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L&E Newsletter

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

Message from the Chair

New Rules

Each time I read a 2009 decision of the U.S. Supreme Court pertaining to a labor or employment law case, I think of the "New Rules" segment of Bill Maher's "Real Time" program.

Donald L. Sapir

- New Rule: An employee's right to bring a lawsuit to redress a federal statutory claim of discrimination against an employer is waived if the employee's union includes statutory claims among those covered by the grievance and arbitration provision of a collective bargaining agreement. (*14 Penn Plaza v. Pyett*).
- New Rule: Mixed motive analysis does not apply to ADEA. A claimant must prove that age discrimination is the "but for" cause of the employer's adverse action against the employee, not that it "played a part." (*Gross v. FBL Financial Services, Inc.*).
- New Rule: Disparate treatment trumps disparate impact. A public employer engages in disparate treatment against persons who pass a civil service test if, without a strong basis in evidence that the test caused a disparate impact against minority applicants, it nullifies the results of a test that was disproportionately failed by minority applicants. (*Ricci v. DeStefano*).

Congress is considering some "New Rules" of its own.

- New Rule: An employer and union must submit to mediation and interest arbitration if an initial collective bargaining agreement is not concluded within 90 days after certification (proposed Employee Free Choice Act).
- Pre-dispute arbitration agreements between an employer and employee are unenforceable, including those contained in an executive's negotiated employment agreement (proposed Arbitration Fairness Act).

Save the Dates

When Section members gather for our Fall Meeting (with the NYSBA Dispute Resolution Section) October

Inside

NYSBA

2-4, 2009, at the Sagamore Hotel on Lake George, we will discuss how the "new rules" affect our clients and our practices. Government agency heads and other officials from federal, state and municipal labor and employment law related agencies will be present to schmooze with us and keep us apprised of what is going on in their agencies. Our keynote address will include former NFL players who are now lawyers for the NFL Management Council and the NFL Players Association. Besides the usual receptions, dinner, tennis and golf matches, other activities for members and their guests include a Lake George cruise, kayaking, and hiking, all during peak autumn foliage.

Our Section's Annual CLE Meeting will be held on January 29, 2010 at the Hilton Hotel in New York City, the same hotel where NYSBA and other Sections are meeting. We look forward to hosting receptions for New York's NLRB Regional Directors and miscellaneous EEO-related officials on Thursday evening, January 28, 2010.

Sponsorship opportunities are now available to law firms that would like to provide financial support for the Section's meetings and its diversity initiatives. For more information contact our Sponsorship Committee Co-chairs: Wendi Lazar (wsl@outtengolden.com), Steve Hurd (shurd@proskauer.com), or Gwynne Wilcox (gwilcox@lrbpc.com).

Achieving Balance in Our Lives

I believe in entrepreneurship, free choice, and the right of an individual to work as long and hard as he or she wants. I also believe in achieving a balance between work and personal lives.

Labor union lawyers fought for years to make a 40-hour work week the norm throughout America. During the last decade, counsel for employees breathed new life into the FLSA's requirements that time-and-a-half be paid to non-exempt workers who work in excess of 40 hours. Management lawyers counsel their employer clients to use "Best Practices" to avoid penalties for non-compliance with FLSA. While we advocate for others to enjoy the benefits of a standard 40-hour workweek, it is a rarity for exempt LEL lawyers to know what it's like to work a 40-hour week on a regular basis. For most of us, the expectation of a 40-hour workweek is neither realistic nor condoned by our employers.

Smartphone connectivity has its advantages, but exacerbates the loss of leisure time. An increasing stream of e-mail messages, the anticipation of incoming e-mails, and unrealistic expectations that immediate response be given to after-hour calls and e-mails, all leave less time to focus on personal lives free from the stress of work.

As a Section comprised of LEL lawyers from diverse constituencies, maybe we can promote positive change. LEL lawyers are repositories of experience and expertise in the workings and problems of the workplace. Solving workplace issues is what we do. Fashioning options to resolve work/life balance issues may allow us to find greater enjoyment in our work and may help us attract and retain lawyers who reject the personal sacrifice required by the 40-plus hour workweek. Please contact me at dsapir@sapirfrumkin.com and let me know if you think we, as members of the Labor and Employment Law Section, should study workplace issues that affect us and propose ways to reform our own workplaces.

Donald L. Sapir

From the Editor

The current economic and political environment has had the effect of creating a higher profile than usual for employment issues. Numerous articles abound concerning the state of the economy and the various political and legal responses taken at all levels of government to address these concerns. As noted by the New York State Department of Labor, New York State's unemployment rate in June was its highest since 1992, and the number of unemployed residents stood at 854,200, the highest number of unemployed since records began being kept in 1976. This is the context in which our field finds itself in 2009.

This context creates an even greater need to remain informed about the changes in the employment and labor law landscape. Hopefully, this publication will continue to provide members of the bar with a tool to assist them in addressing changes and developments in order to more adequately counsel their clients. I would like to try to build upon the fine work Janet McEneaney did in ensuring that the *Newsletter* is a valuable publication.

The articles in this issue present current topics of interest to both the Bar and the public. A review of pending federal legislation is discussed in articles written by Alan Koral, Elena Cacavas, and Jyotin Hamid. The contentious topic of project labor agreements is discussed by Fred Kotler, while Don Dowling and Howard Stovall address the intricacies of employment issues in the Arab Middle East. John Gaal has continued his service to the Bar by keeping us abreast of our ethical obligations. Katherine Schlindwein Vorwald's article, the third place a winner of the Dr. Emanuel Stein Memorial Law Student Writing Competition, comprehensively addressees *Weingarten* rights in New York's public sector.

There is a variety of other subjects of importance that also could have been included. In that vein, I invite anyone who wishes to contribute to contact me to share your expertise with the rest of us.

Philip L. Maier

Spotlight on the Hill: Federal Employment Legislative Developments

By Alan M. Koral*

This article addresses a number of significant federal labor and employment legislative developments, both newly enacted legislation and bills that are currently under serious consideration by Congress.

I. New Legislation

A. The Lilly Ledbetter Fair Pay Act (2009)

Congress passed the Lilly Ledbetter Fair Pay Act (LLFPA) in response to the Supreme Court's 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co.* 550 U.S. 618 (2007). Plaintiff Lilly Ledbetter worked for defendant Goodyear Tire & Rubber in Alabama from 1979 to 1998. Upon her involuntary termination in 1998, Ms. Ledbetter filed a discrimination charge with the EEOC, alleging that in the early 1980s and again in the mid-1990s she received biased performance reviews in retaliation for rejecting a supervisor's sexual advances, which in turn led to lower pay than similarly situated men (a fact of which she was unaware for many years but that continued until her termination). The Supreme Court, in a 5-to-4 split, held that Ms. Ledbetter's claims were untimely and should have been filed within 180 days—in most states it would be 300 days—of the allegedly discriminatory decisions that affected her pay. On January 29, 2009, however, less than two years after the Court rendered its decision, the LLFPA was signed into law by President Obama, reversing the *Ledbetter* decision. The statute provides that a fresh violation of the antidiscrimination laws occurs each time compensation is paid if the compensation is affected by "a discriminatory compensation decision or other practice."

The LLFPA does not do away with the concept of timeliness altogether. Congress did not disturb the Title VII and ADA statute of limitations that back pay may be collected only for up to two years preceding the filing of the EEOC charge, or the ADEA limitation of two years (three if willfulness is shown). Note, however, that this limitation on back pay does not appear to limit the time period that a jury might consider in awarding compensatory or punitive damages.

It is important to remember that, going forward, the charge of discrimination must still be filed with 180/300 days of the receipt of the discriminatory pay. If an individual has not received discriminatory compensation in the last 180/300 days, then he or she cannot file an EEOC claim.

1. Covers Most Kinds of Discrimination

Although Ms. Ledbetter's claim was for gender-based discrimination, Congress cast a much wider net in overturning the Court's decision, as the new law is not confined to gender-based pay inequities. The law applies to all categories of discrimination under Title VII, the Age Discrimination Employment Act (ADEA), the Americans with Disabilities Act (ADA), and the Rehabilitation Act of 1973. Under the newly enacted "paycheck" rule, people claiming most categories of discrimination can avail themselves of LLFPA protection for determining the timeliness of wage-based discrimination complaints. The LLFPA is intended to apply to both intentional discrimination and disparate impact claims.

2. There Are Many Ambiguities

a. Others "affected by" discrimination

Somewhat cryptically, the statute protects not only employees but also others who are "affected by" alleged discrimination that impacts an employee's pay or benefits. The scope of this addition is unknown. In a broad reading, it might create a cause of action for an employee's family members and others "affected by" the alleged pay discrimination. A less broad reading might simply allow an employee to seek damages for injuries to family members caused by the allegedly discriminatory pay, or for herself as a result of such injuries. As there is no Congressional history explaining the "and others" language, there will likely be litigation about the scope of this addition for years.

b. Application to retirement benefits

The LLFPA also apparently applies to retirement payments, as it evidently restarts the time period for filing a charge each time a retiree receives an annuity check or other retirement benefit that he or she claims was based on past discriminatory wage decisions that depressed his or her pension benefits.

c. Doctrine of laches may apply

It remains to be seen whether courts can or will use their equitable powers to apply the doctrine of laches—inexcusable delay—to some wage-based claims. The *Ledbetter* Court did not comment as to whether Ledbetter's failure to complain in a timely manner about the allegedly discriminatory evaluations—which she presumably knew at the time were discriminatory, even if she did not know their economic consequences—affected her right to claim that her pay some ten or 20 years later reflected a discriminatory act by her supervisor. It will therefore be

interesting to see how the courts handle situations where the employee seems to have known about the alleged discrimination and the allegedly discriminatory pay, but did nothing about it for years. Congress may very well have intended to deprive employers of any defense at all to the concept that discrimination renews itself each time a paycheck that is affected by a past discriminatory act is received.

d. Many questions about retroactivity

The LLFPA is retroactive to May 28, 2007, the day before the *Ledbetter* decision. As with the "and others" clause, the language of the LLFPA is ambiguous on this point: "[t]his Act . . . [will] take effect as if enacted on May 28, 2007, and apply to all claims of discrimination in compensation . . . that are pending on or after that date." This open-ended language will create significant controversy because Congress supplied no guidance as to the types of claims that would be covered by LLFPA retroactivity. The following are some possible claims: (i) alleged current pay discrimination resulting from alleged discrimination that occurred prior to May 28, 2007, and was never the subject of an EEOC charge or a lawsuit; (ii) such discrimination that was the subject of an EEOC charge that was dismissed after May 28, 2007 because of *Ledbetter*, where the plaintiff claims that she never acted on her right-to-sue letter because she was advised that going to court was futile because of the Supreme Court's decision; (iii) cases that were pending in court on May 28, 2007, and were subsequently dismissed because of the *Ledbetter* decision and no appeal was taken; (iv) cases that were pending on May 28, 2007 and were dismissed but are now on appeal; (v) EEOC charges that were filed before May 28, 2007 and were never acted on, and (vi) EEOC charges that were filed after May 28, 2007, and are still pending.

Some of these questions are answered by a 1995 Supreme Court decision, *Plaut v. Spendthrift Farm, Inc.* 514 U.S. 211 (1995). In *Plaut*, the Court limited the scope of retroactive statutes, holding that retroactivity only applies to cases that are pending or on appeal when the statute is passed; it does not apply to cases in which a final judgment was issued prior to passage, regardless of retroactivity provisions in the statute, as it is a violation of the separation of powers doctrine for Congress to dissolve final judgments. Further, "a dismissal on statute of limitations grounds [should be treated] the same way [courts] treat a dismissal for failure to state a claim, for failure to prove substantial liability, or for failure to prosecute: as a judgment on the merits." Therefore, litigations dismissed between May 28, 2007 and January 29, 2009 because of untimeliness under *Ledbetter* cannot now be revived unless the dismissals are being appealed. Only those plaintiffs who had a discriminatory compensation litigation pending or on appeal on January 29, 2009 could claim the protection of LLFPA retroactivity.[1]

This says little, however, about claims that never went beyond the EEOC. The effect of the LLFPA on EEOC decisions regarding discriminatory pay charges filed during the *Ledbetter* period has yet to be determined. When the EEOC dismisses a charge, the employee receives a notice of his or her right to sue within 90 days. The retroactivity issue arises where employees received the right-to-sue notice and chose not to do so because of the *Ledbetter* decision. As the *Plaut* Court did not broach the subject of expired time limits for filing litigation, it is possible that these employees will now be able to bring action under the LLFPA even if the 90-day window has elapsed. Only time and future litigation will resolve the many ambiguities arising from the retroactivity provisions of the LLFPA. Certainly, *Plaut* does not answer all of them, although is appears to effectively preclude the revival of cases that were finally litigated before the enactment of the LLFPA.

It is unlikely that courts will sidestep *Plaut* by applying the doctrine of equitable tolling. For equitable tolling to apply, "extraordinary circumstances" must have occurred, and there is only a remote possibility that passage of the LLFPA would meet this criterion.[2] Moreover, *Plaut* suggests that there could be constitutional problems in applying the doctrine to cases that have been finally determined.

In the months since the LLFPA's passage, the courts have strictly interpreted the statute. Previously time-barred claims are now allowed under the statute if filed within the 180/300 day window, and employees have recovered up to two years back pay for LLFPA violations. *See Gertskis v. N.Y. City Dept. of Health and Mental Hygiene*, 2009 WL 812263 (S.D.N.Y. Mar. 26, 2009); *see also Rehman v. S.U.N.Y. Stony Brook*, 596 F.Supp.2d 643 (E.D.N.Y. 2009). There are two scenarios, however, in which the courts have been disinclined to grant LLFPA protection to a plaintiff. First, where the plaintiff failed to raise a discriminatory compensation claim in conjunction with a simple failure to promote claim, the court will not apply the LLFPA. *See Rowland v. Certainteed Corp.*, 2009 WL 1444413 (E.D. Pa. May 21, 2009). Further, where the plaintiff's claim emerges from a "request for a raise that was never answered" rather than a discriminatory compensation decision, the LLFPA will not apply. *Mikula v. Allegheny County of Penn.*, No. 07-4023 (3d Cir. Mar. 24, 2009).

B. ADA Amendments Act (2008)

Since the passage of the Americans with Disabilities Act (ADA) in 1990, federal courts have interpreted the statute in a way that has narrowed the class of persons protected by it. On January 1, 2009, the ADA Amendments Act (ADAAA) went into effect, reversing this trend and broadening the scope and applicability of the ADA.

1. Broader Definition of Disability

The biggest concern over the courts' narrow ADA interpretation has been the constricted definition of the

term "disability." This concern has been addressed by the ADAAA. Under the Act, courts will be required to construe the term disability "in favor of broad coverage . . . to the maximum extent permitted" by the ADA. Moreover, the ADAAA's revised definition of disability includes those impairments that are episodic or in remission if such impairments would "substantially limit a major life activity" when active. Congress has also expressly empowered the EEOC to issue regulations on how to interpret "disability" under the ADAAA.

ADA defines a disability as a condition that substantially limits "one or more major life activities," a term that the courts narrowly interpreted. The ADAAA requires a broad definition, expressly listing the following activities as major life activities: hearing, breathing, reading, learning, caring for oneself, performing manual tasks, thinking, concentrating, communicating, and working. As long as one major life activity is impaired, that impairment is legally considered a disability.

2. Mitigating Factors

In the 1999 decision *Sutton v. United Airlines*, the Supreme Court held that the courts should consider mitigating factors (prosthetics, medication, etc.) when determining whether an individual is protected by the ADA. 527 U.S. 471 (1999). The ADAAA expressly prohibits such considerations. It bans an employer from considering any mitigating factors except "ordinary eyeglasses and contact lenses."

3. "Regarded as" Protection

Finally, the ADAAA broadens the scope of the ADA's "regarded as" clause (those who are "regarded as" having a disability, even if they are not actually disabled). Before the ADAAA, plaintiffs were required to show that their employer regarded them as being substantially limited in a major life activity. With the ADAAA, "regarded as" claimants need only now show that the employer perceived them as having a disability, regardless of whether the impairment is perceived as limiting a major life activity. The ADAAA does make a minor concession by excluding "minor" and "transitory" (lasting less than six months) impairments from the "regarded as" class.

C. COBRA

COBRA, shorthand for the Consolidated Omnibus Budget Reconciliation Act of 1986, is a federal program that allows workers to retain their health insurance benefits (normally for 18 months) after losing their jobs through voluntary or involuntary termination of employment other than gross misconduct. Now, under the American Recovery and Reinvestment Act of 2009 (ARRA), the federal government will subsidize 65% of COBRA premiums (through a tax credit to the employer) for eligible workers for up to nine months after loss of employment. The eligible employees only need to pay 35% of the premium. The subsidy lasts for nine months or until the first date that the employee becomes eligible for another group health plan or Medicare coverage. The legislation does not apply to very small businesses (those with fewer than 20 employees). Further, the COBRA subsidy phases out on a sliding scale for single individuals earning between $125,000 and $145,000, and for married couples filing jointly and earning between $250,000 and $290,000. Those individuals and couples who earned above $145,000 and $290,000, respectively, will have any subsidy they mistakenly receive subsequently recaptured as additional federal income tax.

1. Eligibility

The subsidy is only available to individuals who lost their jobs after September 1, 2008. Although primarily intended to assist people who were laid off after that date (and to those laid off up to December 31, 2009), it in fact applies to virtually anyone who lost or loses his or her job involuntarily during that time frame. The subsidy is available to terminated employees who are eligible for COBRA, which contains an exclusion for serious misconduct (there does not appear to be any further misconduct criterion for eligibility for the subsidy, although this is not completely clear). It is worth noting that the subsidy is not paid by the government directly to the employee. Rather, the employer pays 65% of the premium and then claims a tax credit from the federal government.

2. Required Notices to Employee and Ex-Employees

The subsidy is available retroactively to employees who elected COBRA and were terminated after September 1, 2008. Employers have a duty to notify these employees of their eligibility for the subsidy. Moreover, employers are required to notify any eligible employee who did *not* elect COBRA of their eligibility, and this notice should have been sent between February 17, 2009, and April 18, 2009 (a 60-day window after ARRA went into effect). If an employee elects COBRA during the 60-day period, coverage begins with the first coverage period after election, but does not go beyond the period of COBRA coverage that would have been required had the employee initially elected COBRA. Given this restriction, there would be relatively little subsidy for an employee terminated on September 1, 2008 and electing COBRA in April 2009. Nevertheless, notices should have been sent to all eligible former employees. Failure to give proper notice will likely result in a penalty requiring the employer to repay 110% of the subsidy directly to the government.

Although the case law on this subject is sparse, the Northern District of New York recently held that, for a former employee to make a COBRA claim, the prior health insurance plan under which the employee was covered must still exist. *Laselva v. Schmidt*, 2009 WL 1312559 (N.D.N.Y. 2009). If the employer therefore cancels the health plan, the federal subsidy then disappears. In *Laselva*, because the employer terminated plan

coverage by failing to pay the premiums, the employee's COBRA claims were without merit.

II. Proposed Legislation

A. The Employee Free Choice Act

The Employee Free Choice Act (EFCA) is the most important—and, to employers, dangerous—piece of labor and employment legislation being discussed by the 111th Congress. It was introduced in both the House of Representatives and the Senate on March 10, 2009. Originally introduced in 2007, the bill passed the House of Representatives but died in the Senate after several months of debate. Senate Democrats did not have the requisite 60 votes for a super-majority and thus could not obtain a successful vote for cloture. The most divisive provisions of the EFCA are the so-called "card check" provision, interest arbitration, and increased penalties for violations.

1. "Card Check" Certification

Under the current system of union certification, a union solicits endorsements from employees who show interest by signing cards or a petition. If 30% or more of the employees in a proposed collective bargaining unit sign the cards or petition, the union can then go to the National Labor Relations Board (NLRB) and request an election. If the NLRB grants an election, the company has the opportunity to either accept the union or to reject the union and present its position regarding unionization to employees over a set time period (usually one or two months). If the company rejects the union, the NLRB thereafter holds a secret ballot election. If more than 50% of the voting employees vote in favor of the union, the NLRB will then certify the union as the employees' exclusive bargaining representative. Under the EFCA, however, when a union petition is filed claiming majority employee support, the NLRB would certify the union as the employees' representative as long as more than 50% of the employees have signed authorization cards. Thus, EFCA eliminates the secret ballot election.

2. Mandatory Interest Arbitration

The collective bargaining process is also amended under the EFCA through the imposition of a mandatory interest arbitration provision for first-time contracts. Note that this provision would apply to unions certified either through secret ballot election or card-check majority. Under the EFCA, collective bargaining would have to begin within ten days of a request for bargaining (this request can be made as early as ten days after NLRB certification). After 90 days of negotiations, if an agreement has not been reached, either side can call in the Federal Mediation and Conciliation Service (FMCS). If FMCS does not mediate an agreement within 30 days, the dispute would go to binding interest arbitration unless both parties mutually agree to continue negotiating. FMCS will then appoint a neutral arbitrator, who will hear from both parties and subsequently implement a two-year contract with set terms. The EFCA does not mention how the arbitrator will determine the terms of the contract.[3]

3. Increased Penalties and Damages

Under the EFCA, perpetrators of unfair labor practices would be subject to increased penalties and monetary damages. The bill would award triple back pay for the discharge of a union supporter during organizing or first-time contracts. Further, it would levy fines of up to $20,000 for each willful or repetitive violation.

4. Prospects for Passage

The EFCA has encountered several obstacles in the past few months, however. Because the Democrats have been unable to secure the 60 requisite votes for cloture, congressional leaders for both parties have been working feverishly to find a compromise that encompasses the interests of both labor and business advocates. Sen. Dianne Feinstein (D-Cal.) has been one of the most vocal proponents of compromising, and has suggested that the amended EFCA require workers to mail in authorization cards to neutral third parties rather than handing them in at work. Others have called for increased use of mediation services during the collective bargaining process. It is unlikely, though, that the bill will ultimately pass in modified form.

B. Protecting America's Workers Act (2009)

Since 1970, the Occupational Safety and Health Act ("OSH Act") has been an important mechanism for enhancing the protection of America's workforce from workplace hazards. Since the passage of the OSH Act, employers have been expressly required to institute protections against such things as unreasonable noise, toxic chemicals, physically unsafe work, and unsanitary conditions. Additionally, whistleblower protection is in place for employees who report unsafe workplace conditions. Despite the OSH Act's safeguards, illnesses, injuries, and fatalities in the workplace still occur. As a result, Congress has introduced legislation to enhance the OSH Act: the Protecting America's Workers Act (PAWA). Now under consideration in the House, the 2009 version of PAWA is the latest in a line of drafts introduced over the past decade. While there is no certainty that the latest PAWA will pass this time around, it is widely thought that it has a stronger chance due to the change in administration and composition of the House and Senate.

The 2009 PAWA introduces measures to protect more workers, stiffen health and safety penalties, add additional whistleblower protections, and allow injured workers and their families to question and challenge determinations by the Occupational Safety and Health Administration (OSHA).

1. Expanded Coverage

The proposed PAWA also expands OSHA coverage to include state and local public employee and federal government workers, which the OSH Act did not. Moreover, PAWA would expand coverage to workers in various fields not currently covered by the OSH Act, such as those in the mining, nuclear energy, transportation, and nuclear weapons manufacturing fields.

2. Expanded Penalties

PAWA provides for the following penalties: (1) raised civil penalties as well as establishing mandatory minimum penalties for violations that involve worker deaths, (2) felony prosecutions against employers who commit willful violations that result in death or serious bodily injury, and (3) OSHA will be required to investigate *all* cases of death and serious injuries.

3. Expanded Worker Protections

PAWA also proposes to codify several OSH Act regulations by giving workers the right to refuse to do hazardous work, and also clarifies that employees cannot be discriminated against for reporting illnesses, injuries, or unsafe conditions, and brings the procedures for investigating and adjudicating discrimination complaints into line with other safety and health whistleblower laws.

4. New Right to Contest OSHA Action/Inaction

PAWA also provides rights for workers and their families to contest inaction by OSHA. Currently, the OSH Act permits OSHA to treat certain violations, which have no direct or immediate relationship to safety and health, as *de minimus*, requiring no penalty or abatement. The proposed PAWA provides workers and employee representatives the right to contest OSHA's failure to issue citations, classifications of its citations, and proposed penalties. Further, PAWA would prohibit OSHA from designating a citation as "unclassified" where an employer can avoid the potential consequences of a willful violation, the most serious violation. This is important because the OSH Act currently provides that an employer who willfully violates the Act may be assessed a civil penalty of not more than $70,000 but not less than $5,000 for each violation. The level of penalty is greatly reduced if OSHA's designation of a citation as "unclassified" instead of "willful" is permitted. Finally, the proposed PAWA clarifies that the time spent by an employee accompanying an OSHA inspector during an investigation is considered time worked, for which a worker must be compensated.

It is not clear how much, if any, of PAWA will be adopted by the House and still less clear what would happen to such legislation in the Senate.

