NYSBA SPRING 2002 | VOLUME 27 | NO. 1

L&E Newsletter

A publication of the Labor and Employment Law Section
of the New York State Bar Association

A Message from the Chair

This is my last message as Chair of the Labor and Employment Law Section and I take this opportunity to use this bully pulpit in order to draw further attention to the recent exercise of power by the executive and legislative branches of the United States after September 11, 2001.

I call your attention to the "Patriot Act" (the "Act"),[1] that was quickly passed by the House of Representatives in a vote of 357-66 on October 24, 2001, by the Senate 98-1 on October 25, 2001, and signed into law on October 26, 2001. The Act gives very broad investigative authority to the federal enforcement agencies. This expanded authority is restricted, in some instances, to the investigation of "terrorist activities," as now more broadly defined.[2] Among other newly eliminated restraints on their powers, federal authorities are permitted to (1) conduct searches of Internet and e-mail communications without warrants;[3] (2) conduct searches of premises, albeit with court supervision, but without being compelled to notify the person or entity that the premises was searched;[4] (3) without a warrant, the United States' Attorney or a state attorney general can order the installation of the FBI's Carnivore system on a subject's computer so that the government can determine web pages visited and the identity of senders of e-mails;[5] (4) Internet providers and telephone companies are required, without court order, to release customer information, including telephone numbers called[6] —the company releasing this information is not permitted to notify its customers. Credit-reporting firms, also without court order, must release information they possess to investigators regarding individuals and businesses listed in their databases.[7] And, for those of us who represent employers or employees in an "insured depository institution" (which includes any "uninsured branch or agency of a foreign bank"), our clients are required to report any "suspicions of illegal activity in written employment references."[8] Notification to the subject of this report is also prohibited.[9]

There are many more provisions of the Act that also tend to place limits upon constitutional protections for United States citizens as well as foreign nationals suspected of terrorist activities. For example, *habeas corpus* protection is made unavailable in many instances,[10] and some accused terrorists held outside the United States will neither be treated in conformity with the Geneva

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Convention nor will they have a civilian trial conducted by Article III judges.[11]

While some of these new laws (Title I of the Act) are subject to a sunset provision, the vast majority of them do not expire.[12] Should the government abuse this authority, a private cause of action exists to compensate individuals who were damaged.[13]

Recognizing the absolute necessity of ending terrorism so as to protect our constitutional and democratic institutions, is it not the proscriptions of these very institutions that prevent the enactment of these new laws? Indeed, the vagueness of the term "terrorist activity" could operate to permit warrantless searches of our communications; unfettered access that is abhorrent to those of us who value our privacy.

Most of the founders, as well as ourselves, respect our constitutional guarantees. We have looked to the judiciary, from Justice John Marshall to his present worthy successors, to determine the propriety of these infringements. The Justices will, once again, likely determine whether our civil rights are infringed upon and whether encroachment by the executive and legislative branches disturbs not only our protections, but the balance of power between the three branches of government as well. Many of us became, and still are, attorneys: we want to be part of this system we believe in and devote ourselves to. Even after all these years.

The following quotation from Carl G. Jung[14] may describe the conclusion many of us have reached:

> Observance of customs and laws can very easily be a cloak for a lie so subtle that our fellow human beings are unable to detect it. It may help us to escape all criticism; we may even be able to deceive ourselves in the belief of our obvious righteousness. But deep down, below the surface of the average man's conscience, he hears a voice whispering, "There is something not right," no matter how much his rightness is supported by public opinion or a moral code.

Thank you for this opportunity to serve you as Chair. I know that my successor, Richard Chapman, will encourage our Section to keep moving forward and will rely, as I have, on the continuing excellent work done by you, the members. I wish us all well.

Linda Bartlett

Endnotes

1. 18 U.S.C. § 2500 (PL 107-56, HR 3162).
2. 18 U.S.C. § 1331(1),(5). The Act supplemented former coverage of Title 18, "by striking 'by assassination or kidnapping' and inserting 'by mass destruction, assassination, or kidnapping. . . . '"
3. 18 U.S.C. § 2703; 47 U.S.C. § 551.
4. 18 U.S.C. § 213 (Title II).
5. 18 U.S.C. § 2702-3.
6. *Id*.; 50 U.S.C. § 1842.
7. 18 U.S.C. § 2703. This section of the Act may soon be expanded to include holding companies and persons with controlling interests.

8 12 U.S.C. § 1828.

9. 31 U.S.C. § 5318(g)(2).
10. 18 U.S.C. § 412 (Title II).
11. How this topic created internal and worldwide criticism of the U.S. will not be addressed.
12. Only Title I, of the four Titles in the Act, expires on December 31, 2005.
13. 18 U.S.C. § 2712.
14. This work appears in the introduction to "Analysis der Kinderseele," by Frances G. Wickes, translated into English as, "The Inner World of Childhood," 1931 (American Publisher, Princeton University Press, 3rd edition, June 1988).

From the Editor

I've decided to ask non-lawyers to contribute to the *Newsletter* from time to time about topics in which you may be interested. The first such article is in this issue, about designing corporate ADR programs. At first I was afraid, because Melissa Janis said she would write about transactional and transformational variables and I didn't know what they were, but her article is interesting and sensible and I can understand it. It also has a great title.

Matthew Siebel/Matthew Vance and Philip Berkowitz/Mary Pelz contributed the other two stellar articles for this issue, about whether ERISA preempts the state Prevailing Wage Law and the use of rankings to evaluate employees, respectively.

In addition, I'm glad to say that John Gaal is resuming the "Ethics Matters" column after a hiatus, Geraldine Reilly continues her twice-yearly legislative report, and Rich Zuckerman and Alyce Goodstein amend an article published in the last edition.

The idea of publishing committee reports came up at the last Executive Committee meeting, as a way of letting you know about committee activities and encouraging you to join. I thank the committee chairs who submitted reports for publication and hope to see more for the next issue.

I also wanted to remind you that we have a column about members' news. So far, there has been rather a paucity of contributions to this regular feature. You are invited to submit accounts of your comings and goings, mergers and moves, promotions, awards and other accolades, and anything else newsworthy about yourself or your firm, corporation or agency.

Finally, I appreciate the comments I've received about the *Newsletter*, all of which are duly considered and have been quite helpful. Please continue to let me know what you do or don't admire in the *Newsletter* and if there is anything in particular you'd like to read.

Janet McEneaney

Request for Articles

If you have written an article, or have an idea for one, please contact

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Articles should be submitted on a 3-1/2" floppy disk, preferably in Microsoft Word or WordPerfect, along with a printed original and biographical information.

When Does ERISA Preempt New York's Prevailing Wage Law?

By Matthew A. Siebel and Matthew J. Vance

I. New York's Prevailing Wage Law

Section 220 of the New York Labor Law[1] governs the working conditions for workers engaged in public contracts for the state of New York and its subdivisions. In addition to governing the maximum hours such workers may work, subsection (3) of section 220 requires that contractors on public works projects pay their employees wages and supplements which are at least equal to the prevailing wages and supplements paid to workers employed in the same trade or occupation of that locality. This subsection is often referred to as the Prevailing Wage Law (PWL).

"ERISA itself does not provide or fund benefit plans. Rather, 'private parties, not the Government, control the level of benefits.'"

The term "supplements" is defined by Lab. Law § 220(5)(b) to include "all remuneration for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are not 'wages'. . . including, but not limited to, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay, life insurance, and apprenticeship training." Effective February 26, 1992, supplements include the amount of irrevocable contributions made on behalf of a worker to a fund, plan or program designed to provide supplements and the cost that is actually incurred in providing supplements not covered by such funds, plans or programs provided that such supplements are listed on the prevailing schedule prepared by the Commissioner of Labor.[2] Further, since 1992, any or all of an employer's supplement obligation can be satisfied by providing to its employees directly the cash equivalent of such supplement.[3]

The party responsible for determining the amount of the prevailing wages and supplements in a locality is known as the Fiscal Officer.[4] The Fiscal Officer determines the amount of supplements according to the "prevailing practices in the locality."[5] This amount is determined by reference to the amounts paid to workers in the same locality pursuant to the terms of the collective bargaining agreements that local unions negotiate on their behalf.[6] The Fiscal Officer is empowered to bring an action for enforcement of the PWL under Lab. Law § 223.

II. The ERISA Preemption Doctrine

The Employee Retirement Income Security Act of 1974[7] (ERISA) "subjects to federal regulation plans providing employees with certain fringe benefits. It is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans."[8] ERISA itself does not provide or fund benefit plans. Rather, "private parties, not the Government, control the level of benefits."[9] Pursuant to 29 U.S.C. § 1144(a),[10] certain state laws are preempted by ERISA. This section holds: "Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) . . . and not exempt under section 4(b) . . ."

Acknowledging that early interpretations of this language represented a "form of 'uncritical literalism'" as to what laws "relate to" ERISA, 11 more recent cases have reflected a view that "analysis under ERISA's preemption clause must begin with the 'starting presumption that Congress does not intend to supplant state law'". . . [12] In this regard, the Second Circuit has identified what it calls a "trend"[13] to not find state laws preempted by ERISA. This trend includes *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*,[14] where the Supreme Court sought to narrow what type of laws "relate to" ERISA and held that only "state laws that mandate[] employee benefit structures or their administration," or that "provid[e] alternative enforcement mechanisms" are preempted.[15] By establishing this approach, the Supreme Court sought to ensure that "[p]reemption does not occur . . . if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability."[16]

The first of the two preemption scenarios noted in the *Travelers* decision was discussed by the Second Circuit in *General Electric Co. v. New York State Department of Labor*.[17] The Second Circuit's decision specifies three ways in which a "state law 'relates to' [an] employee benefit plan . . ."[18] for preemption purposes. First, "[s]uch connection exists where a state statute prescribes . . . the type and amount of an employer's contributions to a plan . . . "[19] Second, preemption will be found if the state law mandates "the rules and regulations under which the plan operates . . . "[20] Third, if "the nature and amount of benefits provided thereunder" are specified by the state law, then ERISA preempts.[21]

The second scenario of ERISA preemption—the "alternative enforcement mechanism"—exists where the state law adds "to the remedies available for recovery"[22] with respect to ERISA benefits. The decision in the case of *Ingersoll-Rand Co. v. McClendon* provides another statement of "alternative enforcement mechanism," where the Supreme Court indicated that the state law will be preempted by ERISA when it "provide[s] a remedy for the violation of a right expressly guaranteed by [ERISA] § 510 and exclusively enforced by § 502(a)."[23] In short, ERISA's list of remedies are exclusive; any attempt by a state to add to or change those rights will result in preemption.

