

# Labor *AND* Employment Law

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## Section Responds to Hurricanes Katrina and Rita

By Charles A. Werner, Chairman

Hurricane Katrina roared into the Gulf Coast areas of Louisiana, Mississippi, and Alabama, causing massive flooding and devastating the lives of over a million people in New Orleans and the Gulf Coast region. The area suffered tremendous loss of life and property, and the health

and safety perils compelled the evacuation of thousands of families to inland cities and areas of the country. Then, Hurricane Rita struck Texas and Louisiana, bringing with it more flooding and property damage and additional loss of life. While you are undoubtedly

aware of these hurricanes and the horrendous havoc they caused, I would like to share with you the actions the Section of Labor and Employment Law has taken to respond to the impact of the two hurricanes.

Within the first 10 days after Hurricane Katrina struck New Orleans and the Gulf Coast, Section officers authorized a \$10,000 contribution to the Red Cross relief efforts and established the Section New Orleans/Gulf Coast Disaster Task Force. The task force consists of Section officers and council members, Section members from the Gulf Coast region, and representatives of our Pro Bono, CLE, and Equal Opportunity in the Legal Profession (EOLP) Administrative Committees. E-mails were sent to all members of the Section, informing them of the establishment of our task force and providing a link to the ABA task force website for current information about the relief efforts and opportunities for volunteers to assist victims.

Led by our Employment Rights and Responsibilities (ERR) Standing Committee Officers and Members, and assisted by the EEO, CLE, EOLP, and Pro Bono Committees and the Section staff, a free national teleconference was held Friday,

September 30, 2005, to discuss the many labor and employment issues arising from these disasters, including Disaster Unemployment Assistance; payment of wages earned but not paid; FMLA and WARN Act issues; affirmative action, clean-up, and Davis-Bacon obligations of federal contractors; ADA and OSHA issues; and union issues relating to dislocated workers. Section members and representatives of the EEOC and U.S. Department of Labor spoke during this free conference, in which approximately 700 lawyers participated by telephone.

The Section previously participated in a free national teleconference on Thursday, September 22, 2005, concerning issues faced by employers and employee benefits plans as a result of the Katrina and Rita disasters. This teleconference was arranged by the six ABA Sections that participate in the ABA Joint Conference on Employee Benefits, including the Section of Labor and Employment Law and the American College of Employee Benefit Counsel.

The Section New Orleans/Gulf Coast Disaster Task Force has requested ideas and suggestions

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### Section to Aid in Rebuilding New Orleans Public Libraries

The hurricanes that ravaged the Gulf Coast this fall destroyed entire communities and their social and cultural institutions. Recognizing that these are extraordinary events that call for extraordinary responses, the Section decided to look beyond providing emergency relief and legal services to victims of the hurricanes (*see* story this page) and to find a way to make a broader impact. On the recommendation of the Section's New Orleans/Gulf Coast Disaster Task Force, the Section Council has voted to help restore an institution vital to the life of the community—the New Orleans public library system—through a two-pronged approach. The Section itself will contribute \$25,000 toward the rebuilding effort, and the council will explore with the ABA the possibility of launching a fund-raising effort among the Section members to assist in this effort.

With this money, the New Orleans public library system will be able to begin rebuilding its collections, information systems, educational services, and community outreach—and hopefully take a giant step toward reestablishing the fabric of the city.



# Comments



## from the Chair

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from our Section members concerning activities and programs the Section can undertake to assist individuals, families, and law firms affected by the hurricane and flooding disasters. The task force will respond to all input and will use your comments and suggestions in recommending programs and activities to the Section officers for action in the immediate future. The task force and staff are continuously updating the Section website with ongoing programs and relief efforts in which our members can participate.

Our 21 substantive standing committees, administrative committees, and task forces are the heart and soul of the Section of Labor and Employment Law. The CLE programs at the midwinter and Annual Meetings, the books and supplements produced by the Section, and the opportunity to meet and interact with other practitioners in private and public areas of labor and employment law, including administrative agencies, arbitrators, and the judiciary, cannot be equaled in any other organization.

Every substantive standing committee will have a midwinter or spring program in 2006, which will feature top-notch CLE programs and activities. You probably have received information about these meetings, and I encourage you to plan now to attend one of these outstanding committee meetings. Check the Calendar of Events on the back of this newsletter.

Section activities continue throughout the year, including our teleconferences, work involved in

the publication of 23 Section treatises and supplements, committee newsletters, pro bono work, nationwide mentoring, and outreach to law school students. Get involved in these activities, and you will get more out of your membership in the ABA and the Section.

In addition to our regular monthly teleconferences and the periodic teleconferences we schedule when the Supreme Court issues notable decisions in the field of labor and employment law, our CLE and Marketing Committees have instituted two new series of teleconferences. This fall, the Section scheduled 12 "Best of the Midwinter Meetings and More" teleconferences to provide members with a sampling of some of the outstanding programs presented at the 2005 midwinter meetings. In addition, the Section is planning a series of teleconferences in early 2006 that will present the best programs of the 2005 Annual Meeting.

The ABA 2006 Annual Meeting will be held in Hawaii. The Section is planning a full schedule of CLE programs from Saturday, August 6, through Tuesday, August 9. Among the highlights will be programs on litigating and resolving labor and employment disputes across international borders, whistle-blower claims, and class action cases. High-quality programs will also be offered on bankruptcy, collective bargaining, and conflicts of interest, along with traditional "update" programs providing cutting-edge developments in the EEO, ERISA, NLRA, and ADR arenas. I hope you will take this opportunity to enjoy advanced CLE offerings in spectac-

### Free Hurricane Katrina Webcast

*Sponsored by the ABA Section of Labor and Employment Law and the ABA Center for Continuing Legal Education\**

#### Legal Rights and Responsibilities of Employers, Employees and Labor Unions in the Aftermath of Hurricane Katrina

Participants in the 90-minute webcast, who include experienced labor and employment practitioners and governmental representatives, discuss legal rights and responsibilities of employees, employers, and labor unions. Topics addressed include:

- Disaster unemployment assistance
- Requirements regarding payment of wages
- Leave of absence protections and obligations, including those pertaining to FMLA, WARN Act requirements
- Affirmative action obligations of federal contractors
- Accommodation of individuals with disabilities
- Union matters and additional issues affecting dislocated workers
- OSHA issues

To access the program, go to [www.abanet.org/cle/clenow/t05kat1reg](http://www.abanet.org/cle/clenow/t05kat1reg).

