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**Annual Legal Update**

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IN HIGHER EDUCATION AND THE PROFESSIONS

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“FUTURE THINKING. ACADEMIC COLLECTIVE
BARGAINING IN A WORLD OF RAPID CHANGE”

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“Annual Legal Update”

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I. NATIONAL LABOR RELATIONS BOARD AND RELATED CASES

A. The Bush Board

Over the past year, the National Labor Relations Board was subject to turnover and vacancies; not until January 2006 did the Board again reach full strength. The full Board still holds a Republican majority. The current members with their party affiliation and term expiration dates, are:

- Peter Schaumber (R) Recess appointment; nominated to fill remainder of a term that is set to end on August 27, 2010
- Wilma Liebman (D)  8-27-06
- Robert Battista (Chair)(R) 12-16-07
- Dennis Walsh (D) Recess appointment, to extend through 2007 and nominated to complete term set to end on 12-16-09.
- Peter N. Kirsanow (R) Recess appointment, to extend through 2007 and nominated to complete term set to end on 8-27-08

B. Yeshiva Watch: LeMoyne-Owen College

On September 30, 2005, the Board issued a decision in LeMoyne-Owen College, 345 NLRB No. 93 (2005), in which it found that the faculty members at that institution were managerial employees and not covered by the Act. The Board found that the faculty effectively controlled the curriculum, the courses of study and degree content, teaching methods, grading, admissions standards and textbooks as well as accreditation reviews. This case was on remand from the D. C. Circuit Court of Appeals, which had reversed and remanded the original Board decision that had found the faculty not to be managers. LeMoyne-Owen College v. NLRB, 357 F. 3d 55 (D.C. Cir., 2004) rev’d 338 NLRB No. 92 (2003).

In the original case, the Regional Director had not found managerial status due to several factors. First, the faculty standing committees and faculty assembly were not necessarily comprised entirely of faculty. Second, recommendations from those bodies were subject to multiple review levels, with the Regional Director explaining, “the more levels of authority a recommendation must pass the less likely the recommendation will be “effective,” because there is a lessened likelihood it will arrive at the top of the hierarchy in substantially unchanged form.” Third, the president had circumvented the standing committees by appointing individuals to special committees to study specific topics, such as the core curriculum requirement.
 Upon remand from the Circuit Court, the Board this time found that the faculty handbook gave substantial managerial power to the faculty in critical areas like curriculum, courses of study, majors and minors, and even college organization among other areas; that the assembly was comprised entirely of faculty except for the dean and assistant dean; and that the recommendations from these bodies had been routinely followed by the administration and trustees. The Board also cited examples such as the faculty preventing the reorganization of the colleges’ divisions; the approval of a childhood education major; and the effective recommendation to discontinue the graduate program, among other curriculum decisions. The Board further found that virtually all major faculty recommendations had been approved, despite the layers of review. As to the ad hoc special committees, the Board found that they were also heavily represented with faculty members and did not preclude further assembly review. The Board also found effective faculty power in promotion and tenure recommendations, noting that all recent faculty recommendations on tenure cases were approved by the Trustees. The Board noted that the faculty has also effectively rewritten the evaluations procedures for the college. In light of this record and the guidance of past precedent, the Board found the faculty to be managerial and not subject to the protections of the Act.

Board member Liebman dissented, arguing that the Board majority relied on a record that was “far too thin” to support managerial status. She pointed out that while the faculty handbook does indeed grant great powers to the faculty on paper, there was little evidence that the faculty ever exercised such authority. She tried to draw a distinction between recommendations that are “routinely approved” and those, as here, that are “independently reviewed” at higher levels. In the latter case, she would contend the faculty’s recommendations are not “effective,” even if ultimately approved. Member Liebman was also troubled by the fact that the dean would review major curriculum initiatives even before the matter got to the faculty assembly, thus undercutting the independence of the faculty. Further, the creation of special ad hoc committees with some non-faculty representatives as part of them undercut faculty governance. In the end, she concluded that faculty authority was only proven in the areas of content of courses, grading and honors – an insufficient record to establish managerial status.

C. Work Place Rules: Lutheran Heritage Village-Livonia

An important area of Board decisions over the years has been the tension between the employer’s right to issue work place rules of conduct and the employees’ right to engage in protected concerted activity under Section 7 of the National Labor Relations Act.

In Lutheran Heritage Village-Livonia, 343 NLRB No.75, 176 LRRM 1044 (2004), by a 3-2 vote, the Board held that work rules prohibiting abusive and profane language, harassment, and verbal, mental and physical abuses were lawful ways of maintaining order in the workplace and did not infringe upon protected concerted activity by employees.

The core of the Board’s decision is set forth at the beginning of the decision:
“The Board has held that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. Id. at 825, 827. Consistent with the foregoing, our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule *implicitly* restricts activities protected by Section 7. If it does, we will find the rule unlawful. If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.”

In the year following *Lutheran Heritage Village-Livonia*, the Board also ruled in *Guardsmark, LLC*, 344 NLRB 97 (2005) that an employer violated the Act by maintaining a rule that prohibits its employees from complaining about their terms and conditions of employment to the employer’s customers. However, the Board also found that the employer did not violate the Act by maintaining a rule that forbids employees from fraternizing with coemployees or with the employees of the employer’s customers. Finally, in the same case, a rule prohibiting solicitation while on duty or in uniform was struck down as illegal.

