Nominating Committee Seeks Candidates for NCBA Board of Directors

The Nominating Committee is seeking active NCBA Members who want to serve on the Nassau County Bar Association Board of Directors. The deadline to apply is Monday, January 25, 2021.

The NCBA Board of Directors consists of the President, President-Elect, Vice-President, Treasurer, Secretary, 24 elected Directors, as well as the Dean of the Nassau Academy of Law, Chair of the Young Lawyers Committee, NCBA delegates to the NYSSBA House of Delegates, and all past presidents on the Bar Association.

NCBA Officers and a class of eight Directors are elected at the Annual Meeting in May and take office June 1. Officers serve for one-year terms and Directors hold office for 3-year terms.

NCBA Members who wish to be nominated must be a Life, Regular, or Sustaining Member of the Association for at least three consecutive years, and an active member of a committee for at least two consecutive years. The Nominating Committee also considers each applicant’s areas of practice, leadership positions in the Nassau County Bar Association and other organizations, and the diversity of experience and background a candidate would bring to the Bar’s governing body.

The Nominating Committee consists of nine Members of the Association who previously served on the Board of Directors. Elena Karabatos, NCBA Immediate Past President “once removed,” is Chair of the Committee and Immediate Past President Richard D. Collins serves as Vice-Chair.

“The Nominating Committee is seeking candidates with diverse experiences and skills who are committed to serving our Long Island community and legal profession,” says Karabatos. “We need leaders who can confront the challenges faced by our Bar Association during this unprecedented time and help create opportunities for Members to recover from the pandemic.”

Interviews with candidates will begin in February; the Committee will nominate one person for each Officer—other than President—and Director position and issue its report at least one month prior to the 2021 Annual Meeting and Election to be held on Tuesday, May 11.

NCBA members interested in applying to become a Director or Officer should forward a letter of intent, application, resume or curriculum vitae no later than January 24 to Nominating Committee Chair Elena Karabatos at epost@nassaubar.org or NCBA, 15th & West Streets, Mineola, NY 11501. The application can be downloaded on the Bar’s homepage at www.nassaubar.org.
NCBA Corporate Partners Spotlight

vdiscovery
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NCBA’s newest Corporate Partner, vdiscovery, is a Manhattan-based provider of proprietary and in-breed solutions in computer forensics, document review, and electronic discovery, bringing deep expertise, efficient solutions, and an exceptional client experience to corporations and law firms for over 40 years.

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Since 1970, PHP has worked diligently to be the industry’s leading appellate services provider delivering innovative solutions that address the needs of clients as well as the appellate industry at large.

PHP is a proud corporate partner of WE CARE, the nationally recognized fund of the Nassau Bar Foundation, the charitable arm of the Nassau County Bar Association.
Paying for Convenience: Pitfalls for Employers in On-Call Scheduling

Debra L. Wabnik and Amanda B. Slutsky

After months in quarantine, businesses in New York State began opening and bringing employees back to their worksites. However, with restrictions on the number of occupants in a location and fluctuating operations, employers are often faced with difficulties in scheduling staffing. In these uncertain times, a business might not know its needs in advance, but must be prepared for an influx of customers at any time. For example, a restaurant owner could expect a Monday dinner service to be relatively light, so a small staff is scheduled. Unexpectedly, there is a rush of customers and the owner does not have enough staff onsite or non-scheduled employees available on their day off. One method employers use in these situations to keep business expenses low but still meet customer needs is to schedule employees as “on-call.”

There are various ways an employer can schedule an employee as on-call. An employer may maintain an on-call policy, whereby the employee is required to remain at the worksite and work when called. Alternatively, an employer could require the employee to stay at home during the on-call shift and only come to work if called. Additionally, an employer can allow the employee to do whatever the employee wants at any location during the on-call shift. As another option, an employer can schedule an employee and request the employee contact the employer prior to the shift starting to see if he or she is needed. At first glance, scheduling an employee as on-call seems to be a simple method to give the employer the flexibility it needs in these unprecedented times. But in doing so, an employer can open itself up to liability under the New York Labor Law and the Fair Labor Standards Act, not only for on-call pay, but also for overtime pay, attorney’s fees, and liquidated damages.

Under both statutes, employers must pay employees who are on-call and called into work for the scheduled shift. However, when an on-call employee is not asked to actually work, or only asked to work for a portion of the on-call time, caution must be exercised.  Generally, if the employee is not able to use on-call time as the employee pleases, the employee is considered “engaged to wait,” and on-call time is considered compensable time if the employee is engaged to wait and works more than forty hours that week, it is critical the employer pay the overtime rate to avoid liability.

A definitive rule to determine whether an employee is engaged to wait has not been established. Courts urge against having a jury decide whether an on-call shift was compensable, or whether the employee had too much freedom to be considered working and was therefore merely “waiting to be engaged,” which is not compensable. This involves engaging in a heavily fact-dependent analysis to determine if the employee was “engaged to wait.” For example, in determining that an employee who used on-call time to play cards and partake in other activities was engaged to wait, the United States Supreme Court noted that “[r]efraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity.” In another case, the court found the plaintiff was waiting to be engaged for hours when the plaintiff was free to leave the worksite, use the time for “personal activities,” and did not have to work until told to do so. The United States Supreme Court explained the impossibility of a rigid rule, stating that the required inquiry: …involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conchit, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances. Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged. His compensation may cover both waiting and task, or only performance of the task itself. Simply put, if an employee is waiting to receive work or be told what to do, and can go where the employer pleases, the employee is likely waiting to be engaged, and need not be compensated. On the other hand, if the employee is limited in location and/or activity, the employee likely must be paid. Other considerations include the terms of any company policy or employment contract, the frequency with which the employee is contacted, the time the employee is given to respond, and discipline imposed for the failure to respond. Because each case is different, an employer must be careful when scheduling an employee as on-call. The employer should establish an explicit and consistent policy that outlines an employee’s rights while on-call, the employer’s expectations, and the location of the on-call shift. With this in mind, scheduling employees as on-call could be the solution struggling employers need to maintain their bottom-line, but knowing they have staff available if necessary.
President’s Column

Let us open 2021 with a fresh start. This New Year is unlike any other, where our Bar has the opportunity to flourish! Chief Judge Janet DiFiore said, “At this unprecedented moment in our state and nation’s history, we all need to do what we can to support one another and ensure that we will not only meet this challenge but emerge from it stronger and more united than ever before.”

One challenge that we will soon face is the surge in legal matters. Remember when we were faced with the question of how to address the challenges of a legal profession which generally requires in-person contact with all involved parties; congregating in TAP parts with other attorneys awaiting courtroom assignments; real estate closings in conference rooms; conducting depositions to observe body language to test the veracity of one’s statements; or trials? The answer is we not only faced the challenges, but we also mastered technology so that our function would have a seamless transition.

When Hon. Norman St. George, Nassau County Administrative Judge, invited our COVID-19 Task Force to the Supreme Court on October 15, 2020, we witnessed the court’s preparation in compliance with Phase 4.1 of Return to In-Person Operations, which consisted of protective safety measures and protocols with courtroom layout changes; clear partitions (erected on two sides of the judge’s bench); and the relocation of juror seating to courtroom rows where spectators previously sat.

In addition, we learned the witnesses will testify from the jury box and the tables (where attorneys sit with their clients) have been rotated in the courtroom to provide for more distancing. Attorneys will only deliver remarks from a podium. Spectators will be seated in another courtroom and will be able to view the proceedings with state-of-the-art technology. At our year-end call last month, Justice St. George shared that as soon as we receive the “green light, we are ready!”

We will also succeed with the challenge of the upcoming surge in legal matters. In my capacity as NCBA President, I have received the call to support the courts with a new surge in legal matters. Remember when we were engaged; WE CARE Advisory Board, Chaired by Mike Mastri and Hon. Jeffrey A. Goodstein, who are excelling in the tradition of making charitable financial contributions to community organizations in need; our Lawyer Assistance Program (LAP), directed by Beth Eckhardt, PhD, and the Lawyer Assistance Committee chaired by Jacqueline A. Cara, who offer a 24-hour confidential helpline that is available to lawyers, judges, and law students in need of supportive counseling services for mental health and addiction, free of charge and always confidential; Nassau Academy of Law Dean Anthony Michael Sabino, elevating the Bar with informative and instructive continuing legal education programs; and our staff, led by Executive Director Elizabeth Post, who continue to demonstrate their commitment to Members and the overall success of the Bar Association.

Please note that our January Board of Directors meeting will be special as we will continue the tradition of meeting jointly with the Suffolk County Bar Association. Invited guests include Hon. Norman St. George, Administrative Judge, Nassau County; Hon. Andrew A. Crecce, Administrative Judge Suffolk County; and Scott Karson, New York State Bar Association President.

