Center for Labor and Employment Law

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NEWSLETTER OF THE CENTER FOR LABOR AND EMPLOYMENT LAW

New York University School of Law

Center Convenes International Research Conference on China's Labor Market

ON MAY 11-12, 2012, THE CENTER FOR Labor and Employment Law, along with NYU Law's U.S.-Asia Law Institute, presented a Research Conference on the China Labor Market. The interdisciplinary conference, organized by Center Director Samuel Estreicher and NYU Law Professor Cynthia Estlund, brought together an international group of lawyers, economists, sociologists, organizational behavior experts, and others, to share their work on the present and future state of Chinese workers, employers, labor relations and labor market institutions.

The labor strife of June 2010, the increase in worker claims in China's congested courts and mediation tribunals, the Chinese state's experimentation with direct worker selection of union representatives, and the toll of real estate and other sources inflation on real wages all made the conference especially timely.

The May 11th conference offered a wide range of panels from *The Changing Legal and Institutional Environment for China's Migrant Workers* and *Migrant workers and Social Insurance* to *Trends in Employment Relations in China* and *The Labor Contract Law: Enforcement and Compliance Issues.* Panels on the second day included Changing Structures of Worker Representation and Changing Structures of Bargaining.

Speakers came from Australia, China, England, Hong Kong, and the U.S., and offered insights about a labor market that is often talked about but still not well understood.

Papers will be published in a book edited by Hawaii Law Professor Ronald Brown, a noted expert in the field of Asian labor and employment Law. ●

U.S. Labor and Employment Law: Exceptionalism or Isolationism?

By Donald C. Dowling, Jr., International Employment Partner, White & Case LLC, New York City

U.S. LABOR/EMPLOYMENT LAW IS UNIQUE in the world. But what makes American labor/employment law so unusual? Does "American exceptionalism" in the law of the workplace offer us a competitive advantage or pose some sort of threat?

While of course every country's labor/employment regime is distinct in certain respects, the comparatively-adversarial Wagner/Taft-Hartley Act labor law framework plus the comparatively-freewheeling U.S. employment-at-will doctrine marginalize American law outside the global mainstream. Consider our intransigence at the International Labor Organization: The U.S. has ratified just 14 of the ILO's 189 conventions, while Spain has ratified 111; France, 102; Italy, 92; Netherlands, 83; Cuba, 76; Germany, 73; Mexico, 70; UK, 68; Iraq, 61; Ireland, 58; Venezuela, 50; Israel, 45; and Japan, 41. Countries with ILO ratification rates as low as ours are equally iconoclastic in how they regulate their national workplaces—Iran has ratified just 13 ILO conventions; Saudi Arabia, 15; Vietnam, 17; China, 22.

With less than 7% of America's non-government workforce falling under collective bargaining agreements, by global standards our labor-representation penetration rate is miniscule. Probably well over 90% of the non-government workforce in Germany and France fall under trade union agreements or arrangements with works councils and health/safety committees. Trade unions are omnipresent in Brazil and remain strong across much of Europe, Latin America, Asia and even Africa. Canada's unionization rate is 31.5%. This is because foreign labor laws actively nurture labor organization and many countries *require* labor representation. Brazil mandates trade unions and much of Europe, Latin America and Asia mandate in-house representative bodies like works councils and health/safety committees. (Do not dismiss in-house labor representatives as impotent or hopelessly employer-dominated; too often, overseas branches need to explain to U.S. headquarters that their in-house worker reps really do wield power to obstruct headquarters projects.) Many countries require employers to fund labor organizations, fostering so-called "social partnerships" that contrast sharply with America's prohibition against employers "dominating" labor organizations. And many countries ban permanent strike replacements and flatly prohibit firing union stewards.

Donald Dowling

Collective labor aside, the U.S. is the world's only employment-at-will jurisdiction (but Nigeria comes close). American employment lawyers downplay this distinction, arguing that U.S. discrimination laws have "eroded" employment-at-will away. California lawyers argue that California employment law is akin to its own foreign regime. Neither argument, though, is very convincing when framed internationally. Indeed, the tentacles of employment-at-will reach well beyond firings. The U.S. employment-at-will doctrine means no cap on hours, no mandatory paid vacation, no paid holidays, no paid sick leave, no paid maternity leave. The doctrine makes U.S. reductions-in-force relatively easy, common, and inexpensive, W.A.R.N. notwithstanding. Employment-at-will imposes no "vested rights" concept, allowing U.S. employers facing a downturn a relatively quick way to restructure, reduce pay/benefits, transfer staff and demote people. The doctrine imposes no "acquired rights" concept, giving U.S. employers an incentive to structure M&A deals as asset purchases so the buyer need not employ seller staff.

From our American point of view, overseas "indefinite employment" and collective-labor-friendly regimes look cushy, over-protective, and paternalistic. Former U.S. Secretary of Labor Elaine Chao declared that the "Europeanization of the American workforce" and "European-style entitlement programs and more rigid labor laws" would have "dire consequences for our country's ability to compete abroad." Overseas employment law protections may help those abroad lucky enough to land a good job—but "undoubtedly [with] the side effect of tamping down work productivity and wealth accumulation" as well as causing unemployment. (Robyn Blummer, St. Petersburg Times, Aug. 10, 2008.)

Can this view, though, explain Germany's recent economic success during America's recession? Will international pressure from the ILO, the OECD and free trade accords with labor "side agreements" pull the U.S. closer into the world's labor/employment law mainstream? Might a second Obama term accelerate this trend? Or should the U.S. fiercely guard our labor/employment "outlier" status as a way to create jobs?

Laurie Berke-Weiss, plaintiff-side lawyer, reflects on her practice

LAURIE BERKE-WEISS represents businesses, partnerships, not-for-profit corporations and individuals with commercial disputes and transactions, employment issues, and a wide range of personal concerns. A graduate of Cornell University's School of Industrial and Labor Relations and Fordham Law School, Ms. Berke-Weiss is a past president of the ILR Alumni Association and the New York Women's Bar Association. The Newsletter recently spoke with her about her practice.

Q: What led to your decision to do plaintiff's side work as a labor and employment law attorney?

Helping employees address difficult legal issues has proved to be satisfying work. I relish the continued challenges presented when I negotiate an employment agreement, evaluate whether a termination is wrongful, litigate discrimination and harassment cases, and deal with non-competition and wage and hour issues. Counseling clients through these situations, and being able to resolve them through negotiation, mediation or litigation, continues to be professionally rewarding. Although most of my work is on the plaintiff's side, I also have management clients, which has provided me with a unique perspective on how each side approaches the issues. I believe this experience has made me a more effective counselor and advocate for all my clients.

Q: As a leading labor and employment law attorney in New York City, what is your typical day like?

