

Labor AND Employment Law

WINTER 2004
VOLUME 32, NUMBER 2
Section of Labor and
Employment Law
American Bar Association

GAO Calls PBGC Program 'High Risk': Unfunded Liability Leads to Concern About Single Employer Defined-Benefit Plans

By Daniel J. Finerty

The \$350 billion problem of unfunded pension liabilities led the General Accounting Office (GAO) in July to designate the Pension Benefit Guaranty Corporation's (PBGC) single-employer pension insurance program as "high risk." The PBGC has become saddled with a growing \$8.8 billion deficit.

Congress has begun to look for a short-term fix to ease the pressure and allow further study of long-term solutions to the problem of unfunded pension liability and underfunded single employer defined-benefit pension plans. Employers who sponsor such plans are concerned about increased premiums that may force them out of the pension system. Due to recent examples of failed plans that have resulted in reduced benefit levels for retirees, unions and employees are increasingly anxious about the security of their pensions.

The PBGC's growing deficit and the underfunding of defined-benefit plans have forced a realistic evaluation of whether a huge bill will eventually land in taxpayers' laps in a savings-and-loan-type bailout scenario.

The PBGC, funded by insurance premiums paid by participating plans, was created by ERISA in 1974 to provide plan termination insurance for private sector, single employer defined-benefit pension plans. The PBGC insures approximately 31,000 single-employer valued at about \$1.5 trillion, guaranteeing benefits for 34 million workers. If an insured pension plan is terminated, the Corporation becomes the trustee and guarantees limited annual pension benefits (\$3,664.77/month or \$43,977.24/year) to participants.

In 2002, the PBGC insurance program suffered its largest single-year financial loss. The program had a \$7.7 billion surplus in 2001, yet by the end of 2002 the



program had a deficit of \$3.6 billion—an alarming \$11.3 billion swing. During that period, program liabilities went from \$14 billion to more than \$29 billion. Terminations of PBGC-insured pension plans accounted for more than 80 percent of the total \$11.3 billion swing. Several steel industry pensions, such as LTV Corpo-

continued on page 14

“While there is not an immediate crisis, there is a serious problem that relates to the need to protect the retirement security of millions of American workers and retirees. . .

—Testimony of
David M. Walker,
Comptroller General of the
United States and head of
the General Accounting
Office, before a Congressional
Subcommittee on Education
and the Workforce,
September 4, 2003

Comments



from the Chair

Stephen D. Gordon

The past few months have been busy, exciting, and productive. First and foremost, I am pleased to report that the ABA Board of Governors adopted the majority recommendation of the ABA Pension Review Committee to retain the defined benefit pension plan for ABA employees, with a change from a final average pay formula to a career average pay formula. The decision was consistent with one of the options recommended by our Section in our Submission to the Pension Review Committee. Our Section owes a tremendous debt of gratitude to the Section members who volunteered to serve on our Pension Task Force. Bernie King, Gordy Krischer, Jani Rachelson, Evan Miller, Mary Ellen Signorille, Doug Greenfield, John Bohman, David Levin, and Peter Turza spent many hours reviewing materials, discussing issues, and drafting a consensus report to the Section Council. Extra special thanks are due to Bernie King, who served as Section liaison to the Pension Review Committee, contributed substantial additional time, and made a significant contribution to the outcome. Also, I want to acknowledge the hard work of Chair-Elect Howard Shapiro, who was instrumental in enabling the Section Council to reach a consensus position on the pension issue and to avoid the divisive consequences that would have accompanied submitting separate caucus reports. Our Section consensus protocol was sorely tested at the fall Council Meeting and met the challenge. Indeed, it is the consensus philosophy, which had its genesis in 1946, that provides us with the mechanism and the incentive to resolve contentious matters and to reach agreement.

I am also pleased to report that on November 14, 2003, Bill Earnest and I met with Federal Mediation and Conciliation Service (FMCS) Director Peter Hurtgen, Chief of Staff John Toner, Special Assistant to the Director Peggy McNieve, and General Counsel Alfred Perlstein to discuss the FMCS proposed regulation precluding advocates from inclusion on the list of neutrals. Our Section submitted written comments to FMCS to revise the regulation to permit advocates to serve as mediators. Subsequently, the FMCS requested to meet with Section representatives to discuss safeguards that would accompany this change. We have been authorized by FMCS Director Hurtgen to state that we are "cautiously optimistic" that the FMCS rule will be revised. We also commented to FMCS that the eligibility point system should be adjusted to accommodate advocates as mediators and the Agency asked us to submit a proposed point system. I have assigned this task to Bill Earnest, the co-chairs of our ADR committee, Kevin McCarthy, Jon Rosen and Jackie Drucker, and to our council liaisons to the ADR committee, Carl VerBeek and Connye Harper.

Significant progress is being made by many of our committees and task forces. Over the next few weeks, as a result of the efforts of our union attorney and individual employee attorney working groups chaired by Clint Miller and John Beasley and the drafting skills of Mary O'Melveny, Nancy Hoffman, and Darlene Vorachek, letters soon will be mailed to AFL-CIO LCC and NELA attorneys who are not Section members, encouraging them to join, and to union attorneys and individual employee attorneys already in

our Section, to encourage them to persuade others to join. Recently, I met with the AFL-CIO LCC Board of Directors to develop strategies for increasing union attorney membership. I have offered to have the same conversation with the NELA Board of Directors and employer attorney organizations.

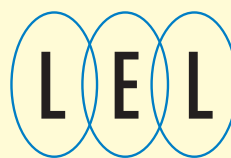
Our CLE committee is busy planning the Annual Meeting program while presenting ongoing CLE programs. Recently, we were advised that more than 3,000 people participated in our CLE teleconferences in our last fiscal year. These efforts were chaired by the National Programs Subcommittee Chairs Ruben Chapa, Pam Hemminger, Gregory McGillivray, and Jeffrey Lewis.

Our Pro Bono Task Force, chaired by Marty Wagner and Jim Singer, recently completed work on the Francis Perkins pro bono award and honor roll program (see p. 7). Our Government Outreach Task Force, chaired by Maurice Wexler, plans to have a government attorney outreach luncheon reception on May 4, 2004, in conjunction with Government Service Week. ABA President Elect Robert Grey has agreed to speak. Thanks to the efforts of the National Mentoring Subcommittee co-chairs Chris Hexter and Barb D'Aquila, letters soon will be sent to every law firm with one or more Section members, and to every member of the Young Lawyers Division, announcing our mentoring program. As a result of the hard work of nation-wide media program co-chairs Leonard Page and Ric Fischer, our media resource rosters soon will be sent to media representatives in every major market.

We also have made significant progress with our Sponsors Task Force chaired by Larry Casazza and Bob Bush. The ABA Board of Governors recently approved our request for a program support fund to enable individuals, corporations, unions and other entities to make tax deductible contributions to fund Section diversity and pro bono activities. We will soon be sending letters to all Section members and law firms to encourage tax deductible contributions to the FJE/LELS Diversity Fund and to hundreds of vendors to market opportunities to establish sponsorship relations (financial or in-kind services) with our Section or standing committees. Merrill Lynch already has agreed to participate in an upcoming midwinter meeting as a sponsor.

Our midwinter meeting season is fast approaching. I want to encourage every Section member to take advantage of the opportunity to participate in these uniformly excellent meetings. I intend to attend as many of these meetings as possible, even though it means sacrificing cross-country ski training!

In my view, our Section is at an all-time high in terms of generating new services and member benefits. I derive great satisfaction from the opportunity to facilitate and participate in all this activity. Together, we will make Section membership even more valuable and *we will make a difference*. ■



Labor & Employment Law

Labor and Employment Law (ISSN: 0193-5739) is published four times a year by season, by the Section of Labor and Employment Law of the American Bar Association, 750 North Lake Shore Drive, Chicago, Illinois 60611, 312/988-5813, www.abanet.org/labor

Chair, Stephen D. Gordon, Saint Paul, MN

Chair-Elect, Howard Shapiro, New Orleans, LA

Secretary, Stephen F. Befort, Saint Paul, MN

Secretary-Elect, Samuel Estreicher, New York, NY

Co-Editors of the Newsletter

Elliot Bredhoff, Bredhoff & Kaiser, 805 15th St. NW, Suite 1000, Washington, DC 20005 202/842-2600

Richard S. Cleary, Greenebaum Doll & McDonald PLLC, 3500 National City Tower, Louisville, KY 40202 502/587-3504

Mark Risk, D'Agostino, Levine & Landesman, L.L.P., 345 Seventh Ave., 23rd Floor, New York, NY 10001 212/564-9800

ABA Publishing Editor, Monica Buckley

ABA Publishing Designer, Mary Anne Kulchawik

The views expressed herein are not necessarily those of the American Bar Association or its Section of Labor and Employment Law. Copyright © 2004 American Bar Association. Produced by ABA Publishing.

A Glimpse at the Supreme Court's Docket: Court Looks at ADEA and ADA Cases

By Professor Stephen F. Befort

Editors' Note: A highlight of the ABA Annual Meeting is the lecture given by the Section Secretary, always a notable law professor, who reviews the decisions of the past Supreme Court term. We asked Secretary Stephen F. Befort, professor of law and associate dean for academic affairs at the University of Minnesota School of Law, to preview cases that he will be watching on the Court's docket in the coming year.

