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NYU Labor and Employment Law News

Artificial Intelligence and Employment Law: 'Big Data' and 'People Analytics' in Personnel Decisions

On October 17, 2016, **Professor Samuel Estreicher (NYU Law)** moderated a widely attended Labor Center conference on the use of predictive analytics in personnel decisions such as hiring, promotion, and placement. The program explored how to address unintended discrimination that can arise and be reinforced by machine learning. In her keynote remarks, the **outgoing chair** of the **Equal Employment Opportunity Commission (EEOC), the Hon. Jenny R. Yang '96**, encouraged companies to consider how they select and use data. **Washington University School of Law Professor Pauline T. Kim** suggested re-evaluating current antidiscrimination doctrine in light of new technologies. Former Northwestern University School of Law Professor **Dr. Zev Eigen**, global director of Data Analytics at **Littler Mendelson** and founder of Cherry Tree Data Science (CTDS), reminded us that such technologies should be evaluated against current alternatives and human decision-making, which also can be biased. He also urged users of big data to pay attention to the program source and data input. All the panelists expressed hope that big data can be harnessed to promote diversity. ■

YANG   ESTREICHER   EIGEN   KIM

The EEOC Explores Big Data

Below is an abridged version of the keynote remarks given by EEOC Chair Jenny R. Yang '96 at the Labor Center's AI & Employment Law Program.

Big data is fundamentally changing the way employment selection decisions are made. As we consider how to best apply our antidiscrimination protections to this reality, we are mindful of the value in promoting innovation while at the same time recognizing how critical it is to ensure that reliance on these vast sources of data do not create new barriers to opportunity. To explore these issues, the EEOC hosted a meeting in October entitled "Big Data in the Workplace: Examining Implications for Equal Employment Opportunity Law."

Data collection has become pervasive. Even if we're not tweeting and posting on Instagram, we each generate data by using restaurant reservation apps on our smartphones, purchasing products online, or watching a movie on Netflix. There's additional data that we can generate as we conduct a job search, as well as data that can be collected at the workplace. These vast amounts of data are merged, analyzed, and utilized to make employment-related decisions, often in coordination with more traditional HR practices, ranging from recruiting strategies and selection of candidates, to decisions about how to retain or pay employees.

The Promise of Big Data

The promise of big data is immense, holding the potential to open the doors of opportunity for more workers in this country and increase the efficiency of the economy.

One way big data can improve employment decision-making is by reducing reliance on a frequent source of discrimination—human bias. One witness at our meeting, Mike Housman of hiQ Labs, noted that a human recruiter tends to spend only seven seconds reviewing a typical resume. During that time, they likely rely on few metrics—and may focus in on lack of recent work history as something that suggests a candidate won't be successful. But data have shown that the long-term unemployed, and "job hoppers," stay just as long and perform as well as people with a more standard work history.

Another witness, Professor Michal Kosinski of Stanford, suggests that big data can level the playing field by helping employers identify talent in job candidates, measuring the potential to excel at a given task, as opposed to skills and knowledge, which are highly correlated with socio-economic status. In a typical work sample test or interview, even mediocre candidates with some training can easily outperform a highly talented candidate with no training.

If you're able to identify candidates in every ZIP Code who have the potential to be great computer programmers, you're opening up the talent pool far beyond those who had the financial means to attend a prestigious university. In these ways, and others, the promise of big data is compelling.

Jenny R. Yang '96

Possible Employment Barrier Scenarios

At the same time, these methods present significant risks of exacerbating or perpetuating existing bias, under the banner of being scientific and therefore more reliable.

Matching. One concern is pattern-matching, or replication bias. For years, employers have sought to identify top performers, and then try to hire more people like them. The same is true for big data, but on a larger scale. If algorithms are fed information about a company's top performers, and then thousands of data points about those people, the algorithm will produce a profile and then predict who will be a successful candidate based on their similarity to that profile. As one of our witnesses, Dr. Kathleen Lundquist, summarized, "The algorithm is matching people characteristics, rather than job requirements." This becomes a concern particularly in cases in which the training set is nondiverse. And if your training set is not diverse because of past discrimination, the algorithm's predictions just serve to exacerbate and lock in those past discriminatory patterns. There very well may be a set of candidates who could perform the job as well, or better, but they have a very different profile than the current top performers.

Machine-learned bias. Another concern is the inability to control the development of a machine-learned algorithm. One of our witnesses, Dr. Kelly Trindel, EEOC's chief analyst, provided an illustration. If, for example, the training phase for a big data algorithm happened to identify a higher incidence of absences for people with disabilities, it might cluster the relevant people together to create a "high absenteeism risk" profile. That profile wouldn't necessarily be labeled "disability"—more likely it would appear to be based on some set of shared financial, consumer, or social media behaviors. It may not be apparent to the employer, or even to the programmer who designed the algorithm, but the fact remains that the subsequent employment decisions based on this model will have an impact on people with disabilities, as well as on women who may be out due to maternity leave or caregiving responsibilities. It also could impact military service members who take leaves of absence.

This illustrates the "black box" problem with big data—once you teach a machine how to learn to make predictions from training datasets, it can keep learning on its own, and it can end up going off in a direction that is potentially problematic, and start picking up factors that are essentially proxies for categories such as people with disabilities. But because there is so much data, and there is no way to manually monitor its learning, those problems may go unchecked.

Correlation vs. Causation. A final concern is big data's tendency to create an illusion of causation, when in fact the underlying relationship between a factor and an outcome is merely correlated.

Marko Mrkonich, a partner at Littler Mendelson, testified at our Commission meeting and authored a law review article on big data in the Oklahoma Law Review. The article explored issues around outside-of-work behaviors that correlate with job performance. For example, researchers have found a relationship between strong computer coders and those who visit a particular Japanese manga site.

In examples like these, what is measured is not directly job-related, but it is simply predictive of the profile of a likely good coder, and may cause an adverse impact. Big data analytics models are finding hundreds or thousands of connections, but they don't explain the why. And the why can be the key. Correlations that reflect causation, as opposed to simply coincidence, are much more likely to yield positive results.

Big data has proven its value in marketing, supply chain management, and other fields. But unlike trying to get clicks on a website, if women are systematically being screened out for management jobs because of problems with an algorithm, that impacts the advancement of women.

While big data may assist employers in identifying talent and evaluating job performance, it is critical to ensure that big data is used in a fair, reliable, and valid way. To start, it is recommended that employers ask what they are seeking to measure, whether the big data products they are deploying are valid, and whether they apply the same test to all candidates. It is also recommended that employers scrutinize vendors that are selling them a big data product, and inquire about whether and what EEOC considerations were incorporated into the analysis.

As the agency [EEOC] works to explore and address issues around big data in employment decision, we welcome the opportunity to work with stakeholders with a wide variety of perspectives on these issues. ◼

Data-Driven Discrimination at Work

Washington University School of Law Professor Pauline T. Kim shares a summary of her forthcoming research paper, Data-Driven Discrimination at Work[1]

Proponents of the new data science claim that it will produce fairer decisions because it relies on "neutral" data. However, data are not always neutral and algorithms can discriminate. Choices are made at every step when building a data model—such as deciding how to measure performance, what dataset to use, and which variables to include. Each of these choices shapes how the model operates and has the potential to introduce biases. Algorithms built using inaccurate, biased, or unrepresentative data may produce outcomes biased along lines of race, sex, or other protected characteristics. When used to control access to employment opportunities, the results may look very similar to the systematic patterns of disadvantage that motivated antidiscrimination laws. What is novel is that the discriminatory effects are data-driven.

In addition to data problems, the nature of data mining techniques raises particular concerns when used to make personnel decisions. These techniques typically lack any motivating theory, but instead simply try to uncover any statistical relationships in the data, regardless of whether the reasons for the relationship are understood. Relying on these models, employers may deny workers opportunities based on unexplained correlations or factors with no clear causal connection to effective job performance. And because there will be limited opportunities for detecting and correcting erroneous judgments about rejected applicants, any existing biases are likely to persist or even worsen over time.

