 F.2d 1091 (7th Cir.1987).

83. 847 F.2d 412 (7th Cir. 1988).

84. *See Weinstein*, at 1092-93.

85. *See Weinstein*, at 1094.

86. *See id.* at 1094 (stating that "[t]he University concedes in this court that a professor of mathematics who proves a new theorem in the course of his employment will own the copyright to his article containing that proof").

87. *See id.* at 1095.

88. *See id.* at 416 (noting that there is a "universal assumption" that teacher's owned the copyright in their academic writings).

89. *See id.*

90. *See* Alissa Centivany, *Paper Tigers: Rethinking the Relationship Between Copyright and Scholarly Publishing*, 17 MICH. TELECOMM. & TECH. L. REV. 385, 404 (2011) (declaring that "Weinstein's shift of focus (however reluctant) away from a teacher exception toward university policy statements concerning copyright ownership in faculty works could be understood to signal a broader shift in legal analysis of copyright ownership in faculty-created works"); Elizabeth Townsend, *Legal and Policy Responses to the Disappearing "Teacher Exception," or Copyright Ownership in the 21st Century*, 4 MINN. INTELL. PROP. REV. 209, 239-40 (2003) (finding that "it seems that only tradition and custom, remembered by the university, keeps the teacher exception in place.").

91. Townsend, *supra* note 90, at 239-40.

92. *See* Townsend, *supra* note 90, at 243-44.

93. Lape, *supra* note 75, at 252.

94. Packard, *supra* note 75, at 294.

95. Anthony J. Luppino, *Fixing A Hole: Eliminating Ownership Uncertainties to Facilitate University-Generated Innovation*, 78 UMKC L. REV. 367, 371-72 (2009).

96. *See id.* at 371-72.

97. Luppino, *supra* note 95, at 377.

98. *See id.* (citing *Intellectual Property*, ARKANSAS STATE UNIVERSITY (Feb. 25, 2005), http://www.asusystem.edu/dotAsset/163051.pdf (last visited Feb. 13, 2013); William D. Underwood, *Intellectual Property Policy of Baylor University*, 6 (Oct. 6, 2005), *available at* http://www.baylor.edu/content/services/document.php? id=42369; *Research Policies*, UNIVERSITY OF DELAWARE: OFFICE OF THE EXECUTIVE VICE PRESIDENT & UNIVERSITY TREASURER (Aug. 11, 2008), http://www.udel.edu/ExecVP/policies/research/6-06.html (last visited Feb. 13, 2013)).

99. *See* Luppino, *supra* note 95, at 383 (citing Baker University Intellectual Property Policy (Feb. 18, 2005), § VIII., http://www.bakeru.edu/images/pdf/About/Intellectual_Property_Policy.pdf (last visited Feb. 13, 2013); Loyola University-New Orleans Intellectual Property Rights Policy § IV.B.4, http://academicaffairs.loyno.edu/sites/academicaffairs.loyno.edu/files/IPR%20Policy%20Attorney%20Final%20Approved%20BOT%205-13-05.pdf (last visited Feb. 13, 2013); University of Mississippi Copyright (Intellectual Property) Policy, http://

secure4.olemiss.edu/umpolicyopen/ShowDetails.jsp?istatPara=1&policyObjidPara=10648215 (last visited Feb. 13, 2013); University of Nebraska Intellectual Property Policy, § 9, http://digitalcommons.unl.edu/ir_information/14/ (follow "Intellectual Property Policy of the University of Nebraska" hyperlink) (last visited Feb. 13, 2013); University of North Carolina-Asheville Copyright Use and Ownership Policy, § 4.7, http://www2.unca.edu/policies/79.pdf (last visited Feb. 13, 2013)).

100. *See NYU II*, *supra* note 28; *Polytechnic Institute*, supra note 29.
101. *See NYU II*, *supra* note 28, at 1.
102. *See id.* at 6.
103. *See id.* at 26.
104. *See id.*
105. *See id.*
106. *NYU II*, *supra* note 28, at 26.
107. *Polytechnic Institute*, supra note 29, at 1-2.
108. *Id.* at 2-3.
109. *Id.* at 14.
110. *Id.* at 18.
111. *Polytechnic Institute*, supra note 29, at 18.
112. *See supra* note 70.
113. *See* NLRA, *supra* note 14.
114. Restatement (Second) of Agency § 220(1) (1958).
115. *See supra* note 72-73.
116. *See* Patel, *supra* note 52.
117. *See NYU II*, *supra* note 28, at 26.
118. Restatement (Second) of Agency § 220(1) (1958).
119. *See supra* Section II.B.
120. *See* Packard, *supra* note 75, at 280.
121. 17 U.S.C. § 101 (2006).
122. Restatement (Third) Of Agency § 7.07 (2006). It should be noted that Agency Third replaced Agency Second in 2006. Under the Restatement (Second) of Agency whether a work fell within the scope of employment was determined by analyzing the work under the following three-part test: 1) whether the work is of the type that the employee is employed to perform; 2) whether the work occurs substantially within authorized work hours; and 3) whether its purpose, at least in part, is to serve the employer. Restatement (Second) of Agency § 228 (1958).
123. *See* Packard, *supra* note 75, at 280-81.
124. *See* Hayden, *supra* note 14, at 1236; Patel, *supra* note 52, at 483.

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Protecting Physicians Through Employment Contracts: A Guide to the Basic Terms and Conditions[1]

By Robert B. Stulberg and Amy F. Shulman

I. Introduction

The American medical profession has evolved, from colonial days to the present, from solo practitioners, to small business owners, to managed care providers, to a diverse, employed workforce.[2] As the percentage of employed physicians rapidly expands,[3] the labor and employment law issues confronting that workforce have attracted increased attention. Key among those issues, from the physicians' perspective, is how to secure and protect their essential workplace rights through contracts with their employers.

Although employed physicians are among the most educated and skilled members of society, they typically lack contracts that sufficiently protect them in their employment relationships. While such physicians are generally covered by federal labor laws,[4] few belong to labor unions or enjoy the protection of collective bargaining agreements.[5] While many employed physicians are offered individual contracts by their employers, those contracts usually contain clauses designed to protect employer discretion in most phases of the employment relationship.

Without the benefit of experience or training, physicians typically find the task of analyzing and negotiating an employment contract to be daunting. The proposed agreement is a complex document, laden with technical language, and the negotiation is unfamiliar, unlike any interaction in which the physician has engaged. This article attempts to demystify the negotiation and drafting of physicians' employment contracts and identify the basic contract provisions necessary to protect physicians' professional and economic interests. It is important to recognize, however, that a physician's employment contract raises unique and nuanced issues not presented in other professional or executive agreements, including multi-faceted employment relationships, the interplay of such contracts with internal governance structures and external regulations, and the paramount need to protect the physicians' duty of care to their patients, notwithstanding their duty of loyalty to their employers.

II. How Should the Contract Be Negotiated?

As an initial matter, the physician should bear in mind that employment contracts are bi-lateral agreements and, therefore, should be negotiable. The physician should not simply accede to the employer's proposed terms because "that's what everyone else has signed" or "that is what we've always done here." Given that the employer has determined that the physician is a welcome addition to its professional staff, contract negotiations should be treated as an opportunity to identify the parties' respective and mutual needs and to incorporate those needs into the agreement.

Undoubtedly the proposed contract was drafted by the employer's lawyer with the employer's interests in mind, and, in all likelihood, the employer will consult with its lawyer throughout the negotiation process. For these reasons and because the contract will be a binding document that will determine the terms of the employment relationship, the physician is best advised to engage counsel as well.[6]

To be most effective in negotiations, the physician should assess his or her bargaining strengths and weaknesses from the outset. What makes the physician a desirable employee, the ability to provide particular services or perform particular procedures, the ability to deliver patients, the ability to deliver revenues, the ability to deliver corporate or government grants? How competitive is the position that has been offered? Senior physicians typically will have more bargaining power than will graduating residents or fellows negotiating their first contracts. Physicians working in under-served specialties or under-served geographic areas will likely have more bargaining power than will physicians working in better-served markets.

Given that every objective will not be achievable in negotiations, the physician should order his or her priorities. What considerations are most important: security; autonomy; duties; schedule; salary; incentive compensation; fringe benefits; professional support; occurrence malpractice coverage; non-competition limitations; other conditions? The physician should make his or her attorney aware of these priorities so that an effective negotiation strategy can be crafted.

Finally, reliable information is the most important tool available to the physician in negotiating an employment contract. What is the employer's reputation, i.e., for professional integrity, patient care, quality practice, financial stability, physician satisfaction, peer recognition, and other important considerations? The best sources for this information are other physicians who have been employed by the employer, who have had dealings with the employer, or who know of the employer's reputation.

III. Employment Contract Basics

As most physicians are unfamiliar with contract jurisprudence, an attorney representing a physician is best advised to explain the core legal principles in play: (1) a contract is any legally enforceable promise made by one party to another;[7] (2) to be legally enforceable, the promise must be supported by valid consideration, i.e., a bargained-for advantage to one party or disadvantage to the other party;[8] (3) an employment contract is enforceable if it contains an agreement, stated in definite language, to four material terms—the parties, the position, the compensation, the du-

ration;[9] and (4) if no duration is specified, the employment is at-will, i.e., the employee is entitled to the fruits of the contract only so long as the employer employs him.[10]

The attorney should also explain why it is important that the employment contract be in writing, i.e., in some states (including New York), an employment contract must be in writing and signed by the parties if it is possible for the employment to exceed one year.[11] Further, the attorney should explain that courts will enforce a contract according to its terms.[12] Therefore, if the terms are clear, the court will look only at the contract itself and will not consider anything else (including the parties' understanding or intent) to determine the contract's meaning,[13] but if the terms are ambiguous (i.e., capable of more than one reasonable interpretation), the court will look to extrinsic evidence (i.e., factors outside of the contract) to interpret the contract.[14]

IV. What Should a Physician's Employment Contract Contain?

Because physicians work in a multitude of states and often have complex employment relationships, there is no single template for a physician's employment contract. Certain basic provisions, however, should be incorporated into such contracts, whether they arise in public or private hospitals, private practice groups, faculty practice groups, managed care organizations, medical staffing groups,[15] academia, or Affordable Care Organizations (ACOs).[16] Additional provisions will apply when physicians are represented by a labor organization and covered by a collectively-bargained contract. This article, however, focuses on the elements of an employment agreement covering an individual physician.

A. The Employer

The employer is the party that is responsible for the employee's working conditions.

For a physician, more than one entity can play that role. A physician employed in a private practice group also may be required to work at an affiliated hospital. An employee of a hospital also may be required to teach at an affiliated medical college.[17] An employee of a medical college also may be required to work at an affiliated faculty practice and an affiliated hospital. An employee of a medical staffing group or an ACO may be assigned to work at a hospital, clinic or practice.[18] Often these relationships entail overlapping duties, responsibilities, supervision and compensation. The physician's employment contract should include as parties every employing entity. The contract also should make clear what responsibilities are owed by the physician to each employing entity and what responsibilities are owed by each employing entity to the physician.

