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Inside

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Message from the Section Chair

By Cara E. Greene

It has been an active summer and fall for the Labor and Employment Law Section. In August we visited Citifield as a group to cheer on the Mets and get to know our fellow Section members better. In October, we traveled to Montreal for the Fall Meeting; highlights included our keynote address from Canadian Supreme Court Justice Clément Gascon, cutting-edge CLE panels, and walking tours of the Old Quarter and Le Plateau Mont Royal street murals. Planning is complete for the January Annual Meeting, where Section members will have another opportunity to receive substantive, high-quality CLE. And all of this is made possible through the efforts of Section members.

The New York State Bar Association is a member-driven organization, and that is equally true of the Labor and Employment Law Section. It is the 2,000-plus members who dictate the focus of the Section, and it is the members' efforts—together with the support of NSYBA's capable staff—that ensure its success.

As we head into a new year, I encourage each of you to consider where you would like to see the Section go in the future. Is there a CLE webinar you would like to see presented? Do you have an idea for our next great networking event? Would you like to mentor a law student or a newly admitted attorney? Have you written an article that other Section members would find interesting? Is there a legislative matter you think the Section should address? Reach out to me or any member of the Executive Committee with your ideas.

And in this new year, I urge each of you to consider what you can contribute to move us forward as a Section. Help organize that CLE panel. Volunteer with the Membership Committee to plan that next great networking event. Give your time as a mentor. Write that article and forward it to our *Journal* editors. Join a substantive committee and monitor legislative developments.

Thank you to all our Section members who made 2018 such a success, and best wishes for a healthy and happy New Year to each of you.

Cara E. Greene

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Calibrating Lady Justice's Scales After 73 Years: A Fair Reading of the Fair Labor Standards Act

By Howard M. Wexler and Vlada Feldman

Introduction

Courts have been called upon to interpret exemptions to the Fair Labor Standards Act (FLSA)[1] more often than to interpret the text of the act itself. In so doing, irrespective of the exemption being examined, courts have often quoted unsupported dicta from *A. H. Phillips, Inc. v. Walling*[2] which stated that while the FLSA should be construed broadly, its exemptions should be construed narrowly. Recently, however, in *Encino Motorcars, LLC v. Navarro*,[3] the Supreme Court held that nothing in the text of the FLSA provided support for this interpretation and that therefore both the statute and its exemptions should be given a fair reading. Although it is uncertain what effect *Encino Motorcars* will ultimately have on FLSA interpretation, two recent Second Circuit decisions, *Munoz-Gonzalez v. D.L.C. Limousine Service, Inc.*[4] and *Flood v. Just Energy Marketing Corp.*,[5] suggest that *Encino Motorcars* may go a long way in refocusing courts asked to make exempt status determinations.

In this article we will examine the origins of the disjunctive FLSA interpretation. We will then discuss the significance of *Encino Motorcars*. Finally, we will address the tide-shift evidenced by the holdings in *Munoz-Gonzalez* and *Flood*.

Background

In 1945, in *A.H. Phillips,* the Supreme Court of the United States addressed whether employees who worked "in the warehouse and central office of an interstate grocery chain store system" were exempt under the "retail establishment" exemption to the FLSA.[6] In holding that the exemption did not apply, the Court concluded that based on the legislative history, Congress intended to exempt small local retail establishments such as corner grocery and drugstores and thus the petitioner's claim was "obvious[ly]" "merit[less]."

More important than the analysis of the exemption, however, was the Court's quoting of President Roosevelt's message to Congress in 1924. On the basis of this message, the Court concluded that the FLSA is a "humanitarian and remedial" piece of legislation, which should be construed broadly. However, the Court also noted that the exemptions themselves must be "narrowly construed" so as not to "extend an exemption to other than those plainly and unmistakably within its terms." To do otherwise, the Court held, would be to "abuse the interpretative process and to frustrate the will of the people."

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Despite the lack of support and citation for this pronouncement, this dicta has withstood the test of time and its effects have been far-reaching. Plaintiffs have wielded this disjunctive interpretation as a sword against employers in the context of wage and hour litigation. In cases where courts find in favor of the employee, this dicta is overwhelmingly quoted.[7]

"Perhaps the most significant contribution of the opinion, however, was the Court's discussion concerning the Ninth Circuit's reference to the oft-cited dicta that FLSA exemptions should be construed narrowly."

Supreme Court Re-Interprets the FLSA

Seventy-three years following *A.H. Phillips* and countless citations to the dicta therein, the Court granted certiorari in *Encino Motorcars* to determine whether service advisers were exempt from overtime. While the district court concluded that service advisers were covered by the exemption and thus not entitled to overtime,[8] the Ninth Circuit instead deferred to the Department of Labor's 2011 interpretation of the FLSA exemption that "interpreted 'salesman' to exclude service advisor."[9] The Court vacated the Ninth Circuit's decision and remanded the case, finding that the Department's rule was "procedurally defective" because it disavowed long-held "reliance interests in the automobile industry . . . without a sufficiently reasoned explanation."[10] On remand, the Ninth Circuit once again concluded that the exemption did not

include service advisers.[11] This time, the Ninth Circuit used the distributive canon to reason that "Congress intended the gerunds—selling and servicing—to be distributed to their appropriate subjects—salesman, partsman, and mechanic. A salesman sells; a partsman services; and mechanic services."[12] Finally, consistent with the methodology of other courts that reached plaintiff-friendly conclusions, the Ninth Circuit noted that exemptions to the FLSA should be construed narrowly.

"The Second Circuit once again reiterated that although "[u]ntil recently, it was a rule of statutory interpretation [to] . . . narrowly construe an exemption to the FLSA in order to effectuate the statute's remedial purpose ..."

The Supreme Court granted certiorari once again, this time to answer whether the FLSA exemption[13] for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles" at a covered dealership "applie[d] to service advisors—employees at car dealerships who consult with customers about their servicing needs and sell them servicing solutions." In a 5-4 opinion penned by Justice Thomas, joined by the then-newest member of the court, Justice Gorsuch, the Court reversed the Ninth Circuit once again and held that service advisors were salesman primarily engaged in servicing of automobiles and thus exempt from overtime. In arriving at its conclusion, the Court applied the plain meaning canon to the words "salesman" and "servicing," giving the terms their ordinary meaning.

Perhaps the most significant contribution of the opinion, however, was the Court's discussion concerning the Ninth Circuit's reference to the oft-cited dicta that FLSA exemptions should be construed narrowly. Taking this dicta head-on finally, Justice Thomas wrote:

> [w]e reject this principle as a useful guidepost for interpreting the FLSA. Because the FLSA gives no "textual indication" that its exemptions should be construed narrowly, "there is no reason to give them anything other than a fair (rather than a narrow) interpretation." . . . [T]he FLSA has over two dozen exemptions in § 213(b) alone, including the one at issue here. These exemptions are as much a part of the FLSA's purpose as the overtime-pay requirement. . . . We thus have no license to give the exemption anything but a fair reading.

Thus, 73 years following its birth, Justice Thomas dealt a swift blow to this disjunctive pronouncement. Indeed, from this opinion, it would seem that the majority of the Court recognized that "a fair reading," one which does not tip the scales against the applicability of FLSA exemptions, would not defeat the "humanitarian and remedial" character of the FLSA.

Second Circuit Follows Suit

The Second Circuit has started to follow the Court's *Encino Motorcars* holding, as evidenced by its recent holdings in *Munoz-Gonzalez* and *Flood*. In *Munoz-Gonzalez*, a group of limousine drivers argued that DLC, a "chauffeured car service," violated the FLSA by not compensating them for the overtime hours they worked. When the district court granted summary judgment in favor of DLC, Munoz-Gonzalez appealed, arguing that DLC was an "airport limousine service" and therefore did not qualify for the taxicab exemption.[14]

In deciding whether the taxicab exemption applied to the drivers, the Second Circuit applied the plain meaning canon, just as the Court had in *Encino Motorcars*. Based on the ordinary meaning of the word "taxicab," the Second Circuit concluded that a "taxicab" is "(1) a chauffeured passenger vehicle; (2) available for hire by individual members of the general public; (3) that has no fixed schedule, fixed route, or fixed termini" and therefore DLC qualified for the exemption and the drivers were exempt from overtime pay.

Notably, in affirming the grant of summary judgement in favor of DLC, the Second Circuit rejected Munoz-Gonzalez's admonition to construe the FLSA narrowly. Instead, the opinion cited the holding in *Encino Motorcars* that FLSA exemptions should be construed "'fair[ly]' . . . with full attention to the text" instead of in favor of the plaintiff. In the words of the Second Circuit: "a taxicab is a taxicab is a taxicab."

In *Flood*, Kevin Flood, a door-to-door salesman, sued his employer, Just Energy Marketing Corporation ("Just Energy"), alleging that the company violated the FLSA by failing to pay him and the class that he hoped to represent overtime for the weeks that they worked in excess of 40 hours. The district court agreed with Just Energy's argument that Flood was not entitled to overtime pay based on the "outside salesman" exemption.[15] On appeal, the Second Circuit upheld the district court's ruling and rejected Flood's argument after quoting Flood's own statement: "Sales is 'what I do.'"

The Second Circuit once again reiterated that although "[u]ntil recently, it was a rule of statutory interpretation [to] . . . narrowly construe an exemption to the FLSA in order to effectuate the statute's remedial purpose," the Supreme Court rejected that view in *Encino Motorcars* because "exemptions under the FLSA are 'as much a part of the FLSA's purpose as the overtime-pay requirement.'"

Outlook for the Future

It is impossible to say with absolute certainty that the holdings in *Munoz-Gonzalez* and *Flood* would be completely different without the Supreme Court's holding in *Encino Motorcars*. However, based on the fact that the Second Circuit decided both cases on the same day and that the court rejected plaintiff Munoz-Gonzalez's specific admonition to construe the FLSA narrowly, it is clear that the Second Circuit—and other courts around the country[16]—is adopting the new principle enunciated by the Supreme Court to give the FLSA a fair reading.

Endnotes

1. 29 U.S.C. §§ 201 *et seq.*
2. 324 U.S. 490, 65 S. Ct. 807 (1945).
3. 138 S. Ct. 1134 (2018).
4. No. 17-2438-cv, 2018 U.S. App. LEXIS 26628 (2d Cir. Sep. 19, 2018).
5. No. 17-0546-cv, 2018 U.S. App. LEXIS 26629 (2d Cir. Sep. 19, 2018).
6. 29 U.S.C. § 213 (a) (2) (repealed 1989).
7. *See, e.g.*, *Karropoulos v. Soup du Jour, Ltd.*, 128 F. Supp. 3d 518 (E.D.N.Y. 2015) (noting that "exemptions to the FLSA are narrowly construed against employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit") (internal quotations omitted); *Blotzer v. L-3 Communs. Corp.*, No. CV-11-274-TUC-JGZ, 2012 U.S. Dist. LEXIS 173126 (D. Ariz. Dec. 5, 2012) (finding that "FLSA exemptions are to be narrowly construed against employers and are to be withheld except as to persons plainly and unmistakably within their terms and spirit").
8. *Navarro v. Mercedes Benz of Encino*, No. CV 12-08051-RGK (MRWx), 2013 U.S. Dist. LEXIS 188961 (C.D. Cal. Jan. 25, 2013).
9. 138 S. Ct. 1134, 1138 (2018) (citing 76 Fed. Reg. 18832, 18859 (2011) (codified at 29 CFR §779.372(c))).
10. *Id*. at 1139.
11. *Navarro v. Encino Motorcars, LLC*, 845 F.3d 925 (9th Cir. 2017).
12. *Id*. at 934.
13. 29 U.S.C. § 213(b)(10)(A).
14. 29 U.S.C. § 213 (b)(17).
15. 29 U.S.C. § 213 (a)(1).
16. *See, e.g.*, *Mosquera v. MTI Retreading Co.*, No. 17-2366, 2018 U.S. App. LEXIS 22462, at *6 n.1 (6th Cir. Aug. 14, 2018) (finding that employee was exempt under the professional exemption and noting that "previous decisions of this [c]ourt have narrowly construed FLSA exemptions against the employers seeking to assert them. But, *Encino Motorcars* explicitly rejected this principle.") (internal quotations and citations omitted); *Friedman v. Nat'l Indem. Co.*, No. 8:16-CV-258, 2018 U.S. Dist. LEXIS 64538 (D. Neb. Apr. 13, 2018) (noting that "the ultimate question of whether an employee's particular activities excluded them from the overtime benefits is a question of law [a]nd as the Supreme Court has recently made clear, exemptions to the overtime requirement are to be given a fair reading. That is, those exemptions are not to be construed narrowly.") (internal citations and quotations omitted).