Client meetings, litigation deadlines, and drafting, along with a daily onslaught of email and phone calls from clients, current and potential, all are part of a typical day. But, no two days are exactly the same which keeps the practice fresh and interesting. In all these activities I must be a problem solver, prepared to answer questions and deal with new and existing issues and concerns, some anticipated, others unexpected. Working closely with clients I strategize an approach for each matter and help each client achieve his or her goals by applying legal principles and my experience to evaluate and analyze the issue presented.

Q: How have your caseload and case topics developed over your career?

Laurie Berke-Weiss

After graduating from Fordham Law School I was a litigator at the NYC Law Department, going to court almost every day to field a variety of discrimination and § 1983 claims in federal court, and civil service claims and Article 78 proceedings in state court. Since then, I have been in private practice, with a sharpened focus on employment law. I continue to litigate claims of discrimination including those based on sexual harassment, disability, age and race. In recent years I have negotiated and litigated more non-competition agreements, along with related issues of confidentiality and trade secret protection. Increased use of mediation in employment disputes also has influenced my caseload, and I frequently represent clients in mediation—a process which barely existed at the beginning of my career. Negotiation of employment and severance agreements remains a significant part of my practice. There always are new challenges, such as addressing defamation claims raised in the context of an employment dispute.

Q: Is there an issue (sexual harassment, wage and hour, wrongful termination, etc.) that interests you the most?

No single issue is at the top of the list, but representing lawyers and doctors with employment issues is particularly engaging work. Representation of physicians can present a challenging dual agenda, how to address what may be a garden variety employment issue while avoiding a licensure threat. Representing lawyers is inherently challenging, but particularly satisfying when I can help a colleague achieve a positive result. Employee misclassification, which affects all classes of employees including professionals, is an interesting issue, and recently has received a lot of attention from the New York State and U.S. Departments of Labor.

I continue to address claims of sex harassment, but confess surprise that so many years after Title VII's enactment this behavior persists in the workplace. Helping clients obtain redress after suffering discrimination, be it disability (including the process of achieving a reasonable accommodation), race, or age discrimination, also keeps me eager to continue helping my clients get the law to work for them. ●

Resolving Labor and Employment Disputes: A Practical Guide

Proceedings of the New York University 63rd Annual Conference on Labor

Summary of Contents

Is *McClatchy Newspapers* Sui Generis?

Frederick D. Braid, Holland & Knight LLP

HARD CASES MAKE BAD LAW.[1] *McClatchy Newspapers*[2] illustrates the maxim.

The landscape for collective bargaining was pretty well settled by the time the Board decided *McClatchy*. Freedom of contract without Government intervention prevailed.[3] The Board lacked authority to force anyone to put into a contract anything they did not freely agree to even as a remedy for a refusal to bargain in good faith.[4] And, the parties were free to unilaterally implement their final proposals on mandatory subjects of bargaining once they had exhausted their efforts to reach an agreement and had reached impasse.[5] These bedrock principles persist today.

In *McClatchy*, the employer had bargained in good faith to impasse over a merit pay proposal, a mandatory subject of bargaining. It then unilaterally implemented that proposal. In its entirety, the employer's proposal permitted it to (1) implement wage increases in its discretion (2) without any definable objective criteria (3) at any time, without notice, as many times as it wished, and (4) without providing the union any role in the process of establishing or challenging the wage increases. Initially, the Board found a violation, holding that the employer's proposal was tantamount to a request for a waiver by the union of its right to bargain over the merit increases, that the union had not waived its right, and that the employer could not unilaterally impose the union's consent to a waiver by its unilateral implementation. The D.C. Circuit remanded, characterizing the Board's waiver theory as a "farcical misapplication of the law",[6] and providing an opportunity for the Board to fashion a theory harmonized with the bedrock principles that conflicted with its position.[7]

On remand, an entirely new and divided Board panel reaffirmed the mandatory nature of the employer's proposal and its right to bargain to impasse over it, but held that unilateral implementation was a refusal to bargain in good faith. In so doing, the Board created "a narrow exception to the implementation-upon-impasse rules, at least in the case of wage proposals," in order to preserve the integrity of the collective bargaining process. As the Board explained, permitting the employer to have "carte blanche authority over wage increases . . . would be so *inherently* destructive of the fundamental principles of collective bargaining"[8] that it would not serve as a useful tool for breaking impasse and restoring collective bargaining as unilateral implementation was intended to do. A dubious proposition at best, but the D.C Circuit deferred to the Board and enforced the Board's supplemental decision with considerable skepticism:

Frederick D. Braid

> This case presents a difficult question because of the tension between the Supreme Court decisions bearing on the Board's limited exception to the post-impasse rule. . . . . The question is even more difficult for us as a reviewing court, and we are obliged to admit that we are unsure ourselves as to the right answer.[9]

If it is not overruled, *McClatchy* should be limited to its extreme facts.[10] As the D.C. Circuit observed in denying enforcement to the Board's application of *McClatchy* to a non-wage proposal, *McClatchy* was based upon and limited by the "paramount importance of wages", and the Circuit's approval was predicated upon the distinction between wages and other decisions closely tied to management operations.[11] The Board's asserted policy considerations underlying the *McClatchy* exception to post-impasse implementation do not apply to any other term or condition of employment but wages, which are "uniquely expected to be set bilaterally in a collective bargaining agreement."[12] Adhering to the theory underlying *McClatchy* will hopefully confine this bad law to its roots and prevent its spread. ●

1 "Great cases, like hard cases, make bad law. For great cases are called great not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." *Northern Securities Co. v. United States*, 193 U.S. 197, 400-01 (1904) (Justice Holmes, dissenting).

2 299 NLRB 1045 (1990), remanded, NLRB v. McClatchy Newspapers, Inc., 964 F.2d 1153 (D.C. Cir. 1992), supplemental decision, 321 NLRB 1386 (1996), enf'd in pertinent part, 131 F.3d 1026 (D.C. Cir. 1997), cert. denied, 524 U.S. 937 (1998).

3 NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952).

4 H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970).

5 NLRB v. Crompton-Highland Mills, Inc., 337 U.S. 217 (1949).

6 964 F.2d at 1158 (Justice Edwards).

7 Only two of the three member panel were in favor of remand. One would have denied enforcement.

8 321 NLRB at 1388, 1390-91 (emphasis original) (footnote omitted).

9 131 F.3d at 1036.

10 The Tenth Circuit refused to enforce a Board decision involving unilateral implementation of a somewhat less discretionary merit pay proposal. Colorado-Ute Electric Ass'n, Inc. v. NLRB, 939 F.2d 1392 (1991).

11 Mail Contractors v. NLRB, 514 F.3d 27, 33 (D.C. Cir. 2008).

12 514 F.3d at 35 (internal quotations omitted).

NYU Law honors Marvin Miller on 40th anniversary of the first strike in U.S. sports history

ON APRIL 25, NYU LAW'S CENTER FOR Labor and Employment Law sponsored a celebration of Marvin Miller, whose groundbreaking leadership of the Major League Baseball Players Association (MLBPA) forever shaped the game of baseball and provides a shining example of how a union can be central to the economic growth of an industry. The date of the event was quite befitting of the occasion; it was the 40th anniversary of the first strike in sports history—not the at-bat kind—kindled by Marvin Miller.

