

NYU Labor & Employment Law

NEWSLETTER

OF THE CENTER FOR LABOR AND EMPLOYMENT LAW

New York University School of Law

- 1 LABOR & EMPLOYMENT LAW UNDER THE OBAMA ADMINISTRATION** Union, plaintiff and management-side representatives come together to discuss new labor initiatives
- 2 THE ORIGINS OF THE WAGNER ACT IN LIGHT OF THE CURRENT ECONOMIC CRISIS** Bruce Kaufman explores the historical background of the NLRA and the Wagner Act
- 4 FIDUCIARY DUTY** Samuel Samaro gives a brief overview of his noted 2006 paper
- 5 THE WINNING ARGUMENT IN CHAMBER OF COMMERCE OF U.S. V. BROWN** Willis Goldsmith wins Supreme Court case
- 6 "IMPLICIT BIAS": A CHALLENGE FOR EMPLOYMENT DISCRIMINATION LAW** Michael Yelnosky discusses the disparate treatment doctrine
- 6 ON OUR BOOKSHELF** Review of Jon Fasman's award-winning novel, *The Unpossessed City*
- 7 THE PRESIDENTIAL TRANSITION AND THE NLRB** Cynthia Estlund reflects on her work on the Obama Transition Team
- 7 THE INTERSECTION OF VIRTUAL WORK AND THE FLSA** Miriam Cherry studies the application of the FLSA to Second Life and other Internet novelties
- 8 ADVISORY BOARD**
- 9 CALENDAR**
- 10 BOARD NEWS**
- 12 DIVERSITY IN THE LEGAL PROFESSION – GOING FORWARD** A Conversation with Meryl R. Kaynard
- 13 CONTACT THE CENTER**
- 14 IN MEMORIAM** Seymour Waldman
- 15 CONTRIBUTION FORM**
- 16 ABOUT THE CENTER**

Labor & Employment Law under the Obama Administration

Nora Strecker, Editor



Liebman

LAST NOVEMBER, THREE WEEKS into then-President-Elect Obama's transition efforts, the Center for Labor and Employment Law gathered six noted labor professionals to discuss possible initiatives in labor and employment law that the new Administration would have to contend with and what initiatives

might be put forward in response. Panelists included: Rosemary Alito, a member of K&L Gates LLP; Jonathan Hiatt, general counsel of the AFL-CIO; Peter Hurtgen, senior counsel with Morgan Lewis & Bockius and former director of the FMCS and chair of the NLRB; Professor Thomas Kochan of MIT's Sloan School of Management (who headed up the Obama transition

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effort for the FMCS); Andrew Kramer, a partner with Jones Day; and former Member, now Chairman, Wilma Liebman of the National Labor Relations Board. Marshall Babson, a partner with Hughes Hubbard, moderated the discussion of the Employee Free Choice Act (EFCA) and other possible policy initiatives. Babson, Hiatt, Hurtgen, and Liebman are also members of the NYU Labor Center.

The colloquy was spirited. Andrew Kramer observed afterwards: “The program demonstrated the serious divide that exists over the proposed Employee Free Choice Act.” Chairman Liebman suggested: “it just may be that the stars are coming into alignment, as part of a broader constellation of economic events that are compelling governmental action on a scale we have not seen for

many decades. Perhaps that is what it takes to bring about meaningful labor law reform.”

One audience member not only expressed his satisfaction with the program, but further suggested the Center repeat the program after President Obama’s first 100 days in office. ●



The Origins of the Wagner Act in Light of the Current Economic Crisis

Bruce E. Kaufman, Georgia State University

THE NATIONAL LABOR RELATIONS ACT (NLRA, or Wagner Act) was enacted in July, 1935, in the midst of the Great Depression. The timing is not coincidental for the Great Depression helped create the massive labor problems that gave impetus to the Wagner Act and also forged a critical mass of political and public support in favor of state-encouraged collective bargaining. Had the Great Depression not happened, or had it stopped short at a modest-sized recession, the Wagner Act would have never progressed beyond a talking point in progressive/left-wing circles.

Reflecting on these events and connections is interesting and worthwhile for its own sake. But taking a fresh look at the origins of the Wagner Act is also apropos in light of current events. I particularly have in mind the current economic crisis (incipient depression?) that is unfolding and the new legislation before Congress – the Employee Free Choice Act (EFCA) – that seeks once again to make it easier for workers to form unions and engage in collective bargaining. One is naturally led to ask: Could lightning strike twice?