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The Application of *Daimler AG's* Principal-Place-of-Business Standard in New York Courts

By John R. Higgitt

Personal jurisdiction is a significant topic in the realm of civil procedure. That topic has generated many important decisions by the United States Supreme Court, such as *Pennoyer v. Neff*,[1] *International Shoe Co. v. State of Washington, Office of Unemployment Compensation and Placement*,[2] and *Goodyear Dunlop Tires Operations, S.A. v. Brown*.[3] Add to that list the Court's 2014 decision in *Daimler AG v. Bauman*,[4] which had a lot to say about where corporations may be haled into court. This article will provide a snapshot of personal jurisdiction law, generally; review the *Daimler AG* litigation and the Supreme Court's decision resolving it; examine the principal-place-of-business aspect of the *Daimler AG* decision; and discuss some of the procedural impacts of the decision on New York civil procedure.

Personal Jurisdiction, Generally

To issue a judgment, order or decree that is binding on and enforceable against a defendant, a court must have personal jurisdiction over that party.[5] In New York, personal jurisdiction comprises three elements:[6] (1) a basis upon which to assert the court's jurisdiction over the defendant;[7] (2) proper service of process on the defendant;[8] and (3) proper commencement of the action.[9] Our focus here is on the first element. (Also, the court must have subject matter jurisdiction over the action. More on that below.)

The requirement that a court have a basis to assert personal jurisdiction over a defendant comes from the federal Constitution. Due process requires that, before a court asserts its jurisdiction over a defendant, the defendant must have sufficient contacts with the forum state.[10] There are two types of basis jurisdiction. General (or all-purpose) jurisdiction permits a court to hear and determine any and all claims asserted against the defendant, regardless of where the claims arose and regardless of whether the claims have any connection to the forum state.[11] Specific (or long-arm) jurisdiction allows a court to adjudicate a forum-related claim against a defendant with certain ties to the forum.[12]

For approximately 100 years, New York law dictated that a corporation that was "present" or "doing business" in the state was amenable to general, all-purpose jurisdiction.[13] A corporation was therefore subject to our courts' general jurisdiction if it was "engaged in such a continuous and systematic course of doing business here as to warrant a finding of its presence in this jurisdiction."[14]

That familiar standard was displaced by the United States Supreme Court's January 14, 2014 decision in *Daimler AG v. Bauman*.[15]

Daimler AG

In 2004, 22 Argentinian residents commenced an action in the United States District Court for the Northern District of California against Daimler AG, a German corporation with headquarters in Stuttgart, Germany, that manufactures Mercedes-Benz vehicles.[16] The plaintiffs alleged that during Argentina's 1976-1983 "Dirty War," Daimler AG's Argentinian subsidiary collaborated with Argentinian state security forces to commit atrocities against certain workers at the subsidiary.[17] The plaintiffs sought to hold Daimler AG vicariously liable for the alleged tortious conduct of its Argentinian subsidiary.[18]

The plaintiffs claimed that the California courts[19] could exercise personal jurisdiction over the German corporation Daimler AG because an American-based subsidiary of Daimler AG had significant contacts with California, that those contacts were imputable to Daimler AG, and that, by virtue of those imputed contacts, Daimler AG was subject to the California courts' general jurisdiction.[20] The United States subsidiary was a Delaware limited liability corporation that maintained its principal place of business in New Jersey, but had substantial and continuous contacts with California (e.g., the subsidiary had multiple facilities in California, was the largest supplier of luxury vehicles to the California market, derived substantial revenue from sales in California).[21]

Daimler AG moved to dismiss the complaint for want of personal jurisdiction; the California courts, said Daimler AG, had no basis upon which to assert jurisdiction over it.[22] The District Court agreed and granted the motion, but the Ninth Circuit reversed the dismissal of the complaint. "In sustaining the exercise of general jurisdiction over Daimler [AG], the Ninth Circuit relied on an agency theory, determining that the [United States subsidiary] acted as Daimler [AG]'s agent for jurisdictional purposes and then attributed [the United States subsidiary]'s contacts to Daimler [AG]."[23]

The Supreme Court granted certiorari. In its opinion, the Court stated that "[t]he question presented [wa] s whether the Due Process Clause of the Fourteenth Amendment preclude[d] the District Court [in California] from exercising jurisdiction over Daimler AG ..., given the absence of any California connection to the atrocities,

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perpetrators, or victims described in [the plaintiffs'] complaint."[24] The Court was focused on whether the California courts[25] had general jurisdiction over Daimler AG, as the plaintiffs did not assert that those courts had specific jurisdiction over the German corporation.[26]

Stressing that it was assuming for the purposes of resolving the appeal that the United States subsidiary's California contacts were imputable to Daimler AG, the Supreme Court held that the California courts lacked general jurisdiction over Daimler AG.[27] General jurisdiction, said the Court, may be exercised over a corporation only if it is "at home" in the forum.[28] "[T]he place of incorporation and principal place of business are paradig[m] bases for general jurisdiction over a corporation."[29] That is to say, a corporation is "at home" in the state in which it was incorporated and in the state in which the corporation maintains its principal place of business.[30] (The Court did "not foreclose the possibility that in an exceptional case...a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State.")[31] Because California was neither Daimler AG's place of incorporation nor its principal place of business, the German corporation was not "at home" in the Golden State.

The Court rejected the notion that general jurisdiction can be exercised over a corporation on the basis that it "engages in a substantial, continuous, and systematic course of business" in the forum,[32] the test New York courts had been using to ascertain whether general jurisdiction exists over a corporation.[33]

Principal Place of Business

The first paradigm basis identified by the *Daimler AG* Court—the place of incorporation (i.e., the state with which the corporation has filed its certificate of incorporation or other similar document)—is usually readily ascertainable. Let's focus on the second place in which a corporation is "at home": the principal place of business of a corporation.

The *Daimler AG* Court did not define expressly what constitutes a corporation's principal place of business for the purpose of determining whether a corporation is "at home" in the forum state. But, in noting that the paradigm bases for general jurisdiction "have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable,"[34] the Court cited to its prior decision in *Hertz Corp. v. Friend*,[35] a familiar face on the subject-matter-jurisdiction scene.

As noted above, a court needs subject matter jurisdiction over an action and personal jurisdiction over the defendant.[36] Personal jurisdiction relates to whether a court can exercise its power over a particular defendant and, therefore, render a binding and enforceable judgment, order or decree against that defendant.[37] Personal jurisdiction was the subject of the *Daimler AG* decision.

Subject matter jurisdiction deals with the separate concern of whether a particular court has the authority to adjudicate a particular type of action or proceeding.[38] In this regard, the question is whether the court has the competence, by virtue of a constitutional provision or statute, to entertain a given action or proceeding.

A federal district court has subject matter jurisdiction over actions involving federal questions and actions in which there is diversity of "citizenship" among the parties ("diversity jurisdiction").[39] To ascertain the citizenship of a corporation and evaluate whether diversity jurisdiction exists in an action involving a corporation, 28 U.S.C. § 1332(c)(1) must be consulted. That provision states that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." What constitutes a corporation's "principal place of business" under the statute? *Hertz Corp.* considered and answered that question.

The plaintiffs in *Hertz Corp.* were citizens of California and they sued the defendant corporation in California state court, seeking damages for violations of that state's labor law.[40] The defendant removed[41] the action to federal court on the basis that diversity jurisdiction existed because the plaintiffs and the defendant were citizens of different states.[42] The defendant, which was not incorporated in California,[43] asserted that its principal place of business was in New Jersey, where both the defendant's corporate headquarters were located and the "core executive and administrative functions" were performed.[44] The defendant stated that it also had significant administrative operations in Oklahoma.[45]

With respect to its California contacts, the defendant acknowledged that the State accounted for (1) 273 of the defendant's 1,606 car rental locations; (2) approximately 2,300 of the defendant's 11,230 employees; (3) approximately $811 million of the defendant's $7.371 billion annual revenue; and (4) approximately 3.8 million of the defendant's 21 million annual rental transactions.[46] The plaintiffs argued that the defendant's significant contacts with California rendered it a "citizen" thereof; that the parties were citizens of the same state; and, therefore, the District Court lacked diversity jurisdiction over the matter.[47]

In evaluating whether diversity jurisdiction existed in the matter, the District Court employed the analysis dictated by Ninth Circuit precedent, which required the *nisi prius* to identify the defendant's principal place of business by first determining the amount of the defendant's business activity state by state.[48] Next, the District Court had to determine whether the amount of activity was "significantly larger" or "substantially predominated" in one state.[49] If it did, then that state was the defendant's principal place of business.[50] If the amount of the defen-

dant's business activity was not "significantly larger" or did not "substantially predominate" in one state, the defendant's principal place of business was the defendant's "nerve center"—the place where the majority of its executive and administrative functions were performed.[51] Applying that analysis, the District Court found that "the differential between the amount of th[e] [defendant's business] activities in California and the amount in the next closest state was significant."[52] Therefore, the court determined that the defendant's principal place of business was California, that diversity of citizenship among the parties was lacking, and that the court lacked subject matter jurisdiction over the action.[53] The District Court remanded the action to the California state courts.

The Ninth Circuit affirmed the order of the District Court remanding the action to the California state courts. Because different tests had emerged for identifying a corporation's "principal place of business" for the purposes of applying the diversity jurisdiction statute, the Supreme Court granted certiorari.[54]

After reviewing the history of diversity jurisdiction—particularly the 1958 amendment to 28 U.S.C. § 1332(c)(1) that added the principal-place-of-business form of corporate citizenship—and surveying the various tests and analyses set forth by the courts for ascertaining a corporate defendant's principal place of business, the Supreme Court held that a corporation's principal place of business is "the place where [its] officers direct, control, and coordinate the corporation's activities."[55] This place is the corporation's "nerve center."[56] The Court observed that "in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control and coordination."[57]

The Supreme Court endorsed the "nerve center" rule for three principal reasons. First, the plain language of 28 U.S.C. § 1332(c)(1)—"the State where [the corporation] has its principal place [of business]"— suggested that the main, prominent or leading single place of business within a state is the corporation's principal place of business.[58] Second, convoluted jurisdictional rules should be eschewed: "[c]omplex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims."[59] Complicated jurisdictional rules, found the Court, frustrate predictability regarding the proper forum for a potential action, and consume judicial resources.[60] Third, the legislative history of the 1958 amendment to § 1332 indicated that the test for ascertaining the citizenship of a corporation should be feasible, and easy to apply.[61]

The $75,000 question:[62] Does the *Hertz Corp.* Court's principal-place-of-business test, which is employed to ascertain whether a federal court has *subject matter jurisdiction* based on diversity of citizenship, apply in gauging a corporation's principal place of business under *Daimler AG* and, therefore, whether a court has *personal jurisdiction* over a corporation? Numerous district court decisions from throughout the country and a New York State Supreme Court Justice have applied *Hertz Corp.'s* "nerve center" test to ascertain a corporation's principal place of business under *Daimler AG.*[63]

Daimler AG in New York State Courts

A corporate defendant is sued in a New York State court. The defendant is not incorporated in New York, believes that its "nerve center" is in a state other than New York, and suspects that the plaintiff is relying on general jurisdiction in an effort to get the defendant before the New York State court. A CPLR 3211(a)(8)[64] motion to dismiss the complaint for want of personal jurisdiction may be used to bring to a New York court's attention the issue of whether general jurisdiction exists over a corporate defendant.[65]

The CPLR 3211(a)(8) motion must be made within the defendant's answering time. Alternatively, the paragraph 8 objection may be asserted in the defendant's answer and made the subject of a subsequent application (e.g., summary judgment motion).[66] Like most CPLR 3211(a) grounds for dismissal, a paragraph 8 defense may be waived.[67] "An objection based upon... paragraph eight... is waived if a [defendant] moves on any of the grounds set forth in subdivision (a) without raising such objection or, if having made no objection under subdivision (a), [the defendant] does not raise such objection in the [answer]."[68]

There is no requirement in New York State court practice that a plaintiff allege in the complaint a basis for a court's exercise of personal jurisdiction over a defendant.[69] However, the plaintiff must set forth and support a basis for personal jurisdiction if confronted with a CPLR 3211(a)(8) motion: "The pleading burden lies ... with the defendant to raise lack of personal jurisdiction as a defense in a pre-answer motion to dismiss or in the answer. If the defendant moves to dismiss due to the absence of a basis of personal jurisdiction, the plaintiff must come forward with sufficient evidence, through affidavits and relevant documents, to prove the existence of jurisdiction."[70]

Where personal jurisdiction is contested by the defendant on a CPLR 3211(a)(8) motion, the ultimate burden of proof on the issue rests with the plaintiff.[71] That burden is discharged by the plaintiff making a prima facie showing that the court has personal jurisdiction over the defendant.[72]

A party confronted with a pre-answer, pre-discovery CPLR 3211(a)(8) motion may not possess information relevant to ascertaining a corporation's "nerve center." CPLR 3211(d) provides that, "[s]hould it appear from affidavits submitted in opposition to a motion made under [CPLR 3211(a) or (b)] that facts essential to justify opposition may exist but cannot then be stated, the court may

deny the motion, allowing the moving party to assert the objection in his [or her] responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just." The burden is on the party opposing the CPLR 3211 motion to persuade the court that facts "may exist" that would defeat the motion; the party need not convince the court that the facts actually exist.[73] Mere hope, however, that discovery will unearth useful information is insufficient to warrant invocation of CPLR 3211(d).[74]

In *Peterson v. Spartan*, the Court of Appeals stated that subdivision (d) "protects the party to whom essential jurisdictional facts are not presently known, especially where those facts are within the exclusive control of the moving party."[75] When a party invokes subdivision (d) in opposition to a CPLR 3211(a)(8) motion and both makes a "sufficient start" in the opposition papers and shows its jurisdictional position to be non-frivolous, the party may have the opportunity to demonstrate that the movant is subject to the jurisdiction of New York courts.[76]

If a court determines that a party ought to get the benefit of jurisdictional discovery, the court may (1) deny the CPLR 3211(a)(8) motion and allow the movant to assert the lack-of-personal-jurisdiction defense in its answer;[77] (2) direct a continuance of the motion pending the completion of jurisdictional discovery;[78] or (3) deny the CPLR 3211(a)(8) motion with leave to renew upon the completion of the discovery.[79]

Robins

A decision of the First Department, *Robins v. Procure Treatment Center, Inc.*,[80] demonstrates CPLR 3211(d) at work in the context of a motion to dismiss for want of general, personal jurisdiction over a corporate defendant.