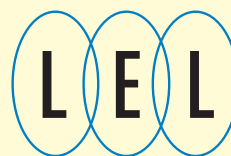
\*NOTE: This online course is offered as an informational service and is not eligible for CLE credit.

ular surroundings. If you have not received information about the meeting, please contact the Section office.

The Section's programs and activities are truly outstanding. In addition to our usual programs and activities, the Section is committed, through its activities, volunteer efforts, and donations, to assist the

victims of Hurricanes Katrina and Rita. These efforts will continue as long as necessary as we work with our members and the ABA to provide assistance and relief.

I urge you to be active in the Section New Orleans/Gulf Coast Disaster Task Force as well as other activities and programs of the Section. ■



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## Estreicher Considers Changes to the Supreme Court

By Mark Risk

Cautioning that predicting the behavior of Supreme Court justices is “especially hazardous duty,” Section Secretary Samuel Estreicher told a packed hall of Section members that he expected Judge John Roberts to be a “reliable conservative” in the tradition of Lewis Powell, Potter Stewart, and John M. Harlan.

“This year there is essentially one question” said Estreicher, Opperman Professor of Law at New York University Law School, at the Plenary Session of the Section’s program at the ABA Annual Meeting, turning to the issue of how the retirement of Justice Sandra Day O’Connor and the confirmation of Roberts would affect the Supreme Court.

Estreicher’s presentation took place prior to the death of Chief Justice William Rehnquist and the president’s nomination of Roberts to be Chief Justice.

Roberts is “something of an unknown quantity,” said Estreicher, due to his limited time as a federal appeals court judge. He added that prior to becoming a federal appellate judge in 2003, Roberts had been “one of the few ‘must consider’ lawyers for any client with a case before the Supreme Court.”

Estreicher framed the discussion by attempting to describe the philosophical composition of the current Court. Though much of the Court’s work involves the resolution of intercircuit conflicts where, in Estreicher’s view, the outcome is not in doubt, in the few controversial cases involving deeply held moral beliefs and values, the Court “tends to break down into two reliably predictable wings: the liberal ‘gang of four’ and the conservative ‘gang of three.’” Justice Kennedy often votes with the conservatives, Estreicher said, except in First Amendment and personal autonomy cases.

Justice O’Connor has been the



Professor Samuel Estreicher

PHOTO BY JOEL A. D’ALBA

least predictable of the justices, he said. Her “judicial conservatism” was responsible for her being the crucial fifth vote in so many cases. “Judicial conservatives believe in a limited judiciary, care about the facts of a particular case, decide cases narrowly, are reluctant to overturn precedent, and are mindful of the likely practical consequences of a ruling. They also tend to defer to policymaking by the Congress and the states.”

“These virtues are not present in every O’Connor opinion,” he said, “but they are present in a good many of them.”

Estreicher contrasted this with Justice Antonin Scalia, whom he described as a judicial activist “because he is quite open to, and actively seeks to prod, change.”

In constitutional cases, Estreicher said, this is due to Scalia’s commitment to “originalism,” the view that the Constitution should be read in light of the original intent of the framers.

While this may be a useful counterweight to a more “purposive” approach under which judges function as a constitutional convention that reads the text in light

of changing times, Estreicher said that it also frees Scalia and like-minded judges to upset longstanding precedent in the interest of restoring the Constitution’s original meaning.

Estreicher said that Judge Roberts had told Senate interviewers that he believes in stare decisis, and will vote to overturn precedent only in the most extreme of cases, suggesting a more cautious conservatism than that of Justices Scalia or Thomas.

Estreicher contended that the differing judicial styles and the pivotal influence of Justice O’Connor were both present in the major labor and employment cases of the 2004 term.

### *Smith v. City of Jackson*

In *Smith v. City of Jackson*, the Court held 5–3, with O’Connor “concurring but essentially dissenting,” that the Age Discrimination in Employment Act (ADEA) authorizes disparate impact claims. *Smith* was a challenge by older police officers to a department-wide pay raise that resulted in more-junior officers receiving proportionately larger raises.

Although all eight Justices who participated agreed on the outcome of the case, Estreicher said that the three opinions demonstrate the different judicial philosophies on the Court.

Justice Stevens, in an opinion joined by Justices Souter, Ginsberg, and Breyer, held that the ADEA should be given the same reading as the virtually identical statutory language in section 703(a)(2) of Title VII, which had been held to recognize a right to recover for disparate impact in *Griggs v. Duke Power* (1971).

Justice Stevens noted two differences between Title VII and ADEA, however, that function together to make the disparate impact theory under *Smith* more limited than that available under Title VII.

First, Title VII was amended in 1991 in response to the Court’s decision in *Ward’s Cove Packing Co. v. Atonio* (1989), which limited the scope of disparate impact liability. The 1991 law, however, did not amend the ADEA, suggesting to the Court that *Ward’s Cove* still applied to disparate claims under ADEA. The Court held that an age discrimination plaintiff must identify the *specific employment practices* responsible for the claimed statistical disparities, and ruled that the *Smith* plaintiffs had not done so.

Second, the ADEA also includes a provision with no equivalent in Title VII that allows employers to take otherwise-prohibited actions based on “reasonable factors other than age.” The *Smith* plurality opinion states that this permits a broader range of defenses than Title VII’s “business necessity” defense. The plurality found that the City of Jackson’s pay raise policy was not unreasonable under this test.

