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NYU Labor and Employment Law News



NYU Center for Labor and Employment Law
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RECENT PROGRAMS:

Avoiding the Next Harvey Weinstein: Sexual Harassment and Non-Disclosure Agreements

February 2, 2018, in Greenberg Lounge

With the surge of sexual harassment headlines, the NYU Labor Center hosted a timely and robust discussion on the use of non-disclosure and non-disparagement agreements that are often part of settlements in sexual harassment cases. The panelists included US Equal Employment Opportunity Commission Acting Chair Victoria Lipnic; Sara Ziff, founding director of the Model Alliance, a non-profit organization advocating for rights of fashion industry workers; Michael Delikat, employment practice chair at Orrick; NYU Law's Dwight D. Opperman Professor of Law Samuel Estreicher; and former Maersk general counsel James Philbin '92, now of the Philbin Law Firm. Emery Celli partner Zoe Salzman '07, a new member of the Advisory Board, served as moderator. *Continued on page 2*

**FEB 2
2018**
8:45 a.m. -
12 p.m.
NYU LAW
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40 Washington Sq. S
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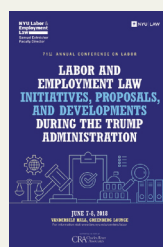
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Left: Michael Delikat (Orrick), Center: Professor Samuel Estreicher (NYU Law), Acting Chair Victoria Lipnic (EEOC), Sara Ziff (Model Alliance) Right: Zoe Salzman '07 (Emery Celli Brinckerhoff & Abady)

Continued from cover.

Several of the panelists on both plaintiff and defense sides agreed there is often an interest in confidentiality, not just from the employer but also the employee. Professor Estreicher proposed that the EEOC require employers under its jurisdiction to report settlements of sexual harassment claims against the same employee on more than one occasion. These reports would not disclose identities but would provide a basis for an EEOC commissioner's charge and further investigation. Chair Lipnic directed the audience to the EEOC Taskforce on Sexual Harassment in the Workplace, which investigated and made recommendations for how companies investigate and handle complaints, and how to help employees better understand the process. Sara Ziff shared her personal modeling experiences that led her to form the Model Alliance, which champions legislation extending child labor protections to models under age 18, has held workshops to educate models of their rights, and has set up a grievance hotline.



Watch the event here: <https://www.youtube.com/watch?v=QTw-w9gnjIM&t=15s>

Michael Delikat gave an overview of proposed legislation, as well as underscored a provision in the tax law, IRC Section 162(q), passed during the Trump administration. The provision states: "No deduction shall be allowed...for (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorney's fees related to such a settlement or payment." Will this provision prompt companies to reallocate amounts from the settlement agreement to claims not involving sexual harassment or abuse? Delikat also mentioned a resurgence of the debate over arbitration in the realm of sexual harassment, mentioning recent proposals in NY to make it illegal for businesses to force arbitration for sexual harassment claims.

Jim Philbin, now starting his own firm after more than a decade as general counsel of Maersk, Inc. in the US, talked about the real cost to companies of superstar harassers and proposed strategies for crisis management. Zoe Salzman peppered all of the panelists with cogent questions and led an active audience Q&A. ■

New Forms of Worker Representation

April 2017

NEW MODELS OF WORKER REPRESENTATION focused on the challenges labor and employee groups are facing as a result of the global economy and the new approaches to the representation of worker interests.

Moderated by Wilma Liebman, former National Labor Relations Board (NLRB) chair and NYU Law adjunct professor, the event featured David Rolf of the Service Employees International Union, who has spearheaded "The Fight for 15" movement across the country, and Leonard A. Smith, a Teamsters Union leader who helped bring about the Seattle collective bargaining system for independent contractor Uber drivers. Professor Estreicher also presented an excerpt from his article, "The Labor Antitrust Exemption for (Certain) Independent Contractors."



From left: David Rolf, Leonard Smith, Wilma Liebman, and Prof. Samuel Estreicher



Liebman set the stage, noting the need to reinvent the union model to reflect the “gig economy.” She stressed the importance of restoring worker power within the broader context of the future of labor and work as we know it. She asked the panelists: “Does binary classification of employee and employer still make sense? Does the employer as gateway to benefits still make sense? What are some alternative ideas?”

While Rolf was skeptical of the survival of labor unions, he was optimistic about the ability of the US to find creative solutions to revive the middle class. Rolf declared the demise of unions due to a system where workers have to pay dues and where incentives exist for companies not to characterize workers as employees. To replace the current system, he suggested job training, government intervention, co-ownership with employees, employer contributions, portable benefits that are optional for workers to elect and with standards set across a region or section, and raising the minimum wage.

Leonard Smith has played a pivotal role in the self-organized movement of contract drivers to organize. Smith noted the advent and success of Uber has helped prompt new ideas about the nature of employment law. In all, the morning presented a thought-provoking discussion on how to revive organized labor and middle-class workers without hindering overall economic growth. ■



*Top: Panel Is It Time to Revisit Federal Law Pre-Emption?
Bottom from left: Roger King (HR Policy Association), Mary Joyce Carlson (Fight for 15), Wilma Liebman (former NLRB Chair), Prof. Samuel Estreicher (NYU Law) and Adam Lupion '01 (Proskauer Rose).*

21st Annual FJC Employment Law Workshop for Federal Judges

March 21-23, 2018

IN COOPERATION with the Institute of Judicial Administration and the Federal Judicial Center, the Labor Center hosted almost 50 federal judges, as faculty and participants, from around the country on March 21-23, 2018, at NYU School of Law for this annual workshop. The workshop provided the opportunity for judges to learn about updates and the elements of labor and employment cases, as well as gain practical insight for managing them. Each panel was comprised of a federal judge, an experienced employee-side attorney, and an experienced management-side attorney. Subjects ranged from staples such as “Implicit Bias,” featuring the Hon. Lorna G. Schofield ('81) of the US District Court for the Southern District of New York, and “Case Management” featuring the Hon. Kiyo Matsumoto of the US District Court for the Eastern District of New York, to evolving issues such as transgender rights, as well as new workplace technology issues.