B. The Compensation

Compensation is everything of value that is provided in exchange for the physician's services. Compensation can include: base salary; supplemental salary; bonus or incentive compensation; research grants; intellectual property rights; and fringe benefits.

Base salary is generally tied to rank and seniority within the employing organization. The employment contract should specify the annual amount of salary and the time frames in which it will be incrementally paid. In addition, where there is more than one employing entity, the contract should specify which part of the salary (and other compensation) is to be paid by which entity.

Supplemental salary is negotiated with the employer as an "add-on" to the base salary and is tied to the physician's individual bargaining power. For example, physicians who can bring research grants to a medical college, patients to a private practice, or specialized services to a hospital, often have the ability to negotiate supplemental salary as part of their guaranteed compensation. Again, the contract should specify the amount of the supplemental salary, when and how it will be paid, and who is going to pay it.

Bonus or incentive compensation is sometimes available to encourage and reward performance based upon productivity or other factors. Some employers omit mention of such compensation in an employment contract, in order to maintain complete discretion over such payments. Some employers structure their compensation packages around it, using pay-for-performance ("P4P") (linking compensation to achievement or avoidance of pre-determined health care delivery targets or outcomes),[19] Relative Value Units ("RVUs") (weighing the value of physician services against the costs of maintaining a service or practice),[20] pay for additional shifts (e.g., for hospitalists or emergency room physicians), or other incentive pay models. Where such compensation is available, however, the contract should specify the criteria justifying a bonus (e.g., revenue targets, patient census, patient outcomes) and the units in which such criteria are measured (e.g., by physician, department, hospital, practice). Those criteria should be objective (insofar as possible) and reasonably related to factors within the physician's control. The contract also should provide for a clear and regular accounting, so the physician can readily ascertain if the bonus has been properly calculated.

For physicians employed at research facilities, government and corporate grants, patents and other **intellectual property** can provide additional sources of compensation. The physician's entitlement to such compensation should be made clear in the employment contract, and the physician should not accept as a given that all such revenue is the exclusive property of the employer.

For physicians employed at private practice groups, compensation can include the opportunity to acquire an **equity share** in the practice, usually after an agreed period of years. In such circumstances, the contract should specify the conditions for such partnership or shareholder status, the type and amount of equity that will be available if the conditions are met, the "buy-in" cost for acquiring the

equity, the "buy-out" rules for leaving the practice, and any unusual obligations the physician will be required to undertake as a partner or shareholder (including a share of capital improvements or legal liabilities).

Finally, physicians' employment contracts should specify the **fringe benefits** that will be provided, including vacations, holidays, personal days, medical insurance, dental insurance, disability income insurance, life insurance, retirement benefits, moving costs, religious observance accommodations, and professional development benefits, e.g., paid time off and payment of costs to attend Continuing Medical Education programs and board examinations. For the sake of clarity, the applicable benefit plans should be referenced in or attached to the contract. Also, the contract should state which of the benefits are to be provided at the employer's cost, and which will require an employee contribution.

C. The Duration

Perhaps the most important part of the contract—and the most challenging to negotiate—is a provision specifying the contract term and defining the circumstances under which that term can be cut short. In New York and most other states, in the absence of a contract, physicians are employed at the employer's "will," i.e., they can be discharged at any time and for any or no reason, without warning, notice or severance pay.[21] Although the employment-at-will doctrine does not permit unlawful discharges, e.g., those in breach of anti-discrimination statutes, it otherwise provides the employer with unfettered discretion to continue or terminate the employee's employment, regardless of the employee's seniority, performance or value.[22]

While most physicians' contracts contain a duration clause reciting a definite term, they also usually contain a clause permitting either party to terminate the agreement on written notice (typically 60 or 90 days). Such contracts provide no meaningful job security beyond the notice period. Given that the physician can be let go for any reason or no reason, a termination on notice provision imposes no significant limit on the employer's discretion to terminate the relationship. Moreover, such provisions sometimes trigger other adverse consequences, such as discontinuity of patient care and clawbacks of sign-on bonuses and relocation expenses.

The best way for a physician to protect job security is to negotiate a fixed term contract with a clause permitting discharge only "for cause." "Cause," in turn, should be defined to mean an objectively measurable failure, such as criminal conviction, willful misconduct, loss of license or loss of malpractice insurance. If the employer insists on defining "cause" more broadly to include subjective measures, such as "poor performance," the contract should entitle the physician to written notice of the alleged shortcoming and an opportunity to cure it.

The contractual remedies for the employer's termination without "cause" can be negotiated as well. Such remedies can include payment of the value of the remainder of the contract term or of a liquidated amount, which typically decreases in size as the contract term proceeds, or reinstatement where appropriate.

As for termination of the contract by the physician, many employers insist upon prior written notice from the physician (typically 60 or 90 days). Such notice provisions are standard. In addition, the physician should be able to terminate the contract "for good reason" without notice if the employer breaches the contract in some material respect (e.g., by failing to pay required compensation or by failing to provide required staff support) and should try to negotiate a requirement that the employer pay the physician an agreed liquidated amount in such circumstances.

In addition to negotiating "good cause" and "for good reason" provisions, the physician should seek to incorporate into the contract safeguards against arbitrary discipline or discharge that exist outside of the contract. For example, a physician employed in whole or in part by a medical college or a hospital can try to incorporate into the contract the procedural protections provided by the medical college's by-laws or the hospital's and its medical staff's by-laws, including peer review, progressive discipline, corrective action proceedings, and due process termination hearings, which generally are controlled by physicians.[23] Similarly, a physician in New York State can try to incorporate into the contract statutory terms prohibiting hospitals from diminishing physicians' privileges without valid reasons and an opportunity to be heard.[24] By incorporating these external protections into the contract, the physician increases the prospects for employer compliance and establishes a private mechanism to enforce them.

Finally, physicians employed by public employers have an additional interest in negotiating "for cause" clauses in their employment agreements. This is so because, when a public employee's employment is terminable only "for cause," that employment will likely be viewed as a constitutionally protected property interest, which only can be denied through a due process proceeding, but when that employee's employment is terminable at will, it will not enjoy such constitutional protection.[25]

D. The Physician's Duties

The employment contract should clearly delineate the physician's duties, including clinical responsibilities, administrative tasks, mentoring of interns and residents, and teaching. The contract also should specify the physician's work location(s), reporting line(s), schedule and workload. Telephone call, hospital call, and emergency room duties, in particular, should be defined in as much detail as possible, and should be equitably distributed (so far as possible).

Most importantly, the contract should stipulate that, whatever the scope of the contractual duties, the physician's first responsibility is to the patients, and the physician is entitled to exercise his or her independent profes-

sional judgment and control in patient care and quality practice matters. Such contractual language—which has recently been strongly advocated by the American Medical Association—provides essential protection against demands that place a claimed duty of loyalty to the employer over the physician's paramount duty and fiduciary responsibility to the patients.[26] The contract also should protect the physician's right to advocate on behalf of his/her patients.[27]

To avoid conflict, the contract should clarify the circumstances under which the physician may engage in professional activities outside of normal working hours and receive remuneration for certain of those activities (i.e., "moonlighting"). Activities typically viewed as falling outside of the physician's normal employment responsibilities include attending and delivering lectures, giving depositions or expert testimony, and performing community service.

E. The Employer's Duties

In order to fulfill his or her duties under the contract, the physician will need the employer's on-going institutional support. The categories and level of such support should be specified in the contract. As a general matter, the contract should recite the employer's commitment to ensure that the practice meets all appropriate standards for medical care. That commitment should extend to provision of all appropriate clinical and office facilities, equipment, supplies and reference resources. It also should extend to provision of appropriate staff support, including physicians, nurses, physician assistants and administrative personnel. Further, the contract should make clear that non-physicians working at the practice will be employed by the employer but directed, for patient care purposes, by the physician.

Purchase of malpractice insurance for the physician also should be the responsibility of the employer. More specifically, the employer should agree to purchase, at its sole cost, "occurrence" coverage, i.e., coverage that will insure the physician against liability for anything that occurs while the physician is employed by the employer, even if the claim concerning that occurrence is filed after the physician's employment ends. Some employers attempt to limit their responsibility in this area by offering to provide only "claims-made" coverage, i.e., coverage that will insure the physician against liability arising only out of claims filed while the physician is employed by the employer. Such limited coverage, however, would leave the physician with an enormous potential uninsured risk, and require the physician, upon terminating employment, to purchase costly "tail" coverage (also known as "extended reporting period coverage") to insure against claims arising during the physician's employment but not filed until after that employment ends.

Finally, the contract should specify whether the employer, the physician or both have responsibility for billing. Depending upon the nature of the employment, the physician may wish to cede that responsibility to the employer (e.g., where the physician's compensation is not linked to the employer's finances) or retain it for himself or herself (e.g., where the physician's compensation is linked to the firm's finances and/or the physician's productivity).

F. Restrictive Covenants

Employers typically seek to include in physicians' employment contracts restrictions on the physicians' right to practice medicine in designated geographic areas for some period after the employment ends.[28] Such restrictive covenants or non-competition agreements are illegal in some states.[29] In most states, however, these provisions are enforceable so long as they meet certain standards. In New York, for example, non-competition agreements are disfavored but generally will be upheld if they are reasonable as to time and area, necessary to protect legitimate employer interests, not unreasonably burdensome to the employee, and not harmful to the general public.[30] The permissible geographic scope of such restrictions will vary depending upon population density and availability of particular medical services.

A comprehensive review of the law governing restrictive covenants is beyond the scope of this article, but, as a general matter, an attorney representing a physician should seek to have any restrictive covenant eliminated or narrowed in scope and impact. Among other things, the attorney representing the physician should seek to ensure that the restrictive covenant does not preclude a physician from maintaining or obtaining medical staff memberships or privileges at hospitals within the geographic area at issue and should limit the duration of the restrictions and the circumstances in which they can be imposed (e.g., by making the restriction effective only after the parties have completed an agreed "trial period" and by ensuring that the restriction does not apply unless the physician is terminated for "cause"[31] or resigns "without good reason").[32] In negotiating a restrictive covenant, the physician should bear in mind that a post-employment non-competition pact has economic value for the employer and, therefore, such a provision might be traded for other items of value to the physician, including items of compensation.

Finally, employers frequently seek to include in an employment contract restrictions on the physician's right to offer employment or partnership opportunities to other employees of the employer after the physician's employment ends. Such non-solicitation restrictions are generally enforceable if they meet the standards imposed for judging the legality of non-competition clauses.[33]

G. Other Contract Terms

Physicians' employment contracts typically also include the following standard clauses:

- **Successors**—This provision should make the contract binding on the employer's successors, i.e., entities that acquire the employer and/or its assets through sale, merger, reorganization, etc., and

require, as a condition of sale or merger, that the acquiring entity continue the physician's position and adopt the physician's contract. This provision also should entitle the physician's heirs to any compensation due under the contract at the time of the physician's death.

