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The Center for Labor  
and Employment Law



New York University School of Law

# NYU Labor & Employment Law

## NEWSLETTER

OF THE CENTER FOR LABOR AND EMPLOYMENT LAW

New York University School of Law

## 62nd Annual Conference: Labor and Employment Initiatives under the Obama Administration

Nora M. Strecker, Editor

**O**N JUNE 4-5, THE NEW YORK UNIVERSITY School of Law held its 62nd Annual Conference on Labor on the theme “Labor and Employment Law Initiatives and Proposals Under the Obama Administration”—a continuation of the Center’s November 2008 program of the same title. • After Professor Samuel Estreicher’s (NYU Law) welcome, Thursday morning’s session on Administrative Reform, moderated by Jerome Kauff (Kauff McGuire & Margolis), began with a presentation by Professor Deborah Malamud (NYU Law) of her paper, “The NLRB in Administrative Law Exile: Problems with its Structure and Function and Suggestions for Reform.” Commentators were Celeste Mattina, NLRB Regional Director in Manhattan, Laurence Gold, of counsel to Bredhoff & Kaiser and Adjunct Professor at NYU Law, and Paul Salvatore of Proskauer Rose. The second part of the administrative reform session covered



**ADMINISTRATIVE REFORMS** Front: Paul Salvatore, Jerome Kauff, Laurence Gold;  
Back: Hon. Wayne Hold, Prof. Samuel Estreicher, Prof. Deborah Malamud, Hon. Celeste Mattina



**CHANGING THE VOTING RULES** Front: Hon. J. Michael Lightner  
Back: Tom Jerman, Prof. Benjamin Sachs

“Improving the Administration of Labor Law without Statutory Change,” with a presentation by Professor Estreicher and comments by the Wayne Gold, NLRB Regional Director in Baltimore, Larry Gold, and Salvatore.

The second part of the morning program dealt with Changing the Voting Rules. Moderated by the Michael Lightner, Regional Director of the NLRB for Newark, the panel included a presentation by Professor Benjamin Sachs of Harvard Law School and comments by Sarah Fox, former NLRB board member and now with Bredhoff & Kaiser, Tom Jerman of O’Melveny & Myers, and Lee Seham of Seham Seham Meltz & Petersen.

Rather than the usual luncheon speaker format, the first day featured a spirited luncheon debate on the resolution, “Resolved: The Employee Free Choice Act Should Become Law” with Jonathan Hiatt, General Counsel of the AFL-CIO, arguing the affirmative and Andrew Kramer of Jones Day arguing the negative. Former Columbia Law dean and employment law specialist Lance Liebman moderated.

Following lunch, Part Four dealt with Card-Check Certification and Interest Arbitration: The Canadian Experience. With moderation by Ronald Shechtman of Pryor Cashman, Roy Heenan of Heenan Blaikie, and David Lawrence, 2008-09 editor-in-chief of the *NYU Annual Survey of American Law*, presented their papers on the Canadian experience with card-majority certification and first-contract interest arbitration. Commentary was provided by Michael Delikat of Orrick, Anton Hajjar of O’Donnell Schwartz in Washington, D.C., William Herbert and Richard Curreri of New York State Public Employment Relations Board and Gene Orza, COO of the Major League Baseball Players Association.

Part Five concluded the afternoon with a presentation by Professor Henry Drummonds (Lewis & Clark Law School) revisiting Labor Law Preemption of State Law with comments by Frederick Braid of Holland & Knight and Eugene Eisner of Eisner & Associates. A reception followed, with informal remarks and a book signing by Steven Greenhouse for his new book *The Big Squeeze: Tough Times for the American Worker*.







r, Lee Seham, Hon. Sarah Fox;

**CARD-CHECK CERTIFICATION AND INTEREST ARBITRATION** Front: William Herbert, Richard Curreri, Michael Delikat, Prof. Samuel Estreicher; Back: Roy Heenan, David Lawrence, Ronald Shechtman, Gene Orza, Anton Hajjar

The second day of the conference started with a presentation by Steve Wetzell, a healthcare policy expert with HR Policy Association, on President Obama’s proposed health care initiatives. Part Six—Antidiscrimination Reforms—was led by Professor Kerri Stone of Florida International University. The first session featured a presentation by Professor Michael Yelnosky (Roger Williams University) on the subject of using testers to combat employment discrimination, with comments by Dean Silverberg of Epstein Becker. The second session featured a presentation on reforming the Age Discrimination in Employment Law by Professor Michael Harper of Boston University. Michael Peterson, also with HR Policy Association, provided commentary.

The next session covered employment law initiatives with Robert Whitman (Seyfarth Shaw) serving as moderator. Professor Sharon Rabin-Margalioth, visiting professor at NYU Law from the Interdisciplinary Center in Herzliya, Israel, started off with a presentation on Paycheck Fairness Legislation, with commentary by John Fullerton III of

Sullivan Cromwell and Wayne Outten of Outten & Golden. Outten focused on executive compensation issues. NYU Law professor Cynthia Estlund presented her proposal for expanding disclosure obligations of employers. Mark Brossman of Schulte Roth provided commentary.

**“Excellent” said one attendee about this year’s conference. “It should have been required for all members of Congress.”**

Acting Chairman of the Equal Employment Opportunity Commission Stuart Ishimaru offered luncheon remarks on new initiatives at the agency. Afterwards, the discussion turned to employment arbitration. Professor Alexander Colvin of Cornell ILR analyzed recent California data in his paper “Employment and Consumer Arbitration: What Do the Data Show?,” while Professor Zev Eigen of Northwestern University School of Law provided commentary. Zachary Fasman of Paul Hastings concluded the conference with a presentation on ethical issues for in-house and transactional employment lawyers.

This year’s volume for Kluwer Law International will be edited by Northwestern Law Professor Zev Eigen, a new Research Scholar of the Center. ●



**LUNCHEON DEBATE: “RESOLVED: THE EMPLOYEE FREE CHOICE ACT SHOULD BECOME LAW”** Prof. Lance Liebman, Prof. Samuel Estreicher, Andrew Kramer, Jonathan Hiatt

**LUNCHEON REMARKS: EEOC ACTING COMMISSIONER STUART ISHIMARU** Frederick Braid, Prof. Samuel Estreicher, Pearl Zuchlewski, Hon. Stuart Ishimaru

# Seizing the Moment: The Formation of Workers United

Brent Garren, Workers United

**W**E ARE AT A MOMENT IN THE LABOR movement when workers are facing unprecedented challenges with a failing economy, stagnated wages, and significant job losses. At the same time, the potential for real and lasting gains is closer to our reach than ever before. We have the chance to improve healthcare, reform immigration, and pass the Employee Free Choice Act, among other things. Workers United, an affiliate of SEIU, is a union dedicated to seizing these opportunities.

Workers United was formed in March 2009 when 150,000 unionists democratically decided to leave UNITE HERE and form a new union, affiliated to SEIU. These workers, former UNITE and former HERE members alike, had a vision of a democratic union that would engage in aggressive, massive organizing to strengthen workers' bargaining power in our core industries, including laundries, food service, manufacturing, distribution and hospitality. Disputes persist with its former partner, UNITE HERE, led by John Wilhelm. Sadly, newly organized workers fighting for a first contract have seen their employers break off negotiations because of pressure from UNITE HERE. Workers United is seeking to end the divisive conflict, calling for arbitration to bring an immediate end to hostilities, but UNITE HERE rejected that offer.

