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Recent Developments in Preemption of State and Local Government Action Under the Machinists Lodge/Golden State Doctrine

by Phyllis W. Cheng*

I. Introduction

The Supremacy Clause of the United States Constitution confers upon Congress the power to preempt state law.[1] In the area of labor relations, preemption must reconcile state labor law which arises from traditional state police powers and the National Labor Relations Act (NLRA).[2]

Since congressional intent determines preemption questions, courts have developed three theories for deciding whether state law or the NLRA controls under the doctrine of preemption.[3] First, under the primary jurisdiction theory, states have no jurisdiction to regulate activities clearly or arguably regulated by federal law.[4] Second, under the section 301 preclusion theory, where state claims are inextricably intertwined with the terms of a collective bargaining agreement, preemption occurs because federal interest in uniformity is paramount.[5] Third, under the laissez-faire theory[6] advanced in Lodge 76, *Machinists v. Wisconsin Employment Relations Comm'n* and *Golden State v. City of Los Angeles*, states are preempted from interference with labor disputes that Congress intended to be left unregulated.[7]

This article will explore recent developments under the *Machinists Lodge/Golden State* doctrine of laissez-faire preemption, the emerging remedies thereunder, and the consequences for state and local governmental actions.

The Machinists Lodge rule, therefore, permits preemption of state labor claims in areas Congress intentionally left unregulated under the NLRA.

II. The *Machinists Lodge* Facts and Rule

Machinists Lodge definitively set out the laissez-faire preemptin doctrine. It held that states are preempted from interference with labor disputes that Congress intended to be left unregulated by the free play of economic forces.[8]

In *Machinists Lodge*, the union membership engaged in a concerted refusal to work overtime during negotiations for renewal of an expired collective bargaining agreement.[9] The employer first filed a charge with the National Labor Relations Board (NLRB), which found that the challenged activity did not violate the NLRA, and hence was not conduct cognizable by the NLRB.[10] The employer next filed a complaint with the Wisconsin Employment Relations Commission, which held that the union's refusal to work overtime violated state labor laws and ordered the union to cease and desist from such activities.[11] The Wisconsin Circuit Court affirmed and entered a judgment enforcing the cease-and-desist order; the Wisconsin Supreme Court affirmed the judgment.[12]

On certiorari, in an opinion written by Justice Brennan, the Supreme Court held that the union's concerted refusal to work overtime was peaceful conduct constituting

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activity that must be free of state regulation so as to uphold the congressional intent in enacting the comprehensive federal law of labor relations (NLRA).[13] The Court reasoned that the use of economic self-help weapons by either the union or employer in a labor dispute is an integral part of the free economic bargaining power struck by Congress.[14] Consequently, state jurisdiction under such circumstances would be inappropriate.

The *Machinists Lodge* rule, therefore, permits preemption of state labor claims in areas Congress intentionally left unregulated under the NLRA.[15]

III. *Golden State I* Facts and Rule

Golden State I substantially relied on the *Machinists Lodge* preemption doctrine.[16]

In *Golden State I*, while the employer taxicab company was in the process of seeking renewal of its franchise to operate taxicabs in the City of Los Angeles, its contract with employee drivers expired.[17] On the day the City Council was scheduled to consider the franchise renewals, the drivers went on strike, halting all operations.[18] Union representatives also appeared before the City Council and argued against renewal of the franchise based on the labor dispute. As a result, the franchise renewal was postponed.[19] As the labor dispute continued, the City Council's decision on the employer's franchise renewal became clearly intertwined the the drivers' strike, with some council members expressing sympathies with the union.[20] Ultimately, the Council conditioned renewal of the franchise on the parties settling their labor dispute before the franchise expired the following week.[21]

The employer filed suit alleging, inter alia, that the City of Los Angeles was preempted by the NLRA from conditioning franchise renewal on settlement of the labor dispute,[22] and sought declaratory and injunctive relief, as well as damages.[23] Ultimately, the United States District Court granted summary judgment for the City on the grounds that the City's actions were not preempted, and the Ninth Circuit Court of Appeals affirmed.[24]

On certiorari, the Supreme Court, in an opinion authored by Justice Blackmun, held that the City's action in conditioning the employer's franchise renewal on settlement of the labor dispute was preempted by the NLRA.[25] The Court applied the *Machinists Lodge* preemption doctrine and reasoned that the settlement condition imposed by the City "destroyed the balance of power designed by Congress, and frustrated Congress' decision to leave open the use of economic weapons."[26] The Court remanded *Golden State I* for further proceedings consistent with the opinion.[27]

Thus, Golden State II not only firmly reiterated the NLRA's subordination of state interests to the principle of unfettered collective bargaining by establishing a section 1983 remedy, but also transformed the nature of section 1983 from a mainly civil rights statute to a powerful tool against state violation of other federal rights.

The holding in *Golden State I* reaffirmed the *Machinist Lodge* doctrine that the state and local government may not interfere with labor activities that Congress intentionally left unregulated.

IV. Golden State II And The Emerging Compensatory Damages Remedy Under Section 1983

Golden State II[28] significantly expanded the *Machinists Lodge* preemption doctrine by recognizing, for the first time, the availablility of section 1983[29] compensatory damages based on governmental interference with labor-management rights.[30]

In *Golden State II* (on remand of *Golden State I*), the District Court ordered the City of Los Angeles to reinstate the employer's taxicab franchise, but concluded that section 1983 did not authorize an award of compensatory damages.[31] The Ninth Circuit Court of Appeals affirmed.[32]

In a 6-3 opinion written by Justice Stevens, the Supreme Court reversed, holding that the NLRA granted the employer rights enforceable under section 1983.[33] The Court reviewed the history of prior application of section 1983 outside the labor context. Citing the plain language of section 1983, the court stated that "the remedy encompasses violations of federal statutory as well as constitutional rights," and that "the coverage of the statute must be broadly construed."[34] In determining whether section 1983 was available to remedy a statutory or constitutional violation, the Court referred to the two-step analysis adopted in *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n.*[35]

First, the plaintiff must assert the violation of a federal right.[36] In deciding whether a federal right has been violated, the inquiry is whether the provision in question creates obligations binding on the governmental unit or rather "does no more than express a congressional preference for certain kinds of treatment.[37] The interest asserted by the plaintiff must not be "too vague and amorphous... to be beyond the competence of the judiciary to enforce," and must be "intend[ed] to benefit the putative plaintiff."[38]

Second, after plainfiff has met its burden on the first step, the defendant may show that Congress "specifically foreclosed a remedy under section 1983... by providing a comprehensive enforcement mechanis[m] for protection of a federal right."[39] The Court additionally explained that the Supremacy Clause,[40] of its own force, does not create rights enforceable under section 1983.[41]

Applying the *Middlesex* analysis to the facts of *Golden State II*, the Court concluded that the employer satisfied the first step since it was the intended beneficiary of a federal statutory scheme designed by Congress to prevent governmental interference with collective bargaining, and that the NLRA provided rights enforceable in such an action under section 1983.[42] The City however, failed to meet its burden on th second prong to prove that there already existed a comprehensive enforcement mechanism, because the NLRB has jurisdiction only over employers and unions, and cannot address governmental interference, such as by the City.[43]

Justice Kennedy dissented, arguing that section 1983 should not be interpreted to provide a cause of action when the City's only wrong was the misinterpretation of the precise location of the boundaries between state and federal power.[44] Viewing section 1983 under an historical context at the time of Reconstruction, Justice Kennedy also contended that the statute's framers intended to secure individual civil rights, and not the legal interests in preemption, which concerns the federal structure of the nation.[45]

Thus, *Golden State II* not only firmly reiterated the NLRA's subordination of state interests to the principle of unfettered collective bargaining by establishing a section 1983 remedy, but also transformed the nature of section 1983 from a mainly civil rights statute to a powerful tool against stat violation of other federal rights.

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V. Recent Applications Of The *Machinists Lodge/Golden State* Rule

The *Machinists Lodge/Golden State* preemption doctrine has been followed in a number of circuit and district court decisions. These early cases shed light on the emerging pattern of the future application of laissez-faire preemption.

The First Circuit Court of Appeals, in *Associated Builders & Contractors v. Massachusetts Water Resources Auth.*, held that a state water agency's bid specification for construction work, requiring contractors and subcontractors to abide by the terms of a previously-negotiated labor agreement, was preempted by the NLRA.[46] In *Associated Builders & Contractors*, the state water agency, under a court order to clean up the Boston Harbor, adopted a master labor agreement under which all project bidders must be bound.[47] Non-union construction industry employers filed suit for injunctive relief.[48] The court of appeals analyzed the case under the preemption principles of *Machinists Lodge/Golden State*, and found state intrusion into the bargaining process to be pervasive.[49]

The court reasoned that although local concerns for labor stability during the clean-up project were "laudable, they conflict[ed] with paramount federal law and must therefore fall."[50] Moreover, the court discounted the notion that had the state been the employer and entered directly into the agreement with the unions, it would be unassailable because the NLRA leaves regulation of state and local government to the states.[51] The court reasoned that the state's substantial participation was not enough to alter its status from regulator to employer.[52] Just as states are not employers under the NLRA, construction industry exemptions under the NLRA would not be applicable to the state.[53] The state agency's bid specification action was therefore enjoined.

The Fourth Circuit Court of Appeals, in *Rum Creek Coal Sales v. Caperton*, held that police enforcement of a state criminal trespass statute that excepted violent labor demonstrations on private property was preempted by the NLRA.[54] In *Rum Creek*, an employer filed suit for declaratory and injunctive relief after police refused to enforce the criminal trespass statute against striking workers who physically blocked the company's private road, committed assaults, and caused the employer to virtually shut down its business.[55] Although the trespass statute excepted labor actions in an effort not to infringe on NLRA jurisdiction, and although the connection between the statute and the employer's ability to withstand a strike was not as direct as the *Golden State* cases, the court explained that "the inconstistent application of state law [was] necessarily outside the power of the state."[56] As a result, under the *Machinists Lodge/Golden State* preemption doctrine, the court ordered reversal of the denial of a preliminary injunction.[57]

In *Glenwood Bridge V. City of Minneapolis*, the Eighth Circuit Court of Appeals held that the City of Minneapolis might be preempted from rejecting a construction contractor's low bid and, after bidding was reopened, award the contract to another bidder who agreed to abide by a labor stabilization agreement made part of the reopened bidding documents.[58] In *Glenwood Bridge*, a low-bid contractor sought to restrain the City, which had rejected the bid because the no strike/no lockout clause provision contained in the contractor's collective bargaining agreement with its union was "not good enough" for the City.[59] Citing *Machinists Lodge, the Golden State* cases, and *Associated Builders & Contractors*, the court held that the facts presented a sufficiently strong case of federal preemption by the NLRA to issue the injunction, because the City's actions constituted unlawful interference with free collective bargaining.[60] Thus, in ordering a preliminary injunction, the court ruled that if the contractor were to prevail on the merits, it can be compensated both by a permanent injunction and money damages under section 1983.[61]

At the district court level, in *Livadas v. Aubry*, the Northern District of California applied section 1983 to the state's violation of a discharged employee's NLRA rights.[62] There, the state labor commissioner refused to process the employee's claim for unpaid wages[63] on the ground that she was covered under a collective bargaining agreement with an arbitration clause, and federal labor law preempted the state from interpreting or applying the terms of the collective bargaining agreement.[64] The court held that "since the right at issue in the case stems from state law, rather than from the [collective bargaining agreement], the arbitrator cannot enforce it."[65] Otherwise, "union employees are forced to bargain for a valuable benefit which all other employees receive automatically."[66] Therefore, the state law was not preempted and the state must enforce the employee's rights.[67] In addition, after applying the *Middlesex* two-pronged inquiry used in *Golden State II*, the court held that the NLRA vests employees with rights enforceable against state interference, and that a section 1983 remedy was not precluded since the NLRB does not have the authority to protect NLRA rights against state interference.[68] Accordingly, the court ordered the state to pay the discharged employee compensatory damages, attorneys' fees, and costs.[69]

These circuit and district court cases show a strong pattern of support for the *Machinists Lodge/Golden State* preemption doctrine, and an emerging application of section 1983 as a remedy to address state interference with collective bargaining under the NLRA.

VI. Conclusion

The *Machinists Lodge/Golden State* laissez-faire preemption doctrine subordinates state and local governmental action that interferes with labor disputes which Congress intended to be left unregulated. Under *Golden State II*, state interference with collective bargaining may result in section 1983 damages including compensatory damages, attorneys' fees, and court costs.

