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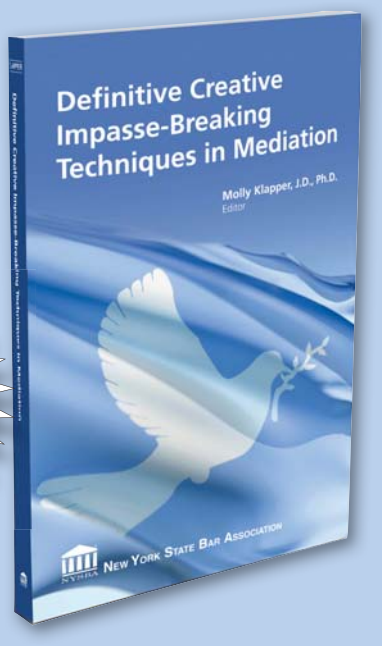

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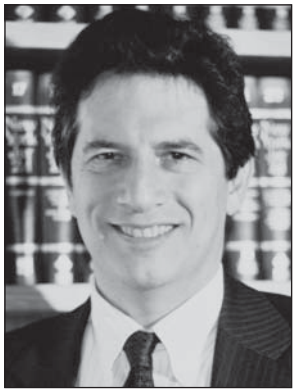
From the Editor



Philip L. Maier

Once again, I would like to express my thanks to the authors for sharing their expertise with the labor and employment law community. Charles Diamond's and Michael Casey's article entitled *Game Changer in Discrimination Statistics: Management Interest Surveys* focuses on statistical analyses in gender discrimination in the workplace while Vincent Miranda's article addresses recent court decisions about the New York State Division of Human Rights' jurisdiction over student discrimination cases. Paul Levitt's article provides a valuable overview concerning the staying and vacating of arbitration awards based upon public policy grounds, and Sean Strockyj's article is a review of an area about which more attention may need to be paid: the recoupment of unemployment benefits in cases in which back pay is awarded. Additionally, Vanessa Delaney submitted an article about recent developments in union organizing in the private sector, while Adam Sasiadek submitted an interesting review of the American Recovery and Reinvestment Act's labor and employment law implications. There is an article concerning recent developments in the Public Employment Relations Board's deferral doctrine which I submitted, and of course, no edition would be complete without John Gaal's and Don Dowling's contributions.

Finally, I would like to congratulate Neema Kassaii for winning second place in the Dr. Emanuel Stein and Kenneth Stein writing competition for her article entitled "Socially Constructing Non-Statutory Exceptions to the New York At-Will Rule to Employment Law."

Philip L. Maier

Game Changer in Discrimination Statistics: Management Interest Surveys

By Charles Diamond and Michael Casey

Complexities of Workplace Discrimination

Workplace discrimination dominates the recent wave of employer class action suits. Discrimination is deemed characteristic of a workplace when there is an unaccountable difference in hiring, promotions, wages and other employer practices regarding a protected group and the unprotected group. In other words it is a statistically significant residual or something left over whenever all else is controlled for and the result is contrary to the interests of a protected group. Typically, statistical analysis in allegations of discrimination involves analyzing large amounts of data to determine if designated protected classes are receiving the same treatment as the majority or unprotected class. Unfortunately, there is no specific measure of discrimination like there is of income, gender, age or even ethnicity, which further complicates legal challenges for employers.

A Shortage of Female Managers

Our discussion focuses on gender discrimination in the workplace. Allegations of this nature involve, for example, unjust reduction-in-force ("RIFs"), promotions and pay disparities. The Equal Employment Opportunity Commission's gender discrimination case against Outback Steakhouse Inc., filed in September 2006, highlights the complexities of measuring systemic discriminatory treatment. Female workers claimed they were unfairly passed over for management promotions. Plaintiffs cited the gross disparity in gender composition of the employer's management teams as opposed to the gender profile of the pool of employees from where managers were drawn. Initial observations of Outback's workforce painted an unfavorable picture for the defense team. While there was a 60/40 ratio of women to men in the wait staff labor pool, the ratio of **men to women** was allegedly **8/1 among management.**[1] Attorneys estimated more than 150,000 women who worked at any point since 2002 and had at least three years of tenure at the chain's corporate-owned restaurants to be eligible for the settlement.[2]

Defendants argued these calculations were grossly inflated and failed to measure the group of women who were actually interested in management positions. With a large group of potential plaintiffs, it is imperative to get size and composition of the labor pool correct so that statistics are meaningful and do not give a false positive to a finding of discrimination when it does not exist.

Establishing the Pool of Eligible, Qualified and Interested Employees

A fundamental step for statistical analysis in employment discrimination cases is identifying the pool of *eligible, qualified and interested* employees affected by an employer's actions. Were all 150,000 eligible females qualified ***and interested*** in management roles at the restaurant? In large class actions, sometimes involving hundreds of thousands of alleged class members, statistical analysis has a bias towards finding significant differences because of the large numbers. This is an artifact of the mathematical formulas and assumptions of statistical analysis itself. Therefore, it is important, in the spirit of being fair to the employer, that the numbers in the statistical analysis be as close to correct and meaningful as possible so as not to give a misleading indication.

Interest is often an overlooked element in discrimination cases *(employee or job applicant)*, that may have relevance in systemic situations. Under systemic disparate treatment, the burden is on the complainants to proffer the correct pool of employees to test whether there is a discriminatory effect of an employer practice. In order to objectively assess interest in, say, promotion one must think in terms of the job matching process that goes on from both the employee and employer perspectives. In the restaurant business, as well as in many retail establishments, the manager's job involves getting along well with various people including co-workers, vendors, upper management and customers. The employer has strong incentives to hire smart, capable, healthy and gregarious people as managers because the job demands it.

Many employees with management potential have agendas other than being promoted to upper management. Recent social parody movies, *Waiting* and its sequel *Still Waiting*, attempt to show the dilemma and choices open to young people with potential for moving into the restaurant management business. In both films, most of the young employees are part-time and in need of fast cash to pay their expenses at college or some other short-term objective. The overwhelming point is that very few have any desire for a long-term career in the restaurant business, let alone management aspirations. Considering the wide range of interest levels among employees and how not properly gauging it can render class size estimations inaccurate, surveys can help to more precisely identify the impacted group.

Constructing a Survey to Measure Management Interest

A survey is one tool to measure management interest among employees. FTI Consulting created a questionnaire to gauge employee willingness, desire and interest in becoming a manager. The three parts consisted of a labor supply section, a labor demand section and a consistency check as outlined in Table 1.

The labor supply section assessed an employee's willingness and desire to be a manager. Parts included work-life goals, work-life conflict with personal goals, understanding of manager's job requirements, current position and view of the next step and hours/effort involved. The labor demand section sought to assess, from the employer's point of view, if an employee had the necessary qualities and interest to become a manager. Questions included relationships dealing with the customers, kitchen and wait staff co-workers, immediate management and proprietor and past restaurant business experience. The consistency section tested whether a respondent understood the questions and ensured that answers were consistent.

Survey questionnaires were distributed to 37 Outback Restaurants to ensure sufficient sample size and returned via courier envelope. Run tests were conducted to confirm that the sample was random for all qualified respondents.[3]

Table 1
Outback Employee Job Questionnaire

Section	Questions
Labor Supply	**Willingness and Desire to Become Manager**
	Current Position
	Work Life Goals
	Work Life Conflicts with Personal Goals
	Understanding of Manager's Job Requirements
	View of Hours/Effort Involved in Management
Labor Demand	**Qualities and Interest in Management**
	Dealing with Customers
	Relationships with Kitchen Co-workers
	Relationships with Wait Staff Co-workers
	Relationship with Immediate Managers and Proprietor
	Past Experiences in Restaurant Business and Outside
Consistency	**Ensured Understanding and Consistent Answers**

Survey results in Table 2 outlined a starkly different perspective than initial allegations. Of the 486 employees in the final sample *(204 male and 282 female)*, only ***15%*** of front-of-the-house staff demonstrated strong interest in pursuing any management role at Outback. For the total sample, the 95% confidence interval for the number of males interested given a sample size of 204 employees was between 35 and 59 employees with a mean of 47.[4]

Table 2
Management Interest
Total Sample

Total Sample Population	
Expected Interest	**14.67%**
Sample Size	486

	Interested	**Not Interested**
Observed	56	430
Expected	71	415

Chi-Squared Statistic	3.844919669
One Tailed Prob	5.0%

*Chi Square Critical Value = 3.84 (at .05 significance, 1 degree of freedom)

Comparison by gender in Table 3 shows an even greater difference in interest between both groups. Males showed an expected interest of 22% while only 11% of females were interested in front-of-the-house management opportunities at Outback.

Table 3
Comparison of Management Interest
Males and Female Employees[5]

	Males	**Females**
Expected Interest	22.92%	11.11%
Sample Size	204	282

	Interested	**Not Interested**	**Interested**	**Not Interested**
Observed	35	169	21	261
Expected	47	157	31	251

Chi-Squared Statistic	3.838817644	**Chi-Squared Statistic**	3.830982569
One Tailed Prob	5.0%	**One Tailed Prob**	5.0%

*Chi Square Critical Value = 3.84 (at .05 significance, 1 degree of freedom)

The 95% confidence interval for females given a sample size of 282 employees was between 21 and 42 employees with a mean of 31. For the entire sample, this implies that the mean male percent interest in management is ***more than 2 times*** the mean female percent interest in management positions. Based on 95% confidence intervals around the mean values, the percentage interest ratio could be as low as 1.16 and as high as 3.86.[6]

In sum, only 15% of qualified male and female employees had strong interest in a management position at Outback. Moreover, the results for men versus women show a ratio of interest ranging from 1.16 to 3.86 (with men demonstrating statistically significant greater interest).

Analysis of Promotions to Outback's Manager-In-Training Program

Movement of KEY and AKM Employees to MIT

Results from FTI's management interest survey were used in subsequent analyses by the defense team. Plaintiff expert Dr. Janice Madden claimed that female employees were statistically significantly less likely to be selected for promotions. Looking at the feeder pool alone, she declared "…a gender neutral process would have awarded approximately twice as many promotions (between 14 and 21) to female employees between January 2003 through April 2007."[7]

Defendant's expert Dr. Joan Haworth analyzed the movement of hourly positions to the Manager-in-Training (MIT) program using Dr. Diamond's interest survey results to adjust for differences in the desire to move into management. There were 63 moves to MIT during the 2003 to April 2007 time period. Table 4 shows that there was one year, 2004, in which the selection rate of women was greater than men's selection rate, a statistically significant difference favoring women.[8] In that year, women's selection rate was 86% and men's selection rate was only 35%.[9] The other years show the selection rates of men were greater than women's selection rates, but that none of these were statistically significant among those identified as KEY (staff who could adjust or modify customer bills) or AKM employees (assistant kitchen managers).[10]

Movement of All Waitstaff and Kitchen Employees to MIT

Dr. Haworth also expanded her analysis to incorporate all the WAIT (waitstaff) and KIT (kitchen) employees into the feeder pool. These two sources of employees for the MIT program were weighted by their relative importance among the movers (6 of the 63 from the wait staff or kitchen and 57 of the 63 from the KEY or AKM positions) and the gender composition of that group was used to predict the selection rates for men and women.

Table 4

Analysis of KEY/AKM Promotions to MIT Adjusted for Interest in Management[11]

	Adjusted Number of KEY/ AKM Employees			Number of Employees Promoted to MIT				
Date	Women	Men	Percent Women	Women	Men	Percent Women Promoted	Fisher's Exact Probability	Statistically Significant?
2003	5	18	22%	2	10	17%	0.640	No
2004	7	23	23%	6	8	43%	0.031	Yes
2005	8	29	21%	2	16	11%	0.232	No
2006	8	26	24%	4	14	22%	1.000	No
2007	11	22	32%	0	1	0%	1.000	No
							Common – Odds Ratio	
Total	**39**	**118**	**25%**	**14**	**49**	**22%**	**1.000**	**No**

Table 5

Analysis of All Staff Promotions to MIT Adjusted for Interest in Management[12]

	Adjusted Number of KEY, AKM, Wait Staff or Kitchen Staff			Number of Employees Promoted to MIT				
Date	Women	Men	Percent Women	Women	Men	Percent Women Promoted	Fisher's Exact Probability	Statistically Significant?
2003	9	30	23%	2	10	17%	0.693	No
2004	12	36	25%	6	8	43%	0.139	No
2005	12	40	23%	2	16	11%	0.179	No
2006	13	36	27%	4	14	22%	0.743	No
2007	14	31	31%	0	1	0%	1.000	No
							Common - Odds Ratio	
Total	**60**	**173**	**26%**	**14**	**49**	**22%**	**0.724**	**No**

Table 5 shows similar results to the prior analysis using only KEY or AKM employees. In no year was there a statistically significant difference between the predicted selection rate and the actual selection rates after adjusting for the desire to move into management, based on Dr. Diamond's Outback employee interest survey data.[13] When all years were aggregated together there was no statistically significant difference in selection rates of women and men in the feeder pools. Adjusting for employee interest in management showed results that were more consistent with a gender neutral selection process into the Management-in-Training program over the time period.[14]

Case Settlement

The EEOC's case against Outback settled for $19 million and administrative relief. In a written statement, Outback admitted no wrongdoing and stressed that "… settling the suit with funds provided entirely by insurance was preferable to the 'cost and distraction' of further litigation"[15] along with the possibility of enormous damages estimates for 150,000 possible plaintiffs.

In Conclusion

In order to properly estimate class size and number injured, the group of eligible, qualified and interested alleged class members must be measured. Surveys, such as the management questionnaire in the Outback case, present a more in-depth view of management interest levels among genders, one much more telling than initial face-value ratios in detecting discrimination. Interest surveys can help to ensure that class size calculations in litigation against restaurants, retail, and other similar industries are presenting a fair and accurate assessment of the employer's eligible pool of potential managers. While interest seems to be un-mined defense in terms of prima facie case and then to liability, this is poised to change as discrimination cases become increasingly complex and additional supporting research is published.

Endnotes

1. Complaint in Intervention and Jury Demand, 2006 WL 4024383.
2. St. Petersburg Times, Outback Steakhouse Settles class-action sex discrimination case for $19M, p.1, December 30, 2009.
3. Expert Report of Dr. Charles A. Diamond, pp. 30 -37, September 4, 2007.
4. Expert Report of Dr. Charles A. Diamond, p. 14.
5. Expert Report of Dr. Charles A. Diamond, p. 15.
6. Expert Report of Dr. Charles A. Diamond, p. 15.
7. Janice Fanning Madden, Ph.D., Evaluating Whether Promotion Practices at Outback in Region 47 Are Gender Neutral, p. 1, December 31, 2007.
8. Joan G. Haworth, Ph.D. and Dr. Charles J. Mullin, Ph.D., Analysis of Promotion to Management Positions at Outback Steakhouse of Florida, Inc., p. 7, September 18, 2007.
9. Joan G. Haworth, Ph.D. and Dr. Charles J. Mullin, Ph.D., p. 7.
10. Joan G. Haworth, Ph.D. and Dr. Charles J. Mullin, Ph.D., p. 12.
11. Joan G. Haworth, Ph.D. and Dr. Charles J. Mullin, Ph.D., p. 7.
12. Joan G. Haworth, Ph.D. and Dr. Charles J. Mullin, Ph.D., Analysis of Promotion to Management Positions at Outback Steakhouse of Florida, Inc., p. 9, September 18, 2007.
13. Joan G. Haworth, Ph.D. and Dr. Charles J. Mullin, Ph.D., p. 13.
14. Joan G. Haworth, Ph.D. and Dr. Charles J. Mullin, Ph.D., p. 13.
15. St. Petersburg Times, Outback Steakhouse Settles class-action sex discrimination case for $19M, p. 2, December 30, 2009.

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The New York State Division of Human Rights' Jurisdiction Over Student Discrimination Complaints: An Evolving Issue in the Appellate Divisions

By Vincent Miranda

Although it is well settled that the New York State Division of Human Rights ("Division") has jurisdiction over discrimination complaints filed by public school district employees,[1] recent case law has emerged from the Second, Third, and Fourth Departments regarding whether the Division has jurisdiction over student-filed discrimination complaints filed against public school districts. This case law has arisen because of the statutory language of Executive Law § 296(4), which prohibits various forms of discrimination by "*an education corporation or association* which holds itself out to the public to be non-sectarian and exempt from taxation pursuant to the provisions of article four of the real property tax law." (emphasis added). The central question presented in these Appellate Division cases has been whether a school district is an "education corporation" or "education association" pursuant to Executive Law § 296(4). This article will examine the decisions that have emerged from the Second, Third, and Fourth Appellate Divisions.

The Second Department

In *East Meadow Union Free School District v. New York State Division of Human Rights*,[2] the Second Department was the first Appellate Division to rule on the jurisdiction question and the only Appellate Division to reach the merits of the issue. In *East Meadow Union Free School District*, the school district appealed the Division's determination that the school district violated Executive Law § 296(14)[3] by preventing students with disabilities from using guide, hearing, and service dogs in a public school.[4] The Second Department vacated the Division's determination that the school district engaged in an unlawful discriminatory practice because the Division's jurisdiction in the matter was predicated on Executive Law § 296(4).[5]

The Second Department utilized the General Construction Law, which establishes the meaning of terms not otherwise defined by statute,[6] to reason that Executive Law § 296(4) was not applicable to the school district because the Executive Law did not define the terms "education corporation" or "education association."[7] With respect to whether the school district was an "education association," the court concluded that the school district, a corporation, was not an association because a corporation and association were "different things."[8] The court then concluded that while the General Construction Law did not define both "education corporation" and "school district," the General Construction Law established that the terms were mutually exclusive.[9] More specifically, the court reasoned that:

> [p]ursuant to General Construction Law § 65 (a), a corporation is either a public corporation, a corporation formed other than for profit, or a corporation formed for profit (*see* General Construction Law § 65 [a] [1]); it cannot be more than one of these. An "education corporation" is a type of corporation formed other than for profit (General Construction Law § 65 [c]). A "school district," by contrast, is a type of "municipal corporation" (General Construction Law § 66 [2]). Since a "municipal corporation" is a public corporation (General Construction Law § 66 [1]), a school district is a public corporation. Hence, a school district cannot be an "education corporation" *within the meaning of Human Rights Law § 296 (4)*.[10]

The Second Department then noted that in 1974 it held, in an opinion devoid of discussion, that Queens College of the City University of New York was not subject to the jurisdiction of the Division pursuant to Executive Law § 296(4).[11] The court then further noted that its ruling was not in conflict with the Fourth Department's 1983 decision in *State Division of Human Rights v. Board of Cooperative Education Services*, which held, *inter alia*, that a Board of Cooperative Educational Services ("BOCES") was an "education corporation" pursuant to Executive Law § 296(4).[12] The court reasoned that a BOCES was created pursuant to Education Law former § 1950 and was thus subject to Executive Law § 296(4).[13]

The Third Department

One month after the Second Department released its decision in *East Meadow Union Free School District*, the Third Department released a decision in *Newfield Central School District v. New York State Division of Human Rights*,[14] which also involved the Division's jurisdiction over student-filed discrimination complaints. In *Newfield Central School District*, the Division appealed the Supreme Court's grant of a writ of prohibition sought by the school district to prevent the Division from investigating claims of gender discrimination brought by two sets of parents on behalf of their children.[15] After the Division issued an initial determination that it had jurisdiction to investigate and that probable cause existed to believe that an

unlawful discriminatory practice had occurred, the school district sought the writ pursuant to CPLR article 78 on the basis that the Division did not have jurisdiction pursuant to Executive Law § 296(4).[16] The Third Department reversed the Supreme Court's grant of the writ of prohibition and did not reach the merits of the jurisdiction argument because the school district failed to exhaust its administrative remedies.[17]

The Third Department began its analysis by re-iterating the Court of Appeals holding in *Tessy Plastics Corp. v. State Division of Human Rights*:[18]

> a writ of prohibition is not an appropriate vehicle to be used to bar SDHR from conducting an investigation because the "[r]emedy for asserted error of law in the exercise of [SDHR's] jurisdiction or authority lies first in administrative review and following exhaustion of that remedy in subsequent judicial review pursuant to section 298 of the Executive Law."[19]

Nevertheless, the court then concluded that the school district did not establish an exception to the administrative remedies exhaustion rule such as the futility of the administrative remedy or irreparable harm.[20] In concluding that it was not futile for the school district to pursue its jurisdiction argument through the Division, the court acknowledged the Second Department's decision in *East Meadow Union Free School District* in a footnote.[21] The court noted that in light of the Second Department's recent decision, it was possible that the Division might take a different position on whether it had jurisdiction over the school district pursuant to Executive Law § 296(4).[22]

The Fourth Department

More recently, the Fourth Department was also presented with the issue of the Division's jurisdiction over a public school district in *North Syracuse Central School District v. New York State Division of Human Rights*.[23] From its procedural disposition before the Appellate Division to the Fourth Department's subsequent ruling, *North Syracuse Central School District* was similar in most respects to the Third Department's ruling in *Newfield Central School District*. The Division issued an initial determination that it had jurisdiction to investigate claims of racial and disability discrimination brought by a mother on behalf of her daughter and that probable cause existed to believe that an unlawful discriminatory practice had occurred.[24] The school district sought a writ of prohibition pursuant to CPLR article 78,[25] and the Supreme Court granted the writ pursuant to the Second Department's ruling in *East Meadow Union Free School District*.[26] The Fourth Department reversed the Supreme Court's grant of the writ of prohibition and did not reach the merits of the jurisdiction argument because the school district failed to exhaust its administrative remedies.[27]

Conclusion

As discussed above, the Second Department in *East Meadow Union Free School* was the only Appellate Division to render a decision regarding whether the Division has jurisdiction over public school districts pursuant to Executive Law § 296(4). In *Newfield Central School District* and in *North Syracuse Central School District*, the interlocutory nature of the appeals rendered the Third and Fourth Departments unwilling to usurp the administrative adjudicative process to reach the merits of the jurisdiction question.

Although both departments were on solid legal ground in relying on Court of Appeals case law to reverse the grant of a writ of prohibition,[28] the ruling in *East Meadow Union Free School District* raised the question of whether the school district's resort to an administrative remedy through the Division in *North Syracuse Central School District* would be futile. The Fourth Department concluded that the school district failed to establish that resort to the administrative remedy would be futile,[29] but the Division admitted in its brief before the court that "[s]ince the issuance of *East Meadow*, the Division no longer processes complaints involving discrimination against public school students within the Second Department."[30] Essentially, the Division continued to investigate discrimination complaints by students against public school districts in the First, Third, and Fourth Departments despite the Second Department's ruling that the Division did not have jurisdiction in such a matter pursuant to Executive Law § 296(4). Such an admission by the Division brings into question the preliminary nature of its initial determination of jurisdiction. The Division's strategy within the different Appellate Divisions ensures that this issue will continue to be litigated.

The Second Department's ruling in *East Meadow Union Free School District* is not without its faults. The decision lacks, *inter alia*, a public policy discussion about an issue with far-reaching implications,[31] an analysis of the Executive Law statutory language,[32] or a review of relevant legislative history. Clarification regarding the Division's jurisdiction over public school districts might soon arrive, however, from a new decision out of the Third Department.

On February 9, 2011,[33] the Third Department heard oral argument in *Ithaca City School District v. New York State Division of Human Rights*. In *Ithaca City School District*, a mother, on behalf of her daughter, filed a complaint with the Division alleging that her daughter was subjected to racial insults and threats by other students at a middle school and that the school officials failed to respond effectively.[34] After a hearing, the Administrative Law Judge concluded that the School District had engaged in unlawful discriminatory acts, awarded $500,000 in damages to both mother and daughter, and ordered the school district to take steps to prevent future incidents of racial harass-

ment.[35] The Division's Commissioner reduced the damages award to $200,000 for each mother and daughter, and the school district and Division filed petitions in Supreme Court pursuant to Executive Law § 298 seeking transfer of the matter to the Appellate Division.[36] The Supreme Court dismissed the petitions pursuant to *East Meadow Union Free School District* and held that the Division had no authority to hear complaints against the school district because it was not an "education corporation."[37]

Unlike the Third Department's earlier decision in *Newfield Central School District*, *Ithaca City School District* is before the Third Department pursuant to Executive Law § 298 final review and not a CPLR article 78 request for a writ of prohibition. While this procedural disposition bodes well for the court to reach the jurisdiction issue, respondents in *Ithaca City School District* raise procedural contentions in that the school district waived any objection to the Division's jurisdiction and that the Supreme Court improperly failed to transfer the matter to the Appellate Division by dismissing the petitions.[38] Hopefully, these procedural hurdles will not prevent the Third Department from deciding whether a public school district is an "education corporation" pursuant to Executive Law § 296(4). Otherwise, the Third Department must adjudicate compelling contentions concerning the intent and construction of the Human Rights Law, the legislative history of § 296(4), and the inadequacies[39] of *East Meadow Union Free School District*. Such compelling contentions may prompt a decision that lands *Ithaca City School District* before the Court of Appeals where New York's highest court would settle the question of whether the Division has jurisdiction over student-filed discrimination complaints against public school districts.

Endnotes

1. *See generally* N.Y. Executive Law § 296(1)(a) (McKinney 2011) ("It shall be an unlawful discriminatory practice…for an employer.…").
2. 65 A.D.3d 1342 (2d Dep't 2009), *lv. denied*, 14 N.Y.3d 710 (2010).
3. N.Y. Exec. Law 296(14) prohibits discrimination against a "person with a disability on the basis of his or her use of a guide dog, hearing dog or service dog."
4. S*ee East Meadow Union Free Sch. Dist.*, 65 A.D.3d at 1342-43.
5. *See id.* at 1342-44.
6. *See* General Construction Law § 110 (McKinney 2011).
7. *See East Meadow Union Free Sch. Dist.*, 65 A.D.3d at 1343-44.
8. *Id.* at 1343 (citing *Martin v. Curran*, 303 N.Y. 276, 280 (1951)).
9. *See id.*
10. *See id.* (emphasis in original).
11. *See id.* at 1344 (discussing *Student Press, Inc. v. New York State Human Rights Appeal Bd.*, 44 A.D.2d 558 (2d Dep't 1974)).
12. 98 A.D.2d 958 (4th Dep't 1983), *appeal dismissed*, 62 N.Y.2d 645 (1984); s*ee East Meadow Union Free Sch. Dist.*, 65 A.D.3d at 1344.
13. S*ee East Meadow Union Free Sch. Dist.*, 65 A.D.3d at 1344.
14. 66 A.D.3d 1314 (3d Dep't 2009).
15. *See id.* at 1314-15.
16. *See id.* at 1315.
17. *See id.* at 1315-17.
18. 47 N.Y.2d 789 (1979).
19. *Newfield Cent. Sch. Dist.*, 66 A.D.3d at 1315-16 (quoting *Tessy Plastics Corp.*, 47 N.Y.2d at 791).
20. *See id.* at 1316-17.
21. *See id.* at 1316, n.2.
22. *See id.*
23. 920 N.Y.S.2d 564 (4th Dep't 2011).
24. *See* Brief of Respondent-Appellant Division at 4, *N. Syracuse Cent. Sch. Dist.*, 920 N.Y.S.2d 564 (No. 10-02171).
25. *See N. Syracuse Cent. Sch. Dist.*, 920 N.Y.S.2d at 564.
26. *See* Brief of Petitioner-Respondent North Syracuse Central School District at 2, *N. Syracuse Cent. Sch. Dist.*, 920 N.Y.S.2d 564 (No. 10-02171).
27. *See N. Syracuse Cent. Sch. Dist.*, 920 N.Y.S.2d at 565.
28. *See Tessy Plastics Corp.*, 47 N.Y.2d 789.
29. *See N. Syracuse Cent. Sch. Dist.*, 920 N.Y.S.2d at 565.
30. Brief of Respondent-Appellant Division at 20, *N. Syracuse Cent. Sch. Dist.*, 920 N.Y.S.2d 564 (No. 10-02171).
31. *See, e.g.*, S. 8436, 233rd Sess. (N.Y. 2010) (prohibiting discrimination by educational institutions and requiring the posting of information in schools on a school violence hotline and the circumstances under which a complaint may be filed with the Division).
32. *See* N.Y. Exec. Law § 290(3) (stating that a purpose of the Division is to "eliminate and prevent discrimination in . . . educational institutions"); N.Y. Exec. Law §291(2) (stating that it is a civil right to obtain an education free of discrimination); N.Y. Exec. Law § 300 (stating that "[t]he provisions of this article shall be construed liberally for the accomplishment of the purposes thereof").
33. *See* State of New York Supreme Court, Appellate Division, Fourth Judicial Department, http://decisions.courts.state.ny.us/ad3/DayCalendar/2011/feb%209.pdf (last visited May 17, 2011).
34. *See* Brief of Respondent-Appellant Kearney at 2, *Ithaca City Sch. Dist.* (No. 510106).
35. *See id.* at 3; Brief of New York State Attorney General as Amicus Curiae Supporting Respondents at 5, *Ithaca City Sch. Dist.* (No. 510106).
36. *See* Brief of Respondent-Appellant Kearney at 3-4, *Ithaca City Sch. Dist.* (No. 510106).
37. *See id.* at 4.
38. *See id.* at 12-14; Brief of Respondent-Appellant Division at 17-19, *Ithaca City Sch. Dist.* (No. 510106).
39. *See, e.g.*, *Bovich v. East Meadow Pub. Library*, 16 A.D.3d 11, 17 (2d Dept 2005) ("While there is authority for the proposition that a public library is an 'education corporation,' this does not mean that it cannot also be a municipal corporation") (internal citations omitted); *cf. East Meadow Union Free Sch. Dist.*, 65 A.D.3d at 1343 (holding that a school district cannot be an education corporation because it is a municipal corporation, which is a type of public corporation).