- **Assignment—**This provision typically states that the employer can assign its obligations and benefits under the contract to another entity, but that the physician cannot do so, i.e., the contracted-for services must be provided by the signatory practitioner. The physician should seek to make the employer's right to assignment subject to the physician's written consent.
- **Entire Agreement—**This provision states that the contract contains all of the terms agreed to by the parties and that any change in those terms must be set forth in a writing signed by the same parties. Given this provision, employers' oral promises that do not appear in the contract (typically as to work schedule, call schedule and bonus compensation), should be made part of the contract. Also, any terms that exist outside of the contract (e.g., hospital or medical staff by-laws, benefit plan descriptions, incentive pay plans, practice partnership agreements) must be incorporated into the contract (by reference or attachment) in order to be considered part of the contract.
- **Governing Law—**This provision specifies the state law that will be used to interpret the contract (typically the law of the state in which the contract is to be performed).
- **Notices—**This provision specifies the method by which one party gives the other party notices required by the contract. The physician's address should be one where he or she is certain to receive the notice.
- **Arbitration**—Many employers include in the parties' agreement a provision requiring that contractual disputes be resolved through arbitration rather than litigation. An evaluation of such provisions is beyond the scope of this article. At a minimum, however, where such a provision mandates arbitration, it should apply only to contractual disputes and exclude statutory and/or constitutional claims or defenses.

V. Conclusion

Given the essential and highly skilled services that physicians provide and the resulting value that those services bring to health care employers, physicians should enjoy appropriate job security, autonomy, remuneration, benefits and professional support at work. Employment contracts, if properly negotiated and drafted, can help assure that physicians achieve these important workplace protections. While this guide provides some basic recommendations for negotiation strategy and contract language, each employment relationship will present unique challenges and opportunities. For that reason, the physician and his or her counsel should carefully assess the physician's objectives and priorities, the parties' relative bargaining positions, and the legal and practical considerations that bear upon the negotiations. Such preparation and analysis will best assure that the resulting contract provides an equitable foundation for a secure and successful employment relationship.

Endnotes

1. Parts of this article previously appeared in a publication distributed by the Committee of Interns and Residents, SEIU Healthcare, at its 2012 Workshop and Webcast on Post-Residency Life.
2. Paul Starr, Princeton University Professor of Sociology and Public Affairs, *The Social Transformation of American Medicine* (Basic Books, 1982); Paul Starr, "American Medicine's Transformation (or not): A Quarter-Century's Perspective," Policy History Conference, May 31, 2008; Paul Starr, *Social Transformation Twenty Years On*, in Transforming American Medicine: A Twenty-*Year Retrospective on The Social Transformation of American Medicine*, ed. by Keith Wailoo, Timothy Stoltzfus Jost, and Mark Schlesinger, *Journal of Health Policy, Politics, and Law* 29 (4/5, 2004), 1005-1019; "Transformation in Defeat: The Changing Objectives of National Health Insurance, 1915-1980," *American Journal of Public Health* 72 (January 1982): 78-88.
3. *See* Robert Pear, *Doctors Warned on 'Divided Loyalty,* N.Y. Times, December 27, 2012 at A18 [hereinafter "Pear Article"] (discussing the *AMA Principles for Physician Employment*, adopted by the American Medical Association (AMA) at the 2012 Interim Meeting of the AMA House of Delegates [hereinafter "AMA Principles"], *available at* http://ama-assn.go/employmentprinciples); Gardiner Harris, *More Doctors Giving Up Private Practices*, N.Y Times, March 25, 2010.
4. National Labor Relations Act (NLRA), 29 U.S.C. § 151, *et seq.*; *see St. Barnabas Hosp.*, 334 N.L.R.B. 1000, 334 N.L.R.B. No. 125 (2001) (holding that hospital unlawfully terminated physicians for engaging in protected, concerted activity within the meaning of the NLRA), *enf. granted*, *NLRB v. St. Barnabas Hosp.*, 46 Fed.Appx. 32 (2d Cir. 2002); *New York Univ. Med. Ctr. v. NLRB*, 156 F.3d 405 (2d Cir. 1998). For instance, Doctors Council, SEIU Healthcare, www.doctorscouncil.com, is a national union representing post-residency physicians, and the Committee for Interns and Residents, SEIU Healthcare, www.cirseiu.org, is a national union representing interns, residents and fellows.
5. "According to the Bureau of National Affairs, an estimated 7.2 percent of physicians and surgeons were union members in 2011." *See* Department for Professional Employees, AFL-CIO News, Feb. 14, 2013 (*available at* http://dpeaflcio.org/professionals/prefessionals-in-the-workplace/healthcare-professional-and-technicians).
6. The AMA recognized the importance of seeking advice of experienced counsel in negotiating physicians' employment agreements. AMA Principles § 3(b).
7. *See Startech, Inc. v. VSA Arts*, 126 F. Supp.2d 234 (S.D.N.Y. 2000).
8. *Id.*
9. *See, e.g., Janover v. Bernan Foods, Inc.*, 901 F.Supp. 695, 702 (S.D.N.Y. 1995); *Gilinsky v. Sarbro Realty Corp.*, 525 N.Y.S.2d 742 (3d Dep't 1988).
10. *See Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 300, 461 N.Y.S.2d 232 (1983); *Talansky v. American Jewish Historical Socy.,* 779 N.Y.S.2d 58 (1st Dep't 2004).
11. *See, e.g.*, New York Statute of Frauds, N.Y. Gen'l Obligations Law § 5-701. The contract, however, need not be contained in one document; "it may be pieced together out of separate writings,

connected with one another either expressly or by the internal evidence of subject matter and occasion." *Gilinsky*, 525 N.Y.S.2d 742.

12. *See Janover*, 901 F. Supp. at 700.
13. *See Golden Archer Invs., LLC v. Skynet Fin. Sys.*, __ F. Supp.2d __, 2012 WL 6200728 (S.D.N.Y. Dec. 12, 2012); *R/S Associates v. New York Job Dev. Auth.*, 98 N.Y.2d 29 (2002).
14. *UBS Secs. LLC v. Finish Line, Inc.*, No. 07 Civ. 10382 (LAP), 2008 WL 536616 (S.D.N.Y. Feb. 22, 2008); *Geothermal Energy Corp v. Caithness Corp.*, 34 A.D.3d 420, 825 N.Y.S.2d 485 (2d Dep't 2006).
15. Professional staffing groups typically contract with hospitals or other medical entities to provide physicians (often in particular specialties) for permanent or temporary assignments. Such temporary assignments are referred to as "locum tenens" positions.
16. In general, an ACO is an organization of medical providers and suppliers who work together to coordinate patient care and contain costs and may be eligible to participate in the Medicare Shared Savings Program, pursuant to Section 3022 of the Affordable Care Act. *Medicare Program; Medicare Shared Savings Program: Accountable Care Organizations*, 76 Fed. Reg. 67802 (Nov. 2, 2011); *see also* 42 C.F.R. § 425.10, *et seq.*
17. *See, e.g., Ostrow v. State Univ. of New York at Stony Brook*, 202 A.D.2d 587, 609 N.Y.S.2d 83 (2d Dep't 1994) (upholding revocation of physician's hospital staff privileges, where privileges were contingent on appointment to medical school faculty and faculty appointment was summarily terminated).
18. *See* note 14, *supra.*
19. *See* Anemona Hartocollis, *New York City Ties Doctors' Income to Quality of Care,* N.Y. Times, Jan. 11, 2013; Pauline W. Chen, M.D., *Paying Doctors for Patient Performance*, N.Y. Times, Sept. 30, 2010, Sandeep Juahar, M.D., Essay, *The Pitfalls of Linking Doctors' Pay to Performance*, N.Y. Times, Sept. 9, 2008.
20. *See, e.g.*, Pear Article.
21. *See Spencer v. Int'l Shoppes, Inc.*, No. 06-CV-2637(JS)(MLO), 2010 WL 1270173 (E.D.N.Y. Mar. 29, 2010); *Cohen v. Davis, M.D.*, 926 F.Supp. 399 (S.D.N.Y. 1996).
22. *Id.*
23. Where such by-laws are not incorporated into an employment agreement, they still might be enforceable contractually if they place "an express limitation on the employer's right to discharge." *See Romer v. Board of Trs. of Hobart & William Smith Colls.*, 842 F.Supp. 703 (W.D.N.Y. 1994) (quoting *Murphy* 58 N.Y.2d at 305). In addition, where a hospital or medical college violates its own by-laws or internal procedures, an employed physician can seek review under C.P.L.R. Article 78. *Id; Gertler, M.D. v. Goodgold, M.D.*, 487 N.Y.S.2d 565 (1st Dep't), *aff'd*, 66 N.Y.2d 946 (1985). Note, however, that such proceedings are subject to a four-month statute of limitations and the standards of review set forth in N.Y. C.P.L.R. § 7803.
24. *See, e.g.*, New York Public Health Law ("PHL") § 2801-b (prohibiting hospitals from diminishing staff membership or professional privileges of a physician (1) without stating the reasons for the adverse action, or (2) for a reason unrelated to standards of patient care, patient welfare, the hospital's objectives, or the physician's character or competency); *Murphy, M.D. v. St. Agnes Hosp.*, 484 N.Y.S.2d 40 (2d Dep't 1985) (PHL § 2801-b was enacted to curtail the common-law rule that a hospital could terminate a physician's privileges for any reason, even an arbitrary one). *See also* PHL § 4406-d(2)(c) (prohibiting health care plans from terminating a contract with a physician without providing a written explanation of the reasons for the proposed termination and an opportunity for review or hearing).
25. *Compare Greenwood, M.D. v. New York*, 163 F.3d 119 (2d Cir.1998) (where state hospital's by-laws prohibited revocation of clinical privileges without certain due process protections, those privileges constituted a constitutionally protected property interest); *Hamad v. Nassau Cty. Med. Ctr.*, 191 F.Supp.2d 286 (E.D.N.Y. 2000), *with Abramson v. Pataki*, 278 F.3d 93, 100 (2d Cir. 2002) (at-will employment does not constitute a constitutionally protected property interest, but, a protectable property interest may arise where an employee may only be terminated for cause).
26. AMA Principles, § 1; Pear Article.
27. *Id.* at § 2.
28. The American Medical Association "'discourages any agreement between physicians which restricts the right of a physician to practice medicine for a specified period of time or in a specified area upon termination of employment or a partnership or a corporate agreement.'" *Oak Orchard Cmty. Health Ctr. v. Blasco*, 800 N.Y.S.2d 277, 281 n. 3 (N.Y. Sup. Ct. 2005) (quoting AMA Opinions of the Council on Ethical and Judicial Affairs E-9.02). The AMA's Opinion, however, has not been construed as a legal ban on such covenants. *See Awwad v. Capital Region Otolaryngology Head & Neck Group, LLP*, 856 N.Y.S.2d 22 (Sup. Ct. 2007); *Oak Orchard*, 800 N.Y.S.2d at 931, n. 3; AMA Principles § 3(f).
29. For instance, Massachusetts, Delaware, and Colorado prohibit enforcement of covenants not to compete against physicians. Mass. Gen. L. ch. 112, § 12x;6 Del. C. § 2707; C.R.S.A. § 8-2-113; *Parikh v. Franklin Med. Ctr.*, 940 F. Supp. 395 (D. Mass. 1996); *Falmouth Ob-Gyn Assocs., Inc., v. Abisla*, 417 Mass. 176, 629 N.E.2d 291 (1994)). California prohibits all restrictive covenants with certain exceptions. Cal. Bus. & Prof. Code §§ 16600–16602.5; *Bosley Med. Group v. Abramson*, 161 Cal.App.3d 284, 207 Cal. Rptr. 477 (1984).
30. *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382 (1999) (quoting *Reed, Roberts Assocs. v. Strauman*, 40 N.Y.2d 303, 307 (1976)); *Goodman v. New York Oncology Hematology, P.C.*, 957 N.Y.S.2d 449 (3rd Dep't 2012); *Gazzola-Kraenzlin v. Westchester Med. Group, P.C.*, 782 N.Y.S.2d 115 (2d Dep't 2004); *Albany Med. Coll. v. Lobel*, 745 N.Y.S.2d 250 (3d Dep't 2002); *North Shore Hematology/Oncology v. Zervos*, 717 N.Y.S.2d 250 (2d Dep't 2000); *see also Coppa, M.D. v. Lederman, M.D.*, No. 04 Civ. 399 (ILG), 2004 WL 884258 (E.D.N.Y. Mar. 11, 2004).
31. As a matter of law, New York courts will generally not enforce a covenant not to compete against an employee who has been involuntarily terminated without cause. *Arakelian v. Omnicare, Inc.*, 735 F.Supp.2d 22 (S.D.N.Y. 2010); *Cray v. Nationwide Mutual Ins. Co.*, 136 F.Supp.2d 171 (W.D.N.Y. 2001).
32. In New York, under the "employee choice" doctrine, courts will enforce (without regard to reasonableness) non-compete provisions against employees who voluntarily resign and who receive post-employment economic benefits conditioned upon compliance with the non-competition clause. *Morris v. Schroder Capital Mgmt. Intern.*, 7 N.Y.3d 616 (2006), *answering question cert. by*, 445 F.3d 525 (2d Cir. 2006).
33. The term "non-solicitation" also is sometimes used in a physician's employment contract to refer to a prohibition on solicitation of the employer's patients after the physician has left the employer's employ. In that sense, non-solicitation is synonymous with non-competition.