Due to the fact that a contractor may meet its supplement obligations under the PWL (a state law) by making contributions to funds covered by ERISA, several New York state and federal cases have addressed the issue of whether or not the PWL is preempted by ERISA. This article will examine and comment upon those cases.

III. History of ERISA Preemption of New York's Prevailing Wage Law

A. The *General Electric* Case

The stage for later ERISA preemption analysis of the PWL was set in the case of *A.L. Blades & Sons, Inc. v. Roberts*.[24] Here, the public works contractor attempted to satisfy its obligations under the PWL by substituting additional payments into the employees' pension fund for some of the payments scheduled by the Commissioner of Labor ("Commissioner"). Although the total cost of the benefits provided by the contractor equaled those listed in the Commissioner's schedule, the Commissioner determined this approach violated the PWL. The contractor sought review of the Commissioner's determination.[25]

Of significance to later ERISA preemption analysis, the Appellate Division's decision in favor of the Commissioner included the statement that "the Legislature intended that the Commissioner of Labor, not the contractor, determine the supplements to be provided and that the employee receive either the listed benefits or equivalent cash (or a combination of both)."[26] Thus, the court took the position that the PWL requires that the government, not employers, determine the level of benefits.

The first Second Circuit case to directly confront the ERISA preemption issue was *General Electric Co. v. New York State Department of Labor*.[27] Here, the contractor appealed an order of the U.S. District Court for the Southern District of New York in favor of the Commissioner in a case arising under the PWL. Plaintiff was signatory to a collective bargaining agreement with a local union which required it to make contributions to a number of nationally administered ERISA plans. The Commissioner determined that the contractor's supplements were different (and, in some cases, less) than those which the Commissioner claimed were due.

The trial court, ruling in favor of the Commissioner, held that the PWL required the contractor "either to bring the cost of its prescribed benefit into equivalence with the cost of the local prevailing one or to pay the additional cost directly to the employee-beneficiaries."[28] In addition, the contractor was not permitted to substitute one form of benefits for another because, in the court's view, the Commissioner, not the contractor, determines what supplements are due. Finally, the contractor received no credit for supplements not deemed to be "prevailing."

"Although the General Electric case appeared to have set a rule in holding that the supplement provision of the PWL was preempted by ERISA, subsequent cases have not been consistent with this decision and have weakly applied its holding."

Acknowledging that New York courts have held that the Commissioner, not employers, determine the level of benefits to be provided under the PWL, the Second Circuit ruled that, under ERISA, "private parties, not the Government, control the level of benefits."[29] The Second Circuit also explicitly rejected the view of the lower court that "section 220 does not 'do anything other than consider the value to the employee of contributions to [ERISA] as compared to the value of contributions made to similar plans by other employers in the industry and locality'"[30] and held that the portion of the PWL dealing with "supplements" was preempted by ERISA.

The court noted that the PWL impermissibly "relates to" ERISA on a number of levels. First, the PWL requires ex-locality employers either to bring benefit plans into conformity with those prevailing in the locality or to make up the difference through cash payments. Second, the court noted that such contractors are required to keep records relating to supplements and to make these records available for inspection. The court concluded that "the above-described provisions of section 220 clearly relate to the ERISA plans of ex-locality employers and are preempted by the federal statute."[31]

B. "Line Item" vs. "Total Package"

Although the *General Electric* case appeared to have set a rule in holding that the supplement provision of the PWL was preempted by ERISA, subsequent cases have not been consistent with this decision and have

weakly applied its holding.[32] Courts that have examined this issue subsequent to *General Electric* have not focused on the PWL itself, but rather the manner in which it is enforced by the Fiscal Officer.

In *Tap Electrical Contracting Service, Inc. v. Hartnett*,[33] the contractor provided supplements through a combination of benefits and lump sum cash payments. A number of the supplement plans were covered by ERISA and others were not. To further comply with the applicable prevailing wage-rate schedule, the contractor made payments towards both the ERISA and non-ERISA supplements by making cash payments directly to employees.

The Commissioner investigated and charged the contractor with willfully violating the PWL. The petitioner commenced an Article 78 proceeding arguing that the PWL was preempted by ERISA. The Appellate Division agreed with the contractor in accordance with *General Electric* insofar as the decision related to the ERISA supplements and the matter was remitted to the Commissioner to calculate the amount by which the contractor had underpaid the non-ERISA supplements.

In recalculating the amount of the underpayments, the Commissioner, "rather than applying the full amount of the weekly cash payments to the non-ERISA supplements . . . apportioned those payments between the ERISA supplements and the non-ERISA supplements."[34] The contractor's payments were again found to be deficient. The contractor therefore commenced a second Article 78 proceeding claiming "that because the order applied to a portion of the weekly cash payments to ERISA supplements, the order 'related to' and, therefore, was preempted by, ERISA."[35] The Appellate Division agreed, holding that by applying a portion of the weekly cash payments to ERISA supplements, the Commissioner determined the amount of an employee's benefit and also "created a funding requirement and provided a rule for the calculation of the amount of the benefits to be paid under the employees' ERISA plans."[36] As such, the Commissioner's order was determined to be preempted by ERISA.

The first case to examine the relationship between ERISA preemption and the PWL subsequent to the *Travelers* decision was *Burgio and Campofelice, Inc. v. New York State Department of Labor*.[37] Here, a contractor, arguing ERISA preemption, sought to enjoin the state from enforcing the PWL. The trial court, relying upon the Second Circuit's decision in *General Electric*,[38] granted summary judgment to the contractor. Below, the state had unsuccessfully argued that it had changed its PWL enforcement policy such that it no longer was preempted by ERISA. The Second Circuit vacated and remanded for further proceedings based on the supposed change in enforcement policy. The court noted that the state had followed a "line-item" approach when *General Electric* was decided. Under the "line-item" approach, the Commissioner

> prescribed prevailing benefits levels for each individual type of wage supplement. In each instance where the cost of a supplement provided for in an employment contract did not correspond with the cost of a similar prevailing local benefit, section 220 required the employer either to bring the cost of its prescribed benefit into equivalence with the cost of the local prevailing one or to pay the additional cost directly to the employee-beneficiaries. The employer was not permitted to substitute one form of supplement for another, and received no credit under the statute for the cost of providing benefits not deemed to be "prevailing benefits" by the Commissioner.[39]

The state submitted that the "line-item" approach had been replaced by a "total package" approach which

> simply requires employers to match the total cost of all prevailing supplements. Employers are no longer required to match one-for-one the specific prevailing rate for each prevailing supplement, or even to provide each type of prevailing supplement. Thus, according to the State, the total package approach avoids those requirements that led the GE I court to find preemption.[40]

The court then examined the "total package" approach within the framework established by *Travelers* and inquired as to whether this approach mandates employee benefit structures or their administration or provides for an alternative enforcement mechanism. Noting that the "total package" was benefit-neutral and did not mandate an employee benefit structure or its administration, the court stated that

> an employer need not establish or contribute to any particular type of pension or welfare plan in any particular amount . . . an employer may provide supplemental benefits in any form or combination so long as the sum total is not less than locally prevailing benefits . . . Under such an enforcement scheme, it is no longer true that "under section 220, 'the Commissioner of Labor, not the contractor, determine[s] the supplements to be provided.'"[41]

The Second Circuit further held that the "total package" approach did not involve an "alternative enforcement mechanism":

> The monies that have been withheld from Burgio are not owed to an ERISA plan, to whom the subcontractor failed to pay contributions, but to individual workers . . . DOL, not the ERISA plans, will collect the monies due and disburse them to those workers . . . The State's enforcement action would therefore not fall "within the scope of" ERISA civil enforcement mechanism.[42]

Thus, the court held that the PWL is not *per se* preempted by ERISA. Rather, the court ruled that, depending upon the enforcement approach of the state, it is possible to enforce the supplement provisions of the PWL without running afoul of the ERISA preemption.

In *Beltrone Construction Co., Inc. v. McGowan,*[43] the Fiscal Officer utilized the prohibited "line-item" approach in issuing its schedule but attempted to justify its actions by presenting the novel argument that the enforcement proceedings did not conflict with ERISA because it thereafter used the "total package" enforcement procedure. That is, the Fiscal Officer totaled up the amounts listed on the schedule, arrived at a lump sum and compared this total amount to what had been paid by the contractor. Rejecting this argument, the Appellate Division held that when the Fiscal Officer issued its schedule, contractors were effectively directed to pay each benefit according to the schedule. As such, the Fiscal Officer was continuing to use the prohibited "line-item" approach and its determination that the contractor had violated the PWL was annulled.

The Second Circuit's recent decision in *HMI Mechanical Systems, Inc. v. McGowan*[44] gave the court an opportunity to discuss the PWL preemption controversy within the context of the use of subpoenas issued by the Fiscal Officer in a PWL compliance investigation. The New York State Department of Labor had commenced an investigation of a contractor to determine whether and to what extent supplement contributions made by the contractor had been "for work other than on public work contracts."[45] The investigation utilized an annualization formula found in 12 N.Y.C.R.R. § 220.2(d) which calculates the hourly cash equivalent of public work supplements paid by contractors.

