Labor AND Employment Law

WINTER 2009
VOLUME 37, NUMBER 2
Section of Labor and Employment Law
American Bar Association

The 111th Congress: Changes Suggest Major Labor Legislation

By Arthur Luby

The tried-and-true method for predicting the flow of legislation in a new Congress is to review matters that were in play at the close of the last session. For the current Congress, this means paying particular attention—given the reconfiguration in the balance of power in the Senate—to those bills that generated majority support but failed in the face of actual or potential Senate filibusters.

This method offers legitimate guidance with respect to labor and employment legislation in the 111th Congress.

Hence, within the first ten days of the Obama administration, legislation responding to the Supreme Court's decision in *Ledbetter v. Goodyear* was approved in both the House (H.R.11) and the Senate (S. 181) by significant margins and signed by the president.

The legislation addresses when the statute of limitations for employment discrimination claims begins to run, and it failed to overcome a filibuster last year. Notably, the final legislation goes beyond simple reversal of the *Ledbetter* decision in specifying that a new cause of action accrues each time a plaintiff receives pay or benefits unlawfully diminished by discrimination. The new legislation extends this principle to the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act, and the Rehabilitation Act of 1973, in addition to Title VII of the Civil Rights Act of 1964. These principles are effective for litigation filed on or after May 28, 2007.

The Paycheck Fairness Act (H.R. 12), which modifies the Equal Pay Act to expand the opportunity for class action litigation, provides for compensatory and punitive damages for successful plaintiffs, and narrows the applicable defenses to such claims, has also passed the House, although it may face more Republican opposition than the highly publicized Lilly Ledbetter Act in the Senate.

Other legislation expanding reasonable accommodation rights under the ADA and broadening the protections provided by the Family and Medical Leave Act, including the scope of employees covered by the statute and entitlement to paid leave (S. 910 and H.R. 1542 in the last Congress), have been or will be introduced this session and have realistic chances of passage. These initiatives are consistent with congressional action in past sessions expanding and calibrating the rights of unorganized employees to bring litigation to enforce workplace protections.

President Obama signs his first bill into law: the Lilly Ledbetter Fair Pay Act of 2009 with the bill's namesake at his side (center). Others (L–R) are House Majority Leader Steny Hoyer (D-Md.), Senator Barbara Mikulski (D-Md.), Senator Olympia Snowe (R-Me.), D.C. Delegate Eleanor Holmes Norton, and Speaker of the House Nancy Pelosi (D-Calif.).

AP PHOTO/RON EDMONDS

The most interesting question, though, is whether the results of the 2008 election will be the basis for breaking the half-century deadlock on the laws governing private sector collective bargaining.

The obvious battleground for resolving this issue will be the Employee Free Choice Act (EFCA), which generated majority support but nowhere near enough votes to sustain a motion for cloture in the

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Comments from the Chair

Barbara Berish Brown

This season, three themes coalesce for me: the economy, developments in Washington, and the benefits of active Section membership.

The economy is affecting all of our institutions and our clients. Many are having to invent new ways of doing business with fewer resources. At the same time, the federal government will continue to pass new legislation, issue new regulations, and staff federal agencies with new incumbents.

The benefits of active Section membership flow from these other two trends. This year more than others, it is important for all of us to get out of our offices—literally or virtually—and mingle with our peers. By now I hope you have attended or are planning to attend a midwinter meeting of one or more of our Section's standing committees. If you already went to a meeting, I hope you took full advantage of the opportunity to get excellent CLE and also to meet and socialize with your colleagues and the government officials and neutrals in attendance. If you are going to a meeting over the next several weeks, please plan to take full advantage of the opportunities there.

This is an important year to stay connected to friends and colleagues.

All of our practices will be affected by what is going on in Washington, D.C. (Of course, you will want to come to our 3rd Annual CLE Conference in Washington, D.C., in November to get up to speed on what's happened by then.) New legislation, including some bills passed late in the Bush presidency, is already changing the way that our clients do business, whether it's a matter of reasonable accommodation or military and medical leave policies and practices. Other legislation likely to be enacted early in the Obama presidency will have profound effects on our clients' workplaces as well. So it is important to come to a midwinter meeting or participate in an ABA CLE event to hear about new laws and their implications.

From a personal perspective, this is an important year to be connected to a network of friends and colleagues in the labor and employment law area. Although our practice area has been less adversely affected than many this past year, the uncertainty facing law firms touches us all. All of us, particularly those just starting their careers, need to be broader in the areas that we know well, up-to-date on regulatory and judicial developments, and alert to the ways in which we can distinguish ourselves.

In difficult times, clients will have to make hard choices about what legal advice is worth securing from outside counsel and what they can forego. To be part of what they retain, you need to be smart, informed, and able to offer insights that save time and money. Many of those insights can be found at ABA LEL events. There you can get to know those who are on the other side of bargaining tables or courtrooms, those who enforce the laws in your region of the country, and those who arbitrate or mediate your clients' disputes. Talking about what makes a difference to them, how they select and prosecute or defend cases, and what they find most persuasive can give you insights not easily obtained elsewhere.

Another benefit of LEL events is meeting lawyers senior to you, or those in another city to which you might be considering relocating or in which you might want to practice. Those connections can make you aware of openings that would not otherwise come your way and can provide help and support if you do move to a new city or to a new practice setting. That networking is an invaluable benefit—and joy—of being actively involved in the Section.

