

**LABOR AND THE LAW:  
NEWS AND CURRENT EVENTS FROM THE LERA SECTION ON LABOR AND EMPLOYMENT LAW  
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**January 2006**

**LEL SECTION BUSINESS**

The Labor & Employment Law Section Meeting will take place at the Annual Conference on Friday, January 6 at 12:30–2:15 p.m. Elections for officers will be held, and there will be a panel and discussion.

**PANEL:**       **WHAT WE DON'T KNOW IS PROBABLY HURTING US: DATA AND INFORMATION ISSUES IN PENSION AND LABOR LAW REFORM**

**Co-Chairs:**   *Kenneth May*, Bureau of National Affairs; and *Charlie Jeszeck*, U.S. Government Accountability Office

**Presenters:**

Tamara Cross, Raun Lazier and Gene Kuehenman, U.S. Government Accountability Office

*But I Was Told That the Pension Was Fully Funded: Weaknesses in the Form 5500 and 4010 Pension Data Sets and the Consequences for Workers*

Ellen Dannin, Wayne State University Law School and Gangaram Singh, San Diego State University, College of Business Administration

*At an Impasse: Crafting a Research Agenda*

Sheldon Friedman and Gordon Pavy, AFL-CIO

*Data Gaps and Workers Rights: Weaknesses in Data in NLRB Cases and the Implications for Labor Law Reform*

**Discussants:**

*Howard Wial*, The Brookings Institution

*Fred Feinstein*, University of Maryland

**SECTION NOMINATIONS**

Please take notice Section By-Laws provide:

"A nominating committee consisting of the Past-Chair and two other members of the Board shall be responsible for presenting a slate of candidates for election as officers and members of the Board to the annual business meeting.

*Additional nominations supported by at least five members may be submitted to the Secretary-Treasurer in advance of the business meeting."*

The Secretary-Treasurer is Charles Jeszeck. Nominations may be sent to him at [jeszeckc@gao.gov](mailto:jeszeckc@gao.gov).

The Nominating Committee has nominated the following slate for election at the annual meeting:

**Officers:**

Chairperson: Robert Thornton, Department of Economics, Lehigh University

Vice-Chair: Charles Jeszeck, U.S. General Accounting Office, NGB / Education & Employment

Secretary-Treasurer: Philip Harvey, Professor of Law, Rutgers School of Law - Camden

**Board Nominations:**

Ellen Dannin, Professor of Law, Wayne State University Law School

Lorraine Schmall, Professor of Law, Northern Illinois University

**The following members of the Board will be continuing in office** (the year of appointment is listed after each name:

Fred Feinstein - 04 (School of Public Affairs, University of Maryland)

Heather Grob - 05 (Economist, Washington State Department of Labor & Industries)

Phil Harvey - 05 (Law, Rutgers-Camden)

Susan Stabile - 04 (St. John's University School of Law)

David Williams - 05 (Labor studies, Indiana)

James Wooten - 04 (The State University of New York at Buffalo Law School)

Howard Wial - 05 (Brookings Institute)

Please also take notice of the process for amending the LEL Section By-Laws:

These by-laws may be amended by a two-thirds majority vote of those present and voting at the annual business meeting provided that the amendments are received at least two weeks in advance by the Secretary-Treasurer.

The Secretary-Treasurer is Charles Jeszeck. Proposed amendments may be sent to him at [jeszeckc@gao.gov](mailto:jeszeckc@gao.gov).

## **LABOR AND EMPLOYMENT LAW NEWS**

### **Noncompetition Agreements and Trade Secrets**

Many companies want to protect trade secrets and prevent employees from working for competitors. However, trade secrets and agreements not to compete harm the public by lowering the amount of public information and lessening competition and individual autonomy. They are therefore not favored by the courts. As a result, courts have traditionally imposed strict requirements on employers who want to enforce trade secret or noncompetition agreements. An example is a recent decision by a New York state court refusing to enforce either agreement. *ENV Servs. Inc. v. Alesia*, Case No.11777-04 (N.Y. Sup. Ct. Nov. 28, 2005).