The plaintiff in Robins suffered from a non-malignant brain tumor that required surgery.[81] She subsequently underwent proton radiation therapy over a two-month period in New Jersey at a facility owned and operated by defendant PPM.[82] Approximately five months after the therapy terminated, plaintiff experienced blindness; efforts to restore her vision were not successful.[83] The plaintiff's blindness was apparently caused by radiation toxicity of her optic nerves that occurred as a result of the therapy.[84] The plaintiff commenced a damages action against the defendants in Supreme Court, N.Y. County.

PPM moved to dismiss the complaint as against it under CPLR 3211(a)(8) on the ground that no basis existed upon which Supreme Court could assert its jurisdiction over PPM.[85]

In opposition to the motion,[86] the plaintiff alleged that PPM, which was incorporated in Delaware, had its principal place of business in New York.[87] The plaintiff pointed to a filing PPM made with the State of New Jersey's Department of the Treasury in which PPM listed as its "Main Business or Principal Business Address" an address on Lexington Avenue in Manhattan.[88] (For its part, PPM maintained that its principal place of business was situated in New Jersey.)[89]

In analyzing the issue of whether PPM's principal place of business was in New York and, concomitantly, whether the court had general jurisdiction over PPM, Supreme Court, New York County, endorsed the *Hertz Corp.* Court's "nerve center" test to ascertain PPM's principal place of business.[90] Highlighting PPM's filing with New Jersey's treasury department, the court found that the plaintiff had made a "sufficient start" in demonstrating that general jurisdiction exists over PPM.[91] The court therefore denied PPM's motion to dismiss.[92]

The First Department affirmed the motion court's order denying PPM's CPLR 3211(a)(8) motion. The appellate court wrote, in pertinent part, that

> Plaintiff made a "sufficient start" in establishing that New York courts have jurisdiction over PPM under CPLR 301 ... to be entitled to disclosure pursuant to CPLR 3211(d) (*see Peterson v. Spartan Indus.*, 33 N.Y.2d 463, 467 [1977]). With regard to general jurisdiction, codified in CPLR 301, it is not clear whether PPM's "affiliations with the State New York are so continuous and systemic as to render it essentially at home in the State" (*Daimler AG v. Bauman*, ___U.S.___, 134 S. Ct. 746, 761 [2014] [internal brackets omitted]). However, the record contains a State filing in which PPM identified itself as having a principal place of business in Manhattan – "tangible evidence" upon which to question PPM's claims to the contrary (*see SNS Bank v. Citibank*, 7 A.D.3d 352, 354 [1st Dept. 2004]).[93]

The personal-jurisdiction-oriented discovery permitted by the *Robins* Court is similar to the discovery allowed by federal courts when considering whether subject matter diversity jurisdiction exists in an action involving a corporate defendant under *Hertz Corp*.[94]

Conclusion

Daimler AG changed personal jurisdiction jurisprudence, resulting in the new "at home" inquiry and its accompanying "paradigm bases" for determining whether a corporation is subject to the general jurisdiction of our courts. The principal-place-of-business basis will, as evidenced by the *Robins* decision, generate motion practice in New York State courts. That motion practice will occur under, among other statutes, CPLR 3211, which contains conditions, limitations and features that must be reviewed and considered. Civil practitioners should be familiar with the changes wrought by *Daimler AG* and the procedural impacts of the decision.

Endnotes

1. 95 U.S. 714 (1877).
2. 326 U.S. 310, 66 S.Ct. 154 (1945).
3. 564 U.S. 915, 131 S.Ct. 2846 (2011).
4. 571 U.S. 117, 134 S. Ct. 746.
5. A plaintiff submits to the jurisdiction of the court by bringing an action. The concern therefore is whether the court has personal jurisdiction over the defendant. *See* Siegel & Connors, New York Practice § 58 (6th ed).
6. A defect relating to personal jurisdiction may be waived by a defendant (CPLR 3211[e]), whereas an objection to a court's subject matter jurisdiction – the court's power to hear and decide a particular type of action – cannot. *Lacks v. Lacks*, 41 N.Y.2d 71, 390 N.Y.S.2d 875, 359 N.E.2d 384 (1976); *see Fry v. Village of Tarrytown*, 89 N.Y.2d 714, 658 N.Y.S.2d 205, 680 N.E.2d 578 (1997).
7. *See* Siegel & Connors, New York Practice §§ 58, 80-99, *supra* note 5.
8. *See id*., §§ 58, 66-76B, *supra* note 5.
9. *See Goldenberg v. Westchester County Health Care Corp*., 16 N.Y.3d 323, 921 N.Y.S.2d 619, 946 N.E.2d 717 (2011); *Fry v. Village of Tarrytown*, *supra* note 6; Siegel & Connors, New York Practice §§ 58, 63-63A, *supra* note 5.
10. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72, 105 S. Ct. 2174, 2181-82 (1985) ("The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he [or she] has established no meaningful contacts, ties, or relations.") (internal citations omitted). Of course, a defendant may consent to the personal jurisdiction of a court. *See* Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 301, C301:6; *see also* Siegel & Connors, New York Practice § 98, *supra* note 5.
11. *See* CPLR 301; Alexander, Practice Commentaries, *supra* note 10, C301:1.
12. *See* CPLR 302. Where a New York court has both subject matter jurisdiction over an action and personal jurisdiction over the defendant but a court in a different jurisdiction provides a more appropriate forum for the action, the New York court may decline to adjudicate the dispute under the doctrine of forum non conveniens. *See* CPLR 327; Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 327, C327:1.
13. S*ee* Siegel & Connors, New York Practice § 82, *supra* note 5.
14. *Laufer v. Ostrow*, 55 N.Y.2d 305, 309-10, 449 N.Y.S.2d 456, 458, 434 N.E.2d 692, 694 (1982) (internal quotation marks omitted); s*ee Tauza v. Susqehanna Coal Co.*, 220 N.Y. 259, 267, 115 N.E. 915, 917 (Cardozo, C.J., 1917) ("If in fact [a corporation] is here, . . . not occasionally or casually, but with a fair measure of permanence and continuity, then, whether its business is interstate or local, it is within the jurisdiction of our courts.").
15. 571 U.S. 117, 134 S. Ct. 746; *see* Siegel & Connors, New York Practice § 82, *supra* note 5.
16. 571 U.S. at 121-123, 134 S. Ct. at 750-751.
17. 571 U.S. at 122, 134 S. Ct. at 751-752.
18. *See id.*
19. "'Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons.' *Daimler AG v. Bauman*, 571 U.S.____, ____, 134 S.Ct. 746, 753 (2014). This is because a federal district court's authority to assert personal jurisdiction in most cases is linked to service of process on a defendant 'who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.' Fed. Rule of Civ. Proc. 4(k)(1)(A)." *Walden v. Fiore*, 571 U.S. 277, 283, 134 S. Ct. 1115, 1121, 188 L.Ed.2d 12 (2014).
20. 571 U.S. at 123, 134 S. Ct. at 751-752.
21. *Id.*
22. 571 U.S. at 123, 134 S. Ct. at 752.
23. 571 U.S. at 134, 134 S. Ct. at 758-759.
24. 571 U.S. at 121, 134 S. Ct. at 751.
25. *See* note 19 *supra*.
26. 571 U.S. at 133-134, 134 S. Ct. at 758.
27. 571 U.S. at 136, 134 S. Ct. at 760.
28. 571 U.S. at 122, 136, 134 S. Ct. at 751, 760.
29. 571 U.S. at 137, 134 S. Ct. at 760 (internal citation, ellipses and quotation marks omitted). The Supreme Court repeated and reinforced the "at home" and "paradigm bases" principles it articulated in *Daimler AG* in the Court's 2017 decision in *BNSF Railway Co. v. Tyrrell*, ___U.S.___, ___, 137 S. Ct. 1549, 1558.
30. 571 U.S. 137, 134 S. Ct. at 760. These bases afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims. (If a corporation is incorporated in and maintains its principal place of business in the same state, then the corporation is at home in that one state.)
31. 571 U.S. at 139, 134 S. Ct. at 761, n. 19 (internal citations omitted).
32. 571 U.S. at 137-138, 134 S Ct at 760-761.
33. S*ee* Siegel & Connors, New York Practice § 82, *supra* note 5; Alexander, Practice Commentaries, *supra* note 10, C301:8 (2014 pocket part); Connors, *Impact of Recent U.S. Supreme Court Decisions on Practice in New York*, June 18, 2014 N.Y.L.J.

    The *Daimler* Court observed that:

    > Plaintiffs emphasize two decisions, *Barrow S.S. Co. v. Kane,* 170 U.S. 100, 18 S.Ct. 526, 42 L.Ed. 964 (1898), and *Tauza v. Susquehanna Coal Co.,* 220 N.Y. 259, 115 N.E. 915 (1917) (Cardozo, J.), both cited in *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952), just after the statement that a corporation's continuous operations in-state may suffice to establish general jurisdiction. *Id.,* at 446, and n. 6, 72 S.Ct. 413. See also *International Shoe,* 326 U.S., at 318, 66 S.Ct. 154 (citing *Tauza*). *Barrow* and *Tauza* indeed upheld the exercise of general jurisdiction based on the presence of a local office, which signaled that the corporation was "doing business" in the forum. *Perkins'* unadorned citations to these cases, both decided in the era dominated by *Pennoyer* 's territorial thinking, see *supra,* at 753 – 754, should not attract heavy reliance today. 571 U.S. at___, 134 S. Ct. at 761, n 18 (emphasis added; internal citation omitted).
34. 571 U.S. at 137, 134 S. Ct. at 760 (internal citation, ellipses and quotation marks omitted).
35. 559 U.S. 77, 130 S. Ct. 1181 (2010).
36. *Morrison v. Budget Rent A Car Systems Inc.*, 230 A.D.2d 253, 258, 657 N.Y.S.2d 721 (2d Dep't 1997).
37. *International Shoe Co., supra* note 2.
38. *Lacks v. Lacks*, 41 N.Y.2d 71, 75, 390 N.Y.S.2d 875, 877-878, 359 N.E.2d 384 (1976).
39. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513, 126 S. Ct. 1235, 1244 (2006); *see* 13D and 13E Wright, Miller & Cooper, *Federal Practice and Procedure* §§ 3561, 3602 (3d ed.).
40. 559 U.S. at 81, 130 S. Ct. at 1186.
41. "If [an] action is within the concurrent jurisdiction of both the federal and state courts, and the plaintiff chooses the state court, the defendant often has the option of removing the action to the federal court." Siegel & Connors, New York Practice § 619, *supra* note 5.
42. 559 U.S. at 81, 130 S. Ct. at 1186.
43. 2008 W.L. 7071465, *1 (N.D. Cal. 2008) (defendant was incorporated in Delaware).

44. 559 U.S. at 81-82, 130 S. Ct. at 1186.

45. *Id.*

46. 559 U.S. at 81, 130 S. Ct. at 1186.

47. *Id*.

48. 559 U.S. at 82, 130 S. Ct. at 1186.

49. *Id*.

50. *Id*.

51. *Id.*

52. 559 U.S. at 82, 130 S. Ct. at 1187 (internal quotation marks omitted).

53. *Id*.

54. *Id*.

55. 559 U.S. at 84-92, 130 S. Ct. at 1187-92.

56. 559 U.S. at 93, 130 S. Ct. at 1192.

57. *Id*.