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Staying Arbitration Proceedings and Vacating Arbitration Awards Based on Public Policy Considerations

By Paul E. Levitt

You have negotiated into the collective bargaining agreement ("CBA"), a very well-crafted four stage grievance procedure resulting in binding arbitration. Grievances will now be heard within a tight time schedule, arbitration hearings will be conducted quickly, and arbitration awards will be made by neutral arbitrators who are experts in the labor field. Industrial Peace is bound to break out all over the land. You are humming the John Lennon song, "Imagine."

Then one peaceful summer Friday afternoon, you receive a 40-page fax from your union client. A judicial order to show cause demands you to show why the arbitration should not be stayed and the grievance dismissed.

You have a new song in your heart, and it is of a Wagnerian bent, dark, foreboding and warlike. You must reply quickly because the battle has been joined.

Fortunately there are very limited statutory grounds to stay arbitration proceedings. The Courts favor the use of arbitration as agreed to by the parties to the CBA and generally avoid granting judicial stays of arbitration.

Unfortunately, the order to show cause will delay the grievance and arbitration process, a process that the parties negotiated in order to have a quick resolution of workplace problems. Generally, management and unions recognize that a quick resolution provides real benefits. For as long as an important grievance is left unresolved, labor management relations become strained, leading to the filing of more grievances and a complete breakdown in communication between Labor and Management.

In the public sector, local governmental entities, Towns, Village, Counties, School Districts and other employers seek new ways to reduce union compensation and benefits. Difficult economic times lead to more grievances and more litigation.

The *New York Times* reported on May 15, 2011 that $170 million has been pared from the $3 billion New York State judicial budget. The *Times* article stated that about 350 court employees, including clerks and court lawyers, are to be laid off, following about 75 layoffs in the court system's administrative offices that took place earlier this spring. It was reported recently that in addition to layoffs, there has been a demotion or transfer of 241 other judicial employees.

At this critical time, Judges are seeking pay increases, the first increase in 12 years, from $136,700 to $192,500. The Coalition of New York State Judicial Associations makes the point that in the last 12 years the caseloads have increased dramatically.

Understandably, limiting judicial intervention in grievance disputes and alternative dispute resolution, such as arbitration, is strongly favored by the courts.

Article 75 of the CPLR (7501) broadly embraces the use of arbitration,

> A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.

However, there is a public policy exception to the general rule of judicial "hands off" of the arbitration of disputes.

A challenge to arbitration proceedings must be made before the parties participate in the hearing and before an arbitration award is issued. A special proceeding is commenced under CPLR 7503 (application to stay arbitration).

In *Sprinzen v. Nomberg*, 46 N.Y.2d 623, 415 N.Y.S.2d 974 (Ct. of App. 1979), the Court of Appeals held that the relevant public policy considerations, "embodied in statute or decisional law," must "prohibit, in an absolute sense, particular matters being decided or certain relief being granted by an arbitrator." Id. at 631, 415 N.Y.S.2d at 978.

The applicability of the public policy exception requires the court to examine the agreement, "on its face," meaning that the court should not have to become involved in extended fact-finding or legal analysis in order to decide the issue. Thus, *Sprinzen* held that the enforceability of a restrictive covenant in an employment agreement was arbitrable because such covenants are not per se illegal. Enforceability turns on reasonableness of the particular covenant, which is a fact-based inquiry that the parties may delegate to an arbitrator.

A stay of arbitration will be denied if it appears possible, at the outset, for the arbitrator to grant relief that will not contravene public policy. *Hackett v. Milbank, Tweed, Hadley & McCloy*, 80 N.Y.2d 870, 587 N.Y.S.2d

598, (Ct. of App. 1992). Arbitration will be stayed if the arbitrator could grant no relief without violating public policy, but a stay would be premature if the arbitrator may fashion narrow relief that avoids conflict with public policy. *Port Washington Union Free School District v. Port Washington Teachers Ass'n,* 45 N.Y.2d 411,408 N.Y.S.2d 453 (Ct. of App. 1978).

In *Associated Teachers of Huntington, Inc. v. Board of Education, Union Free School, Dist. No. 3, Town of Huntington,* 33 N.Y.2d 229, 235, 351 N.Y.S.2d 670, 675, (Ct. of App. 1973), the union sought to arbitrate the District's denial of sabbatical leave provided to unit members under the CBA. The District denied the grievance and moved to vacate the award claiming that if it had granted the leave, it would violate the State's Sabbatical Leave Moratorium Act, in effect at the time. The Court found that the legislative act did not express so strong a public policy as to require vacating the award. The Moratorium Act provided that it would not be construed to impair any contractual right to a leave of absence or sabbatical leaves of absence where such contractual right was in existence and enforceable prior to its effective date. The Court of Appeals stated that if issues are so "interlaced with strong public policy considerations," they may not be arbitrated. But this was not such an issue. The Court quoted the dissenting justice below, "arbitration is considered so preferable a means of settling labor disputes that it can be said that public policy impels its use."

In the concurring opinion of *Port Washington Union Free School District v. Port Washington Teachers Ass'n.,* 45 N.Y.2d 411, 408 N.Y.S.2d 453, (Ct. of App. 1978), Justice Breitel stated that arbitration should only be barred "if it will offer the opportunity to frustrate explicit prohibitions of illegal or gravely immoral conduct, or displace non-delegable judicial authority." Id. at 422, 408 N.Y.S.2d at 458.

"Public policy involved must, indeed, be substantial, for otherwise the freedom to resort to voluntary arbitration as an alternative forum for the resolution of disputes would be thwarted by endless attempts to invoke one purported public policy or another." Id. at 421, 408 N.Y.S.2d at 458. See also *Port Jefferson Station Teachers Ass'n v. Brookhaven-Comsewogue Union Free School District*, 1978, 45 N.Y.2d 898, 899, 411 N.Y.S.2d 1, 2, (arbitral award may be set aside on policy ground "[o]nly when the award contravenes a strong public policy, almost invariably involving an important constitutional or statutory duty or responsibility").

In a case decided June 16, 2011, *Endicott Central School District v. Union Endicott Maintenance Workers Association,* 200 WL 2378182, 2011 N.Y. Slip Op. 05167, the Third Judicial Department determined that the parties agreed to arbitrate under a CBA that broadly defined a grievance as "any dispute between the parties covered by the Agreement concerning the meaning and application of the specific written provisions of this Agreement." The grievant was a retiree seeking to enforce certain retirement benefits he claimed he was entitled to, despite having been terminated after a §75 hearing. The Court rejected the School District's claim that public policy would be violated because the retiree was terminated as a result of a sex offense. The Court also rejected the claim that a retiree could not grieve a denial of benefits because there was no language in the CBA which excepted grievances concerning retirement benefits from arbitration. The Court noted that the fact that the substantive clauses of the CBA might not support the grievance is irrelevant on the threshold question of arbitrability. In repeating the longstanding principle that it is for the arbitrator, and not the courts, to resolve any uncertainty concerning the substantive rights and obligations of the parties, the Court cited *Matter of Board of Education of Deer Park Union Free School District v. Deer Park Teachers Association*, 50 N.Y.S.2d 1011 (Ct. of App. 1980).

Below are examples of public policy issues when the courts will grant stays of arbitration or vacate arbitration awards:

Granting tenure to teachers. See *Cohoes City School District v. Cohoes Teachers Ass'n*, 40 N.Y.2d 774, 390 N.Y.S.2d 53 (Ct. of App. 1976). However, the parties may arbitrate the procedural prerequisites to tenure determination. *Candor Central School District v. Candor Teachers Ass'n,* 42 N.Y.2d 266, 397 N.Y.S.2d 737 (Ct. of App. 1977). Although arbitrator's interpretation of provisions in collective bargaining agreement governing teacher evaluations limited power of district superintendent to exercise discretion in making teacher recommendations to school board, where it did not in any way impair the authority of the board to make the ultimate decision to grant or withhold tenure, decision was not violative of public policies expressed in the Education Law. *United Liverpool Faculty Ass'n v. Board of Ed. of Liverpool Central School Dist.,* 52 N.Y.2d 1038, 438 N.Y.S.2d 505 (Ct. of App. 1981).

When the CBA conflicts with Civil Service Law §80 ***governing use of seniority in connection with layoffs.*** *County of Chautauqua v. Civil Service Employees Ass'n,* 8 N.Y.3d 513, 838 N.Y.S.2d 1 (Ct. of App. 2007). Section 80 and §80-a of the Civil Service Law (the date of hire being for purposes of layoff is the date of the individual's permanent appointment in public service) "reflect a legislative imperative" that the City cannot bargain away. A conflict existed between the seniority provisions in the collective bargaining agreement, which employs the date hired, and the seniority provision in Civil Service Law §80, which uses the date of permanent appointment.

Terms of the CBA purporting to grant tenure rights to provisional civil service employees after one year of service were contrary to the Civil Service Law and public policy. The CBA conflicted with constitutional and statutory (McKinney's Civil Service Law §65) limitations on duration of provisional employment. *City of Long Beach v.*

Civil Service Employees Ass'n, 8 N.Y.3d 465, 835 N.Y.S.2d 538 (Ct. of App. 2007).

In *City of New York v. Uniformed Fire Officers Ass'n, Local 854*, 95 N.Y.2d 273, 716 N.Y.S.2d 353 (Ct. of App. 2000), the Court of Appeals held that the City Department of Investigation's (DOI's) ability to conduct criminal investigations presented a strong public policy in a case where the CBA limited or restricted the procedures that could be used in conducting the questioning of witnesses and suspects. The Court found that allowing arbitration of such a dispute would amount to an impermissible delegation of city's broad authority under statutory and decisional law to investigate its internal affairs. The CBA contained many restrictions on interrogation, such as requiring the suspected employee being advised of the right to counsel and the right to union representation, and adjourning the interrogation for two working days, if requested. Also see *Board of Educ. of City of New York v. Hershkowitz*, 308 A.D.2d 334, 764 N.Y.S.2d 254 (1 Dept. 2003), in which Investigators from the Office of the Special Commissioner of Investigations (SCI) interrogated a teacher about sexually explicit internet communications with a student and other inappropriate conversations with students. Public policy was violated when the CBA required the presence of union representatives at any interview which could lead to employee discipline. The CBA also required the arbitrator to exclude statements made by a teacher during the interrogation, and that too was a violation of public policy.

The orderly administration of the courts. An Administrative Judge for the County of Broome requested that the County remove a sheriff from assignment at a county court facility. The arbitration of a grievance contesting the transfer was stayed. The court found that the Administrative Judge was acting within the court's inherent authority to "maintain the integrity of the judicial process, manage their judicial process and guard their independence." The court cited regulation which stated that the responsibility of the administrative judge is to ensure "the orderly administration of the courts within the area of their administrative responsibility." *County of Broome v. NYS Law Enforcement Officers Union, District Council 82, AFSCME, AFL-CIO*, 80 A.D.3d 1047, 915 N.Y.S.2d 708 (3d Dept. 2011).

You have been successful in defending the motion to stay arbitration. So much time has passed while awaiting the decision, labor and management are already negotiating a successor CBA. Yet, you push on. Finally you and your adversary arbitrate the dispute. An award is issued. You win. You will soon begin your long dreaded vacation to Disney World, in August. But on the Friday before vacation, your client receives another order to show cause. This one seeks to vacate the arbitration award. Maybe the news isn't so bad. You decide not to seek an extension of time to answer. You explain to your family that you will need to remain home and work on responding to the motion. You will sacrifice a few days at Disney World in order to work.

CPLR 7511 states that an arbitration award must be vacated if a party's rights were impaired by an arbitrator who "exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made." (CPLR 7511(b)(1)(iii)).

It is well settled that an arbitrator exceeds her power under the meaning of CPLR 7511 when the award violates a strong public policy. *Matter of New York City Transit Authority v. Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 812 N.Y.S.2d 413 (Ct. of App. 2005).

Many of the public policy challenges to arbitration awards arise out of disciplinary arbitration.

***Education Law* §3020-a(5)** limits a court's review of an arbitration award to the grounds set forth in CPLR 7511.

The courts did not find a public policy exception in the following cases:

In a teacher's disciplinary hearing under Education Law § 3020-a, the teacher was found guilty of serious misconduct arising from non-physical relationship with student but the penalty was a 90-day suspension without pay and reassignment rather than termination. The public policy exception was not applicable as the court stated that it applies only in cases in which public policy considerations, embodied in statute or decisional law, prohibit, *in an absolute sense*, particular matters being decided or certain relief being granted by an arbitrator. *City School Dist. of City of New York v. McGraham*, 75 A.D.3d 445, 905 N.Y.S.2d 86 (1 Dept. 2010).

The Court of Appeals reversed the First Department which vacated an Arbitration award reinstating a bus driver who was unable to provide sufficient amount of urine to permit random drug test. The lower court found that federal regulations required employees who had "refused" to take a drug test to be removed from performing safety sensitive functions. The Court of Appeals rejected the lower court's determination that public policy was violated by returning drug users to work and perform safety sensitive functions. Further, the Appellate Division improperly substituted its factual finding for that of the arbitration panel. *Dowleyne v. New York City Transit Authority*, 3 N.Y.3d 633, 782 N.Y.S.2d 401 (Ct. of App. 2004).

In a case involving the October 2003 crash of the Staten Island Ferry which killed 11 people and seriously injured 71, an arbitrator reinstated a ferry deckhand who had been terminated as result of random drug test. The First Department found that the award did not violate any strong, well-defined public policy. The Court stated that the Department of Transportation's (DOT) zero toler-

ance policy was not expressly embodied in constitutional, statutory or common law, but rather was adopted as DOT's new internal policy shortly before deckhand was tested, and administrative code section, providing generally that city and other public employers had sole authority over all aspects of the work and discipline of their employees, and generally removing those areas from scope of collective bargaining, did not embody public policy violated by award. *Matter of Local 333, United Mar. Div., Intl. Longshoreman's Assn., AFL-CIO v. New York City Dept. of Transp*, 35 A.D.3d 211, 826 N.Y.S.2d 225 (1st Dept. 2006), leave to appeal denied, 9 N.Y.3d 805, 842 N.Y.S.2d 781 (2007).

In *New York City Transit Authority v. Transport Workers Union of America*, 99 N.Y.2d 1, 750 N.Y.S.2d 805 (Ct. of App. 2002), the Court of Appeals reversed the First Department and reinstated two terminated employees. The arbitrator reinstated an employee who failed to properly operate a hand brake on a subway causing it to derail (no injuries). Another employee, a bus driver who struck a pedestrian, after arbitrator's finding that the accident was avoidable was reinstated by the arbitrator. "The narrowness of the public policy exception, as applied to the arbitration process under collective bargaining agreements, is designed to ensure that courts will not intervene in this stage of the collective bargaining process in pursuit of their own policy views, or because they simply disagree with the arbitrator's weighing of the policy considerations." 99 N.Y.2d 1, 750 N.Y.S.2d 805, at 808.

The courts did find a public policy exception in the following cases:

Arbitrator's failure to consider and determine retaliation claims. In a December 2010 decision, the Court of Appeals found that an arbitrator's failure to separately consider and determine an employee's Civil Service Law §75-b retaliation defense as part of a disciplinary arbitration required the award to be vacated. The Court stated that the arbitrator acted in excess of his authority and violated public policy. In *Kowalski v. New York State Dept. of Correctional Services*, 16 N.Y.3d 85, 917 N.Y.S.2d. 82 (Ct. of App. 2010), the Court stated that a separate retaliation inquiry and determination on the merits is "critical." The Court spoke of the importance of the whistleblower statute, which was to shield employees from being retaliated against by an employer's selective application of its rules and also quoted the statute's legislative intent in "establishing a major right for employees—the right to speak out against dangerous or harmful employer practices."

Protecting children and mentally disabled from harmful conduct of adults. New York's explicit and compelling public policy to protect children from the harmful conduct of adults (*see e.g.* Social Services Law § 384-b; Family Ct. Act art. 10), particularly in an educational setting (*see e.g.* Education Law art. 23-B; *Executive Law* § *296* [4]) was violated by Education Law 3020-a award when tenured teacher's improper, intimate, and clandestine relationship with 16-year-old female student showed no remorse for his conduct, disobeyed administrative direction to cease his relationship with student and not transport her in his car, and continued to contact her even after disciplinary charges were brought. *In re Binghamton City School Dist. (Peacock)*, 33 A.D.3d 1074, 823 N.Y.S.2d 231, (3d Dept. 2006). An arbitrator's award of a two-month suspension after finding that a mentally disabled woman's sexual intercourse with employee of state mental health institution was consensual and that the physical abuse was "minimal," was an irrational award in violation of public policy. *Ford v. Civil Service Employees Ass'n, Inc.*, 94 A.D.2d 262, 464 N.Y.S.2d 481 (1st Dept. 1983).

Reclassification of positions. In determining that a per diem firefighter was required to perform the same job duties as firefighters and fire assistants and should therefore be accorded the same wages and benefits, the arbitrator, in effect, reclassified the civil service position in violation of public policy, making reclassification of civil service position not subject to arbitration. *In re City of Norwich (City of Norwich Firefighters Ass'n, Local 1404, Intern. Ass'n of Firefighters, AFL-CIO, CIC*, 43 A.D.3d 609, 841 N.Y.S.2d 179 (3d Dept. 2007).

Arbitration award required college to retrain teacher even though he was unqualified to teach because of his lack of academic credentials. *Meehan v. Nassau Community College*, 231 A.D.2d 720, 647 N.Y.S.2d 865 (2d Dept. 1996).

You have now succeeded in defeating the application to vacate the arbitration award. You await a notice of appeal to be filed by your adversary and thankfully the time has expired. Several weeks later, you receive a phone call from the union president asking when the union member will be paid the money awarded to him by the arbitrator. Did you forget to cross-move to confirm the arbitration award? Rather than explain this oversight to your client, you would rather be doing anything else, even standing on line to the Nemo & Friends Pavillion at Disney World in August.

In conclusion, although New York courts have historically encouraged and favored the arbitration of CBA disputes and disciplinary matters, there exists some very limited policy exceptions when the courts will stay or vacate arbitration.

Recoupment of Unemployment Benefits in Cases Where Back Pay Is Awarded

By Sean Strockyj

An issue employment practitioners may unexpectedly encounter is the New York State Department of Labor's power of recoupment after a court award or settlement allotting back pay. The answer to whether the Department has such power is fairly simple. It does. Fortunately for claimants, the Department often forgoes this alluring opportunity to add money to the Unemployment Compensation Fund.

An important case recently dealing with this issue is *Matter of Glick*, 77 A.D. 3d 1008 (3d Dept 2010). In *Matter of Glick*, the claimant was terminated on October 27, 2005 from the Office of Children and Family Services, where he made $35,000 a year. Mr. Glick filed for unemployment benefits and received $10,165.50, covering November 2005 through May of 2006. When receiving benefits, Mr. Glick sued for wrongful discharge based on sexual harassment. The case ultimately settled for $250,000, which included $92,317 in back pay, covering the period between his termination in October 2005 and May 1, 2008.

Somehow, the Department of Labor learned of the State Agency's settlement. The Department of Labor notified Mr. Glick that in light of the settlement, he was not entitled to keep the unemployment benefits. Since Mr. Glick received wages (the back pay) in the period he received benefits, he was not considered "totally unemployed," under Labor Law §591(1), and Mr. Glick was charged with the substantial overpayment of $10,165.50.

An Administrative Law Judge sustained the Department's determination and the Unemployment Insurance Appeal Board affirmed. The Third Department upheld the Board decision that the lump sum back pay constituted wages for the purpose of determining benefits and the overpayment was recoverable under Labor Law §597(3) and (4). The Glick decision followed the Third Department's previous decisions in *Matter of Talkov*, 33 A.D. 2d 1084 (3d Dept 1970) and *In Re Hernandez*, 97 A.D. 2d 585 (3d Dept 1983), *aff'd*, 63 N.Y.2d 737 (1984).

Historical Perspective

To understand the issue of recoupment, an analysis is required of the Supreme Court decision of *Labor Board v. Gullett Gin*, 340 U.S. 361 (1951). Here, the NLRB found that the Gullett Gin Company discharged workers in violation of the National Labor Relations Act. The NLRB ordered reinstatement and back pay without discounting the award for unemployment compensation received. The High Court held that the NLRB did not abuse its discretion and was under no obligation to deduct unemployment compensation from the award. The Court reasoned that unemployment payments are made to employees by a state (as opposed to the employer) from funds derived from taxes to carry out a policy of social betterment. Therefore, the unemployment benefits were considered collateral benefits and failing to take them into account in ordering back pay did not make employees "more than whole, as that phrase had been understood and applied."

"The answer to whether the [New York State] Department [of Labor] has [the] power…of recoupment after a court award or settlement allotting back pay… is fairly simple. It does."

The *Gullet Gin* decision referenced the states' power of recoupment in a footnote. *See* 340 U.S. at 365. First, the Court detailed that some states permit recoupment of benefits during a period in which the NLRB subsequently awards back pay and cited a leading case in this area, the New York case of *In re Skutnik*, 268 A.D. 357 (3d Dept 1944) (involving striking bakery workers who received back pay and were ordered to pay back unemployment compensation). The footnote then stressed that recoupment is a matter between the state and employees. *See Gullet Gin*, 340 U.S. at 365 Fn1.

The *Gullet Gin* decision is most often discussed in relation to whether unemployment compensation should be deducted from an award of back pay—a matter which is not dealt with uniformly and which has been subject of much comment. *See Eric Pearson*, Collateral Benefits and Front Pay, 69 U. Chi. L. Rev. 1957 (Fall 2002); *Eric A. Martin*, Deduction of Unemployment Compensation, 16 U. Mich. J.L. Reform 643 (Spring 1983).

In the Second Circuit and a minority of federal circuits, the decision of whether to deduct unemployment compensation is left to the discretion of the trial court. *See Dailey v. Societe Generale*, 108 F.3d 451, 461 (2d Cir. 1997); *Daniel v. Loveridge*, 32 F.3d 1472, 1478 fn.4 (10th Cir. 1994); *Hunter v. Allis-Chalmers*, 797 F.2d 1417, 1428 (7th Cir. 1986) (per J. Richard Posner). New York State Courts seem to share such discretion. *See Matter of Cohen*, 44 A.D.2d 286 (3d Dept 1974). The *Cohen* decision held that the State lost

the power of recoupment when an arbitrator from the NYS Board of Mediation diminished the award to reflect unemployment benefits.

The majority of federal circuits have adopted the NLRB policy ratified in *Gullet Gin,* and hold that unemployment benefits should not be deducted from back pay. *See Kauffman v. Sidereal*, 695 F.2d 343, 347 (9th Cir. 1983); *Brown v. A.J. Gerrard Mfg*., 715 F.2d 1549, 1551 (11th Cir. 1983); *Goworski v. ITT*, 17 F.3d 1104, 1114 (8th Cir. 1994); *Craig v. Y&Y Snacks*, 721 F.2d 77, 82-84 (3d Cir. 1983).

The Supreme Court of Hawaii wisely summed up why the NLRB's longstanding position is sensible when it noted that recoupment of state paid benefits should be a remedy that inures to the benefit of the State rather than the discriminating employer. *See Teague v. Hawaii Civil Rights Commission,* 89 Haw. 269, 282-83 (Haw Sup. Ct. 1999). Further, as many courts have noted, allowing the discriminating employer to offset liability would undermine the deterrence objective of a back pay award.

New York State Policy

Given the *Glick* and *Hernandez* decisions in New York, it is clear the Department of Labor has the power of recoupment. However, it has not been exercised with anything resembling unbridled discretion. Instead, recoupment will mostly occur, as practitioners know, when there is willful misrepresentation or fraud in claiming unemployment benefits.

Besides not being overly aggressive in seeking recoupment, New York State law limits the possibility of restitution to a particular statutory time period. Pursuant to Labor Law §597(3), in the absence of fraud or willful misrepresentation, a determination may be reviewed because of new or corrected information only within a year of the date it is issued or within six months from a retroactive payment. In other words, the law sets time limits for the re-opening of a case based upon new evidence, such as a settlement or court award containing back pay.

The Plight of the Unemployed

The fact that states have discretion to avoid pursuing recoupment is likely an acknowledgment of the uncompensated consequential damages that a discharged employee suffers. In *Entergy v. Oubre*, the Supreme Court announced a simple observation that should typically mitigate against going after recoupment, namely that a discharged employee will often have to spend the money he receives and will lack the means to tender it back. *See Entergy*, 522 U.S. 422, 427 (1998) (involving claimant who brought age discrimination claim after he received severance package).

Moreover, unemployment compensation is never confused with a complete remedy for the effects of a job loss. While the claimant is fortunate to receive any funds while being out of work, he obviously must live on a fraction of his former salary while financial demands such as a mortgage, rent, car payments, student loans, home heat, transportation fees, food, electricity, water, etc., do not abate. As is easily recognized, unemployment can plunge the once gainfully employed individual into debt, bankruptcy and emotional turmoil. This is an especially appalling result to the wrongfully discharged employee.

In the well-respected decision of *Gilles v. Dept of Human Resources Development*, the California Supreme Court noted some wise considerations that should be analyzed before a state seeks recoupment. *See Gilles,* 11 Cal. 3d 313, 316, (1974). The *Gilles* decision stated that it is important to examine whether the claimant changed his position in reliance on receipt of the benefits and whether imposing such a hardship on a claimant would tend to defeat the purpose of the unemployment insurance provisions.

As the policy declaration to Labor Law §501 highlights, the unemployment provisions are to be construed liberally, as a humanitarian measure. It follows that it is generally the humanitarian course to refrain from recovering benefits that were correctly awarded the wrongfully discharged worker when such recoupment would create a hardship on the claimant.

Other Jurisdictions and Recoupment

Other jurisdictions have addressed the recoupment issue in several ways. For example, Alabama and Connecticut statutes mandate that unemployment benefits should be deducted from a back pay award and paid by the employer to the proper agency. *See* Code of Ala. §25-4-78(6)(2011); Conn. Gen. Stat. §46a-86(b).

Pursuant to the California law, the employer is liable for the repayment when an award is reduced by unemployment received. *See* Cal Unemp Ins Code §1382. However, when a back pay award is not reduced, §1375 allows the State to seek recoupment with the caveat that the recovery must not be against good conscience and equity, which is in line with the considerations manifested in the *Gilles* decision.

Michigan has developed a similar statutory framework to permit its agency to waive recovery if the claimant did not cause the overpayment and if the recovery would not offend equity and good conscience. *See* MCLS §421.62(a). Maryland has also enacted a statute that permits a discretionary recoupment. *See* Md. Labor and Employment Code Ann. §8-809 (noting Secretary "may" recover benefits when retroactive wages are awarded).

Pennsylvania has created a less employee friendly statutory scheme that requires the claimant to affirmatively report his back pay award. Here, a recipient of a back pay award must notify the state immediately of said award, and is liable to pay into the insurance fund an amount equal to the benefits received. *See* Pa. Stat. Ann. Tit. 43, Section 874(b)(3)(2010).

The receipt of back pay by an employee who is wrongfully discharged is the epitome of a case where the funds were received in good faith. Additionally, the fact that this opportunity is often forged across the country indicates that State agencies often make the determination that waiving recovery does not offend precepts of fairness.

Final Practice Considerations

It is well understood that the parties involved in employment litigation will often come up with a settlement amount that does not expressly reflect the claimant's unemployment receipts. However, when negotiating settlements, an employer's attorney should always raise the amount of unemployment compensation and interim earnings the claimant received. Further, the employer's counsel should mandate that a specific portion of a proffered settlement be deemed back pay.

On the side of the employee's attorney, it is quite common to have the employer expressly agree that he will not challenge any award of unemployment. The employee's attorney should also scrutinize how much of the settlement the employer wants to consider back pay.

Of course, the claimant is obligated to pay taxes on back pay. If the Department of Labor were to receive this information as a mandate at tax time, or as soon as the back pay award is received, New York litigants would be operating in a different legal field.

As it stands, the New York State Department of Labor's discretionary power of recoupment is only curtailed by the statute of limitations. There is a question whether the *Glick* decision is the foreshadowing of a new direction or an unusual case involving a State worker that was somehow eyed by a different branch of State Government.

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Changing the Rules of the Game: The New Face of Union Organizing Campaigns

By Vanessa Delaney

Introduction

A union organizing campaign is one of the most frustrating and complex events employers and employees can experience at a workplace. Section § 7 of the National Labor Relations Act grants employees the freedom to join, form, or reject a union.[1] The heart of the Act is to preserve an employee's free choice. In order to do so, the Act restricts employers and unions from unduly interfering with this choice.[2] Yet, the reality is, during most campaigns, both the employer and the union operate "much like a political campaign," utilizing both legal and illegal tactics, in an attempt to convince employees to vote a certain way on the day of the election.[3] An organizing campaign often entails a wide range of legal protections and prohibitions most employees are not aware of.