The workshop was created by Professor Estreicher, who has led it since its inception. ■

Is It Time to Revisit Federal Labor Law Pre-Emption?

IN NOVEMBER 2017, the Labor Center hosted a lively debate on the doctrine of federal labor law pre-emption featuring Adam Lupion '01 (Proskauer Rose), Roger King (HR Policy Association senior counsel), Wilma Liebman (former NLRB chair), Mary Joyce Carlson (counsel, Fight For 15). The panel agreed there has been a proliferation of local labor law initiatives stemming in part from the failure of Congress to act to protect workers in a changing society. Along with this flurry of new laws has been a commensurate rise in companies advocating for strong federal pre-emption. Liebman noted that while national minimum standards need to be raised, a lot can still be done at the local level without running afoul of pre-emption doctrine. King stressed that the economy benefits from uniform labor and employment law policy to avoid the increased costs of complying with patchwork regulations diverting resources from employees, with jobs shifting to low-regulation states, as well as increased litigation. He noted Rep. Mimi Walters' bill on workplace flexibility, which includes federal safe harbor for companies meeting certain standards. Carlson countered that global companies already deal successfully with myriad regulations in all areas, not just labor. Lupion discussed some of the recent NYC and NYS initiatives on family and sick leave, and the interaction of such laws with collective bargaining agreements covering some of the same issues, suggesting that such laws may actually further erode union membership. ■



Watch it here:
<https://www.youtube.com/watch?v=N-yOIVP9Vbac>

NYU's 70th Annual Conference on Labor

In the wake of a presidential election in which workers expressed their economic uncertainty, the Labor Center hosted its 70th Annual Labor Conference, June 8-9, 2017, on the timely topic of *Sharing the Gains of the US Global Economy*. The conference brought together lawyers, economists, media, companies, and public interest groups from across the country to discuss the challenges facing American workers and to explore solutions. US Secretary of Labor R. Alexander Acosta, who gave the keynote address, observed that conferences like NYU's are important to discuss pressing issues, consider policy, and generate ideas. Secretary Acosta expressed the goal to ensure all Americans benefit from a changing economy, in particular the need to address the skills gap, such as through the DOL apprenticeship programs. He urged demand-based education, increased opportunities for experiential learning, and changing the misconception that work in skilled trades cannot result in a good living.



To see more,
you can watch the
conference here:
https://www.youtube.com/watch?v=GUjbi-fL2m8M&list=PLJkLD_s9pYaZouXs-Fjjxc-cUOh_rnn_Mn

In addition to Secretary Acosta, other speakers included NLRB Chair Philip Miscimarra, EEOC Acting Chair Victoria Lipnic, Harvard economist Richard Freeman, and former *New York Times* correspondent Steven Greenhouse.

The first morning assessed the headline challenges of the day: job displacement from **international trade**, worker displacement from **immigration**, and worker obsolescence due to **automation**, while the afternoon panel put forth suggestions on how to address these challenges. University of South Carolina Law Professor Clint Wallace discussed tax reform, while others urged macroeconomic policy changes, increased apprenticeship and retraining programs, universal basic income and wage insurance, or profit-sharing and employee ownership structures.

The second day of the conference took up questions of equal employment opportunity. Professor Estreicher proposed safe harbor regulations for companies to encourage hiring of the chronically underemployed (such as workers over 50 years old or with a criminal record). EEOC Commissioner Jenny Yang ('96) talked about the dearth of women at high levels of Silicon Valley tech firms, as well as the results of the EEOC Taskforce on Sexual Harassment in the Workplace. Erika Ozer, head of the human resources department at Swiss Re Management Organization, described *Own the Way You Work*, her company's work-life balance initiative meant to foster a more inclusive and productive workplace. Listed in Glassdoor's top programs in 2017, the program helped change the corporate mindset to focus on productiveness, not presentee-ism, and allowed managers to tailor the program in a way that best fit each location and team. ■

The Conference was supported in part by: Jones Day, Proskauer Rose LLP, Schulte Roth & Zabel LLP, and Stroock & Stroock & Lavan LLP



Clockwise from left: US Sec. of Labor Alexander Acosta, conference speakers, audience members, Steven Greenhouse, Frederick Braid LLM'79 (Holland & Knight)

Brazil and France

Reform of Brazilian Labor and Employment Law: *Recent Changes In Collective and Individual Negotiations*

José Daniel Gatti Vergna, Candidate for LLM '18, NYU Law

Brazil has just enacted a significant reform of its labor and employment laws. This measure aims to enlarge the freedom of employers and labor unions to negotiate the terms and conditions of employment, while preserving the minimum labor and employment standards provided by the Constitution.

In this article, we will address the principal changes made to collective and individual negotiations.

Collective bargaining agreements

In Brazil, all employers and employees are represented by a labor union. The classification of labor unions is based on the (i) economic sector and (ii) geographic territory in which they operate, which provides the concept of union class (*categoria sindical*).

The law stipulates there can be only one labor union representing employers (union of employers) and employees (union of employees) per union class. This representation is not dependent on any majority employer or employee support for the union, or any concept of membership in the labor union. Further, the law provides the collective bargaining agreement will cover all participants of the union class.

There are two types of collective bargaining agreements: (i) the general collective bargaining agreement, executed by the applicable union of employers and union of employees; and (ii) the special collective bargaining agreement, executed by the company and applicable union of employees. The parties are free to negotiate with respect to any term or condition of employment, provided it is not against the law and their agreement is not detrimental to the employees.