Endnotes

1. The April 2009 case of *Gentry v. Jackson State Univ.* embodies this principle. 610 F.Supp.2d 564 (S.D.Miss. 2009). The plaintiff filed an EEOC discrimination charge on April 13, 2007 (before *Ledbetter*) and brought suit in October 2007 (when *Ledbetter* was still good law). Because of a drawn-out discovery process, however, the defendant did not move to dismiss for untimeliness, for some reason, and did not file a summary judgment motion until April 2009, when the LLFPA was the controlling law. The defendant's motion was therefore denied in regard to plaintiff's LLFPA claims.
2. For example, changes in case law do not provide a justification for sidestepping a final judgment; they do not constitute "exceptional circumstances." *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394 (1981). The extraordinary circumstances bar is set quite high.
3. For example, in Major League Baseball, the contract is determined by final offer arbitration (the arbitrator picks between two offers). The National Hockey League, however, employs compromise arbitration wherein the arbitrator can choose the terms of the contract as he or she sees fit. Interest arbitration is often found in public sector jobs where the employees (e.g., police, firefighters) are forbidden from striking.

Alan M. Koral is a Vedder Price shareholder and heads the firm's Labor and Employment Practice Group in the New York office. Mr. Koral has written and lectured extensively on labor and employment law matters. He has written numerous articles and is the author of two books, *Conducting the Lawful Employment Interview* (4th ed. 1992) and *Employee Privacy Rights* (1988), and edited Chapter 7 (on religious discrimination) of the second edition of Schlei & Grossman's *Employment Discrimination Law* (1983).

Mr. Koral was Chair of the New York State Bar Association's Labor and Employment Law Section, 2008-2009, and he has been named Vice Chair of the Employment Law Committee of the International Law Section of the American Bar Association. He is also a member of the EEO Committee of the ABA's Labor and Employment Law Section.

***My thanks to Mark S. Goldstein, a student at the Fordham University School of Law, for his invaluable assistance in preparing this article.**

The Lilly Ledbetter Fair Pay Act of 2009: A Survey of District Court Decisions in the First Six Months

By Jyotin Hamid

Introduction

The Lilly Ledbetter Fair Pay Act of 2009,[1] signed into law on January 29, 2009, was one of President Obama's top legislative priorities. The Ledbetter Act was intended principally as a specific fix to an earlier, much-maligned ruling of the U.S. Supreme Court restrictively interpreting statute of limitations issues in discriminatory pay litigation. The first six months of experience of litigation under the Ledbetter Act in the federal courts, however, suggests that the Act could have far broader implications.

The Ledbetter Act overturned a controversial 2007 decision by the U.S. Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co.*[2] In that case, a five-justice majority of the Supreme Court had ruled that a plaintiff's illegal pay discrimination suit under Title VII was time-barred, notwithstanding that the plaintiff received allegedly unequal pay within the limitations period, because the alleged initial discriminatory decision was made outside the limitations period.[3] The majority opinion was widely criticized, in part based on the observation that employees are often unaware of their co-workers' compensation and therefore are practically unable to challenge the initial allegedly discriminatory pay decision. As Justice Ginsburg argued in her dissent, the majority opinion "overlook[ed] common characteristics of pay discrimination," including the fact that "[c]omparative pay information . . . is often hidden from the employee's view." [4] Such characteristics set compensation discrimination apart from other "adverse actions 'such as termination, failure to promote, . . . or refusal to hire,' all involving fully communicated discrete acts, 'easy to identify' as discriminatory."[5] Justice Ginsburg urged Congress to correct the "Court's parsimonious reading of Title VII."[6]

In response to widespread criticism of the majority decision, President Obama and the new Congress passed the Ledbetter Act to provide that each allegedly unequal paycheck is a discrete unlawful action which, effectively, restarts the clock on the statute of limitations. Specifically, the Ledbetter Act amends Section 706(e) of the Civil Rights Act of 1964[7] to provide that:

> [A]n unlawful employment practice occurs, with respect to discrimination in compensation . . . , when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[8]

The inclusion of "other practice[s]" aside from "discriminatory compensation decision[s]" in the statutory language has the potential to expand the application of the Ledbetter Act beyond discriminatory pay decisions. For example, employment decisions about promotion, discipline, work assignments and a host of other matters all could have an impact on compensation. Under one reading of the statutory language, therefore, a plaintiff could bring a discrimination lawsuit to challenge a decision about promotion made well outside the limitations period on the grounds that each allegedly unequal paycheck resulting from that decision restarts the clock. Arguably, such an expansive reading of the Ledbetter Act would be contrary to its purpose because a discriminatory decision about promotion—unlike a decision about pay—typically would be known to the employee at the time it was made. There is in such cases, therefore, arguably less reason to excuse the plaintiff from the requirement of commencing action within the limitations period running from the date of the decision and arguably more reason to excuse the employer from the burden of trying to defend a decision made outside the limitations period.

In the first six months since the enactment of the Ledbetter Act, several courts have already begun to grapple with defining the breadth of "other practices" covered under the Act.

Congressional Debate of the Ledbetter Act

The uncertainty concerning which adverse employment actions are covered by the Ledbetter Act was foreshadowed during congressional debate of the Act. Indeed, various amendments were introduced to clarify or limit the scope of the Act, although none passed.[9] In particular, Senator Arlen Specter introduced Amendment 27 with the purpose of limiting the application of the bill to discriminatory compensation decisions, primarily through deletion of the undefined term "other practice" from the Act.[10] Senator Specter noted the potential for interpreting the Act to include discrete acts beyond pay-setting decisions, stating that:

> I think there is merit in specifying that this legislation is aimed at pay, and if you talk about other practices it is going to produce a lot of litigation because there is no definition of what the "other practices" means. For example, other practices might be promotion, might be hiring, might be firing, might be training,

> might be territorial assignment, might be transfer, might be tenure, might be demotion, place of business reassignment, might be discipline.[11]

Senator Barbara Mikulski, who had introduced the bill, argued that the Act was intended to cover situations "where a discriminatory difference in pay [was] tied to a practice like job evaluations that contributes to the employer's decision to set a worker's pay at a certain level."[12] She noted that "Ms. Ledbetter's case—and many others—show that salary determinations often rely on other discriminatory actions."[13]

Narrow Interpretations of the Ledbetter Act

Some lower courts have held that the Ledbetter Act applies only to true compensation decisions, and not to other actions, like promotion decisions, that may have some impact on compensation.

In *Vuong v. New York Life Insurance Co.*,[14] for example, the U.S. District Court for the Southern District of New York did not apply the Ledbetter Act to the plaintiff's promotion claim. In *Vuong*, the plaintiff alleged that his former employer had discriminated against him in several respects, including with respect to certain promotion decisions and the allocation of performance-based compensation as between plaintiff and his co-managing partner. In granting New York Life's motion for summary judgment, which argued that the claims were barred by the statute of limitations, the court found that the failures to promote were discrete acts of which plaintiff was aware at the time they occurred, which was more than 300 days prior to plaintiff's filing his claim with the EEOC, and were therefore time-barred.[15] The court did, however, apply the Ledbetter Act to the compensation allocation decision, noting that the defendant's untimeliness argument "is foreclosed by the new legislation" and that plaintiff's claim that the paychecks he received within the charging period would have been larger but for the discriminatory compensation decision made years earlier was the "type of claim . . . expressly declared to be timely by virtue of the recently enacted law."[16] Similarly, in *Aspilaire v. Wyeth Pharmaceuticals, Inc.*,[17] the U.S. District Court for the Southern District of New York granted defendant's motion for summary judgment, finding that certain alleged discriminatory practices, including failure-to-promote and certain scheduling decisions allegedly impacting pay, were time-barred.[18]

In *Masterson v. Wyeth Pharmaceuticals*, the U.S. District Court for the Eastern District of Virginia held that the Ledbetter Act did not apply to allegedly discriminatory promotion or transfer decisions that allegedly impacted pay. [19] The court held that the Ledbetter Act was not relevant to such questions because it "pertain[s] only to discrimination claims respecting unfair compensation, which is not an issue in this case,"[20] and "[t]herefore, Wyeth is correct that any claim of Masterson's derived from an adverse employment action arising prior to [the beginning of the charging period] (e.g., [defendant's] *refusals to promote or move Masterson . . .*)."[21]

In *Goodlett v. State of Delaware*,[22] the U.S. District Court for the District of Delaware, while finding the Ledbetter Act applicable to plaintiff's claim that he and other black employees were systematically paid less than their white counterparts because of their race,[23] held that other claims based on "hiring decisions," such as the refusal to grant plaintiff his requested lateral transfers, would have been untimely because these actions were taken prior to the charging period.[24]

In *Stewart v. General Mills, Inc.*,[25] the U.S. District Court for the Northern District of Iowa held that claims based on harassment, denial of benefits or termination decisions were not saved by the Ledbetter Act from being time-barred because the Act "pertains to discriminatory compensation, which is not an issue in the instant action and does not affect the court's analysis."[26]

In *Leach v. Baylor College of Medicine*,[27] a case involving Title VII claims based on allegations of a racially hostile work environment and discriminatory termination, the U.S. District Court for the Southern District of Texas explained its view that the Ledbetter Act did not completely overturn the Supreme Court's decision in the *Ledbetter* case, holding that "[t]he Fair Pay Act of 2009 only affects the *Ledbetter* decision with respect to the timeliness of discriminatory compensation claims."[28] The court noted that "[t]he rule set out in *Ledbetter* and prior cases—that 'current effects alone cannot breathe new life into prior uncharged discrimination'—is still binding law for Title VII disparate treatment cases involving *discrete acts other than pay*."[29] Other courts have subsequently cited to *Leach* to support the proposition that *Ledbetter* remains good law to some extent and that the Ledbetter Act should be interpreted restrictively.[30]

More Expansive Interpretations of the Ledbetter Act

In several cases, courts have been willing to apply the Ledbetter Act to adverse actions beyond compensation decisions, including decisions relating to promotions, opportunities to substitute for other employees, and the granting of tenure.

For example, in *Bush v. Orange County Corrections Department*,[31] the U.S. District Court for the Middle District of Florida held that claims based on allegedly discriminatory transfers (which resulted in a pay reduction) were not time-barred because of application of the Ledbetter Act.[32] In *Shockley v. Minner*, the U.S. District Court for the District of Delaware denied a defendant's motion to dismiss a failure-to-promote claim as time-barred, holding that the Ledbetter Act was applicable to such claims.[33] In *Gilmore v. Macy's Retail Holdings*,[34] the U.S. District Court for the District of New Jersey applied the Ledbetter Act to an alleged discriminatory decision to deny plaintiff the

opportunity to substitute for absent colleagues in a position that would have enabled her to earn higher bonuses.

The most explicitly expansive interpretation of the Ledbetter Act so far was articulated by the U.S. District Court for the Southern District of Mississippi in *Gentry v. Jackson State University*,[35] a case involving Title VII, Section 1981, and Equal Protection claims based on allegations that plaintiff's employer denied her tenure and a related salary increase because of her gender. Defendants moved for summary judgment with respect to the Title VII claim (denial of tenure) on the basis that it was untimely. The court rejected this argument, stating that although "it can hardly be denied that the denial of tenure was a 'discrete' act of which plaintiff was obviously aware,"[36] "in the court's opinion, the denial of tenure, which plaintiff has contended negatively affected her compensation, qualifies as a 'compensation decision' or 'other practice' affecting compensation within the recently-enacted Lilly Ledbetter Fair Pay Act of 2009,"[37] and therefore summary judgment based on untimeliness was inappropriate.

Conclusion

From the first six months of experience under the Ledbetter Act, it is clear that there is significant uncertainty about the scope of the Act's coverage. Until guidance emerges from the Courts of Appeals, there will continue to be uncertainty and litigation about the nature of "other practices" covered by the Act: plaintiffs will be able to cite district court precedent (including cases such as *Gentry*) to support maintaining claims based on a broad range of adverse employment actions occurring outside the limitations period, and employers will be able to cite to another line of precedent (such as the *Vuong* case) to support limiting the application of the Act only to decisions explicitly about compensation.

Endnotes

1. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111–2, § 2, 123 Stat. 5 (2009).
2. 550 U.S. 618 (2007).
3. *Id.* at 623. The Court also reasoned that a pay-setting decision is a discrete act triggering the period for filing a charge with the Equal Employment Opportunity Commission (the EEOC) under Title VII, and any claim based on that discrete act must be filed within the 180- or 300-day charging period. *Id.* at 628.
4. *Id.* at 645 (Ginsburg, J., dissenting).
5. *Id.* (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002)).
6. *Id.* at 661.
7. The Ledbetter Act makes similar amendments to the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act of 1973.
8. Lilly Ledbetter Fair Pay Act § 3.
9. For example, amendments were introduced by Senators Kay Bailey Hutchinson (S. Amdt. 25), 155 Cong. Rec. S693 (daily ed. Jan. 21, 2009) (statement of Sen. Kay Bailey Hutchinson), and Mike Enzi (S. Amdts. 28 and 29), *see* 155 Cong. Rec. S749 (daily ed. Jan. 22, 2009) (statement of Sen. Mike Enzi).
10. 155 Cong. Rec. S697 (daily ed. Jan. 21, 2009) (Statement of Sen. Arlen Specter).
11. *Id.*; *see also* 155 Cong. Rec. S758 (daily ed. Jan. 22, 2009) (statement of Sen. Arlen Specter) (explaining that "or other practices" should be stricken "because it is vague and ambiguous . . . [and] could include promotion, demotion, hiring, transfer, tenure, training, layoffs, or many other items").
12. 155 Cong. Rec. S758 (daily ed. Jan. 22, 2009) (statement of Sen. Barbara Mikulski) (noting that Senator Specter's amendment failed to address "personnel actions that still result in discriminatory wages" including job evaluations and classifications).
13. *Id.* at S757 (statement of Sen. Barbara Mikulski) ("Unfair differences in pay may be brought about not only b[y] discriminatory job evaluations, but also by discriminatory decisions to classify a job a particular way, or by discriminatory assignments to a particular location.").
14. No. 03 Civ. 1075 (TPG), 2009 WL 306391 (S.D.N.Y. Feb. 6, 2009).
15. *Id.* at *8.
16. *Id.* at *9. The court ultimately found that this claim, while timely, failed on the merits (along with the other timely claims).
17. No. 07 Civ. 952 (WCC), 2009 WL 988648 (S.D.N.Y. Mar. 30, 2009).
18. *Id.* at *8.
19. No. 3:08cv484, 2009 WL 1106748 (E.D. Va. Apr. 23, 2009).
20. *Id.* at *11 n.5.
21. *Id.* at *11 (emphasis added).
22. No. 08-298-LPS, 2009 WL 585451 (D. Del. Mar. 6, 2009).
23. *Id.* at *6.
24. *Id.* at *5. The court also found the plaintiff's Title VII retaliation claim, based on, *inter alia*, denial of promotion opportunities and inappropriate work assignments, to be time-barred. *Id.* at * 7.
25. No. 08-V-16-LRR, 2009 WL 350639 (N.D. Iowa Feb. 11, 2009).
26. *Id.* at *9 n.2.
27. No. H-07-0921, 2009 WL 385450 (S.D. Tex. Feb. 17, 2009).
28. *Id.* at *17.
29. *Id.* (emphasis added).
30. *See, e.g.*, *Maher v. Int'l Paper Co.*, 600 F. Supp. 2d 940 (W.D. Mich. 2009) (applying the reasoning of *Ledbetter* to statute of limitations analysis in context of Family and Medical Leave Act claims, while relying on *Leach* and *Vuong* to support court's refusal to apply Ledbetter Act to such claims).
31. 597 F. Supp. 2d 1293 (M.D. Fla. 2009).
32. *Id.* The court, however, granted defendant's summary judgment motion on substantive grounds.
33. No. 06-478 JJF, 2009 WL 866792 (D. Del. Mar. 31, 2009).
34. No. 06-3020 (JBS), 2009 WL 305045 (D.N.J. Feb. 4, 2009).
35. No. 3:07CV584TSL-JCS, 2009 WL 1097818 (S.D. Miss. Apr. 17, 2009).
36. *Id.* at *2.
37. *Id.* at *1.

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The Employee Free Choice Act: Balancing Power in the Workplace?

By Elena Cacavas[1]

There are striking similarities between the National Labor Relations Act (NLRA) and the Public Employees' Fair Employment Act (Taylor Law). Indeed, analogies are often drawn between the two statutes and the bodies of law they have created. Often the older NLRA has provided interpretive guidance with respect to the Taylor Law and its cases of first impression. There are, however, also significant differences, and proposed legislation to amend the NLRA would significantly expand the rights of employees and labor organizations regarding organizing and first contract negotiating efforts.

The Employee Free Choice Act (EFCA)(H.R. 1409, S. 560) is pending federal legislation which would "amend the National Labor Relations Act to establish an easier system to enable employees to form, join, or assist labor organizations, to provide for mandatory injunctions for unfair labor practices during organizing efforts, and for other purposes."[2] The legislation was introduced into both chambers of the U.S. Congress on March 10, 2009 after fierce lobbying and amid hot public and congressional debate. The legislation, however, is not "new." It was first introduced in 2003, failed to overcome a veto in 2007, and was reintroduced in 2009.

Although EFCA arguably has gotten the most attention for its union-certification provisions, which originally proposed to eliminate in many cases the secret ballot elections that have historically governed the process of certifying a bargaining agent in the private sector, there are other penalty and first-contract provisions which dramatically change existing law. This article will explore the aspects of EFCA in its original and currently revised state, make references to the Taylor Law where applicable, and examine the debates which the legislation has generated.

Currently under the NLRA, a labor organization typically becomes the exclusive representative for a bargaining unit of employees through a secret ballot election conducted by the National Labor Relations Board (NLRB). To begin the process, a petition is filed with the Board, supported by signed authorization cards representing at least 30 percent of the employees in the unit to be organized.[3] If, in the election, the union receives a majority of the votes cast, it is certified as the bargaining agent and the employer is obligated to bargain in good faith over wages, hours and other terms and conditions of employment. If, however, a majority of the votes cast are against representation, the union is not certified; that result follows even if 100 percent of the workers had signed authorization cards presumably indicating their initial support for the union.[4]

Language in EFCA, though now under revision, proposed to amend § 9(c) of the NLRA to require the NLRB to investigate any petition filed by an employee, group of employees, or any individual or labor organization which alleges that a majority (more than 50 percent) of employees in an appropriate unit wish to be represented. Under the original language, if signed, valid authorization cards from a majority of the employees in the unit are presented, and if there is no other bargaining representative presently certified or recognized as the exclusive representative of the employees in the unit, the Board would be required to certify the petitioner as the collective bargaining representative without an election. Hence, EFCA proposed to remove the secret ballot election from the certification process in many cases.

As support for EFCA dropped among Senate Democrats throughout the spring and early summer, efforts were undertaken to develop compromise language. In mid-July a half dozen senators decided to drop the card-check provision in order to help secure a filibuster-proof 60 votes. Discussion on a revised bill has considered requiring shorter campaigns, faster elections, union access to the employer's property and prohibition of "captive audience" meetings. While the card check language may be "off the table," the uncertainty of the legislation's ultimate passage and its likely reintroduction in the future, along with the fierce debate the card-check provision has generated, warrant closer scrutiny of it and its implications.

The significance of the card-check provision in the proposed legislation can perhaps best be evaluated in the context of the extent of the change it dictates, as well as arguments for and against it which have been voiced since its reintroduction earlier this year and during the debates which led to its elimination.

Majority sign-up is not a new procedure. The NLRA, since its inception in 1935, has allowed for union representation through majority sign-up (also known as "card check") so long as the employer is willing to recognize the bargaining agent on the basis of such showing of support. In fact, the original language of § 9(c) of the 1935 Wagner Act, concerning employee selection of a bargaining representative, provided that the NLRB could utilize a secret ballot "or any other suitable method" to ascertain representative status. Within a few years of the law's enactment, however, that quoted language was eliminated.

Since then the NLRB will certify a union as the exclusive representative of employees only if it is selected by a secret ballot election. In other words, an employer can lawfully refuse to bargain with a union chosen by workers through majority sign-up, even if 100 percent of them wish to be represented. As a practical matter, the vast majority of private employers will bargain with a union only after it is elected and certified and the majority sign-up rules are of little significance. Proponents of the proposed law argue that under the existing system, the choice of whether to require an election or accept majority sign up to recognize a union's status and authority is exclusively controlled by employers.

The certification-without-an-election provision now debated in the private sector, however, has been a part of practice under the Taylor Law since its inception.[5] Under § 201.9(g)(1) of the Rules of Procedure (Rules) of the Public Employment Relations Board (PERB), certification without an election will take place where the choice available to employees is limited to the selection or rejection of a single employee organization, and where a majority of employees in the proposed unit have indicated their choice by the execution of dues-deduction authorization cards signed within six months prior to the date of the Director of Representation's recommendation to certify without an election. Written objections to certification can be filed by any party within five working days after receipt of the Director's notification. Hence, under the public sector model, elections are held only when the choice available to employees within a negotiating unit includes more than one employee organization or when authorization cards evidence less than majority support.[6]

Given its long-term application in the public sector, the certification-without-an-election debate that EFCA has generated is interesting. Opponents maintain that, unlike a secret ballot election, authorization cards do not necessarily reflect an employee's wishes regarding union representation. They argue that peer pressure and the simple lack of sufficient time to consider the pros and cons of representation when an employee is asked to sign an authorization card on the spot taint the "free choice" that a decision as significant as unionization requires. Additionally, card drives are typically conducted before an employer has the opportunity to meet with employees and outline its position on unionization. Furthermore, opponents claim that there is a huge difference between an employee agreeing that a vote should take place and actually expressing his or her own preference on the representation issue. Indeed, the U.S. Supreme Court and lower federal courts have weighed in on the issue over the years, determining that the secret ballot election is the preferred method of ascertaining majority support.[7] To the proposal's adversaries, "implied choice" or "forced choice" is the direct opposite of "free choice."

Proponents of the legislation, however, are as vocal. The primary benefit identified under the earlier EFCA language was its elimination of the opportunity for employers to conduct anti-union campaigns in the sometimes lengthy period between the filing of the petition and the election. That time period, proponents argue, allows employers to hold "captive audience" meetings with workers and pressure them to vote against representation. They point to the fact that 7.4 percent of the U.S. workforce is presently represented by unions and that that figure is the lowest in the western world. According to the legislation's supporters, if employees are as disinterested in unions as the opponents of the legislation suggest to refute the 7.4 percent figure, then lawmakers should have let the legislation pass to see if the law would fail in its application as potential unit members refuse to sign cards.

One of the most high-profile supporters of the bill is President Obama, who was a 2007 co-sponsor of the legislation. In urging his Senate colleagues to pass it in its original form, he said it would "help working Americans exercise their right to organize under a fair and free process and bargain for their fair share of the wealth our country creates."[8] In April 2008, he told a labor meeting that he will make it the law of the land.[9]

In order to address the opposition's claim that the card-signing process is laden with pressure and employee misunderstanding as to its significance, so as to result in an unreliable indication of employee preference, proponents point to other provisions of EFCA aimed at informing employees of the consequences of signing. EFCA, under that prior language, would have required the NLRB to develop model language for union authorization cards that accurately and simply advises employees of the consequences of signing the card, as well as Board procedures for establishing the cards' authenticity.

To many of those in the public sector who have experienced certification without an election for decades, the more dramatic changes embodied within EFCA address first contracts and the NLRA's remedial provisions. These portions of the legislation, as of press time, remain intact.

EFCA would amend § 8 of the NLRA to facilitate achieving an initial agreement following certification or recognition of a bargaining representative. It would provide that the parties must commence bargaining within ten days of the filing of a written request by the newly certified representative. The parties would then be required to make "every reasonable effort" to sign a collective bargaining agreement. If they fail to do so within 90 days, however, either party has the right to request mediation by the Federal Mediation and Conciliation Service (FMCS). If an agreement is still not reached within 30 days thereafter, FMCS refers the dispute to an arbitration panel for a binding decision. That decision would endure for two years, unless it is amended during that period by written consent of the parties.[10]

This language is new to both the public and private sectors, with the exception of compulsory interest arbitration in limited circumstances such as agreements for police, fire, and other "essential" services. To some labor specialists, it addresses one of the greatest weaknesses of the NLRA, that being the necessity to simply go back and keep negotiating when agreement cannot be reached. Those advocates of the legislation cite a figure of 44 percent of first contracts which are not concluded. According to an MIT Sloan School of Management study of more than 22,000 union organizing drives between 1999 and 2005, only one in five cases ultimately reached a first contract.[11] Advocates also argue that the provision actually ensures the good-faith bargaining obligation, rather than infringing upon the basic tenets of freedom of contract.

Opponents of the provision, however, assert that it represents a significant change in existing law and a major infringement upon the NLRA's assurance that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession."[12] It is also viewed as a striking blow to the principle of mutual consent. As a practical matter, negotiators have opined that the 90-day period is unrealistic, particularly with respect to a first contract and potentially inflated employee expectations coming out of an election campaign. The outcome of the provision, opponents charge, will be that employers are placed in positions they cannot afford and tied to terms that jeopardize the viability of their businesses.