NYU Labor Center Research Scholar and Law Professor Ross Davies of George Mason University School of Law opened the event by unveiling a portrait of Miller that was commissioned for the Supreme Court collection, where it will hang in the hallowed halls of our Nation's highest court. Miller's is the only portrait of a non-Justice to be so honored. Miller was also honored with his portrait on a "Supreme Court Slugger" baseball card, where he is paired with former Justice Arthur Goldberg, who argued the landmark case of *Flood v. Kuhn*, a challenge to baseball's Reserve Clause that ultimately led to the creation of "free agency" in sports.

Richard Moss, former general counsel of the MLBPA, introduced his longtime colleague, particularly emphasizing Miller's rapport with the players he represented. "In the early days, he functioned very much as a teacher for the players," Moss said. "Under Marvin's leadership, players acquired dignity and understood their worth."

But when Marvin Miller himself spoke, he opened with a tone of humility. Miller confessed that he did not feel comfortable celebrating a strike, noting, "I draw a sharp distinction between celebrating a strike and celebrating the results of a strike." Miller was very candid and nostalgic as he shared many of what he called the "untold stories" of the union's history leading to the 1972 strike, a watershed moment in sports history.

Among the untold stories was what, in Miller's view, constitutes the single greatest blemish on the fabric of baseball's history—namely, the League's collusion to resist racial integration. This collusion, Miller argued, was akin to throwing every championship game for decades by refusing to admit some of the greatest talents ever to take the field.

Miller also argued that the union has been vital to the steady growth of the League over the years. Miller challenged

Marvin Miller

conventional wisdom that minimum wage standards stifle job growth. He pointed to the hard-fought rise of player salaries and pensions, and the monumental growth that improved standards helped generate for management--a 50 percent expansion in the number of Clubs in Major League Baseball, as well as annual League revenues now approximating $8 billion. Noting Commissioner Bud Selig's recent report of this figure "with an air of shock," Miller asked, "Where does he think that came from?" Miller defended the rise in player salaries, and said, "The players are the labor, but they are also the product."

Finally, Miller spoke warmly and with keen recollection about the behind-the-scenes plays that led to the historic 1972 strike. His admiration and appreciation for the players was obvious as he recounted visits to spring training meetings and of astonishing unanimous votes to take the unprecedented step of striking, not knowing what might happen. It was ultimately a story of unmitigated triumph over management. "They folded. And when I say they folded, I mean they folded," Miller said with a grin of satisfaction. "It was a monumental misjudgment on the part of the owners as to who the players were and what their resolve was... and they have paid for it ever since."

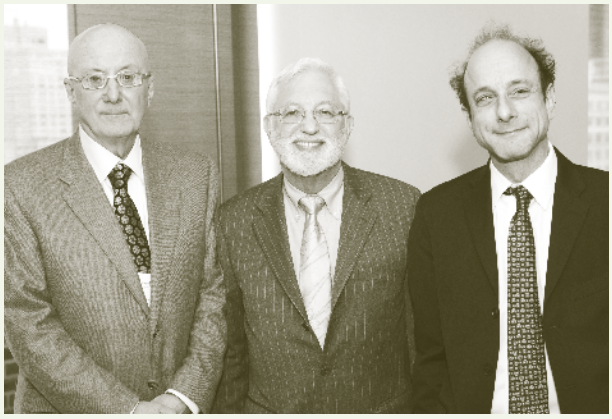
After regaling the audience of students, faculty, press, friends, and former colleagues, Marvin Miller received a standing ovation. Professor Arthur R. Miller then followed with a question-and-answer style panel discussion. During the panel discussion, Michael Weiner, current executive director of the MLBPA, spoke reverentially about the influence that Marvin Miller's contributions have had on Weiner's own experience; and Professor Robert Boland of NYU's Tisch Center for Hospitality, Tourism, and Sports Management spoke about the union's role in the growth of baseball.

Attendees were treated to a limited batch of "Supreme Court Slugger" baseball cards of Marvin Miller, an apt memento celebrating a man whose union leadership shaped the underlying business structure of America's favorite pasttime, and who remains a most beloved and influential figure in the history of baseball. ●

The Center Co-Hosts Its Fifteenth Workshop on Employment Law for Federal Judges

ON MARCH 7-9, 2012, THE CENTER hosted its Fifteenth Annual Workshop on Employment Law for Federal Judges. The program was co-sponsored by the Federal Judicial Center, the Dwight D. Opperman Institute of Judicial Administration and the Labor Center. The three-day event took place in Furman Hall and was attended by more than 50 Federal judges. Thirty-three program faculty members—11 judges, 11 plaintiff-side lawyers, and 11 management lawyers led the panels. The Honorable Lee Rosenthal (U.S. District Court for the Southern District of Texas) gave the luncheon address on March 7, on developments in the rulemaking process of the Federal Rules of Civil Procedure. Of particular notice, EEOC Commissioner Chair Feldblum addressed the group on the role of legislative history in analyzing and applying employment law.

The workshop's panels focused on various aspects of labor and employment law: "Evidence Issues/Use of Experts," "Employee Benefits Litigation," "Employment Litigations; Claims Against Employees," "Class and Collective Actions," Employment Arbitration and Mediation," "Sex and Racial Discrimination: Cutting-Edge Developments," "Retaliation and Whistleblowers," and "Electronic Discovery." ●



Left to right: Gary Siniscalco, Hon. Jed Rakoff, Jonathan Ben-Asher

Left to right: Prof. Samuel Estreicher, Gary Siniscalco, Hon. Lee H. Rosenthal, Hon. Noel Lawrence Hillman (D.N.J.)

Left to right: Anne Vladeck, Hon. Laura Taylor Swain, Terri L. Chase

Restatement of Employment Law: The Privacy Chapter

A Management Attorney's Perspective and Concerns

Michael I. Bernstein, Esq.
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CENTRAL TO THE EMPLOYMENT LAW Restatement chapter on Privacy and Autonomy is its emphasis upon "the individual interests in avoiding disclosure of personal matters," "'the right to be left alone,' the right to keep certain areas and activities free from intrusion by others," and the view that activities, even where not private, may be "considered so much a part of the individual's personality that they deserve a level of protection against outside interference."

When individual employees *themselves* put the information out there, are they truly seeking to "avoid disclosure of [their] personal interests," to "be left alone"? When they intrude upon others, can they reasonably expect to "keep [their] areas and activities free from intrusion by others"? Is there a point where their own disclosures are no longer "deserv[ing of] a level of protection against outside interference"?