Throughout the years, however, the labor courts have been creating obstacles to the intentions of the parties by limiting or regulating the matters that could be subjected to collective negotiation (e.g., Precedent 437 of the Superior Labor Court forbids collective negotiation aiming the reduction of the meal break).

In this respect, the current reform expands the scope of collective bargaining providing a wide-ranging list with the topics that *may* be subjected to collective negotiation, as well as those topics that *cannot* be bargained over by the parties.

Now the law clearly sets forth that parties may bargain over:

- (i) The extension of the working hours, provided the constitutional limits (eight hours per day, 44 hours per week);
- (ii) Compensatory time;
- (iii) Break during working hours, respecting the minimum limit of 30 minutes for working hours lasting more than six hours;
- (iv) Adhesion to a job retention program supported by the Government (proportional reduction of working hours and salaries);
- (v) Career, salary and position plan compatible to the skills and job capabilities of the employee;
- (vi) Corporate regulation;
- (vii) Employee representative at the workplace;
- (viii) Remote, on-call and intermittent work;
- (ix) Compensation by productivity, including the tips received by the employee, and individual performance;
- (x) Forms of recording working hours;
- (xi) Exchange of holidays; and
- (xii) Rules for unhealthy or hazardous conditions at the workplace provided the limits of the law.

On the other side of the ledger, the reform stipulates that parties are not able to negotiate downward from the minimum labor and employment standards set forth by the Constitution (e.g., overtime pay cannot be inferior to 50% of the regular wage).

The new legislation also provides that collective bargaining agreements are binding to the parties, and have the status of law. Moreover, once the agreement expires by its own terms, it loses all effect and a new agreement must be negotiated.

Negotiation of employment contracts

The law provides that parties are free to negotiate the terms of the employment contract. In practice, however, the labor courts respect party freedom only where the employee is highly placed in the company. In such cases, the labor courts usually take into consideration whether the employee holds a position of trust, exercises a level of autonomy in taking decisions on behalf of the company, and has some responsibility for the economic position of the company, among many other factors.¹

Under the new law, the employees who have higher education and receive compensation two or more times higher than maximum benefit paid by social security² have a greater freedom to negotiate their terms and conditions. The list with the topics that may be subjected to individual negotiation is the same one as applied to collective bargaining. Likewise, these negotiations are limited by the standards of the Constitution.

What's next?

In the past months, there has been an intense debate among representatives, judges, prosecutors, lawyers, labor unions, class associations, and companies about the changes promoted by the labor and employment reform. To some observers, the reform is unconstitutional and employees will fare worse under the new law than before. Others claim that the reform will help generate job opportunities, and enhance the competitiveness of Brazilian companies by reducing the high costs with employment relationships.

At a glance, it is clear that the new law presents some inconsistencies, which will have to be resolved by the Congress or labor courts. ■



¹ In Brazil, supervisors, managers, and officers will also be regarded in an employment relationship, provided the existence of the following statutory elements: (i) personality (the service is executed by one specific person); (ii) continuity (the service is executed at least three times in a week); (iii) compensation (the person receives salary and/or other forms of compensation); and (iv) subordination (the level of autonomy is limited).

² Today, this amount is close to BRL 12,000 (= USD 3,500 approx.).

The French Labor and Employment Law Reform

Estelle Houser,
Candidate for LLM '18, NYU Law

French labor and employment law is undergoing reform. In September 2017, the new French president, Emmanuel Macron, soon after his election issued five ordinances enhancing the ability of employers to dismiss employees, simplifying collective bargaining requirements with unions, and promoting “social dialogue,” in part by gathering all the previously existing work councils into a unique work council.

Security of the employment relationship: the reform of dismissals

The dismissal prong of the reform comes from the idea—supported by some modern economists—that employers are unwilling to hire employees because of the unpredictability of unfair dismissal law.

In France, the indefinite duration contract is the ordinary and default form of employment.¹ Contrary to the United States, France does not have an at-will employment doctrine; therefore, once an employment relationship has been formed, the employer cannot dismiss the employee without good cause. The 2017 reform does not try to modify this requirement of good cause but rather reduces the consequences a wrongful dismissal has on the employer. Three points are important here.

First, the ordinance limits the indemnity payment—or in US parlance, the *damages*—the courts can award. Rather than only setting a threshold of six months of salary and giving the court discretion to raise or lower the amount, the law now sets a minimum and a maximum amount, which is based on the employee's length of service with the company.² Thus, if you worked for your employer less than one year, the maximum you can get is the equivalent of one month's salary. On the opposite side of the scale, if you have worked for 30 years or more, you can get from three to 20 months' salary.

Those ceilings do not apply in case of a violation of a fundamental liberty—that is, in case of sexual harassment, racial or sex discrimination, or dismissal on account of membership in a union.³ Some commentators have already expressed concerns about the floodgate of litigation that may arise from this exception.

¹ Article L. 1221-2 of the French Labor Code

² Article L. 1235-3 of the French Labor Code

³ Article L. 1235-3-1 of the French Labor Code

Secondly, the ordinance increases by 25% the amount of severance pay that an employee will receive when dismissed with cause. This, too, depends on length of service.

