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USA Regional Employment

Introduction
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INTRODUCTION

Bond, Schoeneck & King, PLLC Labor and Employment practice is comprised of 90 attorneys across the firm's offices. Key offices providing legal services across New York State include: Syracuse, Albany, Buffalo, Garden City, New York City and Rochester. Our Immigration Practice and our Employee Benefits and Executive Compensation practice work closely with our Labor and Employment attorneys. Bond represents management exclusively, in union and non-union settings. We provide legal representation, advice and counsel exclusively to management in both the private and public sectors related to wage/hour and benefits issues; development of employment-related policies, procedures and handbooks; guidance to human resource and business unit managers on the many different laws encompassing employees' rights; labor and employment-related litigation; collective bargaining, administration of collective bargaining agreements, and grievance and arbitration proceedings. Our attorneys serve large international corporations, medium and small businesses, startups, entrepreneurs, not-for-profit corporations, and public sector entities. Our industry experience runs the gamut, including manufacturing, higher education, health care, construction, transportation, financial services, retail, telecommunications, municipalities and school districts, energy, agriculture, technology, insurance, defense and government contractors, hospitality and food service.

Author

Michael I. Bernstein is a senior labor and employment law attorney at Bond, who began his career with the New York Regional Office of the National Labor Relations Board. In more than 50 years of private practice, he has represented management in all facets of labor and employment law, both in for-profit and not-for-profit settings, including in his capacities as a Managing Partner with Benetar Isaacs Bernstein & Schair, and as a Senior Partner and Of Counsel with Bond, Schoeneck & King. A graduate of Columbia Law School and the University of Michigan (Economics), Michael has Chaired the Labor & Employment Law Section of the New York State Bar Association (and is a member of its Executive Committee), and, as well, has Chaired both the Labor Committee of the New York City Bar Association and the Federal Labor Standards Legislation Committee of the American Bar Association. Michael also has served as a Member of the Governor's Advisory Panel on Economic Development, New York State; the Lt. Governor's Task Force on Plant Closings, New York State; the New York State Bar Association Privacy Initiative Task Force; and on Advisory Committees/Task Forces to the American Arbitration Association and the New York City Commission on Human Rights. Additionally, he is a long-standing member of the New York State Bar Association Committee on Diversity and Inclusion, the New York City Bar Association Committee on Minorities in the Profession, and the NYU Labor and Employment Center's Board of Advisors. In 2015, the New York State Bar Association, Labor & Employment Law Section, honored Michael with its "Lifetime Achievement Award." He is also an elected Fellow to the College of Labor & Employment Lawyers, the American Bar Foundation and The New York Bar Foundation. Michael is a past member of the Second Circuit Credentials Committee of the College of Labor & Employment Lawyers. He is a frequent lecturer and contributing editor and author to major federal and state labor and employment law treatises and periodicals.

Employment law in the private sector, as with any area of the law, necessarily begins with definition. At this stage in the evolution of our labor and employment history, one might expect the fundamental concepts and definitions to be fairly well settled. To many, however, the picture is at times somewhat unsettled. From a positive point of view, this is arguably attributable to a vibrant economy's need, and its willingness to adapt to the changes in our global and socio-economic, political and technological climate. At the same time, alternative solutions have created new challenges and, it has been argued, some unintended consequences.

A global entity seeking to establish or enhance its presence in the United States – or, more specifically, in a given region or regions of the United States – will encounter these issues in the context of what, at times, has been referred to as today's "changing workplace." No matter the nature of the entity, the "workplace" essentially remains the focus of any dispute, but the issues, relationships and considerations of today have in some measure been redefined and, indeed, expanded or delimited to the point where what traditionally was viewed as the "workplace" may, in certain circumstances, no longer be as we once knew it.

The ever-increasing use of social media and the evolution of its more sophisticated and complex vehicles have alone transformed the "workplace" to include or otherwise affect recipients not previously considered and to invoke entitlements and/or restrictions not previously recognized. The same applies to the impact upon the "workplace" of the "gig" economy, cyberspace, artificial intelligence, analytics and other technological inroads and advances. The "Me Too," "Pay Equity," "Whistleblowing" and other related movements, by highlighting their own issues, have had their own impact, whether it be in areas of alleged sexual and other harassment, discrimination, retaliation, workplace

and product safety, financial and business misconduct. All of this has occurred in the face of a steady decline in the unionization of the private sector workplace, accompanied, ironically, by efforts to expand the scope of the protections and restrictions of the labor laws to both the unorganized and organized employees in a workplace.