Unions: The Orthodox View

Each semester, respected economist Daniel Hamermesh begins his labor course with a rap:

It’s all about the Law of Supply and Demand,
Prices are set by the Invisible Hand.¹

These parodies accurately capture the core doctrine of orthodox economics and explain in a nutshell why the very large majority of economists and like-minded legislators and citizens oppose unions, collective bargaining and legislation such as the NLRA and EFCA. These economists model the labor market as akin to a competitive (auction) commodity market where demand, supply and the Invisible Hand determine the level of wages, employment and working conditions. Perhaps the crowning lesson of standard microeconomics is the First Fundamental Welfare Theorem, which states that a competitive free market economy leads to the most efficient (Pareto optimal) utilization of resources.

This theorem has several important implications for policy regarding employees, unions and the labor market. First, free labor markets allocate and price labor resources efficiently (implying wages and employment are “optimal”). Second, free markets through flexible wage adjustments bring about full employment (obviating involuntary unemployment and the need for government intervention). Third, free markets protect employees from exploitation because competition prevents firms from underpaying (or overworking) people and employees can always escape bad conditions by quitting (obviating the need for unions and labor laws). Fourth, free markets lead to fair and just wages and conditions since workers are paid their contribution to production (called “marginal productivity justice”). Fifth and finally, unions in this situation harm economic efficiency, flexibility, and fairness

¹<http://freakonomics.blogs.nytimes.com/2009/02/18/the-latest-economics-rap>



Kochan, Alito, Estreicher, Babson, Liebman, Kramer, Hurlgen, Hiatt

by imposing monopoly-like wage gains, restrictive work rules, discriminatory membership conditions, and strikes. In the orthodox view, unions are essentially a monopolistic-like special interest group that imposes a large and destructive “tax” on consumers, firms and society as they redistribute wealth to a relatively small part of the workforce.

This view of unions predominated in the 1920s, much as it does today among mainstream economists. The union movement in that period was widely seen as monopolistic, discriminatory, corrupt, and increasingly irrelevant in an age of mass production. Union density had slowly fallen during the 1920s to about ten percent at the end of the decade and fell further with the mass layoffs of the depression. Academics were predicting the demise of trade unions, and public support for unions was tepid-to-hostile. The idea that public policy in the form of an NLRA-type bill should encourage and protect union-joining and widespread collective bargaining had little following in the early 1930s.

The Wagner Act As Heterodox Economics

By the mid-1930s, spontaneous strikes and union organizing drives were breaking out in the thousands; public perception of business turned highly critical while support for unions staged an amazing rebound; and in July 1935 the worst nightmare of employers came true – Congress enacted and President Roosevelt signed into law the NLRA. Within a few short years, one-third of the workforce and many key industries and business firms were unionized.

What happened? A full answer requires many pages and coverage of disparate events; the simple answer, however, is that Americans were sold on the idea that unions and collective bargaining would help end the Great Depression.

The idea that unions are a useful device for restoring full-employment is so heterodox today that it is not even discussed let alone given credence among mainstream economists. Senator Wagner, institutional economists, and other progressives made this pitch, however, and in the context of the mid-1930s they found a receptive audience.

The heterodox case for unions and the Wagner Act has several parts. First, the Invisible Hand story and First Fundamental Welfare theorem assume the economy is highly competitive and that flexible prices are capable of bringing about a demand/supply equilibrium (also known as “Say’s Law”). The heterodox thinkers of the 1930s denied both propositions; that is, they argued the economy is riddled with

monopolistic elements on the business side and that cutting wages as a way to cure unemployment only makes job losses grow. An economy, therefore, is not self-regulating and can get stuck in a vicious downward spiral (called “destructive competition”). Second, they argued that the cause of the depression was a shortfall of aggregate demand caused by a growing mal-distribution of income as profits and stock market returns far outpaced wage growth during the 1920s, leading to over-production and an ultimately a collapse. The solution to the depression, therefore, was to expand wages, paychecks, and household income and spending. Third, the reason wage growth during the 1920s lagged behind was because labor suffered an *inequality of bargaining power* – that is, the individual worker is no match for General Motors,

A well-known joke in economics

Q: How many economists does it take to change a light bulb?