Justice Scalia concurred in the decision, but did so on the basis of deference to administrative

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## Judges Talk About Jurors

“What can we do to improve the service of jurors to help them get to the issues they are tasked with?” asked Judge Bernice Donald of the U.S. District Court for the Western District of Tennessee, kicking off the Section’s Plenary Session panel on lawyers and juries at the ABA Annual Meeting.

“Lawyers don’t try their cases from the jurors’ perspectives,” said Judge Mark Bennett, Chief Judge of the U.S. District Court for the District of Iowa. The program was moderated by Professor Michael J. Howlett Jr. of Loyola Law School of Chicago, himself a former Illinois state court judge.

The panelists discussed the use of technology for making presentations to juries. “Jurors are visual learners,” said Judge Bennett. The judge, who designed his own high-technology courtroom, encourages and requires lawyers to use technology and uses Microsoft PowerPoint slides himself in conducting voir dire. He said that surveys show that jurors view lawyers who use technology in their presentations as their teachers or helpers.

Judge Bennett permits lawyers to use PowerPoint presentations during opening statements without previewing their slides. “I just tell

lawyers to be careful, because if there is an objection to the slides it will be embarrassing.” Judge Donald reviews all visual exhibits before trial and, if they are merely illustrative, explains this to the jury.

“I will not stop a trial to pass around photos and documents when cameras are available,” Donald said. Both Donald and Bennett added that they make their staff available to train attorneys to use trial presentation equipment. Professor Howlett added that studies show retention among students is increased when the instructor merely draws a straight line across the blackboard while making a presentation, indicating that any visual presentation increases retention.

Judge Donald uses PowerPoint slides while reading the jury instructions to jurors, having found that it greatly reduces juror confusion and questions about the charge.

Judge Bennett believes technology “levels the playing field” for parties with limited financial resources. “PowerPoint software is \$85, and we have Trial Director software and we train attorneys to use it.” Judge Bennett provides laptops to lawyers who need them for trial and makes court staff available to scan and load exhibits and



Judge Bernice Donald



Judge Mark Bennett

PHOTOS BY JOEL A. D'ALBA

to train the attorneys to use the software to call them up. A lower-technology alternative is to use a digital document camera, which scans and projects the documents and is easy to operate.

Judge Donald noted that the technology gap between counsel is not related to unequal resources, but rather to their differing abilities to operate the equipment. “Jurors comment on lawyer fumbling, asking for a recess to look for something in bankers boxes,” she said. “Jurors expect that lawyers can move through their presentations in a manner that looks smooth, like the lawyers they see on television.”

Judge Bennett and Judge Donald both permit witnesses to testify by real-time video. Bennett said that this practice is especially useful to parties with experts, whose fees are increased if they must travel to trial. Judge Donald cautioned that attorneys should be careful in using excerpts from video depositions at trial and in counseling their clients in how to give video depositions. She cited an example where a witness’s failure to look straight into the video camera during a deposition played out later on credibility issues at trial.

Addressing juror issues that arise in employment cases, Judge Bennett stressed that jurors are more persuaded by employer witnesses who are not from senior management. “If the claim is that

the plaintiff had poor attendance, a co-worker’s testimony about the plaintiff’s attendance is much more persuasive than the manager’s manager.”

Judge Donald cautioned, however, that middle management witnesses often cause problems for the employer. “They try too hard to do a good job for their employers and sound like they are trying to hide something.”

On issues of more general application, Judges Donald and Bennett agreed that lawyers often make the mistake of being too harsh on adverse witnesses in cross-examination. Judge Donald said that jurors will penalize lawyers for doing so. Judge Bennett added that when a defense lawyer treats the plaintiff unfairly, it is an early sign that the jury will favor the plaintiff, noting that he often sends an e-mail to his law clerk when he observes this happening. “I can see a plaintiff’s decision coming a mile away based on the conduct of the lawyer toward the plaintiff.”

The exception, said Judge Bennett, is when the witness “gives permission” for rough treatment by lying. “But if he doesn’t, the jurors react negatively to the lawyer beating him up.”

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# Dialogue with NLRB Explores Hot Topics and Current Challenges

By Joseph J. Torres

Attendees at this year's Annual Meeting were treated to a lively discussion featuring National Labor Relations Board (NLRB) Chairman Robert Battista and members Wilma Liebman and Peter Schaumber. The topics ranged from the continuing relevance of the NLRB to significant issues pending before the board and current challenges in administering the agency. Not surprisingly, the board members offered a wide range of opinions on these issues.

**The board is adaptive, but the principles of free choice and the duty to bargain in good faith are immutable.**

The session was moderated by NLRB Executive Secretary Lester Heltzer, with questions posed by Peter Janus and Ken Wagner, co-chairs for the Section's Committee on Development of the Law Under the NLRA.

## Is the Board Still Relevant?

Despite the passage of 70 years since the enactment of the National Labor Relations Act (NLRA) and the absence of any significant modifications to its basic provisions, Chairman Battista said that both the act and the board are in good shape. Battista attributed the act's continuing relevance to a broadly worded and flexible statutory scheme that established immutable principles that remain relevant today: free choice and the duty to bargain in good faith. Within that framework, Battista noted, the NLRB has been adaptive, for example, by applying long-established

principles governing solicitation and distribution rules to e-mail and other emerging technologies that have dramatically changed today's workplaces. The chairman also discounted the continuing decline in union-represented employees in the private sector as affecting the board's relevance, noting that unions remain strong in a number of important industry sectors. Battista said that as long as organizing efforts continue, the board's role will remain important.

Schaumber echoed the chairman's comments, stating that the board continues to provide a vital role in labor-management relations. He observed that in 2004 the board processed more than 27,000 unfair labor practice charges, oversaw in excess of 3,000 elections, awarded approximately \$294 million in back pay by employers and \$440,000 in fees and back pay by unions, and reinstated about 3,000 employees.

In contrast, Liebman suggested that a fair assessment of the board's relevance needs to separate the basic entitlements afforded under the NLRA, which she believes remain relevant as core human rights, from an assessment of the continued vitality of the systems established by the NLRB for protecting those rights. She mentioned the problems of ongoing vacancies in the board's membership, a lack of knowledge among nonunion employees that the act

applies to them, diversifying workforces, and a less-stable working environment due to outsourcing and foreign competition. She also questioned whether current board law and doctrine are suited to deal with this new environment.