In recent cases, the emerging pattern of *Machinists Lodge/Golden State* preemption suggests a broadening application of the doctrine. For example, the laissez-faire preemption has been applied to a variety of state actions, including: imposition of state court orders,[70] renewal of municipal franchises,[71] specification of city construction contracts,[72] and police enforcement of state criminal trespass statutes.[73]

As for the beneficiaries, the laissez-faire preemption doctrine has been applied to protect the collective bargaining rights of both employers and labor unions.[74] Moreover, even individual employees under a collective bargaining agreement may have an individual cause of action under section 1983 when their NLRA rights are violated.[75] However, where a state denies a labor-related benefit under the guise of preemption, it receives no protection as a party outside the collective bargaining process.[76]

The growing trend to preempt state and local action bearing upon NLRA collective bargaining and to impose section 1983 remedies have serious implications for

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states, counties and municipalities. While collective bargaining rights enjoy unfettered liberty in areas Congress intended to be left unregulated, state and local governmental actions do not share such freedoms. As Justice Kennedy commented in *Golden State II*, a state or local government making a "misinterpretation of the precise location of the boundaries between state and federal power" may have section 1983 damages imposed.[77] Thus, to avoid laissez-faire preemption and section 1983 damages, state and local governments must tread carefully whenever they implement actions affecting private sector employers, unions and employees.

The *Machinists Lodge/Golden State* preemption doctrine, therefore, underscores the rule that denies both federal and state governments the authority to abridge the personal liberty of collective bargaining.

1. U.S. Const., art. VI, cl. 2.
2. National Labor Relations Act, 29 U.S.C., §§ 151-170 (West 1988).
3. *See* Arthur Brody, *Labor Preemption Again—After the Searing of Garmon*, 13 Sw.U.L.R. 201 (1982). *See* Note, *Lingle v. Norge Division of Magic Chef, Inc.: Revolutionizing the Application of Substantive State Labor Law to Unionized Employees*, 38 Cath.U.L.R. 769 (1989).
4. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978).
5. Labor Management Relations Act, 29 U.S.C. § 185 (West 1988). *See Allis-Chalmers v. Leuck*, 471 U.S. 202 (1985).
6. For use of the "laissez-faire" term as a preemption theory, see Brody, supra, note 3 at 204, 205. *See also* Archibald Cox, *Labor Law Preemption Revisited*, 85 Harv.L.Rev. 1337, 1352 (1972); Robert A. Gorman, *Basic Text on Labor Law* 785 (1976).
7. *Lodge 76, Int'l Ass'n of Machinists & aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) [hereinafter *Machinists Lodge*]. *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) [hereinafter *Golden State I*]. *Golden State Transit corp. v. City of Los Angeles*, 493U.S. 103 (1989) [hereinafter *Golden State II*].
8. *Machinists Lodge*, 427 U.S. 132, 149-151 (1976).
9. *Id.* at 134.
10. *Id.* at 135.
11. *Id.*
12. *Id.* at 135-136.
13. *Id.* at 155.
14. *Id.* at 146, 149, 155.
15. *Id.* at 140.
16. *Golden State I*, 475 U.S. 608 (1985).
17. *Id.* at 609-610.
18. *Id.*
19. *Id.*
20. Id. at 610-611.
21. *Id.* at 611.
22. *Id.*
23. *Id.*
24. *Id.* at 612.
25. *Id.* at 618.
26. *Id.* at 619.
27. *Id.*
28. *Golden State II*, 493 U.S. 103 (1989).
29. 42 U.S.C. § 1983 (West 1988). Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."
30. *See. Emergence of a Section 1983 Cause of Action under the NLRA: Golden State Transit corp. v. City of Los Angeles*, 32 B.C.L.Rev. 215 (1990). *See. Federal Statutes and Regulations. Civil Rights Law Section 1983*, 104 Harv.L.Rev. 339 (1990).
31. *Golden State II*, 493 U.S. 103, 104 (1989).
32. *Id.* at 105.
33. *Id.* at 113.
34. *Id.* at 105.
35. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981).
36. *Golden State II*, 493 U.S. at 106.
37. *Id.*, citing *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 19 (1981).
38. *Id.*, citing *Wright v. Roanoake Redevelopment and Housing Auth.*, 479 U.S. 418, 430-432 (1987).
39. *Id.*, citing *Smith v. Robinson*, 468 U.S. 922, 1003, 1005 (1984).
40. *See supra* note 1.
41. *Golden State II*, 493 U.S. at 107.
42. *Id.* at 109.
43. *Id.* at 108.
44. *Id.* at 114 (Kennedy, J., dissenting).
45. *Id.* at 116-117.
46. *Associated Builders & Contractors v. Massachusetts Water Resources Auth.*, 935 F.2d 345 (1st Cir. 1991).
47. *Id.* at 348.
48. *Id.*
49. *Id.* at 353.
50. *Id.* at 354.
51. *Id.* at 354-355.
52. *Id.* at 354
53. *Id.* at 355-357.

    Construction industry exemptions under the NLRA are specified under sections 8(e) and 8(f). Section 8(e) makes it an unfair labor practice for an employer and a union to enter a "hot cargo" agreement, whereby one employer binds itself not to do business with another employer or person. However, section 8(e) contains a limited exemption on "hot cargo" agreements for the construction industry "relating to the contracting or subcontracting of work to be done at the site of the construction." 29 U.S.C. § 158 (e). Section 8(f) creates another exemption for the construction industry by allowing "pre-hire" agreements between employers and employees, union shop provisions, and a condition establishing minimum training or experience qualifications and area-wide seniority. 29 U.S.C. § 158 (f) (2-4).
54. *Rum Creek Coal Sales v. Caperton*, 926 F.2d 353 (4th Cir. 1991).
55. *Id.* at 356-357.
56. *Id.* at 365, citing *Machinists Lodge*, 427 U.S. at 153.
57. *Id.* at 367.
58. *Glenwood Bridge v. City of Minneapolis*, 940 F.2d 367 (8th Cir. 1991).
59. *Id.* at 368.
60. *Id.* at 370-371.
61. *Id.* at 371-373.
62. *Livadas v. Aubry*, 749 F.Supp. 1526 (N.D.Cal. 1990).
63. California Labor Code section 203 requires employers to remit unpaid wages to discharged employees immediately upon termination. California Labor Code section 201 provides penalties for employer non-compliance.
64. *Livadas v. Aubry*, 749 F.Supp. at 1528-1529.
65. *Id.* at 1529.
66. *Id.*
67. *Id.*
68. *Id.* at 1531-1532.
69. *Id.* at 1540-1541.
70. *Machinists Lodge*, 427 U.S. 132.
71. *Golden State* I, 475 U.S. 608; *Golden State II*, 493 U.S. 103.
72. *Associated Builders & Contractors v. Massachusetts Water Resources Auth.*, supra note 46; *Glenwood Bridge v. City of Minneapolis, supra note* 58.
73. *Rum Creek Coal Sales v. Caperton, supra* note 54.
74. Employers were protected as beneficiaries in the *Golden State* cases, *Associated Builders & Contractors, Rum Creek Coal Sales* and *Glenwood Bridge*. Unions were protected as beneficiaries in *Machinists Lodge*.
75. *Id.*
76. *Livadas v. Aubry, supra* note 62.
77. *Golden State II*, 493 U.S. at 114 (Kennedy, J., dissenting).

CPER Threatened By Budget Cuts

By Bonnie G. Bogue

Most members of the public sector labor bar are familiar with the journal, *CPER*, which has been a mainstay for lawyers and laymen alike over the past 24 years of developments in public sector employment relations.

So it may be surprising to learn that the California Public Employee Relations Program's survival is threatened by budget cuts at the University of California at Berkeley, which has sponsored the program since 1969 (for those with that long of a memory, that was the year the Meyers-Milias-Brown Act kicked in).

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The Enforceability of Agreements to Arbitrate Employment Disputes

by

Gerard Morales and Kelly Humphrey*

I. Introduction

In the past few years, the federal judiciary has considered the applicability of the Federal Arbitration Act ("FAA") to contracts between employers and employees in which they agree to arbitrate employment disputes. Courts have found such contracts enforceable despite Section 1 of the FAA, which excludes from the Act's coverage "contracts of employment of seamen, railroad employees, or *any other class of workers* engaged in foreign and interstate commerce."[1]

This article first reviews recent Supreme Court decisions regarding the enforceability of contracts calling for binding arbitration; analyzes the issue in the context of agreements to arbitrate disputes arising out of the employment relationship, by discussing the Supreme Court decision in *Gilmer v. Interstate/Johnson Lane Corp.*[2] and progeny, as well as the policies reflected by the Uniform Arbitration Act and the Model Uniform Employment Termination Act; and concludes by exploring the strength of the FAA's exclusion of employment contracts, in light of the well-established national policy favoring arbitration of labor disputes, reflected in the cases decided under § 301 of the Labor Management Relations Act.[3]

II. The Supreme Court's Arbitration Trilogy

The judiciary's early disfavor towards arbitration has "steadily eroded" in recent years.[4] This progressive erosion culminated in what is referred to as the 1980s "trilogy" of arbitration cases.[5] In those cases, the Supreme Court enthusiastically endorsed arbitration as an effective and efficient alternative to litigation, recognizing a general "federal policy favoring arbitration.[6]

In the new trilogy, the Supreme Court upheld agreements to arbitrate federal statutory claims raised under the Securities Exchange Act of 1934, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and the Sherman Act. In essence, the Supreme Court held that the FAA, standing alone, mandates enforcement of arbitration agreements.[7] The FAA's mandate is overridden only by showing that Congress intended to preclude a waiver of the judicial forum for the statutory right at issue.[8] The Court emphasized that "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."[9]

The Court refused to decide the issue lurking behind its entire analysis: the applicability of the FAA's section one exclusion providing that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

The Court has stated: "We are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."[10] The Court noted that "[by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial, forum."[11] Similarly, the Court has emphasized that "the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights."[12]

In sum, the Court, has effectively foreclosed any argument against arbitration as an inadequate or incompetent forum for the resolution of disputes.

III. Employment Disputes: Gilmer

On May 13, 1991, the Supreme Court decided *Gilmer v. Interstate/Johnson Lane Corp.*[13] In *Gilmer*, the court considered the issue of whether a claim of age discrimination under the Age Discrimination in Employment Act ("ADEA") was subject to compulsory arbitration pursuant to an agreement to arbitrate disputes "arising out of the employment." This agreement was included in a securities registration application.

Interstate/Johnson Lane corp. ("Interstate") hired Robert Gilmer as manager of financial services. In his registration with the New York Stock Exchange, he agreed "to arbitrate any dispute, claim or controversy" arising between him and Interstate "that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which I register." The rules of the New York Stock Exchange provided for the arbitration of "[a]ny controversy between a registered representative and any member or member organization *arising out of the employment or termination of employment* of such registered representative."[14] Upon his termination, Gilmer brought suit in federal court against Interstate, alleging age discrimination in violation of the ADEA. Interstate filed a motion to compel arbitration, based upon the arbitration agreement in Gilmer's registration application and pursuant to the FAA. The United States Court of Appeals for the Fourth Circuit reversed the District Court's decision, and, based on the arbitration trilogy, found that Gilmer's age claim was subject to the arbitration agreement.[15]

The Supreme Court affirmed the Fourth Circuit's decision, finding that Gilmer had waived his right to a judicial forum by agreeing, in his securities registration form, to arbitrate all employment-related issues.[16] The Court noted its recent trilogy of arbitration cases favoring the enforceability of arbitration agreements, and emphasized that it was Gilmer's burden to show Congress intended to preclude waiver of the judicial forum for ADEA claims. Since the ADEA did not address the issue of judicial waiver, either in its text or in its legislative history, Gilmer was unable to meet this burden.

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Unfortunately for practitioners in employment law, the Court refused to decide the issue lurking behind its entire analysis: the applicability of the FAA's section one exclusion providing that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." In response to Gilmer's argument that section one of the FAA excludes from its scope *all* "contracts of employment," the Court stated in a footnote that it left the issue for "another day."[17] In the Courts' view, it was unnecessary to decide the issue because the arbitration clause in question was not contained in a "contract of employment," but rather in Gilmer's security registration application, which was a contract with the securities exchange, not with Interstate.[18]

IV. Gilmer's Progeny and the FAA

Several federal courts have had the opportunity already to apply and interpret Gilmer.