If you went to a midwinter meeting, you might have seen a sign-up sheet for Section activities. I hope you also noted the presence of some new events and practices—the result of our Standing Committee Best Practices Task Force, which surveyed what each committee has been doing and relayed that information to the others so that we can all benefit from the creativity of our colleagues. I hope committee leadership will follow up with everyone who expressed interest in doing more for the Section or the committee. But even if they don't get in touch with you, you can and should take the initiative to find an activity that appeals to you. You can write or edit, help with regional CLE events in your city, help the Membership Development Committee welcome new members to the Section, work on diversity initiatives with the Equal Opportunity in the Legal Profession Committee, or find some other activity that appeals to you.

Times of trouble can be a boon if they lead us to give up the nonessential and to focus on what can make us stronger in developing our careers. The Section can be part of that renewed look at your career. Just ask any of us how we can help and we'll be glad to brainstorm and direct you to the group or activity that suits you best. Have a great spring! ■

L E L
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, 321 North Clark Street, Chicago, Illinois 60654, 312/988-5813, *www.abanet.org/labor*

Diversity Rationale and Private Sector Affirmative Action Policies

By Jyotin Hamid

There has been much recent public commentary about whether traditional justifications for affirmative action remain compelling. Litigation brought by nonminorities challenging employment actions based on affirmative action policies may also be a rising trend. It is therefore timely to examine the legal standards governing affirmative action programs in private sector employment.

Analysis of affirmative action under the Equal Protection Clause of the U.S. Constitution (in such contexts as education or public sector employment) has been a subject of plentiful and quite recent jurisprudence. Caselaw analyzing affirmative action strictly under Title VII of the Civil Rights Act of 1964 (which governs employment in both the public and private sectors), however, is more sparse and less recent. The respective legal analyses under the Equal Protection Clause and Title VII are quite distinct, particularly with regard to whether affirmative action can be justified on the basis of non-remedial goals, such as promoting diversity.

The Supreme Court has repeatedly held that achieving diversity in the education context can be a compelling state interest sufficient to justify certain race-conscious affirmative action admissions practices. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306 (2003). Courts of Appeals have extended this holding to public sector employment. For example, in *Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003), the Seventh Circuit held that achieving diversity in a metropolitan police force in a racially and ethnically divided city was a compelling state interest sufficient to justify an affirmative action policy for promoting minority police officers.

But the Supreme Court has never endorsed the diversity rationale as a permissible basis for affirmative action in private sector employment. The Court first analyzed affirmative action under Title VII in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). In *Weber*, the Court held that although Title VII generally prohibits race-conscious employment actions, the statute does not prohibit all voluntary affirmative action plans to eliminate manifest racial imbalances in traditionally segregated job categories.

The Supreme Court addressed the validity of affirmative action plans under Title VII for the next and last time in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987). In *Johnson*, the Court held that the employer's affirmative action plan did not violate Title VII's general prohibitions because the plan (1) was aimed at remedying a manifest imbalance in the relevant workforce, (2) was temporary, seeking to eradicate traditional patterns of segregation, and (3) did not unnecessarily trammel the rights of non-beneficiaries.

Affirmative action programs aimed at mitigating the effects of historical discrimination are permissible, under *Weber* and *Johnson*, because they are consistent with the general remedial purposes of Title VII reflected in the statute's legislative history. While the Supreme Court has not yet considered directly whether an affirmative action program can be justified under Title VII based on a diversity rationale, lower courts interpreting Court precedent have answered that question in the negative.

In its influential decision in *Taxman v. Board of Education*, 91 F.3d 1547 (3d Cir. 1996), the Third Circuit held explicitly that affirmative action aimed at achieving diversity, rather than at correcting a manifest imbalance in a historically segregated job category, was invalid under the Supreme Court's *Weber* and *Johnson* standards and constituted reverse discrimination in violation of Title VII. The Court granted certiorari in the *Taxman* case, but the litigation was settled before the case was argued.

Formal regulations and informal guidance on affirmative action promulgated by the U.S. Equal Employment Opportunity Commission also focus on remedying the effects of past discrimination and do not endorse affirmative action policies aimed solely at achieving diversity in the workplace. *See, e.g.*, 29 C.F.R. § 1608.

There is thus a disconnect between the permissible bases for affirmative action recognized in Title VII law and regulations and the purposes that today's employers generally articulate for their affirmative action policies and diversity initiatives. Employers' policies today are seldom adopted for the explicit purpose of mitigating the effects of past discrimination or correcting manifest imbalances. Most employers establish policies to advance diversity, either as a social good in its own right or as a means of offering better goods and services and competing more effectively in a diverse marketplace.

Such policies typically are not temporary, and they generally cover all employees and all positions within the organization, thus including groups of beneficiaries and job categories for which there may not be predicate factual findings of traditional patterns of segregation and continuing manifest imbalances in the relevant workforce.

There is no legal problem with broad aspirational policies aimed at promoting respect for diversity in the workplace or at recruiting employees from a more diverse array of sources. Legal exposure may arise, though, if a nonminority challenges a discrete employment action—such as a hiring, firing, or promotion decision—that adversely impacts the nonminority and was taken, or is claimed by the nonminority to have been taken, pursuant to a policy aimed at achieving diversity in the workplace.

The law does not provide employers with strong support for defending an employment action that adversely affects nonminorities if the action was based on a policy aimed at achieving diversity.

Under the statutory language of Title VII, as amended by the Civil Rights Act of 1991, race-conscious employment decisions also cannot be defended on the basis of business necessity or bona fide occupational qualification. Private sector employers, therefore, must be cautious about whether their affirmative action policies and diversity initiatives support—or might be characterized as supporting—concrete employment actions that adversely impact nonminorities.