As we host the meeting remotely, I also look forward to welcoming Hon. Derrick J. Robinson, Suffolk County Bar Association President, and his Board of Directors. Looking forward to our fresh start in 2021!

NCBA 2020-21
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NOW AVAILABLE FOR PURCHASE
NCBA Members can contact our Membership Department at
(516) 747-4070 to purchase a hardcopy of the directory for just $15.
Hon. Linda K. Mejias

Cultural Competence in the Family Court

The practice of cultural competence and cultural humility which inform our perception of access to justice and the fair and just application of the law.

The first step to becoming culturally competent is understanding what culture is and its impact on the individual’s daily life. Culture is the “set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and... encompasses, in addition to art and literature, lifestyles, ways of being, value systems, traditions and beliefs.”

Culture vastly impacts how a person defines justice, conflict, and disorder. It plays a large role in defining how the person determines when it is appropriate to involve third parties, including the state and/or court, in resolving problems and conflicts. Culture also impacts how a person describes events or incidents, and how they fashion responses or solutions to problems and conflicts. It is, however, when differing cultures intersect within the justice system, that misunderstandings and missed opportunities, for creating solutions, solving can present themselves, unless of course judges are able to identify, understand, and consider the litigants culture. Simply put, we, as judges, cannot continue to be blind to culture and to continue to be so deeply immersed in our own culture and adapting inequities of our current legal system.

Certainly, most of us have heard the terms cultural competence and cultural humility, as well as implicit bias, but perhaps you are not clear what that all means. “Cultural competence means [we have] been educated about the law and the best outcomes so that we can make decisions based upon the totality of circumstances. However, time and again I have seen that cultural differences may affect the outcome of a matter or the application of the law, just as we are trained to identify legal issues in law school, as members of the judiciary we must be able to identify instances when cultural differences may bear on the cases at best. Taking time to consider and make inquiry of the parties will give us the complete picture so that we can make decisions based upon the totality of circumstances. I have found that the best application of the law and the best outcomes come when we take the time to take a step back and take the litigant as they are—taking into consideration where they come from and what their life experience has been.

Cultural competence means [we have] been educated about other cultures.”

To be clear, being culturally competent should not be confused with being culturally biased, which can either unfairly disfavor or favor a group, which would clearly not produce a just outcome. Being culturally competent and putting cultural humility into practice does not mean that a judge will favor or disfavor a group, but rather that it means that the judge ought to take a holistic approach to the administration of justice in family court.

A culturally competent bench can be achieved with education and training, however, the best and most effective step towards creating a more culturally competent bench is to actively pursue diversity on the bench so that it reflects the community it serves. Until appropriate and sufficient diversity is achieved on the bench, bias training must be mandatory for all judges, court staff, and administration. Indeed, among the recommendations presented by Secretary Jeh Johnson in the Report from the Special Advisor on Equal Justice in the New York State Courts, is that the court system develop and mandate comprehensive biased training for judges and non-judicial employees that focuses on implicit bias, racial bias, and cultural sensitivity.

In order to achieve a fair and just legal system we must take off our blindfolds, put in our contact lenses of cultural humility, and take the time to really see, listen and understand.


Employers have the option to complete the paper Form I-9 and retain records accordingly, or to use the e-Verify tool created by United States Citizenship and Immigration Services (USCIS). If relying on the paper form, the most updated form can be found on the USCIS’s website. USCIS frequently changes forms with little to no notice, so it is incumbent upon employers who are paper documenting to ensure they are using the latest Form I-9. Similarly, it is the employer’s obligation to ensure that the Form I-9 is properly executed. While it may seem as though it is simply providing routine information and checking boxes, there are various pitfalls about which employers need to be aware to avoid employment discrimination claims from employees to ensure that employees do not reasonably appear to be genuine or to relate to the person presenting them, you must accept them. To do otherwise could be an unfair immigration-related employment practice. If the document(s) do not reasonably appear to be genuine and to relate to the person presenting them, you must not accept them. That said, if an employer has knowledge that the documents presented do not demonstrate an employee’s work authorization, the employer cannot hire such an individual. Federal regulations define knowledge not just as actual knowledge but also constructive knowledge, but warn that knowledge cannot be inferred from a person’s appearance or accent. While at first blush, it may seem prudent to “over-document” in order to shield an employer from an audit and financial penalties, it is important to understand that the Form I-9 requirements are designed to protect both the employer and the employee. In fact, under no circumstances can an employer require an employee to present any specific documents to show proof of employment authorization. Requiring that an employee present specific documents can result in a claim for employment discrimination where an employee presents acceptable documents to show employment authorization, but it is rejected because it is not what the employer requested. Specifically, the Department of Justice, Immigration and Employee Rights (IER) Section reviews potential claims based on discrimination related to citizenship status discrimination, national origin discrimination, unfair documentary practices; and retaliation/imintimidation. Notably, IER is available to answer questions for both employers and employees about employment practices, and their hotlines are available on their homepage. Similarly, IER provides technical guidance on the anti-discrimination practices, and their hotlines are available on their homepage.

Rachel Baskin has provided guidance for employers reviewing original documents to confirm their authenticity. Specifically, USCIS advises when reviewing documents, “if they reasonably appear to be genuine and to relate to the person presenting them, you must accept them. To do otherwise could be an unfair immigration-related employment practice. If the document(s) do not reasonably appear to be genuine or to relate to the person presenting them, you must not accept them.” That said, if an employer has knowledge that the documents presented do not demonstrate an employee’s work authorization, the employer cannot hire such an individual. Federal regulations define knowledge not just as actual knowledge but also constructive knowledge, but warn that knowledge cannot be inferred from a person’s appearance or accent.
In 2015, the Washington Post observed that unpaid wage and hours cases brought in federal courts under the Fair Labor Standards Act ("FLSA") were growing faster than any other category of cases. So, it was not surprising that on August 7, 2015, New York’s employment law bar felt shockwaves after the Second Circuit decided Cheeks v. Freeport Pancake House, Inc.2 Cheeks set the requirement that FLSA settlements be approved by a court or the Department of Labor, mandating a determination of the fairness of the settlement, including the reasonableness of attorneys’ fees. Whether it was simply human nature to react negatively to change, or whether Cheeks actually imposed unfair requirements or undue hardships on litigants, it cannot be debated that Cheeks left unanswered questions, and employment attorneys uncertain about whether their FLSA settlements would pass judicial scrutiny. Among other things, plaintiffs’ lawyers were particularly concerned about the court’s role in reviewing attorneys’ fees, and defense counsel were concerned that agreements could not be confidential and had to be filed on a public docket. But, two debated questions were recently decided by the Second Circuit: (1) can litigants avoid Cheeks by using rules of procedure other than a stipulated dismissal, such as an offer of judgment, and (2) what is the court’s role in determining the fairness of attorneys’ fees in FLSA settlements. The answers and their implications are discussed below.

History of FLSA Settlements and Cheeks

Generally, the FLSA establishes rules for minimum wage and overtime pay for workers. The FLSA allows workers to sue employers for FLSA violations. But, unlike most lawsuits where parties can freely and privately settle the case, seeds of uncertainty concerning whether parties could privately settle FLSA claims were sown in 1945. In Brooklyn Savings Bank v. O’Neil, an employee was not paid overtime wages, but the employer later paid the owed wages in exchange for a release of FLSA claims.3 The employee nonetheless sued the employer for liquidated damages available under the FLSA. The Supreme Court ruled that the employee could not waive his entitlement to the liquidated damages because no genuine dispute existed as to whether the employee was owed liquidated damages.4

The question of whether parties could privately settle FLSA claims when such settlements resolved the genuine dispute between the parties, however, remained unaddressed.

The next year, the Supreme Court addressed that question, in part, and again injected uncertainty into FLSA settlements when it ruled that private settlements cannot be enforced when the dispute relates to whether the employer is covered by the FLSA.5 The support for this rule stems from the proposition that public policy prohibits employers from bargaining away rights provided to consumers. The Court determined that “neither wages nor the damages for withholding them are capable of reduction by compromise of controversies over coverage.”6

Fast forward to 2015, the Cheeks Court was presented with a question about FLSA settlements not before answered by the Supreme Court or a Circuit Court. The issue in Cheeks was whether parties to an FLSA lawsuit can, pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), privately settle the case without approval by a district court or the Department of Labor (“DOL”).5 6

In Cheeks, after engaging in discovery, the court approved on a private settlement and, pursuant to Rule 41(a)(1)(A)(ii), privately settled the case without approval by a district court or the Department of Labor (“DOL”).7 8

The Court explained that “[t]he plain purpose of Rule 41 is to encourage settlement and avoid litigation,” and the plain language of the Rule “leaves no discretion in the district court to do anything but enter judgment once an offer has been accepted” because of the Rule’s mandatory and absolute command that the clerk must enter judgment, and the Act itself contains no language requiring judicial approval before an FLSA claim can be settled or otherwise dismissed.

