

Editors' Page: Articles from the 71st Annual Conference on Labor at the Center for Labor and Employment Law, NYU School of Law

The faculty editors of the *ABA Journal of Labor & Employment Law* are pleased to welcome our new collaboration with the Center for Labor and Employment Law at the NYU School of Law. Each year, the NYU Center holds its Annual Conference on Labor, a two-day event touching upon an important area of focus for labor and employment lawyers, government officials, and academics. We are pleased to publish a selection of articles from NYU's 71st Annual Conference on the topic "Labor & Employment Law Initiatives, Proposals, and Developments During the Trump Administration." The following summary of these articles is provided on behalf of the NYU Center by Professor Charlotte Alexander and Professor Samuel Estreicher, with assistance from law student Lindsay Roach.

—Marcia McCormick, Miriam A. Cherry & Matthew Bodie,
Faculty Editors, Saint Louis University Law School

Introduction

The Center for Labor and Employment Law at New York University's School of Law has long been a leader in advancing the discussion among practitioners, policy makers, and scholars about labor and employment law topics. This issue furthers that tradition by providing updates, opinions, and guidance in the areas of sexual harassment, employment contracts, and union relations. The authors' contributions assist practitioners in counseling their clients and advocating for change in order to mitigate risk against a shifting legal landscape. As the authors point out, societal norms around work and employment, enforcement patterns, and courts' interpretation of labor, employment, and related laws are experiencing substantial change, and "business practices will be challenged both more frequently and more vigorously" across a variety of work-related contexts.¹

1. Eric S. Hochstadt & Nicholas J. Pappas, *Restrictions on Employee Change of Jobs: Antitrust Challenges to "Non-Compete" and "No-Poach" Clauses*, 34 ABA J. LAB. & EMP. L. 253 (2020); Shlomit Yanisky-Ravid, *Making Physical and Virtual Sexual Harassment Illegitimate: The US #MeToo Movement and the Israeli Prevention Act*, 34 ABA J. LAB. & EMP. L. 181 (2020).

The first two articles, by Philip M. Berkowitz and Sixtine Gossellin, and Shlomit Yanisky-Ravid, respectively, focus on sexual harassment law in the #MeToo and #TimesUp era, identifying challenges, providing a framework for workplace investigations, and presenting a comparative analysis of best practices in the United States and Israel. The next three articles, authored by Zachary D. Fasman, Zoe Salzman, and Eric S. Hochstadt and Nicholas J. Pappas, examine three types of provisions found within employment agreements: mandatory arbitration requirements, non-compete and other employment contract limitations, and liquidated damages terms. These authors explain the risks involved and employers' options for risk avoidance, management, and mitigation. The final article presented at the conference, authored by Alan M. Klinger and Dina Kolker, addresses union agency fees, the prohibition on such fees from the U.S. Supreme Court's *Janus v. American Federation of State, County, and Municipal Employees, Council 31* case, and employers' options in light of this prohibition.

Binding these articles together is the common recognition that practitioners need real-world, practical guidance in each of these evolving areas of law. Together, the articles in this issue provide just such insight, equipping practitioners and their clients to navigate employment and labor law changes.

I. Sexual Harassment

Countries around the world take substantially different approaches to addressing employment-related sexual harassment. In our first article, Berkowitz and Gossellin explain that although “a third of countries . . . do not have any workplace-specific prohibitions of sexual harassment in place, . . . some common-law countries . . . have rules broadly consistent with the U.S. model,” and a few countries “impose thorough sex harassment laws and even criminalize sex harassment.”² Given this variation, Berkowitz and Gossellin offer lessons for American companies when dealing with sexual harassment claims overseas. The authors provide a non-exclusive list of considerations for companies operating across borders, including the following: selection of investigation team personnel; attorney-client privilege; culture and language differences; representation rights for complaining parties; witness interview considerations; privacy concerns; and the form, content, and disclosure of investigation reports. Practitioners can thus identify tangible action items to assist their clients in preparing for and conducting both domestic and global sexual harassment workplace investigations.