The third aspect of the legislation targets the NLRA's remedial provisions, which some scholars have called "an unfulfilled promise."[13] In a context of some 15,000 unlawful discharges in a year, critics of the NLRA's remedial structure challenge its delay in bringing justice to aggrieved employees and its lack of a deterrent effect. The legislation would amend the statute by granting injunctive relief for unfair labor practices (ULPs) committed by employers during organizing campaigns or first-contract negotiations, provide treble back pay for an employee subjected to unlawful discharge or discrimination in those same situations, and provide civil penalties of up to $20,000 per violation for an employer's willful or repeated violation of employees' rights during these two critical periods.

Under current law, there are no treble damages and the remedy is typically a "make whole" order. There is also no mechanism by which the NLRB Director can go directly to federal court to seek immediate reinstatement. The result is delay and a feared negative impact on union efforts to organize or negotiate. Finally, the civil penalties bring to the table the deterrent effect which proponents of the legislation call "necessary" to breathe life into the statute in the context of current conditions.

Interestingly, less opposition has been voiced to this portion of the legislation than to its other two aspects. Opponents cite general disinclination to federal court intervention and fear that the severity of the penalty scheme will deter employers from otherwise legal conduct under the NLRA for fear of prosecution.

Arguably the most intriguing debate has been that which focuses on a compromise position which seemingly is necessary for the passage of any amendment. Early discussion had some practitioners saying they would trade the compulsory interest arbitration section for the certification-without-an-election provision, taking the former off the table. Others proposed keeping secret ballot elections, but speeding up the process by imposing an election period limited to two weeks. Still others advocated the secret ballot election, a shortened campaign period and more stringent restrictions on employer conduct during election campaigns. With respect to the last point, advocates suggest prohibitions on captive audience speeches, home visits by either side, and campaigning within 24 hours of an election. Lastly, there has been discussion of broadening the application of, and authority for, a *Gissel* order, requiring an employer to recognize and bargain with a union where the campaign environment is so deteriorated that a fair election cannot take place.

The proposed amendments to the NLRA have created substantial discussion and controversy over the fundamental changes they would impose on some longstanding principles of private sector labor relations. For every advocate who suggests they would give the workforce the opportunity to establish a fair percentage of industrial democracy and fulfill the policies of § 1 of the NLRA, there are staunch opponents who argue free choice is best protected by secret elections and a bargaining process free of drastic government intervention. The debate will no doubt continue as America's workforce, employers, and both union and management professionals closely watch the future course of labor in the private sector.

Endnotes

1. This article is written by the author in her personal capacity and is not intended to present her views as a representative of the Public Employment Relations Board (PERB). This article also is not intended to support or oppose proposed changes to the National Labor Relations Act (NLRA) or any other current law.
2. H.R. 800.
3. As a practical matter, the card check usually reveals support greater than the required 30 percent and closer to 50 percent or more.
4. As discussed more fully below, a significant part of the debate over the legislation centers around the issue of whether an employee's signing an authorization card is a reliable indicator of his or her desire to actually be represented.
5. The paper, *Certification Without an Election: The New York Experience*, by PERB's Deputy Chair and Counsel William A. Herbert, recently delivered at the New York University School of Law's 62nd Annual Conference on Labor, presents a thorough discussion of certification without an election under the Taylor Law.

6. When an election is held, however, the employee organization needs only to receive a majority of the *votes cast*, not majority support based on the entire proposed unit.

7. *Gissel Packing*, 395 U.S. 575, 602 (1969).

8. Donald Lambro, *Obama Supports Union Ploy to Drop Secret Ballots*, Aug., http://townhall.com.; *Employee Free Choice Act of 2007—Motion to Proceed*, Congressional Record (GPO): pp.S8378-S8398, June 20, 2009, http://frwebgate4.access.gpo.gov/cgi-bin/waisgate.cgi.

9. Lambro, *supra* note 8.

10. The parties can also mutually agree to extend any of the provisions of this section.

11. Thomas Kochan and John Paul Ferguson, *Modernizing Labor Law*, Boston Globe, June 21, 2007, *available at* http://www.boston.com/business/articles/2007/modernizing labor law.

12. NLRA § 8(d).

13. Andrew A Peterson, *The NLRB and Equal Access to Justice: A Promise Unfulfilled*?, Labor Law Journal, 34 (May 1983), pp. 266–278.

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A Practitioner's Guide to Handling Certification/ Decertification Conferences Before PERB

Current debate regarding proposed changes to the National Labor Relations Act (NLRA) reflects concern with the delay which often affects certification/decertification procedures. Once the process in both the public and private sectors begins with the filing of a petition, the expeditious movement of that through the various required stages prompts a more timely outcome. This article examines the public sector's certification/decertification conferences and gives the practitioner a primer on how to best prepare for, and handle, this stage of PERB's procedures.

Certification, or "C," cases refer to that process by which a bargaining representative is chosen for a designated unit of employees. In certification cases, there is no incumbent representative. In certification/decertification cases, there is an incumbent representative whose status is being challenged by another representative claiming to have employee support. There are also purely decertification cases, still identified as "C" cases, in which the representation status of an incumbent is challenged without another union seeking certification. The objective of the conference in certification/decertification cases is to resolve issues regarding the petition and obtain a signed Consent Agreement embodying the terms of an election. If issues remain at the conclusion of the conference and a Consent Agreement cannot be executed, an investigation is scheduled by the conferencing Administrative Law Judge (ALJ) to address matters in dispute.

By the time of the conference, the employer should have received, and responded to, the petition for certification/decertification. A critical part of the employer's response is the list of employees in the titles in the proposed unit. That list enables the ALJ assigned to the case to compare the authorization cards submitted in support of the petition, also called the showing of interest, to the employee names to determine the sufficiency of the showing. A petition must be supported by at least 30 percent, but majority support (equal to more than 50 percent) can result in certification without an election. The employer's response also verifies the absence of any other interested parties or the need to put potential interested parties on notice; other interested parties would include recognized or certified representatives of the proposed unit or other existing units within the employer which might be appropriate for the employees in question. If there is already a recognized or certified representative of the defined unit, the case also becomes a decertification action. Typically, the employer's response raises challenges to the unit description or advises that there is no such challenge. When the unit is challenged, the standard under the law is that the unit must be appropriate, based on a community of interest.

The conference commences with the employer or other interested party raising any issues which would prevent the petition from being processed to election or certification without an election. Disputes as to the employee list, which is shared with the union, can be addressed at the election by way of challenges to the person's vote and typi-

cally do not impede the processing of the case. An exception to that rule would be if the showing of interest was so at odds with the employer's list that its sufficiency could not be determined. There might also be raised a question as to the status of the petitioner as an "employee organization" under the law. In the vast majority of cases, however, the issue which precludes moving the petition directly to an election or certification without, is the unit question. If the employer or another interested party has challenged the appropriateness of the unit, or raised any other substantive objections to the petition such as employee organization status, the case moves into the investigation mode and the petition is effectively placed on hold until there is resolution of those issues. Although the proceeding to resolve disputes regarding the petition is referred to as "investigative" within PERB and the Rules of Procedure (Rules), it functions very similarly to a hearing and effectively follows the same format. The main point of departure for an investigation from a hearing is that the case is not bifurcated to another judge and the investigative process contemplates the potential for more direct involvement, in terms of questioning witnesses, etc., by the presiding ALJ.

Where, during the conference, the parties agree that there are no issues or challenges relating to the petition, terms for an election are established. Often the first issue to be decided is whether there will be an on-site election or a mail election. In the vast majority of cases, the election is conducted by mail, which provides a window period for employees to send in their votes and avoids the complexities of multiple work sites, a particularly large unit, multiple shifts, holidays, and employee attendance issues. For purposes of the remainder of this primer, a mail election will be assumed.

In most cases it is easiest to establish the election date first and then work backward on the calendar to set other necessary dates and deadlines. The election date is the date that ballots will be counted at PERB. The only people who need to be present for that are a representative for each side and one or two people who are designated as observers by each side. At the conference, the parties need only agree on the number of observers, which is the same for all parties affected by the petition, and will have additional time to submit the names of the observers at a later date. The role of the observers in a mail election is to watch over the ballot count and to register any objections to the election.

The parties next determine the cutoff date for voter eligibility. This is usually the last pay day before the conference. This date establishes which employees will be entitled to vote and looks to those who are in the defined unit and on payroll as of the date established.

Once the cutoff date is agreed upon, the employer must use that to create an alphabetized list of names and addresses for employees who will be eligible to cast ballots. In the private sector this list is referred to as an "excelsior list." This list will be provided to PERB and the petitioner; any ballots which are cast by a person who is not on the employer's list will be subject to challenge. The parties and the ALJ at conference will determine a date by which the list, along with two sets of mailing labels for all of the employees listed, must be submitted. This date is usually within a week or two of the conference, although the deadline may be slightly longer if there is a holiday.

The next date set is the date by which the employer must post election notices and sample ballots. This must be at least five full working days before the election, but in the case of mail balloting, should be as soon as practicable after the conference to allow ample time for employees to have notice of the election and familiarize themselves with the ballot. Essentially, a notice should be posted at all locations which are typically used for other work postings and at as many sites as are necessary to reach all employees in the agreed upon unit. The ALJ will ask the employer to specifically identify the number and location of the sites. Soon after the conference, PERB will send to the employer the completed notices and sample ballots, in the number specified, along with a certification for the employer to sign and return to PERB indicating that the posting was made in a timely fashion at the locations identified at conference.

The parties next work with the ALJ to determine the date by which ballots will be mailed out. This date is usually a few weeks from the conference and several weeks before the date that ballots will be counted. Ample time must be provided to allow for mail delays, holidays, and the opportunity for replacement ballots to be sent to employees who did not receive one initially. PERB handles the mailing of the ballots. There are no "absentee ballots"; if either party knows that an employee will be away when ballots are mailed—for example, on military leave, extended vacation or at another address—the information should be shared at conference (or as soon thereafter as such becomes known) and the alternate address should be provided.

After the mailing date is set, a date for employees to call in and report that they did not receive a ballot is established, called the "call-in date." This date is usually at least one week from the initial ballot mailing and at least two weeks before the date that ballots will be counted. Employees are advised on the posted notices of the PERB telephone number and date to call if they did not receive a ballot and PERB handles this mailing, as well.

The last date set is the date by which ballots must be received. Ballots are sent to PERB's Albany office in pre-addressed envelopes, which are color-coded to facilitate collection and sorting by PERB. The deadline for receipt must be far enough from the date that ballots from the call-in are mailed out to employees, to allow time for them to cast their vote and mail the ballot back to PERB. The deadline is also at least a few days before the ballot count to enable ballots to be sent from PERB in Albany to the regional offices. Employees must sign the **outside** of the envelope where indicated or the vote will be challenged. Employees are sometimes reluctant to sign the envelope for fear that their vote will not be confidential; however, the signature is necessary for the presiding ALJ to check the envelope against the employee list. It is important for employees to understand that only the ALJ opens the envelope and is privy to the ballot contained inside.

The final issue to be addressed before a Consent Agreement is executed at the conference is how the choices on the ballot will appear. Where there is no incumbent representative, employees will be asked, "Do you want to be represented by union XYZ?" and can indicate yes or no. Where there is an incumbent union and a new union seeks to represent, employees will be asked to check a box by the name of the union they choose or a box indicating "Neither." The three choices are listed on the ballot horizontally across the page and, where there are two union choices, the parties have to agree on which spot each name will be listed. The union(s) must also indicate the exact wording and spelling that they desire on the ballot.

At the conclusion of the conference, the parties are asked to sign a Consent Agreement, which sets forth the agreed-upon unit, the cutoff date, the posting date, the number of observers, the union name and location on the ballot, and other terms of the election. The Consent Agreement is also signed by the ALJ, as Board Agent, and sent to PERB's Director of Public Employment Practices and Representation for approval. Paragraph 4 of the Consent Agreement provides that the election will be held, according to the terms agreed upon and approved, unless within ten working days from service of the Director's approval the union provides a showing of majority support (more than 50 percent) of the employees in the defined unit. If that showing is produced, then certification without an election will occur pursuant to § 201.9(g)(1) of PERB's Rules of Procedure. In the event that the petition was filed with such showing of majority support, and the showing is current (within six months of the date of the Director's approval), an additional showing need not be submitted.

Following the conference, the ALJ will send to the parties a summary of all election terms agreed to, whether reflected in the Consent Agreement or not, along with the notices for posting and the certification which the employer will sign to indicate that posting was done as prescribed. The parties will also be sent a copy of the Consent Agreement once it is executed by the Director.

Although for many seasoned practitioners the steps in a certification (and/or decertification) proceeding become rote, for those who are new to the process or who handle these matters infrequently, unfamiliarity can unduly delay an outcome. Coming to PERB for the conference on a petition with an understanding of the necessary information and the issues to be resolved moves the parties closer and faster to resolution of the representation question.

ETHICS MATTERS
New York's "New" Rules of Professional Conduct: The Essentials for Labor and Employment Lawyers—Part II

By John Gaal

[Part I of this piece appeared in the prior issue of the Section's *Newsletter* and dealt with both a general introduction of the new Rules of Professional Conduct in New York (which took effect April 1, 2009) and a more focused discussion of changes to a lawyer's obligation to maintain confidentiality. Part II continues the discussion of specific provisions of the new Rules, focusing on Conflicts of Interest, Prospective Clients, Rights of Third Persons, Communications with Represented Persons, Fairness to Opposing Party and Counsel, Lawyer as Witness, and Rules for Lawyer-Arbitrators/Mediators.

Since publication of Part I of this article, the New York State Bar Association has issued its "final" Comments to the new Rules. These Comments, which add detail and guidance to the text of the Rules, can be found at www.nysba.org.]

IV. Rules 1.7, 1.8 and 1.9 and Conflicts of Interest

Although there are some language changes in the new Rules dealing with conflicts of interest, Rules 1.7 and 1.8 do not appear to be substantively different than the former Code provisions dealing with conflicts of interests involving current clients (DRs 5-101 and 5-105). Under both, a lawyer cannot represent clients which have "differing interests" or otherwise represent a client in a context which poses a significant risk that the lawyer's professional judgment on behalf of that client will be adversely affected by the lawyer's own financial, business, property or other personal interests, unless:

- the lawyer reasonably believes that he or she will be able to provide diligent and competent representation, and
- the affected client gives informed consent.

The significant difference between the Code provisions and the new Rule comes in the form of the required consent. Under the Code, consent/conflict waivers did not have to be in writing. While the best practice dictated written consents typically, there are likely any number of situations in which lawyers did not resort to written conflict waivers. That, however, will no longer suffice. Now, all conflict waivers under Rules 1.7 and 1.8 (and 1.9 involving conflicts with former clients) must be "confirmed in writing." Rule 1.0 (Terminology) explains that "confirmed in writing" means:

- a writing from the person to the lawyer confirming that the person has given consent;
- a writing that the lawyer promptly transmits to the person confirming the person's oral consent, or
- a statement by the person made on the record in any proceeding before a tribunal.

Where it is not feasible to obtain or transmit the writing at the time the person gives oral consent, the lawyer must obtain or transmit it within a reasonable time thereafter.

As noted, the changes made in the context of concurrent representations, except for written confirmation of client consents, are not significant. What may be significant is a change that was not made. The Bar Association's proposals called for limiting conflicts to matters in which one client was "directly adverse" to another, instead of instances of mere "differing interests." (Direct adversity is the terminology of the Model Rules.) We do not yet know the significance, if any, of this. On one hand, the Bar Association's phrase "direct adversity" seems narrower than the current definition of "differing interests," which includes:

> every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest.

However, the commentary proposed by the Bar Association and the COSAC Reporter's Notes does not suggest a significant difference in scope. But because the courts did not explain why this (or any other) provision in the proposals was rejected, we are left to speculate as to what meaning, if any, to afford this rejection.

Neither the Bar Association's proposed Rules nor the Rules finally adopted by the Courts expressly address advance waivers—requesting a client to waive a conflict in advance of it actually arising and thus often before its full scope can even be identified. But the Bar Association's Comments (22 and 22A) to Rule 1.7, which were neither adopted nor even commented upon by the courts, provide a fairly detailed discussion of advance waivers. Moreover, it is a discussion which reflects fairly wide ac-

ceptance of advance waivers, especially when provided by "sophisticated" users of legal services.[1]

New Rule 1.9 deals with conflicts involving former clients. It continues the prior rule that a lawyer cannot be materially adverse to a former client in the same or a substantially related matter unless the client consents, but with the added requirement that any consent be confirmed in writing.

Of some note with regard to former clients is a change that deals with the former client's confidential information. Under the prior Code, a lawyer could not use confidential information obtained in a prior representation unless otherwise permitted by the rules or the information had become generally known. (Presumably if a lawyer could not use such information, he or she could not disclose it, although DR 5-108 did not explicitly reference disclosures.) New Rule 1.9 expressly prohibits the disclosure of a former client's confidential information, but it only prohibits a use of that information which is disadvantageous to the former client. In other words, apparently a lawyer may now use a prior client's confidential information to the advantage of a new client (or to his or her own advantage), provided that use does not disadvantage the former client.

V. Rule 1.18 and Prospective Clients

Although there have been numerous ethics opinions and court cases dealing with the confidentiality of information imparted to a lawyer by a prospective client, as well as whether such disclosures provide a basis for disqualification in the event a lawyer seeks to represent a party adverse to a prospective client, under the Code there was no Disciplinary Rule which dealt with this issue. *See generally* ABA Formal Opinion 90-385; New York City Opinion 2001-01 (2001), dealing with confidentiality, and Nassau County Opinion 98-9 (1998), *Desbiens v. Ford Motor Co.*, 81 A.D. 2d 707 (3d Dept. 1981); *Ulrich v. The Hearst Corp.*, 809 F. Supp. 229 (S.D.N.Y. 1992), dealing with disqualification.

New Rule 1.18 remedies this omission and provides that a lawyer shall not use or reveal information learned in a consultation with a prospective client except as would be permitted with respect to information obtained from a former client. In other words, a lawyer may not reveal that information nor can he or she use it to the disadvantage of the prospective client, although the lawyer apparently may otherwise use it to the advantage of another client.

A prospective client is defined as one who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter. The new Rule specifically provides that one who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, or one who communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation, is not a prospective client for purposes of this Rule.

Rule 1.18 also provides that a lawyer who has had discussions with a prospective client may not represent another client with interests materially adverse to that prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in that matter, unless the lawyer has consent, confirmed in writing, from all affected parties.

Moreover, other lawyers in that lawyer's firm will be disqualified from representing another client in a materially adverse matter that is substantially related to the prospective client's matter *unless*:

- the lawyer receiving the "harmful" information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client;
- the firm acts promptly and reasonably to notify others in the firm that the lawyer is screened from participating in the representation of that new client;
- the lawyer gets no part of any fee earned from that representation;
- written notice is promptly given to the prospective client; and
- a "reasonable lawyer" would conclude that the law firm will be able to provide competent and diligent representation notwithstanding these circumstances.

This new Rule obviously puts a premium on firms keeping records of prospective clients for conflicts-checking purposes, so that if it does find itself in a position to represent an adverse party in a substantially related matter, it can take advantage of these screening provisions.

VI. Rule 4.4 and Respect for Rights of Third Persons

A common dilemma faced by lawyers is the handling of confidential information mistakenly sent to them by an opposing party or counsel—the misdirected fax or e-mail. Although the Code did not expressly address how these situations should be handled, numerous ethics opinions over the years did. While those authorities have not been of one view, the "majority" view seems to be that upon realizing the inadvertent receipt of confidential information, the lawyer should read no further, advise the sending person of the receipt and, at least sometimes, return the misdirected materials or otherwise follow the sender's instructions with respect to those materi-

als (including instructions to return, destroy or not use the materials). *See generally* ABA Formal Opinion 92-368 (since withdrawn) and New York County Opinion 730 (2002) (following ABA approach) *but see* New York City Opinion 2003-04 (2003) (following ABA approach only if the lawyer is made aware that the material was inadvertently sent prior to reviewing it, and requiring only notice to the sender when the material is reviewed prior to any advance warning that the material was inadvertently sent).

New Rule 4.4 now explicitly addresses this issue, but does not necessarily provide much guidance to lawyers. Specifically, Rule 4.4 provides that a lawyer who receives a document relating to the representation of the lawyer's client and who knows or reasonably should know that the document was inadvertently sent must promptly—but merely—notify the sender of that receipt. (Interestingly, the Rule is not limited to "confidential information," but rather covers any "document" relating to the representation of a lawyer's client.) As a matter of ethics, this Rule imposes no requirement that the recipient refrain from further review, that the material be returned, that the sender's instructions be followed, that the material not be used, etc. It only requires that the sender be notified.

Having said that, it is important to understand that if the document in fact contains attorney-client privileged information and the lawyer keeps reading beyond what is necessary to realize he or she is not the intended recipient, then the lawyer may still be at risk that a court will disqualify the lawyer, or otherwise impose sanctions and / or preclude evidence. *See, e.g., State Compensation Ins. Fund v. WPS, Inc.*, 82 Cal. Rptr. 2d 799 (Cal. Apps. 1999) (sanctions); *Spears v. Fourth Court of Appeals*, 797 S.W. 2d 654 (Texas 1990) (disqualification); *In re Shell Oil Refinery*, 143 F.R.D. 105 (E.D. La. 1992) (order precluding use of information). Thus, before a lawyer keeps reading, he or she should make sure to see if in the relevant jurisdiction inadvertent disclosure is a waiver of the privilege. If not, the prudent course may be to not read further without first seeking court intervention.

Rule 4.4 is silent with respect to the intentional, albeit perhaps improper, receipt of an opposing party's confidential information. A number of jurisdictions have adopted the view previously expressed by the ABA in Formal Opinion 94-382 (since withdrawn): refrain from further review of the materials upon learning of their confidentiality, notify the adverse party or their lawyer of the receipt and either follow their instructions or seek court intervention for a resolution of proper disposition. *See* NYSBA Formal Opinion 700 (1998). When the ABA added Model Rule 4.4 (identical to New York's Rule 4.4) to its Model Rules in 2002, it withdrew Formal Opinion 94-382, reasoning that in light of the fact that Model Rule 4.4 only addresses inadvertent receipt of materials, a lawyer is under no general ethical constraints with respect to how he or she deals with materials intentionally provided to him or her (unless, of course, some other law provides differently), and not even notice to the other party is required. We simply do not know whether similar reasoning will now apply in New York in light of Rule 4.4's identical scope.

VII. Rule 4.2 and Communications with Represented Persons

Rule 4.4 provides no significant substantive change from the prior Code, DR 7-104 (A), which prohibits direct communication between a lawyer and another party who is represented by counsel with respect to the matter of that representation. Nor is there any change in the Rule which would alter who, in an organizational context, is considered represented by virtue of the organization's representation by counsel. Similarly, there is no change in the circumstances in which a client may communicate directly with an opposing party who is represented by counsel.

Rule 4.4 also carries forward, exactly, the provisions of DR 7-104 (B), which permit a lawyer to cause a client to communicate directly with a represented party, and to fully assist that client with those communications, provided the lawyer has given reasonable advance notice to that other party's lawyer. Interestingly, the Bar Association's proposal called for eliminating the need to provide advance notice to opposing counsel before causing a client to engage in and assisting a client with direct communications, but the courts failed to include this change.

VIII. Rule 3.4 and Fairness to Opposing Party and Counsel

Rule 3.4 generally continues to prohibit a lawyer from:

- suppressing any evidence lawyer or client has a legal obligation to produce;
- knowingly using perjured testimony or false evidence;
- concealing or knowingly failing to disclose that which the lawyer is required by law to reveal;
- participating in the creation or reservation of evidence when the lawyer knows, or it is obvious, that the evidence is false, or
- knowingly engaging in other illegal conduct or conduct contrary to the Rules.

Of some significance, this Rule also continues DR 7-105's prohibition (which has no explicit counterpart in the Model Rules) that a lawyer will not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter. The Bar Association had proposed prohibiting threats of criminal charges only if doing so were unlawful (e.g., extortion),

and would have otherwise permitted them even "solely" for the purpose of gaining an advantage in a civil matter. The courts rejected this proposed change, and the provision remains unchanged.

This continuation includes keeping the existing language, which only prohibits threats of "criminal" charges. Given NYSBA Formal Opinion 772, which concluded that this very specific language does not apply to non-criminal charges (such as professional misconduct charges), presumably the Courts intended to continue this narrow interpretation as well.

Also of some significance is another proposed change that the courts rejected in connection with Rule 3.4. Model Rule 3.4 contains a provision which prohibits a lawyer from even requesting a person other than a client to refrain from voluntarily giving relevant information to another party unless that person is a relative, employee, or agent of the client (and then only if the lawyer believes that that other person's interests will not be adversely affected by refraining to provide that information). There was no similar provision in the Code. The Bar Association proposed adding this Model Rule provision to Rule 3.4, with the modification that a non-cooperation request could also be made to a former employee of a client or to someone who is contractually obligated or otherwise owes a legal duty to the client to refrain from disclosing certain information. The courts rejected this proposal as well, suggesting that a lawyer may request anyone to refrain from voluntarily providing information to other side.