In its investigation, the state issued subpoenas to plaintiffs' contractor and its plan administrator seeking information relating to payroll, contributions to the contractor's benefit plans and other detailed information concerning the allocation of benefits to the contractor's employees. The contractor and its plan administrator then sought injunctive relief and a declaration that "ERISA preempted the state's investigation into the internal allocation of supplemental wages. . . ."[46] During litigation, the Commissioner issued a notice which reminded New York employers of their obligations under the PWL, and discussed the manner in which the supplement provisions of the PWL are enforced. The notice also addressed the use of pooling funds as a means of escaping supplement obligations under the PWL.

"Thus, the court held [in Burgio*] that the PWL is not* per se *preempted by ERISA. Rather, the court ruled that, depending upon the enforcement approach of the state, it is possible to enforce the supplement provisions of the PWL without running afoul of the ERISA preemption."*

Plaintiffs argued that the subpoenas and the regulatory notice evidenced an intent to "examine the internal allocation of benefits . . . and judge the adequacy of benefits distributed under the plan."[47] Plaintiffs also argued that the annualization formula was preempted by ERISA because it "binds plaintiffs to a particular method of administering the ERISA plan and requires plaintiffs to make continuous calculations, adjustments and payments for Section 220 compliance."[48] Plaintiffs submitted that the state's approach constituted a retreat to the prohibited "line-item" approach by focusing on the internal allocation and adequacy of benefits and attempting to mandate employee benefit structures and their administration. The Commissioner responded that he was merely attempting to determine the amount of the contractors' supplement contributions and that any impact on ERISA plans was indirect.

The Second Circuit agreed with the plaintiffs' preemption arguments to the extent that the state was seeking to examine the actual benefits that plan participants received. The court also found the wording of the subpoenas "particularly troublesome" because of the type of information sought.[49] However, persuaded by a concession made in oral argument below by the state's counsel that all the state actually needed for the annualization formula was the total number of hours worked and the total number of benefits received, the court held that "[t]he state [was] not through its inquiry mandating a particular benefit structure for ERISA plans," the crucial issue in *General Electric*.[50] While the court agreed that the original subpoenas were overly broad to the extent that they sought to examine the internal allocation of benefits that employees actually receive, the court stated that "information such as a list of plan participants, payroll lists, the amount of an employer's con-

tributions and the names of people for whom the employer made contributions are appropriate areas of inquiry substantially similar to the record production we approved in Burgio."[51]

Further, while plaintiffs claimed that the annualization formula involved a judgment about the adequacy of ERISA benefits and bound contractors to a particular method of administering an ERISA plan, the court held that the state sought only to examine total contributions, not to require employers to make particular contributions to an ERISA plan. Thus, the court ruled that the use of the annualization formula is consistent with the "total package" approach because "the formula on its face is concerned with the level of the employer's contribution rather than the benefit that any worker receives. . . ."[52] In conclusion, the court ruled that while the state's approach had a direct effect on employers by discouraging pooling, it had only an indirect effect on ERISA plans. Therefore, the court found that the state's enforcement approach was not preempted by ERISA.

"[In Beltrone*] the court ruled that while the state's approach had a direct effect on employers by discouraging pooling, it had only an indirect effect on ERISA plans. Therefore, the court found that the state's enforcement approach was not preempted by ERISA."*

IV. Conclusion

The state and federal case law of New York seems to have reached a somewhat tenuous resolution of the preemption of the PWL by ERISA. That is, based on the framework established in the cases examined above, a court examining the issue of preemption must examine not the PWL itself, but rather, how the state chooses to enforce it. This approach has resulted in a situation whereby cases involving the PWL must be examined on a case-by-case basis depending on the particular enforcement approach of the Fiscal Officer. For example, in *HMI*, the issue was framed in terms of the state's attempt to issue a subpoena to judge compliance with the PWL. In this case, resolution of the issue came from the state's concessions during oral argument that only certain information was actually needed. Such an approach hardly seems static and paves the way for numerous other disputes concerning particular enforcement approaches to raise the preemption specter again and again.

Further, while the current trend to not find preemption is reflective of the general trend in this area subsequent to the *Travelers* decision, the approach of New York courts seems to run afoul of the seminal *General Electric* case. There, the court made no distinction in how the law was actually enforced but simply held that the supplement provisions of the PWL were preempted by ERISA. As such, it would appear that a more definitive resolution of this issue is in order to avoid future litigation of every nuance of the state's enforcement approach.[53]

"The state and federal case law of New York seems to have reached a somewhat tenuous resolution of the preemption of the PWL by ERISA."

Endnotes

1. McKinney's Consolidated Laws of New York, Labor Law, Chapter 31 of the Consolidated Laws, Article 8, "Public Work," § 220 "Hours, wages and supplements." ("Lab. Law").
2. 12 N.Y.C.R.R. § 220.2(a)(1), (2).
3. 12 N.Y.C.R.R. § 220.2(b).
4. Lab. Law § 220(3). Pursuant to Lab. Law § 220(5)(e), the Fiscal Officer is the Commissioner of Labor on all projects that are performed by or on behalf of the state, a public benefit corporation, a county, a village or city with a population of less than one million people. If the work takes place on behalf of a city with a population of more than one million people, the Fiscal Officer is that City's Comptroller.
5. Lab. Law § 220(3).
6. Lab. Law § 220(5)(c).
7. 29 U.S.C. § 1001 *et seq.*
8. *Burgio & Campofelice, Inc. v. New York State Dep't of Labor*, 107 F.3d 1000, 1007 (2d Cir. 1997).
9. *Alessi v. Raybestos-Manhatten, Inc.*, 451 U.S. 504 (1981).
10. Alternatively cited here and elsewhere as ERISA § 514(a).
11. *Plumbing Indus. Bd., Plumbing Local Union No. 1 v. E.W. Howell Co., Inc.*, 126 F.3d 61, 66 (2d Cir. 1997) (quoting *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997) and citing *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995)).
12. *Id.* at 66–67 (quoting *Travelers Ins. Co.*, 514 U.S. at 654).
13. *Id.* at 66.
14. 514 U.S. 645 (1995).
15. *Id.* at 658.
16. *Id.* at 661 (quoting *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 130 n.1 (1992)). *See Dillingham*, 519 U.S. 316 (where the Supreme Court stated that "if ERISA were concerned with any state action . . . we could scarcely see the end of ERISA's pre-emptive reach, and the words 'relate to' would limit nothing").

17. 891 F.2d 25 (2d Cir. 1989), *cert. denied*, 496 U.S. 912 (1990).
18. *Id.* at 28.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Burgio & Campofelice, Inc. v. New York State Dep't of Labor*, 107 F.3d 1000, 1009 (2d Cir. 1997).
23. 498 U.S. 133, 145 (1990).
24. 136 A.D.2d 926, 524 N.Y.S.2d 912 (4th Dep't 1988).
25. Pursuant to Lab. Law § 220(8), review of the Fiscal Officer's determination of noncompliance with the PWL is through the commencement of an Article 78 proceeding.
26. *A.L. Blades & Sons, Inc. v. Roberts*, 136 A.D.2d 926, 927, 524 N.Y.S.2d 912 (4th Dep't 1988).
27. 891 F.2d 25 (2d Cir. 1989), *cert. denied*, 496 U.S. 912 (1990).
28. *Id.* at 27.
29. *Id.* at 28 (quoting *Alessi v. Raybestos-Manhatten, Inc.*, 451 U.S. 504, 511 (1981)).
30. *Id.* (quoting *Rondout Elec., Inc. v. New York State Dep't of Labor*, 84 Civ. 3095 (S.D.N.Y. 1984)).
31. *Id.* at 29.
32. *New York Employment Law*, § 35.08[4][d][v] (2d ed. 2000). "The Appellate Division, Second Department, however, has read the holding of *General Electric* narrowly."
33. 207 A.D.2d 547, 616 N.Y.S.2d 86 (2d Dep't 1994).
34. *Id.* at 548.
35. *Id.* at 549.
36. *Id.* at 550.
37. 107 F.3d 1000 (2d Cir. 1997).
38. Referred to by the Court as "GE I".
39. *Burgio & Campofelice, Inc.*, 107 F.3d at 1003–1004.
40. *Id.* at 1004.
41. *Id.* at 1009 (quoting *General Elec. Co. v. New York State Dep't of Labor*, 891 F.2d 25, 28 (2d Cir. 1989), *cert. denied*, 496 U.S. 912 (1989) (quoting *A.L. Blades & Sons, Inc., v. Roberts*, 136 A.D.2d 926, 927, 524 N.Y.S.2d 912 (4th Dep't 1988)).
42. *Id.* at 1010.
43. 260 A.D.2d 870, 688 N.Y.S.2d 783 (3d Dep't 1999).
44. 266 F.3d 142 (2d Cir. 2001).
45. *Id.* at 146. The purpose of the investigation was to determine whether plaintiff was taking part in a process known as "pooling" which allows an employer to dilute supplements due each public works employee by spreading the benefits out to cover both public and private work.
46. *Id.*
47. *Id.* at 148.
48. *Id.*
49. *Id.* at 150.
50. *Id.* at 151.
51. *Id.*
52. *Id.*
53. Although examined within the contexts of the applicable state prevailing wage law, a number of other circuits have also held that these laws are not preempted by ERISA. *See Associated Builders & Contractors, Saginaw Valley Area Chapter v. Perry*, 115 F.3d 386, 393 (6th Cir. 1997) (The Michigan Prevailing Wage Act is not preempted by ERISA in that the law "does not relate to any employee benefit plan within the meaning of section 514(a) of ERISA"); *WSB Electric, Inc. v. Curry*, 88 F.3d 788 (9th Cir. 1996), *cert. denied*, 519 U.S. 1109 (1997) (ERISA's preemption provision is not implicated by California's prevailing wage law); *Minnesota Chapter of Associated Builders & Contractors, Inc. v. Minnesota Dep't of Labor & Indus.*, 47 F.3d 975 (8th Cir. 1995) (ERISA does not preempt where Minnesota's prevailing wage law does not relate to an ERISA benefit plan); *Keystone Chapter, Associated Builders & Contractors, Inc. v. Foley*, 37 F.3d 945 (3d Cir. 1994), *cert. denied*, 514 U.S. 1032 (1995) (although an administrative order issued by the state agency was preempted by ERISA, the text of Pennsylvania's prevailing wage law and regulations issued thereunder were not preempted).