A. Sex discrimination Under the ASE/NYSE Arbitration Clause

The Sixth Circuit Court of Appeals applied *Gilmer* in the context of a Title VII sex discrimination action. In *Willis v. Dean Witter Reynolds, Inc.*,[19] the plaintiff filed a sexual harassment action against her employer, Dean Witter. Dean Witter filed a motion to compel arbitration, based on the plaintiff's execution of a securities registration form filed with the American and New York Stock Exchanges. In her registrations, she agreed to "arbitrate any dispute, claim or controversy that may arise between me and my firm... that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which I register."[20] As was the case in *Gilmer*, those rules required that disputes arising out of the employment relationship be submitted to arbitration. The Sixth Circuit reversed the District Court's denial of Dean Witter's motion to compel, finding *Gilmer* dispositive of every argument presented by the plaintiff. The court emphasized that nothing in Title VII's text or legislative history prohibits the arbitration of employment discrimination claims.[21]

In *Bender v. Smith Barney, Harris Upham & Co., Inc.*[22] the plaintiff/employee sued her employer for Title VII violations, as well as breach of contract, intentional infliction of emotional distress, and other common law claims.

The employer moved to compel arbitration of the suit, pointing to her registration with securities exchanges, which contained an agreement to arbitrate any disputes "between me and my firm." The employee argued that she was "fraudulently induced" into signing the agreement because her employer failed to affirmatively disclose to her the specific clause, and that enforcement would contravene public policy. She contended that 9 U.S.C. § 4 mandates a jury trial on whether there existed an agreement to arbitrate claims arising from her employment.

There is no persuasive argument today to justify the exclusion of agreements to arbitrate disputes arising out of the employment relationship from the enforcement mechanisms of the FAA.

The court held that a jury trial was not required, as the plaintiff was challenging only the *scope* of the clause, and not the *existence* of the agreement. The court also rejected plaintiff's claim of fraudulent inducement, explaining that she could not demonstrate "reliance on an affirmative false representation or the withholding of truth when it should have been disclosed." Finally, the court held that any public policy arguments against the enforcement of agreements to arbitrate Title VII claims "were necessarily rejected by *Gilmer*." Thus, the common law claims, as well as the statutory claim, were subject to arbitration.

The Ninth Circuit recently addressed the issue of whether the Federal Employee Polygraph Protection Act ("EPPA") prohibits a waiver of the judicial forum in favor of arbitration as provided for in a securities registration application. In *Saari v. Smith Barney, Harris Upham & Co., Inc.*[23] Saari, an employee who had signed an agreement to arbitrate disputes between "me and my firm," was fired for stealing from a client of the employer. After the employee was allegedly asked to submit to a polygraph test in violation of the EPPA, he filed suit for EPPA violations, as well as a common law claim for slander. The employer moved to compel arbitration, pointing to *Gilmer*. The employee argued that because the EPPA provides a judicial enforcement process and an anti-waiver provision, Congress intended to exclude EPPA claims from FAA. The court disagreed, stating that the "Court made it very clear in *Gilmer* that the fact that a particular statute embodies a judicial enforcement process does not exclude arbitration.[24] The court held that the employee's slander claim was also subject to arbitration because it found that his alleged theft from a client arose out of his employment.[25]

B. Age Discrimination Under a Partnership Agreement Clause

An age discrimination case which discusses and interprets *Gilmer* is *George Dancu v. Coopers & Lybrand*,[26] decided on December 3, 1991, by the District Court for the Eastern District of Pennsylvania. In that case, the plaintiff, Mr. Dancu, was hired by Coopers & Lybrand ("C&L") as the director of a group of management consulting services. Upon becoming a partner at C&L five years later, he executed a partnership agreement, which included a provision requiring arbitration of any claims or controversies arising out of the agreement or the practices and affairs of C&L. After Dancu was asked to withdraw from the partnership, he filed a charge with the EEOC alleging age discrimination in violation of the ADEA. When the EEOC declined to review his claim because he was a partner and not entitled to ADEA protection, Dancu filed suit in federal court, alleging violations of the ADEA and a common law wrongful discharge claim. C&L filed a motion to compel arbitration pursuant to the arbitration clause in the partnership agreement and the FAA.

The court found that the "threshold question is whether the arbitration agreement is within the scope of the FAA.[27] Noting that *Gilmer* expressly declined to provide a definitive interpretation of Section 1 of the FAA, the court held that Dancu's partnership agreement was not excluded from the scope of the FAA, because he engaged in consulting services and "was not in any way part of a class of workers *actively involved in interstate transportation*."[28] The court cited *Tenney Engineering, Inc. v. United Elec. Radio & Machine Workers*,[29] for the proposition that Section 1 of the FAA does not exclude all contracts of employment from its scope. In the court's opinion, in purposely following the specific exemption created for seam

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and railway workers with the words "any other class of workers engaged in foreign or interstate commerce," the drafters of FAA Section 1 intended to exclude from the FAA's coverage only arbitration agreements covering classes of workers *actively involved in the transportation industry*. If it had have been the drafters' intent to exempt all contracts of employment, they "almost certainly would explicitly have so stated without qualification."[30]

C. Arbitration Clause in a Personnel Policy Manual

In *Corion Corporation vs. Chen*[31] the court considered an arbitration proviso contained in Corion's personnel policy manual (the "manual"), which, in essence, provided that "situations involving severe penalties, termination, or alleged discrimination" were subject to arbitration. Here the employee, Chen, invoked the arbitration procedures in the manual and Corion declined, maintaining that the arbitration proviso was not an arbitration agreement and in any event, was not enforceable because neither the FAA, nor the Massachusetts Uniform Arbitration Act, applied to arbitration agreements contained in employment contracts. Chen filed an action to compel arbitration.

The court found that the FAA applied to Chen's employment contract because the contract constituted "a contract evidencing a transaction involving commerce." The court, as in *Dancu*, adopted the *Tenney* proposition that FAA Section 1 does not exclude all contracts of employment from its scope, but rather excludes only contracts of employment for workers actually engaged in the transportation industry.

D. Arbitration Clause In an Employment Application

In *Mago v. Shearson Lehman Hutton Inc.*,[32], the Ninth Circuit Court of Appeals compelled arbitration of an employee's (Mago) sexual harassment claims. Mago had signed an "employment application" requiring her to arbitrate employment disputes. The court declined to address the applicability of the FAA because Mago failed to raise the issue, which the court described as "an unresolved question."[33] The court held that Mago had not met her burden of showing that Congress, in enacting Title VII, intended to preclude arbitration of claims under the Act. It held that although *Gilmer* involved the ADEA rather than Title VII, the similarity of the statutes necessitated that the arbitration agreement be enforced.[34]

V. Section One of the FAA - A Historical Perspective

As described above, in the cases addressing this issue courts have wrestled with the question of Congress's intent in excluding from the FAA's scope "contracts of employment of... workers engaged in... interstate commerce". The sketchy legislative history ambiguous, and does not strongly support a broad exclusion from coverage for individual employment arbitration agreements. If anything, the record, combined with legal development since then, tends toward the opposite conclusion.

The FAA was originally drafted by the American Bar Association's Committee on Commerce, Trade, and Commercial Law to address "the further extension of the principle of commercial arbitration."[35] It was enacted on February 12, 1925, and later codified at Title 9 of the United States Code in 1947.[36]

While it is clear from the FAA's legislative history that it was basically intended to apply to commercial contracts between merchants, there is little that addresses its exclusion for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The exclusion was briefly commented on in a report of the Bar Association Committee as follows:

> Objections to the bill were urged by Mr. Andrew Furuseth as representing the Seamen's Union. Mr. Furuseth taking the position that seamen's wages came within admiralty jurisdiction and should not be subject to an agreement to arbitrate. In order to eliminate this opposition, the committee consented to an amendment to Section 1 as follows: 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce.[37]

This comment suggests that restricting the Section 1 exclusion, as the *Corion* and *Dancu* courts have done, is in accord with the drafters' intent. In addition, as noted in *Tenney* and *Dancu*, the concept of the commerce power has been interpreted increasingly expansively since the FAA's enactment in 1925, to the point where distinction between employment circumstances based on their relationships to "commerce power" is practically meaningless.[38]

Aside from the obscure FAA legislative history (which by now is obsolete in any event), there is no persuasive argument today to justify the exclusion of agreements to arbitrate disputes arising out of the employment relationship from the enforcement mechanisms of the FAA.

VI. The Policies of The Uniform Arbitration Act and the Model Uniform Employment Termination Act.

The exclusion of agreements to arbitrate disputes arising out of employment relationships from FAA's coverage contrasts sharply with the provisions in the Uniform Arbitration Act ("UAA") and the Model Uniform Employment Termination Act. Both acts expressly promote arbitration as the preferred method for the resolution of employment disputes.

The UAA was approved and recommended for adoption by the states in 1955 by the National Conference of Commissioners on Uniform State Laws (NCCUSL). Section 1 of that Act states that "This Act also applies to arbitration agreements between employers and employees or between their respective representatives [unless otherwise provided in the Agreement]."[39]

Most recently, in August, 1991, the NCCUSL approved and recommended the Model Uniform Employment Termination Act, which provides detailed binding arbitration procedures for the resolution of employment disputes. The drafters of this Model Act emphasized that arbitration procedures are much speedier, more informal, more expert, and less expensive than courts and juries for the resolution of disputes arising from the employment relationship.[40]

It is apparent that the UAA and Model Act approaches to arbitration of individual employment agreements conflict with any notion that the FAA should exclude such provisions from enforcement.

VII. Arbitration in the Collective Bargaining Context

The well-established national policy in favor of arbitration of claims and disputes arising from labor or collective bargaining agreements also contrasts sharply with the proposition that agreements to arbitrate disputes arising from the employment rela-

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tionship should be excluded from the FAA's enforcement mechanisms. During the last decade, the Supreme Court has handed down four significant opinions emphasizing that it is the policy to preserve "the central role of arbitration in our system of industrial self-government," *Allis Chalmers Corp. v. Lueck*[41]; *International Brotherhood of Electrical Workers v. Hechler*[42]; *Caterpillar, Inc. v. Williams*[43]; *Lingle v. Norge, Division of Magic Chef, Inc.*[44]

In *Allis Chalmers*, the Court noted:

> The need to preserve the effectiveness of arbitration was one of the central reasons that underlay the Court's holding in *Lucas Flower*. The parties here have agreed that a neutral arbitrator would be responsible, in the first instance, for interpreting the meaning of their contract. Unless this [state law] suit is preempted, their federal right to decide who is to resolve contract disputes will be lost.[45]

Pointedly, the Court noted that to sidestep an available grievance procedure would "eviscerate a central tenet of federal labor contract law under Section 301 [of Labor Management Relations Act], that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance."[46]

Conclusion

If it is truly a fundamental tenet of federal labor contract law to preserve and enforce arbitration as the preferred method of resolving disputes arising from collective bargaining agreements, then the same enforcement mechanisms should be available for agreements to arbitrate disputes arising from the employment relationship. There is no viable policy reason to favor arbitration in the collective bargaining context but not in the non-union setting. The Supreme Court has foreclosed any argument that arbitration is inadequate or incompetent as a means of resolving disputes between employers and employees.[47] The Court has likewise rejected the assertion that the unequal bargaining power inherent in many employment relationships in any way taints agreements to arbitrate in this context.[48]

Arbitration is increasingly being used to resolve employment disputes, because it is less expensive, quicker, more efficient,[49] and is seen as a process which mutually benefits employees and employers. Given the federal policy favoring arbitration, agreements to arbitrate employment disputes should be enforceable under both federal statutory law and federal common law of employment relations.