Is there an inherent contradiction if the vehicle for such disclosures is not their own electronic equipment, but that of their employer? Should an employee even be able to assert an expectation of privacy in such circumstances in the face of the employer's explicit policy negating any such expectation? Must the employer actually *heighten* its monitoring of the employees' use of its electronic equipment if it is to have any hope its policy will be sustained? Consider the irony. Is such heightened monitoring what we really want?

Michael I. Bernstein

When is insubordinate or other improper behavior in the workplace somehow transformed into protected, concerted activity by virtue of an employee's having *expanded* the parameters of his/her communications to include other employees? Where is the line drawn? Is civility in the workplace an indefensible employer objective in this new, technological age of social media? Is there no distinction between the "water cooler" and social media?

How do we reconcile these competing equities with the role society has assigned the employer in the workplace? We require an employer to act as a censor of words and actions that elsewhere are minimized or at least tolerated, and where censorship is otherwise disdained. We hold the employer responsible for protecting and safeguarding the privacy and other rights and interests of its employees, often even when the challenged actions are not those of its managers, supervisors or other agents, but of non-supervisory employees directed against their fellow employees.

These are only some of the tensions we all confront in our attempts to strike the proper balance contemplated by the forthcoming Restatement of Employment Law. ●

Connecticut Ethics Leader and Employment Lawyer Daniel M. Young

DANIEL M. YOUNG (NYU, YEAR OF 1995) has served on the Stamford Board of Ethics, for both Democrat and Republican administrations. During his final two years on the Stamford Board, Young served as the board's chairman, presiding over numerous, hotly contested public hearings involving public officials and employees governed by the Code of Ethics. Last year, newly elected Governor Daniel Malloy selected Young as his first appointment to the State of Connecticut's Citizen's Ethics Advisory Board, the governing body for Connecticut's Office of State Ethics. Recently, Young spoke with the Newsletter about his public service and interest in government ethics.

Daniel M. Young

Q: When did you first become interested in ethics?

In my law practice, almost from the beginning, I have regularly consulted with other lawyers about legal ethics, and I have represented lawyers with respect to grievances. One of my mentors, a senior partner in my law firm, drafted the first Stamford Code of Ethics in the late 1960s. When he resigned his position on the Stamford Board of Ethics eight years ago, I was appointed by the mayor to replace him.

Q: What do you find most interesting about ethics rules?

Both with respect to legal ethics and government ethics, there often is a significant disparity between what is or is not required by the applicable rules, and what might be "ethically" or morally right. Indeed, with legal ethics, the rules sometimes require conduct that many might deem to be immoral or unethical. With government ethics, while simple dishonesty, often financially motivated, is usually clear-cut and relatively easy to address once detected, curbing the abuse of power is much more challenging; nonetheless, it can be just as important in order to ensure that our government works for the benefit of the citizens, not as a personal fiefdom for those with official power.

Q: What are the main contributions you believe you bring to these ethics boards?

Because ethics rules can be complex, my legal experience and training has been very helpful. Many members of ethics boards are not lawyers, and it can be quite challenging for a non-lawyer to understand, interpret and apply a complicated code of ethics. In addition to my legal skills, I also have always strived to make sure that the boards I sit on do their best to maintain the public's confidence. When I felt it was important for the Stamford Board of Ethics, I would give interviews to the local newspapers or, even on a few occasions, write editorials explaining or defending our public actions. Because the most powerful punishment any ethics board has is typically issuing a finding of an ethics violation, I believe it is paramount that ethics boards maintain their actual and perceived integrity, so that their findings mean something to the individual involved and to others. On the state board, I have similarly done by best to impress upon everyone that we handle all matters fairly and patiently, without any political or other improper motivation.

Q: Your biggest surprise?

My biggest surprise, pleasantly, has been how conscientious many municipal and state officials and employees are about ensuring their compliance with the sometimes very technical rules governing conflicts of interest and prohibited activities. This usually involves formal or informal requests for advisory opinions. Many of the matters I have seen involve people who have really gone out of their way to ensure that they are acting in compliance with all applicable rules. ●

Mediation of Employment Litigation

Hon. Faith S. Hochberg[1]

Every federal judge in the nation has seen a proliferation of lawsuits claiming that adverse employment actions violated federal law. Often, while state law causes of action are considered more "plaintiff friendly" by the savviest members of the plaintiffs' bar, the lawsuits may still be filed in federal court by alleging one federal question claim together with numerous state law claims.

I SPENT MY FIRST YEAR ON THE BENCH WRITING what often seemed like endless summary judgment opinions in these cases. While I thought that writing opinions 24/7 was a service to the bar, experience has taught me that it is far more helpful to the bar (and to the other cases on my docket as well as my quality of life!) to take steps to mediate these disputes to resolution. Federal trials are expensive, time-consuming for all involved, and too often no party really "wins" regardless of how a jury decides, because the costs of litigation in money, time and emotion surpasses monetary awards in these cases.

I. Mediate Fee-Shifting Cases Early

Mediation, if done correctly, needs to be attempted fairly early in the case. No judge likes to hear the lament: "Gee, judge, I could have settled this case 6 months ago before I put so much time into the summary judgment motion, but now I have too much into it to expect the other side to cover my fees and costs at the kinds of numbers that they are willing to put on the table, even if I take a haircut on fees...." We have all heard this, but how to silence it? Adopt a plan to refer potential fee shifting cases to mediation well before the deadline for filing summary judgment motions.

My practice is to identify potential fee shifting cases prior to the initial Rule 16 conference, and then raise the issue of mediation at that conference. Most often, these cases have at least one party (usually the plaintiff in an employment case) who cannot afford the fees of private mediation, so the discussion centers on the court-annexed mediation program, which provides for discounted fee schedules that all parties can afford if they choose to litigate in federal court.

II. Immediate Exchange of "Core Discovery"

Almost no case is ready to go to mediation immediately after the Rule 16 conference because both sides feel that they need some discovery in order to be ready to mediate. Yet, if discovery becomes lengthy or complicated, the potentially fee shifting attorney's fee will rise, making successful mediation less likely.

In order to balance these competing interests, I add a paragraph to the Rule 16 order, which the parties fill in right at the Rule 16 conference, which asks them to identify "core discovery" needed to be ready to mediate within 45 days. I explain that this does not preclude full discovery if mediation fails, so that there is no risk in omitting less central discovery. Right at the conference, an agreement will be made for certain key documents to be produced; a date for the plaintiff's deposition and one employer's deposition will be set. Often, the parties agree not to bother with interrogatories or requests for admissions.

III. Set a Mediation Schedule

At the conclusion of that 45 day period, they are sent to mediation. Dates within which the mediation is to commence and conclude are set in the order of referral to mediation.

IV. Carefully Select a Mediator for Employment Cases

It is key to pick the right mediator. Through word of mouth, locate a mediator with experience in employment cases, and who is not perceived as either a "pro-management" or a "pro-plaintiff" lawyer. Often, states that have causes of action for employment discrimination will have attorneys recognized by their peers as neutral and experienced in this area. Find them, interview them, and add them to the court-annexed mediator list if they are willing to work on this reduced-fee basis. Most are.