The employer in *Guardsmark* was a nationwide corporation providing uniformed security personnel to commercial entities. The company maintained a set of work rules for its employees which included the following three rules:

**GENERAL ORDERS, paragraph 5:** “While on duty you must follow the chain or command and report only to your immediate supervisor. If you are not satisfied with your supervisor’s response, you may request a meeting with your supervisor and his or her supervisor. If you become dissatisfied with any other aspect of your employment, you may write the Manager in Charge or any member of management. Written complaints will be acknowledged by letter. All complaints will receive prompt attention. *Do not register complaints with any representatives of the client.*”

**GENERAL ORDERS, paragraph 18:** “Solicitation and distribution of literature not pertaining to officially assigned duties is *prohibited at all times while on duty or in uniform*, and any known or suspected violation of this order is to be reported to your immediate supervisor.”

**GENERAL ORDERS, paragraph 4:** “While on duty you must NOT… fraternize on duty or off duty, date or become overly friendly with the client’s employees or with co-employees.”
The Board analyzed these rules under the guidance of its previous rulings in *Lutheran Heritage Village* and the earlier decision in *Lafayette Park Hotel*, 326 NLRB 824 (1998), enfd 203 F.3d 52 (D.C. Cir. 1999). The Board reiterated that it will first look to whether or not the rule explicitly restricts Section 7 activity. If it does, it is illegal. If it does not, then the Board will only find a violation upon a showing that 1) the employees would reasonably construe the language to prohibit Section 7 activity; 2) the rule was promulgated in response to Section 7 activity or 3) the rule has been applied to restrict the exercise of Section 7 activity.

In the case of the first general order dealing with workplace complaints, the Board found that the restriction on complaining to representatives of the client, “explicitly trenches upon the right of employees under Section 7 to enlist the support of the employer’s client or customers regarding complaints about terms and conditions of employment.” The employer argued that the rule applies exclusively to on-duty conduct and is therefore a permissible regulation of employee conduct. The Board disagreed:

“By instructing employee to follow the chain of command “while on duty,” the employer’s rule arguably limits its prohibition on lodging complaints with employees outside the chain of command to working time only. However, its prohibition on discussing terms of employment with customers is not similarly time-limited. It is absolute – “do not register complains with any representatives of the client.””

(One can speculate if there is a parallel here about faculty members soliciting students and parents to support their bargaining positions, with a distinction being drawn between soliciting students during class time versus outside of “working time.”)

The second rule on solicitation was easily disposed of by the Board. It found the rule limited solicitation during non-working time, was overly broad and contrary to well-established principles on solicitation. The Board rejected the employer’s only justification for the rule, namely, that allowing employees to engage in off-duty solicitation while in uniform would leave the impression that the company was giving unlawful assistance to a labor organization.

Regarding the fraternization rule, the employer was found not to have violated the Act. This rule was upheld because employees could not reasonably read this rule to prohibit protected employee communications about terms and conditions of employment. An employee would reasonably read the rule to prohibit only “personal entanglements” rather than activity protected by the Act.

In a case out of the 10th Circuit Court of Appeals in Colorado, *Double Eagle Hotel & Casino*, 414 F. 3d 1249 (10th Cir, 2005), the Court upheld a 2004 NLRB decision that two casino rules—prohibiting the discussion of company or personal problems anywhere around guests and prohibiting discussion of the tip sharing policy—were both unlawfully broad because they were not limited to areas frequented by...
customers. The appeals court also found that the casino’s rules on confidential information and communication illegally interfered with the employees’ Section 7 rights.

The rules in question were:

“Never discuss Company issues, other employees and personal problems to or around our guests. Be aware that having a conversation in public areas with another employee will in all probability be overhead.”

The confidential information rule prohibited the dissemination of certain information outside the employee’s department, including salaries, performance evaluations, pay increases, etc. Employees are not, without prior approval, “permitted to communicate any confidential or sensitive information concerning the Company or any of its employees to any non-employee.”

The Court said that the rules were overly broad and not limited to areas frequented by customers. Had it been so limited, it may have been upheld, but it could reasonably be construed to cover areas which guest would not frequent. Further, a rule that interferes with employees’ rights to discuss wages and other terms and conditions of employment is illegal. While the employer does have an interest in protecting its confidential information, the casino in this case defined confidential too broadly.

D. Solicitation Rules and Union Elections

In Enloe Medical Center, 345 NLRB No. 54 (2005), the Board found that the medical center violated the NLRA by: 1) requiring employees to remove or cover pro-union badges in certain locations and 2) prohibiting the placement of union literature in the break room. A unanimous Board panel of Battista, Schaumber and Liebman found that employees were told they could not wear badges that said, “Ask me about our union,” or “ask me about the SEIU” in immediate patient care areas. The memo from the hospital administration went on to state that the employees either had to remove the badges or cover the language on them while inside the hospital unless they were in areas that patients, families and visitors did not frequent.

The Administrative Law Judge found that the badges did not constitute solicitation and therefore the ban was inappropriate. Upon review, the Board believed that the badges did constitute solicitation but still found a violation because the policy was overly broad:

“… in requiring employees to limit their wearing of the badges in non-patient care areas that patients, families and visitors do not frequent, the rule set forth exceeded the restrictions that would be presumptively valid under our law.”

Unless the hospital could show the broader rule was necessary to avoid disrupting patient care, the policy would be deemed illegal. The hospital said the broader rule was
necessary because of the inconvenience of putting on and taking off the badges throughout the course of the day. The Board found such a justification insufficient.

In addition, the hospital had sent a memo out restricting the union from placing literature in an employee break room. Such a memo was found to be discriminatory on its face because it barred only union literature from being placed in the break room.