## Current "Hot" Topics

Liebman focused on issues involving contingent workers. In light of the board's recent decision in *Oakwood Care*, 343 NLRB No. 76 (2004), overruling *M.B. Sturgis*, 331 NLRB 1298 (2000), and holding that jointly employed temporary employees may only be included in a unit with full-time employees if both employers consent, Liebman opined that the board needs to grapple with the question of how such contingent workers may obtain representation if they so desire. She said that the board's failure to address this issue may undermine its ability to remain relevant to changing workforces.

Schaumber identified a range of emerging issues, including the legality of neutrality agreements, whether "salts" must be regarded as employees under the act in all circumstances, the possible limits on board make-whole remedies, and jurisdictional issues arising from the recent AFL-CIO rift.

Chairman Battista also acknowledged the board's need to address issues concerning supervisory status arising from the U.S. Supreme Court's decision in *NLRB v. Kentucky River Cmty. Care*, 532 U.S. 706 (2001). He noted, however, that any such decisions will have to await the board regaining its full five-member complement.

## Balancing Employee and Employer Rights

The board members also considered a number of questions concerning the proper balancing between employees' right to organize and an employer's right to regulate

its workplace by promulgating generally applicable rules of conduct. Liebman noted that the primary issue for the board to resolve is whether antiharassment or workplace civility policies may impair employees in the exercise of their Section 7 rights. She questioned whether the board is able to put itself in the shoes of the average low-skill, low-wage employee to determine how he or she perceives such rules.

In response, Schaumber suggested that the board members try to balance the competing interests of employer and employee, and use their own life experiences to assess a particular situation, much like a judge or jury does.

## The Board's Ability to Function at Less Than Full Strength

Chairman Battista discussed the board's plan to conduct business with only two members, anticipating the expiration of Schaumber's term on August 27. The Senate had not yet approved Schaumber's reappointment. Battista noted that the Justice Department had issued an opinion that the board could delegate its powers to a three-member panel, such that two members would constitute a quorum and could decide cases prior to the addition of a third member. While Chairman Battista left open in his remarks at the Annual Meeting the question of whether he and Liebman would, in fact, issue opinions, the board announced on August 26 that it had made the delegation of its powers. Shortly thereafter, however, President Bush gave Schaumber a recess appointment, avoiding a test of the two-member board's authority to decide cases. ■

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## Acting NLRB General Counsel Rosenfeld Gives Farewell Address

By Paul W. Iversen

At the ABA Annual Meeting, National Labor Relations Board (NLRB) Acting General Counsel Arthur Rosenfeld addressed the Section for what may be his last time as NLRB general counsel. Rosenfeld announced that President Bush has appointed him to be director of the Federal Mediation and Conciliation Service and has nominated former board member

Ronald Meisburg to serve as general counsel. Rosenfeld has agreed to remain as acting general counsel until his successor is confirmed.

Reflecting on his four years as general counsel, Rosenfeld stated that he wanted three Es to be the hallmark of his term: evenhandedness, efficiency, and effectiveness. He believes he has accomplished these goals through both what he

has done as general counsel and what he has refrained from doing. With respect to what he has done, Rosenfeld emphasized activities in the following areas:

- Bringing issues before the board relating to card check and neutrality agreements, including
  - The lawfulness of according recognition under such an agreement while a disaffiliation petition is being circulated;
  - Using neutrality agreements to prenegotiate terms and conditions of employment (the *Majestic Weaving* issue); and
  - Whether and to what extent granting recognition under such an agreement creates a “recognition bar.”
- Submitting a brief to the NLRB, at its request, providing the general counsel’s view of how the board should resolve issues of the definition of supervisor following the Supreme Court’s *Kentucky River* decision.
- Issuing a complaint based on the board’s *Target Rock* ruling that “at-will” employees are temporary replacements, while arguing to the board that *Target Rock* should be overruled.
- Urging the board to reconsider its blanket refusal to defer request for information cases.

Turning to how he has accomplished his “three E goals” by refraining from acting, Rosenfeld noted that while the general counsel position has sometimes been caricatured as a “labor czar,” he believes the general counsel must tread lightly, recognizing that the board cannot right every wrong or resolve every legal issue. He explained that there were circumstances in which he believed that resolving the issue would not justify the damage to the bargaining relationship that would result from a board complaint,

citing as examples cases that involved the following:

- A company requested a copy of the questionnaire the union sent to unit members to determine their interests in advance of negotiations.
- A union requested a copy of company bargaining notes.
- A deposed union attempted to require the employer to deal with it concerning grievances arising while it represented a bargaining unit, but the replacement union had agreed to process grievances through arbitration, if necessary, and the employer had agreed to deal with the replacement union.
- A union and a company each alleged they had agreed on a collective bargaining agreement but disagreed as to whether the employees had to reimburse the employer for money the employer had neglected to withhold from their wages for health insurance during the term of the previous agreement. In that case, the general counsel refused to issue a complaint on either charge in order to require the parties to resolve the issue through negotiations.

Rosenfeld also expressed his continued support of the use of section 10(j) injunctions when appropriate, citing the fact that he had requested the board’s authorization to initiate section 10(j) proceedings on 87 occasions and that the board approved 59 of those requests.

Rosenfeld concluded his remarks by thanking those in attendance for their guidance over the last four years. ■

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Outgoing Chair Howard Shapiro presents the Frances Perkins award to Judith Conti of the EJC (see story page 8) and accepts a token of thanks from incoming Chair Charles Werner (left).