V. Evaluate Your Process

While it may seem counterintuitive, often the value of mediation is the confidential right to vent. Drama, even shouting, may occur in successful mediations. I occasionally interview my mediators, careful not to touch on any specific cases, but rather to ask about areas where my Orders of

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Remarks presented at NYU Center for Labor and Employment Law's 15th Annual Workshop on Employment Law for Federal Judges (March 7-9, 2012).

Referral to Mediation can be improved to prevent some of the impediments that they face: resistance to mediate; refusal to bring to mediation the representative who truly has independent discretion to move numbers higher or lower to reach settlement; privately telling the mediator that the dates in the schedule set by the Court in the referral order "don't work for them," without ever having so stated to the Court at the Rule 16 conference; lack of preparation of the client about what the mediation process is and how it works; inattention to the mediation process by trying to do other work on iPad, cell phone, etc.

Once we know the trouble spots that our mediators face, we can take steps to head them off by confronting them in advance.

When mediation is successful, the parties will memorialize the terms with sufficient specificity, inform the Court that the case has settled, and file a stipulation of dismissal after consummation of the settlement. I do not read or "approve" settlements reached via outside mediation, and I have yet to have a motion to enforce a settlement that required me to rule on the sufficiency of the memorialized terms. (When I do my own settlement conferences in court, which I mediate, I usually have the parties put the terms on the record, to cement in their minds that a binding settlement has been reached, and to be sure that the clients understand and agree with it. If this route is chosen, be aware of the confidentiality concerns that may arise and have alternate plans to deal with it.)

VI. If at First You Don't Succeed....

Some cases do not settle after the exchange of core discovery and the first round of mediation. In those cases, consider trying again either during the summary judgment briefing or after the Court has denied a summary judgment motion and it is clear to the parties that the big expenses of litigation are real and nearly upon them. This can either be done by sending the parties to a one-day or half-day session with an outside mediator, or scheduling a mini-mediation by a judge or magistrate judge.

I conduct my own mediated settlement conferences in jury trial cases only. In bench trials, I send the parties to another judge. One exception is the pro se plaintiff. I do not try to mediate those settlements because there is too often a distrust of the ex parte conference process, even if it is fully explained. Those cases do very well in outside mediation, however, where the judge is not involved.

The timing of court settlement conferences is largely dictated by the case itself:

• Did the parties make progress in outside mediation, such that another try by a judge is likely to succeed? Every mediated settlement conference is a gamble that the time it takes will not be wasted time. I gauge the amount of time that I am willing to put "at risk" by the amount of time that the trial and/or complex motions would consume if the case does not settle. After many years of experience, I can say with absolute confidence that the time I have saved vastly exceeds the time spent on my own mediated settlements.

• Is Summary Judgment looming? This is often the best time to try a court mediation if outside mediation has been tried earlier in the case without success. The uncertainty about the outcome leads to the greatest moment of flexibility in the case. One side—or perhaps both, if there are cross-motions—faces the possibility of total loss. Both sides face the rapid escalation of attorneys' fees, where the plaintiff's attorney faces the prospect of getting no fee if s/he loses the trial and the defendant faces the prospect of paying both a fat plaintiff attorney's fee plus his own attorneys' fees if the plaintiff prevails at trial. When I mediate at this phase of the case, I am careful not to have formed any view of which party would succeed or fail in the motions, so as not to telegraph that view to the parties. I do discuss the hurdles that I see when I meet with each side (after they have signed a form consenting to short, private conferences during the settlement conference). And I tell the parties not to assume that anything I say indicates what the outcome of the motion will be, because I truly do not know.

Cases can also settle after the denial of a summary judgment motion, for many of the same reasons, except that the uncertainty of potential loss of the case is more removed in time. While the attorneys' fees have already been expended on the summary judgment briefing, oral argument preparation, etc. , they still loom large for the final pretrial conference, motions in limine, and trial, which is the next event to happen if they don't settle. I recommend setting a firm trial date----because nothing spurs attorneys to settle more than a firm date when they have to stand up before a jury!

And so I have ended with a verity that is not news to any judge, but that is not the point of this tale. If we wait until after summary judgment motions are decided, or the eve of trial, to hold settlement conferences, thousands of hours of judicial time will be wasted on cases that could easily and effectively have been settled far earlier in the life span of a case through effective mediation. The earlier a case settles, the more it benefits the parties and the Court. The parties go back to their lives; potential jurors are never asked to suspend their lives to serve on that case; and the Court can sooner turn its attention and convene a trial of those few cases that cannot be settled. ●

Board member and Plaintiff Counsel Ethan Brecher (NYU 1991) opens own office

Q: Why you are starting your own firm?

After 21 years of practicing law at the same place where I got great experience, it was time to make a change in my life. I needed new challenges and focus, and I had been thinking about making a move for a long time. There was no better time than the present to do it, so I just decided to go for it and put up my own shingle.

Q: What areas will your practice focus on?

My practice will focus on plaintiffs's-side employment law, as well as commercial litigation. Primarily, I will focus on representing senior executives in connection with their claims for compensation, discrimination and remedies for various business torts, like defamation. I also handle issues involving non-competition and non-solicitation clauses, and negotiate employment and separation agreements. My business litigation practice will focus on representing hedge funds in claims involving investments. I will also represent individuals who have claims against their securities brokers for fraudulent or otherwise improper conduct. I find that helping people get fair and just results in difficult situations are very rewarding and motivational. There is nothing better than getting a good result for a client and having that client feel like his or her rights were vindicated. It is also important that clients know that I am in their corner and fighting for them. Many clients are happy just to know that they have someone on their side. I want my clients to feel that in me, they have no better friend, and their adversary no worse opponent.

Q: What led you to become a labor and employment lawyer?

I wanted to work at a small a litigation firm, where I could early on in my career get hands-on experience working with clients and going to court. As it happened the firm I joined focused on plaintiffs-side employment litigation. At that firm I got great experience trying cases (mostly in arbitration for senior executives in the financial services industry) and arguing appeals in federal and state courts. My career in employment law found its own way based on the firm's practice.

Ethan Brecher

Q: Any particularly challenging or interesting issues on cases you have handled?