58. 559 U.S. at 93, 130 S. Ct. at 1192-93.

59. 559 U.S. at 94, 130 S. Ct. at 1193.

60. *See id.*

61. 559 U.S. at 95, 130 S. Ct. at 1194.

62. 28 U.S.C. 1332(a) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs....").

63. *E.g.*, *Retail Pipeline, LLC v. JDA Software Group, Inc*., 2018 W.L. 1621508 (D. Vt. 2018); *Live Face on Web, LLC v. Archevos Corporation,* 2018 W.L. 1035209, *4 (S.D. Cal. 2018); *Nespresso USA, Inc. v. Ethical Coffee Company SA*, 263 F. Supp. 3d 498, 503 (D. Del. 2017); *Maxchief Investments Limited v. Plastic Development Group, LLC*, 2016 W.L. 7209553, *3 (E.D. Tenn. 2016); *Rullan v. Goden*, 2016 W.L. 1159112, *8 (D. Md. 2016); *Hood v. Ascent Medical Corp.*, 2016 W.L. 1366920, *9 (S.D. N.Y. 2016); *Campbell v. Fast Retailing USA, Inc.*, 2015 W.L. 9302847, *2 n. 3 (E.D. Penn. 2015); *Allstate Ins. Co. v. Electrolux Home Prod., Inc*., 2014 W.L. 3615382, *4 n. 3 (N.D. Ohio 2014); *Flynn v. Hovensa*, LLC, 2014 W.L. 3375238, *2 (W.D. Penn. 2014); *Simon v. Republic of Hungary*, 37 F. Supp. 3d 381, 428 (D. D.C. 2014), *aff'd in part and rev'd in part* 812 F.3d 127 (D.C. Cir. 2016); *Google Inc. v. Rockstar Consortium U.S. LP*, 2014 W.L. 1571807, *1 n. 1 (N.D. Cal. 2014); *Robins v. Procure Treatment Center, Inc.*, 2017 W.L. 1398812, *1-2 (Sup. Ct., New York County 2017, Silver, J.), *affd* 157 A.D.3d 606, ___N.Y.S.3d___ (1st Dep't 2018); *see* Robert L. Haig, *Commercial Litigation in New York State Courts* § 2:21, n. 8 (4th ed.); *but see* Cornett and Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdictio*n *After Daimler AG v. Bauman*, 76 Ohio St. L. J. 101, 147-149 (2015).

64. CPLR 3211(a), entitled "Motion to dismiss cause of action," provides that

> A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> 1. a defense is founded upon documentary evidence; or
>
> 2. the court has not jurisdiction of the subject matter of the cause of action; or
>
> 3. the party asserting the cause of action has not legal capacity to sue; or
>
> 4. there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires; or
>
> 5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or
>
> 6. with respect to a counterclaim, it may not properly be interposed in the action; or
>
> 7. the pleading fails to state a cause of action; or
>
> 8. the court has not jurisdiction of the person of the defendant; or
>
> 9. the court has not jurisdiction in an action where service was made under section 314 or 315; or
>
> 10. the court should not proceed in the absence of a person who should be a party.
>
> 11. the party is immune from liability pursuant to section seven hundred twenty-a of the not-for-profit corporation law. Presumptive evidence of the status of the corporation, association, organization or trust under section 501(c)(3) of the internal revenue code may consist of production of a letter from the United States internal revenue service reciting such determination on a preliminary or final basis or production of an official publication of the internal revenue service listing the corporation, association, organization or trust as an organization described in such section, and presumptive evidence of uncompensated status of the defendant may consist of an affidavit of the chief financial officer of the corporation, association, organization or trust. On a motion by a defendant based upon this paragraph the court shall determine whether such defendant is entitled to the benefit of section seven hundred twenty-a of the not-for-profit corporation law or subdivision six of section 20.09 of the arts and cultural affairs law and, if it so finds, whether there is a reasonable probability that the specific conduct of such defendant alleged constitutes gross negligence or was intended to cause the resulting harm. If the court finds that the defendant is entitled to the benefits of that section and does not find reasonable probability of gross negligence or intentional harm, it shall dismiss the cause of action as to such defendant.

65. *See also* CPLR 3012(d) (allowing a defendant to seek leave to interpose a late answer) and 5015(a)(4) (allowing a defendant against whom an order or judgment has been entered to seek vacatur of the paper on the ground that the court lacked personal jurisdiction over the defendant); *see also* Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 5015, C5015:9.

66. *See* Siegel & Connors, New York Practice §§ 266, 274, *supra* note 5. Where the CPLR 3211(a)(8) objection is that the plaintiff failed to effect proper service on the defendant, a special rule applies that compels the defendant to interpose and seek judgment on the service objection with dispatch. *See* CPLR 3211(e) ("An objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship.").

67. Of the 11 dismissal grounds provided by subdivision (a), all but three may be waived by a defendant. While paragraphs 1, 3-6, 8-9, and 11 are subject to waiver, paragraphs 2 (lack of subject matter jurisdiction), 7 (failure to state a cause of action), and 10 (absence of a necessary party) are not. CPLR 3211(e).

68. CPLR 3211(e).

69. *Fischbarg v. Doucet*, 9 N.Y.3d 375, 381 n. 5, 849 N.Y.S.2d 501, 880 N.E.2d 22 (2007), citing Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 302, C302:5 (main vol.) ("Nowhere in the CPLR's rules of pleading is there any requirement of an allegation of the court's jurisdiction.").

70. Alexander, Practice Commentaries, *supra* note 69; *see Fischbarg v. Doucet*, 9 N.Y.3d at 381 n. 5, 849 N.Y.S.2d 501, 880 N.E.2d 22.

71. *Wells Fargo Bank, NA v. Decesare*, 154 A.D.3d 717, 62 N.Y.S.3d 446 (2d Dep't 2017); *Mejia-Haffner v. Killington*, 119 A.D.3d 912, 990 N.Y.S.2d 561 (2d Dep't 2014); *Urfirer v. SB Builders, LLC*, 95 A.D.3d 1616, 946 N.Y.S.2d 266 (3d Dep't 2012); *see Bernardo v. Barrett*, 87 A.D.2d 832, 449 N.Y.S.2d 272 (2d Dep't 1982), *aff'd,* 57 N.Y.2d 1006, 457 N.Y.S.2d 479, 443 N.E.2d 953 (1982).

72. *Nick v. Schneider*, 150 A.D.3d 1250, 56 N.Y.S.2d 210 (2d Dep't 2017); *Halas v. Dick's Sporting Goods*, 105 A.D.3d 1411, 964 N.Y.S.2d 808 (4th Dep't 2013); *Cornely v. Dynamic HVAC Supply LLC*, 44 A.D.3d 986, 845 N.Y.S.2d 797 (2d Dep't 2007); *see Coast to Coast Energy, Inc. v. Gasarch*, 149 A.D.3d 485, 486, 53 N.Y.S.3d 16, 18 (1st Dep't 2017) (in opposition to "a motion to dismiss pursuant to CPLR 3211(a)(8), the plaintiff has the burden of presenting sufficient evidence, through affidavits and relevant documents, to demonstrate jurisdiction").

73. *Peterson v. Spartan Industries, Inc.*, 33 N.Y.2d 463, 354 N.Y.S.2d 905, 310 N.E.2d 513 (1974).

74. *See Cracolici v. Shah*, 127 A.D.3d 413, 4 N.Y.S.3d 506 (1st Dep't 2015).

75. *Peterson v. Spartan Industries, Inc.*, 33 N.Y.2d at 466, 354 N.Y.S.2d at 907-908, 310 N.E.2d at 515.

76. *See Peterson v. Spartan Industries, Inc.*, *supra* note 73; *Williams v. Beemiller, Inc.*, 100 A.D.3d 143, 952 N.Y.S.2d 333 (4th Dep't 2012); *see also Copp v. Ramirez*, 62 A.D.3d 23, 31-32, 874 N.Y.S.2d 52, 60 (1st Dep't 2009); *see generally* Alexander, Practice Commentaries, *supra* note 69, C302:5, at 167 (main vol.) ("With respect to the scope of discovery, it should be noted that the relevant time frame for evaluating the defendant's contacts for jurisdiction based on CPLR 301 ("doing business" in New York) as compared to CPLR 302 (long-arm jurisdiction) is the time of commencement of the action.").

77. *See* CPLR 3211(d).

78. *See id*.

79. *Goel v. Ramachandran*, 111 A.D.3d 783, 788, 975 N.Y.S.2d 428, 435 (2d Dep't 2013).

80. 157 A.D.3d 606, ___N.Y.S.3d___ (2018).

81. 157 A.D.3d at 607.

82. 2017 W.L. 1398812, *1-2; *see* 157 A.D.3d at 607.

83. 2017 W.L. 1398812, *

84. *Id*.

85. *See id.* at *2, 5.

86. The plaintiff claimed that the New York courts had personal jurisdiction over PPM on both general and specific jurisdictional bases. We're concerned here with the former basis.

87. 2017 W.L. 1398812.

88. *Id.; see* 157 A.D.3d at 607.

89. 2017 W.L. 1398812, *3.

90. *Id.* at 5.

91. *Id*.

92. *Id.*

93. 157 A.D.3d at 607.

94. *See, e.g., Cail v. Joe Ryan Enterprises, Inc.*, 65 F. Supp. 3d 1288 (M.D. Ala. 2014); *Robertson-Armstrong v. Robinson Helicopter Co., Inc.*, 18 F. Supp.3d 627 (E.D. Penn. 2014); *Lewis v. Lycoming*, 2012 W.L. 2422451 (E.D. Penn. 2012).

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Ethics Matters

By John Gaal

Q I recently started work on a litigation matter for a new client. Now that I have jumped into the details, I can see that there are several non-parties that I may have to subpoena to testify or provide documents. Do I need to run those names through my firm's conflicts system before I can proceed?

A You certainly do, and if any turn up as current firm clients, you may need to get their consent, confirmed in writing, before proceeding. The New York City Bar Association's Committee on Professional Ethics ("Committee") recently addressed this issue in Formal Opinion 2017-6.

In New York, a conflict with a current client exists under Rule 1.7(a) "if a reasonable lawyer would conclude that either (1) the representation will involve the lawyer in representing differing interests, or (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." Rule 1.0(f) provides that "differing interests" include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." Of course, even if a conflict does exist, in most cases a representation may continue provided the lawyer "reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client," and each affected client provides an informed consent confirmed in writing. See Rule 1.7(b).

After reviewing a number of earlier ethics opinions issued by the ABA and the New York County Bar Association, as well as several New York court decisions, the Committee concluded that "ordinarily" issuing a subpoena to a current client to obtain testimony will create a conflict. The Committee noted that obtaining testimony often involves "inconveniences [to] the witness, involves probing a witness' recollection, and at times may involve challenging and confronting the witness," each of which can be perceived as disloyal and give rise to a conflict. Similarly, subpoenaing a witness to produce documents typically requires an allocation of resources (time and money) by the subpoenaed party and may even require the retention of counsel to work through production issues, which also can be contrary to that person's own interests. Thus in those circumstances as well a conflict will "ordinarily" arise.[1] This is true even if you do not envision "attacking" the credibility of the subpoenaed witness or otherwise getting into a significant dispute over testimony or documents.

Thus a critical first step prior to subpoenaing any non-party is to run a full conflicts check so that you know whether you are about to subpoena an existing client. In fact, this step should be undertaken as soon as you have any sense that you may need to subpoena that witness because the consequences of failing to do so can be severe, and in some cases may even prevent you from being able to proceed with the representation. Needless to say, if you only discover this dilemma well into the litigation (because you did not bother to run the conflicts check initially)—and worse yet, after you already issued the subpoena—you could severely prejudice your client by creating a need to withdraw or face disqualification.

On the other hand, if you uncover the issue early there may be alternative ways to deal with the problem. The first is to secure the subpoenaed client's consent to the subpoena. (While this approach could also resolve the issue even if employed "mid-litigation," the risk you run in waiting is that if consent is not forthcoming you may not be able to proceed at a crucial time, potentially harming your litigation client.) A second approach, if you know early enough that this problem exists, may be to limit the scope of your representation of your litigation client. As long as it does not render your counsel inadequate, and your litigation client consents, you may be able to limit your representation to avoid the conflict. See New York City Formal Ethics Opinion 2001-3. Of course that consent must be "informed" and the client must be advised of the reasonably foreseeable impacts of that limited scope.

If all else fails and you do not secure the early consent of your non-litigation client, there may still be an option short of mid-term withdrawal from the litigation. In Formal Opinion 92-367, the ABA noted that, in some circumstances at least, you might be able to secure "conflicts

Ethics Matters is provided by the Ethics and Professional Responsibility Committee of the Labor and Employment Law Section. The Committee is pleased to mark the return of this column after a several year hiatus and we hope to continue it on a quarterly basis. Specific columns are authored by various members of the Committee. 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 either Co-Chair of the Committee, John Gaal at jgaal@bsk.com, or Jae Chun at jchun@friedmananspach.com.