1. 9 U.S.C. $ 1 et seq. (emphasis added).
2. 114 L.Ed.2d 26 (1991).
3. 29 U.S.C. $ 185.
4. Rodriguez de Quijas v. Shearson/American Express Inc., 490 U.S. 477, 480 (1989).
5. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985); Shearson/American Express, Inc., v. McMahon, 482 U.S. 220 (1987); and Rodriguez de Quijas v. Shearson/American Express, Inc., supra note 4.
6. McMahon at 255, supra note 5.
7. Id. at 277.
8. Id.
9. Rodriguez at 1920, supra note 4.
10. Mitsubishi at 626-27, supra note 5.
11. Id. at 628.
12. McMahon, at 2340, supra note 5.
13. 114 L.Ed.2d 26 (1991).
14. Id. at 35 (emphasis added).
15. 895 F.2d 195 (4th Cir. 1990).
16. Gilmer at 43, supra note 13.
17. Id. at 36-37.
18. Id.
19. 948 F.2d 305 (6th Cir. 1991).
20. Id. at 306.
21 Id. at 310.
22. 58 FEP (BNA) 1036 (D.N.J. 1992).
23. 1992 Westlaw 145066 (9th Cir. 1992).
24. Id. at 3.
25. Id.
26. 778 F.Supp. 832 (E.D.Pa. 1991).
27. Id. at 833.
28. Id. at 5 (emphasis added). Several other courts have adopted a similar interpretation of the scope of Section 1. See, e.g., Bacashihua v. United States Postal Service, 859 F.2d 402, 405 (6th Cir. 1988) (postal worker excluded from FAA because she belonged to a class of workers directly involved in interstate commerce); Dickstein v. du Pont, 443 F.2d 783, 785 (1st Cir. 1971) ("Courts have generally limited this exception [$ 1] to employees... involved in, or closely related to, the actual movement of goods in interstate commerce;" thus FAA did not apply to securities industry employee); Management Recruiters, Int'l v. Nebel, 765 F.Supp. 419, 421-22 (N.D. Ohio 1991) ("nonunion account executives do not fall within the exception from coverage outline in $ 1 of the FAA [because]... they are not engaged in interstate commerce or transportation..."); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972) (FAA applies to professional basketball player's contract because player "clearly is not involved in the transportation industry.").
29. 207 F.2d 450 (3d Cir. 1953).
30. Id.
31. 1992 Westlaw 98469 (1st Cir. 1992).
32. 956 F.2d 932 (9th Cir. 1992)
33. Id. at 934.
34. Id. at 935.
35. Report of the Forty-Third Annual Meeting of the6ABA, 45 ABA Rep 75 (1920).
36. 43 Stat. 883, 9 U.S.C. $ 1 et seq.
37. Tenney, supra, 207 F.2d at 452, quoting, 48 ABA Rep. 287 (1923).
38. Compare, e.g. Hammer v. Dagenhart, 247 U.S. 251 (1918), with United States v. Darby, 312 U.S. 100 (1941).
39. The UAA has been adopted by 35 states. Some of those states have specifically excluded from coverage arbitration agreements between employers and employees. See, e.g., 12 A.R.S. $ 1517 (Arizona). Other states have adopted the original UAA language or, like Montana and South Carolina, they have modified the language to provide that arbitration agreements between employers and employees ar covered if the agreement so provides. See MCA, 27 5-113 (Montana); S.C. 15-48-10 (South Carolina).
40. Analysis, 137 Labor Relations Reporter 522 (August 26, 1991).
41. 471 U.S. 202, 118 LRRM 3345 (1985).
42. 481 U.S. 851, 125 LRRM 2353 (1987).
43. 482 U.S. 386, 125 LRRM 2521 (1987).
44. 486 U.S. 399, 128 LRRM 2521 (1988).
45. Teamsters v. Lucas Flour Company, 369 U.S. 95, 105, 49 LRRM 2717 (1962).
46. Id.
47. See notes 13-18 and accompanying text, infra.
48. Id.
49. An average arbitration costs around $1,000 to $5,000 while litigation costs $5,000 to $10,000 just to begin the process. 1 Daily Labor Report A-5, 1-2-92.

Credit Checks and The Fair Credit Reporting Act in Employment and In Employment Litigation

by

William F. Murphy*

Employee privacy, including the permissible extent of pre-employment and employment-related investigation, is a topic generally familiar to most employment lawyers. Little systematic attention has been directed to employers' use or abuse of their access to confidential consumer credit information concerning job applicants, and current or former employees.

Employment lawyers know that access to such reports may implicate common law theories such as unreasonably intrusive private investigation, invasion of privacy, or defamation. However, a California employer who obtains a consumer credit report concerning an applicant, or employee or former employee *also* may face liability under federal legislation known as the Fair Credit Reporti Act, 15 U.S.C. Section 1681 et seq. ("FCRA"). The FCRA presen an interesting avenue of potential discovery and investigation for

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plaintiff's employment lawyers, and an additional area of concern for defense attorneys.

A. The FCRA Applies To An Employers' Use of Consumer Credit Reports In Employment-Related Litigation and Decisionmaking.

Access to what are known as "consumer credit reports" is strictly regulated by the FCRA. Consumer credit reports–as distinguished from "investigative consumer reports" including interviews with neighbors, business associates, etc.[1]–are summary compilations of business dealings between consumers and providers of credit who subscribe to particular credit reporting agencies' services, such as Trans Union, TRW or Equifax. They contain financial information that Congress–and most other people–regard as private, such as the average outstanding balance on your Mastercard; how promptly you pay your Macy's bill; whether or not you defaulted on your second mortgage. Congress, in enacting the FCRA, found that "[t]here is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy" (15 U.S.C. § 1681(a) (2)).

Although much of the FCRA consists of do's and don'ts for consumer credit reporting agencies–the entities that compile the information which is then disseminated to subscribers–the FCRA also regulates the permissible purposes for which consumer credit reports can be obtained by subscribers to the services (such as employers). As the Ninth Circuit declared, this is because "[e]ven consumer reporting agencies acting in complete good faith cannot prohibit illicit use of consumer information if users are not bound to obtain consumer reports only for permissible purposes."[2]

Although much of the FCRA consists of do's and don'ts for consumer credit reporting agencies, the FCRA also regulates the permissible purposes for which consumer credit reports can be obtain by subscribers to the services, such as employers.

The FCRA also sets forth the list of permissible purposes for which consumer reports can be obtained by subscribers such as employers. These are found in 15 U.S.C. § 1681b, and permit access to consumer reports in the following situations: (1) in response to a Court or grand jury subpoena; (2) in response to written instructions from the consumer to whom the report relates; and (3) disclosure to persons who the reporting agency has reason to believe will only use the report (a) in a credit transaction with a consumer, (b) for employment purposes, (c) for underwriting insurance involving the consumer, (d) in connection with a determination of the consumer's eligibility for a license or granted by a governmental entity required by law to consider an applicant's financial responsibility or status, or (e) where there is otherwise a "legitimate business need" for the information in connection with a business transaction involving the consumer (such as a credit purchase).[3]

The FCRA's list of permissible purposes Congress specified is important because those purposes have been held by Congress and the Courts to be *exclusive*. Access to reports for a non-specified purpose–even if it seems like it has a legitimate business purpose or is a good idea– is a violation of the FCRA: "A consumer reporting agency may furnish a consumer report under the following circumstances *and no other****"[4]

For example, even if an employer articulates some plausible business need for access to confidential consumer information, "the FCRA does not authorize the use of consumer reports whenever a user has a legitimate business need for the information; instead the user must have a legitimate business need for the information in connection with a business transaction involving the consumer."[5] A "business transaction with a consumer" does not include running a credit check on a former employee not then being considered for employment[6]

Violations of the FCRA expose the violator to claims for actual damages, as well as costs and attorneys' fees as determined by the Court.[7] Moreover, if the violation is found to be willful, the violator is also exposed to such amount of punitive damages as the Court may allow.[8]

B. The FCRA and Employers.

The FCRA expressly permits access to a consumer's credit report for "employment purposes" (see 15 U.S.C. § 1681b(3) (B)). The statute defines "employment purposes" when used in connection with obtaining a consumer report as "a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee" (15 U.S.C. § 1681a(h)). Nothing in the FCRA indicates that a consumer credit report for employment purposes may be obtained on any persons other than the actual individual whose employment is being considered.[9] The Ninth Circuit has also made it clear that an elastic definition of an "employment" inquiry will not be permitted as, for example, where the question is whether an individual is fit to be "employed" as a Congressman.[10] In addition, a "business transaction with a consumer" does not include running a credit check on a former employee not then being considered for employment, to obtain a tactical advantage in litigation with that person or for other, non-employment reasons.[11]

The Ninth Circuit Court of Appeals recently held in *Comeaux v. Brown & Williamson Tobacco Co.*[12] that an employer who secretly obtained a credit report on an individual suing the employer for breach of an employment contract was guilty of violating the FCRA. In *Comeaux*, the employer falsely represented to the credit reporting agency that the purpose of obtaining a consumer report was for "employment" purposes when, in fact, as the employer later admitted, the true purpose was to gain a tactical advantage in litigation with the plaintiff. Employment litigators should accordingly caution employers who routinely conduct investigations of plaintiffs in wrongful termination and other employment litigation: if the investigation includes running a credit check or obtaining a credit report, one likely result will be an additional cause of action for violation of the FCRA.

The FCRA's protections are aimed at deliberate efforts to obtain private consumer information. In *Houghton v. New Jersey Manufacturer's Insurance Company*,[13] the defendant was the admittedly *innocent* recipient of information which, although disguised when presented to defendant by the investigative service it retained, in fact had been obtained in violation of the FCRA's regulations concerning investigative consumer reports. The *Houghton* Court held simply that the disguised report received by the innocent user who did not request a consumer report was not

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an investigative consumer report, and so the innocent recipient did not violate sections of the FCRA requiring copies of investigative consumer reports to be turned over to consumers on request. Significantly, the Court in *Houghton* was *not* presented with the question of whether the investigative service (which *did* obtain the consumer report unlawfully) was liable for violations of the FCRA. The opinion, instead, was limited to whether the innocent recipient of disguised information would be liable where the report it ultimately received, on its face, did not suggest that it was an investigative consumer report.

By contrast, employers may find it difficult to establish as a factual matter that they were merely innocent recipients of consumer information if there has been a pattern or practice of conducting such investigation, if the employer in fact was the instigating party requesting the report, or if the information on its face discloses that its source was a credit report.

Similarly, although the FCRA permits employers to obtain credit reports concerning applicants and current employees for "employment purposes," in California it is mandatory - and in other states it is still a good policy - to obtain the prior, written consent of the consumer whose report is being obtained. This is to assure that the investigation is not surreptitious, and to limit the possibility that an employee or prospective employee may later assert that the credit report was obtained for pretextual purposes other than employment, or that the report, although obtained for a permissible purpose under the FCRA, still constitutes conduct that violates state law.

C. California Law.

Compliance with the FCRA does not end the employer's responsibilities. Applicable state law also should be also reviewed in each instance before a credit report is run, because the FCRA does not preempt state law, and thus does not erect a "safe harbor" against state law claims.[14]

The Ninth Circuit has held that an employer who secretly obtained a credit report on an individual suing the employer for breach of an employment contract was guilty of violating the FCRA.

California has its own legislative scheme regulating access to consumer reports, the California Consumer Credit Reporting Agencies Act, Civil Code Section 1785 et seq. ("CCRA"). An important amendment, effective January 1, 1992, makes it unlawful for California employers to obtain a credit report on employees or prospective employees without first providing written notice to the employee, informing the employee that a consumer report will be used and the source of that report, and permitting the employee to ask for a copy of the report at the same time the employer receives it.[15]

In addition, employers should carefully regulate employees with access to consumer credit reporting facilities. Where an employer permits an employee access to consumer reports of former or current employees for non-employment purposes (for example, to investigate assets in a divorce proceeding) the FCRA is violated. Finally, access by an employer should be limited to the credit report for the prospective or current employee. Accesss to the reports concerning a spouse, for example, will be permitted under the FCRA.

Conclusion.

The FCRA is a small but sharp tool for the plaintiff's employment litigator in a field of law in which courts are increasingly hostile to providing any tort damages.

Effective January 1, 1992, an amendment to the Civil Code makes it unlawful for California employers to obtain a credit report on employees or prospective employees without first providing written notice to the employee.

An employer is permitted to obtain a consumer credit report for "employment" purposes under the Fair Credit Reporting Act. Although a prospective employee who is rejected for employment in whole or in part based on information contained in a consumer credit report must be notified of this after the fact, there is at this writing no requirement under the FCRA that an employer notify a prospective employee *prior* to running a credit check on the prospective employee. However, California law now requires that potential employees be given advance notice prior to a prospective employer's access to consumer reports. With the demise of the surprise or clandestine credit check, a potential employee will be forewarned against relying too soon on a job offer that might be withdrawn based on information contained in a credit report.

If an opposing party (or opposing counsel) confides that a credit check has been run on your client after the commencement of litigation, it is a fair bet that the FCRA has been violated. Under such circumstances, some informal checking from local credit agencies will reveal the inquiry was made, and, most importantly, the expressed purpose of the inquiry.[16] Armed with such information, a plaintiff may wish to amend or supplement an existing complaint to allege a violation of the FCRA or applicable California law.