Workers United will carry on the fight for working people. Some examples: We are continuing the important work helping the thousands of laundry workers employed by Cintas form a union and win decent health and safety conditions. We are working in Puerto Rico to help the military apparel workers of Propper International unionize and win the labor standards promised by law but ignored in reality. We are seeking first contracts for newly organized hotel workers in Niagara Falls, and we are proud that we were instrumental in saving the jobs of the Hartmarx workers who make great suits for people like President Barack Obama. When Hartmarx went into bankruptcy, Wells Fargo pressed to liquidate the manufacturer, which would destroy thousands of jobs in Illinois and Western New York. However, Workers United successfully fought for a sale to a new owner who will preserve jobs. We will also fight to pass important legislation like the Employee Free Choice Act, which will benefit all working people—union and non-union alike. This young union has a very proud past that stretches all the way back to the immigrant garment workers of New York in 1900. We are looking forward to another hundred years filled with important victories for working people across North America. ●

## New Initiatives on Executive Compensation

Nora M. Strecker

**O**N OCTOBER 14, 2009 STUDENTS AND lawyers gathered to discuss recent proposals to regulate executive compensation. Michael Delikat, chair of Orrick Herrington & Sutcliffe's Global Employment Law Practice and Labor Center Advisory Board Member, started the program with a comprehensive presentation of the four statutes and regulations that have been put into place since 2008 - the Emergency Economic Stabilization Act of 2008, the Department of the Treasury's Capital Purchase Program, the American Recovery and Reinvestment Act of 2008 and June 2009's Interim Final Order. As the presentation revealed, "incentive compensation should be tailored to long-term prosperity of a firm and should be structured to discourage imprudent, short-term risk-taking." Furthermore,

compensation packages now include clawback provisions, deferrals in vesting of long-term compensation and the discontinuing short-term cash payments. The difficulties that such regulation of compensation presents to employees and employers were addressed at large by Barbara Bishop, former Senior Managing Director at Bear Stearns, and Labor Center Advisory Board Member Wayne Outten, managing partner of Outten & Golden and co-chair of the firm's Executives and Professionals Practice Group. Professor Jeffrey Gordon of Columbia Law School then discussed his recent article, "Say on Pay" (Harvard Journal on Legislation, Vol. 46, 2009). The article addresses the case for a federal rule regarding compensation at U.S. public companies, by looking at the U.K.'s experience with a similar regime, adopted in 2002. ●

# Thoughts on *14 Penn Plaza LLC v. Pyett*

## Arguing for Arbitration Before the Supreme Court

Paul Salvatore, Proskauer Rose

**T**HE CASE BEGAN LIKE SO MANY OTHERS BEFORE it: employees were upset with an aspect of their employment (in this case, reassignment to different job duties) and brought claims in court alleging their employer's action were discriminatory and violated the law. The three employees in this case, Steven Pyett and two co-workers belonged to a union that had negotiated a collective bargaining agreement (CBA) that required arbitration of all discrimination claims. When Pyett's employer moved to compel arbitration in the case, the question arose: Is a union able to agree on behalf of its members that they must arbitrate their statutory discrimination claims?

This question worked its way all the way up to the Supreme Court, where I argued that under the National Labor Relations Act, a union is able to agree to just such an arbitration provision. On April 1, 2009, in a 5-4 decision, 129 S.Ct. 1456, the Supreme Court agreed with our position, and held that a CBA that clearly and unmistakably requires union members to arbitrate discrimination claims under the Age Discrimination in Employment Act is enforceable.

The experience of arguing before the Supreme Court is unparalleled. The process of preparing for that argument in our highest court is, similarly, beyond compare. Less than a month before my argument, I had the great fortune of being "mooted" at NYU School of Law, by "Justices" who were as demanding as the nine who sit on the actual Supreme Court. Deborah Malamud and Sam Estreicher, who teach Employment Discrimination and Labor Law at NYU, along with several other esteemed colleagues, poked and prodded every aspect of my argument, demanding to know why this case belonged in the Supreme Court in the first place, and how my arguments could possibly hold water. After the NYU Moot, I went back to work with my team of talented attorneys, as I did after each moot I was fortunate enough to participate in, to further hone my arguments and carefully craft answers to every conceivable line of questioning.

The Supreme Court's decision in *14 Penn Plaza LLC v. Pyett* is a significant one likely to affect every unionized workforce. The Court empowered unions to agree to a broad arbitration provision in their CBAs, in exchange for valuable concessions

from employers. Years ago, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court had held that an employer can agree to this type of arbitration provision with an individual employee. The decision in *14 Penn Plaza* recognized that Congress had not made any distinction between arbitration agreements with an individual employee and those agreed to by a union representative, and held that the Judiciary must respect this choice. The Court also noted the many benefits of arbitration, which often provides employers and employees with a quicker and less costly resolution of claims. The Court's ruling presents a meaningful opportunity for employers, unions, and employees to reap the substantial benefits of arbitration.

## Now that the Court has Spoken, What's Next?

Larry Engelstein and Andrew Strom, SEIU Local 32BJ

**I**N *14 PENN PLAZA*, THE SUPREME COURT HELD that a collective bargaining agreement (CBA) that "clearly and unmistakably" waives a judicial forum for individual ADEA (and presumably, Title VII) claims is enforceable. This decision was a victory for employers, but it remains to be seen how much impact the case will have.

SEIU Local 32BJ has negotiated four different collective CBAs with the Realty Advisory Board on Labor Relations, Inc. (RAB) that together cover approximately 50,000 property services workers in New York City. In *14 Penn Plaza*, the RAB argued that those agreements "clearly and unmistakably" require workers to arbitrate their statutory discrimination claims. Local 32BJ filed an amicus brief in the Supreme Court arguing to the contrary, inasmuch as the CBAs provide no mechanism for individual workers to bring claims to arbitration, but instead, provide only for arbitration of "Union claims." Ultimately, the Court declined to answer this dispute over the meaning of the contract and its legal consequences, finding that these arguments had been waived by the respondents' failure to raise them below.

By refusing to address the relevant provisions in the CBA, the Court offered no guidance as to what contract language would make a purported waiver of a judicial forum "clear and unmistakable." Further, as the dissent pointed out, the Court "explicitly reserve[d] the question whether a CBA's waiver of a judicial forum is enforceable when the union controls access



to and presentation of employees' claims in arbitration, which is usually the case."

To date, the answers trial courts are providing to these questions tend to support the dissent's prediction that "the majority opinion may have little effect." In *Kravar v. Triangle Services, Inc.*, 186 LRRM 1565 (S.D.N.Y. 2009), another case involving a Local 32BJ member covered by one of the RAB agreements, Judge Richard Holwell of the Southern District of New York refused to compel the plaintiff to arbitrate her discrimination claim, finding that the employer's willingness to arbitrate was irrelevant since the CBA did not allow individual employees to take cases to arbitration without the consent of the union.

*14 Penn Plaza* did resolve one question in a way that will make it harder for employers to impose mandatory arbitration on employees represented by unions. The Court

ruled that requiring workers to arbitrate their statutory claims is a mandatory subject of bargaining under the National Labor Relations Act. Thus, employers must bargain with unions instead of going directly to employees to get them to sign arbitration agreements. Furthermore, an employer must reach an agreement with the union, and not merely an impasse, in order for there to be a "clear and unmistakable" waiver. To that extent, *14 Penn Plaza* reduced employers' prerogative to act unilaterally.

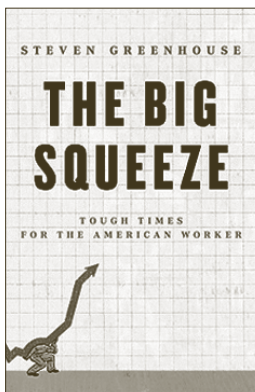
Finally, it is worth noting that low-wage workers often have trouble finding employment discrimination specialists who are willing to take their cases to court. Preserving the right to a jury trial is a worthy goal, but unless there is a pool of competent lawyers who are ready and willing to take these cases, that right may be meaningless. ●

## ON OUR BOOKSHELF

### **The Big Squeeze: Tough Times for the American Worker**

by Steven Greenhouse

Alfred A. Knopf, 2008, 384 pages



**IN THE BIG SQUEEZE**, Steven Greenhouse takes an in-depth look at trends in the American workplace and finds that in many ways things have grown worse for the nation's workers. Wages have stagnated, health and pension benefits have grown worse, job security has shriveled and on-the-job stress has increased.

Going behind the scenes, Greenhouse (NYU School of Law '82) tells the stories of software engineers in Seattle, hotel housekeepers in Chicago, call center workers in New York and immigrant janitors in Houston, as he explores why, in the world's most affluent nation, corporations have been squeezing their workers so hard. *The Big Squeeze* tells the stories of many types of workers: white collar and blue collar, high tech and low tech, middle income and low income; employees who stock shelves during a hurricane while locked inside their store, get fired after suffering debilitating injuries on the job, face egregious sexual harassment, and get laid off when their companies move high-tech operations overseas. Greenhouse also profiles young workers who are having a hard time starting out in today's tough economy and seventy-year-old workers with too little money saved up to allow them to retire.