John Gaal

counsel" to separately deal with your other client—that is, to be solely responsible for subpoenaing and otherwise dealing with that client and its testimony/documents. To have a chance of success with this approach, you must be careful not to assist conflicts counsel with its efforts (e.g., you may not instruct or otherwise strategize with conflicts counsel on how to proceed, or provide it with information related to the subpoenaed client). And, of course, there is no guarantee that a court would find this approach acceptable in any given case. As a result, it should only be considered as a last resort.

Consequently, you should always run non-party witnesses through your firm's conflicts system, and do so as early as possible, so you can determine whether you will have an issue going forward. If you find that a non-party witness is a current client, the prudent course would be to treat that situation in all instances as a conflict and to seek the clients' consent, [2] confirmed in writing. If consent is not forthcoming from the client to be subpoenaed, you should consider the appropriateness of limiting the scope of your representation of your litigation client and/or using "conflicts counsel" to deal with your other client.

Endnotes

1. The Committee did acknowledge that in "exceptional" cases, a subpoena may not create a conflict if the subpoenaed client is not burdened by the subpoena and has no objection to compliance. However, as the Committee pointed out, in order for the subpoenaing lawyer to "know" that the other client does not find the subpoena burdensome or objectionable, he or she must communicate with the subpoenaed client in a manner substantially similar to the communication needed to secure the client's "consent" to waive any conflict. As a result, the prudent course would be to treat all situations involving a subpoena addressed to a current client as requiring consent and to secure a consent confirmed in writing. This is likely the best approach from a "client relationship" perspective as well. No client likes to be surprised by receiving a subpoena from "their" lawyer, even if the substance of the subpoena is not otherwise burdensome or objectionable. By reaching out to that client in advance, the likelihood of securing a consent to proceed is much greater and any potential harm to your existing relationship with that client as a result is likely minimized.
2. You need the consent of not only the client to be subpoenaed, but you also need to disclose to your litigation client that this relationship exists and secure its consent to your proceeding on their behalf.

John Gaal is Of Counsel at Bond, Schoeneck & King, PLLC and Co-Chair of the Section's Committee on Ethics and Professional Responsibility.

Arbitrating Fair Labor Standard Act Cases—Is the Process a Problem?

By Tracy B. Frisch and Robyn Weinstein

In the 2015 decision *Cheeks v. Freeport Pancake House, Inc., W.P.S. Industries, Inc*. the Second Circuit held, as a matter of first impression that the Fair Labor Standards Act (FLSA) fell under Federal Rule of Civil Procedure Rule 41's "applicable federal statute" exception.[1] Meaning, absent approval of the District Court or Department of Labor (DOL) parties cannot settle FLSA claims through a private stipulated dismissal with prejudice pursuant to the Federal Rule of Civil Procedure 41(a)(1)(A)(ii).[2] Since *Cheeks* was decided, the question has been raised at the District Court level as to whether pre-dispute agreements to arbitrate FLSA claims are considered private settlements requiring approval of the District Courts or DOL. Thus far, the District Courts' answer has been uniformly no.

"Judge McMahon found that nothing in Cheeks *stands for the proposition that FLSA claims cannot be arbitrated; it does, however, mean that any settlement of such a claim must be court-approved."*

The issue of pre-dispute agreements to arbitrate FLSA claims post-*Cheeks* was raised in a handful of New York District Court decisions during 2016. In February 2016 Judge McMahon of the Southern District of New York held, in the case *Moton v. Maplebear Inc*., that *Cheeks* was not applicable in the pre-dispute arbitration agreement context.[3] Judge McMahon reasoned that although *Cheeks* held that stipulated dismissals settling FLSA claims with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii) required approval of the District Court or the Department of Labor to take effect, the plaintiff and defendant in *Moton* were not trying to settle a claim asserted in a lawsuit. Instead, the parties were proposing to litigate a claim in an alternative forum. Further, Judge McMahon found that nothing in *Cheeks* stands for the proposition that FLSA claims cannot be arbitrated; it does, however, mean that any settlement of such a claim must be court-approved. In *Moton*, there was an arbitration agreement signed by the parties at the outset of the employment relationship and the parties were compelled to arbitration. Judge McMahon did not dismiss the action but issued a stay and cited *Katz v. Cellco P'ship*, 794 F.3d 341, 343 (2d Cir. 2015). In citing *Katz* Judge McMahon stated, "[f]urther, although Defendant has requested that the Court dismiss this action upon granting its motion, the case will be stayed pending the outcome of arbitration. As the Second Circuit reasoned in *Katz v. Cellco P'ship*, 794 F.3d 341, 343 (2d Cir.), a stay permits the parties 'to proceed to arbitration directly, unencumbered by the uncertainty and expense of additional litigation,' should judicial participation in the arbitral process prove necessary." *Id*. at *9. The plaintiff further argued that under *Cheeks* and other precedent[4] the forum selection clause, fee-splitting, fee-shifting and confidentiality provisions rendered the arbitration clause unenforceable because they amount to an impermissible waiver of statutory rights. Judge McMahon viewed this as an argument of unconscionability and held under New York law that these provisions, to the extent needed, could be severed and the arbitration clause enforced. *Id*. at *8.

Around the same time as *Moton* was decided, Judge Weinstein heard a similar case, also against Maplebear Inc., *Bynum v. Maplebear Inc*.[5] *Bynum* likewise involved a pre-dispute agreement to arbitrate FLSA claims. The plaintiff in *Bynum* asserted that in light of *Cheeks* FLSA claims should not be arbitrated. Judge Weinstein rejected that claim and held that *Cheeks* did not require District Court or DOL approval of pre-dispute agreements to arbitrate FLSA claims. In his opinion, Judge Weinstein wrote that *Cheeks* did not raise the issue of the arbitrability of FLSA claims, and that the plaintiff's reference to the Second Circuit's decision in *Cheeks* was misplaced. Judge Weinstein did find merit in plaintiff's argument that the provisions in the arbitration agreement requiring the arbitrator to award legal fees and costs to the prevailing party were unconscionable pursuant to the applicable state law, which in *Bynum* was California law. Ultimately, Judge Weinstein found that "[w]ithout the objectionable venue, fee splitting and fee shifting clauses, the arbitration agreement is valid and enforceable." *Id*. at 538.

Similarly in *Zambrano v. Strategic Delivery Solutions, LLC*, 15 Civ. 8410 (ER), 2016 WL 5339552 (S.D.N.Y. Sept. 22, 2016), the plaintiffs argued that *Cheeks* should be interpreted to prevent plaintiffs from having to arbitrate their FLSA claims because the potential costs and fees involved would undercut the concerns expressed by *Cheeks*. *Id*. at *8. Judge Ramos rejected that argument, finding that the prohibitive costs were too speculative and ordered the parties to arbitrate under their pre-dispute arbitration clause. Judge Ramos did cite to *Cheeks* in finding that the "arbitration provision cannot preclude [plaintiffs] from recovering their reasonable attorney's fees and costs should they prevail on their claims. '[T]he FLSA is a uniquely protective statute.'" *Id*. at *6. The court held that it is within the arbitrator's authority to modify the agreement and that the provision limiting recovery of attorney's fees was also severable from the agreement to arbitrate, and that the agreement to arbitrate remained enforceable. *Id*. at *8. Like the other District Court judges, Judge Ramos

stayed the case pending arbitration rather than dismissing the case citing *Katz*. *Id*. at *9.

Since *Cheeks* was decided, the New York District Courts have been faced with the argument that *Cheeks* expands judicial review of pre-dispute agreements to arbitrate. Thus far, it appears that the District Courts have rejected that argument based on the fact that the *Cheeks* case itself did not involve an arbitration clause.[6] However, the questions have not yet been answered as to whether the *Cheeks* decision could affect how District Courts view post-dispute agreements to arbitrate, how District Courts might view settlements reached once the matter has been compelled to arbitration, or how arbitrators themselves might apply *Cheeks* to settlement agreements reached during the arbitration process.

Endnotes

1. *See Cheeks v. Freeport Pancake House, Inc., W.P.S. Indus., Inc*. 796 F. 3d 199, 206 (2d Cir. 2015), *cert. denied*, 136 S.Ct. 824 (2016).
2. Rule 41(a)(1)(A) provides in relevant part: "Subject to Rules 23(e), 23.1(c), 23.2, and 66 and *any applicable federal statute*, the plaintiff may dismiss an action without a court order by filing: (i) a notice of dismissal before the opposing party served either an answer or a motion for summary judgment; or (ii) a stipulation of dismissal signed by all parties who have appeared" (emphasis added).
3. *Moton v. Maplebear Inc*. No. 15 Civ. 8879 (CM), 2016 WL 616343, at *6 (S.D.N.Y. Feb. 9, 2016), *appeal dismissed* (2d Cir. 16-555) (Jul. 13, 2016).
4. The other case cited by Plaintiff was *Barrentine v. Arkansas-Best Freight Sys., Inc*., 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed2d 641 (1981).
5. *Bynum v. Maplebear Inc*. 160 F. Supp. 3d 527 (E.D.N.Y. 2016), *on remand* 15-CV-6263, 2016 WL 4995093, (E.D.N.Y. Sept. 19, 2016) (dismissing action with prejudice in light of plaintiff's repeatedly stated intention to abandon arbitration as sought by plaintiff so could appeal initial decision to Second Circuit), *appeal pending* (2d Cir. 16-3348) (filed Sept. 30, 2016).
6. *Alfonso v. Maggies Paratransit Corp*., No. 16-CV-0363 (PKC)(LB), 2016 WL 4468187 (E.D.N.Y. Aug. 23, 2016) is another District Court case that addresses the issue of pre-dispute agreements to arbitrate FLSA claims. In *Alfonso*, Judge Chen ordered the FLSA case to arbitration and issued a stay. She stated, " [a]s an aside, the Court notes that because the threshold question before it is whether the challenged CBA provisions constitute substantive waivers of Plaintiff's statutory rights at all, Plaintiff's reliance on *Cheeks v. Freeport Pancake House, Inc*., 796 F.3d 199 (2d Cir.2015), for the proposition that an employee's FLSA rights may not be waived without approval by the Department of Labor or a court, is wholly inapposite." *Alfonso* at footnote 6.

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A Labor Mediator's Perspective on Mediation

By Ira B. Lobel

Why Labor Mediation Works

The growth of mediation in recent years has been exponential and is used in many different settings. While it is difficult to accurately determine the success of any of these mediation programs,[1] it is clear that there are institutional and procedural differences between labor mediation, court induced mediation, and mediation in other arenas. Keeping these differences in mind may be helpful to mediators in other venues when attempting to help parties settle a dispute. Successful introduction of any of these elements may sometimes help sow the seeds for settlement.

The presence of these elements makes the dynamics involving labor mediation different from mediation in other arenas. The elements include the following:

1. Only parties make the decision
2. Power relationship
3. Deadline
4. Continuing relationship
5. Cost

It is important to analyze these factors to understand why labor mediation works in many situations and why the mediation process in other venues faces different challenges. Recognition of some of these elements makes me a more effective mediator in other venues. All of these elements are intertwined and overlapping, as will be apparent from the discussion below.

Only Parties Make the Decision

In a collective bargaining situation, labor and management negotiate over wages, hours and working conditions. In the event of a disagreement, the parties can (1) agree to new terms; (2) continue to bargain and maintain the terms of the expired agreement; or (3) engage in concerted activity (strike or lockout).[2] If there is a disagreement, no third party can substitute his judgment for that of the parties. This means the parties *must* make their own decisions about the terms and conditions of employment. Even if one side can dictate the terms and conditions of employment (because of superior bargaining power), no third party has the legal power to determine the terms and conditions of employment.

In most civil matters, if the parties cannot agree on a resolution, ultimately a judge will make a decision for the parties. The parties can look to the law, equity, and cost of continued litigation as factors in determining whether or not to negotiate and settle; however, both sides know that, ultimately, someone else can dictate the settlement terms for them.

At various times in my career, I have mediated in situations where the parties can move to arbitration if no agreement is reached in mediation. In these situations, the dynamics change, because an outside decision maker can determine the outcome. The mediator, instead of using what the other side will do or not do to raise doubt, can try to suggest what the third party decision maker must do. This can dramatically change the dynamics of the negotiations.

The mediator may be able to use the uncertainty of a judge's ruling, delay in the final decision, the cost of the legal process, etc., as factors that may encourage a party to make difficult decisions prior to a trial. These elements take on a different tenor than raising questions in a labor situation of the practical implications of a strike, lockout, continued negotiations, final offers and the like. The mediator can use the uncertainty of the outside decision maker as a pressure for the parties to evaluate and reevaluate positions.