Finally, the statute of limitations has been reduced. The employee must bring an action within 12 months from the notice of the contract termination, regardless of whether it relates to an economic dismissal or other causes for dismissal. Before, the employee had two years from notice for dismissals not based on economic reasons.⁴

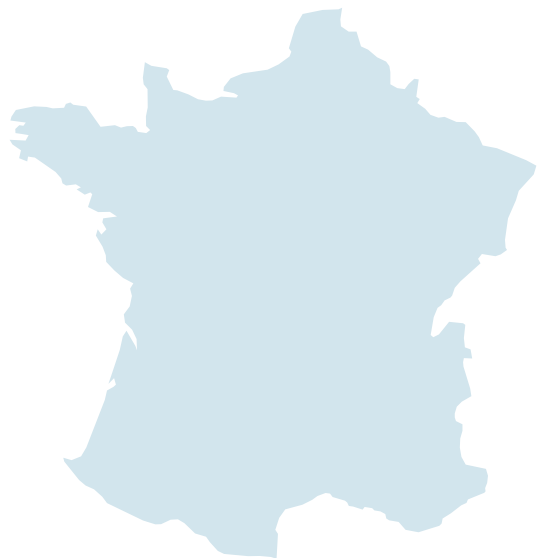
The Reinforcement of Collective Bargaining

The new reform relative to collective bargaining is to modify the hierarchy of the different levels of collective agreements. In France, collective agreements can be signed at the company level, at the group level (if there is a group of companies), at the branch level (voluntary multi-employer grouping), and at the national level.

Previously, the branch collective agreement used to take precedence over the company collective agreement. Under the 2017 reform, the company-level collective agreement takes priority over the branch one. The French government reasons that the employer itself is in the best position to decide what is good for its business, and that more flexibility to negotiate on work conditions, wages, etc. will promote better economic results. In essence, the Macron reform is seeking decentralization of collective bargaining.

For negotiations in small- and middle-sized companies (called in French “Petites et moyennes entreprises”), whose employees often lack union representation (96% of them), employers are now permitted to negotiate collective agreements with employees who are not union representatives.

The new reform also reinforces the legitimacy of collective agreements signed at the company level by generalizing a validity requirement. All kinds of agreements now call for execution by a majority of representative unions (previously only limited to agreements concerning working time).



The New of Organization of Social Dialogue

One of the most important parts of this reform is the merger of all the personnel representative bodies into one called the Economic and Social Committee, in French “Comité Social et Economique.”

Before this reform, there were three different bodies within a company. The employee representatives (“Délégués du personnel”) functioned much like an intermediary between the employer and the employees, especially to present grievances. The Enterprise Committee (“Comité d’entreprise”) managed social and cultural activities of employees. The Health, Security and Work Conditions Committee (“Comité d’Hygiène, de sécurité et des conditions de travail”) dealt with questions related to safety in the workplace.

Under the Macron reform, the new body absorbs all the attributions of the previous ones.

The objective of the reform is to facilitate dialogue between employers and employees (through these personnel representative bodies). Previously, the different existing bodies created unnecessary administrative burden on employers, who often had to engage in multiple consultations on the same subject. However, the 2017 ordinance also provides for the creation of additional commissions: commission for health, security and work conditions, economic commission, commission for formation, commission on professional equality...Is this really getting simpler?

We’ll have to wait for the reform to enter into force to answer this question. This will only happen when implementing decrees are passed. ■

Saipan, Northern Mariana Islands

According to a March 5, 2018 press release, the U.S. Department of Labor “has finalized a series of settlements with contractors on Saipan in the Commonwealth of the Northern Mariana Islands that will pay a collective \$13.9 million in back wages and damages to thousands of employees who came from China to build the Saipan Casino and Hotel on the island.

Investigators with the Department’s Wage and Hour Division determined that the foreign-based construction contractors paid their workforce less than the minimum wage and overtime pay required by the Fair Labor Standards Act (FLSA).” The settlement will be paid by four China-based construction contractors to more than 2,400 employees. Aaron Halegua, a fellow of the Center for Labor and Employment Law as well as of the U.S. Asia Law Institute at NYU Law, was quoted on these events by several news outlets, applauding the DOL settlement and offering recommendations, such as third party monitoring, to help prevent future abuses of construction workers in Saipan. ■

⁴ Article L. 1235-7 of the French Labor Code

Brief of Amicus Curiae In Support of City of Seattle, as Defendants-Appellees

No. 17-35640

In the United States Court of Appeals for the Ninth Circuit*

The District Court in this case granted the defendants' motion to dismiss on the ground that City of Seattle Ordinance 124968 ("Ordinance") is shielded from challenge under the Sherman Act by the "state action" doctrine recognized in *Parker v. Brown*, 317 U.S. 341 (1943),¹ and that the Ordinance does not implicate federal labor law pre-emption principles. Amicus submits that an alternative ground for rejecting plaintiffs' antitrust challenge is labor's so-called "statutory" immunity from the federal antitrust laws derived from Section 6 of the Clayton Act of 1914, 38 Stat. 730, as amended, 15 U.S.C. §§12, 17. Section 6 declares:

The labor of a human being is not an article of commerce and that nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor...organizations, instituted for the purposes of mutual help...or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Because of judicial rulings refusing to apply the Clayton Act's labor-antitrust exemption to disputes involving businesses that were not the immediate employer of the labor group, Congress enacted the Norris-LaGuardia Act of 1932, 47 Stat.70, as amended, 19 U.S.C. §§ 101, 113(c) , to preclude federal court injunctions in peaceful "labor dispute[s]," a term that was broadly defined to include "any controversy concerning terms and conditions of employment...regardless of whether or not the disputants stand in the proximate relation of employer and employee."

Labor's statutory antitrust exemption was solidified in two Supreme Court rulings in the early 1940s. In *Apex Hosiery v. Leader*, 310 U.S. 469 (1940), the Court held that the federal antitrust laws are not violated by labor-imposed restraints on competition in the market for the services of workers as opposed to restraints in product markets. A year later, in *United States v. Hutcheson*, 312 U.S. 219 (1941), the Court held that because of the combined operation of the Clayton and Norris-LaGuardia Acts, the criminal provisions

of the antitrust laws could not be applied to activity of labor acting in its own interest and not in combination with business groups.