*The Big Squeeze* examines many major employment and law issues: the growing use of independent contractors and temps, the many companies that pressure employees to work off the clock, the widespread use of undocumented workers and the often egregious exploitation of immigrant workers, the declining influence of labor unions and the many obstacles labor faces in trying to organize workers in the 21st century workplace.

The book explains how economic, business, political and social trends – among them globalization, the influx of immigrants and the Walmart effect – have fueled the squeeze. We see how the social contract between employers and employees that guaranteed steady work and good pensions has eroded over the past three decades, undermined by massive layoffs of factory and white-collar workers and by Wall Street's push for ever-higher profits. The book explores how the post-World War II social contract that helped build the world's largest and most prosperous middle class has been replaced by a startling contradiction: for years corporate profits, economic growth and worker productivity grew strongly while employee pay languished and Americans faced ever-greater pressure to work harder and longer.

*The Big Squeeze* also highlights numerous companies that treat their extremely workers well—in pay, benefits and work-family balance—and can serve as models for all of corporate America. Those companies include Costco, Patagonia, Ernst & Young and the casino-hotels of Las Vegas. The last chapter presents a series of pragmatic, ready-to-be implemented suggestions on what government, business and labor should do to alleviate the squeeze on the nation's 140 million workers.

For more information, visit [www.stevengreenhouse.com](http://www.stevengreenhouse.com).

# Employee Free Choice Act: The Argument Against

Andrew Kramer, Jones Day

**T**HE PASSAGE OF THE EMPLOYEE FREE Choice Act (EFCA) was a hot topic early in the year, but the recent financial crisis and healthcare reform debate have since largely occupied Congress's legislative agenda. In addition, the opposition of key conservative Democrats, including former Republican Arlen Specter, makes passage of the bill in its current form less likely. However, several of these Senators have indicated a willingness to consider other forms of labor law reform, and compromise legislation is being drafted. Given that organized labor continues to pour tremendous resources into the EFCA battle and the Democrats' filibuster-proof Senate majority, the likelihood that some major piece of Labor reform will reach the Oval Office for President Obama's signature cannot be underestimated.

As many others have noted—including Senator Specter, a Labor reform proponent—EFCA as proposed has serious flaws. See 155 Cong. Rec. S3635 (daily ed. Mar. 24, 2009) (statement of Sen. Specter). First, the card-check provisions of EFCA, which would eliminate the secret ballot, would remove “the cornerstone of how contests are decided in a democratic society,” *id.*, and would not solve, but only exacerbate, the alleged fundamental flaw with elections: coercion. If, as the unions suggest, employees may be coerced into voting against their true wishes in a secret ballot contest, they can certainly be coerced into checking a particular box against their wishes as someone looks over their shoulder. Second, EFCA's increase in punitive measures and mandatory injunctive relief unfairly apply only to employers, and not to unions, without evidence that they are necessary.

Still, perhaps the most flawed, and least discussed, part of EFCA are its provisions requiring interest arbitration of first contract disputes not resolved within a ridiculously unrealistic 120 days. These provisions would take responsibility for deciding the terms of a collective bargaining agreement away from the parties to the agreement and place that responsibility in the hands of an arbitrator appointed in accordance with regulations promulgated by the Federal Mediation and Conciliation Service. The rules governing this extraordinary transfer of authority would be drafted by FMCS, with no statutory guidance or limitations whatsoever. And arbitrators who may or may not be familiar with the particular industry or workplace at issue would be called upon to set both economic and non-economic terms of a contract that

would bind the parties for two years. This poorly developed proposal—in which even proponents do not know how the arbitration will work, what kind of arbitration it will be, how the panel will be established, what remedy parties will have for violations of the government imposed contract, and legion other issues—is the wrong answer.

First, and most importantly, EFCA's first contract arbitration provisions turn collective bargaining on its head. Under U.S. labor law, collective bargaining is based on the principles that the threat of economic force—which in general is unregulated—will compel agreement and achieve industrial peace, and that thus a party must negotiate, but cannot be forced by the NLRB to agree to any particular contract term. Forced interest arbitration abandons this system in favor of one in which an FMCS arbitrator, and not economic reality, decides the rules that will govern the parties' relationship. In the current economic climate, especially, this would appear to be an especially dangerous gambit.

Second, the arbitrary timetables that EFCA imposes virtually ensure that nearly all first contracts will be settled by arbitration rather than negotiation. Even the NLRB has acknowledged that initial bargaining “involves special problems” and, even when successful, takes “almost twice as long” as renewal negotiations. This is because matching employee expectations—often spurred on by inflated union promises—is not an easy task. Nor is determining the rules of the shop—so-called non-economic terms—for the first time. Each of these take time, but with that time comes an agreement that the parties can accept to govern their relationship, rather than one imposed upon them by an arbitrator.

Third, arbitrators are ill-suited to establish non-economic provisions of a labor agreement. While it is at least theoretically possible to set standards for economic terms—although EFCA does not do so—non-economic provisions are different. There are no widely accepted standards for management rights, management flexibility, and the like, and deciding these issues—much less the appropriate balance between these issues and the contract's economic terms—fall well outside an arbitrator's expertise.

Finally, and for all of these reasons, there are serious constitutional concerns with the arbitration provisions that would likely implicate the Fifth Amendment's Due Process and Takings Clauses as well as delegation concerns regarding private arbitrators receiving governmental powers. ●

# Predictions for the EEOC's Future

Stuart Ishimaru, Acting Chairman & Commissioner, EEOC

**HAVE SERVED AS A COMMISSIONER AT THE U.S.** Equal Employment Opportunity Commission (EEOC) since 2003. Recently, I have had the privilege of serving at President Obama's designation as the Acting Chairman of the agency. My tenure as Acting Chairman has proven to be both inspiring and invigorating.

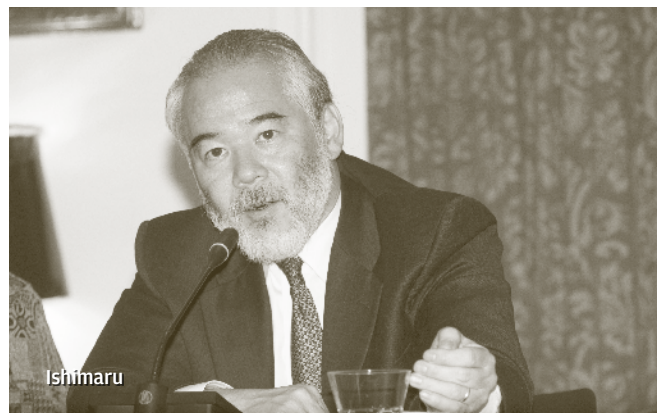
My tenure began during a time of great testing and transition for the Commission. Unfortunately, during the previous eight years, flat budgets had decimated the EEOC. The agency had lost almost 25% of its work force, severely hindering our enforcement efforts. The private sector charge docket reached all-time highs. The morale of our employees—and the public perception of the agency as a vigorous champion of civil rights—appeared to approach all-time lows.

But we've turned the corner from those darker days. I have been proud and grateful to serve in the current administration, which appreciates the pivotal role law enforcement agencies like the EEOC play in promoting civil rights and social justice. Thanks to an empathetic President and an understanding Congress, our fiscal outlook has improved significantly. We have a down payment on the funds we need to begin putting the agency back together again. The challenge now is figuring out how to use these resources most creatively and effectively—how to seize this opportunity to retool the EEOC for a new era.

What should a reinvigorated EEOC look like? To begin, EEOC appointees and employees need to recommit ourselves to upholding and embodying the highest standards of professional competence and integrity. We have to focus more on the quality as well as the quantity of our work product. We need to be smart, nimble, and forward-thinking. We also need to innovate. The agency must come up with better strategies to eliminate our charge backlog. At the same time, we also need to figure out how to transform ourselves from an organization focused primarily on achieving charge resolutions within a targeted timeframe, to one that can effectively handle a heavy charge load and simultaneously engage in large-scale, systemic enforcement actions targeting problematic companies and industries.

The Commission also has to become better at combating emerging and nuanced forms of workplace discrimination. We of course must continue to identify and rectify blatant bigotry in the workplace. However, there are new, more subtle types of employment discrimination, or what I call “second generation” violations, to confront. These are harder to detect and therefore harder to prove. Often, unconscious stereotypes or implicit biases are at play. Examples include zip code discrimination (discriminating against applicants who live in

allegedly “undesirable”—typically minority—neighborhoods), dialect/accents discrimination (discriminating against someone for “sounding foreign” or “sounding black”), and resume discrimination (discriminating against individuals with presumptively “black” names or who are affiliated with “ethnic” organizations). Similarly, increased employer use of credit checks, personality tests, and arrest and conviction records puts certain protected groups at greater risk of being disqualified from employment opportunities, unnecessarily and illegally.