These risks raise concerns about what I call "classification bias." Classification bias occurs when employers rely on classification schemes, like data algorithms, to sort or score workers in ways that worsen inequality or disadvantage along the lines of race, sex, or other protected characteristics. Although the resulting employment patterns may resemble traditional forms of discrimination, the mechanisms producing these discriminatory effects are quite distinct. Because classification bias is data-driven, addressing the challenges it poses to workplace equality requires fundamentally rethinking how the law should respond.

When decision-making algorithms produce biased outcomes, they may seem to resemble disparate impact cases familiar under Title VII doctrine; however, mechanical application of

Pauline T. Kim

existing doctrine will fail to address the real sources of bias when discrimination is data-driven. For example, disparate impact doctrine provides a defense if an employer can show that a test is "job related…and consistent with business necessity." In the case of workforce analytics, the data algorithm by definition relies on variables that are correlated in some sense with the job. So to ask whether the model is "job related" in the sense of "statistically correlated" is tautological. The more important question in the context of data mining is what does the correlation mean? Is the statistical relationship it uncovers causal, such that it provides a reliable basis for predicting future behavior? Or is it merely an artifact of the data mining process?

The "black box" nature of many data algorithms also makes it difficult to assess an employer's justifications for relying on a model. Rather than providing specific selection criteria that are justified by clearly stated rationales, data models typically involve opaque decision processes, rest on unexplained correlations, and lack clearly articulated employer justifications. Existing law does not offer clear guidance on whether an employer is permitted to rely on a model that produces biased effects when it is based on unexplained correlations.

Because data algorithms differ significantly from the employer practices addressed in earlier case law, they require a legal response adapted to the particular risks they raise. A close reading of the statutory text suggests that Title VII directly prohibits classification bias. More specifically, section 703(a)(2) forbids employer practices that "classify" employees or applicants "in any way which would deprive or tend to deprive" them of employment opportunities because of protected class characteristics. By focusing on the consequences of employers' classification schemes, this reading offers a frame for addressing the challenges that workforce analytics pose.

An approach focused on preventing classification bias suggests that when to data algorithms, antidiscrimination law should be adjusted in several ways. For example, because of differences between data mining techniques and traditional ability tests, employers who use data mining models should bear the burden of demonstrating the accuracy and representativeness of the data used to construct the models, rather than requiring complainants to identify the flaws giving rise to biased outcomes. In addition, employers should not be able to justify reliance on a biased model merely by showing a statistical relationship, but should bear the burden of showing that the model is statistically valid and substantively meaningful. At the same time, an employer should be permitted to rely on a "bottom line" defense if its use of a model as part of a larger selection process does not produce discriminatory results. ∎

For more about the issue of predictive analytics in employment, see: Solon Barocas and Andrew D. Selbst: Big Data's Disparate Impact, *104 Calif. L. Rev. 671 (2016). www.californialawreview.org/ wp-content/uploads/2016/06/2Barocas-Selbst.pdf*
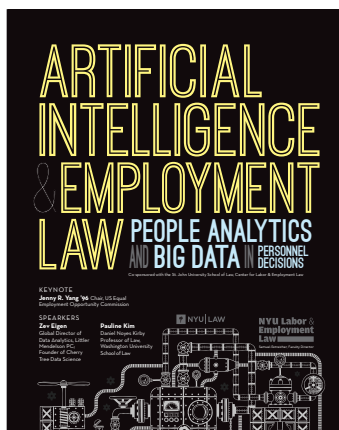
Photos from AI & Employment Law, October 17, 2016. From upper left: Charles Diamond (Charles River Associates) and Mark Risk '84 (Mark Risk, PC); Dr. Zev Eigen (Littler Mendelson); Jenny R. Yang (EEOC) and Prof. Samuel Estreicher (NYU Law). Lower Right: Audience members.

The End of Work and the Case for a Universal Basic Income?

With SEIU Former President, Andy Stern

On November 18, 2016, as part of the Labor Center's Breakfast Forum, Andy Stern, former SEIU president and current Ronald O. Perelman Senior Fellow at Columbia University's Center for Business, Law, and Public Policy, discussed his recent book, *Raising the Floor: How a Universal Basic Income Can Renew Our Economy and Rebuild the American Dream* (PublicAffairs Books 2016). Labor Center Board member Ronald Shechtman '72, managing partner of Pryor Cashman, gave welcoming remarks.

The day's subject took on greater resonance in the wake of a US presidential election fueled by working class anxiety. Stern said he worked on behalf of workers for 38 years but retired from SEIU when he began to feel he no longer understood where to take workers in our new economy. He painted an apocalyptic picture, saying there has been a "tsunami" and "fundamental shift" with automation replacing workers, GDP increases disconnected from wage improvements, and the burden of retirement and health benefits shifting from employers to employees. Looking to history, he predicted danger
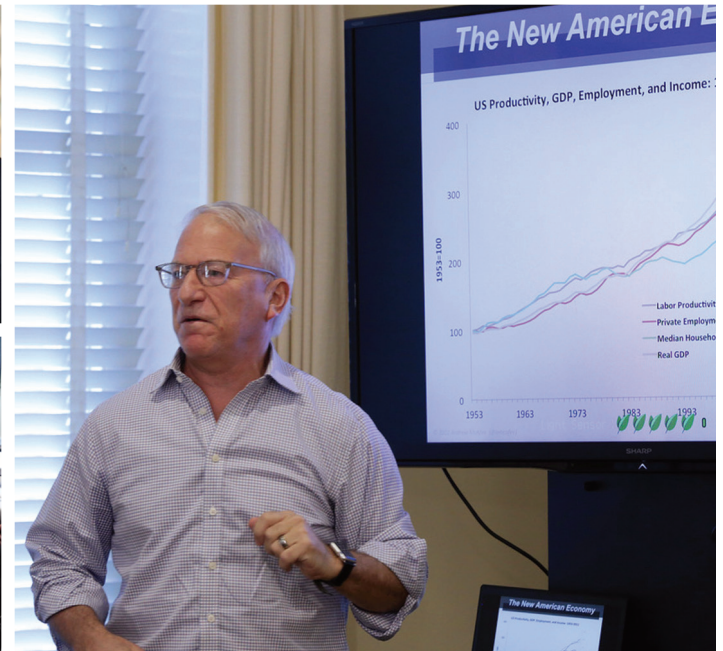
Andy Stern

"when there is economic dystopia" and "we fail to make a plan." Then he introduced his plan of a universal basic income (UBI) of $12,000 annually per adult for all US citizens. The benefits he cited included freeing people to enroll in job re-training or to engage in valuable though not traditionally profitable work, such as art and philosophy, as well as enabling parents to stay home to raise young children. His presentation was followed by a lively discussion and probing questions from the audience—Would UBI actually address the fundamental problems he cited, especially if spending was discretionary? What about the inflationary effects or economic devaluing of the basic income subsidy? How to pay the tremendous cost of such a program? Would people feel purpose-less or dis-incentivized to work? There was also discussion about basic income pilot programs adopted elsewhere, and ideas were floated on how to convince the public to accept such a bold program. Stern candidly admitted that he does not have all the answers, that he is raising the issue so thoughtful people can deliberate, as we have to start somewhere. ■

Clockwise from top left: Andy Stern, Professor Samuel Estreicher (NYU Law), Allison Schifini '95 (NYU Law Labor Center); Ronald Shechtman '72 (Pryor Cashman); Andy Stern, former President of SEIU; Audience at the breakfast with Andy Stern

The Future of Collective Bargaining:

Interviews with Two Prominent Players in the Field

William A. Herbert

The Labor Center interviewed William A. Herbert, executive director of the National Center for the Study of Collective Bargaining in Higher Education and the Professions at Hunter College, City University of New York. Herbert is an attorney and scholar whose prior experience includes serving as deputy chair and counsel of the New York State Public Employment Relations Board and as a labor and employment practitioner. Here he shares his thoughts about the National Center's mission, resources, and upcoming events with our newsletter readers:

Q1. What is the mission of the National Center for the Study of Collective Bargaining in Higher Education and the Professions? The National Center is a labor-management resource center focused on collective bargaining in higher education and the professions. The National Center is dedicated to the belief that collective bargaining and unionization are important means for advancing higher education and the working conditions of faculty and staff in colleges and universities. We, at the National Center, believe that research is an essential element for a knowledge-based dialogue on labor and management issues.