Power Relationship

The second element one must consider is the question of power. In a labor dispute, a party has the legal right to be unreasonable; the consequences may be a work stoppage or unhappy employees or poor productivity, but it is up to the parties, singularly or jointly, to decide certain courses of action. In the event one side wishes to try to force its will on the other, there is no check, through a court or other third party, on the ability of the party to do this.[3]

Contrast this to a legal proceeding where one party cannot use its power in contravention of the law. Because the judge or third party must look at the law and justice, the parties may defer to the third party's judgment, rather than risk a negotiated settlement that does not achieve the goals they are hoping for.

In some civil disputes, power can play an important role. For example, the side with deeper pockets may be able to prolong the litigation, engage in endless discovery, delay trial and have countless appeals and motions. This may prompt the weaker side into a settlement; however, if it holds out, the case will be decided on law and justice, not on power.

The mediator may constantly remind the parties that the use of power, or delaying tactics, may have some short and long-term consequences. The good mediator will constantly remind people of the "cost" of using power and leave it up to the parties whether it is worth using.

Continuing Relationship

In a labor matter, the parties know that once the dispute is settled, they must still find a way to work together. Unless one side can absolutely destroy the other side, a collective bargaining relationship is like a marriage without the possibility of divorce. The parties know that they must deal with each other in the future. Accordingly, both sides often have an interest in allowing the other side to survive. Mediators can use this "continuing relationship" as a tool to convince the parties not to be too harsh with each other.

In a civil mediation in which the parties will have to maintain a continuing relationship, such as a matrimonial matter involving children, an on-going business partnership, or an employment matter where the employee continues employment, the mediator can use the need for a continuing relationship as a means for preventing the parties from trying to "punish" the other side. In a single transaction dispute, such as a medical malpractice or a simple contract dispute, this dynamic is not present. The parties simply want to get the best deal possible and are really not concerned about the feelings or perceptions of the other party.

The mediator should be aware of whether there will be a continuing relationship. The mediator may wish to adjust questions and methodology, depending on the answer to this question. A dispute where there is a continuing relationship takes on an added dimension of possibilities that a mediator can use in "raising doubt" and trying to get the parties to reconsider their positions.

Deadline/Timing

Deadlines force parties to make decisions; lack of deadlines encourages parties to delay and defer decision. Regardless of the subject of the mediation, the reality is that the introduction of a mediator into a dispute often is a sign to the parties that they should begin to get serious. Many years ago, the entry of a mediator into a labor dispute was often tied to a strike threat or a specified stage in the process. The entry of the mediator into a labor dispute became a signal for the parties to get down to business.[4] Mediators often talk to both sides about the proper timing of the mediation. They look to see whether there is any deadline that can be used that will provide pressure for a settlement

In a civil matter, the entry of a mediator will also give the attorneys for both sides a reason to look at the file, to start preparing and to consider alternatives and possible settlements. In effect, because the mediation is taking place, it becomes a time for both sides to look at their cases more seriously. Nevertheless, parties sometimes go into mediation when they are not prepared to negotiate, possibly because it is court ordered or the proper amount of discovery has not taken place. Mediators could be very helpful to the process if, when scheduling a session, they discuss with the parties the proper time for scheduling a session, particularly as it relates to discovery. Scheduling mediation too early in the process may prevent either side from settling, since neither would have a clear idea what a case was worth. Too late in the process may have both sides firmly entrenched in their position. The timing of a motion for summary judgment or some other legal or practical event may help the parties set a deadline. A discussion with both sides may help assess the appropriate time to mediate.

Cost

In the labor arena, mediation is often provided free of charge by government. It is considered a legitimate government expense to promote sound labor relations and, in effect, keep both the economy and government working. Accordingly, the cost of mediation, and often who the mediator is, rarely becomes an issue. Even if the parties choose to hire a mediator, the cost is absorbed by the parties and not considered significant. Simply, the parties usually do not consider the cost of mediation as an issue to resolve before agreeing to mediate.

In the non-labor arenas, there are many different approaches. Some parties choose to hire and pay a mediator on an ad hoc basis. Some courts require that the parties mediate, either pro bono from a list maintained by the courts or by hiring a mediator on their own. Many courts and community dispute resolution programs have numerous pro bono mediators that are available.

All of these approaches have certain advantages and disadvantages. Paying for mediation can be problematic in many situations due to cost and lack of understanding of the process. Many have some concerns that, without any payment for the process, the parties may not take it as seriously as they should. The cost of mediation is one of the elements that must be considered. If a case can be settled expeditiously with the help of a mediator, the cost may be worth it. It is, however, sometimes very difficult to get two hard-nosed negotiators to settle on mediation when they are at each other's throats on substantive matters. This is one reason why it may be helpful to have court-ordered mediation, paid for by the parties, with the mediators selected from a list of individuals who state their fees and experience up front.

Conclusions

Mediators in one venue can learn from the dynamics and peculiarities present in another venue. Labor mediators can learn from mediators in other venues and vice versa. Mediators should be aware of the similarities and differences and try to use them to help the parties resolve disputes. This article highlighted labor mediation dynamics as they will serve to inform mediation in other contexts.

Endnotes

1. Experts differ on how to properly evaluate the effectiveness of a mediation program. For example, settlement rates, while helpful, may not be an indicator of success, unless there is a control that studies settlement rates of similar cases without mediation.
2. In the public sector, the parties can proceed to fact finding or arbitration (police and fire). Both of these quasi judicial proceedings will change some of the dynamics explored in this section.
3. One check may be a company going out of business or reducing its operations. This was often a possibility in the manufacturing sector. This possibility diminished greatly if there was a very large plant with a large capital investment (making moving or closing impractical) or an employer that could not move (for example: hospital, service industry, public sector).
4. This dynamic has changed considerably in recent years with the decline of the labor movement and lack of interest for immediacy in reaching contracts. This could be due to declining power of the labor movement, the increase in economic uncertainty, and/or decline in the effectiveness of the strike. For whatever reasons, contract expirations today do not have the same immediacy for settlement that they had 30-40 years ago.

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A "Model" Minority: Employment Challenges Faced by Asian Women in the U.S. Modeling Industry

"When you're a supermodel like Giselle or Christy Turlington you're treated like royalty, but 99% of models are treated like garbage."[1]

By Audrey Winn

Audrey Winn

People in fashion talk a lot about its global influence. In interviews, designers wax poetic about how travel has inspired their collections and creative endeavors.[2] To listen to them speak, haute couture is an homage to wanderlust, a celebration of the beautiful differences inherent in being human. While fashion's appreciation for other cultures may be reflected in fabric and silhouette choices, however, it has historically failed to be reflected in models. This is starting to change.

Based on data compiled from 241 shows around the world, a report by The Fashion Spot[3] found that 27.9 percent of the models who walked the fall 2017 runways were people of color. This was considered an improvement—the number represented the highest proportion recorded since The Fashion Spot began tracking the data two and a half years ago.[4] By the spring of 2018, this number had gone up. At that time, The Fashion Spot found that 37.3 percent of models walking in New York Fashion week were people of color.[5] As fashion continues to diversify, Asian models are increasingly represented on runways. Of the 19 models who walked the most shows in 2018, for example, four were Asian.[6] While the inclusion of Asian models makes a lot of sense for designers—especially given the huge buying power of Asian markets[7]—it comes at a cost to the models. Beyond the cameras, makeup, and lights, these models must confront an industry filled with exploitation and employment discrimination.

The Euro-centric fashion industry in the United States presents unique dangers to Asian models. Though all models work against a background of pervasive sexual harassment, a lack of intersectional legal options, stereotypes about Asian women's sexuality, and racism create unique challenges for their success. First, this article will discuss challenges faced by Asian models. Then, it will discuss a potential solution, namely the proposed "Models' Harassment Protection Act." Finally, this article will conclude with a brief recommendation about ways that the Act should be modified to better support Asian models.

Part 1: Challenges Faced by Asian Models

A. Sex Sells: The Culture of Harassment in the Modeling Industry

Modeling work is intertwined with the marketing of seduction. Sex sells, so it is unsurprising that no one thinks twice about asking young models to "undress in front of colleagues and [] appear scantily clad, sometimes with no clothes at all, to sell everything from watches to lingerie."[8] Due to the industry's emphasis on physical appearances, and the fact that the average career only spans from age 16 to age 21, many models begin working as minors.[9] During that time, these models are frequently "asked to dramatize sexual behavior they may not yet have experienced in real life" as part of their photoshoots.[10] In this context, power dynamics are exploited and the line between creativity and sexual misconduct gets blurred. With little supervision, intimate situations with photographers, agents, and designers frequently turn sinister. Though all models experience objectification, however, women of color suffer most from it due to the overlay of race upon gender stereotypes. This is especially true for Asian women.

Because of racialized stereotypes, Asian women are especially likely to be hyper-eroticized and portrayed as submissive to white men. This attitude most likely grows out of the 1870s racist portrayal of all Asian women as prostitutes, seeking to enter the United States to engage in "criminal and demoralizing purposes."[11] Portrayals of Asian women have not helped to correct this history, as images of exotic geishas, prostitutes, and "mail-order" brides remain common. Depictions like this have led some to state that "[t]he stereotype of the oriental girl is the greatest sexual shared fantasy among western men, and like all the best fantasies it is based on virtual igno-

rance uncorrupted by actuality."[12] Asian models come into modeling with these stereotypes superimposed onto them. Given that the industry is already rife with sexual harassment, this makes them particularly vulnerable.

When abuse occurs, many models struggle to find help and protection. Though there are many factors that perpetuate this struggle, two stand out: their employment status and a culture where being likable can make or break your career. As will be discussed below, these factors affect all models, but present special challenges for Asian models in particular.

1. Employment Status, and Lack of Intersectional Complaint Mechanisms

Workplace discrimination and harassment are prohibited under Title VII of the Civil Rights Act, which outlaws "employment practice[s] [that] discriminate against any individual with respect to [] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[13] Further, traditional employees who feel that they are being harassed at work have the option to file complaints with the Equal Employment Opportunity Commission, the first step in taking legal action.[14] However, Title VII doesn't apply to models because they are not classified as "employees."

As independent contractors, models "don't exactly have an HR department to report to if something goes awry."[15] Instead of being empowered by the law, models are marginalized by the fact that the anti-discrimination and sexual-harassment protections of federal law don't apply to them.[16] Even worse than in traditional independent contractor situations, models are additionally vulnerable because of the "incidental booking exception clause."[17] Though modeling agencies in New York State are licensed alongside other employment agencies under the general business law, the exception allows "agencies to claim that they instead serve as management companies."[18] To do this, modeling agencies must simply claim that helping models book work is incidental to their greater purpose of providing career management. Agencies "that claim to be management companies have escaped licensing requirements, avoided caps on commissions, and accountability to the models whose interests they represent."[19] Because of this exemption, it is especially difficult for models to hold their agencies legally liable for abuse.

For Asian models, however, the situation is even bleaker. White models at least can hope that, as labor and employment experts continue to debate the line between "employee" and "independent contractor" status, they will eventually be considered employees of their agencies. Even if this occurs, however, it is unlikely that Asian models would feel the benefit of the change based on EEOC statistics.

According to a recent EEOC report on discrimination against Asian immigrant and Asian-American workers, there is a huge disparity between discrimination that occurs and the rate at which Asian workers file EEOC complaints. Per the report, "31% of Asians surveyed reported incidents of discrimination, the largest percentage of any ethnic group."[20] This data on perceptions differs from the EEOC's actual experience of individuals filing charges, because though 31 percent of Asian workers reported incidents of discrimination, "the agency's enforcement experience shows that only about 2 percent of all charges in the private sector and 3.26 percent in the federal sector are filed by AAPIs."[21] In short, there is more discrimination occurring than is being reflected in complaint statistics. Expanding this data to the modeling industry, it seems likely that the trend would continue, and many Asian models would not report discrimination.

