

## CIHLER Roundtable

# *Dealing with Shifting Labor Employment Sands*

by David Sherwyn

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### ABOUT THE AUTHOR

**David Sherwyn** (BS, JD, Cornell University) is the John and Melissa Ceriale Professor of Hospitality Human Resources, professor of law at Cornell University's School of Hotel Administration, and director of the Cornell Institute for Hospitality Labor and Employment Relations. Dave is also a research fellow at the Center for Labor and Employment Law at New York University's School of Law and of counsel to the law firm of Stokes, Wagner.



From 2006-2009, Dave was the director of the Center for Hospitality Research at Cornell University (CHR). Prior to joining the School of Hotel Administration, Dave practiced management-side labor and employment law. Dave has published articles in, among others, *Northwestern Law Review*, *Stanford Law Review*, *UC Hastings Law Journal*, *Indiana Law Journal*, *Berkeley Journal of Labor and Employment Law*, *Fordham Law Review*, *University of Pennsylvania Labor and Employment Law Journal*, and *Cornell Hospitality Quarterly*. Dave annually teaches Business and Hospitality Law, a required class with more than 200 students, and Labor Relations in the Hospitality Industry, in conjunction with Cornell's

Industrial and Labor Relations (ILR) School. In his 17 years as a faculty member, Dave has received 15 Teacher of the Year awards. In 2014 he was named a Stephan H. Weiss Presidential Fellow—the most prestigious teaching award at Cornell University. Dave conceived of, organized, and hosted the CHR's first hospitality industry roundtable, and has hosted more than 20 Labor and Employment Law Roundtables, while other centers and institutes have hosted roundtables in the school's other hospitality disciplines

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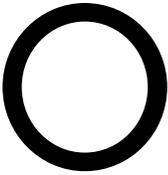
## EXECUTIVE SUMMARY

Changes in regulations and tighter interpretations of existing regulations engaged participants in 14th annual Labor and Employment Roundtable, hosted by the Cornell Institute for Hospitality Labor and Employment Relations. They also reviewed changes in union organizing rules. Two Supreme Court decisions dealt with the challenging application of accommodating workers' health and religious needs, while a new ruling by the National Labor Relations Board calls into question the supposedly arm's length relationship of employee leasing firms and their clients, as well as franchisors and franchisees. The NLRB also has shortened the campaign time for union elections. In one Supreme Court case, *Young v. United Parcel Services, Inc.*, the Court pointed to a simple principle when employers implement policies for those with illness or medical conditions. Policies must be consistent with regard to how on-job and off-job health issues are treated, and the company's policy must not be driven by economic considerations. That is, the Court stated that an employer's denial of a light-duty assignment for an employee could not be based on cost or convenience. The case relating to religious accommodation also involved an economic hinge. In an earlier case, the Court had held that religious accommodations are limited to that which would have no more than a *de minimus* cost on the employer. In this case, *EEOC v. Abercrombie & Fitch Stores Inc.*, Abercrombie had declined to hire a woman wearing a headscarf on the assumption that she would need a religious accommodation. The Court frowned on the idea that an employer would take religious accommodations into account when deciding whether to hire a person. The franchising industry is attempting to make sense of the NLRB ruling regarding joint employment, in which the board ruled that franchisors that maintain some kind of control over their franchisees' employees should be considered joint employers of those employees. This is a complicated matter, and the situation is still in flux. Finally, with regard to the telescoped union campaign ruling, these are supposed to benefit the unions. So far, however, there's no indication that the change has affected the overall outcome of union election campaigns.

CIHLER Roundtable

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 On Monday October 5, 2015, CIHLER held its 14th annual Labor and Employment Roundtable. The roundtable featured over 30 private practice lawyers, in-house counsel, VPs of human resources, faculty, and deans. In addition, over 200 students attended the event. The roundtable consisted of three main topics:

Two new Supreme Court accommodation cases—What do they mean, and how will they change practice.