We at the EEOC need to devise and use tools and tactics up to the task of rooting out and ridding the workplace from these seemingly innocuous but unlawful employment practices.

We also need to have a grander vision. We should look beyond our current workload and at more than just the cases that come through our doors. We have to get out more into our communities to find out where and how discrimination is happening “on the ground.” We need to be much better at serving populations that currently are underserved (perhaps because of language barriers, fear of government, or a simple lack of knowledge about the EEOC and employee rights). Finally, we need to get out ahead of the discrimination curve. We have to ask ourselves what the “third generation” of employment discrimination will be. Will it increasingly involve genetic discrimination? “Intersectional” discrimination (e.g., discrimination because of a combination of disability and advanced age)? Methods and grounds of discrimination we have not even contemplated yet?

It won't be easy to anticipate these coming trends, much less to rebuild and reform the agency so it is ready for them. But we've already put the Commission on a much firmer footing for the future. With the continuing help of administration officials and appropriators, and with input from those we serve and our stakeholders, we can make sure the EEOC's best days and most lasting accomplishments lie ahead. ●



# Moving from UNITE HERE to MLBPA

David Prouty, Major League Baseball Players' Association

**A** LITTLE OVER A YEAR AGO, I MOVED from one union to another—and from one world to another. I left my position as General Counsel of UNITE HERE, after 22 years with that union and its predecessors, to become Chief Labor Counsel of the Major League Baseball Players Association.

Readers of this newsletter need little introduction to either UNITE HERE or the MLBPA. The former is famous for its campaigns to organize low-wage workers (think “Norma Rae”); the latter for its remarkable success in freeing its members from a lifetime of indentured service and bringing them free agency and (on average) millionaire status.

I started with UNITE HERE’s predecessor union, ACTWU, in 1986 as the lawyer for the union’s Southern Region. Over the next fifteen years, I worked throughout the South, helping courageous low-wage clothing, textile and laundry workers stand up to vicious employers, nasty supervisors and belligerent management attorneys. I handled the legal work on many of the union’s landmark organizing drives, including Fieldcrest Cannon, S. Lichtenberg, Kmart and Tultex. I then served seven years as the Union’s General Counsel, overseeing the legal work for one of the nation’s most progressive and aggressive organizing unions.

Contrary to appearances, my job change had little to do with the civil war that has erupted in UNITE HERE since my departure. Rather, I was offered a remarkable opportunity to work with a union and with individuals I had long admired and, after 22 years, a chance to do something markedly different that still fell within the rubric of union-side labor law. Besides, it’s baseball—and as a lifelong fan, that mattered.

Of course, I engaged in much hand-wringing and soul-searching along the way (ask my wife) about what the move from a union of low-wage workers to a union of highly-paid athletes meant—about me, my work, and my life.

My new position has its own challenges, as any new job does. I’m still in the process of learning the industry, the Basic Agreement, and (literally) the rules of baseball.

There are significant differences: these workers, unlike my previous clients, have their own agents, and sometimes their own lawyers and accountants. The union here deals with only one industry—but there are 30 different employers (teams) to wrestle with. There’s only one union contract to administer, but it’s the longest and most complicated I’ve seen. The union here deals with the strictest drug testing program in American sports. And in baseball, the names

and likenesses of the workers are literally worth millions of dollars—a property interest the union devotes much attention to protecting.

On the other hand, it’s not a completely new world. I’m lucky to be surrounded by great lawyers at the MLBPA, both inside and outside, just as I was at UNITE HERE. I still investigate and file grievances, handle arbitration hearings, write briefs, negotiate settlements with management attorneys, give advice to workers (or agents) about the meaning of the collective bargaining agreement, handle internal union matters, and advise the union’s elected leaders. And I still get to spread the gospel of trade unionism and the virtues of collective action and collective bargaining.

I got tremendous satisfaction from representing UNITE HERE members, especially in organizing campaigns, and from watching them empower themselves and literally change their lives. But there is satisfaction here, too, in helping the players who need our help. That includes the superstars, as well as the young players coming up—the ones whose careers can be manipulated by teams through a complicated system of waivers, options, and injury assignments that I am still learning my way through. And it’s been fascinating to learn about salary arbitration, where players who have accumulated three years of major league service are rewarded for that time and effort in the form of salaries set by recourse to that most basic of union principles—a hearing before a panel of impartial arbitrators.

Do I feel bad about those salaries? Not at all. As a trade unionist, I believe the workers deserve every penny. The baseball players I represent now are cream of the crop—the best at what they do in the world. They are the product, the game, the reason the fans come to the park, and they deserve to reap the fruits of their labors.

Since I graduated from college, I’ve never drawn a paycheck for a full-time job from any institution but a union. To have stayed a part of the labor movement I love and yet worked in such varied settings has been my true good fortune. ●

# Revisiting the New Deal: The Historical Context and Economic Underpinnings of the NLRA

David Schwartz, Senior Counsel to NLRB Chairman Wilma B. Liebman

**O**N APRIL 24, 2009, NYU LAW'S CENTER for Labor and Employment Law and the National Labor Relations Board (NLRB) co-hosted a symposium at NLRB Headquarters in Washington, D.C. examining the political and economic setting of President Roosevelt's New Deal and the creation of the NLRB. After welcoming remarks by NLRB Chairman Wilma Liebman and Deputy General Counsel John Higgins, Professor Sam Estreicher introduced the participants: Kirsten Downey, the author of a new biography of Frances Perkins (*The Woman Behind the New Deal: The Life of Frances Perkins, FDR's Secretary of Labor and his Moral Conscience*), and Bruce Kaufman, professor of economics at Georgia State University.

In telling the story of the 1935 passage of the Wagner Act, Ms. Downey focused on three key players: President Franklin D. Roosevelt, Secretary of Labor Perkins, and Senator Robert Wagner. Contrary to the conventional view of Roosevelt and Perkins as strong advocates of the Wagner Act, Ms. Downey stated that they covertly opposed its passage because they feared that the Act would promote widespread governmental intervention in labor-management relations. Roosevelt and Perkins preferred to empower unions through their participation in the industry groups established by the National Industrial Recovery Act (NIRA), enacted in 1933. It was Senator Wagner, based on his unsuccessful attempts to resolve labor disputes on a voluntary basis as chairman of the National Labor Board under the NIRA, who saw the need for an agency—the NLRB—with the authority to compel employers to recognize their employees' unions and bargain with them. Ms. Downey concluded that Senator Wagner was able to persuade Congress to pass his bill—despite the resistance of Roosevelt and Perkins—only because the Supreme Court invalidated the NIRA in 1935.

Professor Kaufman elaborated on Ms. Downey's presentation by discussing the Wagner Act in the context of the endemic wage-price deflation of the 1930s. In the NIRA, the Roosevelt administration sought to raise prices and wages by suspending the antitrust laws and permitting industry groups to set prices and by providing employees with the right to join independent unions and bargain collectively. In contrast, Senator Wagner believed that the promotion of collective bargaining, in itself, would stop deflation by raising

workers' wages and expanding the country's purchasing power. Professor Kaufman described this theory as "heterodox economics" because it went against the orthodox theory that depressions were self-correcting. Professor Kaufman concluded that the Wagner Act was enacted only because the Supreme Court's invalidation of the NIRA left Roosevelt with no other feasible method of raising wages.

Both presentations provoked lively discussion from the audience—and provocative responses from the presenters. Professor Kaufman predicted that the Employee Free Choice Act, currently pending in Congress, will pass only if the current economic crisis worsens. Ms. Downey stressed that the New Deal's importance was not in ending the Great Depression, but in keeping many impoverished Americans alive and in reviving a sense of political egalitarianism in the United States. ●

## On the Duty of Fair Representation

Mitchell Rubinstein, New York State United Teachers; New York Law School

**R**ECENTLY PUBLISHED IN *THE UNIVERSITY of Michigan Journal of Law*, "Duty of Fair Representation Jurisprudential Reform: The Need to Adjudicate Disputes in Internal Union Review Tribunals and the Forgotten Remedy of Re-Arbitration," 42 *U. of Mich. J. L. Ref.* 517 (2009) is an important article concerning the problems with existing duty of fair representation jurisprudence.

