

**National Lawyers Guild NYC Chapter Labor and Employment Committee
& Cardozo Labor & Employment Law Society**

*present the SIXTH of a series of seminars aimed at developing
closer relationships among workers rights advocates in NYC*

On Offense: Tactics for Worker Justice



Sarah Ahn, Organizer, Justice Will be Served!

Magdalena Barbosa, Supervising Attorney, Make the Road New York

Dave Colodny, Supervising Attorney, Urban Justice Center

Benjamin N. Dictor, J.D., Eisner & Mirer

Sonya Z. Mehta, Student, CUNY School of Law

Cardozo Law School • 55 5th Ave (at 12th street) • Room 206

Tuesday November 13, 2012 • 6:30 – 9:00 pm

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BIOGRAPHIES

Sarah Ahn is a volunteer with the Justice Will Be Served! Campaign as well as Chinese Staff and Workers Association and a newly formed workers' center in Flushing, Queens. She also works as a special education tutor. She currently lives in Queens.

Magdalena Barbosa currently works as a supervising attorney at Make the Road New York. She coordinates employment legal services and legal support of worker justice campaigns. She also maintains an active caseload of workers' rights cases, concentrating primarily in cases involving unpaid wages. After finishing law school, Magdalena worked at Legal Services of New Jersey in their Workers' Legal Rights Project where she litigated wage and hour, discrimination, and unemployment cases in state and federal courts and administrative proceedings. Next, as a staff attorney at MFY Legal Services, Inc., Magdalena continued her advocacy for low wage and immigrant workers and litigated unpaid wages cases involving domestic workers and restaurant workers. She also handled unemployment cases before the New York State Department of Labor. Magdalena is a graduate of Davidson College and Rutgers-Newark Law School.

David Colodny is a Supervising Attorney in the Community Development Project (CDP) of the Urban Justice Center. Since joining the CDP in 2005, David has represented low-wage immigrant workers who are participating in organizing campaigns led by community-based worker centers to improve working conditions in restaurant, supermarket, domestic, nail salon, and other service industries. The majority of David's work is representing groups of workers bringing suit under the Fair Labor Standards Act and New York Labor Law for minimum wage, overtime, and tip retention violations. David graduated *cum laude* from Georgetown University Law Center in 1995, and has been admitted in Maryland (1995) (inactive); District of Columbia (1996) (inactive); and New York (2006) State Courts, and to Federal Courts in D.D.C. (2004); D.C. Circuit (2005); S.D.N.Y. (2006); E.D.N.Y. (2006); Second Circuit (2007). Prior to joining CDP, David worked for the D.C. Employment Justice Center (2001-05) and for the law firm of Patton Boggs LLP (1995-2000).

Benjamin N. Dictor is an associate at Eisner & Mirer P.C. and co-founder of the Laundry Workers Center. Benjamin is a graduate of the Benjamin N. Cardozo School of Law (2012) and the University of Florida (2009) and is currently awaiting admission to the New York Bar. While attending law school, Benjamin worked as a clinician for the Cardozo Labor and Employment Clinic and was a staff writer on progressive labor issues for the Cardozo Jurist. Benjamin was initially hired at Eisner & Mirer as a Peggy Browning Fellow in 2010. Benjamin continued to work with the firm throughout law school, during which time he has worked on a variety of cases that are important to immigrant and low-wage worker organizing, including Flaum Appetizing Corp., and the Hot & Crusty Campaign.

Sonya Z. Mehta is a third-year law student at the City University of New York (CUNY) School of Law, where she represents working people in struggle as part of the Workers' Rights Docket of the Community Economic Development Clinic. Before law school, she was a community/labor organizer, then Co-Director, at Young Workers United (YWU) in San Francisco from 2001 to 2008. YWU is a workers' center organizing young and immigrant service sector workers. She led YWU in passing the first paid sick days law in the country, winning millions in back pay for workers, and many other victories. Sonya was a Peggy Browning Law Fellow at UNITE HERE and an AFL-CIO Law Fellow at CWA, where she continues to clerk.