Specifically contrasting a combination of manufacturers of goods to suppress competition, the Court stated in *Hunt v. Crumboch*, 325 U.S. 821, 824 (1945):

It is not a violation of the Sherman Act for laborers in combination to refuse to work. They can sell and not sell their labor as they please, and upon such terms and conditions as they choose, without infringing the Anti-trust laws....A worker is privileged under congressional enactments, either acting alone or in concert with his fellow workers, to associate or decline to associate with other workers, or accept, refuse to accept, or to terminate a relationship of employment, and his labor is not to be treated as 'a commodity or article of commerce.'

Id. (internal citations omitted) (quoting 15 U.S.C. § 17; 29 U.S.C. § 101 *et seq.*).

Were the Uber and Lyft drivers covered by the Ordinance "traditional employees" in plaintiffs' parlance (Appellants' Br. 57), there would be no question that labor's statutory immunity from the antitrust laws bars plaintiffs' suit. The terms of the Ordinance parallel in many respects the terms of the basic federal labor relations law, the National Labor Relations Act of 1935 ("NLRA"), 49 Stat. 449, as amended, 29 U.S.C. §§151-169.

The Ordinance differs in one important respect: its provisions apply to Uber and Lyft drivers denominated as "independent contractors" (a term that is not defined in the Ordinance other than to state it does not apply to "employees" covered under the NLRA). These contractors, however, are not independent businesses. They supply only their own personal services as drivers of a general-purpose vehicle on behalf of a "supply coordinator" who dictates their compensation, the prices customers are charged for those services, the customers for whom the services are provided, and in significant part the manner in which those services are to be provided. If these drivers are independent contractors under some federal labor and employment laws, it is because, under the common law of agency's "right to control" test that governs many of those laws, they are free to fashion their own working hours and (due to the coordinator's algorithm-assisted ability to

¹ Although Amicus is an expert in labor and employment law and in its interaction with antitrust law, his expertise does not extend to other areas of antitrust law. Accordingly, Amicus does not address the issue of state action immunity in this brief.

supervise electronically their services) they work free of physical supervision of their work by their “coordinator”.²

But even if they are not employees under the common law of agency, the Uber and Lyft drivers covered by the Ordinance are still “workers” or “laborers” who comfortably fall within the reach of the Clayton exemption because they sell only their own personal services, without any significant capital investment,³ for particular “coordinators” who effectively control the terms and conditions of their work. There is nothing in the Clayton Act or Supreme Court decisions on labor’s statutory antitrust exemption that hinges the applicability of the exemption on “employee” status under federal labor relations law. The Clayton Act was enacted well before the 1935 NLRA and well before the other important federal employment law, the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 203 et seq. Indeed, until 1935, outside the railroad industry, there was no federal statutory definition of “employee.” Labor’s antitrust immunity was framed in 1914 to protect workers’ efforts to improve their wages and working conditions against antitrust challenge, at a time when there was no affirmative federal labor legislation at all.

In *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), the Supreme Court’s initial approach to defining covered employees under the 1935 NLRA was quite expansive. Rejecting the strict applicability of the common law of agency’s “right to control” test, the Court held that whether an individual was a covered employee depended on whether “the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the [NLRA].” Under the “economic realities” test adopted in *Hearst*, the so-called “newsboys” in that case were properly found to be covered employees because, in addition to some supervision by publishers of their hours of work and effort, they “work continuously and regularly, rely upon their earnings for the support of themselves and their families, and have their total wages influenced in large measure by the publishers, who dictate their buying and selling prices, fix their markets and control their supply of papers.” *Id.* at 131. The *Hearst* Court did not discuss whether the newsboys’ attempt to organize a union would be outside the protective ambit of the Clayton antitrust immunity, but it is inconceivable, given the Court’s reasoning, that it would have been.

Admittedly, Congress in the 1947 Taft-Hartley amendments to the NLRA disagreed with the Court’s reading of the NLRA by adding an express provision excluding “independent contractors” and referencing in committee reports the common law of agency’s “right to control” test as the appropriate test for statutory coverage. See *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968). The Taft-Hartley amendments left undisturbed labor’s antitrust immunity and impart no suggestion that such immunity changed because of the change in the NLRA coverage test.

² As the Court stated in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 128 n.27 (1944): “Control of ‘physical conduct in the performance of the service’ is the traditional test of the ‘employee relationship’ at common law.” (citing Restatement of the Law of Agency § 220(1)).

³ The provision of a general-purpose automobile, which is also available for personal use, does not reflect the kind of special-purpose investment in an office, equipment, and hiring of assistants associated with the running of a business. See note 6, *infra*.

There are good reasons why the definition of covered employee in a given labor or employment law does not, without more, alter the applicability of the Clayton antitrust immunity. Labor relations laws, like the NLRA, balance competing goals such as the employees’ right to engage in concerted activities as against the employer’s ability to manage the workforce, which may call for certain restrictions on statutory coverage that are generally irrelevant to the policies of the labor antitrust exemption. Supervisors, for instance, are excluded from the protection of the NLRA because they are viewed as management’s agents, but they can form unions and seek collective bargaining free of antitrust liability under the Clayton exemption. The same should be true of the Uber and Lyft drivers covered by the Ordinance, who, although they are excluded from the protections of the NLRA, are still within the shelter of labor’s Clayton Act antitrust exemption.