1. See 15 U.S.C. § 1681a(e). Where an *investigative* consumer report is contemplated, prior notification to the person investigated generally must be given unless the report is obtained for employment purposes for which the consumer has not specifically applies. See 15 U.S.C. § 1681d. This article is limited to the question of "consumer reports" and does not address "investigative consumer reports."
2. *Hansen v. Morgan* 582 F.2d 1214, 1220 (9th Cir. 1978) [credit report obtained for political purposes a violation of the FCRA].
3. See 15 U.S.C. § 1681b.
4. 15 U.S.C. §1681b. See *Russell v. Shelter Financial Services* 604 F. Supp. 201, 203 (W.D. Mo. 1984) [credit check run on former employee in connection with possible embezzlement a violation of FCRA and not for "employment" purposes].
5. *Russell v. Shelter Financial Services, supra*, 604 F. Supp. 202-203.
6. *See Id.* Of course, some employers or potential employers wear more than one hat in their dealings with employees or potential employees. A bank, for example, may find itself involved with an employee in a "business transaction" where it extends credit to the employee, as well as having an employment relationship with that employee. If the credit report is obtained and used for a legitimate purpose (i.e., the business transaction) and for no other purpose, it is doubtful that the FCRA will be violated merely because an employer occupies a dual status.
7. See 15 U.S.C. § 1681o [civil liability for negligent noncompliance with any requirement of FCRA]; 15 U.S.C. § 1681n(1) & (3) [civil liability for willful noncompliance].
8. 15 U.S.C. § 1681n(2).
9. *Zamora v. Valley Federal Savings and Loan Ass'n* 811 F.2d 1368, 1370 (10th Cir. 1987) [obtaining a credit report on the spouse of an employee violates FCRA].
10. *Hansen v. Morgan, supra.* However, the Fourth Circuit has held that "employment purposes" may include a report obtained by a State Board of Medical Examiners to determine an applicant's fitness for a medical license. *Hoke v. Retail Credit Corp.*, 521 F.2d 1079 (4th Cir. 1975).
11. See *Comeaux v. Brown & Williamson Tobacco Company* 915 F.2d 1264 (9th Cir. 1990); *Maloney v. City of Chicago* 678 F.Supp. 703, 706-707 (N.D. Ill. 1987) [consumer report obtained by city officials in connection with investigation of plaintiff's claim for financial damages held to violate FCRA].
12. 915 F.2d 1264 (9th Cir. 1990)
13. 795 F.2d 1144 (3d Cir. 1986)
14. See 15 U.S.C. § 1681t; *Credit Data of Arizona, Inc. v. State of Arizona*, 602 F.2d 195 (9th Cir. 1979).
15. See Civil Code § 1785.20.5, codifying A.B. 1102 (Speier), effective January 1, 1992 (Stats 1991 ch 971, § 2).
16. Information may be obtained by writing the consumer reporting agencies. Several of the larger ones are: Trans Union Credit Information Co., 1561 E. Orangethorpe Avenue, Fullerton, CA 92631; Equifax Credit Information Services, P.O. Box 23758, San Jose, California 95153 (6389 San Ignacio, San Jose, CA 95119); TRW Credit Services, P.O. Box 749029, Dallas, Texas 75374.

Recent Developments In Labor and Employment Law

Equal Employment Notes

By Michael M. Johnson*

Update on Family Care Leave Regulations

After five preliminary drafts, the Fair Employment and Housing Commission adopted proposed regulations on March 25, 1992, which interpret the Family Rights Act of 1991, Government Code $ 12945.2. The regulations are anxiously awaited by most employers, employee groups and employment lawyers, since the Family Rights Act was hardly a model of clarity. The proposed regs, which are substantially identical to the draft summarized in the Spring 1992 Labor & Employment Law Quarterly (Vol. 8, No. 8 at pp. 9-10), were the subject of public comment and hearings on June 10 in San Francisco, June 18 in Los Angeles, and June 19 in San Diego.

The comments received by the Commission were about equally divided between management and employee groups, and by and large they were not critical of the regs. The comments focused on two principal areas: (1) who is an employee eligible for family leave (the Act says an employee must have one year of continuous service and receive "other benefits" but doesn't say what those benefits are), and (2) what the minimum duration of leave can be (the Act says that an employee can take a total maximum leave of four months within a 24-month measuring period but lets the Commission define the minimum that can be taken at any one time). The rather narrow focus of these comments suggests that the Commission did a good job in drafting the regs and filling the substantial gaps in the language of the Act.

The proposed regs define an employee as eligible for leave if he or she receives *any* employer-provided benefit, such as insurance, retirement, vacation or sick leave. Predictably, employers argued that this was too broad and should be limited to major benefits like insurance, and employee groups argued that it was too narrow and should be expanded to any benefit including statutorily-required programs like Workers' Compensation. The fact that both sides claim to be unhappy suggest that the current definition is probably about right.

On the question of minimum leave, the proposed regs state that an employee may take no less than two weeks off except that two leaves of between one day and two weeks may be taken during the 24-month measuring period. Since this is already a compromise between employers (who preferred a long minimum such as two weeks) and employees (who wanted a short minimum such as one day), the comments were mostly directed toward details. In particular, many employers argued that the two instances of leaves less than two weeks should be limited to family illness and not allowed for childbirth or adoption.

After digesting the public comments, the Commission will hold another meeting (currently scheduled for September 16) to consider changes and send the final proposed regulations to the Office of Administrative Law. That agency has 30 days to review the regulations for compliance with the demanding standards of the Administrative Practices Act and then either approve the regs or return them for more work. On the current schedule, it therefore seems unlikely that the final regulations will be adopted before early 1993.

Update on Sexual Orientation Protection

In October 1991, the Division of Labor Standards Enforcement (DLSE) began enforcing Labor Code §§ 1101 and 1102 against complaints of sexual orientation discrimination. Jurisdiction was based on Governor Wilson's October 1991 veto message for Assembly Bill 101, which would have added sexual orientation discrimination to the Fair Employment and Housing Act, and the Court of Appeal's decision in *Soroka v. Dayton Hudson Corp.*, 235 Cal.App.3d 654 (1991). Both the veto message and *Soroka* stated that the protections against discrimination on account of political activity embodied in Sections 1101 and 1102 included sexual orientation discrimination without regard to political advocacy. Even though the Supreme Court has vacated *Soroka* by granting a hearing, DLSE has continued to exercise jurisdiction.

DLSE has administered sexual orientation discrimination complaints under Labor Code § 98.7, a peculiar statute that creates a unique administrative remedy. Section 98.7 has a 30-day statute of limitations (which may be extended an unspecified time for good cause) and requires a decision by the Labor Commissioner within 60 days of filing the complaint. It establishes a procedure for investigation followed by a hearing before the Labor Commissioner or a deputy. If a violation is found, the Labor Commissioner can award reinstatement, back pay and attorneys' fees.

The Labor Commissioner's decision can be appealed by either party to the Director of Industrial Relations, who must affirm, reverse or modify within 10 days. If the respondent fails to comply with an order in favor of the complainant, the Labor Commissioner must file a lawsuit in court on behalf of the complainant (presumably for a trial de novo, but the statute is silent on this point). By the same token, a complainant who has lost before the Labor Commissioner can file a private lawsuit in court. Interestingly, § 98.7 states that the judgment in court can include "other compensation" in addition to reinstatement, back pay and attorneys' fees, which invites a claim for emotional distress. In addition, Labor Code § 1105 gives a private right of action in court, which is independent of this administrative procedure.

As of July 22, 1992, DLSE had accepted 70 sexual orientation discrimination complaints. Eighteen of the complaints have been decided by the Labor Commissioner, and 7 decisions were appealed to the Director of Industrial Relations. Surprisingly, none of the complaints produced lawsuits in court and there have been no actions challenging DLSE's imaginative interpretation of Labor Code §§ 1101 and 1102.

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* *Michael M. Johnson is a labor partner at Baker & Hostetler, McCutchen Black in Los Angeles. He is a member of the Section's Executive Committee and a former member of the Fair Employment and Housing Commission.*

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Legislative Updates

Assembly Bill 2601, which would codify DLSE's current interpretation and enforcement of sexual orientation discrimination under Labor Code §§ 1101 and 1102, is proceeding through the Legislature. It was passed by the Assembly on a 42-30 vote on May 14, and it cleared the Senate Committee on Industrial Relations by a 5-2 vote on June 15. As of July 17, A.B. 2601 was before the Senate Committee on Appropriations. If passed by the Legislature, the Governor will have an interesting time with A.B. 2601 since it codifies the Administration's own interpretation and practice under the Labor Code.

Assembly Bill 3825, the Civil Rights Restoration Act of 1992 sponsored by Assembly Speaker Brown and Senate President Pro Tempore Roberti, is also proceeding through the Legislature. This mammoth bill adds 15 new code provisions and amends 58 existing code provisions to provide comprehensive changes to state civil rights laws. Among other things, it adds protections under the Americans with Disabilities Act to the FEH Act and the Unruh Act, it adds new disability protections in employment, housing and public accommodations, it modifies administrative procedures for housing and employment discrimination complaints handled by the DFEH and the FEHC, it grants the FEHC authority to award compensatory damages and civil penalties, and it supersedes Supreme Court decisions such as *Harris v. Capital Growth Investors*, 52 Cal.3d 1142 (1991)

A.B. 3825 passed the Assembly by a 41-33 vote on May 27, and cleared the Senate Judiciary Committee by a 6-4 vote on July 2. As of July 17 it was pending in the Senate Committee on Appropriations. If passed by the Legislature, approval by the Governor seems very unlikely.

Supreme Court Rejects Attorneys' Fees Enhancements

In *City of Burlington v. Dague*, 60 U.S.L.W. 4717 (June 24, 1992), the Supreme Court held that federal courts cannot enhance attorneys' fees awards to plaintiffs who have prevailed in an action under a federal statute. Although the facts involved a claim arising under the attorneys' fee provisions of environmental statutes, the court described the provisions as "typical" of other federal fee-shifting statutes and the holding therefore portends similar results in cases under Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act and other employment and civil rights laws.

The plaintiff in *Burlington* recovered judgment against a city in an action under the Clean Water Act and the Solid Waste Disposal Act, which both contain provisions for awarding attorneys' fees to the prevailing party. See 33 U.S.C. § 1365(d) and 42 U.S.C. § 6972(e). Because the plaintiff's attorney had taken the case on a contingent fee basis and had a substantial risk of loss, the District Court enhanced the fee award. The court did so in the customary fashion of calculating the "lodestar" amount (the reasonable and prevailing fee rate multiplied by the reasonable number of hours devoted to the case), and enhancing this by an appropriate multiplier of 25 percent. The Second Circuit affirmed the award in all respects.

In a 6 to 3 decision, the Supreme Court reversed and held that any fee enhancement beyond the lodestar amount is improper. Writing for the majority, Justice Scalia explained that a fee enhancement essentially results in double recovery. That is because the factors considered for enhancement - difficulty of the case and risk of loss - are already accounted for in the lodestar by justifying a higher fee rate and requiring a large number of hours in order to prevail. Justice Scalia also reasoned that fee enhancements are undesirable because they effectively subsidize other non-meritorious cases in which the plaintiff's attorney has not prevailed.

It seems likely that the decision in *Burlington* will be followed in civil rights and employment discrimination actions under federal law. If so, this would reduce many fee awards.

Editor's Note: Burlington represents a marked change from prior Ninth Circuit law, which required fee enhancement in civil rights cases. However, in actions brought under both federal and state discrimination statutes, California law may provide an independent basis for fee enhancement.

Wrongful Termination Casenotes

by Anthony J. Oncidi*

Title VII Damages Subject To Taxation

United States v. Burke, 112 S.Ct. 1867 (1992)

This case involves the question of whether backpay awards in settlement of Title VII claims are excludable from federal income taxes. The Supreme Court ruled that such amounts are not excludable and are, therefore, subject to taxation. The Court's opinion is, however, very narrow in scope, because the case arose exclusively under Title VII and prior to that statute's amendment by the Civil Rights Act of 1991.

Workers' Comp Is Exclusive Remedy For Emotional Distress Claim

Livitsanos v. Superior Court, 2 Cal. 4th 744 (1992)

This case involves causes of action for defamation and intentional and negligent infliction of emotional distress, where no physical injury or disability was alleged. The California Supreme Court held that the emotional distress claims were preempted by the exclusivity provisions of the Workers' Compensation Act ("the Act"), notwithstanding the absence of any compensable physical disability. In so ruling, the court expressly disapproved of *Renteria v. County of Orange*, 82 Cal. App. 3d 833 (1978). The Court remanded to the court of appeal the question of whether the defamation claim was preempted by the Act.

Public Policy Claim Must Be Based Upon Violation Of Statute/Constitution

Gantt v. Sentry Ins., 1 Cal. 4th 1083 (1992)

This case involves a cause of action for wrongful termination in violation of public policy. The California Supreme Court affirmed the decision of the court of appeal affirming a jury verdict in the amount of $1.34 million in favor of plaintiff, a former sales manager for defendant. Plaintiff alleged that he had complained about the sexual harassment that his subordinate, Joyce Bruno, had suffered at the hands of another manager. After Bruno was fired and filed a complaint with the Department of Fair Employment and Housing

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* *Anthony J. Oncidi is an associate with Hill Wynne Troop & Meisinger in Los Angeles, specializing in the representation of management in employment and labor law matters.*

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("DFEH"), plaintiff met secretly with an investigator from the DFEH and provided evidence that turned out to be harmful to his employer. Shortly thereafter, plaintiff was demoted to a sales representative. Plaintiff quit his job after accepting a position with another employer and filed suit against defendant, alleging, among other things, that he had been constructively terminated. The jury agreed and awarded plaintiff $1.34 million. The supreme court held that since there was evidence that defendant terminated plaintiff in violation of a specific statutory provision (Cal. Gov't Code § 12975–prohibiting interference with the DFEH's performance of its duties), plaintiff had stated a claim for wrongful termination in violation of public policy. The supreme court went on to enunciate a new rule: Henceforth, an employee may state a public policy claim *only* if it is based upon a specific statutory or constitutional provision. The supreme court further held that the California Workers' Compensation Act did not preempt plaintiff's public policy claim, since an employer's public policy violation cannot be deemed "a risk reasonably encompassed with the compensation bargain."