At my old firm I handed a case, Raedle v. Credit Agricole Indosuez, where my client sued his former employer for tortious interference. He had been terminated from his old job, and got a new job. The new employer called the old employer for a reference. His prior boss answered the call and told the new employer (falsely) that he had mental problems. The new employer then rescinded the job offer based on this statement. A jury trial was held in federal court in New York City. We lost the trial. US District Judge Thomas P. Griesa granted us a new trial on grounds that the verdict at the first trial was against the weight of the evidence. A second trial was held about year later, which we won (the jury awarded nearly $3 million in damages). The US Court of Appeals reversed on appeal, holding that Judge Griesa had abused his discretion in granting a new trial. In fact, at least in my view, the Second Circuit conducted a de novo review of the first trial record, and substituted its view for that of Judge Griesa. That opinion is now being appealed to the US Supreme Court. There is a circuit split on the level of deference appellate courts owe trial courts on orders granting new trials where the ground for the new trial is that the verdict was against the weight of the evidence. The case has been a tug-of-war, and hopefully my client will prevail in the end of this long-running case, which was filed in 2004. ●

Mark Pearce reflects on his role as chair of the National Labor Relations Board

Chairman Pearce has served on the NLRB since 2010, and was confirmed by the Senate to a term that ends on August 27, 2013. A founding partner of the Buffalo, NY law firm of Creighton, Pearce, Johnsen and Giroux, he also worked as an attorney and district trial specialist for the NLRB from 1979 to 1994.

IT SEEMS EARLY TO REFLECT ON A CHAIRMANSHIP that isn't even a year old, as my friend Sam Estreicher has asked me to do here. But looking back to last August, I realize that there is, in fact, plenty to write about.

Let's start with the cases. So far, the Board has issued more than 200 decisions under my Chairmanship. Some were viewed as more controversial than others, but if you read through them, as I encourage you to do, you'll find human drama in every single one.

Some of the cases decided include: *DR Horton 357 NLRB No. 184 (2012)* , which found that employers can't require employees to sign away all rights to collective legal recourse; *Lancaster Symphony 357 NLRB No. 152 (2011)*, which found symphony orchestra musicians to be employees eligible for union membership; *Flaum Appetizing 357 NLRB No. 162 (2012)*, which found that an employer cannot engage in a fishing expedition for evidence that might help it escape backpay liability. You will undoubtedly hear about more in the months ahead, as the Board wrestles with questions of employee status in a number of industries.

Then there were the rulemaking proceedings. When I took the reins from Chairman Wilma Liebman, the Board had already adopted a rule requiring employers under our jurisdiction to post notices informing workers of their rights under the National Labor Relations Act. And we were in the midst of considering a second rule, to streamline and modernize the Board's representation case process—parts of which we adopted in December.

The NLRB hasn't historically done much rulemaking although it is well within its statutory authority to do so. While many commentators have recommended it as preferable to adjudication in some areas, we have experienced some intense pushback from several constituencies.

Both rules were immediately challenged in federal courts, by the U.S. Chamber of Commerce, National Association of Manufacturers, and various allied groups. Currently the implementation of both rules is on hold while we wait for the litigation to be concluded.

Mark Pearce

The rules, our decisions, the authority and composition of the Board, and the actions of the NLRB's Acting General Counsel have also come under intense political scrutiny. We've been subject to many Congressional hearings and information requests. At least a dozen bills have been introduced to reform, defund, and even eliminate the NLRB entirely.

But we are still here—out in the open, where we need to be. The NLRB will continue to be a very visible resource when employee rights are threatened and industrial peace must be secured. While we may have to contend with the attention and challenges such visibility generates, we welcome it because we believe this is a sure path to fulfilling our goal of making the law work fairly for everyone. If our response is to sound retreat when things get difficult, we might as well lock the doors. ●

The NLRB will continue to be a very visible resource when employee rights are threatened and industrial peace must be secured.

Estreicher's Judicial Performance Index
2010-12 Supreme Court Labor & Employment Decisions*

SAMUEL ESTREICHER

Dwight D. Opperman Professor of Law and Director of the Center for Labor and Employment Law

POLITICAL CRITERIA FOR JUDGING THE Supreme Court's work are hopelessly unsatisfying as long as we reserve the right to have different political views and legal philosophies, and the Court continues to have a completely discretionary docket. I propose, instead, a more limited criterion that may generate broader consensus: Is the Court deciding what it has to and no more than it has to? In the table that follows, I apply this criterion to labor and employment cases argued and decided during the Court's 2010-2012 Term. A grade of 1 is awarded whenever the Court decides the case on the issue presented by the petition and the facts and rules no more than is necessary to address that question; if the Court purports to decide (rather than merely offer dicta on) a broader issue, it receives a score of 0. On the other hand, when the Court hears a case and fails to address a fairly presented issue, it also receives a score of 0.

Seven years of results are in:

- In the 2005-2006 Term, the Court heard 9 cases involving labor and employment issues. The maximum score it could have received was 9; instead, it received a grade of 4, for an overall performance score of .44.
- In the 2006-2007 Term, the Court heard 4 cases raising labor and employment issues and received the maximum score of 4, for an overall performance score of 1.0.
- In the 2007-2008 Term, the Court decided 11 cases raising labor and employment issues and received a grade of 10, for an overall performance score of .9.
- In the 2008-2009 Term, the Court decided 9 cases raising labor and employment issues and received a grade of 6, for an overall performance score of .67.
- In the 2009-2010 Term, the Court decided 10 cases raising labor and employment issues and received a grade of 8, for an overall performance score of .8.
- In the 2010-2011 Term, the Court decided 11 cases raising labor and employment and received a grade of 9, for an overall performance score of .81.
- This year, in the 2011-2012 Term, the Court decided 6 cases raising labor and employment issues and received a grade of 5, for an overall performance score of .85.

As we can see, after a hesitant start in the 2005-2006 Term, with the dip repeated in 2008-2009 Term, the Court is doing a consistently better job of deciding the question presented and not deciding more than it has to (in deciding that question) in cases involving the law of the workplace.

We will apply the same criteria to evaluate the Court's work product during the 2012-2013. Stay tuned.

CASE	ISSUE	JUDICIAL RESTRAINT?	NON-DECISION?	NET SCORE
CSX Transp., Inc. v. McBride 131 S.Ct. 2630 (2011)	Whether the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, requires proof of proximate causation?	Decided question presented	No	1
Wal-Mart Stores, Inc. v. Dukes 131 S.Ct. 2541 (2011)	1. Whether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2) - which by its terms is limited to injunctive or corresponding declaratory relief– and, if so, under what circumstances?	Decided more than the questions presented	No	0
Borough of Duryea v. Guarnieri 131 S.Ct. 2488 (2011)	Whether the Third Circuit erred in holding that state and local government employees may sue their employers for retaliation under the First Amendment's Petition Clause when they petitioned the government on matters of purely private concern, contrary to decisions by all ten other federal circuits and four state supreme courts that have ruled on the issue?	Decided question presented	No	1