The Second Circuit distinguished between private settlements and Rule 68(a) judgments, noting the latter are “publicly-filed, stipulated judgments between parties to an action brought in a court of competent jurisdiction after litigation has been commenced pursuant to § 216(b) of the FLSA.”9 The Court further emphasized that no precedents support requiring judicial review of stipulated judgments. Absent such support, the Second Circuit was not ready to agree with the district court and “make [5(e)] interpretive leap in the context of Rule 68(a) offers of judgment.”10

The Court of Appeals acknowledged the similarities between Cheeks and Mei, but declined to extend Cheeks’ holdings to offers of judgment, affirming that the decision in Cheeks is limited to only Rule 41(a)(1)(A)(ii) dismissals with prejudice.11 The Court further noted that the Supreme Court has recently underscored the importance of giving the FLSA nothing more than a “fair reading.”12 In sum, Cheeks does not bar parties from settling an FLSA case via a Rule 68 offer of judgment.

Second Circuit Provides Practitioners with Clarity When Settling Unpaid Wage Cases

Litigants Can Avoid Cheeks by Using Offer of Judgment

Less than five years after Cheeks, the Second Circuit decided Mei v. Mei’s restaurant, Hasaka Restaurant, Inc.13 Mei was entitled to liquidated damages after the employer made a Rule 68 offer of judgment, which Mei accepted. The district court, however, ordered Mei to submit the settlement agreement to the court for review and approval per Cheeks. Both parties filed an interlocutory appeal, disrupting the propriety of the district court’s request. The Second Circuit reversed, holding that judicial approval is not required for Rule 68(a) offers of judgment which settle FLSA claims.14 The Court of Appeals explained that “[t]he plain purpose of Rule 68 is to encourage settlement and avoid litigation.” The plain language of the Rule “leaves no discretion in the district court to do anything but enter judgment once an offer has been accepted” because of the Rule’s mandatory and absolute command that the clerk must enter judgment, and the Act itself contains no language requiring judicial approval before an FLSA claim can be settled or otherwise dismissed.

The Second Circuit distinguished between private settlements and Rule 68(a) judgments, noting the latter are “publicly-filed, stipulated judgments between parties to an action brought in a court of competent jurisdiction after litigation has been commenced pursuant to § 216(b) of the FLSA.” The Court further emphasized that no precedents support requiring judicial review of stipulated judgments. Absent such support, the Second Circuit was not ready to agree with the district court and “make [5(e)] interpretive leap in the context of Rule 68(a) offers of judgment.” The Court of Appeals acknowledged the similarities between Cheeks and Mei, but declined to extend Cheeks’ holdings to offers of judgment, affirming that the decision in Cheeks is limited to only Rule 41(a)(1)(A)(ii) dismissals with prejudice. The Court further noted that the Supreme Court has recently underscored the importance of giving the FLSA nothing more than a “fair reading.” In sum, Cheeks does not bar parties from settling an FLSA case via a Rule 68 offer of judgment.

District Court’s Role in Reviewing Attorneys’ Fees Is Limited

Two months after Mei, the Second Circuit decided another FLSA-related issue in Fisher v. SD Protection, Inc.15 concerning the limits on district courts’ powers when reviewing attorneys’ fees for FLSA fairness hearings. In Fisher, plaintiff and his former employer settled an FLSA action with a stipulated dismissal with prejudice, pursuant to Fed. R. Civ. P. 41, for $25,000. Under the settlement agreement, $25,000 would be paid to Fisher’s attorneys for fees and costs, and $2,000 would be paid to Fisher himself. In other words, the attorneys’ fees would consume the bulk of the settlement proceeds.

Per Cheeks, the district court reviewed the settlement agreement for fairness, including the reasonableness of attorneys’ fees and costs.16 Finding the allotted attorneys’ fees to be objectionable, the district court sua sponte modified the distribution of the settlement funds as between plaintiff and his attorneys, awarding Fisher $13,055 (i.e., 60.22% of the settlement amount) and his attorneys $8,195 in fees and $1,695 in costs (i.e., 33.78% of the settlement amount). The district court held, among other things, that as a matter of policy, the maximum fee percentage that plaintiffs’ attorneys can earn from an FLSA case settlement is 33% of the total settlement amount.

On appeal, the Second Circuit rejected the district court’s imposition of a proportionality limit on recoverable attorneys’ fees and held that “the district court abused its discretion in rewriting the settlement agreement by modifying the allotment of the settlement funds.”17 The Court agreed that whenever an FLSA settlement agreement includes an allocation of attorneys’ fees and costs, a district court is required to review the reasonableness of the allocation, but when a district court finds a proposed terms unreasonable, “it cannot simply rewrite the agreement.”18 The only two options available for the district court are to either reject the settlement agreement or allow the parties to revise the agreement. In its discretion, the district court may suggest to the parties an amount the court would find reasonable under the circumstances.

When settling unpaid wage cases, attorneys should be cautious of the risks of “Cheeks” and “Cheeks” cases. Failing to carefully review the settlement agreement may result in a stipulated judgment with prejudice, which is likely to be reviewed by the court and can result in a loss of the settlement. In light of these recent developments, attorneys should be sure to review the settlement agreement for the terms of the settlement, the amount of the settlement, the allocation of the settlement amount, and the attorneys’ fees and costs. In addition, attorneys should be aware of the risks of settlement agreements that are not approved by the court, as these agreements may be subject to judicial review.

In summary, if an attorney is considering settling an FLSA case, they should carefully review the settlement agreement to ensure that it is fair and reasonable and that it does not violate the policies set forth in the FLSA or the principles of fairness set forth by the Second Circuit. By being diligent in this process, attorneys can help ensure that their clients receive fair and reasonable settlements and that their clients are adequately compensated for their work. By understanding the risks and implementing best practices, attorneys can provide their clients with the highest level of service and representation.
FOCUS: LABOR LAW

Michael A. Berger

During the height of the COVID-19 pandemic, Governor Andrew Cuomo seemingly issued new Executive Orders weekly placing restrictions on businesses. Between all of the Executive Orders, mandating which businesses were permitted to open and the maximum capacity at which they could operate, one of the significant changes affecting New York State businesses that has been overlooked is the phasing out of the tip credit for employers covered by the Minimum Wage Order for Miscellaneous Industries and Occupations (the “Miscellaneous Wage Order”).

As of December 31, 2020, in addition to the ever-changing conditions under which businesses must operate, businesses subject to the Miscellaneous Wage Order are no longer permitted to take a tip credit against their employees’ wages. This change will have implications for many employers, including but not limited to, those in the nail salon, hairdresser, car wash, and valet parking industries.1 As discussed below, this change will not apply to restaurants, bars, hotels, or any businesses covered by the Hospitality Industry Wage Order (“Hospitality Wage Order”).2

Tip Credit for Miscellaneous Industries

New York is often considered one of the most progressive jurisdictions in the country when it comes to protections for workers. While the fight for a $15 federal minimum wage rages across the country, New York has already implemented annual wage increases that will bring workers in every region of New York State to a $15 per hour minimum wage.

While all employers must pay their workers at least the New York State minimum wage, until recently, employers governed by the Miscellaneous Wage Order were subject to complicated and confusing regulations that permitted them to take a tip credit against the required State minimum wage, provided eligible employers met certain requirements.2 Pursuant to section 142-2.5(b) of the New York Codes, Rules and Regulations (“N.Y.C.R.R.”), tips or gratuities “may be considered a part of the minimum wage” so long as:

(i) the occupation was one in which tips “have customarily and usually constituted a part of the employee’s remuneration”;

(ii) there is substantial evidence that the employee’s tips at least equal or exceed the allowance claimed by the employer; and

(iii) “the allowance claimed by the employer is recorded on a weekly basis as a separate item in the wage record.”