In 1976, Professor Julius G. Getman of Harvard University, along with two other colleagues, Stephen B. Goldberg and Jeanne B. Herman, wrote a book entitled, *Union Representation Elections: Law and Reality* (Law and Reality). This book, through an extensive study, researched the impact illegal organizing tactics, utilized by either the employer or the union, have on an employee's decision at election time. The research suggested that the use of illegal tactics during an organizing campaign did not substantially affect an employee's decision at the election.[4] Since this book was published, however, the laws and realities surrounding a representation election have significantly changed. Though many of the procedural processes have predominately stayed the same, employers and unions have substantially altered their strategic approach towards an organizing campaign. Many of their new methods test the limits and underlying theme of the Act, often leaving an employee's "free choice" at the hands of either the employer or the union.

Beginning in the1970s, unions began to "broaden" their organizing tactics in response to several decades of declining membership.[5] Most people are aware that union density has been sharply declining since its peak in the 1950s.[6] During the mid-1970s union density in the private sector was about 25 percent; within ten years, union density dropped significantly to about 15 percent.[7] This dramatic decrease in unionization can be attributed to several factors. For one, over the past four decades, a majority of employment in America has shifted away from manufacturing towards services.[8] With globalization on the rise, many historically unionized industries have been outsourced.[9] Secondly, some researchers point to the rapid increase of women participation in the workforce since the 1960s, as a cause for the reduction of union density.[10] This research suggests that women are less likely to join a union because they are more likely to work part-time or intermittently.[11]

Unions and many academic commentators, however, point to employer resistance as the main cause of the declining unionization rate.[12] As union membership has been declining, concurrently the "union avoidance" industry has been thriving. In 2007, this industry was estimated to be a $4 billion-dollar-a-year business.[13] Though this industry has been around since the establishment of the Act, hiring union consultants firms has become increasingly common since the 1970s.[14] Research now indicates that new, more aggressive anti-union campaigns *do* have a substantial affect on the success of a union organizing drive.[15] Today, approximately 75% of employers hire union avoidance firms when faced with a union organizing drive.[16] The range of activities employed to combat unionization are more "sophisticated" and "brazen" than those of the past.[17] Studies estimate that approximately 23,000 workers a year are illegally fired or discriminated against for union-related activity.[18] Employers have also increasingly responded to organizing with plant closings, harassment, surveillance, and modifications in benefits and conditions of employment.[19]

The declining union rates and the increased activity by employers, both legal and illegal, have pushed Congress towards implementing various labor reforms. The proposed Employee Free Choice Act (EFCA) has received substantial attention since its introduction in 2007.[20] The proposed act, which purports to establish a more efficient system to enable employees to form, join, or assist labor organizations, looks to amend the National Labor Relations Act for the first time since 1959.[21] Many now believe, since the Democrats lost their 60-seat filibuster-proof Senate, EFCA is a losing battle.[22] However, EFCA may still be accomplished via regulation, and certain recent NLRB efforts show an intention to do so.[23]

The workplace has changed considerably since the publication of *Law and Reality* in 1976. With the rise of human resource and labor departments, businesses have also been increasingly implementing various forms of alternative dispute resolution (ADR) programs. These mechanisms provide businesses with "an easier more cost effective manner to resolve conflicts with their employees."[24] Historically, a grievance procedure has been "one of the cornerstones of unionization." By voluntarily implementing such programs, employers are depriving unions of one of their "principal attractions" in organizing employees.[25] In response to management's evolving tactics attempting to limit union organizing success,

unions have felt the need to become more aggressive with their organizing tactics.[26] As a result, representation elections, which were once perceived to be the "best method" for determining whether employees wanted a union, have become less important to unions in organizing members, and union campaigns look and operate very differently than those of the past.[27]

National Labor Relations Act

The National Labor Relations Act (NLRA), originally enacted in 1935, was created to maintain industrial peace between employers and employees through the promotion of collective bargaining.[28] Through several amendments, the Act in its current form is the principal body of law that governs employment relationships of the private sector.[29] One of the principal functions of the Act is to provide a framework for a union to be recognized as the exclusive bargaining agent of an appropriate unit of employees in a workplace.[30] Currently, there are three avenues for a union to obtain recognition and require an employer to bargain in "good faith" over the wages, hours, and conditions of employment of its employees.[31]

Historically, unions most commonly sought representation through a method referred to as a secret-ballot election.[32] This process first requires a union to obtain signed authorization cards from at least 30 percent of employees; these cards must then be submitted with a petition for an election to the National Labor Relations Board (NLRB).[33] Typically, an election today is held within 42 days after a regional officer of the Board receives the petition; although in the 1970s and 1980s, the time period was as long as sixty days.[34] The Board is given wide discretion in regulating the time period prior to a secret-ballot election.[35] A regional director from the Board monitors the election process and certifies the results.[36]

An employer may also voluntarily agree to recognize a union that can show that a majority of employees in an appropriate unit signed authorization cards.[37] Also referred to as card check, this mechanism is presently the predominate means in which a union obtains recognition and bargaining rights.[38] This method often operates in conjunction with a neutrality agreement, where an employer agrees to remain neutral during a campaign.[39]

Lastly, though uncommon, the Board may order an employer to recognize and bargain with a union that has not won an election. This occurs when the employer has made it "impossible for a free and fair secret-ballot election to take place," and as a part of a Board order to remedy the employer's flagrant unfair labor practices. [40]

Union representation is a protected individual right. The freedom to make this choice, and the underlining purpose of the Act, is defined by Section § 7:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities...[41]

The Act seeks to further ensure an employee's complete autonomy in making this decision by restricting both the employer and the union from unduly interfering with the employee's "free choice."[42] Section §8 of the Act defines and prohibits unfair labor practices by both a union and an employer. One of the principal functions of the NLRB, created to enforce the Act, is to prevent and remedy unfair labor practices.[43]

The NLRA does little to define what actually constitutes an unfair labor practice (ULP). Section 8(a) of the Act describes, generally, employer ULPs. Section 8(b) describes somewhat in mirror image ULPs by unions. For example, Section 8(a)(1) merely describes an unfair labor practice of an employer as using interference, coercion, and restraint in order to influence an employee's decision.[44] Once a ULP is filed, a pending secret-ballot election will be most likely held in abeyance while the Board conducts an investigation to determine whether the challenged action interferes with an employee's free choice.[45] Section §8 also explicitly prohibits an employer from firing employees for union activity, and prohibits unions from causing an employer to fire an employee for anti-union activity. It also prohibits both employers and unions from bribing employees to win election votes.[46] Likewise, a union is prohibited from threatening or discriminating against an employee who does not join a union.[47]

If a violation is found the Board will issue a "cease and desist" order requiring the party to stop the unfair labor practice.[48] As part of the remedy, the Board will also require a posting, notifying employees of the violation and, if necessary, the Board will take affirmative steps to make the "victim whole."[49] Decisions made by the Board are not self-enforcing, but carry a significant amount of weight in court.[50] If a party is not willing to comply with its order, the Board may file a petition with an appropriate U.S. Court of Appeals, and request Supreme Court review if necessary.[51] An aggrieved party may also seek similar court review.

Union Organizing Tactics

Historically, the primary organizing technique of most unions has been to organize workplaces where employees are known to have grievances.[52] Many employers may be surprised to learn that employees typically only seek out unions when a "motivating grievance" has fallen on deaf ears.[53] Even though unions are known

for the ability to provide employees with higher wages, better working conditions, and a grievance procedure, (but union membership entails union initiation fees and periodic dues, as well as possible job loss from strikes and picketing), employees rarely seek union representation solely because of dissatisfaction with their terms and conditions of employment.[54] According to a study done by Hart Research "more than half of all U.S. workers—nearly 60 million—say they would join a union right now if they could," yet few employees attempt to exercise this right.[55] Unions generally attempt to capitalize on issues that an employer ignores or feels are worth little or no attention.[56] Consequently, most organizing drives are the result of poor leadership within management or a lack of trust between employees and their supervisors.[57]

After being informed of a complaint, a union organizer is typically sent to the facility to evaluate the gravity of discontent among employees.[58] Union organizers of the AFL-CIO, for example, use an actual checklist to assess the vulnerability of a workplace.[59] The checklist measures items such as evidence of widespread discrimination, lack of communication between employees and management, and dissatisfaction with wages.[60] The wide range of activities involved in an organizing drive is both expensive and time consuming; therefore, it is important for union organizers to measure likeliness of a positive outcome before initiating a campaign. Some classic examples of union organizing activities include hand billing, home visits, telephone calls to employee's homes, offsite meetings with employees, and marketing videos.[61] However, the drastic decline in union density has motivated union leadership to shift its focus and resources in organizing.[62] As a result, though new version tactics have raised controversy, union density in the private sector has increased for the first time in almost thirty years.[63]

In the mid-1970s, unions began to modify the means in which workers were organized by focusing efforts on "disorganizing companies" in order to gain support.[64] One way this was accomplished was by strategically using "salts" as an organizing tactic.[65] A union "salt" is a union organizer who seeks employment at a non-union workplace with the intention to organize employees.[66] Although the use of union "salts" has been around for decades, the tactic has been modified and applied more frequently and more aggressively in the recent decades.[67]

The Supreme Court decision in *Town & Country* most likely contributed to the rejuvenation of salting campaigns. In this case, a non-union employer refused to interview several job applicants because of their status as union members.[68] The union, the International Brotherhood of Electrical Workers (IBEW), responded by filing an unfair labor practice charge with the Board.[69] After investigation, issuance of a complaint, and an administrative hearing, the Board concluded that the employer had committed an unfair labor practice by refusing to hire the applicants, because the applicants were "employees" within the meaning of the NLRA.[70] After U.S. Circuit Court of Appeals Review, the Supreme Court reaffirmed the Board's ruling and held that "a worker may be a company's 'employee' within the terms of the National Labor Relations Act, even if, at the same time, a union pays that worker to help the union organize the company."[71] This holding enabled union organizers lawfully to gain access into non-unionized workplaces by coercing employers into hiring union organizers.[72] By regarding a "salt" applying for a job as an "employee" protected by the Act, an employer who is made aware of an applicant's status as an organizer could be forced either to hire an organizer, or violate the NLRA.[73] The *Town & Country* decision prompted "salts" to inform employers of their union status "either verbally or in writing on the job application" to gain employment and organize employees from inside a facility.[74]

Moreover, *Town & Country* granted union "salts" protection from retaliation when engaging in various controversial "salting" activities. "Salts" have notoriously been used to "search for and report unfair labor practices" during a campaign.[75] Under the Act an employer and its supervisors and management are prohibited from interfering with an employee's right to organize.[76] An employer is extremely limited when making decisions that affect the working conditions of its employees during the time period between the filing of the petition and an election.[77] This includes suspensions, discharges, transfers, and demotions as well as interrogation, promises, and surveillance.[78] An informed employer will most likely not give any raises, discipline, or fire an employee out of fear that, regardless of its justification or business necessity, the NLRB may perceive the action as an unfair labor practice.

Defending ULPs can place significant burdens on employers; defending a single ULP, on average, costs a business $10,000-50,000 not including lost time of company officials.[79] An ULP can also lead to negative publicity, which can have lasting detrimental effects on a business and, if publicly traded, on its stock price.[80] Unions have used this knowledge to gain a tactical advantage. In 1987, leadership of the IBEW issued a manual to its local unions that provided guidance for running a successful "salting campaign."[81] The manual included a strategy of filing ULP complaints at "every opportunity," with the intention of purposely hurting a business.[82] The manual informed organizers that imposing such cost would benefit the union, because the employer would be forced either to "scale back its business, leave the salting union's jurisdiction entirely, or go out of business altogether."[83] Other salting activities included provoking supervisors to commit ULPs with the intention of imposing expenses on the employer or to provide grounds for an ULP strike.[84]

A 1997 Board decision further protected salting activities in a ruling that held, "even if "salting" is intended in part to provoke an employer to commit unfair labor practices," the salt is still entitled to protection under the

Act.[85] Essentially, "salts" were able to seek employment for the sole purpose of damaging a business. Unions enjoyed this freedom until a 2007 Board's decision in *Toering Electrical* that narrowed the decision in *Town & Country*.[86] In *Toering*, the Board ruled that the union member seeking employment must have a "genuine interest" in the position to be considered an "employee" within the meaning of the Act.[87] Further the Board ruled that the NLRB General Counsel bears the ultimate burden of proving the applicant's "genuine interest" in seeking employment.[88] This decision greatly limited the ability of unions to use "salts" as a mechanism to damage a business, because a salt who was retaliated against would have to prove an actual interest in employment to succeed with an unfair labor practice complaint.

Along with the use of "salts," unions have also increasingly utilized "corporate campaigns" to organize. A corporate campaign, also referred to as a "comprehensive" campaign, is a "systematic assault on the reputation of a corporation designed to undermine its relationship with such key stakeholders as its customers, shareholders, regulators, bankers and the general public."[89] Some increasingly common examples of these tactics involve attracting media attention or consumer interest by exposing a company's possible health, safety, and environmental violations.[90] Unions then use these "systematic assaults" in a quid pro quo sense with a business by "[offering] to withdraw the pressure in return for substantial concessions."[91] Generally, the goal of a corporate campaign is an attempt to "twist management's arm" to concede to a card check and neutrality agreement.[92] A neutrality agreement is an arrangement where the company agrees not "to say or do anything to express management's view of unionization or its effects on the workplace or the workers."[93] Essentially, a neutrality agreement sets the "ground rules of an organizing drive."[94] A card check, as mentioned in the previous section, is when an employer agrees to recognize a union based on the union's showing that a majority of employees have signed its authorization cards. Companies typically only agree to such agreements when they fear severe economic losses will result from the union's corporate campaign tactics.[95]

Unions have been noticeably successful in corporate campaign tactics. Historically, organizing through card check was extremely uncommon. Two decades ago only five percent of unions were recognized through card checks.[96] Currently, card check is the predominant mechanism utilized by unions in organizing members.[97] According to AFL-CIO officials, "card checks were used to sign up roughly 70 percent of the private-sector workers" in 2004 and "150,000 private-sector workers…in 2005."[98] Unions prefer a card check process for many reasons, but by far the most important is the significantly higher success rate.[99] On average unions win slightly more than fifty percent of NLRB administered elections, whereas "one study conducted for the AFL-CIO set the success rate in such circumstances [by card check] at more than 70 percent."[100] As a result, the use of secret-ballot elections has been declining considerably; currently on average less than 2,000 elections are held a year compared to an average of 7,000 elections during the 1960s.[101]

One major question in the card check process is whether the results actually represent the will of the employees.[102] Many employers argue that card checks are a "notoriously unreliable means" of determining employee views concerning union representation.[103] There have been cases of union organizers purposely lying and harassing employees to get them to sign cards.[104] Recently in *Dana Corp*., the Board changed its longstanding policy that prevented employees from filing decertification petitions for a "reasonable" time after union recognition.[105] This policy, referred to as the "voluntary recognition bar" rule, was initially adopted to prevent employers from ousting a union following voluntary recognition.[106] The change in policy resulted from two separate NLRB cases where employees filed decertification petitions and claimed the union had "harassed" them into signing recognition cards.[107] In both disputes, the employer agreed to a neutrality agreement with the UAW, but employees were not aware of this agreement or that a secret ballot election would not be held.[108] The Board's decision in *Dana* changed the "voluntary recognition bar" doctrine in several ways. Under the new policy, employees can now petition for a secret-ballot election for 45 days following voluntary recognition.[109] The NLRB will grant employees an election if 30 percent of workers sign the election petition.[110] Employers must also inform employees of their rights to an election following voluntary recognition.[111] The Board's decision explained the necessity to adjust the former policy to preserve employees Section § 7 rights.[112]

Some union organizing tactics have led to companies successfully bringing claims against unions for damages. In a recent case, *Sutter v. Unite Here*, a California jury awarded a hospital a $17 million judgment against the union for defamation.[113] In *Sutter*, the union sent out postcards to 11,000 patients of a hospital in California.[114] The postcards stated that Angelina, the hospital's laundry facility, "[did] not ensure that 'clear' linens are free of blood, feces and harmful pathogens."[115] At the time the postcards were sent, the union was attempting to organize Angelina. These postcards were part of a "comprehensive campaign." In comprehensive campaigns, a common strategy is for unions to seek to hurt the relationship between the employer and its largest client in order to place pressure on the employer to sign a neutrality or card check agreement.[116] In addition to challenging corporate campaigns under defamation law, employers have also asserted claims under federal labor law, federal antitrust law, and by alleging the union's activities constituted extortion under the Racketeer Influenced and Corrupt Organizations Act (RICO).[117]

Union Avoidance Campaigns

Managements' fight to keep unions out of their workplaces is not a new battle. Most people know that employers want to avoid unionization at all cost. There is a wide array of reasons why employers feel negatively towards unions. Most commonly, employers believe that with a union comes a loss of authority and a loss of power, as well as increased cost.[118] Employers often also express concern that unionization creates a divide between employees and management, making it difficult for supervisors to "maintain a positive work environment," which leads to a reduction in productivity.[119] Conversely, one recent study concluded that unions actually have a significantly positive effect on productivity in U.S. manufacturing and education.[120] Researchers have even indicated that productivity benefits from a good relationship between management and a union.[121] Regardless, notice of "union grumbling" or some other type of evidence that employees may be attempting to organize usually elicits an immediate response from an employer. Though immediate responses may vary, currently the most common response includes hiring an outside firm or consultant, who specializes in union avoidance, to combat organizing efforts.[122]

Depending on how much an employer is willing to spend on a union avoidance campaign, the services can vary anywhere from several consultants and a complex, sophisticated, lengthy strategy to a quick, low-budget consultation.[123] These services do not come cheap; on average companies spend as much as $2,000 to $3,000 per employee on an anti-union campaign, and about $50,000 for a four to five week campaign.[124] A campaign can last anywhere from about ten weeks up to several years, resulting in campaign cost in the millions.[125] The type of union avoidance campaign the employer decides on has a strikingly large impact on the outcome of an election. Accordingly, it has been estimated that if an employer makes no real effort to oppose unions, unions are successful almost 80 percent of the time, versus a 35 percent success rate if an employer "wages an intense campaign."[126]

The practice of hiring an outside party to assist during a union campaign is not new. Since the enactment of the Wagner Act in 1935, employers have sought out these types of companies in an attempt to remain union free.[127] Prior to the 1970s, however, employers felt the need to hide their anti-union campaigns out of "fear of exposure," and union avoidance firms were relatively small in number.[128] Beginning in the 1970s, these consultant firms began to increase in popularity by offering seminars on union avoidance strategies to employers in the business community.[129] These seminars would often entail lectures from an industrial psychologist on how to measure union sentiment among employees.[130] As a result, the union avoidance industry increased dramatically and firms were able to increase the "sophistication" and "scope" of their activities.[131] The impact of this increase proved to be detrimental to union efforts.[132] From the late 1970s into the mid 1980s, decertification elections increased threefold, and union success rates in NLRB elections decreased about 10 percent.[133] The most notorious union avoidance firm during this time, Modern Management Methods, advertised a truthful success rate of 99%.[134] Since the 1970s, union avoidance firms have continued to grow and expand to where it now is an estimated $4 billion year industry.[135]

Many unions and academic scholars point to the length of time between the petition being filed with the NLRB and the actual election date, as a primary cause of the high success rate of union avoidance campaigns. Currently, the NLRB target is to hold elections within 42 days from the date the petition was filed, down from around sixty days in the 1970s and 1980s but still, arguably giving employers enough time to run an effective anti-union campaign.[136]

There have been various studies conducted that attempt to prove the impact employer union avoidance tactics have on the success of a campaign. One study, using published data from the NLRB, suggests that beginning in the 1970s, employers began the "systematic and widespread use of illegal firings as a strategy to undermine the success of campaigns for union representation."[137] Nancy Shiffer, an AFL-CIO lawyer, during her testimony in front of the Congressional Subcommittee on Health, Employment, Labor, and Pensions, emphasized the impact illegal firings have on an election. She stated,

> In one fourth of [elections] campaigns, a worker is fired…[w]hen a worker who has supported the union is fired, fear is instantly and inevitably injected into the workplace. Workers are afraid that the same thing will happen to them if they support the union. This fear devastates the organizing campaign. This adds up to an inherently and intensely coercive environment. Before the NLRB agent ever arrives at the workplace with the voting booth and cardboard ballot box, workers have been harassed, intimidated, spied on, threatened and fired.[138]

Firing union supporters in order to induce fear is one of management's oldest tricks. In *Law and Reality*, research indicated that the discharges of union supporters during a campaign did not coerce any union supporter into voting against the union.[139] However, economic conditions in America have greatly changed since 1976. "Up [to] the mid-1970s, the single most defining feature of labor markets was the importance of long-term stable employment relationships in vertically integrated large firms operating in mass production industries."[140] Considering the increased unemployment rate, the changes in employment conditions, and the increases in illegal discharges, the

study in *Law and Reality* may have turned out very differently today.

Over the past four decades, employers' increasing dependence on union-avoidance firms has enabled such firms to develop a "standardized" approach to organizing campaigns.[141] Today most union avoidance campaigns have a similar framework. These campaigns typically begin with training supervisors on the "do's" and "don'ts." This entails informing supervisors what types of communications and other activities are illegal and what types are both lawful and necessary during a campaign.[142] These training sessions usually serve a dual purpose, to give the hired firm insight into what is going on with the workers, and also to train supervisors to avoid committing ULPs.[143] Front line managers and supervisors are usually extensively involved in the process, and are usually used to "spearhead" anti-union campaigns.[144] Both union avoidance firms and consultants emphasize the importance of daily communications with employees and suggest holding constant meetings with employees for the weeks leading up to the election.[145]

During these meetings supervisors and management are free to inform employees of their strong opposition towards unionization and frequently do so.[146] This practice is protected by Section 8(c) of the Act, which states:

> The expressing of any view, argument or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act if such expression contains no threat of reprisal or force or promise of benefit.[147]

Managers may only "legally" tell employees facts, opinions, and their experiences regarding unions.[148] Frequently supervisors are trained on how to capitalize on this right, and employees are lawfully informed about unflattering facts about union corruption and union dues.[149] Though it is illegal for management to create or be involved in "vote no committees," as a result of management's communication with employees; employees often create these committees.[150] Some common communication strategies include informing employees of the benefits they currently receive without union dues, as well as "the union cannot guarantee anything," and that a "union is a third party that interferes in the employment relationship."[151]

Frequently these campaigns attempt to control employees through fear.[152] The central theme revolving around most avoidance campaigns tends to focus on the negative implications of union strikes.[153] Typically employees are required to watch videos that depict extremely violent strikes.[154] For example the anti-union video, "And Women Must Weep," presents the story of an extremely violent strike that took place in Princeton Indiana.[155] In the video, the strike was initiated to serve the "wrongful ends" of one union officer, and members who opposed the strike were deprived of their rights by the union.[156] The movie ends with strikers opening fire on the home of a dissenting union member with a bullet striking his baby in the head.[157] The closing narrative asks, "all you have to do is ask yourself, could my town be next?…"[158]

Commonly employers lawfully attach propaganda to paychecks, post flyers, send letters, and hold meetings, which inform employees that unions are "free to go on strike at any time," and also inform employees of its current policy on replacement workers.[159] Some employers hire former union organizers, who have become "hostile" towards unions to sit at a workplace, answer employee questions, and "expose the [union's] half-truths and distortions."[160]

In recent years, law firms that specialize in labor relations have become a major part in the union avoidance industry.[161] According to some, this has proved to be advantageous to employers because such firms know "how not to violate the law while achieving maximum impact."[162] Due to the decline of unionization, many of these firms now also offer preventative strategies to aid employers in avoiding union organizing and elections altogether.[163] These preventative strategies include "employee attitude surveys" that help the firm to "identify unionization vulnerabilities."[164] Clients are urged to "minimize sources of complaints union organizers could exploit."[165] As a result, many businesses have voluntarily implemented grievance procedures for non-unionized employees.[166] In 1995, the United States General Accounting Office reported, "almost all employers with 100 or more employees use one or more alternative dispute resolution approaches."[167] Typically "organizing drives begin in response to employee discontent." Therefore, by voluntarily implementing such programs, employers are taking away a primary organizing technique of most unions.[168]

Labor Reform: Employee Free Choice Act

The continuous decline in unionization has led political and labor advocates to spend millions of dollars promoting the Employee Free Choice Act (EFCA).[169] Since its initial proposal, in February 2007, EFCA has been the center of debate and controversy.[170] Through a three-part initiative, according to organized labor, the proposed act seeks to establish a more efficient system for employees to form, join, or assist labor organizations.[171] The main feature of the bill would do away with secret-ballot NLRB elections, and require employers to recognize unions on the basis of a card check.[172] Second, EFCA would put pressure on employers to reach a collective bargaining agreement within 90 days after the union is recognized.[173] Lastly, the proposed act would increase penalties on employers for unfair labor practices committed during an organizing campaign.[174]

Supporters of EFCA believe that unionization is crucial into getting the American economy "back on track."[175] Supporters and many academic commentators claim that the declining union membership rates have severely impacted the middle class by "exacerbating income inequality."[176] Statistics compiled by the Department of Labor estimate that unionized workers earn, on average, 30 percent higher wages and are 59 percent more likely to have employer-provided health insurance than non-union employees in the private sector.[177] Currently, unionization in the private sector is barely 8 percent. Therefore, according to EFCA proponents, a majority of Americans are left with lower paychecks, resulting in fewer purchases, and less jobs.[178]

Historically, unions have played a vital role in attaining rights and benefits for workers and have also maintained an important role in shaping public policy.[179] Many fear if unionization continues to decline, corporations, given their "enormous power," will influence policy against public programs that benefit the middle class.[180] Yet, one of the major contentions often raised by opponents of EFCA is its failure to preserve the employee's "free choice." In the eyes of the unions, EFCA would "give an employer less of an opportunity to organize an anti-union campaign."[181] But employers argue that EFCA would prevent an employer from being able to "present its own case of the tradeoffs, costs and disadvantages of representation" as permitted by Section § 8(c) of the Act and the First Amendment.[182] Republican U.S. Congressman Kenny Marchant has stated that EFCA would authorize disclosure of a worker's anonymous vote to employers, union organizers, and coworkers and would "take away a clear right to free and confidential voting that is held so dear in this country and is as American as Apple Pie."[183] Also, EFCA would overrule the Board's decision in *Dana*, and mandate employer recognition of a union with a card check showing of majority support.[184]

After a long tough fight by both labor and business, it now appears that EFCA, unless radical reforms are made to the bill, will not have the 60 votes required to get past a Republican filibuster in the Senate.[185] However, recent efforts by the NLRB show an intention to adopt parts of EFCA through permissible Board decisions and rule making.[186] The NLRB is now considering several major changes to its regulations and reversing past decisions that would materially alter the current process. For one, the NLRB is considering allowing employees to vote electronically by using a phone or the Internet.[187] Secondly, the NLRB is also contemplating "expedited elections," some suggesting as short as 14 days, to decrease the perceived employer advantage during union campaigns.[188] Employers point out that these changes would give unions a "significant advantage" because employers would have very little time to lawfully respond to union organizing tactics.[189] These departures from the standard processes have raised questions. Many fear these processes decrease voter participation significantly, and also increase the possibility of union coercion and intimidation in the voting process.[190]

New appointees to the five-member NLRB may also seek to overturn *Dana*, and require an employer that has a neutrality and card check agreement in place with a union to voluntarily recognize a union that demonstrates a card check showing of majority support. On June 17, 2010, the Supreme Court ruled 5-4 that the two-member NLRB, which had been deciding cases for nearly two years, did not represent a "sufficient quorum" of the five-member board to decide disputed cases before them.[191] The NLRB normally comprises five members.[192] However, at the end of 2007 the Board was left with only four members with two additional members' terms expiring shortly.[193] The Supreme Court's decision "threw into doubt" approximately 600 cases decided by the two-member Board.[194] In March of 2010, President Obama appointed to the Board two Democrats, Craig Becker and Mark Pearce.[195]

The newly constituted Democratic-controlled NLRB, has indicated a "willingness" to revisit important cases previously decided by the earlier Republican-controlled Board as well as by the two-member Board, including the decision in *Dana* which substantially altered the "voluntary bar recognition" doctrine.[196] The NLRB has agreed to reexamine the *Dana* decision in the *Lamons Gasket Company* case.[197] In *Lamons Gasket Company*, employees filed a decertification petition with the NLRB after the company voluntarily recognized the United Steelworkers (USW) as its exclusive bargaining representative for its employees.[198] The USW petitioned the NLRB to reexamine the *Dana* decision, the NLRB agreed and prevented employees from holding a decertification election.[199] Some suspect the NLRB will rule to overturn *Dana*, leaving employees susceptible to union coercion and taking away employee opportunity to participate in secret-ballot elections.[200] Since the *Dana* decision, the NLRB has received 111 requests for voluntary recognition notices, 85 election petitions have been filed by employees, 54 elections were conducted as a result of employee petitions, and in 15 of those elections employees voted against the voluntarily recognized union, including 2 elections in which a petitioning union was selected over the recognized union.[201] The Board, however, has indicated that *Dana* was "unnecessary, burdensome, and contrary to NLRB precedent."[202]

The NLRB has also recently moved to implement part three of EFCA by increasing penalties on employers for unfair labor practices during organizing campaigns. On September 30, 2010, Acting General Counsel of the NLRB, Lafe E. Solomon, announced an initiative to strengthen the Agency's response to "nip in the bud" violations of the Act during organizing campaigns through the use of section 10(j) injunctions.[203] Solomon described these violations as cases where a pro-union employee was discharged during the course of a union organizing

drive. Such violations, he said, could "quickly destroy a campaign by creating fear in the workplace."[204] The new procedure would give unlawful discharges "priority action and speedy remedy" and would enable the NLRB to file in the federal courts applications for a 10(j) injunction, seeking a court order forcing employers to reinstate discharged employees promptly.[205]

Conclusion

It is yet to be determined to what extent the NLRB, through its decisional and regulatory powers, will be able to affect union organizing processes. Unions and employers have polarized to such an extreme that employees are left in the middle like a child in midst of a parental divorce. The Act was intended to protect an employee's free choice, to be represented by a union or not; however, current tactics utilized by both unions and employers are taking away this choice. Employees are receiving misinformation from both sides. With the current economic conditions employees have too much at stake to allow these conditions to continue. Unfortunately, neither the Board nor the courts have to date shown an inclination to shelter employees from excessive and improper tactics by both employers and unions. Employees should be better informed about the processes so that they will be better equipped to make a decision when it comes to signing a union card or voting at an election. With modern day technology, information is easily sent to large groups of employees inexpensively and efficiently. One possible suggestion is for the NLRB to set up a website or send out emails after an election petition is filed with the NLRB. This website could give employees completely neutral information regarding employer and union tactics, information pertaining to employee rights, and also provide a website where employees could anonymously post experiences, or ask questions. This could provide employees with a neutral third party prospective to turn to with questions regarding a union campaign, without fear of being retaliated against. I believe the number one biggest problem with organizing campaigns is that employees are heavily relying on one-sided information from either the employer or the union, and they are intimidated by both.