Q2. How does the National Center pursue its mission? What are some of the National Center's main activities? Since 1973, the National Center has held an annual conference in New York City, the next of which will be March 26-28, 2017, bringing together labor representatives, administrators, academics, attorneys, and neutrals, for panel discussions and the presentation of papers. We also publish a monthly electronic newsletter that closely follows unionization and collective bargaining issues and provides relevant data relating to private and public sector higher education unionization issues. The National Center maintains data concerning collective bargaining units on campuses. The data collection is a continuation of our historical role of publishing a directory of collective bargaining in higher education (*Directory of US Faculty Contracts and Bargaining Agents in Institutions of Higher Education*). Since I came here in 2013, we have been closely following the certification and recognition of new bargaining units, and we are in the process of re-imagining the format and substance of the next directory.

William A. Herbert

Q3. What trends or changes in higher education collective bargaining do the empirical data suggest? Are there diverging trends in different areas, such as public/private institutions, full faculty vs. adjunct, or geographic locations? Over the past four years there has been a continued growth in unionization efforts and collective bargaining relationships in higher education. The strongest area of organizational and bargaining unit growth has been with respect to non-tenure track faculty at private nonprofit colleges and universities. The phrase *non-tenure track* encompasses all faculty who are outside the tenure system. The growth in non-tenure track faculty unionization stems from core changes that have taken place in higher education. In 1969 tenure track faculty made up almost 80% of the overall faculty. Since then there has been a complete flip. As of 2009 only 33%-34% of faculty members are tenured or on the tenure track.

This change in faculty composition has had an important legal consequence for faculty unionization under the National Labor Relations Act. The [US] Supreme Court ruled in 1980 in *Yeshiva University*[1] that tenure track faculty at that private university were managerial employees excluded from statutory coverage because they had control over essential functions of the university through shared governance. The *Yeshiva* decision led to a decline in faculty unionization at private colleges and universities. However, the decision is largely irrelevant to non-tenure track faculty unionization because they are excluded or marginalized from shared governance.

Q4. On a personal note, how did you get interested in employment law? I would say that one of my first introductions to labor issues was the alienation and struggle for workplace control in Herman Melville's, *Bartleby, the Scrivener*.[2] I read it in high school and have re-read it many times since. It is a fascinating story and an excellent pedagogical tool.

The major influences that led to my interest in labor and employment law was observing my father's experiences as a public employee in New York City in the days before collective

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1 *NLRB v. Yeshiva University*, 444 US 672 (1980).

2 *Bartleby, the Scrivener: A Story of Wall Street* is a short story by Herman Melville published in 1853.

bargaining. He was a police officer. I also had an uncle who was a professor at Cornell's School of Industrial and Labor Relations and who had been a labor activist. The social ferment and activism of the 1960s and 1970s also played a key role in my decision to go to law school. When I applied, I had the idea of becoming a civil rights or labor attorney.

Q5. Prior to serving as executive director of the Center, you were deputy chair and Counsel to the NYS Public Employment Relations Board (PERB). How has your current position developed or changed your interests in employment law issues? At PERB, I researched and drafted decisions that resolved litigated disputes between public sector unions and employers under New York's public sector collective bargaining law. That role improved my understanding of the principles of labor relations, as well as practical tools on how to resolve and litigate disputes. In that position, I also learned a great deal about conciliation, including the use of mediation, fact-finding, and arbitration.

My academic research and writing at the National Center is a logical next step from my responsibilities at PERB. My duties at the National Center include keeping close track of developments at the NLRB and public sector collective bargaining agencies concerning higher education and the professions. At PERB, I published a number of scholarly articles, including presenting my research at NYU Labor and Employment Center's annual labor conferences. Also, I continue as a coeditor of the New York State Bar Association's treatise Lefkowitz on Public Sector Labor and Employment Law.

Paul Salvatore

Paul Salvatore, a partner at Proskauer Rose, provides strategic labor and employment law advice to companies, boards of directors, senior executives, and general counsel in labor-management relations, major litigation, alternative dispute resolution, international labor and employment issues, and corporate transactions. Below, Paul answers some questions posed by the Labor Center.

Q1. Your practice includes representing universities and colleges in labor relations. What are the trends in higher education collective bargaining, particularly in light of the NLRB Columbia University ruling on graduate students? I'm very fortunate to represent many of America's great universities, and assisting them has been keeping me very busy lately. Proskauer's

Paul Salvatore

higher education labor law practice goes back decades and includes the seminal US Supreme Court decision on *Yeshiva University*, finding faculty to be managers, not eligible for unionization. This past year we represented Columbia University, where the Obama administration NLRB reversed essentially 80 years of established law, permitting PhD graduate students, along with masters and undergraduates who serve as teaching or research assistants, to

unionize. We also had a 17-day NLRB hearing for Yale University, where PhD students serving as TAs are seeking to organize in only nine (out of Yale's 56) academic departments, in an extreme application of the NLRB's new micro-unit doctrine. (An NLRB decision remains pending.) And, we're representing Duke University, where the SEIU seeks to organize approximately 1,500 PhD students. However, post-presidential election, it may just be a matter of time before the new Trump NLRB returns graduate TAs and RAs to student, not employee, status. It's foreseeable that the months ahead will be filled with appeals to the Trump NLRB and circuit courts on the grad student status issue.

Q2. You have particular expertise in the real estate industry, having represented the Realty Advisory Board on Labor Relations in the very important collective bargaining agreements with SEIU Local 32BJ. What are the trends in collective bargaining in the New York real estate industry and how, if at all, may it differ from other sectors or places? I have long been active in the real estate and construction industry, both in NYC and nationally. Traditionally, this sector has been heavily unionized, both in construction and building maintenance. Times have changed, however, even in NYC (which I like to say is more of an "island off of Europe" when it comes to labor relations and union density than part of the rest of the USA). NYC construction has largely become an open-shop market, even in Manhattan, except for the tallest buildings. This has profoundly shaken up the building trades, as is apparent in the current 421(a) renewal controversy,[3] where labor has not been able to maintain or regain market share in affordable housing. In 2015, our client, The Cement League (a multi-employer bargaining association of leading superstructure contractors), had to enjoin an illegal carpenters union strike of project labor agreement (PLA) jobs in order to precipitate needed reform and moderation of the wage/benefit package. Absent negotiated easing of rates and work rules, more labor strife is likely ahead with other building trades. On the other hand, maintenance unions, such as SEIU 32BJ and Operating Engineers Local 94, have proven to be adaptable partners with the NY real estate industry, resulting in fair contracts, continuing high union market share, and solid labor-management relationships. The future of this sector undoubtedly will be exciting as the construction industry adapts to a new labor paradigm.