A: None. The free market will take care of it.

leading to low wages and conditions. With the advent of mass unemployment in the 1930s, worker bargaining power became non-existent and wages and conditions raced to the bottom. Fourth, and finally, the view was that workers are not commodities but human beings and they deserve democratic voice, due process and fair treatment at work (“industrial democracy”) and free markets do not provide these basic human rights.

Instead of a form of labor market monopoly, the heterodox economic theory of the 1930s portrayed unions as a valuable way to level the playing field, offset high monopolistic business prices, bring democracy to industry, and – most importantly – raise wages, improve working conditions and gain protection from unfair dismissal so workers have bigger paychecks and more stable and satisfying jobs, which lead to a virtuous spiral of larger family incomes, more spending, more production, and more jobs until full employment is restored.

Lessons and Implications for Today

The passage of the Wagner Act was based on these heterodox economic principles and could not have succeeded without them. Over the next seven decades, however, this New Deal rationale for unions and the NLRA greatly receded. One reason is that a year after the Wagner Act was signed economist John M. Keynes published his masterpiece, *The General Theory of Employment, Interest and Money* (1936). It convinced economists and policymakers that they have an alternative, simpler and more efficient way to restore aggregate demand and end depressions – the use of expansive fiscal and monetary policies (e.g., more infrastructure spending, tax cuts, and lower interest rates). A second reason is that the experience with widespread unionism after World War II convinced many people that the orthodox story has a large element of truth – that is, unions are labor market monopolies that lead to wage inflation, production inefficiency, and numerous strikes. Hence, the 1980s-1990s seemed to replay the 1920s – small and declining union density, falling public support for unions, along with rising income inequality and stagnating wages.

Will unions mount a major come-back with the EFCA? Can lightning strike twice?

History suggests the answer depends on three key factors. First, the public has to become convinced that the worsening income inequality and wage stagnation of recent years is an important cause of the current crisis. Second, the public also has to become convinced that other methods to raise wages and stimulate spending, such as traditional Keynesian fiscal and monetary policies, have failed or are inadequate. And, third, there needs to be a labor-friendly voice in the White House, such as Franklin Roosevelt in the

1930s, who will encourage passage and then sign pro-union legislation. Until 2009 all three conditions registered “No.” Should the current crisis and the new Obama administration cause all three to shift to “Yes,” then a pro-union shift in the labor laws is likely. ●

Professor Kaufman spoke at the Center’s Program for NLRB Lawyers at the Board’s headquarters on April 24, 2009.

Fiduciary Duty

Samuel Samaro, Pashman Stein

MOST WAGES ARE USUALLY PAID contemporaneously with delivery of services by the employee. When wages are paid in this manner, the employer assumes all of the risk that the services will be worth what it has agreed to pay for them. There is no quality or quantity defense. So long as the employee was at the appointed place, at the appointed time, and at least going through the motions of performing the appointed responsibilities, the agreed-upon wages will be due.

It is precisely the opposite when an employer pays on a “straight” commission basis. Those who get paid on a commission basis receive no time-based compensation and only get paid when they have selling success, as that term is defined by the commission agreement or practice. In that compensation arrangement, the employer’s labor costs, expressed as a percentage of revenue, remain constant, and it is the employees who accept the risk that the value of their labor may be insufficient.

The problem for such employees is not that they assume selling risk, which they largely accept as the price of greater potential reward. However, most sales employees, like most employees generally, are employed on an at will basis and can be fired at any time for any reason. When an employee paid on a time basis is fired, he or she will at least have been paid up until the time of dismissal. Because a commission employee is only paid when a sale is consummated, a termination before a deal closes can mean that weeks, months or even years of hard work will have been wasted.

In addition, it is not always easy to define selling success. The sale of a product or service is an extremely complex



Samaro

undertaking, requiring cooperation and integration across an entire organization's operations and management structures. If the product is poorly made, often delivered late or too expensive, it will be hard to sell. When it is sold, it is often difficult to ascribe a procuring cause – frequently numerous individuals contributed to the effort, some employed on a commission basis, some not. It is literally impossible to draft a commission agreement that will be nuanced and detailed enough to analyze fairly all transactions under all circumstances.