*Discussants:* Barry Hartstein '73, of Littler Mendelsohn; and David Ritter '80, of Barnes & Thornburg;

Joint-employer doctrine—Where are we now and where are going. *Discussants:* John Gessner, of Front Burner Restaurant Group, and Gregg Gilman '85, of Davis & Gilbert; and

New NLRB organizing rules—Are they a game changer? *Discussants:* Paul Ades, of Hilton, and David Rothfeld, of Kane, Kessler.



**John Ceriale, founder and president, Prospect Advisors.**

The first session addressed the Supreme Court's decisions in *Young v. United Parcel Services, Inc.*,<sup>1</sup> and *EEOC v. Abercrombie & Fitch Stores Inc.*<sup>2</sup> Both cases dealt with accommodations for protected employees. In *Young* the issue revolved around pregnancy, and in *Abercrombie* the issue was religion. At the crux of each case is the fact that protections for religion, pregnancy, and disabilities all require accommodation. Religious (1964) and pregnancy (1973) protections, however, pre-date disability by such a significant amount of time that the term accommodations has acquired several different meanings, as interpreted by the courts. The EEOC has made it a priority to level this playing field, and *Young* and *Abercrombie* seemingly did just that. At least that is how the popular press reported the decisions. These reports, however, did not accurately characterize the cases. As described in a previous report,<sup>3</sup> the cases' holdings are narrow and do not really stand for the principles as reported.

### Clarifying Pregnancy Accommodations

In *Young*, the employer, UPS, had a policy of offering light duty to employees who: **(1)** were hurt on the job; **(2)** lost their Department of Transportation certification to operate a vehicle; or **(3)** had disabilities covered by the Americans with Disabilities Act (ADA). The company did not, however, offer light duty to

<sup>1</sup> 135 S.Ct. 1338 (2015)

<sup>2</sup> 135 S.Ct. 2028 (2015)

<sup>3</sup> "The U.S. Supreme Court Rules in Favor of Employees in the *Young* and *Abercrombie* case: What Do They Really Hold," *Cornell Hospitality Report*, Vol 15, No. 20, Cornell Center for Hospitality Research, and Cornell Institute for Hospitality Labor and Employment Relations. .

employees who were hurt outside of work (e.g., slipping in the shower, carrying a child) or who could not lift due to pregnancy.

In *Young*, the district court had granted summary judgment in favor of UPS, and the Court of Appeals for the Fourth Circuit upheld the lower court's decision. Summary judgment is granted when there are no issues of material fact to be decided. Here, however, *Young* argued that some employees who did not fit into the any of the three categories listed above did, in fact, receive an accommodation. Such an allegation, if it had any merit, made summary judgment inappropriate, but the Supreme Court generally does not hear cases simply to correct lower courts' factual errors. Instead, the Court will take cases when there is split in the circuits' holdings or there is a legal issue that needs to be addressed. Citing cases from the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, and 9<sup>th</sup> circuits the Supreme Court cited a need to clarify the law with respect to pregnancy. Specifically, the issue was the meaning of the following statutory language: "[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes... as other persons not so affected but similar in their ability or inability to work."<sup>4</sup>

The Court asked: "Does this clause mean that courts must compare workers only in respect to the work limitations that they suffer? Does it mean that courts must ignore all other similarities or differences between pregnant and non-pregnant workers? Or does it mean that courts, when deciding who the relevant 'other persons' [1349] are, may consider other similarities and differences as well? If so, which ones?"<sup>5</sup>

The Court seemingly answered these questions by relying on the 1973 *McDonnell-Douglas* precedent,<sup>6</sup> under which a plaintiff needed to prove that there was disparate treatment in order to prevail in a discrimination case. Under such a standard, an employer could provide light duty for ADA and work-related injuries, but not for off-work "injuries" like appendicitis or pregnancy. The problem was the Court then stated that an employer's denial of light duty to pregnant employees could not be because of cost or convenience. This is a radical departure from *McDonnell-Douglas*, and thus, the popular press reported that after *Young* employers had to provide light duty to pregnant employees.