CASE	ISSUE	JUDICIAL RESTRAINT?	NON-DECISION?	NET SCORE
Bd. of Trustees of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc., 131 S.Ct. 2188 (2011)	1. Does a police officer member of a special Whether a federal contractor university's statutory right under the Bayh-Dole Act, 35 U.S.C. §§ 200-212, in inventions arising from federally funded research can be terminated unilaterally by an individual investor through a separate agreement purporting to assign the inventor's rights to a third party?	Decided question presented	No	1
Chamber of Commerce of the U.S. v. Whiting 131 S.Ct. 1968 (2011)	1. Whether an Arizona statute that imposes sanctions on employers who hire unauthorized aliens is invalid under a federal statute that expressly preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens. 8 U.S.C. § 1324a(h)(2). 2. Whether the Arizona statute, which requires all employers to participate in a federal electronic employment verification system, is preempted by a federal law that specifically makes that system voluntary. 8 U.S.C. § 1324a note. 3. Whether the Arizona statute is impliedly preempted because it undermines the comprehensive scheme that Congress created to regulate the employment of aliens. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).	Decided question presented	No	1
CIGNA Corp. v. Amara, 131 S.Ct. 1866 (2011)	Whether a showing of "likely harm" is sufficient to entitle participants in or beneficiaries of an ERISA plan to recover benefits based on an alleged inconsistency between the explanation of benefits in the Summary Plan Description and the terms of the plan itself?	Decided more than the question presented	No	0
AT&T Mobility LLC v. Concepcion 131 S.Ct. 1740 (2011)	Whether the Federal Arbitration Act preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures--here, class-wide arbitration--when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims?	Decided question presented	No	1
Kasten v. Saint- Gobain Performance Plastics Corp. 131 S.Ct. 1325 (2011)	Is an oral complaint of a violation of the Fair Labor Standards Act protected conduct under the anti-retaliation provision, 29 U.S.C. § 215(a)(3)?	Decided question presented, with some over-writing.	No	1
Thompson v. No. American Stainless, LLP 131 S.Ct. 863 (2011)	1. Does section 704(a) of Title VII of the Civil Rights Act of 1964 forbid an employer from retaliating for such activity by inflicting reprisals on a third party, such as a spouse, family member or fiancé, closely associated with the employee who engaged in such protected activity? 2. If so, may that prohibition be enforced in a civil action brought by the third party victim?	Decided questions presented	No	0

CASE	ISSUE	JUDICIAL RESTRAINT?	NON-DECISION?	NET SCORE
NASA v. Nelson, 131 S.Ct. 746 (2011)	1. Whether the government violates a federal contract employee's constitutional right to informational privacy when it asks in the course of a background investigation whether the employee has received counseling or treatment for illegal drug use that has occurred within the past year, and the employee's response is used only for employment purposes and is protected under the Privacy Act, 5 U.S.C. §552a? 2. Whether the government violates a federal contract employee's constitutional right to informational privacy when it asks the employee's designated references for any adverse information that may have a bearing on the employee's suitability for employment at a federal facility, the reference's response is used only for employment purposes, and the information obtained is protected under the Privacy Act, 5 U.S.C. §552a?	Decided question presented	No	1
Christopher v. SmithKline Beechman, 2012 U.S. LEXIS 4657 (June 18, (2012)	1. Whether deference is owed to the Secretary of Labor's interpretation of the Fair Labor Standards Act's outside sales exemption and related regulations; and 2. Whether the Fair Labor Standards Act's outside sales exemption applies to pharmaceutical sales representatives?	Decided question presented	No	1
CompuCredit Corp. v. Greenwood, 132 S.Ct. 665 (2012)	Whether claims arising under the Credit Repair Organizations Act, 15 U.S.C. § 1679 et seq., are subject to arbitration pursuant to a valid arbitration agreement?	Decided more than the question presented	No	1
Elgin v. Dept. of Treasury, 2012 U.S. LEXIS (June 11, 2012)	Whether the Civil Service Reform Act impliedly precludes federal district courts from having jurisdiction over constitutional claims for equitable relief brought by federal employees?	Decided question presented	No	1
Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S.Ct. 694 (2012)	Whether the [First Amendment's] ministerial exception applies to a teacher at a religious elementary school who teaches the full secular curriculum, but also teaches daily religion classes, is a commissioned minister, and regularly leads students in prayer and worship?	Decided question presented	No	1
Knox v. Service Employees Int'l Union, Local 1000, 132 S. Ct. 2277 (2012)	1. May a State, consistent with the First and Fourteenth Amendments, condition employment on the payment of a special union assessment intended solely for political and ideological expenditures without first providing a Hudson notice [*Teachers Local No. 1 v. Hudson,* 475 U.S. 292 (1986)] that includes information about that assessment and provides an opportunity to object to its exaction? 2. May a State, consistent with the First and Fourteenth Amendments, condition continued public employment on the payment of union agency fees for purposes of financing political expenditures for ballot measures?	Decided questions presented	No	1

CASE	ISSUE	JUDICIAL RESTRAINT?	NON-DECISION?	NET SCORE
Pacific Operators Offshore, LLP v. Valladoid, 132 S.Ct. 680 (2012)	The Outer Continental Shelf Lands Act, 43 U.S.C., §§ 1331-1356, governs those who work on oil drilling platforms and other fixed structures beyond state maritime boundaries. Workers are eligible for compensation for "any injury occurring as the result of operations conducted on the outer Continental Shelf." hen an outer continental shelf worker is injured *on land*, is he (or his heir): (1) *always* eligible for compensation, because his employer's operations on the shelf are the but for cause of his injury (as the Third Circuit holds); or (2) *never* eligible for compensation, because the Act applies only to injuries occurring on the shelf (as the Fifth Circuit holds); (3) *sometimes* eligible for compensation, because eligibility for benefits depends on the nature and extent of the factual relationship between the injury and the operations on the shelf (as the Ninth Circuit holds)?	Decided question presented	No	1

Upcoming Labor Center Events

LABOR CENTER WINTER BOARD MEETING

Snow Dining Room, Vanderbilt Hall
NYU School of Law
40 Washington Square South
January 11, 2013

16TH ANNUAL NYU EMPLOYMENT LAW WORKSHOP FOR FEDERAL JUDGES

Lester Pollack Colloquium, Furman Hall
NYU School of Law
245 Sullivan Street
March 13-15

LABOR CENTER SPRING BOARD MEETING

Faculty Club, D'Agostino Hall
NYU School of Law
108 West 3rd Street
March 15

CUTTING-EDGE EMPLOYMENT LAW ISSUES FOR CORPORATE COUNSEL

Greenberg Lounge, Vanderbilt Hall
NYU School of Law
40 Washington Square South
June 4

66TH ANNUAL CONFERENCE

Greenberg Lounge, Vanderbilt Hall
NYU School of Law
40 Washington Square South
June 6-7

LITIGATION SKILLS FOR PLAINTIFF LAWYERS

Classroom 206, Vanderbilt Hall
NYU School of Law
40 Washington Square South
June 11

For information on these and other events, visit our website at www.law.nyu.edu/centers/labor or contact us at (212) 992-8103.