In order to have an enforceable trade secret, a company must be vigilant to ensure that the information is secret. However, in this case the information was kept in unlocked file cabinets and posted on the company website; computer files were not password protected; and client lists

could be found by reading trade publications, among other sources. Thus the information was publically available and not secret.

In the case of an agreement not to compete, state law tends to require that the contracts be limited in time, geography, and work restricted. They must usually be agreed to, provide consideration to the employee, and be in writing. Courts will strike down covenants not to compete that fail to meet these and other requirements. This case is a good example. The employer (MRL) tried to enforce a noncompetition agreement between employees and the company whose stock it had bought. However, the contract did not say that it could be assigned to other employers. Therefore, the company was not a party to the contract.

The law for both trade secrets and covenants not to compete is state-based and until recently judge developed, not statutory. As a result, each state's law will vary, and court cases must be consulted to find the law.

### **Preempted or Not Preempted?**

The doctrine of preemption is derived from the US Constitution's Supremacy Clause: federal law shall be the supreme law of the land. In other words, if a state law conflicts with federal law or intrudes into an area governed by federal law, it is struck down as preempted. Recently the Seventh Circuit Court of Appeals handed down two decisions that show how details affected the courts decision on the scope of preemption.

In the first case, a three-judge panel found no preemption of an Illinois law that conditioned receiving a state subsidy for construction of renewable-fuels plants on negotiating a project labor agreement setting wages and prohibiting strikes. The court concluded that the law did not regulate the zone protected by federal labor law because it did not regulate labor relations in general. It also did not apply to employers who spurned the "state's largesse". Thus, the law was not general labor regulation prescribing how all labor relations must be handled; it was merely a legitimate state activity that affected labor. Northern Illinois Chapter of Associated Builders & Contractors Inc. v. Lavin, Case No.05-2174 (7th Cir. Dec. 9, 2005).

The second case involved a county ordinance that required contractors that provide services for elderly or disabled people to sign "labor peace agreements" with unions seeking to organize their workers. In addition, the ordinance provided that if the parties could not agree on terms for the agreement, an arbitrator would select them; employers must give unions employee names, addresses, and telephone numbers and reasonable access to the workplace; and the union must agree not to strike, picket, or boycott, as well as many other requirements. The court concluded that the ordinance used the county's spending power as a pretext so it could regulate a wide range of labor relations directly. In addition, the ordinance affected contractors' private contracts and did nothing to prevent work stoppages. The court found the ordinance to be preempted by the National Labor Relations Act. Metropolitan Milwaukee Association of Commerce v. Milwaukee County, Case No.05-1531 (7th Cir. Dec. 5, 2005).

### **DOL Ordered to Explain Why Software Workers Did Not Qualify for Trade Adjustment Assistance**

The U.S. Court of International Trade has issued two decisions highly critical of the U.S. Labor Department's application of Trade Adjustment Assistance to software workers. In the first case, the court required the DOL to explain why producing software is not producing an "article" for purposes of trade adjustment assistance and how this decision squares with 20 years of law

that has concluded that software is an "article" for legal purposes. The court said: "Labor failed to follow the court's entire instructions on its remand determination. While its factual investigation resulted in a developed record, with the exception that Labor did not inquire into the work done by EDS for other clients, Labor's legal conclusions fall short of a reasoned analysis and fail to account for the ways other United States agencies have treated the term 'articles' in applying the provisions of their pertinent statutes." This is the second remand of the case involving workers who lost their jobs and filed for TAA benefits in late 2002 on the ground that their work had been moved from Fairborn, Ohio to Juarez, Mexico. Former Employees of Electric Data Systems v. U.S. Secretary of Labor, Case No.03-00373 (Ct. Int'l Trade Nov. 14, 2005)

In the second case, the International Trade Court said the Labor Department's decision as to its leased workers doctrine was flawed and its decision anemic and result oriented. The court said that DOL had relied on minimal evidence, made conclusory assertions, and delegated to an employer official the power to decide a key issue. The case was remanded to the DOL for a third review, and the DOL was ordered it to apply its own rules and perform an adequate investigation. Former Employees of Int'l Bus. Mach. Corp. v. U.S. Sec'y of Labor, Case No.05-153 (Ct. Int'l Trade Dec. 2, /2005).