**Q3. In a 2008 Law360 interview, you were asked which aspects of employment law you think are in need of reform. At the time, you said legislators should expand, not curtail, the use of alternative dispute

3 421(a) is a New York State tax abatement afforded to developers who designate at least 20% of units affordable. The abatement is considered an important incentive for building affordable housing but had expired in 2015 in the absence of agreement on wages and other worker issues that are still being negotiated between the government, real estate developers, and labor unions.

resolution. Has this happened? Why or why not? I came to Proskauer from Cornell's School of Industrial and Labor Relations and its Law School poised to be a "traditional" labor lawyer, but my early career was swept up in the 1990s employment litigation explosion. Having been exposed to both private (mediation and arbitration) and public (courts) systems of dispute resolution for over 30 years, I see the profound value of utilizing alternative dispute resolution as the preferred forum for workplace disputes. The courts may work well for a minority of plaintiff-employees, but most employees and employers with a workplace dispute are much better served in a private, faster, and confidential forum. As the US Supreme Court recognized in *Pyett*[4] (a case arising from the NYC real estate industry), traditional labor-management dispute resolution can be applied to employment law claims without abridging anyone's rights and with salubrious outcomes for both employee and employer. After eight years of Obama-led workplace initiatives, mediation and arbitration for employment law claims is still going strong, and there is no reason to believe that the Trump administration won't favor these proven techniques to solve workplace conflicts.

Q4. What are your predictions on the future of collective bargaining generally, particularly in the wake of the recent presidential and legislative election? Collective bargaining is at a crossroad after the Trump election. Eight years of pro-labor Obama administration policies have tilted the playing field toward unions, particularly at the NLRB. Nonetheless, overall national union diversity has not skyrocketed; indeed, it's barely inched up. While a Trump NLRB will undoubtedly reverse some of the Obama Board's more controversial moves (e.g., "quickie" elections, joint employer liability, etc.), let's not forget that many current or former union members staunchly supported President-elect Trump, particularly in post-industrial battleground states. And fundamental to the Trump message was keeping traditionally union jobs in America and returning those that left. How these conflicting initiatives interact and are translated across the bargaining table will be the challenge for collective bargaining in the next few years.

Q5. What do you consider your greatest accomplishment as a labor and employment lawyer? On September 12, 2001, stunned, saddened, and staying home as the authorities recommended, I received a call from Jim Berg, the president of our client, the Realty Advisory Board on Labor Relations, the multi-employee bargaining association for NY's real estate industry. Jim told me that Mike Fishman, president of SEIU Local 32BJ, called him and emotionally recounted how, while all the details were not yet available, Local 32BJ members working at the World Trade Center had likely been killed and it appeared that thousands would be out of work for many months ahead as much of downtown Manhattan was closed, covered in smoke, rubble, and ash. Mike had

asked Jim if the real estate industry would somehow help these workers as well as the families of the victims.

What happened next was collective bargaining's finest hour. The parties convened emergency negotiating sessions to hammer out special job and benefits security agreements affecting thousands of employees who found themselves in need because of 9/11 and its aftermath. The real estate industry and the union partnered together to help workers and their families get through these dark, difficult times.

Because of the extent of the devastation, the initiatives we agreed upon remained in place for several years and even had to be extended a couple of times. But, in the end, the industry's workers maintained a basic income level, received preferential hiring for new jobs, and maintained their benefit package. I'm proud to have played a hand in forging these arrangements, responding in this hour of need of our city, the industry, and its employees. ∎

TalkShop 2017: Cutting-Edge Employment Law Issues

On February 8, 2017, the Labor Center hosted *TalkShop 2017: Cutting-Edge Employment Law Issues*, part of a series for specific constituencies, sometimes from labor and sometimes from management. TalkShop provides a forum for peers to discuss best practices and relevant employment law developments. At this breakfast, Mark E. Brossman '78, LLM '81, and Holly E. Weiss, both employment law and benefits partners of Schulte Roth & Zabel LLP, led a discussion about new appointees in the Trump Administration and what to expect on labor and employment policy, as well as about recent developments in employment agreements from non-competes to non-disparagement covenants. A group of in-house counsel and senior HR executives participated in the breakfast.

TalkShop on February 8, 2017

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4 *14 Penn Plaza LLC v. Pyett*, 556 US 247 (2009).

Achieving Antidiscrimination Objectives Through "Safe Harbor" Rules for Cases of Chronic Hiring Aversion

Samuel Estreicher

Dwight D. Opperman Professor of Law & Faculty Director, Center for Labor and Employment Law, NYU School of Law. Modified text of keynote address, "Achieving Antidiscrimination Objectives Through Safe Harbor Rules" Conference on Fair Play 3 (sponsored by the Shalom Comparative Legal Research Center at Ono Academic College & The Israel Women's Network), July 12, 2016, Kiryat Ono, Israel.

As a general matter, we have pursued antidiscrimination goals through standards rather than rules. This is understandable because discrimination is normally a motivation- or intention-based inquiry. In the employment context, the law does not bar employer discipline or staff reductions; these are routine activities that the law does not ordinarily take cognizance of. The law bars such employer actions only when they are improperly motivated. Improper motivation or intention acts as an impeaching factor.[1] Hence, the tension between regulation and employer control of the workplace is cabined and minimized because discriminatory motives are thought to be counterproductive, simply unnecessary to achievement of legitimate business objectives. From the formal standpoint of employer prerogatives, the antidiscrimination command appears as a form of virtually costless regulation.

Similarly, hard-and-fast rules are not relied on extensively. There are two principal reasons for this legal-design preference. First, rules may under-enforce and over-enforce either because the rules are set too leniently or are set too stringently. It is difficult for the legislator or other policymaker at the outset to determine what is needed to achieve the antidiscrimination objective and what roadblocks will be encountered. Especially where it is difficult to revise legislation once enacted, delegating standard-setting to an administrative agency promotes a mechanism for fine-tuning the regulation.[2] A second reason for preferring standards over rules is that rules will tend to make manifest the costs of regulation,

Samuel Estreicher

to highlight the interference with employer decision-making that regulation entails. Such transparency may chill political support, and hence legislator willingness, to advance the regulatory scheme.

From this political- economy standpoint, it may be far better to announce a standard—e.g., "thou shall not discriminate on the basis of race or gender, etc."—and thus broadly delegate to the administrative agency or the courts the task of working out the actual rules through case-by-case determinations that will seek to control or influence behavior.

Some aspects of antidiscrimination law reflect a mix of both approaches. For example, the disparate impact theory, or what Europeans call "indirect discrimination," sets a standard not a rule but is purportedly based on objective factors: does the employer practice have a disproportionate impact on a statutorily protected group, such as blacks or women, and if so, can the employer demonstrate that the practice is job-related and justified by business necessity?[3] The employer's good faith does not provide a defense and its good or bad motivation is generally irrelevant to the inquiry. Similarly, in the "bona fide occupational qualification" (BFOQ) context, the inquiry is based on the employer' motivation but there is a strong presumption of a violation because the employer has been shown to have been motivated by an improper group classification.[4] The BFOQ concept allows only a very narrow defense in limited circumstances where race or gender or other prohibited characteristic may have especially strong predictive power and the employer is not able to pursue substantial operational objectives by other means.

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1 See the explanation for motive-based inquiry in *Textile Workers Union v. Darlington Manuf. Co.,* 380 U.S. 263 (1965); see also Samuel Estreicher & Matthew T. Bodie, Labor Law 72-79 (2016).

2 This is ultimately the explanation for judicial deference to agency interpretation of authorizing statutes. See, e.g., *Chevron U.S.A. Inc. v. National Resources Defense Council* 467 U.S. 837 (1984).

3 See, e.g., 42 U.S.C. § 2000e-2 (k); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

4 See, e.g., 42 U.S.C. § 2000e-2(e); *Int'l Union, United Automobile Workers v. Johnson Controls*, 499 U.S. 187 (1991).

These exceptions are few and far between. The dominant approach of antidiscrimination law is to establish a standard of nondiscrimination and attempt to implement that command by motive-based inquiry in agency or court adjudications. Some agencies have rulemaking authority but the rules tend to be broadly framed without specifying the regulatory command.