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Is Your Alternative Dispute Resolution Program a Flea-dip?: How to Prevent Your Employment ADR Efforts from Going to the Dogs

By Melissa Janis

Your dog Fifi has fleas. The veterinarian recommends a flea-dip. Fifi is immersed in a chemical bath and *poof*, Fifi is flea-free. Everyone is happy: Fifi feels great, the vet gets paid and you are relieved that you've eradicated the fleas. Seems like the ultimate win-win; except slowly, the pests creep back, undetected . . .

Like a flea-dip, alternative dispute resolution programs are often regarded as a single dose cure-all. The intuitive appeal of ADR and the anecdotal evidence of program success make ADR seem a panacea—just establish the policies and procedures, and ADR will work its magic with your employees. Given the rush to develop ADR programs as an answer to skyrocketing litigation costs in virtually every possible venue, it might seem premature to be reflecting on their potential demise. However, early success does not guarantee longevity. Employment ADR simply hasn't been around long enough to determine its staying power in the courts or in the workplace. In the long run, the critical factor that will make or break employment ADR is employee choice.

"Like a flea-dip, alternative dispute resolution programs are often regarded as a single dose cure-all."

Whether the employment ADR program is mandatory or voluntary, employees always have some degree of choice in determining the process through which their disputes are resolved. Even in a mandatory program, an employee may choose to avoid addressing a dispute, which is likely to make it more difficult and more costly to resolve later. Alternatively, the employee may challenge the ADR program in court (successful or not, the organization is back in litigation). In the meanwhile, the employee withholds his or her commitment and contributions to the organization either by reducing productivity or by leaving its employ. If employees may choose traditional dispute resolution processes in lieu of their ADR program and they exercise that right, the ADR program is rendered useless.

The more willing employees are to choose to participate in the ADR program, the greater the opportunity to reduce legal costs and improve employee relations and productivity. Furthermore, when employees choose to participate, the issue of enforcing pre-dispute arbitration becomes moot. ADR success depends on employees making choices that are consistent with ADR program goals.

Although employees may willingly choose ADR when the program starts, they may revert back to more adversarial options as time goes on. Consider the organization that added a voluntary mediation component to its grievance procedures. In large numbers, employees, union officials and managers agreed to try mediation. Satisfaction with both the process and neutrals exceeded expectations and the program was deemed highly successful. After three years, however, the pests are beginning to creep back in. A senior union official who was initially supportive of the program recently related that he is increasingly reluctant to recommend mediation to members because he is displeased with the way they have been treated by program administrators.

Changing Employee Choices

"The key to success of any new process, system, or strategy is implementation. And that's about people. People have to execute. They have to support the new system or it will go nowhere."[1] For an ADR program to be successful, employees must change their behavior: they must choose to address their conflicts in the new way that the organization deems desirable. Employees choose if they will initiate a complaint, if they follow the new procedures for doing so and if they will actively participate in a process unfamiliar to them to resolve their disputes.

In order to achieve desired changes in behavior, W. Warner Burke (1992) asserts the importance of recognizing both transactional and transformational variables.[2] Using Burke's framework, it is easy to appreciate the initial success of ADR programs and the potential for their demise.

Transactional Variables

"Transactional variables include policies, procedures, rewards, communication, and organizational structure. They are transactional in that change occurs primarily via relatively *short-term* reciprocity among people and groups. In other words, you do this for me and I'll do that for you."[3] By and large, organizations

have embraced the transactional components of the change effort by establishing and communicating policies and procedures to employees. Whether or not ADR programs are being linked with performance appraisals is unknown, although anecdotal evidence suggests that such rewards, if they exist, are limited to legal department employees. The initial success of the employment ADR programs can be explained by the extent to which transactional variables were addressed by program designers. Because transactional variables are short-term in nature, however, they alone cannot sustain behavioral change.

Transformational Variables

In contrast, it is far less common for transformational variables to be given genuine attention in the design and implementation of employment ADR programs. Burke suggests that "transformational variables refer to areas in which change is likely caused by interaction with environmental forces and which require entirely new behavior sets on the part of organizational members. Transformational variables include an organization's mission, strategy, vision, leadership, and culture."[4] In other words, if you want to change employee behavior, you need to do more than set the rules.

Since "organizational change stems more from environmental impact than from any other factor,"[5] long-term success depends on modifying the environment in which these behaviors occur. Ensuring that employees will choose ADR long term requires that changes be made to support the new, preferred ways of thinking and interacting with others in the workplace. Only those who also address transformational variables in designing ADR programs create the conditions necessary to ensure that employees will choose to use the ADR program.

Ten Ways to Go Beyond a Flea-dip

Since change must occur at both levels to be successful, below are five transactional and transformational ways to enhance the longevity of your organization's ADR program.

Transactional

1. Build ADR into the Reward System

That which gets measured gets done, and if there's pay involved, all the better. Implicitly, every organization conveys its values through what it chooses to pay for. Unless the company's money is "put where its mouth is," employees may perceive their ADR program as another management fad. This is the ultimate transactional variable. If you want a certain behavior from your employees, make sure you are measuring and paying them for it by adding it to the performance appraisal process.

In addition, review the performance appraisal system for compensation that is based on goals that are inconsistent with the ADR program. In his ingenious article, "The Folly of Rewarding for A While Hoping for B," Steven Kerr points out that employers often not only fail to reward for desirable behaviors, but inadvertently reward undesirable behaviors as well.[6] If you want supervisors to support a company-wide open door policy, don't penalize them when their subordinates knock on the boss's door.

"[I]f you want to change employee behavior, you need to do more than set the rules."

2. Repair Reputation

Collecting information about employee perception of the ADR program can provide critical feedback for program designers. Find out if the workforce really thinks every aspect of the ADR program is as wonderful as you do. If you had a dispute, what course of action would *you* choose?

What you may find by doing this sort of "due diligence" exercise are opportunities to enhance employee experiences with the ADR program. Choosing to use the ADR program will depend upon more than perceptions of mediator competence and neutrality. For example, an attitude of respect must be conveyed by everyone the employee encounters in the course of resolving his dispute. When an administrator uses power-based principles when setting up the mediation, the employee will likely be dissatisfied with the program even if the dispute is ultimately resolved to his satisfaction. Employees who use the system first provide feedback to the company rumor mill that affects the choices other employees will make. Be sure they're saying good things about the entire program, not just the particular ADR process—such as mediation or ombuds—used to resolve the dispute.

3. Improve Communication and Feedback

Communication in the form of feedback is necessary to implement a successful ADR program. Periodically, the employer needs to assess how much the employees know about the program. Are usage levels influenced by lack of information or inaccurate information about the program? Does program knowledge vary among employee groups? Will your ADR program be more successful if you simply get better at getting the word out? By determining the disparity between what employees

actually know and what they need to know, program designers can target specific groups with specific messages that will enable employees to make informed choices. It will also better prepare them to be informed participants in the program.

4. Provide More Training and Support

Sometimes there is a disparity between what employees are capable of doing and what they need to be able to do to feel confident that they will be successful in an unfamiliar situation. Like the ADR program itself, training is typically viewed as a single dose cure-all. Unfortunately, the transfer of learning from a single day's worth of training to the workplace is minimal and decreases over time. Effective training takes place periodically and includes support systems (such as ombuds, mentor, peer counselor) to guide employees as they try out their new skills.

In times of stress, an individual will resort to his or her dominant response. Effective training can institute collaboration as a replacement for less productive dominant responses to conflict. If training was not effective, an agitated employee in the throes of a dispute will respond as he or she did prior to training. This is likely to be a win-lose approach that does not support ADR program goals.

5. Expand Eligibility: Types of Disputes

Many programs limit eligibility for ADR to disputes that involve legally protected rights, effectively discouraging participation except for those cases in which litigation and agency filings are likely. If participation in your ADR program is voluntary, expanding eligibility to all types of workplace conflict will remove a critical barrier to using the ADR program. An employee in distress will not have to evaluate whether or not she has the right to come forward. In addition, she will not return dissatisfied to the workplace because her complaint, although not rights-based, was unheard. Also, by addressing interests rather than positions, the company will minimize the employee's tendency to reframe interest-based conflicts as statutory violations. Including interest-based conflicts in the ADR program makes early resolution possible and maximizes the wide range of benefits possible in an ADR program.

Transformational

1. Expand Eligibility

An employer often limits participation in ADR programs or offers differing levels of ADR services depending on the category of employee, such as hourly workers or salespeople. Treating disputes differently for different categories of employees works against efforts to institutionalize an ADR program. It sends a message that creates resistance and jeopardizes the culture change necessary for long-term ADR program survival. Since management is typically an excluded group, the very people needed to recommend the program and to inform and support its users are prevented from using it themselves. It is difficult to advocate for a program from which one is barred. When the ADR program applies to everyone in the workplace, employees tend to use their newly-acquired skills outside the program, transforming the culture of the organization.