If an employer satisfied each of the above-referenced conditions and the employee’s weekly average tips brought his total pay above minimum wage, the employer was permitted to take an allowance for tips.3 The amount of the allowance varied based on the employee’s number of employees and geographic location.6 For example, until June 29, 2020, an employer in New York City with ten or fewer employees was permitted to take a tip credit of $2.25 “for an employee whose weekly average of tips received is between $3.65 and $3.80” and a tip credit of $3.65 “for an employee whose weekly average of tips received equals or exceeds such High tip amount [$3.65].”7

In contrast, if the employer was located in Nassau County or Suffolk County, the tip credits available ranged from $1.95 on the low end to $3.20 on the high end.8 In upstate counties, the tip credits ranged from $1.75 to $2.90.9

Elimination of Tip Credit in Miscellaneous Industries

At the end of 2017, Governor Cuomo directed the New York State Labor Commission to determine the impact of tip credits on employers and workers across the State and recommend a solution.10 After holding hearings and receiving testimony from business owners, business groups, and workers, the Labor Commission recommended the elimination of the tip credit in the industries covered by the Miscellaneous Wage Order.11 In response to this recommendation, on December 31, 2019, the Commissioner of Labor, Roberta Reardon, adopted the recommendation and ordered, pursuant to New York Labor Law § 659(2), that section 142-2.21 of the N.Y.C.R.R. be amended as follows:

Notwithstanding any other provision contained in this part, tips or gratuities, shall not be considered a part of the minimum wage on or after December 31, 2020, provided, however, that no employer shall claim a tip allowance in an amount of fifty percent of the applicable allowances listed in this part and rounded to the nearest five cents on or after June 30, 2020.12

In doing so, the Department of Labor phased in the elimination of the tip credit over the span of one year, purportedly to provide businesses adequate time to adjust.13 Employers were permitted to take the full tip credit from January 1, 2020 to June 29, 2020 and 50% tip credit from June 30, 2020 to December 30, 2020.14 As a result, Long Island employers in the miscellaneous industries were no longer permitted to take a tip credit of $3.20, but rather half of that value, $1.60.15

As of December 31, 2020, the tip credit was completely eliminated and all employers subject to the Miscellaneous Wage Order were no longer permitted to consider tips and gratuities as part of their employee’s minimum wage. Instead, employers are required to pay their employees a cash wage of the full New York State minimum wage, regardless of how much their employees receive in tips.16

In reaching the decision to recommend the elimination of the tip credit, the New York State Department of Labor cited various concerns including “widespread confusion about whether or not [workers] are entitled to earn minimum wage,” “rampant wage theft in particular industries,” and a concern that tip credits are inappropriate in certain industries.17 The Department of Labor’s recommendation will likely resolve some of these concerns. The elimination of a sliding scale for allowances depending on the amount of tips received and the employer’s number of employees will alleviate confusion among workers as to their wages and may reduce inadvertent wage theft resulting from the complex calculation of allowances.

Hospitality Industry

It is important to note the Miscellaneous Wage Order and its elimination of the tip credit in miscellaneous industries will not affect employees and employers in the hospitality industry. Restaurants and hotels can still take the tip credit from their employees’ wages, provided they meet the requirements set forth in the Hospitality Wage Order.18

While amendments to the tip credit in the Hospitality Wage Order may be forthcoming, restaurants and hotels need not eliminate tip credits in calculating employees’ cash wage for the time being. However, with the start of the new year, employers must nevertheless be aware of the new minimum wage on Long Island and the new cash wage, tip credit and tip threshold beginning December 31, 2020.19

In Brief

In December, Ronald Fatoullah & Associates presented a donation to the Nassau County Medical Society. In collaboration with Concierge Health and 305 West End Assisted Living in New City, Ron also presented “Managing Family Dynamics in The Estate Planning Process.”

Desiree M. Gargano, an Associate in the Employment Law and Litigation Practice Groups at Certilman Baer & Carone LLP, was named to the 2021 Best Lawyers, “Ones To Watch.”

Russell I. Marnell of the Marnell Law Group has been named to the New York Metro Super Lawyers list for the sixth year in a row in the practice area of Family Law. Marnell is also AV-rated by Martindale Hubbell and listed in its Bar Register of Pre-Eminent Lawyers. In addition, he has earned an Avvo rating of 10 (out of 10). NCBA Member, Bill Corbett and Ann, his wife, were among four honorees recognized at the 7th Annual Hearts for Russ Awards Virtual Program for their outstanding efforts to encourage live and deceased organ donations and tissue donations.

Jennifer B. Cona announced a re-branding and reorganization of the law firm she founded in 1998. Effective immediately, the firm formerly known as Genner Dubow Genner Cona LLP will now be known as Cona Elder Law PLLC, making it easier to identify the practice area.

The Nassau Lawyer welcomes submissions to the IN BRIEF column announcing news, events, and recent accomplishments of its members. Due to space limitations, submissions may be edited for length and content.

END OF THE TIP CREDIT IN THE MISCELLANEOUS INDUSTRIES
Prohibited Deviation from Established Lists

With the exception of the use of properly announced bi-lingual competitive exams, the Appellate Division cited Civil Service Law when it disallowed an appointing authority to give preference to candidates on the basis of fluency. The Second Department prohibited Suffolk County from adding a new qualification of fluency/proficiency in Spanish after certification of a list of eligibles. Specifically, the Second Department rejected a challenge to the Second Department’s “determination to appoint out of turn three Spanish-speaking eligibles...on the basis of their linguistic ability.” In this case, Suffolk County used oral examination, subsequent to the list establishment, to identify fluent candidates. The Second Department rejected this methodology, even though it recognized the need for diversity: ‘The record adequately demonstrates the need for bilingual officers to adequately service Suffolk’s substantial Spanish-speaking community, as well as the fact that normal recruitment programs have so far failed to satisfy this need. Be that as it may, an attempt to impose other and further qualifications, not listed in the examination notice, after the certification of the list of eligibles is palpably improper and is not to be condoned.’

Similarly, the Third Department rejected appointment procedures subsequent to the New York State Troopers’ announcement of a two-part competitive examination that assessed a 65% weight to written performance and a 35% weight to physical performance. When New York State funding allowed the hiring of two sets of new troopers (50 new troopers, and 50 new troopers to police interstate highways), the trial court held that the established list controlled. The Third Department summarized the Troopers’ strategy: ‘However, instead of offering appointment to as many of those ranked highest on the eligible list as would fill this complement of Troopers, respondents proposed to appoint only 75 candidates in that fashion. In order to further an avowed goal of procuring greater representation of certain minorities and women in the State police, it was decided that the remaining 25 candidates would be obtained by separately appointing the 15 highest ranked ‘ethnic minority’ eligibles and the 10 highest ranked female eligibles without regard to their individual placement among all others so listed.’

Rejecting that strategy and affirming the trial court’s direction to appoint Troopers solely on the basis of their ranking on the existing eligible list, the Appellate Division held that the New York State Superintendent can exercise the power of appointment “only through the process of competitive examination.” Further, even though “examination scores need not always constitute the sole basis for determining fitness and...some leeway must be accorded to the appointing authority in making final selection” the answer to the “narrow question as to whether the Superintendent may constitutionally depart from the apparent results of an examination to the extent of making appointments that allow a preference to ethnic minorities and females...is no.”

The Third Department relied upon the fact that “both males and females took part in the examination on an equal footing. Thus, respondents use of a sexually mixed eligible list can only signify that the position of Trooper is not one for which the work demands individuals of one sex.”

Importance of Pre-Application Recruitment

With the constraints of Civil Service Law identified in this article, diversity strategies must focus upon recruitment designed to attract a diverse population to apply for the examinations that ultimately form the basis of established lists.

In 2020, Governor Cuomo issued Executive Order 203, which established the “Committed to a New York State Police Reform and Reinvention Collaboration.” To implement Executive Order 203, New York State issued Resources and Guides for Public Officials and Citizens. Focusing specifically on law enforcement recruitment, in its section entitled “Recruiting a Diverse Workforce,” the lack of awareness of opportunities is identified as an impediment.

Education and outreach in advance of the closing date of the application period increases the pool of eligibles legally and consistent with Civil Service Law. Toward that end, the Commission works directly with Nassau County’s Offices of Asian-American, Hispanic

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FOCUS: LABOR LAW

Martha Krisel

General Rule and Limited Exceptions

Under New York State Civil Service Law, public sector employees are hired through competitive testing. After applying for, qualifying for, and passing a Civil Service exam, the applicant is included on an established list from which public sector employers recruit. That established list is based upon the universe of applicants who passed the exam and meet requirements that include residency. The list has a fixed date, expiring no less than one year but no more than four years after its establishment. In Nassau County, where an appointing authority has a vacant position, it submits a formal request to the Nassau County Civil Service Commission (Civil Service) for the current established list. That appointing authority uses that list to “canvas,” which simply means that it notifies applicants, starting with those that scored the highest, of the opportunity. An applicant that has been canvassed can decline the position under certain circumstances.

When the appointing authority interviews or evaluates applicants, it is entitled to non-select (reject) two applicants for any reason at all, other than an illegal reason. The appointing authority must, however, select one of all others so listed. With the constraints of Civil Service Law, public sector recruitment decisions are made in accordance with Civil Service Law, as authorized by the State Constitution, and consistent with the requirements of the Civil Service Law and Rules.

Under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, “a State or its political subdivisions cannot constitutionally consider race, color, or national origin as a factor in the process of hiring employees to public service positions.” The New York State Constitution recognizes the need for diversity. In determining eligibility, the Appellate Division held that the established list was decided that the remaining 25 candidates would be obtained by separately appointing the 15 highest ranked ‘ethnic minority’ eligibles and the 10 highest ranked female eligibles without regard to their individual placement among all others so listed. Rejecting that strategy and affirming the trial court’s direction to appoint

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CALL FOR NOMINATIONS

The Nominating Committee welcomes applications for nominations to the following Nassau County Bar Association offices for the 2021-2022 year:

- President-Elect
- Vice President
- Treasurer
- Secretary
- Director

Applications are welcome for nominations to serve on the Nassau County Bar Association Board of Directors. There are eight (8) available director seats, each is for a three-year term.

