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NYU Center for Labor and Employment Law
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NYU Labor and Employment Law News

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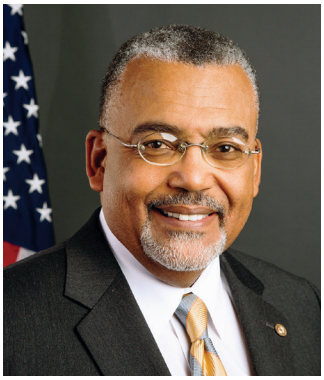
Advisory Board

NLRB Chair Mark Gaston Pearce: An Interview

On August 7, 2011, President Obama appointed Mark Pearce Chair of the National Labor Relations Board (NLRB).

Q How did private practice influence your approach to working on the NLRB? After law school, I worked for 15 years with the NLRB, mostly at its Buffalo, New York, Regional Office, investigating charges, prosecuting unfair labor practice cases and drafting representation case decisions on behalf of the regional director. During that period I became a district trial specialist, investigating and litigating cases in various parts of the country. This experience made clear to me how important the National Labor Relations Act (NLRA) is to working people seeking protection from retaliation for exercising their rights. The Act gives them critical protections needed to engage in activities to improve their working conditions and to employers seeking industrial stability.


Mark Gaston Pearce

I also developed a keen awareness of the limitations on the work of the NLRB. The Act is only useful if effectively enforced and it can only be enforced where the public has knowledge of the statute and its reach. Later, in private practice, my goal was to facilitate those rights through my practice before the Board and educating my clients on the protections and nuances of the NLRA. My return to the Board, as a Member, was for me a homecoming of someone who had acquired many years of private sector experience. This experience taught me, among other things, that the workplace and workforce are ever evolving due to innovations in

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The 68th Annual NYU Conference on Labor

The NYU Center for Labor and Employment Law held the 68th Annual Labor Conference on June 4–5, 2015. The theme of the conference was "Who is an employee, and who is the employer?" Lawyers and academics from across the country were in attendance to discuss these issues.

The conference featured keynote speaker, Richard Griffin Jr., general counsel of the NLRB Board, and Board Members Kent Hirozawa '82 and Philip Miscimarra. The first day focused on joint employers, differences between employees and independent contractors, and the extent to which partners, students, interns, and volunteers may be considered employees. The second day of the conference featured keynote speaker David Weil, administrator of the Wage and Hour Division of the US Department of Labor, and focused on new forms of worker organizations. ■

Left to right: Geoffrey Mort (Kraus & Zuchlewski), Zachary Fasman (Proskauer Rose), Charlotte Alexander (Georgia State Law), David Sherwyn (Cornell School of Hotel Administration); not pictured: Jonathan Donnellan '94 (Hearst Corporation)

Left to right: Jennifer Gordon (Fordham Law), Matthew Bodie LLM '05 (Saint Louis Law), Sara Ziff (Model Alliance), Jennifer Hunter (SEIU)

Kent Hirozawa '82 (NLRB)

Kent Hirozawa '82 (NLRB), Irwin Bluestein (Meyer, Suozzi, English & Klein), Samuel Estreicher (NYU Law)

Arun Sundararajan (NYU Business) and Mark Risk '84 (Mark Risk Law)

David Weil (US Department of Labor), Laurie Berke-Weiss (Berke-Weiss Law), Samuel Estreicher (NYU Law)

Philip Miscimarra (NLRB) and Karen Fernbach (NLRB, Region 2)

Richard Griffin Jr. (General Counsel, NLRB) taking questions from the audience

Standing Left to Right: Samuel Estreicher (NYU Law), Larry Cary (Cary Kane), Jennifer Hunter (SEIU), Sara Ziff (Model Alliance), Matthew Bodie LLM '05 (Saint Louis Law). Seated Left to Right: Kate Griffith '04 (Cornell ILR), Dennis Lalli (Bond Schoeneck & King), Daniel Clifton (Lewis Clifton & Nikolaidis), Jennifer Gordon (Fordham Law)

Employee or Independent Contractor?

At the 68th Annual Conference on Labor, David Weil, administrator of the US Department of Labor Wage and Hour Division, addressed the "fissured workplace." Below, Weil has summarized his remarks.

The Wage and Hour Division is tackling employee misclassification because so much depends upon the answer to that question.

Imagine working as a drywall installer building houses as an employee one day, but the next day, while performing the same work on the same site for the same company, you're told you are now considered an independent contractor. You didn't suddenly open a business of your own. Nothing about your work changed. But now, you're told that since you're no longer an employee, you're no longer eligible for overtime pay, unemployment insurance, workers' compensation or a host of other benefits that come with employee status.

David Weil

That really happened to a group of workers recently, who we discovered were owed back wages after conducting an investigation. And unfortunately, this situation is all too common—with terrible consequences. Misclassified employees are often denied access to the critical benefits and protections they are entitled. Misclassification also generates substantial losses to the federal government and state governments in the form of lower tax revenues, as well as to state unemployment insurance and workers' compensation funds. It forces workers to pay the entirety of their payroll (FICA) tax. It also tips the scales against all of the employers who play by the rules and undermines the economy.

Employer-Employee Relationships

In recent years, employers have increasingly contracted out or otherwise shed activities to be performed by other entities through, for example, the use of subcontractors, temporary agencies, labor brokers, franchising, licensing, and third-party management. Among the many consequences of these "fissured workplaces," misclassifying employees as independent contractors is among the most damaging to workers and our economy.

Whether a worker is an employee under the Fair Labor Standards Act (FLSA) is a legal question determined by the economic realities of the working relationship between the employer and the worker, not by job title or any agreement that the parties may make. The Labor Department supports the use of legitimate independent contractors—who play an important role in our economy—but when employers deliberately misclassify employees in an attempt to cut costs, everyone loses.

Strategic Enforcement

The Wage and Hour Division continues to attack this problem head on through a combination of a robust education and outreach campaign and nationwide, data-driven strategic enforcement across industries.

We also will continue to work with the IRS and 25 states on this issue in a variety of ways—through, for example, information sharing and coordinated enforcement.