Even assuming that Asian models would file EEOC complaints as a preliminary step to legal action, however, there remains several massive legal obstacles caused by the fact that "women of color experience discrimination in multiple spheres that cannot be categorized as solely race-based or solely gender-based."[22] Under current law, there is not an avenue through which to pursue intersectional race and gender discrimination claims. When dealing with combination race-based, gender discrimination claims, courts have historically separated the race and gender claims.[23] Though several courts have tried to acknowledge that discrimination may be based on multiple factors, this history has created confusion about how to conceptualize intersectional claims. Further, as many Asian models are not citizens, additional immigration issues come into play. Many foreign-born Asian models are "encouraged by agencies to come to the United States illegally," and told that they will only be sponsored for visas after proving that they can get booked for shows.[24] For these models, complaining about employment discrimination means exposing themselves to the very real threat of "cross reporting" to the Immigration and Naturalization Services (INS).[25]

2. Pressure to Be Likeable

Even if the law supported Asian models through intersectional legal complaints and better reporting mechanisms, many models would probably continue to remain silent about harassment because of fears about reputational repercussions. Models and their families have spoken about the frustrating experience of contacting agencies for support. Upon informing agencies of abuse, victims are greeted with a frightening message: complaining kills opportunities. Reputation means everything in modeling and being easy to work with opens doors. This leads to a culture where "models say they rarely complain, since doing so could get them labeled 'difficult' and derail their professional aspirations."[26] Cameron Russell, supermodel and activist, knows this all too well. In the wake of the #MeToo movement, she began the #myjobshouldnotincludeabuse campaign and asked other models to share their experiences with her.[27] As hundreds of messages poured in, Russell reposted stories with re-

dacted names and implored fashion magazines to listen, saying:

> We know what is happening in fashion. We tolerate it and ignore it and excuse it every day. We all know who the perpetrators are and we continue to work with them. STOP. Advertisers and magazines, stop hiring these people. Agencies, stop sending them talent. Stop today. Do not wait until lawyers get involved. Do the right thing because the wrong thing is horrific.[28]

Though all models feel the industry's pressure to be silent, however, Asian models are especially vulnerable because of cultural values and repercussions for violating stereotypes. This is true both for foreign-born Asian models and Asian-American models. For immigrant models, research notes that Asian cultures "tend to reinforce traditional gender roles including enforcing hierarchy based on gender, generation, and age as well as encouraging male personal development while discouraging female aspirations in favor of female passivity and submissiveness."[29] Asian models who were raised outside the U.S. or in traditional immigrant families might internalize these cultural values, which could exacerbate the guilt and self-doubt typically felt by victims of workplace harassment. Further complicating this problem is the fact that sex is discussed less frequently and openly in many Asian cultures—given that no words for "sexual harassment" exist in Japanese, Mandarin or Cantonese, it is unsurprising that reporting discrimination is very taboo.[30]

For Asian-American models not raised with traditional cultural values, however, there is still a heavy reputational penalty for speaking up about harassment. Studies have shown that Asian-American workers are seen as less likable when they violate stereotypes about being easy-going and compliant. In one Harvard Business School study, groups of student participants stereotyped Asians to be less dominant than white people, and judged them negatively when they violated stereotypes of submissiveness.[31] Among working professionals, the study found that Asians who reported being more dominant at work were more likely to be harassed and less well-liked.[32] Thus, while speaking up has the potential to protect models, it also has the potential to create the perception that they are "difficult," and thus not desirable hires for appearances, shows, and campaigns. This leaves Asian models with a Catch 22—a choice to be safe from harassment or remain employed. This is similar to the double bind that women experience when ascending to leadership positions: "Competent and assertive women, who fail to meet the gender role expectation of being kind and empathetic, tend to be evaluated negatively."[33]

B. Yellow Face and Orientalism in the U.S. Fashion Industry

As Asian models deal with racialized sexual harassment, they must also deal with colonialized portrayals of their culture and exoticized portrayals of their beauty. Unfortunately, "yellow-face" remains an industry staple despite the fact that Asian models are walking many shows each fashion week. Though supermodels like Liu Wen[34] are attracting millions of Instagram followers and fronting major ad campaigns, white models are still being cast to portray Asian women. Examples are easy to come by.

In 2009, Chanel's Paris-Shanghai collection opened with a video.[35] This video portrayed an imagined alternate history where Coco Chanel travels to an exoticized China. For the video, Chanel director Karl Lagerfeld styled his predominately white models in yellow face. Defending his casting choices, Lagerfeld cited movies like *The Good Earth* and *Madame Butterfly* as a way to argue that "people around the world like to dress up as different nationalities."[36] Continuing, Lagerfeld gushed that he loved "18th-century French chinoiseries. It's an idea of China painted by people who never saw China. And that's amusing, because there's real imagination. It is spirited and light. I also enjoy having non-Chinese play Chinese."[37] Undeterred by concepts like cultural appropriation, Lagerfeld boldly and confusingly stated that the video was not racist because it was "about the idea of China, not the reality…[i]t has the spirit of, and is inspired by, but is unrelated to China. It is not authentic like a Peking Opera or something."[38]

Though not as high-profile as Chanel, Air France's "France Is in the Air" campaign also invoked orientalism. In 2014, the airline publicized its new routes with ads featuring mostly Caucasian women modeling attire from its new destinations. For locations like "Paris and Italy, the women are fairly nondescript, but destinations like Tokyo, Beijing and Dakar had white women with wild eye makeup, headdresses and modified costume."[39] Many passengers found these ads offensive, and wondered why the airline wouldn't deign to use models of color. Jenn Fang, a prominent Asian-American activist, felt the airline "grabbed at the low-hanging Orientalist yellowface fruit for [] depictions of China and Japan" while being "perfectly happy to offer more sophisticated and nuanced imagery" for Western countries.[40] Twitter agreed and began the #IFixedit4UAF campaign, to offer humorous alternatives to the racialized ads.[41]

In 2017, the very white, very American supermodel Karlie Kloss dressed as a geisha in *Vogue's* diversity issue.[42] Posing in front of temples, sacred sites, and various historically significant locations, Kloss's painted face and traditional dress imitated aspects of ancient Japanese culture. On a blog criticizing the photoshoot, one commenter aptly summarized why the photoshoot was offensive, arguing that it served to "orientalize, sexualize, and tokenize [A]sian women further perpetuating their otherness."[43] Though Kloss apologized, *Vogue* did not.[44]

While these examples are probably frustrating for most people, they are particularly upsetting for Asian models because of their employment implications. When

white models are hired to portray Asian beauty, it means that Asian models are not being hired for those jobs. Supermodels are made by being featured in brands like Chanel and magazines like *Vogue*, but these brands continue to engage in yellow face. The slap to the face thus has an economic element and can result in these models missing out on opportunities that could have helped their careers.

Beyond economic repercussions, the fact that magazines and designers are used to white models exoticizing Asian culture can create difficult situations for Asian models when they are actually hired. Many ads that actually feature Asian models do so in ways that perpetuate fetish and orientalism.[45] Though some might argue that Asian models should simply turn down these jobs, they are often not in a position to do so, according to Sara Ziff, the Columbia-educated model and founder of The Model Alliance, a nonprofit fashion advocacy group. Ziff says that many models aren't given details about jobs in advance, and thus likely wouldn't know that the shoot they were participating in was going to be offensive. "You're put in a position where you often have little information going in," she says. "It's not like being on a film set, where you're given a script, and you know what to expect. There are a lot of instances where models are put on the spot and only see what they're participating in after the fact."[46] Without preliminary information and time to call their agents, Asian models could easily find themselves in positions where they feel disempowered and pressured to participate in problematic shoots despite their reservations.

Part II: The Models' Harassment Protection Act

In the wake of the Harvey Weinstein scandal and #MeToo movement,[47] New York Assemblywoman Nily Rozic introduced N.Y. State Assembly Bill A8752 aimed at protecting models against harassment. Though Rozic is championing the bill, its introduction represented months of research in collaboration with the Model Alliance. Called the "Models' Harassment Protection Act,"[48] the bill seeks to amend current anti-discrimination laws in New York "to explicitly include models, explicitly forbid sexual advances and commentary or other forms of discrimination linked to their employment."[49] Harassment would be construed broadly, and would include, but not be limited to, "unwelcome sexual advances, requests for sexual favors, and harassment based on age, race, national origin, color, sexual orientation, sex, and disability. Further, the bill "would require clients to provide models upon booking with a contact and avenue for filing any complaints."[50] In essence, the bill is attempting "to create a human resources department in an industry that has had none."[51]

If passed, proponents say that the bill will put "designers, photographers and retailers (among others) on notice that they would be liable for abuses experienced on their watch."[52] As of Jan. 3, 2018, the bill has been referred to the Governmental Operations Committee and is awaiting further action. Currently, the bill is posted online where voters can submit open legislation comments. Since there is still time for the bill to undergo revision, now is an important moment to make several observations and recommendations.

Part III: Proposed Revisions

Upon reading the bill, there are a few ways that the language could be improved to better address the obstacles faced by Asian models. By making these revisions, it is likely that the bill would be better positioned to support and protect these models from abuse. Recommendations will be separated by subheadings.

1. A Mechanism for Intersectional Discrimination Claims

Under Part II(A) of the bill,[53] sexual harassment of models is prohibited. Further, under Part II(B)[54] of the act, discrimination based on race is prohibited. As discussed throughout this article, separating these two categories creates obstacles for women of color, who experience discrimination based on multiple identities.[55] To protect Asian models and other models of other races and ethnicities as fashion continues to diversify, this bill should create a Part II(C) which allows for intersectional discrimination claims. Doing this would also protect models with different intersecting claims—for example, models who are harassed based on combinations of their age, disability, sexual orientation, etc.

2. Explicit Protections for Immigrant Models

Though Part II(B)[56] lists several protected categories, including "age, race, creed, color, national orgin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, familial status, marital status or domestic violence victim status," it does not list immigration status. This is not necessarily encapsulated in "national origin," and should be explicitly listed here. As discussed earlier in this article, immigrants, including Asian immigrant models, face special obstacles as a result of their immigration status and need special protections from cross reporting to INS.[57] Other legislation has included this type of explicit protection for immigrants, and this bill should do so as well in order to better protect this vulnerable subsect of models.[58]

3. Define "Unreasonably Interfering" in Part II(B)

The existing wording of Part II(B)[59] states that models cannot be discriminated against based on "age, race, creed, color, national orgin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, familial status, marital status or domestic violence victim status, where such harassment has the purpose or effect of unreasonably interfering with an individual's provision of modeling services by creating an intimidating, hostile, or offensive environment."[60] As it stands, the term "unreasonably interfering" is at risk for being interpreted too narrowly. Unless this is more precisely defined in the

bill, there is the potential that the judiciary will interpret this as creating a high burden on models, such that discrimination which doesn't essentially make them quit will not rise to the bar of "unreasonably interfering." Since this bill is meant to curb a culture of harassment, there should be an attempt to make this standard friendly to the victims. While this language does not place a special burden on Asian models as opposed to models of other races, fixing the language would provide greater protection for all models and would thus help the bill achieve its purpose.

4. Define "Intimidating, Hostile, or Offensive Environment" Subjectively, Not Objectively

Part II(B)[61] of the bill only prohibits discrimination which, among other things, creates an "intimidating, hostile, or offensive environment."[62] Here, the bill should define the standard as subjective as opposed to objective. Models come from different cultures, and things that we would not consider objectively offensive by a Western standard might be scarring given the different cultural context. A subjective standard would give models room to express this. Though this sounds broad, it would probably not be abused given that there are already so many forces in the industry pressuring girls not to complain. Likely, anyone who came forward with subjective discrimination would not do so flippantly given the reputational harms they could incur, as this article previously discussed. While this language does not place a special burden on Asian models as opposed to models of other races, fixing the language would provide greater protection for all models and would thus help the bill achieve its purpose.

5. The Complaint Mechanism Should Be More Detailed

Currently, the bill is vague about its complaint mechanism. Part III(A)[63] notes that models should be informed that a complaint process exists, but does not specify what that process would look like. If the bill is assuming that, if passed, models will rely on currently existing complaint processes, this should be stated explicitly. Further, provisions should be made concerning language access. As the fashion industry works with models from around the world, and these models speak many different languages, there should either be new provisions discussing non-English resources or explicit statements about existing resources. For foreign-born Asian models and other models whose written languages are very different from the Romanized alphabet, this is particularly important.

Conclusion

As this article discussed, the fashion industry in the United States presents unique dangers to Asian models. Because of a lack of intersectional legal options, stereotypes about Asian women's sexuality, and racism, there are challenges for their success that must be overcome if fashion ever hopes to embrace true diversity.

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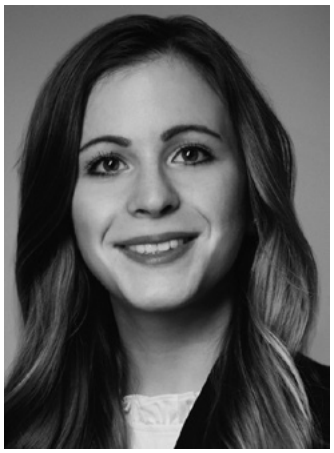
Shining a Light: New York's Response to the Dawn of the #MeToo Movement

By Cara E. Greene and Lauren McGlothlin

Introduction[1]

Cara E. Greene



Lauren McGlothlin

In October 2017, following allegations of sexual misconduct against a famous Hollywood producer, what had been trending as the hashtag #MeToo quickly manifested into a political and social movement condemning sexual harassment and assault across the country. In the first 24 hours of its usage, #MeToo had been used in 12 million posts on Facebook, and in half a month, #MeToo had been used more than 500,000 times on Twitter. [2] Across the nation, and even globally, individuals began to shine a spotlight on a pervasive and longstanding culture of sexual harassment.