As Secretary of the Labor and Employment Law Section, I look forward to presenting the annual Supreme Court review address at the ABA Annual Meeting next August in Atlanta. Several significant issues already are on the Court's docket. Here is a snapshot of two particularly interesting cases; one pending and one already decided.

Age Discrimination in Employment Act

In *Cline v. General Dynamics Land Systems, Inc.*, the Court will examine whether the Age Discrimination in Employment Act (ADEA) prohibits "reverse discrimination" employer actions that treat older workers more favorably than it does younger workers. General Dynamics had a policy of providing full health care benefits to its former employees who retired with 30 or more years of service. A new collective bargaining agreement effective in 1997 modified that policy for future retirees so that full coverage is given only to those employees who were then aged 50 or older. A class of employees between the ages of 40 and 50 challenged that policy as a violation of the ADEA. The trial court dismissed the claims, but a divided Sixth Circuit Court of Appeals reversed.

The ADEA makes it unlawful for an employer to discriminate against any employee aged 40 or older on the basis of age. Most courts have interpreted this pro-

hibition, in light of the ADEA's stated purpose of protecting "older workers," to be a "one-way street." Under that approach, a policy that disadvantages older workers relative to younger workers, such as an early retirement program that offers fewer benefits to employees as they get older, is unlawful, but not one that works in the opposite direction, such as an early retirement incentive that is available to employees only after they reach age 65.

The Sixth Circuit held that the statute protects employees 40 or older, even in situations where younger workers are treated less favorably.

The Sixth Circuit in *Cline* interpreted the ADEA differently and held that the plain language of the statute protects all employees aged 40 or older from discrimination, including situations in which younger protected workers are treated less favorably than older protected workers. The lead majority opinion found nothing in the ADEA's language to warrant treating some individuals in the Act's protected class less well than others. A dissenting opinion, while acknowledging that reverse discrimination suits are permissible under Title VII, argued that the ADEA's fundamental purposes would be thwarted if an employer could not treat older workers more favorably than younger workers. The dissenting judge also noted that, unlike race and gender, age is not an immutable trait that arises at birth. In an interesting twist, the Bush administration has filed a brief with the Supreme Court endorsing the Sixth Circuit's majority opinion.

Americans with Disabilities Act

In *Raytheon Company v. Hernandez*, the Court considered the legality of an employer's refusal to rehire an employee who had earlier resigned following a positive drug test but who no longer uses illegal drugs. Joel Hernandez had worked for Hughes for 25 years when he tested positive for cocaine use in 1991. Fearing the prospect of dismissal, he accepted Hughes' offer to resign in lieu of termina-

tion. Hernandez reapplied to Hughes in 1994, but his application was rejected based on Hughes' policy of not rehiring former employees whose employment ended because of either termination or resignation in lieu of termination. The Americans with Disabilities Act (ADA) prohibits discrimination against an individual with a record of addiction who has been successfully rehabilitated and no longer uses illegal drugs. Hughes argued that its policy has nothing to do with Hernandez's addiction and simply disqualifies all former employees who have lost employment because of misconduct. The Ninth Circuit disagreed, stating that Hughes' policy "although not unlawful on its face, violates the ADA as applied to former drug addicts whose only work-related offense was testing positive because of their addiction." The Supreme Court reversed and, in a unanimous opinion, ruled that the Ninth Circuit improperly applied a disparate impact analysis to Hernandez's disparate treatment claim. The Court explained that Hughes' proffer of its neutral no-rehire policy satisfied its obligation under the *McDonnell Douglas* framework to provide a nondiscriminatory reason for not rehiring Hernandez. The only remaining issue, accordingly, was whether Hernandez could show that Hughes made its hiring decision on the basis of Hernandez's status as disabled as opposed to its no-rehire policy. Rather than deciding this issue, the Ninth Circuit improperly concluded that the otherwise neutral policy was illegal as a matter of law. The Court remanded the case to the Ninth Circuit for a proper determination of the case under the third step of *McDonnell Douglas*.

The Long View

So, what is to be made of these cases? In *Cline*, I hope that the Court will reverse the Sixth Circuit and adopt the majority "one-way street" view of the ADEA. A contrary determination may have the undesirable result of effectively banning most early retirement programs. The *Hernandez* decision once again illustrates the Court's frosty reception to ADA claims. That decision also demonstrates that, despite speculation to the contrary in light of last term's *Desert Palace* decision, the *McDonnell Douglas* test is alive and well in non-mixed motive disparate treatment cases. ■



France Approves Pension Reforms Despite Massive Strike

By Ming Henderson-Vu Thi

On May 13, nearly 2 million public employees marched through the streets of France to protest the government's plans to reform the pension system in both the public and the private sectors. Demonstrations had started as early as November 2002, but the May march marked the peak of the movement. For several days, public servants and employees of French railway SNCF and Paris transport agency RATP, schools, hospitals, the tax department, post office, and gas and electrical utilities—led by trade unions—went on a general strike, bringing French commerce and society to a halt.

Pension Reform in France: The Issues

The French pension system is “pay as you go.” Retirees’ pensions are paid from the contributions of those currently working. Because ever fewer workers must fund the pensions for increasing numbers of retirees—with people living longer in retirement, a falling birth rate, and workers entering the workforce for shorter periods and at reduced working hours—the system has been under increasing financial pressure. With a forecast deficit of 50 billion euros by 2020, many saw pension reform as an inevitable, necessary step to preserving future pension programs.

To workers and their unions, however, pension system reform is a violation of their rights and a reduction of their compensation, especially for those workers who have contributed to the system for 37.5 years, with expectations of certain guarantees. Thus, pension reform has been a huge political issue in France, where the pension terms are set by legislation. In the fall of 1995, the former government, headed by Prime Minister Alain Juppé, was forced to back out of proposed reforms and resign after three weeks of continuous general strikes that brought down the government.

In 2003, however, the conserva-

tive government was able to take advantage of a strong majority in Parliament that supported its bill and to push the bill through. The Law of August 21, 2003, presented by Labor Minister François Fillon, contains only minor amendments to the bill and was declared constitutional on August 18, 2003.

The reform aims at gradually implementing the following principles:

- Increasing the contribution period for the same pension level from 37.5 years to 40 years (41 years in 2012), which is in line with the pension requirement for private sector workers, and setting the value of the full pension at 75 percent salary based on the last six months’ pay.
- Encouraging workers 55 and over to continue working. To that end, early retirement schemes are strongly penalized and there are financial incentives for working beyond the age of 60; a retiree may continue working in the private sector while receiving a government pension; and forced retirement before the age of 65 is prohibited except under a bargaining agreement.
- Preserving the fairness and equality within the system. To that end, workers who have a full record of 40 years of contribution may retire beginning at age 56; all pensions served are guaranteed to amount to 85 percent of minimum wage (approximately 930 euros per month); and bonus periods for raising children are granted for all workers.

Right to Strike

French workers have a constitutionally recognized right to strike. The state may only step in to prohibit a strike that seriously threatens the country and population. Significantly disrupting the day-to-day operation of the French economy is not deemed to constitute such a threat. French workers may strike at any time over any issue



On May 13, 2 million people demonstrated in Paris over pension system reforms.

(AP/WIDE WORLD PHOTOS)

that concerns their work conditions, subject to certain requirements.

No demonstrations can take place in the public sector unless strikers have given a minimum of five days notice prior to the strike during which good faith negotiation with the employer can occur (Strike Act of July 31, 1963). To avoid any abuse of the right to strike, “strikes by turn” and “go-slow strikes” are prohibited (Article L. 521-4, Labor Code).

During a strike, a minimum service requirement is imposed on hospital and public transport workers. Civil servants for whom such minimum service applies face disciplinary sanctions if they should join in a strike, but these sanctions are often weak deterrents because they are enforced months after a strike is over. Furthermore, strikes without notice go without sanction, with the exception of possible salary cuts for unworked days.

However, last summer the government took an unusually strong stand against the strikers, and negotiations with the trade unions to include payment for strike days in exchange for ending the strikes failed. The government announced on July 30, 2003, that all days not worked would remain unpaid. These salary cuts may explain why the strikes expected to

resume in September never occurred. In some sectors, the rules included withdrawal of pay for the entire period of striking, including holidays and days off. RATP employees, however, will have these wage cuts spread out over a period of several months.

Toward the Future

It is unlikely that the recent legislation marks the end of strikes in France. The so-called Pension Law deals only with the base retirement benefits, and further reform is under way for the complementary national pension funds for all employees (ARRCO) and those at management level (AGIRC).

The system’s funding remains unclear because the current funding scheme beyond 2020 may have to rely on transferring funding from other social protection schemes, which also are under financial pressure. Many consider that the reform has merely rendered the system more dependent on the performance of the economy and that contributions to it will have to increase after 2006. ■

Ming Henderson-Vu Thi is a partner in Touati-Henderson in Paris, France, and is a member of the Section. She wishes to thank Patrick Thiebart of Caubet Chouchana Meyer, who reviewed a draft of this article.

Sports and Entertainment Labor Law Committee Stages Mock Baseball Salary Arbitration

By Helen Walter

When a professional baseball player and a baseball club are unable to reach a salary agreement, they sometimes participate in salary arbitration. At its October meeting in New York City, the Sports and Entertainment Labor Law Committee conducted a mock arbitration, to give members an inside look at the process.