Costs of Reliance on Standards vs. Rules

The system's preference for standards over rules, while understandable, brings with it certain costs. There are administrative costs because motivation-based inquiry is time-consuming and resource-intensive, often requiring a small army lawyers and witnesses, pretrial discovery, motion papers, and the time of judges and court personnel. It takes time for these processes to yield a judgment, thus raising the concern that "justice is delayed is justice denied". Employee claimants who have not been hired or have been discharged will need to find a means of income in the interim; such income will in our system be deducted from any compensation award.[5] As time passes it becomes more difficult to reinstate even the wronged claimant. In the U.S., reinstatement is a remedy available only in statutory discrimination cases but is rarely awarded even there. In addition, the process requires lawyers. Unless the government agency agrees to use its limited resources to sue on the claimant's behalf or a class action litigation can be fashioned, representation by a lawyer is doubtful in individual cases.[6]

There are also error costs in any regulatory system. Whenever a third party will make the ultimate decision over whether the employer wrongly denied an individual a position or wrongly discharged that person from employment, there is a risk that the third-party decision maker will make a mistake and impose an unqualified or difficult employee on the enterprise (or require award of the financial equivalent of reinstatement). These costs are likely to be magnified where the underlying factual issue is the elusive one of motivation, and where the law is in flux and even well-motivated employers may have difficulty anticipating and complying with the law's shifting demands.

In many cases the employer lives with these costs and tries as best it can to hire qualified individuals from protected groups. The employer does so out for good business reasons. To avoid all hiring or promotion of, say, blacks or women, would be damaging to the business by depriving the employer of the benefits of an available, qualified workforce and by alienating customers from the same population groups or others who would without their patronage from a discriminatory employer.[7] The employer will then do what it can to train its personnel/HR staff to select qualified workers who will fit well within the organization.

As a general matter, regulation hastens this dynamic of integration of marginalized groups into the workplace by penalizing employers who discriminate against employees and job seekers in the protected categories. In this sense, regulation helps employer take advantage of qualified workers from these groups and build good will with customers from the same groups and others.[8]

Cases of Chronic Hiring Aversion

There are cases, however, where this dynamic does not work and non-utilization of individuals from certain protected groups is chronic. I have three examples in mind (though to be sure there are others): (1) individuals aged 50 and over who have worked for many years for a prior employer and are seeking new employment; (2) individuals with obvious disabilities requiring costly accommodations, such as readers or special equipment; and (3) individuals with prior records of conviction for serious crimes.

In each of these (and perhaps other) cases, the employer will generally avoid hiring individuals from these categories even though such a hiring aversion is unlawful and there doubtless are individuals within those categories who will defy the predictions underlying these categories and perform well as employees. Most employers will avoid hiring individuals with these characteristics because the risks of being caught are very low and the costs of hiring a problematic employees from these categories are higher and more enduring than in the usual case. Ironically, regulation of termination decisions in this context may worsen the employability prospects of these individuals.

For example, in the case of the unemployed older worker, we can assume that the individual performed adequately in the prior position but that the worker's likely fit in a new organization dealing with different tasks or technologies and reporting to younger supervisors is difficult to predict. If the employer makes a mistake and hires an older worker who turns out to be a problematic fit, it would very difficult, as a practical matter, to terminate that worker's employment. Error costs are especially likely to be high in the case of a terminated older worker because the trier of fact is likely to indulge in a presumption in that worker's favor. Employers appreciate this risk, even if they are not unduly risk-averse, and will avoid hiring older workers.[9]

A second group involves individuals with obvious, difficult-to-accommodate disabilities. In the U.S., the law provides that the costs of accommodation cannot generally be considered in deciding whether to hire the disabled employees. The statutory

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5 See American Law Institute, Restatement of Employment Law ch.9 (2015). The author serves as chief reporter for the Employment Restatement project.

6 See Beyond Elite Law: Access to Civil Justice in America (Samuel Estreicher & Joy Radice eds. 2016).

7 Where social forces help entrench racial or other group discrimination, employer are likely to refrain from hiring and promoting workers from discriminated-against groups. See George A. Akerlof, The Economics of Caste and of the Rat Race and Other Woeful Tales, Ch. 3 in An Economic Theorist's Book of Tales (1984).

8 Compare John J. Donohue III, Is Title VII Efficient? 134 U.Pa. L. Rev. 1411 (1986)=, with Richard A. Posner, the Efficacy and Efficiency of Title VII, 134 U. Pa. L. Rev. 513 (1986).

9 See Richard W. Johnson & Janice S. Park, Can Unemployed Older Workers Find Work? (Urban Instit., No.25, Jan. 2011) ("Workers age 50 to 65 who lost their jobs between mid-2008 and the end of 2009 were a third less likely than those age 25 to 34 to find work within 12 months, and those age 62 or older were only half as likely."); National Council on Aging, Fact Sheet: Mature Workers ("In 2014, 44.6% of those unemployed workers aged 55+ had been unemployed for 27 weeks or longer, compared to 36.4% of workers aged 25-54.").

duty is to treat equally disabled and non-disabled employee provided that the worker is qualified to perform the essential functions of position with or without reasonable accommodations. Costs of providing accommodation is not at this point treated as cognizable under the concept of "reasonable accommodation"; cost considerations can come into play, if at all, only if the employer can establish the very difficult affirmative defense of proving "undue hardship.[10] A good number of employers skirt the problem by avoiding hiring such disabled workers altogether.[11]

A third example of chronic employability problems are individuals with a history of prior conviction for a serious crime. Here, too, the costs of an employer mistake are especially large because employee theft or violence on the job will be especially costly. Most employers will avoid hiring such workers altogether.[12]

There are several possible responses to these hard cases. One response is to stiffen the penalty for employer noncompliance by increasing the level of damages that can be recovered, including, in the U.S., noneconomic and punitive damages. Relatedly, the level of enforcement can be increased by creating special bureaus with beefed-up resources for these categories of discrimination.

A second response to is to use "carrots" rather than sticks" say, by giving employers subsidies for hiring individuals from these categories or giving employees vouchers they can use to mitigate for the hiring employer some of the costs of hiring ex-convicts.[13]

These two modes of response are useful and should be encouraged but may be of limited reach. Presumably, existing resources, both financial and enforcement, represent what the government is willing or able to provide; more is not likely to be forthcoming any time soon.

The "Safe Harbor" Approach

A third response is for the responsible agency to promulgate "safe harbors" for employers willing to hire individuals from these categories of perceived high employment risk.[14] The safe harbor would be in the form of a regulation, promulgated after notice and opportunity for public comment, that individuals from these categories may be hired as probationary employees for a defined, say three-year, period, during which they may be discharged without cause or consequence for the employer under the law administered by the agency. All other provisions of the antidiscrimination and other employment laws would remain in effect. If such employees are retained beyond the probationary period, they will be treated the same as other employees in all respects.

The benefit of the safe-harbor approach is that it directly addresses the concerns that materially influence the employer's non-hiring decision. The employer is given a relatively cost-free opportunity to evaluate whether engaging the employee from the perceived high-risk category will in fact entail the predicted risks or whether an employee's actual performance will belie the prediction.

Safe-harbor rules are increasingly being used in the employment areas, typically as a means of handling technical aspects of the legal regime, such as nondiscrimination testing to determine whether the coverage of an employee benefits plan disproportionately favors highly-compensated employees[15] or navigating the "affordability" requirement for mandatory employee healthcare coverage.[16] Some states are exploring safe harbor rules for dealing whistleblower protections.[17] And the Supreme Court has introduced a form of safe-harbor approach in affording employers an affirmative defense to liability for sexual harassment by supervisors

10 See 42 U.S.C. § 12111(10).

11 See U.S. Dept. of Labor, Bur. of Lab. Stat., Persons with a Disability: Labor Force Characteristics -- 2015 (Econ. News Release, June 21, 2016) ("The unemployment rate for persons with a disability was 10.7 percent in 2015, about twice that of those with no disability (5.1 percent)."); e.g., Abigail Abrams, Job Hunting is Daunting for People with Autism, Washington Post, Sept. 27, 2016, at E1; Many Workers Still Reluctant to Hire Blind Workers, The Assoc. Press, Nov. 4, 2012.