IX. Rule 3.7 and Lawyer as Witness

Under Code provisions DR 5-102 (A) and (C), a lawyer could not be both an advocate before the tribunal and a witness on a significant issue for his client (except in a few narrow situations, i.e., an uncontested matter, testimony that relates to a fee, etc.). So if a lawyer "had to be" a witness for his client, he could not advocate before the tribunal. This prohibition did not prevent the lawyer's firm from appearing as an advocate on behalf of the client, nor did it prevent the lawyer from participating in non-advocacy matters associated with the representation (e.g., discovery, outside presence of court). *See* Gross, *Amendments to the New York Code of Professional Responsibility, Part III,* N.Y.L.J. (March 12, 1990); *Conigliaro v. Horace Mann School*, 1997 U.S. Dist. LEXIS 5169 (S.D.N.Y. 1997); Nassau County Opinion 92-37 (1992).

New Rule 3.7 does not substantively change this outcome in that it continues to prohibit a lawyer from acting as "advocate before the tribunal" in any matter in which he or she is "likely" to be a witness on a significant issue of fact (except for basically the same exceptions).

DR 5-102 (B) and (D) also provided that if a lawyer "ought to be called" as witness other than on behalf of his client—i.e., by the other side—and his or her testimony might be prejudicial to the client, neither the lawyer nor his or her firm could continue to represent the client, at all (i.e., in an advocacy role or otherwise).

New Rule 3.7 continues to preclude any lawyer in a firm from advocating before the tribunal on behalf of a client if he or she is likely to be called as a witness (other than on behalf of the client) on a significant issue, and his or her testimony may be prejudicial to the client. But in a potentially significant change from the Code under the new Rules, the non-testifying members of the firm are not necessarily barred from continuing to represent that client in a role other than as advocate before the tribunal.

However, in no case may the firm continue representation, as an advocate or otherwise, unless doing so is consistent with Rule 1.7. Rule 1.7 prohibits representation of a client where there is a significant risk that the lawyer's professional judgment will be adversely affected by the lawyer's own financial, business, property or other personal interests. Certainly in a case in which another lawyer in the firm is likely to testify—and especially if that testimony is likely to be prejudicial to the firm's client—a lawyer must at least assess whether his professional / personal relationship to that testifying lawyer is such that he or she cannot continue to represent the client even in a non-advocacy role. And if he or she can pass this test, the client must consent, confirmed in writing.

X. Rules 1.12, 2.4 and 8.3 and Arbitrators and Mediators

Two provisions of the new Rules explicitly address issues related to lawyers who act as arbitrators, mediators and / or third party neutrals. First, Rule 1.12 provides that unless all parties give informed consent, confirmed in writing, a lawyer cannot represent anyone in connection with a matter in which the lawyer participated personally and substantially as an arbitrator, mediator or third party neutral. Although new, there is nothing surprising about a prohibition against moving from the role of arbitrator / mediator / third party neutral to the role of an advocate in the same matter without the consent of all parties. This Rule, however, would permit such a lawyer's firm to serve as an advocate, provided the arbitrator / mediator / third party neutral lawyer is screened from the firm's representation, receives no part of the fee from that representation, written notice is promptly given to the parties and any appropriate tribunal, and there are no other circumstances in the particular representation which create an appearance of impropriety.

Rule 1.12 also provides:

> A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as . . . an

arbitrator, mediator or other third party neutral.

Presumably this provision is meant to prohibit an arbitrator / mediator / third-party neutral from seeking a job with a party or lawyer of a party where that party / lawyer is involved in a matter pending before that person in their role as arbitrator, mediator, or third-party neutral. However, the provision may be subject to an even broader interpretation. For example, if a lawyer is serving as an arbitrator in matter A, can he or she have discussions with one of the lawyers involved in that arbitration regarding his or her availability to serve as an arbitrator in an upcoming unrelated matter (including on behalf of entirely different parties)? Can he or she discuss with such a lawyer his or her availability to serve on a permanent arbitration panel being negotiated in a collective bargaining agreement for a different employer and union? Or would that constitute a negotiation for employment? Would that arbitrator's simple appearance on an AAA panel for another case involving one or more of the lawyers now appearing before him or her be enough to constitute a "negotiation" for these purposes? While it should be appropriate to assume that the latter situation—merely showing up on another AAA panel or even coming up as the "next" arbitrator in line under a previously negotiated permanent panel list—does not trigger an issue under Rule 1.12, literally it does not appear that an arbitrator could otherwise engage in any conversation with a lawyer appearing before him or her about his or her ability to serve in any other matter.

Rule 2.4, titled "Lawyer Serving as Third Party Neutral," expressly provides that a lawyer serving as an arbitrator, mediator or other third party neutral must inform unrepresented parties that the lawyer / neutral is not representing them. That Rule further provides that when the lawyer / neutral knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer must explain the difference between the lawyer's role as a third party neutral and a lawyer's role as an advocate who represents a client.

Rule 8.3 deals with reporting attorney misconduct. Under DR 1-103 of the Code, all lawyers were subject to a requirement to report another lawyer who we knew had committed a violation of the Rules which raised a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer, unless that knowledge was itself a client confidence. Rule 8.3 continues this requirement without change.

The Bar Association had proposed that lawyers serving as arbitrators, mediators or other third party neutrals be excluded from this reporting obligation if their information about another lawyer was gained in a confidential arbitration / mediation proceeding. The courts rejected this exception. Consequently, a lawyer-arbitrator / mediator / neutral, who in the course of that proceeding acquires knowledge that another lawyer has committed an ethical violation that raises a substantial question as to that lawyer's fitness to practice, is obligated to report that lawyer to the appropriate disciplinary authorities. It is not clear how this Rule will be applied in situations where a mediation session, for example, is considered "confidential" by statute or court rule, as opposed to a matter of professional ethics. Presumably, this reporting obligation is not intended to override such a statutory or similar obligation, but there is no explicit exception in the new Rules.

XI. Conclusion

The new Rules of Professional Conduct mark a new chapter in professional responsibility in New York. On the one hand, these Rules will bring New York practice into greater conformity with the rest of the country. In other respects, however, these Rules retain a special "New York flavor," which continues to mean lawyers practicing in New York cannot simply assume that our rules are like those which govern everyone else.

Unfortunately, the courts' adoption of these Rules—most identical to those proposed by the Bar Association, but some not—without any explanation, as well as their failure to adopt or otherwise even address the supporting Comments provided by the Bar Association, leave New York lawyers in the dark about a number of new provisions.

Endnote

1. Various ethics opinions issued under the Code have recognized generally the potential validity of advance waivers. *See* NYSBA Formal Opinion 823 (2008); New York County Opinion 724 (1998); New York City Formal Opinion 2006-01 (2006). The Comments to Rule 1.7 provide further support for their use.

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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.

Legal Risks Arising from "Floating Employee" Arrangements in the Arab Middle East

By Donald C. Dowling, Jr. and Howard L. Stovall

Multinational companies face various legal obstacles and economic costs when doing business in the Arab Middle East. As a result, an increasing number of multinationals are considering a different approach to operating within the Arab Middle East: hiring one or more employees physically located in the relevant Arab jurisdiction, even though the multinational employer itself does not maintain a formal office in that country. In other words, a* non-resident *employer hires a* resident *employee, an arrangement we might describe as "floating employment," because the in-country personnel ("floating" employees) are not anchored to any in-country legal or physical infrastructure. These "floating employee" arrangements raise a number of employer legal issues.

Any short list of the biggest boom towns on Earth right now would certainly include such Arabian Gulf locales as Dubai, Abu Dhabi, and Qatar. Governments and businesses in the oil- and gas-exporting countries of the Arab Middle East, awash in "petro-dollars," have become increasingly attractive customers for multinational businesses seeking to sell a wide range of products and services.

Of course, many major multinationals have been operating across the Middle East for decades. In most cases, these are the multinationals with the resources to enter new markets without having to take any shortcuts. The huge multinationals can usually formally establish a local branch or subsidiary, get it fully licensed, and staff a legally compliant local operation that meets all the requirements of local corporate, tax, employment, and immigration law. Indeed, entering a new local market in this way—formally establishing a registered commercial presence—is almost always the best practice.

But as many markets in the Arab Middle Eastern become increasingly attractive to foreign businesses, many smaller multinationals (those "new-to-market" for the Arab Middle East) are taking their first steps into the region. These smaller multinationals may seem reluctant to make the significant commitment reflected in a formal, registered, commercial presence—at least until market potential actually results in some positive commercial success.

The economies of many "business friendly" countries in the Arab Middle East are overheated, with skyrocketing inflation, which further increases the cost of doing business. Many countries in the region are still accurately described as "high risk, high reward" markets, offering not only opportunities but also restrictions, complexities and hurdles, at least in some instances. U.A.E. law, for example, currently requires that any locally incorporated subsidiary be 51+% owned by U.A.E. locals.

Multinationals might prefer to establish a local branch in the region, but the procedural hurdles for setting up such an office can sometimes be daunting. In the U.A.E., for example, a foreign company must appoint (and compensate) a U.A.E. "sponsor" in order to establish a branch office.

In the face of obstacles and costs like these, some (particularly smaller, new-to-market) multinationals may try to take baby steps into the Arab Middle East, seeking to avoid the "all-in" model of formally registering a local presence. One such approach that seems under consideration increasingly frequently in recent years is placing employees physically in the target country within the region, even though the multinational employer itself does not maintain a formal registered presence in-country. In other words, a *non-resident employer* hires (or "seconds") a *resident employee* in a particular country in the Arab Middle East. We might call this arrangement "floating employment," because the in-country staff ("floating employees") are not directly anchored to any local legal entity or in-country physical infrastructure maintained by the employer.

These arrangements, unfortunately, are legally risky.

"Floating Employees" Working for Foreign Employers

From a practical perspective, the marked upswing in proposed "floating employee" arrangements should come as no surprise: technology greatly facilitates this strategy. In the old days (say, up to the 1970s and 1980s), a multinational's in-country local manager used to need dedicated office space, a secretary, and other support staff. Today's "floating employee," on the other hand, can work efficiently from home, relying on computer / e-mail / Internet, video conference software, cell phone, and express courier deliveries.

But while technology may facilitate floating employee arrangements, the legal concerns here should give pause, especially because *advances in technology mean enhancements in enforcement by local regulators.* Adopting a floating employee arrangement in the Arab Middle East (employing someone there without a local in-country employer entity) is usually *not* a best practice. Indeed, a multinational generally should not hire an employee resident and working inside a country in the region unless the employing entity is (or shortly will be) registered to do business in that country.

The "floating employee" arrangement raises a number of local legal problems, particularly those involving commercial registration requirements, corporate income tax requirements, labor / employment law (including issues with would-be independent contractors) and immigration law (including visa / work permit requirements). We address each in turn.

Commercial Registration

If a multinational engages an employee who makes only short, limited, intermittent business visits into an Arab country but without establishing a local residence, without signing contracts and without demonstrably generating revenue in-country, that employer probably does not cross the customary "doing business" threshold in the jurisdiction. Once it does cross this threshold, however, a multinational employer generally must register in the country's "Commercial Registry" (the local equivalent to a U.S. state's secretary of state business registration office).

In most countries in the Arab Middle East, our seemingly simple question—*When does a foreign company cross this threshold and become obligated to register itself in the local commercial registry?*—does not always have a simple answer. Qatar, for example, requires every natural or "juristic person" to register in the local commercial registry before "engaging in commerce." However, Qatari commercial registration law is perhaps murkier as to what "engaging in commerce" means; some provisions of Qatari law seem to fix this threshold at the point when a foreign company has actually set up a local branch office. Like Qatar, many other countries in the region offer no bright lines to distinguish what constitutes a level of "doing business" sufficient to trigger local commercial registration requirements. By comparison, Article 31(2) of Syrian Legislative Decree No. 151 (1952) sets out an illustrative list of factors that indicates when a foreign company might have established a *de facto* (unregistered) local branch office subject to local registration requirements:

- hiring workers paid by the employer (our floating employee situation);
- buying or renting local real estate in the employer's name;
- opening a local bank account in the employer's name;
- listing the employer in a local telephone directory, and
- subscribing to a post office box (or a "telegraph address") in the employer's name.

As Syria's (expressly non-exhaustive) list suggests, the question of whether a multinational must get a commercial registration depends not only on whether there is a "floating employee" relationship but also on any other activities that the employer conducts locally—for example, leasing office space or office equipment, publishing telephone listings or establishing bank accounts on behalf of the non-resident company, or transacting business locally with local customers, and generating income locally. Of course, a non-resident employer would have a hard time denying it has a local business presence in a particular country if its "floating employee" used business cards and stationery indicating that the multinational has a fixed place of business in-country.

Once an employer's in-country employee triggers the local threshold for commercial registration, the question becomes: *What must the company file?* In non-Arab jurisdictions around the world, registration requirements may include:

- registering the local business office as an unincorporated local branch;
- providing a local address;
- naming a local-resident agent (and sometimes even naming an entire board of directors—notwithstanding that the local branch technically is not a separate entity);
- empowering a local authorized agent via an apostilled (and translated) power of attorney;
- registering with (or filing disclosures with) local tax, social security, and other government authorities.

However, in countries in the Arab Middle East, the commercial registration requirement will usually be tied to a

requirement that the foreign company establish a formal local presence, such as a local subsidiary or branch office.

What if an out-of-country employer violates these registration rules locally in some country in the Arab Middle East? In many countries in the region, local commercial registry officials have police power to investigate and charge a foreign business that flouts local registration laws. In addition, commercial registration laws allow for imposing fines on violators. However, generally speaking, enforcement officials in the Arab Middle East do not seem aggressively to search out "floating employees" who conduct limited and discreet in-country activities. As a practical matter, officials who enforce these laws might initially warn an unregistered business and let the employer choose either to "regularize" or shut down local operations.

Non-compliance threatens financial costs that can run higher than these statutory fines. For example, a multinational with an in-country "floating employee" may be unable to take certain acts that require proof of commercial registration—such as renting office space, opening a bank account, importing goods through customs, or making a sale to a government entity. In addition, a foreign company's lack of a local commercial registration number can cascade into violations of other local laws, in particular: corporate tax requirements, employment rules, and immigration / work permit mandates. Each is discussed below.

Corporate Tax

Bahrain and the U.A.E. are "tax haven" jurisdictions that currently do not assess any general corporate income tax. But most every *other* country in the Arab Middle East imposes tax obligations on businesses that generate taxable income locally. Any multinational operating in the region through a local floating employee (even an employer that in its home country is registered as a non-profit) exposes itself to liability under these local corporate tax laws.

Whether any corporate tax is due is a fairly straightforward question where the local country and the multinational's headquarters country have executed a tax treaty for avoiding double taxation. In this regard, there is good news and bad news: Fortunately, every country in the Arab Middle East has indeed ratified tax treaties; unfortunately, the Arab world's network of tax treaties is less extensive than in many other regions—and relatively few of these countries have comprehensive tax treaties *with the U.S.* Where there is no applicable tax treaty, local income tax laws apply (with their home-grown definitions of taxable income and their domestic principles of tax liability), regardless of what corporate taxes the multinational company may pay back home.

- For example, a new Saudi Arabia income tax law defines "persons subject to taxation" as including non-residents who earn income "from sources within the Kingdom," which in turn is defined as income "derived from an activity which occurs in the Kingdom." The absence of a comprehensive U.S. / Saudi tax treaty means that revenues generated by a Saudi-resident floating employee (such as in-country support personnel for a multinational's product sales) expose the multinational's otherwise arguably foreign-source income to Saudi Arabian income tax.

In tax matters involving an unregistered local permanent establishment, the multinational might try to argue that its local "floating employee" plays a mere supporting, non-revenue-generating, role. Whether this argument will prevail turns on the specific facts and relevant definitions under local corporate tax law. That said, if local (in-country) customers buy products or services or pay bills through the floating employee, the multinational may have a tough time arguing that its in-country operations generate no taxable local revenue, especially (but not necessarily) if the local employee has power to bind the company.

Labor/Employment/Independent Contractor Law

Every country in the Arab world regulates relationships between employers and employees, imposing rules on matters such as:

- employment contracts / fixed-term agreements / probation periods
- part-time / temporary work
- caps on work hours / overtime pay / wage / hour
- holidays / vacation
- health / safety
- social security / social insurance contributions
- personal income tax withholdings / contributions
- firings / severance pay, and—particularly in the Middle East—mandatory end-of-service payments

Generally, local employment laws will reach even a small local start-up operation of a foreign-owned employer. As such, a multinational that hires or assigns an employee to reside overseas generally must follow local employment rules, as a matter of mandatory law—even if the employer and employee agree on a choice-of-law clause in their employment agreement purporting to apply the law of the employer's headquarters country.

- This fact—that employment-context choice-of-law clauses tend not to block the application of local employment law—can be frustrating to learn, but is perfectly logical when we think of it in reverse. Imagine, hypothetically, a Moroccan-based tour operator that posts a Moroccan employee in, say,

Detroit for a year. Imagine both the Moroccan tour operator and the Detroit-based employee sign a choice-of-Moroccan-law clause. Few if any Michigan employment lawyers would argue that that clause effectively divests the application of American and Michigan wage / hour, unionization, health / safety (OSHA), discrimination, and other employment laws. Choice-of-law in the employment context usually works the same way in the countries of the Arab Middle East. In the U.A.E., for example, the labor law invalidates any provisions of an employment contract that contravenes that law, unless the contractual provision is more beneficial to the employee.

In short, comprehensive employment laws in the Arab Middle East will usually reach a multinational's in-country employees, regardless of their nationality and regardless of choice-of-foreign-law clauses. While *local* employers usually have the information and the means to comply with local employment laws, an overseas-based multinational with no other local presence faces a significant challenge in these "floating employee" situations: full compliance with local employment laws is difficult because *the "floating employee" is essentially working "off-the-books."* An unlicensed foreign employer without a local taxpayer ID number and without a local social insurance (social security) registration cannot register with local tax and social security agencies. As such, neither the employer nor the employee would satisfy local payroll / withholding / social insurance obligations.

In a few Arab countries, an employer's own failure to register local employees might, in some contexts, actually offer a defense to an employee's labor law complaints. In Bahrain, for example, a "floating employee" would face difficulty seeking redress of claims under an employment agreement with an unregistered, non-resident employer. Similar results may be likely in other Arab jurisdictions that require employment agreements be registered with the local ministry of labor (these jurisdictions, incidentally, would likely refuse registration of a non-resident employer's labor contracts with local resident personnel). But in a number of other Arab countries, a "floating employee" most probably could sue a non-resident multinational employer in the local courts. In these Arab countries, local courts can exercise their own form of "long-arm" jurisdiction over non-resident employers—for example, local civil and commercial procedure codes likely authorize local courts to hear lawsuits relating to most contracts executed or implemented (in whole or in part) within the relevant country.

One strategy for properly sidestepping local employment-law hurdles is for the multinational employer to "second" (post) its local resident employees onto the payroll of some already-up-and-running local in-country employer—such as, for example, one of the multinational's local commercial agents or distributors. Under a carefully drafted secondment arrangement, the in-country employee can be employed by the local business partner, but render services for the non-resident multinational. In turn, the multinational reimburses all costs (and perhaps pays a premium) to the local business partner / employer. This can be an excellent method for resolving the legal issues surrounding a floating employee arrangement.

A different strategy for possibly sidestepping local employment law hurdles is for the multinational employer to engage the local service provider not as a floating employee, but as an independent contractor or consultant. But structuring a would-be independent contractor relationship in place of an employment relationship is not necessarily an ironclad solution. The first question to ask here is: *"If structuring this as an independent contractor relationship is such a great idea, why don't we also engage all this person's counterparts, back home, as independent contractors?"* Usually there is a simple answer to this question: *"Because that would never fly—these people obviously work as employees, under the applicable tests."* If the job position would fail the employee-vs.-independent contractor tests at home, it will also likely fail the tests in the host country. (These tests, from country to country, tend to be surprisingly similar; applicable law tends not to defer to parties' choice of labels when determining the true nature of the relationship, but rather imposes a "facts and circumstances" test.) Liability for getting this wrong—mischaracterizing a *de facto* employee as a contractor—can be significant, especially when the relationship ends.

- Of course, in some cases engaging an overseas service provider as an independent contractor will be legitimate (where the service provider is truly an independent party, free to work for others, not subject to supervision or discipline, and is paid by the task, not compensated like an employee). If a legitimate independent contractor relationship is structured (and implemented) carefully, it could resolve the commercial registration, corporate tax *and* labor law issues that arise in the "floating employee" context.

Immigration Law

When engaging a "floating employee" (or even independent contractor) to work and live in the Arab Middle East, a multinational is especially likely to face immigration law issues whenever the service provider is not a local national. Indeed, in certain countries in the region, "floating employees" and independent contractors are especially likely to be non-nationals. For example, in Qatar, Kuwait and the U.A.E., very few local nationals are employed in the private sector working for multinational companies.

An expatriate employee who travels in and out of an Arab country on limited, short, intermittent business visits probably will not trigger work-permit or residency

visa requirements. For example, under Qatar's 1963 Entry and Residence of Foreigners Laws (article 17), "a foreigner entering Qatar for a visit or commercial activities which take *no more than one month* shall be exempted from" Qatari immigration requirements.

Otherwise, any expatriate working in-country as a full-time floating employee or independent contractor needs to obtain a residency visa and work permit. In many countries—including the key Arabian Gulf markets of Saudi Arabia, the U.A.E., Kuwait and Qatar—to get a local work permit and residency visa, an expatriate must be sponsored by a local national or a locally registered business. Sponsorship is usually formalized by the sponsoring party and the sponsored party executing an employment contract. In other words, in a floating employment arrangement, a non-resident multinational's employee would need to be formally employed by another party inside the Arab country, with the expatriate's residency visa and work permit tied to that in-country employment relationship.

Moreover, in Arab Middle Eastern countries, a local employer's expatriate employee generally should not be engaged in personal business interests, certainly not by the employee independently hiring himself or herself simultaneously to work for another employer. Of course, these dual-employer situations raise not only legal but also practical difficulties—such as conflicts of interest (the inherent impossibility of an employee maintaining dual loyalty). In this context, an expatriate's need for a local sponsor/employer further complicates the "floating employee" arrangement of a multinational with no local presence in the Arab country.

* * * *

Multinationals that launch business operations in a new country are almost certain to face hurdles. In the Arab Middle East, some non-local employers might be tempted to hire an employee to work and reside in a country where the employer is not formally registered. By inserting a "floating employee" into a country where the employer has no legal or physical infrastructure, the parties are likely to trigger local "doing business" legal rules—that is, local requirements as to commercial registration, income tax, labor/employment law, and immigration law. The best strategy is always to confront these challenges directly, avoid shortcuts, and comply with local legal mandates. In short, foreign employers that try to undertake business activities in the Arab Middle East "on the cheap" quite often end up paying a higher price.

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Project Labor Agreements in New York State: In the Public Interest

By Fred B. Kotler

Introduction

It is especially challenging in these tough economic times for officials within New York City's and New York State's many entities to decide how best to use public money for construction and renovation projects. This article is intended to serve as a resource to help officials make better informed decisions about the value of project labor agreements [PLAs]. It also encourages readers to see PLA use within broader objectives of sound public policy.

PLAs have been demonstrated to be a very useful construction management tool for cost savings, for on-time, on-budget, and quality construction. But PLAs are not necessarily appropriate for every project. This report reviews the background and legal standards for the appropriate use of PLAs on public works projects in New York City and State. It details what PLAs do, how they have been used, and the benefits they offer—benefits that extend to workforce and economic development.

"PLAs have been demonstrated to be a very useful construction management tool for cost savings, for on-time, on-budget, and quality construction. But PLAs are not necessarily appropriate for every project."

This report also tests the validity of the claims made by PLA opponents that PLAs drive up construction costs. Focus is on the studies conducted in recent years by the Beacon Hill Institute, a particularly outspoken opponent of PLA use in both the public and private sectors.

Public Sector Project Labor Agreements: An Overview

A Project Labor Agreement is a type of pre-hire agreement. Pre-hire bargaining means that construction unions and contractors have bargaining rights and can enter into agreements before any workers are hired and without a particular union having to demonstrate majority support among employees of an ascertained bargaining unit. Most pre-hire agreements cover work within a geographically defined jurisdiction for a particular craft and continue from project to project. A PLA, by contrast, is a project-specific, uniform agreement covering all the crafts on a project, and lasting only as long as the project. It is a comprehensive labor relations agreement—the "job site constitution"—that governs over various area craft agreements, setting uniform terms and conditions, for a particular project. Where the PLA is silent, the area agreements' terms are not impacted.

Because they are negotiated pre-bid and specifically tailored to the needs of particular projects, PLAs give project owners, building contractors and trade unions a unique opportunity to anticipate and avoid potential problems that might otherwise arise and possibly impede project progress. They maximize project stability, efficiency and productivity and minimize the risks and inconvenience to the public that often accompany public works projects. This is why Project Labor Agreements have long been used in the private and federal sectors, and more recently by state, county and municipal agencies.