I also believe Lafe Solomon's initiative to use 10(j) injunctions to seek court-ordered early reinstatement of an employee who has been illegally discharged is a great step in the right direction in restricting an employer's control over an employee's choice. With that being said, however, I also believe the NLRB must remain cognizant that unions are not innocent in this war. Overturning the *Dana* decision would leave too much power in the hands of the union. At the end of the day, an organizing campaign is going to continue to be a dirty fight. However, an employee's free choice must remain the top priority.

Endnotes

1. National Labor Relations Act [hereinafter NLRA], 29 U.S.C. §§151-169 (2001).
2. *See* NLRA Section § 8.
3. Julius G. Getman, Stephen B. Goldberg, & Jeanne B. Herman, Union Representation Election: Law and Reality 2 (2010) [hereinafter Law and Reality] (study included interviewing and observing 31 different representation elections all over the country; in 22 of the elections employers engaged in unlawful campaigning).
4. *See* id. at 32, 72, 109, 129.
5. *See* Jarol B. Manheim, U.S. Chamber of Commerce, Trends in Union Corporate Campaigns: A Briefing Book 23-25 (2005), http://www.uschamber.com/sites/default/files/reports/union_booklet_final_small.pdf.
6. *See* SESCO Mgmt. Consultants, How to Prevent and Combat Unionization Successfully: A Guidebook 3 (2008) [hereinafter SESCO].
7. *See* id.
8. *See* Anita U. Hattiangadi, *Fact & Fallacy: Updating the Reasons for Union Decline* 1 (1998), Emp. Pol'y Found., http://www.ncpa.org (from 1960 to 1998, employment in the service sector grew by 182%, while employment in the goods sector grew only 19%).
9. *See* id.
10. *See* id. ("Women's labor force participation [in the workforce] has risen by 22.1 percentage points, and the proportion of married women with children who work soared from 28 percent in 1960 to 70 percent in 1996.").
11. Id. (citation omitted).
12. See Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 Chi.-Kent L. Rev. 3, 4 (1993).
13. *See* Tula Connell, *The Ugly Face of Union-Busting American Federation of Labor*, AFL-CIO, Apr. 23, 2007, http://blog.aflcio.org/2007/04/23/the-ugly-face-of-union-busting.
14. *See* Robert Michael Smith, From Blackjacks to Briefcases: A History of Commercialized Strikebreaking and Unionbusting in the United States 104 (2003).
15. *See*, *e.g.*, Chirag Mehta, & Nik Theodore, *Undermining the Right To Organize: Employer Behavior During Union Representation Campaigns*, Am. Rts. at Work, 5 (2005), *available*: http://www.americanrightsatwork.org, (for an extensive study on the affects of management tactics on the success of organizing campaigns) [hereinafter Undermine the Right].
16. *See* H.R. Rep. No. 110-023, pt. 4 at n.14 (2007-2008).
17. *See* Smith, *supra* note 14, at 104.
18. *See* Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, Am. Rts. at Work and Econ. Pol'y Inst., 9 (2009) (figure derived from the 1993-2003 NLRB Annual Reports, which indicate an average of 22,633 workers per year were ordered to receive backpay from their employers).
19. *See* id. at 14.
20. *See Strengthening America's Middle Class Through the Employee Free Choice Act: Hearing Before the Subcomm. on Health Emp. Lab. and Pensions on Educ. and Lab.*, 110th Cong. (2007) [hereinafter Hearing].
21. *See* Jackson Lewis LLP, *"EFCA": the Time for Awareness and Prevention is Now*, 31 Preventative Strategies No. 3 1, 3 (2008).
22. *See* Lab. Rel. Inst., EFCA is Dead…Long Live EFCA?, (January 19, 2010), http://lrionline.com/efca-dead-long-live-efca-2.
23. *See* id.

24. Elizabeth A. Roma, *Mandatory Arbitration Clauses in Employment Contracts and the Need for Meaningful Judicial Review*, 12 Am. U.J. Gender Soc. Pol'y & L. 519, 520 (2004).
25. *See* Robert J. *Nobile, Advantages of ADR Mechanisms*, HRGD § 5:124 (2010) [hereinafter Advantages of ADR].
26. *See* Manheim, *supra* note 5, at 23-25.
27. *See* Dana Corp., 341 N.L.R.B 1283, 1283 (2004).
28. *See* N.L.R.B., Basic Guide to the National Labor Relations Act: General Principles of Law Under the Statute and Procedures of the National Labor Relations Board 1 (1997) [hereinafter Basic Guide to NLRA].
29. *See* 74 NLRB Ann. Rep. 1 (2009).
30. *See* Law and Reality, *supra* note 3, at 1.
31. Julius G. Getman, Restoring the Power of Unions: It Takes a Movement 23 (2010).
32. See Joel Dillard, and Jennifer Dillard, *Fetishizing the Electoral Process: The National Labor Relations Board's Problematic Embrace of Electoral Formalism*, 6 Seattle J. for Soc. Just. 819, 819 (2008) [hereinafter Dillard].
33. *See* Law and Reality, *supra* note 3, at 1-2.
34. *See* NLRB Regional Office Casehandling Efficiency Rep. No. OIG-AMR-50-06-01 6 (2006) (NLRB had a 95% success rate in holding an election within 42 days in 2005).
35. See Matthew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1, 7 (2008).
36. *See* Peter Panken, *Union Organizing and NLRB Representation Cases: A Management's Perspective*, SR037 ALI-ABA 45, 49 (2010).
37. *See* id.
38. *See* Seth Michaels, *On Fox News Acuff Cuts Through the Spin About Employee Free Choice Act, AFL-CIO Now*, AFL-CIO, Jan. 13, 2009, http://blog.aflcio.org/2009/01/13/on-fox-news-acuff-cuts-through-the-spin-about-employee-free-choice, ("In 2004, about 375,000 workers joined AFL-CIO unions through a voluntary card check process while only 73,000 workers joined through the NLRB election process.").
39. *See* Dillard, *supra* note 32, at 819.
40. See NLRB v. Gissel Packing Co., 395 U.S. 575, 579 (1969) (decision granting the NLRB the power to order an employer to bargain).
41. NLRA Section § 7.
42. *See* NLRA Section § 8.
43. *See* Panken, *supra* note 36, at 51.
44. *See* NLRA Section § 8.
45. *See* Law and Reality, *supra* note 3, at 3.
46. *See* NLRA Section § 8.
47. *See* id.
48. *See* Panken, *supra* note 36, at 51.
49. *See* id. at 51-2.
50. Small Business Encyclopedia (3d ed. 2006).
51. *See* id.
52. *See* id.
53. *See* Robert J. Nobile, *Why Workers Organize*, EFE § 9:3,1 (2010) [hereinafter Why Workers Organize].
54. *See* Ann C. Foster, *Differences in Union and Nonunion Earnings in Blue-collar and Service Occupations*, BLS (June 25, 2003), http://www.bls.gov/opub/cwc/cm20030623ar01p1.htm (unionized workers on average make about 20 percent more an hour than their nonunion counterpart); *see also* Why Workers Organize, *supra* note 53, at 1.
55. James Leaman, *Wal-Mart Interferes in Presidential Campaign*, Chi. Trib., August 17, 2008, at A9, *available at:* http://www.ourfuture.org/makingsense/factsheet/employee-free-choice-act.
56. Gordon E. Jackson, When Labor Trouble Strikes: An Action Handbook (Prentice-Hall Inc. 1981).
57. *See* Why Workers Organize, *supra* note 53, at 1.
58. *See* Getman, *supra* note 31, at 24.
59. *See* SESCO, *supra* note 6, at 24.
60. *See* id. at 10.
61. *See* Robert D. Meyers, *Union Avoidance and Current Union Organizing*, DRI-ELEDR CH 23, 1 (2004).
62. *See* id. ("The AFL-CIO has committed vast resources, including $30 million in matching funds, toward organizing new members.").
63. *See* James J. Brudney, *Collateral Conflict: Employer Claims of Rico Extortion Against Union Comprehensive Campaigns*, 83 S. Cal. L. Rev. 731, 742 (2010) ("The proportion of private sector workers who belong to a union rose from 7.4 percent to 7.5 percent in 2007, and to 7.6 percent in 2008.").
64. *See* Manheim, *supra* note 5, at 13 (quoting William Serrin, *Organized Labor is Increasingly Less So*, N.Y.Times, November 18, 1984, at p. 4:3).
65. *See* id. at 16.
66. See Note, *Organizing Worth its Salt: The Protected Status of Paid Organizers*, 108 Harv. L. Rev. 1341, 1341 (1995).
67. *See* Kenneth N. Dickens, *Town & Country Inc. v. National Labor Relations Board: Salts: We're Employees—What Happens Now*?, 99 W. Va. L. Rev. 561, 564 (1997).
68. *See* N.L.R.B. v. Town & Country Elec., 516 U.S. 85, 87 (1995) (agency hired a union applicant who was dismissed after only a few days on the job).
69. *See* id. at 87.
70. *See* id. at 88.
71. *See* id. at 89.
72. Pamela A. Howlett, *"Salt" in the Wound? Making a Case and Formulating a Remedy when an Employer Refuses to Hire Union Organizers*, 81 Wash. U. L.Q. 201, 203 n.8 (2003) (noting this strategy is being utilized in the construction sector).
73. *See* id.
74. *See* id.
75. Michael J. Hilkin, *The NLRB's Oil Capitol and Toering Decisions and Their Effects on Unionization and American Labor Law*, 94 Iowa L. Rev. 1051, 1054 (2009).
76. *See* NLRA, Section § 8(a)(3).
77. *See* Basic Guide to NLRA, *supra* note 28, at 14 –22.
78. *See* id.
79. *See* Hilkin, *supra* note 75, at 1066.
80. *See* id.
81. *See* Toering Elec. Co., 351 N.L.R.B. 225, 225 (2007) (referring to the COMET program), *reconsideration denied*, 352 NLRB No. 102 (2008).
82. *See* id.
83. *See* id. at 226.
84. *See* id. at 226, 231, 241 ("such conduct has included…putting an arm around a hiring official's shoulder and threateningly stating that "you're messing with the union now").
85. M.J. Mechanical Services, Inc., 324 N.L.R.B. 812, 816 (1997) (quoting Godsell Contracting, Inc., 320 N.L.R.B. 871, 874 (1996)).
86. *See* Toering Elec. Co., 351 N.L.R.B. at 225.
87. *See* id.
88. *See* id. at 228.
89. Manheim, *supra* note 5, at 7.
90. *See* Brudney, *supra* note 63, at 733.
91. *See* Manheim, *supra* note 5, at 7.

92. *See* MANHEIM, *supra* note 5, at 23.

93. Id.

94. Brudney, *supra* note 63, at 744.

95. *See* id.

96. *See* Steve Greenhouse, *Employers Sharply Criticize Shift in Unionizing Method to Cards from Elections*, N.Y. TIMES, March 11, 2006, at A9, *available at:* http://www.nytimes.com/2006/03/11/national/11labor.html.

97. *See* Dillard, *supra* note 32, at 819.

98. Id.

99. *See* Adrienne E. Eaton, & Jill Kriesky, *Union Organizing under Neutrality and Card Check Agreements*, 55 IND. & LAB. REL. REV. 42, 52 (2001).

100. *See* MANHEIM, *supra* note 5, at 24.

101. *See* id. at 22. *See also* N.L.R.B. ANN. REP. NO. 74, at 13 (2009) (showing the decline in representation elections from 2000-2009).

102. *See* Dillard, *supra* note 32, at 821.

103. *See* SESCO *supra* note 6, at 7

104. *See* id.

105. *See* Carl Horowitz, *Board Allows Dissenting Employees to Void Union Card Check*, NAT'L LEGAL POL'Y CENTER (Dec. 3, 2007), http://www.nlpc.org/stories/2007/12/03/board-allows-dissenting-employees-void-union-card-check (quoting Keller Plastics Eastern Inc., 157 NLRB No. 583 (1966)) (the Board routinely dismissed decertification petitions for a year after voluntary recognition).

106. *See* id. at 41.

107. *See* Michael R. Lied, *NLRB Modifies Recognition Bar Rule*, 43 ILL. B.J. 3, 3 (2007).

108. *See* Amy Gaylord, & Alexia M. Kulwiec, "*On the Road Again" (To Organizing) Dana Corp., 341 NLRB No. 150*, 21 LAB. LAW. NO. 1 37, 39 (2005), http://www.bna.com/bnabooks/ababna/nlra/2005/gaylord.pdf.

109. *See* id.

110. *See* id.

111. *See* Lied, *supra* note 107, at 3.

112. *See* Dana Corp., 351 N.L.R.B at 438.

113. *See* Sutter Health v. Unite Here, 113 Cal.Rptr.3d 132 (Cal.App. 3 Dist., 2010).

114. *See* Geri L. Dreiling, *Fighting Fire with Fire,* 92-DEC A.B.A. J. 18, 18 (2006).

115. Sutter Health, 113 Cal.Rptr.3d at 135.

116. *See* Dreiling, *supra* note 114, at 18.

117. *See* Brudney, *supra* note 63, at 733.

118. Stephen J. Deery, & Roderick D. Iverson, *Labor-Management Cooperation: Antecedents and Impact on Organizational Performance,* 58 INDUS. & LAB. REL. REV. 588, 589 (2005).

119. *See* Meyers, *supra* note 61, at 1 (noting reasons why employers want to avoid unionization).

120. Hristos Doucouliagos & Patrice Laroche, *The Impact of U.S. Unions on Productivity: A Bootstrap Meta-Analysis* 7 (Deakin Univ. Sch. of Econ., Working Paper No. SWP 2004/12, 2004) (study concluded that unionization increased productivity by seven to ten percent in the manufacturing and education industry).

121. *See* id. at 95 (concluding that the "nature and quality of the labor-management relations at plant level" impacts productivity).

122. Steve Greenhouse, *How do you Drive out a Union? South Carolina Factory Provides a Textbook Case*, N.Y. TIMES, December 14, 2004, section A, *also available:* http://www.americanrightsatwork.org ("75 percent of employers use union-busting consultants to fight unionization drive"). It should be noted, however, that both unions and employers frequently retain outside law firms to assist and adhere in union organizing campaigns.

123. *See* id. at 655-56.

124. Kris Maher, *Unions' New Foe: Consultants*, WALL ST. J., Aug 15. 2005, *available*: http://online.wsj.com.

125. John Logan, *Consultants, Lawyers, and the 'Union Free' movement in the USA Since the 1970s,* 33 BRIT. J. OF IND. REL 197, 200 (2002) [hereinafter Union Free].

126. *See* Meyers, *supra* note 61, at 1.

127. John Logan, *The Union Avoidance Industry in the United States*, 44 BRIT. J. OF IND. REL. 651, 675 (2006) [hereinafter Union Avoidance Industry].

128. *See* id. at 652, 653 ("Until the 1970s, however, union avoidance consultants were relatively small in number—there were only about 100 firms in the 1960s, compared with over 10 times that number in the mid-1980s—and consultant activity was not yet part of mainstream industrial relations."); see *also* SMITH, *supra* note 14, at 103-04 (In 1959, the Landrum- Griffin Act was passed into law requiring businesses to report any agreements with labor relations consultants; five years later the law was amended only requiring consultants to report activity *after* speaking with clients. Under this new reading, Dep. of Lab. took action against three consultant firms from 1968-1974; by 1970s consultants stopped reporting activity because agents did not "speak directly to clients.")

129. *See* SMITH, *supra* note 14, at 105.

130. Id. at 108.

131. *See* id. at 104; *see also* Union Avoidance Industry *supra* note 127, at 654 ("One prominent consultant estimated that the size of the union avoidance industry increased tenfold in the 1970s.").

132. *See* SMITH, *supra* note 14, at 104.

133. *See* id.

134. *See* id. at 105 ("52% of their nine-hundred-plus election confrontations did not even go to election because the union withdrew.").

135. *See* Connell, *supra* note 13, at 1.

136. *See* Undermine the Right, *supra* note 15, at 5.

137. *See* John Schmitt, & Ben Zipperer, *Dropping the Ax: Illegal Firings During Union Election Campaigns*, CTR. FOR ECON. AND POL'Y RES., 17 (2007) (suggesting a dramatic increase in illegal firings beginning in 1970, a pro-union worker had 1-100 chance of being fired illegally—2000 chance increased to 1-53).

138. Hearing, *supra* note 20, at 65 (statement of Nancy Shiffer, Lawyer, AFL-CIO); *contra* RICHARD A. EPSTEIN, THE CASE AGAINST THE FREE CHOICE ACT 33-34 (2009) (arguing that this calculation is wrong, noting that the likelihood of an improper firing during a union campaign is only 2.7%).

139. *See* LAW AND REALITY, *supra* note 3, at 128.

140. Chris Benner, *Regional Equity, Worker Voice, and Growth in 21st Century Regional Economies*, *in* ACADEMICS ON EMPLOYEE FREE CHOCE: MULTIDISCIPLINATY APPROACHES TO LABOR LAW REFORM ECONOMIC 31, 34 (ed., John Logan, 2009) [hereinafter ACADEMICS ON EMPLOYEE FREE CHOICE].

141. *See* id. at 14.

142. *See* SESCO, *supra* note 6, at 16.

143. Id. at 16-17.

144. *See* Union Free, *supra* note 125, at 201.

145. *See* SESCO *supra* note 6, at 15; *see also* Undermine the Right *supra* note 15, at 15 ("Employers held an average (median) of six mandatory meetings during the election period, roughly one every week during the election process.").

146. *See* LAW AND REALITY, *supra* note 3, at 9.

147. NLRA Section § 8(c) (this section of the Act was added by the Taft Harley amendments in 1959).

148. *See* SESCO, *supra* note 6, at 12.

149. *See*, e.g., Kim Phillips-Fein, *The More Perfect Union Buster*, MOTHER JONES, Sept., 2009, *also available*: http://motherjones.com/politics/1998/09/more-perfect-union-buster (noting managers were instructed "to terrify the supervisors with visions of greedy, fat-cat, strike-happy, mob-infested unions.").

150. *See* Union Free, *supra* note 125, at 202 (suggesting consultants train supervisors on how to start such committees).

151. *See* Undermine the Right, *supra* note 15, at 14-15.

152. *See* Phillips-Fein, *supra* note 149 at 1.

153. *See* SESCO, *supra* note 6, at 19.

154. *See* Nelson Lichtenstein, *Why Wal-Mart Workers Need an Employee Free Choice Act*, *in* ACADEMICS ON EMPLOYEE FREE CHOICE, *supra* note 140, at 58; *see also* Union Free *supra* note 125, at 205.

155. Luxuray of N.Y., Div. of Beaunit Corp. v. N. L. R. B., 447 F.2d 112, 116-17 (1971) (overturning the ruling of the NLRB, holding it is the "responsibility of employees, and not of the Board, to evaluate the merit of competing propaganda.").

156. *See* id. at 115.

157. *See* id.

158. Id.

159. *See* id.

160. LAB. REL. INST., *Interviews with Union Organizers*, http://lrionline.com/union-avoidance/videos/interview-with-union-organizer (last visited Nov. 27, 2010); *see also* Union Free *supra* note 125, at 203.

161. *See* Union Avoidance Industry, *supra* note 127, at 658.

162. *See* Undermine the Right, *supra* note 15, at 13.

163. *See* Union Avoidance Industry, *supra* note 127, at 659.

164. *See* id. at 664.

165. *See* SMITH, *supra* note 14, at 104.

166. *See* D. M. McCabe and D. Lavin, *Employee Voice: A Human Resource Management Perspective*, 26 CAL. MGMT. REV. 112-23 (1992).

167. *See* Mary Rowe, *Dispute Resolution in the Nonunion Environment: An Evolution Toward Integrated Systems for Conflict Management*? *in* FRONTIERS IN DISPUTE RESOLUTION IN LABOR RELATIONS AND HUMAN RESOURCES 80 (Sandra Gleason ed., 1997).

168. *See* GETMAN *supra* note 31, at 24.

169. *See* Robert Bonsall, Sofia Chesnokova Beeson, Tayer & Bodine, *The Prospects of Labor Law Reform in the Obama Administration: The EFCA and the Respect Act*, 802 PLI/LIT 297, 297 (2009) [hereinafter Prospects of Labor].

170. *See* Hearing, *supra* note 20.

171. *See* Jackson Lewis LLP, *"EFCA": the Time for Awareness and Prevention is Now*, 31 PREVENTATIVE STRATEGIES NO. 3 1, 3 (2008).

172. SESCO, *supra* note 6.

173. *See* David Fairris, Ellen Reese, & Todd Sorensen, *The Employee Free Choice Act and Its Impact on Workers and the Economy, in* ACADEMICS ON EMPLOYEE FREE CHOICE, *supra* note 140, at 8.

174. *See* EPSTEIN, *supra* note 138, at 9.

175. *See* Robert B. Reich, *Why We Need the Employee Free Choice Act*, *in* ACADEMICS ON EMPLOYEE FREE CHOICE, *supra* note 140, at 8.

176. *See* Hearing, *supra* note 19 at 72 (statement of Harley Shaiken, Professor, University of California, Berkeley).

177. *See* Reich, *supra* note 175, at 5-6.

178. *See* id.

179. *See* GETMAN, *supra* note 31, at 10.

180. *See* id. (asserting that the current tax policy for big business is a direct result of the decline in unionization).

181. *See* Reich, *supra* note 175, at 8.

182. *See* EPSTEIN, *supra* note 138, at 9.

183. *See* Hearing, *supra* note 20, at 3 (testimony of Hon. Kenny Marchant, a Representative in Congress).

184. *See* Dillard, *supra* note 32, at 819.

185. *See* Thomas Frank, *Card Check Is Dead*, WALL ST. J., Apr. 22, 2009, at A13.

186. News release.

187. *See* Prospects of Labor, *supra* note 169, at 305.

188. *See* Jay Sumner, *Obama Deems Chance of EFCA Passage Dim*, LAB. REL. COUNSEL, September 15, 2010, http://www.laborrelationscounsel.com/labor-management-relations/obama-deems-chance-of-efca-passage-dim.

189. Ivan Osorio & F. Vincent Vernucci, *Big Labor May Still Reap Benefits Despite Election Losses* (Nov. 5, 2010), FORBES, *available*: http://www.forbes.com/2010/11/05/labor-elections-unions-opinions-contributors-ivan-osotio-f-vincent-vernuccio.html.

190. *See* Sumner, *supra* note 188.

191. *See* New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010).

192. *See* N.L.R.B. FACT SHEET, http://www.nlrb.gov/About_Us/overview/fact_sheet.aspx. (lasted visited on Nov.27, 2010).

193. *See* Peter Whoriskey, & Sonja Ryst, *NLRB decisions were illegal, Supreme Court rules*, WASH. POST, June 13, 2010, at business.

194. *See* id.

195. *See* Michael Whitney, *Obama Appoints Two Democratic Nominees to NLRB, Leaves GOP Nominee Behind*, F.D.L., Mar. 27, 2010 at 1.

196. N.L.R.B., *Between the Regions*, Nov. 2010, No. 1, 2.

197. *See Lamons Gasket Company*, NLRB Case 16-RD-1597, http://1.usa.gov/fcTGGQ.

198. *See* id.

199. *See* id.

200. *See* Richard D. Alaniz, *New Route to Allowing Unions Through Card Checks*?, ACCT. & AUDITING HUM. RESOURCES, Nov. 9, 2010, http://www.accountingweb.com/topic/accounting-auditing/new-route-allowing-unions-through-card-checks.

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The Labor and Employment Law Implications of the American Recovery and Reinvestment Act

By Adam Sasiadek

Abstract

The American Recovery and Reinvestment Act (ARRA) was enacted in February 2009, during America's worst economic and financial downturn since the Great Depression. The main purpose of this legislation is to provide fiscal stimulation to the ailing American economy through tax credits, aid to state governments, and most importantly, public works projects. The ARRA is one of the most significant initiatives of the Obama Administration, by which historians will assess President Obama's domestic program. Although the Act lacks explicit treatment of labor and employment issues, there are provisions on trade, immigration, and job creation that, taken together with President Obama's other actions, and viewed in light of American economic and political history, represent a fundamental shift in the Federal government's policy orientation on labor and employment law. The ARRA therefore provides a template for understanding the impact of the Obama Administration on labor and employment law and the other socio-economic policies that affect and influence the American worker and workplace.

Introduction

The American economy is recovering from the worst economic downturn in at least a generation. The "Great Recession" officially began in December 2007, and ended in June 2009, making it the longest American recession since the end of World War II.[1] Precipitated by a severe credit shortage, the recession became a crisis in the fall of 2008, and several major financial institutions filed for bankruptcy or were bailed out by the Federal government.[2] These failures had ripple effects throughout the economy, worsening the economic downturn. The economy contracted at an annual rate of 4.0 percent in the third quarter and 6.8 percent in the fourth quarter of 2008, followed by a 4.9 percent contraction in the first quarter of 2009 and a 0.7 percent contraction in the second quarter of 2009.[3] Unemployment climbed from 4.9 percent in December 2007 to a peak of 10.1 percent in October 2009, (the highest level since 1983),[4] and it stands at approximately 9.0 percent today.[5] This recession marked the first time that unemployment reached double-digits in over a quarter century.[6] And at least $13 trillion of housing and stock market wealth has been lost since 2007.[7]

To counteract these deleterious effects of the economic slump, the American Recovery and Reinvestment Act (which in this article will be referred to as the "ARRA," or the "Act," or the "Stimulus") was enacted on February 17, 2009.[8] Out of its total of $789 billion, $507 billion is allocated for various spending programs covering education, health care, energy, infrastructure, and other areas,[9] and $282 billion is devoted to tax relief.[10]

The Stimulus is one part of an unprecedented and gargantuan effort by the Federal government to minimize and reverse the economic downturn. $12.8 trillion—equal to America's entire gross domestic product—has been spent, lent, or committed by the Federal government to banks, insurance companies, automobile manufacturers, and other enterprises over the last 2 years.[11] It is enough money to provide every man, woman, and child in America with $42,105.[12] In this time of global economic collapse, other nations are using fiscal stimulus plans as well, such as Japan,[13] India,[14] China,[15] Germany,[16] and France.[17]

The text of the ARRA identifies its five main goals:

> (1) To preserve and create jobs and promote economic recovery.
>
> (2) To assist those most impacted by the recession.
>
> (3) To provide investments needed to increase economic efficiency by spurring technological advances in science and health.
>
> (4) To invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits.
>
> (5) To stabilize State and local government budgets, in order to minimize and avoid reductions in essential services and counterproductive state and local tax increases.[18]

The first purpose is probably the most important politically and economically. Indeed, the hope of Federal policymakers was that the ARRA would save or generate up to 3.5 million jobs by 2011,[19] and this expectation has been fulfilled to some extent.[20] Although the Act's tax cuts will address reasons (1) and (2), and indirectly promote reasons (3), (4), and (5), all five goals will be directly promoted by the extensive spending provisions of the Act. Over $150 billion will be spent on helping states with Medicaid costs, extending the length of unemployment insurance benefits, providing cash payments to the elderly and disabled, and other related social services,[21] but

of greater relevance to this article is what the proponents of the ARRA refer to as "targeted priority investments," which total approximately $300 billion. These investments will preserve or create jobs; assist in job location and training for the unemployed; repair, expand, and modernize the nation's transportation and energy infrastructure; provide more resources for scientific research; improve the productivity of the nation's health-care and public education systems; and provide state governments with the necessary resources to prevent layoffs of their employees.[22] Of that $300 billion, $150 billion will be spent on public works projects for transportation, energy, and technology, which will serve as a form of direct job creation or preservation.[23] So far, the ARRA has "funded more than 100,000 projects to upgrade roads, subways, schools, airports, military bases and much more."[24]

This article will explore the labor and employment law implications of the ARRA. But, as was observed in an earlier analysis of the statute, the ARRA "does not have any provisions which directly address traditional labor law; however it does contain employment law provisions."[25] (Meanwhile, there are extensive provisions on competitive bidding and oversight of the use of the funds disbursed under the ARRA.[26]) In addition to the aforementioned tax cuts for workers and expanded unemployment insurance benefits, those provisions include $80 billion for the enforcement of worker protection laws,[27] as well as reemployment assistance for older workers,[28] protections for employees who "blow the whistle" on the fraudulent misuse of stimulus funds,[29] limitations on executive pay,[30] a substantial reduction of COBRA health insurance premiums for terminated workers who lose their heath insurance coverage,[31] and a restriction on the use of nonimmigrant workers on projects funded by the Stimulus.[32] The ARRA's official website also states that recipients and subrecipients of the funds (the contractors and subcontractors who will carry out these projects) must comply with Federal nondiscrimination and equal opportunity statutes.[33]

A better understanding of the current political, economic, and legal milieu that gave rise to the ARRA will help answer the question of why there is relatively little mention or discussion of the labor and employment issues that will directly affect the workers employed through its funds. To find that answer, other sources of worker protections, external to the explicit provisions of the ARRA but directly affecting those hired through it, will also be examined. Furthermore, the implications of the ARRA on the development of the Obama administration's labor policy will be analyzed. But first an economic explanation of the motives for the ARRA will be provided, in order to better appreciate the purpose of the Act, and the gaps and provisions on labor and employment law contained therein.