Clarity for Employers

As fissuring and misclassification have spread, providing workers and employers a clear understanding of what makes a worker an employee may be more important than ever. Accordingly, we have issued an administrator's interpretation that analyzes how the FLSA's definition of "employ" guides the determination of whether workers are employees or independent contractors under the law. It discusses the breadth of the FLSA's definition of "employ," and provides guidance on the "economic realities" factors applied by courts in determining if a worker is indeed an employee.

Ultimately, the goal of the economic realities test is to determine whether a worker is economically dependent on the employer (and is therefore an employee) or is really in business for him or herself (and is therefore an independent contractor). We believe in providing employers all of the information that they need to comply, and this document, with its discussion of the relevant law and inclusion of numerous examples, will help employers.

Our goal is always to strive toward workplaces with decreased misclassification, increased compliance, and more workers receiving a fair day's pay for a fair day's work. ■

Introducing the Restatement of Employment Law

Matthew Bodie LLM '05

Matthew Bodie is the Callis Family Professor at Saint Louis University School of Law. He received his AB from Princeton University, his JD from Harvard Law School, and his LLM in labor and employment law from NYU Law. He served as one of the reporters for the ALI's Restatement of Employment Law, along with chief reporter Samuel Estreicher and co-reporters Michael Harper and Stewart Schwab.

Matthew Bodie

Over the summer, the American Law Institute (ALI) published the new Restatement of the Law, Employment Law, covering the common law elements of the employment relationship. The product of four reporters, as well as the ALI Council, its membership, and expert editorial staff, the Restatement of Employment Law provides a compact but comprehensive overview of the contract and tort principles that govern employer and employee conduct. Building on an established but evolving tradition of common law jurisprudence, the reporters sought to clarify the various rules relating to the workplace and create a foundation upon which future jurists, lawmakers, and attorneys could operate.

The Restatement is broken down into nine chapters: the existence of the employment relationship; termination of employment contracts; compensation and benefits; employer liability for tortious harm to employees (including vicarious liability); wrongful discharge in violation of public policy; defamation, wrongful interference, and misrepresentation; privacy and autonomy; employee obligations and restrictive covenants; and remedies. Below are a few highlights from the volume:

- The definition of "employee" looks not only at the degree of the putative employer's control, but also at the extent to which the putative employee operates as an independent businessperson. (See § 1.01.)
- The presumption of at-will termination is recognized, but so are exceptions to the rule through specific agreements, policy statements, and the implied duty of good faith and fair dealing. (See Chapter 2.)
- Employer responsibility for supervisory or managerial misconduct may, if so provided by law, be apportioned according to the Supreme Court's *Faragher/Ellerth* test in Title VII, which makes the employer liable unless it has taken certain steps to prevent and correct such harassment, and the employee failed to take advantage of such preventative measures. (See § 4.03.)
- Professional and occupational codes can serve as the basis for a wrongful discharge in violation of public policy claim, but only to the extent that the code provisions at issue serve the public interest. (See § 5.03.)
- Employers have a qualified privilege against defamation when discussing an employee with prospective employers, other company employees, or public and private regulatory authorities. However, the employer remains liable for intentional, reckless, or gratuitous untruths causing harm. (See § 6.02.)
- Employers impliedly agree not to terminate their employees for personal activities or beliefs that do not affect the employer's legitimate business interests, but such an agreement is only the default rule. (See § 7.08.)
- Employer trade secrets do not include information that is "acquired by employees through their general experience, knowledge, training, or skills during the ordinary course of employment." (See § 8.02.)
- A covenant not to compete is generally enforceable unless the employer acted in bad faith in seeking to enforce an over broad agreement or if there is a "great public need" for the employee's services. (See § 8.06.)
- Unlike in most statutory employment schemes, the common law does not generally provide for reinstatement as part of an employee's remedies. (See § 9.06.)

Although employment is regulated by important federal statutory schemes such as ERISA and Title VII of the Civil Rights Act, at its heart it is a contractual relationship. The Restatement of Employment Law provides a useful look at the common law principles that structure the workplace.

The Restatement of Employment Law's "Entrepreneurial Control" Test

Michael Harper

As a panelist at the 68th Annual Conference on Labor, Professor Michael Harper, Boston University School of Law, spoke on the "Entrepreneurial Control" test for employee status in the Restatement of Employment Law. Harper, a reporter for the Restatement project, summarizes his remarks.

The twenty-first century mission of the American Law Institute (ALI) to restate for the first time American employment law carried the responsibility to provide more clear guidance on the law's critical distinction between employees and independent contractors.

This distinction delineates the scope not only of federal employee protection and benefit statutes, but also of employee protections and benefits provided by state statutory and common law. Not surprisingly, the reporters agreed to have the section addressing the distinction be the first in the volume, and it is indeed now included as § 1.01.

A restatement of employment law, however, like any restatement, cannot formulate clearer or otherwise more desirable doctrine from the ex cathedra views and values of the reporters or the ALI membership. The Restatement could not offer a new rule of decision. It could only offer a better explanation of what has been the underlying basis of a majority of the better decisions applying various unstructured multifactor tests formulated and applied since the Restatement Second of Agency. The First Agency Restatement supplemented the right to control test that had been used in the prior century to delimit employer vicarious liability for the torts of its employees within the scope of employment. These reformulations, including that offered by the Supreme Court in two decisions as a default rule for federal employment statutes. Sometimes overlooked is the fact that the Agency Restatement supplemented the "right to control" test with ten or more other factors, but had not specified why these factors were relevant to the distinction of independent contractor. The Restatement of Employment Law had to determine how and why the better decisions applied the right-to-control factor and the other factors listed among the various tests. To what are the various factors, or at least the most critical factors, primarily relevant?

We did so by describing as independent businesspersons those with retained discretion to enhance their returns through entrepreneurial decisions. Truly independent businesspersons retain discretion to enhance their returns or profits by making important business decisions in their own interest. These important decisions, the cases reveal, include the allocation of the labor of others, the allocation of capital, and the allocation of the service providers' own labor. Or, as we expressed it in the black letter of § 1.01(2), "whether to hire and where to assign assistants, whether to purchase and where to deploy equipment, and whether and when to provide service to other customers."