One of the best-kept secrets in American labor law is that duty of fair representation jurisprudence simply does not work. It does not work for plaintiff union members because they must satisfy a close-to-impossible burden of proof and have a short statute of limitations window in which to assert their claim. It does not work for defendant unions because they are often forced to file pointless grievances in order to avoid the cost of litigation. It does not work for defendant employers because they are often brought into these lawsuits because they have the "deep pockets."

The article makes two proposals to reform duty of fair representation jurisprudence. First, the author argues that putative plaintiffs should be required to have their claims adjudicated before internal union review tribunals as opposed to courts. This internal tribunal system, if procedurally and substantively fair, would provide unions with a complete defense to duty of fair representation claims. This would move most duty of fair representation disputes from the ex-post stage (after a court dispute has arisen) to the ex-ante stage (before a court dispute has arisen) and reduce unnecessary litigation. Second, the Article argues that the current system needs to be “tweaked” to return to the original *Vaca v. Sipes*, 386 U.S. 171 (1967), intent of utilizing re-arbitration as a remedy, as distinguished from money damages, when a breach of the duty of fair representation is found.

As Justice Stephen Breyer recognized before his appointment to the Supreme Court, “[j]ustice requires a fair tribunal, but not necessarily an optimal one.” *Stanton v. Delta Airlines*, 669 F.2d 833, 838 (1st Cir. 1982) (affirming re-arbitration as remedy after breach of duty of fair representation was found). Indeed, Justice Breyer went so far as to state that there should be a presumption in favor of re-arbitration as a remedy when a breach of the duty of fair representation occurs.

If the proposals outlined in this Article are adopted, the prospect of a union or an employer facing a claim for damages for breach of the duty of fair representation would be greatly diminished. ●

# Amicus Brief for the Chamber of Commerce in *Gross v. FBL Financial Services, Inc.*

Shay Dvoretzky, Jones Day

**I**N *GROSS V. FBL FINANCIAL SERVICES, INC.*, 129 S. Ct. 2343 (2009), the Supreme Court held that a plaintiff asserting a disparate-treatment claim under the Age Discrimination in Employment Act (ADEA) must prove by a preponderance of the evidence that age was the but-for cause of the challenged employment action.

The plaintiff, Jack Gross, alleged that his employer, FBL, demoted him on the basis of age. The district court instructed

the jury that it should return a verdict for Gross if he proved by a preponderance of the evidence that FBL demoted him and that his age was a motivating factor in that decision. The court also instructed the jury that it should return a verdict for FBL if FBL carried its burden of proving by a preponderance of the evidence that it would have reassigned Gross regardless of his age. The jury found in favor of Gross.

The Eighth Circuit reversed, holding that the district court improperly instructed the jury pursuant to *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). There, a plurality of the Supreme Court concluded, given the particular context of the Title VII case before it, that if the plaintiff “shows that discrimination was a ‘motivating or a substantial’ factor in the employer’s action, the burden of persuasion should shift to the employer to show that it would have taken the same action regardless of that impermissible consideration.” The Eighth Circuit, interpreting Justice O’Connor’s separate opinion in *Price Waterhouse*, held that a plaintiff must present direct evidence of discrimination (which Gross had not done) to shift the burden of persuasion to the employer.

The Supreme Court granted certiorari to consider whether a plaintiff must present direct evidence of discrimination to obtain a *Price Waterhouse* mixed-motive jury instruction in an ADEA disparate-treatment case. The Chamber of Commerce filed an amicus brief in support of FBL. The Chamber argued that, in accordance with the common law of torts and the conventional civil-litigation rule that plaintiffs must prove their cases, plaintiffs bringing suit under the ADEA must carry the burden of proving that the defendant discriminated on the basis of age. In *Price Waterhouse*, the Chamber argued, the Court recognized a narrow exception to this rule, but it did so in the unusual context where the challenged employment decision was made by a partnership admissions committee, not by a single company supervisor or manager. Thus, *Price Waterhouse* presented the question of which of the multiple grounds, both discriminatory and nondiscriminatory, on which the individual members of the committee acted was decisive in producing the challenged employment decision. In that situation, the Court held, in accordance with common-law tort cases and other precedents involving multiple causation, that once a plaintiff proves that unlawful bias was a substantial factor in the challenged decision, the defendant is entitled to an affirmative defense against liability if it proves that they would have taken the same employment action even absent discrimination. In contrast, the Chamber argued, the burden of persuasion should never shift to the defendant in the ordinary case, like Gross’s, in which the central issue was not multiple causation, but whether the non-discriminatory explanation for the challenged employment action offered by the defendant should be believed. In the alternative, the Chamber argued that the Court should (*Continued on page 14*)



# Estreicher's Judicial Performance Index 2007-08 Supreme Court Labor & Employment Decisions

SAMUEL ESTREICHER, NYU SCHOOL OF LAW

**P**OLITICAL CRITERIA FOR JUDGING THE Supreme Court's work are hopelessly unsatisfying as long as we reserve the right to have different political views and legal philosophies—and the Court continues to have a completely discretionary docket. I propose, instead, a more limited criterion that may generate broader consensus: Is the Court deciding what it has to and no more than it has to?

In the table that follows, I apply this criterion to labor and employment cases argued during the Court's 2007-08 term. The Court receives a grade of 1 if it decides the case on the issue presented by the petition and the facts and rules no more than necessary to address that question. The Court receives a score of 0 if it purports to decide a broader issue. On the other hand, if it hears a case and fails to address a fairly presented issue, the Court also receives a score of 0.

Three years of results are in. In the 2005-06 term, the Court heard nine cases involving labor and employment issues. The maximum score it could have received was 9; instead, it received a case of 4, for an overall performance score of .44. See *Labor and Employment Law Newsletter (LEL)* Spring 2007m p.13, at [www.abanet.org/labor/lel-newsletter.shtml](http://www.abanet.org/labor/lel-newsletter.shtml). In the 2006-07 term, the Court heard 4 labor and employment cases and received the maximum score of 4, for an overall performance score of 1. See *LEL* Summer 2008, p. 10, at [www.abanet.org/labor/lel-newsletter.shtml](http://www.abanet.org/labor/lel-newsletter.shtml). In the 2007-08 term, the Court decided 12 labor and employment cases and received a grade of 11, for an overall performance score of .91.

I will apply the same criterion in a future issue of *LEL* to evaluate the Court's work product during the 2008-09 term. Stay tuned.

CASE	ISSUE
<i>Preston v. Ferrer</i> , 128 S. Ct. 978 (2008)	Does the Federal Arbitration Act (FAA) override state statutes that refer certain disputes initially to an administrative agency?
<i>LaRue v. DeWolff</i> , 128 S. Ct. 1020 (2008)	(1) Does § 502 (a) (2) of the Employment Retirement Income Security Act (ERISA) permit the participant to sue to recover losses in a defined contribution plan caused by a fiduciary breach? (2) Does § 502 (a) (3) of ERISA permit suit for make-whole relief for losses caused by a fiduciary breach?
<i>Sprint/United Mgt. v. Mendelsohn</i> , 128 S. Ct. 1140 (2008)	Must a district court admit "me too" evidence—testimony of nonparties complaining of discrimination by supervisors not complained of by the plaintiff?
<i>Federal Express v. Holowecki</i> , 128 S. Ct. 1147 (2008)	Does an intake questionnaire submitted to the EEOC constitute a "charge" that must be filed under the Age Discrimination in Employment Act (ADEA)?
<i>Hall Street Assoc. v. Mattel</i> , 128 S. Ct. 1396 (2008)	Can parties to an arbitration agreement sue on grounds for just cause more than the grounds for just cause under the agreement?
<i>Gomez-Perez v. Potter</i> , 128 S. Ct. 2267 (2008)	(2) Does the Age Discrimination in Employment Act (ADEA) apply to federal employees? (3) Does the ADEA apply to federal employees? (4) Does the ADEA apply to federal employees?
<i>CBO v. Humana</i> , 128 S. Ct. 1951 (2008)	Does the Age Discrimination in Employment Act (ADEA) apply to a retaliation claim cognizable under 41 U.S.C. §1981?
<i>Engquist v. Ore. Dept. of Agriculture</i> , 128 S. Ct. 2146 (2008)	Does the Equal Protection Clause, in particular the "class-of-one" doctrine, prohibit a public employer from intentionally treating an employee differently from similarly situated employees when it has no rational basis to do so?
<i>Metropolitan Life Ins. v. Glenn</i> , 128 S. Ct. 2343 (2008)	Does the fact that ERISA plan claims administrator both evaluates and pays claims constitute a conflict of interest that must be weighed in a judicial review of the administrator's benefit determination—and if so, how should any such determination be taken into account?
<i>Kentucky Retirement Sys. v. EEOC</i> , 128 S. Ct. 2361 (2008)	Does the use of age as a potential fact in the distribution of retirement benefits to workers who become disabled prior to the time they are eligible for normal retirement benefits establish a prima facie case of discrimination in violation of the ADEA?
<i>Meacham v. Knolls</i> , 128 S. Ct. 2395 (2008)	Does an employer defending against a claim of disparate impact under the ADEA bear the burden of persuasion of the "reasonable factors other than age" defense?
<i>Chamber of Commerce of U.S. v. Brown</i> , 128 S. Ct. 2408 (2008)	Is California's regulation of non-coercive employer speech on union organizing preempted by federal labor law?