"Use It Or Lose It" Vacation Policy Illegal

Boothby v. Atlas Mechanical, Inc., ___ Cal. App. 4th ___. 92 Daily Journal D.A.R. 7399 (June 2, 1992)

In this action for unpaid vacation benefits, plaintiff sought payment from defendant of $24,200 for vacation time that he allegedly earned but did not use. The court of appeal distinguished an illegal "use it or lose it" policy, whereby employees forfeit vested vacation pay, from a legal "no additional accrual" policy, whereby vacation benefits are capped at a certain amount. The court determined that there was no evidence in the record of the substance of the employer's vacation policy and, accordingly, reversed the trial court's summary adjudication order and remanded the matter for further proceedings.

Ex Parte Contact With Former Control Group Member Permissible

Nalian Truck Lines, Inc. v. Nakano Warehouse & Transp. Corp., 6 Cal. App. 4th 1256 (1992)

This case involves the issue of whether an attorney may make ex parte contact with a former member of a corporate adversary's management "control group." The court held that Rule 2-100 of the State Bar Rules of Professional Conduct permits such contact in cases in which the person contacted by the attorney is neither a current employee nor a current member of the management control group of the corporate adversary. The court further held that "it is incumbent upon a party who knows that its former employees, including former control group employees, possess privileged information to seek a protective order."

Public Policy Claim Requires More Than Suspicion Of Illegality

DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655 (9th Cir. 1992)

This case involves a cause of action for wrongful termination in violation of public policy. The court of appeals affirmed summary judgment in favor of defendant on the ground that plaintiff had failed to state a claim for wrongful termination in violation of public policy based upon his "suspicion" that he would have violated California law if he had delivered a load of merchandise to California in a trailer that had expired registration papers from Illinois and an expired prorated vehicle tag from California. The court opined that the "California Supreme Court would not allow a claim of wrongful termination where an employee suspects a violation of the law requiring indicia of registration to be carried in a motor vehicle and therefore refuses to work." Furthermore, the court held that "unlike other cases where retaliatory discharge is alleged, there is no statute in California that prohibits Yellow Freight from terminating DeSoto under the circumstances in which he was terminated.... We have instead a claim by an employee who refuses to work based on his erroneous belief that what he was asked to do was a violation of California law."

Negligent Misrepresentation Verdict Upheld

Branch v. Homefed Bank, 6 Cal. App. 4th 793 (1992)

This case involves a cause of action for negligent misrepresentation and a jury verdict thereon awarding plaintiff $45,163 in economic damages and $60,000 in emotional distress damages. The alleged misrepresentation involved certain economic benefits that plaintiff was promised prior to quitting his former employment and accepting a position with defendant; the promised benefits never materialized. After affirming the economic damages award, the court rejected defendant's contention that *Foley* precluded plaintiff from recovering tort damages for negligent misrepresentation. However, the court did reverse the award of emotional distress damages after concluding that since the employee's loss (other than that arising from emotional distress) was solely economic, the general rule of damages permissible in negligence actions (i.e., no punitive or emotional distress damages) should govern.

Undisclosed Intent To Terminate Sales Reps Supports Fraud Claim

Marketing West, Inc. v. Sanyo Fisher (USA) Corp., 6 Cal. App. 4th 603 (1992)

This case involves causes of action for fraudulent representation, fraudulent concealment, breach of contract and breach of the implied covenant of good faith and fair dealing. Plaintiffs were former independent sales representatives of defendant, all of whom had signed fully integrated, termination-at-will agreements. Plaintiffs alleged that prior to signing the agreements, they had been engaged pursuant to an oral agreement that could be terminated only for good cause. Citing the parol evidence rule, the court of appeal affirmed summary judgment of the fraudulent representation cause of action on the ground that plaintiffs could not have reasonably relied upon the alleged representations concerning the "pro forma" nature of the termination-at-will agreement. However, the court reversed summary judgment of the fraudulent concealment cause of action on the ground that there was evidence that defendant did not disclose its intent to replace plaintiffs at the time that it had them sign the agreements. The court further held that the contract claims were barred by the two-year statute of limitations.

Employee Terminated While On Medical Leave States Claim

Walker v. Blue Cross of Cal., 4 Cal. App. 4th 985 (1992)

This case involves causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing and physical handicap discrimination in violation of the California Fair Employment and Housing Act ("FEHA"). The court reversed the summary judgment that was granted in favor of defendant with respect to plaintiff's first cause of action for breach of implied-in-fact contract and the second cause of action for breach of the implied covenant of good faith and fair dealing. In all other respects, the court affirmed summary judgment in favor of defendant. The court held that there was a triable issue of material fact as to whether there

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was an implied-in-fact agreement not to terminate plaintiff's employment except for good cause. The court considered the "totality of the circumstances," including plaintiff's 19-1/2 years of service, her receipt of consistent promotions, salary increases, merit increases and satisfactory evaluations and the existence of certain personnel policies during her employment. The court held that "at-will" language that existed in an employee handbook did not establish the nature of the employment relationship as a matter of law since there was no integrated written agreement signed by the employee. The court further held that there was a triable issue of material fact as to whether there was good cause to terminate plaintiff's employment, which was effected while plaintiff was away from work on a non-work-related medical leave of absence. The court also found evidence of pretext for terminating plaintiff's employment. Accordingly, the court reversed summary judgment of the contract and implied covenant claims. The court affirmed summary judgment of plaintiff's FEHA claim based primarily upon plaintiff's deposition testimony in which she stated that she did not believe that she was terminated because of any physical limitation.

Public Policy Protects Supervisor Who Supported Harassment Victim

Flait v. North Am. Watch Corp., 3 Cal. App. 4th 467 (1992)

This case involves causes of action for wrongful termination in violation of public policy and breach of the implied covenant of good faith and fair dealing. The court reversed the trial court's order granting summary adjudication in favor of defendant and awarding defendant $154,000 in attorney's fees and costs. The court held that there was a credibility question concerning whether plaintiff in fact had a reasonable, good faith and sincere belief that one of his subordinates was being harassed by plaintiff's supervisor and that such a question could not be determined on summary judgment. The court also determined that there was a genuine dispute about whether defendant's articulated legitimate business justification for terminating plaintiff was contradicted by circumstantial evidence of "pretext." The court rejected the trial court's determination that plaintiff's claim for emotional distress damages was barred by the Workers' Compensation Act. Finally, the court affirmed dismissal of plaintiff's claim for breach of the implied covenant of good faith and fair dealing because plaintiff had failed to present evidence that defendant's actions had violated a contractual term as well as public policy.

Employee Benefits Casenotes

by Marian B. Phillips*

COURT IMPOSES ON EMPLOYER DUTY TO PROVIDE "MEANINGFUL" COBRA COVERAGE

In a surprising decision, a Northern California District Court ruled that an employer was obligated to pay the medical expenses of a former employee after the group health trust which provided her coverage became insolvent. Although *Coble v. Bonita House*, 789 F.Supp. 2824 (N.D. Ca. 1992), presented unique facts, the Court's analysis and conclusion has significant implications for employers who provide health care insurance to employees.

Plaintiff Coble was employed by Bonita House, a non-profit residential mental health care program, at its Ukiah, California facility. Bonita House closed the Ukian facility in 1990 and thereafter retained only its facility in Berkeley, California.

Both before and immediately after closing the Ukiah, facility, Bonita House offered two group health plans to its employees. These were a Kaiser HMO available only to the Berkeley employees and a program offered by the California Council of Community Mental Health agencies ("CCCMHA"), a self-insured, multi-employer trust fund. Coble participated in the CCCMHA plan during her employment and elected to continue coverage under this plan after the Ukiah facility closed. She later obtained insurance through a new employer but she could not obtain coverage for a pre-existing condition until July 1991. CCCMHA became insolvent on April 1, 1991. Because all of its remaining employees lived in the Berkeley area, Bonita House decided to offer only the Kaiser HMO. Of all its employee and former employees, only Coble lost coverage due to the insolvency of CCCMHA. Kaiser refused to cover Coble due to her geographic location. Between April and July of 1991, Coble incurred numerous medical expenses for the pre-existing condition. Both parties moved for summary judgment on the issue of Bonita House's obligation to provide continuation coverage.

Coble argued that the COBRA requirement to provide "coverag identical to the coverage provided under the plan" requires an employer either to provide complete plan coverage, or directly to pay the benefits offered under the plan if it is impossible to provide actual plan coverage. Bonita House argued that it had complied with COBRA's plain language by offering Coble the opportunity to participate in the only plan offered to its similarly-situated employees, which in Ukiah became no plan at all after April 1.

Agreeing that either argument could be accepted under the statutory language, the Court looked to COBRA's underlying policy in concluding that Bonita House's interpretation was too narrow. Focusing its attention on a "least-cost provider" concept, the Court found that the employer rather than the individual employee is better able to obtain health insurance coverage; the Court extended this concept to conclude that the risk should remain with the employer, rather than the employee, if the coverage should fail. Consequently, the Court ordered Bonita House to pay Coble's health care expenses.

The theory of this decision has very significant implications for employers, and particularly small employers. As long as an employer offers health care benefits, its obligation to provide continuation coverage creates a duty (if it should become necessary) to pay directly for benefits identical to those available to similarly situated employees. For employers providing health coverage via region-specific plans or through potentially insolvent trusts or insurance companies, this duty may prove to be economically impossible. The anomalous result of the Court's employee-protective stance could well be that employer unable to accept that level of risk will consider terminating all grou health coverage. Can government-mandated health coverage be far away?

* *Marian Phillips specializes in employee benefits in her practice at Corbett & Kane, a Northern California firm representing management in labor and employment law.*

Employers Face New OSHA Standards Governing Occupational Exposure To Bloodborne Pathogens

by David E. Sirias*

On December 6, 1991, the Department of Labor published final standards of the Occupational Safety and Health Administration (OSHA) intended to reduce occupational exposure to Hepatitis B (HBV), Human Immunodeficiency Virus (HIV) and other bloodborne pathogens. The regulations became effective on March 6, 1992. Although the regulations were published without much fanfare, the standards, 29 C.F.R. 1910.1030, will have significant impact because of their scope, extensive compliance requirements, and costs for certain employers.

Scope

The Center for Disease Control (CDC) had previously published guidelines with respect to protecting employees who face exposure to blood or other potentially infectious material. The new OSHA standards, however, will fundamentally alter the enforcement landscape by implementing "universal precautions." These precautions enforce the concept that all blood and other body fluids from patients, victims, or the incarcerated are deemed potentially infectious, thus requiring rigorous infection control precautions to minimize the risk of exposure to staff. The standards apply to all occupational exposures to blood and other potentially infectious materials. OSHA's intent is to protect all employees at risk, regardless of their job titles or place of employment. The standards do so by conditioning coverage upon any occupational exposure without regard to occupation or industry segment.

Many activities and industries outside the health care field are covered by the OSHA standards.

The standards will reach occupational activities in both health care and non health care facilities and in permanent and temporary worksites. Examples of health care facilities include but are not limited to hospitals, clinics, dentist/physician offices, blood banks, dialysis centers, occupational health centers, nursing homes and other long term health care facilities, blood banks and plasma centers, tissue banks and institutions for the mentally retarded, among others. Health care providers may already have in place many of the safety precautions required by the regulations, due to widespread implementation of CDC's universal safety precautions. Nonetheless, health care providers must review and, where necessary, revise their procedures and employee safety protocols to insure compliance with the new OSHA standards.

Many activities and industries outside the health care field are covered by the OSHA standards including equipment repair and service, infectious waste disposal, virus research laboratories and production facilities, mortuaries and funeral homes, firefighting, paramedic and ambulance work, law enforcement, and corrections institutions. Non-health care employees employed in the private sector, the federal government, or a state or local government are covered under the standard if they have occupational exposure to blood or other potentially infectious materials.