Michael Harper

We found the most important factors in all of the multifactor tests to be relevant to the question of whether a service provider retains discretion to operate as an independent business person with entrepreneurial control over the allocation of capital and labor. Most

importantly, the first factor in both the Court's common law test and the Restatement Second of Torts test, the hiring party's control over "the manner and means by which the product is accomplished," can determine whether entrepreneurial discretion is retained. An employer that controls the manner and means by which an individual renders service effectively prevents the individual from exercising entrepreneurial discretion in his or her own interest and thus from operating an independent business. In general, employees cannot schedule their own time or the time of assistants. They cannot determine their use of their own equipment or make their own investments in further equipment.

We recognized, however, that satisfying the traditional "right-to-control" test was a *sufficient*, but not *necessary*, condition for employee status. This became a major point of clarification in § 1.01 of the Restatement of Employment Law. Section 1.01(1)(c) illuminates the relationship between the "right-to-control" test and the multifactor tests: when the former does not alone determine employee status, the other factors can do so if they establish that the hiring party "effectively prevents the individual from rendering the services as an independent businessperson" by effectively denying the individual entrepreneurial discretion.

The Employment Restatement helps explain why a wide range of service providers whose manner and means of work cannot be controlled effectively by a hiring party nonetheless may be employees of that party. This range of service providers may include the problematic cases noted in the Second Restatement of Agency, such as full-time cooks at high end restaurants, ship captains, managers of great corporations, traveling salesmen, and skilled artisans. It also may include professional or technical workers whose expertise cannot be controlled by a hiring party without similar expertise, or other mobile workers, like delivery persons or drivers, who may not work in the presence of supervisors. All of these kinds of workers may be employees, regardless of their employer's lack of effective control over the details of their work, if the employer does not in practice allow them discretion to make the kind of labor and capital allocation decisions businesspersons can make to enhance their own returns independently from those of the employer.

This is the law not only as it is, but also as it should be, at least for purposes of setting a presumptive default rule defining the scope of employee protection or benefit laws. The economic relationship between two independent businesses is sufficiently distinct from the relationship of employment to vitiate the utility of a presumption of economic dependency. Independent businesspersons, especially ones whose business vitality is dependent on that of a second business, may need legal protections similar to those afforded employees, and sometimes are offered those protections by other laws. Whether such protection should be extended, however, is a separate question of policy usually decided through legislation. ■

New Board Member Todd Gutfleisch, on His Move from Corporate to Employee-Side Law

Todd Gutfleisch, a partner with Wechsler & Cohen, specializes in employment law and litigation. He recently sat down with the Center for Labor and Employment Law to talk about the importance of transitions in his career.

Q How did you realize you wanted to go into law, and employment law specifically? My entry into employment law was accidental. I was an engineer, and had planned on going to graduate school for some time. I was traveling quite a lot in my job, and thought that the best option for me was law school.

Todd Gutfleisch

Initially I had planned on studying patent law, but unfortunately at the time there weren't very many jobs available in that field. I accepted a job at Chemical Bank in their labor and employment law department. It was not my original intent to become involved in employment law, but I think the various Supreme Court cases involving employment law in 1989 had something to do with it. Employment law cases were becoming more common, and it was the expanding field of law when I was graduating from law school.

Q You used to work at JP Morgan Chase. What was the transition like to Wechsler and Cohen—not only in terms of moving from corporate to employee side, but in terms of moving from a huge institution to a relatively small law firm as well? My particular position at JP Morgan Chase and Co. was unique. Now I had begun my first job in employment law at Chemical Bank, which was bought out by Chase Manhattan Bank. JP Morgan subsequently purchased Chase Manhattan to become JP Morgan Chase and Co., so over time I was working in the same position at a company that kept growing. My position was especially unique for in-house law, as we were a relatively mid-sized group of employment lawyers. By 2008, in a department of about 600 lawyers,

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Rebuilding Labor Relations in Detroit: Collective Bargaining During the Bankruptcy

Brian Easley

Brian Easley, a partner at Jones Day, represents employers in all aspects of labor and employment law, with a focus on labor-management relations. Easley led a team of five other attorneys which oversaw Detroit's labor relations during the city's bankruptcy proceeding.

Following decades of decline, during which the municipal government amassed $18.5 billion in outstanding debts, the city of Detroit filed for Chapter 9 bankruptcy protection on July 18, 2013. As is the case with many large bankruptcies, liabilities relating to employee and retiree obligations were significant contributing factors to the city's financial distress, and were among the largest obstacles to the city's financial restructuring and future viability. However, when Detroit emerged from bankruptcy sixteen months later on November 7, 2014, the city had made significant progress towards reducing employee and retiree obligations and stabilizing its historically contentious relations with municipal labor unions.

Significantly, the city was able to address these problems without rejecting a single collective bargaining agreement (CBA)—the usual strategy employed by debtors burdened by significant liabilities resulting from collective bargaining. Instead, the city successfully addressed its labor relations issues by negotiating consensual CBAs with the vast majority of the unions representing the city's employees that both allowed Detroit to operate within its budget and provided the city government with much needed operational flexibility to effectuate the goals of its restructuring. These results were achieved in large part due to the mediation process ordered by the Bankruptcy Court, not due to any Bankruptcy Court orders relieving the city from its contractual obligations.

To be sure, municipal bankruptcies differ from commercial bankruptcies in many important respects. One significant difference is the absence of the complex provisions for interim relief and rejection of collective bargaining agreements and retiree medical obligations set forth in sections 1113 and 1114 of the Bankruptcy Code. Chapter 9 of the Bankruptcy Code does not include comparable procedures for rejecting collective bargaining agreements or retiree medical obligations. As such, a Chapter 9 debtor can reject a collective bargaining agreement so long as it meets the less onerous requirements established by the Supreme Court in *NLRB v. Bildisco & Bildisco*. Under *Bildisco*, a debtor may reject a CBA if (a) the labor agreement burdens the estate; (b) after careful scrutiny, the equities balance in favor of contract rejection; and (c) "reasonable efforts to negotiate a voluntary modification have been made, and are not likely to produce a prompt and satisfactory solution."