The roundtable participants interpreted the case as being unclear and misleading, but relatively easy to comply with. As David Ritter of Barnes & Thornburg stated: "You have to ask yourself, why not provide light duty to pregnant employees?" The chief answer to this largely rhetorical question is that a company simply may not have light duty jobs. If that is the case, the participants agreed, an employer would not have to provide light duty to pregnant employees, ADA employees, or worker's compensation employees. Another, less solid reason

<sup>4</sup> 42 U. S. C. §2000e(k), (emphasis added)

<sup>5</sup> *Id.*

<sup>6</sup> *McDonnell-Douglas Corp. v. Green* 411 U.S. 792 (1973)

for not wanting to provide light duty for pregnant employees is that if a work force is predominately young and female the employer may fear that there would be a rash of pregnant employees needing light duty. The participants agreed that this reason should not drive policy. Light duty becomes a problem when employees seek to stay on the reduced work load for many months and even years. By definition, pregnancy is short term. Thus, participants concluded that it was simply unlikely for there to be rash of long-term light-duty requests arising out of pregnancy. With that realization, the conclusion was simple: **(1)** if you don't have light duty you are safe with regards to denying pregnancy; and **(2)** if you have light duty—include pregnant people in that category.

### Religious Accommodation

The *Abercrombie* case was another situation where the popular press misinterpreted the law. Abercrombie & Fitch's dress code prohibits "caps" and other headwear. Here the plaintiff, a Muslim, applied for a job while wearing a religious head scarf. The company did not ask the employee whether she needed a religious accommodation so that the "cap" policy would not apply to her. Instead, the company assumed that the head scarf was a religious requirement, and since it would violate the cap policy, the company refused to hire the plaintiff. Here, the roundtable participants were torn between the law and the reality of a changing diverse workforce. Both Ritter and Paul Wagner of Stokes, Wagner, advocated for religious tolerance and the elimination of cap policies that prohibit religious headwear. The HR professionals in the room concurred that a policy like this one was a relic that needed to be eliminated from the 21st workplace.

The lawyers, however, delved into the nuances of the case. The Court did not hold that cap policies are unlawful. Indeed, the Supreme Court in *TWA v. Hardison* held that religious accommodations are limited to that which would have no more than a *de minimus* cost on the employer. The *Abercrombie* court did not hold that the head scarf did not have less than a *de minimus* cost on the employer. Instead, the Court simply held that an employer cannot refuse to hire an employee because the company assumes the need for an accommodation and does not wish to provide it. Indeed, this case provides no guidance as to dress policies as they apply to religious accommodations, other than the fact that the EEOC is focused on this issue and that litigation associated with a dress code is expensive and difficult, if not impossible. The participants questioned how the employer could prove that the head scarf negatively affected business. The participants concluded from legal perspective that employers can deny these types of accommodations, but from a practical (i.e., the cost of defending them), ethical, and moral standpoint, it makes sense to accommodate.

The participants were in agreement, until other examples of "religious accommodations" muddied the waters. A flight attendant who played in a reggae band, claimed that having



Roundtable chair David Sherwyn, director of the institute, opens the sessions.

below-the-shoulder dreadlocks was part of his religion (the employer thought it was more to support the band's image), and a woman who belonged to the Church of Body Modification, demanded multiple face piercings. For the group the answer seemed uncomfortably clear—traditional dress of traditional religions should be accommodated, but tenets of non-traditional religions that violate policies need to be examined on a case-by-case basis. There is nothing more frustrating for management employment lawyers to advocate case-by-case analysis as it provides no guidance, but the issue is too new to have clear rules.

### The Joint Employer Doctrine

The next session concerned the joint-employer doctrine. Several weeks prior to the roundtable, the National Labor Relations Board decided the Browning-Ferris Industries (BFI) case, which dealt with leased employees. In BFI the National Labor Relations Board (NLRB) held that BFI was the joint employer of those employees it leased from an employee supplier firm, Leadpoint. For the last 30 years the NLRB has found joint employment only when the putative employer exercised direct control over the employees in question. In BFI, the NLRB returned to its former standard under which an employer who had the authority to exercise control, even if it did not do so, was a joint employer.