An additional challenge to tackling workplace sexual harassment around the globe is simply defining sexual harassment, as Shlomit Yanisky-Ravid explains in our second article on this topic. This

2. Philip M. Berkowitz & Sixtine Gossellin, *Cross-Border Sexual Harassment Claims and Investigations*, 34 ABA J. LAB. & EMP. L. 161 (2020).

foundational question has become especially important as the #MeToo movement raises questions about the sufficiency of the current definitions.³ While U.S. law treats “sexual harassment [as] a form of unlawful sex discrimination” and sets forth the quid pro quo and hostile work environment frameworks for analyzing sexual harassment, “[o]verseas, the legal framework in which sexual harassment claims are governed differs dramatically from country to country.”⁴ Yanisky-Ravid encourages U.S. policy makers to “rethink their tactic in fighting against sexual harassment, possibly by learning from other countries’ experience, when it comes to effective enforcement.”⁵ To this end, Yanisky-Ravid offers a close analysis of Israel’s Prevention of Physical and Virtual Sexual Harassment Act. She highlights the Israeli Act as “an example for other nations and states [that] provid[es] a clear path to assist individuals who are subject to sexual harassment misconduct,” including specifically harassment in virtual spaces.⁶

Together, Berkowitz, Gossellin, and Yanisky-Ravid provide an extremely useful international and comparative perspective on sexual harassment law today, allowing both domestic and global U.S. employers to learn from each other in addressing—and ultimately ending—workplace sexual harassment.

II. Employment Agreement Provisions

This issue also addresses a second trend in employment relations: the prevalence of contractual provisions that shape employees’ substantive and procedural rights vis-à-vis their employers, along with their post-employment options. As one scholar has observed, “Overall, terms in today’s employment agreements tend to trend toward protection of the employer and its flexibility to manage aberrant behavior or poor performance . . . [as] [e]mployers simply want to maintain an at-will relationship where possible” and maintain the upper hand in employee termination decisions and management of that process.⁷ In this section, Fasman, Salzman, Hochstadt, and Pappas analyze the benefits and risks for employers arising from mandatory arbitration, liquidated damages, non-poaching, non-compete, and wage-fixing provisions in employment contracts.

3. Yanisky-Ravid, *supra* note 1, at 183.

4. Berkowitz & Gossellin, *supra* note 2, at 162; *see also* DONALD C. DOWLING, JR., LITTLER, HOW TO LAUNCH AN EMPLOYMENT DISCRIMINATION, HARASSMENT, DIVERSITY OR AFFIRMATIVE ACTION INITIATIVE ON A GLOBAL SCALE 3, 7–8 (2017), https://www.littler.com/files/how_to_launch_an_employment_discrimination_harassment_diversity_or_affirmative_action_initiative_on_a_global_scale_0.pdf [<https://perma.cc/5D4N-GUQG>]; Kevin Gomez, Melissa McClure & Destinee McCulley, *State Regulation of Sexual Harassment*, 18 GEO. J. GENDER & L. 815 (2017).

5. Yanisky-Ravid, *supra* note 1, at 216.

6. *Id.* at 188.

7. Christopher E. Parker, *Drafting Employment Agreements That Secure Talent and Maintain Flexibility to Mitigate Bad Employment Relationships*, 2014 WL 4785366, at *3 (2014).