The participants were Reginald Alleyne, arbitrator and visiting professor at Boston College School of Law; Francis X. Coonelly, general labor counsel, Major League Baseball (MLB); and Michael S. Weiner, associate general counsel, Major League Baseball Players Association (MLBPA). The hypothetical arbitration concerned the salary for the Hall of Fame outfielder the late Roberto Clemente of the Pittsburgh Pirates, for the 1959 baseball season.

Salary arbitration is available for players who have major league experience but are required to resign with their current team. Generally speaking, players with between three and six years of major league service have the right to have their salary determined by an arbitrator. Players with six years of service are free agents who may negotiate and sign a contract with any team when the term of their contract expires.

The members of the salary arbitration panel are selected annually by MLB and the MLBPA. Prior to arbitration, both the player and the club submit a proposed salary figure. The parties sign a player's contract, with the salary left blank pending the arbitrators' decision.

The collective bargaining agreement provides that the arbitrator must choose the salary advocated by either the player or the team, and may not pick another, in-between amount. The

arbitrators are expected to issue their decision within 24 hours of the hearing. The confidential award is issued without an opinion.

The collective bargaining agreement provides that the arbitrator should consider i) the quality of the player's contribution during the past season, including "special qualities of leadership and public appeal"; ii) the length and consistency of his career to date; iii) the player's salary history; iv) salaries paid to comparable players; v) the player's health and injuries; vi) team performance, including attendance.

The arbitration panel may not consider press reports or other testimonials, the financial position of the player or the team, the pre-arbitration negotiations between the parties, or salaries in other sports or professions.

Alleyne opened the arbitration by providing instructions to the parties. Neither party was permitted to make laudatory comments during the presentations. Alleyne also shared that typically there are three arbitrators, and the parties face each other in U-shape formation. The hearing takes a few hours.

Players Association Presentation

Clemente received a \$20,000 salary for 1958, and Weiner argued that it should be increased to \$25,000. He argued that Clemente

was an excellent hitter and a good fielder, and that the team's performance had improved since Clemente joined. Weiner submitted exhibits that set forth Clemente's offensive and defensive statistics for the 1955 through 1958 seasons.

Weiner noted that Clemente made significant contributions to the team despite suffering an injury in 1957. Weiner compared

only \$17,000 for the 1959 season. Coonelly's most persuasive evidence was Clemente's lack of performance as a power hitter. He argued that Virdon and Clemente were similar offensively and should be paid similar salaries.

Alleyne ruled in favor of the Pirates. Though the arbitration panel does not normally reveal its reasoning, Alleyne shared his view that Clemente and Virdon had per-

The collective bargaining agreement provides that the arbitrator must choose the salary advocated by either the player or the team, and not an amount in between.

Clemente to his teammate Bill Virdon, who had negotiated a contract for \$22,500. Weiner argued that based on past performance, Clemente was worth about \$3,000 more than Virdon.

Weiner also compared Clemente with Elston Howard of the New York Yankees, who had received from the Yankees a \$25,000 contract for the 1959 season. Arbitrator Alleyne noted, however, that Howard played catcher and questioned whether that was an appropriate comparison to Clemente.

Major League Baseball Presentation

Coonelly made the presentation for the Pittsburgh Pirates, advocating a salary of \$22,500 for Clemente. Coonelly stressed that the Pirates were not trying to denigrate Clemente. He said that Clemente was excellent defensively and improving as a hitter but nevertheless was an average hitter in 1958. Coonelly's exhibits compared Clemente to Don Blasingame, who would be paid

formed similarly and should receive similar salaries.

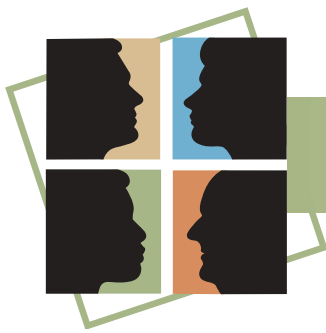
The panelists also commented that paper exhibits are most common and include comparisons between performance and salary, with graphics that illustrate the differences. It is typically the most persuasive piece of evidence. In some cases the parties bring posters or use videotape to illustrate a player's performance.

The panel participants agreed that the salary arbitration program is viewed as a successful process because it encourages the parties to settle either before or during arbitration. This is surely related to the "winner take all" rule that prohibits the arbitration panel from reaching a compromise in its award. Since 1990, 1,239 cases were filed and only 164 cases were heard, meaning that nearly 87 percent of the players reach new agreements before arbitration. ■

Helen Walter is a second-year student at Rutgers University Law School in Newark, New Jersey.



Roberto Clemente in action. (AP/WIDE WORLD PHOTOS)



Profile

By Mark Risk

Now Living Up North

In October, a letter to the *Petoskey News-Review* on Michigan's western lake shore complained of tactics by the local hospital that the writer stated were intended to induce a brutal, year-long nurses' strike and the decertification of the nurses' union. Leonard Page of Cheboygan (pop. 5,300) began his letter this way: "I am a semi-retired union attorney now living up north. My last full-time job was as General Counsel of the National Labor Relations Board."

Page, also the retired former Associate General Counsel of the United Auto Workers (UAW), grew up in Dearborn, Michigan, the son of a "good Republican father" who worked in management at General Motors' Fleetwood plant in Detroit. Page obtained a BBA and MBA from the University of Michigan in 1965 and 1968, and then took a management position with Ford Motor Company.

But something didn't feel right, and Page enrolled in law school at night at the Detroit College of Law. During a heated discussion, a classmate told Page that his liber-

In the early years, he attended up to three Board hearings per week and wrote briefs on Friday.

He graduated from organizing work to strikes, General Motors collective bargaining negotiations, retiree health insurance, trade matters, and Labor-Management Reporting and Disclosure Act litigation. And plant closings, "literally hundreds of plant closings," during the decline of the American automobile industry, when the UAW saw its membership decline from 1.4 million to about 700,000 members. He represented the UAW in the protracted, difficult struggles during the 1990s with Caterpillar, Inc.

Page's journey to the NLRB began in the 1970s, when "labor law reform" was on the Carter administration's legislative agenda. Page participated on an NLRB task force of union and management lawyers, which considered proposals to strengthen NLRB remedies.

When he heard that the Section's NLRB Practice and Procedure Committee was not happy with the task force's recommenda-

tion and mutual respect. "Nobody pulled any fast ones," he says. "If you wanted to be an ideologue, these could be very un-fun meetings. You could try to avoid making friends, but that's not my style. Of course, there were fights, but sometimes we worked together and got good things done."

Page remained on the Committee for more than 20 years, including serving as chairman. He also served on the LEL Section Council, as chairman of the Labor Section of the Michigan State Bar, and as a founding member of the College of Labor and Employment Lawyers.

Page's appointment as Board general counsel is a tale of the governmental gridlock of our era. In 1998, Board General Counsel Fred Feinstein's term had expired, and it was believed that the Republican Congress would not confirm him for a new term with a presidential election coming up. Page agreed to be the official nominee, with the expectation that Congress would never take up his nomination and Feinstein would continue in the office as a recess appointment. A year later, however, when Feinstein's recess term ended, Page was asked to accept a new recess appointment.

As general counsel, Page again focused on expanding NLRB remedies. These included consequential damages for illegal discharges and access remedies in election campaigns.

He enjoyed the work because his decisions "were affecting more people than the cast of characters in any single case before me," he says. He also relished opportunities to speak to management groups, preaching that "if we really believe in the rule of law, we've got to give the Agency some real authority to deal with serious unfair labor practices, and then let the workers decide by vote



Leonard Page

whether they want the union."

After being relieved by President Bush in 2001, Page retired to Cheboygan and built a log house for himself and Susan, his wife of 38 years. Page admits that the big drawback to being in the North Woods is that his two adult children, Joe and Katie, their spouses, and three grandchildren aren't nearby.

After about a year up in the woods, Page affiliated as counsel with the Detroit firm of Klimist, McKnight, Sale, McClow and Canzano, to assist on labor law matters. He rejoined the Section and now serves as co-chair of the nationwide media program initiative.

Page's letter to the *Petoskey News-Review* ended this way: "I consider myself an old-timer and a good American. I know that unions have provided employees with a voice, dignity, and self-respect and have dramatically improved the standard of living for everyone. . . . As long as I am conscious, I will never enter [the hospital] until there is a union contract in place." ■

A classmate at Detroit College of Law told Page his liberal opinions would make it impossible for him to get a law job—"except at the UAW."

al opinions would make it impossible for him to get a law job in Michigan—"except at the UAW."

Page drove to UAW headquarters that day. By chance, the UAW's student law clerk had just resigned. Page started in May 1970, the day after the death of legendary UAW President Walther Reuther, and he worked in the UAW legal department for the next 30 years.

At the beginning, Page assisted organizers during NLRB hearings.

tions, Page joined it to attempt to "turn them around."

The NLRB general counsel attends the Committee's Midwinter Meeting and spends the week discussing proposed rule changes with Committee members, often before the proposals have even appeared in the Federal Register. "I persuaded the UAW that important things were happening there and that it should send me," he says.