On the other hand, it was not illegal for a nurse manager to ask a couple of employees who had accompanied her to a meeting why, “off the record,” they believed they needed a union. The employees cited decreasing benefits, a feeling of distrust and management issues. The meeting lasted 10 minutes. While noting that the employer violates the Act when “interrogation reasonably tends to restrain, coerce or interfere with rights guaranteed by the Act,” the Board found this interview non-coercive because the employees were not reluctant to respond to the nurse manager’s question and no further inquiries were made after the interview. Member Liebman dissented from this finding, noting that the manager had no apparent reason for her question; did not assure the employees that they did not have to answer her; did not assure them that a refusal to answer would have no effect on their job; and that the questioning took place in a high-level manager’s office during a disciplinary meeting.

In another 2-1 decision (Liebman dissenting), the Board found that the Aladdin hotel and casino in Las Vegas did not violate the Act when two Human Resources Managers interrupted employee conversations about union organizing and gave management’s view of the matter. *Aladdin Gaming LLC*, 345 NLRB No 41 (2005)

In this case, two off-duty employees were at a table in the employee dining room talking to one another about signing union cards. The VP of Human Resources came into the room and stood by the table for approximately two minutes without speaking and then interrupted the employees’ conversation and spoke for about eight minutes about the company’s no-union position. Two days later an off-duty employee was soliciting another off-duty employee to sign a card when another HR representative approached them in the dining room and expressed management’s perspective on unionization.

In both cases, the Board found no violation. The presence of the managers in the dining room was routine and their observation of employees engaging in solicitations was not accompanied by any coercive action. Both managers had a right to express their opinions about unionization, and although the employees may have stopped their own solicitations to listen, the employees could have ignored him and continued their own conversation. The Board said, “This is not a case where an employer representative lurks in the background to surreptitiously hear the employees’ conversation. Rather, this is a case where the representative openly stood by the employee table for two minutes until he began to speak.” In contrast, Member Liebman found the conduct illegal, noting that section 8(C) of the Act does not give employers “a license to effectively terminate a conversation between employees” and that such conduct was coercive.

E. Illegal Promises, Threats and Union Elections
In *E.L.C. Electric, Inc.*, 344 NLRB No. 144 (2005), in a 2-1 decision, the Board majority (Battista and Liebman) found that an employer’s comments before an election that the company was actively seeking to improve its health benefits was an unlawful promise of benefits. In this case, when the IBEW began organizing the company, the company’s vice president or operations and the general superintendent began visiting job sites to answer questions by employees about the union. In one session, when an employee asked about whether the employer was trying to improve health benefits, the vice president said the company was “actively seeking to improve health benefits by the end of the year.” He made no promise that it actually would take place.

However, the Board found that these comments constituted an “implied promise” that the employees could reasonably interpret as being linked to voting against the union. Dissenting member Schaumber disagreed, finding the comment uncoercive, and indeed “an innocent casual remark.”

In another election case, a Board majority of Battista and Schaumber found that a supervisor’s offer to discuss employee problems during the course of an organizing campaign was not illegal. One supervisor asked an employee if she had any problems or questions about the union and if she did, she should come and talk to him about it. The supervisor also said that he would be willing to talk to other employees as well. The Board said that supervisor’s question was a permissible question as to whether the employee “had any uncertainties about union representation, election procedures or the company’s views on the union.” It was not a solicitation of grievance or a promise of benefits. Dissenting member Liebman found the employee could have understood the discussion as “an implicit offer to redress her problems if she declined to support the union.”  

[Contempora Fabrics, Inc., 344 NLRB No. 106 (2005)]

All members agreed, however, that the company acted unlawfully when it required employees to attend a series of mandatory meeting about the campaign where the vice president “unlawfully predicted that unionization would cause the company to lose customers and risk plant closure.” The statements were made without any objective evidence or any objective basis for them and therefore were unlawful.

**F. Supervisors’ Support for a Union**

In 2004, the Board had issued a significant decision in *Harborside Healthcare Inc.*, 343 NLRB No. 100, 176 LRRM 1113 (2004), where the Board held in a 3-2 decision that the pro-union activities of a nursing home charge nurse who later was found to be a supervisor amounted to objectionable conduct that interfered with the holding of a fair representation election.

In that case, the Board set forth in detail the criteria it would use to decide whether or not a supervisor’s pro-union activity would be sufficient to overturn an election.
We take this opportunity to restate the legal standard to be applied in cases involving objections to an election based on supervisory pro-union conduct.

“[W]hen asking whether supervisory pro-union conduct upsets the requisite laboratory conditions for a fair election, the Board looks to two factors.

“(1) Whether the supervisor’s pro-union conduct reasonably tended to coerce or interfere with the employees’ exercise of free choice in the election.

“This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the pro-union conduct; and (b) an examination of the nature, extent, and context of the conduct in question.

“(2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.”

In 2005, Harborside was applied in the case of Chinese Daily News, 344 NLRB No. 132 (2005). There, a department supervisor at a newspaper tainted a representation election by distributing union authorization cards and watching the employees sign them. Members Battista and Schaumber set aside the 2001 union election victory. (78-61 in favor of the union.) The Board found that the conduct was objectionable under Harborside even though Harborside came after the election and conduct in question. The Board said that the supervisor’s active solicitation of employees for the union tainted “the laboratory conditions necessary for a fair election.” There were no mitigating circumstances in this case and the supervisor’s activity materially affected the outcome of the election (at least eight employees had been solicited by the supervisor).