The participants began the discussion by considering hospitality examples where it is common to lease employees and where the putative employer may now be a joint employer. For



**David Rothfeld, of Kane, Kesler, weighs the issues involved in speedier union elections. His co-discussant is Paul Ades, senior vice president for labor relations for Hilton Worldwide.**



example, a hotel that leases out its valet service but demands that the employees wear uniforms of the hotel, abide by the hotel's dress code, and greet guests in a certain manner would likely be seen as the joint employer. If the hotel reserved the right to prohibit a certain employee from working at the hotel or limited the wages in any way, the putative employer would certainly be the joint employer.

The discussion then moved to the effects of BFI. The participants all agreed that it was naïve (and somewhat silly) for employers who lease employees that, as one participant stated, are part of the “belly of the hotel,” to believe that these employees would not be considered joint employees. The easy answer is to contract with “stand-up” suppliers who do not violate the law, but if they do, can indemnify the putative employer. This is not a problem for issues that are covered by insurance. Putative employers can require insurance and can be notified if the coverage lapses.

Certain claims, like wage and hour disputes, however, are not covered by insurance. Thus, putative employers need another mechanism to ensure that the supplier is in compliance and, if not, can pay the legal fees and damages. Even if that is the case, the BFI case resulted in a question of union organizing. The putative employer would have collective bargaining obligations under the National Labor Relations Act (NLRA). More troubling, the NLRA would prohibit the putative employer from cancelling the contract with the supplier if that cancellation was motivated by the firm's desire to avoid collective bargaining. In that case, the employer would be required to negotiate the decision and the resulting effects if the employer were to seek to cancel the contract for labor costs or any reason that the union could bargain over.

The participants agreed that after BFI it made sense to examine all contract employment to see whether it was necessary and worth the risk. Conversely, hotel operators at the table contended that when opening a new hotel, the operator simply does not have the people power and the knowledge to staff the property. In such situations leased labor is the only way to ensure staffing. Still the conclusion of the participants was that leasing employees in the “belly of the hotel” is risky (in terms of disavowing joint-employer status). Thus, the participants agreed that they, or their clients, were limiting such leasing and, when it cannot be avoided, are accepting joint-employer status and ensuring compliance with all labor and employment standards.

The conversation got more intense when we turned to joint-employment as it relates to franchising. John Gessner, general counsel of Front Burner Restaurant Group, is a franchisor. John explained that the business model of franchising would not allow joint employment. Franchising allows brands to expand without expending capital and without establishing the infrastructure necessary to manage the large workforce it takes to operate a labor-intensive business such as a restaurant. The infrastructure includes human resources managers, labor

counsel, and regional operational managers. These people ensure compliance by being “on the ground” to ensure adherence to company policies and legal standards. In the franchising model, the franchisor owns and operates the store and the franchisor simply provides guidance. Indeed, the last 50 years of law have taught franchisors to avoid too much control. Now, the franchisor simply does not know whether it will be considered to be the joint employer and is in situation where it cannot afford to manage the franchisees, but could liable if there are legal violations.

At the time, and currently, the NLRB has numerous cases against McDonald’s where the NLRB claims McDonald’s is the joint employer. The participants agreed that an adverse ruling against McDonald’s could represent a sea change whereby the hospitality industry’s most prevalent model could be seriously compromised.

### NLRB Elections

The final issue was the effect of the so-called “quickie” or ambush elections. As a way of background and oversimplification, unions organize either top-down or bottom up. Top-down occurs when the union and the employer agree to card-check neutrality agreements under which the employer agrees to stay neutral as the union attempts to organize, generally allows the union onto the property, and agrees to recognize the union when 50 percent + 1 of the employees signs a card stating a wish to have the union represent the employees.