**See the complete chart on page 25 of this pdf**

JUDICIAL RESTRAINT?	NON-DECISION?	NET SCORE
Decided question presented.	No	1
Decided question presented (relief was available under § 502 (a) (2), so there was no need to decide the § 502 (a) (3) question)	No	1
Decided question presented.	No	1
Decided question presented.	No	1
Decided question presented.	No	1
Decided question presented.	No	1
Decided question presented.	No	1
Decided question presented	Yes (Court did not decide how conflict should be taken into account)	0
Decided question presented.	No	1
Decided question presented.	No	1
Decided question presented (even though dissent argues that compliance burdens should not have been addressed)	No	1

See the complete chart on page 25 of this pdf

"Estreicher's Judicial Performance Index" by Samuel Estreicher published in *Labor And Employment Law*, Volume 35, No. 3, Spring 2009. Copyright © 2009 by the American Bar Association. Reprinted with Permission.

## ON OUR BOOKSHELF

### Compensation, Work Hours, and Benefits: Proceedings of New York University's 57th Annual Conference of Labor

Jeffrey Hirsch, Editor

Samuel Estreicher, Series Editor

Kluwer Law International, 2009, 652 pages

#### WORKING DISPUTES HAVE BECOME A LARGE

and important part of state and federal court dockets. Perhaps no other area represents this trend more than disputes over compensation, work hours, and benefits. It has become increasingly common to see such cases involving thousands of employees and hundreds of millions of dollars. Yet, these issues are also one of the great equalizers in workplace law, as they affect both the high-wage executive and the low-wage laborer.

In recognition of the importance of compensation, work hours, and benefits issues, the NYU Center for Labor and Employment Law dedicated New York University's 57th Annual Conference of Labor to the examination of these topics. Wolters Kluwer recently published the volume containing the papers presented at this conference, as well as other related pieces; Jeffrey Hirsch edited the volume, and Sam Estreicher is the series editor.

Compensation, work hours, and benefit issues arise in a broad range of contexts—a scope that is reflected in the volume's nine parts. These parts include discussions about ensuring acceptable compensation and work conditions in a global economy; issues surrounding minimum and living wages; the possible demise of traditional pension benefits; issues surrounding the Fair Labor Standards Act; the conflicting issues and policies surrounding attempts to keep workers' pay secret; the payment of bonuses and other forms of compensation, including in the securities industry; exploration of multiemployer benefit plans; and payment issues involving global organizations.

As these topics illustrate, the volume explores a range of areas that have taken a particularly significant role in the emerging global economy. Yet, compensation, work hours, and benefits issues still remain an important concern for smaller, local firms. By examining these issues in the wide variety of circumstances in which they arise, the volume provides important insights into an area of law that will increasingly play a major role in state, national, and international workplace law.

**AMICUS BRIEF** (from page 11) > abandon Price Waterhouse altogether and hold that ADEA plaintiffs bear the burden of persuasion at all times.

The Supreme Court held, as an initial matter, that Price Waterhouse, a Title VII case, did not control its analysis of the ADEA because of differences in the two statutes concerning the burden of persuasion. The ADEA, unlike Title VII, does not expressly authorize discrimination claims in which impermissible bias was merely “a motivating factor” for an adverse employment decision. Moreover, when Congress added the provision involving a “motivating factor” to Title VII, it declined to do so with respect to the ADEA, even though it amended the ADEA in other ways at the same time.

Having determined that Price Waterhouse did not apply to the ADEA, the Court held that the text of the ADEA, which prohibits discrimination “because of” an individual’s age, requires age to be the reason that the employer acted. Moreover, nothing in the statute alters the conventional civil-litigation rule that the plaintiff carries the burden of persuasion. Thus, the Court concluded that the ADEA requires a plaintiff alleging disparate treatment to prove by a preponderance of the evidence that age was the but-for cause of the employer’s actions.

Justice Stevens dissented. In his view, the Court should have applied Price Waterhouse to the ADEA and concluded that a plaintiff need not present “direct” evidence of discrimination to obtain a mixed-motive instruction shifting the burden of persuasion to the defendant. Justice Breyer also dissented, arguing that the ADEA should not be construed to require the plaintiff to show “but-for” causation, which, in his view, is more appropriate in the typical tort case than when an employer’s potentially mixed motives are at issue. ●

## Social Science and Labor and Employment Law at Cornell ILR

Esta Bigler, Cornell ILR

**C**ORNELL ILR SCHOOL’S LABOR AND EMPLOYMENT Employment Law Program, directed by Esta R. Bigler, draws on the expertise of ILR and Cornell University faculty to focus on the interaction of social science research

and labor and employment law and its impact on workplace issues and public policy questions.

This emphasis on social science and the law provides opportunities for attorneys and social scientists to come together at conferences and forums to discuss their respective work and how they can each benefit from the work of the other. Specifically, in the labor and employment law area, the research of the faculty provides a valuable resource to practitioners when advising clients about, for example, diversity initiatives, implicit bias in discrimination cases, wage equity questions, or the impact of home visits on an organizing campaign, to name just a few, as well as when developing new legal theories that will have long range implications for legal practice. Similarly, the work of lawyers offers opportunities for social scientists to see the effect of their research, find avenues for the practical application of their work, and discover new research questions for further exploration.

An example of this approach is The Richard Netter Conference on Race, Criminal Conviction and Employment: Legal Practice and Social Science, held on Friday, October 9, 2009, in which social scientists—sociologists, criminologists, labor economists—who study the impact of criminal convictions on employment, questions of race and recidivism came together with plaintiff and management lawyers to discuss issues of race discrimination, the EEOC guidelines and re-entry programs, with the goal of giving lawyers the most current knowledge enabling them to advise clients on this increasingly complex issue.

Another project is the development of a Consent Decree Repository. Discussions with attorneys and academics working in the area of Title VII revealed that no central repository of resources exists for lawyers and judges to help them draft consent decrees or court orders to settle class action discrimination lawsuits utilizing best practices and best written clauses. Work in Phase One of the project has included collecting consent decrees and categorizing them to create a searchable database. Beta testing of the site will begin shortly, with the initial group of consent decrees soon to be accessible to attorneys, judges, and the public via the ILR School’s Catherwood Library Digital Commons. In Phase Two, attorneys will be able to access specific clauses by industry, protected class, theory of discrimination, and type of remedy. Once the repository is functioning, the next phase of the project is to determine the effectiveness of the remedies.

The Cornell ILR Labor and Employment Law Program has set forth an ambitious agenda to bring together social science researchers and labor and employment lawyers to study the important issues that employers and unions face and the public policy implications arising from decisions made every day. ●



# Restatement Third of Employment Law: The Authors on their Work

**T**HE AMERICAN LAW INSTITUTE (ALI) WAS founded in 1923. With then-48 state court systems, common law doctrine had become complex and uncertain. New legal fields were opening, and scholars, judges, and practicing lawyers thought that legal responses to changing social needs were inevitable but needed to be shaped and guided by leading members of the academy, bench and bar. Today there are about 4,000 members. There was a Council, today of about 60 individuals, to govern the work. Professors were selected to prepare drafts of Restatements. Advisers met to criticize the work. Final approval as an ALI project required separate votes by the Council and by the membership at its annual meeting.