Welcome New Associate Board Members


Karen P. Fernbach

Karen P. Fernbach, Regional Director, National Labor Relations Board; Manhattan Region

Ms. Fernbach graduated from SUNY Albany in 1973 with a BA degree in American History. She attended St. John's University School of Law and served with distinction as a member of the St. John's Law Review. Ms. Fernbach began her career with the National Labor Relations Board in 1977 serving as Regional Attorney from 1988 until her appointment in January, 2012 as the Regional Director of the Manhattan Region of the National Labor Relations Board.

Ms. Fernbach is a member of the Labor & Employment Section of the New York State Bar Association, the Labor & Employment Section of the NYC Bar Association, a volunteer mediator for federal employee EEO work place disputes and an Adjunct Professor at St. John's University School of Law where she teaches both Advanced Labor Law and Labor & Employment Arbitration.


James G. Paulsen

James G. Paulsen, Regional Director, National Labor Relations Board; Brooklyn Region

Mr. Paulsen began his career with the NLRB as an attorney in the Division of Advice in 1978, worked in the Manhattan (Region 2) and Brooklyn (Region 29) Regional Offices as a Field Attorney, was promoted in 1989 to a Supervisory Attorney in Region 2 and in 1996 to Deputy Assistant General Counsel in Operations-Management. Mr. Paulsen HE received his B.A. degree CUM LAUDE from Davidson College, Davidson, North Carolina in 1974, graduating cum laude, and his J.D. degree, with high honors, from the University of Florida Law School in Gainesville, Florida in 1976, WHERE HE WAS. During law school, he also served as the Editor-in-Chief of the University of Florida Law Review.

Craig Becker joins AFL-CIO as co-general counsel

FROM APRIL 2010 TO JANUARY 2012, Craig Becker served as a Member of the National Labor Relations Board, having been appointed by President Obama after serving on the transition team for the new administration. Effective July 1st, Mr. Becker transitioned to position of co-general counsel at the American Federation of Labor & Congress of Industrial Organizations. Before joining the Board, he served as Associate General Counsel to both the Service Employees International Union and the AFL–CIO and was a partner in a Washington, D.C. law firm that was counsel to the American Federation of State, County and Municipal Employees. Mr. Becker has represented workers and their unions in many of the central legal controversies of the last three decades, including clerical workers seeking to unionize at Harvard University; janitors in the landmark Justice for Janitors Campaign in Los Angeles; prison guards subject to random strip search in Ohio; and home health care workers seeking the protection of minimum labor standards legislation. He has argued labor and employment cases in virtually every federal court of appeals and before the United States Supreme Court. A member of the faculty at UCLA Law School from 1989 to 1994, he has also taught at the University of Chicago School of Law. He has published numerous articles on labor and employment law in scholarly journals as well as in the popular press, addressing issues ranging from speech rights in representation elections to the regulation of work in a new, service economy. He graduated from Yale College and received his J.D. from Yale Law School where he was an Editor of the Yale Law Journal. ●


Craig Becker

BOARD NEWS

Jonathan Ben-Asher spoke at the American Bar Association Labor and Employment Section's Employment Rights and Responsibilities Committee Midwinter Meeting on *"Executive Compensation issues in Employment Termination Agreements,"* which took place in Las Vegas; Pennsylvania Bar Institute's 18th Annual Employment Law Institute on *"New Whistleblowing Claims under Dodd Frank and Sarbanes-Oxley,"* in Philadelphia; The New York Chapter of Labor and Employment Relations Association on *"Basics and Beyond: Tax Code 409A;* was designated as the Chair Elect of the Section of Labor and Employment Law of the New York State Bar Association and will become Chair in June, 2013; also is currently the Employee Chair of the Sixth Annual CLE Conference of the ABA's Labor and Employment Section, which will be held in Atlanta in November.

Laurie Berke-Weiss was listed in *Top 50 Women New York Super Lawyers in the New York Metro Area*; and is a member of the recently convened New York City Bar Association Task Force on New Lawyers in a Changing Profession.

Ethan A. Brecher is opening his law firm, *Law Office of Ethan A. Brecher*, which specializes in employment, customer (securities) and general commercial litigation, representing both plaintiffs and defendants, in both litigation and arbitration (*see page 12 for full article*).

Eugene G. Eisner was listed in the 2012 edition of *America's Most Honored Professionals*; was the attorney for the workers at the NLRB in a groundbreaking decision affecting undocumented workers (Flaum Appetizing Corp., 357 NLRB No. 162 (December 30th, 2011); and his office has commenced several class actions under the New York State Wage Prevention Act, representing low wage workers.

Eugene Friedman argued for the prevailing party in HOP Energy L.L.C. v. Local 553 Pension Fund 678 F.3d 158 (2d Cir. 2012) .

Anton G. Hajjar was named the 2012 Pro Bono Lawyer of the Year by the American Arab Anti-Discrimination Committee.

Jeffrey S. Klein published *Effective Use and Presentation of Social Science Evidence* in the *Employee Relations Journal* (Spring 2012), was listed in *LawDragon*'s "500 Leading Lawyers in America," and *Human Resource Executive*'s "100 Most Powerful Employment Attorneys."

Preston Pugh is leading a team consisting of his firm and Navigant Consulting that has been selected as an Independent Private Sector Inspector General for the New York Waterfront Commission and presides as a monitor over the consent decree between the EEOC and YRC Frieght.

Paul Secunda published *the Future of Board Doctrine on Captive Audience Speeces* (87 Ind. L.J. 123, 2012); *The Forgotten Employee Benefit Crisis: Multiemployer Benefit Plans on the Brink* (21 Cornell J. Law & Pub. Pol'y 77, 2011); *Neoformalism and the Reemergence of the Rights-Privilege Distinction in Public Employment Law* (48 San Diego L. Rev. 907, 2011); *Constitutional Contracts Clause Challenges in Public Pension Litigation* (28 Hofstra Lab. & Emp. L.J. 263, 2011); and "Constitutional Contracts Clause Challenges in Public Pension Litigation," which was selected as one of the Top Ten Employee Benefit Law Review Articles by Tax Notes; was appointed Visiting Scholar at Osgoode Hall Law School in April 2012 to conduct research with Professor Harry Arthurs on Ontario occupational pension system; and was designated as the 2012 Hicks Morley Visiting Professor in International Labour Law at The University of Western Ontario Faculty of Law in January 2012.

Susan P. Serota was listed in Chamber USA's 2012 *"Employee Benefits and Executive Compensation,"* named in Euromoney's 2011 *"Guide to the World's Leading Labor & Employment Lawyers,"* and authored *"Electronic Disclosure of Employee Benefits Related Documents: Summary of the Key Requirements under the DOL, IRS, PBGC and SEC Rules"* which was published by the BNA Benefits Practice Resource Center and updated on March 31st, 2012.

Susan Stabile was inducted into the American College of Employee Benefits Council in November, 2011 and published an article, "Blame it on Catholic Bishop: The Question of NLRB Jurisdiction Over Religious Colleges and Universities," in the Pepperdine Law Review. ●

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