The obvious question is why an employer would enter into such an agreement. The reasons include, but are not limited to (1) it is required by a collective bargaining agreement; (2) the local government requires such agreements before it will issue building permits; or (3) the employer and the union cut some sort deal where both sides benefit. The effect of card-check neutrality is significant—if the employees have the propensity to unionize under card-check they will.<sup>7</sup> Alternatively, with an election, the employer has a strong chance of prevailing. Consequently, Unite-Here, the world’s largest hotel union, announced almost 20 years ago that it would no longer organize bottom up with elections.

**Rule changes.** Under the NLRB rules, elections were to be held approximately 42 days after the filing of a petition. As of April 2015 the NLRB reduced the time of elections from 42 to no more than 21 days. Furthermore, they eliminated the pre-election litigation and held all issues until after the election if necessary. With the rules changed, the question for the panel was how the union did react, and how the employers should react. The answers are still being determined, but changes are on the way.

<sup>7</sup> I base this statement on the following analysis. Unions need 30 percent of the eligible voters to sign authorization cards to file an election petition. In the vast majority of cases, however, the union will not file unless it has cards from more than 60 percent of the voters. Since the union needs just one vote over 50 percent to be certified in a card-check, any bargaining unit that files for an election using the 60-percent standard would have been certified under card-check. Contrast that to the uneven results in the 26 petition filings in the analysis presented below. Elections are a better bet for employers than card-check.



David Ritter, partner in Barnes & Thornburg LLP, opened the discussion of the Supreme Court accommodation cases, joined by Barry Hartstein, shareholder, co-chair, EEO and diversity practice, Littler.



Number of days from petition to election, and union win rate

NAICS 721 "Accomodation" April 2015 - March 2016

# Days	# Elections Held	# Union Wins	% Union Wins	% of Total Elections Held
1 to 10 Days	2	2	100.0%	4.1%
11 to 20 Days	14	10	71.4%	28.6%
21 to 30 Days	27	21	77.8%	55.1%
31 to 40 Days	3	1	33.3%	6.1%
41 to 50 Days	2	2	100.0%	4.1%
51 to 60 Days	0	0		
61+ Days	1	1	100.0%	2.0%
Totals	49	37	75.5%	100.0%

NAICS 721 "Accomodation" April 2014 - March 2015

# Days	# Elections Held	# Union Wins	% Union Wins	% of Total Elections Held
1 to 10 Days	0	0		
11 to 20 Days	1	1	100.0%	2.5%
21 to 30 Days	6	3	50.0%	15.0%
31 to 40 Days	22	15	68.2%	55.0%
41 to 50 Days	7	6	85.7%	17.5%
51 to 60 Days	0	0		
61+ Days	4	1	25.0%	10.0%
Totals	40	26	65.0%	100.0%

Source: Bloomberg BNA NLRB Elections database

To assess the effect of the rule change, subsequent to the roundtable we compared union elections in the hotel industry in two twelve-month time periods: April 1, 2014, to March 31, 2015, and April 1, 2015, to March 31, 2016. Based on Bloomberg data, the number of days between petitions and elections decreased substantially. In 2014-2015, 82.5 percent of the elections took place more than 30 days after the petition, 15 percent occurred 21 to 30 days after the filing, and only 2.5 percent occurred within 20 days. Twelve months later, in 2015-2016, 12.2 percent of the elections occurred more than 30 days after filing, 55.5 percent occurred between 21 and 30 days, and 32.7 percent occurred within 20 days. This change in time is statically significant. The number of elections increased from 40 to 49, but that increase is not significant.