There was a climate of consen-

Section Announces The Frances Perkins Public Service Award and Pro Bono Honor Roll

The need for pro bono services in the labor and employment area is acute. Questions relating to labor and employment law account for more than a quarter of the issues raised in many pro bono programs. To acknowledge individuals, firms, corporate and union legal departments, government agencies, and other organizations that help meet this crucial need, the Section is sponsoring its first annual Frances Perkins Public Service Award, and is encouraging Section members to enroll in the Section's first Pro Bono Honor Roll.

The Frances Perkins Public Service Award

The Award recognizes individuals or organizations that demonstrate a significant commitment to providing pro bono legal services, primarily in the areas of labor and employment law, to people of limited means or to nonprofit, governmental, civic, community, or religious organizations designed primarily to address the needs of individuals with limited means.

The criteria for the Award are as follows:

Section Membership. Individual nominees must be Section members. In the case of a firm, corporate or union legal department, government agency, or other organization, the entity must have at least one Section member who is employed by or associated with the organization and who is actively involved in the pro bono project that is the subject of the nomination.

Rule 6.1. The pro bono services that are performed must meet the definition of pro bono services under Rule 6.1 of the American Bar Association's Model Rules of Professional Conduct. Preference will be given to nominees who provide pro bono services in the labor and employment law area. Nominees may provide pro bono services in other areas.

Significant Services. The pro bono services provided must be significant. Examples of such sig-

nificant services include (1) an innovative approach to the delivery of pro bono legal services; (2) a significant new policy or systemic outcome benefiting people of limited means; or nonprofit, governmental, civic, community, or religious organizations designed primarily to address the needs of individuals with limited means; and (3) an expansion of pro bono services to a previously underserved community or segment of the population.

Nominations must be submitted in duplicate to the Section Office by April 1, 2004. The following information must be provided:

- The names, addresses, firm, company, or other organization names, telephone and fax numbers, and e-mail addresses of both the nominee and the nominator.
- A description of the nominee's background and other relevant activities, including principal areas of practice, the number of years practicing law, other public service contributions, educational background, and other bar association activities.
- A nomination narrative describing the significant pro bono services provided, including the nature of the pro bono contribution and those who have benefited from it, and if possible specific documentation or other materials demonstrating the nominee's contribution. Nominators may submit the names, addresses, telephone and fax numbers, and e-mail addresses of no more than three other individuals who could provide additional information. Letters of support from other individuals and organizations may also be provided.

The Pro Bono Committee will review the nominations and make recommendations to the Section chair and chair-elect. The Award will be presented during the ABA Annual Meeting in August 2004 in Atlanta, Georgia.

The Pro Bono Honor Roll

The Honor Roll recognizes any Section member who complies with the ABA Model Rule of Professional Conduct 6.1 by completing at least 50 hours per year of pro bono services. Section members who enroll for the 2004 Honor Roll will be acknowledged in the newsletter. Members who successfully complete the requirements by March 15, 2005, will receive additional recognition in the newsletter and a certificate. Rule 6.1 can be accessed online at www.abanet.org/legalservices/probono/rule61.html. Labor and employment pro bono opportunities can be accessed at www.abanet.org/labor/proopp.html and other pro bono opportunities can be accessed at www.abanet.org/legalservice/probono/directory.html.

To enroll and receive initial

recognition in the 2004 newsletter, an attorney must be a member in good standing of the Section and submit an enrollment form to the Section by April 2, 2004.

To satisfy the requirements of an enrolled member, a lawyer must complete at least 50 hours of pro bono services during calendar year 2004 and submit a reporting form to the Section by March 15, 2005. Reporting forms and enrollment forms are available on-line at www.abanet.org/labor/proopp.html#probono and can also be obtained from the Section office at 312/988-5813.

For more information please contact the Section Director at 312/988-6710. Submit all materials to the Section Director, Labor and Employment Law Section, American Bar Association, 750 N. Lake Shore Drive, Chicago, IL 60611. ■



Who Was Frances Perkins?

Frances Perkins spent her career as a social worker, social reformer, and public servant. The first woman to serve in a presidential cabinet, she was appointed Secretary of Labor by President Franklin D. Roosevelt in 1933, and was a principal architect of the New Deal. She is pictured above sewing the first National Recovery Administration Blue Eagle label into a dress on January 22, 1934, during a ceremony in New York. The label signifies a thirty-five hour week, a minimum wage for labor, and the elimination of child labor.

(AP/WIDE WORLD PHOTOS)

A Resolution You Can Keep— Attend Your First Midwinter Meeting in 2004

It's Midwinter Meeting season at the Section of Labor and Employment Law! This year's midwinter meetings will be loaded with substantive agendas on current developments and recent decisions, presented by experts in their respective fields. All committee meetings are eligible for CLE credit; some fulfill a year's requirement in many states.

Check out the Section's revised on-line registration system—it's more user-friendly than ever. And be sure to visit www.abanet.org/labor/calendar to view additional meeting, registration, hotel, air travel, and destination information.

Ethics and Professional Responsibility

January 16–18, Camino Real Hotel, Puerto Vallarta, Mexico

- **Risk Management for Labor and Employment Law Attorneys.** Covers risk management strategies for labor and employment law attorneys to avoid any professional negligence claims and other malpractice problems.
- **MultiJurisdictional Practice Issues and What is the Practice of Law.** Covers the new ABA model rule regarding multi-jurisdictional practice; an update of the states that have adopted this new rule; MJP issues for labor and employment law attorneys who regularly practice in more than one state; and the definition of "what is the practice of law," particularly with respect to mediators, arbitrators, and other neutrals and how that interrelates with MJP issues.
- **Trial Publicity Issues for Labor and Employment Law Attorneys.** Covers ethical issues associated with trial publicity and how such issues may arise in the context of labor and employment, including class action litigation.
- **Civility and other Professionalism Issues.** Covers civility issues for labor and employment attorneys and related ethical and professionalism issues.

- **Ethical Issues Relating to Sarbanes-Oxley and Whistle-Blowing.** Covers the Sarbanes-Oxley Act, with a focus on whistle blowing and the ethical implications for labor and employment counsel.

- Also, subcommittee chairs will present reports on developments in their areas of the law regarding confidentiality, trial publicity, advertising, solicitation, conflicts of interest, behavioral problems, mediation, arbitration, conciliation, fact-finding, and investigations.

Employee Benefits

February 4–7, Ritz-Carlton Hotel, New Orleans, Louisiana

The program will include a comprehensive review of the 2003 developments in employee benefits law. Subcommittees will present detailed reports covering all substantive areas, including legislation, administration, and court decisions. The meeting will feature a roundtable open discussion format for each report, often with participation by the counsel involved in the cases reviewed.

State and Local Government Bargaining and Employment Law

February 5–7, Presidente InterContinental, Cozumel, Mexico

This program will consider, in roundtable and report format, state and local bargaining and employment laws and their effect on labor relations within the states. It will include important updates on constitutional issues—such as First Amendment, due process, and rights of union members and nonmembers—and their impact on employment law. A special ethics report also will be presented.

ADR in Labor and Employment Law

February 8–11, Westin Regina, Puerto Vallarta, Mexico
Please visit www.abanet.org/labor/calendar for information on this program.

Federal Labor Standards Legislation

February 18–20, Wyndham Sugar Bay Resort, St. Thomas, U.S. Virgin Islands

The committee will report on the latest legislative, administrative, and judicial developments under the FLSA, FMLA, ADEA, WARN, and other labor standards statutes. Senior officials from the EEOC and the U.S. Department of Labor will speak on the latest developments at their agencies.

State Labor and Employment Law Developments

February 19–22, Wyndham Sugar Bay Resort, St. Thomas, U.S. Virgin Islands

The two-day program will include discussions on a variety of topics, including the nontraditional workforce, state ADR cases, news, UPL rulings, legal ethics, noncompetition agreements, lifestyle protection employee privacy issues, and state whistleblower protections.

Practice and Procedure Under the NLRA

February 23–26, Grand Bay Hotel-Isla Navidad Resort, Manzanillo, Mexico

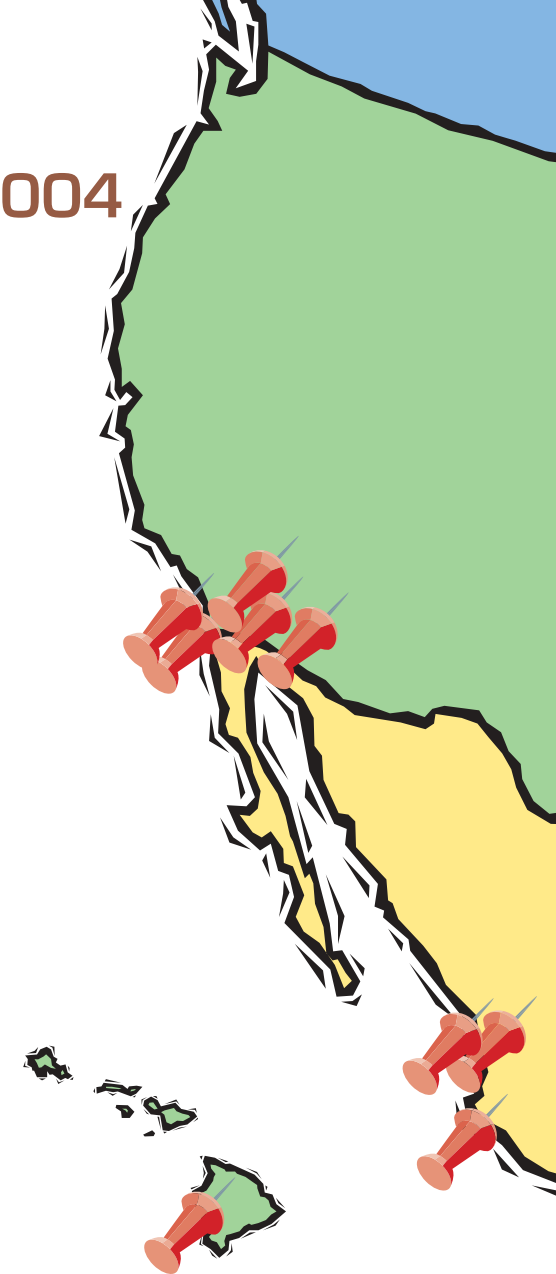
This program will include interaction with the general counsel, deputy general counsel, the chief administrative law judge and the executive secretary and members of the National Labor Relations Board on timely and critical practice and procedure issues. A "Newcomer" function with the general counsel and members of the NLRB is planned for first-time attendees.