### **Employer Liability for Independent Contractor Harrassment**

One perceived advantage of contracting out work is contracting out potential liability. However, this is not always the case. Recently, the Seventh Circuit Court of Appeals held an employer liable under Title VII for sexual harassment of the employer's employees by an independent contractor. In this case, a nurse was harassed by a doctor who was an independent contractor of the hospital. The court found that the hospital could be liable if it tolerated the harassment, regardless of whether the harasser was an employee, customer, or independent contractor, because an employer is directly responsible for every tangible employment action. *Dunn v. Washington County Hospital*, Case No.05-1277 (7th Cir. Nov. 17, 2005).

### **WEB LINKS**

Offshoring of Services: An Overview of the Issues. GAO-06-5 (Nov.) 28  
<http://www.gao.gov/new.items/d065.pdf>

American Staffing Association, Quarterly Survey of Temporary and Contract Staffing  
<http://www.americanstaffing.net/statistics/employment.cfm>

Sloan Foundation Families and Work Institute (FWI), 2005 National Study of Employers  
<http://familiesandwork.org/summary/2005nsesummary.pdf>

Older Workers: Labor Can Help Employers and Employees Plan Better for the Future  
GAO-06-80 <http://www.gao.gov/new.items/d0680.pdf>

GAO, Thousands of Civilian Agency Contractors Abuse the Federal Tax System with Little Consequence - Statement of Gregory D. Kutz, Managing Director, Forensic Audits and Special Investigations, Steven J. Sebastian, Director, Financial Management and Assurance and John J. Ryan, Assistant Director, Forensic Audits and Special Investigations GAO-05-683T

<http://www.gao.gov/new.items/d05683t.pdf>

Workforce Investment Act: Labor and States Have Taken Actions to Improve Data Quality, but Additional Steps Are Needed. GAO-06-82 <http://www.gao.gov/highlights/d0682high.pdf>

No Child Left Behind Act: Improved Accessibility to Education's Information Could Help States Further Implement Teacher Qualification Requirements. GAO-06-25  
<http://www.gao.gov/new.items/d0625.pdf>

GAO, Additional Data Reporting Could Improve the Suspension and Debarment Process  
GAO-05-479 <http://www.gao.gov/new.items/d05479.pdf>

GAO, Thousands of Civilian Agency Contractors Abuse the Federal Tax System with Little Consequence GAO-05-683T <http://www.gao.gov/new.items/d05683t.pdf>

EBRI Consumerism in Health Care Survey <http://www.ebri.org/> or <http://www.cmwf.org/>

Council for Affordable Health Insurance (CAHI), HSA State Implementation Report  
[http://www.cahi.org/cahi\\_contents/consumerinfo/implementationguide.asp](http://www.cahi.org/cahi_contents/consumerinfo/implementationguide.asp)

#### **RECENT LABOR AND EMPLOYMENT LAW ARTICLES**

David Abney, Excluding the Disabled from Trial: The Impact of the Americans with Disabilities Act, 28 Am. J. Trial Advoc. 415 (2005)

Roy J. Adams, Organizing Wal-Mart - The Canadian Campaign, 6/7 Just Lab. 1 (2005)

Benny Agosto & Jason Ostrom, Can the Injured Migrant Worker's Alien Status Be Introduced at Trial? 30 T. Marshall L. Rev. 383 (2005)

Larry Altenbrun, et alia, Recent Developments in Maritime Personal Injury Law, 17 U.S.F. Mar. L.J. 155 (2004-05)