PHOTOS BY JOEL A. D'ALBA



# International

## Cross-Border Ethics Codes: The Case of Wal-Mart in Germany

By Dr. Gerlind Wisskirchen, Christopher Jordan, and Alexander Bissels

Throughout Europe and the United States, more and more major companies are adopting codes of ethics or conduct that set out their own framework of legally and ethically responsible conduct. In the United States, one company in eight has now introduced such a code, addressing issues that range from accounting rules to rules governing social conduct. (See “Dialogue with NLRB Explores Hot Topics and Current Challenges,” on page 5 for NLRB member Liebman’s comments on the status of such codes under section 7 of the NLRA.) As Wal-Mart’s recent experience in Germany demonstrates, however, companies must be wary about facing a clash of cultures—reflected in different laws, traditions, and attitudes—when they attempt to extend the codes of conduct developed in one country to their subsidiaries elsewhere.

The debate over whether rules developed in the United States comply with European law recently came to a head over attempts by the German subsidiary of the U.S. supermarket chain Wal-Mart to impose the company’s ethical standards—including a 28-page book containing nearly 50 rules—on its 10,500 employees. Among the rules is one stating, “You may not date or become romantically involved with another Associate if you can influence that Associate’s terms and conditions of employment.” Another states, “[A]ll Associates are *required* to report any known or suspected violations of the law, applicable regulations or this Statement of Ethics or any other Wal-Mart policy.”

In implementing the code of conduct, Wal-Mart came up against two sets of legal restraints: the “codetermination” rights of the

company’s works council and the “general personality rights” accorded individual employees.

### Rights of the Works Councils

Under German labor law, works councils and labor unions coexist side-by-side in the same enterprises. The unions negotiate collective bargaining agreements on an industrywide basis, while the works councils deal with management on terms of employment within a particular establishment. The Works Constitution Act gives the works councils an enforceable right of “codetermination”—i.e., the right to be kept informed and be heard before the company implements decisions—on matters ranging from employee conduct, hiring decisions, and discipline, to hours of work, forms of remuneration, and safety and health rules.

The works council at Wal-Mart filed a claim in the German Federal Employment Court alleging that by unilaterally introducing the code of ethics, the company breached its codetermination rights. The council also alleged that by requiring employees to report breaches of the code to a phone hotline, Wal-Mart was inciting its employees to denounce their colleagues.

### Rights of the Employees

The German courts recognize that individuals have a general right that protects a “core area” of the human personality. This personality right bars the state from interfering with this “core area.” In addition, it has long been recognized that these rights afford individuals protection against other actors as well, and apply, to a certain extent, in the relationship between the employer and the employee.

The trade union at Wal-Mart sup-

ported the works council’s complaint before the labor court, while at the same time publicly asserting that the company’s regulation of personal relationships and romantic associations and its imposition of whistle-blowing obligations constituted “serious incursions into personality rights” and fostered a “culture of denunciation.”

The labor court struck down major parts of Wal-Mart’s code of ethics. Agreeing with the works council, the court prohibited the company from enforcing any of the rules that are subject to the council’s codetermination rights because Wal-Mart had failed to involve the works council in their development and implementation. These include rules as follows:

- Requiring employees to report breaches of the code of ethics on an anonymous phone hotline;
- Prohibiting, demanding, requesting, or receiving presents or special payments;
- Prohibiting statements to the press, newspapers, or other sources without consent from the company communications department;
- Prohibiting harassment and improper conduct at the workplace;
- Regulating inspection rights with respect to the company’s personnel and illness files;
- Barring personal relationships/romantic associations;
- Prohibiting alcohol and drug abuse; and
- Prohibiting the display of posters referring to the rules banning presents or gifts and requiring employees to report breaches of the code of ethics.

The judges left standing rules that merely referred to the applica-

bility of German statutory provisions or that were described in such generic terms that they did not implicate any specific employee obligations. In addition, the court left open a number of rules that it concluded were not subject to codetermination but that are likely ultimately to be held invalid because they breach the general personality rights of individual employees. The labor court, however, does not have jurisdiction over personality rights claims.

The court decided that Wal-Mart will have to pay an administrative fine of up to US\$300,000 for each contravention of its cease-and-desist order. Wal-Mart has appealed the decision.

Wal-Mart’s experience in Germany demonstrates that ethics codes do not necessarily translate well, and that implementation of identical codes of conduct throughout a worldwide organization will hardly be possible. International operating groups attempting to draft such codes must comply with national legal systems that vary not only with the protections they provide individual employees, but also with the participation rights they guarantee to employee representatives.

As a rule, before introducing codes of ethics to their European subsidiaries, U.S. companies should review the extent to which their concepts comply with the law of the country in which each particular subsidiary is located. ■

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# Section News

## Employment Justice Center Receives Frances Perkins Public Service Award

The Section honored the D.C. Employment Justice Center (EJC), a not-for-profit organization that provides a full range of employment law services to low-wage workers, as the second recipient of its Frances Perkins Public Service Award at the 2005 Annual Meeting in Chicago. Judith Conti and Kerry O'Brien, founders of EJC, received the award on behalf of EJC and spoke at the Pro Bono Committee's Annual Meeting Workshop. EJC Workers Rights' Clinic Coordinator Hannah Barton, who was placed at EJC by a Lutheran public service organization and will attend Yale Law School in the fall, and Laurie Wardell, director of the Equal Employment Opportunity Project of the Chicago Lawyers Committee for Civil Rights Under Law, also

spoke at the workshop. All four speakers discussed volunteer opportunities available to lawyers through their organizations.

Conti and O'Brien founded EJC in 2000 in response to a survey by the D.C. bar that revealed that disadvantaged residents felt they had no place to turn to for employment-related legal services. Their goal in establishing the EJC was to secure, protect, and promote workplace justice in the D.C. metropolitan area. The EJC works toward this goal by (1) providing direct legal services, (2) educating low-wage workers on their workplace rights and responsibilities, and (3) advocating for systemic change that will benefit low-wage workers through traditional legislative and administrative advoca-

cy as well as community organizing.

The backbone of EJC's invaluable legal services program is its Workers' Rights Clinics, which are held weekly in two communities in the D.C. area. Through the clinics, the EJC has advised and counseled over 5,000 individual workers, collected over \$1.5 million in back wages and benefits, and returned many people to jobs from which they were wrongfully terminated.