Given the episodic way in which commissions accrue and the very real difficulties inherent in defining selling success, commission employees are vulnerable to employer opportunism. For employers inclined to cheat, it is too easy to manipulate the variables that determine how a commission is earned and where an employee will be (handling different accounts, transferred, unemployed) when a transaction has completed all stages of the sales cycle. Traditional methods for restraining opportunism in matters of compensation do not work well for commission employees. In 42 states and the District of Columbia there are wage payment statutes that require timely, cash payment of wages and impose harsh penalties on employers who withhold them without just cause. Most of those laws define commissions as wages. However, such laws typically say nothing about how wages accrue; they simply provide for enhanced penalties if an employee can prove that the wage agreement was violated. But it is precisely because of accrual uncertainties that sales employees are vulnerable.

The solution is for the law to treat sales employees more like entrepreneurs. Business partners owe each other duties of loyalty and care, broadly described as fiduciary duties, because they have taken risks and must be able to trust one another in order to increase the likelihood of a successful outcome. Moreover, it is difficult, if not impossible, to draft an agreement that will anticipate and restrain every opportunity each has to harm the other through opportunistic behavior. The same is true for sales employees. They take compensation risks and must be assured that their employers will not deprive them of the benefit of their bargain, namely, an even playing field on which to earn a commission. Employers always have the option of paying on a time basis. If they choose a compensation method that has the effect of transferring financial risk to employees, they must be willing to accept some limitations on discretionary activities that determine whether and to what extent their employees will be paid. ●

Mr. Samaro is the author of "The Case for Fiduciary Duty as a Restraint on Employer Opportunism under Sales Commission Agreements," 8 *U.Pa. J. Lab. & Emp. L.* 441 (2006), from which this article is taken.

The Winning Argument in *Chamber of Commerce of U.S. v. Brown*

Willis Goldsmith, Partner, Jones Day

THE U.S. CHAMBER OF COMMERCE AND a group of private employers challenged portions of a California law that prevented employers from using state funds to "assist, promote or deter union organizing." In a 7-2 decision, the U.S. Supreme Court struck down key provisions of the law, holding that it was preempted by the National Labor Relations Act. *Chamber of Commerce of U.S. v. Brown*, 128 S.Ct. 2408 (No. 06-939) (2008). Center Board Member Willis Goldsmith argued the case for the U.S. Chamber.

The law was challenged on the ground that it conflicted with federal labor policy favoring unfettered employer speech regarding union organizing. The Supreme Court, reversing a 12-3 en banc Ninth Circuit opinion, agreed with the Chamber of Commerce, holding that the law is preempted "because [it] regulate[s] within 'a zone protected and reserved for market freedom.'"



In doing so, the Court relied upon *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 140 (1976), which forbids both the National Labor Relations Board (NLRB) and the States from regulating conduct that Congress left to the free play of economic forces. The Court held that the California law sought to silence conduct that Congress intended to encourage – noncoercive employer speech. Citing, among other things, the explicit protection for noncoercive employer speech in section 8(c) of the National Labor Relations Act, the Court found that the Act "manifested a congressional intent to encourage free debate on issues dividing labor and management." Because the California law had the purpose and effect of inhibiting that debate, the Court held that it was preempted. The Court also relied upon *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986) and *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103 (1989), argued by Center Board Member Zachary Fasman, in striking down the California statute. ●

“Implicit Bias”: A Challenge for Employment Discrimination Law

Professor Michael Yelnosky, Roger Williams University School of Law

DISPARATE TREATMENT DOCTRINE HAS BEEN described by the United States Supreme Court as “the most easily understood form of discrimination. The employer simply treats some people less favorably than others because of their race, religion, sex, or national origin.” *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). However, as those well-versed in Title VII law are well aware, any “simplicity” in disparate treatment law is superficial.

The challenges posed by the possibility of implicit bias are the product of but one of the complexities of Title VII disparate treatment doctrine belied by the Court’s description in *Teamsters* – ambiguity about what it means to prohibit discrimination “because of” race, color, religion, sex or national origin. There is, on the one hand, universal agreement that disparate treatment doctrine prohibits conscious, purposeful discrimination – often referred to as intentional discrimination. Thus, all would agree that a manager who 1) has a conscious belief that blacks are not as well-suited as whites for supervisory positions, and 2) refuses to hire a black applicant for that reason, has engaged in conduct that violates Title VII. However, that consensus breaks down if instead the manager’s choice of the white applicant is a product of “implicit bias,” a subconscious set of stereotypes that cause the manager to evaluate the white applicant more favorably than the black candidate. The manager would not be aware of the operation of the stereotypes and indeed may consciously perceive himself to be evaluating all candidates for employment without regard to their race. Whether this manager’s conduct violates Title VII is a hotly contested question.