Dissenting Member Liebman believed the retroactive application of Harborside was inappropriate; she would have applied the earlier Board test under Millsboro Nursing & Rehabilitation Ctr, 327 NLRB 879 (1999), which had stated that authorization cards obtained by a supervisor were lawful where the employer clearly communicated an anti-union message and where there was no evidence of reprisal, punishment or intimidation by the supervisor.

G. Preemption

Since the time of our founding fathers, the fundamental tension in our constitutional system resides in the relative power and authority of the federal government and state governments. In the legal world, this issue often arises under the heading of preemption – the principle that in some regulated areas of society Congress through its legislative authority has preempted the field, and states cannot pass legislation that does violence to that federal oversight.
In the past year, a number of preemption issues have arisen in the labor law sector. In *Chamber of Commerce of the U.S. v Lockyer*, 2005 U.S. App LEXIS 19208 (9th Cir, September, 2005), a three judge panel for the U.S. Court of Appeals for the Ninth Circuit found that a California state law which prohibited employers receiving more than $10,000 in state funds from using any of those funds to “assist, promote or deter union organizing” interfered with an employer’s right to free speech under Section 8 (c) of the NLRA and was thus preempted by that Act. The Court wrote:

> “Although cast nominally as an effort to ensure state neutrality, the California statute, by discouraging employers from exercising their protected speech rights, operates to significantly empower labor unions as against employers. In doing so, the California statute runs roughshod over the delicate balance between labor unions and employers as mandated by Congress through the National Labor Relations Act.”

The statute in question (A.B.1889) established a state policy “not to interfere with an employee’s choice about whether to join or to be represented by a labor union,” and consequently the state should not be subsidizing campaigns either way. Thus, the law prohibited all recipients of state grants and private employers that receive more than $10,000 annually in state funds from using “any of those funds to assist, promote or deter union organizing,” which was further defined as “any attempt by an employer to influence the decision of its employees in this state or those of its subcontractors regarding .... [w]hether to support or oppose a labor organization that represents or seeks to represent those employees… or [w]hether to become a member of any labor organization.” An employer who qualified under this language could not use state funds for “any expense, including legal and consulting fees and salaries of supervisors and employees, incurred for research for, or preparation, planning or coordination of, or carrying out, an activity to assist, promote, or deter union organizing.” The employers also would have been required to keep detailed records to show the funds have not been used for improper purposes. The law further created a presumption that if state and nonstate funds were commingled in any way, the state funds were used for an illegal purpose.

Violations of the law would not merely involved loss of state funds but included fines and treble damages and the employer could be sued by both the State and by private taxpayers.

In this most recent ruling, the Court expanded on the principle of preemption in striking down the statute:

> “We conclude that the California statute, which is far from the neutral enactment that the state attorney general and the unions contend it to be, significantly undermines the speech rights of employers related to union organizing campaigns. Under the guise of preserving state neutrality with respect to labor relations, it directly conflicts with employers’ rights as granted by the Act....
“By creating exacting compliance burdens, strict accounting requirements, the threat of lawsuits, and onerous penalties, the statute chills employer speech on the merits of unionism.”

This was actually the second time the Court had ruled on the legislation. In *Chamber of Commerce v. Lockyer*, 364 F. 3d 1154 (9th Cir., 2004), the Court had previously ruled that California’s “neutrality” legislation limited the free exchange of ideas and free speech during a union campaign and was inconsistent with national labor policy as delineated in the National Labor Relations Act. However, the AFL-CIO secured a reconsideration of the case and the opinion was withdrawn.

On January 17, 2006, the Court did grant rehearing en banc in the case.

In another preemption case, the Seventh Circuit Court of Appeals struck down a Milwaukee County ordinance that required contractors who supply services for the elderly or disabled to sign “labor peace” agreements with unions seeking to organize their workers. *Milwaukee Association of Commerce v. Milwaukee County*, (Case No. 05-1531) (7th Cir, 2005).

The ordinance required that any employer that contracts with Milwaukee County must provide upon request to union representatives with the names, addresses and telephone numbers of its employees who devote any significant time to working on county projects. The employer must also promise to make no false statements to employees about the union and not to hold “captive audience” meetings with employees to oppose the union organizing drive. Unions, in turn, would agree to no “economic action” against an employer that complied with the ordinance. The ordinance was designed, it was argued, to promote labor peace by reducing work stoppages.

The court found, however, a “spillover effect” on the contractors’ non-county contracts and other employees. In some companies, it would be impossible to segregate county work from non-county work or employees who work on county contract from those who do not. The employer’s free speech rights under the NLRA would clearly be compromised.

In addition, since the not-so-hidden effect of this law would be to encourage unionization, the court also emphasized that the ordinance would likely increase work stoppages rather than decrease them. Since strikes can be a consequence of failed collective bargaining, the more unionization occurred, the greater the likelihood of strikes. It was noted that it would have been more effective to simply preclude unionization among county contractors if avoiding work stoppages was the true motivation behind the ordinance.

Finally, on the preemption front, a battle is warming up in Maryland over the so-called Wal-Mart legislation. The law in question (Fair Share Health Care Fund Act) requires very large employers to contribute a minimum percentage of wages for employee health care coverage or pay the difference to a public health care fund. Only employers with 10,000 employees would be affected, and such employers would have to spend at least 6% of their payroll on health care costs, or else pay the difference into the
state fund. Out of all employers covered, only Wal-Mart does not meet this 6% threshold.