The Nominating Committee invites applications for nominations to the following offices of the Nassau Academy of Law for the 2021-2022 year:

- Dean
- Associate Dean
- Assistant Dean (2)
- Secretary
- Treasurer
- Counsel

NCBA members interested in applying for any of the above nominations, or in submitting suggestions for such nominations, are invited to submit such information to:

Elena Karabatos
Nassau County Bar Association
15th & West Streets
Mineola, NY 11501

JANUARY 25, 2021 DEADLINE FOR ALL NOMINATIONS.
Pre-registration is REQUIRED for all Academy programs. Go to nassauabar.org and click on CALENDAR OF EVENTS to register. CLE material, forms, and zoom link will be sent to pre-registered attendees 24 hours before program.

All programs will be offered via ZOOM unless otherwise noted.

January 11, 2021
Dean's Hour: U.S. Supreme Court 2019-20 Review
Program sponsored by NCBA Corporate Partner Champion Office Suites
12:30-1:30PM
1 credit in professional practice

January 13, 2021
Dean's Hour: Understanding the New Child Parent Security Act and Second Parent Adoptions
Program sponsored by NCBA Corporate Partner Champion Office Suites
1:00-2:00PM
1 credit in professional practice
Skills credit available for newly admitted attorneys

January 20, 2021
Dean’s Hour: PPP Loan Is a Fake! How to Determine if a Paycheck Protection Program Loan Is Fraudulent and How to Handle a Related Criminal Investigation
Program sponsored by NCBA Corporate Partner Champion Office Suites
12:30-1:30PM
1 credit in professional practice
Skills credits are available for newly admitted attorneys

January 22, 2021
Dean’s Hour: Bankruptcy and Divorce
Program sponsored by NCBA Corporate Partner Champion Office Suites and Cardinal Financial Company
12:30-1:30PM
1 credit in professional practice
Skills credits available for newly admitted attorneys

January 26, 2021
Mortgage Foreclosure Referee: Part 36 Certified Training
6:00-8:00PM
2 credits in professional practice
Program is excluded from free CLE offer.
Pricing: $100 NCBA Members; $200 Non-Members
Pre-registration is REQUIRED for all Academy programs. Go to nassaubar.org and click on CALENDAR OF EVENTS to register. Registered attendees 24 hours before program.

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January 26, 2021
Mortgage Foreclosure Referee: Part 36 Certified Training
6:00-8:00PM
2 credits in professional practice
Program is excluded from free CLE offer.
Pricing: $100 NCBA Members; $200 Non-Members

January 28, 2021
Dean's Hour: Signed and Sworn—A Notary Primer During the Pandemic Age
Program sponsored by NCBA Corporate Partner Champion Office Suites
12:30-1:30PM
1 credit in ethics
Program open to non-attorneys; $20 fee applies

February 3, 2021
Dean's Hour: Spirit Which Prizes Liberty: Abraham Lincoln
Program sponsored by NCBA Corporate Partner Champion Office Suites
12:30-1:30PM
1 credit in professional practice

February 4, 2021
Recent Rules in Real Estate: A n Update on Real Estate Law Trends since the Pandemic
Program sponsored by NCBA Corporate Partner Champion Office Suites
5:30-8:30PM
3 credits in professional practice
Skills credit are available for newly admitted attorneys

February 10, 2021
Dean's Hour: Running A Lean Practice In 2021
Program sponsored by NCBA Corporate Partner Champion Office Suites
12:15-1:15PM
1 credit in professional practice.
Skills credits are available for newly admitted attorneys
A Few Thoughts on Making Technology a Lawyer’s Best Friend

Scott J. Limmer

I

n today’s hectic legal climate, technology can make or break your practice. Those who have been able to adapt during the pandemic, have been those who have been able to run a virtual practice with the help of video conferencing. But there are other tools available that will empower you to run a leaner and more efficient practice. Below are some suggestions that might prove helpful.

E-signature

This may sound familiar. After a video consultation with a new client, you are told later that day that you’re hired. So you pull up a standard retainer, make some edits, and email it to the client with instructions to print, sign, scan, and email back.

But what if the client doesn’t have ready access to a printer? You are now left wondering how long it will take for them to retain you. As a business owner, you want the sign-up process to go as smoothly as possible. The most convenient and reliable way to have a client sign a retainer is to use an E-signature app. An E-signature app can automate the entire process creating documents with fields that can be customized and then sent off. Clients can review the retainer agreement and sign with their mouse or by checking off a box.

E-signatures can be used on a wide array of documents. It also speeds up the process, since it takes far less time than mailing. E-signatures are more client-friendly. Some of the most popular apps are DocuSign, eSignature and SignNow.

On-Line Appointment Scheduler

All attorneys know the feeling of sitting down to begin an important project. As soon as you start to really dig in, you are interrupted by clients wanting an update on their cases. Naturally you feel obligated to take their calls. Before you know it, you never have to do is then remember the master password for the app, as opposed to all your usernames. Once set, it is very easy to maintain.

It can also save common online information, speeding up the information you fill out frequently, like your home or work address or credit card information. Some of the more common password managers are 1Password, Last Pass, and Keeper.

Wi-Fi Speed

Having reliable internet reception is a must wherever you are working from. Many households have multiple people and numerous devices at the same time. If you want to be able to access a file without having to use all sort of data. One tool you should run it at various times during the day to see what kind of speeds you are getting. If the speed is not what your provider promised, then determine if the problem is with your devices or with the provider.

Mesh Wi-Fi

Like having good bandwidth, you need to be able to access all bandwidths. You may want to be able to access hard to reach places like your basement, attic, or backyard. That’s why a mesh Wi-Fi system is necessary. We recommend using a mesh Wi-Fi system that will work on all devices. All you have to do is plug it into a wall socket, and it will give you a prompt to set up your device.

Cloud Backup

You must choose among the following options:

A) You can save all your documents and important items in a folder on your desktop that can only be accessed from that computer.
B) You have a server in your office that you can log into from the office or remotely, or
C) You can save all your documents and important items in a folder on your desktop that will be saved in the cloud and can be accessed by any device with an internet connection.

Using the cloud is a no-brainer. It not only gives you an additional layer of security, but it is also secure and if your device breaks, you don’t lose anything, because it’s all in the cloud. When you get your new device, log in, and there you are. It alleviates the need to maintain expensive and secure servers in your office.

Google Suite

Google Suite is a collection of enterprise-based products offered by Google such as Gmail, Drive, Docs, Sheets, and so on—help to streamline your business. Some of the features include:

• The ability to send professional email from your business web address (you@yourcompany.com).
• 30GB of storage which allows you to store information on the cloud so it may be accessed by any device.
• Advanced administrative controls that allow you to add and remove users, add two step verification and single sign on for your employees.
• Mobile device management that allows you to keep your law offices data secure. You can easily locate devices, require passwords and erase data if an employee goes rogue. The ability to use all their apps and have your business look and be run in a professional way is most definitely worth the $3.00 a month charge.
A Primer on Affirmative Action for Construction Contractors

John Caravella

Ill businesses must avoid discriminating against members of protected classes when making employment decisions, but federal contractors, including construction contractors, must also take affirmative steps to ensure that they hire and promote members of protected classes. As discussed below, these affirmative action requirements derive from several discrete legal authorities and carry a range of undesirable sanctions for violators.

Moreover, recent changes in antidiscrimination law suggest a growing tension between affirmative action and color- and gender-blindness that may further complicate matters for construction contractors in the future. While the laws discussed herein apply to all federal contractors, provisions vary between construction and non-construction contractors. This article focuses on affirmative action as it pertains to construction contractors in particular.

There are three primary sources of affirmative action requirements: Executive Order 11246; the Rehabilitation Act of 1973; and the Vietnam Era Veterans’ Readjustment Assistance Act of 1974 (the “VEVRAA”).

Executive Order 11246

Executive Order 11246, as amended, applies to equal opportunity regardless of race, color, religion, sex, sexual orientation, gender identity, or national origin and requires federal contractors to take affirmative action to ensure that applicants are employed, and employees are treated during employment without regard to the foregoing classes. The Rehabilitation Act of 1973 requires federal contractors to take affirmative action to employ and advance in employment qualified individuals with disabilities. The VEVRAA requires federal contractors to take affirmative action to employ and advance in employment qualified covered veterans, including disabled veterans and recently separated veterans.