Federal Service Labor and Employment Law

February 26–27
Washington, D.C.
Please visit www.abanet.org/labor/calendar for information on this program.

Development of the Law Under the NLRA

February 29–March 3, Mauna Lani Bay Hotel, Kohala Coast, Hawaii
This program will include the regulation of anti-union campaigns through the prohibition of the use of state funds; Board officials discussing recent "R" and "C" case developments; the possible deferral of request for information charges; the duty to bargain in a newly organized or successor situation concerning the implementation of discipline pursuant to previously established rules; banners, inflatable rats, and picketing or secondary boycotts; the unilateral discontinuation of a union dues check-off provision following contract expiration; handbilling and private property rights; and a RICO Committee presentation on the new uses of RICO in labor disputes, organizing campaigns, and corporate campaigns.





The highlight of the program will be presentations by the General Counsel, Chairman and Members of the National Labor Relations Board.

Occupational Safety & Health Law

March 2–5, L'Auberge Del Mar, Del Mar, California

This program will focus on significant legal, regulatory, and legislative developments in safety and health law, including federal and state regulatory and enforcement initiatives, as well as the congressional relationship to OSHA, international standards, genetic privacy issues, and employer and OSHA responses to terrorism in the workplace. The Solicitor of Labor and the heads of OSHA, MSHA, OSHRC, MSHRC, and several state OSHA programs have been invited to participate.

Workers Compensation

March 4–5, L'Auberge Del Mar, Del Mar, California

This year's Midwinter Meeting will be held in conjunction with the Midwinter Meeting of the Occupational Safety and Health Law Committee. The Workers' Compensation Committee has planned programs that will touch issues of national importance for the workers' compensation practitioner, with ample time for questions.

The meeting will begin with a panel discussion for both committees: How OSHA and Workers' Compensation Laws Interface with One Another. Other sessions will focus on medical privacy issues, including HIPAA, and the effects of bankruptcy on workers' compensation proceedings; and Medicare, including when an injured worker becomes eligible for Medicare benefits. Also on the program:

24-Hour Integrated Healthcare, and Coverage Issues, addressing coverage for intentional torts and the exclusive remedy provision.

Railway and Airline Labor Law

March 10–12, Westin Savannah Harbor Resort, Savannah, Georgia

Coverage includes recent major dispute litigation, "electronic communications changing the face of labor law," "political job actions," the Norris LaGuardia Act, "interest arbitration as it relates to other RLA dispute resolution mechanisms," "Section 2, first developments, preemption issues," and "airline issues." The program also will include Committee and Section business as well as remarks from officials of the National Mediation Board.

Employment Rights and Responsibilities

March 24–27, Westin Mission Hills, Rancho Mirage, California

See article on page 10, and visit www.abanet.org/labor/calendar for information on this program.

Equal Employment Opportunity

March 24–27, Westin Mission Hills, Rancho Mirage, California

See article on page 10, and visit www.abanet.org/labor/calendar for information on this program.

Sports & Entertainment in Labor and Employment Law Committee

April 1–3, Westin Mission Hills, Rancho Mirage, California

Please visit www.abanet.org/labor/calendar for information on this program.

Immigration Law

April 2, ABA Offices, Chicago, Illinois

In light of the increased scrutiny of companies with respect to compliance with various immigration and labor/employment-related laws, our program will focus on how to handle audits and investigations by the Department of Labor and Immigration Service for compliance with various regulations, including those relating to labor condition applications, I-9s, and other related areas. Experienced practitioners and government officials

will provide guidance regarding how to prepare companies for audits, what to do when the government is knocking at your client's door, and the dos and don'ts of dealing with the government.

Antitrust, RICO & Labor Law

April 16, ABA Offices, Washington, D.C.

This program will include a comprehensive review of the 2003 developments in the application of RICO and antitrust statutes to labor disputes. The program will include a review of recent decision affecting this area of labor law and updates on current RICO litigation relating to labor disputes. The meeting will feature an open discussion format, often with participation by counsel actually involved in the cases at issue.

Technology

April 21–23, National Hotel, Miami Beach, Florida

Featuring an interactive program with up-to-date reports and special presentations on hot issues, including practical and ethical issues surrounding surreptitious taping in the workplace by employees and employers; use of technology to assist with reasonable accommodation under the ADA; issues surrounding the use of technology in connection with crimes committed in the workplace; how technology in the courtroom influences jurors; and a review of recent cases concerning burden and cost shifting onto the employer in connection with the production of electronic discovery.

International Labor Law

May 16–22, Sheraton Stockholm and Towers, Stockholm, Sweden and Corintha Nevskij Palace Hotel, St. Petersburg, Russia

This program will discuss developments in Europe and other international areas during the last year, including the impact of European directives and human rights laws on various countries. Invited speakers include prominent government representatives, labor and employment officials, lawyers, and academics. ■



Section News

EEO and ERR Committees Join Forces for Mega Midwinter Meeting

For the first time, the Equal Employment Opportunity (EEO) Committee and the Employment Rights and Responsibilities (ERR) Committee will host a special joint meeting designed to ensure that all practitioners—from the novice to the seasoned practitioner—receive useful, up-to-date information and practice pointers. The meeting will take place March 24-27, 2004, at the Westin Mission Hills in Rancho Mirage, California. “Every year, the ERR and EEO Committees’ Midwinter Meetings attract hundreds of attendees. The combined meeting in 2004 should be even more popular,” says Stu Manela, ERR Employer co-chair.

Section members who have not joined a committee are encouraged to attend this special meeting. The joint meeting is not restricted to EEO and ERR Committee members. “This is a unique opportunity for non-members to meet members from both the EEO and the ERR Committees simultaneously and to become involved in the committee of their choice based on an informed understanding of each committee’s focus,” says Kelly Dermody, EEO Individual Employee co-chair.

Barry Hartstein, Employer co-chair of the EEO Committee, encourages committee members who have not attended a Midwin-

ter Meeting during the past several years to attend the joint meeting. All registrants will have the option of attending any program at the joint meeting. There will be multiple “tracks” to provide programming for those interested in litigation skills as well as those whose practices focus on day-to-day counseling of employers, employees, or unions on employment issues.

During the course of the Midwinter Meeting, EEO Committee members will provide updates on ADR issues, employment class actions, ADA cases, and trends in harassment and discrimination cases. Substantive track session titles will include the following:

- Managing Diversity in the 21st Century: Trends and Challenges
- Image-Based Discrimination: How Far Can Brand Image Drive Employment/Selection/Assignment Decisions?
- Ethics Issues in the Discovery Process
- Mixed-Motive Cases Revisited: The Impact of *Desert Palace, Inc. v. Costa*

The ERR Committee will offer programs that address the impact of Sarbanes-Oxley on the obligations of in-house and outside counsel, the First Amendment, and sexual harassment, and how EPLI affects a case. Other topics to be presented include:

- Contingent Workforce: Who Is an “Employee”?
- State Wrongful Withholding Statutes
- HIPAA: What It Says, What It Means, What We Do
- Discrimination and Privacy Rights in the European Union
- Hidden Protections in Overlooked Federal Statutes

Marvin Gittler and Louis Malone, EEO Union and Employee co-chairs of the ERR and EEO Committees, respectively, ensure that the program will have something for everyone. “The fact pattern that will serve as a focus of the program will present issues and stimulate discussions that will be of interest to all attendees, whatever the focus of their practice.”

The meeting also will offer opportunities for informal interaction among conference attendees, including separate breakfasts for union, corporate, management, neutral, and plaintiff/public sector counsel, as well as two receptions for attendees and their families and guests. Group leisure activities, including world-class golf and tennis, also are planned.

“Special events are planned for first-time attendees so that they will have the opportunity to make new contacts in a smaller group setting before attending functions open to all EEO and ERR members,” says Darlene Vorachek, ERR Individual Employee co-chair.

To help defray costs and encourage participation, substantial discounts for new attendees from the same firm or organization as a regular attendee will be offered, as well as an alternative hotel location at a lower price. Scholarships are available for those who otherwise would be unable to attend the meeting. Contact the ABA Section Office at vakosm@staff.abanet.org for more information.