The law is likely to develop further as nonminority employees advance lawsuits challenging employment actions that they claim were made pursuant to invalid affirmative action policies or diversity initiatives. In January, the Supreme Court granted certiorari after the Second Circuit dismissed a challenge by a group of white and Hispanic employees against the city of New Haven, Connecticut, for refusal to certify the results of a promotional exam. While the city argued that certifying the exams would have had a disparate impact on black employees seeking promotions, the plaintiffs charged that the decision was impermissibly motivated by a desire to achieve diversity. *Ricci v. DeStefano*, No. 07-1428.

In *Ricci*, or some other case in the not too distant future, the Supreme Court is likely to address squarely the extent to which the diversity rationale can support affirmative action under Title VII. ■

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Scholars Discuss Labor, Legal Theory, and the Financial Crisis

By Mark Risk

Are there connections between labor and employment issues and the deepening economic downturn? A group of scholars has attempted to explore this question.

In a recent symposium issue of *Comparative Labor Law & Policy Journal*, Sanford M. Jacoby, an economist and professor of management, policy studies, and history at UCLA, argues that recent events have demonstrated the relationships between financial development and economic inequality. When public policies favor the beneficiaries of financial development, he says, economic gains are diverted toward top economic brackets and away from workers.

GETTY IMAGES

According to Jacoby, the surge in financial development during recent decades was caused not only by market forces, but also by a long political process of financial deregulation. Economic stagnation in the 1970s led finance interests to argue that New Deal regulatory policies were inhibiting growth, a claim that was accepted by both Democratic and Republican administrations.

Under the 1980s' Republican administrations, the capital gains tax was reduced and the income tax was made less progressive. The 1981 tax-reform legislation included more favorable treatment for corporate debt, facilitating leveraged buyout activity, in which corporate acquisitions are financed by large loans secured by the acquired company's assets.

In the 1990s, the Clinton administration lined up Democratic congressional support for the repeal of the Glass-Steagall Act, freeing banks of regulatory barriers to pursuing new business opportunities, including securitization of their loans.

Jacoby says that these developments have been accompanied by an intellectual movement to promote shareholder primacy—the notion that the sole objective of the corporation is maximizing shareholder value. It is argued that shareholder primacy promotes the most efficient use of capital, which is optimal for everyone. Earlier legal thinking viewed the corporation as distinct from its owners, and expected executives to exercise independent business judgment on behalf of the corporation as a going concern.

Jacoby argues that institutional investors, whose holdings are highly diversified and who now own 68 percent of the largest 100 U.S. corporations, press corporations to pursue more aggressive business practices, like incurring more debt, which may require cost cutting. To raise returns above those of indexed assets, institutional investors put more money into leveraged assets with greater risk, including private equity, hedge funds, real estate, and commodities.

This kind of investing leads to shorter corporate time horizons, which Jacoby claims fosters job instability. When owners obtain greater influence over corporations, they extract more value, taking resources that otherwise would have been reinvested, retained, or paid out in wages.

Jacoby contrasts the finance politics of the late 20th century with the New Deal period of the 1930s, in which new regulation including the Securities Act and Banking Act of 1933, Securities Exchange Act of 1934, Banking Act of 1935, and Investment Company Act of 1940 *restricted* the activities of the financial sector.

Regulation made the financial sector smaller. Jacoby notes that 17 percent of the Harvard Business School class of 1928 went to work on Wall Street. By 1941, the percentage had fallen to one percent.

In those days, shareholdings were dispersed. In fact, as recently as 1965, individuals owned 84 percent of U.S. equities. Until the 1970s, executive pay did not increase, and more income was held by corporations as retained earnings, reducing dependence on financial markets. The era favored high wages in both union and nonunion settings.

Labor's share of national income began to fall and executive pay to rise in the 1980s, which Jacoby argues cannot be accounted for only by the weakening of the labor movement, a process that had started long before then.

Jacoby also focuses on the role of union pension funds as institutional investors. When restrictions on their holding stock were lifted in the '80s, state and local government pension funds became more involved in corporate affairs. In search of higher returns, these funds became leaders of a new shareholder rights movement. They supplied capital for hostile takeovers, which were understood as a means to prod underperforming companies to maximize shareholder value. Jacoby notes, however, that private sector union-affiliated pension funds have shown concern for corporations' employment practices.

In his response to Jacoby's article, Thomas Kochan, professor of management at the MIT Sloan School of Management, notes that union pension funds suffer from a split loyalty—"to workers as investors seeking maximum returns and to workers as workers with a collective interest in responsible employer behavior."

Professor Teresa Ghilarducci, an economist at the New School for Social Research, is more critical of organized labor. She states that in its role as an investor of pension fund assets, the labor movement is "more engaged and implicated in creating the mania, risk, some of the corruption, and a great deal of the inept response to the imploding present financial system than it was in the 1920s."

Brishen Rogers, lecturer at Harvard Law School, questioned Jacoby's account of the changes in legal doctrine, arguing that "corporate law has consistently protected directors' prerogatives to govern in the best interests of the firm as a whole." Rogers notes, however, that prominent lawyers and others in the corporate governance area have argued that the dominance of short-term investors poses challenges to long-term value creation.

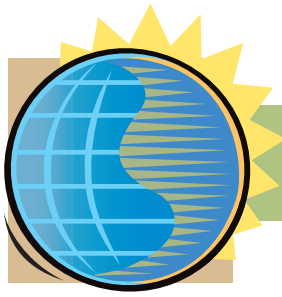
Rogers views shareholder primacy as a more complex phenomenon than in Jacoby's account, explaining that it may also provide an opportunity for unions and other shareholders to encourage socially conscious corporate behavior.