A considerable body of empirical literature has developed, involving applications of the “Implied Association Test,” suggesting quite powerfully that unconscious or implicit bias is pervasive. See <https://implicit.harvard.edu/implicit>. The difficult question is whether, and if so how, the insights from this literature should inform Title VII rules. Should Title VII disparate treatment doctrine be read to prohibit discrimination that is the product of implicit bias or should it prohibit conduct only where the employer or other actor is consciously aware that he or she is discriminating? If Title VII disparate treatment doctrine can and should be read to reach decisions that are the product of implicit bias, there are a number of operational ramifications to consider, including

appropriate jury instructions, permissible expert testimony, and tests for weighing the sufficiency of evidence for purposes of motions for summary judgment or motions for judgment as a matter of law. ●

Professor Yelnosky is a Research Fellow of the Center and editor, most recently, of “Behavioral Analyses of Workplace Discrimination,” 3 *NYU Selected Essays on Labor and Employment Law* (Kluwer Law Intl., 2007) (with Mitu Gulati).

ON OUR BOOKSHELF

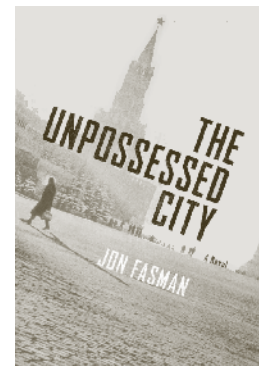
The Unpossessed City by Jon Fasman

The Penguin Press, 2008. 320 pages.

JON FASMAN, THE SON OF BOARD MEMBER

Zachary Fasman, has been named one of five finalists for the Young Lion’s Fiction Award by the New York Public Library, an award given annually which “honors the work of authors age 35 and under who are making an indelible impression on the world of literature.”

Jon’s second novel, *The Unpossessed City*, is set in Moscow, where he worked as a journalist. The book tells the story of Jim Vilatzer, a young man who flees gambling debts and a dead-end job at his parents’ restaurant in the suburbs of Washington, D.C., for a position in Moscow, where he uses his Russian-language



skills (learned from his emigré grandparents) to interview survivors of the Gulag. He grows to discover that these survivors’ stories collectively hide a much darker secret – one that also interests both the CIA and the Russian underworld. Jim also finds himself falling in love

with Moscow: its majesty and brutality, and the way unexpected and deeply human acts of kindness glow amidst the thousands of petty indignities Russia foists upon its citizens. Critics have called *The Unpossessed City* a captivating fast-moving espionage novel, a love letter to Moscow, and the story of a man finding himself and a sense of his place in the world far from any home he had known.

Jon’s first novel, *The Geographer’s Library* (Penguin Press, 2005), was a *New York Times* bestseller and has been translated into more than a dozen languages. His journalism has appeared in the *Times Literary Supplement*, the *New York Times Magazine*, *Slate*, *Legal Affairs* and *The Economist*, where he is an online editor.

The Presidential Transition and the NLRB

Professor Cynthia Estlund, NYU School of Law

HAVING SPENT MUCH OF MY PROFESSIONAL career engaged with labor law, first as a lawyer and then as a law professor, I was honored and excited to be asked last fall to lead the Presidential Transition Team’s review of the National Labor Relations Board.

This was part of the agency review process – the largest and least glamorous part of the official presidential transition. For each of over 100 federal agencies – from cabinet level departments to small and rather obscure independent boards – a team of anywhere from one to 25 people was assigned to scrutinize the agency inside and out. We were to examine both the agency’s inner workings and the perceptions of the agency on the part of important stakeholders both inside and outside the government so that the incoming administration could hit the ground running and make good decisions about budget, personnel, and policy. But others in the transition operation were charged with both policy issues and personnel issues. Ours was basically an information-gathering function.

Our review team’s function was further limited, for the NLRB is an independent agency. The President does not make policy at the NLRB or control its operations; he can appoint Board Members and the General Counsel when there is a vacancy to be filled – and there are currently three vacancies on the five-member Board – and must propose and defend a budget for the agency. So our mission was accordingly limited.

Still, it was quite a thrill, just two days after the election, to fly to D.C. to attend a meeting of the 100 or so “team leaders” for the overall agency review process. At the front of the room were many of the people who have since moved into offices very close to the Oval Office. The level of organization, preparation, and professionalism was simply extraordinary. And our task was daunting, for our reviews were to be largely completed and our reports submitted within six weeks. Like nearly all of the other team leaders, I was ostensibly holding down a full-time job – teaching as a visitor at Harvard Law School.