EJC's most significant achievement to date was a sweeping victory in a class action lawsuit against the D.C. Disability Compensation Program (DCP), the workers' compensation system for D.C. government employees. EJC challenged the DCP's regulations and practices, under which numerous qualified disabled workers had lost

their benefits. In November 2004, a federal judge voided all of the DCP's regulations, enjoined the program from terminating any benefits until it issued proper regulations, and ordered reinstatement of all benefits as of September 24, 2004, at an amount that is likely to exceed \$20 million.

EJC has a volunteer corps of more than 250 law students, paralegals, and attorneys who donate time and expertise to the program.

The Pro Bono Committee of the Section of Labor and Employment Law encourages all members to perform at least 50 hours of pro bono work per year in accordance with Rule 6.1 of the ABA's Model Rules of Professional Conduct. For more information, go to [www.abanet.org/labor/pbcomm.html](http://www.abanet.org/labor/pbcomm.html). ■

## Labor Standards Committee Issues Supplement to Wage and Hour Treatise

Wage and hour plaintiffs are increasingly commencing their lawsuits in state court, turning from federal "opt-in" suits under the Fair Labor Standards Act (FLSA) to the more typical class action "opt-out" suits available under state law.

This phenomenon is discussed in the 2005 Supplement to the Section treatise *Wage and Hour Laws: A State-by-State Survey*, written by members of the Federal Labor Standards Legislation (FLSL) Committee and published by BNA Books. Both the supplement and the main volume are available at a substantial discount to Section members (see page 11).

There are several reasons for the increase in suits based on state law. Most obviously, many states permit wage and hour suits to be pursued as true opt-out class actions as opposed to the FLSA collective actions in which each plaintiff must affirmatively opt in to the

lawsuit. The opt-in requirement under the FLSA has resulted in most lawsuits (other than those that are union-sponsored) involving less than half the eligible workforce because language barriers, itinerant low-income workforces, and fear of employer retaliation inhibit participation. In contrast, state law class actions include the entire affected workforce for the entire applicable limitations period.

A related reason, however, is that defense lawyers are propounding discovery in federal court collective actions to all of the opt-in plaintiffs. In many cases this increases the cost of litigating the case. Additionally, many opt-in class members cannot be located or otherwise fail to respond and are dismissed from the cases. In state court class actions, the representative plaintiffs alone must respond to discovery, a much less onerous discovery obligation, and

one in which the entire class of plaintiffs remains in the case.

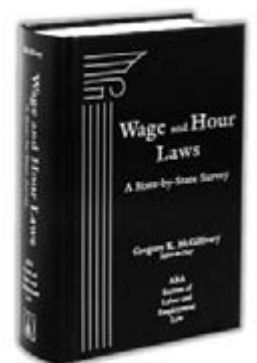
Also, state laws sometimes offer advantages to plaintiffs. Many states provide for longer statutes of limitations than the FLSA. Some states allow claims unavailable under the FLSA, such as failure to provide meal periods, pay wages on time, provide an employee's last paycheck, or take proper deductions from paychecks. Some states provide for additional penalties for failure to comply with state law, such as compounded interest or liquidated damages for these additional claims.

A further reason is that state courts may provide a more hospitable forum for plaintiffs' claims. The importance of this reason has diminished, however, as a result of the passage of the Class Action Fairness Act. Under this act, which was signed into law in February, cases in which there is diversity

between one plaintiff and one defendant and which involve 100 or more plaintiffs with claims for more than \$5,000,000 in the aggregate will be removed to federal court.

Members of the FLSL Committee also contribute to annual updates to the Section's treatise *The Fair Labor Standards Act* (see page 11) and are working on a treatise on the Family and Medical Leave Act.

The committee, which will hold its midwinter meeting in San Juan, Puerto Rico, March 1-3, welcomes new members. Further information about the meeting will be posted on the Section website at [www.abanet.org/labor](http://www.abanet.org/labor). ■



## Work/Fun: The Dialectic of the Midwinter Meetings

What's so great about the midwinter meetings? Why are they considered to be backbone of the Section?

True, they may be held far from home. You already have more than enough professional commitments and other responsibilities. Your bosses or partners might not understand why you want to attend.

So many Section members view the midwinter meetings as a major part of their professional lives. It's a great way to meet other good lawyers who share your professional interests. It addresses the sense of isolation that lawyers sometimes feel in their work. It is a professionally

broadening experience to meet lawyers from all over the country and from other countries. They become teachers, mentors, business associates, and friends.

At the midwinter meetings, you are suddenly part of a bigger conversation about the law, with lawyers from employers, employees, unions, and the government, plus judges, government officials, arbitrators, and scholars. Friendships are made between lawyers who would otherwise only encounter each other as adversaries. Many Section members have developed their own practices sub-

stantially through the people they meet at their midwinter meetings.

The meetings are serious but informal and strike a good balance between structured CLE programs and opportunities to meet in more social settings. Many lawyers bring a spouse, a friend, or their family and plan their own vacation activities around the meeting.

Okay, it's always hard to be new. But the committees of our Section work very hard at making the meetings friendly and welcoming for first-time attendees. The substance of the committees' work varies throughout all areas of labor

and employment law, but the quality of the CLE programs and the friendliness of the committee members is consistent throughout.

You might return to your office with broader horizons, new professional contacts, and renewed interest in your work.

Most of us want our work to be more stimulating, personally satisfying, and exciting. Attending midwinter meetings is a concrete investment in those goals. Get the details on the Section website at [www.abanet.org/labor](http://www.abanet.org/labor) and see the Calendar of Events on the *LEL* back cover. ■

### College of Labor & Employment Lawyers Inducts Class of 2005

The College of Labor and Employment Lawyers inducted its newest class of fellows at the ABA Annual Meeting in Chicago in August. Founded in 1995, it is a nonprofit professional association honoring the leading labor and employment law lawyers nationwide.