How should the representatives and allies of wage workers participate in such an environment? Kochan says that responding to changes in financial markets will require shifts in thinking no less dramatic than those that separated the New Deal from the common law notions of worker rights.

He laments that contemporary labor law restricts the subjects of collective bargaining to corporate decisions that directly affect wages, hours, and working conditions: "There is little to no serious challenge to this principle raised by labor advocates in current debates over how to reform labor law."

Kochan looks elsewhere for avenues for change, including the increased public investments likely to occur. Organized labor needs to "go a step further and help invent and support use of new capital instruments that are capable of creating and sustaining good jobs with good wages and working conditions." ■

Mark Risk, principal at Mark Risk, PC, in New York City, is co-editor of *LEL*.



International

English Is *Not* a Multinational Company's Exclusive Language

By Donald C. Dowling Jr.

As American multinationals align their human resources operations across borders, they launch global employee "offerings" rolled out with consistent employee communications. Global communication is often an excellent HR practice, but one that can spark international employment law compliance problems in unexpected contexts. One of these unexpected contexts is adhering, across borders, to language laws. Language-law issues get implicated in multinationals' global workplace communications such as those done via company intranets, all-hands e-mails, internal newsletters, global benefit plan documents, and global codes of conduct/workplace policies.

Fifteen years ago, multinationals tended to run their global human resources as "siloed" operations with little intervention from corporate headquarters. Almost all employer communications to the employees at a plant in Montreal, for example, would come from local Canadian HR, in French. Work rules for an office in Tokyo would be issued by local Japanese HR, in Japanese. Benefit plans for employees in São Paulo were generated by local Brazilian HR, in Portuguese.

In many respects, this regime continues today. At many overseas offices of U.S.-based multinationals, local HR continues to issue routine HR communications to local workforces in the local language. The main difference now is that, layered on top of these local communications, U.S. multinational headquarters use intranets, e-mail, and all-employee document distributions to issue certain global employee communications to their affiliates' employees worldwide—in English. A multinational headquarters may post English-language global HR policies on a company intranet or issue an English-language global code of conduct and whistle-blower hotline communication or distribute English-language global or regional compensation and benefits documents.

To facilitate these headquarters-issued global employee communications, some multinationals have gone so far as to designate English as their "official company language." After all, these multinationals reason, English fluency is necessary in today's globalized business world—particularly for employees who work for a U.S.-based multinational. In fact, even some multinationals headquartered in non-English-speaking countries have embraced this English-as-official-company-language model.

For the most part, however, a company's designation of English as its "official company language" is legally meaningless. Employers must comply with the language laws in each country in which they operate. Even if English were a viable Lingua Franca for business (and in many respects it is not because most people in the world, including many business leaders, do not speak fluent English), there are three legal obstacles that block a multinational from communicating with its affiliates' employees worldwide in English: (1) flat prohibitions, (2) enforceability barriers, and (3) reception in local courts.

Flat Prohibitions

France, which sponsors an academy dedicated to upholding the integrity of the French language, has a statute called the *Loi Toubon*, "the Toubon law," that in effect commands French employers that "Thou shalt communicate with thy local employees exclusively in French." In 2006, a U.S. Fortune 10 multinational was fined about $800,000 (halved on appeal from an initial fine of about $1.6 million) for violating the Toubon law when its U.S. headquarters issued English-language HR and benefits documents to subsidiary employees in France.

Quebec and Belgium have similar laws. Belgium's law grows out of the uniquely Belgian tension between Flemish, Dutch, and Waloon French, and requires employee communications to be in the local regional language. Quebec's law permits some employee opt-outs. In Spain, some "Autonomous Communities" mandate that certain employee communications be in both Spanish and the co-official local language (such as Catalan or Basque).

Enforceability Barriers

The number of countries with laws that actually authorize them to fine employers for the offense of issuing employee communications in a foreign language is relatively low. More common is a second tier of non-English-speaking countries whose statutes impose rules that, in effect, render foreign-language employee communications void. In these countries, which include Chile, Poland, Russia, and Vietnam, an employer that tries to enforce, for example, an English-language global code of conduct against a local violator could find the code's rules per se unenforceable because they were written in a foreign language.

A number of Central American countries, including Costa Rica, El Salvador, Guatemala, and Honduras, impose laws that actively invalidate work rules not issued in Spanish. Those laws are said to be a legacy of the era when monolingual American plantation bosses barked English-language orders at local banana workers and fired hapless locals who did not obey. Other countries, including Mali, Mozambique, Nicaragua, and Ukraine, affirmatively require that employment agreements be in the local language or dual-language format.

Reception in Local Proceedings

In the rest of the non-English-speaking world—countries not in the previous two categories—local statutes tend not to regulate the language of employee communications at all. In these countries, English-language communications will not be per se illegal. But English communications will not likely be readily enforceable in local proceedings.

To understand the dynamic here, think of Toyota's auto plant in Georgetown, Kentucky. Imagine if Toyota headquarters in Japan were to issue a global code of conduct in its own headquarters language—Japanese. If Toyota someday disciplined a Kentucky autoworker for violating a provision in that code, and if the autoworker's obligation to follow the code became an issue in local litigation, we would not expect a Kentucky judge to hold a local Kentucky autoworker responsible for comprehending a Japanese-language text.

This same analysis applies in the local courts and agencies of non-English-speaking countries, when an American multinational argues that a local employee should have adhered to some English-language policy or should have understood some English-language offering issued by American headquarters. Even if no local statute renders the document per se unenforceable, it will not hold up in court.