PLA use in the public sector is now a settled question in New York State and other jurisdictions around the country. In its landmark 1993 *Boston Harbor* decision, the U.S. Supreme Court recognized the value of PLAs in serving the public interest and opened the door for their use by state, county and municipal agencies. In its 1996 *Thruway Authority* decision, the New York Court of Appeals established guidelines for the use of Project Labor Agreements on publicly funded construction throughout the state. The following year, 1997, Governor Pataki issued an Executive Order reaffirming the utility of PLAs and encouraging their use in New York State. That Executive Order has been adopted by the succeeding Spitzer and Paterson administrations.

Project Labor Agreements make sense for public works projects because they promote a planned approach to labor relations, allow contractors to more accurately predict labor costs and schedule production timetables, reduce the risks of shoddy work and costly disruptions, and encourage greater efficiency and productivity.

On a typical construction project operating without the benefit of a PLA, there can be fifteen or more different collective bargaining agreements covering work being performed by various crafts. As many as fifteen separate union contracts are not generally coordinated in any meaningful way and this leads to certain inefficiencies—inefficiencies that can be addressed by a PLA.

Project Labor Agreements are negotiated to cover all the crafts on a single project and the term of the PLA coincides with the duration of the project. A PLA standardizes otherwise incompatible work schedules,

apprentice-journey level ratios, hours, payment arrangements, and other terms and conditions, providing greater cost efficiencies. Some PLAs also include cost saving procedures for workers compensation issues.

PLAs provide job stability and prevent costly delays by: (1) providing a uniform contract expiration date so that the project is not affected by the expiration of various local union agreements while the PLA is in effect; PLAs in New York City simply incorporate the new wage rates negotiated for those local union agreements; (2) guaranteeing no-strikes and no-lockouts; (3) providing alternative dispute resolution procedures for a range of issues; (4) assuring that contractors get immediate access to a pool of well-trained and highly skilled workers through union referral procedures during the hiring phases and throughout the life of the project.

Whether a PLA is appropriate for a particular project is determined on a case-by-case basis following standards established in 1996 by the New York State Court of Appeals. The burden is on the New York public owner to demonstrate, typically through a consultant's feasibility or due diligence report, that a PLA has a proper business purpose, that it will provide direct and indirect economic benefits to the public and promote the particular project's timely completion. PLAs are more likely found appropriate—and experience has demonstrated great value—for larger, more complicated projects that last more than a few months and that often present unique scheduling issues.

If the consultant's feasibility study determines that a PLA is appropriate for a particular project, the public owner will then authorize that a PLA be negotiated typically between a construction manager, representing the public owner, and the leadership of an area or state building and construction trades council.

The agreement is then included within the bid specifications so that potential bidders can better project their costs and schedule timetables. Bidding on a PLA project cannot, under state competitive bidding laws, be restricted to union contractors; public sector PLAs are not—and cannot lawfully be—union-only agreements. Bidding is open to all contractors—union and non-union. All successful bidders must become signatory to the PLA but are not necessarily bound thereby to other jurisdiction-based agreements.

Typical PLA provisions include the following:

- Collectively bargained wage rates and fringe benefit payments are incorporated into the PLA.
- Negotiated changes in the journey level—apprentice ratios—require a waiver.
- No further negotiations on wages or benefits are conducted for the life of the agreement; the practice in New York City is that wage rates that are newly negotiated for area agreements during the term of the PLA will be adopted by the PLA.
- Work schedules and other terms are made uniform among the various crafts.
    * This amounts to a construction strategy enabling project planners to tailor production, account for logistical challenges, address a public owner's needs, and minimize the project's disruption and inconvenience to the public.
- Hiring is conducted through union referral procedures; nonunion subcontractors are often permitted to retain a defined percentage ["core" group] of employees outside of referral procedures.
- Exclusive representation is granted to the appropriate labor organization for employees in their craft.
- A contractual commitment to uninterrupted production is made via a no-strike / no lockout, no slowdown or disruption clause.
- Dispute resolution procedures are put into place to address contractual and jurisdiction issues: these may include a grievance-arbitration procedure, joint labor-management problem solving, and alternative dispute resolution [ADR] to resolve disputes involving the payment of workers' compensation benefits.
- Fringe benefit payments are directed to joint-trustee pension, health insurance, vacation and apprentice training trust funds, etc.

Background

U.S. Supreme Court *Boston Harbor* Decision Makes PLAs Available for State-Funded Projects (1993)

PLAs were used on federally funded projects for 60 years prior to the G. W. Bush administration and for private sector construction for nearly a century. PLAs have, for example, been used for major federal public works projects since the 1930s. Federal agencies are again encouraged to require the use of PLAs on large-scale projects per President Obama's Executive Order of February 6, 2009. Construction of the Grand Coulee Dam, Shasta Dam, Kennedy Space Center, nuclear missile sites, and the nuclear research facility at Oak Ridge, Tennessee all utilized PLAs. They have been used extensively in the private sector since the early decades of the century. During the 1980s and 1990s, for example, Disney, Toyota, General Motors, and major oil companies [Trans Alaska Pipeline] all used PLAs for major construction projects. In the 1993 U.S. Supreme Court *Boston Harbor* decision[1] PLAs were also permitted and used for state-funded projects.

This landmark case involved the PLA for the court-ordered clean up of *Boston Harbor*, a job originally estimated to last ten years and cost $6.1 billion. At issue was whether a non-federal public entity, here the Massachusetts Water Resources Authority, could choose a contractor based on the contractor's willingness to enter into a project labor agreement and to make this agreement an enforceable part of the bid specifications. The Court unanimously held that it could do so. The public entity was acting as an owner / purchaser, not as a regulator of labor relations, and was, therefore, not preempted by federal law from enforcing the agreement.

The *Boston Harbor* decision significantly broadened the use of PLAs and is a strong statement by the Court supporting collective bargaining in the construction industry. The Court considered the intent of Congress in amending the National Labor Relations Act (NLRA) to allow construction industry pre-hire and restrictive subcontracting agreements (Section 8(e) and 8(f)). It then declared that the same rationale which justifies the use of such agreements in the private sector also justifies their use in the public sector when public agencies are acting as property owners:

> It is evident from the face of this statute [National Labor Relations Act, as amended] that in enacting exemptions authorizing certain kinds of project labor agreements in the construction industry, Congress intended to accommodate conditions specific to that industry. Such conditions include, among others, the short term nature of employment which makes post-hire collective bargaining difficult, the contractor's need for predictable costs and a steady supply of skilled labor, and a long standing custom of pre-hire bargaining in the industry.
>
> There is no reason to expect these defining features of the construction industry to depend upon the public or private nature of the entity purchasing contracting services. To the extent that the private purchaser may choose a contractor based upon that contractor's willingness to enter into a pre-hire agreement, a public entity as purchaser should be permitted to do the same. . .In the absence of any expressed or implied indication by Congress that a state may not manage its own property when its pursues its purely proprietary interest, and where analogous private conduct would be permitted, this Court will not infer such a restriction . . .[2]

The Court discusses the historic use and benefits of PLAs—for stability and productivity—and explains why those benefits should be extended to states and municipalities; the rationale for using PLAs in the private sector also justifies their use in the public sector when public agencies are acting as participants in the construction marketplace. Let all parties operate freely within that marketplace and have the flexibility to authorize or enter into agreements that advance their interests. Important public interests are served when public entities make effective use of limited public resources by securing optimum productivity and insuring the timely and successful completion of the project.[3]

While *Boston Harbor* provided state agencies with a constitutional privilege to require project labor agreements as part of bid specifications, it did not address the limitations on state agencies' authority to use PLAs under state competitive bidding laws. Post-*Boston Harbor* litigation in state courts throughout the nation has now largely resolved these issues by upholding the use of PLAs in the vast majority of cases.[4] But standards for when and how state agencies can authorize PLAs vary according to respective state court decisions.

When Is It Appropriate to Authorize a Project Labor Agreement?

New York State Court of Appeals *Thruway Authority* Decision Establishes Standards for Public Sector PLAs in New York (1996)

New York standards were established in the 1996 Court of Appeals decision in the combined case involving PLAs authorized by the New York State Thruway Authority (NYSTA) and the Dormitory Authority of the State of New York (DASNY). The Court of Appeals upheld the PLA for the $130 million, four-year *Thruway Authority* (Tappan Zee Bridge) project but rejected it for the $170 million, five-year Dormitory Authority (Roswell Park Cancer Institute) project.

A critical distinguishing factor was that the NYSTA based its authorization of a PLA on the recommendation of its project manager, Hill International, Inc., pursuant to a pre-bid cost analysis which favored a uniform agreement; by contrast the DASNY decision was made after bids were opened, even after some of the renovation work had begun, and was not supported by a detailed review and analysis similar to that used by the NYSTA.

The Court held that the validity of PLAs would be considered on a case-by-case basis per the following criteria:

- Project labor agreements are "neither absolutely prohibited nor absolutely permitted" on public construction projects in New York.
- A PLA could be sustained for a particular project where the record supporting the determination to

enter into the PLA was justified by the interests underlying the competitive bidding laws.

- The public authority must show more than a rational basis for its determination that its use of a project labor agreement had as its purpose and likely effect the advancement of the interests embodied in the competitive bidding statutes. The decision to adopt a PLA for a specific project must be supported by the record; the authority bears the burden of showing that the decision had as its purpose and likely effect the advancement of the interests embodied in the competitive bidding statutes.
- Two central purposes of New York's competitive bidding statutes, as restated within the Thruway decision, are protection of the public fisc by obtaining the best possible work at the lowest possible price, and prevention of favoritism, improvidence, fraud and corruption in the awarding of public contracts.[5]

An agency decision based on a consultant/construction manager's report is the key element for having that decision upheld by New York courts. The report should show, regardless of the size or complexity of the project, that a PLA is justified based on specified cost savings—both the direct and indirect benefits of a uniform agreement—taking into account such unique factors as the project's timetable and a history of labor unrest.

Governor Pataki's Executive Order Endorses the Use of PLAs (1997)

Governor George Pataki issued Executive Order No. 49 on January 30, 1997—continued by Governors Spitzer[6] and Paterson[7]—endorsing the use of Project Labor Agreements on appropriate public works construction projects. Each state agency is ordered to establish procedures "to consider, in its proprietary capacity," the use of PLAs on publicly funded projects. The Order restates the broad policy goals for state-funded construction by declaring that

> it is in the best interests of the People of the State of New York to promote the timely completion of public construction projects. . . while at the same time limiting the cost of such projects to the greatest extent possible consistent with the law and principles of fairness and equity.

The Governor's Order then recognizes the value of PLAs by stating that

> it is now clear that project labor agreements are one of many tools which may be used by management and labor and which may, under certain circumstances, assist in achieving the goals described above;

The Executive Order directs state agencies to consider using PLAs ". . . where the standards established by the Court of Appeals can reasonably be expected to be met." Agencies are advised to "show a proper business purpose for entering into such agreement" in order for their decisions to withstand judicial scrutiny.

Appropriate Use and the Application of *Thruway* Standards

While the burden in New York State rests with the authorizing agency, courts in New York State have consistently upheld the use of PLAs for a variety of public works projects so long as the process and decision to authorize the PLA were consistent with the Court of Appeals *Thruway* standards. The following illustrate how, in the years immediately after Thruway, those standards were applied:

- The Second Department, Appellate Division upheld the use of a PLA as appropriate for the construction and renovation of court and government facilities in Orange County, a project involving $29 million in state funding. Applying the *Thruway* standards, the key factor was job stability. The PLA's no-strike provision would "negate the possibility of strike induced delays" and "avoid costs occasioned by the payment of fixed fees of $41,000 per month" that the county owed to the construction manager and architect. An additional cost savings factor related to negotiated changes in work rules. The court noted that the PLA permitted "the designation of working forepersons and . . . (excluded) traditional morning and afternoon 'breaks' from the project workday, resulting in a savings of as much as $2,111,250 over the life of the project." *Albany Specialties Inc. v. County of Orange (1997)*.[8]
- The Appellate Division, Fourth Department in 1997 struck down a PLA for a City of Oswego sewer project because the City didn't adequately show the need for a PLA by presenting "a detailed projection of cost savings" from a PLA; the City did not identify "a unique feature" that the PLA would address nor "demonstrate a history of labor unrest that threatens the success of the project." The court added, "A PLA may not be justified simply by the desire of a municipality 'for labor stability so that the work will be completed on time.'" *Empire State Chapter of Associated Builders and Contractors v. City of Oswego (1997)*.[9]
- Three years later, in 2000, the Fourth Department upheld the PLA authorization by the Buffalo Board of Education. It distinguished these facts from those

of the City of Oswego case. The Board's decision here was based on a detailed projection of cost savings provided by a consultant engineering and architectural firm's report. The court also noted that the earlier Phase One of the project involved labor unrest that would be prevented by a PLA for Phase Two. *Empire State Chapter of Associated Builders and Contractors, Inc., et al v. Board of Education of the City of Buffalo (2000).*[10]

A more recent (2008) decision from Broome County shows just how closely courts may apply *Thruway* standards. Here the court invalidated the County's authorization of a PLA for $10.4 million building reconstruction project because the consultant's feasibility study did not meet the test of "more than a rational basis." The study was rushed and lacked sufficient depth; it failed to show verifiable cost savings, "any type of unique complexity," or that a PLA was necessary to preserve labor harmony such as to justify the County's decision.[11]

Suggested Guidelines for Authorization

How might agencies reasonably assess the appropriateness of a PLA authorization in light of New York's relatively stringent case law? The following guidelines provide an overview or checklist for agency and board decision-makers consideration:

- Base the decision to ratify or authorize the Project Labor Agreement on a review of the project manager / consultant's report and recommendation.
- The project manager / consultant's report should analyze the particular cost savings and other benefits which a project labor agreement would provide.
- Among factors to be considered are the following:
  - * Labor cost savings due to coordinating various craft schedules and other terms / conditions via a uniform agreement instead of various local union agreements;
  - * Potential cost savings and flexibility due to alternative dispute resolution procedures in response to job site problems, jurisdictional disputes and workers compensation claims;
  - * Potential benefits (time and money saved, public convenience) of ensuring labor harmony for the duration of the project; consider other projects where labor disputes increased costs;
  - * Whether a PLA would provide a more immediate and efficient access to a pool of skilled journey level workers and apprentices;
    - – Consider local labor market conditions:
      - ° Is there a documented skilled labor shortage in the area or is there likely to be during the length of the project?
      - ° Will other projects be competing for the same labor pool?
      - ° Would a PLA provide an opportunity for apprentice recruitment and training?
  - * The likelihood that the skill level will translate into safer job performance with reduction in costs due to lower injury rates;
  - * Whether or how a PLA would contribute to an on-time and on-budget completion of the project
    - – Is the project of such complexity that a delay in one area will significantly delay the entire project?
      - ° Does this project have serious time constraints?
      - ° Would delay seriously inconvenience the entity, its clients, or the general public?
        - Examples are delaying the opening of school, causing transportation delays or congestion and interfering with revenue flow—collection of bridge tolls.
- The agreement should ensure that hiring is done in a nondiscriminatory manner, that contractors may be permitted to retain a certain percentage of "core" employees, and that all successful bidders must become signatory to the PLA.
- Direct that a PLA be concluded prior to the opening of bids and include the complete agreement in the bid package.
- Conduct bidding pursuant to a PLA in a nondiscriminatory manner, open to union and nonunion contractors.

How Do PLAs Affect Competitive Bidding and Project Costs?

Public-sector PLAs have consistently been upheld as consistent with state competitive bidding laws in New York State and other jurisdictions since the U.S. Supreme Court empowered states to authorize PLAs in the 1993 *Boston Harbor* decision.

Critics of PLAs nevertheless continue to oppose PLAs, through largely unsuccessful litigation and lobbying efforts, claiming that PLAs are inherently "anti-competitive," "union-only" agreements that discriminate against non-union contractors, limit the pool of bidders and drive up construction costs. These claims are considered here in response to these three questions:

1) Do PLAs discriminate against non-union contractors and workers?

2) Do PLAs limit the pool of bidders?

3) Do PLAs raise construction costs?

Do PLAs Discriminate Against Non-Union Contractors and Workers?

Public-sector PLAs, when appropriately authorized, are consistent with the underlying purpose of New York State's competitive bidding laws: to protect public funds by obtaining the best possible work at the lowest possible price, and to prevent favoritism, improvidence, fraud and corruption in the awarding of public contracts.

Under state competitive bidding laws, all bidding must be open and nondiscriminatory. Although union-only agreements are permitted in the private sector, bid awards in the public sector cannot be made on the basis of union status. Because union and non-union contractors are free to bid on projects covered by PLAs, they avoid the favoritism that competitive bidding laws are designed to prevent. Awards are frequently made to both union and non-union companies. Those same contractors are not required to become union contractors, that is, signatories to the respective area craft agreement, but only to become signatories to the PLA.

There is a second layer of protection against favoritism in the job referral procedure: unions cannot lawfully favor their members or discriminate against equally qualified non-members.[12] This is typically restated within the PLA itself. A useful example is the language within Article 4—Union Recognition and Employment of the PLA for the New York City School Construction Authority Five-Year Capital Programs (SCA) (discussed *infra*). Section 3, Non-Discrimination in Referrals, includes the statement that

> No employment applicant shall be discriminated against by any referral system or hiring hall because of the applicant's union membership, or lack thereof.[13]

PLA signatories, both union and non-union, as illustrated within the SCA PLA, can determine the competency of all referrals, determine the number of employees required, and have the sole right to reject any applicant referred by a local union. Where the union cannot provide qualified workers through referral, contractors can, following a defined time period—48 hours in the SCA agreement—secure workers from a source other than union referral. And non-union contractors are typically also permitted to "drag along" or bypass union referral for an agreed-upon percentage, such as 12%, of its "core employees."[14]

Non-union contractors who are signatories to the PLA may be persuaded to sign area agreements once they experience the advantage of systematic and ready access to properly trained, highly skilled workers. Union-trained journey-level workers must meet certain clearly defined standards for competence and contractors with access to this labor pool can then compete for—and more likely successfully perform—jobs requiring a higher degree of worker skill and technical experience. There is a competitive disadvantage for contractors within the non union or "open shop" sector to invest in worker training. One issue relates to the fierce pressure to contain labor costs, including training costs, and so undercut the competition. Another issue is that the non-union worker whose skills are upgraded may be tempted by better employment terms at another "open shop" company so that, in effect, the first contractor incurs a cost that benefits its competitor. The union sector, by contrast, provides a "level playing field" for training because union signatories pool their training resources—providing outcomes that are good for the industry and the overall economy.

Organizations representing non-union contractors have challenged the fairness and legality of PLAs for many years. But in endorsing PLA use, the courts have responded by essentially saying: You're free to participate—or not to participate—in the PLA bidding process. If you play the game, you have to play by its rules. Otherwise seek your business opportunities elsewhere.

The Associated Builders and Contractors, Inc. (ABC), which represents non-union contractors, has long opposed Project Labor Agreements. Directly addressing the ABC, a litigant in the *Boston Harbor* case, the U.S. Supreme Court made clear that

> those contractors who do not normally enter into such agreements (PLAs) are faced with a choice. They may alter their usual mode of operation to secure the business opportunity at hand, or seek business from purchasers whose perceived needs do not include a project labor agreement.[15]

The New York Court of Appeals later echoed the U.S. Supreme Court. Answering charges that PLAs are "anti-competitive"—meaning that they unfairly favor the union sector and cut into the business of open shop contractors—the Court of Appeals stated:

> The fact that certain non-union contractors may be disinclined to submit bids does not amount to the preclusion of competition . . .[16]

There is a unifying theme that underlies public policy in this area—a basis for the rationales in *Boston Harbor* and *Thruway* decisions as well as statutes governing

competitive bidding and contractor responsibility: government has a duty to protect the public interest and the right to influence the marketplace by the choices it makes as a marketplace participant.

Government agencies make choices and so do contractors. Contractors can choose to accept or reject government's marketplace rules by bidding or not bidding on a particular project.

Do PLAs Limit the Pool of Bidders?

PLA opponents argue that PLAs limit the pool of bidders and that this drives up costs. There is no evidence to support these assertions. While there are many reasons why contractors—both union and non-union—may choose not to bid on particular projects, there are no studies demonstrating that a PLA in the bid specifications is itself responsible for a decrease in the number or bidders; there is also no analysis showing that fewer bidders translates into higher actual project costs.

Two factors do influence bidding behavior and the number of bidders for particular projects—whether or not a PLA is at issue: bidding procedures and market conditions.[17]

Bidding procedures that require separate prime contracts lead to more bidding activity because—in a given area—specialty contractors outnumber general contractors. It's worth noting that there will likely be a decrease in the number of bidders for New York State-based PLAs due to the recent exemption of PLA bidding from the state's Wicks Law;[18] this provision will save—not increase—costs for public owners who authorize PLAs.

The Wicks Reform of 2008 applies to contracts advertised or solicited for bid on or after July 1, 2008 and expressly waives Wicks Law requirements (of separate specifications and bidding for plumbing, heating and electrical work) for bidding on projects where a PLA has been appropriately authorized by the public entity. While encouraging PLA use, the new law exempts more than 70 percent of public works projects from Wicks rules by raising project thresholds from $50,000 to $3 million—a 60-fold jump for New York City, to $1.5 million for downstate suburbs, and to $500,000 for upstate projects. These changes were intended as cost-saving measures: the New York State Division of Budget predicted that the legislation will save New York City $200 million in long-term capital construction costs for fiscal year 2009 along with annual debt service savings of $14 million by CFY 2012. The reforms also represent a further policy endorsement of PLA use.[19]

Market conditions and the business cycle always impact bidding behavior. As the volume of work increases in a construction market, one can expect a decline in the number of bidders per project and an increase when less work is available.

There is a reason why some non-union contractors will choose not to bid on PLAs, a reason that gets to the core of the issue and that PLA opponents might prefer not to publicize: they do not want to operate within or adjacent to the unionized sector—what the *Boston Harbor* Court meant by contractors choosing not to "alter their usual mode of business." Non-union contractors may see PLA work as a threat to their workforce control, so they choose to avoid having their employees work side-by-side with unionized craft workers and under prevailing wage and collectively bargained terms and conditions.

PLAs require that all successful bidders—union and non-union—become PLA signatories. This practice of restrictive subcontracting does not make PLAs unfair to non-contractors but, rather, meets an important public interest. Restrictive subcontracting is sanctioned by the National Labor Relations Act, along with pre-hire bargaining, to accommodate the particular conditions of the construction industry and, in particular, to provide contractors with a ready access to skilled labor, help contractors predict costs, and promote labor harmony and productivity on construction job sites.

It is important here to distinguish private from public-sector PLAs. In the private sector, PLAs can be union-only agreements—subcontracting is limited to those employers who are signatories to the appropriate craft agreement or agreements. Public-sector PLAs must comply with competitive bidding statutes and cannot lawfully exclude non-union contractors from bidding. Restrictive subcontracting in the context of public-sector PLAs means that all successful bidders, union and non-union, are required, as a condition of receiving the award, to be signatory to the PLA; they need not be signatory to a union area or craft agreement.

Restrictive subcontracting and pre-hire negotiations are essential practices of construction industry collective bargaining. Congress, the U.S. Supreme Court, and the National Labor Relations Board have all recognized that these practices are in the public interest because they provide stable relationships not only between employers and employees but also between owners and general contractors as well as between general contractors and various subcontractors. All of these relationships create, as noted several years ago by the U.S. Supreme Court, a close community of interest on construction job sites.[20]

The presence of multiple employers and employees of various crafts on a single construction job site also creates a high potential for friction between employers, employers and employees, and among employees. Conflicts can come from many sources, including craft jurisdiction, the application of separate collective bargaining agreements with various, different expiration dates, or the close proximity of both union and nonunion employers and employees. These can readily translate into picket-

ing, for example, which targets a single employer but is likely to disrupt and delay the entire project.

To stabilize the various relationships and to mitigate the risks of disruption, the construction industry long ago developed restrictive subcontracting practices. While such practices are generally illegal, falling under the "hot cargo" prohibition of the National Labor Relations Act, Congress understood the need to preserve the status quo in bargaining relationships within the construction industry and in 1959 provided an industry-specific legislative exemption. It amended the Act (Section 8(e)) to permit agreements between prime contractors and unions to restrict or exclude certain subcontractors from a construction site.[21] Congress recognized that the subcontracting dynamics of the construction industry made such an exemption necessary to promote productivity and preserve job site harmony.

A second legislative exemption (NLRA Section 8(f)) permits pre-hire agreements.[22] In industries other than construction, an employer may not sign an agreement with a union unless there is proof that the union represents a majority of the employees. Construction industry employers may negotiate contracts not only before the union demonstrates majority status but also before the employer hires the employees for the project.

The unique characteristics of the construction industry again provide the rationale. Pre-hire bargaining ensures the employer of immediate access to a pool of skilled labor during the hiring phases and throughout the life of the project and this also enables the employer to more accurately predict costs and timetables.

Due to the temporary nature of construction jobs and the mobility of its workforce, it is impractical, if not impossible, to show majority status through an NLRB-supervised election—the particular job is likely to end and the workforce will move to the next job either before an election is held or before negotiations are completed. Reviewing the legislative intent behind these provisions, the U.S. Supreme Court not only noted the factors mentioned above but also deferred as well to a "long standing custom" of pre-hire bargaining in construction, a custom which predates the 1935 National Labor Relations Act.