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Ethics Matters

By John Gaal

Q I was recently contacted by an individual who was interviewing a number of firms about possible representation in bringing a significant employment discrimination claim against a company. We met and some limited information was provided to me. The individual, however, ultimately decided on representation by someone else. A short time later, a former client of mine called to ask for my help. This former client is now an executive, it turns out, at that same company and in fact has actually been named as an aider and abettor in that employment litigation. Since I never developed a client-lawyer relationship with the plaintiff, is there any way that I, or my firm, can represent this former client?

A While it may be possible, there are a number of hurdles you have to clear.

This situation is going to be controlled by Rule 1.18 of New York's Rules of Professional Conduct. Prior to adoption of these Rules, New York's Code contained no explicit provisions dealing with our responsibilities to "prospective clients." Rule 1.18 changed that and the New York City Bar Association recently issued a detailed ethics opinion, Formal Opinion 2013-1, explaining how this Rule applies to situations like yours. These "beauty contests," whereby multiple lawyers are interviewed about possible representation, give rise to a number of issues.

The first obligation imposed by Rule 1.18 is that, even when no client-lawyer relationship results, a lawyer who has had discussions with a prospective client can not reveal information learned in that consultation nor may she use that information except in a manner permitted for information received from a former client under Rule 1.9. As Formal Opinion 2013-1 makes clear, this restriction on the use of information applies only to information that is actually provided in the consultation. In other contexts, confidential information is more broadly defined to include information gained during or relating to the representation, regardless of its source. In addition, the restriction on the use of this limited information is that it not be used to the detriment of the prospective client. Unlike confidential information of a current client, there is no restriction on the use of this information to the advantage of a third party (or the lawyer).

Not everyone who speaks with a lawyer is a prospective client under the Rule. As Formal Opinion 2013-1 points out, a person who communicates unilaterally with a lawyer without any reasonable expectation that the lawyer is willing to discuss possible representation or who communicates for the purpose of disqualifying the lawyer from handling an adverse representation is not a prospective client under this Rule and does not receive its protections. Also, the communication must relate to the possibility of representation—communications that do not relate to a particular representation (*e.g.*, introductory or general promotions calls) or social communications generally do not give rise to any duty under Rule 1.18.

Even if a lawyer has met with a prospective client and acquired some information, she may not automatically be precluded from an adverse representation involving that prospective client. In the context of an actual "former client" under Rule 1.9, a lawyer is precluded from an adverse representation in the same or a substantially related matter, without consent, regardless of the information received. Under Rule 1.18, a lawyer is precluded from an adverse representation only if the lawyer received information from the prospective client that "could be significantly harmful to that person in the matter…." Formal Opinion 2013-1 points out that whether information triggers this proscription depends on whether it "could" be significantly harmful to the prospective client—the fact that the receiving lawyer will make no actual use of that information is irrelevant. Whether information "could" be significantly harmful depends on all of the facts and circumstances of the particular situation.

If this standard is met, then the lawyer receiving the information may not undertake the adverse representation. However, unlike the rules applicable to former clients, that lawyer's firm may not be precluded from the adverse representation. Under Rule 1.18, the lawyer's firm may undertake the adverse representation provided certain conditions are met:

1. the lawyer who received information from the prospective client took reasonable steps to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client;
2. the firm acts promptly and reasonably to screen the lawyer who received the information from the prospective client from participation in the adverse representation and to protect that information from reaching those who will participate;
3. the disqualified lawyer receives no part of the fee earned by the firm from the adverse representation;
4. reasonable notice is provided to the prospective client; and
5. a reasonable lawyer would conclude that the law firm will be able to provide competent and diligent representation under these circumstances.

Formal Opinion 2013-1 makes it clear that the screening necessary to permit adverse representation by the firm might not be available in all cases:

> [T]he firm should assess its ability to implement, maintain and monitor screening procedures before undertaking or continuing the representation. In deciding whether the screen will be effective in preventing the internal flow of information about the matter, the firm should consider a number of factors, including its size, practices and organization. A firm that is large and organized in a way that facilitates preventing the flow of information (*e.g.*, separate departments or offices) may be more likely to implement an effective screen, but these factors are not dispositive and a small firm can also satisfy the requirements for an effective ethical screen, although it may need to exercise special care and vigilance. Similarly, allowing the disqualified lawyer to work on other matters with lawyers working on the screened matter may render the screen ineffective under some circumstances, but such a factor would not be dispositive.

In your case, whether you or your firm can represent your former client will depend on a number of factors. First, exactly what information did you receive and could it be "significantly harmful" to the prospective client? Second, did you limit the information you received to only that reasonably necessary to determine whether representation was appropriate? Third, can you and your firm implement an effective screen, taking into account factors such as the size of your firm, its practices and its organization? Even if you can answer all of these questions appropriately, you must still determine that a "reasonable lawyer" would conclude that you are able to provide competent and diligent representation notwithstanding these limitations, you must promptly implement the screen, and you must promptly notify the prospective client.

Endnote

1. 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.

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Accommodating Learning Disabled Employees

By Geoffrey A. Mort

I. Introduction

Representing individuals with Learning Disabilities (LD) has long presented challenges to those attorneys willing to take on such cases. Millions of Americans suffer from LD, and cases involving LD plaintiffs brought under the Americans with Disabilities Act (ADA), Rehabilitation Act, and other statutes most likely represent the tip of the iceberg in terms of LD persons who suffer some form of discrimination because of their conditions. The passage of the Americans with Disabilities Act Amendments Act (ADAAA), which took effect at the beginning of 2009, has expanded the ADA's scope and should make it less difficult to bring and successfully litigate a discrimination case on behalf of an individual with LD. A growing awareness of both the prevalence and subtleties of LD has also made it easier for persons with LD to assert their rights.

What specifically are learning disabilities? Essentially, they are disorders that affect the ability to understand or use spoken or written language, perform mathematical calculations, direct attention, or coordinate movements. Persons with LD are often not aware of their disability until they at least reach school age, and there are no known cures for LD conditions. Unlawful discriminatory treatment of individuals with LD takes the same forms as discrimination against other protected groups: termination, demotion, failure to hire, workplace harassment, and the like.

At least in its early stages, representation of an LD individual often takes the form of attempting to obtain a reasonable accommodation from an employer that will permit the employee to perform the essential functions of his or her job. Should that fail, or the employee be the subject of harassment even though he or she is satisfactorily performing his or her job responsibilities, litigation is sometimes necessary.

Before developing proposed reasonable accommodations for an LD client, counsel should obtain answers to the following questions: (1) what limitations is the LD employee experiencing at the workplace; (2) how do these limitations affect the employee and his or her job performance; and (3) what specific job tasks are problematic as a result of these limitations? Determining what reasonable accommodation to suggest to an employer depends, obviously, on the nature of the client's LD. Discussed below are frequently used accommodations for some of the most common learning disabilities.

II. Specific Reasonable Accommodations

Specific Learning Disability (SLD)

This broad and widespread disorder in using or understanding language can be addressed in many ways, depending on the nature of the SLD. Among the most common ways in which SLD manifests itself is difficulty organizing a written project, be it a report, memorandum, proposal or some other writing. Some electronic accommodations only involve a relatively moderate cost, such as Texthelp Read and Write Gold, a software program that assists with grammar and other writing issues, or speech recognition software. Other accommodations are even more basic and inexpensive. Examples include creating written forms to prompt the employee to provide needed information; allowing the employee to report or respond verbally instead of in writing; and even providing reference books such as a dictionary or thesaurus.

SLD also encompasses problems with spoken language, including following verbal directions and difficulty comprehending oral communications. Supervisors can be instructed to convey information slowly and in a quiet place, as well as to write down necessary information, follow up conversations with an email, repeat verbal instructions to make sure they are understood, and speak directly and precisely to the employee.

Dyslexia

As is the case with SLD, there are a number of frequently used accommodations for individuals with this disorder, which primarily involves difficulties with reading and reading comprehension. Some of the more effective accommodations involve technological devices, which if proposed may raise "undue hardship" objections from the employer. Nonetheless, such accommodations include voice output software, which highlights and reads aloud information on a computer screen. Word prediction software displays a list of words that typically follow a word that is entered in a document, and word completion software displays sample words after a person begins typing part of a word. Electronic or talking dictionaries and using an on-screen ruler or screen highlighting software to help focus and read from a computer screen are also useful.

Other dyslexia accommodations that are non-technological and less costly still require the employer's approval. Examples are having a supervisor or co-worker read written material to the LD employee or, where writing is involved, proofread what the employee has composed. Additionally, a supervisor or co-worker can highlight important information in a written document so that the LD employee understands what to focus on. Finally, a supervisor can orally describe what needs to be done with a

particular project or task after a written communication is sent outlining it.