Economic Underpinnings of the ARRA

The ARRA is one of the relatively few peacetime spending-based stimulus programs in American history. The sociologist Robert D. Leighninger, Jr. explains that

> since the Depression, tax cuts have become the stimulus delivery system of choice. Some large public works—cold-war projects beginning with Truman and modeled on PWA [Public Works Administration], the Eisenhower interstate highway program of the 1950s, and Kennedy's space program in the 1960s—were undertaken. However, they were justified on other grounds and not made part of a national program to stimulate the economy. The GI bill was also an economic stimulus, also not defined as such.[34]

Of course, the ARRA *does* include substantial tax cuts for individuals and tax breaks for certain favored areas like green energy.[35] But the $500 billion devoted to spending constitutes nearly two-thirds of the ARRA, and that money has been used to pay for a massive scheme of public works (and other forms of public investment) whose putative purpose is to revive the economy.

There is a school of economic thought that provides intellectual justification for the use of public works to boost a nation's economic performance. The English economist John Maynard Keynes can probably be called the intellectual godfather of the fiscal stimulus program—he provided a theoretical justification for governments' use of deficit spending, through public works especially, in economic downturns.[36] Keynes believed that fiscal stimulus would allow the private sector to start making profits again, which would allow the economy to recover:

> Government investment…if you can do that for a couple of years, it will have the effect, if my diagnosis is right, of restoring business profits more nearly to normal, and if that can be achieved, then private enterprise will be revived. I believe you first of all have to do something to restore profits and then rely on private enterprise to carry the thing along.[37]

This is the "demand-side" policy that our government is undertaking through the Stimulus; as was discussed above, extensive governmental "investment," much of it in the private sector, is what the ARRA provides.

It has been observed that the ARRA is being financed entirely through deficit spending.[38] But Peter Orszag (the former Director of the Office of Management and Budget in the Obama Administration) explained to Congress

that, "Even with the prospect of such large deficits, however, nearly every leading economist agrees we have no choice but to act aggressively to expand aggregate demand and address the macroeconomic crisis."[39] And Orszag propounded the standard Keynesian doctrine when he explained that, "…the key impediment to growth is aggregate demand: with existing capacity, the economy could produce substantially more goods and services if there were more demand for them… President-elect Obama's economic recovery plan is aimed at promoting economic activity by helping to fill the gap between aggregate demand and existing capacity."[40] As Orszag alluded, a new consensus is forming in a profession known for its broad and deep divisions,[41] and many economists are returning to Keynes in a time of crisis and confusion.[42]

Policymakers hoped that the ARRA would save and create 3.5 million jobs within two years, in spite of the "relatively small number" of workers who will be directly hired by the Federal government. The Obama Administration claims that 3 million jobs have been created or saved by the Stimulus, although some economists dispute this.[43] The Congressional Budget Office has reported that the Stimulus has *created* 1.4 million jobs.[44] The economists Christina Romer and Jared Bernstein, who were advisors to the Obama administration (Bernstein still is, as of this writing), identified several reasons for expected job creation from a stimulus plan like the ARRA. The first reason for the job-creation expectations was that many workers will be hired under projects financed by the ARRA or to produce the goods demanded as the result of tax credits or subsidies targeted to specific industries.[45] Secondly, the newly employed workers "will spend more and this stimulates other industries."[46] Romer and Bernstein observe that direct spending programs and state fiscal relief both have "strong job bang for the buck," an idea that hearkens back to Keynes, because, unlike tax cuts, all of the money coming directly or indirectly from the Federal government will be *spent*.[47] Not only will high-quality jobs be created or saved, but the ARRA will also improve many existing jobs, by reducing underemployment—moving workers from part-time to full-time work.[48] "The estimates suggest that 30% of the jobs created will be in construction and manufacturing," which employ "large numbers of low- and middle-income workers whose incomes have stagnated in recent decades and who have suffered greatly in the current recession."[49]

If one subscribes to the Keynesian thesis, then an expectation of explicit provisions in the Act on worker pay and collective bargaining rights follows naturally. According to the economic logic behind the stimulus, the government would want to ensure unionization of all of the workers who will be employed or otherwise involved on public works jobs, because unionized workers earn more than their non-union counterparts. "The 'union effect' on pay is dramatic: unionized workers earn 20 percent more in wages and 28 percent more in total compensation than non-union workers. The beneficial effects of unions sometimes extend even to non-union employees because their employers tend to improve pay in order to compete for workers."[50] The workers would have more money available to spend, and that extra consumption would spur-on further economic growth. Relatively high wages for certain Federally-financed projects on Federal buildings or other property are already guaranteed, however, through certain Federal wage and hour laws and prevailing wage laws (which will be discussed below).

The ARRA, therefore, in its content, rationale, and intellectual justification, is an important and prominent tile in a larger Keynesian policy mosaic that is currently being assembled by the Federal Government. The Act, drawing upon the theories of Lord Keynes, seeks to enhance aggregate demand through deficit spending on public works. It is important to now examine the ways in which worker wages/purchasing power will be maximized, even without explicit labor law provisions.

President Obama's Executive Orders

On February 6, 2009, President Obama signed Executive Order 13502, effective immediately, allowing for the use of project labor agreements to promote the "efficient and expeditious" completion of the Federal Government's construction projects that cost more than $25 million.[51] A project labor agreement is a "pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project."[52] An executive agency can now require contractors *and* subcontractors to become a party to a project labor agreement if it would, in the agency's judgment, provide economy, structure, labor-management stability, and compliance with labor and employment laws.[53] Executive agencies are now encouraged to *consider* requiring the use of project labor agreements, but such agreements are not required.[54] Section 7 provides for a possible expansion of the order's coverage to include projects receiving Federal financial assistance, depending upon the recommendation of the Secretary of Labor within 180 days of this order. This executive order is therefore an implicit promotion of unionization, and perhaps it was signed in anticipation of the ARRA, for it will have direct effects on some of the approximately 800,000 construction jobs that are hoped to be created by the Act by the end of 2012.[55]

Furthermore, contractors and subcontractors that provide goods and services to the Federal Government will now be required to conspicuously post a notice that informs their employees of all of their labor and employment law rights, including unionization, equal employment opportunity, and health and safety, pursuant to Executive Order 13496, which President Obama signed on January 30, 2009.[56] And Obama's Executive Order

13495 requires that all contracts with the Federal Government require contractors and subcontractors who succeed to a contract for the same or similar services at the same location shall offer those employees who would otherwise lose their jobs because of the new contract a right of first refusal of employment in the positions they are qualified for.[57] Both 13495 and 13496 are justified on the grounds of efficiency and productivity that come through greater industrial peace,[58] and both will apply to workers who are hired through ARRA funding. Considering the breadth of their coverage, they provide additional labor and employment protection for many of the workers on the planned public works projects and other stimulus investments.[59]

Federal Wage and Hour Laws—Their Impact and Significance

The triumvirate of the Davis-Bacon Act,[60] the Walsh-Healey Public Contracts Act of 1936,[61] and the McNamara-O'Hara Service Contract Act of 1965[62] are the major Federal laws governing the wages of workers under contracts let by the Federal Government. Davis-Bacon applies to those who work on Federal building projects, Walsh-Healey covers the workers who furnish goods, equipment and supplies to the Federal Government, and McNamara-O'Hara protects those who provide services to the Federal Government,[63] although the latter two do not appear in the ARRA. (Davis-Bacon does, however.[64]) Specifically, the Davis-Bacon Act requires that contractors pay mechanics and laborers employed on Federal projects wages equivalent to the prevailing wages for corresponding types of workers on similar construction in the locality where the work is performed.[65] The Secretary of Labor determines the prevailing wage in each locality, which has been often interpreted to be the union-scale wage in that area.[66] The Act applies to projects let under Federal contracts for the construction, alteration, or repair of Federal buildings or other public works exceeding $2,000, and it applies to all agencies of the Federal Government and the District of Columbia.[67] Subcontractors' employees, as long as they are employed directly on the site of the project, are covered by the Act, but the employees of "materialmen" are exempt if they do not spend more than 20 percent of their work time at the construction site. (Materialmen are companies that supply materials to the contractors at a separate location from the job site).[68] Activities that fall under the act include highway construction, and the cleaning, painting, refurbishment, construction and demolition of public buildings.[69] Davis-Bacon was enacted in 1931 to increase worker purchasing power, in the hope that higher wages would provide the economy with the positive indirect effects of higher consumer/worker spending—precisely the types of benefits that were identified by Romer and Bernstein.[70]

Title XVI of the ARRA, the "General Provisions," provides a series of politically important mandates that apply to all of the appropriations made under the ARRA and that will be explored further in this article. Under the heading, "Wage Rate Requirements," section 1606 of the ARRA provides,

> Notwithstanding any other provision of law and in a manner consistent with other provisions in this Act, all laborers and mechanics employed by contractors and subcontractors on *projects funded directly by or assisted in whole or in part* by and through the Federal Government pursuant to this Act shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, United States Code [the Davis-Bacon Act].[71]

This is very broad language on the applicability of the Davis-Bacon Act, and may have the effect of informally extending existing collective bargaining agreements to workers on these projects. And though the number of official Federal jobs created will be relatively small, as Romer and Bernstein discussed in their estimates,[72] since 90 percent of the jobs saved or created will be in the private sector, the workers on the Davis-Bacon-applicable projects will be the employees or independent contractors of *private-sector* builders who have contracted to work for the Federal government.[73] Therefore the reach of the Davis-Bacon Act will probably be quite expansive, and this may serve as a substitute, along with the project labor agreements, for lack of explicit unionization provisions in the ARRA. Prevailing wage rate laws exist on the state level, as well, and could provide further protections.[74]

President Obama's Appointments

President Obama's appointments to various Federal positions also have implications for all American workers, including those hired (or whose jobs are preserved) under the ARRA. These appointments include his choice of the staunchly pro-labor Congresswoman Hilda Solis as Secretary of Labor, which was hailed by organized labor.[75] She gives the agency a "decidedly pro-worker tilt after years of business-friendly leadership in the Bush administration."[76] For example, she has suspended the Bush Administration's wage and recruitment regulations for immigrant farmworkers, which had been viewed by labor advocates as onerous and draconian.[77] Obama also designated Wilma Liebman as Chairman of the National Labor Relations Board (NLRB), and designated Craig Becker and Mark Pearce as members of the NLRB. They

are all viewed as pro-labor in their views and sympathies. Wilma Liebman, for example, has also worked as a union lawyer and during the Bush Administration she publicly criticized the Board's frequent pro-employer rulings.[78] And the appointment of Craig Becker was especially controversial because of his perceived sympathies for labor.[79] These appointees can be expected to apply and interpret existing labor and employment laws in a pro-worker way, using the considerable legal structure in place, already well-developed through decades of regulations, administrative rulings, and judicial case law, and leveraging it to the hilt, in favor of workers, including those engaged in public works financed by the ARRA and other Federal initiatives.

Immigration and Trade Restrictions in the ARRA

The ARRA addresses immigration as well, which is another major force in the ongoing development of contemporary American labor and employment law. What shall be the legal status and rights of foreign workers who come to this nation in search of work or enter it under the auspices of an American employer? There is a close nexus between immigration and important labor and employment law issues like unemployment, unionization, wages and working conditions. The labor economist Vernon Briggs, who has extensively analyzed mass immigration's impact on the American workforce, persuasively argues that immigration policy is, above all else, one aspect of a nation's labor policy.[80] Section 1611, the "Employ American Workers Act," prohibits companies receiving TARP assistance under the Emergency Economic Stabilization Act of 2008 to hire nonimmigrants (temporary workers) unless the company qualifies as an H-1B dependent employer.[81] The H-1B visa was created by the Immigration Act of 1990, and it allows foreign nurses, scientific and technical professionals, and other high-skilled workers to enter to country for up to six years. Usually an American employer will sponsor a foreign recruit for this visa if the company can make the case that qualified citizen workers are unavailable for the position.[82] With the recent rapid increase in the unemployment rate,[83] this excuse is no longer plausible, if it ever was.[84] Therefore the stimulus may portend changes to our immigration system that seek to protect American-born workers.

This immigration restriction ties in to the trade protectionism of the ARRA, because they both represent restrictions on forces that are exogenous to the U.S. economy in order to provide help (at least in the short-term) to distressed sectors of American industry and the American labor market.[85] Specifically, the ARRA has a "Buy American" provision requiring that none of the funds "appropriated or otherwise made available by this Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States,"[86] except if such would be "inconsistent with the public interest;"[87] or if American-made iron, steel, and relevant manufactured goods are not produced in sufficient quantity or quality;[88] or if the use of American metals would "increase the cost of the overall project by more than 25 percent."[89] Perhaps this is a sign of a more protectionist administration, a greater willingness of American policymakers to reconsider protectionism, or President Obama's willingness to more vigorously enforce labor and employment laws in the global trade agreements that the United States is a party to; both developments would have ramifications for many American workers.

Labor and Employment Law Implications

The ARRA is not just one part of a collection of politically viable economic measures to deal with current economic conditions. Rather, as Professor Rubinstein argued in his analysis of the Act, "[I]t is a reflection of a fundamental social change that is about to occur in labor and employment law similar to President Roosevelt's New Deal. I refer to this as Obama's Big Deal."[90] The "Big Deal" is the new economic and labor policy orientation of the Obama administration—the complex of enacted, proposed, and expected legislation that will provide new protections and rights to Americans, including workers, in these hard economic times.

The primary purpose of the Stimulus is to boost the economy, but it is also part of an expansive reformation of the American social contract that is being undertaken by President Obama. This includes the Lily Ledbetter Fair Pay Act of 2009[91] (the first law enacted during his administration), and proposed labor and employment laws like the Employee Free Choice Act,[92] the Respect Act,[93] the Equal Remedies Act,[94] the Patriot Employer Act,[95] and other laws that are being proposed are a part of that effort.

President Obama's appointments are also part of this social democratic impulse, as discussed above. We can therefore expect more pro-labor legislative proposals and political action from the Obama Administration.

While there is not a total lack of language on worker protection in the ARRA, there are no provisions on labor law and only several that address employment law issues. Even if the expectation that 90 percent of the ARRA's jobs will be made in the private sector is unrealistic, why leave those workers without explicit protection? Being such a jobs-focused law, one would reasonably expect the statute to provide an ample delineation of the rights of workers affected by the law. And such protections are not lacking, especially in regard to wages. Perhaps this is a sign that the realm of labor and employment regulation is a crowded field, with extensive Federal, state, and local

laws governing these areas (much of this growth coming in the last 70 years). Therefore, the need for new laws is lessened, and the impetus for reform will be directed toward applying and reforming the current legal regime (such as the proposed Employee Free Choice Act, or EFCA, which would alter the existing structure of the National Labor Relations Act to make it more favorable to unionization), or, as perhaps the ARRA shows, to allow *existing* wage laws and government-market processes to provide worker protection.

To the extent that the ARRA will increase the number of Federal government employees in the various departments and agencies, they may be eligible to join the American Federation of Government Employees, the largest Federal employee union representing 600,000 Federal and D.C. government workers nationwide.[96] And the Act's lack of explication on labor law issues is not necessarily harmful to the workers who will toil on the projects it funds. Professor Rubinstein identified a "glaring omission" in the law, namely, that there is "no restriction on the use of funds to assist, promote, or deter unionization" (and the states, pursuant to the Supreme Court's recent decision in *Chamber of Commerce v. Brown*, 128 S.Ct. 2408 (2008), cannot promote or deter unionization where employers receive more than $10,000 in state funding).[97]

But what would such a unionization provision look like, anyway? Perhaps it would be a declaration of congressional intent in favor of the unionization of these employees, or an assurance of their coverage by the National Labor Relations Act (NLRA). Regardless of whether there will be another stimulus plan, which is unlikely in the aftermath of the 2010 Congressional elections, in which the Republican Party took control of the House of Representative,[98] and at a time when many Congressional Democrats are distancing themselves from the ARRA,[99] the employment laws that *are* mentioned in the ARRA, or that directly affect it, are far-reaching and will have a strong impact on the jobs created (even if they are not widely discussed).

It is also useful to examine the recent history of Federal government job creation programs. The political and economic developments of the 1930s still inform contemporary policy, whether monetary or fiscal, but the ideas that emerged out of the Great Depression have also passed through the filter of several generations of intervening political upheavals, particularly in regard to government spending and social programs. The watershed event is probably President Richard Nixon's initiative, the "New Federalism," which was an attempt to devolve control over Federal social programs, especially those created by the Great Society, to state and local governments.[100] In 1970, to deal with growing unemployment in the midst of the 1969-71 recession, Congress passed the Emergency Employment Act, to bring back certain New Deal-type jobs programs for the unemployed. President Nixon opposed the legislation, deriding it as providing for "WPA[101] programs." But when Congress passed it again in 1971, Nixon signed into law the first Federal job creation program since the 1930s.[102] Two years later, the Comprehensive Employment Training Act (CETA) was signed into law.[103] CETA combined the job training goals of previous legislation with the job creation goals of the Emergency Employment Act. It aimed to *de-centralize* the decision-making process of public-works and job training programs. Funding would be provided by the Federal Government, but the states would administer the programs and determine who received the jobs.[104] This shift in the responsibility and planning of Federal programs to lower levels of government was a political turning point.[105] The political reaction to the Federal Government's administration of social programs, which began in the late 1960s, echoed in the chambers of the 111th Congress.[106] It is telling that large portions of the Act are anti-fraud measures, including oversight boards and whistleblower protection, as mentioned above.

We can therefore conclude that there is little on labor law in the stimulus for political reasons. In the current political climate, it is better for a politician to say, for example, that 90 percent of the jobs created will be in the private sector. For the sake of the swift passage of the Act in these dire economic times, the thorny issues surrounding labor and employment law were not allowed to mire down the political process.[107] The pro-labor Obama Admininstration could afford to do this because of the existing protective legal structures, Obama's executive orders, the independent legislative efforts that would presumably affect these workers (such as EFCA), favorable interpretations of labor law by Obama's appointees, and the Federal Government's expectation that the overwhelming number of jobs created by the ARRA will be in the private sector.

Congress has, in allocating an unprecedented amount of money for direct and indirect job creation, fulfilled the self-imposed mandate of the Employment Act of 1946:

> …[T]o use all practicable means…to coordinate and utilize all its plans, functions, and resources for the purpose of creating and maintaining, in a manner calculated to foster and promote free competitive enterprise and the general welfare, conditions under which there will be afforded useful employment opportunities…and to promote maximum employment, production, and purchasing power.[108]

This reinforces the significance of the "Big Deal" paradigm, because the parallel of the ARRA to the New Deal is even clearer, as is, perhaps, the mood of fear and uncertainty at the commanding heights of our economy.

Unlike the New Deal, however, the policymakers' focus is not on direct job creation by the Federal Government, as much as using the resources available to the Federal Government to finance projects undertaken by state governments.

Conclusion

The American Recovery and Reinvestment Act is perhaps the defining program of the Obama Administration. It has created jobs or preserved existing positions for millions of American workers, through substantial investments in public works, new eco-friendly technologies, education, and state governments, among other areas.[109] The question is why, despite the Act's strong support from a pro-labor Congress and Presidential Administration, it did not directly address labor issues. The answer lies in the political-economic setting from which the ARRA emerged. Unlike the workers of the Civilian Conservation Corps (a major New Deal jobs program), who earned a dollar a day, lived in tents and barracks near their work projects, and were subjected to mild military discipline, without much else in the form of workplace rights,[110] today's workers are the beneficiaries of the extensive labor and employment laws of all three levels of government that have largely been developed and implemented over the last 75 years. Therefore, these issues were not imperatives for the ARRA to address. And, generally speaking, it is politically unhelpful to address these matters head-on in the midst of the current political milieu. These issues are better addressed indirectly, because even more important than a guarantee of an even higher consumer purchasing power through the ARRA was the quick and immediate passage of the law.

Perhaps the main labor and employment law implication of the ARRA is that it begins a new era of publicly financed employment. Whatever the wisdom of the policy, the Federal Government has reassumed a role it last played during the New Deal, by meeting the most fundamental need of its citizens—employment. Possibly for the first time since the New Deal, a large-scale public works program is being used to overcome an economic crisis; in particular, as part of an economic stimulus plan of job creation and government spending. The ARRA represents a return to overtly Keynesian policy as well as other economic policies long out of favor regarding trade, immigration, and public investments, which coincides with a similar shift taking place right now in the economics profession itself. Therefore, although we cannot say that the ARRA has directly affected labor and employment law, there is more that the ARRA provides for labor and employment law and policy than appears at first blush, through its provisions, ancillary and supporting labor and employment laws, and through what it portends politically.

Endnotes

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7. Robert J. Samuelson, *The Shadow of the Depression*, Wash. Post, Mar. 16, 2009, at A17.
8. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009), *available at* http://fdsys.gpo.gov/fdsys/pkg/BILLS-111hr1ENR/pdf/BILLS-111hr1ENR.pdf.
9. *Times Topics: Economic Stimulus, Overview*, N.Y. Times, http://topics.nytimes.com/topics/reference/timestopics/subjects/u/united_states_economy/economic_stimulus/ (last visited February 3, 2011).
10. The tax cuts are mostly worker-oriented: the payroll tax cut is the largest individual tax break in the Act, at $116.2 billion, and it also is the most expensive of any of the provisions. (It will provide an average of eight dollars extra in a worker's weekly paycheck. Daniel Henninger, *Obama's Hair of the Dog Stimulus*, Wall St. J., Feb. 19, 2009, at A17.) Other tax breaks include relief for payers of the alternative minimum tax. § 1011, 123 Stat. at 320.
11. Mark Pittman & Bob Ivry, *Financial Rescue Nears GDP as Pledges Top $12.8 Trillion*, Bloomberg, Mar. 31, 2009, http://www.bloomberg.com/apps/news?pid=20601087&sid=armOzfkwtCA4. And that number has surely increased since March 31, because GMAC LLC, the finance arm of General Motors, is about to receive more than $7 billion from the Treasury Department in a package that could ultimately top $14 billion. Neil King & Deborah Solomon, *GM Financial Arm to Get a Fresh Bailout*, Wall St. J., May 21, 2009, at A1. The bailouts may eventually total $23.7 trillion, according to the special inspector general of the Troubled Asset Relief Program (TARP). Dawn Kopeki & Catherine Dodge, *U.S. Rescue May Reach $23.7 Trillion, Barofsky Says*, Bloomberg, July 20, 2009, http://www.bloomberg.com/apps/news?pid=20601087&sid=aY0tX8UysIaM.
12. *Id*. This is up by a staggering $3 trillion from the $9.7 trillion commitment that existed as of early February 2009. Mark Pittman & Bob Ivry, *U.S. Taxpayers Risk $9.7 Trillion on Bailout Programs*, Bloomberg, Feb. 9, 2009, http://www.bloomberg.com/apps/news?pid=washingtonstory&sid=aGq2B3XeGKok. And now, a second round of "quantitative easing" by the Federal Reserve, to massively increase the money supply to further stimulate the

American economy. Sudeep Reddy, *Quantitative Easing: How It Works; When It Doesn't*, Wall Street Journal, November 4, 2010 http://online.wsj.com/article/SB10001424052748704506404575592722702012904.html.

13. *Japan PM Unveils $150bn Stimulus*, BBC News, Apr. 10, 2009, http://news.bbc.co.uk/2/hi/business/7991194.stm.

14. *India Unveils Economic Boost Plan*, BBC News, Jan. 2, 2009, http://news.bbc.co.uk/2/hi/business/7808561.stm.

15. Calum MacLeod, *China's Economic Stimulus Plan Targets Its Infrastructure*, USA Today, Nov. 11, 2008, http://www.usatoday.com/money/world/2008-11-11-China_N.htm.

16. *Germany Seals 50 Billion Euro Stimulus Plan*, Der Spiegel Online, Jan. 13, 2009, http://www.spiegel.de/international/germany/0,1518,600977,00.html. It is the country's largest stimulus plan since World War II.

17. *France Unveils Stimulus Package BBC*, BBC News, Feb. 2, 2009, http://news.bbc.co.uk/2/hi/business/7864942.stm.

18. § 3(a), 123 Stat. at 115-16.

19. "About the Act," http://www.recovery.gov/?q=content/act (last visited January 2, 2011).

20. According to the Obama Administration, the Stimulus has saved or created 3 million jobs. Michael Grunwald, *How the Stimulus Is Changing America*, *Time*, September 6, 2010, 30. "'The stimulus performed more or less as predicted,' said Laura D'Andrea Tyson, who led the Council of Economic Advisers under President Bill Clinton. 'The problem is the economy is worse than predicted.'" Sewell Chan, *Democrats Are at Odds On Relevance of Keynes*, N.Y. Times, October 18, 2010, http://www.nytimes.com/2010/10/19/us/politics/19stimulus.html?ref=christinadromer.

21. *See* Farhana Hossein, et al., *The Stimulus Plan: How to Spend $787 Billion*, N.Y. Times, http://projects.nytimes.com/44th_president/stimulus (last visited May 25, 2009).

22. *See* David Obey, House of Representatives' Committee on Appropriations, Summary: American Recovery and Reinvestment, Conference Agreement (2009), appropriations.house.gov/pdf/PressSummary02-13-09.pdf, for executive and detailed summaries of these investments.

23. Times Topics: Economic Stimulus, Overview, *supra* note 9.

24. "How the Stimulus Is Changing America," *supra* note 20.

25. Mitchell H. Rubinstein, *Obama's Big Deal; The 2009 Federal Stimulus; Labor and Employment at the Crossroads*, 33 Rutgers L. Rec. 1, 5 (2009). This was recently affirmed by the General Counsel of the AFL-CIO. Jonathan Hiatt, General Counsel, AFL-CIO, Address at the St. John's University School of Law: The Future of Labor (Mar. 10, 2009).

26. *See* Title XV of the American Recovery and Reinvestment Act ("Accountability and Transparency").

27. Title VII, 123 Stat. at 175.

28. § 1841(a)(1), 123 Stat. at 387-88.

29. § 1553, 123 Stat. at 297.

30. § 7001, 123 Stat. at 516-20. The limitations apply to executive compensation and golden parachute payments.

31. Sue Kirchoff, *How Will the $787 Billion Stimulus Affect You?* USAToday, February 17, 2009, http://www.usatoday.com/money/economy/2009-02-12-stimulus-package-effects_N.htm.

32. § 1611, 123 Stat. at 309.

33. "Federal agencies must distribute Recovery Act funding in accordance with all nondiscrimination and equal opportunity statutes, regulations, and Executive Orders that apply to the distribution of funds under the Recovery Act." Notice on Civil Rights Obligations Applicable to the Distribution of Funds under the American Recovery and Reinvestment Act of 2009—Federal Agency Obligations (2009) http://www.ed.gov/policy/gen/leg/recovery/notices/civil-rights.html (last visited February 5, 2011).

34. Robert D. Leighninger, Jr., Long Range Public Investment 178 (University of South Carolina Press) (2007). As mentioned in the excerpt above, the ARRA is one of the few peacetime fiscal stimulus programs; otherwise America's wars, especially World War II, dramatically increased deficit spending, and can therefore be added to Leighninger's list of stimulus plans. The Economic Stimulus Act of 2008, however, consisted mostly of tax rebates. *See* David M. Herszenhorn, *Congress Votes For a Stimulus Of $168 Billion*, N.Y. Times, Feb. 8, 2008 at 1.

35. Times Topics: Economic Stimulus, Overview, *supra* note 9.

36. Steven Mufson, *For Insight on Stimulus Battle, Look to the '30s; For Left and Right, Issue Rekindles New Deal Debate*, Wash. Post, Feb. 12, 2009 at D01.

37. Herbert Stein, The Fiscal Revolution in America, 145 (AEI Press 1996) (1969).

38. Rubinstein, *supra* note 25, at 4.

39. Peter R. Orszag, Testimony of Peter R. Orszag, Nominee To Serve As Director of the Office of Management and Budget Before the Committee on Budget, United States Senate, January 13, 2009, budget.senate.gov/democratic/testimony/2009/OrszagFINAL011309.pdf.