TIMED OUTLINE

6:55-7:05

Moderator's Opening Remarks SONYA Z. MEHTA

- I. Introductions**
- II. Workers on the Offensive**
 - A. National Labor Relations Board developments
 - B. Organizing campaigns
 - C. Legislative campaigns
 - D. Litigation as a tool of workplace justice

7:05-7:20

Using Legislative, Political, and Legal Tools to Improve the Conditions of New York City's Car Wash Workers MAGDALENA BARBOSA

- I. WASH New York**
 - A. New York City car wash industry
 - 1. Workforce
 - 2. Conditions on the ground
 - 3. Common legal violations
 - B. The campaign players
 - C. Political partners
- II. Legislative Action**
 - A. Purpose of the bill
 - B. The Model -- California
- III. Litigation as a tool**
 - A. Using FLSA litigation as a hammer
 - B. Negotiating a FLSA case and a union contract
 - C. Challenges and lessons along the way

7:20-7:35

Wage & Hour Claims as an Organizing Tool DAVID COLODNY

- I. Relevant Statutes/Claims**
 - A. Fair Labor Standards Act, 29 U.S.C. § 201 et seq.
 - 1. Minimum Wage
 - a. Current Minimum Wage: \$7.25/hour
 - b. Current Minimum Wage for Tipped Employees: \$2.13

- 1) Tipped minimum wage conditioned on:
 - a) Employee must perform the type of work in which one regularly receives tips (e.g., restaurant server);
 - b) Employer notice to employees of the tip credit law and intent to claim tip credit against minimum wage obligations;
 - c) Employee must keep all tips (tip pools are okay if all the employees receiving tips directly serve customers – e.g., in a restaurant the tip pool cannot include kitchen employees); and
 - d) Tips + Wages must equal at least \$7.25 per hour.
 2. Overtime
 - a. Time and a half over 40 hours per week.
 - b. Common exceptions: Executive, professional, administrative
 - c. Common violations:
 - 1) Paying a weekly or daily salary and not paying a higher rate for overtime hours
 - 2) Misclassifying workers as independent contractors
 - 3) Shaving hours so that workers don't get paid for anything more than 40 hours per week
- B. New York Labor Law
1. In general, consult regulations which are industry specific (available on DOL website):
 - a. Wage Order for the Hospitality Industry (restaurants and hotels)
 - b. Wage Order for the Building Service Industry
 - c. Wage Order for the Hospitality Industry
 - d. Wage Order for Farm Workers
 2. Minimum Wage – N.Y. Labor Law § 652
 - a. Current Minimum Wage: \$7.25/hour
 - b. Current Minimum Wage for Tipped Employees depends on type of work:
 - 1) Restaurant Servers: \$5.00
 - 2) Restaurant Delivery Workers: \$5.65
 - 3) Conditions for entitlement to a tip credit similar to conditions under federal law
 3. Overtime
 - a. Similar rules and exceptions to Federal Law
 4. Tip Theft -- N.Y. Labor Law § 196-d.
 - a. New York prohibits employers or their agents from taking the employees' tips

- b. Examples of Violations:
 - 1) Employer requires servers and busboys to pool tips, and then orders that shares of the tip pool be paid to managers, owners, or other employees who do not serve customers directly (kitchen workers, custodians);
 - 2) Employer charges a mandatory gratuity or a “service charge” that customers understand to be a charge in lieu of a gratuity, and then employer keeps a percentage of those charges;
 - 3) Employer pays for business expenses out of the tip pool; or
 - 4) Employer deducts a charge for converting credit card tips into cash, but the charge exceeds what the employer actually pays the credit card companies to process the payment (typically around 3%).
- 5. Spread of Hours Pay
 - a. Some workers who are not exempt from overtime are supposed to receive an extra hour pay at minimum wage each day they work a spread of hours greater than ten hours.
- 6. Split Shift
 - a. Some workers who work a split shift are supposed to receive an extra hour pay the minimum wage for each day they work a split shift.
- 7. Expenses and Deductions
 - a. Employer cannot deduct for fines, breakages, or make employee pay employer expenses. N.Y. Labor Law § 193.