Membership is by invitation only, honoring those who have demonstrated to their peers, the bar, bench, and public through long performance that they represent:

- the highest professional qualifications and ethical standards,
- the highest level of character, integrity, professional expertise and leadership,
- a commitment to fostering and furthering the objectives of the college,
- sustained, exceptionally high-quality services to clients, bar, bench and public, and
- significant evidence of scholarship, teaching, lecturing and/or published writings on labor and employment law.

#### Fellows

Morris J. Baller, Oakland, CA  
Paula A. Barran, Portland, OR  
Ned H. Bassen, New York, NY  
William Bevan III, Pittsburgh, PA  
Maureen S. Binetti, Woodbridge, NJ  
Patricia Thomas Bittel, Cleveland, OH  
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R. Daniel Bordoni, Syracuse, NY  
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Susan L. Brackshaw, Washington, DC  
Ricklin Brown, Charleston, WV  
Victor A. Cavanaugh, Atlanta, GA  
Jack Clarke, Montgomery, AL  
John H. Curley, Bedminster, NJ  
Irwin Herbert Cutler Jr., Louisville, KY

Shyam Das, Pittsburgh, PA  
Robert P. Davis, Washington, DC  
Joan G. Dolan, Brookline, MA  
Stephen R. Drew, Grand Rapids, MI  
Herbert Eisenberg, New York, NY  
Sue Ellen Eisenberg, Bloomfield Hills, MI  
Samuel Estreicher, New York, NY  
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Matthew W. Finkin, Champaign, IL  
Charles P. Fischbach, Chicago, IL  
Herbert Fishgold, Washington, DC  
George Fleischli, Madison, WI  
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Alvin L. Goldman, Lexington, KY  
Susan M. Hammer, Portland, OR  
Elizabeth Phelps Hardy, Birmingham, MI  
John C. Hendrickson, Chicago, IL  
Jeffrey L. Hirsch, Boston, MA  
Lawrence J. Hurley, Murray Hill, NJ  
Ira F. Jaffe, Potomac, MD  
Eric H. Joss, Los Angeles, CA  
Anita Christine Knowlton, San Francisco, CA  
John B. Lewis, Cleveland, OH  
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William Lurye, Metairie, LA  
Susan T. Mackenzie, New York, NY  
Robert D. Manfred Jr., New York, NY  
Sharon P. Margello, Morristown, NJ  
Christopher J. Martin, Palo Alto, CA  
Francis J. Martorana, Washington, DC  
Loralyn McKinley, Philadelphia, PA  
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Alan A. Symonette, Philadelphia, PA  
Darlene Ann Vorachek, Chicago, IL  
C. Geoffrey Weirich, Atlanta, GA  
Rebecca Hanner White, Athens, GA  
Albert Zakarian, Hartford, CT  
Jacalyn J. Zimmerman, Chicago, IL

#### Honorary Fellows

Howard Block, Tustin, CA  
Frank Elkouri, Norman, OK  
Edna Elkouri, Norman, OK  
James M. Harkless, Washington, DC  
Edgar A. Jones Jr., Pacific Palisades, CA  
Richard Mittenenthal, Novi, MI  
William Murphy, Chapel Hill, NC  
J.F.W. Weatherill, Ottawa, Ontario, Canada

## Supreme Court

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agency interpretations, in this case EEOC regulations, under *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.* (1984).

Estreicher said that while the EEOC is not a favorite agency of political conservatives, the approach of deferring to it offered Scalia “a rather elegant solution.” Though it has been settled precedent for years that Title VII provides disparate impact liability, the text of Title VII does not explicitly

purpose, O’Connor, a judicial conservative, declined to read or infer into the statute something that she did not believe was there.

### ***Jackson v. Birmingham Board of Education***

In *Jackson*, the Court found that Title IX of the Education Amendments of 1972, which prohibits sex discrimination by institutions who receive federal financial assistance, impliedly prohibits retaliation for reporting sex discrimination in violation of the statute. This time, O’Connor wrote the opinion for a 5–4 majority that included Justices

include retaliation, the fact that Title IX did not specifically include “retaliation” was not determinative.

Justice Thomas wrote the dissent, joined in by Justices Rehnquist, Scalia, and Kennedy. They argued that because Title IX imposes conditions through Congress’s spending powers, the conditions should be explicit and unambiguous so that funding recipients have clear notice of what obligations they are undertaking.

### ***Spector v. Norwegian Cruise Line Ltd.***

Estreicher admitted that *Spector*, which held that the public accommodations provisions of Title III of the Americans with Disabilities Act (ADA) sometimes apply to foreign flag cruise ships, is an employment case “only if the phrase is stretched.”

The question for the Court was whether applying the ADA to foreign flag ships triggered concerns over extraterritorial application of U.S. statutes requiring an especially clear statement of congressional intent. The Court fragmented into a number of opinions, with Justice Kennedy authoring the lead opinion.

The Kennedy opinion held that the ADA applied—but only some of the time. Without specific evidence of congressional intent, the foreign flag ships are not reached by laws that govern the “internal order” of the ship, like the relations between the captain and crew, but are reached by laws that govern “the peace of the port,”

such as relations with American longshoremen.

Kennedy wrote that the public accommodations title of the ADA concerns relations between the foreign ship company and its U.S. passengers and, as such, does not impinge on the internal order of the ship.

Scalia, joined this time by Rehnquist and O’Connor, dissented, arguing that requiring ships to comply with the ADA necessarily implicated the internal order of the ship. Scalia said that safety issues are generally covered by the laws of the flag state, and that the structural modifications required by Title III of the ADA necessarily implicate the ship’s internal affairs, requiring a clear statement of intent from Congress, not present in the text of the statute.

The annual review of the Supreme Court’s labor and employment cases by the Section secretary is one of the Section’s longstanding traditions. The position of Section secretary is reserved for a notable professor of labor and employment law, who serves for a one-year term, culminating in the Supreme Court review presentation given at the Section’s Annual Meeting program. A paper based upon Estreicher’s talk will be published in *The Labor Lawyer*, the Section’s scholarly journal. ■

**Mark Risk**, principal of Mark Risk, P.C., in New York City, is a co-editor of *LEL*.

The full text of Professor Estreicher’s talk, including citations and footnotes, is available on the Section’s website at [www.abanet.org/labor](http://www.abanet.org/labor).

say so, and joining the plurality opinion would have been inconsistent with Scalia’s judicial philosophy. Deference to the EEOC regulation provided an alternative way to concur in the decision.