As with other learning disabilities, there are a number of more simple accommodations for dyslexia that do not require the involvement or agreement of management, including discussing unclear written material with a co-worker. Those accommodations usually do not involve counsel and are beyond the scope of this article.

Auditory Perceptual Deficit

Auditory Perceptual Deficit (APD) entails difficulty receiving accurate information from one's sense of hearing. Although a person with APD has no difficulty hearing, his or her brain sometimes fails to accurately interpret what is heard. This condition can cause many workplace problems, but fortunately possible accommodations exist for most of them.

Because APD may cause affected individuals to forget or not grasp deadlines for particular projects or tasks, web-based reminder systems such as Remember-the-Milk, which sends reminders by email or text message, are available. There are telephone voice mail systems which have scheduling reminders that ring at specific times and play reminder messages. And, of course, a supervisor can meet with an LD employee on a regular basis to review deadlines and priorities. The cost of a tickler file is minimal, but placing follow-up notices in it and reviewing it daily can be very helpful.

Another problem commonly faced by APD sufferers is verbal interruption from co-workers when performing one or more tasks, as it is more difficult to correctly absorb what is being said when there are verbal messages being heard from multiple sources. Possible accommodations to address this problem are relatively simple. One can ask his supervisor to prioritize assignments and to allow work on major projects to be done when the office is quiet, for example in the early morning or on weekends. Supervisors can also permit an employee to work on only one task at a time, not beginning a new one until the current one is complete.

Individuals with APD who work in open spaces, a condition that is increasingly common, are prone to become distracted more easily than other employees because they are not always certain of the meaning or significance of what they have heard. An effective accommodation is to be moved to a location away from busy office traffic and noise. When that is not possible, there may be file rooms, storage spaces or other enclosed areas where one can work. A white noise machine may be helpful as well.

Discalculia

Discalculia, difficulty with numbers and mathematical operations, can be addressed by a number of accommodations, the majority of them reasonably priced and relatively simple. A common accommodation is a specialized calculator, most commonly talking calculators or calculators with large display screens. Fractional, decimal, statistical, scientific and construction calculators can be useful as well, depending on the nature of the mathematical tasks the employee performs. Also to be considered are talking scales and talking tape measures.

Visual Perceptual Deficit

Individuals with this disorder have difficulty receiving and/or processing information from their sense of sight. Although there are a number of accommodations for persons with this condition, most involve little or no expense or effort on the part of the employer. At least initially, an employee with Visual Perceptual Deficit will require additional time to familiarize herself with her workplace and will have an ongoing need for people to accompany her when she goes to unfamiliar places. Another accommodation is permission from management to organize one's work area so as many items as possible are kept on shelves, bulletin boards and other areas where they are in plain sight, and to color code objects and materials.

Dyspraxia

Something of an umbrella condition that involves messages from the brain not being properly transmitted to the body, Dyspraxia commonly manifests itself in a tendency to lose things frequently and in difficulty managing time. Many of the accommodations for losing items and documents are relatively simple, such as color-coding items and keeping commonly used objects in the same place, and do not require the employer's assent. One accommodation that can be requested of an employer is that common areas such as bookshelves and tool stations be kept neat and well organized. With respect to time management, two effective accommodations are to have the employee's supervisor divide assignments into smaller tasks and goals and to remind the employee periodically of important tasks or deadlines.

III. A Sample of Instructive LD Cases

The issues that most commonly arise in ADA litigation involving plaintiffs with LD are perhaps best illustrated by a review of a handful of cases from recent years. The cases discussed below involve not only requests for a reasonable accommodation but also termination, failure to promote or hire, and workplace harassment. Because the ADAAA is not retroactive, these cases, e.g., *Stephen v. W. Irondequoit Central School District,*[1] were primarily decided under the pre-amendments ADA.

A. *EEOC v. Dillon Companies, Inc.*[2]

The plaintiff in *Dillon Companies* was a supermarket clerk who suffered from what was described as a "major learning disability" that limited the major life activities of learning, speaking and reading. Nonetheless, for years he had carried out the duties of his job, such as collecting shopping carts from the parking lot, without

difficulty. On one occasion, his supervisor changed his break time "just to make him mad and see what would do."[3] The supervisor then told the plaintiff that she was going to call his mother to report his conduct and, in response, the plaintiff bumped her and disconnected the call; he was terminated that day for misconduct. The court rejected the employer's argument that the plaintiff was not substantially limited in a major life activity (he is unable to manage money or get to work on his own), and concluded that the plaintiff was "engaged in the acts for which he was terminated because of his disability,"[4] and that his evidence that other employees were not terminated following more serious offenses sufficed to defeat summary judgment. As part of a settlement of the case with the EEOC, the defendant made an $80,000 payment to the plaintiff.

B. *EEOC v. Professional Media Corp.*[5]

In this case, the plaintiff suffered from Attention Deficit Hyperactivity Disorder ("ADHD")[6] and ADP. Nonetheless, she was able to satisfactorily perform her responsibilities as a bookkeeper without a reasonable accommodation, and during the first six months of her employment her employer did not even know she had ADHD or ADP. When it learned of her condition, the employer allegedly subjected her to a severe hostile work environment which culminated in her termination. At about that same time, the employer initiated a practice of requiring new employees to sign a statement to the effect that they had no medical condition that would affect job performance and took no medication for any medical or psychological disorder that could impair job performance. The case settled, and the employer agreed in a consent decree to discontinue its practice regarding new employees and make a monetary payment to the plaintiff.

C. *Stephan v. W. Irondequoit Central School Dist.*[7]

The plaintiff in *Stephan* was a school district employee who was terminated and alleged disability discrimination and failure to provide a reasonable accommodation. The Second Circuit affirmed the district court's finding that there was insufficient evidence that plaintiff was disabled under the ADA. The court noted that the employer's records "point merely to an unspecified learning disability as opposed to a medically diagnosed impairment."[8] The plaintiff testified that she had difficultly remembering to keep appointments, pay bills and the like, possibly an indication of dyslexia. Nonetheless, the court—citing a Fourth Circuit decision holding that "occasional forgetfulness is not a substantial limitation"[9]—found that the plaintiff had not shown that she was disabled under the statute.

D. *Jones v. National Conference of Bar Examiners*[10]

The learning disability at issue in *Jones* is never specifically identified, although it is characterized as "a learning disorder that consists of information processing weaknesses specific to visual processing speed and auditory attention and memory systems,"[11] and the court suggests that the plaintiff has dyslexia. The plaintiff, a law student, sought to take the Multistate Professional Responsibility Examination (MPRE) and requested that she be allowed to take the exam using a computer equipped with screen access software (ZoomText and Kurzweil software), an accommodation she had used in college but was denied for the MPRE. The defendant offered no alternative accommodations and instead argued that the $5,000 cost of the plaintiff's computer software requests would present an undue burden. The court was not persuaded, taking note of the defendant's "significant financial resources."[12] As a result, the court granted the plaintiff's request for a preliminary injunction and ordered that she be permitted to take the MPRE using a laptop computer equipped with the software she had requested.

E. *EEOC v. Black Beauty Coal Company LLC*[13]

Like *Jones, Black Beauty* involves a request by an LD individual for an accommodation in taking an examination—a common fact pattern in ADA cases involving learning disabilities. The plaintiff in this case was a temporary employee who sought to become a permanent one, a process which involved taking and passing a written test. The *Black Beauty* plaintiff suffered from both ADHD and Dyslexia, and requested that when he took the examination it be read to him. The employer not only refused to do so, but also terminated the plaintiff. The case was later settled, with the employer agreeing that, among other things, in the future it would ensure that "reasonable accommodations are available to qualified individuals with a disability."

F. *Preston v. Hilton Central School District*[14]

Preston, a case in which the high school student plaintiff's learning disability was Asperger's Syndrome (an autism spectrum disorder), also entails a relatively common set of facts in LD cases. The plaintiff was subjected to unusually vicious harassment and abuse by his fellow students due to his disability, and brought suit under the ADA's coverage of "peer-on peer harassment cases."[15] Despite complaints by his parents, school officials had failed to take any corrective action. Finding that the school had "acted with deliberate indifference to the harassment of [the plaintiff] by his peers because of his disability,"[16] the court denied the defendants' motion to dismiss.

IV. Litigating an LD Case

Although LD cases brought under the ADA, Rehabilitation Act, New York Executive Law or other statutes have much in common with other cases involving plaintiffs with disabilities, there are differences as well that any attorney representing an LD individual should be aware of. Many conditions fall under the heading of learning disabilities, but not all—even after enactment

of the ADAAA—are disabilities covered by the statute. Counsel should be careful to avoid the fate of the plaintiff in *Stephan* and be certain that the client's condition is a covered disability under the statute.

An early conversation with the client should focus on reasonable accommodations, including whether he or she has requested one and what accommodations the client believes will enable him or her to perform the essential functions of the job. As seen from the description above of the most common learning disabilities and reasonable accommodations for them, a number of accommodations for LD individuals are relatively simple and/or low-cost. With LD clients, an early resolution of their workplace issues may well be possible.

Assuming, however, that efforts to agree upon a reasonable accommodation are not successful and the case is litigated, there are several points to keep in mind for actions with LD plaintiffs. First, attempt to anticipate the defenses likely to be raised by the employer. For example, with clients who suffer from Specific Learning Disabilities, the employer may well focus on forcing the employee to prove that he does in fact suffer from this disorder and that it impairs a major life activity. If that fails, the employer may next argue that the employee cannot perform the essential functions of the job. A key to this defense strategy may be the employee's job description, which could include skills that the plaintiff's LD prevents him from exercising. A similar approach can be expected with other forms of LD as well.

In discovery, it is helpful to press the supervisor at her deposition on her knowledge of the disorder in question and measures that can be taken to offset its effects. Supervisors may not be particularly knowledgeable about the employee's condition, and could have made decisions based on assumptions or stereotypes.

Plaintiffs with Dyspraxia or Auditory Perceptual Deficit may encounter particular problems at their depositions due to their struggles with language. This will require additional preparation time and, most likely, assistance from an expert, psychologist or physician.

Should the case go to trial, counsel would be well advised to retain an expert to explain the plaintiff's condition to the jury and point out how traits that the jury will observe on direct and cross examination can be addressed through the right accommodation so that the plaintiff can be a productive employee. If the plaintiff's condition involves problems with verbal communication, having one or more witnesses such as former co-workers can be extremely useful.

Finally, in LD cases it is helpful to portray the plaintiff as a resolute, committed individual who is determined to surmount the obstacles his or her LD has created. If the plaintiff's disorder is in any way apparent to the jury, e.g., a speech impediment, this may be the best way to deal with the conclusions of some jurors that there is something "wrong" with the plaintiff and that it is unfair for an employer to be burdened with a flawed employee. Combating jurors' biases and stereotypes about people with LD may be the greatest challenge a plaintiff's lawyer faces in trying a learning disabilities discrimination case.