Fasman examines the role that collateral estoppel plays in arbitration generally, and in relation to mandatory arbitration provisions in employment contracts specifically.⁸ The main issue here is “whether an employee or a consumer can use an award won by a different employee or consumer in an earlier arbitration to preclude a defendant from relitigating the issue in a subsequent arbitration”; in other words, the issue considers “whether a defendant should be legally bound by the result of a prior arbitration case involving the same issues brought by a different claimant.”⁹ Fasman, based on his own experience as a professional arbitrator and mediator, believes that arbitrators should not be legally obligated to follow prior arbitration awards, but instead should be free, but not required, to use antecedent awards if persuasively relevant, especially when dealing with the same or similar issues.¹⁰ Fasman contends that his approach “comports with the FAA’s language and spirit, Supreme Court precedent, and makes for sound public policy” and lays out both the benefits and disadvantages to applying the doctrine of offensive, non-mutual collateral estoppel in a class action arbitration.¹¹

Salzman takes on another set of terms that frequently appear in employment contracts: protections against “damages flowing from the departure of employees.”¹² Such measures include non-compete agreements, confidentiality clauses, mandatory arbitration provisions, and liquidated damages provisions. Focusing in particular on liquidated damages, Salzman explains that employers may use such contract terms to establish, *ex ante*, a monetary penalty that employees must pay if they quit their jobs.¹³ Drawing on the liquidated damages analysis set forth by the Florida Supreme Court in *Lefemine v. Baron*, Salzman argues that the courts are likely to view liquidated damages clauses as unenforceable attempts to extract a penalty from departing employees as a punishment for quitting.¹⁴ He thus provides a framework for employers to analyze their own liquidated damages provisions to ensure that they are legally defensible.

8. Zachary D. Fasman, *Offensive Non-Mutual Collateral Estoppel in Arbitration*, 34 ABA J. LAB. & EMP. L. 217, 219 (2020) (stating that the goal of *res judicata* is to “determine the effect of prior judgments” and is made up of “two subdoctrines—claim preclusion and collateral estoppel (issue preclusion)”).

9. *Id.* at 217.

10. *Id.* at 238.

11. *Id.*

12. Zoe Salzman, *Liquidated Damages Clauses in Employment Agreements*, 34 ABA J. LAB. & EMP. L. 239, 239 (2020).

13. *Id.* at 240 (“Liquidated damages are contractual clauses used in a variety of contracts to set a fixed amount of damages to be paid in the event of a breach.”).

14. *Id.* at 241 (citing RESTATEMENT (SECOND) OF CONTRACTS § 356 (AM. LAW INST. 1981); *Lefemine v. Baron*, 573 So.2d. 326, 329–30 (Fla. 1991); Complaint, Sinclair Commc’ns, LLC d/b/a WPEC NEWS 12 v. Beaton, No. 2017-CC-012511-O (Fla. Cir. Ct. filed Oct. 13, 2017)) (“The test for liquidated damages [as described in the *Lefemine* case] is similar . . . to the general analysis applied in most states, . . .” and the two-prong test “is the one generally used by both state and federal courts alike in evaluating liquidated damages clauses.”).

In the final article on employment agreements, Hochstadt and Pappas take a broader approach, examining such agreements, as a whole, through the lens of antitrust law. The authors warn that “employment-related information exchanges and especially agreements have been, and will continue to be, . . . area[s] of increasing scrutiny for antitrust enforcers and private plaintiffs.”¹⁵ The article examines no-poach, non-compete, and wage fixing jurisprudence, explaining each concept and then examining possible antitrust challenges.¹⁶ Similar to Fisman and Salzman, the authors provide concrete insight for employers and practitioners into the potential risks of these types of employment agreement provisions.

III. Union Membership Post-*Janus*

In the final article presented at the conference, Klinger and Kolker speak to practitioners who counsel public sector employers and unions, focusing on mandatory agency fees and their impermissibility post-*Janus*.¹⁷ Klinger and Kolker offer a realistic view of the impacts of *Janus* on public sector unionization efforts.¹⁸ As the authors explain, *Janus* overturned previous caselaw that permitted a two-tiered system in which both members and nonmembers paid union dues, and nonmember dues were used to support collective bargaining efforts but not political projects.¹⁹ The *Janus* Court invalidated this system, holding that under the First Amendment, “agency fees could not be extracted from nonconsenting employees.”²⁰ *Janus* thus “upended public sector labor law by creating a novel First Amendment right to refuse to pay union fees,” dramatically changing the legal landscape for public unions, their members, and their employers.²¹

15. Hochstadt & Pappas, *supra* note 1, at 266.

16. *Id.* at 253; Josh M. Piper & Erik Ruda, *Employee “No-Poaching” Clauses in Franchise Agreements: An Assessment in Light of Recent Developments*, 38 *FRANCHISE L.J.* 185, 198 (2018).