Happily, with the help of two terrific fellow team members and the unstinting cooperation and generosity of dozens of people, including many career employees inside the NLRB, congressional staff, and representatives of unions, business, and other organizations, we got the job done and the “deliverables” delivered on time. The rest is history – albeit the history that is yet to be written. ●

The Intersection of Virtual Work and the FLSA

Professor Miriam Cherry, McGeorge School of Law, University of the Pacific

TODAY, MILLIONS ENTERTAIN THEMSELVES OR supplement their incomes – or both – by working within popular virtual worlds such as Second Life or casually “clicking” to make a few cents for completing simple tasks on Amazon.com’s Mechanical Turk (a Web site that breaks down complicated tasks, then “crowdsources” them to large groups of users only to later aggregate their jobs). In theory, such virtual jobs make it possible to “work in a fantasy world to pay rent in reality.” F. Gregory Lastowka & Dan Hunter, “The Laws of the Virtual Worlds,” 92 *Cal. L. Rev.* 1, 11 (2004). In practice, workers face challenges making a decent wage in the largely unregulated realm of virtual work. In my most recent article, soon to appear in the *Alabama Law Review*, I question whether the Fair Labor Standards Act (“FLSA”) should apply to such forms of virtual work.

In June, 2008, the IRS issued a private letter ruling holding that greeters in Second Life were employees, rather than independent contractors. Although this issue has yet to be addressed by the Department of Labor’s Wage and Hour Division, the analysis and logic of the two determinations are generally similar. Of importance in determining the application of the FLSA, however, would be several additional questions. Are these online tasks undertaken as hobbies or for fun? Is the “crowd” in the crowdsourcing endeavor a group of “volunteers” as that term is used under the FLSA? How might we grapple with some of these applications of the law to these novel applications of technology?

One answer, certainly, might be to resort to private contract to determine what the user had in mind. Given the adhesive nature and imperfections of online contracts, other factors need to be considered. One is the question of whether the activity is already being monetized and commodified. Another factor is whether the work is “de-skilled,” such as the highly simplified tasks performed on the Amazon Mechanical Turk. In such situations, the potential for exploitation might be higher, and thus the protections of the FLSA might be more important. Since the Department of Labor may choose to regulate this activity, private employers experimenting with this type of work – and the websites that facilitate them – should seek a private response in order to frame the dialogue if an extension of the FLSA is proposed. These “best practices” would be influential if they formed a coherent set of expectations for both workers and employees, in which case the line-drawing necessitated by the FLSA may not be as difficult as it first appears. ●

Professor Estlund served as a member of the Obama Administration transition team for the NLRB.

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Send your news updates directly to our Editor, Nora Strecker, at nora.strecker@nyu.edu or (212) 992-8820.

Calendar

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24**

**NLRB Headquarters,
Washington, D.C.**

Training Program for NLRB Attorneys
“Revisiting the New Deal – the Historical Context and Economic Underpinnings of the NLRA”

**JUNE
4-5**

**New York University
School of Law**

62nd Annual Conference on Labor
“Labor and Employment Law Initiatives and Proposals in the Obama Administration”

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Doing Business in Asia – The Labor and Employment Story

BOARD NEWS

MINDY FARBER's case *Juan R. Estenos v. PAHO/WHO Federal Credit Union*, was recently discussed in The American Bar Association's ABA Journal's article "Tongue Ties." The article addresses the increasing incidence of national origin discrimination, as illustrated by Mr. Estenos's case. He was fired for his lack of knowledge of the English language, despite having been interviewed in Spanish, having been hired for a position that required English and Spanish and receiving positive performance evaluations.

The New York State Bar Association recently recognized **JOHN FULLERTON** as *Empire State Counsel* for performing more than 50 hours of pro bono service in 2008. He was an honoree at the Annual Dinner of AMIT, a charitable organization that builds and operates schools in Israel, for providing pro bono legal services to the organization.

January 2008, **PROFESSOR WILLIAM GOULD IV** of Stanford University Law School, emeritus member of the Center's board, started his new appointment as independent monitor of labor organizing campaigns at First Group America, a major transportation company that frequently crosses paths with the International Brotherhood of Teamsters. Professor Gould and his staff investigate any allegations of violations of First Group's "freedom of association" policy. Within the first 15 months of his appointment as independent monitor, Professor Gould has issued 60 reports.