The full agenda and registration materials are available online at www.abanet.org/labor/calendars.html or by contacting the ABA Section Office at 312/988-5523. If you have questions or suggestions, please call or e-mail one of the co-chairs or the Section Office at 312/988-5523.



Nationwide Mentoring Program in Full Swing!

The Section’s Nationwide Mentoring Program was developed to match Section members who are newer to the profession with seasoned veterans for career development and Section participation assistance. This Section member benefit establishes matches between mentees and mentors based on geographic location as well as affiliation and practice area, allowing mentors to offer the most relevant guidance in response to questions and challenges newer lawyers face in their practice.

Many pairings have already been made, and open enrollment continues, so if you are interested in becoming either a mentor or mentee, complete the appropriate online form at www.abanet.org/labor/mentors.html.

Save the Date! August 7-10 Annual Meeting in Atlanta

Planning for next summer's ABA Annual Meeting in Atlanta already is well under way. The meeting's theme will be *Lawyers Making a Difference: To Clients, the Public, and Themselves*. The planning committee—Charles Powell IV, Richard Williams, Kathryn Burkett Dixon, and Susan Grody Ruben—is designing a program that promises to be one of the best ever. The Section's activities will take place August 7-10, 2004. Most events will be at the Hyatt Regency Hotel.

As always, the program will kick off with "basics" sessions that provide a comprehensive overview of 10 of the most important areas of labor and employment law practice. These topics are equal employment opportunity; employment litigation skills; immigration law; alternative dispute resolution; ERISA; occupational safety and health law; ethical issues; and the National Labor Relations, Fair Labor Standard, and Family and Medical Leave Acts.

The Section also will feature programs to keep you abreast of recent developments in ERISA, EEO, and ADR. Additionally, there will be updates on National Labor Relations Board activities and a legislative update providing the latest scoop on activities on Capitol Hill.

The substantive programming will address mixed motive cases, EPLI issues, ADA accessibility developments, the impact of technology in the workplace, and tips on drafting effective jury instructions. There also will be a number of programs of special interest to arbitrators and mediators. This year's plenary session will focus on policy, legal, and ethical developments under Sarbanes-Oxley. Other skills development programs and a few surprises are in the works.

In addition to the high-quality CLE programming that characterizes the Section's contribution to the Annual Meeting, we are excited to report that the Section reception on Monday, August 9, will be at the World of Coke, an exciting and extremely popular venue. The Section luncheon will take place on Tuesday, August 10.

More information about these events, including how to order tickets, will appear in the next newsletter.

Be sure to visit the Section's website and watch for the next Section newsletter for updated information about the Annual Meeting, including information about purchasing Section "passports," and descriptions of other exciting events. We look forward to seeing you in Atlanta!



Luncheon Telephone CLE Served

The Labor and Employment Law Section is now offering something extra to go with your lunch. On the first Wednesday of every month, you can participate in a 1.5-hour teleconference that offers delectable bites of knowledge on the hottest labor and employment topics, while you enjoy your lunch. These low-cost sessions allow you and your colleagues to dine in your office or conference room while listening to superb CLE, or, if you are on the road or away from the office, you can join the session on your portable telephone.

Not your run-of-the-mill CLE programs, these sessions provide discussions by nationally prominent lawyers. Thousands already are taking advantage of these lunchtime teleconferences. Recent program titles include:

- Employer Suits Against Unions After *BE&K Construction Co. v. NLRB*
- The Whistleblower Provisions of Sarbanes-Oxley
- The Most Common Mistakes Companies Make When Downsizing
- Using Expert Witnesses in Labor and Employment Cases
- Employment Practices Liability Insurance
- What In-House Counsel Want From Outside Labor and Employment Lawyers

CLE for Sale Buy Your Tapes Now!

171 Ways to Improve Your Discovery Techniques: A Treasury of Ideas from Leaders in the Section of Labor and Employment Law. Experienced employment lawyers from across the country share practical ways to improve your discovery techniques. The program covers mistakes to avoid in informal discovery and investigation; declarations and affidavits; documents and requests for production; interrogatories and requests for admissions; medical exams and records; depositions; preparing the plaintiff for the deposition; deposing the plaintiff and defense witnesses; Rule 30(b)(6) depositions; documents at deposition; video depositions; after-acquired evidence; planning discovery; dealing with the obstructive opponent; and losing a case in discovery. **Formats available** (all packages include a study guide): **DVD** VO3WIDD: \$225; **Video** VO3WIDV: \$195; **CD** VO3WIDC: \$145; **Audio** VO3WIDA: \$125.

A Dialogue with the NLRB. This program, taped at the Section of Labor and Employment Law meeting in August 2003, features the National Labor Relations Board's five members—Alexander Acosta, Robert Battista, Wilma Liebman, Peter Schaumber, and Dennis Walsh—questioned by Peter Janus and Kenneth Wagner about their views on pressing issues facing the Board and their perspectives on prominent decisions. In this 90-minute audio program, they discuss union organization outside the confines of the Board's election procedures; legal issues arising with regard to "salting"; issues raised by *NLRB v. Kentucky River Community Care*; the use of injunctions; the pros and cons of per curiam decisions; the pros and cons of a pilot settlement program; issues relating to employers and employees with limited English proficiency; the role of rule making; the role of stare decisis; and the role of empirical and social science data that bear on the issues before the Board. **Formats available** (both packages include a study guide): **CD** VO3DNLC: \$125; **Audio** VO3DNLA: \$95.

- The New FLSA Regulations: A New World in Overtime Litigation
- *Clackamas v. Wells*: When Is an Employee Not an Employee?
- Contraceptive Equity
- When the Bell Tolls for Your Employer: Bankruptcy Fundamentals for the Labor and Employment Lawyer
- *Desert Palace, Inc. v. Costa*: Getting Past Summary Judgment in Title VII Cases
- Prosecuting and Defending ERISA Disability Cases after *Black and Decker v. Nord*
- *Green Tree Financial Corp. v. Bazzle*
- The Impact of *Grutter v. Bollinger* and *Gratz v. Bollinger* on Labor and Employment Lawyers
- Immigration Issues for Labor and Employment Lawyers

Written materials for most conferences are available on the Section's website. Those who cannot participate on a given date can purchase an audiotope of the program. To see a list of programs and to sign up for future teleconferences, go to www.abanet.org/CLE or call 800/285-2221.



Diversity Initiative Update

The goals of the Section's Diversity Plan are to recruit minority lawyers, women lawyers, lawyers with disabilities, and newer lawyers to Section membership; foster an atmosphere of inclusion; assist in retaining lawyers once they become Section members; seek participation of minority lawyers, women lawyers, lawyers with disabilities, and newer lawyers on panels, task forces, and working groups; and provide those lawyers with opportunities and training to take on leadership roles at both the committee and Section level.

The Section's **Committee on Equal Opportunity in the Legal Profession** is charged with over-

seeing the Section's diversity efforts. Among other things, the committee seeks to identify "Best Practices" employed by various Section entities to implement the Diversity Plan. In this issue, we feature important, new efforts by the ABA at large to enhance diversity, as well as innovative efforts by Section committees toward this end.

The **ABA Commission on Racial and Ethnic Diversity in the Profession** recently issued a Diversity Efforts Checklist. The checklist allows Section, Division, and Forum leaders to self-evaluate their entity's efforts and suggests strategies for recruiting and retaining minority members. Suggested strategies include offering a true welcome to new members by having a member in the same city make a welcoming telephone call to share insights into the Section; using Section members to identify prospective members through day-to-day contacts in their practice areas and to issue personal invitations to these lawyers to join the Section; taking steps to make sure that new members are made to feel that their contributions and participation

are welcomed and valued, and that they themselves are respected; and involving non-minority males in active diversity efforts, while at the same time giving minority lawyers the same types of opportunities as all others to participate in the substantive work of the Section. Please contact any committee co-chair (see below) if you would like a copy.

The Section is co-sponsoring a model rule recommended to the ABA House of Delegates by the **ABA Standing Committee on CLE** and the **ABA Commission on Racial and Ethnic Diversity**. The rule would require that lawyers complete programs related to racial and ethnic diversity and the elimination of bias in the profession as part of their mandatory continuing legal education. It is hoped that the rule will encourage the development of MCLE programs related to all discrimination and bias, and raise professional awareness of the impact of bias in the courts and the legal profession, and at the same time increase public confidence in the fairness of the legal profession and the equal application of the law for all citizens.

As to best practices within the Section, the **Employment Rights and Responsibilities Committee** has initiated a notable practice in the reporting of speaker diversity at its upcoming Midwinter Meeting. In order to facilitate the timely and accurate collection of speaker diversity information, it is sending to all program moderators a form that asks speakers to self-identify using the categories specified on the 2004 Midwinter Meeting Diversity Plan Implementation Reporting Form. (distributed to committee co-chairs at the end of September).

The **Employee Benefits Committee** has expanded its standing Subcommittee on Diversity into three separate subcommittees: Diversity Outreach, Diversity Mentoring, and Diversity Retention. This expansion resulted from the Committee's determination that "[r]ecruiting efforts are one component to growing our Committee. However, two other essential components are providing a welcoming atmosphere to each new recruit and providing a continuing

attachment between the Committee and the recruit to encourage ongoing future participation in the Committee's activities."