O’Connor concurred by separate opinion, joined by Justices Kennedy and Thomas, arguing that disparate impact could not be read into ADEA, noting that *Griggs* had not yet been decided when the ADEA was enacted. Title VII dealt with the “qualitatively different” problem of racial discrimination, she argued, and *Griggs* was based on Title VII’s statutory purpose rather than its text. While the plurality opinion looked to statutory

Stevens, Souter, Ginsberg, and Breyer.

In *Jackson*, a high school teacher sued for unlawful retaliation after he was removed as girls’ basketball coach after complaining that the girls’ team was not receiving equal resources.

The majority opinion rested on considerations of stare decisis, based on a series of decisions extending Title IX’s implied right of action. The Court also noted that its 1969 decision in *Sullivan v. Little Hunting Park, Inc.*, held that a claim for retaliation could be brought under 42 U.S.C. § 1982. The Court reasoned that because Congress had notice in 1972 that the term “discrimination” could be read to

## Judges Talk

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Donald said that juries do not like witnesses who talk down to them. “When an expert says, ‘I know you may not understand this,’ jurors find it condescending.”

Bennett listens for how expert witnesses introduce themselves. If the question is, “What is your name?” and the witness begins his answer with “Dr.,” Bennett believes he will not be a strong witness. “A witness who confuses his title with his name is going to be an advocate,

which juries react least well to.”

“The jurors are the judges of your case, not an irrelevant group of people over on the side,” said Judge Donald. She emphasized that, from the beginning of the case, a lawyer must be sure to address the entire jury, not just one or two members.

“Conduct the examination as a conversation,” said Judge Bennett. “Listen to the witness.” Form a question from the witness’s answer. Judge Bennett said that he had recently seen a very effective direct examination where the lawyer pulled his own chair up

close to the witness, which Bennett said resulted in a more conversational examination.

“Lawyers tend to junk up the record with exhibits they don’t need at trial,” said Judge Bennett. “Put your case on a diet. If you are not going to use an exhibit at closing, reconsider whether to use it at all. Jurors find that trials have too many witnesses and too many repetitive questions.”

Turning to problems related to voir dire, Judge Donald explained that she permits lawyers in her courtroom to conduct the voir dire themselves, adding that two other

judges in her district also have adopted that practice. Judge Donald said that lawyers rely too much on gender, race, and class in selecting their jurors, instead of “looking for other things that are more relevant to the particular case.”

Judge Bennett agreed that lawyers should conduct voir dire on the core issues of the case, observing that many are afraid to do so because they are uncertain what to do with the answers. He suggested asking a question like, “What kind of evidence would you expect to see in order for you to find for my client?” —M.R. ■

## 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 [www.bnabooks.com/ababnal/index.html](http://www.bnabooks.com/ababnal/index.html).

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 American Bar Association  
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Attend a midwinter meeting in 2006.  
**Register now.** (see page 9 and insert)

## Calendar of Events

### 2006

#### January 25–28

Employee Benefits Committee  
 Midwinter Meeting  
 Sonesta Beach Resort  
 Key Biscayne, Florida

#### January 26–28

State and Local Government  
 Bargaining and Employment Law  
 Committee Midwinter Meeting  
 Location TBD

#### February 12–14

State Labor and Employment  
 Law Developments Committee  
 Midwinter Meeting  
 Westin Mission Hills Resort  
 Rancho Mirage, California

#### February 12–15

ADR in Labor & Employment  
 Law Committee  
 Midwinter Meeting  
 Westin Mission Hills Resort  
 Rancho Mirage, California

#### February 26–March 1

Development of the Law Under the  
 NLRA Committee Midwinter Meeting  
 Location TBD

#### March 1–3

Federal Labor Standards Legislation  
 Committee Midwinter Meeting  
 Caribe Hilton  
 San Juan, Puerto Rico

#### March 1–4

Practice & Procedure Under the  
 NLRA Committee Midwinter Meeting  
 Location TBD

#### March 7–10

Occupational Safety and Health Law  
 Committee Midwinter Meeting  
 Bacara Resort  
 Santa Barbara, California

#### March 7–10

Workers' Compensation  
 Committee Midwinter Meeting  
 Bacara Resort  
 Santa Barbara, California

#### March 8–10

Railway & Airline Labor Law  
 Committee Midwinter Meeting  
 L'Auberge Del Mar  
 Del Mar, California

#### March 15–18

Employment Rights & Responsibilities  
 Committee Midwinter Meeting  
 Westin Resort & Spa  
 Puerto Vallarta, Mexico

#### March 16–18

Ethics and Professional Responsibility  
 Committee Midwinter Meeting  
 Westin Resort & Spa  
 Puerto Vallarta, Mexico

#### March 22–24

Technology Committee Midwinter Meeting  
 Hilton La Jolla Torrey Pines  
 La Jolla, California

#### March 22–25

National Conference on Equal  
 Employment Opportunity Law (pre-  
 sented by the EEO Committee)  
 Hilton La Jolla Torrey Pines  
 La Jolla, California

#### April 5–6

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

#### April 7

Antitrust, RICO and Employment Law  
 Committee Midwinter Meeting  
 Washington, D.C.

#### April 7

Immigration Law Committee  
 Midwinter Meeting  
 Washington, D.C.

#### April 20–22

Sports & Entertainment Labor Law  
 Committee Midyear Meeting  
 W Hotel  
 Los Angeles, California

#### May 14–18

International Labor Law Committee  
 Midyear Meeting  
 Grand Hotel Wien  
 Vienna, Austria

**For more information on any of these events, please contact the Section office at 312/988-5813 or check the Calendar of Events page at [www.abanet.org/labor/calendar.html](http://www.abanet.org/labor/calendar.html).**