The three schemes of affirmative action requirements affect construction contractors differently and impose different requirements. Executive Order 11246’s coverage spans all construction contracts with the federal government and its agencies, and all contracts undertaken with federal funds, where the contract sum is at least $10,000. Relevant exceptions include contracts for work to be performed outside the United States by workers from outside the United States and contractors giving hiring preference to Native American Indians with respect to projects on or near Native American Indian reservations.

Given the narrow field of applicable exemptions, essentially all construction contracts with federal authorities will be subject to equal opportunity and affirmative action requirements as to race, color, religion, sex, sexual orientation, gender identity, or national origin.

Where Executive Order 11246 applies, the contractor must initially maintain personnel records for up to two years from the date of making the record or the personnel action involved, including not only documentation as to employees but also job applications, postings, and submissions from applicants. The contractor must be able to identify the gender, race, and ethnicity of employees and applicants in connection with these records.

While construction contractors are not required to develop a written affirmative action plan under Executive Order 11246 and its regulations,8 they must take affirmative actions including the following:

- Making employment opportunities known to minority and female recruitment sources;
- Reviewing equal employment opportunity policies with all minority and female employees;
- Specifically directing recruitment efforts to minority, female, and community organizations, schools with minority and female students, and minority and female recruitment and training organizations;
- Encouraging present minority and female employees to recruit other minorities and women; and
- Annually evaluating all minority and female employees for promotional opportunities and encouraging minority and female employees to seek or prepare for such opportunities through training.

Rehabilitation Act of 1973

Much like Executive Order 11246, the Rehabilitation Act applies to construction contracts where the contract sum is more than $10,000, including subcontracts where the project owner is the federal government or one of its agencies. There is also a similar exclusion for employment activities outside the United States. Unlike Executive Order 11246, however, the Rehabilitation Act imposes greater requirements, in the form of a written affirmative action plan, where the above criteria are met and where the employer has more than 50 employees and a covered contract for at least $50,000.

Under the Rehabilitation Act and its regulations, there is a similar two-year record-keeping requirement concerning personnel actions, with the same abbreviated period for smaller employers.11 Above and beyond this, the regulations require contractors to expressly invite applicants and employees to self-identify as a person with a disability.12 Where the size of the employer and contract necessitate a written affirmative action plan, its requirements include:

- Ensuring that personnel practices are based on the consideration of applicants and employees with disabilities for hiring or promotion;
- Ensuring that physical and mental job requirements that might screen out persons with disabilities are related to the job in question and borne of business necessity;
- Addressing performance problems of individuals with known disabilities by inquiring whether the problem is related to the disability and whether and individual requires a reasonable accommodation;
- Specifically recruiting and employing individuals with disabilities, such as by sharing job openings with a state developmental services office or a private organization that specializes in training and placement of individuals with disabilities; and
- Maintaining records of hiring activities with respect to individuals with disabilities for three years.

VEVRAA

As opposed to Executive Order 11246 and the Rehabilitation Act, VEVRAA has no distinct application to construction contractors with the federal government and its agencies. The mandate is subject to what might be considered “majority” contractors. Recently, President Donald J. Trump signed into law Executive Order 13950, which contains several provisions relevant to affirmative action programs and applicable to federal construction contracts. With respect to all federal construction contracts except those exempt from Executive Order 11246, VEVRAA requires substantially similar actions to those under the Rehabilitation Act, but for the fact that they apply to covered veterans rather than individuals with disabilities. The two-year record-keeping requirements for general personnel records are the same, with the same reduced record-keeping requirement for smaller employers. Contractors must invite applicants and employees to self-identify as a covered veteran.

While construction contractors are not required to develop a written affirmative action plan, its requirements include:

- Ensuring that personnel practices are based on the consideration of applicants and employees with disabilities for hiring or promotion;
- Ensuring that physical and mental job requirements that might screen out persons with disabilities are related to the job in question and borne of business necessity; and
- Maintaining records concerning their setting of employment opportunities for least $50,000.

While the foregoing laws concern employment actions vis-à-vis minority groups, contractors must nevertheless avoid giving the impression of hostility to what might be considered “majority” groups. Recently, President Donald J. Trump signed into law Executive Order 13950, which contains several provisions relevant to affirmative action programs and applicable to federal construction contracts. With respect to all federal construction contracts except those exempt from Executive Order 11246, VEVRAA requires substantially similar actions to those under the Rehabilitation Act, but for the fact that they apply to covered veterans rather than individuals with disabilities. The two-year record-keeping requirements for general personnel records are the same, with the same reduced record-keeping requirement for smaller employers. Contractors must invite applicants and employees to self-identify as a covered veteran.

While VEVRAA does not mandate treatment of workers regardless of race or sex, which would of course preclude preemptive private sector action. Rather, it requires neutrality in training, which cannot assign any particular characteristics, including fault for the necessity of affirmative action laws, to any race or gender. Ultimately, both as a matter of compliance with Executive Order 13950 and avoiding workplace conflict, construction contractors should discuss race and gender toward protected veterans in this instance. Additionally, contractors must list employment opportunities, including those with disabilities, for qualified covered veterans may be referred, and finally, contractors must set benchmarks for hiring qualified veterans, which may be calculated in alternative ways, and retain records concerning the setting of employment opportunities.

While the laws discussed herein apply to any race or sex stereotyping or any form of race or sex scapegoating,19,20 Race or sex stereotyping is defined as “attributing character traits, moral and ethical codes, policies, or other characteristics to a race or sex, or to an individual because of his or her race or sex.”21 Executive Order 13950 might seem like it is at odds with a statutory and regulatory scheme geared toward affording advancement opportunities for minority workers, but these provisions can be reconciled. Executive Order 13950 does not mandate treatment of workers regardless of race or sex, which would of course preclude preemptive private sector action. Rather, it requires neutrality in training, which cannot assign any particular characteristics, including fault for the necessity of affirmative action laws, to any race or gender. Ultimately, both as a matter of compliance with Executive Order 13950 and avoiding workplace conflict, construction contractors should discuss race and gender toward protected veterans in this instance. Additionally, contractors must list employment opportunities, including those with disabilities, for qualified covered veterans may be referred, and finally, contractors must set benchmarks for hiring qualified veterans, which may be calculated in alternative ways, and retain records concerning the setting of employment opportunities.

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Focus: Sports & Entertainment

Curt Flood: Vindication in Defeat

Rudy Carmenaty
I lost money, coaching jobs, a shot at the Hall of Fame. But when you weigh that against all the things that are really and truly important, things that are deep inside you, then I think I’ve succeeded.

— Curt Flood

A
lthough not widely heralded, Curt Flood is quite probably the most impactful figure in American sports during the last half-century. Flood transformed the sporting world, but he did so by his actions in the courtroom.

In 1969 Flood refused a trade from the Cardinals to the Phillies. Bound by the reserve clause, paragraph 10(A) of the uniform contract signed by all professional ballplayers, his options were limited—either go to Philadelphia or retire from the game. Finding neither acceptable, Flood decided to take on baseball’s powers-that-be.

Flood filed suit asserting the reserve system constituted a conspiracy in violation of the Sherman Anti-Trust Act as well as a form of involuntary servitude in violation of the Thirteenth Amendment. He was up against not only the full weight of Major League Baseball (MLB), but also half-century of Supreme Court precedent.

Flood risked it all, losing in the Southern District of New York (SDNY), at the 2nd Circuit Court of Appeals and, ultimately, before the Supreme Court. Once a celebrated athlete, he became an outcast. But his legal challenge helped transform the landscape of labor relations in baseball and beyond.

The current system of free agency was not brought about by Flood’s lawsuit. Rather it was the result of labor arbitration that emancipated the ballplayer. But Flood served as the catalyst, and he deserves the recognition that his sacrifice merits.

I am pleased that God made my skin black—but I wish He had made it thicker.

— Curt Flood

Curt Flood was a transformative figure. A man of character and courage, he cut across all boundaries—sports, economics, race, culture. As with Muhammad Ali, Flood put it all on-the-line. The different being that Ali won his Supreme Court case, while Flood lost in an excruciatingly close decision.

Inspired by Jackie Robinson, Flood went to Mississippi in 1962 in support of the NAACP. Enduring the indignities of Jim Crow, African-American players, he too could not stay at the same hotel as his white teammates. Flood would lead the effort to have the Cardinals integrate their spring training facilities in Florida.

In 1964, following the Cardinals’ World Series victory, Flood rented a house for his family in the Bay Area suburb of Alamo. They were barred from the home by the owner with a loaded shotgun, who didn’t know Flood was African-American when the lease was signed. Flood sued and won.

The premier defensive centerfielder of his era, Flood went a record 568 chances without committing an error for a record of 226 consecutive games. But in the 1968 World Series, Flood was blamed for the loss. Misplaying a line drive by Jim Northrup of the Detroit Tigers, the error unfairly became the defining moment of his career.

The play marked the beginning of Flood’s complaint. After the games, he got involved in a contract dispute. Flood made $72,500 in 1968. In 1969, he held out for $100,000 ultimately settling for $90,000. By the end of the 1969 season, he would be gone from St. Louis.