Labor’s statutory exemption from the antitrust laws is not unlimited. Most importantly, labor cannot act in combination with business groups.⁴ When workers or their union join forces with businesses to cartelize a product market, the labor exemption drops out of the picture. See *Allen-Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). In addition, if the individuals are principally involved in the selling of commodities or other products, they have no claim to the labor exemption, irrespective of whether they have organized as a labor union. See *Columbia River Packers Association, Inc. v. Hinton*, 315 U.S. 143 (1942).⁵

As the instant lawsuit involves a facial challenge to the Ordinance, there is no basis to believe that the Ordinance will operate other than as its express terms indicate—to provide a framework for Uber and Lyft drivers who fall shy of the traditional common law’s “right to control” test to negotiate the terms and conditions of their employment with the “driver coordinator” who effectively controls those terms.⁶ ■

**For the reasons set forth herein, the Clayton Act’s statutory exemption for labor from antitrust laws provides an alternate basis for affirmance.*

⁴ The Supreme Court has recognized a “nonstatutory” exemption from the antitrust laws for collective bargaining activity between unions and employers. See, e.g., *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996). This exemption is called “nonstatutory” because it is not based on the express terms of the Clayton and Norris-LaGuardia Acts, but rather is derived from the pro-collective bargaining policies of the NLRA and its analogue in the rail and airline industries.

⁵ Professional partnerships or corporations or individual practitioners providing principally professional services also fall outside the exemption if they hold themselves out as a business and make nontrivial investments in purchasing or leasing office space and equipment or other key entrepreneurial decisions such as deciding what to charge for their services and selecting which clients to serve. Cf. *FTC v. Superior Court Lawyers Association*, 493 U.S. 411 (1990) (labor exemption not raised in the Supreme Court).

⁶ Although the statutory labor exemption is sometimes referred to as an exemption for labor “acting alone,” the requirement is that labor not act in concert with business groups to restrain competition in product or other non-labor markets. It has been understood from the beginning of modern labor history that governments, whether federal, state, or local, have a constructive role to play in facilitating the organization and representation of workers by establishing a framework for selecting representatives and helping resolve disputes. Such a government role does not alter the labor-exemption eligibility of the workers or their representatives.

IN MEMORIAM:

John H. Ferguson

John H. Ferguson, the associate general counsel, Division of Enforcement Litigation, at the NLRB, died on December 26, 2017 at the age of 77. As described in the ABA Section on Labor and Employment Law announcement of his death, Ferguson was “a gracious mentor...and a brilliant and strategic litigator who had a direct hand in all major labor law issues of the past half century.”

Ferguson devoted a 47-year career to labor law, overseeing the NLRB’s Appellate and Supreme Court Litigation Branch, Contempt Litigation and Compliance Branch, Special Litigation Branch, and the General Counsel’s Office of Appeals.

Former NLRB Chair Wilma Liebman credits Ferguson for giving her a career start. She interviewed with Ferguson upon graduating from law school and was hired by the Division of Advice at the Board. “John was indeed a gracious and brilliant man. He was the quintessential expert, scholar, and public servant. His dedication to the agency as an institution, to labor law and its values, and to integrity in the practice of law was unsurpassed,” recalls Liebman. NYU law professor Samuel Estreicher adds: “John was an absolutely brilliant steward of the fate of NLRB decisions in the courts. We will miss him dearly.”

Ferguson’s dedication has been recognized. He was awarded the President’s Meritorious Rank Award, in honor of his “sustained accomplishments,” and the Mary C. Lawton Outstanding Government Service Award of the ABA’s Section of Administrative and Regulatory Practice.

John served on the ABA Section of Labor and Employment Law’s Council and was a member of the College of Labor and Employment Lawyers. He will be much missed by the labor law community, his colleagues, family, and friends.

TRIBUTE:

Professor David Gregory

David L. Gregory has recently retired as the Dorothy Day Professor of Law and executive director of the Center for Labor and Employment Law at St. John’s University School of Law. Professor Gregory and his center were co-sponsors of the NYU Annual Conference of Labor for many years, and he was a frequent participant in our programs. We have long admired his extraordinary dedication to his students and the pivotal role he has played in the development of St. John’s. We are pleased to be able to include below recollections of Professor Gregory’s special impact on all fortunate enough to come within his orbit.

Robert Nobile (Seyfarth Shaw):

I had the pleasure of meeting Dave when he first joined the faculty at St. John’s in 1982; I was one of his first students. Dave quickly distinguished himself as a professor. He was a brilliant scholar who knew virtually everything about labor and employment law. He always brought his “A” game to class and would constantly challenge his students. When you took a class with Dave, you had to be well-prepared. Virtually everything Dave taught, he had written about. Under Dave’s leadership, the labor program at St. John’s added classes in employment discrimination, advanced labor law, employment law, ERISA, workers’ compensation, alternative dispute resolution, public sector labor law, and sports law with an emphasis on the labor issues pertinent to college and professional sports. Dave built the program into one of the finest labor and employment law programs in the country—he put St. John’s labor studies program on the map!

Dave was also a great mentor. He was always available for his students, and after I graduated, found him to be always available for his former students as well. I cannot begin to count the number of times I called upon Dave to brainstorm a legal issue, or the number of times Dave would respond to a request for help by saying “I just published a law review article on that topic.”

Dave also went above and beyond in helping place his students—I can think of six or seven he placed with firms I was with alone, all of whom have become very prominent and successful labor and employment lawyers.

David Marshall (Locke Lord):

In noting Professor Gregory's singular attributes as a legal scholar, professor, and labor arbitrator, many of his colleagues will rightly comment on his unbounded intellectual curiosity and creativity, prodigious memory, tremendous productivity, subtle even sly wit, and remarkable capacity to illustrate observations about labor law with references to words or deeds from sources as unexpected and intriguing as the writings of Saints Aquinas and Augustine, the lyrics of Dylan and Lennon, and the acts and activism of abolitionists, Homestead Steel strikers, and Black Lives Matter marchers. As co-instructor with Professor Gregory for the past few years, I discovered that his enormous talents rest on a foundation of deep compassion for the dignity, unique potential, and, I believe he would say, divinely inspired spirit of each and every one of his students, without exception, across more than 35 years of law school teaching.