Indeed, this analysis comes up abroad even before a dispute makes its way into court. Outside

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More to It Than You Think

A Member's Guide to the Section of Labor and Employment Law

Many Section members, even those active on a standing committee, have limited knowledge of the Section. So we offer this simple guide. The guide is not only an explanation—it is also *an invitation* to Section members to increase your involvement in Section activities in any manner that suits you and to consider whether you might be interested in opportunities for greater responsibility.

Section members participate in CLE programs at midwinter meetings, the Annual CLE Conference, teleconferences, and other programs; they contribute to the many treatises the Section publishes through BNA; they volunteer in the regional Law Student Trial Advocacy Competitions; they write articles for *The Labor Lawyer* or this newsletter; and they staff the many administrative committees and task forces that help the Section serve its members and the profession.

The Section's website, *www.abanet.org/labor*, has more detailed information about many of the activities listed on these pages. If you want to know more, or to express your interest in participating, call the Section office and the staff will put you in touch with the right people.

Section Staff

The Section has a full-time professional staff of eight, who work out of the Section office at the ABA headquarters in Chicago. The staff includes the Section director, two assistant directors, the membership and marketing department, and meeting planners. Staff members organize and attend every midwinter meeting, CLE conference, and Section Council meeting, manage the website, and assist all the Section members who work the committees and task forces throughout the year.

Budget

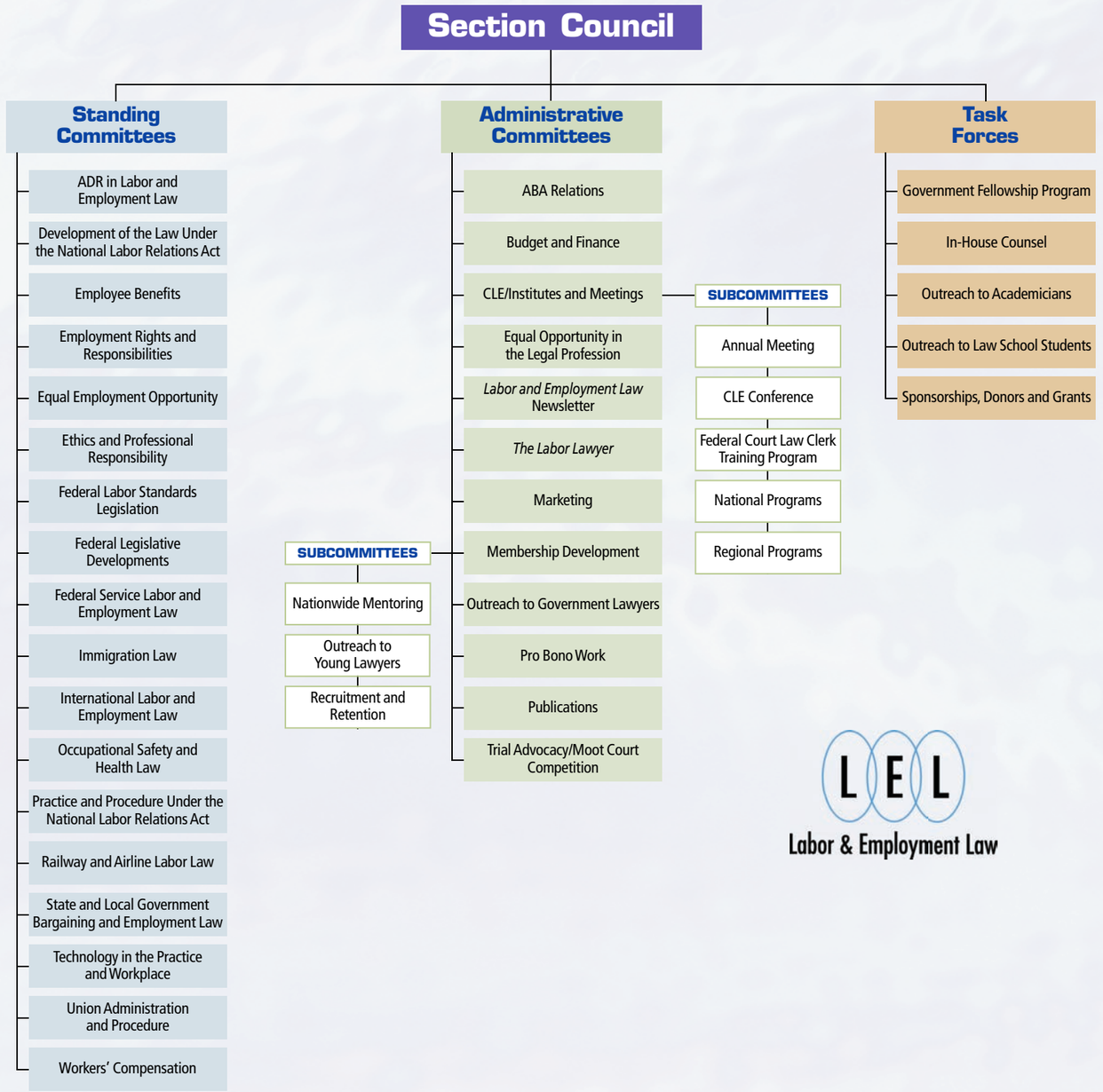
The Section has an annual budget of about $3 million. The Section membership dues cover only a portion of the Section's operating budget. Revenues from book sales and CLE events also fund Section activities.