On February 7, 2006, the Retail Industry Leaders Association challenged the law in the U.S. District Court for the District of Maryland claiming, among other arguments, that the law was preempted by ERISA. The statute was characterized in the lawsuit (Retail Industry Leaders Association, v. Fielder, Docket No. 06-316, D. Md.) as “an unlawful intrusion on the comprehensive federal framework for the administration and regulation of employee benefit plans” that Congress has laid out in ERISA.

The defenders of the legislation will apparently argue that the law is not preempted because the state was seeking to regulate employers, not ERISA plans. The law would not require employers to set up ERISA plans, and only requires the employer to spend a certain amount of money on health care costs, and if they do not, they must contribute to a state fund. On the other side of the argument, opponents will claim that the statute “relates” to a benefit plan because the natural consequence of the legislation will be for companies to modify their plans.

This challenge will be extremely important to watch over the next year or two; as many as 30 states are considering similar legislation (BNA, Daily Labor Report, 2-23-06). It calls into question not only issues of preemption but the broader social and political question of whether it is the responsibility of employers to provide health insurance. As one editorial said, “Employers don’t pay workers’ car insurance, homeowners’ insurance or grocery bills. They shouldn’t be responsible for picking up their health care tab either.” [Des Moines Register, cited in NLRB Watch (www.nlrbwatch.com, issue 35).] Even the Washington Post called this legislation “a legislative mugging masquerading as an act of benevolent social engineering.” NLRB Watch, supra.

H. Time Off for Negotiations

In Ceridian Corp. v. NLRB, (D.C. Cir., Case No. 05-1041 and 04-1421; January 27, 2006) enf’d 343 NLRB No. 70 (2004), the D.C. Circuit Court of Appeals upheld an NLRB ruling that a company’s refusal to meet with a union bargaining team during nonworking hours and at the same time refusing to grant the employees on the union team unpaid leave to attend bargaining during working hours was violation of the Act.

Ceridian is an information services company that provides a variety of employment services to other companies. One of its divisions offers call in assistance, whereby its consultants will provide advice to employees of customers on a wide range of subjects including substance abuse and emotional well-being. In 2003, the Service Employees International Union was certified as the representative of approximately 130 employees at Ceridian’s call-in service center in Minnesota. The new union recruited six employees to serve on the bargaining team, and at the first bargaining session, the union requested that the employees be allowed to take unpaid leave time to attend the bargaining sessions during the work day. The union said it would compensate the workers for their lost time.
The Company refused and said that in order to attend, such employees would have to take time from their accrued paid time pool in full day increments. After further discussion, the Company said the employees could take ½ days from their pool of days instead since the bargaining sessions were only going to be half day sessions. The negotiator for the Company also insisted that all meetings be held during the work day. As a result, some of the workers did not attend any of the subsequent bargaining sessions and others attended sporadically.

After bargaining broke down, the union filed Section 8 (a) (1) and (5) charges claiming that the company, by denying its employees unpaid time off to attend bargaining sessions during the workday while simultaneously refusing to bargain during nonworking time, violated the Act. The Board agreed and ordered the company to grant the employee representatives unpaid leave to attend during working hours, or alternatively agree to meetings during nonworking hours.

On appeal, the company contended that, because an employer is not required to pay employees for time spent attending negotiations, and because the company saw no meaningful distinction between not paying employees and requiring them to use their earned time to attend, it was irrational for the Board to find a violation. The Board’s view on appeal was that, even if an employer is not required to pay employees to attend bargaining sessions, there is a meaningful distinction between refusing to pay employees and requiring them to deplete their earned time to participate. The difference is the union can compensate employees for attending if the employer does not pay but it cannot give them more leave than the employer permits.

The Court agreed. It wrote:

“Ceridian’s policy significantly circumscribes the universe of employees who are able to serve as bargaining representatives, and thus interferes with its employees’ choice of representatives. Employees who need their PDO [earned time] to accommodate substantial family responsibilities, for example, would not be able to serve. An employee who exhausted his annual PDO allotment on bargaining meetings would have nothing left with which to meet his family responsibilities because the union cannot give him additional time off.”

The Court also noted that the company could have minimized the impact of granting unpaid time off by simply scheduling some of the bargaining sessions during nonworking time. The Company offered no rationale for not doing this other than “intrusion into the personal time” of the management team – an insufficient basis to justify its interference with its employees’ choice of representatives.

I. Religious Institutions and the NLRA
One case of consequence was decided by the Board in 2005 on the issue of institutions with religious affiliation being subject to the Board’s jurisdiction: *Carroll College, Inc.*, 345 NLRB No. 17, 8/26/05).

As background, the U.S. Supreme Court held in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) that the NLRB could not exercise jurisdiction over lay teachers in church-operated schools, with the Court explaining that the Board could not assert jurisdiction if it would create a “significant risk” to the free exercise of religion for that institution.

In addition, Congress passed the Religious Freedom Restoration Act (RFRA) which said that government may not “substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless the government can show a compelling governmental interest and that it is the least restrictive means of furthering that interest. While the RFRA was deemed unconstitutional as applied to state and local government action, the Supreme Court has not yet resolved doubt about the law’s constitutionality with regard to federal government action.