II. Remedies and Procedural Issues

A. Records or Absence Thereof

- 1. Employers are required to keep detailed records of, inter alia, hours worked and wages paid each week
- 2. If Employer does not have records, employee can prove case through credible testimony and employer will have to overcome burden that the employee’s credible testimony is accurate.

B. Individual and Joint Liability

- 1. Individuals with sufficient control can be held jointly and severally liable even if there is a corporate employer
- 2. More than one entity can be liable if they each had sufficient control

C. Statutes of Limitations

- 1. FLSA: 2 Years, or 3 Years if violations were willful
 - a. Equitable tolling may be possible
- 2. NYLL: 6 Years

D. Liquidated Damages

- 1. FLSA – 100% liquidated damages unless employer has “good faith” affirmative defense

2. NYLL – 100% liquidated damages unless employer has “good faith” affirmative defense
 - a. Most courts hold that only 25% liquidated damages available for claims arising before April 9, 2011 (effective date of the Wage Theft Prevention Act)
 - b. For violations occurring before November 2009, employee must prove that violations were “willful”
 3. Some courts award liquidated damages under both statutes for the same underlying violations
- E. Interest
1. FLSA – you cannot get pre-judgment interest on top of liquidated damages because both are considered compensatory
 2. NYLL – Pre-judgment and post-judgment interest at 9% per annum
- F. Attorneys’ Fees and Costs
1. Prevailing employees entitled to reasonable attorneys’ fees and costs under FLSA and NYLL
 2. No Waiver
 - a. Under both FLSA and NYLL, it is very hard or impossible for an employee to waive their rights unless supervised by an attorney, the DOL and/or a Court
 3. Class Actions
 - a. FLSA: Class actions are called “collective actions” and are “opt-in” rather than “opt-out”
 - b. NYLL: Class actions are opt-out

III. Retaliation

A. FLSA

1. Retaliation prohibited if employee has filed a complaint in court or with government agency
2. Most courts hold it is not unlawful under FLSA to retaliate against employee who complains only to supervisor (but it might be unlawful retaliation under the National Labor Relations Act)

B. NYLL

1. Formal and informal complaints are protected activities

IV. Immigration Status

A. Generally, immigration status is irrelevant for wage and hour claims

1. Once employees have worked, even if without authorization, they are entitled to be paid a lawful wage for their work
2. Courts often grant protective orders or deny discovery into immigration status because it is harassing and would have an in terrorem effect on plaintiffs

B. Immigration status may be relevant to claims for unlawful retaliation because certain remedies may implicate status: backpay for periods of unemployment, reinstatement.

7:35-7:50

**Unions, Worker Centers, and OWS:
The Hot and Crusty Campaign for Justice and Dignity
BENJAMIN N. DICTOR**

- I. Hybrid Worker Center Organizing—the Laundry Workers Center Model**
 - A. The Laundry Workers Center
 - 1. Introduction
 - 2. Structure
 - 3. Role in Hot and Crust Campaign
 - B. Strengths of organizing through a worker center
- II. Wage & Hour Law and Organizing Campaigns**
- III. Protecting Immigrant Worker Organizing after *Hoffman Plastics***
- IV. Partnership with Occupy Wall Street and Community Activists**
 - A. Partnerships developed in the Hot and Crusty campaign
 - B. Looking forward to future campaigns

8:05-8:20

**Mobilizing Community Stakeholders in Worker Campaigns
SARAH AHN**

- I. Justice Will Be Served! Campaign**
 - A. Introduction
 - B. Tactics used
 - C. Wins
 - D. Challenges: why we need to go beyond the law

8:20-8:50

Moderated Panel Discussion

- I. Lawyers, Organization, Organizers, Organizing, and Clients**
 - A. What do organizers want from attorneys?
 - B. What are limitations on attorneys?
 - C. Suggestions for navigating ethics and movement lawyering
- II. Audience Selected Discussion**

8:50-9:00

Open Questions & Answer

MATERIALS

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Sample, Kirk. "Queens Carwash's Employees Are First in City to Join Union." The New York Times, September 9, 2012. <http://www.nytimes.com/2012/09/10/nyregion/employees-at-a-queens-carwash-vote-to-unionize.html>

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