Membership

Totalling over 27,000 at last count, our members consist of approximately 19,400 lawyers, 7,300 law students, and 400 other related professionals. Lawyer members include practitioners from every conceivable labor and employment discipline—from employee benefits to immigration to workers' compensation—and from all perspectives, including those representing unions, employers, benefit funds, and individuals.

Networking

We prefer this by its old name, "making friends." Involvement in Section activities is the best way to get to know lawyers from all across America and abroad. They act as knowledge resources, career counselors, and client referral sources, and they become friends. Being active in the Section can be a cure for professional malaise. It feels good to know people around the profession.



Section Council

The governing body of the Section, the Council is composed of the chair and chair-elect; 27 members, of whom 12 represent management, 8 represent unions, 4 represent employees, and 3 are at-large, all of whom serve 4-year terms; 2 vice chairs; the immediate past chair; 2 delegates to the House of Delegates; and 2 Section governance liaisons. The chair changes every year, rotating between representatives of management and unions/employees. The Section also has a secretary and secretary-elect, law professors chosen by the Section chair and chair-elect, who serve one-year terms. The secretary's service culminates with an annual address on the Supreme Court's labor and employment docket, presented at the Section CLE conference and published in *The Labor Lawyer*.

Administrative Committees

ABA Relations works on matters related to the Section's relationship with the ABA and other sections. **CLE/Institutes and Meetings** organizes regional CLE programs, including the Section's CLE teleconferences, the Annual CLE Conference held each fall, regional "basics" programs, the Section's programming at the ABA Annual Meeting, and the Federal Court Law Clerk Training Program. **Equal Opportunity in the Legal Profession** implements the Section's Diversity Plan, a road map to assist and encourage the Section's members and leaders to ensure full and equal participation by diverse lawyers. ***The Labor Lawyer*** is the Section's academic journal of ideas and developments in labor and employment law, which for many years has been edited by Professor Robert Rabin with a student staff at Syracuse University Law School. **Membership Development** works on extending the Section's reach to new members. **Outreach to Government Lawyers** coordinates the annual Federal Labor and Employment Attorney of the Year Award, which is presented to a federal attorney who has shown outstanding achievement in the field of labor and employment law. Our Section publishes 24 treatises, produced collaboratively by Section members, and the **Publications** Committee coordinates those efforts with our publishing partner BNA. **Budget and Finance** monitors the Section's revenues and expenses and its short- and long-term fiscal health. ***Labor and Employment Law,*** the Section's newsletter, is published four times per year. The **Marketing** Committee coordinates Section outreach activities, including electronic media "hot topics" and "e-alerts" and the monthly *Flash* e-newsletter. **Pro Bono Work** develops model pro bono policies and promotes activities by Section members in representing the underserved. **Trial Advocacy/Moot Court Competition** runs the annual law student trial competition, with regional tournaments in eight cities and the national finals in Chicago in January.

Task Forces

The **Government Fellowship Program** task force awards 46 three-year fellowship grants to enable federal and state government lawyers to participate as members of Section standing committees. The **In-House Counsel** task force works to facilitate involvement in Section activities by lawyers who work inside corporations and other organizations. **Outreach to Academicians** looks for ways to involve law professors and other academics in Section activities. **Outreach to Law Students** coordinates programs at law schools and other programs for law students interested in labor and employment law careers. **Sponsorships, Donors and Grants** seeks to raise funds for the Annual CLE Conference and other programs from law firms, vendors, and others, so that the fees to members to attend those events can be reduced.

Standing Committees

Universally regarded as the backbone of the Section, the curriculum in these committees covers every labor and employment law field. The committees meet annually from late January through mid-May for CLE programs, which range in attendance from 20 to over 300 lawyers.

Section News

University of Richmond Wins Student Trial Competition Final

On a cold late January weekend at the U.S. Courthouse in Chicago, the eight regional winners from Boston, Chicago, Dallas, Los Angeles, Miami, New York, Seattle, and Washington, D.C., squared off for the championship of the Section's 5th Annual Law Student Trial Advocacy Competition.

In five years, the competition has grown from an experimental pilot program to an eight-region national competition, this year involving nearly 70 teams. Winners of each regional tournament, held in November, advanced to the finals in Chicago.

This year the finalist teams came from Brooklyn, Duquesne, Emory, Oregon, Pepperdine, Richmond, Southern Methodist, and Roger Williams law schools.

Duquesne, Oregon, Richmond, and SMU advanced to the semifinal round. Oregon and Richmond faced each other in the final round, with Richmond taking the title.

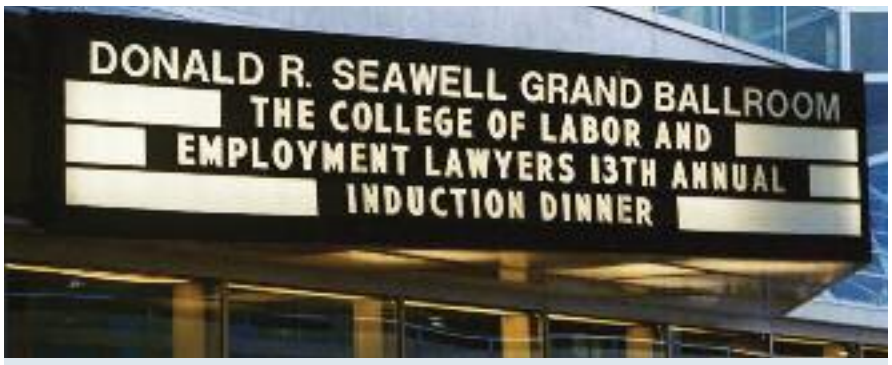
This year's fact pattern involved a sexual harassment and constructive discharge problem in the environment of a correctional facility. U.S. District Judge Rebecca Pallmeyer, who judged the finals for the second straight year, commented that this year's fact pattern was challenging and that many of the participants demonstrated a level of courtroom performance comparable to that of experienced litigators.