40. *Id.*

41. Milton Friedman, There's No Such Thing As a Free Lunch, 1 (Open Court 1975).

42. Louis Uchitelle, *Economists Warm to Government Spending but Debate Its Form*, N.Y. Times, Jan. 7, 2009, at B1.

43. Michael Grunwald, *How the Stimulus Is Changing America*, Time, September 6, 2010, at 30; Annalyn Censky, *White House: Stimulus funded 3 million jobs*, CNNMoney, http://money.cnn.com/2010/07/14/news/economy/stimulus_report/index.htm, July 19, 2010.

44. Congressional Budget Office, Estimated Impact of the American Recovery and Reinvestment Act on Employment and Economic Output from April 2010 Through June 2010 (August 2010), http://www.cbo.gov/ftpdocs/117xx/doc11706/08-24-ARRA.pdf, 2.

45. Christina Romer & Jared Bernstein, The Job Impact of the American Recovery and Reinvestment Plan 5 (2009). Investments in green energy, for example, "will create jobs that generally pay well above the national average…the occupation-weighted average age in green energy jobs is about 20% above the national average." *Id.* at 11.

46. *Id.* at 5.

47. *See id.* at 6. Although even tax cuts will have important job creation benefits by the end of the two-year window. *Id.* at 6.

48. The number of underemployed will be reduced by 3 percent more than would otherwise occur. *Id*. at 11.

49. *Id*. at 8.

50. Lawrence Mishel, *Union Declines Hurt All Workers*, Economic Policy Institute, Dec. 12, 2005, http://www.epi.org/publications/entry/webfeatures_viewpoints_union_decline/.

51. Executive Order No. 13,502, 74 Fed. Reg. 6985, sections 1(b) and 2(c) (Feb. 6, 2009).

52. *Id.* at section 2(e).

53. *Id.* at section 3(a).

54. *Id.* at section 5.

55. *See* Dana Hedgpath, *Builders Decry Obama's Order on Projects*, Wash. Post, Feb. 12, 2009, at A15.

56. Executive Order No. 13,496, 74 Fed. Reg. 6107 (Jan. 30, 2009).

57. Executive Order No. 13,495, 74 Fed. Reg. 6103 (Jan. 30, 2009).

58. Additionally, Obama's Executive Order 13522, signed on December 9, 2009, provides for the creation of Federal agency and department-level labor-management forums to attempt to resolve labor disputes through solutions created jointly by labor and management, rather than through solutions proposed by management and then bargained over by the two sides. These forums will affect the labor relations system of Federal departments and agencies, which will most likely affect some of the workers hired with Stimulus funding.

59. Two other Executive Orders signed by President Obama, 13548 and 13518, are devoted to facilitating the Federal employment prospects of disabled workers and veterans, respectively, in order to increase the numbers of both groups employed by Federal agencies, and these two employment law measures may also affect employees hired under the ARRA.

60. 40 U.S.C. §§ 276a to 276a-5 (2006).

61. 41 U.S.C. §§ 35-45 (2006).

62. 41 U.S.C. §§ 351-58 (2006).

63. Joseph E. Kalet, Primer on Wage and Employment Laws 10-11 (Bureau of National Affairs 1990).

64. See Title XII and §§ 1606 of Division A and 1601 of Division B of the American Recovery and Reinvestment Act. The former will be discussed below. With the creation of so many public jobs and the expansion of the Federal government's activities, one would expect references to the other two laws, yet they were not included in the Act.

65. Mark Rothstein & Lance Liebman, Employment Law 448-49 (Foundation Press 2007).

66. Richard Vedder & Lowell Gallaway, Out of Work 257 (The Independent Institute 1997). In this way, the workers on the public projects funded by the ARRA may be indirectly and partially unionized, receiving the benefits of unions' work in the locale without being formal members of the organizations.

67. Vedder & Gallaway, *supra* note 66, at 449.

68. Kalet, supra note 63, at 102. But the Act applies where equipment is rented to a covered contractor and the contract calls for the employees of the rental company to operate the equipment on the worksite. *Id.* at 103.

69. *Id.* at 102-103.

70. After a 1931 visit to America, John Maynard Keynes "hailed the American record of maintaining wage rates." Murray Rothbard, America's Great Depression 237 (Richardson & Synder 1983) (1963). Perhaps the impact of the Davis-Bacon Act contributed to Keynes' observation.

71. § 1606, 123 Stat. at 304. Emphasis added.

72. Romer et al., *supra* note 45.

73. There will be much work performed on Federal buildings in the coming years, including the "largest weatherization program in history" that will modernize 75 percent of Federal building space. "About the Act," *supra* note 18. $5.5 billion will be spent to overhaul Federal buildings. Title V, 123 Stat. at 150.

74. Jonathan Hiatt, *supra* note 25.

75. Tyche Hendricks, *Labor Dept. Choice Praised in Many Quarters*, San Francisco Chronicle, Dec. 20, 2008, http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/12/20/ MN5814RCPT.DTL&hw=hilda+solis&sn=001&sc=1000.

76. Associated Press, *Senate Confirms Solis as Labor Secretary*, N.Y. Times, Feb. 24, 2009, http://www.nytimes.com/2009/02/25/us/politics/25solis.html.

77. New Department of Labor regulations for these workers went into effect on June 29, 2009. Julia Preston, *Rule Change for Workers on Farms*, N.Y. Times, May 28, 2009, http://www.nytimes.com/2009/05/29/us/politics/29worker.html.

78. Anita Huslin, *Marchers Protest NLRB's Busy Sept.*, Washington Post, November 16, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/11/15/AR2007111502496.html.

79. Becker is a former associate general counsel of the AFL-CIO and a former law professor, who once wrote that employers should not have a voice in unionization elections. Sheryl Gay Stolberg, *Obama Bypasses Senate Process, Filling 15 Posts*, N.Y. Times, March 27, 2010, http://www.nytimes.com/2010/03/28/us/politics/28recess.html.

80. *See* Vernon M. Briggs, Jr., Mass Immigration and the National Interest 5-6 (M.E. Sharpe 2003) (1992).

81. An H-1B dependent employer has 25 or fewer full-time equivalent employees who are employed in the United States; and employs more than 7 H-1B nonimmigrants; or, has at least 26 but not more than 50 full-time equivalent employees who are employed in the United States and employs more than 12 H-1B nonimmigrants; or, has at least 51 full-time equivalent employees who are employed in the United States; and employs H-1B nonimmigrants in a number that is equal to at least 15 percent of the number of such full-time equivalent employees. *See* 8 U.S.C. § 1182(n) (2006).

82. *See* Briggs, *supra* note 80, at 201-02 and 267-70. Skilled workers in the information technology field constitute the bulk of those brought to this country through the H-1B visa provision.

83. As of this writing, the seasonally adjusted American unemployment rate is 9.0 percent. Bureau of Labor Statistics, Labor Force Statistics From the Current Population Survey (2011), http://www.bls.gov/cps/.

84. *See* Briggs, *supra* note 68, at 267-70.

85. And this mildly nationalist policy orientation stands in contrast with the Obama Administration's attempts to foster international cooperation among the major economic powers of the world. *See* Richard A. Epstein, *The Buy American Provisions: Another Stimulus Farce*, Fortune, Feb. 24, 2009, http://www.forbes.com/2009/02/23/buy-american-stimulus-opinions-columnists_wto_trade.html.

86. § 1605 (a), 123 Stat. at 304.

87. § 1605(b)(1), 123 Stat. at 304.

88. § 1605(b)(2), 123 Stat. at 304.

89. § 1605(b)(3), 123 Stat. at 304.

90. Rubinstein, *supra* note 25, at 1.

91. Pub. L. No. 111-2, 123 Stat. 5.

92. H.R. 1409, 111th Cong. (1st Sess. 2009); S. 560, 111th Cong. (1st Sess. 2009).

93. Re-empowerment of Skilled and Professional Employees and Construction Workers Act, S. 969, 110th Cong. (1st Sess. 2007), H.R. 1644, 110th Cong. (1st Sess. 2007).

94. S. 2554, 110th Cong. (2nd Sess. 2008); H.R. 5129, 110th Cong. (2nd Sess. 2008).

95. S. 1945, 110th Cong. (1st Sess. 2007).

96. *About AFGE*, http://www.afge.org/Index.cfm?Page=AboutAFGE (last visited May 25, 2009).

97. Rubinstein, *supra* note 25, at 6.

98. Laura Meckler, *Obama Signs Stimulus Into Law,* Wall St. J., Feb. 18, 2009, *available at* http://online.wsj.com/article/SB123487951033799545.html#printMode. But with new budget estimates, recently calculated by the Federal government, showing an estimated $9 trillion increase in the national debt over

the next decade, the Obama Administration is under renewed pressure to rein-in spending, which diminishes the prospects of any more stimulus packages of the magnitude of the ARRA. *See* Jonathan Weisman & Deborah Solomon, *Decade of Debt: $9 Trillion*, WALL ST. J., Aug. 26, 2009, at A1. And Republican control of the House of Representatives also makes another stimulus package highly unlikely.

99. Sewell Chan, *Democrats at Odds On Relevance of Keynes*, NEW YORK TIMES, October 18, 2010, http://www.nytimes.com/2010/10/19/us/politics/19stimulus.html?ref=christinadromer.

100. POVERTY IN THE UNITED STATES: AN ENCYCLOPEDIA OF HISTORY, POLITICS, AND POLICY 283 (Gwendolyn Mink & Alice O'Connor, eds., ABC-CLIO 2004).

101. The Work Projects Administration, a major New Deal public works program.

102. Vernon M. Briggs, Jr., Professor of Labor Economics, School of Industrial and Labor Relations, Cornell University, Human Resource Economics Lecture (Nov. 9, 2005).

103. 29 U.S.C. §§ 801-992 (1976). CETA was repealed in 1982. *Rock v. Pierce County*, 476 U.S. 253 (1986).

104. POVERTY, *supra* note 100, at 283.

105. BRIGGS, *supra* note 102.

106. For a discussion of the ideological shift and the concomitant policy adjustment on Federal social programs represented by the 1968 election, *see* SAR LEVITAN & GARTH MANGUM, FEDERAL HUMAN RESOURCE POLICY: FROM KENNEDY TO CLINTON 5 (Johns Hopkins Institute for Policy Studies, 1999).

107. The drive to pass EFCA has floundered. Thomas Frank, *The Tilting Yard: Card Check is Dead*, WALL ST. J., Apr. 22, 2009, at A13. And there was staunch opposition to the original "Buy American" provisions in the Senate's version of the ARRA, which would have mandated that only U.S.-made goods be used in projects funded by the bill. This provision was replaced with the aforementioned clause on iron and steel products. *Senate Eases 'Buy American' Clause in Stimulus*, CNN, Feb. 5, 2009, http://www.cnn.com/2009/POLITICS/02/05/senate.buy.american/index.html.

108. HUGH NORTON, THE EMPLOYMENT ACT AND THE COUNCIL OF ECONOMIC ADVISORS 1946-1976 99 (University of South Carolina Press 1976).

109. President Obama has continued this focus on government "investments" in the economy. In his 2011 State of the Union Address, for example, he stressed the need to continue Federal investments in the workforce, technology, and research. Chris McGreal, *Barack Obama's state investment call 'at odds' with spending freeze plan*, THE GUARDIAN, January 26, 2011, http://www.guardian.co.uk/world/2011/jan/26/barack-obama-investment-spending-freeze.

110. LEIGHNINGER, *supra* note 34, at 12-14.

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To Defer or Not to Defer: Deferral of Improper Practice Charges Under the Taylor Law—An Update

By Philip L. Maier

Introduction[1]

The Public Employment Relations Board (PERB) is charged with administering the Public Employees' Fair Employment Act (Act).[2] Briefly stated, the Act grants public employees the right to join a union, which if certified or recognized, has the right to bargain with a public employer on behalf of the employees it represents. In fulfilling their responsibilities, unions often challenge employer actions by filing improper practice charges[3] and grievances pursuant to the parties' dispute resolution mechanism under the collective bargaining agreement (CBA). One common but analytically complex issue which frequently confronts practitioners before PERB is determining whether a charge will be deferred to this contractual dispute resolution mechanism. This article will present an overview of the various contexts in which deferral issues arise, a review of Board decisions which have established the parameters of the case law in this area and recent developments addressing these issues.

Procedural Context

Deferral issues generally arise in the context of charges alleging violations of §§209-a.1(d) or (e) of the Act. After a charge is filed, a pre-hearing conference is held, the purpose of which is to either resolve the charge or limit the factual and legal issues in dispute.[4] During this conference, a party may raise an issue relating to the deferral of the charge and, if appropriate, the Administrative Law Judge (ALJ) will issue a decision pursuant to which the charge is deferred. A charge may be deferred pending either a determination of the dispute on the merits, or a determination as to whether the dispute is based upon rights held by the charging party under the parties' CBA, thereby implicating the Board's jurisdiction. Under both circumstances, as discussed herein, the charge is deferred subject to a motion to reopen. An ALJ may issue a deferral decision without agreement of the parties, and a charge may also be deferred subsequent to a hearing if an ALJ concludes that PERB may lack jurisdiction over the subject matter of the charge. Alternatively, if deferral may have been appropriate, but the merits of the charge were litigated before PERB, the Board will not thereafter defer the charge to the parties' dispute resolution procedure.[5] All decisions are, of course, subject PERB's appeal procedures.[6]

Cases which allege violations of §§209-a.1(a), (b), (c), (f) or (g) are generally not deferred either jurisdictionally or on the merits by the Board.[7] These charges do not implicate the Board's jurisdiction since the rights seeking to be vindicated are based upon statutory provisions, not contract rights.

The interplay between the Board's deferral doctrine and the various types of charges which may be filed is illustrated by S*chuyler-Chemung-Tioga Educational Association.*[8] In that case, the Board reversed an ALJ decision which had deferred a charge alleging a violation of §§209-a.1(a) and (d) to the grievance procedure. The charge alleged a violation due to the failure to provide information regarding the release of information concerning the interview process to fill vacancies. The ALJ had deferred to parties' grievance procedure because the CBA contained a clause regarding information which should be made available to the parties. The Board held that it will not defer an alleged violation of §209-a.1(a) of the Act simply because there is a provision in the parties' CBA that restates or reiterates the language of §209-a.1(a) or provides rights similar to those found by PERB to flow from §209-a.1(a) of the Act. With regard to the §209-a.1(d) allegation, since it is inextricably intertwined with the alleged §209-a.1(a) violation, the Board stated it does not defer a determination on the jurisdictional issue raised by contract language which touches upon the subject matter of the charge. The Board retains jurisdiction over §209-a.1(d) allegations and since it has exclusive jurisdiction over §209-a.1(a) allegation, the Board determined not to bifurcate the proceedings.

Merits Deferral

The Board has had a longstanding policy, specifically endorsed by the Act,[9] of deferring to the merits of an arbitration award as long as certain conditions are met. A decision deferring a charge to the merits of an arbitration proceeding generally is done in the context of cases which allege violations of §209-a.1(e) of the Act. This means that these charges allege violations of the terms on an expired agreement. The Board has jurisdiction of these types of cases, but it has been the policy of the agency to defer these types of charges to the parties' own dispute resolution procedure.

The Board first enunciated this doctrine in *New York City Transit Authority (Bordansky*).[10] Bordansky had filed a charge against both his employer and the Transport Workers Union, Local 100, AFL-CIO (TWU), alleging a violation of §209-a.1(a) of the Act because he was discriminated against because of his non-union status. The Board held that deferral was appropriate because "it was satisfied that the issues raised in the improper practice

charge were fully litigated in the arbitration proceeding, that arbitral proceedings were not tainted by unfairness or serious procedural irregularities and that the determination of the arbitrator was not clearly repugnant to the purposes and policies of the Public Employees' Fair Employment Act." A merits deferral decision will be issued only if the grievance ends in binding arbitration.[11] The Board has held that its merits deferral policy applies to both pre-arbitral and post-arbitral deferral circumstances,[12] and that it applies to both invoked and uninvoked grievance procedures.[13]

In *County of Sullivan and Sullivan County Sheriff*,[14] the Board affirmed an ALJ decision which found that the County violated §§209-a.1(d) and (e) of the Act by unilaterally implementing a system for the recovery of leave accruals and when it deducted hours from an employee's leave accruals. The charge also alleged violations of §§209-a.1(a) and (c), which were dismissed. A grievance was pending to which the ALJ declined to defer. The Board addressed whether, pursuant to its decision in *Town of Carmel*[15] it would be consistent with public policy to defer on its own motion the remaining §§209-a.1(d) and (e) after the §§209-a.1(a) and (c) allegations had been dismissed and the merits of the §§209-a.1(d) and (e) allegations had been reached. The Board stated that on a case by case basis, when it determines that it is appropriate to defer an alleged violation of §209-a.1(d), and the alleged violation of §209-a.1(e) rests upon the same facts, it will ordinarily also defer the §209-a.1(e) allegation. The Board will retain jurisdiction of a charge alleging a violation of §209-a.1(e) at the Board's discretion when the parties have evidenced their mutual preference for PERB to determine the contractual issue. This can be shown by the charging party not having filed a grievance or that a grievance is held in abeyance, and the respondent is not seeking deferral. Generally, the practice of deferring §209-a.1(e) allegations will continue. The Board overruled *Carmel* to the extent that it suggests that the Board on its own motion will issue a merits deferral of §§209-a.1(d) and (e) allegations following development of a full record.

In a *County of Westchester* case,[16] the Board pointed out that a merits deferral is appropriate if the contract clause, in this case, a maintenance of standards clause, provides a reasonably arguable source of right to the parties. Based upon the preference of the parties and the development of a full record, the Board did not, on its own motion, defer the merits of the charge. In another *County of Westchester* case,[17] the Board affirmed an ALJ decision conditionally dismissing a charge pursuant to the Board's merit deferral policy based upon a maintenance of standards clause in the CBA. The charge was subject to being reopened should the County interpose any objections to arbitrability, or if the award did not satisfy the criteria under *New York City Transit Authority (Bordansky).*

Jurisdictional Deferral

An ALJ also may issue a deferral decision when the charge raises allegations which are arguably based upon a right stemming from the parties' CBA. In general, these charges allege that an employer has violated §209-a.1(d) of the Act while the contract is still in effect. The Board's jurisdiction is implicated because these charges often involve contractual violations, and §205.5(d) of the Act precludes the Board from enforcing the terms of the parties' CBAs.[18] Since the Board lacks jurisdiction over charges which allege violations of a contract right, it is subject to dismissal.[19]

The Board's jurisdictional deferral policy was first enunciated in *Herkimer County BOCES*.[20] The Board held that it would conditionally dismiss a charge alleging the same facts which were the subject of a pending grievance, since that result was more equitable than the outright dismissal of the grievance. Under *Herkimer*, an ALJ will issue a decision deferring the disposition of the jurisdictional question pending the issuance of an award disposing of the grievance. The Board stated that while an arbitrator's decision concerning its jurisdiction would not be binding, it would be accorded substantial weight assuming the criteria in *New York City Transit Authority (Bordansky)*, *supra*, have been met.

In making the determination as to whether jurisdictional deferral is appropriate, the ALJ will examine whether a clause in the CBA constitutes an arguable source of right for the charging party's claim.[21] If it does, and there is no objection to the processing of the grievance, the charge will be deferred. A *Herkimer* deferral decision will be issued even if the grievance procedure does not end in binding arbitration.[22] The issuance of such a decision is made based upon the existence of a jurisdictional question, and the Board in effect uses the arbitration award as an aid in determining its jurisdiction.

County of Erie and the Sheriff of Erie County,[23] and *City of Utica*,[24] highlight the requirement that the CBA provide an arguable source of right to the parties in order for a charge to be appropriately deferred. In *County of Erie*, the union filed a charge alleging that the County violated §209-a.1(d) of the Act due its failure to comply with its request for an equal employment opportunity office and internal affairs report regarding sexual harassment needed to represent an employee in a disciplinary action. The employee had filed a grievance challenging his discharge, and the County argued that the charge should be deferred. The Board affirmed the ALJ decision which had found a violation of §209-a.1(d) of the Act due to the failure to comply with the request. The Board stated that it was appropriate not to defer the matter since the clause relied upon by the County did not cover the type of information requested by the union and because it related to a different stage of the grievance proceeding.

In *Utica*, the Board reversed an ALJ's decision to defer to the parties' grievance mechanism. The Board stated that it was not departing from established precedent, but that it believed that the ALJ "had converted deferral policies resting on 'reasonably arguable' violations of the terms of current or expired collective bargaining agreements into policies which permit and require a deferral whenever an improper practice charge alleges a contract breach which is remotely possible."

The filing of a grievance, however, may raise the question as to whether PERB should assert jurisdiction over a charge, or whether the charge should be deferred. In *State of New York (Department of Environmental Conservation)*,[25] the union filed a charge alleging a violation of §209-a.1(d) of the Act when the State precluded a group of employees from working more than a certain number of holidays per year and changed existing work schedules. The parties' CBA contained a comprehensive clause which specified the circumstances under which an employee's shift could be changed. The record contained references to grievances which were filed on behalf of the group of employees in question, though those grievances were not introduced into the record. The basis for the ALJ's determination not to defer was that testimony was adduced that these employees did not work shifts. In light of the number of grievances which were filed, the Board remanded the case to the ALJ for examination of the waiver and jurisdictional issues. The fact that grievances were filed made it incumbent upon the ALJ to determine in the first instance whether there was jurisdiction to proceed.

There are also situations in which both a contract clause and the statute provide a right to an employee organization. Under those circumstances, the Board has held that while it retains jurisdiction over the charge, it nevertheless defers the merits of the charge to the parties' grievance procedure. In *Monticello Central School District*,[26] the union filed exceptions to a decision of an ALJ which deferred that part of a charge alleging that it was denied certain access rights in violation of §209-a.1(d) of the Act. In affirming the ALJ's decision, the Board stated deferral was consistent with the Act's underlying policies, and that the charge was subject to reinstatement based on the criteria set forth in *Herkimer* and *Bordansky*.[27]

"Mixed" Cases

Charges that allege violations of the Act which PERB does not defer, but contain specifications which may be deferred, present unique issues when determining the extent to which the charge should be deferred. For example, a charge may allege that an employer acted unilaterally concerning a mandatory subject of bargaining, thereby both refusing to bargain and interfering with employees' rights. Typically, a charge alleges the same set of facts as the basis for alleging that §§209-a.1(a) and (d) of the Act were violated. If the (a) specification is wholly derivative of the (d) specification, the entire charge will be deferred to the parties' grievance procedure as appropriate.[28] In essence, this means that the facts alleged in support of the §209-a.1(a) specification are the same as needed for the §209-a.1(d) specification. The charge will be deferred notwithstanding the fact that charges containing §209-a.1(a) specifications are not generally deferred.

A more complex scenario is presented when a charge contains multiple specifications, only some of which should be deferred. The Board confronted this issue in *State of New York (SUNY Health Science Center of Syracuse)*,[29] and addressed, for the first time, the merits deferral of a §209.a-1(e) allegation. The Board found that deferral of these types of allegations was consistent with the policies of the Act and found that it was appropriate to defer under the circumstances presented.

In that case, the union had alleged that the State violated §209-a.1(d) and (e) of the Act when it raised the parking rate it charged certain employees, and refused to negotiate in good faith the issue of parking fees. The §209-a.1(d) specification was premised on both the allegation that the State had violated terms of expired agreements between it and the Union, and that the State had negotiated in bad faith. In reversing the ALJ, the Board held that a *Herkimer* jurisdictional deferral was not appropriate since it has jurisdiction over charges which allege a change in the term of an expired contract. The Board did hold, however, that the unilateral change aspect of the §209-a.1(d) specification and the §209-a.1(e) specification were properly deferred on the merits to the pending grievance pursuant to *Bordansky*.[30]

In deferring the §209-a.1(e) specification, the Board cautioned that a merits deferral may not always be appropriate. It left open the question of whether deferral of other types §209-a.1(e) specifications, such as the repudiation of a contract term, or changing the terms of an expired agreement on the grounds that it sunsetted,[31] was appropriate. A further caveat is that the Board stated it was expressing no opinion as to whether it would have reached the same conclusion had the grievance procedure not been invoked, and that if the facts of a particular charge are inseparable.

In *Town of New Windsor,*[32] the Board granted interlocutory review of an ALJ decision which conditionally dismissed, pursuant to *Herkimer BOCES,* the part of a charge alleging a violation of 209-a.1(d) due to a unilateral change. Pursuant to the ALJ's decision, the remaining portion of the charge, which alleged a violation due to the failure to negotiate the impact and the change itself, were to be further processed. The Board found that the bargaining demand allegations are inextricably intertwined with the unilateral change allegations. The refusal to negotiate allegations cannot be litigated fully without litigation concerning the meaning of the contract terms in issue in both the grievance and improper practice forums. The entire charge was deferred subject to a motion

to reopen upon the grounds set forth in *Town of Carmel*, *supra*.[33]

In *State of New York (Division of State Police)*,[34] the Board granted a motion for an interlocutory appeal to review an ALJ ruling which declined to defer a charge pursuant to *Herkimer BOCES*. The charge alleged a violation of §§209-a.1(a), (c) and (d) by denying the PBA access to an employee during an investigatory interview concerning an incident in which the employee had been involved. The Board stated that it granted interlocutory review because extraordinary circumstances were presented since new deferral issues were presented by the case. The Board restated that it does not defer §209-a.1(a) specifications unless the facts are purely derivative of an alleged §209-a.1(d) violation. The fact that the contract may contain language which mirrors or is substantially similar to rights that are arguably guaranteed by the Act is not sufficient to warrant deferral of an independently alleged §209-a.1(a) violation. If a charge sets forth a cognizable violation of §209-a.1(a), the inquiry ends and the charge should not be deferred.

Jurisdiction and Waiver, Duty Satisfaction, Contract Reversion

There is an important analytical distinction between whether a charge should be deferred pursuant to *Herkimer*, and whether there has been a waiver of the right to negotiate about a particular subject. Since both jurisdictional and waiver issues often arise in concert, a careful analytical differentiation must be made between the two. In determining whether a jurisdictional deferral is appropriate, the inquiry should initially focus upon the source of the right in question. For example, if a charging party alleges that an employee is not receiving a particular benefit, the ALJ must determine whether the claim is based upon a contractual clause, as opposed to a claim based upon a past practice giving rise to a bargaining obligation under the statute.

Waiver, on the other hand, is an affirmative defense[35] which focuses on whether a clause in a CBA covers a particular subject, thus indicating that the parties have already negotiated over the issue to conclusion, thereby permitting a party to take the at issue action.[36] Whether a waiver of the right to negotiate over a mandatory subject of bargaining has occurred depends upon an analysis of contractual provisions such as management rights clauses,[37] contracting out clauses,[38] and various other types of clauses.[39] For purposes of this discussion, the important distinction to bear in mind is that waiver is an issue addressed only after analysis of the jurisdictional issues involved.[40]

State of New York (Department of Health)[41] reiterated these principles. In that case, the Board stated that it will not defer a charge when the contract clause in issue, as interpreted in a prior Board decision, is not an arguable source of right, or if the employer refuses to waive a timeliness objection to a grievance. The Board found that the clause in issue constituted waiver of union's right to negotiate, and stated that waiver does not divest this Board of jurisdiction.

Duty satisfaction and waiver are separate but related defenses which often are raised by employers in the context of charges raising deferral issues. If they are not properly raised as affirmative defenses in the answer, those defenses themselves are waived.[42] In addressing the distinction between waiver and duty satisfaction the Board in *County of Nassau (Police Department)*, stated:

> We take this opportunity at the outset of our decision to clarify the nature of a defense grounded upon a claim that the subjects sought to be bargained pursuant to a charging party's demand have already been negotiated to completion. This Board's decisions have sometimes characterized this defense as duty satisfaction, sometimes waiver by agreement, and sometimes simultaneously both duty satisfaction and waiver. Although the second and third characterization cannot be considered wholly inaccurate, we believe that the first most accurately describes the true nature of this particular defense.
>
> Waiver concepts suggest that a charging party has surrendered something (footnote omitted). Although waiver may accurately describe a loss of right, such as one relinquished by silence, inaction, or certain other types of conduct,... Under [duty satisfaction] a respondent is claiming affirmatively that it and the charging party have already negotiated the subjects at issue and have reached an agreement.[43]

In C*ounty of Columbia,*[44] the Board affirmed an ALJ decision finding that the County violated the Act when it created a new shift and assigned an employee to that shift without prior negotiation with the union. The Board rejected the County's arguments based upon waiver and duty satisfaction, finding that the parties' agreement was not reasonably clear on the subject matter at issue. The agreement was inconsistent, if not contradictory on the issue of daily work hours and assignment of employees, and was susceptible to more than one interpretation.[45]

A separate but related defense often relied upon by employers is contract reversion. In *State of New York (Unified Court System)*,[46] the Board defined the defense of contract reversion as follows:

> An employer is privileged to revert to the term of its collective bargaining agreement notwithstanding an inconsistent past practice. Our theory [is] that having reached an agreement on a subject matter, that agreement, not any practice with respect thereto, fixed and controlled the terms and conditions of employment. In effect, despite the reversion from practice to the contract terms, the status quo was nonetheless maintained.[47]

The Board recently discussed the application of that defense in *Board of Education of the City School District of the City of New York*.[48] In that case, the Board affirmed an ALJ decision which held that the District violated the Act when it unilaterally imposed a three-hour limitation on the amount of leave time that employees may take when they donate blood as part of a blood drive during the workday. Employees for over a decade took between one and eight hours of leave time when donating blood. The Board rejected the District's contract reversion defense, stating that in order to demonstrate such a defense a party must show "a specific provision in their agreement which is reasonably clear on the subject presented and that the at-issue change by the District constitutes a reversion to that negotiated provision from an inconsistent practice."