However, rejection of its collective bargaining agreements was not a viable strategy for the city in its bankruptcy proceeding. As an initial matter, the city did not need bankruptcy to reject its collective bargaining agreements. Even before the city filed for bankruptcy, the Michigan legislature passed a series of laws pursuant to which the city's duty to bargain was suspended based upon its financial distress. In addition, the Local Financial Stability and Choice Act (PA 436), which was in effect when the bankruptcy petition was filed, authorized the appointed Emergency Financial Manager, Kevyn Orr, to reject collective bargaining agreements outside of the bankruptcy process. As a result, by the time the city filed for bankruptcy, the labor agreements covering the vast majority of the city's employees had expired, and most of these employees were working under concessionary implemented terms. Thus, at the time the bankruptcy petition was filed, there were few labor agreements to reject.

Brian Easley

Also, there were strategic reasons for foregoing the legal right to reject collective bargaining agreements. In order to effect the substantial restructuring of pension and retiree medical liabilities essential for the success of the plan of adjustment, the city needed to assure that pension and retiree medical reforms would be locked in for the long term. Rejecting collective bargaining agreements would not assure that these reforms would remain

in effect beyond the next negotiation cycle. Accordingly, rather than exercising its statutory authority to reject agreements or further exercising its right to unilaterally implement employment terms, the city instead sought to work with labor representatives to achieve union support and cooperation. To that end, even in the absence of a duty to bargain, the city entered into confidential mediated discussions with union representatives with the ultimate goal of entering into long term collective bargaining agreements to facilitate the city's financial restructuring. This strategy ultimately proved successful, and better served the city's interests for several important reasons.

First, by obtaining union support rather than unilaterally implementing terms, the city was able to move through the bankruptcy process more quickly with less risk that its plan of adjustment would be derailed by union objectors. Indeed, reaching consensual agreements with unions and other key stakeholders expedited the restructuring process by reducing the number of objectors to the city's plan of adjustment and avoiding lengthy appeals contesting the structure and implementation of the plan.

Second, by entering into long term (five-year) agreements, the city shielded its plan of adjustment from the inherent risks presented by interest arbitration processes mandated under Michigan law. Similar to the laws of many other states, when the local governments fail to reach collective bargaining agreements with labor unions representing public safety workers, Michigan Public Act 312 requires the government employer to submit such disputes to binding interest arbitration in lieu of strikes or lockouts. Had the city emerged from bankruptcy without long-term agreements, at the time the duty to bargain reattached, the city could have been compelled to submit any public safety collective bargaining disputes to interest arbitrators who could have issued awards undermining the pension and retiree medical restructuring initiatives that were central to the city's financial restructuring.

Third, the circumstances surrounding the mediation process ordered by the Bankruptcy Court were more conducive to positive outcomes. The Bankruptcy Court appointed dedicated mediators who worked tirelessly to assist the city and municipal unions in reaching consensual labor agreements that were fair and equitable in light of the city's dire financial condition. The ability to negotiate with labor representatives—with the assistance of the mediators—about both the details of the restructuring plan and the implementation of the plan allowed for more flexibility and creativity, ultimately reducing the burden on city employees and retirees. ■

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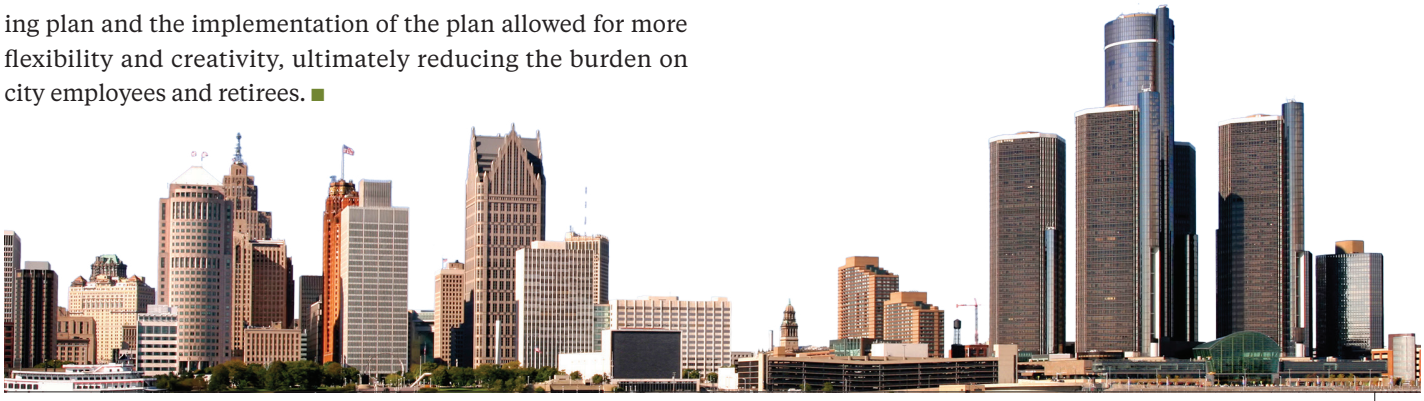
the employment group had 14 lawyers. We were pretty much self-sufficient; we did all of our own litigation. I drafted my own court documents and did much of the leg work myself, so in that way it was different from large in-house law departments. It was similar to the functioning of an employment law group within a large law firm not focused solely on employment law—we were independent, and I pretty much did my own thing. Moving to the truly employment side was actually easier for me because of this. My work at JP Morgan Chase consisted of about 50 percent litigation, with the other 50 percent being employment contracts, negotiations of separation agreements, and other things of that sort. That is very similar to my role now at Wechsler & Cohen. At JP Morgan Chase, one of my responsibilities was to give opinions on whether a certain action taken or not taken by the company was lawful or not, and to decide from this analysis whether it was necessary to change company policies. At Weschler & Cohen I perform analysis of individuals and their particular cases. I have to decide whether this person who calls the firm has a claim to begin with, much like, during my time as an in-house lawyer, I had to decide whether JP Morgan Chase was liable. My day-to-day practices, surprisingly, have stayed the same. In terms of time allocation, and staffing, and my role as far as litigation and association support, my role as an in-house lawyer was unique, and it allowed me to more smoothly transition into working at Weschler & Cohen.