Compliance

A. Exposure Control Plan

The standards require affected employers to maintain an a written Exposure Control Plan. Implementation of the Plan should have been completed by May 5, 1992. 29 C.F.R. 1910.1030(g)(I)(2)(ii)(B).

Each employer with employees who face occupational exposures must list all job classifications where occupational exposure does or may occur and identify those tasks and procedures with actual or potential blood exposure. "Occupational exposure" is:

> reasonably anticipated skin, eye, mucous membrane, or other parenteral contact with blood or other potentially infectious materials that may result from the performance of an employee's duties.
> 29 C.F.R. 1910/1030(b).

The exposure determination is intended to identify those positions whose duties ordinarily include no exposure, though the individual assigned may be called upon to perform and unplanned exposure task. Employers must also document implementation of other provisions of the standards (including engineering and work control practices, Hepatitis B vaccination and post exposure evaluation, communication of hazards to employees, and recordkeeping) in a manner appropriate for the employer's circumstances. In addition, employers must document procedures for evaluating the circumstances surrounding exposure incidents. Each employer must assure that the Exposure Control Plan is accessible to employees. The Exposure Control Plan also must be made without taking into consideration the use of personal protective equipment. See, 29 C.F.R. 1910.1030(c)(1).

B. Personal Protective Equipment

OSHA recognizes that almost half of the exposure incidents documented by OSHA would not have occurred had employers and employees complied with the CDC standards. The standards require employers to furnish all necessary personal protective equipment (PPE) when there is a potential for occupational exposure. PPE includes, but is not limited to, gloves, gowns, fluid proof aprons, head and foot coverings, face shields, eye protection and mouthpieces. The standards also enumerate a long list of engineering and work control practices. OSHA requires that resuscitation bags or other ventilation devices be included as a standard part of PPE, although OSHA has no evidence of transmission of bloodborne pathogens from administering CPR. Each employer must also assure that affected employees be trained in the use of all PPE and that PPE is readily accessible at the worksite in all appropriate sizes.

Almost half of the exposure incidents documents by OSHA would not have occurred had employers and employees complied with the CDC standards.

Most health care employers routinely require employee use of PPE. The standards are significant because employers will have a a clear legal duty to assure that their employees use appropriate PPE. Thus, an employee's insensitivity to a particular risk and

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refusal to wear PPE will not exonerate an employer from liability should an employee become infected as a result of a worksite mishap and subsequently bring suit.

C. Housekeeping

The standards require that employers assure that the worksite is maintained not only in a clean and sanitary condition, but also maintained in a manner which lowers the risk of accidental HBV and HIV infection. The term "worksite", refers not only to permanent fixed facilities but also covers temporary non-fixed workplaces. Examples of temporary facilities include, but are not, limited to, ambulances, bloodmobiles, temporary blood collection centers, and other non-fixed worksites which have a reasonable possibility of becoming contaminated with blood or other potentially infectious materials. 56 Federal Register No. 235,p. 64139. Therefore, the standards require employers to determine and implement an appropriate written schedule of cleaning and method of disinfection based upon the location within the facility, type of surface to be cleaned, type of soil present, and tasks or procedures being performed.

According to OSHA, needles and other "sharps" have been documented as the prime mechanism of accidental HBV and HIV transmission. The standards require affected employers whose employees face occupational exposure to maintain puncture-resistant, leakproof sharps disposal containers which are color coded to warn employees of their existence and inherent danger. The standards also require special steps for handling and cleaning the contaminated laundry of any facility.

Special rules govern research laboratories which manipulate HBV and HIV cultures and production facilities which are engaged in the preparation and concentration of large quantities of HBV and HIV. The rules include the requirement of a biosafety manual for each facility and additional training for employees. See, 29 C.F.R. 1910.1030(e).

D. HBV Vaccination/Post Exposure Follow Up

The OSHA standards require that an HBV vaccine be offered to employees who have occupational exposure unless the employee has been tested to be immune or previously received the vaccine. An employee may decline the vaccination by signing a waiver in a format appended to the regulations. The OSHA standards require that medical evaluation and monitoring be made available to an employee following a report of occupational exposure of HIV, HBV or both. The route of the exposure and the circumstances under which exposure occurred must be documented. The patient (or source of the exposure) must be tested if consent to testing is granted. The follow up requirement is important to guarantee employees the benefit of recommended measures to help prevent infection and disease. It also serves as a barometer from which to compare future test results in order to narrow the point in time at which any infection from exposure was acquired. This is an important tool for employers to limit liability for a non-occupational exposure.

Nationwide, physicians will bear net annalized costs of nearly $150,000,000 and hospitals over $300,000,000.

E. Employee Training

Effective training is critical to the overall Exposure Control Plan. Employers are required to provide employees at risk with training about the hazards associated with blood and potentially infectious materials and some protective measures which must be taken to minimize the risk. Training must include an explanation of the Exposure Control Plan, engineering controls, personal protective equipment, the efficacy and benefits of the HBV vaccine, the importance of medical follow up, and appropriate methods for recognizing tasks which would put employees at risk. The standards also require employers to provide an explanation of the contents of the final standards on bloodborne pathogens, including appendices. This will ensure that employees know about the OSHA standards and will become familiar with its provisions.

Initial employee training was to have taken place by June 4, 1992, (and should be implemented at once if it has not yet happened) and thereafter must take place for new employees at risk at the time of hire. Employee training must be updated and repeated annually. See, C.F.R. 1910.1030(g)(2).

F. Recordkeeping

The standards require each employer to maintain training records which include dates of training sessions, a summary of the content of each session, qualifications of training personnel, and the names of all persons who attended. Employers must also keep medical records which include the name and social security number of each employee at risk, the HBV vaccination history of each employee, a copy of all post exposure follow up procedures and medical evaluations, a copy of a physician's written opinion and a copy of information which physicians must receive from employers upon follow up (i.e. a copy of the final regulations) and a description of the affected employee's duties as they relate to the occupational exposure). See, 29 C.F.R. 1910.1030(h).

Cost of Compliance

OSHA's office of regulatory analysis estimates that the annual cost of compliance will range from $5,588.53 per facility in the medical equipment repair business an $4,730.29 per fire/rescue facility to $51,946.70 per facility for hospitals. On an industrywide basis, it is the offices of dentists and physicians, nursing homes and hospitals which will be affected most by the regulations on a cost basis. If OSHA's cost estimates are correct, physicians nationwide will bear net annualized costs of nearly $150,000,000 and hospitals over $300,000,000. See, 56 Federal Register No. 235, p. 64063.

In short, the scope of industry coverage, detail in compliance requirements, and financial impact compel all employers who might be affected to assess how well their particular facilities can operate in compliance with the regulations. However, it is most important that employers completely familiarize themselves with the regulations because the regulations may establish a threshold standard of conduct to which all employers will be held in the event there is an accidental HIV or HBV exposure to an employee.

CPER from page 4

Section members involved in the public sector depend on the CPER Program as a primary source of information on all aspects of public sector labor and employment law. The bimonthly journal, *CPER*, has become an essential part of labor law libraries, a complement to the Section's own reference, *California Public Sector Labor Relations,* because the journal tracks current litigation and provides timely coverage of court and PERB decisions.

Because of the concern over the threat to *CPER*, I have been invited to explain to Section members the nature of the problem.

The University has reduced its support for the program by 60 percent, not because of lack of interest in the project but because public service activities such as *CPER* have lowest budget priority within the University.

CPER has always been partially supported by practitioners who use the program, through subscriptions to *CPER* and other publications such as the Pocket Guide series. Our current mandate is to increase outside support, in part by reaching those who have not yet subscribed and by encouraging multiple subscriptions (by significant discounts) so that current information circulates throughout a firm or organization before it's months old.

Section members are encouraged to familiarize themselves with *CPER*, which presents intelligently written discussions of the whole spectrum of public sector cases–state and federal courts and PERB –covering all aspects of the public employment, including discrimination and constitutional law. The only reporting service devoted solely to public sector arbitration awards is included in every issue, as are synopses of all PERB decisions.

In addition to thorough legal reporting, *CPER* also provides otherwise unavailable, pragmatic information on collective bargaining in local government, education, the state–negotiations, pay and benefits, strikes, arbitration, innovations in labor-management cooperation, legislative and budget developments, and so forth.

CPER's Pocket Guide series has been welcomed by attorneys, both experienced and new to the field, as a handy quick reference to statutes and case law, and as an educational tool for client training. The *Pocket Guide to the Public Safety Officers Procedural Bill of Rights Act* is undoubtedly the most popular, but the guides to the Meyers-Milias-Brown Act and the Educational Employment Relations Act are also well received. The newest is a *Pocket Guide to Arbitration*, keyed to the California public sector, and *Pocket Guide to Unfair Practices* is being published.

I would welcome calls from section members who want to know more or would like to see a sample copy of *CPER*. My personal line is (510) 643-6812, or the main office number is (510) 643-7092. Or write CPER, Institute of Industrial Relations, Univ. of California, Berkeley 94720. CPER subscriptions are $250 a year, including a detailed, annotated index with case tables; pocket guides run about $5 apiece.

Message from the Chair

by Luella E. Nelson

The Labor and Employment Section helps practitioners improve outcomes for clients by providing a continuing source of current information. Recently, I was struck by the extent to which our programs and publications work together to this end.

During the wrongful termination panel at our Section Spring Symposium, the management-side speaker commented that she had never had a settlement or jury award that exceeded the defense costs. She emphasizes early and earnest attempts to resolve cases short of litigation. Her comments were an interesting addendum to the wrongful termination jury verdicts reported by Angel Gomez in the Spring 1992 issue of the Quarterly. Both demonstrate the consequences when attorneys do not advise their clients of the alternatives to a full court hearing.

Wrongful termination is only one of many evolving areas of labor and employment law. I encourage you to both use and contribute to the Section's resources in your particular field of emphasis. Each of you can help your fellow practitioners by writing articles, suggesting seminar topics, and volunteering to work on large or small programs.

This issue features an article from our Writing Competition. The enthusiasm and willingness to share information demonstrated by these students should inspire our more experienced practitioners to share their experience and insight. Let us hear from you.

New Members – Labor and Employment Law Section

Attorneys

October 1, 1991-June 30, 1992

Caroline Allen
San Francisco

Andrew P. Altholz
Los Angeles

Alisa Baker
Sunnyvale

David H. Bart
San Francisco

Jennifer Beckett
San Francisco

Kelly A. Bennett
Santa Ana

Harry F. Berman
Los Angeles

Gregory Beyerletter
Gold River

W. Allen Bidwell
Salinas

Donald Bierman, Jr.
Fremont

Keith R. Black
San Jose

Richard Brophy
Oakland

Breht Burri
Glendale

Joanne Butler
Aptos

Gina M. Calvelli
San Francisco

Paula Chertok
San Francisco

Nargis Choudhry
Los Angeles

Ron Chun
Los Angeles

Charlotte H. Coats
Santa Ana

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Patricia Cofer
Fullerton

Dolores Cordell
Los Angeles

Shaffer Cormell
Blythe

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See NEW MEMBERS, page 28

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❑ **"Spring Labor and Employment Law Symposium"** — *$40.00 (Originally $45)*

(1992 Spring Program)
Topics include freedom of expression in the workplace; Civel Rights Act of 1991; the ADA and its impact on workplace; HIV testing and the health care worker; wrongful termination.

❑ **"1991 Ninth Annual Meeting" Program Book** — *$40.00 (Originally $45)*

Topics include employer-employee dispute resolution; plant closings, sales, mergers, eliminating bias in the legal profession; stress management for lawyers; Consitutional values, rights update; ethical issues for labor and employment lawyers.

❑ **Evolving Labor and Employment Law Issues in the 1990's** — *$25.00 (Originally $30)*

(1991 Spring Program)

Topics include whistleblower litigation, legislative update, sexual harassment litigation update, temporary employees and the joint employer, and preemption and wrongful termination.

❑ **"1990 Eighth Annual Meeting Program Book"** — *$25.00*

Topics include fair representation; academic tenure; fair labor standards act applications to the public sector; the racketeer influenced and corrupt organizations act (RICO) for employment attorneys: it's not just for godfathers; the immigration reform and control act (IRCA) for employment attorneys; disability and handicap law at the state and federal level; occupational health and safety-workplace exposure claims.

❑ **"Workplace Privacy in the 1990's"** — *$25.00 (Originally $30)*

(1990 Spring Program)

Topics include pre-employment screening, workplace surveillance, use and release of sensitive personnel information, off-hour, off-premises conduct and an update on drug testing issues.

❑ **"1989 Seventh Annual Meeting Program Book"** — *$15.00*

Topics include public sector update, civil rights and affirmative action laws, drug testing in the 1990's, special industry issues/problems covering banks and other financial institutions, entertainment industry, construction industry and the health care industry.