After serving on the transition team for President-elect Barack Obama, **SETH D. HARRIS** was nominated by President Obama for Deputy Secretary of Labor. Seth Harris was a Labor Department appointee under the Clinton administration, taught at New York Law School, and served as a Research Fellow of the Center before rejoining the government.

On January 20, 2009, President Barack Obama designated **WILMA LIEBMAN** as Chairman of the National Labor Relations Board. She has been a member of the NLRB since 1997.

Professor **PAUL SECUNDA** was recently appointed to the National Advisory Board of the Hofstra Labor & Employment Law Journal and to the Editorial Advisory Board, Wolters Kluwer Law & Business, Labor and Employment Law. He is also a faculty advisor, Marquette University Law School Labor and Employment Law Society, as well as chair of the Labor Relations and Employment Law Section, Association of American Law Schools and chair-elect, Employee Benefits Section, Association of American Law Schools.

SUSAN STABLE recently published *ERISA Litigation* (Third Edition, BNA, 2008) with Jayne E. Zanglein, as well as West Concise Nutshell: *Employment Law* (forthcoming 2009) with Peggie Smith, Rafael Gely and Ann Hodges.

Super Lawyers Magazine named **PEARL ZUCHLEWSKI** among New York's 50 best female lawyers.

Congratulations

to the Board Members that were named Super Lawyers by *Super Lawyers Magazine*

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Diversity in the Legal Profession – Going Forward

A Conversation with Meryl R. Kaynard

MERYL R. KAYNARD, diversity director for Orrick, Herrington & Sutcliffe, is a long-time member of NYU’s Center for Labor and Employment Law and former head employment lawyer for JPMorgan Chase. In the following interview, we asked Meryl about her perspective on the future of diversity in the legal profession, as well as the related and anticipated changes in the practice of law in the new economy.



Q: What are the changes you are seeing that will affect diversity in the legal profession?

The world has changed in the short five months since I joined Orrick. With the economy slowing down, clients demanding more efficiency, fierce competition, technology changing the way we work, and evolving workplace and generational expectations, there is no question that tremendous change is upon us. Firms must re-evaluate how work gets done, how lawyers are paid and promoted, and how clients are charged for services. In house and outside counsel will be asked to do more with less. And public interest and alternate career choices will become more prevalent. Look at our new role models – Barack and Michelle Obama!

Q: Can you give an example?

Partnership at law firms is not the secure, end-all-be-all it once was, and Gen Y’ers are leading the charge (along with aging Boomers, and the “canaries in the mine” – women) for other ways to advance and to practice.

While the economy and unprecedented downsizings in law firms will have an immediate and short term impact on voicing and acting upon these perspectives, the pressures on law firms will, in the longer term, work to address these concerns. As firms respond to client demands for efficiency and challenges to the billable hour model and lockstep advancement of associates, those same firms will explore alternatives that satisfy the growing market for increased flexibility in the practice of law.

Firms that are open to new ways of providing legal services will be ahead of the curve. Examples include Orrick’s offsite Global Operations Center where basic research and document review as well as back office technical support can be provided at tremendous savings, increased use of contract

attorneys for work that can be performed more efficiently, and custom (non-partner) track careers for the short or long term, as well as working remotely/telecommuting. All provide alternatives that benefit both attorneys and their clients. This diversity in career paths (both within and outside law firms) will advance diversity in the profession. With all this fast paced change, firms recognize that they must take care in providing access to good work and meaningful feedback so that everyone has the same opportunity to succeed. Diversity concerns need to be front and center as these new initiatives are rolled out.

Q: What are the biggest challenges?

First – keeping the eye on the ball and taking the long view.

It’s easy to go back to old habits and circle the wagons in down times, and to think of diversity as an add-on, or afterthought – rather than integral to business success. But the very real business case for diversity becomes even more crucial when there is increased competition for business. It is critical that clients – who have long propelled law firms to advance diversity – continue to demonstrate their commitment to and expectation of diverse firms.

Second – doing more with less and prioritizing.

The challenge is maximizing existing resources. Do more with less. Affinity groups and Diversity Committees are obvious partners in providing informal (low cost) programs and discussions on substantive and skill building topics (i.e., business development skills, how to navigate the firm, how to use your network effectively), as well as in supporting mentoring programs. Partnering with clients and local bar associations to share expenses and enhance network building and business development skills is another increasingly popular approach.