Q What has been your favorite part of your various roles? What is your favorite part about working on the employee side? I'd say the analysis and strategizing required of my responsibility at both JP Morgan Chase and Wechsler & Cohen has always been my favorite part. Now on the employee side, I also have a little bit more of an opportunity to look at the actual laws to determine if their might be something that would allow me to provide the employee with a higher measure of protection. Mostly this kind of in-depth analysis of laws and policies is what I'm heavily interested in. ■



Mental Impairments in the Workplace— A Lawyer/Former Therapist's Observations

Stephen Sonnenberg

Stephen Sonnenberg is a partner in the employment law practice of Paul Hastings and chair of its New York employment law department.

As a former psychotherapist, I often wonder if there is something about mental impairments, as opposed to physical impairments, that render them more challenging in the workplace, for employees and employers alike. Why do applicants and employees with mental disabilities, as opposed to physical disabilities, sometimes leave employment lawyers, managers, and human resources personnel uncertain about the proper scope and timing of inquiries about the impairment, the types of examinations an employer may require, or the kinds of accommodations that may be effective?

Defining a "mental impairment" is hardly simple. Under the Americans with Disabilities Act, a mental disability is defined as "[a]ny mental or psychological disorder, such as an intellectual disability (formerly termed 'mental retardation'), organic brain syndrome, emotional or mental illness, and specific learning disabilities." As with physical impairments, protection arises from mental impairments that substantially limit one or more of the major life activities of an individual; or a record of such an impairment; or being regarded by an employer as having such an impairment. There are certain statutory exclusions from coverage. The current user of illegal drugs does not have a protected mental impairment, nor does someone who engages in compulsive gambling, kleptomania, transsexualism, pedophilia, exhibitionism or voyeurism. Congress decided that those behaviors simply do not warrant protection.

While the ADA provides a legal definition to ignore the clinical definition, or the social dimension of a mental impairment would divorce the legal analysis from reality. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, or DSM-5, identifies hundreds of mental disorders. For each disorder there are a variety of symptoms often associated with such impairments. Mental health professionals turn to DSM-5 in order to make a differential diagnosis and, for laypersons, DSM-5 can be a challenging read. For mental health professionals, it can provoke disagreement. After all, the inclusion and categorization of certain mental disorders in DSM-5 was not without considerable controversy. Given that the language mental health professionals use to discuss mental impairments is laced with no less jargon than the language lawyers use when analyzing, drafting and debating points of law, lawyers do not always feel at ease delving into the realm of clinical psychology or psychiatry.

As to the social dimension, consider the following. Emotional struggles are intensely private and persons with mental disabilities often experience shame and suffer stigma. There is an inherently subjective quality to an individual's report regarding his or her emotional distress and it often is difficult to measure how a mental impairment affects an individual's ability to function in the workplace.

Stephen Sonnenberg

Defining a mental impairment is thus no simple task. The importance of doing so, at least to the extent that employees and employers can address and resolve an array of related issues that arise in the workplace, is underscored by the prevalence of mental impairments. According to recent studies, an estimated one-quarter of Americans suffer from a clinical mental disorder in any given year, and nearly half of them are diagnosed with two or more disorders. Mental impairments impose upon affected individuals certain social burdens. You do not need to go back many years to recall the proclivity to institutionalize individuals with significant mental impairments, to shunt them off to one side, to describe them with a variety of words and terms derogatory in nature, and you do not need to dig too deep to recognize that, historically, mental impairments have been a source of shame and stigma for many individuals, and for many families.

Privacy concerns and the importance of confidentiality are often acute for individuals in treatment for psychological concerns, regardless of their severity and impact. Nor do you have to dig deep to uncover the unequal economic burden that a mental impairment, as opposed to a physical impairment, sometimes has imposed on individuals. Consider the legal struggle for parity in insurance benefits for mental and physical illness.

The Americans with Disabilities Act is part of a broad and laudable movement to reject unenlightened thinking about mental impairments. But even as recently as 2007, in a survey conducted by the Centers for Disease Control and Prevention on stigma and illness, in which adults in 37 states and territories were surveyed about their attitudes toward mental illness, 57 percent of adults without mental health symptoms believed that people are caring and sympathetic to persons with mental illness. But only 25 percent of adults with mental health symptoms believed that people are caring and sympathetic to persons with mental illness. Stigma and shame still too often burden individuals with mental impairments.

From the employer's perspective, an employee's mental impairment is often hidden. Compare the visible symptoms of impairments in employees who have a loss in hearing, or blindness in one eye, or a neurological impairment causing substantial weakness in a limb or on one side of the body, to the visible symptoms of those who have an anxiety disorder, or depression, or obsessive compulsive disorder. Mental impairments often involve symptoms that do not lend themselves to objective measurement, to CAT scans, MRIs and X-rays, as readily as physical impairments. And, when a mental health professional arrives at a clinical diagnosis and provides treatment, she or he will be constrained by medical privacy laws or will be naturally reluctant to share with a third party information about a patient's emotional well-being and innermost secrets.

All of these factors, I have concluded, make questions and answers about the proper scope and timing of inquiries, exams, and accommodations more opaque for employers and employees alike.

In one interesting development, employers have turned to a myriad of personality tests to screen applicants for jobs, or incumbents for promotions. There are a number of associated legal issues ripe for discussion and, potentially, litigation. According to proponents of personality tests, the tests are a cost-effective, efficient tool readily available to employers to help identify candidates with qualities that are predictive of success. Critics respond that personality tests have numerous drawbacks related to their validity, reliability, and legality, including questions that may be used to diagnose a mental disorder, on the one hand, or to simply measure an applicants' current mood (rather than a personality trait associated with future success), on the other.