12 See Steven Raphael, The New Scarlet Letter: Negotiating the U.S. Labor Market with a Criminal Record (2014); John Schmitt & Kris Warner, Ex-Offenders and the Labor Market (Center for Econ. & Policy Res., Nov. 2010).

13 Japanese government supports the continued employment of older workers through a combination of employer and employee subsidies and community centers. See John B. Williamson & Masa Higo, Older Workers: Lessons from Japan 3-4(Work Opporunities for Older Americans, Center for Retirement Research at Boston College, Series 11, June 2007).

14 In the U.S. regulatory agencies have this authority but it is rarely exercised. See Title VII of the Civil Rights Act of 1964, § 713(b)(1), 42 U.S.C. § 2000e-12(b)(b)(1)("In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission.");§ 7(e)(1) of Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(e)(1) 259 (a), expressly incorporating 29 U.S.C. 259(a) ("In any action or proceeding based on any act or omission on or after the date of the enactment of this Act..., no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under [the specified laws] if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged."). See generally Alfred W. Blumrosen, The Binding Effect of Affirmative Action Guidelines, 1 Lab. Lawy. (Spring 1985).

15 26 C.F.R. § 1.401(k)-3 (safe harbor 401(k) regulations).

16 Section 4980H of Internal Revenue Code, added to the Code by §1513 of the Patient Protection and Affordable Care Act, enacted March 23, 2010, Pub. L. No. 111-148 (Mar. 23, 2010), and amended by § 1003 of the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 (Mar. 30, 2010.

17 See Tex. Administrative Code, tit. 22, part II, ch. 217, § 217.20 (15) (requiring: "A process that protects a nurse from employer retaliation, suspension, termination, discipline, discrimination, and licensure sanction when a nurse makes a good faith request for peer review of an assignment or conduct the nurse is requested to perform and that the nurse believes could result in a violation of the NPA or Board rules. Safe Harbor must be invoked prior to engaging in the conduct or assignment for which peer review is requested, and may be invoked at any time during the work period when the initial assignment changes").

if they put in place internal processes for enabling employees to make complaints and promptly investigate and provide redress for meritorious complaints.[18]

There are three principal objections to the safe-harbor approach. The first is the general concern we have already encountered that the standard may be set too low—that employers will be given a safe harbor when reliance on conventional antidiscrimination enforcement would yield the same antidiscrimination results. Stating the point in a somewhat different way, the concern is that the safe harbor will increase the incentive for noncompliance.

This objection has less force in the present context because the safe harbor, under this proposal, would be available only for chronically unemployed or underemployed individuals in high-risk groups. Promulgation would occur only after considerable experience with conventional antidiscrimination enforcement.[19]

The second objection is a moral objection—that a safe-harbor approach recognizes and legitimates discrimination against individuals in the perceived high-risk group who are qualified for the positions they seek. There is, of course, some force to this point but it must be kept in mind that the underlying objective of the law is to promote the employment, the "mainstreaming" of individuals from discriminated-against groups. If that employment is not happening and conventional enforcement is not changing outcomes, we ought to be seeking approaches that will promote employability without undermining antidiscrimination values.

The third objection is based on the claimed inutility of the safe-harbor approach. Here, the argument is that employers will hire strategically to take advantage of the probationary period with no intention to retain these employees as potential regular employees at the end of that period. This is largely an empirical objection to be evaluated in the course of actual experience with safe-harbor induced probationary employment. In addition, it is difficult to understand what benefits would accrue to the employer in engaging in such a stratagem. Hiring a new employee always entails training and workforce-integration costs, which most employers will not want to incur unless they hope to recoup that investment over the course of sustained employment.

This is a preliminary look at the potential benefits of a "safe harbor" approach to antidiscrimination goals. Creation of carefully cabined regulatory safe harbors for hiring employees from high-risk categories has the potential to spur improved utilization of such employees with limited harm to the moral force of the antidiscrimination regime. ■

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18 See Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Ellerth v. Burlington Indus., 524 U.S. 734 (1998).

19 The objection raised to administrative agency opinion letters often issued in response to hypothetical fact patterns would not apply. Compare Perez v. Mortage Bankers Assn., 135 U.S. 1199 (2015).

China

Access to Justice for China's Workers

Aaron Halegua

Aaron Halegua is a practicing lawyer, consultant, and research fellow at NYU School of Law's U.S.-Asia Law Institute and the Center for Labor and Employment Law. He publishes widely on labor and employment law issues in the US and China, including a recent report on legal representation for China's workers, discussed below. The full report, Who Will Represent China's Workers? Lawyers, Legal Aid, and the Enforcement of Labor Rights, commissioned by the Ford Foundation, is available for download at: http://usali.org/chinasworkers.

China's rapid economic and social changes over the past few decades have fundamentally transformed labor relations in the country. As marketization has moved forward, working people—and particularly domestic migrants—have encountered new forms of abuse. Although China still restricts workers from forming independent unions, it has responded by legislating new legal protections for workers, facilitating access to labor arbitration tribunals and courts, and expanding government-operated legal aid programs. But how successful have these efforts been in providing "access to justice" for China's workers?

My report, *Who Will Represent China's Workers? Lawyers, Legal Aid, and the Enforcement of Labor Rights* (Pub. Ford Foundation, October 2016), is based on extensive review of written materials, workplace visits, observations of legal proceedings, and over 100 interviews inside and outside of China. The report examines the nature of workers' current legal needs, how workers fare in litigation, the landscape of legal service providers, and the size of the "representation gap" between legal needs and services. It also offers a number of practical strategies for narrowing this gap. In this short article, I highlight several of the report's key findings and proposed strategies.

Key Findings

The number and diversity of labor disputes is rising.

The number of wildcat strikes and other protests is increasing, with some sources reporting over 10,000 such incidents in 2015. Similarly, the number of labor disputes handled by mediation organizations or filed at labor arbitration tribunals—a government-operated body that adjudicates statutory claims—mushroomed from 875,000 in 2009 to 1.55 million in 2014. Labor dispute cases in the courts grew by double digits in recent years. Cases concerning unpaid wages and social insurance remain most prevalent nationally, but some localities are seeing more disputes about termination, severance, and overtime.
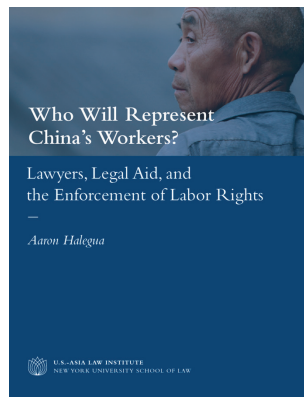
Workers are often unsuccessful in litigation.

Since 2007, workers have become less likely to "totally win" and more likely to only "partially win" in labor arbitration. As for court cases, an original analysis of publicly available decisions revealed that only 58% of workers partially or totally prevailed. Workers' limited understanding of the substantive law and legal process, as well as employers' malicious litigation tactics, contribute to this phenomenon.

Mediation has become the predominant means of resolving labor disputes.

Since 2010, more cases are resolved informally by mediation institutions each year than are filed with arbitration tribunals; even for cases that enter litigation, more are disposed of through mediation than by arbitral awards or judicial decisions. While workers benefit from mediation's relative quickness and settlements that are more likely to be implemented, in mediation, workers—who are almost always unrepresented—are vulnerable to being coerced into settlement.

Private lawyers are often reluctant to represent workers.

The reasons for this reluctance include the sometimes-lengthy litigation procedures, the small size of the available legal fees, the difficulty in collecting a judgment from the employer or a fee from the client, and the potential political sensitivity of labor cases. A formal ban on contingency fees also discourages lawyers

from representing workers who cannot pay for their services upfront. The difficulty of bringing cases on a collective or class basis means representing people with small claims is not economical for lawyers.