2. Match the Customer Service Culture

Similarly, treating disputes differently for customers and employees works against efforts to institutionalize a program. When customers are dealt with on an interest-based level, but employees are not, confusion, distrust and resentment are created. For employees to choose ADR, ensure that the same collaborative message is communicated to everyone.

3. Getting Input = Increasing Buy-in

The establishment of any new program in the workplace, without opportunity for employees to influence the change, constitutes the exercise of formal power. Because the exercise of formal power increases informal resistance, ADR programs that have simply been "presented" to employees have a built-in obstacle to employee usage.

By being consulted and giving input, employees overcome resistance to a change as significant as resolving their differences in a new way. Resistance is more than opposition. Opposition comes in the form of objections that can be anticipated and addressed. Resistance is about the fears underlying the change: the unstated fear of losing control and of being seen as incompetent in the new situation.

4. Hunt for Sacred Cows

Many program designers accept the notion that ADR programs must be consistent with the corporate culture, yet attempt to determine fit on their own. A better way to maximize fit is again through employee involvement in ADR program design. Not only will employee input ensure cultural consistency, but it can reveal and remove hidden aspects of the culture that would otherwise keep dispute resolution adversarial.

Brandt and Kreiger (1996) use the term "sacred cow" to refer to outmoded beliefs, assumptions and practices that inhibit the acceptance of change. Simply put, there is a tendency to hold on to what worked in the past, even when it is no longer applicable or appropriate. If something is done because it's always been done that way, it's probably a sacred cow.[7] Prior successes with resolving problems in the workplace will create

win-lose sacred cows. Giving employees the opportunity to identify practices that are unproductive will create a change-ready environment and will facilitate acceptance and long term usage of the ADR program.

5. Integrate ADR with Mission and Vision

According to Beckhard and Harris (1987), "The greatest single threat to successful change results from inadequate early attention to defining the desired end states for the change."[8] To define the desired end states for an ADR program, there must be consistency between the program and the organization's mission and vision.

"'If you build it, they will come' has been the mantra of the employment ADR movement ever since the first programs were implemented. This idea captures the belief that employment ADR programs offer benefits so compelling to employees that all a company need do is set one up and employees will participate."

When employees understand the goals of the ADR program and how they relate to their company's mission and vision, they are better able to understand the behaviors that are desired.

Furthermore, "misperception of the implications of a change for one's own future role and responsibilities is a major cause of resistance to change."[9] Making the connection between the ADR program and the organization's mission and vision enables employees to determine how they and their new choices fit into the future of the organization, further reducing resistance to the program.

Conclusion

"If you build it, they will come" has been the mantra of the employment ADR movement ever since the first programs were implemented. This idea captures the belief that employment ADR programs offer benefits so compelling to employees that all a company need do is set one up and employees will participate. Indeed, that seems to be the case, so far.

Then again, many had this belief about dot.com companies. At first, customers did show up in droves, and Internet businesses became overnight success stories. After a while, however, users realized that the Web sites were not providing the kind of experiences they wanted and went elsewhere to meet their needs. The rest is stock market history. The message is clear. To ensure the longevity of a program, users must choose to participate, long after the fanfare is gone.

Endnotes

1. David Brandt & Robert J. Krieger, Sacred Cows Make the Best Burgers: Developing Change-ready People and Organizations. (Warner Brothers 1996).
2. W. Warner Burke, Organization Development: A Process of Learning and Changing. (Addison-Wesley 1992).
3. *Id.*
4. *Id.*
5. *Id.*
6. Steven Kerr, "On the Folly of Rewarding for A while Hoping For B" in The Applied Psychology of Work Behavior. (Irwin 1991).
7. Brandt & Krieger, *supra*, note 1.
8. Richard Beckhard & Reuben T. Harris, Organizational Transitions: Managing Complex Change. (Addison-Wesley 1987).
9. *Id.*

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Forced Employee Rankings: Bell Curves and Liability

By Philip M. Berkowitz and Mary Pelz

"Look to your left, look to your right—one of you will not be here by year's end." Much like the first-year law students who heeded this timeless warning by Professor Kingsfield in "The Paper Chase," employees nationwide are facing the increasingly real possibility that their job security is not what it used to be.

But deciding who may stay and who must go is often not an easy task. Facing layoffs in near-record numbers, companies have been seeking better ways to evaluate employees, to make the process of identifying those who need to be discharged that much simpler.

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A number of major employers have looked in unconventional places for solutions to this increasingly difficult problem. Ford Motor Company, for one, felt that it hit upon the right idea when it imposed forced rankings of employees, even using traditional bell curves, a practice borrowed from academia. Ford, however, like other companies who have chosen this innovative approach, learned the hard way the risks inherent in imposing sudden change upon its employees. More than 60 middle-aged, white managers filed a class action against the automaker alleging that the grading system had a disparate impact on older, white workers.[1] Four months after the suit was filed, Ford abandoned the process.[2]

Ford is not the only company to have its process challenged. Former Microsoft employees have claimed that the white managers favored their white friends when ranking subordinates,[3] and Conoco faced a lawsuit from the Justice Department alleging that British citizens were preferred over Americans in employee rankings.[4]

The key problem with forced ranking and bell curves is that the process is inherently artificial. The employee is rated in comparison with the performance of others, and therefore may be ranked at a level below, or even above, actual job performance, based upon the rankings of other employees in the group. Even if, for example, all employees in the company were performing satisfactorily, some would nevertheless be ranked at the bottom. The danger of this practice is that it may appear, to a jury assessing a claim of unlawful discrimination, to be at its core, pretextual.

Purpose of Appraisals

Performance reviews have been a part of the work life of most employees since time immemorial. The problems that have historically plagued performance appraisals have not significantly changed. Most people dislike giving bad news. Therefore, the process of providing a performance appraisal to an employee who is not working up to a supervisor's expectations is, always has been and always will be an unpleasant ordeal. And so, performance appraisals are often wildly inaccurate, and typically inflated.

The most obvious purpose of a performance appraisal, namely, providing accurate information about an employee's job performance, is often the last thing on the minds of the individuals providing the evaluation and the employee receiving it. Many managers view the process as motivational, designed to send an upbeat message to employees and encourage them to keep up the good work. In contrast, some only focus on the negative aspects of an individual's performance, without necessarily focusing on the employee's strengths.

"The most obvious purpose of a performance appraisal, namely, providing accurate information about an employee's job performance, is often the last thing on the minds of the individuals providing the evaluation and the employee receiving it."

Employees, for their part, often view the process as a necessary evil standing between the employee and a raise.

The meaning of rankings often varies from company to company and even manager to manager. Some managers believe that all employees should be expected to do a satisfactory job. Thus, an employee who fully performs his or her job in a satisfactory manner may receive only an average rating, leaving the highest rat-

ings to those employees who perform an exceptional job.

Other managers believe that, in keeping with the company's standards of excellence, all employees who are doing a satisfactory job deserve outstanding ratings—for the employer would not employ individuals who did not meet their rigorous standards.

Performance appraisals are often central evidence in discrimination cases. The lack of guidance, in many companies, in distinguishing between good and marginal job performance, has often led to claims of unlawful discrimination. Minority employees or women may allege that an entrenched system of managers who are white males favors people who are like those managers. Thus, appraisals may be challenged as lacking objectivity and honesty, and even affirmatively reflecting unlawful bias.

It is not unusual for plaintiffs with a history of good appraisals nevertheless to have been terminated for allegedly dissatisfactory job performance. Those employees may prevail in a discrimination case by showing that their employers' explanation for their termination, to the extent that it conflicts with their performance appraisals, is not worthy of belief, and is hence a pretext for discrimination.

In recent years, to assure fairness and avoid lawsuits, the process of ranking employees has received greater scrutiny from corporations. More attention has been given to the definitions of performance rankings, and companies have trained managers more effectively in providing both positive and negative comments to employees.

Performance appraisals typically need to be approved by a personnel manager. Supervisors who continually rank minority or women employees less favorably than their white male counterparts will often draw the attention of their personnel department.

The forced rankings and bell curves adopted by some employers represent the most recent attempt to confront the issue of historically inaccurate and inflated performance appraisals. The battered economy and forced layoffs have caused employers to focus on performance appraisals as an obvious and key tool in determining who should stay and who should go in a workforce reduction. These programs typically require that employees who fall at the bottom of the scale be culled from the ranks at regularly scheduled intervals.

General Electric's program is typical: supervisors identify the top 20 percent and bottom 10 percent of their managerial and professional employees every year. The bottom 10 percent are not likely to stay.[5] This program of eliminating the most marginal performers has been criticized as being subject to easy manipulation. Defenders state that this system offers an effective way to judge employees, which is relatively immune from subjective prejudices.

"Forced ranking systems are not a magic bullet for avoiding hard layoff decisions. Employers need a solid, objective and honest basis for ranking employees, keyed to actual job performance and the business needs of the organization."

Fundamentally, though, a forced ranking system that compels the termination of an employee who is in fact satisfactorily doing his or her job may be inherently flawed.

Forced ranking systems are not a magic bullet for avoiding hard layoff decisions. Employers need a solid, objective and honest basis for ranking employees, keyed to actual job performance and the business needs of the organization.

Endnotes

1. *Siegel v. Ford Motor Co.*, No. 01-102583 (Mich. Cir. Ct).
2. *Employment Policies: Some Companies Use Performance Ranking to Retain Top Workers, Cut Poor Performers*, 171 D.L.R.C-1, Sept. 5, 2001.
3. Reed Abelson, *Companies Turn to Grades and Employees Go to Court*, N.Y. Times, Mar. 19, 2001.
4. *Id.*
5. *Id.*

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This article was first printed in The New York Law Journal *on November 29, 2001.*

Ethics Matters

By John Gaal

Q I represent unions in my labor practice. Recently, in preparing a grievant for an arbitration, it became apparent that a conflict existed between the interests of the grievant and those of the union on a central point of the case. Does this conflict preclude me from continuing to handle the case?