Exceptions to Deferral

Increase in Benefits

The Board does not defer charges which allege that an employer is bestowing greater benefits upon an employee than required by the CBA. The Board has held[49] that since this scenario undermines the role of the union as collective bargaining representative and is inherently destructive of its representation rights, deferral is inappropriate.

Contract Repudiation

PERB will not defer when it is apparent that the employer has repudiated a contract term, as opposed to a having breached a term of a CBA. In distinguishing between a contract breach and repudiation, the Board has stated that a repudiation is an extraordinary circumstance where a party denies the existence of an agreement or acts with complete disregard of the agreement.[50] In *Village of Monroe*,[51] the Board reversed and remanded an ALJ decision which deferred a charge to the parties' dispute resolution procedure. The charge before PERB alleged a repudiation of a clause specifying the type of medical confidentiality waiver form to be used in a GML §207-c proceeding, and that the employee was threatened with loss of his benefits if he did not execute the form. The Village required a different form be used than the one specified in the collectively negotiated agreement (CBA). The Board stated that in order to demonstrate repudiation, a party must show that the complained of action was taken without any colorable claim of right. The right may be from a source other than the CBA. The Board stated that the ALJ erred in concluding that the Village had a colorable claim of right without examining the merits of the Village's legal claim, i.e. that HIPPA permitted it to use this form. The Board stated that the Village was not a "covered entity" under HIPPA and therefore the Village did not have a colorable legal claim of right to use the substituted form. For the same reason, the Board reversed the ALJ's dismissal of the §209-a.1(a) specification. An employer that threatens an employee for exercising a contract violates the Act in the absence at least the minimal showing of any corresponding colorable claim of right under the CBA. The failure to demonstrate a corresponding colorable claim of right under the CBA required reversal.[52]

Procedures After Deferral

After a charge is deferred to the parties' grievance procedure, a party may move to reopen it on the basis that the criteria set forth in *Herkimer* or *Bordansky* have not been met. As the basis for the motion, the supporting affidavits should specify which of the criteria were not complied with. In a jurisdictional deferral, for example, this might be an allegation that the employer objected to the grievance being processed.

An example of when a charge has been reopened is *Metropolitan Bus Corp.*[53] In that case, the Board refused to defer to an arbitration award since the waiver standard applied by the arbitrator differed from the Board's standard. The arbitrator found that the union had waived its right to negotiate about a random drug and alcohol testing policy because it did not limit the employer's right to conduct such tests under the management functions clause of the CBA. The Board in effect found that it would be repugnant to the purposes of the Act to defer to the award.[54]

Chenango Forks Central School District[55] is another example in which an arbitrator's award was not accorded any preclusive effect. In that case, the Board reversed an ALJ decision which held that the District violated the Act when it stopped reimbursing current and retired employees over the age of 65, and their spouses, for Medicaid Part B payments. An arbitration award was issued after the charge was initially deferred finding that the agreement was silent as to reimbursement. The agreement did not have a maintenance of benefits clause, and the arbitrator stated that in the absence of a mutual understanding and agreement no past practice could be found. Thereafter, the ALJ granted a motion to reopen the charge. The Board stated that the standard utilized by the arbitrator to determine the existence of a past practice

was repugnant to the Act. The record established that the District had either actual or constructive knowledge of the past practice. In the absence of this evidence, the length of time that the practice existed would shift the burden to the District to demonstrate under the totality of the circumstances that it did not have either actual or constructive knowledge. The stipulated record in this matter was ambiguous as to what extent if any the current employees had a reasonable expectation that the practice would continue. The Board reversed and remanded the case on this issue

The issuance of an arbitration award, however, involving the same set of facts as the improper practice charge may affect the disposition of the improper practice charge. A typical scenario is that an employee has been discharged or otherwise disciplined, and unsuccessfully challenges the employer's action in arbitration. A charge had also been filed alleging that the disciplinary action was taken against him because of the exercise of protected activity. While the issue of whether he was disciplined in violation of the Act is not litigated in the grievance forum, the underlying factual issues which the employer alleges gave rise to the disciplinary action in the first place are litigated. In *State of New York (Ben Aaman)*,[56] the Board found that an ALJ properly "relied upon the determination of the facts" found by an arbitrator in a related grievance arbitration thereby precluding relitigation of the issue in the hearing on the improper practice charge. This finding was based upon the conclusion that the criteria in *Bordansky* were satisfied.[57]

In *State of New York (Division of State Police)*,[58] the Board affirmed an ALJ decision dismissing a charge which alleged a violation of §§209-a.1(a) and (d) of the Act when the State denied annual leave in one-day increments to a troop commander. The charge had been deferred to arbitration and the arbitrator had determined that there was no past practice of allowing majors to use leave in one-day increments as alleged in this case. The Board held that collateral estoppel applied to the past practice issue as raised in the charge, and that parties are precluded from relitigating in a subsequent action an issue actually litigated and necessarily determined in a prior proceeding. There was an identity of issue in both the charge and the grievance arbitration and since a past practice was not altered, the State did not violate the Act.

The grounds for vacating, modifying or confirming an arbitration award are set forth in the Civil Practice Law and Rules, section 7511. While a full explanation of this section is beyond the scope of this article, it is sufficient to note for purposes herein that if a party moves to vacate an award, it must do so within ninety days after its delivery.[59] Alternatively, a losing party may wait until the winning party seeks to confirm the award before attacking it.[60] A court gives substantial deference to the arbitration award, and an award can be vacated only upon the limited basis set forth in section 7511(b).

Endnotes

1. This is an update of an article originally published in the NYSBA Journal May/June 1999 edition.
2. Civil Service Law, Article 14, section 200 *et seq*.
3. Section 209-a.1, *Improper employer practices*, states:

   > It shall be an improper practice for a public employer or its agents deliberately (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two for the purpose of depriving them of such rights; (b) to dominate or interfere with the formation or administration of any employee organization for the purpose of encouraging or discouraging membership in, or participation in the activities of any employee organization; (c) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any employee organization; (d) to refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees; (e) to refuse to continue all the terms of an expired agreement until a new agreement is negotiated, unless the employee organization which is a party to such agreement has, during such negotiations or prior to such resolution of such negotiations, engaged in conduct violative of subdivision one of section two hundred ten of this article; or (f) to utilize any State funds appropriated for any purpose to train managers, supervisors or other administrative personnel regarding methods to discourage union organization or to discourage an employee from participating in a union organizing drive or (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 to 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.
4. *Rules of Procedure*, 212.2.
5. *County of Westchester*, 42 PERB ¶3025 (2009).
6. *Rules of Procedure*, 213.1 *et seq*.
7. *City of Syracuse*, 36 PERB ¶3047 (2003), *Riverhead Cent Sch Dist*, 32 PERB ¶3070 (1999).
8. 34 PERB ¶3019 (2001).
9. Section 200 of the Act states, in part, that "The legislature of the state of New York declares that it is the policy of the state and the purpose of this act to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of the government. These polices are best effectuated by....(c) encouraging such public employers and such public employee organizations to agree upon procedures for resolving disputes,..."

10. 4 PERB ¶3031 (1971).
11. *New York City Transit Authority (Bordansky), supra*.
12. *Buffalo Bd. of Educ*., 4 PERB ¶3090 (1971); *The City Sch. Dist. of the City of New York City Bd. of Educ*., 6 PERB ¶3006 (1973).
13. *Saratoga Springs*, 18 PERB ¶3009 (1985); *City of Buffalo*, 17 PERB ¶3090 (1984).
14. 41 PERB ¶3006 (2008).
15. 29 PERB ¶3073 (1996).
16. 42 PERB ¶3025 (2009).
17. 42 PERB ¶3027 (2009).
18. This provision, in relevant part, states: (d) ... the board shall not have authority to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.
19. *County of Erie and the Sheriff of Erie County*, 33 PERB ¶3048 (2000), *State of New York (Governor's office of Employee Relations)*, 33 PERB ¶3012 (2000).
20. 20 PERB ¶3050 (1987).
21. *County of Nassau*, 23 PERB ¶3051 (1990).
22. *County of Nassau*, *supra*.
23. 36 PERB ¶3021 (2003).
24. 31 PERB ¶3039 (1998).
25. 29 PERB ¶3057 (1996).
26. 22 PERB ¶3002 (1989).
27. *See Saratoga Springs*, 18 PERB ¶3009 (1985); *City of Buffalo*, 17 PERB ¶3090 (1984). *See also County of Saratoga and Saratoga County Sheriff*, 37 PERB ¶3024 (2004).
28. *See New York City Transit Auth*., 30 PERB ¶4508 (1997); *West Irondequoit Central School Dist*., 30 PERB ¶4552 (1997); *Village of Pleasantville*, 29 PERB ¶4634 1996); *Middle Country Central School Dist*., 28 PERB ¶4531 (1995).
29. 30 PERB ¶3019 (1997).
30. *See also Connetquot Central School District*, 19 PERB ¶3045 (1986), *Monticello Central School District*, 22 PERB ¶3002 (1989) and *Saratoga Springs, supra*.
31. "A sunset provision, in relevant respect, is an agreement between the parties to a bargaining relationship under which one or more terms of a collective agreement are terminated at a specific time, typically upon expiration of the contract, or upon a specified condition." *Waterford-Halfmoon Union Free Sch. Dist*, 27 PERB ¶3070 (1994).
32. 32 PERB ¶3049 (2000).
33. *Cf. State of New York (SUNY Health Science Center)*, 30 PERB ¶3019 (1997).
34. 35 PERB ¶3031 (2002).
35. Waiver is an affirmative defense which, if not pled, will not be considered. *New York City Transit Auth*, 20 PERB ¶3037 (1987).
36. Waiver is defined as "the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it. Such a waiver must be clear, unmistakable and without ambiguity" (citations omitted); *CSEA v. Newman*, 88 A.D. 2d 685, 15 PERB ¶7011 (3d Dep't 1982), *appeal dismissed*, 57 N.Y. 2d 775, 15 PERB 7020 (1982). *See also County of Nassau*, 31 PERB ¶3064 (1998), which discusses duty satisfaction as a defense which claims that a subject has been already negotiated to completion.
37. *See County of Rockland and Rockland County Sheriff*, 30 PERB ¶3020 (1997); *State of New York-Unified Court Sys*, 28 PERB ¶3014 (1995); *County of Nassau*, 24 PERB ¶3027 (1991); *County of Broome*, 22 PERB ¶3019 (1989).
38. *See New York City Transit Auth*., 30 PERB ¶3004 (1997*), conf'd*__ A.D.2d __, 31 PERB ¶7015 (1998). *City of Batavia*, 28 PERB ¶3076 (1995); *State of New York (Dep't of Correctional Serv.)*, 27 PERB ¶3055 (1994), *conf'd*, 220 A.D. 19, 29 PERB ¶7008 (3d Dep't 1996), *County of Livingston*, 26 PERB 3074 (1993); *Town of Smithtown*, 25 PERB 3081 (1992).
39. *See Patchougue-Medford Union Free School Dist*, 28 PERB ¶3026 (1995); *Sachem Cent. Sch. Dist*., 21 PERB 3021 (1988).
40. In *County of Nassau*, 23 PERB ¶3051 (1990), the Board made the following observation concerning jurisdiction and waiver: [W]aiver of the right to negotiate is a matter which necessarily lies within PERB's jurisdiction. A determination whether a party has waived the right to negotiate an issue goes to the disposition of the charge on its merits, but not to PERB's power to reach those merits.
41. 32 PERB ¶3067 (1999).
42. *City of Oswego*, 41 PERB ¶3011 (2008).
43. *County of Nassau*, 31 PERB ¶3064, at 3142 (1998).
44. 41 PERB ¶3023 (2008).
45. See also *New York City Transit Authority*, 41 PERB ¶3014 (2008).
46. 26 PERB ¶3013 (1993).
47. See also, *Town of Greece*, 28 PERB ¶3079 (1985); *Maine-Endwell Central School District*, 15 PERB ¶3025 (1982).
48. 42 PERB ¶3019 (2009).
49. *Connetquot Central School District, supra.*
50. *State of New York (Department of Correctional Services*), 39 PERB ¶3033 (2006); *Board of Educ. of the City School District of the City of Buffalo*, 25 PERB ¶3064 (1992). *See also State of New York (SUNY College at Potsdam)*, 22 PERB ¶3045 (1989); *Monticello Cent. School Dist, supra, Addison Cent School District*, 17 PERB ¶3076), *aff'g* 17 PERB ¶4566 (1984).
51. 40 PERB ¶3013 (2007).
52. *Supra.*
53. 20 PERB ¶3066 (1987).
54. *See also Steuben-Allegany BOCES*, 13 PERB ¶3096 (1980).
55. 40 PERB ¶3012 (2007).
56. 11 PERB ¶3084, at 3138 (1978).
57. *See City of Oneida*, 12 PERB ¶4615 (1979); *New York City Transit Authority (Harvey)*, 28 PERB ¶4592 (1995); *New York City Transit Authority (Cummings*), 30 PERB ¶4564 (1998).
58. 36 PERB ¶3048 (2003).
59. Section 7511(a).
60. *See* practice commentary to section 7511.

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INTERNATIONAL HR BEST PRACTICES TIPS

Global Workplace Health and Safety Compliance: From the "Micro" (Protecting the Individual Traveler) to the "Macro" (Protecting the International Workforce)

By Donald C. Dowling, Jr.

Laws regulating workplace health and safety are local to each jurisdiction. And therefore so is *compliance*. Regulation of workplace machine guarding, protective eyewear, and ergonomic keyboards, for example, differs depending on the jurisdiction, as do workers' compensation systems. This is why multinational employers approach most aspects of workplace health and safety compliance from a local perspective, from the ground up. A top-down, cross-border compliance strategy may not work if the laws to be complied with do not cross borders.

But even so, some workplace health and safety compliance challenges *do* transcend jurisdictional borders and *do* command the attention of a multinational's headquarters. Truly cross-jurisdictional aspects to workplace health and safety compliance tend to cluster at the "micro" and the "macro" ends of the spectrum—the "micro" level of protecting individual expatriates and individual business travelers, such as staff sent into danger zones, and the "macro" level of propagating company-wide initiatives on basic workplace health and safety topics, such as global cardinal safety rules and global pandemic plans applicable across a multinational's worldwide operations. Accordingly, this article addresses the "micro" and the "macro" levels of international workplace health and safety compliance. Part 1 of the article discusses multinationals' duty to protect individual employees overseas, in danger zones and otherwise, and Part 2 addresses cross-border workplace health and safety initiatives, like global cardinal safety rules and global pandemic plans launched across a multinational's workforces worldwide.

Part 1: Duty to Protect Individual Employees Overseas

Whenever a major safety threat erupts in some part of the world, multinationals scramble to understand what duties they owe their employees working in harm's way. For example, when a coup erupted in Egypt in early 2011, multinationals had employees stuck in life-threatening situations—employees like Google's regional marketing head Wael Ghonim, who was captured by Egyptian rioters and held for 10 days. Ghonim tweeted: "We are all ready to die."[1] Then, on February 11, in a widely publicized incident, an Egyptian mob beat and sexually assaulted CBS News Foreign Correspondent Lara Logan. Shortly thereafter, an earthquake, a tsunami, and a nuclear plant meltdown struck Japan; multinationals with employees in harm's way faced another crisis.

Beyond Egypt and Japan, employee security is vital to multinationals operating in war zones like Iraq and Afghanistan, in terrorism-prone areas like certain parts of the Middle East, and in high crime areas like certain parts of Africa and Latin America. In January 2011, for example, a Mexican gunman murdered Nancy Davis, an American missionary working in Tamaulipas State.[2] These international employee security risks extend even beyond places recognized as danger zones: Staff traveling to, say, Zurich or Sydney can get hit by drunk drivers or stabbed by robbers—and sue.

Liability exposure in the overseas-employee-injury context can be significant, sometimes "bet-the-company" litigation. After four Blackwater Security guards were killed and strung from a Fallujah bridge in March 2004, their estates filed a multi-plaintiff wrongful death action that ultimately involved proceedings in several forums (*Nordan v. Blackwater*), including Ken Starr representing Blackwater before the U.S. Supreme Court.

How must a multinational protect individual employees outside the U.S.? Does the duty change if the country gets on a U.S. State Department watch list? What is the risk analysis? Answering questions like these requires drawing four key distinctions:

1. Safety/security issues versus legal issues

Good corporate social responsibility means implementing effective workplace health and safety measures. In addition, occupational health and safety laws worldwide tend to impose a general duty of care requiring employers to offer reasonable safety protections.[3] What, specifically, constitutes adequate safety measures depends entirely on context: In a factory it might mean supplying gloves, machine guards and emergency-stop buttons. In an office it might mean supplying keycards, ergonomic keyboards, and staircase hand rails. In a war zone it might mean supplying guards, body armor and evacuation services. But in contexts like war, terrorism and crime, health and safety regulations can be vague, leaving employers with only the broadest default legal advice—"heed the duty of care." In the real world, employers need answers to highly specific questions. (*Can we provide guns? Does a State Department warning mean we must evacuate expatriates? What about locals? What about the "Rambo" employee who insists on staying put?*) Getting answers to these questions from a lawyer may be less helpful than getting answers from an expert in security or crisis management.

But after someone gets hurt, even an employer that had solicited expert advice and that had implemented expensive precautions may face a claim. After all, an employee who sues will be one who was injured or killed. And after an injury happens, an allegation that security was too lax can look compelling. To make the case, the victim just points to the injury itself. If the employer provided a bodyguard and a bullet-proof vest, the employee victim says the crisis demanded two bodyguards and an armored car.

2. Health/safety regulation versus personal injury litigation

Legal systems impose duties of care on employers in two separate ways: occupational health and safety laws administered by a government agency and private rights of action for workplace injuries. Distinguish these two. Occupational health/safety regulations are tough laws. A serious violation in some countries (France, Italy, Russia) can send a manager to prison. These laws can get incredibly granular, imposing detailed mandates in contexts as specific as machine-guarding, window washing and iron smelting. But as mentioned, health/safety regulations tend to be vague about third-party actions, like war, terrorism and crime, beyond employers' control, and so they may play a lesser role in contexts involving violence. Therefore, multinationals assessing employment risk in danger zones focus more on their exposure to personal injury claims—such as U.S. court lawsuits demanding a jury and millions of dollars.

3. Local employees versus expatriates and business travelers

In assessing a multinational's exposure to employee personal injury lawsuits, distinguish foreign-local employees from expatriates and business travelers visiting temporarily. The population of locals may be far greater. When crisis erupted in Egypt, HSBC Bank had 1,200 Egyptian employees but just 10 in-country expatriates.[4] Even so, on a per-employee basis, exposure as to the visitors may be far greater, for two reasons:

- **Work hours vs. 24 hours**. An employer tends to be responsible for local employee safety/security only during work time. Locals caught up in an altercation off-the-job should not implicate the employer if their injuries are not work-related. Expatriates and business travelers, though, are different: While overseas on business, a visitor can be deemed to be "at work" 24 hours a day/7 days a week—even while out drinking.[5]

- **Capped local worker injury claims**. The U.S. and some (but not all) other countries offer employees special systems that pay a guaranteed recovery for a workplace injury. Under "workers' compensation," an employee injured on the job (even in an act of violence) can bring a claim for a *capped* recovery without having to prove employer fault, even if the employer did nothing wrong. The trade-off inherent in workers' compensation is that it offers an *exclusive remedy*: Employees can be barred from suing employers outside the system. But the "workers' compensation bar defense" to personal injury civil lawsuits, clear as to local employees, gets fuzzy as to expatriates and business travelers injured abroad. These travelers might sue their employer for personal injuries either in the local host country or—more likely—in their home country (regular place of employment). U.S.-based employees injured abroad might sue in an American court.

4. Personal injury lawsuits versus workers' compensation claims

A U.S. employee maimed or killed stateside, even a victim of a mass killing like the Virginia Tech shootings or the Oklahoma City bombing, rarely ever wins an uncapped wrongful death claim against the employer. The workers' compensation bar affirmative defense/exclusivity of the workers' compensation system almost always stands, except as to certain intentional torts.[6] Our focus, though, is on Americans injured while working abroad. Does the fortuity of an incident occurring across the border let an employee beat the U.S. workers' compensation bar and win an uncapped personal injury verdict from an American jury? The answer is "maybe." When a U.S.-

based employee gets hurt on an overseas business trip of under a month, case law usually upholds state workers' compensation payouts and the exclusive remedy/bar defense.[7] The more complex scenario is where an American gets hurt while abroad on a business trip of over a month, or after the place of employment shifted abroad. These cases turn on their facts.[8]

Strategic employers sending American staff abroad, especially into danger zones, try to structure postings to retain both U.S. workers' compensation remedies and the bar defense. This approach is fair because it offers American staff their very same remedy available for *domestic* workplace injuries and violence. Insurers sell a product called "foreign voluntary workers' compensation coverage" that pays no-fault workers' compensation awards to covered employees injured outside the U.S. A common mistake, though, is to assume that merely buying this coverage automatically extends the workers' compensation *bar defense* to foreign-sustained injuries. Multinationals need an affirmative strategy to extend the bar abroad. One theory is to offer foreign voluntary coverage expressly in exchange for a written consent to limit personal injury remedies to the state workers' compensation system and policy benefit. To induce the employer to buy no-fault foreign coverage, the expatriate covenants that the state system plus the policy will be his exclusive remedy against the employer for injuries sustained abroad.

Another strategy is to require that staff traveling into danger zones sign assumption-of-risk waivers acknowledging and accepting all dangers inherent in the posting. But in recent decades American courts have been reluctant to enforce employee waivers to defeat claims of employer negligence.[9] If an employer invokes assumption of the risk to block even a workers' compensation award, a U.S. employee might argue unconscionablility. Waivers may be more appropriate for a family member like a "trailing spouse" who asks to accompany an employee overseas. That said, in this context a choice of forum clause selecting arbitration may be enforceable.

Part 2: Health and Safety Initiatives Launched Across Workforces Worldwide

Having looked at multinationals' obligations to protect individual employees (particularly expatriates and business travelers) in the international context, we now turn to the other end of the spectrum: health and safety initiatives extended across a multinational's entire global workforce—that is, imposing global health/safety baselines, like cardinal safety rules and pandemic plans, across a multinational's worldwide operations.

Multinationals' workplace health and safety concerns increasingly transcend national boundaries. Proactive multinationals are now starting to take steps toward aligning, across their worldwide operations, those aspects of health and safety with a cross-border dimension. In general, these headquarters-driven cross-border health/safety initiatives fall into two categories:

- Targeted health/safety programs addressing serious risks that transcend national borders, such as pandemic policies and crisis plans focused on terrorism and natural disasters
- General health/safety standards imposed across worldwide operations, such as a global code of conduct safety provision, a set of company "cardinal safety rules," or a manifesto on health/safety principles like Sony's "Global Policy on Occupational Safety and Health"[10]

In a perfect world, a single set of global legal principles would govern a multinational's global health and safety policy. Indeed, there is such a thing as "international workplace health and safety law"—the International Labor Organization, the European Agency for Safety & Health at Work, NAFTA, industry associations and others have promulgated robust sets of cross-jurisdictional workplace health/safety standards. But even so, regulation of health and safety in actual workplaces remains stubbornly local. Every country imposes its own workplace safety code comparable to U.S. OSHA, with hundreds or thousands of detailed regulations addressing minutely specific workplace risks. Any employer needing to know, for example, how to store chemicals, how to guard a paper shredder, or how to administer vaccine during a pandemic needs to start by checking the law in each affected jurisdiction and also checking local collective agreements.

The multinational employer, however, increasingly wants to know: *How, in the face of disparate local safety regulations, does a multinational implement a workplace health/safety initiative across its worldwide operations?* The answer is to tailor the initiative accounting for legal compliance in each affected country. Keep the global initiative flexible and modify it in each jurisdiction. In addition to aligning with local safety regulations, nine other issues can come into play:

1. **Duty of care**: Most countries impose a duty of care on employers, and one big reason multinationals launch global health/safety initiatives is to comply with this duty, reducing legal exposure in new contexts like pandemics and terrorism. Breaching safety duties can mean criminal penalties—in May 2010, for example, Russia joined France, Italy, and many other countries in criminalizing certain workplace safety violations. As discussed in part 1, as to civil lawsuits, the first defense to an employee personal injury claim alleging breached duty of care should be to assert any local equivalent to the U.S. state "workers' compensation bar" defense—but some jurisdic-

tions (such as England) offer no such defense while others (such as in Latin America) let an employee surmount the bar by proving mere negligence.

2. **Existing policies and rules**: Countries from Finland to Malaysia and beyond require employers to issue written *health and safety policies*, and countries from France to Japan and beyond require employers to post written *work rules*. Any new global health/safety initiative will likely bump into issues addressed in existing local health/safety policies and work rules. Amend accordingly: A global health and safety policy needs to align with these local rules, or else launching the global policy requires amending the local rules.

3. **Employee representatives**: Many jurisdictions, including Australia, Brazil, China, Finland, France, Malaysia, Mexico, Norway, Ontario, Poland, Quebec, South Africa, Sweden and Thailand, require employers (at least in some contexts) to sponsor health/safety representatives or committees, and then to consult with them on workplace health and safety. That means a new global health/safety policy will likely require amending local protocols, to accommodate it. In amending local health/safety plans to align with some new headquarters-level health/safety initiative, be sure to involve these representatives as necessary. Specialized health/safety representatives aside, many countries confer on ordinary labor representatives—trade unions, works councils, worker committees—a "mandatory subject of bargaining" right to consult on health/safety issues affecting terms and conditions of employment. (In some countries, government labor agencies may also play a role.) These representatives may not have an absolute right to veto a new health/safety initiative, but they may be able to void a plan that an employer implements unilaterally. And failing to consult can amount to an unfair labor practice.

4. **Medical attention**: Those global health/safety initiatives focused on pandemics and crises often implicate the special issue of workplace *medical care*. Employer-provided medical care raises legal issues including: employer (or workplace nurse) practicing medicine, doctor/patient privilege, regulation of prescriptions, drug importation and employer distribution of drugs/vaccines. In some countries, including Brazil and Italy, large employers have on-staff doctors who can facilitate solutions. But outside of "staff doctor" countries, a particular challenge is how an employer can require employees, during a pandemic, to submit to diagnostic exams or to take vaccines/medicines. The analysis often depends on whether the employer mandate is reasonable. A related issue is employee medical care *outside* the workplace: In countries where government medical care systems or insurance pick up sick employees' medical costs, even employees who succumb in the workplace may be able to access medical treatment without adding to the employer's marginal costs. But be sure to account for the special problem of immigrants, expatriates, mobile employees and business travelers unable to access home-country medical systems.

5. **Isolation**: Another issue particular to global pandemic plans is how to reserve an employer's right to isolate, keep out, or "quarantine" employees who might be infected by a communicable disease outbreak. Pandemic plans may seek to restrict employee travel—business and personal—into infected areas, or restrict return-to-work after a trip into a problem region. Isolation orders and travel bans get scrutinized in light of employee rights, so a global plan should spell out procedures that are anchored in reasonable medical advice.

6. **Shut-downs**: Global crisis policies often cover workplace shut-downs, such as shut-downs required in a pandemic, hurricane, or terrorism. The main employment liability here regards *pay*: In many countries an employer that shuts down temporarily will be obligated to pay those employees willing to work. (*Sick* workers often collect sick pay from either the employer or the state under local sick-pay systems.) Some countries, though, let employers suspend operations—and pay—because of a genuine *force majeure*. Other countries allow mandatory furloughs. Account for these in the global policy.

7. **Data privacy**: Routine workplace health/safety procedures involve tracking and reporting accidents and incidents. In a global pandemic or crisis, tracking and reporting becomes vital. Employers may have urgent medical reasons to get workers to disclose whether they or their family members are affected, where they have recently traveled and whom they have been exposed to. Some employers use employee-travel-tracking software to monitor employees' whereabouts. But jurisdictions with robust privacy laws restrict employers from collecting (or forcing workers to divulge) most personal data—particularly health information, which in the European Union is subject to special restrictions on processing "sen-

sitive" data. Therefore, process employee health-status data carefully. A global crisis or health plan should spell out those situations where workplace safety or public health concerns reasonably justify the employer's personal inquiries. Invoke any employer duty to report incidents to public authorities or to maintain a safe workplace.

8. **Discipline:** All global health/safety protocols should be flexible as to the discipline imposed for any given safety infraction, because the discipline issue implicates local law. Global pandemic and crisis policies can implicate discipline issues around employees refusing to report for work, refusing business travel or insisting on working from home. Local law may support a no-show employee whose refusal to work is reasonable, leaving employers free to discipline only for *unreasonable* absences. As such, pandemic or crisis protocols should impose clear rules prohibiting unreasonable employee behaviors. Build in procedures for communicating when the workplace is safe.