The Diversity Outreach subcommittee's function will be to reach out and find potential new recruits for the Committee. One of its efforts will be to coordinate with the **Labor and Employment Law Section's** Law School Outreach Program. The Diversity Mentoring subcommittee's primary function will be to arrange for a committee member to make new recruits feel welcome at the Midwinter Meeting. The Diversity Retention subcommittee will take over after the Midwinter Meeting and ensure that there is follow-up to help new recruits find a subcommittee and participate in its activities.

We encourage all Section entities to consider these and other innovative ideas for enhancing diversity and attendance at upcoming meetings. The Committee on Equal Opportunity will continue to highlight best practices in the Section newsletter, on the website, and in other communications. For more information on the Diversity Plan and/or the work of the committee, please contact any of its co-chairs: Kay Baldwin at katherine.baldwin@usdoj.gov; Denise Clark at dmclark@heriufund.com; Gail Golman Holtzman at gholtzman@constangy.com; or Helen Norton at helennorton@excite.com. ■

ARBITRATION AUDIOTAPES

The ABA Center for CLE and the Section of Labor and Employment Law are offering audiotope and videotape transcripts of the December 2003 programs *Effective Advocacy in Employment Arbitration: Practical Strategies* (Part One) and *The Ultimate Arbitration Update: Drafting, Attacking and Defending Arbitration Clauses and Emerging Jurisdictional Issues* (Part Two). These products can be readily incorporated into your organization's in-house training program.

Videotape Packages:

Parts One and Two: \$445 (Product Code SO3ARBV)
Part One Only: \$325 (Product Code SO3EAEV)
Part Two Only: \$325 (Product Code SO3UEAV)

Audiotope Packages:

Parts One and Two: \$295 (Product Code SO3ARBA)
Part One Only: \$179 (Product Code SO3EAEA)
Part Two Only: \$179 (Product Code SO3UEAA)

All packages include the programs' course materials. Prices do not include shipping and handling charges. For more information or to order the tapes, please contact the ABA Service Center at 800-285-2221.

SEEKING WRITERS

The editors of *Labor and Employment Law* invite Section members to contribute articles. We can provide a topic, but we are also interested in your ideas for articles containing information that our Section members can use. Topics might include coverage of important cases or other developments, or issues or trends in an area of labor and employment law. You may contact newsletter editor Monica Buckley at buckleym@staff.abanet.org.



Section Treatises

Call BNA Books at 1-800-960-1220 and refer to **Priority Code ABALE** to receive the **Special Section Discount Prices** noted below. For additional information, including tables of contents, contributor lists, and publication dates, visit <http://www.bnabooks.com/ababnal/index.html>.

Covenants Not to Compete:

A State-by-State Survey, 3rd Edition

Order #1345-ABALE

List Price: \$495.00/Section Member Price: \$371.25

2003 Supplement

Order #1415-ABALE

List Price: \$215/Section Member Price: \$86.00

NEW!

The Developing Labor Law, 4th Edition

Order #1151-ABALE

List Price: \$515.00/Section Member Price: \$386.25

2003 Cumulative Supplement

Order #1416-ABALE

List Price: \$175.00/Section Member Price: \$70.00

NEW!

Discipline and Discharge in Arbitration

Order #1060-ABALE

List Price: \$95.00/Section Member Price: \$76.00

2001 Supplement

Order #1232-ABALE

List Price: \$65.00/Section Member Price: \$52.00

Elkouri & Elkouri: How Arbitration Works, 6th Edition

Order #1335-ABALE

List Price: \$185.00/Section Member Price: \$138.75

NEW!

Employee Benefits Law, 2nd Edition*

Order #1128-ABALE

List Price: \$560.00/Section Member Price: \$448.00

2003 Cumulative Supplement

Order #1377-ABALE

List Price: \$140.00/Section Member Price: \$56.00

NEW!

Employee Duty of Loyalty: A State-by-State Survey, 2nd Edition

Order #1182-ABALE

List Price: \$295.00/Section Member Price: \$221.25

2003 Cumulative Supplement

Order #1382-ABALE

List Price: \$185.00/Section Member Price: \$74.00

Employment Discrimination Law, 3rd Edition

Order #0791-ABALE

List Price: \$445.00/Section Member Price: \$333.75

2002 Cumulative Supplement

Order #1305-ABALE

List Price: \$235.00/Section Member Price: \$94.00

Employment Termination: Rights and Remedies, 2nd Edition

Order #0730-ABALE

List Price: \$145.00/Section Member Price: \$108.75

2003 Supplement

Order #1184-ABALE

List Price: \$115.00/Section Member Price: \$46.00

NEW!

Equal Employment Law Update

Summer 2003 Edition (3/99-3/01, with Supreme Court cases current through June 2003)

Order #1399-ABALE

List Price: \$165.00/Section Member Price: \$123.75

NEW!

Spring 2000 Edition (3/98-3/00)

Order #1235-ABALE

List Price: \$135.00/Section Member Price: \$101.25

Spring 2000 Edition on CD

Order #C235-ABALE

List Price: \$100.00/Section Member Price: \$75.00

Spring 1998 Edition (3/96-3/98)

Order #1138-ABALE

List Price: \$95.00/Section Member Price: \$71.25

Summer 1996 Edition (3/94-3/96)

Order #1031-ABALE

List Price: \$75.00/Section Member Price: \$56.25

The Fair Labor Standards Act

Order #1108-ABALE

List Price: \$580.00/Section Member Price: \$435.00

2003 Cumulative Supplement

Order #1406-ABALE

List Price: \$150.00/Section Member Price: \$60.00

NEW!

How ADR Works

Order #1253-ABALE

List Price: \$155.00/Section Member Price: \$116.25

How to Take a Case Before the NLRB, 7th Edition

Order #1183-ABALE

List Price: \$385.00/Section Member Price: \$288.75

2003 Cumulative Supplement

Order #1423-ABALE

List Price: \$175.00/Section Member Price: \$70.00

NEW!

International Labor and Employment Laws, Volume I, Second Edition

Order #1390-ABALE

List Price: \$400.00/Section Member Price: \$300.00

NEW!

International Labor and Employment Laws, Vol. II

Order #1103-ABALE

List Price: \$295.00/Section Member Price: \$236.00

2003 Cumulative Supplement

Order #1391-ABALE

List Price: \$140.00/Section Member Price: \$112.00

NEW!

Labor Arbitration: Cases and Materials for Advocates

Order #1036-ABALE

List Price: \$45.00/Section Member Price: \$36.00

Labor Arbitration: A Practical Guide for Advocates

Order #0635-ABALE

List Price: \$55.00/Section Member Price: \$44.00

Labor Arbitrator Development: A Handbook

Order #0430-ABALE

List Price: \$55.00/Section Member Price: \$44.00

Labor Union Law and Regulation

Order #1352-ABALE

List Price: \$225.00/Section Member Price: \$168.75

Occupational Safety and Health Law, 2nd Edition

Order #1239-ABALE

List Price: \$265.00/Section Member Price: \$198.75

The Railway Labor Act

Order #0815-ABALE

List Price: \$255.00/Section Member Price: \$204.00

2001 Cumulative Supplement

Order #1294-ABALE

List Price: \$160.00/Section Member Price: \$128.00

Trade Secrets: A State-by-State Survey, 2nd Edition

Order #1405-ABALE

List Price: \$315.00/Section Member Price: \$236.25

NEW!

* NOTICE...

EMPLOYEE BENEFITS LAW, SECOND EDITION, with the most recent supplement, is available in electronic form in BNA's *Benefits Practice Center*, with hyperlinks to text of cases. Section members receive a discount on subscriptions to the treatise component in the *Center*. Contact your BNA sales representative for more information, or call 1-800-372-1033.

ration (\$1.9 billion), National Steel (\$1.1 billion), and Bethlehem Steel (\$3.7 billion), accounted for almost \$7.8 billion of that loss. Steel industry pensions currently make up *nearly half* of the PBGC's annual payout, while these participants constitute only 2 percent of the program's total beneficiaries.

This year, the PBGC projects another record number of participants and most likely another record deficit. Estimates show unfunded pension liabilities in "financially-troubled firms" may rise to \$80 billion by the end of 2003.

In addition to steel industry pension-funding failures, several economic factors also are contributing to the problem. Most immediately, the decline in the 30-year Treasury interest rate—which is currently used to calculate future pension benefit liabilities and current employer contribution obligations—requires employers to contribute more money to plans than was required when that rate was higher. Employers lose this capital, which might otherwise be used for

investment in facilities and equipment. A program to provide some modest help for employers with this problem is set to expire, absent new legislation. Declines in the stock market have reduced the value of pension plan assets and further contributed to the problem.

Advocates for increased regulation argue that current law allowing employers to make any "reasonable" assumptions in calculating the fiscal health of their plans has led to underfunding of defined benefit plans.

However, there are more fundamental problems with the pension system that pose the gravest danger.

The single-employer program's base of participants continues to move from active to retired employees. In 2000, active workers made up only 53 percent of participants, down from 78 percent in 1980. The program's risk pool is concentrated in industries increasingly affected by global competition. By 2001, nearly half of all insured plans were in an economically troubled manufacturing sector. Shifts in the economy from an industrial to a service base, and

from defined-contribution plans instead of traditional defined-benefit pension plans, have further reduced premium contributions to the PBGC program.