17. Alan M. Klinger & Dina Kolker, *Public Sector Unions Can Survive Janus*, 34 *ABA J. LAB. & EMP. L.* 267, 267 (2020) (referencing *Janus v. Am. Fed’n of State, Cty. & Mun. Emps.*, Council 31, 138 S. Ct. 2448 (2018)).

18. “Public sector unions are unions that represent state employees in the public sector,” and scholars have recognized that “a storm ha[s] been building by virtue of dual attacks upon both relatively successful public sector unions generally, and upon union security agreements, in particular.” Kavitha Iyengar, *Janus v. AFSCME*, 40 *BERKELEY J. EMP. & LAB. L.* 183, 183 (2019); William B. Gould IV, *How Five Young Men Channeled Nine Old Men: Janus and the High Court’s Anti-Labor Policymaking*, 53 *U.S.F.L. REV.* 209, 220 (2019); *see also* *Friedrichs v. Cal. Teachers Ass’n*, 136 S. Ct. 1083 (2015) (*per curiam*); *Harris v. Quinn*, 573 U.S. 616 (2014); *Knox v. Serv. Emps. Int’l Union, Local 100*, 567 U.S. 298 (2012).

19. Iyengar, *supra* note 18, at 187; *see also* *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); Aaron Tang, *Life After Janus*, 119 *COLUM. L. REV.* 677, 691 (2019).

20. Gould, *supra* note 18, at 225, 229–30 (noting that this reversal may have been due to changes in the composition of the United States Supreme Court, up to and including the Trump era nomination and confirmation of Neil Gorsuch).

21. Catherine L. Fisk & Martin H. Malin, *After Janus*, 107 *CALIF. L. REV.* 1821, 1821–23 (2019).

Klinger and Kolker close by offering alternatives to the long-standing agency fee model, including a member-only option, employer support for unions, and charitable contributions, and then analyze the benefits and disadvantages of each. Klinger and Kolker's in-depth examination of *Janus* and its implications offers both union- and management-side practitioners valuable insight into next steps for their clients.

Conclusion

As the articles in this issue ably demonstrate, the changes that are occurring in labor and employment law warrant careful consideration by employees, employers, and their legal counsel. By examining sexual harassment law through an international and comparative lens, reviewing potential employment agreement pitfalls, and assessing *Janus*' impact on the future of public sector unions, the authors map the current lay of the land and provide realistic action items for practitioners and the clients they serve.

—Charlotte Alexander, Connie D. and Ken WomenLead Chair, Associate Professor of Law and Analytics, Robinson College of Business, Georgia State University

—Sam Estreicher, Dwight D. Opperman Professor of Law, New York University School of Law

Further Note

Although not part of the annual conference for the Center for Labor and Employment Law at New York University's School of Law, Francine Eichhorn's student note, *How the NFL "Protects" Cheerleaders with Discriminatory Policies*, complements the other articles in this issue well. In her article, Eichhorn takes the case of Jacalyn Bailey Davis, a former cheerleader for the New Orleans Saints, as a starting point to examine how NFL policies might promote discriminatory working environments for cheerleaders. Davis was fired from her job as a cheerleader for the Saints for posting an Instagram picture of herself in lingerie and receiving social media messages from NFL players, which violated the teams' anti-fraternization policy. That policy applies only to cheerleaders, and not to players. In a sex-segregated workplace, where cheerleaders are women and players are men, Eichhorn argues that a policy that applies only to one job is sex discrimination. The note further explores whether the NFL's stated rationale for its policy, which is to protect the cheerleaders from predatory actions by the players, could be a valid defense under Title VII.