As a result, at times we see the parties, our federal, state and local governments, their agencies and the courts, arbitral and other forums, attempting to grapple with one form or another of the proverbial square peg in the round hole – struggling with what some might have considered relatively time-tested meanings of such terms as "employee," "independent contractor," "supervisor," "exempt" status, "joint employer," "franchisor"/"franchisee," "successor," "alter ego," "ally," a "primary," a "secondary," "civility," "privacy" and expectations of "privacy," "confidentiality," "non-disclosure" and fundamental notions of "due process," or with alleged efforts, due to misclassifications, to evade wage, overtime, pension, other benefits and/or other financial obligations.

Compounding these considerations are the overlapping and conflicting definitions and applications of terms and concepts that go to the very heart of the workplace disputes before the different – and alternative – forums our system provides in each region for such dispute resolution. A definition or application in one forum, or under one constitutional provision or statute or regulation, or contract, may well differ from the definition or application accorded that term in another forum or under another statute, regulation or contract, e.g., the interplay between the First Amendment of the Constitution and a key provision of the National Labor Relations Act ("NLRA"), or between Title VII of the Civil Rights Act and that same key provision of the NLRA. Such issues may arise at a jurisdictional level, in the course of the discovery process, or at a procedural or substantive level. They may relate to the viability of a class or collective action, or the alleged waiver of such. They may surface in the attempted enforcement of a covenant not to compete or not to solicit, or of a "no poaching" agreement, both where the individual is otherwise covered by a collective bargaining agreement or is not so covered. Indeed, the global entity, when hiring an individual subject to such restrictions, may find itself faced with a duty of due diligence to ascertain whether the individual to be hired or retained is or might be subject to enforceable restrictions that would prevent the individual from fulfilling the duties and responsibilities for which he or she is to be hired.

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The import of a regional perspective certainly compounds the issues even further, but at the same time may offer the global entity some insights, possibilities or options that otherwise might not be available in another region. The governance of this Nation's employment law is in so many respects a matter of federal law, and, accordingly, that is the primary focus of this Regional Guide. Even so, it is vital that the global entity understands that the interpretations of the federal laws in each region often may differ, whether it be in the decisions of the regional offices of the applicable federal agencies, the region's federal district courts or its circuit courts of appeals, or, ultimately, the Supreme Court of the United States in its review of regional conflicts between or among the federal courts of appeals. Certain issues, moreover, may well be governed by state or other local law and, accordingly, while our primary focus will remain one of federal law, where especially pertinent to the specific needs and interests of a global entity, this Regional Guide may take note of the interplay of such federal employment law and a region's state or other local law.

Against this background and in the belief that context matters, this Regional Guide seeks to provide a picture of the current socio-economic, political and legal climate, both in the United States generally and in the particular regions here covered. It addresses, in that context, the alternative approaches and arrangements the global entity will need to consider at its inception when defining and implementing its basic structure, its relationships with those who will be servicing it (whether in a non-union, union, or potential union setting), and the import of such decisions. It emphasizes the significance, under our law, of the interviewing process, both as to the possibilities the process offers and the legal and practical constraints our laws may impose.

Among other legal developments this Regional Guide addresses are those terms and conditions that may be of particular importance, if not crucial, to the global entity and its decision as to where in the United States it might wish to establish or enhance its presence, inclusive of restrictive covenants against competition, solicitation or poaching (when enforceable and to what extent), confidentiality, trade secrets, benefits considerations, data and other privacy issues, workplace safety, immigration and related foreign workers' issues. It includes issues and developments in the areas of discrimination, harassment and retaliation, with regard to both pertinent safeguards and restrictions. Also discussed are key issues relative to the termination of the relationship, whether to be addressed at the outset of the relationship in anticipation of that possibility or at the time of the termination.

Most importantly, this Regional Guide also emphasizes what a global entity must understand about the types of disputes that may arise; the different internal and external alternative dispute forums and other forums in which such disputes might be heard; the options available to the entity either in anticipation of such disputes or once such disputes arise; the types of remedies it might seek or to which it might be exposed; and, to the extent relevant, whether there are any extraterritorial applications of the law that may or must be taken into consideration.

The issues, as one should expect, are real and, of course, cannot be ignored, but the choices and opportunities are many. That said, I wish to acknowledge the invaluable contributions of my colleagues who, in our preparation of this Chapter, both helped identify those issues and highlighted those choices and opportunities: Louis P. DiLorenzo; Thomas G. Eron, Howard M. Miller, Thaddeus J. Lewkowicz, Michael D. Billok, Joanna L. Silver, Dennis A. Lalli.