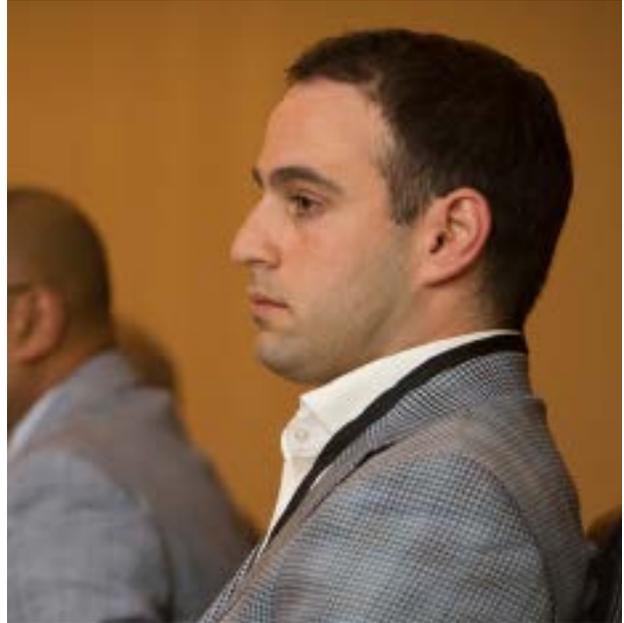
The other major change was the election activity by Unite Here, based on a declaration by its predecessor union, HERE, which was the largest hotel union in the world. The participants opined on whether HERE's mid-'90s pronouncement would hold, with the result that it would not participate in NLRB elections and would instead use its leverage to convince employers to sign card-check neutrality agreements. The participants noted that Unite Here did indeed retire from elections. The union filed 13 petitions in 2014-2105, and 26 petitions in 2015-2016. This is a statistically significant increase. Of the 13 petitions filed in 2014-2015, the union won 5, the hotel won 2, and 6 were unresolved. In 2015-2016, with 26 petitions, the union won 11, the hotel 6, and 9 were unresolved. The two

years' results are not significantly different. Thus, the conclusions from the Unite Here and Bloomberg's industry data sets are clear: the number of petitions being filed has increased and the amount of days between the filing and the election have decreased, but the election results have not changed.

The lack of significantly different outcomes leads to the question about the effect of the change in the campaign period. Long accepted research holds that the number of days from petition to vote will have a significant effect on union win rates. The theory is that each day of the campaign period allows employers to identify the employees who are pro-union, pro-company, and fence sitters. The employer then campaigns to the fence sitters who know they have been identified. Those leaning to the company vote no, while those leaning to the union do not vote (since they have been identified). This theory concludes that the longer campaign period means the employer wins. In our two data sets, the unions' win rates increased from 65 percent to 75 percent (accommodations industry) and from 38 percent to 42 percent (Unite Here), but neither result is statically significant. Thus, this result could just be chance. There are several explanations for the anomalous results: **(1)** the sample is too small; **(2)** unions are withdrawing from elections they think they will likely lose and that skews the data; or **(3)** the unions have avoided elections for so long that they are not as skilled as they once were. Time and subsequent data should shed light on these results.

The Roundtable participants believed that the quick elections will not radically change the Unite Here strategy of top down organizing using card-check to bottom up organizing using elections. Still, everyone agreed that the organizing quiver has another type of arrow that Unite Here and other unions will use more frequently than they did before the change. In other words, NLRB elections are on the rise in the hotel industry and that increase should correspond to increase in the effectiveness of union organizers.

If this is the case, the question is what employers will do. Some employers are indifferent to unionization and thus, business as usual prevails. Other employers are anti-union, for either philosophical or business reasons. These employers are now engaging in the so-called 365-day-per-year campaign. Such campaigns are not what critics would call classic union busting. Instead, the participants emphasized that a successful 365 campaign is simply strong human resources. In other words, employers are ensuring that their wages are in line with those of non-union and union hotels in their competitive set. There is a new emphasis on communication and managers are being trained to treat people in a fair and equitable way. Hotels with poor human resources were always prime union targets. The target on those hotels just got bigger and easier to hit. Finally, because of the decrease in time between petitions and elections, the roundtable participants explained that employers who wish to avoid unionization must be ready to campaign at a moment's notice. These employers must have: **(1)** their team in place; **(2)** identified their preferred methods for communicating their positions; **(3)** an idea of where each employee stands; and **(4)** strong intelligence as to what the issues are driving the employees. ■