While the #MeToo movement originally gained traction in the entertainment world, it quickly spread to other industries, including the legal profession.[3] As of the one-year anniversary of the #MeToo movement, more than 425 prominent people in industries ranging from financial services to entertainment have been publicly accused of sexual misconduct.[4] Of course, this number only includes sex-related allegations that have been reported in the public record, trade publications, and national, state, and local media.

Despite the growing movement to denounce it, sexual harassment continues to pervade the workplace. In 2015, a study conducted by the Equal Employment Opportunity Commission (EEOC), the federal agency administering and enforcing laws against workplace discrimination and retaliation, found that 45 percent of the total number of charges the agency received from employees working for private or state and local governments contained claims of sexual harassment.[5] That number has likely dramatically increased since the beginning of the #MeToo movement. The EEOC recently released preliminary data for fiscal year 2018, finding that EEOC charges alleging sexual harassment increased from fiscal year 2017 by more than 12 percent, and the EEOC filed 66 harassment lawsuits—41 of which included allegations of sexual harassment—which was more than a 50 percent increase in sexual harassment suits during fiscal year 2017.[6]

As of October 2018, at least 12 states have passed laws relating to sexual harassment in response to the #MeToo movement.[7] While New York State and New York City have long had laws prohibiting sexual harassment in the workplace and providing robust remedies for those who have been subjected to sexual harassment,[8] both have revisited those laws in 2018 and have added requirements for employers to finalize workplace policies, conduct employee trainings, and disseminate related information in their workplaces, among other things. This article summarizes these changes to the law.

New York State's Combating Sexual Harassment in the Workplace Policy

On April 12, 2018, Governor Cuomo signed into law the 2019 New York State Budget, which also provided a sweeping overhaul of the State's sexual harassment laws ("State Law").[9] The State Law, which covers all employees and non-employees, including independent contractors, subcontractors, consultants, and vendors,[10] among other things, requires employers to adopt policies and trainings related to sexual harassment. On October 1, 2018, the New York State Department of Labor (DOL), in consultation with the NYSDHR (collectively, "the State"), released final guidance regarding the amended State Law on sexual harassment.

Under the State Law, by October 9, 2018, employers were required to adopt the model sexual harassment prevention policy or establish their own workplace policy that "equals or exceeds" the minimum standards provided by the State and provide their employees with a written copy of the adopted policy, in the language spoken by those employees.[11] The minimum standards are:

1. Prevent sexual harassment consistent with the State guidelines;
2. Give examples of conduct that would constitute unlawful sexual harassment;
3. Provide employees with information regarding the federal and state statutes on sexual harassment and the remedies available under those laws, as well as a statement drawing attention to relevant local laws;
4. Inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints judicially and administratively;
5. Include a complaint form for employees to fill out;
6. Provide a procedure for complaints to be timely and confidentially investigated, and which will allow for due process;

7. Note that sexual harassment is a form of employee misconduct and that sanctions will be enforced against individuals who engage in sexual harassment, as well as against managerial and supervisory personnel who knowingly permit this behavior to continue; and

8. Provide that retaliation against individuals who make sexual harassment complaints or testify in any proceeding or investigation regarding sexual harassment is unlawful.[12]

Further, employers must provide employees with sexual harassment prevention training on an annual basis and in the language spoken by the employees. Such trainings must equal or exceed the following minimum standards provided by the State:

1. Be interactive;

2. Describe sexual harassment pursuant to the guidance issued by the State;

3. Provide examples of conduct that would be considered sexual harassment;

4. Include information about the federal and state statutes regarding sexual harassment and remedies available to sexual harassment victims;

5. Provide information about rights of redress and forums for adjudicating sexual harassment complaints; and

6. Include information pertaining to supervisors' responsibilities and conduct.[13]

The State has created and published a model sexual harassment policy (as well as materials for employers to use in their own creation of a mandatory policy), a model sexual harassment prevention training program, and a model sexual harassment prevention policy. These models, which include documents establishing the minimum standards for both the program and the policy, as well as a complaint form, a compliance toolkit, a poster, and a FAQ, are now available online.[14]

Additionally, the State Law amended the New York Civil Practice Law and Rules (CPLR) in two important ways: CPLR 7515 prohibits all New York State employers from requiring employees to sign "mandatory arbitration clauses" for sexual harassment claims, and makes such "prohibited clauses" null and void within contracts entered into on or after July 11, 2018.[15] CPLR 5003-b and the New York State General Obligations Law § 5-336 also now prohibit employers from including non-disclosure provisions in agreements settling sexual harassment claims and litigation, unless the complaining party requests or agrees to confidentiality.[16] The complainant's preference for confidentiality must be memorialized in an agreement signed by the parties and if a non-disclosure agreement is part of a settlement agreement, the individual must consider the agreement for 21 days and have seven days to revoke the agreement.[17]

New York City's "Stop Sexual Harassment in NYC" Act

On May 9, 2018, Mayor Bill de Blasio signed the Stop Sexual Harassment in NYC Act ("City Act") into law, codified as Local Laws 95 and 96 of 2018, and amending the NYCHRL.[18] The City Act increased the statute of limitations for individuals to file gender-based harassment claims with the NYCCHR from one year to three years from the date the harassment occurred.[19] The City Act also expanded protections for all employees, regardless of the size of the employer, and also applies to interns and independent contractors.[20]

Local Law 95 of 2018 requires all New York City-based employers to post a notice in the workplace and distribute a fact sheet to their employees.[21] The notice must be displayed in both English and Spanish and conspicuously posted in the workplace in a common area. The notice describes the complaint process with the NYCCHR, provides employees with examples to help identify discrimination, urges witnesses of sexual harassment to report it, and explains that retaliation for reporting sexual harassment is prohibited. The fact sheet, which must be distributed to employees either upon hire or incorporated into the employee handbook, again states that retaliation is prohibited, illustrates examples of sexual harassment, and provides ways in which employees can report sexual harassment.

Furthermore, Local Law 96 of 2018 requires employers with 15 or more employees to implement an "interactive" sexual harassment training for all employees, including supervisory and managerial employees, in their workplace effective April 1, 2019.[22] The training must meet the following minimum standards:

1. Statements that sexual harassment are a form of unlawful discrimination under local, state, and federal law;

2. Descriptions of sexual harassment using examples;

3. Information regarding the internal complaint process for addressing sexual harassment claims available to employees through their employer;

4. Information regarding the external complaint process available through the NYCCHR, the NYSDHR, and the EEOC, including contact information;

5. Information regarding the prohibition of retaliation using examples;

6. Explanations of bystander intervention and how to engage in it; and

7. Information regarding the particular responsibilities of supervisory and managerial employees in preventing sexual harassment retaliation, and steps that employees may take to appropriately address sexual harassment complaints.[23]

Employers may provide such training in-person or online, so long as it is a, "participatory teaching whereby the trainee is engaged in a trainer-trainee interaction, use

of audio-visuals, computer or online training program or other participatory forms of training as determined by the commission."[24] The training must be completed within one year of April 1, 2019, and each year thereafter.[25] New employees who work over 80 hours in a calendar year on a full-time or part-time basis must receive the training within 90 days of hire.[26] The NYCCHR is coordinating with the state to develop online training materials that satisfy both state and city requirements, and the online training should be available on or before April 1, 2019.[27] The NYCHRL also mandates that employers keep a record for at least three years of the trainings they have conducted, including signed employee acknowledgements, which may be electronic.[28]

Conclusion

The sweeping changes to New York's state and local laws place New York at the forefront of states taking action to root out and eliminate sexual harassment in the workplace. What remains to be seen is what effect these laws have in changing practices within various industries. Now that the spotlight has been trained on the problem, it is the work of employers, employees, and their counsel together to truly eradicate sexual harassment and transform workplace culture so that all employees are able to work free from discrimination.

Endnotes

1. This article was adapted from a paper submitted in connection with panels at the New York City Bar Association and NYU School of Law in October 2018.
2. Nicole Smartt, *Sexual Harassment in the Workplace in a #MeToo World*, Forbes (Dec. 20, 2017), https://www.forbes.com/sites/forbeshumanresourcescouncil/2017/12/20/sexual-harassment-in-the-workplace-in-a-metoo-world/#23dcce5d5a42; ACC Docket Staff, "#MeToo: The Global Impact of the Sexual Harassment Movement," 36 No. 3 ACC Docket 68 (Apr. 2018).
3. Pamela Hutchinson, #*MeToo and Hollywood: What's Changed in the Industry a Year On?* The Guardian (Oct. 8, 2018), https://www.theguardian.com/world/2018/oct/08/metoo-one-year-on-hollywood-reaction.
4. Jeff Green, Riley Griffin, Hannah Recht, #*MeToo: One Year Later*, Bloomberg (Oct. 5, 2018), https://www.bloomberg.com/graphics/2018-me-too-anniversary/.
5. Chai R. Feldblum, Victoria A. Lipnic, U.S. Equal Employment Opportunity Commission, Select Task Force on the Study of Harassment in the Workplace (June 2016), available at https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf.
6. Press Release, U.S. Equal Employment Opportunity Commission, EEOC Releases Preliminary FY 2018 Sexual Harassment Data (Oct. 4, 2018), https://www.eeoc.gov/eeoc/newsroom/release/10-4-18.cfm.
7. Porter Wells, *States Take Up #MeToo Mantle in Year After Weinstein*, (Oct. 3, 2018), https://news.bloomberglaw.com/daily-labor-report/states-take-up-metoo-mantle-in-year-after-weinstein.
8. *See* N.Y. Exec. L. §§ 290 *et seq*. (NYSHRL); N.Y.C. Admin. Code §§ 8-101 *et seq*. (NYCHRL).
9. *See Combating Sexual Harassment in the Workplace* (Oct. 1, 2018), https://www.ny.gov/programs/combating-sexual-harassment-workplace; N.Y. Labor Law § 201-g.
10. *Combating Sexual Harassment: Frequently Asked Questions* (Oct. 1, 2018), https://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions.
11. *Minimum Standards for Sexual Harassment Prevention Policies*, (Oct. 1, 2018), https://www.ny.gov/sites/ny.gov/files/atoms/files/MinimumStandardsforSexualHarassmentPreventionPolicies.pdf.
12. *See id*.; *see also* N.Y. Labor Law § 201-g(1).
13. *Minimum Standards for Sexual Harassment Prevention Training*, (Oct. 1, 2018), https://www.ny.gov/sites/ny.gov/files/atoms/files/MinimumStandardsforSexualHarassmentPreventionTraining.pdf.
14. *Training Requirements*, (Oct. 1, 2018), https://www.ny.gov/combating-sexual-harassment-workplace/employers.
15. CPLR 7515; *see also Combating Sexual Harassment: Frequently Asked Questions – Mandatory Arbitration* (Oct. 1, 2018), https://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions#mandatory-arbitration. The statute acknowledges this provision may be preempted by federal law, as it states that exceptions include clauses that are inconsistent with federal law or collective bargaining agreements. *See* CPLR 7515(b)(iii)(a), (c).
16. CPLR 5003-b; N.Y. Gen. Oblig. Law § 5-336; *see also Combating Sexual Harassment: Frequently Asked Questions – Nondisclosure Agreements* (Oct. 1, 2018), https://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions#nondisclosure-agreements.
17. *Id*.
18. *See* N.Y.C. Admin. Code §§ 8-107(29)-(30).
19. *Mayor de Blasio Signs Legislation Strengthening Protections Against Sexual Harassment*, (May 9, 2018), https://www1.nyc.gov/office-of-the-mayor/news/243-18/mayor-de-blasio-signs-legislation-strengthening-protections-against-sexual-harassment#/0. The new statute of limitation for sexual harassment claims exceeds the state statute of limitations period of one year and the federal EEOC statute of limitations period of between 180-300 days.
20. *See* N.Y.C. Admin. Code §§ 8-102; 8-107(30)(e). The NYCHRL applies to independent contractors whose work furthers the employer's business and who are not themselves employers. ("For purposes of this subdivision, natural persons employed as independent contractors to carry out work in furtherance of an employer's business enterprise who are not themselves employers shall be counted as persons in the employ of such employer.").
21. *See* N.Y.C. Admin. Code § 107(29); Mayor de Blasio, Stop Sexual Harassment Act Factsheet (2018), available at: https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/SexHarass_Factsheet.pdf.
22. *See* N.Y.C. Admin. Code § 8-107(30)(b).
23. *See* N.Y.C. Admin. Code §§ 8-107(30)(b)(1)-(8).
24. *See* N.Y.C. Admin. Code § 8-107(30)(a).
25. *See* N.Y.C. Admin. Code § 8-107(30); https://www1.nyc.gov/site/cchr/law/stop-sexual-harassment-act.page.
26. *See* N.Y.C. Admin. Code § 8-107(30)(b).
27. *See* "Combating Sexual Harassment: Frequently Asked Questions – Q4", (Oct. 1, 2018), https://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions#for-employers.
28. *See* N.Y.C. Admin. Code §§ 8-107(c)(1)-(2).

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