In 2002, in a case of great significance for institutions with religious affiliations, the D.C Circuit Court of Appeals issued its ruling in *University of Great Falls v. National Labor Relations Board*, 278 F. 3d 1335 (D.C. Cir. 2002). In *Great Falls*, the D.C. Circuit decided that the Board could not exercise jurisdiction based on a new test to determine whether or not a college or university is a “religious institution” and therefore beyond the jurisdictional reach of the National Labor Relations Board. In *Great Falls*, the institution claimed both that it was exempt from the NLRA and that application of the Act would violate the RFRA. The Circuit Court, in reversing the Board, held that an employer does not have to show a “substantial burden” on the employer’s exercise of religion. Instead, the employer has to meet the tripartite test that would be met if it “(a) ‘holds itself out to students, faculty and community’ as providing a religious educational environment . . . ; (b) is organized as a ‘nonprofit’ . . . ; and (c) is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at last in part, with reference to religion.”

Significantly, the Court also ruled that, even if an institution is not exempt from the coverage of the Act, it may still raise an RFRA issue and argue that assertion of jurisdiction would create a “substantial burden” on the exercise of religion.

*Carroll College, Inc.*, is a private liberal arts college located in Waukesha, Wisconsin, and affiliated with the Presbyterian Church. Faculty members had voted in the United Auto Workers as their representative in a Board election and the college challenged Board jurisdiction. In *Carroll College, Inc.*, *supra*, the college conceded it was an “employer” as defined in the NLRA but nonetheless contended that the Religious Freedom Restoration Act would be violated if it were subject to the NLRA. The Board,
in a 3-0 decision, ruled that applying the National Labor Relations Act to the college would not violate the Religious Freedom Restoration Act.

In reaching this result, the Board wrote that the college presented no evidence to indicate what the tenets of the Presbyterian faith were or “how requiring it to bargain collectively with the United Auto Workers would conflict with those tenets and hence result in a substantial burden on its free exercise of religion.” Among the facts cited were:

- the church has no administrative control over the college
- members of the Board of Trustees are not required to be members of the church
- the college’s articles of incorporation prohibit limiting admission of students, election of trustees and appointment of faculty members to Presbyterians
- faculty are not required to subscribe to the Christian faith or to teach or promote the goals or values of the Church or Christianity in general
- students are not required to attend religious services
- church exercises no control over curriculum

On the other hand, the College’s mission statement includes a clause that states: “we will demonstrate Christian values by our example.” The College also adopted a Statement of Christian Purpose that provides in part:

“The Christian purpose of Carroll College is summarized in its motto “Christo et Litteris” – for Christ and Learning. By means of a faculty dedicated to the Christian purpose and assured of the academic freedom necessary to the performance of its tasks, the college seeks to provide a learning community devoted to academic excellence and congenial with Christian witness. To this learning community, the college welcomes all inquirers.”

The Board found that the college did not carry its burden of proving that the application of the Act would substantially burden its free exercise of religion.

The college had argued that collective bargaining would interfere with it right to decide whether faculty members were satisfactorily conforming to the Protestant theological tradition and the tenets of the “reformed” Presbyterian Church. The Board disagreed, noting that there was nothing in the record to indicate that the college used any religious criteria in its hiring process or decisions, or that faculty members must agree to any statement of beliefs. There was no record of anyone ever being disciplined or otherwise the recipient of an adverse employment decision for engaging in conduct contrary to the teachings of the Church.

More importantly, the Board noted, such arguments are speculative. The only burden on the college at present is the duty to bargain in good faith. To the extent the college argues that that burden alone violates the RFRA, the Board rejected such a claim. This is especially so since the college “did not offer a single piece of evidence to indicate what
the tenets of the Presbyterian faith are and how requiring it to collectively bargain with the Petitioner would conflict with those tenets and hence create a “substantial burden” on its free exercise of religion.” Nothing in the Presbyterian faith, unlike other faiths such as the Seventh Day Adventist faith, would prohibit collective bargaining or union membership.

J. Management Rights Clauses and Arbitral Deferral

In Smurfit-Stone Container Corp., 344 NLRB No. 82 (2005), the Board held that an administrative law judge of the NLRB should have deferred to an arbitrator’s decision involving management rights clause and the right to unilaterally promulgate an attendance policy.

The company’s hourly workers at its container facility had been represented by the IBEW since the 1970s. In earlier years, the company had unilaterally implemented no-fault attendance policies that did not excuse medical absences. It later modified that policy to excuse absences when an employee obtained a doctor’s note. In 2000, the company notified the union it was going to issue a new policy the following month that would have no provision for excusing medical absences. While the parties met and discussed the plan, the company refused to engage in bargaining, claiming it had the unilateral right to issue the policy.

The Union filed unfair labor practice charges; the Board deferred the matter to arbitration under Collyer Insulated Wire, 192 NLRB 837 (1971).

The arbitrator found in favor of the company but the administrative law judge refused to defer to the award, concluding that the issues considered by the arbitrator were not parallel to the unfair labor practice charge and that his award was clearly repugnant to the Act. She then went on to find the employer guilty of an 8 (a) (5) refusal to bargain.

The Board reversed the judge. Using the standards set forth in Spielberg Mfg. Co., 112 NLRB 1080 (1955), the Board first found that the arbitrations proceedings were fair and regular. The Board then found that the arbitrator considered the ULP issue:

“The statutory issue here is whether the Respondent’s adoption of the new absence control policy constituted a unilateral change. The question of whether or not the management rights clause of the parties’ collective bargaining agreement authorized the Respondent’s implementation of the new policy is determinative of the unfair labor practice allegation here. ¹ Further, that was the precise argument the Respondent presented to the arbitrator, i.e. that its actions were privileged under [the management rights article]. …. Contrary to the judge and our dissenting colleague, we find a reasonable interpretation of the arbitrator’s

¹ The management rights clause read: “the parties recognize that the operation of the plant and the direction of the work force herein is the sole responsibility of the Company. Such responsibility includes, among other things, the full right to assign work, to discharge, discipline, or suspend for just cause, and the right to hire, transfer, promote, demote, or layoff employees because of lack of work or other legitimate reasons.”
decision is that the management rights article authorized the implementation of the absentee control policy… Indeed, the arbitrator concluded that the agreement gave the Respondent the right to make rules as long as they did not conflict with any provision of the agreement. He found no such conflict. Accordingly, we find that the arbitrator adequately considered the relevant unfair labor practice issue.