Do PLAs Raise Construction Costs?

A PLA is an instrument to predict and control labor costs. PLA labor cost savings are both direct and indirect and can be substantial over the life of a project. New York courts require that an agency show a "proper business purpose" with a cost-savings analysis. A decision to authorize PLA use without a study that articulates cost containment is not likely to withstand court scrutiny.

Direct costs savings are typically garnered from these provisions:

- Alternative dispute resolution procedures for—and containment of—workers compensation costs;
- Elimination or reduction of premium rates including increased contractor flexibility for scheduling;
- Reduction and standardization of the number of paid holidays;
- Increased utilization of apprentices.

Indirect labor cost savings, although not as easily quantified, are no less significant for the project's overall success: to mitigate inconvenience for the user and its clients, for stable and productive operations and to avoid costly delays. These indirect cost savings are achieved through a combination of factors including:

- A uniform contract expiration date for all crafts;
- No-strike provisions;
- Expedited dispute resolution procedures and joint committee structures to address a broad range of jobsite issues including jurisdiction;
- Contractors having immediate access to a pool of skilled labor during the hiring phase and throughout the life of the project.

Consultants' feasibility or due diligence studies make reasonable forecasts of project labor cost savings by comparing and contrasting the terms and conditions of a proposed uniform agreement (PLA) with specific provisions with various area craft agreements; the consultant examines opportunities for cost savings while accounting for the project's particular demands, such as highway, bridge, or school work that must primarily be done at certain hours.

A useful example of PLA cost containment is the report written in 1999 by consultant Hill International, Inc. for the I-287 / Westchester Expressway construction project north of New York City. This project was conducted in seven separate phases over six years at an estimated cost of $265 million. Hill projected $8.4 million in PLA-related cost savings based on the following:

Standardizing workweek / elimination of premium rates	$563,260
Standardizing workday with flexibility in starting / quitting times	864,538
Adjustments for night shift work	969,448
Standardizing eight holidays	3,272,888
Increasing ratio of apprentices	1,032,878
Using Alternative Dispute Resolution (ADR): Workers' Comp	485,526
Managed Care program: Workers' Comp	1,280,981[23]

Hill also conducted a feasibility study in 2004 for the New York City Department of Education 2005-2009 $13.1 billion School Construction Authority Five-Year Capital Program. Hill concluded that a PLA was appropriate for those portions of the plan within its study (representing an estimated $6.8 billion) and identified several concrete ways that a PLA would save both direct and indirect costs.

The nature of the SCA project—rehabilitation and reconstruction of occupied schools—dictated that the majority of the work would be done during second shift. Hill saw the need to standardize schedules and rates. It recommended that contractors be provided with three (3) hours flexibility in starting times and five (5) hours in quitting times without premium penalty. The work week, at thirty-five (35) hours for a number of trades, was standardized to forty (40) hours. Based on a five percent (5%) shift differential negotiated in the PLA, along with the new, uniform forty hour work week, Hill estimated labor cost savings of over $474 million during the five (5)-year project or an 18.7% reduction in labor costs compared to construction without a PLA.

Hill recognized another cost savings opportunity by standardizing the number of holidays to six (6), reduced from a range of seven (7) to eleven (11) found in the various craft agreements. This produced an estimated savings of over $14 million.

Hill measured the SCA feasibility study's forecasts against actual costs in a "PLA Post Audit" conducted during the fourth year of the project in 2008. Hill looked at five areas of work: exterior modification; windows; ADA compliance; laboratory upgrades; and electrical. It selected a representative sample of 15 schools. Relevant cost data was gathered from such documents as contractors' bid breakdowns, engineers' estimates, payment invoices, and schedules of values. Labor costs were isolated from other construction costs and segregated by craft in order to assess the impact of the PLA. Labor cost data for each craft under the PLA was then compared with each craft's area collective bargaining agreement—the difference in labor costs if the PLA were not in place. Cost savings were calculated both in dollars and as a percentage of total construction costs and labor costs. Sample totals were extrapolated through the end of the five year project. PLA labor cost savings for the project's duration, although less than the original feasibility study projections, were quite significant at $221,427,522. The difference between the 2004 and 2008 estimates of cost savings relates to changes in the way that the SCA had work performed and are not related to the PLA itself. By using a PLA, New York City taxpayers saved over $44 million for each year of the project.

The $221 million represents quantifiable direct labor cost savings. But this is only a part of a larger picture. There are direct labor cost savings from the use of Alternative Dispute Resolution (ADR) procedures and negotiated changes in the apprentice-journeyman ratios that are difficult to quantify. And there are indirect cost savings flowing from the PLA's guarantee of project stability and uninterrupted production that are substantial and no less important. These areas highlight a PLA's value not only for taxpayer and contractor savings but as a way to do the job on-time, on-budget and with proper oversight of worker safety and health.

PLAs provide a framework for a particularly high level of labor-management cooperation. This is reflected in provisions for joint committees as well as for alternative and expedited claims and dispute resolution.

Given the particular pressure to contain rising workers' compensation costs—and the burden that these costs represent for the construction industry—ADR procedures are one of the most important advantages of PLAs. ADR procedures are permitted in New York State when established through collective bargaining. The alternative procedures negotiated within PLAs, and subject to Workers' Compensation Board approval, replace WCB procedures with an expedited and non-adversarial process that can potentially save considerable time and substantial costs.

The SCA PLA illustrates typical resolution procedures. No-strike and no-lockout guarantees are backed by expedited arbitration procedures. Grievance and arbitration procedures are available for any disputes arising out of the contract. Jurisdictional disputes are handled by the New York Plan for the Settlement of Jurisdictional Disputes (Article 10) and supported by a separate contract section assuring continued production pending settlement. A broad management's rights clause provides contractors with additional flexibility for scheduling and work assignments not inconsistent with other contractual provisions.

Joint committees are particularly important for effective communications, guidance and oversight during longer duration projects. The SCA PLA, for example, establishes a Program Labor Management Committee that meets on a regular basis with a broad charge to:

> (1) promote harmonious relations among Contractors and Unions; (2) enhance safety awareness, cost effectiveness and productivity of construction operations; (3) protect the public interest; (4) discuss matters relating to staffing and scheduling with safety and productivity as considerations; and (5) review Affirmative Action and equal employment opportunity pertaining to Program Work. (Article 8. Section 1.)

Such a useful provision clearly enables labor and management to make adjustments as become necessary

during the project. In the wake of recent industry accidents in New York City and elsewhere, having a contractual forum for monitoring safety assumes a particular urgency and importance. The provision should also be seen in the larger context of the commitment to industry safety by New York City-based contractors and unions—now formally articulated in guidelines developed by the Build Safe NYC Project, an initiative of the Building Trades Employers Association and the Building and Construction Trades Council of Greater New York.

Despite this and other convincing evidence of PLA's value, and despite the requirement that public projects be governed by prevailing wages, PLA opponents continue to assert that PLAs raise construction costs so as to discourage public entities from authorizing PLAs.

One particularly vocal critic of PLAs is the Beacon Hill Institute at Suffolk University (Massachusetts) (hereinafter "Beacon Hill"), a "free-market"-oriented think-tank founded in 1991 by Massachusetts millionaire and politician Ray Shamie.[24] Beacon Hill published a study in 2006, *Project Labor Agreements and Public Construction Cost in New York State*, which analyzed 117 public school construction projects conducted in New York State since 1996. Of the 117 projects, 19 were conducted using PLAs. This report concluded that "a PLA increases a project's base construction bids by $27 per square foot (in 2004 prices) relative to non-PLA projects," what Beacon Hill called the "PLA Effect," or a 20% increase over base construction bids. Beacon Hill claimed that "the potential savings from not entering into a PLA on a school construction project range from $2.7 million for a 100,000-square-foot structure to $8.1 million for a 300,000-square-foot structure."[25]

Beacon Hill's conclusions should be dismissed as not credible for these reasons: (1) the study focuses on bid costs, not actual costs; and (2) it fails to segregate labor costs or account for various factors that influence project costs.[26]

Beacon Hill's "PLA Effect" is a projection of bid costs data. Bid figures do not provide a reliable basis for comparison. The Beacon Hill team looked at bid figures that were rejected, submitted by unsuccessful bidders. There is no way to know about the accuracy and basis of these bids or the skill, experience, or business acumen of the various bidders. A much more useful study examines actual costs, or isolates labor costs from other construction costs, and compares labor costs between a particular PLA, various area craft agreements and area standards. The authors state that they "contacted town and city officials, architects and contractors requesting data for each school construction project, including the . . . final actual base construction cost (if the project was completed) . . ."[27] but then do not present any such data. The 14-page report is notable for what it does not include. There are, for example, no data broken down by the 117 schools it claims to have sampled, no detail about the nature and size of each project, no comparison of similarly situated projects performed with and without a PLA.

The Beacon Hill Institute report also fails to consider a number of significant factors that impact construction costs. Beacon Hill focused on the size of the project in square feet but did not account for such important determinants of cost as these: whether the work involved new construction or renovation, site preparation, laboratories, classrooms, kitchens, lunchrooms, gymnasiums, auditoriums, or audio / visual facilities.

Another shortcoming of the Beacon Hill study relates to the very nature of PLA work: the study didn't account for the likelihood that many PLA projects will be more complex, involve more amenities, be larger and operate under time constraints that can impact costs and that these same considerations are at issue when PLAs are authorized in the first place.[28]

What PLA opponents have consistently failed to demonstrate is that the PLA is itself responsible for a project's increased costs. A favorite target for many years was the PLA for the massive Central Artery / Third Harbor Tunnel ("Big Dig") project in Massachusetts. Construction on this project, the largest public works project in U.S. history, began in 1991 and was substantially completed in 2006. Early cost estimates for the project were $2.3 billion in 1983 (approximately $6 billion in 2006 dollars), then revised to $5.8 million in 1991, and $13.6 billion in 2000. Actual cost at completion was $14.8 billion; construction costs represented $9.6 billion of that total.[29]

Throughout the Big Dig project, PLA opponents, including the Beacon Hill Institute, sought to pin the project's mounting costs and overruns on the project's PLA. This was not only simplistic. It is not true. The Massachusetts Transportation Authority conducted an extensive post-job analysis in 2007, a history of the project's costs.[30] At no point are labor costs or the PLA identified as responsible for the project's increased costs.

A U.S. Department of Transportation 50-page Task Force report in 2000, written in response to concerns about the project's escalating costs, also found no correlation between the PLA and the cost increases. This report made 34 recommendations affecting accounting, oversight and cost containment practices. It suggested that project officials incorporate labor costs into more accurate monthly projections of overall costs along with estimates for petroleum consumption, insurance premiums, consultant support services, and design activities.[31]

Cost increases on the Big Dig were instead attributable to design changes and engineering problems, controversial accounting and management practices, inflation, the increased scope of the project, and costs incurred to minimize the project's impact on the city's traffic and commerce. Unforeseen engineering problems resulted from soil conditions, the costs of tunneling through land-

fill, soft clay, and glacial till, the need to stiffen soil and relocate a labyrinth of old and often unmapped utility lines.

Fair Labor Standards Under Attack

The controversy over PLAs and labor costs is misplaced. The Big Dig was an especially large and complex project. Design, engineering, equipment, and material costs factor into the final costs of nearly all projects. Labor costs ought not to be a factor in so far as prevailing wage provisions govern public works projects whether or not those projects are performed under PLAs. It is hardly surprising that among those voices most outspoken against PLAs are opponents of the prevailing wage. One such opponent is Beacon Hill's Executive Director David Tuerck, who argues for repeal of the Massachusetts prevailing wage law as a way to cut public works' construction costs.[32]

Beacon Hill represents those in the industry who seek competitive advantages by driving down labor costs and other protective labor standards. Recent studies by Cornell's School of Industrial and Labor Relations, the Fiscal Policy Institute, and the Brennan Center,[33] among others, show just how damaging wage competition has become in the construction industry. Such practices as "under the table" cash payments, ignoring wage, hour and tax laws, and intentional misclassification of workers as independent contractors—to deny workers benefits and evade tax payments, workers' compensation and unemployment insurance premiums—have become rampant.

The Fiscal Policy Institute estimated that the cost to taxpayers of such illegal underground activity in New York City's construction industry to be over half a billion dollars—with one-in-four construction workers either misclassified or paid off the books. Cornell ILR studied four years of Unemployment Insurance audits (2002 to 2005) and concluded that 15% of the state's construction workforce is misclassified.

The construction industry is particularly prone to worker abuse through misclassification. Studies conducted by the U.S. General Accounting Office and for the U.S. Department of Labor underscore that the construction industry stands out both as the industry with the highest percentage of independent contractors (22%) but also as the industry with the "highest incidence of misclassification."

This finding should come as no surprise. Construction is an expanding but fiercely competitive contract industry, characterized by slim profit margins, high injury and comp rates, composed largely of numerous small- to medium-sized companies whose numbers and size may make them more likely to operate beyond the view of state regulators. It is labor intensive, its jobs are temporary and many jobs, particularly in unlicensed trades, can be broken down into piece work. It is a lucrative employment source for immigrant, often undocumented, workers, and unscrupulous employers use their workers' alleged independent contractor status to circumvent employer obligations under federal immigration laws. And the construction workforce is mobile—making it difficult for regulators to track down particular employers. All the elements are present throughout the industry but misclassification and "under the table" practices operate with particular impunity in the large and expanding residential and commercial sectors.

PLAs are a bulwark against the attack on labor standards. And they have been very successful at saving costs while maintaining collectively bargained and statutory standards.

Fair Labor Standards, Responsible Contracting and PLA Bidding

In a climate where labor standards are threatened by fiercely competitive pressures, it makes sense to highlight two Executive Orders issued in 1993 by then Governor Mario Cuomo and continued by all three succeeding gubernatorial administrations: Executive Orders 170 and 170.1 establishing uniform guidelines for determining the responsibility of bidders.[34]

These Orders, together with the Pataki Executive Order No. 49 (encouraging the use of PLAs) are key elements of state policy on competitive bidding and all relate to safeguarding the public interest in obtaining the best work for the money with fair labor standards compliance. The criteria articulated in these Orders apply to contracting for all public works projects—whether or not a PLA is authorized—and should guide agencies evaluating the qualification of PLA bidders.

While statutes and ordinances typically require that contracting agencies make awards to "the lowest responsible bidder," the meaning of "responsible" may not be defined with enough specificity to guide agency decision-makers. The Cuomo Orders establish 12 areas for testing bidder compliance. These are summarized as follows:

1. Lack of adequate experience, prior experience with comparable projects, for financial resources to perform the work . . . in a timely, competent, and acceptable manner.
2. Criminal conduct in connection with government contracts or the conduct of business activities.
3. Grave disregard for the personal safety of employees, state personnel, or members of the public. Agencies are to review company practices around training and monitoring.
4. Willful noncompliance with the prevailing wage and supplements payments.

5. Any other significant labor law violations such as child labor violations, failure to pay wages or unemployment insurance tax delinquencies.
6. Any significant violation of the Workers' Compensation Law.
7. Any criminal conduct involving environmental practices.
8. Failure of a bidder to demonstrate good faith compliance with applicable federal or State statutes and regulations requiring utilization of women and minority owned and disadvantaged business enterprises.
9. Failure of a bidder to comply with federal and state statutes or regulations for the hiring, training, and employment of persons presumed to be disadvantaged per equal employment opportunity requirements.
10. Submitting a bid that is mathematically or materially unbalanced.
11. Submitting a bid so far below the agency's cost estimate that it appears unlikely the bidder can perform at that price.
12. Any other cause so serious as to cause the agency to question the bidder's responsibility such as submitting a false or misleading statement on a uniform questionnaire.

Agencies typically have questionnaires that are based on the Cuomo Orders and that request relevant information from prospective bidders. These questionnaires can seek more detailed information about such issues as apprenticeship certification, financial history, wage and hour and other labor law compliance. Accompanying such questionnaires should be a statement articulating the agency's responsible contracting policy.

One procedure for determining lowest responsible bidder is as follows:

- **Step One—**Provide notice to potential bidders:
  * A statement articulating the agency's responsible contracting policy should accompany bid solicitations.
- **Step Two—**Questionnaire sent to the apparent low bidder:
  * Upon receipt of all bids, the contracting agency identifies the apparent low bidder.
  * The apparent low bidder is then sent a questionnaire.
  * The apparent low bidder has a specified time, e.g., up to one week (seven calendar days), to provide responses to the questionnaire .
- **Step Three—**Preliminary determination of "Lowest Responsible Bidder":
  * The contracting agency analyzes questionnaire responses.
  * Based on this analysis, the agency makes a preliminary determination of contractor status as "lowest responsible bidder" for the particular project within the meaning of the responsible contracting policy.
- **Step Four—**Certification or preliminary disqualification:
  * The agency, based on its analysis of the information received, will either:
    – CERTIFY the apparent low bidder as the "Lowest Responsible Bidder," *or*
    – PRELIMINARILY DISQUALIFY the apparent low bidder.
      ° The agency formally notifies the apparent low bidder of its decision in writing.
        • An apparent low bidder is sent written notification stating the reasons that it is Preliminarily Disqualified.
      ° The Preliminarily Disqualified bidder will, in the same Notice, receive the date, time, and location of a Hearing to be conducted within a specified time, e.g., one week (seven calendar days), prior to a final determination that the apparent low bidder is either certified as the lowest responsible bidder or disqualified.
      ° Final determination that the apparent low bidder is disqualified, pursuant to this policy, for the particular project in no way limits that apparent low bidder from bidding on other projects let by the agency.

Requiring that the bidder be party to a New York State-certified apprenticeship program provides an important standard for quality work. The New York City School Construction Authority, for example, has since 1992 made this a condition for contract awards over $25,000 on projects larger than $1 million.

PLAs as Tools for Workforce and Community Economic Development

Provisions for Apprenticeship Training and Hiring of Minority, Women, and Low Income Workers

Proponents of PLAs have frequently found common ground with advocates for workforce and community development local hiring and for low-income, minority and women workforce and economic. This adds another dimension to PLAs' value for the public interest.

Following are illustrations of innovative provisions from selected PLAs and PLA projects. The point is that PLA planning provides the opportunity for various parties—public owners, contractors, unions, and community groups—to formulate innovative pre-apprenticeship programs, apprenticeship, training, and hiring goals that serve broad, important policy goals as well as the needs of the industry.

- **Tappan Zee Bridge PLA**

  > up to 50% of the apprentices placed on the project shall be first year, minority, women, or economically disadvantaged apprentices as shall be 60% of the apprentice equivalents, placed on the project, who do not necessarily meet all of the age or entrance requirements for the apprentice program or have necessarily passed the entrance exam.

- **New York City School Construction Authority PLA**

  > Recognizing the need to maintain continuing supportive programs designed to develop adequate numbers of competent workers in the construction industry and to provide craft entry opportunities for minorities, women and economically disadvantaged non-minority males, Contractors will employ apprentices. . .in a ratio not to exceed 25% of the work force by craft . . .
  >
  > In the event a Local Union either fails, or is unable, to refer qualified minority or female applicants in percentages equaling affirmative action goals as set forth in the Authority's bid specifications, the Contractor may employ qualified minority or female applicants from any other available source.

This and similar contract provisions gain traction through specific industry-based labor management partnerships for workforce development. A leading example, for both New York City and the nation, is Construction Skills 2000—the Edward J. Malloy Initiative for Construction Skills. The program is jointly sponsored by the Building and Construction Trades Council of Greater New York and the Building Trades Employers Association; BTEA President Lou Coletti serves as Chairman and Building Trades Council Chief of Staff Paul Fernandes is President and CEO. It is supported by the Port Authority of New York / New Jersey, the New York City School Construction Authority, the New York City Department of Education, the New York Building Congress, and the Consortium for Worker Education. Construction 2000 places New York City high school graduates, veterans, women, and economically disadvantaged workers into apprenticeship programs of unions affiliated with the Building and Construction Trades Council. It has a laudable track record, having placed over 700 adults as of 2007. Eighty-seven percent of these placements went to individuals from the African-American, Hispanic, and Asian communities and a five-year long [2001 to 2005] survey showed that the vast majority (81%) remain actively employed in the industry. Named a lead provider of services in 2005 by the NYC Mayor's Commission on Construction Opportunity, CS 2000 received national recognition the following year with the Construction Users Roundtable Workforce Development Award.[35]

- **Central Artery / Tunnel ("Big Dig") PLA**

The massive Central Artery / Tunnel project in Massachusetts had a strong record of meeting affirmative action goals pursuant to its PLA. As reported in a Cornell ILR paper as the project was under way,[36] as of 2000:

> * Minority employment was approximately 15 percent overall or nearly five million worker hours since the project began. Employment of women was 3.7 percent overall or 1.208 million worker hours. Women-owned businesses billed the project for more than $350 million. Contractors provided training through the Central Artery Training Program to minorities, women, and residents of the communities impacted by the project and access was provided to project-related jobs. The program graduated 400 people into the trades, many of whom are currently serving apprentices. 34 percent were women, 65 percent minorities, and 64 percent were from the area impacted by the CA / T project.
>
> * Union leadership played a key role in facilitating minority training and access in part through close contact with community based organizations. Boston Building Trades Secretary Treasurer Joe Nigro sat on the

Board of Directors of the Massachusetts Alliance for Small Contractors, a non-profit organization providing business development courses, workshops, and seminars for minority and women contractors. And Massachusetts State Building Trades Council President Joe Dart served as a Board member of Move Massachusetts, a broad coalition of neighborhood, environmental, business, labor, and public sector organizations.

- **Los Angeles (California) Unified School District PLA**

> Unions shall recruit school district graduates and local community residents from the District's attendance area to be employed on Project work. Unions agree, to the extent law permits and as long as they possess the requisite skills and qualifications, district graduates and local community residents from the District's attendance area shall be first referred, including apprenticeship and other subjourneyperson positions until at least 50% of the positions for a particular Contractor (including core employees) have been filled with graduates and attendance area residents . . .[37]

- **Port of Oakland Maritime and Aviation Project Labor Agreement (MAPLA), Oakland, CA**

$1.2 billion Port of Oakland modernization project PLA (MAPLA) requires local hiring through the oversight of a joint Port-Union Social Justice Committee.[38]

- **East Side Union High School District PLA, San Jose, CA**

The 2004 PLA establishing a Construction Technology Academy provided vocational education for construction industry jobs as part of a $300 million school construction and renovation project: pre-apprentice training, summer internships, and jobs in both blue collar and white collar occupations within the construction industry. Academy graduates—many of whom are from minority communities—had priority in union apprenticeship programs.[39]

Conclusion

- A **project labor agreement (PLA) is a pre-hire, uniform agreement for a particular project** that standardizes schedules, work rules and other terms and conditions among various crafts for the length of the project, and provides for dispute resolution procedures as alternatives to strikes and lockouts.
- **PLAs have long been used in the private sector to promote stability, efficiency, and productivity** on construction job sites. Since the U.S. Supreme Court *Boston Harbor* decision in 1993, such agreements have been available to state, county, and municipal construction users.
- **Public-sector Project Labor Agreements [PLAs] in New York State must be shown to have a proper business purpose**, consistent with state competitive bidding statutes, by providing direct and indirect economic benefits.
- **PLAs are a valuable construction management tool for project planning and labor cost reduction.**
- A key point made here is that there is **no evidence to support claims that project labor agreements either limit the pool of bidders or drive up actual construction costs**. Such claims by PLA opponents are based on inadequate data and faulty methodology. PLAs—in New York City and State and elsewhere—have instead proven very successful at saving costs while respecting fair labor standards.
- **PLAs' cost savings are both direct and indirect and can be substantial.**

These labor cost savings are typically achieved by the following:

* Direct cost savings provisions
  - Alternative dispute resolution procedures for—and containment of—workers' compensation costs;
  - Elimination or reduction of premium rates including increased contractor flexibility for scheduling;
  - Reduction and standardization of the number of paid holidays;
  - Increased utilization of apprentices.
* Indirect cost savings provisions
  - Uninterrupted production, removal of potential friction, and heightened cooperation between labor and management made possible by
    - A uniform contract expiration date for all crafts;
    - No strike provisions;
    - Expedited dispute resolution procedures and joint committee structures to address

a broad range of jobsite issues including jurisdiction;

- Contractors having immediate access to a pool of skilled labor during the hiring phase and throughout the life of the project.

- Public-sector PLAs are not "union-only" agreements. PLA signatories are not necessarily bound to other jurisdiction-based agreements. State competitive bidding statutes, such as those in New York State, require bidding that is open to both union and non-union contractors.

- Contract awards must be non-discriminatory as to union status and can be properly conditioned on the willingness of a successful bidder to sign the PLA.