A To answer this question, it is necessary to determine who is your client: the union, the grievant or both. If the union alone is your client, then you may proceed. Similarly, if (as is not usually the case) the grievant alone is your client, you may also proceed (making sure, of course, that you are proceeding in his or her best interests and not those of the union). However, if both the grievant and the union are your clients with respect to that matter, then it appears that you have a conflict of interest which will preclude you from continuing with the representation, unless after full disclosure both clients consent to continued representation (whether on a continuing joint basis or on behalf of just one of them). Bear in mind, though, that some conflicts are so direct and adverse that no amount of disclosure and consent can effectively waive them, and thus you might be precluded from continuing with the representation on any basis, despite the clients' desires.

Whether you represent only the union or both the union and the grievant jointly is essentially a question of fact. In the typical grievance arbitration setting, the dispute is between the union and the employer, as the parties to the collective bargaining agreement. While the grievant obviously has an interest in the proceeding, and the union owes the grievant a duty of fair representation, the grievant is not formally a party to the proceeding. In those cases, the union's attorney typically represents the union and only the union.[1] As a result, the only attorney-client relationship that exists is between the attorney and the union itself.

Having said that, it is important to understand that for purposes of conflict rules, whether an attorney-client relationship exists is determined by the reasonable beliefs of the putative client. In other words, an attorney-client relationship can be created if, under the circumstances, the putative client reasonably believes that such a relationship has been created, regardless of whether the attorney ever intended to create an attorney-client relationship. As you might imagine, in the typical grievance arbitration setting, unless the union's lawyer is explicit in explaining to the individual grievant that she is acting solely as attorney for the union, the grievant could easily believe the lawyer was acting on both his behalf and that of the union. And as a result, he could easily disclose information to the attorney that he never would have disclosed if he understood the attorney to be only the union's lawyer. By failing to fully explain the situation, the union's attorney can inadvertently create an attorney-client relationship with the individual grievant. And, of course, whether this attorney-client relationship is created inadvertently or deliberately, the conflict rules apply the same way.

"[A]n attorney-client relationship can be created if, under the circumstances, the putative client reasonably believes that such a relationship has been created, regardless of whether the attorney ever intended to create an attorney-client relationship."

In contrast, when a union provides an employee with representation in a Section 75 hearing, for example, the parties to that proceeding are the employee and the employer. The "union's attorney" under those circumstances clearly represents the employee individually, and a separate attorney-client relationship exists between that employee and the union's lawyer. (The fact that the union may be paying for the representation is immaterial.) Thus, absent some unusual circumstance, the attorney will have joint clients. (It is certainly possible that the union would provide the individual employee with "independent" counsel, in which case the only attorney-client relationship would be between the attorney and the individual employee.)

Does it really matter "who" the client is? Well, it can. In the question posed, a conflict arose between the union and the grievant. (For example, there might be a legitimate basis to pursue a particular contract interpretation which, if successful, would be helpful to grievant, but the union opposes that interpretation because it would prove harmful to the bargaining unit as a whole.) As noted, if both are actual clients of the attorney, then she may not proceed with the representation in the face

of these conflicting interests without full disclosure of the conflict to the two clients and their consent to the continued representation, assuming the conflict is even one capable of being waived. While this need for consent could have been avoided if an attorney-client relationship had never been established with the individual grievant initially, it cannot be avoided now by simply "dropping" the individual as a separate client.

But there are other implications of having joint clients. Even aside from whether a conflict arises between the interests of the two clients in that particular matter, in the face of joint representation the attorney will have an independent duty to treat any "confidences" or "secrets" (defined in Disciplinary Rule 4-101 of the Code of Professional Responsibility) imparted to her by the grievant as confidential, including keeping them confidential from the union. This in itself could create problems for the attorney. For example, if in the course of this representation the grievant confided in the attorney that he had also embezzled union funds, the attorney could be precluded from disclosing that fact to the union, creating at best, obvious problems in that relationship. In fact, the Committee went so far as to hold[2] that if, in the course of representing a grievant in an arbitration proceeding, some of the grievant's secrets or confidences had to be revealed and those secrets and confidences found their way into the published arbitration award, the attorney's duty to continue to protect the grievant's confidences and secrets might actually preclude her from sharing that award with either the union or the union's other members.

"[W]hen a lawyer has to deal with multiple persons, and it is her intent to represent only one of those persons, it is critical that she make it clear to all involved who is, and who is not, a client."

Consequently, as is the case in any context, when a lawyer has to deal with multiple persons, and it is her intent to represent only one of those persons, it is critical that she make it clear to all involved who is, and who is not, a client.

Endnotes

1. NYSBA Comm. on Professional Ethics, Formal Op. 743 (2001).
2. *Id.*

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State Labor Law Survey 2001—New Legislation

By Geraldine A. Reilly

The following article summarizes legislative issues of interest to Labor and Employment Law Section members, and is intended to introduce practitioners to new and emerging state law topics. These bills were introduced during the 2001 legislative year, and subsequently passed both houses of the legislature.

Of particular significance are two bills endorsing the procedural concept of collective bargaining agent recognition, through the "card check" procedure. These bills, A.9202/S.5617 and A.9459/S.5828, involve different contexts for the recognition procedure—the former making it the preferred mechanism to be utilized in the recognition process overseen by the New York State Employment Relations Board, and the latter establishing the process in Indian Casino developments.

Readers are encouraged to obtain copies of the bills through their local representatives, the public information staff at the legislature or on the Web at the New York State Assembly Web site, <http://www.assembly.state.ny.us>.

A.9202 (Nolan)/S.5617 (Rules): This bill provides that the State Employment Relations Board is empowered to designate a Collective Bargaining Agent when the majority of workers sign union dues deduction authorization cards, commonly referred to as "A cards." Signifying the symbolic importance of this legislation to organized labor, it was signed into law as Chapter 534 of the Laws of 2001, by the Governor via teleconference broadcast to the national AFL-CIO convention in Las Vegas. It became the law of this state on Nov. 28, 2001. The bill pertains to those workers not covered by the reach of the National Labor Relations Board, and is expected to impact smaller work sites, which either do not reach the monetary business thresholds of the federal law or where the Board has declined jurisdiction.

A.9459 (Rules)/S.5828 (Rules): This omnibus bill relates to a number of state economic development issues, and includes provisions authorizing the Governor to execute Tribal-State compacts in various New York counties for the purpose of establishing Indian gaming facilities. In conferring this authority, the legislature directed that the compact would be deemed ratified upon the Governor's certification that certain enumerated conditions, including the recognition of labor unions by a card check mechanism, had been met. This landmark legislation was signed into law as Chapter 383 of the Laws of 2001 on Oct. 29, 2001.

A.2388 (Cahill)/S.1511 (Bonacic): This bill amends the Workers' Compensation Law to provide for immediate treatment, prior to diagnosis, for certain emergency public safety workers who, in the course of employment, were exposed to blood or other bodily fluids. It became Chapter 251 of the laws of 2001 on Sept. 5, 2001.

A.3219-A (McEneny)/S.3013 (Spano): This bill amends the General Municipal Law to permit local Boards of Education to consider fair labor standards and unacceptable working conditions, including the use of child labor, in determining the lowest responsible bidder for apparel purchases. It became Chapter 227 of the Laws of 2001 on Sept. 4, 2001.

A.4138 (Hoyt)/S.114 (Marcellino): This bill amends the Labor Law to permit state employees additional paid leave for the purposes of bone marrow or organ donation. It specifies that employees may use up to seven days paid leave for bone marrow donation, and thirty days paid leave for organ donation purposes. It also prohibits employer retaliatory action against the employees using this leave. This bill became Chapter 214 of the Laws of 2001 on Aug. 29, 2001.

A.6689 (Nolan)/S.4011 (Spano): This bill would have amended the Labor Law to require municipalities to provide notice to employees and their labor unions, prior to reclassifying certain labor class employees to a less favorable pay scale. The bill was returned by the Executive as Veto 51 of the Laws of 2001 on Dec. 19, 2001.

A.7000 (Nolan)/S.2930 (Spano): This bill amends Article 12-A of the Labor Law which establishes the Special Task Force for the Apparel Industry. It provides that officers and agents of corporations in the apparel industry who knowingly permit violation of the state registration requirements may be guilty of a class B misdemeanor. It was delivered to the Governor on Nov. 1, 2001, and signed into law as Chapter 439.

A.7458 (Nolan)/S.2142 (Spano): This bill amends Article 8 of the Labor Law to require that the Commissioner of Labor ensure that all prevailing wage supplements are paid to or on behalf of the project employees. The bill is intended to address situations where the supplement package due on public work projects is redirected to plans of benefit to other than the eligible employee. It was signed into law as Chapter 203 of the Laws of 2001 on Aug. 20, 2001.

A.8370 (Nolan)/S.5579 (Rules): This bill extends the Labor Law prohibition relating to discrimination against law enforcement officers for their failure to meet certain ticket quotas. It was delivered to the Governor on Dec. 31, 2001, and as of this writing the bill has not been acted on.

A.8503-A (Rules-Nolan)/S.5300-A (Spano): This bill would have amended the Labor Law's Article 8, in providing for public access to apprentice payroll information on prevailing wage projects. This bill was intended to assist enforcement activity for construction workers on state-funded public works projects, to ensure that the proper wage had been paid. It was received as Veto 7 of the Laws of 2001 on Aug. 6, 2001.

A.8612-A (Rules-Nolan)/S.5355-A (Spano): This bill amends the prevailing wage sections of the state Labor Law to authorize public corporations and other public entities which are party to construction contracts implicating Section 220 rights, to require that all contractors and subcontractors on these projects have state validated apprenticeship programs. It was signed into law as Chapter 571 of the Laws of 2001 on Dec. 19, 2001.