Today the ALI works on about a dozen legal topics at a time, taking between 5 and 10 years to complete a project. Today scholars are restating areas that include Torts, Restitution, Employment Law, and the American Law of International Arbitration. A restatement is both a synthesis of the law as stated in judicial opinions and an attempt to declare the correct rule of law and to recommend for the future doctrinal statements that will advance the law's coherence as well as its consistency with good public policy. The ALI has made important statutory recommendations including the Uniform Commercial Code and the Model Penal Code. Today work is underway to revise the criminal sentencing portions of the Penal Code. And for thirty years, the ALI has undertaken work it calls Principles that addresses subjects broader than a common law restatement and can lead to recommendations for legislation, court decisions, and administrative implementation. Current Principles projects include the Law of Software Contracts, the Law of Nonprofit Organizations, and the Law of World Trade.

In 1924, as the ALI was beginning its work, Benjamin Cardozo, later a distinguished Supreme Court Justice, praised the new organization: "The [ALI] is the first cooperative endeavor by all the groups engaged in the development of the law to grapple with the monster of uncertainty and slay him."

We are pleased to report that on May 19, 2009, the membership of the Institute approved three chapters of the Restatement Third of Employment Law: chapter 1 on the definitions of employees (summarized below), chapter 2 on employment at-will and its contractual exceptions, and chapter 4 on the tort of wrongful discipline in violation of public policy. (These chapters are available at [www.ali.org](http://www.ali.org)). The project's chief reporter is NYU Law professor Sam

Estreicher; the other reporters are Cornell Law dean Stewart Schwab, Boston law professor Michael Harper, Illinois Law professor Andrew Morriss and St. Louis University Law professor Matthew Bodie.

—Lance Liebman, Columbia Law School

## The Existence of an Employment Relationship


Michael Harper, Boston University School of Law

**C**HAPTER 1 HELPS SET THE BOUNDARIES FOR the coverage of this Restatement. The Chapter is divided into four Sections: the first defines the general conditions for the existence of an employment relationship (§ 1.01); the second develops the distinction between volunteers and employees (§ 1.02); the third defines when an owner's control of an entity precludes that owner from being an employee (§ 1.03); and the last defines when individuals are employed by two or more employees concurrently (§ 1.04). These sections not only will help define the extent to which economic relationships are subject to the common law governing the employment relationship, but also will often help courts and agencies determine whether individuals are covered as "employees" under the myriad federal and state statutes that do not themselves meaningfully define the employment relationship.

Section 1.01 is the most important section. It elaborates the basic distinction of employees from those individuals who are providing services as part of an independent business. The section states that individuals render service as part of an independent business when they are not effectively prevented from exercising "entrepreneurial control over the manner and means by which the services are performed." The section defines such entrepreneurial control as "control over important business decisions, including whether to hire and where to assign assistants, whether to purchase and where to deploy equipment, and whether and when to service other customers." The section does not displace the various multifactor tests that courts have used under various statutes and the common law to distinguish employees from independent contractors, but rather provides an ultimate standard to determine how the various factors are to be weighed. The section thereby should enable courts to reach more predictable and consistent holdings. *(Continued on the next page)*

The standard for joint employment set forth in § 1.04 is based on the definition of the employment relationship set forth in § 1.01. Section 1.04 states that “an individual is an employee of two or more employers if the employee and each of the employers meet the conditions of an employment relationship set forth in § 1.01.” This may be the case, for instance, where one employer sets the compensation of an employee and another employer directs the details of the employee’s work.

Sections 1.02 and 1.03 both provide exceptions to the basis conditions for the employment relationship set forth in § 1.01. These sections, like the others in this chapter, are not intended to provide rules for assessing an employer’s vicarious liability in tort to third parties. Section 1.02 restates that protections offered by employment laws to those who work for some material inducement generally are not offered to those who work without such an inducement, including those who are only seeking education or contacts in the hope of future material gain. Section 1.03 states that an individual who through an ownership interest has the kind of entrepreneurial control over at least a part of an enterprise that would preclude employee status under § 1.01 is not treated as rendering service to that enterprise as an employee.

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Please e-mail us at ***labor.center@nyu.edu*** so we can add you to our e-mail list and keep you updated on our events.

## Privacy and Autonomy

**Matthew Bodie, Saint Louis University School of Law & Research Scholar, Center for Labor and Employment Law**

**C**HAPTER 7 OF THE ALI’S RESTATEMENT THIRD of Employment Law will concern common law protections for employee privacy and autonomy interests. Many of the protections for employee privacy and autonomy interests come from statutory or regulatory protections of a very specific and limited nature. The common law protects against privacy harms through contractual and tort causes of action that offer more wide-ranging (if less specific) protection. Dating back to the seminal work of Brandeis and Warren, privacy has generally been seen as an issue for tort. Tort law offers protections against invasions of privacy from strangers, just as it protects against battery, defamation, and negligence from third parties. In employment law, tort provides a critical layer of protection for employees on the basis of society’s reasonable expectations of privacy. However, it is important to note that employee and employer are not strangers; they are in a contractual relationship. Thus, the Chapter will address the complications to tort law introduced by this relationship, and it will also discuss the role of contract law in assessing privacy and autonomy protections that stem from the employment relationship.

At this stage in its development, the Chapter has only addressed employee privacy interests. It focuses on such interests in four particular contexts: information requested or collected by the employer; access to physical or electronic locations in which the employees have a reasonable expectation of privacy; the method of information collection used by the employer; and access to the information by third parties or other employees or agents within the employer’s operation. In each of these areas, the Chapter will endeavor to elucidate the common law protections afforded against unreasonable employer invasions. Because of the complex web of interactions between employer and employee, bright-line rules would likely be over- and under-inclusive. Information that an employee voluntarily discloses to certain agents of the employer may still be protected against wider disclosure, just as searches that would be obviously invasive in some contexts may be justified in others. Although workplace technologies and norms will continue evolve over time, the Chapter seeks to establish a framework for evaluating the interests at stake in privacy claims. By using this framework, employers, employees, and courts may develop a more consistent and just approach to balancing employee privacy interests against other employee, employer, and societal concerns. ●

# A Labor Counsel's views on the "NFL Dispute"

L. Robert Batterman, Proskauer Rose

**P**ROFESSOR ESTREICHER HAS ASKED ME to share my views, as labor counsel to the National Football League, on the potential "dispute" between the NFL and the NFL Players Association. First, there are two full seasons of NFL football (2009 and 2010) to be played before the current collective bargaining agreement (CBA) expires on February 28, 2011. The CBA expiration has become a subject for media attention this early because the CBA provided both the owners and the players with the opportunity to decide by last November whether or not to extend the CBA for an additional period beyond February 28, 2011.

The owners decided not to extend but to exercise their right to renegotiate sooner rather than later primarily because the economics of the "deal" are not providing what the owners consider to be a fair or reasonable return given the significant increase in costs, debt load and risk they have been required to assume in more recent years. The business of the sport has changed and the economics of the CBA need to be adjusted to reflect those changes. This has of course been compounded by the current economic downturn.

One example should illustrate the nature of the problem. The system for sharing of revenues with the players was designed 15 years ago, at a time when almost all the teams were tenants in their publicly-owned stadiums. Today, teams are typically in their own stadiums, financed in large part by the team owner who is now assuming significant debt and carrying costs to both build and maintain the stadium. As the players are receiving a share of what are in essence the total revenues of the League and teams, something has to give as these additional carrying costs and capital expenditures are basically coming out of the owners' share of revenues.

My own view is that the needed changes to the CBA do not have to result in a confrontation with the players and their Union. The owners have a solid, verifiable case to make to the Union. When all the public posturing and histrionics and politicking are concluded, I believe the Union will recognize the facts and agree to the necessary redesign of the system to permit both the players and the owners to prosper during the decade to come, as they have done since the current system was first agreed to in 1993. ●

## 2009-10 Events

### LABOR CENTER BOARD MEETING

D'Agostino Hall  
NYU School of Law  
October 28, 2009  
12:30 p.m. – 2:00 p.m.