**Danny Sikka, senior counsel for McDonald's, considers the NLRB's joint-employer ruling.**



**Ruth Seroussi, of counsel in Buchalter Nemer's labor and employment practice group.**

## Labor and Employment Law Roundtable Participants

October 4-5, 2015

**Dave Sherwyn** '86, JD '89, *John & Melissa Ceriale Professor of Hospitality Human Resources, Academic Director of CIHLER and Stephen H. Weiss Presidential Fellow, Cornell University School of Hotel Administration, Chair*

**Paul Ades**, *Senior Vice President of Labor Relations, Hilton Worldwide, Inc.*

**Rachel Aleks**, *Assistant Professor, Cornell University ILR School*

**Robert Bernstein** '91, *Partner, Laner Muchin, Ltd.*

**Christopher Boone** '05, MS '09, *Assistant Professor, Cornell University School of Hotel Administration*

**John Ceriale** P '16, P '18, *Founder and President, Prospect Advisors*

**Dawn Chutkow** PhD '09, *Visiting Professor, Cornell University Law School*

**David Garland**, *Chair, Labor Steering Committee, Epstein Becker Green*

**John Gessner**, *Vice President and General Counsel, Front Burner Restaurants LP*

**Gregg Gilman** '85, *Partner, Co-chair, Labor and Employment, Davis & Gilbert LLP*

**Glenn Grindlinger** '96, *Partner, Fox Rothschild LLP*

**Kevin Hallock**, *Kenneth Kahn '69 Dean and Joseph Rich '80 Professor, Cornell University ILR School*

**Barry Hartstein** '73, *Shareholder, Co-chair, EEO and Diversity Practice, Littler*

**Michael Heise**, *Professor, Cornell University Law School*

**Richard Hurd**, *Associate Dean for External Relations, Professor of Labor Studies and Associate Director of CIHLER, Cornell University ILR School*

**Adam Klausner** '84, JD '88, *Senior Lecturer, Cornell University School of Hotel Administration*

**Jim Knudson**, *Director of Human Resources, Phillips Seafood Restaurants*

**Holly Lawson**, *Area Director of Human Resources, sbe*

**Kara Maciel**, *Chair, Labor, Employment Practice Group, Conn Maciel Carey PLLC*

**Alan Momeyer**, *Vice President, Human Resources, Loews Corporation*

**Harold Morgan** '78, *Senior Vice President Human Resources, White Lodging Services*

**Eduardo Peñalver**, *Allan R. Tessler Dean and Professor of Law, Cornell University Law School*

**David Ritter** '80, *Partner, Barnes & Thornburg LLP*

**Kamilla Rodrigues** '08, *Associate, Pashman Stein, P.C.*

**Sean Rogers**, *Assistant Professor, Cornell University School of Hotel Administration*

**David Rothfeld**, *Partner, Kane Kessler, P.C.*

**Stewart Schwab**, *Jonathan & Ruby Zhu Professor of Law, Cornell University Law School*

**Michael Selmi**, *Professor of Law, George Washington University*

**Ruth Seroussi** '92, *Of Counsel, BuchalterNemer PC*

**Daniel Sikka** '01, *Senior Counsel, Global Labor and Employment Law, McDonald's*

**Bruce Tracey**, *Professor of Human Resources Management, Cornell University School of Hotel Administration*

**Lisa Turano**, *Vice President of Legal and General Counsel, President of Turano Foundation, Turano Baking Company*

**Paul Wagner** '86, JD '90, *Adjunct Assistant Professor, Cornell University School of Hotel Administration*

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**Carol Zhe**, Program Manager  
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Center for Hospitality Research  
Cornell University  
School of Hotel Administration  
389 Statler Hall  
Ithaca, NY 14853

607-254-4504  
chr.cornell.edu

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