- PLAs are effective instruments for workforce and community economic development and to meet public policy objectives for equal employment opportunities. *PLA provisions expand opportunities for apprenticeship training as well as for the hiring of minority, women, and low-income workers.*

Endnotes

1. *Building and Construction Trades Council of the Metropolitan District, et al. v. Associated Builders and Contractors of Massachusetts / Rhode Island, et al.*, 507 U.S. 218 at 142 LRRM 2649, 2651 (1993) (hereinafter *Boston Harbor*).
2. *Boston Harbor* at 2654–5.
3. *Boston Harbor* at 2654.
4. *PLA Scorecard: Unions 30, Open Shop 6: Labor Wins Bulk of Legal Challenges Against Project Labor Agreements*, Cockshaw's Construction Labor News and Opinion, Vol. 29, No. 12, December 1999*; Labor Savors More PLA Successes*, Cockshaw's, Vol. 29, No. 11, November 1999*; Unions Enjoy More PLA Successes*, Cockshaw's, Vol. 30, No. 5, May 2000. This trend toward upholding PLA use has accelerated in recent years so that PLA use at the state level is now well-established.
5. *New York State Chapter, Associated General Contractors v. New York Thruway Authority*, 88 N.Y.2d 56, 666N.E.2d 185, 643 N.Y.S. 2d 480, 151 L.R.R.M. (BNA) 2891, 42 CLR 117, 133, 4/13/96 (hereinafter *Thruway*).
6. Executive Order No. 5, *Review, Continuation and Expiration of Prior Executive Orders, 1/1/2007.*
7. Executive Order No. 9, *Review, Continuation and Expiration of Prior Executive Orders, 6/18/2008.*
8. 240 A.D. 2d 739, 155 L.R.R.M. (BNA) 2856, 662 N.Y.S. 2d 773 (2d Dep't 1997).
9. 239 A.D.2d 875, 659 N.Y.S.2d 672, 1997 N.Y. App. Div. LEXIS 6233, 158 L.R.R.M. 2319 (4th Dep't 1997).
10. 269 A.D.2d 801, 703 NYS2d 418 (N.Y. App. Div., Feb. 16, 2000).
11. *Nelcorp Elec. Const. Corp. v. County of Broome (2008)*, 2008 NY Slip Op. 50436U, 18 Misc. 3d 1144A, 859 N.Y.S.2d 896, 2008 N.Y. Misc. LEXIS 958 (2008).
12. NLRA, 29 U.S.C. § 158(b)(1)(A), (2).
13. *Project Labor Agreement Covering Specified Construction Work Under the Capital Improvement and Restructuring Programs (2005–2009), New York City School Construction Authority and Building and Construction Trades Council of Greater New York and Vicinity*, at 12.
14. *Id.* at 10–11.
15. *Boston Harbor* at 229.
16. *Thruway* at 71.
17. Project Labor Agreements, Dale Belman, Ph.D., Matthew M. Bodah, Ph.D., Peter Phillips, Ph.D., ELECTRI International (2007), at 1, 13–14, 35–36; *available at* http://massbuildingtrades.org/project-labor-agreements-white-papers. The authors reviewed previous research and conducted a study of bidding on both PLA and non-PLA projects in two adjacent school districts of the San Jose-Sunnyvale-Santa Clara, California construction market. They noted that different bidding methods can influence the number of bidders; in their comparison, one of the districts favors separate prime contracts on specialty work. Since there are more specialty than general contractors in most construction markets, that fact alone may account for more bidding.

    Their report concluded that

    > the only statistically significant variable that predicts bidding behavior is business cycle. In the period that construction activity increased, the number of bidder per bid opening decreased.
    >
    > Most notably, the results of the study indicate that the presence of a PLA has no statistically significant effect on the number of bidders per bid opening.

    PLA opponents argue that PLAs restrict bidders thereby reducing competition and raising prices. "The problem with this argument," according to the Belman team, "is that one need only about half a dozen bidders to get the full effect of bidding competition on prices. Furthermore, research to date only looks at whether nonunion contractors are discouraged and not whether union or high wage nonunion contractors are attracted by PLAs. In short, we do not know whether or to what extent PLAs discourage bidding."
18. N.Y. Labor Law § 222 (2)(b) (2008).
19. *See* "Governor Paterson Announces Wicks Law Overhaul: Long-Sought Reform will Help Relieve Onerous Local Property Taxes," NYS Division of Budget, April 9, 2008 news release, *available at* www.budget.state.ny.us.
20. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982).
21. National Labor Relations Act, 29 U.S.C. 158(e).
22. National Labor Relations Act, 29 U.S.C. 158(f).
23. *Feasibility for a Project Labor Agreement on the I-287/Cross Westchester Expressway Project*, prepared for NYS Department of Transportation by Hill International, Inc., 1999, at 30-34.
24. www.beaconhill.org.
25. *Project Labor* Agreements *and Public Construction Cost in New York State*, Paul Bachman, MSIE and David Tuerck, PhD, Beacon Hill Institute at Suffolk University, Boston, Massachusetts (2006), at 1, 10, 12. (Beacon Hill).
26. *Project Labor Agreements*, Belman, Bodah, Phillips at 14.
27. Beacon Hill at 8.
28. See *Project Labor Agreements*, Belman, Bodah, Phillips at 36–37.
29. *Cost/Schedule Update of the Central Artery/Tunnel Project*, Massachusetts Turnpike Authority, May 2007, *available at* http://www.masspike.com/big/dig/updates/finances.html#0507.
30. *Id.* NB "Cost History" at 15.
31. Federal Task Force on the *Boston Central Artery Tunnel Project, Review of Project Oversight and Costs, U.S. Department of Transportation*, 3/31/2000 at 5.

32. David Tuerck, *Next Target: The Prevailing Wage Law*, The Boston Globe, August 20, 2008, *available at* boston.com.

33. *The Cost of Worker Misclassification in New York State*, Linda H. Donahue, James Ryan Lamare, Fred B. Kotler, Cornell School of Industrial and Labor Relations, February 2007, NB 6–8, *available at* http://digitalcommons.ilr.cornell.edu/reports/9/.

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34. 9 N.Y.C.R.R. Sec 4,170, 4,170.1 (2008).

35. *Coletti to Head Skills Corp.*, Real Estate Weekly, Feb. 14, 2007; *Construction Skills 2000 Career Day Attracts Employees of the Future*, Real Estate Weekly, Aug. 13, 2003, *available at* www.thefreelibrary.com; *see also With a Little Help, Gaining Broader Access to Better-Paying-Paying Jobs*, Joseph P. Fried, New York Times, June 19, 2006 and www.constructionskills.org.

36. *Digging Into the Big Dig: The Central Artery/Tunnel Project—Is It Working*? Fred B. Kotler, Cornell ILR, September 2000, at 7–8. Available from the author: fbk2@cornell.edu.

37. PLA text quoted in *Getting to the Table: A Project Labor Agreement Primer,* National Economic Development and Law Center, Liam Garland and Susie Suafai, Oakland, California, 2002 at 19.

38. *Port of Oakland Maritime and Aviation Project Labor Agreement—Entered Into Between Davillier-Sloan, Inc./Parsons Constructors, Inc. and the Building and Construction Trades Council of Alameda County* (California) AFL-CIO, 2000, Article III at 10, *available at* www.communitybenefits.org.

39. *Project Labor Agreements,* Belman, Bodah, Phillips, reported in detail at 53-59.

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Weingarten Right of the Private Sector

By Katherine Schlindwein Vorwald

The well established *Weingarten* rights of the private sector provide that under the National Labor Relations Act (NLRA), employees have the right to request that a representative of their employee organization be present at interrogations in which it is reasonably believed by the employee that he or she may be the subject of discipline.[1] For the past 33 years, this right has been recognized in the private sector, but has only recently been formally recognized in the public sector in New York. The Public Employees' Fair Employment Act (commonly "Taylor Law") posed a problem to the recognition of the right, because it did not contain similar language to the NLRA's "mutual aid and protection" language in § 7. Both the Public Employment Relations Board (PERB) and the courts of New York struggled with recognizing the right since the *Weingarten* decision.

Although Civil Service Law § 75(2) recognizes the right to union representation at interrogations, not all public employees are covered under that statute. The state legislature recently amended the Taylor Law to make it an improper practice for an employer to prohibit a request by an employee to bring an employee organization representative to the interrogation.[2] Because the amendment is new, it has not been adjudicated to determine its scope and how it applies to specific groups of public employees. This article provides a brief history of the development of the *Weingarten* right in the public sector in New York, and explores the application to probationary public employees, members of the New York City police force, and public employees interrogated by the Office of the Inspector General and the Governor's Commission on Quality Care.

The right to request union representation at an interrogation by an employer was first recognized in the private sector by the National Labor Relations Board (NLRB) in 1973. The case that came before the Board involved an interview of an employee of the J. Weingarten, Inc. company who was suspected of inappropriately taking a free lunch from the lobby of her store.[3] A loss prevention specialist and the store manager called the employee up to the vacant employee lounge and questioned her regarding their suspicions.[4] Throughout the interview, the employee requested on numerous occasions that her union steward be present.[5] The employer denied the request, stating that it was a "private matter between her and the Company."[6] Despite being instructed by the managers to not discuss the information with anyone else, the employee told her union steward and a representative of the union.[7] After learning that the employee believed that she was entitled to a free lunch, the managers issued a statement to the department banning the practice.[8] The union then filed a grievance with *Weingarten*,[9] and filed an unfair labor practice with the NLRB, stating that *Weingarten* violated § 7 of the National Labor Relations Act by denying union representation to the employee.

Section 7 of the National Labor Relations Act (NLRA) provides employees with the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."[10] Previous decisions at the NLRB indicated that failure to honor a request for union presence at a compelled disciplinary interview "dilute[es] . . . the employees' right to act collectively to protect his jobs interests."[11] Under § 8(a)(1), the denial of the right to union representation "has a reasonable tendency to interfere with, restrain, and coerce employees in violation of section 8(a)(1) of the Act.[12] Here, the Board found that the employee "could . . . reasonably conclude that action might be taken by (*Weingarten)* which would put her job security in jeopardy"[13] because the line of questioning involved a suspicion of dishonesty.[14] The Board concluded that that the failure to honor the request for union representation at a compelled interrogation that may reasonably result in discipline restrained the employee's right to engage in a collective activity to protect her job.[15] The employer thus committed an unfair labor practice under § 8(a)(5).[16]

The Company appealed the decision to the Fifth Circuit Court of Appeals. Circuit Judge Dyer refused to enforce the Board's decision.[17] Reading § 7 narrowly, the court concluded that there must be "some showing that the purpose of the interview was not merely to elicit facts concerning employee conduct but to impose disciplinary measures upon the employee."[18] The court thus rejected the Board's earlier precedent from *Mobil*, and held that the employee had no right to union representation at an investigative interview.[19] The union then appealed the decision to the Supreme Court.

The Court overturned the Fifth Circuit's decision and upheld the Board's initial holding that the company committed an unfair labor practice. The Court held that the Fifth Circuit "impermissibly encroached upon the Board's function,"[20] when it denied to enforce its decision. The Board's construction of section 7 was "a fair and reasoned balance upon a question within its special competence."[21] The Court stated that the Board's decision was in line with the purposes of the NLRA, in that it protects employees from inequality in bargaining power.[22] In analyzing the Board's decisions in both *Weingarten* and *Mobil Oil*, the Court outlined the Board's new interpretation of § 7.

The employer engages in a "serious violation" of the employee's right to engage in concerted activity under § 7 when it denies the employee's request for union representation at an investigative interview.[23] When an em-

ployee requests union representation, it is seeking to "act collectively to protect his job interests,"[24] and to deny that request restrains the employee's right under the Act. The Court held that the union representative is both safeguarding the employee's interests and "the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly."[25] The employee may, however, waive his or her right to union representation if desired.[26]

The right to request only applies where the employee "reasonably believes the investigation will result in disciplinary action."[27] Quoting the Board's decision in *Quality Mfg. Co.*,[28] the Court held that the rule does not apply to interviews where there is no reasonable fear, such as "shop-floor conversations" where the employee is simply giving instructions.[29] This decision is based on an objective standard, since the Court "would reject any rule that requires a probe of an employee's subjective motivation."[30]

The Court agreed with the Board that the *Weingarten* right does not limit the rights of the employer to conduct its investigation without the union's interference. The employer may refuse to interview the employee at all, thereby circumventing the requirement to permit union representation if requested.[31] The Court accepted the Board's rationale because the interview would then be voluntary, and the employee can choose whether or not the interview would be in his or her best interests.[32] Also, the right does not grant the union any more bargaining power by virtue of its presence at the investigatory interview. The Court agreed with the Board's distinction that investigatory interviews need not involve the union, whereas disciplinary interviews have a "mandatory obligation to meet with the union representative . . ."[33]

Since 1975, unionized employees in the private sector have enjoyed *Weingarten* rights in the workplace. However, because public sector employees are not covered under the National Labor Relations Act in New York, they were not affected by the *Weingarten* decision. The Public Employment Relations Board (PERB) is similar in function to the National Labor Relations Board, except it adjudicates issues of public employment in New York exclusively. It is empowered under the Taylor Law to resolve "issues of law and fact growing out of improper practice charges, representation petitions and strike allegations."[34]

When an improper charge is brought to PERB, the Director of Representation and Employment Practices decides whether the charge was timely filed and whether the facts allege a violation of the Taylor Law.[35] If it fulfills those requirements, the Director assigns the case to an administrative law judge (ALJ) for a formal hearing, conference, and decision.[36] The ALJ procedure creates a record for PERB[37] and then issues a decision and an order, which is final unless there is an exception.[38] The parties can file an exception with regard to "procedure, fact, law, or policy,"[39] and then the Board itself may decide whether to "adopt, modify or reverse the ALJ decision."[40] PERB may then remedy the improper practice as stated in Civ. Serv. Law § 205(5)(d).[41]

In response to the *Weingarten* decision, PERB began hearing cases on this issue and expanding the rights in the Taylor Law to provide for a similar *Weingarten* right. The fact that the Taylor Law forbids public employees from striking became a huge hurdle to the attempts of ALJs and the Board to find a similar *Weingarten* right. There is no explicit protection for acts for mutual aid or protection, as provided in § 7 of the NLRA. Eventually, the Board found the right in the Taylor Law by looking at the purposes of the act rather than the similarities in text.

The history of the *Weingarten* right in the Public Employment Relations Board begins in 1976 after the *Weingarten* decision came down from the Supreme Court. The first case in which the *Weingarten* right was asserted at PERB was *City of New York*.[42] The Social Service Employees Union (SSEU), Local 371, was the charging party. The SSEU asserted that the City of New York violated § 209-a.1(a), (b), and (c) of the Civil Service Law by "refusing to permit union representative during interview conducted by the City's department of Investigation with Sanford Rifkin, an employee with the Department of Social Services."[43] The facts are as follows: the Department directed Rifkin to meet with the investigating attorney of the Department of Investigation with regard to a real estate action that Rifkin was involved with.[44] Rifkin first met with his grievance representative and requested that the representative go with him to the investigatory interview.[45] When they arrived, the investigating attorney refused to let the union representative in.[46] Without addressing the *Weingarten* right directly, the Hearing Officer determined that Rifkin's participation in the investigation interview was voluntary and only to "clear" himself of any suspicion rather than as a precursor to or in furtherance of the employer seeking discipline.[47] However, the Hearing Officer did recognize that the Taylor Law had a longstanding history of "draw[ing] from the vast private sector experience those analogies comparable to the public sector."[48] This was perhaps the first indication that *Weingarten* rights are not incompatible with public employment.

The SSEU appealed the decision and it went before an ALJ in July.[49] Upholding the Hearing Officer's decision, the ALJ determined that the specific language in § 7 of the National Labor Relations Act (NLRA) in which the *Weingarten* right was based is not found anywhere in the Taylor Law.[50] As the Taylor Law did not grant an explicit right of employees to engage in concerted activities for the purposes of mutual protection, the ALJ determined that there simply was no intent to provide for a *Weingarten* right in the Taylor Law.[51] The court relied on *Matter of Scarsdale,* which stated only that the right to represen-

tation in preliminary investigations is not a mandatory subject of bargaining.[52]

When confronted with unions asserting *Weingarten* rights in later cases, PERB continued to avoid analyzing the Taylor Law to any degree. In *City of Newburgh,*[53] the Chairman of PERB determined that "the employer cannot interfere with the employee's opportunity to consult with his union about anticipated charges."[54] Here, the grievant was accused by the Police Commissioner of being intoxicated on the job.[55] The grievant sought out union representation to help him with the accusation.[56] Afterward, the employer requested that the union representative the grievant spoke to come in for questioning about how he counseled the grievant.[57] The union representative resisted the questioning, stating that questioning was improper because "it interfered with the [grievant's] right to organization and representation with his own right as a member of the grievance committee to represent [employees]."[58] The Chairman's determination, although recognizing that an employer cannot interfere with the employee's right to consult the union about potential disciplinary charges, did not extend to pre-disciplinary interrogation. Hearing Officers, however, began to recognize that as a matter of policy *Weingarten* rights should apply to public employees. It was not until 1986 that PERB would hear a case explicitly dealing with *Weingarten* rights.

In *New York City Transit Authority,*[59] the Amalgamated Transit Union (ATU) alleged that an employee was denied representation by the ATU during a possible pre-disciplinary interrogation.[60] The ALJ discussed how PERB had not "directly ruled" on whether or not public employees had a *Weingarten* right under the Taylor Law, and since *City of New York,*[61] has "disassociated itself from the hearing officer's finding to that effect . . . ." *New York City Transit Authority.*[62] Finally, the ALJ resorted back to the Taylor Law's lack of language similar to section 7 in protecting actions for "mutual aid or protection" and determined that the employee had no *Weingarten* rights.[63]

Although the ALJs consistently held that there was no explicit *Weingarten* right in the Taylor Law, some ALJs began to recognize policy inherent in the Taylor Law which could be viewed as granting a *Weingarten* right. In *Wayne-Finger Lakes BOCES,*[64] the ALJ said it was "unnecessary" to determine whether the grievant employee had a right to representation at an investigatory interview because "a right of representation does not attach under *Weingarten* to every meeting between an employer and an employee.[65] The employee must reasonably believe the investigation will result in disciplinary action.[66] Here, the employee was simply attending a counseling session in which it was explicit that the employee was not subject to discipline at all and this kind of meeting is "generally regarded as matters to which no right of representation attaches," even under *Weingarten*.[67] It appeared that had the ALJ received a case with facts that would mirror the ones in *Weingarten*, he or she may have ruled in favor of finding a *Weingarten* right.

In 1988 an ALJ took initiative and, while not finding that *Weingarten* rights existed, began to discuss some of the policy behind why there should be recognized *Weingarten* rights in the Taylor Law. In *City of Rochester,*[68] footnote 9 of the decision, the judge recognized that there are "circumstances in which employees are engaged in protected activity,"[69] and that "they have an unfettered right to consult with their bargaining representative."[70] Furthermore, the ALJ stated that an "employee organization has an "unfettered right to deal confidentially with employees it represents in matters evolving from the employer-employee relationship."[71] Finally, the ALJ stated that the Taylor Law is "designed to protect the rights of the bargaining agent in collective negotiations and in the administration of questions or claims arising under the contract. Interference with those rights is a violation of 209-a(1)(A) of the act."[72] These are all similar policy arguments made in *Weingarten,* and it is clear that the judge is advocating for their adoption in the Taylor Law. The ALJ concluded by stating that because PERB "disassociated" itself from any decision with regard to *Weingarten* rights, there is still no recognized *Weingarten* right in the Taylor Law and therefore the ALJ dismissed the charge in its entirety.[73]

Another ALJ discussed how *Weingarten* rights should be granted to public employees in *Gates-Chili Teachers Assoc.*[74] The ALJ held that the right of an employee to be represented by a union "extends to questions or claims arising under the contract or out of the employer relationship,"[75] and that "employer conduct which has the effect of interfering with the rights of unit employees to be represented by their employee organization have been found to violate 209-a.1(a) of the Act."[76] With regard to *Weingarten* Rights specifically, the ALJ stated that "the rationale articulated by the Supreme Court of the United States with regard to the reason for union representation during investigatory interviews applies equally to the public sector."[77] In footnote 24 of the case, the ALJ found that § 202 of the Taylor Law, the right to organize and participate in an employee organization, is where the *Weingarten* right is located. The ALJ also relied on *County of Rockland*[78] where PERB held that employers conditioning employee's employment on a waiver of right to file a grievance was a violation of § 209-a(1)(A) because the employer interfered with the rights of the employee to representation by their union in the processing of grievances. Thus, the ALJ held that the "right to union representation . . . has been held to be protected by Section 202."[79]

Before finding *Weingarten* rights for public employees were conclusively found, one last attempt was made to argue that there were no *Weingarten* rights for public employees. In *Local 100 Transport Workers Union*,[80] the Transport Workers Union (TWU) filed an improper practice charge which alleged that the New York City Transit

Authority violated § 209-a.1(c) of the Taylor Law by refusing two employee's requests for union representation at meetings with management which could, and in one case did, result in discipline against the employee.[81] In footnote 2 of the decision, the Director noted that because the Civil Service Law was amended to provide for representation in disciplinary proceedings the fact that the Taylor Law was not similarly amended must mean that there is no right under the Taylor Law.[82] Although this is reminiscent of the argument contrasting the language of the Taylor Law with § 7 of the NLRA, these textual arguments began to lose steam as the policy argument began to gain ground and these trends came to a head in 2002.

In *Transportation Workers Union*,[83] the Chairman and members of PERB finally decided that there are *Weingarten* rights for public employees. The facts are as follows: In April of 2001, the employer, New York City Transit Authority, directed an employee to respond to an allegation that he had made a racial remark to another employee by filling out a "G-2" form.[84] When the employee requested the opportunity to meet with a TWU representative, that request was granted and the employee proceeded to submit the form.[85] The Authority became concerned that the union representation influenced the employee's response on the form and directed the employee to complete another G-2 form without union representation present and in the presence of his supervisor in a locked office.[86] TWU representatives attempted to enter the office but were refused to be in the room with the supervisor and employee.[87]

PERB began by discussing the policy in the private sector behind the *Weingarten* rights. They then completely eradicated the textual argument against finding a *Weingarten* right in the Taylor Law by stating, "We do not find that the absence of identical language in section 202 [to section 7 of the NLRA] compels a conclusion that *Weingarten* is inapplicable to employees covered by the act."[88] Indeed, based on the facts, PERB found that "there is no clearer expression of participation in an employee organization than the request for union representation at an investigatory interview which may result in discipline, such as an employee's suspension, loss of pay or termination."[89] Applying this policy to the facts, the Board decided that the employee's request for union representation was done "as the exercise of his rights, protected by section 202 to participate in an employee organization" similar to § 7 of the NLRA.[90] They then addressed the introduction of a *Weingarten* right in Civ. Serv. Law § 75 and discounted the fact that because the Taylor Law was not similarly amended there is no protection for union representation there.[91]

The Board clearly stated that the employee has a right to union representation "during an investigatory interview which may reasonably lead to discipline,"[92] thus establishing *Weingarten* rights for employees. *Id.* The facts of this case—compelling the employee to respond to an allegation in front of a supervisor—was the "golden egg" case; in other words, this case laid the perfect factual background for the Board to find *Weingarten* rights. The Board held that this benefits the employee who is confronted because he or she "may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors."[93] The Board presented the *Weingarten* right not only as a benefit for union employees but for employers as well: "A knowledgeable union representative could assist the employer by eliciting favorable facts. . . ."[94] This is "precisely" the case where an employee is "most in need of his or her union representative."[95]

Unfortunately for public employees, the Court of Appeals of New York did not agree with PERB on the existence of *Weingarten* rights in the Taylor Law. In 2007, after making its way through the lower courts, the case became *New York City Transit Auth. v. PERB*.[96] The majority opinion, written by Judge Smith, overturned the PERB and Appellate Court's findings of *Weingarten* rights in the Taylor Law by going back to the textual arguments found in earlier PERB cases. The standard the court chose focused on "pure statutory construction dependent only on accurate apprehension of legislative intent [with] little basis to rely on any special competence of PERB."[97] Applying this standard, Judge Smith found that there is no comparable language in the Taylor Law that grants the right to engage in concerted activities as found in the NLRA.[98] Judge Smith then addressed the fact that Civ. Serv. Law § 75 was amended, and holds that if § 75 was amended to include the right, it must follow that the Taylor Law does not include *Weingarten* rights at all.[99]

Deviating from the textual standard, Judge Smith pointed out that in a letter of support for the amendment of Civil Service Law § 75, the supporter noted that there is no *Weingarten* right for public sector employees as there is for private sector.[100] He concluded that, based on this statement from a supporter, there could not have been a right in the Taylor Law because lawmakers would be "wasting their time in changing" Civil Service Law § 75(2) to include it.[101] The weaknesses of the argument made by the Court here is best described in Chief Judge Kaye's dissent in the case.