### WORKSHOP ON EMPLOYMENT LAW FOR FEDERAL JUDGES

Lester Pollack Colloquium, Furman Hall  
NYU School of Law  
March 17-19, 2010 (all day)

### ABA TECHNOLOGY IN PRACTICE

Lester Pollack Colloquium, Furman Hall  
NYU School of Law  
April 29-30, 2010 (all day)

### DOING BUSINESS IN ASIA: THE LABOR AND EMPLOYMENT STORY

Greenberg Lounge, Vanderbilt Hall  
NYU School of Law  
May 18-19, 2010 (all day)

### 63RD ANNUAL CONFERENCE ON LABOR

Greenberg Lounge, Vanderbilt Hall  
NYU School of Law  
June 3-4, 2010 (all day)



# 12th Annual Workshop on Employment Law for Federal Judges

Nora M. Strecker

**N PARTNERSHIP WITH NYU LAW'S DWIGHT D. Opperman Institute of Judicial Administration and the Federal Judicial Center, the Center for Labor and Employment Law gathered judicial speakers and attendees, practicing attorneys and several academics in NYU's Pollack Colloquium for the 12th Annual Workshop on**

Employment Law for Federal Judges on March 19-20, 2009. The Workshop, which continues to be among the Federal Judicial Center's most popular judicial education programs, was attended by forty-five judges from thirty-seven different federal district courts around the country, including three federal circuit courts. The topics covered included:

- Trade Secrets/Non-competition Litigation
- Evidence Issues/Use of Experts
- The Evidence on "Unconscious Discrimination"
- Sex and Racial Discrimination: Cutting-Edge Developments
- Class and Collective Actions
- Dos and Don'ts of Mediation of Employment Disputes
- Electronic Discovery
- Jury Instructions; Evaluation of Model Jury Instructions.

The Honorable Lee Rosenthal, U.S. District Court for the Southern District of Texas, chair of the advisory committee on the Federal Rules of Civil Procedure, addressed the group at lunch on Thursday. Judge Rosenthal gave insights into the rule-writing process and described highlights among the rule changes.

Judge Karen K. Caldwell of the U.S. District Court for the Eastern District of Kentucky, an attendee, noted: NYU's Workshop on Employment Law "was one of the most informative seminars I've attended since coming to the bench in 1991." ●



Kathleen McKenna, Hon. Laura Taylor Swain, and Kenneth Thompson

Hon. Lee Rosenthal and Samuel Estreicher

# BOARD NEWS

**MARSHALL BABSON** was identified in *Euromoney's* Guide to the World's Leading Labour and Employment Lawyers two years in a row.

Legal 500 named **L. ROBERT BATTERMAN** a Leading Individual in Labor-Management Relations.

In May 2009, the publication *Human Resource Executive*, in conjunction with Lawdragon, published its list of the Nation's 100 Most Powerful Employment Lawyers, which included board members **MICHAEL DELIKAT**, **MARK DICHTER**, **WILLIS J. GOLDSMITH** and **THEODORE ROGERS**.

Legal 500 named **MARK DICHTER** a Leading Individual in Workplace and Employment Counseling.

NYU School of Law named **STEVEN GREENHOUSE '82** Alumnus of the Month for May 2009.

**HON. SETH HARRIS** has been chosen to receive the Judge William Groat Award. As of May 2009, he is Deputy Secretary of Labor to Secretary Hilda Solis.

**HON. REGINALD JONES**, a labor and employment attorney and former Commissioner of the U.S. Equal Employment Opportunity Commission (EEOC), has joined the U.S. Government Accountability Office as Managing Director of its Office of Opportunity and Inclusiveness.

**RAYMOND LOHIER JR.** was promoted to chief of the Criminal Division's Securities and Commodities Fraud Task Force at the U.S. Attorney's Office for the Southern District of New York.

NYU Law named **WAYNE OUTTEN** Alumnus of the Month for August.

The *New York Times* quoted **MARK RISK** for "In Hard Times, Lawyers Advise Cautious Steps" (October 12, 2008) by Marci Alboher. He is also the author of "A Midnight Call Starts a Big League Struggle" published in *Labor and Employment Law* Fall 2008, the ABA Labor and Employment Law Section's newsletter, which he edits.

Legal 500 named **SUSAN SEROTA** Leading Individual in Executive Compensation and Benefits.

**DANIEL SILVERMAN** recently published *Winning at the NLRB 2d Edition* (BNA 2009). He is also Co-Director, Labor and Employment Institute Cardozo School of Law.

**THIS NEWSLETTER IS THE PREMIER PLATFORM FOR OUR COMMUNITY.**

Please be sure to send the Center your news updates—anything from relocations to career changes and recent achievements.

**SEND YOUR NEWS UPDATES** to Torrey Whitman at [torrey.whitman@nyu.edu](mailto:torrey.whitman@nyu.edu) or (212) 992-8103, or directly to our newsletter editor, Nora Strecker, at [nora.strecker@nyu.edu](mailto:nora.strecker@nyu.edu) or (212) 992-8820.

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# NYU Labor & Employment Law

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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

# Estreicher's Judicial Performance Index

## 2007-08 Supreme Court Labor & Employment Decisions

CASE	ISSUE	JUDICIAL RESTRAINT?	NON-DECISION?	NET SCORE
<i>Preston v. Ferrer</i> , 128 S. Ct. 978 (2008)	Does the Federal Arbitration Act (FAA) override state statutes that refer certain disputes initially to an administrative agency?	Decided question presented.	No	1
<i>LaRue v. DeWolff</i> , 128 S. Ct. 1020 (2008)	(1) Does § 502 (a) (2) of the Employment Retirement Income Security Act (ERISA) permit the participant to sue to recover losses in a defined contribution plan caused by a fiduciary breach? (2) Does § 502 (a) (3) of ERISA permit suit for make-whole relief for losses caused by a fiduciary breach?	Decided question presented (relief was available under § 502 (a) (2), so there was no need to decide the § 502 (a) (3) question)	No	1
<i>Sprint/United Mgt. v. Mendelsohn</i> , 128 S. Ct. 1140 (2008)	Must a district court admit “me too” evidence—testimony of nonparties complaining of discrimination by supervisors not complained of by the plaintiff?	Decided question presented.	No	1
<i>Federal Express v. Holowecki</i> , 128 S. Ct. 1147 (2008)	Does an intake questionnaire submitted to the EEOC constitute a “charge” that must be filed under the Age Discrimination in Employment Act (ADEA)?	Decided question presented.	No	1
<i>Hall Street Assoc. v. Mattel</i> , 128 S. Ct. 1396 (2008)	Can parties to an arbitration agreement agree on grounds for judicial review of awards broader than those provided for in the FAA?	Decided question presented.	No	1
<i>Gomez-Perez v. Potter</i> , 128 S. Ct. 1931 (2008)	Does the federal sector provision of the ADEA prohibit retaliation against employees who complain of age discrimination?	Decided question presented.	No	1
<i>CBOCS West v. Humphries</i> , 128 S. Ct. 1951 (2008)	Is a race retaliation claim cognizable under 41 U.S. C. §1981?	Decided question presented.	No	1
<i>Engquist v. Ore. Dept. of Agriculture</i> , 128 S. Ct. 2146 (2008)	Does the Equal Protection Clause, in particular the “class-of-one” doctrine, prohibit a public employer from intentionally treating an employee differently from similarly situated employees when it has no rational basis to do so?	Decided question presented.	No	1
<i>Metropolitan Life Ins. v. Glenn</i> , 128 S. Ct. 2343 (2008)	Does the fact that ERISA plan claims administrator both evaluates and pays claims constitute a conflict of interest that must be weighed in a judicial review of the administrator’s benefit determination—and if so, how should any such determination be taken into account?	Decided question presented	Yes (Court did not decide how conflict should be taken into account)	0
<i>Kentucky Retirement Sys. v. EEOC</i> , 128 S. Ct. 2361 (2008)	Does the use of age as a potential fact in the distribution of retirement benefits to workers who become disabled prior to the time they are eligible for normal retirement benefits establish a prima facie case of discrimination in violation of the ADEA?	Decided question presented.	No	1
<i>Meacham v. Knolls</i> , 128 S. Ct. 2395 (2008)	Does an employer defending against a claim of disparate impact under the ADEA bear the burden of persuasion of the “reasonable factors other than age” defense?	Decided question presented.	No	1
<i>Chamber of Commerce of U.S. v. Brown</i> , 128 S. Ct. 2408 (2008)	Is California’s regulation of non-coercive employer speech on union organizing preempted by federal labor law?	Decided question presented (even though dissent argues that compliance burdens should not have been addressed)	No	1