The Pension Funding Equity Act, which recently passed the House of Representatives with Bush administration support and two separate Senate proposals, seek to replace the 30-year Treasury rate with a higher interest rate based on long-term corporate bonds or a composite corporate rate. Using the higher corporate rate to calculate whether a pension plan's investments are appropriately funded will give employers some breathing room while Congress continues to consider the longer-term challenge.

Other future proposals for pension reform are likely to include:

- Increased disclosures of plan information regarding funding status, plan liabilities, and investments—a requirement that will create incentives for greater funding by employers and will provide more information to pension plan participants.
- Using the "termination" liability standard that more accurately

states a plan's future benefit liability, as opposed to the "current" liability standard, which may understate a plan's liabilities by unrealistically amortizing liabilities over several years

- Strengthening pension-funding regulations by, among other things, imposing tighter controls on the assumptions employers are permitted in calculating their contribution obligations, and restricting benefit increases for participants in underfunded plans.

In considering reform proposals, however, a balance must be struck so that strengthened funding rules and reduced flexibility do not force employers (and needed premiums) out of the PBGC system.

For more information, consult the GAO report at www.gao.gov/cgi-bin/getrpt?GAO-03-873T, congressional hearing testimony at <http://edworkforce.house.gov>, and PBGC's 2002 Annual Report at www.pbgc.gov/publications/annrpt/02annrpt.pdf. ■

Daniel J. Finerty is an associate at Krukowski & Costello, S.C., in Milwaukee, Wisconsin.

Sports and Entertainment Law Committee Off and Running

The new Sports and Entertainment Labor Law Committee drew more than 75 Section members to the Westin New York Hotel on October 16-18 for a series of panels featuring well-respected sports and entertainment labor attorneys.

Leading the Friday morning panel on Multi-Employer Bargaining in Entertainment and Sports were Committee co-chair George Cohen, Section member Daniel Silverman, and former National Labor Relations Board chair John Truesdale. The panelists described the unique methods of bargaining in the sports and entertainment industries. The panelists also explored the interesting interplay of anti-trust and labor law in the sports industry.

Arbitrator Reginald Alleyne of Boston College School of Law then conducted a mock baseball

salary arbitration, setting the scene in 1959 (See article page 5).

The Committee's luncheon speakers were Eugene Orza and Robert Manfred, Jr. Orza and Manfred discussed the history of baseball labor relations and baseball's future in the context of the luxury tax and revenue sharing.

Saturday morning offered two "entertaining" panels. Legitimate Theater—The Show Will Go On featured William Moriarity, Tony DePaulo, Seth Popper, and Ken Greenwood discussing labor negotiations in the legitimate theater. The parties addressed the events leading to the recent Broadway musicians' strike earlier this year and the unusual dynamic of the League of American Theatres and Producers' representing pro-

ducers as well as theater owners.

The second panel, Television Negotiations Face New Technology and Runaway Production, featured Jerry Kauff, Harry Isaacs, Tony Segall, and Frank Moss, who

discussed the causes of and cures for "runaway production."

The Committee hosted a cocktail reception Thursday evening and organized a dinner at Gallagher's Steak House on Friday night. But the program's social highlight was the Friday afternoon backstage tour of the Metropolitan Opera, which was organized by the International Alliance of Theatrical Stage Employees and its Local 1. Committee members were given a detailed description of the incredible "behind-the-scenes" effort necessary to mount the on-stage productions.

The Committee's next program is scheduled for April 1-3, 2004, at the Westin Mission Hills Resort in Rancho Mirage, California. Visit the Section's website at www.abanet.org/labor or call 312/988-5523 for details. ■



Calendar of Events

2004

January 13-16

Labor and Employment Law:
The Basics
Hotel Monaco
Washington, D.C.

January 16-18

Ethics and Professional
Responsibility Committee
Midwinter Meeting
Camino Real
Puerto Vallarta, Mexico

January 28-30

Civil False Claims Act and
Qui Tam Enforcement
Washington, D.C.

February 4-7

Employee Benefits Committee
Midwinter Meeting
Ritz-Carlton
New Orleans, Louisiana

February 4-10

ABA Midyear Meeting
San Antonio, Texas

February 5-7

State and Local Government
Bargaining and Employment Law
Committee Midwinter Meeting
Presidente InterContinental
Cozumel, Mexico

February 8-11

ADR in Labor and Employment
Law Committee Midwinter Meeting
Westin Regina Resort
Puerto Vallarta, Mexico

February 18-20

Federal Labor Standards
Legislation Committee Midwinter
Meeting
Wyndham Sugar Bay Resort
St. Thomas, U.S. Virgin Islands

February 19-21

State Labor and Employment
Law Developments Committee
Midwinter Meeting
Wyndham Sugar Bay Resort
St. Thomas, U.S. Virgin Islands

February 23-26

Practice and Procedure
Under the NLRA Committee
Midwinter Meeting
Grand Bay Hotel—Isla
Navidad Resort
Manzanillo, Mexico

February 26-27

Federal Service Labor and
Employment Law Committee
Midwinter Meeting
Washington, D.C.

February 29-March 3

Development of the Law Under
the NLRA Committee Midwinter
Meeting
Mauna Lani Bay Hotel
Kohala Coast, Hawaii

March 2-5

Occupational Safety and Health
Law Committee Midwinter Meeting
L'Auberge Del Mar
Del Mar, California

March 4-5

Workers' Compensation
Committee Midwinter Meeting
L'Auberge Del Mar
Del Mar, California

March 5

Immigration Law Committee
Midwinter Meeting
Location TBD

March 9

National Labor Relations Act
Basic Law and Procedures
Boston, Massachusetts

March 10-12

Railway and Airline Labor Law
Committee Midwinter Meeting
Westin Savannah Harbor Resort
Savannah, Georgia

March 24-27

Employment Rights and
Responsibilities Committee
and Equal Employment
Opportunity Committee Joint
Midwinter Meeting
Westin Mission Hills Resort
Rancho Mirage, California

April 1-3

Sports and Entertainment
Labor Law Committee
Midwinter Meeting
Westin Mission Hills
Rancho Mirage, California

April 2

Immigration Law Committee
Midyear Meeting
ABA Offices
Chicago, Illinois

April 8

Employment Litigation Skills
Training
Houston, Texas

April 16

Antitrust, RICO, and Labor Law
Committee Midyear Meeting
ABA Offices
Washington, D.C.

April 21-23

Technology Committee Midyear
Meeting
National Hotel
Miami Beach, Florida

May 6

Fair Labor Standards Act
and Family and Medical Leave
Act Basics
Milwaukee, Wisconsin

May 7-9

Spring Council Meeting
Grove Park Inn
Asheville, North Carolina

May 16-22

International Labor Law
Committee Midyear Meeting
Sheraton Stockholm & Towers
Stockholm, Sweden and
Corinthis Nevskij Palace Hotel
St. Petersburg, Russia

May 18-21

Labor and Employment Law:
The Basics
Sheraton University City Hotel
Philadelphia, Pennsylvania

June 10

National Labor Relations Act
Basic Law and Procedures
St. Louis, Missouri

August 5-10

ABA Annual Meeting
Hyatt Regency
Atlanta, Georgia

For more information on any of these events, please contact the Section office at 312/988-5813 or check the Calendar Web page at www.abanet.org/labor/calendar.html.

1	CONCERN OVER PENSION PLANS
3	SUPREME COURT DOCKET
4	PENSION REFORM IN FRANCE
5	MOCK SALARY ARBITRATION
6	PROFILE: LEONARD PAGE
7	NEW PRO BONO AWARD
8	MIDWINTER MEETING PREVIEW
10	SECTION NEWS



Section of Labor and Employment Law
 American Bar Association
 750 North Lake Shore Drive
 Chicago, Illinois 60611

NONPROFIT
 ORGANIZATION
 U.S. POSTAGE
 PAID
 AMERICAN BAR
 ASSOCIATION



Section Announces Pro Bono Awards (Page 7) Midwinter Meeting Preview (Pages 8-10)



Spotlight on...

First Annual Trial Advocacy Competition

The Section of Labor and Employment Law Student Trial Advocacy Competition will be launched in the spring of 2004 on a regional basis.

Four-student teams will serve as advocates and witnesses. Participating teams will receive a fact pattern along with exhibits, materials, and cases on the dispute and issues presented. These materials will provide background information for witnesses to understand their characters and for advocates to have a basis and prior statements to prepare an effective cross-examination. A team's overall performance, including the opening statement, direct and cross-examinations,

objections, foundations, use of exhibits, and closing argument, will determine the final score.

Labor and Employment Law Section members will score the performances. A labor and employment law judge will preside over the trials and rule according to the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Each mock trial will be evaluated by two attorneys and a judge, who also will provide comments on advocate performance and render a verdict.

The Labor and Employment Law Section will connect teams with experienced employment litigators, who will be the coaches. Moreover, Section members will

serve as evaluators and judges. Students and faculty at the following law schools have expressed interest in participating in the initial competition: University of Baltimore, Georgetown University, George Washington University, University of Richmond, University of Virginia, and College of William and Mary.

For this new initiative to succeed, it is imperative that the Section secure members to volunteer to be coaches, evaluators, and judges.

If you would like to volunteer or want more information, please contact Stu Manela at 202/857-6364, manelas@arentfox.com, or Mike Posner at 213/389-6050, mposner@posner-rosen.com. ■