V. Conclusion

Several factors suggest that LD cases under the ADA and other statutes are likely to increase. Awareness of LD will increase as more is known about this array of conditions, and that may result in more individuals acknowledging their disorders (one study showed that nearly half of all employees with LD conceal their condition at the workplace) and actively challenging workplace actions which they believe are discriminatory. At the same time, advances in technology make it increasingly likely that effective, affordable accommodations will become available and can resolve most workplace disputes before they escalate.

Endnotes

1. No. 11-300-cv, 2011 U.S. App. LEXIS 24773 (2d Cir. Dec. 13, 2011).
2. No. 09-cv-02237-zlw-mea, 2011 U.S. Dist. LEXIS 34594 (D. Colo. Mar. 30, 2011).
3. *Id.* at *2.
4. *Id.* at *13.
5. No. RWT-10CV-02689 (D. Md. Feb. 2, 2012).
6. ADHD is a condition involving inattentiveness, over-activity and/or impulsiveness. Some do not consider it to be a Learning Disability, although it arguably does impair the ability to learn in many cases.
7. No. 11-300-cv, 2011 U.S. App. LEXIS 24773 (2d Cir. Dec. 13, 2011).
8. *Id.* at *5.
9. *Id., quoting EEOC v. Sara Lee Corp.*, 237 F.3d 349, 353 (4th Cir. 2001).
10. 801 F. Supp. 2d 270 (D. Vt. 2011).
11. *Id.* at 276.
12. *Id.* at 290.
13. *No.* 3:09-cv-025 (S.D. Ind. Dec. 16, 2009).
14. 876 F. Supp. 2d 235 (W.D.N.Y. 2012).
15. *Id.* at *12.
16. *Id.* at *14.

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Enforcing the Time Limits of the New York Human Rights Law

By Andrew Marks

Federal district courts presented with untimely discrimination claims under the New York State Human Rights Law (HRL) or New York City Human Rights Law supplemental to federal Title VII or Age Discrimination in Employment Act claims commonly resuscitate the state law claims by imposing a stay of the HRL statute of limitations for the period between the employee's filing of a charge with the EEOC and the EEOC's issuance of a right to sue notice upon completion of its investigation. Such decisions, however, rarely express the foundation for a stay, and offer only a string cite to prior decisions granting a stay but likewise expressing no rationale. A revisit to the text of the HRL demonstrates that a stay pending the EEOC's investigation of a charge is neither authorized nor warranted.[1]

I. State Law Controls Tolling the Statute of Limitations on an HRL Claim

Federal courts considering state law claims are required to apply state statutes of limitations and related principles of tolling.[2] New York's Civil Practice Law and Rules (CPLR) codifies the circumstances under which limitations periods may be tolled. CPLR 204 provides that "[w]here the commencement of an action has been stayed…by a statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced." Federal courts are not free to resort to equitable grounds to stay the limitations on a state law cause of action. The Supreme Court recognized in *Board of Regents v. Tomanio*[3] that the CPLR codifies the grounds for authorizing a stay and courts may not impose tolling provisions inconsistent with the CPLR whether based on principles of judicial economy, convenience of the litigants, or otherwise.

The applicability of a CPLR 204 stay to an HRL claim was explained by the New York Court of Appeals in *Pan American World Airways, Inc. v. Human Rights Appeal Board.*[4] In *Pan American*, after employees had filed a complaint of age discrimination with the DHR, the United States Secretary of Labor (the agency empowered to enforce the ADEA at that time) commenced a federal court on behalf of the same employees. The DHR stayed its investigation during the federal case and, after the federal case was settled, dismissed the complaint for administrative convenience. On the employees' challenge, the DHR Appeal Board reversed the dismissal, reasoning that the employees had been denied due process because they were unable to pursue their state remedies under the HRL. The Court of Appeals, however, reinstated the administrative dismissal. According to the Court, the employees were not denied an HRL remedy because they could maintain the HRL action in court and such claim was not barred by the statute of limitations:

> After the dismissals [for administrative convenience], complainants could have filed in State court by availing themselves of the tolling provision for the Statute of Limitations under CPLR 204. Subdivision 9 of section 297 of the Executive law provides a stay by prohibiting the commencement of suit when a complaint has been filed with the Division. Thus, upon the filing of such a complaint and during its pendency, the Statute of Limitations is tolled until the administrative proceeding is terminated.[5]

Pan American makes plain that the stay provided by CPLR § 204(a) arises because HRL § 297(9) prohibits the commencement of the action when a complaint has been filed with the DHR.

The CPLR stay of the HRL statute of limitations cannot be divorced from the DHR proceedings and the election of remedies. An employee desiring to pursue a discrimination claim under the HRL or New York City Human Rights Law must elect between pursuing an administrative proceeding before the DHR or a civil action in court. An employee who first files with the DHR is precluded from thereafter bringing that same claim in state or federal court unless and until the DHR dismisses the complaint on the grounds of administrative convenience, on the grounds of untimeliness, or on the grounds that the election of remedies is annulled.[6] In such cases, CPLR § 204(a) provides a stay of the three-year limitations period for the period the complaint was before the DHR because the employee was prohibited by statute from commencing a court action during that time. An employee desiring to commence a court action voluntarily may withdraw his complaint from the DHR,[7] but in that case, even though he was prohibited from commencing the court action while his complaint was pending at the DHR, the HRL specifically states that the CPLR § 204(a) stay does not apply, and the claim "shall be limited by the statute of limitations in effect in such court at the time the complaint was initially filed with the division."[8]

II. Because Filing of an EEOC Charge Is Not a Statutory Prohibition Commencing an HRL Action, the CPLR Provides No Stay of the Limitations Period

In contrast to state law, where filing an administrative complaint of discrimination precludes a subsequent court litigation of that claim, an employee intending to prosecute a discrimination claim under federal law is required to exhaust the administrative remedy by first filing a charge with the EEOC and waiting for the EEOC to terminate its investigation and issue a notice of right to sue.[9] However, "in order to give States and localities an opportunity to combat discrimination free from premature federal intervention…no charge may be filed with the EEOC until 60 days have elapsed from initial filing of the charge with an authorized state or local agency, unless that agency's proceedings "have been earlier terminated.... In light of the 60-day deferral period, a complainant must file a charge with the appropriate state or local agency, or have the EEOC refer the charge to that agency."[10]

To satisfy this obligation, the EEOC has entered into work-sharing agreement with the DHR whereby, with minor exception, a charge filed with the EEOC is automatically filed with the DHR. But a proceeding initiated in the DHR pursuant to the work-sharing agreement is deemed immediately terminated (which allows the EEOC to immediately process the charge).[11] The HRL expressly provides that such referral by the EEOC does not constitute the filing of a complaint with the DHR for election of remedies purposes.[12] As a result, an employee who files a discrimination charge with the EEOC is never statutorily prohibited form commencing an HRL action in state court.[13] And, since there is no prohibition on the commencement of the HRL claim, the statute of limitations period is not stayed by operation of CPLR § 204.[14]

III. There Is No Authority for Federal Courts to Impose a Stay the HRL Limitations for the Period and EEOC Charge Was Pending

District courts granting a stay of the HRL limitations period for the time the EEOC was investigating a discrimination charge rarely express a rationale for doing so beyond a string cite to prior decisions, which likewise express no foundation for the stay.[15] Plainly a stay cannot be grounded in the HRL or CPLR. As discussed, the CPLR creates a stay when an employee files a claim with the DHR because the pendency of that administrative complaint creates a statutory prohibition on the commencement of an HRL court action. Filing a charge with the EEOC does not constitute an election of remedies precluding commencement of an HRL court action. Nor does the EEOC referral of that charge to the DHR pursuant to the work-sharing agreement constitute an election of remedies. Indeed, some federal court decisions expressly reject the contention that EEOC referral constitutes an election of remedies under the HRL § 297, thereby implicitly disclaiming the very justification for a stay under CPLR § 204.[16] But, if EEOC deferral under the work-sharing agreement was equivalent to a direct filing by an employee, there still cannot be a stay for the duration of the EEOC's investigation because the DHR's processing of a referred charge is considered immediately terminated and because the DHR precludes a stay when a party withdraws its charge in order to commence a court action.

Nor may a stay of the HRL limitations period be founded on principles of judicial economy or convenience of the parties, as such principles are rejected by the CPLR. "No section of the [CPLR] provides…that the time for filing a cause of action is tolled during the period in which a litigant pursues a related, but independent cause of action.... The New York Legislature has apparently determined that the policies of repose underlying the statute of limitations should not be displaced by whatever advantages inure, whether to the plaintiff or the system, in a scheme which encourages the litigation of one cause of action prior to another."[17] Thus, the filing of an EEOC charge does not operate to stay the limitations periods for other state law claims.[18]

Finally, there is nothing inherently objectionable about requiring a plaintiff to pursue claims of employment discrimination in two forums and the filing of an EEOC charge does not stay the statute of limitations on discrimination charges brought under coordinate federal laws.[19] In *Johnson v. Railway Express Agency*,[20] the Supreme Court held that the limitations period on a discrimination claim under § 1981 was not tolled while the EEOC processed that same charge under Title VII:

> Petitioner argues that a failure to toll the limitation period…on a § 1981 claim during the pendency of an administrative complaint in the EEOC would force a plaintiff into premature and expensive litigation that would destroy all chances for administrative conciliation and voluntary compliance.
>
> We have noted this possibility above and, indeed, it is conceivable, and perhaps almost to be expected, that failure to toll will have the effect of pressing a civil rights complainant who values his § 1981 claim into court before the EEOC has completed its administrative proceeding. One answer to this, although perhaps not a highly satisfactory one, is that the plaintiff in his § 1981 suit may ask the court to stay proceedings until the administrative efforts at conciliation and voluntary compliance have been completed.... Petitioner freely concedes

> that he could have filed his § 1981 action at any time after his cause of action accrued; in fact, we understand him to claim an unfettered right so to do. Thus, in a very real sense, petitioner has slept on his § 1981 rights. The fact that his slumber may have been induced by faith in the adequacy of his Title VII remedy is of little relevance inasmuch as the two remedies are truly independent.... We find no policy reason that excuses petitioner's failure to take the minimal steps necessary to preserve each claim independently.

Just like a claim under § 1981, an employee may file an HRL claim in court at any time and need not wait for the EEOC to complete its administrative proceedings. Granting a stay of an HRL to an employee who files an EEOC charge and consequently was never prohibited by statute from commencing an HRL court action, while denying that stay to an employee who actually files an administrative complaint with the DHR and is prohibited by statute form commencing a court action is denied such additional time, provides an unwarranted advantage based solely on the forum where the employee happens to file his administrative complaint.

IV. Conclusion

Courts that have stayed the HRL statute of limitations for the period the EEOC was investigating a discrimination charge have failed to critically consider the language of the applicable statutes or the purpose of the stay. A close analysis of New York law conclusively demonstrates that there is no justification or authority for approving such a stay. The district courts must be faithful to the determination of the New York Legislature, expounded in *Board of Regents v. Tomanio,* that the "policies of repose underlying the statute of limitations should not be displaced by whatever advantages inure, whether to the plaintiff or the system, in a scheme which encourages the litigation of one cause of action prior to another" and allow the limitations period on state law claims to expire as intended.