Chief Judge Kaye heavily critiqued the Court's opinion on *Weingarten* rights both pragmatically and as a matter of policy. She first addresses the standard provided by the Court and says that it should indeed refer to the intent of legislators who proposed the statute but the court should also look at "the general spirit and purpose underlying its enactment. . . ."[102] She first challenged the textual argument the majority made with regard to omitting any reference to "mutual aid or protection" found in § 7 of the NLRA:

> that section 202 of the Taylor Law omits these words, however, does not contravene an interpretation that the word "participate" in its "natural signification"

> in the Taylor Law manifests a legislative intent to allow public employees the right to union representation at an investigatory interview when the employee seeks that representation.[103]

Chief Judge Kaye goes on to explain that if the purpose of the Taylor Law is to create harmony and balance through the rights of organization of representation, then the right granted in the Taylor Law to "participate" in employee organizations must include the right to union representation in investigatory hearings.[104]

Chief Judge Kaye found the *Weingarten* right inherent in the Taylor Law in the right to participate in an employee organization granted in § 202.[105] She finds this right inherent in the interpretation of participation at the court level, which "has been deemed participation" by both PERB in *Matter of AFSCME*[106] and by the Fourth Department in *County of Monroe.*[107] With regard to the differences in rights granted to public sector employees as opposed to private sector employees, she discusses that the main and most important difference is the no-strike rule for public sector employees.[108] However, she explains, this does not mean that the Taylor Committee did not intend to grant any and all rights that private employees have to public employees, no-strike rule aside. "Indeed, it is likely that the main reason that section 202 does not include the words 'mutual aid or protection' is to bar strikes."[109]

Chief Judge Kaye's reasoning for the lack of similar language in the Taylor Law makes sense, given the very important difference in power between public employees and private employees. However, the policy behind the Taylor Law and the NLRA is the same, and both take into account the right of an employee to participate in an employee organization. Furthermore, Chief Judge Kaye explained that "public and private employees represented by a union are in essentially the same position—seeking to participate in a protected union activity of getting advice from a union representation when discipline is an issue."[110] Despite a lack of a right to strike in the public sector, both public and private employees face the same kind of concerns in disciplinary situations. Chief Judge Kaye pointed out that the rationale of the Supreme Court in *Weingarten* is similarly applicable here, because "deferring representation makes it increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished."[111] Finally, Chief Judge Kaye calls on the legislature to amend the Taylor Law to make the right explicit so that the Court would find in favor of *Weingarten* rights.[112]

In the summer of 2007, the legislature of the State of New York did indeed amend the Taylor Law. Subdivision 1 of section 209-a(g) states:

> 1. Improper Employer Practices. It shall be an improper practice for a public employer or its agents deliberately . . . (g) to fail to permit or refuse to afford a public employee the right, upon the employee's demand, to representation by a representative of the employee organization, or the designee of such organization, which has been certified or recognized under this article when at the time of questioning by the employer of such employee it reasonably appears that he or she may be the subject of a potential disciplinary action.
>
> If representation is requested, and the employee is a potential target of disciplinary action at the time of questioning, a reasonable period of time shall be afforded to the employee to obtain such representation.
>
> It shall be an affirmative defense to any improper practice charge under paragraph (g) of this subdivision that the employee has the right, pursuant to statute, interest arbitration award, collectively negotiated agreement, policy or practice, to present a hearing officer or arbitrator evidence of the employer's failure to provide representation and to obtain exclusion of the resulting evidence upon demonstration of such failure.
>
> Nothing in this section shall grant an employee any right to representation by the representative of an employee organization in any criminal investigation.[113]

In his Sponsor's Memo, Senator Robach indicated that the point of the amendment was to "eliminate any uncertainty and disagreement over the question to the benefit of public employees, unions, and public employers alike who would be freed from exposure to potentially costly and disruptive litigation." Unfortunately, although we now know that public employees have *Weingarten* rights, it is unclear just how far this right extends in the public sector.

One area in which the public sector *Weingarten* right has been undeveloped is with regard to probationary employees. Textually, there is nothing in the amendment that explicitly excludes probationary employees from having this right. Under the Taylor Law, public employees are defined as "any person holding a position by appointment or employment in the service of a public employer."[114] However, the affirmative defense to the amendment may cause problems in litigating this issue. It states that if an employee has the right in another source (statute, interest arbitration, or contract) then the failure to provide representation is not an improper practice.[115] Under the Civil Service Law, a permanent employee has the right to representation during questioning by the

employer[116] but probationary employees do not have this right.

Probationary employees are non-permanent employees who are required to serve a minimum and maximum period of probation under the Civil Service Law.[117] One of the primary differences between a permanent employee and a probationary employee is that probationary employees may be discharged without notice and a hearing prior to the maximum period of probation.[118] Probationary employees generally are not afforded similar pre-discharge procedures granted to permanent employees, nor are they considered to have a "property entitlement" to their positions which would trigger due process protections under federal law.[119] However, probationary employees do have rights under Article 78 of the Civil Service Law to challenge discipline and termination by the employer that was done in bad faith or was arbitrary and capricious.[120] The Civil Service law provides due process procedures for probationary employees who are "appointed on a permanent or contingent permanent basis within the meaning of Civil Service Law 63."[121]

Probationary employees who are discharged for bad faith or for unconstitutional purposes (i.e., discrimination) may be entitled to procedures, such as a pre-discharge hearing.[122] In *Cohen v. Koehler,*[123] the Court of Appeals held that a bad-faith discharge occurred when the employer did not provide complete and accurate documentation as to why the employee was terminated. It also denounced a failure to provide an opportunity for the employee to contest the disciplinary charges while the employer relied on them to terminate the probationer.[124] Courts in New York have held that termination is made in bad faith when (1) an employee took approved leaves of absence from a two year probationary position and (2) an employee called an emergency assistance unit to obtain detoxification while technically absent without leave and used a five-day sick leave for other reasons.[125] Also, discharge due to intent to file a child abuse report is *prima facie* bad faith termination by an employer.[126]

If a probationary employee does not have a right to representation under statute, and there is no right granted to them in interest arbitration or by virtue of their collective bargaining agreement, it is possible that PERB would find that the affirmative defense would not apply to them and the amendment to the Taylor Law would grant them the *Weingarten* right. Many other public employees have different disciplinary rules, and the procedures granted to them through statutes and bargaining will affect whether the exception applies to them as well. Public employees of the various state police departments may have different disciplinary rules which may affect whether they are granted *Weingarten* rights.

In New York, public policy dictates that disciplinary authority over the police force may be vested in local control by statute or local regulation. *Patrolmen's Benevolent Assn. of City of New York.*[127] When such legislation exists, bargaining over disciplinary matters is prohibited. *Id.* As a result, *Weingarten* rights would not be in the contract, and thus to determine whether the affirmative defense to the Taylor Law applies, one would have to look at the state or local statutes governing police discipline over that department. The New York City Police Department force is one such department governed by local statutes. The Court of Appeals held that the New York City Charter and Administrative Code both state a policy "favoring management authority over police disciplinary matters in clear terms."[128]

The New York City Charter empowers the Police Commissioner to discipline the police force.[129] It is well established that the Police Commissioner's power to discipline members of the force is governed by procedures in the Administrative Code of the City of New York, not Article 75 of the Civil Service Law.[130] The Court of Appeals held that because Civil Service Law § 76(4) states that §§ 75 and 76 "do not modify laws relating to the removal or suspension of officers,"[131] this demonstrates that the state legislature "did not intend to supplant the long-established disciplinary provisions of the Administrative Code."[132] Thus, the court concluded that "members of the City police force are punished pursuant to a statutory scheme separate and distinct from Civil Service Law § 75."[133] It appears, then, that the Civil Service Law § 75(2) providing *Weingarten* rights does not apply to police officers in New York City.

Other statutes governing discipline of New York City police officers also lack a provision for union representation at investigatory interviews. Under the Administrative Code, the Commissioner has the power to discipline members of the force

> only on written charges made or preferred against them, after such charges have been examined, heard an d investigated by the commissioner or one of his or her deputies upon such reasonable notice to the member or members charged, and in such manner or procedure, practice, examination and investigation as such commissioner may, by rules and regulations, from time to time prescribe.[134]

Title 38 of the Rules of the City of New York also detail disciplinary proceedings against uniformed officers of the Police Department. The disciplinary proceeding rules "apply to the conduct of all proceedings heard before the Deputy Commissioner of Trials including pre-hearing, hearing and post-hearing proceedings."[135] The Rules provide that a representative of the charged individual may be present at the hearing itself,[136] but do not state anything about union representation at an investigatory interview.

It appears that there are no regulations providing or prohibiting requesting a union representative at an

investigatory hearing by the N.Y.P.D. Because the Police Commissioner has the power to promulgate rules regarding disciplinary procedure of police officers,[137] he is able to permit or deny whether they have *Weingarten* rights by promulgating a regulation to that effect. Currently, however, it appears that it will be an improper practice for the police commissioner to deny a member of the force the right to request union representation at an interrogation because the employee could not seek redress of the right by statute or by contract.

There are a number of different kinds of interviews and interrogations a public employee may be compelled to attend that are outside the scope of traditional employer discipline. One such nontraditional area is investigations by the Inspector General of New York. The Office of the State Inspector General was created by the Public Authorities Accountability Act in 2005.[138] The Inspector General is responsible for investigating "corruption, fraud, criminal activity, conflicts of interest or abuse," in "covered agencies."[139] Covered agencies include:

> all executive branch agencies, departments, divisions, officers, boards and commissions, public authorities (other than multi-state or multinational authorities), and public benefit corporations, the heads of which are appointed by the governor and which do not have their own inspector by general.[140]

In its investigations, the Inspector General can compel public employees to "answer questions concerning any matter related to the performance of his or her official duties."[141] If the employee refuses to answer the questions, that is "cause for removal from office or employment or other appropriate penalty."[142]

After its investigation, the Inspector General prepares reports and recommendations which are then provided to the covered agency.[143] It can then "monitor the implementation . . . of any recommendations"[144] made to the agency to ensure enforcement. The agency itself is responsible for "advising the governor within ninety days of the issuance of a report by the state inspector general as to the remedial action that the agency has taken in response to any recommendation for such action contained in such report."[145]

In order to sustain an improper practice charge under the Taylor Law, the alleged action must be from "the public employer or its agents."[146] The Taylor Law defines the term "public employer" to include "the state of New York,"[147] and "any other public corporation, agency, or instrumentality or unit of government which exercises governmental powers under the laws of the state."[148] The Office of the Inspector General appears to fall under this definition, as it was created by the governor under the Executive law and exercises its powers under the Public Authorities Accountability Act. In order to sustain an improper practice charge under the *Weingarten* right in Civil Service Law § 209-a(1)(g), it must "reasonably appear" that the employee is a potential target of discipline.[149]

Under the rules governing the Inspector General, it is not clear that in every interview the employee is a potential target of discipline. The Inspector may be interrogating an employee to gather information about the department and may not be targeting that particular employee for discipline. It appears that whether an employee has the right to union representation at such an interview would depend on the subject of the investigation and interview itself. The Inspector General does not make the decision to discipline an employee but simply provides recommendations to the agency itself as to what should be done to remedy corruption or conflict. It is likely that an employee who was investigated by the Inspector General would reasonably believe that his or her job was at stake, since the interview may involve his or her job responsibilities.

Despite a lack of litigation on the issue, the policies behind the *Weingarten* right in the public sector seem to support the idea that it should extend to interrogations by the Inspector General. Clearly, the presence of an investigation by the Inspector General would lead an employee to believe that someone will be disciplined in the office. The employee may reasonably believe that the Inspector General will recommend discipline against the employee for being interrogated. It is also important that the failure of the employee to submit to questioning will likely result in termination. As stated in the *Transportation Workers* case before PERB, the confronted employee "may be fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors." *Transportation Workers Union*.[150] The Taylor Law simply requires that the employee be a "potential target of discipline,"[151] and the recommendation of the Inspector General may result in discipline. Assuming that the employee cannot meet the affirmative defense and seek redress of a lack of representation in his or her contract or by statute, it appears that the *Weingarten* right should extend to interrogations by the Inspector General.

Another situation in which public employees may be interrogated is by the State Commission on Quality Care (CQC). The CQC director is appointed by the Governor and must "assu[re], on behalf of the state, that persons with physical disabilities are afforded the opportunity to exercise all of the rights and responsibilities accorded to citizens of this state."[152] The CQC's main responsibility is to research and recommend care standards for persons with mental disabilities to the governor.[153] It is empowered to create its own procedures to investigate complaints of patients, and the procedures must include "interviews of persons, patients, and employees" at facilities where there are complaints of abuse.[154] From the language of the statutes, it is apparent that the CQC is an agent of the state and thus is subject to improper practice charges under § 209-a(1) of the Taylor Law.

Within 24 hours of receiving a complaint of child abuse, the CQC must begin an investigation of the allegations contained therein.[155] If the complaint is substantiated by the investigation, the CQC may then recommend to the Office of Mental Health (OMH) or the Office of Mental Retardation and Developmental Disabilities (OMRDD):

> that appropriate preventative and remedial actions including legal actions, consistent with appropriate collective bargaining agreements and applicable provisions of the civil service law, and pursuant to standards of such offices . . . and other applicable provisions of law, be undertaken with respect to a residential care facility and / or the subject of the report of child abuse or treatment.[156]

It is clear from the language of the statute that the employees alleged in the complaint regarding child abuse may be the potential subject of discipline by OMH or OMRDD because the CQC has the power to both recommend and assist in criminal and disciplinary proceedings against the employees involved.

Like the case of the Inspector General, whether requests for union representation at interviews by the CQC must be honored has not been adjudicated before the courts. However, both the Third Department and the Supreme Court of the United States held that there is no statutory or constitutional right to legal representation by counsel at these interviews.[157] In *In re Raul*, the Third Department held that because the Commission is "investigatory in nature as it has no adjudicative function," it is not an agency as defined under the N.Y. Civil Rights Law § 73.[158] The court did, however, recognize that "disciplinary or criminal proceedings may result from the Commission's investigatory function,"[159] but that was insufficient for the right to have counsel present.[160]

Unlike the Civil Rights Law, the Taylor Law amendment granting the *Weingarten* right considers agents of the employer to be subject to improper practice charges. The fact that the CQC is investigatory in nature does not preclude its designation as an agent of the employer for purposes of the Taylor Law because the Taylor Law considers "any other public corporation, agency or instrumentality or unit of government which exercises governmental powers under the laws of the state" subject to the improper practice provisions.[161] Furthermore, the amendment requires only that there is a reasonable appearance that the employee is subject to discipline, and the Third Department recognized that that may be the case in *In re Raul*.

The Mental Hygiene Law does not indicate a right to union representation at these investigations. Many public employees are, however, subject to Civil Service Law § 75(2), which provides the *Weingarten* right to employees covered under the statute. The CQC may not be subject to an improper practice charge for employees covered under § 75(2) because they could raise the affirmative defense that the employee has the right pursuant to statute.[162] If an employee does not have the right by virtue of collective bargaining agreement and is not covered by Civil Service Law § 75(2), they may be able to succeed in an improper practice charge under § 209-a(1)(g).

The adjudication of whether or not an employee is covered by the *Weingarten* right in the Taylor Law will necessarily depend upon whether or not they are covered in their contracts with the state. For example, the professional, scientific and technical unit employees represented by the Public Employees Federation are not covered by the *Weingarten* right in Civil Service Law § 75(2) as the disciplinary article in the agreement is "in lieu of the procedure specified in Sections 75 and 76 of the Civil Service Law."[163] However, the PS&T unit employees are explicitly granted the right to union representation at an interrogation "if it is determined by the questioner or reviewer at that time that such employee is a likely subject for disciplinary action."[164] This provision only applies to employees subject to the disciplinary procedures in Article 33 of the agreement, which does not cover probationary employees. Thus, it appears that only probationary employees in the professional, scientific and technical unit are covered by the new amendment in the Taylor Law.

It is important to note that the provision granting the *Weingarten* right in the Taylor Law may not be identical to the *Weingarten* right established in the private sector. The right recognized in *NLRB v. Weingarten* applies when the employee has the reasonable belief that there may be disciplinary action.[165] The determination of a reasonable belief is objective and based on the employee's fear, not the underlying facts or the employer's motive.[166] The language of the Taylor Law states that it must "reasonably appear that he or she may be the subject of a potential disciplinary action."[167] In the next paragraph, the Taylor Law states that a reasonable time must be provided for obtaining representation when "the employee is a potential target of disciplinary action."[168]

The right granted under the Taylor Law does not seem to depend upon the employee's reasonable belief of discipline, but rather whether the employee actually is the potential subject of discipline. The Governor's Office of Employee Relations recommended to executive agencies that they should "explain to an employee the purpose of any counseling, probationary review, performance evaluation, work related discussion, or investigation,"[169] to clarify whether the employee is actually the target of discipline or not. If the agencies are clear as to the purpose of the interviews they have with their employees, the differences in the rights granted by the public sector version of the *Weingarten* right may not make a difference.

As it stands, the effect of this amendment is uncertain. Most public employees are granted the right to union representation at interrogations by their contract or by § 75 of the Civil Service Law. The existence of the affirmative defense effectively eliminates a vast majority of improper practice cases. Furthermore, because the largest class affected appears to be probationary employees, it is unclear whether the unions or the employees would be willing to pursue an improper practice charge on this issue. Employers may decide to forgo interrogations of probationary employees altogether since they are not required to do so under the Civil Service Law and under most collective bargaining agreements. It will be interesting to see whether the actual outcome of the interview will have any effect on the improper practice charge if discipline is implemented even after the employer says that the employee is not the potential target. How much weight PERB and the courts give to the reasonable appearance standard under the Taylor Law will also be important to watch as the right is adjudicated. Despite the Sponsor's intent that the *Weingarten* right be extended to all public employees, it is unclear whether that intent will materialize with this amendment.

Endnotes

1. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).
2. N.Y. Civ. Serv. § 209-a(1)(g).
3. *J. Weingarten*, 202 N.L.R.B. 446 (1973).
4. *Id.* at 448.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 449.
9. *Id.*
10. National Labor Relations Act, 29 U.S.C. § 157 (2008).
11. *Mobil Oil Corp.*, 196 N.L.R.B. 1052 (1972).
12. *Id.*
13. *J. Weingarten*, 202 N.L.R.B at 449.
14. *Id.*
15. *Id.*
16. *Id.* at 451.
17. *NLRB v. J. Weingarten, Inc.*, 485 F.2d 1135 (5th Cir. 1973).
18. *Id.* at 1138.
19. *Id.*
20. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975).
21. *Id.* at 267.
22. *Id.* at 262.
23. *J. Weingarten, Inc.*, 420 U.S. at 257 (citing *Mobil Oil Corp.*, 196 N.L.R.B. 1052 (1972)).
24. *Id.* at 257.
25. *Id.* at 260–261.
26. *Id*, at 257.
27. *Id.* at 257.
28. 195 N.L.R.B. 197 (1972).
29. *J. Weingarten, Inc.*, 420 U.S. at 258.
30. *Id.* at footnote 5 (quoting *NLRB v. Gissel Packing Co*, . 395 U.S. 575, 608 (1969)).
31. *Id.* at 258.
32. *Id.* at 259 (citing *Quality Mfg Co.*, 195 N.L.R.B. at 198–199).
33. *Id.* at 260 (citing *Texaco, Inc.*, 167 N.L.R.B. 361 (1967)).
34. PUBLIC SECTOR LABOR AND EMPLOYMENT LAW 115 (Jerome Lefkowitz, Esq. et al. eds., New York State Bar Association 2nd ed. 1998).
35. PUBLIC SECTOR LABOR & EMPLOYMENT LAW, *supra* note 34, at 658.
36. *Id.* at 680.
37. *Id.* at 684.
38. *Id.* at 691–692.
39. *Id.* at 693.
40. *Id.*
41. *Id.* at 697.
42. 9 P.E.R.B. ¶ 4059 (1976).
43. *City of New York*, 9 P.E.R.B. ¶ 3047, 3079 (1976). The facts were outlined in the appealed decision, not in the initial decision of the Hearing Officer.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 3079-3080.
48. *City of New York*, 9 P.E.R.B ¶ 4059 at 4533.
49. *City of New York*, 9 P.E.R.B. ¶ 3047 (1976).
50. *Id.*
51. *Id.*
52. 8 P.E.R.B. ¶ 3075 (1975).
53. 11 P.E.R.B. ¶ 3108 (1978).
54. *Id.* at 3175.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. 19 P.E.R.B. ¶ 4618 (1986).
60. *Id.* at 4790.
61. 9 P.E.R.B. ¶ 3047.
62. 19 P.E.R.B. at 4790.
63. *Id.*
64. 19 P.E.R.B. ¶ 4535 (1986).
65. *Id.*
66. *Id.*
67. *Id.*
68. 21 P.E.R.B. ¶ 4596 (1988).
69. *Id.*
70. *Id.* (citing *Comsewogue U.F.S.D.*, 14 P.E.R.B. ¶ 4611).
71. *Id.*, (citing *Town of Chili*, 18 P.E.R.B. ¶ 4596).
72. *Id.*
73. *Id.*
74. 25 P.E.R.B. ¶ 4683 (1992).
75. *Id.* at 4590.
76. *Id.*

77. *Id.* at 4591.
78. 13 P.E.R.B.¶ 3089 (1980).
79. *Id.* at 4593.
80. 28 P.E.R.B. ¶ 4597 (1995).
81. *Id.*
82. *Id.* at 4742.
83. 35 P.E.R.B. ¶ 3029 (2002).
84. *Id.* at 3080.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 3081.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 3082.
93. *Id.* at 3082.
94. *Id.* (*citing City of Ulster*, 26 P.E.R.B. ¶ 3008 (1993)).
95. *Id.*
96. 8 N.Y.3d 226, 832 N.Y.S. 2d 132 (2007).
97. *Id.* at 231.
98. *Id.* at 232.
99. *Id.* at 233.
100. *Id.* at 234.
101. *Id.*
102. *Id.* at 236.
103. *Id.*
104. *Id.* at 237.
105. *Id.* at 238.
106. 30 P.E.R.B. ¶ 3021(1997).
107. 125 A.D.2d 1002, 510 N.Y.S. 2d 396 (4th Dep't 1986).
108. *Id.* at 239.
109. *Id.*
110. *Id.* at 240.
111. *Id.* at 241–242 (*citing Weingarten*, 420 U.S. at 263–264).
112. *Id.* at 242.
113. N.Y. Civ. Serv. Law § 209-a (2008).
114. N.Y .Civ. Serv. Law § 201(7) (2008).
115. N.Y. Civ. Serv. Law § 209-a(1)(g) (2008).
116. N.Y. Civ. Serv. Law § 75 (2008).
117. PUBLIC SECTOR LABOR AND EMPLOYMENT LAW, *supra* note 34, at 916.
118. *Id.*
119. Isidore Silver, PUBLIC EMPLOYEE DISCHARGE AND DISCIPLINE 24–25 (Aspen Publishers 3rd ed. 2001).
120. PUBLIC SECTOR LABOR AND EMPLOYMENT LAW, *supra* note 34, at 210.
121. PUBLIC SECTOR LABOR AND EMPLOYMENT LAW, *supra* note 34, at 917.
122. *Id.*
123. 82 N.Y.2d 822, 609 N.Y.S.2d 171 (1993).
124. Silver, *supra* note 119, at 28–29.
125. *Id.*
126. Silver, *supra* note 119, at 29–30.
127. 6 N.Y.3d 563; 815 N.Y.S.2d 1, 2 (2006).
128. *Id.* at 4.
129. N.Y. Charter § 434(a).
130. *Montella v. Bratton*, 93 N.Y.2d 424, 691 N.Y.S.2d 372, 430 (1999).
131. *Id.* at 432.
132. *Id.*
133. *Id.* at 376.
134. N.Y.C. Admin. Code §14-115.
135. 38 R.C.N.Y. § 15-02.
136. 38 R.C.N.Y. § 15-05.
137. N.Y.C. Admin. Code § 14-115.
138. N.Y. Exec. Law § 54.
139. *Id.*
140. N.Y. Exec. Law § 51.
141. N.Y. Exec. Law § 54(5).
142. *Id.*
143. N.Y. Exec. Law § 53(4), (6).
144. N.Y. Exec. Law § 54(6).
145. N.Y. Exec. Law § 55 (2).
146. N.Y. Civ. Serv. Law § 209-a(1).
147. N.Y. Civ. Serv. Law § (201(6)(a)(i).
148. N.Y. Civ. Serv. Law § 201(6)(a)(vi).
149. *Id.*
150. 35 P.E.R.B. ¶ 3029 (2002).
151. N.Y. Civ. Serv. Law § 209-a(1)(g).
152. N.Y. Mental Hygiene Law § 45.03(d).
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157. *In re Raul L.*, 164 A.D.2d 189, 563 N.Y.S.2d 342, 343 (3d Dep't 1990); *see also Anonymous v. Baker*, 360 U.S. 287, 294–295(1959).
158. *Id.* at 344.
159. *Id.*
160. *Id.*
161. N.Y. Civ. Serv. Law § 201(6)(a)(vi).
162. N.Y. Civ. Serv. Law § 209-a(1)(g).
163. *Article 33.1 2003-2007 PS&T Unit Agreement.*
164. *Bill of Rights, 2003-2007 PS&T Unit Agreement.*
165. *Weingarten*, 420 U.S. at 257.
166. *Id.*
167. N.Y. Civ. Serv. Law § 209-a(1)(g) (2008).
168. *Id.*
169. Memorandum from Gary Johnson, Director of the Governor's Office of Employee Relations, to the Directors of Human Resources of Executive agencies. (Aug. 16, 2007) (on file with author).

Katherine Schlindwein Vorwald is a 2009 graduate of Albany Law School. This article was the third place winner in the 2009 Emanuel Stein Memorial Law Student Writing Competition.

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