Anna Archer, Comment: Shopping for a Collective Voice When Unionization Is Unattainable: 1.6 Million Women Speak Up, 42 Hous. L. Rev. 837 (2005)

Vincent Avagliano, Comment: The Second Wave: IT Outsourcing, Globalization, and Worker Rights, 23 Penn St. Int'l L. Rev. 663 (2005)

Edward Bernacki & Shan Tsai, Ten Years' Experience Utilizing an Integrated Workers' Compensation Management System to Control Workers' Compensation Costs, 5 Workers' Comp. Pol'y Rev. 24 (Sept./Oct. 2005)

John Burton, The Workers' Compensation Policy Review Guide: a Catalogue of Data and

Information Services, 5 Workers' Comp. Pol'y Rev. 3 (Sept./Oct. 2005)

Jeff Clement, Comment: An Out of Tune Definition of "Employee" Keeps Freelance Musicians from Being Covered by Title VII, 3 Depaul Bus. & Com. L.J. 489 (2005)

Jonathan Collins, Comment: Airlines Jettison Their Pension Plans: Congress must Act to Save the PBGC and Protect Plan Beneficiaries, 70 J. Air L. & Com. 289 (2005)

Colloquium: Relearning Brown: Applying the Lessons of Brown to the Challenges of the Twenty-first Century, 29 N.Y.U. Rev. L. & Soc. Change 633 (2005)

John Darley, The Cognitive and Social Psychology of Contagious Organizational Corruption, 70 Brook. L. Rev. 1177 (2005)

Alisa Dicaprio, Are Labor Provision Protectionist? Evidence from Nine Labor-Augmented U.S. Trade Arrangements, 26 Comp. Lab. L. & Pol'y J. 1 (2004)

Geneve Dubois, Comment: The Age 60 Rule – Is it Time to Defeat It? 70 J. Air L. & Com. 319 (2005)

Margaret Gilbert, Corporate Misbehavior and Collective Values, 70 Brook. L. Rev. 1369 (2005)

Rachel Green, Comment: Privacy in the Government Workplace: Employees' Fourth Amendment and Statutory Rights to Privacy, 35 Cumb. L. Rev. 639 (2005)

Daniel Greenwood, Discussing Corporate Misbehavior: The Conflicting Norms of Market, Agency, Profit and Loyalty, 70 Brook. L. Rev. 1213 (2005)

David Hess, Protecting and Politicizing Public Pension Fund Assets: Empirical Evidence on the Effects of Governance Structures and Practices, 39 U.C. Davis L. Rev. 187 (2005)

Michael Hogg, Social Identity and Misuse of Power: The Dark Side of Leadership, 70 Brook. L. Rev. 1239 (2005)

Robert Hockett, Whose Ownership? Which Society? 27 Cardozo L. Rev. 1 (2005)

Todd Keithley, Note. Does the National Labor Relations Act Extend to Americans Who Are Temporarily Abroad? 105 Colum. L. Rev. 2135 (2005)

Claire Kelly, Enmeshment as a Theory of Compliance, 37 N.Y.U. J. Int'l L. & Pol. 303 (2005)

Rakesh Khurana & Katharina Pick, The Social Nature of Boards, 70 Brook. L. Rev. 1259 (2005)

Scott Kording, Note: Slicing Through the Gordian Knot: "Employers," Standing, and Removal under ERISA, 2005 U. Ill. L. Rev. 1257

George Lightbourn, Wisconsin's Quiet Crisis, 89 Marq. L. Rev. 105 (2005)

Brandon Lofton, Fifty Years after Brown, the Civil Rights Ideology and Today's Movement, 29 N.Y.U. Rev. L. & Soc. Change 719 (2005)

Richard McAdams, The Expressive Power of Adjudication, 2005 U. Ill. L. Rev. 1043

Elaine Massock & Debra Stegall, Survey of Illinois Law: Employment Law, 29 S. Ill. U. L.J. 639 (2005)