Finally, the Board found that the arbitrator’s award was not clearly repugnant to the purposes and policies of the Act. The standard for such a review is “whether [an arbitral decision] is susceptible to an interpretation consistent with the Act,” citing Olin Corp., 268 NLRB 573 (1984). On this issue, the Board concluded that the decision “is susceptible to the interpretation that relied upon the management rights clause and is not dependent on an inherent management prerogative theory. As such, it is not clearly repugnant to the Act.”

Dissenting Board Member Liebman contended that the award was repugnant because it did rely on some general theory of retained management rights and did not focus on the specific management rights clause. But even if the award can be read as an interpretation of the management rights clause, the Board should still not defer in Member Liebman’s opinion. As she noted, “the clause makes no reference to attendance or to the employer’s right to establish rules or policies of any sort, nor does the clause assert that management retains the authority to act unilaterally except as limited by the parties’ agreement.”

**K. Retiree Health Benefits**

One of the most controversial issues in labor relations today is whether or not management will have the right to reduce or eliminate health insurance or other benefits for retirees who were formerly covered by a collective bargaining agreement. Usually, these issues focus on the particular issue of entitlement to the health insurance plan offered to active employees or the special Medicare supplemental plans that some employers will offer to retirees once they are 65 years of age. While these cases come up in an endless variety of circumstances, one case decided last December focuses on many of the common concerns litigants face in these situations.

In *Aerospace and Agricultural Implement Workers of America v. Arvinmeritor, Inc, Rockwell Automation, Inc, and Rockwell International*, Case No. 03-73872 and 04-73656, E.D. Mich. (December 22, 2005), the Court issued an order granting a preliminary injunction in favor of the Union and a class of retirees, to prevent the company’s planned elimination all health benefits for retirees and their dependents age 65 or over. The retirees had formerly worked at the plant represented by the Union and retired under various collective bargaining agreements in past years. The Union and retirees claimed the company did not have the right to eliminate those health insurance benefits, arguing that they are lifetime benefits which individually...

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2 The Board noted that, had the arbitrator merely relied on some general theory of inherent management prerogatives, the award may have been found to be repugnant to the Act.
vested at the time of each retiree’s retirement. The company claimed that it had the right to eliminate the benefits.

The relevant collective bargaining agreements had various clauses dealing with retiree benefits including one that stated: “Hospital, Surgical and Medical Expense Insurance. Upon retirement under the Pension Plan these coverages will be continued during your retirement for yourself and for the eligible dependents who were covered under this plan at the time of your retirement.” Another clause stated: “The Health Care coverage an employee has under this article at the time of retirement shall be continued thereafter provided that suitable arrangements for continuation can be made with the carrier.” The Union argued that such language constituted enforceable contractual promises of lifetime retiree health benefits to accompany lifetime pension benefits. Among other evidence, the Union also introduced numerous letters and statements from the company that constituted written admissions that contractual health benefits begin at retirement and are intended to continue thereafter, i.e. for the lifetime of the retiree.

The company argued principally that the labor agreements “clearly and unambiguously” limited retiree benefits “to the duration of the agreements creating them.” The company relied on the agreements’ general duration clauses and other examples of changes made by the company unilaterally over previous years to such plans.

In granting the injunction, the Court found that the plaintiffs were likely to succeed at trial. The Court turned to the principles that the 6th Circuit had used in UAW v. Yard Man, Inc., 716 F.2d 1476 (6th Cir., 1983), namely that retiree benefits are in the nature of “status” benefits which “carry with them an inference that they continue so long as the prerequisite status [retirement] is maintained.” The Court is to apply basic contract principles in analyzing whether certain retiree benefits can be altered or eliminated after the person has retired. Under this approach, the Court first found that “the explicit language of the agreements ties retiree health benefits to pension status and specifically promises, without time limitation, that the health benefits ‘at the time of retirement… shall be continued thereafter’ for the duration of the retirement.” This explicit language is bolstered by “context” evidence showing that the company had represented by written assurances that these were indeed lifetime benefits.

As to the defendant’s argument that the durational clause limited those benefits to the particular life of the collective bargaining agreement, the Court disagreed. First, general duration clauses do not override specific promises within the agreement of lifetime benefits. As to the defendant’s argument that it had made changes in the past to such plans, the Court noted that four of the seven changes are still under challenge, one was agreed to by the Union and the others merely altered the mechanisms for buying drugs and resulted in savings for the retirees.
If nothing else, this case highlights again the importance of the specific contract language surrounding benefits of any kind, especially retiree benefits. Lifetime benefits will not be assumed in all cases, but clauses in collective bargaining agreements that specifically or implicitly suggest that benefits are without time limit are likely to be construed in such manner. On the other hand, the absence of such guarantees shifts the burden to the retirees and the unions to show intent to provide lifetime benefits.