A.8920 (Cahill)/S.5369 (Bonacic): This bill amends the Workers' Compensation Law to include civilian employees of the Department of Corrections among those entitled to immediate medical treatment upon exposure to blood or other bodily fluids, if such exposure arose out of, or in the course of employment. The bill was signed into law as Chapter 572 of the Laws of 2001 on Dec. 19, 2001.

A.9191 (Rules-Nolan)/S.5576 (Spano): This bill would have amended various portions of the Labor Law to strengthen penalties for violations of wage and hour and the public work enforcement provisions. It received Veto 40 of the Laws of 2001 on Nov. 28, 2001.

A.9331 (Rules-Nolan):/S.5717 (Spano): This bill amended the Labor Law to create a new article providing for plumbing materials specifications and for the continued use of standard piping materials in various types of residential and business property construction. It will expire in three years. It was signed into law as Chapter 526 on Nov. 28, 2001.

A.9424 (Hoyt)/S.5782 (Marcellino): This bill amends the Labor Law to require that a state employer be given 14 days' written notice where possible, before the onset of paid leave for the purpose of organ or bone marrow transplant. It was signed into law as Chapter 465 on Nov. 13, 2001.

A.7698-B (Rivera, P)/S.4318-B (Velella): This expansive bill would have amended the General Business Law to institute provisions ensuring the ongoing prompt payment of contractors, sub-contractors and their workers during the course of a construction project. It was vetoed as Veto 56 of the Laws of 2001 on Dec. 26, 2001.

The author serves as Associate Counsel for Labor at the New York State Assembly. She is a *magna cum laude* graduate of Seton Hall University School of Law. The opinions expressed in this article are the author's own, and do not necessarily reflect the views of the Assembly or any member of the Legislature.

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The Sagamore
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The Statler Hotel
Ithaca, NY

Correction to

"General Municipal Law § 207-c Eligibility: What's Changed Since *Balcerak*?"

By Richard K. Zuckerman and Alyce H. Goodstein

The article that appeared in the Fall/Winter 2001 issue of the *L&E Newsletter* incorrectly stated that both houses of the New York State Legislature passed bills that "would effectively overrule the *Balcerak*[1] decision by eliminating the intentional statutory distinction between entitlement to workers' compensation benefits and General Municipal Law Section 207-c."[2] The article referenced Senate Bill No. 5279 and Assembly Bill No. 8587, which empowered the Workers' Compensation Board to make controlling determinations for benefits pursuant to Section 207-c.[3] However, the legislature passed an amended bill, Senate Bill No. 5279-A, that eliminated all references to benefit determinations by the Workers' Compensation Board.

The amended Senate bill, which also replaced Assembly Bill No. 8587, amends General Municipal Law Section 207-c by changing "is injured in the performance of his *duties* or who is taken sick as a result of the performance of his *duties*" with "is injured during the performance of his or her *tour of duty* or who is taken sick as a result of the performance of his or her *tour of duty*"[4] (emphasis added). This change significantly broadens a covered employee's entitlement to Section 207-c benefits, because it requires only that an injury or illness be sustained during the time that the officer is working his or her tour of duty, without consideration of the activity in which the officer was engaged at the time of the injury. In other words, the bill overrules *Balcerak*'s reasoning that:

> General Municipal Law § 207-c benefits were meant to fulfill a narrow and important purpose. The goal is to compensate . . . employees for injuries incurred in the performance of special work related to the nature of heightened risks and duties. These functions are keyed to "the criminal justice process, including investigations, presentencing, criminal supervision, treatment and other preventative corrective services."[5]

Under this proposed legislation, Section 207-c benefits will be available as long as a covered employee is injured during his or her "tour of duty," regardless of the activity that caused the injury.

The amended bill would also add the following to the statute:

> Where the injury or sickness which results in a claim for benefits provided by this section occurred during, or as a result of, the immediate and actual performance of a public duty and such public duty was performed for the benefit of the citizens of the community wherein such public duty was performed, the benefits provided by this section shall not be denied on the basis that the injury or sickness did not occur during, or as a result of, their performance of his or her tour of duty.[6]

This language appears to address the factual scenario in a post-*Balcerak* decision of the Appellate Division, Second Department. In *Wynne v. Town of Ramapo*,[7] the court affirmed the denial of a police officer's application for Section 207-c benefits where the officer, while off-duty and on vacation outside of his department's jurisdiction, injured his hand while breaking a window to free a child from a car. Because the officer was off-duty when he sustained his injury, the court determined that Section 207-c benefits were unavailable. Under the proposed legislation, a similarly situated police officer would appear to be eligible for Section 207-c benefits because the off-duty injury occurred in the "actual performance of a public duty and such public duty was performed for the benefit of the citizens of the community wherein such public duty was performed."

Senate Bill No. 5279-A has not yet been formally presented to the Governor for signature.

Endnotes

1. *Balcerak v. County of Nassau*, 94 N.Y.2d 253, 701 N.Y.S.2d 700 (1999).
2. New York State Senate Bill No. 5279 and Assembly Bill No. 8587.
3. *Id*.
4. New York State Senate Bill No. 5279-A.
5. *Balcerak*, 94 N.Y.2d at 259, 701 N.Y.S.2d at 703 (citation omitted).
6. New York State Senate Bill No. 5279-A.
7. 728 N.Y.S.2d 785 (2d Dep't 2001).

Mr. Zuckerman is a partner in the law firm of Rains & Pogrebin, P.C. in Mineola and New York City. He is a member of the Section's Executive Committee and Chair of its Committee on Government Employee Labor Relations Law. He and his firm exclusively represent management in all public and private sector labor, employment and education law-related matters. Ms. Goodstein is an associate of the firm.

Public Sector Labor and Employment Law

Second Edition

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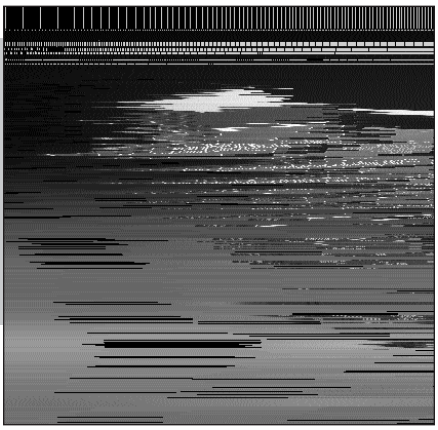

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Committee Reports

The Labor and Employment Section supports committees representing a wide array of interests in our field. Many of the committees welcome new members from the Section. The Newsletter *is featuring reports from the committees in this issue and hopes to publish more in coming editions.*

Equal Employment Opportunity Committee

The purpose of the Equal Employment Opportunity (EEO) Committee is to bring together attorneys from all over the state who represent employees and employers, as both in-house and outside counsel, to discuss developments in the implementation and interpretation of federal, state and local anti-discrimination laws by the courts and administrative agencies in New York. The Committee also undertakes special projects, such as the preparation for the Section's and NYSBA's approval of amicus briefs in pending discrimination litigations in which the plaintiff and defense bars are able to identify a community of interest of significance to the profession as a whole. We are also active in putting together panels for presentation at the Section's semi-annual meetings, frequently in conjunction with the Section's Ethics Committee. Our goal is to maximize participation of a broad spectrum of Committee members, both in our meetings and in our public presentations and projects.

Meetings are generally held at the midtown New York offices of Vedder, Price, Kaufman & Kammholz, with members from upstate and Long Island participating by telephone. The Committee also convenes in conjunction with the Section's annual and semi-annual meetings (normally in January in New York City and at a resort destination in the early fall). This year, we will have our adjourned fall Section meeting at The Sagamore, to be held in April; the Committee has prepared a panel presentation for the Section's plenary meeting.

Committee meetings often feature guest speakers—we try to meet at least once a year with government officials from the administrative agencies. Recent guests have included Spencer Lewis, Regional Director of the New York office of EEOC and the recently appointed Regional Attorney, as well as the Deputy Commissioner of Human Rights for the New York City Commission on Human Rights, Randy Wills. In 2002 we expect to meet with the Commissioner of Human Rights and the General Counsel of the New York State Division on Human Rights, and hope to obtain participation from some of the upstate and Long Island city and county human rights commission members. Other guests have included a series of U.S. Magistrate Judges, from the Western, Eastern and Southern District courts, who shared insights and answered questions about a variety of discovery issues encountered in EEO cases, such as the discovery of medical and psychiatric records in sexual harassment cases, and privilege issues when counsel offers extra-legal advice to clients.

Members occasionally offer formal presentations on EEO topics on which they have been working. But generally, the format is informal, with perhaps one or two discussion topics of current interest and a round-table free-for-all, in which members share insights into practice developments and legal developments, or seek suggestions about difficult practice matters they have encountered. The frank exchange of views among plaintiff- and defense-oriented lawyers generally benefits all participants.

Although we have an active committee, we are always pleased to have new members join us. Those interested can contact either Co-Chair: Pearl Zuchlewski, who generally represents plaintiffs, at (212) 869-1940, or pearlznyc@aol.com; or Alan Koral, who generally represents employers, at (212) 407-7750, or akoral@vedderprice.com. We are an equal opportunity committee.

Alan Koral and Pearl Zuchlewski, Co-Chairs

***

Government Employee Labor Relations Law Committee

Over one dozen members of our Committee met by conference call on January 4, 2002. We are implementing our decision to establish our own listserv for the use of those Committee members who wish to address questions or share information about public sector employment law issues with other members. We also discussed and updated an article written by Committee Chair Richard Zuckerman about General

Municipal Law section 207-c and which was just published in the Section newsletter. Members were advised that the legislature has finally forwarded to the Governor a substantive amendment to the statute that would overrule the Court of Appeals' seminal *Balcerak* decision. There was also discussion about CLE programs that the Committee may wish to sponsor or co-sponsor later this year. Our next meeting will be by conference call on March 21, 2002.