9. **Language:** Some jurisdictions, including Belgium, France, Indonesia, Mongolia, Quebec, Turkey, and much of Central America, specifically require that employee communications, or at least work rules, be communicated in the local language. Even in places with no "language law," any health/safety plan addressed to local employees should be comprehensible to them.

* * *

For the most part, workplace health and safety is an inherently local topic that depends intrinsically on each local jurisdiction's own workplace health and safety code and workers' compensation system. But in this age of multinational employers' headquarters-driven human resources initiatives, many multinationals find a strong business case to align a few key aspects of workplace health and safety across borders. In particular, there is the "micro" level issue of protecting individual expatriates and business travelers in the international context (such as staff sent into danger zones) and there is the "macro" level issue of propagating company-wide workplace health and safety initiatives (such as cardinal safety rules and pandemic plans) across a multinational's worldwide operations. Account for both issues strategically.

Endnotes

1. *See* S. Green, *Corporate Counsel*, 2/9/11.
2. *See* Riccardi & Wilkinson, *L.A. Times*, 1/28/11.
3. *See, e.g.*, Restatement (Second) of Agency § 492.
4. *See* S. Green, *supra* note 1.
5. *See, e.g., Lewis v. Knappen* (NY 1953); Matter of Scott (NY 1949); *Hartham v. Fuller* (NY App. 1982); *Gabonas v. Pan Am* (NY App. 1951).
6. *See, e.g., Ferris v. Delta* (2d Cir. 2001); *Werner v. NY* (NY 1981); *James v. NY* (NY 1973); *O'Rourke v. Long* (NY 1976); *Barnes v. Dungan* (NY App. 2005); *Briggs v. Pymm* (NY App. 1989).
7. *See, e.g., Sanchez v. Clestra* (NY App. 2004). *As to work on U.S. government contracts, see* Defense Base Act, 42 USC §1651.
8. *See, e.g., Kahn v. Parsons* (DC Cir. 2006).
9. *See, e.g., Lane v. Halliburton* (5th Cir. 2008).
10. Sony's policy is available at: http://www.sony.net/SonyInfo/csr/employees/safety/.

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Ethics Matters

By John Gaal

Q Over the past few months, it seems like I have received an increasing number of unsolicited emails from individuals seeking representation (often in an area of the law in which I do not practice). These generally appear to be legitimate requests for representation (and not some scam) and I assume that they secured my email address from my website. While I have so far responded to each by declining to become involved it seems that the number of these inquiries just keep mounting. Do I even have to respond?

A If they are truly unsolicited requests, you do not have an obligation to respond. Under New York's prior Code of Professional Responsibility, the New York State Bar Association Committee on Professional Ethics had issued at least two formal opinions which outlined a lawyer's obligation to respond to calls and correspondence from *existing clients* and *adversaries*. See NYSBA Formal Opinions 396 and 407. In addition, New York's Statement of Client's Rights expressly provides that a *client* is entitled to have "calls returned promptly." 22 NYCRR Section 1210.1(5).

However, your question focuses on non-clients. In December of 2009, the Committee on Professional Ethics addressed this issue in connection with unsolicited inquiries from incarcerated individuals requesting representation. After highlighting the opinions issued under the former Code, noted above, the Committee concluded that under the new Rules of Professional Conduct, "an unsolicited letter…requesting legal representation does not, without more, reasonably require a response." Citing to *Knigge v. Corvese*, 2001 WL 830669 (S.D.N.Y. 2001), the Committee reaffirmed that the mere receipt of truly unsolicited communications regarding possible representation does not create a lawyer-client relationship. (Interestingly, the Committee declined to address whether the obligations it previously recognized under the Code that a lawyer respond to his or her client and adversaries continue under the Rules, although there is no reason to believe that those obligations do not continue.)

Under the new Rules, certain obligations do attach to individuals appropriately characterized as "prospective clients." *See* New York Rules of Professional Responsibility Rule 1.18. Even if representation is not ultimately undertaken, a lawyer is obligated to keep confidential information provided by a prospective client. In addition, a lawyer is obligated to not undertake representation 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 him in the adverse representation. (In a novel twist for the New York Rules, although the individual lawyer who receives this type of information from a prospective client is precluded [without the prospective client's consent] from undertaking the adverse representation, that lawyer's firm is not necessarily precluded from the adverse representation. Provided the information received by the initial lawyer was limited to that necessary to make a determination on representation and appropriate screening is undertaken, other lawyers in that firm may be adverse even though the adverse matter is the same or substantially related.)

But even Rule 1.18 recognizes that a person 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" is not a prospective client for these purposes. Thus with respect to truly unsolicited communications, even these prospective client rules do not apply.

Still an open issue is what constitutes an "unsolicited" communication. If a lawyer advertises in the Yellow Pages and someone seeking representation, in reliance on that ad, calls that lawyer and leaves a message, is that really an unsolicited communication? Or if an individual responds to a "Contact Us" button on a law firm website, is the resulting communication "unsolicited?" While Formal Opinion 833 declined to answer these questions, it did refer to an earlier opinion of the *Association of the Bar of the City of New York*, N.Y. City 2001-1 as potentially relevant authority. That opinion concluded that in the absence of an explicit warning to the contrary, information sent by a potential client via email in response to a firm's website is to be treated as confidential even though that communication is the initial contact between the individual and the firm, and representation is not later undertaken. In offering this reference, the suggestion seems to be that if a disclaimer exists on the firm's website explaining that no lawyer-client relationship is created by merely sending information to the firm, but rather creation of a relationship requires explicit acknowledgement by the firm (and any information provided prior to that time will not be treated as confidential), then that individual's communication may be considered "unsolicited," and not requiring a response.

At a minimum, your firm's website should have an appropriate disclaimer regarding the creation of a lawyer-client relationship. In the absence of a disclaimer, the ability to contact you through your firm's website might well preclude characterizing the inquiries you receive as "unsolicited." However, until the Committee on Professional Ethics more definitively addresses this point, even with a disclaimer, we are left to speculate that the resulting communication would be considered "unsolicited."

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

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Socially Constructing Non-Statutory Exceptions to the New York At-Will Rule to Employment Law

By Neema J. Kassaii

I. Introduction

The majority of workers in New York, and the greater United States, are subject to the at-will rule to employment law merely by virtue of being an employee with an indefinite employment term. The judicially created at-will rule to employment law states, "where an employment is for an indefinite term it is presumed to be a hiring at-will which may be freely terminated by either party, at any time, for any reason, or for no reason."[1] Thus, most American employees are subject to being freely terminated for any reason, or for no reason at all.

The at-will rule is viewed as an equitable approach to employment termination decisions because it not only grants the employer the right to terminate, at any time, for any reason, but it also provides the employee with that same right; accordingly, an at-will employee has the liberty to quit, at any time, for any reason. There are three exceptions to this judicially created rule in New York; two of them are non-statutory exceptions, which were judicially created, and one is a statutory exception, which was promulgated by the New York State Legislature. The following article's focal point is on the application of the New York at-will rule and the need for expanding the scope of the judicially created exceptions to the rule.

A common inquiry that eludes law students, professors and members of the bar alike, is, "do judges have the legal authority to promulgate exceptions to the at-will rule?" In many instances, the judges simply state that the exceptions can only be created by the Legislature; but, with all due deference, does this make sense, especially considering that the at-will rule was judicially created in the first place? Put differently, if the judicial branch had the authority to promulgate the at-will rule, it should also have the authority to promulgate exceptions to the rule.

The main contention of this article sets forth the notion that judges have the authority and responsibility to promulgate exceptions to the at-will employment rule in New York. Judges should create more exceptions to the at-will rule by taking a pragmatic approach to the judicial decision-making process, which will help ameliorate the negative repercussions of the rigid at-will rule. In turn, judges should take into consideration the current legal, political, societal and ethical trends, which will help determine whether the exigencies of today's workforce demand additional exceptions to the at-will rule.

The main assertion of this article is broken down into four distinct sections, which are numbered II–V. Section II provides a brief history of the at-will employment rule in New York. Section III discusses the exceptions to the at-will rule in New York. Section IV gives a detailed explanation of the intricacies of a pragmatic-based approach to judicial decision making. Lastly, Section V explains why a pragmatic approach will aid judges in promulgating suitable and practical exceptions to the at-will rule in New York.

"[M]ost American employees are subject to being freely terminated for any reason, or for no reason at all."

II. Antecedents of the New York At-Will Employment Rule

The New York at-will employment rule was initially recognized in 1895 in the case of *Martin v. New York Life Insurance Company*.[2] In *Martin,* the plaintiff, Edward Martin, who began his employment term in 1891, made an annual salary of $10,000, on a month-to-month basis.[3] As such, there was not an explicit agreement for the precise employment term between Mr. Martin and the New York Life Insurance Co. After being discharged by the insurance company, Mr. Martin filed suit and argued that his employment relationship was a yearly one, thus entitling him to his "salary for the balance of the year."[4] Mr. Martin further asserted that according to *Adams v. Fitzpatrick*[5]—an 1891 New York case with a similar hiring agreement—"a general hiring means, as a matter of law, an employment from year to year." Thus, the two questions presented in the case of *Martin v. New York Life Insurance Co.* were: (a) whether there was sufficient evidence to establish an annual contract between Mr. Martin and the insurance company; and, (b) whether the general hiring implied employment by the year.[6]

As to the first issue, the court simply stated that the only available evidence was a letter of termination, which it found to be insufficient to prove the existence of an annual contract between Edward Martin and the New York Life Insurance Company.[7] Whether the general hiring implied employment by the year, however, remained an unsettled question in the state of New York. As a result, the court had to parse the various legal precedents and principles regarding the at-will rule in New York in order to determine whether the general hiring of Mr. Martin implied employment by the year.

As a matter of due course, the court in *Martin* analyzed the precedent set forth by *Adams*, then the court proceeded to distinguish the two cases.[8] The court in *Adams,* relying on English precedent, found that the contract was equivalent to a general hiring, which, the court stated, "means from year to year."[9] According to the *Adams* court, the notion that a general hiring means from year to year was bolstered by "the fact that an annual compensation was agreed upon."[10] Under this rationale, it would be logical to assume that Mr. Martin's agreement with New York Life Insurance Company was for annual employment. The court in *Martin*, however, took an unexpected and unusual path in reaching its decision.

Rather than simply relying on the precedent set forth by *Adams*, the *Martin* court inexplicably proceeded to look at a treatise that was authored by Horace C. Wood, a lawyer from Albany, New York. In his treatise, Mr. Wood asserts, "A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve."[11] In other words, according to Wood's treatise, a general hiring for an indefinite duration is terminable at the behest of either party, at *any* time, for any reason.

Surprisingly, instead of following the precedent set by the court in *Adams*—as is required under the doctrine of *stare decisis*—the court in *Martin* proceeded to apply Mr. Wood's treatise, thus holding that "a hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring," and "in all such cases the contract may be put an end to by either party at any time." The court concluded that Mr. Wood correctly stated the rule yet it failed to provide an explanation as to why Mr. Wood's rule trumped the precedent set forth by the court in *Adams*. The court ostensibly followed the Woods' rule simply because it had "been adopted in a number of other states."[12] It has also been suggested that the court was simply adjusting to a *laissez-faire* nineteenth century America.[13] Either way, one thing is clear: the ubiquitous at-will rule to employment law emerged, in 1895, from the bench and chambers of the New York Court of Appeals and not through the legislative process.

III. Exceptions to the At-Will Rule in New York

After *Martin*, the New York at-will rule remained relatively undeveloped for almost a century. Beginning in 1982, however, the New York courts grudgingly began to consider the potential need for various exceptions to the rule. The first such case was *Weiner v. McGraw-Hill, Inc.,*[14] which promulgated the "handbook exception." In *Weiner*, the court held that although a hiring of indefinite duration is terminable at-will, an employer could still be liable for arbitrarily discharging an employee. Namely, an employee can recover for an arbitrary discharge if the employee can establish that the employer had a written policy limiting its right of discharge, which the employee was both aware of and relied detrimentally on in accepting the employment.[15] The court in *Weiner* seemingly believed that it had the responsibility of stepping in and recognizing an exception to an inequitable aspect of the at-will rule.

The only other judicially created exception to the at-will rule in New York is the overly narrow "professional exception," which was set forth in the case of *Wieder v. Skala.*[16] In *Wieder*, the plaintiff, Howard Wieder, worked as a commercial litigation attorney and was associated with the defendant law firm. Wieder discovered that one of the partners of the firm had made several mistakes in a real estate transaction, which the partner sought to cover up. Upon being confronted by Mr. Wieder, the partner "acknowledged that he had lied about the real estate transaction and later admitted in writing that he had committed 'several acts of legal malpractice and fraud and deceit.'"[17]

Mr. Wieder subsequently made the decision to report the partner's misconduct to the Appellate Division Disciplinary Committee as required under DR 1-103(A) of the Code of Professional Responsibility.[18] Ultimately, the firm terminated Mr. Wieder, which was apparently because of his insistence that the firm report the partner's misconduct. As a result, Mr. Wieder brought a wrongful discharge claim against Skala, his employer. In its narrow decision, the New York Court of Appeals held that there is an exception produced by DR 1-103(a) because Mr. Wieder had a duty to the New York State Bar to report the misconduct. Thus, the court in *Wieder* purportedly created a narrow professional exception to the at-will employment rule. The same court, however, has refused to recognize the professional exception in cases that did not involve members of the bar; this had the consequent effect of limiting the *Wieder* exception to cases involving employees who are members of the New York State Bar Association.[19]

The New York courts have had several other opportunities to recognize further exceptions to the at-will rule; however, they have been averse to do so. Many New York courts have stated that such an alteration to the at-will rule is best left to the Legislature.[20] For example, in *Murphy v. American Home Products Corp.,* the New York Court of Appeals had the opportunity to make out a public policy exception to the at-will rule. The employee, Joseph Murphy, was discharged after "his disclosure to top management of alleged accounting improprieties" amounting to over

> $50 million in illegal account manipulations of secret pension reserves which improperly inflated the company's growth in income and allowed high-ranking officers to reap unwarranted

> bonuses from a management incentive plan on the part of corporate personnel.[21]

The court found that "as a matter of policy," whether employers can be "held liable to at-will employees discharged in circumstances for which no liability has existed at common law, are issues better left to resolution at the hands of the Legislature."[22]

Similarly, in *Sabetay v. Sterling Drug, Inc*., the plaintiff asked the court to recognize a public policy exception to the at-will rule. The New York Court of Appeals held that such a considerable change of employment relationships is "best left to the Legislature because stability and predictability in contractual affairs is a highly desirable jurisprudential value."[23] The peculiar aspect about these decisions is that they stand for the proposition that any modification to the at-will rule is best left to the Legislature. Given that it is overtly clear—through *Martin*, *Wieder*, and *Weiner*—that the New York Court of Appeals unilaterally created the at-will rule and the non-statutory exceptions, it is flabbergasting that the New York State courts have decided to voluntarily cede their authority to the Legislature. That said, the court's refusal to recognize further exceptions to the at-will rule is—respectfully speaking—nonsensical; this is especially true when considering the fact that the recognition of such exceptions are clearly within the ambit of the Judiciary's authority, as demonstrated by both *Wieder* and *Weiner*.

The New York State Legislature has also refused to recognize more than one exception to the at-will employment rule, thus further entrenching the rule in New York. Despite the Judiciary's repeated announcements regarding the Legislature's role in recognizing additional exceptions to the rule, it is evident that the Legislature has—for the most part—also refused to act. The sole exception that has been recognized by the New York State Legislature is the "whistleblower exception."[24] The "whistleblower exception" has been interpreted, by New York's highest court, to protect only employees who report violations that endanger public health or safety.[25] As a result, employment terminations that are made in bad faith or stem from the reporting of financial improprieties, such as that in *Sabetay* and *Murphy,* respectively, are not covered by the "whistleblower exception." Consequently, members of the New York Judiciary must stop waiting for the Legislature to act. Rather than waiting for Legislative action, the New York courts should take a pragmatic approach in acknowledging the societal need for additional exceptions and promulgate them as necessary.

IV. Jurisprudence: The Pragmatic Approach to Judicial Decision Making

As mentioned above, a pragmatic approach to judicial decision making will help the courts determine what is best suited for employees in New York. This is especially true in cases where statutory interpretation, history, context, relevant traditions, and precedent are too ambiguous to help with the court's decision. The following section discusses the antecedents to pragmatism and the application of pragmatism in the modern judicial system.

A. Classical Pragmatism

The philosophical theory of American pragmatism emerged in the discussions of the Metaphysical Club, which was a 19th century philosophical discussion group.[26] Charles Sanders Peirce, who was a member of the Metaphysical Club, is known for being the first to coin the term "pragmatism."[27] Peirce used the term "pragmatism" to describe a philosophical approach that was based on a truism: "Consider what effects, that might conceivably have practical bearings, we conceive the object of our conception to have. Then our conception of these effects is the whole of our conception of the object."[28] Pragmatism allowed philosophers to look at the world through a modern lens, which provided a unique and effective outlook regarding the rapid societal and scientific developments of the late nineteenth century. Consequently, many other fields—including the legal field—began adopting and implementing the pragmatic concept, primarily because of its practicality in an ever-changing world.

Justice Stephen Breyer of the United States Supreme Court asserts that the tradition of pragmatism in the law can find its roots "in the American judiciary of the eighteenth century, when, as a leading scholar points out, judicial 'appeals to reason and the nature of things became increasingly common.'"[29] Breyer further posits that eighteenth century judges "took an 'unusually instrumental attitude toward law,' offering 'prudent and pragmatic regulations'" and justifying them by "the reasonableness and utility of their operation."[30] Whether the judiciary began implementing a pragmatic approach in the eighteenth century—as posited by Justice Breyer—or the nineteenth century is of little significance; what is important is that the pragmatic approach began building viability and has proven to be a functional and practical method of jurisprudential thought.

B. Modern Pragmatism

Throughout the 20th century, American society continued to transform and develop; as a result, there was a need for the law to accommodate the new demands of society. Modern legal scholars began to realize that there was a need to relinquish and modify many of the country's laws to meet the exigencies of the time. These scholars believed that it would be detrimental to society to allow the dead hand of the past to control modern demands. In his book, *Postmodern Legal Movements*, Professor Gary Minda of Brooklyn Law School suggests that the societal exigencies of the 1960s called for a new

representational mode. According to Minda, the new representational mode, which was required by the demands of the 1960s, was one that would assist in understanding the relationship between law and society.[31] Minda posits that the ideas of this new representational mode were set forth in two abundantly significant law review articles; namely, Charles Reich's *The New Property* and Ronald Coase's *Problem of Social Cost*.[32]

In their articles, both Reich and Coase set forth the proposition "that traditional notions about legal process and rights had to be revised to accommodate the goals and interests of a legal system operating within the modern bureaucratic state."[33] Reich and Coase's notion of viewing the law through the lens of what society needs replaced the rigid legalist lens that was previously the central principle of modern jurisprudence. The approach taken by Reich and Coase "laid the foundation of a new form of jurisprudence based on a new understanding of the dialectic relation between law and society."[34] Thus, the pragmatic approach to jurisprudential thought continued to gain acceptance in the legal sphere of the 20th century.

C. Postmodern Pragmatism

Today, the pragmatic approach to jurisprudential thought has been rapidly gaining momentum and credibility in the legal world. Notably, pragmatism is the preferred approach taken by several influential jurists, including Justice Stephen Breyer and the Honorable Richard Posner of the United States Court of Appeals for the Seventh Circuit. In his book, *Making Our Democracy Work*, Justice Stephen Breyer asserts that the courts should take a pragmatic approach by regarding the laws as containing steadfast principles that must be practically applied to perpetually changing circumstances.[35] Justice Breyer posits that in order to be successful in maintaining public acceptance, the courts must also utilize conventional legal tools, "such as text, history, tradition [and] precedent," which will undoubtedly "help find proper legal answers."[36] Justice Breyer further argues that when analyzing a legal issue, judges must look at the purpose of the law at issue, and "to its consequences evaluated in light of those purposes."[37] Meanwhile, according to Judge Posner's book, *How Judges Think*, more American judges today "fit the pragmatist label than any other."[38] Judge Posner, like Justice Breyer, asserts that the focal point of legal pragmatism is "pragmatic adjudication and its core is heightened judicial concern for consequences."[39] Judge Posner makes clear his conviction that the rigid approach taken by the legalist school of jurisprudential thought is an impractical method for achieving a workable legal regime; this is likely because it fails to take into consideration the consequences of a particular law. In addition, Judge Posner argues that a pragmatic approach to judicial decision making is most useful in a society that is "normatively homogenous; the more homogenous, and therefore the wider the agreement on what kind of consequences are good and what kind are bad, the greater the guidance that pragmatism will provide."[40]

V. Pragmatic Approach: A Judicial Tool for Ameliorating At-Will Employment in New York

In order to properly assess the societal demand for additional non-statutory exceptions to the at-will rule, judges should first look at the purpose of the rule and the potential good and bad consequences of recognizing an exception to the rule. The original purpose of the at-will rule to employment law was to allow an employee with an indefinite employment term to be free to quit at any time. If such an employee were not free to quit at any time, there would be the possibility of running afoul of the 13th amendment of the U.S. Constitution, which forbids involuntary servitude. On the other hand, the doctrine of mutuality of obligations[41] mandated an equal right of the employer to terminate the employee at any time.[42] Thus, the purpose of the at-will rule was to afford both the employee and the employer the same right to terminate an employment relationship that was for an indefinite term.

The doctrine of mutuality of obligations, however, "has been criticized by commentators who claim that it is based on the false premise that the situation of the employer and the employee in today's society is equivalent."[43] For example, in his influential Columbia Law Review article, Professor Lawrence E. Blades of the University of Kansas School of Law argues that the at-will rule has exacerbated the employer-employee inequality.[44] Blades asserts that the at-will rule would be fair if employees were free to go from job to job with ease; this, however, is not the reality. Rather, because of the employee's "comparative immobility, the individual worker has long been highly vulnerable to private economic power."[45] The workers' inevitable vulnerability will have the consequential effect of creating more concern over job security among at-will employees. As a result of the negative consequences of the at-will rule, the New York Judiciary and Legislature have stepped in on several occasions and recognized exceptions to the rule; these exceptions have alleviated some of the employees' warranted anxieties. The Judiciary and Legislature, however, have surprisingly refused to recognize further exceptions to the at-will rule to meet additional modern-day exigencies and anxieties.

It is evident that the Judiciary's refusal to recognize additional non-statutory exceptions to the at-will rule is solely based on the pretext that such promulgations are out of the ambit of the Judiciary's authority. At the least, this alleged reason is misplaced. If a particular negative consequence could potentially arise due to the at-will

rule, as it did in *Murphy* and *Sabetay* (discussed above), the pragmatic jurist would argue that the Judiciary should be prepared to step in and recognize exceptions accordingly.

For example, in *Murphy*, the New York Court of Appeals had the opportunity to defuse the potent at-will rule by recognizing a public policy exception that would have protected at-will employees who reported economic improprieties on the part of their employer. By refusing to recognize this exception, the *Murphy* court left many at-will employees and society in a difficult predicament. At-will employees could either report the improprieties and risk losing their jobs or they could refrain from doing so, thus subjecting innocent victims to detrimental economic consequences. Resultantly, the court's refusal to recognize a public policy exception in *Murphy* has had the negative consequence of creating a chilling effect on at-will employees who will likely be hesitant to report similar improprieties.

The at-will employees' refusal to report wrongdoings that are not covered by the statutory "whistleblower exception"—which only covers at-will employees who are terminated for reporting improprieties that could be detrimental to the public's health or safety—will inevitably lead to detrimental economic ramifications that will have an effect on society as a whole. One example of the negative economic effect on society is the recent exposure of various Ponzi schemes. It is likely that the financial manipulations that fueled the various Ponzi schemes would have been unveiled if the various employees of the schemers had not been concerned about their job security. Rather than realizing the societal need for protections against economic wrongdoings, the New York Judiciary—in cases such as *Murphy*—has refused to act; in turn, the Judiciary has relinquished its actual authority to the Legislature. The New York State Judiciary must recognize that New Yorkers will be better off if the courts take into account the purposes and consequences of the at-will rule. Upon being presented with a case that has the potential of creating negative consequences for society as a whole, the various judges of the State of New York should realize that they have the responsibility to create additional non-statutory exceptions that will help ameliorate the judge-made at-will rule to employment law.

VI. Conclusion

The "great recession" has created much reason for concern among at-will employees in the state of New York, many of whom are justifiably concerned with job security in a period of economic volatility. For this reason, there is greater need for exceptions to the at-will rule today than there has been in the past. As demonstrated by the case law pertaining to the at-will rule, the courts have been reluctant to recognize exceptions to the rule, oftentimes stating that it is up to the Legislature to act. This approach, however, is unsurprisingly detrimental to the general public. Consequently, judges should take a more active role in creating exceptions to the at-will employment rule in New York by taking into consideration the negative consequences of their holding in relation to society.

In order to properly meet their responsibilities, the various judges of the State of New York should look at the current state of the at-will rule to employment law and take into consideration the ramifications, or as Justice Breyer and Judge Posner put it, the "consequences" of the law. Specifically, judges should take a pragmatic approach in assessing the needs of society. A pragmatic approach will help judges meet the exigencies of today's society by recognizing exceptions to the archaic and inequitable at-will rule.

"[T]he courts have been reluctant to recognize exceptions to the [at-will] rule, oftentimes stating that it is up to the Legislature to act. This approach, however, is unsurprisingly detrimental to the general public."

Endnotes

1. *See Martin v. New York Life Insurance Company*, 148 N.Y. 117 (1895).
2. *Martin v. New York Life Insurance Company*, 148 N.Y. 117, 119 (1895).
3. *See id*.
4. *Id*.
5. See *Adams v. Fitzpatrick*, 125 N.Y. 124 (1891).
6. *Id.* at 120.
7. *Id.*
8. *See Adams v. Fitzpatrick*, 125 N.Y. 124 (1891).
9. *Id*. at 127.
10. *Id*. at 128.
11. *Martin v. New York Life Insurance Company*, 148 N.Y. 117, 121 (1895).
12. *Id.*
13. *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 462 (1982).
14. *See id*.
15. *See id.*
16. *See Wieder v. Skala*, 80 N.Y.2d 628 (1992).
17. *Id*. at 632
18. DR 1-103 (A) provides: "A lawyer possessing knowledge, not protected as a confidence or secret, of a violation of DR 1-103 that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness in other respects as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."
19. See *Horn v. New York Times*, 2001 WL 36085201 (held: physician is not subject to the same ethical duty as attorneys, thus physicians are not covered by the *Wieder* exception to the at-will rule.)

20. E.g. *Sabetay v. Sterling Drug, 69 N.Y.2d 329* (1987); *Murphy v. American Home Products*, 448 N.E. 2d 86 (1983).
21. *Murphy v. American Home Products*, 448 N.E. 2d 86, 87 (1983).
22. *Id.* at 89.
23. *Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329, 336 (1987).
24. See Labor Law § 740.
25. See *Remba v. Federation Employment & Guidance Serv.*, 545 N.Y.S.2d 140 (N.Y. App. Div. 1989), *aff'd*, 559 N.E.2d 655 (N.Y. 1990).
26. Catharine Pierce Wells, *Old-Fashioned Postmodernism and the Legal Theories of Oliver Wendell Holmes, Jr.*, 63 BKNLR 59, 63(1997).
27. See *id.*
28. Charles Sanders Peirce, *The Collected Papers of Charles Sanders Peirce* 5.402 (C. Hartshorne & P. Weiss eds., 1934).
29. See Stephen Breyer, *Making Our Democracy Work* (Alfred A. Knopf, New York 2010).
30. *Id.*
31. See Gary Minda, *Postmodern Legal Movements*, 75 (New York University Press, New York and London 1995).
32. *Id.* at 70.
33. *Id.*
34. *Id.*
35. See Stephen Breyer, *Making Our Democracy Work* (Alfred A. Knopf, New York 2010).
36. *Id.* at 88.
37. *Id.*
38. *See* Richard A. Posner, *How Judges Think*, 230 (Harvard University Press, Cambridge, MA and London, England 2008).
39. *Id.* at 238.
40. *Id.* at 241.
41. "If the employee is free to quit at any time, then the employer must be free to dismiss at any time." *Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d 1057, 1061 (5th Cir. 1981).
42. *Id.*
43. *Id.*
44. Lawrence Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 CLMLR 1404, 1406 (1967).
45. J. K. Galbraith, *American Capitalism* 114 (2d ed. 1956).

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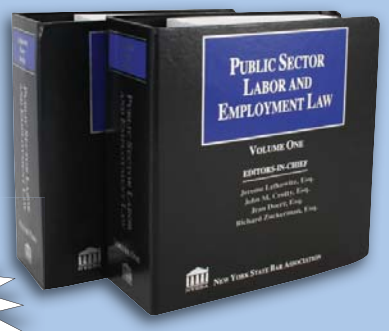

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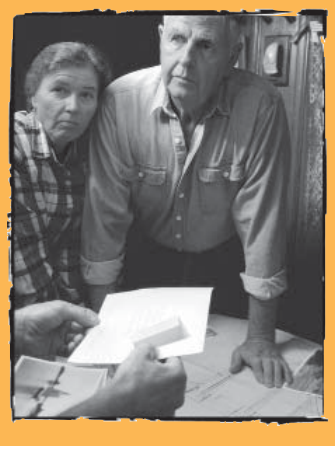

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