A thank-you note to Professor Gregory from a former student giving him credit, not only for the student's new law firm job but also for his courage to become a new father, captures the essence of Professor Gregory perfectly: "You were there for me when I was at a time of most need. It did not matter to you that my GPA in law school never surpassed 3.0 due to my being at home to care for a sick family member and concurrent management of three small businesses. I suspect it may not have mattered to you whether I even had a good reason for my less than expected performance. What mattered to you was to listen to me and my experiences, identify my strengths, explain where I needed to improve, and place me on a path toward success."

Professor Gregory's retirement from the local labor and employment law scene is surely a deep loss, but his example is just as surely a profound inspiration as to how to infuse the practice of our craft with greater compassion and kindness.



David Gregory

Michael Simons (Dean, St. John's Law School):

For 34 years, Dave Gregory has been a stalwart on the St. John's Law faculty, and he exemplified what it means to be a law professor. He was a dedicated teacher, a caring mentor, a prolific scholar, and an indefatigable institution builder. He single-handedly created one of the finest labor and employment law programs in the country. He strove to promote the labor movement and worker rights. And he worked tirelessly to support his students and to launch their careers.

In 2016, Dave received the St. John's University Vincentian Mission Award, the highest mission-based award the university gives. It was a fitting recognition of the animating force behind Dave's work. His legal expertise may be in labor and employment law, but he has lived his professional life by the biblical command to "serve one another through love."

Pope John Paul II, one of Dave's heroes, spoke eloquently about the transformative power of suffering and its ability to bring grace, both to the sufferer and to those the sufferer encountered. For the last ten years of his teaching career, as Dave bore the burden of Parkinson's disease, he was a source of grace for St. John's Law. And for that, I am very grateful. In thinking about measuring a life well lived, I'm reminded of a passage from Robert Bolt's *A Man for All Seasons*, which was a favorite of Dave's:

Sir Thomas More: "Why not be a teacher? You'd be a fine teacher; perhaps a great one."

Richard Rich: "If I was, who would know it?"

Sir Thomas More: "You; your pupils; your friends; God. Not a bad public that."

Indeed.

BOARD NEWS

The Labor Center Advisory Board meetings feature prominent speakers and timely debate of current labor and employment issues

ON MAY 1, 2017, the NYU Center for Labor and Employment Law Advisory Board luncheon featured a debate on *Lewis v. Epic Systems* and whether the Federal Arbitration Act pre-empts the National Labor Relations Act and whether collective action is a substantive or procedural right. Cliff Palefsky (Law Offices of McGuinn, Hillsman & Palefsky) for the worker vantage point debated with Marshall Babson (Seyfarth Shaw) representing the management viewpoint. The discussion was moderated by former NLRB member Kent Hirozawa (Gladstein, Reif & Meginniss). Babson distinguished collective action prior to court filing as protected but took the position that once filed, such action can be prohibited by the employer.

On December 8, 2017, EEOC Acting Chair Victoria Lipnic addressed the group. She first reported on the status of the newly appointed commissioners and then outlined two big issues back on the EEOC agenda: (1) wellness regulations, and (2) whether or not companies will have some type of compensation reporting to the commission. With regard to wellness programs, the ADA gives the EEOC jurisdiction over voluntary wellness plans, but the EEOC was promptly sued when it published rules to incentivize wellness programs via Obamacare. One of the legal issues presented is determining the line between “voluntary” and “coercion” participation in such plans. With regard to compensation reporting, the mandatory requirements added to form EO-1 under the Obama administration and thus were challenged on the basis of the Paperwork Reduction Act. Lipnic underscored the comprehensive work of the commission, noting they were currently engaged in 184 lawsuits, compared to 86 the year prior, and had resolved several big cases this past year. Lipnic also took the opportunity to get feedback from the group of both plaintiff and employer lawyers, querying why management so often declines mediation when studies show 95% of the mediations are deemed successful by the parties.

Laurie Berke-Weiss on Pregnancy at Work Workshops:

THE FIRM OF LABOR CENTER BOARD MEMBER Laurie Berke-Weiss has launched the Pregnancy Project to provide pregnant women and their families in New York State with practical infor-



mation about workplace and health insurance rights during pregnancy. The project aims to help women understand their rights and receive any needed accommodations, as well as help employers understand the myriad overlapping laws that provide pregnant women with workplace and health care rights and assist in creating a culture where

pregnant employees want to return to work. The New York City Human Rights Law protections for pregnant women include requiring employers to enter into an “interactive process” with pregnant employees to come up with reasonable accommodations.

A 90-minute training session is offered in-person and online, as an orientation to pregnancy in the workplace: covering the legal framework for—and providing practical tips about—negotiating leave; the new Paid Family Leave law; how to ask for reasonable accommodations; telling the boss you’re pregnant; negotiating medical bills; and how health insurance generally works.

The Pregnancy Project has trained pregnant women, their partners, human resources staff, doulas, and other professionals who work with pregnant women. A sample portion of the training can be viewed on the Berke-Weiss Law website.