In each round of the competition, two teams try a three-hour trial, including motions *in limine*, opening statements, direct and cross-examination of witnesses, and closing arguments.

This year the jurors included a large number of Section leaders from around the country who were in Chicago for a meeting of the Section's governing Council and sat on the juries between Council meetings.

The competition is distinguished by the extensive participation of Section members who serve as organizers, judges, and jurors. While nominally a tournament, the competition is an elaborate teaching exercise, with the experienced lawyers who sit as jurors giving detailed comments on the individual student performances after each trial. ■

Richmond's winning team (L–R), Scott Jones, Kristen Wright, coach Paul Thompson, Jeanine Ponzera, and Hank Gates, flanked by Section leaders (on left) Stewart Manela and Kathryn Burkett Dickson and (on right) Joe Tilson and Michael Posner.



The College of Labor and Employment Lawyers elected its 2008 class of fellows. Founded in 1995, the college is a nonprofit professional association honoring the leading labor and employment lawyers in the United States and Canada. For information, please visit the website at *www.laborandemploymentcollege.org*.

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Financial Services Reform: A Pension Lawyer's Perspective

By Dana M. Muir

The key question about reform of financial services regulation is not whether it will occur, but rather what shape the reform will take. Depending on its direction, reform may have implications for the regulation of pension plans, particularly defined contribution (DC) plans such as 401(k)s.

In March 2008, the U.S. Treasury Department issued its proposal for reform, *The Department of the Treasury Blueprint for a Modernized Financial Regulatory Structure* (*Blueprint*). The *Blueprint,* a 218-page document that sets out a three-stage approach to reform, is unlikely to be adopted in its entirety. Discussions of reform, however, continue to reference the *Blueprint*, particularly its approach to broad structural issues and long-term objectives.

This article concentrates on two specific questions: What regulatory framework does the *Blueprint* recommend? And how would the recommended reform affect the regulation of benefit plans?

After studying regulatory structures throughout the world, the U.S. Treasury concluded that an "objectives-based" system, such as the one used in Australia, provides the best platform. Since the 1930s, the United States has had a system of "functional regulation," which means that regulatory authority has been allocated by the types of financial services. Under this system, a different regulator has authority over securities, futures, banking, and insurance. In contrast, an objectives-based system establishes a few key regulatory goals and assigns a regulator responsible for each goal.

The *Blueprint* identified three key goals for financial services regulation: overall market stability, including appropriate monetary policy; prudent risk management, including maintaining appropriate reserves and capital ratios; and fair and transparent business conduct. The *Blueprint* recommends assigning a distinct regulator responsibility for each of these goals. It would also establish two additional related regulators: a federal insurance guarantor and a corporate finance regulator.

The first two goals identified by the *Blueprint* are relevant to pension plans. All pension plans that hold assets are affected by market stability factors such as interest rates that flow directly from monetary policy decisions. Likewise, all pension plans risk losses if the underlying financial services firms that hold plan assets fail because of overly aggressive risk taking. But regulation in those two areas does not directly govern the operation of pension plans or the relationship of plans to their employee-participants.

In contrast, the third goal—business conduct regulation—is likely to have a direct effect on employee benefit plans, particularly DC plans. One way to illustrate this is to look at how Australia's financial regulatory framework governs DC plans.

Australia has a mandatory pension system, known as its Superannuation Guarantee, which requires most employers to contribute nine percent of employee earnings to individual employee accounts. The accounts are invested and administered by not-for-profit funds or by for-profit commercial enterprises, which must meet regulatory standards. Most regulation for the accounts is divided between the Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulation Authority (APRA). ASIC acts as the business conduct regulator for all corporate entities in Australia, including the financial entities that offer and administer the funds that hold Superannuation contributions. ASIC is responsible for consumer protection vis-à-vis pension accounts and investments. APRA focuses on prudential matters to safeguard the assets of account holders by ensuring the financial viability of the financial services companies holding the assets.

To understand the implications that creating a new U.S. business conduct regulator would have for DC plan regulation, consider the nature of the recent widely litigated pension issues and regulatory efforts by the Department of Labor's Employee Benefits Security Administration (EBSA).

For example, in civil litigation challenging the use of employer stock in DC accounts, plan participants often argued that the fiduciaries had conveyed misleading or inaccurate information about the employer's prospects or failed to disclose required information. Some claims alleged that disclosures in filings required by securities laws were incorporated into plan disclosures and subject to Employee Retirement Income Security Act (ERISA) fiduciary standards.

Similarly, claims alleging violations associated with DC plan fees often contain an allegation that the plan fiduciary failed to disclose fees or made inaccurate or misleading disclosures. On the regulatory front, during the last year, EBSA has proposed regulations on the disclosure of DC plan account information, including fees and expenses, the provision of investment advice to plan participants, and when, for fiduciary purposes, participant contributions become plan assets.