L. Voter Lists

In *George Washington University*, 346 NLRB No. 13 (2005), the Board unanimously found that the University’s omission of certain part-time faculty from a voting list was not a factor that the employer could rely upon to justify setting aside an election, stating that “where a party through its own error prevents an eligible employee from voting, only the other, non-acting party has any foundation for an objection,” a type of “clean hands” concept. In this case, the SEIU won an election among adjunct faculty by a vote of 326-316 but there were 50 challenged ballots. When some of the ballots were opened, the revised count still favored the union by a new vote of 341-331. The University argued that by overruling challenges to two particular faculty members who were not placed on the Excelsior List by the University the Board effectively expanded the scope of the unit to include 20-30 similarly situated individuals. These individuals were suppliers—not directly employed by the University—who provided teaching services to the institution through a supply contract with a third party vendor. The University’s argument was rejected, the union was certified and the University refused to bargain. The case is now on appeal to the D.C. Circuit.

M. Parking Fees

It was once said that the definition of “faculty” is “a group of professionals united around a common grievance over parking.” While many issues seem weightier at the bargaining table, parking policies, regulations and fees are often difficult subjects for bargainers in higher education. In Illinois however, it will be less of a problem.

In *University of Illinois v. Illinois Educational Labor Relations Board*, 359 Ill. App. 3d 1116 (2005), the Illinois Appellate Court for the Fourth District found that the issues of parking fees was not a mandatory subject of bargaining with a union representing building service and food service workers. In this case, during negotiations for a new contract, the union had proposed new parking rates for its members. Under the fee system in place, first shift employees had been paying $375 per year and second shift workers $75. The union proposed that the rate be lowered to $50 a year for first shift workers and $25 for second and third shift, plus free parking between 2 am and 6 am. Even though the union was flexible on its proposal, the University refused to discuss the issue of parking fees at all. Among other things, the University argued that the parking fee structure was closely linked to its master plan for parking lots on campus. The University noted that, since the state does not pay for
parking lots, in order to finance new parking, long term revenue bonds are issued. To issue these bonds, the University must project the revenue from the parking facilities and demonstrate that the revenue will cover the debt service on the bonds. The need to increase fees for parking is often linked to the need to construct new parking facilities.

Under the Illinois Educational Labor Relations Act, educational employers are not “required to bargain over matters of inherent managerial policy” but must bargain collectively “with regard to policy matters directly affecting… terms and conditions of employment.” (115 ILCS 5/4 West 2000). The Supreme Court of Illinois set forth a test under this statute. First, a determination must be made whether the matter concerns “terms and conditions of employment.” If it does not, there is no duty to bargain. If it does, the next question is whether it is a matter of inherent managerial policy. If it is not, the subject must be bargained. But if it is, the next step is to “balance the benefits that bargaining will have on the decision-making process with the burdens that bargaining imposes on the employer’s authority.” [Central City Educational Ass’n v. Illinois ELRB, 147 Ill. 2d 496, 599 N.E. 2d 892, 905 (1992)]

On the first question, the University argued that, since alternative parking is available to its employees, an increase in parking fees is not a term or condition of employment. Citing various precedent from within and outside Illinois, the Court found this unpersuasive. Parking fees were clearly a term or condition of employment in the Court’s eyes.

On the second question, neither party challenged the fact that the increase in fees is a matter of “inherent managerial authority,” so the Court proceeded to the third question, the balancing issue. Here, the Court found that the burden of bargaining outweighed the benefits:

“On one side of the scale is the University’s master plan and the parking component of that plan. On the other side are the employees, whose livelihood and workplace are directly affected by the costs of parking, so that they may work at and for the benefit of themselves and the University. We conclude the evidence shows parking and the use of parking lots for land planning are integral to the success of the University’s mission. Locations and proximity of parking lots, the cost of parking, and the potential long-term use of land acquired for parking are part of the University’s managerial authority. The need for the University to control these issues cannot be overcome by vague fee proposals that the Union believes would satisfy the employer…. Better, cheaper parking would be a benefit to employees. However, mandatory bargaining of this issue would be a significant burden on the University and the authority of the University to perform its mission.”

Accordingly, the Court found no duty to bargain the parking fees issue.
II. SAME-SEX MARRIAGE AND RELATED MATTERS

In 2003, the Supreme Judicial Court of Massachusetts decision Goodridge v. Dept. of Public Health, 440 Mass. 309 (2003), held that the benefits, obligations and responsibilities of civil marriage must also apply to same-sex couples. The Court thus found that the Commonwealth of Massachusetts violated the Massachusetts Constitution when it refused to grant marriage licenses to same-sex couples. Since May 17, 2004, same-sex couples can lawfully marry in the Commonwealth of Massachusetts.

Over the past year there has been some further litigation in the state courts on same-sex marriage and decisions are pending in some states. The organization Lambda Legal has an excellent summary of national activity in this area on their web site. www.lambdalegal.org.

A few recent cases involving the question of same-sex marriage include:


New Jersey: Lewis v. Harris 2003 WL 23191114 (denied same-sex marriage as guaranteed in New Jersey constitution.) On appeal, the NJ Appellate Court ruled 2-1 affirming the decision to deny same-sex marriage. The case was then brought to the New Jersey Supreme Court. Oral argument in the case was heard on February 15, 2006 and the parties are awaiting decision.

New York: Hernandez v. Robles, NY Slip Opinion 25057 (Feb.4, 2005) (violation of NY constitution to deny same sex couples the right to marry.) In December 2005, the Appellate Division reversed this decision and ruled that there was no violation of the NY constitution. That decision has now been appealed to the New York Appeals Court; briefs have just been filed.