Professor Samuel Estreicher in the news:

- Professor Estreicher was quoted in James Dennin’s October 9, 2017, article in *Mic* online, “How Harvey Weinstein’s Accusers Could Break Their NDAs Without Getting Sued.” <https://mic.com/articles/185077/harvey-weinsteins-accusers-could-break-ndas-without-getting-sued-sexual-harassment#.PUanzdgnV>
- “How to Stop the Next Harvey Weinstein—regulators have the power to curb abuse of nondisclosure agreements. It’s time they use it” in *Bloomberg View* online November 12, 2017.
- In *Risk and Insurance*, Oct 15, 2017, Professor Estreicher commented on the impact of increasing levels of incivility in society on the workplace and employees.
- In the *New York Law Journal* arbitration column on October 19, 2017, titled, “Scotus To Tackle Interaction of FAA, NLRA on Arbitration Agreement Issue,” Professor Estreicher and Holly H. Weiss (Schulte Roth & Zabel) discussed recent US Supreme Court cases that focused on how two federal statutes—the FAA and the NLRA—interact and raise the basic question of whether the NLRB has authority to regulate arbitration agreements in the non-union sector. <http://www.law.com/newyorklawjournal/almID/1202800877186/>

- In a *Wired* article, “Big Tech Eyes Supreme Court’s Employee-Arbitration Case,” Professor Estreicher commented on the US Department of Justice switching its position to side with employers, putting it at odds with the NLRB.

<https://www.wired.com/story/big-tech-eyes-supreme-courts-employee-arbitration-case/>

- *Bloomberg View* online, March 2, 2018, published Professor Estreicher’s article on “*How Unions Can Survive a Supreme Court Defeat*,” proposing an alternative for unions if the “fair-share” rules are defeated.
- PBS’s *FRONTLINE* online newsletter quoted Professor Estreicher in the March 2, 2018, article “What Happens if Someone Breaks a Non-Disclosure Agreement.” <https://www.pbs.org/wgbh/frontline/article/what-happens-if-someone-breaks-a-non-disclosure-agreement/>
- *Just Security*, February 26, 2018, published “Mueller’s Uphill Battle: Obstruction Law and the Comey Firing” by Professor Estreicher and David Moosmann.

Board Member Awards and Recognitions:

Laurie Berke-Weiss was ranked among the Top 50 New York Metro Women Lawyers for 2017 by *Super Lawyers*.

Frederick Braid of Holland & Knight received the *Who’s Who* Marquis Lifetime Achievement Award.

The *New York Law Journal* recognized **Ronald Shechtman**, managing partner of Pryor Cashman, as one of its 2017 Distinguished Leadership honorees, as part of its Professional Excellence Awards recognition event. The recipient attorneys were featured in a special section published in the *Law Journal* and honored at a dinner on October 17, 2017, at Tribeca Rooftop.

Michael Gray, Jones Day, made *Law360*’s list of Employment MVPs for 2017 with an interview published on their site on December 18, 2017. Gray took over as lead counsel for McDonald’s Restaurants of California in a class action.

The Center for Labor and Employment Law Is Pleased To Welcome Its Newest Board Members



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Breakfast and Lunch Included

Reception, Thursday, June 7, 5:15 - 6:15 p.m.

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Join this leading forum on labor and employment issues to explore developments during the Trump Administration and what to expect or look for in the years ahead.

Some ideas to be discussed:

- “Joint Employer” Issues after NLRB Reversals
- DOL’s “Paid” Program and Revival of Opinion Letters
- Prior Salary Disclosure Laws and Pay Equity Suits
- Changes in the Regional Offices at the NLRB?
- Reverse Preemption of State Employment Law?
- Designing Affirmative Action Programs
- Sexual Harassment in the Workplace
- Non-Mutual Issue Preclusion as a Response to Class Action Waivers in Arbitration?
- Impact of “Hire American” Policies

COME BE PART OF THE DISCUSSION.

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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)

Employee Benefits and Employee Compensation: Proceedings of the New York University 59th Annual Conference on Labor (Kluwer Law International, 2010) (series editor: Samuel Estreicher; volume editor: David J. Reilly)

Workplace Privacy: Proceedings of the New York University 58th Annual Conference on Labor (Kluwer Law International, 2009) (series editor: Samuel Estreicher; volume editor: Jonathan Remy Nash)

Compensation, Work Hours, and Benefits: Proceedings of the New York University 57th Annual Conference on Labor (Kluwer Law International, 2009) (series editor: Samuel Estreicher; volume editor: Jeffrey Hirsch)

Employment Class and Collective Actions: Proceedings of New York University 56th Annual Conference on Labor (Kluwer Law International, 2009) (series editor: Samuel Estreicher; volume editor: David Sherwyn)

Workplace Discrimination, Privacy, and Security in an Age of Terrorism: Proceedings of the New York University 55th Annual Conference on

Labor (Kluwer Law International, 2007) (volume editors: Samuel Estreicher and Matthew J. Bodie)

Cross-Border Human Resources, Labor, and Employment Issues: Proceedings of the New York University 54th Annual Conference on Labor (Kluwer Law International, 2005) (volume editors: Samuel Estreicher and Andrew J. Morriss)

Alternative Dispute Resolution in the Employment Arena: Proceedings of New York University 53rd Annual Conference on Labor (Kluwer Law International, 2004) (volume editors: Samuel Estreicher and David Sherwyn)

Global Competition and the American Employment Landscape in the New Century: Proceedings of New York University 52nd Annual Conference on Labor (Kluwer Law International, 2001) (volume editor: Samuel Estreicher)

Sexual Harassment in the Workplace: Proceedings of New York University 51st Annual Conference on Labor (Kluwer Law International, 1999) (volume editor: Samuel Estreicher)

Employee Representation in the Emerging Workplace: Alternatives/Supplements to Collective Bargaining: Proceedings of New York University 50th Annual Conference on Labor (Kluwer Law International, 1998) (volume editor: Samuel Estreicher)

Proceedings of New York University 49th Annual Conference on Labor (Kluwer Law International, 1997) (volume editor: Samuel Estreicher)

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