Endnotes

1. Although sometimes the federal and state claims overlap, the ruling can be material, for example, if the eventually filed federal lawsuit is based on adverse employment actions occurring more than 300 days before the EEOC charge was filed, includes claims against supervisors not subject to liability under federal law, seeks uncapped punitive damages under city law or is founded on a medical condition constituting a disability under state law but not under federal law.
2. James William Moore *et al.*, *Moore's Manual: Federal Practice and Procedure* § 11.64[5] (2009); *see Diffley v. Allied-Signal, Inc.*, 921 F.2d 421 (2d Cir. 1990) (In diversity cases, "state statutes of limitations govern the timeliness of state law claims," and state law "determines the related questions of what events serve to commence an action and to toll the statute of limitations.").
3. 446 U.S. 478, 486-87 (1980).
4. 61 N.Y.2d 542, 549 (1984).
5. 61 N.Y.2d at 548.
6. HRL § 297(9).
7. *See* HRL § 297(9) ("At any time prior to a hearing before a hearing examiner, a person who has a complaint pending at the division may request that the division dismiss the complaint and annul his or her election of remedies so that the human rights law claim may be pursued in court, and the division may, upon such request, dismiss the complaint on the grounds that such person's election of an administrative remedy is annulled. Notwithstanding subdivision (a) of section two hundred four of the civil practice law and rules, if a complaint is so annulled by the division, upon the request of the party bringing such complaint before the division, such party's rights to bring such cause of action before a court of appropriate jurisdiction shall be limited by the statute of limitations in effect in such court at the time the complaint was initially filed with the division.").
8. HRL § 297(9).
9. "The EEOC enforcement mechanisms and statutory waiting periods for ADEA claims differ in some respects from those pertaining to other statutes the EEOC enforces, such as Title VII." *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 392 (2008). The ADEA plaintiff can commence a federal lawsuit as soon as 60 days after her charge has been filed with the EEOC and need not wait for a right to sue notice. 29 C.F.R. §1626.18; *McPherson v. New York Department Education*, 457 F.3d 211, 214-25 (2d. Cir. 2006). Therefore, any stay of HRL claim pending the EEOC investigation of an ADEA charge should not exceed 60 days. *See* discussion in *Wolf v. PRD Management, Inc.*, 2012 U.S. Dist. LEXIS 42662 (D.N.J. Mar. 27, 2012).
10. *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 111-12 (1988).
11. *Tewksbury v. Ottaway Newspapers*, 192 F.3d 322, 327 (2d Cir. 1999) (under work-sharing agreement, state proceedings "terminated upon the EEOC's receipt of [plaintiff's] charge.").
12. HRL § 297(9) ("A complaint filed by the equal employment opportunity commission to comply with the requirements of 42 U.S.C. 2000e-5(c) and 42 U.S.C. 12117(a) and 29 U.S.C. 633(b) shall not constitute the filing of a complaint within the meaning of this subdivision."). *See also* DHR Rules of Practice 465.5 (b): "EEOC Complaints. A complaint filed by the Equal Employment Opportunity Commission on or after July 15, 1991, to comply with the requirements of 42 U.S.C. §2000e-5(c), or on or after June 16, 1992, to comply with the requirements of 42 U.S.C. §12117(a) or 29 U.S.C. §633(b) shall not constitute a filing within the meaning of Human Rights Law §297.9, and shall not require a dismissal from the division where complainant seeks to pursue the above remedies in court."
13. *See Hirsch v. Morgan Stanley & Co.*, 239 A.D.2d 466, 467, 657 N.Y.S.2d 448, (2d Dep't 1997); *Hernandez v. VK Foodshop Inc.*, No. 104780/99, 2000 N.Y. Misc. LEXIS 520, at *6-7 (Sup. Ct. N.Y. Co. 2000). *Scott v. Carter-Wallace, Inc.*, 541 N.Y.S.2d 780 (App. Div. 1st Dep't 1989), had held that an employee who files an EEOC charge which is deferred for processing to the SDHR is deemed to have filed a complaint directly with the SDHR and, for purposes of election of remedies, could not thereafter bring his HRL claim in state court. The HRL was amended in 1991 specifically to overrule the *Carter-Wallace* holding.
14. *See Lehtinen v. Bill Comm. Inc.*, No. 88 Civ. 8257, 1989 U.S. Dist. LEXIS 3707 (S.D.N.Y. Apr. 11, 1989) ("Where a complaint is filed with the NYSDHR on behalf of the claimant and not by the claimant herself, no election has been made and the claimant is free to seek relief in the courts. Thus the period during which plaintiff's complaint was pending in the NYSDHR was not a toll

under CPLR 204.”). Interestingly, *Carter-Wallace* was decided shortly after *Lehtinen.* Based on the *Carter-Wallace* holding that an EEOC referred charge did constitute an election of remedies by the employee under the HRL, the *Lehtinen* court granted reconsideration and applied CPLR § 204 to stay the HRL statute of limitations. *Lehtinen v. Bill Communications, Inc.*, No. 88 Civ. 8257, 1989 U.S. Dist. LEXIS 12471 (S.D.N.Y. Oct. 24, 1989). *Cf. Smith v. Tuckahoe Union Free School District*, 2009 U.S. Dist. Lexis 91106, at *32-33, n.9 (S.D.N.Y. Sept. 30, 2009) (declining to toll the limitations period of an HRL claim during the pendency of the EEOC investigation); *Field v. Tonawanda City School Dist.* suggests a similar conclusion. 604 F. Supp. 2d 544, 579 n. 26 (W.D.N.Y. 2008) (“Declining to find that filing an administrative charge with the EEOC tolls the…limitations applicable to Plaintiffs’ NYHRL claims is also ‘consistent with the general principle that statute of limitations schemes are exclusively the prerogative of the legislative and, absent a clear legislative declaration that any tolling is permissible, the courts should be reluctant to imply one.’”).

15. *See, e.g.*, *Capobianco v. Sandow Media Corp.*, 2012 U.S. Dist. Lexis 143337 (S.D.N.Y. 2012) (“[N]umerous courts in this circuit have recognized that the three year statute of limitations for claims arising under the NYSHRL and the NYCHRL is tolled during the period in which a complaint is filed…with the EEOC.”) (internal quotations omitted) (collecting cases).
16. *Id.*
17. *Board of Regents v. Tomanio*, 446 U.S. 478, 486-87 (1980).
18. *See, e.g.*, *Ashjari v. Nynex Corp.*, 1999 U.S. App. Lexis 13968 (2d Cir. 1999) (“[A]n EEOC charge does not toll the time for state law claims arising from the same events.”); *Chisholm v. Memorial Sloan-Kettering*, 748 F. Supp. 2d 319, 321-22 (S.D.N.Y. 2010) (limitations period for a defamation claim not tolled by EEOC charge); *Hargett v. Metro. Transit Auth.*, 552 F. Supp. 2d 393, 400 (S.D.N.Y. 2008) (“[S]tate common law claims are not tolled during the pendency of an…EEOC claim.”).
19. *St. Louis v. New York City Health and Hosp. Corp.*, 682 F. Supp. 2d 216, 237 (E.D.N.Y. 2010) (“The pursuit of Title VII administrative remedies does not toll the statute on other Civil Rights Acts claims, including those brought pursuant to 42 U.S.C. § 1983.”).
20. 421 U.S. 454 (1975).

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Labor Certification: A Complex Path to Permanent Residency

By Joseph M. Yoo

This article provides an overview of the labor certification process, including an explanation of the regulatory framework and a discussion of strategic considerations and potential pitfalls. It is an introduction for attorneys who do not normally practice immigration law, but who may nevertheless need or desire a basic understanding of labor certification rules and procedures. In addition, this article offers a useful summary for in-house counsel and human resources personnel at companies seeking to sponsor foreign nationals for permanent residency.

I. Background

Companies who employ foreign nationals in nonimmigrant (i.e., temporary) work visa status often seek to extend their employment beyond the duration normally allowed under temporary visa categories. In most instances, this will entail sponsoring the employees for lawful permanent resident (LPR) status, known colloquially as "green card" status. LPRs may reside and work in the United States indefinitely, and generally become eligible for U.S. citizenship once certain prerequisites, including length of residency, are satisfied.

U.S. immigration laws contain provisions for several employer-sponsored LPR categories. Depending on the circumstances of employment, as well as the individual's specific background and qualifications, an employee may be eligible for classification in one or more of the LPR categories. Some employees (for example, individuals of extraordinary ability) can take relatively direct and expedited paths to permanent resident status. However, individuals whose qualifications fall short of such standards must follow a more difficult route involving the labor certification process.

II. Purpose of Labor Certification

The purpose of the labor certification process is to protect U.S. workers, consisting of U.S. citizens and LPRs, from a loss of employment opportunities, or a reduction in wages and/or less favorable working conditions, due to companies engaging the services of foreign nationals. To that end, labor certification cannot be granted unless:

- The employer can demonstrate that there are insufficient qualified U.S. workers who are able, willing, and available to fill the position for which the foreign national is being sponsored; and
- Employment of the foreign national will not adversely affect the wages and working conditions of U.S. workers employed in similar occupations.

Because the principal goal of labor certification is to protect U.S. workers, jurisdiction over this process is exercised by the U.S. Department of Labor (DOL) rather than the immigration service. Labor certification is the first of three separate steps, which together comprise the green card process for most employer-sponsored cases. An employer must first obtain approval of a labor certification application before proceeding to the second and third steps. These latter steps include the employer's immigrant visa petition and the sponsored individual's adjustment of status application (or immigrant visa application), both of which are filed with the immigration service (U.S. Citizenship and Immigration Services).[1]

III. Regulatory Requirements

The current DOL regulations pertaining to the labor certification process, collectively known as the Program Electronic Review Management (PERM) rules, went into effect on March 28, 2005.[2] This section discusses three major regulatory requirements under the PERM regime.

Prior to submitting an application for labor certification, employers must conduct a good faith test of the U.S. labor market by completing several pre-filing recruitment steps.[3] This entails notifying U.S. workers of the availability of the position and requesting interested candidates to submit their resumes for consideration. (Note that for labor certification purposes, a position is considered available even though it may currently be occupied by the foreign national.)

A. Pre-filing Recruitment Steps

For professional occupations, the recruitment steps must include:

- One 30-day job order placed with the State Workforce Agency (SWA) serving the State in which the position is located;
- Two print job advertisements in the Sunday edition of the newspaper of general circulation in the area of intended employment (or, in the alternative, one posting in the newspaper of general circulation and one posting in a professional journal); and
- At least three of the following additional recruitment steps:
  - Job fairs;
  - Employer's website;
  - Job search website (other than the employer's);

- On-campus recruiting;
- Trade or professional organizations;
- Private employment firms;
- Employee referral programs;
- Campus placement offices;
- Local or ethnic newspapers;
- Radio or television advertisements.