Rich Zuckerman, Chair

***

Individual Rights and Responsibilities Committee

As its name implies, the Individual Rights and Responsibilities Committee concerns itself with a wide range of workplace issues. The principal work of Committee members in recent years has been to conceive of and produce programs at the Fall and Winter meetings of the Labor and Employment Law Section designed to explore issues that the Committee members believe are important both to employers and employees. The topics addressed in these programs have included e-mail and Internet privacy rights (2000 Winter meeting); a model separation agreement (1999 Fall meeting); and the legal issues arising out of alternative employment arrangements such as independent contractor status (2001 Winter meeting). At the Winter 2002 meeting of the State Bar, the Committee co-sponsored a half-day presentation on disability issues with another section. At the upcoming rescheduled Fall 2001 meeting, to take place in April 2002, the Committee will sponsor a program that will explore the ways in which employers and employees might better cope with internal complaints between co-workers, titled "Putting Humpty Dumpty Back Together: Maintaining Effective Working Relationships in the Aftermath of a Complaint between Co-Workers."

Allegra Fishel and Ted Rogers, Co-Chairs

***

Ad Hoc Student Education Committee

This letter was received by one of our attorneys participating in our program to expose high school students to legal issues through a speakers bureau, field visits, writing competitions and the like. It speaks for itself. If you, too, would like to become involved, please call Michael Bernstein at (212) 697-4433.

> *My students and I wish to express in writing our sincerest gratitude. Our tour of your firm as well as the discourse that you had with the fourteen students was a valuable experience.*
>
> *We are well aware that time is a precious commodity and were pleased that you spearheaded and arranged such a welcoming and lengthy exchange. Many of the students commented on the fact that you were so "easy going," "approachable" and "down to earth." They were not intimidated and felt comfortable asking questions and savored our informed responses. Several of our students confessed that they would hold the advice that you and Mr. Williams gave them, close and dear to them "words to live by."*
>
> *So let me proclaim that our venture was a success.*

Michael I. Bernstein

***

Legislation Committee

The following is a summary of important labor- and employment-related legislation and regulations that have been adopted or passed since January 1, 2001.

Ivor Moskowitz, Co-Chair

SIGNED LEGISLATION		
Chapter No.	**Law Amended**	**Description**
58	*Civil Service Law,* § 209(4)(d)	Extends the expiration date of the Taylor Law's binding arbitration provision until July 1, 2003.
46	Section 2 of chapter 695, L. 1994, amending the *Civil Service Law.*	Extends the applicability of injunctive relief in public employment improper practice cases for two years, until June 30, 2003.
45	*Retirement and Social Security Law,* § 440	Extends the application of Article 11 of the RSSL to allow all police officers and firefighters joining the retirement system before July 1, 2003 to be given Tier Two status.
44	*Retirement and Social Security Law*, § 470	Extends until July 1, 2003, the right of public employees and employers to negotiate for retirement benefits not requiring approval by the legislature and to extend for two years, until July 1, 2003, every temporary right, privilege or retirement benefit conferred by law for a member of a public retirement system.
36	Section 7 of chapter 677, L. 1977 amending the *Civil Service Law, Judiciary Law and the General Municipal Law*	Extends for two more years, until July 1, 2003, the agency fee provisions for public employee unions under the Taylor Law.
29	Implementation of a ratified CBA.	Implements the ratified CBA between the state and the Graduate Students Employees Union (GSEU), retroactive from July 1, 1999, set to expire on July 1, 2003.
9	Implementation of the provisions of an interest arbitration award.	Implements certain provisions of a binding arbitration decision between the state and the collective negotiating unit consisting of NYS troopers, retroactive from April 1, 1999, set to expire on April 1, 2002.
10	Implementation of the provisions of an interest arbitration award.	Implements the provisions of an interest arbitration award between the state and the collective negotiating unit consisting of commissioned and non-commissioned officers in the Division of State Police, retroactive from April 1, 1999, set to expire on April 1, 2002.
8	Implementation of the provisions of an interest arbitration award.	Implements the provisions of an interest arbitration award between the state and the collective negotiating unit consisting of investigators, senior investigators and investigative specialists in the Division of State Police, retroactive from April 1, 1999.
81	Section 45, Chapter 929, L. 1986 amending the *Tax Law* and other laws relating to the Metropolitan Transportation Authority	Extends from July 1, 2001 to July 1, 2003 provisions relating to compulsory arbitration to resolve impasses in collective negotiations between MTA New York Transit or the MTA Bridges and Tunnels and employee organizations.

SIGNED LEGISLATION (con't)

Chapter No.	Law Amended	Description
31	Chapter 729, L. 1994	Extends the "sunset" date until May 15, 2002 on a provision that prohibits schools from reducing either the level of health insurance coverage or their contribution toward its cost for retirees, unless the reduction applies equally to active employees.
147	Chapter 180, L. 2000	Allows school districts, charter schools, and BOCES to fill vacancies on short notice while awaiting a full criminal background. The amendment also allows a school to make an Emergency Conditional Appointment when an unforeseen emergency vacancy occurs.
251	*Workers' Compensation Law,* § 10	Provides for the care and treatment of public safety officers, including but not limited to emergency medical technicians, firefighters, police officers and corrections officers who are exposed to blood or other bodily fluids in the course of their duties.
281	*Retirement and Social Security Law,* § 212	Increases to $20,000 the amount which a public retiree may may earn before there is a diminution of retirement benfits.
390	*Civil Service Law,* § 205	Provides that hearing officer reports and recommendations would not bind PERB in the exercise of hearing improper practice cases.

LEGISLATION AWAITING GUBERNATORIAL ACTION

Law Amended	Bill No.	Description
New York City Administrative Code, § 13-50(7)	A.2833	Allows NYC substitute teachers to join the NYC Teachers' Retirement System where they are now limited to joining either the NYC Employees' Retirement or Board of Education Retirement Systems.

PASSED BOTH HOUSES BUT HAVE NOT BEEN DELIVERED TO THE GOVERNOR

Law Amended	Bill No.	Description
Civil Service Law, § 75(1)	S.5581	Provides that labor class employees shall not be removed or otherwise subjected to disciplinary penalty except for incompetency or misconduct shown after a hearing on stated charges.
Civil Service Law, § 65(4)	A.8440	Requires that, in a city containing more than one county, collectively bargained disciplinary procedures will be applicable to provisional employees who have served for a at least 18 months in a job title covered by the agreement.
Section 406(p), Chapter 166, L.1991, amending the *Tax Law, Labor Law and Vehicle and Traffic Law*	A.8370-A	Extends for two years, until November 1, 2003, the prohibition of discrimination of police officer regarding ticket quotas.

PASSED BOTH HOUSES BUT HAVE NOT BEEN DELIVERED TO THE GOVERNOR (con't)

Law Amended	Bill No.	Description
Civil Service Law, § 209	A.7325	Makes interest arbitration applicable to deputy sheriffs who are engaged directly in criminal law enforcement activities that aggregate 50 percent of their service and are police officers under the criminal procedure law as certified by the county sheriff.
Civil Service Law, § 209	A.3938	Makes interest arbitration applicable to members of collective negotiation units designated as security services and security supervisors. Also, the bill would limit binding arbitration, just as with police, to the terms of the CBA directly relating to compensation, including, but not limited to, salary, stipends, location pay, insurance, medical and hospitalization benefits; and shall not apply to non-compensatory issues.
Labor Law, § 705	A.9202	Provides that the State Employment Relations Board shall designate a collective bargaining unit representative after a showing of majority interest by employees in the unit; under current law, it is not specified how an agent is designated after a showing of interest.
Education Law, § 532	A.7913	Increases the minimum retirement allowance for members of the New York State Teachers' Retirement System who retired prior to July 1, 1970 to $500 per year of New York State service up to a 35-year maximum of $17,500.
Civil Service Law, § 207-c	S.5279-A	Provides that a determination of Workers' Compensation Board that an injury or illness arose out of employment will be conclusive for benefits under the General Municipal Law.

VETOED LEGISLATION

Law Amended	Veto Message	Description
Civil Service Law, § 71	No. 17 of 2001 (S.3323/A.6615)	Amendment would have provided that a public employee who is disabled by workplace injuries is entitled to a leave for at least two consecutive years for each period of such disability.

APPROVED RULES AND REGULATIONS

Part/Section Amended	Description
Addition of 4 NYCRR § 80-1.11 Addition of Part 87	These rules were promulgated in accordance with L. 2000, ch. 180, to prescribe the necessary procedures to be followed in order to fingerprint prospective school employees and applicants for certification under new law. The rule was adopted as an emergency measure and is set to expire on September 18, 2001. The agency intends to adopt the provisions of the emergency rule as a permanent rule having previously published a notice of proposed rule making on May 23, 2001. The proposal's notice for these rules expires November 19, 2001.
Addition of (db) to 12 N.Y.C.R.R. § 800.3	Incorporation of health standards adopted by the U.S. Department of Labor, Occupational Safety and Health Administration, as of June 30, 2000 as they apply to Longshoring, Marine Terminal and Gear Certification.
Addition of new Part 473 to Title 12 N.Y.C.R.R.	Update of the regulations to bring them into conformity with new operating procedures implemented during the transitioning to telephone claims centers for unemployment insurance benefit filing.

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You are encouraged to participate in the programs and on the Committees of the Section. Feel free to contact any of the Committee Chairs for additional information.

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Deadlines for submission are the 1st of January, April, July and October each year. If I receive your article after that date, it will be considered for the next edition.

Thank you for your cooperation.

Janet McEneaney
Editor

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