One of the most significant legal risks associated with the use of personality tests to screen applicants and employees, whether for hiring or promotion, arises under the ADA. Few published decisions analyze the use of a personality test in aid of recruitment or promotion under the ADA. The Equal Employment Opportunity Commission, however, has shown increased interest in targeting employers' use of facially-neutral hiring tools, such as personality tests, allegedly to discriminate against particular groups of candidates.

Under the ADA, an employer may ask disability-related questions and require medical examinations of an applicant only after the applicant has been given a conditional job offer. As to incumbents, the ADA allows inquiries and exams regarding mental impairments in certain limited circumstances, including fitness-for-duty and direct threat exams. Generally, inquiries and exams during employment must be job-related and consistent with business necessity. The threshold question regarding a personality test is thus whether the questions and answers they elicit constitute a medical examination. Once an employer makes that determination it is informed as to whether it may, under the ADA, utilize the test during the pre-offer phase. An employer would also be informed as to whether use of the test on an incumbent must be job-related and consistent with business necessity.

... employers have turned to a myriad of personality tests to screen applicants for jobs, or incumbents for promotions. There are a number of associated legal issues ripe for discussion and, potentially, litigation.

Although proponents extoll the virtues of using personality tests to screen applicants and employees, the ADA, in particular, warrants close attention. There are unresolved issues that call for the application of legal and psychological expertise. Personality tests, for example, identify personality traits, which are not necessarily clinical disorders, but some personality traits are linked to mental impairments recognized in DSM-5. Does a test that identifies a personality trait linked to a mental impairment constitute a medical exam under the ADA? Although there is little case law or EEOC guidance that meaningfully addresses this question, careful consideration of this issue by employment lawyers is well advised. This issue, like others at the juncture of employment law and psychology, is part of what makes the practice of employment law fascinating. ■

((SOUNDING OFF))

Joint Employers in Franchising

A new column in the newsletter, Sounding Off, will feature opposing sides to various topics in labor and employment law. In our first column, Rachel Bien, Outten & Golden, and Professor David Sherwyn, Cornell University School of Hotel Administration, take opposing sides take opposing sides of joint employer implications of franchising.

From the Plaintiff's Perspective))

Rachel Bien

Although franchisors have decried recent efforts to hold them liable for violating the labor and employment rights of their franchisees or their franchisees' employees, federal and state worker protections do not exempt franchisors or carve out franchise arrangements for special consideration. Rather, these laws, including the Fair Labor Standards Act (FLSA) and the National Labor Relations Act (NLRA), give almost no weight to the way in which a franchisor labels a worker, such as "franchisee" or "independent contractor." Instead, they define the employment relationship expansively in order to bring more workers within their ambit and to better effectuate the public policy goals that motivated Congressional action.

A threshold question in cases challenging an unlawful labor or employment practice in the franchisor-franchisee context is whether the franchisor can be held liable as an "employer" of the aggrieved workers. Both the NLRA and FLSA contemplate that workers can have more than one employer. Thus, a worker can claim that he is "jointly employed" by his direct employer—the franchisee—as well as his indirect employer—the franchisor. Where a joint employment relationship exists, each employer is jointly and severally liable for the violation, including any damages that are owed.

Under both the NLRA and FLSA, the overarching question in determining the existence of a joint employment relationship is whether the putative employer possesses the authority to control the terms and conditions of employment. Under such circumstances, it is reasonable to hold the joint employer liable for any violations because the joint employer had the power to stop the violations from occurring, but did not. It is also often necessary to include the joint employer in disputes involving terms and conditions of work because it may be in the best position to ensure that the violations do not continue.

Certain features of the franchisor-franchisee relationship may make it difficult for franchisors to avoid being held liable as joint employers. In the typical arrangement, a franchisor allows the franchisee to market its products or services under the franchisor's name and trademark using the franchisor's proven business system. This system often includes use of particular operational manuals, managerial and employee training programs, and similarly detailed policies and protocols that enable franchisees to operate their businesses uniformly and maintain the franchisor's brand and reputation. For example, the NLRB general counsel has alleged that McDonald's USA requires its franchisees to use the same operating manuals and training programs, and that it performs inspections to ensure that these requirements are carried out.

While such policies are intended to limit the extent to which any one franchisee can harm the franchisor's image, they also reflect the franchisor's significant authority to control—the central focus of the joint employer inquiry. Thus, one of the chief virtues of the franchisor-franchisee arrangement—the franchisor's ability to protect its brand through widespread distribution of its proven business method—appears to be at odds with franchisors' desire to avoid being held liable for their franchisees' labor and employment decisions.

Of course, not all franchisor-franchisee relationships will result in a finding of joint employment. In April 2015, the NLRB's Division of Advice issued a memo concluding that Freshii Development, a "fast casual" restaurant chain and franchisor, was not a joint employer and should not be held liable for its franchisee's decision to fire two workers for trying to unionize the workforce. Notably, the franchise agreement limited the franchisor's right to mandate standards relating to "any personnel policies or procedures," such as handbooks and hiring, scheduling, and termination policies. While Freshii provided model policies, they were "optional."

The Freshii example shows that franchisor relationships vary. As a result, each case will be assessed on its facts. Where franchisors retain power to make important decisions affecting their franchisees' workplaces, including how workers are classified, trained, or paid, there are strong arguments supporting holding them liable under a joint employer theory. When these franchisors fail to take action to remedy workplace violations, it can have serious repercussions for workers. For example, a federal court in Massachusetts found that janitors working for a franchisee of Coverall North America, Inc., one of the world's largest

commercial cleaning companies, had been improperly classified as "independent contractors." These workers were primarily new immigrants who allegedly did not understand the independent contractor agreements that they were required to sign and that purported to exclude them from statutory employment law protections. These facts are troubling and unfortunately fairly common in certain industries. It is not surprising that courts, the NLRB, and state and federal departments of labor are taking a closer look at franchisor-franchisee relationships to determine whether franchisors should be held responsible for labor and employment law violations.