❑ **"Employment Discrimination Update Substantive and Procedural Issues"** — *$15.00 (Originally $30)*

(1989 Spring Program Material)

Topics include discrimination, sexual harassment and settlement of cases.

❑ **Labor and Employment Law Section Directory of Members** — *$35.00*

❑ **"1988 Sixth Annual Meeting" Program Book** — *$10.00*

Topics include insurance issues in employment litigation and arbitration, decision making in employment discrimination, and agency fee developments.

❑ **NEW BOOK: "California Public Sector Labor Relations"** — *$95.00*

by Members of the Labor and Employment Law Section was published by Matthew Bender in September, 1989. This one volume treatise presents comprehensive coverage of the law governing public sector employers and their employees in California. ***Contact your sales representative, Matthew Bender, or call (800) 833-3630.***

❑ **"Emerging Labor Relations Issues in the Public Sector"** — *$10.00 (Originally $30)*

(1988 Spring Program Material)

Topics include the State Bar Conference update-public sector labor and employment relations 1987/1988, drug and alcohol abuse in the workplace, constitutional issues in public employment, urinalysis, polygraph exams and desk searches, California privacy and disclosure laws, wrongful discharge in the public sector, and the union role in wrongful discharge.

❑ **"1987 Section Fifth Annual Program" Book** — *$5.00 (Originally $30)*

This book covers drugs in the workplace and drug testing.

❑ **"The Nuts and Bolts of Trying Labor and Employment Cases"** — *$5.00 (Originally $30)*

(1987 Spring Program Material)

Topics include hypotheticals, pre-trial procedures, jury selection, voir dire and case presentation at trial. It also includes a discussion of wrongful termination actions.

❑ **"Privacy in the Workplace"** — *$5.00 (Originally $30)*

(1986 Spring Program)

Topics include employee testing and searches, regulation on non-work activities, and employee records.

❑ **"To Strike a New Balance" (1984)** — *$3.00*

This is a report of the Ad Hoc Committee on Termination at Will and Wrongful Termination Discharge appointed by the Labor and Employment Law Section of the State Bar of California.

MAIL TO: ***Section Secretary, Carol Lippold***
Labor and Employment Section
State Bar of California
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FRIDAY

8:00-9:45 REGISTRATION

9:45-10:00 OPENING REMARKS:
Luella Nelson, Section Chair
Leslie Van Houten, Program Chair

10:00-12:00 **EQUITY IN THE WORKPLACE: CURRENT ISSUES IN SEX DISCRIMINATION**

Christine Masters, Esq.
Allred, Maroko, Goldberg & Ribakoff
Los Angeles

Andrew C. Peterson, Esq.
Paul Hastings, Janofsky & Walker
Los Angeles

Cynthia G. Pierre
Enforcement Manager
Equal Employment Opportunities Commission
San Francisco

- Sexual harassment
- Glass ceiling
- Fetal protection
- Impact of the Civil Rights Act of 1991
- Reasonable woman standard

12:00-1:00 **LUNCH**

SPEAKER: (TO BE ANNOUNCED)

1:15-2:15 **STRIKERS AND STRIKE REPLACEMENTS**

Jordan L. Bloom
Littler, Mendelson, Fastiff & Tichy
San Francisco

Christopher E. Platten
Wylie, McBride, Jesinger, Sure & Platten
San Jose

- Strategies and tactics for unions and employers
- Employer liability for termination of replacements
- Legislative outlook

2:15-3:45 **WORKPLACE SAFETY AND THE REGULATORY STRATA: THE BOARD, THE COURTS, AND THE JAILHOUSE**

Neil Bodine
Beeson, Tayer, Silbert & Bodine
Sacramento

Jan Chatten-Brown
Office of the District Attorney
County of Los Angeles

Cathy S. Beyda
Littler, Mendelson, Fastiff & Tichy
San Jose

- Illness and Injury Prevention Programs
- Unlawful employer domination of employee safety committees
- Criminal prosecutions under the Corporate Liability Act and the Labor Code

4:00-5:30 **DILEMMAS AND CONUNDRUMS: CONFLICTS OF INTEREST AND OTHER ETHICAL ISSUES FOR LABOR AND EMPLOYMENT LAWYERS**

Nancy Roberts Lonsdale (Moderator)
Attorney at Law/Arbitrator
Oakland

Scott Drexel
Chief Court Counsel
State Bar Court of California

Judith Keyes
Corbett & Kane
Emeryville

David Adelstein
Schwartz, Steinsapir, Dohrman & Sommers
Los Angeles

- Management Dilemmas: Whistleblowers, Hostile Witnesses and Representing the Individual Supervisor-Defendant
- Union Delemmas: Representing the Union and the Grievant and Representing Union Officers at Election Time
- Neutral Dilemmas: Applying the Rules of Ethics to Attorney Arbitrators and Mediators
- Money-Handling Dilemmas: "True" Retainiers, Advanced Costs and Fees and Pitfalls in Employment Litigation

6:00 - 7:00 **RECEPTION**
(Hosted Hors D'oeuvres and No-Host Bar)

SATURDAY

7:45 - 8:30 **REGISTRATION**

8:30 - 10:00 **FLSA UPDATE FOR PUBLIC AND PRIVATE SECTOR EMPLOYERS AND EMPLOYEES**

Ember Shinn
Crosby, Heafey, Roach & May
Oakland

Craig Becker
UCLA Law School
Los Angeles

Robert Buell
U.S. Department of Labor, Wage and Hour Division
San Francisco

- *Abshire* and its progeny
- The administrative exemption-does it still exist?
- Department of Labor or congressional action?

10:00 - 10:15 **BREAK**

10:15 - 12:00 **EVALUATING AND HANDLING EMPLOYMENT LAWSUITS**

Mark Rudy
Rudy and Zeff
San Francisco

Warren Jackson
Hughes Aircraft
Los Angeles

Mark Schickman
Fox & Grove, Chartered
San Francisco

- Plaintiff and defense strategies
- Case evaluation and settlement techniques
- Feast or famine for plaintiff's lawyers in the '90's?
- Keep the litigation in or send it out–the in-house counsel's perspective

12:00 **ADJOURNMENT**

* * * * * * * *

MCLE CREDIT: Section Education and Meeting Services of the State Bar of California has been approved as a continuing legal education provider of Minimum Continuing Legal Education credit by The State Bar of California. This program will qualify for Minimum Continuing Legal Education credit by The State Bar of California in the amount of 9.75 hours of which 1.5 hours will apply to legal ethics and 1.75 hours will apply to law practice management.

Watch for the program brochure in the mail in September for your program registration and hotel reservation.

Survey On Use Of Statistical Experts

As part of a graduate program at Pepperdine University, a member of the Section is conducting a survey on the use of statistical experts in employment cases. The results will be published in a future issue of the Quarterly. If you wish to participate, please complete the questionnaire, which is reproduced below, and return it to Jean Robbins, 25060 West Avenue Stanford, Suite 222, Valencia, California 91355-3446.

Questionnaire On Use Of Statistical Experts

I. BACKGROUND

1. Is labor and employment law your primary area of practice?
___ Yes ___No

2. If yes, for how long?
___ 0-5 years ___ 6-10 years ___ 10 or more years

3. Who do you represent (primarily)?
___ Employees ___ Employers ___ Unions
___ Neutrals

II. CASES WHICH WENT TO TRIAL

4. Have you represented a client in a labor/employment law case in the last 5 years which went to trial and resulted in a decision?

___ Yes ___ No

If yes, please answer the remaining questions wit regard to your most recent case.

5. What type of case?
___ Discrimination (race, sex, age, etc.)
___ Wrongful termination
___ Wage & Hour
___ Other, please describe

6. Case Name and Number _____
_____
_____

7. Court type?
___ Federal District Court
___ State Superior Court
___ Other, please describe_____
___ Judge or ___Jury

III. USE OF EXPERTS

8. Did either side use a statistical expert?
___ Yes ___ No

9. Did you use a statistical expert in this case?
___ Yes ___ No

10. If yes, please answer the following:

Why did you use an expert?
___ To prove disparate impact/treatment

___ To show discrepancies in salary, hours or other working conditions

___ To rebut opposing counsel's expert

___Other, please describe _____
_____

11. Approximately what percentage of your case was based on testimony regarding statistics?

___ Less than 10%
___ 10-40%
___ 41-70%
___ 71-100%

IV. CASE RESULTS

12. Who did the judge/jury predominantly find for?

___ Plaintiff(s)
___ Defendant(s)
___ Plaintiff(s) and Defendant(s) about equally

13. If there was a written decision, did the decision:

___ Specifically state that the case turned on the statistical evidence

___ Appear to rely on the statistical evidence without specifically stating this

___ Make no reference to the statistical evidence
___ No written decision

14. To what extent do you believe the expert testimony on statistics influenced the outcome of the case?

___ Not at all
___ Barely
___ Some
___ Significantly

V. NAME AND ADDRESS (optional)

_____
_____
_____

Please return this Questionnaire to:
Jean Robbins
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Intellectual Property
Labor & Employment Law
Legal Services
Public Law
Taxation

The **LABOR AND EMPLOYMENT LAW SECTION** is sponsoring the following program:

The Impact of the Labor Code, the Industrial Welfare Commission Orders, and the Labor Commissioner on California Employers and Employees
State Labor Commissioner Ms. Victoria Bradshaw will discuss the responsibilities of the State Labor Commission and the Division of Labor Standards Enforcement: Enforcement of California wage and hour laws; procedures used in investigating alleged discrimination based on political activity (which includes sexual preference discrimination). Learn first-hand from the Labor Commissioner, the issues and topics of What's Hot and What's Not.

Friday, November 13, 2:00 - 3:00 p.m. (1 hour MCLE)

All section members practicing in California will receive registration materials in mid September. For further information now you can call (415) 561-8210.

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Please enroll me as a member in the Labor and Employment Law Section. My annual membership fee is enclosed. (Make check payable to the State Bar of California.)

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PROGRAM 3 **SPORTS AND LABOR LAW** ***(.5 hour MCLE Credit)***	**Richard (Sandy) Alderson, Esq.** *General Manager* Oakland Athletics Oakland		***AUDIO CASSETTE*** Members of The Labor and Employment Law Section....$ 20 All Others ....$ 31 *or included FREE OF CHARGE with complete program purchase!*
PROGRAM 4 **THE ADA AND ITS RELATIONSHIP TO OTHER LAWS AND WORKPLACE OBLIGATIONS** ***(1.25 hours MCLE Credit)***	• The New Americans With Disabilities Act • California Workers' Compensation Laws and ADA Interplay • The Impact of the ADA on Collectively Bargained Obligations • ADA's Effect on Insurance, Benefits and Other Laws	**Leslie L. Van Houten** (MODERATOR) — University of California — Oakland **Grace Morton** — Pacific Gas and Electric — San Francisco **David Rosenfeld** — VanBourg, Weinberg, Roge & Rosenfeld — San Francisco **Michael Winter** — Center for Independent Living — Berkeley	***AUDIO CASSETTE*** Members of The Labor and Employment Law Section...$ 55 All Others...$ 66 ***VIDEO CASSETTE*** Members of The Labor and Employment Law Section...$ 71 All Others...$ 82
PROGRAM 5 **AIDS TESTING AND THE HEALTH CARE WORKER** ***(1 hour MCLE Credit)***	• CDC Guidelines/OSHA Guidelines on Blood Born Pathogens • Testing for Health Care Workers and/or Patients • Employer Responsibilities	**Leslie L. Van Houten** (MODERATOR) — University of California— Oakland **Karen Dubois** — University of California— Oakland **Stanley Montieth, MD** — Santa Cruz **Mary Foley, R.N.** — President, California Nurses Association— San Francisco	***AUDIO CASSETTE*** Members of The Labor and Employment Law Section...$ 30 All Others...$ 41 ***VIDEO CASSETTE*** Members of The Labor and Employment Law Section...$ 55 All Others...$ 66
PROGRAM 6 **THE TOPIC THAT WOULD NOT DIE — TRENDS AND STRATEGIES IN WRONGFUL TERMINATION** ***(1.25 hours MCLE Credit)***	**Stacey D. Shartin** (MODERATOR) Seyfarth, Shaw, Fairweather & Geraldson Los Angeles **Ray Kepner** Morgan, Lewis & Bockius Los Angeles **William C. Quackenbush** Quackenbush & Quackenbush San Mateo **Beverly Stuart** *Kaiser Health Plan, Inc.* Pasadena		***AUDIO CASSETTE*** Members of The Labor and Employment Law Section...$ 55 All Others...$ 66 ***VIDEO CASSETTE*** Members of The Labor and Employment Law Section...$ 71 All Others...$ 82

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