In addition, an employer must notify its own employees of its intention to file a labor certification application. For positions covered by a collective bargaining agreement, this is accomplished by sending a letter and a copy of the application to the bargaining representative. For all other positions, the employer must post a detailed job notice in a clearly visible location at the place of employment for at least ten consecutive business days.[4]

B. Consideration of Job Applicants

Employers must review the resumes of all interested job applicants to determine whether there are any qualified U.S. workers. Under the PERM rules, candidates may only be rejected for "lawful job-related reasons." Among other things, this means that their qualifications can only be measured against an employer's "actual minimum requirements" for the position.[5] Actual minimum requirements only include qualifications that are necessary to perform the job's responsibilities in a *reasonable* manner. Therefore, U.S. workers may not be disqualified because they fail to measure up to an ideal or preferred standard. Nor may candidates be rejected because they possess lower qualifications than those of the sponsored individual.

Labor certification cannot be granted if the recruitment process reveals that qualified U.S. workers are able, willing, and available to fill the position, unless they are offered the position and decline.

C. Prevailing Wage Determinations

In order to ensure that the permanent employment of a foreign national does not adversely affect the wages and/or working conditions of U.S. workers, an employer must agree to pay the sponsored individual at least the "prevailing wage."[6] This obligation begins once the application for permanent residency is ultimately approved (i.e., all three steps in the process are completed). The prevailing wage is calculated by the DOL based on the agency's analysis of the employer's job description and requirements. This includes, among other factors, the position's responsibilities, educational and work experience requirements, specific skills, and supervisory authority.

A job that requires greater qualifications or involves unusual conditions of employment (such as an irregular work schedule) as compared to other positions in the same or similar occupation will be issued a higher prevailing wage determination. For example, a company undertakes the labor certification process for the position of Financial Analyst and indicates that applicants must possess a Master's degree in Finance. The prevailing wage for this position will be higher than normal if most other companies only require a Bachelor's degree.

IV. Strategic Considerations and Potential Pitfalls

A. Actual Minimum Requirements

A careful drafting and review of an employer's job description is of paramount importance for successfully processing a labor certification application. As discussed, employers may only reject U.S. applicants if they lack qualifications that are actually needed for reasonable job performance. As a corollary to this, candidates may not be rejected for lacking any experience, knowledge, or skill that the foreign national gained while working for the sponsoring company.[7] Stated differently, an employer may require no more of U.S. applicants than required of the sponsored employee at the time of initial hire.[8] The reasoning for this is simple: it is unlikely for a position's *actual minimum* requirements to exceed the qualifications of the individual selected by a company to fill it. Why would the company hire someone who is unable to perform the job's responsibilities in a reasonable manner?

Many in-house counsel and human resources managers are surprised when they are informed of this rule. To their thinking, the company has invested considerable time, effort, and money to develop an employee. The individual's enhanced value is precisely why the company is willing to undertake the labor certification process. Why should the company now consider filling the position with someone who has lower qualifications?

This is, of course, a valid point and an understandable sentiment. From a business perspective, it makes perfect sense. However, labor certification must be understood in the context of the DOL's principal mandate to protect U.S. workers. From the DOL's perspective, if a company is willing to hire a foreign national with a given set of qualifications, then expend resources to enhance that individual's value, why shouldn't U.S. workers be granted the same opportunity?

This tension between government goals and business interests aside, the regulations are what they are and are not likely to change in the near future. Therefore, before undertaking the labor certification process, employers should consider whether qualified U.S. workers are likely to be available. If the sponsored employee was recruited straight out of college, without significant work experience or distinguishing skills, there may be substantial cause to doubt the likelihood of success. An employer who fails to properly understand the "actual minimum requirements" rule is at risk of over-estimating the merits

of a prospective labor certification application. This, in turn, may lead the company to initiate a costly and time-consuming process with little probability of success. For employees on temporary work visas of limited duration, time wasted during the fruitless pursuit of labor certification may deter their exploration of alternative avenues for attaining LPR status or otherwise extending their stay in the United States.

B. Ability to Pay the Required Wage

The regulations require the employer to certify that the foreign national's wages will equal or exceed the prevailing wage, as determined by the DOL, upon commencement of the permanent employment.[9] In addition, the employer must attest that the company has sufficient funds to pay the required wage.[10] However, the DOL does not ordinarily seek to enforce this requirement, which is instead left to the determination of U.S. Citizenship and Immigration Services (USCIS) during its adjudication of the immigrant visa petition. The regulations of the immigration service state: "Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage."[11]

Due to the complexity of the labor certification process and its myriad requirements, employers can easily overlook the "ability to pay" requirement. Given the delegation of this task to USCIS, employers sometimes fail to plan ahead and ensure that the requirement can be satisfied at the immigrant visa petition stage. However, for reasons discussed below, it is critical that this be reviewed at the beginning of the green card process, before commencement of the pre-filing recruitment process.

As previously explained, the DOL issues its determination of the prevailing wage following an analysis of the employer's job description. Positions that require qualifications that exceed those normally found in the occupation warrant the issuance of higher prevailing wage determinations. Therefore, when drafting a job description, the employer must consider the impact that its contents may have on the prevailing wage. (Of course, this is in addition to ensuring that the description does not include qualifications that exceed the position's actual minimum requirements.)

The criteria established by the immigration service to determine whether an employer satisfies the ability to pay requirement may vary substantially from a company's own assessment of its finances. The regulations of USCIS state that employers must submit copies of either annual reports, federal tax returns, or audited financial statements.[12] For many employers, the submission of one or more of these documents is not problematic. However, it is not sufficient for employers to simply submit the required documents. The documents must also include very specific financial data that fall within narrowly established parameters. Following an Interoffice Memorandum issued by the Associate Director of Operations of USCIS in June 2004, case examiners are directed to make positive determinations on the ability to pay issue if the documents show: (a) the company's net income is at least equal to the required wage; (b) the company's net current assets are at least equal to the required wage; or (c) the sponsored foreign national is employed by the company and the company has already been paying the individual the required wage.[13] In all other cases, examiners *may* review additional forms of evidence at their discretion, but are *permitted* to deny petitions failing to meet one of the above criteria.[14]

The implementation of such narrow criteria is at odds with real world business and accounting practices. As any business person can confirm, net income and current assets are not, in themselves, dispositive of the issue of financial viability. An employer with a positive cash flow and a long history of consistently meetings its obligations will not expect its immigrant visa petition to be denied for failure to satisfy the ability to pay requirement. Yet this is hardly a rare occurrence.

To be sure, employers should not be dissuaded from including all necessary job qualifications. The rejection of any candidate for reasons not indicated in the description risks denial of the application by the DOL. However, employers must also guard against loading their position descriptions with requirements that may not actually be necessary.[15] First, doing this may cause the DOL to challenge the application for containing more than the employer's actual minimum requirements. Second, the inclusion of more requirements may lead the DOL to issue a higher prevailing wage determination—one requiring a wage that is greater than the employer is willing or able to pay, or that may cause the employer to fail the ability to pay test. This fine balancing between conflicting employer goals within the regulatory framework is one of the distinguishing hallmarks of labor certification practice.

V. Conclusion

A large majority of employer-sponsored green card applications depend on the successful completion of the labor certification process. For employers seeking to retain the services of key foreign nationals in positions for which there are insufficient domestic workers, it is a critically important component of the U.S. immigration system. This article is but a brief overview of this intricate and highly nuanced area of law. Given the target audience, it addresses only a few of the potential pitfalls that may be encountered during the application process. Nevertheless, it is an effective summary for employers, as well as attorneys in allied practice areas, who require an understanding of this complex path to permanent residency.

Endnotes

1. Upon approval of the labor certification application, the employer must submit an immigrant visa petition to demonstrate that its sponsorship of the foreign national satisfies the remaining regulatory requirements. These requirements include justifying the job requirements in light of the company's business, establishing the qualifications of the foreign national employee, and proving that the company has the ability to pay the offered wage. The third, and final, step in the process entails filing the foreign national's application for adjustment of status to show that he or she is not subject to any regulatory bar and is otherwise eligible for admission as a permanent resident. (As an alternative to filing an adjustment of status application, the individual may elect to process the final step at the U.S. Embassy in the country of his or her nationality.)
2. 20 C.F.R. Part 656.
3. 20 C.F.R. § 656.17(e).
4. The employer is also required to publish the notice in any and all in-house media, whether print or electronic.
5. 20 C.F.R. § 656.17(i).
6. 20 C.F.R. § 656.10(c)(1).
7. The regulations provide two exceptions to this rule: (a) the foreign national is being sponsored for a position that is different from the one in which he or she gained the required experience; and (b) changed circumstances now make it infeasible for the company to train a new employee for the offered position. 20 C.F.R. § 656.17(i)(3).
8. Note that it is unnecessary for an individual to be employed by the sponsoring employer during the labor certification process. However, most applications do involve the sponsorship of current employees.
9. 20 C.F.R. § 656.10(c)(1).
10. 20 C.F.R. § 656.10(c)(3).
11. 8 C.F.R. § 204.5(g).
12. 8 C.F.R. § 204.5(g)(2). In the case of an employer with more than 100 employees, USCIS may also accept a statement from the company's Chief Financial Officer confirming that the company has the ability to pay the offered wage. *Id.*
13. Memo, Yates, Assoc. Dir. Of Operations, USCIS, HQOPRD 90/16.45 (May 4, 2004), *published on* AILA InfoNet at Doc. No. 04051262.
14. *Id.*
15. Another common error is for the employer to tailor the job requirements around the foreign national's specific background and qualifications, rather than focusing on what the position actually needs.

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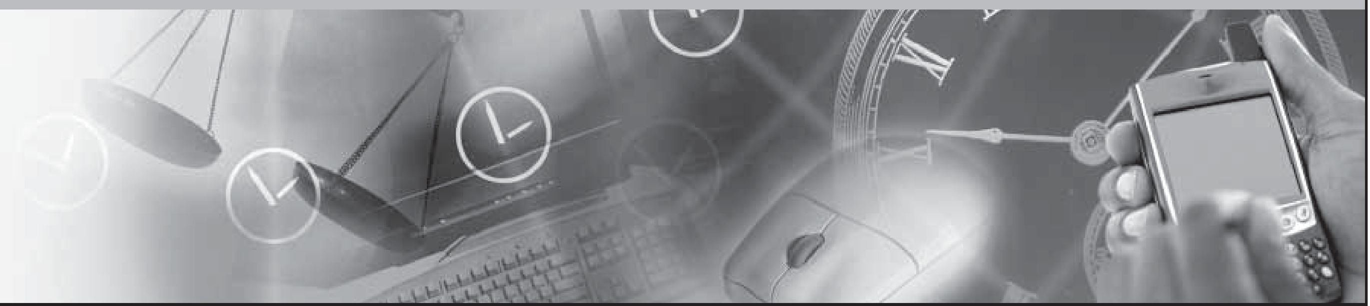

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