I often wondered what I would do if I were ever traded because it was part of the game. And suddenly it happened to me.

— Curt Flood

On October 8, 1969, Flood was sold by Jim Toomey, assistant to GM Bing Devine, that he had been traded. He was upset he got the news from a “mid-level front office coffee drinker.” As the co-captain of a team that had won two World Series titles, he felt he deserved more respect.

Earlier, Flood offered Flood a salary of $100,000. But it wasn’t the money. Flood saw the issue as one of principle, that he wasn’t some commodity to be bought and sold at the whim of the owners. But the reserve clause bound him, in seeming perpetuity, to play wherever he was told to.

Flood consulted his attorney about suing MLB under the Sherman Anti-Trust Act. The Sherman Act outlaws collusion and monoplastic business practices in restraint of interstate commerce. Flood then turned to Marvin Miller, the Executive Director of the Major League Baseball Players Association (MLBPA).

Miller told him that a lawsuit would be costly, would take years to resolve and, even if he did win, it was inevitable that he would not receive any substantial money damages. He was also giving up any future association with MLB. Flood remained steadfast. He decided to go forward regardless of the consequences.

Flood received the backing of the MLBPA for his lawsuit, the players themselves were less than enthusiastic. Most were not willing to jeopardize their own careers and, frankly, many were all too willing participants in the system that governed the game.

The case of Flood v. Kuhn was commenced in the SDNY in 1970. Kuhn was Bowie Kuhn, the Commissioner of Baseball, who had previously been MLB’s legal counsel. Kuhn and the owners were determined to keep things as they had always been.

The owners argued that the elimination of the reserve system would undermine competitiveness by allowing the rich teams to sign the best free agents. They added that not having the reserve clause might foster corruption among the players. After all, a player might throw a game to curry favor with another team at contract time.

MLB’s best argument was that free agency undermined the investment made in player development as star players could leave without any corresponding compensation. A similar argument was made in the NFL resulting in the now defunct “Rozelle Rule,” wherein the Commissioner had the authority to award draft choices thus diminishing the value of free agency.

If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress, and not by this Court.

— Harry Blackmun, majority opinion in Flood v. Kuhn

The owners, whose records many say reveal a proclivity for predatory practices, do not come to us with equities. The equities are with the victims of the reserve clause. I use the word “victims” in the Sherman Act sense, since a contract which forbids anyone to practice his calling is commonly said to be an unreasonable restraint of trade.

— William O. Douglas, in dissent

Flood was also battling the weight of history. In a unanimous 1922 decision, Oliver Wendell Holmes ruled in Federal Baseball Club v. National League that baseball was not interstate commerce under the Sherman Act. In effect, this decision carved out a one-of-a-kind exemption for MLB not accorded boxing, football, or basketball.

This anomaly was affirmed thirty years later by the Warren Court in Toolson v. NY Yankees. This case dealt specifically with the reserve clause. With far less justification than Holmes, the Court said that Congress has the power to subject baseball to the anti-trust laws but hasn’t.

Determining Congressional intent based upon an absence of legislative action, the Court took the backdoor. With far less justification than Holmes, the Court said that Congress has the power to subject baseball to the anti-trust laws but hasn’t.

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Flood’s lawsuit supposedly could not have come at a worse time. The Cardinals had to keep things as they had always been.

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The current system of free agency was not brought about by Flood’s lawsuit. Rather it was the result of labor arbitration that emancipated the ballplayer. But Flood served as the catalyst, and he deserves the recognition that his sacrifice merits.
Ever dream of leaving it all behind—the incessant chatter of the electronic age—disappear into the wilderness—get back in touch with nature? As set out in the beginning of the novel Murphy’s Will, the main character Hannibal Murphy heads the “call of the wild,” journeying to Colorado then later to Mexico, Guatemala, and Peru in search and to understand why native peoples built temples for self-glorification. To Hannibal, these towering structures symbolized the moral corrosion that precipitated the downfall of the ancient societies who inhabited these geographic areas.

Three years later, Hannibal emerges back in the United States just as his mother lands a new job as Attorney Tim O’Leary’s secretary. Thus begins another chapter in the career of Tim O’Leary, whose adventures in the practice of trusts and estates began in Edward A. McCoyd’s first two books Simpson’s Will and Forester’s Will. In his third book, Murphy’s Will, McCoyd juxtaposes the greed and excesses of the 1980s with the harmony and personal fulfillment of a life lived close to nature. The author, cofounder of McCoyd, Parkes & Ronan in Garden City, provides detailed practical advice in his work, drawing upon his many years of experience and practice in trust and estates law.

Murphy’s Will centers on the following fact pattern: Testator bequeaths assets to his son, named Hannibal Murphy, specifying that they are to be held in trust until he reaches 25. He appoints his brother as the Executor and his ex-wife as the Trustee. Testator dies from injuries sustained in a car accident. After suing the other driver, the Estate settles for $6 million.

Unfortunately, the Executor fails to turn over the assets from the settlement for $6 million. In this novel, Edward A. McCoyd also shares his deep appreciation for the natural beauty of Vermont. As the plot unfolds, McCoyd treats his reader to an evening of music under the stars at the von Trapp Lodge in Stowe, Vermont. He provides instructions, albeit in excruciating detail, how to hitch a fallen tree to the back of a truck in order to clear it from the road.

Finally, McCoyd highlights the Smokey House Center (“SHC”) in Danby, Vermont, where teenagers learn traditional farming methods, and also develop the self-confidence and camaraderie that often eludes today’s youth. SHC is a “genuine farming operation, including a full complement of teenagers and pre-teens working diligently to keep the place running, and seeming to be doing so with only minimal adult supervision and guidance.” It has “five thousand acres of forest and farmland…to protect for future generations, and its primary function is to ‘educate[e] young people from the area about the preservation of their rural heritage.’”

Murphy’s Will concludes with a road map for life, as Hannibal shares the insights gained from his research into ancient civilizations and their forays into the wilderness. In his hikes through Central and South America, Hannibal “saw many temples and monuments that powerful people made others build for them.” Eventually, these people passed on and the jungle grew back. This awareness inoculates a deep respect for nature, in its hills and mountains. “All of this is for all of us, not just a few; and it’s our job to protect it. If we build, we won’t build to show off. We’ll build only what we need, and then we’ll build to help others.”

What an inspiring message! A word of caution to the nonlawyer. A consistent sense of urgency pervades the book, creating the impression that once Hannibal turns 25 years old, all will be lost. Upon closer inspection, there are actually two issues that drive the plot forward. In the first part of the book, the Trustee (Hannibal Murphy’s mother) and her lawyer strive to locate the Beneficiary before his 25th birthday. The concern here is that if the trust expires, she will lose her status as Trustee and cannot petition the court to compel an accounting. A different issue is at play once Mrs. Murphy establishes contact with her son: “Of greater concern was the possibility that the court might drag its feet in reviewing the files, giving [the Executor] time to make off with the estate assets, assuming he hadn’t done so already.” Amid the intricacies of the novel’s plot and the suspenseful final chapters, it is not easy to make sense of the timing issues from a legal perspective. For this reason, the novel’s best audience is an attorney relatively new to the practice of trusts and estates, to whom Murphy’s Will provides sound mentorship and practical advice.

5. Id. at 250.
6. Id. at 175.
**Recruiting …**

Continued From Page 9 and Minority Affairs. Each agency has links on its website to Civil Service job interest cards and application information and forms, and each agency collaborates with Civil Service training on the Civil Service system generally, on the application process and on the qualification process.

Training includes overall education about the many facets of a public sector career, as well as detailed instructional classes on how to complete an application and how to determine in advance of completing an application that an individual’s background (education and employment history) meets the qualifications.

This strategy is a long-range plan to increase diversity in the public sector, including in law enforcement, notwithstanding the limitations of New York State Civil Service Law.

1. Civil Service Law §56
2. “APPOINTING OFFICER” means the officer; commission or body having the power to appoint to subordinate positions.
4. §56 provides that if the name of the person declining appointment shall be eliminated from further certification from the eligible list unless declination is for one or more of the following reasons:
   a. Insufficiency of compensation offered when below minimum of grade of the position for which the examination was held;
   b. Location of employment;
   c. Temporary inability, physical or otherwise, which must be satisfactorily explained by the eligible in writing. The Commission shall enter upon the eligible list the reasons for its action in such cases.
5. Civil Service Law §61.
6. Civil Service Law §61(1) (Appointment or promotion from eligible list).
7. Civil Service Law § 50(8) (Limitation of eligibility to one sex).
8. Extra veteran’s points are provided under Civil Service Law §6(1).
9. Civil Service Law §56(9) (Examination of candidates unable to attend tests because of religious observance).
10. Civil Service Law §50(10) (“Determination of disability shall be made by a medical officer employed or selected by the civil service department or the municipal commission having jurisdiction.”)
13. Id. at 368.
14. §56(9).
15. Category 6: Higher Education.
NCBA Collects Toys for Local Nonprofit

This year for the holidays, the Nassau County Bar Association (NCBA) held a toy drive for New Hour for Women and Children LI, a nonprofit organization that provides meaningful support to current and formerly incarcerated women, their children, and families. Toys were generously donated by NCBA Members and staff. We are so proud to lend a helping hand to our community during these difficult times and brighten the holidays for the children.