Lawrence Mitchell, Structural Holes, CEOs, and Informational Monopolies: The Missing Link in Corporate Governance, 70 Brook. L. Rev. 1313 (2005)

Ziyad Motala, The Use of the Truth Commission in South Africa as an Alternative Dispute Resolution Mechanism Versus the International Law Obligations, 45 Santa Clara L. Rev. 913 (2005)

Michael Olneck, Economic Consequences of the Academic Achievement Gap for African Americans, 89 Marq. L. Rev. 95 (2005)

David Orentlicher, Diversity: A Fundamental American Principle, 70 Mo. L. Rev. 777 (2005)

David Paxton & Gregory Hunt, Labor and Employment Law, 40 U. Rich. L. Rev. 241 (2005)

Nicola Persico & David Castleman, Detecting Bias: Using Statistical Evidence to Establish Intentional Discrimination in Racial Profiling Cases, 2005 U. Chi. Legal F. 217

Michael Poulshock, Comment: The Struggle Within the Struggle: White Supremacy in the Movement for Racial Justice, 14 Temp. Pol. & Civ. Rts. L. Rev. 259 (2004)

Daniel Riesel & Dan Chorost, When Regulatory Universes Collide: Environmental Regulation in the Workplace, 13 N.Y.U. Envtl. L.J. 613 (2005)

Josefina Rendon, Under the Justice Radar? Prejudice in Mediation and Settlement Negotiations, 30 T. Marshall L. Rev. 347 (2005)

David Rudovsky, Running in Place: The Paradox of Expanding Rights and Restricted Remedies, 2005 U. Ill. L. Rev. 1199

Miriam Sapiro, Preempting Prevention: Lessons Learned, 37 N.Y.U. J. Int'l L. & Pol. 357 (2005)

Julie Seaman, Form and (Dys)function in Sexual Harassment Law: Biology, Culture, and the Spandrels of Title VII, 37 Ariz. St. L.J. 321 (2005)

Michal Sewerynski, Toward a New Codification of Polish Labor Law, 26 Comp. Lab. L. & Pol'y

J. 55 (2004)

Jean-Michel Servais, Universal Labor Standards and National Cultures, 26 Comp. Lab. L. & Pol'y J. 35 (2004)

Symposium: Corporate Misbehavior by Elite Decision-Makers: Perspectives from Law and Social Psychology, 70 Brook. L. Rev. 1165 (2005)

Linda Trevino, Out of Touch: The CEO's Role in Corporate Misbehavior, 70 Brook. L. Rev. 1195 (2005)

Eric Tucker, "Great Expectations" Defeated? The Trajectory of Collective Bargaining Regimes in Canada and the United States Post-NAFTA, 26 Comp. Lab. L. & Pol'y J. 97 (2004)

Tom Tyler, Promoting Employee Policy Adherence and Rule Following in Work Settings: The Value of Self-Regulatory Approaches, 70 Brook. L. Rev. 1287 (2005)

Amy Weems, Note: A New Use for Civil Rico: Employees Attempt to Combat the Hiring of Illegal Immigrants, 28 Am. J. Trial Advoc. 429 (2004)

Bradley Wendel, Legal Ethics and the Separation of Law and Morals, 91 Cornell L. Rev. 67 (2005)

Jill Yung, Big Brother Is Watching: How Employee Monitoring in 2004 Brought Orwell's 1984 to Life and What the Law Should Do about It, 36 Seton Hall L. Rev. 163 (2005)

Marni Zack, Note: Public Employee Free Speech: The Policy Reasons for Rejecting a per Se Rule Precluding Speech Rights, 46 B.C. L. Rev. 893 (2005)

#### **FUTURE NEWSLETTERS**

To include your news related to legal issues and developments affecting labor and employment, contact Ellen Dannin (e.dannin@wayne.edu) or Wayne State University Law School, 471 W. Palmer Street, Detroit, MI 48202, phone: (313) 577-3941.

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