The government has restricted "barefoot lawyers" from representing litigants but dramatically increased its legal aid program.

While many other countries are finding ways for nonlawyers to fill the gap in legal representation, China is taking a different approach. Whereas "barefoot lawyers"—individuals lacking any formal license or training—previously represented a significant number of workers in arbitration and court (50% of plaintiffs in some localities), China has essentially banned these individuals from representing litigants. Instead, the government has greatly expanded the availability of civil legal aid for migrant workers in the past decade. By 2013, nearly one-third of the over 900,000 civil legal aid cases involved labor remuneration claims, and migrant workers constituted one-third of the 1.2 million individuals represented through legal aid. Most cases accepted for legal aid are assigned to private law firms, which receive a small fixed stipend, regardless of the outcome. As a result, firms often assign their most inexperienced lawyers to these cases.

Represented workers achieve better litigation outcomes, but a significant representation gap exists.

There is a great deal of anecdotal evidence, and some empirical studies, showing that workers with a legal representative fare better in litigation. However, an original analysis of 30,000 labor dispute decisions from courts in major cities revealed that roughly 40% of workers had no legal representative. Studies of other localities found even lower rates. But these statistics that focus solely on litigated cases are only the tip of the iceberg of any representation gap, as they exclude workers who settle their disputes before filing a formal claim and workers who never raise a complaint because they are unable to find any legal help.

Future Strategies

The report's proposed strategies for narrowing the representation gap are designed to be practical in light of China's current political and legal environment. Some of the recommendations focus on increasing the "supply" of legal services and workers' access to them. Others seek to reduce the "demand" for legal services by decreasing workplace injuries or labor violations at the outset. Several of these strategies are drawn from practices already occurring in other jurisdictions, such as the US.

Strengthening antiretaliation measures.

Chinese workers often do not challenge legal violations due to a fear of retaliation, which further emboldens abusive employers. Employer retaliation is commonplace in part because existing

China's rapid economic and social changes over the past few decades have fundamentally transformed labor relations in the country.

law provides insufficient protections for workers who complain. Legislation creating an explicit antiretaliation provision could be a useful first step toward curbing this problem. China has already adopted similar measures in the whistleblower context.

Encouraging the growth of a plaintiffs' bar.

A motivated, entrepreneurial, private plaintiffs' bar could seriously narrow the representation gap for workers. Permitting lawyers to use contingency fee arrangements would allow more workers to access their services. Encouraging class action litigation would make it more efficient and desirable for lawyers to represent workers with small claims. Furthermore, the attorneys' fee-shifting scheme that exists for labor cases in some cities is of limited utility due to the low cap on fee awards. However, if modified, such schemes could be a powerful tool for motivating more lawyers to represent workers.

Establishing personal liability for employers and imposing criminal sanctions.

Legislation establishing liability for individuals (not just corporate entities) would deter labor violations. Increasing the number and impact of criminal prosecutions of employers, of which there were nearly 1,200 in 2015, would have a similar effect. The government should build the capacity of worker advocates to identify cases that are ripe for prosecution, gather evidence, and refer the cases to the authorities.

Engaging employers to reduce workplace injuries and labor violations.

The rates of workplace injuries and workplace deaths in China far exceed those in the United States or United Kingdom. One key reason is that employers rarely provide the training or protective equipment required by law. Multinational companies can be partners in improving workplace safety in their supply chain by developing trainings and monitoring their implementation, ensuring workers receive all necessary protective gear, and encouraging worker-management dialogue on safety issues.

In 2016, the government announced its intention to amend the legislation addressing the employment rights of workers, most likely to roll back labor protections and increase "flexibility" for employers. In this environment, it will be even more important to ensure that workers are able to vindicate those rights that still exist. ∎

A New Deal for China's Workers?

FOR MORE ON CHINA LABOR RELATIONS, Cynthia Estlund, the Catherine A. Rein Professor of Law at NYU Law, has a forthcoming book: *A New Deal for China's Workers?* (Harvard University Press, 2017), in which she views the changing China labor landscape through the comparative lens of America's 20th-century experience with industrial unrest. China's leaders hope to replicate the widely shared prosperity, political legitimacy, and stability that flowed from America's New Deal, but they are irrevocably opposed to the independent trade unions and mass mobilization that were central to bringing it about. Professor Estlund argues that the specter of an independent labor movement, seen as an existential threat to China's one-party regime, is both driving and constraining every facet of its response to restless workers.

China's leaders draw on an increasingly sophisticated toolkit in their effort to contain worker activism. The result is a surprising mix of repression and concession, confrontation and co-optation, flaws and functionality, rigidity and pragmatism. If China's laborers achieve a New Deal, it will be a New Deal with Chinese characteristics, very unlike what workers in the West achieved in the last century. ∎

Comparative View: US Labor Disputes

AARON HALEGUA has also contributed a chapter on U.S. labor dispute resolution systems to a new downloadable book published by the *International Labour Organization, Resolving Individual Labour Disputes: A Comparative Overview* (Dec. 2016). His chapter provides an overview of the role played by administrative agencies (USDOL, EEOC, NLRB, New York State DOL, NYS Division of Human Rights, etc.), federal and state courts, firms' internal efforts, and both labor and employment arbitration—as well as how alternative dispute resolution is used in those contexts.

Parsing the Trans-Pacific Partnership

ON NOVEMBER 17, 2016, the Labor Center collaborated on the *Journal of International Law and Politics (JILP)* 22nd Annual Herbert Rubin and Justice Rose Luttan Rubin International Law Symposium: *Parsing the Trans-Pacific Partnership: The Implications of the Trade Deal for Human Rights, Labor, and the Economy*. The Labor Center faculty director, Professor Samuel Estreicher, moderated the panel on "What TPP Means for the American Worker" with panelists Celeste Drake, Trade and Globalization Policy specialist at the AFL-CIO, and Joshua Meltzer, senior fellow in the Global Economy and Development program at the Brookings Institution. David Huebner, former ambassador to New Zealand, gave the keynote address. ∎

Celeste Drake (AFL-CIO), Professor Samuel Estreicher (NYU Law), and Joshua Meltzer (Brookings Institution); David Heubner, Partner, Arnold & Porter, and former ambassador to New Zealand

Labor Center Board Meeting

ON DECEMBER 5, 2016, the Labor Center Board of Advisors had its semi-annual meeting. The guest speaker was Dr. Ariel Meyerstein, vice president, Labor Affairs, Corporate Responsibility and Corporate Governance, of the United States Council for International Business (USCIB). USCIB represents US companies in connection with the US government (such as the Department of Labor and USTR), as well as with international bodies (such as ILO, OECD, WTO). Dr. Meyerstein discussed his current work's focus on international treaties and global supply chains. He said that in the wake of the widely publicized Bangladesh factory collapse a few years ago, global unions were pressing for more protection from international frameworks (such as installing a global inspectorate).

Dr. Ariel Meyerstein

US employers, however, citing studies that export-driven companies already had higher labor standards than their local peers, think that the real governance gaps are not international, but domestic; therefore, a new international mechanism that focused only on global supply chains might not adequately drive improved working conditions for all workers in any given economy, because it might miss the opportunity to develop national labor laws and inspectorates across all sectors, regardless of which supply chains might pass through the country. In US employers' view, as conveyed by Dr. Meyerstein, a greater domestic focus would be a more sustainable and effective approach in the long term. ∎

Labor Center Board of Advisors News

NYU SCHOOL OF LAW **Professor Samuel Estreicher** was appointed by the Secretary-General of the UN as a distinguished external jurist member of the UN's Internal Justice Council, effective November 13, 2016.

Mark Risk '84 served as vice chair of the 10th Annual Conference of the ABA Section of Labor and Employment Law, held in Chicago in November 2016. He will also serve as co-chair for the 11th Annual Conference of the ABA Section of Labor and Employment Law, to be held in Washington, DC, in November 2017.