Each of the claims or regulations is premised on issues of fiduciary obligation or disclosure standards. Will reform of financial services regulation affect regulation of fiduciary obligation and disclosure standards? To those of us who have lived under the ERISA since its enactment in 1974, it may be inconceivable that any entity other than EBSA would be responsible for the fiduciary and disclosure standards that apply to pension plans. However, while the *Blueprint* never directly addresses consolidation's effect on the authority EBSA currently holds for oversight of employee benefit plans, it repeatedly refers to the goal of establishing a single agency with responsibility for all financial products and touts the benefits of consolidation. For example, the *Blueprint* would consolidate oversight of disclosures—at least disclosures of the terms of transactions—into "one agency responsible for all financial products."

Although there is no clarity in the way financial services regulatory reform will proceed, reformers are likely to attempt to address the "gaps" that have resulted from a functional approach to regulatory authority and that allegedly have allowed excesses and improprieties on Wall Street. In her confirmation hearings, new Securities and Exchange Commission Chair Mary Schapiro said, "One of the real tragedies and one of the real lessons of this tragedy is that we have this stovepiped approach to regulation that allows misconduct to take place out of the sight of at least some of the regulators."

Thus, responsibilities are likely to be realigned using an objectives-based model. As reformers consider consolidation of authority over financial products, disclosures regarding those products, and standards for fiduciaries and others involved with those products, they will need to consider the relationship between financial services regulation and regulation of U.S. pension plans, particularly DC plans. No one who has been watching 401(k) plan balances during the last year can doubt that U.S. capital markets and retirement wealth are deeply intertwined. ■

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111th Congress

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last Congress. This legislation—which requires companies to recognize unions that demonstrate support through authorization cards signed by a majority of their employees and requires binding interest arbitration to resolve impasses in negotiations for a first agreement—is the most significant proposed modification of the National Labor Relations Act (NLRA) and the rules governing establishment of representation since a labor law reform package died a few votes short of cloture in 1978.

The battle lines have already been drawn. In fact, in the waning days of the 110th Congress, a possible proxy for the coming fight on EFCA was joined in the context of the bailout of the automobile industry—a dispute that was converted from a discussion over the value of preserving the domestic automobile industry into a debate over the role of unions in modern industry. Legislation to authorize $14 billion in emergency bridge loans to domestic automakers (S. 7005) died 8 votes short of the 60 votes necessary for cloture in December.

Senate Minority Leader Mitch McConnell (R.-Ky.) blamed this failure on the UAW's refusal to agree to his demand for "a parity pay structure with [non-union] manufacturers in this country by a date certain" and, more pointedly, by Senator James DeMint (R.-S.C.), on the fact that, in his view, the industry could not be saved while it was being suffocated by the "barnacles" of trade unionism.

AFL-CIO President John Sweeney responded by attributing the failure of the legislation to the determination of "a handful of Republican Senators . . . to cut workers' living standards and scapegoat the auto workers union."

The immediate consequences of the legislation's defeat were averted when President Bush authorized funds from the Troubled Asset Relief Program to preserve the industry. This assistance was conditioned on the union making concessions to achieve wage parity with non-union domestic workers employed by foreign automakers, assuring that the same debate will spill over into the Obama administration and the present session of Congress.

To be sure, there are narrower proposals related to basic labor law that will, in all likelihood, be in play. In the previous Congress, there were proposals to revisit the meaning of the NLRA's exclusion of supervisors in light of the National Labor Relations Board's ruling in the *Oakwood Healthcare* case. The definition of "independent contractor" is also a potential subject of review and adjustment, both from a labor law and tax perspective.

A proposal to prohibit employers from holding compulsory, or captive audience, employee meetings during union representation campaigns or other political campaigns was introduced last session and will likely reemerge. Finally, there may be an attempt to refine coverage of the Worker Adjustment and Retraining Notification (WARN) Act and to increase penalties for violations in light of the recent confrontation and sit-down demonstration protesting the unannounced shutdown of Republic Windows and Doors in Chicago in December. Obviously, though, none of these revisions holds the same potential for reconfiguring the balance between the organized and unorganized sectors of the workforce as the proposals for recognition of unions based on submission of authorization cards and binding arbitration of initial agreements.

All of this legislation will be dealt with in the context of the incoming administration's attempt to address a severe recession and what is likely to be continuing and painful job loss. The debate will also occur in the context of a renewed attempt to reform the nation's health care system, an initiative that will almost certainly touch on the role of employers and collective bargaining in providing health care.

In both cases, the management community will argue that rules stifling business formation and expansion will lengthen the recession, while labor will argue that the recession was occasioned by a decline in middle-class incomes directly associated with the decline in the influence of unions in the private economy over the past several decades.

It is possible, then, that this session will see the most direct confrontation over the role of unions in the modern economy since the passage of Taft-Hartley. On the other hand, the common wisdom is that Congress avoids such confrontations whenever possible. Common wisdom fared poorly throughout 2008. We will see if it is resurrected in the coming year. ■

Arthur Luby (*arthur.luby@alpa.org*) is assistant director of representation at the Air Line Pilots Association and the union cochair of the Section's Federal Legislative Developments Committee.

Company Language

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the United States, local government agencies or local employee representatives (trade unions, works councils, health/safety committees) must be notified of certain employer-issued policies and plans. To be accepted, English-language policies and plans will almost invariably need to be translated. For example, in Haiti, Panama, Peru, Niger, and many other countries, employment agreements must be filed with local agencies, in the local language. Laws in France, Japan, Indonesia, and certain other countries require many company work rules to be communicated to local government labor authorities, in the local language.

Translating all of a multinational's global HR communications (via its intranets, all-hands e-mails, internal newsletters, global benefit plan documents, global codes of conduct/workplace policies, and the like) can be cumbersome and expensive. It will always be a *good* HR practice, however, and in some jurisdictions, it is a *mandated* HR practice. ■

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