From the Management's Perspective

David Sherwyn

The NLRB's recent decision in *Browning-Ferris Industries (BFI),* and the control test advocated by the DOL and the EEOC to franchising are examples of what happens when we try to solve twenty-first century workplace problems with nineteenth/twentieth century law. There is simply no basis to argue that franchisee employees are better off when their franchisors exercise even less control. Unlike small franchisees, franchisors have the knowledge and the resources to comply with the law. The application of the control test, however, provides a perverse incentive for franchisors to exercise even less control than the law allows now. The test is set up to make sure that franchisors cannot avoid joint-employer status. If, however, franchisors find a way to toe that line, it seems clear franchisee employees and society will be worse off. We need to", to read: We need to craft a twenty-first century solution to the problem.

To develop such a standard we propose setting a goal and then trying to achieve it by examining the realities of the workplace. The goal, at a minimum, is legal compliance. As David Weil proves in his paper in the *ILR Review*, small franchisees do not comply with the FLSA as well as franchisors. Thus, we need to encourage franchisors to have more control, not less. This is what the BFI holding seeks to do, but it could either: (1) fail because franchisors will exercise less control to avoid liability; or (2) severely compromise the franchise model. Accordingly, we contend that franchisors should have an incentive or, better yet, a requirement to comply with law without the strict liability.

We propose that all franchisors have a "brand standard" of legal compliance. We do not need to develop a process for such compliance in a vacuum. Instead we can look to sexual harassment law with respect to vicarious liability under the antidiscrimination laws—specifically how the Ellerth/Faragher standard has been applied. Under Ellerth and Faragher, employers can avoid liability for sexual harassment if they:

- exercised reasonable care to prevent and correct harassment; and
- the employee unreasonably failed to take advantage of what the employer provided or otherwise avoid harm.

In practice, courts have made it clear, employers will not be liable if they:

- Have a strong anti-harassment policy; and
- Legitimately investigate such claims, fix the problem (if there is one) and discipline the harasser.

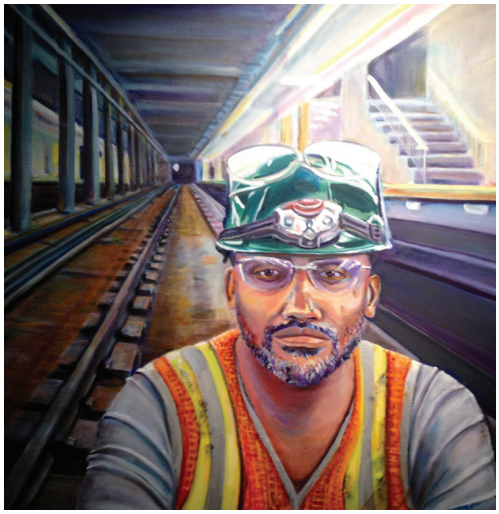
We propose a similar standard for franchisor/franchisees. Franchisors must exercise reasonable care to ensure that franchisees are aware of employment laws and to comply. There will be no such thing as too much reasonable care, but policies and training of the franchisee will suffice. All franchisee employees must be made aware that if they believe they have been the victim of legal violations they should report it to the franchisor. The franchisors will have an obligation to investigate. If they find violations they need to make sure the franchisee corrects the problem and pays damages. A franchisee who does not cure the problem within 60–90 days will lose its franchise. A franchisor who fails to investigate or force the franchisee to cure the problem, will be liable for damages. Our standard is not perfect. First, our goal does not help unions who wish to organize franchisors with top-down organizing opportunities. We contend that this "failure" is acceptable. It is bad policy to alter an entire business structure with numerous opportunities and economic positives simply on the assumption that this may help unions organize. As stated above, there are enough franchisor stores and large franchises for unions to organize, and the NLRA was written, and passed for bottom-up organizing to begin with. Franchisors, especially nascent franchisors, may balk at the requirement and franchisees may believe that the standard compromises their independence. The old axiom—a good deal occurs when no one is truly happy—applies here.

On the other hand, our proposed standard solves many of the problems that concern employee advocates and while it does put additional obligations on franchisors, it protects the business model and allows the franchisor to impart knowledge to ensure a better workplace. The *BFI* holding compared to our standard raises interesting questions. We contend that one's choice is heavily influenced by the values of the majority of franchisors and franchisees in this country. We believe that franchisors and franchisees would like to comply with the law and would prefer that their employees are not abused. Also, we know that litigation is long, expensive, draining, and, all in all, an awful process. Thus, imparting knowledge to ensure compliance and creating methods to fix problems without litigation is a positive development for the United States economy, employees, and society. Another theory is that franchisors and franchisees want to take advantage of employees by violating the law and that litigation, and thus, the overreaching threat of litigation, is necessary because the vast majority of franchisors are bad actors. If you believe the former, our standard is a vast improvement. If you believe the latter, we have much bigger problems than the joint-employer doctrine. ■

Continued from Cover
technology and business models. And that at these workplaces, there continues to be a need for expeditious justice and protections that only the Act can provide.

Q What are some important steps the Board has made under your chairmanship? In your opinion, what strides still need to be made? Under my chairmanship, the agency has had to grapple with member vacancies, constitutional challenges, government shutdowns and sequestration. Even so, this agency has, among other accomplishments, simplified the elements in determining an appropriate bargaining unit; clarified unit placement and jurisdictional standards for many industries; addressed and refined the elements of independent contractor and joint employer status; streamlined and enhanced the efficiency of representation procedures before the Board; addressed protected concerted activity and remedies in several contexts including social media, electronic communications, and mandatory dispute resolution agreements. Notably, as a result of recent Board decisions, the public has become aware that employees communicating about matters pertaining to their terms and conditions of employment via Facebook or an employer's e-mail system may be protected concerted activity under the law.

Between Stops by Mark Gaston Pearce



Brother on Track by Mark Gaston Pearce

Although there is much we have accomplished there is so much more that needs to be done. The Board continues to strive for more expeditious resolution of cases and the development of meaningful and appropriate remedies. Public outreach and education on the rights protected by the Act and the role of the Board in enforcing those rights are essential to the effectiveness of the Act.