Ronald Shechtman '72, managing partner, Pryor Cashman, and chair of the firm's Labor & Employment Group, represented approximately two dozen of the original actors from the smash-hit Broadway musical, "Hamilton," on their equity participation agreement with producers. The deal enabled the actors to get some share in the profit stream of the musical, which is not standard practice. Although "Hamilton" is a mega-hit, the issue of original actor profit-sharing is predicted to become an issue in future labor negotiations on Broadway.

Wayne Outten '74 and his firm Outten & Golden were honored as "Champions of Justice" at the 2016 Annual Awards dinner of Brandworkers, a nonprofit organization aiming to bring local food production workers together to advocate for good jobs and a sustainable food system.

Jonathan Ben-Asher '80, partner of Ritz Clark & Ben-Asher, presented at the ABA Section of Labor and Employment Law's Annual Conference 2016, on "The Yates Memorandum and its Impact on Corporate Executives," discussing the new Department of Justice guidelines for the prosecution of individuals involved in corporate misconduct.

West Academic Publishing has recently released the 2016 fifth edition of the following three volumes of casebooks and materials by **Samuel Estreicher** with **Michael C. Harper** and **Elizabeth C. Tippett**:

- *Cases and Materials on Employment Discrimination and Employment Law: The Field as Practiced*

- *Cases and Materials on Employment Law: The Field as Practiced*

- *Cases and Materials on Employment Discrimination: The Field as Practiced*

Congratulations to Board Members named in Best Lawyers 2017 for Labor and Employment:

Jonathan Ben-Asher (Ritz Clark & Ben-Asher)
Philip M. Berkowitz (Littler Mendelson)
Michael Bernstein (Bond, Schoeneck & King)
Fred Braid (Holland & Knight)
Mark E. Brossman (Schulte Roth & Zabel)
Eugene Eisner (Eisner & Associates)
Zachary Fasman (Proskauer Rose)
Eugene S. Friedman (Friedman & Anspach)
Willis Goldsmith (Jones Day)
Michael Grenert (Law Office of Michael Grenert)
Jerome B. Kauff (Kauff McGuire & Margolis)
Jeffrey S. Klein (Weil, Gotshal & Manges)
Alan M. Klinger (Stroock & Stroock & Lavan)
Wayne Outten (Outten & Golden)
Mark D. Risk (Mark Risk)
Theodore O. Rogers, Jr. (Sullivan & Cromwell)
Samuel S. Shaulson (Morgan, Lewis & Bockius)
Ronald H. Shechtman (Pryor Cashman)
Stephen Sonnenberg (Paul Hastings)
Pearl Zuchlewski (Kraus & Zuchlewski)

The Labor Center Board of Advisors Is Pleased to Welcome Six New Members

Steven Arenson, managing partner of Arenson Dittmar & Karban, has been litigating civil rights cases for over 20 years. His practice focuses on representing workers who have suffered discrimination, sexual harassment, racial harassment, retaliation, wage and hour violations, and other forms of unlawful workplace conduct. He began his career in the legal department of the Anti-Defamation League, working on cases involving issues of constitutional law and civil rights. He then served as a law clerk to US District Court Judge Reena Raggi, taught constitutional law, and worked as an associate in the litigation department of a large New York practice.

Philip M. Berkowitz co-chairs Littler Mendelson's US practice of the International Employment Law Group and the Financial Services Industry Group. He advises multinational and domestic companies in a wide range of industries on employment-related matters. He has significant experience advising multinational companies regarding US and overseas employment and executive compensation practices. He represents employers in individual and class action lawsuits and arbitrations, and appears in US federal and state courts and before administrative agencies and international arbitration tribunals.

Michael Gray co-chairs the Global Labor & Employment Practice at Jones Day. His practice focuses on representing corporate clients with labor and employment matters, including class action and multi-plaintiff employment discrimination lawsuits, state law overtime class actions, FLSA collective actions, and trade secret and restrictive covenant matters. He represents employers throughout the US in bench and jury trials, administrative hearings, arbitrations, and appellate courts in matters arising under federal and state antidiscrimination laws, the Fair Labor Standards Act, FMLA, ERISA, Sarbanes-Oxley, labor management relations laws, and state law wrongful discharge claims. Mr. Gray also advises clients on preventive measures, including reviewing policies, counseling on disciplinary actions and investigations, negotiating severance agreements, and conducting employment practices reviews.

Troy L. Kessler is a partner at Shulman Kessler. He has extensive experience in representing employees who have been the victims of discrimination, harassment, wrongful termination, retaliation, overtime, and minimum wage violations. Mr. Kessler has been a frequent speaker at CLE events sponsored by the American Bar Association, the National Employment Lawyers Association, and the Suffolk County Bar Association, on topics covering wage-and-hour litigation, the exemptions to the Fair Labor Standards Act, amendments to the Federal Rules of Civil Procedure, and drafting and negotiating proper settlement agreements.

Alan M. Klinger '81 is the co-managing partner of Stroock & Stroock & Lavan, and co-chairs the firm's Litigation Practice Group. Mr. Klinger is also a member of Stroock's Executive Committee, and chairs its Legal Personnel Committee. He represents parties in complex civil litigation. Mr. Klinger is integrally involved in the firm's representation of public sector unions and employee benefits funds. Mr. Klinger also functions in the Government Relations Group, concentrating on administrative proceedings, health care, and land use matters. Among his many affiliations, Klinger is a member of the Board of Trustees of the NYU School of Law Foundation.

Marjorie Mesidor, a partner at Phillips & Associates, is a New York workplace discrimination attorney servicing clients who have been the victims of sexual harassment or discrimination based on race, gender, disability, and other protected characteristics. Ms. Mesidor procured a unanimous jury award in Johnson v. STRIVE, decidedly settling the issue of whether those of the same race can discriminate against one another. In addition, her work against the disparate impact of "poor door" policies on rent-stabilized tenants has earned her recognition by the Office of the Public Advocate. ■

Publications of the NYU Center for Labor and Employment Law

Who Is an Employee and Who Is the Employer?: Proceedings of the New York University 68th Annual Conference on Labor (Matthew Bender, 2016) (series editor: Samuel Estreicher; volume editor: Kate Griffith)

Title VII of the Civil Rights Act after 50 Years: Proceedings of the New York University 67th Annual Conference on Labor (Matthew Bender, 2015) (series editor: Samuel Estreicher; volume editor: Anne Marie Lofaso)

The Regulation of Compensation: Proceedings of the New York University 66th Annual Conference on Labor (Matthew Bender, 2014) (series editor: Samuel Estreicher; volume editors: César F. Rosado Marzán and Meron Kebede)

The Challenge for Collective Bargaining: Proceedings of the New York University 65th Annual Conference on Labor (Matthew Bender, 2013) (series editor: Samuel Estreicher; volume editor: Michael Z. Green)

Resolving Labor and Employment Disputes: A Practical Guide: Proceedings of the New York University 63rd Annual Conference on Labor (Kluwer Law International, 2012) (series editor: Samuel Estreicher; volume editor: Ross E. Davies)

Labor and Employment Law Initiatives and Proposals Under the Obama Administration: Proceedings of the New York University 62nd Annual Conference on Labor (Kluwer Law International, 2011) (series editor: Samuel Estreicher; volume editor: Zev J. Eigen)

Global Labor and Employment Law for the Practising Lawyer: Proceedings of the New York University 61st Annual Conference on Labor (Kluwer Law International, 2010) (series editor: Samuel Estreicher; volume editor: Andrew P. Morriss)

Retaliation and Whistleblowers: Proceedings of the New York University 60th Annual Conference on Labor (Kluwer Law International, 2010) (series editor: Samuel Estreicher; volume editor: Paul M. Secunda)

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