I do think we see a dilution of impact because of the many fractured efforts and approaches. While some

healthy competition motivates creativity and action, imagine the power if a number of firms put their resources behind an agreed upon approach, for example, in tackling the pipeline problem. The NYC Association of the Bar is taking this on, and the time has come for this kind of coordinated approach.

Equally important is prioritizing how time, money and resources dedicated to diversity are spent. For instance, being selective in the magazine and association surveys and awards in which to participate, and encouraging increased coordination among clients and other stakeholders on the collection of data for Supplier Diversity programs are among the possibilities. These efforts can consume resources that could be far better utilized.

Q: **In your role as Special Counsel in the Employment Practice – do you see legal developments affecting how diversity is handled and achieved?**

Yes, besides the obvious potential impact of downsizing, restructuring, and reexamining recruitment, there is governing and applicable law to be understood and

implemented. The intersect between Corporate Employee Relations, Diversity and Legal Departments, and between law firm Diversity, General Counsels and Employment Counsel is significant, and those relationships should be forged. The Supreme Court has recently opined on affirmative action, and just accepted certiorari in a case involving alleged reverse discrimination. The new Administration promises to alter the OFCCP's use of regression analysis in conducting compensation analysis, and there are numerous other changes on the horizon. The benefits of proactive, rather than reactive, employment practices are another example of the importance of taking the long view.

Q: **What will success look like?**

When diversity concerns and values are baked into the business practices. When the profession really reflects those it serves; when the playing field is really flat. When the 'meritocracy' considers what it really takes to be an excellent lawyer – not just what the majority – or those who have historically benefited from the status quo – think it takes. And when we value the many different ways there are to practice and contribute to the profession. ●

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IN MEMORIAM

NYU LABOR CENTER REMEMBERS SEYMOUR WALDMAN

14

For nearly sixty years, Seymour Waldman was a consummate advocate for labor unions and the labor movement. As a testament to Waldman's remarkable career, former NLRB Chairman Betty Southard Murphy said if a Labor Hall of Fame existed, Waldman would be a "charter member." Waldman also received the Peggy Browning Fund Award for distinguished service in the profession.

After graduating Columbia Law School in 1950, Waldman quickly established himself as a formidable advocate at his father's labor litigation law firm. Through his representation of the International Longshoremen's Association and other organized labor clients, Waldman made an immediate impact in labor law following passage of the Taft-Hartley Act. Waldman continued to work with his father and brother during the 1960s and 70s representing the interests of meat cutters, glaziers, and painters among many other workers. In 1981, Waldman merged with the Vladeck firm where he acted as General Counsel for the Bricklayers Union for more than twenty-five years. Waldman remained an active attorney until his death.

Waldman regularly confronted novel and complex labor issues, which he often briefed and argued at the Second Circuit and Supreme Court. Waldman also fought for striking workers, including a tugboat union embattled in an eighty-eight day strike at the port of New York and New York City transit workers.

Ever versatile, Waldman's representation of labor clients also involved aspects of other legal practice areas including criminal, immigration and antitrust law. In the current era of law firms staffing legions of attorneys on large disputes, Waldman often worked alone or with one other attorney in many of his memorable cases. He also had the uncanny ability to handwrite or dictate a lengthy brief in one sitting.

Waldman's mother and daughter graduated from New York University School of Law, in 1920 and 1987, respectively.

He will be missed.

— **BRIAN KREUTTER**, NYU SCHOOL OF LAW

Yes

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THE CENTER FOR LABOR AND EMPLOYMENT LAW

was created in 1996 to establish a nonpartisan forum for debate and study of the policy and legal issues involving the employment relationship.

The Center has four major objectives:

- 1** To promote workplace efficiency and productivity, while at the same time recognizing the need for justice and safety in the workplace and respecting the dignity of work and employees
- 2** To promote independent, nonpartisan research that would improve understanding of employment issues generally, with particular emphasis on the connections between human resources decisions and organizational performance
- 3** To sponsor a graduate program for the next generation of law teachers and leading practitioners in the field
- 4** To provide a forum for bringing together leaders from unions, employees and companies, as well as representatives of plaintiff and defense perspectives, for informal discussions exploring new frameworks for labor-management relations, workplace justice, fair and efficient resolution of employment disputes and representation in the workplace