HOW YOU CAN HELP THE WE CARE FUND

MAKE A DONATION
Show your support for the WE CARE Fund by making a donation today by visiting nassaubar.org/donate-now.

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Do your regular online shopping using smile.amazon.com and choose Nassau Bar Foundation, Inc. as your charity of choice. Amazon will donate 0.5% of eligible purchases to WE CARE!

We Acknowledge, with Thanks, Contributions to the WE CARE Fund

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To commemorate our wedding.
Sheryl and Paul Lerner’s new granddaughter, Eden Sarah.
The staff of the NCBA in gratitude for all that they do for our Association.
Best wishes for good health, peace, and happiness this holiday season!
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15th & West Streets Mineola, NY 11501
Sex discrimination and affirmative action only in terms of the employer’s obligation without offering any opinions on whether—or why—such measures are proper or necessary.

**Penalties for Noncompliance**

Noncompliance, whether with Executive Order 13950, Executive Order 11246, the Rehabilitation Act, or VEVRAA, carries a series of penalties. Under all of these laws, a construction contract may be cancelled, suspended, or terminated in the event of a violation, and the contractor may be debarred from being awarded federal contracts.27 Other potential penalties include backpay to employees with interest and injunctions against further violations,28 as well as the withholding of progress payments.29

Earlier this year, the Department of Labor's Office of Federal Contract Compliance Programs, which enforces the affirmative action laws, resolved a contractor's violations, including violating the affirmative action laws by failing to hire qualified female and African American applicants, involved a payment of $900,000 and a commitment to offer positions to 7 qualified women and 30 qualified African American applicants as positions become available.30

Under the threat of the foregoing sanctions, construction contractors must walk a proverbial tightrope to comply with affirmative action requirements. Although the introduction of Executive Order 13950 does not outright contradict those requirements, it suggests the idea of a departure from affirmative action that may or may not take off. Ultimately, this field of law continues to evolve, and navigating it successfully will continue to require extraordinary tact on the part of construction contractors and their attorneys.

**Unpaid Wage ...**

Continued From Page 7

... but the court exceeds its authority when it unilaterally changes the terms of a contract agreed to by parties.

**Mei and Fisher Provide Clarity to Local Attorneys**

Mei and Fisher answered two important questions which lingered in the wake of Chacko. First, litigants are free to settle and dismiss FLSA actions without judicial review by using (and accepting) a Rule 68 offer of judgment.31 Though this provides certainty for parties to know that their settlements will not be rejected by a court, it does not alleviate concerns about confidentiality, since the judgment will be docketed.

Second, plaintiffs’ attorneys are not constrained to fees of one third of a settlement amount.16 Indeed, plaintiffs’ attorneys can rest easy knowing that their fees are not necessarily tied to the damages available. In other words, plaintiffs’ attorneys are now incentivized to take smaller FLSA cases because they still stand to earn fees based on their reasonable work spent on the case.


2. 796 F. 3d 199 (2d Cir. 2015).


5. Id. at 116.


7. Id. at 200.

8. 948 F. 3d 395 (2d Cir. 2019).

9. Id. at 412-14.

10. Id. at 411. The Court in Chacko did not consider whether parties may settle Rule 68(a)(1) A provisions without prejudice. Id. “Nor did it address other avenues for dismissal or settlement of claims, including Rule 68(a) offers of judgment.” Id. 11. 948 F. 3d 395 (2d Cir. 2020).

12. Id. at 412.

13. Id. at 602, 605 (noting the Circuit “eagerly rejected the notion that a fee may be reduced merely because the fee would be disproportionate to the financial interest at stake in the litigation”).

14. Id. at 605.

15. 948 F. 3d at 410.

16. 948 F. 3d at 602.
Form I-9 ...
Continued From Page 6

the form must be completed within three business days.

Second, employers must not over-document an employee’s proof of work authorization. For instance, if an employee presents documentation on List A of the List of Acceptable Documents, the employer should not require any additional documents. In the event that the employer includes additional documents on the Form I-9, s/he may be increasing the chances of financial penalties in the event that Homeland Security Investigations (HSI), the investigative arm of the Immigration and Customs Enforcement (ICE), division of the Department of Homeland Security conducts an audit. As explained below, ICE reviews all violations, even those that appear minor such as over-documenting when evaluating potential penalties.

Not only can over-documenting lead to penalties, but so too can failure to timely complete Form I-9. Again, the form must be completed within three business days of the employee’s start date. While the employee is solely responsible for completing Section 1 of the Form I-9 and providing documentation demonstrating work authorization, the employer is ultimately responsible for the proper execution of the entire form. Sections 2 and 3 must be timely completed by the employer. It is important to note that when reviewing documents, the employer is not required to maintain photocopies of work authorization documents; however, the employer must establish a consistent policy — always retain copies or never retain copies.

Once Form I-9 is completed, it must be retained by the employer for all current employees hired after November 6, 1986 as well as terminated employees, for at least one year after the date of termination, or three years after the date of hire, whichever is longer.

Internal Audits

It is advised that employers conduct their own internal audits and review the current I-9 regulations to ensure compliance. As with completion of Form I-9, when conducting internal audits an employer must consider both employment discrimination and immigration consequences. Immigration and Customs Enforcement has provided guidance for employers conducting internal audits, which all employers should review. Specifically, ICE reminds employers that internal audits cannot be discriminatory and/or retaliatory in nature; employers should not consider citizenship or national origin when conducting internal audits. ICE also provides guidance for employers to conduct the audits and correct deficiencies.

That said, when an employer is unable to verify employment, or notices an issue at the time of an internal audit, it is incumbent upon the employer to try to correct the Form I-9. This means that the employer must provide the employee with a reasonable amount of time to explain any discrepancies. Discrepancies can arise for numerous valid reasons such as name changes, typographic errors, etc. However, if an employer knowingly hires an employee without employment authorization, the employer could face potential penalties. Before making any termination decisions, it is critical that employers review such decisions with counsel to avoid potential violations of employment laws.

HIS/ICE Penalties for I-9 Violations

Penalties for I-9 violations arise during the course of an audit by HSI/ICE and can be significant for violations. Monetary penalties can be in the range of $573 to in excess of $20,000. That said, ICE has some discretion when considering potential fines. Specifically, ICE will consider the following factors: the size of the business; the employer’s good faith effort to comply with I-9 regulations; the seriousness of the violations; whether the violation involved unauthorized employees; and the employer’s history of previous violations.

Accordingly, to mitigate damages, all US employers should consider internal audits to ensure compliance with federal immigration regulations.

Curt Flood ...
Continued From Page 14

concorded with both dissents in the case. MLB praised the decision. For the MLBPA, it confirmed that collective bargaining would be the path going forward. As for Flood, it was more than just a courtroom defeat. The experience was a personal disaster that led to a decade-long decline.

In the 1980’s, Flood regained his dignity and found a new life after baseball. In 1992, the NAACP presented Flood with its 1st Jackie Robinson Award. Unfortunately, three years later, he was diagnosed with throat cancer. On January 20, 1997, just two days after his 59th birthday, Curt Flood died.

Fittingly, it was Martin Luther King Day. A martyr for the cause of free agency, his sacrifice was an affirmation of the dignity of the African-American athlete. He should be remembered; indeed he should be celebrated once again. At the very least, Curt Flood should be in the Hall of Fame in Cooperstown.

1. Flood was traded with Tim McCurry, Byron Brower, Joe Hoerner for Dick Allen, Jerry Johnson, and Cookie Rojas. After Flood refused the trade, Willie Montanez and Jim Browning were sent instead. 2. Ronald Blum, Curt Flood set off the free-agent revolution 50 years ago. 3. Brad Snyder, A High-Profile Case (2006). 4. The Cardinals were World Series Champions in 1964 (beating the Yanks 4-3); and again in 1967 (beating the Red Sox 4-3). 5. Snyder, supra n.5, at 63. 6. Mike Eisenbath, The Cardinals: Encyclopedia (1999). 7. Sports Illustrated Cover (October 7, 1968). 8. Snyder, supra n.5, at 6. 9. Id. at 1. 10. Id.


25. Barra, supra n.17. 26. Flood had a lifetime .293 batting average, hit 309 or better six times with a high of .337 in 1967; he won seven Gold Gloves and was a three-time All-Star.