Q You were born in Brooklyn. Has that helped shape your career and larger ideology? While I devoted most of my legal career to labor law in the Buffalo, New York, area, Brooklyn, where I was born and grew up, will be forever in my blood. When I visit and walk down Flatbush Avenue or across Eastern Parkway, I take in the smells of knishes, pizza, jerk chicken, and curried roti and I am reinvigorated. I understand that Brooklyn is undergoing a major renaissance and a new look. However, my love for the borough well precedes the facelift. My parents were Jamaican immigrants who became part of the multi-cultural mosaic of working people and nurturing communities that truly defines Brooklyn. This had an unquestionable effect on me. If nothing else, it taught me that there is strength in diversity and that diversity gives communities and institutions a way for reinvention and an ability to adapt to the changing times.

Q I see on your personal website that you are passionate about painting. How long have you been painting—and can you still find time to paint? Does your artistic side affect your professional life at all? If so, how? I have been painting since I graduated from college in the seventies, but not with the regularity that I would have preferred. Life and career have not permitted me all the time desired to hone my talent, but I do what I can in my spare time. Painting is a very therapeutic stress reliever and I have a studio in my home which serves me well. I have exhibited in a few art shows prior to becoming a Board Member and I hope that the future will present more opportunities.

I have been asked often whether my artistic side has an effect on my professional life. That has never been an easy question for me to answer. Maybe it's because I'm not the best judge. One could compare the practice of law with any expression an artist might make on canvas. Like the artist, the lawyer might approach a matter utilizing different perspectives and interpretations, achieving any variety of results. Me? I paint what moves me, but it is my personal and professional experiences that I credit for my artistic sensitivity. I would guess that my work and experiences have influenced my art more than the other way around. Yet and still, I would like to think that my work helps make order out of chaos and provides protections where there otherwise would be none—and that, I feel, has its own aesthetic. ■

"I Could Have Been a Contender": The Subtext of *On the Waterfront*

Alia Haddad

Alia Haddad is the assistant director at the Center for Labor and Employment Law. Before working here full-time, she received her Master's in Cinema Studies from NYU Tisch School of the Arts. Below, she looks at the celebrated film, On the Waterfront, *and its portrayal of labor unions.*

With the amount of critical attention Elia Kazan's *On the Waterfront* (1954) garnered, it is probably safe to assume that many people have seen this film. What with the 12 Oscar nominations the film brought in, let alone the eight awards it actually won, including Best Picture and Best Director, and the fact that it stars one of Hollywood's most talented leading men, Marlon Brando, it is likely you have at least heard of this film. Well I had certainly heard of it, but I had never actually seen it, until now that is. What struck me after my initial viewing was the film's portrayal of labor unions. I had often heard this film touted whenever the subject of the role of labor in film had come up, but I had never realized how symbolically rich this portrayal was.

On the Waterfront follows Terry Malloy (Brando), a unionized dockworker, as he oscillates between keeping "deaf and dumb" to and testifying against his union boss, Johnny Friendly (Lee J. Cobb), and his mob-related activity. Decidedly anti-union, the film opens with the murder of Joey Doyle (Ben Wagner), whom Terry has unwittingly set up. After meeting and falling in love with Edie, Joey's sister, Terry considers the idea of testifying against Malloy at Edie's request but soon decides against it. It is only after the murder of another dockworker, Timothy "Kayo" Dugan, who agreed to testify against Friendly after he received the local priest's unwavering support that Terry decides he must complete what Kayo intended to do. Friendly enlists Terry's brother, Charlie Malloy (Rod Steiger) to sway Terry from his intended actions, promising Charlie that if he is not successful, Terry would face certain death. Nevertheless, Terry will not compromise, and flees with his brother's gun after Charlie gives it to him for his protection. Following this meeting, Friendly has Charlie killed and hung in an alley to coax Terry out of hiding. After realizing that Friendly had his brother murdered, Terry decides to kill Friendly, but is soon talked out of it by the local priest who convinces him that the only way to truly punish Friendly is by testifying against him. After the testimony, Friendly accurately declares that Terry will never work again, and the two men have a brawl leaving Terry beaten to a pulp once Friendly's gang comes to his support. Having witnessed this fight, the dockworkers that Terry once worked with declare their support for Terry, refuse to work until Terry is rehired, and push Friendly into the river. The ousted, wet Friendly promises revenge on all the workers, but his threats are left empty as the workers enter the garage and close the door behind them.

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On the surface, it would seem that Kazan's film speaks to the pitfalls of union organizing: the ease at which labor unions can become corrupt as they feed off of and grow from their member dues; the false promises corrupt unions offer to protect their members; and the ability unions have to control their members' lives, in and out of the workplace.

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As you dig deeper however, it becomes clear that Kazan's portrayal of labor unions can be understood as an allegory for a more relevant issue at the time of the filmmaking. Two years prior to the making of this film, Kazan testified before the House Committee on Un-American Activities, outing eight of his friends from the Group Theater who in the 1930s, along with himself, were members of the American Communist Party. A move that divided him among his peers, friends, and the general public, Kazan's decision to name names was one that cost him many of his friendships but helped save his film career. Two years later, Kazan made a film that praises the role of the informer, labeling him a hero, as opposed to the real life reaction Kazan's move created, succinctly summed up when Norma Barzman, one of the people Kazan outed during his hearing, commented after the Academy of Motion Picture Arts and Sciences released that they would be honoring him with a Lifetime Achievement Award in 1999, "His lifetime achievement was the destruction of lives." Looking back now, it is clear that Kazan was commenting on much more than labor unions and the role of the informant. Instead, Kazan's portrayal of labor unions allowed him to create an allegory justifying his role as informer, and thus exonerating himself of this perceived crime. Whether or not a corrupt labor union is analogous to the American Communist Party, well that is another question entirely. ■

Union organizer Johnny Friendly, played by Lee J. Cobb

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The center has three major objectives:

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2. To promote independent, nonpartisan research that will improve understanding of employment issues generally, with particular emphasis on the connections between human resources decisions and organizational performance

3. 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

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